Introduction

Melvin I. Urofsky

We have a particularly appetizing buffet for our readers in this issue, and as I often say, they illustrate the rich variety of Supreme Court history. Although the traditional cases are at the heart of two of the articles, the stories told by the authors go far beyond the four corners of the opinions. This well reflects what one is finding in many recent books about the Court, the Justices, and their work, attention not only to the written opinion, but what Louis D. Brandeis used to call "all the facts that surround."

Williamjames Hoffer's article on the landmark case of *Plessy v. Ferguson* (1896) is not the first, nor will it be the last, historical word on that subject. But *Plessy*, decided more than a century ago, continues to fascinate scholars as we learn more about the people involved in the case. Hoffer takes a close look at the lawyering involved, and the strategy that brought the case to the high court. Since the Court does not issue advisory opinions, there must be a real case or controversy involved, and the people who objected to the Louisiana law segregating railroad cars chose carefully, not just Homer Plessy, but the lawyers and the tactics they would follow.

Thomas Healy, a colleague of Hoffer's at Seton Hall University, also revisits another landmark decision, *Abrams v. United States* (1919). The article is adopted from Healy's recent book, and focuses on why Oliver Wendell Holmes, Jr., changed his mind regarding the meaning of the First Amendment Speech Clause from his decision only a few months earlier in *Schenck v. United States*. Again, much has been written on the Holmes dissent, but Healy unearths new information that led Holmes to write what has been considered one of the great defenses of free speech.

There is much debate over the process by which men and women are nominated to the federal judiciary. One school of thought takes a rather purist view that if the person is qualified (and what that means is the subject of another book), then the Senate ought to confirm. History, however, teaches us that as great—perhaps even a greater—a consideration is politics, not only the political debates over hot button issues, but also old-fashioned party politics. This was as true in the days of the early Republic as it is now.

Lest anyone think that some of the recent fights over nominations are something new,

Albert Lawrence of New York's Empire State College examines the politics involving an open seat on the high court, President Grover Cleveland, and two New York lawyers who happened to be brothers—Wheeler and Rufus Peckham. While the political goals may have changed since Tammany tried to manipulate the process, political reasons still play a large role in who gets on the Bench.

When writing about the Court, historians always note that, in times of stress, especially when national security issues seem to be involved, the Court has often backed away from its role as protector of individual liberties. This is not surprising. The men, and more recently women, who have sat on the bench are subject to the same emotions as their fellow citizens when there is a perceived threat to the country. Justice William J. Brennan, Jr., observed in 1987 that the Court and the country "has a long history of failing to preserve civil liberties when it perceived its national security threatened."

One of the worst episodes of this failure occurred after the Second World War, in the nearly decade-long McCarthy era. Robert Lichtman, a San Francisco attorney and author, looks at the Court during these years, tracing how the Justices, like the country, engaged in the witch hunt, and eventually came out of its madness.

One of the continuing debates among scholars as well as politicians and judicial observers in general is that of "judicial activism" versus "judicial restraint." There are some who consider this at best a fallacious argument, since what constitutes "activism" and "restraint" are relative values very much in the eye of the beholder. Without the activism of the Warren Court, for example, it is hard to believe that the southern states would have voluntarily dismantled segregation.

On the other hand, a too rigid adherence to the "idol of restraint," as Zachary Baron Shemtob calls it, can lead not only to judicial paralysis, but the abdication of responsibility. Shemtob, who holds a doctorate in criminal justice and is now a law student at Georgetown University, looks at the one Court in recent history that took judicial restraint, if not to its limits, far enough to have earned it a reputation as one the least effective Courts in history—that headed by Fred Vinson.

One of the members of the Court, and the man who is often considered the great champion—as well as the worst-case example of taking the restraint doctrine too far—is Felix Frankfurter. A majority of scholars, including myself, do not consider Frankfurter a great jurist, and believe that he had little lasting influence on American jurisprudence. Yet this is the man whom Brandeis once characterized as "the most useful lawyer" in America.

That description came before Frankfurter went on the Bench, and involved his role as chief recruiting officer for Franklin D. Roosevelt's New Deal. Frankfurter placed many of his former students from Harvard Law in key positions in New Deal agencies, and the press dubbed them Frankfurter's "Happy Hot Dogs." How much influence he and his protégés had on the New Deal is, as Sujit Raman, an appellate lawyer in the Maryland United States Attorney's Office, notes, a highly contentious issue, and one that bears re-examination as new evidence and insights into the period become available.

What happens to Justices who retire from the Court? Warren Burger took on a high-profile role as chairman of the United States Constitutional Bicentennial Commission, but for the most part the general public hears relatively little about former Justices. Under the law, of course, they are still members of the federal judiciary and can sit on federal appeals courts. Many of them do just that—and often—and my old friend Stephen Wasby, now emeritus at the State University of New York in Albany, examines the activities of men and women who may have left the high court but who are still active judges. As always, a feast. Enjoy!

Plessy v. Ferguson: The Effects of Lawyering on a Challenge to Jim Crow

WILLIAMJAMES HULL HOFFER

On May 18, 1896, the United States Supreme Court issued opinions in the case of *Plessy v. Ferguson*.[1] Justice Henry Billings Brown's opinion for seven of the eight Justices participating in the case upheld Louisiana's Separate Car Act.[2] He rejected the argument of Homer A. Plessy's attorneys that the law violated sections of the Thirteenth and Fourteenth Amendments, most notably Plessy's right to "equal protection of the laws" under the Fourteenth Amendment. Though the Louisiana law segregated passengers on railroads on the basis of whether they were white or colored—in other words, on the basis of race, Brown found that the law's requirement that the accommodations be "equal, but separate" met the constitutional standard.[3] In a dissent that has become a classic of constitutional jurisprudence, Justice John Marshall Harlan declared that the Constitution was "color-blind." [4] States could not make distinctions that were based on perceptions of race, no matter how race was categorized. The impact of the Plessy case was clear to all: states and their agencies were free to use racial categorization to segregate public places, as they had been doing and would continue to do.

Though largely ignored at the time it was issued, *Plessy* would become the standard-bearer for a long line of "separate, but equal" decisions upholding what was colloquially called the Jim Crow system of pervasive, invidious racial distinctions. The colored facilities were usually vastly inferior, despite the injunction of the *Plessy* case that they be equal. Jim Crow stereotypes of superior whites and inferior blacks were staples of film, radio, popular literature, and advertising.[5] Although the long, hard-fought, and wrenching battle to dismantle the Jim Crow system in law may now be over, its consequences still echo in American education, business, and politics. Not surprisingly, then, the story of the *Plessy* case, though neither simple nor easy to tell, is one we need never forget.

There is no known photo of Homer Adolph Plessy, whose great-grandfather was recognizably African American, but who looked white. Above is a cartoon of a segregated-railcar challenge in Philadelphia.

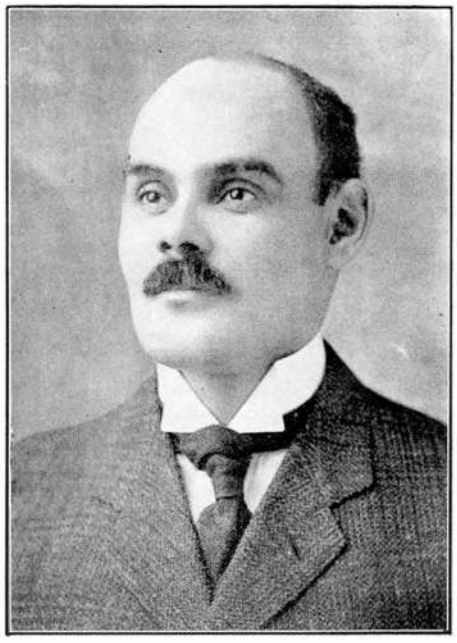
The contribution of this article is as follows: to remind us that behind every case there are human stories. First, Plessy's own story should not be neglected. Crucial aspects of it remain obscure. Homer A. Plessy was no random passenger in a whites-only railroad car that a conductor spotted. In fact, it is unlikely that the conductor would have confronted him, reported him, and had him arrested without considerable prompting. Homer A. Plessy appeared to be just as white as anybody else in the train car. His great-grandfather was a recognizable African American, although the word used at the time was Negro, a term that owed its origins to the Spanish word for "black," a reference to the hue of someone's skin. However, even according to court documents, Plessy was not recognizably black.[6] How could he have been arrested for sitting in the wrong car of the train?

The answer lies in a plan for a legal test of the statute among Plessy, a group of like-minded, similarly situated individuals in New Orleans known as Afro-Creoles, and the train company itself.[7] They arranged to have Plessy arrested for violating Louisiana's Separate Car Act so he would be able to challenge that

law in court. They wanted a test case, and they had to have a real case or controversy to bring that case to court. Test cases were nothing new because courts are averse to issuing declaratory judgments. Therefore, the defendant and the occasion had to be carefully chosen to fulfill the requirements of constitutional litigation.

Second, the moving force behind this particular test of Jim Crow was Aristide Mary, then seventy years old and a veteran of many failed crusades, including his own nomination for governor in 1872. After announcing their intentions on September 5, 1891, he and R. L. Desdunes organized a committee whose name reflected the group's exclusivity: the Comité des Citoyens. It was French, and they saw themselves as a Creole body, not as an African one. In addition to Mary, Desdunes, and the newspaper editor Paul Trevigne, it included Arthur Esteves, president; C. Antoine, vice president; Firmin Christophe, secretary; G. G. Johnson, undersecretary; and L. A. Martinet, the founder of the *Daily Crusader*. Trevigne was a teacher, educated overseas at the Catholic School for Indigent Orphans, also known as the Couvent School. The Couvent was a center for the Creole community. Homer A. Plessy, among others, received his education there. A law graduate of Southern University, Desdunes was on the metropolitan police force when White Leaguers attacked it and killed eleven of their number in 1874.[8]

The committee announced its formation and call for aid in a document they entitled "An Appeal," the self-titled "Citizens' Committee for the Annulment of Act No. 111 Commonly Known as the Separate Car Law' " seeking a national response. Their language suggests the urgency of the cause as well as their strident commitment to it: "No further time should be lost. We should make a definite effort to resist legally the operation of the Separate Car Act. This obnoxious measure is the concern of all our citizens who are opposed to caste legislation and its consequent injustices and crimes." From the organization's very start, they sought victory in the courts: "At all events, it is the imperative duty of oppressed citizens to seek redress before the judicial tribunals of the country. In our case, we find it is the only means left us. We must have recourse to it, or sink into a state of hopeless inferiority."[9]



Aristide Mary and R. L. Desdunes organized a French Creole committee called the Comité des Citoyens, which was behind the *Plessy* test case. Prior to Plessy's arrest, Desdunes's son, Daniel (pictured), a musician, rode an interstate train in order to level the charge that Louisiana's Separate Car Act ran afoul of the interstate commerce power.

The committee also depended on donations from the wider community. By late October, most of the $1,400 they would raise came from skilled labor organizations like the Société des Artisans, the cigar makers' NCR Club, the Bricklayers' Union, and the Mechanics' Social Club. Civic organizations in New Orleans also gave money to support the cause, including the Le Silence Benevolent Association and the Creole of Color chapter of the Masons. Women and their organizations, some from outside New Orleans, also gave to the cause.[10]

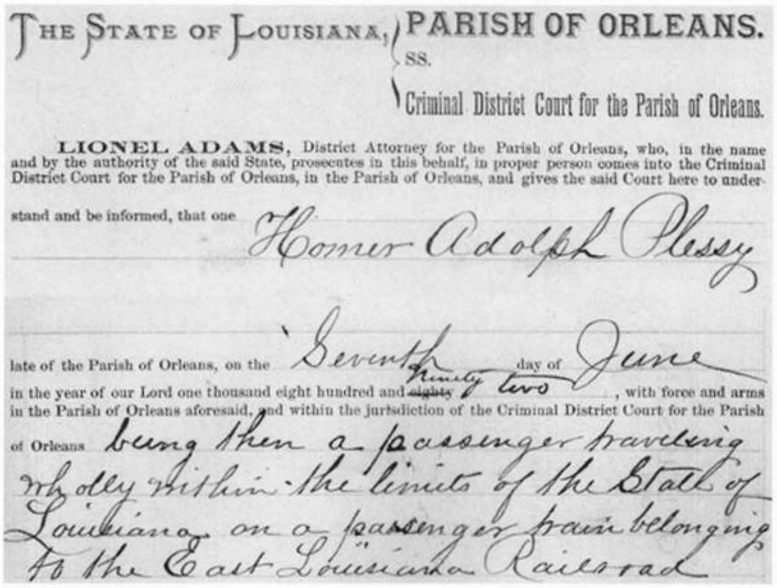
Plessy boarded the Eastern Louisiana Railroad at the Press Depot, which was two miles from his home in the Tremé section of New Orleans.

Although many of these organizations existed before the Civil War, many more demonstrated the organizational trend in American life in the postwar period. This flowering of professional groups, accrediting bodies, and labor societies played a substantial role in shaping America into the professionalized, bureaucratized society we know today. Many theorists call this conglomeration of private groups the civil society—a vital part of the public sphere, but non-coercive because they are not instruments of government.

The leaders and many of the supporters of the cause were Afro-Creoles. Most of the Afro-Creoles, including those who resided in the Faubourg Tremé section of New Orleans, were much like Homer A. Plessy, skilled or semiskilled laborers trying to prosper as best they could. Plessy in many ways was typical. He was variously listed as a clerk, a warehouse worker, and an insurance collector in addition to his occupation at the time of the litigation: shoe repair and shoemaker. By 1902, he was counted merely as a laborer, evidence that he shared the fortune of many a skilled worker in industrializing America: deskilling.[11]

Third, when they had raised the money, the committee needed to select attorneys to conduct their test case. The test case was a legal strategy that owed its origins to the intricacies of the common law. Oftentimes, the common law courts did not allow simple declaratory lawsuits. There had to be a contest over an issue for which there was redress in the courts. As a result, litigants often arranged a suit between themselves in order to have the court hear the case, but only so they could receive a ruling on the specific underlying issue that concerned them, like who owned what, whether there was legal title to an item, or even the status of one of the persons involved. Test cases had evolved from these fabricated suits into an accepted kind of lawsuit.[12]

The committee determined that local attorney James Campbell Walker would handle the litigation in Louisiana. Walker was born on January 24, 1837, and fought in the Civil War on the Confederate side. After the war, he became a lawyer serving the

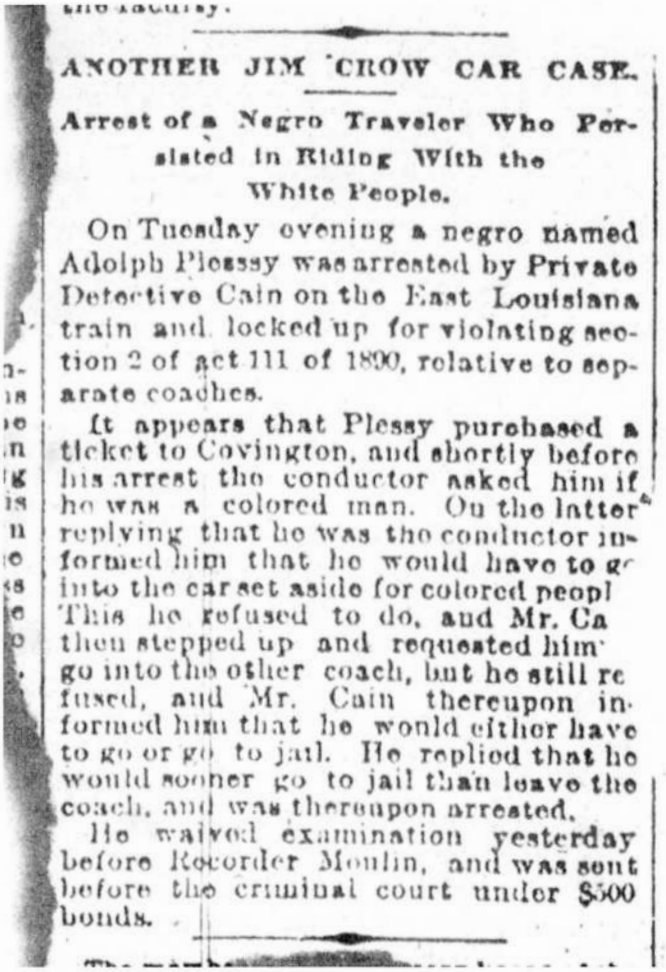


THE STATE OF LOUISIANA, } PARISH OF ORLEANS.
SS.
Criminal District Court for the Parish of Orleans.

LIONEL ADAMS, District Attorney for the Parish of Orleans, who, in the name and by the authority of the said State, prosecutes in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed, that one Homer Adolph Plessy

late of the Parish of Orleans, on the Seventh day of June in the year of our Lord one thousand eight hundred and ~~eighty~~ ninety two, with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans being then a passenger traveling wholly within the limits of the State of Louisiana on a passenger train belonging to the East Louisiana Railroad

Before the train even left the station, the off-duty police detective who had been hired by the Comité arrested Plessy and then escorted him to the nearby police station, where he was booked and then released on bond. Above is Plessy's arrest card; below the *Daily Picayune* reported on the arrest on June 7, 1892.



ANOTHER JIM CROW CAR CASE.

Arrest of a Negro Traveler Who Persisted in Riding With the White People.

On Tuesday evening a negro named Adolph Plessy was arrested by Private Detective Cain on the East Louisiana train and locked up for violating section 2 of act 111 of 1890, relative to separate coaches.

It appears that Plessy purchased a ticket to Covington, and shortly before his arrest the conductor asked him if he was a colored man. On the latter replying that he was the conductor informed him that he would have to go into the car set aside for colored peopl This he refused to do, and Mr. Ca then stepped up and requested him go into the other coach, but he still refused, and Mr. Cain thereupon informed him that he would either have to go or go to jail. He replied that he would sooner go to jail than leave the coach, and was thereupon arrested.

He waived examination yesterday before Recorder Moulin, and was sent before the criminal court under $500 bonds.

Republicans, notably in the election dispute of 1876, before a falling out returned him to private practice. Known to all as Judge Walker from a spell on the bench, by the time of Plessy's trial, he was fifty-seven years old and married with seven children. He was the committee's second choice for local counsel. Their first choice, T. J. Semmes, had wanted $2,500 to do the case. Walker only wanted $1,000. The committee went with Walker.[13]

The committee also wanted a co-counsel of national stature and decided to ask Albion W. Tourgée. Albion Winegar Tourgée was born on May 2, 1838, in the New Englander–settled area of Ohio known as the Western Reserve—"a hotbed of abolitionism," according to Tourgée's most recent biography. When the Civil War broke out, he quit his studies at the University of Rochester and joined the 27th New York Infantry. He was shot in the spine at the First Battle of Bull Run and suffered from a temporary paralysis as a result, but he managed to recuperate sufficiently to rejoin the war as a first lieutenant in the 105th Ohio Volunteer Infantry. He ended his military service in December 1863 after participating in the battles of Chickamauga and Chattanooga. On his return to Ohio, he married Emma Doiska Kilbourne, a union that would produce their only child, a daughter.[14]

At the conclusion of the war, Tourgée sought out opportunity consistent with his abolitionist commitment to a new nation based on equal rights by settling in Greensboro, North Carolina. He also hoped its milder climate would be better suited to recuperation from his lingering battlefield ailments. Finding himself in the midst of that war-torn state's internal civil war over race, post-slavery adjustments, and the arrival of the Republican party, he began a law practice. Tourgée's philosophy was one of radical individualism: a belief in the existence of races and racial differences, but a commitment to the idea that those differences did not matter. This stemmed from a deeply held Christian view that all men were God's creatures and entitled to pursue their lives free from prejudice or discrimination. He could not be dissuaded by compromise, political expediency, or hostile reactions.[15]

In Greensboro, Tourgée's law practice income was supplemented by work for the congressional Reconstruction's state government. He participated prominently in North Carolina's constitutional convention in 1868, served as a superior court judge from 1868 to 1874, and was a member of the constitutional convention of 1875. After an unsuccessful run for Congress in 1878, he published the work that made his name, **A Fool's Errand, by One of the Fools**, a fictionalized account of his experiences in North Carolina, in 1879. His tale of struggle against Klan violence, bigotry, and human folly made it a national bestseller. When the Redemption government's toleration of hostility toward him and his family became apparent, and with his legal practice finished by bad investments, he moved back north to Mayville, New York, near the Chautauqua Institute.[16]

There he continued to write about and advocate for what he labeled a "color-blind" law and society. It was in this vein that he came to the attention of the committee. In his regular column on race and the law, "A Bystander's Notes," for the *Daily Inter-Ocean*, a Republican paper in Chicago, he called for opposition to the Louisiana law segregating railroad cars. If this and his novels, writings, and organizing were not enough, Tourgée had been instrumental in the campaign against lynching, a practice that had spread to his native Ohio. The law against lynching he helped author demonstrated the effectiveness of such legal tactics, at least in Republican-leaning Ohio. Considering that Ohio had taken the lead in segregating before the Civil War and opposed the adoption of the Fourteenth Amendment, this was a considerable accomplishment.[17]

But when the committee approached him, Tourgée was no longer practicing law. He had

After an unsuccessful run for Congress in 1878, Albion Tourgée published a bestselling book that recounted his fictionalized experiences in North Carolina and his struggle against Klan violence and bigotry. An outspoken advocate of anti-lynching laws, Tourgée was no longer practicing law when he was approached by the Comité to take the *Plessy* case.

no appreciable experience in appellate litigation. He was an advocate for a cause, but largely for his conscience and public opinion's sake. Nevertheless, the committee sought his advice, then his services, which the dedicated crusader took on without charge.[18]

It is plain from the correspondence between the committee and Tourgée that he was to be the senior member of the legal team. In a letter dated October 5, 1891, Martinet wrote to Tourgée at his home in New York, "You will be the leading counsel & select your own associate. We know we have a friend in you & we know your ability is beyond question." He added for good measure, "Local counsel too will have to conform to your views." In this same extensive communication, Martinet referred to the idea of having a person who could pass as white be the defendant as presenting a problem, because "there are the strangest white people you ever saw here." Though Tourgée and the committee were thinking along similar lines, Tourgée's experience in North Carolina could not have prepared him adequately for the situation in New Orleans, where making distinctions on the basis of color was as troublesome as maintaining the levees.[19]

Tourgeé and Martinet agreed that Tourgeé's plan for a light-skinned man would be best. In language inherited from laws enacted before the Revolution, they determined an octoroon would be best—someone with a great-grandparent who was African American and likely could pass for white. They settled on Daniel Desdunes, the son of one of the committee members, whose ability to pass for white removed any doubt as to the arbitrariness of the law's iniquitous discrimination.[20]

Fourth, after a long search for a cooperative railroad, the Louisville and Nashville agreed to work with the committee. Their reason was not public-spiritedness, much less a belief in the equality of the races, but rather profit motive. Running entirely separate cars for the very few first-class colored passengers who were likely to board at any given time was a burden they could do without.[21]

The committee decided to have Desdunes ride an interstate train. In this way, they could also level the charge that the law ran afoul of the interstate commerce power, as implicated in a Louisville Railroad case from Mississippi. On February 24, 1892, Daniel bought his first-class ticket for passage on the Louisville and Nashville Railroad to Mobile, Alabama. He boarded at Canal Street and sat in the whites-only car. By prearrangement, the committee employed two private detectives to aid the conductor in arresting Desdunes. Again, according to the plan, Desdunes identified himself as colored, refused politely to leave his seat, and did not resist his removal to the police station two miles from where he had boarded. Paul Bonseigneur, treasurer for the committee, was there to post his bond.[22]

However, the Louisiana Supreme Court threw a wrench into the lawyers' well-oiled machinery when it decided the case of *State ex rel. Abbott v. Hicks* on May 25, 1892.[23] Relying at least in part on the Louisville Railroad case decision in the U.S. Supreme Court, Louisiana's Supreme Court had thrown out the prosecution of a Texas and Pacific Railway conductor for allowing an

African American passenger to sit in a whites-only car.[24] One notes that the beneficiary of their decision was the white conductor. Their specific reasoning is difficult to discern from the case report, but its outcome was not: they preserved the Separate Car Act by declaring that it did not apply to interstate train travel. Fearing that this decision would render their chosen defendant's suit moot, the committee sought out another line of attack.[25]

Thus, while Daniel Desdunes awaited his day in court, Homer Adolph Plessy made his contribution to the cause. His ride was on a railroad that ran wholly within the state, thus making it an entirely different challenge to the Separate Car Act. Once more, the committee set up the transaction carefully. On June 7, 1892, Plessy headed for the number eight train scheduled for a 4:15 p.m. departure to Covington, Louisiana, the end of the line. He boarded at the Press Depot, headquarters for the Eastern Louisiana Railroad, some two miles from his home in Faubourg Tremé. Before the train left the station, the committee's off-duty police detective, Christopher C. Cain, complied with the request of the train's conductor, J. J. Dowling, and arrested Plessy. He then escorted Plessy to the nearby police station, where, just as Desdunes had been, Plessy was booked and then released on bond the committee posted.[26]

There is some disagreement among historians of the case as to how the conductor came to know that Plessy—who, after all, had been chosen because he could pass for white—was a colored man violating the law. This question would return throughout the litigation. According to one account, Plessy stated upon giving his ticket the words he prepared beforehand: "I have to tell you that, according to Louisiana law, I am a colored man."[27] The majority opinion for the Court in *Plessy* noted that Plessy was "of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him," but gave no details as to how the conductor or the High Court knew Plessy was colored.[28] In any case, Louisiana law probably considered some portion of African ancestry as the definition of colored when color itself did not tell under the so-called "one drop rule."

Besides leading to the dead-end discussion of how someone could be colored but did not appear to be, this confusion about Plessy's race would be a hurdle for Plessy's counsel to surmount. While the sheer arbitrariness of the law in determining race was of vital importance to their case, the committee and its lawyers could not adequately resolve the dilemma of how to get a person whose appearance would not arouse suspicion arrested on a charge of violating a law that was based almost entirely on appearance. Plessy's self-identification would have been the best solution. However, their failure to have this critical information entered into the record damaged their prospects for challenging racial distinctions on the basis of their vagueness.

Nevertheless, the litigation moved forward. As happens in most test cases, problems revealed themselves as the case unfolded. The committee's attorneys had to navigate the uncharted waters of both criminal and constitutional law in such a way as to maximize their chances for success. But Tourgée's understandable refusal to sacrifice his other interests or his health by going to New Orleans to work on the case complicated matters. Walker had to conduct a complex conversation about legal strategy and substantive legal issues by mail. Given that Tourgée's home in Mayville, New York, was far from the hub of any major metropolis, each piece of correspondence took up to a week or more. Despite this obstacle, Walker and Tourgée managed a collaboration that succeeded with the help, and sometimes the unwanted interference, of the committee that hired them. Like most test case subjects, Desdunes and Plessy, the actual defendants and supposed clients, had little say in the situation.

Fifth, the judges and Justices in the litigation should not be regarded as Delphic oracles of the law. They were men whose backgrounds and opinions influenced its course. On July 9, 1892, Judge John H. Ferguson of section A of the New Orleans criminal court dismissed the charge against Daniel Desdunes. Without a written opinion, Ferguson ruled that the Louisiana Supreme Court's decision in *Abbott v. Hicks* made the charge unsustainable, essentially granting the defendant's lawyers' plea for dismissal. Though they had failed to overturn the law in court, Martinet wrote Tourgée that the committee was pleased with the outcome. He echoed these sentiments in the July issue of the *Crusader* when he declared, "The Jim Crow car is ditched and will remain in the ditch." A court had ruled that the Separate Car Act could not apply to interstate trains. Actually, the Louisiana Supreme Court had ruled slightly differently: that the law did not apply to interstate trains.[29] Therefore, in all the ways that mattered, this was a defeat. The law still stood.

On October 13, 1892, Assistant District Attorney Lionel Adams arranged for Plessy to be arraigned before the same district judge who had tried Desdunes, John H. Ferguson. Ferguson was a transplant from Massachusetts. Born there in 1837, he studied for and practiced law far from slavery and voted Democratic. At the close of the war, Ferguson heard reports from returning Massachusetts soldiers of the opportunities Northern men could have in the South, in particular New Orleans. Soon after he arrived in his new home, the Yankee from Boston married into a staunchly Unionist family and resumed the practice of law. He aligned himself not with Republicans, however, but with Democrats. When Nicholls first became governor, he arranged for Ferguson to enter the legislature. After one term, Ferguson returned to his legal practice. He reentered public service in June 1892, when Governor Murphy Foster, Nicholls's handpicked successor, rewarded Ferguson with a district judgeship for his many public speeches against the Louisiana Lottery Company. The *Plessy* case was to be his one claim to fame.[30]

With the interstate aspects of the legal arguments now moot, Walker filed a slightly different fourteen-point argument in a plea against the charge against Plessy. Walker sought a writ of prohibition—an order to suspend the prosecution of Plessy on the grounds that the Separate Car Act was unconstitutional. Walker's case centered on the violation of Plessy's rights under the U.S. Constitution, specifically the Thirteenth and Fourteenth Amendments. He made sure to mention Plessy's mixed background—a point Tourgée felt was critically important, particularly because it made the conductor's discretionary enforcement powers subject to a charge of being arbitrary.[31]

The newspaper reports noted that Adams responded more briefly. He alleged that the state of race relations and the noxious smells from colored people made the law reasonable. It is important to note the substance of this contention about reasonability. Although the U.S. Supreme Court had yet to establish the rational basis test for equal protection clause review, it was widely understood that states had to meet a burden of reasonableness even when they claimed a health or police power basis for legislation that restricted a person's liberty. For example, in 1897 in the case of *Gulf, Colorado & Santa Fe Railroad Co. v. Ellis*, the U.S. Supreme Court established that states had the right to exercise what the courts termed "the police power" as long as it bore a "rational relationship" with the "lawful objective" sought, a standard of review we know today as the rational basis test. Thus, it was critically important for those challenging a law not only to show that it impinged on a constitutionally protected right, but that it did so unreasonably.[32]

On November 18, 1892, as the defense team anticipated, Judge Ferguson issued his opinion denying Walker's motion on Plessy's

behalf. According to the *Daily Picayune*'s reprint of the judge's order, Ferguson dismissed any concern over the classification of Plessy as a person of color with the statement of fact: "There is no averment as to the color of the defendant." As for the idea that he could dismiss charges against a defendant because the policy behind the law was improper, he fell back to the concept of judge as the servant of the people: "Judges have nothing to do with the policy of particular acts passed by the legislature. The will of the law-giver being understood, nothing remains but to carry it into effect."[33] Like a baseball umpire calling balls and strikes, Ferguson was denying responsibility for the law. He was also deferring to the legislature, a posture widely adopted by judges. Not only did it make sense for a political appointee like Ferguson to defer to the legislative majority, but also judges' deference to legislatures was a foundational principle of the Democratic party.

Under Louisiana criminal procedure, when Plessy's legal team appealed Ferguson's denial of Plessy's motion, the case became known as *Ex Parte Homer A. Plessy to the Louisiana Supreme Court*, then *Plessy v. Ferguson* to the U.S. Supreme Court. Ex parte means for or on behalf of a party to a dispute, and it refers to a controversy where only one disputant is presented before the court. But, there was an additional step: to exhaust their state-based appeals.

The case went next on appeal to the Louisiana Supreme Court. There, in December 1892, in an opinion by Justice Charles E. Fenner (published in January 1893), the Louisiana Supreme Court upheld Ferguson. Fenner was one of the justices of the Louisiana Supreme Court, like former governor Nicholls (who was now chief justice), who were Democrats. Born in Tennessee, Fenner served the Confederate cause as a captain in a Louisiana artillery battery. Jefferson Davis was a family friend and spent many happy days visiting the Fenner family in their Garden District home. Davis died there in 1889. An attendee of the University of Virginia law school, Fenner had been on the court since 1880 and had a successful law practice after the war. In 1884, he spoke glowingly of Robert E. Lee's physical and moral attributes at the dedication of a statue to the Confederate commander of the Army of Northern Virginia in New Orleans in 1884. He would retire the year after rendering his opinion in *Plessy*, dying in 1911 a distinguished member of the bench and bar, and a member of the board of trustees of what would become Tulane University.[34]

As the legislature had planned when it passed the Separate Car Act, Fenner's opinion turned on the law's facially equal treatment of the races. Fenner dismissed counsel's Thirteenth Amendment position as argumentative—that is, without foundation in law. He cited the relevant passage in the *Civil Rights Cases*, the U.S. Supreme Court's voiding of much of the Civil Rights Act of 1875, which read in part: "The denial of equal accommodations in inns, public conveyances and other places of public amusements, imposes no badge of slavery or involuntary servitude upon the party, but, at most, infringes rights which are protected from State aggression by the XIVth Amendment." In the process of dismissing the claim against the law's vesting of authority in train conductors and exempting them from liability, Fenner patronizingly critiqued the righteous outrage of those challenging the law as stemming from "some misconception." After all, if the legislature's white majority had such bigotry in mind, would it not be better for the colored people to accept segregation for their own protection? "It is certain that such unreasonable insistence upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by Chief Justice Shaw, to foster and intensify repulsion between them rather than to extinguish it." Turning the reasonable test on its head, he opined that to insist on no racial distinctions in the law was "unreasonable." To desire that

state law conform to the U.S. Constitution's demands was "no adequate motive."[35]

On January 3, 1893, Chief Justice Nicholls denied Walker's petition for an additional hearing to go over factual issues Judge Ferguson had missed in the original trial. On January 5, Walker filed for a writ of error with the Louisiana Supreme Court to appeal its decision to the U.S. Supreme Court. Nicholls gave permission for the appeal the same day.[36] The committee had achieved their objective: they now had an opportunity to challenge the law before the highest court in the land.

Practice before the U.S. Supreme Court is and was a rarefied art. It took great courage, mastery of the skills of appellate argument, and a familiarity with the Court's procedures to give a good account of oneself, let alone gain a favorable outcome. One also had to be admitted to practice before the Court—a special privilege granted to a select few. Tourgée knew he would need assistance in this regard. He did not have to look far. He selected an old friend from his days as a judge in North Carolina: the former U.S. Solicitor General, now a Washington, D.C., attorney in private practice, Samuel F. Phillips.

Phillips was born on February 18, 1829, to the English mathematician James Phillips and his wife, Judith Vermeule Phillips, in New York City. From the age of two, Samuel grew up in Chapel Hill, North Carolina, where his father had become a professor at the newly established University of North Carolina. He graduated there in 1841 with highest honors, earning a master's degree in law three years later. After a brief stint as a tutor in the law department, he gained election to the state legislature in 1852 and 1854 as a Whig. From 1861 to 1862, he was on the court of claims, then served as state auditor from 1862 to 1864. He had objected to secession and participated prominently in the antiwar movement. In 1864 he regained a seat in the general assembly, where he became Speaker in 1866. His support for equal rights for African Americans cut short his political career while bringing him into close contact with others of like mind such as Tourgée. Phillips greatly admired the judge and kept in correspondence with him as their career paths separated. After another term in the assembly from 1871 to 1872, President Grant appointed Phillips to be the second Solicitor General.[37]

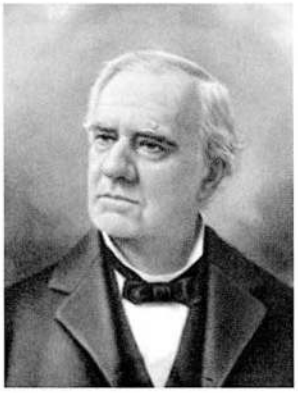
Phillips remained in that difficult post for the next thirteen years. He had the unenviable task of attempting to defend the Enforcement Acts and the Civil Rights Act of 1875 before an increasingly skeptical Court. Despite his general lack of success in these arguments, he did provide original lines of thought Justice John Marshall Harlan used in his dissents, as well as points his distant successors would use to great effect several decades later before more favorable Courts. With his law partner, District of Columbia attorney Frederick D. McKenney, Phillips provided his own brief on Plessy's behalf to supplement Tourgée and Walker's. Both he and Tourgée were also able to make oral arguments before the Court.

Indicating both his sense of the moment and his insouciant optimism, Tourgée later wrote Martinet on October 31, 1893, that it might be a good idea to delay the hearing before the Court. His reading of the Justices indicated that five out of the nine then on the Bench would vote against Plessy's appeal. Though the membership of the Court was unlikely to change, they might be swayed by public opinion through his planned journal, the *National Citizen*. "Of course, we have nothing to hope for in any change that may be made in the court; but if we can get the ear of the Country, and argue the matter fully *before the people first*, we may incline the wavering to fall on our side when the matter comes up."[38] Besides the inappropriateness of a lawyer suggesting that a litigant use public opinion to sway the supreme tribunal, it seemed presumptuous at best, and arrogant at worst, to think that his own publicity efforts might be worth more than a swift decision for his clients.

When arrangements finally moved toward a decision before the High Court in 1894, the committee had lost much of its fervor. Its advocates in state politics had either died or moved on. The successful passage of the miscegenation law prompted a protest but no legal challenge. One author has seen this lackluster response to these laws forbidding marriage among races, particularly against whites marrying those of other races, as the untold, critical part of the segregation movement. Besides the inherent problem in establishing who was a member of a race when there was no actual scientific evidence to substantiate the claim, especially the "one drop" standard of most laws, the state's official classification of people into racial categories and forbidding marriages among unrelated, consenting adults flew in the face of the equal protection guarantees of the Fourteenth Amendment. The laws' justification—the protection of the races, in particular the white race, from contamination—was a red flag of adverse discrimination if ever there was one. This was not just discrimination on the basis of race. It was the raising of white race to an elevated status and the viewing of another as a contaminant.

As they awaited the outcome of their litigation before the U.S. Supreme Court, personal blows fell on committee members. In 1895, Aristide Mary shot himself to death at his dining room table. He had become increasingly frustrated with the setbacks of the preceding years, and his once-vigorous mind had been showing signs of senile dementia. Besides the loss of their leader, the remaining committee members also had to confront the obvious signs that the national Republican party was abandoning them to their fate.[39]

In their part of the appellate brief to the U. S. Supreme Court, Phillips and McKenney undertook the key task of making the initial procedural arguments. They then asserted the first of Plessy's constitutional arguments: in brief, that the Separate Car Act violated



To move his admission to the Supreme Court bar Tourgée selected an old friend, Samuel F. Phillips (above), whom he knew from North Carolina, where Phillips had been a Republican leader during Reconstruction. Now an attorney in private practice in D.C. (and a former U.S. Solicitor General), Phillips made oral arguments before the Court in addition to Tourgée. With his law partner, Frederick D. McKenney, Phillips had supplemented Tourgée's briefs as well.

Plessy's rights under the privileges and immunities clause of the Fourteenth Amendment. While much of the procedural arguments were a walk-through—the state of Louisiana had conceded that Plessy had been arrested for violating the law and had faced trial, and that he had not been intoxicated, badly dressed, or disorderly—Phillips and McKenney did have to admit the record did not show whether Plessy was colored or white.[40]

They attempted to make a virtue of this key omission by asserting that this made their case stronger. After all, in judging the case of a white sitting in a colored car or a colored sitting in a white car, "the constitutional liberty of the party so acted upon is as much offended in the first case as in the second." What was more, the statute was making an unequal discrimination inasmuch as it was reinstituting the racial verities of the antebellum period: "In either such case it is submitted as quite certain that the discrimination in question is along the line of the late institution of slavery, and is a distinct disparagement of those persons who thereby are statutorily separated from others because of a Color

which a few years before, with so small exception, had placed them within that line." Phillips and McKenney, in other words, were alleging this was simply the Old South attempting to reassert itself, a "taunt by law."[41] They were relying on the largely Northern-born Justices to vindicate the Union's victory as well as the Reconstruction policies that followed.

In prose that frequently waxed eloquent and cited the novels of Sir Walter Scott, Phillips and McKenney posited that the law could not discriminate on the basis of color—though outside of the law, such discrimination, much of it defamatory, was widely accepted. They too seemed to accept a hierarchical ordering of the races. "Everybody must concede that this [sitting at the head of the table] is true socially of the White man in this country, as a class. Nor does anybody complain of that." The point was not to bring those social conventions into the law. "It is only when social usage is confirmed by statute that exception ought or legally can be taken thereto." Martinet and the rest of the committee would have been appalled at this casual acceptance of racism. More in keeping with the committee's sentiments was the point that discrimination against people of the "Celtic" race would be obviously wrong.[42]

Phillips and McKenney did not stop there. They also took up valuable space in their brief arguing that train cars and common carriers were a different matter from schools and marriage in terms of state authority to regulate. By conceding these as precedent, they created an obstacle for themselves. Why was seating in a train car different from seating in a schoolroom? "Whether therefore two races shall intermarry, and thus destroy both, is a question of police, and, being such, the *bona fide* details thereof must be left to the legislature. In the meanwhile it cannot be thought that any race is interested on behalf its own destruction!" Having endorsed the repugnant notion that miscegenation was a genuine concern for both races, they decided to endorse segregated schooling. "In educating the young government steps '*in loco parentis*,' and may therefore in many things well conform to the will of natural parents. *Separate cars*, and *separate schools*, therefore, come under different orders of consideration."[43] Phillips and McKenney were certainly giving up a lot of ground to defend their client's basic civil rights.

Finally, they argued that the Court could not save the Louisiana law from itself by a creative construction of its provisions. They cited a passage in Justice Miller's opinion in the *Trade-mark Cases* in 1879 and to *Reese v. U.S.* in 1876 in support of this contention. It was a clever way around the problems *Reese* in particular caused their client. In *Reese*, the Court had voided the conviction of a poll worker in Kentucky, under the Enforcement Acts, who had denied an African American a ballot in the election of 1872 even though he had presented proof of being duly registered. While the *Reese* and the *Cruikshank* cases decided on the same day had done great damage to equal rights, Phillips and McKenney now advanced the claim that these prior decisions aided Plessy's fight for his civil rights because, unlike in *Reese* and *The Civil Rights Cases*, the Separate Car Act was clearly state action.[44] With that feat of legal legerdemain, they closed their portion of the brief.

Tourgée's section of the brief was a lengthy, multiple-point assault on the Separate Car Act. Because some of the points, questions asked, and refutations are duplicative, a look at them under their general headings is more instructive. First, he posited that the very discrimination on the basis of color violated the Thirteenth Amendment's prohibition on slavery. Putting people into different classes using a characteristic associated with bondage a generation ago was the equivalent of imposing the old caste system by other means. Second, the law vested too much authority in the hands of the conductors on trains. These private persons were not

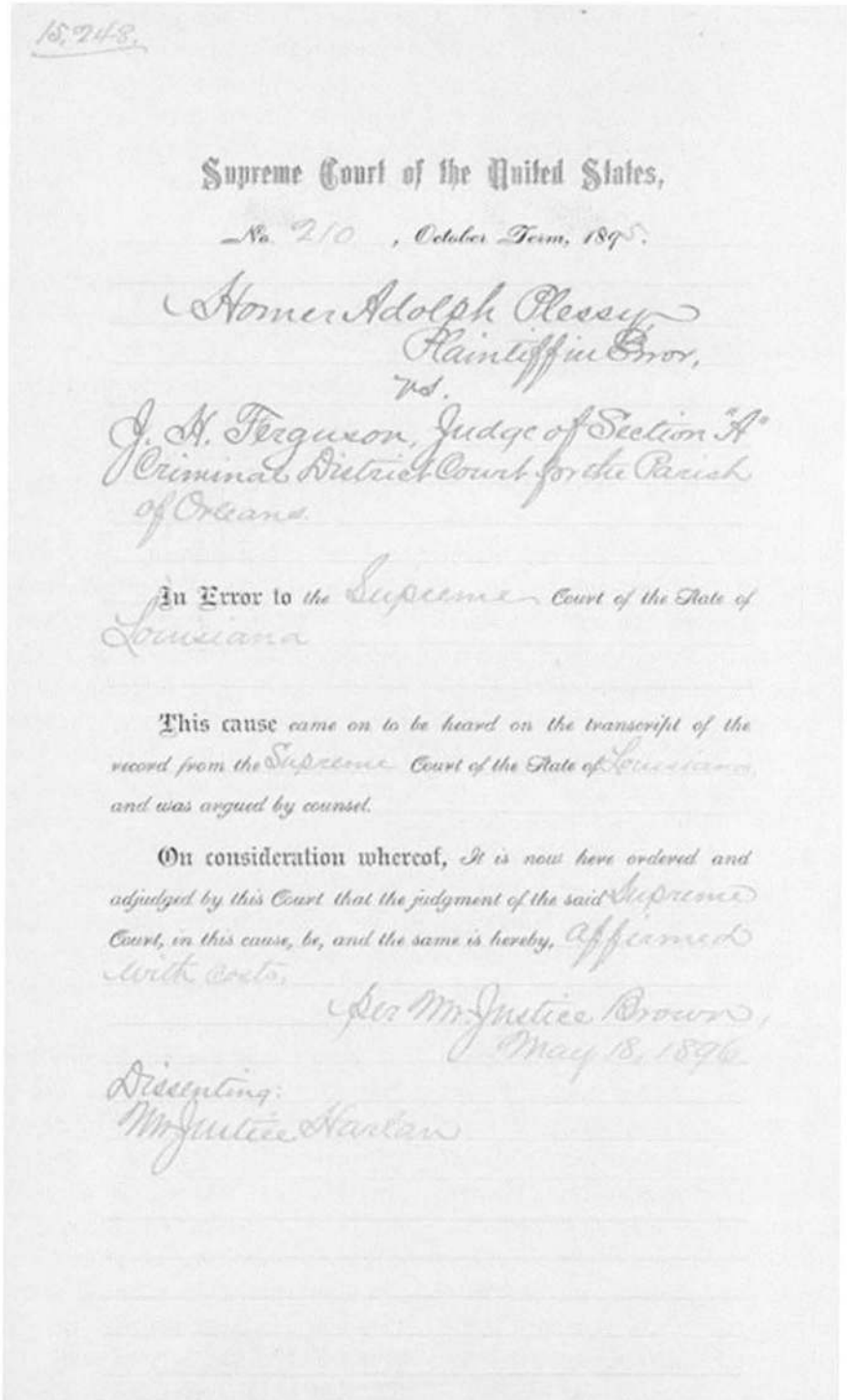
entitled to make judgments of this kind, not the least of which was determining to which category people belonged. Third, the law violated the strictures governing common carriers, in particular their duties of care, by limiting the liability of train conductors in their enforcement of the law. Fourth, the legislature and state of Louisiana had no justifiable purpose in making such distinctions among U.S. citizens. This went to the "reasonableness" of the act. Fifth, the law's exception for nurses of children introduced irreparable contradictions into its motivations, enforcement, and discriminations. Sixth, the law's categories were themselves unjustifiable divisions of people in an arbitrary manner. The law was overbroad and vague. In summary, Tourgée argued that the law violated the Thirteenth Amendment, as well as the privileges and immunities, the due process, and the equal protection clauses of the Fourteenth Amendment.[45]

Tourgée also introduced some novel arguments. One was the idea that the law was depriving those it defined as colored of a piece of their property, namely their identity as just U.S. citizens. "Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?"[46] Whiteness was thus something tangible, of value, and recognized by all. It was a dangerous contention for someone to make on behalf of a client who was determined to challenge the very existence of such a classification, but Tourgée felt the need to put in everything he could. Property rights, after all, found a high level of protection from this Court.

Tourgée next devoted some time to the proposition that "race-intermixture" had occurred to such a degree that state officials, much less train conductors, would not be able to determine the race without "careful scrutiny of the pedigree." Further, how was one to define someone of mixed ancestry? After all, looks could be deceiving, as they were in Plessy's case (by design, in order to raise this very issue). This argument tied in to his contention that the intent behind the law was not benevolent but malevolent, that it did not ensure equality but reinstituted slavery by another name. "The law in question is an attempt to apply this rule [color as a presumption of bondage] to the establishment of legalized caste-distinction *among citizens*." This reasoning applied not only to the due process deprivation of property or liberty claim, but also to the privileges and immunities contention. "A law assorting the citizens of a State in the enjoyment of a public franchise on the basis of race, is obnoxious to the spirit of republican institutions, because it is a legalization of *caste*."[47]

Tourgée did not originate this language or concept. The committee's initial statement in the *Crusader* in August 1891 made this point: "This obnoxious measure is the concern of all our citizens who are opposed to caste legislation and its consequent injustices and crimes."[48] However, it did dovetail nicely with what he truly believed. Whether it would convince a majority of the Justices presented a different matter entirely. Still, in this section of his brief, Tourgée reached high. He asserted that the privileges or immunities clause preempted the states' legislation and created "a *new* citizenship of the United States embracing new rights, privileges and immunities, derivable in a *new* manner, controlled by *new* authority, having a *new* scope and extent, dependent on national authority for its existence and looking to national power for its preservation."[49] This was ambitious advocacy before a Court that had proven reluctant to recognize a "new" nation—quite the opposite.

Tourgée did not cite any precedent or authority for these propositions. He relied instead on the plain language itself, its context, and the general proposition he took from the case of *Prigg v. Pennsylvania* that federal constitutional law was superior to state law. It must have been with some irony that he quoted from that 1842 Justice Joseph Story opinion. After all, Story had invoked federal supremacy



15,748.

Supreme Court of the United States,

No. 210, October Term, 1895.

Homer Adolph Plessy
Plaintiff in Error,
vs.
J. H. Ferguson, Judge of Section "A" Criminal District Court for the Parish of Orleans.

In Error to the Supreme Court of the State of Louisiana

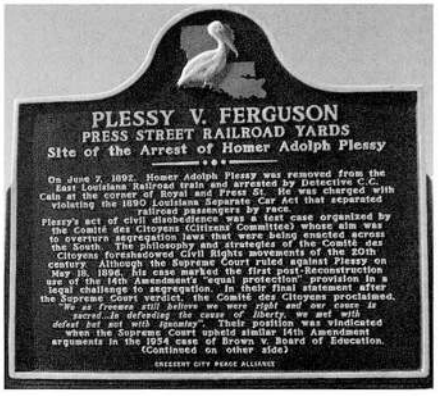
This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, Affirmed with costs.

Per Mr. Justice Brown,
May 18, 1896.

Dissenting:
Mr. Justice Harlan

Justice Henry Billings Brown handed down the 8–1 opinion for the Court on May 18, 1896, holding that the Separate Car Act did not violate Plessy's rights under the Privileges and Immunities Clause of the Fourteenth Amendment. Justice John Marshall Harlan issued a lone dissent.



This marker was placed at Press and Royal Streets on February 12, 2009, to commemorate Plessy's arrest.

in order to reverse the conviction of a slave catcher who had kidnapped a Pennsylvania woman and her freeborn children so he could (and did) sell them in Maryland.[50]

Tourgée then contended that the *Slaughterhouse Cases* and *Strauder v. West Virginia* (1880) supported his client's case. Although he dwelled on the minority opinions in *Slaughterhouse*, he made significant note of the fact that both majority and minority opinions agreed that, if the slaughterhouse law had affected persons of color, the Court would have used a different, perhaps stricter standard. In *Strauder*, the Court, through an opinion by Justice William Strong, held that West Virginia's command that no African Americans could serve on juries violated the equal protection clause of the Fourteenth Amendment. Justice Strong posited that the purpose of the clause was "to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." Tourgée believed *Strauder* lent itself to this interpretation of *Slaughterhouse*.[51] This was in spite of the fact the *Slaughterhouse* majority opinion had sharply limited the national privileges or immunities to such a degree they harmed Plessy's case.

Regardless of these obstacles, he moved forward with his call for equality. He analogized Louisiana's assertion of its right to promulgate a "police regulation" as upheld in *Slaughterhouse* to the Purim story in the Jewish book of Esther, when the evil Persian councilor Haman advised the Persian king to move against the Jews. Haman "did not set out the real cause of his zeal for the public welfare: neither does this statute," Tourgée explained. "He wanted to 'down' the Jew: this act is intended to 'keep the negro in his place.'" The exemption for colored nurses was proof positive. He concluded this section of the brief with a powerful statement: "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind."[52]

Perhaps reminded of the full potential of the Fourteenth Amendment by his analogy to a religious minority, Tourgée reversed course and insisted that the amendment was not a specific protection for those of color, but for all. The Fourteenth Amendment, properly read, mandated that all were to be treated the same without reference to color, not equal treatment that discriminated. The state's true motivation was, once again, adverse discrimination buffeted with states' rights reasoning. "It was the nurse and secured defence of slavery and excuse and justification of rebellion."[53] He drew a straight line from the disfavored rebellion to Louisiana's discrimination on the basis of race.

Abandoning the strategy of reconciling with adverse precedents, Tourgée argued against both *Slaughterhouse* and *Cruikshank*. He ridiculed the latter's reading of the Fourteenth Amendment: "Truly, if this construction be the correct one, this section of the amendment is the absurdist piece of legislation ever written in a statute book." One Justice who ruled on the 1875 case was still sitting on the Bench, Stephen J. Field, no friend to black rights, and lambasting the Court was a dangerous course. Here Tourgée spoke not from the usual appellate stance of making legal points, but from his own wartime experience. The Fourteenth Amendment, a product of the sacrifices and ideals of

that war, should not be rewritten by the Court. Likewise, "equal protection of the laws is not a *comparative* equality—not merely equal as between one race and another, but a just and universal equality whereby the rights of life, liberty, and property are secured to all." Further, these rights "belong to a citizen in every free country and every republican government."[54]

Besides the risk inherent in telling the Justices that they were wrong, he was incorrect about the history. The Fourteenth Amendment had sprung from Congress's experience with Reconstruction, not the Civil War. He could have had a much stronger argument if he had brought forward the actual abuses of the freedmen and the complicity of presidentially reconstructed states before congressional Reconstruction. However, he had a larger problem: the *Civil Rights Cases*.

Ignoring the majority's overturning of the public accommodations provisions of the Civil Rights Act of 1875, Tourgée saw in its demand for a "state action" a supportive precedent for his client. Louisiana had certainly acted. "It is an act of race discrimination pure and simple." The *Civil Rights Cases* limitation of the Fourteenth Amendment to state action put that precedent on his side. The Court, therefore, was entitled to rule on the question in favor of his client. Then he returned to his contention that the Separate Car Act was not a reasonable exercise of police powers. "The experience of the civilized world proves that it is not a matter of public health or morals, but simply a matter intended to re-reintroduce the caste-ideal on which slavery rested." Unfortunately, he was unable to escape the trap of racism himself when he posited, "The court will take notice of a fact inseparable from human nature, that, when the law distinguishes between the civil rights or privileges of two classes, it always is and always must be, to the detriment of the weaker class or race."[55] Again, he admitted the existence of race in order to refute racist legislation.

Courts are reluctant to overturn their precedents outright. They prefer to distinguish a precedent they are departing from, leaving it to apply only to its specific facts as they go on to effectually overrule it. Asking the Court to renounce *Cruikshank*, a case that was not analogous to the present one, led to all manner of confusion. In that case, the Court overturned the Enforcement Acts on the same ground as the *Civil Rights Cases* knocked down the public accommodations provisions of the Civil Rights Act of 1875: the amendment only authorized Congress to pass acts that penalized state action. By citing *Cruikshank*, Tourgée undercut the point he had made about the *Civil Rights Cases*: "It is freely admitted that Cruikshank's case is squarely against us."[56] Given that *Cruikshank* involved faulty indictments on a poorly worded section of the Enforcement Acts, it is hard to see how it related at all, much less went against Plessy's suit against a state law mandating discrimination based on race.

After delineating the differences and implications of the words *right, privilege*, and *immunity*, in his twenty-third and final point, he contended the Declaration of Independence was "not a fable as some of our modern theorists would have us believe, but the all-embracing formula of personal rights on which our government is based and toward which it is tending with a power that neither legislation nor judicial construction can prevent."[57] The Declaration had been the guiding star of generations of abolitionists. They argued it was incorporated in the Constitution. Even if they were right (a position that the High Court had rejected), surely the goals of the Declaration had been achieved by the Reconstruction amendments.

Tourgée closed by excusing his somewhat informal legal writing style. "Legal refinement is out of place when it seeks to find a way both to avoid the plain purport of the terms employed, the fundamental principle of our government and the controlling impulse and tendency of the American people."[58] He

was uncompromisingly moral to the last, just like the abolitionists who were his ideological progenitors.

James C. Walker's section of the brief was much more circumscribed. He restricted himself to five main points, although each can be divided into distinct parts. In each, he always cited precedent. His first point was that the statute's empowering of train conductors to assign passengers to racial categories violated the due process rights of those singled out for the separate car. He noted that both state and federal courts held this kind of task to be a judicial one. Assigning this discretion to the conductors was especially problematic because the state of Louisiana had not defined race, and there was no consensus on what made a person belong to one race or the other. He quoted from statutes both North and South defining *colored* as anything from a quadroon (a grandparent was colored), to an octoroon (a great-grandparent), to the "one drop" rule.[59] Unfortunately, this list also had the tendency to show the presence of belief in race as an objective legal category, if not one on which agreement had been reached.

What was more, Walker continued, the statute was not a reasonable exercise of the police power. "All police regulations are not necessarily constitutional; unconstitutional statutes are sometimes disguised in the habiliments of police regulations." Furthermore, they were subject to review. "Police regulations should be reasonable, and not involve the sacrifice of natural and inalienable rights, nor can they make a crime out of a natural right."[60] Walker had hit upon the standard of review argument. He had found it wanting, inconsistent with the separation of powers that assigned judicial functions to courts. Unfortunately, he did not explain why the statute was unreasonable.

In his second point, Walker found fault with the "equal, but separate" justification for the statute because the conductor could assign a racial character to a passenger, then eject a passenger who was unwilling to move, regardless of whether the cars for the two races were actually equal. Again, he noted the conductor's exemption from liability under the statute. To the idea that white persons were subject to the same arbitrary authority, he scoffed. "Yes, when they are mistaken for colored persons." He continued, "After all, however, discrimination in the matter is evident, and whether for or against the white race, or for or against the colored race, it is by state legislation on account of race or color, and such discrimination is forbidden."[61]

According to Walker's lights, this set of circumstances was exacerbated by the state's failure to designate Plessy as colored or white. For Walker, the factual classification was a constitutional matter—or rather, the Court should not take race into account. "Whether the petitioner, H. A. Plessy, is white or colored, or mostly white, or mostly colored, cuts no figure in the determination of the question of a court's jurisdiction or authority to hear and determine a case upon constitutional grounds."[62] The law violated Plessy's right to due process and equal protection of the laws.

Walker's third point emphasized the vagueness of the law's specification of color and its assignment of sole authority to conductors. "The race to which the octoroon belongs is just where the state Supreme Court left it, to be decided by the railroad conductors." The state supreme court had ignored this important task, probably because they themselves could not define the racial categories. Walker stated, "When neither jurists, lexicographers, nor scientists, nor statute laws nor adjudged precedents of the state of Louisiana, enable us to say what race the passengers belong to," how can there be duly executed laws on the subject?[63]

Walker's fourth point centered on the legality of the indemnification provision. The Separate Car Act protected the railroads from suit for enforcing the statute. For Walker, this was an improper removal of liability because only courts could make the determination of whether someone was liable for his or her

actions. "The legislature might with equal reason," Walker analogized, "undertake by anticipation to say that the courts shall not condemn a policeman for clubbing an unresisting prisoner in his custody."[64] Although it sounded absurd on its face, it was actually common practice for states to exempt their officers from liability for their actions. It was not the sovereign immunity—that is, "the sovereign can do no wrong"—that protected the state itself from suit (reinforced by the Eleventh Amendment to the federal constitution), but rather official immunity, a more limited protection of a state employee or officer acting within the prescriptions of the law and his or her official duties.

In his fifth and final point, Walker assailed the state supreme court's ruling that conductors had no final authority in the assignment of passenger cars based on race. It was as plain at the statutory language itself. It made conductors unappealable judicial officers. After quoting Fenner's opinion's label of "necessary discretion" to describe conductors' powers, Walker asked, "What idea do these words convey? Neither more nor less than what we say ourselves."[65] With this, he concluded his section of the brief.

The story of *Plessy*'s people reveals a lesson more important than the ultimate outcome of the case, more lasting, as history, than the words of Justices Brown and Harlan. That story is not one of heroism or tragedy, but of people seeking simple justice. It would come, but long after *Plessy*'s people had left the scene. The law does not automatically work its way pure. But sometimes the historian of law can uncover its inner springs in the ideas and yearning of persons like these. The lawyers effectively humanized their clients and presented solid evidence for the problems with the state of Louisiana's policy decision to discriminate on the basis of race.

However, though Tourgée and Walker's reading of the meaning of the Civil War and Reconstruction's contribution to American law was eminently supportable, it led them into a trap. It is not hard to understand why they fell into it. Despite their commitment to equal treatment for all regardless of race and their opposition to racial segregation by law, they were still people of their time. Racism was so deeply ingrained in America's history, society, culture, and law even a fervent antiracist like W. E. B. DuBois accepted its existence.

What Tourgée and Walker failed to do was to recognize what their clients truly wanted, represented, and constituted in their very persons, which had important ramifications for the legal debate over race in America. Homer A. Plessy, like Desdunes, Mary, and the other members of the Comité des Citoyens, was a category breaker. His possible statement to the conductor about Louisiana's definition of him as colored spoke volumes about the arbitrary nature of race. The *gens de couleur libres*, as they were known under French sovereignty, had not fought racism for generations because they were seeking equal treatment between Negroes, African Americans, coloreds, and whites. They were seeking equal treatment as individuals. Their pronounced defiance of racial categories was not just a political stance, but a reflection of their own unique identity. In short, they were seeking the abolition of race in America. Their lawyers' inability to escape the racial concepts of the time was largely inevitable, but it was also another instance of how lawyers and their decisions, whether conscious or subconscious, impact their clients and, in a larger way, the course of their country's history.

Editor's Note: This article is largely derived from the author's ***Plessy v. Ferguson*: Race and Inequality in Jim Crow America** (Lawrence: University Press of Kansas, 2012).

ENDNOTES

[1] 163 U.S. 537 (1896).

[2] The standard works on *Plessy* include James C. Cobb, "Segregating the New South: The Origins and Legacy of

Plessy v. Ferguson," *Georgia State University Law Review* 12 (1996): 1017–1036; Harvey Fireside, **Separate and Unequal: Homer Plessy and the Supreme Court Decision That Legalized Racism** (New York: Carroll & Graf, 2004); Michael J. Klarman, "The *Plessy* Era," *Supreme Court Review* 1998 (1998): 303–414; Charles Lofgren, **The *Plessy* Case: A Legal–Historical Interpretation** (New York: Oxford University Press, 1987); Keith Weldon Medley, **We as Freemen: "*Plessy v. Ferguson*," the Fight against Legal Segregation** (Gretna, La.: Pelican Publishing, 2003); Clarence Thomas, "The Virtue of Defeat: *Plessy v. Ferguson* in Retrospect," *Journal of Supreme Court History* 2 (1997): 15–24; Barbara Y. Welke, "When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to *Plessy*, 1855–1914," *Law and History Review* 13, no. 2 (Fall 1995): 261–316.

[3] *Plessy*, *supra* note 1, 163 U.S. at 540.

[4] *Id* at 559.

[5] **Racism and the Law: The Legacy and Lessons of "Plessy,"** ed. Gerald J. Postema (Norwell, Mass.: Kluwer Academic, 1997); **The Age of Segregation: Race Relations in the South, 1890–1945**, ed. Robert Haws (Jackson: University Press of Mississippi, 1978), in particular Derrick A. Bell Jr., "The Racial Imperative in American Law," and Mary Frances Berry, "Repression of Blacks in the South 1890–1945: Enforcing the System of Segregation"; Stephen Duncombe, ed., **Cultural Resistance Reader** (London: Verso, 2002), for an account of lynching; Leon F. Litwack, **How Free Is Free? The Long Death of Jim Crow** (Cambridge: Harvard University Press, 2009); **Remembering Jim Crow: African Americans Tell about Life in the Segregated South,** ed. William H. Chafe, Raymond Gavins, and Robert Korstad (New York: New Press, 2001); and Catherine M. Lewis and J. Richard Lewis, eds., **Jim Crow America: A Documentary History** (Fayetteville: University of Arkansas Press, 2009) C. Vann Woodward, **The Strange Career of Jim Crow**, commemorative edition with afterword by William S. McFeely (New York: Oxford University Press, 2002); Richard Wormser, **The Rise and Fall of Jim Crow** (New York: St. Martin's Press, 2003).

[6] *Plessy*, *supra* note 1, 163 U.S. at 537.

[7] On the Afro-Creole population's unique approach to the law, *see* Rebecca J. Scott, **Degrees of Freedom: Louisiana and Cuba after Slavery** (Cambridge: Harvard University Press, 2005); "The Atlantic World and the Road to *Plessy v. Ferguson*," *Journal of American History* 94, no. 3 (December 2007): 726–733; and "Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge," *Michigan Law Review* 106 (March 2008): 777–804.

[8] Medley, *supra* note 2, at 112–127.

[9] *Id.*, at 126.

[10] *Id.*, at 127–131.

[11] *Id.*, at 24–33.

[12] N.E.H. Hull, **The Woman Who Dared to Vote: The Trial of Susan B. Anthony** (Lawrence: University Press of Kansas, 2012), 155–156.

[13] Lofgren, *supra* note 2, at 30–31.

[14] Mark Elliott, **Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality, from the Civil War to *Plessy v. Ferguson*** (New York: Oxford University Press, 2006), 43–103.

[15] *Id.*, at 103–107.

[16] *Id.*, at 107–182.

[17] *Id.*, at 182–249.

[18] Lofgren, *supra* note 2, at 30.

[19] Louis A. Martinet to Albion W. Tourgée, October 5, 1891 (Tourgée Papers, Chautauqua County Historical Museum, New York) in Otto H. Olsen, ed., **The Thin Disguise: "*Plessy v. Ferguson*"** (New York: Humanities Press, 1967), 56–57.

[20] Lofgren, *supra* note 2, at 32–33.

[21] *Id.*, at 32.

[22] Medley, *supra* note 2, at 135.

[23] *State ex rel. Abbott v. Hicks*, 44 La. Ann. 770, 1 So. 74 (1892).

[24] *Louisville, New Orleans, & Texas Railway Company v. Mississippi*, 133 U.S. 587 (1890), 10 S. Ct. 348, 33 L. Ed. 784, 1890 U.S. LEXIS 1935.

[25] Lofgren, *supra* note 2, at 39.

[26] Medley, *supra* note 2, at 13–14.

[27] Fireside, *supra* note 2, at 1.

[28] *Plessy*, *supra* note 1, 163 U.S. at 537.

[29] Lofgren, *supra* note 2, at 39–40.

[30] Medley, *supra* note 2, at 39–52.

[31] Lofgren, *supra* note 2, at 41–42.

[32] 165 U.S. 150, 165 (Brewer, J.) (1891).

[33] "Jim Crow Car Law," *The Daily Picayune*, November 19, 1892, 3.

[34] Williamjames H. Hoffer, ***Plessy v. Ferguson*: Race and Inequality in Jim Crow America** (Lawrence: University Press of Kansas, 2012), 75–76.

[35] *Ex Parte Homer A. Plessy* No. 11,134 Supreme Court of Louisiana 45 La. Ann. 80 (1893), 11 So. 948, 1893 La. LEXIS 345, (Fenner, J.).

[36] Lofgren, *supra* note 2, at 43.

[37] Office of the Solicitor General, U.S. Department of Justice, "Samuel F. Phillips," (accessed August 16, 2010), http://www.justice.gov/osg/aboutosg/samuelphillipsbio.htm.

[38] Albion W. Tourgée to Louis A. Martinet, October 31, 1893, (Tourgée Papers), *Thin Disguise*, 78.

[39] Medley, *supra* note 2, at 169–173.

[40] Philip B. Kurland and Gerhard Casper, ed., **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law**, vol. 13 (Arlington,

VA: University Publications of America, 1975), 4–9 (hereinafter referred to as "*Landmark Briefs*").

[41] *Landmark Briefs*, at 9–11.

[42] *Id.*, at 12–13.

[43] *Id.*, at 13–15.

[44] *Id.*, at 23–26; *see also Trade-mark Cases*, 100 U.S., 82; *U.S. v. Reese*, 92 U.S. 214; *U.S. v. Cruikshank*, 92 U.S. 542 (1876).

[45] *Landmark Briefs*, *supra* note 40, at 30–32.

[46] *Id.*, at 36.

[47] *Id.*, at 37–8, 41.

[48] Medley, *supra* note 2, at 126.

[49] *Landmark Briefs*, *supra* note 40, at 39.

[50] *Prigg v. Pennsylvania*, 16 Peters, 539, cited in *Landmark Briefs*, 40.

[51] *Landmark Briefs*, *supra* note 40, at 42–44.

[52] *Id.*, at 45–46.

[53] *Id.*, at 48.

[54] *Id.*, at 49, 50.

[55] *Id.*, at 53.

[56] *Id.*

[57] *Id.*, at 62.

[58] *Id.*, at 63.

[59] *Id.*, at 66–68.

[60] *Id.*, at 73–74.

[61] *Id.*, at 76.

[62] *Id.*, at 77.

[63] *Id.*, at 77–78.

[64] *Id.*, at 78.

[65] *Id.*, at 80.

The Brothers Peckham and the Politics of Judicial Nomination

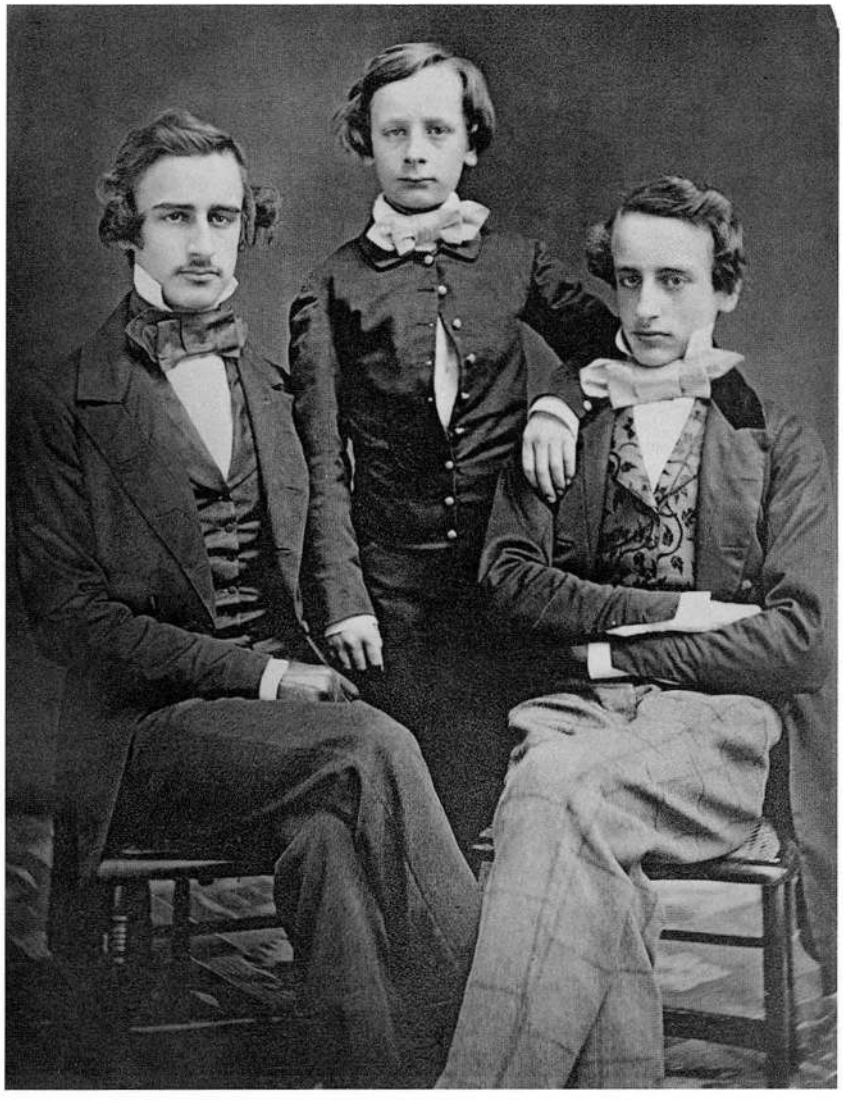
ALBERT B. LAWRENCE

In 1894, President Grover Cleveland nominated Wheeler H. Peckham, a New York lawyer, for a seat on the Supreme Court of the United States. The Senate rejected the nomination. The defeat was orchestrated by New York Senator David B. Hill, a Tammany-Hall Democrat who opposed Cleveland's reform style of "Bourbon" Democratic politics. Strangely, Hill proclaimed that he would support as a substitute nominee Peckham's brother, New York Court of Appeals Judge Rufus W. Peckham, whose politics were rooted in the same reform tradition as that of his brother. Why the brother but not the nominee? There are circumstances to suggest that Hill wanted to move Rufus out of the way to make room on New York's high court for a political crony of Hill's, a lawyer who had been involved in a notorious "vote-stealing" scandal. Cleveland did not accede to Hill, and stubbornly put forward Wheeler's nomination, which failed. He did nominate Rufus Peckham for another seat the following year, however, and won his confirmation.

Cleveland, Hill, and the Peckhams were all New York Democrats. In fact, Hill had been Cleveland's lieutenant governor when he served as governor from 1883 until he moved to the White House in March 1885.[1] But in the 1870s and 1880s the New York Democratic party was divided between what was known as the Tammany Hall machine in New York City and upstate reformers, led by one-time presidential candidate Samuel J. Tilden and his chief lieutenant, Daniel Manning, an Albany banker and newspaper owner.[2] The reformers became known as "Bourbon" Democrats.[3] When the reformers allied with Republicans, they were collectively called "Mugwumps."[4] Cleveland had made his name as a reformer as mayor of Buffalo in 1882.[5] Hill, on the other hand, had been "in league" for years with Tammany Hall and its leader, William Marcy "Boss" Tweed,[6] but he supported Cleveland for governor because he wanted to become lieutenant governor.[7] Once in Albany, Governor Cleveland angered Tammany by nominating someone from a rival Brooklyn machine as immigration commissioner. When Tammany

objected, he submitted a long list of nominees to state jobs, none of whom were favorites for Tammany patronage.[8] He also battled with Tammany over fares on New York City's elevated railroad.[9]

As President, Cleveland refused to participate in New York politics, and he would not endorse Hill, his successor as governor, when Hill ran for re-election in 1888.[10] This was the final straw between Cleveland and Tammany. Hill, as governor, became the leader of the anti-reformers and promptly declared war on Cleveland's attempts to stem government patronage and reform the civil service. As President Cleveland's biographer Alyn Brodsky described it: "A faction [of the New York party] dancing ominously to Hill's piping and committed to perpetuating the spoils system was tightening its grip on the party."[11] Likewise, the President's failure to win a second consecutive term in 1888 was attributed to Tammany's refusal to give him strong support.[12]



Wheeler Hazard Peckham (left) and Rufus Peckham, Jr. (middle) read law under their father, Rufus Peckham Sr., and became successful lawyers in Albany. A middle brother, Joseph Henry (right), died at age seventeen. (Their mother, Isabella, died when young Rufus was nine.) Rufus followed in his father's footsteps by serving as the district attorney for Albany, on the New York Supreme Court, and on the Court of Appeals.

The Peckham brothers were lawyers from Albany whose father had been a Court of Appeals judge. All of the Peckhams were long-time acolytes of Tilden and their fellow Albanian, Manning. Tilden had run in opposition to Tammany corruption since his first campaign for New York Assembly in 1845.[13] Tweed then controlled the nomination and election of state, county, and city officials—particularly judges—in New York. "Judges were nominated partly with a view to the amount they could 'put up,' and partly with a view to their future decisions on political questions," concludes Tammany Hall scholar Gustavas Myers[14] As state Democratic chair in the 1860s and 1870s, Tilden sought to reform the state's judiciary and successfully proposed a slate of what he called "pure" candidates for the state's highest court, the Court of Appeals, including the Peckhams' father, who was also known as Rufus W. Peckham. The Tweed Ring would be powerless without its hand-picked judges on the state's courts, Tilden felt.[15]

Wheeler Hazard Peckham played a larger role in the reform movement than either his brother or his father. He established a law practice in New York City in the 1860s and became a friend of Tilden.[16] In 1873, Wheeler Peckham was appointed chief assistant to Charles O'Conor, who was then prosecuting "Boss" Tweed and many of his associates on corruption charges. He devoted several years to destroying O'Conor and the infamous Tweed Ring. "The actual conviction of Tweed, for which Mr. Peckham was mainly responsible, broke the power of the Ring, and its fragments were scattered to the four corners of the earth," notes Wheeler's biographer"[17] In a contemporaneous role as a special deputy attorney general, Peckham also pursued $6 million in civil damages against Tweed and his cronies.[18] One report asserted that the civil and criminal actions against Tweed "were practically conducted by [Peckham] alone."[19] Even after he returned to private practice, he remained a reformer as president of the Association of the Bar of the

The Peckham brothers and their father were long-time acolytes of Samuel Tilden and opposed Tammany Hall corruption. The Tammany Society was the Democratic party political machine that used patronage and graft to control New York politics. Pictured is Tammany Hall decorated for the 1868 election, where the Tammany Society held its convention.

City of New York.[20] In 1888, he supported Hill's Republican opponent for governor,[21] and sealed his division with Hill, first by commissioning a bar association probe into an election scandal involving a Hill ally, then by leading opposition to Hill's nomination of the same man, Isaac H. Maynard, to the Court of Appeals, which Peckham saw as a reward for Maynard's election shenanigans.[22]

The election scandal came in 1891, and control of the state senate was in the balance. Maynard was then serving as a deputy state attorney general. The senate election was especially important because the state was to be re-districted the following year, and the ability of Democrats in the senate to influence configuration of the districts might determine control of the state legislature for years to come. The 1891 senate election hinged upon the outcome of balloting in the Hudson Valley's Dutchess County.[23] Hill sent Maynard to the county as a personal representative of the governor and as an adviser to the Democrats.[24] Thirty-one Republican ballots were found to have ink marks on their edges. The Democrats claimed that they were thereby defective and should be rejected.[25] The Dutchess County Board of Canvassers agreed and threw out the votes, giving the election to the Democratic candidate by fourteen votes. The Republican county clerk, as secretary to the board, refused to certify the results, however, and the board selected one of its own members, John J. Mylod, as secretary *pro tem*, and he forwarded the pro-Democratic return to the three members of the state board of canvassers in Albany: the governor, the secretary of state, and the state comptroller.[26]

The Republicans went to court and demanded a corrected return from the county board and an order prohibiting the state board from certifying the Mylod return.[27] The case eventually made its way to the Court of Appeals, which decided—ironically, in a decision by Judge Rufus W. Peckham—that a new return by the county should be filed with the state board.[28] In the meantime, a new return had been prepared by the county and sent to the three state officers.[29] Maynard was later accused of intercepting one of the copies in an after-hours raid of the state comptroller's office, and the other copies were taken by another man.[30] When the state board met, it had only the Mylod return, and it certified the Democrat as the winner of the senate race.[31]

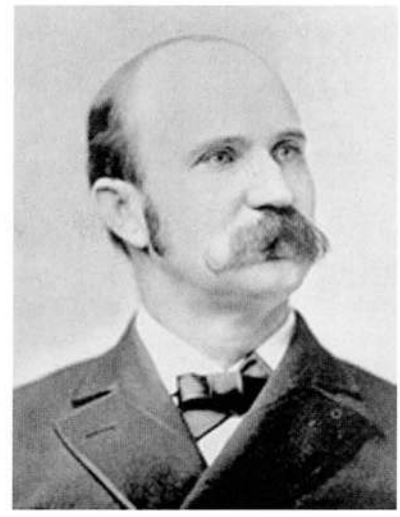
Early the following year, Maynard was appointed to a vacancy on the Court of Appeals by Governor Roswell P. Flower, whom David Hill had handpicked as his successor after Hill was elected to the United States Senate.[32] It was only then that Maynard's role in the mysterious disappearance of the ballots became widely known, prompting an indignant outcry. The city bar association, headed by the reform-minded Wheeler Peckham, began an investigation,[33] concluded that Maynard had committed a crime,[34] and petitioned the state legislature to remove him from office because his actions had impaired public confidence in him as a judge and rendered him unfit for judicial office.[35] Senator Hill returned to Albany to aid his old friend, but no witnesses were subpoenaed to testify.[36] For three hours, Wheeler Peckham testified against Maynard before a joint legislative committee. He called the investigation into the judge's activities "the most disagreeable duty I have ever performed in my life." He asserted that his brother, Rufus, who was then sitting on the Court of Appeals bench with Maynard, once had a good opinion of Judge Maynard. "But as to this act, he does not approve of it, for he has told me so." According to newspaper reports, this assertion "staggered" members of the committee.[37] Out of respect for his high office, Maynard himself was never subpoenaed to testify.[38]

Maynard was exonerated by the legislative majority,[39] but his temporary appointment soon expired. Despite the controversy, Governor Flower named Maynard to a new vacancy in 1893.[40] The bar association passed a resolution calling him "eminently unfit."

Wheeler Hazard Peckham (above) moved from Albany to New York City, where he became a leader of the bar. He was known for his anti-corruption initiatives and became instrumental in breaking up Boss Tweed's notorious "Ring," which controlled Tammany Hall in the 1860s and expanded the corruption and kickbacks into practically every aspect of city and state governance. In the cartoon above Boss Tweed is the fat man at left.

President Wheeler Peckham protested by letter, "The simple question is whether law breaking for a party purpose constitutes a good reason for appointing the law breaker to fill a vacancy in the Court of Appeals."[41] This was, after all, the "pure" court on which his father had served from 1870 until he was lost at sea in 1873[42] and upon which his brother, Rufus, was a member at the time.[43]

When Judge Maynard ran for a full term in the fall of 1893, the bar association sponsored mass meetings in protest and supported his Republican opponent, Edward T. Bartlett.[44] In campaign speeches, Hill vigorously defended Maynard and bitterly attacked the bar association's investigation as a "conspiracy" and a "contemptible farce." At times, he criticized Wheeler Peckham and



In 1894, President Grover Cleveland nominated Wheeler H. Peckham to the Supreme Court, but this nomination was caught in the middle of a political tug-of-war between Cleveland and New York Senator David B. Hill (right) because Wheeler had challenged Hill's political machine. Hill was particularly angry that Peckham had exposed corruption by his friend Isaac Maynard (left), whom he backed for a seat on the New York Court of Appeals in 1891.

others by name. "A little coterie of Mugwump lawyers with aristocratic pretensions and exclusive tendencies, habitués of clubs, who desire to regulate and control politics in swallow-tailed coats around dining-room tables because 'it's English, you know,' are the brainless set of namby-pambys who are today [sic] controlling the Bar Association, and dictating its suicidal policy in aid of the Republican state machine," Hill ranted.[45] For his part, Wheeler Peckham chaired what was called a Committee of 50 opposed to the nomination.[46] He mobilized poll watchers to oversee the elections and guard against fraud.[47] Still, corruption was pervasive. Some districts reported that Maynard had received every single vote for the Court of Appeals. One district tallied 5,000 more votes than there were registered voters.[48] Nevertheless, Maynard was defeated state-wide by 101,000 votes, and he brought down the rest of the Democratic ticket, as well.[49] The defeat was later judged a "death knell for the Hill machine" in New York.[50]

But Hill was still a power in the United States Senate, and he was soon to show his strength there. Since leaving Albany, Grover Cleveland had served a term in the White House, was defeated in 1888, but was returned to the presidency in 1892, the only President to date to serve two split terms.[51] Hill actively campaigned against his nomination for a second term.[52]

Early in Cleveland's second presidency, in the summer of 1893, Justice Samuel Blatchford died, leading to one of the Senate's most vociferous confrontations with any President over a Supreme Court nomination.[53] The fight came as a surprise, since there was a Democratic majority in the Senate and it was thought that the President would have no trouble getting his nominee confirmed.[54] Cleveland initially chose William B. Hornblower, a New York lawyer who had been appointed by Wheeler Peckham to the bar association's committee investigating Judge Isaac Maynard two years earlier. At the age of forty-two, Hornblower was then the youngest person ever nominated for the high Court.[55] Cleveland consulted no one—not even his Attorney General—about the

nomination. Initially, Hill voiced no complaint. But Hornblower's nomination coincided with Judge Maynard's (ultimately unsuccessful) re-election bid for the Court of Appeals.[56] Hill became concerned that the Senate's confirmation of Hornblower might be interpreted in New York as vindication of the bar association report that condemned Judge Maynard. He persuaded the Senate Judiciary Committee to delay consideration of the nomination until after the November elections. The Senate adjourned without considering it, and Cleveland had to renew the nomination when a new Congress convened in January, even though Hornblower himself objected to having his name put forward again.[57] Senator Hill renewed his opposition, curiously suggesting Judge Rufus W. Peckham as an alternative.[58] After five hours of speeches on the Senate floor, including an attack by Hill, the nomination was rejected, 24–30, on January 15, 1894.[59] The defeat was considered a direct challenge to the President.[60]

A few days later, through an intermediary, the White House queried Wheeler Peckham, then sixty years old, asking whether he would accept the nomination. He would, he replied, but only if the President was confident that he could secure confirmation. Half an hour after the intermediary cabled Peckham's reply, the nomination was announced in Washington.[61] The choice came as a shock on Capitol Hill. Some were initially confused, thinking that it was Rufus Peckham who had been nominated, as Hill had suggested.[62] Joseph Pulitzer's paper, *The World*, called it "the sensation of the day."[63] Peckham's hometown newspaper was equally astonished, headlining its story on the nomination, "Not Judge R.W. Peckham; But Wheeler H. Who Is Nominated By The President, Instead of Mr. Hornblower." The story noted that the New York Senators found his selection "distasteful."[64] The choice of Wheeler Peckham, whose opposition to Maynard had been even more powerful than Hornblower's, was seen by some as defiant—even spiteful—on Cleveland's part.[65] "Mr. Peckham stands for all that Mr. Hornblower represented and more," one paper noted. "He was prosecuting Tammany criminals before Mr. Hornblower wore whiskers."[66] Hill was seen as a particular target of the President's wrath.[67] "Cleveland, from a bad motive, named a bad man," one paper cried. "His sole purpose was to insult and outrage the senators from New York and evidence his contempt for them . . . The one, sole, overpowering purpose with Cleveland was to brew disaster for Hill."[68] The President was known to want to bring Rufus Peckham to Washington in some capacity, but he could not capitulate to Hill.[69] The Senator immediately objected, calling Wheeler Peckham the worst possible choice and, with candor rare in politics, admitted to pure partisanship: "In 1888, Mr. Peckham supported Warner Miller, who ran against me for Governor, and did everything in his power to defeat me, making many speeches in which I was bitterly attacked." The Senator called Peckham "a man of strong prejudices and [] lacking altogether in the

Senator Hill also blocked the appointments of William B. Hornblower (above) and Frederic Coudert to the Supreme Court in 1893. Like Wheeler Peckham, Hornblower had worked to defeat Maynard. Hornblower's nomination was referred to committee and rejected after several months' delay by a 24–30 vote.

judicial temperament." He again suggested that Wheeler's brother, Rufus, would make "a magnificent member of the Supreme Court."[70]

Why would Hill favor Rufus over Wheeler? The brothers resembled one another in both political portfolio and in physical appearance.[71] It's true that Wheeler's opposition to Tammany had a longer and stronger history. But Rufus was also a Tilden follower and had been one of the most influential leaders of the reform faction of the Democratic party in the 1870s. He was a Tilden delegate to the presidential conventions in 1876 and 1880. He had opposed Tammany in 1879 and supported a rival candidate for governor. In 1882, he chaired the Democratic State Convention and supported Cleveland for the state's chief executive.[72] They became close friends—so close that Rufus (then a state supreme court justice) was one of the few confidants who sat with Cleveland in the Governor's mansion in Albany the night that they waited for the results of the presidential election in 1884.[73] And Hill had not always had so high an opinion of Rufus Peckham. As governor, Hill had opposed Peckham's nomination to the Court of Appeals in 1886,[74] and, having failed to keep him off that court, successfully challenged his nomination for chief judge in 1892, supporting the Republican candidate instead.[75] Surely there must have been Tammany Hall regulars who were more likely favorites of Hill for a seat on the Supreme Court. Could it be that he still coveted a seat for Maynard on the Court of Appeals and hoped to make way for him by elevating Rufus Peckham out of his roost there? One newspaper report suggested this might be the case: "Senator Hill said a few days ago that should the President nominate Rufus W. Peckham he undoubtedly would be confirmed. At the time this was looked upon as a move on Senator Hill's part to get Judge Peckham appointed in order that Gov. Flower might appoint Judge Maynard, who is now out of a job, to fill the vacancy."[76] But later accounts of the confirmation battle have overlooked this possible motive.

Wheeler Peckham's nomination was seen as a mark of Cleveland's political stubbornness. "If Cleveland thought he could shame Hill into backing down, he was carrying naiveté to Himalayan heights," one historian has written.[77] Hill immediately huddled with members of the Senate Judiciary Committee.[78] He attacked the nominee's age and health, citing his resignation from the Office of District Attorney in New York, ostensibly for reasons of illness, only a few days after his appointment in 1883.[79] Hill began trading votes with other senators to gain their support in the challenge to Peckham.[80] He garnered the favor of Massachusetts Senators who had supported Hornblower by promising to vote against the nomination of a foreign-service appointee to whom they objected. And Hill appealed to western Senators who were angry with Cleveland over other issues.[81] Peckham's supporters in the legal and political community lobbied Senators by letter to establish his qualifications as a loyal Democrat and to note that a good number of prior Justices had ascended to the Supreme Court without judicial experience.[82]

Evaluating Peckham's qualifications to be a Supreme Court Justice was not easy because he lacked judicial experience. According to political scientist Carl A. Pierce, "No one doubted for an instant that the charges brought against Peckham on account of his temperament, age and health would be seriously considered by the Senate. Because Peckham had no judicial experience, the Senators could not look at his record on an inferior tribunal to justify or repudiate the attacks on his fitness; all they could do was examine the various testimonials submitted to the committee for and against the nominee."[83]

There is no record of the debate on the nomination in the Judiciary Committee. It ultimately deadlocked, 5–5, and sent it to the Senate floor without a recommendation. This was only the second time this had occurred.[84]

Cleveland went to work to gain Republican support for the nominee. One newspaper claimed that carriages carrying Cabinet members making calls to reluctant senators could be heard clomping about the streets of Washington the night before the final vote.[85] But Hill matched Cleveland's efforts by urging business and railroad interests to lobby against Peckham. One account maintained that "Hill's labors never ceased until he had his foot on Peckham's neck."[86] After four weeks of "intense political struggle," the nomination went to the floor on February 15, 1894. His supporters argued that Peckham should be judged on his qualifications alone and tried to delay the vote, but others saw the nomination as a personal vendetta on the part of Cleveland.[87] Democratic opponents saw Peckham as "not a good enough" party man. In the end, the nomination failed, 32–41. "It was reached after one of the longest struggles in executive session in the history of the Senate," according to reports at the time.[88] Fifteen Democrats, twenty-four Republicans and two Populists voted "no."[89] Peckham's nomination was only the seventh, including Hornblower's, to fail in the history of the Supreme Court.[90]

Cleveland became the first President to have two successive nominees to the Court rejected by the Senate.[91] But the President had brought defeat on himself. He insulted the Senate and embarrassed the Supreme Court, in a misguided effort to defeat Senator Hill and reassert his shaky leadership of the Democratic party. In making the Peckham vote a test of Democratic loyalty to his administration, he had overreached.[92]

Stubbornly, Cleveland resisted turning to the man that Hill had recommended, Rufus Peckham. Could it be that the President suspected that Hill was supporting Rufus Peckham only to make way on the New York Court of Appeals for his old friend, Isaac Maynard? Roswell Flower was still governor, and presumably would be willing, as he had twice in the past, to appoint the disgraced Maynard. Instead of Rufus Peckham, Cleveland next asked Frederic Coudert, another of the lawyers who had investigated Judge Maynard, to stand for the Supreme Court seat, but Coudert could foresee what Cleveland could not and declined the nomination. Three days later, the President chose one of the Senate's own, Edward D. White of Louisiana, and he was unanimously confirmed.[93]

A year-and-a-half later, Justice Howell E. Jackson died, and Cleveland had another chance to fill a seat on the Court. He again wanted to nominate Hornblower, but the New York lawyer refused to go through another battle. Coudert again declined as well, even though he had been assured that Hill would support him. Finally, the President called upon Rufus W. Peckham.[94] He initially hesitated, asking the President for a few days to discuss the matter with his brother and other associates because the appointment would "necessarily entail great changes in [his] personal surroundings."[95] He eventually accepted, noting that his friends had convinced him that the important work of the Court trumped "my reluctance to sever partially old associations and leave temporarily the old city of my birth."[96]

Appearing to have learned a lesson from the year before, Cleveland made no end-runs around senatorial courtesy this time. On November 18, the President wrote the Senator in Albany a handwritten note that bore no hint of their former hostility. He proposed Peckham for the Court and tactfully inquired: "Have you any desire as to the time of sending the nomination? I think the court needs him and I would be glad to have him qualified very early if you could find it consistent and agreeable to pave the way for it in your absence."[97] Hill responded in kind, stating that "the nomination is a most excellent one and very satisfactory." He told the President to submit it "at your convenience as I have no preference in the matter." Moreover, Hill said that he had already asked the Senate

leadership to consider the nomination promptly and confirm Rufus without delay.[98] The nomination had come as a surprise to the Senate because Cleveland had ignored Hill's suggestion that Rufus be given the Blatchford seat the year before.[99] The younger Peckham, then fifty-eight years old, was on the bench in Albany when he received word of his nomination. It was said that he merely nodded at the news.[100]

The Judiciary Committee favorably reported on the nomination on December 9, 1895, and Rufus Peckham was confirmed by voice vote that same day.[101] Senator Hill made a short speech in support, and there was no opposition.[102] Peckham immediately handwrote a short note on Court of Appeals stationery to Hill: "Allow me to thank you very heartily for your course in the matter of my nomination and confirmation. I know how much the ease of any passage through the Senate is owing to your attitude regarding the matter, and I want to say that I appreciate the same . . ."[103] By this time, Governor Flower was out of office and had been replaced by a Republican, Levi P. Morton,[104] so Hill knew Maynard no longer had a chance of gaining appointment to the Court of Appeals seat vacated by Peckham. Justice Peckham was sworn in a month later[105] and served more than thirteen years until his death at his summer home near Albany in 1909.[106]

Rufus Peckham became an intellectual leader of the Court. He and Justice David J. Brewer authored its most "powerful and eloquent" opinions.[107] Upon his death, a hometown paper called him "one of the best and one of the brainest [sic] jurists to ever sit on the United States supreme court bench."[108]

David B. Hill served in the Senate until 1897, then returned to Albany, where he died in 1910.[109] Isaac H. Maynard faded into obscurity after his 1893 election defeat and died alone in an Albany hotel on June 12, 1896,[110] six months after Peckham left for the Supreme Court.

The Peckhams appear to be the only brothers ever nominated for the high Court.[111] After his failed nomination, Wheeler focused on his corporate law practice in New York, representing primarily railroads, and continued his good-government reform efforts until he died in his office on September 27, 1905.[112] At seventy-three, he was still serving in the last year of his life on a state commission investigating delays and costs in the city courts.[113] After his death, a legal journal declared that Wheeler Peckham was among the "men who protect the community or the Nation from those who would rob it, hurt it, or do dishonestly that which the people wish to have done well."[114]

ENDNOTES

[1] Rexford Guy Tugwell, **Grover Cleveland** 179 (1968).

[2] Allan Nevins, **Grover Cleveland: A Study in Courage** 95–96, 113 (1933); James K. McGuire, **The Democratic Party of the State of New York**, Vol. I, 436–38, 474, 494–95 (1905).

[3] Horace Samuel Merrill, **Bourbon Leader: Grover Cleveland and the Democratic Party** 44 (1957).

[4] Tugwell, *supra* note 1, at 69n. 80.

[5] Nevins, *supra* note 2, at 79–80.

[6] "Hill as Tweed's Partner," *New York Times*, Oct. 1, 1885; Gustavus Myers, **The History of Tammany Hall** 212 (1917).

[7] Tugwell, *supra* note 1, at 179.

[8] Merrill, *supra* note 3, at 32–34; Alfred Connable and Edward Silberfarb, **Tigers of Tammany: Nine Men Who Ran New York** 193–94 (1967).

[9] Alyn Brodsky, **Grover Cleveland: A Study in Character** 58 (2000).

[10] *Ibid.* at 235–36; McGuire, *supra* note 2, Vol. II, at 55, 81.

[11] Brodsky, *Ibid.* at 127, 129; Tugwell, *supra* note 1, at 99, 179; McGuire, *ibid.* At 59, 82.

[12] McGuire, *supra* note 2, Vol. II, at 69.

[13] Alexander Clarence Flick, **Samuel Jones Tilden: A Study in Political Sagacity** 70 (1939).

[14] Myers, *supra* note 6, at 219–20; M.R. Werner, **Tammany Hall** 112–13 (1928).

[15] Flick, *supra* note 13, at 205, 224, 234.

[16] "Wheeler H. Peckham: An Upright and Able Lawyer Who Has Served the Public Well," *New York Times*, Jan. 23, 1894.

[17] J. Noble Hayes, "Wheeler Hazard Peckham," 18 *Green Bag* 57, 59 (Feb. 1906); Flick, *supra* note 13, at 215.

Tweed was accused of 220 counts of neglect of official duty for failing, as a member of the board of audit, to examine inflated contractors' bills for the construction and furnishing of a Manhattan courthouse that, in the 1860s, ended up costing more than $6 million, a million of which went to Tweed personally. An initial trial ended in a hung jury. In a second, he was found guilty on 204 of the misdemeanor counts and was sentenced to twelve consecutive one-year terms in jail and fined $12,500. That sentence was ultimately reduced on appeal to one year's imprisonment and a $250 fine (Henry Lauren Clinton, **Celebrated Trials** 440, 442, 445, 464, 465–66, 468 [1897]). Despite twenty years of plundering of the public purse, this was the first successful prosecution of Tammany leaders (Charles M. Stebbins, **Tammany Hall: Its History, Organization and Methods** 36–56 [1921]).

[18] *Supra* note 16; Hayes, *supra* note 17, at 59.

[19] "Wheeler H. Peckham Dies in His Office; Prosecuted the Tweed Ring," *New York Times*, Sept. 28, 1905.

[20] Hayes, *supra* note 17, at 60.

[21] "Wheeler H. Peckham Named; Nominated by the President for the Supreme Court," *New York Times*, Jan. 23, 1894.

[22] "Not Fit to Be a Judge," *New York Times*, Dec. 21, 1892.

[23] "Ex-Judge Maynard Dead, *New York Times*, June 13, 1896; McGuire, *supra* note 2, Vol. II, at 78.

[24] "Crooked Work Suspected," *New York Times*, Nov. 18, 1891.

[25] *Supra* note 23.

[26] *Matter of People Ex Rel. Daley v. Rice*, 129 N.Y. 449, 451, 454, 458 59 (1891).

[27] Report of the Committee on the Action of Isaac H. Maynard, Mar. 22, 1892, Pp. 6–7, on file in the archives of The Association of the Bar of the City of New York, New York, N.Y.

[28] *Daley*, *supra* note 26, at 461.

[29] *People Ex Rel. Platt v. Rice*, 144 N.Y. 249, 250, 253 (1894).

[30] Report of the Committee, *supra* note 27, p. 8; McGuire, *supra* note 2, Vol. II, at 78.

[31] *Supra* note 23. The state board's action came later the same day as Judge Peckham's decision upholding a lower court's order prohibiting the board from considering the Mylod return. The board was later held in contempt of court for doing so, the Court of Appeals concluding that the board members knew that they had been barred and should have awaited a new return from the county (*Platt*, *supra* note 29).

[32] "Maynard Gets His Pay," *New York Times*, Jan. 20, 1892; 129 N.Y.; "Political Notes," *New York Times*, June 21, 1891; Cleveland and his wing of the party also endorsed Flower ("Cleveland Is for Flower," *New York Times*, Oct. 4, 1891). After a two-year term, Flower stepped aside to let Hill try to reclaim the Governor's mansion ("Flower Is Not a Candidate," *New York Times*, Sept. 19, 1894).

[33] *Supra* note 23.

[34] Report of the Committee, *supra* note 27, pp. 24–28; Nevins, *supra* note 2, at 569.

[35] Report, *ibid.*, p. 27; *supra* note 22. A would-be biographer of Senator Hill has written that the investigation and scandal could have been avoided had Maynard agreed to acknowledge that he had been "a little overzealous" in handling the ballots. The bar association would have accepted such an admission, a deal brokered by Attorney General Simon W. Rosendale, but Maynard rejected the offer (Bixby, *infra* note 61, Box 41, Folder 1, p. V-1-24).

[36] "Hill Helps Maynard Out," *New York Times*, Mar. 26, 1892.

[37] "Mr. Peckham Under Fire," *New York Times*, Mar. 30, 1892.

[38] "Now Let Maynard Squirm," *New York Times*, Mar. 25, 1892.

[39] *Supra* note 23; "The Whitewash Applied; Maynard Vindicated by Party Vote," *New York Times*, Apr. 21, 1892.

[40] "Governor Flower's Curious Action," *New York Times*, Dec. 23, 1892.

[41] *Supra* note 22.

[42] Albert M. Rosenblatt, **The Judges of the New York Court of Appeals: A Biographical History** 155–56 (2007).

[43] L.B. Proctor, "Rufus W. Peckham," 55 *Albany Law Journal* 286, 287 (1897).

[44] "Working to Defeat Maynard," *New York Times*, Nov. 2, 1893; *supra* note 23.

[45] Speech of David B. Hill at the Democratic Mass Meeting, Academy of Music, Brooklyn, Oct. 23, 1893, Papers of David B. Hill, Series II: George S. Bixby Papers, Box 43, Folder 9, pp. 32, 35, on file at Manuscripts and Special Collections, New York State Library, Albany, N.Y.; *see also*, Speech of Nov. 4, 1893, in Buffalo, *ibid.* at pp. 20–21.

[46] *Supra* note 44.

[47] "Germans against Maynard," *New York Times*, Nov. 1, 1893.

[48] Stebbins, *supra* note 17, at 63.

[49] *Supra* note 23; "The Vote of New York City," *New York Times*, Nov. 10, 1893.

[50] "Judge E.T. Bartlett Dies in Albany," *New York Times*, May 4, 1910. Hill himself tried to return to the governor's office in 1894, but the Maynard controversy became a big factor in the election, and he lost to Levi P. Morton ("Hill Long Controlled Party," *New York Times*, Oct. 21, 1910; McGuire, *supra* note 2, Vol. II, at 87).

[51] Brodsky, *supra* note 9, at 238; Merrill, *supra* note 3, at 167.

[52] Brodsky, *ibid.* at 266.

[53] *Ibid.* at 326.

[54] Carl A. Pierce, "A Vacancy on the Supreme Court: The Politics of Judicial Appointment," 1893–94, 39 *Tennessee Law Review* 555 (Summer 1972).

[55] *Ibid.* at 559; Nevins, *supra* note 2, at 569; Pierce, *ibid.* at 559, 560, 561.

[56] "Delaying the Confirmation," *New York Times*, Nov. 2, 1893.

[57] Pierce, *supra* note 54, at 564–65.

[58] *Ibid.* at 563.

[59] *Ibid.* at 574–75, 576.

[60] Nevins, *supra* note 2, at 570.

[61] *Ibid.* at 582; George S. Bixby, "The Life and Times of David Bennett Hill," draft of an unpublished manuscript, Papers of David B. Hill, Series II: George S. Bixby Papers, Box 39, Folder 7, Chapter VII, p. VI-3-8, on file at Manuscripts and Special Collections, New York State Library, Albany, N.Y.

[62] *Supra* note 21.

[63] "Peckham Named," Jan. 23, 1894.

[64] *Albany Argus*, Jan. 23, 1894.

[65] Pierce, *supra* note 54, at 584.

[66] *Supra* note 63.

[67] Peckham's Nomination," *New York Sun*, Jan. 23, 1894.

[68] A.H.L., "Has No Peckham Now; President Cleveland Is Brooding over an Empty Nest," *Chicago Times*, Feb. 17, 1894.

[69] Brodsky, *supra* note 9, at 327.

[70] *Supra* note 21.

[71] Rosenblatt, *supra* note 42, at 234; *supra* note 63.

[72] "Justice Peckham Dies Near Albany; Appointed by Cleveland," *New York Times*, Oct. 25, 1909; Robert Lawrence Lasky, **Rufus Wheeler Peckham, His Life and times: A Study in American Conservatism**, pp. 47–48, 49–50, unpublished dissertation, Harvard University, Cambridge, Mass., Apr. 11, 1951.

[73] Lasky, *ibid.* at 50; Nevins, *supra* note 2, at 184. He is said to have continued to advise President Cleveland even after he was elevated to the Supreme Court (Rosenblatt, *supra* note 42, at 236; Nevins, *ibid.* at 696).

[74] "Rufus W. Peckham for the Court of Appeals: Tammany Forced to Yield but Making a Savage Attack on Cleveland and Civil Service Reform," *New York Times*, Sept. 30, 1886.

[75] Letter From S.W. Rosendale to Hon. D.S. Lamont, Feb. 1, 1894, Wheeler H. Peckham Family Papers, Box 2, Folder 27, on file at the Manuscript Division of the Library of Congress, Washington, D.C.

[76] *Supra* note 63. A correspondent of Peckham's also thought this likely: "If your name is withdrawn and that of your brother Judge Rufus Peckham sent in, Mr. Hill . . . will not oppose the confirmation of your brother and Gov. Flower will appoint Mr. Maynard to succeed your brother," [Letter from Dr. Branch Clark to Hon. Wheeler H. Peckham, Feb. 6, 1894, Wheeler H. Peckham Family Papers, *ibid.*

[77] Brodsky, *supra* note 9, at 327.

[78] *Supra* note 21.

[79] Pierce, *supra* note 54, at 586; "Mr. M'kcon's Successor; Wheeler H. Peckham Appointed District Attorney by the Governor," *New York Times*, Dec. 1, 1883; "Wheeler H. Peckham Resigns," *New York Times*, Dec. 11, 1883. A later account gave a different version of the reason for Wheeler's hasty departure from the D.A.'s office: "its duties were distasteful to him and he resigned. He was saddened and grieved by constant contact with the seamy side of life and the dramas of the criminal courts were distressing to his sensitive nature," (Memorial of Wheeler H. Peckham by Mr. Justice Edward Patterson of the Appellate Division of the New York Supreme Court, Read before the Association of the Bar of the City of New York, May 8, 1906, Wheeler H. Peckham Family Papers, *supra* note 75, Box 2, Folder 30).

[80] Nevins, *supra* note 2, at 571.

[81] Brodsky, *supra* note 9, at 327–28.

[82] Letter from Simon W. Rosendale to Hon. James L. Pugh, Feb. 2, 1894; Letter from Simon W. Rosendale to Hon. William Lindsay Feb. 3, 1894; Letter from Walter S. Logan to Hon. Orville H. Platt, Feb. 9, 1894; Wheeler H. Peckham Family Papers, *supra* note 75.

[83] *Supra* note 54, at 586.

[84] Denis Steven Rutkins and Maureen Bearden, **Supreme Court Nominations, 1789–2010: Actions of the Senate, the Judiciary, and the President** 2, 9 (2010).

[85] "Mr. Peckham Rejected," *The World*, Feb. 17, 1894.

[86] Pierce, *supra* note 54, at 596–97; A.H.L., *supra* note 68.

[87] Pierce, *supra* note 54, at 596–97, 601, 602.

[88] "Mr. Peckham Was Defeated," *New York Times*, Feb. 17, 1894.

[89] *Supra* note 85.

[90] Rutkins, *supra* note 84, at 10.

[91] Pierce, *supra* note 54, at 556.

[92] *Ibid.* at 608.

[93] Brodsky, *supra* note 9, at 328; Merrill, *supra* note 3, at 171; Nevins, *supra* note 2, at 571. White later became Chief Justice, nominated by President William Howard Taft (Henry J. Abraham, **The Judicial Process**, 6th Ed. Appendix A [1993]).

[94] Brodsky, *ibid.* at 328; Letter from Theodore M. Roche to Hon. David B. Hill, Nov. 16, 1895, Papers of David B. Hill, Series I: David B. Hill Papers, Box 10, Folder 5, on file at Manuscripts and Special Collections, New York State Library, Albany, N.Y.

[95] Letter from Rufus W. Peckham to Mr. President, Oct. 30, 1895, Papers of Grover Cleveland, Box II: 327, Reel 91, on file at the Manuscript Division of the Library of Congress, Washington, D.C.

[96] Letter from Rufus W. Peckham to Mr. President, Nov. 3, 1895, Papers of Grover Cleveland, *ibid.*

[97] Letter from Grover Cleveland to Hon. David B. Hill, Nov. 18, 1895, Papers of David B. Hill, Series I: David B. Hill Papers, *supra* note 94, Box 28, Folder 2.

[98] Letter from David B. Hill to My Dear Mr. President, Nov. 23, 1895, Papers of Grover Cleveland, *supra* note 95, Box II: 328, Reel 91.

[99] "Judge Peckham Is Named," *New York Times*, Dec. 4, 1895.

[100] "Judge R.W. Peckham; Cleveland's Choice," *Albany Argus*, Dec. 4, 1895; Lasky, *supra* note 72, p. 1; Note: Rufus Wheeler Peckham, 2 Case And Comment 1 (Dec. 1895).

[101] Rutkins, *supra* note 84, at 2.

[102] "Peckham's Nomination Confirmed," *New York Times*, Dec. 10, 1895.

[103] Note from R.W. Peckham to Hon. David B. Hill, Dec. 9, 1895, Papers of David B. Hill, Series I: David B. Hill Papers, *supra* note 94, Box 10, Folder 4.

[104] "Hill Long Controlled Party," *supra* note 50; McGuire, *supra* note 2, Vol. II, At 87, 112.

[105] "Justice Peckham Seated," *New York Times*, Jan. 7, 1896.

[106] *Supra* note 72; Hill offered a newspaper eulogy upon the Justice's death, obliquely referring to the Hornblower and Wheeler Peckham turmoil by calling Rufus Peckham's selection for the Supreme Court "a happy outcome to a previous unpleasant situation" ("Tribute to Dead Jurist; Justice Peckham's End Causes General Mourning," *Albany Times-Union*, Oct. 25, 1909).

[107] Owen M. Fiss, **"The Fuller Court," in Encyclopedia of the American Constitution** 816 (Leonard Levy, Ed., 1986); George Shiras, **Justice George Shiras, Jr. of Pittsburgh** 131 [1953].

[108] "Tribute," *supra* note 107.

[109] "David B. Hill Dead; Intended to Aid Dix," *New York Times*, Oct. 21, 1910.

[110] *Supra* note 23.

[111] Rutkins, *supra* note 84, at 2. Justice Joseph R. Lamar and Justice Lucius Q.C. Lamar were cousins. The two Justices John Marshall Harlan were grandfather and grandson. Justice Stephen J. Field was the uncle of Justice David J. Brewer (Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1993** 252, 316, 441 (1993). Cleveland's first failed nominee, William Hornblower, was a nephew of Justice Joseph P. Bradley (Willard L. King, **Melville Weston Fuller: Chief Justice of the United States, 1888–1910** 189 [1950].

[112] *Supra* note 19.

[113] Hayes, *supra* note 17, at 60; Note: "Obituary," 67 *Albany Law Journal* 305 (1905).

[114] "Wheeler H. Peckham," *The Week*, Oct. 7, 1905.

The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story behind *Abrams v. United States*

THOMAS HEALY

More than any other single person, Oliver Wendell Holmes, Jr., is responsible for the position that freedom of speech occupies in American society today. His landmark First Amendment opinions have not only shaped free speech doctrine and theory, they have worked their way into our collective consciousness, becoming part of our language, our view of the world, and our identity as a nation. Yet, strangely, Holmes was not always a staunch defender of free speech. Prior to writing his 1919 dissent in *Abrams v. United States*, he had done as much as any judge to render the First Amendment toothless. In one of the first Supreme Court cases to address the topic, he had embraced the cramped Blackstonian view that freedom of speech prohibits only prior restraints but places no limits on the government's power to punish speakers after the fact.[1] In another case, he had upheld the conviction of a small-time anarchist for inciting nude sunbathing.[2] And just eight months before his famous dissent in *Abrams*, Holmes had written three opinions for the Court upholding convictions of socialists and pacifists who had criticized American involvement in World War I.[3]

It wasn't that Holmes had a particular dislike of free speech. What irked him was the notion of individual rights in general, the idea that there are limits on what a democratic majority can do. "Every society rests on the death of men," he liked to say.[4] If a nation needs soldiers, it seizes young men and marches them off to war at the point of a bayonet.[5] If an epidemic breaks out, it forces the public to get vaccinated. The same is true, Holmes thought, even when there is no emergency. If the majority wants to limit the workday of bakers to ten hours, it should be permitted to do so, regardless of whether that decision is misguided or conflicts with

The Espionage Act of 1917 and Sedition Act of 1918 outlawed the use of "disloyal, profane, scurrilous, or abusive language" about the government during World War I. In 1922, children of fathers who were political dissidents pleaded for their release.

some ideal of freedom.[6] And he, as a judge, had no business standing in the way. "If my fellow citizens want to go to Hell I will help them," was another favorite saying. "It's my job."[7]

In short, Holmes was in many ways the Justice least likely to stick his neck out for the right of free speech—and for the Court's role in enforcing that right. So why did he do it? Why did a man who sneered at liberal sentimentality his whole life write one of the canonical statements of American liberalism, an opinion that has been compared to the speeches of Lincoln and the essays of Milton?[8] That question is one of the great legal and intellectual mysteries of the twentieth century. And the answer is a fascinating story of chance encounters, intellectual exploration, and personal relationships. But in order to appreciate how remarkable that story is, we first need to understand just how radically Holmes' position on free speech shifted from his early years as a state court judge to his later years on the Supreme Court.[9]

Free Speech Skeptic

The evidence of Holmes' insensitivity to free speech begins during his tenure on the Massachusetts Supreme Judicial Court from 1882 to 1902. Although the First Amendment did not apply to the states at the time, Holmes decided a handful of cases raising issues of free speech. For the most part, these cases fell into two categories. The first consisted of libel suits in which the defendants asserted a common law privilege in an effort to avoid liability. In *Cowley v. Pulsifer*, a newspaper argued that its statements about the plaintiff were protected because they had been taken from a petition filed in court.[10] And in *Burt v. Advertiser Newspaper Co.*, a newspaper claimed it could not be held liable for false

Charles Schenck and Elizabeth Baer, officers of the Socialist party of Philadelphia, oversaw the publication of a leaflet attacking the constitutionality of the draft and attempted to distribute thousands of the flyers to recently drafted American servicemen. Above is a 1914 Socialist rally in New York's Union Square.

statements it believed in good faith to be true.[11] In both cases, Holmes rejected the argument of privilege in favor of a rule of strict liability: "A person publishes libelous matter at his peril," he wrote in *Burt*.[12] Moreover, he made clear that this rule applied regardless of whether the statements concerned a matter of public interest. Indeed, to the extent that the statements were made public, Holmes indicated, that would only weaken the defendants' claim of privilege, since in that situation "the harm done by a falsehood is much greater than" when the statements are made in private.[13]

The second category of cases involved claims of free speech by public employees or on public property. In *McAuliffe v. City of New Bedford*, a policeman was fired for violating a department rule banning membership in a political committee or solicitation of money for political purposes. Rejecting the policeman's claim that his dismissal violated the First Amendment, Holmes wrote that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[14] Likewise, in *Davis v. Commonwealth*, Holmes rejected the plaintiff's claim that his right to free speech was violated by a city ordinance that prohibited public addresses on Boston Common. "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house," he wrote.[15] Although both cases concerned the power of government to regulate speech when acting outside its capacity as sovereign, Holmes' opinions nevertheless reflected a narrow view of free speech that has since been rejected by the Supreme Court.[16]

With his appointment to that Court in 1902, Holmes had an opportunity to broaden the guarantee of free speech. Instead, he narrowed it. In *Patterson v. Colorado*, the Court heard an appeal from a Denver

newspaper that had been fined for criticizing a decision of the Colorado Supreme Court. The newspaper claimed that the fine violated the First Amendment, but a majority of the Court disagreed. In an opinion written by Holmes, the Court held that, even if the rights of free speech and free press applied against the states (a doubtful proposition at the time), "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." [17] With that statement, Holmes embraced the Blackstonian view of free speech, which drew a sharp distinction between prior restraints and subsequent punishment.[18] Blackstone's view was actually a significant breakthrough for civil liberties in England, since for much of the seventeenth century Parliament had operated a licensing system that banned any publication not approved by an official censor. But to early twentieth century progressives—as to most jurists now—the Blackstonian position seemed pinched and formalistic. What was the point of free speech if you could still be punished for anything you said?

Eight years after *Patterson*, Holmes wrote another opinion for the Court rejecting a free speech claim. In *Fox v. Washington*, a small-time anarchist challenged his conviction for advocating unlawful conduct. The basis of the conviction was an article entitled "The Nudes and the Prudes," which celebrated nude sunbathing and called for a boycott of the "prudes" in society who had begun to crack down on the practice. The anarchist maintained that his article was protected by the First Amendment, but Holmes disagreed. Even though there was no evidence that the article might lead to any danger—much less an imminent one—he concluded that it was not protected for the simple reason that it encouraged a breach of the state laws against indecent exposure.[19]

Such were Holmes' views on free speech when the Court decided a series of cases at the end of World War I involving the 1917 Espionage Act, which made it a crime to willfully cause or attempt to cause insubordination in the military, willfully obstruct the draft, or willfully publish false reports with the intent to interfere with the war.[20] The first of these decisions was *Schenck v. United States*, an appeal from Charles Schenck and Elizabeth Baer, officers of the Socialist party of Philadelphia who had overseen the publication of a leaflet attacking the constitutionality of the draft. Entitled "Long Live the Constitution of the United States" on one side and "Assert Your Rights" on the other, the leaflet quoted the Thirteenth Amendment's ban on slavery, compared conscripts to convicts, and encouraged readers to write to their congressmen requesting repeal of the draft. It also advised those who were against the war to register as conscientious objectors, urging them not to be intimidated by flag-waving politicians or the capitalist press. "If you do not assert and support your rights," the document stated, "you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[21] Some of the fliers were sent to draftees, and when the postal inspector spotted them in the mail he led a raid on the party's downtown bookstore. There, he found several thousand copies of the leaflet, tied up with string and stacked on tables and chairs.[22] He also found a notebook implicating both Schenck and Baer in the mailings. They were each charged with conspiracy to cause insubordination and obstruct recruiting, convicted by a jury, and sentenced to six and three months in jail, respectively.

The second case, *Frohwerk v. United States*, was an appeal from Jacob Frohwerk, the editor of a German-language newspaper in Kansas City called the *Missouri Staats-Zeitung*. The *Staats-Zeitung* was a small newspaper with a circulation of just a few thousand, but one of its subscribers was the

Department of Justice, which was keeping tabs on German papers for evidence of espionage.[23] Officials read the paper during the summer and fall of 1917 as the draft went into effect and the first casualty lists came back from Europe. But it was not until the following spring, when the department was under pressure to crack down on radicals, that officials brought an indictment against Frohwerk. The charges were based on a dozen articles published between June and December 1917, with each article serving as the basis for a separate count. Several of the articles criticized England, claiming it had instigated the conflict to shore up its empire and had manipulated the United States into joining the cause. A few repeated the stock socialist line that the country had gone to war to appease the bankers on Wall Street. One simply reported that Russia had signed a treaty with Germany, which would make it harder for the Allies to secure an honorable peace. The only article that came close to inciting insubordination was an editorial in August 1917 on the draft riots breaking out around the country. Although the paper agreed that the draft should be obeyed until struck down by the courts, it expressed sympathy for the young men who had been called upon to leave their homes. "We ask who then will arise and pronounce a verdict of guilty over such a man if he stops reasoning and follows the first impulse of nature: self preservation?"[24] The paper disclaimed any intent to encourage draft resisters, stating that it did "not endorse their action in any manner." But that stipulation had little effect. After three minutes of deliberation, a jury convicted Frohwerk of violating the Espionage Act, and a judge sentenced him to ten years in prison.[25]

Finally, there was the case of Eugene Debs, leader of the national socialist party and a five-time candidate for president. His conviction was based on a speech he gave at the Socialist party annual picnic in Canton, Ohio, during the summer of 1918. The speech lasted more than two hours and covered a variety of themes, but it was essentially a stump speech designed to fire up the base in advance of the fall elections.[26] Debs traced the history and growth of socialism and predicted its ultimate triumph over capitalism. As for the war, he said nothing that explicitly urged interference with it, though he did praise party members who had been convicted of opposing the draft. He also denounced the capitalists who were responsible for the war but wanted the working class to fight it. "They have always taught you that it is your patriotic duty to go to war and to have yourselves slaughtered at a command," Debs told his audience. "But in all of the history of the world you the people never had a voice in declaring war. You have never yet had!"[27]

In spite of such comments, the Department of Justice initially concluded that Debs had not violated the Espionage Act. In a letter to the U.S. Attorney in Cleveland, the head of the department's war unit explained that most of what Debs said was lawful.[28] And though some of his statements may have come close to the line, the case was "by no means a clear one." "All in all," the letter concluded, "the Department does not feel strongly convinced that a prosecution is advisable." The U.S. Attorney did feel strongly, however. He charged Debs with attempting to incite disloyalty in the military and obstruct the draft. A jury convicted Debs, and a judge sentenced him to ten years in prison.

The three cases were scheduled to be heard together the first week of January 1919, but because of complications in Frohwerk's case his appeal and *Debs* were moved to the end of the month. Nonetheless, it appears from the timeline of events that the Court discussed the cases as a group in early February, during a four-week recess. The Justices voted to uphold the convictions in all three cases, and Holmes was assigned to write the opinions.

Of the three, his opinion in *Schenck* contained the most complete discussion of

free speech. It began, surprisingly enough, by retreating from his earlier embrace of Blackstone. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints," Holmes wrote, "although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*."[29] This wasn't a complete admission of error. There was the use of that qualifying phrase, "it well may be." And the word "intimated" implied that *Patterson* had not fully embraced the Blackstonian view. Still, it was enough to establish that the First Amendment applies to subsequent punishments as well as prior restraints.

Just because the First Amendment protected against subsequent punishments, however, did not mean its protections were absolute. Holmes made this clear a few sentences later, writing that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[30] Because this example has become such a famous argument against an absolutist interpretation of the First Amendment, a number of scholars have speculated about its source. Some have suggested it came from Holmes' younger years in Boston, when he and his wife, Fanny, would sometimes hurry to the scene of a fire upon hearing a siren.[31] Others have noted that there were a number of prominent theatre fires in the decades prior to 1919, which would have been on the minds of many Americans.[32] As it turns out, Holmes almost certainly borrowed the example from the U.S. Attorney in Cleveland, who made a similar point in his closing argument to the jury in the *Debs* case: "A man in a crowded auditorium, or any theatre, who yells 'fire' and there is no fire, and a panic ensues and someone is trampled to death, may be rightfully indicted and charged with murder."[33] That statement appeared in the transcript of record that was filed with the Court in the *Debs* case, where Holmes would have almost surely seen it.[34]

Having explained why free speech was not absolute, Holmes next addressed its limits. As a number of scholars have demonstrated, this part of his analysis was heavily influenced by his thinking about the law of attempts.[35] The traditional view was that a person is guilty of attempt when he both intends to commit a crime and takes any step toward its completion. Holmes disliked that approach because it placed too much emphasis on the issue of moral guilt. Why should society care if someone has a bad heart unless his actions pose a danger to others? For that reason, Holmes thought courts should require more than a mere preparatory step before a person could be convicted of attempt. "As the aim of the law is not to punish sins, but is to prevent certain external results," he wrote in an 1897 case, "the act done must come pretty near to accomplishing that result before the law will notice it."[36] Thus, if a person lights a match next to a haystack with the intent to start a fire, he should be punished for attempted arson. But if he merely buys a box of matches with the same intent, the law should leave him be.[37] This wasn't a bright-line test, of course. There were many possibilities between these two examples, and it was unclear exactly how near to the result a person had to come before he was guilty of attempt. But Holmes didn't like bright-line tests anyway, since the answer in any given case would always depend on circumstances. As he wrote in another attempt case while on the Supreme Court, "It is a question of proximity and degree."[38]

In Holmes' view, the issue posed in *Schenck* and the other speech cases was analogous to the issue raised by the crime of attempt. As with attempts, a person should not be convicted for the thoughts in his head or the feelings in his heart. But once he expressed those thoughts or feelings in a way that posed a sufficient danger to society, the protections of free speech ended. And the formula he adopted for expressing this idea was strikingly similar to the formula he had adopted in the context of attempts. "The question in every

case," he wrote in *Schenck*, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[39]

On its face, this formula appeared quite sensitive to the value of free speech. Most judges had analyzed Espionage Act cases by asking whether the speech at issue had a "bad tendency" —meaning there was *some* chance it might lead to harm at *some* point in the future.[40] Holmes' formula seemed to require more. The phrase "clear and present danger" suggested that a mere possibility of harm was not enough; that the likelihood of harm must be high. It also implied that the risk of *future* harm is insufficient; that the harm must be *imminent*. And had this standard been applied to the facts of *Schenck*, the convictions should have been reversed, since there was little evidence that Schenck and Baer posed a clear risk of imminent harm. But Holmes did not apply this standard to the facts. Instead, he reverted to his old belief that individual rights are subordinate to the needs of the state. "When a nation is at war," he wrote, "many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."[41]

Moreover, when Holmes turned to the other two cases, he didn't so much as mention the words "clear and present danger." His opinion in *Frohwerk* conceded that the articles in the *Staats-Zeitung* were not inherently unlawful. He also acknowledged that, unlike Schenck and Baer, Frohwerk had not made "any special effort to reach men who were subject to the draft."[42] And if the evidence showed that Frohwerk was a poor man turning out copy for a small newspaper (which he was), "there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed."[43] The problem, according to Holmes, was that the parties had not agreed on a bill of exceptions—the document that would explain exactly what evidence had been presented and what objections had been raised. And without that document, Holmes concluded, the Court had to "take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[44] This statement—with its speculation about unknown evidence and its reference to "a little breath" that might "kindle a flame"—was a far cry from the "clear and present danger" language of *Schenck*. And it suggested that Holmes had used that phrase casually, without intending to change the law.[45]

His opinion in *Debs* only reinforced that impression. Holmes began by acknowledging that the main purpose of Debs's speech was to promote socialism, which the Espionage Act did not prohibit. "[B]ut if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech."[46] Holmes then noted that Debs had told his audience he could not say all he wanted to, thus "intimating to his hearers that they might infer that he meant more."[47] He also cited Debs's support of the Socialist party's anti-war proclamation as proof that he had intended to obstruct the draft. Finally, Holmes endorsed the trial judge's statement of law to the jury. "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, and unless the defendant had the specific intent to

do so in his mind."[48] This was the strongest indication that Holmes was not trying to transform the law. The jury instructions were similar to the bad tendency test. And if they were acceptable, then "clear and present danger" was little more than a clever turn of phrase.[49]

Even Holmes acknowledged that his opinions in these three cases were not fully thought out. In a letter responding to criticism of the *Debs* decision, he explained that "[t]here was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case, *Schenck v. U.S.*, also *Frohwerk v. U.S.*,"[50] Nonetheless, he defended the decisions, writing that "the powers of the Constitution certainly never supposed that the provision for it gave a man immunity for counseling a murder or falsely crying fire in a theatre, and if when a country is at war a man chooses to try to obstruct it and says things that tend directly to that result he can't complain if he is laid by the heels."[51]

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As of March 1919, then, Holmes had ruled against free speech claims in a wide range of contexts as both a state court judge and a Supreme Court Justice. In fact, there are only two instances in which he ruled in favor of a party raising free speech claims, and neither case undermines the general theme established above.

The first case is *Toledo Newspaper Co. v. U.S.*, an appeal from a newspaper that had been convicted of contempt by a federal judge for questioning his handling of a pending case. A majority of the Justices rejected the claim that this violated freedom of the press, and Holmes was initially inclined to go along. But Justice Brandeis, his closest

The *Baltzer* case involved a group of socialists from a small farming community in South Dakota who opposed American involvement in the war, viewing it as a capitalist conspiracy against the working class. When they found that the draft quota for their county was higher than for neighboring counties, they took their case to the Supreme Court in 1919.

friend on the Bench, privately urged him to dissent,[52] and, when the majority opinion was circulated, Holmes agreed to do just that. He did not rely on the First Amendment, however. Nor did he claim that the conviction was unjustified. Instead, he noted that the federal statute authorizing judges to rule on contempt charges themselves (i.e. without submitting the matter to a jury) was limited to situations in which a party engages in misbehavior "in their presence or so near thereto as to obstruct the administration of justice."[53] The phrase "so near thereto as to obstruct," Holmes argued, required a showing of immediate danger. And because "a judge of the United States is expected to be a man of ordinary firmness of character," there was no immediate danger that the newspaper's criticism would influence the judge's decision or otherwise obstruct the administration of justice.[54] Thus, although Holmes was willing to give the newspaper the benefit of a jury trial on the issue of contempt, his dissent was far from a ringing defense of free speech.

The other case is *Baltzer v. United States*, which was actually the first of the Espionage Act appeals to reach the Court. Argued in November 1918, *Baltzer* involved a group of twenty-seven socialists from a small farming community in South Dakota.[55] Like many socialists, the farmers opposed American involvement in the war, viewing it as a capitalist conspiracy against the working class. But they had a more specific complaint as well. When the draft quotas for each county were announced in the summer of 1917, the number for their county was higher than for neighboring counties.[56] The reason for this was simple: more young men in those counties had voluntarily enlisted, which meant that fewer had to be forced into service. But the farmers thought they were being targeted for their political beliefs and German heritage. So they sent a petition to the governor, who was in charge of administering the draft. Brief and clumsily written, the petition demanded that the quota for each county be fixed without regard to the number of volunteers. It also demanded that the governor call a referendum on the draft and that he oppose the use of bonds to fund the war. The farmers were arrested, convicted of obstructing the draft, and sentenced to one to five years in prison.

In their appeal to the Supreme Court, the farmers relied not only on the right to free speech, but also on the right to petition the government for a redress of grievances.[57] This made little difference to a majority of the Court, which upheld the convictions. But Brandeis was again troubled by the result and visited Holmes in his private study, where he "catspawned" him "to do another dissent on burning themes."[58] Short and to the point, Holmes' dissent argued that the defendants had done nothing more than sign a petition to the governor seeking a change in the law. "[T]he changes advocated are changes by law, not in resistance to it, the only threat being that which every citizen may utter, that if his wishes are not followed his vote will be lost."[59] As he wrote, his words became more impassioned, and he concluded with a grand, sweeping flourish:

> Real obstructions of the law, giving real aid and comfort to the enemy, I should have been glad to see punished more summarily and severely than they sometimes were. But I think that our intention to put out all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm, although opposed to our own. It is better for those who have unquestioned and almost unlimited power in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that perhaps we are in danger of forgetting that the bill of rights which cost so much blood to establish still is worth

> fighting for, and that no tittle of it should be abridged. I agree that freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has had to deal from time to time. But the emergency would have to be very great before I could be persuaded that an appeal for political action through legal channels, addressed to those supposed to have power to take such action was an act that the Constitution did not protect as well after as before.[60]

At first glance, it is tempting to read this paragraph as a full-throated endorsement of free speech, which is how one scholar has interpreted it.[61] But a closer reading suggests that it is merely a preliminary step in Holmes' transformation. For one thing, Holmes begins by explaining that, in some instances, the government did not go far enough in punishing those who obstructed the law or gave aid and comfort to the enemy. Second, although Holmes argues for tolerance of opinions that are "opposed to our own," he limits that tolerance to "opinions and speech that could not be imagined to do harm." This is a far cry from the clear and present danger test and sounds more like the bad tendency test. Finally, it is not even clear from his *Baltzer* dissent that Holmes is willing to protect entirely harmless speech. Just a few sentences later, he writes that "freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has had to deal from time to time." In other words, Holmes has not yet abandoned the Blackstonian view of free speech, which prohibits only prior restraints. Why, then, does Holmes object to the conviction of the

Oliver Wendell Holmes, Jr.'s landmark First Amendment opinions have not only shaped free speech doctrine and theory, they have worked their way into our collective consciousness, becoming part of our language. But it was not until his 1919 dissent in *Abrams* that Holmes, appointed in 1902, insisted on free speech protection.

Baltzer defendants, who were punished after, not before, they sent their petition to the governor? Because they were relying not only on the right to free speech, but also on the right to petition the government for a redress of grievances. And like other jurists at the time, Holmes was apparently willing to grant broader protection to the latter right than to the former.[62]

Holmes' dissent in *Baltzer* was never published because, less than a week after he circulated it to his colleagues (and before the Court announced its decision), the government unexpectedly confessed error in the case and asked that it be sent back to the lower court for a new trial. As a result, the Court issued a one-line order reversing the defendants' convictions, and the case disappeared as if it had never happened.[63] But, even if his dissent had been published, it would not likely have changed the history of the First Amendment or Holmes' reputation because of the narrowness of its reasoning. At most, *Baltzer* and *Toledo Newspaper* show an emerging willingness on Holmes' part to rule in favor of free speech claimants, particularly when pressured to do so by Brandeis.

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In addition to his judicial opinions, Holmes addressed the issue of free speech in a handful of letters to friends and acquaintances in the years prior to *Abrams*. First, according to a newly discovered entry in the diary of Chauncey Belknap, who served as Holmes' secretary during the 1915–16 term, Holmes discussed the issue in a letter to "an English lady" during the fall of 1915.[64] The woman had apparently written to Holmes about the censorship of war news. In response, Belknap recorded in his diary, Holmes wrote a "dissertation on the logically indefensible right of free speech." Governments concede the right for three reasons, Holmes explained: "either because they don't care, they are not cock-sure they are right, or they haven't the power to check speech."

This is almost identical to what Holmes told Harold Laski three years later in the summer of 1918. Responding to a letter in which Laski made the case for tolerance, Holmes wrote:

> My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise. In most matters of belief we are not cocksure, we don't care very much, and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like.[65]

He used similar language a few days later in a letter to the American diplomat Lewis Einstein, noting that "the logical result of a fundamental difference is for one side to kill the other—and that persecution has much to be said for it."[66] And he said the same thing to Learned Hand less than a month earlier after their chance encounter on a train from Washington D.C. to Boston. I discuss this encounter in more detail in Part V, but for now it is sufficient to note that, when Hand spoke in favor of toleration, Holmes responded, "You strike at the sacred right to kill the other fellow when he disagrees."[67]

None of these comments suggest that Holmes' extra-judicial views on free speech were different from the views he expressed in his written opinions. And taken together, the two strands of evidence establish without much doubt that prior to the fall of 1919 Holmes was not a strong believer in free speech. It is true that his views had begun to evolve. In *Baltzer*, he had written eloquently on the subject, even though his reasoning was quite narrow. And in *Schenck*, he not only abandoned the Blackstonian view, but also articulated a standard that, in theory, was quite speech protective. Unfortunately, Holmes did not actually apply that standard, and his statements in *Frohwerk*, and *Debs*—along

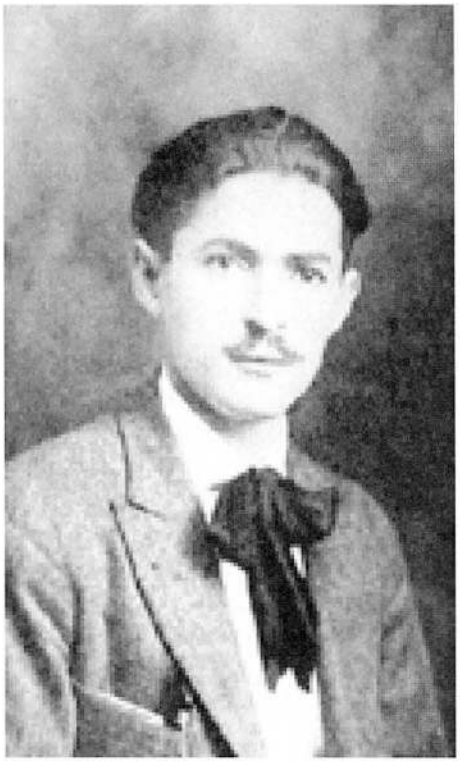
with his vote to affirm the convictions—show that he had still not taken the decisive step toward an expansive view of free speech.

First Amendment Hero

Holmes' dissent in *Abrams* represented just that step. In many ways, the government's case in *Abrams* was stronger than in the earlier cases. The defendants were Russian immigrants active in the anarchist movement then flourishing in New York.[68] Like most anarchists, they opposed the United States' involvement in the war, believing it was motivated by capitalist greed.[69] But unlike many of the German socialists who were prosecuted under the Espionage and Sedition Acts, the anarchists had no sympathy for the Central Powers. So it was not until President Wilson sent troops into Russia during the summer of 1918 that they printed two leaflets attacking the President's actions.

The first, written in English, denounced Wilson as a liar who had deceived the country about the real purpose of the Russian expedition, which was "to crush the Russian Revolution." "What have you to say about it?" the flier asked. "The Russian Revolution cries: 'Workers of the World! Awake! Rise! Put down your enemy and mine.'"[70] The second flier, written in Yiddish, sounded many of the same themes. But, whereas the first leaflet was addressed to the people of America, this one targeted a more specific audience: "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom." And, in place of the first leaflet's vague call to "put down your enemy and mine," this one proposed a more concrete plan of attack: a general strike in the munitions factories.

Working in a basement store on Madison Avenue, the anarchists printed 5,000 copies of each leaflet.[71] Then, they began scattering them from rooftops and windows in lower Manhattan, where many munitions workers lived.[72] When passersby complained to the police about the fliers, officials tracked down its authors and charged them with violating the 1918 Sedition Act, an amendment to the Espionage Act.[73] In four counts, the defendants were charged with conspiring to willfully publish scurrilous language about the form of the United States government, bring that form of government into disrepute, incite resistance to the war against Germany, and curtail the production of weapons and ammunition with intent to interfere with the war. They were



Russian-born Jewish anarchists Jack Abrams (above) and Mollie Steimer scattered 5,000 leaflets from rooftops and windows in lower Manhattan, where many World War I munitions workers lived. One leaflet, signed "revolutionists," denounced the sending of American troops to Russia, and another, written in Yiddish, opposed U.S. efforts to hinder the Russian Revolution and called for a strike against weapons production. Abrams was convicted under the Sedition Act of 1918 and the Supreme Court upheld the conviction over a dissent from Justices Holmes and Brandeis.

convicted and sentenced to prison terms ranging from fifteen to twenty years.

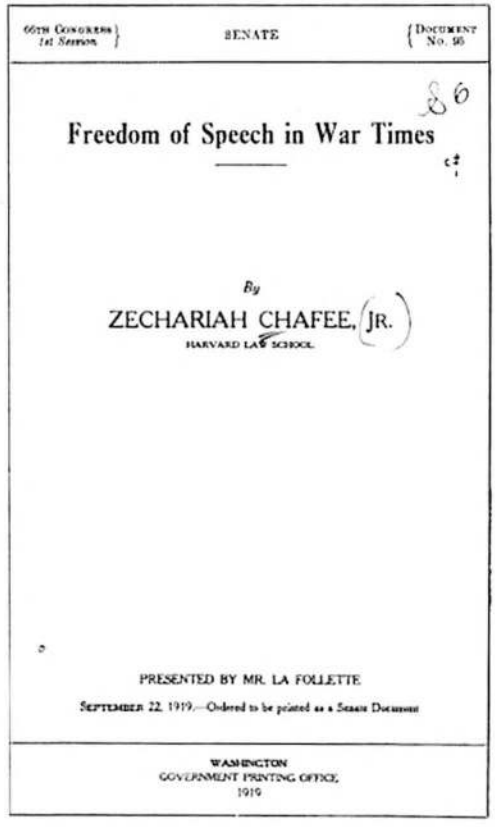
When the case came before the Court in the fall of 1919, seven Justices voted to affirm.[74] To them, the anarchists' free speech claims were no stronger than the ones the Court had rejected earlier in the year. But Holmes, joined by Brandeis, dissented.[75] His dissent rested on two separate and independent grounds. First, he disputed the jury's conclusion that the defendants had violated the Sedition Act. Nothing in the leaflets could be interpreted as assailing the *form* of the United States government, he argued. Nor could they be construed as encouraging resistance to the war against Germany. As to the claim that the defendants had incited the curtailment of military supplies, Holmes acknowledged that they had advocated a strike in the munitions factories. To violate the Sedition Act, however, they must have *intended* to interfere with the war. And in Holmes' view, the defendants never had that intent. They were not German sympathizers who hoped the Allies would lose the struggle in Europe. They were Russian immigrants who wanted Wilson to stay out of their homeland's affairs.[76]

Even if the anarchists had violated the Sedition Act, however, Holmes argued that their speech was protected by the First Amendment. In making this argument, Holmes disavowed the notion—suggested in *Schenck*—that free speech is inapplicable during times of war. The government's power to restrict speech "undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times," he wrote. "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same."[77] What was that principle? Was it the clear and present danger test he had articulated in *Schenck* and then seemingly abandoned? Or was it the bad tendency test he had appeared to fall back on in *Frohwerk* and *Debs*? Holmes' answer was clear: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned," he wrote.[78] As evidence of his commitment to this new standard, he used the words "immediate" or "imminent" seven times in the opinion—three times in one sentence alone.

Just as important as Holmes' reaffirmation of the new test was his application of it. In *Schenck*, he had made no attempt to assess whether the defendants posed a clear and present danger. Instead, he had simply concluded that the First Amendment did not protect their speech. In *Abrams*, by contrast, he focused on the actual circumstances of the "crime." And although the circumstances were similar to those in *Schenck*, Holmes' conclusion was quite different: "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[79]

Holmes ended his dissent by offering a theoretical justification for free speech. This justification began with a repetition of Holmes' frequent observation that "persecution for the expression of opinions seems to me perfectly logical."[80] But for the first time, he moved beyond the logic of persecution to the lesson of experience: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[81] In a subsequent section, I will discuss the inspiration behind Holmes' market metaphor in this passage. For now, it is sufficient to note how different this language is from his opinions in *Schenck*, *Frohwerk*, and *Debs* and from his earlier statements about free speech.

Young Harvard law professor Zechariah Chafee published an influential article in *The New Republic* arguing that the 1917 Espionage Act was acceptable because it was closely linked to military operations and applied only to speakers who *expressly* advocated unlawful conduct. But he also argued that the 1918 Sedition Act was unconstitutional because it made it a crime to say almost anything against the war or even to make the case for peace.



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Freedom of Speech in War Times

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And *Abrams* was just the start. During the same term, the Court heard two other appeals involving the Espionage Act. The first was *Schaefer v. United States*, an appeal from the editors and officers of a German-language newspaper called the *Philadelphia Tageblatt*. [82] Founded in 1877, the *Tageblatt* was known as a "society" paper—not because it covered the well-heeled and glamorous, but because it reported on the activities of all the

local societies (building associations, singing groups, and gymnastics clubs) that were at the center of German immigrant life.[83] When war broke out in Europe, the editors decided to expand their coverage of national and international events. The problem was they had no way of getting this news. With a small staff and a limited budget, they could afford neither to send their own reporters overseas nor to subscribe to the wire services. Instead they copied articles from other papers and printed them as their own, usually rewriting the headline or changing a sentence or two to make the stories fit onto the page. In the fraternity of cash-strapped and harried newspaper editors, this was a common practice. But eventually it led to the *Tageblatt*'s prosecution. For, when government agents began reading the paper in the summer of 1917, they concluded that many of the changes made to the reprinted articles were favorable to the German cause.[84] They therefore charged the editors with making false reports with intent to hinder the war, as well as obstructing recruiting.

Although Schaeffer was argued the same week as *Abrams*, the Court's opinion was not published until four months later. But the outcome was the same. The Court rejected the defendants' claim that the government had failed to prove the falsity of their reports, insisting that the jury's factual findings were binding.[85] It also rejected their claim that the articles were harmless, explaining that under the Espionage Act the government was not required to prove harm. "The tendency of the articles" was enough, the Court ruled, "and to have required more would have made the law useless."[86]

As in *Abrams*, Holmes dissented. But instead of writing an opinion, he joined a dissent by Brandeis, which picked up where Holmes had left off in *Abrams*—with the clear and present danger test. Although the majority had ignored that standard, Brandeis declared that it, not bad tendency, was the correct test to apply.[87] He also argued that the jury's findings were not inviolable, and he scoffed at the notion that the editors had violated the ban on false reports.[88]

A week later, Holmes and Brandeis dissented in another Espionage Act case, *Pierce v. United States*. Argued in November 1919, after the Court decided *Abrams*, *Pierce* involved four socialists from Albany who had circulated copies of a pamphlet entitled "The Price We Pay."[89] Written by an Episcopal clergyman and printed by the national Socialist party, the pamphlet repeated the standard leftist critiques of the war: that it was being waged to protect J.P. Morgan's loans to England, that victory was impossible, and that the only way out of the mess was to embrace socialism. Initially wary of distributing the pamphlet, the defendants changed their minds after a federal court in Baltimore ruled that it did not violate the Espionage Act.[90] Unfortunately for them, that decision had no authority in New York, and prosecutors there charged them with making false statements and conspiring to cause insubordination in the military. A jury convicted them, and they appealed to the Supreme Court, which repeated much of what it had said in *Schaefer*. Whether the defendants intended to interfere with the war and whether they posed any risk of doing so were issues of fact for the jury. As long as that decision was supported by evidence, the Court could not overturn it on appeal.[91]

Brandeis again wrote a dissenting opinion, joined by Holmes. In typical Brandeis fashion, he marched methodically through the evidence, explaining that none of the statements were false because they were either matters of opinion or hyperbole.[92] He also disputed the claim that the pamphlet had posed a danger of causing insubordination in the military, pointing out that it had been circulated only among civilians and was primarily designed to recruit members for the Socialist party.[93]

Pierce was the last Espionage Act case decided by the Court, but it was not the last

case in which Holmes voted in favor of free speech. In *Milwaukee Social Democrat Publishing Company v. Burleson*, he dissented from a decision upholding the postmaster's denial of second-class mailing privileges to a socialist newspaper during the war. Although Holmes acknowledged that the government is not obligated to operate a postal service at all, he argued that as long as it does so "the use of the mails is almost as much a part of free speech as the right to use our tongues."[94] This statement runs directly counter to his opinions in *McAuliffe* and *Davis*, in which he held that the government can force speakers to choose between a governmental benefit (such as a job or the use of a park) and the right of free speech.[95] And it illustrates the extent to which his views on free speech had evolved in the intervening years.

Holmes went even further in support of free speech in *Gitlow v. New York*, an appeal from a socialist editor who had advocated overthrow of the government through "revolutionary mass action."[96] A majority of the Court upheld the editor's conviction, ruling that the government is not required to wait until a revolution is imminent but may "suppress the threatened danger at its incipiency."[97] Holmes disagreed. Arguing that "clear and present danger" was the applicable standard, he asserted that the defendant's "redundant discourse had no chance of starting a present conflagration." He also expressed a willingness to accept the long-term consequences of radical speech, no matter how unpleasant. "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community the only meaning of free speech is that they should be given their chance and have their way."[98]

Finally, Holmes defended free speech in the 1929 case of Rosika Schwimmer, a pacifist who had been denied citizenship for refusing to swear that she would take up arms to defend the United States.[99] Although the case did not technically involve the First Amendment, Holmes saw it as one more example of the government's effort to impose uniformity of belief—an effort he now categorically opposed. "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[100]

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From *Abrams* to *Schwimmer*, then, Holmes was a staunch supporter of the First Amendment, voting to uphold free speech claims in a wide variety of contexts. There are only two cases after *Abrams* in which he rejected free speech claims. One was *Whitney v. California*, an appeal from a California communist who was convicted under the state's criminal syndicalism law for belonging to a group that advocated violent overthrow of the government. But Holmes did not join the majority opinion upholding the conviction. Instead he joined Brandeis' concurring opinion, which eloquently defended the right of free speech before concluding that the defendant had procedurally defaulted on her First Amendment claim.[101]

The other is *Gilbert v. Minnesota*, a 1920 case involving a state law nearly identical to the Espionage Act. A majority of the Court upheld the defendant's conviction, rejecting his claim that the law violated freedom of speech. Brandeis dissented, arguing that the state law interfered with the federal government's control over military affairs.[102] But Holmes did not join that dissent, believing it went "too far."[103] Instead he concurred separately in the judgment without explanation.

Because Holmes voted to uphold the conviction in *Gilbert*, at least one scholar has cited it as evidence that Holmes did not fundamentally change his views on free speech between *Schenck* and *Abrams*.[104] But there are two alternative explanations for Holmes' concurrence in *Gilbert*. First, according to a memo written by Dean

Acheson, who was secretary to Brandeis at the time, it was unclear whether the defendant in *Gilbert* had properly raised the issue of free speech in the trial court.[105] Second, there is reason to think that Holmes' vote in *Gilbert* was based not on his views about free speech but on his aversion to using the due process clause of the Fourteenth Amendment to protect substantive rights. In a conversation with Frankfurter after *Gilbert* was decided, Brandeis indicated that as long as the conservatives on the Court were using due process to protect the right to property it should also be used to protect free speech. But Holmes, Brandeis added, "doesn't want to extend" the amendment's reach.[106] By the time of *Gitlow*, four years later, Holmes was willing to accept the incorporation of free speech through the due process clause. But his opinion in that case suggests that he did so primarily because of the broad scope that the majority of the Court had given to the word "liberty" in other cases.[107] In other words, Holmes appears to have embraced precisely the position Brandeis laid out in his conversation with Frankfurter.

Was Holmes Consistent All Along?

In spite of the foregoing evidence, some scholars maintain that Holmes did not change his mind about free speech in the months leading up to *Abrams*.[108] In support of this claim, they offer a number of arguments, which, though ultimately unpersuasive, deserve to be addressed.

First, some scholars point out that Holmes himself never acknowledged that he changed his mind, nor admitted that his early Espionage Act opinions were incorrect. To the contrary, in *Abrams* he explicitly reaffirmed those decisions, stating that he had never seen "any reason to doubt that the questions of law alone that were before this Court in the cases of Schenck, Frohwerk, and Debs were rightly decided."[109] Moreover, in a letter to Nina Gray in 1921, he denied that he had been persuaded by Brandeis to adopt a more liberal view of free speech, stating that he had "turned that way long before" Brandeis joined the Court.[110]

With respect to Holmes' statement in *Abrams*, I submit that one must take it with a grain of salt. It is the exceptional judge who is willing to publicly admit his mistakes, and Holmes was not exceptional in this sense. As nearly everyone who has studied his life has concluded, Holmes was defensive, sensitive to criticism, and reluctant to give credit for his ideas to others.[111] Instead of conceding that a decision was wrong, he was more likely to qualify or distinguish it. Consider his treatment of *Patterson v. Colorado* in *Schenck*. Holmes did not candidly acknowledge that he was overruling *Patterson* and renouncing Blackstone. He hedged, first by saying "it well may be" that freedom of speech is not limited to prior restraints, then by suggesting that protecting against such restraints might nonetheless be its "main purpose," and then again by implying that Patterson had only "intimated" as much. His statement in *Abrams* is similarly qualified. Holmes does not defend the convictions in *Schenck* and the other cases. He claims only that "the questions of law that alone were before this Court" were rightly decided. In doing so, he distances himself from the prosecution of the defendants without accepting any responsibility for their plight.

As for Holmes' letter to Nina Gray, there is a major flaw with his claim that he embraced free speech "long before" Brandeis joined the Court. Brandeis was confirmed to the Court in June 1916. Yet only eight months earlier, in October 1915, Chauncey Belknap had quoted Holmes as referring to the "logically indefensible right of free speech." And only seven months before that, Holmes had written his opinion in *Fox v. Washington* upholding the conviction of an anarchist editor for encouraging a violation of the laws against public indecency. Therefore,

unless Holmes experienced a change of mind between October 1915 and June 1916—and unless the phrase "long before" refers to a period of several months—his claim to Gray is simply not believable.

Next, some scholars argue that Holmes voted differently in *Abrams* than in the earlier cases not because he changed his mind about free speech but simply because the issues raised were different. It was Holmes, after all, who argued that "general propositions do not decide concrete cases"[112] and that the outcome in any given case would depend on the circumstances. So perhaps there was something in the circumstances of *Abrams* that led him to view that case differently than the early ones.

What might that have been? A few scholars have emphasized that *Schenck*, *Frohwerk*, and *Debs* all arose under provisions of the 1917 Espionage Act while *Abrams* arose under the Sedition Act of 1918, an amendment to the earlier law. It is true that many progressives at the time viewed the two acts in starkly different terms. The Espionage Act, which was closely tied to military concerns, was primarily designed to prohibit certain results, such as the obstruction of the draft. The Sedition Act went much further, targeting not only results—like the curtailment of munitions production—but criticism of the government. Even Harvard Law professor Zechariah Chafee argued that, whereas the Espionage Act might be upheld if narrowly construed, the Sedition Act was almost certainly unconstitutional.[113] Holmes might have felt the same way and thus have been unwilling to give the government the same latitude in enforcing the latter as the former.

There are two problems with this hypothesis. First, although the first two counts in *Abrams* charged the defendants with assailing the form of the United States government, the third count charged them with encouraging resistance to the war against Germany, and the fourth count charged them with inciting curtailment of munitions production. These last two counts were directly tied to military concerns and, if substantiated, would have been no less troubling than the charges at issue in the earlier cases.

Second, although *Abrams* arose under the Sedition Act, *Schaeffer* and *Pierce*, decided the same term, involved the Espionage Act. In fact, the defendants in *Schaeffer* and *Pierce* were charged with violating the same provisions as the defendants in *Schenck*, *Frohwerk*, and *Debs*. And yet Holmes voted to reverse the convictions in both cases, suggesting that his *Abrams* dissent was not based simply on a belief that the Sedition Act had gone too far.

If Holmes' shifting votes were not based on the particular legal provisions of each case, were they based on the particular facts? In other words, was it easier to conclude that a clear and present danger was posed by the defendants in *Schenck*, *Frohwerk* and *Debs* than by the defendants in *Abrams*? This seems doubtful. The fliers in *Schenck* were unsigned, and the only clue to their origin was a reference to the Socialist party bookstore. Moreover, the fliers urged only that readers should encourage their representatives to repeal the Selective Service Act and that men who opposed the war should register as conscientious objectors. Nowhere did they explicitly encourage unlawful resistance to the draft. Nor does it seem likely the fliers would have had that effect—at least not imminently. Although an unknown number of fliers were mailed to draftees, prosecutors presented no evidence that any of those draftees were influenced by what they read. To the contrary, the handful of recipients who testified said that the flier had no effect on their view of the war or the draft.[114]

The evidence against Frohwerk was even weaker. The twelve articles that formed the basis of the counts against him were striking primarily for their banality. It is hard to imagine that anyone reading them would have been roused to obstruct the draft or engage in insubordination in the military. Nor, as

Holmes acknowledged, did the editors make any special effort to reach draftees or soldiers. He also acknowledged that "if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed."[115] In fact, that is exactly what the evidence showed. And, though the Court did not have before it a bill of exceptions, it did have the transcript of record, which made clear that the prosecution did not present any evidence that "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." Moreover, the government did not so much as allude to any such evidence in its brief. In any case, if Holmes was truly concerned about the absence of a bill of exceptions, there was a simple solution. The Court could have ordered the trial court to submit one. Indeed, that is what Frohwerk's attorneys requested in a motion filed a month before oral argument.[116] Yet Holmes showed no inclination to give the defendant the benefit of the doubt or to take other steps that might resolve the uncertainties in the case.

As for Debs, he was at least a major political figure with widespread influence, and he did use language in his Canton speech that was sharply critical of the war and the draft. Still, not even the Justice Department thought he had violated the law. Moreover, his speech was so long and ranged over so many topics, only one of which was the war, that it seems a stretch to say it posed a clear and present danger of obstructing the draft. Nor did the government present any evidence to this effect. The only thing it proved was that draft-age men were in the crowd, which might be sufficient under a bad tendency test but hardly seems adequate to establish a clear and present danger.

Now consider *Abrams*. Unlike in the first three cases, the defendants in *Abrams* explicitly advocated the very thing that the law guarded against: a strike in the munitions factories. There was no beating around the bush or vague, inferential language. They also directed their message to the very people best positioned to curtail the production of weapons: the workers in the munitions factories. And they directed that message to them while they were on their way to and from those factories. The message itself was a powerful one. The defendants did not appeal primarily to the intellect of their audience, as had Frohwerk. They appealed to the emotions of the Russian workers, arguing that they were "producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom." If any of the four cases presented a clear and present danger, it would seem to be *Abrams*. And yet *Abrams* is the only case of the group in which Holmes voted to reverse the convictions. It is therefore difficult to conclude that his shifting votes were based on an evaluation of the danger posed in each case.

There is one final way one might distinguish *Abrams* from the earlier cases. Perhaps the difference has less to do with the danger posed by the defendants in each case than with their intent. This is the argument made by Sheldon Novick, one of Holmes' biographers. Novick argues that Holmes was "stubbornly consistent" in his free speech opinions and that the key to understanding his votes lies in his 1894 article "Privilege, Malice, and Intent."[117] In that brief article, Holmes repeated his general theory that individuals should be held liable for harms that are foreseeable, regardless of intent.[118] However, he also argued that, for some types of privileged activities, courts should require more than just foreseeability; they should require specific intent. The reason is because these activities are socially valuable,

and courts should not deter people from engaging in them.

According to Novick, this article explains why Holmes voted the way he did in the Espionage and Sedition Act cases. Novick argues that Holmes always viewed speech as a privileged activity that could not be punished unless specific intent was shown. That intent was present in *Schenck*, *Frohwerk*, and *Debs*, Novick claims, but not in *Abrams*. Therefore, Holmes was consistently applying his theory when he voted to affirm in the former cases but to reverse in the latter.

There are several problems with this argument. First, although Holmes did claim that certain activities are privileged and can only be punished upon a showing of specific intent, he did not make this claim about speech in general. To the contrary, Holmes recognized a privilege only for expressions of opinion and for certain kinds of factual statements, such as a reference provided by a former employer. But he denied that there was a privilege for false statements about matters of public concern. As noted above, he argued that such statements were subject to a rule of strict liability.[119] Therefore, it is unclear whether he would have viewed the statements at issue in the Espionage and Sedition Act as privileged under his theory.

Even if he did, the distinction Novick draws between the *Schenck* trilogy and *Abrams* is not persuasive. This is because the evidence of specific intent in the first three cases was no stronger than in *Abrams*. In *Schenck*, the only evidence of intent was the fact that the defendants had mailed the fliers to draftees. But as pointed out above, the fliers themselves did not advocate unlawful resistance to the draft, so the inference that this is what the defendants intended is not obvious. Frohwerk specifically disclaimed any intent to encourage draft resisters in the only article he wrote that could plausibly have been interpreted as inciting such resistance. One might argue that this disclaimer was disingenuous, but even so there was no other evidence that he intended to obstruct the draft. As for Debs, the only evidence of his intent was the fact that he opposed the war and told his audience he could not say all he wanted to. In spite of this paucity of evidence, Holmes deferred to the jury's finding of intent in each case and explained on several occasions that the Court was powerless to second-guess those findings.[120] And yet when it came to *Abrams*, Holmes had no problem doing just that.

The tone of Holmes' writing about free speech also undermines Novick's thesis. Up until the middle of 1919, Holmes almost always spoke about free speech with a casual, dismissive air. When Learned Hand advocated tolerance in the summer of 1918, Holmes replied, "You strike at the sacred right to kill the other fellow when he disagrees." When an English friend complained about the censorship of war news in 1915, Holmes responded with "a dissertation on the logically indefensible right of free speech." In *Schenck* too, Holmes responded to the defendants' free speech claim somewhat glibly, comparing criticism of the government and the war to a shout of fire in a crowded theatre.

By *Abrams*, his tone had changed considerably. Instead of trivializing the defendants' speech, Holmes argued that they had as much right to publish their two leaflets "as the Government has to publish the Constitution of the United States now vainly invoked by them."[121] He also criticized the judge's handling of the case and the sentences imposed. And he wrote a passionate defense of free speech, arguing that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[122] This was a far cry from his comments the previous summer about killing those who disagree with us or treating speech like any other act we dislike. And it suggests that Holmes had fundamentally changed his attitude toward free speech.

Moreover, that is how it looked to observers at the time. Contrary to Novick's

claim, Holmes' decision in *Schenck* was not hailed as a victory for free speech. Most people did not pay much attention to it because the defendants were not well known outside Philadelphia. But *Debs*, decided just a week later, was widely condemned by progressives. Gilbert Roe, who wrote an amicus brief on behalf of *Debs*, said the opinion in that case set back the First Amendment two centuries, while the *San Francisco Examiner* called it "a perversion of the Constitution and a most dangerous and vicious invasion of our native and guaranteed liberties."[123] *Abrams*, on the other hand, was immediately celebrated by prominent liberals such as Herbert Croly, Walter Lippmann, and Roscoe Pound. At the same time, conservatives were horrified by it, as illustrated by John Wigmore's article in the March, 1920, issue of the *Illinois Law Review*. Wigmore blasted Holmes' dissent, arguing that it was "shocking in its obtuse indifference to the vital issues at stake in 1918, and . . . ominous in its portent of like indifference to pending and coming issues."[124] This was not the response of someone who viewed Holmes as merely applying a theory of intent. It was the response of someone who believed that Holmes was proposing a radical new approach to free speech.

Finally, Novick's theory cannot account for Holmes' dissent in *Gitlow*, which went further than any of his other opinions in terms of defining the scope of free speech. One might acknowledge that *Gitlow* is inconsistent with *Schenck*, *Frohwerk*, and *Debs*, but suggest that this inconsistency is irrelevant to the question of whether Holmes changed his mind during 1919. It is relevant, though. For if Holmes' *Gitlow* dissent is inconsistent with his earlier opinions, then he did change his mind at some point. Yet there is no reason to think that this change occurred between *Abrams* and *Gitlow*, since nothing happened in Holmes' life during that period to make him rethink his position. Instead, the events that influenced his views on free speech occurred in the period during which *Baltzer*, *Schenck*, *Frohwerk*, *Debs*, and *Abrams* came to the Court.

A Lobbying Campaign

The years 1918 and 1919 were eventful ones for Holmes. In addition to his usual heavy caseload, he wrote his essay on natural law for the *Harvard Law Review* and put together a collection of pieces for his Collected Legal Papers. These were busy years on a personal level as well. Holmes was the target of an assassination attempt in the spring of 1919 and his wife, Fanny, fell ill that summer and spent most days in bed.[125]

With respect to Holmes' personal life, nothing was more important to him at this time than his friendship with a group of young progressives that included Harold Laski, Felix Frankfurter, and the editors of the *New Republic*. Frankfurter had first met Holmes when he moved to Washington in 1911 to work for the Taft Administration. Carrying a letter of introduction from his former professor John Gray, he called on the Justice shortly after arriving and soon became a regular for Monday afternoon tea.[126] He also introduced the Justice to a group of young admirers who gathered at the house in Dupont Circle where Frankfurter lived with other bachelors. Nicknamed The House of Truth, it was the center of social and intellectual life for lawyers, journalists, and diplomats in the capital.[127] Holmes often stopped in to join the men for dinner or a game of cards on his way home from court.[128] He delighted in their enthusiasm and their earnest intellectual pursuits, which helped him recapture the excitement of his own youth, when he had "twisted the tail of the cosmos" with William James and the other members of the Metaphysical Club.[129]

In addition to helping him recapture his youth, these men also gave Holmes something he desperately desired: recognition. Because he looms so large now in legal history, it is

difficult to realize that, for much of his time on the Court, Holmes was not particularly well-regarded. Critics described him as a "literary feller" who relied too heavily on clever aphorisms, glossed over counterarguments, and provided insufficient guidance to lower courts. These criticisms wounded Holmes, and for a long time he feared he would never receive the recognition he desired. But during the second decade of the twentieth century, his star had grown brighter, primarily because of the young progressives at the House of Truth. Attracted by his willingness to uphold social reforms, they praised him as a paragon of judicial virtue, publishing tributes to him, feting him with parties and dinners, and passing around his opinions like sacred texts. And, though Holmes was not yet the national icon he would later become, his young friends made him feel as though his life's work had been worthwhile.

Holmes was thus surprisingly susceptible to their influence, which helps to explain his transformation on the issue of free speech. For, during the years 1918 and 1919, these men engaged in an intense, behind-the-scenes lobbying effort to change Holmes' views on free speech. Although some aspects of this lobbying effort have been documented, others have not. In addition, none of the existing accounts have arranged the events in their proper order, so as to demonstrate their cumulative impact and chronological relationship to each other. In this section, therefore, I will present a timeline of the key events, along with an analysis of the effect they had on Holmes' views.

June 16, 1918

The first significant event occurred during the summer of 1918 while Holmes was on his way to his vacation home in Beverly Farms, Massachusetts. Traveling north on the train between New York and Boston, he ran into Learned Hand, then a federal judge for the Southern District of New York. Hand was close to Herbert Croly and the other editors at the *New Republic*, and he and Holmes had crossed paths from time to time. So it was natural that they would strike up a conversation and also natural that talk would turn to the issue of free speech. A year earlier, Hand had become the first judge in the country to rule on the constitutionality of the Espionage Act when he heard a challenge to the postmaster's decision to block the circulation of a leftist magazine called the *Masses*.[130] Hand ruled in favor of the magazine, interpreting the Espionage Act narrowly to prohibit only explicit incitements to violate the law. That decision was reversed several months later by the Second Circuit, but Hand was convinced he had been right, not only about his interpretation of the Espionage Act but also about the larger issue of tolerance. And, based on a letter he wrote to Holmes several days later, he raised that issue when the two men met on the train. Holmes was not receptive, arguing that Hand struck "at the sacred right to kill the other fellow when he disagrees," and Hand was momentarily "silenced." But feeling that he had given up too easily, he resumed the debate by letter:[131]

> I gave up rather more easily than I now feel disposed about Tolerance on Wednesday. Here I take my stand. Opinions are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own.

Holmes received Hand's letter in Beverly Farms and responded the next day:[132]

> Rarely does a letter hit me so exactly where I live as yours, and unless you are spoiling for a fight I agree with it throughout. My only qualification, if any, would be that free speech stands no differently than freedom from

vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act.

You tempt me to repeat an apologue that I got off to my wife in front of the statue of Garrison on Commonwealth Avenue, Boston, many years ago. I said—if I were an official person I should say nothing shall induce me to do honor to a man who broke the fundamental condition of social life by bidding the very structure of society perish rather than he not have his way—expressed in terms of morals, to be sure, but still, his way. If I were a son of Garrison I should reply—Fool, not to see that every great reform has seemed to threaten the structure of society, but that society has not perished, because man is a social animal, and with every turn falls into a new pattern like the Kaleidoscope. If I were a philosopher I should say—Fools both, not to see that you are the two blades (conservative and radical) of the shears that cut out the future. But if I were the ironical man in the back of the philosopher's head I should conclude—Greatest fool of all, Thou—not to see that man's destiny is to fight. Therefore take thy place on the one side or the other, if with the added grace of knowing that the Enemy is as good a man as thou, so much the better, but kill him if thou Canst. All of which seems in accord with you.

Although Holmes indicated in his letter that he agreed with Hand, a closer reading casts doubt on that claim. Hand had argued that, because opinions are nothing more than provisional hypotheses, we must be tolerant of conflicting views. Holmes did not deny the provisional nature of opinions: he was as skeptical of the notion of objective truth as anyone. To Holmes, however, that lack of certainty did not necessitate tolerance. "If for any reason you did care enough [to stop freedom of speech]," he had written, "you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act." We are always acting upon a provisional hypothesis, was Holmes' point. We can never be sure we're right. But that shouldn't stop us from acting.

His apologue in front of Garrison's statue drove this point home. William Lloyd Garrison was a fervent abolitionist who had opposed all compromise over the issue of slavery in the years leading up the Civil War. Holmes had been an abolitionist himself before the war; he even served as a bodyguard at an anti-slavery rally in Boston.[133] After the war, however, he grew to detest the abolitionists, as well as all other ideologues, on the left and the right. Yet strangely, he didn't lose his taste for battle. He didn't become the philosopher who thinks both sides are foolish for fighting because neither can know the truth. Instead, he became the ironical man in the back of the philosopher's head, the man who thinks there's no choice but to pick a side and fight, even if one might be wrong, even if one might be killed as a result. So Hand's doubts and insecurities—his incredulity—meant little to Holmes when it came to tolerance. If we feel strongly enough about our beliefs, Holmes thought, we should not hesitate to act upon them, whether that means marching to war, passing laws to stamp out child labor, or suppressing the speech of those who stand in our way.

June 25, 1918

Although Holmes was not persuaded by Hand, he was intrigued enough by their

conversation to mention it in a letter to Harold Laski, who was spending the summer just up the coast in Rockport. "I had a good talk with Judge Hand (Learned) coming on which led to a characteristic and mighty good letter carrying on the talk," he wrote after arriving in Beverly Farms.[134] Then, when Laski visited a few days later, Holmes showed him the letter. Like Hand, Laski was a strong believer in free speech, having written about the benefits of disagreement and discussion in his 1917 book **Studies in the Problem of Sovereignty.** He responded that Hand had reached the correct conclusion, though for the wrong reasons and without considering all the difficulties involved. His own belief in toleration, he explained, was based on the writing of John Stuart Mill in "On Liberty." "I mean that there are all kinds of theories, e.g. Christian Science, which seem to me stupid and wrongheaded, but looking at the natural history of such theories I don't think either their stupidity or wrongheadedness has a sufficient chance of survival to penalise the ideas themselves."[135] The one exception, he added, is when a tyrant comes along who thinks toleration is nonsense and wants to slay all who think differently. If such a tyrant and Hand were the last two people on earth, "how could Hand secure the survival of toleration except by killing him? All of which surely means that there *is* something in Carlyle's ultimate question, Can I kill thee or can't thou kill me?"[136]

This was typical of Laski, who rarely disagreed with Holmes explicitly, instead couching any difference in their views as trivial and incidental to their agreement on some larger issue. His quotation of the Scottish satirist Thomas Carlyle ("can I kill thee or can't thou kill me?") even echoed Holmes' letter to Hand ("but kill him if thou Canst."). But Holmes saw through Laski's disingenuousness and pointed it out to him in a letter the following day: "Just a line to say that I don't see where your quarrel with Hand is. It rather should be with me if either—but I don't see any quarrel." He then repeated what he said to Hand, arguing that, when we believe in something strongly enough, we fight for it, free speech and tolerance be damned.[137]

July 12, 1918

That initial exchange about free speech seems to have spurred Laski to action. For when he returned for another visit ten days later, he brought Holmes a book entitled **A Theory of Toleration**. Written by a Cambridge fellow named A.A. Seaton, the book was not directly about freedom of speech. It was about the struggle for religious freedom in late seventeenth-century England. Still, the two subjects were closely connected, and most of Seaton's conclusions applied to both. He argued that forced conformity of religious beliefs had largely failed, producing resentment and hypocrisy instead of genuine unity. He also argued that the natural appeal of persecution had diminished over time, as the Enlightenment ushered in an attitude of inquiry and skepticism. But, unlike Hand, Seaton believed that skepticism alone was an insufficient basis for toleration. Even if we cast doubt on long-accepted beliefs, those who seek to impose them on us may feel strongly enough to take the chance of being wrong. The case for toleration must therefore have a positive aspect, appealing to the dignity of man and the quest for truth. For when "it is grasped that we have not the total sum of truth as a treasure to be guarded with fire and sword, but an infinitesimal portion of it to be increased, if possible, by zealous and humble search, the question assumes a different aspect," he wrote. "There can hardly be a nobler motive to toleration than the conception of the multitudinous religions of mankind contributing each its quota—infinitesimal it may be, but precious . . . to some vast synthesis of religious thought, aspiration, and experience at present beyond the limits of our narrow intellectual range."[138]

Holmes read the book within a week and was favorably impressed. "I have read it with

profit and pleasure," he wrote to Laski. "The writer is rather of the literary school of John Austin in his effort to secure precision at every step—but the gossip of inadequate thought having practical significance always is amusing."[139]

November 8, 1918

Although Laski continued to feed Holmes a diet of progressive literature that summer, none of the books dealt with the issue of free speech. But Laski returned to the subject that fall after Holmes was back in Washington. Noticing that the Court had several Espionage Act cases on its docket, he mentioned them in a letter to Holmes on November 8. "I see that there are some 'free speech' cases to listen to so that the next few weeks won't be without excitement," he wrote.[140]

More intriguing than that statement was Laski's reference a few paragraphs later to Clement Vallandingham, an Ohio politician who had been arrested during the Civil War for a speech critical of the Union cause. In many ways, Vallandingham was a precursor to Eugene Debs: a well-known political figure who was jailed for speaking out against the government during a controversial war. And, as with Debs, his case had become a cause célèbre, with prominent Democrats petitioning Lincoln for a pardon. Lincoln declined their request and ordered Vallandingham deported to the Confederacy, a decision that generated another round of controversy. Laski knew all of this because he had read a biography of Lincoln by the British politician Lord Charnwood, which Holmes had mentioned in a recent letter. Charnwood denounced Vallandingham as a dangerous agitator and praised Lincoln's decision not to pardon him—an assessment Laski strongly disagreed with. "I think Lincoln was dead wrong about Vallandingham despite Charnwood's denunciations," he wrote to Holmes.[141] It was a small comment, but, combined with Laski's reference to the Court's upcoming cases, it indicates that the subject of free speech was on his mind and that he was willing to engage Holmes in further discussion about it.

November 16, 1918

Around the same time Laski wrote that letter to Holmes, he was also involved in another effort to advance the cause of free speech. The editors of the *New Republic*, troubled by the government's persecution of dissenters, had decided to solicit an analysis of the situation from an expert on free speech. And Laski, who was a frequent contributor to the magazine, had an idea about who they should ask. That summer, while helping to edit the *Harvard Law Review*, he had learned that Zechariah Chafee, a young professor at the law school, was working on an article about the Espionage and Sedition Acts. He therefore suggested that Croly ask Chafee to write a shorter version of that article for the *New Republic*.[142] Croly agreed, and Chafee's article was published on November 16, 1918.

Chafee's article had two main goals. First, he wanted to show that the First Amendment did not adopt Blackstone's understanding of free speech, but instead limited government's power to punish dissent both before *and* after the fact. This was no easy task. In addition to Holmes' decision in *Patterson v. Colorado*, many state courts had embraced Blackstone in interpreting their own guarantees of free speech.[143] But Chafee ignored these precedents, arguing that the framers never meant to codify Blackstone's views.[144] They had the seen the way the British crown silenced its critics, he claimed, and intended to make such suppression impossible in this country. And when the Federalist party disregarded that intent, passing the Sedition Act of 1798, two of the most influential founding fathers, Jefferson and Madison, were quick to cry foul.

In addition to challenging Blackstone, Chafee also wanted to elucidate the purpose of free speech. His argument on this point relied

heavily on the writing of Milton and Mill. The purpose of free speech, he wrote, is the discovery and spread of truth, which "is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantages."[145] This did not mean that speech could never be punished. Chafee was a pragmatist who acknowledged that "there are other purposes of government, such as order, the training of the young, protection against external aggression." Freedom of speech sometimes conflicts with these interests, he noted, and when it does the competing interests must be balanced against each other. But "freedom of speech ought to weigh very heavily in the scale."[146]

Did the Espionage and Sedition Acts get the balance right? Chafee argued that the 1917 Espionage Act reached an acceptable balance because it was closely linked to military operations. As long as the law was applied only to speakers who *expressly* advocated unlawful conduct, as Hand had argued in *Masses*, it was within constitutional bounds. But the 1918 Sedition Act did not get the balance right. That act made it a crime to say almost anything against the war or even to make the case for peace. This was a grievous mistake, Chafee argued. "The pacifists and Socialists are wrong now, but they may be right the next time," he wrote. "The only way to find out whether a war is unjust is to let people say so."[147]

Chafee did not mention Holmes in his article. But, because Holmes had written *Patterson v. Colorado*, the article was in large part an attack on his views. And it appeared in one of the few publications Holmes actually read. In fact, Holmes was an enthusiastic supporter of *The New Republic* and the men who edited it. He had read Croly's second book, **The Progressive Democracy**, when it was published in 1913 and wrote him a long letter filled with praise.[148] He regarded Walter Lippmann, another editor, as "a monstrous clever lad,"[149] and Frances Hackett, the magazine's literary editor, as a genius.[150] So what did he think when these same men published an article assailing his views on free speech?

No one knows. There is no mention of the article in any of Holmes' surviving letters, which might suggest he never saw it. However, that seems unlikely. Based on his correspondence during this time, Holmes read the *New Republic* faithfully. And, even if he skipped an issue, it seems likely that Laski, Frankfurter, or one of his other *New Republic* friends would have called it to his attention. Moreover, although Holmes did not comment on the article, he did embrace its argument about Blackstone three months later in *Schenck*.

December 3, 1918

Two weeks after Chafee's article was published, Holmes came under pressure again. In early December, Justice McKenna circulated his majority opinion in *Baltzer*, the first of the Espionage Act cases to come before the Court.[151] It is not clear how Holmes voted at the conference. But Brandeis apparently had concerns about the outcome, for on December 3 he visited Holmes at home and urged him to write a dissent. As Holmes put it in a letter to Laski, "A whirlwind struck me in the middle of the last sentence. It has taken the wind out of me, esp. as when I can get calm I am catspawned by Brandeis to do another dissent on burning themes—and half an hour ago I was at peace!"[152]

As discussed earlier, Holmes gave in to Brandeis' request and wrote a dissent in *Baltzer*. It was the second time in less than eight months Brandeis had persuaded Holmes to rule in favor of a party raising free speech claims—the first was *Toledo Newspaper* the previous spring. And although Holmes' opinions in both cases were narrow and not based directly on free speech, they show his willingness to take seriously the arguments of his friends.

February 1919

In early February, as Holmes prepared to write the opinions in *Schenck*, *Frohwerk* and *Debs*, Laski suggested that he reread "On Liberty" by John Stuart Mill. It is unclear exactly how this recommendation came about—whether as part of a discussion about the Espionage Act or in some other context. But it is clear that Holmes took Laski up on his suggestion because he mentioned it in a letter on February 28. Describing the books he had read earlier in the month, he wrote, "and led by what you have said, I reread Mill on Liberty—fine old sportsman—Mill."[153]

Like Hand, Mill's defense of free speech was grounded in the pursuit of truth and the fallibility of human judgment. Only by assuming we are infallible, he argued, can we justify the suppression of opinions we think false.[154] Unlike Hand, however, Mill anticipated Holmes' objection, which was that, even though we are fallible, even though we can never be certain of the truth, we must still act. That was undeniable, Mill conceded. We must act, and we must assume, for the purpose of acting, that what we believe is true. But that does not mean we can assume our opinions are true for the purpose of suppressing speech. Just the opposite, in fact. For it is only because our opinions are open to challenge that we are justified in assuming their truth for purposes of action. "If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do," Mill wrote. "The beliefs which we have most warrant for have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded."[155]

This was a powerful argument—and one that Holmes would adopt almost verbatim nine months later in his *Abrams* dissent. For now, however, it appeared to have little influence on him. Despite articulating the clear and present danger test in *Schenck*, he did not actually apply that test to the facts of the case. Moreover, as discussed earlier, he seemed to abandon that standard in both *Frohwerk* and *Debs* and revert back to the bad tendency test.

March 18, 1919

Although it is not clear whether Holmes and Laski discussed the Espionage Act cases while they were pending, it seems likely that they at least mentioned them. For, after the decisions in *Schenck*, *Frohwerk*, and *Debs* were issued, Holmes sent copies of them unsolicited to Laski. There is more than a hint of defensiveness in the accompanying letter, in which Holmes stated that "he greatly regretted having to write [the decisions]—and (between ourselves) that the Government pressed them to a hearing."[156] He also explained that he knew "donkeys and knaves would represent us as concurring in the condemnation of Debs because he was a dangerous agitator." But on the question of law that was before the Court, he added, "I could not doubt."

Laski responded two days later in typically diplomatic fashion. "I read your three opinions with great care and though I say it with deep regret they are very convincing," he wrote. "The point, I take it, is that to act otherwise would be simply to substitute judicial discretion for executive indiscretion with the presumption of knowledge against you."[157] But, although Laski did not dispute the results Holmes had reached, he did express his opposition to the prosecution of the defendants. "I think you would agree that none of the accused ought to have been prosecuted; but since they have been and the statute is there the only remedy lies in the field of pardon." He also expressed uneasiness about Holmes' willingness to defer to the executive in times of war. "Your analogy of a cry of fire in a theatre is, I think, excellent, though in the remarks you make in the *Schenck* case I am not sure that I should not have liked the line to be drawn a little tighter about executive discretion. The Espionage Act tends to mean the prosecution of all one's

opponents who are unimportant enough not to arise [sic] public opinion."

March 31, 1918

Holmes does not appear to have replied to Laski's criticism, but two weeks later he received another letter about his decisions. It was from Hand, who used the Court's decisions as an opportunity to renew his debate with Holmes from the previous summer. Like Laski, Hand chose not to dispute the outcomes reached by the Court. Whether this was because he agreed with those outcomes or was simply being respectful is unclear. But he did encourage Holmes to think harder about the legal rule that lay behind the decisions, suggesting that it was not supported by history. He also questioned Holmes' reliance upon the jury's finding of intent in *Debs*, arguing that such a focus on motive would chill valuable speech.[158]

Holmes was busy when Hand's letter arrived and could not give it the attention it required. The result showed. When he wrote back a few days later, it was clear that he did not understand the substance of Hand's test or how it differed from his own. "Since your letter came I have been so busy propagating new sophistries that I haven't had time to defend the old ones. And now I am afraid that I don't quite get your point."[159] Holmes then explained that he had said nothing about intent "except to note that under the instructions the jury must be taken to have found that Debs's speech was intended to obstruct and tended to obstruct—and except further that evidence was held admissible as bearing on intent." He also argued that "words may constitute an obstruction within the statute, even without proof that the obstruction was successful to the point of preventing recruiting. That I at least think plain."

Hand was discouraged after receiving this letter and did not engage Holmes in further discussion about free speech. As he explained to Chafee later, "I kept up my hopes until the Debs case and when the whole court affirmed that without laying down anything like what I thought was the rule, I confess I began to wonder whether I had not got some kind of wrong squint on the subject."[160]

May 3, 1919

Like Laski and Hand, the editors of the *New Republic* initially chose not to challenge the outcome in *Debs* or the other cases.[161] But one month later, they published a scathing critique of the decision by Ernst Freund, a professor at the University of Chicago Law School.[162] Freund faulted Holmes for relying upon the jury's finding that Debs had intended to obstruct the draft. Like Hand, Freund thought this set a dangerous precedent. Not only would it empower juries to punish speakers they disagreed with; it would make it impossible for speakers to know ahead of time whether they could be punished for their words. And that, Freund argued, would chill all but the blandest political discussion. "To know what you may do and what you may not do, and how far you may go in criticism, is the first condition of political liberty," he wrote. "To be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift."[163]

Freund also disputed the jury's finding that Debs's speech had in fact been likely to cause harm. After all, Debs had not directly urged his audience to obstruct the draft; at most, he had *in*directly encouraged them to do so by criticizing the war. And the likelihood that this encouragement would cause actual obstruction was "practically nil." "Yet Justice Holmes would make us believe that the relation of the speech to obstruction is like that of the shout of Fire! in a crowded theatre to the resulting panic! Surely implied provocation in connection with political offenses is an unsafe doctrine if it has to be made plausible by a parallel so manifestly inappropriate."[164]

Holmes was stung by the article and responded by writing a letter to Croly, the magazine's editor.[165] Like his earlier letter to Laski, it was both defensive and defiant. He

hated having to write the *Debs* opinion, he insisted. Had he been on the jury, he likely would have voted for acquittal, and he didn't understand why the government had pressed the case to a hearing. But as long as there was at least some evidence to support the jury's verdict, he could not overturn that verdict simply because he personally might have viewed that evidence differently. As for the constitutionality of the Espionage Act, he explained, that question had already been put to rest in *Schenck*. Of course, he neglected to add that he was the one who had put it to rest; he cited his *Schenck* opinion as if it were the decree of some superior tribunal he had nothing to do with. At the same time, he took pains to downplay the implications of both *Debs* and *Schenck*, stating that he had only ruled on the "clauses under consideration." He also signaled a new appreciation for free speech, declaring that, regardless of what the law dictated, he personally favored the "aeration of all effervescing convictions"—not because it promoted the search for truth or self-government, as Hand and Chafee had argued, but because "there is no way so quick for letting them get flat."

After writing this letter, Holmes had second thoughts about sending it. The Court had recently received the petition for review in *Abrams*, and he was apparently worried about expressing his views so candidly on an issue that was likely to come before the Court again. While debating what to do, he received a letter from Laski asking if he had read Freund's piece and was "at all influenced by his analysis."[166] This apparently gave Holmes an idea. Instead of sending his letter to Croly, he sent it to Laski. "Yesterday I wrote the within and decided not to send it as some themes may become burning," he wrote. "Instead I trust it confidentially to you and it will answer your inquiry about Freund. I thought it poor stuff—for reasons indicated within."[167]

Laski did not respond to Holmes' letter, and the two friends do not appear to have mentioned Freund's article in writing again. But Learned Hand did. Reading the piece in New York, he saw Freund's analysis as a vindication of his own views and wrote to thank its author. "Your article in last week's 'New Republic' was a great comfort to me," he wrote Freund on May 7. "You express my own opinion much better than I could myself and in your distinguished company I shall take heart of grace to believe I am right, even with the whole Supreme Court the other way."[168] Hand also made clear that he had been trying to persuade Holmes to adopt a more expansive view of free speech. "I own I was chagrined that Justice Holmes did not line up on our side; indeed, I have so far been unable to make him see that he and we have any real differences, and that puzzles me a little."

Summer 1919

The summer of 1919 was difficult for Holmes. In early May, police discovered a bomb plot against him and thirty-five other prominent government officials and business leaders.[169] Then, in June, just before he left Washington for Beverly Farms, a bomb exploded in front of the house of Attorney General A. Mitchell Palmer, leading police to station an officer near Holmes' front door.[170] And finally, on the train ride north, his wife had fallen ill from the heat and fatigue and spent most of the summer confined to her bed.[171]

In light of these circumstances, Holmes spent much of his summer with Laski, who was once again staying just up the coast in Rockport. And Laski used the opportunity to continue feeding Holmes a steady diet of progressive literature, much of it with at least a tangential connection to free speech. In May, he gave Holmes a biography of Francis Place, the nineteenth-century British social reformer who had fought against the stamp tax on newspapers.[172] In July, he passed along **The History of English Rationalism in the Nineteenth Century**, an account of the triumph of science and logic over religious

dogma.[173] And, in August, he presented him with **The History of English Democratic Ideas in the Seventeenth Century**, a chronicle of the emergence of political liberalism during and after the English Civil Wars.[174]

More important than these books was Chafee's article in the *Harvard Law Review*, which Laski also forwarded to Holmes.[175] Entitled "Freedom of Speech in War Time," the article repeated many of the arguments Chafee had made in *The New Republic* the previous fall, including his claim that the framers had rejected the Blackstonian view of free speech.[176] But Chafee was no longer content merely to discredit Blackstone. As he pointed out, Holmes had already done that in *Schenck*, though not before his earlier endorsement "had had considerable influence."[177] What Chafee cared about now was filling the void left in Blackstone's wake. Many judges, he noted, had interpreted the First Amendment to protect the "use" of speech but not its "abuse," "liberty" of the press but not "license."[178] Those formulas, however, gave little guidance to judges and speakers about what speech was protected. "Justice Holmes in his Espionage Act cases had a magnificent opportunity" to clarify the uncertainty, Chafee wrote. "He, we hoped, would concentrate his great abilities on fixing the line."[179] Instead, like other judges, Holmes had taken aim at easy targets, such as the man who falsely shouts fire in a crowded theatre and causes a panic. "How about the man who gets up in a theatre between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked?" Chafee asked. "He is a much closer parallel to Schenck or Debs. How about James Russell Lowell when he counseled not murder, but the cessation of murder, his name for war? The question whether such perplexing cases are within the First Amendment or not cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection."[180]

In private conversations, Chafee made clear that the principle he favored was the one proposed by Hand in *Masses*, which protected all speech except explicit incitement to break the law.[181] But Hand's test had been rejected by the appeals court and ignored by the Supreme Court. So instead Chafee embraced the clear and present danger test of *Schenck*, arguing that it was now the standard that governed all Espionage Act cases. There was only one problem. Holmes had not clearly indicated that the phrase "clear and present danger" was intended as a substitute for "bad tendency." Indeed, as discussed above, there was reason to think he was not introducing a new test at all, but was simply using a different formula to describe the old test. But Chafee ignored that possibility and portrayed "clear and present danger" as a new standard designed to protect more speech than the old "bad tendency" test.

Chafee also criticized the Court's judgment in *Debs*. If the Supreme Court had applied the clear and present danger test to Debs's speech, he argued, "it is hard to see how he could have been held guilty."[182] It was true that a jury had convicted him, and equally true that the Supreme Court ordinarily does not second-guess a jury's factual conclusions. But the judge had not instructed the jury that a "clear and present danger" was necessary. In addition, the judge had allowed the jury to infer that Debs intended to obstruct the draft from the mere fact that he gave the speech. These were serious mistakes that had to be avoided in the future, Chafee argued. "If the Supreme Court test is to mean anything more than a passing observation, it must be used to upset convictions for words when the trial judge did not insist that they must create 'a clear and present danger' of overt acts."[183]

As David Rabban has shown, Chafee's argument was inspired, if somewhat disingenuous.[184] He had seized upon an isolated phrase in *Schenck*—a phrase used casually,

almost carelessly, by Holmes—and held it out as announcing a new standard in First Amendment law. Then, he had used that new standard to undercut one of the very opinions from which it ostensibly derived. Where most progressives had looked at *Schenck*, *Frohwerk*, and *Debs* and seen only disaster, Chafee had seen opportunity. As Hand put it to him in a letter two years later, "You have, I dare say, done well to take what has fallen from Heaven and insist that it is manna rather than to set up any independent solution."[185]

In addition to turning Holmes' words against him, Chafee also faulted the Justice for not paying adequate attention to the values underlying the First Amendment. "It is regrettable," he wrote, "that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time."[186] Indeed, Chafee noted, Holmes' opinion in *Schenck*—with its assertion that "many things that might be said in time of peace . . . will not be endured so long as men fight"—suggested that he would "sanction any restriction of speech that has military force behind it, and reminds us that the Justice used to say when he was young 'that truth was the majority vote of that nation that could lick all others.' His liberalism seems held in abeyance by his belief in the relativity of values."[187]

When Laski read Chafee's article that summer, he sent a copy to Holmes and then had an idea that was almost as inspired as Chafee's article. Chafee was scheduled to spend a weekend with him in Rockport at the end of July. Why not invite Holmes to tea that same weekend so that Chafee might make his argument in person? He broached the possibility with Holmes, who seemed open to the idea. Then, three days before Chafee was scheduled to arrive, Laski wrote to inform him of the plan:

> You won't forget that you are coming down on Saturday for the week-end. Holmes is coming to tea, and I want you to arrive in good time. For I have given him your article and we must fight on it. I've read it twice, and I'll go to the stake for every word. Bless you for it.[188]

The meeting took place as planned. According to a letter Chafee wrote to Charles Amidon, a federal judge in North Dakota, Holmes again indicated that he regretted having to write the decision in *Debs* and likely would have voted for acquittal if he were on the jury.[189] Chafee also noted that Holmes seemed "inclined to allow a very wide latitude" to the government when it came to speech in time of war. Finally, he noted that Holmes did not think it possible to draw a clear line between protected and unprotected speech "but simply to indicate cases on the one side or the other of the line." "While I do not anticipate myself that any hard and fast line could be drawn, his failure, it seems to me, is the omission to state the principles by which decisions are to be placed on one side or the other."

September 1919

Before the summer ended, Laski sent Holmes three additional books that influenced the Justice's thinking on free speech.

The first was **Essays on Freethinking and Plainspeaking** by Leslie Stephen. A former clergyman turned agnostic, Stephen chastised those liberal but diffident clerics who tried to reconcile their hard-earned skepticism with the lazy fictions of faith. Instead of openly challenging antiquated Church doctrines, they "waste their power in an attempt to square circles."[190] There is enough deceit and hypocrisy in the world without such misguided attempts at harmony, he argued. "Let us think freely and speak plainly, and we shall have the highest satisfaction that man can enjoy—the consciousness that we have done what little lies in ourselves to do for the maintenance of the truths on which the moral improvement and the happiness of our race depend."[191]

Those familiar with Holmes' Abrams dissent will notice a familiar phrase in this paragraph. Leslie's reference to the squaring of circles would reappear less than two months later in the following line: "To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle."[192]

The second book was a biography of Adam Smith, the Scottish economist and founder of free market capitalism. Holmes was well acquainted with Smith, having read **The Wealth of Nations** years earlier. But the biography, written by the British journalist Francis Hirst,[193] influenced him in two respects. First, it emphasized the extent to which Smith believed not just in economic liberty, but in political liberty, including free speech. Second, Hirst disputed the revisionists who had tried to invoke Smith's name in support of governmental regulation of the economy. Although Smith accepted the need for some regulation, Hirst argued, he believed strongly that a policy of "free trade" would produce the greatest good for the greatest number. "*The Wealth of Nations* is a forest of full-grown arguments for free trade," Hirst wrote.[194] "Smith's name can no more be dissociated from free trade than Homer's from the siege of Troy." In all, Hirst used the phrase "free trade" more than twenty times in his book, including as a chapter title. So it is not surprising that Holmes, when casting about for a metaphor to explain the value of open debate, should seize upon the idea of free trade, or as he put it, "free trade in ideas."

Finally, there was **The Decline of Liberty in England**, written by E.S.P. Haynes, a British lawyer and author. Published in 1916, Haynes's book argued that individual freedom in England was being chipped away by growing state interference and an infatuation with German efficiency. Haynes focused most of his attention on social and moral issues, but he also despaired over the future of free speech. Libel suits were on the rise, censorship was spreading, and a mob mentality was overtaking the country. Worse, judges had abdicated their responsibility and were deferring "to the wishes of the Executive without much attention to other considerations."[195] Liberty of speech in England was still greater than anywhere else, including the United States, Haynes argued. But if judges failed to rein in the "unchecked power of the Executive" and if the public did not jealously guard this vital privilege, it would be swallowed up by the movement toward national militarism "and even more by an increasingly tyrannical collectivism which would destroy the freedom of the individual to discuss any problems except from the collectivist point of view."[196]

Haynes's book was not a work of serious political theory like Mill's **On Liberty**. It was a polemic that Holmes found both verbose and obscure. Still, it made a strong impression on him. "The whole collectivist tendency seems to be toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for," he wrote to Pollock shortly after reading the book. Then, foreshadowing the dissent he would write just a month later, he added, "We have been so comfortable so long that we are apt to take it for granted that everything will be all right without our taking any trouble. All of which is but a paraphrase of eternal vigilance is the price of freedom."[197]

Defending His Friends

The lobbying effort targeted at Holmes lasted nearly a year and a half and involved many of his closest friends. Although it does not appear to have been consciously orchestrated, there is some evidence of coordination between various participants, such as Laski and Chafee. There is also evidence that the effort had an effect, as Holmes gradually began to distance himself from his earlier views and opinions and expressed a new appreciation for free speech. But the effort

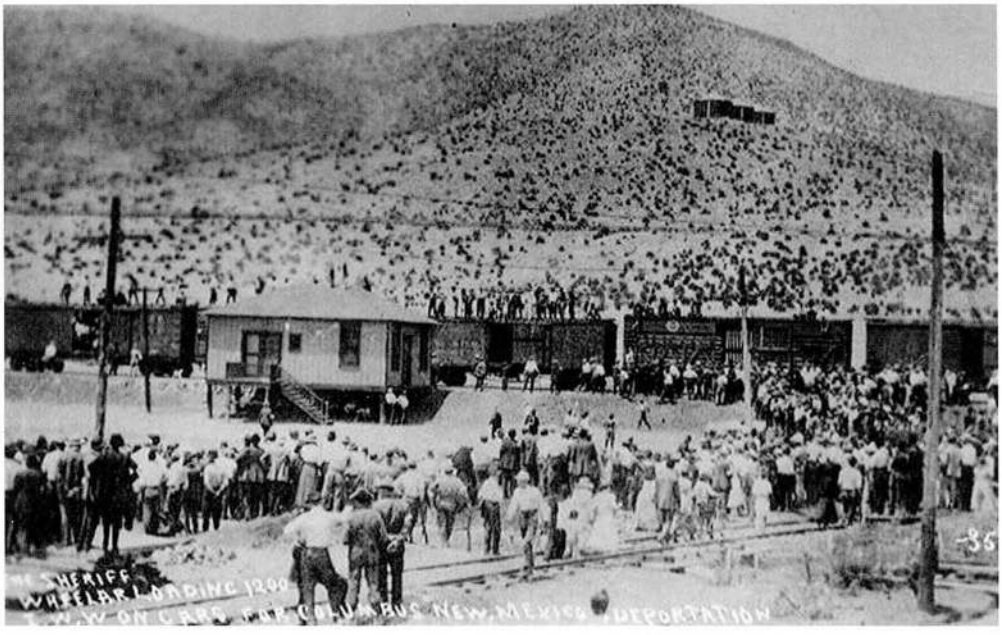
might never have succeeded were it not for another development that made the issue of free speech more personal to Holmes than it had previously been.

The year after World War I was bleak and divisive in the United States. After the initial wave of relief and euphoria, the country plunged into a state of suspicion and anxiety. Congress allocated $500,000 for an investigation of seditious activities,[198] the Attorney General called for the enactment of a peacetime Espionage Act,[199] and a congressional committee released a list of sixty-two radicals who were said to be enemies of the state.[200] The list included such respected figures as Jane Addams, the social reformer from Chicago; Charles Beard, the Columbia University historian; and Frederic Howe, Commissioner of Immigration at Ellis Island. But the people on the list weren't the only ones under suspicion. Laski and Frankfurter also found themselves under attack for their views and the actions they took on behalf of the progressive cause.

For Laski, the trouble began in the spring of 1918 when a complaint was filed against him at Radcliffe College, where he was teaching a course on economics. According to the mother of one of his students, Laski was a Bolshevist sympathizer who was indoctrinating the girls in socialist theory.[201] Officials at Radcliffe forwarded the complaint to Harvard President A. Lawrence Lowell, who opened a file on the young instructor that would eventually include nearly 100 letters from angry parents and alumni. Around the same time, a Harvard professor named Edwin H. Hall began telling anyone who would listen that Laski was a "poisonous influence" who was spreading leftist propaganda on campus.[202] Hall's whispering campaign was successful enough that in January 1919 Laski offered to resign his position on the *Harvard Law Review* as a way to deflect criticism from the law school.[203] But the situation only worsened that spring when he took part in a strike at the Lawrence textile mills and published **Authority in the Modern State,** which argued that workers should be given control over all major manufacturing questions, from the length of the workday to the hourly wage to the method and rate of production.[204]

Frankfurter's troubles began in 1917 when he got tangled up in two controversies as a result of his work on the President's Mediation Commission, which was charged with resolving labor disputes during the war. The first was an incident known as the Bisbee Deportation.[205] During the copper strikes in Arizona, the town of Bisbee had emerged as a hot spot for labor strife, with widespread strikes and conflicts among various union factions. Amid rumors of violence, local officials asked the federal government to send in troops to keep the peace. When the government denied this request, officials took matters into their own hands. Leading a massive vigilante force, they rounded up nearly 1,200 strikers, loaded them onto cattle cars, and hauled them into the middle of the New Mexico desert, where they were stranded for two days without food or water. The Army eventually rescued the strikers and moved them to a nearby town for safety, but the incident became a rallying cry for progressives. And, although it was technically outside the Commission's mandate, Frankfurter persuaded the group to visit Bisbee and conduct a full investigation. He then drafted a report declaring the actions of local officials "wholly illegal" and recommending a process for resolving similar disputes in the future.[206]

The second controversy stemmed from the case of Tom Mooney, a California labor leader who had been sentenced to death for allegedly planting a bomb that killed ten people during a 1916 Preparedness Day march.[207] After the trial, defense attorneys uncovered evidence suggesting that the primary witness against Mooney had perjured himself. But, because they had already appealed to the California Supreme Court, the trial judge ruled that he lacked jurisdiction



In July 1917, 2,000 vigilantes illegally deported about 1,200 striking copper mine workers from the town of Bisbee, Arizona. They forced them into cattle cars and transported them without food or water to a desert in New Mexico, where they were told not to come back.

to reopen the matter. At the same time, the state supreme court indicated that it would only consider evidence that had been introduced at trial. This put Mooney in an impossible situation, with evidence undermining his conviction yet no court willing to hear it. The situation also proved embarrassing for the Wilson Administration, which had gone to war to "make the world safe for democracy" yet now appeared unable to secure justice at home. Thus, as part of his work for the Commission, Frankfurter investigated the case and wrote a report on his findings. Although he stopped short of saying that Mooney was innocent, he did conclude that the case was a miscarriage of justice that had weakened the country's credibility with its allies. To remedy the injustice, he proposed that Wilson urge the governor of California to grant Mooney a retrial—advice that Wilson followed, with mixed results. Instead of a new trial, the governor commuted Mooney's sentence to life in prison.[208]

Made public within a few months of each other, the Bisbee and Mooney reports thrust Frankfurter into the national spotlight. And, although progressives cheered his efforts, conservatives questioned his integrity, his motives, and his patriotism. The most damning criticism came from Theodore Roosevelt, whose close friend, the copper magnate Jack Greenway, had spearheaded the Bisbee deportation. In a letter published in the *Boston Herald*, Roosevelt called the Bisbee report "as thoroughly misleading a document as could be written on the subject." He also accused Frankfurter of "excusing men precisely like the Bolsheviki in Russia, who are murderers and encouragers of murder, who are traitors to their allies, to democracy and to civilization, as well as to the United States."[209]

The attacks on Frankfurter continued when he accepted a job as chairman of the War Labor Policies Board, a position that required him to impose progressive labor standards, such as the eight-hour workday, on some of the most recalcitrant industries in the country.[210] Frankfurter supported these standards, believing they would ultimately boost productivity, but the captains of industry

viewed them as the first step to communism. When the chairman of U.S. Steel, Elbert H. Gary, met with Frankfurter in Washington, he complained that a shortened workday would destroy his company. He then spread a rumor that Frankfurter had threatened a federal takeover of the steel mills.[211]

By the end of the war, then, Frankfurter was a controversial figure, closely identified with some of the most radical causes in the country. And the conservatives at Harvard were not pleased. In the spring of 1919, a group of influential alumni demanded that Dean Roscoe Pound remove Frankfurter from the faculty.[212] When Pound refused, they demanded that *he* be removed. Distraught over the situation, Pound warned Frankfurter that their future at the school looked grim.[213] But Frankfurter was in Paris attending the peace conference and could not defend himself in person. So Pound explained the situation to Brandeis, who apparently shared the news with Holmes.[214]

"Every once in a while, faintly and vaguely as to you, a little more distinctly as to Frankfurter, I hear that you are dangerous men," Holmes wrote to Laski in April 1919. "What does it mean? . . . Have your writings as to sovereignty led people who don't read them to believe that you were opposed to law and order or what?"[215]

Laski downplayed the attacks on himself, responding that, although he had enemies, they had not yet made his life difficult. But there was a movement afoot to run Frankfurter and Pound out of Harvard, he explained. Exactly who was behind the effort Laski didn't know, though he suspected it was the work of Richard Hale and Thomas Perkins, two prominent Boston lawyers with close ties to the school. "Hale is abominable," he told Holmes. "He actually sent for the editor of the Law Review early in the year and warned him against Felix."[216] Laski was also unsure about the motive behind the campaign, though he suspected it was anti-Semitism. In any case, he said, Pound and his allies were taking a beating and could use some help. "If you ever get a chance to drop a hint to Hale or Perkins, you would do us all a great service."

Though Holmes expressed concern about the situation, he did not initially take steps to help. So Laski wrote again: "The real truth is that there's a great fight on as to the future of the School and the older Tories are eager to make the place unbearable for Pound. He is a very great Dean and the students worship him and sooner or later the Law School Alumni Association has to step in and tell the world what Pound is counting for in scholarship and prevent this idle insistence on a status quo which has already lost its status."[217]

Holmes, as Laski knew, was president of the Law School Alumni Association. So Laski's insistence that the association would have to step in was essentially a plea for *Holmes* to step in. And this time, Holmes got the message. He had just received notice of the Association's next meeting, he informed Laski two days later. "They ask for suggestions. Could I say anything to them? Answer quick. The letter comes from F.W. Grinnell, partner of Richard Hale."[218]

Laski wasted no time taking advantage of this response. "Only one word in very partial reply to a letter worth its weight in gold," he wrote back the next day. "If the Association would, *te movente*, record its appreciation of the way Pound kept the School going during the war it would help marvelously. That, *bien entendu*, if you felt so inclined. My love and great gratitude for that letter."[219]

So that's what Holmes did. He sent a note to Grinnell repeating exactly what Laski said. "Your letter invites suggestion and I venture one," he wrote. "I have a very strong conviction of the value and importance of Pound who I think has done much to maintain the superlative reputation of the School. If it were possible to pass a resolution expressing our appreciation of the way in which he has kept the School going during the war, or giving him encouragement in such form as is deemed best I should be much gratified.

Perhaps you will call this to the attention of the meeting."[220]

When Laski received a copy of this note from Holmes, he was elated. "That is a most generous letter of yours about Pound and on his account, as well as my own, I am very grateful," he wrote.[221] Pound was also pleased. Grinnell had shown him the letter, he wrote to Holmes, and it was "worth reams of resolutions." But he was still anxious about Frankfurter. "Unhappily most people hereabout seem to be chiefly concerned to push Frankfurter out of the school. If such a thing were to happen, it would be nothing short of a calamity. What I fear is that he will be made uncomfortable and will go."[222]

After discussing the matter with Brandeis, Holmes wrote another letter—this time to President Lowell: "I have a very strong feeling that Pound and in his place Frankfurter have and impart the ferment which is more valuable than an endowment and makes a Law School a focus of life."[223] He also suggested that Pound be given an honorary degree from Harvard, "as I believe he has from various other universities. He is one of the very few men whose work on legal subjects is referred to by Continental writers."

That seemed to do the trick. Lowell sent back an encouraging response, which Holmes forwarded to Laski with permission to show to Pound. "I have the notion that Pound thought Lowell's attitude to be different from this, and it may cheer him up," he wrote.[224]

For the next several months, the situation at Harvard remained stable. But that fall, matters heated up again when Laski came out in support of a strike by the Boston police force. In an interview with the *Harvard Crimson*, he argued that every worker had the right to affiliate with a union, no matter who his employer or what his vocation.[225] Then, in a speech to the families of the striking police on October 15, he blamed Boston Police Commissioner Edwin Curtis for the situation and declared that labor would "never surrender."[226]

The reaction to these comments was swift and severe. In a letter to the *Boston Herald*, Professor Hall accused Laski of glorifying Bolshevism and attempting to intimidate those who disagreed with his radical doctrines.[227] The *Boston Evening Transcript* also denounced the speech. "It is not too much to ask," the newspaper wrote, "whether the Harold J. Laski who addressed last night's meeting at Fay Hall is an instructor in or lecturer upon American Government or Soviet Government. The parents of the sons entrusted to his tutelage are entitled to know. The followers from Maine to California of straight Americanism will, we think, insist upon knowing."[228]

As it turns out, they did want to know. The university was in the midst of a fifteen-million-dollar fundraising campaign, and Lowell received dozens of letters from alumni who threatened to withhold their contributions unless Laski was fired.[229] Lowell refused to give in to the pressure, even though he estimated it cost the school three hundred thousand dollars. But the Board of Overseers took matters into its own hands, scheduling a meeting for October 27 to consider whether Laski should be fired.[230]

In the meantime, the Court heard arguments in *Abrams* on October 21 and 22. On the second day of arguments, something happened that has never before been revealed and that sheds new light on Holmes' actions that fall. Furious not only with the attacks on Laski but with the general atmosphere of intolerance in the country, Frankfurter paid a visit to Ellery Sedgwick, editor of *The Atlantic Monthly* and member of the Harvard Board of Trustees. As Frankfurter described it in a newly discovered letter to his fiancée, "I bearded the great editorial lion in his den yesterday—Ellery Sedgwick to shake him to some plain speaking. . . . He *wants* to be a liberal and is considerably one."[231] In fact, Sedgwick had agreed to "print a blast on tolerance" if Frankfurter could solicit one from "somebody like Holmes or [Charles

Norton] Eliot"—in other words, Sedgwick had said, "somebody who counts."[232] Frankfurter responded that "everybody counts who has courage & speaks sense," but he was apparently intrigued by Sedgwick's proposal because over the next week both he and Laski wrote Holmes asking if he could write such an article. Their letters to Holmes have not survived, but his responses have, and they make clear not only that the young men asked Holmes to write, but that their request made an impression on him.[233] Here is Holmes' response to Laski:

> I didn't till this moment read your letter correctly and realize that it asked if I would write. I thought it expressed a regret but assumed that I couldn't—I can't—I am too much beleaguered with duties. I infer that you have had trouble, I hope not serious, because of your criticism of Curtis. I gather from what I have seen that you didn't uphold the strike (which I think impossible) but pitched into Curtis's behavior, of which I know little but which I should think was at least open to discussion. I fear that we have less freedom of speech here than they have in England. Little as I believe in it as a theory I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion, in favor of it. Of course when I say I don't believe in it as a theory I don't mean that I do believe in the opposite as a theory. But on their premises it seems to me logical in the Catholic Church to kill heretics and the Puritans to whip Quakers—and I see nothing more wrong in it from our ultimate standards than I do in killing Germans when we are at war. When you are thoroughly convinced that you are right—wholeheartedly desire an end—and have no doubt of your power to accomplish it—I see nothing but municipal regulations to interfere with your using your power to accomplish it. The sacredness of human life is a formula that is good only inside a system of law—and so of the rest—all of which apart from its *banalité* I fear seems cold talk if you have been made to feel popular displeasure. I should not be cold about that—nor do I in any way shrink from saying what I think—but I can't spare the energy necessary to deal with extra legal themes.[234]

Of all the letters Holmes wrote during this period, none captures so clearly the extent to which he was wrestling with the issue of free speech. Indeed, with its internal contradictions and sudden swerves of direction, his letter to Laski suggests a man on the verge of a momentous decision, vacillating between the dictates of reason and the pull of emotion. On the one hand was the logic of persecution, which still had a powerful hold on him. From a moral standpoint, he could see no difference between the punishing of dissenters and the killing of Germans during the war. Both rested on the same "justifiable self-preference" he had identified as long ago as *The Common Law*."[235] On the other hand, Holmes himself had taught that logic wasn't the only aspect of the law. There was also "experience," "the felt necessities of the time," "even the prejudices which judges share with their fellow-men."[236] And it was those aspects of the law that seemed most relevant to him now. For what had been merely an abstract question for Holmes over the past year was, suddenly, concrete and personal. The face of free speech was no longer Eugene Debs, the dangerous socialist agitator. It was his good friend Harold Laski, and Holmes' views shifted accordingly. He now declared himself willing to die for it. Moreover, he seemed to realize how his

blustery comments about the logic of persecution might seem "cold talk if you have been made to feel popular displeasure," as of course Laski had been. "I should not be cold about that," Holmes insisted. Nor was he afraid to speak his mind. Nonetheless, he claimed, he was too busy at work to write outside the job.

Holmes' letter to Laski was written on Sunday, October 26. Less than a week later, on Saturday November 1, he sent the following response to Frankfurter:

> Your letter gave me great pleasure to know that all is going well. But the same causes that have delayed my answer make it impossible for me to write outside the job. I am too busy. Just now I am full of a tentative statement that may see light later on kindred themes to your subject but I don't yet know whether what I have written *quasi in furore*, as Saunders says, is good enough. And ahead of me is a string of cases to be remediated and that drives me mad. I already had told Laski that the notion of my writing an article was no go.[237]

The "tentative statement" Holmes refers to in this letter is almost certainly his dissent in *Abrams*, which Holmes prepared ahead of time and circulated to his colleagues on November 6 when he received a copy of the majority opinion.[238] Thus, after receiving a request to write an article on tolerance from both Frankfurter and Laski, Holmes wrote his dissent in *Abrams* "quasi in furore"—as if possessed. That dissent, of course, was precisely the kind of "blast on tolerance" that Laski and Frankfurter had wanted Holmes to write. And, when it was handed down the following week, they and the other young men who had been lobbying Holmes made their gratitude known to him in a series of gushing letters.

Laski called Holmes' dissent "a fine and moving document for which I am deeply and happily grateful."[239] Frankfurter wrote of "the gratitude and, may I say it, the pride I have in your dissent."[240] Lippmann wanted Holmes "to know that there exists profound gratitude to you, coupled with a pretty clear sense not to abuse in any way what you have vindicated."[241] Croly was "so deeply moved by it that I cannot forbear to write you and tell you what a profound piece of legal and political reasoning it seemed to me to be."[242] And Hand confessed that he could not "help feeling like thanking you, even though I recall the annoyance it gives me when anyone undertakes to thank me for what I may say in an opinion."[243]

Based on the effusiveness of these letters, it seems clear that Holmes' young friends viewed his dissent as, at least in part, a defense of them and a response to their arguments for tolerance. Did Holmes view it the same way? That question is impossible to answer. There is nothing in his letters to indicate that he did, although that should not be surprising. A judge as concerned about his reputation as Holmes was not likely to admit that he had written an opinion out of consideration for his friends. Besides, Holmes may not have been aware himself of the role that personal sympathy played in his decision. Less than a year before writing his *Abrams* dissent, Holmes had bought a print by the Dutch painter Adriaen van Ostade that depicted a peasant family saying grace over a bowl of porridge. His description of the print to a friend could well be used to describe his dissent in *Abrams*. "It has the line of piety that Millet got in his Angelus," Holmes wrote, "but so simple, so unconscious, so immediately sympathetic. I mean you don't feel that Ostade was seeing himself sympathize."[244]

CONCLUSION

To say that Holmes changed his mind about the value of free speech is not to suggest that his *Abrams* dissent came completely out

of the blue. To the contrary, it built on many of the themes and ideas he had been expressing for years—his skepticism of objective truth, his commitment to Darwinism, his faith in free markets, and his taste for competition and battle. In addition, the process Holmes went through on the way to writing his *Abrams* dissent serves as an illustration of his most famous dictum—that "the life of the law has not been logic; it has been experience." It was the experience of debating the issue of free speech and watching his young friends attacked for their views that helped pushed him past the logic of persecution.

But although Holmes' *Abrams* dissent did not come out of the blue, it did mark a critical point in his thinking. Prior to that point, he had been willing to accept governmental suppression of speech as simply another instance of the majority's right to sacrifice the interests of the individual. From *Abrams* onward, however, he viewed speech differently—as a privileged activity that was protected from governmental regulation because of the benefits it offered to society.

Holmes' dissent also marked a turning point in the country's view of free speech. And in that sense, his transformation is representative of the experience of society as a whole during World War I and the first Red Scare. For much of the nineteenth century, free speech had been viewed as a fringe issue that affected only extremists—advocates of free love, for example, or radical unions like the Wobblies.[245] During the war, however, many mainstream thinkers saw individuals they knew and respected come under suspicion and persecution for their views. That experience awakened in them a new appreciation for the value of free speech, just as Holmes was made more sensitive through the experience of his friends.[246] And, once those in the mainstream began to think of free speech as a personal issue—not simply an abstract ideal—it was inevitable that the country would move toward a more expansive view of the First Amendment.

For advocates of free speech today, the lesson of this story is clear. The strength of First Amendment rights is largely dependent upon the extent to which the majority views those rights as relevant to itself. In an era in which corporations and other powerful institutions frequently assert free speech claims in support of their own interests,[247] it should therefore be no surprise that First Amendment rights are as strong as they are. Whether the courts should recognize those claims is certainly open to debate. But what seems beyond debate is the proposition that free speech thrives when everyone—judges included—has a stake in its survival.

Editor's Note: This article is based upon material published in **The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America** (Metropolitan Books, 2013).

ENDNOTES

[1] *See Patterson v. Colorado*, 205 U.S. 454 (1907).

[2] *See Fox v. Washington*, 236 U.S. 273 (1915).

[3] *See Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204; *Debs v. United States*, 249 U.S. 211 (1919).

[4] Letter from OWH to Sir Frederick Pollock (Feb. 1920), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 36 (Mark DeWolfe Howe ed., 2nd ed. Belknap Press of Harvard University Press 1961).

[5] *See* OLIVER WENDELL HOLMES, THE COMMON LAW, 41 (Belknap Press of Harvard University Press 2009) (1881).

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

[7] Letter from OWH to Harold J. Laski (March 4, 1920), *in* 1 Holmes-Laski Letters: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 249 (Mark DeWolfe Howe ed. Harvard University Press 1953).

[8] Robert A., Ferguson, *Holmes and the Judicial Figure*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR., 155, 180 (Robert Gordon ed., 1992) (comparing Holmes' dissent to the Gettysburg Address); SAMUEL J., KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS 207 (MacMillan 1956) (comparing Holmes' dissent to Milton).

[9] For other descriptions of this shift, *see* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER

(Ronald K.L. Collins ed., Cambridge Univ. Press 2010); Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192 (2008); Edward G. White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982).

[10] 137 Mass. 392 (1884).

[11] 28 N.E. 1 (1891).

[12] *Id.* at 5.

[13] *Id.* at 4. This, of course, is the opposite of the modern rule, which protects libelous statements about public officials and public figures made in good faith and concerning matters of public concern. *See N.Y. Times v. Sullivan*, 376 U.S. 397 (1964).

[14] 29 N.E. 517 (Mass. 1892).

[15] 39 N.E. 113 (1895), aff'd, 167 U.S. 43 (1897).

[16] *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (the Court has "long since rejected Justice Holmes' famous dictum" from *McAuliffe*); *Hague v. CIO*, 307 U.S. 496 (1939) (the public has "a kind of First-Amendment easement" to use streets, sidewalks, and parks for expressive purposes).

[17] 205 U.S. 454, 462 (1907).

[18] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151 (Oxford: Clarendon Press 1765–69).

[19] 236 U.S. 273, 277–78 (1915).

[20] Espionage Act of 1917, ch. 30, tit. I, 40 Stat. 217, 219 (1917).

[21] Transcript of Record at 17–18, *Schenck v. United States*, 249 U.S. 47 (1919) (No. 1017).

[22] *See id.* at 31–37.

[23] Motion for Leave to File a Petition for A Writ of Mandamus at 9–10, *Frohwerk v. United States*, 249 U.S. 204 (No. 685) (1919).

[24] Transcript of Record at 39, *Frohwerk v. United States*, 249 U.S. 204 (No. 685) (1919).

[25] *See Convicted in 3 Minutes: Verdict on Frohwerk Case Set Record for Haste*, KANSAS CITY TIMES, June 29, 1918, at 1.

[26] Transcript of Record at 177–189, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

[27] *Id.* at 184.

[28] Letter from John Lord O'Brian to Edwin S. Wertz, (June 20, 1918), in Law Spec. Coll. 05, O'Brian Papers (on file with Charles B. Sears Law Library, SUNY at Buffalo, Box 18, Folders 5–7).

[29] *Schenck v. U.S.*, 249 U.S. 47, 51–52.

[30] *Id.* at 52.

[31] *See* L.A. Powe Jr., *Searching for the False Shout of Fire*, 19 CONST. COMM. 345 (2002).

[32] *See* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 196 n.57 (2004).

[33] Transcript of Record at 249, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

[34] *See* Letter from Lloyd H. Landau to Augustin Derby (June 7, 1935) in Oliver Wendell Holmes Papers, on file with Harvard Law School Library [hereinafter Holmes Papers] (explaining that Holmes always read the record in a case before writing an opinion that was assigned to him).

[35] *See, e.g.*, White, *supra* note 9, at 418; Bogen, *supra* note 9, at 158–59.

[36] *Com. v. Kennedy*, 48 N.E. 770, 772 (Mass. 1897).

[37] Holmes, *supra* note 5, at 62.

[38] *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905).

[39] *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[40] DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132–46 (Cambridge University Press 1997).

[41] *Schenck*, 249 U.S. at 52.

[42] *Frohwerk v. United States*, 249 U.S. 204, 208–09 (1919).

[43] *Id.*

[44] *Id.* at 209.

[45] *See* Rabban, *supra* note 40, at 132–46.

[46] *Debs v. United States*, 249 U.S. 211, 212–13 (1919).

[47] *Id.* at 212–13.

[48] *Id.* at 216.

[49] *See* KONEFSKY, *supra* note 8, at 201 (arguing that the phrase was, "a bit of neat verbalization on the part of a man given to terse expression").

[50] Letter from OWH to Frederick Pollock (April 5, 1919), *supra* note 4, at 7.

[51] Letter from OWH to Alice Stopford Green (March 26, 1919) in Holmes Papers, reel 32.

[52] *See* Letter from OWH to Laski (May 25, 1918), *supra* note 7, at 157.

[53] 247 U.S. 402.

[54] *See id.* at 424.

[55] Transcript of Record at 1-7, *Baltzer v. United States*, 248 U.S. 593 (1918).

[56] Brief for the United States at 4, 248 U.S. 593 (1918) (No. 320).

[57] *See* Reply Brief of Plaintiffs In Error to the District Court of the United States for the District of South Dakota at 2, *Baltzer v. United States*, 248 U.S. 593 (1918) (No. 320).

[58] Letter from OWH to Laski (Dec. 3, 1918), *supra* note 7, at 176.

[59] *Baltzer v. United States* (Holmes, J., dissenting) (unpublished opinion), memorandum distributed to the Justices (December 3, 1918), in Holmes Papers, reel 70.

[60] *Id.*

[61] *See* Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression, 1991*, SUP. CT. REV. 303, (1991); *But see* White, *supra* note 9 (arguing that, although Baltzer shows that Holmes "could wax eloquently about free speech," it is "hardly evidence that he had developed the kind of approach to free speech issues

that he would exhibit in some of his subsequent opinions").

[62] *See* Novick, *supra* note 61, at 333 n.135.

[63] Sheldon Novick discovered Holmes' dissent while researching his biography of the Justice.

[64] *See* Chauncey Belknap, Unpublished diary entry Oct. 21, 1915, (on file with Patterson, Belknap, Webb & Tyler Law Library, New York, New York).

[65] Letter from OWH to Laski (July 7, 1918), *supra* note 7, at 160.

[66] Letter from OWH to Lewis Einstein (July 11, 1918), in Holmes Papers.

[67] Letter from Learned Hand to OWH (June 22, 1918), in Holmes Papers, reel 33.

[68] *See* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 11–27 (Cornell University Press 1999) (1987).

[69] *Id.* at 22.

[70] Transcript of Record at 16–19, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316).

[71] POLENBERG, *supra* note 68, at 122.

[72] *Id.*, at 43.

[73] Sedition Act of 1918, ch. 75, 40 Stat. 553, repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359.

[74] *See Abrams v. United States*, 250 U.S. 616.

[75] *Id.* at 624–31 (Holmes, J., dissenting).

[76] *Id.* at 625.

[77] *Id.* at 627–28.

[78] *Id.* at 628.

[79] *Id.* at 628.

[80] *Id.* at 630.

[81] *Id.*

[82] 251 U.S. 466 (1920).

[83] Transcript of Record at 129, 145 *Schaefer v. United States*, 251 U.S. 466 (1919) (No. 804); Alexander Waldenrath, *German Language Newspress in Pennsylvania during World War I*, PENNSYLVANIA HISTORY 42, no. 1, January, 1975, 30–31.

[84] Brief for Defendants in Error to the District Court of the United States for the Eastern District of Pennsylvania at 1–3, *Schaefer v. United States*, 251 U.S. 466 (1919) (No. 804).

[85] *See* Schaefer, 251 U.S. 466, 476 (1920)

[86] *Id.* at 479.

[87] *Id.* at 482 (Brandeis, J., dissenting).

[88] *Id.* at 493–94.

[89] 252 U.S. 239, 245–47 (1920).

[90] *Id.* at 248.

[91] *Id.* at 249–51.

[92] *Id.* at 273 (Brandeis, J., dissenting).

[93] *Id.* at 271.

[94] 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

[95] *See supra* notes 14–15 and accompanying text.

[96] 268 U.S. 652, 669 (1925).

[97] *Id.* at 669.

[98] *Id.* at 673 (Holmes, J., dissenting).

[99] *See United States v Schwimmer*, 279 U.S. 644 (1929).

[100] *Id.* at 644 (Holmes, J., dissenting).

[101] 274 U.S. 357 (1927) (Brandeis, J., concurring).

[102] 254 U.S. 325, 334–43 (1920) (Brandeis, J., dissenting).

[103] Note from OWH to Louis D. Brandeis, in Louis D. Brandeis Papers, (on file with Harvard Law School Library box 5, folder 13) [hereinafter Brandeis Papers].

[104] *See* Novick, *supra* note 61, at 363.

[105] *See* Memorandum from Dean Acheson to Louis D. Brandeis (Nov. 19, 1920), in Brandeis Papers, box 5, folder 12.

[106] Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320 (1985).

[107] 268 U.S. 652, at 672 (Holmes, J., dissenting) (stating that "the general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used").

[108] *See* H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION (New York University Press 1991); Novick, *supra* note 61; Bogen, *supra* note 9.

[109] *Abrams v. United States*, at 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

[110] *See* Letter from OWH to Nina Gray (March 5, 1921), in Holmes Papers, reel 23.

[111] *See, e.g.*, White, *supra* note 9, at 431; Mathias Reimann, *Holmes's Common Law and German Legal Science* 104 *in* THE LEGACY OF OLIVER WENDELL HOLMES JR. (1992).

[112] *See Lochner v. New York*, 198 U.S. 45, 76 (1905).

[113] Zechariah Chafee, *Freedom of Speech*, NEW REPUBLIC 17, no. 211, November 16, 1918.

[114] Bill Lynskey, *Reinventing the First Amendment in Wartime Philadelphia*, Vol. CXXXI, No. 1 PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 33, at 65 (January 2007).

[115] *Frohwerk v. United States*, 249 U.S. 204, 208–209 (1919).

[116] Motion for Leave to File a Petition for a Writ of Mandamus, *Frohwerk v. United States*, 249 U.S. 204 (1919) (No. 685).

[117] *See* Novick, *supra* note 61, at 303, 361.

[118] Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

[119] *See supra* note 10–12 accompanying text.

[120] Letter from OWH to Herbert Croly (May 12, 1919), in Holmes Papers.

[121] *Abrams v. United States*, 250 U.S. 616, at 629 (1919) (Holmes, J., dissenting).

[122] *Id.* at 630.

[123] *A Dangerous Encroachment Upon the Freedom of Speech*, SAN FRANCISCO EXAMINER, March 29, 1919.

[124] John H. Wigmore, *Abrams v. U.S: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 545 (1920).

[125] *36 Were Marked as Victims by Bomb Conspirators*, NEW YORK TIMES, May 1, 1919.

[126] FELIX FRANKFURTER REMINISCES 58 (Harlan B. Phillips ed. Reynal 1960).

[127] FRANKFURTER REMINISCES, *supra* note 126, at 105–12; Brad Snyder, *The House That Built Holmes*, 30 LAW AND HISTORY REVIEW 661, 661 (2012); Jeffrey O'Connell and Nancy Dart, *The House of Truth: Home of the Young Frankfurter and Lippmann*, 35 CATH. U. L. REV. 79, 86, 88 (1985).

[128] *Id.*

[129] LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 174 (HarperCollins 1991).

[130] *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917).

[131] Letter from Learned Hand to OWH (June 22, 1918), in Holmes Papers, reel 33.

[132] Letter from OWH to Learned Hand (June 24,1918), in Holmes Papers reel 26.

[133] ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK & LEGACY OF JUSTICE HOLMES 42 (University of Chicago Press 2000).

[134] Letter from OWH to Laski (June 25, 1918), *supra* note 7, at 159.

[135] Letter from OWH to Laski (July 5, 1918), *supra* note 7, at 159–60.

[136] *Id.*

[137] Letter from OWH to Laski (July 7, 1918), *supra* note 7, at 160–61.

[138] ALEXANDER ADAM SEATON, THE THEORY OF TOLERATION UNDER THE LATER STUARTS 26–27 (Cambridge University Press 1911).

[139] Letter from OWH to Laski, (July 18, 1918), in Holmes Papers, reel 4.

[140] Letter from OWH to Laski (November 8 1918), *supra* note 7, at 170.

[141] *Id.* at 171.

[142] Letter from Herbert Croly to Zechariah Chafee, (September 24,1918), in Chafee Papers, box 1, folder 9.

[143] *See*, e.g., *Commonwealth v. Blanding*, 20 Mass. 304, 308 (Mass. 1825); *Respublica v. Oswald*, 1. Dall. 319, 325 (Pa. July 1788); *Dailey v. Superior Court of City & County of San Francisco*, 112 Cal. 94, 100 (1896).

[144] Chafee, *supra* note 113, at 67.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 68.

[148] Letter from OWH to Herbert Croly (November 22, 1914) (on file with Houghton Library, Harvard College Library, Harvard University Autograph File H).

[149] Letter from OWH to Sir Frederick Pollock (Dec. 29 1915), *supra* note 4, at 229.

[150] FELIX FRANKFURTER REMINISCES, *supra* note 126, at 92.

[151] *Baltzer v. United States*, 248 U.S. 593 (1918).

[152] Letter from OWH to Laski (Dec. 3, 1918), *supra* note 7, at 176. Although Holmes did not refer specifically to *Baltzer* in his letter, it seems clear it was the subject of his conversation with Brandeis. Other than Baltzer, there were only two cases in which Holmes wrote a dissent in the months after Brandeis' visit. In one, *Ruddy v. Rossi*, 248 U.S. 104 (1918), Brandeis joined the majority, not Holmes' dissent. In the other, *International News Service v. Associated Press*, 248 U.S. 215 (1918), Brandeis wrote his own dissent, making it unlikely that he would solicit a separate dissent from Holmes. Moreover, the latter case involved a dispute between wire services about the use of each other's articles—hardly a burning theme.

[153] Letter from OWH to Laski (Feb. 28, 1919), *supra* note 7, at 187.

[154] JOHN STUART MILL, ON LIBERTY, 78 (Penguin Books 1985) (1859).

[155] *Id.* at 81.

[156] Letter from OWH to Laski (March 16, 1918), *supra* note 7, at 190.

[157] Letter from Laski to OWH (March 18, 1919), *supra* note 7, at 191.

[158] Letter from Learned Hand to OWH (April 1, 1919), in Holmes Papers, reel 33.

[159] Letter from OWH to Learned Hand, Washington, D.C., April 3, 1919 Hand Papers, box 103B, folders 25–26.

[160] Letter from Learned Hand to Zechariah Chafee (December 3, 1920), in Chafee Papers, box 4, folder 20.

[161] *Editorial Notes*, NEW REPUBLIC, April 19, 1919, at 362.

[162] Paul A. Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC 19, no. 235, May 3, 1919, at 13.

[163] *Id.*

[164] *Id.* at 14.

[165] Letter from OWH to Herbert Croly, enclosed in a letter to Laski (May 13, 1919), *supra* note 7, at 202–04.

[166] Letter from Laski to OWH (May 11,1919), *supra* note 7, at 201–02.

[167] Letter from OWH to Laski (May 13, 1919), *supra* note 7, at 202.

[168] Letter from Learned Hand to Freund, (May 7, 1919), in Holmes Papers, box 21, folder 1.

[169] *36 Marked as Victims by Bomb Conspirators*, NEW YORK TIMES, May 1, 1919.

[170] *Recalls April Plot to Kill through Mails*, NEW YORK TIMES, June 3, 1919, 2.

[171] Letter from OWH to Sir Frederick Pollock (June 27, 1919), *supra* note 4, at 17.

[172] Letter from Laski to OWH (May 20, 1919), *supra* note 7, at 206.

[173] Letter from Laski to OWH (May 30,1919), *supra* note 7, at 201–02.
[174] Letter from OWH to Laski (August 19,1919), in Holmes Papers, reel 4.
[175] Letter from Harold J. Laski to Zechariah Chafee (July 23, 1919), in Chafee Papers, box 14, folder 15.
[176] Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932–973 (1919).
[177] *Id.* at 938.
[178] *Id.* at 941.
[179] *Id.* at 943–44.
[180] *Id.*
[181] See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 747–48 (1975).
[182] Chafee, *supra* note 176, at 967–68.
[183] *Id.*
[184] *See* RABBAN, *supra* note 40.
[185] Letter from Learned Hand to Zechariah Chafee (January 2, 1921), in Learned Hand Papers (on file with Harvard Law School Library, box 15, folder 26).
[186] Chafee, *supra* note 176, at 968.
[187] *Id.* at 969.
[188] Letter from Harold J. Laski to Zechariah Chafee (July 23, 1919), in Chafee Papers.
[189] Letter from Zechariah Chafee to Judge Amidon (September 30, 1919), in Chafee Papers, box 4, folder 1.
[190] SIR LESLIE STEPHEN, ESSAYS ON FREETHINKING AND PLAINSPEAKING 45 (Smith Elder 1907).
[191] *Id.* at 409.
[192] *Abrams v. United States*, 250 U.S. 616, 630 (1919).
[193] Letter from Laski to OWH (July 17, 1921), *supra* note 7, at 351. In this letter, Laski refers to Francis Hirst and adds, "you may remember that I lent you his life of Adam Smith." Holmes' black book indicates that he read the biography late in the summer of 1919.
[194] FRANCIS WRIGLEY HIRST, ADAM SMITH, 193 (MacMillan 1904).
[195] E. S. P. HAYNES, THE DECLINE OF LIBERTY IN ENGLAND 205 (Grant Richards 1916).
[196] *Id.* at 213–14.
[197] Letter from OWH to Sir Frederick Pollock (Sept. 19, 1919), *supra* note 4, at 25.
[198] ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920, 34, 81 (University of Minnesota Press 1955).
[199] ANN HAGEDORN, SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 159 (Simon and Schuster 2007).
[200] *Id.* at 55–57.
[201] ISAAC KRAMNICK AND BARRY SHEERMAN, HAROLD LASKI: A STUDY IN THE INFLUENCE OF IDEAS, 128 (Macmillan 1956).
[202] *Id.* at 28.
[203] *Id.* at 130.
[204] HAROLD J. LASKI, AUTHORITY IN THE MODERN STATE (Yale University Press 1917).
[205] LIVA BAKER, FELIX FRANKFURTER, 66–67 (Coward-McCann 1969).
[206] "Report of President's Mediation Commission," MONTHLY REVIEW OF THE U.S. BUREAU OF LABOR STATISTICS 6, no. 1, January, 1918 (Washington, D.C.: U.S. Government Printing Office, 1918), 16.
[207] FRANKFURTER REMINISCES, *supra* note 126, at 130–135; MICHAEL E. PARRISII, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 97–101 (Free Press 1982).
[208] *Report on the Mooney Dynamiting Cases in San Francisco*, OFFICIAL BULLETIN, vol. 2, no. 219, January 28, 1918.
[209] Letter from Theodore Roosevelt to Felix Frankfurter (December 19, 1917) in 2 THEODORE ROOSEVELT AND HIS TIME: SHOWN IN HIS OWN LETTERS, at 464 (Joseph Bucklin Bishop ed. Charles Scribner's Sons 1920).
[210] Parrish, *supra* note 207, at 107.
[211] FRANKFURTER REMINISCES, *supra* note 126, at 139–142.
[212] *Id.* at 169–70.
[213] Letter from Roscoe Pound to Felix Frankfurter (April 28,1919), in Felix Frankfurter Papers, 1846–1966, (on file with Library of Congress, box 90, reel 55).
[214] Letter from Louis D. Brandeis to Alice Goldmark Brandeis (June 14,1919), in 4 LETTERS OF LOUIS D. BRANDEIS, at 400 (Melvin I. Urofsky and David W. Levy eds. Norman: University of Oklahoma Press 2002).
[215] Letter from OWH to Laski (April 4, 1919), *supra* note 7, at 193.
[216] Letter from Laski to OWH (April 19, 1919), *supra* note 7, at 196.
[217] Letter from Laski to OWH (May 11, 1919), *supra* note 7, at 201.
[218] Letter from OWH to Laski (May 13, 1919), *supra* note 7, at 202.
[219] Letter from Laski to OWH (May 15, 1919), *supra* note 7, at 204.
[220] Letter from OWH to Laski, (May 18, 1919) (quoting letter to F.W. Grinnell), *supra* note 7, at 204.
[221] Letter from Laski to OWH (May 20, 1919), *supra* note 7, at 204.
[222] Letter from Roscoe Pound to OWH (May 29, 1919), in Holmes Papers, reel 36.
[223] Letter from OWH to Abbott Lawrence Lowell (June 2, 1919) in Holmes-Laski, *supra* note 7 at 211 fn2.
[224] Letter from OWH to Laski (June 16, 1919), in Holmes Papers, reel 4.
[225] "Laski Scores Commissioner's Action in Walkout Crisis," HARVARD CRIMSON, Oct. 10, 1919.
[226] *Women Take a Hand in the Police Strike*, BOSTON DAILY GLOBE, Oct. 16, 1919, 1.
[227] *See* "The Boston Police Strike," HARVARD ALUMNI BULLETIN 106, Oct. 23, 1919.
[228] BOSTON EVENING TRANSCRIPT, Oct. 17, 1919.

[229] Kramnick and Sheerman, *supra* note 201, at 135–38.
[230] *See id.*
[231] Letter from Felix Frankfurter to Marion Denman (Oct. 23, 1919) in Felix Frankfurter Papers August–November 1919 (on file with Library of Congress, Manuscript Division, box 9, reel 4).
[232] *Id.*
[233] *Id.*
[234] Letter from OWH to Laski (Oct. 26, 1919), *supra* note, 7.
[235] Holmes, *supra* note 5, at 44.
[236] *Id.* at 1.
[237] Letter from OWH to Frankfurter (November 1, 1919) *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 73–4 (Robert M. Mennel and Christine L. Compston eds., University Press of New England, 1996).
[238] Letter from OWH to Sir Frederick Pollock (Nov. 6, 1919), *supra* note 4, at 29 (explaining that he had just sent around a dissent that had been prepared earlier in a case that he was "stirred about").
[239] Letter from Laski to OWH (Nov. 12, 1919), *supra* note 7.
[240] Letter from Laski to OWH (Nov. 12, 1919), *supra* note 7, at 220.
[241] Letter from Walter Lippmann to OWH (Nov. 13, 1919), in Holmes Papers, reel 35, frame 0337.
[242] Letter from Herbert Croly to OWH (Nov, 13, 1919), in the Holmes Papers, reel 30, frame 0357.
[243] Letter from Herbert Croly to OWH (Nov, 13, 1919), in the Holmes Papers, reel 30, frame 0357.
[244] Letter from OWH to Laski, Jan. 25, 1919, *supra* note 7, at 180.
[245] *See* Rabban, *supra* note 40.
[246] *See id* at 16.
[247] *See*, e.g., *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310 (2010).

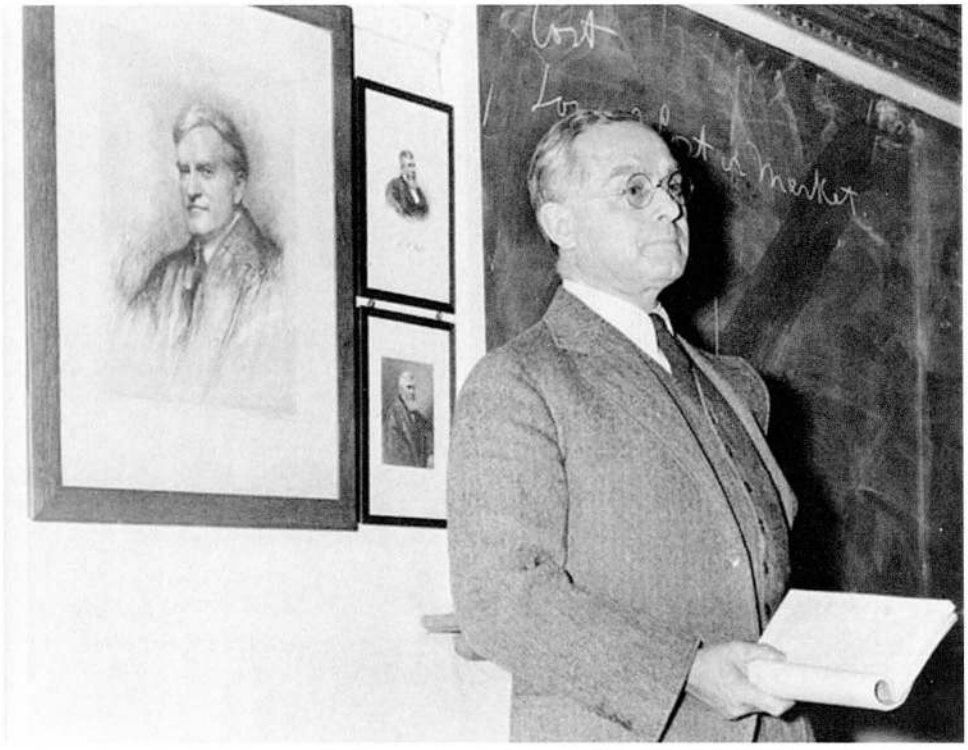
Felix Frankfurter and his Protégés: Re-examining the "Happy Hot Dogs"

SUJIT RAMAN

Felix Frankfurter left an indelible imprint on American history. Noted Progressive, passionate civil libertarian, prolific jurist—the immigrant from Vienna wore many hats and rose to towering heights in his nearly sixty years of public service. Frankfurter was so prominent in politics and the judiciary that, at least in the public's imagination, his academic career as professor of law at Harvard between 1914 and 1939 has often been overlooked.[1] A British intellectual's characterization of how Frankfurter was perceived in England in the mid-1930s—"less as an academic figure than as a man of influence in Washington"[2]—aptly summarizes how that aspect of his career has largely been remembered. It is an assessment, however, that misses the mark, for Frankfurter arguably exerted more lasting influence from his classroom in Cambridge than he ever did in government or from his seat on the nation's highest tribunal.[3]

Indeed, Felix Frankfurter's greatest legacy may well have been the legions of students he trained and nurtured at the Harvard Law School, men (like James Landis, Dean Acheson, and Henry Friendly, among numerous others) who, in their own right, shaped the age in which they lived. As one biographer put it, Frankfurter disciples "went into small law offices in small towns, into high-powered Wall Street firms, into town halls, state legislatures, and Congress; into teaching, journalism, industry, trade unions, business, government, social work, and the judiciary."[4] Frankfurter men immersed themselves in public life; and no era in American history is more closely identified with Frankfurter's protégés than the New Deal.

The question of the depth of Frankfurter's influence over the politics and policies of the New Deal is deeply contested. He was an acknowledged confidant of President Roosevelt, and it was no great secret that the Harvard professor placed his students throughout the government. Upon Frankfurter's nomination to the Supreme Court in early 1939, for example, *Time* magazine counted "125 'happy hot dogs' . . . in Washington today" who owed their jobs to recommendations from their academic mentor.[5] Frankfurter



Felix Frankfurter believed his primary responsibility as a Harvard Law School professor was to recruit and train the future public servants of the republic. His critics, however, believed he was creating an empire of personal power in Washington.

admitted to playing such a role in the New Deal, stating simply in his memoirs: "I was the recruiting officer."[6] For Frankfurter, this was nothing remarkable; he believed his primary responsibility as a teacher was to train the future public servants of the republic. Frankfurter's critics, however, believed he was more than a mere recruiter. To them, he was a shifty operator, a shady, secretive manipulator who preserved himself in Cambridge while his pupils satisfied his thirst for an empire of personal power in Washington. The depth of his alleged influence took on legendary, even sinister, proportions: the *New York American* called him "the Iago of [Roosevelt's] Administration."[7] Another contemporary labeled Frankfurter "the most influential single individual in the United States."[8] One federal judge, in an opinion construing the Anti-Injunction Act (a landmark 1932 labor statute), even singled out the Harvard professor as a "figure" lurking in the "background" of the Act's passage, "sinister or saintly (the reader may take his choice), . . . [who] from Mount Olympus, more than once, . . . has moved the pawns upon the nation's chess board and, it is whispered, on occasion has even sought to check the King."[9] As the journalist John T. Flynn, a passionate critic of the New Deal, observed in his 1948 book, *The Roosevelt Myth*: "From the beginning of the New Deal, Felix Frankfurter had been pictured as the mysterious being who sat off in the shadows and pulled the strings that operated all the puppets who had cooked up the NRA and invented the AAA, who was the arch Red and was in fact the unseen and unheard culprit behind most of Mr. Roosevelt's dangerous enterprises."[10] Especially in an age when conspiracy theories targeting immigrants and Jews—"two groups that were synonymous to many Americans of the time with communism,

radicalism, and anti-Americanism"[11]—had vocal and visible proponents, the specter of Frankfurter as his protégés' puppeteer took on a life of its own.

The true extent of Frankfurter's influence over the workings of the New Deal is a contentious subject, at once amply studied and under-studied. Countless scholars have written about his contributions, both philosophical and practical, to that innovation in welfare state-ism. Fewer have explored his relationship with his former students, the foot soldiers of the New Deal.[12] None has focused on the question of *how* Frankfurter impressed upon his protégés his ideas, *when they were actually his students*. By examining the professor's social and political philosophies, and the mechanisms he used to transmit these ideas to his students at Harvard, one gains new insight into Frankfurter's contributions to the New Deal. One also learns about the man. Felix Frankfurter had an infectious personality and incredible powers of influence, both of which he used within and without the classroom to cultivate disciples who, in later years, "multiplied him."[13] Especially when it becomes clear that Frankfurter's "control" over his former students during the New Deal years was less extensive—or at least of a different character—than is popularly imagined, the importance of examining the ideas and the techniques of Frankfurter the teacher, the molder of minds, is underscored.

THE SOCIAL AND POLITICAL PHILOSOPHIES OF FELIX FRANKFURTER

Felix Frankfurter was born to Jewish parents in Vienna in 1882, the third of six children. He came from a long line of distinguished rabbis and academics, though his father failed as a businessman, prompting the family to move to the United States in 1894. Young Felix is reputed to have learned English in six weeks, and he excelled scholastically, first in the New York public schools, then at City College. On the day he was to enroll at Columbia Law School, he ran into a friend, who convinced him to take the day off so they could enjoy the weather at Coney Island. As Frankfurter recalled in his memoirs, "The whole course of my life was changed by that decision."[14] The men went to Coney Island, and young Felix came down with a mysterious illness. His doctor told him he needed to rest and "to go somewhere where there was a law school in the country"[15] to regain his health. To a youth born in Vienna and reared in New York, Cambridge, Massachusetts was as rustic a place as any. So Felix Frankfurter enrolled at the Harvard Law School in the fall of 1903—and thus, apparently on a whim, began a passionate association that lasted over sixty years.

To begin to understand Frankfurter's relationship with his students, one first must appreciate the reverence he felt for the institution they represented. To the Jewish immigrant Frankfurter, the Harvard Law School served as a symbol of America's meritocratic greatness. Late in life, he would refer to it as "the most democratic institution I know anything about."[16] At the Law School, in Frankfurter's view, neither lineage nor personal fortune mattered; the true mark of distinction and achievement was academic performance. "There was a dominating atmosphere [there], first, of professionalism, and [second], what I think is an indispensable quality of the true professionalism, the democratic spirit," he recalled. "What mattered was excellence in your profession to which your father or your face were equally irrelevant . . . The thing that mattered was what you did professionally."[17] On this highly idealized view, the classrooms of the Law School were sacred catacombs of learning, its professors the high priests of knowledge. And, constituting its student body, the novitiates were the future leaders of the American republic. Frankfurter did not exaggerate when he claimed his feelings for the Law School bordered on the "quasi-religious"[18]; to him

Harvard "was an institution all by itself,"[19] a magical place "whose function was to produce men whose only interests were public service, professional excellence, and a zeal for being very good at the business which is the law."[20] Even if those statements smack today of excessive romanticism,[21] one can appreciate the confident spirit in which they were offered. For, as one scholar has recently observed, by the end of the nineteenth century, Harvard Law School was "a preeminent and nationally renowned [legal] institution" that "stood alone in that category."[22] Indeed, at the turn of the century, Harvard Law School had, in the estimation of Harvard's own president, Charles W. Eliot, "reached the climax of success in professional education."[23]

Frankfurter's love for the Law School derived in great part from the fact that he excelled there. It was as a student at Harvard that Frankfurter became enamored of the law and cognizant of the contributions he could make to it. As H. N. Hirsch writes in his critical psychobiography of Frankfurter, "The vague image of himself as an intellectual that Frankfurter had absorbed from his surroundings in New York was concretized at Harvard through his worship of the law. The law—as taught at Harvard—would become the object of his energies, the root of his pride, an immensely important source of his self-esteem."[24] By dint of his sheer academic accomplishment, Frankfurter exacted a measure of respect and social acceptance from the cream of gentile, Brahmin society. He also found important mentors from that world who were willing to look past his Jewish, immigrant background and to encourage him.[25] When Frankfurter recalled in his memoirs that "the *Harvard Law Review* in particular and the Harvard Law School in general are to me the most complete practices in democracy that I have ever known about,"[26] Frankfurter was praising both a journal that accepted him as an editor regardless of his Jewish faith and an institution that he topped academically all three years he was there. Perceived in this light, Frankfurter's love and gratitude for the Harvard Law School—the institution that "gave him a chance"—is more easily understood, as is the fierce manner in which he upheld its vaunted standards when he himself joined its faculty.

Frankfurter learned soon enough after his graduation in 1906 that the real world is not always a meritocracy. Despite his superior academic standing, he did not receive any job offers from the distinguished New York law firms. Shuttling from office to office after each interview, he "was made to feel as though [he] were some worm begging for a job."[27] Anti-Semitism had reared its ugly head. Frankfurter finally landed a job at a firm that had never hired a Jew before—where it was gently suggested that he should consider changing his name. Within a few weeks, Frankfurter had tired of being beholden to his clients, and, when an offer arrived from the United States Attorney's Office in Manhattan, he accepted. In the fall of 1906, Felix Frankfurter entered public service. He would never really leave.

Frankfurter joined the office of Henry L. Stimson as an Assistant United States Attorney. These were momentous days in American history, a time when the role of the national government was controversially being redefined. Taking its lead from Republican President Theodore Roosevelt's Progressive, "trust-busting" agenda, the U.S. Attorney's Office prosecuted the "moneyed interests" of big business for antitrust violations, as well as for corruption and bribery.[28] These years, particularly under Stimson's leadership, left a tremendous impression on Frankfurter and instilled in his mind the important role that responsible public servants played in the functioning of government, a philosophy Frankfurter later tried to pass on to his students. The example of his mentor Stimson—an austere, high-minded administrator, himself a graduate of the Harvard Law School, who would contribute to public life well into the 1940s—was particularly

Justice Holmes marveled at Frankfurter's uncanny ability to involve himself in public affairs, saying that he had "an unimaginable gift of wiggling in wherever he wants to!" Above Frankfurter checks his coat upon arriving at the elite Gridiron Dinner in 1939.

instructive; as Frankfurter would recall, "This was an incredibly effective and wholly scrupulous man . . . I'm sure he must have had a good deal of influence on the exactions I make of my young men, what my standards are."[29]

When Stimson joined President Taft's cabinet in 1910 as Secretary of War, Frankfurter followed him to Washington as Law Officer of the Bureau of Insular Affairs. The next few years were crucial to Frankfurter's life because he formed extensive contacts in the nation's capital that served him for the rest of his career. He mingled with high-ranking officials in the military. He renewed his friendship with Justice Oliver Wendell Holmes, Jr., and with Louis D. Brandeis, who joined Holmes on the Supreme Court in 1916. Frankfurter also met a young Assistant Secretary of the Navy by the name of Franklin Delano Roosevelt. As he revealed in his diary (an exercise he began in 1911 only because he was "fortunate enough to meet men of rare spirit" and felt his experiences "in such encounters deserve[d] to be embalmed"[30]), Frankfurter was beginning to realize how important it was to have a mentor and a wide circle of acquaintances in government to have any effect on its workings:

> Edwards (the head of the Bureau of Insular Affairs) . . . regards me as a "Stimson man" and treats me as if I had status. This has more or less filtered through and I enjoy the pleasantest feelings and relations with the War Department officials...It makes me smile and at times sad, for it shows the necessity of having a status down here to have full opportunities for effective work and full utilization of the great opportunities of Washington

> life in the way of rare men worth while and contact with "the inside."[31]

There would come a time when "Frankfurter men" capitalized on their status to maximize their possibilities in Washington and to have contact with "the inside."

Notwithstanding the excitement and responsibility that government service offered, Frankfurter faced a dilemma in 1912 when Democrat Woodrow Wilson won election to the White House. Though he was invited to stay in his position at the Bureau of Insular Affairs, Frankfurter was put off by the new President—"Wilson didn't appeal to me man to man . . . He believed in democracy in the abstract, but didn't care for people"[32]—and found his career at a crossroad. Louis D. Brandeis, himself a celebrated graduate of Harvard Law School, secured for his young friend an invitation to join the school's faculty as a full professor in the emerging field of administrative law. Torn between dissatisfying service in government and the cloistered walls of academe, Frankfurter agonized over the decision and turned to his mentors for help. Henry Stimson, who had since returned to private practice, strongly encouraged his protégé to remain in government. "You have the greatest facility of acquaintance—for keeping in touch with the center of things,—for knowing sympathetically men who are doing and thinking," Stimson wrote in accurate, almost prophetic fashion. "I query whether that most valuable faculty would not be to a great extent lost at the Law School."[33] Justice Holmes—who on one occasion similarly marveled at Frankfurter's uncanny ability to involve himself in public affairs by exclaiming that he had "an unimaginable gift of wiggling in wherever he wants to!"[34]—echoed Stimson's sentiments. He warned Frankfurter that "[a]cademic life is but halflife—it is a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking of them from a cloister . . . "[35]

The decisive factor in Frankfurter's thinking was not the cautious words of his mentors, however, but developments underway at the Law School itself. Guided by Dean Roscoe Pound, Harvard Law School was at the epicenter of a new trend in legal education emphasizing the application of the law to real-life conditions. These thinkers believed that the law should be more than a sterile, formalistic code of mechanistic rules and regulations. Rather, they argued, it should be used as a tool for social betterment. In order for the law to have a broader social utility and applicability, they contended, it had to transcend narrow academic divisions and embrace the whole of the social sciences, including economics, sociology, and political science. In this way, the gulf between academy and society could be forded, and the law could have practical, real-world effect. Pound was the father of a strand of progressive thinking called "sociological jurisprudence," a philosophy he described in a seminal 1909 article:

> The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assume first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America.[36]

Pound recruited faculty to Harvard who shared his belief that the law was vital to promoting good governance and furthering the betterment of the human condition in an increasingly complex, industrial society. He found an able intellectual kinsman in Felix Frankfurter. Indeed, Frankfurter himself would declare the need for applying the law to evolving social conditions in a 1915 address before the American Bar Association:

"We must show the young men the law as an instrument, and not an end of organized humanity," he said. "We make of them clever pleaders, but not lawyers, if they fail to catch the glorious vision of the law as a vital agency for human betterment."[37]

Accepting Harvard's offer meant Frankfurter could combine his talents and aspirations; he could remain active in public affairs while still imparting his vision of the law to future generations of lawyers. As he wrote Stimson in reply, "I am not a scholar, *qua* scholar. On the other hand, I do feel very deeply the need...of a definitely conceived jurisprudence coordinating sociology and economics, [and] I am struck with the big public aspect of what should be done by our law schools."[38] Leaning toward taking on the professorship, the thirty-year-old Frankfurter recorded in his diary the relative merits of the "call to Harvard."

These ruminations, dated July 5, 1913, lend considerable insight into what Frankfurter perceived the nation's needs at this snapshot point in time were, and what his function as a teacher would be:

> [W]e have turned a corner . . . [and] there is a noticeable different demand in our national, in our community life . . . The social passions are alive and alert; they now need direction . . . To be stable, to meet our realization of the need and capacity for conscious readjustments, requires adequate data, and correlated, persistent, prophetic thinking. Largely that cannot be done by those in office. It must be done from the outside . . . There should a constant source of thought for the guidance of public men and the education of public opinion, as well as a source of trained men for the public life . . . This organized thinking must be assumed by our law schools, and the most hopeful center, the rightful leader, is the Harvard law School . . . The student body would carry the day . . . I would go in for about five years of thinking, not cloistered, but in the very current of the problems that are the national problems of greatest appeal to me . . . [and after five years] I will still be young enough to decide . . . whether Boston does impose unnecessary limitations to [my] usefulness in [public affairs].[39]

We see in these words several individual threads of Frankfurter's thought weaving together to form a loose tapestry, a philosophy of government linking the intellectual to the needs of society. Frankfurter believed that the nation needed "organized thinking" based on "adequate data." This thinking had to occur "outside of office," in the nation's law schools; and the "rightful leader" in this movement was the Harvard Law School. The products of the Law School would "carry the day"—they were the future administrators of the republic, the highly informed experts who would bring to life his vision of good, responsible government. Indeed, to Frankfurter, the public servant, particularly the young lawyer, was the very engine of democracy.

It is crucial to understand the role of youthful lawyers in Frankfurter's philosophy of government, for it is upon this basis that we shall examine his treatment of his students at the Law School and during the years of the New Deal. In an article he wrote for *Fortune* magazine, Frankfurter cited the political philosopher Graham Wallas: "Governments have come to be engaged . . . in bringing it about that right things shall be done . . . [and] a positive government requires a constant supply of invention and suggestions."[40] The best way to introduce fresh ideas to government, argued Frankfurter, was to direct the nation's finest minds into public service. "Administration of a statute . . . depends on the quality of its administrator," he wrote. "By

their disinterested contribution of energy, ability, training, and imagination to the public service, hundreds of young men and women have demonstrated beyond doubt that the indispensable step for improving the public service lies in some method of keeping a constant flow of qualified young people attracted to it."[41] Only young, trained experts were qualified to unravel the complexities of modern government, he believed; these experts should remain disinterested, apart from politics, and wholly devoted to advising elected officials, while faithfully, yet independently, administering these representatives' enactments.[42] Frankfurter saw that the government as an employer was at a disadvantage to private industry in attracting the finest young minds: "Government cannot compete with private employers for the most desirable recruits through the ordinary inducements. The best of the annual crop of the good law schools . . . will normally be offered places in the greatest private law offices of New York . . . with promises of immediate professional opportunity that are exceedingly alluring."[43] Thus it was the duty of law schools—and the law professors—to capture the imagination of these brilliant minds, recruit them for government service, and guide them toward furthering the public good. "From [this] might come, ten or fifteen years later, the mature leaders of public affairs in their generation."[44]

Frankfurter's resolute belief, inspired by the British system, that a disinterested, professionalized civil service was critical to the functioning of American democracy led him to accept the Harvard professorship, and motivated him to stay at the Law School to continue this task even when the status and power associated with a high position in government beckoned. When in 1919, after having spent two years on academic leave to serve as Chairman of the War Labor Policies Board, Frankfurter was offered a position at the newly established New School for Social Research (which would have permitted him the flexibility to become further involved in government), he declined. As he wrote his close friend Herbert Croly, "The opportunity of influencing year by year the dominant minds in the legal profession" was a "very strong affirmative" reason to return to Cambridge.[45] In 1932, Frankfurter was recommended for a seat on the Massachusetts Supreme Judicial Court, but he turned that down, too, writing the governor that "against the opportunities for immediate achievement on the bench, the long-term effects of legal education make their claim." He continued, "The Future direction of bar and bench will be determined by the quality of our law schools . . . This work must go forward, and I cannot bring myself to believe that I should prematurely abandon my share in it, however great and honorable the opportunity you offer me..."[46] The next year, Frankfurter declined a similar offer from President Roosevelt to become Solicitor General, citing again, among other reasons, his commitment to his students.[47]

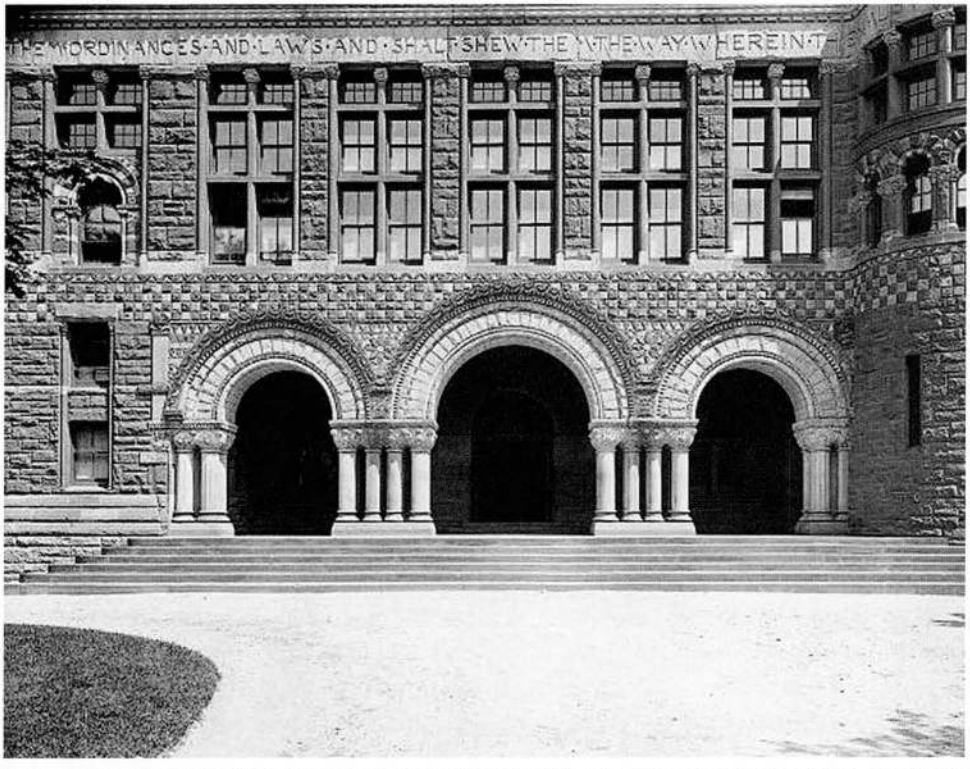
Felix Frankfurter believed his role as a teacher was to initiate the brightest minds to the wonders of the law and to the satisfaction of public service. This was an attitude tied intimately to his philosophy of responsive democratic government that, nonetheless, would be staffed and manned by unelected elites; it was an attitude that also permitted him to combine his twin passions of academics and policy. Frankfurter's years with Henry Stimson acquainted him to the power politics of Washington, D.C., and led him to believe that government had an obligation to serve as a positive force for human betterment. His intellectual sympathies with Roscoe Pound led him to believe that scientific study and its application to law (and society) were what were needed in the nation's law schools, particularly its shimmering jewel, the Harvard Law School.[48] Frankfurter's philosophy that an educated civil service was indispensable to national life defined his academic career. He wrote Franklin Roosevelt in 1937, near the

end of his twenty-five-year tenure at Harvard, that his "predominant interest" at the Law School had been "the promotion of public service as a permanent career for the nation's best abilities."[49] Frankfurter's aspirations to train an enlightened public elite were genuine enough. But his techniques for molding these men—and his treatment of them once trained—presents a different issue altogether.

FELIX FRANKFURTER THE TEACHER

Felix Frankfurter began teaching classes at his alma mater in the fall of 1914. His avowed intent as a professor was to instill in his students an interest in public service, and, from his earliest days, he began collecting recruits for his crusade. Frankfurter attracted disciples through a variety of means: a stimulating, unorthodox teaching style; an ability to make his most brilliant students perform even better, often by treating them differently than their peers; a reputation for having powerful friends in high places; magnanimity; and, perhaps most importantly, personality.

Frankfurter's teaching techniques reflected his progressive outlook on legal education. He assigned unconventional readings—newspaper articles and journal articles ranging across all fields—in addition to the usual casebooks, illustrating his belief that the law had to have practical utility and be studied in social context.[50] Frankfurter de-emphasized the formal aspects of pedagogy, focusing instead on imparting to his students a passion for the subject matter at hand. His lectures were often disorganized, and he had a terrible time sticking to a syllabus; one student



Frankfurter's teaching techniques at Harvard Law School (above) reflected his progressive outlook on legal education but his lectures were often disorganized. He assigned unconventional readings—newspaper articles and journal articles ranging across all fields—in addition to the usual casebooks, illustrating his belief that the law had to have practical utility and be studied in social context.

recalled that Frankfurter's public utilities course was nicknamed the "Case-of-the-Month Club" because it proceeded at about that pace.[51] Frankfurter's classes may have seemed disorganized, but he was capturing his students' imagination—and their adulation. He peppered his remarks with entertaining personal tidbits about the great men of the day; and he employed the Socratic method, which compelled students to match wits with their brilliant professor and ensured that each class would be exciting. As Erwin Griswold recalled, "Frankfurter conducted one course at the Harvard Law School called Public Utilities, and two novel seminars, one in Federal Jurisdiction and the other in Administrative Law. All of these, however, were essentially courses in Frankfurter—or perhaps more accurately, in being stimulated by Frankfurter."[52] Professor Frankfurter regularly sat in the back of the classroom and heckled his students, forcing them to defend their arguments and, often, their very core principles.[53] Eventually, his students realized that this was more important a legal education than any other. What Frankfurter's classes lacked in formal instruction, they more than made up in passion and excitement. As Ernest J. Brown, a Frankfurter student, recalled years later, "[S]lowly—innocents that we were—came some measure of awareness . . . of what was happening to us and of the excitement that awareness brought with it. We were gaining some measure of understanding of law that both reflected and shaped a nation's growth . . . Above all, we gained a sense of function and responsibility in the profession we had chosen."[54] Students at Harvard had never experienced anything quite like the teaching methods of Felix Frankfurter, and many of them, consequently, became fascinated with and devoted to him.

Frankfurter attracted disciples also by picking the very best to attend his classes. He was often a dynamic teacher, but he was choosy upon whom he bestowed his favors. Frankfurter certainly played favorites, embarrassing those who asked pedestrian questions in his lecture courses, sometimes scornfully ignoring them altogether.[55] As one of his students later recalled, "There were no neutrals about Felix. You either thought the sun rose and set down his neck; or you despised him."[56] Even a future Supreme Court Justice found himself excluded from among the professor's circle of favorites: As Harry Blackmun once said, "Felix would get five or six students whom he liked, put them in the front row, and carry on a Socratic dialogue with them. Those of us in the outer circle thought he was pretty arrogant."[57] Frankfurter saw nothing wrong with his intellectual snobbery. To the contrary, he almost certainly saw himself as simply carrying on the traditions of one of his own mentors, James Barr Ames, a legendary Harvard instructor and dean who conducted classes "chiefly by means of Socratic dialogues between himself and fifteen or twenty of the best students who formed, so to speak, a Greek chorus."[58] Indeed, Frankfurter believed his duty at Harvard was to produce the nation's future leaders, and he had no time to suffer those he regarded as fools. He was wont to cite John Stuart Mill's dictum that "mediocrity ought not to be engaged in the affairs of the state."[59] As Frankfurter himself once memorably wrote, "Law schools must limit the range of what we do so that everything we do will be of first-rate quality." To Frankfurter, of course, Harvard symbolized first-rate, meritocratic quality, and the best Harvard men were especially suited to become public elites.

While Frankfurter taught introductory lecture course in public utilities and criminal law during his early years at Harvard, by 1922 he was teaching only third year and graduate students.[60] During his senior years on the faculty, Frankfurter perfected the seminar format; he was the only professor to announce in the course catalog that his advanced courses were "open only to students of high standing with the consent of the instructor."[61] To be

In 1933, Frankfurter asked President Roosevelt to appoint his former student James Landis to the Securities and Exchange Commission. Mentor and protégé are pictured above in this 1934 photo.

picked to attend a Frankfurter seminar became a mark of distinction among Harvard men. In the words of Roscoe Pound, in these years Frankfurter "developed fully his power of teaching the individual student." His seminars "took on something of the character of Socrates's 'thinking shop.'"[62] While Frankfurter undoubtedly limited enrollment in his classes in order to create a sense of exclusivity, this exclusivity, in Frankfurter's mind, served a larger purpose: embodying his long-held concerns about the "curse of bigness," these restricted-enrollment seminars focusing on cutting edge topics in public law represented a protest against what one historian has described as the "alienating forces of mass education during the 1920s,"[63] as professional schools like Harvard Law School grew larger and larger to accommodate the needs of a rapidly expanding private economy. Even so, if Frankfurter conceived of himself as standing apart from the Law School's increasingly corporate focus, his teaching methods reinforced certain emerging trends in legal education that in the long run proved quite damaging to HLS's reputation. The single-minded focus on grades (and the cosmic significance accorded to even the finest distinctions between them);[64] the intense competition to be elected to the editorial board of the *Harvard Law Review* (and the deification of the select few who made it); and the other moving parts of the "machinery of academic meritocracy" that Frankfurter had found so liberating as a student, were, by the time he became a teacher, already giving rise to the "humiliation, anxiety, [and] rancorous competition among students" that marred the Law School's image for much of the latter half of the 20th century.[65] In any event, the hand-selected few who were privileged to partake in Frankfurter's intellectual jousting sessions felt forever grateful to their mentor.

There were also concrete reasons why Frankfurter's favorites became beholden to him. A man with extensive contacts in the private sector as well as in government, Frankfurter was a one-man employment agency, recommending his best students to friends in New York and Washington. The highest prize was a judicial clerkship with Justice Holmes or Justice Brandeis, both of whom relied exclusively on Frankfurter to supply them with assistants. (Justice Cardozo, too, relied upon Frankfurter to select some of his clerks). While Frankfurter has been remembered for packing his students in the New Deal, in fact he began recommending bright young men as early as 1910, during his days with Stimson. Frankfurter's ability to stay "near the center of things" kept him apprised of the demand and supply of various job opportunities, and in time he developed a reputation as, in the words of a 1936 editorial in *Fortune* magazine, "the most famous legal employment service in America."[66] Naturally, Frankfurter's legendary influence attracted the ambitious: as David Lilienthal, later a prominent New Dealer, wrote his father upon arriving at Harvard, "[Frankfurter] is a man . . . [whom] I consider very important . . . I plan to take his course in Public Utilities . . . and thus come to know him better."[67]

Frankfurter was equally magnanimous in academic matters, which further endeared him to his favorites. He personally contacted friends in the corporate world to arrange for research scholarships for his pet students. While Frankfurter stated that the explicit purpose of the research fellowships was to "attract men to law teaching, to further legal scholarship, and to afford men with scholarly tastes, but drawn to practice, an opportunity for postgraduate legal training,"[68] in fact the funds paid for a Frankfurter favorite to remain an extra year with his mentor on the premise that the student would derive "a great deal from [his] freer and more intimate association"[69] with Frankfurter. The professor, for his part, proved more than generous in rewarding his students for their exertions. In his annual letter to the research fellowship's benefactors, Frankfurter proudly listed the publications "directly traceable" to the possibilities opened up by the fund, and invariably, nearly all of the articles featured as the authors, "Frankfurter and" a fellowship recipient.[70] Frankfurter claimed that offering a young student co-authorship of a law review article when "the canons of literary ethics would have been satisfied with a prefatory acknowledgement"[71] encouraged the young scholar to turn his attention to legal research and public affairs, and away from private practice. Left unsaid was the fact that it also elicited the student's gratitude, and identified him forever as a "Frankfurter man." "Felix was the world's most generous person in giving credit lines," Adrian Fisher told Frankfurter's biographer. "[I]t's probably true that . . . I spent probably about four times as much [time on the article] as he did. On the other hand, when the article got through, I was after all one year out of law school, and he was quite an experienced professor."[72] Though Frankfurter always stoutly insisted that he tolerated only those students who thought independently, his academic magnanimity did amount to much more than mere intellectual midwifery. His students' work bore the mark of his mentorship, even when his name was not attached as co-author.[73] For example, the graduate thesis of James Landis—the first recipient of Frankfurter's research fellowship and the man whom Frankfurter, late in life, referred to as his dearest student at Harvard[74]—closely resembled an opinion piece the professor had written for *The New Republic*. One friend even commended Landis on the "felixity" of his style![75]

Throughout the 1920s and early 1930s, the student members of Frankfurter's select seminars found their work published, often in the pages of the *Harvard Law Review*, often under their own names.[76] These articles were in many ways the fruit of Frankfurter's labor. Indeed, Frankfurter nearly always suggested topics for his students to work on.[77] And,

while this was hardly unusual in the way of typical teacher/student relationships, what was unusual was the public attention and wide circulation that these articles received in reputable journals. Moreover, the articles themselves often were path-breaking works in the emerging fields of federal jurisdiction and administrative law. "This distinguished scholarship in collaboration with younger men suggest[ed] what may well [have been] [Frankfurter's] greatest long-run contribution to law reform."[78] And with good reason: for, as Bruce Allen Murphy has documented, throughout these years Justice Brandeis kept up an active correspondence with Frankfurter in which he suggested research topics for his friend's able students. "[A] number of Brandeis's letters to Frankfurter during this period offered suggestions for . . . articles in legal periodicals and included the necessary evidence drawn from the behind-the-scenes negotiations of the justices on the Supreme Court,"[79] writes Murphy. In this way, Frankfurter's students became converts to, and unwitting foot soldiers of, his and Brandeis' crusade to bring their philosophy of law to life.

And, despite all of Frankfurter's talk about "disinterested" and "objective" academic work, his intellectual agenda *was* keenly political. As Edward A. Purcell, Jr., has observed, ***The Business of the Supreme* Court**—the classic book on the role of the federal courts that Frankfurter and James Landis published in 1928, marking the culmination of years of work on these issues—"was not simply an academic monograph. It was also a carefully designed political instrument" that "used history in the same way that a long line of progressive social critics . . . had used it—to denigrate the authority of tradition and replace it with the promise of science."[80] Indeed, basically all of the scholarship that Frankfurter and his young research associates produced in these years embraced "a reformist jurisprudential positivism that assumed the benevolent regulatory power of government, . . . undermined the jurisdictional status quo, stressed the need for innovative problem solving, and provided ostensibly 'neutral' and 'professional' support for a series of progressive judicial reforms that Frankfurter hoped to see adopted."[81] Throughout the 1920s, in other words, Frankfurter's students—under the guise of dry, technical legal scholarship—helped their mentor promote an indisputably political agenda aimed at "constraining the reach of the conservative Supreme Court, limiting the ability of corporate litigants to exploit federal jurisdiction, . . . expanding substantially the issues on which the lower federal courts would defer to state courts," and advancing other core Progressive goals.[82] While their priorities and policy prescriptions eventually changed as the political and economic climate shifted around them, Frankfurter and his disciples used these years to lay the groundwork for the intellectual and policy-oriented partnerships that would bear full fruit during the New Deal. In doing so, these young men earned considerable reputations for themselves, thanks not only to their individual abilities, but also to the intellectual influence and academic magnanimity of their mentor.

Perhaps the greatest single factor that attracted disciples to Frankfurter, however, was his sparkling, indefatigable personality. To the childless Frankfurter, these young men were more than students; they became family. On Sunday afternoons he hosted teas at his home on Brattle Street in Cambridge to which he invited his favorites, welcoming them to his household as equals to the other Harvard faculty luminaries and statesmen who regularly attended. Frankfurter was at his best around youngsters. "I'm having a happy time of it here," he wrote Henry Stimson in 1914. "[My students] are an inspirational lot."[83] Recalled Isaiah Berlin of the year Frankfurter spent as a visiting professor at Oxford: "He talked copiously with an overflowing gaiety and spontaneity which conveyed the

Eleanor Roosevelt, along with (from left to right) Felix Frankfurter, Franklin D. Roosevelt, Jr., and Everetta Kilmer, attended a 1956 memorial service for Franklin D. Roosevelt at his grave in Hyde Park, New York. Frankfurter's close friendship with the President had helped him place many of his protégés in New Deal jobs.

impression of great natural sweetness; . . . the young men were charmed and exhilarated, and stayed up talking with him until the early hours of the morning."[84] Edward F. Prichard, Jr., a "happy hot dog" who was only a college student the first time he encountered Professor Frankfurter, observed: "We immediately got into a relationship where virtually all the barriers were down at once . . . He was bouncy, very ebullient and would stride up and down with his short legs, talking and effervescing all the time . . . We screamed and shouted at one another, not in controversy but in agreement and delight."[85] Perhaps James Landis stated it best when, after living with Frankfurter through the summer of 1925 researching, writing, philosophizing, eating, drinking, and playing tennis with his mentor, he wrote a friend: "I suppose I'm nearing more and more each day the brink of pure idolatry."[86]

Frankfurter was fully aware of his abilities to attract the young. As he declared in his memoirs, "I happen to have a penchant for relations, good relations, warm relations with young men who were [my] students."[87]

He was deeply and personally involved in his former students' lives, unusually so, perhaps, for most faculty members. As he wrote to James Landis upon the latter's appointment as dean of the Harvard Law School (a position Frankfurter did not feel his former student should accept), "I have to tell you that I was not one of those who urged your appointment as Dean . . . But you also know what the School means to me, and how deeply I care for your welfare . . ."[88] When Charles Wyzanski, later a distinguished federal judge, lost his first case, Professor Frankfurter sent an encouraging note: "You may have heard me express a favorite foolish notion of mine that it is good for a lawyer to lose his first case . . . I know you assimilate experience, and I know how wisely you will assimilate this."[89] Over twenty-five years later, when Henry Friendly, a newly minted judge on the Second Circuit, was forced to vacate the opinion he had written in the very first case he had heard, due to an oversight in considering his court's jurisdiction, Justice Frankfurter sent his former student a comforting letter. "I thought it was invigorating for a lawyer to lose his first case," wrote the Justice. "[And] [a]fter coming down here I decided that it was a healthy experience for a judge very early in his career to stub his toe by reasonably enough relying on a solid assumption without subjecting it to critical examination."[90] An embarrassed Friendly sent his mentor a grateful response, thanking him for his "note of consolation."[91]

Frankfurter's deep personal interest in his protégés often led him to meddle in their lives. He wielded the power to secure them jobs and determine their life course; and on occasion he overstepped his bounds. One example was Mark DeWolfe Howe. Frankfurter compelled Howe, a talented researcher, to spend years writing the definitive biography of Oliver Wendell Holmes, Jr., against Howe's wishes. Frankfurter then pushed Howe to move to the University of Buffalo to serve as dean of its law school—again against the younger man's wishes. "[Frankfurter] loved his protégés, but he also owned them," observed Howe's wife. "It was very bad for Mark . . . There was a sweet side to Felix's paternalism, but he didn't care whether what he wanted was good for [his students]."[92] Stella Landis, too, sensed Frankfurter's control over her husband, telling him, "I don't think [Frankfurter] likes you to do anything he hasn't a hand in."[93] Indeed, Frankfurter was not pleased when his favorites went off on their own, against his wishes. Thomas Corcoran—who Frankfurter once told Holmes was "one of the most delightful and sweetest lads I've ever had"[94]—was, for a time, Franklin Roosevelt's right-hand man, and Frankfurter's most famous and influential protégé. He was also directly responsible for helping secure Frankfurter's appointment to the Supreme Court.[95] As the New Deal years progressed, however, the two men became increasingly estranged as Corcoran outgrew "his student-professor relationship with Frankfurter," and as they clashed over growing personal and philosophical differences, including over the role that America should play in the looming European crisis.[96] By 1941, when Corcoran asked Justice Frankfurter to recommend him to Roosevelt to fill the vacant Solicitor Generalship, their break was complete; Frankfurter not only refused to endorse Corcoran, but in fact wrote Roosevelt a letter stating that "Tom lacks mental health just now . . . [and could inflict] serious damage to the present national effort."[97] Tommy Corcoran, needless to say, did not become Solicitor General, and the two men never spoke again.[98] The student who crossed Felix Frankfurter, however beloved, could expect to feel the repercussions of his actions.

The Corcoran episode is illustrative of two aspects of Frankfurter the teacher's personality. First, Frankfurter attracted the brightest students through a variety of means, and he clearly loved his best students in return, seeing himself as a dominating, father-

like presence in their lives.[99] He hesitated to permit his protégés to escape from his orbit. He took such a proprietary interest in them that he had difficulty regarding them as anything other than his students. This led some to chafe under his excessive interfering. As a close friend of Corcoran's and another now middle-aged Frankfurter favorite, Benjamin Cohen, once reputedly exclaimed, "Felix is incapable of having adult relationships!"[100] Frankfurter's relationship with these younger men was that of a "sponsor,"[101] and this was a role that—for better or for worse—he could never fully escape. Frankfurter's inability to do so no doubt inflicted, at times, a psychological and emotional price; but as John D. French, one of Frankfurter's last law clerks (whose relationship with the Justice accordingly differed from those protégés who were closer to him in age) once reflected, these ruptures could be seen more in terms of love and attachment, rather than through the lens of betrayal and vindictiveness:

> [Frankfurter] felt strongly about ideas and about people. If ideas were his life, people were his joy. He gave love abundantly and reveled in the success and happiness of those he loved. Sometimes his fond wishes for them gave rise to unjustified expectations as to their prospects for achievement, and their failure to attain anticipated heights was a bitter disappointment to him. Because of the intensity of feelings, such disappointments sometimes led to critical overreaction.[102]

Second, Frankfurter's treatment of Corcoran also suggests how deep-seated was his belief that his students should shun partisan excess and try to fulfill his ideal of an enlightened, apolitical administrative elite—for, personal differences aside, one of the principal reasons that Frankfurter had so vigorously opposed his former protégé's appointment as Solicitor General was that "Corcoran was seen as simply too political for the job."[103] While Frankfurter taught that government service and policymaking were inseparable, he did not approve of his students' deviating from his austere vision of what the public servant's function was in the liberal administrative state. That Frankfurter himself strayed from this ideal was a fact that the professor, rather conveniently, overlooked.

The liberal administrative state, long the object of Frankfurter's philosophical affections, became a reality in 1933, upon the inauguration of Franklin Roosevelt as President. Roosevelt's rise to power heralded, Frankfurter recalled in his memoirs, an era of "great expansion of governmental activity [and] the need for lawyers."[104] The New Deal, in other words, promised to combine the two themes that had long animated Frankfurter's life: the idea of positive, responsive government and the need for a highly trained civil service. An activist all his life, there was little doubt that Felix Frankfurter would involve himself in the workings of the New Deal in any way he could.

FELIX FRANKFURTER AND THE NEW DEAL

Felix Frankfurter's contributions to the New Deal are wide ranging—and well-documented.[105] They were, at once, manifest and intangible. Frankfurter was one of the New Deal's intellectual architects as well as one of its most accomplished draftsmen of policy—yet he had no legislative portfolio or any official position in the Roosevelt Administration. Aspects of the movement's philosophical aims and many of its concrete enactments bear the stamp of his direct influence. In addition, Frankfurter was the New Deal's principal recruiting agent. He placed his protégés in all levels of

government, and consequently his vision was carried forth, albeit indirectly, by his able lieutenants. "We have got to cross-fertilize between the laboratory of thinking and its application to life," he once told Roscoe Pound. "I resent more and more [the] shallow dichotomy between 'theory and practice.'"[106] Frankfurter had dedicated his teaching career to linking the academic study of the law to the practical aspects of government. The New Deal was in many ways the embodiment and culmination of Frankfurter's life work.

"[I]t is the conventional wisdom in Washington," Joseph Lash has written, "that to be out of sight is to be out of mind."[107] The question of how a professor based at Harvard could exert any influence over affairs in the nation's capital is, however, in Frankfurter's case, relatively simple to answer. Frankfurter directed a life's worth of energy and experience into his involvements with the New Deal. He was the nation's leading expert on administrative law, and the New Deal was nothing but Frankfurter's law lectures brought to life. Furthermore, Frankfurter was a man who accumulated friendships over the course of a long career in public service. "Felix collects people,"[108] Harold Laski once memorably said, and Frankfurter counted among his closest friends in Washington the President of the United States. In fact, Frankfurter was President Roosevelt's confidant and tireless correspondent/advisor; the editor of their correspondence has written that "there was nothing in American history that quite resembled this [relationship] between a President and a law professor . . ."[109]

Frankfurter had Roosevelt's ear, but then so did many others: Roosevelt's style of leadership was to solicit counsel from many people simultaneously, then to synthesize the advice into a single course of action.[110] Frankfurter's correspondence with Roosevelt is littered with proposed legislation, drafts of speeches, and recommendations for action. Some of these the President used; others he did not. Thus while Frankfurter's direct influence on the New Deal is evident and extensive, the precise degree of power he wielded at the highest levels of administration is difficult to distinguish. It was in the lower levels of government that the professor truly left his mark.

Frankfurter spent his life training an elite pool of public servants, and, now that the opportunity presented itself, he made sure his disciples went to work. The early days of the New Deal, the time of greatest government expansion and recruitment, were critical, and Frankfurter did not stand idly by. He communicated with his friends in power, the same men who had been asking him for advice on personnel matters for years. "[They] were contemporaries of mine," recalled Frankfurter, "men I'd known who had been my friends, or were out and had been formerly students, and now themselves were heads of agencies and what not. [Soliciting my advice] was the most natural thing in the world, and it so happened that there came to be a considerable percentage of Harvard Law School men on the legal staffs, among government lawyers."[111]

Frankfurter's characterization of his own role is too modest. He was more than a mere consultant. In fact, he actively sought jobs for his former students (and others), and once they had been employed, badgered them to hire even more of his protégés. The example of Charles Wyzanski, as described by historian Nelson Dawson, is typical:

> In the middle of April [1933] Frankfurter began his effort to get Charles Wyzanski appointed solicitor of the Labor Department . . . Frankfurter, however, not only had to sell [Secretary of Labor] Perkins to Wyzanski, he also had to sell Wyzanski on the job, assuring him that he was "just the man for the job." . . . In the summer of 1933 [after Wyzanski had been confirmed], Frankfurter suggested some possible

> labor mediators, concluding, "if the foregoing names are of the kind that interest the Secretary . . . I shall be glad from time to time, if others occur to me, to send them on." . . . [T]hree days later, Frankfurter sent him a list of 147 names![112]

In this way, Frankfurter placed his students throughout the executive agencies and the administration. On his way to England in September 1933 for an academic year at Oxford, he hurriedly cabled President Roosevelt from his ship: "LANDIS HAS UNIQUE EQUIPMENT FOR FAIR EFFECTIVE ADMINISTRATION DURING CRUCIAL MONTHS."[113] James Landis was indeed appointed to the Securities and Exchange Commission (SEC), and later chaired it. Frankfurter similarly prevailed on Roosevelt to entrust Tommy Corcoran with various responsibilities in the administration (this, of course, before their break), and Corcoran—a man of legendary influence himself, who earned the nickname of "The Fixer"—kept his mentor abreast of the gossip and job vacancies circulating around the capital. Despite his absence from the scene, Frankfurter was able to keep his finger on the pulse of goings-on in Washington through his extensive network of former students.[114]

Representative of this mutually beneficial relationship is a fascinating set of letters, unearthed by John Q. Barrett, between Professor Frankfurter and David Ginsburg, a young graduate of the Harvard Law School whom Frankfurter, in 1935, placed in the SEC's General Counsel's Office. There, Ginsburg worked alongside Ben Cohen, Tommy Corcoran, and others, to defend the constitutionality of the Public Utility Holding Company Act (PUHCA), a centerpiece of New Deal reform legislation that facilitated the regulation of electric utilities. Challenges to the legislation reached the Supreme Court in 1938. In a lengthy, gossipy letter dated February 12 of that year, Ginsburg provided his mentor with a blow-by-blow account of the oral argument in the case, *Electric Bond & Share Corp., Inc. v. SEC*,[115] along with a detailed, behind-the-scenes description of the personalities involved. At the end of the letter—and of particular relevance here—Ginsburg inserted the following:

> [. . .] I'm glad [the litigation over the PUHCA] [is] over. During the past 12 weeks I've lost as many pounds, and almost all of my friends. I'm eager to get back to the untroubled comfort of a nice, warm rut.
>
> I've said nothing about the results of our protracted conversation last week [about new job possibilities], for I assume that one of the others has written to you or spoken with you. Suffice it to say that you were right, and that your caution prevented a good deal of heartbreak.
>
> If [Robert H.] Jackson [who led the government's defense of the PUHCA] is confirmed [as Solicitor General], and I believe that he will be, there may be an opening in the SG's office. If you have time, and at your convenience, I should be grateful for your opinion.
>
> [/s/ Dave][116]

Nearly two weeks later, Professor Frankfurter responded:

> Dear Dave Ginsburg:
>
> Though it is still very early in 1938, I have no doubt whatever that your historic account of Ben [Cohen]'s argument . . . will turn out to be the best letter I have had during the year. I am very grateful to you for the generosity which led you to give me such a detailed literary masterpiece and for the imagination which

realized how greatly eager I was for all the nuances and the undercurrents. But not only am I grateful, others are too with whom I discreetly ventured to share it.

That Ben's argument was a triumph not only of masterful preparation and masterly execution, but also triumph of his temperament and his generalship in leading a whole company of intellects into action, I have no doubt, not only from your own authoritative conveyance but from the impressions of disinterested judges. I can only say I envy you the excitement of the experience, its intellectual and whimsical satisfactions.

[. . .]

An experience like that has its great disadvantage in that one cannot always live in high altitudes. But rhythm is the law of life, and wise men absorb the let-downs as well as the exhaltations. Moreover, the work you are doing, though not immersed in the sauce of great drama from day to day, has its own significance to your seeing eye.

As for the S.G's office, I will talk with Paul [Freund] about you and it when he comes up here.

With all good wishes,

Very sincerely yours,

[/s/ Felix Frankfurter][117]

This exchange of letters, in many ways, exemplified the complex, multivalent relationship between Frankfurter and his "happy hot dogs." The younger man—who owed his position in government to his mentor—provided the older man, who was outside of the scene, with a detailed account of what had taken place during a period of high drama in the evolution of the New Deal state. The older man, in turn, thanked his protégé for his "detailed literary masterpiece," complete with "all the nuances and the undercurrents." And, by suggesting that he had "discreetly" shared Ginsburg's letter with other (presumably important) people, Frankfurter subtly puffed up the young man's self-confidence, encouraging him to send more letters. But there also was, in Frankfurter's words, an equally subtle quality of condescension: the professor conveyed the clear message, for instance, that he already had heard about the *Electric Bond* oral argument from others—and not just any others, but "disinterested judges," that is, the very decision-makers in whose hands the fate of the litigation ultimately rested. (Note, too, Frankfurter's conscious use of the word "disinterested," which preserved his self-image as someone above the partisan fray—even as he admitted, in so many words, to an astonishing breach of ethics, namely, discussing a pending case with a judge, most likely Justice Brandeis or Justice Stone). Less subtle was the observation that Ginsburg's work, "though not immersed in the sauce of great drama from day to day," was nonetheless "significan[t]"; and that Ginsburg himself was simply one among a "whole company of intellects" under Ben Cohen's able generalship.

Ginsburg, for his part, clearly had an additional, if not an ulterior motive in sending Frankfurter this letter: trying to climb up the next rung in his career by securing a coveted job as an assistant to the Solicitor General. Frankfurter responded openly and candidly to this request, stating that he would bring the matter up with another protégé he already had placed in the S.G.'s Office, Paul Freund.[118]

It is important to identify the forces and motivations at work here; and yet, to evaluate the Ginsburg-Frankfurter correspondence solely in cynically instrumental terms is also to miss the point. For, in reading Ginsburg's letter, one cannot help but appreciate the

excitement this young man, so early in his career, felt in participating personally in such momentous events, and in describing these events to the man who had made it all possible. Frankfurter, in turn, plainly took great pride in his protégé's accomplishments, taking time out of his busy schedule to write a personal note of encouragement to a man thirty years younger than he, and fondly expressing his vicarious "excitement of the experience." Each man may have been subtly manipulating the other in one degree or another, but the fundamental sincerity of the underlying personal bond cannot be denied.

Frankfurter's ability to place his students in the Roosevelt administration and New Deal agencies naturally led some to speculate about the depth of his influence over his protégés, branding him as a "'patriarchal sorcerer' who cast dark spells of magic over the administration's young lawyers."[119] Those critical of Frankfurter—conservatives, anti-Semites, and opponents within Roosevelt's circle, among others—circulated rumors that he was a remote, sinister Iago. While there was a similarity in spirit and a sense of unity among the "happy hot dogs,"[120] claims of Machiavellian intrigue and lockstep unanimity seem off-base. First, Frankfurter's former students were, after all, highly accomplished and highly intelligent men in their own right. They shared his vision of the law and philosophy of government, but they certainly could think for themselves.[121] Indeed, his pupils did not always agree among themselves, personally or philosophically. Second, Frankfurter himself insisted that he trained thinkers, not blind followers, and bristled whenever critics intimated otherwise. He wrote to Jerome Frank, a fellow New Dealer, in 1936:

> As to your vague hints about some of my friends, I will say only that you quite misconceive the relation of close friends to me. A teacher who has disciples is a teacher who fails in the essential task of his office. Whatever action any of my former students in Washington may have pursued, follows, I hope, from convictions of inner propulsion and not in response to any wishes or orders. This is too ridiculous a conception for you to entertain.[122]

He expressed similar sentiments to Charles Wyznaski:

> For a teacher to inculcate in a student his own views is, on the whole, apt to be a disservice, for it usually means that he is a persuasive dogmatist . . . What I care about profoundly is that men should know what they think and why they think it; . . . nothing is more disheartening than the uncritical, parrot-like repetition of familiar formulas by so-called leaders of the bar . . . I do covet . . . the habit of critical inquiry and detached judgment . . .[123]

Whatever his protests to the contrary, however, Frankfurter *did* distance himself from protégés who strayed ideologically—much as he did in his classrooms at Harvard. He derided his former student, John Dickinson, the Assistant Secretary of Commerce, for the latter's pro-business attitudes.[124] He lobbied heavily for the appointment of Donald Richberg, a contemporary of his at Harvard Law School, to a post in the administration, but when Richberg evinced similar pro-business attitudes, Frankfurter wrote Brandeis that Richberg "really is irreclaimable" and that Brandeis had better "cross [Richberg] off" the list of reliable allies.[125] Frankfurter liked to boast that he mentored individuals regardless of their partisan affiliation, but there is no question that they had to be intellectually compatible. Charles Wyzanski and Henry Friendly, for example, though registered Republicans, were "happy hot

dogs" through and through.[126] Moreover, Frankfurter shunned certain men at Harvard because, their brilliance aside, they refused to come under his wing. One of these students was Adolf Berle, the author of **The Modern Corporation and Private Property**, a Bible of Roosevelt's economic planners. As Jordan Schwartz writes, Frankfurter's antipathy for Berle continued long after the latter's student days, even though the two were forced to work closely together throughout the 1930s: "Among New Dealers it was well known that they were lifelong enemies."[127] The professor encouraged individual thinking, but within strict limits.

Frankfurter expected his former students to conform to his intellectual agenda, and was insulted when he felt they deviated from the vision of disinterested public service that he had introduced to them. This was somewhat hypocritical, for Frankfurter did push his own political projects once given access to power, and he often employed his protégés as his foot soldiers, much as he had done when they attended Harvard. Frankfurter, for instance, was an early convert to Keynesian economics. Intent on giving life in America to the British economist's ideas, Frankfurter wrote to Corcoran:

> Keynes is to be in Washington in two or three weeks . . . I want you to give him a small dinner, including Jim [Landis] and Ben [Cohen], perhaps [Sam] Rayburn . . . so as to secure a thorough discussion of Securities Act and Stock Exchange control. Keynes will come to Washington after a week or so of New York, during which I'm sure a lot of his Wall Street friends will pump him full of poison which they will call facts . . . He has hardly an idea . . . of the piracies and greed of American finance or the huggermuggery and abuse of the Stock Exchange.[128]

While these words reflect Frankfurter's lifelong hostility to "moneyed interests," they also show him at his scheming best, using his former students for clearly political purposes. The high priest of 'disinterested public service,' once given access to power, often stooped to involve himself in petty politics, even if he would not tolerate such actions in others. One can perhaps understand why in later years Tommy Corcoran accused Frankfurter of discarding his ideals and "playing with whatever forces were on top."[129] Even the beloved James Landis said of his mentor years later, "[H]e shouldn't have allowed his, shall I say, political and social ideas to be changed by something of that nature (access to power). It's so easy, in this life, to associate with people who have prestige . . . and you become a little loose in your thinking . . . I have a great admiration for [Frankfurter]. And yet, when . . . you have responsibilities with regard to the destiny of the United States [like he did] . . . and you start playing a game like that . . ."[130]

Frankfurter likely viewed his involvement (or interference?) in political matters as a simple manifestation of linking "theory" to "practice." He was unapologetically involved in drafting numerous pieces of key New Deal legislation, including "bills to limit federal jurisdiction, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Norris-LaGuardia [Anti-Injunction] Act."[131] During a critical period in the summer of 1935, Frankfurter actually *lived* at the White House as President Roosevelt's houseguest, taking charge of the administration's flagging legislative agenda in an ultimately successful effort to promote FDR's chances for re-election.[132] His protégés assisted him on each of these projects. These overtly partisan involvements—and the role that Frankfurter encouraged his former students, who now were public servants, to play in them—pose serious difficulties to anyone seeking to

reconcile Frankfurter's pronouncements with his actions. Contradictions did abound; and yet, one still must acknowledge that the Securities Exchange Act, for instance—which Frankfurter recruited Landis, Corcoran, and Ben Cohen to write; convinced Sam Rayburn to shepherd through Congress; and pushed President Roosevelt to sign—did reform the securities industry and establish the SEC, an agency charged with protecting the investments of everyday Americans, as part of a broader legislative agenda designed to preserve market capitalism and to promote economic growth. (The SEC's efficacy on this score is, of course, a question that has divided scholars ever since.) Thus, Frankfurter's political involvements can, in some ways, be regarded as consistent with his social philosophies of government.

Frankfurter's meddling in his students' affairs can be perceived in a similar vein. He often convinced his students to take jobs they were at first reluctant to accept, but only because he felt they would bring his philosophy to life. He reveled in his role as recruiting agent, but emphasized that he never offered unsolicited advice. "As you know, I have consistently refrained from pestering the President about appointments, except on inquiries from him,"[133] he pointedly wrote Roosevelt's secretary. He told John Burns, the chairman of the SEC: "You will have noticed that I have been very careful not to initiate suggestions of personnel . . ."[134]

Frankfurter took further liberties with his former students, but seems to have recommended policy and personnel only when asked. As Paul Freund, one of the most prominent of the happy hot dogs, recalled years later, "[H]e was certainly outgiving *when he was solicited for advice*."[135] It seems Frankfurter's greatest contribution to the New Deal, when evaluated through the lens of his students, was to place his favorites in important posts (and to attempt blackballing those with whom he disagreed), rather than directly to affect policy in a sustained way. As Nelson Dawson has observed, Frankfurter was "able to place a number of men in various posts, but [his] ability to shape policy was limited."[136] While this, perhaps, was not Frankfurter's desired outcome, it was an outcome that nonetheless was largely consistent with both his philosophy of government and his philosophy of teaching.

CONCLUSION

Scholars have debated the extent of Felix Frankfurter's influence over his former students during the New Deal years without exploring adequately the latter's intellectual debts to their mentor. Frankfurter was able to shape his students' worldview through his optimistic vision of government and through his remarkable powers of personality. He had the singular ability to attract and to cultivate young men of potential, and to inculcate in them his ideal of responsive government manned by responsible civil servants. Frankfurter continued to influence many of his students directly (and indirectly) in the years after they left Harvard, but the most important seeds had been planted in Cambridge. The New Deal was, indeed, the culmination of Frankfurter's life work, the synthesis of his philosophy of government and of his methodology of instruction. Many of the ideas he espoused about the role of experts in public life have long since become old-fashioned, or been tried and rejected; and much of his judicial legacy, perhaps unfairly, is either tarnished, or forgotten. But one should not overlook the contributions Felix Frankfurter made in the classrooms of the Harvard Law School—because, in the end, his greatest legacy may have been that which Pericles says in his funeral oration is the most important thing of all: his deposit in the minds of men.[137]

ENDNOTES

Primary Source Abbreviations:

FFLC	Felix Frankfurter Papers, Library of Congress [microfilm]
FFP	Felix Frankfurter Papers, Harvard Law School [microfilm]
REM.	FELIX FRANKFURTER REMINISCES*
FF/FDR	Frankfurter/ Roosevelt Correspondence**
FF/OWH	Frankfurter/ Holmes Correspondence+
NYT	*New York Times* Oral History Project [James Landis]
L&P	LAW & POLITICS#
TRIBUTE	FELIX FRANKFURTER: A TRIBUTE++
DIARY	FROM THE DIARIES OF FELIX FRANKFURTER^

*FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES (1960) (ed., Harlan B. Phillips).

**ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–945 (1967) (ed., Max Freedman).

+HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934 (1996) (eds., Robert M. Mennel and Christine L. Compston).

#FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938 (1971) (eds., Archibald MacLeish and E.F. Prichard, Jr.).

++FELIX FRANKFURTER: A TRIBUTE (1964) (ed., Wallace Mendelson).

^From the Diaries of Felix Frankfurter (1975) (ed., Joseph P. Lash).

[1] Among practicing lawyers and law professors, of course, Frankfurter's academic legacy is secure, through his path-breaking scholarship on the power and jurisdiction of the federal courts. *See* Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Courts*, 24 LAW & SOC. INQUIRY 679, 682 (1999) ("[Frankfurter's] *Business of the Supreme Court* [1928] is deservedly a classic. It helped make the lower federal courts a subject of sophisticated historical analysis, and it created both an enduring image of their past as well as a powerful prescription for their future"); Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GEORGIA L. REV. 697, 701 (1993) ("Today's concept of judicial federalism can be traced largely to the work of one man: Felix Frankfurter"). *See also* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM ix (1st ed. 1953) (dedicating their pioneering treatise to "Felix Frankfurter, who first opened our minds to these problems"). To the extent this article focuses on Frankfurter's broad legacy in the public imagination, especially with respect to the New Deal, it does not touch very deeply upon his influence over technical aspects of legal doctrine.

[2] Isaiah Berlin, *Felix Frankfurter at Oxford*, TRIBUTE at 23.

[3] *See* Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 175 (1991) ("Perhaps the greatest disappointment in the high court was Felix Frankfurter . . . Many held high hopes that he would become the intellectual leader of the Court; instead, he proved a divisive figure whose jurisprudential philosophy is all but ignored today"); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 265 (1993) ("With all his intellect and scholarly talents, Frankfurter's judicial role remained essentially a lost opportunity. As far as public law was concerned, he may well have had more influence as a law professor than as a Supreme Court Justice"); Eugene Gressman, *Psycho-Enigmatizing Felix Frankfurter*, 80 MICH. L. REV. 731, 740 (1982) (describing Frankfurter's "surprisingly limited judicial legacy"). As described in Note 1, the impact of Frankfurter the judge on certain important jurisprudential areas is subject to re-evaluation, see, *e.g.*, Cass Sunstein, "Home-Run Hitters of the Supreme Court," *Bloomberg View* (Apr. 1, 2014 blog post) (listing Frankfurter as the fourth greatest U.S. Supreme Court Justice of all time, and observing, "He was wise, and he was deep, and he is underrated; it's high time for a Frankfurter revival."), but that is not the task of this article.

[4] LIVA BAKER, FELIX FRANKFURTER 106 (1969).

[5] *A Place for Poppa*, TIME, Vol. 33 at 17 (16 January 1939). By way of comparison, as of May 1939, "there were an estimated 5,368 lawyers working in legal positions for the federal government." Karen M. Tani, *Portia's Deal*, 87 CHI.-KENT L. REV. 549, 552 (2012).

[6] REM. at 248.

[7] Cited in Freedman's introduction to FF/FDR at 9.

[8] Hugh Johnson, cited in FF/FDR at 303. According to Joseph Lash, Johnson created the "Happy Hot Dogs" moniker for Frankfurter's protégés, a term Johnson intended to be derisive. *See* DIARY at 53.

[9] *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 21 F.Supp. 807, 821 (W.D. Mo. 1937) (Otis, J., dissenting).

[10] JOHN THOMAS FLYNN, THE ROOSEVELT MYTH 144 (1956 edition).

[11] Lori Ringhand, *Aliens on the Bench: Lessons in Identity, Race, and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. 795, 799. Frankfurter's 1939 Supreme Court confirmation hearing, described in detail in Ringhand's article, was especially controversial, not least because of Frankfurter's foreign background and his alleged ties to Communists. *See also* SAM TANENHAUS, WHITTAKER CHAMBERS 233 (1997) ("As a Jew, Harvard intellectual, . . . and 'socialistic' Svengali to FDR, Frankfurter was warmly hated by the right, attacked many

times over the years, most bitterly in 1939, when FDR had nominated him to the Court. During Frankfurter's bruising confirmation hearing, [Alger] Hiss had been accused of being one of the nominee's obsequious followers—'linked Frankfurters . . . know[n] as the 'happy hot dogs,' whose 'tails wave madly when they hear the word 'Moscow.'"). Frankfurter was no Communist, but Alger Hiss and other well-known Frankfurter protégés, including Lee Pressman and Nathan Witt, almost certainly *were*, which adds a layer of complexity to a simplistic portrayal of Frankfurter's opponents as being uniformly irrational, xenophobic, and bigoted. It is equally intriguing that Frankfurter, once the bête noire of the Right, is today deeply admired by judicial conservatives, *see* Jeffrey S. Sutton, *Barnette, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 145–48 (2012), while at least one respected scholar has drawn parallels between Frankfurter's network of former students during the New Deal to the creation and operation of the Federalist Society, and the rise of the conservative legal movement, during the 1970s and 1980s. *See* Mark Tushnet, *What Consequences Do Ideas Have?* (Book Review), 87 TEX. L. REV. 447, 457–60 (2008).

[12] Excellent examinations of Frankfurter's relationships with his former students during the New Deal include: NELSON DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL, Chapter IV ("Launching the New Deal: Recruitment and Personnel") (1980); JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA 167–72 (1976); G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 ARK. L. REV. 631 (1986). None of these works examines Frankfurter's teaching techniques or philosophy at the Harvard Law School.

[13] Alexander M. Bickel, *Applied Politics and the Science of the Law: Writings of the Harvard Period*, TRIBUTE at 168.

[14] REM. at 15.

[15] REM. at 15.

[16] REM. at 19.

[17] REM. at 26–27.

[18] REM. at 19.

[19] REM. at 26.

[20] REM. at 28.

[21] For critiques of the Frankfurterian view that performance on law school examinations largely measures a student's objective "worth" as a future lawyer, *see* Andrew Yaphe, *"Reputation, Reputation, Reputation": Fred Rodell, Felix Frankfurter, and the Re-Production of Hierarchy in the Unlikeliest of Places*, 36 J. LEGAL PROF. 441, 445–48, 449–50 (2012); White, *supra* note 12, at 660–65; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

[22] Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129, 138 (2010). *See also* Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1514 (2001) ("Harvard housed the most prestigious law faculty of the era").

[23] Quoted in Austin Wakeman Scott's Foreword to ARTHUR E. SUTHERLAND, THE LAW AT HARVARD vii (1967).

[24] H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 20–21 (1981).

[25] These mentors included Professor John Chipman Gray, for whom Frankfurter worked as a summer research assistant while he was a student; Dean James Barr Ames, a formidable classroom presence and leader of the American bar; and, later, Justice Oliver Wendell Holmes, for whom Gray provided Frankfurter a letter of introduction. *See* White, *supra* note 12, at 640.

[26] REM. at 27.

[27] REM. at 35–36.

[28] *See, e.g., New York Central & Hudson River Railroad Company v. United States*, 212 U.S. 481 (1909) (criminal prosecution of railroad company for violating anti-rebating provisions of the Elkins Act); *Morse v. United States*, 174 F. 539 (2d Cir. 1909) (criminal prosecution of senior bank official for fraud); *Heike v. United States*, 192 F. 83 (2d Cir. 1911) (criminal prosecution of public officials and executives of the American Sugar Refining Company, among others, for corruption), *aff'd* 227 U.S. 131 (1913). Stimson's and Frankfurter's names appear together on the government's briefs filed in the latter two cases.

[29] REM. at 48.

[30] DIARY at 102. In evaluating Frankfurter's diary entries and his personal correspondence, one must remain ever-mindful, of course, that, in the course of his long life, Frankfurter "wrote a number of self-serving documents." *Symposium: "Contracted" Biographies and Other Obstacles to "Truth,"* 70 N.Y.U. L. REV 730, 743 (1995) (comment of James Simon); *see also* WILLIAM DOMNARSKI, THE GREAT JUSTICES, 1941–54 73 (2009) (describing Frankfurter's diary as "self-serving"). Indeed, as Frankfurter himself once acidly remarked about Harold Ickes: "[H]e rewrote his 'secret' diaries three times"—a comment that says as much about Frankfurter as it does about Ickes. Quoted in William Harvey, *An Appointment to the Supreme Court*, 49 RES GESTAE 13, 13 (2005).

[31] DIARY at 110.

[32] REM. at 78.

[33] Henry Stimson to FF, 28 June 1913, FFLC.

[34] Cited in Freedman's introduction to FF/FDR at 8.

[35] Oliver Wendell Holmes to FF, 15 July 1913, in FF/OWH at 12.

[36] Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454, 464 (1909).

[37] DIARY at 15–16 (from Lash's biographical essay).

[38] FF to Henry L. Stimson, 26 June 1913, FFLC.

[39] REM. at 80–83.

[40] *L&P* at 240.

[41] *L&P* at 241, 247.

[42] For more on Frankfurter's unquestioning faith in "disinterested" experts and his optimistic belief in "neutral" scientific administration, *see* Sanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 432, 433–35 (1973). This was an attitude that, in the fullness of time, and as early as the New Deal years themselves, engendered a host of detractors from all sides of the political spectrum—and, eventually, from even Justice Frankfurter himself. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 213–46 (1992); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the First Amendment*, 86 VA. L. REV. 1, 75–95 (2000); *id.* at 87 ("[B]y the mid-1940s, the idea of the existence of a connection between the administrative state and totalitarianism was prevalent among intellectuals across the political spectrum . . . "). *Compare* FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 50–51 (1930) (courts are poorly suited to review administrative acts) to *Radio Corp. of America v. United States*, 341 U.S. 412, 426 (1951) (Frankfurter, J., "dubitante") (courts are perfectly competent to review "complex scientific matters" that often are considered to exist within agencies' exclusive "domain of expertness").

[43] *L&P* at 249.

[44] *L&P* at 377.

[45] Quoted in HIRSCH, *supra* note 24, at 67.

[46] FF to Joseph B. Ely, 29 June 1932, FFLC.

[47] *See* FF/FDR at 110–14 for Frankfurter's entire memorandum to President Roosevelt. As Michael Parrish has observed, there were also less lofty—and more calculating—reasons why Frankfurter turned down Governor Ely's offer of a seat on the Massachusetts Supreme Judicial Court, and FDR's offer to be Solicitor General. Accepting Ely's offer would have aligned Frankfurter with a political opponent of Roosevelt's within the Democratic party; and, as Solicitor General, Frankfurter not only would have been submerged in the details of day-to-day litigation, but also would have been obliged to defend the constitutionality of all laws, including those with which he disagreed, rather than drafting new laws that would advance his policy objectives. *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 210, 223 (1982).

[48] *See* McManamon, *supra* note 1, at 739 ("The American legal community has long looked to Harvard for leadership. The scholarship of the Harvard law faculty . . . dominated the academic dialogue in the early twentieth century and hence did much to determine the form of the law").

[49] FF/FDR at 377.

[50] An excellent description of Felix Frankfurter the teacher can be found in Matthew Josephson's series of "Profiles" on Frankfurter that appeared in *The New Yorker* in 1940; *see* especially 14 December 1940 ("Jurist III") at 24–25.

[51] Paul A. Freund, *Mr. Justice Frankfurter*, TRIBUTE at 148.

[52] Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 8 (1962).

[53] Josephson, *supra* note 50, at 24.

[54] Ernest J. Brown, *Professor Frankfurter*, 78 HARV. L. REV. 1523, 1524 (1965).

[55] As the writer Archibald MacLeish, Frankfurter's friend and former student, observed in *Life* magazine: "As a Harvard Law School professor, . . . [Frankfurter] drew out his most brilliant and wittiest students. The bright ones were often invited to the Frankfurter home for Sunday-night suppers, the dumb ones ignored." Archibald MacLeish, *Mr. Justice Frankfurter: The Great Law Teacher Grounds His Philosophy on a Relish for Living*, LIFE (12 February 1940) at 53.

[56] W. Barton Leach, quoted in PARRISH, *supra* note 47, at 160.

[57] Quoted in JAMES F. SIMON, THE CENTER HOLDS 108 (1995).

[58] Paul D. Carrington, *The Pedagogy of the Old Case Method: A Tribute to "Bull" Warren*, 59 J. LEGAL EDUC. 457, 462 (2010) (quoting Edward "Bull" Warren, who was a student at HLS a couple years before Frankfurter attended, and who later served alongside Frankfurter on the school's faculty). For more on the "Ames method" of classroom instruction, which Frankfurter evidently adopted, *see* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 17–18 (1995); Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895–1915*, 61 J. LEGAL EDUC. 31, 44 (2011).

[59] *L&P* at 242.

[60] Roscoe Pound, *Felix Frankfurter at Harvard*, TRIBUTE at 142.

[61] BAKER, *supra* note 4, at 104.

[62] Pound, *supra* note 60, at 143.

[63] PARRISH, *supra* note 47, at 155.

[64] As Frankfurter observed in his memoirs, "If one fellow got 76, and another 76.5, there's no use saying, 'the 76 man is better.'" REM. at 27.

[65] Kimball, *supra* note 58, at 31, 37. Bruce Kimball's article provides interesting explanations for why the "meritocratic machinery" of the HLS of Frankfurter's student days, which was considered largely benign, came within a few decades "to be viewed as malignant." *Id.* at 42. *Cf.* JOHN J. OSBORN, THE PAPER CHASE (1971); SCOTT TUROW, ONE-L (1977).

[66] FF/FDR at 309. (The *Fortune* editorial is reproduced in full at FF/FDR at 303–10; *see Felix Frankfurter*, 13 FORTUNE 83 (January 1936)).

[67] Quoted in PARRISH, *supra* note 47, at 160.

[68] Form letter available in FFP (Part III, Reel 21).

[69] Thurlow Gordon to FF, 8 December 1928, FFP (Part III, Reel 21).

[70] *See* letter cited at *supra* note 68.

[71] FF to Walter Dodd, 16 August 1929, FFLC.

[72] Quoted in BAKER, *supra* note 4, at 107.

[73] Sometimes it bore a more direct imprint: as David Dorsen's research reveals, Frankfurter appears personally to have written the "powerful[]", oft-cited final paragraph of Henry Friendly's path-breaking student note on the history of federal jurisdiction, which was published in 1928 in the *Harvard Law Review*. *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 319, 320 (2012).

[74] FF to Edward Costikyan, 12 February 1964, FFP (Reel 17).

[75] James M. Landis, NYT, at 124 (REMINISCES OF JAMES M. LANDIS, published by the *New York Times*, 1964).

[76] For a partial (if lengthy) list of some of this Frankfurter-inspired student scholarship, *see* McManamon, *supra* note 1, at 754 n.338.

[77] *See* Griswold, *supra* note 52, at 9 ("The students in the [federal jurisdiction] seminar had to write a paper. It was at Professor Frankfurter's suggestion that I joined with [a] classmate . . . in writing about 'The Narrative Record in Federal Equity Appeals.'" "This was a subject about which I had never heard when it was suggested . . . "). Griswold's piece was later published in the *Harvard Law Review*, *see id.* at n.3, and a few years later, the reforms he advocated were adopted in the Federal Rules of Civil Procedure—"solely because of Professor Frankfurter's suggestion." *See id.*

[78] Jerome A. Cohen, *Mr. Justice Frankfurter: A Tribute*, 50 CAL. L. REV. 591, 594 (1962).

[79] BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 84 (1982).

[80] Purcell, *supra* note 1, at 683.

[81] *Id.* at 683–84.

[82] *Id.* at 684.

[83] FF to Henry L. Stimson, 4 November 1914, FFLC.

[84] Berlin, *supra* note 2, at 24–25.

[85] Quoted in TRACY CAMPBELL, SHORT OF THE GLORY: THE FALL AND REDEMPTION OF EDWARD F. PRICHARD, JR. 41 (1998).

[86] Quoted in DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 22 (1980).

[87] REM. at 248.

[88] FF to James M. Landis, 5 January 1937, FFLC.

[89] FF to Charles Wyzanski, 19 May 1933, FFLC.

[90] Quoted in DORSEN, *supra* note 73, at 82.

[91] *Id.*

[92] Quoted in DIARY at 54–55 (from Lash's biographical essay). *See also* FF/OWH at xv (editor's observation that "Frankfurter closely supervised Howe['s work on Holmes] while simultaneously promoting other biographical projects on Louis D. Brandeis and himself," leading to a "somewhat tense atmosphere").

[93] Quoted in RITCHIE, *supra* note 86, at 32.

[94] FF/OWH at 208 (26 November 1928).

[95] *See* DAVID MCKEAN, TOMMY THE CORK: WASHINGTON'S ULTIMATE INSIDER FROM ROOSEVELT TO REAGAN 100-02 (2004); NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 159 (2010) (Corcoran went "to great lengths to convince Roosevelt that Frankfurter could easily be confirmed" and "work[ed]" tirelessly to "recruit[] active support from administration insiders . . . ").

[96] WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 245 (2002); *see also id.* at 245–48 (describing break between Frankfurter and Corcoran); MCKEAN, *supra* note 95, at 152–55 (same); FELDMAN, *supra* note 95, at 259–60 (same).

[97] FF/FDR at 577.

[98] *See* MICHAEL HILTZIK, THE NEW DEAL 204 (2012); WILLIAM O. DOUGLAS ORAL HISTORY (17 December 1962), available at: http://www.princeton.edu/~mudd/finding_aids/douglas/douglas13.html (containing Justice Douglas's observation that Frankfurter's activity "in defeating Corcoran for the Solicitor Generalship created a gulf between the two men that never was restored, never resulted in anything by animosity and hard feelings on each side").

[99] As Matthew Josephson, a contemporary observer, wrote: "Frankfurter's attitude toward his students was paternal . . . Having a warm, bubbling, aggressive personality, he intended unconsciously to dominate many of his pupils . . . " *See supra* note 50, at 24.

[100] Quoted in MURPHY, *supra* note 79, at 190.

[101] White, *supra* note 12, at 643–44, discusses the concept of "sponsorship," especially as it applied to Frankfurter's own early career, through his relationship with establishment figures like Henry Stimson, Oliver Wendell Holmes, and James Barr Ames. As White convincingly argues, Frankfurter attempted to replicate those early relationships with the younger men he mentored later in his own life. *See id.*

[102] John D. French, *Book Review: The Enigma of Felix Frankfurter*, 57 N.Y.U. L. REV. 330, 330 (1982).

[103] LASSER, *supra* note 96, at 245.

[104] REM. at 249.

[105] Three books that focus on Frankfurter's contributions to the New Deal (there are many) include: JEFFREY D. HOCKETT, NEW DEAL JUSTICE (1996); DAWSON, *supra* note 12; and JORDAN SCHWARTZ, THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT (1993).

[106] FF to Roscoe Pound, 4 February 1912, FFLC.

[107] DIARY at 132.

[108] DIARY at 36 (from Lash's biographical essay).

[109] FF/FDR at 19 (from Freedman's introduction).

[110] *See* BAKER, *supra* note 4, at 192.

[111] REM. at 249.

[112] DAWSON, *supra* note 12, at 52, 53–54.

[113] FF/FDR at 157.

[114] An excellent example of Corcoran's keeping Frankfurter abreast of events occurring in Washington can be found at DAWSON, *supra* note 12, at 58.

[115] 303 U.S. 419 (1938).

[116] The letter is reproduced in full at John Q. Barrett, *David Ginsburg on the PUHCA Oral Arguments (1938)*, THE JACKSON LIST, available at: http://www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju (Feb. 12, 2013 blog posting).

[117] *Id.*

[118] Of significance, perhaps, is the fact that Ginsburg ultimately did *not* move to the Solicitor General's Office, but instead remained at the SEC, where he came to know the agency's chairman, William O. Douglas. Ginsburg followed Douglas to the Supreme Court in 1939 as Douglas's first law clerk. *See* WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975 169 (1980).

[119] PARRISH, *supra* note 47, at 221.

[120] Corcoran, for example, referred to men in the Treasury Department "who are *ours*" (Thomas G. Corcoran to FF, 30 December 1933, FFLC) (emphasis added). At a more theoretical level, G. Edward White has identified certain social and cultural trends that combined, by the New Deal years, to create "[t]he characteristic Frankfurter recruit": "[a] graduate of Harvard Law School, politically liberal, usually ranked high in his class, and either an obvious product of upper class gentile culture or an obvious product of a radically different cultural environment [often Jewish and/or immigrant] who was 'comfortable' in the upper class gentile world." White, *supra* note 12, at 655.

[121] Paul Carrington, for instance, has applauded various members of HLS's Class of 1917 who were "morally formidable and autonomous persons" (at least one of whom, Dean Acheson, was a Frankfurter protégé), and whose "courageous public acts" as lawyers at important points in the mid-twentieth century deserve recognition. *See* Carrington, *supra* note 58, at 464–65; LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES 16 (2006) (same). Nonetheless, it is true that Frankfurter's network "primarily functioned to create opportunities for graduating students," White, *supra* note 12, at 657, rather than more senior, experienced lawyers.

[122] FF to Jerome Frank, 18 January 1936, FFLC. Frankfurter expressed similar sentiments in his memoirs: "[As for] all this business of how Felix Frankfurter filled the government with his cohorts, his disciples, whatnot. In the first place, [my critics] have no understanding of my relations with these young men. They have no understanding of the kind of independence—that we're just all in the same boat in being, as it were, part of the ministry of justice, part of the great company of lawyers who serve law, and that the bond was just the bond of fellowship of ideas and purposes and nothing more complicated than that . . . " REM. at 250.

[123] FF to Charles Wyzanski, 24 June 1930, FFLC.

[124] DAWSON, *supra* note 12, at 59. Frankfurter opposed Dickinson's promotion to Assistant Attorney General in charge of antitrust matters, telling Roosevelt that his former student's ideological opposition to the Sherman Act would be "embarrassing" to the Administration. *See* FF to FDR, 1 July 1935, FFLC. It is important to note, perhaps, that Dickinson got the job, anyway; *see* DAWSON, *supra* note 12, at 59 n.104. Frankfurter was not all-powerful in personnel matters, not even with President Roosevelt.

[125] FF to Louis D. Brandeis, 28 November 1934, FFLC. Frankfurter's antipathy for Richberg may also have been motivated by reasons less philosophical, and more personal. As Amity Shlaes has observed, Richberg's aggressive legal strategy of attempting to validate the New Deal in the eyes of the Supreme Court ran up against Frankfurter's more cautious approach. Richberg won the battle within the Roosevelt administration, but ultimately lost the war, when the Supreme Court, in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), unanimously held key provisions of the National Industrial Recovery Act to be unconstitutional. *See* AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 239, 239–45 (2007); Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L. J. 2399, 2406 (2000).

[126] *See* White, *supra* note 12, at 654 ("Frankfurter's network functioned to place only certain types of elite lawyers in public service: those who were perceived as having a reformist inclination"). Interestingly, Friendly—whom Frankfurter had recruited to the study of law when the latter was a mere college student, *see* DORSEN, *supra* note 73, at 20—never joined the New Deal, and despite the repeated entreaties of both Frankfurter and Justice Brandeis (for whom he clerked, thanks to Professor Frankfurter's endorsement), did not work in government during these years. *See id.* at 38. Instead, Friendly cultivated a highly lucrative private corporate practice before securing, with Justice Frankfurter's behind-the-scenes help, a judgeship on the Second Circuit in 1959. There, he carried on Frankfurter's intellectual legacy. It is interesting to compare Professor Frankfurter's relationship with the importuning David Ginsburg, with its subtle touches of condescension, *see supra* note 114, to his relationship with star student Henry Friendly, who politely but firmly *rejected* his mentor's job advice.

"Holmes' and Brandeis' clerks" did indeed "occupy special roles within [Frankfurter's] network," constituting a "charmed circle" of their very own. White, *supra* note 12, at 655.

[127] SCHWARTZ, *supra* note 105, at 126.

[128] FF to Thomas G. Corcoran, 7 May 1934, FFLC.

[129] Edward F. Prichard, Jr. to FF, 6 January 1945, FFLC (Benjamin Cohen file).

[130] Landis, *supra* note 75, at 95, 96.

[131] McManamon, *supra* note 1, at 772. *See also* David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916–1933*, 78 MICH. L. REV. 1252, 1271–78 (1980).

[132] *See* SCHLAES, *supra* note 125, at 246, *et seq.*

[133] FF to Missy LeHand, 9 March 1935, FFLC.

[134] FF to John Burns, 24 May 1935, FFLC.

[135] Paul A. Freund, *Felix Frankfurter: Reminiscences and Reflections*, Address Given at the Centennial Celebration to Mark the Birth of Felix Frankfurter at the Harvard Law School, 19 November 1982 (emphasis added).

[136] DAWSON, *supra* note 12, at 54. *See also id.* at 47–60 (arguing that Frankfurter's influence varied widely from department to department, and that he was especially influential in the Labor Department, while nearly ineffectual in the Justice Department); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1208 n.45 (2009) (observing that the loyalty of the "happy hot dogs" "allowed Frankfurter to *indirectly* influence a diverse range of government agencies and programs") (emphasis added); FLYNN, *supra* note 10, at 146 (observing that "[p]robably from 1937 to 1940 Frankfurter became a minor figure so far as his influence on policy was concerned").

[137] Frankfurter cited the Pericles funeral oration in his memoirs when referring to James Barr Ames, Dean of HLS during his student days, and the man whom Frankfurter made out to be the best teacher he ever had. REM. at 20.

McCarthyism and the Court: The Need for "an uncommon portion of fortitude in the judges"

ROBERT M. LICHTMAN

American history is punctuated by periods of political repression, invariably the product of wars or national crises. Among these are the period of the Sedition Act of 1798 (when President John Adams' administration, on the verge of war with France, prosecuted and imprisoned Jeffersonian critics); the Civil War period (when President Abraham Lincoln suspended habeas corpus and the government tried persons deemed disloyal by court-martial); the World War I period (when individuals who spoke against the war were jailed under espionage and sedition statutes); World War II (when over 100,000 Japanese on the West Coast, the vast majority American citizens, were interned without charges or hearing); and the McCarthy era (by far the longest of the episodes, when a wide range of repressive measures was directed at Communists and "subversives").[1]

This country, Justice William J. Brennan, Jr. observed in a 1987 address, "has a long history of failing to preserve civil liberties when it perceived its national security threatened." "After each perceived security crisis ended," he added, "the United States has remorsefully realized that the abrogation of civil liberties was unnecessary."[2]

Political repression in America is majoritarian, administered by elected officials and supported by public opinion. As a consequence, if the Supreme Court in a time of repression frustrates the government's goals by deciding cases in favor of targeted groups or individuals, it risks attack by the Congress, the press, and the public at large. This risk was foreseen by the Founders when they provided lifetime tenure for federal judges. Alexander Hamilton, in *The Federalist Papers, No. 78*, found it "easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[3]

The Court, however, is not necessarily under attack in a time of political repression, for it may acquiesce in repressive measures. An accommodating Court does not invite attack. The clearest example is the World War I period. In 1919 and 1920, the Court issued a string of decisions in criminal prosecutions against individuals whose only crime was disseminating anti-war views in speeches or written materials—every decision in the government's favor. The World War I decisions, Harry Kalven wrote, are "dismal evidence of the degree to which the mood of society penetrates judicial chambers." Concomitantly, public criticism of the Court was at a low ebb.[4]

The Court's McCarthy era, which (in this reading) spanned the October 1949 through October 1961 Terms—during which it issued roughly one hundred decisions in "Communist" cases—began with a period in which it largely acquiesced in repressive measures. In the 1955 and 1956 Terms, however, it issued a number of decisions in favor of accused Communists that triggered harsh attacks upon the Court. Critics accused it of aiding Communist "subversion" and questioned the Justices' patriotism and competence. Scores of anti-Court bills were introduced in Congress.[5]

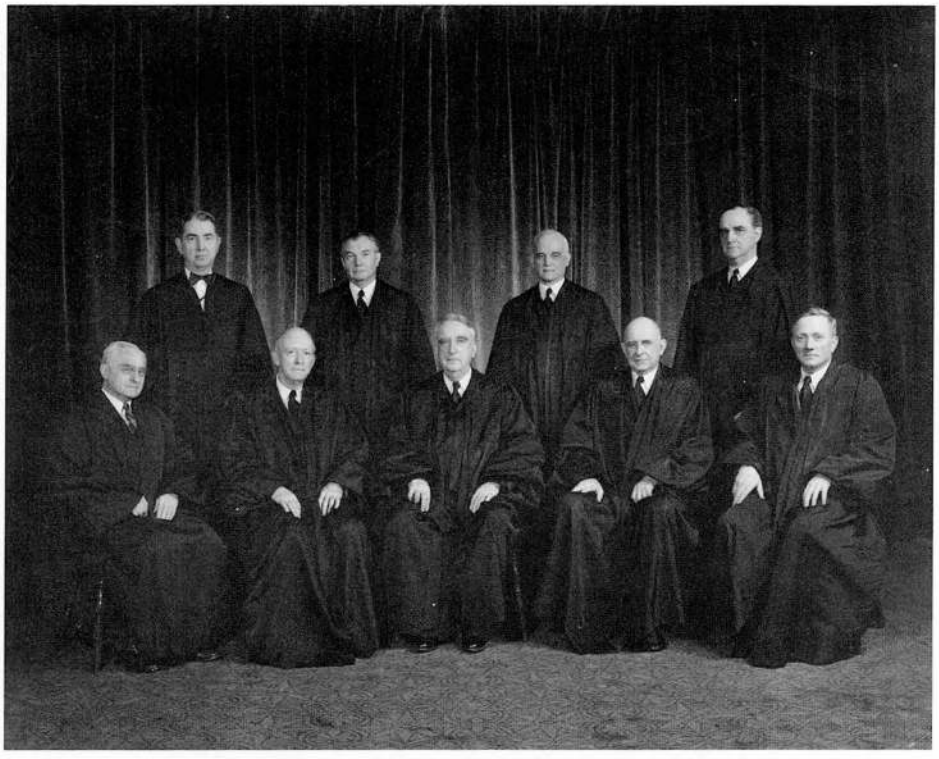
Aware of public opinion, the Court employed an assortment of defensive strategies. When ruling against the government, it evaded constitutional issues, deciding on narrow, this-case-only grounds. It repeatedly postponed decision in major cases. It upheld the constitutionality of a key sedition statute but interpreted it as imposing a formidable burden of proof upon the government. And, when enactment of anti-Court legislation was close at hand, it retreated, deciding new cases in the government's favor and distinguishing, substantially nullifying, earlier contrary decisions.

This article traces the course of the Court's decisions in McCarthy-era "Communist" cases, the attacks upon it and the anti-Court legislation in the Congress, and the Court's response.

In October 1949, when a heavy flow of "Communist" cases first began to reach the Court, Fred M. Vinson was Chief Justice. He, along with three other Truman appointees, Harold H. Burton, Tom C. Clark, and Sherman Minton, and a Roosevelt appointee, Stanley F. Reed, comprised a five-Justice conservative majority that would regularly vote to sustain government action in "Communist" cases. Two other Roosevelt appointees, Hugo L. Black and William O. Douglas, liberals and zealous defenders of First Amendment rights, were often in dissent. The votes of the two remaining Justices, Felix Frankfurter and Robert H. Jackson, also Roosevelt appointees, were more difficult to categorize.[6]

During the 1949 Term, the Court issued five signed decisions in "Communist" cases, all in the government's favor. Three were in contempt-of-Congress prosecutions stemming from proceedings before the House Committee on Un-American Activities (HUAC). A fourth sustained the exclusion from the United States of a discharged American soldier's German-born "war bride," without charges or hearing, as a threat to national security. The Term's most important decision rejected a First Amendment challenge to a provision in the 1947 Taft-Hartley Act that in effect required every union official to file annually with the NLRB a written oath denying Communist Party (CPUSA) membership.[7]

In the 1950 Term, the Court sided largely—six out of nine signed decisions—with the government. *Dennis v. United States*, easily the term's most significant decision, upheld the constitutionality of the Smith Act, a federal sedition statute, affirming the convictions of eleven top CPUSA officials under the Act for conspiring to teach and advocate forcible overthrow of the government. The convictions could not have been sustained under the prevailing First Amendment



The Vinson Court in 1950. Chief Justice Fred M. Vinson, along with three other Truman appointees, Harold H. Burton, Tom C. Clark, and Sherman Minton, and a Roosevelt appointee, Stanley F. Reed, provided a five-Justice conservative majority to sustain government action in "Communist" cases. Two other Roosevelt appointees, Hugo L. Black and William O. Douglas, zealous defenders of First Amendment rights, were often in dissent. The votes of Felix Frankfurter and Robert H. Jackson, also Roosevelt appointees, were more difficult to categorize.

standard, the Holmes-Brandeis clear-and-present danger test, for there was no proof of a clear or present danger that the Party's advocacy of revolution would succeed. The Court, however, changed the standard. As Brennan later explained, it "reinterpret[ed] the clear and present danger test in a way that emasculated it and effectively upheld a limitation on speech where the danger was neither clear nor present." Only Black and Douglas dissented.[8]

Two other decisions left in place—albeit by very close votes—the loyalty program applicable to millions of federal employees and the Attorney General's compilation of an official list of "subversive" organizations, used to implement the program.[9]

During the 1951 and 1952 Terms, the Court handed down thirteen signed decisions in "Communist" cases, nine in the government's favor. Several were deportation cases. In one, the Court held that the government, acting under a 1940 statute, could constitutionally deport three longtime resident aliens because of CPUSA membership that ended prior to the statute's enactment.[10]

Two decisions involved state loyalty programs. One upheld a New York law authorizing the firing of public school teachers for membership in organizations listed as "subversive" by the state Board of Regents. However, the Court, without dissent, struck down an Oklahoma statute that required public employees to sign an oath denying affiliation with "subversive" organizations, because it made no exception for "innocent members" (*i.e.*, persons who joined a proscribed organization unaware of its "subversive" goals).[11]

Five of the eleven top Communist Party officials convicted under the Smith Act in 1949 being returned to their jail cells in a police van. Pictured are: Benjamin Davis, Jr., Eugene Dennis, Gilbert Green, John Williamson, and Gus Hall. The Court's *Dennis* decision was handed down two years later.

After the 1952 Term ended, the Court considered, in a special Term, Douglas's stay of execution for convicted spies Julius and Ethel Rosenberg. It had narrowly denied review of the case during the 1952 Term (on two occasions three Justices voted to grant certiorari). But with the Court in recess and execution imminent, Douglas, presented with a petition posing an issue not previously raised or considered, one that placed in question the legality of the death sentences, granted a stay.[12]

His stay order was released at noon on June 17, and within hours, following an *ex parte* meeting between Vinson and Attorney General Herbert Brownell, the government moved the Court to convene a special Term to review Douglas's action. Vinson immediately announced the special Term; the Court heard oral argument the next day; and the following day, June 19, by 6–3 vote (Black, Douglas, and Frankfurter dissented), it vacated Douglas's stay. The Rosenbergs were executed before sundown. Vinson's opinion of the Court was issued four weeks later.[13]

Frankfurter termed the "manner in which the Court disposed of" the case, "[t]he merits . . . aside," "one of the least edifying episodes in its modern history." Douglas's assessment was that the Justices

> certainly were aware of the hysteria that beset our people, and that hysteria touched off the Justices also. I have no other way of explaining why they ran pell-mell with the mob in the Rosenberg case and felt it was important that this couple die that very week—before the point of law on the legality of their sentence could be calmly considered and decided by the lower courts.[14]

But "imposition of the death sentence and the Government's determination to see it carried out, "the *New York Times*'s Arthur Krock wrote," were powerfully and broadly supported in all parts of the United States." When the Court vacated Douglas's stay, Rep. Frank L. Chelf, a Kentucky Democrat, rushed to the House floor, interrupting debate, to announce what he "just read on the ticker tape." "Praise God, from whom all blessings flow," he said, "We thank the Supreme Court."[15]

Within hours after Douglas ruled, Rep. W. M. Wheeler, a Georgia Democrat, introduced a resolution calling for his impeachment—one specification charged treason. Wheeler termed him "a knave unworthy of the high position he holds." A special five-member House subcommittee held hearings on June 30. But with Douglas's stay by then vacated, the Rosenbergs dead, and the issue of judicial independence starkly presented, the resolution died. Still, Douglas, as he later wrote, had been "denounced" in the press by many members of Congress and "temporarily became a leper whom people avoided . . ." "It hurts," he said, "when old friends cut one down."[16]

Vinson's *Rosenberg* opinion was his last. On September 8, 1953, he died in his home of a massive heart attack. His successor, appointed by Eisenhower, was three-term California governor Earl Warren. A year later, at the start of the 1954 Term, Jackson also died suddenly of a heart attack; his replacement was John Marshall Harlan, a prominent New York lawyer whom Eisenhower had appointed to a federal court of appeals ten months earlier.[17]

The Warren Court's first two Terms were dominated by the school-desegregation cases—*Brown I* in May 1954 holding racial segregation in public schools violative of the Equal Protection Clause and, a year later, *Brown II* ordering that desegregation proceed with "all deliberate speed"—and marked by a diminution, temporary only, in the number of decisions in "Communist" cases.[18]

In the 1953 Term, the Court issued only two signed decisions in "Communist" cases, both in the government's favor. It upheld, under a section of the Internal Security Act of 1950, the deportation of a Mexican-born alien who was a CPUSA member from 1944 to 1946 or 1947, rejecting his "innocent member" defense, and sustained New York's suspension of a doctor's medical license because of his contempt-of-Congress conviction. The new Chief Justice joined the Court's opinion in both cases.[19]

In the 1954 Term, however, Warren began his shift toward the Black-Douglas wing of the Court. He wrote all four of the Court's signed opinions in "Communist" cases—all adverse to the government. In a trio of contempt-of-Congress cases, the Court sustained the defendants' self-incrimination pleas, reversing their convictions. The decisions were not earth-shaking: the procedural requirements the Court announced for congressional committees when a witness refused to answer on Fifth Amendment grounds were ones easily complied with.[20]

In the fourth decision, a federal-employee loyalty case that bristled with constitutional issues, the Court set aside the firing of John P. Peters, a Yale professor who served as a consultant to the U.S. Public Health Service, on a narrow procedural ground not argued by the parties. It held that a loyalty review board, created during the Truman Administration but since abolished, was not authorized to review

decisions by departmental loyalty boards in the employee's favor, as in Peters' case.[21]

The Court was accused of Communist sympathies in 1954; but the attack stemmed not from its "Communist" decisions but from *Brown*. Mississippi's James O. Eastland, in a Senate speech ten days after *Brown I*, stated

> Everyone knows that the Negroes did not themselves instigate the agitation against segregation. They were put up to it by radical busybodies who are intent upon overthrowing American institutions.

The Court, he continued, "has been indoctrinated and brainwashed by left-wing pressure groups." Eastland cited an award given Black in 1945 by "a notorious Communist-front organization." Douglas, he said, had urged recognition of Communist China, a "spectacle . . . for a man who sits on the highest tribunal of our country . . . openly to espouse the cause of our greatest enemy . . ."[22]

The flow of decisions in "Communist" cases became heavier in the 1955 Term, with the Court issuing nine signed decisions. The government won three, including a decision upholding the Immunity Act of 1954 (which allowed prosecutors to override witnesses' self-incrimination pleas in national-security cases by making immunity grants).[23]

In the most important "Communist" case on its docket, *Communist Party v. Subversive Activities Control Board*, reviewing the SACB's order under the Internal Security Act that the CPUSA register with the government and provide a list of its members, the Court, in a 6–3 decision, dodged the constitutional issues presented, remanding the case to the SACB because three of the twenty-two government witnesses had perjured themselves in other proceedings. "Justice Department lawyers said they were 'astounded' by the majority opinion," the *Washington Post* reported, and "[s]ome declared it may prove to be the most important Communist victory in the past decade."[24]

Three other decisions generated far more intense criticism. One involved the discharge on loyalty grounds of Kendrick Cole, an inspector in the Food and Drug Administration's New York district. Cole was fired under a 1950 statute that authorized an agency head summarily to terminate an employee "whenever he shall determine such termination necessary or advisable in the interest of the national security . . ." The statute as enacted applied only to eleven "sensitive" agencies (*e.g.*, the Atomic Energy Commission), but one of its provisions authorized the President to extend it to other departments as he "deem[s] necessary in the best interests of national security." Eisenhower, in a 1953 executive order, extended the statute to every job in the federal government. The Court held, however, by a 6–3 vote, in an opinion by Harlan, that the President was not authorized by the statute to extend it to employees in non-sensitive positions, such as Cole. The 1950 statute, it found, applied only to government activities "directly concerned with the Nation's safety" and to employees in "'sensitive' position[s]."[25]

Although, the *Times* reported, government officials saw "no difficulty in using regular personnel procedures to get rid of unreliable employees in non-sensitive areas," *Cole* immediately gave rise to legislation to overturn it. Senator Karl Mundt, a South Dakota Republican, termed it a "travesty" when

> six men in black robes can nullify our every effort and expose the internal workings of our Government to the stealthy espionage and sabotage of Communist agents whose services the government cannot now terminate unless the agency in which they work be designated "sensitive" or unless their individual positions are classified as "sensitive."

His bill made the 1950 statute expressly applicable to employees in non-sensitive jobs. Joseph R. McCarthy, the Wisconsin Republican who lent his name to the era, introduced

similar legislation, as did Eastland, chairman of the Senate Judiciary Committee and its Internal Security subcommittee (SISS), and Rep. Francis E. Walter, a Pennsylvania Democrat and HUAC's chairman.[26]

In the second decision, the Court, by 5–4 vote, set aside New York City's firing of Harry Slochower, a professor in German literature at Brooklyn College, for pleading the Fifth Amendment at a SISS hearing in response to questions about Communist affiliations. The Court, in an opinion by Clark, "condemn[ed] the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower*, McCarthy said in a Senate speech, "handed another solid victory to the Communist Party."[27]

The third, and most controversial, decision reviewed the conviction (and twenty-year prison sentence) of Steve Nelson, the CPUSA chief in Western Pennsylvania, under the state's little-used sedition statute, one of an assortment of statutes in forty-two states that criminalized sedition, anarchism, or syndicalism. Nelson's prosecution was directed exclusively to sedition against the federal government, and on appeal the Supreme Court of Pennsylvania held that the state's sedition law had been preempted by the Smith Act.[28]

The Court, by 6–3 vote, agreed that Pennsylvania's law was preempted. In an opinion by Warren, it found the federal scheme "so pervasive"—citing the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954—that "[l]ooking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition."[29]

Nelson caused widespread denunciation of the Court and the introduction of dozens of anti-Court bills in Congress. The *Times*'s Arthur Krock saw "[t]he most determined effort since 1938 . . . to check and reverse the trend of Supreme Court decisions." The *Times* reported that "[a]bout seventy" anti-Court bills had been introduced.[30]

On April 11, a week after *Nelson* was decided, McCarthy, terming the decision a ruling "that aid[s] the Communist Party," introduced a bill providing in substance that "no Federal antisubversion statute shall be construed to deprive the States of jurisdiction to enforce their own antisubversion or antisedition statutes." A group of twelve Republican Senators and three southern Democrats sponsored similar legislation. Howard W. Smith of Virginia, chairman of the House Rules Committee and author of the Smith Act, had earlier introduced, at the behest of private employers unhappy with Supreme Court preemption rulings favorable to labor unions, a universal anti-preemption bill, H.R. 3, providing that no state law was to be deemed preempted by federal law unless Congress had expressly stated such an intent—a mischievous bill, whose consequences were largely uncertain. After *Nelson*, H.R. 3 gained a widened group of supporters. As Walter F. Murphy explained, "the segregationists could curb the Court," "[t]he ultra-security-conscious could revitalize state sedition laws," and employers "could get the specter of federal supremacy removed from their legal closets."[31]

McCarthy, appearing before Eastland's SISS in May and June, attacked the Court on a variety of grounds, including the Justices' lack of prior judicial experience. Warren, McCarthy said, "had no judicial experience"; his "entire experience was as a politician." The two Senators agreed that "there is just one pro-Communist decision after another from this court," with Eastland asking:

> EASTLAND: What other explanation could there be except that a majority of that court is being influenced by some secret, but very powerful Communist or pro-communist influence?
>
> MCCARTHY: It is impossible to explain it. Either incompetence beyond words, Mr. Chairman, or the

type of influence which you mentioned.[32]

The judicial-experience issue was debated on the Senate floor in connection with a bill introduced by George A. Smathers, a Florida Democrat, to require that all future Supreme Court appointees have at least five years' judicial experience. "[M]ost members of the Senate," Smathers said, "and certainly many of the American people would prefer that we begin to get better trained legal minds to serve us on the Supreme Court of the United States."[33]

The Conference of State Governors, by an "almost unanimous vote," adopted a resolution stating that the governors are "gravely concerned" by the Court's preemption decisions. They "recommended to the Congress that Federal laws should be so framed that they will not be construed to preempt any field against state action unless this intent is stated."[34]

Added criticism came from a former member of the Court, James F. Byrnes, more recently the governor of South Carolina. Byrnes's May 18 article in *U.S. News & World Report* (its cover story), titled "The Supreme Court Must Be Curbed," appealed to "the court of public opinion" to "urge the Congress to act before it is too late." "The present trend," he wrote, "brings joy to Communists and their fellow travelers . . ."[35]

Lawyer groups joined the chorus. The National Association of Attorneys General, appearing before the Senate Judiciary Committee, urged passage of H.R. 3. Smith's bill was also approved by the American Bar Association's House of Delegates at its August meeting.[36]

In June, H.R. 3 was favorably reported by both the Senate and House Judiciary committees. But the House committee, chaired by Emanuel Celler, a liberal Brooklyn Democrat, limited its application to sedition laws. When the House Democratic leadership refused to bring the limited bill to the floor under a rule permitting it to be amended, Howard Smith, forced to choose between a sedition-only bill or waiting until next year (after the 1956 elections), chose to wait. The bills to overrule *Cole* had been reported by Eastland's SISS but not the full committee when Congress adjourned, on July 27.[37]

The Court's level of resistance to repressive McCarthy-era government action reached its zenith in the 1956 Term. It issued eleven signed decisions in "Communist" cases, and the government lost them all. Four were issued the same day, June 17, 1957, a day critics called "Red Monday." Two other significant cases were decided in *per curiam* opinions, again adversely to the government. The Court's performance, Lucas A. Powe wrote, was "nothing short of astounding."[38]

The decisions seemed almost to suggest diminished concern for adverse reaction. In a Smith Act case, *Yates v. United States*, the Court not only reversed the convictions of fourteen CPUSA officials but also made it more difficult (nearly impossible as it turned out) for the government to secure future Smith Act conspiracy convictions. A contempt-of-Congress decision, *Watkins v. United States*, sharply criticized the procedures employed by HUAC and indeed the entire House. And the Court twice overturned a state's refusal to admit former Communists to the practice of law, angering bar groups.[39]

The decision that most outraged public opinion was *Jencks v. United States*, which reversed the conviction of a union official for filing a false Taft-Hartley non-Communist affidavit. *Jencks*'s holding that the defense was entitled to examine reports to the FBI by two prosecution witnesses raised the specter of Communists rummaging through the FBI's confidential files—a view fostered by Clark's inflammatory dissent. Congress enacted legislation sharply curtailing the decision before the Justices returned from their 1957 summer vacation.[40]

The Court's opinion in *Jencks* was written by a new member, William J.

Brennan, Jr., formerly a justice of the New Jersey Supreme Court, chosen by Eisenhower to replace Minton, who retired for medical reasons. Brennan, a Democrat, joined the Court under a recess appointment two weeks after the Term began and quickly aligned himself with the Black-Douglas wing. Eisenhower gained another appointment when Reed retired in February 1957 and this time chose a Justice more attuned to his own views, Charles E. Whittaker, a federal judge from Missouri. But Whittaker did not join the Court until late March and had almost no impact on its direction during the Term.[41]

Yates was a prosecution of West Coast CPUSA officials. The fourteen defendants were convicted, as in *Dennis*, of "conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government . . . by force and violence and (2) to organize, as the [CPUSA], a society of persons who so advocate and teach" in violation of the Smith Act. A seven-Justice Court, in an opinion by Harlan (Clark alone voted to affirm), found the "organizing" charge barred by a three-year statute of limitations—the CPUSA, it said, was not "organized" continuously (as the government argued) but in 1945, when it changed its format, six years before the indictment was returned.[42]

More importantly, the Court held that the trial judge improperly withheld an essential issue from the jury's consideration. Both sides had requested, but the judge refused, a jury instruction that the defendants' advocacy must be "not of a mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language . . . calculated to incite persons to such action." An instruction of this kind was essential, the Court found, because the Smith Act did not prohibit "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end . . ."[43]

Measuring the evidence in the 14,000-page record against this standard, the Court found that

> Instances of speech that could be considered to amount to "advocacy of action" are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value.

The Court ordered the acquittal of five defendants and as to the remaining nine allowed them to be retried under "proper legal standards."[44]

The Justice Department, faced with *Yates*'s insistence upon proof of advocacy to "*do* something, now or in the future, rather than merely to *believe* in something," soon admitted that "we cannot satisfy the evidentiary requirements laid down by the Supreme Court" and dismissed the charges against the remaining *Yates* defendants. It also dismissed other Smith Act conspiracy prosecutions pending in eight cities.[45]

Watkins, like earlier reversals of contempt-of-Congress convictions, was directed to a procedural flaw easily remedied by the committees. The witness, John T. Watkins, a former union official, refused to give HUAC the names of associates who he believed had "long since removed themselves from the Communist movement." He did not invoke the Fifth Amendment but challenged the relevance of the questions "to the work of this committee" and its "right to undertake public exposure of persons because of their past activities."[46]

The Court, by a 6–1 vote (only Clark dissented), in an opinion by Warren, admonished Congress that its investigations "must be related to, and in furtherance of, a legitimate task of the Congress" and not "conducted solely for the personal aggrandizement of the investigators, or to 'punish' those investigated . . ." It said that investigations being

"part of lawmaking" were "subject to the command" of the First Amendment. But its holding was narrow. Because "[n]o witness can be compelled to make disclosures on matters outside" a committee's "legislative sphere," it held, a person forced "to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent." Since HUAC failed to explain the pertinency of its questions to Watkins, he was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer . . ."[47]

In the first of the bar-admission cases, Rudolph Schware, admittedly a CPUSA member between 1932 and 1940, was denied admission by New Mexico's bar examiners on the ground he lacked "the requisite moral character for admission to the Bar . . ." The Court, however, without dissent, in an opinion by Black, found "no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." Schware joined the CPUSA, it said, at a time "when millions were unemployed and our economic system was paralyzed [and] many turned to the Communist Party out of desperation or hope." His "past membership in the Communist Party," the Court found, "does not justify an inference that he presently has bad moral character."[48]

The second bar admission case was more difficult for the Court because Raphael Konigsberg, unlike Schware, refused to answer whether he had been a CPUSA member. The California bar examiners denied him admission on the ground he failed to prove either "good moral character" or that he did not advocate forcible overthrow of the government. The Court, however, dividing 5–3, again in an opinion by Black, held that "the evidence does not rationally support the only two grounds upon which the [bar examiners] relied . . ." A witness did testify that Konigsberg attended meetings of a CPUSA unit in 1941. But "[e]ven if it be assumed" he was a CPUSA member in 1941, the Court said, "the mere fact of membership" would neither "support an inference that he did not have good moral character" nor "provide a reasonable basis for a belief that he presently advocates overthrowing the Government by force."[49]

In *Jencks*, prosecutors charged Clinton Jencks, president of a Mine, Mill & Smelter Workers local, with filing a false non-Communist affidavit. They relied on the testimony of two paid undercover FBI informers, both ex-Communists—Harvey Matusow and J.W. Ford. (A year after Jencks's trial, Matusow made a highly publicized recantation, which included disavowal of his testimony against Jencks.) During the periods covered by their trial testimony, both Matusow and Ford had given reports to the FBI. But the trial judge denied Jencks's motion to compel the government to produce the reports.[50]

The Court, with only one dissent, ruled that the defense was entitled to obtain the witnesses' reports to the FBI to impeach their trial testimony. Brennan's opinion, joined by four other Justices, held the defense was not required, in order to obtain the reports, to show they were in conflict with the witness's trial testimony (as the government contended) and need only show they related to "the events and activities as to which [the witnesses] testified at trial." Nor, the Court said, must the reports be produced to the trial judge *in camera* "for his determination of relevancy and materiality" because "only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness . . ."[51]

Clark's lone dissent condemned the Court's decision in extravagant terms and invited congressional action:

> Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may 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.[52]

"[T]he decisions of the 1956 Term," Walter Murphy wrote, "transformed congressional criticism into militant opposition . . ." The press condemned the decisions. The *Cleveland Plain Dealer* said about *Yates*: "Well, Comrades, you finally got what you wanted. The Supreme Court has handed it to you on a platter." *Watkins*, the *Washington Evening Star* said, will likely "cripple the investigative function of Congress." By its decision in *Jencks*, the *New York Herald-Tribune* wrote, the "Supreme Court is in effect destroying the essence of the FBI." The *New York Daily News* suggested that "if a movement should start in Congress to impeach one or more of the learned justices, it might have much popular support."[53]

The legal profession intensified its criticism. At a session in London of the American Bar Association's annual meeting, with Warren, Harlan, and Clark in attendance, Herbert R. O'Conor, a former U.S. Senator, presenting the report of the ABA's committee on Communist tactics, strategy and objectives, told its House of Delegates (which approved the report without dissent) that national security may be endangered if courts "lean too far backward in the maintenance of theoretical individual rights." Not only *Jencks* legislation was needed, he said, but also legislation to overturn *Cole*, *Yates*, *Watkins*, and *Slochower*. Warren, angered by the report, which he later termed "a diatribe against" the Court "charging it with aiding the Communist cause," resigned his membership in the ABA. The ABA told the press that Warren had been dropped from membership for "non-payment of dues."[54]

The National Association of Attorneys General, convened in Sun Valley, Idaho, heard its president, New Hampshire's Louis C. Wyman, charge that the Court's decisions "have set the United States back twenty-five years in its attempt to make certain that those loyal to a foreign power cannot create another Trojan horse here." It called for immediate legislation "to reaffirm and reactivate Federal and state internal security controls."[55]

Criticism of *Jencks* had the most immediate results. The FBI threatened—J. Edgar Hoover "is understood to have passed the word," the *Times* said—to "drop out of some espionage and other criminal cases if . . . necessary to protect its confidential informants." Attorney General Brownell stated the decision created "a grave emergency in law enforcement." The White House announced it "would 'urge' Congressional adoption of legislation" directed at *Jencks*.[56]

The Administration's bill curtailed the decision by mandating *in camera* inspection by the trial judge and limiting disclosure to statements "signed . . . or otherwise adopted or approved" by the witness. On July 1 and 2, less than a month after the decision, the Judiciary committees in both houses approved the bill. The Senate passed a less stringent bill, but the House in substance passed the Administration bill, by a 351–17 margin. A conference version easily cleared both Houses prior to adjournment and became law on September 2.[57]

The enactment of *Jencks* legislation by no means ended the calls for anti-Court action by the Congress. H.R. 3, Howard Smith's anti-preemption bill, had been reintroduced in early 1957; the House would approve it in 1958. Legislation to overturn *Cole* was reported favorably by the House Post Office and Civil Service Committee.[58]

In July 1957, William E. Jenner, an Indiana Republican and SISS's former chairman, introduced the most far-reaching of the anti-Court bills. His bill would strip the Court of jurisdiction in five categories of cases, denying it authority to review cases involving contempt of Congress, the federal loyalty-security program, state anti-subversive

statutes, measures adopted by boards of education to deal with subversion among teachers, and admission to the practice of law in any state. Jenner accompanied the introduction of his bill with an extended, decision-by-decision attack on the Court. The Court, he said, "has dealt a succession of blows at key points of the legislative structure erected by Congress for the protection of the internal security of the United States against the world Communist conspiracy."[59]

Within days, Jenner's bill was accorded a hurried hearing before Eastland's SISS and reported favorably. The following week, Eastland sought approval of the bill by the full Judiciary committee. But Thomas C. Hennings, Jr., a liberal Missouri Democrat, citing the absence of opposition witnesses at SISS's hearing, proposed that the bill be kept until the next session so that full hearings could be held. Jenner's motion to table Hennings' proposal failed by one vote, and further hearings on the bill were postponed to 1958.[60]

"The anti-Court bills," Lucas Powe wrote, "caused Frankfurter to get religion

Oleta O'Connor Yates, a Communist Party official in California and the lead defendant in the Court's 1957 *Yates* decision, is shown here in 1954 addressing dock workers in San Francisco.

again." The Justice believed, Powe explained, that Congress was questioning "whether an independent judiciary might be too high a price to pay when the cost was the eradication of the loyalty-security program . . . Frankfurter was ready to save the Court; prudence dictated the Court yield in this area." This view, almost incontrovertible in succeeding Terms, was only partially confirmed in the 1957 Term.[61]

The continued heavy flow of "Communist" cases produced fourteen signed decisions. The outcomes were mixed, but they revealed a shift in the Court's direction. The government prevailed in two state public-employee loyalty cases (decisions that reduced *Slochower* to insignificance) and three criminal contempt cases (in one, the Justices had decided for the defendant the preceding Term but Frankfurter switched sides after reargument). However, it lost two important decisions finding the State Department without authority to deny passports on political grounds, five deportation decisions, and two narrow rulings invalidating state laws that conditioned the receipt of government benefits on signing a non-Communist oath.[62]

Frankfurter was on the winning side in all but one of the decisions, including all five—four by 5–4 vote—in the government's favor. In those decisions, he led a five-Justice bloc that included Harlan, Burton, Clark, and Whittaker. However, he was also the swing vote against the government in the passport cases, joining Black, Douglas, Warren, and Brennan.[63]

The clearest sign of the Court's shift was in the state loyalty decisions. In the two cases, a Philadelphia public school teacher, Herman A. Beilan, was fired for "incompetency" and a New York City subway conductor, Max Lerner, for being of "doubtful trust and reliability" and thus a security risk, after each invoked the Fifth Amendment in response to his employer's questions about Communist activities. In *Slochower*, two years earlier, the Court ruled that New York City could not lawfully discharge a public employee for invoking the Fifth Amendment before a Senate committee. In *Beilan* and *Lerner*, however, the Court sustained the discharges, providing states and cities with a how-to guide: when firing employees who plead the Fifth Amendment, use words such as "fitness," "candor," "reliability," "trust," and "competence" and never mention the Fifth Amendment.[64]

The contempt prosecution in which Frankfurter switched sides stemmed from a denaturalization proceeding in which the government sought to strip Stefena Brown, a Polish immigrant, of her citizenship for lying about membership in Communist organizations when she was naturalized. In the previous Term, Frankfurter drafted an opinion of the Court, in which Black, Douglas, Warren, and Brennan were to join, holding that a 1919 decision mandated reversal of Brown's contempt conviction. After reargument, he found the 1919 precedent inapposite and wrote the Court's opinion affirming her conviction, this time joined by Harlan, Burton, Clark, and Whittaker.[65]

In the passport cases, however, Frankfurter did not desert the four liberals. The decisions reviewed the government's policy—a corollary to deporting aliens for CPUSA membership—of barring citizens with left-wing associations from leaving the country by denying them passports. Those denied passports were often renowned artists, such as singer-actor Paul Robeson, blacklisted at home but employable in Europe, and playwright Arthur Miller, invited to attend a Brussels premiere of *The Crucible*, and scientists, such as Linus Pauling, asked to lecture abroad.[66]

In *Kent v. Dulles*, the Court overturned the State Department's denial of a passport to Rockwell Kent, "one of America's foremost artists" and a self-styled socialist. The Court, in a 5–4 decision written by Douglas, stated that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot [be]

deprived without the due process of law under the Fifth Amendment . . ." But its holding was not based on the Constitution: Congress, it held, had not authorized the State Department to withhold passports from citizens on the basis of their political affiliations.[67]

The Court's limited rationale did not mitigate the criticism generated by *Kent*. The *Times*'s Arthur Krock repeated with approval Rep. Kenneth Keating's comment that "[w]e cannot allow individual citizens [to travel abroad] without let or hindrance, spewing out their anti-American vitriol everywhere." David Lawrence wrote in *U.S. News & World Report*, "If the Supreme Court had ruled that treason now is lawful, it could not have dealt a more devastating blow to the safety of the people of America . . ." The day after the decisions were issued, Francis Walter introduced legislation to overturn them; so, a day later, did Eastland, characterizing the Court's action "as again lavishly deferring to communism . . ." Eisenhower urged corrective legislation, stating that "[e]ach day and week that passes without it exposes us to great danger."[68]

An assortment of Court-curbing bills moved through the congressional maze during the spring and summer of 1958. Jenner's jurisdiction-stripping bill was "the most fundamental challenge to judicial power," Walter Murphy said, since the days of FDR's Court-packing proposal. To enhance his bill's chances, Jenner endorsed a substitute bill offered by John Marshall Butler, a Maryland Republican. Under the substitute, the Court would be stripped of jurisdiction in only one subject area, state bar admission cases; but other provisions overturned *Yates* (both its interpretation of the Smith Act term "organize" and its holding that the Act did not bar abstract advocacy), *Nelson*, and *Watkins*. The Jenner-Butler substitute was reported favorably by the Senate Judiciary Committee in May.[69]

Other anti-Court bills progressed more rapidly. Smith's H.R. 3, passed the House by a 241–155 margin on July 17. *Nelson*-only bills (*i.e.*, directed to sedition laws only), supported by the Eisenhower administration, were reported favorably by the House and Senate Judiciary Committees. A bill to reverse *Cole*, a substitute for a quite different bill the Senate had approved, passed the House on July 10 by a 298–46 vote and proceeded to a House-Senate conference. A *Yates*-"organize" bill passed the House without a roll-call vote. The House Foreign Affairs Committee held hearings in July and August on legislation to overturn the passport decisions; a bill was passed by the House, without a roll-call vote, on August 23.[70]

Lyndon B. Johnson, the Senate majority leader, kept the anti-Court bills from reaching the Senate floor until late in the session. Then, under pressure from the bills' supporters, and assured by his floor managers, Hubert Humphrey and Thomas Hennings, that they had the votes to defeat the measures deemed most objectionable—the Jenner-Butler bill and H. R. 3—he allowed several of the bills to reach the floor.[71]

On August 20, the Senate considered the Jenner-Butler bill. Jenner, explaining why he introduced the bill, referred to "a long line of cases, involving Communists and subversive activity, in which the Court had accepted, point after point, the legal propositions advanced by the Communists . . ." Hennings responded that the bill presaged "future attempts to strip the Court of its jurisdiction whenever there is disagreement with its decisions." His motion to table the bill prevailed, and the bill died, by a 49–41 vote.[72]

In the early evening, the Senate turned to a *Nelson*-only bill and a motion by John L. McClellan, an Arkansas Democrat, to amend the bill by adding the text of H.R. 3 to it. The vote on McClellan's amendment—a vote on H.R. 3—was not simply a reprise of the Jenner-Butler vote. Because H.R. 3 overturned not only *Nelson* but also federal-preemption decisions adverse to employers, it drew support from the Chamber of

Republican Senator William E. Jenner (left), shown with Attorney General Herbert Brownell (center) and FBI director J. Edgar Hoover (right) at a 1953 Senate Internal Security Subcommittee hearing, sponsored legislation to strip the Court of jurisdiction in five subject areas.

Commerce, National Association of Manufacturers, and American Farm Bureau, all of whom had lobbied for it intensively. When Hennings moved to table McClellan's amendment, his motion was defeated, by a 46–39 vote. An immediate motion to reconsider failed by a 47–40 margin. Passage of the bill, including H.R. 3, was now imminent.[73]

Johnson, surprised by the turn of events, noted that "[i]t is 11:30 in the evening" and moved to adjourn the Senate until noon the next day. McClellan and Jenner, with victory at hand, opposed adjournment, demanding a roll-call vote on Johnson's motion; but it passed easily.[74]

When proceedings resumed the next day, the Senate debated a motion to send the bill back to committee while Johnson "talked to senators from both parties, arguing, cajoling, pleading even threatening." In the roll-call vote that followed, three conservatives, one of them Everett Dirksen, the GOP whip, supporters of the bill only hours earlier, switched sides. Another supporter stayed outside the Senate chamber. But two moderates, previously opposed to the bill, defected. When Johnson's count showed he needed one more switch, he turned to Wallace Bennett, a conservative Utah Republican and a supporter of Vice President Richard Nixon's 1960 presidential bid. Johnson told Bennett that as matters stood the vote would be a tie and, in Robert Caro's words,

> a tie vote would have to be broken by Nixon, and no matter how Nixon voted . . . the vote would hurt Nixon's chances to become President: he would have to antagonize either liberals or conservatives.

With Bennett voting in favor of the motion, the bill was sent back to committee by a 41–40 vote, killing it. "The final result of the court debate," the *Times*'s Anthony Lewis wrote the next morning, "was one of the great triumphs of Mr. Johnson's career as a Senate strategist."[75]

Nor did any of the other anti-Court bills, caught in the end-of-session stampede, become law. The *Nelson*-only bill, which would

easily have passed the Senate, was yoked to H.R. 3 and sent back to committee. The bill overruling *Cole* was agreed on by House-Senate conferees and approved by the House on August 22. But, after a conversation on the Senate floor between Johnson and the Senate and House committee chairmen, the conference bill was not called up in the Senate. And the *Yates*-"organize" and passport bills, both passed by the House, were not reported out of committee in the Senate.[76]

The Justices, however, had little cause for celebration for, as Warren later wrote, "[s]ome of this legislation, evoking as it did the atmosphere of Cold War hysteria, came dangerously close to passing."[77]

As the 1958 Term began, Harold Burton announced his retirement from the Court. His successor, nominated by Eisenhower the following day, was Potter Stewart, like Burton an Ohio Republican, only forty-three years old, and a Federal Court of Appeals judge. Stewart joined the Court on October 14 under a recess appointment.[78]

The 1958 congressional elections, on November 4, resulted in a sweeping victory for the Democrats—particularly in the Senate, where they gained sixteen seats—and reduced anti-Court ranks. Of the forty-one senators who supported the Jenner-Butler bill in the August 20 roll-call vote, four were defeated and two, including Jenner himself, retired and were replaced by moderate Democrats.[79]

The Court, however, conscious of its narrow escape from punitive legislation, quickened its retreat from the decisions of the 1955 and 1956 Terms. The flow of decisions in "Communist" cases, heavy in each of the preceding two Terms, slowed in the 1958 Term, when it issued seven signed decisions, and more so in the 1959 Term, with only two signed decisions and two via *per curiam* opinions. In the 1958 Term, the government prevailed in two major First Amendment decisions, and in the 1959 Term it won every one of the handful of cases decided.[80]

Frankfurter was now a consistent vote for the government and, more clearly than before, the leader of a five-Justice conservative majority (with Stewart replacing Burton) in "Communist" cases. The Black-Douglas wing did not retreat: virtually every decision won by the government was by 5–4 vote.

The First Amendment decisions, *Barenblatt v. United States* and *Uphaus v. Wyman*, were contempt cases. The issue decided was one the Court had avoided deciding for years: whether legislative committees may, consistently with the First Amendment, compel witnesses to disclose "Communist" associations. In *Barenblatt*, a HUAC contempt-of-Congress case, Lloyd Barenblatt, a thiry-one-year-old psychology instructor at Vassar College, refused to answer "have you ever been a member" questions but declined to invoke the Fifth Amendment, relying instead on the First. Whether the First Amendment protected his refusal to answer, the Court held, in an opinion by Harlan, turned on a balancing test:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

The government won. Congress, the Court said, has unquestioned power "to legislate in the field of Communist activity," a power that "rests on the right of self-preservation . . ."[81]

Uphaus involved the refusal of an elderly New Hampshire adult-camp director, Willard Uphaus, a pacifist, to provide the names of guests to the state's attorney general, Louis C. Wyman, whom the state legislature authorized "to determine whether subversive persons . . . are presently located within this state." The Court measured Uphaus's First Amendment claim by a balancing test, won by the State. New Hampshire's investigation, the

Court said, was "undertaken in the interest of self-preservation . . ."[82]

The only significant decision against the government during the two Terms was *Greene v. McElroy*, which addressed but did not decide the constitutional issue whether the government could revoke a security clearance essential to an individual's job on the basis of undisclosed information supplied by informants it would not name. The Court held (as in the passport cases) that the secretary lacked authorization to do so. Bills to overturn *Greene* were quickly introduced in both houses of Congress.[83]

Although the anti-Court forces in the Congress were thinned in the 1958 elections, they remained formidable, and lawyer groups again provided strong support for anti-Court legislation. A resolution of the Conference of Chief Justices (composed of chief justices of state supreme courts), adopted by a 36–8 margin, warned the Court to exercise "judicial self-restraint" and to recognize "the difference" between that which "the Constitution may prescribe or permit" and "that which . . . a majority of the Supreme Court . . . may deem desirable or undesirable . . ."[84]

The ABA's House of Delegates, in February 1959, approved (with only slight changes in language) the recommendations of its committee on Communist tactics, strategy, and objectives. "Many cases," the committee reported, "have been decided in such a manner as to encourage an increase in Communist activity in the United States"—it listed no fewer than twenty-four "principal" cases. The committee urged the adoption of bills to overrule *Nelson* and *Cole*; to overturn *Yates*'s interpretation of "organize" and ban abstract advocacy of forcible overthrow; and to authorize the Secretary of State to withhold passports "based upon confidential information . . ." The ABA's action, Anthony Lewis wrote, "added up to a charge that the court has been soft on communism."[85]

Anti-Court legislation was again successful in the House. In March 1959, a *Yates*-"organize" bill passed without debate. In June, Smith's H.R. 3 was again passed. Passport legislation was passed in September (although liberals succeeded in gaining important procedural rights for persons refused passports). And Walter's bill to provide the authorization found lacking in *Greene* passed in February 1960.[86]

All of the House-passed bills, however, died in the Senate. Most never made it out of committee, and none had reached the Senate floor for a vote when Congress adjourned.

The 1960 Term saw a final outpouring of decisions in "Communist" cases—fifteen signed decisions. The government prevailed in nine (a tenth had a mixed result), every one over the dissenting votes of Black, Douglas, Warren, and Brennan. The decisions included *Scales v. United States*, which upheld the constitutionality of the Smith Act's "membership" clause, and *Communist Party v. SACB*, which sustained the registration provisions of the Internal Security Act of 1950. Decisions in two contempt-of-Congress cases confirmed that after *Barenblatt* the First Amendment posed no obstacle to committees seeking to compel disclosure of "Communist" affiliations. And in two bar-admission cases, the Court ruled in effect that states may deny admission to any applicant who refuses to disclose his political associations. Of the five cases decided against the government, only one—a largely unnoticed companion case to *Scales*—had any continuing significance.[87]

Committee-contempt cases flooded the Court and gave rise to five signed decisions. In one, Frank Wilkinson, a forty-three-year-old political activist for a group advocating HUAC's abolition, was subpoenaed by HUAC and refused to answer an "are you a member" question. The Court dismissed his First Amendment claim as having been "thoroughly canvassed by us in *Barenblatt*."[88]

One of the bar-admission decisions reviewed California's second rejection of Raphael Konigsberg, who again refused to say whether he had once been a CPUSA

member. This time, the State excluded him on the ground that "his refusals to answer had obstructed a full investigation into his qualifications." The Court rejected his First Amendment challenge, applying a balancing test again won by the government.[89]

Scales arose under the Smith Act's "membership" clause, which made it a felony if a person knowingly "becomes or is a member" of a "society . . . of persons who teach, advocate, or encourage" violent overthrow of the government. When *Yates*'s proof requirements caused the government to abandon Smith Act conspiracy prosecutions, membership-clause cases assumed enhanced importance. But the cases presented issues the Court was in no hurry to decide. *Scales* reached the Court during the 1955 Term, was argued, put over for reargument, and then remanded for a new trial on *Jencks* grounds. When the case returned during the 1958 Term, the Court, after again hearing argument, ordered reargument in the 1959 Term and then at the start of the 1960 Term. By the time of his second trial, Junius Irving Scales, previously the CPUSA's chief for the Carolinas, had quit the Party.[90]

The Court, in an opinion by Harlan, affirmed Scales's conviction, rejecting his First Amendment challenge to the statute. Much of Court's lengthy opinion, as in *Yates*, was directed to the sufficiency of the evidence. It reaffirmed that *Yates* required proof that "there was 'advocacy of action'" by the Party. But this time it found the prosecution's evidence "sufficed to make a case for the jury on the issue of illegal Party advocacy."[91]

In the companion case to *Scales*, however, a membership-clause prosecution of John Francis Noto, a CPUSA official in Buffalo, the Court, without dissent, found the evidence insufficient. It held that the "kind of evidence" found in *Scales* "to support the jury's verdict of present illegal Party advocacy is lacking here to any adequately substantial degree."[92]

After *Scales* and *Noto*, the Justice Department reviewed its pending membership-clause prosecutions and in succeeding months abandoned every one. "*Yates* had made conspiracy prosecutions impossible," Michal Belknap wrote, "and now the membership clause too was a spent bullet."[93]

CPUSA v. SACB also had "a long history," beginning in 1950. In the 1955 Term, the Court set aside the SACB's registration order and remanded the case because of perjuries by government witnesses.[94]

Registration under the Internal Security Act entailed submitting a form signed by a CPUSA officer and containing the names and addresses of its officers and members. Filing triggered a laundry list of sanctions against both the Party and its members. Members, among other things, were barred from employment by the federal government, any defense facility, or any labor union, and prohibited from obtaining or using a passport. Alien members were barred from becoming naturalized citizens.[95]

The Court, in a 112-page opinion by Frankfurter, upheld the SACB's order. It held that the Act's registration scheme neither violated the First Amendment nor constituted a bill of attainder, and it dismissed as "premature at this time" the Party's claim that, since the registration form must be signed by one of its officers, "the very act of filing" would compel the officer to incriminate himself. The Court also refused to decide constitutional issues raised by the Act's post-registration sanctions, finding it "wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport, or seek government or defense-facility or labor-union employment, or being an alien, become a party to a naturalization . . . proceeding."[96]

The CPUSA, however, refused to register. The government prosecuted it for failing to register and, in 1962, obtained a conviction and fine. But a court of appeals reversed, holding the government was obligated to prove that a signer for the registration form

was available. At a second trial in 1965, two paid FBI informants testified they had offered to register the Party, and the government obtained a new conviction. But in March 1967 the court of appeals again reversed, this time on Fifth Amendment grounds. In the interim, in 1965, the Court had ruled unanimously that two Party members, ordered to register by the SACB, could invoke the Fifth Amendment because the "risks of incrimination" in registering as a Party member "are obvious." In April 1967, the government abandoned its more than sixteen-year effort to compel the CPUSA to register. "[N]ot a single individual or group," the *Times* reported, "ever registered with the Attorney General, as required by the act."[97]

In June 1961, however, when *CPUSA v. SACB* was decided, these subsequent defeats were not readily foreseeable. The McCarthy era had waned but not yet ended. In the Eighty-Seventh Congress, which began in January 1961, Smith's anti-preemption bill, still numbered H.R. 3, was approved by the House Judiciary Committee but failed to pass either house. A *Yates*-"organize" bill passed the House but died in the Senate.[98]

The 1961 Term saw two Justices leave the Court, both unexpectedly for health reasons. Whittaker retired on March 29, 1962, after a nervous breakdown. Only a week later, Frankfurter, seventy-nine years old, collapsed at his desk from a stroke and, following a three-month hospital stay and a period of convalescence at home, reluctantly retired—in August after the Term had ended.[99]

The number of decisions in "Communist" cases dropped sharply—only three signed decisions. The decisions were in routine cases—a false Taft-Hartley affidavit prosecution, a challenge to Florida's loyalty oath for public employees, and a group of contempt-of-Congress cases collected in a single decision. The first two were decided by a nine-Justice Court prior to Whittaker's and Frankfurter's illnesses. The government won the false-affidavit case by the usual 5–4 vote; in the loyalty-oath case, the words of the oath were so obviously unclear in application that the Justices voted unanimously to invalidate it. The third decision, issued late in the Term by a seven-Justice Court, reversed six contempt-of-Congress convictions, by a 5–2 vote, on a narrow procedural ground.[100]

The most significant "Communist" case considered during the Term was not decided because the Justices, divided 4–4 following Whittaker's retirement, ordered reargument. The case, *Gibson v. Florida Legislative Investigation Committee*, marked a convergence of what had been separate lines of decision in NAACP and "Communist" cases.[101]

After *Brown*, the Justices had "allied themselves with the NAACP," Michal Belknap wrote, "shielding it from attack by southern authorities." In a string of cases (*NAACP v. Alabama*, *Bates v. Little Rock*, *Shelton v. Tucker*), the Court, invoking a First Amendment "freedom of association," protected the names of NAACP members from disclosure to southern jurisdictions. These decisions stood in stark contrast to its decisions in "Communist" cases. In the case of Willard Uphaus, imprisoned for refusing to disclose the names of guests at his adult summer camp, Douglas, joined by Warren and Black, had pleaded in vain that "[a]ll groups—white or colored" should receive "the same protection against harassment as the N.A.A.C.P. enjoys."[102]

In *Gibson*, a Miami NAACP official, Theodore R. Gibson, was convicted of contempt after refusing a Florida committee's demand for an NAACP membership list to facilitate the identification of persons who were also CPUSA members. The case required the Court to decide whether its practice of shielding NAACP membership lists from disclosure to southern states was trumped by a state's claim that it needed the list to hunt Communists. At conference, in December 1961, the five-Justice majority

voted to sustain Gibson's conviction, and in March Harlan circulated a draft opinion of the Court. But with Whittaker's departure, a necessary fifth vote was lost, and Harlan's opinion was not issued.[103]

The departure of the two Justices was the Term's central event. Whittaker performed no work after February 1 and on March 6 was admitted to Walter Reed Hospital, physically and mentally exhausted. On March 29, his retirement was announced by President Kennedy who, the following day, appointed a successor, Byron R. White, the deputy attorney general. White joined the Court on April 16 but did not participate in any of the Term's "Communist" decisions. In subsequent years, like Whittaker, he regularly sided with the government in "Communist" cases.[104]

Frankfurter's stroke occurred as he worked in his Chambers on April 5th. He was taken by ambulance to George Washington University Hospital. Weeks later, a second stroke "left him with his speech slightly impaired and with difficulty in the use of an arm and leg." On August 28, he advised the President he would retire. His successor, announced the next day, was Arthur J. Goldberg, JFK's Secretary of Labor.[105]

As a Justice, Goldberg voted with the Black-Douglas wing in "Communist" cases, irrevocably tipping the Court's balance and bringing its McCarthy era to an end. When *Gibson* was reargued in the 1962 Term, Goldberg wrote the Court's opinion reversing the conviction.[106]

In subsequent years, as the flow of "Communist" cases slowed to a trickle, a new majority ruled repeatedly against the government—and not only, as in prior years, on narrow rationales. In the 1963 Term, the Court held unconstitutional on due process grounds the Internal Security Act section that made it a felony for CPUSA members to apply for a passport. In the 1965 Term, it held that CPUSA members may invoke the Fifth Amendment and refuse to comply with SACB registration orders. And in the 1967 Term, it held unconstitutional on First Amendment grounds the Internal Security Act provision that made it a crime for a CPUSA member to be employed at a defense facility. The provision was overbroad, the Court said, because it applied to "passive or inactive members" and those "unaware of" or who "may disagree with" the Party's unlawful aims.[107]

"[I]f anti-Communist extremism was the Dracula prowling the mid-century darkness of American politics," Richard M. Fried wrote, "it was the Supreme Court that drove the fatal stake through its heart." Fried did not exaggerate much.[108]

Largely as a result of the Court's actions, the two most repressive laws in the government's arsenal—the Smith Act and the Internal Security Act's registration scheme—were ultimately rendered useless. The constitutionality of the Smith Act was of course upheld in *Dennis* and *Scales*; but after *Yates* and *Noto*, the government could not prove a violation. Similarly, *Communist Party v. SACB* upheld the Internal Security Act's registration scheme; but the Court was able to consume a full decade before issuing that decision and then deferred ruling on key self-incrimination issues. When no one registered, the government, by then in a changed political climate, was unable to do anything about it.

There was more. *Nelson* blocked prosecutions under state sedition statutes that held a serious potential for abuse. *Cole* held that summary dismissals of federal employees on loyalty grounds were authorized only for those holding sensitive positions. *Kent* led to the issuance of passports to hundreds of Americans previously barred from traveling abroad.

Still, the Court's retreat from the decisions of the 1955 and 1956 Terms was real. *Watkins*' assurance that legislative investigations were "subject to the command" of the First Amendment came to naught. *Slochower*

Chief Justice Warren, who voted and wrote often in favor of accused Communists, received more criticism than any other Justice. Pictured is one of the ubiquitous "Impeach Earl Warren" signs, this one in Belmont, Massachusetts in 1962.

became a nullity: any public employee could be fired merely for pleading the Fifth Amendment so long as the proper words were used. After *Konigsberg II*, any bar applicant could be denied admission if he refused to disclose political associations.

Frankfurter, more than any other Justice, determined the Court's direction and led its retreat. He "always was fearful that the Court would injure itself," Arthur Goldberg said, and "[t]his was his principal concern, always." Black, leader of the Court's other bloc, was untroubled by such considerations and cast his votes oblivious to the political consequences. Douglas issued the stay of execution in *Rosenberg* knowing he would receive a torrent of personal abuse. Warren, *Brown*'s author, who also voted and wrote often in favor of accused Communists, received more abuse than any other Justice. By the late 1950s, America's landscapes "blossomed with 'Impeach Earl Warren' billboards . . ."[109]

Alexander Hamilton foresaw it all.

Editor's Note: The author is a San Francisco attorney. This article is derived from his recent book **The Supreme Court and McCarthy-Era Repression: One Hundred Decisions** (Urbana: University of Illinois Press, 2012).

ENDNOTES

[1] See, *e.g.*, Geoffrey R. Stone, **Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism** (New York: W.W. Norton, 2004); Robert Justin Goldstein, **Political Repression in Modern America: From 1870 to 1976** (Urbana: Univ. of Illinois Press, 2001).

[2] Brennan, "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises," Address, Law School of Hebrew University, Jerusalem, Israel, Dec. 22, 1987 (available at http://www.hofstra.edu/PDF/law_-civil_hafetz_article1.pdf) (quote, 1). Also reported at 18 *Isr. Y.B. on Hum. Rts.* 11 (1988).

[3] James Madison, Alexander Hamilton and John Jay, **The Federalist Papers** (London: Penguin Books, 1987), Isaac Kramnick ed., 440–41.

[4] *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United*

States, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Gilbert v. Minnesota*, 254 U.S. 325 (1920); Harry Kalven, Jr., **A Worthy Tradition: Freedom of Speech in America** (New York: Harper & Row, 1988), 147. In *Schaefer*, the Court reversed the convictions of two (of five) defendants on grounds of insufficient evidence. 251 U.S. at 471.

[5] The term "'Communist' cases" is used here to mean the entire array of cases dealing with the prosecution, firing, or deportation of current or former Communists or "subversives." By the author's count, the Court issued ninety-five signed decisions in "Communist" cases and six decisions, on the merits after argument and over dissents, in *per curiam* opinions; it affirmed by an equally divided court without opinion in two cases.

[6] See generally Michal Belknap, **The Vinson Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2004).

[7] *Dennis v. United States*, 339 U.S. 162 (1950) (contempt of Congress);*United States v. Bryan*, 339 U.S. 323 (1950) (same); *United States v. Fleischman*, 339 U.S. 349 (1950) (same); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (exclusion from U.S.); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (Taft-Hartley oath).

[8] *Dennis v. United States*, 341 U.S. 494 (1951) (Smith Act); *Rogers v. United States*, 340 U.S. 367 (1951) (contempt); *Garner v. Board of Public Works*, 341 U.S. 716 (1951) (state loyalty); *Feiner v. New York*, 340 U.S. 315 (1951) (disorderly conduct); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (1871 statute); *Collins v. Hardyman*, 341 U.S. 651 (1951) (same). Government lost: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Attorney General's list); *Blau (Patricia) v. United States*, 340 U.S. 159 (1950) (contempt); *Blau (Irving) v. United States*, 340 U.S. 332 (1951) (same). Brennan, "The Quest to Develop," at 7 (quote).

[9] *Bailey v. Richardson*, 341 U.S. 918 (1951) (affirming a loyalty discharge by 4–4 vote without opinion) and *Joint Anti-Fascist* (reversing on narrow procedural grounds and remanding dismissals of lawsuits by listed organizations, by 5–3 vote with no opinion of the Court).

[10] *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation); *Carlson v. Landon*, 342 U.S. 524 (1952) (same); *United States v. Spector*, 343 U.S. 169 (1952) (same); *Heikkila v. Barber*, 345 U.S. 229 (1953) (same); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (exclusion from U.S.); *Sacher v. United States*, 343 U.S. 1 (1952) (lawyer contempt); *In re Isserman*, 345 U.S. 286 (1953) (disbarment); *Orloff v. Willoughby*, 345 U.S. 83 (1952) (doctor draft); *Adler v. Board of Education*, 342 U.S. 485 (1952) (state loyalty); Government lost: *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state loyalty); *Stack v. Boyle*, 342 U.S. 1 (1951) (bail); *Bridges v. United States*, 346 U.S. 209 (1953) (naturalization fraud); *Kwang Hai Chew v. Colding*, 344 U.S. 590 (1953) (exclusion from U.S.).

[11] *Adler* and *Wieman*.

[12] On the first occasion, Black, Frankfurter, and Burton voted to grant certiorari; on the second, Black, Frankfurter, and Douglas voted to grant. *Rosenberg v. United States*, 344 U.S. 838, 889 (1952) and 345 U.S. 965 (1953); Frankfurter Mem., June 4, 1953, at 1–4, 7–8, Frankfurter Papers, Harvard Law School, Part 1, microfilm reel 70.

[13] *Rosenberg*, 346 U.S. 273, 313–21 (appendix to Douglas, J., dissenting), 277–88 (opin. of Court), 288–89 (June 19 *per curiam*), 296–301 (Black, J., dissenting), 301–10 (Frankfurter, J., dissenting), 310–13 (Douglas, J., dissenting); Appl. to Convene Court in Special Term, June 17, 1953, Box A26, Folder 9, Clark Papers, Univ. of Texas-Austin; Vinson announcement, June 17, 1953, 6:00 p.m., Box 284, Rosenberg file, Vinson Papers, Univ. of Kentucky. Vinson's log (kept by a secretary) states that his meeting with Brownell was held from 12:25 to 1:10 p. m. on June 17. Box 299, Chief Justice's Log May–Sept. 1953, Vinson Papers. *New York Times*, June 20, 1953 ("Pair Silent to End").

[14] Frankfurter to Harlan, Oct. 23, 1956, Box 532, Frankfurter 1956 file, Harlan Papers, Princeton, NJ; Douglas, **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (New York: Random House, 1980), 83.

[15] *New York Times*, June 21, 1953, (A. Krock, "Case of the Rosenbergs Will Long Be Debated"); 99 *Cong. Rec.* 6888 (June 19, 1953).

[16] H. Res. 290, 83rd Cong., 1st Sess. (1953); *New York Times*, June 19, 1953 ("5 to Study Impeachment"), June 30, 1953 ("Justice Douglas Accused in House") (Wheeler quote), July 1, 1953 ("House Move to Impeach Douglas Bogs Down"); Douglas, *The Court Years*, 85–86 (quotes).

[17] *New York Times*, Sept. 9, 1953 ("Chief Justice Vinson Dies of Heart Attack in Capital"), Oct. 1, 1953 ("Eisenhower Names Warren to Be Chief Justice of U. S."), Oct. 10, 1954 ("Justice Jackson Dead at 62"), Nov. 9, 1954 ("Eisenhower Names U.S. Judge Harlan to Supreme Court").

[18] *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

[19] *Galvan v. Press*, 347 U.S. 522 (1954) (deportation); *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (medical license suspension).

[20] *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955); *Bart v. United States*, 349 U.S. 219 (1955); *New York Times*, May 24, 1955 ("High Court Clears Three of Red Inquiry Contempt") ("consensus of lawyers and interested officials" that the

decisions "would in no way restrict the investigating functions of Congressional committees").

[21] *Peters v. Hobby*, 349 U.S. 331 (1955).

[22] 100 *Cong. Rec.* 7251–57 (May 27, 1954).

[23] Won by government: *Ullmann v. United States*, 350 U. S. 422 (1956) (contempt; Immunity Act); *Jay v. Boyd*, 351 U.S. 345 (1956) (deportation); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956) (private-employee firing). Government lost: *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956) (SACB registration order); *Cole v. Young*, 351 U.S. 536 (1956) (federal loyalty); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956) (state loyalty); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (state sedition); *Cammer v. United States*, 350 U.S. 399 (1956) (contempt); *United States v. Zucca*, 351 U.S. 91 (1956) (denaturalization).

[24] 351 U.S. 115; *Washington Post*, May 2, 1956 ("'Taint' Ruling Halts 'Subversives' Cases").

[25] 351 U.S. 536 (quotes, 538 n. 1, 543, 546).

[26] *New York Times*, June 17, 1956 ("Security Program Setup Is Due for Some Changes"). Mundt: 102 Cong. Rec. 10173–76 (June 13, 1956), S. 4047, 84th Cong., 2d Sess.; McCarthy: S. 4052; Eastland: S. 4050; Walter: H. R. 11721.

[27] 350 U.S. 551, 557; 102 *Cong. Rec.* 6064 (April 11, 1956).

[28] *Nelson*, 350 U.S. 497 *aff'g* 377 Pa. 58 (1954).

[29] 350 U.S. at 502, 504.

[30] *New York Times*, May 20, 1956 (A. Krock, "Supreme Court Faces New Attack on Power"), May 14, 1956 ("High Court Faces Congress Attack").

[31] McCarthy: 102 *Cong. Rec.* 6063–64 (April 11, 1956), S. 3603, 84th Cong., 2d Sess.; 15 senators: S. 3617. H.R. 3 was introduced at the start of the 84th Congress. 101 *Cong. Rec.* 31 (Jan. 5, 1955); Murphy, **Congress and the Court: A Case Study in the American Political Process** (Chicago: Univ. of Chicago Press, 1962), 86–92 (quotes, 91).

[32] *Id.* at 88–89 (quotes), 282 nn. 43, 44

[33] 102 *Cong. Rec.* 7274–81 (April 30, 1956) (quote, 7277); S. 3759 , 84th Cong., 2d Sess.

[34] *New York Times*, June 28, 1956 ("Governors Score High Court Stand").

[35] Byrnes, "'The Supreme Court Must Be Curbed,'" *U.S. News & World Report*, May 18, 1956, 50–58 (quotes, 56, 58).

[36] *New York Times*, May 19, 1956 ("States See Peril in Sedition Edict"); Proceedings of the House of Delegates, 79th Annual Meeting, 42 *A.B.A Journal* 1051, 1053 (1956).

[37] S. Rept. No. 2230, 84th Cong., 2d Sess. (June 14, 1956); H. Rept. No. 2576 (July 5, 1956); Murphy, **Congress and the Court,** 93–95, 174–75.

[38] Signed decisions: *Yates v. United States*, 354 U.S. 298 (1957) (Smith Act); *Mesarosh v. United States*, 352 U.S. 1 (1956) (same); *Jencks v. United States*, 353 U.S. 657 (1957) (Taft-Hartley affidavit); *Leedom v. International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145 (1956) (same); *Amalgamated Meat Cutters v. NLRB*, 352 U.S. 153 (1956) (same); *United States v. Witkovich*, 353 U.S. 194 (1957) (supervision of deportees); *Schware v. Board of Bar* Examiners, 353 U.S. 232 (1957) (bar admission); *Konigsberg v. State Bar of California*, 353 U. S. 252 (1957) (same); *Watkins v. United States*, 354 U.S. 178 (1957) (contempt of Congress); *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957) (state contempt); and *Service v. Dulles*, 354 U.S. 363 (1957) (federal loyalty). *Per curiam* decisions: *Kremen v. United States*, 353 U.S. 346 (1957) (harboring fugitives) and *Gold v. United States*, 352 U.S. 985 (1957) (Taft-Hartley affidavit). Powe, **The Warren Court and American Politics** (Cambridge: Harvard Univ. Press, 2000), 93, 98 (quote).

[39] See note 38.

[40] 353 U.S. 657; *Jencks* legislation, see p. 117, *supra*.

[41] *New York Times*, Sept. 8, 1956 ("Minton Retiring from High Court"), Sept. 30, 1956 ("President Names Jersey Democrat to Supreme Court"), Oct. 17, 1956 ("Brennan Assumes High Court Duties"), Feb. 1, 1957 ("Justice Reed, 72, to Retire from the Supreme Court"), March 3, 1957 ("Federal Judge in Missouri Named to Supreme Court"), March 26, 1957 ("Whittaker Takes Post as Justice of Supreme Court").

[42] 354 U.S. 298, 303–12 (quote, 300). Brennan and Whittaker did not participate.

[43] *Id.* at 312–27 (quotes, 316, 318).

[44] *Id.* at 327–34 (quotes, 327).

[45] *Id.* at 325 (quote; orig. emphasis); *New York Times*, Dec. 3, 1957 ("U.S. Court Clears 9 California Reds") (quote); Stone, **Perilous Times**, 415.

[46] 354 U.S. 178 (quotes, 185).

[47] *Id.* at 187, 197, 206, 208–09, 215. Burton and Whittaker did not participate.

[48] *Schware*, 353 U.S. 232 (quotes, 235, 245, 246–47).

[49] *Konigsberg*, 353 U.S. 252 (quotes, 259, 262, 267, 271).

[50] 353 U.S. 657; Robert M. Lichtman and Ronald D. Cohen, **Deadly Farce: Harvey Matusow and the Informer System in the McCarthy Era** (Urbana: Univ. of Illinois Press, 2004), 91–92, 112–45.

[51] 353 U.S. 657 (quotes, 668–69).

[52] *Id.* at 681–82.

[53] Murphy, *Congress and the Court*, 120 (quote), 128 (quoting *Herald-Tribune*); *New York Times*, June 19, 1957 ("U.S. Press Comment on Decisions in Watkins, Smith Cases") (quoting newspapers); *New York Daily News*, June 18, 1957 ("Aid and Comfort to the Enemy").

[54] Warren, **The Memoirs of Chief Justice Earl Warren** (Garden City, NY: Doubleday, 1977), 321–30 (quotes, 322, 324); Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New

York: NYU Press, 1983), 283–86 (dues quote, 285); *New York Times*, July 26, 1957 ("Bar Unit Assails High Court Trend") (quote), Feb. 21, 1959 ("U.S. Bar Accepts Warren's Action").

[55] *New York Times*, June 25, 1957 ("Law Group Head Hits High Court") (quote), June 27, 1957 ("Law Heads Avoid Censure of Court") (quote), and Oct. 28, 1957 ("Laws to Reverse High Court Asked").

[56] *New York Times*, June 5, 1957 ("U.S. Aides Study F.B.I. Data Ruling"); June 27, 1957 ("F.B.I. Ready to Act to Shield Informers"), June 28, 1957 ("President Seeks Curb on File Use") (quotes), June 29, 1957 ("Bill to Protect F.B.I. File Voted by Senate Group") (quote).

[57] Pub. L. 85–269, 71 Stat. 595; 103 Cong. Rec. 10120 (June 24, 1957) (quote), 10984–85 (July 8, 1957); H. Rept. No. 700, 85th Cong., 1st Sess. (July 5, 1957); S. Rept. No. 981 (Aug. 15, 1957); Murphy, *Congress and the Court*, 131–53.

[58] H. Rept. No. 1201, 85th Cong., 1st Sess. (Aug. 20, 1957); Murphy, *Congress and the Court*, 174–75.

[59] 103 Cong. Rec. 12806–13 (July 26, 1957) (quote, 12806); Murphy, *Congress and the Court*, 154–56. A companion bill, H.R. 9207, was introduced in the House.

[60] *Limitation of Appellate Jurisdiction of the United States Supreme Court*, Hearing before SISS on S. 2646, 85th Cong., 1st Sess. (Aug. 7, 1957); Murphy, *Congress and the Court*, 157.

[61] Powe, **The Warren Court and American Politics**, 141–42. The "again" in Powe's comment presumably referred to Frankfurter's acquiescence in *Dennis* and other decisions during the Vinson years.

[62] *Beilan v. Board of Public Education*, 357 U.S. 399 (1958) (state loyalty); *Lerner v. Casey*, 357 U.S. 468 (1958) (same); *Brown v. United States*, 356 U.S. 148 (1958) (contempt); *Green v. United States*, 356 U.S. 165 (1958) (same); *Yates v. United States*, 355 U.S. 66 (1957) (same); *Kent v. Dulles*, 357 U.S. 116 (1958) (passport); *Dayton v. Dulles*, 357 U.S. 144 (1958) (same); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (deportation); *Heikkinen v. United States*, 355 U.S. 273 (1958) (same); *Bonetti v. Rogers*, 356 U.S. 691 (1958) (same); *Nowak v. United States*, 356 U.S. 650 (1958) (denaturalization); *Maisenberg v. United States*, 356 U.S. 668 (1958) (same); *Speiser v. Randall*, 357 U.S. 513 (1958) (gov't benefits); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958) (same). The government lost two decisions in *per curiam* opinions. *Harmon v. Brucker*, 355 U.S. 579 (1958) (Army discharges); *Sacher v. United States*, 356 U.S. 576 (1958) (contempt of Congress).

[63] Frankfurter was on the losing side only in *Bonetti*.

[64] *Beilan*, 357 U.S. 399; *Lerner*, 357 U.S. 468.

[65] *Brown*, 356 U.S. 148; Frankfurter draft opin., circulated April 17, 1957, Pt. 2, microfilm reel 28, Frankfurter Papers; 354 U.S. 907 (1957) (ordering reargument). 1919 precedent: *Ex parte Hudgings*, 249 U.S. 378.

[66] Stanley I. Kutler, **The American Inquisition: Justice and Injustice in the Cold War** (New York: Hill and Wang, 1982), 89–117; *Robeson v. Dulles*, 235 F. 2d 810 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 895 (1956); Arthur Miller, **Timebends: A Life** (New York: Grove Press, 1987), 356–57.

[67] *Kent*, 357 U.S. 116 (quote, 125); *New York Times*, June 17, 1958 ("Disputatious Artist") (quote). The Court reached the same result in a companion case involving a physicist seeking to travel to India. *Dayton*, 357 U.S. 144.

[68] *New York Times*, June 19, 1958 (A. Krock, "The Court on 'The Right to Travel'"); *U.S. News & World Report*, July 18, 1958, 100 (D. Lawrence, "Legalizing Treason?"); 104 Cong. Rec. 11536–37 (June 17, 1958) (Walter); 104 Cong. Rec. 11558–61 (June 18, 1958) (Eastland); *New York Times*, July 8, 1958 ("Eisenhower's Message on Passports").

[69] Murphy, *Congress and the Court*, 156 (quote), 163–70; S. Rept. No. 1586, 85th Cong., 2d Sess. (May 15, 1958).

[70] H.R. 3: 104 Cong. Rec. 14138–62 (July 17, 1958); a Senate counterpart to H.R. 3 was approved by the Senate Judiciary Committee in July. S. Rept. No. 2230, 85th Cong., 2d Sess. (July 31, 1958). *Nelson*-only: H. Rept. No. 1822 (May 28, 1958); S. Rept. No. 2250 (Aug. 8, 1958). *Cole*: 104 *Cong. Rec.* 13401–17 (July 10, 1958). *Yates*-"organize": 104 *Cong. Rec.* 17168–71 (August 12, 1958). Passports: H. Rept. No. 2684 (August 21, 1958); 104 *Cong. Rec.* 19653–59 (August 23, 1958).

[71] *New York Times*, Aug. 6, 1958 ("Court Curb Bills Gaining in Senate"), Aug. 19, 1958 ("High Court Curb Voted in Senate"); Robert A. Caro, **The Years of Lyndon Johnson: Master of the Senate** (New York: Alfred A. Knopf, 2002), 1030–31; Robert Mann, **The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights** (New York: Harcourt Brace & Co., 1996), 231–32.

[72] 104 *Cong. Rec.* 18635–87 (Aug. 20, 1958) (quotes, 18636, 18686) (vote, 18687).

[73] 104 *Cong. Rec.* 18691–749 (Aug. 20, 1958); Harry McPherson, **A Political Education** (Boston: Little, Brown & Co., 1972), 202–04, 210–11.

[74] 104 *Cong. Rec.* 18750.

[75] 104 *Cong. Rec.* 18880, 18911–28 (Aug. 21, 1958) (vote, 18928); Caro, **Master of the Senate**, 1033; Murphy, **Congress and the Court**, 212–17 (first quote, 212); *New York Times*, Aug. 22, 1958 ("41–40 Senate Vote Kills Bills Aimed at Supreme Court") (Lewis quote)

[76] *Cole*: H. Rept. No. 2687, 85th Cong., 2d Sess. (August 21, 1958); 104 *Cong. Rec.* 19176–78 (August 22, 1958); Murphy, **Congress and the Court**, 217–19.

[77] Warren, **The Memoirs of Chief Justice Earl Warren**, 313.

[78] *New York Times*, Oct. 7, 1958 ("Burton Quits High Court on Advice of Physicians"), ("The Quiet Arbiter"), Oct. 8, 1958 ("Ohioan Is Chosen for Burton's Post on Supreme Court"), Oct. 15, 1958 ("Stewart Takes High Court Seat").

[79] Jerrold G. Rusk, **A Statistical History of the American Electorate** (Washington: CQ, 2001), 216, 377; Michael J. Dubin, **United States Congressional Elections, 1788–1977** (Jefferson, NC: McFarland, 1998), 621.

[80] 1958 Term: *Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of Congress); *Flaxer v. United States*, 358 U.S. 147 (1958) (same) *Uphaus v. Wyman*, 360 U.S. 72 (1959) (state contempt); *Raley v. Ohio*, 360 U.S. 423 (1959) (same); *Greene v. McElroy*, 360 U.S. 474 (1959) (federal loyalty); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (same); *In re Sawyer*, 360 U.S. 622 (1959) (lawyer discipline). 1959 Term: *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960) (state loyalty); *Flemming v. Nestor*, 363 U.S. 603 (1960) (gov't benefits). *Per curiam: Niukkanen v. McAlexander*, 362 U.S. 390 (1960) (deportation); *Kimm v. Rosenberg*, 363 U.S. 405 (1960) (same). The government lost only *Greene, Vitarelli*, and *Flaxer*; *Raley* had a mixed result.

[81] 360 U.S. 109 (quotes, 126–28).

[82] 360 U.S. 72 (quotes, 74 n.1, 80).

[83] 360 U.S. 474. H.R. 8121, 86th Cong., 1st Sess. (Walter); S. 776 (Butler), S. 2392 (Johnston, Eastland), S. 2416 (Keating).

[84] *U.S. News & World Report*, Oct. 3, 1958 ("What 36 State Chief Justices Said about the Supreme Court"), 92–102, reprinting text of resolution and accompanying committee report.

[85] 105 *Cong. Rec.* 3361–80 (March 5, 1959) (Eastland; reprinting ABA recommendations and committee report) (quotes, 3364, 3365); *New York Times*, March 1, 1959 ("High Court Debate Is Given New Impetus") (Lewis quote).

[86] *Yates*-"organize": 105 *Cong. Rec.* 3157 (March 2, 1959). H.R. 3: 105 *Cong. Rec.* 11789–808 (June 24, 1959). Passports: 105 *Cong. Rec.* 18443–53, 18611–25 (Sept. 7–8, 1959). *Greene*: 106 *Cong. Rec.* 1783 (Feb. 2, 1960).

[87] *Scales v. United States*, 367 U.S. 203 (1961) (Smith Act); *Communist Party v. SACB*, 367 U.S. 1 (1961) (Internal Security Act); *Wilkinson v. United States*, 365 U. S. 399 (1961) (contempt of Congress); *Braden v. United States*, 365 U.S. 431 (1961) (same); *McPhaul v. United States*, 364 U.S. 372 (1960) (same); *Slagle v. Ohio*, 366 U. S. 259 (1961) (state contempt); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (bar admission); *In re Anastoplo*, 366 U.S. 82 (1961) (same); *Polites v. United States*, 364 U.S. 426 (1960) (denaturalization); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (federal loyalty). Government lost: *Noto v. United* States, 367 U.S. 291 (1961) (Smith Act); *Deutch v. United States*, 367 U.S. 456 (1961) (contempt of Congress); *Chaunt v. United States*, 364 U.S. 250 (1960) (denaturalization); *Travis v. United States*, 364 U.S. 631 (1961) (Taft-Hartley affidavit); *Communist Party, U.S.A. v. Catherwood*, 367 U.S. 389 (1961) (Communist Control Act).

[88] *Wilkinson*, 365 U.S. 399 (quote, 413). A companion case, *Braden*, 365 U.S. 431, reached a similar result.

[89] *Konigsberg*, 366 U.S. 36, 39 (quote), 52. In *Anastaplo*, 366 U.S. 82, a companion case, there was no evidence of membership in any organization, only a refusal to answer on First Amendment grounds.

[90] *Scales*, 350 U.S. 992 (1956), 353 U.S. 979 (1957), 355 U.S. 1 (1957), 358 U.S. 917 (1958), 360 U.S. 924 (1959), 361 U.S. 952 (1960); 367 U.S. 203, 205 n. 1 (quote); Michal Belknap, **Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties** (Westport, CT: Greenwood, 1977), 265.

[91] 367 U.S. 203 (quotes, 232, 251).

[92] *Noto*, 367 U.S. 290 (quote, 299).

[93] Belknap, **Cold War Political Justice**, 271–72.

[94] 367 U.S. 1, 19–22.

[95] *Id.* at 8–11, 15–18.

[96] *Id.* at 71–110 (quotes, 79, 106–07).

[97] *Communist Party v. United States*, 331 F.2d 807 (D.C. Cir. 1963), 384 F.2d 957 (D.C. Cir. 1967); *Albertson v. SACB*, 382 U.S. 70 (1965) (quote, 77); *New York Times*, Dec. 2, 1961 ("Communist Party Indicted after Failing to Register"), Dec. 18, 1962 ("Communist Party Convicted by U.S."), Nov. 20, 1965 ("Red Party Guilty on Registration), April 4, 1967 ("U.S. Drops Fight to Register Reds") (quote).

[98] H.R. 3: H. Rept. No. 1820, June 13, 1962, 87th Cong., 2d Sess. *Yates*-"organize": 107 Cong. Rec. 7966–67 (May 15, 1961).

[99] *New York Times*, March 30, 1962 ("Ailing Justice Whittaker Leaving Supreme Court"), April 6, 1962 (Justice Frankfurter Taken to Hospital"), Aug. 30, 1962 ("Justice Frankfurter Retires"); David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," 67 *U. Chi. L. Rev.* 995, 1045–50 (2000).

[100] *Killian v. United States*, 368 U.S. 231 (1961) (Taft-Hartley affidavit); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (loyalty oath); *Russell v. United States*, 369 U.S. 749 (1962) (contempt of Congress).

[101] 369 U.S. 834 (1962) (ordering reargument).

[102] Belknap, **The Supreme Court under Earl Warren**, 150; *Uphaus*, 364 U.S. 388, 408 (Douglas, J., dissenting). *NAACP*, 357 U.S. 449 (1958); *Bates*, 361 U.S. 516 (1960); *Shelton*, 364 U.S. 479 (1960).

[103] Douglas conf. notes, Dec. 8, 1961, and Harlan draft opinion, circulated March 13, 1962, Box 1288, Gibson memos, cert. memos file, Douglas Papers, Library of Congress.

[104] Warren Mem. to Justices, April 25, 1962, Box 354, Frankfurter 1962 to 1974 file, and Box 358, Whittaker file, Warren Papers, Library of Congress; *New York Times*, March 30, 1962 ("Ailing Justice Whittaker Leaving Supreme Court"), March 31, 1962 ("Byron White Gets Whittaker's Seat"), April 17, 1962 ("White Takes Supreme Court Seat").

[105] *New York Times*, April 6, 1962 ("Justice Frankfurter Taken to Hospital"), August 30, 1962 ("Justice Frankfurter Retires") (quote).

[106] *Gibson*, 372 U.S. 539 (1963).

[107] *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Albertson*, 382 U.S. 70; *United States v. Robel*, 389 U.S. 258 (1967) (quotes, 266).

[108] Richard M. Fried, **Nightmare in Red: The McCarthy Era in Perspective** (New York: Oxford Univ. Press, 1990), 184.

[109] Schwartz, **Super Chief**, 280–81 (quote), 448 (Goldberg quote).

The Vinson Court and the Idol of Restraint

ZACHARY BARON SHEMTOB

Few judicial characteristics garner greater praise than that of judicial self-restraint. Yet the most restrained Court of the twentieth century, that of Chief Justice Fred M. Vinson, is largely considered a failure. Using the Vinson Court as a historical case study, this article questions the merit of this judicial ideal.

I.

Judicial restraint is generally contrasted with judicial activism. Indeed, it has become commonplace to criticize the latter while extolling the former.[1] Such criticism has come from scholars, politicians, and judges alike.[2] Perhaps more notably, the vitriol has come from both the Left and the Right.[3] Despite its frequent usage, judicial activism has no clear definition. Some believe it a vacuous phrase, used merely to dismiss decisions one seeks to paint as politically partisan.[4] Since judicial decisions are rarely, if ever, transparently political, however, proving such partisanship is far from straightforward.

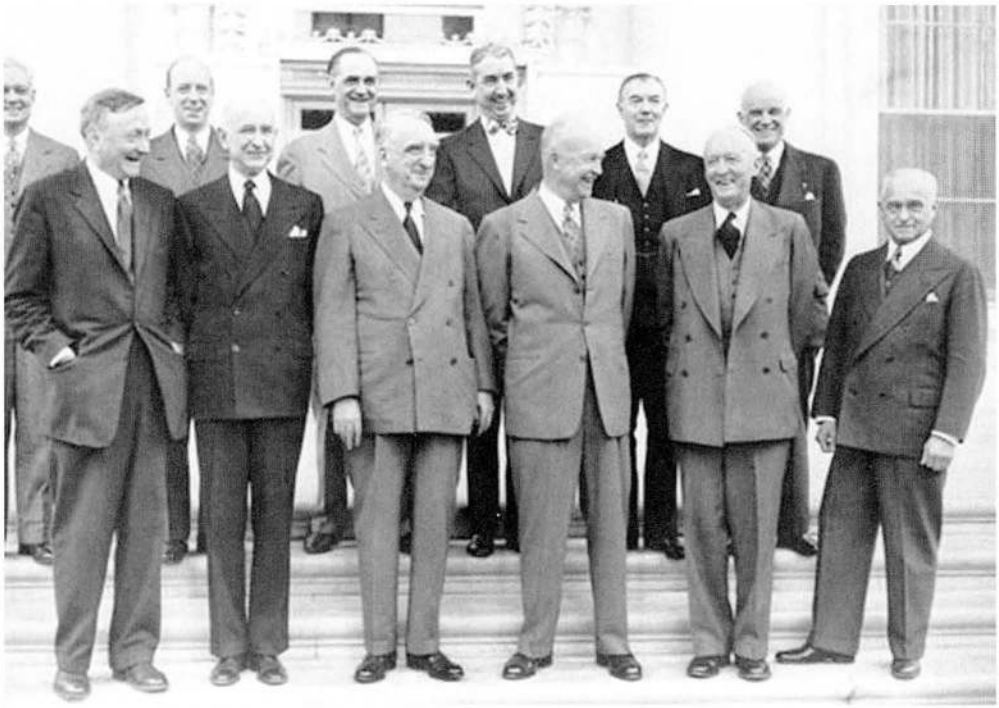
Regardless of what makes an activist judge, the parameters of judicial restraint have usually been easier to draw. If activist judges interpret the law as they please, restrained judges are seen as impartially deferring to other authorities whenever possible. James Bradley Thayer, perhaps judicial self-restraint's most influential advocate, argued that the best judges should avoid nullifying executive and legislative acts unless they are *clearly* unconstitutional.[5] Richard Posner succinctly summarizes judicial self-restraint as a judge's reluctance to "declare legislative or executive action"[6] void, and such deference "at its zenith when action is challenged as unconstitutional."[7]

Indeed, while "judicial activism" was originally invoked as a form of judicial abuse,[8] praise for a restrained judiciary has existed since our nation's very founding. Alexander Hamilton warned against judges enshrining their own values into law by overturning legislative or executive prerogatives.[9] Chief Justice John Marshall was cautious not to nullify legislative enactments, openly decrying the appearance of judicial partisanship.[10] Indeed, up until the *Dred Scott* decision, today largely recognized as "the worst imaginable case of judicial activism,"[11] the Court only once overruled a federal statute and declared state statutes void a mere handful of times.[12]

With the turn-of-the-century and the Industrial Revolution, the idea of an unrestrained (and thereby more activist) Court began to grow increasingly prominent.[13] Interestingly, although today judicial activism is widely associated with the Left, this label was first used to denounce conservative jurists during the Progressive Era. These conservatives—today perhaps better conceived as classical liberals—sought to support property claims and the newly rising industrial elite, and nullified state and legislative statutes through implicit, immutable property rights and a nebulous "freedom of contract."[14] In *Baldwin v. Missouri* (1930), Oliver Wendell Holmes, Jr., an advocate of restraint, complained that his activist brethren's political support for industry, and its refusal to respect legislative or executive prerogatives, had "hardly any limit but the sky." Louis D. Brandeis agreed, chastising the Court for acting as a sort of "super legislature" in *New State Ice v. Liebmann* (1932), a decision preventing state legislatures from demanding businesses have licenses in order to sell ice.

The Court's activism reached its peak during President Franklin D. Roosevelt's first term. The President had been elected on a platform of economic reform, and shortly after taking office attempted to pass a package of sweeping financial measures.[15] When the Justices struck a number of these, Roosevelt threatened to retaliate by packing the Court with his own Democratic appointees. Although the President's plan fizzled, the Court majority became markedly less willing to overturn executive and congressional statutes.[16] When a number of the more conservative Justices died or retried shortly thereafter, Roosevelt crafted a Court almost entirely loyal to his progressive economic agenda.

The resulting Court, led by Chief Justice Harlan F. Stone, soon became splintered between the judicial ideologies of Felix Frankfurter and Hugo L. Black.[17] While



The author argues that the Vinson Court (pictured in 1953) was perhaps the most restrained of the twentieth century in terms of judicial activism. It had the lowest nullification rate of federal, state, and local statutes, the third lowest rate of overturning precedent, and was the most ideologically moderate.

Frankfurter followed Holmes' and Brandeis' calls for restraint in both social and economic matters, Black urged his Brethren to more actively enforce individual rights. Following Roosevelt's death, President Harry S. Truman sought to both control the Court's factions and promote Frankfurter's more restrained approach. Truman's first opportunity to do so arose within three months of his ascension, with the death of Justice Owen J. Roberts. A year later, Chief Justice Stone died. This was followed shortly after by two more vacancies, allowing Truman to effectively shape the early Cold War Court.

II.

Truman's Court, led by Chief Justice Fred M. Vinson, achieved the President's goal regarding a restrained judiciary. According to political scientists Stefanie Lindquist and Frank Cross, judicial restraint can be measured in four ways.[18] First, as mentioned previously, is judges' willingness to defer to other federal and state actors. The more judges refuse to override legislative and/or executive provisions, the less likely they will be to disrupt the status quo. Second is an adherence to precedent: Obeying precedent shows the court "is not following the whims of political winds or the judge's own predilections," but respects pre-established prerogatives. Third is "institutional aggrandizement," or judges' refusal to grant certiorari. The more cases a court accepts, the likelier it is to substitute its own principles for the legislature or executive's. Finally, although the most difficult to decipher, is the (in)frequency of result-oriented judging: "When decisions appear to be based almost exclusively on the justices' own policy preferences, it suggests a more activist orientation," allowing judges to override legislatures and shape legal provisions however they see fit.

First, the Vinson Court, along with the Stone Court, struck proportionality fewer federal statutes than any of their predecessors or successors, at only three percent:[19]

Approximate Percentage of Total Federal Statutes Nullified	
The White Court (1910–1921)	11%
The Taft Court (1921–1930)	18%
The Hughes Court (1930–1941)	13%
The Stone Court (1941–1946)	3%
The Vinson Court (1946–1953)	3%
The Warren Court (1953–1969)	30%
The Burger Court (1969–1986)	15%
The Rehnquist Court (1986–2005)	34%

Second, the Stone and Vinson Courts had the lowest nullification rate regarding state and local statutes, at around six percent:[20]

Approximate Nullification Rate of State and Local Statutes per Term	
The White Court	11 per term
The Taft Court	14 per term
The Hughes Court	8 per term
The Stone Court	6 per term
The Vinson Court	6 per term
The Warren Court	13 per term
The Burger Court	18 per term
The Rehnquist Court	8 per term

Third, the Vinson Court was far less willing to overturn precedent than those Courts before and since, although did not rank the lowest of the twentieth century:[21]

Approximate Percentage of Total Precedents Overturned	
The White Court	2.5%
The Taft Court	3%
The Hughes Court	10.4%
The Stone Court	7.5%
The Vinson Court	6.5%
The Warren Court	22.4%
The Burger Court	25.9%
The Rehnquist Court	8%

Fourth, the Vinson Court denied certiorari more frequently than any Court before it, although successive Court's (perhaps motivated by the Vinson Courts example) have been even stingier:[22]

Certiorari Grant Rates	
The Vinson Court	.82
The Warren Court	.75
The Burger Court	.65
The Rehnquist Court	.69 (the first seven terms)

Finally is the question of the Court's ideological direction. As detailed by Lindquist and Cross, Courts regarded as predominantly liberal or conservative are considered more activist, rendering decisions according to judges' personal policy preferences. Since more restrained Courts will not follow a single ideological direction, they will more likely display a moderate judicial record. Of the Courts surveyed, the Vinson Court was indeed nearest to the conventional center:[23]

Ideological Direction of Each Court by its Approximate Percentage of Liberal Decisions	
The White Court	65%
The Taft Court	76%
The Hughes Court	76%
The Stone Court	82%
The Vinson Court	58%
The Warren Court	66%
The Burger Court	38%
The Rehnquist Court	N/A[24]

As revealed by the five leading indicators, the Vinson Court was undoubtedly one of the most restrained (if not the most restrained) Supreme Courts of the twentieth century. It had the lowest nullification rate of federal, state, and local statutes, the third lowest rate of overturning precedent, and was the most ideologically moderate. And although certiorari grant rates were lower on succeeding Courts, this was likely a result of institutional factors beyond the Vinson Court's control.[25]

Of course, these numbers do not paint the entire picture. Perhaps more interesting is how the Court's behavior reflected its underlying adherence to restraint, and why many of its members specifically felt obligated to act in this manner.

III.

Effectively, the Vinson Court can be broken into two phases. The "first" Vinson Court lasted from 1946 until 1949, encompassing the three years before all four Truman nominees joined the Court. The Truman Justices then dominated Court proceedings from 1949 until 1953.

The Court's earliest Terms reflected a deep division between the more activist, or "libertarian four," consisting of Justices Black, Rutledge, Murphy, and Douglas, and the restrained temperament of Justices Frankfurter, Jackson, Vinson, Burton, and Reed.[26] From 1946 to 1949, both sides traded occasional victories. Most notable was the record-breaking level of dissent and polarization. Disagreement rates reached their highest point since the 1790s, with two pairs of Justices (Jackson and Rutledge, and Frankfurter and Douglas) having the highest disagreement rates in Court history. Additionally, an unprecedented fifteen pairs of Justices disagreed in more than forty percent of cases.

Following the 1948 deaths of Murphy and Rutledge, the appointments of Tom C. Clark and Sherman Minton strengthened the restrained camp. This reduced the libertarians to two members, Black and Douglas, who were then consistently overruled. This era saw even greater discord than the previous one. The rate of dissent was the second highest in Court history, with Black and

Douglas setting records for the number of disagreements with their more restrained Brethren's jurisprudence.

This restrained ideology was largely the result of the Court's Truman appointments. While the jurisprudence of Justices Frankfurter and Jackson was important in steering the Court's restrained direction, these two figures ultimately played a secondary role to Truman's Justices: Burton, Vinson, Clark, and Minton. Understanding their judicial philosophies (or lack thereof) is thus key to any analysis of the Truman Court.

Truman's first appointment, Harold H. Burton, was a long-time Senator who had originally served with the President on a committee to investigate a national defense procurement program.[27] In his book on the Vinson Court, Melvin Urofsky states that Burton "had a pragmatic mind," attuned to the case before him rather than seeking to stake out any larger judicial philosophy.[28] Frances Rudko summarizes Justice Burton's judicial mindset as that of a "lawyer's judge." [29] Burton generally decided slowly and methodically, rather than focusing on the larger principles or desired outcome of each case. This involved identifying the legal problem, carefully weighing the issues on both sides, and usually deferring to executive or legislative interests. Burton thus avoided constitutional matters whenever possible, treating each case individually, "objectively," and "dispassionately."

Truman's second nominee, Chief Justice Vinson, had been an ardent New Dealer and briefly served as President Truman's Secretary of the Treasury. As Chief Justice, Vinson attempted (and generally failed) to unite a fractured Court around narrow decisions. A former clerk recalled that the Chief Justice was, like Burton, a "pragmatist," leaving the "abstract philosophizing" for Justices Black and Frankfurter.[30] Perhaps most important to

Chief Justice Vinson has been characterized as a pragmatist who emphasized procedure over abstract thinking. Vinson also largely favored executive and legislative interests. Roberta Vinson and her husband, Chief Justice Vinson, posed for a photograph while visiting Key West, Florida in 1951 as members of President Harry S. Truman's vacation party.

Vinson was procedure. The Chief Justice often denied standing to plaintiffs, insisting that they follow a rigorous review structure.[31] When cases did reach the Court, Vinson largely favored executive and legislative interests: "[H]e nearly always favored the power of government . . . over that of the individual."[32] His son, Frederick Vinson, Jr. summarized his father's legacy as neither doctrinaire nor blatantly "cause oriented," but akin to Burton, always focused on the case at hand.[33]

Justice Tom C. Clark, Truman's third nominee, is generally considered his best.[34] Although a firm believer in judicial restraint, Clark was somewhat more flexible than the other Truman appointments. Like these Justices, Clark did not skew traditionally Left or Right. More important to Clark was precedent. The Justice believed that only by following previous decisions could the Court best avoid invalidating "appropriate action" by federal or state governments.[35] Indeed, Clark followed precedent even with decisions with which he personally disagreed. In *Miranda v. Arizona* (1966), for example, Clark originally dissented from the majority opinion. Nevertheless, after *Miranda* became established law, the Justice voted to uphold it in every case before him.

Truman's final appointment was that of Justice Sherman Minton. A liberal senator and former ally of Justice Black, many expected Minton to show some sympathy for protecting individual rights in the face of government encroachment.[36] In fact, Minton proved to be the most restrained Truman appointee: "more than any of the other Truman appointees," Minton deferred to the executive and legislature, seeming to have no "deep seated" judicial philosophy.[37] A former clerk notes that Minton was "extremely conscious of and insistent upon adhering to . . . statutory limitations," regardless of the resulting "justice or injustice."[38] Even Minton's (otherwise sympathetic) biographers fault the Justice's almost reflexive preferencing of state to individual interests.[39]

Numerous reasons underlie the Truman bloc's restrained temperament. First, and perhaps most importantly, each Justice was a product of the Cold War, believing non-essential liberties had to be subordinated to the perceived Soviet threat. Anxiety over communism's spread unleashed a broad Red Scare throughout 1940s and '50s America, reaching its apex when the Court took shape. Fearing Soviet infiltrators, state and federal governments established various so-called loyalty and security programs, to which the Court expressed little concern. To the majority, a restrained judiciary was thus far preferable to one that seemingly held nebulous freedoms over citizens' security.

Of course, the Cold War alone cannot solely be blamed for the Vinson Court's adherence to restraint. Many of the Court's Justices had gained prominence during the 1930s, and had therefore borne close witness to Roosevelt's attacks on judicial activism. They were thus careful to "mind their knitting" or risk another attempt at executive usurpation. Truman chose his men with this very concern in mind, himself a firm believer in judicial restraint.[40]

Another reason for the Vinson Court's behavior undoubtedly lies with the Chief Justice himself. Vinson did not have the strength of personality to commandeer the Court towards any overarching goal, instead finding himself caught between the middling Truman bloc (of which he was a part) and the continual clashes of Frankfurter and Black. Vinson, perhaps substantively outmatched, thus concentrated on process above all else, focusing on legal technicalities over decisive decision-making.

This narrow focus is reflected throughout the Court's most important decisions, which, against stinging dissents by its more activist members, limited free speech, endorsed the deportation and exclusion of aliens, and generally favored government interests in criminal procedure and labor law. The Vinson Court's record on civil rights is more mixed.

Sherman Minton, who had been a liberal Senator from Indiana, surprised many when he was appointed to the Court by not championing the protection of individual rights in the face of government encroachment. In fact, Justice Minton proved to be the most restrained Truman appointee and reflexively preferred state interests. Minton is pictured here in 1948, when he was a judge on the Seventh Circuit Court of Appeals, reading a letter from John L. Lewis of the United Mine Workers of America.

While the Court refused to abolish segregation entirely, it opened the door (however slightly) to *Brown v. Board of Education* (1954).

Chief among the so-called Cold War cases was *American Communications Associates v. Douds* (1950), challenging the Taft-Hartley Act's denial of membership to the National Labor Relations Board for union members who refused to swear they were not communists. In his majority opinion, Chief Justice Vinson recognized this provision of the Act abridged free speech, but upheld it through an expansive reading of the Commerce Clause. Using this case as precedent, the Court further backed measures banning subversives from running for office in *Gerende v. Board of Supervisors* (1951), and upheld a 1952 act deporting longtime resident aliens for ex-membership in the Communist Party in *Harisiades v. Shaughnessy* (1952).

More controversial was the majority decision in *Dennis v. United States* (1951). In this case, leaders of the Communist Party were indicted for planning to overthrow the U.S. government. Since the federal government could only prove the defendants had taught and advocated revolution, they charged them with conspiring to promote subversive actions rather than ever actively engaging in them. Vinson's plurality opinion recognized the importance of free speech, but stressed the overriding danger of communist infiltration. This involved rewriting Holmes' and Brandeis' prevailing "clear and present danger test" to accommodate not only actual but potential danger.

The Vinson Court is also notable for one national security case it did not take, that of Julius and Ethel Rosenberg. Sentenced to death for espionage, the couple's plight came before the Court and was declined a striking six times.[41] Were Frank Murphy and Wiley Rutledge still serving, certiorari would have likely been granted.[42] As it was, the Vinson Court wanted "nothing to do with such a potentially explosive issue."[43]

The Vinson Court was equally restrained regarding labor rights. In 1946, the federal government took control of the nation's bituminous coal mines in order to end an ongoing labor strike in *United States v. United Mine Workers of America* (1947). After a breakdown in negotiations between the government and unions, District Judge Alan T. Goldsborough invoked the Norris-LaGuardia Act to issue a temporary restraining order.[44] He further found the union leaders in civil and criminal contempt and fined them a substantial $3.5 million. The union countered that the Norris-LaGuardia act had no bearing on private labor disputes, accusing Judge Goldsborough of overstepping his jurisdiction. The Supreme Court, after weeks of debate, issued a highly fragmented opinion. The majority sided with Goldsborough, upholding his right to issue an injunction and his finding of contempt. They faulted Goldsborough's high sum, however, reducing this to an arbitrary $700,000.[45]

More influential, though only temporarily, were some of the Court's cases concerning the Fourth Amendment. In *Harris v. United States* (1947), FBI agents conducted a four-hour search of a suspected check-forger's bedroom without a warrant. When they found numerous illegal selective surface classification cards, they used this as evidence to secure a conviction. Chief Justice Vinson acknowledged the search was disturbing, but upheld the conviction on a nebulous "totality of the circumstances rationale." Frankfurter, usually an ally of Vinson's, wrote a passionate dissent. In what would become the case's most celebrated line, Frankfurter declared the Fourth Amendment "not an outworn bit of Eighteenth Century romantic rationalism," but "an indispensible need for a democratic society."

The Court again split in *Wolf v. Colorado* (1949). Dr. Julius Wolf had been twice convicted of conspiring to perform abortions based on appointment books seized during a warrantless search of his office. Frankfurter's majority opinion held that the Fourth Amendment was only partially applicable to the states, and rejected the exclusionary rule. According to Frankfurter, if state action violated "the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples," this qualified as a violation of due process. Since the exclusionary rule was a relatively recent innovation, however, Frankfurter found it constitutionally unnecessary for states to abide by it. Justice Douglas dissented, instead recognizing a "right to privacy" implicit within the Fourth Amendment itself.

With the rise of the civil rights movement, the Court was forced to further interpret the extent of the Due Process Clause. Among the more controversial cases was *Adamson v. California* (1947), which became an opening salvo in Black and Frankfurter's struggle over full incorporation. Frankfurter's majority won this round, refusing to incorporate the Fifth Amendment. According to the Justice, those amendments should only be imposed on the states whose violation "shocked the conscience."

The Vinson Court's "equal protection" rulings were less restrained, albeit similarly narrow. As Melvin Urofsky summarizes, the Vinson Court left *Plessy* "alive and well," although somewhat restricted its scope.[46] In *Bob-Lo Excursion Co. v. Michigan* (1950), for example, the Court sided with a plaintiff who had been refused access to an amusement park ride solely based on his skin color.

The Court further restricted the separate-but-equal doctrine in *Henderson v. United States* (1950). In this case, Elmer Henderson was prevented from sitting at an empty seat at a whites-only table. While Justice Burton was careful not to challenge segregation itself, he sided with the plaintiff, making it more difficult for expensive interstate carriers to maintain separate cars. The Court's cautious civil rights activism came through more clearly in *Sweatt v. Painter* (1950), where the Court mandated the University of Texas Law School admit a black student, the first time an all-white institution had been ordered to do so. Nevertheless, the Court pointedly refused to expand this ruling to other educational institutions.

Despite the Court's narrow activism regarding civil rights, perhaps its greatest restraint lies in its continual delay to hear public school segregation laws. In the middle of 1952, the Court did announce it would hear challenges to school segregation in Delaware, Virginia, South Carolina, Kansas, and the District of Columbia.[47] The resulting conferences led to no agreement, however, and Vinson lacked neither the gravitas nor much inclination to push things further. Frankfurter also purposely delayed hearing the issue, convinced that Vinson and the other Truman nominees would rule against the plaintiffs. Indeed, when Vinson died a year later (and *Brown* finally landed on the Court's docket), Frankfurter cruelly declared the Chief Justice's demise "the first solid piece of evidence I've seen to prove the existence of God."[48]

IV.

Michal Belknap, who wrote a comprehensive treatment of this Court's history, rulings, and legacy, begins his book, **The Vinson Court: Justices, Rulings, and Legacy**, by acknowledging the Vinson Court was, at best, "mediocre." William Wiecek, another of the Court's biographers, has offered similarly faint praise.[49] Most other scholars have graded the Court far more harshly. In July of 1970, sixty-five legal historians evaluated the ninety-six Justices that served between 1780 and 1969.[50] A third of the Vinson Court was listed as "failures." Bernard Schwartz identifies two Vinson Justices, Fred Vinson and Sherman Minton, as among the ten worst to have ever served on the Supreme Court.[51] Edward Prichard calls the Vinson Court President Truman's "most disastrous legacy."[52] And, according to Fred Rodell, "fifty years hence" few of the Vinson Court's members "will be any better remembered—or deserves to be better remembered—than the nameless Justices who sat with Chief Justice Marshall."[53] Scholars have proposed numerous reasons for the Vinson Court's failings. Perhaps the most basic source of criticism has been its dry and repetitive opinions.[54] Although Black, Douglas, Jackson, and (to a lesser extent) Frankfurter are considered among the Court's finest wordsmiths, the Truman bloc wrote mechanically and with little rhetorical flourish.

A second, and considerably more serious, criticism is the Vinson Court's failure to lay down any lasting legal principles or precedent. As described earlier, none of Truman's nominees had an articulated philosophy of law. They placed predictability and dependability above all else. Unlike Black or Frankfurter, who often used individual cases to reflect on the larger legal system, Truman's nominees focused solely on the issue before them and sought to literally apply the rules as best they could.[55] Judge Richard Posner remarks that "the test of greatness for the substance of judicial decision" rests on its "contribution to the development of legal rules and principles."[56] For the most part, the Vinson Court issued few grand statements or clear directions for the future. This is not to say that no precedent was laid during this period. In Justice Black's 1947 opinion in *Everson v. Board of Education* (1947), for example, the Court essentially incorporated the Establishment Clause. Nevertheless, this exception proves the rule, as Justice Black,

considered by many to be the era's greatest Justice,[57] was more often in the Vinson Court's minority.

Indeed, one need only look at the cases Black dissented from to get some idea of the Vinson Court's meager legacy. While scholars have largely criticized Vinson's *Dennis* plurality, for example, Black's dissent is considered one of his greatest.[58] Here Black, the leader of the so-called libertarian four, chastised the plurality for substituting fear for reality, making apparent their alteration of the "clear and present danger" test. Black's conclusion was particularly powerful, being a hope that "in calmer times, when pressures, passions, and fears subside" the First Amendment would be restored to its hallowed place. Indeed, Black's plea won out shortly thereafter: *Dennis* was never invoked as precedent, and hastily buried only a few years after its holding.[59] The Court's major Fourth Amendment decision, *Harris*, was also reviewed and reversed in short succession.

Perhaps even more damning are *Wolf v. Colorado* and *Adamson v. California*; indeed, both cases would perhaps become most famous for being reversed. In *Mapp v. Ohio* (1961), Justice Clark, wrote for a majority explicitly overruling *Wolf*. Justice Douglas, a *Mapp* dissenter, even got in the final word, declaring *Wolf* without "reason or principle." *Adamson* was reversed more gradually, as the Court slowly moved towards greater imposition of the Bill of Rights on the states.

The Vinson Court's greatest failing in this regard, however, surely revolves around *Brown v. Board of Education*. As detailed, the Vinson Court was substantially more activist regarding civil rights than in most other matters. Nevertheless, public school segregation, the period's most controversial and far-reaching domestic matter, was a bridge it dared not cross. By kicking this can down the road, Vinson and his brethren not only prolonged the nation's suffering, but also lent no institutional authority to the Court itself. This institutional impotence was further reflected by the Court's dissent rates, among the highest in history.

The Vinson Court's ideological divisions could even be found among those who favored judicial restraint. Justice Frankfurter, for example, tempered his preference for restraint with a constant awareness of real-world consequences. When it came to civil rights, Frankfurter was among the Court's most far-reaching and progressive Justices. On the matter of due process, Frankfurter was even more activist than Black, recognizing a vaguely substantive component in cases like *Malinski v. New York* (1945) and *Francis v. Resweber* (1947). The Truman Justices (save for perhaps Clark) refused such complexities, almost reflexively supporting state interests. The Vinson Court thus came dangerously close to being a rubber stamp for the other two branches, undermining the Court's independent authority. Indeed, in reading its majority opinions, one is often left wondering the need for a high court at all.

The Vinson Court's reflexive deference, however, is not solely responsible for its failings. Equally to blame is the schizoid nature of judicial restraint itself. Whereas decisions that actively curbed economic interests have generated widespread praise, those that stymied social progress, as the Vinson Court so often did, have generally faced greater criticism. Compare the twentieth century's most reviled decision, *Lochner v. New York* (1905), with that of its greatest decision, *Brown v. Board of Education*. *Lochner*, striking down a New York law limiting bakers' working hours, came to embody the Fuller Court's misguided war on progressive reform. The early Roosevelt Court was tarred for similar reasons.[60] While *Lochner* stands as the century's worst decision for the Court's failure to restrain itself, the greatness of *Brown* lies in the Court's social activism. (The activist *Lawrence v. Texas*, which nullified the nation's last

remaining sodomy laws, has faced similar praise.[61])

Indeed, Bernard Schwartz's list of the Court's ten greatest decisions almost perfectly reflects this dichotomy.[62] Schwartz identifies four of the greatest decisions as having expanded state control over economic interests and two as having expanded civil liberties. According to Schwartz, not one of the Court's strongest rulings aided commercial interests or curbed social rights. In Schwartz's list of the Court's worst decisions, five of these curbed social rights and five supported business interests. Frank Cross and James F. Spriggs have made similar findings.[63] Even the ever-controversial *Roe v. Wade* has generally enjoyed a majority of public support.[64]

Why economic and social decisions generate such dichotomous reactions lies well beyond the scope of this paper. Regardless of its cause, this phenomenon helps further explain the Vinson Court's poor legacy. By the time of Vinson's ascension to the Chief Justiceship, many of the most important economic issues had been decided and resolved in the executive and legislature's favor. The Cold War, on the other hand, brought a host of social issues for the Court to address. If seated during the New Deal, the Vinson Court may have become known for its championing of individual over economic interests. Instead, enmeshed in the Cold War and having learned the lessons (perhaps all too well) of judicial overreach from the 1930s, the Court's legacy proved one of social repression.

Ironically, Felix Frankfurter, restraint's most eloquent spokesman, perhaps best identified the problems with such an inflexible attitude. According to Frankfurter, in a world where "facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life, for facts are stubborn and will not yield."[65] The Vinson Court, in bowing to state policy rather than balancing the interests before it, never heeded this advice. In doing so, Truman's Justices left little practical difference between judicial restraint and abdication.

ENDNOTES

[1] *See* Craig Green, "An Intellectual History of Judicial Restraint," *Emory Law Journal* 58 (2009), p. 1195 (explaining that "for pundits, politicians, judges, and the public, activism-talk is so common that it masquerades as something timeless").

[2] *See* Mark Levin, **Men in Black: How the Supreme Court Is Destroying America** (Washington, DC: Regnery Publishing, 2005), pp. 11–12 (claiming that "[a]ctivist judges have taken over school systems, prisons, private-sector hiring and firing practices, and farm quotas."). *See also* "Sessions Says He's Looking for Judicial Restraint," *National Journal*, January 2, 2011. *See also* Sandra Day O'Connor, "The Threat to Judicial Independence," *The Wall Street Journal*, September 27, 2006 (remarking that "[t]he ubiquitous 'activist judges' who 'legislate from the bench' have become central villains on today's domestic political landscape").

[3] *See The New York Times*, July 4, 2010 ("If Elena Kagan is confirmed, her first task will be . . . to help the court realize that judicial modesty actually means something."). *See also* Lester Jackson, "The Threat of Liberal Activism Reaches New Heights," *American Thinker*, August 14, 2011.

[4] *See* Kermit Roosevelt III, **The Myth of Judicial Activism: Making Sense of Supreme Court Decisions** (New Haven: Yale University Press, 2008), p. 3 ("[I]n practice the 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with.").

[5] *See* James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893), p. 129 ("[A]n act of the legislature" should not "be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.").

[6] Richard Posner, "The Rise and Fall of Self-Judicial Restraint," *California Law Review* 100 (2012), p. 519.

[7] *Ibid.*, p. 528.

[8] *See* Green, note 1, p. 1200 ("[T]he *term* "judicial activism" was "coined by Arthur Schlesinger in 1947.").

[9] **The Federalist Papers**, p. 469 ("[T]he courts must be the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure for that of the legislative body.").

[10] *See* James W. Ely, Jr., "John Marshall: Definer of a Nation (Review)," *The Independent Review*, Winter 1998 ("Far from championing unbridled judicial activism, Marshall was always mindful of the restraints on judicial

power."), available at http://www.independent.org/publications/tir/article.asp?a=391.

[11] *See* Green, note 1, p. 1214 (this decision not only nullified existing federal law, but held that slaves were not protected by the U.S. Constitution and could not become U.S. citizens).

[12] *See* Joseph Francis Menez, John R. Vile, and Paul Charles Bartholomew, **Summaries of Leading Cases on the Constitution** (Savage: Littlefield Adams Quality Paperbacks, 2005), p. 125 (*Marbury v. Madison* was the only other case in which a federal statute had been nullified).

[13] *See, e.g.*, Evan Tsen Lee, **Judicial Restraint in America** (New York: Oxford University Press, 2011), p. 24 (discussing the *Lochner* era Court).

[14] *See generally*, P.S. Atiyah, **The Rise and Fall of the Freedom of Contract** (New York: Oxford University Press, 1985).

[15] *See generally*, Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. the Supreme Court** (New York: W.W. Norton & Company, 2010).

[16] *Ibid.*

[17] *See generally*, Noah Feldman, **Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices** (New York: Twelve Books, 2010) (offering a detailed history of this time period).

[18] *See generally*, Stefanie Lindquist and Frank Cross, **Measuring Judicial Activism** (New York: Oxford University Press, 2009).

[19] Data gathered from Linda Camp Keith, **The U.S. Supreme Court and the Judicial Review of Congress** (New York: Peter Lang Publishers, 2008), p. 44.

[20] Data gathered from Thomas M. Keck, **The Most Activist Supreme Court in History: The Road to Modern Judicial Activism** (Chicago: University of Chicago Press, 2004), p. 41.

[21] Data gathered from Elliot E. Slotnick, ed., **Judicial Politics: Readings from Judicature** (Washington: CQ Press, 1999), p. 379.

[22] *See* Robert L. Boucher, Jr. and Jeffrey A. Segal, "Supreme Court Justices as Strategic Decision-Makers; Aggressive Grants and Defensive Denials on the Vinson Court," *Journal of Politics* 57 (1995), p. 824 (for a fuller discussion of the Vinson Court's cert. process). *See also* Saul Brenner and John F. Krol, "Strategies in Certiorari Voting on the United States Supreme Court," *Journal of Politics* 51 (1990), p. 828 (discussing grant rates for the different Supreme Courts and tying this to their ideological dispositions).

[23] Data gathered from Keith, *see* note 19, p. 37.

[24] The data only contains the first few Terms, and therefore an inaccurate picture, of the Rehnquist Court.

[25] *See, e.g.*, John Paul Stevens, **Five Chiefs: A Supreme Court Memoir** (New York, NY: Back Bay Books, 2011), p. 24 (Stevens explains the high cert. rate was due to the Court's mandatory jurisdiction. Indeed, as this jurisdiction waned, the Court began to refuse more and more unmeritorious appeals.).

[26] *See* Robert Vincent Galloway, "The Vinson Court: Polarization (1946–1949) and Conservative Dominance (1949–1953)," *Santa Clara Law Review* 22 (1982), p. 375 (presumably coining the term the "libertarian four").

[27] *See* Frances Howell Rudko, **Truman's Court: A Study in Judicial Self-Restraint** (New York: Greenwood Press, 1988), p. 47.

[28] Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953** (Columbia: University of South Carolina Press, 1997), p. 57.

[29] *See* Rudko, note 27, p. 47.

[30] *Ibid.*, p. 79.

[31] *Ibid.*, p. 78 ("[Vinson] insisted that appeals be considered only on the points legally reserved for review and that cases be brought to the Court through the proper review structure.").

[32] *Ibid.*, p. 150.

[33] *Ibid.*, p. 79.

[34] *See* Rudko, note 27, p. 33 ("In July of 1970, sixty-five legal scholars evaluated the ninety-six justices who served between 1789 and 1969"; of the Truman nominees only Clark was not rated a "failure." This is admittedly not the highest of praise.). *See also* Urofsky, note 28, p. 155 (According to Douglas, Clark "had the indispensible capacity to develop so that with the passage of time he grew in stature and expanded his dimensions.").

[35] *Ibid.*, pp. 91–92.

[36] *See* Michal R. Belknap, **The Vinson Court: Justices, Rulings, and Legacy** (Santa, Barbara: ABC-CLIO, 2004), pp. 82–86.

[37] *See* William Wiecek, **The History of the Supreme Court of the United States, Vol. 12: The Birth of the Modern Constitution: The United States Supreme Court** (New York: Cambridge University Press, 2006), pp. 439.

[38] Harry L. Wallace, "Mr. Justice Minton—Hoosier Justice on the Supreme Court," *Indiana Law Review* 34 (1959), pp. 145, 421.

[39] *See* Linda C. Gugin and James E. St. Clair, **Sherman Minton: New Deal Senator, Cold War Justice** (Indianapolis: Indiana Historical Society, 1997), p. 30.

[40] *See* Wiecek, note 37, p. 406.

[41] *See* Belknap, note 36, p. 99.

[42] *Ibid.* (claiming "[h]ad Murphy and Rutledge been alive, they almost certainly would have joined" those seeking review of the Rosenberg convictions).

[43] *See* Urofsky, note 28, p. 179.

[44] *Ibid.*, p. 191.

[45] *Ibid.*, p. 195 ("Vinson's majority opinion was roundly criticized . . . Commentators at the time tended to treat the Murphy and Rutledge dissents as better reasoned and

better law than the majority holdings," though even these were quite technical and confusing.).

[46] *Ibid.*, p. 248.

[47] *Ibid.*, p. 258.

[48] Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History," *Harvard Law Review* (1987), p. 840. Interestingly, Frankfurter may have been wrong here. Vinson's clerk Newton N. Minow believed *Brown* would have "been decided the same way 'and with the same unanimity' had Vinson lived." *See* Rudko, note 27, p. 35.

[49] William Wiecek, **The History of the Supreme Court of the United States, Vol. 12: The Birth of the Modern Constitution: The United States Supreme Court** (New York: Cambridge University Press, 2006), pp. 439–440 (describing the Vinson Court, and the Truman appointees especially, as neither intellectually solid nor jurisprudentially systematic).

[50] *See* Rudko, note 27, p. 35.

[51] Bernard Schwartz, **A Book of Legal Lists: The Best and Worst in American Law** (New York: Oxford University Press, 1999), p. 29.

[52] E.F. Prichard, Oral History Interview, Vinson Papers (quoted in Rudko, note 27, p. 37).

[53] Fred Rodell, **Nine Men: A Political History of the Supreme Court from 1790–1955** (New York: Random House, 1955), p. 306.

[54] *See* Belknap, note 36, pp. 36, 76, 79, 82 (discussing some of the dry and mechanical writing styles of the Truman nominees).

[55] Rudko, note 27, p. 130.

[56] Richard Posner, "The Learned Hand Biography and the Question of Judicial Greatness," *Yale Law Journal* 104 (1994), pp. 511, 523.

[57] *See, e.g.*, Akhil Reed Amar, "Hugo Black and the Hall of Fame," *Alabama Law Review* 53 (2001–2002), p. 1221 (summarizing much of scholars' consensus on Black's impressive judicial legacy).

[58] *See* Urofsky, note 28, p. 579 (praising and detailing the influence of this dissent).

[59] *Ibid.*, p. 75.

[60] *See generally* Shesol, note 15.

[61] *See* Laurence H. Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117 (2004), pp. 1894–1895 (*Lawrence* "may well be remembered as the *Brown v. Board of Education* of gay and lesbian America."). *See also* Nancy Gibbs, Perry Bacon Jr., and Mark Thompson, "A Yea for Gays," *TIME*, July 7, 2003 ("Gay-rights activists declared *Lawrence* a victory on the scale of the *Brown v. Board of Education* decision, which desegregated schools in 1954 . . . in cases like this the symbolism, over time, can shape the substance.").

[62] *See generally*, Schwartz, note 51.

[63] Frank Cross and James F. Spriggs, "The Most Important (and Best) Supreme Court Opinions and Justices," *Emory Law Journal* 408 (2010), p. 441 (of the twenty-five cases that the authors identify as the most legally relevant (and best), a majority expanded civil liberties).

[64] *See* "Support for *Roe v. Wade* Increases Significantly, Reaches Highest Level in Nine Years," *Harris Interactive*, December 14, 2007, available at http://www.harrisinteractive.com/Insights/HarrisVault.aspx?PID=830.

[65] Helen Shirley Thomas, **Felix Frankfurter: Scholar on the Bench** (Baltimore: The Johns Hopkins University Press, 1960), p. 172.

Retired Supreme Court Justices in the Courts of Appeals

STEPHEN L. WASBY

Supreme Court Justices, after their retirement from the Court, engage in a variety of activities and at times comment on current issues. Justice Sandra Day O'Connor, for example, often speaks about judicial independence. Such statements attract attention. What does not attract attention, so that little is known about the subject, is that retired Justices continue to decide cases—but in the lower federal courts. This article is an examination of their participation in the U.S. Courts of Appeals.

To avoid possible tie votes from vacancies resulting from illness, death, or recusal, many state high courts bring back their retired justices for particular cases. There is no such practice in the United States Supreme Court, although Sen. Patrick Leahy (D-VT) recently proposed it.[1] Supreme Court Justices who retire cannot again sit on the Supreme Court, even if one or more of "the brethren" is unavailable. However, a 1937 statute allows retired Justices to sit on lower courts,[2] and several have done so, especially in the Courts of Appeals.

Some have only had minimal lower-court participation, but others have sat for an extended period of time and written more than a few opinions. Justices Stanley F. Reed and Harold H. Burton are examples of Justices who sat in only one circuit. More recently, David H. Souter sat in the First Circuit, where he had served briefly prior to his Supreme Court nomination. Others have sat in several circuits. Justice Tom Clark sat in every geographic circuit (and the Court of Customs and Patent Appeals [CCPA]),[3] and Sandra Day O'Connor has sat in all but the D.C. Circuit. Both Potter Stewart and Byron R. White sat in several but not all circuits, while Lewis F. Powell, Jr. sat only in the Eleventh Circuit in addition to the Fourth Circuit in which he lived.

A retired Justice would not be likely to sit regularly in the lower courts if retirement had been for reasons of ill health, but those retiring for other reasons often wish to remain active by deciding cases. Most obvious in this regard is Tom Clark, who retired to allow President Lyndon B. Johnson to appoint his son,

Ramsey, as Attorney General so he would not have to recuse himself frequently in cases involving the federal government. Justice O'Connor retired because of her husband's dementia but, after his institutionalization, had the opportunity for both speech-making and Court of Appeals participation.

This article will examine only those Justices who sat in the Courts of Appeals a nontrivial number of times. Among matters examined are the number of cases in which retired Justices participated; the number of the opinions they wrote, including separate opinions; the subject matters of the cases in which they participated and their routine or significant nature; and the judges with whom they sat. Its primary purpose is to update the one systematic study of the subject by Minor Myers III[4] to include Justices Sandra Day O'Connor and David H. Souter, to modify the number of participations reported for earlier retired Justices, and to explore additional questions. Because of the importance of their possible effect on the dynamics of the courts in which retired Justices sit, the results of a short survey of Court of Appeals judges who sat with them will be reported.

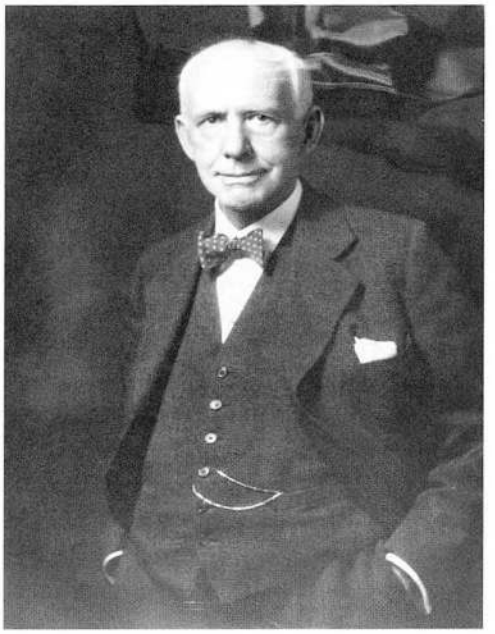
Also noted is whether a retired Justice's positions in the Courts of Appeals are consistent with those taken earlier on the Supreme Court, as it would be useful to know whether the retired Justice continued any position or "agenda" evidenced by previous rulings. Related is the use retired Justices make of Supreme Court decisions, both from before and after their tenure there and particularly from cases in which they participated and in which they wrote opinions, although a Justice's Court of Appeals opinions are likely to be constrained not only by more recent Supreme Court opinions but also by circuit precedent.

The Myers Study

Myers reported that nine Justices (Willis Van Devanter, Stanley F. Reed, Harold H. Burton, Tom Clark, Potter Stewart, Lewis F. Powell, Jr., William Brennan, Jr., Thurgood Marshall, and Byron White) who had taken senior status had sat in the lower courts. With Justices O'Connor and Souter, that number is now eleven. (Justice Stevens has not sat in the lower courts.) Only ten Justices sat on the Courts of Appeals, as Van Devanter, the first to utilize the 1937 statute, sat only on the district court. The lower-court service of Justices Marshall and Brennan was negligible, so Myers examined the other six, who varied in the extent of their Court of Appeals service (length of time, number of cases, and number of courts). Myers also reported on a topic not discussed in this article: the fate of their decisions, few of which went to the Supreme Court with very few of those being granted review.

Updating Myers' Numbers

Myers' reporting of the number of retired Justices' cases was "based on secondary sources and searches of cases and newspaper accounts on online databases," and he found that "not all cases are reported and searchable."[5] For some Justices, he reported only



Willis Van Devanter was the first to utilize the 1937 statute that allowed retired Justices to sit on lower courts. He accepted judicial assignments in the district courts in New York.

opinions and not all cases in which the Justice participated. For the present study, Westlaw searches were conducted for each retired Justice in Myers' study, as well as for Justices O'Connor and Souter. Some of the resulting numbers depart considerably from Myers'.

Myers' report of Justice Reed's seventeen opinions in the D.C. Circuit is confirmed, but five dissents must be added, along with the seventy-two other cases in which he participated there. To Justice Burton's eight D.C. Circuit opinions (also confirmed), three dissents must be added; there are fifty-one (not forty-four) additional cases in which he participated, a total of sixty-two. To Justice Stewart's nine Court of Appeals opinions and one dissent, the thirty cases in which he participated should be added. In addition to eighteen opinions and one dissent Myers reported (confirmed), Justice White concurred in a judgment without opinion and had an additional fifty-nine participations. For Justice Lewis Powell, Jr., instead of thirty-three opinions and one dissent, there are thirty-six opinions for the court and three separate opinions, with Powell participating in 238 other cases.

Justice Clark is the most difficult retired Justice for whom to obtain an accurate count because of the large number of cases in which he took part, with the further complication that some of these cases were pending at the time of his death. Among those is *Estelle v. Gamble*, on an Eighth Amendment claim of inadequate medical attention in prison, issued as a Fifth Circuit per curiam but authored by Justice Clark, which the Supreme Court reversed in part and remanded in part.[6] Myers reported seventy majority Clark opinions and one dissent and participation in roughly 380 cases, but the numbers are far higher. Westlaw searches reveal 124 majority Court of Appeals opinions, eight of which were for the Federal Circuit's predecessor, the Court of Customs and Patent Appeals (CCPA) and three dissents, and total participation in 574 cases (twenty-seven in the CCPA).[7] His total Court of Appeals cases include 381 in which he took part but did not write the opinion or for which the author could not be determined because they were per curiam opinions (185) or "unpublished" memorandum dispositions (eight).[8] However, Craig A. Smith, using Justice Clark's papers at the University of Texas, identified him as the author of seventy-four Court of Appeals per curiams, producing a new figure of 198 published majority opinions.

From 2007 through September 2012, retired Justice O'Connor authored twenty-six opinions for the courts on which she sat plus one dissent, and she participated in another 118 cases in which dispositions were filed. From early 2010 through August 2012, Justice Souter had written forty-eight First Circuit opinions and participated in 113 others.

The Circuits

We now look at the Court of Appeals judges with whom the retired Justices have sat. The counts combine the Justice's own Court of Appeals opinions with those in which other judges wrote for the panel, per curiam dispositions, and "unpublished" memorandums, which in a number of circuits do not carry the author's name. After looking at the circuits, we turn to a Justice-by-Justice account.

It is not unusual for a circuit to have been visited by more than one retired Justice—so many judges have sat with a retired Justice at least once—yet with limited exceptions retired Justices seldom have sat with any individual judge for very many cases. After having sat with one retired Justice, a Court of Appeals judge would not likely find sitting with another to be strange apart from differences in individual personalities and styles. Just as members of a multi-member appellate court become accustomed to each other's ways and thinking, a "stranger" who sits more than rarely with a court may be able to develop mutual understanding with its judges, although a rare or occasional sitting with

any individual judge leaves little such opportunity.

A retired Justice's Court of Appeals sitting might be only one day (Justice O'Connor in the Second Circuit), or it might be for several days, or a full judge week. Justice Souter's First Circuit sittings have been for three court weeks of three days each in a year, an average of eight to nine days total. His load has been less than that of an active duty First Circuit judge; while he sits regularly, the load is less than that of the circuit's senior judges. Like them, he hears six cases a day but writes in only one of those cases rather than the usual two.

The only circuit in which only one retired Justice sat is the "old Fifth," visited by Justice Clark. Both Justices White and O'Connor sat in the new Fifth Circuit but only with two judges each (four judges total). Only one of the Eleventh Circuit's judges (R. Lanier Anderson) sat with both Justices O'Connor (six cases) and Powell (two). Two Justices (Clark and O'Connor) sat in the Second and Eighth Circuits, but no judges sat with both. In two circuits, three retired Justices sat, but the time spread meant no judge sat with more than one Justice: the Third, with Justices Clark, Stewart, and O'Connor, and the Eighth, with Clark, who accounted for most sittings, White (only a few cases), and O'Connor, who sat with eighteen different judges. In the Tenth Circuit, visited by Justices Clark, White, and O'Connor, only Judge Deanell Reese Tacha sat with two (White and O'Connor), while eighteen other judges sat with one or another of them. Clark, Stewart, and O'Connor also sat with eighteen judges in the Seventh Circuit, but only two of its judges sat with two Justices: Wilbur Pell (Clark for forty-six cases and Stewart for three) and Robert Sprecher (thirty-three with Clark and two with Stewart). The pictures for the First, Fourth, Ninth, and D.C. Circuits are somewhat more complex. The First and Ninth Circuits are the only ones in which four Justices have sat. Clark, White, Stewart, and O'Connor sat in the Ninth Circuit; O'Connor sat in the most cases, but still in less than two dozen, and no Justice sat with any one judge in more than twelve cases and with no other judge in more than five. Only two Ninth Circuit judges (Pamela Rymer and Sidney Thomas) sat with two Justices—both with White and O'Connor. The four Justices to have sat in the First Circuit are the ubiquitous Justices Clark and O'Connor plus Justices Stewart and Souter; collectively, they sat with twelve different First Circuit judges, a large number considering that the court has only six judgeships; all but its most newly appointed judge have sat in thirty or more cases with a Justice. Four of its judges have sat with both O'Connor and Souter, while Judges Frank Coffin and Levin Campbell earlier sat with both Justices Clark and Stewart.

The Fourth Circuit has had the presence of three Justices, who in total sat with thirty-one judges—Clark, Powell (by far the most cases), and O'Connor. Ten judges sat with both Powell and another Justice—five with both Clark and Powell and five others with Powell and O'Connor. The latter includes Judge J. Harvie Wilkinson III, a former Powell clerk and the son of a Powell lawyer colleague,[9] who sat in three cases with Justice O'Connor and in seventy-seven with Powell.

The D.C. Circuit, where no retired Justice has sat since Justice Clark, is the court with the largest number of judges who sat with more than one Justice, resulting perhaps from Justices Reed and Burton having sat only there. Two of the court's judges participated in cases with the three retired Justices who sat there—Judge David Bazelon in forty cases, twenty-three of which were with Justice Reed, and Judge J. Skelly Wright, in only eight total. Judges Henry Edgerton, John Danaher, Wilbur K. Miller, Walter Bastian, E. Barrett Prettyman, Spottswood Washington, Charles Fahy, and (later Chief Justice) Warren Burger sat with both Justices Reed and Burton, while Judge Harold Leventhal sat with Justices Reed and Clark.

The Justices

In looking at each retired Justice in turn, we look first at those retired Justices with smaller amounts of Court of Appeals activity and then to Justices Tom Clark and Lewis Powell, Jr., before looking at Justices O'Connor and Souter. Justice Reed sat with eleven D.C. Circuit judges and in at least ten cases with all but two—in roughly two dozen cases each with Judges Edgerton, Bazelon, Robinson, and Danaher; seventeen or eighteen cases each with Judges Burger, Miller, Prettyman, and Fahy; and eleven with Judge Bastian. Justice Reed dissented from three Bazelon opinions and one by Prettyman and from a Bazelon-Prettyman per curiam opinion.

Justice Burton sat with all but one of the same D.C. Circuit judges as had Reed, sitting the most (seventeen to nineteen cases) with Judges Fahy, Danaher, Miller, and Bastian, and somewhat fewer times with Judges Edgerton and Prettyman (eleven each), Bazelon, and Burger. Of Burton's three dissents (one full, one partial), two were from Danaher and one was from Bastian.

With his lesser participation spread over four circuits, Justice Byron White did not sit often with very many judges. In the Fifth Circuit, he sat with only Judges Rhesa Hawkins Barksdale and Robert Parker (seven reported cases); in the Eighth, with only three judges—James Loken (ten cases) and Richard Arnold and Theodore McMillian (five each). He sat in a dozen or baker's dozen each with four Ninth Circuit judges—Sidney Thomas, William Canby, Pamela Rymer, and John Noonan—plus four with Margaret McKeown. White's largest number of cases was in his home area, the Tenth Circuit, where he sat with nine different judges, in ten cases with only Judge David Ebel, and with no others in more than six (Paul Kelly and Stephanie Seymour) and five each with the others.

Justice Stewart also sat with individual judges in only a few cases because of quite limited service in three of the five circuits in which he sat. In the Sixth Circuit, for example, he sat with only four judges—with Judges Gilbert Merritt and Pierce Lively in four cases and in only one case with two others; in only one three-case Ninth Circuit panel; and in the Third Circuit with two judges, Collins Seitz and Arlin Adams (eight cases). He participated the most in the First Circuit, where he sat in twelve cases with Judges Levin Campbell and Hugh Bownes but in only five each with Judges Frank Coffin and (later Justice) Stephen Breyer.

In the Seventh Circuit, Justice Stewart sat with no judge in more than five cases, but his sitting there is of note because of his dissent in a case that went to the Supreme Court, an antitrust opinion by Judge Richard Posner on denial of membership in a professional association, *res judicata* (because of a prior dismissed state court case), and contempt for violation of discovery orders.[10] After Judge Posner wrote a narrower opinion for a badly fractured en banc court, the Supreme Court did not uphold Stewart's position.[11]

In the Eleventh Circuit, Justice Powell sat with only five judges—in nine cases with Judge Phyllis Kravitch and ten with Gerald Bard Tjoflat. Powell's extensive Fourth Circuit sitting led to his serving on cases with nineteen different judges as well as in nineteen cases with non-Fourth Circuit judges, particularly district judges sitting by designation. The number of cases in which he sat with individual judges ranged from four (Clement Haynsworth) to a dozen or fewer cases with five more judges, to the previously noted seventy-seven with Judge Wilkinson, and he sat with another seven—Karen Williams, J. Michael Luttig, Emory Widener, John Butzner, James Phillips, Paul Niemeyer, and Clyde Hamilton—in twenty to thirty cases each; he sat in over thirty cases with Judges Francis Murnaghan, Donald Russell, William Wilkins, and Kenneth Hall. He dissented only once, in a case with Judges Wilkinson and Luttig, and concurred separately twice—once in part and in the judgment with Judges Hall and Luttig and in another,

with Judges Widener and Williams, in the judgment.

Despite not having the longest period of retirement to sit in the Courts of Appeals, Justice Clark clearly had the most extensive participation, which varied by circuit from minimal (Third and Ninth) to quite considerable (Second, Seventh, and Eighth), with moderate participation in the others. While he wrote fewer than a half-dozen opinions (even including per curiams) in the First, Sixth, and Ninth Circuits, he wrote a dozen or more in the Third (four signed opinions, seven per curiams), Fourth (nine signed, five per curiams), Tenth (eight each signed and per curiams), and D.C. (ten opinions, five per curiams) Circuits. His written output was considerably higher in the Second Circuit, where he wrote twenty signed opinions and fourteen per curiams, and in the Seventh and Eighth Circuits, in each of which he produced over forty opinions (over twenty-five signed opinions in each, along with fifteen or more per curiams).[12]

In the Third Circuit, in addition to sitting with two non-Third Circuit judges (from the Second Circuit and a district judge) in one case, Justice Clark sat in only five cases each with Judges John Gibbons and James Hunter. His death came only several months after he sat in the Ninth Circuit,[13] in one case each with four judges and with one judge in only two. He heard more cases in the First Circuit but with only three judges, then its complement of judgeships, almost twenty each with Frank Coffin and Levin Campbell and eleven with Edward McEntee. Clark sat in the Fourth Circuit with nine judges but with no judge in more than twelve cases (Judge Haynsworth), in seven cases each with four judges, and with two others in four each. He sat with only four of its judges in the "old Fifth," in eight cases with two (Irving Goldberg and Robert Ainsworth), and in ten with Walter Gewin and Paul Roney. He sat in no more than six cases with any of the seven Sixth Circuit judges with whom he sat.

In the Tenth Circuit, where he sat with eight judges plus six cases with a non–Tenth Circuit judge, he sat in thirty cases with Judge Delmas Hill,[14] in only sixteen cases with Robert McWilliams, and in roughly a dozen each with Judges David Lewis and Oliver Seth. He sat with eight D.C. Circuit judges, most often with George McKinnon (fifteen cases) and Roger Robb (twelve), and less David Bazelon (eight), Spottswood Robinson (seven), and J. Skelly Wright (five). Clark dissented from a Bazelon opinion Robinson joined.

There was a wide distribution in the number of times Clark sat with the greater number of Second, Seventh, and Eighth Circuit judges. He sat with thirteen active and senior Second Circuit judges, in addition to twenty-one cases with non–Second Circuit judges (in one case, with two). He sat least (only five cases) with Judge Ellsworth Van Graafeiland and most with Irving Kaufman (thirty-two cases), and his one dissent was from a Kaufman opinion. He sat in twenty cases each with William Mulligan and Walter Mansfield; eighteen with Lumbard; eleven to thirteen cases each with four (William Timbers, Sterry Waterman, Henry Friendly, and J. Joseph Smith); eight cases with Leonard Moore; and seven each with Robert Anderson, Paul Hays, and Wilfred Feinberg.

Justice Clark also sat with thirteen judges in the Seventh Circuit as well as with non–Seventh Circuit judges in twenty-six cases; in two cases, the panel was the unusual combination of Clark and two district judges. Clark's contact with five of the judges was only eight or fewer cases, but he sat with Judge Thomas Fairchild in thirty cases, in thirty-three with Judge Robert Sprecher, and in forty-six with Judge Wilbur Pell; he dissented in a case with Judges Pell and Sprecher. Other judges with whom he sat in more than a dozen cases were Philip Tone (fifteen), Latham Castle (sixteen), (later Justice) John Paul Stevens (twenty), and Luther Swygert (twenty-two). In the Eighth

Circuit, in addition to sitting with non-Eighth Circuit judges in ten cases, Justice Clark sat with ten circuit judges and in more than twenty cases each with eight of them—in slightly over twenty each with Donald Ross and (later Director of the FBI and the CIA) William Webster, twenty-seven with Marion Matthes, thirty-eight with Gerald Heaney, and forty-seven with Floyd Gibson, but in fifty-nine, the most, with Judge Myron Bright.

In the CCPA, which used five-judge panels rather than the three-judge panels of the Circuit Courts of Appeals, Justice Clark sat with seven CCPA judges and in eleven cases with non-CCPA judges. He sat in over twenty cases with Judges Lindsay Almond (twenty-four), Donald Lane (twenty-seven), and Phillip Baldwin (thirty-one), and the most with Giles Rich (thirty-eight), but in less than ten each with Judges Eugene Worley, Arthur Smith, and (later Chief Judge) Howard Markey.

Justice O'Connor's Court of Appeals activity through 2012 was broad but also somewhat thin, with not many cases in any circuit, so she has not sat often with any judge. Indeed, there are only a few judges with whom she has sat in at least ten cases—Third Circuit Judges Anthony Scirica and Marjorie Rendell (seventeen cases) and Ninth Circuit Judge Sidney Thomas. She sat in nine cases each with two other Third Circuit judges, Theodore McKee and Dolores Sloviter. In the Second, Fifth, Tenth, and Eleventh Circuits, she sat with only two judges each and in no more than eight cases with any of them. She sat with only four judges in six cases each in the First and Sixth Circuits but less in the Seventh Circuit. In the Eighth Circuit, she sat with five judges, but again for no more than six cases each, with three judges. She did sit with a few more Ninth Circuit judges—eight—but in only three or four cases with all but one of those, and with eighteen judges in the Fourth Circuit but in six cases with Judges Clyde Hamilton and Dennis Shedd and ten with William Traxler.

Sitting in only one circuit, Justice Souter's contact with the court's members, including senior judges, is spread far more equally than for some other retired Justices. Through September 2012, his sittings with his First Circuit colleagues ranged from the most, eighty-three cases with (former Chief) Judge Michael Boudin to only twelve with newly appointed O. Rogeriee Thompson; the others clustered in the thirties—Judges Jeffrey Howard, Kermit Lipez, and Juan Torruella—to between forty-seven and fifty-two—Judges Bruce Selya, (now Chief) Judge Sandra Lynch, and Norman Stahl.

O'Connor and Souter, Writing and Joining

Myers' study concluded before Justices O'Connor and Souter began to sit on the Courts of Appeals, so we now look at opinions they wrote and some they joined.

O'Connor

Among the subjects on which Justice O'Connor wrote Court of Appeals opinions are some business matters; review of agency actions; the First Amendment, including church-and-state; elections and voting; and multiple aspects of criminal procedure. She also joined opinions on agency review, including immigration appeals and economic regulation; matters of local government, including zoning and their employees; and discrimination and disenfranchisement. The largest number, on aspects of criminal justice, reflected the Courts of Appeals' many criminal appeals and habeas corpus cases. At least for people accustomed to seeing the Supreme Court address the most salient of legal matters, most of her published opinions are not exciting, either on their facts or as to their issues; many opinions are heavily fact-specific rather than addressing broad doctrine. An example is her opinion in an Eleventh Circuit appeal from a conviction for conspiracy to defraud, health care fraud, and false claims, in which she ruled certain evidence admissible but found an error in excluding a videotape on hearsay grounds, although the error was harmless.[15] With few exceptions,

Justice Tom Clark took part in a large number of lower court cases after he retired from the Court, including *Estelle v. Gamble*, issued in 1975 as a Fifth Circuit per curiam but authored by Clark. The case involved a Texas prisoner who injured his back during prison labor and claimed that doctors had failed to provide appropriate care. The Supreme Court, which reversed in part and remanded in part, held that medical malpractice did not rise to the level of "cruel and unusual punishment" simply because the victim was a prisoner.

her cases resulted in moderate-to-conservative outcomes, much as would be expected from her Supreme Court service.

Quite a number of cases—both her opinions and other participations—dealt with routine matters unlikely to be found in the Supreme Court but that are typical in Courts of Appeals' regular dockets, such as convictions for drug offenses or for felon-with-gun, many containing search issues and also implicating sentencing; revocation of supervised release; deliberate indifference to prisoner needs; denial of asylum for aliens; bank and wire fraud; denials of Social Security disability benefits; racial or gender discrimination; and insurance coverage.

A typical "unpublished" O'Connor disposition came in a case that might at first have looked like a violation of rights but that she said was a run-of-the-mill property dispute, where she found no violation of due process in an agency asserting its own due process rights and no free speech violation in a state-threatened lawsuit as to disputed ownership of lakefront property.[16] Perhaps less typical was a case involving sexual abuse of a minor, in which a USAID officer in Kiev, looking out for children of colleagues, committed improper acts, but the law in the case was straightforward and O'Connor found no clearly erroneous findings and ruled that, even if a government agent had committed an ethical violation, dismissal of the indictment was not the proper remedy.[17] Also legally straightforward was an appeal from convictions for a $56 million Ponzi scheme, which had the twist of defendants uncooperative in court, with the appeals court finding no error in the district court's appointment of full-time counsel for them.[18]

There were some somewhat less typical situations in nonprecedential rulings O'Connor

joined. One was a university student organization's challenge to allegedly discriminatory application of an unwritten outdoor-zone reservation policy that required fees and insurance.[19] When a dog rescue organization sued over Pennsylvania's statute for licensing out-of-state dog dealers, resulting from seizure of dogs at a transfer point, the Third Circuit panel held that the law did not violate the (infrequently raised) dormant Commerce Clause, with other claims not before the court because of lack of ripeness or standing.[20]

A somewhat complex business-related case was among the insurance coverage matters that came before Justice O'Connor, and she engaged in a rare dissent when insurance representatives sought to obtain a no-coverage declaratory judgment when theft of copper tubing damaged air conditioners. The panel majority said that breaking into external fixtures was not entering the building and found the A/C damage within the theft exception to vandalism coverage and outside the burglary exception. O'Connor reached a different conclusion, saying that the A/Cs were part of the building and damage was construed properly as caused by burglars, particularly as, under Texas law, the policy was to be construed in favor of the insured.[21] In an attempted consumer class-action suit against a telemarketing company over credit card charges, Justice O'Connor stated for the Seventh Circuit that the action was barred by the voluntary payment doctrine, as earlier credit card payments had been made without complaint."[22]

She also joined several rulings unfavorable to class actions, for example, the shunting aside of two class-action antitrust cases alleging conspiracies to fix the price of title insurance in Delaware and New Jersey, which turned on the "filed rate" doctrine, applicable because the title insurance companies had properly filed rates.[23] She continued not to favor class actions in two discrimination cases brought in that form. In one, Hispanic employees sued an Arizona community college district for a hostile work environment created by not responding to a professor's racially charged e-mails to the college community, but the appeals court said the professor's statements were pure speech, not unlawful harassment.[24] The other case raised the type of question the Supreme Court later resolved against class actions in *Wal-Mart v. Dukes*,[25] with the Third Circuit reversing certification of a nationwide class of UPS employees for a pattern-and-practice case of disability discrimination.[26]

Justice O'Connor did, however, join a consumer-friendly opinion upholding a $250,000 jury verdict in a suit against a debt collection law firm and a finding of malice;[27] a Fifth Circuit panel that ruled in a private securities fraud case that an improper burden had been placed on investor-plaintiffs;[28] and a Second Circuit securities class-action case in which the panel said that it was sufficiently alleged that misstatements in audited financial statements were those of the corporation's outside accountant but that the accountant's duty to correct misstatements in corporate filings did not produce a misleading report within the class period, and the accountant's duty to review quarterly statements did not make those statements the accountant's statements or create a statement subject to Sec. 10(b).[29]

On agency actions and procedures, when a veteran claimed violation of the Vietnam Era Veterans Readjustment Assistance Act, Justice O'Connor noted the "strong presumption that agency action is reviewable by courts"[30] but said that decisions to enforce were left to the agency, quoting her former Supreme Court colleague (then-Judge) Anthony Kennedy on courts not expressing opinions on anemic enforcement policy. She also joined a panel ruling against a public interest organization's challenge to OSHA's standard for exposure to hexavalent chromium because there was substantial evidence to support the agency finding of technical infeasibility of the proposed standard for the welding industry.[31]

At least outside of the criminal justice system, Justice O'Connor seldom faced constitutional issues in the Courts of Appeals, although she did write in two church-state cases (discussed later). In one of Puerto Rico's many political controversies, when a discharged government employee there alleged party affiliation as the basis for discrimination, O'Connor said for a First Circuit panel that political affiliation was not a protected category.[32] Of considerable potential significance were claims of disfranchisement on which she ruled. However, no far-reaching result was reached in a challenge to a Missouri statute denying the right to vote to residents under court-ordered guardianship, as the court said that no equal protection violation had been shown because Missouri's law did not categorically disenfranchise those under full guardianship.[33] When Arizona felons with multiple drug and other offenses sued over having been disenfranchised, O'Connor held that states could disenfranchise whether the crimes were felonies at the common law and that there was no violation of equal protection from automatic restoration of rights to one-time felons on payment of fines and restitution.[34]

Also from Arizona was a highly significant voting rights case in which O'Connor provided the deciding vote in the appellate panel. A voter-adopted proposition required documentary evidence of citizenship to register to vote and identification in order to vote. Judge Sandra Ikuta, who wrote, and Justice O'Connor held that the National Voter Registration Act had superseded the state's documental proof of citizenship rule and that requiring proof of identification to vote did not violate the Voting Rights Act and was not a poll tax, although people would have to expend funds to obtain proper identification.[35] The Ninth Circuit then ruled en banc in basically the same fashion.[36] The Supreme Court granted review to the voter registration question and affirmed in June 2013 but did not discuss the Ninth Circuit's opinion or mention Justice O'Connor's participation.[37]

Also of wide importance was an opinion O'Connor joined in a civil rights attorney fees case. The issue was whether in a Voting Rights Act case deriving from the drawing of county legislative districts—not in the South but in Albany, New York—the district court could use only local billing rates (the "forum rule") or could consider higher rates charged by lawyers from elsewhere when those lawyers were chosen by a local group. Through Judge John Walker, the Second Circuit panel said that if plaintiffs reasonably retained out-of-district attorneys, the district judge could take that into account but then ruled that a reasonable plaintiff would have sought attorneys within the (less-expensive) Northern District of New York rather than the far more expensive Southern District.[38]

Justice O'Connor wrote many Court of Appeals opinions on recurring criminal justice issues, but she also wrote on matters of first impression, for example, finding sweat patches generally reliable as a basis for probation revocation for a user of illegal drugs possessing a gun.[39] Also related to guns was her ruling upholding ATF reporting requirements applied to a certain proportion of firearms dealers and its authority to issue a demand letter.[40] She was also a member of a Seventh Circuit panel that held that a categorical ban on a felon possessing a gun was valid under the Second Amendment, as the ban advanced a government objective.[41]

Justice O'Connor wrote several opinions on searches and prisoners; she also joined other judges' opinions on those matters and on speedy trial, guilty plea issues, and sentencing appeals of the sort regularly before the Courts of Appeals. In a less typical Fourth Amendment case, she wrote for a Fourth Circuit panel to hold that an officer who had seized what an angry neighbor called a wolf (actually a malamute dog) had qualified immunity and that plaintiff had insufficiently pled his claim against the county; there was no *Monell*-required policy or custom[42] behind the seizure, nor was the officer liable for

failing to inquire into the lawfulness of possessing the animal.[43]

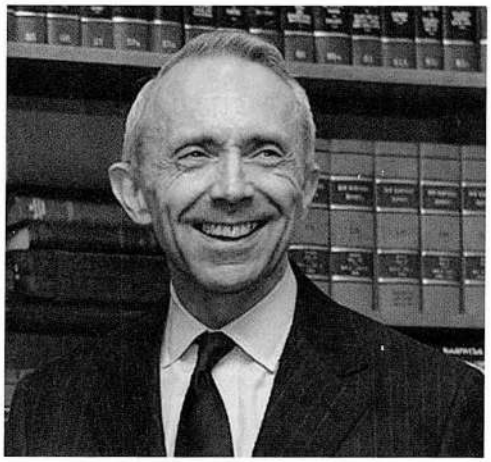
The Justice wrote that an officer's failure to disclose certain facts in an affidavit in a drugs-and-guns case did not defeat probable cause, as the good faith exception applied and "a finding of probable cause does not require absolute certainty."[44] She also joined an Eighth Circuit ruling upholding a search under the good faith exception, even in the absence of probable cause,[45] and a Ninth Circuit case reversing suppression of child pornography evidence from a warrant-based computer search where the dissenting judge argued that the extent to which porn messages were disguised meant the presence of unsolicited messages on a computer did not create probable cause for a house search.[46]

Justice O'Connor's opinions in prisoner cases also involved searches of a different type: the interception of communications. In a straightforward opinion for the First Circuit, she said that an inmate who had consented to phone monitoring of calls with defendant was not bounded by a prison phone policy, and a guard could provide an investigator access to the calls, which led to a conviction for false statements to a government official.[47] The other case, more complex and more like what one might find in the Supreme Court, involved lawyer-client communication and touched on an attorney/defendant's rights at least as much as the detainee/client's when the officer monitoring calls did not stop listening on realizing the call was from an attorney, and thus privileged, but instead went to the detainee for assistance in investigating the attorney, who was then convicted of obstruction of justice and money laundering. Justice O'Connor found no Fourth Amendment violation in jail monitoring of calls and disagreed that a state law violation meant the inmate had not consented.[48] Using First Circuit precedent, she ruled that a prisoner talking to any nonattorney would be consenting to monitoring and it did not matter that the prisoner was speaking to an attorney or that the Massachusetts regulations went beyond the Constitution's demands. O'Connor thought that the inmate had indicated his consent because, although he had other means to communicate with the attorney, he continued with the calls despite the warning of monitoring at the beginning of each call, but she did warn that "[t]he monitoring of these calls, made between an attorney and a client who is seeking legal advice, is troubling."[49]

Souter

Justice Souter's opinions for the First Circuit present a picture of a judge laboring in quiet workmanlike fashion, like most Court of Appeals judges and as befits his low-key personality. Just as with Justice O'Connor, much of his output has been in criminal cases and others typical of routine Court of Appeals work. However, in March 2013, he wrote for a unanimous panel to issue a writ of mandamus to remove the district judge presiding over the James ("Whitey") Bulger case (gangster/FBI informant accused of murder, claiming FBI promise of immunity) because the judge's impartiality might reasonably be questioned "from the very structure of the prosecutorial forces" in which the judge had earlier been involved.[50]

Not many of Souter's cases contained unusual facts, but he did write in a somewhat atypical case in which mothers sued a school district for failing to keep schoolchildren from leaving school during school time, which the mothers said failed to preserve family integrity and prevent abuse. Finding the mothers' due process rights and the students' rights not violated, Justice Souter said, "As constitutional claims, those stated here do not rise to a substantial level."[51] He also took part in a case brought by the estate and relatives of someone killed in a terrorist attack, where the panel allowed the Palestine Liberation Organization to attack the default judgment against it.[52] In addition, one of Justice Souter's nonprecedential dispositions came in a quintessential New England case in which one lobsterman's gear was found in the boat of



Since retiring from the Supreme Court, Justice David H. Souter has sat on the Court of Appeals for the First Circuit, where he had served briefly prior to his Supreme Court nomination. Souter has relied on several Supreme Court rulings in his Court of Appeals opinions.

another, whose lobster- and crab-taking license was suspended without further hearing after he did not appear in court. The panel ruled that the state did not need to provide notification of the consequences of this default, as sufficient post-deprivation proceedings—availability of appeal in the state courts—were available.[53]

Justice Souter wrote opinions in several cases requiring interpretation of state law under federal diversity-of-citizenship jurisdiction, including one on insurance coverage for liability for injury to privacy from advertising[54] and another against a former employee for violating an employment agreement.[55] Several other of his run-of-the-mill cases involved employees, such as an ERISA benefits case on denial of disability benefits,[56] a suit by a temporary employee over an injury,[57] and another insurance coverage dispute over an insured's injured son's bar fight.[58] He also joined a ruling about an individual's nonreappointment to a town commission after criticizing a town council proposal, in which the court found no First Amendment violation even if the discharge had been for speech.[59] Like Justice O'Connor, Justice Souter faced some cases with discrimination claims—under Title VII, the Americans with Disabilities Act, and state Fair Employment Practices and Whistleblower Acts—but he did not write opinions in any while joining a number that held against the claimants. Of greater significance was a case challenging management of public institutions. Minor children, as a class of those in state agency custody, sued through their "Next Friends," claiming they were underfed in the Rhode Island institutions in which they were kept and that the institutions were understaffed and mismanaged. The panel held that a federal court could appoint Next Friends and specified several appropriate individuals.[60]

Justice Souter wrote and joined opinions upholding searches and seizures. Where, after expiration of a period of probation, a probationer had been arrested and searched on a probation officer's authorization, Souter upheld the warrantless search, as the officers had probable cause to believe that the individual was subject to arrest for violating his probation and also had reasonable suspicion of contraband in his house.[61] He also wrote an opinion on *Miranda* warnings in a military context, ruling in defendant's favor (discussed below). He joined opinions in a felon-with-gun case where the court held valid a warrantless seizure for impoundment of a motorcycle in plain view;[62] another in which the panel found no legal expectation of privacy in the apartment of one's former girlfriend;[63] and one holding the warrantless regulatory search of a gun shop valid under the Gun Control Act.[64]

Among the criminal justice opinions Justice Souter joined was one upholding a Rhode Island state senator's conviction on the basis that honest services mail fraud covered more than bribery and that the senator's facilitation of a meeting between a health insurer and a hospital employing the senator was a misuse of legislative power.[65] There were also several cases involving lawyers' actions or inactions, such as whether a

prosecutor had improperly vouched for a witness[66] and whether defendant's counsel was deficient, the latter in a case, with cult overtones, of first-degree murder of defendant's infant son.[67] Dealing with another state murder conviction, Justice Souter wrote an opinion on the procedures by which habeas cases were to come to federal court, saying that Massachusetts's "gatekeeper rule," in which one Supreme Judicial Court justice decides which post-conviction issues are to be heard, was an adequate and independent state ground precluding federal habeas.[68] In one of the federal appeals courts' many Sentencing Guidelines cases, he wrote a nonprecedential ruling to affirm the sentence of a bank robber as a career offender[69] and joined a ruling that a state conviction was a predicate for Armed Career Criminals Act sentencing.[70]

Justice Souter was faced with several claims of deliberate indifference to the needs of the incarcerated, including one on the post-release suicide of a detainee[71] and another on a Sec. 1983 claim against a sheriff when an injury was claimed to have resulted from inadequately maintained correctional facilities.[72] He also joined an opinion rejecting an inmate's suit, claiming a taking based on a corrections director's ceasing to pay interest on inmate trust accounts.[73] And he took part in the continuing controversy over officials' duties toward inmates with gender identity disorders who seek medical or surgical treatment when he served on a panel that affirmed a district court preliminary injunction in favor of the detainee with such a disorder who had sought hormone therapy and female garb.[74]

Retired Justices' Use of Supreme Court Rulings

Retired Justices sitting on the Courts of Appeals make some use of the Supreme Court rulings in which they participated and in which they wrote for the Court, as well as rulings from both before and after their Supreme Court tenure. Here we make a preliminary examination of such uses by Justices O'Connor and Souter.

Justice O'Connor

In a case where an insurer had sued the owner of a vessel and the manufacturer over damage in international transit to a shipment of steel coils, involving application of the Carriage of Goods on the High Seas Act (COGSA), Justice O'Connor said that the ship's manager was not covered under COGSA and a finding of negligence was not clearly erroneous. In doing so, she drew on an earlier case, *Robert C. Herd & Co. v. Krawill Machine Corp.*,[75] to say the Justices had "considered and rejected an argument similar" to one made in the current case, and she rejected efforts to distinguish that case, noting that "[t]he Supreme Court unanimously . . . found that COGSA's plain terms applied only to owners, not to agents thereof."[76] She then drew on a case in which she had spoken for a unanimous Court, *Norfolk Southern Railway Co. v. Kirby*,[77] to state that "shipping parties are free to extend COGSA's coverage by adding provisions to bills of lading extending the COGSA regime to any and all agents or independent contractors who participate in the shipment of goods under a particular contract."[78] In ruling on whether a Puerto Rico conviction was a "domestic conviction" that could serve as a sentencing predicate, she distinguished a case where she had been in the majority, *Small v. United States*,[79] as dealing with foreign convictions, not those from Puerto Rico.[80]

When Justice O'Connor wrote for the Fourth Circuit to affirm a denial of suppression of evidence taken from trash in a drug-and-gun case and say that probable cause was not defeated by the officer's failure to describe certain facts in the affidavit, she cited *Illinois v. Gates*,[81] in which she had been in the majority, for the proposition that "a finding of probable cause does not require absolute certainty."[82] Of particular note is her reference, in a case on alleged discrimination based on political party affiliation, to a Supreme

Court 5–4 decision that she found "persuasive" although she had been in dissent there;[83] this speaks both to whether Justices adhere to precedent even when they disputed it when announced and to their role as followers of precedent when sitting in the lower courts.

Of special interest are Justice O'Connor's lower court rulings on church and state because of the important role she played on the subject while on the Supreme Court. Sustaining a city council rule that opening prayers at council sessions must be nondenominational, O'Connor, writing for the Fourth Circuit panel to sustain the ban, brought into play two cases in which she had participated. One was *Lee v. Weisman*,[84] in which O'Connor had agreed with Justice Blackmun's separate concurrence, but that she now distinguished as not being about nonsectarian prayer but about whether one could compel attendance at a high school event. The other was *Marsh v. Chambers*,[85] where she had been in the majority and from which she quoted to say that the Supreme Court "has treated legislative prayer differently from prayer at school events": "The Council's decision to provide only nonsectarian prayers places it squarely within the range of conduct permitted by *Marsh*."[86] And in upholding a prisoner's religion-based complaint against a ban on beards, she joined an opinion that drew the standard to apply from another case in which she had been in the majority.[87]

When another judge writes for a panel, a retired Justice's presence might prompt inclusion of discussion of particular Supreme Court cases. An instance of an opinion by another judge drawing on an O'Connor Supreme Court opinion was, perhaps not surprisingly, a church-state case. A group supporting church-state separation and inmates sought to prevent Christian pre-release rehabilitation services, and they prevailed in large measure in their effort when the Eighth Circuit held on the basis of *Aguilar v. Felton*[88] that the provider was a state actor and the funding endorsed religion.[89] When a panel on which she was a member ruled in a nonprecedential disposition that, in a sex discrimination case, there was no employer liability without adverse employment action and that reasonable care had been taken to avoid sexual harassment, the panel used the test from *Burlington Industries v. Ellerth*,[90] in which O'Connor had been in the majority; the opinion used a post-O'Connor ruling on retaliation.[91] In a nonprecedential ruling she joined, the district court had used *Heck v. Humphrey*,[92] in which O'Connor had joined a concurrence in the judgment, to turn aside federal civil rights claims, and also noted the test found in her opinion in *Reeves v. Sanderson Plumbing Products*.[93]

Souter

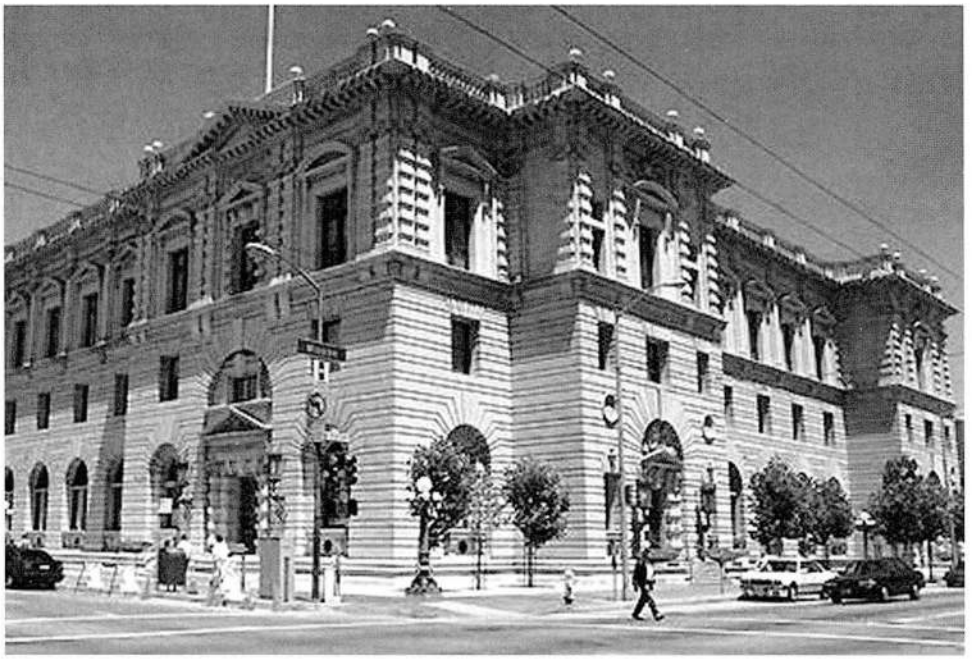
In a suit against a state parole board to rectify claimed due process and equal protection violations, Justice Souter, dealing with a Supreme Court case preceding his tenure, wrote that there was no positive entitlement to parole if statutory requirements were met and that it was acceptable to grant discretion to the state board. He treated seriously the petitioner's claim that *North Carolina v. Pearce*[94] applied because his earlier effort to obtain a new trial led to his being penalized through denial of parole, but Souter thought the analogy failed.[95]

In a case on a pretrial detainee's claim of indifference to medical needs, Souter utilized Supreme Court opinions in which he had participated. Saying that exhaustion of administrative remedies was not jurisdictional, he drew on *Woodford v. Ngo*, which held that the exhaustion requirement of the Prison Litigation Reform Act meant proper exhaustion,[96] and *Jones v. Bock*, which unanimously held that a prisoner's failure to exhaust was an affirmative defense.[97] While the latter had been decided unanimously, Souter had joined Stevens' dissent in *Woodford*, a further indication of accepting as precedent a ruling to which a Justice had initially objected.[98] He also joined an opinion on the resentencing of a federal inmate in which the author drew on

one of his opinions. Holding that a defaulted claim of error could not be resurrected, the panel said that *Shepard v. United States*,[99] where Souter had spoken for a 5–3 Court on proving the predicate for a sentence, was not an intervening change in the law.[100]

Supreme Court rulings are key in two of Justice Souter's Court of Appeals opinions. In one, he wrote an opinion holding that a serviceman had been in custody for *Miranda* purposes because of "the inherently coercive force of military organization," which the U.S. Court of Military Appeals and Congress itself had recognized even before *Miranda*.[101] Making a strong statement in support of *Miranda*'s rationale, he spoke of "the psychological insight that prompted adoption" of the warnings *Miranda* required, *Miranda*'s point being "to preserve the suspect's Fifth Amendment privilege against compelled self-incrimination, be it by confession or admission, during 'custodial interrogation,' whether the questioning occurs in traditionally formal custody or while a suspect is 'otherwise deprived of his freedom of action in any significant way.'"[102] He also drew for support on three other cases, in two of which he had been in the majority. One was *Dickerson v. United States*,[103] from which he noted that "[s]ignificant deprivation occurs in circumstances carrying a 'badge of intimidation,' . . . 'inherent compulsions,'" or ones with an elevated risk "that the Fifth Amendment privilege will not be appreciated." And he pointed to the earlier *Thompson v. Keohane*[104] to say that one test was whether the person questioned would have felt free to cease and leave, with another test, drawn from the earlier *Berkemer v. McCarty*,[105] being whether the suspect had been coerced to engage in "back and forth with the police, as in the paradigm example of traditional questioning."[106]

Justice Souter placed heavy reliance on a Supreme Court ruling decided after he had left the Court when he reversed a district court, which, on revoking supervised release, had imposed a longer sentence to aid the defendant's rehabilitation. Indeed, in ruling that such sentence extension could not be done either



Retired Justices who sit in a circuit for which they served as the Circuit Justice have met the circuit's judges over the years at circuit judicial conferences. This was the case, for example, for Justice Powell in the Fourth Circuit, Justice White in the Tenth Circuit, and Justice O'Connor in the Ninth Circuit (whose courthouse is pictured).

on sentencing or resentencing, he extended the Court's opinion in *Tapia v. United States*[107] and used it to trump the rulings of all other Courts of Appeals that had considered the issue.[108] Souter said *Tapia* had "held that the caution against imprisonment for rehabilitation is a prohibition not only to a decision to commit for that purpose, but to order a longer, rather than shorter term of any commitment in order to provide adequate time for a prison treatment course."[109] He said the Supreme Court's unanimous "assessment of the significance" of the matter of congressional authority made *Tapia* relevant to the present case, "even though *Tapia* dealt with initial sentencing, whereas resentencing is involved here."[110] He pointed to Congress's obvious intent not to have rehabilitation considered to say that the Court "fe[lt] bound to conclude that rehabilitation concerns must be treated as out of place at a resentencing to prison, just as at ordering commitment initially."[111]

What Say the Judges

To determine possible effects of retired Supreme Court Justices' presence on Courts of Appeals' decision-making, a brief survey was sent by e-mail to forty-seven judges who had sat with one or more retired Justices and were able to be contacted. Thirteen judges (27.7%) completed the survey, with several adding comments; four declined to respond as it would require revealing nonpublic conference deliberations.[112] The overwhelming direction of the responses allows the conclusion that more responses would not likely have produced a different distribution, although near unanimity may also mask a desire not to indicate possible effects.

The judges were asked whether sitting with a retired Supreme Court Justice was any different from sitting with fellow Court of Appeals judges, and those who had sat with more than one retired Justice were asked about any differences between the two. Judges were then asked whether the retired Justice's presence had any effect on distribution of cases *to* the three-judge panel or *within* it and on the assignment of opinions, followed by whether there was discussion about how to make it more or less likely that the Supreme Court would grant certiorari in the cases under consideration.

A number of judges commented on their positive feelings about having retired Justices sit with them. Comments included "It was a great pleasure and privilege to sit with Justice O'Connor" and "It is a privilege for any Court of Appeals judge to sit with a retired Supreme Court Justice." A judge who sat with Justices O'Connor and Souter wrote, "They are both very fine as Court of Appeals judges and a real pleasure to sit with." The positive view was well stated by the judge who said that sitting with a Supreme Court justice "was simply a nice perk of being an appellate judge."

All but two judges said there was no difference between sitting with a retired Justice and sitting with one's Court of Appeals colleagues, but one judge observed that "the outcome was not different, but the feel was different." When a Justice sat, there was "greater respect and higher regard," although "without affecting other judges' views more than from any other judge." One judge placed this is in context by saying, "Sitting with any judge is always a bit different" and is no different with a retired Justice, and the Justices were hardly the only "visitors" who sat with a Court of Appeals. However, differences could be seen among retired Justices. Justice O'Connor was said to be a "presence" and "acted more like a judge of the court," including being more active from the Bench in questioning than Justice Powell, who brought "formality and dignity" and "sat back [and] acted like a guest." Further underlining differences among the Justices was the acerbic observation, made as to the relatively humorless Justice Byron White, "I imagine that other Justices were more stimulating than the one who sat with me."[113]

"If exceptional deference is paid" to a retired Justice's presence, one judge added,

"that occurs chiefly in the social occasions that are held in the justices' honor outside of court," where the retired Justice might tell stories, as Justice Powell did about his confirmation to the Court,[114] and Justice O'Connor, "more open and direct," made comments on issues like cameras in the courtroom. One judge observed that, when a retired Justice was present, "our panel attracted a few more gawkers than usual," and it is mentioned with high regard that Justice O'Connor met with high school classes that attended court on days she was sitting. When she visited one circuit, it was said to be "more like having a movie star come," with "arranged tours and exercise classes for the women."

As each circuit has been visited by more than one Justice, when a retired Justice comes to sit, another will likely have sat with the court earlier, although some time may elapse between these occurrences. While the retired Justices may be unknown to most judges with whom they are to sit, some Justices might be friends—perhaps over many years—with at least someone on the court, and a judge might even have clerked for the now-visiting retired Justice, or an acquaintanceship may have developed outside the courts, seen when one judge referred to Justice O'Connor as his "fly-fishing buddy." A judge who had lived in the same Harvard residential house as Justice Souter indeed suggested that, in part because they shared the same education and had lived in close proximity, he probably knew the Justice's thinking better than he knew that of his own Court of Appeals colleagues. If a retired Justice sat in a circuit in which he or she had been the circuit justice—Justice Powell in the Fourth Circuit, Justice White in the Tenth Circuit, and Justice O'Connor in the Ninth—the Justice would have met the circuit's judges repeatedly over the years at circuit judicial conferences.

Of particular importance is whether the presence of the retired Justices affects panel decision-making. The near-unanimous response was that court dynamics were not affected, with one judge observing that the retired Justices' "transition seems to me to be perfectly seamless" as they "seek to integrate themselves in the workings of the circuit court in the most useful way" and come to argument prepared. (The retired Justice has a clerk, who, with the Justice's judicial assistant, is in the Justice's Chambers at the Supreme Court.) Justice O'Connor was said to have been "fully prepared and asked plenty of questions at oral argument," and a judge who had sat with both Justices White and O'Connor observed that "[n]o doubt because of their broad experience before appointment to the Supreme Court, neither . . . had any difficulty adjusting to the Court of Appeals environment."

Nor did retired Justices' presence affect specifics of the decisional process. Distribution of cases to a panel, "controlled by the Clerk of Court" and "is mechanical," was not affected. The retired Justices did not use their status to preside over panels. Likewise, most judges thought that distribution of cases within the panel and opinion-assignment were not affected, probably because the circuit is following its standard operating procedures, SOPs, and the Justice adheres to them. The Justices are said to have declined to state preferences for particular cases when asked, but had the visiting Justice expressed an interest in a particular case, "Most who ask . . . would accede to the judge's request." And the Justice was said to show "a willingness to take on important, but unglamorous cases." In short, as one judge put it, "We go about our business in precisely the same way we would on any case."

Apparently, however, there are instances of specific assignments to the retired Justice. One judge reported that the judges in his circuit gave Justice Tom Clark "the difficult civil rights cases so a liberal view would not be overturned en banc," and that judge has elsewhere observed that "we always gave him the tough civil rights cases to write . . . those that were on the cutting edge of the law and

where we needed a liberal opinion by a judge who was not likely to be overturned by the court sitting en banc." An example was a case in which Justice Clark agreed that "it was important to strike down what appeared to be racially discriminatory practices in the hiring of school teachers in this particular school district."[115] The strategy of avoiding en banc may have succeeded in that instance, but the Supreme Court, without mentioning Justice Clark's name, overturned his decision.[116]

One judge's comment suggests that a retired Justice's presence does not create a problem sometimes thought to result from the presence of other visiting judges—the importation of law from other circuits. Instead, "the retired justices appear, if anything, especially solicitous of the precedent of the circuit on which they sit." Yet a retired Justice's mindset might differ from circuit norms, with Justice Powell said to have brought "a presumption of regularity" and "a very strong bias," stronger than on the court on which he was sitting, "of affirming the district court unless there was error clearly shown," but that led a judge of that court to think "perhaps we don't give the district court enough deference."

No judge said there was discussion with the retired Justice about writing opinions in such a way as to affect the Supreme Court's consideration of certiorari, but one observed that this was "[n]ot discussed but relevant in our thoughts." Another judge's comments suggest that a retired Justice's expertise did have effects. The Courts of Appeals "don't do that much constitutional law, except perhaps for search and seizure," said the judge, and "'[c]onstitutional law is harder to grasp than say, admiralty, which you can learn from a book." (When Judge Stephen Breyer was elevated to the Supreme Court, he is said to have remarked that the biggest change was the extent of constitutional issues.) Thus, "if we had a discussion on a constitutional issue," that the retired Justice would have "marinated" in constitutional law for ten to fifteen years meant that what the Justice had to say would be heard because "you turn to those who know most about a subject."

Concluding Thoughts

The federal Courts of Appeals are part of a *national* judicial system but are also regional bodies, and we have come to understand that circuits vary in their jurisprudence, procedures (such as use of informal en bancs), and practices (e.g., the proportion of cases resulting in nonprecedential dispositions). The glue that helps hold the various circuits together includes the Supreme Court's review of their rulings, especially as inter-circuit conflict is a prime desideratum for the Court's granting review. That retired Justices participate in deciding Court of Appeals cases may be another source of the thread tying those courts together, as well as extending the Justices' role beyond their Supreme Court service. They bring with them a national perspective honed in their Supreme Court service, particularly important for the constitutional issues, and that perspective may at least nudge the Courts of Appeals judges toward a national "center."

There are, however, constraints on this possible effect. One is that Supreme Court Justices sitting in the circuits appreciate the norm that they are expected to follow the law of the circuit rather than attempt to import their own jurisprudence. Another is that, with relatively few exceptions, retired Justices do not sit in any one circuit or with any individual judge in substantial numbers of cases, thus limiting the exposure from their presence. A Justice who sits solely or predominantly in one circuit, like Justices Souter and Powell, can have an effect there, but the effect would be greater if the Justice sat in at least a handful of circuits (e.g., Justice White). If there were more like Justice Tom Clark, with the breadth and depth of his participation across the circuits, which Justice Sandra Day O'Connor may emulate if she continues her court of appeals sittings, the effect would be greater still. However, we cannot expect a Justice to retire *in order to* sit in the lower courts.

ENDNOTES

[1] David Ingram, "Leahy Introduces Bill to Allow Retired Supreme Court Justices to Serve," *Nat'l L. J.*, Sept. 30, 2010 (from *The BLT: The Blog of Legal Times*).

[2] Retirement Act of 1937, P.L. No. 10, 50 Stat. 24; 28 U.S.C. 294(a).

[3] He also served as a Special Master for the Supreme Court, *New Hampshire v. Maine*, 426 U.S. 363 (1976) (consent decree entered), 434 U.S. 1 (entry of final decree), and as a district judge.

[4] Minor Myers III, "The Judicial Service of Retired United States Supreme Court Justices," *Journal of Supreme Court History*, 32 (#1, 2007): 46–61.

[5] *Id.* at 58, n. 23.

[6] *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975). Source: Craig A. Smith data.

[7] This does not include a case in which he wrote an opinion for a three-judge panel of the Appellate Term of the Second Division of the Customs Court.

[8] On identifying authors of per curiams, see Michael Gizzi and Stephen L. Wasby, "Per Curiams Revisited: Assessing the Unsigned Opinion" 96 *Judicature* 110 (2013).

[9] *See* John C. Jeffries, Jr., **Justice Lewis F. Powell, Jr.: A Biography** 293–294 (1994, 2001). Judge Wilkinson writes on his relationship with Justice Powell and on the Justice's sitting on the Fourth Circuit in J. Harvie Wilkinson III, "Justice Lewis F. Powell, Jr.: A Personal View by a Former Clerk," **In Chambers: Stories of Supreme Court Law Clerks and their Justices**, eds. Todd C. Peppers and Artemus Ward 342–343, 347 (2012).

[10] *Marrese v. American Academy of Orthopaedic Surgeons*, 591 F.2d 1083, 1090 (7th Cir. 1982) (Stewart, J., dissenting).

[11] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

[12] Source: Craig A. Smith data. Professor Smith's work reveals some difficulties in reconciling Westlaw search findings with archival material, here, Justice Clark's papers.

[13] On the day Justice Clark died, the author, observing oral argument, was in a Ninth Circuit courtroom when Judge Walter Ely made the announcement.

[14] Smith notes this high number; a great-nephew of Judge Hill was a clerk for Justice Clark. Craig Alan Smith, "'Spreading the Wealth': Justice Tom C. Clark's Wide-Ranging Efforts to Open the Doors of the Law Clerk Ranks," 31 *J. Sup. Ct. Hist.* 129, 151 (2011).

[15] *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010).

[16] *Hornbeak-Denton v. Myers*, 361 Fed. Appx. 684 (6th Cir. 2010).

[17] *United States v. Guild*, 341 Fed. Appx. 879 (4th Cir. 2009).

[18] *United States v. Brunson*, 2012 WL 2019535 (4th Cir.).

[19] *ASU Students for Life v. Crow*, 357 F3d. Appx. 156 (9th Cir. 2009).

[20] *Sixth Angel Shepherd Rescue v. West*, 2012 WL 1385009 (3rd Cir.).

[21] *Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574, 583 (5th Cir. 2009) (O'Connor, J., dissenting).

[22] *Spivey v. Adoptive Marketing*, 622 F.3d 816 (7th Cir. 2010).

[23] *McCray v. Fidelity National Title Insurance Co.*, 682 F.3d 229 (3rd Cir. 2012); *In re New Jersey Title Insurance Litigation*, 683 F.3d 451 (3rd Cir. 2012).

[24] *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9th Cir. 2010).

[25] 131 S.Ct. 2541 (2011).

[26] *Hohider v. UPS*, 574 F.3d 169 (3rd Cir. 2009).

[27] *McCullough v. Johnson, Rodenburg & Leavinger*, 637 F.3d 939 (9th Cir. 2011).

[28] *Alaska Electricians Pension Fund v. Flowserve Corp.*, 571 F.3d 221 (5th Cir. 2009).

[29] *Lattanzio v. Deloitte Touche*, 476 F.3d 147 (2nd Cir. 2007).

[30] *Greer v. Chao*, 492 F.3d 962, 964 (8th Cir. 2007).

[31] *Public Citizen Health Research Group v. U.S. Department of Labor*, 557 F.3d 165 (3rd Cir. 2009).

[32] *Perez-Sanchez v. Public Building Authority*, 531 F.3d 104 (1st Cir. 2008).

[33] *Missouri Protection and Advocacy Services v. Carnahan*, 499 F.3d 803 (8th Cir. 2007).

[34] *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).

[35] *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) Chief Judge Kozinski dissented on the first holding.

[36] *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc). The vote was 8-3, with Judge Ikuta again writing for the majority and with Chief Judge Kozinski now concurring on the basis of a de novo interpretation of the statute, possible because an en banc court was not bound as was the panel.

[37] *Arizona v. Inter Tribal Council of Arizona*, 133 S.Ct. 2247 (2013).

[38] *Arbor Hill Concerned Citizens Ass'n v. County of Albany*, 522 F.3d 182, 183 (2nd Cir. 2008)(amended).

[39] *United States v. Meyer*, 483 F.3d 865, 868 (9th Cir. 2007).

[40] *J&G Sales Ltd. v. Truscott*, 473 F.3d 1043 (9th Cir. 2007).

[41] *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010).

[42] *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

[43] *Walker v. Prince George's County*, 575 F.3d 426 (4th Cir. 2009).

[44] *United States v. Gary*, 528 F.3d 328 (4th Cir. 2008).

[45] *United States v. Ross*, 487 F.3d 1120 (8th Cir. 2007).

[46] *United States v. Kelley*, 482 F.3d 1047 (9th Cir. 2007).

[47] United *States v. Conley*, 531 F.3d 56 (1st Cir. 2008).

[48] *United States v. Novak*, 531 F.3d 99, 100 (1st Cir. 2008).
[49] *Id.* at 103.
[50] *In re Bulger*, 12–2488 (1st Cir. March 14 2013).
[51] *Saez v. City of Springfield*, 387 Fed. Appx. 6, 8 (1st Cir. 2010).
[52] *Ungar v. Palestine Liberation Organization*, 599 F.3d 79 (1st Cir. 2010).
[53] *Rich v. Lapointe*, 2012 WL 2370061 (1st Cir.).
[54] *Cynosure v. St. Paul Fire & Marine Insurance Co.*, 645 F.3d 1 (1st Cir. 2011).
[55] *EMC Corp. v. Arturi*, 655 F.3d 75 (1st Cir. 2011).
[56] *Kindelan v. Disability Management Alternatives*, 457 Fed. Appx. 5 (1st Cir. 2011).
[57] *Robidoux v. Muholland*, 642 F.3d 20 (1st Cir. 2011).
[58] *Vermont Mutual Insurance v. Maguire*, 662 F.3d 51 (1st Cir. 2011).
[59] *Foote v. Town of Bedford*, 642 F.3d 86 (1st Cir. 2011).
[60] *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77 (1st Cir. 2010).
[61] *McInnis v. Maine*, 638 F.3d 18 (1st Cir. 2011).
[62] *United States v. Sanchez*, 612 F.3d 1 (1st Cir. 2010).
[63] *United States v. Battle*, 637 F.3d 44 (1st Cir. 2011).
[64] *Giragosian v. Bettencourt*, 614 F.3d 25 (1st Cir. 2010).
[65] *United States v. Urciuoli*, 613 F.3d 11 (1st Cir. 2010).
[66] *United States v. Gomes*, 642 F.3d 43 (1st Cir. 2011).
[67] *Robidoux v. O'Brien*, 643 F.3d 334, 342 (1st Cir. 2011).
[68] *Mendes v. Brady*, 656 F.3d 126 (1st Cir. 2011).
[69] *United States v. Fulcher*, 428 Fed. Appx. 16 (1st Cir. 2011).
[70] *United States v. Dancy*, 640 F.3d 455 (1st Cir. 2011).
[71] *Coscia v. Town of Pembroke*, 659 F.3d 37 (1st Cir. 2011).
[72] *Braga v. Hodgson*, 605 F.3d 58 (1st Cir. 2010).
[73] *Young v. Wall*, 642 F.3d 49 (1st Cir. 2011).
[74] *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011).
[75] 359 U.S. 297 (1959).
[76] *Fortis Corporate Insurance v. Viken Ship Management*, 597 F.3d 784, 790 (6th Cir. 2010).
[77] 543 U.S. 14 (2004).
[78] 597 F.3d, at 792.
[79] 544 U.S. 385 (2005).
[80] *United States v. Laboy-Torres*, 553 F.3d 715 (3rd Cir. 2009).
[81] 462 U.S. 213 (1983)(changing test of probable cause to "totality of circumstances").
[82] *United States v. Gary*, 528 F.3d 324, 327 (4th Cir. 2008).
[83] *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1985), noted in *Perez-Sanchez v. Public Building Authority*, 285 Fed. Appx. 765 (1st Cir. 2008).
[84] 505 U.S. 577 (1992).
[85] 463 U.S. 783 (1988).
[86] *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2008).
[87] *Coach v. Jabe*, 679 F.3d 197 (4th Cir. 2012); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (the Religious Land Use and Institutionalized Persons Act section increasing prisoner's religious rights did not violate the First Amendment).
[88] 521 U.S. 203 (1997).
[89] *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007).
[90] 524 U.S. 742 (1998).
[91] *Burlington Northern Santa Fe Rwy v. White*, 548 U.S. 53 (2006). The case is *Amati v. U.S. Steel Corp.*, 304 Fed. Appx. 131 (3rd Cir. 2008).
[92] 512 U.S. 477 (1994).
[93] 530 U.S. 33 (2000). The case is *Tripati v. McKay*, 211 Fed. Appx. 552 (9th Cir. 2006).
[94] 395 U.S. 711 (1969).
[95] *Jiminez v. Conrad*, 678 F.3d 44 (1st Cir. 2012).
[96] 548 U.S. 81 (2006).
[97] 549 U.S. 199 (2007).
[98] *Ramos v. Patnaude*, 640 F.3d 485 (1st Cir. 2011).
[99] 544 U.S. 13 (2005).
[100] *United States v. Matthews*, 643 F.3d 9 (1st Cir. 2011).
[101] *United States v. Rogers*, 659 F.3d 74, 78–79 (1st Cir. 2011).
[102] *Id.* at 77.
[103] 520 U.S. 428 (2006).
[104] 516 U.S. 99 (1995).
[105] 468 U.S. 420 (1984).
[106] 659 F.3d, at 78.
[107] 131 S.Ct. 238 (2011).
[108] *United States v. Molignaro*, 649 F.3d 1 (1st Cir. 2011).
[109] *Id.* at 4.
[110] *Id.*
[111] *Id.* at 5.
[112] Responses to the "Wasby survey" included those from one face-to-face interview and one telephone interview by the author. Respondents were promised that their responses would not be attributed to them.
[113] Also attributed to Justice White is the comment by a judge who "ask[ed] him about a particular case he had authored and he very nicely said, 'read the case.'" Wasby survey.
[114] For the story of Powell's confirmation, *see* Jeffries, **Justice Lewis F. Powell, Jr.** 1–8.
[115] Myron Bright to Mimi Clark Gronlund, Dec 30 1999. The case is *United States v. Hazelwood School District*, 534 F.2d 805 (8th Cir. 1976), vacated and remanded, 433 U.S. 299 (1977).
[116] It is interesting that the lone dissenter, supporting the government's suit against the school district, was Justice John Paul Stevens, who as Judge Stevens had once sat with Justice Clark in the Seventh Circuit.

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Illustrations

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Cover: The Supreme Court Justices were photographed in February 1953 calling on President Eisenhower at the White House. Pictured from left to right: (front row) Chief Justice Vinson, President Eisenhower, Justice Black, Justice Frankfurter; (back row) Justices Minton, Clark, Jackson, and Burton. Library of Congress.

Errata: The Editors received this comment from the Honorable Thomas N. O'Neill, Jr. regarding Alexander Wohl's statement in his article in Vol. 38, No. 2, that Clark "developed into a more competent judge than any of the other Truman appointees":

I had the privilege of clerking for Justice Harold H. Burton, a Truman appointee, during the 1954 term of the Court. There are two events concerning Justice Burton that I wish to draw to your attention.

During the 1954 term the law clerks conducted a poll, by and among themselves, the question being "if you were on trial for your life which Justice of this Court would you like as your judge." I believe that, some years ago, Barrett Prettyman published an account of this poll. I was the last law clerk polled although I did not know that when asked for my vote. When asked for my vote I recalled that Justice Frankfurter had been active in the movement to save the lives of Sacco and Vanzetti; therefore, I voted for Justice Frankfurter. The response I received was "that is curious because all of the law clerks on the Court but you have unanimously voted to select Justice Burton as the judge in the death case."

Secondly, there is the letter that the Court sent to Justice Burton when he retired in 1958. The signatories to that letter included such luminaries as Chief Justice Warren, Justice Black, Justice Frankfurter and Justice Brennan. The letter said in part: "in the history of the Court no Justice, without exception, has come closer than you to the goal that we all strive for, equal justice under law."