# Introduction

Melvin I. Urofsky

Having spent a good part of my professional life working on Louis D. Brandeis, I am always happy to discover new information about him, or to read a new take on one of his opinions. So it was with great interest that I read Jessie Steffan's article on the Brandeis dissent in the *Liebmann* case. In the midst of the Depression, Oklahoma had passed a law that on the face of it seemed to foster monopoly, something Brandeis had fought against ever since his reforming days at the turn-of-the-century. The majority struck down the law on these grounds, yet Brandeis defended it, causing many of his admirers, as well as future scholars, to wonder why. Yet, as Steffan shows, the tension between Brandeis' opposition to monopoly and his belief in judicial restraint is not a black-and-white matter, but involved the type of nuanced judging that was his forte. Ms. Steffan wrote this article while a law student at the Saint Louis University School of Law, and it is the winner of the 2013 Hughes-Gossett student prize.

Another case that has had scholars scratching their heads is Joseph Story's opinion in *Prigg v. Pennsylvania* (1842). At issue was the constitutionality of the Fugitive Slave Act, and what means could be used by slave-catchers to capture runaway bondsmen and return them to their owners. The case is complicated by the fact that it was an arranged case between Maryland and Pennsylvania to test the law, and because the alleged runaways, Margaret Morgan and her children, were actually free blacks. Story wrote the opinion for the majority, and has been condemned ever since for bowing to the interests of southern slaveholders. Robert Baker, who teaches at Georgia State University, argues that the story is much more complex, and that Story was actually trying to accomplish something very important.

When someone writes an article about a case with which I am unfamiliar, as an editor I have to assume that it is important enough for someone to go to the trouble that writing an article requires. The second thing I do is check the textbook Paul Finkelman and I write, *A March of Liberty*, to see if we have it. I am relieved to see that we do cover *Roosevelt v. Meyer*, which, although little noted today, was

an important case at the time because it brought into constitutional jeopardy the Union's tactics for financing the Civil War. Dawinder Sidhu is a Supreme Court Fellow, on leave from the University of New Mexico Law School, and he looks at this case in the light of Brandeis' famous dictum that sometimes the most important thing the Court does is not doing anything.

William O. Douglas continues to intrigue us. Surely no Justice before or since has had such a colorful career both on and off the Bench, and has told so many tales about his life and exploits. Scholars have for a long time known that Douglas was self-aggrandizing, and, like his bitter foe, Felix Frankfurter, left all sorts of memos to burnish his reputation. In his memoirs he told how in a 1960 case he not only dissented, but because his colleague, Charles Whittaker, suffered from writer's block, Douglas also wrote the majority opinion for him. Because Whittaker has had such a poor reputation, and since everyone knew how fast Douglas could write, many people—including myself—took this story at face value. As Craig Smith shows, we should have been a bit more skeptical.

Teachers of constitutional law instruct their students in the different tests that courts use to determine the constitutionality of a government action. There is strict scrutiny, a very high bar that usually implicates a basic right such as speech or the impact upon a minority. The rational basis test is usually seen as the easiest test for the government to pass, since all it requires is that, if the government has the power, it use it in a way that a rational person finds sensible. In fact, all of the tests—including the intermediate level of scrutiny used for gender-based cases x2014;are complex and cover a wide range of possible outcomes. Earl Maltz of Rutgers Law School believes that in a relatively minor Burger Court case, several of the Justices, especially Brennan and Powell, tried to refine the rational basis test to make it more reliable and predictable, but failed to do so.

The Hon. Thomas G. Snow now sits on the bench, as an immigration judge in Arlington, Virginia, a position he has held since 2005. Before that, he served as an attorney in the International Division of the Department of Justice for two decades. His article, however, is not about his experience as a lawyer or a judge, but as a messenger at the Supreme Court in the 1977 Term, working primarily for Chief Justice Warren Burger. As Judge Snow notes, it was a fascinating experience for him, and will interest all of you who want to know more about the Court than just its decisions. To help put Judge Snow's experience in context, Matthew Hofstedt, Associate Curator at the Supreme Court, has helpfully written a brief overview of the history of messengers at the Court. We are grateful to him for sharing his institutional expertise.

Finally, we again thank Grier Stephenson for the Judicial Bookshelf, and his take on some of the recent books appearing on the Court and its members.

As always, a rich and varied menu. Enjoy!

# A Better Story in *Prigg v. Pennsylvania*?

H. ROBERT BAKER

By any measure, Justice Joseph Story must rank among the most important of Supreme Court Justices. He added intellectual heft to the Marshall Court's nationalism and was a stabilizing influence as it transitioned to the states' rights–leaning Taney Court. He authored some of the Court's more memorable opinions and a constitutional law treatise that became the standard for half a century. He was a clear thinker and sharp intellectual. In his spare time, he founded Harvard Law School.[1]

But Joseph Story's reputation is and ever will be tarnished by his authorship of the opinion of the Court in *Prigg v. Pennsylvania* (1842). Story's opinion established federal exclusivity in supervising fugitive slave rendition from free states to slave states and essentially negated the states' ability to protect their free black citizens from kidnapping. The case stemmed from an incident in 1837, when slave catcher Edward Prigg arrested Margaret Morgan and her children in Pennsylvania. When circumstances suggested that Prigg might have trouble securing a certificate of removal, Prigg simply took Margaret and her children back to Maryland. Prigg was subsequently indicted for kidnapping under the Pennsylvania Personal Liberty Law of 1826. The Supreme Court struck down the Pennsylvania law and upheld the Fugitive Slave Act, and Story wrote the opinion of the Court. Story not only sided with the slaveholders, elevating their right to fugitives above any abstract right to liberty, but also seriously called into question the security of free blacks claimed as fugitives, as federal law did not provide any protection against kidnapping. His opinion was made all the more egregious because one of the "fugitives" seized by Prigg was born on Pennsylvania soil and was therefore not in any technical sense of the word a fugitive. But never mind that. Story willfully ignored it, essentially erasing the legal personhood of a human being.[2]

This was so obviously proslavery on its face that Story's admirers have struggled to explain it ever since. And scholarly scrutiny has not been kind. For those who claim that Story was simply following the law, evidence

suggests that Story deliberately ignored case law and overstated his case to construct (rather than just discover) a clear path to federal exclusivity. For those who claim that his decision was antislavery in practice because it removed state assistance for fugitive slave rendition, it is rather quite clear that Story envisioned a sweeping congressional remedy in the form of federal commissioners and marshals who could do the work of slave-catching for the reluctant states.[3] To be sure, there are scholars who maintain that Story's ruling would have pro-freedom implications for other areas of law that abolitionists held dear, most notably in protecting free blacks in southern ports (where they were subjected to the oppressive Negro seamen acts) or Native Americans (when states attempted to harass them in opposition to federal policy).[4] But this reduces Story's admirers to excusing a proslavery ruling because it contained progressive potential, which *might* have been implemented *should* anyone have cared to and *if* federal judges mustered the will to stand up to the state governments, down the road. This is a poor excuse.[5]

But even if we begin by stipulating that Story's opinion was good for slaveholders, it is not necessary to accept the conclusion that Story was motivated by innate racism or even just brute indifference to the plight of African Americans in America. Nor was his opinion necessarily *proslavery*. There is, in fact, a missing context to Story's opinion. *Prigg v. Pennsylvania* arrived at the Supreme Court after a concerted and ongoing campaign by southern states to infuse the Constitution with a distinctive proslavery meaning. This was something more than the old subterfuges of strict constructionism, states' rights, or even nullification. Rather, this new theory suggested that the very history and object of the Constitution was to preserve slavery. Consciously rejecting an older tradition of expedient compromise on the subject of slavery, southerners demanded recognition of slavery as a natural property right and reoriented the Constitution historically to ground their demands. Theirs was a Constitution that protected slavery by loading "implied conditions" upon all the states and the federal government, saddling them with positive duties to seize fugitives, repress abolitionists, and protect slaveholding in the territories. While this argument was loudest in the political theater—voiced in resolutions from southern legislatures, on the floor of the Congress, and in the country's newspapers—it had a profound impact on a Supreme Court attempting to preserve the nonpartisan veneer of the law. When placed in this context, Joseph Story's interpretive stance in *Prigg v. Pennsylvania* takes on a new meaning as a conservative attempt to reinstate older constitutional arrangements against an aggressive new southern constitutionalism.

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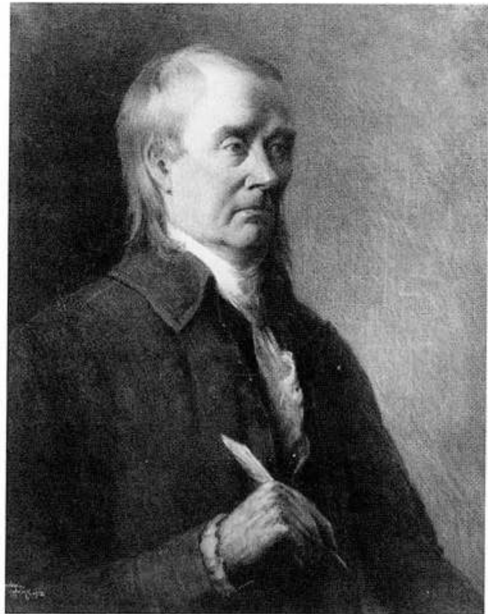
The Constitution has long been understood as a set of compromises between contending groups at the Philadelphia Convention. This helps explain much of the Constitution's final shape and structure, including its inconsistencies and oddities. Most of the compromises present in the Constitution had to do with the subject of national versus state power, and the correct controls to place on a government in order to avoid degeneration into tyranny. Among these compromises were those made with slavery. The most determined proslavery members of the Convention belonged to South Carolina's delegation, which took every opportunity to advance its section's interests. But South Carolina's delegates were also committed nationalists, and not above compromise themselves. They found themselves at odds not just with delegates from northern states where slavery appeared to be on the wane, but also with their brethren from the Chesapeake. When Charles Pinckney of South Carolina warned the Convention in late August that his state would "never receive the plan" if it prohibited the slave trade, it was George Mason of Virginia—the owner of

300 slaves himself—who answered him. Mason attacked the institution for its inhumanity and deleterious effects on society. The rancorous debate that followed revealed, tragically, just how committed the delegates of the lower south were to defending their slavery and just how ambivalent were the delegates of the northern states about combatting it. The same can be said about another major concession to slaveholders—the three-fifths clause. Such compromises sparked firestorms of protest culminating in the conflagration of Civil War, and debate about their merit and effects have smoldered on paper ever since.[6]

Unlike the vitriolic debate surrounding the slave trade, or the momentous weight shouldered by the three-fifths compromise, the Fugitive Slave Clause was adopted with little dissention and little controversy. Charles Pinckney and Pierce Butler first introduced it on August 28 when they moved a provision that would require fugitive slaves "to be delivered up like criminals." This drew protests from James Wilson of Pennsylvania and Roger Sherman of Connecticut because it would oblige the several states to hunt down fugitive slaves at public expense. Sherman, renowned for his honesty, oratory, and proud simplicity, compared the rendition of fugitive slaves with the seizing of horses. Perhaps he had not meant to be coarse, but only to draw from the analogy that private property rights ought to be privately enforced. Pinckney and Butler retracted the motion and returned the next day with a different one: "If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor." This passed unanimously, and with no debate. With a few alterations, it would become the second paragraph of Article IV, Section 2.[7]



**During discussions at the Constitutional Convention, Roger Sherman of Connecticut objected to having the Constitution read that fugitive slaves be delivered up "like criminals" because he believed that fugitive slave reclamation was a private rather than public affair.**

The framing of the Fugitive Slave Clause gives us only a few hints at unraveling some of its textual mysteries. The transition in language from "delivered up like criminals" to "shall be delivered up" was clearly intended to take the onus off of states for hunting down fugitives. It was the implication of a public obligation that the framers sought to avoid. The final language also contained a prohibition on the states, which limited what a sovereign state could do. In this case, no state could pass a law making free a refugee from slavery who sought shelter within its borders. What was unclear was how the "delivering up" would occur, or who would do it. Nor did the Constitution's structure provide any clues. If it was fully intended that Congress would enforce this right (for which there is no historical evidence from the Convention or the ratification debates), then why was the power not lodged in Article I, Section 8? True, congressional power was lodged in other articles, including Article IV itself. But every other section of Article IV contained a clear

enabling clause explicitly giving power to Congress. The Fugitive Slave Clause had none. Would it be the responsibility of the states or Congress? Was the power to be concurrent or exclusive in either body?[8]

Perhaps the textual ambiguities are at least partially the result of a lack of interest. The drafters, exhausted by the labors of June and July, did not spend much time debating the Fugitive Slave Clause. Moreover, their deliberations were held in secret. The public was largely unaware of how divisive the issue of slavery had been during the Convention. But the very public debate that played out both inside and outside of the ratification conventions revealed a people far less interested in the Convention's politics than in the Constitution's details. Given the import of ratification, this was wholly to be expected. Sadly, very few seemed concerned with the document's relationship with slavery. In the lower south, the very delegates who had threatened repeatedly to walk out on the Convention if their every demand was not met (and not every demand was met) now just as trenchantly defended its final product. Charles Cotesworth Pinckney argued before the South Carolina legislature (which debated the Constitution before calling a ratifying convention) that the Fugitive Slave Clause conferred upon slaveholders a right that they had not had before. James Madison lauded the clause in the Virginia ratification debate, and the delegates from North Carolina reported back to their legislature that the southern states had "a much better Security for the Return of [Fugitive] Slaves" under the Constitution. If northerners disliked the Fugitive Slave Clause, they kept their thoughts about it largely private. It was only slightly different for slavery as a whole. Given the explosion of ink on paper that accompanied the ratification debates, this relative silence makes it difficult to conclude that fugitive slaves—or even slavery itself—constituted one of the contentious compromises contained within the Constitution.[9]

There is a simple, if ultimately unsatisfying, explanation for both the Fugitive Slave Clause's presence in the Constitution and the public lack of interest in its particulars. The legal principle of *Somerset v. Stewart* (King's Bench, 1772) was that slavery could find no sanction in natural law, and slaveholders could exercise no dominion over another human being without an express law allowing them to do so. In short, slaveholders throughout the British empire were put on notice that their property claims might not be respected from one jurisdiction to another. This was hardly a declaration of war on slavery—there existed no organized antislavery society in 1772 and fugitive slave rendition in North America was conducted as a matter of course. Nonetheless, South Carolinians had some difficulty recovering slave property from Massachusetts following the conclusion of the Revolutionary War. Although *Somerset* had not guided the judge in that case, many leapt to that conclusion. In short, politically savvy South Carolinians were aware that slave property *might in the future* be compromised by antislavery principles that were gathering political force in the 1780s. This led to its proposal. Because fugitive slave rendition was common in all the states in the 1780s (and had a long history), it was a rather uncontroversial measure. Fugitive slave clauses, after all, could be found in even antislavery legislative measures, such as the Pennsylvania statute for the Gradual Abolition of Slavery (1780) and the Northwest Ordinance (1787).[10]

The first congressional interpretation of the Fugitive Slave Clause both clarifies and obscures. On the one hand, its legislative history confirms the Constitution's treatment of fugitive slave rendition as a private rather than public affair. When the Senate first considered legislation governing the rendition of fugitive criminals and slaves in 1792, the first bill reported out of committee obliged state executives to hunt down fugitive slaves at the public expense. This met with

## Thirty Dollars Reward.

Ran away from the subscriber, living in Oldham county, Ky. on the 27th of March last, a mulatto woman, named LUCY, between 25 and 28 years of age, about 5 feet 5 or 6 inches high, wears her hair long, before, in plaits—clothing not recollected. The above reward will be given, for said negro, if she is taken out of the state and confined so that I get her again—or twenty dollars, if taken in the state, and confined in ike manner—and all reasonable charges paid, if delivered to me.

HENRY CAPLENGER.

may 10—792ds3

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## $20 REWARD.

Ran away from the subscriber, living in Louisville, on the night of the 18th inst. a negro man, named

MOSES,

About 30 years of age, about 5 feet 9 or 10 inches high, very black, stout and square built, has a scar on the inside of one of his hands, caused by a burnt whether accidental, or for his rascality, is no· known. He has thick lips, speaks freely and pert, ly, and has heavy eyebrows. He is believed to have worn, when he left home, a blue cloth coat, yellow Nankin pantaloons, and a watch in his pocket. He had, however, other clothing, in a pair of saddlebags, and may change his dress. Moses can read, and I am informed, can write, and it is believed he will attempt to pass as a free man; and that he is endeavoring to make his way to Tennessee. I am also informed, he had from twenty to thirty dollars with him.

☞The above reward will be given, for apprehending and securing said negro, in this state or Tennessee, so that I get him again; or forty dollars, for apprehending and securing him on the north side of the Ohio river, so that I get him again; and all reasonable expenses will be paid, for bringing him home.

SHAPLEY OWEN.

**In drafting the Fugitive Slave Clause, the Founding Fathers expected that slaveholders would be able to seize fugitives wherever they found them without the assistance of legal cover. They did not anticipate that slaveholders would encounter sustained opposition by abolitionists to their claims. Above is a Kentucky broadside from 1827.**

opposition, although we don't know what was said because no record of early Senate debates exists. But we do know that the bill was recommitted to committee and that the Senate added to that committee Roger Sherman. Sherman, it will be recalled, had objected to having the Constitution read that fugitive slaves be delivered up "like criminals" specifically because fugitive slave reclamation was a private rather than public affair. The committee returned a new bill that would mark the distinction. In its final form, the "Act respecting fugitives from justice, and persons escaping from the service of their masters," made fugitive criminal reclamation an official, public act. Governors made requests for fugitives, and the law specified what documents were necessary to request rendition and who should bear the expenses for capture, jailing, and rendition. Fugitive slave reclamation, on the other hand, was a private affair. Slaveholders could seize their fugitives

wherever they found them. In order to remove them from one state to another, slaveholders had to convince either a state or federal judge or magistrate that the person so seized was in fact their property. If so, the state or federal judge or magistrate could issue a certificate of removal giving the slaveholder permission to transport the fugitive across state lines. The last section of the *Fugitive Slave Act* gave slaveholders additional security for their property right by allowing them to sue anyone who obstructed them for up to $500.[11]

But the *Fugitive Slave Act of 1793* (as it would come to be popularly called) raised constitutional questions. Congress had acted without stating upon what grounds it could legislate. Article IV, Section 2 had no enabling clause, after all. It is significant that St. George Tucker neglected to name fugitive slaves in his list of subjects over which congressional power extended in his famous 1803 commentary on Blackstone. He referred to the Fugitive Slave Clause as a "necessary provision" because of "numberless inconveniences … felt by the citizens of those states, where slavery prevails, from escaping of their slaves into other states, where slavery was not tolerated by law, and where it was supposed no aid ought to be given to any other person claiming another as his slave."[12] He recognized the *Fugitive Slave Act* as valid, but his analysis suggests that the Fugitive Slave Clause, like the Full Faith and Credit and Privileges and Immunities Clauses, were matters of state comity and not subject to federal jurisdiction except by limited reach.

Moreover, St. George Tucker was the only contemporary commentator to mention the "numberless inconveniences" as the Fugitive Slave Clause's *raison d'être*. No observer present at the Constitutional Convention complained of such problems, and the subject was a non-issue during Ratification. What evidence there is of fugitive slave rendition prior to the Constitution's adoption suggests that it was, in fact, conducted as a matter of course.[13] The bill's deficiencies also provide indirect evidence for this conclusion. The bill's authors had not seen fit to authorize courts to issue warrants of arrest, or to jail alleged fugitives during delays in hearings. The more detailed section 1 of *An act respecting fugitives from justice, and persons escaping from the service of their masters* at least commanded the executive to arrest fugitives from justice and instructed him as to how long he had to hold a fugitive (six months) while waiting for the requesting state to retrieve him or her. On the one hand, these differences reinforced the private nature of fugitive slave recaption as compared with the public duty of capturing and returning fugitive criminals across state lines. But the expectation that slaveholders could seize fugitives wherever they found them without the assistance of legal cover betrays an assumption of the Founding generation: namely, that slaveholders would not encounter sustained opposition to their claims. On this point, they clearly lacked foresight, and the *Fugitive Slave Act* would prove a poor remedy where antislavery societies marshaled both private and public power to oppose slaveholders.[14] But their lack of foresight is not the issue. Rather, it is the inarticulate assumption that fugitive slave rendition was ordinary and simple.

Early judicial interpretation did not accord slaveholders any special constitutional right from the Fugitive Slave Clause. Rather, courts tended to construe the clause narrowly and in concert with dominant constitutional principles. The New York Supreme Court declared (albeit in dicta) that the master's right to recapture his fugitive slave would yield to the power of the state to punish fugitives for committing a crime in that state, a point held by Pennsylvania as well.[15] Chief Justice William Tilghman of the Pennsylvania Supreme Court did construe the Fugitive Slave Clause generously for slaveholders in 1814 when he rejected the Pennsylvania Abolition Society's ingenious argument that a black man named Lewis was not technically

a fugitive slave because his master had brought him willingly into the state. The slaveholder in question was a congressional representative from South Carolina who had remained in Philadelphia during the congressional recess. This, the Pennsylvania Abolition Society surmised, was enough to make him technically a free man according to Pennsylvania law. As such, he could not be a fugitive under the Fugitive Slave Clause. Tilghman refused the argument. "We all know that our southern brethren are very jealous of their rights on the subject of slavery," Tilghman wrote, "and that their union with the other states could never have been cemented, without yielding to their demands on this point."[16] An overly strict interpretation of the statute, in other words, conflicted with the Constitution's clear purpose.

But Tilghman did not always give slaveholders a wide latitude. A second *Commonwealth v. Holloway* (1816) involved the same jailor but a different alleged fugitive: a child named Eliza. Eliza had been committed to jail for being "the daughter of Mary, a negro woman, the slave of James Corse, of Maryland, and as such, also the slave of the said James." Mary had been a fugitive slave at large for two years in Philadelphia, where Eliza was born. Tilghman freed Eliza, ruling that her birth in Pennsylvania made her a Pennsylvanian, and as such the Fugitive Slave Clause and the *Fugitive Slave Act* did not apply. "The Constitution was formed upwards of seven years after the passage of [the Pennsylvania Act for Gradual Abolition]," wrote Tilghman. The law, quite famously, declared that all children born to slaves in Pennsylvania after passage of the act would be free. Clearly this would include Eliza, unless a superior command of the Constitution precluded it. "By [the time of the Convention], the operations of the act had been fully experienced by the slave-holding states. It was a subject on which their feelings had been excited, and therefore we must presume that their representatives, in the General Convention of 1787, regarded this important object with vigilant attention."[17] Constitutional compromises, Tilghman reminded everyone, cut both ways. The same held true for Tilghman in *Wright v. Deacon* (1819), when he admonished abolitionists that "Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured."[18]

Tilghman has been credited (if that is the right word) for originating the idea that the Fugitive Slave Clause was a necessary bargain.[19] Certainly he was the first jurist to apply it. But he did not use the idea of the necessary bargain to advance a proslavery agenda. Rather, he read the bargain as proof of intentional compromise that might have proslavery or antislavery readings, depending upon their application. Other judges followed this line of reasoning. Chief Justice Isaac Parker of the Massachusetts Supreme Court referred to the Constitution as a "compromise" document, one that had to balance sovereignties, interests, and prejudices. Any proper construction of the Constitution, he argued, had to take note of the text because "the words of it were used out of delicacy, so as not to offend some in the convention whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be considered as property."[20] This did not preclude the state courts from protecting free blacks, he noted, but it did necessitate that fugitive slaves be returned to their masters, over the objections of abolitionists.

These cases, it should be noted, were conducted in state courts and under state procedures provided for by state law as well as by the *Fugitive Slave Act*. Federal courts also heard fugitive cases, albeit only a few, before the 1830s. One involved a constitutional challenge of the *Fugitive Slave Act*—*In Re*

*Susan*, decided in 1818 by the Circuit Court for the District of Indiana. Counsel for the fugitive argued that the federal law was unconstitutional because the Constitution conferred no direct authority on Congress to legislate. In a second line of reasoning, counsel argued that the power was concurrent. The court rejected both arguments. It rejected the first line of reasoning by implication. Plagiarizing St. George Tucker, Judge Parker surmised that "prior to the adoption of the constitution of the United States, the inhabitants of the states where slavery prevailed, were exposed to so many inconveniences from the escaping of slaves into other states, where slavery was not tolerated." The Fugitive Slave Clause corrected these abuses and Congress passed the *Fugitive Slave Act* "in conformity to this provision of the Constitution."[21] As to the question of it being a concurrent power, the judge reasoned that it was not. There might be concurrent powers on similar subjects (taxation, e.g.), but not on subjects designed *to attain the same end.* But the judge stopped short of ruling that the state could not legislate at all. Rather, he pointed to the salient differences between Indiana and federal law. Federal law allowed a magistrate to decide the issue in a summary manner whereas Indiana law required the magistrate to certify the case to circuit court for a jury trial. In short, it was the specific conflict of the Indiana law that called it into question. The implication was that states could pass laws, provided they worked within federal law.[22]

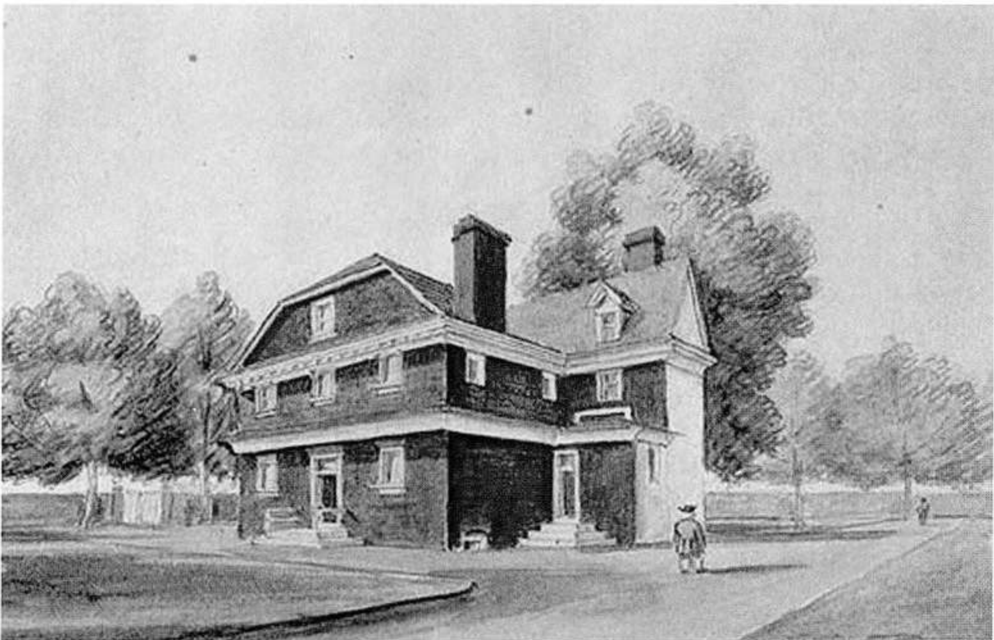
And pass laws they did. Indiana passed a new law governing fugitive slave recaption in 1824. New Jersey and Pennsylvania followed suit in 1826 and New York followed.[23] For the matter in *Prigg v. Pennsylvania*, the Pennsylvania law is the most relevant. Dubbed the "Personal Liberty Law of 1826," Pennsylvania accepted the congressional requirement for a summary hearing in fugitive slave rendition. It granted slaveholders the right to make application for arrest warrants for their fugitives, thus employing the power of the state in recapturing fugitives. Although there was no prohibition on slaveholders exercising the power of private recaption, slave catchers were well aware that to do so without legal cover might open them to the hefty charge of kidnapping, and so they did so at their peril—much better for all parties involved to obtain an arrest warrant. The personal liberty law prevented petty magistrates from issuing certificates of removal, but empowered any judge of a court of record to do so. It also set new evidentiary requirements. The slaveholder's testimony was to be excluded from court (after all, the slaveholder was an interested party), and at least two witnesses proving the status of the alleged fugitive were required. Finally, the removal of a fugitive slave without a certificate of removal was deemed a kidnapping.[24]

The law was a compromise. While at least one scholar has thought it "obvious" that the two witness requirement was designed to frustrate fugitive slave rendition by making it more expensive, it is worthwhile to note that fugitive slave rendition became easier rather than harder by the experience of the law. And it was passed at the behest of the state of Maryland, which had sent commissioners to several states (including Pennsylvania) seeking a new law aiding fugitive rendition. The Maryland commissioners did not get everything they wanted, but they certainly left with a more favorable legal regime in place than that which they encountered when they arrived.[25] And there is substantial evidence that the regime worked, that fugitives were returned from Pennsylvania and other states with personal liberty laws (often to the chagrin of abolitionists). It was not always successful, of course, and the strident activity of the Pennsylvania Abolition Society if nothing else raised the cost of fugitive slave rendition for slaveholders.[26]

In fact, abolitionist activity had, by the 1830s, completely changed the grounds upon which fugitive slave rendition rested. The organization of the American Anti-Slavery

Society (AASS) in 1833 capped a series of moves that marked the transition of abolitionism to immediatism. The demand for immediate, uncompensated emancipation was not new in 1833—it had been cultivated by British and American abolitionists for a decade and voiced in some form for much longer—but its full-throated articulation now came with a moral, political, and constitutional program.[27] Constitutionally, the AASS recognized that Congress lacked the authority to abolish slavery, as the master-slave relationship was a domestic matter and subject exclusively to state sovereignty. Nonetheless, the AASS asserted that Congress had the power to ban the interstate slave trade and to abolish slavery in places where it had plenary jurisdiction (the District of Columbia and the territories). The AASS also demanded that free states sever their links with slavery however possible. This constitutional call for action came with a political program. The AASS promised to organize chapters in "every city, town, and village"; to "send forth Agents to lift up the voice of remonstrance, of warning, of entreaty and rebuke"; to circulate "unsparingly and extensively" antislavery literature; to use the pulpit and the press and purify the churches; and to find ways to avoid purchasing the products of slave labor.[28]

The intensity of the abolitionist message masks continuities in their strategies. Abolitionists had always protected fugitives and free blacks alike in northern courts. But now their arguments took on new meaning, especially in light of the passage of personal liberty laws in northern states after 1824. Faced with a country increasingly sectionalizing over issues ranging from the tariff to Indian Removal to slavery, northern judges found themselves under new pressure to uphold the Constitutional bargain and return fugitive slaves. When New York Supreme Court Justice Samuel Nelson encountered such a situation in 1834, he wrote a remarkable opinion that, for the first time, directly called a personal liberty law unconstitutional.



**Chief Justice William Tilghman served on the Pennsylvania Supreme Court from 1806 to 1827 and interpreted the Fugitive Slave Clause as a necessary bargain, or an intentional compromise, that might have proslavery or antislavery readings, depending upon its application. Tilghman owned slaves on his plantation (above is a sketch of his house), but gradually freed them when he ran for governor, unsuccessfully, in 1811.**

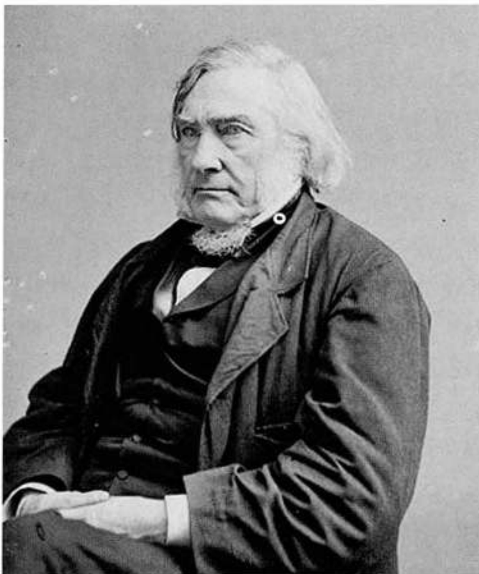
**Indiana, New Jersey, and Pennsylvania passed so-called personal liberty laws in the 1820s that made it more expensive for slaveholders to reclaim slaves by requiring them to apply to courts for an arrest warrant. Without obtaining a certificate of removal, a slaveholder could be charged with kidnapping.**

The law in question was New York's, which reserved the writ *de homine replegiando* to alleged fugitives. This would allow alleged fugitives to have jury trials to determine whether the owner had a reasonable claim. Regardless of whether this was better for fugitives, it did put New York's law in conflict with the *Fugitive Slave Act*, which specified a summary hearing for fugitive slave rendition. Nelson's opinion provided the first in-depth rationale for exclusive federal authority on the matter of fugitive slave rendition. He did so by looking to the object of the clause, which Nelson surmised was to protect future slaveholders from the force of the antislavery movement. "It was natural," wrote Nelson, "for [slaveholders] to fear that the [northern states] might ... be tempted to adopt a course of legislation that would embarrass the owners pursuing their fugitive slaves, if not discharge them from service."[29] It followed that the founders intended to grant sole jurisdiction over the matter to Congress.

Nelson's written opinion will strike the modern reader as an explicit use of originalism—that is, interpreting the Constitution by discerning the will of the legislator (the Framers) by reference to historical circumstances surrounding its establishment. In part it was. Certainly Nelson's use of history was reasonable. It followed in substance the story established in St. George Tucker's famous *Commentaries* and echoed in a few later decisions. But Nelson's opinion went further. Tucker had not thought to make the case for congressional exclusivity in his *Commentaries*, and judges and legislators in the 1810s and '20s had assumed that the power was concurrent, provided that state law did not directly conflict with federal law. Nelson's opinion broke with these precedents. Not that he made any such admission—quite the contrary. His invocation of the original intent of the clause and the authority of the *Fugitive Slave Act of 1793* allowed him to paper over his substantial departure from judicial precedent.

To be clear, Nelson was not committed to originalism in the manner of some of our modern commentators. Nelson never argued that the Framers' intent was dispositive, and he deployed a variety of interpretive strategies

to defend his intended result. But key to understanding his innovative opinion is his reliance upon original intent. After all, if the Founders included the Fugitive Slave Clause in the Constitution *because* they did not trust northern states to perform the duty of fugitive slave reclamation, then it followed that the intent was to confine the issue to the national legislature. But no one had yet made such a claim, and nearly four decades of constitutional law suggested otherwise. Such is the magic of originalism—its ability to feign continuity in the face of significant change. But his contemporaries were not fooled. On appeal, Nelson's reasoning was significantly challenged.[30] The New Jersey Supreme Court also rejected Nelson's reasoning in an unreported case.[31] Such conflict indicated just how unsettling Nelson's opinion really was. But the point is not that Nelson was wrong; rather, it is that that the basis for fugitive slave jurisprudence was heavily contested.



**As a New York Supreme Court justice, Samuel Nelson wrote an opinion in 1834 that, for the first time, held a personal liberty law unconstitutional. The law in question would allow alleged fugitives to have jury trials to determine whether the owner had a reasonable claim, which put it in conflict with the Fugitive Slave Act's requirement of only a summary hearing for fugitive slave rendition.**

Nonetheless, it was Nelson's opinion that laid the crucial groundwork for Joseph Story's opinion of the Court, more than half a decade later. *Prigg v. Pennsylvania* took five years to wind its way up to the Supreme Court. While the facts of the case are grave and momentous in their own right, they were inconsequential to the Court, which was interested instead in the abstract question of whether states could pass laws that added requirements to the federal law that governed the extradition process of fugitive slaves. And there was, by 1842, little at stake in terms of the original parties to the case. Edward Prigg and his co-defendants, charged with kidnapping by Pennsylvania, were under the protection of the state of Maryland. The case had come up by explicit agreement between the two states under terms mutually agreed upon, and numerous statements (official and unofficial) from Maryland indicated that Prigg had little to fear should he lose the case. Margaret Morgan and her children—the fugitive slaves whom Prigg had seized (or kidnapped, depending upon one's vantage point)—had been sold south, never to be heard from again. Margaret Morgan's husband, a free black citizen of Pennsylvania, traveled to Harrisburg to plead with Pennsylvania's governor to protect his wife and children's rights. But upon his return he was mistaken for a fugitive slave, clasped in irons aboard a ferry, and drowned after trying to escape his captors. What was left to decide was whether the state of Pennsylvania could theoretically punish a slave catcher for kidnapping if he practiced warrantless recaption and removed an alleged fugitive from Pennsylvania without a certificate of removal. Also at issue was a broader question of federalism—could Pennsylvania pass laws regulating fugitive slave rendition in support of federal law, or that added requirements to federal law, or contravened federal law?[32]

To these abstract constitutional questions, the Court had some clear—and some not so clear—answers. The Justices were unanimous

in their assessment that the 1826 Pennsylvania law was unconstitutional, although the Court split as to why. Associate Justices Joseph Story, James Moore Wayne, and John McLean all wrote opinions declaring that the power to pass fugitive slave laws was exclusive in Congress. Chief Justice Roger B. Taney, and Associate Justices Peter V. Daniel, and Smith Thompson all declared the power concurrent to some degree, but admonishing that the states could not pass laws that conflicted with federal law or further burdened slaveholders. Associate Justices John Catron and John McKinley by their silence left their position on that question ambiguous—a subject for scholars to debate ever after. But the holdings of the Court are not what interest us here. Rather, it is the way in which Story fashioned and defended his opinion of the Court.

To say that Story borrowed liberally from New York Supreme Court justice Samuel Nelson's opinion in *Jack v. Martin* is to understate the size of Story's debt. He in essence plagiarized Nelson's opinion, right down to the inelegant adoption of two inconsistent lines of reasoning that he could not be bothered to patch up in the scant three weeks he had to write the opinion between oral arguments and the announcement of the decision. Whether Story had been aware of Nelson's opinion before the case was committed to the docket is unknown, but if he was not then Edward Prigg's attorney, James Meredith, supplied the want.[33] Meredith laid out Story's case largely by parroting the reasoning of Nelson, whose opinion in *Jack v. Martin* Meredith recommended as "entitled to the most attentive consideration of the Court."[34] These proved the most prescient words in oral argument, at least from the standpoint of predicting the case's final outcome and reasoning. It is therefore instructive to examine Story's departures from Nelson's opinion.

Both Nelson and Story predicated their opinions on the sources of law, but their emphases were different. Nelson traced the authority back no further than the Constitution. Story did as well, but situated the Constitution and its relationship to slavery within the ambit of natural law. "By the general law of nations, no nation is bound to recognize the state of slavery," explained Story, "as to foreign slaves found within it territorial dominions."[35] Slavery was "a mere municipal regulation," and had no basis in natural law. As such, "if the Constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits."[36] Story constitutionalized the principle in *Somerset* and thus reminded slaveholders that their rights depended upon the Constitution. Scholars have rightly interpreted this in the current of Story's judicial nationalism—how better to advance the cause than to bring the states' rights southerners into the ranks of those insisting upon national authority?[37]

Nelson and Story also differed subtly in their use of history. Nelson's analysis of the Fugitive Slave Clause followed from the historical assumption that southern and northern boundaries were fixed in 1787, and that the clause was necessary because they "already had some experience of the perplexities in this respect under the Confederation, which contained no provision on the subject."[38] For Nelson, it stood to reason that the Framers left the power to legislate on this subject in the hands of Congress because, if left to the states, "the great purpose of the provision might be defeated, in spite of the Constitution."[39] Story echoed this sentiment and largely adopted Nelson's reasoning. "Perhaps the safest rule of interpretation," Story surmised, "[is] to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history." In short—rather than inflexibly adhering to the text of the Constitution, secure its objects and goals. The object of the Fugitive Slave Clause, continued Story "is historically well known": to secure the right of slaveholders to their slaves wherever

they fled. It constituted one of those "compromises" in the Constitution, "without the adoption of which the Union could not have been formed." Here was real historical urgency—without a Fugitive Slave Clause, no Constitution. This was at variance with, of all things, Joseph Story's interpretation of the clause in his *Commentaries of the Constitution* of 1833, when he cited it as evidence "that many sacrifices of opinion and feeling are to be found made by the Eastern and Middle states to the peculiar interests of the south." Story's *Commentaries* largely copied the rationale of Henry St. George Tucker for the clause's existence. Nonetheless, Story had not cast the Fugitive Slave Clause as a "fundamental article" in 1833. Neither had Nelson in 1834.[40]

Historians have pointed to this as evidence of Story's intellectual dishonesty.[41] After all, to reinterpret history, however subtly, to suit one's desired outcome does smack of opportunism. When combined with his tendentious reading of the precedents as all being on his side, his deliberate overlooking of precedents that contravened his position, and his willingness to relegate inconvenient facts (such as Margaret Morgan's child, born on Pennsylvania soil) to oblivion, the evidence against Story is pretty strong. But it does not satisfy. Story was hardly a doughface, unless one defines as a doughface anybody who was unwilling to bend the Constitution to explicitly antislavery purposes. Moreover, it is not immediately obvious that Story necessarily changed his story. After all, between the publication of his *Commentaries* in 1833 and *Prigg v. Pennsylvania* in 1842, constitutional thinking in the United States underwent some serious transformations. Story's rhetorical shifts can be explained as part of this larger process.

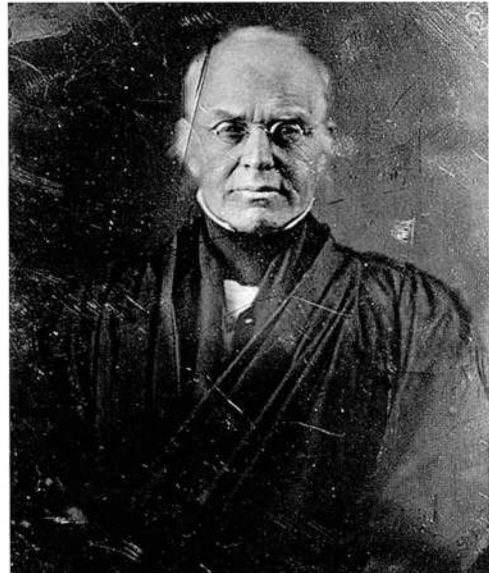
Southern constitutional thinking took an important turn in the 1830s, largely thanks to aggressive northern abolitionism. It was precipitated not by fugitive slaves, but rather by abolitionist speech. In 1835, the AASS engaged in its now famous mail campaign, sending many of the 1.1 million pamphlets it published southward in an attempt to stimulate abolitionist sentiment there.[42] Predictably, the opposite occurred. Southerners stormed the mail offices, burned pamphlets, and harassed anyone suspected of harboring antislavery beliefs. But southern ire did not stop at the doorstep of federal institutions within their own states.[43] One by one, the legislatures of the slaveholding states adopted resolutions condemning abolitionists and demanding that their northern brethren suppress the abolitionists. Doing so, the southern legislatures made clear, was not merely politically wise, but a duty.[44]

To reach such conclusions, southern legislatures began with assumptions that had undergirded southern constitutionalism for some time. They began with the proposition that the states had the sovereign right to regulate slavery without interference. Thus, Virginia's first resolution stated that "this commonwealth only, has the right to control or interfere with the subject of domestic slavery within its limits."[45] Each state had a similar statement, located at some point among its resolutions. North Carolina offered an historical justification for it as well. "When the American Colonies first united for their protection," they legislature recalled, "they assumed the character of sovereign and independent States ... When the present constitution was adopted ... it declared by a specific enumeration the powers intended to be granted to this government, and expressly declared, out of abundant caution that the powers not granted belonged to the States respectively, or to the people."[46] This was axiomatic, and not even abolitionists disputed it. In fact, the AASS had explicitly endorsed it. It remained for the slaveholding states to reason from this axiom a political duty on northern states to oppose and repress abolitionism.

North Carolina's elaborate preamble to its resolutions put the matter in the starkest

terms. If abolitionists had hailed from foreign states, it should violate their national law to allow their citizens "to disturb our peace by arraying one portion of society against another." This obligation, owed freely by foreign states to one another, was strengthened by "the constitution which unites us." In short, the slave states were giving notice that the Constitution, "cannot be supposed to have lessened our mutual obligations."[47] This made explicit what was sometimes implicit in all the southern resolutions—that all claims against abolition and in defense of slavery would rest on state sovereignty. Not that the reasoning was entirely one of legal or even political obligation. South Carolina's preamble noted that "the slave question" in the United States "presents one of the most extraordinary spectacles which ... has ever challenged the notice of the civilized world." Slavery was "solemnly recognized and guaranteed" by the Constitution, referred to as "the compact" that bound together in a "common league." In such a union, to sit idly by while abolitionists built up "a body of public opinion against us" and to rely upon their internal vigilance to avert "the torch of the incendiary and the dagger of the midnight assassin" was intolerable. "No people can live in a state of perpetual excitement and apprehension."[48] Virginia's second resolution combined these two sources of obligation explicitly when it noted that its right to be left alone was founded "on the principles of international law," yet also "peculiarly fortified by a just consideration of the intimate and sacred relations that exist between the states of this Union."[49]

These foundations situated the historic nature of the Union on terms favorable to southern constitutionalism—state sovereignty and the ultimate right of self-defense. But it required an additional pivot to reason actual constitutional duties from the text. In a weak way, it could be discerned from sentiment. "Wicked" abolitionists imperiled fraternal comity, and therefore those who worshipped at the "shrine" of Union (those northerners who had opposed Nullification) were now morally obligated to solve the problem.[50] But no legitimate constitutional justification appeared. The state of Georgia reasoned that Union was "only to be ensured by a strict adherence to the letter of the Constitution, which has guaranteed to us certain rights with which we will suffer no power on earth to interfere."[51] Georgia thus read the Constitution's text strictly to conclude that the northern states were constitutionally obligated to pass laws suppressing abolitionists—an absurdity if there ever was one. South Carolina called the passage of such laws an "indisputable constitutional obligation."[52] That repression of abolitionist societies might explicitly violate the foundational principle of freedom of speech was a cost the slaveholding states were willing to bear. Making the common distinction between requiring "prior



**In his 1842 opinion in *Prigg v. Pennsylvania*, Joseph Story (above, in 1844) copied Nelson's argument in the New York case, but went further by explicitly answering slaveholders' claims that the Constitution could only confirm existing arrangements, not (in essence) create new rights. Nelson had not needed to spell out as clearly the Constitution as a source, largely owing to the fact that in 1834 southerners had not yet forcefully articulated their proslavery position.**

permission" and punishing "licentiousness," the resolutions universally demanded that constitutional obligations to protect slavery outweighed protections of free speech.

This was constitutionalism in its incipient stages. The doctrine of state sovereignty allowed for invocation of the law of nations, and the sentimental bonds of union allowed for an appeal to mutual defense from a perceived threat. But the southern states took this reasoning further. All of the state resolutions demanded a special place for slavery that restricted the powers of the national government to control it in those areas where it had undoubted plenary power. Hence South Carolina's resolution that "we should consider the abolition of slavery in the District of Columbia, as a violation of the rights of the citizens of that District, derived from the implied conditions on which the Territory was ceded to the General Government."[53] Georgia put it even more starkly. The power to make "all needful rules and regulations" in U.S. territories was "derived from the constitution, which recognizes and guarantees the rights resulting from domestic slavery."[54] The Constitution's recognition of slavery now became itself a condition for its construction. The justification was in a particular reading of history. Slave states had entered the union on the promise that slavery would be protected. Any abolition in the district or in the territories would be, as North Carolina's legislature put it, a "breach of faith."[55] One can only reach such a conclusion if the contractual metaphor is fully played out—the faith breached was that of the Founding Fathers.

The southern resolutions thus attacked the substance of abolitionist constitutionalism with an originalist justification. While the Constitution granted plenary authority over the District of Columbia and federal territories to Congress, that authority was limited by the historical understanding that property rights had been surrendered only if they would be protected. This represented a radical departure from the chief intellectual sources of southern constitutionalism. The Virginia School and its major apostles, Spencer Roane and John Taylor of Caroline County, had provided the primary justification based on original state sovereignty. This wellspring informed more than just southern constitutionalism, to be sure. It was responsible for a consistent body of constitutional construction on the basis of a strict reading of the text. The Virginia School provided a defensive argument against outside interference with slavery because domestic institutions remained within the ambit of reserved state sovereignty. But this could not in and of itself deny federal authority over the territories or the district. Even John Taylor of Caroline County's famous comment upon the Missouri Compromise had conceded that Congress had the power to pass local laws (i.e., ones that might control slaveholders' rights) in the District of Columbia. He made a halfhearted attempt to argue that Congress could not pass local laws governing slaveholders in the territories, but his major concern was in proving that Congress did not have the power to attach conditions to the admission of new states.[56]

Furthermore, the Virginia School's practice of strict constructionism and reliance upon the base of state sovereignty destabilized arguments that the federal government should actively protect and enforce slaveholders' rights. The most visible means of this was at the center of the controversy in *Prigg v. Pennsylvania*—fugitive slave reclamation. About fugitive slave reclamation, the Virginians had little to say. Spencer Roane had remarked upon the clause's operation in an opinion, although it was admittedly dicta and amounted to the statement that northern state courts could not pass final judgment upon the property rights of southern slaveholders.[57] James Pindall of Virginia had led the fight in Congress in 1817 to achieve a new federal fugitive slave law more favorable to slaveholders, but he never devised a justification for the law consistent with the principles of

state sovereignty, reserved powers, and strict construction.[58] The simultaneous adoption of reserved state sovereignty and federal power left one simply asserting the right without a reason, much as Senator John Pendleton King of Georgia did when he explained that fugitive slave reclamation was a right "which the slaveholders acquired by virtue of the Constitution itself; and the slaveholder had a constitutional right to the whole power, moral and physical, of this Government to enforce it."[59]

This confusion owed something to John C. Calhoun, who had provided a creative twist to southern constitutionalism during the time of the Nullification Crisis. Calhoun's famous opposition to the protective tariff of 1828 is well known. He proceeded from doctrines of state sovereignty and relied upon the basic assumptions of compact theory espoused by the Virginia school. His creative twist was to provide a new means of assessing the constitutionality of congressional law on the basis of state sovereignty and a kind of reverse reading of Article V procedures. States could nullify laws by convention, and only a positive amendment to the Constitution could overrule the state. Nullification was clearly extra-constitutional and sufficiently radical to be rejected by dominant opinion in the 1830s, even in the South.[60] Moreover, the intellectual ferment of Calhoun's Exposition and Protest does not fully explain the proslavery constitutionalism trotted out by southern legislatures in the legislative sessions of 1835–1836. Nullification amounted to a defensive strategy against intrusive governmental policy. It would be of no help for a state asking for positive legislation to prevent abolitionists from circulating their materials via the U.S. mail, or for that matter in attempting to resist a federal ban on slaveholding in the territories.

The resolutions of the southern legislatures would achieve a national audience primarily in Congress. In a series of debates beginning in 1835, southerners repeated these demands over and over again. But even their demands evinced the confusion marked by the lack of a consistent constitutional theory. Andrew Jackson's message to Congress in December of 1835 called for consideration of a bill that would make it illegal to distribute incendiary publications through the mail that would encourage slave rebellion. John C. Calhoun orchestrated the effective highjacking of this bill by having it referred to a select committee (which he would chair) rather than the standing committee on the Post Office and Post Roads. Calhoun's committee returned a bill to the floor of the Senate on February 13, 1836 along with a report that Calhoun authored but the committee failed to endorse. Calhoun criticized President Jackson's proposal because it amounted to an unconstitutional attack on First Amendment freedoms. The correct route, Calhoun maintained, was to allow state postmasters the authority to remove any material disallowed by state law. In this way, incendiary publications might still be banned, but the federal government would not do the banning itself. This led to a lively debate in the Senate, but no law passed both houses of Congress. That same year, the House and Senate adopted the "Gag Rule," refusing to receive abolitionist petitions.[61]

There were during these debates multiple proslavery arguments put forward. Some were based plainly upon racial theory, or perverse explanations of the necessity of slavery to liberty. Others invoked the notion of a necessary evil. Several theories of constitutional interpretation were advanced to prove that Congress had no right to adopt antislavery measures, and a positive duty to enforce slaveholders' property rights. These proslavery theories, which owed much to the singular reaction of southern legislatures in 1835, found their culmination in John C. Calhoun's Resolves of 1837. Calhoun, continuing to object to the dogged attempts by antislavery congressmen to bring forward petitions for the abolition of slavery in the District of Columbia, made the foundations of proslavery

constitutionalism plain: 1) that the states were sovereign at the time of the adoption of the Constitution; 2) that the states had an indisputable right to determine their own domestic institutions; 3) that the federal government was a common agent of the several estates, and should not be used as an instrument to attack the domestic institutions of another; 4) attacks on slavery were in manifest violation of the mutual and solemn pledge to protect and defend each other; 5) any federal restriction on slavery in D.C. or the territories was an attack on all the states; 6) rights and advantages by the federal government had to be spread equally amongst all the states. Implicit in these resolutions was a historical bargain between northern and southern—proslavery and antislavery—forces in the Constitution. That this was still controversial as a theory is marked by the Senate's actions on his resolves. The body adopted the first four resolutions, but declined the last two.[62]

Justice Story's rhetorical and theoretical positioning in *Prigg v. Pennsylvania* makes more sense when placed in this context. Proslavery constitutionalism had attempted to make property rights a natural right, protected by implication in the Constitution but grounded firmly in international and natural law. Story instead insisted on the Constitution as its only legitimate source. This, Story averred, was what made their rights "absolute" and "unqualified." But these rights were also "positive" in their character.[63] To be sure, Samuel Nelson in *Jack v. Martin* (1834) had virtually identical reasoning. Nonetheless, he had not needed to spell out as clearly the Constitution as source, largely owing to the fact that southerners had not yet forcefully articulated their proslavery position. Story was explicitly answering slaveholders' claims that the Constitution could only confirm existing arrangements, not (in essence) create new rights.

Story's recourse to history also makes sense when one considers this context. By invoking the notion of a "necessary bargain," Story was reaching back past Samuel Nelson to the jurisprudence of William Tilghman. To invoke the bargain implied that the bargain had been made with the consent and knowledge of all parties. After all, Tilghman himself had used a strict reading of the clause to deny slaveholders' claims and to protect state residents. The language of a "necessary bargain" may have rankled abolitionists who wanted no pact with evil, but it did suggest that the only bargain that could be enforced was that expressly agreed to. Northerners had made explicit bargains and were obligated to keep them. "Implied obligations," in the form that had been advanced by southern constitutionalists to protect slavery in the territories and to thwart abolitionist speech, had no force of law. Story's position may have confirmed slaveholders' rights and protected them from state interference by permanently invalidating the state's right to protect its free black residents from kidnapping under color of law, but it at least denied slaveholders the right to make additional demands outside the document's express bargains. Thus it was not just a commitment to natural law or judicial nationalism that motivated Story. He was searching in 1841 for a consistent constitutional jurisprudence that would lay to rest more grandiose southern visions while opening up possibilities to maintain the historic balance between liberty and slavery in the United States.

* * *

Joseph Story's fencing match with southern constitutionalists does not have a happy ending. The logic of his argument did not play well in either the southern or northern court of opinion. Southerners rightfully recognized *Prigg* as giving legal cover to abolitionists who wanted to wash their hands of fugitive slave reclamation. Abolitionists (northern, obviously) despised the opinion's callous disregard for the rights of free blacks seized as fugitive slaves. And the decision went a long way towards convincing most that

the Constitution was irrevocably proslavery, whatever Story's intentions.

Such a conclusion calls into question Story's program rather than Story's political and moral commitments. Whether we wish to condemn Story as proslavery or vindicate him as trying to salvage a moderate antislavery constitutionalism, we cannot escape the fact that his opinion of the Court overturned settled law and precluded a more moderate judicial solution. For this, Story does not deserve all the blame. All the Justices agreed that Pennsylvania's law was unconstitutional. They all agreed to overturn existing constitutional arrangements. Story chose the path that he believed best supported a strong Union and rejected the natural right of slaveholders to the people they claimed as property. His reasoning answered southern constitutional claims in ways that protected slaveholders' rights, but not on the terms that they wanted. The distinction was subtle. Perhaps too much so.

Understanding this context, Story's opinion of the Court does not absolve him from the judgment of history, which will necessarily be against him so long as we understand slavery to be evil. But moral judgments can lead to blinkered assessments of the past, leaving too much out of the field of vision. In the case of *Prigg v. Pennsylvania*, Story's opinion was bracketed by a constitutional context that extended beyond the available precedents and beyond the Supreme Court itself. Story was dialoguing with southerners who wished for a far more proslavery interpretation of the Constitution than he was willing to give. This context helps us explain some of Story's interpretive choices, as well as his rhetorical embellishments. Judges would do well to mark his example as a reminder of just how entangled one can become in a difficult case. For the rest of us, we can understand a little better that judges contend with enemies sometimes unacknowledged and assumptions ingrained yet unarticulated in their opinions. We should always search for these unseen yet important influences.

## ENDNOTES

[1] For a general biography and a critical look at Story's accomplishments, *see* R. Kent Newmyer, **Supreme Court Justice Joseph Story: Statesman of the Old Republic** (Chapel Hill: University of North Carolina Press, 1985); R. Kent Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence," *The Journal of American History* 74, no. 3 (December 1987): 814–835, doi:10.2307/1902155.

[2] Some scholars have been forgiving of Story in this regard. *See* Joseph C. Burke, "What Did the Prigg Decision Really Decide?" *The Pennsylvania Magazine of History and Biography* 93, no. 1 (January 1, 1969): 73–85; Christopher L. M. Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *The University of Chicago Law Review* 55, no. 1 (January 1, 1988): 273–327, doi:10.2307/1599775; James McClellan, **Joseph Story and the American Constitution; a Study in Political and Legal Thought with Selected Writings,** reprint ed. (Norman: University of Oklahoma Press, 1990); Herbert J. Storing, "Slavery and the Moral Foundations of the American Republic," in **The Moral Foundations of the American Republic**, ed. Robert H. Horwitz, 3rd ed. (Charlottesville: University Press of Virginia, 1986), 313–332.

[3] Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Historical Review* (1994): 247–94; Barbara Holden-Smith, "Lords of Lash, Loom, and Law: Justice Story, Slavery, and *Prigg v. Pennsylvania*," *Cornell Law Review* 78, no. 6 (September 1993): 1086–1151; William M. Wiecek, "Slavery and Abolition before the United States Supreme Court, 1820-1860," *The Journal of American History* 65, no. 1 (June 1978): 34–59.

[4] Leslie Friedman Goldstein, "A 'Triumph of Freedom' After All? *Prigg v. Pennsylvania Re-examined*," *Law & History Review* 29, no. 3 (August 2011): 763–796.

[5] There is also a middle ground interpretation, that the decision represented a genuine attempt at accommodation by the Supreme Court, especially when associated with *Groves v. Slaughter* and *United States v. Amistad* from its prior term. *See* Earl Maltz, **Slavery and the Supreme Court, 1825-1861** (Lawrence, Kan.: University Press of Kansas, 2009), 52–82. Cf. H. Robert Baker, ***Prigg v. Pennsylvania*: Slavery, The Supreme Court, and the Ambivalent Constitution** (Lawrence: University Press of Kansas, 2012).

[6] For different perspectives on the Constitutional Convention and slavery, *see* Don E. Fehrenbacher, **The Slaveholding Republic: An Account of the United States Government's Relations to Slavery** (New York: Oxford University Press, 2001); Paul Finkelman,

"Affirmative Action for the Master Class: The Creation of the Proslavery Constitution," *Akron Law Review* 32 (1999): 423–467; John P. Kaminski, ed., **A Necessary Evil?: Slavery and the Debate Over the Constitution**, v. 2 (Madison, WI: Madison House, 1995); Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17 (Spring 1997): 37–59.

[7] Max Farrand, ed., **The Records of the Federal Convention of 1787** (New Haven: Yale University Press, 1911), 2:443, 446, <http://hdl.loc.gov/loc.law/amlaw.lwfr.>

[8] For a discussion of abolitionist legal arguments, *see* Robert M. Cover, **Justice Accused: Antislavery and the Judicial Process** (New Haven: Yale University Press, 1975). For the best narrative account of the Convention and slavery, *see* Richard R. Beeman, **Plain, Honest Men: The Making of the American Constitution** (New York: Random House, 2009), 327–330.

[9] On the South Carolina debate, *see* Pauline Maier, **Ratification: The People Debate the Constitution, 1787-1788**, (New York: Simon & Schuster, 2010), 248–252. General Charles Cotesworth Pinckney's comments may be found in Jonathan Elliot, ed., **The Debates in the Several State Conventions on the Adoption of the Federal Constitution**, 2d ed., with considerable additions (Philadelphia, Washington: J.B. Lippincott & Co.; Taylor & Maury, 1836), 4:305–6, <http://hdl.loc.gov/loc.law/amlaw.lwed.> Madison's comments may be found at *ibid.*, 3:453. North Carolina delegates to Governor Richard Caswell, September 18, 1787, in Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., **The Documentary History of the Ratification of the Constitution** (Madison: State Historical Society of Wisconsin, 1976 –), 13:216 [hereafter: **Documentary History of Ratification**]. North Carolina Delegates to Governor Richard Caswell, 18 September 1787, in **Documentary History of Ratification**, 13: 216. Gen. Charles Cotesworth Pinckney's comments are found at: Elliott's Debates, 4:305-6; 286.

[10] Mark Stuart Weiner, **Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste** (New York: Vintage Books, 2006), 70–90; William M. Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *The University of Chicago Law Review* 42, no. 1 (October 1, 1974): 86–146, doi:10.2307/1599128.

[11] "Act respecting fugitives from justice, and persons escaping from the service of their masters," February 12, 1793, 1 Stat. 302 (1793) [Hereafter: Fugitive Slave Act of 1793]. Paul Finkelman, "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *The Journal of Southern History* 56, no. 3 (August 1990): 397–422, doi:10.2307/2210284.

[12] St. George Tucker, **Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia**, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), v. 1, appendix, 366. For his analysis of subjects of legislative powers granted to the federal government, *see* v. 1, appendix, 289.

[13] Before the Constitutional Convention, Massachusetts had achieved fame for its adoption of the judicial principle in *Somerset v. Stewart* in the famous *Quok Walker* case. This led many to believe that Massachusetts was an asylum for escaped slaves. The truth, however, was otherwise. Fugitive slaves were not given legal protection (except by an occasional technicality) and most fugitives were returned as a matter of course. *See* Emily Blanck, "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts," *The New England Quarterly* 75 (March 2002): 24–51.

[14] On this point, it was clear that state resources were necessary for slaveholders. Most states obliged by passing fugitive slave laws of their own, although these laws often contained anti-kidnapping provisions as well. *See* Thomas D. Morris, **Free Men All: The Personal Liberty Laws of the North, 1780-1861** (Baltimore: Johns Hopkins University Press, 1974), passim, and H. Robert Baker, "The Fugitive Slave Clause and Antebellum Constitutionalism," *Law & History Review* 30 (November 2012): 1133–1174.

[15] *Glen v. Hodges*, 9 Johns. 67 (N.Y., 1812) at 69. *Commonwealth ex rel. Johnson, a Negro v. Holloway* 3 Serg. & Rawle 4 (Pa., 1817).

[16] *Commonwealth, Ex. Rel. Negro Lewis v. Holloway*, 6 Binney 213 (Pa., 1814).

[17] *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. Sup. Ct., Eastern District 1816).

[18] *Commonwealth ex rel. Wright v. Deacon*, 5 Serg. & Rawle 62, 62–63 (Pa., 1819).

[19] Eric W. Plaag, "'Let the Constitution Perish': *Prigg v. Pennsylvania*, Joseph Story, and the Flawed Doctrine of Historical Necessity," *Slavery & Abolition* 25, no. 3 (2004): 76–101.

[20] *Commonwealth v. Griffith*, 19 Mass. 11, 18 (1823).

[21] *In Re Susan* (1818) 23 F. Cas. 444, at 445.

[22] H. Robert Baker, "The Fugitive Slave Clause and Antebellum Constitutionalism," *Law & History Review* 30 (November 2012): 1133–1174.

[23] *See* Thomas D. Morris, **Free Men All: The Personal Liberty Laws of the North, 1780-1861** (Baltimore: Johns Hopkins University Press, 1974).

[24] "An Act to give effect to the provisions of the Constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping," 25 March 1826; 1825 Pennsylvania Session Laws 150–155 [hereafter: Pennsylvania Personal Liberty Law].

[25] William R. Leslie, "The Pennsylvania Fugitive Slave Act of 1826," *The Journal of Southern History* 18, no. 4 (November 1952): 429–445, doi:10.2307/2955218; Thomas D. Morris was much more perceptive and nuanced in his discussion of the compromises that went into the Pennsylvania Personal Liberty Law of 1826, see his **Free Men All,** 53.

[26] For examples, *see* Richard S. Newman, **The Transformation of American Abolitionism: Fighting Slavery in the Early Republic** (Chapel Hill: University of North Carolina Press, 2002), 152–175.

[27] Seymour Drescher, **Abolition: A History of Slavery and Antislavery** (Cambridge: Cambridge University Press, 2009), 294–306.

[28] "Declaration of the Anti-Slavery Society," *The Liberator* (Boston, MA), December 14, 1833; 19th Century Newspapers, Gale Group Databases, <http://www.infotrac.galegroup.com>

[29] *Jack, a Negro Man v. Martin*, 12 Wend. 311 (N.Y., 1834).

[30] *Jack v. Martin*, 14 Wend. 506 (N.Y.C.C.E., 1835).

[31] *Opinion of Chief Justice Hornblower on the Fugitive Slave Law* [1851 pamphlet], reprinted in **Fugitive Slaves and American Courts: The Pamphlet Literature**, ed. Paul Finkelman, 4 vols. (Clark, N.J.: Lawbook Exchange, 2007), 1:97–104.

[32] The facts of the case greatly complicate the import of the case as well as what it's holding actually meant. But in terms of understanding what Justice Joseph Story was *attempting* to accomplish, they are not relevant.

[33] *Prigg v. Pennsylvania*, 41 U.S. 539, 559–571 (1842). For Nelson's opinion, *see Jack, a Negro Man v. Martin*, 12 Wend. 311 (Supreme Court of Judicature of New York 1834).

[34] *Prigg v. Pennsylvania*, 41 U.S. 539, 565.

[35] *Prigg* at 611.

[36] *Prigg* at 612. "Municipal regulation" at 611.

[37] Finkelman, "Story Telling on the Supreme Court."

[38] *Jack v. Martin*, 12 Wend. 311 (N.Y., 1834), 319.

[39] *Jack v. Martin*, 12 Wend. 311 (N.Y., 1834), 319.

[40] Joseph Story, **Commentaries on the Constitution of the United States** (Boston: Hilliard, Gray and Co., 1833), v. 3, chapter 40.

[41] Finkelman, "Story Telling on the Supreme Court," 258–259.

[42] David Brion Davis, **Inhuman Bondage: The Rise and Fall of Slavery in the New World** (Oxford; New York: Oxford University Press, 2006), 260.

[43] Although I emphasize the power of the backlash against the abolitionist mail campaign, this is not intended to invoke the old and discredited argument that proslavery ideology came about only in the 1830s. On the development of proslavery ideology, *see* Larry E. Tise, **Proslavery: A History of the Defense of Slavery in America, 1701-1840** (Athens: University of Georgia Press, 1987) and Jeffrey Young's introduction to his edited collection, **Proslavery and Sectional Thought in the Early South, 1740-1829: An Anthology** (Columbia: University of South Carolina Press, 2006). Neither of these works details the development of proslavery constitutional theory, which seems somewhat incidental to proslavery ideology as a whole. This is true even in contemporary southern legal arguments defending slavery. *See* Thomas. Cooper, **An Introductory Lecture to a Course of Law**. (Columbia [S.C.]: Telescope Office, 1834), <http://galenet.galegroup.com/servlet/MOML?dd=0&locID=atla48845&d1=19004153900&srchtp=a&aa=AND&c=5&SU=US&l2=GE&a0=cooper&docNum=F103337371&vrsn=1.0&af=RN&a5=A0&ste=11&dc=flc&stp=DateAscend&d4=0.33&n=10&tiPG=1.>

[44] For the text of the resolves of the legislatures, *see* "A Memorial of the General Assembly of the State of Alabama to the General Assemblies of the several States of the Union," January 9, 1836, 1835 Alabama Session Laws 174 [hereafter: Alabama Resolves]; "resolutions," December 22, 1835, 1835 Georgia Session Laws 297 [hereafter: Georgia Resolves]; "resolutions," 1835 North Carolina Session Laws 119 [hereafter: North Carolina Resolves]; "Report of the Joint Committee on Federal Relations," Dec. 16, 1835, 1835 South Carolina Session Laws 26 [hereafter: South Carolina Resolves]; "resolutions relative to the interference of certain associations in the northern states with domestic slavery in the south," February 16, 1836, 1835 Virginia Session Laws 395 [hereafter: Virginia Resolves]. The resolutions are collected in *Report and Resolves on the Subject of Slavery: Massachusetts. General Court. Joint Special Committee on Slavery* (Massachusetts General Court, 1836), Library of Congress. Digitally available at: <http://www.archive.org/details/reportresolveson03mass.> Accessed August 26, 2013.

[45] Virginia Resolves, 1835 Virginia Session Laws 395.

[46] North Carolina Resolves, 1835 North Carolina Session Laws 119.

[47] North Carolina Resolves, 1835 North Carolina Session Laws 119.

[48] South Carolina Resolves, 1835 South Carolina Session Laws 26.

[49] Virginia Resolves, 1835 Virginia Session Laws 395.

[50] South Carolina Resolves, 1835 South Carolina Session Laws 26.

[51] Georgia Resolves, 1835 Georgia Session Laws 299.

[52] South Carolina Resolves, 1835 South Carolina Session Laws 26.

[53] *Ibid.*, 28.

[54] Georgia Resolves, 1835 Georgia Session Laws 300.

[55] North Carolina Resolves, 1835 North Carolina Session Laws 121.

[56] John Taylor, **Construction Construed, and Constitutions Vindicated** (Richmond: Shepherd & Pollard, 1820), 499–510, The Making of Modern Law. Gale. 2013. Gale, Cengage Learning. Accessed October 2, 2013 <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F104953510&srchtp=a&ste=14>.

[57] *Lewis v. Fullerson*, 1 Rand. 15 (1821).

[58] *Annals of Congress*, 15th Cong., 1st sess., 242–255 (March 9, 1818).

[59] Congressional Globe, 24th Cong. 1st sess., app. 284 (April 11, 1836). It has long been contended (successfully, in my view) that southern constitutionalism was heavily "consolidationist," demanding federal action to protect slavery. *See* Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860," *Journal of the Illinois State Historical Society* 54 (July 1961): 117–180.William M. Wiecek, "'Old Times There Are Not Forgotten': The Distinctiveness of the Southern Constitutional Experience," in **An Uncertain Tradition: Constitutionalism and the History of the South**, ed. Kermit Hall and James W. Ely (Athens: University of Georgia Press, 1989), 159–197.

[60] Saul Cornell, **The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828** (Chapel Hill: Published for the Omohundro Institute of Early American History and Culture, Williamsburg, Virginia, by the University of North Carolina Press, 1999), 294–297. Cf. John Niven, **John C. Calhoun and the Price of Union** (Baton Rouge: Louisiana State University Press, 1988), 154–160. On Calhoun's unionism even during the Nullification crisis, *see* Richard E. Ellis, **The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis** (New York: Oxford University Press, 1987), 64–68.

[61] Sean Wilentz, **The Rise of American Democracy: Jefferson to Lincoln** (W.W. Norton & Co., 2005), 403-412. *See also* David C. Frederick, "John Quincy Adams, Slavery, and the Disappearance of the Right of Petition," *Law and History Review* 9 (Spring 1991): 113–155; Richard R. John, **Spreading the News: The American Postal System from Franklin to Morse,** (Cambridge: Harvard University Press, 1995), 257–280; Susan Wyly-Jones, "The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign," *Civil War History* 47 (December 2001): 289–309.

[62] **The Works of John C. Calhoun: Speeches... Delivered in the House of Representatives and in the Senate of the United States** (D. Appleton, 1853), 140–141.

[63] *Prigg v. Pennsylvania*, 41 U.S. 539 at 612, 613, 623.

# Judicial Modesty in the Wartime Context, *Roosevelt v. Meyer* (1863)

DAWINDER S. SIDHU

"The most important thing we do is not doing," Justice Louis D. Brandeis noted of the Supreme Court.[1] At the height of the Civil War, the Supreme Court in *Roosevelt v. Meyer*[2] claimed that it could not review, and therefore let stand, a state court decision upholding the Legal Tender Act ("Act"),[3] a critical wartime measure designed to stabilize the Union economy and fund the Union's war efforts. In this essay, I suggest that this oft-overlooked case warrants the legal community's consideration because it implicates a question fundamental to our constitutional system: should the courts decline judicial review—or, "not do"—in order to facilitate government responses to wartime challenges?

## The Legal Tender Act

In the process of establishing "one great, respectable, and flourishing empire,"[4] the Framers anticipated the possibility that the United States would split into two distinct political bodies, and that this disunion would occur specifically along northern and southern lines.[5] One generation later, the prospect of this North-South division was altogether real. In his March 4, 1861 inaugural address, Abraham Lincoln acknowledged that the common ties among the North and South were bending, but urged the people not to "break our bonds of affection."[6] During the seminal speech, President Lincoln pledged to keep the peace, provided that the North was not subject to Southern provocation or aggression. There shall be "no bloodshed or violence, and there shall be none," he declared, "unless it be forced upon the national authority."[7] Soon thereafter, on April 12, 1861, confederates bombarded Fort Sumter, firing the opening salvo and thereby triggering the condition in President Lincoln's inaugural. The "one great" nation was at war with itself.

To sustain the war effort, the Union had to withstand wartime stresses on the economy. "Wars have now become rather wars of the purse than of the sword," observed Chief Justice Oliver Ellsworth as early as 1788.[8] To

the extent that war poses both financial and existential threats to a nation, the Union's initial financial situation was precarious and thus its ability to respond to the rebellion seriously compromised.

On one side of the ledger, the Union's wartime costs were growing at a rapid clip. On April 15, 1861, President Lincoln activated the militia, charging it with the awesome responsibility to "maintain the honor, the integrity, and the existence of our National Union[.]"[9] President Lincoln made additional calls for troops that year, leading to a dramatic expansion of the Union army from 16,402 soldiers on January 1, 1861 to 575,917 soldiers by the end of the year. These and other wartime preparations and necessaries were quite costly. Indeed, federal expenditures ballooned from $63.1 million in 1860 to $474.8 million in 1862. By January of 1862, war costs approached $2 million per day.

On the other side, federal revenues stagnated. For example, most federal revenue came from customs duties, and income from this source increased only slightly from $39.6 million in 1861 to $49.1 million in 1862. The federal income tax was not implemented until 1862,[10] and the meager revenues from customs duties and other taxes could not even cover the interest on the federal debt.[11] The federal government could not rest its wartime funding on borrowing because the federal government was considered a poor credit risk. Put simply by Charles Fairman, the "treasury was empty" and the "Government's credit had been shattered."[12] The combination of weak revenues and rising costs conspired to bloat the federal debt, which swelled from $75 million in 1861 to $505 million the following year.

In response to this acute, unsustainable situation, the federal government was compelled to experiment with various economic initiatives. Most notably, it introduced paper notes as currency. At the onset of the Civil War, regular exchange took place through the use of specie (*i.e.*, gold or silver coin, also called "hard money") rather than paper money. In July of 1861, Congress authorized the Secretary of the Treasury, Salmon P. Chase, to issue "demand notes," paper notes redeemable on demand for specie.[13] Banks were not fond of these notes because they bore no interest and depleted the banks' reserves of specie, an established and widely recognized commodity. Congress also authorized Secretary Chase to offer banks "treasury notes"—which paid 7.3% interest semiannually and which were redeemable in three years—in exchange for $50 million in specie.[14] In August of 1861, the banks agreed, supplying the federal government with $50 million in specie in return for $50 million in "treasury notes," making the same deal in October of 1861 and again in December. These programs held promise, but were viable only insofar as specie was readily available and flowing between banks, the people, and the government. The flood of notes in the market gave rise to inflation and, with a premium on specie, the public and banks began hoarding hard money. On December 28, 1861, banks ultimately voted to suspend specie payments.

As the Supreme Court would hold in a later ruling: "It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency" that Congress proposed the Legal Tender Act.[15]

On December 30, 1861, two days after the banks' decision to suspend specie payments, Elbridge Gerry Spaulding, chair of a House Committee of Ways and Means subcommittee, addressed his congressional colleagues, announcing that the nation was "never in greater peril than at this moment."[16] Congressman Spaulding introduced what he called a "war measure" and a "measure of necessity"[17]: a bill that would authorize Secretary Chase to issue $150 million in paper notes as "lawful money and a legal

**As Secretary of the Treasury during the Civil War, Salmon P. Chase reluctantly endorsed soft money. After Congress passed the Legal Tender Act, he became responsible for approving the design of the United States Notes, and included his own face on the front of the one-dollar notes.**

tender in payment of all debts, public and private, within the United States."[18] Whereas demand notes and treasury notes were backed by specie, the United States Notes were backed by the "good faith of the government."[19]

Congressman Spaulding explained that the "leading object" of the bill was to "fund the debt" and to "meet the most pressing demands upon the treasury to sustain the army and navy until they can make a vigorous advance upon the traitors and crush out the rebellion."[20] "These are extraordinary times and extraordinary measures must be resorted to, in order to save our Government," he continued.[21] Secretary Chase, a general proponent of hard money, reluctantly endorsed soft money, acknowledging that the situation had become "indispensably necessary that we should resort to the issue of United States notes."[22] As a sign of his acquiescence—and perhaps even more so his vanity—Secretary Chase, who was responsible for approving the design of the United States Notes as the head of the Treasury, included his own face on the front of the one-dollar notes, which would have the widest circulation.[23]

On February 5, 1862, after two weeks of debate, the House passed the legal tender bill by a vote of 93–59, and on February 12, the Senate did the same, by a 30–7 margin. President Lincoln signed the Act into law on February 25, 1862. Congress wasted no time, quickly using the Act's grant of power to authorize the issuance of $150 million in United States Notes. (By separately enacted statutes, Congress authorized $150 million in additional notes in July of 1862, and another $150 million in March of 1863). The notes, which would be printed with green ink, would come to be called "greenbacks."

The paper money issued pursuant to the Act eased the financial strain on the Union economy and facilitated the war effort. As Justice Samuel F. Miller later recounted, thanks to the Act, Union soldiers in the field were compensated, public and private debts were paid, trade was stimulated, and confidence in the market was enhanced.[24] Were it not for the Act, he wrote, "the rebellion would have triumphed, the States would have been left divided, and the people impoverished."[25] In short, Justice Miller concluded, "The National government would have perished, and, with it, the Constitution."[26]

## The Constitutionality of the Act

The practical benefits of the Act may have been beyond dispute, but the

constitutionality of the Act was a completely separate—and very much open—question. For example, the Attorney General, Edward Bates, gave his opinion that the Act was constitutional, but tempered that opinion with the admission that it was prepared during the "very brief interval afforded" and "with all the brevity and without argument, for the time does not allow elaborate consideration."[27]

When the Act was under consideration, some members of Congress held concerns that the body did not have the authority under the Constitution to establish paper notes as legal tender. They argued that the Constitution prohibits states from making "any Thing but gold and silver Coin a Tender in Payment of Debts" and therefore the constitutional authority to issue paper notes is expressly denied to states, but neither is it affirmatively granted to Congress.[28] At most, they asserted, the Constitution gives Congress the power to "coin money," but it does not confer upon Congress any authority to make paper money.[29] This point was advanced by Justice Oliver Wendell Holmes, Jr. "an express grant seems to exclude implications," and therefore, "If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"[30] Justice Stephen J. Field stated the same proposition this way: "When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject."[31] Moreover, there was fear that paper currency would "unconstitutionally impair contracts made in specie."[32]

**James Roosevelt's business interests were primarily in coal and transportation, but he also served as president of the Southern Railway Security Company. He is pictured here with his son, future President Franklin D. Roosevelt.**

Accordingly, some, such as editors of the New York *World*, deemed the Act "repugnant to the Constitution."[33]

In support of the Act's constitutionality, Congressman Spaulding, who became known as the "father of the greenbacks,"[34] asserted that the Constitution's own terms empowered Congress to "raise and support armies" and "provide and maintain a navy," and that Congress therefore retained "discretion" to determine how to fund the army and navy, including through the issuance of paper notes.[35] This authority, supplemented by the enumerated power to make laws "necessary and proper" to execute other express powers,[36] afforded Congress a sufficient constitutional foundation to pass the Act, he said. Others, such as James Thayer of Harvard Law School, posited that, while the Constitution gives Congress the authority to "coin money," the text of the Constitution says nothing about "legal tender."[37] "The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution," Thayer wrote.[38] There also was the fallback "war powers" argument, espoused by Republicans, that the "Constitution authorized any Congressionally approved measures designed to maintain the government in times of insurrection."[39]

**Justice James Moore Wayne of Georgia wrote the Court's brief opinion in *Roosevelt v. Meyer*, holding that Roosevelt merely referenced the Constitution in support of his essential claim that Congress did not have the authority to pass the Legal Tender Act, and that the plaintiff did not make an independent claim that his constitutional rights were violated.**

### *Roosevelt v. Meyer*

The Supreme Court's first opportunity to resolve the constitutionality of the Act arose out of a case involving a simple debt. On August 23, 1854, James J. Roosevelt—the father of future President Franklin D. Roosevelt—loaned $8,000 to Samuel Bowne. As security for the loan, Bowne executed a bond and, along with his wife, placed a lien on their property in New York. On May 28, 1861, the property was conveyed to Lewis H. Meyer, who assumed the obligation to Roosevelt. On June 11, 1862, subsequent to the passage of the Act, Meyer sought to discharge the debt to Roosevelt by paying the principal and interest in United States Notes. Roosevelt refused the notes, insisting instead that payment be made in gold coin. Roosevelt pointed out that the proffered notes held a market value $326.78 less than gold coin. Further, Roosevelt argued, Congress did not have the constitutional power to authorize the issuance of fiat money.

On June 25, 1862, the parties, in agreement as to the facts, submitted the following question to the Supreme Court of New York: were the paper notes of the Act valid legal tender? In November of 1862, the court heard arguments over two days and, on June 3, 1863, ruled in favor of Roosevelt. The next day, Meyer filed notice that he would appeal the adverse decision to New York's highest court, the Court of Appeals of New

York. On September 29, 1863, the Court of Appeals of New York entertained arguments in the case. On October 9, 1863, the court reversed, siding with Meyer. The court ordered Roosevelt to accept the paper notes as full and complete satisfaction of the debt, and to discharge the bond and mortgage.

On December 11, 1863, Roosevelt appealed, filing, pursuant to the Section 25 of the Judiciary Act of 1789, a writ of error to the Supreme Court of the United States, arguing that a "manifest error hath happened to [his] great damage" and urging that "such error . . . should be duly corrected" by the Court.[40] The same day, Meyer moved to dismiss the writ for lack of jurisdiction. Meyer contended that Section 25 did not provide the Supreme Court with authority to review a decision by a state's court of last resort that upholds a federal statute.[41] The first subsection of Section 25 provides that the Supreme Court may review the final decision of "the highest court of law or equity of a State" in which "the validity of a treaty or statute" is put into question and the "decision is against their validity[.]"[42] Here, the Supreme Court could not hear the appeal, Meyer claimed, because the Court of Appeals of New York was New York's highest court and the court did not rule "against" the validity of the Act.[43]

In response, Roosevelt highlighted the third subsection of Section 25 as the source of the Court's appellate jurisdiction. This passage authorizes the Court to review a decision by a state's court of last resort that construes "any clause of the constitution" against a "right" of either party.[44] Here, Roosevelt argued principally that the proffered payment in United States Notes was $326.78 short, thus the Court of Appeals of New York's decision forcing him to accept such payment deprived him of property without due process of law in violation of his Fifth Amendment rights. Therefore, according to Roosevelt, the decision by New York's highest court was "against" his rights and the Supreme Court could hear his challenge to the Act.

In the Judiciary Act of 1863, Congress, which has the constitutional power to establish inferior federal courts,[45] created a tenth circuit.[46] The addition of this new circuit required that the number of Justices increase from nine to ten. By the time Roosevelt's appeal was before the Court, the Bench had the following ten members: Roger B. Taney of Maryland (Chief Justice), James Moore Wayne of Georgia, John Catron of Tennessee, Samuel Nelson of New York, Robert C. Grier of Pennsylvania, Nathan Clifford of Maine, Noah Haynes Swayne of Ohio, Samuel F. Miller of Iowa, David Davis of Illinois, and Stephen J. Field of California.

On December 21, 1863, three days after it heard oral argument, the Court agreed with Meyer's interpretation of subsection one of the Judiciary Act of 1789, holding that it did not have jurisdiction to consider Roosevelt's appeal.[47] The brief opinion, written by Justice Wayne, dismissed Roosevelt's arguments as to the viability of subsection three, suggesting that Roosevelt merely referenced the Constitution in support of his essential claim that Congress did not have the authority to pass the Act, and that Roosevelt did not make an independent claim that his constitutional rights were violated.[48] In staying its hand, the Court left intact the ruling by the New York Court of Appeals on the constitutionality of the paper notes.

Justice Nelson dissented without writing separately. Chief Justice Taney, who was ill and did not participate in the case, also penned an undelivered dissent.

### Judicial Modesty and *Roosevelt*

What can we make of *Roosevelt*? Whereas judicial activism and judicial restraint are unhelpful terms insofar as they are designed to characterize virtuous judicial decision making, the concept of judicial modesty may be useful at least as one measure of principled judicial review. Judicial

modesty generally occurs when a judge subordinates his or her personal policy preferences in service of and in allegiance to broader constitutional norms that contradict those personally held preferences.[49]

The legal tender context offers an example of judicial modesty. In 1870, the Supreme Court in *Hepburn v. Griswold* held that the Constitution vested no power in Congress to render paper money legal tender for preexisting debt obligations.[50] *Hepburn* was authored by Salmon P. Chase, the former Treasury Secretary who joined the Supreme Court as Chief Justice of the United States in 1864. In other words, Chief Justice Chase asserted that the very Act that he endorsed, albeit reluctantly, as the Treasury Secretary was unconstitutional. In turning down the opportunity to affirm a policy position in a judicial forum, Chief Justice Chase reflected the sort of forbearance that is central to judicial modesty.

On initial inspection, *Roosevelt* may be said to embody three aspects of judicial modesty. First, the *Roosevelt* Court declined jurisdiction, and in doing so ruled only that it lacked the authority to hear the case. In general, refusing to hear a case on jurisdictional grounds may be considered judicial modesty because the refusal demonstrates a court's ability to constrain its vast and natural adjudicative functions[51] in deference to structural constitutional considerations. Rather than give effect to personal or policy preferences, the argument would go, the *Roosevelt* Court recognized and paid tribute to its limits in our constitutional design.

Second, some also may credit the *Roosevelt* Court with exhibiting judicial modesty in that the Court declined to overturn a critical wartime statute. To some, national security matters are incapable of meaningful judicial appraisal and courts are therefore ill-equipped to second-guess the national security initiatives devised by the policy making branches.[52] Further, they may say, courts should not let the technical niceties of the law impair that which may be necessary to help the government respond to existential threats. This position calls to mind Senator William Pitt Fessenden's take on the Act: "the thing is wrong in itself but to leave the government without resources at such a crisis is not to be thought of."[53] The *Roosevelt* Court may be said to embody judicial modesty because the decision reflects the Court's self-awareness of judicial inadequacy in the national security context as well as the court's appreciation for the Union's first-order interest in self-preservation.

Third, the appearance of judicial modesty also may arise from the view that the *Roosevelt* Court, which consisted of seven Democrats and three Republicans, would be disinclined to uphold an Act passed by a Republican administration. From this perspective, *Roosevelt* was an act of judicial modesty because the majority suppressed its political preferences in refusing to strike down an Act championed by the party opposite.

Despite these three arguments, any clear sense that *Roosevelt* was an exercise of judicial modesty becomes cloudy in light of a few additional considerations. First, the force of the contention that *Roosevelt* involved judicial modesty because of the political affiliations of the Justices loses steam when one realizes that, as Akhil Amar writes of the Court in 1863, "the deepest ideological divide ran not between Republicans and Democrats but between Unionists and Secessionists."[54] The *Roosevelt* Court was dominated by Unionists. For example, in 1862, the same Court (minus Justice Field, who had not yet been appointed) held in *The Prize Cases* that President Lincoln's order of a military blockade in several Southern states was constitutional, even though Congress had not formally declared war.[55] This decision, historian Brian McGinty explains, indicated that the Court in 1862 was "prepared to sustain the government's war efforts" and "prepared to 'stretch' constitutional doctrine to meet the extraordinary exigencies of the

crisis[.]"[56] That this crisis was more acute in December of 1863 suggests that the *Roosevelt* Court likely possessed an even greater willingness to let stand the Union's wartime actions. This increased support for the Union may be reflected in the votes in the two cases —5–4 in *The Prize Cases* and 8–1 in *Roosevelt.* In short, the Court may not have subordinated its political interests in *Roosevelt*, but instead may have actively effectuated those preferences towards the Union by leaving the Act undisturbed.

The Unionist character of the Court and the potential for party identification to mislead an analysis of *Roosevelt* are reinforced by the selection of Justice Field. In picking the tenth Justice to serve on the Bench, President Lincoln, a Republican, made the seemingly unusual move of nominating Justice Field, a Democrat. This choice is perhaps puzzling from a Republican/Democrat framework, but is imminently reasonable when one realizes that Justice Field was a staunch Unionist.

With respect to the notion that the *Roosevelt* Court exhibited judicial modesty because it merely disclaimed jurisdiction, the wartime circumstances surrounding *Roosevelt* suggest that the jurisdictional ruling may have been strategic. David Silver, a scholar of constitutional issues during the Civil War, observes that "the majority of the Court did not desire to interfere with a measure devised by the administration to aid the war effort."[57] As a result, Silver notes, the *Roosevelt* Court narrowly interpreted its appellate jurisdiction and "gracefully side-stepped the broad issues involved."[58] Had the *Roosevelt* Court "not denied jurisdiction on dubious statutory grounds," writes Mark A. Graber, the Court "would have almost certainly declared the [Act] unconstitutional."[59] Seen from this light, *Roosevelt* may have been a "judicial dodge,"[60] more than a detached procedural ruling.

Subsequent post-war decisions cut in favor of this perspective. In 1871, with the war over and wartime stresses eased, the Court explicitly overruled *Roosevelt*, conceding that it was wrongly decided and that the Court's jurisdiction could have been sustained just as Roosevelt had argued in 1863.[61] The ability of the Court to recognize the propriety of Roosevelt's appellate jurisdiction argument in the calmness of peace suggests that wartime circumstances may account for the *Roosevelt* Court's "dubious" procedural decision.[62] (In 1871, the Court, with new members nominated the same day as—and arguably in response to[63]—*Hepburn,* found the Act constitutional.)[64]

To be sure, the *Roosevelt* Court may not have had much occasion to construe the subsection of the Judiciary Act of 1789 relied on by Roosevelt. Fairman suspects that the Court may have merely invoked subsection one out of "habit" and that Roosevelt's subsection three argument was a "novelty" that "caught the Justices unawares."[65] But this generous explanation is tough to square with the fact that Roosevelt expressly and plainly articulated in his brief why subsection three provided a foundation for the Court's appellate jurisdiction, and likely said the same at argument. One is hard-pressed to believe that the Court would dismiss jurisdiction in rote, automatic fashion when faced with contrary text and argument.

The *Roosevelt* Court arguably engaged in strategic inaction in another wartime case, adding further weight to the possibility of a calculated procedural ruling in *Roosevelt.* In 1864, during the war, the Court in *Ex Parte Vallandigham* unanimously held that it did not have jurisdiction to consider a challenge to a military commission.[66] In 1866, after the war was over, however, the Court in *Ex Parte Milligan* proceeded to the merits and held that military commissions could not be applied to a citizen where the civilian courts were open.[67] In *Roosevelt*, as with *Vallandigham*, the Court in wartime perhaps utilized a jurisdictional bypass as a means to secure a desired substantive outcome that was seen to be incorrect after the war, as in *Hepburn* and *Milligan*, respectively.

The final argument that *Roosevelt* constitutes judicial modesty stems from the proposition that the Court deferred to the political branches' national security efforts. But the *Roosevelt* Court did not expressly invoke a rule of necessity in its opinion. Accordingly, on this score, the virtues of judicial forbearance cannot be attributed to *Roosevelt*. In sum, to the extent that judicial modesty is a touchstone for proper judicial behavior, *Roosevelt* leaves much to be desired from a legal lens, its wartime benefits notwithstanding.

* * *

*Roosevelt* triggers the critically important question of whether the courts should affirmatively aid the national security policies of Congress and/or the Executive by declining jurisdiction. In general, ideas on principled judicial decision making in the wartime context seem to gravitate towards two poles. On one end is the notion that the laws are silent, or at least "speak with a somewhat different voice," in times of war.[68] The Constitution is "not a suicide pact," the Supreme Court has famously remarked.[69] On the other end is the proposition that times of war demand even more robust judicial vigilance of government measures that may curtail individual rights and liberties.[70] Experiences with excessive judicial deference to the other branches, such as in *Korematsu v. United States*,[71] may serve as useful reminders of the hazards of "not doing" in the wartime context, and may caution the courts to be particularly on guard when the government is implementing national security policies affecting personal freedoms.

The American people and their leaders remain engaged in an ongoing conversation regarding which of the spectrum, or something in between, marks the acceptable role for the courts in times of war.[72] In analyzing *Roosevelt*, I suggest that at least one option should be taken off the table: the opportunistic use of jurisdictional principles to support the war effort. It is one thing to engage in flexible judicial review in times of war, it is entirely another to close the door to judicial review altogether. This constitutional norm would still leave plenty of room within the joints for the people to fine-tune the extent to which courts should review actions by the government in moments of crisis. In this respect, the value of *Roosevelt* is that it may help us get closer, however marginally, towards determining the proper role of the courts in wartime.

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## ENDNOTES

[1] Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 313; Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** 71 (1962).

[2] 68 U.S. (1 Wall.) 512 (1863).

[3] Legal Tender Act of 1862, ch. 33, 12 Stat. 345.

[4] *Federalist* No. 14, Nov. 30, 1787 (Madison).

[5] "Should the people of America divide themselves," John Jay, the first Chief Justice of the United States Supreme Court, wrote, "confidence and affection" would give way to "envy and jealousy," and the "general interests of all America" would cede to the "partial interests of each confederacy." *Federalist* No. 5, Nov. 10, 1787 (Jay). Chief Justice Jay specifically identified northern and southern confederacies, or "hives," as "distinct nations." *Id.*

[6] Abraham Lincoln, Inaugural Address, Mar. 4, 1863, available at: http://www.nytimes.com/interactive/2011/03/04/opinion/20110304_Lincoln_Inaugural_Speech.html.

[7] *Id.*

[8] Henry Flanders, **The Lives and Times of the Chief Justices of the Supreme Court of the United States**, vol.

2 150 (1858) (quoting Chief Justice Ellsworth remarks to the Connecticut Convention, Jan. 7, 1788).

[9] Abraham Lincoln, *Proclamation Calling Forth the Militia and Convening an Extra Session of Congress*, Apr. 15, 1861.

[10] No federal income tax existed at the start of the war and the first federal income tax, authorized by the Act of August 5, 1861, ch. 45, § 49, 12 Stat. 292, 309, was repealed, Act of July 1, 1862, ch. 119, § 89, 12 Stat. 432, 473, prior to any enforcement or collection. The federal income tax was not effective until 1862, Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473. For a summary of the marginal involvement of the federal government in the economy prior to the war, *see* Phillip Shaw Paludan, **"A People's Contest": The Union and Civil War 1861–1865** 108–09 (2d ed., 1996).

[11] *See Hepburn v. Griswold*, 75 U.S. 603, 632 (1869) (Miller, J., dissenting).

[12] Charles Fairman, **Reconstruction and Reunion** 1864–88, 678 (1971).

[13] Act of July 17, 1861, ch. 5, § 1, 12 Stat. 259 (1861).

[14] *Id.*

[15] *Legal Tender Cases*, 79 U.S. 457, 541 (1870); *see also* Fairman, **Reconstruction and Reunion**, *supra* note 12 at 682 ("What was needed in December 1861 . . . was a program immediately effective, adequate for financing a great war, and such as would satisfy the people that the government was firmly set on a sound course.").

[16] Elbridge Gerry Spaulding, **History of the Legal Tender Paper Money Issued during the Great Rebellion: Being a Loan without Interest and a National Currency** 29 (1869).

[17] *Id.* at 5.

[18] Elbridge Gerry Spaulding, **A Resource of War—The Credit of the Government Made Immediately Available: History of the Legal Tender Paper Money Issued during the Great Rebellion. Being a Loan without Interest and a National Currency** 16–17 (1869) (hereinafter "HISTORY"). Import duties would still be paid in specie, but "[e]veryone else in the nation would have to accept the paper for debts to government or to each other." Paluden, *supra* note 10 at 111.

[19] Heather Cox Richardson, **The Greatest Nation on Earth: Republican Economic Policies during the Civil War** 71 (1997).

[20] Spaulding, **History** at 16–17 (italics, internal quotes, and citation omitted).

[21] *Id.* (internal quotes and citation omitted).

[22] Spaulding, **History**, *supra* note 18 at 46.

[23] *See* Brian McGinty, **Lincoln and the Court** 224 (2008); Emily Kendall, "*Because of His Spotless Integrity of Character*," *The Story of Salmon P. Chase: Cabinets, Courts and Currencies*, 36 J. SUP. CT. HIST. 96, 103–04 (2011) (quoting Chase as saying, "I had some handsome pictures put on them and . . . as the engravers thought me rather good looking I told them [they] might put me on the end of the one dollar bills.") (citation omitted)

[24] *See Hepburn*, 75 U.S. at 633 (Miller, J., dissenting).

[25] *Id.* at 632–33 (Miller, J., dissenting).

[26] *Id.* at 633 (Miller, J., dissenting). To be sure, any success attributed to the Act and its successors must be deemed partial. $450 million in notes were authorized, though the cost of the war approached $13 billion. *See* Paluden, *supra* note 10 at 113.

[27] Fairman, **Reconstruction and Reunion**, *supra* note 12 at 683–84.

[28] U.S. Const. Art. I, s. 10 ("No State shall. . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts[.]").

[29] *See* U.S. Const. Art. I, s. 9 ("The Congress shall have the power... To coin Money[.]"); Spaulding, **History**, *supra* note 18 at 122–24.

[30] James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 83 (1887) (quoting *In 1 Kent's Com.*, (12 Ed.) 254 (1873) (Holmes, J.). Justice Holmes, in response to Thayer's arguments in support of Congress's power to make paper money legal tender, may have come around to a different conclusion.

[31] *Legal Tender Cases*, 79 U.S. at 651 (Field, J., dissenting).

[32] Heather Cox Richardson, **The Greatest Nation**, *supra* note 19 73 (1997).

[33] David Mayer Silver, **Lincoln's Supreme Court** 144 (1956) (internal quotes and citation omitted)

[34] *See* Fairman, **Reconstruction and Reunion**, *supra* note 12 at 680.

[35] Spaulding, **History**, *supra* note 18 at 5.

[36] *Id.* at 108.

[37] Thayer, *supra* note 31 at 83.

[38] *Id.*

[39] Richardson, *supra* note 19 at 28–29; *see also Hepburn*, 75 U.S. at 633 (Miller, J., dissenting).

[40] Writ of Error to the United States Supreme Court, Oct. 28, 1863 (on file with author).

[41] *Roosevelt v. Meyer*, Br. of Def.'d in Error, on Motion to Dismiss the Writ of Error at *3–6 (undated) (on file with author).

[42] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

[43] Br. of Def'd. in Error, *supra* note 42 at *3–4.

[44] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

[45] *See* U.S. CONST. Art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

[46] Judiciary Act of 1863, ch. 100, § 1 12 Stat. 794, 794.

[47] *Roosevelt*, 68 U.S. at 517.

[48] *Id.*

[49] For an articulation of the tension between personal viewpoints and judicial decision making, *see, e.g., W. Va.*

*State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting).
[50] 75 U.S. 603 (1870).
[51] *See* Michael F. Duggan, *The Law as Justification: A Critical Rationalist Analysis*, 86 N.D. L. Rev. 149, 174 (2010).
[52] *See Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).
[53] Richardson, *supra* note 19 at 81.
[54] Akhil Reed Amar, **America's Constitution: A Biography** 220 (2005).
[55] 67 U.S. 635 (1862).
[56] McGinty, *supra* note 23 at 142.
[57] *Id.* at 145.
[58] *Id.*
[59] Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. Sup. Ct. Hist. 17, 36 n.31 (2000).
[60] Spaulding, **History**, *supra* note 22 at 82.
[61] *Trebilcock v. Wilson*, 79 U.S. 687 (1871).
[62] *See Hepburn*, 75 U.S. at 625–26 ("The [Civil War] was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. . . . Not a few who then insisted upon [the Act's] necessity, or acquiesced in that view, have, since the return of peace and under the influence of the calmer time, reconsidered their conclusions, and now concur [that the Act is unconstitutional].").
[63] *See* Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 1128, 1130 (1941); Kendall, *supra* note 23 at 108 (referring to the additions of the Justices as "the first Supreme Court-packing scheme.")
[64] *Legal Tender Cases*, 79 U.S. 457.
[65] Fairman, **Reconstruction and Reunion**, *supra* note 12 at 697–98.
[66] 68 U.S. (1 Wall.) 243 (1863).
[67] 71 U.S. (4 Wall.) 2 (1866).
[68] *See* William H. Rehnquist, **All the Laws but One: Civil Liberties in Wartime** 225 (1998).
[69] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).
[70] *See* **Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report** 394 (2004) (noting that a "shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life").
[71] 323 U.S. 214 (1944).
[72] *See generally* Stephen Breyer, "Liberty, Security, and the Courts," Address before the Association of the Bar of the City of New York (Apr. 14, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html.

# Doing Brandeis Justice: the Development of the *Liebmann* Dissent

**JESSIE STEFFAN**

## Introduction

Journalist Max Lerner made a prescient admonition about Justice Louis D. Brandeis in 1931. Given the richness of the Justice's social philosophy, "[t]here is of course the ever-present danger that the student will read his own preconceptions into Mr. Justice Brandeis's opinions."[1] It may always be dangerous to see decisions as mirrors of the jurists who penned them. But the act becomes particularly perilous when reading Brandeis, whose opinions provide—intentionally—a glance at only a tiny part of his working schema.[2] If any given Brandeis opinion is a circle, commentators have transformed that circle into a coffee cup, a wheel, and the brim of a hat, and have consequently found in Brandeis an ally in the philosophy of coffee cups, wheels, and hat brims. This was evident in 1931 when Lerner sounded his word of caution, but became even clearer the following year, when Brandeis issued his famous dissent in *New State Ice Company v. Liebmann*.[3]

The Court handed down *Liebmann* toward the end of the 1931 Term, on March 21, 1932. The majority opinion was quickly—and perhaps unfairly—forgotten.

The Brandeis dissent was immediately recognized as noteworthy, not only for its content but also for its mere existence. The reasons behind Brandeis' decision to dissent continue to garner substantial academic attention. This article is no exception. It will first describe both *Liebmann* opinions, then summarize the two prevailing theories of why Justice Brandeis dissented. The article will then highlight the gaps in each theory and attempt to set out a more nuanced explanation of the dissent, based on Brandeis' previous writings and others' contemporaneous reactions to the dissent. The article will then turn to the most well-known passage in the *Liebmann* dissent, the "laboratories of democracy" language,[4] using it as an example of the danger of decontextualizing a Brandeis opinion. Finally, the article will demonstrate that—contrary to established views—Brandeis was able to reconcile and effectuate his

values in the *Liebmann* dissent, rather than being forced to choose one over another.

## The Case

### The majority opinion

As the *Liebmann* appeal was brought on constitutional grounds alone,[5] the parties were only briefly introduced. Justice Sutherland, writing for the majority, opened his opinion with a bland description of New State Ice Company as "engaged in the business of manufacturing, selling, and distributing ice" under a license from an Oklahoma state executive agency called the Corporation Commission. Sutherland then noted that New State Ice brought the suit to enjoin Ernest Liebmann, who had not obtained such a license, from doing the same. Sutherland never again mentioned either party, turning instead to what, in the Court's view, was the essential question of Constitutional law presented.

The Oklahoma legislature had enacted a statute ("the 1925 Ice Act") declaring the manufacture, sale, and distribution of ice to be a public business and prohibiting unlicensed ice makers from manufacturing, selling, or distributing ice within the state. It charged the Corporation Commission with implementing the statute and "for[bade] the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business." Ernest Liebmann began making ice without the requisite license; two licensed manufacturers brought suit to enforce the Ice Act. Liebmann defended his right to make ice without a license, arguing that the Oklahoma law was unconstitutional because it violated his Fourteenth Amendment due process rights.[6]

The issue, as framed by Justice Sutherland, was whether the ice industry was "so charged with a public use as to justify the particular restriction" of no entry without licensure by the Corporation Commission. If the ice industry was not charged with a public use, the statute would be found unconstitutional and violative of the Fourteenth Amendment right to contract.

Justice Sutherland and five of his Brethren, Chief Justice Hughes and Justices Van Devanter, McReynolds, Butler, and Roberts, first conceded that all business was, to some extent, subject to regulation. But a private business was subject to less than a public-oriented one. That is why the question presented was one of degree. The Justices viewed mandatory licensure, conditioned on proof of the necessity of supply, to be a heavy-handed restriction, and only an industry "charged with a public use" could be regulated so rigorously.

In the *Liebmann* opinion, the majority first took great pains to distinguish the ice industry from the cotton-ginning industry. A statute declaring cotton ginning a public business had also recently been codified by Oklahoma, and its constitutionality had been upheld by the Oklahoma Supreme Court.[7] The Court noted that cotton ginning was a "paramount industry" conducted in circumstances "completely unlike" those attendant to the ice industry. Much of the state economy depended on cotton ginning, and the Court found that ice manufacture and distribution—even if indispensable—was a more "ordinary business" whose relationship to the public good was too tenuous to justify an invasion of the freedom to contract. Furthermore, the Court pointed out, it was not clear that ice manufacturing truly was indispensable, since home refrigeration had become more widely available. In addition, as the Court saw it, the statute would tend to foster monopolies and prevent competition, not protect the public; the lawsuit was merely an attempt by New State Ice Company to insulate itself from competitors.

The *Liebmann* majority ultimately struck down the law, affirming the lower courts' holdings.[8] The Court ruled that the statute had "the effect of denying . . . the common right to engage in a lawful private business." The

statute would have to bow to the due process clause of the Fourteenth Amendment, which, at that time, protected a robust freedom of contract.

## The dissent

The dissent in *Liebmann* was, of course, written by Justice Brandeis.[9] Rather than focusing on whether the manufacture and distribution of ice was a public business, as Justice Sutherland had done, Brandeis concentrated on whether it was *reasonable* for the Oklahoma legislature to declare it to be so, given the economic and industrial conditions of the time. The dissent was organized, as Brandeis' opinions so often were, into numbered sections of "First," "Second," and so forth; Brandeis laid out eight points in opposition to the majority opinion. First, he wrote, the license required by the Ice Act was truly a "certificate of public necessity and convenience," which had evolved with industrialization and was intended to prevent the waste of goods; it was a tool of the times. Other industries had required similar certificates, including common carriers and cotton ginning, and there had been no question as to the certificates' validity when applied to public businesses. Second, Brandeis pointed out that the concept of a public business could change, and had changed, over time. Whether an industry was a public business, for the purpose of increased regulation and control by the government, ought to be decided by the state legislature.

Brandeis' third point contained his frame for the constitutionality question presented in the case: The statute would be upheld as constitutional if the legislature could have *reasonably* concluded that (1) the ice industry was a public business and (2) it was necessary to give the Corporation Commission power over entry into the ice industry. Brandeis wrote that

> [u]nless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business.

The remainder of the third point was devoted to advancing facts about the experience of Oklahoma in respect to the ice business—specifically, facts that demonstrated the reasonableness of the legislature's decision to pass the 1925 Ice Act. In his fourth point, after providing detailed analysis of the importance and dysfunction of the Oklahoma ice industry, Brandeis concluded that the legislature had acted reasonably in passing the Ice Act. Furthermore, to find that it had acted unreasonably moved the Court out of the realm of judicial review and into the purview of a "super-Legislature."[10]

In his fifth, sixth, and seventh points, Brandeis declared that the state legislature could use its police power to pass *any* business-regulating statute "reasonably required and appropriate for the public protection," as long as the regulation was not unreasonable, arbitrary, or capricious; whether a particular industry could be considered a public business was not a necessary factor in determining whether a state statute was constitutional. Any such distinction between public and private businesses rested on "historical error." Furthermore, the argument that ice manufacture and distribution was a "common calling" would not prevent the legislature from passing reasonable regulations related to it.

Brandeis' final point, comprising just four paragraphs, has been cited more than the rest of his opinion—and that of the majority—combined. He began with a grim, laconic summation of the depressed economic conditions facing the Oklahoma legislature and the rest of the country:

> The people of the United States are now confronted with an emergency

> more serious than war. Misery is widespread, in a time, not of scarcity, but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions.

In so doing, Brandeis conceded that the Ice Act was novel and perhaps even based on unsound policy. But desperate times called for desperate measures, and given those desperate times, the Oklahoma's decision to act—to do something rather than nothing—was not unreasonable. Brandeis sounded a note of optimism: history demonstrates that "the seemingly impossible sometimes happens," as long as institutions are permitted to learn through trial and error. Therefore, "[t]o stay experimentation in things social and economic is a grave responsibility" and one the framers of the Fourteenth Amendment could not have intended the Court to exercise hastily or subjectively. Even within Brandeis' oft-quoted conclusion, the last few lines have received the most attention:

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.... But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

This "laboratories of democracy" language has become the textbook defense of the federalist system.[11] As a theme of Constitutional interpretation, it has stood the test of time.[12] As this article will articulate, the last four paragraphs of the Brandeis opinion perhaps explain best why the dissent immediately eclipsed in notoriety the majority opinion by Justice Sutherland. They also explain how understanding of the Brandeis dissent has changed over time.

## Explaining the Dissent

Many scholars rely upon the laboratories of democracy language to explain *why* Brandeis dissented in the first place. The Oklahoma Ice Act *did* seem to foster monopolies by preventing new, and likely small, ice manufacturers and distributors from entering the marketplace. By explicitly conditioning licensure on proving the necessity of a greater supply of ice, the act burdened newcomers—rather than existing ice suppliers—with a presumption that ice supply was sufficient in any given market. Presuming that the Oklahoma markets were currently being served by large-scale ice suppliers and that it was small businessmen who desired to enter the marketplace,[13] the law clearly favored the large-scale suppliers. There is no question that, before joining the Bench, Justice Brandeis had been an unflagging supporter of small business[14] and an opponent of monopolies, especially combinative trusts.[15] He had pushed back against the concentration of economic power since the beginning of his legal career and, when advising governmental entities on policy matters, had implored them (1) not only to suppress would-be monopolies but (2) to take positive action to decentralize power already concentrated in the hands of a few large-scale businesses. Because of his beliefs, as well as his penchant for on-the-ground facts, some of today's scholars anticipated that Brandeis would point out, as the *Liebmann* majority had, the practical effects of the Oklahoma Ice Act: the tendency of the Act to create an ice-manufacturing monopoly by prohibiting would-be competitors from entering the market.

That Justice Brandeis explicitly recognized this, but fashioned a rationale for the anti-competitive effect and went on to uphold the law, surprised these scholars,[16] who would have expected the Justice to follow the course of his well-known economic ideology.

### The judicial restraint theory of the *Liebmann* dissent

Seeking to explain what they saw as a surprising conclusion, many students of Brandeis have seized the "laboratories of democracy" language and those passages in his dissent that foreshadowed this conclusion.[17] Brandeis has been recognized by most as an advocate of legislative freedom from judicial interference, particularly in the context of economic regulation.[18] He "believed that within [the federal] system, the Supreme Court had an important, but well-defined, role to play, in which it should never attempt to answer anything other than the immediate and narrowly defined question before it."[19] Under this theory, the "laboratories of democracy" language became the key to understanding why Brandeis dissented: although his anti-monopolistic economic ideology was deeply felt, his commitment to the principles of federalism was, in this context, even more important. According to these students of Brandeis, *Liebmann* presented the Justice with a choice: implicitly sanctioning an economic policy abhorrent to his personal beliefs or abandoning the judicial humility he had long seen as fundamental in the functioning of democratic governance. Faced with such a choice, the principle of judicial restraint triumphed over Brandeis' repugnance for an economic policy that rewarded entrenched big business and protected monopolies. The theory holds that it was Brandeis' principled commitment to judicial restraint that led him to supplement the evidence presented in support of the Ice Act by the appellant, New State Ice Company, and the state of Oklahoma. That same commitment led him, paradoxically, to articulate a comprehensive policy justification for the Ice Act, far beyond that which was in the appellant's brief itself.

### The excessive competition theory of the *Liebmann* dissent

Others, skeptical of Brandeis' motivations and more critical of his overall judicial style, have taken Brandeis' *Liebmann* dissent at a more superficial level: as an endorsement of unlimited government intrusion into free enterprise.[20] This explanation, like the judicial restraint theory, holds that Brandeis simply chose the lesser of two evils. In this case, though, the evils are both economic: Brandeis "had again sanctioned governmental interference with the competitive process" in order to "preserve a market structure predicated on small, privately run concerns."[21] Some excessive competition theorists acknowledge the economic worldview Brandeis expressed prior to his Supreme Court career. But these theorists believe that, because Brandeis wanted his judicial opinions to lead to "contemporary social benefit," he accepted "social controls" like the Oklahoma Ice Act, even though such choices ran contrary to his "faith in competition as the safeguard against 'the curse of bigness.'"[22] Under this theory, Brandeis' complex beliefs about excessive competition are condensed into a naïve faith in the propriety of government action.

A more nuanced, yet still unsympathetic view of the *Liebmann* dissent has been espoused by Judge Richard Posner,[23] among others.[24] While Posner finds the dissent consistent with Brandeis' "belief that competition must be regulated," he laments that Brandeis' understanding of the causes of the Great Depression—to which Posner believes the *Liebmann* dissent responded—"had no basis in economic theory or business reality."

### Gaps in the theories

But neither of these theories seems entirely complete. By distilling the *Liebmann* dissent to a straightforward balancing of

**When Ernest Liebmann built an ice-making plant in Oklahoma City and began to operate without a state license, the New State Ice Company, which had secured a license from the Oklahoma Corporate Commission, sued him. Liebmann argued that the Oklahoma law requiring a license was unconstitutional because it violated his Fourteenth Amendment due process rights. Above is an ice merchant in the 1920s.**

principles, the judicial restraint theory fails to recognize the months of "exhaustive study"[25] of the ice industry in Oklahoma. Under that theory, Brandeis would have upheld *any* statute that was not an arbitrary, capricious, or unreasonable exercise of the state's police power. Since the *Liebmann* dissent advances a low-bar subjective reasonableness test—that is, was the Ice Act reasonable from the point of view of the legislature—the evidentiary record alone, which was fairly substantial, would have provided enough support that the state's action was reasonable. If all Brandeis intended by his dissent was a ruling in favor of the state of Oklahoma, he could have saved himself (and his clerk) more than twelve hundred pieces of paper and innumerable hours of research on the commercial uses of ice, the output of each Oklahoma manufacturer, the popularity of home refrigeration, and the history of regulations imposed on ice manufacturers by the state prior to 1925. According to Brandeis' rational basis standard,[26] little evidence was required for the Court to rule in favor of the state.

In addition, lists of footnotes about the ice industry weakened the "laboratories of democracy" language. Had the passage not been qualified by details about the specific needs of the Oklahoma ice industry, it would have been stronger and more sweeping. Judicial restraint theorists point out that a litany of supporting footnotes may reflect Brandeis' work ethic more than the purpose of any particular opinion. But Brandeis had authored an opinion on the same general issue—whether

a regulatory state statute comported with Fourteenth Amendment substantive due process—just one year before *Liebmann*. In *O'Gorman & Young*, Brandeis' holding was essentially identical, but his four-page opinion did not set out a defense for the legislation:

> As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. . . . The record is barren of any allegation of fact tending to show unreasonableness.
>
> Affirmed.[27]

The *O'Gorman & Young* opinion demonstrates that Brandeis did not always feel the need to articulate a policy rationale for a state legislature whose regulations had come under constitutional scrutiny.[28] Simply put, the judicial restraint theory explains *why* Brandeis dissented, but not the long-winded style in which he did so.

Under the excessive competition theory, the *Liebmann* dissent becomes nothing more than an outdated economics textbook. In finding nothing startling about the dissent, in light of Brandeis' background as a lawyer and public citizen, it ignores Brandeis' longstanding commitment to the decentralization of economic power and the protection of the small businessperson, his reluctance to endorse large-scale capitalism and intrusions of the freedom to contract, and his recognition that the most fundamental of rights was the "right to be let alone."[29] It also ignores the explicit language of the opinion itself. If this theory were truly illustrative of Brandeis' intent in writing the dissent, his wry prediction that the Ice Act "might bring evils worse than the present disease" becomes entirely superfluous. Indeed, his insistence that the Court not concern itself with the questions of "[w]hether the grievances are real or fancied, whether the remedies are wise or foolish" undermines his supposed support for government wisdom.[30] The excessive competition theory also explains why Brandeis dissented, but it cannot make sense of the *Liebmann* dissent in light of Brandeis' other values.

Each theory, alone, leaves an unanswered question. The judicial restraint theory does not explain why Brandeis felt compelled to provide far more support for the state than his own test required, especially when doing so weakened, or at least limited, his supposed position. The excessive competition theory does not explain how *Liebmann* can be squared with Brandeis' longtime, unmistakable opposition to bigness in private enterprise.

### Forging a more nuanced theory of the *Liebmann* dissent

Characterizing the theories as incomplete begs the question of whether the theories could be reconciled in order to fully explain why Brandeis dissented in *Liebmann*. I believe that they can, under two conditions: (1) a more nuanced understanding of Brandeis' anti-bigness worldview and (2) a recognition that Brandeis' judicial opinions often served two distinct functions.

First, Brandeis saw a fundamental difference between the economics of private industry and the economics of public utilities.[31] If we understand the opinion as endorsing *only* anticompetitive regulation of essential public goods, the conflict central to the judicial restraint theory disappears. It remains true that Brandeis not only exercised judicial restraint in *Liebmann* but explicitly warned of the dangers of interfering with state law. But adhering to the principle of judicial restraint, in this case at least, did not require Brandeis to set aside his personal economic ideology. Similarly, in light of Brandeis' dogged public campaign against bigness in private industry, distinguishing public utilities and private industry is the only way to make reasonable the excessive competition

**Louis D. Brandeis wrote a famous dissent in *Liebmann*, which has been cited in forty-two subsequent Supreme Court cases and by nearly every Justice since the 1940s. It includes these oft-cited words: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."**

theory; in fact, as we will see, Brandeis' own writings provide ample support for this distinction.

Second, it is clear from his writings that Brandeis believed a judicial opinion had not one, but two, functions: judging and teaching. The *Liebmann* dissent effectuates Brandeis' principle of judicial restraint through its judging function, while also realizing his economic views through its teaching function. The judicial restraint theory, today, holds that the economic stance expressed in *Liebmann* was contrary to Brandeis' antimonopoly worldview, but, as we will see, this was not how his contemporaries saw it. Adapting the two prevailing theories to take account of a *philosophical* public/private distinction, as well as a *functional* judging/teaching distinction, can unite them as one coherent, comprehensive theory.

## The Economics of Private Industry and Public Goods

Toward the beginning of the *Liebmann* dissent, Brandeis recharacterizes the "license" that the Oklahoma legislature requires for an entrant into the ice industry as a "certificate of public convenience and necessity,"[32] which he calls a "creature of the machine age."[33] Brandeis was keenly aware that, because of industrialization, America was undergoing spectacular economic changes. His long involvement in economic issues had taught him that the law must take those changes into account in order to stay relevant.

One way industrialization affected Americans was through the development of public utilities. Before the late nineteenth century, there were not "public utilities" as we conceive of them today: gas, electricity, common carriers, and telecommunications did not exist or had not been harnessed. Large-scale water supply and wastewater systems had not developed, and even individual indoor plumbing mechanisms were rare. There had been no special category of businesses whose products were especially essential to the health and safety of Americans. In fact, as Brandeis pointed out in *Liebmann*, for most of the history of Anglo-Saxon law *all* businesses had been subject to price control and other government regulation.[34] It was only once certain fungible products became mass-distributed that the idea of public utilities began to take shape. Conscious of how quickly technology was developing,[35] experience had taught Brandeis that the concept of a public utility was dynamic. Experience had also taught him, however, that ensuring a steady supply of certain goods to the public might take different economic strategies than he was willing to apply in a strictly private context.

### The gas fight

In the early 1900s, while a private attorney in Boston, Brandeis became involved with a controversy over the regulation of a natural gas provider. Representing the Public Franchise League, Brandeis first opposed a state bill approving the consolidation of eight gas companies serving the Boston area.[36] Despite his opposition, the bill became law, and a state commission was charged with overseeing the capitalization of the new consolidated gas provider. Brandeis did not pay much attention at first, but a colleague convinced him that the gas company planned to engage in stock-watering—selling more stock, at a higher value, than the company was truly worth. Once he began studying the issue, Brandeis took a more public role in the controversy. He spoke out against stock-watering and overcapitalization but developed a "sliding scale" dividend scheme that he believed would give the gas company's investors a fair return.[37] In addition to the Public Franchise League (PFL), Brandeis volunteered to represent the State Board of Trade, whose interests diverged from the PFL.[38] Eventually, he also treated with representatives of the gas company to reach a compromise bill. His involvement with the rival groups earned Brandeis some criticism, but he pressed on. After much political wrangling, the bill passed. As biographer Lewis J. Paper wrote:

> For Brandeis there was much reason to feel satisfied with the result. There would now be no need for government ownership of the gas company—a prospect that carried the risk of corruption. Nor would there be a need for detailed regulation by government—a prospect that carried the risk of inefficiency.[39]

Brandeis was proud of the sliding-scale mechanism, so much so that, in 1915, he wrote an article for the influential *American Review of Reviews* called "How Boston Solved the Gas Problem," in which he called the sliding scale "the best practical solution of

the public-utilities problem."[40] Brandeis wrote that price-fixing and other Massachusetts regulations had been insufficient to ensure adequate, cheap gas supply to Boston residents; this is what prompted the state to adopt the sliding-scale dividend scheme. "While these laws [were] of great value . . . dissatisfaction with conditions from time to time . . . was persistent and well founded. Boston tried successively 'regulated' monopoly, competition, and the combination of gas companies. The service was poor and the management unprogressive." He thought that the sliding scale mechanism, which created "a reasonable assurance of the undisturbed enjoyment of large dividends," "might be the best method of attaining cheap gas."

Brandeis affirmed that, because gas companies supplied an essential public good with "ever-growing demand," "[p]rotection against corporate abuses demand[ed] for gas companies strict supervision" and "high efficiency in management." Then he explained what characteristics of gas companies made them different from other kinds of private businesses. Those characteristics turned out to be the same as those of the ice industry that Brandeis highlighted in his *Liebmann* dissent. Compare these two passages. First, from the 1915 article:

> [N]o self-sustaining system of supplying gas can give to the people cheap gas unless it rests upon high efficiency in management. The cost of [gas companies'] product is dependent largely upon the character and condition of the plant. . . . To an even greater extent than in most mercantile businesses, the pro rata cost of distribution of gas is dependent upon large volume. The distributing plant requires an exceptionally large investment. But the mains or pipes are rarely used to their full capacity. The interest, depreciation, and maintenance charges are the same whatever the volume of sales.

Now, from *Liebmann*:

> Particularly in those businesses in which interest and depreciation charges in plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates.[41]

It becomes clear that, not only did he believe the Oklahoma legislature's declaration was reasonable, Brandeis *personally* saw comparisons between natural gas, a conventional public utility (whose regulation few questioned), and ice, a novel public utility. But, despite the fact that Brandeis identified so many similarities between ice and gas, he had advocated for private regulation in the gas context (the profit-incentive sliding scale) and public regulation (certificate of public convenience and necessity) in the ice context. The simple explanation for this shift in technique is that Brandeis learned better between 1915 and 1932. The Massachusetts legislature abandoned the sliding scale barely decade after it had adopted it. Brandeis himself had drafted the language the legislature used to repeal the bill. As the gas company (and others) grew larger, stockholder dividends no longer provided enough of an incentive for management to keep prices down in Boston. It also became clear that the mechanism provided no incentive for technological innovation. However well-intentioned the gas-rate sliding scale had been, and however suitable when proposed, it was no longer adequate even two years later, in 1917.

In fact, Brandeis initially defended the Oklahoma Ice Act for the same reason he touted the sliding-scale mechanism in Boston. At the end of his 1915 article about gas rates, Brandeis wrote, "If the demand for municipal ownership in America can be stayed, it will be by such wise legislation as" the sliding scale. Nearly all his drafts of *Liebmann* ended with the same cautionary note. Until just before the opinion was finalized, Brandeis had concluded with: "[W]e may not forget that if States are denied the power to prevent the harmful entry of a few individuals into a business, government ownership may close it altogether to private enterprise."[42] Eventually, Brandeis removed the warning altogether[43] and closed on a more inspirational note he had taken from an earlier opinion, "If we would guide by the light of reason, we must let our minds be bold."[44] Although the Massachusetts sliding scale and the Oklahoma license requirement measures employed different means, they had, in Brandeis' view, the same ends: to keep the government small and private enterprise robust.

Because of his experience in the trenches of the Boston gas fight, Brandeis recognized that a regulatory idea once thought foolproof was rarely so—arriving at a permanent solution actually *required* incremental progression. As he wrote ruefully in 1922, "Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions, there must be much and consistent enquiring into facts . . . and much experimentation."[45] Not only states, but also the Court, had a responsibility to recognize that social necessities changed over time. *Stare decisis* did not dictate blind adherence to past decisions; "[t]he logic of words should yield to the logic of realities."[46]

## Brandeis expresses his views on public utilities

There are other clues in Brandeis' speeches and writings that, although he thought bigness in private industry was destructive and undemocratic, he saw public utilities in a profoundly different light. In 1910, he wrote to his nephew about monopolies in public service corporations. His nephew had written an article urging Louisville to adopt a sliding-scale system like Boston had. After applauding the article, Brandeis cautioned his nephew that the real danger lay in combinative public utilities, not monopolies in any given public industry: "A gas company with a monopoly may be a good thing; an electric company with a monopoly may be a good thing . . . In the smaller cities it is often desirable to consolidate the two methods of lighting partly because there are parts of the city to which the gas mains cannot be extended without undue expense, but in a large city the merger of gas and electric companies is certainly an evil."[47] He wrote that a short-term distribution agreement between the gas and electric companies, or even municipal ownership of the utilities, was preferable to an indefinite merger. A short-term distribution agreement would lead to a "great reduction in the cost of distribution." Certainly, the letter demonstrates that he understood some need for monopoly in public utilities in order to guarantee the access and efficiency essential to reasonable rates.

Brandeis had expressed this sentiment publicly in 1908, when he addressed the New England Dry Goods Association. His speech is a fiery revolt against a proposed multistate transportation merger, which would have created an "alien" and "complete monopoly" of railroad, steamship, and trolley lines in the region. He rejects the idea that such a monopoly is inevitable: "It has been suggested that we accept the proposed monopoly in transportation, but provide safeguards. . . . There is no way to safeguard the people from the evils of a private transportation monopoly except to prevent the monopoly."[48] At first glance, Brandeis' furious opposition to the merger seems to fly in the face of the philosophical public/private distinction that this article proposes. However, Brandeis goes on to distinguish

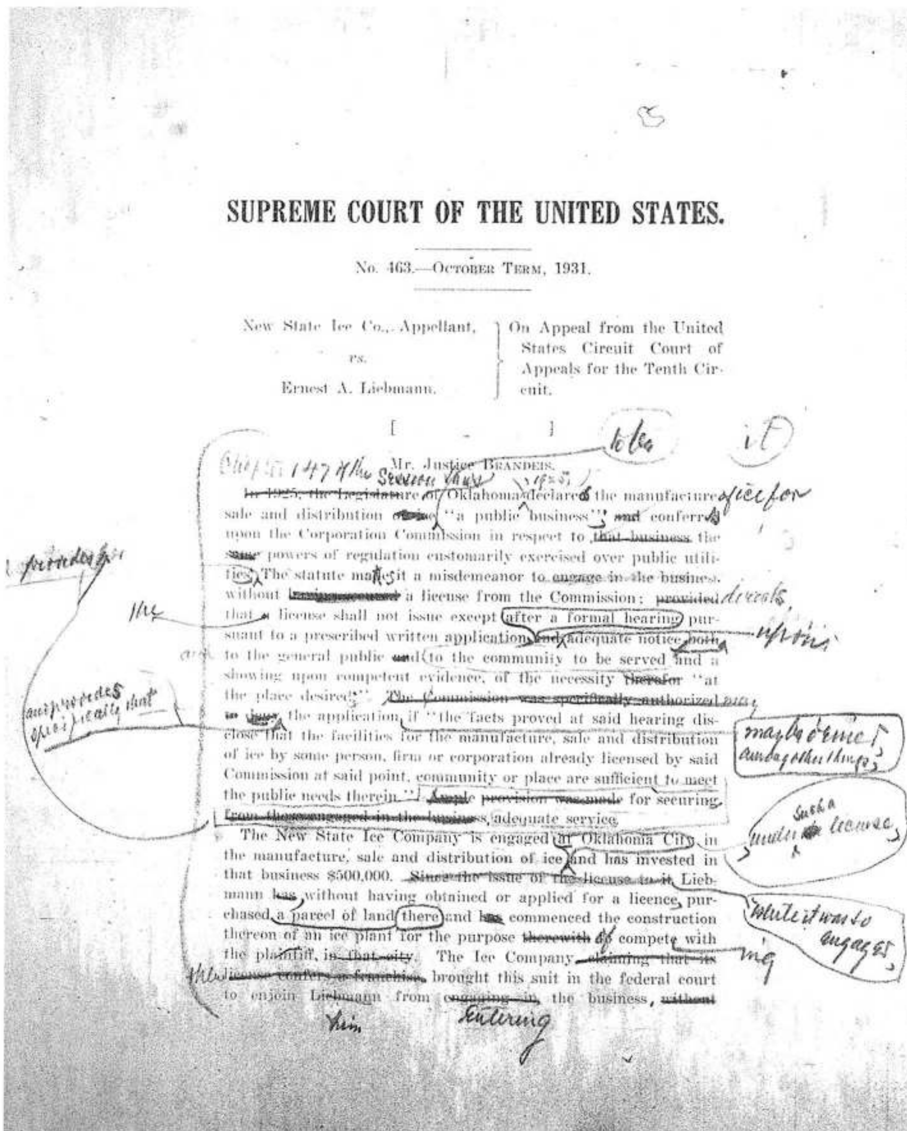
the would-be transportation monopoly from the kind of monopoly the Oklahoma Ice Act tended to protect:

> The analogy sometimes urged in favor of existing well-operated local monopolies in lighting, or gas, or street railways is delusive. In the first place a local gas company may have a monopoly of gas, but it has not a monopoly of lighting. It has the competition of electric light and the competition of oil.
>
> A local monopoly, like a gas company, or an electric light company or a street railway company, is but a creature, a servant of the State, wholly subject to the control of the State within which it is situated. . . .
>
> The street railways of Massachusetts and the gas and electric light companies of Massachusetts, so far as they are monopolies, are performing practically, as agents of the State, public functions during good behavior. If they do not properly serve the community, the community may at any time terminate their franchises without even paying compensation. The right to run street railways in our public streets, the right to lay gas pipes or electric light wires, is a license merely, and is subject at all times to termination by the State and the municipal authorities. There is no resemblance between such a monopoly of service covering a specific agency and the proposed New Haven monopoly of all transportation, a monopoly which claims rights under the laws of other States, and has asserted, though operating also in Massachusetts, that it is free from the restrictions imposed by the Massachusetts law.

This is exactly the situation that Brandeis laid out in *Liebmann*: an intrastate public utility whose right to conduct business was continuously subject to review by a democratically elected legislature. Brandeis believed that "[t]his reserved power in the community [was] an effective weapon by which the community [could] compel the corporation to supply the service it need[ed]."[49] In addition, the Oklahoma Ice Act did nothing to prevent the spread of electricity, which—because of refrigeration—was natural competition to the manufactured ice industry.[50]

Brandeis also believed that the public would benefit from direct governmental interference in utilities in a way that it would not benefit from similar interference in private industry. In 1911, he advised that the government should acquire all the railroads in Alaska and take other protective actions in order to secure dependable public utilities: "The development by the Government should include, I think, all public utilities. It is highly probable that such public utilities as are strictly local, like tramways or electric light and water ought to be matters for local as distinguished from general government."[51] In addition to sanctioning government-regulated utilities, Brandeis' statement demonstrates how committed he was to the principles of federalism and the independent development of small communities.

Government—whether federal or local—could even engage in price-fixing and other regulations Brandeis saw as anticompetitive in private industry. "[T]here is a radical difference between attempts to fix rates for transportation and similar public services, and fixing prices in industrial businesses," Brandeis wrote in 1912.[52] Price-fixing in private industry was generally insufficient, if not counterproductive, because of the countless theoretical differences between suppliers of goods and services. Public utilities, however, reached something close to uniformity of product,[53] which made price-fixing and other regulations both appropriate and beneficial.[54]



SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1931.

| | |
|---|---|
| New State Ice Co., Appellant, vs. Ernest A. Liebmann. | On Appeal from the United States Circuit Court of Appeals for the Tenth Circuit. |

[ ]

Mr. Justice Brandeis.

In 1925, the Legislature of Oklahoma declared the manufacture, sale and distribution of ice "a public business" and conferred upon the Corporation Commission in respect to that business the same powers of regulation customarily exercised over public utilities. The statute makes it a misdemeanor to engage in the business without a license from the Commission; provided that a license shall not issue except after a formal hearing pursuant to a prescribed written application and adequate notice both to the general public and to the community to be served and a showing upon competent evidence, of the necessity therefor "at the place desired". The Commission was specifically authorized to deny the application, if "the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place are sufficient to meet the public needs therein." Ample provision was made for securing from those engaged in the business, adequate service.

The New State Ice Company is engaged at Oklahoma City in the manufacture, sale and distribution of ice and has invested in that business $500,000. Since the issue of the license to it Liebmann has without having obtained or applied for a licence, purchased a parcel of land there and has commenced the construction thereon of an ice plant for the purpose therewith to compete with the plaintiff, in that city. The Ice Company claiming that its license confers a franchise brought this suit in the federal court to enjoin Liebmann from engaging in the business, without

**Brandeis' first draft of his *Liebmann* dissent (at least, the first draft in his papers) was done entirely by hand. There are at least a dozen printed drafts afterward, some with substantial changes: entire paragraphs added and deleted.**

There is evidence that, even after Massachusetts repealed the sliding scale, Brandeis still believed public utilities should be treated differently than private business. In 1922, he proposed to Felix Frankfurter that the "sphere of private capitalistic control" was and should necessarily be narrowed by government assumption of functions that cannot properly "be entrusted to private ownership or management."[55] As an example, he wrote, "[s]uch are now the municipally owned water, gas, electric light and power services, and tramways, motor buses, ferrys [sic] and wharves—and the gradual substitution of the modern state highway for the privately owned toll-pike."[56] Not only did Brandeis personally believe that public utilities should be regulated more forcefully than private industries, but he accepted that the concept of a public utility would expand over time, as it had in incorporating highways.

The New England transportation merger went forward despite Brandeis' public opposition. Brandeis saw many of his dire predictions come true, writing frankly in 1912 that "[p]rosperity of all New England has been retarded" because of slow, unreliable freight service.[57] He repeated his call to action, attempting to marshal the states to legislate the separation of the trolley lines. He laid out his anti-monopolistic stance in the broadest possible strokes: "Competition, except in purely local traffic, subject to complete regulation [in the case of state licensure of businesses], should be introduced so far as possible everywhere."[58]

The Oklahoma law at issue in *Liebmann* closed the local ice business to all but a few corporations. It was just one piece of a comprehensive regulatory scheme under which the government had, over time, assumed more and more responsibility for overseeing the industry.[59] It is possible that the Ice Act fell into this narrow exception ("purely local traffic, subject to complete regulation") to Brandeis' procompetitive worldview.[60]

### Prior judicial opinions

Brandeis insists in *Liebmann* that "so far as concerns the power to regulate, there is no difference, in essence, between a business called private and one called a public utility."[61] While he saw no formalistic distinction between private businesses and those "affected with a public interest," his prior judicial opinions demonstrate that he saw a functional distinction between public utilities and private industry. Indeed, they provide support for his *Liebmann* definition of a public utility as one in which "the public's concern . . . [is] so pervasive and varied as to require constant detailed supervision and a very high degree of regulation."

*Frost*,[62] the case most closely tied to *Liebmann*, addressed the question of whether requiring some, but not all, cotton gin operators to obtain a state license violated the Fourteenth Amendment equal protection clause. An Oklahoma statute required individuals and ordinary corporations to be licensed but excluded cooperative corporations. The Court struck down the statute as creating an arbitrary classification. Brandeis, who had championed cooperative associations for most of his professional life,[63] found the classification eminently reasonable.[64] He dissented, upholding the statute on several predictable grounds. But one of arguments undoubtedly heralded the public-utility exception articulated by his *Liebmann* opinion. First, Brandeis dismissed the plaintiff's claim that, once granted to him, the state license protected his exclusive right to engage in cotton ginning: "It was within the power of the Legislature at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers." This is clearly in line with Brandeis' broad procompetition stance. But Brandeis went on to remind the plaintiff that the right to operate a public utility cannot be compared to the right to engage in private enterprise:

> It must also be borne in mind that a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen; that it is a special privilege which does not belong to citizens generally; that the state may, in the exercise of its police power, make that a franchise or special privilege which at common law was a business open to all.

This issue was not squarely before the Court, and Brandeis' reasoning is an aside. By seizing the chance to articulate his view on public utilities, Brandeis foreshadowed his *Liebmann* dissent.[65]

Several other opinions demonstrate that Brandeis had long tolerated monopoly in local public utilities. In 1923, Brandeis wrote a concurring opinion in a telephone case that

characterized the public utility investor as a "substitute for the state in the performance of the public service, thus becoming a public servant."[66] He went on to write that, "[c]ontroversy with utilities is obviously injurious, also, to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. . . . It can get ample service through private companies only if investors may be assured of receiving continuously a fair return upon the investment." It is difficult to square this conception of business efficiency with Brandeis' earlier declaration that "whenever trusts have developed efficiency, . . . the community has gained substantially nothing,"[67] unless we believe that Brandeis distinguished public utilities from private monopolies. Brandeis concurred with the majority in reversing the state court, finding that the rates the state had set "did not bring a fair return on the actual investment."[68]

Brandeis had also concurred in a 1926 dissent written by Justice Holmes involving a "certificate of public necessity and convenience." In arguing that the state could require such certificates from what were essentially taxicabs, Justice Holmes wrote that states have power "to limit what otherwise would be rights having a pecuniary value when a

Fifteenth Census, vol. I

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| | April 1, 1930 | 1920 | 1910 |
|---|---|---|---|
| | 2,396,040 | 2,028,283 | 1,657,155 |

increase 18.1%

16 cities of 10,000 or more

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| | | | |
|---|---|---|---|
| Ada | 11,261 | 8,012 | 4,349 |
| Ardmore | 15,741 | 14,181 | 8,618 |
| Bartlesville | 14,763 | 14,417 | 6,181 |
| Chickasha | 14,099 | 10,179 | 10,320 |
| Enid | 26,399 | 16,576 | 13,799 |
| Lawton | 12,121 | 8,930 | 7,788 |
| McAlester | 11,804 | 10,632 | 11,774 |
| Muskogee | 32,026 | 30,277 | 25,278 |
| Okl. City | 185,389 | 91,295 | 64,205 |
| Okmulgee | 17,097 | 17,430 | 4,176 |
| Ponca City | 16,136 | 7,051 | 2,521 |
| Sapulpa | 10,533 | 11,634 | 8,283 |
| Seminole | 11,459 | 854 | 476 |
| Tulsa ~~Shawnee~~ | 141,258 | 72,075 | 18,182 |
| Shawnee | 23,283 | 15,348 | 12,474 |
| Wewoka | 10,401 | 4,520 | 1,022 |

**One of the many source documents Brandeis gathered before drafting the *Liebmann* dissent was this list of the populations of the sixteen largest cities in Oklahoma in 1910, 1920, and 1930. Presumably, Brandeis was considering how much ice was needed in Oklahoma. His sources also included ice cream recipes; brochures about new technologies related to electric refrigeration; articles about the transportation of ice, the storage of meat, and appropriate temperatures for refrigerators and freezers; articles about coal-company regulation; documents related to how bacteria growth is inhibited in refrigerated milk; and tally lists of the number, size, output, and profit of many ice manufacturers.**

predominant public interest requires the restraint."[69] Holmes distinguished "between activities that may be engaged in as a matter of right and those like the use of the streets that are carried on by government permission." Because Brandeis did not write the opinion, it is entirely devoid of footnotes and all but the barest factual assertions. But Brandeis had already acknowledged privately that the highways were becoming public utilities. The 1926 opinion demonstrates that he agreed, as a judge, that the concept of a public utility could change over time.[70]

*Liebmann* was not the last case in which Brandeis analyzed a state regulation of public utilities. Two years later, *Chattanooga* proved that Brandeis' subjective reasonableness test—despite its modest requirements—was not a free pass for all state regulation. The Court was considering the constitutionality of a Tennessee law that required railroads to pay one-half the cost of grade crossings that the state highway commission determined were necessary for safety purposes.[71] The highway commission had determined that the railroad should pay half the cost of a highway underpass in Lexington, and the railroad sued, claiming that the regulation was arbitrary as applied. The railroad argued that the underpass was not necessary for local safety and that the highway was not designed to meet local transportation needs; the underpass was, instead, part of federal plan for a nationwide highway system. Brandeis, writing for the majority, agreed with the railroad. He remanded the case to the Tennessee Supreme Court, which he chided for its "obvious[]" error in "refusing to consider" the facts adduced by the railroad.

*Chattanooga* is notable for several reasons,[72] but most interesting here is Brandeis' reasoning about the competitive effect of the planned highway underpass. It was no secret that Brandeis opposed the "revolution wrought" by a national road system.[73] He wrote in *Chattanooga* that competition from the highways in general, and the Lexington underpass in particular, would "disastrously" affect the railroad. Times had changed, Brandeis admonished the state court; once, requiring railroads to pay for road underpasses had been constitutional. The railroads benefited from the underpasses, which had become necessary because of the local growth spurred by the railroads themselves. Now, it was "the railroad which now requires protection from dangers incident to motor transportation." Brandeis put himself in the peculiar position of defending a private monopoly *against* government regulation that would tend to strengthen a competitive industry. But, if we recall that Brandeis bore no ill will toward public-utility monopolies—and had long expressed support for maintaining competition *among* utility monopolies—the opinion makes more sense.

## Judging and Teaching: The Two Functions of a Brandeis Opinion

It would, of course, be easier to understand the purposes behind Brandeis' *Liebmann* dissent if he had explained his thinking. Unfortunately, Brandeis only made a single direct reference to his groundbreaking opinion. In a letter to Bernard Flexner, a New York lawyer and fellow Zionist, Brandeis wrote, "The opinion should help stimulate thinking."[74] It is notable, and predictable, that Brandeis emphasized the dissent's potential for teaching, rather than its potential for changing the law. He had a lifelong fixation with broadening and socializing legal education, specifically choosing clerks who would go on to teaching careers, contributing financially and intellectually to Harvard Law School and the University of Louisville, and urging lawyers to teach judges the economic and social facts that inform legal issues. Judicial opinions were yet another forum in which Brandeis could teach the nation about the relationships between law, economics, and society.[75]

As biographer Melvin Urofsky has written, "Brandeis had a[n] . . . institutional view of his role on the Court, and the role of the Court not only in interpreting the law, but in teaching the nation what the Constitution meant."[76] Occasionally, Brandeis' judicial opinions stated explicitly how crucial he believed this responsibility to be.[77] More frequently, his opinions simply exemplified this belief. Take, for example, Brandeis' famous concurrence in *Whitney v. California*.[78] Although he felt bound by judicial restraint to concur in the outcome of the case, he took the opportunity to teach the country "why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." After laying out that major social question, Brandeis devoted the rest of his opinion to answering it. Clearly tangential to the narrow issue examined by the Court—as Brandeis himself framed it—the value-laden history Brandeis develops in *Whitney* was nonetheless utterly intentional. Brandeis' intent, however, was not to judge, but to teach: to teach citizenry, bench and bar about the "purposes and effect"[79] of the law, in addition to the law itself. As Dean Acheson later wrote, "to [Brandeis] truth was less than truth unless it were expounded so that people could understand and believe."[80]

### The teaching value of the Liebmann dissent

The *Liebmann* dissent functions in much the same way as the *Whitney* concurrence. Though the catalogue of facts is ostensibly in support of Brandeis' eventual holding, we know from *O'Gorman & Young*, as well as the low bar Brandeis set in *Liebmann* itself, that they are mostly unnecessary. Instead, the footnotes serve to teach, or to "stimulate thinking," about the problems of the day.[81]

Given Brandeis' documented beliefs about public-utility monopolies, it is unlikely that he gritted his teeth and set about fashioning a rationale for a law he found repugnant. Instead, he took the opportunity to explain the story of the Ice Act. He conducted a case study on how a creative legislative body could address big issues—the Great Depression, the rapid advancement of technology, the rising dependence on such technology, the changing relationship between government and industry, and the exponential growth of each of those institutions—through small local reforms. Brandeis was not necessarily teaching legislatures that the Ice Act would be suitable for other jurisdictions and other industries (though he did not necessarily oppose the government assumption of control inherent in the Oklahoma law); indeed, no matter what one thinks about *Liebmann* or any other case, all can agree that Brandeis was an unequivocal supporter of particularized solutions. Instead, he was merely teaching the process of legislative reform and the process of fact-finding necessary to support good reforms. If he had concluded that the Ice Act had not led to positive outcomes, it would not have been a useful vehicle for demonstrating how well these processes worked. In a way, Brandeis *was* teaching economics—the macroeconomics of the Depression[82] and the microeconomics of manufactured ice consumers in Oklahoma.[83] As biographer Alpheus Mason put it, in 1946, "he was using this opportunity to crystallize in eloquent words his own mature judgment on these matters."[84] I believe his intent was not only to demonstrate why the Ice Act was reasonable, but how other governmental bodies might apply the same economic principles and the same political processes to reach industry- and locality-appropriate reforms.

This possibility is borne out by the correspondence Brandeis received about the *Liebmann* dissent. While the opinion is sometimes described today as a single-minded ode to judicial restraint, that was not the way Brandeis' contemporaries saw it. Almost without exception, they saw *Liebmann* as an economics teaching tool.[85] Most

significant was the letter from Max Lerner, who was in the process of writing a feature on Brandeis' economic worldview. Lerner undoubtedly had studied Brandeis closely.[86] While Lerner expressed surprise about Brandeis' support for the would-be Oklahoma City ice monopoly, there is no doubt that he recognized the opinion *as* support:

> [T]his is distinctly one of your greatest opinions—cogent, comprehensive, unflinching, and withal possessed of a gathering passion. I am especially happy that you have put as clearly as you have in the paragraph on pages 18–19 your views with regard to the theory of public interest as the basis of state regulation. It is well that the issue should be drawn this sharply: at least we shall have fixed one of our own objectives. I must confess that in view of your clear utterances about competition in this opinion, I find I must shift the emphasis of some of the statements I expressed in my essay. You seem less concerned with the value of maintaining competition than with the effective administration of a service.[87]

Lerner frames this "theory of public interest as the basis of state regulation" as one of "our own" objectives, which is probably a reference to progressive policy makers. If so, it shows that he believed that it was an economic principle that governments should use in enacting laws. Whether Brandeis agreed with Lerner's reading is unknown. But it seems that most of Brandeis' correspondents saw *Liebmann* as a lecture on economic policy delivered by the nation's foremost law professor.[88]

Other contemporaneous reviews of the dissent, both sympathetic and critical, express similar sentiments. Morris Cohen, a liberal philosopher who opposed laissez-faire economics, wrote that *Liebmann* was a "beautiful illustration[] of how his sensitiveness to the actual demands of the situation make him ready to sacrifice the dogma of free enterprise or competition to the need of communal regulation."[89] Likewise, economics reporter Thomas Woodlock wrote in the *Wall Street Journal* that in the *Liebmann* dissent, "Brandeis accurately picture[d] one of the main problems of the day, namely the problem of bringing into some kind of *modus vivendi* the principle of competition and the principle of cooperation."[90] *The Washington Post* was not as supportive: Brandeis had "put his economic theories ahead of the Constitution" and had taken "occasion to air his personal views on the American economic structure."[91]

### Relevancy of *Liebmann*'s lessons today

While *Liebmann* remains familiar to many today, it is decidedly not for the theory of public-utility regulation it set forth,[92] but rather for the "laboratories of democracy" passage. Yet none of Brandeis' correspondents, including Lerner, commented specifically on that concept, though it was relatively new as a descriptor of the fifty states.[93] *The New York Times* and *The Washington Post* articles about the *Liebmann* dissent also focused on other features, like Brandeis' language about the Depression. Many of Brandeis' contemporaries correctly predicted that *Liebmann* would become a mainstay of American jurisprudence, but not for the right reason.

There are probably several factors that explain why the "laboratories of democracy" language has outlived the rest of the *Liebmann* dissent as a part of our shared cultural consciousness. Most importantly, it is utterly un-Brandeisian in its generality. Those who knew Brandeis' entire body of work were able to ground the laboratories-of-democracy concept in the "laborious development of details" and "careful adjustment to local conditions" that they knew Brandeis insisted upon. Today's careful students of Brandeis can also appreciate it as a defense of carefully crafted and particularized legislative solutions. But, taken out of context, it can be used to support *any* piece of legislation, no matter

how hasty or unpopular, how conservative or progressive, on any subject. Its malleability, plus its pithy quotability,[94] explains its mass appeal to advocates (and opponents) of all stripes. In addition, when used by a state actor, the phrase seemingly endorses the expansion of power for the one invoking it. When used by a judge, the phrase liberates him or her from the responsibility of interfering with a state law.[95] Either way, it can be a useful shortcut that reinforces the position an actor is already inclined to take. *Liebmann* was intended to "stimulate thinking," but invoking the laboratories-of-democracy language without an appropriately detailed analysis of local needs[96] actually *suppresses* thinking by glossing over the need to refine proposed legislation. While Brandeis may have been pleased that the metaphor he popularized lives on, I believe he would be disappointed by how many of *Liebmann*'s lessons we have forgotten.

## Conclusion

No matter how one reads it—as a judicial restraint theorist or an excessive competition theorist, or whether one agrees with the nuanced theory set out in this article—the *Liebmann* dissent is a highly instructive trove of information on Brandeis' judicial and economic doctrines. But it remains only one manifestation of Brandeis' creed as jurist, teacher, and policymaker. We should avoid thinking of any given opinion, even a tour de force like this one, as an "express[ion of] an untrammeled economic or social philosophy" or a reflection of "the plentitude of his experience and his imagination."[97] Justice Brandeis, perhaps more than any Justice before or since, was tied to the facts at hand. If the *Liebmann* dissent teaches us anything about his judicial or economic philosophy, it is that he unfailingly began with facts and worked toward principles. I do not believe that Brandeis defended an economically unsound law just to illustrate a principled application of judicial restraint. Likewise, I do not believe he agonized over whether he was betraying his antimonopolistic roots by expressing support for a monopolistic regulation. Brandeis' research demonstrates that he simply examined the case before him: a case that involved the exceptional needs of a public utility and a case ripe to be a catalyst for a nationwide discussion on economic policy. In *Liebmann*, as in each case presented to him, Brandeis did not choose one value over another but rather reconciled them. Indeed, by crafting an opinion that not only effectuated both principles but educated the public about his rationale, Brandeis was acting in the venerated tradition of the American judiciary.[98]

In addition to Brandeis' hope that the *Liebmann* dissent would "stimulate thinking," he left one other clue about how he felt his opinion should be read. A clipping from his files shows a three-paragraph blurb from a newspaper explaining the case. In the first paragraph, the editor relates the facts of *Liebmann*. The second and third paragraphs read:

> When the case was taken to the United States Supreme Court six justices sustained the Oklahoma decision, but Justice Louis D. Brandeis defended "the right of the people to meet changing economic conditions of the machine age by experimental State legislation"[99] and said "We must let our minds be bold."
>
> Bold minds are good things if bold in the right direction. When their boldness is defiance of common sense and the Constitution the quality is not so advantageous.

This last paragraph is circled in a wavy line. Across the top of the blurb, Brandeis has written "Another dn fool." It remains a

mystery whether Brandeis thought it was foolish to restrain wrong legislative thinking through judicial activism, or whether he thought the Oklahoma law *was* "bold in the right direction," or whether he thought the writer missed the point of his *Liebmann* dissent entirely. Regardless of his judgment of the content, I am sure Brandeis would agree that summing up the opinion in two short sentences is, as such, entirely foolish.

## ENDNOTES

[1] MAX LERNER, *The Social Thought of Mr. Justice Brandeis*, in IDEAS ARE WEAPONS: THE HISTORY AND USES OF IDEAS 70 (Viking Press, 1939), reprinted from 41 YALE L. J. 1 (1931) and MR. JUSTICE BRANDEIS (1932) (Felix Frankfurter, ed.).

[2] Brandeis, more than many other Supreme Court Justices, took seriously the jurisdictional and justiciability constraints that, in his opinion, often prevented the Court from ruling. *See, e.g.*, Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (1985) (reproducing Frankfurter's notes of conversations with Brandeis, who said, "the most important thing we do is *not* doing") (emphasis in original); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). In addition, Brandeis often framed an issue more narrowly than the other opinions in the same case. *See, e.g., National Life Ins. Co. v. United States*, 277 U.S. 508, 525–26 (1928).

[3] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

[4] Nearly every sitting Justice since the 1940s has cited Brandeis' *Liebmann* dissent at some point, including Justices Stevens, Breyer, O'Connor, Kennedy, Ginsburg, Scalia, Rehnquist, Blackmun, Marshall, Harlan, Stewart, Goldberg, Brennan, Burger, Powell, Reed, Jackson, Rutledge, Stone, and, of course, Frankfurter. Every citation refers to a single passage in the dissent, which this article will dub the "laboratories of democracy" language. One may be hard-pressed to find another excerpt universally supported by such a wide range of judicial temperaments. Timothy Sandefur has helpfully laid out all forty-two Supreme Court cases in which the "laboratories of democracy" language from the Brandeis dissent has been cited. *Insiders, Outsiders, and the American Dream: How Certificates of Necessity Harm Our Society's Values*, 26 NOTRE DAME J. of L., ETHICS & PUBLIC POL. 381, 413 n.152 (2012). Conversely, the majority opinion has not been relied upon since World War II. *Id.* It has only been cited (and rejected) once since that time, in *Breard v. Alexandria*, 341 U.S. 622, 633 (1951).

[5] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 272 (1932). Interestingly, New State Ice Company seems to have conceded that licensure of ice plants involved a federal constitutional issue. It is unclear why the company chose a federal forum in the first place, not citing diversity but federal question doctrine. *See* E.E. Steiner, *Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL'Y REV. 1, 7 (1983).

[6] *Liebmann*, 285 U.S. at 281 (Brandeis, J., dissenting). Interestingly, the majority opinion never mentions the legal argument of the defendant.

[7] *Id.* at 273–74. Furthermore, the United States Supreme Court had reviewed a related Oklahoma Supreme Court ruling about the regulation of cotton gins, which it reversed on equal protection grounds. There was no holding as to whether mills were "public businesses," but dicta in a majority opinion written by Justice Sutherland supported that conclusion. *Frost v. Corp. Comm. of Oklahoma*, 278 U.S. 515, 519 (1929) ("It already appears that cotton gins are declared by the Oklahoma statute to be public utilities, and their operation for the purpose of ginning seed cotton to be public business. . . . Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view."). Justice Brandeis dissented, voting to uphold the Oklahoma regulation. His dissent will be discussed in greater detail in Part IV of this article.

[8] *New State Ice Co. v. Liebmann*, 42 F.2d 913 (W.D. Okla. 1930) (dismissing the suit brought by the licensed ice companies and stating that "I have no hesitation whatever in stating the true reason for the bringing of these suits is that plaintiffs may further their practical monopoly of the ice business"); *Southwest Utility Ice Co. v. Liebmann*, 52 F.2d 349 (10th Cir. 1931) (affirming the dismissal, but holding, conversely, that "[i]t is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices").

[9] Justice Cardozo, who had just been confirmed, did not participate in the case. Justice Brandeis was pleased and surprised at the Cardozo confirmation. He wrote to Felix Frankfurter in February 1932 that "[t]he Cardozo nomination was an unexpected boon." Letter of Feb. 16, 1932 *in* 'HALF BROTHER, HALF SON': THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 476 (Melvin I. Urofsky & David W. Levy, eds.) (1991). In fact, one page of Brandeis' handwritten research notes on *Liebmann* is decorated with a half-dozen official-looking stamps of "Cardozo, J." *See* Papers of Louis Dembitz Brandeis, Reel 60.

[10] Brandeis also used this term, "super-Legislature," in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924). This and other parallels demonstrate that Brandeis

employed some of the same reasoning in these two cases, which will be discussed in further detail in Part III of this article.

[11] *See, e.g.*, Rich Stowell, *Mitt Romney and the Defense of Federalism*, WASH. TIMES, Oct. 22, 2011, *available at* http://communities.washingtontimes.com/neighborhood/general-factotum/2011/oct/22/mitt-romney-and-defense-federalism/; Ralph Nader, *State Legislatures as "Laboratories of Democracy,"* COMMONDREAMS.ORG, May 31, 2004, *available at* http://www.commondreams.org/views04/0531-12.htm.

[12] *See, e.g., Oregon v. Ice*, 555 U.S. 160, 171 (2009); *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546 (1985). *See also generally* Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, *in* FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS 76 (Harry N. Scheiber ed., 1992).

[13] Historical research demonstrates that the Oklahoma City market was, in fact, served by three relatively large ice manufacturers and that the ice distribution service was jointly run by the three companies together. Anheuser-Busch owned the plaintiff New State Ice Company. However, Mr. Ernest Liebmann was no small businessman. He and his brother Paul owned ice plants throughout Oklahoma, Kansas, and Texas. Their father had established a combined electricity and ice plant in Hobart and a combined ice and coal company in Sulphur, Oklahoma. The Liebmanns had, in fact, obtained several other licenses to serve other communities in Oklahoma. In reality, though, Oklahoma City *did* need more ice: once Mr. Liebmann opened his Oklahoma City plant, it was inundated with business. This information all comes from Nigel Anthony Sellars, *Cold, Hard Facts: Justice Brandeis and the Oklahoma Ice Case*, 63 HISTORIAN 249 (2001). Mr. Sellars based most of the foregoing statements on a personal interview with Paul Liebmann and historical public and private records. Combining ice facilities with more traditional public utilities was not unique to the Liebmanns, *see Liebmann*, 285 U.S. at 291 n.18 (Brandeis, J., dissenting) ("Such companies in Oklahoma operate more than one-third of the ice plants.").

[14] *See, e.g.*, Statement of Hon. Louis Brandeis before the House of Representatives Committee on Interstate and Foreign Commerce 9 (Jan. 9, 1915). Brandeis did, at times, represent large businesses in his private practice. He was also careful to distinguish between businesses that *grew* large and those that *combined* to become large. As concerning concentration of wealth rather than power, which Brandeis viewed as correlative, see *Big Men and Little Business*, *in* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 145, 163–64 ("[I]t is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration.").

[15] Brandeis occasionally differentiated between bigness and monopoly, which he saw as distinct. *See, e.g.*, Louis D. Brandeis, *The New Haven—An Unregulated Monopoly*, BOSTON J. (Dec. 13, 1912), *reprinted in* BUSINESS—A PROFESSION (1914) ("Excessive bigness often attends monopoly; but the evils of excessive bigness are something distinct from and additional to the evils of monopoly. A business may be too big to be efficient without being a monopoly; and it may be a monopoly and yet (so far as concerns size) may be well within the limits of efficiency.").

[16] Perhaps the most well-known of Justice Brandeis' clerks, Professor Paul Freund, wrote in a memoir that "[o]nly a note of skepticism, uncommon in his opinions, betrayed his private judgment of the [Oklahoma] law." Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 785 (1957). Freund's description of the judicial restraint theory of the *Liebmann* dissent is characteristically lyrical: "Complexities arose . . . when the judge's role was at odds with the partisan interests Brandeis might have been expected to support." *Id.* at 786. *See also* Marion E. Doro, *The Brandeis Brief*, 11 VANDERBILT L. REV. 783, 786 (1958) (citing *Liebmann* as an example of Brandeis' tendency to affirm reasonable legislation "even when he doubted its wisdom").

[17] For example, "to hold the act void as being unreasonable would, in my opinion, involve the exercise, not of the function of judicial review, but the function of a super-Legislature," *Liebmann*, 285 U.S. at 300, and "the state's power extends to every regulation of any business reasonably required and appropriate for the public protection," *id.*, 302–03.

[18] *See* Louis D. Brandeis, *Cutthroat Prices—The Competition That Kills*, HARPER'S WEEKLY (Nov. 15, 1913) ("When a court decides a case upon grounds of public policy, the judges become, in effect, legislators. . . . It seems fitting, therefore, to inquire whether this judicial legislation is sound . . . And when making that inquiry we may well bear in mind this admonition of Sir George Jessel, a very wise English judge: 'If there is one thing which more than any other public policy requires, it is . . . the utmost liberty of contracting . . . Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract.'").

[19] MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 143 (1981).

[20] *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 54–61, 111 (1997) (discussing *Liebmann* and stating "Brandeis seemed to believe that there was something about the government that gave its judgments on these matters an uncommon touch of credibility.").

[21] *Mr. Justice Brandeis, Competition and Smallness; A Dilemma Re-Examined*, 66 YALE L. J. 69, 83 (1956). This article finds evidence that Brandeis' opinions were frequently willing to permit government intrusion into business for the sake of avoiding worse economic problems. *E.g., Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928). *See* Sellars, *supra* note 13, at 259 ("This was hardly a new position for the justice.").

[22] Harold J. Laski, Book Review, THE FAITH OF A LIBERAL (MORRIS R. COHEN, 1946), 59 HARV. L. REV. 816, 819 (1946). For his part, Brandeis wrote that "I don't agree at all with what is apparently [Laski's] free trade view." Louis D. Brandeis, Letter to Felix Frankfurter (Nov. 19, 1931), in 'HALF BROTHER, HALF SON,' *supra* note 9.

[23] Richard A. Posner, *Brandeis and Holmes, Business and Economics, Then and Now*, 1 REV. OF L. & ECON. 1 (2005).

[24] *See, e.g.*, MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY 101–03 (2001).

[25] *Brandeis, Viewing Crisis 'Worse Than War,' Urges Control of Competition by the State*, N.Y. TIMES, March 22, 1932, at A1. This article appeared on the front page of the *New York Times* the day after *Liebmann* came down. Nineteen of its twenty-one paragraphs discuss the Brandeis dissent, reproducing most of the latter half of the Brandeis dissent—without footnotes. The discourse on Brandeis is followed by a perfunctory paragraph about the Court's holding.

[26] Of course, the term "rational basis" would not be developed until the 1960s. Nonetheless, Brandeis' reasonableness test clearly channels rational-basis review.

[27] *O'Gorman & Young, Inc. v. Hartford Ins. Co.*, 282 U.S. 251 (1931).

[28] Brandeis' *O'Gorman & Young* opinion represents a five-Justice majority, not a two-Justice dissent like *Liebmann*. But no matter why Brandeis toned down the facts, *O'Gorman and Young* represents the idea that the factual support iterated by Brandeis in *Liebmann* was not necessary to reach a judicial-restraint-oriented holding. Plus, it seems unlikely that Brandeis would have "spoke as with deep feeling and from time to time emphasized his words with vigorous gestures" when delivering his 31-page opinion, if all it reflected was a desire not to interfere with the legislative process. N.Y. TIMES, *supra* note 25. *See also Court Denies Oklahoma Ice Supervision*, CHI. DAILY TRIB. (March 22, 1932), at 23 ("accompanying his ringing words by vigorous gestures").

[29] *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting). Brandeis meant to describe freedom from unreasonable government intrusion into an individual's right to privacy, not his or her right to engage in lawful private business or enter a contract. Nonetheless, his commitment to it demonstrates that he did not favor broad grants of power to the government.

[30] However, the fact that Brandeis expressed uncertainty about the outcome of the legislation cannot be taken as conclusive proof that he did not support it. *Compare Liebmann*, 285 U.S. at 309 ("Whether that view [of the legislature] is sound nobody knows") to *Quaker City*, 277 U.S. at 411 (affirming a state's right to pass legislation with which Brandeis would have agreed—the taxation of corporations, but not individuals—engaged in the taxi business but also stating "[t]he court may think such views unsound."). We can safely assume that Brandeis agreed with the import of the *Quaker City* law because of his opinion in *Liggett*, 288 U.S. at 565.

[31] Although I will use the term "public/private distinction" as shorthand in this article, I caution readers that Brandeis did not believe that there were static *categories* of public and private businesses; in fact, in *Liebmann*, he espouses the idea that the subjective reasonableness test applies to state regulation of *all* business. Nonetheless, Brandeis wrote that a "regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness of every regulation is dependent upon the relevant facts." In this way, Brandeis would have agreed that more heavy-handed regulation would be valid for those businesses that supply essential public goods (whether or not they were categorized as a "public utilities"), though it would not be for businesses that supply luxury items, financial products, or commercial services or equipment.

[32] *Liebmann*, 285 U.S. at 281–82 (Brandeis, J., dissenting). Brandeis had requested, two weeks before the Court decided *Liebmann*, a bibliography from the Supreme Court law librarian on such certificates. Papers of Louis Dembitz Brandeis, Reel 59. Such certificates withstood the *Lochner* age and have since been upheld for railroads, natural gas pipelines and distributors, telephone lines, nuclear power plants, motor carriers, electricity plants, radio operators, bus companies, airlines, petroleum pipelines, water shippers, and warehouses. *See, e.g.*, *Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm. of New York*, 447 U.S. 530 (1980).

[33] Brandeis defines the machine age as one in which "plants have displaced tools and businesses are substituted for trades." This wording is taken, nearly verbatim, from Walter H. Hamilton, *Affectation with a Public Interest*, 39 YALE L. J. 1089 (1929) (a marked-up copy of which is found in Papers of Louis Dembitz Brandeis, Reel 59). The article takes the perspective, which Brandeis adopts in *Liebmann*, that the distinction between private business and business "affected with a public interest" serves no legitimate purpose.

[34] *Liebmann*, 285 U.S. 302 n.43, 305 n.46. In fact, even after the *Liebmann* majority pooh-poohed the idea of food and clothing as public utilities, the idea was still debated. *See, e.g.*, Henry S. Manley, *Constitutionality of Regulating Milk as a Public Utility*, 18 CORNELL L. Q. 410 (1933).

[35] Brandeis' suspicion of both automobiles and television was well documented. *See* LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES 312, 337 (1980).
[36] PAPER, *supra* note 35, at 70.
[37] The scheme allowed the company to pay increasingly higher-percentage dividends to its investors if it lowered its prices.
[38] The colleague who had persuaded Brandeis to get involved in the controversy, Edward Warren, took issue with this dual representation and eventually opposed Brandeis' confirmation to the Supreme Court. *Id.* at 75.
[39] PAPER, *supra* note 35, at 78.
[40] *See* Louis D. Brandeis, *How Boston Solved the Gas Problem*, 51 AM. R. OF REVIEWS 594 (1915).
[41] *Liebmann*, 285 U.S. at 282 (Brandeis, J., dissenting).
[42] Louis D. Brandeis, Drafts of *New State Ice Co. v. Liebmann*, Papers of Louis Dembitz Brandeis, Reel 59.
[43] We can only speculate as to why Brandeis made this decision, but the first draft to exclude this language is also the first draft including the line "Justice Stone concurs in the opinion." Papers of Louis Dembitz Brandeis, Reel 59.
[44] *Jay Burns*, 264 U.S. at 520. So well-known is this use of the line that some *Liebmann* commentators do not note its original context.
[45] Louis D. Brandeis, Letter to Robert Walter Bruere (Feb. 25, 1922), *in* LOUIS D. BRANDEIS, LETTERS OF LOUIS D. BRANDEIS VOL. V 45–46 (Melvin I. Urofsky & David W. Levy, eds. 1972).
[46] *Jay Burns*, 264 U.S. at 520 (Brandeis, J., dissenting).
[47] Louis D. Brandeis, Letter to Louis Brandeis Wehle (Oct. 1, 1910), *in* FAMILY LETTERS OF LOUIS D. BRANDEIS 155–56 (Melvin I. Urofsky & David W. Levy, eds. 2002).
[48] Louis D. Brandeis, *The New England Transportation Monopoly*, Address Before the New England Dry Goods Association (Feb. 11, 1908), *reprinted in* BUSINESS—A PROFESSION 271 (1914).
[49] Louis D. Brandeis, *The New Haven—An Unregulated Monopoly*, BOSTON J. (Dec. 13, 1912), *reprinted in id.*, 284.
[50] *See Liebmann*, 285 U.S. at 290 n.17 (Brandeis, J., dissenting). Brandeis intended to demonstrate by this footnote that most Oklahoma families that purchase ice could not yet afford a refrigerator. But it also shows that the price of an electric refrigerator had dropped $180 (forty-two percent) in six years, so household refrigeration was quickly becoming a true competitor to manufactured ice.
[51] Louis D. Brandeis, Letter to Amos Pinchot (July 31, 1911), *reprinted in* BRANDEIS ON DEMOCRACY 46 (Philippa Strum ed., 1995). In a preceding letter, Brandeis also suggested that "government ownership of a mine [in Alaska] would always be valuable as a regulator." Letter to Robert M. La Follette (July 29, 1911), *reprinted in id.*, 45. It is hard to imagine Brandeis advocating for government entry into a strictly private business.
[52] Brandeis, *supra* note 49, at 496. Brandeis took copious notes on, and eventually relied upon Hamilton, *supra* note 33, in his *Liebmann* dissent. *See id.* at 1108 ("Certain 'natural monopolies' . . . must be recognized as a class apart. Here . . . the state must accord the protection which in the usual case the market is supposed to afford. Accordingly the state may resort directly to price-fixing.").
[53] *Compare id.*, with *New State Ice Co. v. Liebmann*, 285 U.S. 262, 291 n.18 (1932) ("It is noteworthy that the ice industry has the characteristic of uniformity of product or service common to most public utilities, and distinguishing it from other businesses in which differences in quality or style make difficult effective regulation.")
[54] For a comprehensive defense of this view, complete with several examples of state commissions charged with overseeing a growing number (and more aspects) of public-oriented businesses, *see, e.g.*, CHARLES VAN HISE, CONCENTRATION AND CONTROL 233 (1921) (Section II, *Commission Control of Public Utilities*). *Compare* Charles Van Hise, Address before the Economic Club of New York (Nov. 1, 1912), *The Regulation of Competition versus the Regulation of Monopoly*. Mr. Van Hise, a Wisconsin geologist and later an architect of the New Deal, shared much of Brandeis' economic philosophy, but disagreed that most private industries were monopolies in fact. His Economic Club address highlights this fact.
[55] Louis D. Brandeis, Letter to Felix Frankfurter (Sept. 30, 1922), in 'HALF BROTHER, HALF SON,' *supra* note 9. Brandeis characterized this expression of his views as his "last will & testament" before the coming Supreme Court term. *Id.* at 114.
[56] *Id.* A few months later, Brandeis wrote to Frankfurter that "a super-corporation tax, progressive in rate" should be "[p]ut on all corporations (except utilities including railroads). *Id.* at 133 (Jan. 4, 1923).
[57] Louis D. Brandeis, *The New Haven—An Unregulated Monopoly*, BOSTON J. (Dec. 13, 1912), *reprinted in* BUSINESS—A PROFESSION 289 (1914).
[58] *Id.* at 301. Indeed, Brandeis acknowledged that traditional public utilities were excepted: "Undoubtedly, also, certain public services, local in character, like those supplying gas or water, will, on the whole, be best performed by monopolies, if effectively regulated; or, as in the case of the telephone, may as monopolies best serve the public convenience." *Id.* at 282–83.
[59] Carl Illig, Jr., *Public Utilities—Regulation—Ice Business*, 11 TEX. L. REV. 89, 97 (1932) ("Mr. Justice Brandeis' dissent in the *Liebmann* case reflects that thousands of hearings have been held before the corporation commission and that, besides issuing general orders to ice companies it has fixed or approved prices to be charged in particular communities, required ice to be sold without discrimination and to be distributed

equitably, forbidden short weights and ordered scales to be carried on delivery wagons, required ice to be weighed at the customer's request, and has undertaken to compel sanitary practices in ice manufacture and courteous service to patrons.").

[60] There is additional reason to believe that Brandeis viewed utilities in a fundamentally different light from other private industry: he was trustee of the National Public Utilities Bureau from its inception in 1915 until his resignation when he joined the Supreme Court in 1916 (other trustees included Felix Frankfurter and Charles Van Hise, *see supra* note 124). Louis D. Brandeis, *A Resignation*, 1 UTILITIES MAG. 1 (Jan. 1916). The Bureau was a forum "devoted primarily to the competent and free discussion of utility problems" and an "influential agency" that intended to educate American cities on utilities. Morris L. Cooke, Acting Director of the Bureau, *Opening Remarks*, 1 UTILITIES MAG. 4 (Jan. 1916). *See also* Brandeis' own remarks on the Bureau in *Interlocking Directors* (Ch. 19) in BUSINESS—A PROFESSION, in which he highlights the "efficiency" of cooperation between both private entities and cities in the utility business.

[61] *Liebmann*, 285 U.S. at 302 (Brandeis, J., dissenting).

[62] *Frost v. Corp. Comm.*, 278 U.S. 515 (1929).

[63] *See generally, e.g.*, BRANDEIS, OTHER PEOPLE'S MONEY, *supra* note 14, at 208–20 (calling for municipal bond marketing cooperatives, wholesaler cooperatives, credit associations, and building and loan associations).

[64] *Frost*, 278 U.S. at 531 ("The differences are vital, and the classification is a reasonable one.").

[65] Just before the *Frost* dissent came out, Brandeis told Frankfurter: "It will deserve writing up." Letter to Felix Frankfurter (April 30, 1930), in 'HALF BROTHER, HALF SON,' *supra* note 9. *See also Jay Burns*, 264 U.S. at 520. The *Liebmann* dissent is also a natural continuation of *Jay Burns*, though for different reasons: much of the language about second-guessing state legislatures, the inquiry into the problem to which the legislature addressed itself, the reference to facts outside the record, the value of legislative experimentation, and the reasonableness standard is nearly identical. *E.g.*, *id.* at 519–20, 533. In *Jay Burns*, Brandeis also expresses tolerance for state commission oversight of an essential consumer good, though there is no tendency either to create or suppress monopoly. Brandeis does characterize the law as protection against "unfair competition." *Id.* at 517.

[66] Missouri *ex rel. Southwestern Bell Telephone Co. v. Mo. Pub. Serv. Comm.*, 262 U.S. 276, 291 (1923) (Brandeis, J., concurring).

[67] Louis D. Brandeis, *Shall We Abandon the Policy of Competition*, CASE & COMMENT 498 (February 1912), in Papers of Louis Dembitz Brandeis, Reel 46.

[68] See the description of Brandeis' concurrence in ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 551 (1946).

[69] *Frost & Frost Trucking Co. v. R.R. Comm.*, 271 U.S. 583, 601 (1926) (Holmes, J., dissenting).

[70] *Southwestern Bell*, 262 U.S. at 291, along with *Bluefield Water Works & Improvement Co. v. Public Serv. Comm.*, 262 U.S. 679 (1923), *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926), *St. Louis & O'Fallon Ry. v. United States*, 279 U.S. 461 (1929), and *United Railways & Electric Co. v. West*, 280 U.S. 234 (1930), all interpreted the *Smyth v. Ames* doctrine. 169 U.S. 566 (1898). The doctrine was a formula for public-utility rates, under which private investors were entitled to a rate of return based on the cost of "reproduction." Brandeis fought vigorously against the "wild uncertainties" of the *Smyth* formula, which he believed did not provide a fair or predictable return. In *West*, he read and cited "hundreds of authorities" in economics, political science, and public administration, becoming a veritable expert on the business of utilities. MASON, *supra* note 68, at 550.

[71] *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405 (1931). For a discussion of the case from the point of view of then-Brandeis-clerk Nathaniel Nathanson, see PAPER, *supra* note 35, at 337–38. This summary of the issue is taken from page 337.

[72] For example, Brandeis departed radically from judicial restraint. *See id.*

[73] *Chattanooga*, 294 U.S. at 431.

[74] Louis D. Brandeis, Letter to Bernard Flexner (Mar. 27, 1932), *in* LETTERS OF LOUIS DEMBITZ BRANDEIS VOL. V, 1921–1941, THE ELDER STATESMAN 500 (Urofsky & Levy, eds. 1972). The full reference reads, "It was good of you to write me and to send the clipping [of the *Times* editorial on *Liebmann*]. The opinion should help stimulate thinking. We certainly need a good deal of that article in the business world." Brandeis' comment on "that article" could be referring to the editorial, which highlighted Brandeis' characterization of the Great Depression as "more serious than war." Perhaps Brandeis was hoping the editorial would spur private industry to recognize, and respond creatively to, the problems of the Depression. Early drafts refer to the Depression as "greater" than war. Papers of Louis Dembitz Brandeis, Reel 59.

[75] A year before *Liebmann* came down, Felix Frankfurter wrote that "[Brandeis'] work as Justice may accurately be described as a continuation of devotion to the solution of those social and economic problems of American society with which he was preoccupied for nearly a generation before his judicial career." *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 35–36 (1931).

[76] Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 BRANDEIS L. J. 733, 750 (2007). Urofsky recounted specific examples, including: "Several of his law clerks recalled that, after reworking an opinion—usually a dissent—through several drafts, Brandeis would say,

'Now I think the opinion is persuasive, but what can we do to make it more instructive?'" *Id.* at 734.

[77] See, of course, *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."). *See also Gilbert v. Minnesota*, 254 U.S. 325, 338 (1920) ("The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws, and in the conduct of the Government, necessarily includes the right . . . to teach the truth as he sees it . . .").

[78] 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[79] Brandeis, Letter to Norman Hapgood, *quoted in* MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM 38 (1971).

[80] Dean Acheson, *Mr. Justice Brandeis*, 55 HARV. L. REV. 191, 192 (1941).

[81] *See* Mary Murphy Schroeder, *The Brandeis Legacy*, 37 SAN DIEGO L. Rev. 711, 713 (2000) ("His style was to teach by marshaling facts, not theories.").

[82] We know, for instance, that Brandeis studied and admired John Maynard Keynes. *See* Brandeis, Letter to Felix Frankfurter (Nov. 8, 1925) *in* 'HALF BROTHER, HALF SON,' *supra* note 9 (calling Keynes a man who thinks "vigorously," writes "effectively," and speaks out "fearlessly").

[83] *Liebmann*, 285 U.S. at 293, 294 nn.23, 24 (Brandeis, J., dissenting).

[84] MASON, *supra* note 68, at 609.

[85] *See, e.g.*, Letter from Foster Simcox (March 22, 1932) ("the Supreme Court, as a whole, [should] condemn[] to death our whole cotton, heart-and-brainless economical system"), Letter from Ralph Epstein (undated) ("brilliant piece of economic philosophy"); Letter from Isador Lubin, The Brookings Institution (March 30, 1932) ("I really feel that your dissent is going to be something to which we of the younger generation are going to turn to with pride in future years when the law finally comes into accord with economic reality."); Letter from an employee of the Ohio Commission on Unemployment Insurance (April 4, 1932) ("[I]t is in throwing the light of economic and social science upon what otherwise might be considered a purely legal question that your opinion presents a classic contribution to the philosophy of economic law."), *all in* Papers of Louis Dembitz Brandeis, Reel 50; Francis Goodell, Letter to the Editor, N.Y. TIMES (March 26, 1932) ("The note today in Justice Brandeis' dissent in the Liebman [*sic*] case is also that of a liberal and a profound student of our social forces; a liberal who had acquired tempered vision in his long public service. There is in that authoritative opinion ... the wisdom of the expert in his broad conception of the tragic and needless maladjustments contrasted with the possibilities of the use of our social forces in our form of government. . . . [man] must abandon 'laissez-faire' policies and venture forth against our jungle tiger in this situation 'as bad as war.'"). Compare, though, the letter Brandeis received from Yale professor Walter Hamilton, which—though cryptic—seems to provide strong support for the judicial restraint theory. It does not appear that Professor Hamilton thought very positively of Brandeis' commitment to restraint. "When the majority of the court sees the light—as I take it they did here—there is real need for an understanding of stare decisis by the Justice or two who felt themselves compelled to follow precedent against their own judgment." Letter to Louis D. Brandeis (April 12, 1932), *in* Papers of Louis Dembitz Brandeis, Reel 50.

[86] Lerner had also recently written a commemorative article for Brandeis' seventh-fifth birthday. *The Social Thought of Mr. Justice Brandeis*, 41 YALE L. J. 1 (1931). In 1949, he became a professor at Brandeis University.

[87] Max Lerner, Letter to Louis D. Brandeis (March 26, 1932), *in* Papers of Louis Dembitz Brandeis, Reel 60.

[88] I believe this would have pleased Brandeis, who sent copies of his dissent to many of his correspondents.

[89] Morris R. Cohen, Book Review, MR. JUSTICE BRANDEIS (Felix Frankfurter, ed. 1932), 47 HARV. L. REV. 165, 166 (1933).

[90] Thomas F. Woodlock, WALL ST. J. (April 6, 1932), A1, *quoted by* Malcolm P. Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions* (Part I), 46 HARV. L. REV. 361, 399 n.159 (1933). The author of a 1932 law review article devoted to the question of whether the manufactured ice industry should be a public utility in Texas also discussed *Liebmann* in detail, summarizing the holdings as (1) "the ice business was intrinsically a private one" and (2) that the certificate of public convenience and necessity was unreasonable, "tending to encourage monopoly and prohibit competition." The article then stated that "Mr. Justice Brandeis, in an elaborate dissent . . . put both of these points to an economic test and arrived at an opposite conclusion." The author, who chronicles the development of U.S. and Texas law on public-interest business regulation, employs an interesting style and uses many of the same sources as Brandeis. Illig, *supra* note 59.

[91] MASON, *supra* note 68, at 610.

[92] Of course, public-utility monopolies are commonplace today, and the *Liebmann* dissent almost certainly played a role in their widespread acceptance.

[93] Justice Brandeis almost certainly borrowed the concept from Theodore Roosevelt, who used it to praise Brandeis' dear friend Robert M. La Follette, a Progressive governor and senator of Wisconsin. Roosevelt had visited La Follette in Madison for the first time in 1911. *Wisconsin: An Object Lesson for the Rest of the Union*, OUTLOOK (May 27, 1911), *quoted in* BELLE C. LA FOLLETTE & FOLA LA FOLLETTE, ROBERT LA FOLLETTE VOL. I (1953). The next year, he wrote the introduction of a book about La

Follette, in which he called Wisconsin "literally a laboratory for wise experimental legislation aiming to secure the social and political betterment of the people as a whole." Theodore Roosevelt, *Introduction*, in CHARLES MCCARTHY, THE WISCONSIN IDEA (1912). There is also evidence that Brandeis heard the term used to describe the nation of Switzerland. *See* Chapter 1, *A Laboratory of Democracy*, HENRY DEMAREST LLOYD, THE SWISS DEMOCRACY (1908). This book was reviewed in La Follette's weekly magazine, to which Brandeis contributed; Brandeis also knew Lloyd personally and was impressed by his work as a reformer. *See* Louis D. Brandeis, Letter to Elvin Doak Mead (Nov. 9, 1895), LETTERS OF LOUIS D. BRANDEIS VOL. I (Melvin I. Urofsky & David W. Levy, eds.). It may be the case that he heard the term to describe *all* the states, not just Wisconsin, for the first time in 1915: "Americans have begun to realize that their country is both the workshop and the laboratory of democracy. In their forty-eight States and their Congress they are trying experiments in every form of popular government by which the whole world may profit, and indeed is profiting." James Bryce, *Stray Thoughts on American Literature*, 201 NORTH AMERICAN REV. 359 (March 1915). Brandeis knew of Viscount James Bryce, a British aristocrat, referencing him in a letter to David Lubin in 1918. LETTERS VOL. II 356 (Sept. 29, 1918). Regardless of where he picked up the phrase, the first time Brandeis used it publicly was in 1922, after he had been on the bench six years. In the introduction to a book about La Follette, Brandeis wrote, "The best conceived plans for the amelioration of our conditions will require for success laborious development of details, careful adjustment to local conditions, and great watchfulness for years after their introduction. We must encourage such social and political invention, though we feel sure that the successes will be few and the failures many. Most of these inventions can be applied only with the sanction and aid of the government. It is America's good fortune that her federal system furnishes in the forty-eight states political and social laboratories in which these inventions may be separately worked out and tested, thus multiplying the opportunities for inventors and minimizing the dangers of failure." Louis D. Brandeis, Introduction 11, *in* ALBERT O. BARTON, LA FOLLETTE'S WINNING OF WISCONSIN: 1894–1904 (1922).

[94] *E.g.*, Peter Suderman, *The Lesson of State Health-Care Reforms*, Oct. 15, 2009 (10:26 PM), http://online.wsj.com/article/SB10001424052748703298004574455560453-947646.html?mod=djemEditorialPage. And misquotability. *See, e.g.*, Grover G. Norquist & Patrick Gleason, *Rethink Renewable Energy Mandates*, POLITICO.COM, Dec. 18, 2011 (9:13 PM), http://www.politico.com/news/stories/1211/70610.html (stating "Thankfully, we have the states—those '50 laboratories of democracy,' as Supreme Court Justice Louis Brandeis called them," despite the fact that there were not fifty states when the Court decided *Liebmann*).

[95] *E.g.*, *United States v. Virginia*, 518 U.S. 515, 600–01 (1996) (Scalia, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 3025 (2010) (Stevens, J., dissenting). Notably, each Justice switched positions between these two cases.

[96] Norquist and Gleason, for example, cite this passage, then go on to discuss their nationwide campaign for the repeal of renewable-energy minimums in all twenty-nine states that have enacted them.

[97] LERNER, *supra* note 1, at 72.

[98] *I.e.*, *Marbury v. Madison*, 5 U.S. 137 (1803) (finding a way to enshrine the Supreme Court power of judicial review *and* gaining the support of then-President Thomas Jefferson).

[99] This is not actually a quote from the case, so it is unclear why it is in quotes.

# Debunking Douglas: The Case Against Writing Both Majority and Minority Opinions

**CRAIG ALAN SMITH**

## Introduction

In the annals of Supreme Court history, *Meyer v. United States* was hardly noteworthy. Decided by a six to three majority and announced in late November 1960, the case by all appearances was a run-of-the-mill federal tax question involving a disputed marital deduction on estate taxes paid.[1] Although treated favorably by *Shepard's* citations, *Meyer* did not become a significant precedent, and no one outside the parties involved, their lawyers, or the Justices (at least, for a few weeks) paid any attention to it.

Not so for the legacies of Justices Charles Evans Whittaker and William O. Douglas. Although Whittaker was the second person ever to serve at all three levels of the federal judiciary,[2] he was still rated a judicial "failure" by sixty-five legal and political experts in a 1971 survey.[3] The only Missourian and first native Kansan appointed to the Supreme Court, Whittaker's five years of service were routinely dismissed as ineffective or insignificant. Shortly after Whittaker's resignation, Leon Friedman prepared a biographical sketch portraying him as "not fitted intellectually or physically for the job." Relying on Friedman, Victoria Woeste concluded Whittaker "was in every way unsuited for his exalted position."[4] Criticized for making inconsistent decisions, struggling with making decisions (or changing his mind once he made a decision), Whittaker's weakened reputation was further tarnished when he (supposedly) failed to write the majority opinion assigned to him in *Meyer v. United States*.

William O. Douglas, on the other hand, was the longest serving Justice in history. His feats were truly remarkable, often controversial, and some were arguably unbelievable. Touted more than once as a vice presidential candidate while on the Bench (each time unsuccessfully), Douglas left an indelible stamp on Supreme Court history with his

four marriages (a couple to women less than half his age), several calls for his impeachment, wide-ranging publications based on his world travels, and nearly being killed when the horse he was riding fell on him.[5] Stories of Douglas's youth hiking through western mountains to overcome polio seemed fabled, and, according to one Douglas biographer, they probably were.[6] Even Douglas's relations with his law clerks contributed to recent debates over just how cruel a taskmaster he really was.[7]

Setting aside the hype, however, there was one Douglas legend that for over thirty years became so commonplace as to scarcely need attribution. According to Douglas himself, he wrote the Court opinion and the dissenting opinion in *Meyer v. United States*. Considering Douglas's prodigious work output and *Meyer*'s relative obscurity, this claim was accepted by at least a dozen different authors as evidence of another memorable act in Douglas's long list of accomplishments. As Supreme Court historical trivia, the story of how one Justice wrote the majority and minority decisions in the same case was repeated and regaled. Unfortunately, none of it was true; Douglas embellished it beyond credulity. More tragic, though, than the gullibility of scores of Douglas commentators was the irreparable damage this innocuous story did to Whittaker's reputation once he became the unwitting buffoon of another Douglas tall tale.

This article analyzes the persistency of Douglas's story and presents how various sources (including Douglas) used it to perpetuate his legacy while denigrating Whittaker. This textual analysis reveals inconsistencies with other factual circumstances that made Douglas's story all the more suspect. While the earliest sources who believed Douglas could be excused their naiveté, later sources were guilty of inexcusable laxness for preserving such a preposterous story without verification (even Douglas related inaccurate facts). It was more convenient—some might say plausible—to cast Douglas as the genius behind two written opinions and Whittaker as the incapable rube who needed assistance. The truth found in the historical record (hidden in plain sight for thirty years) proved far more revealing for both men's characters. Not only was Douglas's story untrue, but the truth cast Whittaker in a more positive light than his critics might admit. After reviewing the myth-building effects of Douglas's proponents, this article reveals for the first time Douglas's duplicity and Whittaker's achievement.

The real story behind *Meyer v. United States* was not an amusing anecdote of Supreme Court lore; it was a cautionary tale of one Justice's deceit and another's influence. After more than thirty years it is time to tell the truth about *Meyer*; otherwise, as Douglas's former clerk Marshall Small recognized in another context, further repetition of Douglas's story will "run the risk of becoming accepted fact."[8]

## Establishing Legend

The first recorded mention of Douglas drafting the majority and dissenting opinions in the same case appeared in Bob Woodward's and Scott Armstrong's provocative 1979 tell-all **The Brethren**. In a passage extolling Douglas's promptness and productivity, they noted, "Douglas was so prolific that once when former Justice Charles E. Whittaker was unable to draft a majority opinion, Douglas finished his dissent and then wrote Whittaker's majority for him."[9] Without providing corroborating details (like the name of the case or Court term), Woodward and Armstrong established three salient features of the *Meyer* legend: a) Douglas's dissent was finished first, b) Whittaker could not draft his own opinion, and c) Douglas wrote both opinions. Not one of these statements later proved true, but at the time there was no reason to question their veracity.

Douglas retired from the Court in 1975, and Whittaker died two years earlier. Besides, it was impossible to confirm which of Whittaker's forty-two majority opinions Woodward and Armstrong had in mind.[10]

A more compelling question was the source for Woodward's and Armstrong's offhand, marginal snub against Whittaker. Although it was widely accepted that at least five Justices cooperated with Woodward and Armstrong in preparing **The Brethren**, the identities of some of them remained speculative. Douglas was never considered a collaborator.[11] Another possible source was one of the 170 law clerks who reportedly cooperated with Woodward and Armstrong, but that was highly unlikely considering **The Brethren** focused on the Court from 1969 to 1975, almost a decade after *Meyer* was decided. The clerks who might have known about Douglas writing his own dissent and Whittaker's majority opinion in *Meyer* certainly never heard of it. One of Whittaker's clerks at the time found Douglas's story hard to believe, and Douglas's clerk remembered Douglas working on only one *Meyer* opinion.[12]

The most likely source for Woodward and Armstrong was Douglas's confidential researcher and literary aide, Dagmar Hamilton, who through much of the 1960s conducted research for seven of Douglas's books before Douglas asked her to edit the manuscript for his autobiography.[13] As a result of her long association with Douglas's literary efforts—largely without acknowledgment—Hamilton learned a great deal about Douglas's life and legacy, which she shared with two other authors the same year **The Brethren** was released. The story Hamilton told Kurt Reiger and Richard Shenkman bore such a striking resemblance to the one contained in the second volume of Douglas's autobiography (published the same year) that Hamilton likely lifted the account directly from Douglas's notes.

In both versions of the story (Hamilton's and Douglas's) the case was identified as *Meyer v. United States* (1960). It was a close decision (Hamilton called it "split," while Douglas twice repeated it was "five to four"). Whittaker was "assigned" or "directed" to write the majority opinion, and when Douglas went to see Whittaker in his chambers about a "totally (or wholly) different matter," Whittaker was so distressed over writing *Meyer* he was "pacing the floor (his office)." After Whittaker confessed he could not write it, Douglas told him he picked the wrong side and then offered to send him a draft. Although convinced he was on the right side, Whittaker accepted Douglas's offer, and within hours Whittaker had Douglas's draft and handed it down just as Douglas wrote it.[14] The essentials established in **The Brethren** remained the same: Douglas wrote his dissent first, and then he wrote the majority opinion for Whittaker.

These nearly identical versions of the story suggested Hamilton learned it from Douglas and then told it to any authors interested in an insider's view of the Court. Woodward and Armstrong got the basic outline while Reiger and Shenkman filled in the details. Douglas, of course, provided his own details, including the dialogue he exchanged with Whittaker. It was the details, though, that first indicated something was wrong with the story.

Reiger and Shenkman reported *Meyer* was argued on October 12, 1960, and involved "a life insurance payment." These facts were accurate in themselves (although the case involved a claimed marital deduction for tax purposes on life insurance proceeds), but they suggested Reiger and Shenkman *investigated* the decision. In his autobiography Douglas never mentioned the subject of the case or when it was argued. He did claim, though, that the conference vote and final decision were five to four. Here Douglas's story fell apart. Anyone checking the *U.S. Reports* could easily verify the case was decided six to three. That Reiger and Shenkman overlooked this was not

unreasonable—they appeared unfamiliar with Court customs (and Douglas's character) where they claimed Douglas "was *chosen* to write the minority opinion." Douglas, on the other hand, should have known better. His cavalier depiction of *Meyer* as a five to four decision indicated his unconcern with accuracy, and later commentators were just as disinterested with checking Douglas's facts. Douglas's rendition of what happened became so widely accepted that eventually the story's original source was no longer acknowledged.

## Perpetuating Legend

The next two sources known to repeat Douglas's claim to writing both *Meyer* opinions (published in the same year and more than a dozen years after Douglas's autobiography) focused more on Whitaker's character than on Douglas's deed. In a biographical dictionary about Supreme Court Justices, Victoria Woeste included the *Meyer* story in an entry for Whittaker (not Douglas) highlighting Whittaker's "inability" and "distress" at making decisions.[15] In his book on Supreme Court confirmation battles, Mark Silverstein recounted the *Meyer* story in a note relative to "political hacks and cronies" who became "simply wretched" Court appointments, and he used *Meyer* to draw attention to Whittaker's "anxiety" and "indecision."[16] With these sources, the *Meyer* legend took on a different character—one that Douglas may not have intended. Now the story came to represent Whittaker's failings more than Douglas's once-in-a-lifetime-however-trivial achievement.

**William O. Douglas claimed that he wrote both the dissent in *Meyer v. United States* (1960) and the majority opinion after his bench-mate, Charles Whittaker, gave up on it. The author refutes this claim. Above Carl A. Hatch, the chairman of the Senate Judiciary Committee, informed Douglas in 1939 that his appointment to the Court had been approved.**

These sources also presented barely distinguishable embellishments to the story and conflicting interpretations over Douglas's feelings behind telling it. Woeste maintained, as had Douglas, that Douglas finished his dissent before he offered to assist Whittaker with the majority opinion. Silverstein, on the other hand, related the story differently, introducing for the first time the perception that "Whittaker *sought* Douglas's advice," and Douglas then agreed to write both opinions. This may have been entirely speculative, as Silverstein acknowledged Douglas's autobiography as his only source. More perplexing, though, than Silverstein's adornment where Whittaker went looking for assistance, was Silverstein's imputation that Douglas told the story "caustically." Reading Douglas's account one might infer that Douglas was sympathetic towards Whittaker or that Douglas sought to amuse or impress his readers with his own eccentricity, but Douglas's account does not come across as caustic. In fact, Woeste, who also relied on Douglas's autobiography to gain "useful information about Whittaker," characterized this anecdote as "told with warmth and charity."

The idea that Douglas held Whittaker in contempt, however, as a result of the *Meyer* incident caught hold. In a compendium of judicial portraits for **The Warren Court**, Melvin Urofsky claimed Douglas "derived some malicious pleasure from recalling this episode." Other than one reference from Douglas's autobiography to Whittaker as an "affable companion," Urofsky offered no citation or explanation for believing Douglas recounted *Meyer* with "malicious pleasure."[17]

One of the last sources to retell the *Meyer* story, however tangentially, while acknowledging Douglas's autobiography as its source was Bernard Schwartz, who first included it as part of his justification for leaving Douglas off of his top-ten list of "Supreme Court Superstars."[18] A few years afterwards Schwartz developed his penchant for list-making into a book-length overview of legal greatness. In his chapter of the Ten Worst Supreme Court Justices, Schwartz included the *Meyer* story to illustrate Whittaker's difficulty writing opinions. This time Schwartz did not bother acknowledging Douglas's autobiography as the source, although its origins were plain enough. When Douglas asked Whittaker if he wanted Douglas to draft the majority opinion for him, Schwartz had Whittaker answer identically to Douglas's autobiography, "Would you please?" Had the *Meyer* story actually happened as Schwartz related it, then Schwartz's characterization of Whittaker as "the dumbest Justice ever appointed" appeared legitimate.[19]

According to Schwartz, *Meyer* displayed Douglas's speed in drafting opinions, but more significantly it exemplified Whittaker's inadequacies. Certainly Whittaker had difficulty as a Justice, not the least with making decisions, but Schwartz's overreliance on a few suspect anecdotes like *Meyer* made his condemnation of Whittaker dubious. In addition to believing Douglas's version of *Meyer*, Schwartz's two favorite tales to castigate Whittaker (really, the only other two he used) involved Whittaker "literally crying" after Conference or Whittaker failing to appreciate one of Felix Frankfurter's jokes. In the first instance, Potter Stewart told Schwartz about Whittaker's inferiority complex and discomfort at Conference, apparently leading to tears afterwards, and Schwartz clung to that story for two decades to call Whittaker "the worst Justice of the century" or "the least talented Justice appointed during this century."[20]

In the second instance, Schwartz was fond of reproducing an obscure exchange of correspondence between Frankfurter and Whittaker that Schwartz believed "best illustrates" why Whittaker was on the list of the Ten Worst Justices. In a movie censorship case Frankfurter circulated what Schwartz characterized as a "satirical" or "mock" opinion for the Court. After Whittaker naively

joined Frankfurter's *per curiam* opinion Frankfurter explained it was intended as a joke.[21] Since the Court did, in fact, announce a *per curiam* decision the week following this exchange, it was hardly unreasonable that Whittaker misunderstood Frankfurter's intentions.[22] Whittaker was still early in his first year as a Justice, and even more experienced Justices like Tom Clark (on the Court eight terms) failed to grasp Frankfurter's mockery. Unnoticed by Schwartz were two additional memos tucked away in Clark's Court papers indicating Clark took Frankfurter's satirical opinion seriously. Assuming Frankfurter intended his *per curiam* as the opinion of the Court and finding it inadequate substantively and stylistically, Clark prepared his own statement dissenting from Frankfurter's supposed jest:

> Mr. Justice Clark dissents from the summary disposition of this case, believing that the Court should not substitute its judgment in this case for that of the Chicago Police Censor Board, the mayor of Chicago, the federal District Court, and the Court of Appeals, and further believing that the constitutionality of the movie pre-censorship is a question entitled to more than summary consideration.

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Undoubtedly Stewart made unflattering remarks about Whittaker; however, in every recitation of Stewart's remarks Schwartz neglected to characterize whether Stewart spoke perniciously or sympathetically (just the opposite difficulty of interpretation as Silverman's reading of Douglas's words). Stewart's attitude towards Whittaker—whether ridicule or pity—was not clearly reflected in his words. Just as important, should Stewart's remarks (whatever their purpose) condemn Whittaker as severely as Schwartz believed? The movie censorship memos were ambiguous at best to prove Whittaker's stupidity. All that remained of Schwartz's selective judgment was Douglas's *Meyer* story, which from first to last was pure fabrication.

The new millennium began with renewed confidence in Douglas's *Meyer* legend. Melvin Urofsky, who found "malicious pleasure" in Douglas's recitation of the story, followed closely Silverstein's interpretation, claiming Whittaker "*turned to* Douglas for help," an aspect of the story even Douglas never recollected.[24] Richard Miller, a self-proclaimed independent scholar, reproduced Douglas's story verbatim (including the five to four error) to demonstrate "how desperate [Whittaker] must have been."[25]

Perhaps the most revealing new take on the story (for its revelation of the story's origins, not for its certainty of the story's reliability) was William Domnarski's adoration for Douglas, among others, in his book **The Great Justices, 1941–1954**. Praising Douglas's speed and do-it-himself approach to writing opinions, Domnarski related, "There seemed to be nothing beyond Douglas's talents. He had once, he confided to his law clerk, gone so far as to complete a most unusual double play, writing both the majority and dissenting opinions in what Douglas described as a trivial tax case."[26] Harkening back to **The Brethren**, Domnarski failed to mention the name of the case or Court term even though twenty-five years earlier Douglas revealed the case citation in his autobiography. The law clerk to whom Douglas confided, Domnarski noted, was Richard Benka, who in 1989 publicly shared his reminiscences of Douglas. Domnarski failed to mention (again) that Benka clerked for Douglas in 1973–1974, more than a dozen years after *Meyer* was decided and about the time Douglas was working on the second volume of his autobiography. Domnarski also noted a 1965 interview Douglas gave to Fred Rodell where Douglas boasted about writing both opinions in the same case, and he named Whittaker as bearing responsibility for the

**Although he struggled to write opinions, Justice Charles Whittaker excelled at interpreting federal tax questions, which comprised thirty percent of his majority opinions. During deliberations in *Meyer*, a tax case, Whittaker apparently took the majority away from Douglas, who had actually intended to write the majority opinion, not the dissent.**

majority opinion.[27] Although Domnarski appeared unaware that Douglas told this same story in much greater detail in his autobiography, the citations to Benka and Rodell clearly established that Douglas had the legend in mind as early as 1965, and he continued working at it as he prepared the second volume of his autobiography.

Most recently, three distinguished professors of history and law unwittingly included the *Meyer* legend in a comprehensive history of the Court as evidence that Whittaker "had risen above his level of competence." The legend was entrenched enough now that Whittaker "*gave the task* to his friend, Douglas."[28] From this source it appeared as though Whittaker never attempted his own opinion. He willingly acquiesced, and Douglas had to set things right. "For perhaps the first and only time in its history," these professors concluded, "a justice wrote both a majority and a dissenting

opinion." Certainly the *first* or *only* instance in Supreme Court history deserved notice, but the qualifier *perhaps* was more to the point: *perhaps* Douglas told a story that never happened, and it became so widely believed through repetition that only direct, contrary, documented evidence could dislodge its acceptance.

## Challenging Legend

In his controversial Douglas biography, **Wild Bill**, Bruce Allen Murphy set out to rectify the public image Douglas created for himself in his autobiography. Concluding that "in reality people did not know [Douglas] at all," Murphy claimed he "could not find a single person who could confirm a single account dealing with them in one of Douglas's books."[29] Concerning the second volume of Douglas's autobiography containing the *Meyer* legend, Murphy quoted former Justice Abe Fortas as saying, "They never should have published that second volume of his memoirs. People don't realize that Douglas was a very sick man by then."[30] Douglas suffered a debilitating stroke at the end of 1974 that eventually forced him to retire from the Court; but Murphy did not attribute Douglas's "fertile imagination" in recreating a life story unrelated to reality to his stroke. Even Douglas's first volume, released before his stroke, Murphy faulted with inaccuracies so pronounced that one of Douglas's law school classmates thought they "stretch[ed] hyperbole beyond its limits."[31]

Despite his best effort, which did not go unchallenged, to revise many of the legendary tales Douglas told in his autobiography, Murphy still accepted the *Meyer* story just as Douglas told it.[32] Buried in a note citation about Whittaker's Court resignation, Murphy reiterated that Whittaker "allowed Douglas to write his majority opinion for him," even though, as one reviewer of Murphy's book acknowledged, "Scholars have known for a long time that the books are full of . . . down-right lies."[33] Rather than rely solely on Douglas's autobiography, however, Murphy sought confirmation of the story from Douglas's secretary, Fay Aull Deusterman, in an interview thirty years after *Meyer* was decided. Considering memories fade, this author contacted Murphy to ascertain whether Deusterman had reason other than Douglas's autobiography to believe Douglas wrote both opinions. In a candid admission Murphy replied that Deusterman was "very advanced in age" at the time of the interview, and it was "quite possible that this was her recollection of WOD's memoir story rather than her personal recollection of the case."[34] Unlike other issues related to working for Douglas, Deusterman had no confirming documentation for the outcome in *Meyer*, and Murphy had no reason to go looking for it.

The first and, to date, only source to question Douglas's myth-making effort in *Meyer* was this author's Whittaker biography, **Failing Justice**, which addressed Whittaker's "failure" classification by examining those factors contributing to Whittaker's poor reputation. Any Justice who willingly abdicated his assigned majority opinion—or worse, gave it to a dissenter to write—should surely be regarded as a failure. Needless to say, I had my doubts.

Relying on factual and circumstantial evidence, I began with Douglas's claim the vote was five to four, which the documentary record proved wrong. Calling Douglas's account a "gross over-exaggeration," I considered Douglas's frame of mind as he worked on his autobiography.[35] By the time Douglas contacted Dagmar Hamilton in 1969 to assist him with the project, he believed his Court office was bugged and portions of his manuscript stolen. Douglas's paranoia had advanced to the point he believed his life was in danger, and he proposed Hamilton store his manuscript in a warehouse.[36] Just as significant, Douglas continued working on the second volume of his autobiography

following his stroke. He was no longer in control of his mind, and one of Hugo Black's former clerks, Charles Reich, recalled, "He was in much, much worse shape than he or the public realized."[37]

Aside from Douglas's mental condition, which could not conclusively be shown as contributing to his *Meyer* story, there were documentary incongruities in the historical record. Reading the two *Meyer* opinions together (majority and dissenting), it was inconceivable they were, as Douglas claimed, "written by the same man." Whittaker was a fiercely independent, self-reliant man who wrote with excruciating exactitude. Douglas, on the other hand, wrote his opinions so quickly that one reviewer considered them "taken as a whole . . . slipshod and slapdash."[38] Neither opinion in *Meyer* was legally complicated (not a single legal precedent was cited); their only difference involved interpretation of the Internal Revenue Code, an exercise at which Whittaker excelled. Additionally, the historical context suggested Whittaker would not have difficulty writing *Meyer* due to the timing and the topic. *Meyer* was argued and decided during Whittaker's fourth term when his opinion output was at its highest.[39] *Meyer* was also a tax-related question, an area of law in which Whittaker wrote most of his opinions. Because he was most comfortable with federal tax questions —and confident in his opinions—Whittaker received more of those assignments (thirty percent of his majority opinions). Even Douglas recognized Whittaker's expertise in this area, writing him at the end of their first term together, "You know this better than any of us."[40]

In one notable example of Whittaker's influence, he dissented all alone his first term in a tax-related case, *Flora v. United States*, but following reargument two years later he was assigned to write the majority opinion on the same question.[41] Although Whittaker ended up losing the majority in a close five to four decision (see below), Frankfurter praised his efforts in a separate opinion, and one of Frankfurter's clerks, Paul Bender, who convinced Frankfurter to support Whittaker's view, remarked, "Whittaker was the best tax lawyer on the Court."[42]

The timing of *Meyer* cast further doubts on Douglas's recollection. The Court heard oral arguments in eight cases, including *Meyer*, the second week of October. Following that first week of oral arguments (if one believed Douglas) Whittaker received three majority assignments (two from Chief Justice Earl Warren, and one from Frankfurter, the senior Associate Justice in the majority). No other Justice received so many majority assignments in one week (with the exception of Stewart, who was considered a swing vote).[43] It seemed implausible that Whittaker received so many assignments if he were having trouble writing one, particularly one involving a federal tax question so early in his fourth term. Besides, the time elapsed between argument and decision in *Meyer* was not excessive; the average time interval of the thirty-two cases argued from October through November was between eight to thirteen weeks (depending on one's average) —more time than *Meyer* took.[44]

For nearly thirty years, though, Douglas's tale persisted, through repetition and unquestioning laxity. Why bother to counter Douglas's claim? He fabricated so much about his life that one trivial case made little difference. Whether Whittaker wrote his own opinion in *Meyer* could hardly exculpate his dependency on prescription medicine to get through his first term or his nervous breakdown five years later. At best, **Failing Justice** raised doubts about Douglas's story, but doubts based on speculation—no matter how compelling—could not dispel the legend. The tale was too provocative. Even my effort to reconstruct case assignments accepted one basic premise of Douglas's account: Whittaker was *assigned* the majority opinion. How could it be otherwise, since Whittaker announced the majority decision? That was

the key question, and the answer lay in the circulation of opinions, the one source Douglas could not conceal.

## Setting the Record Straight

While reviewing case files in the Tom Clark papers at the University of Texas in Austin, I happened to come across *Meyer*, which was not a case anyone would notice at first glance. Like most of the case files in the Clark collection where Clark wrote no opinion, this file contained circulated drafts sent from other Justices. I might have ignored it completely save for one conspicuous feature: on one of Whittaker's circulated drafts he wrote the opinion of the Court, and on another, earlier draft he circulated a dissent. Immediately I realized another Justice was assigned the majority opinion (prompting Whittaker's dissent), and that was Douglas, who did, indeed, write the majority opinion, but *before* he called it his dissent. Whittaker was not assigned the majority opinion, as Douglas claimed; after the first week of oral arguments Douglas received the *Meyer* assignment.

Initially, Whittaker appeared to be the only Justice dissenting in *Meyer* when on Thursday, November 3, three weeks after oral arguments, he circulated his dissent. The next day Douglas recirculated the opinion of the Court (Douglas's initial circulation of the majority opinion was not contained in the Clark papers), with which Clark agreed. Shortly thereafter, Whittaker recirculated his dissent, indicating Black and Stewart joined him. The vote then appeared to stand six to three in Douglas's favor, but over the weekend Whittaker gained another Justice. On Monday Frankfurter, with some reservation, signed onto Whittaker's dissent, writing, "After arguing back and forth with myself, I have come to rest in finding it less uncomfortable to go with the Government than with the taxpayer. Accordingly, I am joining the dissent, although the result is not as obvious as Charlie's dissent makes it appear to be."[45] Now the decision was split.

Had *Meyer* been decided as it was assigned, the decision could have been announced within four weeks of oral argument; at the time the Court still announced decisions on Monday, and the first "decision day" was November 7. The delay in announcing *Meyer* had nothing to do with Whittaker struggling to write his opinion; he was not *assigned* to write one. The delay was caused by other Justices reconsidering Whittaker's dissent against Douglas's opinion for the Court. The switch in Whittaker's favor occurred on Monday, November 14, when John Marshall Harlan, who admitted to being "wishy-washy back and forth about the case," agreed to change his Conference vote, placing him on Whittaker's side.[46] The next day Douglas—for the first time—circulated what was styled a dissent.

Losing the majority in *Meyer* may have mattered less to Douglas than the taxpayer losing to the government. According to Bernard Wolfman, Douglas's behavior during this time period (1959–1964) in tax-related questions became "bizarre" and "enigmatic." He exhibited extreme tendencies, ruling in favor of taxpayers at a higher rate than in previous periods or than the Court generally. Other than his failed attempt in *Meyer* giving him a ready-made dissent that other Justices joined, Douglas wrote no opinions for the Court in tax cases during this period, which saw significant increases in his dissents without opinion and solo dissents.[47]

In the two weeks since Whittaker first circulated his dissent until it became the opinion of the Court, his draft enlarged from barely two pages to six pages, presumably without Douglas's assistance (Whittaker did not preserve any of his Court papers). Whittaker's opinion for the Court first circulated on Thursday, November 17, the same day Frankfurter shared with the Brethren two conflicting memos prepared by

his clerks regarding the opposing *Meyer* opinions because "all but two members . . . were in a state of dubiety."[48] Frankfurter's memo suggested only Whittaker and Douglas were certain of their positions, but the outcome in *Meyer* was not an easy decision for the rest of the Court. Despite the change in outcome, Clark adhered to Douglas's opinion, but William J. Brennan, Jr. did not join Douglas until a few days before the decision was announced. Chief Justice Warren appeared to be the enigma in this case. The Clark records did not indicate Warren signing onto either opinion—Whittaker's or Douglas's—suggesting Warren was content to remain with the majority no matter who held it. That was the difficulty with *Meyer*; it could easily have gone either way.

## Reconsidering the Legend

The story of *Meyer v. United States* was not that Whittaker struggled with his majority assignment and Douglas had to write it for him. The *Meyer* story, the real one, illustrated that Whittaker had some influence on the Court, however marginal. In the term before *Meyer* was decided, Whittaker's influence was evident in another minor case that gained some public attention when Whittaker and Douglas appeared to spat in open court. Ironically, like the real *Meyer* story one year later, Douglas received the majority assignment, Whittaker circulated a dissent, and in the end Whittaker's side prevailed while Douglas adapted his majority opinion into a dissent.

*Inman v. B & O Railroad*, was a negligence case where a railroad worker sued his employer for injuries sustained on the job.[49] A jury awarded the injured worker a $25,000 settlement, but an Ohio appeals court overturned that judgment, finding no evidence of negligence on the part of the railroad in protecting its employee, a crossing flagman hit one night by a drunken driver. This was another in a long line of cases over several years where the Court reconsidered the sufficiency of evidence presented to a jury and employers' liability for workers' injuries. These worker injury cases provoked sharp disagreement on the Court because some Justices, especially Frankfurter, thought the Court wasted its time in second-guessing jury determinations of compensation.[50] More than two weeks after the case was argued, Douglas circulated an opinion for the Court sustaining the jury's award to the injured worker.[51]

Initially, three Justices were prepared to dissent in *Inman* (Frankfurter preferred to ignore the case, claiming the writ of *certiorari* was improvidently granted). Whittaker's circulated dissent provoked mirth with a sardonic recommendation as to how the railroad could protect its flagmen from the unpredictability of drunken drivers: "provide them with military tanks and make sure they stay in them," he wrote, but "I am not even sure that this method, though ironclad, would be certain protection . . . for someone might shoot him." Stewart responded with his own dissent, endorsing "the armored tank suggested by my Brother Whittaker." [52] These seemingly frivolous remarks had a serious purpose: to counter Douglas's standard of what a jury might consider reasonable in terms of railroad negligence.

Soon after Whittaker and Stewart circulated their dissents, Clark wrote Douglas that he intended to change his Conference vote. He could no longer support Douglas's opinion in light of the reservations he had after reading the dissents. "While the ridicule indulged in has no effect upon me, other than a slight chuckle," Clark wrote, "I am still disturbed by the case itself." Clark had in mind the cause of the accident, drunk driving, "something over which of course the railroad had no control," and there were no accidents at that locale in the seven years the worker was stationed there. Although the dissents overlooked this last point, Clark thought it "more pertinent to their reasonable man doctrine than the caustic phrases used."[53]

One week later, Clark shared his doubts (and his changed vote) with the rest of the Court in an opinion of his own; the decision was then split four to four, and Douglas realized the Ohio court ruling denying compensation would be upheld without opinion. As long as Frankfurter refused to choose a side, preferring instead to waste no more of the Court's time on the matter, then an equally divided Court could make no decision and Whittaker's dissent became irrelevant. Believing his dissent would never see the light of day, Whittaker sent a copy of it as "an epistle" to his good friend and patron, Roy Roberts, president and general manager of the *Kansas City Star* newspaper. Asking Roberts to keep the dissent confidential, Whittaker admitted it was written "in a satirical and semi-humorous vein," and "a number of justices, on both sides of the controversy, have had a measure of fun out of [it]." Thinking Roberts, too, might get a "chuckle out of it," Whittaker confided, "I am not sure that this dissent is solely responsible—but I am sure that it played its part—in inducing the majority to withdraw from their original purpose."[54]

When Frankfurter decided to join Clark's opinion in order to make a five-person majority, he did so by expressly denouncing the Court's willingness to consider the case, but he did not want it "cast into the limbo of unexplained adjudications," depriving lower courts of knowing its disposition. Therefore, he did not consider it "undue compromise with principle" for him to join Clark.[55] With Frankfurter's accord, Clark issued the majority opinion, and Douglas restyled his opinion into a dissent. More surprising, though, than Frankfurter's willingness to set aside his convictions, was Whittaker's decision to announce his "tank" opinion as a concurrence. Nothing more was needed to dispose of the case (Stewart put his dissent aside after Clark changed his vote). Apparently, Whittaker was delighted enough with his "satirical and semi-humorous" opinion he wanted to announce it. It was possible, too, he believed what he wrote Roberts, that his opinion "played its part" in changing the outcome, and he wanted it preserved.

What happened next surprised onlookers and baffled Whittaker. While listening to Whittaker's concurrence, not unexpectedly, "a murmur of amusement ran through the courtroom." Clearly, Whittaker's opinion had its intended effect, but Douglas, upon reading his dissent, appeared offended by the levity. "The case is rather an important one," he said, "it cannot be dismissed by this attempted humor." The gravity of the case, Douglas announced, belied the "rather smart-alecky things that have been said."[56] As he read his dissent, Douglas became visibly angry, and he left the Bench immediately afterwards. Certainly any Justice, including Douglas, who found Whittaker's mirth distasteful could request alterations to the opinion. None did, though, because it was not as offensive as Douglas portrayed. Instead, the outcome of *Inman*, losing the majority (particularly to his archenemy Frankfurter) rankled Douglas more than Whittaker's flippancy.[57]

That Whittaker had any influence at all was not apparent in the historical record; the *U.S. Reports* published final decisions, not the drafts and circulated opinions that lay behind most Court decisions. It was not unusual for the final disposition of a case to differ from the first circulated majority opinion as Justices reconsidered their positions. At times, dissenters ultimately prevailed, and those in the initial majority issued dissents (unless opinions were set aside and never published, which sometimes happened).[58] Argued the same day as *Inman* but taking much longer to decide, *Flora v. United States* provided another example of a case where Whittaker and Douglas were on opposite sides, Clark determined the outcome, and Whittaker's influence was discernible.

As mentioned previously, *Flora* first went to the Court during Whittaker's first term. Eight Justices agreed that a taxpayer

could not bring suit in federal court to challenge a tax deficiency until the full amount owed was paid. Whittaker was the only Justice to dissent, which amounted to one sentence supporting three appellate decisions. One year later the Court granted rehearing, and the case returned during Whittaker's third term. As the recognized tax expert on the Court, Whittaker gained enough adherents to his view supporting the taxpayer that Frankfurter, the senior Justice in the majority, assigned him the Court opinion. Within two weeks of oral arguments Whittaker circulated his majority opinion, and Clark indicated he could join it, but first Clark wanted to read the dissents.[59] The Court waited another ten weeks before Chief Justice Warren, who authored the first *Flora* decision, replied with a thirty-three-page dissent. Douglas also circulated a dissent, but his was more a diatribe against the Court being overworked or accepting frivolous cases than concern for the ruling.[60] Had the decision been announced as assigned, Whittaker might have vindicated his first minimal dissent in a close five to four decision. As happened in *Inman*, though, Clark switched sides.

Holding onto a bare majority to overrule one of its own decisions from two years earlier proved too much for Clark, particularly with Douglas's dissent drawing attention to the Court's internal squabbles. Instead of joining Warren's dissent buttressing the Court's prior decision, Clark issued his own dissent decrying the Court's change in direction:

> The present majority says the case comes here this Term "in a very different posture." But it appears the same old shoe to me. If you look below the gloss, it involves the same facts, the same statute, and the same legal problem—in fact each party relies on the same theory as when the case was argued here in 1958. There is one change, namely, the minds of three of the Justices.[61]

Within a month, Warren's dissent became the opinion of the Court, making the separate opinions of Clark and Douglas unnecessary. Since Clark's vote had been the most precarious, Whittaker continued to appeal directly to him, asking Clark to read and ponder what was then Whittaker's dissent and to explain how it was in error.[62] Clark could not be swayed, however, making the final decision in *Flora*, like the outcome of *Meyer*, different from what was originally assigned.

## Resolving the Legend

The foregoing examples epitomized the real story of *Meyer v. United States*, which was not a "first and only time" in Court history story or another predictable failing of a much maligned Justice. Nothing Douglas reported about *Meyer* was true: it was not a five to four decision; Whittaker was not assigned the opinion of the Court; Douglas had not already written a dissent; and, most significant, Douglas did not write both decisions announced. Like *Inman* and *Flora* before it, *Meyer* was another incident where Whittaker and Douglas remained on opposing sides, and the majority decision changed as a result of Whittaker's exertions at persuasion. The true legacy of *Meyer* was that Whittaker's dissent prevailed and Douglas tried to cover over what actually happened so he could recreate a preposterous myth trumpeting another achievement.

The last remaining but finally unanswerable question was: why would Douglas tell such a fantastic tale? His original version of the story, before later embellishments, provided enough detail that his recollection seemed certain. There were elements of truth that made Douglas's story at least plausible: he usually did work faster than his colleagues, and Whittaker did struggle making some decisions. Was that all that was needed—Douglas's overdeveloped ego and Whittaker's peculiar difficulty? Considering

Douglas fabricated his *Meyer* legend with at least one verifiable error (the five to four outcome), why did he choose that case in particular? Douglas was admittedly brilliant; he should have had no trouble selecting one of the eleven obscure cases where Whittaker wrote the Court opinion and Douglas wrote a dissent. The problem for Douglas was choosing a case that made sense.

In the five years they served together Douglas dissented without opinion six times when Whittaker wrote for the majority (two of those included one brief sentence).[63] Not counting *Meyer*, that left Douglas four other decisions where he actually wrote a dissent, but one of those was unacceptable for the story because other Justices also wrote dissents, meaning Douglas could not write *the* dissent.[64] The other three were probably just as unacceptable because they involved civil liberty claims and would be more important to Douglas than a simple tax question of statutory interpretation.[65]

That left *Meyer v. United States*, an inconsequential decision, as the only practicable candidate for the story. Using *Meyer* to impress readers with his capacity to write any opinion (especially two opposing opinions) gave Douglas the cover he needed. *Meyer* had been close; only Warren's willingness to join whoever held the majority avoided a five to four outcome. *Meyer* was also legally uncomplicated and had just two opinions--one for the Court and one dissent. Since the outcome in *Meyer* involved Whittaker and Douglas exchanging the majority, there were considerable similarities to their arguments. That may explain why Douglas chose *Meyer* for his tall tale: of all of Whittaker's majority opinions where Douglas dissented, it was the only one where a) Douglas dissented with opinion, b) Douglas wrote the only dissent, and c) no one had ever heard of or would remember it.

Claiming to have written a majority and a dissenting opinion in the same case was not at all extraordinary; at least, not the way it usually happened. Modern Court history is replete with instances of cases turning out differently from opinion assignment to final decision. Any Justice could see their opinion for the Court become a dissent (or visa versa) as votes changed during the circulation of opinions. That was what happened in *Meyer*, but that was not what Douglas claimed. He brashly asserted he wrote both final opinions and, by implication, accused Whittaker of writing neither. Why would Douglas so blithely besmear Whittaker's reputation?

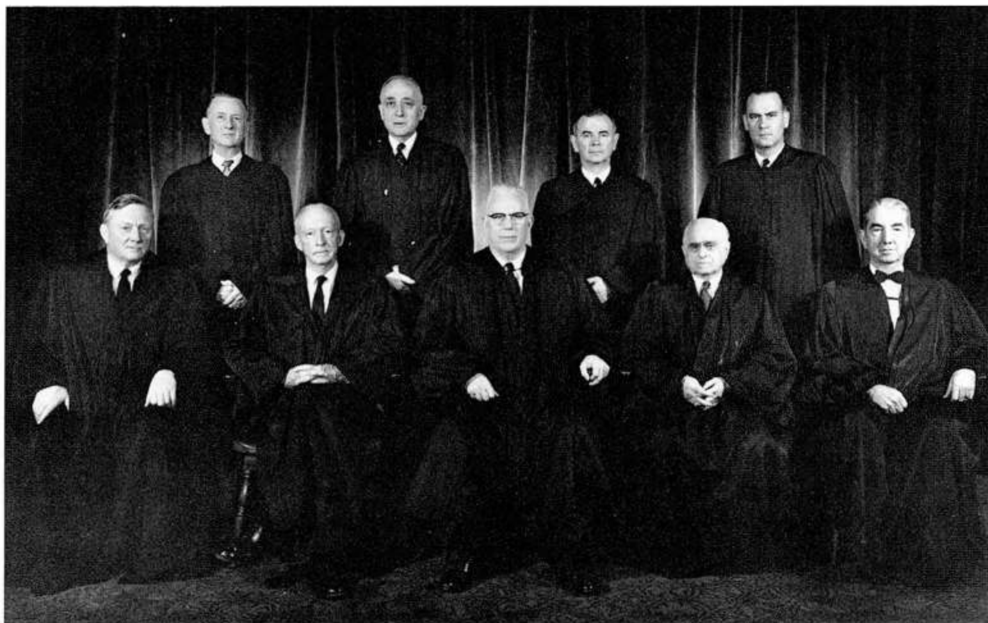
The answer to that question will remain speculative but may be found in the historical circumstances. Whittaker served on the Court five years, but he completed only four full terms (his 1956 and 1961 terms were partial). The four full terms he served (1957–1960) corresponded with a decisively conservative turn of the Court.[66] From 1949–1967 (using Tom Clark's service), the greatest numbers of close decisions (one vote margin) happened during this conservative turn, which corresponded with the greatest number of cases assigned by a senior Associate Justice when the Chief Justice was not in the majority.[67] Since Frankfurter, the recognized leader of the conservative bloc, assigned most of these cases, Whittaker's four full terms reflected a time of highly contested decisions (close votes) where the conservative side more often prevailed. In fact, the 1960 term when *Meyer* was decided stood out as the greatest number of close decisions and as the greatest number of times in close decisions when Whittaker's side prevailed.[68] Considering Whittaker (and Frankfurter shortly afterward) left the Court during the succeeding term, *Meyer* may have symbolized for Douglas everything he detested about the Court's conservative turn.

The historical context of *Meyer* also included events taking place outside the Court. The 1960 term was especially difficult for Douglas as he came to loathe his place on the Court. According to Murphy's biography, Douglas realized his presidential aspirations were finally at an end. Before John F.

Kennedy received momentum to become the Democratic nominee, Douglas hoped Lyndon Johnson would choose him to be Johnson's running mate. Douglas was in anguish over the potential of two Kennedy terms, setting up Johnson (not Douglas) as the Democratic successor. In one heart wrenching, drunken rant Douglas poured out his venom over losing the White House for good, but the most troubling pathos was Douglas's realization he was trapped on the Court.[69] All this occurred before the 1960 term began, but Douglas undoubtedly carried his enormous disappointment with him. Election Day was November 8, one day after Frankfurter joined Whittaker's dissent in *Meyer*, making the case five to four in Douglas's favor. One week later Whittaker secured the majority, and Douglas lost his influence. According to Murphy, influence on the Court mattered little to Douglas; he wanted to be with the action, which only the presidency offered.[70] *Meyer* became another lost cause in an increasingly long but inconsequential judicial career.

Finally, Whittaker's ignominious departure from the Court gave Douglas an easy target if he needed a patsy for his legend. Although Whittaker did not have the shortest tenure of Douglas's twenty-five Court colleagues, he was the only one forced to retire because of disability. A combination of several factors, including relentless pressure and underlying emotional instability, led to Whittaker's nervous breakdown. Before he was hospitalized, Whittaker disappeared from the Court for several weeks seeking solitude in the Wisconsin woods. Once he returned to D.C. a severe, recurrent depression set in and Whittaker contemplated suicide.[71] To protect the Court, Chief Justice Warren gave Whittaker little choice but to retire; to protect Whittaker, Warren never permitted him to judge again on the lower federal courts, leading to Whittaker's resignation from federal service.[72]

Nearly a decade later Whittaker's reputation was irrevocably damaged when he was consigned to the lowest "failure"



**Whittaker's four full terms reflected a time of highly contested decisions where the conservative side, led by Felix Frankfurter, more often prevailed. The author suggests that Douglas's dismay at the conservative turn of the Court may have prompted him to malign Whittaker. Above are the members of the Court in 1960.**

classification, leaving the unmistakable impression that his Court appointment was a mistake. None of his opinions were considered significant, and any influence he exerted was overlooked. His return to Kansas City, Missouri, following his retirement went as unnoticed as his thirty-year rise in corporate law beforehand. Following Whittaker's death in 1973, no one would challenge—or even care—if Douglas attributed to him the inability to write an opinion. Of all the Justices who eventually served with Douglas, Whittaker most likely would turn to another Justice for assistance. Only a "failure" would accept the opprobrium of not writing an opinion assigned to him. Once the story got out it caught hold. Everyone who read it believed it.

For over thirty years Douglas's *Meyer* legend was read and repeated. It became a *rara avis* of Court history—relatively inconsequential but offbeat enough to attract attention. Usually it represented plaudits to Douglas's extraordinariness, but it also became a cudgel for Whittaker's weaknesses. The allure of the story lay in its unbelievability; it was told with such conviction few suspected it of fraudulence.

Without doubt, William Douglas was an extraordinary Justice and a complicated man. He could be petty, mean, and vindictive. He could also be commended for much of his judicial legacy—whether or not one agreed with his methods or his manners. He should not, however, be believed for the legend of *Meyer v. United States*. Likewise, Charles Whittaker was at best a mediocre Justice who never wanted to go to the Supreme Court. He was a first-rate lawyer who was more comfortable as a trial judge than an appellate jurist. On the Supreme Court he suffered at times with intense indecision and self-doubt. He was not, however, assigned the majority opinion in *Meyer*. His reputation as the Court's tax expert *gave* him the majority—a majority he took away from Douglas. While Whittaker could be faulted many shortcomings, writing his own *Meyer* opinion, first as a dissent and then as the opinion of the Court, was not one of them.

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## ENDNOTES

[1] 364 U.S. 410 (1960).

[2] The first person was Samuel Blatchford (District Court for the Southern District of New York, 1867; Court of Appeals for the Second Circuit, 1872; and Supreme Court, 1882). Sonia Sotomayor became the third person to do so (District Court for the Southern District of New York, 1992; Court of Appeals for the Second Circuit, 1998; Supreme Court, 2009). Whittaker served on the District Court for the Western District of Missouri, 1954; Court of Appeals for the Eighth Circuit, 1956; and Supreme Court, 1957. Unlike the other two, Whittaker advanced so quickly through the lower federal courts that one President, Dwight Eisenhower, made all three nominations.

[3] Albert Blaustein and Roy Mersky, "The Twelve Great Justices of All Time," *Life*, October 15, 1971, 53–59; which was subsequently reproduced with the names of the raters, "Rating Supreme Court Justices," *American Bar Association Journal* 58 (November 1972): 1183–89; *see also* Blaustein and Mersky, **The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States** (Hamden, CT: Archon Books, 1978). Robert W. Langran considered the motivations of the raters, "Why Are Some Supreme Court Justices Rated as 'Failures'?" *Supreme Court Historical Society Yearbook* (1985): 8–14; and William G. Ross analyzed the factors contributing to certain ratings, "The Ratings Game: Factors that Influence Judicial Reputation," *Marquette Law Review* 79, no. 2 (Winter 1996): 401–52. In an updated 1993 survey, Blaustein & Mersky reported Whittaker received thirty-eight rankings "below average," thirty-two rankings "failing," and twenty-six rankings "average," placing him just ahead of James McReynolds in their overall mean ranking; *ibid.*, 449.

[4] Leon Friedman, "Charles Whittaker," in **The Justices of the United States Supreme Court: Their Lives and Major Opinions**, eds. Leon Friedman and Fred I. Israel (New York: Chelsea House, 1969), 4:2903; and Victoria

Woeste, "Charles Evans Whittaker," in **The Supreme Court Justices: A Biographical Dictionary**, ed. Melvin I. Urofsky (New York: Garland Publishing, 1994), 533.

[5] *See generally* James F. Simon, **Independent Journey: The Life of William O. Douglas** (New York: Harper & Row, 1980); **and Bruce Allen Murphy, Wild Bill: The Legend and Life of William O. Douglas** (New York: Random House, 2003). The accounts in Simon portray Douglas more admirably than Murphy.

[6] Simon recounted Douglas's bout with "infantile paralysis" using a familiar passage from Douglas's first autobiographical work, **Of Men and Mountains** (1950), but later admitted Douglas generously used "writer's license" when describing his "climb from poverty and polio," 21 and 284. Murphy, on the other hand, argued Douglas invented his polio diagnosis to reshape his public image, **Wild Bill**, 283–86.

[7] In response to Murphy's unflattering portrayal of how Douglas treated his law clerks, several of Douglas's former clerks prepared a rejoinder, Marshall Small, "William O. Douglas Remembered: A Collective Memory by WOD's Law Clerks," *Journal of Supreme Court History* 32, no. 3 (November 2007): 297–334; Murphy then defended his assessment of Douglas's treatment in "Fifty-Two Weeks of Boot Camp," in **In Chambers: Stories of Supreme Court Law Clerks and Their Justices**, eds. Todd C. Peppers and Artemus Ward (Charlottesville: University of Virginia Press, 2012), 191–95.

[8] Small, 299.

[9] Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon and Schuster, 1979), 63.

[10] Challenges to **The Brethren**'s reporting began soon after publication. *See, for example*, Anthony Lewis, "Supreme Court Confidential," *New York Review of Books*, February 7, 1980, and the reply to Lewis from Woodward and Armstrong, "The Evidence of **The Brethren**: An Exchange," *New York Review of Books*, June 12, 1980. A more recent refutation was Ross E. Davies, "A Tall Tale of **The Brethren**," *Journal of Supreme Court History* 33, no. 2 (July 2008): 186–99. Arnold Rice mistakenly attributed to Whittaker a "dozen or so" opinions, **The Warren Court, 1953–1969** (New York: Associated Faculty Press, 1987), 249; and Henry Abraham credited him with only eight, **Justices and Presidents: A Political History of Appointments to the Supreme Court**, 3d ed. (New York: Oxford University Press, 1992), 271. Relying on Abraham, Richard Miller claimed Whittaker wrote only eight opinions, then inexplicably named at least a dozen Whittaker opinions elsewhere in his book, **Whittaker: Struggles of a Supreme Court Justice** (Westport, CT: Greenwood Press, 2002), 69.

[11] Stephen R. McAllister recently argued that Byron White may have assisted, "Justice Byron White and **The Brethren**," *Green Bag* 15, no. 2 (Winter 2012): 159–73. McAllister claimed Potter Stewart, Lewis F. Powell, Jr., and Harry Blackmun were publicly identified as assisting Woodward and Armstrong. David Garrow speculated that William H. Rehnquist, John Paul Stevens, or Byron White were likely candidates, "The Supreme Court and **The Brethren**," *Constitutional Commentary* 18 (2001): 304–05.

[12] Bernard Jacob to author, June 4, 2003. Jacob clerked for Douglas, and he remembered *Meyer* "pretty well." "The Justice, as usual, wrote the draft very quickly and I did some work on it," Jacob recalled, "I was not terribly impressed by the draft, but I don't think I improved it much. I may remember the Justice saying it could have gone either way;" *quoted in* Craig Alan Smith, **Failing Justice: Charles Evans Whittaker on the Supreme Court** (Jefferson, N.C.: McFarland, 2005), 315, n. 18. Whittaker's clerk, James Edwards, said, "It's hard to imagine that he would let another justice write an opinion for him. He was too proud of his opinions. If he did let anyone else write his opinion, he would not let anyone in his office know about it." Author interview, June 17, 1996; quoted in *ibid.*, 190.

[13] Simon, 443–44. *See also* Murphy, **Wild Bill**, 426.

[14] Compare Richard Shenkman and Kurt Reiger, **One Night Stands with American History: Odd, Amusing and Little-Known Incidents** (New York: William Morrow, 1980), 261 (citing personal interview with Dagmar Hamilton, February 1979) with William O. Douglas, **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (New York: Random House, 1980), 173–74.

[15] Woeste, 533–34.

[16] Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations** (New York: W.W. Norton, 1994), 162, n. 2.

[17] Melvin I. Urofsky, **The Warren Court: Justices, Ruling and Legacy** (Denver: ABC-CLIO, 2001), 65. Urofsky cited Douglas, 250, for "affable companion," but not 173–74 for the *Meyer* story.

[18] Bernard Schwartz considered Douglas's behavior erratic and his opinions unpolished, "Supreme Court Superstars: The Ten Greatest Justices," *Tulsa Law Journal* 31 (Fall 1995): 153.

[19] Bernard Schwartz, **A Book of Legal Lists: The Best and Worst in American Law** (New York: Oxford University Press, 1997), 31.

[20] Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New York: New York University Press, 1983), 216; Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993), 271–72; and Schwartz, **A**

**Book of Legal Lists**, 30–31. Not until the final publication did Schwartz reveal Stewart as the source.

[21] Schwartz identified his source as the Felix Frankfurter papers, Harvard Law School, **Super Chief**, 216–17; *see also* Schwartz, **A Book of Legal Lists,** 31–32.

[22] *Times Film Corporation v. City of Chicago*, 355 U.S. 35 (1957). Smith believed Whittaker's novice overawe of Frankfurter and of the Court caused his reaction because Whittaker did not know Frankfurter made a habit of writing mock opinions, 192.

[23] Supreme Court Case Files, October Term 1957, Box A70, folder 7, No. 372 *Times Film Corp. v. Chicago*, undated, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin (Clark Papers).

[24] Urofsky, **The Warren Court**, 65.

[25] Miller, 73. Miller cited Woodward and Armstrong, 63, and Douglas, 173–74. Smith criticized Miller for the "embarrassingly large number of material errors" in his book and accused Miller of using sources "without giving proper credit," 4.

[26] William Domnarski, **The Great Justices, 1941–54: Black, Douglas, Frankfurter & Jackson in Chambers** (Ann Arbor: University of Michigan Press, 2006), 143.

[27] *Ibid.*, 191 n. 36.

[28] Peter Charles Hoffer, William James Hull Hoffer, N.E. H. Hull, **The Supreme Court: An Essential History** (Lawrence: University Press of Kansas, 2007), 340.

[29] Murphy, **Wild Bill**, 474 and 514.

[30] *Ibid.*, 499.

[31] Milton Handler to Murphy, July 10, 1991; *quoted in* **Wild Bill**, 660, n. 474. Simon acknowledged the first volume bemused Douglas's friends and family, who debated whether it should be marketed as fiction or nonfiction, 442.

[32] Murphy, **Wild Bill**, 637, n. 360. David Danelski challenged Murphy's accounts of Douglas having polio as a child and whether his military record entitled him to burial at Arlington National Cemetery; see Melvin I. Urofsky, "A Portrait of Douglas—One Half Missing," review of **Wild Bill**, H-Law, Humanities and Social Sciences online (http://www.h-net.org/), June 2003, http://www.h-net.org/reviews/showrev.php?id=7726 (accessed June 29, 2014).

[33] Urofsky, "A Portrait of Douglas." Richard A. Posner considered Douglas "a flagrant liar" and recounted several of the more outlandish lies in his review, "The Anti-Hero: Another Lying Leftie Exposed," *The New Republic*, February 24, 2003, http://www.freerepublic.com/focus/news/847746/posts (accessed July 2, 2013).

[34] Murphy to author, June 3, 2013.

[35] Smith, 185.

[36] Murphy, **Wild Bill,** 426; *see also* Simon, 443–44.

[37] *Quoted in* Simon, 450. *See* Simon, 454; and Murphy, **Wild Bill**, 498–99. Before his retirement Douglas's deteriorating condition led the other Justices to agree to make no decisions where his vote was determinative; even after his retirement Douglas insisted he was still a member of the Court. *See* Simon 448–53; and Murphy, **Wild Bill**, 487–88 and 497–498.

[38] Posner, "The Anti-Hero."

[39] Whittaker authored 12 opinions for the Court and 9 dissents; by comparison, Frankfurter authored 12 and 9, respectively, Harlan (11 and 9), Brennan (11 and 9), Stewart (12 and 7), and Warren (11 and 4).

[40] Douglas to Whittaker, May 29, 1958; quoted in Melvin I. Urofsky, ed., **The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas** (Bethesda, MD: Adler & Adler, 1987), 129.

[41] 357 U.S. 63 (1958) and 362 U.S. 145 (1960).

[42] Author interview, October 1, 2001; *quoted in* Smith, 165. According to Bender, Frankfurter usually voted mechanically with the majority in tax-related questions, but Frankfurter's disgust with Chief Justice Warren's liberal-activist posture led him to pay more attention in *Flora* only to embarrass Warren's first *Flora* decision. *See* Smith, 163.

[43] Assuming the assignment of opinions matched their final announcement, after the first week of oral arguments the assignments were Whittaker (three), Harlan (two), Warren (one), Black (one), and Frankfurter (one). After two weeks of oral arguments, the assignments were Whittaker (three), Stewart (three), Warren (two), Black (two), Frankfurter (two), Harlan (two), Brennan (two), Douglas (one), and Clark (one).

[44] Counting the week a case was argued to the day it was decided, the median average was 8 weeks while the mean average was 12.8 weeks. The shortest time interval was three weeks while the longest time interval was thirty-four weeks. A dozen cases that term took twenty weeks or more to complete; Shenkman and Reiger clearly misunderstood the time necessary for Court decisions where they noted Douglas's impatience as "days soon turned into weeks" while awaiting Whittaker's opinion, 261.

[45] Frankfurter memo, November 7, 1960, Supreme Court Case Files, October Term 1960, Box A105, folder 5, No. 13 *Meyers v. United States*, 1960, Clark Papers.

[46] Harlan memo, November 14, 1960, *ibid.*

[47] Examining Douglas's record from four time periods, Wolfman et al. considered their data for 1959–1964 "extraordinary"; *see* Bernard Wolfman, Jonathan Silver, and Marjorie Silver, **Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases** (Philadelphia: University of Pennsylvania Press, 1975), xvi and 43–44.

[48] Frankfurter memo, November 17, 1960, Supreme Court Case Files, October Term 1960, Box A105, folder 5, No. 13 *Meyers v. United States*, 1960, Clark Papers.

[49] 361 U.S. 138 (1959).

[50] In the decade preceding *Inman*, the Court considered at least two dozen worker injury cases with written opinions. These cases involved the Federal Employers' Liability

Act, 45 U.S.C. § 51, enacted in 1908 to protect railroad workers, and the Jones Act, 46 U.S.C. § 688, enacted in 1920 to provide remedies to sailors injured or killed in the course of maritime service. For conflict dealing with these cases, *see* Smith, 201–02.

[51] Douglas circulated draft, November 30, 1959, Supreme Court Case Files, October Term 1959, Box A94, folder 4, No. 36 *Inman v. Baltimore and O.R. Co.*, 1959 & undated, Clark Papers.

[52] Whittaker circulated draft, December 1, 1959; and Stewart circulated draft, December 2, 1959, *ibid.*

[53] Clark to Douglas, December 3, 1959, *ibid.*

[54] Whittaker to Roberts, December 10, 1959, Charles Whittaker papers, Kansas City, Missouri. *See also* Whittaker's concurring opinion, 361 U.S. 138 (1959) at 142. Smith considered this correspondence evidence of Whittaker's sense of humor, 193, contrary to Schwartz's criticism that Whittaker failed to appreciate a joke; *see* text accompanying note 21.

[55] Frankfurter's concurring opinion, 361 U.S. 138 (1959) at 141.

[56] *Quoted in New York Times* and *Kansas City Times*, December 15, 1959. These comments were not part of Douglas's written opinion and were delivered prior to reading his dissent. Theodore M. Vestal considered Whittaker's *Inman* opinion to his "discredit" and called it "one of the most intemperate opinions written by an Eisenhower Court justice," **The Eisenhower Court and Civil Liberties** (Westport, CT: Praeger, 2002), 272.

[57] Smith posited Douglas's outburst was a response to Whittaker making spectators laugh, momentarily giving him the limelight, which Douglas craved more, 204.

[58] *See, for example*, Bernard Schwartz, **The Unpublished Opinions of the Warren Court** (New York: Oxford University Press, 1985).

[59] Whittaker circulated draft, November 27, 1959, Supreme Court Case Files, October Term 1959, Box A100, folder 12, No. 492 *Flora v. United States*, 1959 Nov–1960 Feb., Clark Papers.

[60] Douglas circulated draft, undated, folder 13, *ibid.*

[61] Clark circulated draft, February 16, 1960, folder 12, *ibid.* In his draft, Clark noted that Stewart did not participate in the first *Flora* decision and Whittaker was the only Justice in dissent.

[62] Whittaker to Clark, February 27, 1960, *ibid.*

[63] Douglas dissented without opinion in *CIR v. Acker*, 361 U.S. 87 (1959), *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173 (1959), *Bulova Watch v. United States*, 365 U.S. 753 (1961), and *United States v. Neustadt*, 366 U.S. 696 (1961). Douglas wrote one sentence dissents in *United States v. Hvass*, 355 U.S. 570 (1958), and *Williams v. Oklahoma*, 358 U.S. 576 (1959).

[64] *Killian v. United States*, 368 U.S. 231 (1961); Black and Brennan wrote their own dissents.

[65] In *McPhaul v. United States*, 364 U.S. 372 (1960), and *Wilson v. Schnettler*, 365 U.S. 381 (1961), other Justices joined Douglas's dissents, but in *Draper v. United States*, 358 U.S. 307 (1959), Douglas dissented alone. Smith argued that Whittaker's *Draper* opinion had "the greatest lasting impact," 173–75, when the Court later identified *Draper* as "the classic case on the value of corroborative efforts of police officials," *Illinois v. Gates*, 462 U.S. 213 (1983) at 242.

[66] The Court's conservative turn was partially due to congressional threats against it at the end of the 1956 term, when it announced several Communist-related decisions. According to Lucas Powe, the change in direction was intentional, and Frankfurter was responsible for it. While not the "switch in time to save nine" the Court faced two decades earlier, Powe believed the threat more serious, **The Warren Court and American Politics** (Cambridge: Harvard University Press, 2000), 127–34 and 141–42. Walter Murphy believed the Court retreated in the field of domestic security to give Congress more responsibility for it, **Congress and the Court: A Case Study in the American Political Process** (Chicago: University of Chicago Press, 1962), 267. *See also* Vestal, 4–5; and Smith, 123–25.

[67] The numbers of close decisions (one vote margin) from 1957–1960 were twenty-three, twenty-two, twenty-two, and twenty-five, respectively. The numbers of cases assigned by a senior associate Justice were twenty-six, twenty-four, twenty-one, and twenty, respectively, with Frankfurter assigning twenty-two, eighteen, seventen, and eighteen, respectively. Leading in receiving these assignments were conservative to moderate Justices like Clark in 1957 (seven cases), Harlan in 1958 (six), Clark in 1959 (six), and Stewart in 1960 (seven).

[68] In 1957, of the twenty close cases (one vote margin) where Douglas and Whittaker were on opposite sides, Douglas's side prevailed eight times (40%) and Whittaker's side prevailed twelve times (60%). In the three subsequent terms the numbers were as follow: 1958 included nineteen cases where Douglas's side prevailed seven (36.8%) and Whittaker's side prevailed twelve (63.2%); 1959 included twenty-one cases where Douglas's side prevailed twelve (57.1%) and Whittaker's side prevailed nine (42.9%); and 1960 included twenty-one cases where Douglas's side prevailed six (28.6%) and Whittaker's side prevailed fifteen (71.4%).

[69] Murphy, **Wild Bill**, 346–50.

[70] *Ibid.*, 351.

[71] For the pressure leading to Whittaker's disappearance, *see* Smith, 213–16; for Whittaker's plans to commit suicide, *see ibid.*, 220–21.

[72] For Warren protecting the Court, *see ibid.*, 221–22; for Whittaker's willingness to judge again and Warren's reluctance to permit it, *see ibid.*, 231–33.

# Supreme Court Messenger, 1977 Term

THOMAS G. SNOW

U.S. Supreme Court hearings offer more highbrow free theater than the often tragedy-filled but captivating criminal trials held a few blocks down Constitution Avenue in D.C. Superior Court. Someone old enough to have attended an oral argument at the Supreme Court during its 1977–78 Term may have noticed the four young people seated on the raised bench directly behind the nine sober-faced Justices. Back then, the white-haired, sonorous-voiced, regal-looking Warren Burger was Chief Justice of the United States. Sandra Day O'Connor hadn't yet shattered the federal judiciary's glass ceiling. And one of the young men behind the Justices was an awestruck, bearded, recent college graduate in philosophy who was considering law school but who really did not have a clue about what he wanted to do with his life. That young man was me.

We were known as Supreme Court messengers. In 1977 there seemed to be two messenger types. One was like me—somebody recently out of college with plans to stay at the Court a relatively short time before going on to higher education, usually law school. Some in this group were already attending law school at night. We were mostly (but not exclusively) young men, and mostly white. It seemed to me that those in this group had, like me, learned about and obtained the messenger position via some personal or family connection to the Court. The other group was made up of mostly African-American men. Some were young and some were not. I don't believe most of them had graduated from college. For them, the messenger job was not a stepping-stone; it was a long-term position. Some were assigned to individual Justices and seemed to work for their judge as a combination valet, driver, and messenger. Others worked for all the Justices performing the many tasks described below. All the messengers in both groups, except those who worked for individual Justices, sat together in a small room just across the hall from the Marshal's Office. Despite our different backgrounds and goals, we got along great and had a lot of laughs.

The title of "messenger" did not begin to capture all of our diverse duties and

responsibilities. On "Court days," we would either usher visitors quietly in and out of the Courtroom, or sit up on the bench with the Justices. The latter was the more coveted assignment. There we would ready ourselves to scurry off in the middle of oral argument in response to a scribbled note from the outstretched hand of a Justice—usually containing simply the volume and page number of a past Supreme Court precedent wanted for immediate perusal.

Before Court, after preparing the bench with pens, paper, and pewter glasses of ice water, we would meet the Justices in the robing room as they trickled in, one by one, in response to the buzzer that sounded in each of their Chambers, summoning them to duty. There we would help them slip on their black judicial robes—that is, for all but the spry, most junior Justice at the time, John Paul Stevens: he insisted on robing himself. Then, at 10:00 a.m. sharp, as the Marshal of the Court began his cry commencing the day's business ("Oyez, Oyez, Oyez ..."), we would pull back the large courtroom curtains as the Justices stepped to the places dictated by their seniority, and roll their chairs carefully up behind their knees so that, as the Marshal finished, ("... God save the United States and this Honorable Court!"), they could sit down both gracefully, and simultaneously.

But as heady as our time on the bench could be—on some occasions I would understand enough to fantasize about how I planned to vote on the case—much of our most interesting work took place on days when the Court was not in session. Then we would chauffeur the Justices around town to medical or social appointments, serve at occasional luncheons hosted by them or their wives, run draft decisions and other documents back and forth between their Chambers, and give brief lectures to groups of tourists on the history of the Court and the magnificent Supreme Court building. On days the Justices met to discuss and vote on cases, we sat sentry in an anteroom outside of the judicial conference room, ready

*Supreme Court of the United States*
*Memorandum*

................................., 19.......

Something Wrong with This Water

This note, written by Chief Justice Warren Burger, is the subject of an amusing anecdote by the author, who served as a messenger at the Court during the 1977 Term.

to pass papers and communications in and out, but careful never to violate their sacred and secretive space.

All this gave us a unique and privileged view of the Burger Court Justices. We heard the jokes and quips intended only for each other. And we saw how they interacted with and treated everyday folks like us—non-lawyers at the bottom of the Court hierarchy whose only job was to serve them.

So recently, when I stumbled across a stack of notes that I jotted down and then kept wrapped in a rubber band and stashed in a nightstand for the past three and a half decades, I got to thinking. All the members of the Burger Court have long since left the bench. The only one still alive is that Energizer Bunny of a Justice, John Paul Stevens. Perhaps it is time to share the moments—some playful and some poignant—captured in those pages. Maybe they will add just a little bit to our understanding of these important Americans.

*Supreme Court of the United States*
*Memorandum*

................................., 19.......

Dear Chief
Please look a
little more stern
+ Hughes-like
Byron
Bill R
HAB

**Justices Byron White, William H. Rehnquist, and Harry Blackmun wrote—but did not send—this note to Chief Justice Burger during oral argument.**

And I'm pretty sure if I don't tell these stories, they won't get told.

## The Chief

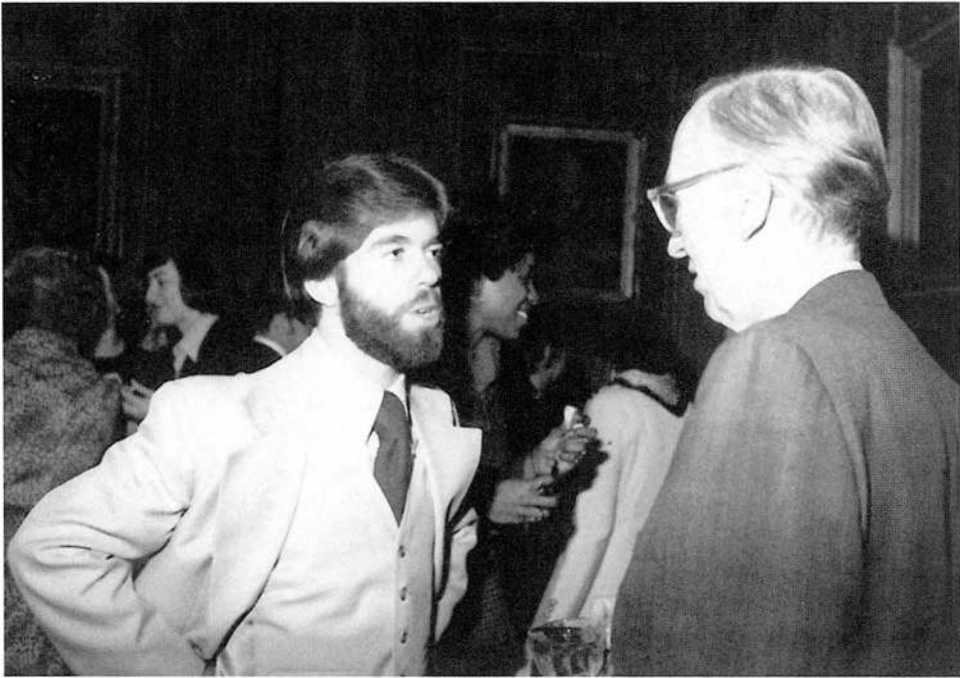
Although constitutional scholars still debate the degree to which his views influenced the eight Associate Justices, we messengers never doubted that it was Chief Justice Warren Burger who called the shots on the day-to-day operations of the Court. That included the Courtroom. Remembered now for his broad, long-term impact on judicial administration, he was to us an in-the-moment perfectionist wanting things just so.

My first audience with the Chief was a test of sorts.

Shortly after the new term began on the first Monday in October, the head of the messenger crew, Mr. Bill Matthews, gave me an ultimatum. Matthews was a good-hearted, conscientious, middle-aged African-American

**Chief Justice Burger and Mrs. Rehnquist sang carols at the Court's Christmas party in 1977.**

A friend of the author snapped these two images at the annual Christmas party for the Court's staff. Above, Snow is at right sporting a beard and a red tie, Chief Justice Burger and Justice Rehnquist are singing. Below, the author is standing next to Justice Rehnquist at right.



**Justice Lewis F. Powell, Jr. (right) kindly wrote a letter to the Dean of University of Virginia's law school in support of the author's application.**

man with one arm that, for reasons I never learned, hung limply at his side. He informed me that, if I wanted to sit on the bench, the bushy, dark brown beard I sported would have to go. Apparently beards on the Justices were fine, but none had worn them for at least a generation. He explained that the conservative, appearance-sensitive Chief Justice would never permit a full-bearded messenger to sit with the Justices in clear view of the public.

Although disappointed, I wasn't going to let some facial hair keep me from a bird's-eye seat on the Supreme Court bench. But before I shaved, Matthews reconsidered. He told me that if the Chief looked me over and didn't complain immediately to the Marshal of the Court about the beard—he was certain that he would—I could keep it.

Soon after, I was sent to the Chief's Chambers to drop off some mail. He happened to be there when I arrived, and his stunning, forty-something personal secretary, Jo Clark, introduced me. I don't remember the specifics of that first conversation. But I do recall that the Chief was both pleasant and gracious. And to my relief, he never mentioned my beard to the Marshal.

Although always polite and courteous, the Chief was not warm and familiar with those of the general messenger staff who he didn't know and who had not worked directly for him. That just wasn't his style. But once he got used to seeing me around the Court, he did sometimes strike up short conversations.

One time early in the term, as I was delivering some souvenirs that he had picked up on his trip to the USSR during the Court's summer recess, he volunteered a few of his impressions of the Soviet Union. He told me that the thing that struck him the most was how, out of a nation of over 200 million, only a few thousand Communist party members enjoyed anything resembling the freedom of a United States citizen. That short, private civics lesson from the Chief Justice of the United States occurred to me more than once during the next generation's dramatic changes.

His visit to the USSR seemed to have made a big impression on him, and I had a second opportunity to hear him talk about it, this time in greater depth. That October, at the Judicial Conference held at the Court, I served a luncheon for the Chief Judges of all the Circuit Courts of Appeal. The Chief spent the better part of an hour at the end of the meal recounting his trip. He told the gathering of senior judges that the Soviets seemed afraid of us, and that they felt the United States was somewhat war-hungry. On the other hand, he said, on an individual level, they seemed to really like Americans. He quoted one Soviet official as commenting, "Every American I've met has been such a nice fellow—why do you carry on the policies you do?"

Although his vote on cases carried no greater weight than those of the Associate Justices, when it came to the Supreme Court building—including the Courtroom—the Chief's word was law. His changes were mostly popular, and rarely was any opposition voiced, at least not within earshot of the messengers. So I was startled one day to hear the usually quiet Justice Harry Blackmun, the Chief's so-called Minnesota Twin, complain bitterly to some of the other Justices about the prohibition against spectators taking notes in the Courtroom. He said, "That's one rule the Chief has made that I completely disagree with!"

Sometime after that term, Blackmun's view prevailed. Spectators are now free to take notes.

It surprised me less when civil rights hero Justice Thurgood Marshall expressed annoyance over a new, plush, red carpet the Chief had installed in the hallway directly in front of his own Chambers. Marshall seemed to take considerable pleasure in countering the Chief's formality with an exaggerated informality of his own—occasionally calling Burger, "Chiefy." A Supreme Court Police officer told me that, when Marshall saw the carpet for the first time, he shook his head and exclaimed, "They ought to take the money for this right out of that man's pocket!"

With age, experience, and legal training of my own, I now better appreciate the Chief's attention to detail and desire for perfection. But as a math- and science-avoiding kid right out of college, I was not prepared for how meticulous he could be.

One day when I was helping out in the Chief's Chambers and he was meeting in another part of the Court with some visitors, I was asked to take him a note. It had been typed and placed in an envelope by Jo Clark. After I handed the envelope to the Chief, he opened it, scanned its contents, and then looked at me sternly and said, "Typo!" He proceeded to ink-in the correct letter on what was apparently a single misspelled word. This, despite the fact he was the only person in the whole world who would ever read that note.

His insistence on perfection went beyond the written word. As mentioned, one of our pre-Court tasks was to fill up the pewter glasses on the bench with ice water. I had done so one morning, utilizing the same ice and District of Columbia tap water for all nine Justices. During the first case, the Chief penned a note that I quickly snatched from his outstretched hand—and which I still have. It said simply, "Something wrong with this water."

I didn't know what to do. I had no idea what it was about the water that displeased the Chief. None of the other Justices had complained about theirs. Bottled drinking water was at that time found mainly in upscale restaurants. So I did what any semi-panicked 22-year-old might do. I walked off the bench and behind the curtains with his glass, poured out its contents into a sink, re-filled it with ice and water taken from the same place from which I had filled it and the other glasses in the first place, and hoped for the best. When I returned it to the Chief he took a sip, and nodded once in silent satisfaction. Crisis averted.

Someone trying to cast a Chief Justice for a part in a Hollywood movie could not have done better than Burger himself. He looked and sounded like what Americans in the 1970s expected a Chief Justice to look and sound like. Even the Associate Justices seemed to appreciate that. One day on the bench, however, several of them apparently felt that he was not portraying the desired image. Justice White wrote him a note, signed it "Byron," and then had Justices Rehnquist and Blackmun also initial off on it. It said simply, in reference to a former Chief Justice from the 1930s, "Dear Chief, please look a little more stern & Hughes like." The signers, as well as Justice Brennan, all had a good laugh over the note during oral argument. But they never gave it to the Chief.

Despite his serious, all-business demeanor on the bench, Burger could still enjoy an inside joke with a colleague.

On one occasion during the early spring of 1978, a lawyer from Louisiana who had been practicing law for over forty years appeared before the Court. He was almost deaf and the Justices had to keep repeating themselves, practically yelling questions into their microphones. After the case, Justice Potter Stewart grumbled to those of his colleagues within earshot: "That guy couldn't even hear my questions, and even when he did hear them he couldn't understand them." But even before the argument had concluded, the Chief, stone-faced and without a word, passed a note to the gregarious Justice William J. Brennan, Jr., who, as the most senior Associate Justice, was seated directly to his right. It said simply, "And you say YOU are showing your age!"

## Senior Associate Justice Brennan

In contrast to the reserved Chief Justice, senior Associate Justice Brennan was a jovial, upbeat, friendly, quick-to-laugh man with a common touch we messengers much appreciated. Not afraid to use a "hell" or a "damn," he would routinely greet us with an enthusiastic handshake and a wide and genuine smile. He exuded warmth and a total absence of pomposity.

Sometimes he would, almost like a priest or politician, engage in the laying on of hands —and he did so regardless of one's caste. I remember my surprise and delight when one morning, as we robed the Justices before court, Brennan turned around, grabbed me by the lapels, and began to straighten my tie and the buttons on my vest as he said with a twinkle in his eyes, "You want to look good out there!" Those buttons then almost popped when the Chief glanced over and remarked to Brennan, "He looks pretty sharp, doesn't he?"

I could tell that Brennan was genuinely liked by his colleagues. One day at the very end of November the Chief had to leave the bench about fifteen minutes before the conclusion of the last oral argument of the day. He had been suffering from back trouble and was in a lot of pain. So, per tradition, Justice Brennan took over his duties. All that amounted to was for Brennan to announce to the lawyers as time expired, "Thank you, gentlemen, case is submitted."

Seconds later, as the Justices poured off the back of the bench and handed me their robes, Justice Potter Stewart exclaimed, "Well said, Mr. Acting Chief Justice!" They all cracked up, and several of the other Justices began teasing Brennan about his "new position." They were having a ball, and I don't think I ever saw them—including the always good-natured Justice Brennan—laugh so hard.

Sometimes a reaction to a single situation or event tells you all you need to know about a person.

One day in mid-January I was asked to take the Court van and deliver some documents to Justice Brennan at his apartment near the National Zoo on Connecticut Avenue. He had been working from home since the holiday break because he was under treatment

for throat cancer, and he needed them for a decision he was drafting. On the way there I noticed an elderly man lying on the street who, I learned after stopping, had fallen and hit his head on the pavement. Without focusing on the fact I was delaying the delivery of important documents requested by a U.S. Supreme Court Justice (that 22-year-old brain, again), I waited with the man and helped get him into an ambulance.

Well, it ended up taking me at least three times as long to get to Brennan's place as it should have. I could see from his expression as he opened his door that he was pretty annoyed. He had obviously been waiting anxiously for the documents. So I quickly began to explain why it was that I was late, thinking even as I spoke that my unscheduled stop for a total stranger wasn't going to save me. But as I finished, Brennan's demeanor changed completely, and with a voice made hoarse from the cobalt treatments he was undergoing, he said sincerely, "Well of course you should have stopped as you did!"

Ex–football star Justice Byron White sat directly to Brennan's right. Despite their differences in backgrounds, outlook, and temperament, they seemed to have a comfortable on-the-bench relationship. One day in March about halfway through oral argument in the second case of the morning, White leaned over toward Brennan and whispered, "You've already made up your mind on this one, haven't you." Brennan looked at him and deadpanned, "I usually have"—then stifled one of his irrepressible laughs.

Brennan remained consistently happy and positive despite the serious health challenge he was facing at the time. One day during April, he turned to White and informed him with smiling eyes that he had just hired two law clerks for the 1979–80 term —at that point still a year and a half away. He gushed, "For 1979, Byron! I am optimistic!"

A little later that spring, during the last day of oral argument for the term, I witnessed a truly moving moment between the two men. White asked Brennan about his health. When Brennan told him that he had just been checked out and, referring to his cancer, "There is no sign of it," White immediately reached over and grabbed Brennan's right hand with his own left. They remained that way, hands clasped, for several seconds, with neither man uttering another word.

Brennan continued to serve on the Court until his retirement in 1990.

### Justice Byron White

At five feet eight inches and with little vertical leap, I felt lucky to be invited by the Supreme Court Clerks to join their regular pick-up basketball game in the gym on the Court's upper level—as the inside joke goes, the "real" highest court in the land. Every now and then, Justice White, that strong, solid, often gruff but pomposity-free judicial jock, would join us.

I loved playing basketball with that man. Despite his sixty years, he was a good, aggressive, competitive player, not afraid to go for a defensive steal even if it meant delivering an inadvertent blow with his powerful forearm, or to mutter "Shit!" after a missed scoring attempt. And, while nobody would have complained if he had shot the ball every time he touched it—we were just thrilled he was on the floor with us—he was, in fact, a real team player. One of my sweetest sports-related memories is the night he and I were on the same squad and in particularly good synch. After hitting each other with a variety of passes, as I put one up at a crucial point in the game I heard White yell, "There it is!" just before the ball sailed cleanly through the net.

Another time White asked Jim Duff, who was working for the Chief while attending law school but who had in college successfully walked on to the formidable University of Kentucky basketball team, to get up a game. Justice Powell overheard White and said to

him incredulously, "You play with him?! But he's a Kentucky boy!" White, without hesitation and while looking at me and winking, responded as many an elite athlete would—with good-natured trash talk. "Oh, I shoot with my left hand when I play with him!" he said.

Although he was just one of the guys on the basketball court, he definitely had high expectations for those around him, including mere messengers.

One day in December 1977, I was driving White home because his car was in the shop. He turned to me (like Justice Rehnquist, he always hopped in the front seat of the Court car) and, out of the blue, asked my opinion on something concerning the preliminary peace talks between Israel and Egypt currently underway in Cairo. I have no recollection of his specific question, or my response. Whatever I said seemed to satisfy him. But what I do remember is the great feeling it gave me afterward. A Supreme Court Justice saw me not just as a kid whose job it was to chauffeur him home, but as somebody worth asking about world events.

Small, unexpected things could capture his interest—and pique. One day late in the term a lawyer, in a misguided effort to impress, stated that his argument had "perdured." White quickly passed me a note asking whether "perdure" is a verb. I dashed off the bench, found a dictionary, and looked it up. Sure enough, it is, and I wrote a note back telling him so, along with a short definition (to endure or remain in existence over time). Upon reading it, as oral argument continued, he turned his chair around to face me and told me how strange it sounded to him. He said he couldn't believe counsel had actually used the word in that manner. He then tucked my note in with the attorney's written brief for later reference.

White could become bored or impatient while Court was in session. He would sometimes make simple drawings to pass the time, usually a frontal view of the face of one of the lawyers. During one case in April he drew a simple, but pretty fair likeness of the bearded lawyer from the Solicitor General's Office who was arguing the case. He showed off his work to Justice Brennan, who, impressed, asked him if he planned to show it to the attorney. I don't believe he ever did.

Not surprisingly, White didn't seem to like the time it took before the Court's real business began in order to complete the ceremony for the admission of new members of the Bar of the U.S. Supreme Court. Back then, the filing fee for admission to practice before the Court was a mere twenty-five dollars. Many lawyers who had no intention of ever setting foot in the building again would pay the fee, travel to Washington with their sponsors, and then be personally admitted into this most prestigious bar by the Chief Justice himself—and in full view of all the Associate Justices. The impressive ceremony was truly memorable for the attorneys, and it had the additional benefit of permitting them to wow clients back home with prominently displayed, framed certificates of admission to practice before the Supreme Court of the United States.

One morning after sitting through the admission of several dozen attorneys, one by one, and with another large group still to go, White stretched behind Brennan's chair and said to the Chief with exasperation, "I think we ought to raise the admission fee to 100 dollars and cut some of this out!" Some years later, White got his wish. And the fee has now risen to 200 dollars.

The bar admission ceremony even resulted in an on-the-bench wager between White and Justice Rehnquist. They sometimes talked around and behind Justice Harry Blackmun, who sat between them. As we entered the Courtroom one morning at the very end of the term, the crowd of well-dressed lawyers promised a particularly large number of new admissions. After the Justices were seated, White looked over and asserted that the largest number of attorney last names

would begin with a W. Rehnquist, on behalf of the Rs, immediately took up the challenge. He asked White, "How much should we bet? A quarter?" White responded, "No, a nickel."

Justice Brennan had overheard them. So after each W name was called by the Clerk, he solemnly counted off, "One! Two! Three!" and White, looking sternly out over the Courtroom the entire time, kept the tally with corresponding slashes on a piece of paper. There were a total of ten Ws. That beat the number of Rs. Without a word, while Justice Potter Stewart announced the first decision of the day, Rehnquist leaned behind Blackmun and placed a dime in White's palm. Silently, White reached into his pocket, pulled out a fistful of coins, selected a nickel, and handed Rehnquist his change.

### Justice Thurgood Marshall

No Justice showed the messengers—several who, unlike me, served at the Court for many years and were African American—more down-to-earth authenticity than the iconic Justice Marshall. Already a national treasure when he joined the Court, his lack of both pretense and pomposity tickled us. He spoke to us in everyday language more often heard on the street corner than the courthouse. Like White and Rehnquist, he usually rode in the front seat of the Court limousine and would often carry on conversations with his driver. His occasional exclamation of, "Yowza, Yowza!," as he ambled down the hall or entered a room, which he seemed to use as a half greeting, half announcement of his presence, always brought a smile to my face.

Perhaps because he had so much experience arguing historic cases before the Court himself, Marshall could sometimes be an aggressive, almost cynical interrogator of those appearing before him. On occasion, he even made me feel sorry for a lawyer. Marshall would jump in and interrupt an argument mid-sentence—a fair practice engaged in by all of the Justices—but then sometimes pose a vague or confusing question. I could almost sense the advocate struggling with the no-win decision, "Do I tell a Justice of the United States Supreme Court that his question isn't clear, or do I just do my best to answer it and risk sounding unprepared or evasive?"

One young attorney had nothing to fear from Marshall, however. He appeared before the Court in February, not long after a big stir created by Chief Justice Burger for his widely publicized claim that fifty-percent of all trial lawyers are incompetent. About thirty years old, he was outstanding, making his points clearly and succinctly, and parrying the Justices' questions with ease. Near the end of his presentation, Justice Stewart, seated to Burger's left, leaned to his own left and whispered to Marshall, "Do you think the Chief will give HIM a passing grade?" It cracked Marshall up.

On that same day the Court heard a case that had something to do with raising chickens. At one point, one of the lawyers, as part of an argument he was making, asserted that farming had changed greatly over the years. Although Marshall could be tough on the bench, he could also be funny. Immediately after the lawyer's statement, Marshall, in reference to the thousands of protesting farmers who had descended on Washington the previous month, piped up loudly, "It certainly has changed. Now we have tractors being driven up Independence Avenue!" The entire courtroom erupted in laughter.

On another day in late February, I was standing in an empty hall chatting with two of the other messengers, one a tall, young, very attractive African-American female. Justice Marshall approached us and, referring to perhaps the most well-known Harlem Globetrotter ever, burst out in mock anger with, "Did you hear what Meadowlark's wife did? She cut him!" Apparently, the day before his estranged wife had indeed stuck a steak knife in Meadowlark Lemon's neck. Marshall made a show of rolling up his shirt sleeve, clenching

his fist, and, while pretending planned retribution for the attack on this famous American basketball entertainer, exclaimed, "Well, then I'm gonna hit a woman! I'll hit HER!" It was great theater.

The previous November, I and another messenger were sent to National Airport to pick up Marshall. He had just flown in from judging a moot court competition at Harvard Law School. As we were walking out of the airport, a man I didn't recognize sauntered up, put his arm around Marshall, and began talking to him with a big smile on his face. Marshall just kept walking, tolerating the intrusion but not saying much. As the man departed his last words to the Justice were, "I'll have to come over and have you buy me lunch sometime!" As we watched him disappear into the crowd, Marshall turned, looked at us with a straight face and said simply, "That's the biggest bullshitter in this whole town." To this day, I wish I knew who that man was.

As the spring of 1978 progressed and the number of days left for the issuance of opinions diminished, the crowd of reporters in the press box began to grow, all hoping to be present for the release of the Court's landmark decision in *Regents of the University of California v. Bakke*. The *Bakke* case, which dealt with the permissibility of considering race in admissions decisions, was by far the term's most important and involved hot button issues still debated today.

Decision day finally arrived on June 28. Marshall, who that morning would read in open Court his concurring opinion concluding that race may be considered in the admissions process, was, for the first time the entire term, already in the robing room even before I sounded the 9:55 a.m. buzzer. In fact, all the Justices seemed more excited than usual—they knew this was not just another day at the Court. However, despite the significance of what was to come, or perhaps because of it, Marshall could not resist one of his occasional, good-natured tweaks of the Chief. As the Justices were arriving, one of the other messengers said to Marshall, "Are you going to be robed, sir?" Marshall responded loudly, "Well, maybe not. I might just go like this! Hey Chief, did you hear that? I might not wear my robe today!"

The Chief didn't respond, and Marshall wore his robe on that historic day, as he presumably had and did for all others of his twenty-four years on the bench.

## Justice Lewis F. Powell Jr., and Justice William H. Rehnquist

Powell and Rehnquist, two Justices with quite different personal styles, were both particularly good to me. I have never forgotten their kindness and concern, all the more memorable given my humble position at the Court.

Of course it probably didn't hurt that they learned I was a messenger with dreams of a possible legal career, or that I was fairly close in age to a couple of their own kids. Powell, given his pedigree, may have taken a special interest because I was a Virginian. In any event, they really went out of their way to encourage and support me.

Powell, the quintessential Virginia gentleman, was always quiet, soft-spoken, polite, kind, and dignified. During oral argument he busied himself by taking rather copious notes, and I rarely heard him make a comment to Marshall, seated on his right, or to Stevens, on his left.

Rehnquist, who, of course, would later become Chief, was more outwardly friendly and lacking in formality. To my shock and delight, one time while driving him through town and after casually mentioning that, like him, I sometimes suffered from lower back pain, he immediately turned completely around in his seat and began demonstrating—the best he could in the cramped quarters—some of his daily back exercises. From his place, rather ironically, seated on the extreme

left as one faced the bench, he was much more likely than Powell to interact with those nearby him while Court was in session.

One day on the bench, Rehnquist surprised me by handing me a note asking where I had applied to law school. About a month later as we passed each other in the hall, he followed up and asked if I'd heard from any schools. After I named two that had accepted me, he visibly brightened, stuck out his hand, and boomed, "That's great! Congratulations!" When I went on to say that I still wasn't certain whether I'd get into my first choice, the University of Virginia, he shared a personal story. He said that back when he was first interested in law school, he asked an uncle where he should go. His uncle told him that there were a hundred law schools across the country at which he could get a fine legal education. Rehnquist then said some nice things about the schools at which I had already been accepted.

While I appreciated his sentiment, it was not lost on me that Justice Rehnquist had ultimately chosen to attend Stanford—where he graduated at the top of his class.

Powell went even further than Rehnquist on my behalf. At the Christmas party for the staff hosted by the Justices, after standing near Rehnquist and booming out a few carols, I found myself chatting with Powell. He asked me a bit about my academic background and plans. Then, on a slow Saturday in early February when we both happened to be at the Court, he popped his head into the messenger room and asked what law school I had decided on. When I told him I hoped to attend the University of Virginia but that they had not yet made a decision on me, he asked me to drop off my resume at his chambers on Monday, and offered to write the law school on my behalf. Ever humble, he said before walking away, "All I can say is that you work here and we like you, but it may help".

He did in fact write a beautiful letter on my behalf to the Dean of Admissions, Albert Turnbull. Somehow I think it did help.

Rehnquist wasn't as much of a note taker on the bench as Powell, but he always seemed fully intellectually engaged. During the argument of one particularly aggressive and able attorney, Justice John Paul Stevens, who sat on the far end of the bench from Rehnquist, interrupted. He said he couldn't see why the attorney had made a particular claim. The attorney, without missing a beat, responded by stating he could make the claim for three separate reasons, a, b, and c. He then summarized them, quickly, clearly, and succinctly. Just as he finished Rehnquist added, under his breath but loud enough to get a good laugh from White, "So there!"

## Serious Men

Despite their different personalities, and their occasional asides or jokes, the Justices were all serious men. And they took their important work seriously. A conversation I overheard between Powell and Stewart as I chauffeured them to the uber-exclusive Alibi Club at 1806 I Street, N.W. provided one memorable example of this.

Back then, messengers received absolutely no special training before being entrusted to shuttle the Associate Justices around town—only the Chief had his own driver. That December day, maybe because of the one-way D.C. streets, or maybe because I was a little nervous with double the usual number of Supreme Court Justices in the backseat, I made two wrong turns and almost ran a red light.

Fortunately, the Justices were deep in conversation and didn't seem to notice. They were busy sharing their angst that the Court had been delaying or pushing aside a large number of cases for decision later in the term. This clearly bothered them. They kibitzed about how they preferred making judgments with extreme caution, and hated to feel pressed into making decisions without the time for full attention and careful consideration. They feared that the end of the term would "creep up" on them. Stewart even told

Powell that he'd been losing sleep lying awake at night as he turned sentences in draft opinions over and over in his mind, trying to perfect them.

Overhearing conversations like that forged my deep respect for the Justices of the Burger Court. As did my glimpse of Blackmun sitting alone in the Court library hunched over a dozen open volumes as he slowly wrote out an opinion by hand. As well as, perhaps most of all, my backside view of all nine Justices, shoulder to shoulder, day after day, probing and digesting arguments in our nation's greatest cases and controversies.

But what I really cherish are the spontaneous, unguarded, everyday moments that gave me a peek at some other aspects of their humanity.

*Editor's Note: Judge Snow was hired as a Supreme Court messenger in 1977 by the former Marshal of the Court, Al Wong. His father and Mr. Wong had served together as senior officials in the United States Secret Service. Judge Snow was appointed as an Immigration Judge in 2005 after serving for over twenty years as an attorney in the Office of International Affairs, Criminal Division, United States Department of Justice. The views expressed in the article are his own and do not necessarily reflect those of the Executive Office for Immigration Review or the U.S. Department of Justice.*

# Afterword: A Brief History of Supreme Court Messengers

MATTHEW HOFSTEDT

*Editor's Note: To help put Judge Snow's memoir into context, we asked Matthew Hofstedt, Associate Curator at the Supreme Court, to draw on his institutional expertise and provide readers with a brief, general overview of the role of messengers at the Court.*

Judge Snow's service as a Court Messenger from 1977 to 1978 came during a time of transition when the duties of Court Pages (setting up the Courtroom, sitting behind the Bench during oral argument to run errands, etc.) were being merged with those of Court Messengers (driving Justices to appointments, providing public lectures, etc.). The Court's Page program had ended in 1975, and, after a short period with a Courtroom Attendant position, the duties of the Pages were soon passed along to the Messengers. Eventually, the Messenger position, too, would change into the two modern positions: Aides to Chambers and Marshal's Aides. These changes brought an end to nearly 140 years of Supreme Court messenger history.

In its earliest days, the Court had a small permanent staff: the Crier, the Clerk, and a few deputy clerks.[1] When the Court convened, the U.S. Marshal assigned to the area where the Court was sitting would supply any additional staff needed. Meeting for just a few weeks at a time, and with the Justices generally rooming together in one boarding house, this arrangement proved adequate. In addition, many Justices had their own personal servants, some of whom were slaves, who would perform messenger duties.[2]

By the 1840s, however, the Court's footprint was spreading across Washington. The Courtroom was lodged in the U.S. Capitol, the Justices' Consultation Room was in a building a few blocks down Pennsylvania Avenue, and more of the Justices were living in separate accommodations.[3] With an increasing need to maintain communication around the city, more staff was added, but it is unclear when the title "Messenger" came into use as an official position at the Court. In 1855, for example, Chief Justice Roger B. Taney referred to some

of the staff not as messengers but as "servants about the Court."[4]

Following the Civil War, the Court hired Richard C. Parsons as its first Marshal dedicated to serving the Court year-round. Parsons organized the staff to include "assistants and messengers to attend the court."[5] An employee roster from about 1874 lists twelve messengers: nine assigned to the Justices, with one each in the Clerk's Room, the Courtroom, and the Robing Room.[6] By the late 1880s, the Marshal's budget routinely included a line item for "Assistants, Messengers, Pages, and Fireman."[7]

Messengers were appointed by the Marshal with the approval of the Chief Justice, largely based on personal references and familial relations. When there was turnover on the Court, the former Justice's messenger was usually assigned to work for his successor. Not only would this keep a trusted employee on the payroll, but it also provided the new member of the Court with a veteran messenger who could help him adjust to his new routines.

The role of the late 19th century messengers was described in a Marshal's Office memorandum:

> The messengers are permanent employees of the Marshal's Office and carried on his pay-roll. From this force a messenger is detailed for service to each judge. They are paid three dollars per day through the year. They are all colored men, and most of them have long been in the service of the Court and are well versed in their duties. They class as servants to the Court. In the interchange of proof[s] between the judges, and with the printer they have responsible duties, and they carry important papers etc. between the judges' chambers and the Capitol every court day. It is part of a messenger's duty to be the personal attendant on the judge. He procures and serves the judge's luncheon at the 2 o'clock recess, looks after his robe and his carriage at proper times and performs any personal service the judge desires.[8]

Depending on the needs of the Justice, therefore, a messenger could play a variety of roles beyond delivering correspondence, such as chauffeur, valet, cook, and barber.

While having a personal attendant surely made life easier for the members of the Court, such attention could take some getting used to, especially for a new Justice. William Woods, who served from 1881–1887, reportedly said, "My body-servant is the most annoying thing I have experienced. The fellow is the first man I see in the morning and the last man I see at night. He forces his way into my bedroom in the morning and orders me down to breakfast, taking my order himself to the cook. I cannot get rid of him in any way. He haunts me all the time. I try to

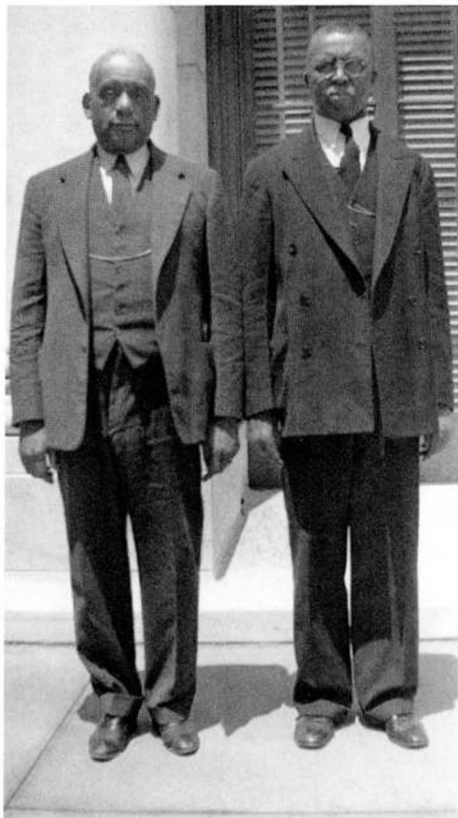
**The earliest known photograph of a Supreme Court Messenger is this one of Laurence Callan (above), an Irish immigrant, who served as a messenger and porter for the Court from 1853 into the 1890s.**

think of places to send him, but he his back again as quick as lightning. That fellow will be the death of me. I have this satisfaction, however; the other justices are tortured in the same way."[9]

Messengers were also entrusted with handling sensitive documents and delivering opinion proofs between the Justices' homes, the private printing house that typeset and printed Supreme Court documents, and the Court.[10] The close relationship between Justices and messengers during this period was summarized by Charles Henry Butler, who served as Reporter of Decisions for the Court from 1902 to 1916, in his memoir:

> The Messengers of the Supreme Court of the United States, a band of the most faithful and painstaking public servants that ever lived, have many opportunities to tell of happenings of which they know because of their intimate relations with the Justices in the performance of their duties. Not one of them, however, has ever been known to betray his trust by disclosing anything within his knowledge.[11]

Almost all of the messengers were African-American men who remained with the Court for many years.[12] Archibald Lewis served for sixty-four years, from 1849 to 1913, and remains the longest-tenured employee in Court history. Thomas Welch joined the Court staff in 1857 and was the Doorkeeper when he died in 1904. Many messengers were followed in service by their sons or other trusted relatives. William H. Bruce served from 1868 to 1919 and was followed by his son Percival M. Bruce from 1904 to 1941. The Joice family had three generations of messengers: William Joice (1870 to 1900), J. Edward Joice (1900 to 1948), and W. Harold Joice (1919 to 1963), for a total of more than 120 years of service from one family.[13]



**A 1939 snapshot of Messengers Robert Marshall (left) and Joseph Wilson. Marshall joined the Court in 1926 as a Skilled Laborer and became the Robing Room Messenger from 1927 to 1956. Wilson was hired in 1898 as a Laborer, ran the Court's elevator in the Capitol building from 1903 to 1906, and then became a Messenger until the early 1940s.**

Once the Supreme Court Building opened in 1935, the Marshal's Office maintained about nineteen messengers on staff: nine were assigned to the Justices, three to the Marshal's Office, two were Doorkeepers, one was a Storekeeper, one an Usher, and the rest assigned to the Conference Room, Robing Room, and a relief position.[14] In addition, the other Court officers (the Clerk, Reporter of Decisions, and Librarian) were each provided with a messenger. By the mid-1940s, however, the move into the building had changed the role of the messengers. All of the Justices were using their Chambers in the building and printing was done by an internal Print

**Two of the Court's longest serving Messengers, J. Edward Joice (left) and Clinton C. Burke, in a 1947 snapshot. Joice's forty-eight-year career included time as a Messenger to Justices Joseph McKenna and Harlan Fiske Stone. Burke served fifty years, with Justices William Moody and Willis Van Devanter. Both ended their service with the Marshal's Office.**

**Messengers Hansford Harrison, Harvell Stewart, James A. Martin, Russell Boston and Shackelford C. Hollins were photographed together in the 1965 Term.**

Shop, resulting in less messenger work outside the building.[15]

While the work of the messengers changed during the mid-to-late twentieth century, so too did the nature of the entire Court's workforce. All Supreme Court employees serve "at the pleasure of the Chief Justice," but the system where positions were filled by word of mouth and through family relations was slowly phased out. The Court adopted hiring practices in keeping with the federal civil service standards and open positions were publically advertised. A "Summer Messenger Program" was inaugurated in the late 1960s, but when the first woman applied she was referred to other judicial offices because it would be "a little awkward" to have her in the all-male messengers' lounge.[16] A 1976 job posting, probably the one a young Judge Snow applied for, outlined a messenger's main duties as conducting public tours, operating Court automobiles and trucks, processing mail and correspondence, and acting as an usher in the Courtroom.[17]

Eventually, the Court decided to phase out the antiquated messenger title and create two new positions: Aides to Chambers and Marshal's Aides. The transition occurred over several years, allowing long-serving messengers to retire. In 1996 the title of "Messenger" was eliminated. Today, Aides to Chambers are generally permanent Court employees who remain with a particular Justice performing a wide range of duties depending on the Justice they serve. Marshal's Aides are mostly recent college graduates who serve two-year terms and assist with the many tasks the Marshal's Office undertakes to run the modern Court.

## ENDNOTES

[1] The Court appointed a Crier and then a Clerk during its initial session in New York City. Maeva Marcus, ed., **The Documentary History of the Supreme Court, vol. 1, part 1**, 175.

[2] One example is Chief Justice John Marshall who was usually accompanied by one of his slaves who assisted him as a manservant. Peter is mentioned being with him on circuit in 1803, and Robin Spurlock later in life.

Charles Hobson, ed., **The Papers of John Marshall,** vol. 6, 145; R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court**, 415.

[3] For many years, the Court's Consultation (or Conference) Room was located in "Morrison's Buildings" at 23 4 ½ Street. Carl Brent Swisher, **History of the Supreme Court of the United States**, vol. 5, 717.

[4] *Ibid.*, 294.

[5] Under the Judiciary Act of 1867 (14 Stat., 433, Sec. 2), a Marshal "whose compensation shall be $3,500 per annum" was authorized by Congress for the exclusive use of the Supreme Court.

[6] "Names of Employees Supreme Court U.S.," Papers of Marshal John G. Nicolay, Office of the Curator, Supreme Court of the United States.

[7] Memorandum requesting funding for Court expenses, January 17, 1890, Papers of Marshal James M. Wright, Office of the Curator, Supreme Court of the United States.

[8] Memorandum to a new Justice, undated, Papers of Marshal James M. Wright, Office of the Curator, Supreme Court of the United States.

[9] "Justice at Zero: The Frigid Austerities Which Enrobe The Members of the Supreme Court," Edward G. Lowry, Harper's Weekly Advertiser, May 21, 1910, p. 8, 34. A few Justices did choose their own messengers, but in most cases they accepted one of the tenured messengers.

[10] For descriptions of Harry N. Parker, messenger and all-around assistant to Justice James C. McReynolds, and later Robert H. Jackson, *see generally*, Dennis J. Hutchinson and David J. Garrow, **The Forgotten Memoir of John Knox**. Some Justices apparently made arrangements for services that were outside of official duties, such as Justice Arthur Goldberg, who paid his messenger, Robert Suttice, for his services as a chauffeur, *see* Dorothy Goldberg, **A Private View of a Public Life,** 169.

[11] Charles Henry Butler, **A Century at the Bar of the Supreme Court of the United States**, xiii-xiv.

[12] Records of early court employees are often fragmentary or incomplete but it appears that a few messengers were white, such as Laurence Callan, but the ones assigned to Justices were predominately black. In "Supreme Court Hiring," a January 3, 1953, article in the *Afro-American* newspaper, the apparent bias in the Court's hiring practices is described and indicates there was one white messenger at that time.

[13] Information compiled by the Marshal's Office, Marshal's Office Papers, Office of the Curator, Supreme Court of the United States.

[14] Memorandum, dated 1944, Papers of Marshal Thomas E. Waggaman, Office of the Curator, Supreme Court of the United States.

[15] When the Supreme Court Building first opened in 1935, several Justices preferred to work out of their home offices and did not fully move into their new Chambers.

[16] "Would-Be Girl Messenger Calls Supreme Court Biased," *Washington Post*, July 14, 1972.

[17] Job Vacancy Announcement, March 18, 1976, Messenger Research File, Office of the Curator, Supreme Court of the United States.

# The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of *Massachusetts Bd. of Retirement v. Murgia*

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Few commentators would rank *Massachusetts Bd. of Retirement v. Murgia*[1] high in terms of doctrinal significance. In rejecting an equal protection challenge to a Massachusetts statute that required police officers to retire at age fifty, the Court made no effort to refine the parameters of rational basis analysis. Instead, a brief *per curiam* opinion simply noted that the rational basis test was "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one" and that "perfection in making the necessary classifications is neither possible nor necessary."[2]

In fact, however, the internal deliberations of the Court in *Murgia* played a central role in the evolution of modern rational basis jurisprudence. During those deliberations, Justices William J. Brennan, Jr., and Lewis F. Powell, Jr., made a concerted effort to unite a majority of the Justices behind an opinion that would have committed the Court to a version of the rational basis test that was significantly less deferential than the approach that had been followed by the Warren Court. When this effort failed, it became clear that the Justices were irrevocably divided, and that no single, definitive formulation could command majority support. Thus, the members of the Court simply agreed to disagree, and the core issue remained unresolved for the remainder of Burger's tenure.

## THE RATIONAL BASIS TEST IN THE EARLY 1970s

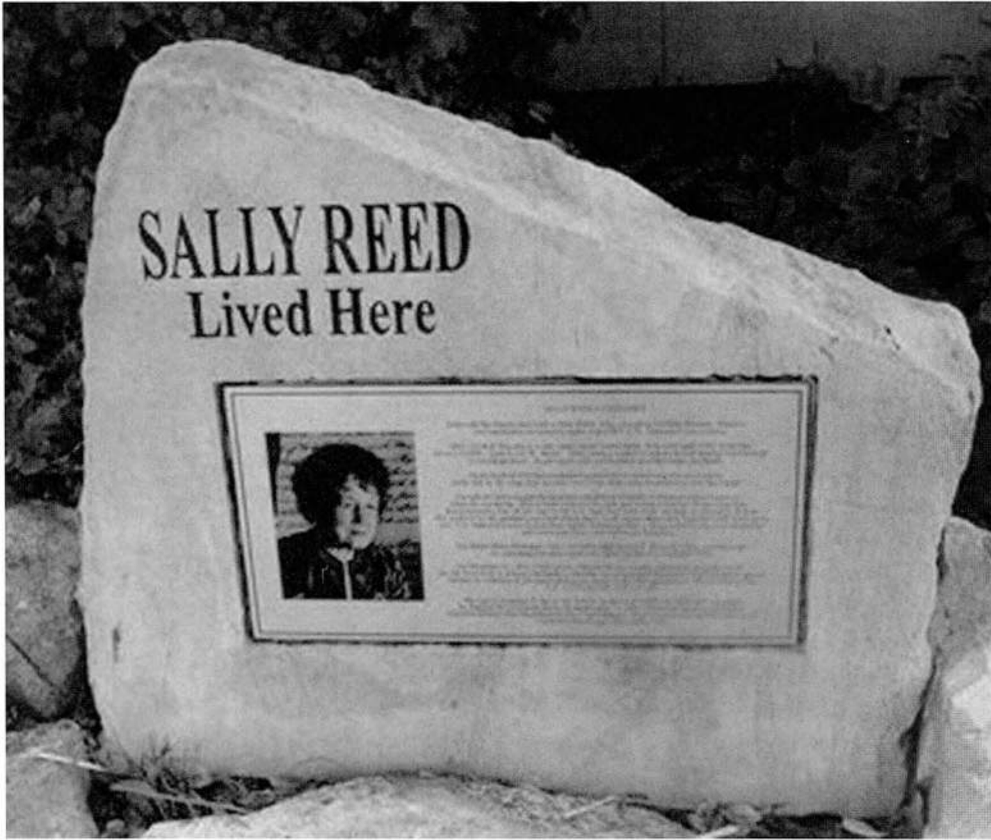
The early 1970s was a period of great ferment in the development of equal protection doctrine. At the time that Warren Burger succeeded Earl Warren as Chief Justice in

1969, the traditional structure of two-tiered analysis appeared to be firmly entrenched in the Court's constitutional jurisprudence. Under this approach, legally established distinctions were divided into two categories. If such a distinction was based on one of a small group of suspect classifications or implicated one of a limited number of fundamental rights, then the distinction was subjected to "strict scrutiny" and would only survive a constitutional attack if the government could demonstrate that the distinction was necessary to serve a compelling governmental interest. In practice, this standard was so stringent that this high level of scrutiny was famously described by one commentator as "strict in theory but fatal in fact."[3] By contrast, the constitutionality of all other classifications was measured only by a rational basis test that was as deferential as strict scrutiny was harsh. Thus, for example, in his opinion for the Court in *McGowan v. Maryland*,[4] Chief Justice Warren relied on the 1920 decision in *Lindsley v. Natural Carbonic Gas Co.*[5] and a variety of other cases in declaring that, under the rational basis test, "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[6] Although a number of late Warren Court decisions might have been taken to suggest that a majority of the Justices were prepared to designate additional classifications as "suspect" and also to expand the set of rights that would be deemed fundamental, the Court remained firmly committed to deference in all other equal protection cases.

The equal protection decisions of the early Burger era were far less consistent in this regard. In some high-profile cases, the Court appeared to take the same approach to rational basis analysis that had animated *McGowan* and its progeny. Thus, for example, in *Dandridge v. Williams* (1970), the majority opinion explicitly adopted the *McGowan* standard in upholding the constitutionality of a Maryland statute that limited the amount of benefits that could be paid to families under the Aid to Families with Dependent Children Program.[7] But in a variety of other cases, including challenges to statutes that discriminated against women and illegitimate children and laws that restricted access to contraceptives and eligibility for welfare benefits, a majority of the Justices concluded that statutory classifications did not satisfy the strictures of rational basis analysis.

The 1971 decision in *Reed v. Reed*[8] provided one of the most widely-discussed examples of this phenomenon. There, speaking for a unanimous Court, Chief Justice Warren Burger purported to apply the rational basis test in a unanimous opinion that concluded that an Idaho statute that gave a preference to men in choosing administrators for estates ran afoul of the Equal Protection Clause. Rather than applying the deferential *McGowan* formulation, Burger relied on the *Lochner*-era decision in *Royster Guano Co. v. Virginia* for the proposition that, in order to survive rational basis scrutiny, a challenged classification must "'rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"[9] Three years later, while rejecting an equal protection challenge to a federal statute that denied some veterans' benefits to conscientious objectors, eight Justices joined an opinion in *Johnson v. Robison* that once again cited the *Royster Guano* standard as the appropriate benchmark for rational basis analysis.[10]

Not surprisingly, decisions such as *Reed* generated considerable interest among academic commentators. In perhaps the most famous example, in a 1972 article Professor Gerald Gunther hailed what he saw as the emergence of a model of rational basis analysis that, in his words, "would place a greater burden on the state to come forth with explanations about the contribution of its means to its ends." Gunther argued that the consistent use of such a model by the Court had the potential "to improve the operation of the political process . . . by encouraging a




**Sally Reed, the plaintiff in the first case in which the Supreme Court struck down a law discriminating on the basis of gender, was later honored with a marker in her hometown of Boise. The Court held in 1971 that an Idaho law automatically appointing her husband the administrator of their deceased son's estate violated the Equal Protection Clause under the rational basis test.**

fuller airing in the political arena of the grounds for legislative action."[11]

While Gunther's argument itself does not seem to have had an immediate impact on the views of the Justices, the Court's rational basis decisions continued to follow an uneven course in the early 1970s. Thus, in *Rodriguez*—one of the most eagerly awaited decisions of the 1972 term— Justice Powell spoke for a narrow five-Justice majority in concluding that the Texas system of financing public schools survived rational basis scrutiny, emphasizing the need for judicial deference and citing *McGowan* with approval.[12] But the same year, in *United States Department of Agriculture v. Moreno*,[13] seven Justices joined an opinion that deployed the rational basis test to strike down a limitation on eligibility for benefits under the federal food stamp program. It was against this background that the Court began its consideration of *Murgia* in late 1975.

## *MURGIA* BEFORE THE SUPREME COURT

### Preliminary Consideration

*Massachusetts Bd. of Retirement v. Murgia* was a constitutional challenge to a Massachusetts statute that required state police officers to retire at the age of fifty. All parties conceded that there was "a general relationship between advancing age and decreasing ability to respond to the demands

of the job." Nonetheless, observing that no other state required police officers to retire at such a young age, the district court concluded that the statute was unconstitutional because there was "no reason to suppose that age fifty is within, or even significantly approaching, a range where changes of condition warrant a change of treatment."[14]

Initially, *Murgia* did not seem to be the kind of case that would engender great discussion among the Justices. While Thurgood Marshall (who by this time was firmly committed to abandoning two-tiered analysis entirely in favor of a sliding scale approach) voted to affirm the lower court judgment at the conference that followed the oral argument of the case, none of the other Justices had any trouble in concluding that the Massachusetts statute did not raise any constitutional difficulties. Indeed, Potter Stewart asserted that the state could constitutionally have set the mandatory retirement age at thirty if it had so desired.[15]

Justice Brennan was assigned the task of preparing the majority opinion that explained the rationale for the reversal of the district court judgment. Brennan circulated a draft of his proposed majority opinion on January 27, 1976. After considering and rejecting the claim that *Murgia* implicated either a suspect classification or a fundamental right, Brennan cited *Reed* and *Robison* for the proposition that, in the absence of a justification for the use of strict scrutiny, the appropriate question was "whether the classification is 'reasonable, not arbitrary, and ... rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" He then declared that "the substance of such inquiry is whether the classification is reasonably related to a legitimate state objective." Brennan conceded that discrimination on the basis of age was in some respects analogous to sex discrimination. Nonetheless, he argued that deference to legislative classifications based on age was more appropriate because older Americans were well-represented in the other branches of government. Thus, he concluded that "our inquiry ceases with a determination that the age 50 classification rationally relates to the furtherance of the State's announced objective."[16]

### The Reaction to Brennan's Draft

Although Byron White immediately signaled his concurrence with the Brennan's opinion,[17] other Justices soon voiced a variety of different concerns about the structure of the draft. Not surprisingly, Thurgood Marshall produced a dissent that reiterated his criticism of the basic structure of two-tiered analysis and concluded that the Massachusetts statutes could not survive equal protection scrutiny under the sliding scale approach that he preferred.[18] But it was an exchange between Brennan and William H. Rehnquist that gave the first real hint of the intense struggle that was to follow in *Murgia*.

On January 28, only one day after Brennan had distributed his draft, Rehnquist announced that he would deliver an opinion concurring only in the judgment.[19] Two days later, Rehnquist—who had not participated in *Reed* but had concurred without comment in *Robison*—circulated a memorandum that described his objections to the draft opinion in detail. While agreeing that the rational basis test provided the appropriate standard of review in *Murgia*, Rehnquist disagreed sharply with the formulation of that test in the opinion. He complained that, in requiring that the classification have a "fair and substantial relation" to an "announced" objective, Brennan had enunciated a standard that was significantly more demanding than the test that had been employed in cases such as *McGowan*, which Rehnquist contended had described the proper approach to rational basis scrutiny. Characterizing decisions such as *Reed* as cases in which the Court had in fact applied some standard other than the rational basis test, Rehnquist asserted that a classification should be struck down using rational basis analysis only "in the rare, rare case

where the legislature has all but run amok and acted in a patently arbitrary manner."[20]

On February 9, Brennan replied privately to Rehnquist with a detailed memorandum defending the structure of the draft opinion. Implicitly conceding that his approach was inconsistent with the analysis embodied in *McGowan*, he argued that the recent cases in which the Court had relied on the rational basis test to strike down legislation had developed "a more flexible rule," and that, while these cases "fall into the twilight zone of equal protection," they were nonetheless part of the "warp and woof of equal protection law." Reiterating his view that discrimination on the basis of age was "in many respects quite akin to [discrimination on the basis of] sex," Brennan asserted that, if his opinion was not considered a fair treatment of the then-existing equal protection doctrine, "we are left with only the rigid two-tier approach which I had thought all of us found unacceptable," and that many of the more recent decisions relying on the rational basis test to strike down legal classifications would be indefensible.[21]

Two days later, Rehnquist responded with the draft of a separate opinion that would have concurred only in the result. The draft elaborated on the objections that he had voiced on January 28, complaining that the reference in the Brennan draft to a "legitimate" state interest required the Justices "to determine by some unknown calculus whether the State's goal in enacting the statute is 'legitimate.'" Even more importantly, after expressing concern that a "fair and substantial relation" was stronger than a rational relationship, Rehnquist focused on the language that would have required a classification to be related to a statute's "announced" purpose, noting that state legislatures did not typically specify the purpose or objective of a statute and that the Constitution did not require any such specification. He concluded by raising the specter of the *Lochner* era, asserting that:

> We read to little purpose the history of this Court's half century of adjudication ending in 1940 if we do not view with the gravest apprehension any broadening of the extent of judicial oversight in cases where concededly no more than minimum scrutiny is required. . . . I cannot believe that the Court would wish to retreat, either consciously or inadvertently, a single step back towards doctrines which were once the law of this Court, but which have been so long discredited that it can now fairly be said that the judgment of history is solidly against them.[22]

### Powell Comes to the Fore

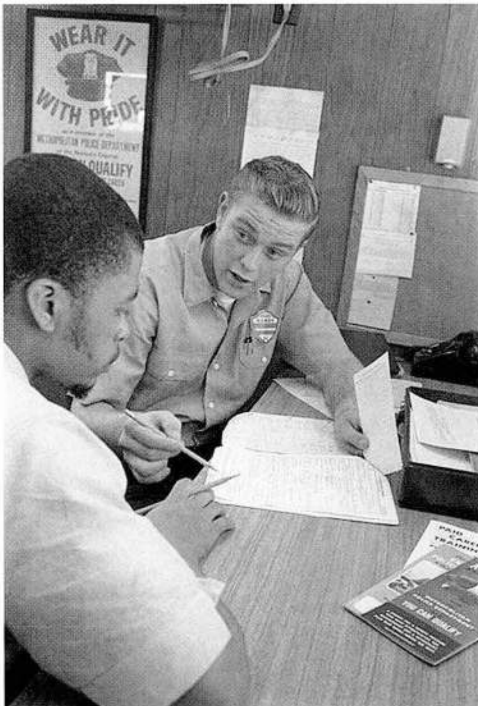
Justice Powell publicly joined the fray on February 11.[23] Even before the consideration of *Murgia*, he had played an important role in the evolution of the debate over the structure of equal protection analysis. While Powell's majority opinion in *Rodriguez* was a classic exposition of traditional two-tiered analysis, his opinion in *Weber v. Aetna Casualty and Surety Co.*,[24] where the Court had invalidated a state law that discriminated against illegitimate children, provided ammunition for those who contended that the Court had embraced a more demanding standard of review even in cases that did not apply strict scrutiny.

Although objecting to the suggestion that discrimination on the basis of age was in many ways analogous to discrimination on the basis of sex, Powell's initial missive in *Murgia* also expressed his basic agreement with the analysis in Brennan's draft opinion. But Powell also went on to aver that he was "not happy with 'two-tier' analysis," and that he would "view with an open mind any broad reconsideration of [the Court's] position."[25] By contrast, after Brennan circulated his written exchange with Rehnquist, on February 12, Potter Stewart declared himself "in substantial agreement with Bill Rehnquist's

views,"[26] and, on March 30, Warren Burger expressed a similar view.[27]

Given the divisions that had been created by his draft, on March 16, Brennan broached the possibility that the responsibility for producing the majority opinion in *Murgia* should be reassigned.[28] But the dynamic of the controversy changed dramatically on April 7, when Powell became the latest Justice to circulate a draft opinion in the case.[29] Like Rehnquist, Powell styled his opinion as "concurring in the result." However, Powell had a far different view of the proper role of the Court in rational basis cases.

Powell began his analysis by considering and rejecting the analysis that underlay Thurgood Marshall's opinion, which Powell described as advocating "a 'middle-tier' type of test." While suggesting that he might have been receptive to the argument if *Murgia* had been a case of first impression, Powell viewed himself as bound to apply two-tiered analysis until a majority of the Court definitively endorsed a different approach.[30] Thus, the remainder of the draft opinion focused on the proper application of the two-tiered methodology.




**A uniformed police officer on the Massachusetts police force, Robert Murgia was forced to resign at age fifty although he was in excellent physical and mental health. The Court heard his challenge to the mandatory retirement law in *Massachusetts Bd. of Retirement v. Murgia* in 1980. Above a police officer helps a new recruit fill out paperwork.**

The draft first took issue with Brennan's analysis of the question of the level of scrutiny to be applied to discrimination based on age generally. Powell objected to an emphasis on either actual representation in the legislature or the question of whether the legislature has shown a willingness to protect a particular class, observing that, if taken seriously, the latter criterion in particular would suggest that minority races should not be entitled to special constitutional protection in the wake of the passage of the Civil Rights Act of 1964 and other statutory prohibitions on racial discrimination.[31]

Instead, Powell focused on two other factors in determining the appropriate level of scrutiny to be applied in *Murgia*. First, he noted that older people had neither experienced a "long history of purposeful unequal treatment" nor been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of the group's abilities." Second, referencing the *Carolene Products* footnote, he observed that, since everyone expects to grow old at some point, older people did not constitute a "discrete and insular minority."[32] Thus, Powell concluded that the mandatory retirement provision should be subjected only to the rational basis test.

Powell then turned to an examination of the rational basis test itself. Like Brennan, Powell categorically rejected Rehnquist's assertion that a requirement that the state interest be "legitimate" necessarily entailed some enhancement of the intensity of judicial scrutiny. But, unlike Brennan's draft, Powell's opinion frankly acknowledged the dissonance between the approach that had been adopted by some of the earlier rational basis decisions

of the Burger Court and the analysis that had underlain Warren Court decisions such as *McGowan*.[33] Moreover, unlike Rehnquist, Powell viewed the change as a positive development.

In particular, Powell contended that the idea that a statutory classification generally satisfied the strictures of the Equal Protection Clause if "any state of facts reasonably may be conceived to justify [the discrimination]" should be abandoned in favor of a requirement that "the . . . purposes to be served by the classification . . . must be expressly articulated by the legislature or clearly implicit in the statutory scheme." Drawing heavily on Gerald Gunther's analysis, Powell asserted that "the proper function of the political process is best served where the State bears the responsibility of enacting legislation that is designed to serve identifiable policies or objectives. When legislation is enacted against such a background, the Court has some guarantee that the legislature has focused on the problem and also that the decision has received a public airing."[34]

Once the Court had identified the statutory purpose, Powell embraced the requirement that the classification bear a "fair and substantial" relationship to that purpose, which he defined as "something more than [a] trivial or illogical [relationship]." He reasoned that "a trivial or illogical relationship would not only fail to comport with the requirement of rationality, but may indicate that the defined purpose actually masks an improper (for example, racially discriminatory) purpose."[35]

Brennan enthusiastically endorsed the idea of directly confronting the apparent dissonance among the Court's rational basis opinions and attempting to unite a majority of the Justices around a formulation that would explicitly reject the *McGowan* approach in favor of more searching judicial scrutiny of statutorily created classifications. He prepared a new draft that, in his words, "cribbed unashamedly" from Powell's opinion, and on April 14 sent the draft to Powell and White. The new draft was also accompanied by a memorandum suggesting that Powell formally take on the task of producing a majority opinion, not only because much of the reasoning in the opinion originated with Powell, but also because Brennan believed that an opinion bearing Powell's name had a better chance of attracting majority support.[36]

White responded the same day, stating that he could "probably" join the opinion.[37] But at the same time, White stated that he would prefer a more relaxed standard for identifying the state interest in the event that it was specifically identified by the legislature or immediately obvious from the face of the statute itself.[38] In particular, White believed that the Court should give "substantial weight" to the characterization of the state interest by the state officials charged with enforcing the statute.[39]

White also implicitly suggested that he was concerned with the potential impact that Powell and Brennan's approach might have on the resolution of cases such as *City of New Orleans v. Dukes*,[40] which was under consideration at the same time as *Murgia*. *Dukes* was an equal protection challenge to a New Orleans ordinance that prohibited the selling of food from pushcarts in the French Quarter of the city, but exempted pushcarts that had been operating for at least eight years prior to January 1, 1972—a class that included only two pushcarts. The city argued that the classification was rationally related to the purpose of preserving the atmosphere of the French Quarter in order to advance the tourist trade. At the initial conference on *Dukes*, White indicated that he would join a majority of his colleagues in voting to reject the challenge.[41] By contrast, while having no strong feelings on the case, Powell tentatively disagreed.[42] White's April 14 memorandum suggested that he might be unwilling to support an opinion that called into question the constitutionality of the New Orleans ordinance or similar laws.[43]

But, in any event, retaining White's support was not Powell's only problem. With only eight Justices participating in *Murgia*, Powell could not command a majority if he lost the votes of more than three of his colleagues. Since Thurgood Marshall was committed to dissenting and Chief Justice Burger and Justice Rehnquist were firmly opposed to any explicit retreat from *McGowan*, obtaining the support of both Harry Blackmun and Potter Stewart was essential if Powell was to succeed in definitively committing the Court to formally abandoning the *McGowan* approach.

The task of obtaining majority support was paramount in Powell's mind as he redrafted the opinion. After his law clerk made an unsuccessful search for opinions by either Stewart or Blackmun that might support a more aggressive formulation of the rational basis test, Powell made two significant changes in the draft he had originally submitted. First, in an effort to assuage White's concerns, he inserted a sentence in a footnote stating that, in ascertaining the state interest, "substantial weight may be given to the contemporaneous interpretation by the administrative or executive agencies charged with a statute's enforcement." In addition, Powell removed all specific references to *McGowan*, observing to his law clerk that "I fear our chances of winning a [majority] would be diminished by even a tactful frontal assault on [that case]."[44]

Rather than submit the revised draft to the Court as a whole, Powell decided to first solicit comments individually from the Justices whose support was crucial. On May 7, he sent the draft to Potter Stewart, noting that it had not been sent to the other Justices, but that Brennan had been involved in the drafting process and that Powell believed that the draft would also be acceptable to Byron White[45]—an impression that White soon confirmed explicitly in a conversation with William Brennan.[46] In the letter accompanying the draft, Powell emphasized that he had not tried to establish a new formulation for the rational basis test, but instead had "tried to distill from recent precedents the essence of rational basis equal protection analysis."[47]

Convincing Potter Stewart to join the opinion was another matter entirely. One might have expected Powell to have realized that Stewart was likely to be skeptical of any effort to strengthen rational basis analysis. To be sure, in 1973, Stewart had joined the majority opinion in *United States Department of Agriculture v. Moreno*,[48] where the Court had purported to apply the rational basis test in striking down a federal statute that generally denied welfare benefits to any household containing an individual who was unrelated to any other person in the household. But the same year, he had explicitly reaffirmed his support for the *McGowan* formulation in his concurring opinion in *San Antonio Independent School District v. Rodriguez*.[49]

The same commitment to judicial deference had been reflected in Stewart's reaction to Brennan's initial draft in *Murgia*. Even before his February 12 statement of support for Rehnquist's position, on February 3 Stewart had circulated the draft of an opinion concurring only in the result. In this draft, Stewart argued that the Court should not seek to determine whether the classification in the statute was "reasonable," decrying such an inquiry as analogous to the discredited approach of the *Lochner* era. Instead, Stewart argued that in cases that, did not involve either a suspect classification or fundamental rights, the Court should reject an equal protection challenge unless the classification was "wholly irrelevant to the achievement of the State's objective."[50]

Nonetheless, after private discussions with Stewart on May 10, Powell came away with some encouragement. Stewart did clearly voice an objection to the portion of the opinion that limited the nature of the state interests that could be considered to those that were indicated by the legislature or clearly implicit in the statutory scheme. But at the same time, Powell was left with the

understanding that Stewart would support an opinion that explicitly required classifications to have a "fair and substantial relation" to an identified state interest and that "the distinctions made by a classification must be genuinely related to the State's purpose in enacting the legislation in question."[51]

Powell then turned to the task of ascertaining the views of Harry Blackmun. Powell sent him a copy of the proposed opinion on May 12, together with a letter that outlined the positions of the other Justices who had already expressed views on the draft. The letter also explained that Powell had made a conscious decision not to challenge the basic structure of two-tiered analysis in order to avoid the unsettling of too many existing precedents, and that, while Stewart had complained about the paragraph dealing with the nature of the state interests that should be recognized by the Court, Powell and Brennan "very much prefer[red]" to retain that paragraph.[52]

Blackmun responded on May 18. On March 11, he had circulated a memorandum stating that, while not firmly committed to the concept of two-tiered analysis, he preferred Rehnquist's approach to the rational basis test to that which had been elaborated in Brennan's early draft.[53] But, after reading Powell's draft, Blackmun apparently changed his mind. Although advocating explicitly recognition of the concept of middle tier scrutiny, on May 18 Blackmun also stated that there was "much to be said for [the draft's] approach to the rational basis test for this case and for others like it." Thus, Blackmun stated that he was willing to endorse the draft, including the portion of the opinion that had caused Stewart such difficulty.[54]

The day after receiving Blackmun's response, Powell finally distributed his draft opinion to the Chief Justice and Justices Marshall and Rehnquist.[55] While there was no real hope that any of the three would join any opinion along the lines that he had prepared, at this point Powell no doubt believed that he had reason to be optimistic about the prospects of gaining majority support for an opinion that would fundamentally change the structure of rational basis analysis. He apparently had four solid votes for his opinion as a whole, and, even if he could not reach some accommodation with Stewart on the question of what interests should be considered, he was under the impression that that Stewart was at least willing to formally endorse the "fair and substantial relationship" test, and thereby implicitly reject the extremely deferential version of the rational basis test that had underlain *McGowan*.

However, any such hopes were dealt a crushing blow on May 20, when Stewart distributed a new draft concurrence reaffirming the basic position that he had taken on February 3. The opinion began with a blunt assault on the idea that state laws could not survive rational basis analysis based solely on interests hypothesized in the course of the litigation itself, characterizing that view as "[an] extraordinary pronouncement [that is] contrary to the first principle of constitutional adjudication—the basic presumption of validity of a duly enacted state or federal law." Taken alone, this statement was nothing more than an emphatic restatement of the objection that Stewart had voiced in his private discussions with Powell and Brennan. However, the May 20$^{th}$ circulation also went much further, explicitly reaffirming Stewart's allegiance to the *McGowan* approach and once again declaring that, in his view, a statutory classification would not run afoul of the Equal Protection Clause so long as it did not rely on a suspect classification or impinge on some "constitutionally protected right or liberty," and "does not rest on grounds wholly irrelevant to the state's objective."[56]

Despite the position that Stewart had taken in his February 3 draft, Powell was clearly taken aback by the tone of Stewart's newest draft. In a handwritten comment on the draft, Powell asserted that "this doesn't reflect Potter's statement to me that if the [offending]

'pronouncement' were eliminated he would join the opinion [which endorsed the fair and substantial relation test.]"[57] But, in any event, Stewart had now irrevocably committed himself to an approach that was very close to Rehnquist's formulation of the rational basis test. Thus, even if Powell and Brennan retained the allegiance of both White and Blackmun, they would be one vote short of majority support for an opinion that formally committed the Court as a whole to more searching rational basis scrutiny.

Faced with this problem, Powell brought John Paul Stevens into the conversation. Stevens, who replaced William O. Douglas on the Court in December 1975, had not yet taken his seat at the time that *Murgia* was argued and was thus ineligible to vote in the case. Nonetheless, on the same day that Stewart circulated his draft opinion, Powell delivered his own draft to Stevens and apparently asked for Stevens' reaction.[58]

While there is no record of the reason that Powell took this step, the most plausible explanation is that he was preparing for the potential of later conflicts over the nature of the rational basis test. Still counting on the votes of Brennan, White and Blackmun, Powell might well have decided that, if Stevens agreed with his analysis, a plurality opinion along the lines that Powell had circulated in *Murgia* might pave the way for a majority opinion that adopted the same approach at some future date.

If this in fact was Powell's thought process, Stevens' private response on May 21 could only have been a great disappointment. Stevens flatly rejected the claim that respect for the principle of majoritarianism was the only or even the primary justification for deferring to legislative judgments. Instead, he advanced three other justifications for judicial deference. First, Stevens asserted that, simply because the legislature was the primary source of policy judgments, legislators must be allowed to make some errors without having the judiciary displace those judgments. Second, he contended that deference was justified because judges had no special expertise in making policy judgments. Finally, "and perhaps of greatest importance," Stevens argued that "the strength of the judiciary is largely the consequence of its tradition of self-restraint. The more often we substitute our judgment for the product of the majoritarian process the greater is the risk that our moral authority will diminish and our mountain of work will increase." Against this background, Stevens suggested that the detailed analysis of the scope of the rational basis test should be deleted in favor of a simple declaration that there was no difficulty in identifying the relevant state interest in *Murgia*, leaving the debate over the rational basis test for a later case in which the Justices disagreed over the question of whether the standard had actually been met.[59]

Powell and Brennan received still more worrisome news on May 24 in a private communication from Byron White which indicated that, despite his previous expression of support for the latest draft of Powell's opinion, White continued to have "some difficulties" with Powell's argument. The May 24 missive focused on two points. First, White suggested that, if a state court concluded that a particular classification in a state law was based on a purely hypothetical justification, the Court was bound to treat that justification as if it had been expressly written into the statute. In addition, White now expressed discomfort with the idea that the "fair and substantial relationship" standard should be viewed as adding anything to the traditional rational basis test.[60]

The following day, unaware of the exchanges between Powell and Stevens and White, Rehnquist circulated a full-bore assault on the reasoning in Powell's draft. Associating himself in general terms with Stewart's analysis, Rehnquist conceded that decisions such as *Reed* and *Weber* were difficult to square with conventional rational

basis analysis. But, while he had consistently dissented in cases in which the Court had struck down laws that discriminated on the basis of gender or legitimacy and continued to advocate the use of the rational basis test in cases that did not involve discrimination on the basis of race or national origin, Rehnquist declared that he would much rather have the Court explicitly create a middle tier analysis than enhance the intensity of rational basis analysis generally.[61]

Against this background, Rehnquist leveled two major criticisms at Powell's argument. First, he asserted that the effort to identify a single purpose for a challenged classification would often be doomed to failure. He observed that state statutes often came before the Court without either preambles or published legislative history, and that most courts and commentators who had focused on the issue had concluded that in fact it was generally a mistake to ascribe to the legislature a single purpose for adopting a statute. Rehnquist argued that an effort to identify a single legislative purpose would be especially problematic in cases involving complex statutory schemes that had evolved over time.[62]

More fundamentally, Rehnquist asserted that Powell's approach misconstrued the appropriate role of the courts in the American political system. Rehnquist scornfully dismissed the core of Gunther's claim that means-focused analysis would improve the functioning of the legislative process (and, by implication, Powell's own analysis) as "pure political science [rather than] constitutional law" that was "miles removed from what this Court's decisions have ever intimated to be the purpose or meaning of the Equal Protection Clause." Rehnquist concluded by asserting that "it seems to me almost inconceivable that we could correctly conclude that a group of legislators, all devoting a good part of their time to the art of legislation would choose a means that [was not] 'genuinely' related to their purpose," arguing that, in practical effect, Powell's approach would "mask... the actual operation of the Equal Protection Clause behind a surface doctrine which set this Court up as a tutor for legislators in order that they may be taught how to enact statutes which carry out the purpose which they have in mind."[63]

Ultimately, neither Powell nor Rehnquist succeeded in persuading a majority of the Justices to endorse their position in *Murgia*. Not surprisingly, Powell was unmoved by Rehnquist's arguments. He continued to negotiate with Brennan and Stewart in an effort to reach some accommodation on the question of the identification of the state interest that would command the support of five Justices. However, Stewart remained adamant in his refusal to acquiesce in the relevant language from the May 19 draft, and Brennan was equally unwilling to join an opinion that did not incorporate such language.[64] Apparently believing that the best chance to gain the votes of at least four Justices was to placate Stewart, Powell reluctantly chose to abandon what he described privately as his "favorite paragraph on purpose."[65] On June 7, he circulated a new draft that eliminated the requirement that the purpose for the classification must be "articulated by the legislature, apparent from the legislature, or clearly implicit in the statutory scheme." Instead, the June 7 circulation observed that "identification of the state purpose or purposes normally presents little difficulty" and that "although the purpose may not be imagined, it usually is apparent from the face of the statute and the legislative history." In an apparent effort to respond to one of Rehnquist's points, the draft also stated explicitly that a statutory classification might serve more than one purpose.[66]

The relationship between the intensity of judicial review and the promotion of democratic values was also downplayed in the June 7 draft. In the previous version, Powell had explicitly tied judicial deference to confidence in the political process. The

May 17th draft had observed that "the proper functioning of the political process is best served where the State bears the responsibility of enacting legislation designed to serve identifiable policies or objectives" and also declared that "when legislation is enacted against such a background, the Court has some guarantee that the legislature has focused on the problem and also that its decision has received a public airing. In such circumstances deference to the decision of the State is not only appropriate, but required by the demands of our democratic system."[67] By contrast, on June 7, the discussion of the political process was reduced to a footnote, which observed simply that "the proper functioning of the political process is usually best served where the policies or objectives of the legislature are identified at the time of the enactment" and that "when legislation is enacted against such a background, there is greater assurance that the legislature has focused on the problem."[68]

But, by this time, unbeknownst to Powell, his effort to formally strengthen the rational basis test had become entangled with Court's treatment of still another equal protection case—*Mathews v. Lucas*.[69] *Mathews* was a challenge to the manner in which a federal statute determined the eligibility of minor children to survivor's benefits upon the death of their biological fathers. While all legitimate children were eligible to receive such benefits, with certain exceptions, unacknowledged illegitimate children were only eligible if they could prove that at the time of his death the deceased father was living with the child or was contributing to the child's support. The illegitimate children who were denied benefits argued that their exclusion was inconsistent with the constitutional norms established in cases such as *Weber* and *Jiminez v. Weinberger*,[70] in which the Court had struck down classifications that discriminated against children born out of wedlock.

Only Justices Brennan, Marshall, and Stevens took the view that the classification in *Mathews* was in fact unconstitutional.[71] In a draft majority opinion that was circulated on June 1, Harry Blackmun first considered and rejected the contention that discrimination against illegitimates should be subjected to strict scrutiny. Instead, the draft argued that the statutory classification should be measured against the fair and substantial relationship test which Brennan and Powell were arguing should be applied in rational basis cases generally. While noting that this standard was "not a toothless one," Blackmun concluded that the classification in *Mathews* was constitutional because it provided an administratively convenient method of determining actual dependency while at the same time "avoid[ing] the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable." The draft asserted that "such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the [equal protection analysis] so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny."[72]

Powell had no difficulty in joining the draft majority opinion *Mathews*.[73] But, although White also agreed that the statutory classification in *Mathews* did not run afoul of constitutional limitations, on June 9 he wrote to Powell, asserting that Powell's willingness to accept the justification of administrative convenience as sufficient under the fair and substantial relationship test rendered that test "even less help than the unadorned rationality standard." Citing this concern "among others," White circulated a letter informing Powell that he had changed his mind and now opposed the idea of using *Murgia* as a vehicle "to pacify the law review critics or commentators and to attempt to clarify our equal protection standards for the benefit of the district judges and courts of appeals." Instead,

White argued that the case should be decided on simple rationality grounds.[74]

White's defection ended any hope of uniting even four Justices around an opinion in *Murgia* that would reject traditional rational basis analysis. Thus, rather than press the issue, the Justices on both sides of the dispute agreed on a resolution of the case that would leave their disagreement unresolved. Accordingly, on June 15, Powell circulated the draft of a brief *per curiam* opinion that was, in his words, "as blandly written as one can write to dispose of the equal protection arguments."[75] After minor word changes, all of the members of the original majority endorsed this opinion, and all agreed not to write separate opinions.

The bulk of the analysis in the *Murgia* opinion that was ultimately published focused on the question of whether strict scrutiny should apply to the mandatory retirement provision of the Massachusetts statute. Having concluded that the rational basis test should apply, the opinion observed that "the Massachusetts statute clearly meets the requirements of the Equal Protection Clause" because the age-based classification "clearly is rationally related to the State's objective."[76] The opinions in both *Dukes* and *Mathews* were also changed to remove all reference to the fair and substantial relationship formulation. As Powell observed on June 15, taken together, these actions were designed to "[leave] each of us free to 'fight another day' as to our respective perceptions of a proper formulation of equal protection analysis."[77] It would be almost four years before the full extent of the Justices' disagreement over rational basis analysis was aired formally.

## THE BATTLE REJOINED: THE RATIONAL BASIS TEST FROM *Murgia* TO *FRITZ*

In the period between 1976 and 1980, none of the Justices publicly discussed their differences over the proper formulation of the rational basis test. To be sure, in 1979, in *New York City Transit Authority v. Beazer*,[78] they vigorously debated the question of whether an employment policy that categorically excluded heroin addicts on methadone maintenance survived rational basis scrutiny. However, none of the opinions in *Beazer* made any effort to address the kinds of issues that had so divided the Court in *Murgia*.

Nonetheless, the differences over those issues remained. Indeed, despite his failure to assemble a majority in support of his position in *Murgia*, Justice Powell was initially tempted to continue the struggle over the proper formulation of the rational basis test. Less than a year after *Murgia* was decided, he drafted a concurring opinion in *Craig v. Boren*[79] that would have openly advocated the rejection of the *McGowan* formulation in favor of the fair and substantial relationship test.[80] However, Powell ultimately decided not to take an explicit public position on this issue in *Craig*, instead contenting himself with the observation that "the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications" together with an assertion that "there are valid reasons for dissatisfaction with the 'two-tier' approach."[81] Similarly, in his majority opinion in *Maher v. Roe*, Powell made a conscious decision to describe the rational basis test in a manner that would be acceptable to all members of the majority.[82]

Conversely, in 1979, after Potter Stewart was assigned the task of attempting to write a majority opinion in *Parham v. Hughes*,[83] his first draft explicitly adopted the *McGowan* formulation of the rational basis test.[84] However, in a vain effort to attract Powell's support, Stewart later removed all specific references to the *McGowan* approach from the final version of his *Parham* opinion.[85] Instead, as ultimately published, the opinion provided simply that, in cases governed by the rational basis test, "[l]egislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative

**Justice William Brennan, Jr., (front, right) was assigned to write the majority opinion in *Murgia*, but he and his Brethren had difficulty deciding on which standard of review to apply in this case. Ultimately, the Court (photographed here in 1980 with outgoing President Jimmy Carter) held *per curiam* that rational basis was the appropriate standard for this question of equal protection, and that the age limit was rationally related to a legitimate state interest. Thurgood Marshall (center, back row) dissented, arguing that the Court's "two-tier" model of equal protection scrutiny was inappropriate and that this case should be judged under a higher level of scrutiny.**

classifications are valid unless they bear no rational relationship to a permissible state objective."[86] But during the 1980 term, the issues that had divided the Justices in *Murgia* once again came to the fore in *United States Railroad Retirement Board v. Fritz*[87] and *Schweiker v. Wilson*.[88]

## *RAILROAD RETIREMENT BOARD v. FRITZ* AND THE 1980 TERM

*United States Railroad Retirement Board v. Fritz* was a challenge to the constitutionality of parts of a statute that was designed to reform the federally established railroad retirement system in order to put the system on a sound financial footing. The challenge revolved around a provision of the statute dealing with the situation of some potential beneficiaries who might otherwise have been eligible to receive payments from both the railroad retirement system and the social security system. The challenged provision provided that some members of that class would be entitled to receive such benefits only if they had been employed by a railroad on December 31, 1974. The plaintiffs argued that the discrimination against otherwise eligible persons who were not employed by a railroad on that date violated the equal protection component of the Due Process Clause.

All of the Justices agreed that the statutory classification in *Fritz* should be subjected only to the rational basis test. At the initial conference on the case, Brennan stood alone in expressing the view that the classification was in fact unconstitutional.[89] However, Marshall ultimately joined Brennan in an opinion that reiterated Brennan's allegiance to the *Royster Guano* formulation of the appropriate standard and concluded that

June 15, 1976

No. 74-1044 Massachusetts Board v. Murgia

MEMORANDUM TO THE CONFERENCE:

Here is a suggested Per Curiam that would dispose of Murgia.

It is about as blandly written as one can write to dispose of the equal protection arguments advanced in this case. It leaves, I think, each of us free to "fight again another day" as to our respective perceptions of a proper formulation of equal protection analysis.

Bill Brennan has seen this "bare-bones" draft, and - subject to one relatively minor change - he thinks he could join it as a Per Curiam opinion. He does, however, have certain reservations that he will mention at Thursday's Conference. Bill is not disposed to join even this Per Curiam if other Justices still wish to write. I have assured Bill my zeal for writing has been so thoroughly dampened by this spring's experience, that it may be sometime before I venture forth again - although I suppose I will in due time.

Bill also has Dukes in mind, and will discuss its posture in light of what we decide to do about Murgia. A possibility that I suggested to him is that we might dispose of Dukes in very much the same way, by a Per Curiam that leaves all options open. After all, Dukes is a "peewee".

My own view is that there is much to be said for our disposing of these cases rather than carrying them over for futile reargument.

L.F.P., Jr.

ss

Justice Lewis F. Powell, Jr.'s memorandum to the conference on June 15 gives a sense of how exhausting the struggle was to decide *Murgia*. He notes that the per curiam decision would leave each Justice free to "fight again another day" regarding his view on what is proper equal protection analysis.

the statute failed to pass constitutional muster under that test.[90] However, not surprisingly, Justice Rehnquist, who was assigned the task of writing the majority opinion, took a quite different view of the issues presented by *Fritz*.

Rehnquist's first draft, which was distributed on November 7, 1980, clearly indicated that he hoped to use *Fritz* as a vehicle to settle the dispute over the proper nature of rational basis scrutiny in his favor. Although conceding that "the Court has not been altogether consistent in its pronouncements in this area," the draft did not cite any of the modern cases that relied on the fair and substantial relation test that had first been articulated in *Royster Guano*. Instead, Rehnquist disparaged *Royster Guano* itself as a product of *Lochner*-era jurisprudence and noted that earlier decisions such as *Lindsley v. Natural Carbonic Gas Co.* had adopted the

approach that was later endorsed by the *McGowan* Court. Then, citing and quoting from a variety of late twentieth century decisions, the draft asserted that "in more recent years, we have returned to the standard announced in *Lindsley* and have consistently deferred to legislative determinations as to the desirability of statutory differentiations." Amplifying the same theme, Rehnquist subsequently averred that "where the legislative purpose of [an] enactment may be extremely obscure, it may be appropriate to search for some unannounced but underlying 'purpose of the statute' and determine whether the 'fit' between that purpose and the legislature's chosen means of accomplishing that purpose is rational." Against this background, he concluded that "where [as in *Fritz*] there are plausible reasons for Congress' action, our inquiry is at an end."[91]

While Potter Stewart[92] and Harry Blackmun[93] quickly signaled their willingness to concur in Rehnquist's opinion, Powell was predictably less enthusiastic. On November 10th, he circulated a letter objecting to both the claim that recent cases had uniformly embraced the standard enunciated in *Lindsley* and the assertion that at times in rational basis cases it was appropriate for the Court to search for some purpose other than that enunciated by the legislature itself. Implicitly raising the specter of reigniting the internecine struggle that had marked the consideration of *Murgia*, Powell stated that he would file a separate concurring opinion if Rehnquist remained committed to the language to which Powell objected.[94] Two days later, characterizing Rehnquist's draft as "somewhat misleading,"[95] John Paul Stevens distributed a draft concurrence that asserted that the classification at issue in *Fritz* satisfied the different standards articulated in both *Lindsley* and *Royster Guano* and that there was therefore no reason to endorse one formulation over the other.[96]

After consulting privately with Powell, Rehnquist responded to these criticisms in writing on November 13th. In his response, Rehnquist observed that, so long as the apparent dissonance among the Court's rational basis decisions remained unresolved, "a district court or a Court of Appeals may . . . pick and choose among the various 'standards' or 'tests,' depending on whether it is desired to invalidate [a] statute or sustain it" and contended that "if we leave the case law the way it is now we will . . . be leaving in the hands of four or five hundred lower federal court judges an authority very much like a governor's veto." Rehnquist acknowledged that the struggle over the formulation of the standard in *Murgia* had demonstrated that any effort to unite a majority of the Justices around a single, definitive standard would be an uphill struggle. Nonetheless, he expressed the hope that a majority would at least be willing to endorse a formulation that would "indicate that [the rational basis test] is a *legal standard* and not simply a 'chancellor's foot' veto."[97]

In an effort to achieve consensus while at the same time emphasizing the need for judicial deference, Rehnquist proposed two major changes from the language of the November 7 draft. First, rather than stating that in recent years the Court had abandoned the *Royster Guano* formulation in favor of the *Lindsley/McGowan*, the November 13 language stated only that "in more recent years, in cases involving social and economic benefits, the Court has consistently refused to invalidate on equal protection grounds legislation which it simply deems unwise or unartfully [sic] drawn." In addition, while retaining the statement that "where there are plausible reasons for Congress' action, our inquiry is at an end" and continuing to assert that "it is . . . 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,'" Rehnquist agreed to eliminate the explicit reference to the idea that a court should, if necessary, rely on a state interest hypothesized by the court itself in order to reject an equal protection challenge.[98]

These proposals were sufficient to mollify Powell, and on November 17 he agreed to join the opinion.[99] But on November 21, Stevens requested more changes.[100] However, by that time, both Chief Justice Burger and White had joined Blackmun and Stewart in endorsing Rehnquist's opinion,[101] and Stevens' vote was therefore unnecessary to create a majority. Thus, on November 24, Rehnquist declined to make any further changes, expressing the fear that to do so would "embroil us still further in the *Murgia* and *Dukes* discussions."[102] Faced with this reality, Stevens nonetheless chose to join the majority opinion, although he ultimately decided to file a separate concurrence as well.

But the struggle over the proper formulation of the rational basis test took one final turn before the majority opinion was filed on December 9. On December 4, Justice Brennan circulated a dissenting opinion in which he insisted that the "fair and substantial relation" language from his majority opinion in *Johnson* provided "the clearest statement of this Court's current approach to 'rational basis' scrutiny."[103] In response, Rehnquist added a footnote to the majority opinion that asserted caustically that "the most arrogant legal scholar would not claim that all of [the Burger Court] cases applied a uniform or consistent test under equal protection principles" and also observed resignedly that "realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion [in] any of the . . . cases referred to in this opinion and in the dissenting opinion." But at the same time, Rehnquist insisted that

> we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved [cases such as] *Dandridge v. Williams*, . . . together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.[104]

While somewhat unorthodox in its frankness, this assessment accurately conveyed the status of rational basis analysis in the wake of *Murgia* and *Fritz*. Despite their best efforts, the Justices had failed to reach any consensus on the proper approach to rational basis analysis and the result in individual cases would of necessity depend on potentially shifting majorities. The depth of their disagreement would be revealed even more publicly later the same term in *Schweiker v. Wilson*.[105]

In *Schweiker*, the Justices were faced with an equal protection challenge to the constitutionality of a provision of the Social Security Act that provided small allowances to disabled people who lived in public institutions that were eligible for Medicaid funds, but did not provide such allowances for otherwise eligible disabled people who lived in institutions that were not entitled to receive Medicaid funds. Because of the complex structure of the relevant statutes, the impact of the exclusion was felt largely by a subset of people who suffered from mental illness. Against this background, a majority of the Justices concluded that the constitutional challenge should be rejected.

All of the Justices agreed that the rational basis test supplied the appropriate standard of review in *Schweiker*. However, they split 5–4 on the question of whether the challenged provision passed muster under that standard. Despite the closeness of the vote, *Schweiker* does not seem to have generated extensive discussions within the Court. Nonetheless, particularly when considered together with *Fritz*, the majority and dissenting opinions aptly reflected the dynamic that remained in the wake of *Murgia*.

Speaking for the majority, Harry Blackmun characterized the challenged exclusion as the product of a "deliberate, considered choice" by Congress. While at times emphasizing the need to respect congressional authority to make such judgments, the language of Blackmun's opinion could be viewed as less deferential than Rehnquist's formulation of the rational basis test in *Fritz*. Thus, while Rehnquist had declared that "where there are plausible reasons for Congress' action, our inquiry is at an end," Blackmun quoted *Murgia*'s characterization of the test as "'a relatively relaxed standard [of review]'" and also pointedly cited *Mathews v. Lucas* for the proposition that "'[the] rational basis standard is not a toothless one.'"[106]

Powell spoke for himself and Brennan, Marshall and Stevens in dissent. Much like the majority opinion in *Fritz*, the dissent in *Schweiker* included a footnote that acknowledged that "'[t]he Court has employed numerous formulations for the "rational basis" test'" and also observed that "[m]embers of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear and about the degree of deference afforded the legislature in suiting means to ends."[107] But, in addition, now freed from the tactical considerations surrounding the effort to attract the support of a majority of the Justices, Powell used *Schweiker* as a platform to express the views that he had hoped would form the basis for an opinion for the Court in *Murgia*. In his *Schweiker* dissent, Powell declared that:

> The deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people. Accordingly, an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature intended to serve. When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernible purpose receive the most respectful deference. Yet the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice, as its absence.[108]

*Fritz* and *Schweiker* laid bare the dispute over the proper scope of the rational basis test that had left the Justices so deeply divided during the 1975 term. But although the supporters of judicial deference emerged victorious in both cases, the opinions also suggested that the argument might be far from definitively settled. Four Justices remained openly hostile to the *McGowan* formulation, and Justice Blackmun's declaration that the rational basis test was "not toothless" implied that he might be willing to join with them at some future date. Moreover, the language of the footnote to the majority opinion in *Fritz* suggested that even Justice Rehnquist understood that the doctrinal dispute might easily reemerge at some future date.

## EPILOGUE: *BOWEN v. GILLIARD* AND *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER*

In the wake of the decisions in *Fritz* and *Schweiker*, the Justices seem to have

abandoned any hope of reaching consensus on a generally applicable formulation of the rational basis test. While they continued to disagree at times on the proper application of rational basis analysis to specific cases, the Justices seemed far more concerned with establishing the criteria for determining whether intermediate or strict scrutiny should be applied in place of the rational basis test. Thus, for example, in the 1987 decision in *Bowen v. Gilliard*,[109] in which Justices Brennan, Marshall, and Blackmun concluded that enhanced scrutiny should be applied to a provision of the statute governing the AFDC welfare program, Powell had no apparent qualms in joining Stevens' majority opinion that concluded that the rational basis test should be applied, privately characterizing the opinion as "exceptionally well written"[110] notwithstanding the fact that Stevens explicitly embraced the *McGowan* language that Powell had found so objectionable in the discussions surrounding *Murgia* and *Fritz*.[111] Conversely, in *City of Cleburne v. Cleburne Living Center*, Justice Rehnquist was willing to countenance the application of a more searching version of rational basis analysis in order to create a majority that definitively rejected the idea that discrimination against the mentally challenged should be subjected to middle tier scrutiny.[112]

Taken together, *Gilliard* and *Cleburne* demonstrate convincingly that, by the late 1980s, the Justices had abandoned the effort to bring consistency and coherence to the Court's rational basis jurisprudence. Instead, even Justice Rehnquist had at least implicitly accepted the idea that rational basis analysis could be used as a kind of doctrinal safety valve that would allow the Justices to on occasion strike down classifications that they found particularly offensive without adding to the set of groups and rights that are formally entitled to some form of enhanced constitutional protection. However unsatisfactory it might be from a theoretical perspective, this use of the rational basis test remains a staple of the Court's equal protection jurisprudence to this day.

*Author's Note:* The author gratefully acknowledges the assistance of Katie Eyer and John Jacob, Archivist Librarian at Washington and Lee University School of Law.

## ENDNOTES

[1] 427 US 307 (1976) (per curiam). The Court's internal deliberations in *Murgia* are also discussed in Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 *Mich L Rev* 1854, 1857–61 (1995).

[2] *Murgia*, 427 US at 307

[3] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv L Rev* 1, 8 (1972).

[4] 366 US 420 (1961).

[5] 220 US 61 (1920).

[6] *McGowan*, 366 US at 426 (citations omitted).

[7] 397 US 471, 494 (1970).

[8] 404 US 71 (1971).

[9] *Id.* at 76 (1971), quoting *Royster Guano Co. v. Virginia* 253 US 412, 415 (1920).

[10] 415 US 361, 374–75 (1974).

[11] Gunther, 86 *Harv L Rev* 1 (cited in note 7) at 44.

[12] *Rodriguez*, 411 US at 51.

[13] 413 US 578 (1973).

[14] *Murgia v. Massachusetts Bd. of Retirement* 376 F Supp 753, 755, 756 (1974) (three-judge court), reversed 427 US 307 (1976) (per curiam).

[15] Conference Notes of Lewis F. Powell, Jr., [hereinafter, LFP] *Massachusetts Bd. of Retirement v. Murgia* No. 74-1044 (December 12, 1975) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), [hereinafter, Powell Murgia file], online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf.

[16] Draft Opinion of William J. Brennan, Jr., *Massachusetts Bd. of Retirement v. Murgia*, No. 74-1044, 8, 9–10, 10 (on file with the Library of Congress, Harry A. Blackmun Papers Box 219, Folder 2).

[17] Byron R. White [hereinafter BRW] to William J. Brennan, Jr. [hereinafter WJB] January 28, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf.

[18] *Murgia*, 427 US at 317–27 (Marshall dissenting).

[19] William H. Rehnquist [hereinafter, WHR] to WJB, January 28, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf.

[20] WHR to WJB, January 30, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf, at 2, 2, 3.

[21] WJB to WHR, February 9, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf, at 2–3.

[22] WHR to the Conference, February 11, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirement-Murgia1975.pdf, at 4, 4, 8–9, 15–16.

[23] LFP to WJB, February 11, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf.

[24] 406 US 164 (1972).

[25] LFP to WJB, (cited in n. 23).

[26] Potter Stewart [hereinafter PS] to WJB, February 12, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgia1975.pdf.

[27] Warren E. Burger [hereinafter WEB] to WJB, March 30, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgia1975.pdf.

[28] WJB to WEB, March 16, 1976, (on file with the Library of Congress, Harry A. Blackmun Papers Box 219, Folder 2).

[29] Draft opinion of LFP concurring in the result, April 7, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgiaOpinionChambers&1st.pdf.

[30] *Id.* at pp. 1–2 n. 1.

[31] *Id.* at 3–4.

[32] *Id.* at 4, 4–5.

[33] *Id.* at 5–6, 6.

[34] *Id.* at 6 (footnote omitted), 7 (footnote omitted).

[35] *Id.* at 7–8, 8.

[36] WJB to LFP, April 14, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976April.pdf.

[37] BRW to WJB, April 14, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976 April.pdf.

[38] *Id.*

[39] *Id.*

[40] 427 US 297 (1976) (per curiam).

[41] Conference notes of LFP, *City of New Orleans v. Dukes* No. 74-775 (November 12, 1975) in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http://law.wlu.edu/deptimages/powell%20archives/74-775_NewOrleans_Duke.pdf.

[42] *Id.*

[43] BRW April 14 Memorandum (cited note 40).

[44] *See* memoranda from LFP to Chris Whitman, April 20, 26 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgia1976April.pdf.

[45] LFP to PS, May 7, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May7_24.pdf.

[46] LFP to Harry A. Blackmun [hereinafter HAB], May 12, 1976, Powell Murgia file, http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirement-Murgia1976May7_24.pdf.

[47] LFP to PS, (cited note 48).

[48] 413 US 528 (1973).

[49] 411 US 1, 60 (1973) (Stewart, J., concurring).

[50] 2nd Draft, opinion of PS concurring in the result, *Massachusetts Bd. of Retirement v. Murgia*, February 3, 1976, (on file with the Library of Congress, Harry A. Blackmun Papers Box 219, Folder 2) at 1, 1–2.

[51] LFP to HAB, May 12, 2013, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May7_24.pdf.

[52] *Id.*

[53] HAB to WJB, March 11, 1976, (on file with the Library of Congress, Harry A. Blackmun Papers Box 219, Folder 2).

[54] HAB to LFP, May 18, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May7_24.pdf.

[55] LFP to the Conference, Jr. May 19, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirement Murgia1976May7_24.pdf.

[56] 3rd Draft, opinion of PS concurring in the result, *Massachusetts Bd. of Retirement v. Murgia*, May 20, 1976, Powell Murgia, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgia1976May7_24.pdf at 1, 1–2.

[57] *Id.* at 1.

[58] John Paul Stevens [hereinafter JPS] to LFP, May 21, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoard RetirementMurgia1976May7_24.pdf (referencing Powell's memorandum on *Murgia*).

[59] *Id.* at 1, 1–2, 2.

[60] BRW to LFP, May 24, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May7_24.pdf.

[61] WHR to LFP., May 25, 1976, Powell Murgia file, http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May25_30.pdf, at 5, 4–5, 5.

[62] *Id.* at 8, 9, 14–17.

[63] *Id.* at 12, 18.

[64] *See* LFP to Chris Whitman, June 2, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/

powell%20archives/74-1044_MassBoardRetirement Murgia1976June.pdf (discussing negotiations).

[65] LFP to the Conference, June 7, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976-June.pdf. *See* Memorandum from Powell to Whitman (cited at n. 67) (describing deleted portion as "our favorite paragraph on purpose").

[66] 4th Draft, *Massachusetts Bd. of Retirement v. Murgia* (June 7, 1976), Powell Murgia file, online at http:// law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgiaOpinion4th&5th.pdf.

[67] *See* nn. 45–47. And accompanying text.

[68] 4th Draft (cited at n. 119) at p. 11 n. 13.

[69] 427 US 495 (1976).

[70] 417 US 628 (1974).

[71] *Mathews*, 427 US at 516–23 (Stevens dissenting).

[72] 2nd Draft, *Mathews v. Lucas*, No. 75-88, (June 1, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http://law.wlu.edu/deptimages/powell%20archives/MathewsLucas.pdf, at 9–11, 11, 15, 14.

[73] *Id.*

[74] BRW to LFP, June 9, 1976, Powell Murgia file, (online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976June.pdf).

[75] LFP to the Conference, June 15, 1976, Powell Murgia file, online at http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976-June.pdf.

[76] *Murgia*, 427 U.S. at 314, 315.

[77] Memorandum to Conference (cited at n. 75).

[78] 440 US 568 (1979).

[79] 429 US 190 (1976).

[80] Draft opinion, *Craig v. Boren*, No. 75-628, Nov. 19, 1976, (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http:// law.wlu.edu/deptimages/powell%20archives/75-628_Craig Boren.pdf.

[81] *Craig v. Boren*, 429 US at 210 n. 79 (Powell, J., concurring).

[82] LFP to WHR, November 10, 1979 in Case File, *Railroad Retirement Board v. Fritz*, No. 79-870 [hereinafter Fritz Case file], online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[83] 441 US 347 (1979).

[84] Draft opinion of Justice Potter Stewart, Feb. 9, 1979, Case File, *Parham v. Hughes* No. 78-3 (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http://law.wlu.edu/deptimages/powell%20archives/ParhamHughes.pdf, at pp. 3–4.

[85] PS to LFP, February 14, 1979, *Parham v. Hughes* Case File (cited in n. 84).

[86] *Parham*, 441 US at 351 (plurality opinion) (citations omitted).

[87] 449 US 106 (1980).

[88] 450 US 221 (1981).

[89] Conference Notes of LFP, October 8, 1980, in Fritz Case file, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[90] *Fritz*, 449 US at 182–98 (Brennan, J., dissenting).

[91] First Draft Opinion in *United States Railroad Retirement Board v. Fritz*, October 8, 1980, in Fritz Case file, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirement Fritz.pdf at 7, 8, 7–8, 8 (citations and quotations omitted), 11.

[92] PS to WHR, November 10, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[93] HAB to WHR, November 10, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[94] LFP to WHR, November 10, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf at 2.

[95] JPS to WHR, November 12, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[96] First Draft, opinion of JPS concurring in the result in *United States Railroad Retirement Board v. Fritz*, No. 70-870, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf, at 3.

[97] WHR to LFP, November 13, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf at 1, 2.

[98] *Id.* at 3, 5.

[99] LFP to WHR, November 17, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[100] JPS to WHR, November 21, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[101] BRW to WHR, November 17, 1980; WEB to WHR, November 17, 1980, both in Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[102] WHR to JPS, November 24, 1980, Fritz Case File, online at http://law.wlu.edu/deptimages/powell%20archives/79-870_USRailroadRetirementFritz.pdf.

[103] *Fritz*, 449 US at 183–84 (Brennan dissenting).

[104] *Fritz*, 449 US at 177 n. 10.

[105] 450 US 221 (1981).

[106] *Id.* at 235, 234 (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 US 307, 314 (1976), 234 quoting *Mathews v. Lucas*, 427 US 495, 510 (1976).
[107] *Id.* at 243 n. 4 (Powell, J., dissenting), quoting *Railroad Retirement Bd. v. Fritz*, 449 US 166, 176–77 n. 10 (1980).
[108] *Id.* at 244–45.
[109] 483 US 587 (1987).
[110] First Draft of Opinion in *Bowen v. Gilliard*, June 9, 1987, (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http://law.wlu.edu/deptimages/powell%20archives/86-509_Bowen_Gilliard1987June9.pdf.
[111] *Gilliard*, 483 US at 601, quoting *McGowan v. Maryland*, 366 US 420, 426 (1961).
[112] WHR to BRW, June 5, 1985, Case File, *City of Cleburne v. Cleburne Living Center*, No. 84-468 (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives), online at http://law.wlu.edu/deptimages/powell%20archives/84-468_CleburneTexas_CleburneLiving1985June3-7.pdf.

The complexity of the negotiations that ultimately led to the majority opinion in *Cleburne* is reflected in the correspondence among the Justices collected in the Case File in the Powell archives, online at http://law.wlu.edu/powellarchives/page.asp?pageid=1581.

# The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Numerous students received their first formal college-level exposure to American politics by way of a textbook of nearly encyclopedic proportions written by Frederic A. Ogg and P. Orman Ray and entitled **Introduction to American Government**,[1] the first edition of which appeared in 1922. In a major chapter on the presidency, the authors insisted that "no monarch or minister in any foreign land has as much actual control over the filling of public offices as does he,[2] even as they acknowledged that this appointment power was one that the framers, consistent with the principle of separation of powers, had purposefully shared with the Senate. The resulting arrangement was not for the purpose of relieving the President of responsibility for appointment, but, as Alexander Hamilton had argued in *The Federalist*, No. 76, to check any spirit of favoritism which he might display and to prevent the appointment of "unfit characters from State prejudice, from family connections, from personal attachment, or from a view to popularity."

Because of the sequence of events as the new government got underway in 1789, however, George Washington became President before any judicial positions, and therefore judicial vacancies, even existed. Chancellor Robert R. Livingston, senior judicial officer in the State of New York, administered the oath of office to Washington on April 3, but it was not until September 24 that the First Congress passed the foundational Judiciary Act, which created the national judicial system and with it a Supreme Court with six Justices. Yet once that law was in place the new President moved swiftly, nominating six Justices[3] on September 24, with their confirmations following two days later. At this point, however, what had been a smooth selection process encountered a hurdle as Washington's sixth nominee, Robert Harrison of Maryland declined to accept, possibly because of health.[4] What was to have been Harrison's seat went to James Iredell, who was named on February 8, 1790 and confirmed on February 10.

Among the nation's forty-four Presidents to date, Washington therefore remains in a unique position in that, as he took office, he knew that his initial work would include staffing a Supreme Court that everyone expected Congress to create. Among his

successors, while each presumably has hoped to fill one or more seats on the Court, barely a few have known *when* that opportunity would in fact first arise. For example, only rarely has an incoming Chief Executive both inherited a vacancy and then revived his predecessor's stalled nomination, as happened with President James Garfield's appointment of Stanley Matthews, whose name had initially been placed in nomination by President Rutherford B. Hayes.[5]

For the rest, it has nearly always been the indeterminate and sometimes possibly even vexing situation of waiting for events to take their course. For an example, one need look no further than some statements in the perhaps self-serving memorandum written by Professor Felix Frankfurter soon after Franklin D. Roosevelt became President in 1933, on the occasion when, according to the memorandum, Roosevelt asked Frankfurter to be Solicitor General and Frankfurter politely declined. As Frankfurter recalled another part of this conversation, the President said, "You ought to be on the Supreme Court, and I want you there. One can't tell when it will come—it may come in my time or not—but that's the place you ought to be." Later in the same conversation, Frankfurter wrote that he asked his friend, "Are you aware that before very long you are likely to have two vacancies to be filled west of the Mississippi?" "I then told him that I had good reason to believe that Van Devanter and Sutherland would retire before next Term of Court. That took him by surprise. 'I hadn't realized that. But when is McReynolds going to retire—isn't he going to resign?' I told him I feared not."[6]

Indeed, as the second Roosevelt and other occupants of the White House have learned, simple patience might as well have been listed in Article II among the Chief Executive's qualifications for office, as the table below illustrates. If one calculates the interval between the beginning of each of the nineteen presidencies since 1900 and the date of the first vacancy (as measured by the number of approximate whole months), the results range on short end from three months for Presidents Warren Harding and Harry Truman to, on the long end, what was most assuredly a frustrating fifty-one months for Franklin Roosevelt—despite Frankfurter's woefully inaccurate prediction otherwise. Reflecting the recent tendency for some Justices to depart in the first year of a new Administration usually at the conclusion of the Court's Term, the statistical mode or most common interval shown in the table is approximately five months.

| President | Time in Office to First Supreme Court Vacancy |
|---|---|
| Theodore Roosevelt | 12 months |
| William Howard Taft | 7 months |
| Woodrow Wilson | 16 months |
| Warren Harding | 3 months |
| Calvin Coolidge | 17 months |
| Herbert Hoover | 11 months |
| Franklin D. Roosevelt | 51 months |
| Harry S Truman | 3 months |
| Dwight Eisenhower | 9 months |
| John F. Kennedy | 15 months |
| Lyndon B. Johnson | 32 months |
| Richard Nixon | 5 months |
| Gerald Ford | 15 months |
| Jimmy Carter | No Supreme Court vacancies |
| Ronald Reagan | 5 months |
| George H. W. Bush | 18 months |
| Bill Clinton | 5 months |
| George W. Bush | 5 months |
| Barack Obama | 5 months |

Across all administrations, whenever a vacancy on the Court has appeared and whether it has been filled through a recess or regular appointment, every Supreme Court nominee has encountered the Senate. While most senatorial scrutiny today occurs during

hearings before the Judiciary Committee at which the nominee testifies, for most of American history, the practice was otherwise. As a standing committee of the Senate, the Judiciary Committee dates only from 1816, with nominations prior to that date being dealt with by the full Senate alone. Between 1816 and 1867 some two thirds of the nominations were referred to the Judiciary Committee, with nearly all of them being processed in that way since 1868.[7]

The modern practice began to take shape with Louis D. Brandeis' nomination in 1916, when the Committee first held an open hearing with outside witnesses testifying, although the nominee himself was not present. Supreme Court nominees did not appear before the committee to answer questions until 1925, when President Coolidge's nomination of Attorney General Harlan F. Stone to replace Justice Joseph McKenna ran into difficulty. Even here, however, Stone was present only to respond to specific allegations growing out of his work as Attorney General. The second nominee to testify was Frankfurter, in 1939, who agreed to appear only when supporters informed him that he would probably be rejected if he did not. Indeed, Frankfurter was the first to take a variety of questions in an open recorded public hearing. Still, such appearances did not become routine until after 1954. Ever since, all nominees have been expected to appear, although concerns persist over the propriety of questions that Senators ask and what obligation the nominee has to answer them. Moreover, hearings since 1965 have usually been both exhaustive and, for the prospective Justice, often exhausting. Gone forever, apparently, are the days of the cursory Senate probing that Kennedy nominee Byron White experienced in 1962, when public hearings lasted a scant one hour and thirty-five minutes.

There is now a considerable literature in book and periodical form on judicial appointments, and nearly every such study devotes at least some space to the confirmation part of the appointment process in addition to the politics of the nomination itself. To this collection is now added **Supreme Court Confirmation Hearings and Constitutional Change**[8] by political scientist Paul M. Collins, Jr., of the University of North Texas and Lori A. Ringhand of the University of Georgia School of Law. Together they have authored a readable and important study that seeks to place the confirmation process in the larger context of democratic politics. Their book is the outgrowth of an impression they shared that there is a lack of comprehensive information about "what actually happens at the confirmation hearings of Supreme Court nominees." That is, alongside the plain fact that the hearings today are open public events where every word is transcribed and where, in more recent decades, the text of what is spoken is paired with both audio and video, they wondered about the full significance of what unfolds in the committee room. In other words, are the hearings merely pointless exercises in political posturing and grandstanding by Senators and meaningless question-dodging by nominees, "or is there a more positive story to be told about the role [the hearings] play in our governing system?"[9] Certainly there has been no shortage of appraisals that have adopted the negative view. Justice Elena Kagan herself, the newest member of the Court, was on record at the time of her nomination in 2010 that modern-day confirmation proceedings had become "a vapid and hollow charade."[10] Indeed, it is instructive but also perhaps ironic that the photo chosen for the cover of the Collins and Ringhand book was taken in the Senate hearing room at the moment that General Kagan was being sworn in as a witness by Senator Patrick Leahy. He was standing with right hand raised as was she. The photographer's position, perhaps ten to twelve feet behind the nominee, was such that the photograph captures the nominee's perspective at that moment, as she faced not only Senator Leahy, other committee members

**The second Supreme Court nominee to testify before the Senate Judiciary Committee, Professor Felix Frankfurter spoke with Senator Alexander Wiley of Wisconsin during his confirmation hearings in 1939. Frankfurter had agreed to appear in an open recorded public hearing only when supporters informed him that he would probably be rejected if he did not. *Supreme Court Confirmation Hearings and Constitutional Change*, a new book by political scientists Paul M. Collins, Jr., and Lori A. Ringhand examines the history of open Supreme Court confirmation hearings, which did not become routine until the 1950s.**

seated at the dais, and numerous staff, but also a coterie of more than a dozen still photographers seated on the floor just below the dais and no more than a few feet in front of the nominee's table with each holding an impressive DSLR[11] camera and attached lens, weighing probably three pounds, aimed squarely at the nominee. For someone effectively auditioning for a seat on the Supreme Court, it was a dignity-deprived and visually traumatic spectacle she would never experience in the Courtroom.

In contrast to that image and to the widely shared opinion that judicial confirmation hearings are little more than a demonstration of vapidity or an exercise in futility, the authors adopt a celebratory view that hearings instead represent "important constitutional moments"[12] in that they "are one of the important ways in which the public contributes to constitutional change."[13] As such the hearings have become an integral part of democratic politics, a conclusion Collins and Ringhand reach based on a meticulous content analysis of available hearing records.

As they summarize their findings, when:

> . . . constitutional choices made by the Court gain acceptance by the public at large, nominees are expected to pledge their adherence to those choices at their confirmation hearings. Over time, subsequent nominees from across the political spectrum voice their support for those changes, allowing the hearing to function as a formal mechanism through which the Court's constitutional choices are

> ratified as part of our constitutional consensus—the long-term constitutional commitments embraced by the public. In doing so, the constitutional choices made by an otherwise largely insulated judiciary are affirmed through a formal, public, and law-focused process.[14]

Accordingly, the "Senate's ability to refuse to confirm a nominee who fails to accept or reject a particular constitutional doctrine provides a tangible moment at which elected officials, acting on our behalf can choose one legally viable constitutional meaning and reject another."[15] Moreover, one suspects the same might be said of the President in the initial choice of a nominee in that winnowing the proverbial "short list" at the Department of Justice or at the White House necessarily entails a process of inclusion and exclusion, not only of individuals but of jurisprudential values too. Similarly, while the authors' thesis is entirely plausible, and although they could obviously work only with the record that exists, their thesis would be even more persuasive if recent decades contained more failed High Court nominations instead of a pattern where successful outcomes are the rule and rejections very much the exception.

Methodologically, a focus "on the role the hearings play in formally recognizing *previously contested cases* as part of our constitutional consensus allows [the authors] to see how the confirmation hearings can in fact contribute to this process. Major constitutional changes from this perspective are not 'mistakes' that must be grudgingly tolerated because people have come to rely on them, but rather are constitutional choices, made by the people and ratified through the confirmation process. Constitutional meaning, in the process we describe here, is not pulled from the parchment by nine legal seers, but rather is created in fits and starts as the Court issues decisions that are accepted, rejected, ignored, and passionately argued about by us."[16] In short, the "process of debating and repeatedly affirming (or, in some cases, rejecting) once deeply contested constitutions choices ratifies a new constitutional canon, one that reflects the broad and deep support of those who agree to live under it."[17] Yet because the authors' link between the hearings and the democratic process seems clearly dependent upon a civically engaged citizenry—a link that the book should make more evident—that connection would seem to be most applicable to that most recent period of American history when hearings have been widely accessible through television.

In helping the reader to understand their objectives and findings, the authors lay out near the outset, and with some specificity, a series of points that their book is *not* making. Of these, perhaps most important is that they do not believe the Court's job is "to track short term public opinion (although it will frequently do so, nor do we believe Supreme Court Justices have an obligation to vote the way their political allies or 'constituencies' want them to." Nor do the authors believe nominees "should be required to answer every question put to them by senators (although we do think that senators could get better answers if they asked better questions) and we certainly do not think justices should be impeached for failing to always vote [sic] in accordance with the answers they gave at their hearings (although we think they should feel a special obligation to explain such deviations in their written opinions)." Also important and instructive, because their book spans many years highlighted by many decisions, the authors do not believe "that every decision rendered by the Supreme Court is equally valid. The tools of legal reasoning constrain judicial discretion even if it cannot eliminate it, and there will always be better and worse legal arguments. Likewise, although the Constitution in almost all hard cases allows for more than one legally correct answer, it is not infinitely flexible. To say there is unlikely

to be a single correct answer is not to say that there are no wrong answers." Finally, the authors do not claim that confirmation hearings are the "only important means by which Supreme Court decisions gain acceptance."[18]

This paragraph of nonintention is quickly and logically followed by a succinct statement of intention that is an instructive summation of the Court's constitutional decision making and its relationship to the political process. "The Constitution rarely gives determinative legal answers to complex constitutional questions. Supreme Court justices therefore necessarily make choices among the constitutionally acceptable answers the tools of legal reasoning leave open to them." While those choices are allowed by the Constitution they are "rarely uniquely mandated by the Constitution itself. Accordingly, they draw their legitimacy not from any constitutional decree, but rather by acceptances, over time, by broad and deep swaths of the public. The confirmation hearings contribute to this process by providing a forum in which those choices are ratified in democratically legitimated way." What may have once been controversial "is recognized as part of our constitutional understanding."[19]

Among confirmation proceedings since the contentions hearings for Abe Fortas in 1965 and again in 1968, those for Judge Robert Bork to replace the retiring Lewis F. Powell, Jr., in 1987 surely remain in a class by themselves. The depth of the controversy then of course had hardly been surprising. Not only had Justice Powell's departure placed a pivotal seat on the Court into play, but the nominee's published writings and his forthrightness and willingness to discourse at length during the Senate hearings advanced not only an interpretative theory of originalism, but accordingly called into question, among other things, the continued viability of a constitutionally protected right to privacy (on which the abortion right created in *Roe v. Wade*[20] rested and adherence to the ground-shaking one-person, one-vote standard adopted by the Court in the legislative districting cases of 1963 and 1964. Moreover, Republicans had lost control of the Senate as a result of the 1986 midterm elections, so the nominee faced a less than welcoming committee environment. The combination proved fatal for his advance to the High Bench. As matters unfolded, President Reagan was able to fill Powell's seat only when the President's second nominee,[21] Judge Anthony Kennedy —less provocative and far less well known than Bork—convinced the Senate that he passed the not-Bork test.

Indeed, the Bork affair looms so large in confirmation politics that it is arguable that without the Bork event Collins and Ringhand would not have written their book. So it is not surprising that the authors have recourse from time to time to the 1987 Bork hearings as a landmark reference point. For example, they find particular and supporting significance in the hearings for Judge John Roberts in 2005 and Judge Samuel Alito in early 2006 to fill the vacancies created by the death of Chief Justice William H. Rehnquist and the retirement of Justice Sandra O'Connor.

> Unlike Kennedy, [David] Souter, [Stephen] Breyer, and [Ruth Bader] Ginsburg, Roberts and Alito were separated from the Bork hearings by more than two decades. Also unlike those nominees, Roberts and Alito were appointed by a Republican president *and* faced a Republican-controlled Senate—a situation that seemingly would have presented a perfect opportunity to reassert the constitutional vision presented by Bork. Neither of them did. Like their predecessors, Roberts and Alito each explicitly rejected Bork's constitution and embraced Kennedy's. Alito was the more precise about this, whereas Roberts was the most expansive. . . . By 2006 [sic], when

> President Barak Obama named his first Supreme Court nominee, the issues that had so inflamed the Bork hearing were so obviously part of the constitutional consensus that most of them were mentioned only in passing. The war against the Warren Court was over. It was, in fact, over in 1987. Robert Bork just failed to realize it.[22]

As the authors reflect in their concluding paragraph, the Constitution now protects various rights and empowers Congress in various ways it did not two generations ago "not because no other answers to these constitutional questions are legally available, but because these are the answers the American people have chosen."[23]

On some thirteen pages, Collins and Ringhand refer to *Brown v. Board of Education*.[24] *Brown* is now the focal point of **A Storm Over This Court**, a study in judicial decision making by political scientist Jeffrey D. Hockett of the University of Tulsa.[25] Given that, among all decisions by the Supreme Court, *Brown* surely ranks today among those that have attracted the most scholarly attention, one might fairly wonder at the outset if much more could productively be said about the case. Hockett shows that there is, particularly when one places the case in the context that he constructs. Furthermore, *Brown* remains in multiple ways a landmark among judicial landmarks. First, this highly respected and celebrated decision—perhaps *iconic* is the better adjective—jump started the modern civil rights movement that challenged not only white supremacy but soon sought out for correction not only various manifestations of racial but other forms of discrimination, with effects and momentum that continue today. Indeed in some respects *Brown* began the rights revolution. Second, coming as it did nearly at the beginning of the Chief Justiceship of Earl Warren, the decision seemed almost to inspire the Court to attempt a variety of major political, legal, and social changes. Indeed, by the time Warren retired in 1969, hardly an aspect of life had gone untouched by landmark decisions not only on race discrimination, but on representation, voting, privacy, and the Bill of Rights. It was for this reason that, although he considered *Brown* "a great and [morally] correct decision,"[26] Robert Bork nonetheless viewed Warren's opinion in the case as legal mischief in that, by separating the decision from the Constitution, it freed the Justices to substitute their views of desirable policy for the views of the framers.[27]

Third, even at a distance of some sixty years, the enormity of the challenge the Supreme Court assumed on May 17, 1954, in declaring unconstitutional racial segregation in public schools still seems staggering. It was not only that the Court had never fully repudiated the separate-but-equal doctrine dating from *Plessy v. Ferguson*[28] in 1896, where eight Justices had upheld a state statute requiring racial segregation on trains, but also that racial segregation was, by the 1950s, a way of life for many, whites and blacks alike, and not just in the southern states. A decision against state-mandated segregation in public schools would affect more than eight million white children and half a million black children in the school systems of seventeen states and the District of Columbia where segregation was required by law, and those of four states where segregation was permitted by local option. Even greater issues were involved: if segregation in public schools was deemed a denial of equal protection of the laws, then it would be difficult if not impossible to defend segregation in other sectors of public life. Thus, a frontal challenge to segregation meant that the legal underpinnings of the social structure of a large part of the nation had come under attack.

Fourth, in ways that distinguished the decision from many other important cases of that era, *Brown* and the litigation it fostered created both *legal* as well as a *political*

uncertainty or ambiguity. The legal uncertainty was partly a function of the language Chief Justice Earl Warren used in his opinion for the Court in 1954 that "in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal."[29] Left unclarified was the source of the constitutional inequality—that is, whether the constitutional violation stemmed from the laws that mandated separate schools for the two races or from the simple fact of separation itself. The political uncertainty arose from that legal uncertainty as well as the Court's decision (usually referred to as *Brown* II[30]) a year later on implementation of its historic ruling in *Brown* I. The decree in the second Brown case expressed the conclusion that desegregation in public education would necessarily take place at varying speeds and in different ways, depending on local conditions. In wording that proved significant, Warren's opinion declared, "The judgments below . . . are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."[31]

The implementation of *Brown*, however, proceeded at a turtle's pace outside the Border States. Some Deep South states began a campaign of active and passive resistance, adopting various legal tactics and devices that delayed implementation. Several legislatures passed resolutions declaring the desegregation decisions "unlawful." Almost all southern Senators and Representatives joined in 1956 in issuing a "Declaration of Constitutional Principles" and advocated resistance to compelled desegregation by "all lawful means."[32] Indeed, it was not until after the mid-1960s—following intervention by federal troops, additional rulings by the Supreme Court, and the combined effects of congressional legislation—that widespread implementation proceeded in the most heavily segregated southern regions, even as widespread residentially based school segregation continued outside the South.[33]

Fifth, and key to Professor Hockett's book, *Brown* was remarkable because of the kind of criticism it engendered, extending well beyond those who plainly disliked the *result* that the Court reached. Even among the many people who applauded the decision, there has been a recurring concern expressed widely that the Chief Justice's opinion for the unanimous Bench was inadequate and perhaps even disingenuous—indeed, that it fell short, a defect that only compounded the decision's political difficulties. In his opinion, Warren had expressly foresworn reliance on the intent of the framers of the Fourteenth Amendment in finding a constitutional violation. Historical sources were "inconclusive."[34] Instead, the Court's task was not to look backward but to "consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[35] Furthermore, to "separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ."[36] This was a finding, Warren insisted, that was "amply supported by modern authority."[37] Attached to that statement was a footnote highlighting various studies, the methodology of which in some instances was hardly airtight, thus making the Court's supporting rationale appear somewhat dubious at best.

Such reactions thrust the Supreme Court into the scholarly spotlight of an intensity that has only rarely been matched. According to Hockett, the aspect of the decision's "origin to receive perhaps the most attention involves the reasons for declaring public school segregation unconstitutional." The most

commonly held view, which surfaced soon after the case came down, was that "it represented an especially flagrant instance of instrumental decision making by judges"[38] by which they grafted their own attitudes or personal value preferences onto the language of the Fourteenth Amendment. Hockett believes there is much more to understanding *Brown* and "challenges the empirical basis of this normative assessment of the Warren Court's jurisprudence by demonstrating the problematic nature of the attitudinal account"[39] by emphasizing instead an institutional or noninstrumentalist approach. While all the Justices who comprised the *Brown* Bench "engaged in non-originalist decision making, and some of them based their votes on a policy preference for desegregation, it is necessary to consult the insights of institutional—primarily noninstrumental—approaches to Supreme Court decision making in order to explain the behavior of *most* of the justices in *Brown*."[40] In short, Hockett claims that his study "demonstrates that the puzzle regarding *Brown*'s basis defies an elegant solution." Hockett believes that "while most general studies of Supreme Court decision making emphasize the degree to which a single (usually instrumental) factor affords predictive success for many decisions across numerous issue areas, such a focus is of limited value, especially if the task is to explain the votes of nine justices in one case." Accordingly, scholars should "recognize that all Supreme Court decisions are combinations of instrumental and noninstrumental factors. . . ."[41]

For Hockett, primary reliance on an instrumental or attitudinal explanation is problematic for at least two reasons. First, "seven of the nine justices who decided *Brown* had been active participants in the New Deal before joining the Court. As harsh critics of the anti-New Deal decisions that the Supreme Court rendered . . . , the New Deal justices were sensitive to the charge of judicial policy-making." Second, "members of the Court [in 1954] were deeply divided over the issue of elementary school segregation" and some "acted contrary to their personal policy preferences." While such evidence "does not prove that noninstrumental goals informed the desegregation votes of these men, it suggests that we cannot assume the Justices were part of the current of history that was beginning to liberalize American racial attitudes at midcentury."[42]

To ferret out nonattitudinal or noninstrumental factors, the author turns to all available sources, including the papers of Justices, Court records and publications, and other models of decision making. Thus, a strategic model, or a constitutive model, with emphasis on collegiality and professional considerations may partly explain the success of Warren's efforts to achieve unanimity, given that a nonunanimous ruling would have invited even more resistance than the Justices actually anticipated. The waiting outcry lay behind the admonition "a storm over this Court"[43] that is attributed to Justice Hugo L. Black and that Hockett chose as the title of his book. The idea of a united front was particularly effective with respect to Justice Stanley Reed, whose final position went against his policy predilections. "Failing to secure Reed's vote through bargaining, Warren ultimately achieved unanimity by emphasizing his colleague's isolation and appealing to his sense of loyalty to the Court as an institution."[44]

In addition, a regimes approach looks at the Court's connections to the broader political system. Here enters the impact of the realization by certain Justices of the "international dimension of segregation"[45] particularly in the context of the Cold War as that had emerged after World War II, with the United States competing with the Soviet Union for the minds of people in the so-called unaligned nations and regions. In the author's analysis, "the justices who proved most receptive to the international implications of segregation were those who had been

appointed by the administration that brought these matters to the Court's attention—Harold Burton, Sherman Minton, and especially Harry Truman's former attorney general, Tom Clark." While Hockett admits that neither Burton nor Minton left sufficient documentation to suggest their personal views on segregation, each one had combined an "illiberal approach to civil liberties" with a "more permissive approach to civil rights," thus giving each "voting records that reflected the administration's posture toward civil liberties and civil rights."[46]

There is evidence too that some Justices considered the impact of an antisegregation ruling on the existing political party coalitions. The dominant Democratic coalition since the 1930s had consisted of labor unions and ethnic Roman Catholics and Jews in the North coupled with whites in the South. Indeed, since the Civil War, the southern states had been a necessary component of any Democratic party victory in presidential elections.

> [T]he New Dealers' willingness to risk the negative consequences associated with the destruction of the Democratic coalition stemmed . . . from a belief in the fluidity of the southern political situation. The justices recognized social and political forces that were altering race relations in the South, and their comments regarding these changes reflected a faith that the expansion of liberalism in the region—especially the development of a mutually beneficial relationship between racial minorities and labor, which the New Dealers promoted in their rulings—would at some point offset the loss of southern conservatives to the Republican party.[47]

From the author's perspective, reference to factors as varied as international politics and American political parties, as well as personal values and institutional harmony is a reminder as well as a plea that in explaining Supreme Court decisions, "methodological diversity is a necessity." As Hockett concludes, "the increased accuracy achieved through reference to multiple perspectives . . . compensate[s] for the inelegance that necessarily attends abandoning the quest for a single explanation of the decision."[48]

Probably no better example of the benefits of Hockett's methodological diversity surfaces than in the career of Justice Clark, who, during the period from the first argument in *Brown* to its reargument, and finally to its decision curiously inched from a defender of segregation to its opponent. Justice Clark, is now, along with his son Ramsey, the subject of a dual biography, **Father, Son, and Constitution**, by Alexander Wohl, who is the Supreme Court correspondent for the *San Francisco Chronicle* and adjunct professor at the law school of Washington's American University.[49] The father in this pair of Clarks had a life spanning 1899–1977. He finished law school at the University of Texas barely four years after the end of World War I. Private practice then led to a position as a special assistant to the U. S. Attorney General in 1937–1943, and an assistant attorney general in the Department of Justice (antitrust and criminal divisions) in from 1938 until 1945, when President Truman named him Attorney General. His tenure on the Supreme Court extended from 1949 until 1967, during which time he authored 214 majority opinions, twenty-four concurring opinions and ninety-four dissents, all the while keeping "up a schedule that would have been worthy of another entire job."[50] Son Ramsey was born in 1927, completed law school at the University of Chicago in 1950 near the beginning of the Korean War, and was named an assistant attorney general (lands division) in the Department of Justice in 1961 by President John Kennedy and then deputy attorney general (1965–1967) and Attorney General (1967–1969) by President

Lyndon Johnson. In the years since his last public office, he has twice unsuccessfully sought the Democratic nomination for U. S. Senate from the state of New York, adopted a high-profile stance in various anti-war and other progressive causes, and accepted or assisted in the legal defense of certain well-known clients, who, as Wohl writes, "could have been taken from an encyclopedia entry for modern-day dictators and war criminals."[51] This latter part of the son's story contrasts markedly with his prosecution in the 1960s of anti-war notables such as Dr. Benjamin Spock and the Rev. William Sloane Coffin.[52]

Combining two biographical subjects within a single volume would challenge any author, but Wohl has blended his treatments both fairly equally and effectively, despite the generational and sharply contrasting professional differences in the lives of these two Texans. Excluding pages devoted to endnotes, bibliography, and other sources, the book has 412 pages of substantive text spread across seventeen chronologically organized chapters. Within these, the elder Clark is the primary focus of about fifty-five percent, and son Ramsey the remaining forty-five percent. The dual biography is hardly "authorized," as that phrase is customarily used, although Wohl explains that the younger Clark fully cooperated in terms of facilitating access to sources and taking part in many hours of interviews, yet he "did so without ever expressing a concern about how either he or Tom Clark would be portrayed."[53]

Without question, Justice Clark, whom one scholar described as "the most underrated Justice in recent history,"[54] has been overdue for biographical treatment. The first substantial book-length look at his life[55] appeared barely four years ago when his daughter Mimi Clark Gronlund authored **Supreme Court Justice Tom C. Clark.**[56] Clark's Supreme Court tenure encompasses not only most of Fred Vinson's Chief Justiceship but almost all of the Warren Court years as well. Together, those years indeed qualify as an interesting time. To follow Clark as a Justice, therefore, is to have a window into the Court at significant points in its history. Son Ramsey's accomplishments and contributions to the public life of the nation have fallen into a different category and order of significance, but nonetheless seem appropriate for shared treatment with his father, particularly in that the contrasts between the two men are themselves instructive. Taken together, their family political legacy—still relatively rare in the United States—easily stretched over half a century. Moreover, by including the younger Clark, the author is able to explore some fascinating years in American politics and culture. As the author maintains, "Tom and Ramsey Clark's tag-team tenure in government was an unprecedented shared proximity to power and influence on policy during some of the most challenging, divisive, and triumphant periods in U.S. history, from World War II to the attacks of September 11, 2001."[57]

Students of the Supreme Court will be especially interested in the attention that Wohl gives to several decisions of lasting importance where Justice Clark had a key role. For example, in the famous Steel Seizure case of 1952,[58] he was part of the six-Justice majority that ruled against the legality of President Truman's takeover of the industry, but between the argument and the Conference discussion and vote Clark "[r]eassured [Chief Justice] Vinson that he would join him in supporting the president's authority. 'If you have four, I'll be the fifth,' he said."[59] By the time the Justices met in Conference on the case, however, Clark had changed his mind. Wohl suggests that the concurring opinion Clark filed was consistent with an earlier memorandum he seems to have authored while Attorney General that outlined broad inherent powers of the president to deal with various crises that imperiled the nation. "If crises arising from labor disputes in peacetime necessitate unusual steps, such as seizure to

prevent paralysis of the national economy, other inherent powers of the President may be expected to be found equal to the occasion."[60] Congress, however, had created a specific procedure in the Taft Hartley Act to cope with strikes and other labor stoppages, but Truman, having vetoed that legislation, which Congress then enacted over his veto, chose not to use what Congress had provided.

To say that President Truman was unhappy with the Court's decision and Clark's vote in particular would be an understatement, but the author believes that the extent or depth of that displeasure is hard to determine. He disputes the story that has become nearly legendary that the ruling provoked Truman into a string of expletives, not about the Court but about his former Attorney General. "At the very least, the comment about Clark is logically inconsistent with everything else about the relationship between Truman and [Clark] both before and after the decision."[61] Wohl does report as fact, however, that Justice Black, who had written the majority opinion, afterward "invited the president and his Brethren to a peacemaking gathering at his home. At the get-together Truman reportedly told Black, 'Hugo, I don't much care for your law, but, by golly, this bourbon is good.'"[62]

Wohl's treatment of the Clarks' lives reflects the importance and interplay for each man of two recurring themes, one macro and the other micro. The first theme predates the Constitution itself: security versus freedom. Whether during the Cold War or in more recent years, measures designed to guard or increase security often entail a constriction of liberty. Yet too much insistence on maintaining liberties may jeopardize security or collective war aims. American constitutional history is partly an attempt to find an appropriate balance between the two, although a perfect adjustment seems forever out of reach. The record suggests that the nation is eager to embrace liberty when danger seems remote but leans in the other direction when imperiled. There is thus a repeating pattern of under-and over-reaction. Sometimes lost amidst shifting policies is recognition that the nation's strength may derive as much from the ideas and values it reflects and protects as from the armies and munitions it deploys. "Constitutional law," wrote Edward Corwin decades ago, "has for its primary purpose not the convenience of the state but the preservation of individual rights."[63] The second theme, less majestic than the first, proved nonetheless as essential for father as it did for son. This was the role of patrons, benefactors (in a nonfinancial sense), and friends in the professional advancement of each. At its most elementary level, the current college and postcollege generation calls it "networking," but, by whatever name, neither Clark would have accomplished as much or gone nearly as far without it.

Relating directly both to Justice Clark and the first theme of Wohl's book is **Priests of Our Democracy** by Marjorie Heins,[64] who is an attorney, adjunct instructor at New York University, and founding director of the Free Expression Policy Project, which labels itself "a think tank on artistic and intellectual freedom."[65] As the subtitle suggests, Heins's exhaustively researched, detailed, and readable volume addresses "the Supreme Court, academic freedom and the Anti-Communist purge" mainly during the 1950s and early 1960s, a focus that should be of interest not only to students of the Court and civil liberties, but to educators as well and, as will become apparent, anyone interested in New York politics.[66] Her title is borrowed from Justice Frankfurter's concurring opinion in *Wieman v. Updegraff*,[67] a 8–1 decision through an opinion by Justice Clark that for the first time struck down a state loyalty oath statute because, in this case from Oklahoma, it penalized innocent as well as knowing association with suspect organizations. "To regard teachers—in our entire educational system, from the primary grades to the university—as the *priests of our democracy*

is therefore not to indulge in hyperbole," wrote the former Harvard Law School professor. "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma."[68]

Specifically, Heins's study tells the story of the constitutional controversy over application of New York State's Feinberg law of 1949, which "required detailed procedures for investigating the loyalty of every public school teacher and ousting anyone who engaged in 'treasonable or seditious acts or utterances' or joined an organization that advocated the overthrow of the government by 'force, violence or any unlawful means.' It was a typical Cold War -era loyalty law,"[69] she writes. Her account begins in 1952 with *Adler v. Board of Education*,[70] where the U.S. Supreme Court, in a ruling with national implications during the Korean conflict, and through an opinion by Truman appointee Justice Sherman Minton (which Clark joined) that upheld the law. "They may work for the

***Fighting Foreclosure*** **is a new book by political scientist John A. Fliter and historian Derek S. Hoff that examines** ***Home Building & Loan Association v. Blaisdell*** **(1934). The Supreme Court's decision in that case held that Minnesota's suspension of creditors' remedies during the Depression was not unconstitutional.**

school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere," Minton declared.[71]

The narrative and analysis then move onward to 1967 and *Keyishian v. Board of Regents*,[72] where an opinion by Justice William J. Brennan, Jr., for a slim majority of five effectively overturned *Adler* and struck down the Feinberg law and related administrative procedures, expressly recognizing academic freedom as part of First Amendment guarantees. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[73] His words amounted essentially "to the death knell for statewide anti-subversive programs" anywhere in the United States.[74] In contrast, Justice Clark, as joined by Justices Harlan, Stewart, and White, accused the majority of behaving in "blunderbuss fashion."[75] "In view of [the] long list of decisions covering over 15 years of this Court's history, in which no opinion of this Court even questioned the validity of the Adler line of cases, it is strange to me that the Court now finds that the 'constitutional doctrine which has emerged since . . . has rejected [Adler's] major premise.' With due respect, as I read them, our cases have done no such thing."[76]

In recounting important moments from the pre-Adler years to *Keyishian*, Heins tells "social and human stories, to connect the policy issues and the court cases to the people who lived them—those who were targeted by the witch hunt, those who pursued them, and those who started like Harry Keyishian as bystanders but eventually found a way to participate."[77] Given that much of this conflict took place in the nation's largest and most diverse city, where for most non–New Yorkers the politics appear thoroughly bewildering at best,[78] the struggles were particularly intense. The struggles were also culturally and politically complex in that the "passion and idealism of radicals eager for social justice clashed with legions of both super-patriots and liberals. The super-patriots wanted to use anti-communism as a wedge against progressive reforms; the liberals either were trying to prove their anti-communist credentials, and so undermine Republican party claims to monopolize the issue, or were so fiercely hostile to communism that they were willing to condemn people who had once been attracted to radical causes unless they publicly and lavishly recanted past enthusiasms."[79]

Furthermore, alongside such crosscurrents and contradictions were ethnic and religious elements in play. As the author describes the situation, the "overwhelming majority of left-wing teachers and professors targeted by the Boards of Education and Higher Education were Jewish; so were some of the leading inquisitors. Anti-Semitism, Jewish-Catholic tensions, battles over educational policy and race discrimination, and turmoil within the city's Jewish community provide the background against which the courts and the state's administrative apparatus wrestled with questions of free speech, union busting, and ultimately the Board of Education's unseemly policy of requiring teachers who admitted past CP [Communist party] membership to 'name names' or lose their jobs."[80]

Outside New York, the struggles may have been less complex and intense, but no less real. If one looks for lessons learned, Heins sees such threats arising "from a habit of mind, long prominent in American politics, that seeks simple answers to complex problems, that shuts out nuanced or radical critique, and that demonizes dissent especially from the left. It was this habit of mind, in large part, that allowed the anti-communist purge of the 1950s to flourish as long and as intensely as it did."[81]

One further benefit of **Priests of Our Democracy** is that it again brings to the center of attention several important free speech cases decided by the Supreme Court in the 1950s and 1960s concerning various loyalty and security policies in use at both the state and national levels—cases that have in some significant measure all too apparently fallen out of sight. Excerpts typically are no longer found in commonly used casebooks, and outside of judicial biographies and specialty studies such as Heins's only rarely receive serious discussion in the literature. This phenomenon of course is not the result of any collective judgment that the loyalty cases are unimportant, but rather, one suspects, the result of the impact of an unfolding First Amendment jurisprudence that continues to apply old principles to current problems, issues, and concerns. The unsurprising result is that newer cases naturally displace the old. The scholarly attention span has its limits.

While predictions are often risky, it nonetheless seems safe to suggest that one Supreme Court decision unlikely to fall from the canon within the next decade is *Home Building & Loan Association v. Blaisdell*, otherwise known as the Minnesota Moratorium Case.[82] The case involved a challenge by a financial institution to a Depression-era state statute that attempted to rescue beleaguered farmers and homeowners by extending a mortgage's redemption period. *Blaisdell* seems safely within the teaching and research canon for several reasons. First, it deals with a problem that is recent history. The United States has only lately begun emerging from a housing and financial crisis that, while less extensive than the one of the 1930s, has by almost all accounts been the most severe since that time. Second, in retrospect *Blaisdell* marked the modern-day minimization of the contract clause in the Constitution that seemed, by its own plain language, to prohibit precisely what Minnesota had done: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."[83] Indeed, as Justice George Sutherland convincingly insisted in his dissent, "[a] candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress. Indeed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed. . . ."[84] Third, and because of the conflict between the decision and that apparent specificity, the outcome sparked a debate on constitutional interpretation both inside and outside the Court. Finally, *Blaisdell* seems safely ensconced because it remains a useful window into the Court's series of responses to that variety of legislative measures passed both by Congress and state legislatures that collectively is known today as the New Deal.

*Blaisdell* is now the subject of **Fighting Foreclosure** by political scientist John A. Fliter and historian Derek S. Hoff, both of whom teach at Kansas State University.[85] Their book is one of the latest to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this series of case studies now claims nearly five dozen titles,[86] almost all of them treating decisions by the United States Supreme Court. As such, the Kansas series fits comfortably into an established scholarly category in that the case study has been an instructive part of the literature on the judicial process for more than five decades.[87]

Fliter and Hoff's addition adheres to the structure and pursues the objectives of most of the other books in this series. Like them, their volume unfortunately lacks footnotes or endnotes, but does include a thorough bibliographical essay, and, essential for this kind of case study, a chronology. (While

footnotes or endnotes are not usually important for classroom use, where, one suspects the principal marketing thrust for the series is directed, their presence would greatly aid scholarly use, with no loss of appeal to a wider audience.) Moreover, near the outset the authors not only explain in detail how the Minnesota statute operated in practice but helpfully place the moratorium case in a social, historical, and legal context by guiding the reader through what may well be two tracts of unfamiliar territory. First, they provide a concise summary of the Court's Contract Clause jurisprudence. Second and equally important for enhancing the usefulness of their book, they include a mini-tutorial on Minnesota politics including particularly the impact of the state's Farmer-Labor party, which until 1944, when it merged with the Democratic party, "was never less than the second strongest party"[88] in the Gopher State and which later was the political soil for Democrat United States Senator, Vice President, and 1968 presidential candidate Hubert H. Humphrey.

The authors show that the Court's application of the Contract Clause, particularly after the Marshall era, had typically abjured an absolute interpretation, thus allowing the Justices some room for maneuver. As Justice Mahlon Pitney, whom the authors reveal[89] is the great-grandfather of Superman actor Christopher Reeve, wrote about two decades before *Blaisdell* came down in practically foreseeing the outcome of the moratorium case, "[The] statute in question was passed under the police power of the state for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property. It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the contract and due process clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."[90] Still what was so prominent in the Minnesota case was the obvious adjustment in the terms of the mortgage agreements that was possible.

What is nearly as fascinating about *Blaisdell* as its outcome is how the majority opinion of Chief Justice Charles Evans Hughes actually came to be. With a majority consisting of himself and Justices Louis D. Brandeis, Benjamin Cardozo, Harlan F. Stone, and Owen J. Roberts, Hughes tried to distinguish between the obligation of the contract and the remedy, by demonstrating that the moratorium placed on mortgage foreclosures did not impair the obligation, but merely modified the remedy. Justices Cardozo and Stone read the Chief Justice's first draft with misgivings so serious that each considered writing a concurring opinion. The former actually prepared a draft that was never officially published that advocated a Contract Clause that would adapt with the times. Cardozo urged:

> [The] contract clause is perverted from its proper meaning when it throttles the capacity of the states to exert their governmental power in response to crying needs. . . . [T]he welfare of the social organism in any of its parts is bound up more inseparably than ever with the welfare of the whole. . . . The state when it acts today by statutes like the one before us is not furthering the selfish good of individuals or classes as ends of ultimate validity. It is furthering its own good by maintaining the economic structure on which the good of all depends. Such at least is its endeavor, however much it miss the mark.[91]

It was Cardozo's theme that Hughes built into his final draft. "It is manifest," explained

the former Associate Justice, ". . . that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. . . . With a growing recognition of public needs and the relation of individual right to public security, the Court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. . . ."[92]

A decision like *Blaisdell* illustrates the significance at times of what a President does in the situation raised at the beginning of this essay: the Chief Executive's first opportunity to name someone to the High Court. Of the key players in the moratorium case, Stone represents President Coolidge's first (and only) appointment, and Hughes was President Hoover's first, just as in *Brown* where Earl Warren was President Eisenhower's first.

THE BOOKS SURVEY IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW:

COLLINS, PAUL M. JR. AND LORI A. RINGHAND. **Supreme Court Confirmation Hearings and Constitutional Change.** (New York: Cambridge University Press, 2013). Pp. xii, 296. ISBN: 978-1-107-03970-4, cloth.

FLITER, A., AND DEREK S. HOFF. **Fighting Foreclosure: The *Blaisdell* Case, the Contract Clause, and the Great Depression.** (Lawrence: University Press of Kansas, 2012). Pp. x, 222. ISBN: 978-0-7006-1872-9, paper.

HEINS, MARJORIE. **Priests of Our Democracy: The Supreme Court, Academic Freedom, and the Communist Purge.** (New York: New York University Press, 2013. Pp. x, 363. ISBN: 978-0-8147-9051-9, cloth.

HOCKETT, JEFFREY D. **A Storm Over This Court: Law, Politics, and Supreme Court Decision Making in *Brown v. Board of Education*.** (Charlottesville: University of Virginia Press, 2013). Pp. x, 267. ISBN: 978-08139-3374-785-0, cloth.

WOHL, ALEXANDER. **Father, Son, and Constitution.** (Lawrence: University Press of Kansas, 2013). Pp. x, 486. ISBN: 978-0-7006-1916-0, cloth.

## ENDNOTES

[1] Frederic A. Ogg and P. Orman Ray, **Introduction to American Government** (1922).

[2] *Id.* at 237.

[3] His choices were John Jay of New York as Chief Justice and John Blair of Virginia, William Cushing of Massachusetts, Robert Harrison of Maryland, John Rutledge of South Carolina, and James Wilson of Pennsylvania as Associate Justices.

[4] Harrison remained chief justice of the General Court of Maryland until his death on April 2, 1790.

[5] In a series of events that are too involved to recount here, President Rutherford B. Hayes's choice of fellow Ohioan Stanley Matthews to fill the seat vacated by Justice Noah Swayne in January 1881 was as surprising as it was thoroughly understandable. The fact that Matthews eventually secured a seat on the Court seemed nothing short of a miracle. Not only did Matthews reach the Court by way of a second-try, cliff-hanging confirmation vote, but his nomination marked the first time that organized interests attempted to block a Supreme Court appointment. *See* John A. Maltese, **The Selling of Supreme Court Nominees** (1995), 36, and Donald Grier Stephenson, Jr., **The Waite Court: Justices, Rulings and Legacy** (2003), 29–30.

[6] "Memorandum by Frankfurter of a visit with Roosevelt on March 8, 1933, when the President asked Frankfurter to become Solicitor General," in Max Freedman, ann., **Roosevelt and Frankfurter: Their Correspondence—1928–1945** (1967), 112–113.

[7] *See* Denis Steven Rutkus and Maureen Bearden, Congressional Research Service Report for Congress, "Supreme Court Nominations, 1789–2009: Actions by the Senate, the Judiciary Committee, and the President." (2009) http://fpc.state.gov/documents/organization/124658.pdf (last accessed on January 7, 2014).

[8] Paul M. Collins, Jr. and Lori A. Ringhand, **Supreme Court Confirmation Hearings and Constitutional Change** (2013), hereafter cited as Collins and Ringhand.

[9] *Id.* at xiii.

[10] *Quoted in* Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 16th ed. (2012), 20.

[11] Digital Single Lens Reflex.

[12] Collins and Ringhand, 1.

[13] *Id.* at 3.

[14] *Id.*
[15] *Id.* at 3–4.
[16] *Id.* at 5–6, emphasis added.
[17] *Id.* at 2.
[18] *Id.* at 6.
[19] *Id.* at 7.
[20] 410 U.S. 113 (1973).
[21] Between the failed nomination of Judge Bork and the confirmation of Kennedy, Reagan had chosen Judge Douglas Ginsburg for Powell's seat. After the nominee's past marijuana use as a law professor came to light, however, he withdrew his name from consideration before committee hearings could begin.
[22] Collins and Ringhand, 228–229, emphasis in the original.
[23] *Id.* at 230.
[24] 347 U.S. 483 (1954).
[25] Jeffrey D. Hockett, **Storm Over This Court** (2013), hereafter cited as Hockett.
[26] *Quoted in* Collins and Ringhand, 189.
[27] *See* Robert H. Bork, **The Tempting of America** (1990), 73–79.
[28] 163 U.S. 537 (1896).
[29] 347 U.S. at 495.
[30] 449 U.S. 294 (1955).
[31] *Id.* at 301, emphasis added.
[32] *See* http://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/, last accessed on February 1, 2014.
[33] See Joyce A. Baugh, **The Detroit School Busing Case: *Milliken* v. *Bradley* and the Controversy over Desegregation** (2012).
[34] 347 U.S. at 489.
[35] *Id.* at 493.
[36] *Id.*
[37] *Id.* at 496.
[38] Hockett, 4.
[39] *Id.* at 5.
[40] *Id.* at 6, emphasis in the original.
[41] *Id.*
[42] *Id.* at 8–9.
[43] *Id.* at 1.
[44] *Id.* at 10.
[45] *Id.* at 12.
[46] *Id.*
[47] *Id.* at 13.
[48] *Id.* at 178–179.
[49] Alexander Wohl, **Father, Son, and Constitution** (2013), hereafter cited as Wohl.
[50] *Id.* at 179.
[51] *Id.* at 395.
[52] *Id.* at 358–359.
[53] *Id.* at x.
[54] Bernard Schwartz, **Super Chief** (1983), 58.
[55] While still a high school student, Evan A. Young wrote **Lone Star Justice** (1998), which Amazon.com classifies as "young adult" reading.
[56] Mimi Clark Gronlund, **Supreme Court Justice Tom C. Clark** (2010).
[57] Wohl, 1.
[58] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[59] Wohl, 146.
[60] *Id.* at 145.
[61] *Id.* at 148.
[62] *Id.* at 147.
[63] Edward S. Corwin, "The Establishment of Judicial Review," 9 *Michigan Law Review* 283, 316 (1911).
[64] Marjorie Heins, **Priests of Our Democracy** (2013), hereafter cited as Heins.
[65] http://www.fepproject.org/fepp/aboutfepp.html (last accessed on January 25, 2014).
[66] Heins is also author of "'Priests of Our Democracy': The Origins of First Amendment Academic Freedom," 38 *Journal of Supreme Court History* 386 (2013), an article that emphasizes some of the themes from her book and which appeared as this review essay was being completed.
[67] 344 U.S. 183 (1952). Justice Jackson did not participate.
[68] *Id.* at 197, emphasis added.
[69] Heins, 3.
[70] 342 U.S. 485 (1952). Justices Black, Douglas, and Frankfurter dissented.
[71] *Id.* at 492.
[72] 385 U.S. 589 (1967).
[73] *Id.* at 603.
[74] Heins, 12.
[75] 385 U.S. at 621.
[76] *Id.* at 625.
[77] Heins, 11–12.
[78] The standard work, first published in the period Heins examines, is Wallace Sayre and Herbert Kaufman, **Governing New York City** (1960).
[79] Heins, 10.
[80] *Id.*
[81] *Id.* at 6. Relevant to the author's point is the work of the late Richard Hofstadter. *See* his **Anti-Intellectualism in American Life** (1963) and **The Paranoid Style in American Politics, and Other Essays** (1965).
[82] 290 U.S. 398 (1934).
[83] U.S. Constitution, Article I, section 10.
[84] 290 U.S. 453–454, emphasis in the original.
[85] John A. Fliter and Derek S. Hoff, **Fighting Foreclosure** (2012), hereafter cited as Fliter and Hoff.
[86] A current list of titles is available online at http://www.kansaspress.ku.edu/printbyseries.html, last accessed on January 26, 2014.

[87] For example, *see* Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959), and C. Herman Pritchett and Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[88] Fliter and Hoff, 47.

[89] *Id.* at 46.

[90] *Chicago and Alton Railroad Co. v. Tranbarger*, 238 U.S. 67, 76–77 (1915).

[91] Excerpts from Justice Cardozo's unpublished opinion are reprinted in Mason and Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases**, 329.

[92] 290 U.S., at 443–444.

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**Cover:** From a spread titled "Off the Bench," published in *Leslie's Weekly* in 1894. The back page depicts Chief Justice Fuller with his messenger. Collection of the Supreme Court of the United States.

Corrections for Vol. 39, No. 1:

On page 27, William B. Hornblower was not the youngest person ever nominated for the High Court. Joseph Story became a Justice at the age of thirty-two in 1811.

On page 137, Owen J. Roberts retired in 1945 and died in 1955.

On pages 146-165, Stephen L. Wasby's "Author's Note" was inadvertently omitted:
"Author's Note: The author is most appreciative of the assistance of Richard Irving, Bibliographer for Public Affairs and Law, Dewey Library, University at Albany, for conducting multiple iterations of searches used here, and for liking the challenge of such searches, and for the willingness of Craig A. Smith, California University of Pennsylvania, to share his data on per curiam court of appeals ruling authored by Justice Tom Clark. He also wishes to acknowledge helpful commentary by Gary Wente, Circuit Executive for the First Circuit, and by a favorite reader and editor, Ginger Kimler. An earlier version of this article was presented to the Midwest Political Science Association, Chicago, Illinois, April 13, 2013. Contact wasb@albany.edu"