Introduction

Melvin I. Urofsky

This issue of the *Journal*, like its predecessors, shows the great variety of topics that fall under the rubric of "Supreme Court History." While there are two articles dealing with specific cases—both from the Society's Silverman Lecture series—others are about the impact of cases on individuals, an attack on the integrity of a member of the Court, and an examination of why dissent became more common during the years of the so-called Roosevelt Court.

Your editors are always interested in receiving articles about the Court and its members in the nineteenth century—especially the lesser-known ones. So we perked up when Daniel J. Wisniewski sent us a piece on Robert Cooper Grier that met both criteria—nineteenth-century and lesser-known. For the most part there have been very few scandals involving the Court, and only one member has ever resigned due to allegations of misconduct. But as Wisniewski points out, these charges were rife in 1854 and 1855 when opponents were gunning to get Grier off the Court.

As I have mentioned before, I am currently working on a book on dissent on the High Court, and when I began my work a few years ago most of the material I found was descriptive rather than analytic. There were plenty of articles about dissent rates, but very few about why Justices dissented. Everybody assumed it resulted from their disagreement with the majority opinion. It is, however, far more complicated. From John Marshall through William Howard Taft the culture of the Court favored institutional unity: during the thirty years that Oliver Wendell Holmes, Jr., sat on the Court, for example, nine out of every ten cases came down unanimously.

One of the things I want to understand is why this culture fell apart, and so I was elated when we received the article from Pamela Corley, Amy Steigerwalt, and Artemus Ward on the disintegration of consensus in the Roosevelt Court. As readers who follow the Court you will all find this very interesting, I found it far more than that, in that it suggests how much more there is to explore about dissent.

We all know that Supreme Court decisions affect lives, not just those of the populace at large, but also small groups and

individuals. The remaining three articles help us understand just how great an impact the Court's rulings can have.

Two of the pieces, by Douglas Laycock and Richard W. Garnett, are adapted from the lectures they gave as part of 2011 Silverman Series titled "The People behind the Supreme Court's Religion Cases." Laycock tells us about Edward Schempp, whose name will always be attached to one of the landmark cases that helped define what the First Amendment's religious freedom clauses mean.

Professor Garnett's article is about a far lesser-known case involving who would have control over a Russian Orthodox church in New York. Following turmoil in the Soviet Union, the New York legislature passed a statute transferring dominion of the church from the Russian synod to the American congregation. The Russian synod protested, as did some of the American parishioners, and the case went to the Supreme Court.

We are so used to seeing Little League games with children of many different ethnicities on the field that it is hard to recall that for many years Little League games in the South were as strictly segregated as the rest of society. Just as many great professional baseball players in the Negro Leagues never got the recognition or fame their talents deserved, Douglas Abrams tells us a story of an African-American Little League team that was denied their just place as national champions because they were not allowed to compete against white teams. It is a sad story, especially because it occurred only a year after the Court's *Brown* decision, but it does have a belated bittersweet ending.

As I was about to write this introduction, I received a notice about an author appearing at the famous Politics and Prose Bookstore in Washington. By itself this was not unusual; the store is the standard stop in Washington for authors on book tours. What caught my eye, however, was the name of the author, Justice Sonia Sotomayor, who has just published a memoir, **My Beloved Country**. This book should certainly be added to the very comprehensive list that Ronald Collins has put together on books by members of the High Court. The list is fascinating, and most of the works are not autobiographies. John Marshall wrote a biography of his hero, George Washington, and also an (anonymous) defense of *McCulloch v. Maryland*; Robert H. Jackson explained the President's reasoning behind the ill-fated 1937 Court-packing plan; and more recently William H. Rehnquist penned a history of the Court.

Very few Justices write about cases they have been involved in. Even William O. Douglas's **The Court Years** talks about the men he served with, but avoids any real story-telling about how cases were decided. A number of years ago my son and I were interviewing Thurgood Marshall, and he told us that he had signed a very lucrative book deal to write his memoirs. He thought the publisher wanted him to tell about his work in the civil rights movement; when he learned that they wanted inside stories of the Court, he tore up the contract and returned the advance.

So, as usual, a feast for you to enjoy.

Heating Up a Case Gone Cold: Revisiting the Charges of Bribery and Official Misconduct Made against Supreme Court Justice Robert Cooper Grier in 1854–55

DANIEL J. WISNIEWSKI

Introduction

On July 13, 1854 Zedekiah Kidwell, a representative from Virginia, rose from his seat in the House of Representatives and announced: "I hold in my hand a very important memorial [petition] which I ask the unanimous consent of the House to allow me to present, for the purpose of reference to the Judiciary Committee. ... [It is a m]emorial of the Wheeling and Belmont Bridge Company asking for an investigation of the charges preferred against the Hon. R. C. Grier, one of the Justices of the Supreme Court of the United States."[1] Representative Thomas M. Howe, from Pittsburgh, quickly responded: "If left to the impulses of my own feelings and judgment, I should certainly object to the reception of the memorial; but so fully satisfied am I that the distinguished jurist to whom it relates would dissuade me from that course, could he be consulted, I shall interpose no objection."[2]

A week earlier the Wheeling and Belmont Bridge Company had delivered a five-page "legislative memorial" to Congress, leveling numerous allegations of serious judicial misconduct against sitting Justice Robert Cooper Grier, who had been serving on the Court since 1846.[3] Three allegations stood out as the most egregious. The Bridge Company claimed that Grier 1) solicited a bribe from their agents, 2) leaked the opinion of the Supreme Court early in order to favor the other party, Pennsylvania, Grier's home state, and 3) willfully disregarded the law in considering an application for injunction.[4] They sought impeachment.

In 1854 the Wheeling and Belmont Bridge Company accused Justice Robert C. Grier of soliciting a bribe from their agents and of leaking the opinion of a case involving their bridge in order to favor the other party, the Commonwealth of Pennsylvania, Grier's home state. They sought impeachment.

The House Judiciary Committee received the Bridge Company's allegations and assigned the task of investigating them to Rep. Hendrick B. Wright, the only Pennsylvanian on the Committee. Ultimately, Wright would produce a five-page report completely exonerating Grier. He would introduce the report on the floor of the House on the last day of the 33rd Congress, March 3, 1855. The report was tabled, time passed, and the allegations faded into history.

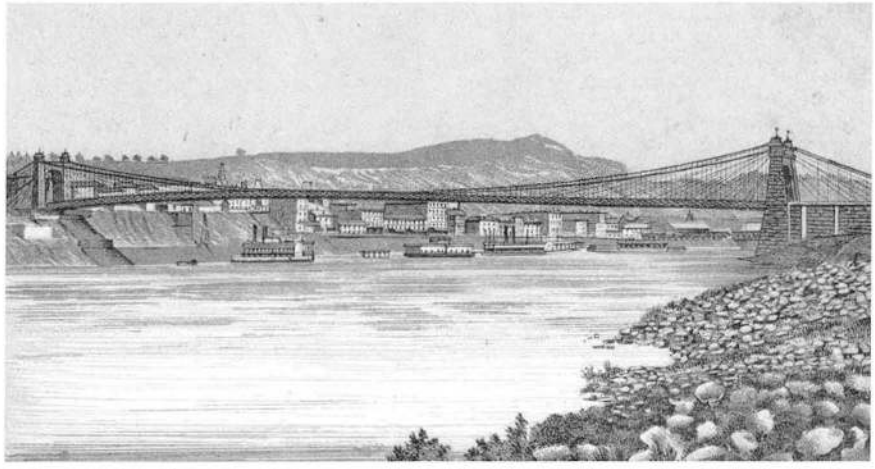
Up until now, no known scholarly work has examined the contents of Wright's Report or the circumstances surrounding its creation. The object of this article is to revisit the "Case of Hon. R.C. Grier" by analyzing Wright's Report and "testing" it, so to speak, against the contents of two newly discovered letters,[5] written from Grier to Wright in July and August 1854.[6] In these letters, Grier asks for Wright's assistance and proposes to meet to discuss the allegations.[7]

Background

The allegations against Grier stemmed from litigation in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, which the United States Supreme Court reviewed five times between 1850 and 1856.[8] The case gained national attention and attracted famed counsel to both sides—Edwin M. Stanton for Pennsylvania and Reverdy Johnson for the Bridge Company (a Virginia corporation). The dispute was over the height of the Wheeling Suspension Bridge, which spanned the Ohio River at Wheeling, Virginia. Pennsylvania argued that the bridge was built too low and obstructed the passage of riverboats going to and from Pittsburgh, and that Virginia's charter authorizing the bridge violated the Commerce Clause of the Constitution.[9] On the other hand, the Bridge Company argued that the bridge blocked only seven steamboats that had excessively high stacks, and that increasing the bridge's elevation was not economically feasible.[10]

The existence of a bridge at Wheeling was very important. By spanning the Ohio River, the Wheeling Suspension Bridge would finally realize the goals of the Cumberland Road, which was to make it easier for the United States Mail and commerce in general to travel west.[11] But for years, even before plans for its design were ever drawn up, interests in Pennsylvania opposed the bridge, arguing that a bridge across the Ohio would block river traffic flowing south from Pittsburgh.[12]

A bridge at Wheeling would threaten Pittsburgh's prominence as a commercial hub to the west.[13] In the 1830s and '40s Pennsylvania had invested significant resources in their Main Line canal-railroad system going from Philadelphia to Pittsburgh, spending $30 million in improvements.[14] They expected a return on their investment, but the Main Line was already struggling to compete with other routes. Even before litigation in *Pennsylvania v. Wheeling & Belmont Bridge*



The allegations against Grier stemmed from a case disputing the appropriate height of the Wheeling Suspension Bridge, which spanned the Ohio River at Wheeling, Virginia. Pennsylvania argued that the bridge was built too low and obstructed the passage of riverboats going to and from Pittsburgh, and that Virginia's charter authorizing the bridge violated the Commerce Clause. The Bridge Company countered that the bridge blocked only seven steamboats that had excessively high stacks, and that increasing the bridge's elevation was not economically feasible.

Co. began, trade from Wheeling was cutting into Pittsburgh's profits. By the 1830s, Wheeling was selling $2 million in merchandise annually, sending 13.7 million pounds of goods east and 56.2 million pounds south and west each year.[15]

Now the Baltimore and Ohio Railroad was in position to compound Pittsburgh's trading woes. By the late 1840s the Baltimore and Ohio rail line was almost to Wheeling,[16] becoming a serious threat to the Pennsylvania transportation industry. The Wheeling Suspension Bridge could not accommodate railroad traffic as built, but plans were in the works to convert it into a railroad bridge.[17] Once that happened, it would create an even more efficient way to go west from Wheeling.

After several failed attempts to obtain government funding, and vocal protests by competing interests in Pennsylvania,[18] the Bridge Company finally made progress in constructing the Bridge. By 1847 it had raised enough private funds to hire up-and-coming civil engineer Charles Ellet, Jr. and begin construction.[19] Ellet would design the bridge, oversee its construction, participate heavily in the bridge litigation, and be one of the primary motivators behind the movement to impeach Grier.[20]

After two years of delays, the bridge was completed in November 1849. It was an impressive technological feat, bridging a gap of 1,010 feet, the longest span in the world at the time.[21] The Bridge would consist of two large bundled steel cables stretching across the river, anchored on either side by impressive works of stone masonry. These cables attached to a wooden plank floor by four hundred suspenders.[22]

However, only a few months before the bridge was completed, Pennsylvania sued for an injunction to have the bridge taken down.[23] Pennsylvania's attorneys chose Justice Grier to hear their motion while sitting "in chambers" in Philadelphia.[24] At that time, Grier was "riding circuit," hearing cases throughout New Jersey and Pennsylvania in his capacity as "Circuit Justice" for the Third Circuit. He would sit on a two-person panel, along with a designated District Court judge, trying cases and hearing appeals from the District Courts.[25] But as a Supreme Court Justice, he also had the responsibility of hearing motions that were within the original

or appellate jurisdiction of the Supreme Court. These motions could have included requests for bail, certificates of appealability, extensions of time, injunctions, stays, and possibly even writs for habeas corpus, error, or appeal.[26] When Grier heard motions "in chambers," the proceedings were not always held in his actual office chambers, and were oftentimes open to the public.[27]

When Stanton appeared to make his application for injunction in August 1849 Grier held the proceedings in the State House (Independence Hall) in Philadelphia.[28] The hearing lasted for two or three days and was probably held in the old Pennsylvania Supreme Court room. At the end, Grier denied Pennsylvania's motion, holding that, although the bridge obstructed the river, Pennsylvania had failed to show irreparable harm.[29] Grier then forwarded the case to the full Court, where it waited on the docket for over two years.

Interestingly, Grier heard the motion even though the underlying matter came from outside of his circuit. Grier was responsible for hearing motions that arose from the Third Circuit, which included only Pennsylvania and New Jersey at the time. The Wheeling Suspension Bridge, however, was in Virginia, which was (and still is) in the Fourth Circuit. Chief Justice Roger Brooke Taney was responsible for the Fourth Circuit, and presumably should have heard the motion.[30]

Only a few months before the bridge was completed in 1849, Pennsylvania sued for an injunction to have the bridge taken down. Justice Grier heard the motion while riding circuit in Philadelphia. The hearing lasted for two or three days and was probably held in the old Supreme Court room in Independence Hall (above).

Eventually the case would be decided by the full Court on its merits in 1852, resulting in a short-lived victory for Pennsylvania.[31] The Court held that the bridge was an obstruction of the river, and that only Congress could authorize the bridge at its current elevation, not a state charter, because the bridge interfered with interstate commerce.[32] However, a few months later, at the behest of the Bridge Company, Congress passed a law authorizing the bridge at its current location and height.[33] This effectively reversed the legal underpinning of the Court's decision, allowing the bridge to stand.

By 1854 two years had passed since a serious effort to abate the bridge was mounted. The matter seemed settled, but then an act of God interceded. In late May a terrible windstorm destroyed the bridge, sending the massive structure into the river. Pennsylvania quickly applied again for an injunction to prevent its reconstruction, which Grier granted "in chambers" in Philadelphia after less than twenty minutes of argument.[34] Rather unwisely, the Bridge Company decided not to oppose the injunction. Its officers felt that "as Judge Grier had declared publicly in conversation, while the case was before the court, that 'the bridge should go up or come down,' he will grant the injunction, and decide against the sufficiency of the act of Congress, all the same, whether we are present or absent."[35]

There is an interesting inconsistency between Grier's account of the June 1854 hearing and that of the Bridge Company. In Grier's letter to Wright, he says that at the hearing he "inquired why the motion had not been made before the Chf Just [Taney] or Judge McLean."[36] But, Francis De Haes Janvier, a "spy" for the Bridge Company, took down an account of the proceedings, and it does not show that Grier made any effort to

inquire into why the motion was brought to him instead of the other Justices.[37] This means that either Grier was dishonest in his account to Wright, or that Janvier's account did not include all of the details. The latter is quite possible, considering Janvier was a businessman and poet, and not an attorney. He might not have considered that part of the proceedings to be important. Janvier states: "Some of the windows of the courtroom were open, and there was so much noise from the street, that I found it very difficult to hear. [B]ut I believe that nothing of any importance, escaped my notice, and trust that my report may be satisfactory."[38]

When Grier granted the injunction in 1854, it was the final straw for the Bridge Company. It had had enough of litigation and what it perceived as a conspiracy by Grier and the Pennsylvania litigants. The Bridge Company viewed Grier's background as a native Pennsylvanian with suspicion because of his connection with Pittsburgh.[39] He had been a long-serving state court judge in Pittsburgh before joining the Supreme Court. So in July 1854 the Bridge Company presented to Congress allegations of bias and judicial misconduct against Grier.[40] And, by January 1855, the five-page "legislative memorial" of allegations would be supplemented with specifications of the charges and evidentiary proof in the form of two witness affidavits (sworn by Bridge Company officials).[41]

The Bridge Company's memorial contained a variety of allegations, including charges of bias and states' rights arguments. But the most salient and egregious charges against Grier were that he:

1. Solicited a bribe from Bridge Company officials at the first hearing of the case in August 1849
2. Leaked the decision of the Court two weeks before its publication, in order to prevent the legislature of Pennsylvania from dropping the suit, which it was actively considering
3. Willfully disregarded an Act of Congress when considering the 1854 application for injunction.[42]

The House Judiciary Committee was tasked with the preliminary investigation, which resulted in a five-page report entitled the "Case of Hon. R.C. Grier."[43] This very favorable report absolved Grier of any and all wrongdoing.[44] It concluded that "[i]n the opinion of your committee, Judge Grier is entirely and absolutely exonerated and freed from the charges preferred against him. There is absolutely nothing which can or will impair his reputation as a judge or an upright and honest man."[45] These words were decidedly strong and unequivocal. And, perhaps as a curious mind might suspect, the report was authored by a fellow Pennsylvanian, Hendrick B. Wright, who probably knew Grier fairly well.

Inception of the Wright Report

On July 13, 1854, the allegations against Grier were forwarded to the House Judiciary Committee. The Committee reviewed the allegations and decided that an investigation ought to be done.[46] Out of the nine members on the House Judiciary Committee it is unknown why Wright was selected to author the Committee's report.[47] It is likely that Committee Chairman Frederick P. Stanton, nine-year Representative from Tennessee, had the final say in delegating the work.[48]

There is no indication that Stanton favored either side. His name does not appear in any of the letters of the important players, other than one mention that he was the Chairman of the Judiciary Committee.[49] The Bridge Company letters often mention the names of other Congressmen the Bridge Company officers met with regarding the allegations against Grier, including Speaker of the House Linn Boyd and Rep. Zedekiah Kidwell ("Dr. Kidwell") of Virginia,[50] but

there is no mention of Stanton. The Bridge Company officers kept each other well apprised of their respective meetings, making it probable they would have mentioned a meeting with Stanton if it ever happened.

The lack of evidence pointing one way or the other makes it seem as though Stanton assigned the report to Wright out of indifference rather than partiality. But Stanton must have seen the potential for controversy by assigning the investigation to the only Pennsylvanian on the Committee. Maybe Stanton had some kind of hidden motive. Or, if Wright knew Grier, maybe he asked for the job.

Equally strange is the lack of involvement by Virginia's Representative on the Committee, John S. Caskie. Instead of using Caskie, the Bridge Company relied on its local Representative, Zedekiah Kidwell, for introducing the allegations on the floor of the House. There are various reasons why Caskie may not have been involved. First, he was representing a different part of Virginia and he would have been less interested in the goings-on in Wheeling. Second, the Bridge Company did not want to involve Caskie because of rumors circulating about his poor character. In 1860, when Caskie's wife died, numerous bruises had been found on her body and rumors were circulating that she was "brutally" treated by Caskie.[51] The bishop giving her eulogy said "he would not cover up or draw attention from the *vices and wrongs of the living* by a eulogy upon the dead."[52] And Robert Saunders, a Virginia State Senator, wrote that Caskie was a "debased drunkard."[53] If these things were well known in 1854, the Bridge Company would not want Caskie representing them in Congress while trying to take the moral high ground.

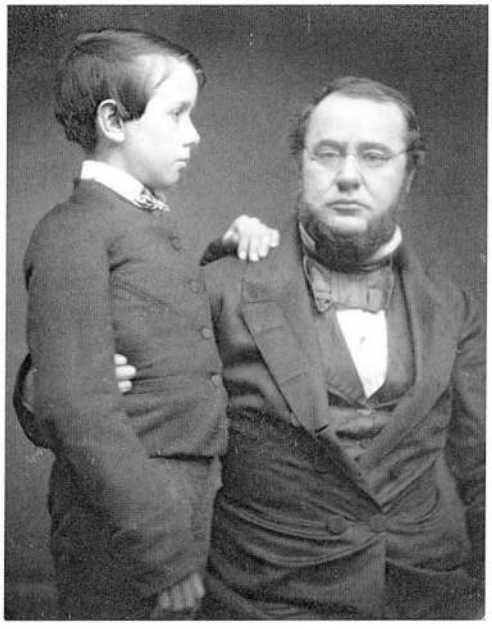
The Wright & Grier Acquaintanceship

Grier probably had a friendship with Hendrick B. Wright going back years before the bridge litigation. There is good circumstantial evidence to suggest that they were at least acquaintances. If this is true, it may have skewed Wright's representations of the facts when preparing his final report. It may have biased his conclusions.

Both men were Pennsylvania natives who probably met in the 1830s while practicing law. Before becoming a judge, Grier had practiced law for sixteen years in the small towns of Danville and Bloomsburg (located in northeastern Pennsylvania).[54] And for the last two years of that time Wright practiced in a nearby area—the town of Wilkes-Barre, no more than fifty miles distant.[55] There weren't many practicing attorneys at that time in those small communities,[56] and as a practical matter each of them would have visited neighboring towns for court and clients. It was during 1831–33 when the two men likely would have met for the first time.

At the very least, the two men had probably heard of each other. They were important people in the community. Grier was an experienced attorney by the time Wright started practicing, and was selected for a new judgeship created in Pittsburgh (in 1833).[57] Wright was a rising star, having been appointed district attorney of Luzerne County (encompassing Wilkes-Barre) in 1834 after only two years of private practice.[58]

Grier and Wright had other things in common that might have brought them together at some point. Both had graduated from Dickinson College,[59] a Pennsylvania institution, when few attended college. They also shared the same political opinions: both were southern-sympathizing "dough-faced" Democrats.[60] Grier obtained his first judgeship through party patronage,[61] and Wright was appointed district attorney of Luzerne County by using his ties to the Democratic Party.[62] And, if the two men did not meet in the 1830s or 40s, they could have met later. By 1854 they were both important residents of Washington, D.C.—Grier, a Supreme Court



As lead counsel for Pennsylvania, Edwin M. Stanton (pictured here with his son) argued the case for the injunction before the Supreme Court in 1852. Stanton would go on to serve as Secretary of War under President Lincoln.

Justice, and Wright, a Congressman. At the very least, they were in the same orbit for many years.

With this background, Grier probably did not feel much hesitation in soliciting help from Wright, the only Pennsylvanian on the Judiciary Committee. It was July 13, 1854 when Zedekiah Kidwell announced the charges on the floor of the House, and by July 21, only eight days later, Grier had contacted Wright asking for his assistance.[63] In a lengthy four-page letter, Grier defended his actions in handling the bridge case and denounced the "calumniators" who brought charges against him, questioning their pride as Virginians.[64] He also did not shy away from appealing directly to Wright's sense of pride as a Pennsylvanian, reminding Wright that he, Wright, was not the kind of person who would "suffer a fellow Pennsylvanian to be trampled on by a set of scoundrels."[65] Grier concluded that the allegations were nothing more than an attempt to "bully" the Court and create a new "contest" with Congress.[66] In closing, Grier asked Wright to dismiss the accusers' "libel … with the reproof such an infamous attempt deserves."[67]

Wright responded to Grier on July 25.[68] We don't have this letter, which may be lost to history. But we can make an educated guess as to its contents based on a second letter that Wright received from Grier, dated August 15. In this second letter Grier expresses his surprise that the Judiciary Committee would even investigate the allegations against him, stating that he "hardly expected that the committee would, in their time of bustle & excitement, turn their time and attention to what, is to them, and the public of so little importance."[69] And he again asks Wright for a chance to appear in front of the Judiciary Committee to "shew up" the conduct of the "rascalls" who accuse him.[70] Most tellingly, his letter closes with a request to meet with Wright privately: "If not sooner, we will probably meet at Washington in [D]ecember when I shall speak to you more fully on the subject. Accept my thanks for your kindness & attention to this matter."[71] The Court's next term commenced in December, and was probably the soonest that Grier could be in Washington.

This second letter reveals two important things worth pointing out. First, Wright was not hesitant to reveal to the accused party the impressions of the members of the Judiciary Committee. He told Grier that the Committee was interested enough in the allegations to prepare a report evaluating them. And second, Wright and Grier most likely met in person to discuss the strategy for handling the allegations. If this meeting occurred, and was not disclosed as being part of the Committee's inquest into the charges, it surely would have raised eyebrows for being irregular or suspect.[72]

If it occurred, it is unlikely that their proposed meeting was ever made public. Wright never mentions in his report that he met with Grier to investigate the matter. Nor does he mention doing an active investigation

at all, for that matter. The meeting also did not appear in the supplemental specifications presented by the Bridge Company on January 29, 1855.[73] As far as the historical record now reflects, the letters (and probable meeting) between Grier and Wright were *ex parte* communications between a member of the Judiciary Committee and the accused party being investigated.[74]

Given their background and the contents of Grier's second letter to Wright, indications are that Wright was receptive to helping out his fellow Pennsylvanian.

The Wright Report: Its Substance and Style, as Tested by the Grier Letters

The Wright Report was twenty-eight pages, consisting of two parts. The first was Wright's conclusions, five pages in length, and the rest of the report was what one would call the "record"—the history of the allegations, including written opinions and decrees from the bridge case, the allegations filed by the Bridge Company, and two witness affidavits. The most serious of the Bridge Company's allegations were that Grier, 1) solicited a bribe from the Bridge Company, 2) leaked the decision of the Court early in order to favor Pennsylvania, and 3) willfully disregarded an Act of Congress when considering the 1854 application for injunction.

The Bribery Allegation

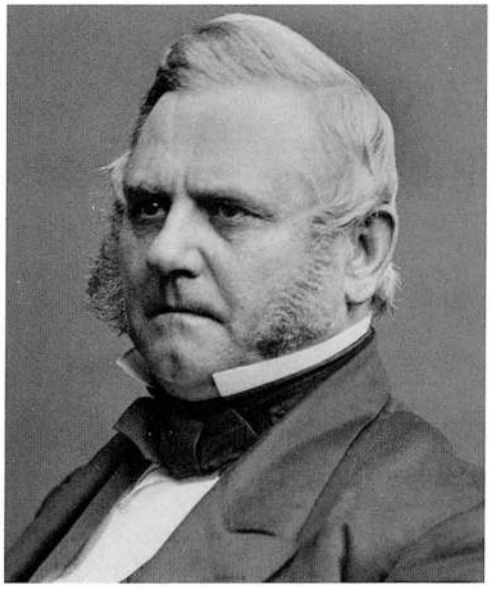
In his report Wright spent almost the entire discussion on the bribery allegation—the only charge he deemed "of any importance to refer."[75] The Bridge Company claimed that Grier solicited a bribe from Bridge Company officials at the outset of the case—the first hearing for an injunction. Grier heard the motion over two or three days of argument in August 1849.[76] At the close of argument, Bridge Company's President, James Baker, and its Secretary, Edward H. Fitzhugh, were standing in the courtroom discussing their travel plans for heading home. The significance of the ensuing conversation was debated between the two sides.

Baker's and Fitzhugh's affidavits are nearly identical, with only minor variations. They claim that Grier asked them for a bribe during conversation at the end of the hearing in the State House courtroom in Philadelphia. Fitzhugh could not remember who started the conversation, while Baker says Grier approached them as he was stepping off of the bench.[77] Both allege that Grier spoke in a "low tone of voice" out of the hearing of others, and that he apparently told them that they ought to settle the case.[78] They asked Grier how a compromise could be reached in such a contentious case, his response being that they should "take the same course that was taken at Harrisburg to obtain the re-charter of the United States' Bank."[79] Baker asked, "do you mean the pillow argument?" Grier said "yes," the conversation was "interrupted," and Grier departed.[80]

Fitzhugh did not understand what the "pillow argument" was. Apparently, there had been rumors circulating that the United States Bank's charter to operate in Pennsylvania had been obtained by using bribery. Specifically, as Baker explained, a member of the Pennsylvania Legislature had $20,000 placed under his pillow.[81]

Oddly, in his report Wright does not deny that this conversation happened. He apparently admits that it occurred, stating that the evidence consists solely of "[a]n idle remark made by the judge, in passing the agents of one of the parties, in open court, as he was leaving the room."[82] Instead, Wright goes on to argue that the brevity of the conversation implies that it could not have been a sincere effort to solicit a bribe and that Grier's comment was made only "in jest."[83]

It is certainly possible that Grier was just making an off-handed remark from the bench. The Justice had a bold personality. For example, Grier once heard a case brought against P.T. Barnum, the circus showman,



Representative Hendrick B. Wright, the only Pennsylvanian on the House Judiciary Committee, was tasked with investigating the allegations against Grier. His report exonerated him.

where Barnum was sued for stealing a circus act. As recounted in the *Centennial History of Allegheny County*, then state court judge Grier interrupted one of the attorneys mid-argument:

> "Stop. I've heard enough! such a case! What does it amount to? One vagabond gets a live bear," (drawling out the word), "goes about the country gathering all the idlers and gaping idiots to pay their money to see a bear dance. Another vagabond procures a bear's skin, stuffs it with straw, and tramps about exhibiting it. Vagabond No. 1 says to vagabond No. 2, 'you have no right to do that; the harvest is mine for I was first in the field to gather all the fools' money!' And because vagabond No. 2 got the money, vagabond No. 1 sues him for ten thousand dollars damages! Rule absolute: prisoner discharged; cryer, adjourn the Court!" And as [Grier] walked down the steps, he remarked to [an attorney], "Did you ever hear of such a case? I'll teach Mahon [counsel for P.T. Barnum's opponent] not to bring such a suit in my Court."[84]

Grier was not afraid of stating his personal opinions in open court.

Wright also seized on a statement made by Fitzhugh to support his claim that Grier's comment was just a joke. He quoted Fitzhugh, stating that he "took it for granted that Judge Grier spoke in jest."[85] However, Wright does not give a fair treatment to Fitzhugh's affidavit. In his affidavit, Fitzhugh says that "*at that time*" he thought Grier was joking.[86] Fitzhugh, not understanding what a "pillow argument" was, which sounds quite silly on its face, may have found it humorous for a sitting Justice to recommend its use. Only when Fitzhugh fully understood the meaning of the statement could he have realized that it might have actually been a sincere attempt at a bribe.

Even so, it is not clear that it would have made much sense for Grier to solicit a bribe from the Bridge Company. After all, Grier was accused of being biased towards the Pennsylvania side, being from that state. So the only way the allegations make sense is if 1) Grier was going to rule in favor of Pennsylvania (which he did consistently after the first hearing), but 2) he was making it known that his allegiance could be bought. Grier ultimately forwarded the case to the full Court, stating that Pennsylvania had not met the legal requirements for an injunction.[87] His two letters to Wright are silent on the bribery allegation.

Allegation of Leaking the Court's Decision Early

Three years later, in 1852, the case was finally before the full Court on its merits. By that time, the Court had appointed a commissioner who made extensive factual findings determining that the bridge should be removed or elevated.[88] However, the Pennsylvania Legislature had apparently grown

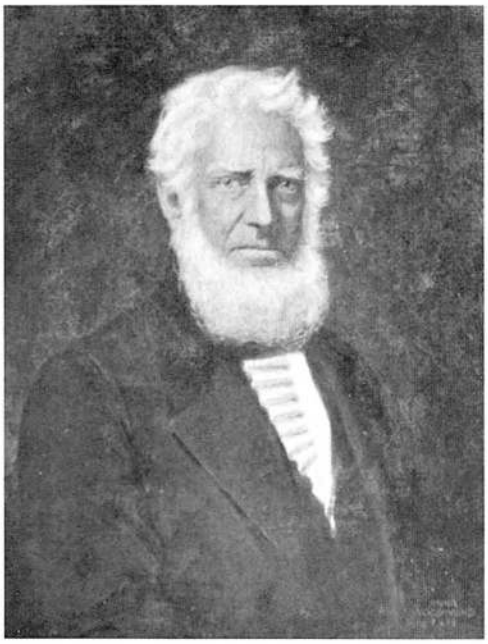
weary of the ongoing litigation and wanted to drop the case.[89] According to Bridge Company allegations, in order to prevent Pennsylvania from dismissing the suit, Grier leaked the Court's decision two weeks early—informing members of the Pennsylvania General Assembly, through intermediaries, that the Court was going to rule in their favor.[90]

As the Bridge Company put it, "according to the usage of [the Court], the judges thereof had, in a private conference, confidently divulged to each other their respective opinions respecting the decree about to be rendered ... and it was thereby made known to [Grier] that a majority of the court would concur" in the issuing of an injunction in favor of Pennsylvania.[91] Then, about two weeks before the Court published its decision, Grier "improperly made known the result of said conference to certain citizens of the State of Pennsylvania, particularly to E[dwin] M. Stanton" who was counsel for Pennsylvania.[92] After this, it appears from the allegations that Stanton sent his assistant counsel to Harrisburg, who informed the Pennsylvania General Assembly of the Court's decision, and persuaded them to continue with the suit.[93]

It is unclear who this informant was,[94] but there is direct evidence indicating that Grier had friends on the ground in Harrisburg. He complained to Wright that "[a]fter our decision was known the [Bridge Company] sent its agents to Harrisburg to persuade the legislature of Pennsylvania to withdraw the suit. And, as I was informed, their agents dealt largely not only in misrepresentations of the facts but in foul abuse in public barrooms..."[95] This statement indicates that Grier was getting information back from Harrisburg, specifically from conversations had in barrooms.

The most telling piece of evidence indicating that Grier had communication with people on the ground is gleaned from his letters.[96] Apparently, in June 1854, probably while riding circuit, Grier ran into "Judge Shaler." Charles Shaler was the U.S. District Attorney for the Western District of Pennsylvania at the time. Shaler wanted to know when Grier would be back in Philadelphia, so Pennsylvania could bring another motion for injunction in front of him.[97] The state wanted to prevent the Bridge Company from rebuilding the bridge, which had recently been blown down.[98] Grier claims that he "refused" to tell Shaler when he would be home, and told him that the injunction should be heard by Chief Justice Roger B. Taney or Justice John McLean instead.[99] This was, he complained, because "every act done by me, was misconstrued by certain people at Wheeling, that it would only excite their mean malice to personal abuse of me ..."[100]

This exchange seems puzzling at first glance. Shaler was a U.S. District Attorney, with presumably little personal interest in the case, other than maybe for its popular appeal at the time. But Shaler had information from



Charles Shaler was the U.S. District Attorney for the Western District of Pennsylvania and a former law partner of Edwin M. Stanton. Shaler probably solicited information from Grier to help his old friend Stanton with the case.

Pennsylvania's side of the case, and he was relaying it to Grier. Why?

Shaler's familiarity with the case is easily explained. Up until 1853, Shaler had been partner in a very lucrative law firm with Edwin M. Stanton, lead counsel for Pennsylvania.[101] It does not look like Shaler wrote any of the briefs for the Court, or conducted oral argument.[102] But nonetheless, Shaler must have been intimately familiar with the details of the case. He was Stanton's only law partner in Pennsylvania[103] and had even litigated cases at the state level for damages arising out of collisions with the bridge.[104]

Shaler's discussion with Grier indicates that Stanton was feeding him information on the case and that Shaler was helping out his old friend. Shaler asked Grier when he would be back in Philadelphia to hear the injunction; the Justice was back in Philadelphia for only two days before Stanton arrived to make the motion.[105]

There is no way of knowing exactly what was said in the meeting between Grier and Shaler. But it is unlikely that Grier treated Shaler as coldly and matter-of-fact as he makes it seem. Shaler and Grier also had a history. Prior to the bridge case, Grier and Shaler sat on the bench together in the District Court of Allegheny County (during the years 1841–44).[106] And before that, Shaler had been the Judge of Common Pleas of Allegheny County from 1824 to 1835.[107] Grier had been appointed Chief Judge of the District Court only two years earlier in 1833. They likely became acquaintances at that time. Surely their friendship grew, or at least Shaler's respect for Grier did, because Shaler would ultimately lobby on Grier's behalf when he was being considered for the Supreme Court in 1846.[108] It is even said that Shaler himself was offered the nomination, but turned it down in favor of Grier.[109]

These personal connections gave Grier at least the *means* to reveal inside information from the Court. Stanton was lead counsel of the case from the beginning, and Grier had a demonstrably strong relationship with his law partner, Charles Shaler. So when the Bridge Company alleged that Grier "improperly made known the result of said conference to certain citizens of the State of Pennsylvania, particularly to E[dwin] M. Stanton..." the claim is not far-fetched. The claim is made more plausible by Grier's letter to Wright, where he acknowledges having discussions with Shaler while the case was still pending. Those discussions occurred in 1854, but Shaler very well could have helped Grier leak information from the Court in 1852 as well.

If Grier did in fact reveal the decision of the Court early, this would constitute a serious violation of judicial ethics, allowing one of the parties to gain an advantage in the case (and probably a *decisive* advantage, as Pennsylvania did not drop the suit and the Court ruled in its favor two weeks later). Grier would also have violated judicial ethics by having discussions with Shaler (depending, of course, on the true nature of what was said between them). He may have triggered an obligation to recuse himself for becoming too intimately involved with the case.[110]

Allegation of Willfully Disregarding the Law

Grier was also accused of deliberately disregarding an act of Congress when making his decision to grant Pennsylvania's second application for injunction in 1854. Back in 1852, the full Court had decided that the bridge was constructed too low and that it constituted a nuisance.[111] Only months later, Congress passed a law authorizing the bridge at its current height and location, effectively reversing the Supreme Court.[112] This created a conflict in the law, but Pennsylvania did not again challenge the validity of the Suspension Bridge until June of 1854 after it had blown down in a storm.

When Pennsylvania brought its second application for injunction, Grier granted it in less than twenty minutes.[113] In his written opinion, he ordered the Bridge Company to

refrain from rebuilding the bridge at an elevation lower than allowed in the Court's 1852 decision.[114] At the same time, he completely ignored the act of Congress authorizing the bridge at its current height and location, not mentioning it once.

As the Bridge Company put it, "Grier recklessly and willfully disregarded the said act of Congress ... without so much as reading the same, although well knowing of its existence, and bound by a sacred obligation to know and consider the same ..."[115] The Bridge Company had a point. Grier had taken an oath upon his confirmation to the Supreme Court to carry out his duties "agreeably" with the laws of Congress:[116]

> I, [Justice's Name], do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [Associate Justice of the Supreme Court], according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.[117]

This oath was used from 1789 to 1990.

But according to Grier's own admission, it does not look like he acted with due diligence in understanding and applying the law of 1852. In Grier's first letter to Wright, he candidly admitted that he has "had the hardihood to disregard an act of Congress, which the judge never read, nor passed any opinion upon."[118] This was a startling revelation to make to Wright, a member of the House Judiciary Committee. In one sentence, Grier acknowledged the existence and relevance of the act while admitting that he willfully ignored it. He did not question the constitutionality of the act or reason that it did not apply somehow. It was a bold move for him to reveal this to the man responsible for his investigation. He must have trusted Wright.

Wright did not disappoint. He did Grier a favor by not mentioning his admission in the final report to the House.[119] It went completely ignored, making it look like Wright intentionally left this evidence out of his report. Wright also helps Grier by skewing certain representations of the facts in Grier's favor. Another allegation against Grier that Wright did not fully address was that he tried to "pair off" with Justice Peter V. Daniel, from Virginia, meaning they should both recuse themselves. In his letters to Wright, Grier admits that he approached Daniel with this proposition.[120] However, Wright mentions this conversation only as hypothetical—"If it were true that he paired off with Judge Daniels [sic], he did precisely what he should have done under the circumstances."[121]

If Wright had included Grier's admission that he ignored the act, what would have been the consequences? Would it have triggered impeachment proceedings or some form of public censure? It was certainly relevant to the investigation. But there is no saying whether Congress would have impeached Grier over this allegation—if it rose to the level of being a "high crime" or "misdemeanor."[122]

Either way, Wright did not want to risk letting the allegations go that far. Wright probably also did not want Grier's admission tainting the rest of his report. It would certainly have raised suspicion and drew more attention to the allegations.

The Aftermath of the Report: Deafening Silence

Wright introduced his report to the House on March 3, 1855, the last day of the 33rd Congress.[123] This was probably a maneuver on the part of Wright to avoid any serious movement towards impeachment. The *Congressional Globe* shows that the House was doing business late into the night the night

before, adjourning at about 11:45 p.m. — trying to get done all business they could before the final day of Congress.[124] The *Globe* also shows that partway through the last day of the session the House lost quorum.[125] The members had been working into the waking hours of the morning.[126] They were tired and had to be recalled to the chamber so the House could do business. The Sergeant-at-Arms combed through nearby Washington looking for Congressmen, and they started to file back in, one by one, some of them quite unhappy. Rep. John C. Breckenridge responded amusingly to Rep. Frederick P. Stanton's irritation at being dragged back into Congress:

> I regard this matter in a more serious aspect than my friend from Tennessee, [Mr. Stanton] and when my friend from Virginia [Mr. McMullin] speaks of sporting with the feelings of gentlemen, I desire him to remember that it is no light sporting for a portion of the House to go off toward the end of a long sitting, eat, drink, shave, refresh themselves, and leave other members at their posts. [Laughter.] It is queer sport, that. Some of us have been obliged to stay here the live-long night, and we have felt it to be our duty, in the discharge of our constitutional obligations, to have a call of the House, and to send for these absentees. I submit that it is most disrespectful to the House for these absentees, when they come, to put on lofty airs, and talk about sporting with the feelings of fellow members. [Laughter.][127]

Amid this dreary-eyed bustle, Wright introduced his report, which was "laid on the table and ordered to be printed," probably within the final hour of the session (about eleven o'clock p.m.).[128] There was no discussion of the matter, and it pretty much disappeared from history after that.

After the report was tabled, the movement to impeach Grier waned. There is no indication that a later Congress tried to revive the effort. And members of the Bridge Company expressed fears that they might be sued for slander.[129] This could indicate that their faith in the allegations against Grier was not that strong, that Grier was angry and vindictive, or both.

Conclusion

The ultimate question is, of course: "Was Robert C. Grier guilty as charged?" Unfortunately, there is not enough evidence to convincingly establish his guilt or innocence. However, the new evidence—analysis of Wright's Report and the two Grier letters—still tells us something important.

Grier was nervous and not sure how far the allegations against him would go. He wanted to make sure that he had at least one ally on the House Judiciary Committee, Hendrick B. Wright. He was willing to use his personal connections to influence the outcome of the investigation against him, and *possibly* even affect the outcome of the underlying case.

It is also probable that Grier had a heavy hand in the preparation of the House Judiciary Committee report. It looks like Wright ignored facts relayed to him by Grier, and skewed others to Grier's advantage. If these additional facts are true, the allegations very well could have justified impeachment and removal.

Nevertheless, the Bridge Company ended up winning the underlying case when the Supreme Court handed down its final decision in May 1856.[130] The Court held that the act of Congress authorizing the bridge was a valid exercise of the Commerce Clause of the Constitution, and that the act effectively reversed the legal underpinning that the Court relied upon in its 1852 decision.[131]

The Court also handed down a zinger: "Some of the judges also entertain doubts as to

the regularity of the proceedings in pursuance of which the injunction was issued."[132] We don't know exactly what the Justices thought was irregular, but whatever it was, it was not good. Their comment was a jab at Grier, and was the entire extent of his public censure.

Grier would continue his respectable career on the Supreme Court. He is best remembered for authoring the landmark *Prize Cases*[133] decision in 1863. His health began failing in 1864, and by 1867 Grier was stricken with paralysis.[134] His Brethren eventually joined together to ask him to step down and he resigned from the Court in 1870, after serving twenty-four years. Through storm and strife the Wheeling Suspension Bridge still stands to this day in Wheeling, West Virginia.

ENDNOTES

[1] CONG. GLOBE, 33rd Cong., 1st Sess. 1710 (1854).

[2] *Id.*

[3] H.R. REP. No. 33-147, at 22-27 (1855).

[4] *Id.* at 17-18, 24-26.

[5] The two letters were "found" in Hendrick B. Wright's manuscripts at the Luzerne County Historical Society in Wilkes-Barre, PA. When going through the collection it became evident that they had sat unexamined for years.

[6] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (on file with the Luzerne County Historical Society); Letter from Robert C. Grier to Hendrick B. Wright (August 15, 1854) (Wright MSS). The Wright manuscripts will hereafter be cited as "Wright MSS." The two letters from Grier to Wright have been transcribed and appended to this article.

[7] *Id.*

[8] 50 U.S. 647 (1850); 52 U.S. 528 (1851); 54 U.S. 518 (1852); 59 U.S. 421 (1856); 59 U.S. 460 (1856). Unless otherwise noted, all **U.S. Reports** citations are referring to the numerous individual opinions in the litigation *Pennsylvania v. Wheeling & Belmont Bridge Co.*

[9] Pennsylvania's arguments are included at the beginning of the various reported decisions for *Pennsylvania v. Wheeling & Belmont Bridge Co. See* 50 U.S. 647, at 648, and 54 U.S. 518, at 520-21.

[10] ELIZABETH BRAND MONROE, **THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY** 64-66 (1992).

[11] H.R. REP. No. 21-399, at 1 (1830).

[12] H.R. DOC. No. 22-188 (1832); H.R. DOC. No. 28-67 (1844).

[13] MONROE, *supra* note 10, at 89.

[14] *Id.* at 52.

[15] *Id.* at 32-33.

[16] *See id.* at 37.

[17] GENE D. LEWIS, **CHARLES ELLET, JR.: THE ENGINEER AS INDIVIDUALIST, 1810-1862**, 124-25 (1968).

[18] H.R. DOC. No. 22-188 (1832); H.R. DOC. No. 28-67 (1844); *see also* MONROE, *supra* note 10, at 33-34.

[19] *See* LEWIS, *supra* note 17, at 118-119; MONROE, *supra* note 10, at 38.

[20] Ellet would become very involved with the allegations against Justice Grier, probably co-authoring most of them with Charles W. Russell, attorney for the Bridge Company. Letter from Charles Ellet, Jr. to Elvira Ellet (July 4, 1854) (Ellet MSS). In an interesting twist of fate, Ellet would later be mortally wounded during the American Civil War, and Edwin M. Stanton, President Abraham Lincoln's Secretary of War and lead counsel for Pennsylvania throughout the bridge case, would personally deliver the news of his mortal injury to Ellet's family in Washington, D.C. LEWIS, *supra* note 17, at 206.

[21] LEWIS, *supra* note 17, at 119.

[22] MONROE, *supra* note 10, at 47; *see* LEWIS, *supra* note 17, at 119.

[23] Pennsylvania was also arguing that the bridge could be elevated to a height where it would not obstruct traffic on the Ohio River. In response, the Bridge Company contended that building a bridge that high was not economically feasible with the technology available to it at the time.

[24] MONROE, *supra* note 10, at 50.

[25] Cynthia J. Rapp, "*In Chambers Opinions by Justices of the Supreme Court*," 5 *GREEN BAG* 2d 181, 183 (2002). In the 1840s and 1850s intermediate circuit court judgeships did not exist. The modern Courts of Appeal were not created by Congress until 1891. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[26] *See* Rapp, *supra* note 25, at 183.

[27] An article in the *Green Bag* references an interesting application for temporary injunction made in 1970 where two attorneys had to hike six miles into the woods of Washington State to make a motion before Justice William O. Douglas. He told them to come back the next day, where they found his hand-written "in chambers" opinion laying on a tree stump. *Id.* at 184.

[28] H.R. REP. No. 33-147, at 28 (1855).

[29] 50 U.S. 647, 654 (1850). Irreparable harm is a requirement that must be shown before receiving a preliminary injunction. 54 U.S. 518, 561 (1852).

[30] This is likely part of the reason why Grier suggested that Taney hear the second motion brought in 1854. Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[31] Three opinions would be handed down from the Court during this time: 50 U.S. 647 (1850); 52 U.S. 528 (1851); 54 U.S. 518 (1852).

[32] 54 U.S. 518, 568-69, 578 (1852).

[33] Act of Aug. 31, 1852, ch. 111, §§ 6-7, 10 Stat. 110, 112 (1852).

[34] Letter from Francis De Haes Janvier to Charles Ellet, Jr. (June 26, 1854) (on file with the University of Michigan's Special Collections Library). The Ellet manuscripts will hereafter be cited as "Ellet MSS."

[35] Letter from Charles Ellet, Jr. to James Baker (June 20, 1854) (Ellet MSS).

[36] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[37] Letter from Francis De Haes Janvier to Charles Ellet, Jr. (June 26, 1854) (Ellet MSS).

[38] *Id.*

[39] *See* Letter from Charles Ellet, Jr. to James Baker (June 20, 1854) (Ellet MSS).

[40] *See* H.R. REP. No. 33-147, at 22-27 (1855).

[41] *Id.* at 17-22, 27-28.

[42] *Id.*

[43] H.R. REP. No. 33-147, 1-5 (1855).

[44] *Id.* at 3-4.

[45] *Id.* at 4-5.

[46] *See* Letter from Robert C. Grier to Hendrick B. Wright (August 15, 1854) (Wright MSS).

[47] The members of the House Judiciary Committee were Chairman Frederick P. Stanton, Tennessee; John S. Caskie, Virginia; James Meachem, Vermont; Origen S. Seymour, Connecticut; Samuel W. Parker, Indiana; Hendrick B. Wright, Pennsylvania; John Kerr, Jr., North Carolina; Francis B. Cutting, New York; Henry May, Maryland.

[48] The Committee usually does a "preliminary informal examination" of charges brought against judges before recommending to the House that a full investigation be done. H.R. DOC. No. 80-366, at 64-65 (1947). While no standard operating procedure for the Committee in the 1850s has been found, it would make sense for the Committee chairman to assign the responsibility for performing this examination. *See* 77 CONG. REC. 6, 5803-04 (1933) (for members expressing apparent bewilderment over the history of the House Judiciary Committee procedure).

[49] Letter from George Thompson to Charles Ellet, Jr. (July 17, 1854) (Ellet MSS).

[50] *See* Letter from James Baker to Charles Ellet, Jr. (July 16, 1854) (Ellet MSS); Letter from James Baker to Charles Ellet, Jr. (Aug. 6, 1854) (Ellet MSS).

[51] Letter from Robert Saunders to Lucy Saunders (Sept. 3, 1860) (on file with The College of William and Mary's Swem Library).

[52] This quote is probably a paraphrase of the bishop. *Id.* (emphasis added).

[53] *Id.*

[54] ANDREW A. LAMBING & JOHN W.F. WHITE, ALLEGHENY COUNTY CENTENNIAL COMMITTEE, CENTENNIAL HISTORY OF ALLEGHENY COUNTY: SOUVENIR, ALLEGHENY COUNTY CENTENNIAL, SEPT. 24, 25 & 26, 1888: OFFICIAL PROGRAMME 110 (1888), *available at* http://archive.org/details/centennialhistor00lamb.

[55] Daniel J. Curran, Hendrick B. Wright: "A Study in Leadership" 32-33 (May, 1962) (unpublished Ph.D. dissertation, Fordham University) (on file with Walsh Library, Fordham University).

[56] For example, in 1831-33 there were only about thirty-seven practicing attorneys in the town of Wilkes-Barre, PA, which at the time was a relatively large regional town. *See* GEORGE B. KULP, 3 **FAMILIES OF THE WYOMING VALLEY, BIOGRAPHICAL, GENEALOGICAL, AND HISTORICAL: SKETCHES OF THE BENCH AND BAR OF LUZERNE COUNTY, PENNSYLVANIA** 1393-99 (1890).

[57] *See* Frank Otto Gattell, "*Robert C. Grier*," in 2 **THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS** 436 (Leon Friedman & Fred L. Israel eds., 1995).

[58] **HERRINGSHAW'S ENCYCLOPEDIA OF AMERICAN BIOGRAPHY OF THE NINETEENTH CENTURY** 1038 (Thomas W. Herringshaw ed., 1898).

[59] Interestingly, President James Buchanan was also a Dickinson College alumnus, and would later receive letters from Grier containing inside information on the infamous *Dred Scott* case, then pending before the Court. DON E. FEHRENBACHER, **THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS** 311-12 (1978).

[60] ETHAN GREENBERG, **DRED SCOTT AND THE DANGERS OF A POLITICAL COURT** 171-72 (2009); Curran, *supra* note 55, at 176-77.

[61] Grier was appointed to the Pittsburgh bench somewhat by accident. As part of a complex political arrangement, the governor of Pennsylvania was supposed to offer the position to Grier, who was expected to decline. Much to the governor's surprise, Grier accepted the position. Gattell, *supra* note 57, at 436. He would also be elevated to the Supreme Court by political circumstances. President James K. Polk offered the spot to Grier only after becoming frustrated by rejected nominations and other nominees who could not decide if they wanted the seat. *Id.*

[62] Curran, *supra* note 55, at 44-45.

[63] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* Letter from Robert C. Grier to Hendrick B. Wright (Aug. 15, 1854) (Wright MSS).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] The House Judiciary Committee's procedure for investigating allegations of impropriety in the 1850s was unclear. Charles Ellet, Jr. expressed uncertainty as to the proper mode of proceeding. Letter from Charles Ellet, Jr. to Zedekiah Kidwell (July 22, 1854) (Ellet MSS) (The Bridge Company "couldn't ascertain that the practice in such cases was settled; and they concluded that the most appropriate and differential course could be that adopted."). Later members of the House Judiciary Committee would express apparent bewilderment at the history of the "ridiculous procedure" followed for impeachments. *See* 77 CONG. REC. 6, 5803-04 (1933).

[73] H.R. REP. NO. 33-147, at 17-21 (1855).

[74] Later on in his career, Grier would again engage in *ex parte* communications. *See* FEHRENBACHER, *supra* note 59, at 311-12.

[75] H.R. REP. NO. 33-147, at 2 (1855).

[76] *Id.* at 21.

[77] *Id.* at 21, 28.

[78] *See id.* at 22.

[79] *Id.* at 28.

[80] *Id.* at 28.

[81] H.R. REP. NO. 33-147, at 22 (1855).

[82] *Id.* at 3.

[83] *Id.*

[84] LAMBING & WHITE, *supra* note 54, at 111 (all errors in original). Grier was using the bear as a metaphor. The underlying case was actually about an African-American dancer being copied by a blackface performer. *Id.*

[85] H.R. REP. NO. 33-147, at 3 (1855).

[86] *Id.* at 22.

[87] *Pennsylvania v. Wheeling & Belmont Bridge Company*, 50 U.S. 647, 654-55 (1850).

[88] The Bridge Company also complained that the commissioner, Reuben Hyde Walworth, was friends with unnamed counsel for Pennsylvania. This may have been true. Walworth's first assistant engineer, "E. F. Johnson," was discharged by the Court because he was a brother-in-law of Charles Shaler, one of Pennsylvania's counsel at the time. LEWIS, *supra* note 17, at 122-23; H.R. REP. NO. 33-147, at 20 (1855). Walworth's report ended up being favorable to Pennsylvania, but it did not show signs of apparent bias.

[89] H.R. REP. NO. 33-147, at 5 (1855).

[90] *Id.* at 18.

[91] *Id.* at 5, 18.

[92] *Id.* at 18.

[93] *Id.* at 5-6.

[94] It may have been Charles Shaler, who was Stanton's law partner at the time and also an important Pennsylvanian.

[95] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[101] FRANK ABIAL FLOWER, **EDWIN MCMASTERS STANTON: THE AUTOCRAT OF REBELLION, EMANCIPATION, AND RECONSTRUCTION** 42, 54 (1905).

[102] Stanton tended to handle the more important federal and appellate cases, while Shaler would handle the less important and state cases. *Id.* at 42.

[103] *Id.*

[104] MONROE, *supra* note 10, at 67.

[105] Letter from Francis De Haes Janvier to Charles Ellet, Jr. (June 26, 1854) (Ellet MSS).

[106] LAMBING & WHITE, *supra* note 54, at 104, 110.

[107] *Id.*

[108] *Id.* at 105.

[109] *Id.* Shaler may have been on the short list of candidates to replace the Court's Pennsylvanian member, Justice Henry Baldwin, who had died two years earlier but whose seat was still vacant.

[110] *See* GEORGE SHARSWOOD, **AN ESSAY ON PROFESSIONAL ETHICS** 12-13 (2d ed. 1860). Sharswood's work is an example of the legal ethics of the period, based on lectures given at the University of Pennsylvania in 1854. One excerpt is particularly relevant: "[G]entlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental or social meetings to make *ex parte* statements, or to endeavor to impress their views. They know that such conduct is wrong in itself, and has a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. A judge will do right to avoid social intercourse with those who obtrude such unwelcome matters upon his moments of relaxation." *Id.*

[111] 54 U.S. 518 (1852).

[112] Act of Aug. 31, 1852, ch. 111, §§ 6-7, 10 Stat. 110, 112 (1852).

[113] Letter from Francis De Haes Janvier to Charles Ellet, Jr. (June 26, 1854) (Ellet MSS).

[114] 59 U.S. 421, 422-24 (1856).

[115] H.R. REP. NO. 33-147, at 20 (1855).

[116] Act of Sept. 24, 1789, ch. 20, § 8, 1 Stat. 73, 76 (1789).

[117] *Id.*

[118] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[119] *See* H.R. REP. NO. 33-147, at 4 (1855).

[120] Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

[121] H.R. REP. NO. 33-147, at 4 (1855).

[122] *See* U.S. CONST. art II., § 4.
[123] U.S. HOUSE JOURNAL, 33rd Cong., 2nd Sess. 588 (1855).
[124] CONG. GLOBE, 33rd Cong., 2nd Sess. 1184-85 (1855).
[125] *Id.* at 1183.
[126] Some members were up until seven o'clock in the morning, not getting any sleep at all. *Id.* at 1184-85.
[127] *Id.* at 1185.
[128] *See* U.S. HOUSE JOURNAL, 33rd Cong., 2nd Sess. 588 (1855); CONG. GLOBE, 33rd Cong., 2nd Sess. 1192 (1855).
[129] Letter from James Baker to Charles Ellet, Jr. (July 9, 1855) (Ellet MSS). This July 9 letter mentions only the following about Grier: "I told you Judge Grier said he would bring a suit against me for slandering him. I have no further notice of it. His intention was to catch me here while a citizen of Va. and bring me directly into the U.S. district court here, so that he could manage every thing to his mind. Marshal, Jury and Judge would be himself. My residence [in Maryland] prevents this." Letter from James Baker to Charles Ellet, Jr. (July 9, 1855) (Ellet MSS).
[130] 59 U.S. 421 (1856).
[131] *Id.* at 430-32, 435-36.
[132] *Id.* at 436.
[133] *Prize Cases*, 67 U.S. 635 (1863).
[134] Francis R. Jones, "*Robert Cooper Grier*," 16 *GREEN BAG* 223 (1904).

Appendix

Appendix A. Letter from Robert C. Grier to Hendrick B. Wright (July 21, 1854) (Wright MSS).

Cape May, N.J. July 21, 1854

Hon. H.B. Wright

Dear Sir,

Some days ago, I received a copy of a paper purporting to be a memorial from the Wheeling Bridge to Congress, charging me with improper conduct, with what object and for what purpose, except that of calumniating me and bullying & threatening me in the performance of my official duties, I am at a loss to discover. This paper was sent to me by Hon. J. Glancy Jones Esq to whom I met, supposing him to be a member of the judiciary committee. As I have received no official notice of this proceeding, I feel rather at a loss what step to take in regard to it. The communication is but a libel under pretence of a memorial to congress, exhibiting the malice of the person who originated it under the name of a corporation to endorse his falsehoods. It contains no definite charge except that I ordered an injunction, which they assume to be in disregard to of an act of congress, in a case in which the corporation is a party now pending in the supreme court. I have no doubt the expectation of those who issued this document is to raise a feeling in congress against the court or a majority of them, as disregarding their acts, and if possibly bully the court, so that the defendants who have treated its process with marked contempt[?], may escape punishment, by assuming the part of complainants before congress—and raising a new issue between the legislature & the court. Whether they will succeed in this new piece of tactics remains to be seen. That they will use every endeavor, that malignant calumniators & hired lobby influence can effect, to injure my reputation I have no doubt, from this course they have hitherto followed. Ever since the dispatch about the bridge organization, the people of Wheeling have exhibited a bitter & malignant state of feeling towards myself—because I was formerly a citizen of Pittsburgh & supposed to sympathise with the opposing town. Their papers were continually abusing me. While I believe the Pittsburgh papers retorted somewhat in the same style on my brother Daniel who was a Virginian & supposed to sympathise with his fellow citizens. As for myself, I felt as little concern about whether the bridge stood or fell, as I do about the bridge of Lodi. But I proposed to Judge Daniel that we should both withdraw from the case, as our respective states had become parties to the litigation. But Judge Daniel very properly answered. That we had no personal interest in the matter, and I would be flinching improperly from the performance of a duty, through fear of imputations, which

means malignant or interested person might choose to cast upon us, if we refused to sit in the cause.

After the hearing of the cause, I coincided in opinion with the majority of the court—Judge Daniel with the minority—each deciding in favor of his own state. After our decision was known the corporation sent its agents to Harrisburg to persuade the legislature of Pennsylvania to withdraw the suit. And, as I was informed, their agents dealt largely not only in misrepresentations of the facts[,] but in foul abuse in public barrooms, of the majority of the court but more especially of Judge McLain [McLean] and myself. Such shameful conduct was harmless to us, & of little benefit to themselves.

But now it is hoped, by this secure[?] method of calumny, to injure my reputation & gratify the malignity of certain individuals, & moreover, it is a supposed[?] if no other good is effected, yet that by their charge I shall be frightened or bullied off the bench, who was one of the majority of the court who decided against them before, and it is feared may again. That they have certainly mistaken their man. I can not be frightened or bullied either by abolitionists, or a Virginia corporation, from the performance of a duty.

The history of the act[,] or matter now complained of, is as follows.

In June at the Williamsport court, Judge [Charles] Shaler inquired of me, when I would be at home, stating, that a motion would be made by the state of Pennsylvania for an injunction against rebuilding the Wheeling Bridge. I refused to say when I would be at home, telling him that the application ought to be made to the Chief Just. Or Judge McLain [McClean]. I said that every act done by me, was misconstrued by certain people at Wheeling, that it would only excite their mean malice to personal abuse of me as heretofore, even when I decided in their favor, as I did at first. I heard no more of it till the last Monday in June, when I was was [sic] holding court in Philadelphia. The attorney gen. of Pennsylvania & his associate counsel produced a bill in Equity about to be filed in the Supreme Court of the US by the State of Penna against the Bridge Co—& prayer a preliminary injunction with the usual affidavits. I inquired why the motion had not been made before the Chf Just or Judge McLean. I was told neither of them was at home, they insisted that I was competent to act and bound to act. This could not be denied. I inquired who appears for the defdts—and was told no one appears. I remarked that the questions raised by the bill were very important and I would give no opinion on them whatsoever. As the defendants made no opposition to the issuing of the injunction as they had formerly done, I presumed they did not intend to object, as it certainly would be the part of wisdom to have the questions settled before expending their money. Neither they nor I had a right to treat with contempt questions raised by the law officer of a respectable state. I was not bound to decide their validity, in a preliminary & temporary motion, where the defendants made no objection to the process prayed for. Notice of the motion was proved, and according to the usual Court of chancery practice, the injunction writ[?] of course. The defendants might have moved the next day to have it removed, & if sufficient reason was shown, it would have been set aside, of course. But they chose another course—Which was, to refuse to appear before the court, or to make any objection to the issuance of the writ, or to ask to have it set aside as injurious to them. On the contrary they have invented a new course of practice in chancery cases, which is first to treat, the judge with contempt by refusing to appear or state their objection if they had any—then to treat the court with marked contempt by utterly refusing to obey or regard process issued in the name of the Supreme Court of the United States. And lastly, instead of moving the judge to dissolve the injunction—they file a calumnious libel against him in congress, expecting no doubt, that by means of corporate

influence, & a feeling of state pride (sometimes found in Virginians) they may raise a hue & cry against the judge, and repeal his decision, because he has had the hardihood to disregard an act of Congress, which the judge never read, nor passed any opinion upon. If this corporation expects to hide the enormity of their own course by an attack on the court or a member of it, probably they will find their mistake—as also in attempting to raise a contest between Congress & the judiciary as to their respective powers.

Having no official intimation from the judiciary committee, in answer to which I could properly address them, I must beg you as a member of it, (and one who will not suffer a fellow Pennsylvanian to be trampled on by a set of scoundrels) to make a proper statement of the matter before the committee—and assure them that I am ready to answer to any & every tribunal for the uprightness of my judicial life. And do protest most solemnly against this attempt of a corporation a party to a suit, to commence their defense by such a base attempt to calumniate a member of the court & intimidate the court justices[?] of obeying its process. May I beg the favor of you to communicate the contents of this to the members of the committee, and demand either that I have the liberty of meeting my calumniators, or that their libel be dismissed with the reproof which such an infamous attempt deserves.

I am very truly
Yours
R.C. Grier

P.S. As I expect to be on a journey soon & don't know where a letter will find me—if you write, direct to Philadelphia.

Appendix B. Letter from Robert C. Grier to Hendrick B. Wright (Aug. 15, 1854) (Wright MSS).

Philadelphia, Aug 15 1854

Hon. HB Wright

Dear Sir

On my return home yesterday I found yours of July 25. I hardly expected that the committee would, in their time of bustle & excitement, turn their time and attention to what, is to them, and the public of so little importance.

I think, I should have an opportunity of addressing the committee by some communication not out of proper form so as to shew up the conduct of the rascalls, who have fallen[?] upon this plan of Whelling & calumniating me under cover of a corporate name & a legislative memorial—

If not sooner, we will probably meet at Washington in december when I shall speak to you more fully on the subject.

Accept my thanks for your kindness & attention to this matter—

With much respect
Yours
R.C. Grier

Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus

PAMELA C. CORLEY, AMY STEIGERWALT, AND ARTEMUS WARD

Scholars have long debated questions about the decline of consensual norms on the Supreme Court. It is widely understood that Chief Justice John Marshall is responsible for transforming the institution from one where Justices issued their opinions seriatim—or individually—to a collegial body with a single opinion of the Court. It is also plain that the modern Court is often divided with the Justices only issuing unanimous decisions in about one-third of the cases. What remains unclear, however, is exactly when the norm of consensus ended and what caused its demise.

We argue that the institutional transformation from consensus to dissensus was the result of a series of internal and external changes to the judicial decision-making process during the Roosevelt Court—a period roughly from 1937 to 1947 that was dominated by Justices appointed by President Franklin D. Roosevelt. These developments—occurring both on the Court and in the broader political environment—fundamentally altered the dynamic among the Justices and forever changed the way they decided cases. The end result was the replacement of collective expression—once the long-standing norm—with individual behavior.

We highlight what political scientist Paul Pierson terms a "conjuncture"—a moment in time when "discrete elements or dimensions of politics" collide to produce a new, and often unintended, effect. Specifically, we identify a number of institutional developments that dramatically altered the extent to which consensus could be achieved in the Court's decision making.[1] We trace these trends by undertaking an extensive examination of the Roosevelt Court—the conjuncture, or moment in time, when its ability to achieve consensus changed.

Our investigation is based primarily on the private papers of Justices William O. Douglas and Harlan Fiske Stone, including memos sent between the Justices, draft opinions, and other correspondence, which we use to determine the durable shifts in the Court's decision-making processes during

these years. Our analysis shows that various institutional changes instituted both before and during the Roosevelt Court affected the Court's decision making and brought about and entrenched a dissensus revolution in which individual expression went from virtual nonexistence to the norm.

Most scholars attribute the breakdown in the norm of consensus to internal developments: specifically, the role of individual Chief Justices. The leadership style of Chief Justice Stone is a common culprit.[2] Political scientist Stacie L. Haynie argued that Stone's predecessor—Chief Justice Charles Evans Hughes—was largely responsible.[3] Gregory A. Caldeira and Christopher J.W. Zorn, also political scientists, furthered these findings by suggesting that consensual norms ebbed and flowed over time and under different Chief Justices.[4] But there is other research that points to external factors such as the rise of organized interests and the change in issues that the Court began to consider—specifically the growth of the civil rights and liberties docket.[5]

This research suggests that a mixture of both external and internal factors combined to cause the breakdown of consensus. In short, Stone did not operate in a vacuum and his style alone cannot explain the Court's fundamental transformation that occurred during his tenure. In the following analysis, we identify a number of heretofore-unexplored institutional changes that were implemented during the Roosevelt Court. We suggest that it is these developments that so fundamentally changed the Court's operation that a return to the norm of consensus was virtually impossible—regardless of the Chief Justices or the other Justices that replaced their Roosevelt Court predecessors.

Table 1 shows the important institutional developments—internal and external, cause and effect—that occurred during the Roosevelt Court era. As we detail next, once on the dissensus path, there remained only a "critical juncture" to fundamentally alter the institution.[6] That moment arrived with the conjuncture of the external intellectual force of legal realism, the largely discretionary docket

Table 1: Institutional dissensus developments of the Roosevelt Court

Causes	Effects
External developments	Majority coalition behavior
• Judges' Bill (1925): increased discretionary docket, growth in civil liberties cases	• Decline of acquiescence
	• Court opinions departing from conference views
	• Proliferation of concurrences in the judgment only
• Influence of legal realism	• Criticism of dissents by majority coalition members
• Rapid personnel changes	• Concurrences as "counter-dissents"
Internal developments	Minority coalition behavior
• Expanded conference discussion	• Justices note every dissent
• Circulation delays: Breakdown of twenty-four-hour return of circulated opinions	• Dissents over small disagreements
	• Dissenters raise issues not mentioned in petitions
	• Circulated dissents praised by minority coalition members
• Reargument of cases	• Dissents criticize concurrences
• Academic atmosphere	

created by the Judges' Bill of 1925, and the appointment of New Deal legal liberals, including the elevation of Stone to Chief Justice, who brought with them a more open, academic style. Under Stone, the Justices developed new internal practices that undermined long-standing norms and ushered in the modern era of dissensus. Conference discussion was expanded, opinion writing and opinion circulation delays became common, and there were frequent calls to reargue contentious cases. In short, an academic atmosphere took hold.

External and internal developments on the Roosevelt Court had a dramatic, long-lasting effect on both majority and minority behavior. Justices writing majority opinions increasingly departed from the views of the Conference, the norm of acquiescence broke down, and more concurrences and dissents were issued than at any previous time in the Court's history. Furthermore, majority opinions and concurrences were used to criticize dissents. Dissenters expressed small disagreements and discussed issues not raised in petitions, all the while praising each other for not acquiescing to the majority. The basic character of the decision-making process was completely transformed.

The Roosevelt Court Justices did not initiate these changes out of whole cloth. Specifically, developments toward the end of the consensus era foreshadowed the coming dissensus revolution. We propose that the consensus era on the Supreme Court began at the institution's inception in 1789 and lasted into the Hughes Court, from 1931 to 1940. Interestingly, it began at the end of the eighteenth century in a decidedly individualistic manner, with the earliest Justices issuing their opinions seriatim (i.e., individually in each case), and ended at the close of the nineteenth century with a resurgence of individual expression, presaging the dissensus era to come. However, it is the period in between that largely defines what we term the consensus era. From the Marshall Court to the end of the nineteenth century, Supreme Court decision-making was dominated by the institutional norm of consensus, including a desire for unanimity and a distaste for dissent and individual expression. Decision making took place orally; the justices largely acquiesced and said nothing publicly if they disagreed with the majority; institutional opinions were often delivered by the Chief Justice and not circulated to the other members of the Court for input (as they are today); and the practice of circuit riding provided Justices with a regular outlet for individual expression. As political scientists Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth showed in their examination of the docket books of Chief Justice Waite, Justices commonly muted disagreements expressed at Conference and instead joined the majority opinion.[7] As a result, between 1801 and 1940, the Court handed down unanimous cases approximately ninety percent of the time, if not more often.[8]

At the end of the nineteenth century, however, a number of institutional developments occurred that placed the Court on a path toward increasing dissensus. During the Fuller Court (1888–1910), the courts of appeals were created and the Supreme Court gained limited discretionary review over its docket, thereby allowing it to choose more important, and often more difficult, cases to decide. Also, circuit riding, the outlet for individual expression, was abolished. Now draft opinions began to be circulated to each member of the Court, and for the first time the Justices were able to thoughtfully critique a written opinion before it was issued. These institutional developments helped promote dissensus and presaged the coming, modern era of increased discretion over dockets, the influence of legal realism, and further changes to the decision-making process.

Figure 1 compares indicators of dissensus across consensus-era Courts. Although the transition from the relatively consensual Fuller and White Courts to the more divided

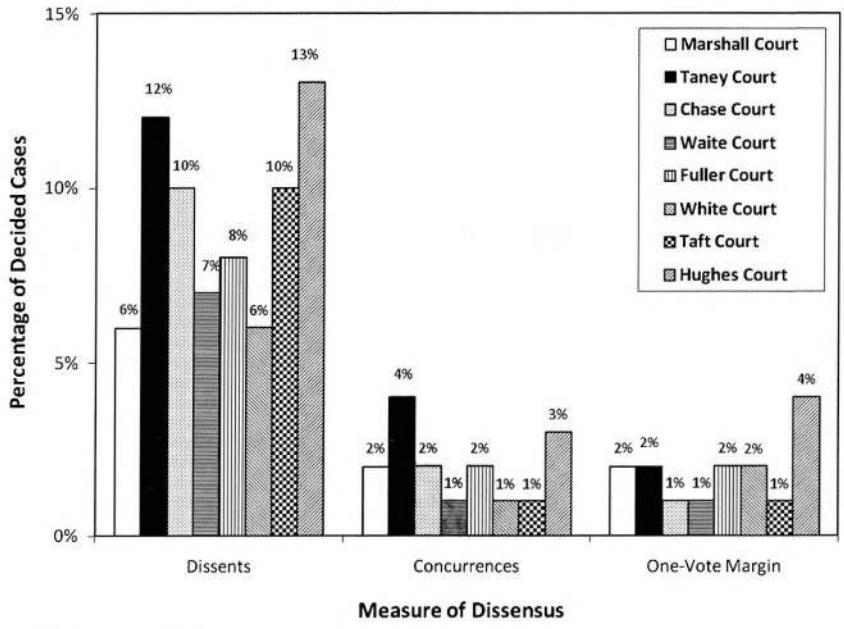


Figure 1: Measures of dissensus in consensus-era courts
Source: Data from Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

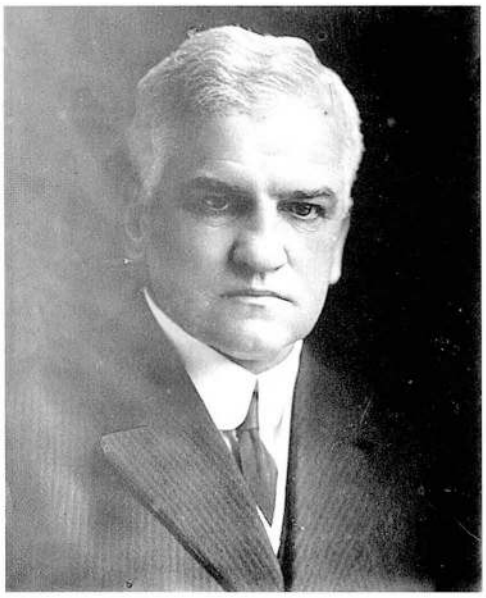
Taft and Hughes Courts is evident from the percentages of dissents, concurrences, and cases decided by a one-vote margin, the levels of dissensus under Hughes were still similar to those under Taney. Thus, while dissensus was seemingly on the rise, there was no reason to believe that the Court would not soon return to more consensual levels. And yet, as we demonstrate, the Justices of the Roosevelt Court so changed the way the Court functioned that even they appear relatively consensual compared to their successors.

Revisiting the Roosevelt Court

President Roosevelt made nine appointments to the Supreme Court, including the elevation of Stone to Chief Justice. Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Robert H. Jackson, and Wiley Rutledge joined Stone and the other holdovers to make up what political scientist C. Herman Pritchett termed "the Roosevelt Court."[9] And while it is conventional to name Courts after their Chiefs, we consider the Justices who served with Stone to be members of the Roosevelt Court in this discussion, for it is this set of Justices who transformed the Court from a largely consensual body into an institution where individual expression was common.

Figure 2 illustrates the dramatic sea change in nonconsensual behavior under Chief Justice Stone. While levels of dissensus increased during the Taft and Hughes Courts, there can be little doubt that the Roosevelt Court Justices transformed the institution during Stone's tenure as Chief.[10] Nearly half of all Stone Court decisions had at least one dissent, nearly one in five contained a concurrence, and one in ten was decided by a single vote. No previous group of Justices had ever come remotely close to these levels of public discord.

Figure 3 further shows that the dissensus trend ushered in by the Justices of the Roosevelt Court was anything but an aberration. As new Justices joined holdovers such as



Justice John H. Clarke stepped down from the Court in 1922 in part because he felt that the Court heard too many trifling cases. "Much more than ½ the cases are of no considerable importance whether considered from the point of view of the principles or of the property involved in them" he complained to President Wilson in his resignation letter.

Black and Douglas, they adopted the dissensus norms begun by their predecessors. Dissent rates regularly reached sixty percent, concurrence rates continued to climb to forty percent, and cases decided by a one-vote margin reached twenty percent. Although the personal predilections of the holdovers certainly contributed to the growth of dissensus over time, a number of important institutional changes that occurred during the Roosevelt Court continued to be influential on future Courts and helped to entrench the norm of dissensus, which continues to this day.

Once the Justices of the Roosevelt Court set out on the dissensus path, their practices and behavior only increased the amount of divisiveness over time. Figure 4 shows that cases with dissents reached an all-time high of fifty-two percent in 1943, only to be topped at sixty percent in 1946. This upward trend continued until eighty percent of the decisions handed down in 1952 contained a dissent—a record that still stands. Dissents were common among Roosevelt Court Justices in landmark

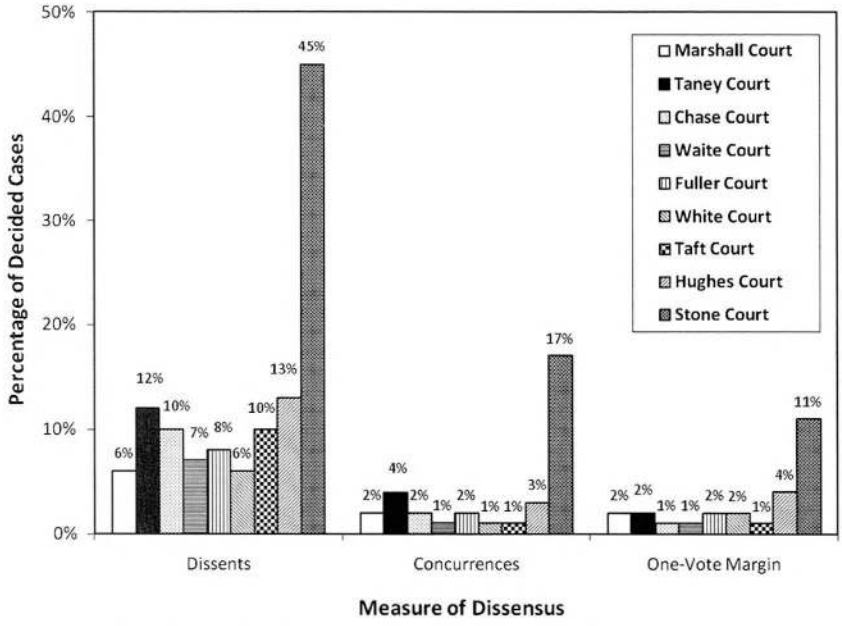


Figure 2: Comparing the Stone Court to its predecessors: Measures of dissensus
Source: Data from Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

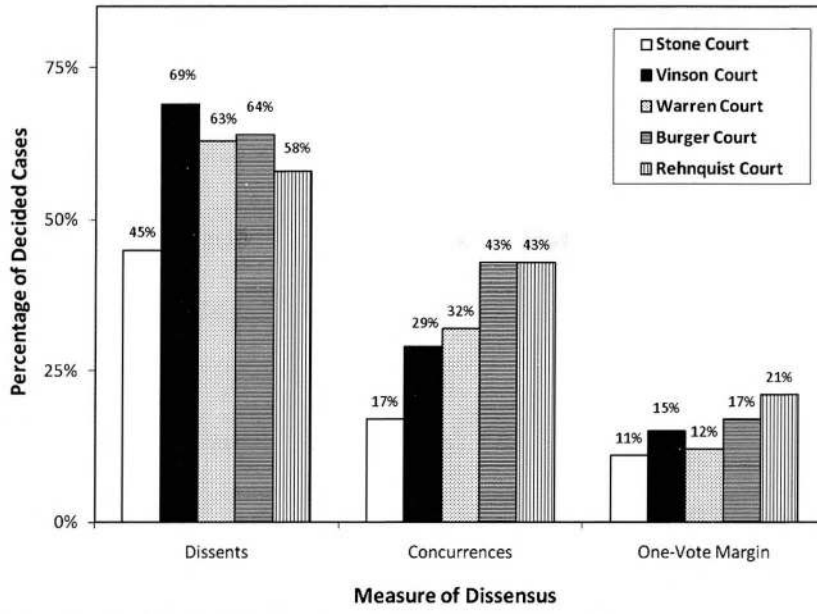


Figure 3: Comparing the Stone Court to its successors: Measures of dissensus
Source: Data from Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

cases. These included *Betts v. Brady* (1942), in which Black, Douglas, and Murphy disagreed with the majority opinion denying a right to counsel for indigent defendants; *West Virginia State Board of Education v. Barnette* (1943), in which Frankfurter, Reed, and Owen J. Roberts dissented from a ruling protecting students from being forced to salute the American flag and recite the Pledge of Allegiance in public schools; and *Korematsu v. United States* (1944), in which Roberts, Murphy, and Jackson opposed the Court's decision allowing the government to intern Japanese Americans during World War II.

Figure 4 also reveals an increase in the percentage of cases with a concurrence, which climbed to another record of thirty-one percent in 1946. Eventually, the Justices issued concurrences in fifty-seven percent of cases by the 1970 Term—an as yet unsurpassed high-water mark. Even some of the landmark cases decided unanimously contained concurrences. For example, both Stone and Jackson concurred in *Skinner v. Oklahoma* (1942), which invalidated state criminal sterilization laws; and Douglas, Murphy, and Rutledge each issued separate concurrences in the World War II Japanese-American curfew case *Hirabayashi v. United States* (1943).

Finally, Figure 4 shows that the percentage of cases decided by a one-vote margin reached an apex of nineteen percent in 1944. For example, both the Free Exercise tax-solicitation case *Murdock v. Pennsylvania* (1943) and the Commerce Clause insurance case *United States v. Southeastern Underwriters Assn.* (1944) were decided by a single vote.[11]

It is important to note that the Court's disagreements were not simply the product of a few Justices. Figure 5 illustrates how each Justice on the Roosevelt Court increased his level of dissenting votes over time. For example, Stone's dissents increased from four percent of cases in 1940 to nineteen percent in 1944; Roberts's, from nineteen percent in 1940 to thirty-six percent in his final year on the Bench; Black's, from nine percent in 1940 to twenty-one percent in 1946; Reed's, from five percent in 1940 to

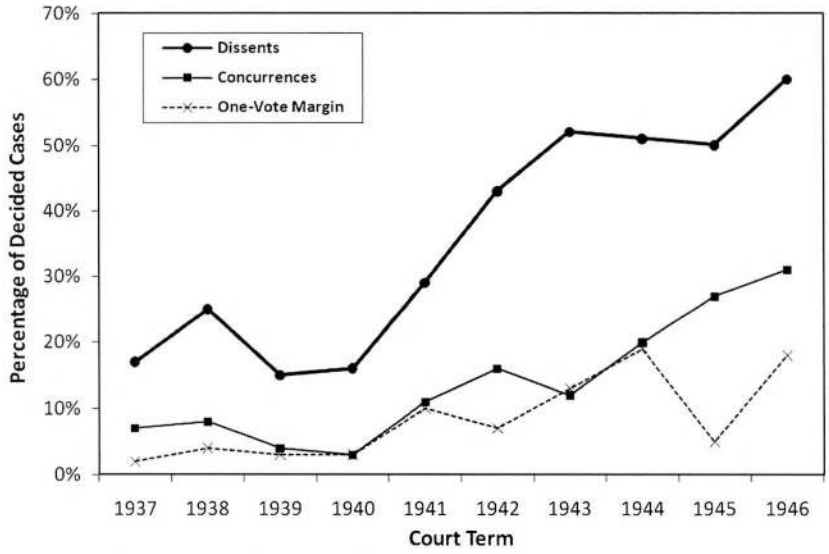


Figure 4: Measures of dissensus on the Roosevelt Court, 1937–1946
Source: Data from Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

twelve percent in 1946; Frankfurter's, from one percent in 1940 to twenty-three percent by 1946; Douglas's, from nine percent in 1940 to twenty-one percent in 1946; Jackson's, from seven percent in 1941 to twenty percent in 1946; and Rutledge's, from only three percent in 1942 to a striking thirty percent in 1946. As the figure shows, the dissensus trend was plainly a collective enterprise.

Still, despite the unprecedented amount of dissensus occurring on the Roosevelt Court, the Justices reached consensus half

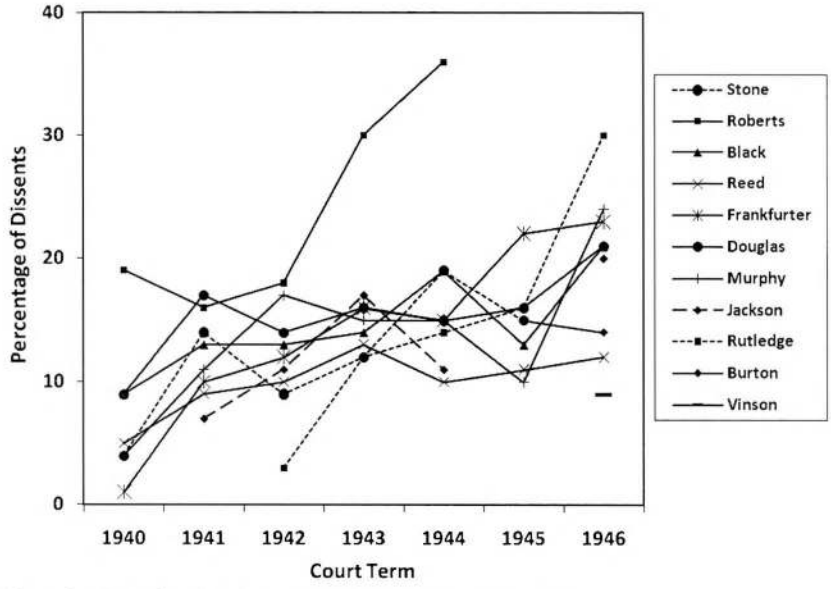


Figure 5: Dissenting behavior of the Roosevelt Court Justices, 1940–1946
Source: Data from Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, 4th ed. (Washington, DC: CQ Press, 2007).

of the time and in a number of important cases. They spoke in a single voice in the "fighting words" case *Chaplinsky v. New Hampshire* (1942), the World War II "enemy combatant" case *Ex parte Quirin* (1942), and the Commerce Clause agricultural case *Wickard v. Filburn* (1942). These decisions illustrate that even on a fractured Court the Justices could agree on some of the most controversial issues of the day.

It is plain from the data that the Court experienced then-unprecedented levels of disagreement while Stone was Chief Justice. However, the extent to which Stone was personally responsible for this discord continues to be debated; for this reason we discuss Stone's leadership and the personal and jurisprudential divisions among his colleagues. While we acknowledge that Stone's freewheeling style helped foster an environment in which conflict thrived, we illuminate a number of intra-institutional developments that further undermined the old-era norm of consensus already threatened by the extra-institutional pressures of the discretionary docket, legal realism, and rapid personnel changes. Thus, the Justices of the Roosevelt Court came together at a time when conditions for increased dissensus were ripe. We argue that it was ultimately these institutional developments, rather than simply the leadership style of Chief Justice Stone or the personal feuds that existed, that transformed the Court. Nevertheless, those latter factors certainly helped to lead to the institutional developments that entrenched dissensus over time.

External Developments: Discretionary Docket, Legal Realism, and Personnel Changes

Three important external developments were central to the breakdown of consensus during the Roosevelt Court: (1) congressional legislation that gave the Justices a large measure of discretion over the cases they would decide, opening the door to more contentious issues; (2) the controversial intellectual ideas of legal realism—in particular the notion of law as indeterminate—that provided an environment for conflict to thrive; and (3) President Roosevelt's successful appointment of Justices who were critical of their predecessors and therefore receptive to changing the institution both procedurally and substantively. In this section, we briefly address how each influenced the Court's decision-making processes. Without these crucial developments, the Justices would have had neither the incentive nor the opportunity to undermine consensual norms or to create internal procedures conducive to dissensus to the extent that they did.

Trifling Cases: The Judges' Bill of 1925

The Judges' Bill of 1925 eliminated the vast majority of mandatory appeals and allowed the Court to choose which certiorari petitions it would consider. This was perhaps the most important development of the Taft Court.[12] Relieving the Justices of their burdensome mandatory docket allowed them to focus on the most significant, and usually most contentious, issues of the day, and the implications of this for the decline of consensual decision-making cannot be overstated. In short, the Justices no longer faced large numbers of relatively easy cases on which they could all agree. Consider the comments of Justice John H. Clarke in his 1922 resignation letter to President Woodrow Wilson:

> Much more than ½ the cases are of no considerable importance whether considered from the point of view of the principles or of the property involved in them, but, nevertheless, a conscientious judge writing them must master details with the utmost care. My theory of writing opinions has always been that if clearly stated

> 9 cases out of 10 will decide themselves,—what the decision should be will emerge from the statement of the facts as certainly as the issues will.... I protested often, but in vain, that too many trifling cases were being written, that our strength should be conserved for better things.[13]

Some have dismissed Clark's remarks as the product of personal melancholy over his sister's death; however, Justice George Sutherland made similar comments. In his Senate testimony in favor of the act, Sutherland explained that "a very large proportion of the cases that come" to the Court "ought never to be there at all" and that the Justices were burdened by "a large number of trifling cases."[14]

The Judges' Bill greatly limited the types of cases granted a mandatory appeal to the Supreme Court.[15] With this reduction of its mandatory jurisdiction, the Court could focus more attention on deciding important constitutional and statutory questions, and spend less time on routine appeals cases.

Not surprisingly, the Justices increasingly chose to adjudicate cases containing difficult and complex legal issues of national importance—namely, those involving civil rights and liberties. Cases involving freedom of speech, religious liberty, privacy, the rights of the accused, and race and sex discrimination not only became a permanent feature of the annual caseload but also divided the justices as never before. Indeed, even the New Deal liberal Justices appointed by Franklin D. Roosevelt differed on these and other matters. The establishment of the Supreme Court's discretionary docket was thus a key external development that helped usher in a new era of dissensus.

The Lawmaking Function: Legal Realism

Distaste with the legal formalism and conservative decisions of pre–New Deal conservative courts led to the intellectual movement known as legal realism.[16] The notion of indeterminacy in law can trace its roots back before legal realism to the sociological jurisprudence of progressives who sought to use law to achieve social change. For them, the law was no longer a fixed set of principles used to settle narrow disputes but was now part of an ongoing debate over larger social issues. Loosely based on notions of legal indeterminacy and the centrality of individual judges, legal realism was never a school of thought or coherent critique of law and judging, and certainly it was not instructive for future jurisprudence.[17] The Roosevelt Court was populated by the first generation of jurists who came of age under its influence. As a result, legal realism's lack of coherence manifested itself in a Court that continually grappled with the nature of judging. For example, Justice Frankfurter wrote Black in 1939:

> 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 lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.[18]

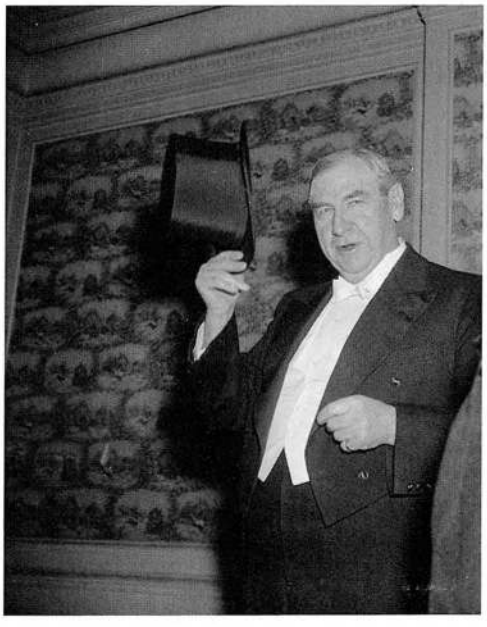
In a 1999 essay, political scientist David O'Brien similarly explained: "[A]s a result of their disagreements over the course of liberal legalism and constitutional interpretation, the New Deal justices were inclined to articulate their distinctive views in individual opinions."[19]

The discretionary docket and the theoretical shift from legal determinacy to legal realism resulted in a number of distinct changes. The length of opinions increased, as did the number of citations to past cases, law review articles, and other authorities.[20] With lengthier opinions containing increasing

amounts of information, the Justices had more to disagree with when determining whether to join an opinion and more to respond to and comment on when writing separately. The level of dissensus rose dramatically as a result.

Poisoning the Well of Collegiality: Stone and His Associates

While President Franklin Roosevelt may have failed to "pack the Court," he was successful in appointing Justices who supported the New Deal. Roosevelt made nine appointments in all: Senator Hugo L. Black of Alabama (1937), U.S. Solicitor General Stanley F. Reed (1938), Professor Felix Frankfurter of Harvard Law School (1939), Securities and Exchange Commissioner William O. Douglas (1939), U.S. Attorney General Frank Murphy (1940), Senator James F. Byrnes of South Carolina (1941), U.S. Attorney General Robert H. Jackson (1941), and Judge Wiley B. Rutledge of the U.S. Court of Appeals (1943); he also elevated Harlan Fiske Stone to Chief Justice in 1941.



Chief Justice Harlan Fiske Stone was often more interested in individual expression than in collective action, and his lax leadership style has been blamed for discord on the Court. The authors argue, however, that the Justices on the Stone Court came together at a time when conditions for increased dissensus were ripe and that it was ultimately these institutional developments, rather than the freewheeling Conferences under Chief Justice Stone, that transformed the Court.

Stone served as Chief Justice for only five years, having been an Associate Justice for the preceding sixteen terms. When he was rumored to be Taft's replacement years before, Taft said that it would be "a great mistake," as "Stone is not a leader," and "would have a good deal of difficulty in massing the Court."[21] Taft's characterization may very well have been apt. Stone's behavior prior to his elevation suggests that he was often more interested in individual expression than in collective action.

As an Associate Justice, Stone found himself on the losing side in a number of bitterly divided 5–4 decisions: *Olmstead v. United States* (1928), which upheld warrantless wiretaps as long as a dwelling is not physically entered; *Railroad Retirement Board v. Alton Railroad Co.* (1935), in which the Court invalidated the Railroad Pension Act of 1934 on Due Process and Commerce Clause grounds; and *Morehead v. New York ex rel. Tipaldo* (1936), which struck down a state minimum wage law for women and children.

Furthermore, Stone issued dissents even when strong majorities were against him, as in *Federal Trade Commission v. Eastman Kodak Co.* (1927), about which he wrote Justice Edward T. Sanford: "I voted the other way, and I find myself unable to agree with your opinion notwithstanding its excellent form. I will let you know at the Conference whether I care to do anything further with respect to it."[22] The Court's opinion limited the FTC's regulatory power, and Stone decided to issue a dissent, which Justice Louis Brandeis joined. Similarly, Stone was the lone dissenter in *Minersville School District v. Gobitis* (1940), a case upholding compulsory flag salutes in public schools. His position against the policy became law three

years later, however, when the Court reversed course in *West Virginia State Board of Education v. Barnette* (1943).

Stone was not shy in expressing his individual views by way of joining or authoring concurring opinions. For example, in *Sorrells v. United States* (1932), in which the Court recognized entrapment as a defense based on the defendant's predisposition to commit the crime, he wrote Chief Justice Hughes: "I am holding your opinion ... until I can give it a little more deliberate examination.... I am not much concerned about the result, but I think I am troubled by the process by which it is reached."[23] Ultimately Stone, as well as Brandeis, joined the separate concurrence issued by Roberts that rejected predisposition in favor of an analysis of the conduct of law enforcement. In another example, he wrote Hughes during the 1938 Term: "I return herewith my concurrence in your opinion in the Labor Board case. It is excellent as far as it goes, but I do not think it goes quite far enough in one respect.... If you prefer not to make any change, I will be quite content to state my point very briefly in a separate memorandum, at the same time concurring in all that you have written."[24]

Stone's penchant for individual expression did not go unnoticed by his colleagues. For example, Justice James McReynolds advised him in a 1930 note: "All of us get into a fog now and then.... Won't you 'Stop, Look, and Listen'? In my view we have one member [Louis D. Brandeis] who is consciously boring from within. Of course, you have no such purpose, but you may unconsciously aid his purpose. At least do think twice on a subject—three times indeed. If the Court is broken down, then there will be rejoicing in certain quarters. I cannot think the last 3 dissents which you have sent me will aid you, the law or the Court."[25] Stone defended his actions and revealed his preference for more exchange among the Justices both in Conference and in opinion writing and circulation:

> I am sure you will give me credit for being sincere in the views which I express. If I did not hold them strongly and believe that very many thoughtful men, trained in the law, would agree with them, I should not take the trouble to write any dissent.... I think you will not misunderstand me when I add that I am profoundly convinced that during that time some very serious mistakes have been made by the Court, which would not have been made had it not been for the disposition of the majority to rush to conclusions without taking the trouble to listen to the views of the minority. If the majority overrules the settled decisions of the Court, if it insists on including in opinions, over the protests of the minority, what is not necessary to the decision ... if it insists on putting out opinions which do not consider or deal with questions raised by the minority, it must, I think, be expected that the minority will give some expression to their views. Otherwise, their function is reduced to registering a vote which is not even published. What I have written in Nos. 281 and 282 is, I think you will agree, at least worthy of consideration, but I was not even given an opportunity to state my position at the Conference. If the Court is willing to put out its opinion without meeting that argument or referring to its own decisions ... any consequence for such ill considered action should not, I think, be attributed to me or what I have written.[26]

Chief Justice Taft was also concerned about the increasing level of individual expression and wrote Stone in 1927:

> I am quite anxious, as I am sure we all are, that the continuity and weight of our opinions on important questions of law should not be broken any more than we can help by dissents. Of course there are some who have deep convictions on the subject of the law governing the relations between employer and employee, whether it involves interstate commerce or not, and I suppose it is to be expected that in their attitude of protest in the past they should find distinctions enabling them to continue their attitude in cases presenting what are substantially the same issues; but with respect to those Judges who have come into the Court since these decisions were rendered, I am sure it is not their purpose to depart from what has been declared to be accepted law.... I hope you will look into this matter with care, because 5 to 4 decisions of the Court, while they must sometimes occur, don't help the weight of its judgment.[27]

Stone replied: "I, of course, appreciate the importance of avoiding dissents which do not seem necessary, and I am sure that you know me well enough now to know that I am not disposed to be opinionated or over-cocky about the opinions which I do hold."[28]

Stone did acquiesce at times, but he continued to issue separate opinions and went further by encouraging his colleagues to dissent in cases in which he voted with the minority. For example, he wrote Justice Roberts concerning the inheritance tax case *Coolidge v. Long* (1930): "I hope you are going to write something in ... the Massachusetts Tax Cases. I think the Court is making the mistake which it has made before, of holding that a state tax is unconstitutional.... With your familiarity with the similar system of taxation in Pennsylvania, you will, I am sure, be able to demonstrate that it is within the state power."[29]

By the time of Hughes's retirement, Stone was more than halfway into his second decade on the Court, and Hughes recommended him to President Roosevelt for elevation to Chief Justice.[30] However, Stone did little to temper the judicial and personal divides that had been brewing among the Justices; rather, he helped foster them through his open, academic style. As a result, the Justices of the Roosevelt Court were frequently engaged in personal and jurisprudential skirmishes. As they joined the Court, President Roosevelt's appointees immediately began testing the landscape.

Felix Frankfurter was a longtime Harvard Law professor, and many felt he would be a leader on the Roosevelt Court. He explained to Stanley F. Reed how he viewed his role: "The fact is that I am an academic and I have no excuse for being on this Court unless I remain so."[31] Frankfurter was notorious for his long speeches in Conference, lengthy memoranda of all kinds, and unrelenting lobbying of his colleagues and their clerks. For example, he wrote Stone regarding the Contract Clause case *Municipal Investors Assn. v. Birmingham* (1942): "I have had a go with Reed's law clerk but not yet with him on the *Birmingham* case."[32] Additionally, his verbose style and disparaging comments led to deteriorating relationships with many of his colleagues, including William O. Douglas, who eventually stopped speaking to him.[33] One day in Conference, Douglas announced: "When I came into Conference I agreed in the conclusion that Felix has just announced. But he's talked me out of it."[34] Frankfurter biographer Melvin Urofsky concluded: "We can see the disastrous effects of Frankfurter's personalization of issues in the disintegration of the Court during the war years ... Frankfurter, of course, does not share the full blame.... There is no doubt, however, that

Frankfurter's behavior poisoned the well of collegiality."[35]

For his part, Douglas drew the ire of the other Justices for his public profile. Roberts became disillusioned with him, as well as his other colleagues, over what he saw as unprecedented activism and public posturing, including a press leak in the energy rate regulation case *Federal Power Commission v. Hope Natural Gas* (1944). Douglas vehemently denied that he was the source of the leak, writing Stone: "The rumor now floating in these halls is that I 'leaked' the *Hope Natural Gas* story to Drew Pearson through Tom Corcoran. That is an outright, contemptible lie. There is not a grain of truth in it ... I never breathed a word about any case pending before the Court to them or to anyone else, at that time or at any other time."[36]

Despite Douglas's denials, Roberts no longer lunched with the other Justices, refused to join them in the robing room for the traditional handshake before taking the Bench, stopped speaking to most of them, and limited his Conference contributions to terse statements of his vote.[37] When he retired at the close of the 1944 term, his colleagues could not agree on the customary farewell letter after Black balked at language in Stone's initial draft, and no letter was ever sent.

Robert H. Jackson's appointment created further personal problems—particularly with respect to his relationship with Hugo L. Black. When Jackson accepted President Harry S. Truman's offer to be the chief Nazi prosecutor at the end of World War II, the other Justices were displeased that they were not consulted, that Jackson was entering the political arena, and that they would have to increase their workloads to make up for his absence. But it was the case of *Jewell Ridge Coal Corp v. United Mine Workers of America* (1945) that led to the greatest acrimony. The Court held that mine workers could be compensated for time spent traveling to work sites while underground. The final decision was 5–4, with Black in the majority and Jackson in dissent. Jackson felt that Black should have recused himself in the case because the miners were represented by Black's former law partner and personal lawyer Crampton P. Harris, and he filed an opinion explaining his position. The strained relationship between the two never recovered.

Internal Developments: Conference Discussion, Opinion Writing, Circulation Delays, and Reargument

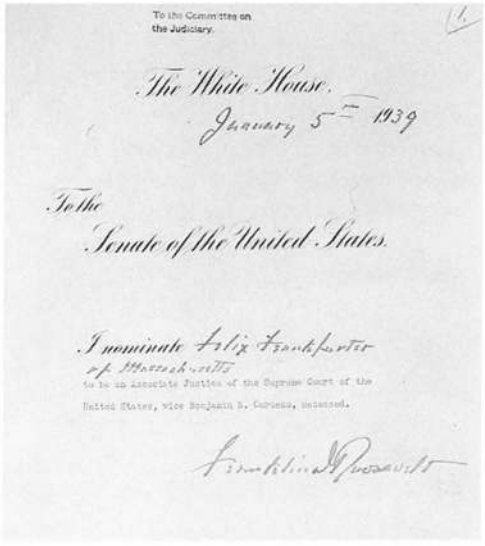
Already influenced by legal realism and with a now largely discretionary docket, the new justices of the Roosevelt Court decided to alter a number of long-standing procedures. The result was expanded Conference discussions, opinion writing and circulation delays, and an increase in reargument of cases. While it is theoretically possible that each of these practices could have fostered consensus, the Justices of the Roosevelt Court instead exploited them for individual purposes. Though they may not have been fully aware of it at the time, the internal practices they developed undermined consensus and entrenched dissensus as successor Justices joined their ranks. In this section, we detail how the internal changes made by Stone and his colleagues fundamentally transformed their ability, and that of future Justices, to achieve consensus.

Free Speech for Everybody: Expanded Conference Discussion

Stone's ideal of how the Court should function was forged during his service under Chief Justice William Howard Taft. On the Taft Court, the Justices exercised considerable freedom of expression during their private Conference discussions, particularly Justice Willis Van Devanter, who served as "task leader" because of what Taft recognized as "his power of statement and his immense memory."[38] Stone recalled Taft's collegial style: "When I first went on the Court in Taft's

time the discussion was very free, although sometimes discursive. During the last of his service there was much more inclination to rush things through especially if he thought he had the support of certain members of the Court."[39]

Chief Justice Hughes, in contrast, ran the Conference in an efficient, almost autocratic fashion. He recounted case facts from his photographic memory and stated his opinion, and at times the Justices simply voted for the outcome he suggested. When there was discussion, each Justice stated his views in order of seniority. Hughes would then comment and call for a vote in reverse order. As a result, all discussion began and ended with him. Roberts recalled: "The Chief Justice was an intense man. When he had serious business to transact he allowed no consideration to interfere with his operations. He was so engrossed in the vital issues that he had not time for lightness and pleasantry."[40]


To the Committee on the Judiciary.

The White House.
January 5th 1939

To the
Senate of the United States.

I nominate Felix Frankfurter
of Massachusetts
to be an Associate Justice of the Supreme Court of the
United States, vice Benjamin N. Cardozo, deceased.

Franklin D. Roosevelt

When Franklin D. Roosevelt appointed Felix Frankfurter, a close advisor and brilliant law professor, to the Supreme Court in 1939, many thought he would become the intellectual leader of the Court. But his verbose style and disparaging comments led to deteriorating relationships with many of his colleagues, including William O. Douglas, who eventually stopped speaking to him. Frankfurter was, however, instrumental in changing the nature of opinion-writing at the Court—from institutional opinions to individually constructed law review articles.

Roosevelt's appointees who served with Hughes, including Stone, felt stifled and wished for Conference discussions entailing a more meaningful exchange. For example, after reading Reed's opinion in the tax case *Higgins v. Smith* (1939), Stone responded: "As I stated at the conference, I think I prefer to put the opinion on [a different] ground.... I think I shall probably adhere to that view but I will wait to see what happens at the conference."[41] Douglas recalled Stone's frustration: "The manner in which Hughes conducted the Conference annoyed Stone.... Stone was, first, last and always, a professor who wanted to search out every point and unravel every skein. So he instituted the custom of having a rump conference at his house every Friday afternoon after the Court. He would preside as the de facto Chief Justice and discuss all the cases to be decided the next day.... This rump conference seemed to bring Stone satisfaction because he could express himself."[42] Frankfurter, too, subtly sowed the seeds of dissatisfaction with the relatively brief Conferences. He wrote Stone in 1939: "I am sending this to you as a continuation of a discussion for which there was no adequate time in Conference."[43] Similarly, he wrote Stone later that same year: "The atmosphere Saturday afternoon was hardly conducive to a clarifying exchange of views."[44]

Once Stone succeeded Hughes, the Conference atmosphere changed immediately. Frankfurter recalled: "[Stone] was a very different personality from Hughes.... Stone was much more easy-going. The conference was more leisurely. The atmosphere was less taut, both in the courtroom and the conference room."[45] After presiding over his first Conference, Stone wrote Frankfurter: "To tell the truth, yesterday was a happy day, because we succeeded in doing our job more completely than I had dared to hope earlier in the week. It was the more so because I am convinced that all this was accomplished without foreclosing desirable discussion or curtailing adequate consideration of the questions on which we had to pass."[46]

But if Conferences under Hughes were too businesslike, Stone's were criticized as too academic and freewheeling. Stone's dramatic expansion of Conference discussion not only failed to increase consensus but ultimately exasperated his colleagues. Even Frankfurter—long a proponent of increased deliberation—sought to limit individual sessions to improve the quality of exchange. He wrote Stone after the first Conference of the 1942 Term:

> The easy-going, almost heedless way in which views on Constitutional issues touching the whole future direction of this country were floated Saturday afternoon leads me to put to you a conviction I formed in regard to Conferences not long after I came on the Court. It is that it would be conducive to the most fruitful results if we kept the Conferences as rigorously within the four hour schedule as we do our sessions in open Court.... The mind is called upon not only to think hard with the kind of responsibility which really takes it out of one, namely, the responsibility of decision, but to do all this in the interplay of nine personalities. Surely the law of diminishing returns sets in after four hours of that sort of intellectual tension. On more than one Saturday I have noted that the discussion after four-thirty gave evidence of fatigued minds and occasionally of frayed nerves.[47]

Frankfurter responded when his colleagues heard of his desire to change the Conference format:

> Some of you at least have understood me as suggesting we contract discussion at Conference. That is precisely not my view.... To decide cases with inadequate discussion is to disregard the conception of a Court.... My only point is that the discussion should be by fresh and not fatigued minds. The kind of intellectual effort that is implied by discussion among nine judges concerning such problems as come before us cannot, I believe as a psychological fact, be sustained best for more than four hours. My suggestion, therefore, is not that we should contract discussion but that our Conferences should be restricted to four hours as well as our sessions in open Court, that we should stop promptly at the end of four hours and begin anew at the second or even a third Conference.[48]

However, despite repeated attempts to reform Conference discussion, the problem only got worse. Douglas explained:

> When Stone became Chief Justice, our Conference was never finished by four-thirty or five. We moved the starting time back, first to eleven and then to ten o'clock, but we still could not finish by six on Saturday. We would come back at ten o'clock on Monday and sit until five minutes before noon, and then go into Court for four hours to hear cases argued. We would again go into Conference at four and sit until five or six. Sometimes we still would be unfinished by the end of the day and have to go back into Conference at ten on Tuesday morning, and again at four in the afternoon on Tuesday. Once we even had Conference on Wednesday from ten to noon and from four to six—to finish up the previous Saturday's Conference List. Under Stone we were, in other words, almost in continuous Conference. He believed in free speech for everybody, including himself.[49]

A notable result of long Conferences was a rise in dissensus on the Court, as political scientist David Danelski explained:

> The unprecedented number of dissents and concurrences during Stone's Chief Justiceship can be only partly attributed to the displacing of the old tradition of loyalty to the Court's opinion. A major source of difficulty appears to have been the free-and-easy expression of views in conference. Whether the justices were sure of their grounds or not, they spoke up and many times took positions from which they could not easily retreat ... [and thus] what began in conference frequently ended with elaborate justification as concurring or dissenting opinions in the United States Reports.[50]

Inexcusable Delay: Opinion Writing

For most Justices, opinion writing is a long and arduous process. At the close of the 1943 Term, Stone wrote Frankfurter: "I am only beginning, now that opinion-writing is over, to find out what is on my desk."[51] Try as they might, many of the Justices of the Roosevelt Court were unable or unwilling to draft their opinions in a timely manner, thereby prolonging an already lengthy process. Increased time meant longer opinions with more arguments to disagree about and more time to find disagreement.

Because of these delays, Chief Justice Stone regularly struggled with opinion assignments—particularly as newly appointed Justices were continually arriving. Wiley Rutledge had been on the Court for only a little over four months, but felt that he was not doing his fair share of the work. He wrote Stone at the end of the 1942 Term:

> You have been more than easy upon me in assignments and, frankly, I have something of a feeling that I have not done my full share here this spring, certainly not as much of the total load as I had hoped to be able to carry, and I am afraid that a very considerable part of this has fallen upon your own shoulders. That I regret. Nevertheless, I want you to know I appreciate your considerate understanding and also that I hope to be able to function more efficiently and effectively in the fall than I have up to now.[52]

Stone replied:

> The matter of assignments is a most perplexing and difficult task with the Chief Justice. There are so many and competing angles which have to be recognized. I have long thought, though, that a new judge beginning the work of the Court should be put at his ease in taking on the work until he is thoroughly familiar with it. I have much hope that next year we will have the experience, which we have not had for some years, of a court working through the term without changes. It will be amazing how much better we can do our work and how much more easily we can carry it on under those conditions.[53]

Particularly because of the proliferation of separate opinions, opinion writing became so prolonged that Stone even proposed extending recess in order to concentrate on it.[54] As the Justices took more time to craft lengthier opinions, their colleagues took more time to consider their positions. As a result, the relatively new process of opinion circulation changed.

Stewing over Their Worries: Opinion Circulation

Though the practice of formally circulating opinions had been in place since the Fuller Court, under Stone an important check on the norm dissolved. Prior to the Stone Court,

comments were returned to the opinion author within twenty-four hours of circulation. Now, however, the divides in Conference carried over into circulation practices, with Justices taking more time to respond to draft opinions. When their suggestions were not met, they were more likely to issue separate opinions than at any time in the Court's history. An academic atmosphere pervaded the Court, and delays became common to the point at which Justices pushed for cases to be reargued.

Stone outlined the Court's circulation practices in a memorandum to newly appointed Justices Byrnes and Jackson:

> So far as may be, opinions are written during recess and considered and approved at the conference held at the end of the recess, and are handed down on the following Monday. When the opinion is prepared and printed the writer sends page proofs of the opinion, usually by messenger, to each member of the Court. The recipient is expected to examine the opinion promptly and if he agrees with it return it to the writer with his concurrence or approval endorsed on the back of the opinion, noting such suggestions as to change in form or phraseology as he thinks desirable. If his suggestions affect the substance or require extensive change of the opinion, he should send the suggestion in memorandum form or call on the writer of the opinion and explain fully his views. If he voted with the writer of the opinion but is unable to agree with the opinion, he should promptly notify the writer to that effect. Prompt examination and return of the opinions, where that can be done by reasonable effort, greatly facilitates the work of the Court and avoids the congestion in the printer's office which would ensue if all the opinions were returned late in the recess period.[55]

But even Stone had trouble sticking to twenty-four hours. Sometimes he would "hold" an opinion and reserve judgment in order to see what others might say. For example, after reading Frankfurter's opinion in *National Broadcasting Co. v. United States* (1943), in which the Court held that the Federal Communications Commission has the power to issue regulations concerning broadcast networks and their affiliates, Stone wrote: "I think you have done a very thorough-going job on these cases, and I shall accept your opinion unless someone is moved to write. In that case I shall reserve judgment until I see what he has to say."[56] Ultimately, he joined the majority despite a dissent from Justice Frank Murphy. Similarly, he wrote Robert H. Jackson after reading his majority opinion in the flag salute–pledge of allegiance case *West Virginia Board of Education v. Barnette* (1943), which overturned *Gobitis*: "You have done a good job, and I am holding your opinion to see what Brother Frankfurter has to say about it."[57] Frankfurter issued a dissent, but Stone stayed with the majority.

Occasionally, Stone would ask that an opinion be returned to him after the author had seen his comments on the draft, as in this letter to Douglas: "I am returning your opinion herewith, with my approval, but after you have looked it over I will be glad if you will return it to me so that I can see the force of anything that others may write."[58] At other times, he would ask to see a proposed majority opinion a second time, usually after the circulation of separate opinions, as when he wrote Chief Justice Hughes: "When I read the Black and Douglas dissent to your opinion ... I wondered whether I had completely misread your opinion. It is for that reason that I sent for it."[59]

Circulation delays were by no means solely within Stone's purview. Jackson wrote Stone concerning the inheritance tax case

Utah v. Aldrich (1942): "I have filed a dissenting opinion. If there is not need for haste in the matter, I would like to have it go over."[60] Stone noted: "Douglas agrees to let this wait." Similarly, Frankfurter wrote Stone in 1939: "Your jurisdictional analysis is powerful, but I am still struggling with doubts, and I would like to sleep on them, instead of either acquiescing with an inner restlessness or writing something that would be too superficial. I wonder, therefore, if you would mind letting me stew over my worries, and see whether they do not evaporate with a little more time or precipitate into something I could show you with self-respect. Would it bother you, therefore, if the opinion went over until next week?"[61]

Ultimately, Frankfurter grew frustrated with the old mechanics of circulating opinions —a process that fostered consensus—and proposed a new system, one that eventually led to greater dissensus. Prompted by the right-to-counsel case *Hawk v. Olson* (1945), he wrote Stone:

> Reed's memorandum setting forth various changes in his *Hawk* opinion emphasizes the very unsatisfactory situation due to the practice of circulating to members of the Court only one copy of proposed opinions. If one is in agreement with an opinion, or agrees with proposed modifications, one naturally returns it. One may of course withhold it and send a separate note, indicating proposed changes. The latter is unsatisfactory and unduly time-taking both for the writer of an opinion and for its critic. But unless one holds on to the opinion subsequent changes, such as those proposed by Reed in his *Hawk* opinion, it cannot be appraised with the necessary care that is called for where every word, and even every nuance, may make a difference because if not meticulously considered may come to plague one in the future.
>
> The short of it is that two copies of every opinion ought to be circulated so that one may be returned and the other withheld to await the event. It does seem almost funny that the Supreme Court of the United States should be denied this obvious means of doing its job competently because it may entail what surely cannot be more than a negligible few dollars for extra printing costs.[62]

In *Oklahoma Press Publishing Co. v. Walling* (1946), which applied the Fair Labor Standards Act to newspaper publishing and distribution, Justice Rutledge grew so frustrated by the delays and qualifiers from his colleagues that he sought to have the case reassigned:

> After a second circulation, which was accompanied by a memorandum requesting justices in accord upon the result to give me the benefit of whatever suggestions they might have for revision of the opinion, the status of the case is (and has been for more than three weeks) as follows: Mr. Justice Reed has concurred in the opinion. The Chief Justice has asked me to rewrite the opinion, as I understand his request, without reference to or discussion of either private corporations or self-incrimination. Mr. Justice Black has indicated he has suggestions to make, whenever the case otherwise may be ready to go down. Mr. Justice Frankfurter has indicated he will have certain suggestions to make. I have not heard from Mr. Justice Douglas or Mr. Justice Burton. Mr. Justice Murphy voted in dissent.
>
> In these circumstances, it seems obvious that I will not be able to

> write an opinion for the Court. I do not wish to be responsible for holding up the disposition of the case longer. Accordingly I now return the case to the Chief Justice and ask that he reassign it to some other justices for writing. To avoid any possible invidious personal implication, I desire to state, in advance of reassignment, that I shall either file a statement of my own views or concur in the result, on the final disposition of this case.[63]

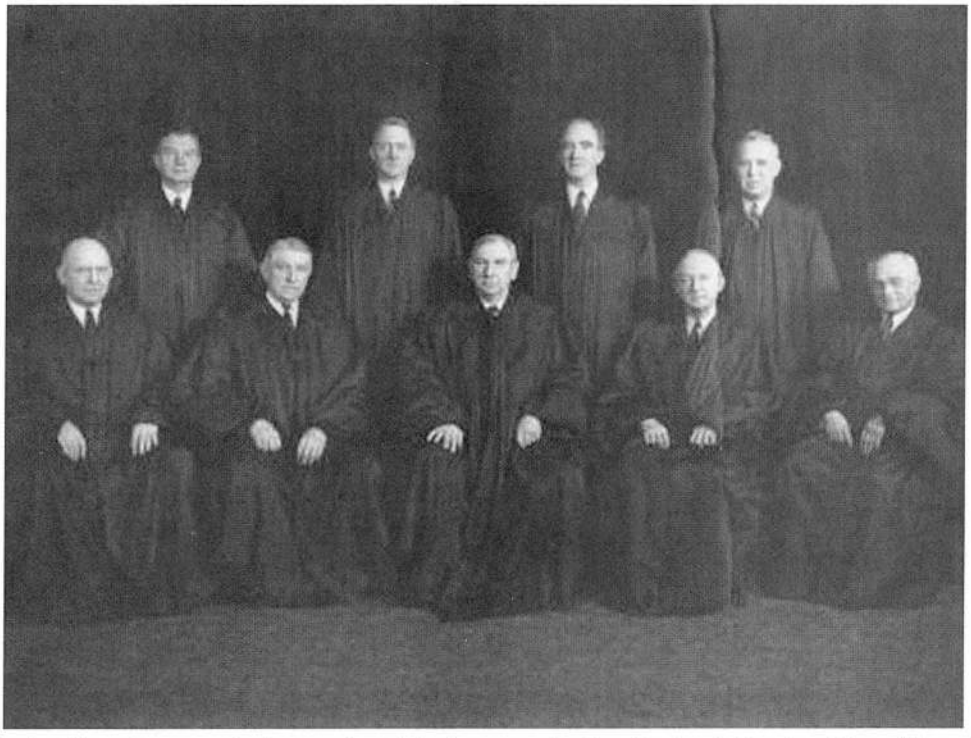
But nearly two weeks later, after Stone had reassigned the case to himself, there seemed to be more consensus. Rutledge informed him: "Justice Burton has indicated his concurrence in the opinion.... Justice Douglas has indicated his agreement.... So have Justices Black and Frankfurter. Justice Reed has concurred."[64] Stone then suggested that Rutledge continue with his draft, and Rutledge agreed, further explaining: "If I created in your mind the notion that I was washing my hands of the case I am sorry, for that was not really my intention. At the time I circulated the original memorandum, in view of the situation which it set forth concerning the responses and lack of responses which I had received after two submissions, I thought that I could not satisfy a majority."[65] Stone replied: "I took the case very reluctantly and only because I thought you felt that you were at the end of your rope."[66] As it turned out, only Murphy issued a separate opinion—a dissent—from Rutledge's majority opinion. Still, the hand-wringing over this case demonstrates the difficulty the Justices faced in achieving consensus, especially as certain Justices pushed for increased opinion circulation of and input on final opinions.

The Quality of the Clearing: Rearguing Cases

The lengthier and more academic atmosphere in Conference and delays in opinion writing and circulation led to a further slowing down of the wheels of justice through calls for cases to be reargued. One would think that cases needing reargument would be those in which the Justices felt the initial argument or the legal briefs were lacking. On the contrary —internal memoranda of the Stone Court reveal that the Justices had little faith in better-quality arguments or briefs the second time around. Instead, they pushed for reargument to give themselves more time, and with that extra time disagreements continued to flourish.

For example, during the debate over whether or not to schedule reargument in the landmark Commerce Clause case *Wickard v. Filburn* (1942), Frankfurter wrote Stone: "If the Act is to be sustained, it would be much healthier to have a decision so far-reaching in its practical application made after adequate argument and after the kind of reflection by members of the Court upon the issues that simply could not be achieved in these last hurried days of the Term."[67] Jackson agreed: "The performance of the Court below and of the plaintiff's counsel gives little hope that they would much sharpen the real issue, and I am afraid that most of the Government men feel too sure of the Court to bother with enlightening it. So I would avoid the row with Black.... on the method and with such meager help as we will get from reargument settle down in the fall to deciding the merits."[68] Stone wrote his colleagues: "In this case Justice Reed takes no part. Justice Black and Justice Douglas are for prompt disposition of the case now, not reargument. The other members of the Court, except myself, desire reargument.... I therefore am assuming that the case will be assigned for reargument."[69] The case eventually was reargued the following Term, and the Justices did reach agreement on the merits.

Reargument became a standard device used by subsequent Justices. According to political scientists Valerie Hoekstra and Timothy Johnson, it occurred in fifty-nine



The lengthier and more academic atmosphere in Conference on the Stone Court and delays in opinion writing and circulation led to a slowing down of the wheels of justice through calls for cases to be reargued. The Justices pushed for reargument not because they had faith in better-quality arguments or briefs the second time around, but because they wanted to give themselves more time, and with that extra time disagreements continued to flourish.

cases during the Vinson Court, in forty-seven during the Warren Court, and in sixty-six during the Burger Court. They concluded: "When the conference vote produces a minimum-winning coalition the case is more likely to be held over for reargument. We argue that the Justices recognize this situation as one where the outcome is uncertain because of the instability of the coalition, and they therefore use reargument to obtain more information."[70]

Writing for a Law Review: Promoting an Academic Atmosphere

Expanded Conference discussion, opinion drafting and circulation delays, and an increased number of reargruments were endemic to the larger academic atmosphere fostered by the Justices of the Roosevelt Court. Rather than speedily resolving cases with minimal writing, they increasingly saw their function as thoroughly explicating the relevant legal issues by maximizing the written word. And no single Justice had as great a hand in promoting academic values on the Bench than former Harvard Law professor Felix Frankfurter.

A little over one month after being sworn in, Frankfurter explained to Stone why he was issuing a separate opinion in the death tax standing case *Texas v. Florida* (1939):

> If the Green case [the deceased against whose estate taxes were being levied] were the end of it—if there were no others in prospect—I would not care about it and hold my tongue. I don't want to be a Cassandra, but I will bet dollars to doughnuts that this is but the beginning of efforts to push us further and further into taking these ... controversies....

> You will, of course, tell me with complete freedom what you think about my draft. In many ways what I have cherished most since I have come on the Court is the feeling you have conveyed to me, that we ought to deal with one another's opinions as though they were writings in a law review.[71]

Once again, Frankfurter likened his new job as Justice to that of his old as professor in this exchange over his majority opinion in the Native American tax case *Board of Comm'rs of Jackson County v. United States* (1939). Hugo L. Black circulated a separate concurring opinion, and Frankfurter wrote him a three-and-a-half-page memo on the nature of judging: "Just because we agree in the result ... and because no immediately important public issue is involved by our different approaches in reaching the same legal result, it is at once interesting and profitable to discuss the underlying jurisprudential problem. And so I venture to make some observations on your opinion, I hope in the same spirit and for the same academic purpose as I would were I writing a piece as a professor in the Harvard Law Review."[72]

Despite Stone's attempt to quash Frankfurter's proposed concurrence in the utility rate case *Driscoll v. Edison Light & Power Co.* (1939), Frankfurter persisted:

> You know the weight I attach to your judgment, and how very deeply I weigh your counsel for intrinsic reasons as well as because of the garnered wisdom of your experience here. Naturally, your observations about my concurrence ... made me pause and reconsider what already had received as much anxious thought as anything that has confronted me since I have come down here. These are, of course, matters of delicate judgment and ultimately of an abiding inner feeling. But after worrying about it and literally spending sleepless moments over it, I should be suppressing a deep conviction if I said nothing about Reed's opinion.[73]

The "deep convictions" of the Roosevelt Court Justices had reshaped the Court from one in which institutional opinions were the norm into a body of law professors who saw their job as constructing individual law review articles.

Though Frankfurter was unquestionably its chief educator, it is plain that the Roosevelt Court's other Justices viewed their roles in academic terms as well. Perpetual Conferences became intensive seminars in the law. Delays in opinion writing and circulation were increasingly common as Justices became more thoughtful in responding to opinions. When one term did not allow enough time to fully explore the issues in a case, they pushed for reargument. This new conception of judging ultimately led to important changes in the Supreme Court's internal practices and forever changed the nature of decision making for subsequent Courts.

Institutional Effects: Dissensus in Majority and Minority Coalitions

In the previous sections we detailed how changes in a number of external and internal practices undermined Supreme Court consensus. Legal realism, a discretionary docket, and rapid personnel changes, coupled with expanded Conference discussion, opinion writing and circulation delays, case reargument, and an overall academic atmosphere created conditions for individual expression to flourish. But what form did this burgeoning dissensus take?

The personal and jurisprudential divides on the Roosevelt Court manifested themselves in numerous ways. In this section we highlight how the institutional developments

previously discussed affected the behavior of both majority and minority coalitions. First we detail how majority coalitions fractured in new ways. Specifically, the norm of acquiescence declined, majority opinions began departing from Conference views, and concurrences became common tools to express individual disagreement with majority and minority opinions. Second, minority coalitions increasingly formed and strengthened. Justices began to write dissents to express small disagreements, to address issues not raised in petitions, or to criticize concurrences. Furthermore, a feeling of solidarity among dissenting coalitions grew as minority coalition members praised circulated draft dissents. These practices became norms that served to entrench a culture of dissensus that lasts to this day.

Taking a Different View: Majority Coalition Behavior

Acquiescence was a common practice for most of the Court's history. Those who cast minority votes in Conference routinely chose to remain silent, or to acquiesce, rather than note or write a dissent. Acquiescence gave majority opinions the appearance of greater unanimity than they actually enjoyed. For example, when Stone expressed concerns over Oliver Wendell Holmes's opinion in the bond contract case *Leach v. Peirson* (1927), Holmes wrote him: "The only thing I can say in answer to your scruples ... is that I don't share them.... I see it differently. All I can say is that I can't—and don't see anything to agree. The opinion is affirmed by all but Brandeis who says I shall not dissent."[74] In the end, Stone like Brandeis acquiesced. Stone also acquiesced in the Federal Employers' Liability Act case *Chesapeake & Ohio v. Leitch* (1928) after writing Holmes: "I have your opinion.... I voted the other way.... I don't think I care to note a dissent unless others do, but I will wait and see."[75] In another example from the 1944 Term, Stone wrote Frankfurter: "I voted the other way in this case but I shall acquiesce in the decision unless some of my brethren see the light and point out that you cracked the law in order to satisfy your moral scruples. But if I do go along I beg of you to take out of the opinion ... two references."[76]

Over time, the Justices of the Roosevelt Court increasingly shunned acquiescence in favor of individual expression. The example of *Polish National Alliance v. Labor Board* (1944) illustrates the unwillingness of opinion writers to accommodate their colleagues, making acquiescence difficult for Justices with concerns and ultimately resulting in separate opinions. What began as a seemingly simple unanimous *per curiam* opinion sustaining an unfair labor practice order devolved into dissensus in the form of a separate concurrence. Stone assigned the *per curiam* to Frankfurter, but Frankfurter was unable to incorporate the views of the Conference. He wrote Stone:

> I believe I am not behind any of my brethren in the desire to achieve the utmost of public expression that our resourcefulness can contrive in a situation involving such contrariety of views as that engendered by the insurance cases. And if that can be achieved by a *per cur* in the *Polish Alliance* case I am all for it. But I am sure nobody wants to be a party even to a *per cur* that does not accurately reflect the record.... Accordingly, I have drawn up and enclose herewith the *per cur* such as this record alone justifies.[77]

Stone replied:

> I, of course, agree with you fully about the case.... I am perfectly willing to join in a *per curiam*.... Unfortunately, Brother Black and his associates take a different view, with which you and I do not agree, but which nevertheless they wish to

> have stated in the *per curiam* as representing their position.... I do not object to the *per curiam* stating that that is the position of a given number of members of the Court, however much I disagree with it. Unless we are prepared to go that far, it seems to me we cannot avoid putting down all the opinions. In the present posture of the case I would prefer to have them go down, stated in shorthand fashion, than to have them elaborated.[78]

Stone's attempt to "save" the *per curiam* and prevent the Court from issuing separate opinions in the case failed. In the end, Frankfurter issued a majority opinion while Black issued a concurrence joined by Douglas and Murphy.

Majority opinion authors who did not faithfully follow the consensus achieved at Conference were taken to task by their colleagues and their recalcitrance served to bolster potential dissenting voices. For example, Douglas circulated an opinion for the Court in the search and seizure case *Davis v. United States* (1946); Stone's memorandum to the Conference stated: "The proposed opinion in the *Davis* case goes on a ground which, in its essentials, was not the ground on which the case was voted to be affirmed at Conference. And, unless my memory fails me, it was not a ground which was urged by any member of the Conference. (This is not to imply that a case should not be written on new ground.)."[79] In the end, Stone sided with the majority, but Frankfurter, Murphy, and Rutledge dissented.

A more complex issue arose in the all-white primary case *Smith v. Allwright* in 1944. Stone initially assigned the opinion to Frankfurter, but Jackson suggested "that the Court's decision, bound to arouse bitter resentment, will be much less apt to stir ugly reactions if the news that the white primary has been outlawed is broken to it, if possible, by a Southerner who has been a Democrat and is not a member of one of the minorities which stir prejudices kindred to those against Negros."[80] The Chief Justice subsequently reassigned the case to Reed. In response, Frankfurter lobbied Reed to change his opinion, suggested that Stone write a separate opinion, and ultimately had Reed note at the bottom of the majority opinion: "Mr. Justice Frankfurter concurs in the result." Frankfurter wrote Stone: "I tried hard to make Reed give the *Allwright* opinion the form and atmosphere of aggressive candor so as to avoid a needless grievance on the score of how we are doing what we are doing. But Reed had his own notions of appeasement which are bound to fail as is all appeasement not rooted in reason. Something like this I feel should be said. Of course it would be best of all if you said it. If you do, I shall eagerly

The 1943 Term marked a turning point in the development of dissensus on the Court as the Justices, for the first time, issued concurring opinions for the sole purpose of critiquing a dissent. Felix Frankfurter wrote the dissent that became their first target.

suppress this."[81] Ultimately, the Court failed to reach unanimity, with Roberts issuing a dissent along with Frankfurter's concurring notation. As Frankfurter's behavior demonstrates, concurring in the judgment only further undermined consensus.

Consensus was undermined as well by members of the majority coalition criticizing both circulated dissents and attempts by majority opinion authors to address dissenters' concerns. For example, when Douglas circulated a proposed dissent to Jackson's majority opinion upholding an Interstate Commerce Commission ruling on the Motor Carrier Act of 1935 in *Gregg Cartage & Storage Co. v. United States* (1942), Stone advised Jackson: "While I think all that you say in the new material added to the opinion in this case is true ... still I have some doubts whether you should accept it.... I am inclined to think that you should stand your ground. I am only making this by way of suggestion. I should not care to say anything further unless someone else did."[82] In the end, Douglas dissented and was joined by Black and Byrnes.

The rise in dissents also led to a new form and level of importance for concurrences: responding to the dissent. Thus, the 1943 Term marked a turning point in the development of dissensus. For the first time Justices issued concurring opinions for the sole purpose of critiquing a dissent. Frankfurter was the first target. In two cases handed down in the middle of the Term—the patent case *Mercoid Corporation v. Mid-Continent Investment Co.* (1944) and the rate-fixing case *Federal Power Commission v. Hope Natural Gas* (1944)—he dissented from the respective majority opinions written by Douglas. Frankfurter's critiques were harsh. He wrote Stone about Douglas's *Mercoid* opinion:

> From what I have circulated you will know that I am the opposite of happy over his perfectly gratuitous treatment of "contributory infringement." Nor am I happy over his treatment of *res judicata*.... Am I wrong in finding at present a too eager tendency not merely to bring the law in conformity to our present needs but gloatingly to show up the unwisdom, if not injustice, of our predecessors? If such an attitude is good for society then I wholly misconceive the notion and the function of Law.[83]

In each case, Black and Murphy issued concurring opinions that sharply chastised Frankfurter for relying on his own "preconceived views on 'morals' and 'ethics'" in the former case and for advancing a "patently ... wholly gratuitous assertion as to Constitutional law" in the latter. These "counter-dissents," as Judge John Ferren termed them, further institutionalized dissensus. And while the disagreements on the Court had a basis in law, they were almost certainly exacerbated by personal discord.[84]

Going Too Far: Minority Coalition Behavior

Minority coalition behavior was also transformed during the Roosevelt Court. But, unlike the fracturing of majority coalitions, minority coalitions became stronger and more common. An increased number of dissenting votes and opinions was the most obvious effect of the institutional changes that occurred, yet there were several other outgrowths that reflected the dissensus revolution in which the Justices were engaged.

The institutional norm of dissenting once in an issue area but acquiescing in subsequent cases—a practice that Louis D. Brandeis said even the "great dissenter" Oliver Wendell Holmes Jr. routinely followed during his years on the Bench—disappeared as new Justices such as Hugo L. Black and William O. Douglas consistently noted every dissent. Stone himself issued more separate opinions as Chief Justice than he had as a member of the Hughes Court.[85] Indeed, Stone dissented

more often than any Chief before or since, and his colleagues were not shy in urging him to do so. For example, Frankfurter wrote him following the Conference vote in *Schneiderman v. United States* (1943), in which the Court overturned the government's decision to denaturalize a citizen for membership in the Communist Party: "Your exposition of *Schneiderman* was masterly. You must lay it out in your dissent with all the powerful detail with which you stated the case to us. The requirement of being 'attached to the principles of the Constitution of the United States' carries an historic meaning not lessened by time, to which you will, I know, give magisterial illumination and authority in your dissent."[86]

Willingness to dissent over relatively small disagreements with a majority opinion was another way in which consensus was undermined. For example, in *United States v. Classic* (1941), Douglas, joined by Black and Murphy, issued a dissent even though he agreed with the central holding of Stone's majority opinion that Congress's power to regulate federal elections includes primaries. The Court upheld the federal government's use of the Enforcement Act of 1870 to prosecute corrupt primary election officials, but the dissenters saw this as too broad an interpretation of a statute that was enacted prior to the existence of primaries and therefore should, in their minds, be limited to general elections. Douglas wrote: "So I agree with most of the views expressed in the opinion of the Court. And it is with diffidence that I dissent from the result there reached."[87]

Dissenters were also increasingly willing to raise issues not brought up by the parties to the case. This controversial tactic is illustrated in the following exchange over *Medo Photo Supply Corp. v. Labor Board* (1944), in which the Court upheld the board's unfair labor practices ruling. Rutledge had written Stone to let him know he had decided to dissent, arguing "that this case simply goes too far."[88] Stone replied:

> Your proposed dissent in this case seems to me to take up questions which were not raised by the petition for certiorari and which certainly I had not thought that the Court was deciding.... It is not the habit of the Court to decide questions not raised by the petition for certiorari, and no action was taken by the conference authorizing a different course. The writer of a dissent is of course a free-lance and he can go as far afield as he likes. But it is not usual for one to dissent on a ground not raised by the petition or decided by the Court, and which he has not asked the conference to consider. A dissent under such circumstances places the majority in the false attitude of deciding against a proposition which they have never been asked to decide either by the petitioner or the dissenter.[89]

Finally, dissenting opinions began incorporating criticisms of concurring opinions. For example, in *Korematsu v. United States* (1944), upholding the internment of Japanese Americans during World War II, Roberts informed his colleagues: "I shall add a paragraph to my dissenting opinion, on page 6, as follows: Concurring opinions filed in the case seem to attribute to me the view that the petitioner was convicted of disobeying an order to go to an Assembly Center, or of disobeying an order to immure himself in a Relocation Center.... I have yet to hear any answer to the proposition that the petitioner was at the same time subject to two conflicting orders."[90]

Both majority and minority coalitions were greatly affected by the external and internal developments detailed in previous sections. Institutional changes such as the discretionary docket and expanded Conference discussion led to a number of divisive consequences: the breakdown of the norm of

acquiescence, the departure of Court opinions from Conference views, and the use of concurrences to express disagreement with both majority and dissenting coalitions. Minority coalitions also became increasingly common and were bolstered by Justices who noted every dissent and disagreement over small issues, including those not raised in the petitions. Finally, dissenting Justices praised each other, thereby solidifying their formal opposition rather than acquiescing or working for consensus. These discordant practices became behavioral norms for future Justices as they joined the Roosevelt Court holdovers who continued them.

Danger in Dissent: Contemporaneous Reactions

Contemporary writers noted from the start of the Roosevelt Court the unprecedented levels of dissensus, and they sensed a fundamental shift in the Court's internal decision making practices. The press covered the internal rifts and asked the Court to make changes. For their part, the Justices many times reacted defensively and expressed little desire to modify their behavior. For example, on January 6, 1944, the *New York Herald Tribune* published a critique by an anonymous "Member of the Bar of the Supreme Court" entitled the "Danger in Dissent":

> On Jan. 3, the Supreme Court of the United States handed down thirteen opinions in twenty-one cases. In four of these the court was unanimous; in nine there were dissents as follows: three 5 to 4, two 6 to 3, one 5 to 3, one 7 to 2, two 8 to 1. The justices who dissented and the number of their dissents were Murphy 5, Black, Reed and Frankfurter 4 each, Roberts 3, Douglas 2, Stone ... C. J. 1, Rutledge 1.
>
> It is not to be expected that the justices will always agree, but there seems to be a growing tendency to disagree; and if this is not checked the effect on the public will be unfortunate, making for doubt and uncertainty and a lack of respect and a loss of confidence in the court ...
>
> A court of last resort, whether in a state or in the Federal system, exists for the purpose not merely of determining the rights of the parties but in order to settle the law, so that the whole body of citizens may know what it is and what it will continue to be. The turnabout of the Supreme Court in the case of Jehovah's Witnesses is a glaring instance of uncertainty. Two justices reversed themselves within three years. One would think that in cases involving the Bill of Rights a judge would know his own mind in 1940 as well as in 1943 ...
>
> One of the least desirable practices that has grown up in the Supreme Court in recent years is the concurring opinion in which a justice who agrees with the decision but is dissatisfied with the language of the opinion or its implications insists on expressing himself in his own words.
>
> In this last batch of decisions two of the justices have indulged themselves in concurring opinions criticizing the approach and attitude if not the character of one of their colleagues. This breach of judicial propriety is in violation of the high traditions and the dignity of the court.
>
> The Supreme Court is not a mere judicial tribunal of nine men; it is a co-ordinate branch of our government charged with grave responsibilities and endowed with great authority and power. Personal

> differences should be confined within the council chamber and not proclaimed from the bench.[91]

The editors of the newspaper noted that the letter was written by "a lawyer of distinction, for whose judgment the *Herald Tribune* has the greatest respect." They continued: "The present court is a relatively new body. It is dealing with new concepts of government. Therefore, it was to be expected that some time would elapse before it shook down into a workable team. Unfortunately, the record appears to show that this goal is as far from realization as ever, if not farther than ever. In the interests of the people, who must know the law to abide by it, one may hope that this trend will be reversed—and speedily."[92] Stone circulated the articles to the other Justices with a note:

> Attached is a clipping from a recent *New York Herald Tribune*, which comes to me from an anonymous sender. I do not know who the writers are, but they are evidently friends of the Court as an institution. Their articles seem well intentioned and merit our prayerful consideration.
>
> I do not find myself in full accord with them, but I desire to make only the following comments. The right of dissent is an important one and has proved to be such in the history of the Supreme Court. I do not think it is the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases. Nevertheless I feel free to say that there is considerable scope for judicial self-restraint in the matter of dissent, lest its usefulness and effectiveness be impaired by its abuse. It is not necessary to play every fly speck in the music, not every difference of opinion calls for a dissent, and there are many cases where the settlement of a rule is more important than that it be settled one way rather than another, or that the different modes of settlement be emphasized. Dissent is of little worth unless it is read. The more numerous the dissents, the more trivial the matters with which they deal, the less likely are any to be read, and the more the public is likely to gain the impression that we are obsessed with trivialities rather than the larger issues which the Court is called on to decide.
>
> It is one of the oldest and, until recently, one of the most honored traditions of the Court that its opinion be written by a single judge. It is for this reason that the writing of the opinion is assigned to a particular judge only after conference, so conducted that he may be fully informed as to the individual views of the justices. It is for this reason that any member of the Court is entitled to ask the writer of the Court's opinion to modify it, and that both should seek some accommodation of their diverse views before separate concurring opinions are written. Adherence to this practice has tended to give coherence to the work of the Court, to make the effect of its decisions readily ascertainable and understood, and to command the respect of the public, which may readily be lost by over-emphasis of differences of opinions which do no produce differences in result.[93]

Frankfurter wrote Stone not long after: "If you have not already seen them, these four articles in The *New York Law Journal* may interest you. They are evidently written by one—I wonder who he is?—who either had knowledge or informed himself before

writing about the tradition of expressing differences of opinion on this Court. What a lot of ignorant tosh has been appearing lately on this subject!"[94] Stone replied: "As is pretty well known, I do not believe in dissenting just for the sake of dissenting, or overruling just for the sake of overruling. But there are occasions which call for both lines of effort, and no doubt I shall do my share in the future as I have in the past."[95]

In November 1944, the *Associated Press* even went so far as to informally ask the Justices to issue off-the-record comments on their opinions. Frankfurter asked Graham Claytor, former clerk to Associate Justice Louis D. Brandeis, what he thought Brandeis' response would have been and then circulated Claytor's reply to the other Justices. Claytor wrote: "[Brandeis] would not have expected a responsible news agency so far to forget the Court's judicial function as to ask it to interpret for the papers its own decisions. Such an attitude indicates a state of mind which has come to look upon the Court not as a tribunal but rather as a colorful source of sensational if complex news stories."[96]

Conclusion

The Roosevelt Court era ended with Stone's death on April 22, 1946; perhaps fittingly, he suffered a stroke on the Bench and died later that night. According to C. Herman Pritchett, Stone's "ineptness in the exacting role of Chief Justice was, to some extent at least, a contributing factor in the disintegration of the Court which occurred between 1941 and 1946."[97] Although we contend that the extent to which Stone was responsible for the breakdown of consensus is debatable, it is more than plausible to conclude that the era of dissensus began during his tenure. And while Stone's leadership style almost certainly exacerbated discord, it was the institutional changes—both internal and external—that conclusively ushered in the new dissensus era.

Outside the Court, three factors laid the foundation for individual expression: legislation allowing the Justices discretion over their dockets, the influence of legal realism, and the appointment of Justices who were critical of traditional jurisprudential philosophy. Changes in the Court's internal practices—expanded Conference discussions, opinion writing and circulation delays, reargument of cases, and an overall academic atmosphere—built on this foundation. Divisions occurred in both majority and minority coalitions. Majorities fractured as the norm of acquiescence eroded, Court opinions increasingly departed from Conference views, and concurrences, as tools to disagree with both the majority and minority coalitions, exploded. Additionally, Justices who disagreed with the majority began noting every dissent, even over small disputes and issues not raised in petitions, and took aim at concurrences.

In the years after Stone's death, the Justices continued to disagree at record levels, and further institutional changes made it increasingly difficult, if not impossible, to return to the high degree of consensus achieved prior to Stone's Chief Justiceship. For example, the increased use of law clerks, Justices and their staffs working daily in their own building, opinion assignment equalization, and Conference voting changes were hallmarks of the Warren Court. The end of notation and the formalization of dissent assignments occurred during the Burger Court. And increased bureaucratization, in the form of rapid opinion circulation with majority opinion assignment penalties, as well as a shrunken docket and shortened Conference deliberations, were features of the Rehnquist Court. The end result is a modern Court marked by high levels of dissensus. A puzzling facet of the dissensus revolution, however, is how frequently consensus, and unanimity still occur. Given the institutional breaks against consensus, further research is necessary to explore how and why the current Justices are ever able to agree.

Editor's Note: This article is adapted from **The Puzzle of Unanimity: Consensus on the United States Supreme Court** by Pamela C. Corley, Amy Steigerwalt, and Artemus Ward.

ENDNOTES

[1] Paul Pierson. 2004. **Politics in Time: History, Institutions, and Social Analysis**. Princeton, NJ: Princeton University Press, 55.

[2] David J. Danelski. 1960. "The Influence of the Chief Justice in the Decisional Process of the Supreme Court." Paper delivered at the annual meeting of the American Political Science Association, Statler-Hilton, New York, September 8–10. Thomas G. Walker, Lee Epstein, and William J. Dixon. 1988. "On the Mysterious Demise of Consensual Norms in the United States Supreme Court." *Journal of Politics* 50:362–389.

[3] Stacie L. Haynie. 1992. "Leadership and Consensus on the U.S. Supreme Court." *Journal of Politics* 54:1158–1169.

[4] Gregory A. Caldeira and Christopher J. W. Zorn. 1998. "Of Time and Consensual Norms in the Supreme Court." *American Journal of Political Science* 42:874–902.

[5] Paul M. Collins, Jr. 2008. "Amici Curiae and Dissensus on the United States Supreme Court." *Journal of Empirical Legal Studies* 5:143–170. Marc Hendershot, Mark S. Hurwitz, Drew Noble Lanier, and Richard Pacelle. 2013. "Methodical Mystery: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court." *Political Research Quarterly* 66:250–267. Mark S. Hurwitz and Drew Noble Lanier. 2004. "I Respectfully Dissent: Consensus, Agendas, and Policy-Making on the U.S. Supreme Court, 1888–1999." *Review of Policy Research* 21(3):429–445.

[6] Paul Pierson, **Politics in Time,** 134–135.

[7] Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth. 2001. "The Norm of Consensus on the U.S. Supreme Court." *American Journal of Political Science* 45:362–377.

[8] Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 2007. **The Supreme Court Compendium: Data, Decisions & Developments.** Washington, DC: CQ Press.

[9] C. Herman Pritchett. 1948. **The Roosevelt Court: A Study in Judicial Politics and Values,** 1937–1947. New York: Macmillan.

[10] See, for example, Stephen Halpern and Kenneth Vines. 1977. "Institutional Disunity, the Judges' Bill and the Role of the United States Supreme Court." *Western Political Quarterly* 30:471–483. Alpheus Thomas Mason. 1956. **Harlan Fiske Stone: Pillar of the Law.** New York: Viking Press. Walter F. Murphy. 1964. **Elements of Judicial Strategy**. Chicago: Chicago University Press. C. Herman Pritchett. 1948. **The Roosevelt Court, 1937–1947**. New York: Macmillan.

[11] Eventually, the Court reached a record of 30 percent one-vote margin cases by the close of the 2000 Term.

[12] 43. Stat. 936, February 13, 1925.

[13] Quoted in Robert Post. 2001. "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court." *Minnesota Law Review* 85:1267–1390, 1287-1288.

[14] Post, "The Supreme Court Opinion as Institutional Practice," 1267.

[15] For example, mandatory appeals from state high courts were limited to instances in which the state high court declared a federal statute invalid or denied a claim that a state law was unconstitutional. Direct appeals from the federal district courts to the Supreme Court were eliminated in most instances. Instead, parties needed to file a writ of certiorari asking the Court to hear their case, and the decision to grant these writs was left to the Court itself.

[16] *See e.g.*, Jerome Frank. 1936. **Courts on Trial: Myth and Reality in American Justice.** Princeton, NJ: Princeton University Press. Karl Llewellynl. 1930. **The Bramble Bush: On Our Law and Its Study.** Dobbs Ferry, New York: Oceana Publications. Karl Llewellyn. 1962. **Jurisprudence: Realism in Theory and Practice.** Chicago: University of Chicago Press. Roscoe Pound. 1908. "Mechanical Jurisprudence." *Columbia Law Review* 8:605–623.

[17] *See e.g.*, Laura Kalman. 1996. **The Strange Career of Legal Liberalism**. New Haven, CT: Yale University Press.

[18] Felix Frankfurter to Hugo Black, December 15, 1939, Douglas Papers, Box 39, Manuscript Division, Library of Congress.

[19] David M. O'Brien. 1999. "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions." In **Supreme Court Decision-Making: New Institutional Approaches**, edited by Cornell W. Clayton and Howard Gillman, 91–113. Chicago: University of Chicago Press, 102.

[20] Robert Post, "The Supreme Court Opinion as Institutional Practice." Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler. 1978. "The Evolution of State Supreme Courts." *Michigan Law Review* 76:963–1005.

[21] Quoted in Alpheus Thomas Mason. 1964. **The Supreme Court from Taft to Warren**. New York: W. W. Norton, 66.

[22] Harlan F. Stone to Edward Sanford, May 13, 1927, Stone Papers, Box 76, Manuscript Division, Library of Congress.

[23] Stone to Charles Evans Hughes, November 28, 1932, Stone Papers, Box 75.

[24] Stone to Charles Evans Hughes, November 2, 1938, Stone Papers, Box 75.

[25] James McReynolds to Harlan F. Stone, April 2, 1930, Stone Papers, Box 76.

[26] Stone to James McReynolds, April 3, 1930, Stone Papers, Box 76.

[27] William Howard Taft to Harlan F. Stone, January 26, 1927, Stone Papers, Box 76.

[28] Stone to William Howard Taft, January 26, 1927, Stone Papers, Box 76.

[29] Stone to Owen Roberts, December 16, 1930, Stone Papers, Box 76.

[30] David J. Danelski and Joseph S. Tulchin, eds. 1973. **The Autobiography of Charles Evans Hughes.** Cambridge, MA: Harvard University Press.

[31] Melvin Urofsky. 1991. **Felix Frankfurter: Judicial Restraint and Individual Liberty**. Boston: Twayne Publishers, 47.

[32] Felix Frankfurter to Harlan F. Stone, April 23, 1942, Stone Papers, Box 74.

[33] John M. Ferren. 2004. **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge**. Chapel Hill: University of North Carolina Press, 277.

[34] Urofsky, **Felix Frankfurter**, 48.

[35] Ibid.

[36] William O. Douglas to Harlan F. Stone, January 6, 1944, Stone Papers, Box 74.

[37] Ferren, **Salt of the Earth**. Roger K. Newman. 1994. **Hugo Black: A Biography**. New York: Pantheon.

[38] Taft to William Lyon Phelps, May 30, 1927. Quoted in Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," 10.

[39] Mason, **The Supreme Court from Taft to Warren**, 66–67.

[40] Quoted in Danelski "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," 10.

[41] Stone to Stanley Reed, December 27, 1939, Stone Papers, Box 76.

[42] William O. Douglas. 1980. **The Court Years, 1939–1975**. New York: Random House, 222–223.

[43] Frankfurter to Harlan F. Stone, May 3, 1939, Stone Papers, Box 74.

[44] Frankfurter to Harlan F. Stone, December 12, 1939, Douglas Papers, Box 39.

[45] Felix Frankfurter, Felix. 1953. "Chief Justices I Have Known." *Virginia Law Review* 39:883–905, 902.

[46] Stone to Felix Frankfurter, October 12, 1941, Stone Papers, Box 74.

[47] Frankfurter to Harlan F. Stone, October 21, 1942, Stone Papers, Box 74.

[48] Frankfurter to the Brethren, October 22, 1942, Stone Papers, Box 74.

[49] Douglas, **The Court Years**, 222–223

[50] Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," 23.

[51] Stone to Felix Frankfurter, June 7, 1944, Stone Papers, Box 74.

[52] Wiley Rutledge to Harlan F. Stone, June 21, 1943. Stone Papers, Box 76.

[53] Stone to Wiley Rutledge, June 24, 1943, Stone Papers, Box 76.

[54] For example, Stone wrote the other Justices on February 23, 1944:

> Should we increase the length of the next recess in order to catch up with opinion writing? On Saturday February 26th we will have completed 21 weeks of the 34 week term. During that period we have handed down 55 full opinions. As of this date 10 opinions have been circulated, in most of which there will probably be concurrences or dissents, or both. There are 23 cases assigned for opinion in which no opinion has been circulated. Unless we catch up with our opinion writing soon we will be in serious difficulties as we approach the end of the term. We ought to avoid, if possible, the accumulation of unwritten opinions at the end of the term which embarrassed us so seriously last year. (Stone Papers, Box 77)

[55] Stone to James F. Byrnes, November 1, 1941, Stone Papers, Box 74.

[56] Stone to Felix Frankfurter, April 1, 1943, Stone Papers, Box 74.

[57] Stone to Robert H. Jackson, March 31, 1943, Stone Papers, Box 75.

[58] Stone to William O. Douglas, March 20, 1944, Stone Papers, Box 74.

[59] Stone to Charles Evans Hughes, January 3, 1941, Stone Papers, Box 75.

[60] Robert H. Jackson to Harlan F. Stone, April 10, 1942, Stone Papers, Box 75.

[61] Frankfurter to Harlan F. Stone, February 24, 1939, Stone Papers, Box 74.

[62] Frankfurter to Harlan F. Stone, November 10, 1945, Stone Papers, Box 75.

[63] Rutledge to the Conference, January 3, 1946, Stone Papers, Box 76.

[64] Rutledge to Harlan F. Stone, January 15, 1946, Stone Papers, Box 76.

[65] Rutledge to Harlan F. Stone, January 15, 1946, Stone Papers, Box 76.

[66] Stone to Wiley Rutledge, January 16, 1946, Stone Papers, Box 76.

[67] Frankfurter to Harlan F. Stone, May 26, 1942, Stone Papers, Box 74.

[68] Jackson to Harlan F. Stone, May 25, 1942, Stone Papers, Box 74.

[69] Stone to the Conference, May 27, 1942, Stone Papers, Box 74.

[70] Valerie Hoekstra and Timothy Johnson. 2003. "Delaying Justice: The Supreme Court's Decision to Hear Reargurments." *Political Research Quarterly* 56:351–360, 356.

[71] Frankfurter to Harlan F. Stone, March 6, 1939, Stone Papers, Box 74.

[72] Frankfurter to Hugo Black, December 15, 1939, Douglas Papers, Box 39.

[73] Frankfurter to Harlan F. Stone, April 14, 1939, Stone Papers, Box 74.

[74] Oliver Wendell Holmes, Jr., to Harlan F. Stone, November 16, 1927, Stone Papers, Box 75.

[75] Stone to Oliver Wendell Holmes, Jr., March 22, 1928, Stone Papers, Box 75.

[76] Stone to Felix Frankfurter, January 25, 1945, Stone Papers, Box 75.

[77] Frankfurter to Harlan F. Stone, May 15, 1944, Stone Papers, Box 74.

[78] Stone to Felix Frankfurter, May 16, 1944, Stone Papers, Box 74.

[79] Stone to the Conference, March 6, 1946, Stone Papers, Box 75.

[80] Jackson to Harlan F. Stone, January 17, 1944, Stone Papers, Box 75.

[81] Frankfurter to Harlan F. Stone, March 17, 1944, Stone Papers, Box 74.

[82] Stone to Robert H. Jackson, April 3, 1942, Stone Papers, Box 75.

[83] Frankfurter to Harlan F. Stone, December 28, 1943, Stone Papers, Box 74.

[84] Ferren, **Salt of the Earth, Conscience of the Court.**

[85] O'Brien, "Institutional Norms and Supreme Court Opinions."

[86] Frankfurter to Harlan F. Stone, March 16, 1943, Stone Papers, Box 74.

[87] Douglas, **The Court Years**, 330.

[88] Rutledge wrote: "Last week I promised that I would give further consideration to this case and indicate my conclusions to you during the present week. I have done so and after going through the record with some care ... I feel I must dissent.... While I regret, again the necessity of dissenting from an opinion of yours, I feel that this case simply goes too far." Rutledge to Harlan F. Stone, March 30, 1944, Stone Papers, Box 76.

[89] Stone to Wiley Rutledge, March 31, 1944, Stone Papers, Box 76.

[90] Owen Roberts to the Conference, December 1, 1944, Stone Papers, Box 76.

[91] *New York Herald Tribune*, "Danger in Dissent," January 6, 1944, collected in Stone Papers, Box 77.

[92] *New York Herald Tribune*, "'Rift' in the Court," January 6, 1944, collected in Stone Papers, Box 77.

[93] Stone to the Conference, January 13, 1944, Stone Papers, Box 77.

[94] Frankfurter to Harlan F. Stone, March 8, 1944, Stone Papers, Box 74.

[95] Stone to Felix Frankfurter, March 27, 1944, Stone Papers, Box 74.

[96] Frankfurter to the Brethren, November 10, 1944, Stone Papers, Box 74.

[97] C. Herman Pritchett. 1954. **Civil Liberties and the Vinson Court.** Chicago: University of Chicago Press, 1.

The Little League Champions Benched by Jim Crow in 1955: Resistance and Reform after *Brown v. Board of Education*

DOUGLAS E. ABRAMS

Introduction

Little League Baseball, Inc. calls them "the most significant amateur team in baseball history."[1] The *Boston Globe* calls their story "one of baseball's cruelest moments."[2] ABC News says that their story is "[n]ot about man's inhumanity to man but man's inhumanity to children."[3]

They were the Cannon Street YMCA All Stars, a team of eleven- and twelve-year-olds who went to the Little League World Series in Williamsport, Pa. in 1955 after winning the Charleston, South Carolina city championship; the South Carolina state championship in Greenville; and the southern regional championship in Rome, Georgia. They did not lose a single game.[4]

The Cannon Street All Stars were also the only team that ever went to Williamsport but was forbidden to play there for the World Series title. They attended as Little League's guests, but they sat in the stands and watched, barred from competing because they had won the city, state, and regional titles by forfeits.[5]

The All Stars were "the team that no one would play."[6] Every other Charleston Little League team refused to take the field against them in the city championships. All sixty-one other South Carolina teams eligible for the state tournament joined the boycott, and so did all seven other state champions that qualified to play for the southeastern regional title, the final step on the road to Williamsport.[7] In the wake of the mass boycott and forfeits, Little League's national office recognized the Cannon Street All Stars as the city, state, and southeastern regional champions.[8]

None of the other teams—more than seventy in all—ever suggested that the Cannon Street All Stars played dirty. None ever suggested that the All Stars violated any

The Cannon Street All Stars traveled from Charleston, South Carolina, to Williamsport, Pennsylvania, to play in the Little League World Series in 1955. They were not allowed to play, however, because they had won their place in the World Series through forfeits—the other teams had all refused to play them because of their race.

Little League rule. The several dozen teams refused to play them for only one reason—all the kids playing for the All Stars were black and every other southern Little League team with eyes on Williamsport was all white.

Jim Crow laws had enshrined state-sanctioned racial segregation in the Deep South for decades,[9] and race relations remained especially tense in the summer of 1955. Barely a year had passed since May 17, 1954, when the Supreme Court's unanimous decision in *Brown v. Board of Education* held that racial segregation in public elementary and secondary schools violates the Equal Protection Clause of the Fourteenth Amendment.[10]

Judge J. Harvie Wilkinson III calls *Brown* "the story … of a thousand tales of human suffering and sacrifice subsumed in the winning of a principle."[11] The story of the Cannon Street All Stars belongs in this vast array, but the story has evidently gone untold in extended studies of the Court's landmark decision.

The All Stars and their young prospective white opponents in the Deep South were

The Supreme Court ruled that racial segregation in public elementary and secondary schools violates the Equal Protection Clause on May 17, 1954, barely a year before the All Stars were kept out of the World Series.

caught in a drama that transcended Little League baseball. Black and white South Carolina children often played informal pickup baseball games together on local sandlots, at least until police broke up the contests.[12] The prospect of integrated Little League tournaments, however, struck a raw nerve among white parents enraged by *Brown*'s threat to the existing legal and social order.

The Supreme Court confined *Brown*'s holding and rationale to public elementary and secondary education, without explicitly dismantling official segregation in all walks of American life. Southern whites who dug in their heels, however, foresaw that the Court had "put into effect a judicial juggernaut to dismantle apartheid."[13]

Images of black schoolchildren such as the Cannon Street All Stars playing organized baseball against whites evoked reactions similar to images of black schoolchildren sitting side-by-side with whites in the classroom. In *Brown*'s shadows, the All Stars' saga permits more than just a view of life in the Deep South in the 1950s. The saga also remains instructive today because recollections of official segregation's cruelties can help shape ongoing debate about *Brown*'s profound national impact on race and beyond,[14] about the decision's fulfilled and unfulfilled promise, and about its "contested and uncertain" legacy.[15]

Brown Then and Now

Judge Richard A. Posner calls *Brown* "the most esteemed judicial opinion in American history."[16] Richard Kluger's masterpiece, **Simple Justice,** concludes that the decision holds "a high place in the literature of liberty" because it "marked the turning point in America's willingness to face the consequences of centuries of racial discrimination," the nation's "most inhumane habit."[17] Judge Wilkinson says that *Brown* "may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew."[18]

Tributes such as these recognize *Brown*'s "place in the forefront of the pantheon of historic decisions,"[19] but the tributes come with the passage of years. Legal historian Lawrence M. Friedman notes that *Brown* was "extremely controversial from the word go."[20] Leading government officials in the Deep South reacted immediately to the decision with anger, defiance, and vows of Massive Resistance, punctuated by what Anthony Lewis has called "attacks on the Supreme Court unmatched in scope and virulence."[21]

Governors themselves energized white resistance to *Brown* in South Carolina and Georgia, the two states that were slated to host the Little League championship tournaments that the Cannon Street All Stars sought to enter on the way to the Little League World Series. South Carolina Governor James F. Byrnes (who had served briefly as a Supreme Court Justice in 1941–42) threatened to close the state's public schools entirely rather than integrate,[22] and he warned that, unless the state could "find a legal way of preventing the mixing of the races in the schools, [*Brown*] will mark the beginning of the end of civilization in the South as we have known it."[23]

Georgia Governor Herman Talmadge vowed that the state would "resist mixing the races in the schools if it is the sole state in the nation to do so."[24] He likened school desegregation to "national suicide,"[25] said that "there will never be mixed schools while I am governor,"[26] and charged that *Brown* "has reduced our Constitution to a mere scrap of paper."[27]

Defiance at the highest levels of state government set the stage for the Southern Manifesto, which nineteen southern U.S.

Senators and eighty-one House members signed in March of 1956. The statement's principal drafter, South Carolina Senator Strom Thurmond,[28] focused directly on the acculturation of white schoolchildren such as the ones who would have faced the Cannon Street All Stars on the field. The 100 signatories charged that, influenced by "agitators and troublemakers invading our States," the Supreme Court exercised "naked judicial power" to deprive parents of "the right to direct the lives and education of their own children."[29]

The All Stars' Story

In this incendiary Southern atmosphere, the Cannon Street All Stars sought to play baseball—the National Pastime—with white children in the quest for city, state, and national championships. The word "sports" sometimes conjures visions of mere fun and games, but sports in our nation means much more than leisure or diversion. As "a microcosm of American society"[30] and "one of the most powerful social forces in our country,"[31] sports maintains (as the U.S. Court of Appeals for the Fourth Circuit observes) "a special significance in our culture."[32]

In the South and throughout the nation, Little League held particular symbolic significance amid the fallout from *Brown* in the summer of 1955. Just a year earlier, French philosopher and cultural historian Jacques Barzun had pinpointed the social and cultural force of youth baseball in the United States. "Whoever wants to know the heart and mind of America," he wrote, "had better learn baseball, the rules and realities of the game—and do it by watching first some high school or small-town teams."[33] When Barzun said "baseball flatly expresses the powers of the nation's mind and body,"[34] his sources were local community ball fields and not Major League stadiums.

When the Cannon Street All Stars entered Charleston's city tournament, the *Charleston Post and Courier* published "Agitation and Hate," an editorial whose ringing condemnation of the All Stars and their parents took Little League seriously. "Some Negro adults," the paper began, "knowing that the colored children weren't wanted in the all-white state league, nevertheless decided to force the colored team into the league."[35] The editorial called the All Stars' quest for Little League's World Series title "a textbook example of why racial relations in the South are becoming increasingly difficult," and threatened that "[t]he Northern do-gooders who have needled the Southern race agitators into action may have to answer for the consequences."[36]

When the Cannon Street All Stars advanced to the South Carolina state tournament in Greenville following forfeits in Charleston's city tournament, the *Greenville News* published an open letter that linked Little League baseball squarely to *Brown*. "[T]he various powers that be in our State Government who are fighting to maintain segregation in our public schools," said the writer, "very strongly feel that the participation in the tournament by any White team against a Negro team will strongly aid and support those forces within our state who are advocating mixed schools and racial integration. This open competition of Negro versus White can and will be used by the integration forces as evidence in the school cases,"[37] which people knew would return to the Supreme Court and the lower federal courts for clarification, enforcement and extension.[38]

Sports and the future of public education also remained linked in Georgia, where the Cannon Street All Stars would have played for the southeastern regional title. After succeeding Herman Talmadge as the state's governor in 1955, Marvin Griffin likened "compromising the integrity of race on the playing field" to "doing so in the classroom." "One break in the dike," Griffin declared, "and the relentless sea will rush in and destroy us."[39]

No Barriers of Race, Creed, or Color

With the specter of integrated tournament play looming, the president of Little League's South Carolina affiliate and other white men began scouting the Cannon Street All Stars as they played on their local ball field. These men did not like what they saw—a strong, talented team with an excellent chance to defeat white youngsters on the field.[40]

Rather than risk defeat, the South Carolina affiliate requested all-white championship tournaments despite Little League's written non-discrimination policy, which had been in place ever since the national organization's creation in 1939.[41] Little League's national office rejected the request, forthrightly instructing the affiliate that bigotry held no place in youth baseball: "For the boys of these teams there are no barriers of race, creed or color.... For the boys, baseball is a game to be played with bat, ball and glove."[42]

South Carolina's Little League affiliate countered that the national organization's non-discrimination policy threatened the Southern way of life[43] by using "a Negro Little League Team... as an opening wedge to abolish segregation in recreational facilities in South Carolina."[44] Unwilling to leave the door to interracial play even slightly ajar, the affiliate hastily left the national organization and set up an all-white state tournament for the same days that the integrated tournament would have been conducted.[45] The *Post and Courier* ignored the Cannon Street All Stars, but obliged the segregated tournament by publishing its team pairings and photographs of the winning team's players.[46]

Within a few months, other southern Little League state affiliates joined South Carolina to create a new all-white organization that began play the following season and became known as Dixie Youth Baseball.[47] Like the Charleston and Greenville newspapers, the Dixie group's official rules directly linked integrated youth baseball and official segregation. "[I]t is for the best interest of all concerned that this program be on a racially segregated basis," recited the official rules, "[M]ixed teams and competition between the races would create regrettable conditions and destroy the harmony and tranquility which now exists."[48]

South Carolina's Little League affiliate claimed that the national organization's non-discrimination policy threatened the Southern way of life and in 1955 they founded an all-white organization called Dixie Youth Baseball. The league integrated in 1967.

"We Were So Young"

Little League's national office admonished its South Carolina affiliate that the All Stars were "innocent victims of alien influences that have deprived them of beneficial associations and opportunity to meet other boys in Little League Baseball."[49] To help neutralize these influences, the national office invited the All Stars to the World Series as guests from August 23–26 and housed them in the same Lycoming College dormitories as the other eight regional champions.[50]

Most of the All Stars had never traveled outside South Carolina, so attending the World Series enabled them to interact socially with white youngsters for the first time. Accustomed to state-enforced segregation, the All Stars were surprised to see the other teams' black and white children living in the same quarters and playing against one another in front of cheering adults.[51]

When the All Stars began the 740-mile trip from Charleston in an old borrowed school bus that lacked air conditioning, broke down a few times, and caught fire a few miles

After tears and entreaties, Little League officials permitted the All Stars to don their uniforms and warm up on the field, but refused to let them play even a brief exhibition game. They watched the World Series from the stands.

from its destination, the boys still expected to play for the World Series title.[52] Their parents and coaches had not yet broken the news that Little League officials had decided to enforce its rule excluding teams that had advanced by forfeits.[53]

After tears and entreaties, Little League officials permitted the All Stars to don their uniforms and warm up on the field, but refused to let them play even a brief exhibition game. The All Stars had never set foot on a field as beautiful as the one in Williamsport. In Charleston, they played at Harmon Field, an inner city clay patch located on a landfill overrun by crabgrass and littered with rocks. Black children were barred from the lush green fields reserved for Charleston's all-white Little League teams.[54] At a tender age, the All Stars experienced the "grotesquely unequal"[55] realities of the "separate but equal" doctrine that the Supreme Court had announced in *Plessy v. Ferguson* in 1896.[56]

"We were so young," remembers All Star Maurice Singleton. "We didn't know what was going on. All we knew was that we were good and could have beaten any one of those teams in Williamsport."[57]

"Let Them Play!"

When the public address announcer introduced the All Stars for their brief warm-up, Williamsport's 5,000 cheering fans had ideas of their own. Even though the Charleston team might have defeated their own children if given a fair chance, the fans began spontaneously chanting, "*Let them play!*"[58] Beginning in one corner of the stadium, the crescendo grew so loud that Maurice Singleton recalls feeling the stands shake.[59]

After Little League officials turned a deaf ear, the crowd treated the All Stars "like kings"[60] and the youngsters signed autographs as they sat in the stands and watched

When the Cannon Street All Stars advanced to the South Carolina state tournament, the *Greenville News* published an anti-integration letter that linked Little League baseball squarely to the *Brown* decision. "This open competition of Negro versus White can and will be used by the integration forces as evidence in the school cases," it conjectured. Pictured above are anti-integration protesters in Little Rock.

other teams vie for the World Series title.[61] According to writer Margot Theis Raven, the players returned home to Charleston as "the team that had won a crowd's heart."[62]

On ABC's "Nightline" news program in 2005, journalist Dave Marash speculated that expediency led Little League's national office ultimately to turn its back on the All Stars. Marash theorized that after enforcing its written non-discrimination policy at the local, state, and regional levels, the organization feared that permitting the All Stars to play on the national stage for the World Series title would prompt other southern state affiliates to follow South Carolina into the segregated Dixie Youth Baseball program,[63] an exodus that happened anyway.

"We Weren't Making a Political Statement"

At a reunion in 2003 with several members of the white teams that boycotted and forfeited decades earlier, the All Stars learned that most of the white youngsters wanted to play for the chance to go to Williamsport, but that their elders forbade them.[64] "We were just kids out there playing. So, we just did what the parents and the coaches told us to do," recalled one of the white players.[65]

"We weren't making a political statement," All Stars third baseman Carl Johnson reminisced. "We didn't know what a political statement was. We just wanted to play ball."[66] From his position as a prominent Atlanta architect in 2002, the All Stars shortstop John Rivers reasoned that "the white kids were cheated too" when adults denied them a chance to win a berth to play at Williamsport.[67]

"Classy, Forgiving Men"

The magnitude of the social change reflected and accelerated by *Brown* and its progeny[68] emerges vividly from the pages of the *Post and Courier* and the *Greenville News* themselves. After roundly condemning the All Stars and their families in 1955, both newspapers embraced the team at the dawn of the 21st century.

When the city of Charleston honored the Cannon Street All Stars in 2000 by unveiling a large plaque at the entrance of a public park near where they played decades earlier,[69] the *Post and Courier* praised them as a team of "classy, forgiving men" whose sterling example taught a "lesson of courage and inspiration."[70] Soon afterwards, the paper ran an editorial with the headline, "Hail Our Cannon Street Champs,"[71] and also wrote about "the appalling unfairness of what happened to the Cannon Street All-Stars in 1955."[72]

When the All Stars returned to Greenville in 2005 for ceremonies recognizing the fiftieth anniversary of the South Carolina state tournament that produced forfeits solely for the color of their skin, the *Greenville News* led the tribute: "[A]ll we can do now is thank them for being kids who loved baseball when it was a different game. And welcome back to Greenville."[73]

Righting the Wrong

In 2002, Little League invited the All Stars back to Williamsport with their families as honored guests to throw out the first pitch at that year's World Series. In the opening

ceremonies, the team finally received the South Carolina State Championship banner that it had earned nearly fifty years earlier.[74]

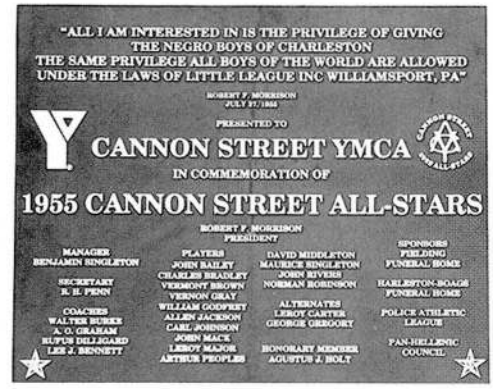
"There is no way to right the wrong perpetrated on the boys of the Cannon Street YMCA Little League team, just as there is no way to right the wrongs perpetrated throughout history on people because of their skin color," Little League executive director Stephen Keener told the crowd.[75] Fans representing teams from around the world, including a team from Harlem, responded with a standing ovation.[76]

In 2005, the Cannon Street All Stars returned again to Williamsport to throw out the first pitch of the Little League World Series on the fiftieth anniversary of their team's exclusion from competitive play.[77] Two years later, the All Stars were inducted into the Charleston Baseball Hall of Fame, which is located only a few miles from the old landfill where they learned the game.[78] In 2012, the city of Charleston unveiled an historical marker honoring the All Stars for their accomplishments on and off the field.[79]

Dixie Youth Baseball (DYB) remains the South's dominant youth baseball organization today, fielding hundreds of leagues with about 400,000 players in eleven southern states. Founded in segregation, DYB has enrolled white and black youngsters alike since 1967.[80] Its African American alumni include basketball star Michael Jordan and several major league baseball players, notably Bo Jackson, Otis Nixon, and Reggie Sanders.[81]

"Staying Positive Is What Kept Us So Strong"

Praising their dignity on and off the field, columnist George F. Will says the Cannon Street All Stars "were never beaten."[82] The All Stars are now gray and hitting seventy, and they have lived successful lives pursuing a variety of careers and professions while raising families and doting over their grandchildren.[83]



In 2000, the city of Charleston unveiled a large plaque at the entrance of a public park near where the All Stars played decades earlier honoring them for their accomplishments on and off the field.

"[T]he bitterness is gone," says Leroy Major, the All Stars' pitcher and a former Marine who spent a career mentoring children before he retired as a school teacher a few years ago. "If you hold that bitterness in, it's going to eat you up. You can't hate. You have to let it go.... I want to teach love."[84]

When All Star Maurice Singleton speaks to elementary and secondary school students, he tells the children "to focus on the positive things."[85] "Kids today," he says, "need to... stay positive, like we did. Staying positive is what kept us so strong."[86]

Looking Back and Looking Ahead

With Southern white resistance to *Brown* simmering, race made national headlines in the summer and late autumn of 1955. Jackie Robinson was inching toward the Hall of Fame after breaking Major League Baseball's color barrier in 1947. His dignity on and off the field continued to challenge the underpinnings of *de jure* and *de facto* segregation as he led the Brooklyn Dodgers to their only world championship.[87]

On August 28, while the All Stars were on their bus back home to Charleston only two days after the Little League World Series finals, fourteen-year-old Emmett Till (nearly

the same age as they) was brutally murdered in Mississippi, reportedly for insulting a white woman.[88] According to journalist David Halberstam, Till's murder and his accused killers' trial "at last galvanized the national press corps, and eventually the nation," and "became the first great media event of the civil rights movement."[89]

In a "fearless act of civil disobedience"[90] on December 1, Rosa Parks helped launch the Civil Rights Movement by refusing to give up her seat to a white man on a public Montgomery, Alabama bus.[91] "The national press corps that had coalesced for the first time at the Emmett Till trial only a few months earlier returned in full strength," reports Halberstam.[92]

When the Cannon Street All Stars felt the sting of racial prejudice, however, their story never made it onto America's radar screen. Founded in 1939,[93] Little League had emerged as a post-war national institution that would receive a federal corporate charter by unanimous act of Congress just a few years later.[94] The Little League World Series attracted spirited local competition by teams and communities that yearned to participate, but the World Series was still decades away from becoming a "marquee slice of Americana," televised nightly for millions of viewers who pay close attention to happenings on and off the field.[95]

To be sure, the All Stars' brush with discrimination ended much less harshly than many of the other confrontations that have shaped the story of American race relations before and after *Brown*. No one died, shed blood, demonstrated, or suffered arrest and incarceration when Little League short-circuited the team's quest for the World Series title. Nor did the All Stars suffer the lifetime denial of baseball equality that dogged Negro Leagues professional players until Jackie Robinson joined the Dodgers.[96]

The sting of official segregation inflicted on the All Stars, and on other African American children and adolescents, nonetheless remains central to assaying *Brown*'s legacy. *Brown* itself identified the pernicious effect of racial prejudice on the emotional well-being of the youngest black Americans, even ones who suffered no physical injury or loss of liberty: "To separate [children] from others of similar age and qualifications solely because of their race," wrote Chief Justice Earl Warren for the unanimous Court, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[97]

The Capacity for Self-Correction

"The great strength of history in a free society," wrote historian Arthur M. Schlesinger, Jr., "is its capacity for self-correction."[98] In its pursuit of racial equality, America enhances this capacity by recalling indignities such as those suffered by the Cannon Street All Stars. Because uncomfortable memories can help shape future correction, the nation's march toward greater racial tolerance is sometimes sustained with stories that acknowledge the harshness of past intolerance.

Writing on *Brown*'s fiftieth anniversary on May 17, 2004, Justice Stephen G. Breyer said that the decision's "message sets a goal: we have made progress; we aspire to more."[99] As the nation pursues aspirations through progress, the story of the Cannon Street All Stars' road from legally sanctioned racial discrimination to reconciliation and forgiveness is remembered in Charleston but largely overlooked almost everywhere else.

The racial barrier that sidelined the All Stars has been called "the civil rights story that got lost in history."[100] The *Post and Courier* calls the All Stars "the most significant team you've never heard of,"[101] but their "little-told civil rights saga"[102] enriches chronicles of *Brown*'s enduring influence on the fabric of American law and the lives of the nation's children.

ENDNOTES

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[6] Gene Sapakoff, "Never Too Late": '55 Cannon Street All-Stars to be Honored, *Post and Courier* (Charleston, S. C.), Aug. 5, 2000, at C1; see also Buck Godfrey, **The Team Nobody Would Play** (2008).

[7] Gene Sapakoff, "Cannon Street All Stars Get to Smile," *Post and Courier* (Charleston, S.C.), Aug. 6, 2000, at D1.

[8] Tony Bartelme, "50 Years Later, All-Stars Reflect on Missed Chance," *Post and Courier* (Charleston, S.C.), Aug. 15, 2005, at 1B.

[9] E.g., Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (2004).

[10] 347 U.S. 483, 495 (1954); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (companion case to *Brown*; holding that racial segregation in the District of Columbia's public schools violated 5th Amendment due process).

[11] J. Harvie Wilkinson III, **From *Brown* to *Bakke:* The Supreme Court and School Integration: 1954-1978**, at 6 (1979); see also, e.g., Derrick A. Bell, Jr., "*Brown* Reconceived: An Alternative Scenario," in ***Brown* at 50: The Unfinished Legacy** 59 (Deborah L. Rhode & Charles J. Ogletree, Jr., eds. 2004) (calling *Brown* "a long-running racial melodrama").

[12] Bartelme, *supra* note 8, at 1B.

[13] Melvin I. Urofsky, **The Warren Court: Justices, Rulings, and Legacy** 94 (2001).

[14] E.g., Martha Minow, **In *Brown's* Wake: Legacies of America's Educational Landmark** 1 (2010) (*Brown* "transformed the treatment of immigrants, students learning English, girls, students with disabilities, and poor students in American schools; religion in schools; school choice; and social science evidence about schooling"); see also, e.g., ***Brown* at 50,** *supra* note 11 (collection of essays); Derrick A. Bell, Jr., **Silent Covenants: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform** (2004); Lawrence M. Friedman, *Brown* in Context, in **Race, Law, and Culture: Reflections on *Brown v. Board of Education***, at 50-51 (Austin Sarat ed., 1997); Black Issues in Higher Education, **The Unfinished Agenda of *Brown v. Board of Education*** (2004) (collection of essays).

[15] Austin Sarat, "The Continuing Contest About Race in American Law and Culture," in **Race, Law, and Culture**, *supra* note 14, at 5.

[16] Richard A. Posner, "The Incoherence of Antonin Scalia," *The New Republic*, Aug. 24, 2012 (book review).

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

[18] Wilkinson, *supra* note 11, at 6.

[19] Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** 109 (1983).

[20] Lawrence M. Friedman, "*Brown* in Context," in **Race, Law, and Culture,** *supra* note 14, at 49.

[21] Anthony Lewis, "What Has *Brown* Wrought?," in ***Brown* at 50,** *supra* note 11, at 110.

[22] Klarman, *supra* note 9, at 183.

[23] Marcia G. Synnott, "Desegregation in South Carolina, 1950-1963: Sometime "Between 'Now' and 'Never,'" in **Looking South: Chapters in the Story of an American Region** 57 (Winfred B. Moore, Jr. & Joseph F. Tripp, eds., 1989).

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[25] Herman Talmadge: "Southern Democrat Who Fought to Succeed His Father as Governor of Georgia and Investigated Watergate," *Daily Telegraph* (London), Mar. 23, 2002, at 29 (obituary).

[26] Davison M. Douglas, "The Rhetoric of Moderation: Desegregating the South during the Decade after *Brown*," 89 **Nw. U. L. Rev.** 92, 98 n.25 (1994).

[27] *Id.*

[28] Nadine Cohodas, **Strom Thurmond and the Politics of Southern Change** 283-87 (1993).

[29] 102 **Cong. Rec.** 4515, 4516 (Mar. 12, 1956) (remarks of Rep. Smith).

[30] Kenneth L. Shropshire, **In Black and White: Race and Sports in America** 16-19 (1996).

[31] Brian Lampman, "Sport, Society, and Social Justice," in **Learning Culture Through Sports** 255, 257 (Sandra Spickard Prettyman & Brian Lampman eds., 2006).

[32] *United States v. Shortt*, 485 F.3d 243, 250 (4th Cir. 2007); Robert S. Griffin, **Sports in the Lives of Children and Adolescents: Success on the Field and in Life** 90 (1998).

[33] Jacques Barzun, **God's Country and Mine** 159 (1954).

[34] *Id.* at 160.

[35] Sapakoff, *supra* note 1.
[36] *Id.*
[37] Bart Wright, "They Were Just a Bunch of Kids Who Wanted to Play Baseball," *Greenville News* (Greenville, S.C.), Aug. 17, 2005, at 16C.
[38] E.g., *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Cooper v. Aaron*, 358 U.S. 1 (1958).
[39] Frank Fitzpatrick, **And the Walls Came Tumbling Down: Kentucky, Texas Western, and the Game That Changed American Sports** 44 (1999) (quoting Griffin).
[40] Sapakoff, *supra* note 1.
[41] Little League Online, *History of Little League*, http://www.littleleague.org/learn/about/historyandmission.htm; Seanna Adcox, "School Brings History of Segregation to Life," *Post and Courier* (Charleston, S.C.), Apr. 27, 2004, at 1D.
[42] Gene Sapakoff, "The Most Significant Team You've Never Heard Of," *Post and Courier* (Charleston, S.C.), Oct. 25, 1995, at B1.
[43] *Id.*
[44] Sapakoff, *supra* note 1.
[45] *Id.*
[46] *Id.*
[47] Youth Baseball League Founded on Racism Now Flourishing as Integrated Program, *Grand Rapids* (Mich.) *Press*, Aug. 7, 2005, at E11.
[48] Sapakoff, *supra* note 6, at C1.
[49] Sapakoff, *supra* note 1.
[50] Grossfeld, *supra* note 2, at E1.
[51] Adcox, *supra* note 40, at 1D.
[52] Bartelme, *supra* note 8, at 1B.
[53] Adcox, *supra* note 40, at 1D.
[54] ABC News, "Nightline," *supra* note 5; Grossfeld, *supra* note 2, at E1.
[55] Anthony Lewis, "What Has *Brown* Wrought?," in ***Brown* at 50**, *supra* note 11, at 108.
[56] 163 U.S. 537 (1896).
[57] Gene Sapakoff, *supra* note 6, at C1.
[58] Grossfeld, *supra* note 2, at E1.
[59] ABC News, "Nightline," *supra* note 5 (quoting Mr. Singleton).
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[65] ABC News, "Nightline," *supra* note 5.
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[67] Grossfeld, *supra* note 2, at E1.
[68] Michael J. Klarman, "Better Late Than Never," *N.Y. Times*, May 17, 2004, at A21.
[69] Sapakoff, *supra* note 6, at C1.
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[98] Arthur M. Schlesinger, Jr., "Folly's Antidote," *N.Y. Times*, Jan. 1, 2007, at A19.

[99] Stephen G. Breyer, "50 Years after *Brown*," *N.Y. Times*, May 17, 2004, at A21.

[100] ABC News, *supra* note 3.

[101] Sapakoff, *supra* note 41, at B1. The All Stars players are John Bailey, Charles Bradley, Vermont Brown, William Godfrey, Vernon C. Grey, Allen Jackson, Carl Johnson, John Mack, Leroy Major, David Middleton, Arthur Peoples, John Rivers, Norman Robinson, and Maurice Singleton. The alternates are Leroy Carter and George Gregory. The coaches and founders are Lee J. Bennett, Walter Burke, Rufus Dilligard, A.O. Graham, Robert Morrison, R.H. Penn and Benjamin Singleton. The honorary team member is Augustus Holt. See "1955 Little League Team from Charleston, S.C.," to be featured on ESPN, http://www.littleleague.org/media/newsarchive/04_2005/05_cannonstreet_espn.htm (2005).

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Edward Schempp and His Family

DOUGLAS LAYCOCK

The Origins of the Controversy

Abington School District v. Schempp is probably the best known of the Supreme Court's school prayer cases, and the most fully reasoned. The story of the case begins long before the litigation began, and before any of the Schempps were even born. Its roots are in the early years of the effort to create a system of public schools in the young United States.

Sustained efforts to create public schools began while the country was still experiencing the effects of the Second Great Awakening: an outpouring of Protestant religious fervor led by revivalist preachers and growing new denominations.[1] In the religious fervor of the time, the common schools (as they were called) would have to teach religion. But what religion should they teach? Protestants had much in common, but they also had deep disagreements. "Protestantism was not one religion, but many."[2]

There were strict Calvinists, who taught that God chooses the elect, and that each of us is predestined either to heaven or to hell. And there were Arminians. The term has become unfamiliar, but the idea has flourished. Jacobus Arminius, a Dutch theologian of the late sixteenth century, taught that God's saving grace is offered to each of us, but that we have to accept it. This is the underlying theology of every preacher who ever exhorted his listeners to accept Jesus Christ as their personal Lord and Savior. In the simplified form in which it reached the masses, Arminianism was the polar opposite of strict Calvinism. Either salvation is all up to God, and there's not a thing you can do; or it's all up to you, and you have to make a decision.[3] Between strict Calvinism and simplified Arminianism was a long continuum, with many variations that need not concern us tonight. But the variations seemed important at the time, and they were actually exaggerated by preachers and denominations competing for adherents.[4]

Then there were the Unitarians. Unitarians believed in a unitary God and denied the Christian doctrine of the Trinity.[5] And therefore, they denied the divinity of Jesus. Today, the Unitarian-Universalists are a very small denomination. But in the early nineteenth century, the Congregational

Churches of Massachusetts were in full schism over Unitarianism. By the time the state repealed its formal establishment in 1833, Unitarians had taken over many of the locally established Congregational churches, and they had taken over the Harvard Divinity School.[6] The Unitarians were too big to ignore in Massachusetts, and Massachusetts was a leader in the common schools movement.

So what could the common schools possibly teach about religion? Horace Mann in Massachusetts had a very simple idea: Everyone believed in the Bible. So the common schools should read the Bible, "without note or comment."[7] That is, the teacher should make no effort to explain what was read. That would keep the common schools out of denominational conflicts. A simple extension of Mann's idea was to read the Bible and then recite the Lord's Prayer. This added prayer to the students' day without departing from the Biblical text on which all agreed. Mann's idea was "a stroke of genius."[8] Not every Protestant was happy with it, but every Protestant could live with it.

For the Catholic immigrants just beginning to arrive in large numbers, Mann's solution was no solution at all. The common schools almost universally read from the King James Version, which Catholics denounced as "the Protestant Bible."[9] And equally important, the idea of reading scripture "without note or comment" was fundamentally Protestant. It was Protestants who taught that every human could read the Bible for himself. For Catholics, the teaching authority of the church had to explain the Bible's proper interpretation.

Protestants obstinately insisted that Mann's practice should be acceptable to all Christians, and never mind what any actual Christians might say. Protestants called the King James Version "the common English version."[10] They said that teaching any specific doctrine, Catholic or otherwise, would be "sectarian," but that the Bible was appropriately nonsectarian.[11] And when pushed, they said that, even if there were disagreements about the translation, no one was required to believe anything.[12] Students had only to read it, not believe it.

So as not to offend any of the many Protestant sects in nineteenth-century America, Massachusetts education reformer Horace Mann proposed that common schools teach the Bible by having students read passages without the teacher explaining them. He believed that simple Bible reading would keep the common schools out of denominational conflicts.

The common schools did not hesitate to coerce dissenters. We have reported cases, which are no doubt the tip of a much larger iceberg of school discipline, in which Catholic children were beaten or expelled for refusing to read the King James Bible.[13]

The dispute over the Protestant Bible provoked social unrest, political campaign issues, a proposed constitutional amendment,[14] and mob violence. The worst occurred in five days of rioting in Philadelphia in 1844. Protestant and Catholic mobs clashed, a Catholic church was burned to the ground, at least twenty people were killed, and 2,000 militia occupied the city.[15] But Bible reading in the common schools continued without change.

When the great Jewish immigration began later in the century, a new voice was added to the dispute.[16] The Jewish objection was partly to the translation of what Christians called the Old Testament, but more fundamentally to the use of what Christians called the New Testament.

By the turn of the century, Bible reading in the common schools was slowly declining. After the Civil War, and even earlier in a few places, some school boards had begun to take the Catholic complaint more seriously.[17] School-sponsored Bible reading was gradually abandoned in many schools, and held unconstitutional by the Supreme Courts of Illinois and Wisconsin.[18]

Early in the twentieth century, there was a wave of legislation to *require* Bible reading in the schools—legislation pushed by groups who feared that the practice was gradually dying.[19] Pennsylvania passed such a statute in 1913, requiring that ten verses be read from the Holy Bible, "without comment," every day in every school.[20]

And so it was that well into the second half of the twentieth century, every public school in Pennsylvania carried on with Horace Mann's stroke of genius from more than a century before. It was a nineteenth-century solution to a nineteenth-century problem, in a twentieth-century nation with religious diversity far beyond anything the Protestants of the Second Great Awakening could ever have imagined.

In Abington High School, in Philadelphia's northern suburbs, students still read the ten verses from the Bible and still recited the Lord's Prayer. Participation was still mandatory, the verses were still read without note or comment, and the school still supplied only the King James Version. But Abington High did now permit students to bring their own translation from home and read from that if they preferred. And in Abington High's brand new state-of-the-art building, students in the radio and TV workshop read the ten verses over the intercom.[21]

No one felt any need to disguise what the school was doing. Everyone called the Bible readings and prayer "the morning devotionals."[22] And the morning devotionals very much bothered a remarkable young man named Ellery Schempp.

The Schempps

There were actually five plaintiffs in the *Schempp* litigation. There was Edward Schempp, the father, his wife Sidney Schempp, and their three children: Ellery, his younger brother Roger, and their younger sister, Donna.

Before I continue the story of the Schempps, I have to give credit where credit is due. I have studied the *public* history of this controversy for many years. But before being asked to give this lecture, I had not studied any *private* information about the Schempps. Luckily for me, someone else had already done that research. The definitive book is **Ellery's Protest**, by Stephen D. Solomon, and it is a great read. Solomon is Professor of Journalism at New York University, and he has a law degree from Georgetown.

He interviewed the surviving members of the Schempp family and the surviving

lawyers. He interviewed one of Ellery Schempp's high school teachers, and one of his high school friends. He reviewed all the extant files on the case. By all rights, he should be giving this lecture. I have my own insights to add, and I have personally reviewed key portions of the arguments in the trial court and the Supreme Court. But with respect to everything that would be known only to the parties or their lawyers, and with respect to much that is in unpublished portions of the record, I am relying on Professor Solomon.

Edward Schempp was born to German immigrants in Philadelphia in 1908. He was raised in the Lutheran Church, and he soon rebelled against it. He thought the church should "be talking about goodness and decency," not about "being washed in the blood of the Lamb."[23] He says he didn't like the gore. He apparently didn't like a lot of what he heard.

His wife Sidney was raised unchurched on the west coast. Her older son describes her as "a free thinker."[24] Part of Ed and Sidney's attraction for each other was that they both questioned tradition. As best I can tell, neither Ed nor Sidney ever went to college.

They took their children to the Unitarian Church. The Unitarians had gone from denying the Trinity to doubting all sorts of things about Christian teaching; today the church describes itself as "a liberal religion with Jewish-Christian roots" and "no creed."[25] Its Sunday morning services bring in speakers from many traditions, both religious and secular. Ellery Schempp remembers hearing Reinhold Niebuhr, Paul Tillich, and Norman Thomas as a child.

Ed Schempp was a modestly successful, small-scale entrepreneur. He was self-taught in electronics, and his electronics store did well enough that he could build his family a modest house in Abington Township without a mortgage. Later he worked for Sylvania, and at night he ran his own electronics business out of his garage.

He was also self-taught on social and political issues. He believed in separation of church and state and in equal rights for African-Americans. He joined the American Civil Liberties Union and subscribed to *The New Republic*. He and Sidney discussed public issues with their children, and they encouraged their children to think for themselves.

They sometimes discussed religion, and in some of those discussions, Ellery would bring up Bible verses he had heard in school. Ed didn't think it right that they were reading the Bible to his children in public school, but he was not sufficiently motivated to do anything about it.[26]

Ellery was on a different track. In 1956, Ellery Schempp was sixteen years old and a junior in high school. He believed in God, but not in the God depicted in the Bible. Some of his friends were Jewish, and he thought the Bible readings were especially unfair to them. He was aware of other religious minorities. And he thought the Bible readings were so obviously unconstitutional that "this whole thing must have been some silly mistake."[27]

Ellery seems to have gotten some positive reinforcement when he shared his complaints with Allan Glatthorn, who taught Honors English. But Glatthorn never said anything in public. He was worried about his job. Four or five of Ellery's friends agreed to join him in a protest, but as plans took shape, they all backed out. There were no models for student protest in 1956, and there were college recommendations to worry about. Ellery was on his own.

He decided that complaining to the school authorities would accomplish nothing. And disruption would accomplish nothing. It would let school officials focus on the disruption and divert attention from his substantive point. He needed a form of protest that was attention-grabbing but not disruptive.

On Thanksgiving Day, 1956, on the way home from dinner at his grandmother's house, Ellery told his parents that he was planning to

protest the daily Bible readings. They did not object. He decided that he "had a green light."[28] None of them had any idea what would ensue.

On Monday morning, Ellery went to home room as usual. Elmer Carroll, the home room teacher, told everyone to clear their desks for the morning devotionals. Ellery put a borrowed Koran on his desk, opened it to a random page, and read silently while the Bible verses came over the intercom. Then everyone stood for the Lord's Prayer—except that Ellery remained seated and read the Koran.

When the prayer was over, Mr. Carroll reminded him that the devotionals were mandatory. Ellery said he had been thinking about it, and he could no longer participate in good conscience. Mr. Carroll sent him to the principal's office.

Irvin Karam, the assistant principal, leaned on Ellery for fifteen minutes, but Ellery stood his ground. Mr. Karam sent him to the guidance counselor. Ellery thought she seemed sympathetic, but that she didn't dare offer him any support. After a long discussion, she asked about the next day. Had he made his point, so that he could comply in the future? No. He said again that this was a matter of conscience. She sent him back to class.

Later in the day, Ellery was called back to the guidance counselor's office. She told him to check in to home room to record his attendance, then come to her office. This was not much of a solution, because the Bible verses and the Lord's Prayer came over the intercom into her office. But it enabled Ellery to visibly protest, and it removed the protest from the classroom. What surely no one foresaw was that Ellery Schempp would go to the guidance counselor's office every day for the rest of the school year—from November to May. He did not give up.

That first night, the Monday after Thanksgiving, he wrote a letter to the Philadelphia office of the American Civil Liberties Union. He enclosed a small contribution, and he asked for any help they might offer "in testing the constitutionality" of Bible reading in public schools.[29]

Abington School District v. Schempp was not a test case stirred up by lawyers looking for a client. Instead, a sixteen-year-old client, acting almost entirely on his own, had come looking for a lawyer.

The Lawyers

The ACLU volunteer asked to investigate Ellery's complaint was Bernard Wolfman, then a young lawyer at Wolf, Block, and later dean of the University of Pennsylvania Law School. Wolfman thought the Bible readings and prayers raised a serious civil liberties issue, but he was not so sure what the judges would think.[30]

In 1956, the Supreme Court precedents consisted of four cases, only three of which had been decided on the merits.[31] Only one, *McCollum v. Board of Education*,[32] had ended in a clear win for a separationist plaintiff. The most recent case, *Zorach v. Clauson*,[33] had retreated sharply, distinguishing *McCollum* on grounds the dissenters found wholly implausible.

Wolfman went to the Schempp house to meet the potential clients. Would they make good witnesses? Could they take the abuse they would be subjected to? What did Roger and Donna think? Ellery would graduate before a case could be litigated. His claim would be moot, so the younger siblings would be essential.

Ed and Sidney introduced the children and then left the room. Wolfman asked Ellery to tell his story, and then asked Roger and Donna what they thought. They all said that they should not have to be lectured every morning on religious beliefs they disagreed with. They all seemed to feel strongly about it.

In an interview forty-six years later, Wolfman remembered a remarkable exchange with Donna Schempp. Donna was eleven years old at this point. And she said, "Mr.

Edward Schempp, Donna Schempp, Roger Schempp, Sidney Schempp, plaintiff Ellery Schempp and Josephine Hallett, a friend of the family, were photographed on the steps of the U.S. Supreme Court Building after attending oral argument in their 1963 case challenging the Pennsylvania law requiring at least ten verses of the Bible to be read without comment at the start of each school day.

Wolfman, you're Jewish, aren't you?" He said he was. And she said, "Well, all I can say is that like the Jews, we have a very individualistic relationship with God."[34] Of course this is more accurate as a social observation about American Jews than as a theological observation about God's covenant with the Jewish people. But what I find so remarkable about this comment, and probably why Wolfman would remember it for the rest of his life, is that here we have the eleven-year-old making the interfaith analogy—the eleven-year-old trying to explain in terms the adult could understand.

Then Wolfman talked to the parents. He emphasized the likelihood of community outrage. And Ed Schempp said, "The children feel very strongly about this. If you say that there's a case, they want to go ahead, and we'll support it to the end."[35] Then he asked how much it would cost. He hadn't known that when the ACLU takes a case, it takes the case pro bono.

In fact the Schempps had presented a more solid front than they felt. Ed Schempp was proud of his son and solidly behind him. Sidney agreed in principle, but she worried about the consequences for the children.

Roger and Donna didn't feel nearly as strongly as Ellery did, and they were much more worried about the embarrassment of being exposed as nonconformists. In private, Donna went back and forth between supporting and opposing the lawsuit. But in public, she supported her big brother.

Wolfman recommended that the ACLU take the case. But the ACLU was struggling financially in the 1950s, and its focus was on free speech and the lingering effects of McCarthyism. When the board of the Philadelphia chapter met, the vote was a tie. The chairman was Clark Byse, a professor at the Penn Law School, and he was about to leave for Harvard (where he would become the model for Kingsfield in **The Paper Chase**[36]). Byse said that reading the Bible to children every day was a good thing. But he also said that, if half the board believed the issue should be litigated, then they would let the courts decide. He cast the deciding vote to take the case.[37]

Wolfman soon withdrew from the case, on the ground that a Jewish lawyer would enable the school board to attack the lawyer's motives instead of dealing with the merits. The ACLU was unpersuaded; it assigned the case to another Jewish lawyer, Theodore Mann.

Mann drafted a complaint and sent it off to get advice from Leo Pfeffer and Shad Polier, the two top lawyers at the American Jewish Congress. At that time, Pfeffer was the nation's leading theorist of church-state separation.[38] He was cautious, especially after *Zorach*.

His advice was emphatic: Do not file this case. Pfeffer wanted a case with egregious facts. He wanted hymns and nativity scenes and Easter celebrations. He was afraid the Court would not get any real sense of offense from ten Bible verses and the Lord's Prayer, without note or comment. After *Zorach*, who could be confident?

But Pfeffer couldn't stop the ACLU from filing its case. And unlike Pfeffer, the lawyers in Philadelphia had a client. They were reluctant to abandon so impressive a young man as Ellery Schempp. They were also more optimistic than Pfeffer. Their generation was more assimilated; it had experienced less, and less virulent, anti-Semitism. They were more optimistic about the country and the Court.

They also had a different view of tactics. School boards might say that holidays were cultural and not just religious. But the Lord's Prayer and the King James Bible—how could that be anything but religious?

Pfeffer had more advice. If you insist on filing this case, file it in state court. If they lost in state court, they wouldn't have to file a cert petition unless the prospects looked good. Pfeffer had just talked some losing litigants in Tennessee out of a cert petition.[39]

But if they filed in federal court, the case would be assigned to a three-judge federal district court. The only appeal would be to the Supreme Court, and if anyone appealed, the Court would have to decide the case. These three-judge courts and the mandatory appellate jurisdiction have been almost entirely repealed, but for most of the twentieth century, they put constitutional challenges to statutes on a fast track to the Supreme Court.[40] The lawyers talked it over in Philadelphia, and they decided to file in federal court.

Pfeffer had one other piece of advice: find a Catholic plaintiff and a Jewish plaintiff. That made sense, but after a further delay to look for more plaintiffs, the lawyers wrote Pfeffer that no other plaintiffs were willing to join. It takes courage to be a plaintiff in one of these cases. The Schempps would be the only plaintiffs.[41]

While the lawyers debated strategy, Ellery Schempp returned to high school for his senior year. He told his new home room teacher that he wanted to be excused from the morning devotionals. This teacher also sent him to the principal's office, where Mr. Karam had a new hard line. Ellery must attend home room, he must stand for the

Lord's Prayer, and he must "show respect." Two days later, Ellery's teacher sent him back to Karam, reporting that he wasn't paying attention during the devotionals. Ellery insisted it was a matter of conscience; Karam insisted that it was no such thing. He had to attend home room, and he had to participate in the devotionals. Ellery felt that they "absolutely compelled" him, and he reluctantly gave in. He knew what Karam did not know—that a lawsuit was in preparation.[42]

But Mr. Karam probably knew something that Ellery did not know. Ellery's high school principal had written negative letters of recommendation for all his college applications. He had personally contacted the admissions officer at Tufts to urge that Ellery be rejected.[43]

The Litigation

The ACLU finally filed its complaint in February 1958. Theodore Mann had withdrawn on the ground that he was too inexperienced to handle a case that was probably headed to the Supreme Court. The Schempps were now represented by Henry Sawyer. The school district was represented by C. Brewster Rhoads. Both were experienced litigators from the elite of the Philadelphia bar.[44]

The three-judge court consisted of John Biggs, the respected chief judge of the Third Circuit, and district judges William Kraft and William Kirkpatrick. Biggs had been appointed by Franklin D. Roosevelt, Kraft by Dwight Eisenhower. Kirkpatrick had been appointed by Calvin Coolidge.

Astonishingly, it took only six months for the case to come to trial, in August 1958. The first witness was Ellery Schempp. Sawyer had Ellery describe the morning devotionals. Then he began asking Ellery about readings he had heard that contradicted his own religious beliefs.

"Mr. Schempp, do you believe in the divinity of Christ?"

"I do not."

"Were you read in the course of your instruction at Abington High School material from the Bible which asserted the divinity of Christ?"

"Yes, sir."

"Do you believe in the Immaculate Conception?"

"No."

"Were you read material during the course of your time at Abington High School which asserted the truth of the Immaculate Conception?"

"There was."[45]

Here, both Ellery and his lawyer were probably just confused. Probably Ellery had heard that Jesus was born of a virgin. But the "Immaculate Conception" is not about the birth or conception of Jesus, and it is not about sex. It is the Catholic teaching that Mary "in the first instant of her conception ... was preserved free from all stain of original sin."[46] The doctrine's scriptural support is scattered and cryptic; Ellery was quite unlikely to recognize it from hearing any of those passages read "without note or comment." No one appears to have noticed the mistake.

Ellery testified that he believed in God, but that he did not believe in an anthropomorphic God. He did not believe in the Trinity. He did not believe in petitional prayer.

Ed Schempp took the stand and said that he disagreed with many things in the Bible. He didn't believe in much of Leviticus. He didn't believe in a God of vengeance. The Bible said that God would visit the sins of an ancestor upon the fourth generation. That passage made God look worse than humans. "My concept of God is bigger than that."[47]

Roger and Donna described the Bible readings in their individual classrooms; the elementary school and junior high did not have intercoms. They testified to passages that they disagreed with, and Donna described a

Jewish friend who "said that she was just plain fed up."[48]

Rhoads's cross-examinations followed a common theme with all four witnesses. They had never complained before Thanksgiving 1956. Except for Ellery, they had never asked to be excused. Roger and Donna had never thought about the issue before Ellery brought it up, and maybe not until they realized that Ellery was about to graduate. Donna had actually volunteered to read the Bible in her classroom. She had volunteered more than once.[49]

Each side put on one expert witness. The Schempps called Rabbi Solomon Grayzel, editor of the Jewish Publication Society. Grayzel testified that Jews rejected the New Testament and that Catholics rejected the King James translation. "I don't want to step on anybody's toes but the idea of God having a son is, from the viewpoint of the Jewish faith, practically blasphemous."[50]

He summarized the story in the Gospel of Matthew of the Jews demanding that Jesus be crucified, and saying "His blood be upon us, and on our children."[51] And he said, "I submit to you that this verse ... has been the cause of more anti-Jewish riots throughout the ages than anything else in history. And if you subject a Jewish child to listening to this sort of reading ... It is a direct accusation and a threat ..."[52]

Reading the Bible without note or comment risked misinterpretation by the children. And the practice was meaningful only to Protestants. For Catholics the meaning was to be found in church teaching. For Jews, the meaning was to be found in study and discussion; a bare reading of the text had little significance.

On cross, Grayzel agreed that the King James Bible had passages of literary merit and passages of moral value.[53]

The school district called Luther Weigle, a man with extraordinary credentials. He was dean emeritus of the Yale Divinity School, and he chaired the committee that created the Revised Standard Version, a new translation of the Bible first published in 1946. But he had been ordained in 1903, and some of his testimony repeated the Protestant arguments of the nineteenth century.[54]

Weigle testified that "the Bible is not a sectarian book," and therefore, reading ten verses from the King James Version without note or comment "is not sectarian."[55] And his answer would be the same if the ten verses were read from the Douay Version or from the Jewish Version.

Judge Kirkpatrick asked a question: What if the teacher read only from the Jewish Scriptures, and excluded the New Testament. Weigle said that *that* "would be a sectarian practice."[56]

Weigle said that reading the Bible to schoolchildren had "a moral educational value," "very high literary value," and "great value ... to the perpetuation of ... the American way of life."[57]

On cross, Sawyer forced Weigle to admit that his Revised Standard Version had been "greeted with some controversy in the Protestant world." In fact, it had been burned in protest. "People feel strongly about these matters, don't they, translations of the Bible?" Weigle said that "[o]f course people feel strongly."[58]

Next Sawyer asked Weigle to define "sectarian." After some sparring, Weigle said that when he said "nonsectarian," "I meant among the various Christian bodies."[59]

Finally, Sawyer asked Weigle if he considered the Bible to be primarily an historical record, a piece of English literature, or the revealed word of God. Weigle said his religious beliefs were irrelevant. So Sawyer turned to Weigle's writings, where he had said that the important thing about the Bible was that it "contains the Word of God to man."[60] Weigle said he stood by what he said there. But he also stood by his testimony; the Bible also had moral, literary, and historical value that justified its having a place in our educational system.[61]

Ed and Sidney Schempp and two of their children, Donna and Roger, received hundreds of letters after the Court ruled against compulsory Bible reading in schools. While all of them had publicly supported Ellery's pursuit of the case, Roger and Donna didn't feel nearly as strongly as their brother did, and they were much more worried about the embarrassment of being exposed as nonconformists. Ellery's father was, however, always solidly behind him.

After the trial, the case slowed to a crawl. The lawyers filed post-trial briefs, and, in March 1959, the three-judge court assembled to hear oral argument. Sawyer said that the practice of reading the Bible without note or comment showed that it was a ceremonial religious observance. There was no pedagogical purpose to teach moral, literary, or historical lessons, because the teachers were forbidden to point out such lessons.

Sawyer said that he didn't have to show that the practices were also sectarian, but they were. The New Testament was Christian, and in places affirmatively hostile to Jews. The King James Version was Protestant. And the Schempps had pointed out many passages that were inconsistent with their religious beliefs and the beliefs the parents were trying to instill in their children. If Donna had actually liked the Bible reading and participated eagerly, that would make the case stronger, not weaker, because it would show that the school's usurpation of parental authority in religious matters was succeeding.

Two of the judges wanted to know about other religious ceremonials, such as "God save the United States and this Honorable Court." Sawyer gave a messy mix of answers, centered on the claim that most of these practices were de minimis.

Brewster Rhoads said that prohibiting note or comment was a critical safeguard that kept the readings nonsectarian. He denied that the readings were even devotional. The legislature had chosen the Bible for its moral and literary truths, and it was not read "for the purpose of convincing, proselytizing or for dogma."[62] So there was no Establishment Clause violation. And there was no free exercise violation, because no one was required to believe what was read to them—yet another argument from the Protestant playbook of the mid-nineteenth century. Ed Schempp sat in the courtroom all day and took careful notes. He predicted victory.[63]

In September 1959, all three judges agreed that the Pennsylvania Bible reading statute, and the practice of reciting the Lord's Prayer, violated the Establishment Clause.[64] They found that the exercises were a religious ceremony and religious instruction. The court implied that, if the school had used the Bible to actually teach moral, literary, or historical points, distinguishing those points from the religious teaching in which those points were embedded, it would be a different case. But students could not be expected to make those distinctions when the Bible was read without note or comment.

The opinion noted that the students referred to the exercises as morning devotionals and that even a lawyer for the school district had slipped and called them "devotional services." It also noted that as children the judges had experienced similar exercises as "devotional in nature."[65]

The exercises also violated the Free Exercise Clause.[66] Both teachers and students were compelled to participate. And teaching religious beliefs inconsistent with the beliefs of the parents violated the parents' right to

teach their own faith, or lack of faith, to their children.

Condemnation of the opinion greatly outweighed the few supportive comments. Hundreds of letters arrived at the Schempp house, nearly all negative, some threatening. Someone cared enough to repeatedly smear feces on the handle of their front door. Roger and Donna lost friends; Roger was regularly called a Communist and anti-Christ.

Ed Schempp fought back. He wrote letters to the editor, and he appeared on public discussion panels all over the Philadelphia area. He repeatedly emphasized the familiar beliefs that his family rejected—the divinity of Jesus, the Trinity, and what he continued to call the Immaculate Conception. He denounced the violence in the Bible. At least once, at the Delaware County Unitarian Church, he said the Bible was an "unclean book" and "unfit for children to read."[67]

Ellery was spared all this. Despite the principal's personal intervention to keep him out, he was now a sophomore at Tufts. He was president of the Unitarian student association on campus, and much taken with the Presidential campaign of John F. Kennedy. His father was a political liberal but deeply suspicious of Catholics. Ellery kept working on him, and takes credit for getting two more Kennedy votes in Pennsylvania.[68]

The School District filed its appeal on November 12, 1959.[69] On December 17, the governor signed a bill providing for the first time that children would be excused from the Bible reading if their parents or guardians so requested in writing.[70] Ed Schempp told the press that the amendment was "no more than a dishonest subterfuge of legal quibbling, completely beside the main point that devotional services have no place in the Public Schools."[71] Maybe so, but judges would have to decide that. On October 24, 1960, the Supreme Court vacated the judgment and remanded for further proceedings in light of the statutory amendment.[72] Most of another year had gone by.

On the remand, Brewster Rhoads argued that Bible reading with an excusal provision was a completely different practice from Bible reading without. The entire trial was now irrelevant, and the case should be dismissed. Alternatively, the court should abstain and let the Pennsylvania courts construe the new law.

Sawyer of course argued that little had changed. The three-judge court retained jurisdiction and let Sawyer amend his complaint.[73]

Finally, fifty-one weeks after the remand order, the court assembled to hear testimony on the excusal provision. Ed Schempp testified that he had never asked to have his children excused from the Bible readings. Having his children labeled as odd balls every day was even worse than having them subjected to religious teachings they didn't believe. They might be denounced as atheists, which was often connected to "atheistic communism," and viewed as un-American and immoral.[74] Roger Schempp testified briefly, confirming his father's testimony.[75]

In February 1962, the three-judge court delivered another unanimous opinion striking down the Pennsylvania law as amended.[76] The statute still required a religious ceremony that preferred Christianity over other religions. It still violated the Establishment Clause. This time, they did not find a free exercise violation.

There was another round of public denunciations of the court and of the Schempps. Ed Schempp told a reporter that his family was not atheist, and that they frequently read the Bible in their home. Perhaps he exaggerated, or perhaps they read only the passages that were fit for children. However that might be, he said that reading the Bible in a public school, without note or comment, was a different matter. Unitarians did not "believe in a literal, infallible Bible as the 'Word of God.'"[77]

Ellery Schempp was by now a senior at Tufts, picketing the Woolworth's in Medford

in support of sit-in demonstrators in the South.[78]

The Other Cases

There had been litigation over prayer and Bible reading in public schools off and on since 1854.[79] And, by the late 1950s, cases were popping up all over.[80]

The Schempps had started first, and seemed en route to the Supreme Court first, but the statutory amendment and resulting remand and the leisurely pace of the three-judge court had changed that. A case from Long Island, filed in 1959, had worked its way through the state courts. The New York Court of Appeals had upheld a twenty-two-word prayer composed by the New York State Board of Regents to be recited in every classroom in the state. The case was *Engel v. Vitale*,[81] and it was already pending in the Supreme Court when the three-judge court issued its second opinion in *Schempp*.

In Baltimore, Madelyn Murray filed suit in state court in December 1960, after an exchange of correspondence with the Schempps. As in Pennsylvania, Maryland schools read the Bible without note or comment and led recitals of the Lord's Prayer, and they refused to excuse Murray's son. In April 1961, the trial court dismissed the complaint for failure to state a claim. The case moved quickly through the state's appellate courts,[82] and arrived at the Supreme Court just ahead of *Schempp*. The cert petition in *Murray v. Curlett* was filed on May 15, 1962; the school board's appeal in *Schempp* on May 28.[83]

On June 25, the Court decided *Engel v. Vitale*.[84] The Court struck down the New York Regents prayer, emphasizing that it was no business of the state to compose prayers to be recited by any portion of the American people. Some observers thought that settled the issue in *Schempp* and all the other cases. Others thought the facts of *Engel* were so odd that it controlled nothing. There was only one dissent, but with Justice Felix Frankfurter's stroke and Justice Charles Whittaker's sudden retirement in mid term, also for medical reasons, the vote had been only 6–1.[85]

Meanwhile, Leo Pfeffer had finally found the case he wanted. He didn't like *Schempp*, or *Murray*, or *Engel*. But in Miami, there were prayers and Bible readings and more. Teachers and outside speakers added sectarian comment. There were Christmas celebrations with nativity scenes and Christmas plays and a strong emphasis on the New Testament account of the birth of Jesus. Students who asked to be excused had been refused. At Christmas, students decorated the schools with nativity scenes, crosses, crucifixes, and quotations from the Bible.

Most remarkable of all, in the junior and senior high schools, there were miniature passion plays at Easter. One boy in each school was tied to a cross, with red makeup to simulate blood from the wounds of crucifixion. A girl portraying Mary knelt by the cross, which was spotlighted while two other students read the biblical account of the passion.

The case became *Chamberlin v. Dade County Board of Public Instruction*, filed in state court in summer 1959. The trial judge held many of Dade County's religious excesses unconstitutional. But he upheld the Lord's Prayer and daily Bible reading without note or comment, provided that children who objected were excused. He upheld the singing of hymns and the display of religious symbols.

The Supreme Court of Florida affirmed, in a testy opinion arguing that the separationist passages in the Supreme Court's opinion in *Everson v. Board of Education*[86] had grossly misinterpreted the Establishment Clause.[87] The Florida opinion came down on June 6, 1962. If Pfeffer hurried, he might get the case before the Supreme Court at the long conference in October, simultaneously with *Murray* and *Schempp*. But a Florida lawyer

who wasn't thinking filed a petition for rehearing! Pfeffer must have been furious, but all he could do was wait. Rehearing was denied on July 31,[88] but there was a further delay before anyone told Pfeffer.

Pfeffer finally filed his cert petition on October 15—one week after the Court granted cert in *Murray*[89] and noted probable jurisdiction in *Schempp*.[90] Pfeffer's perfect case was too late.[91]

The Supreme Court

Murray and *Schempp* were set for argument at the end of February 1963. Ellery Schempp was now a graduate student in physics at Brown University. He and his fiancée and his sister came down for the argument and slept on the floor of a friend's apartment. Ed and Sidney apparently could afford a hotel room.

The arguments were spread over two days and seven lawyers, some of whom were allowed an hour. Brewster Rhoads became the third lawyer to withdraw from *Schempp* for selfless reasons. He was seventy years old, and he was starting to have memory lapses. He turned the argument over to a younger partner, Philip Ward.

Ellery Schempp's high school principal wrote negative letters of recommendation for all his college applications and contacted the admissions officer at Tufts University to urge that Ellery be rejected. Ellery nonetheless attended Tufts, received his Ph.D. at Brown University, and went on to a career as a research physicist. He was elected to the Abington High School Hall of Fame for his achievements in science in 2002.

For the schools, *Engel v. Vitale*[92] was a serious problem. The attorney general of Maryland asked the Court to "reevaluate" it—not a promising strategy for a brand new decision with only one dissent.[93] He also said the case could be distinguished, because no state official had written the Lord's Prayer.[94] Ward's response to *Engel* was to concede the unconstitutionality of asking children to recite the Lord's Prayer.[95] He said that prayer was a purely religious act, but that ten verses from the Bible were just Pennsylvania's way of teaching morality.

If the readings were only about morality and not religion, a Justice asked, why did Pennsylvania allow students to be excused? Ward said that students with religious objections were also excused from medical and dental exams. He did not get time to fully explain the logic of that answer, but the point seems to have been that students with religious objections could be excused even if the activity were purely secular.[96]

Henry Sawyer had many responses. Much of the Bible had nothing to do with morality. Much of it was about theology or ritual or other purely religious matters.[97] Some of its morality was controversial or difficult for children to understand without adult explanations, which were prohibited. His example here was "an eye for an eye and a tooth for a tooth."[98] Why would you excuse children from lessons in morality? And why would you teach morality without note or comment? Schools didn't teach anything else without note or comment.[99]

Horace Mann's stroke of genius had become self-defeating. When everyone agreed that the schools should teach religion and that non-Protestants didn't count, the Bible had been nonsectarian. But to be religiously neutral in 1963, the schools had to claim they were not teaching religion at all.

And that claim was belied by the safeguards originally installed to keep the teaching of religion nonsectarian. If the schools were teaching morality, literature, and history, there was no easy way to explain why students were excused.[100] And there was no way at all to explain why teachers were forbidden to comment.

The decision came down on June 17, with a workmanlike opinion by Justice Tom Clark and a long scholarly concurrence by Justice William J. Brennan.[101] Only Justice Potter Stewart dissented, and it was a limited dissent, asking only for further proceedings. He thought coercion to participate would be unconstitutional, and he recognized the risk of social coercion, but he wanted more evidence on that question. And he anticipated by twenty years the solution of the Equal Access Act,[102] allowing religious groups to meet after school while students not participating were free to leave or do other things.

The case caption said *School District of Abington Township v. Schempp*, even though *Schempp* had been the second case filed and therefore had the higher docket number. The opinion discussed the facts of *Schempp* in detail; it gave the facts of *Murray* cursory treatment. One reason is that in *Schempp* the Court had a full trial record; in *Murray*, it had only a complaint. But there was probably another reason.

The Schempps were an intact nuclear family who went to church every week. The Court said they were "of the Unitarian faith." They were "members of the Unitarian Church in Germantown ... where they regularly attend religious services."[103] The Court did not say that many Americans might question whether those services were really religious.

Madelyn Murray was an outspoken atheist, an unwed mother who had given up on America and applied for Soviet citizenship, and by many accounts a foul-mouthed confrontationalist with an anger-management problem.[104] It's not clear how much of this the Court knew, but it is a reasonable inference that Justice Clark decided the Schempps would make a better public face for a decision he knew would be unpopular.[105]

When the decision came down, Ellery Schempp was on his honeymoon, driving through South Dakota. He and his new wife heard about it on the car radio. They were hiking and camping on a student budget, with no money for motel rooms, but now they wanted to see the evening news. So they stopped at a motel and said, "Can we have a room for an hour? We just want to watch television." The clerk obviously didn't believe a word of it. So they tried to explain that their case in the Supreme Court had just been decided. The clerk didn't believe a word of that either. They found another motel, with a TV in the lobby, and watched the news there.[106]

Compliance with the Court's decision was slow; resistance was widespread. Statewide defiance was highly visible and quickly overcome;[107] local resistance was less visible and often went unchallenged.[108] But over time, compliance gradually increased. *Schempp* did not suddenly bring religious observances in public schools to a halt, but it sharply accelerated their long decline.[109]

Pennsylvania, and the Abington School District, issued immediate plans for compliance. The superintendent at Abington encouraged his teachers to talk with students about "the importance of law in the protection of our American and World civilization," and the school's "professional responsibility to act in accord with the decision."[110]

Ed Schempp lived into his nineties, long enough to be interviewed by Stephen Solomon. Ellery Schempp finished his Ph.D. at Brown and went on to a career as a research physicist. He is active in the Secular Humanist Society and he is still a member of the Unitarian-Universalist Church. Time keeps on slipping into the future; Ellery Schempp is now seventy-two years old and retired.

Time also heals wounds. In 2002, Ellery Frank Schempp was elected to the Abington

High School Hall of Fame for his achievements in science. The citation also noted one other accomplishment: "Initiated school prayer suit against Abington which was eventually decided by U.S. Supreme Court in 1963."[111]

ENDNOTES

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[1] *See generally* Sydney E. Ahlstrom, **A Religious History of the American People** 415-509 (Yale Univ. Press, 2d ed. 2004).

[2] John C. Jeffries, Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Mich. L. Rev.* 279, 298 (2001).

[3] *See generally* Alan P.F. Sell, **The Great Debate: Calvinism, Arminianism and Salvation** (Baker Book House 1983).

[4] Ahlstrom, *supra* note 1, at 442.

[5] *See id.* at 388-402.

[6] Jacob C. Meyer, **Church and State in Massachusetts From 1740 to 1833**, at 177-78, 209 (1930) (Russell & Russell, 1968 reprint); 3 Anson Phelps Stokes, **Church and State in the United States** 380 (Harper Bros. 1950).

[7] Noah Feldman, **Divided by God: America's Church State Problem—and What We Should Do About It** 61-62 (Farrar, Straus & Giroux 2005); Jeffries & Ryan, *supra* note 2, at 298-99, 301.

[8] Robert Michaelsen, **Piety in the Public School** 69 (Macmillan 1970).

[9] For accounts of the controversy over the Protestant Bible, see Charles Glenn, **The Myth of the Common School** 196-204 (Univ. Mass. Press 1988); Carl F. Kaestle, **Pillars of the Republic: Common Schools and American Society** 98-99 (Hill & Wang 1983); Michaelsen, *supra* note 8, at 85-89, 103-08, 122-33; 1 Stokes, *supra* note 6, at 825-32; Jeffries & Ryan, *supra* note 2, at 299-305.

[10] *Commonwealth v. Cooke*, 7 Am. L. Reg. 417, 418, 421 (Mass. Police Ct. 1859) (quoting a Massachusetts statute).

[11] Feldman, *supra* note 7, at 61-71.

[12] *Cooke*, 7 Am. L. Reg. at 423.

[13] *Donahoe v. Richards*, 38 Me. 379 (1854); *Cooke*, 7 Am. L. Reg. 417.

[14] The Blaine Amendment would have prohibited government financing of religious schools but preserved Bible reading in the public schools. *See* Feldman, *supra* note 7, at 71-85; Glenn, *supra* note 9, at 252-53; 2 Stokes, *supra* note 6, at 68-69, 722-28; Stephen K. Green, "The Blaine Amendment Reconsidered," 36 *J. Legal Hist.* 38 (1992).

[15] *See generally* Michael Feldberg, **The Philadelphia Riots of 1844: A Study of Ethnic Conflict** (Greenwood 1975).

[16] *See* Jonathan D. Sarna & David G. Dalin, **Religion and State in the American Jewish Experience** 181-203 (Notre Dame Press 1997).

[17] *See* Stephen D. Solomon, **Ellery's Protest: How One Young Man Defied Tradition and Sparked the Battle over School Prayer** 120-26 (Univ. Mich. Press 2007); Kaestle, *supra* note 9, at 169-70; Michaelsen, *supra* note 8, at 89-98; Samuel Windsor Brown, **The Secularization of American Education** 68-81 (1912) (Russell & Russell 1967 reprint); *Bd. of Educ. v. Minor*, 23 Ohio St. 211 (1872) (upholding decision of Cincinnati school board to remove school-sponsored prayer and Bible reading from public schools).

[18] *People ex rel. Ring v. Bd. of Educ.*, 92 N.E. 251 (Ill. 1910); *State ex rel. Weiss v. Dist. Bd.*, 44 N.W. 967 (Wis. 1890).

[19] Solomon, *supra* note 17, at 129-30.

[20] 1913 Pa. Laws 226 (Act No. 159). The text of the Act as amended through 1958 is quoted in *Schempp v. Abington Sch. Dist.*, 177 F. Supp. 398, 399 n.3 (E.D. Pa. 1959).

[21] This paragraph is based on Solomon, *supra* note 17, at 19, 22-23, and *Schempp*, 177 F. Supp. at 399-400 & nn.8-10.

[22] Solomon, *supra* note 17, at 23; *Schempp*, 177 F. Supp. at 401 ("morning devotions").

[23] Solomon, *supra* note 17, at 13.

[24] *Id.* at 13-14.

[25] "About Our Unitarian-Universalist Association of Congregations," http://www.uua.org/association/index.shtml.

[26] The preceding six paragraphs are based on Solomon, *supra* note 17, at 13-17.

[27] *Id.* at 25.

[28] *Id.* at 28. The preceding four paragraphs are based on *id.* at 21-28.

[29] *Id.* at 30. The preceding five paragraphs are based on *id.* at 1-4, 28-30, 61, and *Schempp v. Abington Sch. Dist.*, 177 F. Supp. 398, 400-01 (E.D. Pa. 1959).

[30] This paragraph is based on Solomon, *supra* note 17, at 32-33.

[31] *Zorach v. Clauson*, 343 U.S. 306 (1952); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952) (dismissing a challenge to school-sponsored religious exercises for lack of standing); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (announcing a strong commitment to separation of church and state, but upholding public funding of transportation to both public and religious high schools).

[32] 333 U.S. 203 (1948) (invalidating program of religious instruction taught by local churches and synagogues on

public school grounds, where students who chose not to attend were held in study hall). *See generally* Dannell A. McCollum, **The Lord Was Not on Trial: The Inside Story of the Supreme Court's Precedent-Setting McCollum Ruling** (Americans for Religious Liberty 2008).

[33] 343 U.S. 306 (1952) (upholding program that was substantially identical to that in *McCollum* except that religion classes were taught off public school property). For doctrinal analysis, *see* Douglas Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Nw. U. L. Rev.* 1, 33 (1986). For analyses in terms of social and political issues of the time and interactions among the Justices, *see* James E. Zucker, Note, "Better a Catholic Than a Communist: Reexamining *McCollum v. Board of Education* and *Zorach v. Clauson*," 93 *Va. L. Rev.* 2069 (2007); Samuel A. Alito, Note, "The 'Released-Time' Cases Revisited: A Study of Group Decisionmaking by the Supreme Court," 83 *Yale L.J.* 1202 (1974).

[34] Solomon, *supra* note 17, at 35.

[35] *Id.*

[36] John Jay Osborne, **The Paper Chase** (Houghton Mifflin 1971); **The Paper Chase** (film version, Twentieth Century Fox 1973).

[37] The preceding six paragraphs are based on Solomon, *supra* note 17, at 31-40.

[38] He litigated, advised others on when and how to litigate, and wrote what was then the leading book. See *id.* at 42-44; Leo Pfeffer, **Church, State, and Freedom** (Beacon 1953).

[39] *Carden v. Bland*, 288 S.W.2d 718 (Tenn. 1956) (upholding Tennessee's Bible-reading statute).

[40] 28 U.S.C. §1253 (2006) (authorizing direct appeals from three-judge courts); 28 U.S.C. §2281 (repealed) (requiring that any challenge to the constitutionality of state statutes be heard by a three-judge court). Section 2281 was repealed by Pub. L. 94-381, 90 Stat. 1119 (1976).

[41] The preceding eight paragraphs are based on Solomon, *supra* note 17, at 41-63.

[42] The quotations in this paragraph are from *id.* at 62.

[43] The preceding two paragraphs are based on *id.* at 61-62, 146, and *Schempp v. Abington Sch. Dist.*, 177 F. Supp. 398, 401 (E.D. Pa. 1959).

[44] This paragraph is based on Solomon, *supra* note 17, at 62-69.

[45] The preceding ten paragraphs are based on *id.* at 132-34, 146-47, and *Schempp*, 177 F. Supp. at 400 & n.11.

[46] Pope Pius IX, **Ineffabilis Deus** (1854); **Catechism of the Catholic Church** ¶¶ 490-93 (Thomas More 1994) . For the full text of the encyclical, in a somewhat different translation, see **The Immaculate Conception**, http://www.papalencyclicals.net/Pius09/p9ineff.htm.

[47] Solomon, *supra* note 17, at 149.

[48] *Id.* at 150.

[49] The preceding four paragraphs are based on Solomon, *supra* note 17, at 148-51, and *Schempp*, 177 F. Supp. at 400.

[50] Solomon, *supra* note 17, at 158; *Schempp*, 177 F. Supp. at 401.

[51] *Schempp*, 177 F. Supp. at 401 n.14; *see* Solomon, *supra* note 17, at 158.

[52] Solomon, *supra* note 17, at 158; *see Schempp*, 177 F. Supp. at 401 n.14.

[53] The preceding four paragraphs are based on Solomon, *supra* note 17, at 156-63, and *Schempp*, 177 F. Supp. at 402 & nn.13-14.

[54] Weigle's credentials are based on 2 **Who's Who in America** 3242-43 (38th ed. 1974-75), and *Schempp*, 177 F. Supp. at 402 & n.15.

[55] Solomon, *supra* note 17, at 164.

[56] *Id.* at 165.

[57] *Id.* at 166.

[58] The quotations in this paragraph are from *id.* at 167.

[59] *Id.* at 169.

[60] *Id.* at 170-71; *Schempp v. Abington Sch. Dist.*, 177 F. Supp. 398, 404 n.18 (E.D. Pa. 1959).

[61] The preceding seven paragraphs are based on Solomon, *supra* note 17, at 163-71.

[62] *Id.* at 185.

[63] The preceding four paragraphs are based on *id.* at 175-88, and on Trial Transcript 326-402, *Schempp v. Abington Sch. Dist.*, Mar. 12, 1959 (Civil Action No. 24119, E.D. Pa.) (oral argument of Henry Sawyer for the Schempps).

[64] *Schempp*, 177 F. Supp. at 403-06.

[65] The quotations in this paragraph are from *id.* at 406.

[66] *Id.* at 406-07.

[67] Solomon, *supra* note 17, at 207.

[68] The preceding three paragraphs are based on *id.* at 201-07.

[69] *Id.* at 209.

[70] 1959 Pa. Laws 1928, 1929 (Act No. 700). The text of the Act as amended in 1959 is quoted in *Schempp v. Abington Sch. Dist.*, 184 F. Supp. 381, 382 (E.D. Pa. 1960).

[71] Solomon, *supra* note 17, at 208.

[72] *Abington Sch. Dist. v. Schempp*, 364 U.S. 298 (1960).

[73] *Schempp v. Abington Sch. Dist.*, 195 F. Supp. 518 (E.D. Pa. 1961).

[74] *Schempp v. Abington Sch. Dist.*, 201 F. Supp. 815, 818 (E.D. Pa. 1962).

[75] The preceding three paragraphs are based on Solomon, *supra* note 17, at 232-37.

[76] *Schempp*, 201 F. Supp. at 818-19.

[77] Solomon, *supra* note 17, at 242.

[78] The preceding two paragraphs are based on *id.* at 237-38, 241-42.

[79] *Donahoe v. Richards*, 38 Me. 379 (1854).

[80] For other accounts, see Thomas C. Berg, "The Story of the School Prayer Decisions: Civil Religion under Assault," in **First Amendment Stories** 193 (Richard Garnett & Andrew Koppelman, eds.) (Foundation Press 2011); Lucas A. Powe, **The Warren Court and American Politics** 358-63 (Harvard Press 2000).

[81] 191 N.Y.S.2d 453 (Sup. Ct. 1959), *aff'd*, 206 N.Y.S.2d 183 (App. Div. 1960), *aff'd*, 176 N.E.2d 579 (N.Y. 1961). *See generally* Bruce J. Dierenfield, **The Battle Over School Prayer: *How Engel v. Vitale* Changed America** (Univ. Press of Kansas 2007).

[82] *Murray v. Curlett*, 179 A.2d 698 (Md. 1962).

[83] Solomon, *supra* note 17, at 220-28, 251-53, 264.

[84] 370 U.S. 421 (1962).

[85] On Whittaker's retirement and Frankfurter's strokes, see Powe, *supra* note 80, at 205.

[86] 330 U.S. 1 (1947).

[87] 143 So. 2d 21 (Fla. 1962).

[88] *Id.*

[89] *Murray v. Curlett*, 371 U.S. 809 (1962).

[90] *Abington Sch. Dist. v. Schempp*, 371 U.S. 807 (1962).

[91] The preceding five paragraphs are based on Solomon, *supra* note 17, at 189-92, 210-19, 253-58, 267.

[92] 370 U.S. 421 (1962).

[93] 57 **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** 990 (Philip B. Kurland & Gerhard Casper, eds.) (University Publications of America 1975).

[94] *Id.* at 995-96.

[95] *Id.* at 1026-27.

[96] *Id.* at 1020.

[97] *Id.* at 1036, 1054.

[98] *Id.* at 1054; Solomon, *supra* note 17, at 278.

[99] **Landmark Briefs and Arguments**, *supra* note 93, at 1036-37. The Supreme Court argument is reviewed in Solomon, *supra* note 17, at 268-80.

[100] The school could have said that it was voluntarily accommodating the free exercise interests of students who objected, as Ward apparently tried to imply. There was a long tradition of such exemptions in other contexts, but little development of such a tradition in public schools. And there was little in the way of free exercise precedent to help theorize such exemptions. The Supreme Court had not decided any case that unambiguously recognized a right to exemption from laws that burden the free exercise of religion. It would come down the same day as *Schempp*. *Sherbert v. Verner*, 374 U.S. 398 (1963).

[101] *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

[102] 20 U.S.C. §§4071 *et seq.* (2006).

[103] Both quotations are from *Schempp*, 374 U.S. at 206.

[104] Solomon, *supra* note 17, at 193-96, 220, 238-39, 252-53, 272; Berg, *supra* note 80, at 217-18.

[105] *See* Thomas M. Mengler, "Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case," 6 *Const. Comm.* 331, 338-46 (1989).

[106] This paragraph is based on Solomon, *supra* note 17, at 305-06.

[107] *See Chamberlin v. Dade County Bd. of Pub. Instruction*, 160 So. 2d 97 (Fla. 1964) (distinguishing *Schempp* and upholding Bible reading in Florida public schools), *rev'd*, 377 U.S. 402 (1964); *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964) (invalidating Idaho's Bible-reading statute); *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964) (invalidating Delaware's Bible-reading statute).

[108] *See generally* Kenneth M. Dolbeare & Phillip E. Hammond, **The School Prayer Decisions: From Court Policy to Local Practice** (Univ. Chicago Press 1971); H. Frank Way, Jr., "Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases," 21 *W. Pol. Q.* 189 (1968).

[109] *See* Berg, *supra* note 80, at 223-24.

[110] Solomon, *supra* note 17, at 310.

[111] The preceding two paragraphs are based on *id.* at 28 & n.49, 348.

The Story of *Kedroff v. St. Nicholas Cathedral*

RICHARD W. GARNETT

On February 1, 1952, a self-described "twenty-seven-year-old bachelor" recently graduated from the Stanford Law School, having just completed the long drive from Wisconsin in his 1941 Studebaker, reported for duty in Washington, D.C. as a law clerk to Justice Robert H. Jackson. It was, as the young man would later put it, "a highly prized position; I was surprised to have been chosen for it, and I did not want to be late for the start of my work." His clerkship for Justice Jackson was, William H. Rehnquist wrote, his "first job as an honest-to-goodness ... lawyer." Not too shabby.[1]

Orientation was apparently a no-nonsense business for new law clerks at the Supreme Court in 1952: After walking around the building to admire its construction and design, he reported to the Marshal's Office, and was then escorted to Justice Jackson's chambers and to the small office that he would share with his co-clerk, George Niebank. Rehnquist recalled having spent the morning of his first day on the job working on a petition for *certiorari* in a federal drug case, and worrying a bit both about his "lack of any systematic typing skill" and about the fact that he had never studied "federal jurisdiction" in law school. Around lunchtime, though, at the invitation of his co-clerk, he made a brief appearance in the courtroom and was duly "impressed ... by the magnificence of [the] surroundings." After describing in his memoir the scene and ceremony, and providing thumbnail biographical sketches of the then-sitting Justices, the future Chief Justice interrupted himself with the memory of being told it was "time to go to lunch" and dutifully departing the courtroom for the cafeteria.[2]

It is striking and, given the interests of those who write and comment about the Court and its work, perhaps even amusing that Rehnquist said nothing about the case that was actually argued on his first day on job. That argument, it turns out, resulted in a now-famous religious-liberty ruling, *Zorach v. Clauson*, in which the Court rejected a constitutional challenge to a New York statute providing for the "release" of public-school pupils to attend off-site religious-education

classes. "We are a religious people," Justice Douglas memorably wrote for the Court, "whose institutions presuppose a Supreme Being." Accordingly, he reasoned, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[3] No small part of the Court's First Amendment work during the last half-century —including, of course, Rehnquist's own contributions—has involved the delicate and divisive question of religion's place in public schools and, in a way, the meaning and implications of Justice Douglas's assertion in *Zorach* about our national character. And yet, Rehnquist's otherwise meticulous account of his first day as a law clerk (he even records his afternoon snack of cherry pie a la mode) includes nothing--not a word—about the case.

Another First Amendment case was also on the docket that day, though only for some housekeeping matters, so it is easier to understand why it (unlike the "mysterious" maple syrup in the Wooster, Ohio diner where he had nervously eaten breakfast the day before)[4] escaped Rehnquist's mention. That case would eventually be argued and reported, later in the year, as *Kedroff v. St. Nicholas Cathedral*.[5] And while it would probably not be accurate to include *Kedroff* among the sleeper cases of the kind that Justice Rehnquist would later enjoy comparing to Thomas Gray's "flowers which are born to blush unseen,"[6] few would disagree with the judgment that, First Amendment-wise, *Kedroff* is no *Zorach*. I want to offer, however, a different view.

Strictly speaking, the *Kedroff* case emerged from a land-use dispute, an ejectment action, involving the "right to possess and use certain church property known as Saint Nicholas Cathedral of the Russian Orthodox Church located on East 97th Street in the city of New York."[7] Generally speaking, such a matter, as Justice Jackson complained in his dissenting opinion, is almost paradigmatically one of only local concern, and it would seem hardly "within the proper province of [the] Court."[8] In fact, however, in striking down a New York law that purported to transfer control of the Cathedral from one religious authority to another, the Court majority's decision affirmed and vindicated both the core and the aim of church-state separation, correctly understood. In so doing, as Prof. Mark DeWolfe Howe recognized in a short essay published in the *Harvard Law Review* soon after the decision, the Court engaged "a classic problem of political theory," that is, the "pluralistic thesis ... that government must recognize that it is not the sole possessor of sovereignty[;]"[9] that "Caesar ... is only Caesar, [and so should] forswear[] any attempt to demand what is God's."[10]

Heady stuff for an ejectment dispute![11] As I see it, John Kedroff's real-estate case complements well and matters for reasons similar to those that make so important yet another case, one that *did* capture young William Rehnquist's (and many others') attention during the spring of 1952; one that law students, lawyers, scholars, and jurists alike place near the top of their "Supreme Court's greatest hits" lists. In *Youngstown Sheet & Tube*, the Justices famously, though not with one voice, declared that President Truman's Korean War–era seizure of most of the nation's steel mills was unconstitutional. And, even if the decision's implications remain unclear, its rhetorical and symbolic force is not.[12] The case says and means, among other things, that "the fears of power and the hopes for freedom"[13] that have long animated and shaped our constitutional experiment require careful, vigilant attention to the distinction, division, and separation among authorities. It illustrates the fact—one to which Justice Rehnquist was always attentive—that "[t]he genius of the American Constitution lies in its use of structural devices to preserve individual liberty."[14]

The "separation" of President Truman's executive power from the legislative powers vested in Congress is, the Justices insisted in *Youngstown*, one such device. The "separation" of religious and political authority, of "church" and "state," of New York's police power and the appropriate autonomy of the Russian Orthodox Church is, the Court reminded us in *Kedroff*, another.

I.

The *Kedroff* story is, among other things, a story about the carrying into Russia of powerful, provocative, and world-transforming ideas by two charismatic men named Vladimir, whose lives were separated by nearly a millennium. Although some traditions have it that St. Andrew the Apostle visited and blessed what is today the city of Kiev, in modern-day Ukraine, it is conventional to date the "conversion of Kiev" —the *Rus'*—to the year AD 987.[15] According to the medieval **Tale of Bygone Years**, also known as the **Chronicle of Nestor**, Prince Vladimir the Great decided, after studying and ruling out other religious options,[16] to invite missionaries from Byzantium to evangelize and baptize his people, thereby securing the title "Equal to the Apostles."[17] Nine centuries later, a second Vladimir—a Russian-born lawyer named Vladimir Ilyich Lenin—returned home from exile in April 1917 to lead the Bolsheviks in what he hoped would be a "world-wide Socialist revolution[.]" And the next year, in his decree "On the Separation of the Church from the State and the School from Church," he purported to undo what Prince Vladimir had done by abolishing the privileges and seizing the properties of the Russian Orthodox Church and mandating official atheism for the entire new Soviet state.[18] In so doing, he prompted the passage of the New York law struck down in *Kedroff*.

The Russian Orthodox Church's first mission on what is now U.S. soil was established in 1794, on Kodiak Island, in Alaska. About fifty years later, the Cathedral of St. Michael (above) was built in Sitka, Alaska.

Russian Orthodoxy is as old in North America as is the United States. The Church's first mission on the continent was established in 1794, on Kodiak Island in Alaska, or "Russian America." About fifty years later, the Cathedral of St. Michael was built in Sitka, Alaska—today a quick stop for cruise ships—and served as the seat for the Bishop, whose jurisdiction stretched more than 2,000 miles from southeast Alaska to Kamchatka, across the Bering Sea on Russia's eastern coast. As it happens, I grew up in Alaska, and can report that the imprint of Russian Orthodoxy on the state has proved indelible. Although, I admit, I could not "see" Russia from my hometown of Anchorage, school field trips and travels with my father to far-flung villages like Ninilchik, Eklutna, Unalaska, Seldovia, and the Pribilof Islands helped to make Russian Orthodoxy a real, if exotic and a bit mysterious, presence. As Justice Reed noted in his opinion for the Court in *Kedroff*, after entering the "missionary field in the Aleutian Islands and Alaska … [l]ate in the Eighteenth Century," the Church later spread, "with the Slavic immigration to our eastern cities, particularly to Detroit, Cleveland, Chicago, Pittsburgh and New York."[19]

Eventually, in 1901, thanks in part to donations from Tsar Nicholas II and smaller contributions from believers all across Russia, the cornerstone for St. Nicholas Cathedral on

New York City's Upper East Side was laid by Archbishop (now Saint) Tikhon, who was then the head of the "Diocese of the Aleutians and Alaska." The beautiful, red brick, onion-domed Cathedral—with its imposing, Muscovite exterior and luminous blue-and-gold-leaf worship space—was completed a few years later and designated as the seat for the Russian Church in America. Archbishop Tikhon returned to Russia a few years later and on November 5, 1917—the same day that Lenin proclaimed the victory of the Revolution—he was selected as the Church's Patriarch. Justice Stanley F. Reed, in his opinion, referred understatedly to the "political disturbances" of the time, noted that the Church "was drawn into this maelstrom[,]" and observed further that "[t]he Russian upheaval caused repercussions in the North American diocese."[20] Indeed, it did.

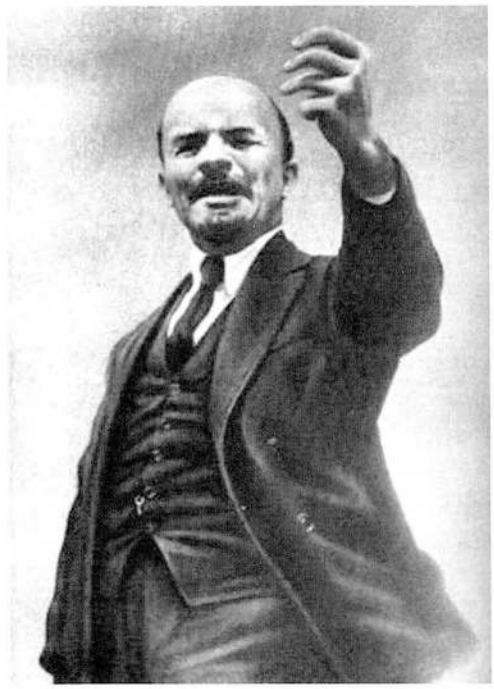
These "repercussions" and their context were, to put it mildly, complicated, and it makes sense, for present purposes, to simplify and streamline them dramatically rather than to present them in—as a memorandum in Justice Reed's case file put it—their "gruesome detail." The big question was this: Given that Archbishop Tikhon and his successors had been appointed by the "Holy Synod of Russia," and in light of the aggressive and intrusive Soviet moves against the Church that followed the Revolution —"who is in charge?" As Justice Reed recounted, Russian Orthodox believers in the United States had, by the time of the Soviet Revolution, grown "accustomed to our theory of separation between church and state" and, what's more, they "[n]aturally … did not cling to a hierarchy identified with their country of remote origin with the same national feeling that moved their immigrant ancestors."[21] Perhaps. In any event, three years after the Revolution, as persecution of the Church in Russia increased, the beleaguered Patriarch issued "Ukase [Edict] 362," which—anticipating increased Soviet interference with Church authorities at home—authorized dioceses outside Russia to act autonomously, to the extent necessary, and subject to eventual confirmation and approval.[22] Accordingly, in 1924, a conference or "sobor" was held in Detroit—the "Fourth All-American Sobor" —which, among other things, declared the Russian Orthodox

The Most Holy Synod, the highest governing body of the Russian Orthodox Church, was photographed at a meeting in 1917 to elect a new patriarch.

diocese in America to be a "temporarily self-governing Church[.]" "This was followed," Justice Reed reported, "by the declarations of autonomy of successive sobors since that date, a spate of litigation concerning control of the various churches and occupancy of ecclesiastical positions, the New York legislation [at issue in *Kedroff*], and this controversy."[23]

So what, exactly, was the "controversy"?

After the end of World War II, the Church authorities in Russia let it be known to the believers and churches in America that the time had come for re-unification. One requirement for this reunion, though, was that the Church in America "abstain 'from political activities against the U.S.S.R.'"[24] At another All-American Sobor—this time in Cleveland—the invitation to reunite with Moscow was rejected by the apparently patriotic faithful. "This ended [for a time] the efforts to compose the differences between the Mother Church and its American offspring [,]"[25] and with this end came, eventually, the interesting and delicate problem of deciding who would have the right to worship within—and, more important, who would exercise religious authority over—St. Nicholas Cathedral. Benjamin Fedchenkoff, who had been appointed Archbishop of North America in 1934 by the Patriarch in Moscow, claimed the right to use and occupy the Cathedral. However, the same right was asserted by a "corporation created in 1925 by an act of the Legislature of New York"[26] to acquire the Cathedral for the archbishop chosen by the assertedly autonomous American churches. The resolution of the dispute depended, as the Court recited, on "whether the appointment of Benjamin by the Patriarch, or the election of the Archbishop for North America by the convention of the American churches, validly selects the ruling hierarch for the American churches." New York's high court had ruled in favor of the latter, relying on a 1945 addition to the state's Religious Corporations Law that, in effect, put the Russian Orthodox churches in New York under American, rather than Russian, control.



One year after returning from exile in 1918, Vladimir Lenin abolished the privileges and seized the properties of the Russian Orthodox Church, mandating official atheism for the entire new Soviet state.

So, who was John Kedroff? I am afraid there is actually not much to say about him. He appears to have been the under achieving son of John S. Kedrovksy who had, in the 1920s, been installed as Archbishop of North America by—as the New York Court of Appeals put it—a Communist-backed splinter group of Orthodox priests that styled itself the "Renovated" or "Living" church and that had, for a time, seized control of Church administration in Moscow. Kedrovsky had managed, through an earlier round of land title litigation, in 1926 to gain control and possession of St. Nicholas from "the rightful Archbishop Platon." Unfortunately for him, though, the Soviets lost interest in the "living Church" the next year, leaving Kedrovsky's second-choice successor, John Kedroff, as the "appointee of a nonexistent church" and also an inviting target of the ejectment action,

backed by the New York religious-corporations law, brought by representatives of the autonomous Church in America. In what seems to have been an effort to strengthen his case, Kedroff obtained the support of, and was reordained (or ordained) a priest by, Archbishop Benjamin—who was, again, the appointee of the Church authorities in Russia. Kedroff "gave" the cathedral—and his role in the lawsuit—to Benjamin. And so the issue was joined, while John Kedroff himself faded into the background and eventually—as the case wandered through various courts until 1960—disappeared from the caption. In 1954, he moved to the San Fernando Valley to help out at a brand-new, English-speaking Orthodox Church, Saint Innocent, in Tarzana, California. He continued his ministry in California until his death at age fifty-four in 1973.

II.

The question finally presented to the Justices in *Kedroff* was whether a New York law purporting to codify the governance of and re-organize the Russian Orthodox Church in that state and, indeed, in the United States was "invalid under the constitutional prohibition against interference with the exercise of religion."[27] At that time, of course, the application of this prohibition to the states via the Fourteenth Amendment was still a relatively recent development.[28] The New York Court of Appeals was impressed by the claim that the "Moscow Patriarchate" was no longer functioning as a "true religious body" and was instead a "tool of the Soviet government, primarily designed to implement foreign policy." Certainly, there was no shortage of evidence supporting this claim. And so, that court thought, any impact on religious liberty was indirect, and easily justified by obvious Cold War necessities.

The Supreme Court was happy to acknowledge that the Legislature had acted out of concern regarding the Soviet state's "control over the central church authorities," in accord with a desire to assist the American church in its efforts to "protect its pulpits and faith from such influences," and "on the theory that [the Russian Church in America] would most faithfully carry out the purposes of the religious trust." Still, the bottom line was clear: "Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state."[29]

But, why? Certainly, the relevant precedents were thin and most of Justice Reed's discussion was dedicated to the 1872 decision in *Watson v. Jones* which, like *Kedroff*, involved a state-court lawsuit between rival religious claimants to property—the Walnut Street Presbyterian Church in Louisville, Kentucky—and grew out of divisions in a religious community caused by a grave, human-rights-denying evil and political efforts to restrain it.[30] *Watson* was not, of course, a case about the First and Fourteenth Amendments, but it did invoke a "broad and sound view of the relations of church and state under our system of laws," according to which "whenever the questions of discipline, or of

Nicholas Cathedral became the seat of the Russian Orthodox Church in America when it was completed in 1917. Following the Communist turmoil in the Soviet Union, the New York legislature passed a statute transferring control over the church from the Moscow synod to American control.

faith, or ecclesiastical rule, custom, or law have been decided by the highest ... church judicators to which the matter has been carried, the legal tribunals must accept such decisions as final[.]"[31] *Watson*, Justice Reed reminded his readers, "radiate[d] ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, ... must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."[32] As framed by the Court, the New York law at issue—again, conceding that it reflected the legislature's good-faith effort to responsibly counter Soviet attempts to control and manipulate the Church, both at home and in America— "passe[d] the control of matters strictly ecclesiastical from one church authority to another" and thereby "intrude[d] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[33]

Justice Frankfurter wrote separately, underscoring and casting in eloquent and evocative terms the large principles and dynamics at issue in the case: "What is at stake here," he insisted, "is the power to exercise religious authority." What New York had done, at the end of the day, was choose sides—and assist powerfully the side chosen —in a religious dispute. "In doing so," Justice Frankfurter noted, "the legislature effectively authorized one party to give religious direction not only to its adherents but also to its opponents."[34]

Justice Frankfurter moved next to address what had to have been, at that time, an elephant in the room, namely, that many Americans would have said, if asked, that the Roman Catholic Church in America was every bit as under the thumb of a foreign power as was the Russian Orthodox. He observed that "[t]he fear, perhaps not wholly groundless, that the loyalty of citizens might be diluted by their adherence to a church entangled in antagonistic political interests, reappears in history as the ground for interference by civil government with religious attachments." "Under our Constitution," though, "it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion."[35]

To Justice Jackson, though, this ejectment action was just, and only, that: an ejectment action. "If the Fourteenth Amendment is to be interpreted to leave anything to the court of a state to decide without [the Court's] interference, I should suppose it

CHURCH ENDS MOSCOW TIE

Russian Orthodox Communion in U. S. Will Be Independent

SPRINGFIELD, Mass., Oct. 13 (AP)—The Russian Orthodox Church in America announced today that it was breaking all ties with Moscow and would henceforth function independently of Russia.

Leaders of the church, meeting for the first time on their own initiative, named Metropolitan Bishop Joseph Krimowics of Springfield as Patriarch of the church in the United States.

Metropolitan Bishop Konstantin Jaroshevich was chosen Patriarch of the church in all foreign countries.

Archbishop Joseph Zielonka of the Old Catholic Church of New Jersey was elevated to Hierarchical Bishop and Bishop Damaskinos of California to Archbishop.

On October 14, 1950, *The New York Times* announced that the Russian Orthodox Church in America was severing ties with Moscow. The church leadership in the Moscow synod had wanted to maintain control, and John Kedroff represented a group of parishioners who supported its efforts to retain control over St. Nicholas Cathedral.

would be claims to ownership or possession of real estate." One has to assume that this view would have been shared and discussed with his law clerk, William H. Rehnquist. Given that he was then relatively recently returned from serving as the United States' chief prosecutor of Nazi war criminals at Nuremberg, Justice Jackson was far from naive about the grim realities of totalitarian aspirations. Indeed, he asserted that the "Cathedral was incorporated and built ... under the regime of a state-ridden church in a church-ridden state" and that while "[t]he Bolshevik Revolution may have freed the state from the grip of church, ... it did not free the church from the grip of the state. It only brought to the top a new master for a captive and submissive ecclesiastical establishment."[36] Still, the case remained, for him, a state-law-governed property dispute among contending parties; that the parties were contending over a Cathedral did not, as the saying goes, "make a federal case out of it."

In words that have a contemporary ring,[37] Justice Jackson pushed back hard against what he understood to be the claim that "New York law must yield to the authority of a foreign and unfriendly state masquerading as a spiritual institution."[38] Where the Court saw civil intrusion into a religious dispute, Justice Jackson saw the imposition, by a secular court, in the name of deference, of ecclesiastical law over the legislatively expressed policy of the relevant state. As for the claim that the New York law violated the Fourteenth Amendment's religious-freedom guarantee, Justice Jackson sniffed, "I find this contention so insubstantial that I would dismiss the appeal."[39]

* * * * *

This did not end the wrangling. Eight years later, the matter was again before the Supreme Court—under a different name—as John Kedroff's patron, Archbishop Benjamin, had handed on both his pastoral and litigation duties to a successor. In a *per curiam* opinion, the Justices noted that the New York courts, on remand after *Kedroff*, had ruled again against the Patriarch of Moscow. This time, after a trial that established the fact of the "domination ... of the Patriarch by the secular authority in the U.S.S.R.," the state's court of appeals had ruled that "his appointee could not under the common law of New York validly exercise the right to occupy the Cathedral."[40] The Justices were, it appears, unimpressed by the state court's effort to evade the principles applied in *Kedroff* and none of them, evidently, was moved to reprise Justice Jackson's defense of the state's control over property-law disputes. *Cooper v. Aaron* was still fairly recent, and the Court was emphatic that a state may not attempt to do through its judiciary what it has been forbidden to do, by the Court, through its legislature.

III.

In fairness to the great Justice Jackson, it could well be that it is only with the benefit of hindsight that the facts and circumstances surrounding *Kedroff*, its context, and later developments in First Amendment doctrine and constitutional law that *Kedroff* appears to us, as it should, as so important and so worth a story. Looking back, it is striking and instructive that even as the Cold War against Soviet aggression, expansion, and influence was ramping up—and notwithstanding what had to have been the Justices' clear-eyed appreciation of the realities of the relationship between the Soviet state and the Church authorities in Moscow—the Court nevertheless held the First Amendment line against an effort by politically accountable actors to strike back in defense of what they perceived as American interests, values, and security.

Only days before the decision in *Kedroff* was handed down, the Court had denied *certiorari* in the cases of Julius and Ethel

Rosenberg, who had been tried and sentenced to death for illegally sharing the United States' nuclear secrets with the Soviets.[41] The North Korean People's Army was brutalizing American prisoners-of-war through such propaganda stunts as the 1952 P.O.W. "Olympics." That year, Senator Joseph McCarthy published his book, **The Fight for America**. Arthur Miller would soon put on his play, **The Crucible**, and the stage version of Arthur Koestler's **Darkness at Noon** had opened in New York the year before. In 1951, in *Dennis v. United States*, the Court had rejected a First Amendment challenge to the federal Smith Act, which outlawed teaching and advocating the overthrow of the United States government, emphasizing among other things the "power of the Congress to protect the Government of the United States from armed rebellion" and Communist conspiracy.[42] This is not the environment or time when one might have expected the Court to invoke, on behalf of an allegedly Soviet-controlled church, its relatively newly claimed role as protector of religious freedom in the states. When the decision was announced, even the attorney for the Cathedral—that is, for those appointed by the Church authorities in Russia —was quoted in *The New York Times* as insisting that he was "uncompromising" in his opposition to communism. Still, he insisted, "the church must be preserved."[43]

What's more, *Kedroff* was decided at a time that was not particularly ripe for institutional religious freedom claims to deference-worthy authority over property brought by "foreign" churches with governing "hierarchies." (Indeed, Prof. Philip Hamburger has described the deep roots of anti-Catholicism in American law relating to church property and incorporation.)[44] As Justice Frankfurter's opinion hinted, if somewhat gently, the fight over the use of St. Nicholas Cathedral undoubtedly set off in the minds of many the alarms that Paul Blanshard had sounded in his then-recent blockbuster book, **American Freedom and Catholic Power**,[45] and also its best-selling follow-up, **Communism, Democracy, and Catholic Power**.[46] These books described and stoked not only the grumblings of cranks and bigots, but "fears widely shared in the liberal Protestant 'Establishment' in America in the years immediately after the Second World War."[47] As Prof. Thomas Berg has established, many "intellectuals around mid-century came to define themselves heavily in terms of opposition to the Church, which they viewed as an authoritarian force that threatened reasoned inquiry, democratic politics, and social unity."[48] These "intellectuals" — liberal or not—included members of the Supreme Court, and it is clear that *Everson* and *McCollum*, the Court's foundational Establishment Clause cases, were influenced by some of the Justices' anti-Catholicism and their worries about the un-American content and effects of parochial schools.[49] Rev. Fulton J. Sheen's sunny and appealing television personality, presented to millions in the early 1950s thanks to his **Life Is Worth Living** program, offered hints of changing attitudes, but such changes, before the Second Vatican Council and the election of President Kennedy, were not yet widely evident.

If we step back and expand the frame through which we view *Kedroff*'s context, we can find confirmation for Prof. Howe's suggestion that the decision is particularly striking given the extent to which its premises supplement, assuming they do not contradict, those that structured the Founding-era debates about religious freedom. "It would seem clear," he proposed, "that the bills of rights of state and federal constitutions were designed to secure individuals, not groups, from certain types of governmental action ... The framers, one suspects, had been so thoroughly educated by Rousseau that they were fearful that the recognition of rights in associations would threaten not only the authority of government but the liberty of individuals."[50]

Justice Stanley F. Reed wrote the opinion for the Court, ruling that the New York law that transferred control of the church violates the Fourteenth Amendment by limiting the parishioners' rights to freely exercise their religion. He is pictured here being photographed after his appointment to the Court in 1938.

Consider, for example, the Court's landmark *Everson* and *McCollum* decisions. In each case, notwithstanding the fact that the Court allowed the challenged program in the former and invalidated it in the latter, the relevant interest to be protected through judicial enforcement of the no-establishment rule is that of the individual in avoiding unwelcome burdens on his private conscience. In *Everson*, Justice Black had to satisfy himself that the allocation of public funds to help defray the bus-transportation costs of children attending public schools did not offend the Madisonian principle that such spending violates the consciences of objecting taxpayers;[51] in *McCollum*, he was not able to so conclude.[52] And if the good at which this enforcement aimed was the protection of individuals' interest in protecting their conscience, the danger that threatened in each case was not-so-subtly pinned to the power and ambitions of institutional religion, specifically, those of the Roman Catholic Church. In *Kedroff*, by contrast, there is no suggestion that it is the individual-liberty interests of either would-be occupant of the Cathedral that was at stake; instead, the New York statute was condemned by Justice Reed because it "directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy."[53] Prof. Howe was right: "If this statement is to be taken with full seriousness it has large significance[,]" because "[t]he liberty of self-government is in its nature and purpose quite unlike the liberty of belief which the Constitution secures to individuals."[54]

Even a quick glance back over the Court's sixty-five or so years of church-state decisions since *Everson* reminds us that "the church" is often curiously absent in our hot-button, high-profile "church-state" controversies: May governments allow privately owned menorahs and nativity scenes in public parks,

or display the Ten Commandments on the grounds or in the halls of public buildings, or include the words "under God" in the Pledge of Allegiance? May the state ban ritual animal sacrifice, or the religiously motivated use of hallucinogenic tea, or peyote? May a child in public school read a Bible story from his favorite book, or hand out pencils with a religious message, or start a Christian club at her public school? And so on.

To be sure, these and similar disputes involve important questions about the freedom of conscience and the powers and prerogatives of governments. The image of the lone religious dissenter, heroically confronting overbearing officials or extravagant assertions of state power, armed only with claims of conscience, is evocative and timeless. No account of religious freedom would be complete if it neglected such clashes or failed to celebrate such courage. And yet, something is missing—something that is center-stage, however, in *Kedroff*.

IV.

Zorach v. Clausen, it was noted earlier, sits very near the headwaters of important streams in the Court's Religion Clause doctrine, dealing as it does with problems of religion's role in public education and in the public square of our democracy. *Kedroff*, by contrast, would be seen by most students and scholars as something as an idiosyncrasy, an anomaly, or a frolic-and-detour in the Court's First Amendment work. But this characterization gets both the "story" about *Kedroff* and the "story" about the First Amendment wrong. It was, after all, *Kedroff* that first clearly constitutionalized what has come to be known as "church autonomy,"[55] and Gerard Bradley has (correctly, I think) identified "church autonomy" as the "flagship issue of church and state," the "litmus test of a regime's commitment to genuine spiritual freedom."[56] John Courtney Murray, the American Jesuit and great scholar of religious freedom, similarly saw in *Kedroff* an affirmation of pluralism, and of the truth that "[w]ithin society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state."[57]

Was he right? A quick search reveals a decidedly underwhelming number of citations to *Kedroff* in the Supreme Court's decisions since the case came down.[58] In *Abington v. Schempp*, for example, it was noted as authority for a general "mandate of judicial neutrality in theological controversies;"[59] in the *Blue Hull Memorial Presbyterian Church* case, it provided support for the similar proposition that the "civil courts [have] no role in determining ecclesiastical questions;"[60] in *McDaniel v. Paty*, it anchored a string-cite for the statement that the Establishment Clause has required governments to "refrain ... from insinuating themselves in ecclesiastical affairs or disputes;"[61] and it illustrated a dimension of the substantive content of the Free Exercise Clause that, the Court assured readers, survived the ruling in *Smith*, namely, that government may not "lend its power to one or the other side in controversies over religious authority or dogma."[62] That's about it.

The closest thing to "progeny" that *Kedroff* seems to have produced is the 1976 *Serbian Eastern Orthodox Diocese* case, the facts and procedural history of which are fittingly tangled and byzantine. "The basic dispute," though, was "over control of the Serbian Eastern Orthodox Diocese ..., its property[,] and assets."[63] The facts will sound familiar. The highest church authorities had, after an investigation and various church proceedings, removed and replaced a Bishop and re-organized his diocese. The Bishop, in response, filed a civil lawsuit—which would last for thirteen years—and the Supreme Court of Illinois (eventually) concluded that his removal and defrockment should be set aside because the church proceedings had not, in the court's view, been conducted in accord with church law.

Justice William J. Brennan, Jr., concluded, relying on *Kedroff*, that the Constitution simply did not permit the Illinois court to "reject[] the decisions of the highest ecclesiastical tribunals of [a] hierarchical church" or to "substitut[e] its own inquiry into church polity and resolutions."[64] The case was not, Justice Brennan insisted, a garden-variety "church property" dispute—that could, in theory, be resolved using only secular and religion-neutral criteria. It was, instead, "a religious dispute the resolution of which is for ecclesiastical and not civil tribunals."[65]

Justice Brennan's reasons for refusing to second-guess such "resolution[s]" sound a bit less in pluralist political theory or fundamental principles of religious freedom than one might like. In one place, for instance, he suggested that the constraints on secular courts reflect the fact that "it is the essence of religious faith that ecclesiastical decisions are to be accepted as matters of faith, whether or not rational or measurable by objective criteria."[66] Religion is all mystery and mysticism, he seemed to suggest; there's no "there" there for the judicial mind or judicial methods to latch on to. In another, he justified judicial modesty on the ground that civil judges lack training in the "law that governs ecclesiastical disputes."[67] On this view, it is not that religion is too esoteric or weird for judges; it is just that religious-doctrine questions are too hard. But, judges answer hard questions, and untangle complicated problems, and educate themselves about new fields all the time. The stronger argument, it seems to me, for Justice Brennan's conclusion is the one provided in (and borrowed from) *Kedroff*, namely, that "religious freedom encompasses the power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[68]

Echoing Justice Jackson, and perhaps echoing lunchtime conversations he had had as a law clerk during the year *Kedroff* was argued and decided, now-Justice William H. Rehnquist dissented, and in a way that recapitulated precisely the doubts his former boss had expressed in the earlier case. He needled the majority for suggesting that the "State of Illinois had commenced a proceeding designed to brand [the Bishop] a heretic, with appropriate pains and penalties" when, in fact, the state court had merely asked, in the context of a case between two "contesting claimants to Diocesan authority," "if the real Bishop of the American-Canadian Diocese would please stand up."[69]

Rehnquist did not contest that "there [are] a number of good arguments that civil courts ... should ... avoid adjudicating religious disputes to the maximum extent possible[.]"[70] However, he insisted, these arguments were no more weighty here than in other cases involving "private intraorganizational disputes."[71] In cases like this one, he contended, religious institutions are, and may be regarded as being, like other "private voluntary associations."[72] Indeed, he appeared to endorse the claim that, given the Establishment Clause, religious associations must be treated just like "secular voluntary associations," even in the context of cases involving church doctrine, governance, and authority.[73]

Conclusion

I suggested at the outset that *Kedroff* complements well and matters for reasons similar to those that have made so influential the Court's opinion in *Youngstown Sheet & Tube*. "Perhaps our oldest question of constitutional law," Justice Sandra Day O'Connor once observed, "consists of discerning the proper division of authority between the Federal Government and the States."[74] Similarly well pedigreed, as the *Youngstown* case illustrates well, is the challenge of working out both the "real world" and doctrinal implications of the facts that our Constitution separates the legislative, executive, and

judicial powers, and vests them in Congress, the President, and in the federal courts, respectively. We have, in other words, been wrestling for a long time with the "the law governing the structure of, and the allocation of authority among, the various institutions of the national government."[75] Behind, underneath, or somehow prior to these venerable problems of horizontal and vertical structuring is (at least) one big and similarly credentialed question: *Why?* That is, why is "authority" divided and allocated as it is? William H. Rehnquist might not have been moved by the *Kedroff* Court's religious-freedom arguments, but his answer on this point is entirely consonant with them: "[T]o ensure protection of our fundamental liberties."[76] That is, while the implications of separation of powers have been and will remain elusive, it is clear that this structural feature of our Constitution "was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."[77]

Kedroff should remind us that the freedom of religion protected by the Constitution has a similar, structural role to play. The case quietly and without much fanfare incorporates into our doctrine and thinking about church-state relations the "conviction that government must recognize that it is not the sole possessor of sovereignty" and that there are, in the end, things that are not Caesar's—or, for that matter, the Czar's.

ENDNOTES

An expanded version of this lecture was published as "Things That Are Not Caesar's: The Story of *Kedroff v. St. Nicholas Cathedral*," in Richard W. Garnett & Andrew Koppelman, eds., **First Amendment Stories** (Foundation Press 2011)

[1] William H. Rehnquist, **The Supreme Court: How It Was, How It Is** 17, 19 (1987).

[2] *Id.* at 31, 35.

[3] *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). February 1 was actually the second day of argument in the case.

[4] Rehnquist, *supra*, at 17.

[5] 344 U.S. 94 (1952). On February 1st, leave was granted to file a reply brief.

[6] *See* Richard W. Garnett, "William H. Rehnquist: A Life Lived Greatly, and Well," 115 *Yale L. J.* 1847, 1849 (2006) (quoting Gray's "*Elegy Written in a Country Churchyard*").

[7] *St. Nicholas Cathedral v. Kedroff*, 276 A.D. 309, 94 N. Y.S. 2d 453 (1950), *rev'd*, 302 N.Y. 1, 96 N.D.2d 56 (1950), *rev'd*, 344 U.S. 94 (1952).

[8] *Kedroff*, 344 U.S. at 127 (Jackson, J., dissenting).

[9] Mark DeWolfe Howe, "Foreword: Political Theory and the Nature of Liberty," 67 *Harv. L. Rev.* 91, 91 (1953).

[10] Richard W. Garnett, "Religious Freedom, Church Autonomy, and Constitutionalism," 57 *Drake L. Rev.* 901, 906-907 (2009) (quoting William Clancy, "*Religion as a Source of Tension*," in **Religion and the Free Society** 27-28 (1958)).

[11] Prof. Howe acknowledged, in his Foreword, that "[d]oubtless some readers . . . will see my effort as a labored attempt to discover portentous theory in a casual phrase." Howe, *supra*, at 91.

[12] *See* Patricia L. Bellia, "The Story of the Steel Seizure Case," in Christopher H. Schroeder & Curtis A. Bradley, eds., **Presidential Power Stories** (2008).

[13] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 590 (1952).

[14] Steven G. Calabresi & Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," 105 *Harv. L. Rev.* 1153, 1155 (1992).

[15] *See* Peter Brown, **The Rise of Western Christendom** 467 (2d ed. 2003).

[16] As one author summarizes the investigation, "Vladimir selected Orthodox Christianity for its aesthetic beauty and a lack of objectionable features associated with other religions. He rejected Islam for its abstention from alcohol and was appalled at Jewish political inability to keep their land." Arina Lekhel, Note, *Leveling the Playing Field for Religious "Liberty"* in *Russia: A Critical Analysis of the 1997 Law "On Freedom of Conscience and Religious Associations*," 32 *Vand. J. Transnat'l L.* 167, 174 n. 19 (1999).

[17] Paul Valliere, "Introduction to Modern Orthodoxy," in John Witte Jr. & Frank S. Alexander, eds., I **The Teachings of Modern Christianity on Law, Politics, & Human Nature** 514-15 (2006).

[18] *See generally, e.g.*, G. P. Fedotov, **The Russian Church and the Revolution** (1928). Indeed, as Prof. Berman observed, the Russian Revolution was "directed in part" against the Orthodox Church. Harold J. Berman, **Law and Revolution: The Formation of the Western Legal Tradition** 24 (1983).

[19] *Kedroff*, 344 U.S. at 101. I recall field trips, as an elementary-school student in Anchorage, Alaska, to a different, much more modest, old-log St. Nicholas Russian Orthodox Church, in Eklutna, Alaska.

[20] *Id.* at 102.
[21] *Kedroff*, 344 U.S. at 103.
[22] *Ibid.*
[23] *Id.* at 103-04.
[24] *Id.* at 105.
[25] *Id.* at 106.
[26] *Id.* at 95.
[27] *Id.* at 100.
[28] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause).
[29] *Id.* at 108-09.
[30] 13 Wall. 679 (1872).
[31] *Id.* at 727.
[32] *Kedroff*, 344 U.S. at 116.
[33] *Id.* at 119.
[34] *Id.* at 122-23 (Frankfurter, J., concurring).
[35] *Id.* at 123-24 (Frankfurter, J., concurring).
[36] *Id.* at 127 (Jackson, J., dissenting).
[37] *Cf., e.g.*, James C. McKinley, Jr., "Judge Blocks Oklahoma's Ban on Using Shariah Law in Court," *N.Y. Times*, Nov. 29, 2010.
[38] *Kedroff*, 344 U.S. at 131.
[39] *Id.* at 132.
[40] *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).
[41] *Rosenberg v. United States*, 344 U.S. 838 (1952).
[42] *Dennis v. United States*, 341 U.S. 494, 501 (1951).
[43] U.S. Court Voids Act on Russian Church, Nov. 25, 1952.
[44] *See* Philip Hamburger, "Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property," 12 *J. Contemp. Legal Issues* 693 (2002).
[45] Paul Blanshard, **American Freedom and Catholic Power** (1949).
[46] Paul Blanshard, **Communism, Democracy, and Catholic Power** (1951).
[47] Mark S. Massa, **Catholics and American Culture: Fulton Sheen, Dorothy Day, and the Notre Dame Football Team** 1-2(1999). See also Paul Horwitz, "Religion and American Politics: Three Views of the Cathedral," 39 *U. Memphis L. Rev.* 973, 978-95 (2009) (discussing anti-Catholicism and Sen. John F. Kennedy's famous 1960 speech to the Greater Houston Ministerial Association).
[48] Thomas C. Berg, "Anti-Catholicism and Modern Church-State Relations," 33 *Loy. U. Chi. L. J.* 121, 124 (2001) (citing John T. McGreevy, "Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960," *J. Am. Hist.*, June 1997, at 97).
[49] My colleague, Robert Rodes, recalls Mark de Wolfe Howe's in-class statement at Harvard Law School that "what you think of these cases depends on what you think of the Catholic Church."
[50] Howe, *supra*, at 91-92.
[51] *See Everson*, 330 U.S. at 17-18. I have expressed my doubts about this principle. *See* Richard W. Garnett, "Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience," 54 *Vill. L. Rev.* 655 (2009).
[52] *McCollum*, 333 U.S. at 209-10.
[53] *Kedroff*, 344 U.S. at 119.
[54] Howe, *supra*, at 92.
[55] *See* Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 *Colum. L. Rev.* 1373, 1395 (1981).
[56] Gerard V. Bradley, "*Forum Juridicum: Church Autonomy in the Constitutional Order*," 49 *La. L. Rev.* 1057, 1061 (1987).
[57] John Courtney Murray, **We Hold These Truths: Catholic Reflections on the American Proposition** 80 (2005 ed.).
[58] A search in the "SCT" database, in February of 2011, for cases decided after 1952 and citing *Kedroff* yields a list of only eleven decisions, two of which are related to the *Kedroff* litigation. A similar search for citations to *Zorach*, in contrast, found thirty-nine decisions.
[59] *Abington v. Schempp*, 374 U.S. 203, 244 (1963).
[60] *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447 (1969). For more on the *Blue Hull* case, see generally Richard W. Garnett, "Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine," 51 *U.C.L.A. L. Rev.* 1645 (2004).
[61] *McDaniel v. Paty*, 435 U.S. 618, 638 (1978).
[62] *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).
[63] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 698 (1976).
[64] *Id.* at 708.
[65] *Id.* at 709.
[66] *Id.* at 714-715.
[67] *Id.* at 714 n.8.
[68] *Id.* at 721-22 (quoting *Kedroff*).
[69] *Id.* at 725-26 (Rehnquist, J., dissenting).
[70] *Id.* at 735.
[71] *Id.* at 728.
[72] *Ibid.*
[73] *Id.* at 734.
[74] *New York v. U.S.*, 505 U.S. 144, 149 (1992).
[75] Gary Lawson, "Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction," 49 *St Louis Univ. L. J.* 885 (2005).
[76] *United States v. Lopez*, 514 US 549, 552 (1995).
[77] *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). *See also, e.g., Metropolitan Washington Airports Authority v. Citizens for Abatement*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed.").

Books by Supreme Court Justices[1]

RONALD K.L. COLLINS

In December 1833, the *American Monthly Review* commented on a newly published book by Joseph Story. By that time the fifty-four-year-old Supreme Court Justice had written or edited some twelve books. These works included a treatise on bills of exchange, a treatise on pleading, yet another on pleading and assumpsit, commentaries on the law of bailments, a biography, and even a book of poetry titled *The Power of Solitude: A Poem in Two Parts*. And he had a new work, a three-volume set with a long title: *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*. Of this book, the *American Monthly* reviewer wrote:

> [T]he work is a rare union of patience, brilliancy, and acuteness, and ... [contains] all the learning on the Constitution brought down to the latest period, so as to be invaluable to the lawyer, statesman, politician, and in fine, to every citizen who aims to have a knowledge of the great Charter under which he lives.

That review was among the first of many such laudatory reviews of a treatise that went on to become canonical in the history of American constitutional law. Joseph Story published another twenty-one books after his *Commentaries* before he died in 1845.

Justice Story's literary accomplishments notwithstanding, he was not the most prolific Justice—that honor goes to Justice William O. Douglas. This son of a Scottish Presbyterian minister and former Yale law professor and SEC chairman wrote fifty-one books on a wide variety of topics ranging from foreign policy to psychiatry, from corporate reorganization to environmentalism, and from *stare decisis* to manifest destiny. If nothing else, Douglas was prolific. In 1958 alone, five works were published under his name, and then in 1960 and 1961, he published four different books for each of those respective years. Justice Story was second in productivity; he had thirty-three books under his byline, followed by William Howard Taft, the onetime President and later Chief Justice, who published thirty different books.

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Methodology

Those of us at SCOTUSblog were pleased to post a listing of all the books written or edited by the Chief Justice and Associate Justices of the Supreme Court and are now honored to have this compilation reproduced in this *Journal*. So far as books by Justices are concerned, this new offering is more refined, extensive, and current than what had appeared previously in Fenton Martin and Robert Goehlert's *The U.S. Supreme Court: A Bibliography* (Congressional Quarterly, 1990), which used slightly different selection criteria (*e.g.*, they include titles for which a Justice wrote only a preface, introduction, or chapter).

The tally of 353 represents our best current calculation of the total number of titles (as opposed to volumes, since some titles were multi-volume works). Additionally, this tally pertains only to *books* (as opposed to separately printed reports, opinions, articles, etc.) published *during the Justices' lifetimes.* Hence, posthumous collections, such as *The Selected Papers of John Jay* (2010) are not counted. An exception was made for memoirs or diaries written during a Justice's lifetime but published posthumously, as in the case of *The Memoirs of Earl Warren* (1977) and *From the Diaries of Felix Frankfurter* (1975). But if the work of a Justice was collected and compiled by another, even if it was during the Justice's lifetime, I have not included such works in my total tally, though I have included these works [in brackets] in the supplementary list following the main entries. One such example is [*The Public Papers of Chief Justice Earl Warren* (1959, 1966) edited by Henry M. Christman]. Likewise, the final tally does not include collections of Supreme Court opinions by a Justice—for example, *Dispassionate Justice: A Synthesis of the Judicial Opinions of Robert H. Jackson* (1969) (being a sampling of his judicial opinions). Here again, I tried to list (with brackets) as many of such works as I could.

A rare few books that were written by a Justice but discovered long after he died are included in the total tally as in the case of Robert H. Jackson's *That Man: An Insider's Portrait of Franklin D. Roosevelt* (2003). By contrast, a number of the listings, such as those of the works of William Howard Taft, include books written before a Justice came onto the Court and pertain to matters other than law or the judiciary.

As with all questions of judicial interpretation, there are matters of nuance and construction. For example, for our purposes, what constitutes a book? Does any monograph count? I took the liberty of saying "yes" as in, for example, James F. Byrnes's *The Supreme Court Must Be Curbed* (1956), *unless* the monograph was particularly short, as in the case of William Howard Taft's eight-page work *The Obligations of Victory* (1918) or his twenty-four-page work *The Progressive World Struggle of the Jews for Civil Equality* (1919).

Similarly, what does it mean to say that a book is *by* a Justice? For example, do all edited books count? What about Oliver Wendell Holmes' editing of *Kent's Commentaries on American Law* (12th ed., 1873)? Here, too, I included it in my tabulation. Or what about Justices who compiled works such as those collected by Samuel Blatchford in *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit* (1852–88) (24 vols.)? Though it is a tougher call, I elected to include such books in my tabulation, although only as a single entry. I did not, however, include mere forewords or introductions by Justices to a work that was otherwise done entirely by another. With the exception of memoirs published posthumously, I did not include in the tally, as indicated above, collections of writings compiled and published *after* a Justice's lifetime as in the case of *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*

(Richard Posner, ed., 1997). Additionally, the compilation below does not include reports on the Justices' confirmation hearings—for example, *Nomination of Sandra Day O'Connor: Hearings Before the Judiciary of the United States* (Sept. 9–11, 1981).

* * *

As one might expect, not all of the Chief Justices or Justices of the Court wrote or have written books. Forty-five of its members fall into that category. (That count also includes current members of the Court such as Chief Justice John G. Roberts, Jr. and Justice Elena Kagan.)

In his book *We The Judges* (1956), Justice William O. Douglas wrote: "Books must serve as powerful agencies of social, economic, or political reform. They may enable us to get a keener insight into our society and its problems." As the compilation below reveals, the range of the Justices' interests was by no means confined to matters pertaining to law. Some of the more noteworthy books by Justices concern the Civil War, such as the following:

- Salmon Portland Chase, *How the South Rejected Compromise in the Peace Conference of 1861* (1863)
- John Archibald Campbell, *Reminiscences and Documents Relating to the Civil War During the Year 1865* (1887)
- William O. Douglas, *Mr. Lincoln & the Negroes: The Long Road to Equality* (1963)
- William H. Rehnquist, *Civil Liberty and the Civil War* (1997)

Similarly, some of the Justices were keenly interested and wrote works on religion and related topics:

- David J. Brewer, *The United States: A Christian Nation* (1905)
- Louis Dembitz Brandeis, *The Jewish Problem, How to Solve It* (1915 & 1919)
- William H. Taft, *The Religious Convictions of an American Citizen* (1916)
- William H. Taft, *Anti-Semitism in the United States* (1920)
- Benjamin N. Cardozo, *Values* (1944)

Yet other Justices had interests in law and medicine:

- Benjamin N. Cardozo, *What Medicine Can Do for Law* (1930)
- William O. Douglas, *Law and Psychiatry* (1956)

As for constitutional law, the Justices' interests in this subject were likewise varied:

- Henry Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States, Deduced from the Political History and Condition of the Colonies and States, from 1774 until 1788. And the Decisions of the Supreme Court of the United States. Together with Opinions in the Cases Decided at January Term, 1837, Arising on the Restraints on the Powers of the States* (1837)
- Samuel Freeman Miller, *Lectures on the Constitution of the United States* (1891)
- William H. Taft, *Liberty Under Law, An Interpretation of the Principles of Our Constitutional Government* (1922)
- Robert Houghwout Jackson, *Full Faith and Credit, the Lawyer's Clause of the Constitution* (1945)
- Hugo L. Black, *A Constitutional Faith* (1968)

Certain other works dealt with technical matters or issues of foreign law, such as the following:

- John Marshall Harlan, *Manning the Dikes; Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States* (1958)
- Ruth Bader Ginsburg, *A Selective Survey of English Language Studies on Scandinavian Law* (1970)

- Stephen G. Breyer, *Energy Regulation by the Federal Power Commission* (1974)

Yet other works that caught my attention, for various reasons, include the following books:

- William H. Taft & William J. Bryan, *World Peace: A Written Debate between William Howard Taft and William Jennings Bryan* (1917)
- James F. Byrnes, *The Supreme Court Must Be Curbed* (1956)
- Clarence Thomas, *Why Black Americans Should Look to Conservative Policies* (1987)
- Samuel Alito et al., *The RICO Racket* (1989)
- Anthony M. Kennedy, *The Constitution and the Spirit of Freedom* (1990)
- Stephen G. Breyer, *Judicial Activism: Power Without Responsibility?* (2005)

Also worthy of note is the publisher of the following selection of materials about Justice Louise D. Brandeis:

- *Brandeis and (Brandeis): The Reversible Mind of Louis D. Brandeis, "the People's Lawyer," as It Stands Revealed in His Public Utterances, Briefs, and Correspondences*. Boston: United Shoe Machinery, 1912

This book was published by United Shoe Machinery four years before President Wilson nominated Louis D. Brandeis to the Court. Brandeis was once counsel for United Shoe Machinery and had even served on its board. But the relationship soured with time. During his confirmation hearings, the president of the company accused Brandeis of "unprofessional conduct" for turning against the company, at the behest of a competitor, and with then aiding government prosecutors in building an antitrust case against the company. *See* John Braeman, "The 'People's Lawyer' Revisited: Louis D. Brandeis versus the United Shoe Machinery Company," 50 *The American Journal of Legal History* 284 (2008), and Melvin I. Urofsky, *Louis D. Brandeis: A Life* 310–317, 450–451 (2009).

* * *

There may be occasions in the future when it becomes necessary to revise or expand this compilation. In that regard, comments or corrections are, of course, welcome. In all of this, my hope is that this work will benefit scholars, lawyers, judges, professors, students, and anyone else interested in the Supreme Court and the work of its members.

Chief Justices

Jay, John. (October 19, 1789–June 29, 1795)[2]

Jay, John, *An Address to the People of the State of New York on the Subject of the Constitution, Agreed Upon in Philadelphia, September 17, 1787*. NY: S. & J. Loudon, 1788.

— 2: *Letters, Being the Whole of the Correspondence between the Hon. John Jay, Esq. and Mr. Lewis Littlepage: A Young Man with Whom Mr. Jay, When in Spain, Patronized, and Took into His Family*. NY: F. Childs, 1786.

— 3: et al. *The Federalist: A Collection of Essays Written in Favour of the New Constitution*. NY: J. and A. McLean, 1788. (2 vols.)

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Rutledge, John. (August 12, 1795–December 15, 1795)

Rutledge, John, et al. *Acts of the General Assembly of South-Carolina, Passed in September and October 1776*. Charles-Town, SC: Peter Timothy, 1776.

Ellsworth, Oliver. (March 8, 1796–December 15, 1800)

N/A

Marshall, John. (February 4, 1801–July 6, 1835)

Marshall, John. *The Life of George Washington, Commander in Chief of the American Forces*. Philadelphia: C.P. Wayne, 1804–07. (5 vols.)

— 2: et al. *Reports of Cases Adjudged in the Superior Courts of Law and Equity of the State of North Carolina from the Year 1789 to the Year 1806*. Halifax: Abraham Hodge, 1806. (2 vols.)

— 3: *A History of the Colonies Planted by the English on the Continent of North America From Their Settlement to the Commencement of That War Which Terminated in Their Independence*. Philadelphia: A. Small, 1824.

[*The Writings of John Marshall: Late Chief Justice of the United States, upon the Federal Constitution*. Boston: J. Munroe and Company, 1839.]

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[Marshall, John, *The Constitutional Decisions of John Marshall*. NY: G.P. Putnam's Sons, 1905. Edited, with an introductory essay, by Joseph P. Cotton, Jr.]

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[*The Papers of John Marshall*. Edited by Herbert A. Johnson et al. Chapel Hill: University of North Carolina Press, 1974–2006. (12 vols.)]

[Marshall, John. *Papers of John Marshall*. Norman: University of Oklahoma Press, 1969. (2 vols.)]

[*Maxims of Democracy: Three Speeches by John Marshall at the Virginia Convention Debating the Ratification of the Federal Constitution, 1788*. Richmond, Va.: John Marshall Foundation, 2007 (24 pp.). Edited with introduction by Marshall Lee Smith.]

[John Marshall and George Washington, *Great & Interesting Events: Private Correspondence of George Washington and John Marshall: Regarding the U.S. Mission to France, 1796–1798*. Richmond, Va.: John Marshall Foundation, 2009.]

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Taney, Roger Brooke. (March 28, 1836–October 12, 1864)

Taney, Roger Brooke, *The Case of Dred Scott in the United States Supreme Court. The Full opinions of Chief Justice Taney and Justice Curtis, and Abstracts of the Opinions of the Other Judges; with an Analysis of the Points Ruled, and Some Concluding Observations*. New York: The Tribune Association, 1860.

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N/A

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Taft, William H. *Four Aspects of Civil Duty*. NY: C. Scribner's Sons, 1906.

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— 3: *Missions and Civilization*. NY: F. H. Revell, 1908.

— 4: *Present Day Problems; A Collection of Addresses Delivered on Various Occasions*. NY: Dodd, Mead & Co., 1908.

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— 6. *Political Issues and Outlooks; Speeches Delivered Between August, 1908 and February, 1909*. NY: Doubleday, Page & Co., 1909.

— 7. *Presidential Addresses and State Papers*. NY: Doubleday, 1910.

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— 13: *United States Supreme Court the Prototype of a World Court*. Baltimore, MD: American Society for Judicial Settlement of International Disputes, 1915.

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— 15: *The President and His Powers*. New York: Columbia University Press, 1916.

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— 30: *Address at Dedication of Alphonso Taft Hall*. Cincinnati: University of Cincinnati, 1925.

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[Taft, William H. *Essential Writings and Addresses*. Madison, NJ: Fairleigh Dickinson University Press, 2009.]

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— 4: *The Permanent Court of International Justice: An Address*. Washington, DC: Chamber of Commerce of the United States, 1923.

— 5: *Foreign Relations*. Chicago: Republican National Committee, 1924.

— 6: *Liberty and Law*. Baltimore: Lord Baltimore Press, 1925.

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Achievements, an Interpretation. NY: Columbia University Press, 1928.

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[Hughes, Charles Evan. *The Autobiographical Notes of Charles Evans Hughes.* Cambridge, MA: Harvard University Press, 1973. (original notes edited and published after his death)]

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Vinson, Fred Moore. (June 24, 1946–September 8, 1953)

N/A

Warren, Earl. (October 5, 1953–June 23, 1969)

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— 2: *All Men are Created Equal.* NY: Association of the Bar of the City of New York, 1970.

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— 2: *Remarks at Federal Bar Council Law Day Dinner, May 3, 1971.* NY: Federal Bar Council, 1971.

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— 4: *Delivery of Justice: Proposals for Changes to Improve the Administration of Justice.* St. Paul, MN: West, 1990.

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— 6: *It Is So Ordered: A Constitution Unfolds.* NY: W. Morrow and Co., 1995.

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— 2: *All the Laws But One: Civil Liberties in Wartime.* NY: Knopf, 1998.

— 3: *Grand Inquests; The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson.* NY: Morrow, 1992.

— 4: *Civil Liberty and the Civil War.* Washington, DC: National Legal Center for the Public Interest, 1997.

— 5: *The Supreme Court.* NY: Alfred A. Knopf, 2001.

— 6: *Centennial Crisis: The Disputed Election of 1876.* NY: Alfred A. Knopf, 2004.

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[William H. Rehnquist, *The American Constitutional Experience: Stress and Strain among the Three Branches of Government.*

University of London, Institute of United States Studies, 2000 (twenty pages), part of James Bryce lecture on the American Commonwealth.]

Roberts, John G. (September 29, 2005–Present)

N/A

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Rutledge, John. (February 15, 1790–March 5, 1791)

See entry under Chief Justices.

Cushing, William. (February 2, 1790–September 13, 1810)

N/A

Wilson, James. (October 5, 1789–August 21, 1798)

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— 2: *Considerations on the Bank of North-America.* Philadelphia: Hall and Sellers, 1785.

— 3: *An Introductory Lecture to a Course of Law Lectures.* Philadelphia: T. Dobson, 1791.

— 4: et al. *Commentaries on the Constitution of the United States of America.* London: J. Debrett, 1792.

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[Wilson, James. *Selected Political Essays of James Wilson.* Edited by Randolph Adams. New York: Knopf, 1930.]

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Blair, John. (February 2, 1790–October 25, 1795)

N/A

Iredell, James. (May 12, 1790–October 20, 1799)

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N/A

Paterson, William. (March 11, 1793–September 9, 1806)

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N/A

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— 3: *Reports of Cases Argued and Determined in the Court of Appeals of Virginia,* 2d ed. Philadelphia: A. Small, 1823. (2 vols.)

— 4: et al. *Reports of Cases Determined in the Circuit Court of the United States for the Third Circuit Comprising the Districts of Pennsylvania and New Jersey, Commencing*

at April Term, 1803. Philadelphia: P.H. Nicklin, 1826. (4 vols.)

Moore, Alfred. (April 21, 1800–January 26, 1804)

N/A

Johnson, William. (May 7, 1804–August 4, 1834)

Johnson, William. *An Oration, Delivered in St. Philip's Church, Before the Inhabitants of Charleston, South-Carolina, On Saturday the Fourth on July, 1812 in Commemoration of American Independence*. Charleston: W.P. Young, 1813.

— 2: *Nugae Georgicae: An Essay*. Charleston: J. Hoff, 1815.

— 3: *Sketches of the Life and Correspondence of Nathanael Greene, Major General of the Armies of the United States, In the War of the Revolution*. Charleston: A.E. Miller, 1822. (2 vols.)

— 4: *Eulogy on Thomas Jefferson*. Charleston: Sebring, 1826.

Livingston, Henry Brockholst. (January 20, 1807–March 18, 1823)

Livingston, Brockholst. *Democracy, An Epic Poem*. NY: Printed for the Author, 1794. [published as *Democracy: An Epic Poem* by Aquiline Nimble-Chops, Democrat; attributed to Livingston]

Todd, Thomas. (May 4, 1807–February 7, 1826)

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Duvall, Gabriel. (November 23, 1811–January 14, 1835)

N/A

Story, Joseph. (February 3, 1812–September 10, 1845)

Story, Joseph. *An Eulogy on General George Washington; Written at the Request of the Inhabitants of Marblehead, and Delivered Before Them on the Second Day of January, A.D., 1800*. Salem: Joshua Cushing, 1800.

— 2: *The Power of Solitude A Poem in Two Parts*. Boston: John Russell, 1800.

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Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments. Boston: Hilliard, Gray and Co., 1834.

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— 16: *A Discourse Upon the Life, Character, and Services of the Honorable John Marshall, LL.D., Chief Justice of the United States of America*. Boston: J. Munroe and Co., 1835.

— 17: *A Discourse on the Past History, Present State, and Future Prospects of the Law*. Edinburgh: T. Clark, 1835.

— 18: *The Miscellaneous Writings: Literary, Critical, Juridical, and Political of Joseph Story, Now First Collected*. Boston: James Monroe & Co., 1835.

— 19: *A Discourse upon the Life, Character and Services of the Honorable John Marshall, Chief Justice of the United States of America*. Boston: James Monroe & Co., 1835.

— 20: *Commentaries on Equity Jurisprudence, As Administered in England and America*. Boston: Hilliard, Gray & Co., 1836. (2 vols.)

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Thompson, Smith. (September 1, 1823–December 18, 1843)

N/A

Trimble, Robert. (June 16, 1826–August 25, 1828)

N/A

McLean, John. (January 11, 1830–April 4, 1861)

McLean, John. *An Eulogy on the Character and Public Services of James Monroe, Late President of the United States*. Cincinnati: Looker and Reynolds, 1831.

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Wayne, James Moore. (January 14, 1835–July 5, 1867)

N/A

Barbour, Philip Pendleton. (May 12, 1836–February 25, 1841)

N/A

Catron, John. (May. 1, 1837–May 30, 1865)

N/A

McKinley, John. (January 9, 1838–July 19, 1852)

N/A

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N/A

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N/A

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ENDNOTES

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[2] The parenthetical dates following each author's name refer to his or her tenure on the Court. And again, all bracketed references are *not* included the total tally since they did not meet the selection criterion. Still, I thought it best to include them for general reference purposes.

Contributors

Douglas E. Abrams is an Associate Professor at the University of Missouri School of Law.

Ronald K.L. Collins is the Harold S. Shefelman Scholar at the University of Washington School of Law.

Pamela C. Corley is an Assistant Professor of Political Science at Southern Methodist University.

Richard W. Garnett is a Professor of Law and Associate Dean at Notre Dame Law School.

Douglas Laycock is the Robert E. Scott Professor of Law, the Horace W. Goldsmith Research Professor of Law, and a Professor of Religious Studies at the University of Virginia.

Amy Steigerwalt is an Associate Professor of Political Science and Director of Graduate Studies at Georgia State University.

Artemus Ward is an Associate Professor of Political Science at Northern Illinois University.

Daniel J. Wisniewski is the winner of the 2012 Hughes Gossett Student Prize. He wrote this paper as a law student at George Mason University School of Law, from which he graduated in 2012.

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