Introduction

Melvin I. Urofsky

Most of the articles in this issue come from the Leon Silverman Lecture Series that the Society sponsored last year, and that dealt with the broadly defined topic of the Supreme Court and property rights. As one can see, this covers a wide spectrum of interests.

Jonathan O'Neill explored the notion of property, and what it meant to the Founders of the country. As James Ely put in his classic book, property was considered the "guardian of every other right." Professor Ely also delivered one of the lectures on property rights in the Gilded Age, and tried to dispel some myths about the alleged obsession of jurists of the latter part of the nineteenth century with property. Richard Epstein picked up on this theme in his exploration of the beginnings of public utility regulation, and how the Supreme Court responded to it.

The source of much of the power of Congress to regulate different aspects of the market derive from the Commerce Clause, and as we all know, over the years there have been several definitions of commerce, as well as ideas on just how much power the Clause granted to the federal government. Professor Mark Killenbeck looks past the superficial contradictions to find certain basic threads regarding the meaning the Commerce Clause as well as the goals that it has sought.

Few groups have fared as badly at the hands of the federal government as Native Americans. Professor Angela Riley examines the efforts of tribes to protect their lands—rights supposedly guaranteed by treaties in many instances—in the high court.

We also have three articles that are not Silverman Lectures. Marjorie Heins examines the First Amendment and academic freedom, focusing on the Supreme Court cases that arose out of the massive investigations in the early 1950s into New York City teachers' and professors' political beliefs and associations. Deborah Ann Roy is a lawyer in the Justice Department. Just as 2013 marks the fiftieth anniversary of the March on Washington, it is also a half-century since the Good Friday Parade in Birmingham, Alabama, an event that holds an important place in the history of the civil rights movement, and that also led to two Supreme Court cases. Ms. Roy gives us

a retrospective narrative of that march, and assesses the ensuing Supreme Court cases.

Anthony Lewis was an important figure in Supreme Court history. Nearly everyone credits him as being the first modern reporter of the Court and its business. He was not simply a congressional correspondent who walked across the street on slow days. *The New York Times* assigned him to focus on the Court, and his lucid and intelligent analyses of the Court's decisions not only won him a Pulitzer Prize, but set a gold standard for all who came after. After his death last year, I asked Lyle Denniston to write about him. Lyle has had a distinguished career as a Court reporter for the *Baltimore Sun*, but beyond that, he worked with Tony Lewis and has witnessed how reporting on the Court has changed. His piece reflects that intimacy, as well as the differences the two men had over certain matters.

Last, but certainly not least, Grier Stephenson tells us about some of the books that have come out recently dealing with the Court, its members, and its decisions.

As always, a veritable feast, and I invite you to enjoy!

A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States

MARK R. KILLENBECK

The charge I was given was a truly modest one: the history of the Commerce Clause in forty minutes or less, the constitutional equivalent of Around the World in Eighty Days. Anyone undertaking this task faces two dilemmas. The first is one all constitutional law professors routinely face: the Commerce Clause is most assuredly not what students dream of when they contemplate the course. But, as former Justice Wiley B. Rutledge wisely observed:

> If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view toward Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.[1]

The second challenge is the nature of the subject. I am acutely aware that Chief Justice John Marshall felt obliged to apologize at the end of *Gibbons v. Ogden*, noting "the tediousness inseparable from the endeavor."[2] Cases involving Commerce Clause matters may on occasion generate considerable public interest. But the doctrines involved tend to be dry and lifeless, at least when compared to other areas of constitutional law. Hopefully what follows will overcome these inherent limitations, at least to the extent that the history proves of interest.

My thesis is that all parties to the Commerce Clause debate must approach these matters in the light of the need to exercise a "prudent regard to their own *common* good." That characterization comes from James Madison, who spoke of the obligation of "the people themselves"—and presumably those who represent them—to exercise "a prudent regard to their own good as involved in the general and permanent good of the Community."[3]

Since our focus is on history, it seems appropriate to begin with resort to one favorite interpretive technique: consulting a dictionary. But not just any dictionary. So, we find in the pages of the first edition of Samuel Johnson's magisterial *A Dictionary of the English Language* that a "prudent" individual is one who is "practically wise," and, in a closely related vein, that "prudence" is "wisdom applied to practice."[4]

Simply put, I believe any appropriate understanding of the history of the Commerce Clause and the role it can, has, and should play in this Compound Republic is best shaped by paying close attention to three things:

- insights gleaned from the writings of the individual aptly characterized as the Father of the Constitution;
- the manner in which the powers conferred and limitations imposed by Article I, section 8, clause 3 have been interpreted and applied; and
- the need to be "practically wise," in particular to shape and apply rules in Commerce Clause matters that reflect "wisdom applied to practice."

§

We begin with James Madison, whose appeal to the need for "prudent regard" is found in one of the most important and most overlooked documents in American constitutional history: his April, 1787 essay, **Vices of the Political System of the United States**.[5] The editors of the definitive edition of Madison's papers stressed that **Vices** was written during "perhaps the most creative and productive year of [Madison's] career as a political thinker," characterizing it as a "masterful" blend of "personal experience and theory."[6] Jack Rakove in turn has appropriately described **Vices** as "one of those rare documents in the history of political theory in which one can literally observe an original thinker forge his major discovery."[7]

In 1780, future Justice James Iredell (above) characterized certain laws passed in his home state of North Carolina as "the vilest collection of trash ever formed by a legislative body," an assessment that underscores that the Framers and Founders lived in an era where the states were part of the problem, not the solution.

It is then simply astonishing that **Vices** has largely been ignored by the principal parties tasked with applying and interpreting the Constitution: Congress and the federal courts, in particular, the Supreme Court.

Currently available records allow computerized searches of the debates and proceedings in Congress from 1789 through 1875 and, in the modern era, from 1985 through the present. That accounts for just about one-half of the 223 years Congress has been in session, during which Madison's **Vices** appears only once: in a statement by Senator Robert Byrd of West Virginia on the occasion of the 213th anniversary of the signing of the Constitution.[8]

The Supreme Court has done a little bit better, albeit almost certainly by accident rather than design. Prior to this lecture, **Vices** had been mentioned in three decisions, always in opinions written by Justice Anthony Kennedy, and always, thankfully, for a proposition central to any discussion of the Commerce Clause: the need to "prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[9] That doctrine—under which the Commerce Clause serves as both a positive grant of authority to Congress and a limitation on the powers of the states—will be a central part of our discussion. But I first want to discuss why **Vices** provides an appropriate lens through which to view the purposes, history, and effects of the Commerce Clause.

In early 1786 Madison studied and reflected as he prepared for two seminal events in American history. The first was the September, 1786 Annapolis Convention, the sole focus of which was commerce. That meeting was prompted by the realization that the Confederation government could not bring order to the commercial affairs of a "nation" within which individual states expressly retained their "sovereignty" and meaningful national "powers" were nonexistent.[10] Rather, the Articles were infected by what Madison described as "a mistaken confidence" in "the justice, the good faith, the honor, the sound policy, of... several legislative assemblies,"[11] entities whose actions were marked by "caprice, jealousy, and diversity of opinions."[12] The challenges—and opportunities—were perhaps best expressed by George Washington, who observed in a letter to Madison:

> I hope the resolutions which were published for the consideration of the House, respecting the reference to Congress for the regulation of a Commercial system, will have passed. The proposition in my opinion is so self evident that I confess I am at a loss to discover wherein lyes the weight of the objection to the measure. We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which have national objects to promote, and a national character to support. If we are not, let us no longer act a farce by pretending to it. For whilst we are playing a dble game, or playing a game between the two, we never shall be consistent or respectable—but *may* be the dupes of some powers, and, most *assuredly*, the contempt of all.[13]

Formally styled as a "Meeting of the Commissioners to Remedy Defects of the Federal Government," the Annapolis Convention did not recommend any actual remedies. But it did famously produce a request for "the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next... to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."[14] As the date for that gathering approached, Madison distilled what he had learned into **Vices**, within which we see him describing the problems posed by the Articles of Confederation. We also see him outlining the foundations for the solution that would be crafted in Philadelphia, a document predicated on the "great desideratum in Government," namely:

> such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society.[15]

This "great desideratum" speaks simultaneously of powers and limitations. Given the contexts within which it was articulated, it focuses on the realities posed by the existence of three sovereigns—the people, a nation, and the states—and the dangers that inhere in any political system that indulges one at the unnecessary expense of the others.[16]

In particular, Madison saw the need to address two serious, interrelated problems: a dearth of authority at the national level, and overindulgence of authority at the state level. He speaks, accordingly, of "the mortal diseases of the existing constitution,"[17] listing twelve specific problems caused by a system of governance that was "in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States."[18] The difficulties posed by state sovereignty were "numerous," and "repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation."[19] The proverbial bottom line was that the pre-Constitution Confederation was, in perhaps the most apt turn of phrase offered by Publius (albeit in this instance, Alexander Hamilton), marked by "incurable disorder and imbecility in the government."[20] As James Wilson stressed, "the commencement of peace" after the Revolution "was likewise the commencement of our distress and disgrace."[21]

Commerce, and matters commercial, were front and center. **Vices**, for example, speaks of:

- "Trespasses of the States on the rights of each other," the first of which are "the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same."[22]
- Within the same evil of "trespasses," the "practice of many States in restricting the commercial intercourse with other States."[23]
- A "want of concert in matters where the common interest requires it," a flaw "strongly illustrated in the state of our commercial affairs," to the point that "the national dignity, interest, and revenue [have] suffered from this cause."[24]
- Indeed, within this, and ironically, given subsequent debates, Madison laments the "want of uniformity in the laws concerning" certain important matters, among which are "grants of incorporation for national purposes, for canals and other works of general utility, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary."[25]

The same message was repeated during the Constitutional Convention and in its aftermath, albeit sometimes with qualifications that resonate today. Jack Rakove, for example, has observed: "Along with taxation, the need to vest the Union with authority to regulate foreign commerce was one of the two great issues that drove the original movement for constitutional reform in the 1780s."[26] This initial emphasis on foreign commerce is telling in the light of the debates that followed, within which the contending parties tried to draw sharp lines based on distinctions between foreign and national, interstate and intrastate. That said, Rakove stresses that the "Federalists"—who, at the risk of offense, were after all the winners in the constitutional debates and process—

> understood that removing trade barriers among the states could create a great domestic market that would become an engine of economic growth. States would still compete for economic advantage, but they would do so under the authority of a national government that could promote the free movement of goods, capital, and labor across state lines, and prevent states from erecting barriers to free trade.[27]

Indeed, even Luther Martin, whose strong objections to both content and process led him to leave the convention in disgust, nevertheless recognized that "because the States individually are incompetent to the purpose" the notion that "the United-States should also regulate the Commerce of the United-States foreign & internal, is I believe also a matter of general Consent."[28]

The importance of commerce, and by necessary implication, of the Commerce Clause, is also evident in post-convention discussions. In **Federalist 6**, Hamilton describes an essential aspect of commerce—the "love of wealth"—as an element in political and social affairs "as domineering and enterprising a passion as that of power and glory."[29] In **Federalist 7**, he stresses that "[t]he competitions of commerce [are] another fruitful source of contention."[30] And in subsequent numbers he describes at length issues posed by "our intercourse with foreign countries, as with each other."[31]

Indeed, in **Federalist 10**—Madison's great essay on faction and the importance of an "extended republic"—Madison ties together the theme of this lecture series, and of this particular lecture, observing:

> [T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.[32]

Madison shifts the focus slightly in **Federalist 42**, making the transition from the importance of commerce and commercial interests to the manner in which such matters would be addressed under the proposed Constitution. He describes at some length the need for and benefits of what we now know as the Commerce Clause. In particular, he stresses the interrelationship between external and internal regulation:

> The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have clearly been pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incompleat, and ineffectual.[33]

Article I, section 8, clause 3 lies accordingly at the heart of the attempt to form a "more perfect union." That government would look outward, by design leaving most internal matters to the states. But it could do so effectively only if it could bring order to its internal commercial affairs.

§

This sounds a great deal like an argument for an "originalist" approach to the Commerce Clause and matters commercial. I concede, more or less cheerfully, that this is what I have in mind. But the brand of originalism I embrace is quite different from those normally bandied about. I trust that what I am about to say reflects the *sine qua nons* of originalism: "historical skills," and "a comprehensive approach to sources."[34] However, I believe

it is profound error to treat the "Constitution's original meaning" as, for example, "its meaning to those ratifying the document during a discrete time period: from its adoption by the Constitutional Convention in late 1787 until Rhode Island's ratification on May 29, 1790."[35]

Simply put, I doubt that the Framers and Founders themselves believed that their words or intentions were to be regarded as definitive. There is in fact powerful evidence that the individuals who wrote and ratified the Constitution did not believe that its interpretation should be cabined by the intentions expressed or meanings found in their own deliberations, to the exclusion of all that followed.

Consider the following four points.

First. To the extent we base our approach on the thoughts and words of the founding generation, it is important to bear in mind that they lived, worked, wrote, and ratified in an era when the states were the problem, rather than the solution.[36] In 1780, for example, future Justice James Iredell notably characterized certain laws passed in his home state of North Carolina as "the vilest collection of trash ever formed by a legislative body."[37] That was arguably extreme. But it is quite clear that there was a broad consensus in advance of the constitutional convention, as Hamilton argued in **Federalist 22**—in an essay focusing on the problems caused by a "want of power to regulate commerce"[38]—that:

> The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by national controul, would be multiplied and extended till they become no less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy.[39]

This does not mean these individuals devalued the states to the point that they wished to eliminate them. Far from it. Even the most ardent Federalists did not advance a case for what was characterized in the constitutional debates as "full consolidation." Those fears were expressed. Brutus argued in the first of his essays, "although the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it."[40] Melancton Smith in turn complained: "how long [will] the people . . . retain their confidence [in federal] representatives, who shall meet once in a year to make laws for regulating the height of your fences and the repairing of your roads?"[41]

That did not happen. As a matter of both necessity and compromise, the states were retained. So, as Madison explained in **Federalist 51**:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be countrouled by itself.[42]

That said, we cannot forget the role the states played in what Madison characterized as "the present anarchy of our commerce."[43] Nor can we afford to discount the extent to which full and effective national authority over the states in such matters was "an obvious and essential branch of the foederal administration."[44]

Second. All parties to the debate understood that the text that emerged from the

convention would not "meet the[ir] full and entire approbation."[45] But all parties also agreed on the general goal: to "fully and effectively vest" certain powers "in the general government of the Union."[46] The states were preserved for instrumental reasons. They were to be retained, as Madison observed repeatedly, "so far as they can be subordinately useful."[47] But these supposedly sovereign entities were to be subject to a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary."[48] That is, using the language proposed by Gunning Bedford. Jr. of Delaware—language that provided the underlying theory for the Committee on Detail's enumeration of federal powers—the Constitution contemplated the ability of Congress "to legislate in all cases for the general interests of the Union . . . and . . . in those to which the states are separately incompetent."[49]

Given some of the fears expressed by the Constitution's opponents, Madison and his colleagues were careful in their post-Convention rhetoric. In **Federalist 45,** for example, he stressed:

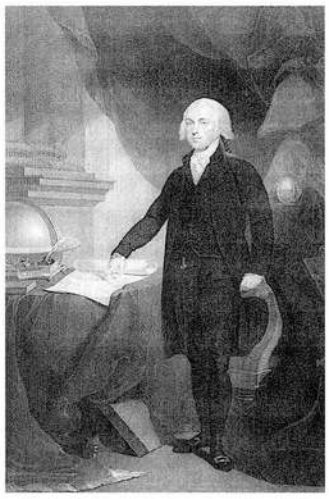
> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which the last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[50]

But that declaration of good faith—in the sense that the states remained a part of the governing process—did not mean that any "residual sovereignty" should be allowed to stand in the path of national solutions for national problems. There was a clear understanding that "if Congress have not the power it is annihilated for the nation."[51] And it was apparent, given the dictates of the Supremacy Clause, that one of the primary virtues of the new system would be that any "necessary and proper" congressional action would have the purpose and effect of fashioning a "uniform & practical sanction" in the face of dangers posed by competing or contradictory state regimes.[52]

Third. That said, it is a mistake to assume that Madison, or anyone else, knew exactly where the lines were to be drawn. As Washington stressed in the letter accompanying the Constitution when it was forwarded to the Confederation Congress: "It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved."[53] Chief Justice John Marshall in particular emphasized this characteristic as the Court he presided over played its part in giving active form to previously inchoate concepts. Like others of his generation, he understood that the Constitution did not "partake of the prolixity of a legal code," but rather, by its very nature "requires . . . only its great outlines should be marked, its important objects designated, and the minor objects which compose those objectives be deduced from the nature of the objects themselves."[54]

Madison recognized this. Indeed, in certain respects he reveled in it. As he stressed in **Federalist 37**:

> All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and



Although he had opposed a national bank in 1791, James Madison changed his mind after his experience in the War of 1812 and supported the creation of the Second Bank of the United States (pictured, in Philadelphia) in 1815. Madison (left) was not being inconsistent in his views, but had matured with experience.

> ascertained by a series of particular discussions and adjudications.[55]

So, for example, in **Federalist 36** he contemplated the reality that there may well be "certain emergencies of nations, in which the expedients that in the ordinary state of things ought to be foreborn, become essential to the public weal. And the government from the possibility of such emergencies ought to have the option of making use of them."[56]

Indeed, we would do well to remember that it was Representative James Madison who led the opposition to Hamilton's proposal to create the First Bank of the United States, speaking eloquently and at length, in language that resonates today: "If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."[57] But it was also President James Madison whose first-hand experiences during the War of 1812 convinced him that a national bank was both necessary and proper. So, he declared in 1815, he had no constitutional objections to chartering the Second Bank. Rather, he

> [w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.[58]

This is not a Madison who is somehow "inconsistent," as some have alleged.[59] It is, rather, a Madison mature enough to recognize that the beliefs and perspectives brought to bear in 1791 were not definitive, but were rather subject to a process of giving meaning to the Constitution that was dynamic and evolving.[60]

Fourth. The process of "liquidation" and "ascertainment" over time requires the use of words. Both as a general matter, and in terms

of commerce, the founding generation needed to assign meanings to the terms employed. For our purposes, they needed to determine exactly what was meant by the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The use of words poses two difficulties. One is their very nature. As Madison stressed in **Federalist 37**:

> [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracies of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated. Here then are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, [and] inadequacies of the vehicle of ideas.[61]

A second major problem is posed by context: something that is perfectly clear, and perfectly defined at one point in time, or for one particular purpose, may not be as accurately expressed in altered circumstances. Jefferson, for example, spoke of complex and evolving questions to be "pursue[d] with temper and perseverance" as we struggle continuously to perfect "the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its members the enjoyment of life, liberty, property and peace."[62] It is accordingly important to keep in mind that the very nature of this radical enterprise means that there will inevitably be interpretive difficulties, especially in the light of history and the changing roles of the states in our federal system.[63]

Madison understood this, stressing that the Constitution created a "novel and unique political system," within which "new ideas . . . must be expressed by either new words, or by old words with new definitions."[64] Indeed, in an important letter written toward the end of his life, Madison admonished individuals trying to assign definitive meanings based on what was found in the initial debates:

> It ought to have occurred that the Govt. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it, and that old terms were to be used in new senses, explained by the context or by the facts of the case.[65]

§

Commerce, Samuel Johnson tells us in his **Dictionary**, is "[i]intercourse; exchange of one thing for another; interchange of any thing; trade; traffick." Further, that "to regulate" is "[t]o adjust by rule or method," "to direct." Individuals far wiser than I have devoted hundreds of pages to puzzling out the implications of these definitions and the usages of these words at the precise moment that the Constitution was framed and ratified.[66]

That may or may not be a fool's errand. For the proof lies not in what the Framers and Founders said, but in what followed. The critical question is not how the terms were understood in 1787. As Hamilton stressed in **Federalist 34**:

> Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing therefore can be more fallacious, than to infer the extent of any power to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible to safely limit that capacity.[67]

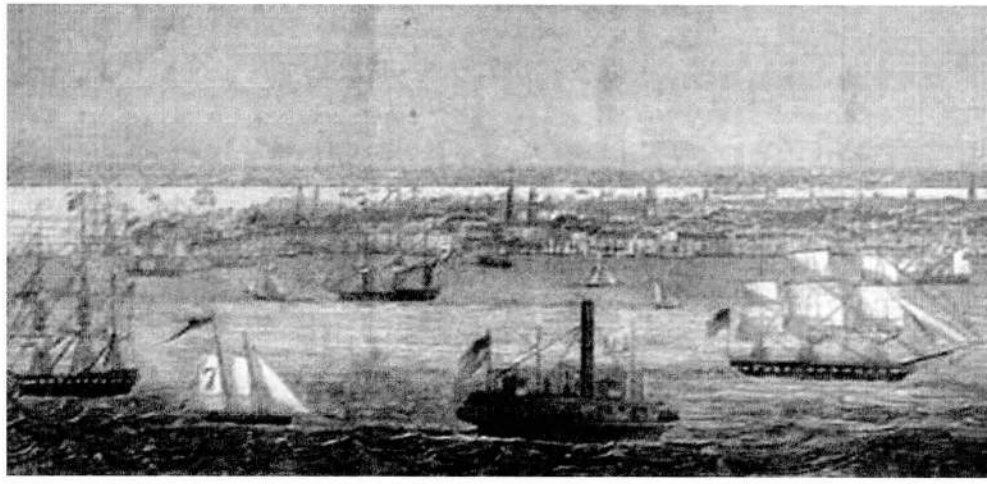
We need then to ask how the individuals charged with giving the document meaning carried out that task. How did the process of interpretation and application play out? How did Congress and the Court "liquidate and ascertain" the Clause's meaning?

§

We begin with Congress. Theirs was not an easy task. As now Representative James Madison stressed early on, the process was "intricate," "novel," and evolving, and "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[68]

The first of these "precedents"—arguably the first "pure" exercise of the positive commerce power—came on September 1, 1789: *An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes*.[69] This was both a typical statute for the regulation of what we now recognize as an "instrument" of commerce and the prototype for most of what Congress did in the early years of the nation. Indeed, a revised version of this measure, enacted on February 18, 1793,[70] lay at the heart of the Court's first attempt to give meaning to the Commerce Clause, *Gibbons v. Ogden*.[71]

These and similar measures were precisely what a new nation needed, albeit one that was sparsely populated and largely rural and agrarian. As such, these statutes were consistent with what Calvin Johnson has characterized as a "mercantilist" norm, one within which largely external congressional



***An Act for the government and regulation of Seamen in the merchants service*, passed by Congress in 1790, regulated the working conditions of seamen, mandating that sufficient fresh water and food be on board. Passage of this bill, and others like it, show that Congress viewed the Commerce Clause as having a large regulatory scope. Above are ships in New York Harbor circa 1800.**

vision focused on "deep water shipping and foreign trade."[72] Viewed as a matter of both what the founding generation believed about the Commerce Clause, and what they did as they applied it, the *form* of these acts seems to imply that they did not envision a society in which the Commerce Clause would serve as the constitutional predicate for federal regulation of vast swaths of our economic and social life. Or, as Raoul Berger observed: "Imagine the bemusement of a Founder upon learning of the several ways the federal government can now regulate the functioning of the janitor of a State building, an activity far removed from the contemplation of the Founders, who jealously clung to sovereignty over all matters of local, internal police."[73]

But that does not necessarily mean they would find many modern measures inconsistent with their own understanding of a Clause they themselves treated in ways that are quite clearly inconsistent with the more limited view, which confines federal power to purely interstate "trade or exchange of goods (including the means of transporting them)."[74]

That is—as I first noted in articles published twelve years ago[75]—early Congresses enacted several statutes that embraced a view of the federal commerce power that is quite different from modern "originalist" views.

Consider, for example, *An Act for the government and regulation of Seamen in the merchants service*,[76] enacted by the First Congress, and *An Act for the government of persons in certain fisheries*,[77] a product of the Thirteenth. These measures governed the day-to-day working lives of individuals who were obviously necessary participants in a continuum that led ultimately to an exchange of goods. The 1790 measure, for example, functioned as the early equivalent of a code of labor relations, mandating "an agreement in writing or in print, with every seaman or mariner on board" a ship "bound from a port in one state to a port in any other than an adjoining state."[78] "Seamen or mariners" obviously participated in the process through which individual acts of trade were completed. But it is difficult, if not impossible, to envision how Congress could require the written agreements that lay at the heart of the statutes *unless* Congress believed the Commerce Clause authorized something more than simple regulation of "mere 'trade or exchange.'"[79]

The 1790 Act also regulated numerous other matters that clearly fell outside those narrow strictures. It included a requirement that ships bound overseas carry "a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same."[80] And it mandated that for each person aboard there be "well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread."[81]

Indeed, two arguably essential elements of the Act posed fundamental concerns about the sanctity of state sovereignty. The first made penalties paid by delinquent seamen to ship owners "recoverable in any court, or before any justice or justices of any state, city, town or county within the United States" that had "cognizance of debts of equal value."[82] The second "required" local justices of the peace to resolve controversies between owners and seamen over the seaworthiness of a vessel.[83]

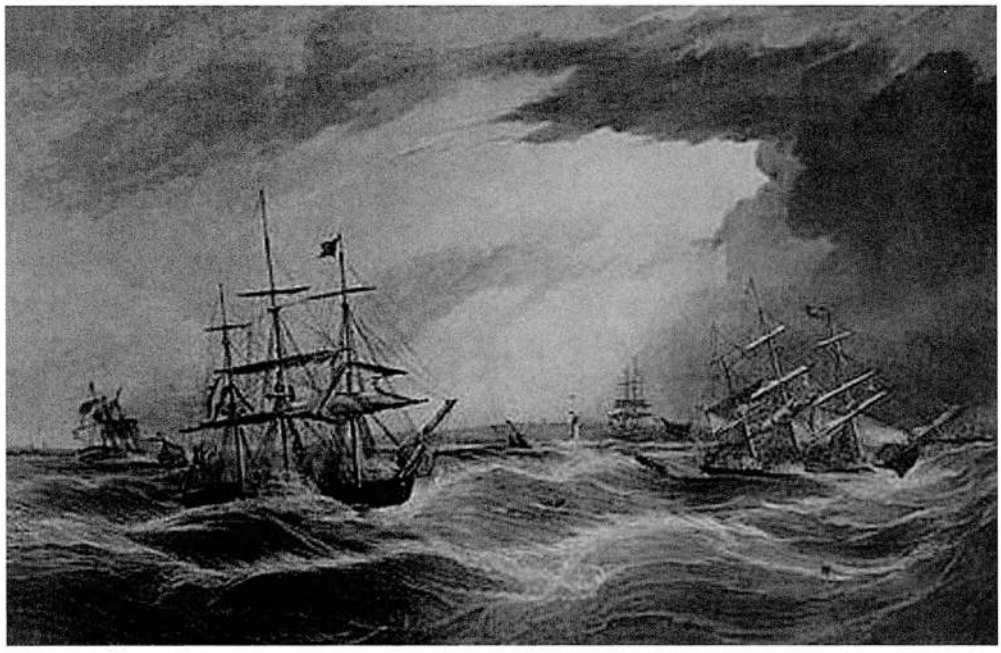
These Acts are far broader than any authorized by the narrow readings of "commerce" championed in some quarters. The structuring of and strictures imposed on the relationship between employer and employee, for example, are precisely the sort of regulations that were subsequently condemned by a Court intent on enforcing a narrow view of the proper scope of the term "commerce," in cases like *Adair v. United States*[84] and *Railroad Retirement Board v. Alton Railroad Company*.[85]

The theory embraced was simple. As the Court stressed in *Adair*, a federal act was constitutional when there was "some real or substantial relation to or connection with the commerce regulated."[86] But that was not present, as the Court emphasized the same year in *The Employer's Liability Cases*, where the measure in question "is not confined solely to the interstate commerce business which [employees] may do," but instead "regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."[87]

Early statutes also presaged the use of the Commerce Clause as a predicate for making certain matters federal crimes. In 1825, for example, Congress made it a felony to steal goods from a shipwreck.[88] The Court sustained that provision thirteen years later in *United States v. Coombs*, stressing that the commerce power was not "confined to acts done on the water, or in the necessary course of the navigation thereof," but rather extended to "any offense which thus interferes with, obstructs, or prevents such commerce or navigation."[89]

Once again, there is at least an arguable but hardly ineluctable relationship between these measures and narrow understandings. The connection with actual commerce was, however, much more attenuated in certain other measures. In both 1803 and 1804, for example, Congress enacted, and President Thomas Jefferson supported, measures authorizing funds to explore the lands secured through the Louisiana Purchase.[90] Jefferson's remarks regarding the first and more famous of these, the Lewis and Clark Expedition, are of special interest, as he observed: "The interests of commerce place the principal object within the constitutional powers and care of Congress, and that it should incidentally advance the geographic knowledge of our own continent cannot but be an additional gratification."[91]

We are accustomed to the idea that the Purchase was in the strictest sense of the term



Early statutes presaged the use of the Commerce Clause as a predicate for making certain matters federal crimes. In 1825, for example, Congress made it a felony to steal goods from a shipwreck, a provision that was sustained by the Supreme Court thirteen years later.

an unconstitutional act by a President who not only overlooked his own constitutional qualms, but actively advised others to conceal them.[92] But the range Jefferson imparts to the scope of the Commerce Clause is startling, assuming, as many do, that the founding generation believed that commerce is simply the core economic transaction.

I am not offering these statutes as definitive proof of anything. Rather, I am suggesting that a post-Convention congressional process of liquidating and ascertaining the meaning of the text offers compelling evidence of a broader and more nuanced reading of the Commerce Clause than one might expect. Indeed, as will shortly become clear, I am setting the stage for an argument that much of what the Court held from the 1850s through the 1930s marked a sharp and unsupported departure from an original understanding that is much more robust than that depicted in traditional "originalist" visions.

§

So far, references to decisions of the Supreme Court have been indirect and incidental. That will not do. Certainly not for a lecture of this sort, in this venue. More to the point, certainly not in a political and legal regime within which the Court has the final say on matters of constitutional interpretation. So I turn directly to its decisions, but with no intention of providing anything that even remotely resembles definitive treatment. Rather, I want to sample the cases in order to illustrate what I believe have been three historic trends: exposition, dispute, and resolution.

Exposition begins, as it should, with *Gibbons* for one obvious reason: this was the first time the Court confronted issues raised by the Commerce Clause. A second and more telling fact is that we can actually find virtually everything we need to determine both original understandings and most aspects of modern Commerce Clause doctrine in *Gibbons*, properly read and understood.

Given what I have said about the Clauses's importance, the fact that *Gibbons* is the first case to parse it seems remarkable. There are scattered references to "commerce" in the first twenty-one volumes of what we now know as the United States Reports. None are particularly enlightening. None pose questions about either the nature or scope of the clause. More to the point, neither *Gibbons*—nor any of the truly memorable nineteenth-century cases that followed it—have anything to do with the power of Congress to regulate commerce. Federal statutes do lurk in the background. Properly understood, for example, *Gibbons* is a preemption case, resting as it does on the implications of a license held pursuant to the 1793 federal statute regulating the coasting trade. But that is not why most people remember or cite that decision.

Think carefully for a moment about the nature of the "great"—or at least, the well-known—nineteenth-century Commerce Clause decisions. The Court did decide a smattering of cases in which federal power was at issue. But, with one possible exception, none of them are especially important or memorable. So, for example, in 1838 the Court sustained a federal measure making it a crime to steal from a shipwreck.[93] In 1850, it held that Congress had the power to prohibit importing counterfeit coins and using such coins with intent to defraud.[94] But I suspect few individuals know about, much less regard as seminal pronouncements, either *Coombs* or *United States v. Marigold*. And while there is one arguable exception to the general rule, *The Trademark Cases*,[95] those are best understood as illustrations of the need for Congress to act with precision: interesting snippets from the opinion aside,[96] all the Court found was that the terms of the act in question swept too broadly,[97] a defect Congress cured two years later.

The *Gibbons* Court considered three important questions: what exactly is "commerce"; what is, or should be, the fate of state

measures that purport to deal with such matters; and, in a closely related vein, is the federal power to regulate commerce exclusive or concurrent? It answered the first two, and mostly punted on the third, albeit over the objections of Justice William Johnson.

Marshall arguably took a broad view of matters answering the first question. In a passage we are all familiar with, he rejected an attempt to "limit [commerce] to traffic, to buying and selling, or the interchange of commodities."[98] Rather, he declared:

> This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.[99]

That broad statement allowed Marshall to do what was necessary to resolve the claim before him. The federal coasting license held by Thomas Gibbons was a constitutionally sound regulation of commerce, properly defined. As such, it preempted New York's attempt to confer a monopoly via the license issued to Aaron Ogden.

Marshall did not, however, directly resolve the issue of exclusivity. He does imply that the power must be regarded as concurrent, stating: "The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States."[100] But the discussion is inferential rather than conclusive. Marshall reasons only that the case before him must be resolved in the light of the reality that Congress had acted, declaring: "The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?"[101]

This prompted Justice William Johnson to issue a concurring opinion, within which this supposedly "Republican" jurist—Thomas Jefferson's first nominee—argued that the commerce power must, of necessity, be deemed exclusive. The states, Johnson stressed, had embraced "selfish principle[s]" during the period after the Revolution.[102] Their insistence on passing "iniquitous laws and impolite measures . . . was the immediate cause, that led to the forming of a convention."[103] The text that emerged "contain[ed] . . . positive restrictions imposed by the constitution upon State power."[104] One of those was the Commerce Clause, which, given Johnson's take on the history that informed its drafting and ratification, gave Congress "exclusive grants . . . of power over commerce."[105] That was of course not the rule Marshall embraced, and it remained for a Court led by his successor, Roger Brooke Taney, to reject the exclusivity theory in *Cooley v. Board of Wardens of the Port of Philadelphia.*[106]

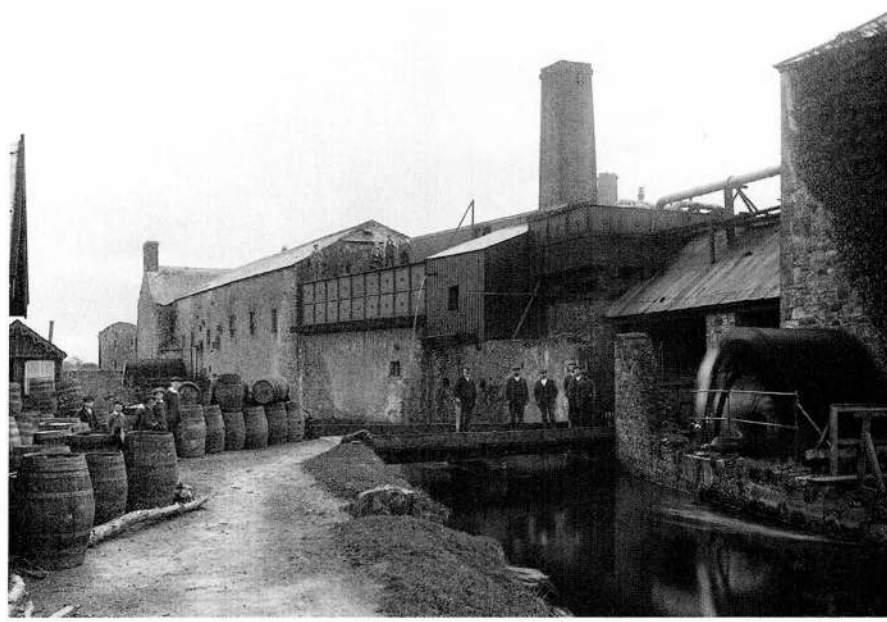
All of this is familiar stuff, as are, I suspect, certain passages in *Gibbons* I will now discuss in some detail. For example, Marshall clearly stressed the centrality of the intra-/interstate distinction. He states: "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."[107]

This is, of course, the approach taken by the Court in cases whose names are familiar to

us as exemplars of what has appropriately been characterized as a regime within which semantics and formalism resulted in "elastic standards that produced seemingly erratic results."[108] So, for example, in *Paul v. Virginia*,[109] the Court held that insurance policies issued in one state and in force in another "are not articles of commerce in any proper meaning of the word," but are rather "local transactions, and are governed by the local law."[110] In *Coe v. Town of Errol*,[111] it declared that logs cut for the sole purposes of transportation and sale in another state, "until actually put in motion," must "be regarded as still remaining a part of the general mass of property in the State."[112] And in one of the central decisions in the confrontation between the Court and the New Deal, *A. L. A. Schechter Poultry Corp. v. United States*,[113] the Court held that the poultry in question "had come to a permanent rest within the State," with "[n]either [its subsequent] slaughtering nor . . . sale . . . transactions in interstate commerce."[114]

In a similar vein, Marshall provides support for one of the major threads in subsequent treatment of these matters by the Court: the notion that "commerce" did not include activities like manufacturing or agriculture. Speaking of state inspection laws, he states that their

> object . . . is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not

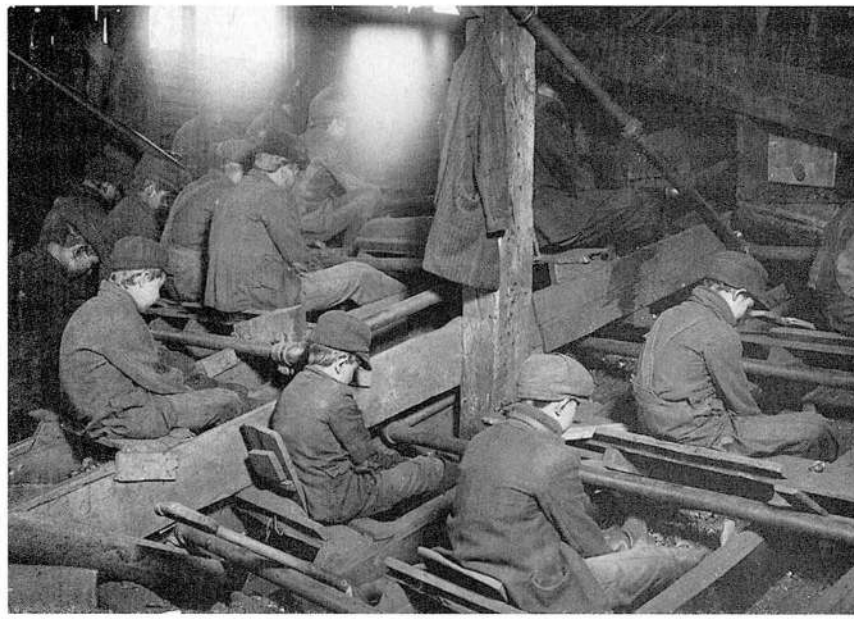


In an 1888 Supreme Court case involving a distillery (such as this one in Michigan), the Court held that a state could bar the production of "intoxicating liquors," given that "[n]o distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce."

> surrendered to the general government: all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpikes, roads, ferries, &c., are component parts of this mass.[115]

Once again, these distinctions factor into subsequent decisions regarding both state and federal measures. In *Kidd v. Pearson*,[116] the Court held that Iowa could bar the production of "intoxicating liquors," given that "[n]o distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce."[117] In *United States v. E. C. Knight Co.*,[118] the Court ruled that Congress could not bar a monopoly in the manufacture of refined sugar, characterizing this as a "matter of internal police" and stressing that "[t]he fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."[119] And in *Hammer v. Dagenhart*,[120] it struck down a federal child labor act, stressing that "[t]he goods shipped are themselves harmless" and "the production of articles, intended for interstate commerce, is a matter of local regulation."[121]

The record was not uniformly bleak. In *Southern Railway Company v. United States*,[122] the Court recognized the power of Congress to mandate safety devices on all



While the Court struck down a law banning child labor in 1918, stressing that "[t]he goods shipped are themselves harmless" and "the production of articles, intended for interstate commerce, is a matter of local regulation," the Justices also upheld laws mandating safety devices on railroads and banning state lotteries. Above, boys sort coal at an anthracite coal breaker near South Pittston, Pennsylvania, in 1911.

locomotives and cars, not simply those used in interstate commerce, observing that "it is no objection to such an exertion of this [plenary] power that the dangers intended to be avoided arise, in the whole or in part, out of matters connected with intrastate commerce."[123] In *Champion v. Ames (Lottery Case)*,[124] stressing that the ban on lottery tickets reached only "commerce . . . among the several States,"[125] the Court upheld a judgment by Congress that it was appropriate to bar something that "has grown into disrepute and has become offensive to the entire people of the Nation."[126] And in *Houston, East and West Texas Railway Co. v. United States*,[127] the Shreveport Rate Case, the Court held "that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce."[128]

That said, the substantial majority of the decisions issued in the wake of *Gibbons* tended to favor the authority of the states and call into question the ability of Congress to act. As such, they represent what I have labeled as the second phase of Court treatment of the dormant and positive commerce clauses: a process of dispute, by which I mean the development of an approach to the Commerce Clause by a Court that is much more attuned to and sympathetic to issues of state sovereignty than was the case under Marshall.

There is a temptation to lay the responsibility for much of this at the feet of Taney. Justice Felix Frankfurter, for example, said of the fifth Chief Justice:

> [E]ven the most sober historians have conveyed Taney as the leader of a band of militant "agrarian," "localist," and "pro-slavery" judges, in a strategy of reaction against Marshall's doctrines. They stage a dramatic conflict between Darkness and Light: Marshall, the architect of a nation; Taney, the bigoted provincial and protector of slavery.[129]

Taney does have a great deal to answer for, especially in the area of slavery. That said, we must give the devil his due. It is important to recognize that *Cooley* served as the catalyst for much of what we now recognize as the dormant commerce clause: the doctrine we use to strike down state measures even in the absence of federal legislation. Marshall had a role in this, coining the phrase in *Willson v. Black-Bird Creek Marsh Company*, where he spoke of "the power to regulate commerce in its dormant state."[130] But it was the Taney Court, speaking through Justice Benjamin Curtis, that best articulated the underlying theory:

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.[131]

It was also on Taney's watch that the Court began to move away from what I at least believe to be the heart of Marshall's vision in *Gibbons*. Much of that is understandable, given Taney's background and beliefs. So, for example, in *Mayor, Alderman, and Commonality of the City of New York v. Miln*,[132] decided in his first term as Chief, we find the Court drawing a sharp distinction between an individual who had been a "passenger" on a ship docking in New York, and that same individual, post-journey, who is now simply a "person" subject to near

plenary state authority over "internal police."[133]

§

My account of *Gibbons* so far suggests that the Court was correct as a matter of original understanding when it held that the federal commerce power does not extend to matters "wholly internal," and that there is indeed a distinction between commerce and "other productive" activities, such as manufacturing. But let's look again at what Marshall actually said.

First, he does state that "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself."[134] But he follows that suggestive passage with one that speaks directly to the nature of the power actually conferred:

> The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.[135]

The bar on federal action extends, accordingly, only to those matters that "do not affect other States," with the exercise of the federal commerce power appropriate over "those internal concerns which affect the States generally."[136] In particular, Marshall speaks of the need to avoid "interfering" with internal state matters, *unless* such actions comport with the "the purposes of executing some of the general powers of the government."[137]

Second, as Justice William Rufus Day stressed for the majority in *Hammer*, Marshall does indeed appear to speak directly to the distinction between commerce and other matters such as agriculture or manufacturing in his discussion of inspection laws in *Gibbons*.[138] But, just as I did when I quoted that passage earlier, Justice Day does not go on to consider the implications of what Marshall says next:

> No direct power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.[139]

Simply put, there is truth in the routine claim that the Court took a "wrong turn" and repudiated the original understanding of the nature and scope of the commerce power. But that did not happen during the New Deal, the period routinely characterized as the one during which the "cases worked a revolution in constitutional theory as well as in textual interpretation."[140] Rather, it occurred when the principles espoused by Madison and Marshall were forgotten and the foundations laid by Marshall in *Gibbons* were abandoned. Viewed in this light, the poster child for what so many see as wrong in contemporary Commerce Clause doctrine, *Wickard v. Filburn*,[141] is not the revolutionary departure. Rather, as Justice Robert H. Jackson observed in his opinion for the Court, *Wickard* was part of an effort to "return to the principles first enunciated by

Chief Justice Marshall in *Gibbons v. Ogden*."[142]

Once again, I concede that none of this is self-evident. An argument can be made, for example, that *Gibbons* does not reach so broadly: "Even with an explicit reference to the necessary and proper clause, Chief Justice Marshall acknowledged that the commerce clause was itself directed toward specific ends, as was captured by the distinction between 'internal' and 'external' commerce, where internal commerce was that trade 'between man and man in a State, or between different parts of the same State.'"[143] That is certainly a defensible position. But it is also not inevitable, and that is much my point: the degrees of certainty that pervade much of the "originalist" commentary on such matters are troubling, and there is another view that must be considered with care in the light of the analytic principles I have noted.

§

I labeled the third phase in the interpretive process as resolution, by which I mean a change in interpretive approach that has brought us back to a close approximation of what I think Madison in particular had in mind as he surveyed matters prior to the Constitutional Convention and then worked diligently to fashion, ratify, and implement a Constitution for "We the People" that would help us secure "a more perfect union."

Now, I doubt very much that Madison believed it would be necessary for Congress to pass many of the federal laws at issue in the late nineteenth century, much less those that were so bitterly contested in the years leading up to *NLRB v. Jones & Laughlin Steel Corporation*,[144] *United States v. Darby*,[145] and *Wickard v. Filburn*.[146] But whether he would agree that such measures are not constitutionally proper is another question entirely.

As Justice Rutledge noted, the world Madison lived in was characterized by a "a rural, horse-powered economy, with largely water-borne commerce."[147] That was not, however, the one that existed in the wake of the Civil War. And it was certainly not the one Congress addressed as it fashioned the measures contested in the first and successive waves of major cases dealing with the regulatory dimensions of the federal commerce power. That is, at the point where profound economic change prompted Congress to become much more active, the commerce power needed to be parsed consistent with what Madison described as the need to create a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary."[148] I seriously doubt, accordingly, that either Madison or Marshall would have any quarrels with dormant Commerce Clause doctrines, as expressed in, for example, *Pike v. Bruce Church, Inc.*,[149] which provides the general rule, and *Complete Auto Transit, Inc. v. Brady*,[150] which structures inquiries when states impose taxes on interstate commercial activities. I also believe that the two of them would be quite comfortable with the current description of the nature and scope of the positive federal commerce power:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activity. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.[151]

The fact that neither Madison nor Marshall could easily envision intercontinental railroads, massive industrialization, the internet, and the like, does not mean they would necessarily oppose federal measures designed to advance national interests. In particular, it does not mean that they would question federal statutes seeking to provide solutions for pressing national problems in situations where the states were individually "incompetent" to do so. Both men understood that the Constitution was of necessity a general outline, rather than a detailed blueprint. And both acknowledged that it would be incumbent on future generations to deal with problems and circumstances the founding generation could not possibly imagine. That is, as Marshall observed in *M'Culloch*, the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[152] In particular, the Constitution largely left judgments about means to Congress:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.[153]

That was especially the case in matters commercial, both in terms of acknowledging the need for flexibility in the face of an uncertain future, and the degree of deference to be afforded Congress, So, for example, as Hamilton observed in **Federalist 36** Madison observed: "The real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself, for not abridging the discretion of the national councils in this respect."[154] And in *Gibbons* Marshall emphasized: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse."[155]

There was, however, a *quid pro quo*. Madison, consistent with his notion of the "great desideratum of Government," believed that the cure for faction is government by "prudent" individuals; by those who are "practically wise"; by elected representatives "who possess most wisdom to discern, and most virtue to pursue, the common good of society."[156] This suggests that a necessary corollary to a general rule of deference is that Congress should act for the nation only after due deliberation. That is, we should expect congressional actions to reflect what Chief Justice Harlan Fiske Stone described as "the sober second thought of the community, which is the firm basis on which all law must ultimately rest."[157]

There are two obvious problems with this, neither of which is especially new. The first is a variation on the difficulties that led to the Constitution to begin with: the corrosive influence of looking to local or individual needs, rather than those of the nation. In an election speech delivered in November, 1774, Edmund Burke voiced many of the sentiments and principles that would soon be articulated by the individuals responsible for trying to fashion a United States of America:

> Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when

> you have chosen him he is not a member of Bristol, but he is a member of *Parliament.*[158]

The second problem is the temptation to cut corners. Madison, for example, both complained of what he witnessed and anticipated much of what now routinely transpires when he warned that Congress would "follow the example of other Legislative assemblies in first procrastinating and then precipitating their acts; but, owing to the termination of their session every other year at a fixed day & hour, a mass of business is struck off, as it were at shorthand, and in a moment. These midnights precedent of every sort ought to have little weight in any case."[159]

This brings us to one final point of agreement between Madison and Marshall and, in the light of what they believed, the extent to which they would disagree with certain aspects of current doctrine. Both understood as a practical matter that it was important to preserve the states. But neither, I believe, attached totemic significance to what has been routinely characterized as measures that regulate "the States as States," in ways that impair "attributes of state sovereignty."[160]

Madison, acutely aware of the vices of the prior political system, made it quite clear that that "sovereignty" extended only to those areas where the responsibility to act had not been vested in the nation. Thus, in **Federalist 39,** he stated that national "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[161] In a similar vein, Marshall declared in *Gibbons* that the commerce power "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[162]

The Court can and must play a role in making certain that a given federal statute is in fact one that regulates commerce, appropriately defined and understood, or, in the alternative, that it is in fact "necessary and proper" within the letter and spirit of the formulation first expressed in *M'Culloch*:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional.[163]

Madison was admittedly troubled by this. Consistent with his posture during ratification, he perceived that the real threat to state sovereignty lay not in the pronouncements of the Court *per se*, but in "the latitude of power which it has assigned to the National Legislature."[164] In language that anticipated *Garcia v. San Antonio Metropolitan Transit Authority*,[165] Madison then observed:

> But what is to controul Congress when backed and even pushed on by a majority of their Constituents, as was the case in the late contest relative to Missouri, and as may again happen in the constructive power relating to Roads & Canals? Nothing within the pale of the Constitution but sound arguments & conciliatory expostulations addressed both to Congress & to their Constituents.[166]

It is worth noting, however, that Madison did not equate threats to sovereignty only with overreaching in favor of purely national objectives. The evils of "latitude" also lay in the "impulses given to it by a majority of the States seduced by expected advantages, than from the love of Power in the Body itself, countrouled as it *now* is by its responsibility to the Constituent Body."[167]

Madison did not embrace *M'Culloch*, but his actual criticisms of the decision were nuanced. In a letter to Spencer Roane, for

example, he criticized "a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned."[168] Thus he did not so much reject the Court's construction as outline a requirement that a given legislative act exhibit "an obvious and precise affinity" between the means embraced and the ends anticipated.[169] The real danger, then, was in the risk that Marshall's opinion would both encourage Congress to act precipitously and preclude effective judicial review of the resulting measures:

> Does not the Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers? According to that doctrine, the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms; and Congress are admitted to be Judges of expediency. The Court certainly cannot be so; a question, the moment it assumes the character of mere expediency or policy, being evidently beyond the reach of Judicial cognizance.[170]

The assumption that Congress may act for any reason or virtually no reason at all, with no expressed justifications, or on the basis of those offered only after the fact, is an entrenched aspect of the Court's extraordinarily deferential approach to such matters. While grounded in decisions like *M'Culloch* and *Gibbons*, modern rational basis review is also arguably inappropriate given the founding generation's belief that the legislative process should be treated with a degree of seriousness all too often lacking today. It is one thing, as Representative Theodore Sedgwick observed early on, to say that "the Constitution had expressly declared the ends of Legislation; but in almost every instance had left the means to the honest and sober discretion of the Legislature."[171] It is quite another to say that a given statute is in fact the product of "honest and sober deliberations," much less that assessing said statutes via rational basis review, at least in its pristine form, is the appropriate approach.

§

Madison expected us to apply wisdom to practice. His appeal for a "prudent regard for our own common good" asks that we keep in mind the primary purposes informing the decision to allocate certain enumerated powers to the national government: the need to arm it with what Charles Pinckney described as "complete" authority[172]—authority that was necessarily supreme[173]—in either of two situations. The first is those in which "the states are separately incompetent,"[174] either because they are the source of the problem or simply incapable of its resolution. The second is those where Congress has made a serious and considered attempt "to legislate in all cases for the general interests of the Union."[175]

The rules are important. But so too are the perspectives brought to bear as all parties to this continuing Great Experiment seek to puzzle out the application of the Commerce Clause to the virtually infinite set of circumstances under which it is applied. This is an area where it is impossible to say that there is a single, right answer. That said, my suggestion that Madison largely got it right, and that we need to keep in mind the vices the Constitution was designed to smite, draws nourishment from the words of another great member of the founding generation, Justice Joseph Story, who observed:

> But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent

> of the power.... Are we at liberty, upon any principles of reason, or common sense, to adopt a restrictive meaning, which will defeat an avowed object of the constitution, when another equally natural and more appropriate to the object is before us? Would not this be to destroy the instrument by a measure of its words, which that instrument itself repudiates?[176]

§

Marshall spoke in *M'Culloch* of the need to consider both the "letter and the spirit of the constitution."[177] Madison, in **Vices**, provides an interpretive baseline for assessing how best to maintain what he described in a letter to Washington as a "middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."[178]

The principles and perspectives gleaned from the writings and actions of Madison and his colleagues support a dynamic, originalist approach to the Commerce Clause. They instruct that it must be read in the light of what Madison observed at the very end of his life in a brief essay on "sovereignty," in which he observes:

> In settling the questions between these rival claims of power, it is proper to keep in mind that all power in just & free Govts. is derived from compact, that when the parties to the compact are competent to make it, and when the compact creates a Govt., and arms it not only with a moral power, but the physical means of executing it, it is immaterial by what name it is called. Its real character is to be decided by the compact itself; by the nature and extent of the powers it specifies, and the obligations imposed on the parties to it.[179]

There is a pronounced tendency in current discussions of the Commerce Clause and, in particular, of the federalism issues associated with it to assume that the obligations imposed by the text should be viewed purely as restrictions on federal authority. It seems clear, however, that any full and fair reading of the original record must account for the extent to which the states failed to live up to their end of the constitutional bargain, exhibiting instead a "want of concert in matters where common interest require it."[180] There is also a propensity to forget that it is a Constitution for "We the People of the United States," within which the federalism formulation articulated in the Tenth Amendment is not limited to the notion that power resides in the federal and state governments, but also expressly acknowledges the central role played by "the people."

Madison believed that "the fundamental principle of republican Government [is] that the majority who rule in such Governments, are the safest Guardians of both public Good and of private rights."[181] He also understood that "[i]f men were angels, no government would be necessary."[182] I am not at all certain who the angels and devils are in the history of the Commerce Clause. I do know that the concerns that led to its insertion in the Constitution lay at the heart of the initial American experience and have remained there ever since. As we work together to make sense of all of this, we can do no better than to keep in mind the central lessons of Madison's **Vices**; lessons that instruct both as to the reasons for granting federal powers and the ends toward which they are properly directed. Which is another way of saying that it is incumbent on all of us of to exercise "a prudent regard to [our] own [collective] good as involved in the general and permanent good of the Community."[183] To be, as Madison expected us, both practical and wise.

Author's Note: This lecture was delivered on May 23, 2012 and the current text was finalized in early June 2012. My goal was to provide the best possible account of what key members of the founding generation envisioned when they crafted and approved the Commerce Clause, and how that provision has been interpreted and applied by the Court. At the time the invitation to deliver the lecture was extended, the Court had not yet granted cert in the cases involving the Patient Protection and Affordable Care Act. It was, however, quite clear that it would, and I decided that I would not read any of the briefs, scholarship, and/or public commentary on that measure, including reports of the oral arguments and the transcript of those proceedings. My goal was to provide a commentary uninformed and uninfluenced by that debate and, by finalizing this text prior to the opinions being handed down, by the Court's resolution of the issues.

ENDNOTES

[1] Wiley Rutledge, *The Commerce Clause: A Chapter in Democratic Living*, at 25, in **A Declaration of Legal Faith** (1947) (Rutledge). Put another way, student pre-course expectations look much like current Supreme Court nomination confirmation hearings: Abortion! Affirmative Action! Flag Burning! Legislate from the Bench!!

[2] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 221 (1824).

[3] James Madison, **Vices of the Political system of the U. States** (April. 1787), in 9 **The Papers of James Madison**, at 348, 355 (Robert A. Rutland et al. eds, 1975) ((Madison, **Vices**) and (Madison, **Papers**)).

[4] Samuel Johnson, **A Dictionary of the English Language** (1755) (Johnson, **Dictionary**).

[5] Madison, **Vices**, at 348.

[6] *Editorial Note*, 9 Madison, **Papers**, at 345, 346.

[7] Jack N. Rakove, **James Madison and the Creation of the American Republic** 52 (2nd ed. 2002).

[8] 146 *Cong. Rec.* S 9119, S 9121 (Sept. 22, 2000) (noting only that as Madison "examined the 'vices of the political system of the United States' . . . he became convinced that the agenda of the upcoming convention should not be limited to the failings of the Articles [of Confederation]"). The statement may or may not have actually been read, given Congress's unique approach to crafting a "record" of its "debates and proceedings." The one thing that is clear is that Senator Byrd "spoke" after that day's session ended. *See* Order for Recess, *id.* at S 9118 (Senate to "stand in recess . . . following the remarks of Senator Baucus and Senator Byrd").

[9] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). *See also Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.") (citing *C & A Carbone* and its citation of **Vices**); *American Dredging Co. v. Miller*, 510 U.S. 443, 466 (1994) (Kennedy, J., dissenting) (noting that both foreign "trading partners" and the "individual States" needed "assurances" that neither the United States nor the states themselves would "erect barriers to commerce," citing **Vices**).

[10] *See* Act of Confederation of the United States of America (Nov. 15, 1777), art. II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled"), in I **The Documentary History of the Ratification of the Constitution: Constitutional Documents and Records**, 1776–1787, at 86, 86 (Merrill Jensen ed., 1976) (**Documentary History**).

[11] James Madison, **Vices**, at 351.

[12] Letter from James Madison to George Washington (Dec. 9, 1785), in 8 Madison, **Papers**, at 438, 438.

[13] Letter from George Washington to James Madison (Nov. 30, 1785), in 9 *id.* at 428, 429.

[14] Alexander Hamilton, *Annapolis Convention: Address of the Annapolis Convention* (Sept. 14, 1786), in 3 **The Papers of Alexander Hamilton** 686, 689 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[15] Madison, **Vices**, at 357.

[16] My emphasis on the existence and importance of three sovereigns is important, given the extent to which traditional discussions of these matters tend to speak simply of nation and states, to the exclusion of the people. But it is the people, speaking through their elected representatives, who provide essential safeguards in our federal system. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) ("we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result").

[17] Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), 9 Madison, **Papers**, at 317, 318.

[18] Madison, **Vices**, at 351.

[19] *Id.* at 348.

[20] **The Federalist No. 9**, at 55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[21] Speech of James Wilson in the Pennsylvania Convention (Nov. 24, 1787), in 2 **Documentary History**, at 340, 347.

[22] Madison, **Vices**, at 349.
[23] *Id.* at 350.
[24] *Id.*
[25] *Id.* The ironic twist here is, of course, the implications of this statement for two of the most important post-ratification debates. The first was the controversy caused by Alexander Hamilton's proposal to create the First Bank of the United States. The second, an ongoing dispute on the matter of internal improvement, that is, the authority of the federal government to itself construct such infrastructure enhancements as roads and canals. For a discussion of the issues and debates, see Mark R. Killenbeck, "*Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*," 1999 *Sup. Ct. Rev.* 81 (Killenbeck, *Pursuing*).
[26] Jack N. Rakove, **The Annotated U.S. Constitution and Declaration of Independence** 134 (2009).
[27] *Id.*
[28] Luther Martin (June 19, 1787), 4 **The Records of the Federal Convention of 1787** 20, 23 (Max Farrand ed., 1937) (revised edition) (**Farrand**).
[29] **The Federalist No. 6**, at 32 (Alexander Hamilton).
[30] **The Federalist No. 7**, at 39 (Alexander Hamilton).
[31] **The Federalist No. 11**, at 65 (Alexander Hamilton).
[32] **The Federalist No. 10**, at 59 (James Madison).
[33] **The Federalist No. 42**, at 283 (James Madison).
[34] Robert G. Natelson & David Kopel, "Commerce in the Commerce Clause: A Response to Jack Balkin," 109 *Mich. L. Rev. First Impressions* 55, 55 (2010).
[35] *Id.*
[36] So, for example, Professor Epstein is correct when he stresses that "[t]he original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *Va. L. Rev.* 1387, 1443 (1987) (Epstein, *Proper Scope*). That said, I believe he and many other champions of a narrow view undervalue the extent to which key members of the founding generation believed that the states themselves were indeed "evil."
[37] Letter from James Iredell to Hannah Iredell (May 18, 1780), *quoted in* Gordon S. Wood, **The Creation of the American Republic 1776–1787** 406 (1960).
[38] **The Federalist No. 22**, at 135 (Alexander Hamilton).
[39] *Id.* at 137.
[40] 1 Brutus, *To the Citizens of the State of New York* (Oct. 18, 1787), in II **The Complete Anti-Federalist**, at 363, 365 (Herbert J. Storing ed., 1981).
[41] Melancton Smith, *Speech Delivered in the Course of Debate by the Convention of the State of New York on the Adoption of the Federal Constitution* (June 25, 1788), in VI *id.*, at 164, 166.
[42] **The Federalist No. 51**, at 351 (James Madison).
[43] Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 Madison, **Papers**, at 501.
[44] **The Federalist No. 42**, at 279 (James Madison).
[45] *The President of the Convention to the President of Congress* (Sept. 17, 1787), in 1 **Documentary History**, at 305, 306 (*President's Letter*).
[46] *Id.* at 305.
[47] Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Madison, **Papers**, at 368, 369. *See also* Letter from James Madison to George Washington (April 16, 1787), *id.* at 382, 383 (describing the need to find a "middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful").
[48] Madison to Randolph, 9 *id.* at 370.
[49] *Committee of Detail I*, in II **Farrand**, at 129, 131. Note that this tracks in important respects the language employed in the Virginia Plan, as depicted in the "Resolutions proposed by Mr. Randolph in Convention, May 29, 1787." *See* I *id.* at 20, 21 ("to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation").
[50] **The Federalist No. 45**, at 313 (James Madison).
[51] Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in IX **The Writings of James Madison**, at 316, 330 (Gaillard Hunt ed., 1909) (Madison, **Writings**).
[52] *Id.* at 332–33.
[53] *President's Letter*, I **Documentary History**, at 305.
[54] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
[55] **The Federalist No. 37**, at 236 (James Madison).
[56] **The Federalist No. 36**, at 229 (James Madison). It is important to recognize that the word "emergency" was not then and is not now used in such matters to describe catastrophic events. *See* Johnson, **Dictionary** (emergency as "any sudden occasion; unexpected casualty," and/or "pressing necessity"); *cf. Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 444–45 (1934) (stressing that "there were in Minnesota conditions urgently demanding relief").
[57] 2 *Annals of Congress* 199 (1791).
[58] *Veto Message*, Jan. 30, 1815, in IX Madison, **Writings**, at 471, 471. For a thorough, scholarly, and engaging (!) treatment of these matters, see Mark R. Killenbeck, ***M'Culloch v. Maryland*: Securing a Nation** (2006).
[59] *See, e.g.*, Letter from James Madison to N. P. Trist (Dec., 1831), in IX Madison, **Writings**, at 471, 471 ("Other, and some not very candid attempts, are made to stamp my political career with discrediting inconsistencies.").
[60] *See id.* at 476–77 (stressing in the case of the Bank a process within which "precedents . . . expound a Constitution," fixing its interpretation, rather than changing it).
[61] **The Federalist No. 37**, at 236–37 (James Madison)

[62] Thomas Jefferson, *The solemn Declaration and Protest of the commonwealth of Virginia on the principles of the constitution of the US. of America and the violations of them*, in 3 **The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776–1826**, 1944, 1946 (James Morton Smith ed., 1995).

[63] *See, e.g., Garcia*, 469 U.S. at 543–44 (stressing the need to "accommodat[e] changes in the historical functions of States" and that "[r]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort").

[64] Letter from James Madison to Edward Livingston (April 17, 1824), in 9 Madison, **Writings**, at 187, 189.

[65] Letter from James Madison to N. P. Trist (Dec 1831), in 9 *id.* at 471, 475.

[66] *See, e.g.*, Randy E. Barnett, "New Evidence of the Original Meaning of the Commerce Clause," 53 *Ark. L. Rev.* 847 (2003) (Barnett, *New Evidence*); Randy E. Barnett, "The Original Meaning of the Commerce Clause," 68 *U. Chi. L. Rev.* 101 (2001) (Barnett, *Original Meaning*); Grant S. Nelson & Robert J. Pushaw, Jr., "Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues," 85 *Iowa L. Rev.* 1 (1999) (Nelson & Pushaw, *Rethinking*).

[67] **The Federalist No. 34,** at 210–11 (Alexander Hamilton).

[68] Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 Madison, **Papers**, at 249, 250.

[69] Act of Sept. 1, 1789, ch. XI, 1 **Stat.** 55.

[70] Act of Feb. 18, 1793, ch. VII, 1 **Stat.** 305.

[71] 22 U.S. (9 Wheat.) 1 (1824).

[72] Calvin H. Johnson, "The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause," 13 *Wm. & Mary Bill Rts. J.* 1, 1 (2004).

[73] Raoul Berger, **Federalism: The Founders' Design** 120–21 (1987).

[74] Barnett, *Original Meaning*, at 146. *See also* Epstein, *Proper Scope*, at 1454 (limiting "commerce" to "interstate transportation, navigation, and sales, and the activities closely incident to them"). United States District Judge John Davis, a delegate to the Massachusetts convention, and one of the "midnight judges" nominated by John Adams in February, 1801, took a distinctly different view:

> [T]he power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable.

United States v. The William, 28 F. Cas. 614, 621 (D. Mass.) (No. 16,700).

[75] *See, e.g.*, Mark R. Killenbeck, "Pursuing"; Mark R. Killenbeck, "The Qualities of Completeness. More? Or Less?," 97 *Mich. L. Rev.* 1629 (1999).

[76] Act of July 20, 1790, ch. 29, 1 **Stat.** 131.

[77] Act of July 19, 1813, ch, 2, 3 **Stat.** 2.

[78] 1 Stat. 131, at § 1. This stricture applied only to a "ship or vessel of the burthen of fifty tons or upwards." *Id. See also* 3 Stat. 2, at § 1 (requiring that the "master or skipper of any vessel of the burthen of twenty tons or upward" shall "make an agreement in writing or print with every fisherman who may be employed therein"). In that respect it operates in exactly the same manner as many current statutes that trigger regulation only when an enterprise employs a specified minimum number of people or engages in a specified level of commercial activity. *See, e.g.*, 42 U.S.C. § 2000e(b) (1994) (defining an "employer" for the purposes of Title VII of the Civil Rights Act of 1964).

[79] Barnett, *New Evidence*, at 865.

[80] 1790 Act, § 8, 1 **Stat.** at 134.

[81] *Id* § 9.

[82] *Id.* § 2, 1 Stat at 132.

[83] *Id.* § 3, 1 Stat at 132–33.

[84] 208 US 161, 179 (1908) (holding that because "interstate commerce" does not cover labor organizations, Congress had no power to prohibit the discharge of employees based on union membership).

[85] 295 U.S. 330, 374 (1935) (holding that "a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation").

[86] *Adair*, 208 U.S. at 178.

[87] 207 U.S. 463, 497 (1908).

[88] *See* Act of Mar. 3, 1825, ch. 65, 4 Stat. 115, 116, § 9.

[89] *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838).

[90] *See* Act of Mar. 27, 1804, ch. 61, 2 Stat. 303, 305, § 13 ("sum of three thousand dollars be, and the same hereby appropriated, for the purpose of extending the external commerce, and exploring the limits of the United States, in the newly acquired territory of Louisiana"); Act of Feb. 28, 1803, ch. 12, 2 Stat. 206, 206 ("sum of two thousand

five hundred dollars be, and the same is hereby appropriated, for the purpose of extending the external commerce of the United States").

[91] Thomas Jefferson, *Message to the Senate and House of Representatives* (Jan. 18, 1803), in 1 **A Compilation of the Messages and Papers of the Presidents**, at 352, 354 (James D. Richardson ed., 1897).

[92] *Compare* Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 10 **The Writings of Thomas Jefferson**, at 5, 7 (Paul Leicester Ford ed., 1905) ("The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union."), *with* Letter from Thomas Jefferson to John Breckinridge (Aug. 18, 1803), in *id.* at 7, 8 ("A letter receive yesterday shews that nothing must be said on that subject which may give a pretext for retracting but that we should do sub silentio what shall be found necessary."). The same strategy and rationale were expressed in letters that same day to Thomas Paine and James Madison. *See id.* at 8. It is interesting, to say the least, to see Jefferson characterize issues of constitutionality as a "pretext."

[93] *Coombs*, 37 U.S. (12 Pet.) at 78.

[94] *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850).

[95] 100 U.S. 82 (1879).

[96] *See, e.g., id.* at 95 ("Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress.").

[97] *Id.* at 96–97 ("If its main purposes be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of as power not confided to Congress.").

[98] *Gibbons*, 22 U.S. (9 Wheat.), at 189.

[99] *Id.* at 189–90.

[100] *Id.* at 198.

[101] *Id.* at 200.

[102] *Gibbons*, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring).

[103] *Id.*

[104] *Id.* at 236.

[105] *Id.* at 236.

[106] 53 U.S. (12 How.) 299 (1851).

[107] *Gibbons*, 22 U.S. (9 Wheat.), at 194. *Cf. id.* ("that commerce which concerns more States than one").

[108] Nelson & Pushaw, *Rethinking*, at 78.

[109] 75 U.S. (8 Wall.) 168 (1869).

[110] *Id.* at 188.

[111] 116 U.S. 517 (1886).

[112] *Id.* at 526.

[113] 295 U.S. 495 (1935).

[114] *Id.* at 543.

[115] *Gibbons*, 22 U.S. (9 Wheat.), at 203.

[116] 128 U.S. 1 (1888).

[117] *Id.* at 20. *But see* **The Federalist 35**, at 219 (Alexander Hamilton) ("Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce.").

[118] 156 U.S. 1 (1895).

[119] *Id.* at 13.

[120] 247 U.S. 251 (1918).

[121] *Id.* at 272.

[122] 222 U.S. 20 (1911).

[123] *Id.* at 27.

[124] 188 U.S. 312 (1903).

[125] *Id.* at 357.

[126] *Id.* at 358. "Immorality" looms large in a number of decisions in which the Court upheld federal measures even though "the fact that [the violators] cross state lines does not render their activity commercial." Robert L. Stern, "That Commerce Which Concerns More Than One State," 47 *Harv. L. Rev.* 1335, 1355 (1934). *See, e.g., Brooks v. United States*, 267 U.S. 432 (1925) (sustaining bar on transporting stolen cars across state lines); *Caminetti v. United States*, 242 U.S. 470 (1917) (sustaining the Mann Act, even where movement across state lines is not for "pecuniary gain").

[127] 234 U.S. 342 (1914).

[128] *Id.* at 353.

[129] Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite** 48 (1937).

[130] 27 U.S. (2 Pet.) 245, 252 (1829).

[131] *Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 319 (1852).

[132] 36 U.S. (11 Pet.) 102 (1837).

[133] *Id.* at 138–39.

[134] *Gibbons*, 22 U.S. (9 Wall.), at 195.

[135] *Id.* at 195.

[136] *Id.*

[137] *Id.*

[138] *See Hammer*, 247 U.S. at 274 (quoting *Gibbons*, 22 U.S. (9 Wheat.), at 203).

[139] *Gibbons*, 22 U.S. (9 Wheat.) at 203–04.

[140] Epstein, *Proper Scope*, at 1443.

[141] 317 U.S. 111 (1942).

[142] *Id.* at 122. Indeed, in language that anticipated much of what I now argue, Justice Jackson goes on to note that "[n]ot long after the decision" in *E. C. Knight* "Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.'" *Id.* (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

[143] Epstein, *Proper Scope*, at 1404.

[144] 301 U.S. 1 (1937).
[145] 312 U.S. 100 (1941).
[146] 317 U.S. 102 (1942).
[147] Rutledge, at 31.
[148] Madison to Randolph (Apr. 8, 1787), 9 Madison, **Papers**, at 370.
[149] 397 U.S. 137 (1970).
[150] 430 U.S. 274 (1977).
[151] *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citations omitted).
[152] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).
[153] *Id.* at 421.
[154] **The Federalist No. 36**, at 229 (Alexander Hamilton).
[155] *Gibbons*, 22 U.S. (9 Wheat.) at 197. *See also Champion*, 188 U.S. at 358 ("if Congress is of the opinion . . . we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large").
[156] **The Federalist No. 57**, at 384 (James Madison).
[157] Harlan F. Stone, "The Common Law in the United States," 50 Harv. L. Rev. 4, 25 (1936). I make the case for a "hard look" approach in such matters in Mark R. Killenbeck, "In(re)Dignity: The New Federalism in Perspective," 57 *Ark. L. Rev.* 1 (2004) (Killenbeck, *In(re)Dignity*). And note some potential that Professor Epstein would agree, given his criticism of "key New Deal commerce clause opinions [that] took the substantive findings of Congress at face value," rather than "identify[ing] the powerful interest group politics that were so evident in both the labor and agricultural cases." Epstein, *Proper Scope*, at 1451.
[158] "Speech to the Electors" (Nov. 3, 1774), in **Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War**, at 114, 116 (Ross J.S. Hoffman & Paul Levack eds., 1949).
[159] Letter from James Madison to Spencer Roane (May 6, 1821), in IX Madison, **Writings**, at 55, 61. *See also* Letter from James Madison to John Cartwright (1824), *id.* at 181, 181 ("The infirmities most besetting Popular Governments, even in the Representative Form, are found to be defective laws which do mischief before they can be mended, and laws passed under transient impulses, of which time & reflection call for a change."). For a discussion of one such "midnight precedent," see Killenbeck, *In(re)Dignity*, at 46–47 (discussing the Gun Free Schools Zone Act of 1990 and the lack of any meaningful actual debate or consideration of that measure).
[160] *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).
[161] **The Federalist 39,** at 256 (James Madison).
[162] *Gibbons*, 22 U.S. (9 Wheat.) at 196.
[163] *M'Culloch*, 17 U.S. (4 Wheat.) at 421.
[164] Letter from James Madison to Spencer Roane (May 6, 1821), in IX Madison, **Writings**, at 55, 57. The letter focused on the implications of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).
[165] 469 U.S. 528 (1985).
[166] Madison to Roane (May 6, 1821), IX Madison, **Writings**, at 56–57.
[167] *Id.* at 57–58. This language tracks closely the dominant fear in Madison and Jefferson's opposition to a program of internal improvements: that such projects would become highly politicized appeals to purely local interests. *See also* Letter from James Madison to Henry St. George Tucker (Dec. 23, 1817), in VIII Madison, **Writings** at 406 ("Another & perhaps a greater danger is to be apprehended from the influence which the usefulness & popularity of measures may have on questions of their Constitutionality.").
[168] Letter from James Madison to Spencer Roane (Sept. 21, 1819), in *id.* at 447, 448.
[169] *Id.*
[170] *Id.* at 449.
[171] 2 *Annals of Congress* 1962 (1789).
[172] Charles Pinckney, *Observations of the Plan of Government Submitted to the Federal Convention*, May 28, 1787, in III **Farrand** at 106, 116 ("The 7th article invests the United States, with the complete power of regulating the trade of the Union, and levying such imposts and duties . . . as shall, in the opinion of Congress, be necessary and expedient."). Pinckney's characterization is especially interesting, since it pairs the positive power to regulate with the collateral power "to make all Laws which shall be necessary and proper."
[173] *See, e.g.*, Letter to James Monroe, Aug 7, 1785, in 8 Madison, **Papers** at 333, 333 (stating that the states "can no more exercise this power separately than they could separately carry on war, or separately form treaties of alliance and commerce").
[174] *Committee of Detail I*, in II **Farrand**, at 129, 131.
[175] *Id.*
[176] Joseph Story, I **Commentaries on the Constitution of the United States** § 462 (1833).
[177] *M'Culloch*, 17 U.S. (4 Wheat.) at 421.
[178] Letter from James Madison to George Washington (April 16, 1787), in 9 Madison, **Papers**, at 382, 383.
[179] James Madison, *Sovereignty* (1835), in IX Madison, **Writings**, at 568, 569.
[180] Madison, **Vices**, at 350.
[181] *Id.* at 354.
[182] *The* **Federalist No. 51**, at 349 (James Madison).
[183] Madison, **Vices,** at 355.

Property Rights and the American Founding: An Overview

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A few general observations about property will help orient our discussion of its place in the American founding. The English word "property" is derived ultimately from the Latin *proprius*, meaning "own." It is distinguished from *communis*, meaning "common," and *alienus*, meaning "another's." As this etymology suggests, the Western political and legal tradition has always associated property with individuality of some type—as that which belongs to someone in particular rather than to a group or the public.[1] Whatever the other attributes or extensions of the concept of property, at its core is the right to exclude others.[2]

Any regime's treatment of property reveals much about its conception of justice, order, and good government. Modern political theory has long been concerned with private property and its relationship to work and the distribution of valued resources.[3] These topics rather quickly involve arguments about human nature and the human good. Moreover, while it may be helpful at the level of theory to separate claims about justice in distribution from those about original appropriation of private property, in the early twenty-first century there can be little doubt about which fundamental approach to property best generates productivity and secures prosperity.[4] These goods have been shown by empirical economics and historical experience to depend on robust protection for private property in a system of market exchange.[5] This is true, as defenders of private property often emphasize, because the limits and duties associated with it coordinate human interaction so that people can efficiently specialize, trade, and invest. Property rights have this effect because they let members of a society know where they stand when their competing projects come into conflict. Stated in the language of modern economics, property rights facilitate the internalization of negative externalities because owners, rather than bystanders, are held responsible for the costs of their actions.[6]

Yet, even the staunchest contemporary defenders of the economic utility of private property recognize that it also serves as a

guarantor of liberty, against even the logic of economic efficiency, because it insulates individuals from exploitation and from the vagaries of market shocks.[7] Accordingly, property's connection to liberty, choice, and consent means that it has long figured prominently in thinking about constitutionalism. This has been especially true since the writing of John Locke in the late seventeenth century (addressed below). In Locke's broad and crucial sense "property is the protection of consent . . . not merely or chiefly what supplies men's needs; it is what keeps men free."[8] Indeed, the distribution of valued resources in a given society has always been a contested issue, but for several hundred years at least, the mainstream of Western thought has regarded property as having a pre-political and natural basis in the human individual and the human desire for liberty. From this perspective it has seemed utopian to address perceived injustices in the distribution of property by slighting the human propensity to stake out mine and thine.[9]

The following overview, though synoptic and brief, will show how the political philosophy of the American founding manifested this general view of the relationship among property, liberty, prosperity, and government by consent. We will first sketch how the colonists of British North America thought about property, and then recount its importance in the coming of the American Revolution and the postwar period of economic dislocation and insecurity. The focus then moves to the treatment of property in the text and political science of the Constitution. Especially in this penultimate section, I will argue that the Founders' view of property and commerce confirms that America was created as a fundamentally modern regime, even as its political science did not wholly discount ancient political wisdom. Having founded America as a regime that would protect private property within a system of market competition and exchange, the Founders allowed for significant latitude on issues of political economy and regulation. The final section notes the importance of property in helping to establish judicial review as a crucial limitation on legislative power.

Property in the English Legal Inheritance and the Colonial Era

From the earliest settlements in British North America, colonists understood themselves as having the rights of Englishmen. They found these rights in the common law and the principles of the English Constitution. Absolutely fundamental to English identity, as expressed in documents from the Magna Carta in 1215 to the English Bill of Rights in 1689, was the principle that no Englishman could have his life, liberty, or property taken but by the "law of the land," nor could he be taxed without his consent. The common law's protections for life, liberty, and property were influentially expressed in the decisions of Sir Edward Coke (1552–1634) and in his **Institutes of the Laws of England** (1600–1615). Coke put common law courts and doctrines on the side of the individual against both King and Parliament, maintaining that in English jurisprudence "these protections were outside, above, and beyond the reach of the positive law."[10]

The very idea of the rights of Englishmen often was expressed by referring to the concept of ownership. The rights to due process, taxation by consent, trial by jury—and to constitutionalism itself—were described with cognates of ownership found in the common law. These rights were described with such terms as: birthright, inheritance, estate, freehold, and, of course, property.[11] So, for example, in a context far removed from America, an English writer could refer to "the true Liberties and Privileges which every Englishman is justly *entitled* to, and *estated* in by his birthright."[12] As one historian has said of this mindset, "A person owned the security

of constitutionalism just by being born British."[13]

When the conflict with England eventually deepened, the American colonists would assert their rights as Englishmen at every possible turn. The common law and constitutional emphasis on usage, custom, and precedent, convinced them that, on crucial matters like property and taxation, they were as British as anyone else in the Empire. In practice, the mother country often would acknowledge their claims—but it always insisted on the imperial principle of final authority over the colonies. This disconnect between theory and practice gradually helped bring on the war.[14]

Nevertheless, to underscore the importance of property in English law is not to claim that property rights were in any sense absolute or beyond regulation—far from it. It is true that William Blackstone's famous **Commentaries on the Laws of England** (1765–69) defined property in absolutist terms, as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[15] This statement does indeed show just how fundamental property was in the common law. But Blackstone then spends several hundred pages qualifying this statement: much of the purpose of the **Commentaries** is to explain how minutely the common law regulated the use and conveyance of property.[16]

The property rights of American colonists were constrained by both common law principles and the economic policy of mercantilism by which Britain governed its colonies. As in England, taverns were licensed and their prices set, and also so for gristmills and ferries. Local markets were heavily regulated: everything from weights and measures, hours, and sanitary conditions, to the ancient ban on forestalling (i.e., purchasing goods before they reached the market, in order to control the supply). Many colonies copied the English Assize of Bread, which regulated its ingredients, quality, and price. Some colonies passed usury laws to regulate interest rates on loans, and sumptuary laws to regulate the consumption of luxuries. The power of eminent domain, of taking private property for public use, was exercised frequently, often with a broad definition of public use. Nor was compensation always paid for a taking, though that was becoming the norm. Various mercantilist rules also limited what the colonists could manufacture, including control of quality, and with whom they could trade.[17] Despite the abundance of regulations, many of them went unenforced due to the generally weak reach of government authority. Often the colonists simply ignored or evaded them. Over time, too, the abundance of land in the new world wrought havoc with the intricate common law regulation of real property, and the law simply had to adapt to this changed circumstance.

In sum, then, colonial life began with the common law's traditional orientation toward a settled or static view of property, as something that was not made, but conveyed or inherited for purposes of "quiet enjoyment." To be sure, this approach never wholly opposed innovation (and certainly accepted regulation), and elements of it persisted for a long time, especially at the state level. But the long-term trend was toward the modern, dynamic, and developmental conception of property, one that also permitted the use of government power to foster prosperity and the public good. Rather quickly after the Revolution, for example, Americans abolished the practices of primogeniture and entail. These were legal requirements that land be conveyed to the eldest son and could not be sold outside the family. Thomas Jefferson famously led this change in Virginia, insisting that the public interest was to increase access to land so it could be put to productive use.[18] This reform exemplified what would become the dominant approach to property in America.

Locke on Property

Just as the new American context was helping to liberalize property law, English philosopher John Locke was also shaping Americans' understanding of property and its place in legitimate government. Locke's views remain ingrained in American political culture and we must briefly recount them here.[19] His **Two Treatises of Government**, published in 1690, argued that government should be based on consent, and limited in its function to the protection of the natural rights of the individual. Locke famously posited a "state of nature," a situation before the existence of government, and asked what it would be like, and for what purposes government would arise. His answer was that people would create it to preserve their natural rights to life, liberty, and property.

Locke said that, by nature, a person owned himself and the motion of his limbs, his labor. Man labors to preserve himself, and the exertion of his labor creates title to—property in—the thing he has labored on. Labor creates value because "Nature and the Earth furnished only the most worthless materials."[20] Yet in the state of nature man is insecure. Each person acts in his own interest as a law unto himself, and his property is vulnerable to the stronger, as is his life. What is lacking is a common acknowledged authority over all. So, Locke argued, people would agree to give up their natural power to preserve themselves by any means necessary, if others would too. Together they would create and consent to a government of set and standing laws whose purpose would be to protect each person's natural rights to life, liberty, and property. If government fails in this task, says Locke, revolution is justified so that people can create a new government better able to protect their rights.

Locke's political philosophy was designed so that human individuals could be secure from tyranny and governed with their consent. Liberty and property protected life and served as a "fence" against the arbitrary rule that threatened all three. "The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and rules set as Guards and Fences to the Properties of all the Members of Society, to limit the Power and moderate the Dominion of every Part and Member of Society."[21] Just as liberty is a fence to the preservation of one's life, Locke held that a thief who takes one's property is also a threat to life and liberty, and may justly be killed.[22] As one scholar has observed, in Locke's view "the right to property serves as a kind of 'early warning system' to invasions of life and liberty."[23]

Locke wanted a government of sufficient strength to secure life, liberty, and property, but also understood that powerful government could ignore or overwhelm consent. Protection of property would guarantee that government acted with the consent of the governed. Indeed, Locke stated the difference between political power and despotism precisely in terms of property: political power is "where Men have Property in their own disposal; *Despotical* over such as have not property at all."[24] As Harvey C. Mansfield, Jr., has summarized the connection in Locke between property and government by consent "government can be kept from invading freedom, or resisted when it does, by property understood as an effectual whole: when anyone's property is taken without his consent, property as a whole is attacked and the people as a body can see or can be made to see this clearly."[25]

Locke made it abundantly clear that a crucial nexus of property and consent was taxation:

> 'Tis true, Governments cannot be supported without great Charge, and 'tis fit everyone who enjoys his share of the Protection, should pay out of his Estate his proportion for the

> maintenance of it. But still it must be with his own Consent, *i.e.* the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them. For if any one shall claim a *Power to lay* and levy *Taxes* on the People, by his own Authority, and without such consent of the People, he thereby invades the *Fundamental Law of Property*, and subverts the end of Government: for what property have I in that, which another may by right take, when he pleases, to himself?[26]

From here it is a short step to conclude that if people in general became convinced that government was a threat to life, liberty, or property, than rebellion is justified.[27]

Locke's ideas rippled out, and they shaped how Americans thought about politics and property. Surveys of colonial libraries have shown that ownership of Locke's books was fairly widespread, and he was cited more than any other political writer in the immediate pre-Revolution period. [28] His ideas also were transmitted in the famous English political pamphlets from the 1720s known as **Cato's Letters**, which were reprinted across America. Locke's ideas also informed important political sermons of the late colonial era, as preachers used his principles to instruct their congregations in how to judge political power.[29]

Property in the Revolutionary Era and the Declaration of Independence

Both the English legal inheritance and Locke's philosophy influenced how American colonists understood the actions of the British Empire once the Seven Years War concluded in 1763. Britain had defeated the French to secure its position as the major colonial power in North America. It then sought increased control over the colonies and increased revenue from them for their continued defense and security. Britain began to regulate trade more tightly, and, for the first time, to tax the colonists directly. Americans' desire to protect their property, and to have a say in decisions affecting it, became a major force uniting them against the British. Recalling a few well-known examples will illustrate these points.

The growing conflict with Britain was apparent in the Writs of Assistance Case (1761). The writ of assistance was originally intended to compel official aid in the execution of a proper and specific search warrant that aimed to find smuggled, untaxed goods. While the authority of the government to search for contraband was well-established, at this time in Boston the writ of assistance was being used as a general search warrant: often neither a particular house nor particular goods were specified. One can scarcely imagine a more visceral threat to home and property. The colonists hated these actions. The fiery Boston lawyer James Otis railed against the writ of assistance in 1761, denouncing it as a violation of the rights of Englishmen and the principles of the constitution.[30] As John Adams famously said many years later, "Then and there was the first scene of the first Act of Opposition to the Arbitrary Claims of Great Britain. Then and there the child Independence was born."[31] Historians typically use the Writs of Assistance Case to illustrate the halting transition toward what would become the characteristically American conception of a constitution—a written text understood as a higher law or fundamental law that limits government. It is altogether fitting that this development emerged in the context of a threat to the property rights of individuals.[32] It was not until the ratification of the Fourth Amendment that Americans were protected from general warrants and unreasonable searches and seizures.

An even better known example of how the revolutionary conflict centered on property was the Stamp Act, which forced the

colonists to pay a tax on all manner of paper: everything from newspapers and legal documents to diplomas and playing cards. This tax enraged them. To protest, they convened the Stamp Act Congress in New York in October 1765. It insisted that "It is inseparably essential to the freedom of a people, and the undoubted rights of an Englishman, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives." And, since the colonists had no representatives in Parliament, they said that "it is unreasonable and inconsistent with the principles and spirit of the British Constitution, for the people of Great Britain to grant his Majesty the property of the colonists."[33]

The Stamp Act was repealed in 1766. But in the same session, Parliament passed the Declaratory Act, which stated that Britain could legally bind the colonies in "all cases whatsoever." This pattern repeated a few more times: imperial assertion, virulent colonial protest, and then repeal or moderation without Britain conceding anything in principle. A renewed round of taxation came with the Townshend Duties of 1767. Protests again ensued, and sometimes in more explicitly Lockean terms. For example, the Massachusetts Circular Letter of 1768 insisted that it was "an essential unalterable right in nature, ingrafted into the British Constitution, as a fundamental law [. . .] that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent."[34] The Americans simply could not—and ultimately would not—accept taxation by an institution in which they had no representation. John Dickinson's **Letters from a Farmer in Pennsylvania** (1767–68) made this point with direct reference to Locke. "If *they* have the right to tax *us*—then, whether *our own money* shall continue in our *own pockets* or not, depends no longer on *us*, but on *them*. There is nothing which 'we' can call our own; or, to use the words of Mr. *Locke*—WHAT PROPERTY HAVE 'WE' IN THAT, WHICH ANOTHER MAY, BY RIGHT, TAKE, WHEN HE PLEASES, TO HIMSELF?" Dickinson reached the conclusion that the Americans were being governed without their consent: "*Those* who are *taxed* without their own consent, expressed by themselves or their representatives, are *slaves*."[35]

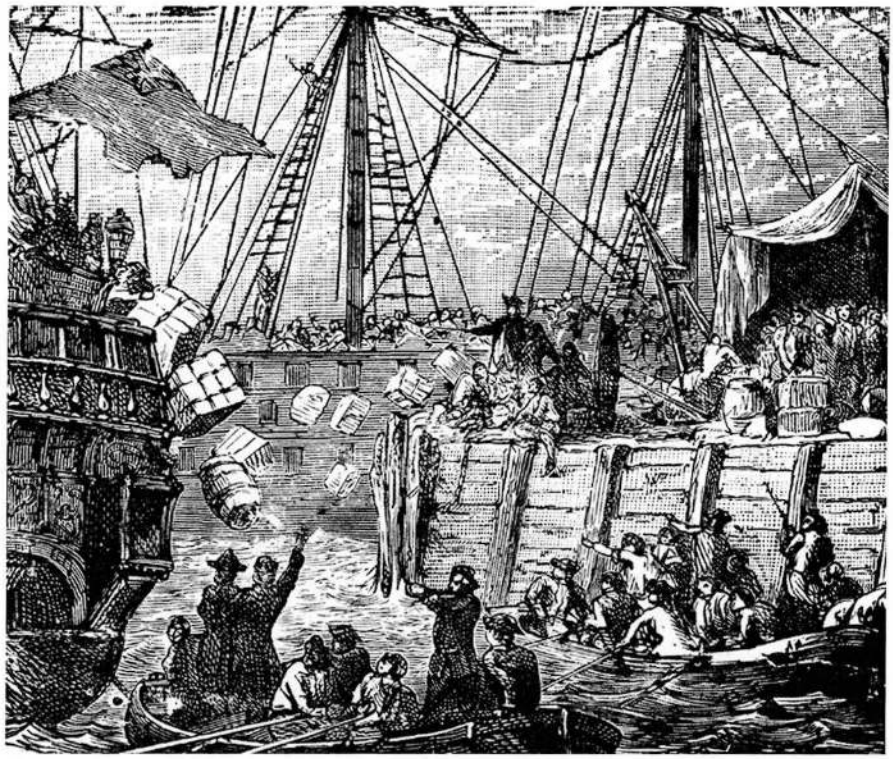
Although the Stamp Act, taxing all manner of paper goods, was repealed in 1766 after virulent colonial protests, in the same session Parliament passed the Declaratory Act, which stated that Britain could legally bind the colonies in "all cases whatsoever." This pattern repeated a few more times without Britain conceding anything in principle.

After another brief lull, the Tea Act of 1773 reignited the controversy one last time. It gave the East India Company a monopoly to sell tea that in fact was *cheaper* than what the colonists could get elsewhere—but still taxed.[36] When this tea ended up in Boston Harbor on the evening of December 16, Britain lost all patience. It cracked down severely on Massachusetts, taking control of its government and closing the port of Boston. In return, the colonists made all of the by now familiar arguments about property, taxation, and government by consent. These arguments run like a red thread through the writings of the period, as in Thomas Jefferson's Summary

View of the Rights of British America (1774): "Still less let it be proposed that our properties within our own territories shall be taxed or regulated by any power on earth but our own."[37] The colonists kept insisting, as in Resolves of the First Continental Congress (1774), that by "the immutable laws of nature, [and] the principles of the English constitution" they were "entitled to life, liberty, and property, and they never ceded to any sovereign power whatever, a right to dispose of either without their consent."[38] The continued failure of such appeals meant that the armed resistance was the solution to Britain having repeatedly "undertaken to give and grant our money without our consent, though we have ever exercised an exclusive right to dispose of our own property."[39] In the Declaration of the Causes and Necessities of Taking Up Arms (1775) the Americans once more emphasized the importance of property: "In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms."[40]

We come now to the Declaration of Independence. Its famous second paragraph articulated these ideas, and was closely modeled on Locke. When the Americans felt their natural rights were no longer secure within the British constitution, whose principles they had been continually invoking to no avail, they abandoned it to stake their rights directly on the "laws of nature and of nature's God."

But what of the Declaration's noticeable shift from the Lockean triad of life, liberty, and property, to life, liberty, and the "pursuit of happiness"? This change was not intended



The Tea Act of 1773 gave the East India Company a monopoly to sell tea, which in fact was *cheaper* than what the colonists could get elsewhere. When colonists threw the tea into Boston Harbor to protest the tax, Britain cracked down severely on Massachusetts, taking control of its government and closing the port of Boston.

to diminish the importance of property in the political philosophy of the founding, but came as a result of the editing of the document through several drafts. When writing the Declaration, Thomas Jefferson had before him George Mason's draft of the Virginia Declaration of Rights. Mason had written it this way: "all men are born equally free and independent, and have certain natural rights [. . .] among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." In a rather mundane fashion, Mason's phrasing got pared down in the several versions of the document as it evolved before July 4. To quote the historian Pauline Maier's fine book on the subject, Jefferson "meant to say more economically and movingly what Mason stated with some awkwardness and at considerably greater length . . ." She concludes that "Jefferson perhaps sacrificed clarity of meaning for grace of language, [but] his rewriting of Mason produced a more memorable statement of the same content."[41] It is important to add that a similar formulation of the connection between the right to property and the pursuit of happiness was routinely used in this period. The Pennsylvania Constitution of 1776 held that among man's natural rights were "enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Almost this exact wording was used in the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784.

It is also significant that the phrase "pursuit of happiness" appears in Locke's **Essay Concerning Human Understanding**, which Jefferson owned. There Locke described happiness as the natural human aim, though never wholly or permanently attained, of achieving ease, contentment, and security.[42] The political philosophy of the **Second Treatise** makes it plain that property must be secure if people were to have any chance at happiness understood in this way, and thus the concepts as used by Locke are not opposed to one another. Finally, Jefferson's letters speak several times of property as a natural right, expressed precisely in Locke's terms. For example, in 1816 he wrote that he believed "that a right to property is founded in our natural wants, in the means with which we are endowed to satisfy those wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings." He clearly did not think the Declaration was against this view.[43] Simply put, Locke, Jefferson, and the American Founders saw property as essential to the pursuit of happiness—to separate them would have made no sense to them.[44]

Nevertheless, property was never beyond regulation during the Revolution or afterward—Locke's natural rights philosophy had not changed that. Property continued to be regulated by many doctrines of the common law, which all the states explicitly adopted after the Revolution. And, of course, property was never wholly beyond the reach of necessity or politics. During the war, for example, the patriot army sometimes commandeered or destroyed the property of other patriots when military necessity so required. These actions typically went uncompensated. Likewise, Loyalists, now denominated traitors and enemies, had their property seized through numerous confiscation statutes and bills of attainder. Debts owed to them were frequently cancelled or substantially reduced. Those who sought compensation or recovery under the terms of the Treaty of Paris were often ignored, and only occasionally found succor in state courts.[45]

Property in the Articles of Confederation and the Constitution

Loyalists were far from the only people whose property rights were insecure as a

result of the war. In the 1780s the economy was in dismal shape. Threats to property significantly increased in the context of a weak and ineffectual central government. Under the Articles of Confederation, the national Congress had no power to directly tax citizens. It could only make requests for money from the states—which were often ignored. The United States could not even pay the interest on its foreign loans. Congress issued unsecured paper money that was at first inflationary and soon worthless. It did not have clear authority to pursue a concerted commercial policy with foreign nations, and states were beginning to enter into separate commercial negotiations with foreign powers. Nor could Congress effectively regulate internal commerce, so states were entering commercial conflicts with one another. At the level of state government, the first wave of revolutionary constitutions put precious few checks on the legislatures, and Congress had no authority to rein them in. States also issued their own paper money, which quickly depreciated but was still a legal tender for debt. They passed laws suspending foreclosure actions, and stay laws that extended the term of loans. Forcible resistance to debt collection was frequent. In some areas mobs formed to prevent the execution of court orders.[46]

The most influential of these actions was Shays's Rebellion, in western Massachusetts in late 1786 and early 1787. Indebted farmers attacked courts that were hearing debt proceedings and demanded that the legislature relieve their debts in part by issuing paper money. Congress was powerless to act, and the rebellion was put down mostly by private citizens rallied by the governor, rather than by the state militia (many of whom were aligned with Shays). The Massachusetts government then passed legislation that acceded to several of the Shaysites' demands. Though the rebellion was put down, exaggerated claims about its size and goals further persuaded leading Americans, like James Madison, John Marshall, and George Washington, that the republican aims of the Revolution were in peril.[47] They knew the federal government was too weak to handle the problems it faced, and they worried that the new nation was headed for disaster. As Washington said in a letter fraught with concern, "If the powers are inadequate, amend or alter them; but do not let us sink into the lowest state of humiliation and contempt, and become a by-word in all the earth."[48] Accordingly, after a preliminary meeting to discuss the reform of commercial affairs at Annapolis in 1786, several states agreed to convene at Philadelphia in the summer of 1787 to see what might be done to "to render the constitution of the Federal Government adequate to the exigencies of the Union."[49]

Madison especially was aware that attacks on property illustrated the general problem of popular government: How can the ruling majority be kept from violating the rights of others?[50] No one doubted that the new Constitution must be popularly based and republican in form, yet all agreed that the protection of property was also a primary purpose of government. This fundamental tension surfaced throughout the Philadelphia convention, especially in the debates over the nature of representation that occupied so much of the delegates' time.

Several delegates wanted substantial property qualifications for voting and office holding. Reflecting the republicanism of ancient times, they argued that this approach would fill government with independent and able men who had a clear stake in society. Madison himself was of this view at the convention, although he later changed his mind. But no property qualification for office holding made it into the text of the Constitution. Several delegates, including Benjamin Franklin, opposed such proposals as "debas[-ing] to the spirit of the common people." He deflated the too easy association of wealth with honesty or character, observing that "If honesty was often the companion of wealth,

Daniel Shays and Jacob Shattuck (above, left to right) led a rebellion in Western Massachusetts in late 1786 in which indebted farmers attacked courts that were hearing debt proceedings. They demanded that the legislature relieve their debts in part by issuing paper money. Congress was powerless to act and the rebellion was put down mostly by private citizens rallied by the governor, rather than by the state militia (many of whom were aligned with Shays). This led some politicians to fear that the federal government was too weak.

and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire of more property. Some of the greatest rogues he was ever acquainted with, were the richest rogues."[51] The delegates could not reach agreement on the related question of property qualifications for voting. They decided that, for the House of Representatives, voting qualifications would follow those of the lower houses of the states, most of which did have some property requirement (Article I, Section 2). Senators were to be elected by their respective state legislators and there was no federal property qualification for holding the office (Article I, Section 3). It is also significant that Representatives and Senators were to receive a salary. Otherwise, only the independently wealthy could have afforded to serve in Congress.

As in other areas, the Constitution took a threefold approach to regulating and protecting property and commerce from the kinds of threats apparent in the 1780s: it created new powers in the federal government; denied it certain other powers; and significantly restricted the powers of the states. There was widespread agreement at the convention that one of the federal government's most important new powers would be the power to tax citizens directly, with the proviso that direct taxes be apportioned according to population. Equally important, the Constitution gave Congress the power to regulate foreign and interstate commerce. These provisions granted the new government significant powers that affected the property of citizens, and they were absolutely crucial for commercial stability and national strength over the course of American history (Article I, Sections 8 and 9).

Much of the specific mischief states had undertaken was prohibited by Article I, Section 10. States cannot tax imports and exports without the consent of Congress. They cannot enact bills of attainder. They cannot emit bills of credit, nor make anything but gold and silver a legal tender for debt. Perhaps most significantly, states are forbidden from passing laws impairing the obligation of contracts, as they had been doing in the debtor relief statutes.

The "contract clause" was actually inserted late in the convention and not discussed in great detail. Its scope was unclear. There is scattered evidence that some of the Founders thought it included charters or grants made by state governments, not just private contracts.[52] And that is what Chief Justice John Marshall later held in the famous case of *Fletcher v. Peck* (1810). The scope of the clause was narrowed somewhat in *Ogden v. Saunders* (1827), which held that a contract was not violated by a state bankruptcy statute that discharged a debtor from obligations made subsequent to its passage—in essence reading the bankruptcy statute into all ensuing contracts. At the most general level, the contract clause was intended to prevent individual states from passing parochial, self-serving legislation that disrupted the flow of national commerce. Marshall disagreed with the Court's majority in *Ogden*, which contained his only dissent in a constitutional case, yet his description of the genesis of the clause remains apt:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.[53]

The most explicit limitation on federal power over individual property rights was not in the original Constitution, but in the Fifth Amendment. Madison and other Federalists did not think a Bill of Rights was necessary in a regime of enumerated powers, but many Antifederalists and members of state ratifying conventions did. Madison soon became convinced that adding a Bill of Rights would win more support for the Constitution and make it more secure, so he drafted the amendments in the first Congress.[54]

The Fifth Amendment states that no person can be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The protection of property here is quite clear, but, as in earlier times, the right is not absolute. The government can deprive a person of property, but it must do so according to the established law of the land—a principle that goes back at least to Magna Carta. Whether the due process clause also created a substantive limit against arbitrary or unreasonable treatment of property, even if procedurally sound, was a question that emerged quite soon.[55] The issue took on major importance in the late nineteenth and early twentieth centuries as the Supreme Court began to use the due process clause to shield property owners and

businesses from what it regarded as illegitimate regulations. Putting aside that later development, the Amendment's text also recognized the inherent government power to "take" private property for public use, though just compensation for the loss was required. The just compensation principle was not as ancient as due process, but it had deep roots in the common law and was broadly supported in America. Given Madison's concern with property, it is not surprising that the Bill of Rights rejected outright confiscation as an acceptable government policy.[56] In the nineteenth century, states sometimes generated significant controversy by seizing private property on behalf of private corporations (typically a railroad), or by paying inadequate compensation. As the regulatory power of American government grew substantially in the twentieth and twenty-first centuries, just what could be considered a "taking" or a "public use" became matters of extensive litigation before the Supreme Court.

Given that the contract clause and the takings clause are so central to the Constitution's protection of property, it is somewhat puzzling that there is no contract clause binding the federal government, as there is for the states, and no takings clause binding the states, as there is for the federal government.[57] There is very little direct evidence bearing on this question, so we are thrown back on more general considerations. Part of the answer must lie in the Congressional authority to legislate on the subject of bankruptcy (Article I, Section 8). Bankruptcy impairs previous contracts, so a federal contract clause would be a contradiction. Likewise, a federal contract clause could conflict with Congressional regulation under the commerce clause if it shielded agreements made under a state law that was later displaced by federal action.

Why the just compensation clause was not originally applied to the states is unclear. But the simplest reason might be that it occurred in the Bill of Rights, which was originally intended to apply only to the federal government. Another consideration is that, while the Founders clearly thought state impairment of a contract might have potentially serious consequences for national commerce, they likely saw state-level takings as having merely state-level consequences, and so left it to the states to regulate them.

We also must make the melancholy recognition that the Constitution protected property in slaves in several ways. Slaves were partially counted for purposes of representation in the House; there was a clause compelling the return of escaped slaves and a clause permitting American participation in the international slave trade until at least 1808 (Article I, Section 2; Article IV, Section 2; Article I, Section 9). However, it is significant that the word "slave" does not appear in the Constitution. In the three instances noted above when we would expect to see it, the word "person" was used instead. As James Madison said in the constitutional convention, he "thought it wrong to admit in the Constitution the idea that there could be property in men."[58] Acceptance of slavery was indeed the price of union. But it is crucial to recognize that it was a union founded on the Declaration's principle that "all men are created equal." It was precisely foundation on this principle that made slavery a political problem: prior to this statement, slavery had not been one of any magnitude for the colonies of British North America. Only by basing a regime on natural rights could the ground be established for rejecting one human being's treatment of another as property. Of course it was Abraham Lincoln who most clearly taught Americans this lesson. When Lincoln insisted that the union be held to the principles of the Declaration, the contradiction of slavery began to move toward its resolution.[59]

The Federalist on Property, Commerce, and Virtue

To recognize how deeply the Lockean philosophy of natural rights shaped the

American founding, especially on property, is also to recognize that the founding was essentially modern in its political principles. This is not to deny that ancient political wisdom still had some influence. Taking up this question of ancients and moderns for a moment will clarify the role of property in the Founders' basic political philosophy.

The American Founders did understand and share the ancients' ambition for political fame. They sought greatness in founding the first modern republic. In doing so they retained the ancient view that human beings have sufficient reason to deliberate about the advantageous, the just, and the good. They likewise agreed with the ancients that human dignity was inseparable from the distinctly human capacity for politics and self-government.[60]

But the regimes of ancient Greece had no understanding of a state as separate from society. They compelled citizens, by law and education, in the self-denial necessary for virtuous self-sacrifice and war.[61] The Americans knew that virtue and public spirit were real things, but their Constitution did not inculcate or rely on them. "Enlightened statesmen would not always be at the helm," as Publius put it in **Federalist 10**. As modern men, they believed that most people most of the time would pursue their self-interest. So the Founders constructed a system that addressed the "defect of better motives" by separating and checking power. Their political science relied not on virtue, but on institutions to channel self-interest toward the public good. Yet, despite their modernity, they never wholly dismissed virtue. As stated in **Federalist 76,** "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude."[62] As a result, the Constitution created room for the exercise of virtue, "call[ing] it forth" without depending on it to come.[63] This approach is probably best expressed in the beautiful conclusion to **Federalist 55**: "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another."[64] This political accounting for both the high and the low in human nature shows that the Founders were influenced by ancient republicanism.

Nevertheless, the Founders' modernity is most evident in their welcoming of commerce, and with it a dynamic, wealth-producing view of property, which tied it to self-interest.[65] For the ancients it was far different. Commerce was necessary, but it was suspect and often regarded with contempt. Property was typically thought of as a landed estate: It simply gave one independence and a stake in the city, which were necessary for political awareness and participation. Ancient trade was heavily controlled because it was seen as a possible source of discord within the community—trade with outsiders could undermine the solidarity needed for survival.[66] As Alexander Hamilton put in **Federalist 8**: "The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers, which was the true condition of the [ancient] republics."[67] Throughout the founding era, indeed in the whole Enlightenment, we find very positive assessments of commerce as improving, civilizing, and pacific. It increased human comfort, softened and regularized manners, and promoted peace through mutual interdependence. The

Founders' embrace of this view of commerce, which includes the agricultural commerce so many of them were engaged in, fundamentally separated their republicanism from that of the ancients.[68]

This is not to say that the Founders would have endorsed all of contemporary American consumer society, or even the rampant consumer society that was readily apparent by the 1830s. If modern Lockean liberalism and its embrace of commerce tend toward individualism, greed, and neglect of public things, then principles like those contained in ancient republicanism stand as a warning to us: A sole focus on *homo economicus* is crude, petty, and less than fully human, and certainly a reduction in the scope of human nobility from what it was in previous eras. This tension between the modern liberal basis of America and those things that limit or criticize it, like ancient republicanism, religion, and the common law, was part of the American founding and remains a fruitful source of political critique and political moderation.[69]

Still, at the most basic level, the Founders believed that their attempt to create a regime dedicated to human liberty could succeed only in a large, commercial society.[70] This view is central to the political science of the Constitution, as seen in the famous argument about faction in the **Federalist Papers.** There Madison accepts that, where there is human liberty, there will be difference, competition, and inequality of wealth, all of which will result in political factions with conflicting interests. "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government."[71] He further emphasizes that "the most common and durable source of factions has been the various and unequal distribution of property."[72] Madison and the leading Founders knew that the problem of faction, particularly the conflict between rich and poor, the few and the many, is just what had destroyed democracies throughout Western history. In this sense, the most basic problem of popular government was that the many poor simply legislated in their own interest to despoil the propertied few. History taught that those with something to lose had no choice but to oppose democracy.

But on this score, as on so many others, America was different. Madison pointed out that popular regimes of earlier times were small and homogeneous, with few different economic interests, few different ways of making a living. In these regimes, property-based factions would nearly always be opposed to one another, on nearly all issues. However, the large, extended republic of America vastly multiplied the various levels and kinds of property. "Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[73] Commercial society, on a continental scale, created so many different interests that they could not readily dominate one another. "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."[74] Factional conflict would never simply be all the poor versus all rich. The multiplicity of interests in Congress would force politics toward coalition and compromise. No particular interest would always lose, as it would in a small republic.

It is crucial to note that, in this system, as in Locke's political philosophy, secure property rights enable the poor to live better than in other regimes because they can pursue and attain the prosperity that liberty makes possible. Thus the large, commercial republic of America was designed to account for the

problem of faction, and especially its most acute form, which heretofore had always ended popular government. It did so by encompassing many factions, and then channeling and directing them through the institutions created by the Constitution. It took this approach rather than attempting to eliminate faction by eliminating liberty or equalizing property.

Property and Political Economy

Despite the brilliance of the Founders' political science and the ratification of the Constitution and the Bill of Rights, there was no consensus on government's role in the American economy. In the 1790s this disagreement centered on Alexander Hamilton's proposed financial program. It included restructuring and funding the national debt, federal assumption of state debts, new tariffs and excise taxes, and creation of a national bank.[75] Jefferson and Madison opposed the plan, and the first party system of Federalists versus Republicans quickly formed. Hamilton saw his plan as the way to national strength and stability, and he was strongly committed to a dynamic, wealth-producing conception of property. To the Republicans, Hamilton's program looked dangerously like the reconstitution of mercantilism and the use of government power to pick favorites in the economy. Hamilton thought that the Republican complaint was hidebound and unrealistic about what was needed for success in the coming age of manufacturing and global competition.

Although we cannot here go into the details of this debate, it underscores that government involvement in the economy existed throughout the founding era and that disagreement about its role was common. Intervention and regulation of various kinds abounded—*laissez faire* did not exist.[76] Indeed, Hamilton clearly thought that government should take an active role, and under his financial program government authority altered economic relationships in a variety of ways. Though Jefferson never doubted that property was a natural right, property was alienable and could be regulated in the interests of sound republican government. Hence the principles of inheritance could be changed, as in his attack on primogeniture and entail.[77] Thus, there was a fairly wide spectrum of opinion about what government should or should not do in the realm of economics, which Madison expressed with his usual acuity. He said: the "the true policy" was "between the extremes of doing nothing and prescribing everything; between admitting no exception to the rule of 'laissez faire,' and converting the exceptions into the rule. The intermediate Legislative interposition *will be* more or less limited, according to the differing judgments of Statesmen, and *ought to be so*, according to the aptitudes or inaptitudes of countries and situations for the particular objects claiming encouragement."[78]

Nevertheless, the Founders' varying views about regulation always existed within the basic template of a market-based economy. As Madison said on the occasion of accepting some duties on imports: "I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive and impolitic—it is also a truth, that if industry and labour are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened legislature could point out."[79]

Whatever the Founders' differences on regulation, there was wide agreement about protecting property rights. A leading historian has rightly concluded that "certainly no political leader questioned the right to hold private property." Protecting it while also "enhanc[ing] commerce [was] at the heart of the constitution-building process."[80] Government could regulate property relationships for

the common good and use the law to facilitate commercial prosperity, but it could not justly expropriate private wealth and then redistribute it. As Jefferson expressed this view to a correspondent, "To take from one, because it is thought that his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association, 'the *guarantee* to every one of a free exercise of his industry, and the fruits acquired by it.'"[81]

The depth of the Founders' commitment to property and its centrality in their political philosophy was perhaps best encapsulated in a brief newspaper essay which Madison wrote in 1792, which was titled simply "Property." In the midst of his attack on the Hamiltonian financial program—a political disagreement about the role of government in the economy—he articulated a strikingly modern and expansive view of property that remains at the core of American constitutionalism. He began by acknowledging Blackstone's definition of property as exclusive dominion over physical things or objects. He then articulated a broader view:

> [A] man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[82]

Property was not about mere things. More fundamentally and profoundly, it was a way of securing the distance between the human individual and the legitimate reach of government. Property understood in this way established both the purpose and limit of constitutional government:

> Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions. Where there is an excess of liberty, the effect is the same, tho' from an opposite cause. Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.[83]

Property and Judicial Review

In the early years of the American republic, protection of property rights, broadly understood, became a task associated increasingly with the judiciary. As Edward Corwin long ago observed, the judicial doctrine of "vested rights" emerged primarily to protect property, and in so doing accrued power to the judiciary as a governing institution. Vested rights, property chief among them, were those so fundamental that government could never completely control or extinguish them. Moreover, since vested rights were so important, they could be vindicated against a legislative act, which did not necessarily violate any specific textual provision of the Constitution.[84]

Two well-known cases from the 1790s illustrate how the judiciary was beginning to position itself as the protector of the vested right of property. *Vanhorne's Lessee v. Dorrance* (1795) was a circuit court case that arose from a land dispute in which the Pennsylvania legislature intervened on the

In the 1790s, the judiciary began to position itself as the protector of the vested right of property for citizens (such as this farmer above). The Supreme Court issued two decisions that highlighted the potential threat to property rights from legislative majorities.

side of one party against the other. Justice William Paterson stated it as an axiom that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man." Moreover, he added, "no man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law."[85] The state legislature had violated "the principles of social alliance in every free government" and "the letter and spirit of the Constitution" by "divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind."[86] The emphatic statement of this view testified to the importance of property in recent American constitutional development.

The famous case of *Calder v. Bull* (1798) arose when the Connecticut legislature granted a new hearing in a probate proceeding, thus aggrieving the property rights of heirs who argued that it was an unconstitutional *ex post facto* law. While the Court held that *ex post facto* laws applied only to criminal cases and not to civil ones, Justice Samuel Chase took the opportunity to defend the idea of a vested right in property. "There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established." He added that it would be "against all reason and justice for a people to entrust a legislature" with the power

to make a law "that destroys or impairs the lawful private contracts of citizens" or "that takes property from A. and gives it to B."[87]

The courts in these two cases clearly thought that it was necessary to highlight the potential threat to property rights from legislative majorities. Yet neither decision offered a clear justification for the practice of judicial review itself (though in some sense they represented instances of it). It was not until the landmark case of *Marbury v. Madison* (1803) that Chief Justice John Marshall linked a vested right to property to a justification for judicial review, which he famously derived from America's commitment to limited government based a written constitution and popular sovereignty.

William Marbury sued for a writ of mandamus to compel Secretary of State James Madison to deliver his commission so that Marbury could take his office as a judge. Marshall had first to determine whether the situation presented a justiciable case in which a right was at stake. He explained that once Marbury was officially appointed, he held what in essence was a property right. He was entitled to his commission as the proof that he was the legitimate office holder. "For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property."[88] Once made, the "appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country. To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right."[89] Marshall readily acknowledged that there were political questions deliberated in the executive branch that were no business of the judiciary, but he insisted that law existed to vindicate the rights of individuals. In this case, delivery of the commission was a ministerial duty that the President was directed by law to perform. Neither the President nor his subordinates could "at his discretion, sport away the vested rights of others."[90] He insisted that "the question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority."[91]

Accordingly, "the province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion."[92] Marshall was here conceptually separating law from politics, putting the law and the judiciary on the side of protecting rights, especially property, from overreaching government power.[93] If rights were to be secure, if the government of the United States was to remain "a government of laws, and not of men," then there would have to be a "remedy for the violation of a vested legal right."[94] The Court could not issue the remedy (a writ of mandamus) that Marbury was entitled to, which Marshall established only once he had both justified and exercised judicial review. Marshall's monumental defense of judicial review as integral to limited government was thus predicated on the principle that an individual must be able to protect his rights—in particular his property rights—from arbitrary power.

Conclusion

Property was central to the legal and political tradition that colonial Americans had inherited, and thus was part of a well-established language that enabled them to resist the overreach of the British Empire. At a more philosophical level, Americans built on the proposition that property emerges from the most natural and elemental dimensions of the human experience. To live, people must appropriate elements of the external world, literally making a part of themselves the air and nutrients necessary for existence. The requirements of life are secured by the natural human capacity for labor, and property in what labor creates is thus derived directly and naturally from the right to life. Property so understood is pre-political.[95] And yet, as we

have seen in the American founding, property has a political end: it enables people to distinguish free government from despotism.[96] A major achievement of the Constitution, then, was to ensure that the legitimacy of any future regime would depend on its ability to secure both private property and government by consent.

Author's Note: I thank the Supreme Court Historical Society, and especially Herman Belz, for the opportunity to present this paper at the Court. I am also grateful to Joseph Postell for his keen eye on the penultimate draft.

ENDNOTES

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[2] David Schmidtz, "Property and Justice," *Social Philosophy and Policy* 27 (2010): 79, 80.

[3] Alan Ryan, PROPERTY AND POLITICAL THEORY (Oxford: Blackwell, 1984).

[4] David Schmidtz, "The Institution of Property," *Social Philosophy and Policy* 11 (1994): 42–62.

[5] *Id.*

[6] David Schmidtz, "Property," in THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY, ed. George Klosko (Oxford: Oxford University Press, 2011), 599–610; Schmidtz, "Property and Justice," 82–86, 92–94.

[7] James M. Buchanan, PROPERTY AS A GUARANTOR OF LIBERTY (Aldershot: Edward Elgar, 1993), esp. 19, 37, 47–48, 57; Schmidtz, "Property and Justice," 98–99.

[8] Harvey C. Mansfield, Jr., "On the Political Character of Property in Locke," in POWERS, POSSESSIONS, AND FREEDOM, ed. Alkis Kontos (Toronto: University of Toronto Press, 1979), 37.

[9] Kenneth Minogue, "The Concept of Property and Its Contemporary Significance," in NOMOS XXII: PROPERTY, 17, 24.

[10] Arthur R. Hogue, ORIGINS OF THE COMMON LAW (Indianapolis, IN: Liberty Fund, 1986), 79–80, 112–13; Bernard H. Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (New Brunswick, NJ: Transaction, 2001), 5-46, quote at 29.

[11] John Phillip Reid, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, abridged ed., (Madison: University of Wisconsin Press, 1995), 8-9.

[12] *Id.* at 9 (spelling has been modernized).

[13] *Id.*

[14] *See generally*, Jack P. Greene, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788 (New York: WW Norton, 1990). *See also* Reid, CONSTITUTIONAL HISTORY, 26–48.

[15] Book II, chap. 1, "Of Property in General."

[16] Forrest McDonald, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (Lawrence: University Press of Kansas, 1985), 13.

[17] McDonald, NOVUS ORDO, 13- 24, 29–36; James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (New York: Oxford University Press, 1992), 17–22.

[18] Ely, GUARDIAN OF EVERY OTHER RIGHT, 22–23; Kermit L. Hall, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (New York: Oxford University Press, 1989), 39–45, 114; Siegan, PROPERTY RIGHTS, 53–56.

[19] Scholarship on Locke and his influence is unending. My understanding has been aided especially by Michael P. Zuckert, NATURAL RIGHTS AND THE NEW REPUBLICANISM (Princeton, NJ: Princeton University Press, 1994).

[20] John Locke, TWO TREATISES OF GOVERNMENT, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II: 43.

[21] *Id.*, II: 222.

[22] *Id.*, II: 17, 18.

[23] Edward J. Erler, "The Great Fence to Liberty: The Right to Property in the American Founding," in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, eds. Ellen Frankel Paul and Howard Dickman (Albany: State University of New York Press, 1989), 56.

[24] Locke, TWO TREATISES, II: 174.

[25] Mansfield, "Property in Locke," 38.

[26] Locke, TWO TREATISES, II: 140.

[27] *Id.*, II: 222, 226.

[28] Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review* 78 (1984): 189–97.

[29] Zuckert, NATURAL RIGHTS AND THE NEW REPUBLICANISM, 18–25, 312–19; Ronald Hamowy, "Cato's Letters, John Locke, and the Republican Paradigm," *History of Political Thought* 11 (1990): 273–94; Zuckert, NATURAL RIGHTS, 148–201.

[30] Hall, MAGIC MIRROR, 53–55.

[31] Quoted in *Id.*, 53.

[32] Gordon Wood argues that Otis himself never made the final step toward a written fundamental law, but rather remained in the older jurisprudential universe in which it was impossible for the common law and Parliament to be fundamentally opposed. THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (New York: WW Norton, 1972), 262–65.

[33] Jack P. Greene, ed., COLONIES TO NATION, 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION (New York: WW Norton, 1975), 64.

[34] *Id.* at 134

[35] *Id.* at 132–33.

[36] Melvin I. Urofsky and Paul Finkelman, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 3rd ed., 2 vols. (New York: Oxford University Press, 2011), 1: 59–60.

[37] Greene, COLONIES TO NATION, 238.

[38] *Id.* at 244.

[39] *Id.* at 256.

[40] *Id.* at 259.

[41] Pauline Maier, AMERICAN SCRIPTURE: HOW AMERICAN DECLARED ITS INDEPENDENCE FROM BRITAIN (London: Pimlico, 1999), 134.

[42] John Locke, ESSAY CONCERNING HUMAN UNDERSTANDING, Book II, ch. 21, sections 52, 61, and see the discussion in Zuckert, NATURAL RIGHTS REPUBLIC, 83–85. *See also*, Erler, "Great Fence to Liberty," 50–51, who observes that a variation of the phrase also occurs in Locke's THE REASONABLENESS OF CHRISTIANITY.

[43] Jefferson to P.S. Dupont de Nemours, April 24, 1816; Zuckert, NATURAL RIGHTS REPUBLIC, 79–81.

[44] Ely, GUARDIAN OF EVERY OTHER RIGHT, 29; Zuckert, NATURAL RIGHTS REPUBLIC, 79.

[45] Ely, GUARDIAN OF EVERY OTHER RIGHT, 34–36; McDonald, NOVUS ORDO, 90–92, 151–52, 154–56.

[46] McDonald, NOVUS ORDO,168–76; Ely, GUARDIAN OF EVERY OTHER RIGHT, 37–39; Urofsky and Finkelman, MARCH OF LIBERTY, 1: 91–97, 100.

[47] Urofsky, and Finkelman, MARCH OF LIBERTY, 1: 101, Ely, GUARDIAN OF EVERY OTHER RIGHT, 39–40; McDonald, NOVUS ORDO 176–78.

[48] Greene, COLONIES TO NATION, 508.

[49] *Id.* at 511.

[50] *Id.* at 517–18.

[51] Max Farrand, ed., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, rev. ed, 4 vols, (New Haven: Yale University Press, 1966), 2:249.

[52] McDonald, NOVUS ORDO, 271–74.

[53] *Ogden v. Saunders*, 25 U.S. 213, 354–55 (1827).

[54] Robert A. Goldwin, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (Washington, DC: AEI, 1997).

[55] Ely, GUARDIAN OF EVERY OTHER RIGHT, 54.

[56] *Id.* at 55.

[57] This and the next paragraph follow the excellent analysis of Michael W. McConnell, "Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure," in Frankel and Dickman, eds., LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, 141–68. *See also* Bernard H. Siegan, "One People as to Commercial Objects," *id.* at 117.

[58] Farrand, RECORDS OF THE FEDERAL CONVENTION, 2: 417. *See also*, Jacob E. Cooke, ed., THE FEDERALIST (Hanover, NH: Wesleyan University Press, 1961), No. 54, 367–68.

[59] *See generally*, Harry V. Jaffa, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (Chicago: University of Chicago Press, 1959).

[60] Paul Rahe, REPUBLICS ANCIENT AND MODERN, 3 vols., (Chapel Hill: University of North Carolina Press, 1994), 3: 23–30.

[61] *Id.*, 1: 16, 91-114.

[62] FEDERALIST, NO. 76, 513–14.

[63] Harvey C. Mansfield, Jr., AMERICA'S CONSTITUTIONAL SOUL (Baltimore: Johns Hopkins University Press, 1991), 215.

[64] FEDERALIST NO. 55, 378.

[65] Rahe, REPUBLICS ANCIENT AND MODERN, 3:14–21.

[66] *Id.*, 1: 66–90.

[67] FEDERALIST, NO. 8, 47.

[68] Rahe, REPUBLICS ANCIENT AND MODERN, 1: 43–46; Alan Levine, "The Idea of Commerce in Enlightenment Political Thought," in REDISCOVERING POLITICAL ECONOMY, eds. Joseph Postell and Bradley C. S. Watson (Lanham, MD: Lexington Books, 2011), 53–82; Marc F. Plattner, "American Democracy and the Acquisitive Spirit," in HOW CAPITALISTIC IS THE CONSTITUTION? eds., Robert A. Goldwin and William A. Schambra (Washington, DC: AEI, 1982), 1–21.

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[71] FEDERALIST, NO. 10, 58.

[72] FEDERALIST, NO. 10, 59

[73] FEDERALIST, NO. 51, 351.

[74] FEDERALIST, NO. 51, 352–53

[75] Hamilton's approach is well explained in McDonald, NOVUS ORDO, 135–42 and Rahe, REPUBLICS ANCIENT AND MODERN, 3: 117–25.

[76] William Letwin, "The Economic Policy of the Constitution," in LIBERTY, PROPERTY AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, 121–39; Joseph Postell, "The Right Kind of Regulation: What the Founders Thought about Regulation," in REDISCOVERING POLITICAL ECONOMY, 209–30.

[77] Jean Yarbrough, "Jefferson and Property Rights," in LIBERTY, PROPERTY AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, 65–83.

[78] Madison to Frederick List, February 3, 1829 in LETTERS AND OTHER WRITINGS OF JAMES MADISON, 4 vols., (Philadelphia: Lipincott, 1865), 4:12 (emphasis in original).

[79] James Madison, Import Duties, House of Representatives, 9 April 1789, available at The Founders' Constitution, http://presspubs.uchicago.edu/founders/documents/a1_8_1s18.html.

[80] Ely, GUARDIAN OF EVERY OTHER RIGHT, 52, 57. It is precisely the constitutional constraints on majority rule required by a robust regime of property rights within a market economy that Jennifer Nedelsky finds to be so problematic. PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (Chicago: University of Chicago Press, 1990).

[81] Thomas Jefferson to Joseph Milligan, April 6, 1816, available at The Founders' Constitution, http://presspubs.uchicago.edu/founders/documents/v1ch15s64.html (emphasis in original).

[82] James Madison, "Property," 29 Mar. 1792, available at The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html

[83] *Id.* (emphasis in original).

[84] Edward Corwin, "The Basic Doctrine of American Constitutional Law," MICHIGAN LAW REVIEW 12 (1914): 247.

[85] *Vanhorne's Lessee v. Dorrance* (1795), available at The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/v1ch16s24.html

[86] *Id.*

[87] *Calder v. Bull*, 3 U.S. 386, 388 (1798).

[88] *Marbury v. Madison*, 5 U.S. 137, 155 (1803).

[89] *Id.* at 162.

[90] *Id.* at 166.

[91] *Id.* at 167

[92] *Id.* at 170.

[93] This is a theme emphasized in William E. Nelson, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (Lawrence: University Press of Kansas, 2000), esp. 8, 60, 62, 73. *See also* Charles F. Hobson, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (Lawrence: University Press of Kansas, 1996), esp, 51–54.

[94] *Marbury* at 163.

[95] Zuckert, NATURAL RIGHTS REPUBLIC, 80–81, *citing* Locke, TWO TREATISES, II: 26.

[96] Mansfield, "Property in Locke," 37–38.

Property Rights and the Supreme Court in the Gilded Age

JAMES W. ELY, JR.

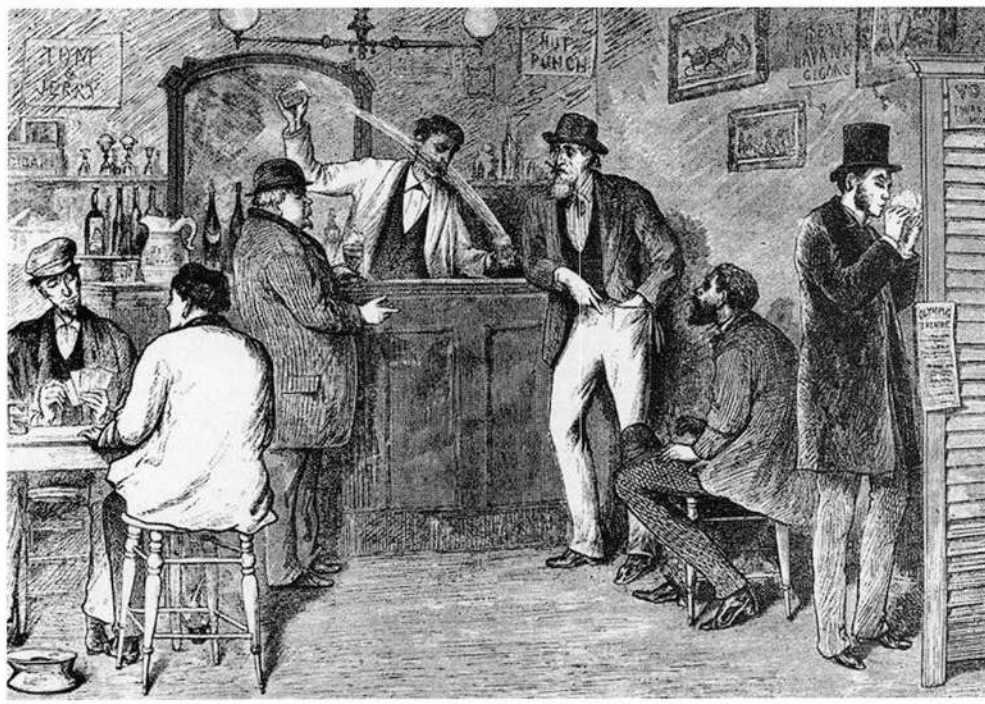
Any attempt to assess the property-rights jurisprudence of the Supreme Court in the Gilded Age (1870–1900) must confront several difficulties. First, the late nineteenth century was an era of sweeping economic and social changes that transformed American society. In response to rapid industrialization and urbanization, the states and eventually the federal government began to more aggressively intervene in the economy. In response, lawyers increasingly challenged such regulatory legislation, arguing that the laws exceeded legislative authority under the Constitution. Consequently, the Supreme Court under Chief Justices Morrison R. Waite and Melville W. Fuller had to wrestle with novel legal issues relating to the rights of property owners. The range of property-rights decisions is impressive, covering bond repudiations, rate regulations, debtor-creditor relations, contractual freedom, workplace regulations, labor law, eminent domain, and taxation. These rulings invoked various provisions of the Constitution, including the Contract Clause, the Due Process Clause of the Fourteenth Amendment, the Takings Clause of the Fifth Amendment, and the "direct tax" clauses. To distill common themes from this huge outpouring of decisions is a challenging task.

Second, modern historians are not writing on a fresh slate. Scholars associated with the Progressive movement of the early twentieth century fashioned a durable—if cartoonist and one-sided—image of Gilded Age jurists as either out of touch with new realities or, even worse, as craven handmaidens of business enterprise. These jurists, we are told, sought to impose a rigid laissez-faire regime on American society.[1] Although this once-common tale has been sharply assailed in recent years,[2] it retains considerable influence in the academy and continues to color thinking about the legal culture of the late nineteenth century. I submit that we should set aside such preconceptions and take a fresh look at the property-rights jurisprudence of the Gilded Age. I argue that a very different understanding of that era will emerge from careful investigation.

Third, the Supreme Court Justices of the late nineteenth century did not march in lockstep. They differed as to the degree of protection that should be afforded property owners and as to the appropriate room for governmental regulation. Although all of the Justices shared to some degree the basic values of limited government and private property, they were for the most part practical men, not constitutional theorists. One must be careful not to attribute to the Justices an elaborate judicial philosophy.[3] In addition, their dedication to guarding property rights was also tempered by a strong commitment to federalism and state autonomy.[4]

Despite these complexities, I contend that a general pattern emerges from the Supreme Court's property-rights decisions. My thesis can be simply stated: the core principle of the Court in the Gilded Age was the protection of private property as a means to uphold individual liberty against governmental overreaching. As Michael J. Phillips cogently pointed out, "the Court's aim was to protect liberty and property against arbitrary or unreasonable restraints."[5] This commitment to liberty was reinforced by a second theme, the importance of secure property rights as the basis for economic growth. Moreover, I maintain that there was substantial continuity between the Court's treatment of economic rights in the Gilded Age and earlier periods of American constitutional history. Let us examine each of these propositions.

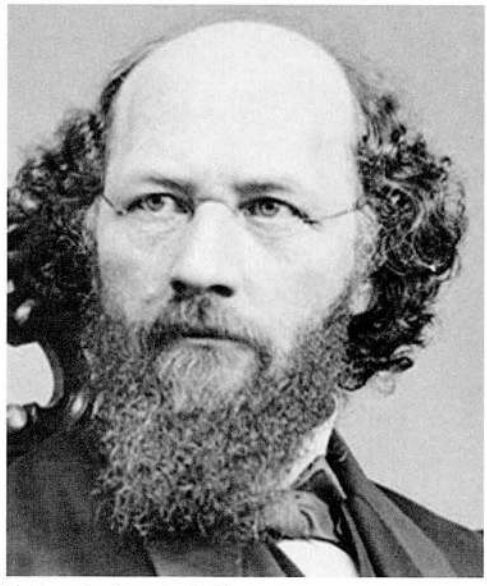
Property ownership and political liberty had long been linked in Anglo-American constitutional thought.[6] Since the time of Magna Carta (1215), respect for private property set the bounds of legitimate government. Political dialogue associated liberty and property rights during the colonial era. "Liberty and property are not only join'd in common discourse," a correspondent observed in the *Boston Gazette* in 1768, "but



During the Gilded Age, the Court sustained the vast majority of challenged legislation, and was especially sympathetic to safety regulations and laws protecting public morals. The Justices thus upheld Sunday closing laws and state laws prohibiting the manufacture and sale of alcoholic beverages as a valid exercise of the state police power.

are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other."[7] The founding generation saw liberty and property as inseparable. "Property must be secured," John Adams succinctly proclaimed, "or liberty cannot exist."[8] By defending the rights of property owners, the Supreme Court in the late nineteenth century followed this well-marked path and sought to safeguard individual liberty by curtailing the reach of government.[9]

Leading Justices of the Gilded Age repeatedly articulated the view that property was essential for the enjoyment of individual liberty. In contrast to post–New Deal jurisprudence, the Justices believed that property and other rights were interdependent. Justice Stephen J. Field, whose long and influential career on the Court can be seen as an exploration of the meaning of liberty,[10] best summarized this relationship between rights in an 1890 address: "It should never be forgotten that protection of property and person cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."[11] Justice David J. Brewer echoed this theme: "The utmost possible liberty to the individual, and the fullest possible protection to him and his property is both the limitation and duty of government."[12] Members of the Court repeatedly equated property and liberty. For instance, Field pointedly insisted that the Fourteenth Amendment "places property under the same protection as life and liberty."[13] In the same vein, Chief Justice Fuller praised those constitutional provisions "which inhibit the subversion of individual freedom, the impairment of the obligation of contracts, and the confiscation of property."[14]



Justice Stephen J. Field was a great proponent of property rights, and pointedly insisted that the Fourteenth Amendment "places property under the same protection as life and liberty" in his 1877 dissent in *Munn v. Illinois*.

Having stressed the libertarian foundation of Gilded Age jurisprudence, we must explore the then prevailing understanding of liberty. We should start by laying to rest the myth that the Supreme Court was bent upon imposing a rigid laissez-faire regime on American Society.[15] Not only was such a task beyond judicial capability, but the Justices never objected to all economic regulations. In fact, the Court in the late nineteenth century sustained the vast majority of challenged legislation.[16] It invariably upheld, for example, safety regulations governing railroad operations.[17] The Court found no constitutional object to state laws abolishing the fellow servant doctrine.[18] It was sympathetic to laws protecting public safety and morals, even when such measures abridged previous contracts.[19] The Justices found that Sunday closing laws passed constitutional muster.[20] The Court also affirmed workplace regulations, such as restrictions on the hours of work in underground mines, where health and safety concerns were obvious.[21] It sustained a law requiring a health certificate to operate a public laundry, and limiting the hours of business in such establishments.[22] It validated

The Fuller Court validated state laws mandating that physicians obtain a license, and barring persons without such a license from practicing medicine.

state laws mandating that physicians obtain a license, and barring persons without such a license from practicing medicine.[23] Even more striking, the Court upheld state laws prohibiting the manufacture and sale of alcoholic beverages as a valid exercise of the state police power, rejecting the contention that the statute amounted to either a taking of property or a deprivation of property rights without due process.[24] In a ruling that looks especially dubious to modern eyes, it affirmed a state law outlawing the manufacture and sale of oleomargarine on ostensible health grounds.[25] This is hardly a laissez-fairist record. Nor does it suggest that the Justices were merely servants of business corporations.

We should also dispel the received tale that the Supreme Court in the Gilded Age sought to safeguard the wealthy. As we shall see, the evidence suggests otherwise. Justice Field, for example, was convinced that his philosophy of individual rights and limited government was calculated to assist the disadvantaged. "I am on the other side," he explained to a friend in 1884, "and would give the under fellow a show in this life."[26]

So what kind of legislation ran afoul of the Gilded Age Supreme Court? The Justices tended to view government, especially when coupled with powerful special interests, as the most dangerous threat to liberty. Consequently, the Court looked skeptically at laws by which governmental authority was exercised for the benefit of a segment of society at the expense of others, or that altered the outcome of market bargaining. Such laws amounted to "class" legislation, which had been denounced by the Jacksonian Democrats in the 1830s.[27] This dislike of "class" legislation had been forcefully renewed by Thomas M. Cooley in his landmark 1868 treatise,[28] as well as by a host of prominent intellectual leaders during the late nineteenth century. They perceived that "class" legislation threatened individual liberty because it represented the use of power by those in control of government to secure special advantages for

themselves.[29] John F. Dillon forcefully articulated this position in 1895:

> The one thing to be feared in our democratic republic, and therefore to be guarded against with sleepless vigilance, is class power and class legislation. Discriminating legislation for the benefit of the rich against the poor, or in favor of the poor against the rich, is equally wrong and dangerous. Class legislation of every kind is anti-republican and must be repressed.[30]

The solution to the danger of class legislation was for courts to restrain legislative power. Regulations that appeared to involve a redistribution of resources, in contrast to health and safety measures, were pictured as an odious form of "class" legislation.[31] "The chief legal and moral problem," one historian has noted, "was redistribution."[32]

The powers of eminent domain and taxation were clearly subject to abuse in order to benefit politically favored special interests. At root, both involved a forced transfer of property. The Court therefore took steps to cabin the exercise of these powers. It repeatedly declared that private property could not be taken for private gain, even with the payment of compensation.[33] Moreover, the Court put new teeth into the Takings Clause. In *Pumpelly v. Green Bay Company* (1871) Justice Samuel F. Miller, speaking for the Court, construed the Takings Clause of the Wisconsin Constitution, which he pointed out was virtually identical to that in the Fifth Amendment. He determined that an owner was entitled to compensation when his land was permanently flooded by overflow from a dam even though formal title remained with the owner. A physical invasion of land that effectively destroyed its usefulness, he reasoned, amounted to a taking. Significantly, Miller saw the Takings Clause as upholding individual liberty, observing that the provision was "always understood to have been adopted for protection and security to the rights of the individual as against the government."[34]

Similarly, in 1893 the Court, in an opinion by Justice Brewer, explained that the compensation principle "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from the other members of the public, a full and just equivalent shall be returned to him."[35] He defined just compensation broadly, and insisted that the determination of just compensation was a judicial and not a legislative function. More importantly, the Court, in an 1897 opinion by Justice John Marshall Harlan, ruled that the principle of just compensation when private property was taken for public use was an essential element of due process under the Fourteenth Amendment, and thus restrained state exercise of eminent domain.[36] The just compensation norm became, in effect, the first provision of the Bill of Rights to be incorporated into the Fourteenth Amendment. In reaching this conclusion, Harlan quoted with approval language by Justice Joseph Story that "in a free society, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."[37]

Similarly, the Supreme Court sought to limit the capacity of the taxing power to serve private ends. In *Loan Association v. Topeka* (1874) the Court addressed the widespread practice of issuing municipal bonds to help fund private enterprise. Writing for the Court, Justice Miller invalidated the bonds because they rested upon an illegitimate use of the taxing power. "Of all the powers conferred upon government," he warned, "that of taxation is most liable to abuse."[38] In wording reminiscent of the attacks on class legislation, Miller revealingly added: "To lay with one

hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."[39]

Although the Court was unable to shut the door entirely on the issuance of subsidy bonds, it helped to curb the use of the taxing power to aid manufacturing.[40] The outcome in *Loan Association* and its progeny, of course, was hardly a victory for business enterprise, which was generally the beneficiary of such subsidies.[41]

The Supreme Court took a more significant step to confine the taxing power in *Pollock v. Farmers' Loan and Trust Company* (1895).[42] In that case, the Court invalidated the 1894 income tax as a "direct tax" which, under the Constitution, must be apportioned among the states according to population.[43] The apportionment requirement doomed the income tax. The *Pollock* case thus turned upon the meaning of "direct tax." Writing for the Court, Chief Justice Fuller broadly pictured the direct tax clauses as part of a constitutional arrangement to safeguard both states and individuals by limiting federal taxing authority. He observed that the provisions were "manifestly designed to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers."[44] The complex range of political and legal issues raised by the 1894 income tax cannot be addressed here.[45] For our purposes, it bears emphasis that the levy on incomes was vulnerable to attack as class legislation. By burdening only a narrow

In 1895, the Court invalidated the proposed national income tax as a "direct tax" that, under the Constitution, must be apportioned among the states according to population. Writing for the Court, Chief Justice Melville W. Fuller (pictured in this Courtroom scene of the *Pollock* case being argued) broadly portrayed the direct tax clauses as part of a constitutional arrangement to safeguard both states and individuals by limiting federal taxing authority.

segment of the population, the tax breached the widely accepted constitutional norm enjoining equality of rights and duties. As Dillon explained:

> But when taxes, so-called, are imposed, not as mere revenue measures, but for the real purpose of reaching the accumulated fruits of industry, and are not equal and reasonable, but designed as a forced contribution from the rich for the benefit of the poor, and as a means of redistributing the rich man's property among the rest of the community—this is class legislation of the most pronounced and vicious type; is, in word, confiscation and not taxation. Such schemes of pillage are indefensible on any sound principle of political policy.[46]

In short, the income tax was seen as a threat to both liberty and democracy. With respect to both eminent domain and taxation, then, the Court forged constitutional doctrines to guard against redistributive exercise of these powers by government, and thus vindicate the prevailing understanding of liberty.

The same concern for individual liberty also undergirds the Court's defense of contractual rights. Contracts played a fundamental role in shaping American society during the nineteenth century. Indeed, the extensive use of contracts led J. Willard Hurst to characterize this era as "above all else, the years of contract in our law."[47] Contractual arrangements were at the heart of the market economy. The Framers recognized the vital importance of contractual stability in fostering commerce by placing in the Constitution a provision barring the states from impairing the obligation of contracts.[48] Since the time of Chief Justice John Marshall, this provision figured prominently in litigation before the Supreme Court, and the Gilded Age was no exception. In 1878, Justice William Strong proclaimed: "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away."[49]

In the late nineteenth century, the Court heard a steady stream of Contact Clause cases. Many of these cases involved state laws that sought to revamp debtor-creditor relations to favor debtors, questioned the validity of tax exemptions, or attempted to repudiate bonded obligations. Such legislation undercut existing contracts and was redistributive in nature. It easily fit the definition of "class" legislation, and, not surprisingly, the Court looked skeptically at such measures. A few examples illustrate the range of Contract Clause litigation. During Reconstruction, legislators in debt-ridden southern states greatly enlarged the extent of the homestead exemption from the claims of creditors, and often applied such increased exemptions retroactively. Creditors challenged the retroactive homestead exemptions as an impairment of antecedent contracts, an argument that the Supreme Court found persuasive in the 1870s.[50] Finding the retroactive application of homestead exemptions to be unconstitutional, Justice Noah Swayne remarked: "No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice."[51] Other debt relief measures also ran afoul of the Contract Clause. In *Barnitz v. Beverly* (1896), the Court struck down a Kansas law authorizing the redemption of foreclosed property where no such right previously existed.[52] In addition, the Court continued to uphold grants of tax immunity under the Contract Clause against legislative steps to repeal such concessions.[53] This record lends some credence to the views of the English political economist Henry Sumner Maine, who in 1886 pictured the Contract Clause as "the bulwark of an American individualism against democratic impatience and Socialist fantasy."[54]

Still, Maine attributed too much importance to the Contract Clause. Although the provision retained a large measure of vitality in the Gilded Age, several doctrines weakened its protection of contractual arrangements. The Court adhered to the well-settled rule that corporate grants were to be strictly construed against the grantee. Corporations claiming immunity from state regulations or taxation had to demonstrate this privilege clearly by express language in the grant. For example, the Justices repeatedly rejected claims that railroads had been given the power to set their rates in their charters free of legislative control.[55] Further, in the 1870s the Court gravitated toward the view the states could not, even by express language in a charter, surrender the police power to safeguard the health, safety, and morals of the public. The notion of an inalienable police power opened the door for state legislatures to modify public contracts to which a state was a party.[56] Thus, in 1894 Chief Justice Melville W. Fuller, speaking for the Court, brushed aside a Contract Clause challenge to an amendment to a railroad charter that imposed a new duty to remove grade crossings. He insisted the Contract Clause was "not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals."[57] As this brief account makes clear, the Contract Clause in the Gilded Age was hardly a strong or consistent shield for business interests.

Aside from their economic importance, contracts had individualist dimensions with profound implications for the social order. The ability to enter contracts represented a move away from a hierarchical system in which one's place was set by birth and status, and toward a society in which relationships were governed by agreements. Again, Maine's views are instructive. He famously observed that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[58] The notion of contractual freedom had deep roots in the legal culture. By the eighteenth century, the common law began to increasingly emphasize the capability of private persons to make economic bargains for themselves.[59] This commitment to contractual freedom was strengthened by the ideology of the anti-slavery movement. The Civil Rights Act of 1866, for example, listed the rights "to make and enforce contracts" and to acquire property among the liberties guaranteed to freedpersons. In short, contracts were seen as a liberating force.[60]

Justice Field was a key proponent of what would emerge as the freedom of contract doctrine. In a series of dissenting and concurring opinions he championed the right of individuals to pursue lawful callings.[61] During the 1880s, Field's views gained increasing acceptance among state courts. Courts began to stress the right of individuals to enter agreements, reasoning that the right to pursue callings and to acquire property entailed the right to make contracts.[62] The Supreme Court, however, did not address the question of contractual freedom until late in the nineteenth century.

The close affinity between the evolution of the liberty of contract doctrine at the state court level and its eventual adoption by the Supreme Court is illustrated by the career of Rufus W. Peckham.[63] While on the New York Court of Appeals, Peckham was apparently the first jurist to use the phrase "liberty of contract" in a constitutional context. In 1887 he affirmed "the general rule of absolute liberty of the individual to contract regarding his own property."[64] Peckham also warned against the evils of class legislation, which in his mind encouraged interest groups to seek control of government for their own advantage.[65] Named to the Supreme Court in 1895, he was instrumental in pushing the Court toward its rather cautious endorsement of the liberty of contract principle. Writing for the Court in the landmark case of *Allgeyer v. Louisiana* (1897), Peckham asserted that the protection of liberty under the Due Process

Clause of the Fourteenth Amendment entailed more than freedom from physical restraint.[66] He insisted that liberty encompassed the right "to earn his livelihood by any lawful calling" and "for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[67] Peckham then invalidated a state law that barred residents from entering insurance contracts with out-of-state companies as a deprivation of liberty without due process of law. This decision opened the door to competition in the insurance industry, and was hardly calculated to shield the wealthy or business interests from regulation.[68]

For all of the controversy that later engulfed the principle of contractual freedom, two points stand out. First, the doctrine was seen by its proponents as a vindication of individual rights, not a devious scheme to assist business. Second, the liberty of contract doctrine did not bulk large in the Gilded Age jurisprudence of the Supreme Court. In fact, the Court did not invoke the doctrine again until the early twentieth century. As Gregory S. Alexander has explained, "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle." [69]

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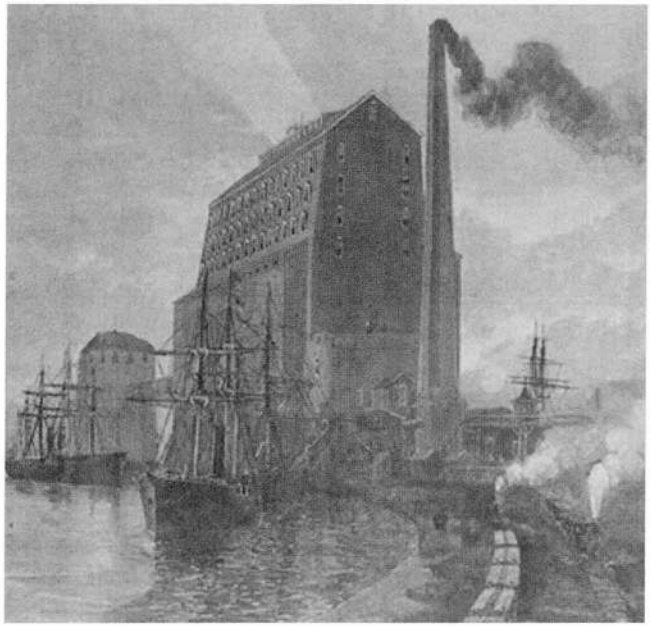
Let us explore this libertarian theme further by examining one of the most contested issues of the Gilded Age—the power of government to regulate rates. As is well-known, in *Munn v. Illinois* (1877) the Supreme Court, over a spirited dissent by Field, affirmed the authority of states to prescribe the charges of businesses "affected with a public interest."[70] Although Chief Justice Morrison Waite made clear that states could regulate the charges of railroads and allied industries, he never satisfactorily explained how to ascertain when property became so infused with a public interest that regulation was permissible. He further insisted that any decision as to the reasonableness of imposed rates was a matter for the legislature. Field, dissenting, would have none of it. "The legislation in question," he lectured," is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of a citizen, and fix the compensation he shall receive."[71] Field was concerned that the definition of business "affected with a public interest" was so open-ended as to encompass virtually every enterprise. He argued that the state's power to regulate, aside from preserving health, safety, and morals, was confined to situations in which government granted monopoly status to a particular business. Field pictured unrestrained legislative power over private property as a threat to liberty.

A full account of the tangled tale of state rate regulations in the Gilded Age is beyond the scope of these remarks.[72] Suffice it to say that over the next few years the Supreme Court partially gravitated toward Field's position, adopting a sort of middle course. The Justices never accepted Field's contention that rate regulation was confined to government-conferred monopolies. But in a line of cases it weakened *Munn*, ruling that state-imposed rates were subject to judicial review, and that regulated industries were entitled under the due process norm to receive a reasonable return upon investment.[73] Such developments were consistent with a judicial attitude that was supportive of individual liberty and adverse to class legislation. Bear in mind that rate regulations were a departure from market bargaining, and amounted to an implicit transfer of economic benefit from the railroads to shippers.

A central concern of the Supreme Court in the Gilded Age, therefore, was the relationship of the individual with government. In a curious way this commitment to liberty helps to explain the attack on the jurisprudence of the late nineteenth century by leading figures of the Progressive Era. The Progressives were generally hostile to all



In 1877 the Supreme Court affirmed the authority of states to prescribe the charges of businesses "affected with a public interest" (such as this grain elevator). Although Chief Justice Morrison Waite made clear that states could regulate the charges of railroads and allied industries, he never satisfactorily explained how to ascertain when property became so infused with a public interest that regulation was permissible. He further insisted that any decision as to the reasonableness of imposed rates was a matter for the legislature.

claims of individual right and stressed the primacy of the state over the individual.[74] "Progressives," Michael McGerr has pointed out, "often spoke of their commitment to democracy. But many reformers, so critical of individualism and individual rights, were not very democratic at all."[75] In particular, they displayed little patience with property rights or notions of limited government, which were seen as obstacles to their legislative program and the emerging regulatory state. Many of these complaints were exaggerated, but for our purpose it is useful to realize that the Progressives agreed that the Court had been guided by a defense of individualistic values.

The Court's dedication to liberty was reinforced by utilitarian considerations. "An old concern for private rights and individual freedom," Morton Keller has perceptively commented, "coexisted with the desire to foster the development of a national economy."[76] Members of the Court readily associated private property with economic growth. For instance, Justice Brewer maintained that "actual human experience, from the dawn of history to the present hour, declares that the love of acquisition, mingled with the joy of possession, is the real stimulus to human activity."[77] Likewise, the Court emphasized the key role of contracts in the economy. Contracts, it asserted in 1878, "are springs of business, trade and commerce. Without them, Society could not go on."[78]

This commitment to economic growth markedly influenced the Court's handling of bond repudiation and rate regulation cases, both of which related to the expansion of the rail industry. The Court heard hundreds of cases, primarily under diversity of citizenship jurisdiction, resulting from municipal efforts to repudiate bonded debt incurred to promote railroad development. Stressing the economic importance of railroads, the Justices declared in an 1874 bond case: "Where they go they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence."[79] Broadly speaking, the Court, in a long line of decisions,

upheld the claims of bondholders.[80] The distinguished historian Charles Warren credited the Court's bond decisions in the face of calls for debt repudiation with restoring investor confidence and encouraging commercial development.[81]

Similarly, in the railroad rate cases the Court recognized the vital role of private capital in financing economic development, and expressed concern that stringent controls would discourage investment. Striking down in 1894 a rate imposed by the Texas railroad commission, the Court reasoned that the rate schedule diminished the company's earnings to the point that it could not pay interest on bonded debt. "Would any investment ever be made of private capital in railroad enterprises," it asked, "with such as the proffered results?"[82] Mary Cornelia Porter cogently explained "that the Court was less interested in rate regulation per se than in assuring that regulated utilities would continue to attract the investment capital necessary for expanding and improving services to the public."[83] In short, by fashioning minimal national standards governing state rate controls the Court sought to give confidence to investors.

This utilitarian dimension of the Court's property jurisprudence is often overlooked by those anxious to picture the Gilded Age as an era of formalist thinking. We are told that the Justices followed a mechanical conception of law and decided cases without regard to policy considerations.[84] Yet, even a casual reading of the Court's decisions and the statements of notable jurists contradict this fashionable but problematic thesis devised by scholars associated with the Progressive movement to advance a political agenda. The record makes plain that the Justices championed what they saw as socially desirable outcomes with their defense of property rights. In short, within bounds they pursued a market-oriented jurisprudence.

It remains to assess the property rights jurisprudence of the Gilded Age in the larger context of Supreme Court history. The Progressives and their progeny have long sought to characterize this era as a departure from constitutional norms, as one in which the Court moved in unprecedented directions. In my view, this Progressive historiography is fundamentally in error. The myth of an aberrant Court served the political needs of the New Deal by disguising the extent to which the constitutional revolution of the 1930s marked a sharp break in our constitutional history.[85]

Instead, I argue that the Gilded Age jurists drew upon a time-honored tradition of property-conscious constitutionalism. There was a close affinity between the views of the Framers regarding the sanctity of private property and constitutional thought throughout the nineteenth century. As Morton J. Horwitz has noted, "Progressive historians lost sight of the basic continuity in American constitutional history before the New Deal."[86] The Justices of the Gilded Age, like those on the Marshall Court, attempted to vindicate property rights and foster economic development.[87] Indeed, until the New Deal era courts in the United States were heavily involved in explicating the pivotal role of property in the constitutional order. With the adoption of the Fourteenth Amendment, the Supreme Court could invoke restrictions on state authority through the Due Process Clause that were not previously available, but the underlying goal of safeguarding private property from legislative abridgement remained unchanged.

Moreover, the Justices in the late nineteenth century reflected the prevailing values about the importance of property rights. It was widely believed that the rights of owners deserved a high degree of constitutional solicitude. As one historian has reminded us: "Civil liberties encompass both personal and property rights. Indeed, in nineteenth-century America, property was considered among the most important civil liberties."[88]

For better or worse, we have wandered far from the constitutional principles that guided the Supreme Court during the Gilded

Age. It has been a long time since the notion of limited government has received more than lip service. Property rights have been relegated to a secondary status in the constitutional hierarchy, and courts rarely speak of property as essential to liberty. Given these enormous changes in outlook, there is a tendency to see the property rights jurisprudence of the late nineteenth century through a distorted lens. I realize that my comments challenge a good deal of conventional (if contested) wisdom. I hope, however, that they may serve as a call for a reevaluation of the work of the Supreme Court in this fascinating but often misunderstood period of our constitutional history.

Author's Note:

I want to thank Mark E. Brandon, Brian T. Fitzpatrick and David N. Mayer for helpful comments on an earlier version of these remarks.

ENDNOTES

[1] For a classic expression of this view, *see* Benjamin R. Twiss, **Lawyers and the Constitution: How Laissez-Faire Came to the Constitution** (Princeton: Princeton University Press, 1942). The notion that the Supreme Court pursued a laissez-faire policy during the Gilded Age has been repeated in numerous works. *See*, e.g., Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993), 174–202. For a recent articulation of this position, *see* James McGregor Burns, **Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court** (New York: Penguin Press, 2009), 93–113 (attributing the jurisprudence of the Supreme Court in the Gilded Age to laissez-faire ideology, Social Darwinism, and sympathy for business interests).

[2] David M. Bernstein, **Rehabilitating *Lochner*: Defending Individual Rights against Progressive Reform** (Chicago: University of Chicago Press, 2011), 21, 128 ("The long-standing myth of a wildly reactionary Supreme Court imposing a grossly unpopular laissez-faire ideology on the American people on behalf of large corporate interests—with little concern for precedent, constitutional text, or individual or minority rights—is far removed from historical reality."); David N. Mayer, **Liberty of Contract: Rediscovering A Lost Constitutional Right** (Washington: Cato Institute, 2011), 66–67, 115 (dismissing as "a folktale" the view that the Supreme Court adhered to a laissez-faire philosophy, and pointing out that the Court upheld many economic regulations).

[3] Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003), 174 ("In the end, Miller cared less about espousing a consistent judicial philosophy than he did about practical results."). *See also* Lawrence M. Friedman, **American Law in the Twentieth Century** (New Haven, Conn.: Yale University Press, 2002), 24.

[4] Paul Kens, **The Supreme Court under Morrison R. Waite, 1874–1888** (Columbia, S.C.: University of South Carolina Press, 2010), 7 ("The justices who made up the Waite Court were weaned on a tradition of federalism that emphasized state authority and a limited role of the federal government in everyday life."); James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (Columbia, S.C.: University of South Carolina Press, 1995), 213 ("There was . . . a degree of tension between judicial solicitude toward property rights and the growing national market on one hand and the pull of traditional states' rights sentiment on the other.").

[5] Michael J. Phillips, **The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s** (Westport, Conn.: Praeger Publishers, 2001), 115.

[6] James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional of Property Rights**, 3rd ed. (New York: Oxford University Press, 2008), 13–14, 16–18, 28–29. John Phillip Reid, **Constitutional History of the American Revolution: The Authority of Rights** (Madison: University of Wisconsin Press, 1986), 27 ("In the eighteenth-century pantheon of British liberty there was no right more changeless and timeless than the right to property.").

[7] *Boston Gazette*, February 22, 1768, p. 1.

[8] "Discourses on Davila," in Charles Francis Adams, ed., **The Works of John Adams** 10 vols. (Boston: Little, Brown, vol. 6, 1851), 280.

[9] Owen M. Fiss, **History of the Supreme Court of the United States, Volume 8: Troubled Beginnings of the Modern State, 1888–1910** (New York: Macmillan, 1993), 389 ("Liberty was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors."): Michael J. Phillips, **The *Lochner* Court: Myth and Reality**, *supra* note 5, at 115 ("From all this, one might conclude that the justices' motives aligned with their words: that they were trying to protect liberty and property against government actions that would deprive people of either or both.").

[10] *See* Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence, Kansas: University Press of Kansas, 1997).

[11] Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U. S. 729, 745.

[12] *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

[13] *Munn v. Illinois*, 94 U.S. 113, 141 (1877) (Field, J., dissenting).

[14] Melville W. Fuller, "Address in Commemoration of the Inauguration of George Washington as First President of the United States," December 11, 1889, reprinted in 132 U.S. 706, 732.

[15] Richard A. Epstein, **How Progressives Rewrote the Constitution** (Washington: Cato Institute, 2006), 52 ("... it is critical to remember that no justice of the Supreme Court has ever held that all forms of state regulation are unconstitutional").

[16] Claudio J. Katz, "Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era," 31 *Law and History Review* 275, 277–278 (2013) ("Courts upheld a host of statutes promoting economic growth and regulating it in the public interest.").

[17] *Missouri Pacific Railway Company v. Humes*, 115 U. S. 522 (1885) (state fencing law); *Minneapolis and St. Louis Railway Company v. Beckwith*, 129 U. S. 26 (1889) (state fencing law); *New York and New England Railroad Company v. Bristol*, 151 U.S. 556 (1894) (statute requiring railroads to eliminate grade crossings); *St. Louis and San Francisco Railway Company v. Mathews*, 165 U.S. 1 (1897) (statute imposing absolute liability upon railroads for damage from fire).

[18] *Missouri Pacific Railway Company v. Mackey*, 127 U. S. 205 (1888).

[19] *Fertilizing Company v. Hyde Park*, 97 U. S. 659 (1878); *Stone v. Mississippi*, 101 U. S. 814 (1880).

[20] *Petit v. Minnesota*, 177 U.S. 164 (1900).

[21] *Holden v. Hardy*, 169 U.S. 366 (1898). *See also St. Louis, Iron Mountain, & St. Paul Railway Co. v. Paul*, 173 U.S. 404 (1899) (Fuller, C.J.) (upholding a law requiring railroads to promptly pay earned wages to discharged employees).

[22] *Barbier v. Connolly*, 113 U.S. 27 (1888).

[23] *Dent v. West Virginia*, 129 U.S. 114 (1889) (Field, J.). In this era of supposed laissez-faire, courts proved generally receptive to a marked increase in occupational licensing laws. Lawrence M. Friedman, **A History of American Law**, 3rd ed. (New York: Touchstone Book, 2005), 340–342.

[24] *Bartemeyer v. Iowa*, 85 U.S. 129 (1874); *Mugler v. Kansas*, 123 U.S. 623 (1887).

[25] *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

[26] Field to Mathew Deady, October 29, 1884, as quoted in Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897," 61 *Journal of American History* 970, 979 n. 54 (1975).

[27] Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293, 318–326 (1985).

[28] Thomas M. Cooley, **A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States** (Boston: Little, Brown, 1868, reprint New York: Da Capo Press, 1972).

[29] Benedict, "Laissez-Faire and Liberty," *supra* note 27, at 305–314. *See also* Ken I. Kersch, **Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law** (Cambridge: Cambridge University Press, 2004), 141 ("Given the prevailing ideological order, class legislation was considered a constitutional abomination because it was understood as the issue of self-interested individuals or groups using the power of government for their own private and profit while circumscribing the God-given property and labor rights of others.").

[30] John F. Dillon, "Property—Its Rights and Duties in our Legal and Social Systems," 29 *American Law Review* 161, 173 (1895).

[31] *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362, 410 (1894) (invalidating a state railroad rate regulation, and observing that "the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gains.").

[32] Katz, "Protective Labor Legislation," *supra* note 16, at 278.

[33] *Olcott v. The Supervisors*, 83 U.S. 678, 694 (1872). *See also* Cooley, *Constitutional Limitations, supra* note 22, at 531.

[34] *Pumpelly v. Green Bay Company*, 80 U.S. 166, 177 (1872).

[35] *Monongahela Navigation Company v. United States*, 148 U.S. 312, 324–328 (1893).

[36] *Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897).

[37] *Id.* at 236. *See* Joseph Story, **Commentaries on the Constitution of the United States**, 2nd ed., 2 vols. (Boston: Little and Brown, 1851, vol. 2), 534–535.

[38] *Loan Association v. Topeka*, 87 U.S. 655, 663 (1874).

[39] *Id.* at 664.

[40] *Petersburg v. Brown*, 106 U.S. 487 (1883); *Cole v. LaGrange*, 113 U.S. 1, 6 (1885) ("The general grant of legislative power in the constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or the right of taxation, to take private property without the owner's consent, for any but a public object.").

[41] L.A. Powe, "Rehearsal for Substantive Due Process: The Municipal Bond Cases," 53 *Texas Law Review* 738, 747 (1975) (*Loan Association* demonstrated that "[t]he

Court had no monolithic pro-business or pro-investment bias which overrode all other concerns.").

[42] *Pollock v. Farmer's Loan and Trust Company*, 157 U.S.429, 158 U.S. 601 (1895).

[43] *See* Article 1, section 2 (direct taxes "shall be apportioned among the several States . . . according to their respective Numbers . . . "); Article 1, section 9 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census....).

[44] *Pollock*, 157 U.S. at 583.

[45] For the *Pollock* cases, *see* Ely, **The Chief Justiceship of Melville W. Fuller**, *supra* note 4, at 118–123; Fiss, **Troubled Beginnings**, *supra* note 9, at 77–89; Eric M. Jensen, "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes,'" 33 *Arizona State Law Review* 1057, 1079 (2001) ("An income tax is nothing like the classic forms of indirect taxation, and the Supreme Court therefore got the right result in the *Income Tax Cases* of 1895; an income tax is a direct tax as that term was originally understood.").

[46] Dillon, "Property—Its Right and Duties," *supra* note 30, at 173. *See also* Morton J. Horwitz, **The Transformation of American Law, 1870–1960** (New York: Oxford University Press, 1992), 19 (declaring that "far from marking a sharp break with the past, the decision in Pollock instead exemplified the crystallization and culmination of ideas that had been gathering strength in American constitutional thought for over fifty years").

[47] J. Willard Hurst, **Law and the Conditions of Freedom in the Nineteenth-Century United States** (Madison: University of Wisconsin Press, 1956), 18.

[48] James W. Ely, Jr., "The Marshall Court and Property Rights: A Reappraisal," 33 *John Marshall Law Review* 1023, 1029–1047 (2000).

[49] *Murray v. Charleston*, 75 U.S. 603, 623 (1870).

[50] *Gunn v. Barry*, 82 U.S. 610 (1873); *Edwards v. Kearzey*, 96 U.S. 595 (1878). *See* James W. Ely, Jr., "Homestead Exemption and Southern Legal Culture," in Sally E. Hadden and Patricia Hagler Minter, eds., **Signposts: New Directions in Southern Legal History** (Athens, Ga.: University of Georgia Press, 2013), 289–314.

[51] *Edwards v. Kearzey*, 96 U.S. 595, 603 (1878).

[52] *Barnitz v. Beverly*, 163 U.S. 118 (1896).

[53] *Mobile and Ohio Railroad Company v. Tennessee*, 153 U.S. 486 (1894).

[54] Henry Sumner Maine, **Popular Government**, 3rd ed. (London: John Murray, 1886), 247–248.

[55] James W. Ely, Jr., "Whatever Happened to the Contract Clause?", 4 *Charleston Law Review* 371, 384 (2010).

[56] *Id.* at 371, 381-386 (2010) (tracing slow decline of Contract Clause jurisprudence regarding public contracts).

[57] *New York and New England Railroad Company v. Bristol*, 151 U.S. 556, 567 (1894).

[58] Henry Sumner Maine, **Ancient Law**, 3rd American edition (New York: Henry Holt and Company, 1873), 165.

[59] Mayer, **Liberty of Contract**, *supra* note 2, at 44–47 (stressing the significance of a contract-based society for the evolution of individual rights); James W. Ely, Jr., "The Protection of Contractual Rights: A Tale of Two Constitutional Provisions," 1 *NYU Journal of Law & Liberty* 370, 371–372 (2005).

[60] Herman Belz, **Emancipation and Equal Rights: Politics and the Civil War Era** (New York: Norton, 1978), 109–110; Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1862–1937," *1984 Supreme Court Historical Society Yearbook*, 22–33 (tracing liberty-of-contract doctrine to pervasive "free labor" ideology of Civil War era).

[61] *Slaughterhouse Cases*, 83 U. S. 36, 83–111 (1873) (Field, J., dissenting); *Munn v. Illinois*, 94 U. S. 113, 136–154 (1877) (Field, J., dissenting); *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 754–760 (1884) (Field, J., concurring).

[62] E.g., *In re Jacobs*, 98 N.Y. 98 (1885); *Godcharles & Co. v. Wigeman*, 113 Pa. St. 431, 6 A. 354 (1886).

[63] *See* James W. Ely, Jr., "Rufus W. Peckham and Economic Liberty," 62 *Vanderbilt Law Review* 591 (2009).

[64] *People v. Budd*, 117 N.Y. 1, 48 (1889) (Peckham, J., dissenting).

[65] Ely, "Rufus W. Peckham," *supra* note 63, at 594–597.

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

[67] *Id* at 589.

[68] Kermit L. Hall and Peter Karsten, **The Magic Mirror: Law in American History**, 2nd ed. (New York: Oxford University Press, 2009), 257.

[69] Gregory S. Alexander, "The Limits of Freedom of Contract in Age of Laissez-Faire Constitutionalism," in Francis H. Buckley, ed. **The Fall and Rise of Freedom of Contract** (Durham, N.C.: Duke University Press, 1999),

[70] *Munn v. Illinois*, 94 U.S. 113 (1877).

[71] *Id* at 148.

[72] For a discussion of the rate regulation controversy, *see* James W. Ely, Jr., **Railroads and American Law** (Lawrence, Kansas: University Press of Kansas, 2001), 80–99.

[73] E.g., *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U.S. 418 (1890); *Reagan v. Farmers' Loan and Trust Company*, 154 U. S. 362 (1894); *Smyth v. Ames*, 169 U.S. 466 (1898).

[74] James W. Ely, Jr., "The Progressive Era Assault on Individualism and Property Rights," 29 *Social Philosophy and Policy* 255 (2012).

[75] Michael McGerr, **A Fierce Discontent: The Rise and Fall of the Progressive Movement in America** (New York: Oxford University Press, 2003), 217.

[76] Morton Keller, **Affairs of State: Public Life in Late Nineteenth Century America** (Cambridge, Mass.: Harvard University Press, 1977), 370.

[77] David J. Brewer, "Protection to Private Property from Public Attack," 55 *New England and Yale Review* 97, 99 (1891). *See also* Henry B. Brown, "The Distribution of Property," American Bar Association, Report of the 16th Annual Meeting (1893), 213 226 (criticizing socialism, and declaring that "the fact still remains that no people who did not respect the right of private property have ever emerged from barbarism, that the disposition to acquire and the ability to own are the prime distinctions between the civilized man and the savage; that the desire to better one's condition—in other words, to make money—is the great incentive to labor, in fact, lies at the basis of all social progress").

[78] *Farrington v. Tennessee*, 95 U.S. 679, 682 (1878) (Swayne, J.).

[79] *Township of Pine Grove v. Talcott*, 86 U.S. 666, 676 (1874) (Swayne, J.).

[80] Charles Warren, **The Supreme Court in United States History**, rev. ed. (Boston: Little, Brown and Co., 1926, 2 vols.), vol. 2, 528–532.

[81] *Id.*

[82] *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 412 (1894).

[83] Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," *1976 Supreme Court Review* 135, 143.

[84] *See* Brian Z. Tamanaha, **Beyond The Formalist-Realist Divide: The Role of Politics in Judging** (Princeton: Princeton University Press, 2010), 27–63 (sharply criticizing "myth" of mechanical jurisprudence, asserting that the story of legal formalism was fashioned by Progressives to serve a political agenda, and declaring: "Any jurist with politically conservative views who believes in liberty or in fidelity to legal rules is a prime candidate for being branded a formalist.").

[85] Horwitz has explained the prevailing historiography of the Gilded Age in terms of "the legitimatizing needs of the New Deal." **The Transformation of American Law, 1870–1960**, supra note 46, at 7. He added: "The New Deal's constitutional revolution of 1937 was justified not as a powerful break with old order but as a conservative restoration of neutral constitutional principles that had supposedly been thrown overboard by the *Lochner* Court. The result has been to buttress historical interpretations that, for example, continue to treat the late nineteenth-century judiciary as having capitulated to big business." *See also*, Bernstein, **Rehabilitating *Lochner***, *supra* note 2, at 125 ("The standard liberal version of constitutional history has relied on broad caricatures of the relevant historical actors: . . . The liberals' historical bad guys are the 'reactionary' justices of the Gilded Age and their successors into the early New Deal era, who are said to have substituted crass class interests or dogmatic laissez-faire ideology for constitutional principle.").

[86] Horwitz, **Transformation of American Law**, *supra* note 46, at 7.

[87] Jennifer Nedelsky, **Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy** (Chicago: University of Chicago Press, 1990), 228 (". . . the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth century advocates of laissez-faire"); Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence** (Durham, N.C.: Duke University Press, 1993), 199 (cautioning that historians should not "overlook the continuities in nineteenth-century American political culture and the extent to which the justices of the late nineteenth century interpreted the social turmoil of the 1880s and 1890s through an ideological prism developed by another group of social elites in response to the social turmoil of the 1780s").

[88] Stephen A. Siegel, "Lochner Era Jurisprudence and the American Constitutional Tradition," 70 *North Carolina Law Review* 1, 33 n.154 (1991).

The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates

RICHARD A. EPSTEIN

Introduction

The topic of rate regulation is today commonly associated with the activities of the Supreme Court during the 100-year period from the end of the Civil War to about 1965. Within that period, most of the heavy lifting was done after the passage of the Interstate Commerce Act of 1887[1] and before the end of the Second World War. By any account, it is a "historical" topic today, because, although the issues remain live in public debate, the entire area, with one or two exceptions, has slipped into relative oblivion in the modern Supreme Court—defined for these peculiar purposes as the period that ends with the appointment of the longest-serving Supreme Court Justice, now Antonin Scalia, appointed in 1986. The topic is thus ideal for a lecture before the Supreme Court Historical Society because the last major constitutional decision on the topic dates from 1989 with the opinion by then–Chief Justice Rehnquist in *Duquesne Light Co. v. Barasch*,[2] which purported to bring a close to the underlying issues by allowing the states and the federal government a choice of one of two internally consistent methodologies to protect the capital that companies have invested in their operation. This said, the issues of rate regulation have continued on before lower courts in ways that reflect profound differences in the approaches that emerged during the earlier period.

In this article, I shall trace the development of rate regulation from three complementary perspectives: historical, economic, and constitutional. The basic conclusion from this investigation reveals this profound paradox: at a time when the United States Supreme Court did not have available to it the huge

advances in the general economic theory of regulation, it nonetheless was able to fashion a set of principles that, more often than not, properly balanced competing interests in the perennial quest to avoid both monopoly profits on the one hand and confiscation on the other. Unfortunately, with the rise of rational basis review in modern constitutional law, the effects of those early decisions[3] have to some extent been eroded in the lower courts since the heyday of economic rate regulation.[4]

To flesh out this theme, I shall proceed as follows. In section I, I set out the economic explanation for ratemaking with respect to common carriers and other public utilities. In section II, I discuss the English origins of modern rate regulation law that explicitly formed the basis of the key American decisions on this topic. In section III, I trace the incorporation of the English doctrine into American law, and its constitutional elaboration on both the procedural and substantive frontiers. Section IV then completes the story by discussing the possible applications of the earlier principles in some modern American contexts.

I. The Simple Economics of Ratemaking

The intellectual history of the law of rate regulation begins with the writings of Sir Matthew Hale in the late seventeenth century; he wrote that, for businesses that were so "affected with the publick interest," it was right for their rates to be subject to some external oversight from either the courts or the legislature. This position was set out in no uncertain terms in Hale's famous treatise, **De Portibus Maris**, written in 1670, as follows:

> A man for his own private advantage may in a port town set up a wharf or crane, and take what rates he or his customers can agree for cranage, wharfage, [etc.;] for he doth no more than is lawful for any man to do, viz, make the most of his own . . . but such wharfs cannot receive customable goods against the provision of the statute of 1 Eliz. cap. II.
>
> If the king or a subject have a publick wharf, unto which all persons that come and unlade or lade their goods for the purpose, because they are wharfs only licensed by the queen, according to the statute of 1 El. Cap II, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, [etc.,] neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only . . .
>
> But in that case the king may limit by his charter and license him to take reasonable tolls, though it be a new port or wharf, and make publick; because he is to be at the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights.[5]

The implicit model behind this early intuition divided the world into three types of transactions, where rate regulation played a proper role in the middle part, that is, in those cases that Hale christened as "affected with a publick interest." Start with the first extreme, not mentioned in this brief excerpt, namely the threat or use of force by one person against another, which was the focus of earlier works of that same generation: Thomas Hobbes's **The Leviathan**, written in 1651, and John Locke's **The Second Treatise of Government**, first published in 1690, although written perhaps ten years earlier. Aggression

is, of course, the greatest threat to civil peace, and it was well understood that the primary function of government was to protect against the use of force "the Lives, Liberties and Estates" of its citizens.[6] In responding to force, there could be no compromise. The actions had to be stopped before they harmed any other person. It was well understood even then that the payment of compensation to ward off threats by others was a massive invitation to social disorder. No person could figure out how much the assailant was entitled to extract from each innocent person. But everyone understood that the payment of compensation to satisfy the first attacker would not bring civil peace. Instead it would only invite a second, and then a third, person to make the same threat in order to exact the same or similar payment. Compensation was a form of abject surrender that only invited further rounds of social discord. To keep society together, aggressive action had to be stopped either by self-defense or public force—no compensation required. Any understanding of the social contract begins with the proposition that Clause 1 of that elusive agreement involves the mutual renunciation of force by all persons against all others. No actual agreement can achieve that result, notwithstanding some subjectivist language on this point in Locke,[7] but the enforcement of that principle by public authorities (who themselves had to be restrained in the use of force) was paramount to the social order.

At the other extreme lies the question of whether one individual can refuse to do business with a second for any reason at all. The correct answer as a matter of political theory is that in the normal case the refusal to deal becomes necessarily a strong right that each person possesses against each other, a point that is clearly intimated in the last passage quoted from Hale. The economic explanation behind that principle is based on the clear need to minimize the transaction costs needed to create some social improvements. To deny that principle is to invite forced exchanges whereby it must be determined how much compensation should be provided in exchange for what services.

The multiple difficulties in deciding which persons should be forced to deal with which other persons cannot be solved. The greater the number of individuals, the harder the regulatory solution at a time when the competitive solution—more parties on both sides of any market—comes ever closer to hand. Nor is it possible in this regulatory purgatory to identify which goods or services should be supplied to which person, on what terms, and at what price for their use. Oddly enough, the only way in which the government can protect all individuals against the use or threat of force by others in this context is to give them the absolute right to walk away. The damage in these situations is, moreover, likely to be modest for, as the number of individuals in society increases, the greater the number of close substitutes for any particular good or service. Hence, the more likely it is that a competitive market will emerge.[8] The ability to take one's business elsewhere—what is often called the exit right[9]—is the surest protection that basic wants and needs will be satisfied. Any insistence that one person be forced to work for another has the opposite consequence. It unleashes and legitimizes the use of force against strangers. At the limits, the maxim force no, cooperation yes, sets out the two fundamental principles of society.

The overall synthesis is not complete, however, because it does not cover the intermediate case of Hale's "conveniences" that are "affected with the publick interest." Note that Hale had superb instincts because he did not limit this class to firms that had legal franchises from the Crown, but also included those "where there is no other wharf in that port, as it may fall out where a port is newly erected," which is close to what today we call a natural monopoly. Yet, oddly enough, he never quite connected the dots between these "conveniences" and the monopoly position of

those who hold that position, which is critical for understanding why this doctrine makes sense in the first place.

Quite simply, the clean case of a business affected by the public interest arises when a single firm interest holds a monopoly position over particular supply services. Situations of this sort were common in early English history, which had its fair share of legal and natural monopolies. The latter involved cases without formal restraints on entry, but markets in which it was nonetheless highly expensive for any new entrant to create duplicate facilities.[10] Thus there might be enough demand to service one carrier or one inn on the one road from London to Oxford, but not enough to service two, given the high fixed costs needed to set up the second operation. Similarly, there might be physical space for one landing operation in a harbor, but not two, so that the nearest alternative site was far enough away that it could not serve as a suitable port of entry sufficient to supply a local market. In an age of limited transportation options, the dangers of both natural and legal monopoly were apparent. The question was how to treat them.

In answering this question, it is clear that neither of the two polar extremes works. To treat the exercise of monopoly as though it involved the use of force is to invite wholesale confiscation of the assets of the sole provider of what has come to be called an "essential facility,"[11] a doctrine that has not yet quite received its official Supreme Court benediction.[12] That conclusion would deprive people of the very services that they need. But to go to the opposite extreme is to allow, as in a competitive market, the monopolist to charge whatever price he wants to all his potential customers. That alternative is also destructive because it opens up the prospect of monopoly pricing, which has the unfortunate characteristic of cutting out many customers who could afford to pay a price between the competitive and the single monopoly price. Or the monopolist might try to do what a competitive firm cannot, which is to engage in various forms of price discrimination. The firm in a competitive market who tries this will find that all his customers will flee to the next best supplier. The monopolist knows that he can extract at least some concessions from higher demanders precisely because they have nowhere else to go. As will become clear, the economics of price discrimination are complex. But none of these complexities point unambiguously to the rule that says let the monopolist charge what he wants.

At this point, therefore, it follows that we need an intermediate solution for those cases where single suppliers cannot be allowed as an absolute right to refuse to deal. The formula that gets put into place at a very early time is as powerful as it is elusive. It requires that the party that possesses this monopoly power deal with all comers on *reasonable and nondiscriminatory*, or RAND, terms. It is useful to analyze the two key components of this formula in order to get a better sense of its strengths and limitations.

The word "reasonable" in this context does not refer to the balance of costs and benefits that are associated with, say, determining whether a party has acted with reasonable care under the circumstances.[13] Rather it is an effort to move the regulated firm in the direction of a risk-adjusted competitive rate of return on the assets committed to its business. Put otherwise, the word "reasonable" is an effort to thread the needle between total prohibition of a useful activity on the one hand, and total price freedom on the other. It rejects, in other words, the full embrace of either of two dominant paradigms governing social activity—force, no; cooperation, yes.

The term *nondiscriminatory* is directed to the second problem raised by the operation of firms that occupy monopoly positions. It is an effort to prevent the regulated firm from doing what no firm could do in a competitive market, namely, price discriminate among its customers. That prohibition requires some

explication. The first point is that no firm in a competitive market will sell to any portion of its customers at a price that requires it to suffer a loss from that separate sale. But just how is this calculated? The first constraint holds that the competitive firm will, and should, deny service to any customer who pays less than the marginal cost of his individual service. Thus, in the simple case, if it costs $10 extra to sell the next widget to X, when the going price is $8, the sale of that unit will not be forthcoming.

Note, however, the downside of this approach for the marginal customer whose reservation price is in excess of $10, at which point price discrimination based in response to differential costs starts to make sense. The firm that charges a rate over $10 to that customer will be able to generate an extra sale, which helps both sides and hurts no one else—a clear Pareto improvement. If all firms in the market are identical, no firm will undercut that price unless it wants to sell at a loss, which it does not. Any competitive market need not lead to uniform prices in the face of non-uniform costs. Accordingly, the same condition should also hold for a regulated monopolist by a regulator who is trying imperfectly to mimic the outcomes found in a competitive market. The rates that are set for that firm should allow it to cover the costs of the higher price service that it provides.

The prohibition against discriminatory rates therefore has to be understood in light of one complication that depends on a second notion of price discrimination. The danger is, arguably, that the monopoly firm will attempt a different form of discrimination, namely, by the willingness of its customers to pay more for the good even though there is no cost increase in serving that segment of the market. At this point, the economics of discrimination does not yield clear results. If the law requires all customers to be serviced at a uniform price, the total revenues received by the firm might be less than the total costs needed to remain in business at any and all price points. Let the firm shut down and all potential gains are lost. A legal regime that allowed this type of price discrimination could expand the customer base in two ways. First, some buyers could enter the market at a below-average price. Second, some existing customers could be charged an above-average price. Both steps together could help undo the logjam. Neither of these is easy to execute. The demands of individual customers are often difficult to determine. One misstep in the venture could easily achieve this trifecta: diminished revenues, increased administrative costs, and more visible ill-will.

Notwithstanding these obstacles, some firms go part of the way by distinguishing between, say, business and family customers. At this point the charge against price discrimination is that the discretion in prices can create distortions in other markets if the monopolist favors one party with whom he has a special alliance while disfavoring other actions. The current view therefore tends to split the difference by allowing all forms of cost to push price discrimination, but looking with suspicion upon price discrimination driven by efforts to play favorites among customers within a given class. So it is all right to charge different fares to customers in the same class at different hours, but not to charge different customers different fares for the same service at the same time.

At this point, therefore, we have a set of loose parameters that helps get a handle on the issue. Conscious cross-subsidization cannot survive in a competitive market, and so it should not be tolerated under a theory of regulation that hopes to make monopoly firms mimic the behavior of firms in competitive markets. That constraint unambiguously allows the regulated firm to turn down customers who seek service below the marginal cost of their coverage—and put upon the public at large the payment of any such subsidy. But it does not answer the question of what should be done in the

common case of joint costs of production—namely, those that are inputs in the production of two related goods, such as meat and hide from cattle. Their allocation is never perfect under competition such that the same slippage will manifest itself under rate regulation. But no matter how those joint costs are allocated, the RAND formula at least points to the two issues that dominate this area—total cost recovery and cost allocation.

II. The Rise of Common Carrier Regulation: England

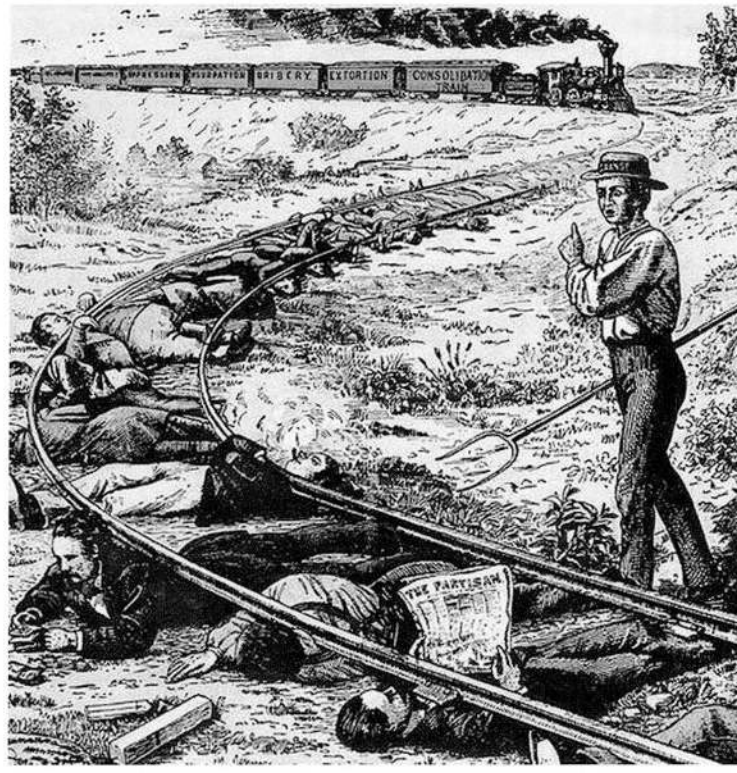
De Portibus Maris was not published until about 100 years after Sir Matthew Hale's death. But its posthumous publication shaped the course of first English and then American law. Its first judicial invocation was in Lord Ellenborough's decision in *Allnutt v. Inglis*,[14] which offered laboratory conditions for its successful application. The dispute centered on the prices that the London Dock Company (of which Inglis, the defendant, was treasurer) could charge its customers. The LDC had been designated as a customs-free warehouse by statute. The LDC refused to accept plaintiff's wine, which was bound for the export trade, except at its listed prices. The plaintiff then stored his wine elsewhere, and sought recovery of the extra £500 he had to pay.

Lord Ellenborough relied on the writings of Sir Matthew Hale in upholding the LDC's duty to take all customers at a reasonable price. But he sharpened the inquiry by observing that the LDC had "the benefit of having a legal monopoly of landing goods in a public port," under the general warehousing act,[15] which was created with the express purpose of allowing England to compete with foreign nations as a distribution hub in the international transport market, by exempting from all duties those goods that were not to be sold in internal British markets. That objective would be foiled if the London Dock Company could charge more than competitive rates, thereby enriching itself while frustrating the national policy. What made Lord Ellenborough's task easy was the plaintiff's choice of a damage remedy—the increased storage fees—which in no way taxed the institutional capacities of the King's bench.

III. Common Carrier Regulation in the United States

The disposition of *Allnutt* was the small issue. The enduring consequence was how that case set the dialogue for public utility regulation in the United States after the Civil War. The first of the great rate cases after the Civil War was *Munn v. Illinois*,[16] which involved rate regulation at the height of the Granger movement in the United States. The basic statutory provision limited the maximum rates for storing and handling grain at two cents per bushel.[17] But there was no determination as to whether those rates allowed the regulated firms to recover their costs. Nor was it clear at the time that these firms acted in concerted fashion, although more recent scholarship from Edmund Kitch and Ann Bowler[18] suggests that the complex positioning of the roads and the storage facilities could have supported such an arrangement. But two points were also clear. The first is that the Court might have tolerated ratemaking power even if the firms had not attempted to exert any monopoly power. The second is that, in a competitive market, the sharp limitations on rates can do more damage than they can whenever a natural monopoly is present, because there is no cushion that keeps the charged rate above costs for any, let alone all of the companies affected. It is also worth noting that many of the rate regulation schemes in the nineteenth century were driven by these strong populist impulses that tended on average to take size, rather than monopoly power, as the watchword for government intervention.

Notwithstanding any differences in institutional settings, the Court's decision in *Munn* rested squarely and explicitly on the earlier English decisions. *Munn* quotes extensively from Hale and from *Allnutt*. Indeed, its use of



The Granger Laws were promoted by farmers in several midwestern states in the late 1860s and early 1870s to protest and regulate rising fare prices of railroad and grain elevator companies. The laws, which upset major railroad companies, led to several Supreme Court cases, including *Munn v. Illinois*, which concerned an 1871 Illinois statute that regulated the operation of public warehouses on various matters dealing with the handling and inspection of grain, which included the charge of maximum rates for their use.

the elusive phrase "virtual monopoly" is taken straight from Lord Ellenborough's opinion in *Allnutt*,[19] and *Munn* itself appears right after *Allnutt* in the 1904 edition of **Cases on the Restraint of Trade,** edited by James Barr Ames and Jeremiah Smith, both preeminent Harvard Law School professors of their time.[20]

Munn itself concerned an 1871 Illinois statute that regulated the operation of public warehouses on various matters dealing with the handling and inspection of grain, which included the charge of maximum rates for their use. Chief Justice Morrison R. Waite's opinion did not systematically address, however, whether any of the various warehouses had the exclusive rights that were enjoyed by the LDC, but it treated the issue as one with few constitutional dimensions. Waite wrote:

> For our purposes, we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because is excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.[21]

The bottom line was thus clear: "We know that this is a power which may be

abused, but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts."[22] The decision in question prompted a memorable dissent by Justice Stephen Field that stands, at the very least, for two propositions. The first is that it was not within the power of the state legislature to convert private property into public property by a mere statutory declaration.[23] The second was that Illinois could not engage in the forms of rate regulation that risked confiscation or destruction.[24] At some point the Field position has to be correct, for if it is not, then even in a purely competitive market the state could only allow charges of a penny for storage, notwithstanding the high costs associated with its regulation.

The next question that remained is just how to implement in a federal system constitutional protection of minimum rates in settings that were far more complex than those of *Allnutt*. At this point, three questions require attention within the American framework. The first concerns the procedural rights that must be afforded the regulated firm under the banner of procedural due process. The other two concern the two prongs under the RAND test. What attitude was taken by the Supreme Court in dealing with the overall rate of return? And what attitude was taken toward the question of nondiscriminatory rates? I shall take up these three questions in turn.

A. Procedural Due Process: The Minnesota Experience. The procedural issues at stake in this area came to a head in two Minnesota cases decided some eighteen years apart. The first of these was the *Minnesota Rate Cases*[25] brought before the United States Supreme Court in 1890. The second was an indirect challenge to rates set by the Minnesota legislature in the much-mooted decision in *Ex parte Young*.[26] In both cases the question was what types of judicial protection should be given to railroads who raised challenges to confiscatory rates.

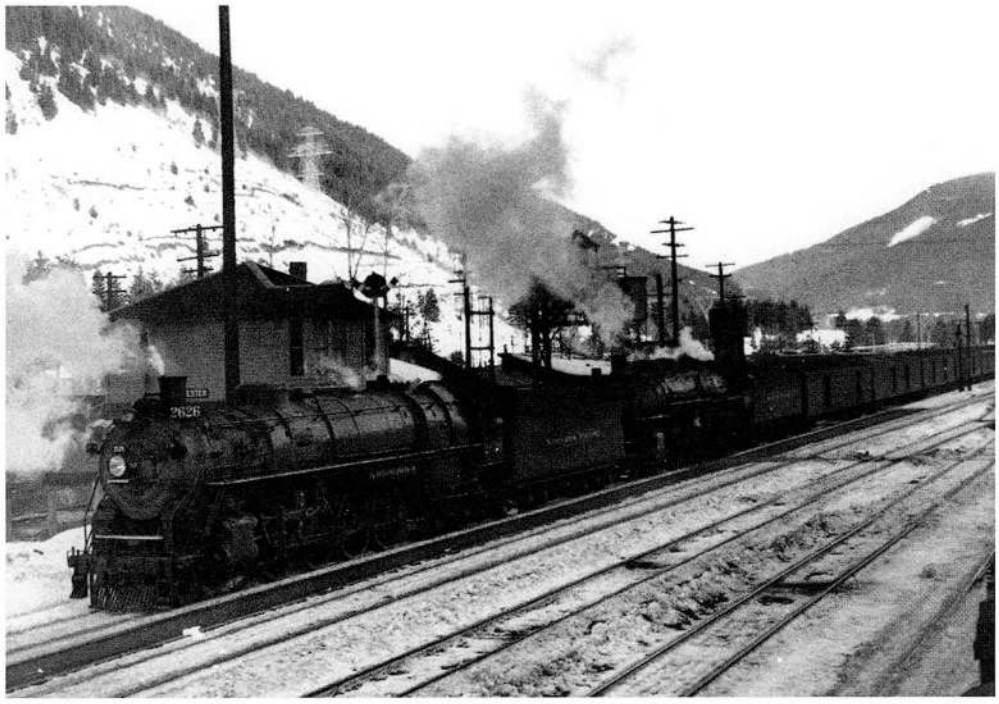
In the *Minnesota Rate Cases*, this issue arose in connection with an 1887 statute similar to the earlier Illinois statute in *Munn*, which asserted Minnesota's power to set rates for its railroad operations and storage facilities. The Minnesota statute established a "Railroad and Warehouse Commission" to set such railroad tariffs as the Commission "shall declare equal and reasonable," and did so even for railroads that were in direct competition with each other. The original tariffs at issue set rates for transporting milk from Owatonna to St. Paul and Minneapolis at three cents per gallon, after which the Commission ordered a rate reduction to two and one-half cents per gallon. Judge William Mitchell of the Supreme Court of Minnesota, one the greatest state jurists of his time, sustained the statute even though it offered no judicial review of that tariff determination. His decision is clearly law today on the power of the state legislature to delegate its authority to set rates to a specialized Commission.[27] He relied on *Munn*[28] to hold that the Commission had final authority to set the rates under its police power since railroads were affected with the public interest:

> It has received special rights and privileges from the state, whereby it enjoys certain advantages over others. Submission to regulation of its compensation by the state, in the exercise of its police power, may be said to be an implied condition of the grant; and the state, in exercising this power, only determines the conditions upon which the grant shall be enjoyed. The controlling fact is the right to regulate at all. This being conceded, it is immaterial, so far as concerns the question now under consideration, whether the legislature fixes the rates directly, or does it indirectly through a commission.[29]

This extension of the police power makes it appear that the state could set whatever rates

it chooses, thereby paying little heed to the risk of confiscatory rates, which are always a risk in the regulation of competitive markets. Mitchell's decision did not survive in the Supreme Court, which found the action of the Commission vulnerable precisely because the Minnesota statute did not provide for any hearing in which the Commission had to set out the grounds for its decision.[30] It is hard, I think, to dispute the Supreme Court's finding that the slack procedures did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. The railroad raised its capital from private investment, so assertion of police power authority could allow the Commission to commandeer the railroad to run it as it pleased. In the United States, Hale's famous proposition became the stuff of an American constitutional bargain, given that rate regulation has avoided the twin perils of monopoly exploitation and confiscation. Judicial review became the way to police that bargain and make sure that the popular sentiment did not control. Hence the Supreme Court concluded that rate regulation "is eminently a question for judicial investigation, requiring due process of law for its determination."[31]

The procedural context was much more complicated in *Ex parte Young*, which arose when shareholders of the Northern Pacific Railroad sued to enjoin their officers from obeying the allegedly confiscatory rates when Minnesota in 1907 reduced the maximum rate for transporting passengers from three cents per mile to two cents per mile, again without reference to any monopoly power. The plaintiffs also joined Young, the Minnesota Attorney General, as a defendant in the case in order to enjoin the enforcement of the statute. On the basic substantive question, Justice Peckham had no difficulty in finding that the rates were confiscatory. But he was obviously vexed over the question of whether the federal courts could enjoin the state officials in the teeth of the doctrine of sovereign immunity



The case of *Ex parte Young* arose when shareholders of the Northern Pacific Railroad sued to enjoin their officers from obeying the allegedly confiscatory rates when the state of Minnesota reduced the maximum rate for transporting passengers from three cents per mile to two cents per mile, again without reference to any monopoly power.

that normally insulated states from suits under the Eleventh Amendment, passed in the wake of the 1793 decision in *Chisholm v. Georgia*,[32] which provided: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[33] The basic point of the Amendment was that the doctrine of state sovereign immunity, which had been thought essential to the federal union, could be thoroughly upset if plaintiffs of one state could sue another state in federal court and thus get out from under that doctrine. It would, however, be a mistake to think that the only source of sovereign immunity was the Eleventh Amendment given that the 1890 case of *Hans v. Louisiana*[34] noted that the prohibition of citizens suing their own state was effectively precluded by the common understanding of the time, embodied in **Federalist Number 81**, that nothing in the Constitution was meant to upset so fundamental a feature of our theory of government.

Unfortunately, it is not easy to reconcile the principle of sovereign immunity with the constitutional protection against the taking of private property. Important decisions in the 1920s held that sovereign immunity applied to tort cases, but not to cases of permanent occupation of property by the sovereign.[35] Just that same difficult issue arose in connection with confiscatory ratemaking. Here the awkward compromise was to claim that the suit to enjoin the state attorney general was not a suit against the state, but only against an official working, of course, in his official capacity. Doctrinally, the decision did not sit well with Justice John Marshall Harlan, the pioneer in ratemaking cases, who rejected this effort to so limit the scope of sovereign immunity. But it is critical to understand what drove the eight-member majority in this case. Once the rate is decreed by statute, it is no longer possible to require a ratemaking commission to offer the regulated parties the opportunity to challenge rates as they could in the earlier *Minnesota Rate Cases*. So the Court decided to intervene on the ground that the railroads were entitled to raise some judicial challenge to these rates before they went into effect, especially in light of the heavy statutory fines imposed. After all, it was virtually self-evident that "the officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them in case the court should decide that the law was valid."[36] In essence, the remedy either had to come before the statute went into effect, or not at all. Given the attitude on the substantive side, it is no mystery that *Ex parte Young* came out as it did.

B. Substantive Due Process. 1. Procedural Preliminaries Doctrinally

The substantive side of rate regulation had two homes under both federal and state law—takings and due process. On takings, the Supreme Court held in *Barron v. Baltimore*[37] that the Takings Clause bound only the federal government, and not the states. It also quickly became apparent that this gap could not be filled after 1868 by resort to the Privileges or Immunities Clause of the Fourteenth Amendment,[38] which applies to the states. That avenue was cut off by the *Slaughter-House Cases*,[39] decided in 1873, which refused to use the clause to scrutinize the 25-year monopoly that Louisiana conferred upon the Crescent City Slaughter-House Company for slaughtering meat in the state. The Court did so by limiting the Privileges and Immunities Clause to the distinct federal rights of United States citizens, such as the right to petition the United States government or to take advantage of the federal navigation servitude.[40] But that clause, as construed, did not offer any protection against state violation of states' rights. That decision is at some basic level almost surely wrong.[41] But right or wrong, the

Slaughter-House Cases meant that the constitutional protection for public utilities in rate regulation had to find a new home.

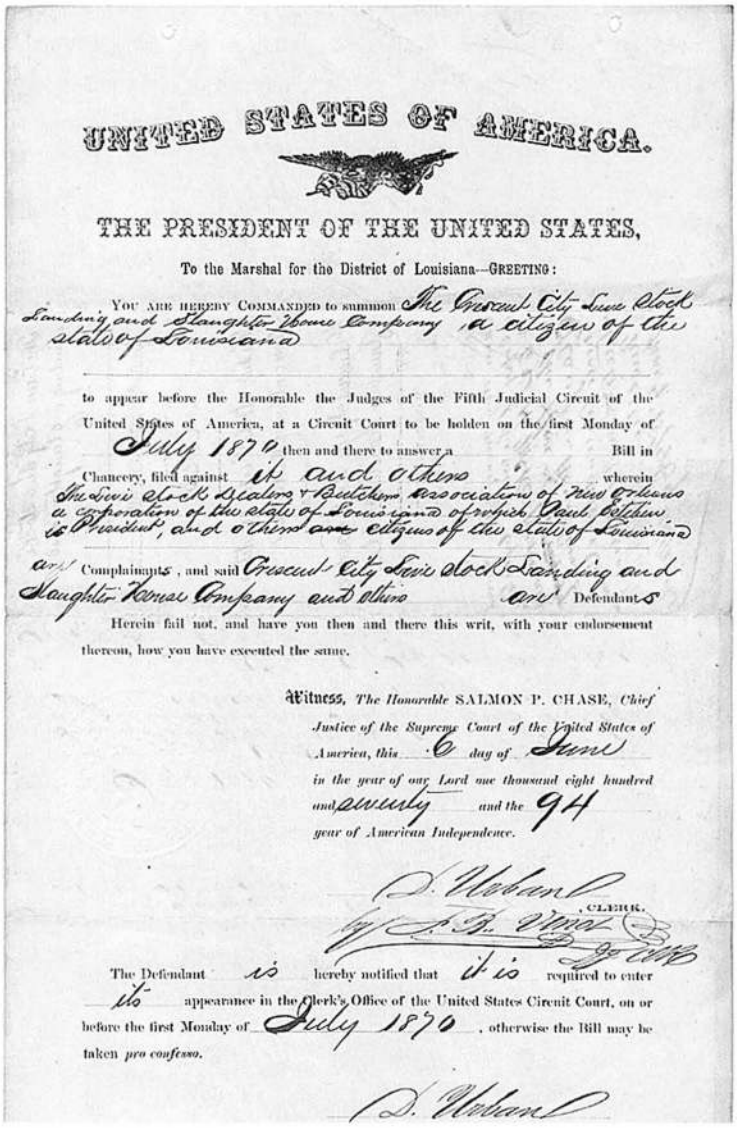
That objective it promptly achieved through the Due Process Clause of the Fourteenth Amendment in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*,[42] which upheld the repeal of the original statutory monopoly, left unchallenged in the first *Slaughter-House* case. Only now, with Privileges or Immunities blocked, Justice Joseph P. Bradley (who dissented the first time around) turned to the Due Process Clause to address the deprivation of liberties from the ordinary citizen. In short order, the constitutional connection between confiscation and the Due Process Clause was enforced, chiefly through the efforts of Justice John Marshall Harlan. The theme is evident in the 1896 case of *Covington & Lexington Turnpike Road Co. v. Sandford*,[43] where Justice Harlan put the key inquiry as "whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."[44] Later that year in *Chicago, Burlington & Quincy Railroad v. City of Chicago*,[45] he tightened the noose by drawing the explicit connection between takings and due process by equating "without due process of law" with "without just compensation": "A judgment of a state court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States."[46] That seemingly effortless transformation of "due process" into "just compensation" is still much mooted today, as the phrase "substantive due process" is frequently denounced as a constitutional oxymoron.[47] But Justice Harlan's decision is perhaps best explained on political process grounds. No well-organized legislature or administrative body could countenance any legal result that violated the natural law principle that had long commended itself as one of the fundamental bulwarks of a free society.[48] But for our purposes, the textual disputes matter far less than the substantive treatment of rate regulation in the U.S. Supreme Court. Now that the Supreme Court had decisively rejected *Munn*'s passive response, just how was that due process test best discharged at the federal level?

2. Substantive Standards

The answers to the substantive issues were not long awaited. In *Smyth v. Ames*,[49] decided just two years after *Chicago, Burlington & Quincy Railroad v. City of Chicago*, Justice Harlan continued his rate review offensive by striking down a Nebraska statute that sought an across-the-board roll-back of railroad rates by 29.5 percent,[50] without offering any detailed analysis of the rollback's impact on the cost structure of any particular line. By way of example, he pointed out the confiscatory effect for the Burlington line, by "showing that in that year the operating expenses would have exceeded the earnings by $5.74 in every $100 of the amount actually received by it."[51]

His analysis of uniform rollbacks does not pose rate-based calculations of any real subtlety. But, by the same token, it does require the articulation of some general principle on which those calculations are made. In *Smyth*, Justice Harlan adopted a "fair value" principle, which he defined as follows:

> [T]he basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the



UNITED STATES OF AMERICA.

THE PRESIDENT OF THE UNITED STATES,

To the Marshal for the District of Louisiana—GREETING:

YOU ARE HEREBY COMMANDED to summon The Crescent City Live Stock Landing and Slaughter House Company a citizen of the state of Louisiana

to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of July 1870 then and there to answer a Bill in Chancery, filed against it and others wherein The Live Stock Dealers & Butchers Association of New Orleans a corporation of the state of Louisiana of which Paul Pelletier is President, and others ~~are~~ citizens of the state of Louisiana are Complainants, and said Crescent City Live Stock Landing and Slaughter House Company and others are Defendants

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, *The Honorable* SALMON P. CHASE, *Chief Justice of the Supreme Court of the United States of America, this* 6 *day of* June *in the year of our Lord one thousand eight hundred and* seventy *and the* 94 *year of American Independence.*

D. Wolsan, CLERK.
by L. B. Wood Deputy Clerk

The Defendant is hereby notified that it is required to enter its appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of July 1870, otherwise the Bill may be taken *pro confesso.*

D. Wolsan

The *Slaughter-House Cases*, decided in 1873, refused to use the Privileges and Immunities Clause to scrutinize the 25-year monopoly that Louisiana conferred upon the Crescent City Slaughter-House Company for slaughtering meat in the state. The Court did so by limiting the clause to the distinct federal rights of United States citizens, but that clause, as construed, did not offer any protection against state violation of states' rights. Above is the subpoena in chancery filed by the Live Stock Dealers and Butchers Association against the company in 1870.

amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public

In the last of the Supreme Court's rate cases, *Duquesne Light Co. v. Barasch*, Chief Justice William H. Rehnquist held that two public utilities companies in Pennsylvania could not charge their customers increased rates to cover the losses suffered when they cancelled their nuclear power contracts. Rehnquist reasoned that the chief requirement under the Constitution was to avoid opportunism by the Public Utility Commission.

> highway than the services rendered by it are reasonably worth.[52]

The obvious question asks, just how workable is this ambitious scheme?[53] The calculation of the appropriate rate starts with the capital invested in the business, after which certain adjustments have to be made to secure the rates that do not allow for a supra-competitive return on the one side, nor a confiscatory outcome on the other. This valuation of capital is not difficult when the contributions take the form of cash or marketable securities. It becomes much more difficult if the contributions are made in kind, often of equipment used in other businesses that have been acquired by separate purchase or as part of some corporation reorganization, when it is always necessary to make accurate revaluations that will differ in substantial ways from original cost less depreciation, and the like.

Once that first step is completed, the second portion of the fair value analysis requires the regulator to make peace with the innocuous statement that "the company is entitled to ask [for] a fair return upon the value of that which it employs for the public convenience." Under this test, it becomes necessary for the public utilities commission (PUC) to correct the rate base to exclude all investments previously made by the firm, which are no longer used in the business. The point here is meant to echo the situation in a competitive industry when firms cannot capture rewards on those assets that turn out to be worthless to the firm.[54] Once that adjustment is made, a second one is needed as well. All firms in competitive industries know that all their investments will not pan out. In

order to stay in business they also know that this higher risk of loss must be offset by a higher return from those ventures that do pan out. So, under *Smyth*, the Constitution requires PUCs to shrink their asset base *and* raise the risk-adjusted rate of return—which is exactly what happens in a competitive market.

That program requires the regulator to make at least these two key adjustments. The first of these is that public utility operators are not subject to the same level of market forces. The utility has no guarantees that all potential customers will use their services, let alone use them at a predicted high rate of intensity. A regulated industry could fail just like any other, and no rate structure brings these industries closer to the competitive benchmark by trying to insulate them from any risk of failure. But, by the same token, the want of a clear alternative means that they surely face fewer market risks than do competitive firms who must deal with potential new entrants and technological obsolescence. The premium that is needed to attract them into the business therefore should be smaller. Accordingly, the anticipated rate of return on equity should be adjusted downward to take into account the relatively stable market conditions. So much depends on a close analysis of market conditions.

Second, the regulator must make the administrative adjustments to decide which assets should be dropped out of the rate base (in whole or in part), and when. There is in effect a heavy cost in making balky public oversight adjustments that markets do more or less by themselves. But the fair value rule admits to no exceptions on this score, so that the entire range of costs incurred by a complex business must be examined under this lens. In sum, the fair value rule gains strength from the sophistication of its ultimate measures, which give the regulated firm the right incentives on its investment and operational decisions. So, by any standard of substantive *validity*, *Smyth v. Ames* ranks high. Yet the *reliability* of its rate-base determinations is far more suspect, given the difficulty of making these calculations in the heated cauldron of rate regulation hearings that face trickier disputes than Nebraska's simple statutory rollback.

The *Smyth* approach also came under attack from Justice Louis Brandeis in *Southwestern Bell Telephone Co. v. Public Service Commission*,[55] on the ground that "[t]he thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return."[56] That suggestion was in turn taken to heart by Justice William O. Douglas in the canonical 1944 decision of *Federal Power Commission v. Hope Natural Gas Co.*,[57] which rejected the fair value approach in *Smyth v. Ames*, for which it substituted a new constitutional standard:

> The ratemaking process under the Act, *i.e.*, the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus, we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." But, such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view, it is important that there be enough revenue not only for operating expenses, but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard, the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial

> integrity of the enterprise, so as to maintain its credit and to attract capital. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U. S. 291 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint.[58]

Read in context, this key passage from *Hope Natural Gas* does not read like a screed from an ardent populist determined to bring public utilities to heel by starving them of their capital. Rather, the argument in the case stresses the relative administrative ease of setting the appropriate rate base, for which the offset is a lower rate of return. Thus the use of Brandeis's rate base of the capital invested in the business eliminates the need for the PUC to scrutinize each expenditure. The errors in those determinations could run either way, and often will cancel out, so that the only question worth asking is whether the "end result" meets the appropriate rate of return standard. By expanding the rate base, it becomes proper to reduce the net rate of return because the risk of investment error is shifted from the shoulders of the shareholders to the shoulders of the ratepayers. But, in principle, the expected rate of return should on a risk-adjusted basis approximate the same under *Smyth v. Ames*.

To be sure, any effort to regulate public utilities must have a weakness. In this case, it is that the guarantee of a safe rate of return undermines the incentives of managers to maximize the value from the invested value, which are present, without regulation, in a competitive firm. The hard question therefore requires a balance of administrative simplicity against superior incentives. That is an inquiry that cannot be answered confidently either in the abstract or in connection with any particular case. The critique therefore results in somewhat of a draw, which explains why in the last of the Supreme Court's rate cases, *Duquesne Light Co. v. Barasch*,[59] Chief Justice William H. Rehnquist, speaking for a unanimous Court, allowed the state regulator to choose either of these methods on a consistent basis: use the broad base and allow a low rate of return, or use the narrow base and authorize a somewhat higher rate of return. In his view, the chief requirement under the Constitution is to avoid opportunism by the Public Utility Commission. "Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."[60]

That rule in *Duquesne* cut off any judicial challenge on the peculiar facts of the case. The Pennsylvania Public Utility had approved a decision by Duquesne Light Company to build a nuclear plant, before reversing field on the question after the project had begun. The state PUC allowed for the inclusion in the rate base, but that determination was overturned by a Pennsylvania statute, Act 335, which required that these expenditures not be included in the rate base until, in a clear nod to *Smyth v. Ames*, it was established that the new facility "is used and useful in service to the public."[61]

The hard question in these cases is whether these "stranded" costs left by the reversal of fortune could be recovered by Duquesne, either in a lump sum or over a period of years as the PUC had ruled. That approach was in this instance precluded by the mode of analysis adopted by Chief Justice Rehnquist who, following *Hope*, simply held

that so long as the rates in question remained at an approved level, this extraordinary decision to stop construction of the plants could not be analyzed apart from the overall rate base. Given that the utility earned a "16.14% return on common equity and an 11.64% overall return on a rate base of nearly $1.8 billion,"[62] upholding the result under *Hope* was a foregone conclusion. It is nonetheless also worth noting that, even though the Court upheld Act 335, the next year the Pennsylvania legislature reversed the conclusion.[63] In my own view, the correct way to deal with these issues of novel innovations is through a binding contract that explicitly addresses the stranded cost question, for otherwise the political pressures on seeking permit revocation become too intense. But a rule that indicated in advance what level of protection was made for sunk costs could help both sides deal with the question. It is one thing to have endless small-bore disputes covered by *Hope*'s end result rule. It is quite another to apply that rule for much larger expenditures.

It is, moreover, important to note that, notwithstanding *Duquesne*, *Hope Natural Gas* and its progeny do *not* represent a constitutional withdrawal from the area of rate regulation. It is, however, easy to gain that impression because of the huge transformation generally in constitutional logic between the Old Court of 1899, which did offer a general protection to economic liberties, and the constitutional revolution of 1937, during which that proposition was decisively rejected. That impression is surely buttressed by the Court's decision in *Nebbia v. New York*,[64] which explicitly rejected the original limitations found in Hale's *De Portibus Maris*,[65] such that the government's regulatory power was not exclusively directed to firms that held monopoly power, but was to be treated instead as an application of the general police power, broadly construed. The extent of this modification should be readily seen because *Nebbia* sustained a criminal prosecution against the defendant-petitioner, who sold milk below the fixed *minimum* price of ten cents per quart.

At this point, it becomes clear that the doctrine of "affected with the public interest" has, at the moment of its demise, been turned on its head. Its original purpose was to constrain the use of monopoly, as an exception to the general rule that parties are free to set whatever prices they choose for the sale of goods and services. The driving force behind this maneuver is the inevitable legislative determination that "the prevalence of unfair and destructive trade practices in the distribution of milk, lead[s] to a demoralization of prices in the metropolitan area and other markets,"[66] which furnishes the opening wedge to raise the price of milk products above competitive levels, a task that is implemented thereafter on the federal level with the passage of the Agricultural Adjustment Acts of the 1930s.[67]

It is equally important to note that nothing in *Nebbia* has anything to do with the peculiar issue of rate regulation as it emerges in the context of public utilities. More specifically, there is no risk of confiscatory rates under a statute whose purpose is to organize a cartel for an industry that would otherwise operate along competitive lines. After all, the returns to investment are made higher, not lower, than what they would be in a competitive market. Accordingly, none of the complex rate efforts to thread a path between excessive and insufficient rates that are par for the course with public utilities enter into the political or constitutional equation here. The closer, but imperfect, parallel to *Nebbia* is *Yakus v. United States*,[68] decided about three months after *Hope*, which upheld the Emergency Price Control Act of 1942 under which the Office of Price Administration sustained a set of maximum price regulations intended to control commodity shortages during World War II. But the key point here is that, in *Yakus*, the defendant did not have capital invested in specific assets that was subject to confiscation by rates regulated

in his direction only. The need to allow for rates to attract and maintain capital is a real restriction that has indeed been applied in subsequent cases where the rate regulation did pose risk of confiscation, including *Michigan Bell Telephone Co. v. Engler*,[69] where the price-setting mechanism did not allow for any positive rate of return whatsoever.[70] *Engler* is especially instructive because it shows how quickly it was possible to loop back to *Hope* after *Nebbia*, which is done within the confines of a single paragraph, set out in the footnote below, that links together many of the cases discussed in this article.[71] In the end, of course, it is possible to quibble that today's level of review under *Hope* is less stringent than might be called for, but at least one portion of the RAND formula—that public utilities must deal on reasonable rates—seems to have held ground. The next section addresses the issue of discriminatory rates.

IV. Nondiscriminatory Rates

The second part of the RAND formula is, as noted, intended to deal with the relationship of rates that are charged by one customer relative to those charged by the others. As indicated earlier, this inquiry raises many difficult issues given that the rate differences in some cases are justified by efficiency considerations wholly apart from any possession of market power.[72] But, nonetheless, in some instances price discrimination represents an effort by a regulator to cross-subsidize one product for another. Recall that the classical theory of rate regulation that starts with Hale is intended solely to limit the use of monopoly power so that the regulated firm behaves, to the extent possible, as if it were in a competitive marketplace. Competitive markets do not support any form of cross-subsidy between two businesses.

Yet, the problem is more intricate than this profession of faith suggests. Cross-subsidy can be difficult in an industry where the same inputs produce two different outputs, for in those cases it is necessary to come up with some metric to divide the joint costs between the two products sold, as they are, in separate markets. In those cases, the tendency will be, laudably, to allocate those costs to the less elastic product, so as to avoid unnecessary erosion.[73] But even subject to that constraint, no product will be produced in the marketplace if it is not able to cover the costs that are uniquely allocable to it.

That constraint should bind in regulated industries in order to achieve the objective of making the regulated firm look as much as possible like the competitive firm. Under the law as it emerged in *Hope Natural Gas*, no attention was paid whatsoever to the setting of different prices that were in part jointly produced. That error turns out to be costly because it does encourage a mischievous regime of cross-subsidies, which results in excessive production of one commodity relative to another, thereby introducing gratuitous inefficiencies into the system of rate regulation. The earlier cases in the area were, however, much more attentive to this problem in at least three ways. First, they were anxious to secure a correct allocation of joint costs for the production of two goods that were sold in the market at the same time. Second, they were concerned with achieving the correct allocation of costs for the sale of a single product over two periods. And third, they were intent on preventing the cross-subsidy of regulated goods by unregulated goods that were sold by the same firm. Let us look at the three cases in order.

A. Cross-Subsidies Between Lines of the Regulated Business. In *Lake Shore & Michigan Southern Railway Co. v. Smith*,[74] the question was whether the Lake Shore & Michigan Southern Railway could be required to issue certain family passes at a loss to its customers. A unanimous Supreme Court, speaking through Justice Rufus Peckham, held that Michigan could not demand that the railroad sell passes to a select set of its customers at below cost.

> [W]e think the company, then, has the right to insist that all persons shall be compelled to pay alike; that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates; and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject.[75]

The key conceptual difficulty with the argument is why the railroad is allowed to raise that objection if any rate increases above the cost of service are passed on to other customers. Wherein lies the injury if the losses on group A are made up to the railroad by higher charges on group B? In a sense, this problem could be solved if the individuals or firms that are required to pay the subsidy could maintain a challenge against the cost in its own name. But that part of the population is widely dispersed, which raises serious procedural hurdles. In the first instance, it is difficult to organize a class action to cover these cases. In the second, there is no aggrieved individual who sustains sufficient losses to justify the outlay of expenses to other individuals. In addition, on a more technical note, this limit on damages is clear from the 1918 decision of Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*,[76] which invoked a somewhat tenuous mishmash of privity and proximate cause to explain why unreasonable rate charges could only be challenged by the shipper and not his customers, even if he were able to recoup the surcharges from them. The single action is much more efficient.

The same argument works in reverse where the rates are too low. Here the correct plaintiffs, still one degree too remote, are the other customers who are forced to pick up the slack. The railroad is thus able to pick up the slack by raising prices in that direction, even if it has flexibility to pick up those losses from other customers. In addition, the railroad does have an economic interest to avoid the cross-subsidy, which, if allowed to persist, will necessarily lower the overall profitability of the firm. The imperfect proxy is surely better than allowing the ratemaking imbalance to persist.

Just that principle was applied with equal force in *Norfolk & Western Railway Co. v. Conley*,[77] which held that the state of West Virginia could not tax the passenger business of the railroad in order to subsidize its freight division. "Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."[78] In reaching that conclusion, the Court first went through the task of allocation, by initially segregating out the items that applied to each portion separately, and then finding a mode of allocation of the joint costs, to reach the correct conclusion. It also made the correct constitutional determination that West Virginia had to be given some leeway in making that joint cost allocation as a matter of legislative discretion.

In addition, Justice Hughes held in the companion case of *Northern Pacific Railway Co. v. North Dakota*[79] that the power to regulate did not give the state the power to force individual firms to enter into given lines

of business by drawing the strong line between regulation and ownership. Hughes explained:

> [B]road as is the power of regulation, the state does not enjoy the freedom of an owner. . . . If [a common carrier] has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. . . . In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.[80]

Finally, the need to contain cross-subsidies also has broad federalism implications. As Justice Hughes understood and noted in *Norfolk & Western*, the allocations in question needed to make sure that the regulators in one state did not allocate costs so that a larger share of the total burden was imposed on the parts of the railroad system that lay in other states. Just as with the lines of service, the cross-subsidies could produce a dangerous misallocation of resources.

All these decisions illustrate the useful common theme that the level of constitutional scrutiny should vary with the economic difficulty of the problem. There should be more deference to the difficult questions on the allocation of joint costs, and no discretion at all on the matter of explicit cross-subsidies. There are other important issues that are not caught by the bottom line approach in *Hope*. Ironically, the one person who was most alert to them in the post-*Hope* years was Justice Douglas himself. Thus, in *Baltimore & Ohio Railroad Co. v United States*,[81] the Baltimore & Ohio Railroad challenged the rates set by the Interstate Commerce Commission on the ground that the rates set for carrying "carload shipments of carrots with tops" on some routes was below costs.[82] According to Justice Douglas's dissent, the federalism issue loomed large, for the purpose was to secure the "leveling down [of] some of the rates out of Texas to make them more nearly equal to those out of California, Arizona, and New Mexico,"[83] by which allowance was made for higher costs for fresh vegetables from other routes. In sustaining the rate differences, Justice Black made quick work of both *Northern Pacific* and *Norfolk & Western*, on the ground that they only held that "unreasonable" and "arbitrary" rate classifications were violative of Due Process. But of course the cases stood for more than this general proposition because they expressed a view as to why those cross-subsidies created economic mischief that the rate commission should have avoided. Although Justice Black, writing for the majority, did not cite to *Hope*, he adopted its philosophy that the errors that were made in "one of a long series of Commission orders" should not be viewed in isolation, so long as the overall end result was correct.[84]

Ironically, it lay to Justice Douglas in dissent to point out that "Texas growers and shippers complained that the rate structure was unduly prejudicial to them and unduly preferential to growers and shippers in California, Arizona, and New Mexico."[85] There is no way that these changes cannot alter the relative prices between these competitors in ways that undermine the allocative efficiency in the relevant market. To be fair to Justice Douglas, the question of separate product lines from separate states did not arise in *Hope*. Yet, by the same token, it is not possible to be confident that any of the intermediate errors that were made in *Hope* were canceled out by the correct "end result," if it turns out that these involve shifts, say, between the industrial and the residential customers of the power line. It is also worth noting that in *Duquesne Light*, Chief Justice Rehnquist's appeal to the bottom line shielded from review the highly questionable decision of the Pennsylvania Public Utility Commission to force the utility to bear the costs of an incipient nuclear power plant that was first approved and then canceled by the PUC. The

question of overall rates is certainly a minimum condition for fairness in this decision. But it is a mistake to assume that the cancellation of errors is always benign, given their potential to distort competition in the end markets that are served by these regulated industries.

B. Temporal Cross-Subsidies. In ordinary ratemaking hearings, rates are usually calculated on the calendar year, where the effort is made to balance the books for each period. That procedure has some advantages insofar as it adds precision to the various estimates. But the requirement that books be balanced each year—or even over any longer period—also has important allocative results. It is a dangerous practice for a PUC to tell a regulated industry that it will be forced to operate at a loss in this period because it will be entitled to make up those losses in some future period. By the same token, it is abusive to allow a public utility to collect excessive rates in the first period on the condition that it accept below-market rates in some subsequent period.

The risks of this strategy are two. First, there is no guarantee that the rates in the second period will offset the conscious errors of those allowed in the first period. Thus, when rates are set too low, a higher set of rates could easily push rates so high that the regulated industry is well advised to back off rates that could reduce its profits. Alternatively, if the rates are set too high, nothing guarantees that the reductions in the next period will balance out those accounts. Indeed, in both cases there are always confounding factors and changed circumstances that could cloud these calculations, including of course a change in the composition of the board that decides these cases.

The second reason why this practice is dangerous is that the shift in time can easily result in a shift in the incidence of the rate's structure. There is routinely a turnover of customers, both business and commercial, between periods. Even if there is no turnover, the quantities needed by businesses and residential users could easily increase or decrease for all sorts of reasons. In some instances, these extrinsic factors could come as a surprise to the affected parties. But, sooner rather than later, firms will realize that the temporal dimension is one on which they could seek private gains, so that they will lobby to push rates in one way or the other in order to deal with this problem. It was therefore correct for the Supreme Court to hold in *Board of Public Utility Commissioners v. New York Telephone Co.*[86] that any credit balance of a public utility that is held as a reserve for depreciation cannot be used to make up any short fall in the current rates. Each year has to be evaluated on its own bottom line. Justice Butler reached this conclusion in part by noting, in a form consistent with the observations of Justice Hughes in *Northern Pacific*, that customers, like regulators, are not owners of the firm in question.

> The customers are entitled to demand service, and the company must comply. The company is entitled to just compensation, and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary.[87]

It follows therefore that any extra profits that come in a particular year belong to the firm, just as any unanticipated losses suffered by the firm are its own to bear. Once again, the competitive firm sets the standard. That firm can have large plusses or minuses that deviate from the anticipated rates. Just as those firms keep the upside and the downside, so too should the regulated firm.

Once again, this principle is not always followed in modern cases. Thus, in *Michigan Bell*, the state of Michigan resorted to what is called TSLRIC, or total system long-run incremental cost, to determine the rates that

left Michigan Bell in the lurch. That system did not allow for any recovery of the initial fixed costs of investment but assumed that a regulated industry, unlike any competitive firm, could regenerate its capital base effortlessly, so that its customers were entitled to force the utility to bear all the cost of interim depreciation, which guaranteed the shortfall in the rate of return that was struck down. Unfortunately, as a matter of statutory construction, the U.S. Supreme Court showed deference to the Federal Communications Commission in *AT&T Corp. v. Iowa Utilities Board*.[88] With a nod to *Chevron v. NRDC*[89] to secure the necessary deference, the Court did not once ask the question whether this formula had the unfortunate consequence of marrying the narrow rate base from *Smyth v. Ames* with the low rate of return under *FPC v. Hope Natural Gas*. Once again, it appears that the earlier decisions show a far more sensitive ear to the sound principles of rate regulation than the modern ones, which, draped in the rhetoric of judicial deference, allow sound principles of rate regulation to luxuriate.

C. Cross-Subsidies by Nonregulated Businesses. The same basic pattern is evident in other areas. *Brooks-Scanlon Co. v. Railroad Commission*[90] squarely raised the question of whether the Railroad Commission of Louisiana could order Brooks-Scanlon to operate one of its businesses, a narrow gauge rail line, at a loss of $1,500 per month. In invalidating the order, Justice Holmes stated:

> A carrier cannot be compelled to carry on even a *branch* of business at a loss, much less the whole business of carriage. . . . The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.[91]

Once again, the issue is not just one of intuitive fairness, but of real economic consequence. Presumably, the firm had some reason to operate the two businesses under the same roof. It could have been that they shared common facilities or personnel. It could have been that they grew up by accident, but that it would be costly to undertake steps to separate them. The exact explanation does not matter. What is critical is that the law of regulated industry does not put artificial incentives on the owner of the two activities to separate them in order to avoid the implicit regulatory tax that Louisiana sought to impose on the unregulated business. The same issue, moreover, applies not only to single firms within a given state, but also to the federalism question. Thus, it is all too common for insurance regulators to insist that firms continue to operate one line of business at a loss in order to have the privilege of keeping their other lines open, or, even worse, to deny the ability of a firm to exit a state by insisting that they cover their local losses (including losses for wind, e.g. hurricane, losses in Florida) out of revenues derived elsewhere. This clear subsidy creates manifest distortions by encouraging risky behavior that is best avoided.[92] A consistent application of the *Brooks Scanlon* rule obviates those difficulties.

Conclusion

One of the striking paradoxes of rate regulation law is this: in the formative period of rate regulation, the judges did not have the advantage of the extensive modern literature on rate regulation that gives voice to the difficulties lurking in this area. Yet, by a matter of judicial engagement and good instinct, these Justices came to a set of general conclusions that are eminently defensible in light of modern theory. Although the pattern is not uniform, the modern cases often lose sight of the fundamental principles for all the

wrong reasons. Instead of thinking hard about the regulatory problem before them, they preoccupy themselves with institutional questions of the sort that ask whether they should have the temerity to overrule Congress and the administrative agency, or whether they have the intellectual abilities to deal with complex questions that are better left to people with greater expertise. In effect, they buy into the critique that started with James Landis[93] that some combination of democratic accountability and administrative expertise is needed to support the withdrawal of judicial supervision of this area.

I have been and remain a vocal critic of this work,[94] but never on the grounds that there is no place for public administration. Instead, the correct approach in the area of rate regulation is to identify the breakdowns in the provision of goods and services that call sensibly for government intervention. That inquiry must start, as did the early cases, with the assumed advantage of competitive markets. It then must deal with the major exception of legal or natural monopolies, neither of which is subject to scrutiny under the antitrust laws.

It must then ask what should be done to correct those imbalances without introducing others. There is in this regard a wide range of regulated industries, and they do not call for the same solution. But that said, the guiding star in this area should be to embrace those regulations that help mimic the performance of competitive markets, and to avoid those solutions that undercut their operation. The RAND formula is, for all its weaknesses, still the best, indeed the only, approach for dealing with that question in both historical and modern settings. On this view, the permissible adjustments should be to find the best way to reduce monopoly firms to competitive rates of return without incurring the risk of confiscation.

Among the guidelines that this approach requires are the following. Never regulate a competitive industry with an eye toward introducing monopoly rates of return, as the Court did in *Nebbia v. New York*. And never introduce discriminatory systems that, under regulation, tend to favor one line of a regulated business over another, or a regulated line over an unregulated line, or current customers at the expense of future ones. Never, to give but one example, use rate regulation to force the adoption or to subsidize the introduction of wind or solar energy.[95] Following those guidelines in a consistent way will not solve all problems, because the allocation of joint costs does not admit of any clean solution under any analysis. But the inability to solve effortlessly or ideally the hard questions offers no excuse for getting the easier questions wrong. In the history of rate regulation, the general tendency has been to move matters in the wrong direction. A return to earlier principles that are well justified by modern theory offers a good step to correct that imbalance.

Author's Note: This essay is an expanded version of the speech that I gave at the Supreme Court Historical Society on October 10, 2012. My thanks to Justice Stephen Breyer for his gracious introduction on the occasion of the speech. I would also like to thank John Ferejohn, Harry First, Helen Hershkoff, Michael Levine, and Adam Samaha for their comments on an earlier draft of this paper, and to all the other participants at the Monday workshop at the NYU Law School for their excellent questions. My thanks also to Jordana Haviv, Peter Horn, Benjamin Margo, and Joshua Stanton, NYU Law School, Class of 2014, for their excellent research assistance.

ENDNOTES

[1] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version in scattered sections of 49 U.S.C. (2006)).

[2] 488 U.S. 299 (1989). For a discussion of ratemaking policy and the Takings issues at stake in *Duquesne Light*, see Michael W. McConnell, "Private Utilities' Public Rights: Paying for Failed Nuclear Power Projects,"

2 REGULATION 35-42 (1988), available at http://www.cato.org/sites/cato.org/files/serials/files/regulation/1988/5/reg12n2-mcconnell.html.

[3] *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (applying rational basis review and upholding the Filled Milk Act as a valid exercise of Congress's power to regulate interstate commerce).

[4] *See* the discussion of *Nebbia v. New York*, 291 U.S. 502 (1934), *infra* at p. 360

[5] Matthew Hale, "De Portibus Maris," in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77-78 (Francis Hargrave ed., 1787).

[6] John Locke, A SECOND TREATISE ON GOVERNMENT § 123 (1690). Locke stresses the personal decision of any one person that, given the risks of living in a state of nature, "he seeks out, and is willing to join in Society with others, who are already united, or have a mind to unite, for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, Property." *Id.* (emphasis in original).

[7] *See supra* quote accompanying note 7.

[8] For discussion of the dynamic of dealing with people in the alternative and people in series, *see* Richard A. Epstein, BARGAINING WITH THE STATE ch. 5 (1993).

[9] For discussion, *see* Alfred O. Hirschman, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); Richard A. Epstein, "Exit Rights Under Federalism," 55 *L. & CONTEMP. PROBS.* 147 (1992).

[10] For a general discussion, *see* Richard A. Posner, NATURAL MONOPOLY AND ITS REGULATION (1999).

[11] For a recent discussion of the "essential facilities" doctrine, *see Florida Fuels, Inc. v. Krueder Oil, Co.* 717 F. Supp. 1528 (S.D. Fla. 1989) (holding that storage tanks on Florida island are not an essential facility). For earlier case law, *see Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). For a skeptical account, *see* Philip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *ANTITRUST L.J.* 841 (1989).

[12] *See Verizon Commc'ns Co. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004).

[13] *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947) (determining liability based upon the probability of a particular harmful event occurring (P), the gravity of the resulting injury (L), and the burden of adequate precautions (B), where the defendant would be liable when $B < PL$).

[14] (1810) 104 Eng. Rep. 206 (K.B.). For a more detailed account of this critical case, see Richard A. Epstein, PRINCIPLES FOR A FREE SOCIETY 282-85 (1998).

[15] 43 Geo. 3, c. 132.

[16] 94 U.S. 113 (1876).

[17] *Id.* at 117 (citing section 15 of the Illinois statute).

[18] Edmund W. Kitch & Clara Ann Bowler, "The Facts of *Munn v. Illinois*," 1978 *SUP. CT. REV.* 313 (1978).

[19] "[I]t is enough that there exists in the place and for the commodity in question a virtual monopoly, for this purpose." *Munn*, 94 U.S. at 128 (quoting *Allnutt*, 104 Eng. Rep. at 211).

[20] James Barr Ames & Jeremiah Smith, V CASES ON RESTRAINT OF TRADE 71 (1904).

[21] *Munn*, 94 U.S. at 132-33.

[22] *Id.* at 134.

[23] *Id.* at 136.

[24] *Id.* at 142.

[25] 134 U.S. 418 (1890).

[26] 209 U.S. 123 (1908).

[27] 37 N.W. 782, 784-87 (Minn. 1888).

[28] *Id.* at 786.

[29] *Id.*

[30] 134 U.S. at 457.

[31] *Id.* at 458.

[32] 2 U.S. 419 (1793).

[33] U.S. CONST. amend. XI.

[34] 134 U.S. 1 (1890).

[35] *See, e.g., Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125 (1922); *Sanguinetti v. United States*, 264 U.S. 146 (1924). For discussion, *see* Richard A. Epstein, "The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions," 78 *BROOK. L. REV.* (2013).

[36] *Ex parte Young*, 209 U.S. at 146. The same sentiment was expressed more recently in connection with environmental regulation in *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

[37] 32 U.S. 243 (1833).

[38] "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." U.S. CONST. amend. XIV, § 1, cl. 2.

[39] 83 U.S. 36 (1873).

[40] *Id.* at 79-80.

[41] *See, e.g.*, William E. Nelson, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). For my views, *see* Richard A. Epstein, "Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment," 1 *N.Y.U. J.L. & LIBERTY* 334 (2005); Richard A Epstein, "Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment," 1 *N.Y.U. J.L. & LIBERTY* 1095 (2005).

[42] 111 U.S. 746 (1884).

[43] 164 U.S. 578 (1896).

[44] *Id.* at 597.

[45] 166 U.S. 226 (1897).

[46] *Id.* at 241.

[47] For a defense against these charges, *see* James W. Ely, Jr., "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process," 16 *CONST. COMMENT.* 315 (1999).

[48] Edward S. Corwin, "The "Higher Law" Background of American Constitutional Law," 42 *HARV. L. REV.* 149 (1928).
[49] 169 U.S. 466 (1898).
[50] *Id.* at 534.
[51] *Id.* at 534.
[52] *Id.* at 546-47.
[53] For a perceptive evaluation of the various schemes of rate regulation, *see* McConnell, *supra* note 3.
[54] *See* McConnell, *supra* note 3 (offering an illustrative example of the risks and rewards associated with drilling natural gas wells).
[55] 262 U.S. 276 (1923).
[56] *Id.* at 290.
[57] 320 U.S. 591 (1944).
[58] *Id.* at 603 (other internal citations omitted).
[59] 488 U.S. 299 (1989).
[60] *Id.* at 315.
[61] *Id.* at 304 (quoting 66 PA. CONS. STAT. § 1315 (Supp. 1988).
[62] *Id.* at 312.
[63] *See id.* at 305 n. 3 (noting that Pennsylvania adopted a new law that authorized the PUC to permit amortized recovery of investments).
[64] 291 U.S. 502 (1934).
[65] *Id.* at 514.
[66] *Id.* at 507.
[67] Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31: Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938).
[68] 321 U.S. 414 (1944).
[69] 257 F.3d 587 (6th Cir. 2001).
[70] For explication *see* Richard A. Epstein, "The Constitutional Paradox of the Durbin Amendment: How Monopolies Are Offered Constitutional Protection Denied to Competitive Firms," 63 *FLA. L. REV.* 1307, 1333-34 (2011).
[71] Courts have long held that State-imposed regulatory price controls are constitutional within certain limits. Pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, "[p]rice control is 'unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . .'" *In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968) (quoting *Nebbia v. People of State of New York*, 291 U.S. 502, 539 (1934)) (emphasis in original). Rates enacted by the State must be just and reasonable. *See id.* at 770 (citing *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid. . . ." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944). *See also Calfarm Insurance Co. v. Deukmejian*, 771 P.2d 1247, 1254 (Cal.1989) ("The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable rate of return on the value of the property used at the time that it is being used for the public service. . . ."). Therefore, "the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). . . . *Engler*, 257 F.3d at 592-93.
[72] For a detailed discussion of how this works, see Michael E. Levine, "Price Discrimination without Market Power," 19 *YALE J. ON REG.* 1 (2001).
[73] *See id.* at 21-29 (discussing "revenue management" (price discrimination) strategies in airlines, shipping, and other industries).
[74] 173 U.S. 684 (1899).
[75] *Id.* at 696-97.
[76] 245 U.S. 531, 533 (1918).
[77] 236 U.S. 605 (1915).
[78] *Id.* at 609.
[79] 236 U.S. 585 (1915).
[80] *Id.* at 595.
[81] 345 U.S. 146 (1953)
[82] *Id.* at 148.
[83] *Id.* at 151.
[84] *Id.* at 149.
[85] *Id.* at 152.
[86] 271 U.S. 23 (1926).
[87] *Id.* at 31.
[88] 525 U.S. 366 (1999).
[89] 467 U.S. 837 (1984).
[90] 251 U.S. 396 (1920).
[91] *Id.* at 399.
[92] For discussion of the Florida decision and its consequences, see Richard A. Epstein, "Exit Rights and Insurance Regulation: From Federalism to Takings," 7 *GEO. MASON L. REV.* 293 (1999).
[93] James M. Landis, THE ADMINISTRATIVE PROCESS (1938).
[94] Richard A. Epstein, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW (2011).
[95] "The Wind Power Tax," *WALL ST. J.* (Feb. 10, 2013), *available at* http://online.wsj.com/article/SB10001424127887324900204578284392827567184.html.

The History of Native American Lands and the Supreme Court

ANGELA R. RILEY

The Supreme Court has been instrumental in defining legal rights and obligations pertaining to Indian lands since its first path-marking decision in the field in *Johnson v. McIntosh* in 1823. But the groundwork for the Court's contemplation of such cases predates Supreme Court jurisprudence, and it in fact predates the formation of the Court and the United States itself.

When Europeans first made contact with this continent, they encountered hundreds of indigenous, sovereign nations representing enormous diversity in terms of language, culture, religion, and governance. For those indigenous groups—as is a common attribute of indigeneity of similarly situated groups around the world—this land was and is holy land. Indigenous creation stories root Indian people in this continent—Turtle Island to many—as the focal point of life, creation, religion, culture, and language. In the settlement of the country, the colonial powers initially—and the United States subsequently—treated with Indian nations to negotiate the transfer of lands from Indians to Europeans, often in exchange for peace and protection.

Historically, treaties were the primary mechanism for recognition of Indian lands. The United States negotiated hundreds of treaties with Indian nations on a government-to-government basis to obtain Indian lands and settle land disputes. This treaty-making authority was ultimately constitutionalized in Article II of the United States Constitution, which states: "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [with Indian nations],"[1] which, with the Supremacy Clause, made treaties the supreme law of the land.[2] Thus, along with the Indian Commerce Clause,[3] there are two constitutional bases for interactions between the United States and Indian nations.

But Congress ended treaty-making with tribes in 1871.[4] Since that time, Indian lands have primarily been recognized through various treaty-substitutes, including executive orders, congressional acts, and judicial decisions.[5] Today, there are approximately

fifty-six million acres of land held in trust for Indian nations by the federal government.[6] Approximately 9.5 million are guaranteed by treaty. These vitally important—and oftentimes sacred—lands are the very places that commonly were desired most by non-Indians and competing sovereigns for their vast natural and cultural resources. As a consequence, these are also the places over which contested claims drove litigation to the United States Supreme Court.

Disputes over land arose almost from the point of contact between the Indian nations—who had pre-existing sovereignty and management over the continent—and Europeans, who sought to settle the New World. As pressure for Indian lands increased, the colonial powers—and later, the United States—began to establish parameters to govern land transactions. As legal historian Eric Kades explains, to navigate these disputes—particularly as they came to be settled, in the language of Chief Justice John Marshall, in the "courts of the conqueror"[7]—Americans sought a body of law to define land rights. But this task proved to be most complicated, as disputes had to be settled upon at least two axes: first, they needed to establish rules to deal with the claims by competing European sovereigns for the same lands; and, second, the European settlers had to determine "what rights, if any, Indians had to their own lands."[8]

Subsequently unfolding events tell the story of the settlement of the continent and formation of the country that would become the United States of America. Accordingly, the history of Native American lands in the United States Supreme Court is not a historical relic, but a living legacy that continues to define the relationship of the federal and state governments to the more than 566 federally recognized Indian nations within U.S. borders. Historically and today, the delineation of tribal lands holds enormous import for Indian nations, as lands form the basis of Indian economies and are also the focal point for social, political, cultural, religious, and familial life for American Indians.

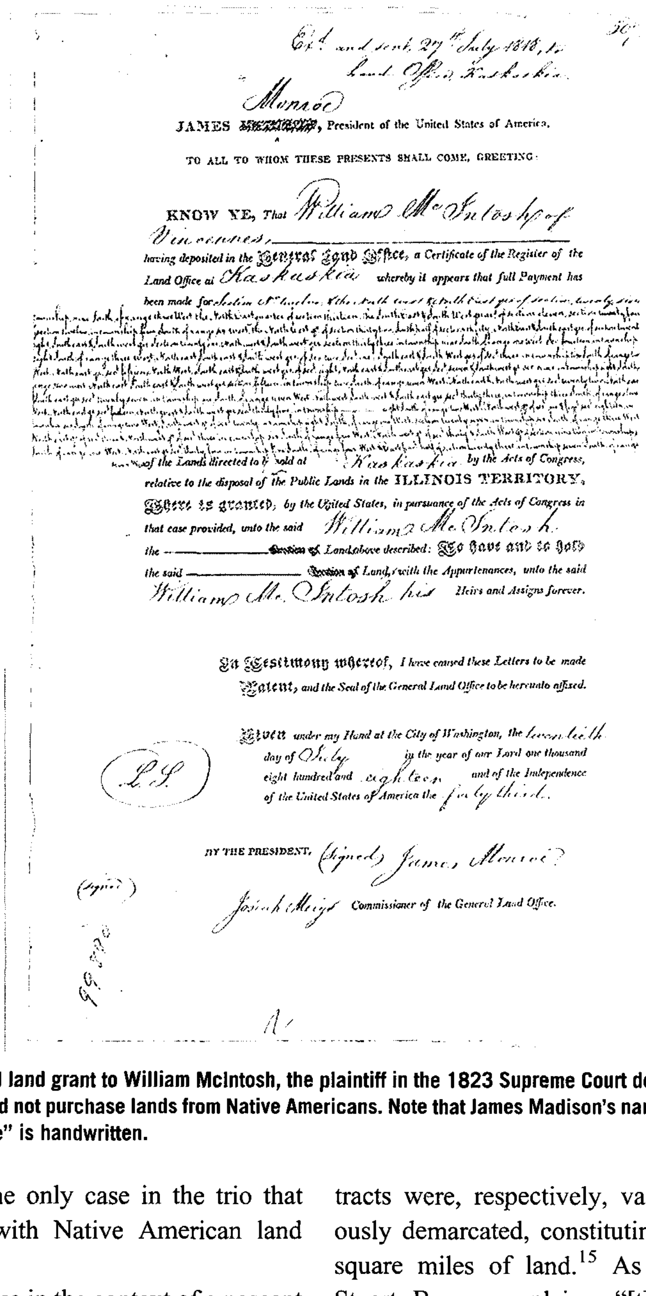
Building on these preliminary ideas, this essay proceeds in three parts, framed by the language of contemporary legal theorist and Indian law expert Kristen Carpenter as *Property, Remedy, and Recovery*.[9] Part I, Property, addresses the critical role of the United States Supreme Court in defining Indian property rights and, concomitantly, the scope of the rights of Native peoples to their lands. Part II addresses the question of Remedy, and sets forth those cases that delineate the legal obligations of the United States government to compensate or provide a remedy for Indian land dispossession. Finally, Part III concludes by highlighting in brief terms the enduring legal consequences for tribal sovereignty resulting from Supreme Court decisions that continue to shape the practical realities and, indeed, Native peoples' efforts at Recovery arising from the colonial endeavor.

Part I: Property

Did Indians "Own" Their Lands?[10]

In the colonial period, the United States treated with Indian nations for their lands. Though certainly not always voluntary or balanced, these negotiations were premised on two ideals: first, that the Indian nations were pre-existing sovereign populations with legitimate, legal rights to their lands and resources; and, second, that conveyances of Indian lands would be based on principles of consent and fair compensation.[11]

Built around these ideals, in 1823, the Supreme Court decided the first canonical case in the field of Indian law, *Johnson v. M'Intosh*,[12] in which the Court addressed the issue of Indian title. *Johnson* marked the first of the famed Marshall Trilogy, three cases penned by Chief Justice John Marshall between 1823 and 1832 that continue to define Indian rights today, though *Johnson v.*



Monroe

JAMES [illegible], President of the United States of America,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That William McIntosh of Vincennes, having deposited in the General Land Office, a Certificate of the Register of the Land Office at Kaskaskia whereby it appears that full Payment has been made for ... of the Lands directed to be sold at Kaskaskia by the Acts of Congress, relative to the disposal of the Public Lands in the ILLINOIS TERRITORY,

There is granted, by the United States, in pursuance of the Acts of Congress in that case provided, unto the said William McIntosh the ——— Section of Land above described: To have and to hold the said ——— Section of Land, with the Appurtenances, unto the said William McIntosh his Heirs and Assigns forever.

In Testimony whereof, I have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my Hand at the City of Washington, the twentieth day of July in the year of our Lord one thousand eight hundred and eighteen, and of the Independence of the United States of America the forty third.

(L.S.)

BY THE PRESIDENT, (Signed) James Monroe

Josiah Meigs Commissioner of the General Land Office.

Above is the original land grant to William McIntosh, the plaintiff in the 1823 Supreme Court decision holding that private citizens could not purchase lands from Native Americans. Note that James Madison's name is crossed out at the top and "Monroe" is handwritten.

M'Intosh was the only case in the trio that dealt squarely with Native American land rights.

Johnson arose in the context of a nascent America, wherein settlers, Native American tribes, and colonial forces competed for dominance over the new world.[13] In the late 1700s, land speculators—on behalf of the Illinois Company and then, a few years later, for the Wabash Company—bought lands from a delegation of Illinois and Piankashaw Indian nations "straddling the present-day border of Illinois and Indiana."[14] The four tracts were, respectively, vast and ambiguously demarcated, constituting thousands of square miles of land.[15] As legal historian Stuart Banner explains, "[t]he companies' purchases were clearly unlawful when they were made, because the Proclamation of 1763 prohibited private land purchasing. Land speculators remained active even after the proclamation, however, because they were gambling that the proclamation would eventually be repealed or modified, and that their purchases would eventually be confirmed retroactively by the government."[16]

But after years of lobbying to get their land titles recognized without success, as a last resort, the parties appealed to the United States Supreme Court to remove any cloud of doubt over questions of ownership.[17] Historical accounts describe the litigation as "collusive."[18] That is, to put forth a claim for land title in the nineteenth century, all that was needed was the construction of a lawsuit whereby "fictional tenants of the plaintiff sought to oust from possession fictional tenants of the defendant."[19] In this case, according to Banner, "[t]he speculators' nominal opponent was an Illinois resident who was alleged to own a parcel within one of the Wabash tracts, which he purchased from the federal government, which in turn had bought much of the same land from the same tribes in the first decade of the nineteenth century."[20]

And thus, the case of *Johnson v. M'Intosh*, the first major precedent in federal Indian law, addressed a fundamental question, the answer to which would not only define the rights of those land speculators at the time, but would establish a property regime of trust—a disaggregation of land title—between the Indian nations and the federal government that continues today.[21] That is: what real property rights did Europeans acquire, and indigenous peoples lose, by virtue of the European settlement of America?

In rejecting the doctrine of first possession as giving rise to property rights, the Court adopted, instead, the international rule of the doctrine of discovery. As Chief Justice Marshall explained, the Indian tribes were the rightful "occupants" of the soil, with rights of possession and use, but "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[22] As Joseph Singer writes, put simply, "the Supreme Court ruled that 'discovery' of new lands by colonial powers gave the authority to exclude other colonial powers from the discovered area."[23] Thus, the doctrine prevented Indian tribes from treating with any sovereign, locking the Indian nations into a sovereign-to-sovereign treaty relationship with the United States.[24]

With the creation of Indian title—wherein "ultimate title" is held by the United States and a "title of occupancy" is held by the relevant Indian nation[25]—*Johnson* laid the foundations for the trust relationship between the federal government and Indian nations. And the "split title remains to this day"; with the majority of Indian lands held in trust by the United States for the benefit of the Indian tribes.[26]

In the context of Native American land rights—but also other seminal arrangements unique to the relationship between Indian nations and the United States—Johnson consequences reverberated across the country and still linger today. On the one hand, *Johnson* is seen as effecting a compromise in recognizing Indians' rights to their lands.[27] Though denied the right of alienation, aboriginal title protected Indians' rights to continued use and occupancy of their ancestral territories.

Johnson also laid the groundwork for *Cherokee Nation v. Georgia*[28] and *Worcester v. Georgia*,[29] respectively, the last two cases of the Marshall trilogy. *Cherokee Nation* defined the rights of the Cherokee—and other Indian tribes—not as states of the union or foreign states, but, in the now-famous words of Justice Marshall, as "domestic dependent nations," in a relationship with the United States as that of a "ward to his guardian," further reinforcing the concept of a trust relationship between the tribes and the federal government.[30] And Justice Baldwin's concurrence in *Cherokee Nation* relied on *Johnson* to first articulate the oft-repeated admonition by the Court that "Indians have rights of occupancy to their lands,"[31] and this right is "as sacred as the fee-simple, absolute title of the whites."[32] This statement appeared repeatedly over the years to affirm the Indian

Elizabeth Stevens, a veteran of the U.S. Army's internment and forced relocation of approximately sixteen thousand Cherokees in the fall and winter of 1838–1839, was photographed in 1903 at age eighty-two. Approximately four thousand members of her tribe died along the route between Georgia and what is now Oklahoma.

right of occupancy.[33] And in the third opinion in the trilogy, *Worcester v. Georgia*, Chief Justice Marshall clarified the rights of Indian nations to be free from state jurisdiction, holding that "the laws of [the state] can have no force" in Indian country.[34]

As Charles Wilkinson has explained, the Chief Justice's pivotal opinions "conceived a model that can be described broadly as calling for largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control."[35] The Marshall trilogy in many ways remains the cornerstone of federal Indian law and continues to shape and guide the conceptualization of relations between the tribal, state, and federal governments in questions that bear on rights and duties related to trust, sovereignty, property, and autonomy in our liberal democracy.

Of course, the Marshall trilogy only laid the groundwork for establishing the parameters of Part I of this Essay: that is, setting forth the rules to govern the question of what rights, if any, the Indians had to their lands. As settlers moved further west, questions related to Indian property rights continued to percolate through the courts. Ultimately, despite the Court's rulings in the Cherokee cases, pressure for Indian lands intensified in the mid-to-late nineteenth century and the states continued to attempt to acquire Indian lands, until the federal government conceded that it could no longer adequately protect the tribes. The American President at the time, Andrew Jackson, purportedly held animus for tribal interests and is (likely incorrectly) credited with the quote: "John Marshall has made his decision. Now let him enforce it."[36] Though the quote is widely believed to have never actually been uttered by President Jackson, his Message to Congress on Indian Removal in 1830 less succinctly, but just as clearly, summarized his views:

> What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms … [and] occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization and religion?[37]

At the urging of the President, Congress passed a series of Removal Acts in the early 1800s, which "forced most of the remaining eastern Indians to migrate west of the Mississippi River."[38] Between 1828 and 1838, an estimated eighty thousand Indians were forcibly relocated from the eastern part of the United States, with many removed to the Indian country, now the state of Oklahoma. As Stuart Banner recounts, "[t]he enduring image of the period is the Trail of Tears—the U.S. Army's internment and forced relocation of approximately sixteen thousand Cherokees in the fall and winter of 1838–1839, under circumstances so dire that four thousand are said to have died along the

route between Georgia and what is now Oklahoma."[39]

By the late 1800's, more than thirty Indian tribes had been "removed" from eastern lands to the Indian Territory to make room for white expansion. The promise of removal was that tribes would be allowed to continue to live together, isolated from the encroaching society, subject to their own laws, and free from state or federal interference. But the promise of "measured separatism," too, would go unmet, as railroad development and mineral extraction were spreading west, causing an influx of non-Indians into the region.[40] To greatly reduce tribal land holdings in exchange for, among other things, protected white passage and westward expansion, the United States continued an active policy of treaty making with the tribes. One set of negotiations resulted in the Treaty of Medicine Lodge, which ultimately served as the central source of contention between the Kiowa, Comanche, and Apache tribes and the United States thirty years later in the pivotal 1903 case of *Lone Wolf v. Hitchcock*, discussed herein.

The process of removal and confinement of Indian peoples onto reservations had devastating consequences for Indians and for Indian economies. Particularly for those tribes of the northern and southern plains, but certainly others, the subsistence culture of seasonal migration, game hunting, and gathering practices all but came to an end. American Indians had spent thousands of years perfecting skills of survival that could no longer be meaningfully employed in the small, harsh, starkly limited reservations of the Plains.[41] Even post-contact Indian economies that had developed and flourished in exchanges with whites—including buffalo hunting and the related trade in animal pelts, buckskin creations, and Indian handicrafts of all kinds, which fed a voracious and deeply curious European market—ceased, as the American bison was hunted almost to extinction, and the United States more vociferously than ever enforced the conditions of reservation confinement with military force.[42]

With so many factors working against Indian survival, tribes became increasingly dependent on the federal government. Allotment was promoted as a remedy for this dependence. Thus, only twenty years after the signing of the Medicine Lodge Treaty guaranteeing Kiowa, Comanche, and Apache ("KCA") reservation lands, Congress passed the General Allotment Act of 1887, pursuant to which the federal government took tribal land and redistributed it in parcels (or "allotments") to be held in trust for a term of years by the federal government for the benefit of tribal members.[43] So-called "surplus" lands left over became available for non-Indian settlement.

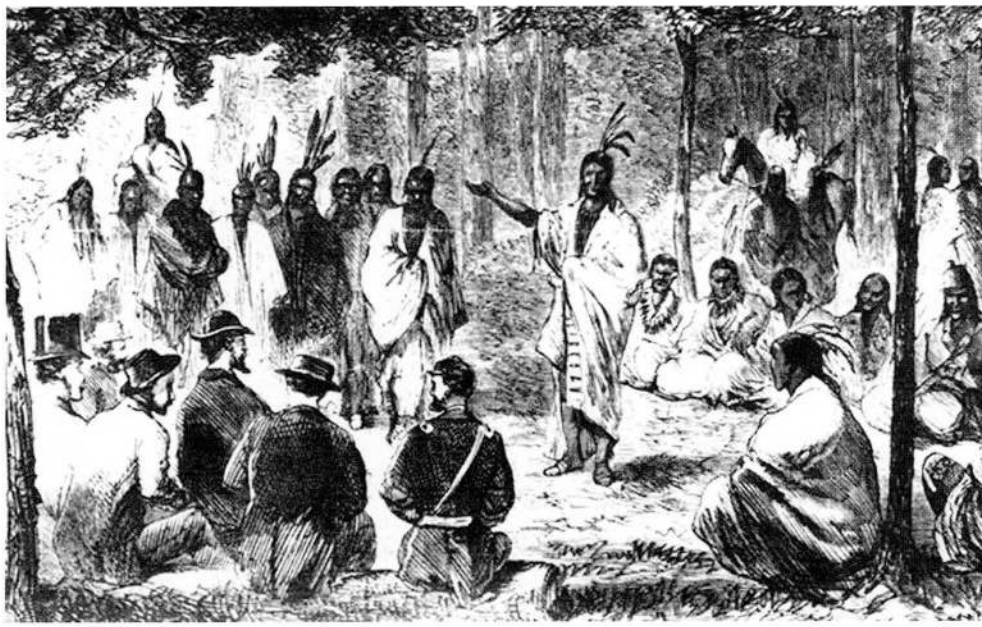
The rugged individualism of the day—personified classically in President Theodore Roosevelt—was on a collision course with the concept of Indian nationhood and collective, tribal rights. In advocating for Allotment, President Roosevelt stated: "The time has arrived when we should definitely make up

Indian economies that developed and flourished in exchanges with whites—including buffalo hunting and the related trade in animal pelts, buckskin creations, and Indian handicrafts of all kinds—ceased as the American bison was hunted almost to extinction. Consequently, the United States more vociferously than ever enforced the conditions of reservation confinement with military force.

our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual. . . ."[44] Consistent with concurrent assimilative policies—including the mass, forced removal of Indian children into Indian boarding schools—allotment furthered the American mission to "kill the Indian, save the man."[45]

To negotiate an allotment treaty, the federal government sent negotiators to the KCA reservation to get consensus on the terms of abrogation of the Treaty of Medicine Lodge and an allotment policy. But before federal negotiators even left the reservation with a purported agreement, Lone Wolf and others contested its veracity. Despite opposition, the commission hurriedly left the reservation and Congress ultimately ratified the agreement anyway. Soon thereafter, Lone Wolf brought suit on behalf of the Kiowa, Comanche, and Apache tribes challenging the agreement abrogating the Treaty of Medicine Lodge and attempting to halt the government's allotment of their lands.[46]

Through the treaty, the United States had promised no further cessions of land unless three quarters of the adult males of the tribe agreed.[47] Congress nevertheless enacted a statute mandating the allotment of the Indian reservation. And when *Lone Wolf v. Hitchcock*[48] reached the Supreme Court in 1903, the Court declined to hear the case on the merits, instead attributing to Congress a "plenary authority" over Indian affairs, including the capacity to break Indian treaties at its discretion and without judicial review.[49] As Phil Frickey characterized the opinion: "The Court in *Lone Wolf* viewed Congress as having a special fiduciary responsibility toward tribes and presumed that Congress would act in good faith in Indian affairs, but saw no judicial role in second-guessing congressional acts in the field."[50] The *Lone Wolf*



Twenty years after the signing of the Medicine Lodge Treaty, guaranteeing Kiowa, Comanche, and Apache reservation lands (pictured), Congress passed the General Allotment Act of 1887, pursuant to which the federal government took tribal land and redistributed it in parcels (or "allotments") to be held in trust for a term of years by the federal government for the benefit of tribal members. Allotment was promoted as a remedy for dependence on the government.

Court's refusal to adjudicate the tribes' complaints on the merits ultimately "solidif[ied] the allotment program as a cornerstone of federal Indian policy."[51]

In subsequent years, the Court mediated *Lone Wolf's* holding—first, in *Delaware Tribal Business Committee v. Weeks*[52] in 1977 and again in a case discussed herein, *United States v. Sioux Nation*[53] in 1980—both of which held specifically that Congress's plenary power in Indian affairs granted by the U.S. Constitution[54] does not mean that litigation involving such matters necessarily entails nonjusticiable political questions.[55]

Despite *Lone Wolf's* devastating holding, in truth, the practical reality of allotment had already taken effect on the ground by the time the Supreme Court issued its ruling. President McKinley's proclamation that the government would open up the "surplus" lands of Indian Territory on August 6, 1901 had already spurred a massive influx of non-Indian would-be settlers.[56] Over a year before *Lone Wolf* even reached the Supreme Court, 150 thousand people had already registered for the lottery that would be held to select those entitled to a 160-acre homestead.[57] As 1901 drew to a close, thousands of homesteads formed on the plains and White society surrounded and engulfed the Kiowa and other Indians.[58] Even the 480 thousand acres of land set aside for the common use of the Kiowa, Comanche, and Apache in the 1900 Allotment Act, known by the Indians as "Big Pasture," was opened up six years later for white settlement only.[59]

From the point of allotment until present day, there was a devastating loss recorded of ninety percent of all landholdings for the Kiowa, from a pre-allotment total of 2.9 million acres to just above three thousand acres.[60] Ultimately, 118 reservations were allotted and forty-four of those reservations were opened to white homesteading.[61] Thus, a dark period fell over Indian country until the repudiation of the Allotment Act via the Indian Reorganization Act of 1934.[62]

Part II: Remedy

Compensating for Indian Land Loss

By mid-century, the initial question addressed by Part I of this essay, that is, whether Indians had legally cognizable rights to their lands, had been answered in the affirmative. *Johnson* and its progeny had settled the matter. But in regards to the necessarily related question—by what means would such land transactions occur?—the historical record is more mixed. On the one hand, a bevy of governmental policy and practice—significantly, the inclusion of treaty making in the Constitution—confirm the view that transactions with Indian nations should be voluntary, consensual, and fair. Nevertheless, as the balance of power between Indian nations and the United States shifted over time, very often corresponding to larger American policy objectives, we see great variation in the degree to which such transactions embodied these principles.

Historically, tribes could only bring suit against the United States for land claims pursuant to specially enacted jurisdictional statutes.[63] But in the post–World War II era, sentiments regarding the treatment of American Indians began to shift. Indian people had fought in significant numbers during both World Wars, and the United States, in assessing the treatment of racial and ethnic minorities in Europe, began more carefully to scrutinize its own actions towards Native Americans.[64] Thus, in a time of post-War reflection, in 1946, Congress passed the Indian Claims Commission Act, specifically for the disposition of so-called "ancient" claims, or those accruing before August 13, 1946. The Commission expired on September 31, 1978 and transferred the remaining 102 dockets to the Court of Claims, now the United States Court of Federal Claims. The Commission settled numerous Indian land claims. But, because the Commission interpreted its charge as providing compensation for Indian nations, not by the return of lands,

but with monetary relief alone, its work largely left American Indians, in the words of Joseph Singer, "bereft of a continent."[65]

The consequences of this system have reverberated throughout Indian country and can be seen in cases such as the 1985 Supreme Court case of *United States v. Dann*.[66] There, the United States had brought a trespass suit against Western Shoshone sisters Mary and Carrie Dann for grazing livestock on public lands without federal permit. The Danns' defense to the trespass action was based on a claim of aboriginal title. They argued that extinguishment of Western Shoshone aboriginal title had never been determined as a matter of law, and that a 1977 Indian Claims Commission judgment could not preclude their defense of aboriginal title since the monetary damages had not been disbursed to the Western Shoshone. But the Court disagreed. In a unanimous opinion, the Court ruled that judgments and settlements in Indian Claims Commission litigation resulted in the formal extinguishment of any aboriginal title claim to lands for which compensation was paid, even if the Native beneficiaries resist efforts to take payment in full satisfaction of their land claims.[67]

Even after the establishment of the Court of Claims, however, cases continued to reach the Supreme Court on questions of both the scope of and legal basis for the obligation of the United States, if any, to compensate for Indian land losses. Thus, Part II of this Essay focuses specifically on two cases critical to establishing and clarifying the Supreme Court's holdings in regards to the United State's Fifth Amendment Constitutional obligations to compensate for the taking of Indian lands: *Tee-Hit-Ton Indians v. United States*[68] and *United States v. Sioux Nation*.[69]

As *Tee-Hit-Ton*, in particular, illustrates, the ethos of American expansion continued aggressively even until mid-century, as the United States began to pursue statehood for territories previously acquired from foreign sovereigns. One such expansion had come via the Treaty of Cession from Russia in 1867, by which the United States purchased Alaska, the name used by the Aleuts to refer to the "mainland" portion of their territory. Those lands were occupied by numerous Native Alaskan tribes, which had maintained subsistence lifestyles there since time immemorial.[70] For decades after the purchase from Russia, the United States largely stayed out of Native Alaskan affairs. But, beginning in the 1920s until statehood in 1959, settlement of Alaska by non-Natives became more common and encroachment on Native lands became an increasing problem. Eventually Native Alaskans' land claims—much as Indian land claims had all across the continent—"began to be seen as obstacles to development."[71]

A 1947 Act of Congress opening the Tongass National Forest to timber sales threatened the subsistence lifestyle of the Tee-Hit-Ton Indians, a subgroup of Tlingit and Haida Indian nations, who asserted a property interest in the timber on their lands. When timber sales in the forest began in 1951, the tribe sued.[72] The case was initially heard in the Court of Claims, which had set out to resolve the question of what rights the Alaska Natives had retained after Russia ceded Alaska to the United States, and, if such rights had been abrogated, what compensation was legally required.

The legal scholar Felix Cohen, who is credited with founding the field of Federal Indian law, served as assistant and associate solicitor at the Department of the Interior. Most notably, he crystallized and advanced the field through his masterful work in the **Handbook of Federal Indian Law**, which he first published in 1941. Cohen had earlier called the acquisition of Alaska Native lands—those ultimately at issue in *Tee-Hit-Ton*—evidence of the government's "feeling that Indians are not quite human, and certainly not fit to own their own homes, cut their own trees, or mine their own lands," and contended that policy regarding the Alaska Natives

manifested "hollow rationalizations of racial prejudice."[73]

Throughout his career, Cohen defended Indian land rights, arguing in his 1947 article, "Original Indian Title," that:

> ***Every American schoolboy*** is taught to believe that the lands of this United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia and for all the continental lands so purchased we paid about 50 million dollars out of the U.S. Treasury. . . . Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian Owners.[74]

To be sure, Cohen acknowledged that the government employed coercion in some instances and paid inadequate consideration in many others. He hoped, however, that these inadequacies would be remedied through the Indian Claims Commission process.

The Supreme Court's opinion in *Tee-Hit-Ton*—decided in 1955, only one year after the Court's groundbreaking decision in *Brown v. Board of Education*—focused on whether the Alaska Natives' original Indian title was "property" within the meaning of the Fifth Amendment to the Constitution. If so, then the United States could not take it without paying compensation. Despite numerous earlier rulings that Indian title was as sacred as the fee simple title of the whites, the Court held that the Tee-Hit-Ton Indians' aboriginal title—which had never been recognized by treaty or statute—amounted to no more than a "license" to be on the land.[75] According to the Court, Indian title meant merely that the Indian nations had "permission from the whites to occupy" those lands and that Indian property rights are not constitutionally protected unless "recognized" by treaty or statute.[76]

In holding that the United States had no constitutional duty to compensate the Tee-Hit-Ton Indians for their property, Justice Reed's words were eerily—and likely not coincidentally—critical of Cohen and his views on Indian rights. Reed opined, "***[e]very American schoolboy*** knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."[77]

It is curious that such a devastating opinion on Indian rights could follow the Court's unanimous, path-marking decision in *Brown* by only one year. However, there are some plausible explanations for the Court's departure from the principles of racial justice it had laid out in *Brown*. For one thing, there had been relatively little connection made up to that point between the nation's move towards racial justice for African-Americans and the contemplation of Indian rights.

Moreover, the Court engaged in what has been called "judicial fiscal restraint."[78] As Reed himself notes in footnote seventeen of the opinion, had the Court concluded that aboriginal property interests were "property" for Fifth Amendment purposes, and that just compensation must be paid for the taking, the federal government would have been exposed to substantial liability in the Indian claims process. According to Justice Reed, approximately nine billion dollars in claims and interest had already accrued against the government.[79]

Perhaps the greatest case for reconciling *Brown* and *Tee-Hit-Ton*, however, lies in an examination of the prevailing American policy at the time. As Mary Dudziak has written, Cold War concerns about the impact of racial discrimination on America's reputation abroad led the Truman Administration to adopt a pro–civil rights platform as part of its

international agenda to promote democracy and contain communism.[80] In this sense, the ruling in *Tee-Hit-Ton* fits in with larger American ideals by minimizing the colonial foundations of the United States, making it possible to advance externally the image of America as a just nation. And, of course, at their core, both cases tapped into a philosophy of individual rights and freedoms, whereas collective, tribal land holdings evoked for the Court and the country the all-too-dangerous conception of communism.

But *Tee-Hit-Ton* would not be the last word on constitutionally required compensation for the taking of Indian lands. In contrast to *Tee-Hit-Ton*, Part II of this Essay concludes with one of the most famous and longest running legal disputes in American history, the battle for the Black Hills, which led to the Supreme Court's Fifth Amendment takings ruling in the 1980 case of *United States v. Sioux Nation*.[81]

There is perhaps no American lore that looms as large as that surrounding the story of the Sioux Nation, the Black Hills, the Battle of Little Bighorn and the massacre at Wounded Knee, which marked the close of the Indian wars on the northern plains. But the legal history leading up to the loss of the Black Hills by the Sioux is perhaps less well known.

Pursuant to the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation, and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three quarters of the adult male Sioux population.[82] The treaty also reserved

In the 1870s, the U.S. Army and Sioux warriors clashed over ownership of land in the Black Hills, leading to the massacre at Wounded Knee (pictured). The defeated Sioux were confined to a small portion of the reservation, deprived of horses and weapons, and then had their rations cut off until they agreed to sign an agreement of cession, which relinquished their rights to the Black Hills. More than 100 years later, the Sioux's takings case regarding that land finally reached the Supreme Court.

the Sioux's right to hunt in certain unceded territories.[83]

However, Lieutenant Colonel George Custer led an expedition into the Black Hills, searching for and discovering gold in 1874. Immediately thereafter, fortune seekers invaded Sioux country. The U.S. government at first attempted to secure the Sioux lands from invaders, but to no avail. Sioux warriors and the Army battled at Little Bighorn, wherein the Sioux defeated the Army, but the United States ultimately prevailed at the now-infamous massacre at Wounded Knee. The Sioux were confined to a small portion of the reservation, deprived of horses and weapons, and then had their rations cut off until they agreed to sign an agreement of cession, which relinquished their rights to the Black Hills and abrogated the Treaty of Fort Laramie. That agreement was ratified in 1877.[84]

More than 100 years after the case arose, the Sioux's takings case regarding the Black Hills finally reached the Supreme Court. Justice Blackmun delivered the Opinion, stating: "This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West."[85] Ultimately, Justice Blackmun's opinion affirmed the Sioux Nation's claim that the United States unlawfully abrogated the Fort Laramie Treaty of 1868.[86]

Sioux Nation further explicated the second of two doctrinal strands established by the Court in determining the scope of Fifth Amendment compensation for the taking of Indian lands.[87] The first, as set forth in *Tee-Hit-Ton*, is that unrecognized aboriginal Indian title is not "property" for purposes of the Fifth Amendment and, thus, compensation is not constitutionally required. The second, delineated in *Sioux Nation*, is that the Court will not treat nonconsensual transfers of Indian tribal land to third parties as takings when the government acts as guardian of the tribe rather than as a sovereign.[88] In other words, when the government can show it "fairly (or in good faith) attempt(ed) to provide (its) ward with property of equivalent value," no constitutionally protected taking has occurred.[89]

But because the Court in *Sioux Nation* found that the government had not made a good faith effort to give the Sioux a fair equivalent for their land, the land acquisition rendered it the act of a sovereign exercising its eminent domain power, rather than the act of a trustee trying to benefit its ward, and just compensation was required, measured by the value of the land at the time of taking plus interest from that date.[90] As a result, the Court upheld the award of more than $120 million (at the time) to compensate the Sioux Nation for the 1877 appropriation of more than seven million mineral-rich acres of the Black Hills of South Dakota.

Of course, the story of the Sioux Nation and the Black Hills remains an open one. Despite the award to the Sioux Nation, each of the tribes refused to accept it. The undistributed judgment has reportedly grown to nearly a billion dollars.[91] Meanwhile, the Sioux, some of the poorest people in the United States, continue to reject the monetary judgment and fight to restore portions of the Black Hills to tribal control.[92] Still today, *Sioux Nation* echoes through Indian country as Indian nations continue to grapple with the consequences of the dispossession of their ancestral lands, which, in addition to greatly impacting tribes' economic concerns, shape the potential for the survival of indigenous land-based religious practices, as well as tribes' governmental and societal functions.

PART III: Recovery

Sovereignty and Property[93]

The Supreme Court, having defined the rights of Indians to their lands (Property), as well as delineated the scope of compensation available to Indian nations in the courts for land losses (Remedy), is in contemporary

times actively engaged in adjudicating issues around Indian nations' Recovery—that is, defining the metes and bounds of the rights of Indians to access, use, and govern their traditional lands in ways that bear on questions of the survival of Indian culture, language, religion, and sovereignty. Thus, Part III of this Essay briefly demonstrates how questions of Indian property rights are intricately tied to Indian peoples' Recovery and their continued cultural and political survival.

Official U.S. policy concerning American Indian nations and their place in the federal system shifted to one of self-determination in the 1970s; concomitantly, Indian nations are ever more actively pursuing rights of self-governance. In recent decades, the Supreme Court has increasingly decided cases that directly bear on rights related to Native American lands and the corresponding exercise of tribal sovereignty. Of course, the Court does not now—nor has it ever—considered cases in a vacuum. In contemporary times, Indian law cases before the Supreme Court are often situated in a larger conversation about how best to contemplate the role of hundreds of sovereign, indigenous, self-governing tribal nations within the border of our larger, democratic state. Against this backdrop, in recent decades, tribal claims to recovery of lands and its related activities, including protections for religious practices, tribal jurisdiction, and immunity from state taxation, among others, have reached the Supreme Court.

One of the defining cases of the last thirty years is *Lyng v. Northwest Indian Cemetery Protective Association*.[94] *Lyng* involved claims by the Yurok, Karuk, and Tolowa Indian tribes alleging that a United States Forest Service plan to build a logging road through the tribes' sacred High Country would violate rights protected under the First Amendment and various federal statutes because of the devastating impact it would have on their land-based religious ceremonies.

As scholarly accounts describe, these tribes have resided along the Klamath River since time immemorial, having never been the subject of governmental policies to either "remove" or relocate them.[95] To the contrary, "[t]heir aboriginal territory encompasses the sacred High Country, which the Tribes continue to use for spiritual and medicinal purposes today."[96] The United States, on the other hand, was a relative "late comer to this region," staking claim to these lands only after 1850, when the Senate failed to ratify dozens of treaties with these and other tribes situated in what is now California.[97] For the tribes of the High Country, this meant that the federally established reservation excluded their most sacred lands, which the United States then treated as within the public domain and under federal control.[98]

Despite evidence in *Lyng* that construction of the road would, in the words of Justice O'Connor, "virtually destroy the Indians' ability to practice their religion,"[99] the Court held there was no Free Exercise Clause violation on the part of the United States, because the government's activity did not coerce the tribes to violate their religious beliefs. Moreover, focusing on the component of current ownership of the land, O'Connor added: "whatever rights the Indian may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all ***its*** land."[100] The case thus sharply limited the extent to which Indian nations may employ the First Amendment's religious freedom protections to safeguard lands used for religious practices that, today, are beyond the boundaries of the tribe's recognized lands. *Lyng* continues to resonate throughout Indian country, as the federal courts actively rely on the case to limit religious freedom claims for land-based religious practitioners.

Finally, as Indian tribes entered the modern era and moved into a policy period of tribal self-determination, in numerous instances they began to reorganize and engage in the process of recovery—both in terms of

land and sovereignty. Some of the New England tribes, generally the first to be impacted by contact with Europeans, have since turned to the courts to adjudicate centuries' old land claims that had arisen in the colonial period. For many of these New England tribes, competing claims between tribes and states over unlawful colonial-era land transfers resulted in large land claims settlement acts in the past several decades. But not all land claims have produced successful settlements with states, and they have, as a result, gone to the Court for adjudication, as with the case of *City of Sherrill v. Oneida Indian Nation.*[101]

The facts underlying *Sherrill* reach back two centuries in American history. During the colonial period, under both British law and the federal Non-Intercourse Acts, first enacted in 1790, a transfer of the tribal right of possession is void unless sanctioned by the United States. Despite Congress's clear policy that no person or entity should purchase Indian land without the approval of the federal government, in 1795 the State of New York bought much of the lands of the Oneida Indian Nation, one of the Six Nations of the Haudenosaunee (The People of the Longhouse), pursuant to agreements that were never approved by the federal government. For two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units.

In the early 1970s, the Oneida Indian Nation sued over these unlawful transactions, and, in 1985, the Supreme Court held that the Oneidas stated a triable claim for damages against the County of Oneida for wrongful possession of lands they conveyed to New York State in 1795 in violation of federal law.[102] In the 1990s, the federal government intervened on behalf of the tribe, and, from that time forward, the state and the tribe attempted to negotiate a settlement, but to no avail. Over time, as the Oneidas began to rebuild their economic base, they bought back some of their homelands on the open market from the non-Indian possessors, lands that had been reserved to them under 1788 and 1794 treaties and that had been previously alienated from the tribe in violation of federal statute.[103] The property in question—purchased in 1997 and 1998—fell within the historic boundaries of the Oneida Indian Reservation and were last possessed by the Oneidas as a tribal entity in 1805.[104]

The City of Sherrill attempted to impose property taxes on these lands as against the Oneida Indian Nation. Oneida argued it had never lost Indian title to the land, and that, by regaining possession of the lands through purchase, it had unified fee and aboriginal title and the lands were within the sovereign authority of the Oneida Nation and, accordingly, immune from state taxation.[105] Lower courts agreed.

Thus, the Oneida Indian Nation returned to the Supreme Court in 2005, contending that regulatory authority over these lands does not reside in the City of Sherrill. But the Supreme Court disagreed, holding that the relief sought by the tribe—"recognition of present and future sovereign authority to remove the land from local taxation"[106]—was barred by the equitable defenses of laches, impossibility, and acquiescence.[107] The Court focused on "the long lapse of time, during which New York's governance remained undisturbed" and the "present-day and future disruption such relief would engender." Though the Court's opinion cabined *Sherrill's* holding, lower courts have relied on the case to reverse a monetary judgment secured by another Indian nation in a similar Eastern land claims case.

For Indian nations, the process of recovery means undertaking the hard work of engaging in and, in some cases, revitalizing Native governance. As *Lyng*, *Sherrill*, and numerous other cases not discussed in this essay, demonstrate, our esteemed federal courts, and the Supreme Court of the United States, in particular, play a pivotal role in

shaping the possibilities for Native peoples' continued cultural and political sovereignty.

Conclusion

The central role of the Supreme Court in defining Native American rights to land and resources cannot be overstated. Though the United States Constitution contemplates the existence of Indian nations in several respects, it does not constitutionalize Indian rights. As a result, much of federal Indian law, including the Native American lands cases highlighted herein, has developed as a matter of federal common law, in a field which—constitutionally, historically, and jurisprudentially—is characterized by exceptionalism.[108] This unique feature of the field makes the judicial branch—and the Supreme Court in particular—of pivotal importance to Native nations going forward.

In some respects, the class of Indian law cases that might be contemplated as those involving Native American lands comprises a capacious category. For Indian peoples, virtually all rights of cultural and political sovereignty attach to land, making the scope of land rights—in relation to religion, economics, culture, and governance—of critical importance. But I have attempted to document here select historical and doctrinal features of Native American land cases to demonstrate how they have been shaped in the Supreme Court of the United States, that highly esteemed and vital body in our democratic society wherein all peoples ultimately seek justice.

In 1953, Felix Cohen wrote: "the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[109]

Far from fulfilling the nineteenth century prophecy of the "vanishing Indian," the story of the Native peoples of this continent is far from over, as Indian nations continue to adhere to a belief in the long-term sustenance of autonomous, sovereign governments within our great nation.

Chi-megwetch.

Author's Note: An earlier version of this essay was delivered as part of the 2012 lecture series on property rights hosted by the Supreme Court Historical Society, to which I am grateful for the opportunity. My thanks to Stuart Banner, Lorie Graham, and Joseph Singer for their keen insights in the field, and especially to Kristen Carpenter for providing detailed feedback and thoughtful criticism at all stages of this project.

ENDNOTES

[1] U.S. Const. art. II, § 2, cl. 2.

[2] U.S. Const. art. VI, cl. 2.

[3] U.S. Const. art. I, § 8, cl. 3.

[4] *See* Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)) ("[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty[, but] nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.").

[5] Charles F. Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW 24 (1987).

[6] David Listokin, et al., Center for Urban Policy Research, Housing and Development in Indian Country: Challenge and Opportunity 100 (2004).

[7] *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

[8] Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1073 (2000).

[9] Kristen A. Carpenter, *Property, Remedy, and Recovery* (manuscript on file with author).

[10] Stuart Banner, HOW THE INDIANS LOST THEIR LAND 10 (2005).

[11] Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 44-46 (1947).

[12] 21 U.S. 543 (1823).

[13] *See*, Lindsay G. Robertson, *The Judicial Conquest of Native America: The Story of* Johnson v. M'Intosh, *in* INDIAN LAW STORIES 29, 29-31 (Carole Goldberg, Kevin W. Washburn, & Philip P. Frickey, eds., 2011).

[14] Banner, *supra* note 9 at 179-80.

[15] *Id.* at 179.
[16] *Id.*
[17] *Id.* at 180.
[18] *Id.* at 179.
[19] Robertson, *supra* note 13, at 31-32.
[20] Banner, *supra* note 10, at 179.
[21] Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L. J. 763, 767 (2011) [hereinafter Singer, *Original Acquisition*].
[22] *Johnson*, 21 U.S. at 574.
[23] Joseph William Singer, *Erasing Indian Country: The Story of* Tee-Hit-Ton Indians v. United States, in INDIAN LAW STORIES, *supra* note 11, at 229, 243 [hereinafter Singer, *Erasing Indian Country*].
[24] Philip P. Frickey, *Doctrine, Context, Institutional Relationships and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 19 (2002) [hereinafter Frickey, *Doctrine*].
[25] Singer, *Erasing Indian Country, supra* note 23, at 244-45.
[26] Singer, *Original Acquisition, supra* note 20, at 767.
[27] Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 492 (1994).
[28] 30 U.S. 1 (1831).
[29] 31 U.S. 515 (1832).
[30] *Cherokee Nation*, 30 U.S. at 17.
[31] *Id.* at 48.
[32] *Id.*
[33] Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 8 (1942).
[34] *Worcester*, 31 U.S. at 561.
[35] Wilkinson, *supra* note 5, at 24.
[36] Banner, *supra* note 10, at 221.
[37] Andrew Jackson, *Second Annual Message*, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 500, 521 (James D. Richardson, ed., 1896), also available at http://www.ourdocuments.gov/doc.php?doc=25&page=transcript.
[38] Banner, *supra* note 10, at 191.
[39] *Id.*
[40] Wilkinson, *supra* note 5 at 14.
[41] Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1676, 1699 (2011).
[42] *Id.*
[43] An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act), 24 Stat. 388.
[44] Wilkinson, *supra* note 5, at 6.
[45] Riley, *Indians and Guns*, *supra* note 41, at 1711.
[46] Blue Clark, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2, 57–66 (1994) [hereinafter Clark, LONE WOLF]; *see* Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, in INDIAN LAW STORIES, *supra* note 13, at 189, 224.
[47] Frickey, *Doctrine, supra* note 24, at 6.
[48] 187 U.S. 553 (1903).
[49] *Id.* at 565-66.
[50] Frickey, *Doctrine, supra* note 24, at 12-13.
[51] *Id.* at 6.
[52] 430 U.S. 73 (1977).
[53] 448 U.S. 371 (1980).
[54] U.S. Const. Art. 1 Section 8, clause 3
[55] Frickey, *Doctrine, supra* note 24, at 14.
[56] Clark, LONE WOLF, *supra* note 46, at 65-66.
[57] Riley, *The Apex of Congress' Plenary Power over Indian Affairs, supra* note 46, at 189, 224.
[58] Clark, LONE WOLF, *supra* note 46, at 66.
[59] *Id.* at 94.
[60] *Id.* at 54-55.
[61] OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, INDIAN LAND TENURE, ECONOMIC STATUS AND POPULATION TRENDS 6 (1935) [hereinafter INDIAN LAND TENURE].
[62] Indian Reorganization Act, 48 Stat. 984.
[63] Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM U. L. REV. 753, 771 (1992) [hereinafter Newton, *Indian Claims*].
[64] Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994) [hereinafter Newton, *Compensation, Reparations, & Restitution*].
[65] Joseph Singer, Book Review, in Banner, HOW THE INDIANS LOST THEIR LAND, *supra*, note 8 (reviewing Banner on back jacket).
[66] *United States v. Dann*, 470 U.S. 39 (1985).
[67] *Dann*, 470 U.S. at 50. *See*, Allison M. Dussias, *Squaw Drudges, Farm Wives and the Dann Sister's Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 715-17 (1999).
[68] 348 U.S. 272 (1955).
[69] 448 U.S. 371 (1980).
[70] Singer, *Erasing Indian Country, supra* note 23, at 230.
[71] *Id.*
[72] *Id.* at 235.
[73] Felix S. Cohen, *Breaking Faith with Our First Americans*, INDIAN TRUTH, Mar.-Apr. 1948, at 6.
[74] *See*, Cohen, *Original Indian Title*, *supra* note 11, at 34-35 [emphasis added].
[75] *Tee-Hit-Ton*, 348 U.S. 277-279.
[76] *Id.* at 229-30.
[77] *Id.* at 289 [emphasis added].
[78] Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 95 n. 11 (1996).
[79] *Tee-Hit-Ton*, 348 U.S. at 283, n. 17; *see id.*
[80] *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79-81 (2000).
[81] 448 U.S. 371.

[82] Fort Laramie Treaty art. 2, Apr. 29, 1868, 15 Stat. 649.
[83] *Id.*
[84] Newton, *Indian Claims, supra* note 63, at 763-64.
[85] *Sioux Nation*, 448 U.S. at 374.
[86] *Id.* at 424.
[87] Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 248 (1982).
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[89] *Sioux Nation*, 448 U.S at 408-09, 416.
[90] *Id.* at 424.
[91] *See*, Tim Giago, *Black Hills Claims Settlement Funds Top $1 Billion*, Huffingtonpost.com (apr. 11, 2010, 12:06 PM), http://www.huffingtonpost.com/tim-giago/black-hills-claims-settle_b_533267.html.
[92] Newton, *Compensation, Reparations, & Restitution, supra* note 55, at 476.
[93] Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).
[94] 485 U.S. 439 (1988).
[95] Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, in INDIAN LAW STORIES, *supra* note 13, at 489, 491.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Lyng*, 484 U.S. at 440.
[100] *Id.* at 453.
[101] 544 U.S. 197 (2005).
[102] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).
[103] Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 12 (2006) (citing *City of Sherrill*, 544 U.S. at 222); *see* Non-Intercourse Act 25 U.S.C.§ 177 (2000).
[104] *Id.* at 8.
[105] Joseph William Singer, *Nine Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 607 (2006).
[106] *City of Sherrill*, 544 U.S. at 216 n.9.
[107] *Id.* at 221.
[108] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 433-34 (2005).
[109] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953).

"*Priests of Our Democracy*": The Origins of First Amendment Academic Freedom

MARJORIE HEINS

Introduction

In the years after World War II, the Supreme Court under Chief Justice Fred Vinson upheld nearly every aspect of the Cold War anti-communist crusade that came before it, including loyalty investigations of teachers and professors. Although Earl Warren, appointed Chief Justice in 1953, led the Court in a more free speech–friendly direction, change came haltingly. It was not until *Keyishian v. Board of Regents* in 1967 that the Court rejected the underlying premises of government loyalty programs and declared academic freedom a "special concern of the First Amendment."[1]

The First Amendment in the 1930s and 1940s

First Amendment jurisprudence essentially began in 1919 when Justice Oliver Wendell Holmes, Jr. announced the "clear and present danger" test to measure the validity of restrictions on political dissent, but then affirmed convictions for anti–World War I protests that had not created any danger to the republic that was either clear or present.[2] The first Supreme Court decision that reversed a conviction for allegedly subversive speech (in 1927) was decided on due-process rather than free-speech grounds.[3]

In 1931, with the anti-Bolshevik panic engendered by the Russian Revolution receding, the Court struck down a California law that banned public display of a red flag as a sign of "opposition to organized government," an "invitation or stimulus to anarchistic action," or an "aid to propaganda that is of a seditious character." The decision only invalidated the law insofar as it criminalized display of the flag as a symbol of peaceful protest.[4] Nevertheless, as the legal scholar Harry Kalven noted, this modest case was the first "in the history of the Court in which there was an explicit victory for free speech."[5]

The Court was more expansive in 1937 when it overturned the criminal syndicalism conviction of an organizer who had spoken at a meeting called by the Communist party to protest police brutality and raids on workers' homes. There was no evidence the defendant said anything violent or distributed revolutionary literature. Chief Justice Charles Evans Hughes's opinion affirmed that states may punish "an attempted substitution of force and violence in the place of peaceful political action," but ruled that, on these facts, the conviction violated the First Amendment.[6]

Two years later, *Hague v. CIO* struck down an ordinance that forbade the holding of meetings in streets and other public places without a police permit, which would not be granted for any meeting at which a speaker advocated "obstruction" of state or federal government or change in government "by other than lawful means." The city had refused labor organizers the right to hold meetings, seized their leaflets, and run them out of town.[7]

The Court continued expanding First Amendment rights during World War II. The same year that Robert H. Jackson's opinion in *West Virginia State Board of Education v. Barnette* affirmed the right of Jehovah's Witness children not to be forced to salute the flag,[8] Frank Murphy wrote an opinion reversing the revocation of citizenship of an active communist. The petitioner's beliefs, Murphy said in *Schneiderman v. U.S.*, neither conflicted with basic requirements for citizenship nor exceeded "the area of allowable thought" under the Constitution: not only the First Amendment but Article V, providing for amendments that change the structure of the government, "refute the idea ... that one who advocates radical changes is necessarily not attached to the Constitution."[9]

Harlan Fiske Stone, joined by Felix Frankfurter and Owen J. Roberts, dissented in *Schneiderman*. Frankfurter oozed contempt in a memo that called Murphy's draft opinion a "gossamer web of evasion and word-juggling." In a note to Murphy, he sarcastically suggested "that Uncle Joe Stalin was at least a spiritual co-author with Jefferson of the Virginia Statute for Religious Freedom."[10]

In 1946, as the Cold War began, the Court appeared to stand by its defense of dissenters. In *U.S. v. Lovett*, it struck down a law that prohibited salary payments to three federal employees because of their "views and philosophies as expressed in various statements and writings." The three had essentially been tried by a congressional subcommittee that relied largely on reports by the House Un-American Activities Committee (HUAC) and the FBI. Hugo L. Black's opinion deemed the law an unconstitutional bill of attainder because it "clearly accomplishes the punishment of named individuals without a judicial trial." The fact that the punishment was to revoke their salaries made it "no less galling or effective" than a criminal conviction. [11]

Lovett did not turn out to be a precursor of the Court's response to the wave of anti-subversive laws and investigations that followed. The facts were too singular for it to serve as a precedent. But the problem ran deeper. Despite the First Amendment decisions of the 1930s and early '40s, most of the Justices remained hostile to revolutionary exhortations and especially to communism. When the Cold War came, they were as vulnerable to exaggerated fears of domestic subversion as the rest of American society.

The Vinson Court

In part, the lamentable performance of the Vinson Court on First Amendment issues was a function of chance. Liberal justices Frank Murphy and Wiley Rutledge died in 1949, enabling President Truman to appoint his old friend, Indiana senator Sherman Minton, and his Texan Attorney General, Tom Clark, to the vacant slots. Both favored claims of national security over civil liberties. For the previous two years, Clark had presided over the Attorney General's List of

Subversive Organizations, a key component of Truman's 1947 federal employee loyalty program.[12]

Felix Frankfurter and Robert H. Jackson were swing votes on the Vinson Court. Frankfurter taxed his colleagues' patience with disquisitions on the importance of judicial restraint, but made exceptions when it came to issues about which he felt passionate, such as academic freedom. Jackson, like Frankfurter, tended to write lengthy concurrences explaining why he was upholding various civil liberties violations even though he personally opposed them.

The Court's first sign of acquiescence in the mounting heresy hunt came in 1948, when it refused to review the contempt-of-Congress conviction of an ex-communist lawyer who resisted HUAC's questions about his politics. The Second Circuit had affirmed the conviction, over the dissent of Charles Clark, who argued that a congressional committee "cannot undertake a completely unlimited inquisition in the area protected by the First Amendment."[13] The Court likewise declined the next challenge to HUAC—by Dr. Edward Barsky, who had organized the Joint Anti-Fascist Refugee Committee (JAFRC) to aid refugees from the Spanish Civil War. Barsky resisted HUAC's demand for documents disclosing the identities of JAFRC's 30,000 or so contributors and of the refugees who received its aid.[14]

Without any word of caution from the Court since *Lovett* in 1946, the legislative and executive branches were by 1949 fully engaged in exposing and blacklisting suspected communists. January 1949 saw the opening in New York City of the nine-month trial of eleven Communist party leaders for conspiracy to advocate the overthrow of the government, in violation of the 1940 Smith Act. HUAC was busy with numerous investigations. In February 1950, Joseph McCarthy stupefied the country with the first of his many charges that the federal government was filled with treasonous communists.

In May 1950, the Vinson Court took its first plunge into the legality of the new loyalty apparatus. The case involved section 9(h) of the 1947 Taft-Hartley Act, which required affidavits abjuring communist associations or beliefs from officers in unions that wanted the protections of federal labor law.[15] Victor Rabinowitz, who represented the union challenging the oath, knew his chances were slim because Justices Murphy, Rutledge, and Douglas were absent from the oral argument. "I well remember that appalling summer of 1949," Rabinowitz later wrote: "Justice Murphy died of a heart attack in July. Justice Rutledge had a stroke and died in August. And then, late in September, Justice Douglas had a horseback-riding accident . . . and was unable to take his place on the bench when it convened in October. Three sure votes lost, in two short months." The oral argument was grim: "The hostility in the courtroom was palpable. I knew that disaster was inevitable."[16]

Vinson, writing for the Court in *American Communications Association v. Douds*, rejected Rabinowitz's arguments that section 9(h) violated the First Amendment, was unconstitutionally vague, and constituted a bill of attainder. Only Stanley Reed and Harold H. Burton joined in all of Vinson's reasoning; Frankfurter and Jackson concurred in the result. Thus, the first major Supreme Court encounter with the test oaths and guilt by association that came to define the Red hunt was decided by a fractured majority of five Justices, but it was cited ceaselessly in the years to come as signaling the Court's approval of nearly any anti-subversive measure.

Vinson's opinion in *Douds* justified the Taft-Hartley oath as a means of preventing strikes. Congress had evidence, he said, that "communists and others proscribed by the statute" had joined unions not to further legitimate goals, but to disrupt industry.[17] Admittedly, these were speculative perils, based on guilt by association, and hardly

sufficient to meet the clear and present danger test. Vinson's answer was to dismiss clear and present danger entirely: "A rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity." He acknowledged that "the breadth" of the oath "would raise additional questions" if read "to include all persons who might, under any conceivable circumstances," hold revolutionary ideas. So he interpreted the language to cover only those "who believe in violent overthrow of the Government . . . as an objective, not merely a prophecy." Then he assumed that any Communist party member fell in the latter category.[18]

Vinson's distinction between an "objective" and a "prophecy" is difficult to make in the most deliberative of circumstances; it was rarely made by loyalty boards or FBI investigators. And the oath itself made no such distinction: it barred anyone who was a member of or "affiliated" with the Communist party.

Frankfurter's concurrence agreed that section 9(h), as written, was too broad and vague, but, unlike Vinson, he did not think the Court could rewrite the oath to make it narrower. Frankfurter understood the dangers of disclaimer oaths: to ask a person to disavow belief in revolution, he wrote, "trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization." Why, then, did he vote to uphold section 9(h)? Frankfurter's explanation was that the "offensive provisions" of the oath left its valid portion unaffected.[19]

Jackson's concurrence in *Douds* likewise recognized that the effects of the Taft-Hartley oath were neither minor nor indirect: "No one likes to be compelled to exonerate himself from connections he has never acquired." If the law required union officers "to forswear membership in the Republican Party, the Democratic Party or the Socialist Party, I suppose all agree that it would be unconstitutional." But the CP-USA was different: behind its "political party facade, the Communist Party is a conspiratorial and revolutionary junta." Jackson did not forgive the Party's flip-flop in 1941 after Hitler broke his pact with Stalin and invaded the USSR, and the party line switched from opposing U.S. aid to the allies to demanding "that American soldiers, whose equipment they had delayed and sabotaged, be sacrificed in a premature second front to spare Russia."[20]

Jackson's intense anti-communism thus warped his reasoning, for it did not follow from the sins of the party leadership in 1941 that anyone who associated with the Communist party in 1950 should be deprived of First Amendment rights. But, because he found the oath so troubling, and its chill on free speech far more serious than Vinson did, Jackson did not want *Douds* to be precedent for suppressing political opinions; hence, he limited his concurrence to the evils of communism—"without which," he said, "I should regard this Act as unconstitutional." After all, "our own Government originated in revolution. . . . That circumstances sometimes justify it is not Communist doctrine but an old American belief."[21]

When the Justices discussed the case after oral argument, Jackson had voted to strike down the Taft-Hartley oath.[22] His papers leave no clue as to why he changed his mind. Even his admirer, Harvard professor Arthur Schlesinger, Jr., who wrote to Jackson praising his "masterly opinion," wondered whether his "contention that 'every member of the Communist Party is an agent to execute the Communist program' is factually true." Jackson's reply acknowledged the distinction but lamented: "That is one of the difficulties from confining attention closely to the concrete situation while the profession will apply the opinion more generally."[23]

Hugo Black's approach was simpler. Test oaths like section 9(h) were among "the major devices used against the Huguenots in France, and against 'heretics' during the Spanish Inquisition"; they "helped English rulers identify and outlaw Catholics, Quakers,

Baptists, and Congregationalists. . . . And wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth. . . . Whether religious, political, or both, test oaths are implacable foes of free thought."[24]

The Odd Twins: *Bailey* and *Joint Anti-Fascist Refugee Committee* (*JAFRC*)

The Vinson Court's next brush with anti-subversive machinery involved President Truman's 1947 executive order requiring loyalty investigations of all federal workers.[25] Dorothy Bailey, a Civil Service Commission employee, was fired based on information received by her loyalty board that she was or had been a member of the Communist party and two other organizations on the Attorney General's List of Subversive Organizations. She never learned the source of the accusations, denied any communist sympathies, and submitted seventy affidavits attesting to her loyalty. A panel of the D.C. Circuit acknowledged that her case was "undoubtedly appealing"—she "was not given a trial in any sense of the word"—but held there was no constitutional violation: the clear and present danger test was irrelevant because "no one denies Miss Bailey the right to any political activity or affiliation"; she was simply denied a government job.[26]

The Vinson Court agreed to consider Bailey's appeal. The treatment of tens of thousands of federal workers—and by extension, thousands more in state loyalty programs—was riding on the result. But on April 30, 1951, *Bailey v. Richardson* was affirmed by an equally divided Court, with no explanation of reasons.[27]

The same day as *Bailey*, the Court imposed its first limit on the mounting repression. Truman's loyalty order directed the Attorney General, "after appropriate investigation," to compile a list of "totalitarian,

The Vinson Court first reviewed the legality of the new loyalty apparatus in 1950 when it heard a challenge to a section of the 1947 Taft-Hartley Act, which required affidavits abjuring communist associations or beliefs from officers in unions that wanted the protections of federal labor law. Chief Justice Fred Vinson's majority opinion rejected a First Amendment challenge to the provision on the theory that it would prevent strikes. Above, members of the National Maritime Union picketed against communists in their ranks in 1951.

fascist, communist, or subversive" organizations; membership in or "sympathetic association" with one would be proof of disloyalty. The list had a predictably devastating effect: organizations lost members, could not find meeting places, and could not raise funds.[28] Yet the Justice Department gave them no chance to contest the listings.

By the time of oral argument, JAFRC, the lead plaintiff, had been decimated by the jailing of its board and director for refusing to disclose to HUAC their contributors and recipients of aid. Now, with the National Council of American-Soviet Friendship and the International Workers Order (IWO), JAFRC was challenging the procedures for compiling the Attorney General's List. Although the government did not contest their claims that they were not communist organizations, a federal judge had dismissed the lawsuit. On these facts, and for reasons elaborated in five opinions, the Supreme Court reversed and remanded.

There was much contention at the Court. Jackson wrote at one point that he had received Douglas's draft and that, "lest the similarity of our results create some impression that I am sympathetic with his reasons, I desire expressly to disassociate myself from his opinion." He was incensed by Douglas's attack on the Justice Department: "it would suffice if we find that a good faith mistake in an unsettled and debatable field has been made as to the procedural safeguards necessary to a conclusive finding of disloyalty." It did not "seem necessary also to join the Communist campaign to smear our own Government by accusing this measure of being 'totalitarian' in trend. . . "[29]

In the end, Harold H. Burton wrote for the Court, but only Douglas joined in his reasoning. Burton essayed no view on the constitutionality of the loyalty program, simply ruling that the Justice Department procedures were "patently arbitrary." Whether the Attorney General could "reasonably find" the plaintiff organizations to be communistic would have to "await determination by the District Court."[30] The remand left ample room for Justice Department delay, and it continued to use its list against both the targeted organizations and people who were alleged to have associated with any of them.[31]

Douglas's concurrence in *JAFRC* remarked on the oddity of the Court's performance on April 30, 1951—striking down the shoddy procedures that produced the Attorney General's List but approving its use to deprive a person of her livelihood:

> The critical evidence may be the word of an unknown witness who is a paragon of veracity, a knave, or the village idiot. . . . The accused has no opportunity to show that the witness lied or was prejudiced or venal. And although the determination of disloyalty turned on association with or membership in an organization found to be "subversive," the accused was not allowed to prove that the charge against the organization is false. This technique of guilt by association is one of the most odious institutions of history. . . . When we make guilt vicarious we borrow from systems alien to ours and ape our enemies.[32]

Crime and Oaths

By June 1951, the Vinson Court had approved a disclaimer oath for labor leaders and affirmed the firing of a government worker on evidence she could not see or contest. It had at least required somewhat more judicious procedures before branding an organization subversive. But the Court had not yet addressed the most direct political repression: criminal prosecution for advocating radical ideas.

The eleven defendants in *Dennis v. U.S.* were Communist party officers convicted of

conspiring to advocate the forceful overthrow of the government, in violation of the Smith Act. The evidence consisted of writings by Marx, Lenin, and Stalin, supplemented by party history: Popular Front strategy in the 1930s, dissolution and replacement by the Communist Political Association, then an abrupt change after World War II when the U.S. and the USSR were no longer allies.

Vinson wrote for the Court, affirming the convictions. He acknowledged the clear and present danger test but, as in *Douds*, thought it "obvious" that the test "cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."[33]

Burton, Minton, and Reed joined Vinson's opinion; Clark recused himself: as Attorney General, he had initiated the prosecution. Frankfurter and Jackson, as in *Douds*, had many reservations but did not act on them. Frankfurter's concurrence noted that "the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day." But whether from a need to assert his liberal sympathies or to leave a trail of breadcrumbs for the future, he closed by quoting the diplomat George Kennan on the "emotional stresses and temptations" engendered by fear of communism, and the danger that Americans would become "rather like the representatives of that very power we are trying to combat: intolerant, secretive, suspicious, cruel, and terrified of internal dissension because we have lost our own belief in ourselves and in the power of our ideals."[34]

Jackson, despite his passion for free speech, also opted for judicial restraint. Deciding whether the convictions unconstitutionally punished speech that created no clear and present danger, he said, would require the Court to "appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians."[35]

Martin Dies, Chairman of the House Committee on Un-American Activities in the 1930s, waved documents relating to alleged subversive groups. Representative Dies was a Democrat from Texas.

Douglas's dissent required no appraisal of imponderables. He acknowledged that "the teaching of methods of terror and other seditious conduct" could be prohibited. But all these defendants did was teach Marxism-Leninism. Communism was not a domestic danger; it had been "so thoroughly exposed in this country that it has been crippled as a political force." True, "in days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents." But those conditions were long gone. Communists now were "miserable merchants of unwanted ideas."[36]

Black's dissent simply pointed out that the First Amendment bars Congress from making laws "abridging the freedom of speech." The Smith Act was precisely such a law. He hoped that "in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[37]

Dennis was the defining First Amendment case of the Cold War era. Its broadest impact was not on the floundering Communist party, but on the thousands of people who were subject to loyalty programs, blacklisting, and legislative inquisitions. And if there remained any doubt that loyalty purges could go forward unimpeded, it was answered the same day as *Dennis*, in a case involving the ritual of the disclaimer oath.

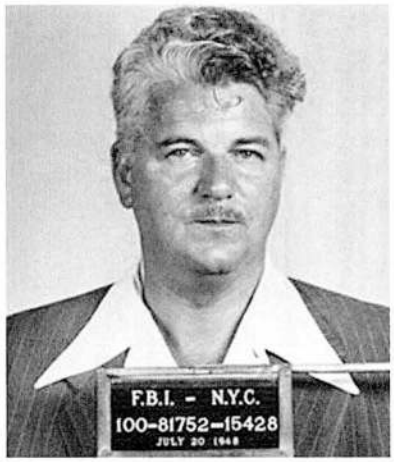
Garner v. Board of Public Works involved two such oaths. One required Los Angeles employees to swear that they had not within the past five years, and would not while employed by the city, advocate the forceful overthrow of the government or belong to an organization with such an aim. In a separate affidavit, employees had to disclose any past membership in the Communist party or the Communist Political Association, with dates and durations.

When the Justices discussed the case, a majority, including Jackson, voted to strike down the oath; Douglas's draft opinion found it an unconstitutional bill of attainder. But Jackson could not accept the bill of attainder argument: being fired, he thought, was not a form of punishment. Frankfurter agreed: "I am dead against the basis of Bill's opinion," he wrote to Jackson, and asked him to "wait and see what I have to say before you make up your mind."[38]

With Jackson and Frankfurter now leaning toward judicial deference, Douglas lost his majority. Eventually, Clark wrote the opinion in *Garner v. Board of Public Works*, ruling that a municipal employer is free to ask its employees questions "that may prove relevant to their fitness and suitability." The oaths and investigations were "reasonable," Clark said, citing a decision a few months earlier that had approved an oath required by Maryland of candidates for political office after the state's attorney general assured the Court that it applied only to "knowing" membership in subversive organizations.[39]

Clark read the same limit into the Los Angeles oath. He trusted that the city would not interpret it "as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent."[40] This notion that oaths and loyalty programs are constitutional if they only punish those with knowledge of a group's revolutionary aims became a defining feature of the Vinson Court, but it did nothing to diminish the impact of the purges.

The reasons were eminently practical. Whether past or present political associations were "knowing," they had to be disclosed. The Justices seemed oblivious to the impact of such disclosure, given the fierce anti-communism of the time. They were equally oblivious to the effect of a program that forces people to forswear beliefs and investigates their thoughts to discern whether membership



Eugene Dennis, General Secretary of the Communist Party USA, was arrested along with ten other party leaders in 1948 and convicted of conspiracy to advocate the violent overthrow of the United States. They claimed that their teachings were protected by the First Amendment and posed no clear and present danger to the nation.

was "knowing." Such investigations inevitably touched on petitions signed, books read, and donations made to progressive causes. And even if, as the Justices assumed, the process would sift out "knowing" from "unknowing" membership, there remained the basic problem with test oaths: they turned due process upside down because anyone who does not sign is assumed guilty and punished without evidence or trial.

Frankfurter dissented in part. The city's oath was not limited to "knowing" membership, he said, and would thus "operate as a real deterrent to people contemplating even innocent associations. . . . All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment."[41] Burton agreed with him, though on narrower, technical grounds. Black and Douglas dissented.

State Loyalty Laws

New York already had two laws imposing political tests on employment when it passed a third one—the Feinberg Law—in 1949. A 1917 statute barred anyone who engaged in "treasonable or seditious acts or utterances" from teaching. Another statute in 1939 barred anyone who advocated the overthrow of the government "by force, violence or any unlawful means," or were members of an organization with such an aim, from public employment.[42] The Feinberg Law implemented the other two by requiring the state to establish a list of subversive organizations, membership in which would be *prima facie* evidence of disqualification from employment, and to create procedures for investigating the loyalty of every employee.

Relying on First Amendment precedents from the 1930s and early '40s, two judges struck down the Feinberg Law. But the state's high court overturned those decisions, citing *Douds* and the Second Circuit's affirmance of the convictions in *Dennis*.[43] In the first round of voting after the case arrived at the Supreme Court, the Justices were 6–2 for affirmance, with Frankfurter in the middle, insisting that there was not a sufficient showing of harm from the law to create a live controversy. [44]

Frankfurter's argument that the case was premature did not stop the train wreck. By January 3, 1952, when *Adler v. Board of Education* was argued, it was a foregone conclusion that the plaintiffs would fail. Despite Frankfurter's argument in dissent that the Feinberg enforcement scheme was "still an unfinished blueprint,"[45] six Justices joined an opinion by Minton upholding the law.

Minton relied on the right-privilege distinction encapsulated half a century earlier by Oliver Wendell Holmes, Jr. in his famous comment that a person may have a right to talk politics but no right to be a policeman.[46] Thus, although the First Amendment assures that everybody may "assemble, speak, think and believe as they will," people cannot expect to work in the school system "on their own terms." Teachers work "in a sensitive area in a schoolroom. . . . One's associates, past and

present, as well as one's conduct, may properly be considered in determining fitness and loyalty."[47]

As in *Douds* and *Dennis*, Black's dissent was a warning: "This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for schoolteachers—to think or say anything except what a transient majority happen to approve at the moment."[48] Douglas was more expansive: he detailed the perils of loyalty programs that turn on "a principle repugnant to our society—guilt by association." The Feinberg Law would be "certain to raise havoc with academic freedom." Teachers would "tend to shrink from any association that stirs controversy." The school system would turn "into a spying project" where "the principals become detectives; the students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty":

> Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of *The Grapes of Wrath*?... Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect... A pall is cast over the classrooms.[49]

Fifteen years later, when the Court overruled *Adler*, William J. Brennan Jr.'s majority opinion borrowed Douglas's metaphor of a "pall" hanging over education.

Reactions to *Adler* were as vociferous as the passions that inspired the Feinberg Law. One admirer wrote to Black, "Were the late Justices Rutledge and Murphy still on the Supreme Court, we would not have had this decision." By contrast, an angry missive lambasted Black for defending "subversive teaching" and blamed him for "giving Godless Russia everything she wanted up to half the world."[50] *The New York Times* criticized the decision while adhering to its belief that communists should not be allowed to teach. Condemning guilt by association and lauding Douglas's "eloquent dissent," the paper warned against a "system of scholastic espionage or intellectual terrorism worthy of a police state."[51] But the *Times* did not explain how it thought communist teachers should be identified, except by the very methods it was condemning, and in this it resembled many anti-communist liberals, uncomfortable with the crudity, recklessness, and use of professional informers that characterized the Red hunt and thinking that more polite procedures or less demagogic rhetoric would make it all right.

Although Douglas's *Adler* dissent remained a minority view on the Court until the mid-1960s, he had made the case for academic freedom as a part of the First Amendment. Eleven months later, the Court invalidated a state loyalty program that included a disclaimer oath for public employees, including state college faculty. The oath was unconstitutional because it did not include a *scienter* limitation;[52] Frankfurter wrote a concurrence that turned on academic freedom:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens.[53]

It was a flicker of libertarian sentiment in an otherwise ghastly Supreme Court year.

Slochower v. Board of Higher Education

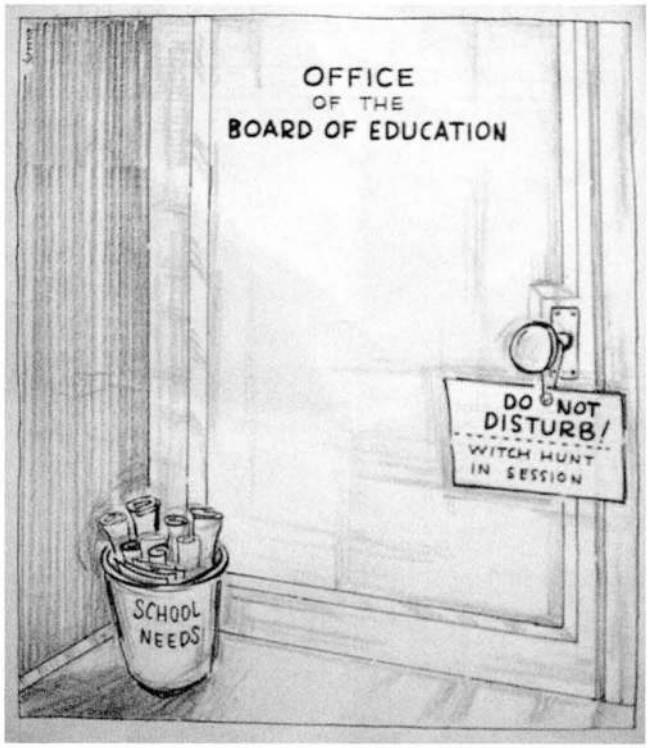
The Senate Internal Security Subcommittee (the SISS) came to New York City in 1952 to investigate the city's schools and

colleges. Professor Harry Slochower of Brooklyn College was one of the first to testify. The courts having already rejected the First Amendment as a basis for refusing to answer questions about past or present beliefs and associations, Slochower avowed that he had not been a Communist party member for the past eleven years, but invoked the Fifth Amendment as to 1940-41. This strategy kept him out of prison for contempt of Congress but it did not save his job or the jobs of more than a dozen other professors at New York City's public colleges who refused to answer some of the SISS's questions.

Section 903 of the New York City charter prohibited municipal employees from asserting the Fifth Amendment in the course of any official investigation, and declared their position "vacant" if they disobeyed. It had been added to the charter in 1936 in the wake of New York judge Samuel Seabury's investigation into city corruption;[54] it was now enlisted against professors resisting questions about their politics. Within a few weeks, Slochower and the others who resisted were fired.

Teachers Union attorney Harold Cammer represented the professors in a state court challenge to section 903. After a loss in the lower courts, Slochower hired a separate attorney, Ephraim London, who raised federal constitutional arguments that Cammer had not. Ultimately, only London got Supreme Court review.

On April 2, 1956—a week before the Court decided *Slochower*—it took a step toward slowing the loyalty juggernaut when it invalidated Pennsylvania's anti-sedition law on the ground that the federal Smith Act occupied the field of defining and punishing subversion.[55] If this was not quite the "dramatic return to libertarian values" that



Cartoonist Bernard Kassoy published this cartoon in *New York Teacher* criticizing investigations of teachers. About 500 teachers at public schools and universities lost their jobs between 1948 and 1958, mostly for refusing to answer questions or to execute loyalty oaths.

one historian claims,[56] at least it indicated that there might now be a majority in the Warren Court to impose some genuine limits on loyalty programs.

After oral argument in *Slochower*, the Justices discussed the right-privilege distinction. Frankfurter opined that "Holmes cover[ed] it all in [the] policeman case," but acknowledged that "to fire a person in 1950 because he does not say in 1940 that he was or was not a member of the Party is unreasonable." Frankfurter nevertheless wanted to postpone decision, Eisenhower appointee John Harlan agreed with him, and Reed, Burton, and Minton voted to affirm.[57] But at a second Conference, Clark voted to reverse, on the relatively narrow ground that the city had deprived Slochower of due process by firing him summarily.[58] Clark wanted to avoid a broader ruling on the issue of unconstitutional conditions. With five votes to reverse, and needing to hold onto Clark, Warren assigned him to write the opinion.

Clark's opinion in *Slochower* rejected the simplistic Holmes principle that any condition on public employment is constitutional: to say that nobody has a right to a government job "is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms." Using section 903 to summarily fire a tenured professor, without a hearing or other inquiry into "the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege" was so arbitrary as to violate due process.[59]

But Clark did not ignore the Fifth Amendment: "We condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right... The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." Clark ended, however, by noting that the city had "broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State."[60]

Black and Douglas appended a note indicating that they "adhere[d] to the views" expressed in their *Adler* and *Garner* dissents—that is, they objected to Clark's suggestion that the city could fire Slochower for his politics as long as it gave him due process. Reed, Burton, Minton, and Harlan dissented, with Harlan arguing that a teacher's refusal to answer questions "jeopardizes the confidence that the public should have in its school system"[61]—an argument that was to prevail two years later when Harlan assembled a majority to undo much of the reasoning of *Slochower*.[62]

The day after the decision, union attorney Cammer called city authorities to urge that the five professors he represented, who had been fired under section 903 but whose cases the Supreme Court had declined to review, be given the benefit of the ruling. The city refused, and also backed out of a stipulation that promised six other fired professors the same remedy, if any, won in the litigated cases. The city argued that the stipulation only applied if the professors succeeded in both cases, not just Slochower's.[63]

Red Monday and Beyond

The Warren Court took other cautious steps toward dismantling loyalty programs. In 1955, it overturned the federal Loyalty Review Board's firing of a Yale professor as a consultant to the Public Health Service, but avoided the constitutional question of whether loyalty boards could use evidence from informants that the employee could not see and therefore try to discredit or rebut.[64] The Justices had left that question hanging since their deadlock over Dorothy Bailey's firing four years before. In 1956, it reversed another loyalty dismissal without deciding whether firing someone based on alleged

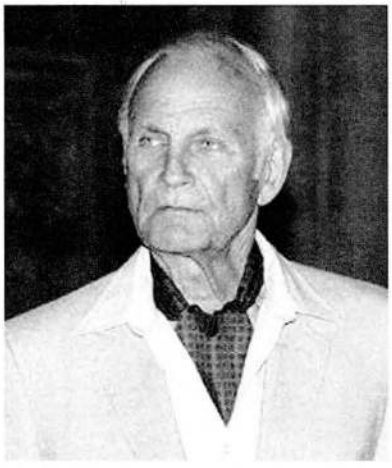
membership in an organization on the Attorney General's List of Subversive Organizations violated freedom of association.[65]

The first whiff of major change came in May 1957, in two cases that invalidated decisions by state bar committees denying admission to law practice on the basis of previous Communist party membership. Rudolph Schware had joined the party as a teenager and quit in 1940; he freely answered the committee's questions. Raphael Konigsberg had refused to answer questions about his political past. In both cases, the Court found violations of due process and rejected guilt by association.[66] Black, writing in *Schware v. Board of Bar Examiners*, pointed out that the Communist party "was a lawful political party with candidates on the ballot in most States" when Schware was a member.[67]

In early June 1957, the Court reversed the criminal conviction of union leader Clinton Jencks for filing a false Taft-Hartley affidavit. Brennan wrote for the majority that the trial judge had violated due process when he refused to order government disclosure of reports by informants who testified at trial, among them the perjurer Harvey Matusow.[68]

Jencks v. United States had major implications for the use of secret evidence—a point not lost on Tom Clark, who had urged at the Court's conference that it would be a "big mistake to open up FBI records on the showing here" and whose anger "only grew as his warnings went unheeded."[69] Clark's dissent charged that intelligence agencies might as well "close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets."[70]

Clark's rhetoric provided ammunition for what Brennan's biographers call "the still-potent Red Scare powder keg. . . . Within a day, members of Congress introduced eleven different bills" aimed at undoing *Jencks*.[71] The reaction did not deter the Court from issuing four more rulings, on June 17, 1957, that weakened major pillars of the Red hunt. The date became known as "Red Monday."



In 1954, Paul M. Sweezy, a Marxist economist, was summoned before the attorney general of New Hampshire, who had been conferred wide-ranging powers to investigate "subversive activities." After his refusal to answer some questions, Sweezy was held in contempt of court. His appeal of the contempt verdict was turned down by the New Hampshire Supreme Court, but upheld eventually by the U.S. Supreme Court in 1957.

One of the four decisions reversed the Loyalty Review Board's dismissal of a China expert from the State Department, even after he had been cleared five times by departmental loyalty boards.[72] A second ruling shrank the Court's broad interpretation of the Smith Act in *Dennis* by requiring evidence of "advocacy directed at promoting unlawful action," rather than abstract teaching, before a person could be jailed for subversive beliefs.[73] The third Red Monday case reversed the contempt conviction of labor organizer John Watkins, who had answered most of HUAC's questions but refused to "name names" of people who were no longer in the party. Warren wrote for the Court that, because the scope of HUAC's authorization was unclear and because there is no congressional power to "expose for sake of exposure," Watkins was justified in refusing to answer.[74] Early drafts of the opinion had strong First Amendment language, but

Frankfurter pushed Warren to remove it, writing: "As a matter of prudence, the stiffer our condemnation of action by Congress the less provocative should be the expression of it."[75]

The fourth Red Monday case involved Marxist scholar Paul Sweezy, convicted of contempt for refusing to answer some questions posed by New Hampshire Attorney General Louis Wyman, acting as a one-man investigating committee. Sweezy talked freely about his political views, but balked at providing information about people active in the Progressive party, including his wife; and although he assured Wyman that he had not, in a lecture at the state university, advocated overthrowing the government, he refused to reply to such queries as whether he told the students that "socialism was inevitable in this country."[76]

In a memo, Warren's law clerk argued that Sweezy had conceded the government's right to ask about his lectures, and could not pick and choose where the questioning should stop; furthermore, Wyman's inquiry was polite, lacking the "flamboyant abuses" of the "McCarthy approach."[77] Rejecting the advice, Warren wrote an opinion using the same logic as *Watkins v. United States*: the extent of the attorney general's authorization was unclear. Hence, Sweezy's right to due process was violated. But Warren additionally noted "the essentiality of freedom in the community of American universities" and "the vital role in a democracy that is played by those who guide and train our youth":

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.[78]

Warren thus recognized that, although there was nothing secret about Sweezy's lectures, the "atmosphere of suspicion and distrust" and the chilling effect of government investigation threatened academic freedom.

Frankfurter, meanwhile, had been investigating an academic freedom dispute in South Africa, where the legislature was threatening to reduce "non-European" university students to second-class status, thereby interfering with faculty governance.[79] As Warren was preparing his opinion, Frankfurter reminded the Chief, "A quarter century of my life was lived as a university teacher. . . . Both before I came to the Harvard Law School and since coming here, the problem of the relation of universities to the state has been a chief concern of mine."[80] Ultimately, Frankfurter (joined by Harlan) wrote a concurrence in *Sweezy v. New Hampshire* that turned on academic freedom rather than merely treating it as a "plus" factor in a due process case.

Frankfurter found the state's vague national-security justification for Wyman's questions "grossly inadequate" when "weighed against

Harry Keyishian was one of four professors at the State University of New York who refused to sign a disclaimer of Communist party affiliation that the school's Board of Trustees had instituted as a way of implementing the Feinberg Law. When their case came before the Supreme Court in 1967, the Justices finally rejected the basic tools of the loyalty era.

the grave harm resulting from governmental intrusion into the intellectual life of a university." He quoted the recent "poignant plea" of South African scholars, which identified "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[81] It was one of the ironies of the case that, while Warren, Black, Douglas, and Brennan rested the ruling on due process, the Court's two champions of judicial restraint recognized a First Amendment right to academic freedom as a limit on a political branch of government.

Frankfurter's opinion in *Sweezy* did not distinguish between the freedoms of individual scholars and those of the university. His concurrence seemed to elevate institutional interests, and thus failed to account for situations in which university administrations, rather than outside investigators, seek to squelch non-conforming professors.

Harry Kalven thought the Court's four liberals did not vote for an academic-freedom ruling in *Sweezy* because Frankfurter and Harlan were fair-weather allies. In this case, they concurred because the questions concerned Marxism and the Progressive party, but they would not have extended academic freedom to communists.[82] Kalven surmised that Warren *et al.* were "unwilling to make such a concession." Their strategy, Kalven further surmised, was thus "to protect the witness by means of procedural safeguards, while saving the First Amendment challenge for some later day."[83]

Red Monday triggered outraged responses: SISS chair James Eastland proposed a constitutional amendment requiring Justices to be re-confirmed every four years, and Senator William Jenner introduced a bill to remove Supreme Court jurisdiction over a broad swath of loyalty cases.[84] Others were enthusiastic: journalist I. F. Stone proclaimed that June 17, 1957, "will go down in the history books as the day on which the Supreme Court irreparably crippled the witch hunt."[85]

Stone was overly optimistic. In 1958, the Court approved loyalty dismissals of a teacher in Pennsylvania and a subway conductor in New York. Harlan, writing for the 5-4 majority in the New York case, made the circular argument that the firing was legitimate because, even though the conductor had pled the Fifth Amendment just as Harry Slochower had, he was not fired for invoking his constitutional privilege but "for creating a doubt as to his trustworthiness and reliability by refusing to answer the question."[86]

But 1958 was not entirely a year of retrenchment. The same day as the Pennsylvania and New York decisions, Brennan displayed his talent in assembling majorities by striking down a California law that mandated a disclaimer oath as a condition of receiving a tax exemption. In *Speiser v. Randall*, Brennan held that requiring taxpayers to prove their loyalty turns due process upside down: ordinarily, it is the state that must prove wrongdoing, especially when free thought is in question: "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."[87]

Brennan's biographers say "there was little to suggest at the time" that *Speiser* "would become a building block in the rights revolution that lay ahead."[88] The opinion was cautious and acknowledged precedents such as *Garner* and *Douds*. In these cases, Brennan said, unpersuasively, the oaths did not punish political speech but simply vindicated governmental concerns about efficiency or safety. Brennan distinguished *Adler*, too, because there, teachers "could only be dismissed after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence."[89] The distinctions were tenuous, but they were needed because, in 1958, he did not have a majority to

overrule the precedents supporting loyalty programs.

In June 1959, the Court decided the First Amendment question that Warren, Black, Brennan, and Douglas had avoided in 1957. By a 5–4 vote, it upheld the contempt conviction of Professor Lloyd Barenblatt for refusing to answer HUAC's questions about Communist party activity during his graduate student days. Harlan wrote for the Court that academic freedom "does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher."[90] As Douglas observed, HUAC's authorization was exactly the same as it had been when it questioned John Watkins, but "[w]hat had been six to one for Watkins became five to four against Barenblatt" and two other HUAC witnesses who lost their cases in 1961.[91] Kalven ruefully commented that the liberals' strategy of "marking time with procedural protections until some later day backfires. The 'later day' arrives too soon, and the four find themselves in dissent where they now openly rest their objections on the First Amendment grounds they had so carefully eschewed in *Sweezy*."[92]

Backlash, from one organization in particular, helps explain the Court's retreat in *Barenblatt v. United States*. In 1959, Louis Wyman persuaded a committee of the American Bar Association to recommend legislation that would override recent Supreme Court decisions that "weaken[ed]" internal security.[93] This threat from the nation's major lawyers' association could not have escaped the notice of President Eisenhower's newest appointment to the Court, Potter Stewart, or of Harlan and Frankfurter, who switched sides between *Watkins* and *Barenblatt*.

Stewart's vote was also critical in *Uphaus v. Wyman*, decided the same day as *Barenblatt*. Again, a witness had resisted Wyman's questions—this time, about employees and guests at the summer camp of the leftist World Fellowship. Neither the associational privacy recently established in *NAACP v. Alabama*[94] nor the due process limits announced in *Sweezy* persuaded five Justices to invalidate Wyman's demand. Clark wrote for the majority that, although guilt by association "remains a thoroughly discredited doctrine," this should not stop a state investigation "undertaken in the interest of self-preservation." And "the academic and political freedoms discussed in *Sweezy* were not present "in the same degree, since World Fellowship is neither a university nor a political party."[95] Stewart had suggested "in the same degree" and other phrases to smooth the edges of Clark's draft.[96]

Politics were again a factor in the Court's result. Frankfurter wrote to Brennan that "the vast appropriations that the Congress votes each year to Edgar Hoover" persuaded him not to question the legitimacy of Wyman's investigation.[97]

The retrenchment was temporary. In a 1960 decision, Justice Stewart invalidated an Arkansas law that required publicly employed teachers to disclose every organization to which they had belonged or contributed within the past five years. Stewart wrote that free association is "closely allied to freedom of speech" and that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[98]

The Court Tackles Disclaimer Oaths

Once the Supreme Court approved a disclaimer oath in *Garner*, more states and localities exacted similar pledges. By 1956, forty-two states and more than 2,000 local governments had created new oaths for their employees. Some states also demanded oaths from private school teachers, pharmacists, barbers, lawyers, voters, wrestlers, junk sellers, and applicants for unemployment benefits, public housing, or fishing licenses. Texas banned any book in the public schools unless

the author filed an oath disclaiming communism; if the author was no longer living (for example, Aristotle), the publisher had to file the oath in his behalf.[99]

In Florida in 1959, teacher David Cramp was ordered to sign an oath swearing that he was not a member of the Communist party, did not believe in the forcible overthrow of the government, did not belong to any group with such beliefs, and had not—and would not in the future—lend his "aid, support, advice, counsel or influence" to the party. Cramp refused; as he wrote to the ACLU, "I am not nor never have been a communist... but I feel it is a violation of my rights as a citizen... to have to so state in order to hold my job."[100] The school board was about to fire Cramp when attorney Tobias Simon rushed a complaint into state court, but the trial judge denied his request to preliminarily enjoin the discharge, and the Florida Supreme Court affirmed.[101]

Simon's appeal to the Supreme Court emphasized the chilling effect of disclaimer oaths and the importance of academic freedom. By executing the oath, he wrote, "an affiant pledges himself to so fetter his mind that he thereby takes a large step in destroying his own qualifications as a teacher."[102] At conference, six Justices focused on the extraordinary vagueness of the oath. "One could be subjected to prosecution for just about anything," Clark said.[103]

Stewart's opinion in *Cramp v. Board of Public Instruction* focused on Florida's open-ended pledge not to lend "aid, support, advice, counsel or influence to the Communist party." Communist party candidates had "in the not too distant past" appeared on election ballots, he pointed out; could anyone who had voted for them "safely subscribe" to the oath? Indeed, could a lawyer who had ever represented the party or its members swear "that he had never knowingly lent his 'counsel' to the Party?"[104] In a draft, Stewart had included "a judge who had ever decided a lawsuit" in the CP's favor, but this was deleted.[105]

The "very absurdity" of the examples, Stewart said, "brings into focus the extraordinary ambiguity of the statutory language.... With such vagaries in mind," the oath might well "weigh most heavily upon those whose conscientious scruples were the most sensitive." Although a perjury prosecution against lawyers or voters might seem "fanciful," it would be "blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." Florida's oath violated the rule against laws that are "so vague that men of common intelligence must necessarily guess at" their meaning[106]

The outcome was anti-climatic. The case went back to the Florida high court, which ruled that, because the U.S. Supreme Court had only struck down the "aid, support, advice, counsel or influence" portion of the oath, Cramp must swear to the rest.[107] The ACLU legal director wrote Simon asking if he intended further litigation. Simon replied, "Down in these here parts, we regard the *Cramp* case as a major victory... It has put the lie to the rumor that we are a bunch of losers, and judges, lawyers, friends, enemies, etc. give grudging respect to us as we walk down the streets." Simon acknowledged that the Supreme Court chose "a very narrow ground," but he did not think it fair to ask Cramp to continue litigating. He had been "financially hard-pressed" since he lost his job, had now signed the oath as amended, "and an effort is under way to secure the return of his teaching position."[108]

In Washington, meanwhile, another oath challenge had been percolating for years. A 1931 law required teachers to swear that, "by precept and example," they would "promote respect for the flag and institutions" of the state and nation, "reverence for law and order," and "undivided allegiance to the government." A second oath created in 1955 required every public employee to state "whether or not he or she knowingly is a member of the communist party or other

subversive organization, or is a subversive person."[109] False statements in either oath were punishable by up to fifteen years in prison, and anyone who failed to sign would be fired.

Two tenured University of Washington professors sued to challenge the 1955 law. They won an injunction, but the state supreme court reversed, in a decision rife with rhetoric about the "evil menace of expanding communism" and "the strategic geographical position of the state of Washington."[110] The Supreme Court vacated and remanded to the state courts to decide whether a teacher who refused the oath could be fired without a hearing. The Washington Supreme Court finessed the question by ruling that, although the law did not provide for a hearing, as tenured professors, the plaintiffs would be entitled to one. Since there were no untenured teachers in the case, this disposed of the due process problem. An appeal to the Supreme Court was dismissed for want of a substantial federal question,[111] whereupon the injunction that had prevented enforcement of the 1955 oath was dissolved.

In May 1962, the Washington Board of Regents set October 1 as the deadline for signing both the 1955 oath and the earlier pledge to "promote respect for the flag and institutions" of government and "reverence for law and order." The local chapters of the American Association of University Professors (AAUP) and ACLU prepared a federal suit, this time on behalf of sixty-four plaintiffs, a group that included untenured as well as tenured professors, foreigners for whom an oath of allegiance to the United States was problematic, Quakers who could not sign for religious reasons, and a variety of others. Several of the professor-plaintiffs alleged that they could not sign the oaths and continue to function as scholars. One taught **The Communist Manifesto** in his philosophy class; another attended international meetings that included communist scholars; a nuclear physicist felt he could not communicate with researchers from communist nations if he signed; a history professor could not sign without injecting "historically incorrect doctrines into his teaching."[112]

The vagueness of the oaths gave the federal judges the hardest time. They admitted that it was difficult to know what was meant by requiring teachers to swear to "promote, by precept and example," the flag, the institutions of government, and "reverence for law and order." But they thought the Washington Supreme Court should have a chance to elucidate these terms.[113] Once again, a procedural hurdle threatened to frustrate the case. But the Supreme Court noted probable jurisdiction and scheduled *Baggett v. Bullitt* for argument in March 1964.

The Road to *Keyishian*

In Buffalo, meanwhile, four professors at the State University of New York (SUNY) had refused to sign the "Feinberg certificate," a disclaimer of Communist party affiliation that the SUNY Board of Trustees had instituted as a way of implementing the Feinberg Law. The certificate required employees to accept all the restrictions of the law and to deny that they were members of the Communist party, or, if they ever had been, to state that they had disclosed this fact to the SUNY president.[114]

No doubt the Feinberg certificate was a response to the bureaucratic burden of conducting loyalty investigations on thousands of employees. But, like all disclaimer oaths, it affected many more individuals than those who might realistically fear retaliation for radical beliefs or associations. It thus greatly expanded the pool of people with standing to bring a new challenge to the Feinberg Law.

The first confrontation came not over the certificate but over a question on a civil service form that asked employees whether

they had "ever advised or taught," or been members of any group that taught, that the government should be overthrown "by violence or any unlawful means."[115] George Starbuck, a celebrated young poet who had recently started work at the university library, refused to answer a question he considered both vague and obnoxious.[116] By December 1963, SUNY had begun the process of firing him. The next month he wrote to a colleague that he had "joined a few others in a fight against one of them damn loyalty oaths which I had thought, in my innocence, to have died out with McCarthy. Result: I'll most likely be out of a job by July, if not by February 1 . . . I'm no revolutionary and never was a joiner; I've signed the damn things for the Army, . . . but I'm just not going to sign one more sweeping general promise about what I will forbid myself to think, discuss or condone."[117]

Starbuck's situation was urgent by the end of January 1964; administrators were about to fire him unless he completed the questionnaire. He retained Richard Lipsitz, who rushed a complaint into federal court. Judge John Henderson denied Lipsitz's motion for a preliminary injunction, whereupon Lipsitz dismissed the case; he later joined Starbuck in a new lawsuit with the four who refused to sign the Feinberg certificate.

Starbuck wrote to Charles Morgan, Jr., at the national office of the AAUP, requesting help in paying court costs and thanking him for "heartening" advice that he contrasted with his colleagues' "sympathy of the sickroom variety," as if he and the others fighting the oath "were all terminal cases of quixotism."

> I try to explain that martyrdom isn't in question—that there's a real case at law to be made... —but they've had it explained to them by the authorities: the Law is the Law; and they smile indulgently at my pose of modesty. They know the stake and faggots are being prepared for me: after all, what lesser danger could have deterred them from joining me?[118]

Morgan, soon to become a crusading civil rights lawyer, had a key role in seeing that the AAUP donated funds to the case that eventually became *Keyishian v. Board of Regents*. As SUNY administrators argued with the holdouts in the spring of 1964, three English professors—Harry Keyishian, Ralph Maud, and George Hochfield—also received AAUP aid.

Maud was oddly sure of victory. He wrote to the Emergency Civil Liberties Committee (ECLC), a left-wing alternative to the larger but more conservative ACLU, opining that the case was "impossible to lose." The ECLC forwarded his letter to attorney Leonard Boudin, hardly one to avoid a challenge. But Boudin warned Maud, "The case you present cannot, in my view, be described as 'impossible to lose.'" He reminded Maud that *Adler v. Board of Education* was still good law, and that other recent cases had reaffirmed its holding.[119]

While events unfolded in Buffalo, *Baggett v. Bullitt* was being briefed at the Supreme Court. The attorneys emphasized the chilling effect of Washington's oaths, especially the one requiring teachers to promise by "precept and example" to "promote respect for the flag" and "reverence for law and order." They cited figures showing the damage to academic freedom from loyalty programs: a study by sociologists had found that forty-six percent of the teachers surveyed felt apprehensive about their freedom to teach, write, and speak on public issues—fifty-four percent if only teachers without tenure were considered. Some professors "toned down their writings," some avoided controversial subjects in class.[120] About 500 teachers at public schools and universities had lost their jobs between 1948 and 1958, mostly for refusing to answer questions or to execute loyalty oaths.[121]

At conference, Brennan, Douglas, Black, Warren, and the newest justice, Arthur Goldberg voted to strike down both oaths. Warren opined that they were "too broad and too vague" and that the right to a hearing "means nothing, because explanation of reasons gets you nowhere." Clark protested: "I thought we'd passed on loyalty oaths," Harlan agreed.[122] But there were seven votes to invalidate the oaths. Warren assigned the opinion to Byron White.

As in *Cramp* three years before, so in *Baggett*, the decision did not squarely attack anti-subversive programs; instead, it used vagueness doctrine to invalidate the Washington oaths without reaching more politically treacherous questions. Nevertheless, *Baggett v. Bullitt*, announced on June 1, 1964, was a broader decision than *Cramp*, and gave a substantial boost to Richard Lipsitz and his clients in Buffalo.

White said Washington's 1955 anti-subversive oath suffered from "similar infirmities" as those that doomed Florida's oath in *Cramp*. "A teacher must swear that he is not a subversive person" and does not advocate any revolutionary act. A person might reasonably conclude that any aid to the Communist party or one of its members could make you a "subversive person." Hence, "the questions put by the Court in *Cramp* may with equal force be asked here." What about endorsement or support of communist candidates for office? What about a lawyer who represents the Party or its members, or a journalist who defends their rights?[123]

After this, it was a simple matter for White to dispose of Washington's "precept and example" oath. Even "criticism of the design or color scheme of the state flag. . . could be deemed disrespectful." The law's reference to "institutions" was even more enigmatic. This wildly vague oath could stop a professor "from criticizing his state judicial system or the Supreme Court or the institution of judicial review," or from "advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American Activities, or foreign aid."[124]

White concluded by warning of the perils of vague laws in "sensitive areas of basic First Amendment freedoms." Uncertain meanings require oath-takers "to 'steer far wider of the unlawful zone'" than if the boundaries are "clearly marked." People "with a conscientious regard for what they solemnly swear or affirm" would have to confine their activities "to that which is unquestionably safe. Free speech may not be so inhibited."[125]

Clark's dissent, which Harlan joined, was indignant at the majority's invalidation of the 1955 oath, which was no different from myriad others that targeted advocacy of revolution, including some that the Court had approved. Furthermore, it was "absurd" to think that professors might violate this oath by teaching history or any other subject, "to so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist."[126]

In July 1964, three months after the Supreme Court ruled in *Baggett*, Richard Lipsitz filed *Keyishian v. Board of Regents* in federal court. Joining Starbuck with Keyishian, Hochfield, Maud, and philosophy instructor and Quaker Newton Garver, Lipsitz launched a full-dress assault on the Feinberg Law. Again, Judge Henderson was assigned the case. In September, he denied Lipsitz's motion for a preliminary injunction and a three-judge court.[127] But the Second Circuit reversed in May 1965, finding a substantial federal question, and sent the case back to Buffalo so that a three-judge court could be convened. Then–circuit judge Thurgood Marshall wrote that *Adler* was not dispositive: the Supreme Court had since rejected the notion that "public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable."[128]

SUNY Chancellor Samuel Gould now persuaded the trustees to revoke the Feinberg certificate.[129] The state's lawyers were to argue that, with the oath gone, there was no

longer a live controversy. But Lipsitz had framed his case as a challenge to the whole Feinberg Law. *Keyishian* went to trial before a three-judge court, which in January 1966 again dismissed the case. Lipsitz began drafting his Supreme Court papers.

The Court had one more loyalty case on its docket before it decided *Keyishian*. Since Arizona's beginnings as a territory, it had a typical affirmative oath for all public employees—to swear to support the United States and state constitutions, to "bear true faith and allegiance" to them, and to "defend them against all enemies, foreign and domestic." In 1961, the legislature created criminal penalties for anyone who took the oath yet "knowingly and willfully" became or remained a member of the Communist party, "any of its subordinate organizations," or any other group that had as "one of its purposes" the overthrow of the government.[130]

Barbara Elfbrandt, a schoolteacher and Quaker, had conscientious objections to the oath. She brought a class action suit, but the state courts dismissed it. Elfbrandt was not fired; she simply was not paid. She continued to teach for five years without salary before her case was resolved.[131]

The Arizona Supreme Court acknowledged that the oath and perjury law might deter "constitutionally protected conduct" and that they "weigh[ed] most heavily on those whose scruples are the most sensitive," but it rejected Elfbrandt's claim. The Supreme Court remanded for reconsideration in light of *Baggett*; the state supreme court again upheld the law.[132] There were now five votes to reverse, and Warren assigned the opinion to Douglas. This boded well for a decision on grounds more sweeping than the case-by-case method of finding particular oath language too vague, but Douglas's first draft relied only on vagueness. A different draft four days later contained the essence of Douglas's April 1966 decision in *Elfbrandt v. Russell*, invalidating Arizona's loyalty scheme as an unconstitutional exercise in guilt by association.[133] It was a step beyond the recent rulings in *Cramp* and *Baggett*, but, in the process, Douglas lost the votes of their authors, Stewart and White.

Douglas explained that Arizona's perjury law was too broad because it punished people who joined a political group without specific intent to further the group's illegal aims.[134] The Court had ruled in *Garner* that people must have knowledge of those aims, or *scienter*, before they can be punished for organizational affiliations, but the *scienter* rule had done nothing to slow the purges. More recently, the Court had added a further requirement in cases involving criminal laws: the person must not only know of but specifically share the group's unlawful purpose.[135] Douglas in *Elfbrandt* now extended this specific intent requirement to a loyalty case.

It seemed a technical distinction, but it made a huge difference. Tens of thousands of people had joined the Communist party over the years, probably knowing that it supported violent revolution in some circumstances but not specifically intending to further that purpose. They joined instead because it seemed the best way to fight fascism, racism, and other evils, because they believed that an overhaul of existing institutions, not just piecemeal reforms, was needed, and because the Party offered a cultural community of fellow radicals.

White's dissent, joined by Clark, Harlan, and Stewart, quarreled with Douglas's specific intent requirement.[136] As the dissenters knew, punishments based on guilt by association could not continue if the government had to prove specific intent before prosecuting or firing people on the basis of present or past associations. It remained for the next loyalty case, *Keyishian*, for the Court finally to end the teacher purges.

Keyishian at the Supreme Court

Lipsitz's Supreme Court papers relied on academic freedom at the college level as a

way of distinguishing *Keyishian* from *Adler v. Board of Education*. His jurisdictional statement argued that the convoluted apparatus of the Feinberg Law was fundamentally incompatible with institutions whose *raison d'être* was intellectual freedom.[137] But Lipsitz did not ignore the other possibility: that the Court should overrule *Adler*. This would have the advantage of "at last eliminating" guilt by association, which "represents an aberration on the American scene."[138] The state's lawyers, for their part, admitted that the plaintiffs were sincere conscientious objectors: "there is no indication that any of the appellants are, in fact, members of any communist party."[139]

At oral argument, Warren threw Lipsitz a softball question: "I suppose you'll tell us why university students are less subject to subversion than children?" Lipsitz replied that, in contrast to 1949, when the Feinberg Law included "findings" as to the risk of communist indoctrination, the addition of universities to the law in 1953 was unaccompanied by any findings of danger.[140]

Ruth Kessler Toch, defending the case for the state, focused on technical questions of procedure: the sections of the law making Communist party membership "*prima facie* evidence of disqualification," she said, did not unconstitutionally shift the burden of proving loyalty to employees. Lipsitz countered that the law gave the accused only three narrow ways to rebut guilt by association: they could argue that the organization in question was not really subversive—even though the state had already concluded that it was—or that they were not members, or that they had no knowledge of the organization's unlawful goals.[141]

This wrangling over procedure may have signaled the Court's interest in avoiding more substantive issues, and at conference the result was uncertain. Warren wanted to reverse based on the vagueness of the "statutory scheme as a whole."[142] Black, Douglas, and Brennan agreed, but Justice Abe Fortas, whose Washington, D.C., law firm had represented victims of loyalty programs, was nevertheless tentative. Brennan's law clerks recount what happened next: "It was clear that Justice Fortas was a shaky vote for reversal, and he indicated he did not know which way he would ultimately turn."[143]

Warren assigned the opinion to Brennan, who began by trying to emphasize the differences between *Adler* and *Keyishian*. But, after trying "to unravel and delineate the boundaries" set by the Feinberg Law's "complex scheme," Brennan concluded that the "prolixity and profusion" of provisions affecting First Amendment rights made the entire law unconstitutional. He "also decided that *Adler* was not worth saving, and that its interment could be made explicit." He circulated his draft and received "quick affirmative responses" from Black, Douglas, and Warren. "But there was no word from Justice Fortas." More than two weeks later, Clark circulated a dissent. Its "McCarthyistic" tone "outraged" the wavering Fortas and persuaded him to join Brennan in striking down the law.[144]

Brennan's opinion in *Keyishian* turned on both vagueness and overbreadth. Section 3021 of New York's education law, originally enacted in 1917, mandated job termination for "treasonable or seditious" acts or utterances, and a 1958 amendment to the civil service law incorporated the same vague language. The amendment provided definitions: "treasonable" had the criminal law meaning of levying war against the United States or giving aid and comfort to its enemies; "seditious" meant "criminal anarchy," defined as advocating forceful overthrow of the government or assassination of its leaders. But, said Brennan, "our experience under the Sedition Act of 1798 taught us that dangers fatal to First Amendment freedoms inhere in the word 'seditious.'" Even if the terms "treasonable or seditious" in the 1917 law were assumed now to have the definitions in the 1958 amendment, "the uncertainty is hardly removed," for

"seditious" could still include abstract advocacy of revolution. "If so, the possible scope of 'seditious' utterances or acts has virtually no limit." It would cover the "public display" of any book "containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means."[145]

This led Brennan to the first of *Keyishian*'s rhetorical questions: "Does the teacher who carries a copy of the **Communist Manifesto** on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscientious and scrupulous regard for such undertakings.'"[146]

Brennan also found unconstitutional vagueness in the 1939 law barring employment of anyone who "advocates, advises or teaches the doctrine of forceful overthrow of government." The provision was "susceptible of sweeping and improper application"; it could "prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action." And "since 'advocacy' of the doctrine of forceful overthrow is separately prohibited," what other meaning might the words "teach" and "advise" have? "Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?" The "very intricacy" of the law's administrative machinery and the "uncertainty as to the scope of its proscriptions" made it "a highly efficient *in terrorem* mechanism."[147]

Brennan now turned to academic freedom. He borrowed the "pall over the classroom" imagery of Douglas's *Adler* dissent: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[148]

Brennan proceeded to the question of guilt by association. The Feinberg Law made Communist party membership "*prima facie* evidence of disqualification." Although *Adler* had upheld the provision, "pertinent constitutional doctrines ha[d] since rejected" the premises of *Adler*. Guilt by association is not an acceptable legal rule unless an individual has "a specific intent to further the unlawful aims of an organization." Should the result be any different because teachers and professors "have captive audiences of young minds?" On the contrary: "curtailing freedom of association" has an impermissibly "stifling effect on the academic mind."[149]

Brennan's clerks recount that the announcement of majority and dissenting opinions in *Keyishian* was "marked by some of the most impassioned oratory which followers of the Court had ever seen."[150] Clark attacked the "blunderbuss fashion in which the majority couches its 'artillery of words'" and predicted that "neither New York nor the several States that have followed the teaching of *Adler* for some 15 years can ever put the pieces together again." The Court had

> swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. [151]

Keyishian v. Board of Regents had a tremendous impact. In the next three years, courts in the District Columbia and eight states invalidated loyalty laws; attorneys general in six others pronounced them unconstitutional.[152] Brennan's opinion nonetheless left many questions about the scope of academic freedom unanswered. *Keyishian* became a ubiquitous source of authority for

court decisions condemning censorship in school libraries, reading assignments, and classrooms, but it also invited myriad conflicts over where to draw the line.

Today, the status of *Keyishian* is uncertain. Subsequent cases have noted a tension between institutional and individual academic freedom, without indicating how courts are to umpire disputes when the two collide. [153] Then, in 2006, the Supreme Court decided in *Garcetti v. Ceballos* that public employees have no First Amendment protection against retaliation for statements "pursuant to their official duties."[154] David Souter, dissenting, sounded an alarm: the Court's creation of an "ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor." He hoped that the majority did not "mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to [their] official duties.'" In response, Anthony Kennedy, author of the majority opinion, inserted a caveat:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.[155]

The Court's once full-bodied appreciation of academic freedom in *Keyishian* was now reduced to an ambiguous aside.

Conclusion

The Supreme Court responded dismally to deprivations of free speech and due process during the Cold War's early years. Despite piecemeal invalidations of a few egregious government actions, the Court did nothing to protect the "discrete and insular minorities" that Harlan Fiske Stone, in his famous *United States v. Carolene Products* footnote,[156] identified as the groups needing judicial solicitude. The situation improved, gradually, under the Warren Court, but it was not until *Keyishian* in 1967—well after the Red hunt had abated—that the Court fully rejected the basic tools of the loyalty era.

Author's Note: This article is based on several chapters from the author's book **Priests of Our Democracy: The Supreme Court, Academic Freedom, and the Anti-Communist Purge**, published in spring 2013 by NYU Press.

ENDNOTES

[1] 385 U.S. 589, 603 (1967).

[2] *Schenck v. United States*, 249 U.S. 47 (1919).

[3] *Fiske v. Kansas*, 274 U.S. 380 (1927) (reversing conviction under Kansas criminal syndicalism law based solely on defendant's membership in Industrial Workers of the World).

[4] *Stromberg v. California*, 283 U.S. 359 (1931).

[5] Kalven, **A Worthy Tradition: Freedom of Speech in America** 167 (1988).

[6] *DeJonge v. Oregon*, 299 U.S. 353, 363–5 (1937).

[7] 307 U.S. 496 (1939).

[8] 319 U.S. 624 (1943).

[9] 320 U.S. 118, 137–9 (1943).

[10] Frankfurter to Stone, 5/31/1943; Frankfurter to Murphy, 5/31/1943, Felix Frankfurter Papers, Harvard Law School, 3:2.

[11] 328 U.S. 303, 316-8 (1946).

[12] See Eleanor Bontecou, **The Federal Loyalty-Security Program** (1953); Robert Goldstein, **American Blacklist** (2008).

[13] *Josephson v. United States*, 165 F.2d 82, 95 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948).

[14] *Barsky v. United States*, 167 F.2d 241 (D.C. Cir. 1948). See *Joint Anti-Fascist Refugee Committee v. McGrath* (*JAFRC*), 341 U.S. 123, 130–1 (1951). Each of JAFRC's board members was called before HUAC and refused to surrender the records; all were convicted of contempt of Congress.

[15] The officer had to swear that he was "not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports

any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." *American Communications Ass'n v. Douds*, 339 U.S. 382, 385–6 (1950).

[16] Rabinowitz, **Unrepentant Leftist** 55 (1996).

[17] *Douds* at 388–9.

[18] *Id.* at 399, 408, 411.

[19] *Id.* at 419–22.

[20] *Id.* at 434-5, 422–4, 427.

[21] *Id.* at 422–3, 439.

[22] Docket sheet, *Douds*, 10/15/1949, Robert Jackson Papers, Library of Congress, 151:1.

[23] Schlesinger to Jackson, 6/16/1950; Jackson to Schlesinger, 6/29/1950, *id.* at 159:3

[24] *Douds* at 446–8.

[25] See Bontecou.

[26] *Bailey v. United States*, 182 F.2d 46, 50, 61 (D.C. Cir. 1950), aff'd without opinion, 341 U.S. 918 (1951). As in *Barsky*, Judge Henry Edgerton dissented, objecting in particular to such questions asked at loyalty hearings as: "What books do you read?" "How do you explain the fact that you have Paul Robeson record[s] in your home?" and "Do you ever entertain Negroes in your home?" *Id.* at 66–71.

[27] Minton, Burton, Reed, and Vinson voted to affirm; Jackson, Douglas, Frankfurter, and Black voted to reverse. Clark, the former Attorney General, did not participate. Docket sheet, *Bailey*, 10/14/1950, Jackson Papers, 167:2.

[28] *JAFRC* at 127, 175 (Douglas, concurring).

[29] Draft "Addendum," 4/12/1951, Jackson Papers at 165:9.

[30] *JAFRC*, 136, 141–2.

[31] Goldstein at 148–204; see also Arthur Sabin, **In Calmer Times: The Supreme Court and Red Monday** 74 (1999) (the victory in *JAFRC* was "entirely pyrrhic: it changed nothing").

[32] *JAFRC* at 178–9 (internal citations omitted).

[33] 341 U.S. 494, 509 (1951).

[34] *Id.* at 525, quoting Kennan, "Where Do You Stand on Communism?," *The New York Times Magazine*, 4/27/1951, 7, 53.

[35] *Id.* at 570.

[36] *Id.* at 582, 588–9.

[37] *Id.* at 589, 581.

[38] Frankfurter to Jackson, 5/24/1951, Frankfurter Papers, 3:1.

[39] 341 U.S. 716, 720–3 (1951), citing *Gerende v. Election Board*, 341 U.S. 56 (1951).

[40] *Id.* at 723–4.

[41] *Id.* at 728.

[42] NY Laws of 1917, ch. 416; NY Laws of 1939, ch. 547.

[43] *Thompson v. Wallin*, 301 N.Y. 476, 489 (1950).

[44] Docket sheet, *Adler*, Jackson Papers, 171:7; see also *Adler v. Board of Education*, 342 U.S. 485, 504 (1952). Frankfurter pressed the point at oral argument; in response, attorney Osmond Fraenkel argued that the Feinberg Law created "a miasma of fear and intimidation." Luther Huston, "High Court Scans the Feinberg Law," *NY Times*, 1/4/1952, 21.

[45] *Adler* at 497.

[46] *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

[47] *Adler* at 492–4.

[48] *Id.* at 496–7.

[49] *Id.* at 508–11.

[50] Irving Dillard to Black, n.d., and Mrs. L. E. Trachsel to Black, May 1952, Hugo Black Papers, Library of Congress, 310: Adler.

[51] Editorial, "The Feinberg Law Upheld," *The New York Times*, 3/5/1952, 28.

[52] *Wieman v. Updegraff*, 344 U.S. 183 (1952).

[53] *Id.* at 195-6.

[54] See *Slochower v. Board of Higher Education*, 350 U.S. 551, 564–5 (1956).

[55] *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

[56] David Oshinsky, **A Conspiracy So Immense: The World of Joe McCarthy** 497 (2005).

[57] Douglas notes, 10/21/1955, William O. Douglas Papers, Library of Congress, 1164: O.T. 1955.

[58] Douglas notes, 3/8/1956, *id.* at 1164: O.T. 1955.

[59] *Slochower* at 555–9.

[60] *Id.* at 558–9.

[61] *Id.* at 559, 560–6.

[62] See *Lerner v. Casey*, 357 U.S. 468, 476 (1958). The Supreme Court also eventually retreated from *Slochower*'s statement that no adverse inference should be drawn from use of the Fifth Amendment. The case involved a prison disciplinary proceeding. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[63] Minutes, Board of Higher Education "903 Committee," 4/10/1956, City University of New York, BHE Archives, TN-139. After the Supreme Court decision, Brooklyn College momentarily reinstated Slochower, then suspended him on charges of lying about past Communist party membership. He resigned the day before his administrative trial was to begin. Leonard Buder, "Slochower to Get and Lose Old Job." *The New York Times*, 4/10/1956, 17; Hearing transcript, 1/5/1957, City University Archives, TN-139.

[64] *Peters v. Hobby*, 349 U.S. 331 (1955).

[65] *Cole v. Young*, 351 U.S. 536 (1956).

[66] *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

[67] *Schware* at 244.

[68] *Jencks v. United States*, 353 U.S. 657, 665 n. 9 (1957) ("Matusow recanted as deliberately false the testimony given by him at the trial. On the basis of this recantation, the petitioner moved for a new trial. . . . The District Court denied the motion").

[69] Seth Stern and Stephen Wermiel, **Justice Brennan: Liberal Champion** 127 (2010).

[70] *Jencks* at 681–2.

[71] Stern and Wermiel at 127–8. After much maneuvering, the compromise "Jencks Act" provided that trial judges should decide whether information must be turned over and that the penalty for non-disclosure would be to strike the witness's testimony, not dismiss the case. Walter Murphy, **Congress and the Court** 152–3 (1962).

[72] *Service v. Dulles*, 354 U.S. 363 (1957).

[73] *Yates v. United States*, 354 U.S. 298, 318 (1957). *Yates* sparked a heated reaction from FBI director J. Edgar Hoover, who saw that it would make further prosecutions of communist leaders nearly impossible. Fearing such a ruling, Hoover had instituted his illegal program of surveillance and dirty tricks, COINTELPRO, the previous year. Sabin at 6–12, 192–8.

[74] *Watkins v. United States*, 354 U.S. 178, 200 (1957).

[75] Frankfurter to Warren, 5/31/1957, Earl Warren Papers, Library of Congress, 580:261,175.

[76] *Sweezy v. New Hampshire*, 354 U.S. 234, 243–4 (1957).

[77] Curtis Reitz to Warren, n.d., 8-11, Warren Papers at 174:151-75.

[78] *Sweezy* at 250.

[79] Arthur Suzman to Frankfurter, 5/15/1957; Albert Van de Sandt Centlivres, "Freedom," *The Forum*, Mar. 1957, in Frankfurter Papers, 2:25.

[80] Frankfurter to Warren, 6/3/1957, Warren Papers at 174:151–75.

[81] *Sweezy* at 261–3 (citations omitted).

[82] *Id.* at 266.

[83] Kalven at 497.

[84] "High Court Scored in Senate and House," *The New York Times*, 6/25/1957, 15; Murphy at 154–7.

[85] Stone, **The Haunted Fifties** 204 (1963).

[86] *Lerner*, 357 U.S. at 476. The teacher case was *Beilan v. Board of Public Education*, 357 U.S. 399 (1958).

[87] 357 U.S. 513, 526 (1958).

[88] Stern and Wermiel at 136.

[89] *Speiser* at 528 n. 8.

[90] *Barenblatt v. United States*, 360 U.S. 109, 113 (1959).

[91] Douglas, **The Court Years** 100 (1981). The other two cases were *Braden v. United States*, 365 U.S. 431 (1961), and *Wilkinson v. United States*, 365 U.S. 399 (1961).

[92] Kalven at 498.

[93] "Bar Bids Congress Tighten Red Laws," *The New York Times*, 2/25/1959, 1; "Text of Bar Association's Stand on Communists," *NY Times*, 2/25/1959, 25.

[94] 357 U.S. 449 (1958) (invalidating Alabama's demands for NAACP membership list).

[95] 360 U.S. 72, 79, 77 (1959).

[96] Stewart noted that "political and perhaps also academic freedom can be at least to some extent involved even when it is not a university . . . that is being investigated." Stewart to Clark, 2/23/1959, Potter Stewart Papers, Yale University Library, 167:1466. Stewart also (with Harlan) urged Clark to make clear that the state cannot subpoena guest lists without "grounds for believing that the Fellowship was a subversive organization"; Clark's draft "could permit a state to subpoena everyone in the telephone book and ask them to give the names of their house guests." *Id.*; Harlan to Clark, 2/10/1959, *id.* at 167:1466.

[97] Frankfurter to Brennan, 1/7/1959, William Brennan Papers, Library of Congress, I:19:3.

[98] *Shelton v. Tucker*, 364 U.S. 479, 485–7 (1960).

[99] Harold Hyman, **To Try Men's Souls: Loyalty Tests in American History** 338 (1959); Robert Goldstein, **Political Repression in Modern America** 351–2 (2001).

[100] Cramp to ACLU, 11/6/1959, ACLU Archives, Princeton University Library, 1318.

[101] *Cramp v. Board of Public Instruction*, 125 So.2d 554 (Fla. 1960).

[102] Jurisdictional Statement, *Cramp v. Board of Public Instruction*, 2/1/1961, 9–11.

[103] *Cramp* docket book, Stewart Papers, 383:4690.

[104] *Cramp*, 368 U.S. 278, 286 (1961).

[105] Undated draft, Stewart Papers, 15:144.

[106] *Cramp* at 286–7, 293.

[107] *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1964).

[108] Mel Wulf to Simon, 3/6/1962; and Simon to Wolf, 3/12/1962, ACLU archives, Princeton University, 1318.

[109] Washington Laws, 1931, ch. 103; Washington Laws, 1955, ch. 377.

[110] *Nostrand v. Balmer*, 53 Wn.2d 460, 467 & n. 11 (1959).

[111] *Nostrand v. Little*, 362 U.S. 474 (1960).

[112] Jurisdictional Statement, *Baggett v. Bullitt*, 6/20/1963, 25–33.

[113] *Baggett v. Bullitt*, 215 F. Supp. 439, 454 (W.D. Wash. 1963).

[114] Feinberg certificate, Richard Lipsitz Papers, University of Buffalo, 2:2.

[115] Starbuck Payroll and Personnel Transaction form, 10/28/1963, Lipsitz Papers, 2:5.

[116] *Id.*

[117] Starbuck to "Mark," 1/10/1964, George Starbuck Papers, University of Buffalo, 1:1.

[118] Starbuck to Morgan, 3/24/1954, Lipsitz Papers at 2:4.

[119] Boudin to Maud, 1/29/1964, *id.* at 1:1.23.

[120] Jurisdictional Statement, *Baggett*, 6/20/1963, 37–8, 73, citing Paul Lazarsfeld and Wagner Thielens, **The Academic Mind: Social Scientists in a Time of Crisis** (1958).

[121] *Id.* at 73, citing Ralph Brown, **Loyalty and Security** 498 (1958).

[122] *Baggett* docket book, Stewart Papers, 387:4765.
[123] 377 U.S. 360, 368 (1964).
[124] *Id.* at 371.
[125] *Id.* at 372, quoting *Speiser* at 526.
[126] *Id.* at 382–3.
[127] *Keyishian v. Board of Regents*, 233 F. Supp. 752 (W.D.N.Y 1964).
[128] *Keyishian v. Board of Regents*, 345 F.2d 236, 238–9 (2d Cir. 1965).
[129] "Gould Announces Unanimous Decision," *Spectrum*, 6/15/1965, AAUP Papers, University of Buffalo, 14:3; Gould, "Statement for Prospective Appointees," July 1965, *id.* at 11:11.
[130] *Elfbrandt v. Russell*, 384 U.S. 11, 12–3 (1966).
[131] Alan Sager, "The Impact of Supreme Court Loyalty Oath Decisions," 22 *Am. U. L. Rev.* 39, 60 (1972–3).
[132] *Elfbrandt v. Russell*, 97 Ariz. 140, 147–8 (1964).
[133] Draft opinions, 3/11/1966, 3/15/1966, Stewart Papers at 215:2283.
[134] *Elfbrandt.*
[135] *Scales v. United States*, 367 U.S. 203 (1961); *Aptheker v. United States*, 378 U.S. 500 (1964).
[136] *Elfbrandt* at 22–3.
[137] Jurisdictional Statement, *Keyishian*, at 3–4, 19.
[138] Answer to Motion to Dismiss, *id.* at 9.
[139] Motion to Dismiss and Brief for SUNY Trustees, 5/16/1966, *id.* at 2.
[140] Recording of oral argument, 11/17/1966, NARA, tape no. 267-608.
[141] *Id.*
[142] *Keyishian* docket sheet, Stewart Papers, 394:4856.
[143] Stephen Goodman and Abraham Sofaer. "Opinions of William J. Brennan, Jr., October Term, 1966." VIII–IX, in Brennan Papers, VIII.
[144] *Id.*
[145] *Keyishian* at 597-9.
[146] *Id.* quoting *Baggett*, at 374.
[147] *Id.* at 599–602.
[148] *Id.* at 602–3.
[149] *Id.* at 595, 605–7.
[150] Goodman and Sofaer, at IX.
[151] *Keyishian*, at 622–4, 628-9.
[152] Sager, at 77. Later in 1967, the Supreme Court in *Whitehill v. Elkins*, 389 U.S. 54, invalidated the same Maryland oath it had upheld in 1951 in *Gerende.*
[153] See *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (invalidating an affirmative action program in medical school admissions, but noting that discretion to decide who will be admitted to study is one of the "four essential freedoms" of a university [quoting Frankfurter's concurrence in *Sweezy*, 354 U.S. at 263]); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) (noting that academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself").
[154] 547 U.S. 410, 421 (2006) (rejecting claim of a prosecutor who was punished for reporting false statements in a search warrant affidavit).
[155] *Id.* at 438–9 (Souter), 425 (Kennedy).
[156] *United States v. Carolene Products*, 304 U.S. 144, 184 n.4 (1938).

The 1963 Good Friday Parade in Birmingham, Alabama

Walker v. City of Birmingham (1967) and *Shuttlesworth v. City of Birmingham* (1969)

DEBORAH ANN ROY

On Good Friday, April 12, 1963, the actions of a group of African-American ministers and their supporters in Birmingham, Alabama would impact the struggle for civil rights in America and lead to the passage of the 1964 Civil Rights Act. Two United States Supreme Court decisions would arise from the Good Friday events, one that upheld the actions of the ministers and one that held that their actions had violated the law. In deciding the two cases, the Supreme Court balanced the First Amendment right to freedom of speech and to peaceably assemble against the right of a state to maintain public order and to require that citizens respect state court orders. The two cases are *Walker v. City of Birmingham*[1] and *Shuttlesworth v. City of Birmingham.*[2] The named petitioners, Wyatt Tee Walker and Fred Lee Shuttlesworth, were African-American ministers who were active in the movement protesting segregation in the City of Birmingham. In *Walker*, the Supreme Court considered the ministers' violation of a state court injunction that prohibited them from violating a city ordinance requiring a permit for parading or demonstrating. In *Shuttlesworth*, the Court considered the constitutionality of the parade ordinance itself.

In April 1963, Reverend Walker was the executive director of the Southern Christian Leadership Conference ("SCLC"). The SCLC was a civil rights organization formed by African American ministers in 1957. Martin Luther King, Jr. served as the SCLC's President.[3] Prior to joining the SCLC, Reverend Walker was pastor of the Gillfield Baptist Church in Petersburg, Virginia. King described Walker as a "youthful, lean and bespectacled man" who "brought his energetic and untiring spirit" to the SCLC's meetings.[4] Walker was detailed by the SCLC to begin work on a direct action campaign to end segregation in public facilities in

Birmingham. He visited the city periodically to lay the groundwork for the campaign that would begin in the spring of 1963. Walker scheduled workshops on nonviolent confrontation and he conferred with lawyers about the city code on picketing and demonstrating.[5]

Reverend Shuttlesworth grew up in a rural area outside of Birmingham.[6] As a young man, he worked as a mechanic and truck driver before joining the ministry. At the age of thirty, Shuttlesworth was named the pastor of the Bethel Baptist Church in Birmingham.[7] He began a voter registration campaign among his new congregation and agreed to act as membership chair for the Birmingham branch of the National Association for the Advancement of Colored People ("NAACP").[8] He organized a campaign to desegregate Birmingham's buses, was jailed several times, and had his home damaged by a bomb, although he escaped injury.[9] Due to his active participation in the effort to end segregation in Birmingham, Shuttlesworth became the named petitioner in a number of U.S. Supreme Court cases.[10]

Following actions taken in Alabama against the NAACP, Reverend Shuttlesworth helped to found a new civil rights organization in Birmingham. In 1956, Alabama's attorney general John Patterson had sought to force the NAACP to register as an out-of-state corporation and furnish lists of its officers, employees, and members to the State of Alabama.[11] On June 1, 1956, Patterson obtained a temporary restraining order against the NAACP, barring its operations in Alabama for failing to register as a foreign corporation with the state.[12] The NAACP did not want to register with Alabama because it meant identifying its members and supporters, which might place them in harm's way. From the date of the Alabama court's order until the Supreme Court overturned it in *NAACP v. Alabama ex rel. Flowers*,[13] the NAACP had almost no presence in Alabama.[14] Reverend Shuttlesworth joined with other members of the banned NAACP to form a new group named the Alabama Christian Movement for Human Rights ("ACMHR"),[15] and he was elected its first president by acclamation.[16] The ACMHR became an affiliate of Dr. King's SCLC and began work to relax Birmingham's segregation policies.[17] Dr. King observed that "[t]here was a special adulation that went out to the fiery words and determined zeal of Fred Shuttlesworth, who had proved to his people that he would not ask anyone to go where he was not willing to lead."[18]

The two ministers would become involved in one of the Supreme Court's most significant First Amendment cases. On March 29, 1960, Reverend Wyatt Tee Walker and Reverend Fred L. Shuttlesworth's names appeared in a full-page advertisement titled "Heed Their Rising Voices" that was carried in *The New York Times*. The advertisement sought to raise funds for the legal defense of Martin Luther King, Jr. and others in the Civil Rights Movement. The "Heed Their Rising Voices" advertisement became the subject of a defamation suit brought by the Public Safety Commissioner of Montgomery County Alabama, L.B. Sullivan, against *The New York Times*. Reverend Shuttlesworth was one of the four Alabama clergymen who were named as co-defendants with the newspaper. The Alabama court's civil libel verdict against Shuttlesworth would be overturned by the Supreme Court in *New York Times v. Sullivan*.[19]

The Birmingham Campaign

In 1963, the leadership of the SCLC, including Wyatt T. Walker, Dr. King, and SCLC Treasurer Ralph Abernathy, joined with Fred Shuttlesworth to plan a direct action campaign against segregation in Birmingham.[20] At the time, segregation was the rule of law applied in nearly every public facility located in the city. The goal of the Birmingham Campaign was the desegregation of stores, adoption of fair hiring practices by

Fred Shuttlesworth, Ralph Abernathy, and Martin Luther King, Jr., marched on Good Friday 1963 to protest segregation in the city of Birmingham. The city had denied their request for a permit for the march, and the decision to go forward was not an easy one. They and their supporters proceeded in an orderly fashion and carried no signs.

employers, and the achievement of equal opportunities for African-American employment with the city government.[21] Dr. King stated that "[a]long with Fred Shuttlesworth, we believed that while a campaign in Birmingham would surely be the toughest fight of our civil-rights careers, it could, if successful, break the back of segregation all over the nation."[22] On April 2, 1963, Dr. King arrived in Birmingham to lead the direct action campaign against segregation.

The next day, Reverend Shuttlesworth sent Mrs. Lola Hendricks, the ACMHR's corresponding secretary, to the Birmingham City Hall to request a permit for parading or demonstrating on the sidewalks of Birmingham. Mrs. Hendricks was the thirty-one-year-old daughter of a tin mill worker. She "had a reputation for fearlessness that did not fail her" when she set out to the Birmingham City Hall accompanied by Reverend Ambus Hill of the Lily Grove Baptist Church.[23] At the Birmingham City Hall, Mrs. Hendricks and Reverend Hill went to the Office of the Public Safety Commissioner of the City of Birmingham, Eugene "Bull" Connor, to ask for a permit for parading, picketing, and demonstrating.[24] Connor was a strong supporter of segregation in Birmingham, vowing that integration would never come to his city. To emphasize his strong opposition to the integration of Birmingham, he wore a button inscribed "Never."[25] Given his viewpoint, it was not surprising that Commissioner Connor's response to Mrs. Hendrick's request for a parade permit was to tell her, "[n]o, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail."[26]

On the same day that Mrs. Hendricks failed to obtain the parade permit from Commissioner Bull Connor, the Birmingham Campaign began when sixty-five demonstrators went to five downtown drug and department stores where they engaged in sit-ins at lunch counters. Approximately two dozen of the demonstrators were arrested.[27] On April 5, 1963, Reverend Shuttlesworth sent a telegram to Commissioner Connor requesting a permit to picket on April 5th and 6th "against the injustices of segregation and discrimination" on designated sidewalks.[28] Bull Connor informed Shuttlesworth that a permit to picket could not be granted by Connor individually, but that it must be

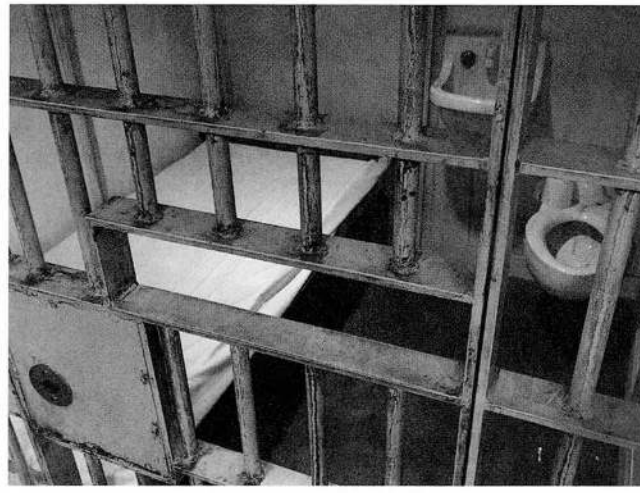
approved by the entire three-person Commission of Birmingham. He further insisted that Shuttlesworth should not start any picketing in Birmingham.[29] Reverend Shuttlesworth, however, did not ask the full Board of Commissioners for a permit. Instead, on Saturday April 6, Shuttlesworth led forty-five men and women in two-by-two procession out of the Gaston Motel in a silent march to the Birmingham City Hall. The group marched 2.5 blocks when the police chief picked up a bullhorn and told them that they were violating a city ordinance against parading without a permit.[30] Forty-two individuals were arrested for parading without a permit.[31]

The Gaston Motel would have a prominent place in the events of April 1963. The motel was located in Birmingham's African-American business district. It was owned by A.G. Gaston, a successful African-American entrepreneur who owned a number of businesses frequented by the African-American citizens of Birmingham.[32] Dr. King stayed at the Gaston Motel's only suite, Room 30, during the Birmingham Campaign. Room 30 became the de facto headquarters for planning the direct action events that took place in April 1963.

In response to the ongoing direct action demonstrations, on the evening of Wednesday, April 10, two attorneys for the City of Birmingham, John M. Breckenridge and Earl McBee, submitted an application for a temporary injunction to Judge William A. Jenkins, Jr. of the Tenth Judicial Circuit of Alabama. The injunction would require the leaders of the Birmingham Campaign to cease their direct action activities.[33] Judge Jenkins was a World War II veteran who had returned to his hometown of Birmingham after the war, graduated from the Birmingham School of Law, and started a private law practice in 1950 at the age of thirty. In 1957, he was appointed to the Tenth Judicial Circuit by Governor James E. Folsom.[34] Shortly after 9:00 p.m. on April 10, Judge Jenkins signed the injunction that enjoined the leaders of the Birmingham Campaign from engaging in or encouraging street parades, processions, or demonstrations without a permit, as required by a Birmingham city ordinance against parading without a permit, § 1159 of the 1944 General City Code of the City of Birmingham (the "Birmingham Parade Ordinance").[35]

Four hours after Judge Jenkins signed the injunction, it was served on Fred Shuttlesworth, Martin Luther King, Jr., A.D. King, Wyatt Tee Walker, and Ralph Abernathy as they sat in the ground floor restaurant of the Gaston Motel during the early morning hours of Thursday, April 11, 1963.[36] Alfred Daniel ("A.D.") Williams King was Martin Luther King, Jr.'s younger brother and pastor of the First Baptist Church of Ensley in Birmingham. The SCLC leaders pensively read the injunction while press photographers snapped pictures.[37] Reverend Shuttlesworth remarked that the injunction was a flagrant denial of the ministers' constitutional rights.[38] Later that day at noon, the ministers held a press conference at the Gaston Motel. Reverend Walker distributed a press release, which Dr. King read aloud. The press release stated that the ministers could not obey Judge Jenkins's injunction, which they believed to be unconstitutional. The ministers noted that "[i]n the past we have abided by Federal injunctions out of respect for the forthright and consistent leadership that the Federal judiciary has given in establishing the principle of integration as the law of the land."[39] However, in their view, public officials were using the Alabama courts to perpetuate illegal segregation. The injunction represented an unconstitutional use of the legal process and, therefore, the ministers could not obey it.[40]

Following the press conference and into Thursday evening, Dr. King considered whether to march on Good Friday in violation of Judge Jenkins's court order. A march would likely result not only in his arrest, but also the arrests of many of his supporters. Dr. King telephoned Harry Belafonte, the Jamaican-born



The protesters were jailed for violating a city ordinance that prohibited parading without a license. While in his cell (recreated at the National Civil Rights Museum above), serving a five-day contempt sentence, King wrote his eloquent "Letter from a Birmingham Jail," explaining why civil disobedience can be necessary: "One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws," he concluded.

singer, who was in New York. Belafonte had been one of the SCLC's most active fund-raisers. Dr. King and Belafonte discussed obtaining funds for bail bonds for those who would be arrested in a Good Friday march.[41]

The Good Friday Parade

On Good Friday morning, April 12, Dr. King, Reverend Shuttlesworth, Reverend Walker, and other leaders of the Birmingham Campaign gathered in the Gaston Motel to discuss whether there should be a march in defiance of Judge Jenkins's injunction on that day. Norman Amaker, a lawyer who had been sent from New York by the NAACP Legal Defense Fund to provide legal assistance to the Birmingham Campaign leaders, participated in the discussion.[42] He told the ministers that, although the injunction appeared to be unconstitutional, anyone who violated it would likely be punished.[43] Whatever Dr. King decided, Amaker pledged, the Legal Defense Fund would support him in court.[44] The NAACP Legal Defense Fund was formed in 1938 as an offshoot of the NAACP, and, under the leadership of Thurgood Marshall, it had led the fight for equality in the courts. The Legal Defense Fund first began representing the SCLC during the sit-in demonstrations in 1960 and, by 1963, it had become the SCLC's principal legal advisor.[45]

Dr. King had never led a civil rights march in defiance of a court order, and the decision to go forward was not an easy one for him. A decision to disobey Judge Jenkins's court order was made more difficult because the civil rights leadership had argued that the U.S. Supreme Court's decision in *Brown v. Board of Education*, ordering the desegregation of schools, should be obeyed even by those who strongly disagreed with it. Dr. King told those gathered in the sitting area of Room 30 of the Gaston Motel that he would pray over the decision to march on Good Friday in the adjoining bedroom. Thirty minutes later, he emerged from the bedroom wearing a new pair of blue-denim overalls instead of the dark suit that he usually wore.[46] Dr. King told his supporters that it was clear to him that he would have to march because so many people were depending on him. The injunction would have to be disobeyed. He observed that, "if we

obey it, then we are out of business."[47] His father, Martin Luther King, Sr. who was at the Gaston Motel, spoke up, telling his son, "I've never interfered with any of your civil rights activities, but I think at this time my advice would be to you to not violate the injunction." Dr. King responded that there were other things more important than the injunction.[48]

Shortly after 2:30 p.m. on Good Friday, April 12, 1963, Dr. King, Fred Shuttlesworth, and Ralph Abernathy emerged from Birmingham's Sixth Avenue Zion Hill Baptist Church leading a group of about fifty persons.[49] The ministers and the individuals following them marched on a sidewalk two abreast, heading towards downtown Birmingham. They were orderly, carried no signs, and did not violate any traffic regulations.[50] Dr. King recalled that the marchers were singing and that the African Americans standing along the street observing the marchers joined the singing, which was interspersed with bursts of applause.[51] After walking several blocks, the marchers were stopped by the Birmingham police. Dr. King, Ralph Abernathy, and about fifty other persons were arrested for violating the Birmingham ordinance that prohibits parading without a permit.[52] At the time of the arrests, Reverend Shuttlesworth was walking several rows back from the front of the march and he was not arrested with King and Abernathy. However, Reverend Shuttlesworth was arrested an hour or two later and subsequently charged with parading without a permit.[53] Reverend Walker did not participate in the march and he was not arrested on Good Friday.[54]

Following Dr. King's arrest, he was placed in solitary confinement for twenty-four hours. No one was allowed to visit him, including the NAACP lawyer Norman Amaker.[55] Fred Shuttlesworth posted bond and was released on Saturday, April 13.[56] Dr. King and Ralph Abernathy did not post bond until the following Saturday, April 20. The funds for their release came from Harry Belafonte.[57] During his prison stay, Dr. King wrote his essay "Letter from a Birmingham Jail," which would become one of the most widely read statements defending the role of civil disobedience in achieving social change. He began by writing his thoughts on the margins of a newspaper. Later, attorneys who visited Dr. King in the Birmingham jail would take King's drafts of the essay and give them to Reverend Walker, who would have them typed by his secretary and returned to King for editing.[58]

In his essay, Dr. King discussed his concept of just and unjust laws. He wrote, "I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws."[59] For Dr. King, a just law is a man-made law that squares with the moral law or law of God. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.[60] In regard to Judge Jenkins's injunction, Dr. King wrote:

> Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.[61]

Dr. King argued that an individual who broke a law that was unjust in order to arouse a community over its injustice is expressing the deepest respect for the law.[62]

On Easter Sunday, April 14, Reverend Walker helped to organize a march that departed from the Thirgood CME Church and was intended to proceed to the Birmingham City Jail, which held Dr. King and Ralph Abernathy. Walker did not participate in the

During the first week of May, 1963, organized protests by young people following the arrests were met with fire hoses, police dogs, and jail-bound school buses. Although Birmingham's population in 1963 was sixty percent white and forty percent black, the city had no black police officers or firefighters.

Easter Sunday march, but A.D. King and other ministers led a group of about fifty persons who set out from the church, walking two or three abreast along the sidewalk. Prior to reaching the Birmingham City Jail, about twenty of the marchers were arrested.[63]

On Monday, April 15, Norman Amaker filed an application to dissolve Judge Jenkins's temporary injunction that had prohibited the ministers from parading without a permit in violation of the Birmingham Parade Ordinance. The matter was referred to Judge Jenkins, and he set a hearing on the application to dissolve the injunction for April 22, 1963.[64] Later in the day, attorneys for the City of Birmingham filed a petition alleging that Dr. King, Shuttlesworth, Walker, Abernathy, and others should be held in contempt for violating the injunction. Judge Jenkins issued an order directing the ministers to appear in his court on April 22 to show cause why they should not be held in contempt of the court's order.[65]

Dr. King's recollection was that most of the demonstrators were cited for criminal contempt, but that ten leaders of the Birmingham Campaign were initially cited for civil contempt. In Alabama in 1963, the punishment for criminal contempt was a prison term of five days. However, an individual cited for civil contempt could be held until he recanted his actions. If the individual did not recant, he could be held in prison for most of his natural life. Dr. King recalled that by the time the Birmingham Campaign's leaders appeared in court in late April, all Birmingham knew that they would never recant, no matter how long they were confined in Birmingham's jails. Confronted with this certainty, Dr. King believed that the city attorney changed the civil contempt charge to criminal contempt."[66]

At the hearing held on April 22, 1963, Judge Jenkins had before him both the ministers' motion to dissolve the injunction and the City of Birmingham's request to find

the ministers in criminal contempt of court for violating the injunction. Matt Breckenridge and Earl McBee, the two attorneys who had initially obtained the injunction from Judge Jenkins, represented the City of Birmingham. The legal team representing Dr. King and the other individuals charged with contempt included NAACP Legal Defense Fund Attorneys Norman Amaker, Jack Greenberg, and Constance Baker Motley and local Birmingham attorneys Arthur Shores and Orzell Billingsley.[67] Judge Jenkins ruled that he would consider the contempt violation first and the record does not show that he took any further action on the motion to dissolve the injunction. The only issues considered by Judge Jenkins were whether the court had jurisdiction to issue the temporary injunction and whether the defendants had violated the injunction.[68] Thereafter, the ministers and the Legal Defense Fund did not pursue the motion to dissolve the injunction.[69]

Fifteen defendants stood trial for criminal contempt during the proceedings before Judge Jenkins on April 22, 1963. The alleged violations of the injunction were for the Good Friday press conference, where a press release was handed to reporters indicating the ministers' intention to violate the injunction and for their participation in and incitement of the parades.[70] The defendants argued that the injunction was designed to prevent their right to free expression and, therefore, was an invalid order.[71] On Friday morning, April 26, Judge Jenkins announced that eleven of the defendants were guilty of criminal contempt. The convicted defendants included Dr. King, Ralph Abernathy, Reverend Walker, and Reverend Shuttlesworth. He sentenced each to five days in jail and a $50 fine, the maximum penalty under the Code of Alabama. Four of the defendants were acquitted on the grounds that they had never been served the injunction. The sentences for the eleven individuals convicted of criminal contempt were stayed while appeals were pursued.[72]

The Birmingham Accord

In May 1963, the direct action campaign against segregation continued in Birmingham. There was a boycott of downtown Birmingham stores and marches continued to take place. On May 2, 1963, fifty teenagers marched from the Sixteenth Street Baptist Church; most were arrested for parading without a permit. The next day, nearly a thousand teenagers and young adults marched. They were met with fire hoses, police dogs, and jail-bound school buses. The May 1963 Birmingham demonstrations, now involving young persons, became known as the Children's Campaign.[73]

The disruption in the daily life of Birmingham resulting from the demonstrations led representatives from the business community to seek a settlement of the demonstrators' demands. On Friday, May 10, 1963, leaders of the business community and leaders of the campaign against segregation reached a settlement. The Birmingham Accord (the "Accord"), as the settlement was named, provided for the desegregation of lunch counters, restrooms, and drinking fountains in planned stages within ninety days after the Accord was signed. It also required the upgrading and hiring of African Americans on a non-discriminatory basis throughout Birmingham. The civil rights movement's legal representatives would be able to obtain the release of all jailed persons on bond or on personal recognizance. Finally, the Accord established communications between African-American community leaders and the Birmingham city leadership in order to prevent the necessity of further marches, protests, and demonstrations.[74] However, not all of Birmingham welcomed the Accord. The day after the Accord was signed, the Birmingham home of A.D. King and the Gaston Motel were severely damaged by bombs. A.D. King's family had been in the rear of the home when the bomb exploded and no one was injured.

Dr. King had departed from the Gaston Motel and was in Atlanta. Fortunately, no other persons were injured at the motel.[75]

The legal resolution of the arrests of the participants in the Birmingham Campaign continued to work its way through the Alabama state courts. On May 15, 1963, Fred Shuttlesworth was tried in the Recorder's Court of the City of Birmingham for violating the Birmingham Parade Ordinance when he participated in the Good Friday march. He was convicted and sentenced to 180 days at hard labor and a fine of $100. From this judgment, he took an appeal for trial *de novo* in the Tenth Judicial Circuit Court.[76] The trial before a jury was held on September 30 and October 1, 1963.[77] Shuttlesworth was convicted and sentenced to ninety days imprisonment at hard labor, and an additional forty-eight days at hard labor in default of a payment of a fine of $75, and costs of $24.[78] The trials of approximately 1,500 other civil rights activists who had been arrested during the April and May 1963 demonstrations in Birmingham and charged with violating the Birmingham Parade Ordinance were stayed pending the outcome of Fred Shuttleworth's appeal.[79]

On June 11, 1963, President John F. Kennedy spoke to the nation in a televised broadcast about the country's need for civil rights legislation, pointing to the events that had recently occurred in Birmingham. President Kennedy told the country, "Now the time has come for this Nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them."[80] On June 19, 1963, President Kennedy sent a civil rights bill to Congress. During the following summer months, Birmingham remained relatively quiet and the provisions of the Birmingham Accord were implemented. In July, the Birmingham City Council repealed all of Birmingham's segregation statutes.[81] The summer's quiet would be shattered on Sunday morning, September 15, 1963, when a bomb exploded in the basement of Birmingham's Sixteenth Street Baptist Church, killing four African-American girls who were attending Sunday School.[82]

Following President Kennedy's death on November 22, 1963, the Civil Rights Act was signed into law by President Lyndon B. Johnson on July 2, 1964. The Civil Rights Act outlawed racial discrimination in public accommodations, prohibited discrimination in employment, and established the Equal Opportunity Commission.

The March to the United States Supreme Court

The convictions of Dr. King, Fred Shuttlesworth, Ralph Abernathy, and other leaders of the Birmingham Campaign for violating Judge Jenkins's injunction and the conviction of Fred Shuttlesworth for violating Birmingham's Parade Ordinance would proceed through the Alabama state courts, finally arriving at the United States Supreme Court in 1967 and in 1969, respectively. The paths taken by *Walker v. City of Birmingham* and *Shuttlesworth v. City of Birmingham* will be described below. The discussion of the court decisions for both cases will be presented in chronological order as the paths of the decisions rendered in the two cases crossed each other in time.

The first decision by the Alabama appellate courts in the Good Friday parade cases, *Shuttlesworth v. City of Birmingham*,[83] issued from the Court of Appeals of Alabama on November 2, 1968. In a 2–1 decision, it overturned the conviction of Fred Shuttlesworth for violating the Birmingham Parade Ordinance. The majority decision held that the evidence was insufficient to show that Shuttlesworth marched in a parade that would require a permit under Birmingham's parade ordinance. The Court described the participants in the Good Friday parade as a group walking on a sidewalk in an orderly and

On May 8, King, Shuttlesworth, and Abernathy held a news conference to discuss the ongoing store boycotts and protests in Birmingham. Two days later, they reached a settlement with leaders of the business community providing for the desegregation of lunch counters, restrooms, and drinking fountains, and for the upgrading and hiring of African Americans on a non-discriminatory basis throughout the city.

peaceable fashion, not blocking others nor interfering with cross traffic.[84] The only act that tended toward disorderly conduct was that some members of the group sang and clapped hands.[85] The Court stated that the right to use the public sidewalk in this manner was so fundamental that requiring a permit would be the exception.[86] Further, the Court of Appeals found that the ordinance had been applied in a discriminatory fashion.[87] Finally, the Birmingham Parade Ordinance itself was found to be unconstitutional as a prior restraint that lacked understandable standards for determining when a permit would be granted by the City of Birmingham.[88] The Alabama Court of Appeal's broad holding that Fred Shuttlesworth's constitutional rights were violated when he was arrested for parading without a permit on Good Friday was likely a welcome surprise for the leaders of the Birmingham Campaign.

Just one month after the Court of Appeals of Alabama had found that the Birmingham Parade Ordinance was unconstitutional, the second decision in the Good Friday parade cases was issued by the Alabama Supreme Court. Alabama, like most states, has two levels of state appellate court review. As discussed above, the *Shuttlesworth* case was appealed to the Court of Appeals of Alabama. However, Alabama state law allowed persons convicted of contempt of court to bypass the Court of Appeals and petition directly from a contempt conviction to the Alabama Supreme Court. In *Walker*, the eleven ministers convicted of violating Judge Jenkins's injunction appealed their conviction directly to the Alabama Supreme Court. On May 15, 1963, the Alabama Supreme Court granted the petition for a writ of certiorari filed by Dr. King, Wyatt T. Walker, Ralph Shuttlesworth, and the eight other individuals convicted of

criminal contempt for violating Judge Jenkins' injunction.[89]

The ministers' argument to the Alabama Supreme Court was that the Birmingham Parade Ordinance was void because it violated the First and Fourteenth Amendments to the Constitution of the United States and, therefore, the temporary injunction was void as a prior restraint on their constitutionally protected rights of freedom of speech and assembly.[90] The Supreme Court of Alabama issued its decision in *Walker v. Birmingham* on December 9, 1965, more than two years after it had granted review of the case. The Court upheld the convictions of eight of the petitioners and overturned the convictions of three petitioners, one because there was not sufficient evidence that the individual knew about the injunction and two because there was insufficient evidence that they had disobeyed the injunction.

In upholding the eight convictions, the Alabama Supreme Court found that these petitioners had deliberately defied Judge Jenkins' order that had issued from the Circuit Court for the Tenth Judicial Circuit (the "Circuit Court") when they engaged in and incited street parades without a permit.[91] The Circuit Court was a court of general equity jurisdiction and it had the power to issue the injunction prohibiting the petitioners from violating the Birmingham Parade Ordinance.[92] The Alabama Supreme Court stated that the petitioners should have obeyed Judge Jenkins's injunction until such time as the order was reversed for error by an orderly review.[93] The Alabama Supreme Court noted that the petitioners failed to file a motion to vacate the injunction until after they had incited and participated in the Good Friday and Easter Sunday parades.[94] The petitioners' defiance of Judge Jenkins's injunction was contempt of the lawful authority of the Circuit Court.[95]

The Alabama Supreme Court did not take notice of the Court of Appeals' recent ruling that the Birmingham Parade Ordinance was unconstitutional. The eight petitioners whose convictions for violating the injunction were upheld were Wyatt Tee Walker, Fred Shuttlesworth, Martin Luther King, Jr., Ralph Abernathy, A.D. King, J.W. Hayes, T.L. Fisher, and J.T. Porter. Each of the eight petitioners was an African-American minister.[96] The Alabama Supreme Court denied rehearing on January 20, 1966. On April 13, 1966, by order of Justice Hugo L. Black, the time within which to file a petition for a writ of certiorari to the United States Supreme Court was extended to June 19. A petition for writ of certiorari to the Supreme Court was filed on June 18, and was granted on October 10.[97]

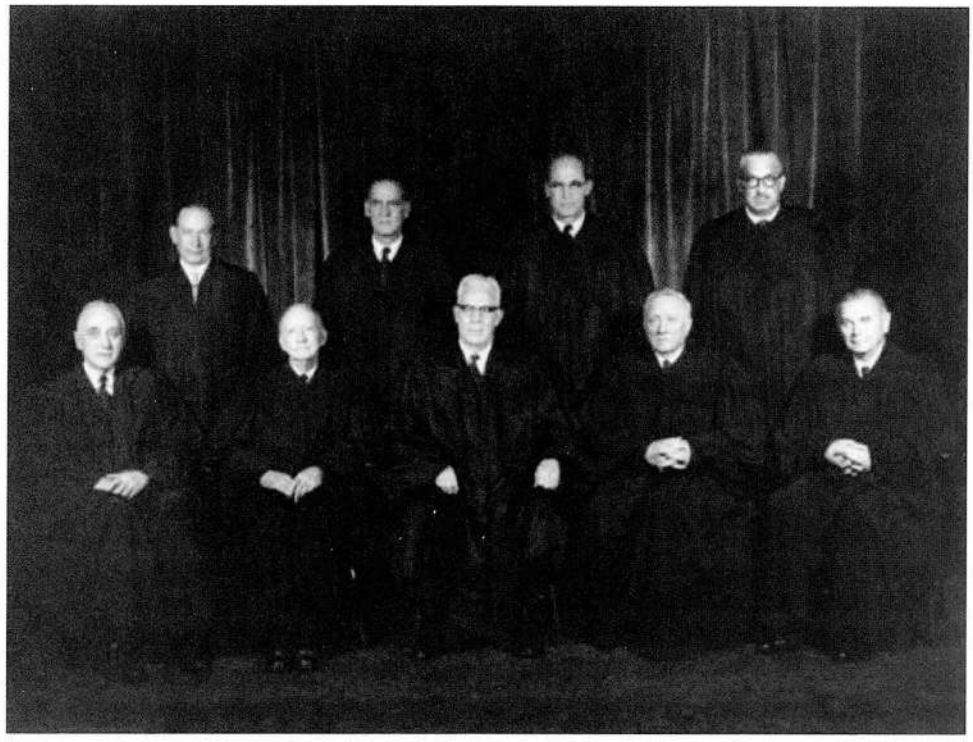
In 1966, when *Walker v. City of Birmingham* came before the Supreme Court, Thurgood Marshall was Solicitor General of the United States. On July 13, 1965, President Lyndon Johnson had nominated Marshall to be the first African-American Solicitor General.[98] He was confirmed by the United States Senate on August 11, 1965.[99] A graduate of Howard University Law School, Thurgood Marshall became the Director of the NAACP Legal Defense and Education Fund. In that position, he won Supreme Court victories, including *Brown v. Board of Education*, that ended legal segregation in education, housing, transportation, and voting in the United States.[100] Choosing to fight segregation in the courts, Thurgood Marshall had not fully supported Martin Luther King, Jr.'s use of boycotts and marches to attack segregation where direct action violated the law.[101] Marshall reflected, "And, while Dr. King was all for this civil disobedience, I kept telling him that, under our government, you had two rights. You had the right to disobey a law, and you also had the right to go to jail for it. And he couldn't see the second part, but eventually he did."[102] Nonetheless, Thurgood Marshall had pledged the entire support of the Legal Defense Fund to protect the legal rights of those who participated in Dr. King's direct action campaign.[103]

The United States submitted an amicus brief in *Walker v. City of Birmingham* under the signature of Solicitor General Thurgood Marshall, Assistant Attorney General John Doar, and Assistant to the Solicitor General Louis F. Claiborne, on January 4, 1967. The brief identified the controlling question in the case as whether, in the contempt proceedings before Judge Jenkins, the petitioners should have been permitted to raise a defense that the injunction was invalid because it broadly suppressed the exercise of their First Amendment rights.[104] Although an individual ordinarily cannot test the validity of a court injunction by disobedience, as held in *United States v. United Mine Workers*,[105] the Solicitor General asked the Court to consider whether that rule should be abrogated when the individual's First Amendment rights were at issue.[106] Judge Jenkins's injunction had merely parroted the Birmingham Parade Ordinance, rendering the statutory prohibition into an invulnerable court decree.[107] Louis Claiborne and Jack Greenberg of the NAACP Legal Defense Fund shared the hour of argument before the Supreme Court that was allotted to the petitioners. Greenberg had joined the Legal Defense Fund shortly after graduating from Columbia Law School in 1948 and had worked closely with Thurgood Marshall in *Brown v. Board of Education*.[108] Greenberg replaced Marshall as Director of the Legal Defense Fund when Marshall was nominated for the Second Circuit Court of Appeals by President Kennedy in 1961.[109] Earl McBee represented the City of Birmingham at the Supreme Court oral argument.

The oral argument in *Walker v. City of Birmingham* was held on March 13 and 14, 1967. Jack Greenberg told the Court that the issues in the case arose out of incidents that had occurred four years earlier, now known as the Birmingham Demonstrations of 1963, which were acknowledged to have led to the passage of the Civil Rights Act of 1964.[110] Greenberg argued that the Birmingham Parade Ordinance was unconstitutional and that it had been "embodied in an injunction perhaps more unconstitutional than the ordinance."[111] In response to a question from Justice John M. Harlan asking whether there had been a construction of the Birmingham Parade Ordinance by the Alabama Supreme Court, Claiborne referred to the proceedings in *Shuttlesworth v. City of Birmingham* that also arose from the April 1963 direct action campaign in Birmingham.[112] Claiborne informed Justice Harlan that the Court of Appeals of Alabama had held that the Birmingham Parade Ordinance was unconstitutional and that the Alabama Supreme Court had granted certiorari to review that decision, but that it had not yet issued its decision.[113]

At the Supreme Court's post-argument conference held on a Friday, the vote was 5–4 to reverse or vacate the conviction of the ministers for violating the injunction.[114] Justice Harlan voted with the majority to reverse the convictions. However, on the following Monday, Justice Harlan circulated copies of a note to Chief Justice Earl Warren asking that the case be listed for further discussion at the next Friday's conference. Justice Harlan wrote, "I am not at rest on my vote and wish to give the matter more study before the case is assigned on the basis of my present vote, five to four to reverse or vacate, my vote being in the majority." At the next Friday's conference, Justice Harlan voted to affirm the convictions of the ministers. His truly swing vote changed the outcome of the case from 5–4 to overturn the convictions of the ministers for violating Judge Jenkins's injunction to a 5–4 decision to uphold the convictions. The majority opinion affirming the convictions was assigned to Justice Potter Stewart.[115]

On June 12, 1967, the Supreme Court issued Justice Stewart's opinion in *Walker v. City of Birmingham* upholding the convictions of the eight ministers for violating Judge Jenkins's injunction. Justice Stewart's majority opinion was joined by Hugo L. Black, Tom



In 1969, the Supreme Court held that the Birmingham Parade Ordinance requiring a permit for parading and demonstrating was unconstitutional because it gave Birmingham officials unfettered discretion in issuing a permit. The only difference between the 1969 Court (pictured) and the 1967 one that considered *Walker* was that Thurgood Marshall had replaced Tom Clark. Justice Marshall abstained from participating in the case, probably because of his close association with the NAACP Legal Defense Fund that represented Reverend Shuttlesworth.

C. Clark, John M. Harlan, and Byron R. White. In his opinion, Justice Stewart did not reach the question of whether the Birmingham Parade Ordinance was constitutional. He observed, however, that the Birmingham Parade Ordinance raised substantial constitutional questions due to the generality of its language.[116] Nonetheless, Justice Stewart noted that Judge Jenkins issued a court injunction that prohibited parading without a permit in violation of the Birmingham Parade Ordinance. The evidence showed that the ministers fully understood the injunction's prohibition on parading without a permit when they violated it. For the majority, the way to resolve the issue of the constitutionality of the Birmingham Parade Ordinance was to apply to the Alabama courts to have the injunction modified or dissolved, not to willfully violate it.[117] Justice Stewart wrote that the ministers could not presume that the Alabama Courts would have ignored their constitutional claims, noting that the Court of Appeals of Alabama had struck down a conviction of one of the ministers under the Birmingham Parade Ordinance, citing *Shuttlesworth v. Birmingham*.[118]

The *Walker* opinion upheld the rule of state and federal courts that an order of a court must be obeyed even when it is based on a law that may itself not be constitutional, citing *Howat v. State of Kansas*,[119] where the Supreme Court affirmed the Supreme Court of Kansas's decision upholding the convictions of persons who had violated a court injunction against engaging in a labor strike. At the end of the majority opinion, Justice Stewart wrote, "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry

their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[120]

The four dissenters in *Walker v. City of Birmingham* were Chief Justice Earl Warren, William O. Douglas, William J. Brennan, Jr., and Abe Fortas. Warren, Brennan, and Douglas each wrote a dissent. The grounds for the three dissents were essentially the same, finding that the Birmingham Parade Ordinance was unconstitutional on its face, and, where First Amendment rights were at issue, the injunction should not be allowed to immunize the unconstitutional ordinance. The majority, Justice Warren wrote, held that the petitioners could be convicted and sent to jail because "the patently unconstitutional ordinance was copied into an injunction."[121] He dissented because he did not believe that the protections of the Constitution could be so easily avoided.[122] Justice Warren observed that, after violating the injunction on Good Friday and Easter Sunday, the ministers "promptly submitted themselves to the courts to test the constitutionality of the injunction," and, therefore, they "were in essentially the same position as persons who challenge the constitutionality of a statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds."[123] In concluding his dissent in *Walker v. City of Birmingham*, Chief Justice Warren wrote "there is only one apparent reason why the city sought this injunction and why the court issued it: to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack. I regret that this strategy has been so successful."[124]

In his dissent, Justice Douglas wrote tersely that the collision between the injunction and the First Amendment was obvious and that an ordinance unconstitutional on its face was not made sacred by an unconstitutional injunction that enforced it.[125] Justice Brennan described a collision between Alabama's interest in requiring adherence to orders of its courts and a constitutional abridgement of the ministers' freedom of speech and their right to peaceably assemble and petition the government for a redress of their grievances.[126] In Brennan's view, an ex parte injunction such as the one issued by Judge Jenkins "represents the most devastating of restraints on constitutionally protected activities" and "arm[s] the state courts with the power to punish as a 'contempt' what they otherwise could not punish at all."[127]

On June 13, 1967, the day after the Court announced its decision in *Walker v. City of Birmingham*, President Johnson nominated Solicitor General Thurgood Marshall to become an Associate Justice. On June 15, 1967, Senator Strom Thurmond of South Carolina inserted into the *Congressional Record* an editorial titled "Dr. King's Conviction" that had appeared in *The Washington Star* on June 14, 1967. *The Washington Star* editorial stated a concern that the principle of the holding in *Walker v. City of Birmingham*, affirming the conviction of Dr. Martin Luther King, Jr. and seven other ministers for violating an injunction that had been issued by a judge in Birmingham, Alabama, would likely be overruled in a future case heard by the Supreme Court if Solicitor General Marshall should take a seat on the Court. The editorial noted that *Walker v. City of Birmingham* was a 5–4 decision and that the Justice whom Marshall would replace, Justice Tom Clark, had been in the majority.[128] Nonetheless, on August 30, 1967, Thurgood Marshall was confirmed as an Associate Justice by a Senate vote of 69–11. Marshall was sworn in to the Supreme Court on September 1, 1967, becoming the first African American to join the Court.

Following the Supreme Court's decision in *Walker v. City of Birmingham* affirming

their convictions for violating Judge Jenkins's injunction, Dr. King, Wyatt T. Walker, and Ralph Abernathy returned to Birmingham, Alabama on October 30, 1967 to serve their five-day jail sentences.

On November 9, 1967, two years after the Court of Appeals of Alabama had issued its decision in *Shuttlesworth v. City of Birmingham*, the Supreme Court of Alabama overruled the Court of Appeals and reinstated the conviction of Fred Shuttlesworth for parading without a permit on Good Friday 1963. All five justices of the Supreme Court of Alabama joined in the opinion, which found that a reasonable construction could be applied to hold that the Birmingham Parade Ordinance was constitutional. The Alabama Supreme Court adopted the construction that the dissenting judge in the Court of Appeals had given the ordinance and found that it did not deprive Shuttlesworth of any right guaranteed under the First and the Fourteenth Amendments to the U.S. Constitution.[129] The Alabama Supreme Court relied on the U.S. Supreme Court's decision affirming the criminal contempt convictions of Reverend Shuttlesworth, Dr. King, and the other ministers in *Walker v. City of Birmingham*, which had been decided five months earlier on June 12, 1967. The Alabama Supreme Court noted that the majority decision in *Walker* had not found that the Birmingham Parade Ordinance was unconstitutional when it upheld the convictions of the ministers for violating Judge Jenkins' injunction.[130]

On April 4, 1968, Dr. Martin Luther King, Jr., at the age of thirty-nine, was shot while he was standing on the balcony of a motel in Memphis, Tennessee. He would die from the gunshot.

On April 22, 1968, the U.S. Supreme Court granted certiorari to review the Alabama Supreme Court's decision in *Shuttlesworth v. City of Birmingham*[131]; oral argument was held on November 22, 1968. Jack Greenberg of the NAACP Legal Defense Fund appeared for Reverend Shuttlesworth and Earl McBee argued for the City of Birmingham. At the beginning of oral argument, Justice John M. Harlan asked Greenberg whether Shuttlesworth was convicted of violating the Birmingham Parade Ordinance in 1963. When Greenberg confirmed that Shuttlesworth's conviction occurred in 1963, Justice Harlan responded, "How in the world has it taken this long to get up here?" Greenberg explained that the case was tried in the Birmingham Recorder's Court in May of 1963 and in the Circuit Court in October of 1963. An appeal was taken promptly to the Alabama Court of Appeals, which did not issue its decision overturning Shuttlesworth's conviction until 1965. The Alabama Supreme Court reinstated the conviction in November 1967. Greenberg told Justice Harlan that "[t]he time was essentially spent in the very lengthy consideration or very lengthy time that was consumed while the case was pending before the two Alabama courts."[132]

Earl McBee opened his argument by reminding the Justices that he had appeared before the Court in *Walker v. City of Birmingham*, which he stated was a closely related case because it dealt with the identical Good Friday parade and the same parties.[133] McBee continued his argument with a reference to Judge Jenkins's injunction, however, one of the Justices interrupted stating, "Mr. McBee, there is no issue of any injunction in this case. It seems to me you are rearguing the Walker case. You already won that one."[134]

Mr. McBee, however, would lose in *Shuttlesworth v. City of Birmingham*, likely for the reason that a court injunction was not at issue in the case. The Court reversed the conviction of Reverend Shuttlesworth and the trials of 1,500 other individuals that had been stayed pending the outcome of Shuttlesworth's appeal never went forward. The decision was unanimous with Justice Potter Stewart writing the majority opinion, just as he had written the majority opinion in *Walker v. City of Birmingham*. Seven Justices joined Justice Stewart's

opinion for the Court: Chief Justice Warren, Black, Douglas, Harlan, Brennan, Fortas, and White. The ninth Justice took no part in the decision. He was Thurgood Marshall, who likely abstained from participating in the case because of his close association with the NAACP Legal Defense Fund that represented Reverend Shuttlesworth. Justice Marshall was the only Justice who had not been a member of the Court when *Walker v. City of Birmingham* was decided in 1967.

The *Shuttlesworth* Court took judicial notice of the facts in the *Walker* opinion relating to the April 1963 Good Friday parade.[135] The Court, however, stated that the legal and constitutional issues in the *Walker* case were quite different from the constitutional issues involved in the *Shuttlesworth* case now before the Court.[136] The Court in *Shuttlesworth* did not articulate the differences between the two cases, but one difference was that it did reach the issue of whether the Birmingham Parade Ordinance was constitutional, where the *Walker* Court had not made a determination of its constitutionality. The *Shuttlesworth* Court found that the ordinance was impermissibly broad, and, therefore, unconstitutional. The terms of the ordinance gave the City Commission extensive authority to issue or to refuse to issue permits for parades, marches, or demonstrations on the basis of broad criteria that were entirely unrelated to the legitimate city interest in the regulation of public sidewalks and streets.[137] Further, Reverend Shuttlesworth reasonably understood that the City of Birmingham would under no circumstances give him and his group of civil rights advocates a permit to demonstrate for their cause in Birmingham.[138] The Court stated that its decisions had made clear that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."[139]

Justice John M. Harlan, whose vote had shifted during the conference deliberations in *Walker v. City of Birmingham*, was the only Justice to file a concurring opinion in *Shuttlesworth*. Justice Harlan expressed his concern that the majority's opinion would be construed as holding that an applicant for a parade permit could rely solely on a lower official's unconstitutional construction of a vague ordinance without making any further attempt to obtain a court's review of the ordinance.[140] However, in the circumstances under which Reverend Shuttlesworth sought a parade permit, neither the Birmingham Parade Ordinance, nor the Alabama state courts provided for an effective review of Commissioner Bull Connor's decision to deny the permit for a parade on Good Friday, April 1963.[141] Since there were no sufficiently expedited procedures for review, Justice Harlan concluded that Reverend Shuttlesworth could not be punished for the exercise of his constitutionally protected right to free expression.[142]

Conclusion

On April 3, 1963, Lola Hendricks asked the Birmingham Public Safety Commissioner for a permit to parade on the sidewalks of Birmingham in order to protest against Birmingham's laws requiring the segregation of public facilities. Commissioner Bull Connor refused to issue the permit. Six years later on March 10, 1969, the U.S. Supreme Court would hold that the Birmingham Parade Ordinance requiring a permit for parading and demonstrating was unconstitutional because it gave Birmingham officials, such as Bull Connor, unfettered discretion in issuing a permit.

During the intervening six years, protests went forward on the sidewalks of Birmingham without permits, ministers defied the orders of a court, children rode school buses to jail, Birmingham's segregation ordinances were repealed, a federal Civil Rights Bill was passed, Martin Luther King, Jr. returned

to Birmingham to serve his sentence for violating a court injunction and later was assassinated, and the first African American took his seat as an Associate Justice of the Supreme Court. Each of the participants in those historic events had to consider what the law and the United States Constitution meant to him or her. Judges of the Alabama state courts and Justices of the U.S. Supreme Court were faced with difficult questions regarding the application of the law to the facts of this era.

ENDNOTES

[1] 388 U.S. 307 (1967).

[2] 394 U.S. 147 (1969).

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[4] Martin Luther King, Jr., WHY WE CAN'T WAIT (New York: Signet Classic, 2000), 47.

[5] *Id.* at 42.

[6] For a biography of Reverend Shuttlesworth, see Andrew M. Manis, A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH (Tuscaloosa: The University of Alabama Press, 1999).

[7] David Benjamin Oppenheimer, "Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964," *University of San Francisco Law Review* (Spring, 1995): 650.

[8] *Id.* at 650.

[9] *Id.* at 650-51.

[10] *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (overturning convictions for violating two city ordinances relating to loitering and failure to comply with the order of a police officer directing traffic); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (Mem.) (reversing judgment of the Court of Appeals of Alabama that upheld conviction for interfering with a police officer in the discharge of a legal duty); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963) (overturning conviction for aiding and abetting a violation of a criminal trespass ordinance because the convictions of individuals whom petitioner allegedly aided and abetted were set aside); *In re Shuttlesworth*, 369 U.S. 35 (1962) (vacating order of the Fifth Circuit Court of Appeals denying habeas corpus petition).

[11] Alan F. Westin and Barry Mahoney, THE TRIAL OF MARTIN LUTHER KING (New York: Thomas Y. Crowell Company, 1974), 16.

[12] Diane McWhorter, CARRY ME HOME (New York: Simon and Schuster, 2001), 108.

[13] 377 U.S. 288 (1964).

[14] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 16, *supra* note 11.

[15] *Id.*

[16] McWhorter, CARRY ME HOME, 109-110, *supra* note 12.

[17] King, WHY WE CAN'T WAIT, 37, *supra* note 4.

[18] *Id.* at 47-48.

[19] 376 U.S. 254 (1964) (Brennan, J.).

[20] King, WHY WE CAN'T WAIT, 41, *supra* note 4.

[21] David J. Garrow, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (New York: William Morrow and Company, Inc., 1986), 237.

[22] King, WHY WE CAN'T WAIT, 40, *supra* note 4.

[23] McWhorter, CARRY ME HOME, 323, *supra* note 12; Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 65-66, *supra* note 11.

[24] Brief for the Petitioners at 7, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967).

[25] *Walker v. City of Birmingham*, 388 U.S. 307, 326, FN 1 (1967) (Warren, J., dissenting).

[26] Brief for the Petitioners at 7, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967).

[27] Branch, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, 708-09.

[28] Brief for the Petitioners at 7, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967.

[29] *Id.* at 8.

[30] McWhorter, CARRY ME HOME, 327, *supra* note 12.

[31] King, WHY WE CAN'T WAIT, 56, *supra* note 4.

[32] McWhorter, CARRY ME HOME, 263, *supra* note 12.

[33] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 68-69, *supra* note 11.

[34] *Id.* at 95-96.

[35] *Walker v. City of Birmingham*, 388 U.S. 307, 309 (1967).

[36] McWhorter, CARRY ME HOME, 342, *supra* note 12; Branch, PARTING THE WATERS, 727, *supra* note 3; *Walker v. City of Birmingham*, 279 Ala. 53 (1965)

[37] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 76, *supra* note 11.

[38] Manis, A FIRE YOU CAN'T PUT OUT, 354, *supra* note 6.

[39] *Walker v. City of Birmingham*, 388 U.S. 307, 323, Appendix B to Opinion of the Court (1966).

[40] *Walker v. City of Birmingham*, 279 Ala. 53, 56-57 (1965).

[41] Garrow, BEARING THE CROSS, 241, *supra* note 21; McWhorter, CARRY ME HOME, 318, *supra* note 12.

[42] Manis, A FIRE YOU CAN'T PUT OUT, 354, *supra* note 6.

[43] Branch, PARTING THE WATERS, 728-29, *supra* note 3.

[44] *Id.* at 728.

[45] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 51, *supra* note 11.
[46] Garrow, BEARING THE CROSS, 241-42, *supra* note 21.
[47] *Id.*
[48] *Id.*
[49] McWhorter, CARRY ME HOME, 345-46, *supra* note 12.
[50] Brief for the Petitioners at 17, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States, January 3, 1967).
[51] King, WHY WE CAN'T WAIT, 61, *supra* note 4.
[52] Brief for the Petitioners at 17, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967).
[53] Brief for the Petitioner at 10, FN2, *Shuttlesworth v. City of Birmingham*, No. 42 (Supreme Court of the United States July 5, 1968); Manis, A FIRE YOU CAN'T PUT OUT, 357, *supra* note 6.
[54] Brief for the Petitioners at 18, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967).
[55] McWhorter, CARRY ME HOME, 347, *supra* note 12.
[56] *Id.*
[57] *Id.* at 356; Branch, PARTING THE WATERS, 753, *supra* note 3.
[58] Garrow, BEARING THE CROSS, 244, *supra* note 21.
[59] King, WHY WE CAN'T WAIT, 70, *supra* note 4.
[60] *Id.*
[61] *Id.* at 71–72.
[62] *Id.* at 72.
[63] Brief for the Petitioners at 20, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967); Manis, A FIRE YOU CAN'T PUT OUT, 358-59, *supra* note 6.
[64] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 91, *supra* note 11.
[65] *Id.* at 91–92.
[66] King, WHY WE CAN'T WAIT, 90-91, *supra* note 4.
[67] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 89-99, *supra* note 11. This volume contains a detailed description of the trial before Judge Jenkins on April 22, 1963. *See* pgs. 99-126.
[68] Memorandum for the United States as Amicus Curiae at 7, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 4, 1967).
[69] Transcript of Oral Argument at 82, *Walker v. City of Birmingham*, 388 U.S. 307 (1967)(No. 249).
[70] *Walker v. City of Birmingham*, 279. Ala. 53, 59 (1965).
[71] *Id.*
[72] Brief for the Petitioners at 6, FN 1 *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967).
[73] Branch, PARTING THE WATERS, 756-774, *supra* note 3.
[74] King, WHY WE CAN'T WAIT, 94-95, *supra* note 4.
[75] Garrow, BEARING THE CROSS, 260, *supra* note 21.
[76] Brief for the Petitioner at 11, FN 3, *Shuttlesworth v. City of Birmingham*, No. 42 (Supreme Court of the United States, July 5, 1968).
[77] *Id.*
[78] Brief for the Petitioners at 12, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967)
[79] Brief for the Petitioner at 20, *Shuttlesworth v. City of Birmingham*, No. 42 (Supreme Court of the United States July 5, 1968)
[80] President John F. Kennedy, Televised Address to the Nation on Civil Rights, at http:www.jfklibrary.org/JFK/Historic-Speeches.
[81] Garrow, BEARING THE CROSS, 277, *supra* note 21.
[82] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 155, *supra* note 11.
[83] 43 Ala. App. 68 (1965).
[84] *Shuttlesworth v. City of Birmingham*, 43 Ala. App. 68, 81 (1965).
[85] *Id.* at 68, 72.
[86] *Id.* at 68, 81.
[87] *Id.* at 68, 92-95.
[88] *Id.* at 68, 84.
[89] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 157, *supra* note 11.
[90] *Walker v. City of Birmingham*, 279 Ala. 53, 60 (1965).
[91] *Id.*
[92] *Id.*
[93] *Id.* at 62-63.
[94] *Id.* at 60.
[95] *Id.* at 62-63.
[96] Brief for the Petitioners at 5, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 3, 1967)
[97] *Id.* at 1.
[98] Juan Williams, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (New York: Random House, 1998), 316.
[99] *Id.* at 317.
[100] *Id.* at xiii.
[101] Williams, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY, 341, *supra* note 98; Columbia University Oral History Project (1977), "The Reminiscences of Thurgood Marshal," in Mark V. Tushnet, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES (Chicago: Lawrence Hill Books, 2001), 471.
[102] Tushnet, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, 479, *supra* note 101.
[103] *Id.* at 476.
[104] Memorandum for the United States as Amicus Curiae at 2, 9 *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 4, 1967).
[105] 330 U.S. 258 (1947).

[106] Memorandum for the United States as Amicus Curiae at 1, *Walker v. City of Birmingham*, No. 249 (Supreme Court of the United States January 4, 1967).
[107] *Id.* at 15, 19.
[108] Westin & Mahoney, THE TRIAL OF MARTIN LUTHER KING, 93, *supra* note 11.
[109] Williams, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY, 294-95, *supra* note 98.
[110] Transcript of Oral Argument at 8, *Walker v. City of Birmingham*, 388 U.S. 307 (1967)(No. 249).
[111] *Id.* at 23-24.
[112] *Id.* at 43.
[113] *Id.* at 43-44.
[114] Case Histories, The Papers of William J. Brennan, Jr., Manuscript Division, Library of Congress, Washington, D.C., Part II, Box 6, Folder 9.
[115] *Id.*
[116] *Walker v. City of Birmingham*, 388 U.S. 307, 316-17 (1967).
[117] *Id.* at 307, 317.
[118] *Id.*
[119] 258 U.S. 181 (1922).
[120] *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).
[121] *Id.* at 324.
[122] *Id.*
[123] *Walker v. City of Birmingham*, 388 U.S. 307, 327 (1967) (Warren, C.J. dissenting).
[124] *Id.*
[125] *Walker v. City of Birmingham*, 388 U.S. 307, 337-338 (1967) (Douglas, J. dissenting).
[126] *Walker v. City of Birmingham*, 388 U.S. 307, 344 (1967) (Brennan, J. dissenting).
[127] *Id.*
[128] 113 Congressional Record 16056-57 (June 15, 1967).
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[130] *Id.* at 544-548.
[131] Brief for the Petitioner at 3, *Shuttlesworth v. City of Birmingham*, No. 42 (Supreme Court of the United States July 5, 1968.)
[132] Transcript of Oral Argument at 3-4, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969)(No. 42).
[133] *Id.* at 14.
[134] *Id.* at 14-15.
[135] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157 (1969).
[136] *Id.* at 158.
[137] *Id.* at 153.
[138] *Id.* at 158.
[139] *Id.* at 151.
[140] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159-60 (1969) (Harlan, J. concurring).
[141] *Id.* at 160-161.
[142] *Id.* at 164 946

Anthony Lewis: Pioneer in the Court's Pressroom

LYLE DENNISTON

Americans with a sense of history, and some knowledge of it, like to think of journalists who open new frontiers in their craft as inevitably muckrakers, or fierce and uncompromising agents of radical change. If every pioneering journalist was an Ida Tarbell or Lincoln Steffens or Upton Sinclair, that perception would be right. Those pioneers had the courage to break the mold, to take on the power elites of their day and compel them to bend to the public good. Their journalism had about it the capacity to coerce reform, sometimes by the bludgeon of shock.

H. L. Mencken in his day did his fair share of puncturing inflated public egos, but it is remarkable how little social reform came at his instigation. His wit was deliciously wicked, and his fascination with philology could well be emulated by journalists of all eras. But his work was mainly for parlor amusement, not social improvement.

In modern times, perhaps closest to the muckraker would be Bob Woodward of *The Washington Post*—at least when he was a reporter before becoming a commentator or pundit—and got into public spats with the White House. Woodward, together with Carl Bernstein, put an end to the practice of Washington journalists looking the other way when something did not seem right in public affairs. Finding the truth required a dogged determination, and no weekends off. The list of post-Watergate reforms that their work stimulated is impressive, indeed.

Another kind of journalistic pioneer uses the instrument of daily news coverage to defog history or unravel mysteries for ordinary people and puts the seemingly unreachable or inaccessible within the easy grasp of the average citizen. In this genre one would have to put the war correspondents: Mathew Brady with his camera, Ernie Pyle with his pencil and pad, Bill Mauldin with his cartoonist's sketch pad, David Halberstam with his tape recorder.

A rarer breed of this kind of pioneer would be Joseph Anthony Lewis, who died in March at age eighty-five after a remarkably rich career with *The New York Times*, enlivening the sometimes-arcane world of the law for his readers. A somewhat

Anthony Lewis worked for thiry-two years as a columnist for *The New York Times*, taking up such causes as free speech, human rights and constitutional law. He won his first Pulitzer Prize in 1955 as a reporter defending a Navy civilian falsely accused of being a communist sympathizer, and he won again in 1963 for reporting on the Supreme Court. He is pictured above reading about his second Pulitzer Prize in the Boston office of the Associated Press.

aristocratic fellow, he had a perhaps surprising passion—and a remarkable gift—for putting the intricacies of law down where any public citizen could reach them. (In these days, perhaps the legal translator who comes closest to Tony Lewis in making law interesting to those who do not make it their profession is the irrepressible online reporter Dahlia Lithwick, who does it with a naughty sense of humor in which Tony Lewis would never have allowed himself to indulge.)

Journalists, whether they know it or not, and whether or not they would admit it, are profoundly influenced by the eras in which they live and by the ideas that make up their daily news conversation. Tony Lewis was America's witness to "the Warren Court," and it forever made him a believing liberal. (He may have been the only reporter covering the Supreme Court who would have understood why that Court was "liberal" rather than "progressive," which is the more fashionable word for what passes for liberalism today with its strong echoes of early twentieth century progressivism.)

Tony's genius was not objectivity; he genuinely agreed personally with the substance of what the Warren Court was doing to make the civil rights revolution and the criminal law revolution into constitutional realities. His copy showed that he thought the Court was getting it right, almost all of the time. It is too much to suggest that he was an apologist for the Court, but the majority almost certainly thought he was an admirer. That he was a favorite of Justice Felix Frankfurter, the most insufferably arrogant member of that, and perhaps any, Court, and that he counted the Justice as one of his favorites, tells us something a bit uncomfortable about both men.

It detracts from Tony's history, though, to dwell upon where his personal sentiments lie. He made history because he was the first newspaper reporter to want to know how the Marble Palace actually worked, day to day and case to case, and the first to commit to sharing that regularly with a newspaper audience. (Before Tony began on the Court "beat" in the late 1950s, the Court was

covered by reporters working in the congressional galleries who would wander across the street on "decision days," trying to catch up enough to report approximately what the Court was doing, only to walk away until the next time. He made it his preoccupation, and that was a genuine breakthrough.)

There had been, before Tony, other journalists who had paid more than passing attention to the Supreme Court. Arthur Krock, also of *The New York Times*, penetratingly covered the politics surrounding the Hughes Court and the Court-packing controversy, and syndicated columnist Drew Pearson, sort of the Bob Woodward of his day, who provided his readers with the ongoing doings—including some of the internal intrigue—of the Nine Old Men.

But Krock and Pearson were not Supreme Court journalists in the singular way that Tony Lewis would show all of his colleagues how to be. The Court was, in short, Tony's working life, and he covered it with a facile grace and a comprehension that no one had done before—indeed, no one had even tried before.

When, for example, the Court ruled in *Baker v. Carr* in 1964 that courts could rule on the constitutionality of "the rotten boroughs" from which unrepresentative state legislatures were chosen, Tony wrote this as his second paragraph the next day: "The historic decision was a sharp departure from the court's traditional reluctance to get into questions of fairness in legislative districting. It could significantly affect the nation-wide struggle of urban, rural and suburban forces for political power." Plain and simple, to be sure, but also wise and prophetic.

If there is a fundamental problem in newspaper (and now television and Internet) coverage of America's courts, including the Supreme Court, it is that reporters—and their editors—are fascinated by the law primarily when it startles or titillates or angers or scandalizes. They cover, at most, the "really big cases," and they now do so with less and less space—and, often, with anecdotes instead of legal comprehension. For much of the press, the law now has personality rather than character. The law does not generate popularly exciting stories every day, on every case, and therefore much of the substantive work of the courts finds an audience only with the bench, the bar, the academy—and, these days, the legal blogosphere.

When Tony Lewis came along, he appreciated that almost all of the law had meaning beyond what it said to the practitioners and the professors, a meaning that could start a conversation or an argument across back fences, around the kitchen table, or over a pitcher of beer. If ever there was a journalist who understood what Holmes meant, "the life of the law has not been logic, it has been experience," it would have been Tony.

His reporting in *The New York Times* combined plain writing with deep understanding of law's processes, and that is not an easy thing to do, or an easy thing to get past an editor who worships simplicity even if it misses part of the essence. Tony's legal stories were made of substance, not once-over-lightly trivializations.

Without being subjective, he worked analysis into the story, without needing to rely upon a quotable source to make sense of it. A reader could come away from one of his articles having learned something, not only about what had happened but what it actually meant. To do that in a daily newspaper, without condescension or misinterpretation, is—now as then—a remarkable professional feat. If it did not quite approach brilliance, it certainly was inventive, in the best sense of the word.

When the Court decided *Gideon v. Wainwright* in 1963, giving poor people for the first time a constitutional right to a lawyer to help defend them against criminal charges, Tony's story added real depth to the public's understanding by discussing what the Court had left unresolved—a gap that is often left, even by a profoundly important ruling.

He wrote, quite high in the story:

> One restriction on the effect of the decision may be the doctrine of waiver—the rule that a man may waive his right to a lawyer by not demanding one. Gideon specifically asked for a lawyer at this trial, but many prisoners may not have done so. Justice Black's opinion did not settle, either, whether the new rule will apply to the most petty crimes, such as traffic offenses. That will presumably be worked out in later cases."

That was Tony speaking, not a source, and he was clearly qualified to do so.

When he turned from newspapering to the book trade, almost nothing appeared to have been lost in the transition. His 1964 book about the *Gideon* case, **Gideon's Trumpet**, rather slyly tells the reader a great deal more about how the law works than the reader might have expected upon opening it (see, for example, the clever weaving of law and human interest in Chapter 2), but it does so in a way that Clarence Earl Gideon himself surely wanted it to be told: simply and directly, and with an appreciation of what it meant to be abjectly poor and yet have someone actually care about your rights. If the Justices' decision in Clarence Gideon's favor was Abe Fortas's finest moment as an advocate before the Court, it also was Tony's as the laureate of the Court.

It was a sign of Fate's kindness that allowed Tony to live a week beyond the fiftieth anniversary of the Court's decision in *Gideon*. Of all that the Warren Court did to make constitutional law "fair," as Chief Justice Earl Warren so often demanded that it be, the *Gideon* decision was its noblest effort. And history had already judged that this was a story made for Tony Lewis, and a story Tony Lewis made for America. It is not too much to suggest that **Gideon's Trumpet** is the best one-case book ever written about what the Supreme Court does. And that is saying a good deal, given the outpouring of the highly readable, one-case diaries published by the University of Kansas Press.

As the record seems to show, Tony was much more comfortable personally when he moved to *The Times'* London bureau, and even began—his friends noticed—to affect something of an English accent. He wrote with obvious approval of the good life in that tempting city, yet nothing he wrote there could compare with the likes of **Gideon's Trumpet** as a book and *Gideon v. Wainwright* as a topic for a newspaper.

After his reporting years, Tony had a long run as an op-ed columnist but, as so often happens when a working reporter dons the mantle of punditry, there was more of Tony than there was of the human adventure that he had formerly brought so vividly to life in news stories. It was a platform for his liberal preferences, and not a whole lot more. He had bought fully into the dominant mindset of the Cambridge dons. For example, in a 1990 column about a Senate hearing on the nomination of Justice David H. Souter, Tony wrote angrily of "right-wing extremists outside the American constitutional tradition," and of "the radical legal right."

Although there is, among those who remember Tony Lewis fondly, an impression that he was a champion of the First Amendment and that he believed in a sturdy freedom of the press, that is somewhat wide of the mark. Tony absolutely believed in the constitutional virtue of *New York Times v. Sullivan*, but that is not the same thing. *Sullivan* did some genuine favors for the American press, but liberate it from the law's sometimes meddlesome constraints, it did not.

While its author, Justice William J. Brennan, Jr., believed that it was a work of First Amendment "absolutism," it was nowhere close to that. It was the diluted form of absolutism that *The Times*'s long-time courtroom defender, Floyd Abrams, had always pursued, and that Tony Lewis

found most agreeable to his own professional understandings.

Tony's 1991 book on the *Sullivan* decision (**Make No Law: The Sullivan Case and the First Amendment**) almost certainly exaggerated the historical significance of that ruling when he wrote: "Without *New York Times v. Sullivan*, it is questionable whether the press could have done as much as it has to penetrate the power and secrecy of modern government, or to confront the public with the realities of policy issues." That is far too much credit to give to a single decision by a court, and far too little credit to the energy, imagination and sheer doggedness of reporters on the scent of a potential abuse of public power.

Still, it must be said that Tony ultimately did recognize the limitations of the *Sullivan* decision as the liberator of the American press. In that same book, he suggested that "If there is a doubt about the many Supreme Court decisions beginning with *Times v. Sullivan* that gave legal force to the First Amendment, it is a wariness about the amount of law and legalism in American society. The grandeur and the vitality of the First Amendment can be obscured when it is turned over to lawyers, when judges begin drawing lines between permitted and forbidden expression."

That, though, was the very essence of *Times v. Sullivan*, and Tony's discovery of that seems a bit tardy, and too little examined.

Tony ultimately began to wonder, in the aftermath of the 9/11 terrorist attacks and human atrocities in Africa, whether America could afford the truly robust journalism for which he had frequently argued and for which *Times v. Sullivan* stood—for him—as a monument. His book published six years after 9/11, **Freedom for the Thought that We Hate: A Biography of the First Amendment**, is generally an adoring portrait of constitutionally protected free expression, and fulsome praise for those who have had the courage to test the restraints on expression. But there is, near the end, a passage that is jarring—especially considering that it was written by Tony Lewis. It suggested that he had lost some of his faith in the people to deal peaceably and maintain a society while bombarded with thought that could be, and was, translated into terrorist acts. Here is what he wrote:

> In an age when words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones. The law of the American Constitution allows suppression only when violence or violation of law are intended by speakers and are likely to take place imminently. But perhaps judges, and the rest of us, will be more on guard now for the rare act of expression—not the burning of a flag or the racist slang of an undergraduate—that is genuinely dangerous. I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging. That is imminence enough.

In any age, there are enough politicians and pundits who will nurture doubts about truly free expression that it was disheartening to have such a prominent journalistic voice sounding the alarm.

In Tony's later years, after he had mostly laid aside his pen, the Supreme Court changed markedly, and one is left to wonder now what Tony would have written about the "Roberts Court" had he continued on the Court "beat" for *The Times*. At some level, it almost certainly would have disappointed his liberal instincts, one supposes, but would he have been able to chronicle the way the Court now works with the same depth of understanding, the same eagerness to explain results with which he might well disagree strongly?

He surely knew, perhaps more than most of his colleagues on the Court "beat" did, that life in the law is not static, that it very likely takes on some of the belief systems that are newly emergent, that what once was so obvious and accepted is no longer so, and that even the Constitution and the ever-expanding liberties it may seem to express might, in fact, contract, maybe just a little, maybe a lot. With change at the Court, news stories about the law have to come out quite differently, too.

It is well to remember that the Warren Court's liberal heyday ended some three generations ago, and that even the transitional Burger Court concluded its work more than a quarter-century ago. A news chronicler of this day and time must appreciate that the Court's evolution of understanding about the Bill of Rights and the Fourteenth Amendment is now more measured, even hesitant. Different though the results definitely are, the process still needs explaining and understanding.

Author's Note: I note with gratitude the research assistance for this article by the staff of the Court's Public Information Office and its library.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

"The first task of a President after taking the oath of office," observed Professor Edward S. Corwin long ago, "is to create 'an administration'; that is to say, a more or less integrated body of officials through whom he can act."[1] Corwin's statement in turn can be read as merely a paraphrase of Chief Justice (and former President) Taft's earlier insistence that the "vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[2] Both Corwin and Taft stated a truth often overlooked on Election Day by voters who, understandably perhaps, are singularly focused on the task at hand: casting a ballot for the nominee of one party or another. Yet, in reality, voters are choosing far more than a President and Vice President, for any incoming President will both sooner and later make an indeterminate number of appointments over the course of even a single term. Coupled with the new chief executive's personality, values, objectives, and the events that happen on his watch, it is these personnel selections that lend a distinct cast or color to each administration, distinguishing it from both those that came before and from those that will follow.

In light of the unique nature of the Presidency—the office was, after all, an American invention, one without true parallel elsewhere—the significance of the appointing power in the larger scheme of the political system was realized practically at the outset. "It should never be forgotten, insisted Justice Joseph Story in his **Commentaries** on the Constitution "that in a republican government offices are established and are to be filled, not to gratify private interests and private attachments; not as a means of corrupt influence or individual profit; but for purposes of the highest public good; to give dignity, strength, purity, and energy to the administration of the laws."[3] Furthermore, as legal scholar and Story contemporary William Rawle of Pennsylvania believed, the appointment process revealed as much about the person who made the appointment as about the one who received it. "A proper selection and appointment of subordinate officers is one of the strongest marks of a powerful mind."[4] Similarly, in his biography of George Washington, Chief Justice John Marshall placed considerable emphasis on the care with which the first

President constructed "his cabinet council" where "[i]n its composition, public opinion as well as intrinsic worth had been consulted, and a high degree of character had been combined with real talent."[5]

Yet Washington learned first-hand that the appointing power, shared with the Senate, included the judiciary as well, a responsibility he took very seriously. Indeed, it was one of his first major concerns as President: who would sit on the Supreme Court of the United States? "Impressed with a conviction that the true administration of justice is the firmest pillar of good government," he wrote soon-to-be Attorney General Edmund Randolph in 1789, "I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." Under the Articles of Confederation, which the recently ratified Constitution had replaced, there had been no national judiciary. The Court's role in the new political system was therefore unclear, but Washington realized the impact the Court might have in the young Republic. This required, he told Randolph, "the selection of the fittest characters to expound the laws and dispense justice . . ."[6] As he selected the six Justices Congress had authorized in the Judiciary Act of 1789, Washington also made sure that each section of the nation was represented and that the six were strong supporters of the new Constitution, leading Marshall later to affirm that in his choices for "high judicial offices" the first President had been "guided by the same principles"[7] that drove his selections for the Cabinet.

Thus in electing a President, voters are choosing someone who will not only construct an administration, but one who will ensconce on the federal Bench some initially unknown number of judges, most of whom will still be sitting long after the more numerous executive branch appointees have departed. Yet, while Presidents in the most recent years may have made approximately the same number of *non-judicial* appointments, in a four- or eight-year period, the same may not, of course, be said for *judicial* appointments. The constitutional mandate of service "during good Behavior"[8] combines with personal choice, infirmities, and operation of the actuarial tables to produce judicial tenure that is highly indeterminate. There is an element present of what can only be called randomness. Measured solely by numbers, therefore, Presidents have had sharply varying impacts on the judiciary, most especially on the Supreme Court. This element of chance in operation has hardly assured an equality of opportunity across administrations, as the table below illustrates.

PRESIDENTS WHO APPOINTED FOUR OR MORE JUSTICES

Washington	10	Cleveland	4
F. Roosevelt	9*	B. Harrison	4
Taft	6*	Harding	4
Jackson	5	Truman	4
Lincoln	5	Nixon	4
Eisenhower	5	Reagan	4*
Grant	4		

*This number includes elevation of a sitting Associate Justice to the Chief Justiceship, so the number of "new faces" on the Bench is actually one less than indicated for Presidents Taft, F. Roosevelt, and Reagan.

Yet if some Presidents were bountifully blessed with vacancies, four others for varying reasons endured a drought and made no appointments to the High Court. William Henry Harrison died shortly after his inauguration, and Zachary Taylor died barely sixteen months into his term. Congress made sure that Andrew Johnson placed no one on the Court during his partial term, first by refusing to act on the Tennessean's sole nomination of Attorney General Henry Stanberry, second, by eliminating the seat Stanberry would have filled, and third, by further reducing the Bench roster to eight.[9] Jimmy Carter remains today the only individual to finish a full single term Presidency completely devoid of an opening

on the Bench, although George W. Bush would have shared that distinction had Senator John Kerry managed to harvest an additional nineteen electoral votes in 2004.

Beyond the sheer number of seats filled, a President's impact on the Supreme Court, as well as the lower federal courts, is also a function of how long any one appointee serves. "The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them,"[10] observed one leading opinion journal more than seven decades ago after President Franklin D. Roosevelt nominated Professor Felix Frankfurter to fill the opening occasioned by the death of Justice Benjamin N. Cardozo. Indeed, along with decisions that the Court renders during a President's term, the number of appointment opportunities that arise and the length of service of those who are in fact appointed are the major variables any President encounters with respect to the Bench. This is in fact the picture that emerges from past administrations. Thus, to place the variables in perspective, a simple "appointment-tenure index" can be fashioned consisting of the sum of the years of service for the Supreme Court appointees of a particular President. The greater the number of appointees combined with a lengthy tenure for each produces a high index score. A smaller number of appointees and/or a number of appointees with abbreviated tenures yield a lower index score. For former Presidents whose appointees are no longer on the Bench, the index would be fixed. For a President whose appointees are still sitting, the index would increase with time, and so on. While any number of factors combines to shape any *single* Justice's influence among her or his colleagues, and hence on the Court as a whole, it seems reasonable to suggest that the higher a President's index, the greater that individual President's *potential* impact on the Court has been.

The table below shows the appointment tenure index for Presidents from Harry Truman (1945–1953) to Barack Obama 2009—), at the approximate midpoint of the forty-fourth President's administration. For William Rehnquist, who received appointments from two Presidents, his years as Associate Justice are counted for President Richard Nixon, and his years as Chief Justice are counted for President Ronald Reagan. Appointees of Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama continue to serve on the Court.

President	Number of Appointments	Index
Truman	4	45
Eisenhower	5	94
Kennedy	2	34
Johnson	2	28
Nixon	4	72
Ford	1	35
Carter	0	0
Reagan	4	96
Bush (GHW)	2	41
Clinton	2	39
Bush (GW)	2	15
Obama	2	7

Yet, whether one looks at the judicial selections of the earliest or relatively contemporary Presidents, all have had a major impact on the shaping of the American political system, a reality reflected in recent books about the Supreme Court.

Aside from Supreme Court appointments themselves, one singular Presidential staffing decision that is integral to the work of the High Court is the identity of the person who is Solicitor General of the United States. This person fills what is surely one of the most important, yet least visible, and, probably, least understood positions in American government.

Performing tasks originally the sole responsibility of the Attorney General and,

later, outside counsel from 1789 until creation of the post in 1870, the Solicitor General has been called "the highest government official who acts primarily as a lawyer and who can devote his time to studying the legal problems which come before him."[11] Among other duties, the Solicitor General sets the appellate agenda for the federal government by deciding which cases the national government should appeal from lower courts and, once the Supreme Court has granted review in a case in which the United States is a party, handles the government's business at the High Court by representing it as counsel. In the assessment of one scholar, "It's the most sophisticated, disciplined kind of law, a constant intellectual engagement,"[12] Or as former Solicitor General Rex Lee[13] described his office in a lecture in October 1985:

> it has the world's most interesting cases and is, on balance, the world's most attractive place to practice law. It is not a very big firm. Presently it has about twenty lawyers, and at times it has had only one. It has always had high-quality lawyers; probably no other firm anywhere has as much talent, lawyer for lawyer. It is unlike other good firms, however, in its high rate of attrition; most of its lawyers leave after about two to five years in the office. This law firm is highly specialized. It does only appellate work; its lawyers appear in only one court—the Supreme Court; and they have only one client.[14]

In this capacity as lawyer at the Supreme Court for the United States, the Solicitor General has long been regarded as having an impact going beyond that of merely being an attorney who appears frequently before the Justices.

Understandably, therefore, the work of this official with the High Court has been the subject of scholarly investigation[15] that has now been substantially enriched by publication of **The Solicitor General and the United States Supreme Court** by political scientists Ryan C. Black and Ryan J. Owens, of Michigan State University and the University of Wisconsin, respectively.[16] Lest there be any doubt, the authors lay out at the beginning of their compact and readable inquiry at least four reasons why the work of the Solicitor General merits study. The first is tied directly to what the Supreme Court does in terms of the impact annually of its decisions on all Americans. Clearly, if a single frequent litigant has any effect on what the Court does, then prudence alone dictates scrutiny of that litigant's behavior. Second, it is through the "SG's office that presidents interact with the Supreme Court . . . . Simply put to understand executive-judicial relations, one needs to understand the intermediary—the OSG [Office of the Solicitor General]." Third, "if the SG could influence the Court, presidents might circumvent Congress and use the OSG to make policy." Thus, to the degree that a President is successful in pursuing policy objectives thorough the Solicitor General, then that office "becomes crucial to understand in a separation-of-powers context." Finally, the Solicitor General's office "employs highly skilled lawyers who often go on to become Supreme Court justices themselves."[17] The authors note that the Court's present membership includes not only one former Solicitor General (Justice Kagan), but that Justice Alito served as assistant to Solicitor General Rex Lee in the 1980s, during President Reagan's first term, and that Chief Justice Roberts was principal deputy solicitor general from 1989 until 1993 in the administration of President George H. W. Bush. Moreover, prior to Justice Kagan, no fewer than four Solicitors General became an Associate Justice or Chief Justice: William Howard Taft (1890–1892), Stanley Reed (1935–1938), Robert H. Jackson (1938–1940), and Thurgood Marshall (1965–1967).

At the outset, Black and Owens make clear that their volume seeks to answer "one central question: does the OSG influence the Supreme Court?"[18] Of course, even to pose the question in that way seems startling in that presumably most people who are familiar with the judicial process in the United States would assume that the answer is plainly in the affirmative. Indeed, the four reasons the authors offer as justification for public interest in the work of the Solicitor General would appear already to assume such influence. Moreover, by the authors' own recounting, "[w]e know that the OSG wins an astonishing number of its Supreme Court cases. . . . We know that when the OSG participates as an amicus curiae, the side it supports usually wins. . . . We even know that the Court may be more likely to borrow language from the OSG's brief than from briefs filed by all the other litigants. . . ." Yet, Black and Owens admit that success "does not necessarily imply influence" in that the success rate may stem from reasons apart from what the Solicitor General does as might happen if the Justices were ideologically disposed to accept the OSG's position even before that position had been communicated to the Bench. Instead, to conclude the presence of influence the authors posit that "one must examine judicial behavior *but for* the presence of the SG."[19] In short, the operative question becomes one of determining whether and how often the Court takes a position it would not have reached without the presence of input from the Solicitor General. If investigation yields a recurring pattern, one can then infer influence. The book thus puts to the test a claim made several decades ago by Solicitor General Erwin Griswold[20] that "I think a strong solicitor general can have very considerable influence on the Court."[21]

Accordingly, in pursuing the task before them the authors make clear along the way their research design. It employs what they label a "mixed-methods" approach that includes "archival data, large-*n* quantitative analysis, and cutting edge empirical methods."[22] Happily, the non-specialist reader need not be proficient with the various statistical devices put to work in the book in order to appreciate what Black and Owens have impressively made so accessible. And, indeed, their findings demonstrate the SG's influence in each aspect of the Court's work.

First, at the agenda-setting or certiorari-granting stage, "justices who agree and disagree with the SG accept his recommendation . . . and this is in cases where the justice desires an outcome other than what the OG recommends."[23] Second, at the decision stage, the presence of the SG in cases appeared to make a significant difference as compared to very similar cases where the SG was not a participant. That is, the "Court is more likely to side with the OSG versus an attorney who never worked in the office and is more likely to side with the OSG versus an otherwise identical attorney who once worked in the OSG."[24] One suspects that part of the success in convincing the Court to accept the OSG's recommendation on cases to decide flows from judicious caution in not asking for too much too frequently. This was the point of one acting Solicitor General in the 1950s who wrote "It is hoped and believed—although no one who has not been on the Court can be sure —that the Court will realize that the Solicitor General will not assert that an issue is of general importance unless it is—and that confidence in the Solicitor General's attempt to adhere to the Court's own standards will cause the Court to grant more government petitions."[25]

Third, in terms of the impact of the OSG on the literal content of Court opinions, the influence is also noticeable. Although the "Court on average borrows more language from winning briefs than from losing briefs, this dynamic does not apply when the OSG loses and a non-OSG lawyer wins. . . ." In such situations, the "Court is just as likely to borrow from a losing OSG brief as it is from a wining non-OSG brief. Simply put, the Court turns to the OSG's briefs much more than to

briefs filed by otherwise identical non-OSG actors in otherwise identical cases."[26]

Finally, the authors examine the relationship between the work of the Solicitor General and the Court's treatment of precedent in its opinions, in the "presence of a recommendation by the OSG to its treatment of precedent with no such OSG recommendation." As at the other stages, the impact of the SG was felt. "We observed a significant increase in the probability that the Court would positively and negatively interpret precedent, simply because the OSG asked it to do so. To be sure, these figures rise and fall depending on other characteristics such as the mode of participation—but not by much."[27]

There remains, however one further question that Black and Owens reserve briefly for the last chapter. If the record demonstrates the influence of the OSG, what accounts for that influence? Here the authors believe that the "data are less clear, but they do seem to line up behind one theory: that OSG success comes from its objectivity and professionalism."[28] This pair of factors they select above other credible candidates such as "attorney experience, the separation of powers, attorney quality, ideology, and strategic selection," all of which "fell by the wayside."[29] While this plausible response to their final and more fundamental question is not subjected to the same rigorous examination that characterizes the remainder of the book, it is consistent with the views of others such as Rex Lee, who, while Solicitor General, observed that "there is a widely held and probably substantially accurate impression that the Solicitor General's office provides the Court with advocacy that is more objective, dispassionate, competent, helpful, and respectful of the Court as an institution than is true of Supreme Court practitioners as a whole. In return, the office enjoys a stature and credibility unmatched by other lawyers. Of the tens of thousands of officers of the Supreme Court, this office stands alone. In the great majority of instances these two roles—officer of the Court and advocate for a client—are not only mutually compatible, but mutually enhancing."[30] One suspects, therefore, that some of the success of the office is a judicious exercise of self-restraint on the part of the Solicitor General. As Lee noted in response to a student's question in 1985, one of the first things someone in his position must learn is "how to count to five."[31] Or as he commented in an interview with National Public Radio, "It is very damaging to the administration's position to make arguments before the Supreme Court that are not likely to succeed." On some matters, "it's simply a question of 'Do you want to blow the bugle, or do you want to win the war?'"[32]

From the days of Benjamin H. Bristow, the first Solicitor General, to the present, every occupant of that office has confronted legal questions arising from what has been a defining characteristic of American government since the founding: federalism. Although many consider judicial review to be America's unique contribution to political science, it is federalism that may continue to be of equal influence on other nations and of unending importance at home, even as it remains a subject more likely to elicit yawns than excitement when first introduced to a classroom of undergraduates. The term refers to a way of sharing political power among different governments with respect to *which* government may legitimately act with respect to *which* subjects and concerns. In other words, which level or entity is allowed to decide and to do what? Particularly in the American context, federalism is a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities. In practice, determining who may act in turn favors those individuals and/or groups who are most influential in those governments, a reality that might well affect, although not necessarily determine, whether one supports action or control by national authority, on the one hand, or a state or even a local authority, on the

other. Determining the level of government that may properly act, after all, may sometimes decide what policies are adopted and implemented or not. In short, questions about federalism are inescapably questions that are about power.

The fact remains that Americans in 1787 did something remarkable, as they struck out into virtually uncharted political territory. "Federalism was our Nation's own discovery," Justice Anthony Kennedy has insisted. "The Framers split the atom of sovereignty..... The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[33] A federal arrangement is thus vastly different from a unitary scheme in that, under the latter, the central government is not only supreme, but regional and local governments typically operate under the complete dictates of the central power. Even a moment's reflection illustrates how widely and deeply federalism permeates the political system today, with fifty functioning separate political units.

The reasons for the adoption of such an arrangement were both historical and rational. During the revolutionary period, the states regarded themselves as independent sovereignties. With little of their power over internal affairs being surrendered to the Continental Congress under Articles of Confederation, local patriotism then had to yield at the Constitutional Convention in the face of the demonstrated inability of the Confederation to cope with the problems confronting the new nation. The situation thus dictated compromise between the advocates of a strong central government and supporters of state autonomy. The result was an arrangement that conveniently fit into James Madison's basic requirement, reflecting his purpose, as stated in **The Federalist, No. 51**, to so contrive "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Alexander Hamilton, in **The Federalist, No. 23**, had already listed four chief purposes to be served by union: common defense, public peace, regulation of commerce, and foreign relations. Yet general agreement that these objectives required some more unified government meant that meeting these objectives would require some decisions about allocating responsibility. As was inevitable, the formal distribution of powers between the national government and the states proved to be a subject of diverse interpretations. The fault line along which supporters and opponents of the Constitution divided in 1787–1788 carried over into debates within the new government over how national authority would be construed. Echoes of this verbal combat reverberate today, as illustrated by two recent volumes. Both leave no doubt about the ongoing importance of federalism in the life of the nation.

Combining a partly historical perspective with examples drawn from timely issues such as environmental, public health, and land use regulations is **Federalism and the Tug of War Within,**[34] by Erin Ryan, who taught in the law school at the College of William and Mary when the book appeared and who later joined the law faculty at Lewis & Clark. It is no mere coincidence that her title suggests conflict because the division of political power in the United States has invited struggles from the beginning. Her comprehensive (and hefty) study—it tops out at just below 400 pages—argues that federalism "is best understood not just in terms of the conflict between states' rights and federal power, or the debate over judicial constraints and political process, or even the dueling claims over original intent—but instead through the inevitable conflicts that play out among federalism's core principles." Attempting to provide "a new conceptual

vocabulary for wrestling with these old dilemmas," the book "traces federalism's internal tug of war through history and into the present" and proposes "a series of innovations to bring judicial, legislative, and executive efforts to manage it into more fully theorized focus."[35]

After focusing on the basic question of who gets to act, she hones it to the even more fundamental matter of who gets to decide whether it will be the state or federal government that acts. Furthermore, will this be a determination made by the political process or the judicial process? By elected representatives and the executive branch, or by unelected federal judges? That question in turn becomes more complex when one remembers that the Constitution mandates not only a vertical division of power between the national government and the states but also a horizontal division of power for the former among three separate branches, a division that is variously replicated across the fifty states as embedded in state laws and constitutions.

For Ryan, the constitutional ambiguity that makes answering these questions so difficult leads to the next question, often overlooked in the federalism discourse: which federalism? By that question, she refers "to which theoretical model of federalism [one uses] in interpreting textual ambiguity[.]" Because "the Constitution mandates but incompletely describes American dual sovereignty," a decision maker faces a situation where boundary issues are left open for interpretation and so "must employ some kind of theory—a philosophy about how federalism should operate—in order to fill in these gaps. Yet constitutional interpreters can choose from more than one theoretical model of federalism in doing so, just as the Supreme Court has done over the centuries in which its jurisprudence has swung back and forth in answering similar questions at various times."[36]

Asking the question "which federalism" of course leads to a wealth of possible answers. One standard reference, for example, highlights and defines no fewer than seven models or ways of thinking about federalism, ranging from dual federalism and horizontal and vertical federalism, to marble cake, cooperative, and creative federalism.[37] The roles, strengths and weaknesses of most of these engage Ryan's attention to one degree or the other.

From the various models the book explores, she acknowledges that it is the dual federalism model "that has predominated at various points in American history, especially during the first half" with, of course, prominent outcroppings in the years on either side of the beginning of the twentieth century.[38] In Supreme Court history this constitutional conception is often closely identified with the jurisprudence of Chief Justice Roger B. Taney, for whom the Constitution was a compact resting on the action of sovereign states, not stemming from an ordinance of the people. The national government and the states therefore faced each other as equals across a precise constitutional line defining their respective jurisdictions. This concept of nation-state equality in the Marshall era had been the basis of Virginia's anarchical arguments in *Cohens v. Virginia*.[39]

Recognizing its anarchic implications, Taney and like-minded jurists of his time moved forward on the basic creed of nation-state equality. Within the powers reserved by the Tenth Amendment, the states were sovereign, but final authority to determine the scope of state powers rested with the national judiciary, an arbitrator standing aloof from the sovereign pretensions of both nation and states. Taney wrote in *Ableman v. Booth*:

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights

> by the general government, . . . So long . . . as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forum of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.[40]

Perhaps one of the clearest and most succinct summaries of this view appeared some years after Taney's death in an opinion for the Court by Justice Samuel Nelson in *Collector v. Day*:

> The general government, and the States, although both exist within the same territorial limits are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States. . . . [I]n respect to the reserved powers, the State is as sovereign and independent as the general government.[41]

This theory of federal equilibrium or dual sovereignty of course did not arise on its own but was a reaction and in juxtaposition to a theory of national supremacy federalism asserted by Chief Justice John Marshall in a series of opinions during his long tenure as Chief Justice between 1801 and 1835. Marshall's understanding of American federalism—a view to which Ryan alludes[42]— is built on the proposition that the central government and states confront each other not as equals but in the relationship of superior and subordinate. If an exercise of one of Congress's enumerated powers, for instance, was legitimate, the fact that its exercise encroached on the states' traditional authority was of no significance. Moreover, the Court's duty was not to preserve state sovereignty but to protect national power against state encroachments. The Court was to function then not as an umpire but as an agent of national authority. Accordingly, the checks on Congress were to be political, not judicial. For Marshall, the principal danger of the federal system lay in erosive state action. Effective political limitations, such as a Senate then elected by state legislators, existed against national efforts to impinge on state power, but only the Supreme Court could peacefully restrain state action that might infringe upon and perhaps eventually cripple the authority of the central government.

Despite the apparent triumph of Marshall's views after the 1930s, Ryan shows how dual federalist thinking has undergone something akin to a revival recently among state autonomy advocates called "Tenthers" as well as among Tea Party adherents and particularly in the "new federalism" identified closely in the near past with the views of Justice and then Chief Justice William Rehnquist. For the author, these approaches "tend to subordinate pragmatic concerns to the maintenance or formalistic boundaries between distinct reservoirs of state and federal power. Judicially enforceable constraints police regulatory activity to discourage trespass by either side—even in contexts where the boundary is difficult to locate, or where both sides hold simultaneously legitimate regulatory interests." For these reasons, she argues that the dualist model can lead both to regulatory confusion "and in the worst cases, chill needed interjurisdictional problem solving"[43] and threatening "resolution of our most pressing societal problems."[44]

In place of such traditional ways of looking at federalism—ways that she believes are inadequate—Ryan proposes what she labels "balanced federalism."[45] She explains

that this approach "mediates the tensions within federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of the three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing."[46] At the heart of what she proposes—and key to its successful application—is agreement among decision makers on the values inherent in federalism. Aside from answering the "why federalism" question in the context of history alone, she lays out a quartet of contemporary merits that American federalism embodies. These include (1) "the checks and balances that protect individuals against sovereign overreaching or abdication, (2) transparent and accountable governance that enable meaningful democratic participation at all levels, (3) protection for local autonomy and innovation that enables the laboratory of ideas, and (4) the ability to harness interjurisdictional synergy between the unique capacities that local and national governments offer for coping with the different parts of interjurisdictional problems." Yet she acknowledges that "those values are suspended in tension with one another, fueling a perpetual tug of war within federalism itself."[47] Good results are then achieved from prioritizing among these values in the context of individual conflicts and cases. And the prioritizing is the product of balancing.

Anticipating the criticism that, in constitutional adjudication at least, balancing "invites lazy and sloppy judicial reasoning,"[48] she nonetheless insists that "balancing is a legitimate methodology in at least some constitutional circumstances, and many concede it is inevitable. Federalism is one of those circumstances in both respects . . . because there is no alternative but to reckon with the tug of war within. The federalism values that pull in directions of checks and balances, localism, accountability, and problem solving are not always well-aligned, and for that reason trade-offs are inevitable." Balancing is therefore acceptable, she believes, "because the trade-offs are better made in careful considerations under a guided jurisprudential standard than under a categorical rule that arbitrarily establishes the trade-off in every instance."[49]

For her balanced federalism approach, Ryan acknowledges that she drew scholarly inspiration from the commencement address that Justice David Souter delivered at Harvard University on May 30, 2010, about a year after he retired from the High Bench following some nineteen years of service. Perhaps Souter's main point on that occasion in explaining the work of a Justice was that constitutional judging requires more than merely reading the text of the document. And from his remarks she highlights a few passages—reprinted below in italics—on which she particularly relied.

"The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time," Souter declared. He continued:

> Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. . . . [T]he Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because *its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once. . . . The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.*[50]

For Ryan, Souter's statements provide "naked insight into the role of all interpreters asked to make sense of the competing principles that the Constitution simultaneously endorses without clarification."[51] Some will recall that this had been Chief Justice Marshall's point in *Gibbons v. Ogden* when he wrote that the Constitution was "one of enumeration, and not of definition."[52] For contemporary jurists, Ryan recaps that "there is no instruction manual for managing conflicts and omissions." Rather, their task "is to identify the competing claims, evaluate their merits, and ascertain how to prioritize among them in factual context."[53]

A second recent book on federalism is **The U.S. Supreme Court and the New Federalism** by political scientists Christopher P. Banks and John C. Blakeman.[54] The former teaches at Kent State University and the latter at The University of Wisconsin–Stevens Point. While Ryan's contribution is notable for its prescription, the Banks and Blakeman volume is distinguished by its analysis and description. Moreover, as the subtitle—**From the Rehnquist to the Roberts Court**—indicates, their contribution focuses on a specific recent period in American constitutional history. Moreover, it is a period made all the more interesting not only because *Chief Justice* William H. Rehnquist had first come to the Court as *Justice* Rehnquist, but because the mentee succeeded the mentor in that Chief Justice John G. Roberts, Jr., had clerked for then Justice Rehnquist in 1980–1981. In addition, the six Terms of the Roberts Court that their study encompasses comprise a discrete period for examination in that, aside from the change in Chief Justices, there were also the departures of Justices O'Connor, Souter, and Stevens and the arrivals of Justices Alito, Sotomayor, and Kagan, thus marking a significant change in personnel in contrast with the last eleven years of the Rehnquist Court, when the Court's membership was nearly historically static.

Most especially, however, the Rehnquist Court and the Roberts Court (to date) are worthy topics for study not only because of the political and policy significance of federalism, as Ryan's book makes clear, but because of what has happened to federalism in the constitutional context during the past several decades. And it is the development of what is sometimes called the new federalism during those years that has attracted much scholarly attention, as anyone who has studied or taught about the Supreme Court will attest. New federalism has attracted attention because of its apparent contrast with much of what had come before. The fact is that in certain major respects there has been a changed constitutional reality.

Beginning with the New Deal in the 1930s and particularly with the "revolution" of 1937 and continuing into and through enactment of Great Society programs in the 1960s, values of state autonomy seemed as out of fashion as those of national and congressional ascendancy seemed to be thoroughly in vogue. Studying or writing about court decisions limiting congressional power in favor of state power typically meant turning to the past, not to the present. Federalism-oriented discussions seemed uninteresting because they seemed inconsequential. Whether with respect to federal judicial oversight of state criminal justice policies or of questions of representation in legislative districting cases, or doubts about the reach of the congressional commerce power, concerns expressed by individuals such as Justice John Marshall Harlan were typically heard only in the minority. As Harlan reminded an audience in 1963:

> Our federal system, though born of the necessity of achieving union, has proved to be a bulwark of freedom as well. We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it

> would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have . . . . Federalism as we know it in this federal system is of course difficult to operate, demanding political genius of the highest order. It requires accommodations being made that may often seem irksome or inefficient. But out of that very necessity usually come pragmatic solutions of more lasting value than those emanating from the pens of the best of theoretical planners. Unless we are prepared to consider the diversified development of the United States as having run its course and to envisage the future of the country largely as that of a welfare society, we will do well to keep what has been called 'the delicate balance of federal-state relations' in good working order.[55]

Against this backdrop, the Court's 1976 decision in *National League of Cities v. Usery* therefore came as a surprise when five Justices led by Rehnquist held that Congress could not extend the minimum wage and maximum hours provisions of the Fair Labor Standards Act to employees of states and their political subdivisions. To do so was to regulate "the states as states." There were "limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce. . . [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[56]

Yet this outcropping of state autonomy was itself short-lived when *National League of Cities* was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[57] Reaffirmed was a view of the Tenth Amendment in which constitutional limits on Congress are structural, not substantive—that states must find their protection from congressional regulation through the national political process and not through the courts. New federalism then reappeared in 1995 when the Court in *United States v. Lopez* struck down the Gun Free School Zones Act in the first invalidation of an act of Congress on commerce clause grounds since 1936. As Chief Justice Rehnquist explained for the majority of five, it was the Court's duty to draw the line between what could properly be the subject of national regulation and what could not. Echoing ideas expressed approximately a century earlier by Chief Justice Melville Fuller,[58] Rehnquist insisted that "the Constitution requires a distinction between what is truly national and what is truly local."[59] When *United States v. Morrison*[60] invalidated a provision of the Violence against Women Act in 2000, also in a 5–4 vote, it became apparent that the old struggle between dual federalism and the principles of national supremacy had been renewed in earnest.

It is this unfolding story that Banks and Blakeman present in their comprehensive study that seeks, with the aid of a series of helpful charts and tables, to put into perspective every federalism-related decision, including those turning on the Eleventh Amendment and preemption of the Rehnquist Court and the Roberts Court through the October 2011 Term. (Preemption cases arise because of the Supremacy Clause of Article VI and are those where the outcome turns on whether a legitimate exercise of national authority supersedes or takes precedence over any arguably conflicting action by a state government). A "Postscript"[61] examines the Roberts Court's opinions in a pair of recent decisions with important federalism issues: *Arizona v. United States*[62] and *National Federation of Independent Business v. Sebelius*.[63]

Productively, the authors position their analysis within the larger context of the Court's historic role as a player in defining how federalism has worked in practice since practically the beginning of government under the Constitution. They begin with the belief that the Supreme Court's "legal policy is profoundly shaped by judicial conflict from within the Court, as well as by ideological considerations and exogenous forces that ultimately strike a workable balance between the forces of centralization and state-centered conceptualizations of sovereignty." More specifically, the authors examine not only the federalism of the Rehnquist Court but investigate whether "the Roberts Court is assuming a different kind of jurisprudence or institutional role than the Rehnquist Court did in superintending federalism litigation."[64]

Alongside fulfilling the book's ambitious research objective and design, the authors turn to the recent past as the basis for looking into the future and hazard several predictions. First, just as did the Rehnquist Court, the current Bench will "continue to address preemption disputes with a view toward refining the principles of preemption doctrine within the larger context of federal-state relations."[65] That is, they see preemption cases as useful vehicles for developing a more comprehensive vision of federalism in the constitutional order. Second, within the preemption category of cases, they detect a "relatively new ideological divide" that "has as much to do with the rival economic philosophies within the Court . . . as it does with traditional judicial conflicts over statutory interpretation and the proper role of the federal government."[66] Third, the authors conclude that the Roberts Court will "chip away at the political safeguards approach to federalism defined in the divisive *Garcia* decision" illustrating that the Roberts Court "is, to a degree, mirroring the Rehnquist Court," making sure that "Congress itself respects those safeguards, especially by making its intent to regulate state functions clear and unmistakable."[67] Fourth, the Roberts Court "remains internally divided over federalism" just as was the Rehnquist Court, with a typical voting dynamic of 4–4 with one Justice "serving as a swing vote."[68] This voting division the authors find unsurprising given the stark partisanship that has pervaded Congress in recent years. "The extent to which exigencies external to the Court, such as the brutish polarization in Congress affect the disagreements among the justices is unknown but cannot be discounted" even though Banks and Blakeman also say that most federalism cases seem to be decided "without ideology being the driving factor." Still, the result is a situation where the Court has difficulty speaking "with one collective voice."[69] Finally, there is the political climate outside the Court, which is not only largely beyond the Justices' control but which in large measure will probably shape the policies to be enacted that in turn will spawn the cases that will land on the Court's docket for possible decision.

As almost any federalism case illustrates, the Justices routinely do far more than merely announce the outcome of the litigation in terms of who wins and who loses. Rather, in what amounts to a pronouncement to the nation, they perform a teaching function by explaining the decision through an opinion, whether for the majority or a plurality, or by way of a dissent or concurrence. But members of the Court have also long expressed themselves off the Bench as well through books, articles, addresses and, more recently, interviews. Many members of the Court have hardly seemed infected with what Justice Frankfurter once termed "judicial lockjaw."[70] Not only did Chief Justice Marshall devote ample space in his acclaimed biography of George Washington[71] to a presentation of the Federalist theory of the union, but even took to the newspapers to defend anonymously his opinion in *McCulloch v. Maryland*.[72] Not long after Marshall's self-protective foray, Justices Story and Baldwin expounded their

theories of the Constitution in their respective sets of commentaries.[73] The breadth of tolerance was such that Justice John McLean maintained his seat on the Court while running perennial campaigns for the presidential nomination on the National Republican, Free Soil, and Republican party tickets, while also making known his views on a variety of subjects through letters in newspapers and going so far as to condemn publicly the conduct of the Mexican War by the Polk administration. A year later, he even expressed his views in a similar fashion on the power of Congress to legislate on the status of slavery in the territories. The pattern continued variously through the following decades so that by the 1960s Justice William O. Douglas had joined the ranks of the most outspoken Justices in Court history, lecturing widely and authoring a series of books and articles dealing with constitutional government, civil liberties, the Supreme Court, travel, and ecology,[74] a prodigious output perhaps rivaled chiefly in degree if not in kind only by Justice David J. Brewer, whose literary and oratorical exertions were concentrated around the turn of the twentieth century.

In its contemporary manifestations, the practice continues unabated, tempered usually by the general refusal to discuss openly specific matters of public law and intra-Court decision-making, especially when the former are or very likely will come before the Court for decision. Certainly any notion that today Justices and other federal Judges should maintain absolute silence off the bench is historically insupportable. The question rather becomes one of balance between what is unexceptionable and what is not, and sometimes the boundary can be fuzzy. There are the competing values of the demonstrable need for the appearance of judicial fair-mindedness and moderation on the one hand, and the individual judge's right to address matters of national concern on the other. Alongside these cautions, the reality of a long-running record of off-the-bench commentary on a wide range of subjects has been so plentiful, rich, colorful, and sometimes stimulating that a half century ago it attracted the attention of political scientist Alan F. Westin, who compiled and edited a collection of some of these off-Bench writings and addresses that he entitled **An Autobiography of the Supreme Court**.[75] More recently, political scientist David M. O'Brien of the University of Virginia looked at the same genre, gave it a more specialized focus, and produced a collection entitled **Judges on Judging**,[76] the first edition of which appeared in 1997. Happily there is now a fourth edition.

Apparently compiled mainly for students interested in the judicial process, the volume is nonetheless serviceable to novice and seasoned scholar and practitioner alike and of particular value to anyone desiring to read about what judges do as described not by outsiders but by judges themselves, as the subtitle—**Views from the Bench**—promises. Moreover, perhaps to avert any confusion that the "bench" at hand is of the judicial and not the athletic[77] variety, O'Brien's introduction tellingly points to the common observation that most Americans know very little about the Supreme Court and the other federal courts—much less in fact than they do about Congress—yet hold the judiciary in much higher regard. This anomaly once led former member of Congress and later U.S. Court of Appeals judge Abner J. Mikva to comment, "I hate to think we're only beloved in ignorance."[78] The humor nonetheless points to the book's objective of making "accessible justices' and judges' thinking about judicial activism and restraint, rival approaches to constitutional interpretation, and the judicial role in the political process." With a balanced selection of entries, the volume seems constructed, as O'Brien explains, "to contribute to the ongoing debate about off-the-bench commentaries and to encourage readers to think about the qualities of judges—their temperaments, characters, judicial philosophies, and political views—as well as the role

of courts in American politics."[79] As such, **Judges on Judging** is what might be described as a self-replenishing book in that the selections O'Brien has included do not represent a canon whose contents are locked or closed.[80] Given the broad topics covered, one may safely predict that judges, including probably some of whom have yet to be heard from, will not only continue to speak and write about what they do, but perhaps continue to do so in occasionally uncommon ways. Yet, when circumstances call for a new edition, one hopes that it include an index, a truly essential feature that would make O'Brien's book noticeably more functional and convenient to use.

Organizationally, the new edition adheres closely to the structure of its predecessors. The book's thirty-four entries represent the work of thirty-one judges. Of the thirty-one, seventeen are current or former members of the United States Supreme Court. With the exception of one state appellate judge,[81] the remaining authors are or were judges on one of the United States' district courts or one of the United States' courts of appeals. To lend additional coherency to the volume, O'Brien has grouped the selections into four parts including (1) Judicial Review and American Politics: Historical and Political Perspectives; (2) The Dynamics of the Judicial Process; (3) The Judiciary and the Constitution; and, injecting a federalism component, (4) Our Dual Constitutional System: The Bill of Rights and the States. Readers will find both some well-known pieces and some that may be new for many. In the former category there are entries such as Oliver Wendell Holmes's "The Path of the Law" published while the future U. S. Justice was still sitting on the Supreme Court of Massachusetts, and Justice Hugo L. Black's signature discourse "The Bill of Rights." Among the latter are former Justice Souter's Harvard commencement address referenced above in connection with Professor Ryan's book, and Justice Clarence Thomas's lecture on "Judging" that he delivered at the University of Kansas School of Law.

Collectively, the contents of this edition of **Judges on Judging,** as did its predecessors, should continue to provide insight into the judicial process. Moreover, the book may have the added benefit of continuing a conversation on the propriety of, and limits to, various types of off-the-bench commentary, and the relationship of that to what Harlan Fiske Stone once termed, in the context of a bar association speech, the "judicial instinct of self-preservation."[82] Yet even without that eventuality, certainly O'Brien's book, as well as the other three surveyed here, demonstrate the High Court's continuing prominence in scholarly literature.

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

BANKS, CHRISTOPHER P., AND JOHN C. BLAKEMAN. **The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Courts.** (Lanham, MD: Rowman & Littlefield, 2012). Pp. xiii, 348. ISBN: 978-0-7425-3504-6, cloth.

BLACK, RYAN C. AND RYAN J. OWENS. **The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions.** (New York: Cambridge University Press, 2012). Pp. ix, 181. ISBN: 978-1-107-01529-6, cloth.

O'BRIEN, DAVID M., ED. **Judges on Judging: Views from the Bench.** (Los Angeles: Sage, 4th ed., 2012. Pp. x, 680. ISBN: 978-1-4522-2782-2, paper.

RYAN, ERIN. **Federalism and the Tug of War Within.** (New York: Oxford University Press, 2011). Pp. xxix, 398. ISBN: 978-0-19973-7987, cloth.

ENDNOTES

[1] Edward S. Corwin, **The President, Office and Powers** (4th ed., 1957), 69.

[2] *Myers v. United States*, 272 U. S. 52, 117 (1926).
[3] Joseph Story, **Commentaries on the Constitution of the United States** (2d ed., 1851), vol. 2, 330.
[4] Quoted in *id.*
[5] John Marshall, **The Life of George Washington** (2d rev. ed., 1848), vol. 2, 169. Although many in the Founding generation were classically educated, one may safely assume that the social life of members of Washington's "cabinet council" did not mirror fifth-century Athens entirely. *See* Ann Steiner, "Private and Public: Links between Symposion and Syssition in Fifth Century Athens," 21 *Classical Antiquity* 347 (2002).
[6] Quoted in Charles Warren, **The Supreme Court in United States History** (rev ed., 1926), vol. 2, 31.
[7] John Marshall, **The Life of George Washington**, 169.
[8] U.S. Constitution, Art. III, Section 1.
[9] Stanberry would have filled the seat vacated by the death of Justice John Catron. The elimination of the Catron seat reduced the Court's roster from ten to nine, and the additional adjustment cut it from nine to eight. The roster was fixed at nine in 1969, after Johnson's departure, and it has remained at nine ever since.
[10] Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.
[11] Robert L. Stern, The Solicitor General and Administrative Agency Litigation, 46 *American Bar Association Journal* 154, 156 (1960).
[12] Quoted in Linda Greenhouse, "Justice," *New York Times*, June 2, 1989, p. A-11.
[13] Named to the position by President Ronald Reagan in 1981, General Lee served until 1985.
[14] Rex E. Lee, "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 51. General Lee's lecture was the first in a series of eight presentations designated "The John Marshall Lectures on the Constitution, the Supreme Court and the Justices," presented on the campus of Franklin & Marshall College between October 1985 and February 1989 with primary funding from the National Endowment for the Humanities.
[15] Book-length studies include Lincoln Caplan, **The Tenth Justice** (1987) and Richard L. Pacelle, Jr., **Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation** (2003).
[16] Ryan C. Black and Ryan J. Owens, **The Solicitor General and the United States Supreme Court** (2012), hereafter cited as Black and Owens.
[17] *Id.* at 6-7.
[18] *Id.* at 5.
[19] *Id.* at 5-6.
[20] General Griswold, named to the post by President Lyndon Johnson, served from 1967 until 1973.
[21] Quoted in Rebeecca Mae Salokar, **The Solicitor General** (1992), 98.
[22] Black and Owens, 9.
[23] *Id.* at 135.
[24] *Id.*
[25] Robert L. Stern, "The Solicitor General and Administrative Agency Litigation," 156.
[26] Black and Owens, 136.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Rex Lee, "The Office of Solicitor General: Political Appointee, Advocate, and Officer of the Court," 59.
[31] D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices**, 22.
[32] Quoted in *id.*
[33] *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 838 (1995), Kennedy, J., concurring.
[34] Erin Ryan, **Federalism and the Tug of War within** (2011), hereafter cited as Ryan.
[35] *Id.* at xi.
[36] *Id.* at xiii-xiv.
[37] Jack C. Plano and Milton Greenberg, **The American Political Dictionary** (10th ed., 1997), 40.
[38] Ryan, 3.
[39] 19 U.S. (6 Wheaton) 264 (1821). In *Cohens*, Chief Justice Marshall refuted the argument that, in all cases "arising" in their courts, state judges had final authority to interpret the Constitution and the U.S. laws and treaties made under its authority. Instead, because the people had surrendered portions of state sovereignty to the national government, the Supremacy Clause and the principle of judicial review required that final decisions on federal constitutional issues in state courts be made only by the Supreme Court. Otherwise a "hydra" in government would result with the Constitution having different meanings from state to state.
[40] 62 U.S. (21 Howard) 506, 521 (1859).
[41] 78 U.S. (11 Wallace) 113, 124 (1871).
[42] Ryan, 71-73.
[43] *Id.* at 16.
[44] *Id.* at 368.
[45] *Id.* at 181.
[46] *Id.* at xi-xii.
[47] *Id.* at 369.
[48] *Id.* at 207.
[49] *Id.* at 208.
[50] Text of Justice David Souter's speech: Harvard Commencement Remarks (as delivered), May 30, 2010. The italicized words in the excerpt here are those that Ryan both quotes and italicizes. Ryan, 11-12. Souter's address is available at http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ (last accessed May 31, 2013).

[51] Ryan, at 13.

[52] 22 U. S. (9 Wheaton) 1, 189.

[53] Ryan, at 12.

[54] Christopher P. Banks and John C. Blakeman, **The U. S. Supreme Court and the New Federalism** (2012), hereafter cited as Banks and Blakeman.

[55] John M. Harlan, "Thoughts at a Dedication: Keeping the Judicial Function in Balance," 49 *American Bar Association Journal*, 943, 944 (1963). *See* also J. Harvie Wilkinson, III. "Justice John M. Harlan and the Values of Federalism," 57 *University of Virginia Law Review*, 1185 (1971). Wilkinson's article was published shortly after Justice Harlan's death.

[56] *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976).

[57] 469 U. S. 528 (1985).

[58] *See* Fuller's opinion for the Court in *U. S. v. E. C. Knight Co*, 156 U. S. 1 (1895), and his dissent in *Champion v. Ames*, 188 U. S. 321 (1903).

[59] 514 U. S. 549, 568 (1995).

[60] 529 U. S. 528 (2000).

[61] *See* Banks and Blakeman at 313-321.

[62] 183 L. Ed. 2d 351 (2012).

[63] 183 L. Ed. 2d 450 (2012).

[64] Banks and Blakeman, 9.

[65] *Id.* at 298.

[66] *Id.* at 298-299. By economic philosophies, the authors have in mind opinions about how little or how much government should regulate business.

[67] *Id.* at 299.

[68] *Id.*

[69] *Id.* at 300.

[70] Felix Frankfurter, "Personal Ambitions of Judges: Should a Judge 'Think Beyond the Judicial'?" 34 *American Bar Association Journal* 656, 658 (1948). Aside from using the "lockjaw" phrase, Justice Frankfurter turned to a sports metaphor in his address: "Even Justices of the Supreme Court need not be wholly tongue-tied and may venture a few general observations about general themes that do not touch even remotely the strange parade of cases that come, or may come, before that extraordinary tribunal. One has thoughts about the game even if one sits upon the top most seat of the bleachers and can view it only faintly". *Id.*

[71] *See* note 5.

[72] 17 U. S. (4 Wheaton) 316 (1819). *See* Gerald Gunther, ed., **John Marshall's Defense of *McCulloch v. Maryland*** (1969).

[73] *See* note 3 and Henry Baldwin, **A General View of the Origin and Nature of the Constitution and Government of the United States** (1837).

[74] Perhaps Douglas's most extreme published thoughts are found in his polemical **Points of Rebellion** (1970).

[75] The book was published by Macmillan in 1963 and contains entries from the Jay Court into the Warren Court. Professor Westin, perhaps best known for jumpstarting the modern study of privacy law, taught at Columbia University for a number of years and died in early 2013.

[76] David M. O'Brien, **Judges on Judging** (2013), hereafter cited as O'Brien.

[77] O'Brien's book is therefore not to be likened to Alan Williams's **Walkon: Life from the End of the Bench** (2006).

[78] O'Brien, 2.

[79] *Id.* at 8-9.

[80] While O' Brien has included a lecture form 1988 by Justice Scalia, perhaps the next edition could feature an excerpt from **Reading Law: The Interpretation of Legal Texts** (2012), which Justice Scalia co-authored with Bryan A. Garner.

[81] Justice Holmes is counted with the former members of the U.S. Supreme Court.

[82] Harlan F. Stone, "Fifty Years' Work of the United States Supreme Court," 14 *American Bar Association Journal* 428, 428 (1928).

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Illustrations

All images are from the Library of Congress or are in the public domain except as noted below:
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Page 433, AP Wide World

Cover: This image, titled "The Supreme Court/Men Who Know the Law" was designed by the American Lithographic Company and published in *Truth* magazine on May 9, 1896, to document the landmark income tax case, *Pollock v. Farmers' Loan & Trust Company*. The scene takes place in the Old Senate Chamber in the U.S. Capitol and while not a literal representation of the Courtroom that day, it accurately depicts many of the people present. Fortunately, a copy of the magazine was retained by the Office of the Clerk of the Supreme Court and someone identified many of the people depicted in the scene with handwritten labels.

Starting on the Bench, from left to right, are Justices Henry B. Brown, Horace Gray, Stephen J. Field, Chief Justice Melville W. Fuller, John Marshall Harlan, David J. Brewer, George Shiras, and Rufus Peckham. (Edward D. White, sitting at far left, is cropped out here for space reasons). At the far right of the Bench sits the Court Crier, F. De C. Faust (Frederick de Courcy Faust), who served as a Court Page from 1887–1893, Court Crier from 1894–1904, and went on to be an Assistant Attorney General of the U.S. from 1904–1913.

Four Court Pages stand behind the Justices: Robert H. Dunlap, who went on to a distinguished military career raising to the rank of Brigadier General in the U.S. Marine Corps; Frank K. Green, who joined the Court's Library before becoming the Marshal of the Court from 1915–1938; James Gillespie "Blaine" Ewing (partially obscured), who became a commercial real estate agent in Manhattan in the 1920s and then worked for National City Bank; and Frank Halford, who may be Colonel Frank Halford, another long-serving Marine Corps officer who returned to duty from retirement to lead the Corps' recruiting during WWII.

Only Joseph H. Choate, who is presenting his argument, is identified in the Bar section. The man seated at the table looking at Choate may be his co-counsel or possibly the opposing counsel, Attorney General Richard Olney. At the far left, may be Solicitor General Holmes Conrad, as he is seated at the desk traditionally used by that office. Although not identified, the man seated with his back to the viewer in the area between the podium and the Bench, has a resemblance to the Clerk of the Court, James H. McKenney, and the artist may have moved him to this location due to a lack of space to the left of the Bench where the Clerk would traditionally sit. If not McKenney, or one his staff, he could represent a member of the Press. The other members of the crowd may depict famous members of the Bar.

From the Collection of the Supreme Court of the United States, caption information by Matthew Hofstedt, Associate Curator. If you have information about any of the other figures, please contact E-mail: curator@supremecourt.gov

Correction: In volume 38, number 2, page 170, the figures in the photo were identified out of order in the caption. Francis Biddle is at left, Harold Ickes in the middle, and Henry Wallace at right.