Introduction

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Four of the six articles that appear in this issue come from the highly successful Leon Silverman lectures sponsored by the Society each year. Those members who live in the metropolitan Washington area are familiar with the events, which take place in the Courtroom of the Marble Palace. They include an introduction of the speaker by one of the Justices, a talk by a well-known scholar, and then a reception in the Conference rooms. I am sure that I speak not only for myself, but for others who have given these lectures, that it is a wonderful experience. So those of you who live outside of Washington, next time you have to travel to the nation's capital, please check if one of the Silverman Lectures is scheduled that week.

The theme for this series involves the plaintiffs in some very important civil rights cases, and this reflects a trend among many constitutional scholars to look not just at what the Justices say about a case, but about the people involved and the factual background.

Philippa Strum, a former professor at Brooklyn College and then director of U.S. Studies at the Wilson Center, ran across a relatively unknown case involving the segregation of Mexican-American children in California. She decided to explore it, and discovered that while it is unknown to the general—and even to much of the scholarly—community, Thurgood Marshall and his staff at the NAACP Legal Defense Fund knew it well. It is one of the first cases in federal court that tackled racial discrimination head on, and she here tells the story of the Mendez family and their ultimately successful fight.

Shelley v. Kraemer (1948) is considered a landmark case in many ways, although it is overshadowed by the more famous cases of the following decade attacking state-sponsored segregation. Jeffrey Gonda, a history professor at Syracuse University, goes into a relatively unknown area of how houses could be bought and sold by African-American families, and the restrictions—both legal and customary—that restricted those sales in post-war America.

One of the most fascinating, and at the same time somewhat confusing, aspects of Warren Court jurisprudence is how the Justices dealt with the arrests following sit-ins

by civil rights protestors prior to the enactment of the Civil Rights Act of 1964. Professor Kenneth Mack of the Harvard Law School explores these cases, but especially that of a young man, Robert Bell, who would go on to attend law school and eventually become chief judge of the Maryland's highest court, the Court of Appeals.

The case of *Tinker v. Des Moines* (1969) is still studied in courses on constitutional law, the First Amendment, and education law. Two students, Mary Beth and John Tinker, were expelled from school for wearing black armbands to protest the Vietnam War. They and their family fought the case all the way to the Supreme Court, where they won a 7–2 decision. As Justice Abe Fortas put it, students do not abandon their rights as Americans when they walk through the schoolhouse door. Professor Kelly Shackelford, president and CEO of the Liberty Institute, spoke about the Tinker family, the courage of their convictions, and the ultimate meaning of their victory.

What made the lectures come alive even more for the audiences was the presence of some of the participants—Mary Beth and John Tinker and members of their families, Judge Robert Bell, and David Duran, a Méndez grandson of the plaintiffs.

A number of years ago scholars discovered John Knox's diary of the year he served as law clerk to Justice James Clark McReynolds. It was not a happy tale, but it led Professor Barry Cushman of the Notre Dame Law School to wonder what happened to the other clerks of the Four Horsemen—McReynolds, Pierce Butler, George Sutherland, and Willis Van Devanter. He has discovered that, unlike poor Knox, who had a hard time remaining employed, they went on to respectable and sometimes even stellar careers. Naturally, to cover the clerks of four men whose combined tenure on the High Court surpassed eight decades led to a long article—a very long article. It was interesting enough, however, that we decided to run it in two installments. In this issue we look the clerks of Justice Van Devanter and McReynolds; in a future issue the focus will be on those of Butler and Sutherland.

A very important civil rights case is *Griggs v. Duke Power Company* (1971), and one of the young lawyers working for the NAACP Legal Defense Fund was Robert Belton. Many years later, Belton, who had become a law professor at Vanderbilt, wrote down his memories of the case and how it had unfolded, but died before it could be published. Stephen Wasby, who is now retired from the University at Albany, edited the manuscript for publication, and at our request excerpted a piece. It is fascinating reading.

Finally, we get Grier Stephenson's sharp eye looking over some of the lastest books to appear on the Supreme Court and its members. As always, enjoy!

"We Always Tell Our Children They Are Americans": *Mendez v. Westminster* and the Beginning of the End of School Segregation

PHILIPPA STRUM

Soledad Vidaurri walked up to the schoolhouse door, five little children in her wake. It was a warm September 1943 day in Westminster, California, thirty-five miles south of Los Angeles in the heart of citrus-growing country, home to some 2,500 residents. American soldiers were still fighting overseas—there were almost two more years of battles ahead before World War II would end—but Orange County was peaceful, and bustling economically because of the wartime demand for agricultural products and war factory materiel. Mrs. Vidaurri had gone to the Westminster Main School to enroll her two daughters, Alice and Virginia Vidaurri, and her niece and two nephews—Sylvia Méndez, Gonzalo Méndez, Jr., and Gerónimo (Jerome) Méndez—in the neighborhood public school.

Mrs. Vidaurri was welcomed to the school and told that her daughters could be registered. Their father had a French ancestor and their last name sounded acceptably French or Belgian to the teacher in charge of admissions. Besides, the Vidaurri girls were light-skinned. The Méndez children, however, were visibly darker and, to the teacher, their last name was all too clearly Mexican. They would have to be taken to the "Mexican" school a few blocks away. Little Gonzalo Jr. would remember the teacher telling his aunt, while indicating the two Vidaurri girls, "'We'll take those . . . but we won't take those three,'" because "We were too dark."[1]

"No way," an outraged Mrs. Vidaurri replied, and marched all the children home. Her equally outraged brother, Gonzalo Méndez, simply refused to send his children to the "Mexican" school. Two years later the Méndezes would lead a group of Mexican-American parents into federal court,

challenging the segregation of their children, and legal history would be made. Their case became the first in which a federal court declared "separate but equal" schooling to be unequal. *Mendez v. Westminster* was the 1946 predecessor to *Brown v. Board of Education*, and can in fact be seen as the Latino/a version of that better-known decision.[2]

There had been Mexican-Americans in California since the United States annexed California in 1848, although their numbers were relatively few. The combination of political turmoil in Mexico in the first decades of the twentieth century and job opportunities in the United States, however, led to large-scale immigration. Official census figures indicated that 661,538 Mexicans entered the United States between 1910 and 1930. Scholars of Latino history put the number as closer to one million, suggesting that 1/8 to 1/10 of the entire Mexican population moved north.[3]

Many of them found work in agricultural fields. In the decades after the end of the American Civil War, railroads had expanded into the West. Simultaneously, advances in irrigation enabled Western growers to produce large quantities of fruits and vegetables, which could be transported in the newly invented refrigerator cars on the railroads that now crisscrossed the United States. That became the pull for Mexican immigrants, as the need of both growers and the railroads for cheap farm workers increased exponentially.[4] In 1930, the U.S. Chamber of Commerce stated that Mexicans picked more than eighty percent of the Southwest's crops. By 1940 Mexican immigrants and their American descendants were almost 100 percent of the picking force in southern California.[5]

Many of them lived in what amounted to ghetto neighborhoods—*colonias*—next to citrus groves or vegetable fields, on the outskirts of cities such as Santa Ana, California. Santa Ana is the county seat of Orange County, where the Méndez story takes place. The Mexican farm laborers in Orange County in the 1930s found themselves in neighborhoods that for the most part lacked sewers, gas for cooking and heating, paved streets, or sidewalks. Many families built their own two-room wooden houses and could afford very little furniture. There were no refrigerators; heat came from wood-burning kitchen stoves. Clothes were made on pedal-powered sewing machines and cleaned in washtubs. The families might have small food gardens and raise chickens, goats or ducks. With dirt streets, a lack of flush toilets, and inadequate plumbing and heating, it was difficult to maintain good sanitation. Tuberculosis was a constant threat, and affected the Mexican-American community at a rate three to five times that of the Anglo community.[6]

Half the men in the *colonias* surveyed in 1927 had been unemployed for 100 or more working days; seventy-three percent were unemployed for sixty or more working days. In 1935, the average U.S. family income was $1,784; for Mexican families in California, $289. The California State Relief Administration reported that year that families required a minimum of $780 for food, utilities, and housing.[7] The wages, in other words, could not provide adequate food, shelter, and clothing. There was no sick pay, no payment for injuries sustained on the job, no guarantee that even an underpaid job would be waiting for anyone who had to stop working temporarily.[8] One scholar has described the existence of a largely disenfranchised laboring class as "citrus society," similar to the exploitative "cotton society" that flourished in the South in the late nineteenth century.[9] In both instances, the land was owned by Anglos and worked by discriminated-against minority group members. Unlike the workers in the South, however, the Mexican-Americans were officially "white." That was the way they were classified by the Census Bureau, and the classification was an important element in *Mendez v. Westminster*.[10]

Like many other immigrants to the United States, Mexican immigrants understood that

the best hope for upward mobility for their children lay in education. Local California school officials, however, made that difficult. An 1885 California law, amended slightly in 1935, specifically gave school districts the authority to create separate schools for "Indian children, excepting children of Indians who are wards of the United States government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese or Mongolian parentage."[11] Mexican children were not mentioned, and in 1929 the California attorney general issued an advisory opinion stating that such children were not covered by the law and so separate schools should not be organized for them.[12]

That ruling was implicitly challenged as, with immigration, Mexican-American children became a larger part of the school population. By 1927 such children, 64,427 of them, constituted nearly ten percent of all children enrolled in California's public schools, and the 2,869 who were enrolled in Orange County made up seventeen percent of the county's public school population. In nearby Imperial County they were more than twenty-six percent. By the mid-1920s El Modena, which was one of the four towns involved in *Mendez v. Westminster*, had 1,000 Mexican and Mexican-American residents, who made up a majority of the town's population.[13]

School districts all over southern California reacted by creating segregated school systems. Pasadena began requiring "Mexican" children to go to the new "Mexican" school in 1913. La Habra opened a similar school in 1920; Ontario, one "Mexican" school in 1921 and another in 1928. Orange County joined the trend. According to one survey, by 1931 more than eighty percent of all California school districts with a significant number of Mexican and Mexican-American students were segregated, usually through the careful drawing of school zone boundaries by school boards that had been pressured by Anglo residents.[14] By 1934, over 4,000 pupils in Orange County—twenty-five percent of the county's total student enrollment—were Mexican or Mexican-American. Seventy percent of the county's students with Spanish surnames were registered in the fifteen Orange County elementary schools that had 100 percent Mexican enrollment. Six of the fifteen schools were in the four districts at issue in the *Mendez* case: three in Santa Ana and one each in Westminster, El Modena, and Garden Grove. Forty percent of the county's Mexican students in fact lived in these four districts.[15] The ostensible rationale for the separate schools was the children's lack of proficiency in English.

The children in the "Mexican" schools were taught a curriculum quite different from the one offered in other schools. The boys studied gardening, boot-making, blacksmithing, and carpentry, to prepare them for the low-paying trades that the schools assumed would be the only ones such boys could or should enter. The girls studied sewing and homemaking.[16]

In 1928, two University of Southern California professors were asked by the Santa Ana school district to conduct a survey of all its schools. The professors found that Delhi, one of the "Mexican" schools, was a wooden fire hazard. Another, the Artesia barrio school, according to the report to the board, "has a low single roof with no air space, which makes the temperature in many of the rooms almost unbearable. Since no artificial light is provided in the building, it is impossible to do satisfactory reading without serious eye strain on many days of the year."[17]

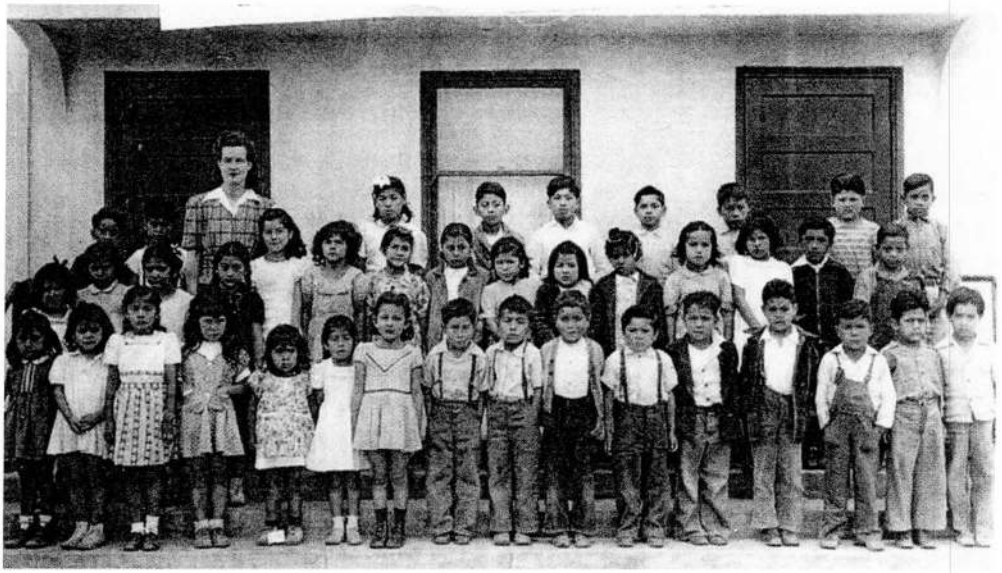
The hazardous Delhi school was not atypical for Orange County's "Mexican" schools, which were usually built of wood while "white" schools were made out of brick or block masonry. Shower stalls were common in the "Mexican" schools, and children whom the teachers considered to be dirty were required to take showers and, if necessary, borrow clean clothing from a cupboard kept

Felícitas and Gonzalo Méndez refused to send their children to the vastly inferior "Mexican" school in Orange County, California, and led a group of Mexican-American parents into federal court, challenging the segregation of their children. While it was not appealed to the U.S. Supreme Court, *Mendez v. Westminster* (1946) was decided en banc by the Court of Appeals for the Ninth Circuit, which ruled that separate Mexican schools were illegal.

for that purpose.[18] Books and other equipment were castoffs from the "white" schools.[19] Many of the schools opened at 7:30 in the morning and ended the day at 12:30, so that the children could go to work in the citrus or walnut groves.[20] In El Modena, one of the school districts at issue in *Mendez*, students were permitted to miss the first two weeks of school each year so they could help harvest the walnut crops.[21]

The segregation and the differential education were justified by educators on the basis of biological determinism. California educator Grace Stanley asserted in an influential 1920 article that Mexican children had "different mental characteristics" from Anglo children, "showed a stronger sense of rhythm," and "are primarily interested in action and emotion but grow listless under purely mental effort."[22] Others echoed this assessment. B. F. Haught did a study in 1931 that convinced him that the "average Spanish child has an intelligence quotient of .79 compared with 1.00 for the average Anglo child."[23] William Sheldon, who gave IQ tests to Mexican and Anglo students in Texas, concluded that Mexicans had only eighty-five percent of the IQ of Anglos.[24] A professor in Denver declared that the children's median IQ was a low 78.1.[25] The academic pundits agreed that students should be encouraged to give up Spanish and develop their talents in industrial and vocational subjects.[26]

The segregation did not go unchallenged. In 1931, the previously integrated San Diego school district of Lemon Grove created a new school for Mexican-American grammar school students. An idea of the wooden



Mexican schools, such as the Hoover School the Méndez children attended (pictured here in 1944), taught children a different curriculum from white schools. Boys studied gardening, boot-making, blacksmithing, and carpentry, to prepare them for the low-paying trades that the schools assumed would be the only ones such boys could or should enter. The girls studied sewing and homemaking.

structure's amenities can be gathered from the nickname, "La Caballeriza" (the barn or stable), that it was soon given by the community. Built squarely in the *barrio*, the school was furnished with second-hand books and supplies. Directed to their new school, the children simply returned home instead and, with the exception of only one family, their working class parents refused to send them to it. Instead, they sued in the San Diego Superior Court (the local state trial court). The San Diego district attorney told the court that the new school was needed because most of the students at issue began the school year late and could not speak English well, and added that the school had a really nice playground. The families' lawyers responded by calling a number of the children, most of whom were born in the United States, to demonstrate their proficiency in English. One of the students in fact spoke no Spanish whatsoever. The judge ordered the school board to permit the children back in their original school, and the board decided not to appeal.[27] The decision of course had no legal weight in any other district, and there is no indication that any other school district followed it.

The League of United Latin American Citizens (LULAC) had filed a similar suit one year earlier, in the Rio Grande border town of Del Rio, Texas. In that case, too, Del Rio's superintendent testified that the Mexican-American children lacked sufficient language skills, and added:

> I have noticed that the Spanish speaking children are unusually gifted in music, above the American children, and I believe that phase of their talents ought to be developed . . . and in art, on an average, I find they are superior to the American child in this talent, and I believe their work should include art and a good deal of handicraft work at the first grade. By nature I feel they are endowed with special facilities for this work.[28]

He added, "I have been told that it is true that a Mexican child will reach the puberty

stage sooner than an American child, and that people originating in torrid climates will mature earlier; it's owing to the climatic conditions."[29]

The trial court ordered the schools to be integrated, but the Texas Court of Civil Appeals overturned that decision, and the U.S. Supreme Court declined to review the case.[30] That was the situation when Gonzalo and Felícitas Méndez decided to challenge their children's segregation.

Gonzalo Méndez was born in the Mexican state of Chihuahua in 1913. One of Méndez's uncles, under threat from the regime of Pancho Villa, fled to the United States in 1919, and was soon followed by Méndez's mother and her five children. They landed in Westminster, California, where Méndez was sent to the Westminster Main School along with other Mexican and Anglo children in his school district. When he was in the fifth grade, however, his mother ran out of funds and he had to go to work to help support the family.[31]

The search for a livelihood took him to the fields, where he became known as a champion orange picker. One of his fellow field hands was Felipe Gómez, who had brought his family to the mainland from Puerto Rico in 1926.[32] Gómez invited the young Méndez to his home, where Méndez met Gómez's daughter Felícitas. They were married in 1935 and, after working together in the fields for three years, opened the Arizona Café in the Mexican *barrio* of Santa Ana. They prospered during the early years of World War II, accumulating sufficient funds to purchase three houses. Méndez said repeatedly that he wanted to try his hand at running a farm, however, and, in 1943, their banker, aware of that, told them about the Munemitsus. The Japanese-American family had been "relocated" to an internment camp. The Munemitsus feared that untenanted Japanese-American farms were likely to pass out of the possession of their owners, who would then find it difficult if not impossible to reclaim them, and they were worried about their family farm in Westminster. Might the Méndezes be interested in leasing the farm until the Munemitsus were able to return? Gonzalo and Felícitas traveled to Arizona, where the Munemitsus were interned, and the two families signed an agreement.[33]

The Méndezes closed the café, rented out the Santa Ana house they had been living in, and moved to Westminster. They took Frank Vidaurri and his family with them. Vidaurri, married to Méndez's sister Soledad, had experience in operating a farm and Méndez thought that Vidaurri would make a good foreman. The two families began running the forty-acre Munemitsu asparagus farm that had fifteen workers for most of the year and as many as thirty—including "*braceros*" brought in from Mexico for just a short time—during the peak season. In addition, Gonzalo worked as the foreman of a second farm that grew asparagus on twenty-two acres and chili peppers on another 100, along with avocados and oranges in a nursery. There, he supervised ten workers in the asparagus fields, with perhaps twenty-five to forty others who came and went depending upon the season. Gonzalo was in charge of marketing all the asparagus as well as keeping many of the farm's books.[34]

When his children—then nine, eight, and seven—were told they could not attend Westminster Main, which was now Westminster's "white" school, Méndez tried speaking with the principal, then with the district's school superintendent, then with the school superintendent of all of Orange County. At one point Méndez was told that his children could be admitted to Westminster but the policy of separating "Mexican" students would not be changed. Incensed, he rejected that solution, and kept his children home.[35] The district school superintendent went to Méndez's home to ask about that, and explained the school district's policy by telling him that a major reason was that Mexicans lived in unsanitary and unhygienic

shacks.[36] As Méndez recounted the incident, "I told him . . . that I lived on a ranch where Japanese people lived, and houses, we all know they compared to the houses where we live, were equal, and they were admitted to go to the Westminster School. When I came to the part of the Japanese people . . . he said that that was an entirely different story, about the Japanese people, that the Mexican people from Westminster could not, in other words, compete in cleanliness with the Americans or the Anglo-Saxon people."[37]

Felícitas Méndez was as infuriated as her husband, outraged as she already was by segregation in public parks, swimming pools, and movie houses. "I was a citizen, born a citizen in Puerto Rico," she would tell an interviewer years later. "I could not even go to a theater and sit with the other people."[38] During the trial, she stated what could have been the Méndezes' creed. "We always tell our childrens [sic] they are Americans . . . and we thought that they shouldn't be segregated like that, they shouldn't be treated the way they are."[39] The Méndezes decided to sue, and went to see a lawyer who had recently won a case allowing Mexican-Americans to use the public swimming pool in nearby San Bernardino.[40]

The lawyer was David Marcus, who specialized in immigration and criminal law. Marcus was himself the son of immigrants from Tbilisi, Georgia, and had experienced anti-Semitism from the time he was a child right through his graduation from the University of Southern California Law School in 1927. His wife was an immigrant from Mexico, so his children were also Mexican-Americans.[41]

When Méndez approached him, Marcus told Méndez about the California education law that permitted segregation of other

Many of the Mexican schools opened at 7:30 in the morning and ended the day at 12:30, so that the children could go to work in the citrus or walnut groves. In some school districts, students were permitted to miss the first two weeks of school each year so they could help harvest crops.

children but did not mention Mexican-Americans. Marcus suggested that Méndez's case would be stronger if he was able to prove that it was not only Westminster but other school districts in Orange County as well that segregated Mexican-American students.[42] Was there evidence of that?

The farmer and the man who was now his lawyer determined to find out. The way to do it was to begin contacting Mexican-American communities throughout the county. With Méndez driving, the two men roamed the county, interviewing parents and pulling evidence together. Many parents were afraid of repercussions if they became involved. Some were content to have their children in the segregated schools, because their location in the *colonias* meant the children went to school right near home. Other parents sponsored meetings to talk about the case. Méndez, an outgoing man, was well known in the *colonias* and had been made godfather to a number of children.[43] He drew on his networks, and eventually families in three other school districts—El Modena, Garden Grove, and Santa Ana—joined the lawsuit. Méndez and Marcus had quickly uncovered the endemic nature of the segregation, as well as the fact that the parents who agreed to become plaintiffs had also protested to their local school officials and had gotten nowhere.[44]

Méndez threw himself into the case, leaving Felícitas to administer the farm for what turned out to be more than a year. It prospered under her management, but Felícitas did more. As the case progressed, Felícitas organized in the community. She initiated 151 meetings with parents and eventually helped turn their enthusiasm into a group, the *Asociacion de Padres de Ninos Mexico-Americanos*, which both provided moral support for the effort and signaled to school officials that the Mexican community was behind the fight.[45] She eventually followed the law by taking her children to the "Mexican" school, where they were enrolled without being given a language test. Sylvia Mendez remembered eating lunch at the school, which had no cafeteria, and where the children were sent to the tables outside. The school abutted a cow pasture with an electrified wire fence, which worried her father. Worse, as far as she was concerned, were the flies from the pasture that were attracted by the children's food and came to settle on them and their lunches.[46]

Once Méndez and Marcus were satisfied that they had a viable case, Marcus could have gone into state court and challenged the segregation on the basis of the California law. That would have been unsatisfactory for two reasons. The first was that the California legislature could have undone whatever victory Marcus might have won by adding "Mexicans" to the education law. The second reason, more important to him, was that he—and the Méndezes—wanted to challenge segregation itself. Marcus decided he would go into federal court, arguing that educational segregation violated the Fourteenth Amendment's Equal Protection clause.[47]

The problem with that, of course, was that, in 1898, the U.S. Supreme Court had held in *Plessy v. Ferguson* that the Fourteenth Amendment permitted a state to require railroads to segregate their passengers by race as long as the accommodations offered to black riders were equal to those offered to whites.[48] While *Plessy* did not mention other public venues such as restaurants, hotels, parks, or schools, the assumption of Southern states was that they had been given a license to separate the two populations in all of those places, and subsequent cases did nothing to challenge that view. In *Cummings v. Board of Education*, decided in 1899, the Court declared that school boards could use public funds to establish white high schools even when no schools were provided for black children.[49] *Berea College v. Commonwealth of Kentucky* (1908) held that the Fourteenth Amendment was not violated by a state statute prohibiting schools and colleges incorporated in the state from educating "white" students

alongside "negro" students.[50] Other groups could also be segregated. The Court's decision in *Gong Lum v. Rice*, handed down in 1927, declared that a Chinese-American child was not deprived of the equal protection of the laws by being forced to attend a school for "colored" students.[51]

At the same time, two recent opinions the Court had handed down in *Korematsu v. U.S.* and *Hirabayashi v. U.S.* held some reason for hope.[52] Justice Hugo Black declared in the 1944 *Korematsu* case "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[53]

There was somewhat similar language in *Hirabayashi*, decided in 1943. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," Chief Justice Harlan Fiske Stone stated. "Classification or discrimination based on race alone has often been held to be a denial of equal protection," and Justice Stone cited the 1886 case of *Yick Wo v. Hopkins*.[54] There, effectively striking down a San Francisco law designed to drive out Chinese-owned laundries, the Court declared, "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[55]

Marcus could argue that the practice of segregating Mexican-American students seemed to be fair, because it was purportedly based on language abilities, but that in fact it was "applied and administered by public authority with an evil eye." In addition, the court had written in *Yick Wo* that, if there was no good reason for the law, "the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution." Justice Stone drew on that reasoning to state, "We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas . . . racial discriminations are in most circumstances irrelevant and therefore prohibited."[56]

Note that Justice Stone did not use the word "segregation." He referred instead to "discrimination." Back in 1945, there was no indication whatsoever that the Supreme Court was willing to undo "separate but equal," or to lend a sympathetic ear to the argument that segregating schoolchildren discriminated against them and did them harm. Segregation on the basis of race was officially legal, and it was a longstanding part of American history. Would a judicial system that saw no Fourteenth Amendment impediment to the wholesale imprisonment of Japanese-Americans, on the basis of their race, not to mention the segregation of and discrimination against African-Americans, be prepared to strike down what it might well see as the lesser evil of segregating Mexican-American students? The answer seemed obvious. Thurgood Marshall, the head of the NAACP, was still telling colleagues that the time was not yet ripe to attack segregated schools head on.[57] What, however, if Marcus argued that *Mendez* had nothing to do with race?

The petition that David Marcus filed on March 2, 1945 with the District Court for the

Southern District of California, located in Los Angeles, carried the names of the five fathers and their school-age children. As the document said, all the petitioners were citizens and resident in their respective school districts, "and each and all petitioners are of Mexican or Latin descent or extraction." The action was brought not only for them but, as well, on behalf of "some 5,000 other persons of Mexican and Latin descent," all of them citizens and residents of the four districts.[58]

The respondents were the four school districts, their superintendents, and all the members of the four school boards. The basis for the suit, Marcus wrote, was that his clients had been deprived of their civil rights and the privileges and immunities of American citizens that were guaranteed to each of them by the Constitution and laws of the United States. In carrying out a "common plan, design and purpose" to keep the children from specific schools solely because of their "Mexican or Latin descent or extraction," the districts had violated the petitioners' right to the equal protection of the laws and had caused them "great and irreparable damage." The petitioners asked the court to declare the practice to be unconstitutional and to issue an injunction prohibiting it.[59]

The question at issue, Marcus would insist throughout the litigation, was not whether the four Orange County school districts segregated students on the basis of race. There was no *racial* segregation, he would tell the court, because Mexicans were members of the white race. The American government, in the form of the Census Bureau, had said so. The students were being artificially separated from others—most of them officially "white," as there were relatively few African-American and Asian-American students in those districts—on the basis of their ethnicity.[60] *Plessy v. Ferguson* and its off-shoots were therefore irrelevant.

The case was assigned to Judge Paul J. McCormick. A former deputy district attorney and judge on the California Superior Court in Los Angeles, McCormick had been appointed to the United States District Court for the Southern District of California in Los Angeles in 1924 by President Calvin Coolidge, and he remained on that court on active service until 1951.[61] He was a fairly well-known jurist. While a member of President Herbert Hoover's National Commission on Law Enforcement and Observance, McCormick had advocated the continuance of Prohibition.[62] The Teapot Dome scandal that erupted in the early 1920s led to a number of lawsuits. One of them, against the Pan-American Petroleum and Transport Company, was filed in California, and McCormick found himself assigned to it. In 1925 he held that the contract giving the company access to the Elk Hills reserve was void.[63]

The attorney opposing David Marcus before Judge McCormick was George F. Holden, the Santa Ana County deputy counsel.[64] Holden was a former litigator in private practice, Orange County district attorney, and president of the Orange County Bar Association. Forty-eight years old in 1945, Holden had behind him years of experience in public office and in litigation as he prepared to face the forty-one-year-old Marcus.[65]

Holden acknowledged that the children in the case were constitutionally entitled to equal treatment, and maintained that they were getting it. The families "of Mexican or Latin descent" in the district spoke Spanish at home, so that their children were "unfamiliar with and unable to speak the English language" when they began school. The districts therefore found it desirable and efficient to educate them separately, the separation being "for the best interests of said pupils of Mexican descent and for the best interests of the English speaking pupils." The Mexican-American students were kept in segregated schools "until they acquired some efficiency in the English language." They were taught by teachers with the same qualifications and salary as the teachers in the

other schools, and given "all of the facilities and all the instruction" available in them—both of which statements were patently untrue. The bottom line was that they were being taught separately, but equally, for sound educational reasons, and that they were never separated "solely" because of their ethnicity.[66] He inadvertently implied, however, that the real problem the children faced was that they had been born to Mexican-American parents. As he told the trial court:

> Sure, they can speak some English, you know. They have to be able to understand a certain amount of English before they can go from one grade to another, but they cannot grasp it. Where they have lived in the Spanish language, with Spanish customs, and they talk it at home, and as soon as they are out of school they go back to their homes and commence talking. So again, thinking in Spanish, they cannot compete with the other students and advance in the same grade at the same age.[67]

In 2011, President Obama awarded Sylvia Mendez a Presidential Medal of Freedom in honor of her life-long battle for equal education.

Holden was not the only person to feel that way. His star witness at trial, which took place in July 1945, was James L. Kent, the superintendent of the Garden Grove school district. In 1941, Kent had written a master's thesis arguing that Mexican-Americans were "an alien race that should be segregated socially" and that, happily, segregation had been accomplished in Southern California "by designating certain sections where they might live and restricting these sections to them"—in other words, keeping them out of "white" neighborhoods. "Upon investigation of the mental ability and moral characteristics of the average Mexican school child it is evident that this [housing segregation] is a condition which is advantageous to both the white and Mexican child," he wrote. "Segregation also into separate schools seems to be the ideal situation for both parties concerned."[68] "Mexican" students—whom he repeatedly differentiated from "American" students—were of "a less sturdy stock than the white race" and suffered from health problems as a result of eating nothing but "tortillas, a greasy mixture, or enchiladas and beans."[69] The children suffered from a "racial language handicap," and differences in IQs between the two "races" made it clear that "a separate curriculum . . . based upon their abilities . . . is advisable."[70]

Those were the views of the man charged with educating the children of Garden Grove, and he gladly repeated them during the trial. When Mexican-American children first enrolled in school, Kent told the court, "We usually find them retarded," meaning unable to work at grade level. Admittedly, some children came to the school speaking English. Of those, "the large percentage of them can speak the English language, or they can understand it, but that does not necessarily

mean that they can progress in school . . . by our tests we find that they are a year retarded in comparison with the white children . . . Your Mexican child is advanced, that is, he matures physically faster than your white child, and he is able to do more in games. Therefore, he goes more on physical prowess than he does on mental ability."[71] Richard F. Harris, the Westminster superintendent of schools, added that Mexican-American children could not keep up with others because they had not been introduced at home to Mother Goose rhymes and "stories of our American heroes, stories of our American frontier, rhymes, rhythms."[72] A "child of Mexican-speaking families . . . has no conception" of such stories and so had to be educated separately.[73]

One can only wonder what the plaintiffs and their families, sitting in the courtroom, thought of such testimony. Felícitas Méndez was in the courtroom every day of the two-week trial. So were other members of the Mexican-American community. Some of the laborers could not afford to give up the wages they would lose because of their absence from work. The Méndezes dug into their own pockets to reimburse them.[74]

Parents from each of the four districts testified about their repeated attempts to get their children into the "white" schools, and the denigrating language that school officials used in denying their requests. The parents were frequently told that all Mexican-American children were dirty and spoke no English, which the officials somehow knew even though the children were given no language tests. Two such students were put on the stand, demonstrating that they did indeed speak proper English.[75]

Then Marcus anticipated the approach that would be used by the NAACP in *Brown v. Board of Education*. He called two educators to the stand as expert witnesses.

Ralph L. Beals was a professor in and chairman of the Department of Anthropology at the University of California–Los Angeles. He had done research in Mexico for the National Research Council and the Smithsonian Institution as well as for his university, and he had written roughly thirty books and articles.[76] Marie H. Hughes had been a school principal and curriculum director in New Mexico for nineteen years and, in addition, had worked in Los Angeles County for the past five. She had specialized in research about Mexican-American children for twenty years.[77] Both testified that separating children with limited English from more fluent children was a poor way to enhance the first group's language proficiency. More importantly, they both argued that the psychological effects of segregation interfered with the segregated students' ability to learn. "Judging by some studies that have been made under my direction," Dr. Beals told the court, "a feeling of antagonism is built up in children, when they are segregated in this fashion. They actually become hostile to the whole culture of the surrounding majority group, as a result of the segregation, which appears to be, to them at least, discrimination . . . The disadvantage of segregation, it would seem to me, would come primarily from the reinforcing of stereotypes of inferiority-superiority, which exists in the population as a whole."[78] Marie Hughes added:

> Segregation, by its very nature, is a reminder constantly of inferiority, of not being wanted, of not being a part of the community . . . I would say that any separation of children which prevents free communication among them, on an equal basis, that is, a peer basis, would be bad because of the very fact that segregation tends to give an aura of inferiority. In order to have the people of the United States understand one another, it is necessary for them to live together, as it were, and the public school is the one mechanism where all the children of all the people go.[79]

* * * * * * * * * * *

Judge McCormick handed down his decision on February 18, 1946, and it was a resounding victory for the plaintiffs. It was more than that, however; it was also a seminal moment in American law.

McCormick found the segregation illegitimate as a matter of both California and federal constitutional law. California law required school districts to admit all children over age six, whether or not their parents were American citizens, and to maintain elementary schools "with equal rights and privileges as far as possible."[80] That, Judge McCormick declared, applied to all children "regardless of their ancestry or extraction" (with the notable exception of Indian and Asian children) and meant that segregation of "pupils of Mexican ancestry" was prohibited. "The common segregation and practices of the school authorities in the defendant school districts in Orange County," however, "pertain solely to children of Mexican ancestry and parentage. They are singled out as a class for segregation." Such segregation violated the state's own laws.[81]

California wanted students to be integrated, according to Judge McCormick's reading of its laws. He found it "noteworthy that the educational advantages of their commingling with other pupils is regarded as being so important to the school system of the State" that education was mandatory for both citizens and non-citizens. California law reflected "a clear purpose to avoid and forbid distinctions among pupils based upon race or ancestry."[82] Further, the Supreme Court had declared in *Hirabayashi* that such distinctions were "'by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'" and "'utterly inconsistent with American traditions and ideals.'"[83]

Judge McCormick concluded his discussion of "the utter irreconcilability of the segregation practices" with California law and went on to suggest a new interpretation of the federal equal protection clause. "'The equal protection of the laws' pertaining to the public school system in California," he wrote, "is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry."[84] Then came the judge's formulation, so radical for its day:

> A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.[85]

That, simply stated, was a declaration that "separate but equal" was not equal. The language must have made the parties to the litigation catch their breaths at its boldness. McCormick was implicitly denying the legitimacy of an entire body of equal protection law, and doing so in language that would soon have civil rights organizations all over the country rushing into the case.

The only permissible grounds for the Orange County segregation, McCormick continued, were the children's language difficulties. "But even such situations do not justify the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population as has been shown to be the practice in the defendant school districts." Instead, there must be "credible examination" of each child, "regardless of his ethnic traits or ancestry."[86] No such examination existed here. "In some instances," McCormick continued with indignation, placement was based on "the Latinized or Mexican name of the child," even though "such methods of evaluating language knowledge are illusory and are not conducive to the inculcation and enjoyment of civil rights which are of primary importance in the public school system of education in the United States."[87] That sentence effectively asserted that civil rights

and knowledge about them were key goals of American public education. So was the avoidance of artificial distinctions among the students:

> The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation, and that commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals. It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.[88]

What Judge McCormick did was sufficiently revolutionary to deserve emphasis here. He not only restated the Supreme Court's suggestion in *Hirabayashi* that discrimination based on ancestry was usually suspect; he applied that doctrine in declaring a state's actions to be illegal. He held that Mexican-Americans as a group could not legitimately be discriminated against—a holding that would not be echoed by the U. S. Supreme Court until 1954. He declared that school segregation impeded learning instead of enhancing it. He insisted, as the NAACP would argue in *Brown v. Board of Education*, that segregated schools fostered unwarranted feelings of inferiority in the students who were segregated. Most importantly, of course, he declared that "separate but equal" education was a violation of the Fourteenth Amendment. There, again, he anticipated the Supreme Court by almost a decade.

In New York, NAACP Assistant Special Counsel Robert Carter, Thurgood Marshall's second in command, expressed surprise that the NAACP had known nothing about the case. Marshall was in the Virgin Islands, recuperating from an illness, so Carter was effectively in charge. The school districts had announced that they would appeal the decision and Carter immediately understood that, if the case reached the Supreme Court, it could be the one to attack segregated education on its face. It might even, he thought, signal the beginning of the end for "separate but equal."[89]

Carter had come to believe that sociological evidence, depicting the psychological and pedagogical effects of school segregation, could be a useful weapon in the litigation arsenal. Other lawyers who worked with the NAACP were less sanguine. The social sciences, they said, weren't pure science, and so their findings were too weak to use in cases. Carter knew, however, that, as long as he was prepared to stand up to the other attorneys, Marshall would support him. The *Mendez* case was too good an opportunity to pass up, Carter thought, and he began drafting a brief that he would later call the NAACP's trial brief for *Brown v. Board*.[90] The NAACP would enter the case as an *amicus*.

So would the American Jewish Congress, the Japanese-American Citizens League, the American Civil Liberties Union, and the Los Angeles chapter of the National Lawyers Guild. The NAACP brief took educational segregation head on. There was nothing, Carter wrote in its brief, to keep a federal court from declaring that segregation in a public school system was unconstitutional. *Plessy* dealt only with railroad cars, not with education, and a line of cases since indicated that the Court was moving toward a holding that "classifications and distinctions on the basis of race [are] contrary to our fundamental law." The conclusion: "It is clear, therefore, that segregation in our public schools must be invalidated as violative of the Constitution and laws of the United States."[91]

The brief of the American Jewish Congress (AJC) lambasted segregation in

general and, in language that tracked that of the experts who had testified at trial, segregation in education in particular. "The value and the desirability of an educational institution is particularly dependent on intangible elements," the AJC asserted. "The physical characteristics of the benches and desks of a school shrink into utter insignificance when compared with the social and psychological environment which the school offers to its children." That "social and psychological environment" could be devastating. Children who were "deemed superior are often, in manifesting their innocent pride, more cruel than normal adults usually are. On the other side, children who feel that they are treated as inferior are more bitterly humiliated by the social stigma that strikes them than adults can be."[92] They are likely to suffer the "deepest and most lasting social and psychological evil results." Segregation based on assumptions of inferiority "perpetuate[s] racial prejudice and contributes to the degradation and humiliation of the minority children."[93]

The state of California also weighed in, and it quickly became apparent that segregation of Mexican-American students did not have its support. In November, 1946, Robert W. Kenny, Governor Earl Warren's attorney general, entered the case as an *amicus*. Kenny argued that any segregation in California schools was unconstitutional, and Warren and the state legislature began the process of implementing that idea.[94] In January, 1947, four members of the California Assembly introduced a bill to end segregated education in the state.[95] It passed on April 10, which, as it turned out, was only four days before the *Mendez* decision was handed down by a unanimous Court of Appeals on April 14.[96]

Writing for the court, Judge Albert Lee Stephens rejected the county's argument that the Supreme Court's segregation decisions were controlling. His reason was quite different from Marcus's, however. Those decisions, Stephens wrote, were handed down in cases where the state legislature had mandated segregation. That was not the situation here. "Nowhere in any California law is there a suggestion that any segregation can be made of children within one of the great races." Mexican-Americans were neither American Indians nor Asians, and those were the only categories of children whom California law permitted to be segregated. Stephens was willing to concede that California could enact a law permitting the segregation of Mexican-Americans but it had not done so, and so the school boards had deprived the plaintiff children of liberty and property without due process of law and the equal protection of the laws.[97]

Stephens specifically declined to get into a discussion of whether racial segregation was no longer constitutional.[98] The country's legal elite, however—at least the part of it outside the South—was willing to go further. Northern and Western law reviews saw Judge McCormick's decision as the writing on the wall. His opinion, the *Yale Law Journal* said in June 1947, "has questioned the basic assumption of the *Plessy* case and may portend a complete reversal of the doctrine." Drawing on statistics in the NAACP's brief, the *Journal* declared that the facts that 34.5 percent of African-Americans had failed to meet the 1943 minimum educational standards for military service and that there were too few African-American physicians, dentists, and lawyers indicated that segregated education was counterproductive. "The only barrier to a flat holding that segregation is a denial of 'equal protection of the laws' is, in the last analysis, the *Plessy case*," the article continued. "However, the basic assumption of the Court in that case, that compulsory segregation does not imply social inferiority, has become untenable in the light of our knowledge of psychology and sociology . . . It is to be hoped" that the Supreme Court would overrule *Plessy*.[99] The *Michigan Law Review* called the *Mendez* decision "a radical departure from the tacit assumption of the legality

of racial segregation" and predicted that it, in concert with the higher education cases that the NAACP had won in the Supreme Court, "may well force a reconsideration of the whole problem."[100] The *Columbia Law Review* urged the Supreme Court to overturn *Plessy*, agreeing that "modern sociological investigation would appear to have conclusively demonstrated" that segregation implied inferiority.[101] The *Southern California Law Review* called segregated education "anomalous" in "a nation priding itself on its solid foundation of basic tolerance and equality of opportunity."[102]

The school districts involved in the case gave up, integrating their schools, and so the case did not make its way to the U.S. Supreme Court. The case nonetheless had ramifications beyond those districts. A few months after Judge McCormick handed down his decision, David Marcus filed suit on behalf of segregated African-American and Mexican-American school children in Riverside County. The school district saw the handwriting on the wall and ended segregation.[103] The handwriting was even more apparent after the Court of Appeals ruling. In Placentia, a town in northern Orange County, returning veteran Alfred V. Aguirre declared that his children should not have to go to a segregated school as he had been forced to do. In 1948 he and other parents petitioned the school board to end segregation. Unsuccessful, and knowing about the *Mendez* case, Aguirre sought out an attorney about possible litigation. The lawyer responded that, while a lawsuit certainly would succeed, given the holding in *Mendez*, it might be wise to petition the school board one more time before following the expensive litigation route. The board, now faced with the threat of a court case, opened the "Anglo" Bradford Elementary School to all children. A year later there were so few students in the "Mexican" school that it closed.[104] In 1948 scholar Mary Peters reported on her survey of 100 non-urban school districts in southern and central California. Seventy-eight percent of the districts that responded replied that they had segregated Mexican-American students; only eighteen percent said that they still did so.[105]

Ninth Circuit rulings do not control the law in Texas, which is part of the Fifth Circuit. Nonetheless, Gustavo (Gus) C. García, an attorney and activist, asked Texas State Attorney General Price Daniel whether *Mendez* meant that segregation on the basis of national origin was illegal. (We will encounter Mr. García again later on.) Daniel replied that it did, but students could still be segregated on the basis of language deficiency. That did nothing to change existing practices and, in June 1948, García and LULAC filed suit against four south Texas school districts on behalf of Mexican-American children and their parents. Like Marcus, García and his team brought expert witnesses to testify about the negative effects of segregation and asserted that "separate but equal" could never be equal; as in *Mendez*, the attorneys argued that the Supreme Court's racial segregation decisions were irrelevant because Mexican-Americans were white. Judge Ben C. Rice of the federal district court in the Western District of Texas agreed that segregation of Mexican-Americans was unauthorized by Texas law and violated the Equal Protection Clause. His decision in *Delgado v. Bastrop Independent School District*, however, did permit separate classes in the first grade for language-deficient students who were identified as such on "scientifically standardized" tests.[106]

In the 1950s, as the NAACP was preparing *Brown v. Board of Education*, Thurgood Marshall asked David Marcus to travel to New York and help the effort. Marcus, who disliked traveling and was reluctant to leave his single-practitioner law practice, declined—but he did send Marshall his briefs and case notes.[107] Then, two weeks before the Supreme Court decided *Brown*, the connection between discrimination against

Mexican-Americans and discrimination against African-Americans was made explicit by Chief Justice Earl Warren.

Pete Hernández, a Mexican-American, had been convicted of murder by a Texas jury from which Mexican-Americans were excluded. His lawyers appealed to the Texas Court of Criminal Appeals, arguing that the all-Anglo jury violated Hernández's right as a member of a "class" to the equal protection of the laws mandated by the Fourteenth Amendment. The Texas court held that, because Mexicans were "white" they did not constitute a separate class protected by the Fourteenth Amendment. As "whites," had not been excluded from the jury, Hernández had been properly tried by a jury of his peers.[108]

A unanimous Supreme Court, after hearing Gus García and Carlos C. Cadena, the first Mexican-American lawyers ever to argue before the court, disagreed.[109] Chief Justice Warren indicated his intense interest in the case of *Hernandez v. Texas* by taking the unusual step of allowing García to continue his presentation in oral argument after the red light indicated that his time had expired. Then Warren wrote the opinion for a unanimous court. "The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment," he stated. He went on to hold, as David Marcus had argued in *Mendez*, that the Fourteenth Amendment protected Mexican-Americans as well.[110] In doing so, he offered a mini-lesson in the history of American racism:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro . . . The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.[111]

The decision was handed down on May 3, 1954, two weeks before the Court decided *Brown v. Board of Education*.

Mendez had stimulated the Mexican-American community and, as was evident in the *Hernandez* case, gave it reason to believe that perhaps justice could be achieved in the United States. It directly affected the strategy used by the NAACP in *Brown v. Board of Education*. It helped delineate the outlines of the Fourteenth Amendment, with Judge McCormick holding that the Constitution guaranteed Mexican-Americans the right to equality under the law. As did Earl Warren a decade later in *Hernandez*, McCormick's decision interpreted the Fourteenth Amendment as being about more than the relationship of Anglos and African-Americans.

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As this series of articles focuses on the personalities behind the cases, it seems appropriate to look at the main players after the case. The Munemitsu family was able to return to Westminster in 1946, when the war ended. They worked side by side on the farm with the Méndezes, so that the Méndezes

could get the benefit of the crop they had already planted and use the money to buy another café. In September 1947, the three Méndez children began school in Westminster Main, which now housed all the district's children in grades one through four.

The Méndezes then reclaimed their Santa Ana home, moving there before the Ninth Circuit opinion was handed down. Santa Ana had not yet desegregated, but the Méndezes took their children to the local "white" school, which of course knew about the litigation and quietly enrolled them. Sylvia went on to college and became a registered pediatric nurse. Jerome went into the armed forces, where he served his country as a Green Beret; Gonzalo Jr. became a master carpenter.[112]

David Marcus maintained his private practice almost until his death in 1982, continuing to handle a combination of civil liberties and other seemingly more glamorous matters. At one point he successfully fought a deportation order for one of actress Rita Hayworth's husbands; at another, he was both the trial and California appeals court lawyer in a major search and seizure case (*Rochin v. California*, 1952).[113] Tragically, he was less successful in his battle against alcoholism, and he was disbarred for inadequate representation of clients two years before he died.[114]

The Méndezes had two more children before Gonzalo, only fifty-one years old, died of heart failure in 1964. Felícitas lived until the age of eighty-one, long enough to know that the Santa Ana Unified School District had broken ground for the new Gonzalo and Felícitas Méndez Fundamental Intermediate School.[115] The farm the Méndezes and Munemitsus worked was sold eventually and, somewhat ironically, became the grounds of Westminster's Finley Elementary and Johnson Intermediate Schools.

In 1998, the Los Angeles Board of Education issued a resolution commemorating the entire family. It was only one of many such resolutions, including those from the California legislature. When the U.S. Congress passed a 2004 concurrent resolution celebrating the fiftieth anniversary of *Brown v. Board*, it included the *Mendez* case in acknowledgement that the case "had successfully dismantled school segregation years before *Brown* . . . in Orange County."[116] In 2007, the United States Postal Service issued a stamp entitled "*Mendez v. Westminster* 1947: Toward Equality in Our Schools." It was unveiled on the campus of Chapman University in Orange County, with members of the Méndez, Estrada, Guzman, Palomino, and Ramirez families—the five plaintiff families—in attendance.[117] The highest profile recognition of the importance of *Mendez* came in 2010, when President Barack Obama bestowed the Presidential Medal of Freedom on Sylvia Méndez, for taking the lesson of *Mendez v. Westminster* to schoolchildren all over the United States.[118] Two years later, the courthouse in which *Mendez* was first heard was designated a National Historic Landmark.[119]

In 1998, when Felícitas Méndez was dying, she spoke with her daughter Sylvia about her unhappiness that Gonzalo had died before the *Mendez* case became better known. Sylvia dedicated herself to educating the public about the case. *Mendez* was an important moment in Mexican-American history, Sylvia Mendez was to tell audiences, but it was equally significant as a moment when Mexican-Americans, African-Americans, Japanese-Americans, and Jewish Americans cooperated to undo what they saw as a great injustice. "*Mendez* is about everybody coming together," she commented in 2009.[120] And, for those optimistic post-war years when it appeared that justice was close at hand and all things were possible, they did.

ENDNOTES

[1] Author's interview with Sylvia Mendez, Feb. 26, 2010; Gilbert G. Gonzalez, **Chicano Education in the Era of Segregation** (Blach Institute Press, 1990), p. 150; Frederick P. Aguirre, "*Mendez v. Westminster School District*: How It Affected *Brown v. Board of Education*,"

4 *Journal of Hispanic Higher Education* 321, 323 (2005); Jennifer McCormick and César J. Ayala, "Felícita 'La Prieta' Méndez (1916–1998) and the End of Latino School Segregation in California," XIX *CENTRO Journal* 13 (Fall 2007), available at http://www.sscnet.ucla.edu/soc/faculty/ayala/ayalares/papers/ayalaC07.pdf, citing Gilbert Gonzalez interview with Felícita Méndez, 1987, in Gilbert Gonzalez personal archive; Molly Nance, "The Landmark Decision that Faded into Historical Obscurity," 24 *Diverse: Issues in Higher Education* 28–31 (December 2007).

[2] *Mendez v. Westminster School Dist. of Orange County*, 64 F. Supp. 544 (C.D. Cal. 1946) (hereafter *Mendez v. Westminster*); *Westminster School Dist. of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947); *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Mendez* trial transcript (hereafter trial transcript): Reporter's transcript of proceedings, *Gonzalo Mendez v. Westminster School District of Orange County*, file folders 4292-M, box #740, Civil Cases 4285–4292, RG 221, Records of the District Court of the United States for the Southern District of California, Central Division, National Archives and Records Administration (Pacific Region), Laguna Niguel, California. The documents are also available at http://mendezetalvwestminster.com/court.html. *Mendez v. Westminster* is written here without an accent mark, as the court personnel who transcribed the trial proceedings and prepared the judicial opinions for publication omitted it. The briefs in *Westminster School District v. Mendez* are in Case Files, Ninth Circuit Court of Appeals, Record Group 276, Box 4464, National Archives-Pacific Sierra Region, San Bruno, CA. No transcript was kept of the oral argument.

[3] Vicki L. Ruiz, "Tapestries of Resistance: Episodes of School Segregation and Desegregation in the U.S. West," in Peter F. Lau, **From Grassroots to the Supreme Court: Exploration of Brown v. Board of Education and American Democracy** (Duke University Press, 2004), p. 56; Charles M. Wollenberg, **All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975** (University of California Press, 1976), p. 109; David G. Gutiérrez, **Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity** (University of California Press, 1995), p. 40; George J. Sanchez, **Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945** (Oxford University Press, 1993), p. 18.

[4] Gutiérrez, **Walls and Mirrors**, p. 41; Gilbert G. González, **Labor and Community: Mexican Citrus Worker Villages in a Southern California County, 1900–1950** (University of Illinois Press, 1994), pp. 19–20; Sanchez, **Becoming Mexican American**, p. 19.

[5] González, **Labor and Community,** p. 7; *cf.* Juan Gómez-Quiñones, **Mexican American Labor, 1790–1990** (University of New Mexico Press, 1994).

[6] González, **Labor and Community,** pp. 32, 59–69; Vicki L. Ruiz, "South by Southwest: Mexican Americans and Segregated Schooling, 1900–1950," *OAH Magazine of History*, Vol. 15, No. 2 (Winter, 2001), pp. 23–27, available at http://www.jstor.org/stable/25163422, at 23.

[7] Camille Guerin-Gonzales, **Mexican Workers and American Dreams: Immigration, Repatriation, and California Farm Labor, 1900–1939** (Rutgers University Press, 1994), pp. 120–121.

[8] González, **Labor and Community,** p. 32.

[9] Christopher J. Arriola, "Knocking on the Schoolhouse Door: *Mendez v. Westminster*, Equal Protection, Public Education, and Mexican Americans in the 1940s," 8 *La Raza Law Journal* 166 (1995), at 167–169; Christopher J. Arriola, "A Landmark Little Noted—Until Today," *Los Angeles Times*, April 13, 1997, available at http://articles.latimes.com/1997-04-14/local/me-48575_1_mexican-americans.

[10] "Mexicans are to be returned as *white*, unless definitely of Indian or other nonwhite race." U.S. Department of Commerce, Bureau of the Census, "Abridged Instructions to Enumerators," January 19, 1940, p. 7, available at http://1940census.archives.gov/downloads/instructions-to-enumerators.pdf. *Cf.* U.S. Department of Commerce, Bureau of the Census, **200 Years of US Census Taking: Population and Housing Questions, 1790–1990** (1989), p. 60.

[11] Act of March 12, 1885, Cal. Stat. ch. 117, §§ 1–2, Laws and Resolutions passed by the legislature of 1883-84 at its extra session, 99–100; CAL. EDU. CODE § 1662 (Deering 1886); CAL. EDU. CODE §§ 8003–8004 (1945), at 194.

[12] California, Department of Justice, "Opinions of the Attorney General," vol. 21, pp. 448–450, Sept. 27, 1929. *Cf.* Wollenberg, **All Deliberate Speed,** pp. 123–124.

[13] Wollenberg, **All Deliberate Speed,** pp. 110–111; Arriola, "Knocking," p. 170; Gilbert G. Gonzalez, **Chicano Education in the Era of Segregation** (The Blach Institute Press, 1990), pp. 137–8; Charles Wollenberg, "*Mendez v. Westminster*: Race, Nationality and Segregation in California Schools," *California Historical Quarterly*, Vol. 53, No. 4 (Winter, 1974), pp. 317–332, at 319.

[14] Nicolás C. Vaca, **The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America** (Harper-Collins, 2003), p. 64; González, **Labor and Community**, pp. 99–100; Irving G. Hendrick, **The Education of Non-Whites in California, 1849–1970** (R & D Research Associates, Inc., 1977), pp. 91–92.

[15] Gilbert G. Gonzalez, "Segregation of Mexican Children in a Southern California City: The Legacy of Expansionism and the American Southwest," *The Western Historical Quarterly*, Vol. 16, No. 1 (Jan., 1985), pp. 55, 57.

[16] Gonzalez, **Chicano Education,** pp. 138, 142; González, **Labor and Community,** p. 102.

[17] Osman R. Hull and Willard S. Ford, **Santa Ana School Housing Survey** (University of Southern California, 1928), pp. 35, 36, quoted in Gonzalez, **Chicano Education**, op. cit., pp. 142–143.

[18] González, **Labor and Community**, pp. 104–107.

[19] Arriola, "Knocking," pp. 178–179.

[20] González, **Labor and Community**, pp. 109–110; Santa Ana Board of Education, Minutes, August 29, 1933, quoted in Gonzalez, "Segregation of Mexican Children," p. 63 n29.

[21] Arriola, "Knocking," p. 181.

[22] Grace Stanley, "Special School for Mexicans," *The Survey*, Sept. 15, 1920, p. 714.

[23] B. F. Haught, "The Language Difficulty of Spanish-American Children," *Journal of Applied Psychology* 15 (Feb. 1931), p. 92, quoted in Gonzalez, **Chicano Education**, p. 72.

[24] William H. Sheldon, "The Intelligence of Mexican Children," *School and Society* (Feb. 2, 1924), cited in Wollenberg, **All Deliberate Speed**, p. 115.

[25] Thomas Garth, "The Intelligence of Mexican School Children," *School and Society* (June 28, 1928), cited in Wollenberg, op. cit.

[26] Gonzalez, **Chicano Education**, ch. 4; Charles Wollenberg, "*Mendez v. Westminster*," p. 321. Cf. Simon L. Treff, **The Education of Mexican Children in Orange County**, unpublished M. Ed. thesis, University of Southern California, 1934.

[27] *Alvarez v. Lemon Grove School District*, Superior Court of the State of California, County of San Diego, Petition for Writ of Mandate No. 66625, February 13, 1931; Robert R. Alvarez, Jr., "The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case," *The Journal of San Diego History* v. 32 (Spring, 1986), available at http://www.sandiegohistory.org/journal/86spring/lemongrove.htm; Vicki L. Ruiz, "*Alvarez v. Lemon Grove*," in Vicki L. Ruiz and Virginia Sánchez Korrol, eds., **Latinas in the United States: A Historical Encyclopedia** (Indiana University Press, 2006), pp. 45–46; Francisco E. Balderrama, **In Defense of La Raza: The Los Angeles Mexican Consulate and the Mexican Community, 1929 to 1936** (University of Arizona Press, 1982), pp. 48, 58; San Diego Mexican and Chicano History, "La Luchea: What was the Lemon Grove School Desegregation Case all about?" http://www-rohan.sdsu.edu/dept/mas/chicanohistory/chapter07/c07s02.html.

[28] *Salvatierra v. Del Rio Independent School District*, 33 S.W. 2d 790, 792 (Tex. Civ. App., 1930); *cert. denied*, 284 U.S. 580 (1931). *Cf.* Guadalupe San Miguel Jr., "The Struggle Against Separate and Unequal Schools: Middle Class Mexican Americans and the Desegregation Campaign in Texas, 1929–1957," 23 *History of Education Quarterly* 343 (1983).

[29] *Salvatierra v. Del Rio Independent School District*, at 793.

[30] *Salvatierra v. Del Rio Independent School District*, cert. denied, 284 U.S. 580 (1931).

[31] Trial transcript, pp. 459, 461, 462; Frederick P. Aguirre, "*Mendez v. Westminster School District*: How It Affected *Brown v. Board of Education*," 4 *Journal of Hispanic Higher Education* 321, 323 (2005).

[32] Gonzalez, **Chicano Education,** pp. 149–150; Jennifer McCormick and César J. Ayala, "Felícita 'La Prieta' Méndez (1916–1998) and the End of Latino School Segregation in California," XIX *CENTRO Journal* 13 (Fall 2007), pp. 8–12, 18–19, 21, 26–28, available at http://www.sscnet.ucla.edu/soc/faculty/ayala/ayalares/papers/ayalaC07.pdf; author's interview, Sylvia Mendez. *Cf.* Carey McWilliams, **Ill Fares the Land: Migrants and Migratory Labor in the United States** (Barnes and Noble, 1967), pp. 71, 80.

[33] McCormick and Ayala, "Felícita," p. 29; Gonzalez, **Chicano Education**, p. 149; author's interview with Sylvia Mendez.

[34] McCormick and Ayala, *id.*; Gonzalez, **Chicano Education**, *id.*; trial transcript, pp. 462–463.

[35] Trial transcript, pp. 330, 369, 411–443.

[36] *Id.* at 442.

[37] *Id.* at. 442–443.

[38] McCormick and Ayala, "Felícita," p. 44, quoting Gilbert González interview with Felícita Méndez, 1987, in González personal files.

[39] Trial transcript, p. 468.

[40] *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Ca. 1944).

[41] Author's telephone interviews: Maria Dolores Lane (David Marcus daughter), Jan. 9, 2008; Stephen DeLapp (grandson) Jan. 6, 2009; Anne K. McIntyre (granddaughter), Jan. 8, 2008; author's email interview with Melissa Marcus (granddaughter), Dec. 10, 2008. Marcus also had a non-Mexican child from a short first marriage.

[42] Frederick P. Aguirre, "*Mendez v. Westminster*," pp. 321, 324.

[43] Philippa Strum, *Mendez v. Westminster: School Desegregation and Mexican-American Rights* (University Press of Kansas, 2010), pp. 41–42; Gonzalez, *Chicano Education*, p. 151.

[44] Trial transcript, pp. 79–80, 90–92, 102–103.

[45] Gonzalez, *Chicano Education*, pp. 151–152.

[46] Author's interview, Sylvia Mendez; *cf.* McCormick and Ayala, "Felicita," p. 35.

[47] Amendment XIV, Section 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[48] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[49] *Cumming v. Board of Education*, 175 U.S. 528 (1899).

[50] *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45 (1908).

[51] *Gong Lum v. Rice*, 275 U.S. 78 (1927).

[52] *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

[53] *Korematsu v. United States*, at 216.

[54] *Hirabayashi v. United States*, at 100; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[55] *Yick Wo v. Hopkins*, at 373–374.

[56] *Hirabayashi v. United States*, at 100.

[57] Memo from Thurgood Marshall to Roy Wilkins, Nov. 27, 1945, Library of Congress, National Association for the Advancement of Colored People Records, 1842–1999, Part 2 (hereafter NAACP records), Box 136 Folder 11; Thurgood Marshall to Carl Murphy, President, *The Afro-American Newspapers*, Dec. 20, 1946, and Thurgood Marshall speech, Association of Colleges and Secondary Schools for Negroes, Nashville, Tenn., Dec. 6, 1945, NAACP records, Part 2, Box 136, Folder 3.

[58] Petition, *Mendez et al. v. Westminster School Dist. of Orange County et al.*, Civil Action No. 4292, U.S. District Court for the Southern District of California, Central Division, Mar. 1, 1946, pp. 6–7, available at http://mendezetalvwestminster.com/pdf/Petition.pdf.

[59] *Id.*, at 2, 7–8.

[60] Trial transcript, pp. 44, 109.

[61] n.a., "Coolidge Picks M'Cormick," *Los Angeles Times*, Feb. 8, 1924, p. A5; n.a., "Fellow Judges Praise Service of McCormick," *Los Angeles Times*, Jul 29, 1951, p. B2.

[62] n.a., "Commissioners Who Made Exhaustive Prohibition Study," *Los Angeles Times*, Jan. 21, 1931, p. 4; n.a., "Crime Viewed by M'Cormick: Wickersham Commissioner Returns Home," *Los Angeles Times*, Jul. 6, 1931, p. A1. *"A Report of the National Commission on Law Observance and Enforcement Relative to the Facts as to the Enforcement, the Benefits, and the Abuses Under the Prohibition Laws, Both Before and Since the Adoption of the Eighteenth Amendment to the Constitution,"* is printed in *House Document 722 (71st Cong., 3d sess., Government Printing Office: 1931).*

[63] n.a., "Confirms Revoking of Doheny Leases," *The New York Times*, Jul. 12, 1925, p. 6; *United States v. Pan American Petroleum and Transport Company*, 6 F.2d 43 (D. Cal. 1925).

[64] Formally, the defendants were represented by Joel E. Ogle, the Santa Ana County Counsel. He effectively turned the case over to Holden, however, and played no more than a minimal role in it.

[65] Email to author from Daniel W. Holden, Mar. 14, 2009; email to author from Chris Jepsen, Assistant Archivist, Orange County Archives, Mar. 10, 2009; email to author from Jack Golden, Senior Assistant County Counsel, Orange County, Mar. 9, 2009; n.a., "Mexican Students To Be Unchanged," *Orange Daily News*, Sept. 13, 1946, p. 1.

[66] Trial transcript, p. 5.

[67] *Id.* at 46–47.

[68] James L. Kent, "Segregation of Mexican School Children in Southern California," Ed. M. thesis, University of Oregon, June 1941, p. 3.

[69] *Id.* at 23.

[70] *Id.* at 67.

[71] *Id.* at 101, 139.

[72] *Id.* at 376.

[73] *Id.* at 377. *Cf.* Strum, *Mendez v. Westminster*, pp. 82–90.

[74] Gonzalez, **Chicano Education**, p. 152.

[75] Trial transcript, pp. 258–270. *Cf.* Strum, *Mendez v. Westminster*, pp. 79–80, 90–92, 102–103.

[76] Trial transcript, pp. 660–661. *Cf.* Walter Goldschmidt, Ralph H. Turner, and Robert B. Edgerton, "Ralph Leon Beals, Anthropology and Sociology: Los Angeles,"http://texts.cdlib.org/view?docId=hb767nb3z6&doc.view=frames&chunk.id=div00006&toc.depth=1&toc.id=.

[77] *Id.* at 687–689.

[78] *Id.* at 676.

[79] *Id.* at 691, 699.

[80] *Mendez v. Westminster* at 548, quoting California Education Code Sec. 8002.

[81] *Mendez v. Westminster*, at 548.

[82] *Id.*

[83] *Id.*, quoting *Hirabayashi v. U.S.* at 100, 110.

[84] *Id.* at 549.

[85] *Id.*

[86] *Id.* at 549, 550.

[87] *Id.* at 550.

[88] *Id.* at 549.

[89] Author's interview with Robert L. Carter, Oct. 17, 2008; Robert L. Carter to Claude G. Metzler, Dec. 26, 1946, and Robert L. Carter, Memo to NAACP's Public Relations Department, Apr. 24, 1947, NAACP records, Part 2, Box 136, Folder 3; Robert L. Carter, **A Matter of Law: A Memoir of Struggle in the Cause of Civil Rights** (NY: The New Press, 2005), pp. 65–66; Richard Kluger, **Simple Justice: the History of *Brown v. Board of Education* and Black America's Struggle for Equality** (Knopf, 1975, 2004), p. 400; Mark V. Tushnet, **The NAACP's Legal Strategy Against Segregated Education, 1925–1950** (U. of N. Carolina, 1987), p. 120.

[90] Author's interview, Robert L. Carter; Carter, **A Matter of Law**, pp. 65–66; Kluger, **Simple Justice**, p. 400.

[91] Motion and Brief for the National Association for the Advancement of Colored People as *Amicus Curiae*, *Westminster v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (No. 11310), pp. i, 31.

[92] Brief for the American Jewish Congress as *Amicus Curiae*, p. 13.

[93] *Id.* at 14.

[94] Brief of the Attorney General of the State of California as *Amicus Curiae* ; Ed Cray, **Chief Justice: a Biography of Earl Warren** (Simon & Schuster, 1997), p. 167.

[95] Wollenberg, **All Deliberate Speed**, p. 132. Governor Warren signed the bill on June 14. *Id.*

[96] 1947 Cal. Stat. ch. 737, Sept. 10, 1947.

[97] *Westminster v. Mendez*, 161 F.2d 774, 789–781 (1947).

[98] Id. at 780

[99] n.a., "Note, Segregation in Public Schools—A Violation of 'Equal Protection of the Laws,'" 56 *Yale Law Journal* 1059 (1947), at 1060, 1063–1064, 1066–1067.

[100] Neal Seegert, "Comment," 46 *Michigan Law Review* 639 (March 1948), at 641.

[101] n.a., "Note: Is Racial Segregation Consistent with Equal Protection of the Laws? *Plessy v. Ferguson* Reexamined," 49 *Columbia Law Review* 629 (May 1949), at 634, 637.

[102] Harry L. Gershon, "Comments: Restrictive Covenants and Equal Protection," *21 Southern California Law Review* 358 (1947–1948), at 370.

[103] Lawrence E. Davies, "Segregation of Mexican American Students Stirs Court Fight," *New York Times Magazine*, Dec. 22, 1946, p. 6.

[104] Aguirre, "*Mendez v. Westminster*," p. 328.

[105] Mary M. Peters, "The Segregation of Mexican American Children in the Elementary Schools of California—Its Legal and Administrative Aspects," M. A. in Education thesis, UCLA, July 1948.

[106] *Delgado v. Bastrop Independent School District*, Civ. No. 388 (W.D. Tex. June 15, 1948).

[107] Author's interview, Anne K. McIntyre; Gonzalez, **Chicano Education**, p. 28.

[108] *Hernandez v. Texas*, 251 S. W. 2d 531 (1952).

[109] *Hernandez v. Texas*, 347 U.S. 475 (1954).

[110] *Id.* at 477–478.

[111] *Id.* at 478.

[112] Author's interview, Sylvia Mendez.

[113] *Rochin v. California*, 342 U.S. 165 (1952).

[114] *David C. Marcus, Petitioner, v. The State Bar of California, Respondent*, June 5, 1980, 27 Cal. 3d 199, 611 P.2d 462, 165 Cal. Rptr. 121, 1980 Cal. LEXIS 173.

[115] "Mendezes Honored for Groundbreaking Lawsuit," Santa Ana Unified School District, *The Superintendent's Report*, March 1998, p. 1; "Landmark decision finally receives recognition," Mexican American Bar Association of Los Angeles County, *MABA News*, February 1998, p. 1.

[116] 108th Congress, 2nd sess., H. Con. Res. 414 ENR, May 19, 2004, available at http://thomas.loc.gov/cgi-bin/query/D?c108:5:./temp/~c108rRyYLs.

[117] "Stamp Announcement 07-40: *Mendez v. Westminster*," United States Postal Service, Postal Bulletin (PB 22213), August 16, 2007, p. 77; "Chapman Commemorates 60th Anniversary of *Mendez v. Westminster* Case on April 14," Chapman University press release, March 26, 2007, available at http://www.chapman.edu/_large-files/news-archive/442.pdf.

[118] "2010 Presidential Medal of Freedom Recipient—Sylvia Mendez," http://www.whitehouse.gov/photos-and-video/video/2011/02/16/2010-presidential-medal-freedom-recipient-sylvia-mendez.

[119] National Park Service, Department of the Interior, "U.S. Court House & Post Office, Los Angeles, California," http://www.nps.gov/history/nr/travel/american_latino_heritage/Los_Angeles_US_Court_House_and_Post_Office.html.

[120] Author's interview, Sylvia Mendez.

Litigating Racial Justice at the Grassroots: The Shelley Family, Black Realtors, and *Shelley v. Kraemer* (1948)

JEFFREY D. GONDA

The night of May 3rd, 1948 was a sleepless one in the modest brick home at 4600 Labadie Avenue in St. Louis. For the blue-collar migrant family of eight ensconced on the property's first floor, it was unlike anything they could have imagined when they first arrived in the city from their native Mississippi in 1940. Excitement and relief washed in waves over the home's owners, J.D. and Ethel Lee Shelley, as congratulatory phone calls poured in from across the country and overseas. Their triumph in the United States Supreme Court earlier that day would soon appear in banner headlines atop the nation's African-American weekly newspapers, heralding—according to some—"the beginning of the end of the Negro ghetto." But for the Shelleys, the victory had a simpler significance. After all, it would be the first night in nearly three years and the only night since they had purchased the Labadie Avenue home without the threat of a court-imposed eviction over their heads.[1]

The home itself was rather unremarkable. It barely fit the large family and Ethel Shelley would remark that "[o]f course it ain't enough." Yet it represented something much greater than any floor plan or lot size could quantify. The home on Labadie was both a symbol and a material embodiment of progress and security for the hard-working couple, one that millions of black Americans strove for but found maddeningly elusive in the wake of World War II. The strictures of residential segregation, enforced by a combination of custom, discriminatory business practices, federal incentives, legal mechanisms, and violence conspired to make access to decent homes a faint hope for the vast majority of the nation's black urban communities. Indeed, the Shelleys had very nearly lost their claim to their own piece of postwar prosperity.[2]

At the heart of the family's troubles were discriminatory instruments known as racial restrictive covenants. Since the 1890s, white homebuilders and homeowners had used these agreements to prohibit African Americans and other minorities from occupying properties in designated neighborhoods. By the 1940s, civil rights advocates in the North and West had come to view covenants as one of the most pernicious obstacles to black social and economic progress and perhaps the foundational building block of the modern American ghetto. The right to access decent homes became an especially pressing issue at the forefront of black activists' sociopolitical agendas in the waning months of World War II and in the war's immediate aftermath. The Shelleys' case against the restriction covering their home would appear before the U.S. Supreme Court in January of 1948 as *Shelley v. Kraemer* and served as the culmination of the battle waged against covenants by the National Association for the Advancement of Colored People (NAACP) and local legal activists across the country.[3]

Despite the significance that contemporary observers assigned to the unanimous victory, *Shelley* has lingered at the margins of Civil Rights Movement history. The case has drawn relatively sparing notice even from those historians whose work pushes the boundaries of the Movement outside of the Deep South and back into the pre–*Brown v. Board of Education* (1954) era. Much of the blame for *Shelley*'s place at the periphery falls on the largely undisturbed tenacity of housing segregation and the seemingly narrow utility of the Court's ruling that only judicial enforcement of restrictive covenants, rather than covenants themselves, constituted discriminatory state action prohibited by the Fourteenth Amendment. Also at issue, however, is a larger unease with incorporating legal history—and its tendency to privilege the actions of great litigators and jurists or ostensibly abstract principles of law—into the heart of a field that has spent much of the last two decades emphasizing local grassroots activism and the everyday experiences of non-elite community members. Though the recent work of historians like Tomiko Brown-Nagin and her brilliant examination of civil rights lawyering in Atlanta have begun to bridge this gulf, many Movement historians still tend to eye legal history warily, seeing it perhaps as the last real bastion of "Great Man" narratives in Civil Rights Studies.[4]

Indeed, by contrast, legal scholars' treatment of *Shelley* affords some perspective on the distance between law and Movement history. Unlike Movement historians, the legal academy has spilled considerable ink problematizing the Court's decision. Rather than seeing *Shelley* as too narrow a ruling, however, legal historians have often cast the Court's expansion of the "state action" concept as so untenably broad in its potential application that it, "seemed to leave little room for any private legal rights at all," and thus failed to achieve its intended influence in civil rights law. This fascination with the decision's overreaching and its subsequent shortcomings has largely excluded the Shelley family and their local supporters from the telling of the case. Looking only at what happened after *Shelley* reached the Supreme Court limits a more thoroughgoing understanding of how and why the case took shape in the first place, disembodying the law from the impact that it had in the daily lives of black Americans and discounting the impact that local communities had in shaping the course of legal change.[5]

A more comprehensive look at the origins and development of the *Shelley* campaign, then, offers a remarkable vehicle to examine the ways in which litigation and legal activism were intimately bound up with and influenced by actors and communities at the grassroots. *Shelley* took shape in a climate of intense demographic change and increasingly severe challenges for urban black populations that drew the Shelley family into cooperation with local civil rights lawyers, an assortment of St. Louis's black

middle-class leaders, and an influential cadre of African-American realtors. *Shelley*'s unsteady march from the local courtrooms of the Gateway City to the Supreme Court chambers ultimately reveals a variety of competing ideas and agendas that render a complex portrait of how black legal activism functioned in the mid-twentieth century.

Reluctant Pioneers: The Shelley Family and Covenant-Breaking

J.D. and Ethel Lee Shelley made their way to St. Louis from rural Mississippi in the years leading up to the Second World War, chasing the lure of employment opportunities in the urban Midwest and fleeing the brutality of Jim Crow in the Magnolia State. J.D. Shelley resolved to leave his home near Starkville in 1939 shortly after local police viciously beat a young domestic worker and a friend of the Shelley family. Mr. Shelley, a proud and protective husband and father, later admitted that he headed for St. Louis because he worried that "if they beat my kids like that, these white folks [would] have to *lynch* me down here." Like many other southern migrants, he left on his own with a promise to send for his wife and children as quickly as he could. Some months later in 1940, the rapid blossoming of wartime industry reunited the devoted couple who had been apart for the first time since they were married at the age of sixteen.[6]

During the war, Mrs. Shelley found work in a childcare service while her husband secured a new job as a mechanic in the city's Small Arms bullet factory. Together, they staked out a place for themselves on the margins of St. Louis's blue collar black middle class. U.S. Cartridge's Small Arms manufacturing plant marked a hotbed of protest and racial contention all its own. A sharply segregated facility, Small Arms became the target of hate strikes among white employees who objected to black mechanics like Mr. Shelley working on machinery that white women operated. Simultaneously it became a focal point of local civil rights organizations who demanded access to jobs and better working conditions for the city's black residents. The Shelley family's links to the plant meant that they faced daily reminders of the hardships and indignities that confronted them in Jim Crow America—but were also aware of the capacity of resolve and community strength to foment change.[7]

Despite the relative financial comfort they enjoyed during the war years, however, urban living with such a large family proved decidedly uncomfortable. For nearly five years, the Shelleys, like so many others in their circumstances, made do with limited space in a series of small apartments that struggled to fit them all. Still, the family saved diligently and, by the time the war began drawing to a close, the prospect of owning their own home seemed—at least financially—within reach. After debating and worrying for some time about whether or not they could truly afford the burden of a mortgage, Mrs. Shelley finally convinced her husband to move when their daughter, Leatha, narrowly escaped an assault on her way home to the family's apartment one summer afternoon in 1945. This close brush with tragedy inspired a new urgency in Mrs. Shelley. As a woman of fierce pride, strength, and a desire to provide the best she could for her family, Mrs. Shelley summoned the full measure of the family's finances and her own deep religious faith to push ahead in a dire housing market.[8]

For African Americans in St. Louis and other cities across the country, finding any home at all, let alone one suitable to raise a family in, was an endeavor that inspired a good deal of prayer. Under the weight of a staggering housing shortage and the strictures of residential segregation, conventional wisdom in the postwar years held that the only way for black home-seekers to obtain property "would be if someone should die, leave the City, or be evicted." Given these circumstances, it was perhaps unsurprising that in July of 1945 Ethel Shelley approached Robert Bishop, a part-time real estate dealer

J.D. and Ethel Lee Shelley (both seated at right, at home with their children) made their way to St. Louis from rural Mississippi in the years leading up to the Second World War. Mr. Shelley found work in a munitions factory and Mrs. Shelley became a childcare worker. Many African Americans made the same journey and housing during and after World War II became increasingly overcrowded in the sections of St. Louis where they were permitted to live.

who also served as the family's pastor at the Church of God in Christ, for help in their search.[9]

Bishop had lived in the Gateway City for more than four decades and worked for the prominent black realtor E.M. Bowers. He quickly ran through the limited potential options from Bowers' listings with the Shelleys. After a month of unimpressive visits, Bishop eventually brought them to 4600 Labadie Avenue. The Shelleys knew the living space would be cramped with only four rooms to share amongst the eight of them, yet it offered a considerable improvement over their current apartment's space and security. Bishop informed them that the flat currently belonged to "a widow lady" who was eager to sell. In fact, he had arranged for a white "straw-party" named Josephine Fitzgerald to purchase the house on his behalf from the previous owners.[10]

Straw-party sales served as a common way to facilitate covenant-breaking by having a white purchaser acquire property from a willing white seller and immediately resell or transfer the title to black buyers. Bishop himself admitted using the tactic in previous transactions and it remained one of the simplest methods of undermining covenants. Ultimately, the strategy of employing straw-buyers performed several key functions. Having a white purchasing party allowed realtors to circumvent discrimination by both sellers and financial institutions. White homeowners who avowedly upheld race restrictions were usually unable to know if the purchaser intended to resell. Indeed, in the case of the Labadie property, Bishop

negotiated the sale with a white woman who stated "that she preferred to sell it [the home] to a white." Only when Bishop assured her that Ms. Fitzgerald was white could the sale proceed.[11]

Perhaps just as important, lenders also eased their restrictions when faced with white buyers. As Bishop put it, "using a white straw party has been an advantage to me in financing . . . [it is] easier to finance through [a] white. That's common knowledge." The straw purchaser could "secure larger loans, better loans," leaving the person who received the subsequent transfer with a lower interest rate and more manageable repayments terms. Another broker with knowledge of the conditions in St. Louis claimed that interest rates for African-American borrowers were "a standard six per cent" while whites often obtained loans at as low as 4.5 percent. Additionally, lenders tended to impose shorter repayment schedules for black home-buyers.[12]

The Shelley's case would demonstrate, however, that the straw-party served an alternate purpose for black realtors. Bishop purchased the home on Labadie through Josephine Fitzgerald for $4,650. The following day, he resold the property to the Shelleys for $5,760—a twenty-four percent profit. Straw-buyers, especially when acting on behalf of or in concert with realtors, allowed for outrageous price mark-ups and profiteering. Bishop's actions in this case would ultimately land him in hot water before the Missouri Real Estate Commission.[13]

In the end, not only had Bishop forced the Shelleys to overpay for their home, he left them completely unaware that their purchase violated the neighborhood's

The Shelleys bought their house at 4600 Labadie Avenue using the intermediary of a white straw party because of its racially restrictive covenant. Their realtor, Robert Bishop, who was also the pastor at their church, pocketed a twenty-four percent profit because of this arrangement.

restrictive covenant. Though Bishop later protested that he had been ignorant of the restriction's existence, it seemed far more likely that he willfully chose to ignore the agreement in pursuit of profit. For their part, J.D. and Ethel Lee Shelley simply believed that the neighborhood would be receptive to their presence because the block on Labadie had actually been integrated for decades prior to their arrival. When they viewed the house for the first time, the couple saw black children playing in the street and perhaps noticed one of the four black-owned homes along the avenue, which included the house next door.[14]

As Mrs. Shelley later testified, "I [had] see[n] other colored people on the street, that's why I bought it. If I hadn't a-seen them I never would." Her statement revealed two frequent themes from the process of covenant-breaking. First, many black home seekers did not actively wish to violate covenants or enter into solidly white neighborhoods. The fact that the Shelleys saw other African Americans on the block likely assuaged concerns about the potential for legal action or violent physical reprisals against them. They had been in the city long enough to know that lone black entrants into all-white regions made easy targets for vandals, mobs, and vigilantes and presumably for that reason sought the relative safety of an already integrated block. As with many black Americans in search of wartime or postwar housing, it was access to quality and safety that were of primary importance, with integration as an afterthought or even a discouraging factor in their decision-making. Moving in alongside whites ultimately had few benefits and even less appeal if the neighborhood might terrorize or evict them.[15]

Secondly, Mrs. Shelley's statement called attention to how confusing and uncertain the process of changing neighborhoods and seeking adequate housing could be. The covenant that she violated covered a patchwork of parcels rather than the entire block and left intact a multi-racial neighborhood whose first black residents had been in place since the 1880s. Restrictive agreements of this sort that sprang up in zones that had already experienced some degree of integration sought to protect white majorities rather than white exclusivity and hoped to minimize the potential impact and growth of an African-American presence. Restrictions like these were not the norm, but they highlighted how covenants could make the process of obtaining decent housing particularly difficult. Contracts like the one on Labadie Avenue frustrated black homebuyers who attempted to avoid integrating all-white regions by seeking out neighborhoods with an existing black population. The result was that, even in some integrated areas of the city, black families had to fight house by house and spend years in courtrooms to gain access to homes right next door to other African Americans.[16]

The Shelleys' efforts also dramatized the fact that breaching covenants rarely began as a political act. These were instead the efforts of individual families to claim some measure of security and comfort amidst trying conditions. Their struggles spoke to the desperation, desires, and dignity of African Americans who fought to own a decent home and in the process came to fight for their right to do so.[17]

Just hours after the Shelleys finished unloading their belongings into their new home, Ethel Lee Shelley received a summons for her eviction proceedings. The effort to drive the Shelleys out originated with the powerful Marcus Avenue Improvement Association, a local homeowners' group dedicated to enforcing restrictive covenants that boasted more than 2,000 members at its peak and some forty homeowners on the 4600-block of Labadie. The Improvement Association chose longtime residents Fern and Louis Kraemer to serve as their plaintiffs in the proceedings. Mrs. Kraemer had inherited her residence at 4532 Labadie after the death of her father and together the Kraemers moved

back to the largely blue collar neighborhood of her youth in the 1930s. Though the Improvement Association's leadership spearheaded the case against the Shelleys, the Kraemers were close acquaintances of the group's chairman, a local baker named Emil Koob, and remained deeply invested throughout the proceedings.[18]

Faced with the resistance of their neighbors and the uncertain future that litigation promised, the Shelleys—like many other families across the country—summoned the courage and resolve to fight back. Their minds undoubtedly returned to the day their daughter arrived home in hysterics having narrowly escaped unspeakable tragedy. Whatever their reasons, the family clung to the hope that they could forge a new and better life in the years following World War II. For them, that dream began at home.

Still, resolve alone would only take them so far. As the case emerged in 1945, the Shelleys discovered an array of supporters who offered the resources to carry their cause into the courts. Assistance from civil rights organizations like the NAACP and interested parties in the real estate industry remained a vital part of covenant litigation in the 1940s and continued a longstanding but newly reenergized effort to undermine restrictive agreements at the local level. While urban whites organized to prevent black encroachment and expel African-American property-owners, local civil rights attorneys fought back against covenants in the same way, block by block.

The Business of Civil Rights: Black Realtors and the *Shelley* Case

Ethel Shelley's first reaction to the summons she received on the day that she moved into her new home was to reach out to her realtor Robert Bishop. "I just didn't understand it . . . I didn't know what it was," she explained, "I just wanted to know whether the property was our property . . . I just wanted him [Bishop] to explain to me what it was." In fact, the only thing that was clear to the Shelleys initially was the attitude behind the eviction efforts. When asked if she understood the lawsuit pending against her, Ethel Shelley replied, "I just understand the white people don't want me back."[19]

Bishop and an informal coalition of black real estate brokers in the city eagerly sprang to the Shelleys' defense. Genuine political concern played some role in the decision of these men to underwrite the cost for the family's legal representation, but the potential for profits was a crucial part of the equation. Progress, after all, stood to be lucrative. These men brought their own agenda to the *Shelley* litigation and for them the case was just as much about commercial opportunity—the right to sell homes where they pleased—as it was about the Shelley's right to purchase property wherever their means allowed. While the conflation of black business interests with the pursuit of civil rights was nothing new, this case would offer a stark reminder that, among the forces that drove the legal fight for racial justice, altruism and moral righteousness occasionally had less noble companions.[20]

For their part, Bishop, his employer E.M. Bowers, and another prominent realtor named James T. Bush entrusted the Shelleys' case to local attorney George L. Vaughn. Vaughn had earned a reputation as one of the city's most spellbinding orators and ardent civil rights advocates in his forty-year career as a lawyer and politician in St. Louis. The grandson of Louisiana slaves, Vaughn was sixty-five when the realtors approached him to challenge the Labadie Avenue covenant's enforcement. An avid student of history, an ambitious leader, and a skillful writer with a flair for drama, Vaughn had carved out a place at the heart of the Gateway City's black community.[21]

When Bishop, Bowers, and Bush approached Vaughn with the Shelleys' case late in 1945, the veteran lawyer had been steadily building a record of fighting

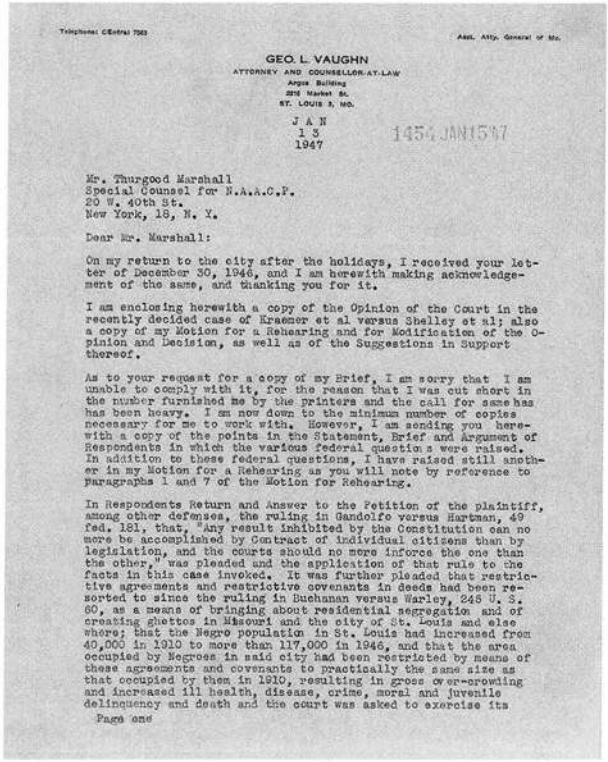
restrictive agreements. Vaughn's advocacy on housing matters had begun when he helped lead the local charge against legislative residential segregation in 1916, but in the 1930s he began attacking covenants in earnest. Vaughn had at least six different covenant cases under his purview in the months after World War II's end and had won at least one other suit in previous years. Though it was unclear how many of these cases he took at the behest of the city's black realtors, he and James Bush had likely crossed paths in Vaughn's earliest anti-covenant work. The attorney had earned his stripes in the battle against racial restrictions by successfully defeating a covenant on Page Avenue. Bush himself moved there following Vaughn's victory and he had been one of the most active brokers on the street. Regardless of the nature of their prior relationship, the two men became fast friends. Bush's daughter described them as "soul brothers" after they joined forces behind the Shelleys' effort.[22]

When George Vaughn entered the St. Louis City Circuit Court in October of 1945, he served at the behest of two clients. While J.D. and Ethel Lee Shelley's interests were the focus of his efforts, Vaughn also understood that the realtors paying for his services had certain expectations of their own. Ultimately both clients sought the same practical results—namely that the Shelleys be allowed to keep their new home. The realtors funding the case, however, had the additional demand that Vaughn defend their business practices should the need arise.[23]

The hearings began on October 18th in the courtroom of Judge William Kinney Koerner. Though Vaughn would advance an array of constitutional and statutory arguments asserting the Shelleys' contract and property rights, Judge Koerner found himself swayed most by a combination of other factors that the veteran attorney put at the center of his case. First, Vaughn highlighted the technical deficiencies of the original covenant. He insisted that the neighborhood's longstanding acceptance of other black property-owners rendered the intentions of the agreement void. A restriction whose sole purpose was the exclusion of African Americans from the area only served an unfairly punitive function if enforced against individuals after the region was already integrated.[24]

Next, Vaughn's witnesses, including James Bush, offered compelling evidence of the overcrowding and resulting struggles of St. Louis's black communities. Vaughn pointed to the rapid growth of the Gateway City's black population from approximately 40,000 residents in 1910 to nearly triple that number by the end of World War II. At the same time, he insisted, "the portions of this [c]ity . . . occupied by Negroes have been narrowed, surrounded and circumscribed almost completely" by the growth of covenants and "by increasing business areas and the condemnation of lands . . . for the purposes of widening streets and beautifying the city and building public institutions." Vaughn assailed the dire circumstances that racial restrictions helped to create and the social consequences of these trends as evidence of covenants' inhumanity and injustice. These moral appeals would play a critical role in Judge Koerner's determinations.[25]

Finally, Ethel Lee Shelley's appearance before the court seemed particularly moving for the judge. Over the course of her testimony, Koerner expressed measures of admiration and sympathy for the resolute and beleaguered woman. As Mrs. Shelley explained her family's circumstances, their struggles with finding a home, and her interactions with her realtor, Koerner found himself vocalizing his empathy for her plight. When she expressed her bewilderment at the fact that she could be evicted from her home despite the fact that she lived on a block with several other black families, Koerner assured her that "You have the sympathy of the Court; I will tell you that." Koerner's interactions with Mrs. Shelley later earned a rebuke from the white homeowners' attorney, who insisted



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Mr. Thurgood Marshall
Special Counsel for N.A.A.C.P.
20 W. 40th St.
New York, 18, N. Y.

Dear Mr. Marshall:

On my return to the city after the holidays, I received your letter of December 30, 1946, and I am herewith making acknowledgement of the same, and thanking you for it.

I am enclosing herewith a copy of the Opinion of the Court in the recently decided case of Kraemer et al versus Shelley et al; also a copy of my Motion for a Rehearing and for Modification of the Opinion and Decision, as well as of the Suggestions in Support thereof.

As to your request for a copy of my Brief, I am sorry that I am unable to comply with it, for the reason that I was cut short in the number furnished me by the printers and the call for same has has been heavy. I am now down to the minimum number of copies necessary for me to work with. However, I am sending you herewith a copy of the points in the Statement, Brief and Argument of Respondents in which the various federal questions were raised. In addition to these federal questions, I have raised still another in my Motion for a Rehearing as you will note by reference to paragraphs 1 and 7 of the Motion for Rehearing.

In Respondents Return and Answer to the Petition of the plaintiff, among other defenses, the ruling in Gandolfo versus Hartman, 49 fed. 181, that, "Any result inhibited by the Constitution can no more be accomplished by Contract of individual citizens than by legislation, and the courts should no more inforce the one than the other," was pleaded and the application of that rule to the facts in this case invoked. It was further pleaded that restrictive agreements and restrictive covenants in deeds had been resorted to since the ruling in Buchanan versus Warley, 245 U. S. 60, as a means of bringing about residential segregation and of creating ghettos in Missouri and the city of St. Louis and else where; that the Negro population in St. Louis had increased from 40,000 in 1910 to more than 117,000 in 1946, and that the area occupied by Negroes in said city had been restricted by means of these agreements and covenants to practically the same size as that occupied by them in 1910, resulting in gross over-crowding and increased ill health, disease, crime, moral and juvenile delinquency and death and the court was asked to exercise its

Page one

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Mr. Thurgood Marshall 1-13-47 Page two.

power and jurisdiction to eliminate said conditions and to afford relief from said dire results.

These additional facts may help to throw further light on this case. Since the agreement was signed in 1911 numerous Negro families have moved into the city blocks in question, successively occupying various parcels of property, with one Negro family succeeding another, all without complaint or action on the part of the signers of said agreement or their assigns. Of course, these are state questions but they do throw additional light upon the situation.

I shall be happy to confer with you further about this case, as well as to have you enter it. The Supreme Court of Missouri has taken no action so far on my Motion for Modification and for Rehearing, but as soon as any thing is done I shall immediately notify you.

The decision was rendered by the court En Banc, so that it will be unnecessary to file a Motion for Transference, since that is the highest court in this state having jurisdiction of the question involved.

With best wishes, I beg to remain,

Respectfully yours,

Geo. L. Vaughn

GLV:mm

ENCLOSURES: ~~Three~~ Four
(Opinion, 7 pages;
Motion Rehearing, 7 pages,
Statement, 4pages.)
Suggestions, 7 pages.

This January 13, 1947 letter from the Shelley family's attorney George L. Vaughn to Thurgood Marshall reported the outcome of the case before the Missouri Supreme Court. In his arguments, Vaughn had insisted that the neighborhood's longstanding acceptance of other black property-owners rendered the intentions of the agreement void.

that, "the Court . . . was overly kindly, courteous and condescending" to her and other witnesses during the trial. Judge Koerner ultimately ruled in favor of the Shelleys in mid-November of 1945.[26]

Despite the thrill of victory, the case had also laid bare some of the complications inherent in the ongoing partnership between civil rights lawyers like Vaughn, black homeowners' like the Shelley family, and black realtors. Indeed, Mrs. Shelley's pivotal testimony had come on the heels of perhaps the most awkward moment of the case, her realtor Robert Bishop's turn as a witness. Judge Koerner—who was genuinely appalled by Bishop's overzealous profit-taking—offered at times a cross-examination more strident than that of Vaughn's opposing counsel. Vaughn, in turn, scrambled to protect his benefactors and defended the realtor's predatory behavior towards his clients. When a string of objections failed to blunt the harsh questioning that Bishop faced, Vaughn insisted that the flagrant abuse of the Shelleys' trust and vulnerability by their pastor and realtor was simply business as usual. "They do it all over town, your Honor," Vaughn pleaded. Mrs. Shelley, who apparently only learned of Bishop's misdeeds during the trial, must have felt the acute irony of depending upon the man who had exploited her family as the only hope of keeping her home. Bishop and Vaughn's actions at trial revealed the tangle of motivations that would loom over the *Shelley* litigation.[27]

Like Vaughn, anti-covenant litigators and activists across the country faced the question of whether or not to embrace and defend the potentially unseemly practices of covenant-breaking realtors. This somewhat reluctant partnership extended beyond instances like that of the Shelleys, where real estate men directly funded the defenses of particular clients. In the summer of 1945, just months before the Shelleys purchased the home on Labadie Avenue, the legal leadership of the NAACP addressed this issue at a conference of lawyers who were engaged in covenant cases. During the gathering, St. Louis NAACP Branch director David Grant asked the conferees what to do about "some intrepid, energetic real estate operator who to make money will go out . . . and buy up in the names of straw parties 3 or 4 houses. Then he will get a Negro buyer and move him in there and sit back and wait to see what happens . . . To what extent should we go to the aid of these real estate brokers?" Charles Hamilton Houston, the man leading the campaign against residential restrictions in Washington, D.C. and perhaps the most venerated civil rights lawyer in the country, immediately exclaimed, "[y]ou should go completely to their aid." The prospect made Grant somewhat uneasy.[28]

As the lawyers discussed further the appropriate course of action in such a case, they largely dismissed popular concerns about realtors' professional practices. Though David Grant insisted that there was "a lot of community disapproval on profiteering," and suggested that an ardent defense of black real estate men might harm the popular appeal or fundraising ability of local litigation campaigns, the other attorneys quickly dispensed with the issue. One participant stated flatly, "I don't see how we can expect to break the agreements if we don't have these law breakers." Thurgood Marshall even justified the excessive profit-taking that occurred by maintaining that, "[t]his is not an ordinary service. You can't expect to break into a neighborhood at the regular rates." The lawyers, however, were not oblivious to the importance of perception in both the arena of public opinion and in the courtrooms themselves. As such, Houston advocated that the speculating realtor "should also try to cover his hand and divorce himself from the matter so that it will look like a natural development of sales." The methods were dubious enough that this partnership was best if kept out of the public eye. With only minor hesitations, the NAACP and legal activists across the country

welcomed the mingling of financial and political interests in postwar covenant cases.[29]

Still, the whole practice often reeked of exploitation. These members of the city's black professional elite—part of the upper crust of their community's income earners—had built their business in part on the desperation of their peers and of blue collar families like the Shelleys. The realtors did not create the distressed conditions of these populations or the problems that black homeseekers faced; those were the fault of the crippling housing shortage in the 1940s and discriminatory practices by white homeowners and real estate men. Still, individuals like Robert Bishop, E.M. Bowers, and James Bush made the decision to profit off of these circumstances. Though these men risked their careers to provide much-needed housing to members of their communities, the rewards they reaped came primarily at the expense of their African-American clientele. The service these men provided was a necessary one. The way in which they provided it, however, left a bitter taste in the mouths of many observers.

What made the *Shelley* case and St. Louis unique was how prominently the professional community of African-American realtors figured in the drive to move the cases forward. While black real estate men in cities across the country stood to benefit from—and therefore lent their support to—covenant-breaking litigation, Bush, Bishop, and other realtors in the Gateway City took this participation to new heights. As *Shelley* moved through the appeals process, Bush and Bishop began formalizing the unofficial network of businessmen that had coalesced around the case.[30]

The critical turning point came in December 1946 when the Missouri State Supreme Court overturned Vaughn's triumph a little more than a year after the initial victory in Judge Koerner's Gateway City courtroom. Up to that point, Bush, Bowers, and Bishop had provided the vast majority of financial support to sustain the case. News of the defeat left Bush deeply troubled. His daughter, Margaret, described his reaction as "probably the only time I saw him look discouraged." At the urging of his wife, however, he quickly rallied. That night, he vowed to orchestrate an appeal to the U.S. Supreme Court. A combination of the substantial costs associated with further appeals and the potential sociopolitical significance of such an effort, however, dictated that Bush seek a wider network of supporters. By the end of the month, he had created the Real Estate Brokers Association of St. Louis (REBA). Comprised of most of the city's black realtors and several salesmen, these men rejected Charles Hamilton Houston's admonition from the previous year and chose not to play silent partners to the civil rights lawyers in the city.[31]

The group quickly announced its formation on the front page of the *St. Louis Argus* and began publicly issuing appeals for donations. Though their first order of business was to generate financial support for the *Shelley* litigation, they articulated a broader social and political purpose. They hoped to lead the way "in the protection of homes and investments in real estate," for the Gateway City's black community by lobbying for reforms in property assessments and taxation, ensuring appropriate municipal services and facilities for African-American districts, and pursuing neighborhood beautification campaigns. One goal had particular resonance for the realtors as the men sought to "improve and expand certain neighborhoods."[32]

In the effort to push the *Shelley* case forward, however, REBA's founder James Bush also recognized the limitations that an advocacy group based solely upon realtors would face. Given the level of popular mistrust or distaste for some of their professional practices, soliciting contributions to meet their $5,000 fundraising goal could prove difficult. To combat this issue and to defray successfully the financial burdens and organizational responsibilities of the campaign, Bush created an offshoot outfit in early 1947 called the "Citizens' Committee" that

incorporated a range of community leaders and activists. While the real estate men retained enough of a presence to steer the new group, they populated the Committee's large advisory board with an array of black middle-class St. Louisans. Apart from the realtors, the sixty-six board members included a dozen reverends, eight attorneys, seven doctors, a handful of newspapermen, and a healthy collection of small business owners. The group also featured ten prominent women, including the president of the St. Louis County Teachers Association, and members of the executive boards of the local NAACP and the Association of Colored Women's Clubs. The Committee's acting chairman was Herman Dreer, a well-respected author and faculty member at Sumner High School.[33]

Despite the legion of legal and political activists who lent their names to the Citizens Committee, the group functioned almost exclusively as the fundraising arm of REBA. The organization successfully tapped into the broader African-American business community of St. Louis and many of the city's key religious, social, and political institutions to amass donations totaling more than $4,000 during a period of economic retrenchment for many black St. Louisans. The members of REBA would add close to $3,000 more of their own contributions to the case by the end of 1947. The Gateway City's black realtors had stirred a community desperate for change and yearning for progress in an uncertain postwar climate.[34]

Shelley highlights some of the ways that class dynamics and tensions within local black communities affected the trajectory of legal activism. The collision of professional, political and class interests that restrictive covenants generated was in some respects uniquely situated in the continuum of civil rights causes. Litigators had worked shoulder-to-shoulder with black middle-class and professional groups like teachers and railway workers on other issues, but rarely had the triangular relationships between clients, attorneys, and "constituents"—those benefactors to whom the attorneys owed some part of their allegiance—been so complex.[35]

In *Shelley*, black realtors were able to use covenant litigation to refocus popular distaste for their practices on an external target while simultaneously strengthening their businesses. This case and the actions that had precipitated it therefore represented a form of investment in the growth and success of local real estate companies, one where an assortment of other middle- and working-class blacks—including a blue collar migrant family on the tenuous dividing-line of class status—bore the risks and costs of litigation most substantially. The realtors who promoted *Shelley* and other covenant cases around the country had much more to gain and less to lose than individuals like the Shelleys who they sometimes callously shoved onto the frontlines of urban America's battle over residential segregation.

At the same time, these realtors were also the men who enabled and sustained a campaign against restrictive covenants at times and in places when local political advocacy groups could not. In St. Louis they helped to generate the kind of capital and popular support that fueled the costly process of litigation. The larger fight against covenants and individual cases like *Shelley* could not have endured without this. REBA's efforts in *Shelley* galvanized broad swaths of the city's black population and served as a reminder that litigation was rarely the province of only one group or individual. Instead, legal activism on behalf of civil rights often became the product of various forms of broad-based community participation, with all of the benefits, pitfalls, tensions, and partnerships that entailed.

The local agenda of realtors like James Bush and his colleagues also generated significant conflicts at a national level. While the NAACP had endorsed the partnership between anti-covenant litigators and black

real estate men in 1945, they had never intended to allow realtors to chart the course of the litigation campaign. In early 1947, as REBA began rallying support to push *Shelley* forward as a Supreme Court test case, the attorneys at the NAACP's legal offices in New York vigorously attempted to discourage the St. Louis contingent from moving forward. The NAACP was undoubtedly committed to the battle against residential restrictions, but lacked the same personal investment that many local anti-covenant movements had. The organization advocated for a slower and more deliberate approach to the appeal, knowing that the cost of losing a petition for certiorari might erase years of careful planning. The Association had also invested considerable time and resources in building a test case in Chicago that they hoped to bring to the Court in the coming years. The realtors behind *Shelley*, however, relentlessly pushed forward.[36]

The rapidly escalating conflict between the NAACP and REBA stemmed from two main tensions. First, the national NAACP was for all intents and purposes completely unaffiliated with the *Shelley* case—meaning that the fate of what the organization called "the core of the housing problem of Negroes" would rest in the hands of a group of businessmen with questionable scruples. This presented any number of problems for both the representational politics of the movement and the effectiveness of the case's leadership. Secondly, the NAACP and REBA's counsel George Vaughn strongly disagreed over the appropriate legal tactics in the case. While the NAACP had begun to build its campaign around the argument that judicial enforcement of discriminatory agreements constituted state action prohibited by the Fourteenth Amendment, Vaughn pushed ahead with the claim that the limitations on African Americans' rights and the conditions of urban segregation that resulted from covenants' enforcement violated the Thirteenth Amendment's prohibition against involuntary servitude. As far as the NAACP and its advisors were concerned, Vaughn's odds of prevailing in the Supreme Court were nonexistent.[37]

When it became clear that REBA intended to ignore the NAACP's pleas for restraint, the national office began to apply whatever pressure it could to disrupt the suit. Gentle attempts to urge cooperation failed quickly and gave way to more aggressive tactics. For example, as the realtors sought to build a coalition of other advocacy groups to bolster their appeal, the NAACP's lawyers began exercising their extensive connections to isolate REBA from potential allies. Marian Wynn Perry, who served as the point-woman for the NAACP's housing litigation efforts, strongly discouraged the ACLU from supporting the *Shelley* suit, calling it "a weak case" that would be "futile and perhaps dangerous" to take to the Supreme Court. The ACLU quickly backed away from REBA. Yet the determination of the St. Louis realtors weathered these setbacks and forced the NAACP to abandon its favorite test case and frantically seek out cases from its local branches to put up alongside *Shelley*. The U.S. Supreme Court's unexpected decision to grant certiorari in June of 1947 put even more tension on the already strained relationship between REBA and the NAACP.[38]

As the cases readied for oral arguments, the NAACP resorted to using its financial resources as a means to coerce the realtors to back down. Thurgood Marshall promised REBA a $1,000 donation in exchange for the group instructing George Vaughn to work "under the direction of Charles H. Houston." The Association's legal leadership hoped that Houston, who had been a key architect of the NAACP's anti-covenant strategy, could help rein in Vaughn's rogue endeavor. Marshall initially believed that this offer had succeeded, but quickly realized that REBA and Vaughn had no intention of coordinating their efforts with the national office. Written and verbal confrontations between the two groups

continued for months both before and after they made their separate oral arguments to the Supreme Court in January of 1948.[39]

Lead on to Victory: The Grassroots Legacy for *Shelley v. Kraemer*

The Court's unanimous opinion in favor of the Shelley family and the NAACP's petitioners from Detroit marked a victory that many activists at the time believed would help change the face of urban segregation forever. Chief Justice Fred Vinson's ruling ultimately proved to be a vindication of the NAACP's legal arguments and political connections, stemming primarily from the Association's innovative Fourteenth Amendment contentions as well as the enthusiastic and timely intervention of the Truman Administration's Solicitor General and the Department of Justice in support of the NAACP's case. Though the state action argument and the Cold War civil rights politics that drove the federal government's intervention were most responsible for the victory, it was equally true that the insistent poking and prodding of the St. Louis realtors and George Vaughn had brought about this triumph years earlier than it would otherwise have come.[40]

Thurgood Marshall, in an unintentionally revealing letter to REBA leader James Bush after the *Shelley* decision, rebuked the realtors' meddling while at the same time acknowledging their place at the vanguard of the anti-covenant fight. Marshall highlighted the cooperation that other attorneys across the country had provided to the NAACP and chastised Bush because, "the Real Estate Brokers Association initiated its own case [and] employed its own lawyers on its own terms." Regardless of Marshall's contempt for Vaughn and Bush's conduct, this testy exchange recognized that the realtors' actions in the Shelleys' case had played a crucial role in forcing the issue of restrictive covenants to the fore. James Bush, George Vaughn, and the host of other African Americans in St. Louis who bankrolled and steered the efforts in *Shelley* had truly fought the fight for greater access to housing "on their own terms" and for their own reasons. The interactions between REBA and the NAACP serve as a reminder that, despite concerted efforts to make civil rights litigation a carefully organized process, the realities were often much more complex and deeply influenced by local communities and individual agendas. The various processes and motivations of legal reform come into much sharper relief when viewing courtroom campaigns for racial justice at the local level.[41]

For the Shelley family, their victory in May of 1948 proved a powerful moment. Ethel Lee Shelley, whose resolve and faith had sustained the family through the entire ordeal remarked to reporters, "My little soul is overjoyed. Wait till I get by myself. I'll tell the Lord of my thankfulness." As parents, the victory meant much more than the security of a home. It was a promise that their children might live in a more just society—a down-payment on the freedom that should have been their birthright. As historians and legal scholars continue to debate the significance and impact of *Shelley* and the role of civil rights litigation in the daily lives of black Americans, perhaps an appropriate place to start would be with the Shelley family itself, the jubilation of that May night, and the happiness and security they enjoyed over the next ten years they spent at 4600 Labadie.[42]

Delving into the restrictive covenant cases from the groundup and understanding what drove families to fight, how litigators made decisions, and the people and ideas that helped to fuel this often desperate struggle for access to homes reveals that the discontent, resolve, and inspiration of individuals played a critical role in creating public policy reforms. *Shelley* offers a window into the intensely personal and human drama unfolding on the frontlines of America's segregated neighborhoods and suggests that the experiences of people like Ethel Lee Shelley, James Bush, or George Vaughn must become a vital

part of emerging scholarly conversations about race, law, and reform in the twentieth century. Telling the story of civil rights litigation campaigns in this fashion can provide not only a fuller sense of the role that law played in the everyday lives and circumstances of black communities—and thereby enrich the way we tell the legal histories of African-American populations—but can also encourage civil rights historians to reconsider the valuable contributions that legal history has to offer in the ongoing effort to recapture this incredible period of social and political transformation in American life. Understanding the Shelley family's struggle and the process of litigating racial justice at the grassroots in St. Louis ultimately provides a unique perspective on the landmark *Shelley* case and on the larger battle to end the age of "separate but equal." Like the generation of activists and organizers who would follow in subsequent decades, the Shelleys and their advocates quite simply would not be moved.

ENDNOTES

[1] *Pittsburgh Courier* May 15, 1948, p. 6; "A House with a Yard," *Time* 51.20 (May 17, 1948): 27; Peter Irons, **The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court** (New York: Penguin Books, 1988), 72 and 78.

[2] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 109. On the variety of intersecting factors sustaining residential segregation at midcentury *see for example*: Arnold Hirsch, **Making the Second Ghetto: Race and Housing in Chicago, 1940–1960** (Chicago: University of Chicago Press, 1983); Charles Abrams, **Forbidden Neighbors** (New York: Harper & Brothers, 1955); Stephen Grant Meyer, **As Long as They Don't Move Next Door: Segregation and Racial Conflict in American Neighborhoods** (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2000); David Freund, **Colored Property: State Policy and White Racial Politics in Suburban America** (Chicago: University of Chicago Press, 2007; Thomas C. Schelling, "Models of Segregation," *American Economic Review* 59.2 (May 1969): 488–493.

[3] On the role of restrictive covenants in American cities *see for example* Robert C. Weaver, **The Negro Ghetto** (New York: Harcourt, Brace and Company, 1948); Wendy Plotkin, **Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago, 1900–1953** (Ph.D. Dissertation: University of Illinois at Chicago, 1999); Herman H. Long and Charles S. Johnson, **People vs. Property: Race Restrictive Covenants in Housing** (Nashville: Fisk University Press, 1947); Michael Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115.4 (Winter 2000–2001): 541–568; Richard R.W. Brooks and Carol M. Rose, **Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms** (Cambridge: Harvard University Press, 2013).

[4] Several key voices in the study of urban segregation and Northern civil rights struggles have largely dismissed *Shelley* as inconsequential. *See* Hirsch, **Making the Second Ghetto**, 16 and 30; Thomas Sugrue, **Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North** (New York: Random House, 2008), 209. On the relationship between law and Civil Rights Movement history *see* Kenneth W. Mack, "Bringing the Law Back into the History of the Civil Rights Movement," *Law and History Review* 27.3 (Fall 2009): 657–670. Mack notes, however, that many recent accounts of Northern black civil rights protest have treated the law as a relevant instrument of protest. *See* as examples of connecting local advocacy and legal activism: Tomiko Brown-Nagin, **Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement** (New York: Oxford University Press, 2011) and Peter F. Lau, ed., **From the Grassroots to the Supreme Court: *Brown v. Board of Education* and American Democracy** (Durham: Duke University Press, 2004).

[5] Brooks and Rose, **Saving the Neighborhood**, 144. The most comprehensive look at the restrictive covenant cases to date has been legal historian Clement Vose's **Caucasians Only: The Supreme Court, The NAACP, and the Restrictive Covenant Cases** (Berkeley: University of California Press, 1959). For a representative sample of legal scholars' approach to *Shelley see* Mark D. Rosen, "Was *Shelley v. Kraemer* Incorrectly Decided—Some New Answers," *California Law Review* 95.2 (April 2007): 451–512; Carol Rose, "Property Stories: *Shelley v. Kraemer*" in *Property Stories*, eds. Gerald Korngold and Andrew P. Morriss (New York: Foundation Press, 2004): 169–200; Mark Tushnet, "*Shelley v. Kraemer* and Theories of Equality," *New York Law School Law Review* 33.3 (1988): 383–408; the retrospective forum in *Washington University Law Quarterly* 67 (1989); Wendell E. Pritchett, "*Shelley v. Kraemer*: Racial Liberalism and the U.S. Supreme Court" in **Civil Rights Stories**, eds. Myriam Gilles and Risa L. Goluboff (New York: Foundation Press, 2008): 5–23; Michael Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York: Oxford University Press, 2004), 212–217 and 261–264.

[6] Irons, **Courage of Their Convictions**, 73–74 [italics in original]. For recent treatments of the local conditions for St. Louis's black communities at midcentury *see* Clarence Lang, **Grassroots at the Gateway: Class Politics and Black Freedom Struggle in St. Louis, 1936–75** (Ann Arbor: University of Michigan Press, 2009); Colin Gordon, **Mapping Decline: St. Louis and the Fate of the American City** (Philadelphia: University of Pennsylvania Press, 2008). On World War II era black migrations *see* Isabel Wilkerson, **The Warmth of Other Suns: The Epic Story of America's Great Migration** (New York: Random House, 2010); Nicholas Lemann, **Promised Land: The Great Black Migration and How It Changed America** (New York: A.A. Knopf, 1991); Lisa Krissoff Boehm, **Making a Way Out of No Way: African American Women and the Second Great Migration** (Jackson: University Press of Mississippi, 2009).

[7] Irons, **Courage of Their Convictions**, 74. On wartime conditions at the Small Arms Plant *see* David Lucander, "'It Is a New Kind of Militancy': March on Washington Movement, 1941–1946" (Ph.D. Dissertation: University of Massachusetts Amherst, 2010), 162–180.

[8] Irons, **Courage of Their Convictions,** 74; *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 124; *Baltimore Afro-American* May 15, 1948, p. 3.

[9] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 128.

[10] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 82, 109, and 116–118.

[11] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 88 and 112. For a discussion of indirect methods of sale in Chicago neighborhoods *see* Plotkin, **Deeds of Mistrust**, 106–107. Prominent St. Louis realtor James T. Bush also relied in large part upon a cadre of straw party buyers to facilitate his business. *See* Margaret Bush Wilson, **Twigs from the Bush** (Chicago: American Bar Association, 2009), 53–58.

[12] Long and Johnson, *People vs. Property*, 63; *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 88.

[13] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 102 and 117.

[14] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 3–12 and 95–96.

[15] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 125.

[16] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 3.

[17] One notable exception to this pattern of non-political covenant-breaking was St. Louis attorney and Lincoln University Law School Professor Scovel Richardson, who attempted to create his own test case in 1941 by purchasing a covenanted home in the city. Gordon, **Mapping Decline**, 80–81.

[18] *Shelley v. Kraemer* 334 U.S. 1 (1948) Transcript of Record, 1, 76, and 114–115; Vose, **Caucasians Only**, 103–113. For more on the role of neighborhood improvement associations in maintaining residential segregation; *see for example* Evan McKenzie, **Privatopia: Homeowner Associations and the Rise of Residential Private Government** (New Haven: Yale University Press, 1994).

[19] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 120–125.

[20] *See for example* Kenneth Mack's discussion of the "race uplift" impulse in the African American legal tradition in Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era Before Brown," *Yale Law Journal* 115 (2005): 281–287.

[21] Herman Dreer, **Negro Leadership in St. Louis: A Study in Race Relations** (Ph.D. Diss.: University of Chicago, 1955), 102; *St. Louis Argus* September 12, 1947, p. 11, September 2, 1949, p. 14, August 19, 1949, pp. 1 and 12, August 26, 1949, pp. 1 and 10; Herman Willer, "Notes on George L. Vaughn and Shelly [sic] v. Kraemer" in **Black History Project Collection—Western Historical Manuscript Collection**, Box 6, Folder 106, University of Missouri–St. Louis, St. Louis, MO (viewed on microfilm—hereafter *Black History – WHMC*); Robert L. Gill, "Legacy of a Civil Rights Lawyer" reprinted from *Journal of Human Relations* 12.1 in *Black History – WHMC*, Box 7, Folder 120.

[22] Wilson, **Twigs from the Bush**, 54–58 and 73. Vaughn and Bush also appear to have shared a church for a period of time and both men were Masons, though it is unclear to what extent the two men actually knew each other before 1945. With respect to Vaughn's other covenant cases, Bush seems to have had an interest in at least one more suit that came just weeks after the start of *Shelley*. *See St. Louis Argus* October 18, 1946, pp. 1 and 15.

[23] For a separate discussion of the conflicting objectives and allegiances of attorneys in civil rights litigation efforts *see* Derrick A. Bell, Jr., "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal* 85.4 (March 1976): 470–516 and Susan D. Carle "Race, Class, and Legal Ethics in the Early NAACP (1910–1920)," *Law and History Review* 20.1 (2002): 97–146.

[24] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 12.

[25] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 14–15.

[26] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 125 and 145.

[27] *Shelley v. Kraemer* 334 U.S. 1 (1948), Transcript of Record, 102–104. For more on the troubling practices of both black and white realtors *see* Rose Helper, **Racial Policies and Practices of Real Estate Brokers** (Minneapolis: University of Minnesota Press, 1969) and Beryl

Satter, **Family Properties: Race, Real Estate, and the Exploitation of Black Urban America** (New York: Metropolitan Books, 2009).

[28] "Potentialities of Change of Neighborhood Doctrine—Charles Hamilton Houston, Monday Afternoon Session," July 9, 1945 in *Papers of the NAACP: Part 5—The Campaign Against Residential Segregation, 1914–1955* (Microfilm), Reel 20, Frames 582–583, Sterling Memorial Library, Yale University (hereafter *NAACP—Part 5*).

[29] "Potentialities of Change of Neighborhood Doctrine—Charles Hamilton Houston, Monday Afternoon Session," July 9, 1945 in *NAACP—Part 5*, Reel 20, Frames 583–584. See also Vose, *Caucasians Only*, 59–60.

[30] As an example of the imbrications of real estate professionals with anti-covenant litigation, the companion cases to *Shelley, McGhee v. Sipes* from Detroit 334 U.S. 1 and *Hurd and Urciolo v. Hodge* from the District of Columbia each had attorneys on their local defense teams who also served as realtors. *McGhee v. Sipes* 334 U.S. 1; *Hurd and Urciolo v. Hodge* 334 U.S. 24. Irene Rosemond, **Reflections: An Oral History of Detroit** (Detroit: Broadside Press, 1992), 24 and 31–32; *Michigan Chronicle* May 4, 1946, p. 5 and February 23, 1946, p. 2.

[31] Wilson, **Twigs from the Bush**, 67–68; Vose, **Caucasians Only**, 119–121; Kenneth Wallentine, "Margaret Bush Wilson: Advocate, Counselor, Friend," *BYU Journal of Public Law* 4.2 (1990): 215.

[32] *St. Louis Argus* January 3, 1947, p. 1 and March 21, 1947, pp. 8 and 11.

[33] Dreer, **Negro Leadership in St. Louis**, 152–156; Pamphlet by St. Louis Citizens Steering Committee "An Effort to Improve American Democracy by Ending Residential Restrictive Covenants," undated in *NAACP—Part 5*, Reel 22, Frames 350–352; Herman Dreer to NAACP National Office, November 23, 1947 in *NAACP—Part 5*, Reel 22, Frame 356.

[34] Margaret Bush Wilson's account of the Citizens Committee's formation suggests that, although prominent black civil rights advocates David Grant, the NAACP Branch Chairman, and Scovel Richardson, a noted anti-covenant attorney, consulted with James Bush and Robert Bishop as the Committee formed—and ultimately lent their names to its letterhead—they were only nominal participants in the group's activities. Wilson, **Twigs from the Bush**, 74–76; Pamphlet by St. Louis Citizens Steering Committee "An Effort to Improve American Democracy by Ending Residential Restrictive Covenants," undated in *NAACP—Part 5*, Reel 22, Frames 350–352; Dreer, **Negro Leadership in St. Louis,** 151–156.

[35] *See* Pritchett, "*Shelley v. Kraemer*," 12–13. For civil rights attorneys' work with black railway workers, *see for example* Charles Houston's U.S. Supreme Court Cases *Steele v. Louisville & Nashville Railroad Company* 323 U.S. 192 (1944) and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76* 323 U.S. 210 (1944). On other labor litigation *see* Risa Goluboff, "'Let Economic Equality Take Care of Itself': The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s," *UCLA Law Review* 52 (June 2005): 1393–1486.

[36] For more on the NAACP's preferred test case, *Tovey vs. Levy* Cook County Superior Court 45 S 947, *see* Plotkin, *Deeds of Mistrust*.

[37] "Note to Key People regarding Decision of the U.S. Court of Appeals, District of Columbia, No. 8831," January, 1945 in *NAACP—Part 5*, Reel 21, Frame 103. Vaughn gave a preview of his Supreme Court arguments in an article for the *National Bar Journal*. *See* George L. Vaughn, "Resisting the Enforcement by Courts of Restrictive Covenants Based on Race," *National Bar Journal* 5.4 (December 1947): 381–400. Vaughn was particularly enamored with Justice Stephen Field's dissent in the *Slaughter House Cases* 83 U.S. 76 (1873). Though roundly criticized by his contemporaries for this approach in *Shelley*, Vaughn was certainly not alone in experimenting with the Thirteenth Amendment as a tool for twentieth-century civil rights litigation. Indeed, the Civil Rights Section of the Department of Justice had explored the use of the Amendment in labor cases prior to Vaughn's efforts in 1947. For more on the Thirteenth Amendment as a potentially powerful vehicle for change in this moment *see* Risa L. Goluboff, "The Thirteenth Amendment and the Lost Origins of Civil Rights," *Duke Law Journal* 50.6 (April 2001): 1609–1685.

[38] Memorandum to Files from Marian Perry, April 9, 1947 in *NAACP—Part 5*, Reel 22, Frame 317; Clifford Forster to Marian Perry, April 3, 1947 in *NAACP—Part 5*, Reel 22, Frame 316; Clifford Forster to Eugene Buder, April 10, 1947 in *NAACP—Part 5*, Reel 22, Frame 318.

[39] Thurgood Marshall to David Grant, September 16, 1947 in *NAACP—Part 5*, Reel 22, Frames 330–331. On the escalating tensions between Marshall and REBA see Thurgood Marshall to James Bush, September 23, 1947 in *NAACP—Part 5*, Reel 22, Frames 337–339; Thurgood Marshall to David Grant, September 23, 1947 in *NAACP—Part 5*, Reel 22, Frames 342–343; Thurgood Marshall to David Grant, October 3, 1947 in *NAACP—Part 5*, Reel 22, Frame 347; Herman Dreer to NAACP National Office, November 23, 1947 in *NAACP—Part 5*, Reel 22, Frame 356; Thurgood Marshall to Herman Dreer, December 5, 1947 in *NAACP—Part 5*, Reel 22, Frames 359–361.

[40] For the role of Cold War political concerns in *Shelley*, *see* Mary Dudziak, **Cold War Civil Rights: Race and the Image of American Democracy** (Princeton: Princeton University Press, 2000), 90–92. On the role of Cold War politics in civil rights reform generally *see* Dudziak, **Cold War Civil Rights**; Thomas Borstelmann, "Jim

Crow's Coming Out: Race Relations and American Foreign Policy in the Truman Years," *Presidential Studies Quarterly* 29.3 (September 1999): 549–569; Thomas Borstelmann, **The Cold War and the Color Line: American Race Relations in the Global Arena** (Cambridge: Harvard University Press, 2001); Glenda Gilmore, **Defying Dixie: The Radical Roots of Civil Rights, 1919–1950** (New York: W.W. Norton, 2008); Azza Salama Layton, **International Politics and Civil Rights Policies in the United States, 1941–1960** (New York: Cambridge University Press, 2000); John David Skrentny, "The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945–1968," *Theory and Society* 27.2 (April 1998): 237–285.

[41] Thurgood Marshall to James Bush, May 24, 1948 in *NAACP—Part 5*, Reel 22, Frames 070-072. For the challenges of coordinating litigation campaigns *see* esp. Stephen L. Wasby, "How Planned Is 'Planned Litigation'?" *American Bar Foundation Research Journal* 9.1 (Winter 1984): 83–138; William B. Rubenstein, "Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns," *Yale Law Journal* 106.6 (April 1997): 1623–1681.

[42] "A House with a Yard," *Time* 51.20 (May 17, 1948): 27; Irons, **Courage of Their Convictions**, 72 and 78.

Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell's Encounter with American Law

KENNETH W. MACK

On June 17, 1960, a sixteen-year-old African-American high school student named Robert Mack Bell took a seat in Hooper's restaurant in downtown Baltimore, and set off a controversy that would eventually draw in Supreme Court Justices, members of Congress, and the Attorney General of the United States as they struggled to come to terms with the consequences of his action and those of others like him. Bell didn't envision any of this when he arrived at Hooper's Restaurant seeking service. In fact, he was nervous. He thought about getting his mother's permission before setting out, but chose not to.

Robert Bell had been drawn into the sit-in movement, which had broken out four months earlier when four black students at North Carolina A & T State University sat down at a segregated Woolworth's lunch counter and refused to leave. Bell was student-body president at Baltimore's all-black Dunbar High School, thus was naturally the person to ask when students at nearby Morgan State College were looking for volunteers to picket and perhaps sit in at downtown restaurants that did not serve African Americans. Bell dutifully complied, and soon found himself sitting quietly at Hooper's along with eleven other students, reading their school books while the manger and the owner swore out a warrant for their arrest. At their criminal trial that fall, Bell and his fellow students were convicted of trespass.[1]

Bell's lawyers, assisted by the NAACP, promptly appealed his conviction, claiming that his actions were protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. That argument seemed to place Bell on a collision course with the state action doctrine, which is generally taken to mean that "the effort to define and apply constitutional rights need not

even begin unless the complaining party first demonstrates that some *government* entity was responsible for the violation of her rights."[2] Private business owners were the ones choosing to discriminate, the argument went, and the only thing that Maryland authorities had done was to create and maintain trespass laws that allowed for private race discrimination. The doctrine, it was believed, could be traced back to the Supreme Court's 1883 decision in the *Civil Rights Cases*, which is often regarded as a clear and unambiguous statement of the principle. When the sit-in cases began to reach the Supreme Court, the Justices worked hard to overturn the convictions while avoiding any major state action rulings. For instance, they often took note of the fact that the sit-ins took place primarily in states where law, public policy, or public officials were lending some support to segregated public accommodations. Thus, what seemed like mere private discrimination was in reality supported by discriminatory public law and within the scope of the Fourteenth Amendment. On that basis and others, the Justices began to invalidate the Southern sit-in protesters' convictions.[3]

When *Bell v. Maryland* reached the Justices in 1963, however, it was immediately evident that this case was different from what had come before it. Bell's case was different, because Maryland had repealed most of its segregation laws during the 1950s. In fact, while his case was on appeal, both the Baltimore City Council and the state legislature enacted civil rights laws prohibiting segregated public accommodations in most of the state. Even the owner of Hooper's restaurant professed to be morally opposed to segregation.[4] By that time, events such as the mass arrests of child demonstrators in Birmingham, Alabama and President Kennedy's civil rights bill, were making the legal status of segregated public accommodations an issue about which many Americans, and especially the Justices, could no longer equivocate. The Supreme Court, however, ducked the issue, and a divided Court chose to send Robert Bell's case back to the Maryland courts to decide whether the state civil rights law retroactively voided the trespass prosecution. Bell's trespass conviction was eventually overturned in the Maryland courts, and the Civil Rights Act of 1964 finally settled many of the contentious issues that the sit-in protesters had raised—not the least of which was the intense pressure the movement placed on the state action doctrine.[5]

Robert Bell was not among those waiting for the resolution of his case. Instead, the teenager embarked on one of the more remarkable journeys in the history of American law. Bell returned to high school following his conviction, graduated from Morgan State College, and decided to go to Harvard Law School. After completing his studies, he returned to Baltimore, and at the age of thirty-one obtained an appointment as a judge in the Baltimore City District Court. As a young member of the judiciary, Bell would serve alongside many of those who had participated in his case. They included the prosecutor who had secured his criminal conviction, the lawyers from the state attorney general's office who defended it, many of the Maryland judges who decided to uphold it, as well as one of his defense lawyers. All were now his colleagues on the bench. Judge Bell went about his work and continued to rise in the state judiciary, culminating in his appointment, in 1996, as Chief Judge of the Maryland Court of Appeals. It was now Chief Judge Bell's task to oversee an entire court system that three decades earlier had defined him as a criminal—or so it seemed.[6]

This essay asks a deceptively simple question: was young Robert Bell breaking the law? There are several conventional ways of reading a case like Bell's: 1) as an episode of civil disobedience, 2) as a conflict between law and morality, or 3) as an instance of

lawmaking outside the courts. However it is framed, such familiar ways of looking at these kinds of controversies depend on the assumption that Bell was in violation of some law.

Lawbreaking was key to the way that contemporaries saw his case as well. Former President Harry Truman, for instance, who remained a hero to many civil rights advocates for his forthright stance against segregation, charged that the sit-ins were a Communist conspiracy and that the protesters were trampling on the business owners' rights. The NAACP's Thurgood Marshall also struggled to come to terms with civil rights activists who "violated the sacred property rights" of business owners, as one of his assistants later remembered, although Marshall ultimately decided to support the young protesters. Lawbreaking was key for Supreme Court Justice Hugo L. Black as well. The former Alabama Senator balked at a ruling that the sit-ins were protected by the Fourteenth Amendment, largely because he believed that the protesters were not protected by state trespass law, and thus were forcibly violating the business owners' property rights to make their case.[7]

For observers, then and now, the striking image of students willing to go to jail for their beliefs caused many to downplay the simple question of whether the students were, in fact, violating the law. From the moment that the sit-ins broke out in February of 1960, the main questions asked of young people like Robert Bell was their attitude toward lawbreaking. That interpretation was buttressed by Martin Luther King's famous 1963 "Letter from Birmingham Jail," which seemed to pose neatly the choice between obedience to Christian morality or to segregationist Southern law. Just about every educated reader is familiar with classic examples of conflicts between law and morality, but perhaps in thinking through this familiar terrain we are sometimes too quick to conclude that the law itself creates a clear rule on the subject. This is very likely to be true of the moral conflicts that often generate constitutional cases that make it to the Supreme Court.

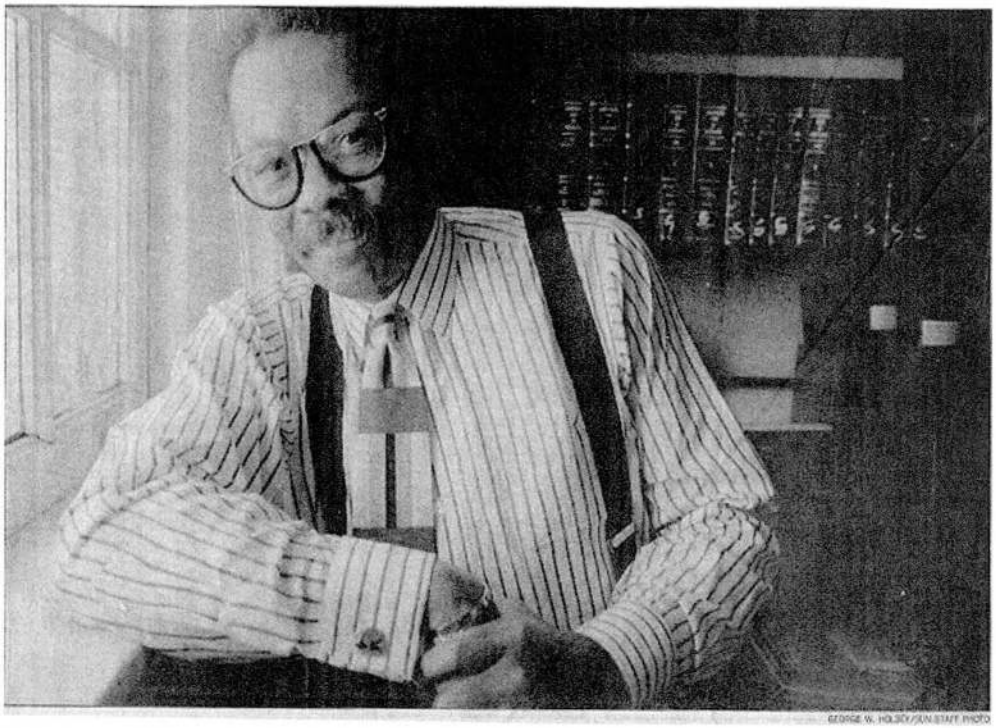
There were two main sources of law that might define Bell and his fellow students' actions as legal or illegal—federal constitutional law, which might protect their actions from state prosecution, and state trespass law, which most people believed had been violated by their actions. With regard to constitutional law, the main question involved the state action doctrine—whether the state of Maryland, or the private business owner, was the real actor who was being accused of violating the Constitution. As was widely recognized at the time, the state action doctrine's asserted distinction between public and private acts had been unraveling for decades, and courts seemed to invoke the doctrine primarily to carve out exceptions rather than to follow its commands. But most people assumed, as they do today, that if one looked far enough in the past, one could find some origin point for the doctrine itself, and that the sit-in students' actions did not accord with its original meaning.[8]

Indeed, in recent years, the Supreme Court has continued to invoke reflexively the conventional idea that state action emerges from a simple reading of the text of the *Civil Rights Cases* and several other 1870s and 1880s decisions.[9] What will be argued here, however, is that, even at its origin point, there was no coherent state action doctrine—at least as articulated in the form that we know today. Rather, one finds an unresolved conflict between competing ideas of the scope of constitutional protections, neither of which neatly matches state action as most people articulated it at the time of the sit-ins, or even today.[10]

Much clearer, seemingly, was the question of whether the sit-in students were in violation of state trespass law. Even today, law students routinely learn the accepted rule that, for the most part, private businesses that are open to the public have the right to exclude patrons, even for arbitrary reasons. There are

well-known exceptions to that rule, most prominently the civil rights laws, but, at the time that Bell sought service at Hooper's, there was no state or federal civil rights law that applied to his actions. If the sit-in students' actions raised murky constitutional issues, it seemed clear at least that they were trampling on the private property rights of the business owners, as defined by state law. However, as will be shown below, even the content of state trespass law was far murkier than it appeared, and this was particularly so in Maryland. Ironically, the very case thought to present clearly the question of law versus morality as applied to the sit-ins, was the case in which the baseline state trespass law was least clear of all.

To say that even the formal law that applied to cases like Robert Bell's was unclear is also to introduce a complication into the way that historians have understood social movements such as the sit-ins. For decades, legal historians have analyzed protest movements as sites of legal pluralism, where unofficial interpretations of law propounded by outsider groups like the sit-in students are understood as *legal* interpretations, rather than mere extra-legal protest actions. That is, rather than choosing morality over compliance with the law, groups like the sit-in protesters were engaged in a contest over just what the law was that applied to the sit-ins. Sometimes, this extra-legal lawmaking results in changes in the official interpretation of law.[11] Bell's story would seem to fit squarely within that framework, for as a Judge he quickly developed a reputation for going against the grain. Judge Bell was known for his Afro hairstyle, his Zodiac medallion that he wore to court in the 1970s, his famous dissents that held prosecutors to strict standards of procedural fairness, and his immaculately tailored clothes that he wears to this day. His elevation to the Chief Judgeship would seem to be the classic



Both as a judge and as a sixteen-year-old sit-in student, the immaculately tailored Maryland Chief Judge Robert Bell developed a reputation as a protester within the legal system. The reality is different.

story of outside-the-box legal consciousness eventually being accepted as a core part of the legal system. Along with the success of Bell and his fellow sit-in students in altering settled law—and eventually contributing to the enactment of the '64 Act—Bell's own career would seem to be clear evidence of the effectiveness of civil disobedience in challenging a legal system that clearly marked off the students' actions as illegal.[12]

Yet, to view Bell's actions at Hooper's as the story of outsider views challenging official interpretations of law is to lose some of the context and complexity that surrounded his act and the legal career that followed it. The story that begins on that day at Hooper's and reached its apogee with his elevation to the Chief Judgeship is far more complicated than this. Moreover, as indicated above, it is not even clear what was the formal law that applied to his case. In emphasizing the conflicts between outsiders like Bell and the legal system, scholars have sometimes lost sight of the contested-ness, the murkiness, of even widely accepted interpretations of official law such as the state action doctrine and ordinary trespass law. After decades of legal-historical and law-and-society scholarship in this vein, it is now relatively easy, and no longer controversial, to focus on outsider and subaltern views of law and their conflicts with more established sources of law-making and law interpretation. The ease with which one can now make such an interpretive move has sometimes led scholars to de-emphasize a point that needs re-emphasis: that "official law" is often shot through with contestation and conflict, even if lawyers and judges present it to the larger society as an island of certainty in an uncertain world.

Robert Bell's case still has much to teach us, if we will discard some conventional ways of viewing his historic act and his subsequent conflict with law. The following essay might be viewed as an invitation to rethink some of those conventions—those surrounding the state action doctrine, the morality of civil disobedience, and the history of law and its interaction with the social world.

Did Constitutional Law Authorize Robert Bell's Actions?

Were Robert Bell and his fellow sit-in students breaking the law? The obvious place to start is with the constitutional doctrine that may or may not have granted him a right to be free of race discrimination in Hooper's restaurant. The restaurant's refusal to serve him—which led to his prosecution—was because of his race. The question was, at least as most contemporaries interpreted it, whether it was some action by the state of Maryland that was really being challenged. There was wide agreement that the origin of the state action doctrine—what Charles Black poetically called its *fons et origo*—was the 1883 majority opinion in the *Civil Rights Cases*, written by Justice Joseph P. Bradley; or that perhaps the doctrine originated in the Fourteenth Amendment itself, which reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."[13] Even legal historians have endorsed the proposition that the state action doctrine emerges from a straightforward reading of these words.[14]

The standard narrative of state action is that the official doctrine, as it emerged in the text of the *Civil Rights Cases* majority opinion, was relatively clear. The real action around state action would seem to come in the twentieth century, when social reform movements, as well as institutional changes such as the advent of the New Deal, began to put pressure on the doctrine's formal separation of public and private.[15]

To do this, however, is to get the story exactly backwards, and to read nineteenth-century texts through twentieth (and now twenty-first) century eyes. It is to assume that,

if we look far enough into the past, we can find answers that avoid the complicated interpretive questions that are more familiar to us today. As will be shown below, however, Bradley's 1883 opinion, and Justice Harlan's dissent, emerged from twenty years of struggle and argument that preceded them—a context in which blacks seeking freedom, and whites sensing their world coming apart, argued intensely over what was, and should be, the substantive content of the law that applied to black freedom. Those arguments, and their resolution in the dueling opinions of Bradley and Harlan, had much to do with how far the Constitution extended to constrain the actions of individual citizens, but those arguments did not match the contours of modern state action.

A judicial opinion written in 1883 would supposedly define whether Bell and his fellow students were violating the law nearly eighty years later. What will follow here is a historical reconstruction of Bradley's opinion, relying on both original research and existing scholarship. It is a reconstruction that will begin with the actual text of the opinion, and the history that led Bradley to produce this somewhat odd document that does not quite read like an elaboration of modern state action. That oddness was no accident, for the legal categories that animated Bradley and his colleagues on the Supreme Court are not those that would animate the 1960s-era Supreme Court as it considered the sit-in cases, nor the ones that govern us today.

What Justice Bradley and his colleagues decided in the *Civil Rights Cases* was that the Civil Rights Act of 1875, which required the operators of public accommodations to admit patrons without regard to race, was unconstitutional. Specifically, he decided that neither the Thirteenth nor the Fourteenth Amendment gave Congress the power to enact a public accommodations law. His majority opinion does, of course, contain the words that are quoted in modern discussions of state action, for instance, "[i]t is State action of a particular character that is prohibited" by the Fourteenth Amendment. "Individual invasion of individual rights is not the subject matter of the amendment." There is also this: "until some State law has been passed, or some State action through its officers or agents has been taken," there is no power for Congress to legislate under the Fourteenth Amendment.[16] Bradley also set out the words that modern observers believe to be exceptions to the official doctrine, for instance, that Congress could regulate "customs having the force of law" under the Fourteenth Amendment, or that the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery." Based on the conventional reading of Bradley's opinion, it would seem to mean that Congress lacked the power to enact the 1875 Act because the statute applied to private business owners who chose to discriminate, rather than to public officials.[17]

This is a traditional way of reading a judicial opinion—as a relatively accessible text from which we can derive a discrete holding that applies to modern controversies. But what one discovers if one applies even this type of reading to the entirety of the voluminous opinions in the case—without the assumption that one will find modern state action there—is how strange the opinions seem from a modern perspective. For instance, the dispute between Justices Bradley and Harlan is decidedly not about their different interpretations of a wall that separates public power from private life. Bradley's majority opinion focused largely on the argument that if Congress could enact a public accommodations statute it would allow the body to create a "code of municipal law" regulating private rights—a phrase Bradley repeated twice—and "make Congress take the place of the State legislatures and to supersede them." Justice Harlan's dissenting opinion devoted most of its space to refuting that same proposition—arguing that the Amendments

did confer broad authority on Congress to pass the Civil Rights Act, but that such authority would *not* empower the federal government to create a "municipal code for all the States, covering every matter affecting the life, liberty, and property of the citizens of the several States."[18]

The Justices differed quite forcefully and powerfully in their readings of constitutional law, but they argued about federalism, not about public versus private life. They argued about whether freedom from discrimination in public accommodations was part of the citizenship rights that had been brought under federal protection by the Thirteenth, Fourteenth and Fifteenth Amendments, or whether it was left under control of the states. What was really at work in the sharply drawn argument between Harlan and Bradley was an attempt to close down a long-running debate that stretched back to the Civil War about the scope of federal versus state authority. In that debate, Bradley himself had taken a somewhat different position from the one he asserted in his majority opinion. By 1883, however, many things had occurred to change his mind.

The path that would lead to that famous opinion began nearly twenty years earlier, in the midst of the Civil War, as Republicans like Bradley tried to understand how slave emancipation might alter the constitutional beliefs under which they were prosecuting the war. A native of upstate New York, Bradley spent most of his life as a lawyer in Newark, New Jersey, where for three decades he represented railroads and other large corporations. During the war, he described himself over and over again at wartime political rallies as a "conservative" Republican who fully endorsed union policy based on the laws of war without altering the fact that "[t]he Constitution gives us no power to meddle" in local Southern institutions. The fundamental objective of the Republican party, he told his listeners again and again, was to suppress the rebellion, and reassert the prewar federal structure. For Bradley, questions of slavery and freedom for black Americans in the South remained firmly within the province of local, or as he later phrased it, "municipal" law. This was, of course, a standard lawyer's move of asserting one's allegiance to past traditions at times of great change—one that would reappear in a different guise a century later in the sit-in cases.[19]

Asserting his allegiance to preserving the sphere of municipal law—as he would again in the *Civil Rights Cases*—was a useful device, because Bradley's adopted hometown of Newark was an especially anti-black enclave. The ambitious, middle-aged lawyer ran for Congress in 1862, and much of what we know of his wartime beliefs comes from his Republican campaign rhetoric. The phrase "municipal law" would have been familiar to almost any political figure who—like both Bradley and Harlan—had lived through the Civil War–era political debates. Republicans deployed it over and over again during the war to indicate that they could accomplish emancipation under the laws of war, without disturbing the constitutional status of slavery, which was still defined by "municipal"—i.e., local, law. Bradley's fellow New Jerseyans had deployed municipal law—the law of slavery—to hold a small number of African-Americans in bondage within the state as late as the 1850s. They initially refused to ratify both the Fourteenth and Fifteenth Amendments. On the campaign trail, Bradley declined even to endorse the Emancipation Proclamation, simply explaining that, regardless of its wisdom, Lincoln's actions were justified under the laws of war.[20]

Bradley's assertions of conservative federalism were good strategy, for Democrats delighted in stirring up anti-black prejudice by arguing that emancipation would make black Americans into equal citizens with whites. As the Thirteenth Amendment was debated in Congress, Democrats reserved their strongest objection—other than appeals to race prejudice—for the claim that the

amendment was a radical revision of existing ideas of limited national power that had been written into the nation's founding documents. They also argued that the amendment would confer both citizenship and a wide range of rights, including suffrage, on the freed slaves. This was, of course, strategic language designed to block the amendment, but even strategic language must ground itself in some plausible version of constitutional reality and this was an entirely plausible claim.[21]

Indeed, the political debates over the Thirteenth, Fourteenth, and Fifteenth Amendments, and the Civil Rights Acts, were filled with assertions that the Amendments undermined the conservative federalism that Bradley defended during the war. Once the Thirteenth Amendment had been ratified, white Southerners worried openly that the antislavery amendment might "give Congress the power of local legislation over negroes" extending to matters other than the bare prohibition of slavery. When Congress responded to the Black Codes and widespread anti-black violence with the Civil Rights Act of 1866, which guaranteed the nondiscriminatory right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property," it was a radical move, not least of which because the Act federalized matters that were conventionally thought to be matters of municipal law. Kentucky Senator Garrett Davis charged that the Civil Rights Act gave Congress "power to occupy the whole domain of local and State legislation" and would allow it "to pass a civil and criminal code for every State in the Union"—almost exactly the idea that Bradley would later deploy in the *Civil Rights Cases*.[22]

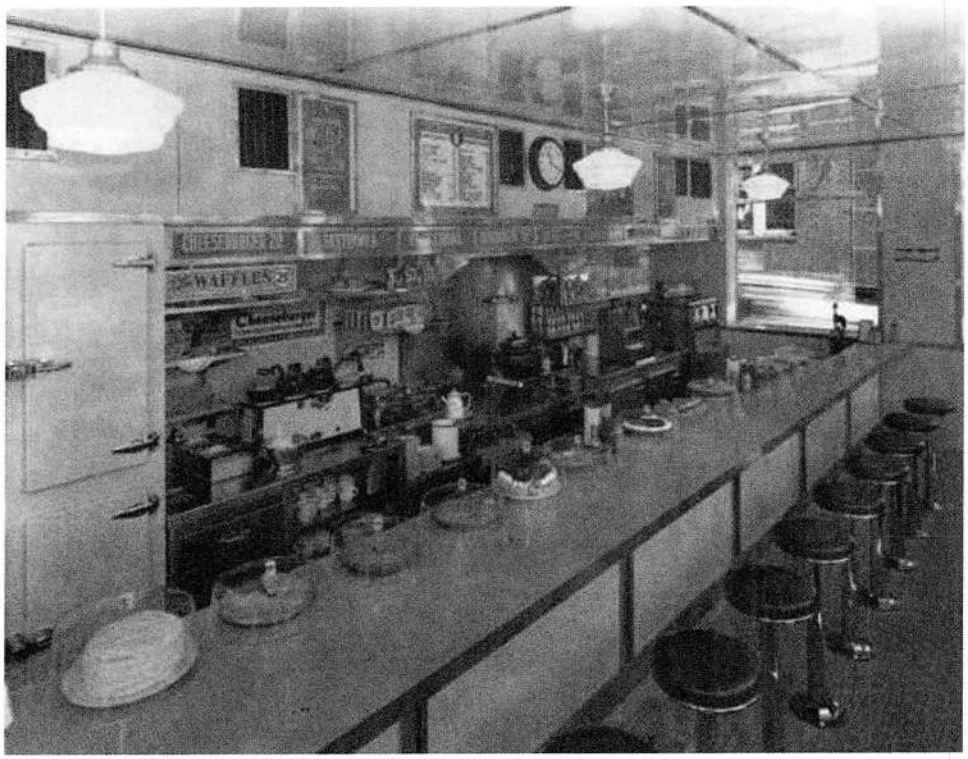
In 1870, Bradley's initial political connections earned him one of President Grant's nominations to fill vacancies on the Supreme Court. Upon joining the Court, Bradley was immediately assigned to the Fifth Judicial Circuit, which stretched from Florida to Texas. Each year, at the conclusion of the Supreme Court's term in May, he spent about six weeks hearing cases there as a Circuit Judge, where he delivered groundbreaking interpretations of the meaning of the Civil War Amendments. Each year, he travelled through the South, where he was called upon to do what he had resolutely avoided during the war: render opinions on the constitutional claims that were being advanced by African-Americans.

During and after the war, African-Americans insisted that emancipation and the ratification of the Thirteenth Amendment raised the very issue that Bradley had done his best to avoid—upending municipal law and granting blacks a broad range of rights. In New Orleans, free people of color had insisted that emancipation, which had begun with the arrival of Union troops in 1862, conferred a broad range of rights on people of African descent, including access to streetcars. In Philadelphia, the local chapter of the Equal Rights League and other African-American groups viewed the Thirteenth Amendment as justification for a renewal of their campaign for equal access to streetcars. The movement quickly secured a decision from a local court that excluding African-Americans from streetcars was an actionable offense. In reversing what was taken to be settled law in Pennsylvania, the local judge stated that war and emancipation had altered what was taken to be settled municipal law: "the logic of the past four years has in many respects cleared our vision and corrected our judgment."[23] Boston lawyer John Rock became the first black man admitted to the Supreme Court bar on the day the Thirteenth Amendment was reported out of Congress. Both Rock and his sponsor, the antislavery Senator Charles Sumner, believed that this simple act, coming on the heels of emancipation, was an acknowledgement by the Court that blacks possessed a broad range of rights. "Streetcars would be open afterwards," Sumner opined.[24]

On May 2, 1870, at the conclusion of his first term on the Supreme Court, Bradley set

out with his wife on the long train ride South for his first tour of the Fifth Judicial Circuit—and, indeed, his first extended exposure to Southern life. The trip would bring him face-to-face with the question of what the Civil War Amendments had done to basic citizenship rights, but not with the claims of black Americans. The former Newark lawyer traveled by train and steamboat, but probably saw little of the constant battles over railroad segregation that took place all over the South. He opened court in Galveston, Texas, where five years earlier freed slaves had initiated the Juneteenth celebrations marking emancipation, and just as the United States military was handing off authority to local government. He spent most of his time interacting with local lawyers and judges. White Southern lawyers liked him, and commented favorably on his judicial demeanor. With his docket of commercial cases, he remained relatively insulated from the citizenship claims of African-Americans. His principal exposure to those claims probably came from the man he would meet when Bradley convened court in New Orleans: Circuit Judge William Woods.[25]

Like Bradley, William Woods was a conservative Northern Republican who was trying to make sense of the constitutional revolution that had made slaves into full citizens. The two men would shape much of the road that would lead to the opinion in the *Civil Rights Cases*. Judge Woods, a transplanted Ohioan, had fought for the Union during the war, and stayed on in the South where he became a state official in Alabama. He was lucky enough to be appointed as a federal Circuit Judge when Congress expanded the federal judiciary in 1869, just before violence, intimidation, and murder overwhelmed many of his fellow Republican



Through the simple act of sitting down in segregated public accommodations, such as this diner, young African-Americans set in motion a constitutional controversy that would reach the highest levels of government.

Alabama officeholders as the Democratic party began to reclaim the state. Unlike Bradley, Woods had half a decade of direct experience with the fragile state of Southern municipal law when the two men teamed up in New Orleans to decide the case that would reach the Supreme Court as the *Slaughterhouse Cases*.[26]

In the *Slaughterhouse Cases*, Bradley would famously deliver his first ruling on what the Fourteenth Amendment had done to the conservative federalism he had defended during the war—in a case that seemed to have nothing to do with race. It involved an ostensible public health law that required New Orleans butchers to slaughter animals at the premises of the Crescent City Company, which lay downriver from the city's water supply. A group of butchers challenged the slaughterhouse law, and hired former Supreme Court Justice John A. Campbell, who had resigned from the Court to fight for the confederacy, as a key part of their legal team. Campbell devised the argument that the Crescent City Company was a monopoly that prevented butchers from pursuing their trade, in violation of the Fourteenth Amendment and the Civil Rights Act.[27]

But as always in New Orleans politics, much lay beneath the surface. Before the war, the Mississippi river city had been home to the largest slave market in the Americas, and was simultaneously the commercial center of the deep South and home to a population of mixed-race men of color, many of whom declared their allegiance to the confederacy before moving closer to the black side of the color line with the arrival Union troops in 1862.[28] The slaughterhouse law in question was enacted in 1869 by the state's first legislature in which both blacks and whites served, elected only after violence and murder squelched the first attempt to enfranchise the state's African-Americans. How much of this Bradley understood is impossible to say, given the paucity of the evidence he left for us. On his first trip to the city three years before, he had adopted the viewpoint of the unreconstructed secessionists who had constituted his social circle there. He dismissed the freed slaves' desire to leave their plantations and move about, with the quip: "off they go—to see the cities or other parishes—their vagrancy only limited by their means of locomotion."[29]

Many scholars have speculated about why Bradley decided that a group of white butchers could challenge a slaughterhouse law, using a constitutional amendment that had been enacted to make African-Americans into full citizens. Perhaps, in constitutionalizing a right to follow what he called "lawful industrial pursuits," Bradley was moved by the circumstances of the industrial workers among whom he had campaigned in Newark. Perhaps he was moved by Campbell's white supremacist–inflected arguments about the supposed corruption of the biracial legislature that passed the statute—an assertion that is often accepted uncritically by scholars.[30] Certainly, Bradley's prior record left little indication that he was friendly to black citizenship claims. As a New Jersey lawyer, he had defended slave-owners against a legal challenge to slavery in that state. As the war loomed he had gone to Washington to promote a sectional compromise that would reassert the Missouri Compromise and allow slavery into the West. As late as 1862 he advocated colonization of freed slaves in another country. Whatever its reasons, there is hardly sufficient evidence to make a definitive judgment.[31]

What can be stated with more assurance is that Bradley (and Woods) ruled broadly, and both men soon had to face up to the implications of their position for black citizenship claims. Assessing the butchers' challenge, Bradley reasoned that the Fourteenth Amendment, in protecting the "privileges or immunities of citizens of the United States," was intended to define and protect fundamental rights that must remain "absolutely unabridged, unimpaired" under municipal law. Which rights were they? Bradley

declined to say, but he thought it self-evident that among them are: 1) "the privileges of every American citizen to adopt and follow such lawful industrial pursuit . . . as he may see fit," 2) the "privilege to be protected in the possession and enjoyment of his property," and 3) the privilege "to have . . . equal protection of the laws." Having said all this, Bradley agreed with the butchers' association. The statute gave the Crescent City Company an "odious monopol[y]" on the slaughtering of animals, and prevented butchers from freely pursuing their trade. He issued an injunction directed to Crescent City to stop suing the recalcitrant butchers, and concluded that butchers could slaughter their animals anywhere they wished.[32]

The Supreme Court Justice boarded a train for the return trip to Newark just after announcing his final opinion in the case, but both Bradley and Woods quickly became enmeshed in a renewed wave of anti-black violence that was sweeping the South as the Democratic party sought to overthrow biracial Republican local governments. The result was a new set of legal enactments that, once again, would come before Bradley as a test of the scope of the Civil War Amendments. In fact, while Bradley was still hearing cases on Circuit, Congress had responded to the spiraling violence with the first of the Enforcement Acts, which established criminal penalties for individuals and state officials who interfered with voting and other citizenship rights. (The statute was introduced in Congress just as Bradley was taking his seat on the Court in February.) In Woods' adopted home state of Alabama, a violent election season was heating up, and would be the occasion for murder and assaults on black Alabamans and their white Republican allies. In New Orleans, no visitor could be unaware of the periodic street battles that had raged since the Massacre of 1866, where a white supremacist mob killed more than thirty-five members of a mostly black constitutional convention. The violent street battles would persist there for another decade, as the fragile bi-racial coalition held its ground, backed by federal law and federal troops.[33]

Basic citizenship rights were under siege throughout the South as Bradley and Woods dealt with the aftermath of their ruling on the butchers' claims, and Republicans responded with broad assertions of federal power under the new constitutional amendments. In up-country South Carolina that fall, black and white Republicans fell prey to overwhelming white supremacist violence and terrorism that made any question of prosecution under municipal law moot. In October, armed whites attacked a mostly black group of Republicans who had gathered at the county courthouse in Eutaw, Alabama, to organize for the fall elections. With the state's Republican Governor looking on helplessly, the whites broke up the gathering, shot and killed several black participants, wounded over fifty, and forced the rest to run for the lives. Later that fall, prompted by continued assaults on what President Grant termed the basic rights to "life, liberty, and property" of American citizens, Congress responded with the Ku Klux Klan Act, which was intended to criminalize conspiracies among individuals to deprive citizens of many basic rights.[34]

In December, Woods wrote Bradley from Alabama to ask for help in applying the constitutional interpretation they had propounded in New Orleans to the Eutaw murders, for which two individuals had been indicted under the Enforcement Act. Bradley wrote back twice in response to Woods, and framed the question as he would a decade later in the *Civil Rights Cases*—whether the new constitutional amendments reached matters that were traditionally governed by state law. In this case, could the defendants be federally indicted for an act that seemed like a "private municipal offense"—i.e., murder? First, Bradley wrote, the defendants were accused of interfering with "the right of suffrage," which was "secured by the 15th Amendment," and thus within the power

of Congress. Second, he concluded, the Fourteenth Amendment prohibited states from denying "equal protection of the laws." Bradley added that "denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." Since Congress could not force the states to protect basic citizenship rights, "the only appropriate legislation it can make is that which will operate directly on offenders." With Bradley's letters in hand, Woods wrote a sweeping opinion, quoting verbatim from the letters, and ruled that the indictments were constitutional. Woods' (and Bradley's) opinion would provide the basis for aggressive federal prosecutions responding to white supremacist violence throughout the South.[35]

The prewar federalism that Bradley had so confidently asserted in the 1860s was coming apart, and even in Washington, where he now spent much of his time, he could not escape it. That became clear in December 1871, when *Blyew v. United States* came before the Supreme Court. It was a horrific case. In 1868, two white men, after attending a Democratic party rally in Kentucky, had gone into the home of a black family and hacked most of them to death. The two men were indicted for murder in federal court under the 1866 Civil Rights Act. Murder was a state law crime, but the Act allowed the prosecution to be brought in federal courts in cases "affecting persons" who were being denied rights that were guaranteed by the Act. The Civil Rights Act guaranteed the right to testify, and Kentucky law still prohibited blacks from testifying in cases involving whites. So the local federal prosecutor took control of the case and brought it in the federal district court for Kentucky.[36]

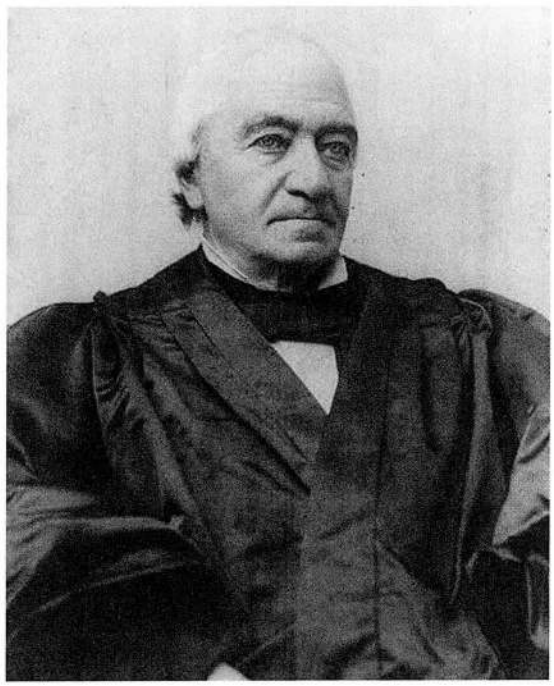
For Bradley and his colleagues, the constitutional issue was not whether the Civil War Amendments applied to private or state action, but federalism.[37] A majority of the court ruled that the federal courts had no jurisdiction over the crime, since the murdered family members and the black witnesses were not "affect[ed] persons" whose rights would be denied in state courts. Since state prosecution was impossible (blacks couldn't testify), the two men would go free. Justice William Strong, in writing for the majority, took the time to write that "we cannot be expected to be ignorant of the condition of things which existed when the statute was enacted"—black Americans were denied basic rights in the courts. Congress could federalize ordinary crimes, he concluded, when state law denied basic rights, but the statute's reach did not extend to this set of facts. Bradley disagreed strongly, and argued that Congress could provide "a remedy where the State refuses to give one." "[W]here the mischief consists in inaction or refusal to act," the Thirteenth Amendment empowered Congress to federalize what would normally be state level crimes. "Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race," he stated. Here were the seeds of the much discussed "badges and incidents" language that he would deploy in the *Civil Rights Cases*. The Thirteenth Amendment empowered Congress to reach the actions of private individuals under its power to abolish slavery, he concluded, and to protect fundamental liberties when state law did not protect them.[38]

The conservative Republican Justice had traveled far from the positions he asserted during the war, and he was soon faced with what he believed to be his most important chance to set out the constitutional "law" that applied to black citizenship. It happened almost by accident, in response to the Colfax Massacre, which Eric Foner called "the bloodiest single act of carnage in all of Reconstruction." On Easter Sunday, 1873, a group of armed whites had murdered more than 100 black men at the local courthouse in Grant Parish, where Republican officials had gathered after hotly disputed state and local

elections. A determined federal prosecutor brought a group of the participants to trial twice, before Judge Woods in New Orleans, in early 1874. The men were indicted under the Enforcement Act for interfering with constitutionally protected rights. The first trial ended inconclusively, but Woods brushed aside objections that the indictments were, in reality, for state-law crimes (like murder) and were thus outside of Congress's power.[39] The second trial began in May, just as Bradley's schedule brought him to the city, and the Justice would preside over the proceedings for a few days with Woods before leaving town to continue his Circuit duties.[40]

Once back in Washington, Bradley spent two weeks writing up an opinion that he understood—rightly—to be his most important to date. Under pressure from the federal prosecutor, he once again made the long trip back to New Orleans to deliver it in person. As always, he believed that the question was one of national versus state power: "the main ground of the objection is that the act is municipal in character, operating directly on the conduct of individuals, and taking the place of ordinary state legislation." The basic problem was that murder was a state law crime, and the Civil War Amendments did not empower Congress to "pass an entire body of municipal law for the protection of person and property within the states." Enforcement of municipal law remained the job of state governments.[41]

However, he also sketched out an interpretation of the Civil War Amendments that was not limited by modern state action. The Thirteenth Amendment, for instance, gave Congress the power to protect certain fundamental rights—for instance the rights to contract, property, sue, and testify in the courts, and others set out in the Civil Rights Act of 1866—and to protect them from being deprived by individuals, not state actors. The Amendment not only eradicated slavery, but "required the slave should be made a citizen



Joseph P. Bradley, who wrote for the Court in the 1883 *Civil Rights Cases* opinion, did not invent modern state action doctrine. He lived in a somewhat different constitutional world from the one that governed the sit-in cases of the 1960s.

and placed on an entire equality before the law with the white citizen." For example, if an African-American desired to "lease and cultivate a farm" in a "neighborhood or community composed principally of whites" and "a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race," the Amendment empowered Congress to prohibit that private, individual action. Under the Fifteenth Amendment, Congress could protect the right to vote from being denied because of race, "not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of state laws." With respect to the Fourteenth Amendment, however, he backtracked from the position he had asserted in his letter to Woods concerning the Eutaw case. Now he concluded, not based on the text of the Amendment, but on a complicated argument about natural rights that states are obligated to guaranty under their municipal law, that Congress could only protect privileges or immunities against "the acts of the state government themselves."[42]

Like many other things Bradley had done in New Orleans, appearances were deceiving. The Justice had also helped pronounce the end of Reconstruction in Louisiana. Having seemingly affirmed broad federal power to criminalize the defendants' actions, he ruled that the indictments should be dismissed. Some of the charges against the defendants were matters reserved for the states to address through municipal law. Others might be the proper federal charges but the original indictments did not allege that the Colfax victims were deprived of rights because of "race, color or previous condition of servitude." Woods disagreed, holding to the original position that he (and Bradley) had asserted in the Eutaw case, but the Supreme Court would eventually rule that the indictments had been properly dismissed when *United States vs. Cruikshank* reached that body.

Before departing an hour later for Washington, Bradley also released the defendants on bail and they exited the court to a raucous celebration. The trial had taken place in an atmosphere of murders and intimidation of the prosecution witnesses, and there was little chance for retrial. The Justice understood that he had done something momentous, and he printed and mailed copies of his opinion to his fellow Justices, the Attorney General, other public figures, newspapers and law journals. He had one more act to make in the debate over the fate of Reconstruction, casting the deciding vote on the commission that awarded the 1876 Presidential election to Rutherford B. Hayes.[43]

What, then, should one make of Justice Bradley's subsequent opinion for the Court holding the Civil Rights Act of 1875 unconstitutional—the opinion that, eighty years later, would supposedly make young Robert Bell's actions illegal? The federal public accommodations law had been bottled up in Congress for years before it finally passed, and was an affirmation of a basic claim that African-Americans had made since the war: that emancipation, and the Thirteenth Amendment, federalized a broad range of rights, including access to public accommodations. White Americans resisted this claim greatly, and cases that challenged the constitutionality of the Act began to pile up in the Supreme Court for half a decade before Bradley finally announced his majority opinion in 1883. By that time, William Woods had joined him on the Court, at Bradley's urging, and had taken over his Fifth Circuit duties. In several well-known opinions, one even written by Woods, the Supreme Court had signaled its retreat from Reconstruction. Through particularly stingy readings of the Fourteenth and Fifteenth Amendments, the Court ruled that they did not empower Congress to criminalize the actions of individuals who committed ordinary state-law crimes.[44]

In the *Civil Rights Cases*, Bradley wrote an extensive opinion, followed by an equally extensive dissent by Harlan, summing up what both men thought was now settled law. Years earlier, Bradley had pronounced himself undecided on the difficult question of the 1875 Act's constitutionality in a letter to Woods. But now he had modified his original views on what he called "the power of Congress to pass laws for enforcing social equality between the races." "Social equality" was the contemporary watchword that whites used to justify their acquiescence to segregation while still professing themselves to be committed to equality. The question, as always for both Bradley and his fellow Justices, was federalism: whether the Thirteenth Amendment federalized a right to access public accommodations, which was traditionally defined by municipal law. Access to public accommodations, he concluded with some colorful language, was not one of those fundamental rights that had been federalized by the amendment.[45]

He framed the question much like he did in his Colfax opinion. "Under the Thirteenth Amendment, the legislation . . . to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." That is, Congress could displace municipal law and directly protect fundamental liberties whose denial was an incident of slavery. What were the "necessary incidents" of slavery? Once again, he listed many of the rights defined in the Civil Rights Act of 1866: the right to be free of "[c]ompulsory service" and "restraint of . . . movement," as well as the right "to hold property," "to make contacts," and to sue and testify in court, and others, but *not* access to public accommodations. What exactly were those basic rights that he believed were protected by the Thirteenth Amendment against deprivation by private actors? Based on existing historical evidence, it is impossible to tell much from his general observations. But his words would generate much work for twentieth, and now twenty-first, century lawyers, judges and constitutional theorists.[46]

Bradley's Fourteenth Amendment ruling was much easier, given what he had concluded in the Colfax case, but he also used some expansive language that later observers, looking for state action, read into his views of the Thirteenth and Fifteenth Amendments, such as this: "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful actions of individuals." He said nothing about the Fifteenth Amendment, since the main provisions of the Civil Rights Act governed public accommodations, not voting. But the Justices had already made it clear that the Fifteenth Amendment applied to private individual actors so long as the interference with voting rights was because of race.[47]

The Civil Rights Act of 1875 was unconstitutional, Bradley wrote, because the rights it protected were municipal rights, and had not been federalized by the Civil War Amendments. The idea of the state action doctrine—a clear constitutional division between private right and state actors—is a later development. The story of that development is the tale of an invented history—a comforting history in which the questions presented in the state action controversies of the twentieth century—those over racially restrictive covenants, company towns, white primaries, and of course sit-ins—had already been decided. That story has yet to be completely told.

By the time Robert Bell walked into Hooper's restaurant, it was widely understood that state action—the constitutional doctrine that might or might not define him as a lawbreaker—was in trouble. But it was also assumed that, if one went far enough back in history—to the text of the *Civil Rights Cases*—one could find an answer to the pressing constitutional questions presented by the sit-in movement. But that text—the long,

voluminous explorations of the meaning of the Civil War Amendments by Bradley and Harlan—seems to provide no definitive answer to the question of whether the Constitution binds private actors. This is not the place to identify a "holding" of the case and to argue about whether that holding resolved Bell's case. Rather, it is only to say that the Court's decision provides support for multiple views of what it decided. For those who are looking for evidence that the text that supposedly defines state action in fact simply does not define it, the evidence is there. Bradley made it clear that the Thirteenth and Fifteenth Amendments protected a broad range of rights from private action, and nothing in the full Supreme Court's contemporary rulings showed that to be untrue. At the same time, it is also true that the Justices struggled with the question of how far the Amendments reached to constrain the actions of those they would have called "individuals" or "citizens." The point is that the text that supposedly resolved Bell's case eight decades later did no such thing. That is because the people who wrote it, and endorsed it, lived in a different constitutional world from the one that governed the sit-in cases of the 1960s.

Were Bell's Actions in Violation of State Law?

If neither the *Civil Rights Cases*' holding nor the textual command of the Constitution resolves the question of whether Bell and his fellow protesters were acting illegally, then surely they were in violation of state law. At least, that is the conclusion that many observers reached at the time, and that is the way their case has been remembered by historians. The claim that the students were acting contrary to state law seems fairly straightforward. Maryland had a criminal statute, defining and prohibiting trespass, and it seemed to contain no exception for the students' activities. During their sit-in, Carroll Hooper, the restaurant owner, had the statute read to the protesters to make it clear to them that they were acting contrary to established law. (He had clashed with sit-in students before, and apparently had a copy of the trespass law on hand for just that purpose.) Some of the students chose to leave at that point, although Bell was among those who chose to stay. Hooper told the students that they had his sympathy, and that racial exclusion from restaurants was "an insult to human dignity." He sincerely hoped it would end in the near future, he said. At their criminal trial, Hooper accused the students of "trying to legislate by terror . . . to force me to either serve or close." He claimed to be merely exercising his prerogatives as a property owner, as defined in the statute.[48]

Hooper was not the only person to frame the sit-in question as legality versus illegality. Contemporary observers, ranging from former President Truman to Thurgood Marshall to Justice Hugo Black, struggled with the morality of the sit-ins because of the assumption that the students were deliberately violating state-law property rights. Proponents of segregation also did. In Atlanta, Lester Maddox, the owner of a popular restaurant called Pickrick, chased protesters away with a gun and became a folk hero among integration's opponents. Framed as a supposed defense of his property rights rather than of segregation, his act would allow him to ride a wave of white populist sentiment all the way to the state governorship.[49]

Scholars, too, have tended to view the sit-in protesters as acting illegally. Over the past several decades, legal historians have framed claims like those of the sit-in protesters as an alternative source of lawmaking, engaged in by many minority groups whose claims were not recognized in positive law. Viewed this way, historians have sought to give minority groups "agency," to rewrite their stories as those of law-*makers* who were excluded from the traditional lawmaking process. The most prominent published version of Bell's story

has told the story of his case in this manner. His story, we are told, is analogous to that of a Vietnam War draft resister who was convicted for his beliefs, went to jail, then went to law school, and afterward was vindicated in the courts.[50]

The sentencing judge at Bell's criminal trial, however, told a slightly different story. After a vigorous argument by Robert Watts, a well-known local African-American lawyer who was defending the students, the judge told him: "I appreciate that comment, Mr. Watts. I agree with you [that] these people are not law-breaking people." He told Watts that he would find the students guilty, but would only assess a token fine of ten dollars. He then suspended the fine. "[T]hey did not intend to deliberately violate the law but were seeking to establish a principle," he concluded. The judge's ambivalence about the students' actions was shared by the Hooper's employee who greeted them when they had asked for service. When they tried to enter front door, she stopped them and said, apologetically: "I'm sorry but we haven't integrated as yet." What both she and the trial judge were hinting at was the fact that, at the time of the protests, Marylanders were in the midst of an intense debate among themselves over the question of how public accommodations should be treated under state law.[51]

On its surface, the state law applicable to the students was clear, but lurking in the background was a beguiling murkiness. As everyone knew, Hooper's extended an open invitation to just about anyone who was orderly and sought to eat there during regular hours—except black Americans. Certain businesses that served the public were under a duty to serve almost anyone who was well-behaved and presented themselves during regular business hours. The sentencing judge summarized the law applicable to such businesses as follows: "the duty imposed by the early common law to serve the public without discrimination was later confirmed to exceptional callings where an urgent public need required its continuance, such as innkeepers and common carriers." Railroads, for instance, were common carriers who had a duty to admit to rail transit anyone who presented themselves at their places of business—subject to reasonable rules governing tickets, schedules, proper conduct during transit, and the like. Innkeepers—proprietors of inns, hotels, motels, and similar establishments—were supposed to have a similar common law duty. Those duties were implicit exceptions to the trespass statute. That is, for businesses with a duty to serve the public, the trespass statute simply did not apply to people who were orderly and presented themselves during business hours. This rule was often cited in the sit-in court cases, much in the way that Bell's sentencing judge did: there was an original common law rule that required certain types of businesses open to the public to admit most patrons, and that rule was later narrowed to focus on certain exceptions such as innkeepers and common carriers.[52]

The creation of the distinction between innkeepers/common carriers and other businesses open to the public, as one might expect, had its roots in race discrimination cases from the Civil War era.[53] In the antebellum era, there was widespread discrimination against free blacks who tried to attend theaters, eat at restaurants, and patronize streetcars and rail transit. The first reported case that decided whether such discrimination and exclusion was permissible was an 1858 Massachusetts case, *McCrea v. Marsh*, involving a black patron who had purchased a ticket for a lecture at the Boston Athenaeum. The Massachusetts Supreme Judicial Court ruled that the ticket was simply a revocable license, relying on the famous English case of *Wood v. Leadbitter*, where the court ruled that a racetrack had no duty to admit someone who had previously purchased a ticket for admission. Although English courts later rejected the *Wood* decision, the *Wood* opinion would become a regular citation in later American cases involving businesses open to the public.[54]

The leading cases in this area, like *Wood*, were often disputes involving racetracks that wanted to exclude unsavory characters, but not cases involving racial discrimination.

The *McCrea* ruling was immediately followed by the war, the Civil War Amendments, and the Civil Rights Act of 1866, which raised the question of whether segregation and exclusion were still permissible in public accommodations and railroad travel. That question was hotly contested during Reconstruction, with the Civil Rights Act of 1875 as one chapter in that ongoing debate. After the Court invalidated the 1875 Act, many Northern states enacted their own laws requiring nondiscrimination in many places of public accommodation, although enforcement was uneven and the battle to integrate Northern accommodations would run straight through the 1950s and 1960s. In states without their own accommodations statutes, the law was taken to be more or less how the court would state it in Bell's case: the duty to serve the public had once been broad, but had been narrowed to essential businesses like innkeepers and common carriers. Actual reported cases dealing with the question of race and access, however, were sparse outside the context of railroad transit.[55]

This is how things stood when Sara Slack, a black reporter for the New York *Amsterdam News*, stopped at a White Tower restaurant along Route 40 in Baltimore in July of 1957, ordered two hamburgers, apple pie, and coffee, and asked to sit down. Her subsequent federal lawsuit, challenging the restaurant's refusal to let her eat inside the building, would wind its way through the federal courts over the next several years where it would intersect with the sit-in cases. The district court handed down its opinion rejecting her challenge only two weeks after the sit-in movement began in February 1960. By that time, everyone understood that the case had wider implications.[56]

Federal District Judge Roszel Thomsen looked for applicable Maryland cases involving race discrimination in businesses open to the public, other than railroads, and found little to guide him in his decision. He did find a 1948 case where the Maryland Court of Appeals had cited the *Wood* decision, but that, as one might expect, was yet another racetrack case that had nothing ostensibly to do with race. With the outbreak of the sit-in movement in 1960, Sara Slack's lawsuit was joined by many other cases in the state and federal courts in Maryland. They were, arguably, cases of first impression. However, they were not treated that way. Judges tended to assume that state law was settled on the issue, even though there was little Maryland precedent on the books to back up that assumption. Thomsen and his colleagues were also influenced by the fact that Maryland law on the subject was being hotly debated outside the courts, where it seemed on the verge of being resolved in favor of nondiscrimination.[57]

By the early 1960s, just what was the Maryland law on the subject of segregation was increasingly open to question. The state legislature had repealed its laws requiring segregated rail, ship, and streetcar travel during the 1950s. By 1957, a public accommodations civil rights law was being debated in the Maryland legisture, and the state's popular governor, Theodore McKeldin, had become a "frequent and outspoken critic of the discrimination policy followed by Baltimore hotels," according to the local press. By 1960, Maryland's race relations commission could report that in Baltimore the following changes had taken place:

> Opening of all first-run movie theaters to Negroes; adoption of nondiscriminatory food service and room policies in all major hotels, with one exception; end of white-only service in nearly all department store activities, at many downtown drugstore lunch counters and at a slowly increasing number of restaurants.

That process was helped along by a series of controversies involving diplomats from newly independent African countries who were being refused service at restaurants along Route 40 while driving between Washington and the United Nations' headquarters in New York. In June 1962, the Baltimore City Council enacted a city ordinance prohibiting race discrimination in public accommodations. That was followed the next year by a state public accommodations law, although the new statute exempted ten counties from its application, presumably because segregationist sentiment there was high.[58]

It was perhaps in everyone's interest to present the question of whether Bell and his fellow students were trespassing as an easy one. State common law seemed fixed and knowable precisely because so much of the law applicable to Bell's case was unknowable. Both the legislature and the city council had been locked in a debate since the late 1950s over whether race discrimination in public accommodations was, or should be, legally permissible. The lawyers in the cases that challenged discrimination reached instinctively for the Fourteenth Amendment because that legal theory could supply a comprehensive answer to the question of whether the sit-ins were legal throughout the South. Judges, too, had an interest in viewing the trespass issue as capable of being easily resolved. They knew that the vexing questions presented in the sit-in cases would soon be resolved by someone else—the city council, the state legislature, or the United States Supreme Court. In fact, Judge Thomsen would cite the vigorous debate taking place in the legislature and the city council as reasons for not taking action in response to Sara Slack's petition to open up Baltimore restaurants to black patrons.[59]

The irony is that the messiness and flexibility of Maryland law made the Supreme Court's job *more* difficult when Bell's case reached that body. The Justices had decided the early sit-in cases by presuming that the trespass conviction was simply a subterfuge for white Southerners who were now on notice that their segregation statutes were unconstitutional. That seemed like a safe enough assumption where segregation clearly remained state policy. But Maryland was not Mississippi or, more accurately, the portions of Maryland that showed themselves to the outside world in the sit-in cases were not Mississippi. The state government was clearly acting to undo portions of its policy of segregation, and the Justices could hardly pretend that state authorities were acting to maintain it. Bell and his fellow students' sit-ins would finally push Justice Black to draw the line with regard to the Fourteenth Amendment because of his concern that the protests were infringing on property rights. At the same time, however, it was also true that Bell's case was the one case where it was least likely that the sit-in protesters were interfering with those settled expectations that we call by the name of property.

Were Bell and his fellow protesters violating state law? It is not my purpose to write a brief for the proposition that they were not, or to say that the judges were wrong to rule as they did. It is only to say that the moral clarity with which many people saw the case—from Justice Black to Thurgood Marshall to scholars today writing about protest movements—might be based on an assumption that is open to question. It is to say something that both well-trained lawyers and well-trained historians should know quite well—that the legal materials are often unlikely to give definitive answers to hotly contested issues like segregation in 1960s-era Maryland. It is to say that law itself is yet another, often unexamined, point of contention in cases of civil disobedience and other familiar instances when law is supposed to be in conflict with morality. This is just one of the many lessons that a sixteen-year-old youth and his fellow students had to teach

when they sat down and waited for service at Hooper's.

Was Bell Even Trying to Change the Law?

If the origins of the state action doctrine, or the protesters' status under state law, are difficult to resolve, then what might at least seem clearer is Judge Bell's story itself. Bell, as I noted earlier, made a truly remarkable journey: from the nervous youth whose criminal conviction was affirmed all the way up to the state Court of Appeals, to the Chief Judge of that body, where he oversaw the entire court system he had once faced as a litigant. He taught the larger society a bit about law and the legal process along the way. As a student at Harvard Law School, he led a session of his constitutional law seminar taught by the associate dean, Albert Sachs, after Sachs discovered that he was *the* Robert Bell of *Bell v. Maryland*. As a young Baltimore lawyer, he passed up the obvious routes to partnership at the prestigious firm of Piper Marbury and instead chose to work in a branch office delivering legal services to the community with which he was most familiar. As a young judge, he sported a medallion over his robes and was known for what one news account called "a series of controversial rulings." Judge Bell put prosecutors to the test for procedural fairness in a way that many in the system found controversial. As an appellate judge, he was known for his many, notable dissents from what a majority of his fellow judges had to say. When it came time for the Governor to choose the next chief judge, it was widely reported that another candidate was the "safe" choice and Bell was somewhat more controversial.[60]

The idea of Judge Bell's story as the story of a rebel fits neatly with how legal historians have read the claims of people like himself. For the past quarter century, much historical writing has focused on the constitutional views of outsider groups, dissenters, subalterns, and how those dissenting views of law are sometimes, over time, recognized (or rejected) by the formal legal system.[61] Bell's story might fit here as well. After all, we might begin this history with the claims of African-Americans in the latter part of the Civil War. Predecessors of Judge Bell, like Boston lawyer John Rock, as well as millions of newly emancipated slaves, claimed rights as equal citizens, including the right to enter places that were open to nearly all of their fellow citizens but closed to them solely because of their race. Americans intensely debated those claims across the color line, eventually reaching a tentative resolution in the *Civil Rights Cases* and many other decisions that narrowly circumscribed black citizenship. In the 1950s and '60s those claims were renewed by a new generation of African-Americans, including a young Robert Bell. Rejected initially, in the person of Bell they made their way inside the legal profession and to the pinnacle of the court system that once defined him as an outsider.

This is an easy, and at this scholarly moment a somewhat tempting, reading of Robert Bell's story. Perhaps for that reason alone it should be resisted. Moreover, something about this way of reading Bell's story does not fit. For one thing, the case is called *Bell v. Maryland* only because, among those twelve young people who were arrested in June of 1960, Bell's name came first alphabetically. Bell was certainly a leader among the young Baltimore African-Americans who had been fired up by the burgeoning sit-in movement, but if there had been an "Anderson" or an "Alexander" among the students, we might not think of this as Bell's case at all.

Judge Bell himself has often minimized the idea that the sit-in case should be identified with him. In multiple interviews, he has emphasized that others really played a leading role in the sit-ins. After his first and only sit-in, he resolved to never do it again because he decided that he could not be non-violent. He

kept his distance from the legal proceedings. He did not testify and did not follow his case closely as it traveled through the appellate courts. He seems to have handed it off to his lawyers and simply gotten on with his life. He became a lawyer of course, but he has stated quite clearly that his decision to become an attorney was not prompted by the case. Rather it stemmed from watching the old television show, "Perry Mason." Finally, there is his role as chief judge of the Maryland Court of Appeals. Judging from the tributes in a recent issue of the *Maryland Law Review*, what is perhaps his most famous legacy as chief judge are reforms covering such topics as access to justice, alternative dispute resolution, and family court reform—topics that have a somewhat tenuous relationship to the issues presented in *Bell v. Maryland*.[62]

Perhaps Bell's story has a more difficult set of lessons to teach us about how we tell stories, how we construct legal precedents, and how we remember the past. History, of course, is a story that *we* create to organize the chaos of social reality—an artificial construct imposed on the past. The same is true for legal precedents. Our professional commitments require us to dig deep for the "reality" of law, or history, but that does not make it easy or simple. The easiest story to tell about Bell's case, the story of protest and the claims of outsiders, remains a useful one. It is a story that allows us to see certain things we might not have seen before, but it is also a story that excludes. Bell was certainly a leader among the young people in Baltimore who wanted to do something about segregation, and he came to Hooper's to change its policies and those of other establishments. But to view him as someone trying to change the law, as someone making claims on the legal system, or as someone articulating a dissenting view of law, is not quite right. Perhaps what Bell's story reminds us is that what is often excluded from our stories of protest are the accidents, the happenstance events that sometimes make history, and sometimes jolt us into action. Perhaps what are often excluded are the stories of people who chose not to be rights-bearers, yet somehow, found themselves in the midst of great social change.

Author's Note: I would like to thank Dirk Hartog, Amy Dru Stanley, and Christopher Schmidt for their tough questions–not all of which I have answered–and Kathleen Borschow for expert research assistance.

ENDNOTES

[1] Robert Mack Bell, *Baptism by Fire*, 141, 142–45, in PETER IRONS, THE COURAGE OF THEIR CONVICTIONS (New York: Free Press, 1988); Robert M. Bell, *Journey to Justice: Fiftieth Anniversary of Brown v. Board of* Education, 34 U. BALT. L. REV. 1 (2004); Trial Record, Bell v. Maryland, at 22–35, 42–48.

[2] LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 51 (New York: Oxford University Press, 1996) (emphasis added). The Thirteenth Amendment, which prohibited slavery and involuntary servitude, is conventionally seen as one (very limited) exception, mainly applicable to circumstances that resemble slavery.

[3] Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL OF RIGHTS J. 767, 791–95 (2010); McKenzie Webster, *Note: The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations*, 17 J. LAW & POLITICS 373 (2001).

[4] In another Maryland case involving a well-known 1960 dispute at the Glen Echo Amusement Park, Chief Justice Warren relied on the fact that a park employee, who had been deputized as a county sheriff, arrested the black patrons. *Griffin v. Maryland*, 378 U.S. 130 (1964).

[5] *Bell v. Maryland*, 378 U.S. 226 (1964); Schmidt, *The Sit-Ins and the State Action Doctrine*, at 801–820. Standard histories of Bell's case are: IRONS, COURAGE OF THEIR CONVICTIONS, at 129–40; William L. Reynolds, *Foreword: The Legal History of the Great Sit-In Case of* Bell v. Maryland, 61 MD. L. REV. 761 (2002).

[6] BALT. MAGAZINE, Mar. 1997, at 46; Balt. SUN, Oct. 27, 1996.

[7] NEW YORK TIMES, Apr. 9, 1960, at 21; Derrick Bell, *An Epistolary Exploration for a Thurgood Marshall* Biography, 6 HARV. BLACKLETTER L.J. 99 (1989); Schmidt, *The Sit-Ins and the State Action Doctrine*, at 797–98; Webster, *Note, The Warren Court's Struggle*, at 394–95. There were other possible objections to the sit-in protesters' actions. Marshall later complained that the young protesters were saddling the NAACP with legal costs,

since the organization felt an obligation to represent them in the courts. Others might object that regardless of the state of the law, it was more appropriate to go through the orderly process of legislation and litigation to change the law. Finally, many might say that if lawyers and judges generally believed that the sit-in students' actions were not protected by state or federal law, then of course those beliefs/expectations constituted "the law," and the students were acting illegally regardless of what century-old precedent said. I have grappled with all these questions, but am merely trying to state the legal dilemma as contemporaries stated it.

[8] The 1960s-era views of the origin, and unraveling, of state action are summarized in: Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 84–95 (1967).

[9] *United States v. Morrison*, 529 U.S. 598, 621–22 (2000). Michael Les Benedict pointed out long ago that the well-known decisions in *United States v. Cruikshank* (1876), and *United States v. Harris* (1883), which are sometimes cited as sources of the state action doctrine, stated quite clearly the Fifteenth Amendment applied to private individuals, and only required that the interference with voting rights was because of race. Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 72–75 (1979).

[10] Federalism concerns lay behind many of the cases that are now cited as sources of state action, as will be argued below. But those concerns contained a markedly different set of assumptions than those which have undergirded the modern Supreme Court's invocation of federalism as a limit on national power, as recent scholarship has shown. We cannot live in the world of law that the nineteenth century Americans imagined, just as their own ideas translate only unevenly into ours. *See* Maeve Glass, *Bringing Back the States: A New Approach to Civil War Constitutional History*, forthcoming LAW & SOC. INQ. (2014); Alison L. La Croix, The Interbellum Constitution: Federalism in the Long Founding Moment, forthcoming 67 STAN. L. REV. (2015).

[11] The breakthrough collection of essays setting out this point of view is: THE CONSTITUTION AND AMERICAN LIFE (David Thelen, ed.; Ithaca, NY: Cornell University Press, 1988).

[12] BALT. MAGAZINE, Mar. 1997, at 46; Balt. SUN, Jan. 3, 1980, at A10; *id.*, June 3, 1980; *id.*, Oct. 24, 1996; *id.*, Oct. 27, 1996.

[13] Black, *Foreword*, at 84; U.S. CONST. amend. XIV, § 1.

[14] Schmidt, *The Sit-Ins and the State Action Doctrine*, at 779.

[15] SEIDMAN & TUSHNET, REMNANTS OF BELIEF, at 52.

[16] 109 U.S. 3, 11, 13 (1883).

[17] 109 U.S. at 16, 20.

[18] 109 U.S. 11, 13, 55.

[19] MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY 128–37, 144, 147–48 (Charles Bradley, ed.; Newark, N.J.; L.J. Hardham, 1902). The best biographical accounts of Bradley remain: Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, part 1, 54 HARV. L. REV. 977 (1941); *id.*, part 2, at 1128; Charles Fairman, *The Education of a Justice: Justice Bradley and Some of His Colleagues*, 1 STAN. L. REV. 217 (1949); Charles Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870–1892*, 30 B.U. L. REV. 46 (1950); Leon Friedman, *Joseph P.* Bradley, in THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, VOL. 2, at 579 (Leon Friedman & Fred Israel, eds.; New York, Chelsea House, 1995); Ruth A. Whiteside, Justice Joseph Bradley and the Reconstruction Amendments (Ph.D. diss, Rice University, 1981). In addition to Whiteside, other scholars have illuminated parts of Bradley's evolving constitutional vision, although their concerns differ markedly from the ones pursued here. *See* Christopher Waldrep, *Joseph Bradley's Journey: The Meaning of Privileges and Immunities*, 34 J. SUP. CT. HIST. 149 (2009); John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughter-House Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 553 (1971).

[20] JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 14, 22–25 (New York: W.W. Norton, 2013), 35; GRAHAM RUSSELL HODGES, ROOT AND BRANCH: AFRICAN AMERICANS IN NEW YORK AND EAST JERSEY 1613–1863, at 228–29 (Chapel Hill: University of North Carolina Press, 1999); KEVIN MUMFORD, NEWARK: A HISTORY OF RACE, RIGHTS AND RIOTS IN AMERICA 18 (New York: New York University Press, 2007); MISCELLANEOUS WRITINGS, 132, 135.

[21] Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 60 (Alexander Tsesis, ed.; New York: Columbia University Press, 2010).

[22] Vorenberg, *Citizenship and the Thirteenth Amendment*, 60; Oakes, FREEDOM NATIONAL, 490; WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 104 (Cambridge: Harvard University Press, 1988).

[23] Philip S. Foner, *The Battle to End Discrimination against Negroes on Philadelphia Streetcars: (Part II) The Victory*, 40 PA. HIST. 354, 360 (1973). Two years later, in a better-known decision, another local court would reject the claim that the Thirteenth Amendment required desegregation of streetcars—in a famous decision that would eventually find its way into the text of the opinion

in *Plessy v. Ferguson West Chester & Phila. RR v. Miles*, 55 Pa. 209 (1867).

[24] REBECCA SCOTT & JEAN M. HÉBRARD, FREEDOM PAPERS: AN ATLANTIC ODYSSEY IN THE AGE OF EMANCIPATION 116 (Cambridge, MA: Harvard University Press, 2012);

[25] 1870 Diary, May 2 to May 27, box 1, folder 7, Joseph P. Bradley papers, New Jersey Historical Society, Newark, NJ; WILLIAM L. RICHTER, OVERREACHED ON ALL SIDES: THE FREEDMEN'S BUREAU ADMINISTRATORS IN TEXAS, 1865–1868, at 284, 287 (College Station, TX: Texas A & M University Press, 1991); RANDOLPH B. CAMPBELL, GRASS-ROOTS RECONSTRUCTION IN TEXAS, 1865–1880, at 20 (Baton Rouge: Louisiana State University Press, 1997).

[26] Thomas E. Baynes, Jr., *Yankee from Georgia: A Search for Justice Woods*, 1978 SUP. CT. HIST. SOC'Y YEARBOOK 31 (1978).

[27] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937 at 116–24 (Cambridge, MA: Harvard University Press, 1991); RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 103–48 (Lawrence, KS: University Press of Kansas, 2003); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, PART 1, at 1321–42 (New York: Macmillan Co., 1971).

[28] WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 2 (Cambridge, MA: Harvard University Press, 1999); SHIRLEY ELIZABETH THOMPSON, EXILES AT HOME: THE STRUGGLE TO BECOME AMERICAN IN CREOLE NEW ORLEANS 210–43 (Cambridge: Harvard University Press, 2009).

[29] Joseph P. Bradley to My Dear Daughter, April 30, 1867, box 3, folder 4, Bradley papers.

[30] See FAIRMAN, RECONSTRUCTION AND REUNION, 1322–24; PETER H. IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION 198 (New York: Penguin Books, 2006).

[31] *Bergen County Freeholders v. Poor Slaves*, box 10, folder 1, Bradley papers; Whiteside diss., 91; MISCELLANEOUS WRITINGS, at 146. In later correspondence, he mentioned Justice Washington's much-debated definition of Article IV "privileges and immunities" in the 1823 Circuit opinion in *Corfield v. Coryell*. Joseph P. Bradley to W. B. Woods, Mar. 12, 1871, box 18, folder 2, Bradley papers; Joseph P. Bradley to Freylinghuysen, July 19, 1874, *id.*

[32] *Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652, 655 (C.C.O. La. 1870); CHICAGO LEGAL NEWS, Oct. 15, 1870, at 17–19.

[33] 1870 Diary, June 11, box 1, folder 7, Bradley papers; JAMES K. HOGUE, UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION (Baton Rouge: Louisiana State University Press, 2006).

[34] Melinda Meek Hennessey, *Political Terrorism in the Black Belt: The Eutaw Riot*, 33 ALABAMA REVIEW 35–48 (Jan. 1980); LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 42 (Athens: University of Georgia Press, 1996); William Warren Rogers, BLACK BELT SCALAWAG: CHARLES HAYS AND THE SOUTHERN REPUBLICANS IN THE ERA OF RECONSTRUCTION 76 (Athens: University of Georgia Press, 1993).

[35] Joseph B. Bradley to W. B. Woods, Jan. 3, 1871, box 3, folder 7, Bradley papers; Joseph P. Bradley to W. B. Woods, Mar. 12, 1871, box 18, folder 2, *id.*; *United States v. Hall*, 26 F. Cas. 79 C.C.S.D. Ala. (1871); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 115 (New York: Henry Holt, 2008); James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 403–05 (2014). The Bradley-Woods correspondence has been invoked sporadically over the years, mainly by reading it as shedding light on the jurisprudential debates of the 1960s—something that I decline to do here. *See Bell v. Maryland*, 378 U.S. 226, 309–11 (Goldberg, J. concurring); John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 108–10 (1963); C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 121 (New York: MacMillan, 1963).

[36] *Blyew v. United States*, 80 U.S. 581 (1871). The fullest account of the case is: Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989).

[37] Although the formal issue before the Court was statutory interpretation, Bradley and Strong made it clear that larger constitutional concerns lay behind the ruling. Bradley responded to the majority's invocation of its knowledge that blacks had been discriminated against in local court, with an assertion of the constitutional limits of his position: "I do not mean to be understood as saying that every cause in which a colored person may be called as a witness," belongs in federal court. 80 U.S. at 601.

[38] *Blyew*, 80 U.S. at 593, 601.

[39] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, AT 530 (New York: Harper & Row, 1988). 2 F. Cas. 79, 81. The relevant section of the Enforcement Act that applied to most of the charges made it a federal crime to "band or conspire together . . . to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." The indictments charged, among other things, that the defendants had been deprived of the right to peacefully assemble, to

bear arms, to not be deprived of life, liberty and property with due process of law, as well as the rights secured by the 1866 Civil Rights Act. The defendants were also charged with interfering with the right to vote, in violation of the Enforcement Act.

[40] 1874 Diary, May 14 to 23, box 1, folder 8, Bradley papers; 25 F. Cas. 710.

[41] 1874 Diary, June 12, box 1, folder 8, Bradley papers.

[42] 25 F. Cas. 710. The Supreme Court had significantly narrowed the scope of the Fourteenth Amendment in its *Slaughterhouse Cases* opinion. Whether this influenced Bradley to change his mind is, like many things, impossible to tell from the evidence.

[43] 1874 Diary, July 3, box 1, folder 8, Bradley papers. The political scientist Pamela Brandwein has recently made a well-documented argument that, during the 1870s and 1880s, Supreme Court pursued a consistent jurisprudence that protected black rights under an approach that was centered on the power of Congress to protect against "state neglect." PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (New York: Cambridge University Press, 2011). I am sympathetic to her approach, but I differ somewhat from her in emphasizing federalism, and in my own belief that Bradley and his colleagues were in fact largely abandoning black rights in the South, and probably understood themselves to be doing exactly that. For documentation of the effect of his *Cruikshank* ruling on the spiraling white supremacist violence, see Pope, *Snubbed Landmark*, at 412–15.

[44] The cases are sometimes cited as elaborations of the state action doctrine, but the cases are almost all about federalism. In the Colfax Massacre opinion, Chief Justice Waite ruled that the defendants had been indicted for what were, essentially, state law crimes and that the indictments were not worded carefully enough. In *United States v. Harris*, Woods invalidated part of the Ku Klux Klan Act of 1871, ruling that it covered state law crimes. In several other decisions, the Justices endorsed, in passing, Bradley's change of heart about the scope of the Fourteenth Amendment in his Colfax opinion. The opinions made it clear that the Justices believed that the Fifteenth Amendment reached the actions of private individuals, so long as those individuals interfered with voting rights because of race. They said little about the Thirteenth Amendment, save Woods' brief speculation that the Amendment might govern the actions of private individuals in *Harris*. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Ex Parte Virginia*, 100 U.S. 339, 346–47 (1880); *United States v. Harris*, 106 U.S. 629, 641 (1883).

[45] [untitled notes], box 18, folder 2, Bradley papers; Kate Masur, *Civil, Political, and Social Equality after Lincoln: A Paradigm and a Problematic*, 93 MARQUETTE L. REV. 1399 (2010).

[46] 109 U.S. at 22, 23. There is other language that would later be quoted by readers who wanted to find modern state action there, for instance, when discussing the Fourteenth Amendment: "[a]n individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror." But he added later that: "Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation," such as the Thirteenth Amendment.

[47] 109 U.S. at 17; Whiteside, Justice Joseph Bradley, at 259–61.

[48] Trial Record, *Bell v. Maryland*, 29, 33, 37.

[49] KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 220–27 (Princeton: Princeton University Press, 2005).

[50] IRONS, COURAGE OF THEIR CONVICTIONS, at x. For my own thoughts on this trend, see Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018, 1034–36 (2012).

[51] Trial Record, *Bell v. Maryland*, at 9, 10, 23.

[52] Trial Record, *Bell v. Maryland*, at 9.

[53] The following two paragraphs rely on: Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. L. REV. 1283 (1996).

[54] *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858); *Wood v. Leadbitter*, 153 Eng. Rep. 351 (Ex. 1845); *Hurst v. Picture Theaters Ltd.*, 1 K.B. 1 (1914).

[55] There were cases involving common carriers such as railroads, where the Maryland courts stated that segregation (but not exclusion) was permissible. But these were common carrier cases, which is why Judge Thompsen struggled with the question of the general rule for businesses open to the public. *See Hart v. State*, 60 A. 457 (Md. 1905).

[56] *Slack v. Atlantic White Tower System*, 181 F. Supp. 124 (D. Md. 1960).

[57] *Slack*, 181 F. Supp. at 125–28; *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960); *Drews v. Maryland*, 167 A.2d 341 (Md. 1961). The Maryland courts even invalidated Baltimore's first civil rights ordinance, on the basis that it conflicted with the state trespass law. Responding to the decision, the state legislature passed the state civil rights law and granted Baltimore authority to re-enact its own civil rights ordinance. MD. DAILY RECORD, Feb. 4, 1963; David S. Bogen, "Race and the Law in Maryland" 217 n. 30 (unpublished manuscript).

[58] BALT. SUN, Feb. 5, 1957; Slack, 181 F. Supp. at 126 n. 11; MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 152–53 (Princeton: Princeton University Press, 2000); Bogen, Race and the Law in Maryland, at 217. This is not to downplay the continuing battle for meaningful desegregation, as well as the segregationist sentiment in Baltimore and many parts of the state, particularly the rural Eastern Shore, which has been well documented. *See* LEE SARTAIN, BORDERS OF

EQUALITY: THE NAACP AND THE BALTIMORE CIVIL RIGHTS STRUGGLE, 1914–1970 (Jackson: University Press of Mississippi, 2013); C. FRASER SMITH, HERE LIES JIM CROW: CIVIL RIGHTS IN MARYLAND (Baltimore: Johns Hopkins University Press, 2008). It is only to say that the formal legal rules being argued about in the sit-in cases were changing.

[59] *Slack*, 181 F. Supp. at 126–27.

[60] BALT. MAGAZINE, Mar. 1997, at 46; Balt. SUN, Jan. 3, 1980, at A10; *id.*, June 3, 1980; *id.*, Oct. 24, 1996; *id.*, Oct. 27, 1996.

[61] *See, e.g.*, THE CONSTITUTION AND AMERICAN LIFE; Mack, *Law and Local Knowledge*, at 1034.

[62] BALT. AFRO-AMERICAN, MAY 11, 1991; BALT. SUN, Nov. 13, 1994; *Tributes to Chief Judge Robert M. Bell*, 72 MD. L. REV. 1077–1144 (2013).

Mary Beth and John Tinker and *Tinker v. Des Moines:* Opening the Schoolhouse Gates to First Amendment Freedom

KELLY SHACKELFORD

One of the most famous phrases from a U.S. Supreme Court decision comes from *Tinker v. Des Moines Independent Community School District.* In its majority opinion, written by Justice Abe Fortas, the Court said:

> It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Tinker is not only one of my favorite cases, but a case I use every week in my work defending religious liberty in America. Some people might ask, "How does a group that does religious liberty rely so heavily on a free speech case?" The answer is that it's very difficult to exercise your religious freedom if you can't speak. So as you might imagine, free speech is very important to me. And in the schools when you're fighting a religious freedoms' case, *Tinker* is the main case to cite because of that precious right to free speech.

But how did the Tinkers get to the chamber of the U.S. Supreme Court? That is crucial to understand.

* * *

In 1965, despite "Bonanza" and "Gomer Pyle" being the number one shows on television, it was a very tumultuous time. Martin Luther King and 2,600 others were arrested in Selma, Alabama. Malcolm X was shot and killed. There were riots in Watts, where thirty-four people were killed, 1,000 people were injured, unrest lasted over six days, and 4,000 people were arrested. It's also the time when the Vietnam War started. By the end of 1965, almost 190,000 American troops were in Vietnam. So in November of that year, it probably wouldn't surprise you to find out that a large number of people were

gathering for a demonstration, a march to the White House, to get our troops home, to get out of the war.

And as his mother announced that she was going to the march, fifteen-year-old John Tinker said, "I really want to go too." And that's really where this whole case started.

Who was this family, the Tinkers?

They had a long history of involvement with civil rights and demonstrations. If you look at that history, for instance, you find that Leonard Tinker, their father, grew up in a conservative community in Hudson, New York, and was a devoutly religious man. In fact, he met his wife Lorena at seminary. And this devout religious background led him to some conclusions in his life: a very strong Quaker-like anti-war pacifism and a commitment to racial equality. And as a Methodist minister, that caused some problems.

When he was in Atlantic, Iowa as a pastor, he stood with the only black family in town and their right to go to the community swimming pool. That ended up costing him his pastorate, and he was moved to Des Moines.

In Des Moines, when he and his wife would invite black couples to their church, *that* caused trouble as well. Eventually John Tinker took a leave of absence from the Methodist church and accepted a position that he really loved, the Secretary of Peace and Education of the American Friends Service Committee. This is a Quaker group that's committed to peace and anti-war activities. That led him to speak at churches all around. And when he traveled, he would take his children, and they would see what he was talking about. So, in fact, the Tinkers had been standing up for racial equality and what they believed for many years—with their children.

Don't miss that. When Dr. Martin Luther King Jr. came through town, he actually talked to Lorena and he said, "Aren't you concerned about the danger to your children when you take them to these things?" Dr. King was concerned about his own children and their safety. And Lorena answered him, "Well, number one, we're trying to pass along our values to our children. Number two, if the issue is serious enough, I just don't see any way to avoid this." And Martin Luther King agreed. He said, "Sadly," but he agreed.

You might think that, because of the trouble Leonard experienced for his beliefs and his positions, he was the outspoken one between he and his wife, but you'd be wrong! Lorena was quite a woman. A member of numerous liberal and civil rights groups, she also had her master's degree in psychology, and, by the time the *Tinker* decision was handed down, she had her doctorate. She taught at universities which, for a woman, many people thought was a little out of place, so she tended to be a little outspoken, ran into the politics of the day, and generated a lot of controversy. So, when she announced that she was going to this demonstration in Washington, D.C., at the very place where two years earlier, Martin Luther King Jr. had given his "I Have a Dream Speech," her son John Tinker said, "I want to go with you." And so, about fifty from the peace community in Iowa boarded buses and came to that demonstration in Washington, D.C.

Their time there was electric. One of the participants said, "I usually feel like I am in the minority, but there with 25,000 people, I felt like I was in the majority." So, it was really an uplifting time. Another family that was there included is a woman by the name of Margaret Eckhardt. Margaret was head of the local peace group in Des Moines, Iowa, and she took her son, Christopher. Christopher was fifteen, the same age as John. Christopher and John would end up being two of the three plaintiffs in the Tinker case with Mary Beth being the third. And this was the initiation.

On the way back, in the bus the boys discussed how they could keep the movement's momentum going—how they could bring this message back home. And what they landed on, eventually, was the idea of wearing a black armband to express their thoughts on

Christopher Eckhardt and John Tinker, who attended different high schools in Des Moines, met in March 1963 when their parents brought them to Washington, D.C. with their Iowa peace group for the March on Washington.

the war. So they decided to have a meeting when they got back.

The meeting was held December 11th on a Saturday, and about twenty-five to thirty people gathered and included a large number of people in this group whose official label was "The Liberal Religious Youth Group." This was a group connected with the Unitarian church. They made the decision to wear black armbands at school and they wanted two messages to come out of that:

First, they wanted to mourn people who had lost their lives in the war from both sides, all the casualties.

Second, they wanted to support a Christmas truce that had been proposed by Senator Robert F. Kennedy. And so that's the decision they made. They would do this on December 16. They contacted students at high schools and colleges, encouraging them to wear the armbands and to get that message out that day. One of the students who was there was Ross Peterson. And Ross actually submitted items to the Roosevelt Newspaper, which is one of the five high schools that was a part of the school district there. Ross was so excited that on Monday, when he got to school, he had an article written that let everybody know that on December 16 they were encouraged to wear armbands.

Things then got interesting.

As soon as the journalism teacher saw this, alarms went off in his head, and he went to the principal, and the principal went to the superintendent. The next thing you knew, there was an emergency meeting called, with *all five principals* of the local high schools attending, as well as the head of secondary education. And, at this meeting, they made the decision that they were banning, in all secondary schools, anyone from wearing an armband. That was the decision of the school.

When the newspaper caught wind of this and asked the Director of Secondary Education why they did this, he said, "Schools are no place for demonstrations."

That statement was a fairly interesting one, because just a year earlier the school had

Eckhard and Tinker organized students to wear armbands to school on December 14, 1965 to mourn the casualties of the Vietnam War and to honor Robert Kennedy's appeal for a Christmas truce. Above is an anti-war protest on a college campus.

advocated that students wear black armbands in order to express the loss of school spirit at the school! But, evidently, wearing a black armband *about the Vietnam War* was a bridge too far. So on December 15, the day before the big day that they were supposed to wear their armbands, an announcement came over the loudspeakers that the school had banned the wearing of armbands at the school.

When Mary Beth Tinker was in the eighth grade, she was thirteen years old. And that day, her math teacher spent half of his class talking about the evils of student protest, which doesn't seem like it has much to do with math. He ended by saying that any student who wore an armband in his class would be thrown out of the room. That night, the students had to meet and decide what they were going to do. It was really a decision that each person had to make on their own.

As to what happened the next day, there is dispute about how many people wore armbands. The school says that there were five who were suspended. They say that there were seven total. The students say there were actually a lot more who wore armbands, but all we need to know is that there were three students who wore armbands who ended up being a part of a lawsuit in this landmark decision. Those students were Mary Beth Tinker, John Tinker, and Christopher Eckhardt.

Prior to 1965, John Tinker had never ever been in trouble at school. Certainly, he'd

never been suspended. The best description I saw was by his lawyer: John was "shy and Quaker-like." And in fact, John had said that if a student actually hit him, he wouldn't fight back—he really felt that maybe, if he wouldn't fight back, just maybe they would be his friend. And so this was the approach of John Tinker.

So, when he heard that the school principals had set out this new policy against wearing the armband, he felt like it wasn't really fair for him to wear his armband until the school board had a chance to do something about this. Like that bully on the playground, maybe the school board would reverse its policy. Maybe there would be an explanation. He wanted to be fair. So he decided he wouldn't wear his armband the next day, on the 16th.

Christopher Eckhardt was a different story. Christopher was in a different high school. He was at Roosevelt High School, whereas John was at North High School. Christopher was a Boy Scout, he was very popular, and was actually voted most likely to succeed. And Christopher went to school with his armband on.

He showed up with an overcoat; it was December in Iowa. But as soon as he got into the school and he took it off, he had already decided that he was going to immediately go to the principal's office because he knew he was violating a school rule. As he began to walk to the principal's office, the captain of the football team saw him, grabbed and tried to rip his armband off, and had some unpleasant things to say to him. And he responded in kind on his way to the principal's office.

When he finally made it to the principal's office, he met the vice principal, Principal Blackman, and the girl's advisor, Thelma Cross, and they proceeded to tell him that if he were to do this it would ruin his college admissions chances. *That no college would accept a protester.* That in fact Roosevelt High School would not even allow him back in if he insisted upon wearing his armband. And then Vice Principal Blackman said he would get, "a busted nose." At that point, Christopher felt intimidated and he began to cry, but he wouldn't take his armband off.

Picture the scene: he's crying, he's intimidated, he's scared. But he won't budge.

So then they picked up the phone to call his mother. The school officials asked her to tell Christopher to take his armband off. Well, they obviously didn't know his mother—the head of the Peace Organization in Des Moines. She said, "Not only am I not going to tell him that, but he has a constitutional right to wear his armband." Evidently, she was somewhat prescient about what was going to happen in the future.

Nevertheless, he *was* punished, and told, "You're suspended until you come back without it on."

Mary Beth Tinker, the eventual third student in the case, was thirteen years old, in the eighth grade. She was a top student, well liked, and decided on her own that she wanted to wear her armband that morning. Her father was somewhat hesitant at first and really didn't favor this display with either of his children. He didn't want to defy authority, but Mary Beth expressed her heart to mourn the

Mary Beth Tinker, who was 13 when she wore the black armband to school, was photographed with her mother, Lorena, who was a leader in the Peace Organization in Des Moines.

casualties and told him she really wanted to advocate for a truce in the war, just as Senator Kennedy had proposed. So he relented and agreed that she needed to speak her conscience in a respectful way.

She went to school and her initial experience was very different from Christopher Eckhardt's. Really no one had much to say during most of the day. A few people asked her why she was wearing the armband, and she got to explain the reason why she was wearing it. And one or two people said, "Hey, you're going to get in trouble." But there was no trouble—until after lunch when she went to math class.

The same teacher who had given the lecture against armbands for thirty minutes the day before immediately sent her to the principal's office. And she talked to the vice principal, who said, "If you'll just take your armband off you can go back to class." So she took her armband off and she went back to class.

It wasn't that she was caving on her principles or making some big decision, she was thirteen and he said, "Hey if you want to go back to class, take your armband off," and that's what she did. However, five minutes after she got back to class, the girls' advisor, Ms. Tarman, showed up and said, "You need to come back to the office." And when she brought her back to the office, she expressed her sympathy. She said, "I understand. My family has a Quaker background, so I totally understand what you're doing. But we have a rule here, you did wear the armband, and so you're suspended."

That night a number of students got together because this had been going on around the school district. They tried to contact the president of the school board, Ora Niffenegger, and an attorney. They actually succeeded after three or four different calls, and said to him, "We need to hold an emergency meeting." And his comment was that it was not "important enough" to hold any special meeting.

John Tinker, if you remember, was trying to be fair, was waiting for them to have their chance. When he heard that the school board considered this trivial and something they wouldn't even hold an emergency meeting to address, he made his decision right then to wear his armband the next day. So the next day in North High School, John wore the black armband. The problem is John was wearing a dark suit and his armband wasn't noticed by anyone at the beginning.

So, after gym class he put on a white shirt and immediately he got some, as he called, "not friendly" comments. And at lunch he endured some comments as well. But a football player came to his defense, telling other students, "Leave him alone. He has a right to his own opinions."

At that point, John went to the principal's office, and was told by the principal, "John you need to take your armband off." And he said, "I'm not going to do that."

They called his father to come and get him, and he was told that he couldn't come back to school until his armband was off. Those are the basic facts that you'll see behind the Tinker case.

Now, as an aside, the Tinkers also had two other children. They had Hope who was eleven years old, and they had Paul who was eight years old. One of these mornings, bounding down to breakfast with an armband on her arm, was eleven-year old Hope Tinker. And Leonard said, "Oh no, not you too, Hope." And she said, "Well Dad, I'm grieving the children who died in Vietnam. Shouldn't I grieve for children who were in Vietnam?" Well, Leonard knew at that point that he was had.

And so off to school that day went eleven-year-old Hope and eight-year-old Paul with their armbands on. Now, one of the fascinating things about this case is that the school had hastily passed the new armband policy and it only applied to secondary schools. They never even thought of the idea of trying to apply this to

elementary schools. So the younger Tinkers had violated no rule. One of the fascinating—and instructive—lessons of this case is how the controversy was handled by the teachers and the people at that elementary school.

Unlike the high school, they considered this a wonderful learning experience. And they actually taught the kids. What a concept. In Hope's class, somebody said, "Is she being unpatriotic?" And they said, "Oh, no. Let's talk about people having different beliefs." And then in Paul's class, they spent a long time, thirty minutes, talking about the First Amendment and what the right to free expression means—and why it's important in our country.

I believe if we would just do things like they did in the elementary school, our country would be a lot better, and I think this is one of the lessons of *Tinker*.

But the authorities didn't follow that course, and that had immense consequences.

* * *

The school board meeting was set for December 21. And this was not a normal school board meeting. Instead of twenty people, there were over 200 people, and there were a lot of opinions flying through the air.

One of the opinions was by a lawyer, an associate professor at Drake University Law School, who was representing the students at this point, by the name of Craig Sawyer. During his discussion, one of the school board members asked, "So, are you saying it would be okay if the kids wanted to wear Nazi swastikas on their arm if they came to school?" His answer was, "Yes, and a Jewish Star of David and the Cross of the Catholic Church and an armband saying 'Down with the School Board.'" Evidently, Mr. Sawyer wasn't looking to make friends on the school board!

The school board voted to postpone the vote and get legal advice. And about two weeks later, they voted five-two to uphold the ban, and to not move off that position. The controversy had started December 16. By January 22, just a month later, there had been twenty-two articles in the Des Moines newspaper and their afternoon newspaper. *The New York Times* had carried a very full story on this case, and it was on CBS Evening News.

They had gone national.

One of the fascinating things to me is this: if you research back and look at the letters to the editor and simply count who they are for and against, actually two-thirds of the letters to the editor supported the students in their right to wear the armband, despite people's view on the war.

That said, one of the unpleasant truths about many landmark cases, which unfortunately is true in this case as well, is the people who stand up typically have to pay a price for what they're doing, and that was the case with the Tinkers. They had red paint thrown at their house. They received hate mail. They endured nasty phone calls. There was a local radio talk show host who said that if anyone would go and physically attack their father, who was a devoted pacifist, he would defend them.

The persecution didn't stop there. John, despite being an excellent musician, was given a D in band. He wasn't allowed to march in the Memorial Day Parade, which is something that really hurt him. Mary Beth—and remember, Mary Beth is thirteen years old—received a call from a woman who said, "Is this Mary Beth?" And she said, "Yes." And she said, in these exact words, "I'm going to kill you." This should never happen to any thirteen year old anywhere. But it is the type of sacrifice that people tend to pay when they stand up in landmark First Amendment cases.

Despite the opposition, the families persisted, and one of the first decisions that they had to decide was: who would their lawyer be?

The decision was made by both the Iowa Civil Liberties Union (ICLU), who was helping them in the case, and the families. They felt that Professor Sawyer was a little bit

volatile and abrasive. So they turned to a young attorney by the name of Dan Johnston. They thought he had better organizational skills and negotiating skills, and, at twenty eight years old and fresh out of law school, he didn't charge very much. In fact, the ICLU was actually helping, mainly through one donor, to fund the case.

And so, young Dan Johnston became the lead attorney on what was to become one of the most consequential cases in Supreme Court history.

On the other side, the schools' attorney was a polar opposite and, if it had been a television show, the casting couldn't have been any better. His name was Allan Herrick. He worked for one of the biggest law firms in town, was almost seventy years old, and was a World War II veteran, who woke up and actually arrived at work every day at 6:00 am. To top it off, Allan Herrick was known, even at age seventy, to play a pretty mean game of racquetball. He was in very good shape, was very agile, and was very emotional about these issues. These lawyers were quite a contrast.

Dan Johnston filed his eight-page complaint in federal court and, in this complaint, he asked for an injunction on the grounds that the students had a right to free speech and that the injunction be in place to stop the restriction on their speech. He also asked for nominal damages of one dollar, because some of these people might graduate, and the case would go away if they did not ask for damages of a dollar. The answer filed by the school was three pages long. And thus started the case. In fact, from the filing of the compliant to the final decision of the Supreme Court, the *Tinker* case took three years, quite a bit quicker than typical cases these days.

The major argument made by the plaintiffs was that this was censorship under the First Amendment, and that the speech here was peaceful, it caused no disturbances and it was protected under the First Amendment. The main argument by the school was that schools have a duty to maintain order and discipline and that the discretion should be left with them and not the courts. The trial, which commenced on July 25, 1966, lasted two days. The main people who testified were the three plaintiffs, Christopher Eckhardt, John Tinker, Mary Beth Tinker, and a few of the school officials. There were no additional facts from what I have recounted except one main fact that was unearthed: the school's admission that it allowed political buttons on campus, allowed religious symbols to be worn at school, and even allowed students to wear Iron Crosses that were associated with Hitler's Third Reich.

So, in the closing arguments, Dan Johnston stood and said, in effect, it was hypocritical to allow political buttons and even Iron Crosses, but to ban armbands, and that here there was no evidence given to show any disruption at the school from what these children had done. The school said that schools have a right to set rules for order, and schools are no place for demonstrations.

Then something occurred that was, in my view, one of those amazing turns of events that typically happen in every case that is remembered as "landmark." You have to have either a little luck or divine providence go your way.

The occurrence? At the same time the *Tinker* trial was happening, unbeknownst to anybody in the case, another case was being decided out of the Fifth Circuit Court of Appeals called *Burnside v. Byars*. In this case, out of Mississippi, more than thirty students had worn freedom buttons as part of the Civil Rights Movement. The principal told them that freedom buttons were banned from now on because, "It might cause commotion or disruption." The Court of Appeals issued a ruling. It said that students had a right to free speech in the schools and that, for the school to interfere with that right, there had to be evidence of a material and substantial interference with the order and discipline of the school. Otherwise, free speech should win.

Remember that ruling, because it was on a collision course with *Tinker*.

The judge in the *Tinker* case was a man by the name of Judge Roy Stephenson. He had been a high-ranking officer in World War II. He received the Silver Star and the Bronze Star. He was probably not who Dan Johnston was hoping for to decide the case with his clients, who were speaking out against the war. And so, five weeks after the trial, Judge Stephenson issued his ruling for the school. But in this ruling, he now had to deal with the *Burnside* decision. So, in his decision, he said that a disciplined atmosphere of the classroom wins out over any sort of student rights, that schools shouldn't be limited to restricting speech when it might cause a material and substantial disruption, and that schools should have a wide discretion. And, as if to leave no doubt, he went on to say that *Burnside*, "is not binding on this Court."

Dan Johnston lost the case, but he really was pretty cheery. He felt like the case was set up well for appeal and he filed it. And on appeal, he argued that armbands were banned, that political buttons and Iron Crosses weren't, and that there was no disruption from anything that happened. The school filed its response and said that the school should have discretion, and that it was reasonable to assume armbands might lead to disturbances of some sort. The oral argument was set for April 1967, in the Court of Appeals in Saint Louis.

Unlike today, there were no transcripts of the oral argument, and no media covered the case. So nobody is sure what happened in that argument. The only thing anybody remembers is that one of the judges asked a funny question of Dan Johnston. He said, "If you win, are you really going to insist upon getting your dollar?" That's all anybody remembers. But at least, after all these hundreds of hours of work and briefs and depositions and trial, they were going to get an answer.

Or so they thought. The argument was before a three-judge panel of the Court of Appeals, and the Court issued no decision and said instead they were resetting it for *en banc*, because they believed it was too important for only a limited panel of the Court to decide.

Thus it went to all eight of the Court of Appeals judges, and reargument was set five months later. Again, there was no transcript, so we have no record, but the newspaper covered at least one question in this oral argument. And it was a question asked by one of the judges parroting an argument of the school, which is, "Even if they can't wear the armbands, we do discuss the war and they'll have their opportunity to express themselves at certain times." And he was asked, "Well why isn't that sufficient under the First Amendment?" Dan Johnston's response was, "What if President Johnson only allowed criticism of his policies on Fridays?" I think he made his point pretty well.

The decision came down a month later by the eight judges. And, again, you would think, after all this time and all this effort, we're at least about to get some analysis. Instead, let me read you the decision: "The judgment is affirmed by an equally divided Court." That's it. No analysis, no discussion, four–four, Johnston tied and, like the phrase kissing your sister, it was worse because that meant he still lost. The decision from the lower Court, a loss, still stood.

Now, what that really meant was that the decision below, which said *Burnside* is not binding on us, had set up a beautiful circuit split. And, for those of you who are not attorneys, the most likely way the Supreme Court takes your case is when one Federal Court of Appeals says one thing and when another Federal Court of Appeals says another, since we don't want, in this country, the Constitution to mean two different things in two different jurisdictions.

Well, as this case went up to the Supreme Court, Dan Johnston had some help. The national ACLU had attorneys in New York City who offered to help write much of his

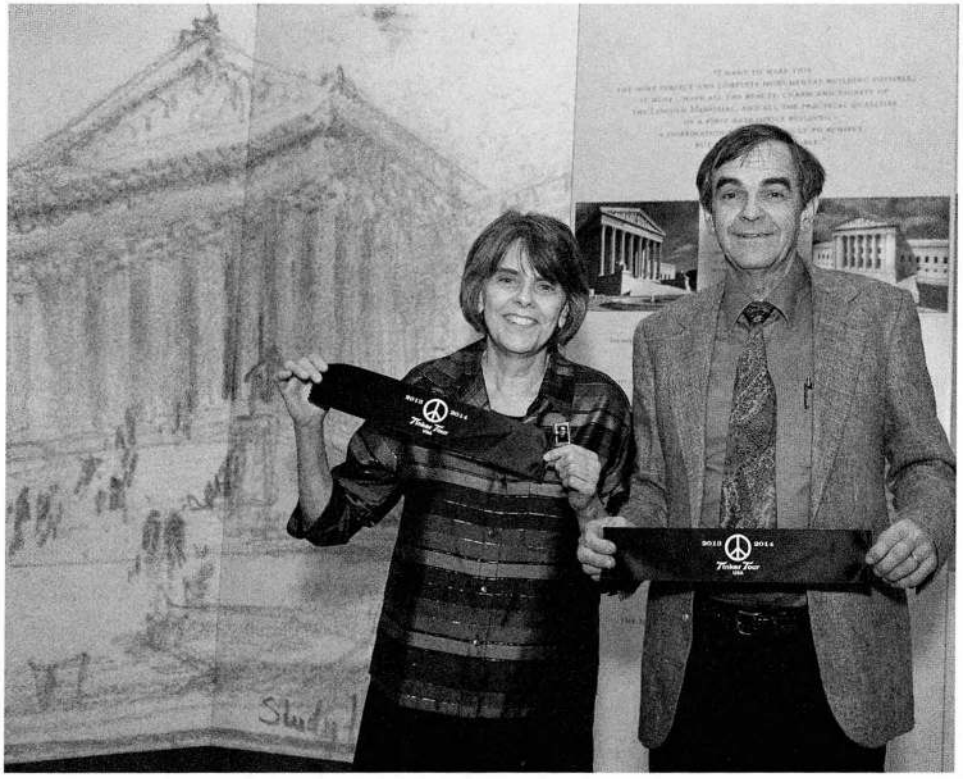
briefing, and they did—two men: David Elenhorn and Melvin Wolfe. And, actually, Dan Johnston was glad to have this help, because he was, at the time, running for attorney general of his state. And they actually did a couple of very bright things. First, they brought out the students' background as Quakers and Unitarians, pulling in a religious background that would make them more mainstream and not appear as outliers or protesters. They also pointed out very clearly the circuit courts split, which presented itself. And so, on March 1968, the Court granted *certiorari*. The case was going to the Supreme Court.

* * *

The Court's vote to accept the case was a five–four split. We know this because of the much later released papers of retired Justices, and in fact, in that five–four vote, two of those Justices would change their opinion by the time they got to the final opinion in the case. The plaintiffs argued similarly as they had before, but with a little more refinement, that the student expression here was dignified, it was orderly, it was peaceful and there were no disruptions. And so, under the First Amendment, they said, they should win.

The school said that chaos was bursting out all over the country, and, in fact, that was true. This was the height of the Vietnam War protest era, and chaos was occurring across the country. Based on that, the school district asserted, their prompt action might have avoided chaotic problems at the school.

One other event that was fairly interesting was that one group filed an *amicus* brief. And this group is called the National Student Association. This is a group that Dan Johnston has connection with. It was, in my opinion, a



Mary Beth and John Tinker attended Kelly Shackelford's lecture at the Supreme Court, along with many other friends and family.

mistake and shows a little bit of Johnston's newness to Supreme Court strategy. Probably the last thing you want to do if your clients were peaceful, orderly and even silently expressing their beliefs via an armband, is to connect yourself with college protests and pictures of TV mayhem with water hoses and bullhorns and arrests. But Johnston was thrilled that the National Student Association filed their briefs saying that this case would affect protests and demonstrations in college campuses all over country.

The all-important oral argument itself was on November 12, one week after the new president, Richard Nixon, was elected. And that week, every leading story in every newspaper was Vietnam. So it was front and center. The Tinkers were all there for the oral argument except for John, who unfortunately missed his flight because of weather, and didn't get there in time to see the argument. But one of the decisions the Tinker team had to make was who was going do the argument.

The attorneys from New York with the ACLU had much more experience, but the Tinkers and the Eckhardts felt that Dan Johnston had been with them for three years, he had done his work, he wanted to argue it, and they felt he had earned that right. And so Dan Johnston stepped into the batter's box for the argument.

He was immediately peppered with nineteen questions in three minutes from Justice Byron White. By the end of that grilling, he was essentially admitting that it *was* a disruption to other students' mental state when they saw an armband in the classroom. This was dangerous water indeed.

Seeing that he was a little bit in trouble, the Chief Justice, Justice Earl Warren, and Justice Thurgood Marshall, came to his rescue. Justice Marshall's "question" wasn't even as much a question as it was a statement. The armband policy—the ban—wasn't limited to the classroom, was it? He was right, and Johnson got the point: the policy says you can't wear an armband *anywhere*. Not in the classroom, not on the school grounds, not on the playgrounds, not anywhere. It helped Johnston get his footing, as he did an excellent job in the balance of the argument.

Now it was Allan Herrick's turn.

Herrick got up on behalf of the school and Justice Marshall was fairly aggressive, which is probably not too surprising. This was Thurgood Marshall, the man who argued *Brown v. Board of Education*, famous as a civil rights attorney before he came onto the Court, and, if anything was important in the Civil Rights Movement, it was the right to peaceful protest and demonstration. So it's not surprising that he asked a very pertinent question. When the school's attorney was trying to argue that this could be a disruption, Justice Marshall said, "Exactly how many people wore these armbands?" The answer: five were suspended, but there were rumors that it could be as much as seven. Marshall's statement was, "So the school board was afraid that *seven students* wearing armbands would disrupt 18,000 people?"

That was the favorite moment of the day for a Tinker family. The rebuttal next was fairly rough, and one of the surprises to Johnston was that Justice Hugo L. Black, normally seen as a liberal who could be counted upon within the give and take in the Court, was very hostile to their side.

On Friday of that week, three weeks after the argument, the Court met in secret and voted.

We know what happened today because, again, we have the Justices' notes that have been released since that time, and, in this vote, the Court voted seven–two in favor of the Tinkers. Two votes had switched from the earlier decision to take the case.

When the discussion started, Chief Justice Warren said, "I think we should decide this based upon the equal protection grounds that they allow political buttons, but they wouldn't allow armbands." Justice Douglas said, "No. I think it should be much

broader protection than that." Justice Black, from Justice Marshall's notes, said: "Children are being allowed to run riot." Justice White then suggested a narrower ruling for the case—that they say that schools had the right to control, discipline and order in the school, but in this case there was no real proof of any disruption and therefore the school lost the case.

That argument won the day.

The writing of the decision was given to Justice Abe Fortas. And this is fairly interesting because Justice Fortas had actually recently written a very significant decision on the rights of minors that I think had a large impact on the decision that was written here. He wrote the decision of *In re Gault*. At fifteen years old, when his parents were at work, this boy was pulled out of his home and taken into custody for allegedly making an obscene phone call that he said he didn't make. He was given no right to an attorney. He and his family were given no identification of the charges against them, and there was no right to a transcript or an appeal, and he was given no right to confront his accuser. In fact, his accuser was told, "*There's no reason for you to come down to the hearing.*" Well, when this made it to the Supreme Court, the Supreme Court ruled almost unanimously that this was unconstitutional and Justice Fortas wrote the opinion. He wrote, "Under our Constitution, the condition of being a boy, does not justify a kangaroo court." And so, in this decision, Justice Fortas gave minors their first rights of protection under the Fourteenth Amendment and due process. And now he was about to give a decision giving them their first protections in the schools. So he was well prepared.

The famous quote that most any law student knows from *Tinker* is this part of his opinion, "It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." He went on to say:

> In our system, state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.

Ensuring that restrictions on speech would be narrow, Fortas wrote, "In our system, undifferentiated fear or apprehension of a disturbance is not enough to overcome the student's rights to free expression. Fear that something might happen, is not a basis for quelling all student speech."

John Tinker heard about the decision when a reporter at school contacted him, and he was thrilled. Mary Beth Tinker heard about it when she was a high school student in Saint Louis. And she was actually fairly embarrassed because she became a celebrity at her new school, which was a little discomforting to her. Leonard Tinker was, at the time, in a peace conference in Paris, France. So, two weeks later, when the Tinkers were first all together, they celebrated by eating ice cream and drinking ginger ale.

The opinions on the *Tinker* opinion were strong and diverse. I'll give you one example of each. Professor Theodore Deno wrote, "A society which is too proud to listen to its children, too afraid they might disturb it, is probably a society too afraid to look itself in the eye. During the course of events in history, there was probably precious little difference between Mary Beth Tinker's message on the black armband, and the twelve-year-old boy who spoke to the elders in the temple." He's referring, of course, to Jesus. "This time, the men in black robes got wise." Not so complimentary were some of the letters that came to the Court. One of my favorites, and I think emblematic of what was sent, was this one: "If my kids ever try to take advantage of your decisions when they're in high school or college, they'll find out who the real Supreme Court is." I think the implication was that the real Supreme Court would be Dad.

Over the years, *Tinker* has gone through many attacks. In fact, there are attempts to reduce the strength of *Tinker* in circuits all over the country. But it's still the law to this day. After the decision, Mary Beth Tinker continued to be active in many peace and anti-war and civil rights efforts, and, because of her parents' experience as professionals and educated people, they were harassed a lot because of their positions and what they did. She decided, at least in the beginning, to stay away from higher education, and she actually liked and became a piano technician, which has a lot less politics than these other positions. But, after a number of years, she decided to go back and she got her nursing degree. And she just recently retired from hospital nursing. But, she is still very, very involved in many activities. In preparing this article and the lecture upon which it was based, I asked her to send me an email, and the list is so long, my first thought was, "She reminds me of her mom."

Her brother John continued his anti-war activities in college, and he actually referred to himself as majoring in protest when he was in college. Afterwards, he held numerous varied and most fascinating jobs. John is married now and has two children of his own, thirteen and nine. And there are situations that occur where a child is all by himself or herself facing a school district, and they'll get a call out of nowhere. From John Tinker. Just calling to support them. So he's still standing up, alongside students, around the country.

Editor's Note: At this point in the author's lecture, Mary Beth and John Tinker were asked to stand and received a standing ovation in the Courtroom.

* * *

So what are my takeaways from this account?

My first takeaway concerns children and their families.

One of the arguments often made against the *Tinker* decision is that kids should be seen and not heard. And that's really a misnomer and misapplication in such First Amendment cases involving students. These cases don't involve kids by themselves; they are families. A child can't bring a lawsuit. They have to have a next friend, and it's their parents.

Freedom cases are frequently about families who have a different belief system from the majority who are not being allowed to express their beliefs—and indeed *punished* for holding or living out those beliefs. And this is very important to our future. Why?

Because our children are not children of the state, they're children of their parents. American society is comprised of millions of little governments called families, and they're each producing unique products, young adults, with their own philosophical, moral, religious and political belief systems. And then they compete in the marketplace of ideas, and we think that that's the best way to arrive at truth and what is best.

Second, there's a great story about something that happened after the *Tinker* decision that I believe says so much about our country. And that is that Dan Johnston, two years after the decision, not very long, was invited by Roosevelt High School—the same Roosevelt High School against which he led the lawsuit—to be its commencement speaker!

I believe that says a lot about maturity, about unity and about coming together, and it shows a grown up America that sometimes we don't always see but that we all desire to be.

Last, as Thomas Jefferson and John Dickinson wrote in 1775, we must be, "With one mind, resolved to die free men, rather than to live as slaves."

John and Mary Beth and I probably share very few political beliefs. But we believe in freedom. And we lock arms in that. And isn't that what this country is all about?

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The Clerks of the Four Horsemen (Part I)

BARRY CUSHMAN

Recent years have witnessed a flowering of scholarship concerning the Supreme Court clerkship. Yet most of this literature focuses on the more modern Justices. And for the Justices who served in the years between Justice Horace Gray's appointment in 1882, when the Supreme Court clerkship was created, and Franklin D. Roosevelt's appointment of Hugo Black in 1937, the literature leans heavily toward those generally thought to be "liberal": Oliver Wendell Holmes, Jr., Louis D. Brandeis, Harlan Fiske Stone, and Benjamin N. Cardozo.

This tendency is not surprising for several reasons. First, Holmes, Brandeis, Stone, and Cardozo are of particular interest, as they are typically regarded as among the greatest Justices of the twentieth century. Second, the extensive biographical literature on each of them, as well as the large collection of private papers left by all but Cardozo, gives the researcher ample material with which to work. And third, there is a substantial remembrance literature generated by their former clerks.

Law clerks to the early twentieth century Justices known collectively as the "Four Horsemen"—Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler—thus have received little attention. With the exception of Sutherland, these more "conservative" contemporaries of Holmes and Brandeis are typically rated as judicial "failures."[1] The biographical literature on each of them is not nearly as thick,[2] and the remaining private papers are neither as extensive nor as revealing.[3] And only two of the thirty-five young men who clerked for these Justices ever published a recollection of his time served in chambers.

The more notable of these remembrances was that of John Knox, who clerked for Justice McReynolds during the 1936 Term.[4] Knox was born in Des Moines, Iowa in 1907, and raised in the Chicago suburb of Oak Park, Illinois. He received his undergraduate degree from the University of Chicago in 1930, his L.L.B. from Northwestern University in 1934, and an L.L.M. from Harvard in 1936. He had begun to write letters to Justice Holmes during his lonely and miserable adolescence, and started to favor other Justices with his correspondence during his years as a law student. Among these was Justice Van Devanter, and when McReynolds informed his colleague in late 1935 of his need

for a clerk for the coming term, Van Devanter arranged an interview for his persistent young pen pal. Knox kept a diary of his experiences during his clerkship year, and between 1952 and 1963 converted the diary into a 978-page typewritten memoir. He tried without success to have the memoir published, and in 1978 deposited the manuscript with several libraries. There it languished in obscurity until 2002, when Professors Dennis Hutchinson and David Garrow brought out a splendid edition published by the University of Chicago Press.[5]

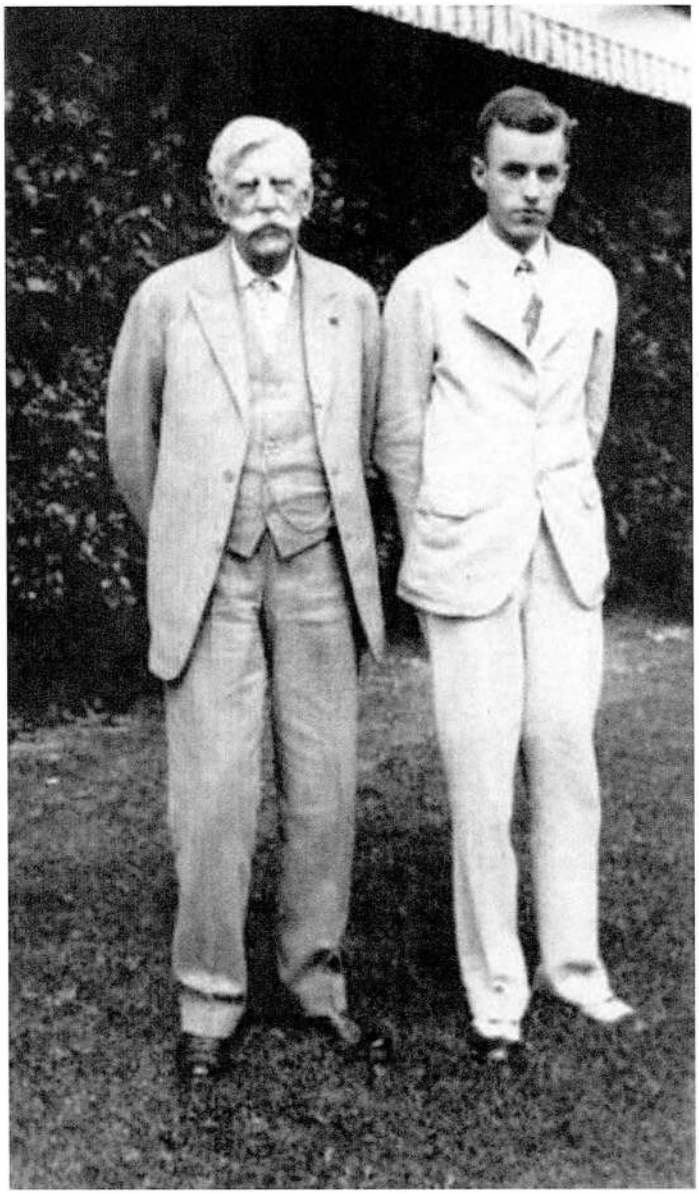
Knox's memoir is largely an exposé of McReynolds' tempestuous and cruel mistreatment of his messenger, Harry Parker; of his maid and cook, Mary Diggs; and, of course, of Knox himself. Knox reported that all of the employees of the "sadistically inclined" McReynolds "lived in a reign of terror and were crushed under foot without any hesitation on his part."[6] By the end of his clerkship, Knox had concluded that McReynolds was "the most contemptible and mediocre man I ever came into contact with," "unbelievably stingy," and "gravely unbalanced." His "selfishness and vindictiveness" were "unbelievable."[7]

There is good reason to believe that Knox's unpleasant tour of duty clerking for McReynolds was representative of the Justice's treatment of his other clerks.[8] On the other hand, we can be reasonably confident that Knox's experience was not representative of the experiences of those who clerked for Van Devanter, Sutherland, and Butler. For example, when Arthur Mattson, who clerked for Van Devanter for five years, was preparing to leave his post to pursue a legal career in New York, he wrote to his boss:

> You have been so good to me during the nearly five years I have been in your employment, and my association with you has been such a fine thing in my life, that I would be ungrateful not to tell you of my deep appreciation. Your uniform kindness, consideration, and patience is something I shall never forget. You have been at once a kind and just employer and a good father to me. Perhaps I can best show my appreciation by striving always in the years to come to reflect your kind manner and sweet disposition, your noble character and your profound knowledge of law and men. They will be treasured memories of mine always.[9]

Three of Van Devanter's other clerks remained with him for stretches of three, nine, and eleven years, which suggests that they, too, found the association agreeable.[10] Like Van Devanter,[11] Sutherland was uniformly regarded as a nice fellow,[12] and the fact that each of his four clerks remained with him for multiple terms similarly suggests that they also found the experience personally rewarding.[13] Butler, who employed two law clerks in his chambers at all times, retained one of them during his entire tenure at the Court, and another for nine terms.[14] Here again, the likelihood of job satisfaction seems high.

Knox's duties while working for McReynolds also were not typical of the duties of all of the Four Horsemen's clerks. The tasks that McReynolds expected Knox to perform were more secretarial than legal. They included typing, taking dictation, responding to social invitations, and answering the telephone. The only lawyerly duties that Knox undertook throughout the year were the preparation of summaries of petitions for *certiorari* and some occasional legal research. McReynolds never asked Knox to produce "lengthy typewritten opinions regarding various points of law."[15] Only once, early in the term, did McReynolds ask Knox to write a draft of a majority opinion. Knox worked at the task feverishly while McReynolds was away from Washington for a few days, and upon McReynolds' return, proudly presented his work product to his boss. McReynolds



John Knox (right), began writing to Oliver Wendell Holmes, Jr., (left) during his lonely adolescence and visited him at his summer home in Beverly Farms in 1930. In law school, Knox began corresponding with other Justices, including Willis Van Devanter, who recommended him as a clerk to James C. McReynolds in late 1935.

responded by ostentatiously tossing the opinion into the wastebasket.[16]

By contrast, Butler's long-term clerk John F. Cotter "wrote first drafts of many opinions, expressing the justice's views so accurately that the drafts often required few changes."[17] Butler's clerks also summarized petitions for *certiorari*, and the Justice encouraged his clerks to offer criticism and suggestions as they assisted him in the research and writing of opinions.[18] William D. Donnelly, who served as a Butler clerk for nine years, described his duties as also including "the preparation of notes . . . on some of the argued cases prior to the conferences of the Court," and assistance

"in the writing of opinions in assigned cases," including "[p]reparation of detailed statements of fact from the records," "analysis of briefs," and "research on points not briefed by the parties."[19] Not much is known about the duties of clerks for Justices Van Devanter and Sutherland,[20] but it does appear that the clerks of at least one of the Four Horsemen were not simply legally trained stenographers, but instead shouldered substantial lawyerly responsibility.

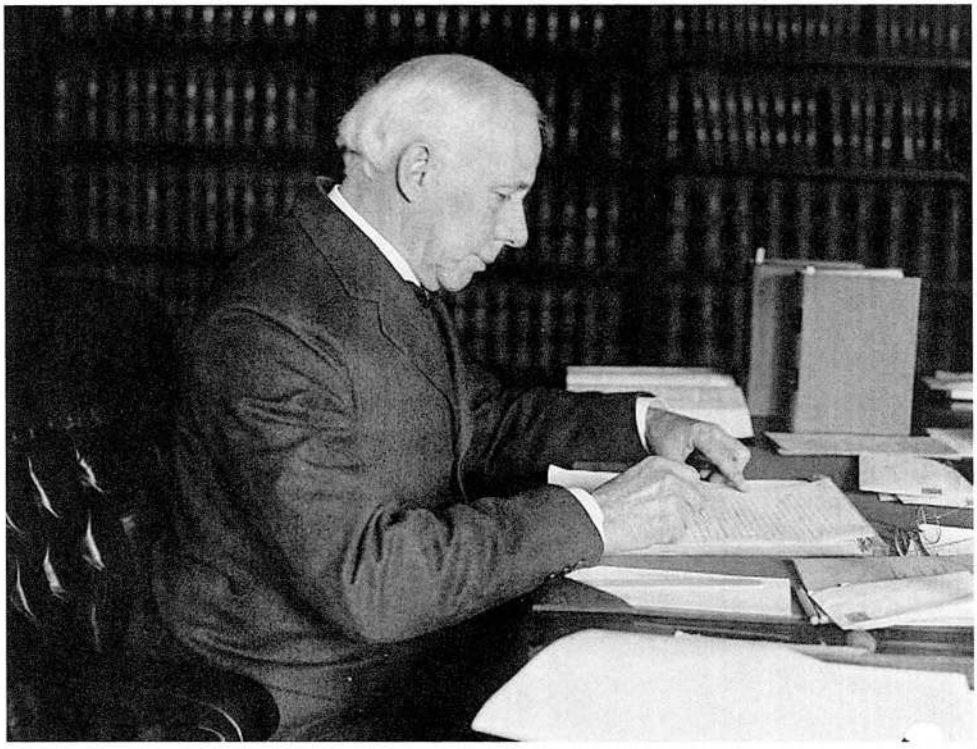
There is an additional respect in which the Knox story was not representative, and it is to the illumination of that dimension that the balance of this article is devoted. One reason for the greater interest in the men who clerked for Holmes, Brandeis, Stone, and Cardozo concerns the highly successful careers they pursued following their clerkships. Many of these alumni clerks rose to positions of great distinction in law practice, business, law teaching, or government service.[21] Consider just a sample from the list of Holmes's alumni: Francis Biddle, Attorney General of the United States;[22] Tommy Corcoran, drafter of key New Deal legislation and Franklin Roosevelt's right-hand man;[23] James H. Rowe, assistant attorney general and Franklin Roosevelt's administrative assistant;[24] H. Chapman Rose, undersecretary of the treasury and partner with Jones Day in Washington;[25] Harvey Hollister Bundy, assistant secretary of state and chairman of the Carnegie Endowment for International Peace;[26] Irving Olds, chairman of the board of directors of United States Steel;[27] George L. Harrison, president of New York Life Insurance Company[28] and the Federal Reserve Bank of New York, and chairman of the board of RCA;[29] Augustin Derby, Harvard law professor;[30] W. Barton Leach, Harvard law professor;[31] Arthur Sutherland, Harvard law professor;[32] Mark DeWolfe Howe, Harvard law professor;[33] Stanley Morrison, Stanford law professor;[34] Chauncey Belknap, founding partner of Patterson, Belknap and president of the New York State Bar Association;[35] John Lockwood, a partner at Milbank, Tweed and chief legal advisor to the Rockefeller family;[36] Donald Hiss of Covington & Burling;[37] Lloyd Landau of Root, Clark, Bruckner & Ballantine in New York;[38] Erland F. Fish, president of the Massachusetts State Senate;[39] Laurence Curtis, "an influential member of the Massachusetts Senate" and Republican Congressman from Massachusetts;[40] and Justice Day Kimball of the Supreme Court of Bermuda.[41]

The Brandeis alumni include Dean Acheson, Secretary of State;[42] Judge Henry Friendly of the United States Court of Appeals for the Second Circuit;[43] Calvert Magruder, Harvard law professor and later Chief Judge of the United States Court of Appeals for the First Circuit;[44] James M. Landis, dean of the Harvard Law School and chairman of the Securities and Exchange Commission;[45] Harry Shulman, dean of Yale Law School;[46] Henry Hart, Harvard law professor;[47] Paul Freund, Harvard law professor;[48] Willard Hurst, Wisconsin law professor and the dean of American legal history;[49] Nathaniel Nathanson, Northwestern law professor;[50] David Reisman, Harvard sociologist;[51] Thomas Austern, of Covington & Burling;[52] Adrian Fisher, general counsel to the Atomic Energy Commission;[53] and W. Graham Claytor, president of Amtrak.[54]

Stone's clerks include Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit;[55] Judge Eugene Nickerson of the United States District Court for the Eastern District of New York;[56] Herbert Wechsler, Columbia law professor;[57] Walter Gellhorn, Columbia law professor;[58] Louis Lusky, Columbia law professor; Milton Handler, Columbia law professor;[59] Warner W. Gardner, founding partner of Shea & Gardner;[60] Alfred McCormack, a partner at Cravath and Director of Intelligence in the Military Intelligence Service during World War II;[61] Alexis Coudert, of Coudert Brothers;[62] Wilbur Friedman, chair of the tax department at

Proskauer Rose;[63] Howard C. Westwood, a partner at Covington & Burling;[64] Adrian Leiby, a partner at LeBoeuf, Lamb;[65] and Thomas Harris, chairman of the Federal Election Commission.[66] Cardozo's Supreme Court career was much briefer, but he nevertheless could claim as alumni Joseph Rauh, Jr., a leading civil rights lawyer and for years the national chairman of Americans for Democratic Action,[67] and Alan Stroock of Stroock, Stroock & Lavan.[68]

Consider, by contrast, the post-clerkship career of John Knox. After leaving McReynolds, he failed the bar examination three times before finally passing the Illinois exam in March of 1939. Following his second failure, he was fired from Mayer, Meyer, Austrian, & Platt after less than a year of employment. He then parlayed a family friendship into a job with the Chicago firm of Loesch, Scofield, Loesch, & Burke. When the firm began to crumble in 1942, Knox began a two-year stint at the War Production Board before being canned in late 1944. By early 1945 he was in New York working in the war-depleted ranks of Cravath, Swaine, & Moore, but was let go in less than two years. For most of 1947 he negotiated and drafted theatrical contracts for the Marquis Georges de Cuevas, the grandson-in-law of John D. Rockefeller, Sr. When that work dried up in November, Knox returned to Chicago and spent the next nine years trying unsuccessfully to save his family's mail-order business selling self-help books to salesmen. In 1956 he took a job as a claims adjuster for the Allstate Insurance Company, and remained in their employ until his retirement in 1973. For the remainder of his life he lived in poor health and straitened financial circumstances. He died in 1997 at the age of eighty-nine, a lonely and childless bachelor.[69] In 1962, at the age of fifty-five, Knox wrote in his diary, "[i]n many ways I am a pathetic failure."[70] The following



Willis Van Devanter employed seven clerks during his twenty-six years on the Court, two of whom came from his native Wyoming. Four ended up making careers in the Washington civil service, one enjoyed a successful practice on Wall Street, and one lived an eventful life on the Wyoming frontier.

year he complained that he had "no money, am thousands of dollars in debt and just hanging on to the status quo by a thread."[71] As Professors Hutchinson and Garrow put it, Knox "had become a pudgy, sour, and chronically ill middle-aged man with no career accomplishments and bitter recriminations, mostly directed at himself."[72]

How representative was Knox's post-clerkship career? Until recently, it was not easy to know. But the proliferation of online sources now has made it possible to reconstruct at least the outlines of the lives of the men who clerked for the Four Horsemen. From these and other biographical data one can discern that most of their clerks went on to enjoy successful careers, apparently happy family and social lives, and active participation in the affairs of their communities. To be sure, none of them became Attorney General of the United States or Secretary of State. But one is nevertheless impressed by how entirely uncharacteristic was the life of John Knox.

The Van Devanter Clerks

Justice Van Devanter was appointed to the Court in 1910 and did not retire until 1937, but during his tenure he employed only seven clerks. Not all of his clerks went to law school, and, with one exception, those who did attended local Washington schools. Four ended up making careers in the Washington civil service, one enjoyed a successful practice on Wall Street, and one lived an eventful life on the Wyoming frontier. In the text, I focus only on four of these clerks; summaries of the careers of the others may be found in the endnotes.

Richard H. Repath clerked for Van Devanter during the 1910 term.[73] He was born in May of 1861 in Plymouth, England.[74] As a young man Repath served as secretary to Wyoming's Territorial Governor Francis E. Warren, and then to Republican Secretary of State and Acting Governor Amos Barber after Wyoming had been admitted as a state and Governor Warren had been elected to the United States Senate.[75] An incident late in Barber's tenure as Governor made Repath into something of a hero in Wyoming Republican circles. The disputed gubernatorial election of 1892 pitted Barber against Democrat Thomas Osborne. Before the contested vote had been fully canvassed, the Republican *Wyoming Tribune* later recalled, Osborne "forcibly entered the capitol and landed in the outer room of the executive chambers where he was met by R.H. Repath, the private secretary of Governor Barber, who barred his further progress. Osborne tried to get into the next room but the secretary stood in his way and the two men encountered each other in a rough and tumble manner. Repath proved to be the ablest athlete and threw his adversary to the floor and held him in that position by sitting on his head for two hours and a half. The newly elected governor while in this undignified and uncomfortable position swore, pleaded, and begged by turns, but the loyalty of the secretary to the state induced him to hold the intruder a prisoner until someone should come to take charge of him."[76]

Repath was also the clerk of the Supreme Court of Wyoming from its organization in 1890 until August of 1897.[77] In addition, he gave private instruction in Pitman's Phonetic Shorthand on the side.[78] After concluding his tenure at the Wyoming Supreme Court, Repath worked for a year as a special agent in the General Land Office protecting public lands and timber before going to Washington to serve as the stenographer for Van Devanter, who was serving as an assistant attorney general in the Department of the Interior.[79] When Van Devanter was appointed to the United States Court of Appeals for the Eighth Circuit in 1903, Repath became Judge Van Devanter's secretary.[80] He continued in this position until 1910, when Van Devanter was appointed to the Supreme Court of the United States.[81]

After completing the 1910 Term of Court with Van Devanter in Washington, Repath returned to Cheyenne to serve as secretary to United States District Court Judge John A. Riner.[82] Repath found the hot, humid weather of Eastern summers uncomfortable,[83] and cited concern for his health and a desire to enjoy the company of his many friends in Wyoming as reasons for leaving his prestigious post with Van Devanter.[84] Repath remained with Judge Riner until that jurist resigned after thirty-one years of service in 1921, whereupon Repath took a secretarial post with Riner's successor, Judge Thomas Blake Kennedy.[85] Kennedy would serve until 1957, and Repath remained with the judge for the remainder of his own career.[86]

Repath died of a heart ailment at the age of seventy-nine in 1943. He never married,[87] but he had an active social life as a leader and participant in the affairs of the Knights Templar,[88] the Masons,[89] and other organizations.[90] He also served on the executive committee of St. Mark's Episcopal Church in Cheyenne.[91] In the 1890s he was a member of the Cheyenne Club, a vigilante group organized by a collection of gentlemen ranchers devoted to the suppression of cattle rustling in Wyoming. In the summer of 1892, Repath successfully persuaded Owen Wister not to go hunting in western Wyoming for fear that marauding rustlers would delight in putting a bullet or two in the young author.[92] But for Repath, we might never have had *The Virginian*.[93]

George Howland Chase III clerked for Van Devanter during the 1923 Term.[94] Chase was born in Germantown, Pennsylvania in 1898, and raised in Washington, D.C. He was graduated from St. Paul's School in Concord, Massachusetts in 1916, from Princeton University in 1920, and from Harvard Law School in 1923.[95] During World War I he served as a second lieutenant in the field artillery of the U.S. Army, stationed at Camp Zachary Taylor in Louisville.[96] Following his clerkship with Van Devanter, Chase spent a year with the Washington firm of McKenney and Flannery. In 1925 he began a stint of more than six years as an associate with the Washington office of Cravath, de Gersdorff, Swaine & Wood,[97] and was admitted to the Supreme Court bar in 1928.[98] The following year he was married to Bryn Mawr graduate Mary Chandler Hale, the niece of Maine's U.S. Senator Frederick Hale and the granddaughter of the late Senator Eugene Hale.[99] After leaving Cravath, he became assistant general counsel to the Federal Reserve Board, which he served for three decades preceding his retirement in 1962. He served as president of the D.C. Family and Child Services, as a member of the D.C. Charitable Solicitation Advisory Council, and as a member of the board of the Washington Institute of Foreign Affairs. He held club memberships at Chevy Chase and Burning Tree. He was at his summer home in Prospect, Maine, when he became ill in 1981, and he died in October of that year at the age of eighty-three. He was survived by his wife, Mary.[100] Sadly, he was preceded in death by his only child, Eugenia Chase Guild, who died in 1954.[101] He was remembered as a "greatly beloved" man of "unusual charm, affectionate and humorous in his only special and delightfully characteristic way." He was also "an accomplished golfer" who had played with members of the Supreme Court and with former Secretary of State Robert Lincoln, the son of President Abraham Lincoln.[102]

In the early 1970s, Mr. and Mrs. Chase offered their mansion on Embassy Row in Washington to the federal government for use as the official residence of the Chief Justice of the United States Supreme Court. The property was valued at $340,000, and the Chases offered an additional $500,000 for its maintenance. The Senate Judiciary Committee was slow to respond, and the couple withdrew the offer in 1973, saying in a letter to the Committee that they had "waited long enough." The Chases instead gave the mansion as a joint gift to their respective alma maters,

George Howland Chase clerked for Van Devanter during the 1923 Term, and eventually went on to become became assistant general counsel to the Federal Reserve Board, which he served for three decades. After his retirement, he and his wife offered their mansion to the federal government for use as the official residence of the Chief Justice of the United States Supreme Court. The property was valued at $340,000, and the Chases offered an additional $500,000 for its maintenance. The couple withdrew their offer in 1973 when the Senate Judiciary Committee was too slow in responding.

Princeton and Bryn Mawr. The schools accepted the gift and later sold the property.[103]

James W. Yokum shared clerking duties with Chase during the 1923 Term, and continued with Van Devanter for the 1924 Term.[104] Yokum was born in Montgomery, Alabama, apparently sometime between 1895 and 1898—he supplied four different years of birth on various employment documents. He attended high school at the Emerson Institute in Washington, D.C., and was a private first class in the United States Army Signal Corps during World War I. He studied law in the evening for one year at National University and for two years at Georgetown while working as a clerk in the Bureau of Indian Affairs and in the General Accounting Office, where he was regarded by his superiors as "[c]apable but impulsive, restless, and somewhat lacking in thoroughness." He left the GAO and Georgetown in 1923 to accept the position with Van Devanter, and, though he never completed his law degree, he was admitted to the Florida Bar. After his service with Van Devanter, Yokum spent three years in the private practice of law in Miami, a year as an assistant trust officer with Bank of America in New York, and three years as a corporate attorney for AT&T, also in New York.

At this point, regrettably, Yokum's career began a downward spiral that came near to rivaling the misfortunes of John Knox. In the spring of 1932, Yokum was appointed a field examiner into War Risk Insurance claims for the Veteran's Administration, and stationed in Indianapolis. In November of that year the VA launched an investigation into his conduct, which it was alleged may have involved "criminal features . . . in connection

with the misuse of tax exemption certificates." Yokum offered to resign in order to keep his record clear, but it was decided instead that he would be suspended without pay pending resolution of the investigation. In January of 1933 the charges against Yokum were sustained, and he was discharged with prejudice. (Yokum later attributed his dismissal to "absence without leave"). Thereafter Yokum scuffled from one temporary gig to another: six weeks as an attorney with the Reconstruction Finance Corporation in August and September of 1933, four months as an auditor in the Agriculture Department from October of 1933 to January of 1934, and two months as an assistant clerk in the Procurement Division of the Treasury Department. Meanwhile, in September of 1933 he was notified that "after careful consideration . . . your previous record will not be regarded as constituting a bar to your reinstatement, if officially requested, subject to such further tests as the Comm. may consider necessary," and by the end of the following March he had been reinstated by the Civil Service as a permanent clerk in the Bureau of Internal Revenue. His principal duty there was the examination of estate tax returns. Yokum remained with the Bureau until the fall of 1941, when he resigned "for personal reasons."

A year later Yokum received a war service appointment as an attorney for the Yards and Docks Bureau of the Department of the Navy. There he was "assigned primarily to administrative work" because of his "special talents" for that sort of duty, and because "[i]n strictly legal matters . . . his work was hardly above 'Unsatisfactory.'" While receiving high ratings for administrative capability and an overall assessment of "Good," he was given low marks for "Accuracy of final results," "Amount of Acceptable Work Produced," and "Dependability." In October of 1944 he was transferred to serve as a trial examiner for the Safety Section of the Civil Aeronautics Board, from which he resigned "because of illness" in February of 1945. In August he returned to the workforce as an attorney for the Disabled American Veterans, whom he represented before the Veterans Administration and the Departments of the Army and Navy in cases involving claims for federal benefits. By June of 1946 he had again resigned due to illness, but in March of 1948 he submitted a successful application for a position as a trademark renewal examiner in the Patent Office. Here he performed "the least difficult assignments in examination of applications for renewal of registrations and republications of trade-marks" until his performance began to unravel about three weeks into his tenure.

In April of 1948, Yokum's wife of fourteen years passed away. Thereafter he became highly erratic in his attendance at work, and was absent without notice or explanation to his superiors for weeks at a time. In late June, his supervisor wrote that "Mr. Yokum has proved to be of no value as an examiner. His failure to be present on the job has made it impossible for him to be productive at all." The letter added that "any hopes for reliable service from Mr. Yokum are wholly without foundation," and requested that he be terminated. Yokum then was sent a letter demanding that, on pain of termination, he return to work by July 2 and show sufficient cause for his unauthorized absence. In late July a letter was sent to the room that Yokum had occupied at the VA Hospital in Perry Point, Maryland since July 7. The letter informed Yokum that he had failed to satisfy the demand set out in the previous communication, and that he was thereby separated from service. Yokum appealed his termination in a letter detailing his distressing personal and financial circumstances, but his appeal was denied in a letter dated September 20.

After his dismissal from the Patent Office, Yokum appears to have gone for more than a decade without gainful employment. In May of 1960 he secured a job as a file clerk with the Veterans Administration, and

the following February he transferred to the VA's Engineering Division as an engineering aide. His employment application made no mention of his brief tenure at the Patent Office. At the end of October, the VA terminated him for being absent without leave. He does not appear to have worked thereafter. Yokum was an active member of the American Legion in Washington, D.C. He died in 1963 and is buried in Arlington National Cemetery.[105]

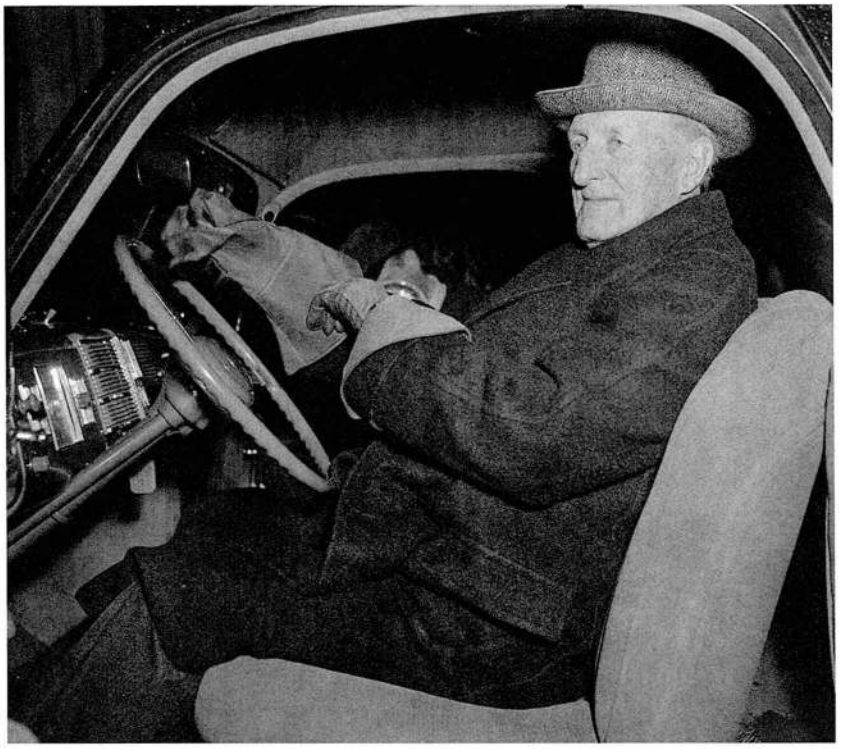
John T. McHale was Van Devanter's last clerk, serving the Justice from the 1926 term through Van Devanter's retirement at the end of the 1936 Term.[106] McHale was born in 1888 and married Ellen Berger at the age of twenty-six.[107] In his youth he was an outstanding tournament pool player known as the "Roxbury Kid."[108] From 1907 to 1912 he worked as a messenger and clerk in the Ordnance Department of the Washington Navy Yard. By 1912 his superiors had become very dissatisfied with his performance owing to his frequent absences from work, which they noted often occurred on the day after payday, and they recommended that he be discharged. At McHale's request he was permitted to resign, so that his separation from service would not damage his future prospects. McHale regrouped, attended (but did not graduate from) Georgetown Law School, and was admitted to the bar in Virginia and the District of Columbia, where he engaged in a probate practice.[109] From 1917 to 1919 he worked as a clerk at the War Trade Board, after which he became a claims examiner for the Bureau of War Risk Insurance in the Treasury Department. By 1924 he had risen to the rank of Chief of the Converted Insurance Section of the Veteran's Bureau. He resigned that position in May of 1925 to resume law practice, this time in Palatka, Florida.[110] The following year McHale returned to Washington to work for Van Devanter as a stenographic assistant for three years before his promotion to the position of law clerk in 1929.[111] After Van Devanter's retirement McHale clerked for McReynolds for the 1937 term[112] before joining the Motor Carrier Division of the Interstate Commerce Commission.[113] He remained at the I.C.C. for the remainder of his career.[114] He died in 1947, leaving a widow and four children.[115] McHale's final year at the Court was not his most cherished. In January of 1938 McReynolds' messenger Harry Parker wrote to John Knox that the Justice had gotten "worse." "Mr. McHale is having a hard time. I am sure he would not stay if he could get anything else to do. . . . You are lucky you got out and don't have to go through what we have to it is next to hell."[116]

The McReynolds Clerks

Of all of the Four Horsemen, Justice McReynolds was the most prolific employer of clerks. During his tenure, which stretched from 1914 to 1941, the difficult Justice retained the services of no fewer than eighteen young legal assistants. This was apparently not by design. Chester Newland, who interviewed seven of McReynolds' former clerks, reports that the Justice "was plagued with troubles in locating and retaining clerks. . . . Because of his strong language and asperity toward his subordinates, the atmosphere was too demeaning for some of his assistants."[117] McReynolds' notoriously offensive personality probably compromised his ability to recruit the most outstanding law graduates. Most of his clerks attended local Washington schools, and many went on to comparatively quiet careers in the Washington civil service. But that was certainly not the trajectory of all of the McReynolds alumni.[118]

The Early Clerks[119]

Newman Blaine Mallan clerked for McReynolds during the 1916 Term.[120] A native of the District of Columbia,[121] Blaine



James C. McReynolds (pictured here in 1939 on his seventy-seventh birthday) employed eighteen clerks during his twenty-six Terms of service. His notoriously offensive personality probably compromised his ability to recruit the most outstanding law graduates, but his clerks mainly went on to respectable careers in government service, private practice, business, and the military.

was the son of Dr. Thomas F. Mallan and Adele Blaine Mallan, and the grandnephew of James G. Blaine, the Plumed Knight of Maine who nearly won the presidency in 1884.[122] He attended Western High School, of which he would later become alumni association president;[123] Cornell University, where he studied engineering for one year;[124] and the University of Virginia School of Law, from which he received his law degree in 1914.[125] After completing his studies at Mr. Jefferson's University, Mallan returned to the District of Columbia, where he was admitted to practice in early 1915.[126] His social affiliations included memberships in the West End Citizen's Association,[127] the Farmington Country Club in Charlottesville, Virginia, and the Chevy Chase Club.[128] He was a member of the Delta Tau Delta fraternity, and an enthusiastic participant in their alumni affairs.[129] Mallan also was active in the affairs of the Washington, D.C. chapter of the University of Virginia alumni association,[130] and in April of 1916 he headed up the committee on arrangements for an alumni banquet in Washington that Justice McReynolds appears to have attended.[131] It may be that this occasion led to Mallan's commencement of service with the Justice that fall.

After leaving McReynolds, Mallan served in France as a lieutenant, junior grade in the Navy during World War I.[132] He engaged in a small private practice,[133] was admitted to the Supreme Court bar,[134] and by 1925 he was general counsel of the Seven Oaks Golf and Country Club.[135] He became engaged to Frederica McKenney, the daughter of a prominent Washington lawyer, in the fall of 1924,[136] and they were married the following May.[137] In January of 1927, Mallan

Blaine Mallan is the only clerk that McReynolds selected from his alma mater, the University of Virginia School of Law. He served during the 1916 Term before going to fight in France as a lieutenant, junior grade, in the Navy. Mallan then made his career practicing law in Washington.

was appointed by President Calvin Coolidge to serve as people's counsel of the Public Utilities Commission. The appointment required Senate confirmation, however, and there was an immediate backlash from local civic groups whose members had not been consulted, and who had favored another candidate.[138] Members of the House and Senate District Committees were likewise disgruntled that they had been left out of the loop. Representative Thomas L. Blanton of Texas led the charge against Mallan at the Capitol, urging his House colleagues to encourage their counterparts in the Senate to withhold confirmation. Blanton maintained that Mallan had been appointed "in behalf of the utility interests," and was an "inexperienced lawyer."[139] The office had been created so that the residents of the District would have "'an outstanding lawyer'" "'looking after the people's interests,'" someone who would be "capable of combating the high class lawyers of the public utilities." Blanton had expected the President to appoint a "'capable, able and willing man,'" but in Mallan he had chosen "'a young fellow, personally all right, but who as a lawyer is unknown to the legal fraternity, so I am informed.'"[140]

It turned out, however, that Mallan was not altogether "personally all right." In October of 1923, at the age of thirty, he had narrowly escaped death by leaping from his car before it plunged over a fifty-foot embankment at Connecticut Avenue and Albemarle Street Northwest. Police had arrived at the scene and arrested Mallan for operating an automobile while drunk.[141] Mr. Mallan had failed to appear in court on the designated date, and a bench warrant had issued for his arrest. Mr. Mallan and his friends insisted that he was innocent of the charge, but the opposition energetically publicized that incident, and Coolidge was forced to withdraw the nomination.[142]

From this point forward, Mallan kept a low profile. We know that he was divorced by 1935, but only because of the activities of his former wife.[143] He continued to engage in a small law practice,[144] and in 1932 was sued for $10,425 by a real estate agent for allegedly backing out of an agreement to sign a ten-year lease at the Army and Navy Hotel.[145] He died of a heart attack at the age of sixty-three in 1955, and left neither a widow nor children. His obituary made no mention of his service with Justice McReynolds.[146]

T. Ellis Allison was born in Washington, D.C. in 1894, and graduated from the City's Business High School in 1910. Before coming to McReynolds he had been a secretary and clerk to the District of Columbia referee of bankruptcy, librarian of the D.C. Bar Association, and secretary to the chief judge of the U.S. Court of Appeals for the District of Columbia Circuit. During this period he attended evening classes at

Georgetown, receiving his law degree and admission to the bar in 1918.[147] Allison's tenure with McReynolds was rather curious. He began clerking for the Justice in the midst of the 1916 Term, on March 1, 1917. His employment with McReynolds was terminated in late August of that year, at which point he began a ten-day stint as a stenographer with the Justice Department. On September 11 of that year he resumed his duties with McReynolds, and stayed with the Justice throughout the 1917 Term and for most of the 1918 Term. He resigned his post on April 20, 1919 to take a job as an attorney in the Bureau of Internal Revenue, though his employment record reveals that he had initiated the application process several months earlier.[148] That October he was married to Minnie Esther Gorman of Washington, D.C. The couple had no children. Allison stayed with the Bureau until 1925,[149] at which time he entered private practice. One of his principal clients was the Laundrymen's Association of Washington, and his practice focused principally on trade association and federal taxation issues. McReynolds undoubtedly beamed with pride when Allison returned to government service in 1934 as an assistant examiner and later a unit chief for the National Recovery Administration. Though his employment with the N.R.A. lasted only six months, he then returned to the Treasury Department, where he helped to draft other welfare legislation, including the Social Security Act, which Justice McReynolds maintained was unconstitutional. Allison would remain at Treasury for the remainder of his highly successful career, which earned him the Department's Albert Gallatin Award for distinguished service. He retired in 1959, and died in Washington in 1974 at the age of eighty-one.[150]

Harold Lee George clerked for McReynolds from April 23 to August 13, 1919, and again from April 12 to June 27, 1920.[151] Born in Somerville, Massachusetts in 1893, George received his LL.B. from the National University in 1917.[152] The United States entered the War shortly after his graduation, however, and George attended Officer's Candidate Camp at Fort Myer, Virginia and was commissioned a second lieutenant in the Cavalry later that year. Because the Aviation Section of the Signal Reserve Corps needed pilots, George retrained as an airman and saw action in France as a bombardier.[153] Somewhere along the line he also managed to win a national competition in typing and shorthand,[154] which must have appealed to McReynolds, who insisted that all of his clerks be equipped with these skills.[155]

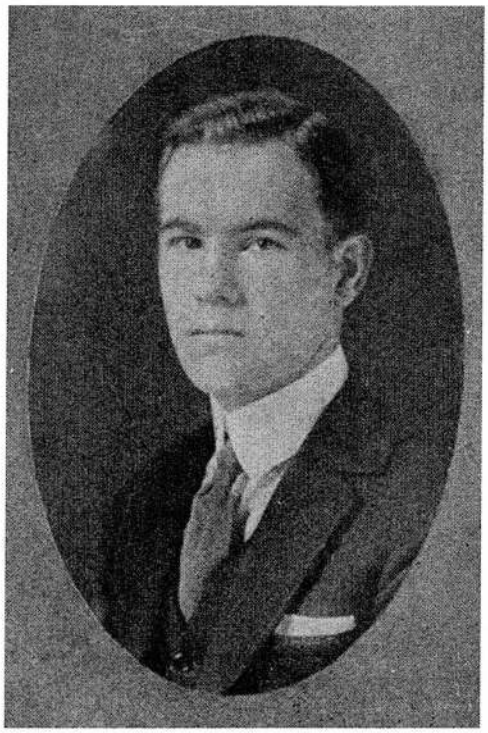
Here, however, there is an interesting lacuna in George's resume. His entry in *Who Was Who in America* makes no mention of his clerkship with McReynolds.[156] Neither did a 1942 *Washington Post* profile of George, which instead skipped ahead from the end of the War to 1920, when George "threw his law books in an attic trunk and entered the Regular Army from the Reserve."[157] Perhaps it was his experience with the Justice that led him to this decision. George went on to enjoy a distinguished career as an officer.[158] He was promoted to major in 1936, and as a lieutenant colonel in August of 1941 he and three other officers devised plans for American air power during World War II.[159] By 1942, George had risen to the rank of brigadier general in charge of the Air Transport Command.[160] The *Post* profile romantically described him as having "the combined characteristics of a big airline executive and a stunt flyer," and as "[d]ramatic, with courageous vision and the hard-headed ability to implement his dreams."[161] He attained the rank of lieutenant general in 1944, and by the conclusion of his military career in 1946 he had been awarded the Air Medal, the Distinguished Service Medal, the Distinguished Flying Cross, and the Legion of Merit.[162] He then moved to southern California, where he became an executive with a series of companies in the airline and aerospace industries, including Hughes Aircraft.[163] He was elected to the Beverly Hills City Council and served two terms as the

City's mayor. He died in 1986 at the age of ninety-three, survived by his wife and four children.[164]

General George's otherwise sparkling resume contained at least two unfortunate incidents. In September of 1926 then-Lieutenant George broke several ribs crashing his plane near Aberdeen, Maryland.[165] Two years later his wife sued him for divorce after he told her that "he loved another woman toward whom he felt duty bound to provide a home, while she, his wife, would have to live elsewhere." She alleged that Lieutenant George had begun to treat her cruelly shortly after their marriage in 1917, and that the couple had become estranged after he informed his wife of the other woman. She had later returned to live with her husband, but "again left him after his declaration of love for the other woman."[166] This was undoubtedly an unpleasant episode that George wished to forget; but if his entry in *Who Was Who* is any indication, his clerkship with McReynolds also was not an experience that he recalled fondly.

Norman Burke Frost clerked for McReynolds for three days during April of the 1919 Term; for the full 1920 Term, during which he was treated for chronic indigestion; and for six weeks in the midst of the 1921 Term.[167] Frost was born in Montgomery County, Maryland, in 1897, and attended the Washington Preparatory School. In 1918 he married Mary Demova King, with whom he had three children. Frost served in the American Expeditionary Forces in 1918 and 1919, and was attached to the staff of the Ambassador Henry White at the Paris Peace Commission. He took his L.L.B. from Georgetown in 1921, and was admitted to the D.C. Bar in 1922. He was associate counsel to the London Landreau Arbitration between the United States and Peru in 1922.[168] Later that year he formed the Washington firm of Frost and Towers with Frederic Towers.[169] The firm, which expanded to a five-lawyer practice in 1955, counted among its clients President Abraham's Lincoln's son Robert Todd Lincoln, the former Secretary of War who had helped Frost to get started in practice and with whom Frost shared a close social friendship; the estate of Robert Todd Lincoln's widow and the daughter of Senator James Harlan, Mary Harlan Lincoln; and Sperry Rand, Textron, and other Fortune 500 companies.[170] His practice ranged from tax matters[171] to government contracts,[172] patents,[173] torts,[174] workers' compensation,[175] and a variety of contract, corporate, and trust matters.[176] Frost continued to enjoy a successful Washington law practice with Frost, Towers, Hayes & Beck until his death at the age of seventy-five in 1973, the year that the firm merged with Baker & Hostetler.[177]

One of Frost's more interesting negotiations occurred early in his practice. In October



Norman B. Frost was McReynolds' clerk for October Term 1920, but he also filled in on two other occasions when the Justice needed him—April 9 to April 11, 1920, and January 19 to March 1, 1922. He went on to enjoy a successful career with the Washington firm of Frost, Towers, Hayes & Beck.

of 1927, a little over a year after Robert Todd Lincoln's death, Mary Harlan Lincoln was contacted by Myra Pritchard and her attorney. Ms. Pritchard was the granddaughter of Myra Bradwell, the famous editor of the *Chicago Legal News* who had been denied admission to the Illinois bar because of her sex, and her husband, Judge James Bradwell. Ms. Pritchard had in her possession several letters that Mary Todd Lincoln had written to the Bradwells in the 1870s, before, during, and after Mrs. Lincoln's commitment to an insane asylum by her son, Robert. Relying upon these missives, Ms. Pritchard had produced for intended serial publication a 111-page manuscript entitled "The Dark Days of Abraham Lincoln's Widow, as Revealed by Her Own Letters." Mrs. Lincoln's letters from this period did not reveal the former first lady at her best, and they contained some rather unfavorable recriminations against Robert. Mary Harlan Lincoln, who objected to the publication of the content of some of the more inflammatory letters, engaged the assistance of Frost and Towers. The young attorneys were aware that their friend and former client Robert Todd Lincoln had attempted to collect and destroy all of the letters that his mother had written relating to her mental illness. After meeting with Ms. Pritchard and reviewing the materials, Frost and Towers successfully negotiated the purchase of the letters and the manuscript, along with a non-publication agreement, for $22,500.[178] Mary Harlan Lincoln apparently destroyed the originals,[179] but Towers retained copies, which were discovered in a steamer trunk nearly eighty years later.[180]

In 1943 and 1944, Frost was the chairman of the United States Air Force Price Adjustment Board, and in 1944 he was honored with the Exceptional Civilian Service award. He served as an officer or director of several corporations, and was a trustee of two charitable foundations. Frost was an Episcopalian, a Mason, and a member of several professional organizations. He was also a member of several clubs, including Burning Tree and Chevy Chase,[181] and was an avid golfer.[182] Indeed, in 1945 he secured a patent for his own design of a golf glove for players using the Varden grip.[183] And this was neither his only nor his most sophisticated invention. Five years earlier, he and Harry F. Vickers of Detroit had secured a patent for an Apparatus for Controlling the Movement of Heavy Masses, such as machine tool tables, guns, gun turrets, and torpedo tubes.[184] In 1951, Frost's daughter Norma married Wilson Patrick Hurley, the son of President Hoover's Secretary of War Patrick J. Hurley.[185] His daughter Betty married Webb Cook Hayes III, the great-grandson of President Rutherford B. Hayes.[186] Both Frost's *Washington Post* obituary and his entry in *Who Was Who* mention his service as a law clerk at the U.S. Supreme Court, but neither makes any mention of Justice McReynolds.[187]

The 1921 Term was a banner year for McReynolds: including Frost, he appears to have gone through four clerks during the course of that term. Carlyle Baer attended James Milliken University in Decatur, Illinois, and worked as the assistant to the district superintendent of the Public Service Corporation of Northern Illinois from 1910 to 1915. That year he resigned to attend law school at Cumberland University, from which he received his law degree in 1916.[188] During World War I he served as an ensign in the Navy.[189] In 1917 he was made an honorary consul of Haiti, in which post he served from Chicago.[190] During this same period he also worked briefly as a legal research assistant to Glenn Plumb, counsel to the Brotherhood of Railway Engineers,[191] and as Chicago's Commissioner of Deeds.[192] In 1919 Baer began working as an adviser to the Bulgarian envoy to the United States in Washington.[193] He left that post to join McReynolds, whom he served for just over two months, beginning November 15, 1921 and resigning effective January 18, 1922. He then returned to service with the Bulgarian envoy.[194] By 1925 he had

become the law librarian of the Sydney Fuller Smith Library of the Sigma Nu Phi legal fraternity in Washington.[195] He held the post at least until 1936.[196] In 1933 he was named honorary consul of Bulgaria,[197] and in 1937 he was elevated to honorary consul general. He served in that capacity until 1941, when the circumstances of the Second World War required his resignation.[198] For this service he was decorated by Bulgaria's King Boris III.[199] During World War II, Baer went to work for the Justice Department as a special inspector in the Immigration and Naturalization Service. He later worked as a research analyst and legal assistant in the Department's Lands Division,[200] and remained with the Justice Department until his retirement.[201] He was secretary-treasurer of the American Society of Bookplate Collectors and Designers, and published several books on the subject.[202] He died in Washington at the age of seventy-nine in 1969.[203]

Andrew P. Federline, who worked as a stenographic clerk for McReynolds from March 1 to June 30, 1922,[204] was a member of the District of Columbia Bar and of the Bar of the Supreme Court of the United States.[205] Early in his career he served as secretary to Robert Todd Lincoln.[206] For a number of years he was legislative and legal counsel to the American Automobile Association, and in the 1920s then-Secretary of Commerce Herbert Hoover tapped Federline to serve as the secretary of the committee charged with drafting the Uniform Vehicle Code.[207] In the 1940s and 1950s, he worked as Washington counsel to organizations representing salesmen and saleswomen.[208] By 1956 Federline was working as a highway safety consultant,[209] and he published a fascinating article on the need for standardization in truck and truck body lighting in *Power Wagon: The Motor Truck Journal*.[210] He died in Bethesda, Maryland, in May of 1977.[211]

Tench Tilghman Marye, also a member of the storied McReynolds Class of 1921,[212] was a descendant of Lieutenant Colonel Tench Tilghman, who served as an aide to General George Washington during the Revolutionary War. He was born in Washington in 1889,[213] graduated from its Western High School in 1905, took his A.B. from George Washington University in 1909,[214] and received his L.L.B. from Georgetown in 1911.[215] From 1909 to 1912 he worked as a stenographer for a Washington law firm before leaving to practice law from 1912 to 1917.[216] He also served as an instructor in law at Georgetown from 1915 until 1917, when he enlisted as a private in the Marine Corps Reserve and was later commissioned as a second lieutenant in the Navy's Office of the Judge Advocate General.[217] After his honorable discharge in 1919, he worked for a year as a legal assistant to the general counsel of the War Finance Corporation[218] before moving to San Francisco to work for less than a year in the editorial department of the Bancroft-Whitney legal publishing company.[219] His tenure with McReynolds lasted only three months, from March 1, 1922 to May 31 of that year.[220] It appears that he was hired only to complete the 1921 Term, and either was not asked or did not agree to remain longer. After leaving McReynolds, Marye was admitted to the Supreme Court bar[221] and returned to a small but active private practice representing clients in probate, property, employment, contract, and personal injury matters.[222] In 1933, he married the former Delores Powell of Florence, South Carolina. Ms. Powell had been married twice before, and had two sons from those marriages. In early 1934, with sponsorship from Senator Harry Byrd and Representative Howard W. Smith, Marye joined fellow McReynolds alumnus T. Ellis Allison as an examiner in the Review Division of the National Recovery Administration, where he provided analyses of codes of fair competition and executive orders. Within months he would be promoted to unit chief of the division. In early 1936, Marye moved from the defunct N.R.A. to the Social Security Board and then to the Federal

Security Agency, where he remained until the summer of 1943. He then was called back to active duty with the Army, which he served in London and later in occupied Berlin as an attorney under Charles Fahy in the Legal Division of the War Department's Office of Military Government (OMGUS). After his discharge at the rank of lieutenant colonel in the summer of 1947, he remained in Germany as a civilian judge trying civil and criminal cases in a special tribunal of OMGUS, and later for the State Department's High Commission of Germany (HICOG). Somewhere along the line he had his left thumb amputated.[223] The widely traveled Marye spoke and read five languages—French, Spanish, German, Italian, and Russian—and he was very keen to remain in Europe after his term of service with HICOG concluded in 1952. Unfortunately, that could not be arranged, so the Maryes returned to the United States and settled in Glen Ellyn, Illinois, where Tench worked as a hearing examiner for the Social Security Administration until his retirement in March of 1959.[224] They then returned to Washington, where Tench worked for the Legal Aid Society, mostly as a volunteer.[225] The Maryes retired to Melbourne, Florida in April of 1971, and were killed in a single-car accident in Rowland, North Carolina that December.[226]

A native Washingtonian, John T. Fowler, Jr., clerked for McReynolds from the 1922 Term through the 1926 Term. In 1934 Fowler (pictured) became an attorney in the office of the assistant solicitor general, and joined Stanley F. Reed and Paul Freund in co-authoring the petition for a writ of certiorari in one of the *Gold Clause Cases*.

The Later Clerks

John T. Fowler, Jr., clerked for McReynolds from the 1922 Term through the 1926 Term.[227] Fowler was a native Washingtonian[228] who attended Strayer's Business College and married Cora Wood in 1912 at the age of twenty-two.[229] He worked for the Southern Railway Company in various capacities from 1908 to 1921, excepting the years 1918 to 1920, when the Railway was under the control of the U.S. Railroad Administration and Fowler worked as the Administration's assistant chief in the Passenger Rate Department.[230] He took his law degree from Georgetown in 1921.[231] Later that year he entered practice with Howard Boyd and Charles Galloway,[232] where he represented a twenty-five-year-old bricklayer named Albert E. Pickles, who had "soured on his name" and wished to change his surname to "Sickles." Mr. Pickles's petition stated that "his real name is a great source of annoyance not to mention material for byplay."[233] Fowler was admitted to the Supreme Court Bar in 1925,[234] and after his clerkship with McReynolds he took a job in the Admiralty Division of the Department of Justice.[235] In 1932 he was appointed special assistant to the Attorney General.[236] In 1934 he became an attorney in the office of the assistant solicitor general,[237] and joined Stanley Reed and Paul Freund in co-authoring the petition for a writ

of certiorari in one of the *Gold Clause Cases*,[238] the ultimate government victory in which caused McReynolds to exclaim from the bench, "This is Nero at his worst. The Constitution is gone."[239] During his career with the Justice Department, Fowler served as acting assistant solicitor general on several occasions.[240] He retired from the Department due to illness after more than three decades of service in 1952, by which time he had become the Department's chief opinion attorney and editor of the Official Opinions of the Attorney General of the United States.[241] He was an active Mason,[242] and volunteered with the Red Cross.[243] Fowler retired to Denver, where he died at the age of sixty-three in 1953. He left a widow and two children.[244]

Chester Gray, another McReynolds short-timer, clerked for the Justice for just one month during the 1925 Term. Gray was born in 1898 in Pittsburgh, where he attended public schools and Martin's Business College. He began his work life as an office boy for the Carnegie Steel Company, becoming proficient in shorthand by the age of sixteen. Following his service as a clerk in the Office of Naval Intelligence during World War I, ironically enough, he served for nearly two years as confidential secretary to then-assistant secretary of the Navy and future McReynolds nemesis Franklin D. Roosevelt. He then worked as a secretary for the Treasury Department for almost two years and for the Department of Justice for one year. Gray attended the Emerson Institute in Washington and received his law degree in 1925 from the National University Law School, where the editors of the yearbook predicted that he would become "Dean of Northwestern University." He was admitted to the District of Columbia bar later that year. Gray's tenure with McReynolds lasted only from February 25, 1926 to March 23, 1926. His departure before the conclusion of the 1925 Term suggests that the position with the Justice may not have been a good fit. After leaving McReynolds, Gray married the former Ruth Hungerford of Wilkes-Barre, Pennsylvania, and worked briefly in private practice before joining the Washington, D.C. Corporation Counsel's office in 1928. He worked continuously in that office for the remainder of his career. By 1938 he had risen to the position of chief trial counsel, and in 1956 he became the District of Columbia's chief legal officer. He died of a coronary thrombosis at the age of sixty-seven in 1965. He was a Fellow of the American College of Trial Lawyers and a member of many professional associations. A Methodist and a Mason, Gray was survived by his wife, a daughter, and two grandchildren.[245]

At Gray's death District Commissioner Walter N. Tobriner remarked, "'The District of Columbia will feel a deep loss in the passing of Chester Gray. . . . For the greater portion of his life he served the city with an unflagging zeal and tremendous learning in the law. . . . The Commissioners have lost a most valuable servant and the community a protector of the rights of all.'"[246] The *Washington Post* praised Gray's "extraordinary tact and patience" as "indispensable assets," and opined that "Chester Gray's long and dedicated service to the District of Columbia richly deserved" Tobriner's "warm tribute."[247] Gray consistently received strong performance evaluations, which characterized him as "a prodigious worker" of "exceptional competence" and "devotion to duty" who handled even the most difficult cases with "outstanding" "diligence, tact, and professional skill." He also was credited with inculcating "high standards of practice of the law and public service" among his subordinates while engendering "extremely high" morale among his staff. A memorandum in his employment file observed that he had "guided the District of Columbia through many stormy incidents, untied numerous legal knots, drafted much important legislation, handled major litigation of the community, and ably and brilliantly defended in court the District, its officers and employees." The

Maurice J. Mahoney clerked for McReynolds for seven Terms (1927–1933), making him his longest-serving clerk. Born in the small town of Blythe, Georgia, Mahoney's Southern upbringing may have helped him to get along with the Kentucky-born Justice.

memorandum praised Gray for driving loan sharks out of the District, and for contributing "substantially to the legal position taken in *Berman v. Parker*," the Supreme Court's landmark 1954 eminent domain decision.[248]

Not everyone took such a favorable view of Gray. Earlier in 1965, the local ACLU had called for Gray's removal over dissatisfaction with his enforcement of the District's fair housing law,[249] which Gray had drafted.[250] Critics also charged that the District's fair employment law, drafted in part by Gray, was insufficiently tough, and denounced his failure to pursue injunctive relief rather than exclusively criminal penalties against violators.[251] George Washington University Professor Monroe Freedman mounted a bumper-sticker campaign calling for Gray's ouster.[252] When Tobriner was named president of the District's Board of Commissioners in 1961, "the Democratic Central Committee asked him to fire . . . Gray, considered by some Democrats to be too reactionary for the 1960s."[253] At the same time, the House of Representatives District Committee, headed by Democrat John L. McMillan of South Carolina, launched an investigation into whether the District Commissioners had exceeded their authority by banning racial discrimination in housing, employment, and at barbershops.[254] Each of these prohibitions had been enacted based on Gray's legal opinions that the Commissioners in fact possessed such authority.[255]

Gray's obituary in the *Washington Post* opined that it was "ironic" that "most of the criticism directed against Mr. Gray's office in recent months has been mounted by civil rights groups charging that the office drags its feet on regulatory interpretations in the civil rights field," because Gray's associates thought that he would "be longest remembered . . . for his work with the so-called 'lost' segregation laws before the United States Supreme Court."[256]

The litigation referred to, *District of Columbia v. John R. Thompson Co.*, involved the questions of a) whether the Legislative Assembly of the District of Columbia had been authorized by the Organic Act of 1871 to enact an 1873 law prohibiting certain businesses from refusing to serve persons on the basis of race, and b) whether that law had survived subsequent enactments, including congressional statutes reorganizing the District's government. The case was a prosecution by information against the Thompson restaurant chain, which refused to serve African-Americans. The Municipal Court had quashed the information on the ground that the Act had been repealed by subsequent legislation, but the Municipal Court of Appeals had reversed on that count. On cross-appeal the Circuit Court of Appeals for the District of Columbia held that the Act had been repealed and that the information should be dismissed. Chester Gray argued the case for the District before the Supreme Court on *certiorari*, and a unanimous Bench, Justice

Jackson not participating, held that the law was valid and still in effect.[257]

The *Post* obituary remarked that "Mr. Gray argued the validity of the 'lost' laws and was vindicated in the landmark opinion that reversed the United States Court of Appeals,"[258] and a memorandum in Gray's employment file credited Gray with taking up "the cudgels against discrimination." "He researched the law, concluded that the enactments of 1872 and 1873 prohibiting discrimination in restaurants were still valid, though they had lain dormant for seventy-five years, and fought through all the courts. . . . Thus, Mr. Gray, through persistent effort, made the first great contribution to the striking down of race barriers in the Nation's Capital."[259] When Gray died, the *Washington Post* editorialized that "[w]hat the city needs . . . is precisely the kind of legal pioneering Chester Gray displayed more than a decade ago when he discovered and disinterred and breathed life into those 'lost' segregation laws in the Thompson Restaurant case."[260]

Philip Elman, who argued the case for the United States as *amicus curiae*, offered a different assessment. In an interview published in 1987, Elman recalled that "Vernon West, corporation counsel of the District of Columbia, and his deputy, Chester Gray, were old-line southerners who didn't believe in the case and had brought it only in response to a lot of pressure. They were perfectly willing to drop the case after losing it in the court of appeals." Elman reported that "Somebody, probably [Attorney General Herbert] Brownell, called the corporation counsel of the District of Columbia and said, 'We want you to file a petition for *certiorari*.' This was a new administration; the Eisenhower group had just come in. The D.C. officials weren't sure what was going to happen to them, so they were quick to do what they were told to do by the new Attorney General." Elman's argument before the Court "went very well," Elman reported, and his boss was "pleased with the way I handled it." But "Chester Gray, who argued for the District of Columbia," Elman concluded, "didn't make a very strong argument."[261]

Maurice J. Mahoney holds the McReynolds clerkship endurance record. Mahoney's tour of duty began with the 1927 term and, with the exception of a brief stint at the Department of Justice in the summer of 1929, ran through the 1933 term.[262] Mahoney's southern roots may have helped in his relations with the Justice. He was born in 1899 and raised in Blythe, Georgia, where he was educated in the public schools. Following his graduation from high school in 1915, Mahoney remained in his hometown to work as a clerk, telegraph operator, and station agent for the Georgia & Florida Railroad. In 1917 he moved to Macon to attend Mercer University and to enroll in shorthand and bookkeeping courses at Georgia-Alabama Business College. He then relocated to Savannah to work as a clerk, stenographer, and secretary in the office of the president of the Central of Georgia Railway. In 1921 Mahoney departed for Washington, D.C., where for the next five years he worked as an accountant and assistant to the Auditor of the District's Supreme Court, which in 1936 was renamed the District Court for the District of Columbia. During this time he took evening law classes at Georgetown, from which he received his law degree in 1925. He then practiced law in Washington for two years before joining McReynolds for the 1927 Term. After two terms with McReynolds, Mahoney left to join the staff of the Admiralty Division at the Department of Justice, but within a month he resigned and "returned to Justice McReynolds at his urgent request."[263] Following his clerkship, Mahoney worked for several years as a highly regarded attorney in the Tax Division of the Department of Justice.[264] In 1943, he formed the firm of Mahoney & Mahoney with his brother Lawrence, who headed the firm's Atlanta office while Maurice took charge of the

Washington branch.[265] One of Mahoney's largest clients was the Copperweld Steel Company,[266] which he served as assistant treasurer,[267] and in 1949 he became the company's Executive Secretary.[268] He held this position until his retirement in 1964,[269] though he continued to practice law until at least 1976.[270] Mahoney died in 1978, leaving a widow, two children, and nine grandchildren.[271]

J. Allan Sherier clerked for McReynolds during the 1935 Term,[272] immediately after taking his L.L.B. from George Washington University Law School. Sherier was a fourth-generation Washington native.[273] His father, Joseph T. Sherier, practiced law in Washington for fifty-five years before passing away in 1960 at the age of seventy-nine. The senior Sherier had attended Columbian University Law School at night while working a day job as secretary to American Federation of Labor president Samuel Gompers.[274] Allan learned secretarial skills at Strayer's Business College, and worked as his father's secretary and law clerk while attending law school. After his clerkship with McReynolds, Allan went into a general law practice with his father at the small Washington firm of Leckie & Sherier, where periodic Martindale-Hubbell listings indicate that Allan retained his affiliation from at least 1938 through 1955.[275] He enlisted in the Naval Reserve as a chief yeoman in the Office of Naval Intelligence in January of 1941, but received an inaptitude discharge within five months because he was "unable to adapt himself to naval discipline" and was "temperamentally unsuited for military service." He re-entered private practice until 1943, when he took a war service appointment as an attorney for the War Department's Office of the Chief of Engineers. In 1944 he became dissatisfied with his position and resigned, explaining that "I feel that my experience and educational background justify my seeking more important and suitable employment." He obtained a transfer to the Legal Division of the Reconstruction Finance Corporation's (RFC) Defense Plants Section, and remained as an attorney with the RFC until 1952. After a brief stint with the Small Defense Plants Administration, Sherier joined the legal office of the Small Business Administration (SBA) in 1953. Save for a hiatus to serve as general counsel to the House Small Business Committee in 1961 and 1962, he remained with the SBA until 1965. That October, Sherier resigned "[t]o pursue the private practice of law or to become affiliated again with the legislative branch of the Federal Government." Before the year was

A native of Utah and the son of an outspoken advocate of polygamy, Milton S. Musser clerked for McReynolds during the 1938–39 Terms. He joined the Army Corps of Engineers in 1941, supervising internal security at construction sites in the Western Hemisphere. In 1943 he was moved to the office of the Inspector General, where he conducted special investigations involving, among others, alleged fraud in the construction of the Pan American highway. After he had established a law practice in Los Angeles, the Army recalled Musser from the Reserves in 1951 to active duty as an investigator with the Inspector General. Headquartered in Panama, he conducted investigations throughout Central and South America.

out the fifty-two-year-old would meet an untimely end when he choked to death while having a Friday dinner at an Arlington restaurant. Twice divorced, he was survived by his third wife and two daughters.[276]

Milton Shipp Musser clerked for McReynolds during the 1938 and 1939 Terms.[277] Musser came from an extraordinary family of polygamous members of the Church of Jesus Christ of Latter-day Saints. His grandfather, Amos Milton Musser, was born in Lancaster County, Pennsylvania in 1830. Amos's father died when Amos was two, leaving a widow and four young children. Amos's mother, Ann Barr Musser, remarried and the family moved to Quincy, Illinois. It was there that Ann was converted to the Mormon faith, and after her second husband died, she took the family to the Mormon settlement of Nauvoo, Illinois in 1846. By that time many of the Latter-day Saints had begun their westward journey, and Amos and his family, along with the other remaining Mormons, were driven across the Mississippi by an Illinois mob shortly after their arrival in Nauvoo. Amos worked as a clerk in an Eddysville, Iowa store for five years before being baptized and beginning his own trek to the Great Salt Basin in 1851.[278]

Amos arrived in Salt Lake City later that year at the age of twenty-one. He worked briefly as a clerk in the Church's General Tithing Office before embarking in 1852 on a five-year mission to India, during which he traveled widely. Upon his return to Utah he became intensely involved in the spiritual and temporal affairs of his people, serving in a variety of leadership positions throughout the late nineteenth century. He was a prolific writer and publisher, and a staunch defender in speech, writing, and deed of the principle of plural marriage. He married four wives, with whom he had twenty-six children, and served a six-month sentence for unlawful cohabitation in 1885. When he died in 1909 he left two widows, sixteen surviving children, twenty-two grandchildren, and four great-grandchildren.[279]

Milton's father was Joseph White Musser. Joseph, who pursued a struggling business attempting to develop oil and gas properties, was a prominent polygamist long after the Church had formally renounced the practice in the 1890 Woodruff Manifesto. This husband to four wives claimed that high officials of the Church had encouraged him to practice polygamy in order to keep it alive in the years following the issuance of the Manifesto. He openly advocated plural marriage in the fundamentalist magazine, *Truth*, of which he was the publisher. His arrest by federal officers in 1944 led to a term in prison. Joseph remained convinced throughout his life that his advocacy and practice of plural marriage would be justified, in heaven if not on earth. His personal papers are said to depict "a religious zealot, a loving father who regretted his absence from home, a tender and apologetic husband, a hard-working businessman, and a dreamer." He died in 1954.[280]

Milton's mother was Ellis Shipp Musser, whose own mother was the well-known Dr. Ellis Reynolds Shipp, the first female physician in Utah. Early in the early twentieth century the younger Ellis moved to Heber City, Utah, where she taught school. She met Joseph there, and their courtship began. They engaged in a substantial correspondence before Ellis reached a firm decision to enter into a polygamous marriage with Joseph. Their correspondence, which began shortly after their meeting and continued until Joseph's death, was often addressed with code names such as Ruth and Samuel or Child and Guide. Later in life Ellis expressed regrets about her polygamous union. It had deprived her of the steady companionship of a husband, she said, and her children of the presence of their father. As the nominal head of four households, Joseph was constantly shuttling from one home to another. His leadership of a fundamentalist religious sect called for him to preach and publish tracts. These tasks also took time away from his family, as did his prison term. And his unsuccessful efforts to

place his family on secure financial footing also necessitated a great deal of travel. The family's financial situation required other sources of income, and, with five children to raise, Ellis rose to the challenge. At a time when comparatively few women entered business, she earned extra income as an insurance agent. Her success enabled her to support two of her sons on Church missions and to help her children through school.[281]

In 1944, the year of Joseph's arrest, Ellis was excommunicated by the Mormon Church. Though she never lost her faith, this shocking experience embittered her toward plural marriage, and toward what she felt was hypocrisy on the part of some Church officials who had, she claimed, accepted her tithes and the missionary labors of her sons while fully aware that she was a plural wife, yet never rallied to her support when the family was in need.[282]

Ellis was an avid proponent of higher education. She received a Bachelor of Arts degree from the University of Utah in 1907. In her later life she took courses at the University of California at Berkeley, and at the age of seventy she was the oldest student at the University of Utah. She took great pride and pleasure in the accomplishments of her children.[283]

Her son Milton was born in Salt Lake City in 1911, and graduated from Latter-day Saints High School. Milton also attended LDS Junior College and LDS Business College, where he learned shorthand[284]—a necessity for a McReynolds clerk[285]—and business fundamentals. In 1930, he began a two-year Church mission in the British Isles, working in his second year in the European Mission Office in Liverpool. Upon his return to the United States, Musser matriculated at George Washington University, where he received first his bachelor's degree, and then his law degree in 1938. He served on the staff of the *George Washington Law Review* and was a member of Sigma Chi, from which he received the Balfour Province Award as "the most representative undergraduate" in the Fraternity's Eastern Province, "In token of his excellence in scholarship, personality, Fraternity service and student activity." In 1932, Musser was employed as a secretary and clerk to the Reconstruction Finance Corporation, and in 1933 and 1934 he worked as a legislative researcher on the staff of Utah Senator William H. King, who had defeated George Sutherland for the seat in 1916. From 1934 to 1938, Musser served as a law clerk to District of Columbia municipal court judge Nathan Cayton.[286]

It was at this point that Musser went to work for McReynolds for two terms.[287] One might think that a promotion from clerk to a municipal court judge to clerk for a Supreme Court Justice would merit notice. But young Musser found the experience so distasteful that it is not even mentioned in the Biographical Note to the Musser Family Papers Finding Aid at the Utah Historical Society.[288] On April 18, 1940, fellow McReynolds clerk John Knox wrote in his diary that he had received "a long and confidential letter" from Gertrude Jenkins, Justice Harlan Fiske Stone's secretary. "Concerning my old boss, Justice McReynolds, Gertrude wrote: 'He certainly is a mess. . . . Musser hates him and is leaving the end of this year.'"[289]

After a year of practice with the Washington firm of Roberts & McInnis, Musser enlisted in the Army. He served on active duty from April of 1941 to November of 1945, rising to the rank of lieutenant colonel. He began with the Army Corps of Engineers, supervising internal security at construction sites in the western hemisphere. In 1943 he was moved to the office of the Inspector General, where he conducted special investigations involving, among others, alleged fraud in the construction of the Pan American highway.[290] After his release from active duty, Musser settled in southern California. He worked for a year as assistant trust counsel at the head office of Security-First National Bank, and then joined

with Woodrow S. Wilson to form Musser & Wilson, a private law firm specializing in tax, corporate, probate, and trust matters. In 1948 and 1949 he taught Securities and Conflict of Laws at Southwestern University Law School.[291]

The Army recalled Musser from the Reserves to active duty as an investigator with the Inspector General in 1951. Though his first assignments took him to various parts of the United States and Europe, he was later headquartered in Panama. From this office he conducted investigations throughout Central and South America, where he frequently met with heads of government, their military chiefs, and the United States' ambassadors and other consular officials. He received strong performance reviews and several commendations and awards, and was disappointed when his application for integration in the regular Army as a Colonel in the Judge Advocate General Corps was declined in 1958. Musser concluded his military career in 1959 with an assignment in Washington, D.C., whereupon he returned to private practice with Musser & Wilson.[292] The firm's clients included Lawrence Welk, Liberace, and Betty White.[293] Musser continued to practice until 1968.[294] After Milton's death in 1986,[295] his law partner Wilson married Milton's widow, Laveda, with whom Musser fathered three children.[296]

Musser's successor, and McReynolds' last clerk, was Raymond Wallace Radcliffe, who served for the portion of the 1940 Term preceding McReynolds' retirement in February of 1941.[297] Radcliffe was born in 1914 in Washington, the son of Dr. and Mrs. Lewis Radcliffe. Dr. Radcliffe was a naturalist and conservationist who was serving as the director of the Oyster Institute of America at his death in 1950 at the age of seventy. His previous positions included deputy commissioner of the Bureau of Fisheries and executive secretary of the Sponge Institute. His son Raymond graduated from the old Central High School, took a degree from Strayer's Business College in 1936, and earned his L.L.B. and L.L.M. from National University in 1941 and 1943, respectively. In 1942 Raymond married Mary Denison Hope of Chattanooga, Tennessee. Before joining McReynolds, Raymond worked as a secretary for a variety of commercial concerns, a law clerk and stenographer for a Washington lawyer and the Public Roads Administration, an adjudicator for the Social Security Board, and an assistant clerk in the War Department. After McReynolds' retirement Raymond returned to his position in the War Department, resigning in November of 1941 to take a job as a personnel investigator for the Civil Service Commission. In 1946 he left to embark on a career as a real estate broker in Prince George's County. In 1966 he established his own real estate firm, which he continued to operate until his death of a heart ailment at the age of sixty-seven in 1982. Radcliffe was a member of the Izaak Walton League "Hall of Fame," an honor bestowed upon him for his work in conservation. A widower, he left one daughter.[298]

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ENDNOTES

[1] Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183 (1972); ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 32–51 (1978); William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 445–49 (1996). Sutherland has slipped in more recent years. In the 1972 Blaustein and Mersky poll he was included among fifteen "near great" Justices, placing him in the top twenty-seven of all time. In the 1993 poll Sutherland fell to fifty-ninth out of 106,

placing him in the forty-fourth percentile. Van Devanter placed 100th, Butler 103rd, and McReynolds dead last.

[2] There is no published biography of Van Devanter. There are, however, two unpublished dissertations covering various aspects of his early career. *See* Lewis L. Gould, "Willis Van Devanter in Wyoming Politics, 1884–1897" (unpublished Ph.D. dissertation, Yale University, 1966); and M. Paul Holsinger, "Willis Van Devanter: The Early Years, 1859–1911" (unpublished Ph.D. dissertation, University of Denver, 1964). *See also* James Joseph McArdle, "The Political Philosophy of Willis Van Devanter" (unpublished M.A. thesis, University of Wyoming, 1955); and James O'Brien Howard, "Constitutional Doctrines of Mr. Justice Van Devanter" (unpublished M.A. thesis, University of Iowa, 1937).

The closest thing that we have to a published biography of McReynolds is James E. Bond's slender volume, I DISSENT: THE LEGACY OF CHIEF [SIC] JUSTICE JAMES CLARK MCREYNOLDS (1992). A number of unpublished dissertations have been written about McReynolds. Among the more useful are Barbara Barlin Schimmel, "The Judicial Policy of Mr. Justice McReynolds" (unpublished Ph.D. dissertation, Yale University, 1964); Stephen Tyree Early, Jr., "James Clark McReynolds and the Judicial Process" (unpublished Ph.D. dissertation, University of Virginia, 1954); Doris Ariane Blaisdell, "The Constitutional Law of Mr. Justice McReynolds" (unpublished Ph.D. dissertation, University of Wisconsin, 1952); and John B. McGraw, Jr., "Justice McReynolds and the Supreme Court: 1914–1941" (unpublished Ph.D. dissertation, University of Texas, 1949). *See* also Robert D. Hill, "James Clark McReynolds: Prosecutor and Judge" (unpublished S.B. thesis, Harvard University, 1942); and STIRLING PRICE GILBERT, JAMES CLARK MCREYNOLDS (1862–1946): JUSTICE OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA (1946).

There are two book-length studies of Sutherland's jurisprudence, and while each contains some biographical information, neither purports to be a biography. *See* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS xii (1994); JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE vii (1951). Alpheus T. Mason, *The Conservative World of Mr. Justice Sutherland, 1883–1910*, 32 AM. POL. SCI. REV. 443 (1938) covers Sutherland's early career. The best unpublished dissertation on Sutherland is Jane J. Mansbridge deLong, "Brandeis and Sutherland: Apostles of Individualism" (unpublished Ph.D. dissertation, Harvard University, 1970). Also useful are James Morrill Banner, Jr., "Mr. Justice Sutherland and the Social Welfare" (unpublished M.A. thesis, Columbia University, 1961); and Jay Benson Saks, "Mr. Justice Sutherland: A Study in the Nature of the Judicial Process" (unpublished Ph.D. dissertation, Johns Hopkins University, 1940). Recent helpful discussions include Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639 (2009); Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions, and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249 (2002); and Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1 (1997).

There is no real biography of Butler. DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964) and FRANCIS JOSEPH BROWN, THE SOCIAL AND ECONOMIC PHILOSOPHY OF PIERCE BUTLER each contains some biographical data, but the former is principally about Butler's appointment to the Supreme Court, while the latter is a study of Butler's jurisprudence. In 1944 *The Catholic Educational Review* published a three-part article sketching Butler's life and career. *See* Richard J. Purcell, *Mr. Justice Pierce Butler*, 42 THE CATHOLIC EDUCATIONAL REVIEW 193–215, 327–41, 420–32 (April, June, and September, 1944). *See* also Richard J. Purcell, *Mr. Justice Pierce Butler (1866–1939)*, 10 THE RECORDER 33 (1940). The best unpublished dissertation on Butler is David Schroeder, "More Than a Fraction: The Life and Work of Justice Pierce Butler" (unpublished Ph.D. dissertation, Marquette University, 2009). Also instructive is David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695 (2009).

[3] *See* Willis Van Devanter Papers, Manuscript Division, Library of Congress; James Clark McReynolds Papers, University of Virginia School of Law; George Sutherland Papers, Manuscript Division, Library of Congress; Pierce Butler and Family Papers, Minnesota Historical Society.

[4] The other is a slim and not particularly revealing essay by Norris Darrell, who clerked for Justice Butler during the 1923 and 1924 Terms. *See* Norris Darrell, "Some Personal Reminiscences," in "Reminiscences by Alumni Who Graduated Fifty Years or More Ago from the University of Minnesota Law School" (Minneapolis, 1976) (unpublished manuscript on file with the University of Minnesota Law School). For an abridged version of this essay, *see* "Appendix: Reminiscences of Two University of Minnesota Law Graduates: Norris Darrell," in Robert A. Stein, *In Pursuit of Excellence: A History of the University of Minnesota Law School, Part III: The Frazier Years—A Time of Excellence and Innovation*, 62 MINN. L. REV. 1161, 1202–04 (1978). *See also* 3 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1948 175 (1948).

[5] DENNIS J. HUTCHINSON & DAVID J. GARROW, EDS., THE FORGOTTEN MEMOIR OF JOHN KNOX vii-ix, xv-xviii, 5–8 (2002).

[6] John Knox, *John Knox Diary* (Jan. 22, 1941) (unpublished manuscript available at Knox MSS, Special Collections, University of Virginia, folder 10240-g).

[7] HUTCHINSON & GARROW, *supra* note 5, at 246.

[8] *See* infra n.116 and accompanying text; n.289 and accompanying text.

[9] Arthur Mattson to Willis Van Devanter, July 25, 1929, Van Devanter MSS, LC, Files M-S, quoted in TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 69 (2006).

[10] *See infra* note 93, note 94, and note 106 and accompanying text.

[11] *See* Schroeder, "More Than a Fraction," *supra* note 2, at 79, 128, 150, 153, 180, 234; HUTCHINSON & GARROW, *supra* note 5, at 58. Even those who were critical of Van Devanter's jurisprudence conceded that he was "courteous" and "likeable." See DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 198 (1936).

[12] See PASCHAL, *supra* note 2, at 115–17, 233; Jay S. Bybee, *George Suthlerland*, in CLARE CUSHMAN, ED., THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789–2012, 316–17 (3d ed. 2012); Schroeder, "More Than a Fraction," at 150–51; TIMOTHY HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 281 (2001). Pearson and Allen were even more lavish in their assessment of Sutherland's temperament, characterizing the Justice as "suave" and "gentle," blessed with "amiability," an "inoffensive good nature," an "agreeable manner," and a "sweetness of disposition." PEARSON & ALLEN, *supra* note 11, at 159, 200, 201, 199.

[13] *See* Barry Cushman, *The Clerks of the Four Horsemen, Part II*, 40 J. SUP. CT. HIST (2015).

[14] *See id.* Butler clearly was liked and admired by many, including his longtime clerk John F. Cotter. *See* Schroeder, "More Than a Fraction," *supra* note 2, at 21–22, 38–40, 50 n.112, 55–56, 79, 82, 90 n.220, 150–54, 167–68, 180–81, 228–29, 233–35, 237–38, 240; Richard J. Purcell, *Mr. Justice Pierce Butler (1866–1939)*, 10 THE RECORDER 33, 36–37 (May 1, 1940); Richard J. Purcell, *Mr. Justice Pierce Butler*, THE CATHOLIC EDUCATIONAL REVIEW 426–31 (September, 1944); DANELSKI, *supra* note 2, at 9, 11.

[15] HUTCHINSON & GARROW, *supra* note 5, at 119 n.2.

[16] *Id.* at 130–36. McReynolds apparently also pulled this stunt with others of his clerks. *Id.* at 134.

[17] Chester H. Newland, *Personal Assistants to the Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 312 (1961); see also Employment Record of John Francis Cotter, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Cotter Employment Record").

[18] *Id.*; *see also* Cotter Employment Record.

[19] William D. Donnelly to Hugo L. Black, Aug. 27, 1937, Box 442, Hugo Black MSS, Library of Congress, quoted in PEPPERS, *supra* note 9, at 93.

[20] *See* PEPPERS, *supra* note 9, at 69.

[21] *See* I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J. L. & HUM. 119, 120 (1999).

[22] Barrett McGurn, *Law Clerks—A Professional Elite*, 1980 Y. B. SUP. CT. HIST. SOC. 98, 101.

[23] W. Barton Leach, *Recollections of a Holmes Secretary*, 1941 HARV. L. SCH. BULL. 12, 13.

[24] McGurn, *supra* note 22, at 101.

[25] *Id.* at 102; Messinger, *supra* note 21, at 141 n.90.

[26] PEPPERS, *supra* note 9, at 225.

[27] McGurn, *supra* note 22 at 102; Norman Dorsen, Law Clerks in Appellate Courts in the United States, 26 MOD. L. REV. 265, 267 (1963).

[28] McGurn, *supra* note 22, at 102.

[29] Leach, *supra* note 23, at 12; Messinger, *supra* note 21, at 142 n.90.

[30] Messinger, *supra* note 21, at 142 n.90.

[31] McGurn, *supra* note 22, at 102.

[32] *Id.*

[33] Messinger, *supra* note 21, at 142 n.90.

[34] McGurn, *supra* note 22, at 102.

[35] *Id.*; Messinger, *supra* note 21 at 121, 140.

[36] *John Lockwood, 89; Advised Rockefellers*, N.Y. TIMES, Sept. 1, 1993.

[37] Messinger, *supra* note 21, at 141 n.90.

[38] *Id.*

[39] *Id.*

[40] Leach, *supra* note 23, at 12–13; Messinger, *supra* note 21, at 142 n.90.

[41] Messinger, *supra* note 21, at 142 n.90. Others include Charles K. Poe of the Seattle firm of Poe, Falknor & Emery; Howard Stockton of Warren, Garfield, Whiteside & Lamson in Boston; Leland Duer of Duer & Taylor in New York; Vaughn Miller of Miller, Martin, Hitching & Tipton in Chattanooga; Robert Benjamin of Parker, Duryee, Benjamin, Zunino & Malone in New York; Robert Wales of Miller, Gorham, Wescott & Adams in Chicago; Messinger, *supra* note 21, at 141 n.90; Charles Denby, Jr., Assistant Administrator, Lend-Lease Administration; Messinger, *supra* note 21, at 142 n.90; James M. Nicely, Vice-President of the First City National Bank; Messinger, *supra* note 21, at 142 n.92; and, of course, Alger Hiss. Messinger, *supra* note 21, at 142 n.90.

[42] McGurn, *supra* note 22, at 98; Dorsen, *supra* note 27, at 267.

[43] McGurn, *supra* note 22, at 102; Dorsen, *supra* note 27, at 267.

[44] McGurn, *supra* note 22, at 102; Dorsen, *supra* note 27, at 267.
[45] McGurn, *supra* note 22, at 98; Dorsen, *supra* note 27, at 267.
[46] PEPPERS, *supra* note 9, at 220.
[47] *Id.*
[48] McGurn, *supra* note 22, at 102.
[49] PEPPERS, *supra* note 9, at 220.
[50] McGurn, *supra* note 22, at 102.
[51] *Id.*
[52] *Id.*; Myron H. Bright & David T. Smorodin, *A Flawed Tale*, 16 *Loy. L.A. L. Rev.* 205, 216, n.40 (1983).
[53] McGurn, *supra* note 22, at 102.
[54] Bright & Smorodin, *supra* note 52, at 220, n.56.
[55] McGurn, *supra* note 22, at 102.
[56] PEPPERS, *supra* note 9, at 232.
[57] McGurn, *supra* note 22, at 101.
[58] Blaustein & Merksy, *supra* note 1, at 1184.
[59] Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 *Cardozo L. Rev.* 235, 236 (1988).
[60] PEPPERS, *supra* note 9 at 232.
[61] Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710 (1946).
[62] McGurn, *supra* note 22, at 102.
[63] PEPPERS, *supra* note 9, at 232.
[64] *Id.*; *Howard C. Westwood, Expert in Airline Law, 84*, N.Y. TIMES, March 21, 1994.
[65] PEPPERS, *supra* note 9, at 232.
[66] *Thomas Harris, 83, Elections Official and Labor Lawyer*, N.Y. TIMES, Feb. 11, 1996.
[67] McGurn, *supra* note 22, at 102; MICHAEL E. PARRISH, CITIZEN RAUH: AN AMERICAN LIBERAL'S LIFE IN LAW AND POLITICS (2010).
[68] *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 *Cardozo L. Rev.* 5, 20 (1979).
[69] HUTCHINSON & GARROW, *supra* note 5, at 272–77; 3 SWAINE, *supra* note 2, at 175; *John Knox*, CHI. TRIB., March 3, 1997, Metro Chicago, p. 5.
[70] Knox Diary, December 28, 1962, Knox Papers, Box 20, Georgetown University Library, quoted in HUTCHINSON & GARROW, *supra* note 5, at 272.
[71] Knox Diary, June 18, 1963, Knox Papers, Box 20, Georgetown University Library, quoted in HUTCHINSON & GARROW, *supra* note 5, at 272.
[72] HUTCHINSON & GARROW, *supra* note 5, at 272.
[73] Willis Van Devanter's clerks' dates of service were provided by the Supreme Court of the United States Library in correspondence dated June 26, 2002 (hereinafter Supreme Court Library Correspondence). While there is no complete list of all Supreme Court law clerks, the Library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may contain incomplete and unverified information.
[74] Richard H. Repath Death Certificate (on file with the author).
[75] JOHN W. DAVIS, WYOMING RANGE WAR: THE INFAMOUS INVASION OF JOHNSON COUNTY 259 (2010); T.A. LARSON, HISTORY OF WYOMING 288 (2d ed. 1990); Session Laws of the State Legislature of Wyoming 7 (1890); *Well Known Cheyenne Man Expires*, WYOMING STATE TRIB., Jan. 11, 1943, p. 1.
[76] *A Dip Into History*, WYOMING TRIB., Oct. 22, 1904, p. 2.
[77] 7 Wyo. iii (1900); 4 Wyo. iii (1898); Session Laws of the State of Wyoming 3 (1897); Senate Journal of the Fourth State Legislature of Wyoming 457 (1897); Session Laws of the State of Wyoming 3 (1895); Annual Report of the State Auditor of Wyoming for the Year Ending September 30, 1892 App. p. iv (1892); Session Laws of the State of Wyoming 7 (1890); *Locals*, WYOMING COMMONWEALTH, Oct. 19, 1890; CHRISTINE BOLD, THE FRONTIER CLUB: POPULAR WESTERNS AND CULTURAL POWER, 1880–1924 78 (2013).
[78] *See*, e.g., *Advertisement*, CHEYENNE DAILY SUN, June 5, 1894, p. 4; *Advertisement*, CHEYENNE DAILY SUN, May 14, 1893, p. 4; *Advertisement*, CHEYENNE DAILY SUN, April 6, 1892, p. 4; *Advertisement*, CHEYENNE DAILY SUN, June 9, 1891, p. 2.
[79] *Short Items*, CHEYENNE DAILY LEADER, May 5, 1903, p. 3; *Centered on Wyoming*, LARAMIE BOOMERANG, Aug. 30, 1897, p. 8; Employment Record of Richard H. Repath, National Personnel Records Center, National Archives at St. Louis (on file with the author).
[80] *Short Items*, CHEYENNE DAILY LEADER, May 5, 1903, p. 3.
[81] *See*, e.g., *Leaving for St. Paul*, WYOMING TRIB., Apr. 30, 1910, p. 6; *Personals*, CHEYENNE DAILY LEADER, May 31, 1908, p. 4; *Complete Court Session*, WYOMING TRIB., Sept. 26, 1906, p. 5; *Personal Mention*, CHEYENNE DAILY LEADER, Nov. 9, 1905, p. 3.
[82] *Repath Leaves Van Devanter to Go with Judge Riner*, WYOMING TRIB., Sept. 19, 1911, p. 3. Professor Peppers notes that upon Repath's return to Wyoming, he nevertheless "continued to perform services and favors for the justice—paying dues owed to a local Masonic lodge, cleaning out the justice's old Eighth Circuit chambers, and closing bank accounts." PEPPERS, *supra* note 9, at 69, citing Repath to Van Devanter, November 14 and 22, 1916, and January 31, 1917, Willis Van Devanter Papers, General Correspondence File, Manuscript Division, Library of Congress.
[83] *See Repath Says It's Hot*, WYOMING TRIB., July 31, 1908, p. 4. Compare Wayne Ford, *Man Says It's Too Hot to Fish*, ATHENS-BANNER HERALD, July 16, 2011, available at http://onlineathens.com/stories/071611/oco_857876345.shtml.

[84] *Repath Leaves Van Devanter to Go With Judge Riner*, WYOMING TRIB., Sept. 19, 1911, p. 3.

[85] *T.B. Kennedy Chosen to Succeed Riner as U.S. District Judge*, SHERIDAN DAILY ENTERPRISE, Oct. 18, 1921, p. 3; *Repath's Nephew Killed, Is Rumor*, WYOMING STATE TRIB., Aug. 13, 1918, p. 1; *Visiting List*, CHEYENNE DAILY LEADER, Jan. 31, 1917, p. 3.

[86] *Society*, WYOMING REPORTER, Nov. 9, 1926, p. 6; *General Breakdown Suffered by Kennedy, Illness Is Not Serious*, LARAMIE DAILY BOOMERANG, Sept. 5, 1922, p. 7; *Cheyenne City Directory*, 247, R.L. Polk & Co. (1942); *Cheyenne City Directory*, 224, R.L. Polk & Co. (1939–40); *Cheyenne City Directory*, 195, R.L. Polk & Co. (1937–38); *Cheyenne City Directory*, 180, R.L. Polk & Co. (1933–34); *Cheyenne City Directory*, 188, R. L. Polk & Co. (1929–30); *Cheyenne City Directory*, 198, R.L. Polk & Co. (1928); *Cheyenne City Directory*, 162, R. L. Polk & Co. (1926).

[87] *Well Known Cheyenne Man Expires*, WYOMING STATE TRIB., Jan. 11, 1943, p. 1; Richard H. Repath Death Certificate (on file with the author).

[88] *See*, e.g., PROCEEDINGS OF THE GRAND COMMANDERY OF THE KNIGHTS TEMPLAR AND APPENDANT ORDERS OF THE STATE OF VERMONT 105 (1942); PROCEEDINGS OF THE ANNUAL CONCLAVE OF THE GRAND COMMANDERY OF KNIGHTS TEMPLAR OF THE STATE OF INDIANA 48 (1934); PROCEEDINGS OF THE GRAND COMMANDERY, KNIGHTS TEMPLAR, AND APPENDANT ORDERS, OF THE DISTRICT OF COLUMBIA, ANNUAL CONCLAVE 738 (1914); *Respected Pioneer Is Called to Rest*, WYOMING REPORTER, Nov. 9, 1926, p. 1; *Wyoming Commandery Has Installation of Officers*, CHEYENNE STATE LEADER, Dec. 28, 1917, p.8; *Knights Hold Election*, NATRONA COUNTY TRIB., Apr. 3, 1913, p. 2; *Knight Templars Elect and Install Officers*, CHEYENNE STATE LEADER, Dec. 14, 1909, p. 1; *Commandery Elects Officers for the Year*, CHEYENNE, DAILY LEADER, Apr. 3, 1908, p. 5; *Knight Templar Officers*, WYOMING TRIB., Dec. 18, 1906, p. 6.

[89] *See*, e.g., *One Hundred Masons Come for Reunion*, WYOMING STATE TRIB. & CHEYENNE STATE LEADER, June 7, 1921, p. 1; *Installation of Officers by Lodge Perfection*, CHEYENNE STATE LEADER, March 5, 1918, p. 2; *Masons Install Officers for 1918*, CHEYENNE STATE LEADER, Dec. 23, 1917, p. 8; *Officers of the R.A.M.*, LARAMIE REPUBLICAN, Apr. 8, 1910, p. 3; *R.A.M. Officers*, WYOMING TRIB., Dec. 18, 1896, p. 1.

[90] *See*, e.g., *Well Known Cheyenne Man Expires*, WYOMING STATE TRIB., Jan. 11, 1943, p. 1; *Country Club Being Given Business Tone*, WYOMING TRIB., March 10, 1917, p. 4; *The Committees*, WYOMING TRIB., Feb. 6, 1910, p. 2; *How the Club Is Growing*, CHEYENNE DAILY LEADER, June 11, 1907, p. 4.

[91] *Fund of $25,000 To Be Raised For Memorial*, LARAMIE DAILY BOOMERANG, Nov. 1, 1922, p. 7.

[92] BOLD, *supra* note 77, at 78.

[93] OWEN WISTER, THE VIRGINIAN (1902). Repath's successor, Frederick H. Barclay, clerked for Van Devanter during the 1911, 1912, and 1913 terms. Supreme Court Library Correspondence. Barclay was born in Illinois in February of 1869. THIRTEENTH CENSUS OF THE UNITED STATES—POPULATION, Precinct 8, Washington, District of Columbia, Roll T624_153, p. 12A, Enumeration District 0148, FHL Microfilm 1374166 (1910). He later moved to Newcastle, Wyoming, *Repath Leaves Van Devanter to Go with Judge Riner*, WYOMING TRIB., Sept. 19, 1911, p. 3, and received his law degree from Columbian University in Washington in 1901. *Graduates of Columbian*, WASH. POST, May 24, 1901, p. 10. Prior to his service with Van Devanter, he worked for twelve years as a copyist, clerk, and assistant attorney in the Department of the Interior. Employment Record of Frederick H. Barclay, National Personnel Records Center, National Archives at St. Louis (hereinafter "Barclay Employment Record") (on file with the author); *Answer of Mr. Hitchcock: Secretary of the Interior Says Mallon Has No Title to Mine Land*, WASH. POST, Oct. 30, 1903, p. 5. After leaving Van Devanter at the age of forty-five, he took a job as an attorney with the Interstate Commerce Commission. Barclay Employment Record; TWENTY-NINTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, 29 I.C.C. 193 (1915). The following year he married Alice Strong, and the happy couple took up residence at, of all places, the Wyoming apartment building in Washington, D.C. *Married at Pelham*, Oct. 6, 1915, p. 7. By 1920, at the age of fifty-one, Barclay had risen to the post of Senior Examiner with the I.C.C. Barclay Employment Record; 36th ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, 36 I.C.C. 238 (1922). He periodically served on the vestry of the Episcopal Church of the Ascension. *Episcopal Churches Elect Officers at 1932 Meeting: Congregations in Washington Dioceses, Comprising Units in Capital, Virginia, and Maryland, Select Wardens and Vestrymen for the Year*, WASH. POST, March 29, 1932, p. 5; *Church Offices Filled: Wardens and Vestrymen Named by Episcopal Congregations*, WASH. POST, April 10, 1917, p. 9. Alice, who was two years older than Frederick, died in 1933. Frederick remained with the I.C.C. in Washington until his death from pneumonia at the Home for Incurables in the summer of 1940. Barclay Employment Record; SIXTEENTH CENSUS OF THE UNITED STATES—POPULATION, Washington, District of Columbia, Roll T627_571, p. 1A, Enumeration District 1–537 (1940); E-mail from Michael Vreeland, Parish

Administrator, Church of the Ascension and St. Agnes, Washington, D.C. to Dwight King, Research Librarian, Notre Dame Law Library (September 30, 2013) (on file with author).

[94] Supreme Court Library Correspondence; Employment Record of George Howland Chase III, National Personnel Records Center, National Archives at St. Louis (hereinafter "Chase Employment Record") (on file with the author). Chase was preceded by Mahlon D. Kiefer, who clerked for Van Devanter from the 1914 Term through the 1922 Term. Employment Record of Mahlon D. Kiefer, National Personnel Records Center, National Archives at St. Louis (hereinafter "Kiefer Employment Record") (on file with the author); Supreme Court Library Correspondence. Kiefer was born on a farm near Hershey, Pennsylvania in 1881. In 1899 he moved to Brooklyn, New York, where until 1901 he studied stenography and typewriting at Brown's Business College. Thereafter he worked as a stenographer for various firms in New York City, including the Equitable Assurance Society and the Harper & Brothers publishing company. In 1904 he moved to Washington, where he attended law classes at George Washington University for one term before enrolling in the National University Law School, from which he received his L.L.B. in 1907 and his L.L.M. in 1909. While a student he worked as a copyist and clerk for the Department of Justice, and as clerk for the Solicitor of the Treasury in the Office of the Attorney General. In 1913 he left Treasury to perform legal work in the office of the Solicitor of the Department of Commerce and Labor, before joining Van Devanter in August of 1914. Kiefer Employment Record; *Law Students in Debate*, WASH. POST, March 25, 1907, p. 9; REGISTER OF THE OFFICE OF THE ATTORNEY GENERAL 17 (No. 2 of 1911). When Kiefer resigned to take a higher-paying position in the Justice Department in September of 1923, Justice Van Devanter wrote to him, "I shall be very sorry to lose you—extremely sorry. I had not counted on that, and hardly know where to turn. But I do not want to stand in the way of your doing better. That is all that could reconcile me to your going. You have always been very efficient in your work, and very good to me personally. I have formed a very sincere and strong attachment for you. Of course there is no hope of any promotion if you stay with me. The place and the compensation are fixed by law, and I cannot make any change in either. . . . Of course, I wish you well and shall always be interested in you and in your progress." Willis Van Devanter to M.D. Kiefer, Sept. 20, 1923, Kiefer Employment Record.

Following his clerkship with Van Devanter, Kiefer became a Special Assistant to the Attorney General in the Prohibition Division of the Justice Department. Kiefer Employment Record; *see*, e.g., *Taylor v. U.S.*, 286 U.S. 1, 3 (1932); *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344, 347 (1931); *U.S. v. Norris*, 281 U.S. 619, 620 (1930); *Commercial Credit Co. v. U.S.*, 276 U.S. 226, 227 (1928); *U.S. v. Berkeness*, 275 U.S. 149, 150 (1927); *Lambert v. Yellowley*, 272 U.S. 581, 586 (1926); *Steele v. U.S.*, 267 U.S. 505 (1925); *Delaney v. U.S.*, 263 U.S. 586, 587 (1924). After the Prohibition Division was abolished following ratification of the Twenty-First Amendment, Kiefer continued to work in the Criminal Division of the Justice Department, specializing in cases involving liquor, kidnapping, and international extradition. It was Kiefer who wrote the Department's position memorandum on the many legal consequences of Prohibition repeal, in which he argued among other things that all pending prosecutions for violations of the National Prohibition Act must be dismissed. He reached the age of mandatory retirement in 1951. Kiefer Employment Record; *The Department Says Good-by to Kief*, WASH. EVE. STAR, May 1, 1951; see, e.g., *U.S. v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 220 (1939); *Myers v. U.S.*, 305 U.S. 670 (1938); *Wainer v. U. S.*, 299 U.S. 92 (1936); *U.S. v. Constantine*, 296 U.S. 287, 288 (1935). A Republican who was married but had no children, Kiefer died in 1965 in Sarasota, Florida. Kiefer Employment Record; WASH. POST AND TIMES HERALD, June 23, 1965, p. B9.

[95] *George H. Chase, 83, Ex-Reserve Board Aide*, NEW YORK TIMES, Oct. 28, 1981, p. B4; *George H. Chase, 83*, WASH. POST, Oct. 28, 1981, p. C10; Chase Employment Record.

[96] 62–2 ALUMNI HORAE 79 (1982).

[97] *George H. Chase, 83, Ex-Reserve Board Aide*, NEW YORK TIMES, Oct. 28, 1981, p. B4; *George H. Chase, 83*, WASH. POST, Oct. 28, 1981, p. C10; 3 SWAINE at 121; *Chicago, Milwaukee, & St. Paul Ry. Co.*, 44 I.C.C. VALUATION REP. 441 (1933); *Atchison, Topeka, & Santa Fe Ry. Co. v. U.S.*, 284 U.S. 248, 249 (1932); *Sta-Shine Products Co., Inc. v. Station WGBB of Freeport, New York*, 188 I.C.C. 271 (1932).

[98] 1927 J. SUP. CT. U.S. 189 (1928).

[99] *Mary Chandler Hale Wed*, WASH. POST, Oct. 6, 1929, p. 31; *Miss Mary Hale To Be the Bride of Mr. G.H. Chase*, WASH. POST, July 9, 1929, p. 7.

[100] *George H. Chase, 83, Ex-Reserve Board Aide*, NEW YORK TIMES, Oct. 28, 1981, p. B4; *George H. Chase, 83*, WASH. POST, Oct. 28, 1981, p. C10; 5 D.C. REG. 259 (1959); Chase Employment Record.

[101] *Mary Hale Chase*, WASH. POST, Feb. 19, 1988, 1988 WLNR 2532613.

[102] 82 PRINCETON ALUMNI WEEKLY 47 (1982).

[103] *George H. Chase, 83, Ex-Reserve Board Aide*, NEW YORK TIMES, Oct. 28, 1981, p. B4; 97 ANN. REP. A.B.A. 183 (1972).

[104] Supreme Court Library Correspondence. During the 1924 Term Yokum shared clerking duties with J. Arthur Mattson, who clerked for Van Devanter from the 1924

Term through the 1928 Term. Supreme Court Library Correspondence. Mattson was born in Helena, Montana in 1901, and attended the University of Montana before taking his law degree from Georgetown in 1924. *Arthur Mattson: Corporation Lawyer Was Once Aide to Van Devanter*, N.Y. TIMES, Sept. 17, 1994, p. 42. During law school he represented the *Billings Gazette*, the *Great Falls Tribune*, the *Helena Gazette*, and the *Sioux Falls Argus Leader* in the Congressional Press Gallery. 1922–3 CONG. DIR. 465, 466 (1922); 1923–1 CONG. DIR. 471, 472 (1923); 1924–1 CONG. DIR. 478, 481 (1924). Following his graduation he was admitted to practice in Montana, 1924–1926 MONTANA ATTORNEY GENERAL REPORTS AND OPINIONS 11 (1926), and in the District of Columbia. *The Legal Record*, WASH. POST, Oct. 20, 1924, p. 11. Mattson married Ruth C. Galbreath, and they moved to New York in 1929. He engaged in a Wall Street practice specializing in issues of corporation, estate, federal tax, and Swiss law. *Arthur Mattson: Corporation Lawyer Was Once Aide to Van Devanter*, N.Y. TIMES, Sept. 17, 1994, p. 42; *Suite Demand Shows Activity in Many Zones*, N.Y. HERALD TRIB., Sept. 19, 1929, p. 43. *See*, e.g., *Leake v. Commissioner*, 1 T.C.M. 623 (1943); *Escher v. Commissioner*, 78 F. 2d 718 (3d Cir. 1935); *U.S. v. Henry Prentiss, Co., Inc.*, 288 U.S. 73, 77 (1933). He was the co-author of *A Digest of the Law of Switzerland*. Mattson served as an officer or director of several corporations, and belonged to a few clubs. He died at the young age of 42 in September of 1944, leaving a widow but no children. *Arthur Mattson: Corporation Lawyer Was Once Aide to Van Devanter*, N.Y. TIMES, Sept. 17, 1994, p. 42.

[105] Employment Record of James W. Yokum, National Personnel Records Center, National Archives at St. Louis (on file with the author); Employment Record of James W. Yokum, National Personnel Records Center, Valmeyer, Illinois (on file with the author); *Washington Organization News of the Week*, WASH. POST, Nov. 27, 1938, p. 5; http://public.mapper.army.mil/ANC/ANCWeb/PublicWMV/ancWeb.html.

[106] Supreme Court Library Correspondence.

[107] *Licensed to Marry*, WASH. POST, Dec. 19, 1915, p. 20.

[108] *McHale in the Lead*, BOSTON DAILY GLOBE, April 4, 1905, p. 8.

[109] Employment Record of John T. McHale, National Personnel Records Center, National Archives at St. Louis (hereinafter "McHale Employment Record") (on file with the author); *District Court News*, WASH. POST, Jan. 5, 1917, p. 5.

[110] McHale Employment Record; *News of the Personnel of the Government Departments*, WASH. POST, Oct. 18, 1925, p. B10.

[111] PEPPERS, *supra* note 9, at 69.

[112] James Clark McReynolds' clerks' dates of service were provided by the Supreme Court of the United States Library in correspondence dated June 26, 2002 (hereinafter Supreme Court Library Correspondence). While there is no complete list of all Supreme Court law clerks, the Library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may contain incomplete and unverified information.

[113] *The Federal Diary*, WASH. POST, Oct. 26, 1938, p. X16.

[114] FEDERAL REGISTER, Thursday, July 11, 1946, p. 7622.

[115] *Obituary 1 – No Title*, WASH. POST, Nov. 18, 1947, p. B2.

[116] Harry Parker to John Knox, Jan. 20, 1938, (unpublished manuscript available at Knox MSS, Special Collections, University of Virginia, folder 10240-a).

[117] Newland, *supra* note 17, at 306–07.

[118] Here again I discuss some of the clerks in the endnotes.

[119] Leroy E. Reed, the first McReynolds clerk, joined the Justice for the 1914 Term. Supreme Court Library Correspondence. He attended Georgetown University, *G. U. Fraternity at Banquet*, WASH. POST, May 7, 1913, p. 3, and was admitted to the bar of the District of Columbia in 1913. *Admitted to the Bar*, WASH. POST, Oct. 14, 1913. Beginning in 1910 he worked as a stenographer in the office of the U.S. Solicitor General, and became a confidential clerk in the Department of Justice under Attorney General Wickersham. In 1912 he transferred to the State Department, where he became secretary to the chief of the Latin American Bureau. In 1913 he became a confidential clerk to the new Attorney General McReynolds. He left the Department at the end of 1913 to become private secretary to Wickersham in New York, but in April of 1914 returned for a brief stint at Justice before resigning in October to assume his duties as secretary to the new Justice McReynolds. REGISTER OF THE OFFICE OF THE ATTORNEY GENERAL 11 (No. 2 of 1911); *McReynolds Aid Resigns*, CHRISTIAN SCIENCE MONITOR, Dec. 13, 1913, p. 22; *Reed Secretary to McReynolds*, WASH. POST, Oct. 24, 1914, p. 5; Employment Record of Leroy E. Reed, National Personnel Records Center, National Archives at St. Louis (on file with the author). Shortly after he concluded the clerkship with McReynolds, Reed married Helena Doocy, a 1914 graduate of the Washington College of Law who went on to a distinguished career as a lawyer and trust officer for the Lincoln National Bank and as an assistant U.S. attorney for the District of Columbia specializing in the collection of fines and civil debts. When Mrs. Reed retired in 1963 she was presented with the Justice Department's "sustained superior performance award." By that time she had been widowed for forty-four years: Leroy Reed perished in the flu epidemic of 1919. *She*

Worked and 'Uncle Sam' Collected, WASH. POST, July 3, 1963, p. B6; *Washington Woman Named An Assistant U.S. Attorney*, WASH. POST, March 17, 1943, p. B1.

[120] Supreme Court Library Correspondence. Mallan was preceded by S. Milton Simpson, who clerked for McReynolds during the 1915 term, and for the bulk of the of the 1919 term, from October 1, 1919 to April 3, 1920. Employment Record of Stephen Milton Simpson, National Personnel Records Center, National Archives at St. Louis (hereinafter "Simpson Employment Record") (on file with the author). Simpson was born in Brooklyn in 1892. After attending George Washington University he graduated from Georgetown University Law School in 1913, and was admitted to the D.C. bar later that year. Supreme Court Library Correspondence; *S. Milton Simpson, Lawyer Here, Dies*, WASH. POST, May 30, 1965, p. B3; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 459, 82nd Annual Edition (Martindale-Hubbell, Inc. 1950), *microformed on* LLMC Martindale-Hubbell, Directories (1950) No. 92-001A F15. Following his graduation he worked as deputy clerk of the Commerce Court. 1913–3 CONG. DIR. 342. He served as confidential clerk to then-Attorney General McReynolds for the three months preceding the Justice's appointment to the Court in March of 1914. He then served as private secretary to Assistant Attorney General Underwood until rejoining McReynolds as his private secretary in November of 1915. After leaving McReynolds in September of 1916, Simpson worked as a law clerk, stenographer, and attorney in the Department of Justice until June of 1918, when he became an aviation cadet in the Army Signal Corps. In early 1919 he returned to the Justice Department, and from April to October of that year he served as special assistant to U.S. Attorney for the Southern District of New York. After his second stint as Justice McReynolds' law clerk, he served from 1920 to 1922 as an attorney in the Office of the Solicitor of Internal Revenue. Simpson Employment Record; *S. Milton Simpson, Lawyer Here, Dies*, WASH. POST, May 30, 1965, p. B3; *Fort Smith & Western R.R. Co. v. U. S.*, 253 U.S. 206 (1920); *San Pedro, Los Angeles, & Salt Lake R.R. Co. v. U.S.*, 247 U.S. 307 (1918); *Chicago & Northwestern Ry. Co. v. U.S.*, 246 U.S. 512 (1918); 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 459, 82nd Annual Edition (Martindale-Hubbell, Inc. 1950), *microformed on* LLMC Martindale-Hubbell, Directories (1950) No. 92-001A F15. In 1923 he became associated with the Washington office of Root, Clark, Ballantine & Bushby and its successor firms, where he would maintain a tax and real estate development practice until his death in 1965. *S. Milton Simpson, Lawyer Here, Dies*, WASH. POST, May 30, 1965, p. B3. See, e.g., 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1594, 74th Annual Edition (Martindale-Hubbell, Inc. 1942), *microformed on* LLMC Martindale-Hubbell, Directories (1942) No. 92-001A F11; *Estate of Allen v. Commissioner*, 6 T.C. 597 (1946); *Van Cliefv. Helvering*, 135 F. 2d 254 (D.C. Cir. 1943); *Hawaiian-Philippine Co. v. Commissioner*, 35 B.T.A. 173 (1936); *Prairie Oil & Gas Co. v. Commissioner*, 29 B.T.A. 113 (1933); *Brady v. Commissioner*, 22 B.T.A. 596 (1931); *Hawaiian Sugar Co. v. Commissioner*, 13 B.T.A. 683 (1928); *Appeal of Manville Jenckes Co.*, 4 B.T.A. 765 (1926). It does not appear that Simpson ever became a partner in the firm: his Martindale-Hubbell entries list him as either "Tax Counsel" or a "Resident Associate" in the Washington office, and his obituary characterizes him as the firm's "Washington representative." None of his Martindale-Hubbell listings mentioned his service as secretary to Justice McReynolds. He died in 1965, survived by his wife, four children, and eight grandchildren. THE MARTINDALE-HUBBELL LAW DIRECTORY 459, 82nd Annual Edition (Martindale-Hubbell, Inc. 1950), *microformed on* LLMC Martindale-Hubbell, Directories (1950) No. 92-001A F15; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 623, 87th Annual Edition (Martindale-Hubbell, Inc. 1955), *microformed on* LLMC Martindale-Hubbell, Directories (1955) No. 92-001A F19; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 850, 92nd Annual Edition (Martindale-Hubbell, Inc. 1960), *microformed on* LLMC Martindale-Hubbell, Directories (1960) No. 92-001A F22; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1289, 97th Annual Edition (Martindale-Hubbell, Inc. 1965), *microformed on* LLMC Martindale-Hubbell, Directories (1965) No. 92-001A F29; *S. Milton Simpson, Lawyer Here, Dies*, WASH. POST, May 30, 1965, p. B3.

[121] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24.

[122] *President Names Blaine Mallan to Aid Utilities Board*, WASH. POST, Jan. 13, 1927, p. 1.

[123] *Western Alumni Plan to Be Merry*, WASH. POST, June 1, 1922, p. 7.

[124] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24; *President Names Blaine Mallan to Aid Utilities Board*, WASH. POST, Jan. 13, 1927, p. 1.

[125] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24.

[126] *Admits 98 to D.C. Bar*, WASH. POST, Jan. 22, 1915, p. 14; *The Legal Record*, WASH. POST, Feb. 2, 1915, p. 10.

[127] *West End Citizens Meet*, WASH. POST, April 9, 1916, p. 13.

[128] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24.

[129] See *Delta Tau Delta Dine*, WASH. POST, April 18, 1915, p. 14 (Mallan speaks at alumni dinner held in House restaurant at Capitol); *Delta Tau Delta Men Give Luncheon*, WASH. POST, Sept. 24, 1915, p. 6 (Mallan

serves as chair of the local alumni chapter's entertainment committee).

[130] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24.

[131] *College Men to Feast: Washington U.V. Alumni Banquet to Be Notable Affair*, WASH. POST, April 9, 1916, p. 12.

[132] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24; *President Names Blaine Mallan to Aid Utilities Board*, WASH. POST, Jan. 13, 1927, p. 1.

[133] *See*, e.g., *Rent Body Is Reversed*, WASH. POST, July 15, 1924, p. 18; Taylor v. Maddux, Marshall & Co., 55 App. D.C. 254 (1925).

[134] 1919 J. SUP. CT. U.S. 80 (1919).

[135] *Display Ad 85—No Title*, WASH. POST, March 8, 1925, p. 72; WASH. POST, March 8, 1925, p. 74.

[136] *Engagements and Weddings of Interest*, WASH. POST, Nov. 2, 1924, p. SO2; *President Names Blaine Mallan to Aid Utilities Board*, WASH. POST, Jan. 13, 1927, p. 1.

[137] *Capital Society Events*, WASH. POST, April 30, 1925, p. 7.

[138] *Secret Naming of Officials Is Protested to Capper*, WASH. POST, Jan. 16, 1927, p. 22; *President Names Blaine Mallan to Aid Utilities Board*, WASH. POST, Jan. 13, 1927, p. 1.

[139] *House Committee Urged to Oppose Naming of Mallan*, WASH. POST, Jan. 20, 1927, p. 22.

[140] *Mallan Too Little Known as Lawyer, Blanton Declares*, WASH. POST, Jan. 27, 1927, p. 22.

[141] *Kin of Blaine Escapes Death in Auto Plunge*, WASH. POST, Oct. 9, 1923, p. 8.

[142] *Senate to Inquire Into Intoxication Charge on Mallan*, WASH. POST, Jan. 23, 1927, p. 2; *President Recalls Mallan Nomination for Utilities Post*, WASH. POST, Jan. 25, 1927, p. 1.

[143] *Mrs. Nina Gore Vidal Is Wed to Hugh Auchincloss, Broker*, WASH. POST, Oct. 9, 1935, p. 1; *Mrs. Mallan Is Engaged to E.E. Rapley*, WASH. POST, Oct. 24, 1939, p.14. The Mallans were still together in 1933. *See* WASH. POST, July 16, 1933, p. 23.

[144] *See*, e.g., *Stern v. Ruzicka*, 44 F. Supp. 726 (D.D.C. 1942); *Standard Slag Co. v. Commissioner*, 62 App. D.C. 8 (1933); *Marx v. Maybury*, 284 U.S. 691 (1931); *Condon v. Mallan*, 58 App. D.C. 371 (1929); *Todd v. State of Washington*, 277 U.S. 611 (1928); *Edgar Estates Corp. v. U.S.*, 65 Ct. Cl. 415 (1928); *Auto Crash Basis of Suit*, WASH. POST, May 26, 1928, p. 22.

[145] *$10,425 Suit Is Filed Against Blaine Mallan*, WASH. POST, Sept. 20, 1932, p. 7.

[146] *Mallan Rites to Be Held on Monday*, WASH. POST AND TIMES HERALD, July 16, 1955, p. 24.

[147] *T. E. Allison, Retired U.S. Attorney*, WASH. POST, Oct. 31, 1974, p. C15; Employment Record of Thomas Ellis Allison, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Allison Employment Record").

[148] Supreme Court Library Correspondence; Allison Employment Record.

[149] Allison Employment Record; *T. E. Allison, Retired U.S. Attorney*, WASH. POST, Oct. 31, 1974, p. C15. *See, e.g., Milton Dairy Co. v. Willcuts*, 8 F. 2d 178 (D.C. Minn. 1925); *Red Wing Malting Co. v. Willcuts*, (D.C. Minn. 1925); *Walsh v. Capewell Horse Nail Co.*, 4 F. 2d 991 (2d Cir. 1925); *Hampton & L.F. Ry. Co. v. Noel*, 300 F. 438 (D.C. Va. 1924); *Coffee v. Exchange Bank of Lennox*, 296 807 (8th Cir. 1924); *Fox v. Edwards*, 287 F. 669 (2d Cir. 1923); *Catherwood v. U.S.*, 291 F. 560 (3d Cir. 1922).

[150] Allison Employment Record; *T. E. Allison, Retired U.S. Attorney*, WASH. POST, Oct. 31, 1974, p. C15. *See, e.g., S. Silberstein & Son v. U.S.*, 69 Ct. Cl. 412 (1930); *Belowsky v. Commissioner*, 7 B.T.A. 424 (1927); *Appeal of Inter-Urban Construction Co.*, 4 B.T.A. 1030 (1926).

[151] Supreme Court Library Correspondence.

[152] 10 WHO WAS WHO IN AMERICA 129 (1993); *Man of War: Harold Lee George*, WASH. POST, Nov. 12, 1942, p. B8; William Head, *George, Harold Lee*, in WALTER J. BOYNE, ED., AIR WARFARE: AN INTERNATIONAL ENCYCLOPEDIA 252 (2002).

[153] 10 WHO WAS WHO IN AMERICA 129 (1993); *Man of War: Harold Lee George*, WASH. POST, Nov. 12, 1942, p. B8.

[154] MARK CLODFELTER, BENEFICIAL BOMBING: THE PROGRESSIVE FOUNDATIONS OF AMERICAN AIR POWER, 1917–1945 55 (2010).

[155] HUTCHINSON & GARROW, *supra* note 5, at 9–11.

[156] 10 WHO WAS WHO IN AMERICA 129 (1993).

[157] *Man of War: Harold Lee George*, WASH. POST, Nov. 12, 1942, p. B8.

[158] 10 WHO WAS WHO IN AMERICA 129 (1993).

[159] JAMES C. GASTON, PLANNING THE AMERICAN AIR WAR: AN INSIDE NARRATIVE (1982); Walter J. Boyne, *World War II Aviation*, in BOYNE, ED., AIR WARFARE, *supra* note 152, at 706.

[160] *Man of War: Harold Lee George*, WASH. POST, Nov. 12, 1942, p. B8; Head, *George, Harold Lee*, in BOYNE, ED., AIR WARFARE, *supra* note 152, at 252; Harold Lee George, *The Air Transport Command, Army Air Forces*, 230 ANN. AM. ACAD. POL. & SOC. SCI. 89 (1943).

[161] *Man of War: Harold Lee George*, WASH. POST, Nov. 12, 1942, p. B8.

[162] *Id.*; Head, *George, Harold Lee*, in BOYNE, ED., AIR WARFARE, *supra* note 152, at 252.

[163] 10 WHO WAS WHO IN AMERICA 129 (1993). The *Boston Globe* placed the promotion to Lt. General in 1945. *See George of Somerville One of Three New Lieutenant Generals*, BOSTON GLOBE, April 12, 1945, p. 8. See also *Pan American Unit Plans for Annual Tea*,

L.A. TIMES, Sept. 15, 1953, p. B1; *Praises Given Camp Fund for Great Benefits*, L.A. TIMES, July 11, 1957, pp. B1, B8.

[164] *Harold L. George, Ex-Beverly Hills Mayor, Dies at 93*, L.A. TIMES, March 30, 1986, p. WS4.

[165] *Injured Flier Reports, Despite Broken Ribs*, WASH. POST, Sept. 10, 1926, p. 1.

[166] *Army Air Officer Sued by His Wife: Mrs. Anna V. George Says Lieutenant Told Her He Loved Another*, WASH. POST, Nov. 1, 1928, p. 22.

[167] Supreme Court Library Correspondence; Employment Record of Norman B. Frost, National Personnel Records Center, National Archives at St. Louis (hereinafter "Frost Employment Record") (on file with the author).

[168] 6 WHO WAS WHO IN AMERICA 149 (1993); *Norman B. Frost, Lawyer in D.C. Since 1923, Dies*, WASH. POST, Aug. 23, 1973, p. B12; *Norman B. Frost Heads Law Group*, WASH. POST, Oct. 8, 1929, p. 2; *N. B. Frost Chosen Director of Bank*, WASH. POST, April 19, 1930, p. 13.

[169] *N.B. Frost Chosen Director of Bank*, WASH. POST, April 19, 1930, p. 13.

[170] http://www.fundinguniverse.com/company-histories/baker-hostetler-llp-history/; S. Oliver Goodman, *Frost Made Counsel for Sperry Rand*, WASH. POST, Nov. 16, 1955, p. 27; *American Surety & Trust Co. v. Frost*, 117 F. 2d 283 (D.C. Cir. 1940); *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir. 1951); CHARLES LACHMAN, THE LAST LINCOLNS: THE RISE AND FALL OF A GREAT AMERICAN FAMILY 366, 371, 402–03 (2008).

[171] *See*, e.g., *Akers v. Commissioner*, 6 T.C. 693 (1946); *Seaboard Loan & Savings Assn. v. Commissioner*, 45 B. T.A. 510 (1941).

[172] *See*, e.g., *Ralph Sollitt & Sons Construction Co. v. United States*, 80 Ct. Cl. 798 (1935); *Diamond v. United States*, 98 Ct. Cl. 943 (1943).

[173] *See*, e.g., *Altorfer v. Haag*, 74 F. 2d 120 (Ct. Cust. & Pat. App. 1934); *Standard Cap & Seal Corp. v. Coe*, 124 F.2d 278 (D.C. Cir. 1941).

[174] *See*, e.g., *Becker v. David*, 182 F.2d 243 (D.C. Cir. 1950); *Hoagland v. Chestnut Farms Dairy, Inc.*, 72 F.2d 729 (D.C. Cir. 1934).

[175] *See*, e.g., *Avignone Freres, Inc. v. Cardillo*, 117 F. 2d 385 (D.C. Cir. 1940); *Employers' Liability Assurance Corp., Ltd. v. Hoage*, (Ct. App. D.C. 1934).

[176] *See*, e.g., *Johnson v. Reily*, 100 F.2d 249 (D.C. Cir. 1947); *Lee v. Mitcham*, 98 F. 2d 298 (D.C. Cir. 1938); *Waterman Corp. v. Johnson*, 106 N.Y.S.2d 813 (1951); *Liberty National Bank v. Hicks*, 173 F.2d 631 (D.C. Cir. 1948).

[177] 6 WHO WAS WHO IN AMERICA 149 (1993); *Norman B. Frost, Lawyer in D.C. Since 1923, Dies*, WASH. POST, Aug. 23, 1973, p. B12; http://www.fundinguniverse.com/company-histories/baker-hostetler-llp-history/.

[178] JASON EMERSON, THE MADNESS OF MARY LINCOLN 141–45 (2007). The text of the agreement can be found at *id.* at 179–81.

[179] *Id.* at 148.

[180] *Id.* at 2, 148–50.

[181] Frost Employment Record; 6 WHO WAS WHO IN AMERICA 149 (1993); *Norman B. Frost, Lawyer in D.C. Since 1923, Dies*, WASH. POST, Aug. 23, 1973, p. B12; *Norman B. Frost Heads Law Group*, WASH. POST, Oct. 8, 1929, p. 2; *N.B. Frost Chosen Director of Bank*, WASH. POST, April 19, 1930, p. 13; *New Members of the American Judicature Society*, 26 J. AM. JUD. SOC. 159 (1943).

[182] *See*, e.g., *Stockhausen, Frost Gain at Chevy Chase*, WASH. POST, Sept. 19, 1954, p. 44; *84 Compete in Guest Golf*, WASH. POST, May 15, 1952, p. 18; Merrell W. Whittlesey, *Leo Walper, Burnett Win Pro-Amateur*, WASH. POST, Oct. 5, 1939, p. 21; *Corkran Advances in Isham Golf Cup*, N.Y. TIMES, Aug. 28, 1931, p. 18; *Corkran Advances to Golf Semi-Final*, N.Y. TIMES, July 31, 1931, p. 20; *Corkran Wins Medal in Golf at Ekwanok*, N.Y. TIMES, July 30, 1931, p. 14; *Mowry and Pond Tie for Ekwanok Medal*, N.Y. TIMES, July 31, 1930, p. 24; *Frost Gains Golf Final*, N.Y. TIMES, July 28, 1928, p. 11; Henry Litchfield West, *Holiday Cards at Local Clubs*, WASH. POST, July 5, 1928, p. 14; Henry Litchfield West, *From Tee to Green*, WASH. POST, June 17, 1928, p. M26; *Voigt Wins Golf Title of Capital Third Time*, WASH. POST, Sept. 30, 1927, p. 1; *Cox Defeated by Shorey for Title*, WASH. POST, July 11, 1927, p. 11; Harold Litchfield West, *From Tee to Green*, WASH. POST, July 18, 1926, p. M22; *Roland Mackenzie Is Beaten for Medal at Sherwood*, WASH. POST, July 17, 1926, p. 13; Henry Litchfield West, *Mackall's 73 Is Medal in Congressional Golf Club*, WASH. POST, June 25, 1926, p. 13; *Shorey Gets Low Golf Score*, WASH. POST, Apr. 30, 1925, p. 13; Henry Litchfield West, *Pair of Pros Beaten, 5 and 4*, WASH. POST, Apr. 27, 1925, p. 11; Henry Litchfield West, *Agnew, Golf Title Holder, Put Out of Potomac Play*, WASH. POST, Sept. 1, 1923, p. 12 Henry Litchfield West, *Rock Creek Links Concessions Set: H.D. Miller and N.B. Frost to Operate New Municipal Golf Course*, WASH. POST, March 8, 1923, p. 18.

[183] U.S. Pat. No. 2,379,430, issued to Norman Frost, July 3, 1945.

[184] U.S. Pat. No. 2,189,823, issued to Harry F. Vickers & Norman B. Frost, Feb. 13, 1940.

[185] *Norma Frost to Wed May 26*, N.Y. TIMES, March 28, 1951, p. 34.

[186] *Descendants of President Rutherford Birchard Hayes*, RUTHERFORD B. HAYES PRESIDENTIAL CENTER (Aug. 26, 2006), http://www.rbhayes.org/

hayes/content/files/hayes_genealogy_2010.pdf; LACHMAN at 403.

[187] 6 WHO WAS WHO IN AMERICA 149 (1993); *Norman B. Frost, Lawyer in D.C. Since 1923, Dies*, WASH. POST, Aug. 23, 1973, p. B12.

[188] Supreme Court Library Correspondence; *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16; *Butler Heads Sigma Nu Phi*, WASH. POST, Nov. 8, 1916, p. 4; Employment Record of Carlyle S. Baer, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Baer Employment Record").

[189] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16.

[190] 1922–1 CONG. DIR. 431; 1921–2 CONG. DIR. 428; 1920–1 CONG. DIR. 375; 1919–1 CONG DIR. 408; 1918–1 CONG. DIR. 384; 1917–3 CONG. DIR. 383.

[191] Baer Employment Record.

[192] Statutes of California xv (1919); Statutes of California xciii (1921).

[193] Baer Employment Record.

[194] *Id.*

[195] 18 LAW LIBR. J. 140 (1925).

[196] 29 LAW LIBR. J. 45 (1936); 27 LAW LIBR. J. 5 (1934); 26 LAW LIBR. J. 15 (1933); 25 LAW LIBR. J. 65 (1932); 23 LAW LIBR. J. 139 (1930); 21 LAW LIBR. J. 12 (1928).

[197] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16; *Foreign Consular Officers in the United States*, Nos. 196–222 U. S.T. 122 (1933); 1936–1 CONG. DIR. 560; 1935–1 CONG. DIR. 554; 1934–1 CONG. DIR. 537.

[198] 1941–1 CONG. DIR. 454; 1940–2 CONG. DIR. 452; 1939–1 CONG. DIR. 445; 1938–1 CONG. DIR. 574; 1937–1 CONG. DIR. 564; Baer Employment Record.

[199] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16.

[200] Baer Employment Record.

[201] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16.

[202] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16; CARLYLE S. BAER, THOMAS SPARROW: EARLY MARYLAND ENGRAVER AND PATRIOT (1950); HETTIE GRAY BAKER & CARLYLE S. BAER, BOOKPLATES OF HETTIE GRAY BAKER (1947); CLARA THERESE EVANS & CARLYLE S. BAER, A CENSUS OF BOOKPLATE COLLECTIONS IN PUBLIC, COLLEGE, AND UNIVERSITY LIBRARIES IN THE UNITED STATES (1938); CARLYLE S. BAER, A COLLECTOR'S CRITICISM OF THE BOOKPLATES OF SARAH B. HILL (1934); AUSTRALIAN EX LIBRIS SOCIETY, CARLYLE S. BAER, & JOHN LANE MULLINS, BOOKPLATE ARTISTS, NUMBER ONE: ADRIAN FEINT (1934).

[203] *Carlyle Baer Dies, Ex-Justice Lawyer*, WASH. POST AND TIMES HERALD, Nov. 28, 1969, p. B16.

[204] Supreme Court Library Correspondence.

[205] *See* Andrew P. Federline, *Variation in State Legislation Shows Need for Standardization in Truck and Truck Body Lighting*, 96 POWER WAGON 13 (May, 1956).

[206] JASON EMERSON, GIANT IN THE SHADOWS; THE LIFE OF ROBERT T. LINCOLN 541 n.16, 545 n.100 (2012). Emerson does not specify the dates of Federline's service to Lincoln, but it cannot have been later than 1926, the year of Lincoln's death.

[207] *See* Andrew P. Federline, *Variation in State Legislation Shows Need for Standardization in Truck and Truck Body Lighting*, 96 POWER WAGON 13 (May, 1956).

[208] *See Three Units Form Salesmen Bureau*, N.Y. TIMES, Sept. 19, 1948, p. F7; *Salesmen to Ask Rail Tax's Repeal*, N.Y. TIMES, Nov. 21, 1948, p. F5; *Advertising and Marketing*, N.Y. TIMES, Nov. 28, 1952, p. 37; *Traveling Salesmen Fight Stabilization*, N.Y. TIMES, Aug. 24, 1951, p. 30; *Salary Board Ruling on Salesmen Hailed*, N.Y. TIMES, Sept. 19, 1951, p. 44; *Salesmen Demand Rate Rise of 15%*, N.Y. TIMES, Aug. 27, 1952, p. 43.

[209] *See* Andrew P. Federline, *Variation in State Legislation Shows Need For Standardization in Truck and Truck Body Lighting*, 96 POWER WAGON 13 (May, 1956).

[210] *Id.*

[211] *Deaths*, WASH. POST, May 6, 1977, p. B6.

[212] Supreme Court Library Correspondence; Employment Record of Tench T. Marye, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Marye Employment Record").

[213] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6; Marye Employment Record.

[214] *Debate on Tariff: Young Men Will Support Important Question at University*, WASH. POST, March 16, 1906, p. D; Marye Employment Record.

[215] *Gold Lures Lawyers*, WASH. POST, June 6, 1911, p. 2; Marye Employment Record.

[216] Marye Employment Record. *See*, e.g., *De Prevost v. Young*, 48 App. D.C. 80 (1918); *U.S. v. Proctor Co.*, 1914 WL 24647 (Cust. App. 1914); *Sues Baltimore and Ohio for $10,000*, WASH. POST, Oct. 27, 1912.

[217] *War Service by Faculty Members*, 6 GEO. L. J. 19 (1917); *Changes in the Faculty*, 4 GEO. L. J. 30, 31 (1915); Marye Employment Record; Military Record of Tench T. Marye, National Personnel Records Center, St. Louis, Missouri, on file with the author (hereinafter "Marye Military Record").

[218] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6; 1920–1 CONG. DIR. 295; Marye Employment Record; Marye Military Record.

[219] Marye Employment Record.

[220] *Id.*

[221] 1922 J. SUP. CT. U.S. 44 (1922).

[222] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6. *See*, e.g., *Mrs. Elsie K. Harrison Loses Divorce Suit Plea*, WASH. POST, Dec. 18, 1927, p. 16; *Brief Is Filed in Allen Case by Attorneys*, WASH. POST, Nov. 18, 1929, p. 1; *Woman Seeks $50,000, Alleging Hurts in Cab*, WASH. POST, Aug. 13, 1930, p. 5; *In the Matter of Paul Case*, 18 F.T.C. 151 (1934); *Knapp v. Dugan*, 59 App. D.C. 240 (1930); *Hackett v. White*, 59 App. D.C. 211 (1930); *Hurdle v. American Security & Trust Co.*, 59 App. D.C. 58 (1929); *Von Bruning v. Sutherland*, 58 App. D.C. 258 (1928); *Ben C. Jones & Co. v. West Publishing Co.*, 270 U.S. 665 (1926); *Dimock v. W.F. Roberts Co.*, 54 App. D.C. 20 (1923); *Sechrist v. Bryant*, 52 App. D.C. 286 (1923).

[223] Marye Employment Record; *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6.

[224] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6; Marye Employment Record. *See*, e.g., *Irvin v. Hobby*, 131 F. Supp. 851 (D. C. Iowa 1955).

[225] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6. *See*, e.g., *Dendy v. United States*, 290 F. 2d 222 (2d Cir. 1961); *Phelps v. Williams*, 192 A. 2d (D.C. Cir. 1963); *Johnson v. Johnson*, 324 F.2d 884 (D.C. Cir. 1963); *Dent v. Virginia Mut. Life Ins. Co.*, 226 A. 2d 116 (D.C. Cir. 1967).

[226] *Tench Marye, Wife, Killed in Car Accident*, WASH. POST, Dec. 16, 1971, p. B6.

[227] Supreme Court Library Correspondence; Employment Record of John Thomas Fowler, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Fowler Employment Record").

[228] *James [Sic] Fowler, Justice Dept. Aide, Dies*, WASH. POST, July 30, 1953, p. 26.

[229] *Licensed to Marry*, WASH. POST, July 3, 1912, p. 3; Fowler Employment Record.

[230] Fowler Employment Record.

[231] *James [Sic] Fowler, Justice Dept. Aide, Dies*, WASH. POST, July 30, 1953, p. 26.

[232] Fowler Employment Record.

[233] *Wants Change in Name: Too Many Jollies About Present One, Albert E. Pickles Says*, WASH. POST, Dec. 8, 1921, p. 13.

[234] 1924 J. SUP. CT. U.S. 322 (June 8, 1925).

[235] Fowler Employment Record; *Hughes Is Invited to Banquet of Bar*, WASH. POST, Feb. 16, 1930, p. 15; *U.S. v. Commonwealth & Dominion Line, Ltd.*, 278 U.S. 427 (1928); U.S. *Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co.*, 272 U.S. 202, 203 (1928); *Boston Sand & Gravel Co. v. U.S.*, 278 U.S. 41, 46 (1928).

[236] 45 U.S.T. 11 (1933); *George E. Warren Corp. v. U.S.*, 22 C.C.P.A. 178 (1934); Fowler Employment Record.

[237] Fowler Employment Record.

[238] *Solicitor General Biggs Asks Final Gold Ruling*, 1 CORP. REORGANIZATIONS 155, 162 (1934).

[239] *Biggest Barrier to U.S. Monetary Program Is Removed*, WASH. POST, Feb. 19, 1935, p. 1.

[240] Fowler Employment Record.

[241] *Id.*; *James [sic] Fowler, Justice Dept. Aide, Dies*, WASH. POST, July 30, 1953, p. 26.

[242] *James [sic] Fowler, Justice Dept. Aide, Dies*, WASH. POST, July 30, 1953, p. 26; *Masonic Notes*, WASHINGTON POST, Feb. 21, 1926, p. A2.

[243] *Business Help Asked in Drive for Red Cross*, WASH. POST, Sept. 17, 1937, p. 23.

[244] *James [Sic] Fowler, Justice Dept. Aide, Dies*, WASH. POST, July 30, 1953, p. 26.

[245] *Chester H. Gray Dead, Chief D.C. Legal Officer*, WASH. POST AND TIMES HERALD, Nov. 28, 1965, p. B10; *Gray Named Corporation Counsel Here*, WASH. POST AND TIMES HERALD, July 7, 1956, p. 29; *Recollections: Oliver Gasch*, 7 WASH. LAW. 22, 26 (1992); *The Docket*, 1925, pp. 79, 129; Employment Record of Chester H. Gray, National Personnel Records Center, National Archives at St. Louis (on file with the author); Military Record of Chester H. Gray, National Personnel Records Center, St. Louis, Missouri (on file with the author); Employment Record of Chester H. Gray, Office of Personnel, Government of the District of Columbia (on file with the author). Gray was preceded in death by his brother Charles, also a graduate of the National University Law School, who worked for thirty-four years as a hearings examiner for the Federal Maritime Commission and the Interstate Commerce Commission. *Retired ICC Examiner Charles B. Gray Dies*, WASH. POST AND TIMES HERALD, Dec. 2, 1963, p. B4.

[246] *Chester H. Gray Dead, Chief D.C. Legal Officer*, WASH. POST AND TIMES HERALD, Nov. 28, 1965, p. B10.

[247] *Command Post*, WASH. POST AND TIMES HERALD, Nov. 30, 1965, p. A22.

[248] Employment Record of Chester H. Gray, Office of Personnel, Government of the District of Columbia (on file with the author).

[249] *ACLU Attorneys Call for Removal of Corporation Counsel and Aide*, WASH. POST AND TIMES HERALD, May 23, 1965, p. A11; *City Heads Work in Secret on Fair Employment Rules*, WASH. POST AND TIMES HERALD, June 10, 1965, p. A22; *Commissioner Replies to Charges of Fair-Housing Non-Enforcement*, WASH. POST AND TIMES HERALD, Jan. 10, 1965, p. A8. *See also Complaints on Housing Fail Hurdle*, WASH. POST AND TIMES HERALD, Jul. 18, 1964, p. A4; *Fair Housing Sale Freeze is Ruled Out*, WASH. POST AND TIMES HERALD, Apr. 4, 1964, p. B1; *D.C. Heads Study Housing Law*, WASH. POST AND TIMES HERALD, July 14, 1963, p. B7. For Gray's response to these charges, *see Corporation Counsel Seeking New*

Ways to Get More Staff Help, WASH. POST AND TIMES HERALD, Nov. 1, 1965, p. A22.

[250] *Action Is Urged on Fair Housing*, WASH. POST AND TIMES HERALD, May 20, 1963, p. B1; *3 Religious Leaders Ask Housing Edict*, WASH. POST AND TIMES HERALD, April 22, 1963, p. B3.

[251] *Job Discrimination Regulation Draws Praise and Criticism*, WASH. POST AND TIMES HERALD, June 12, 1965, p. B1; *City Bans Job Discrimination*, WASH. POST AND TIMES HERALD, June 11, 1965, p. A1; *Fair-Employment Order Lacks Clear Enforcement Procedures*, WASH. POST AND TIMES HERALD, June 11, 1965, p. A26; *Injunction Seen Key to Fair-Hiring Law*, WASH. POST AND TIMES HERALD, Jan. 25, 1965, p. B1; *District Fumbles Fair-Hiring Initiative*, WASH. POST AND TIMES HERALD, Dec. 23, 1964, p. A22; *Gray Disputed by Lawyers on Rights Powers*, WASH. POST AND TIMES HERALD, Nov. 8, 1964, p. B5; *Employment Opportunity*, WASH. POST AND TIMES HERALD, Sept. 2, 1964, p. A20; *Trade Bloc Hits FEPC Plan*, WASH. POST AND TIMES HERALD, Sept. 1, 1964, p. D1; *Gray Tells Plan to End Job Bars*, WASH. POST AND TIMES HERALD, Aug. 25, 1964, p. C2. For Gray's response to these charges, *see Corporation Counsel Counters His Critics*, WASH. POST AND TIMES HERALD, April 4, 1965, p. M1.

[252] *Bumper Stickers Knock D.C. Aides*, WASH. POST AND TIMES HERALD, April 24, 1965, p. B1.

[253] *Bureaucratic Maze Cripples City Efficiency*, WASH. POST AND TIMES HERALD, Nov. 1, 1965, p. B1. *See Commission Post Goes to Tobriner*, WASH. POST AND TIMES HERALD, Jan. 31, 1961, p A1.

[254] *House Probe of City Heads' Rights Moves Voted*, WASH. POST AND TIMES HERALD, Aug. 7, 1964, p. C4.

[255] *Id.*; *"Lost" Haircut Laws Still Hard to Find*, WASH. POST AND TIMES HERALD, Jan. 18, 1965, p. A18; *District Fumbles Fair-Hiring Initiative*, WASH. POST AND TIMES HERALD, Dec. 23, 1964, p. A22; *D.C. Commissioners Set Up Hearing for Open-Hiring Order*, WASH. POST AND TIMES HERALD, Aug. 5, 1964, p. B1; *Gray Drafting City Stand on Fair Employment Act*, WASH. POST AND TIMES HERALD, July 18, 1964, p. A11; *District Is Seen Free to Enact Racial Edicts*, WASH. POST AND TIMES HERALD, July 17, 1964, p. A19; *D.C. Can Cut Barber Permits in Race Cases, Counsel Rules*, WASH. POST AND TIMES HERALD, July 24, 1963, p. A5; *Lawyers Draft Housing Code*, WASH. POST AND TIMES HERALD, Oct. 3, 1962, p. C7.

Gray's civil rights record is further complicated by the fact that he was on the brief for the District of Columbia in *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Segregation Is Legal, D.C. Insists to Court*, WASH. POST, Dec. 3, 1952, p. 18; that he delivered a legal opinion holding that the District Board of Education did not have power to withdraw accreditation from a private school that denied admission to African-Americans, *Study Slated On Taxes as Racial Lever*, WASH. POST AND TIMES HERALD, July 10, 1964, p. C1; *Private School Accreditation Ruling Recalled*, WASH. POST AND TIMES HERALD, July 1, 1964, p. B1; that he was a member of the four-person special committee that unanimously recommended the creation of the District's Council on Human Relations in 1958, *Race Relations Body Proposed*, WASH. POST AND TIMES HERALD, March 1, 1958, p. B3; *Race Relations Committee Considered*, WASH. POST AND TIMES HERALD, Oct. 14, 1957, p. B1; and that he sponsored Hubert B. Pair for membership in the District Bar Association in 1959. *5 More Negroes Apply to Join Bar Group*, WASH. POST AND TIMES HERALD, Jan. 8, 1959, p. D5.

[256] *Chester H. Gray Dead, Chief D.C. Legal Officer*, WASH. POST AND TIMES HERALD, Nov. 28, 1965, p. B10.

[257] 346 U.S. 100 (1953); *Thompson Firm Files Brief in Race Suit*, WASH. POST, April 29, 1951, p. 15; *Arguments Concluded in Bias Case Against Cafes*, WASH. POST, Jan. 8, 1952, p. B1; *Restaurant Racial Case Considered*, WASH. POST, March 1, 1951, p. B1.

[258] *Chester H. Gray Dead, Chief D.C. Legal Officer*, WASH. POST AND TIMES HERALD, Nov. 28, 1965, p. B10.

[259] Employment Record of Chester H. Gray, Office of Personnel, Government of the District of Columbia (on file with the author).

[260] *Command Post*, WASH. POST AND TIMES HERALD, Nov. 30, 1965, p. A16.

[261] Philip Elman, interviewed by Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 831 (1987).

[262] Employment Record of Maurice J. Mahoney, National Personnel Records Center, National Archives at St. Louis (hereinafter "Mahoney Employment Record") (on file with the author).

[263] *Maurice Mahoney, Steel Firm Official*, WASH. POST, Mar. 8, 1978, p. B7; Mahoney Employment Record.

[264] *Id.*; Mahoney Employment Record. During this period Mahoney often handled approximately twenty appellate cases per year. *See*, e.g., *Commissioner v. Southwest Consolidated Corp.*, F.2d 1019 (5th Cir. 1942); *Hoagland Corporation v. Helvering*, 121 F.2d 985 (2d Cir. 1941); *Michigan Steel Corporation v. Commissioner*, 116 F.2d 280 (6th Cir. 1940); *United Light & Power Co. v. Commissioner*, 105 F.2d 866 (7th Cir. 1939); *Commissioner v. Western Power Corp.*, 94 F.2d 563 (2d Cir. 1938); *Insull v. Commissioner*, 87 F.2d 648 (7th Cir. 1937); *Continental Petroleum Co. v. Commissioner*, 87

F.2d 91 (10th Cir. 1936); *Minnesota Tea Co. v. Commissioner*, 76 F.2d 979 (8th Cir. 1935).

[265] *Resigns Government Job*, ATLANTA CONSTITUTION, Nov. 9, 1943, p. 11. *See*, e.g., *Bramer v. Commissioner*, 161 F.2d 185 (3d Cir. 1947); *In the Matter of General Armature & Manufacturing Co. and District 50, United Mine Workers of America*, 69 N.L.R.B. 768 (1948).

[266] *In the Matter of Copperweld Steel Co. and United Steelworkers of America, Local 2243 (CIO)*, 75 NLRB No. 23 (1947); *Terminal Allowance, Copperweld Steel Co., Warren, Ohio*, 269 I.C.C. 323 (1947); *Copperweld Steel Co. v. Industrial Commission of Ohio*, 324 U.S. 780 (1945).

[267] 32 INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909–1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 1416 (1979); 34 INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909–1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 2238 (1979).

[268] S. Oliver Goodman, *Bill Allowing Banks to Deal in Bonds Is Hit*, WASH. POST, May 4, 1949, p. 14. *See*, e.g., *Copperweld Steel Co. v. U.S.*, 344 U.S. 871 (1952); *Copperweld Steel Co. v. U.S.*, 106 F. Supp. 283 (W.D. Pa. 1952); *In the Matter of American Iron & Steel Institute, et al.*, 48 F.T.C. 123, 125 (1951).

[269] *Maurice Mahoney, Steel Firm Official*, WASH. POST, Mar. 8, 1978, p. B7.

[270] *See*, e.g., *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 239 (1976); *In the Matter of Richard C. Spangler, Inc.*, SECURITIES EXCHANGE ACT RELEASE 12104, ADMIN. PROC. FILE NO. 3–1950 (1976); *In the Matter of Richard C. Spangler, Inc.*, 43 S.E.C. 1093 (1969); *In the Matter of the Application of Richard C. Spangler, Inc.*, SECURITIES EXCHANGE ACT RELEASE NO. 8531 (1969); *Strathmore Securities, Inc. v. SEC*, 387 U.S. 918 (1967); *Unicon Management Corp. v. U.S.*, 179 Ct. Cl. 534 (1967).

[271] *Maurice Mahoney, Steel Firm Official*, WASH. POST, Mar. 8, 1978, p. B7. Mahoney's successor, Ward Elgin Lattin, clerked for McReynolds during the 1934 Term. Supreme Court Library Correspondence. Lattin was born in Hesperia, Michigan in 1905, and worked part-time as a basket maker while attending the local Shelby High School. After his graduation in 1922, he worked for a year as a full-time basket maker in nearby Ludington before moving to Detroit to enroll in Wayne State University. During college he worked as a grocery clerk and an assistant treasurer for the University. After receiving his A.B. in English and History in 1927 he moved to Washington, D.C., where he worked for two years for the Board of Temperance, Prohibition, and Public Morals. He enrolled in Georgetown's law school in the fall of 1928, earning his LL.B. in 1932 and his J.D. in 1934, when he was admitted to the D.C. bar. WHO'S WHO IN AMERICAN LAW 310 (1st ed. 1978); *Ward E. Lattin*, WASH. POST, Mar. 30, 1985, p. B6; Employment Record of Ward E. Lattin, National Personnel Records Center, National Archives at St. Louis (hereinafter "Lattin Employment Record") (on file with the author). From 1929 to 1934, Lattin served as assistant secretary to Senator Arthur Vandenberg of his native Michigan, and as an assistant clerk to the Senate Committee on Enrolled Bills. WHO'S WHO IN AMERICAN LAW 310 (1st ed. 1978); OFFICIAL CONGRESSIONAL DIRECTORY (72–2) 224 (2d ed. 1933); Lattin Employment Record; Letter from Christopher J. Doby, Financial Clerk, United States Senate, to the author, March 20, 2014 (on file with the author). Following his clerkship, Lattin worked as an attorney and special contract claims examiner with the General Accounting Office from 1935 to 1942, during which time he earned both an L.L.M. degree and a Doctor of Juridical Science degree from Georgetown. Lattin Employment Record; *Ward E. Lattin*, WASH. POST, Mar. 30, 1985, p B6; Ward E. Lattin, The Unemployment Compensation Features of the Social Security Act (unpublished L.L.M. thesis, Georgetown University, 1937); WARD E. LATTIN, FEDERAL ADMINISTRATIVE AGENCIES AND THE DOCTRINE OF THE SEPARATION OF POWERS (J. Sc. D. thesis, Georgetown University, 1938). *See also* Bernard J. Long & Ward E. Lattin, *Constitutional Problems Arising Out of the 'Fraud Order' Powers of the Postmaster General*, 4 J. D.C. BAR ASSN. 34 (1937); Ward E. Lattin, *Legal Maxims, and Their Use in Statutory Interpretations*, 26 GEO. L.J. 1 (1937). In 1942 he left the GAO to join the firm of Gardner, Morrison, Sheriff & Beddow, where he specialized in tax and corporate matters, along with cases involving railroad regulation, government contracts, wills, and charitable trusts. *Ward E. Lattin*, WASH. POST, Mar. 30, 1985, p. B6. *See*, e.g., *Riggs National Bank v. U.S.*, 352 F.2d 812 (Ct. Cl. 1965); *Hearst Corp. v. Commissioner*, 14 T.C. 575 (1950); *Southern Ry. Co. Discontinuance of Trains No. 35 and 34 Between Washington, D.C. and Salisbury, N.C.*, 331 I.C.C. 9 (1967); *Bangor & Aroostook R.R. Co.—Investigation of Contral – Maine Freightways*, 80 M. C.C. 569 (1959); *Ivy H. Smith Co. v. United States*, 154 Ct. Cl. 74 (1961); *Peter Kiewet Sons' Co. v. United States*, 151 F. Supp. 726 (Ct. Cl. 1957); *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757 (Ct. Cl. 1951); *Hearst Corp. v. Commissioner*, 14 T.C. 575 (1950); *American National Red Cross v. Holtman*, 351 F.2d 746 (D.C. Cir. 1965); *Riggs National Bank v. Holtman*, 221 F. Supp. 599 (D.D.C. 1963); *Olds v. Rollins College*, 173 F.2d 639 (D.C. Cir. 1949); *Noel v. Olds*, 138 F.2d 531(D.C. Cir. 1943). In 1972, he successfully represented a trustee in its suit to strike a

racial restriction from a charitable educational trust it was administering. *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972). He retired as a partner in 1978 and took of counsel status. He died of a heart attack at the age of seventy-nine in 1985, a widower leaving three children and two grandchildren. *Ward E. Lattin*, WASH. POST, Mar. 30, 1985, p. B6.

[272] Supreme Court Library Correspondence.

[273] *J. Allan Sherier, 52; Government Attorney*, WASH. POST, Dec. 29, 1965, p. B6.

[274] *Joseph T. Sherier, D.C. Lawyer, Dies*, WASH. POST, June 20, 1960, p. B3; *Haberly v. Reconstruction Finance Corp.*, 104 F. Supp. 636 (D.C. 1951).

[275] *See*, e.g., 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1590, 70th Annual Edition (Martindale-Hubbell, Inc. 1938), *microformed on* LLMC Martindale-Hubbell, Directories (1938) No. 92-001A F11; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1570, 77th Annual Edition (Martindale-Hubbell, Inc. 1945), *microformed on* LLMC Martindale-Hubbell, Directories (1945) No. 92-001A F11; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 387, 87th Annual Edition (Martindale-Hubbell, Inc. 1955), *microformed on* LLMC Martindale-Hubbell, Directories (1955) No. 92-001A F19. *See*, e.g., *Haberle v. RFC*, 104 F. Supp. 636 (D.D.C. 1951); *Shea v. Second National Bank of Washington*, 143 F.2d 379 (D.C. Cir. 1944); *Myers v. H.L. Rust Co.*, 134 F.2d 417 (D.C. Cir. 1943); *Mountford v. Mountford*, 181 Md. 212 (1942).

[276] *J. Allan Sherier, 52; Government Attorney*, WASH. POST, Dec. 29, 1965, p. B6; Employment Record of Joseph Allan Sherier, National Personnel Records Center, Valmeyer, Illinois (on file with the author); Military Record of J. Allan Sherier, National Personnel Records Center, St. Louis, Missouri (on file with the author); 1962 CONG. DIR. 255 (1962); 107 CONG. REC. 13130 (1961).

[277] Supreme Court Library Correspondence.

[278] *Biographical Note, Finding Aid, Musser Family Papers, 1852–1967*, Utah State Historical Society, at http://history.utah.gov/findaids/B00096/B0096ff.xml#s4 (hereinafter "*Biographical Note*"); *A. Milton Musser Called by Death*, DESERET NEWS, Sept. 25, 1909, at http://jared.pratt-family.org/parley_family_histories/amos_musser_obituary.html; Orson F. Whitney, *Amos Milton Musser*, in LDS BIOGRAPHICAL ENCYCLOPEDIA, available at http://search.ancestrylibrary.com/search/db.aspx?dbid=2028.

[279] *Biographical Note*; *A. Milton Musser Called by Death*, *supra* note 278.

[280] *Biographical Note.* The trial of Joseph Musser and other polygamists received substantial attention from the local press. *See*, e.g., *Judges Delay Polygamy Case Pleas in Both Federal and City Courts*, SALT LAKE TELEGRAM, March 8, 1944, p. 1; *Forty-Six Seized in Three-State Polygamy Drive*, SALT LAKE TRIBUNE, March 8, 1944, p. 1; *Preliminaries Open in Prosecution of Polygamy Suspects*, SALT LAKE TRIBUNE, March 9, 1944, p. 13; *Judge Sends 15 Cultists to State Prison*, SALT LAKE TRIBUNE, May 26, 1944, p. 17; *Woman Details Life in Cultist Colony at Polygamy Trial*, SALT LAKE TRIBUNE, Sept. 27, 1944, p. 13; *Eleven Polygamists Win Paroles From Prison*, SALT LAKE TRIBUNE, Nov. 27, 1945, p. 13. These and other news clippings reporting on the proceedings may be in found in the Musser Family Papers, Box 32, Folder 8.

[281] *Biographical Note.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] HUTCHINSON & GARROW, *supra* note 5, at 9–11.

[286] *Biographical Note*; Letter from Christopher J. Doby, Financial Clerk, United States Senate, to the author, March 20, 2014 (on file with the author) (listing Musser as a "folder" and an "Additional Clerk" in 1933 and 1934); "Personal History Statement," Nov. 9, 1960, Box 20, Folder 6, Musser Family Papers; "Balfour Province Award," Musser Family Papers, Box 32, Folder 6.

[287] Supreme Court Library Correspondence.

[288] *Biographical Note.*

[289] John Knox, *John Knox Diary* (April 18, 1940) (unpublished manuscript available at Knox MSS, Special Collections, University of Virginia, folder 10240-k).

[290] *Biographical Note. See also Bar Association Members Serving in the Armed Forces of the United States*, 10 J.B. ASS'N D.C. 36, 37 (1943); *Purely Personal*, WASH. POST, July 6, 1943.

[291] *Biographical Note*; *Dalby Surrenders to Court on Conspiracy Indictment*, L.A. TIMES, Jan. 16, 1951, p. 2; *Fellows v. Commissioner*, 1950 WL 7940 (Tax Ct. 1950); *Zeller v. Commissioner*, 9 T.C.M. 7 (1950); *Scurlock v. Commissioner*, 1950 WL 7937 (Tax Ct. 1950); 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 86, 97, 80th Annual Edition (Martindale-Hubbell, Inc. 1948), *microformed on* LLMC Martindale-Hubbell, Directories (1948) No. 92-001A F5; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 136, 153, 87th Annual Edition (Martindale-Hubbell, Inc. 1955), *microformed on* LLMC Martindale-Hubbell, Directories (1955) No. 92-001A F8; "Summary of Past Employment," Box 20, Folder 6, Musser Family Papers.

[292] *Biographical Note*; Musser Family Papers, Box 28, Folders 1, 2 and 4.

[293] *Obituary, Woodrow S. Wilson*, DESERET NEWS, January 13, 2005; *Obituary, Woodrow S. Wilson*, PROV. J. BULL., Jan. 7, 2005.

[294] *See, e.g.*, 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 177, 92nd Annual Edition (Martindale-Hubbell, Inc. 1960), *microformed on* LLMC Martindale-Hubbell, Directories (1960) No. 92-001A F8; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 288, 100th Annual Edition (Martindale-Hubbell, Inc. 1968), *microformed on* LLMC Martindale-Hubbell, Directories (1968) No. 92-001A F8.

[295] http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GSln=MU&GSpartial=1&GSbyrel=all&GSst=5&GScntry=4&GSsr=2881&GRid= 63659338&.

[296] *Obituary, Woodrow S. Wilson*, DESERET NEWS, January 13, 2005; *Obituary, Woodrow S. Wilson*, PROV. J. BULL., Jan. 7, 2005; "Brief of Record," Musser Family Papers, Box 28, Folder 2.

[297] Supreme Court Library Correspondence.

[298] *R.W. Radcliffe, 67*, WASH. POST, Sept. 24, 1982, p. B10; *Mary Denison Hope Becomes Bride of Raymond Radcliffe*, WASH. POST, Apr. 29, 1942, p. 17; *Dr. Radcliffe, Fishery Expert, Dies at 70*, WASH. POST, Sept. 4, 1950, p. B4; Employment Record of Raymond W. Radcliffe, National Personnel Records Center, National Archives at St. Louis (on file with the author).

How *Griggs* Came To Be

ROBERT BELTON (AS EDITED BY STEPHEN L. WASBY)

Editor's Note: The history of *Griggs v. Duke Power Co.* (1971) and of the theory of disparate impact was told by the late Robert Belton in his book, **The Crusade for Equality in the Workplace: The *Griggs v. Duke Power* Story**, which Professor Stephen L. Wasby prepared for publication after Professor Belton's death in 2012. Material drawn from that book, published in 2014, is presented in this article, with a brief introduction and conclusion by Professor Wasby. Material reprinted with permission from the University Press of Kansas.

Introduction, by Stephen L. Wasby

In 1971, the Supreme Court decided the first major case on the substance of Title VII of the Civil Rights Act of 1964, *Griggs v. Duke Power Co.*[1] As President Nixon's appointee Warren Burger had replaced Earl Warren as Chief Justice and Burger's friend Harry Blackmun had also joined the Court, observers had expected a withdrawal from the rulings supportive of civil rights complainants. They had not expected a ruling strongly supporting African-Americans' claims of employment discrimination. Indeed, there was still a question as to what "discrimination" was precluded by the Civil Rights Act. Many thought that only direct, intentional discrimination—what has come to be called *disparate treatment*—was all that was barred. However, with the passage of Title VII, employers ceased blatant discrimination of the "no Irish need apply" or "no Negroes except in the labor pool" variety. Instead they adopted employment tests and requirements that were racially (or gender) neutral on their face but which had a disproportionately negative impact on racial minorities and women: that is, these actions had a *disparate impact* on racial minorities. *Griggs* is so significant because the Supreme Court went beyond disparate treatment to rule that, under Title VII, employers could not engage in actions that had a disparate impact on racial minorities. The theory of disparate impact adopted in *Griggs* has now had a history of more than forty years, with some Supreme Court rulings eroding the theory and with Congress enacting the Civil Rights Act of 1991 to restore the theory's strength. Yet before that history took place, there had to be *Griggs*. The case was no accident. It was part of a planned litigation campaign against

employment discrimination undertaken by the NAACP Legal Defense and Educational Fund (LDF). The story of how *Griggs* came to be is worth telling, and Robert Belton, who played a major role in the litigation of the case, tells it here.

* * *

Griggs: The Factual Setting, by Robert Belton

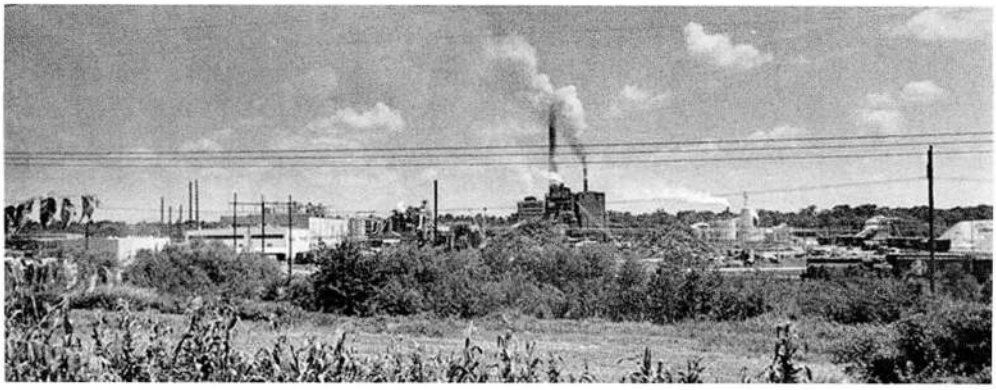
Griggs v. Duke Power Co. arose against the background of decades of widespread overt racial discrimination against African-Americans in the South in all facets of public and private activities: employment, education, places of public accommodation, transportation, and voting. *Griggs* involved the legality of racially neutral educational and testing practices. In 1990, it was reported that, for more than 100 years, employers had been requiring more and more education of applicants for an increasing number of jobs.[2] And a 1963 study, published the year before the enactment of Title VII, reported that although the evidence was fragmentary, it was fairly clear that a large number of industrial firms in the United States used standardized tests in selecting, promoting, and transferring personnel.[3]

The *Griggs* case arose in context of the reality of the difficulty of effective enforcement of Title VII based solely on the disparate treatment theory, which requires proof of intent to discriminate The NAACP Legal Defense Fund's litigation team which focused on employment discrimination cases was also concerned about trying disparate treatment cases before all-white juries. That team, along with the Equal Employment Opportunities Commission (EEOC) and law professors, struggled to articulate a theory of discrimination that was not based solely on discriminatory intent and to find a remedy that would substantially expand the employment opportunities of African Americans.

The employer in *Griggs*, Duke Power Company, was a public utility corporation that was engaged in the generation, transmission, distribution, and sale of electric power to the general public in North Carolina and South Carolina.[4] Duke Power also supplied electric power to federal government agencies and, for that reason, was subject to an Executive Order that prohibited discrimination in employment. The plaintiffs were Willie Griggs, James Tucker, Herman Martin, William Purcell, Clarence Jackson, Robert Jumper, Lewis Hairston, Jr., Willie Boyd, Junior Blackstock, John Hatchett, Clarence Purcell, Eddie Galloway, and Eddie Broadnax. All were employed and classified as laborers or semi-skilled laborers at Duke's Dan River Steam Station, a steam generating facility in Eden, Rockingham County, North Carolina, that went into operation in late 1969 and converted the energy in coal into electrical energy that Duke Power sold to its customers. Some of the plaintiffs, for example, Willie Boyd, who played the leading role in initiating action to challenge the company's discriminatory practices and was the principal spokesperson for the plaintiffs, and William Purcell, had earlier worked as laborers in the construction of the Dan River facility; they became full-time employees after the facility became operational.[5] Employees were not represented by a union.

At the time the LDF began to represent the plaintiffs, Duke Power owned and operated approximately 120 offices, branches, district offices, and power-generating plants throughout the two states and employed more than 5,600 persons in all of its facilities. The overwhelming majority of its African American employees were employed throughout all of its operations in semiskilled, unskilled, or service worker jobs, with African Americans filling 562 out of 600 such jobs. Duke Power employed ninety-five employees at the Dan River Station; of these ninety-five, fourteen were African American and eighty-one were white.

The Dan River station was divided for operational purposes into five departments:



In the 1960s, Duke Power segregated employees by race, with African Americans at the Dan River plant stuck in the least desirable and lowest paid positions. It also maintained racially segregated facilities such as locker rooms, showers, toilet facilities, and drinking fountains.

(1) Operations; (2) Maintenance; (3) Laboratory and Testing; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper were in a miscellaneous category. There were approximately thirty-six job titles used at Dan River, but Duke Power had never prepared written job descriptions for any of them. Employees in all of the departments, except coal handling and labor, worked inside the plant, or in the "inside" departments. The employees who worked coal handling and labor generally worked outside, or in the "outside" departments. The "inside" positions were reserved for white employees while both African-Americans and whites held "outside" positions.

The plaintiffs, held the least desirable and lowest-paid laborer positions, which involved, among other things, janitorial duties throughout the Dan River facility and other menial and manual tasks, such as driving trucks or cleaning equipment and machines. The maximum wage earned by any of the plaintiffs, including some who had almost twenty years of service, was $1.645 per hour, whether or not they had a high school education. This maximum was lower than the minimum wage of $1.875 per hour Duke Power paid to any white employee, many of whom also did not have a high school education. Of the eighty-one white employees, only thirty-three, or forty-nine percent, had finished high school. Of the fourteen African American employees, three, or twenty-one percent, had finished high school.[6] The wages earned by the plaintiffs were drastically lower than the wages paid to white employees with comparable seniority in the "inside" departments, where the top pay was $3.18 per hour or more. After the effective date of Title VII, Duke Power also created a new job classification: auxiliary service man. This new job was established primarily for African American employees in the labor department who "exhibited . . . extraordinary skills," but no one held that position at the time the case went to trial in 1968.

Not only were jobs rigidly segregated by race but Duke Power also maintained racially segregated facilities such as locker rooms, showers, toilet facilities, and drinking fountains at the Dan River station. The EEOC concluded in its investigation that the segregated facilities for African American employees were located in a crowded filthy brick building by the railroad tracks at the base of the soft coal stock-pile. Locker rooms, drinking fountains, and showers for white employees, including those working in the coal-handling department, were located inside the main building. Duke Power made no effort to eliminate its racially segregated facilities until after the plaintiffs had filed their charge of unlawful employment discrimination with

the EEOC, which they did on March 15, 1966. The EEOC's investigation team visited the Dan River facility on April 21, 1966, to begin its investigations. Several days after the visit by the investigation team, Duke Power advised the EEOC that on April 28, 1966, all employees were assigned to the same locker room.

About ten years before the effective date of Title VII, or around 1955, Duke Power had instituted an employment policy of requiring all new applicants for jobs historically reserved for the white "inside" departments have a high school education. On July 2, 1965, the same date that Title VII became effective, Duke Power added a new requirement that all applicants for jobs in the inside departments had to satisfy, in addition to the high school education requirement; it was that the applicants must successfully pass a written test battery. Duke Power stated that it added the test battery to the high school education requirement because its experience was that some of its employees who did not have a high school education had insufficient ability to be promoted to top-level jobs as the complexity of its operations grew. Another reason Duke Power added the test battery was that other public utilities companies had done so.

Even though Duke Power had at least a year to take appropriate measures to bring its employment into compliance with the mandate of Title VII, it did substantially nothing until it actually became subject to the mandate of the Act on July 2, 1965. It seemed ironic to the litigation team that Duke Power instituted its test battery on the same date Title VII became effective. The tests Duke Power selected, after consultations with its expert, Dr. Dannie Moffie, were the Wonderlic Personality Test-Form 1, a general intelligence test including verbal, mathematical, analytical, and pictorial items; the Revised Beta Examination, also a general intelligence test designed to measure the general intellectual ability of persons relatively illiterate or non-English speaking; and the Bennett Mechanical Comprehension, Forms AA and BB, which examines an individual's level of mechanical information, spatial visualization, and mechanical reasoning. It is doubtful that even one of the questions on the Wonderlic test was relevant to some of the white jobs the plaintiffs sought. Duke Power knew, or should have known, that the passing scores on the tests were stringent standards because they would eliminate about half of all high school graduates in the United States. Dr. Moffie put Duke Power on notice of this fact in a July 7, 1965, letter.[7]

Several months after the effective date of Title VII, on September 10, 1965 Duke Power adopted yet another policy, which applied only to employees who did not have a high school education. This policy was adopted in response to complaints from white employees in the coal-handling department who wanted to be promoted to inside jobs but did not have a high school education. The policy provided that employees without high school diplomas who worked in coal handling, as watchmen, or as laborers and who were hired prior to September 1, 1965, could become eligible for promotion to inside jobs if they took both the Wonderlic and the Bennett Mechanical test and scored thirty-nine on the Bennett Mechanical and twenty on the Wonderlic. If they made these scores, then they would be deemed to have the equivalent of a high school education. No one had been promoted under this policy at the time of trial in 1968. The high school diploma and tests were not required for maintaining an employee's present position or for securing promotion to jobs paying $3.18 per hour or more. As an example, Clarence M. Jackson, a black employee with a seventh-grade education, was hired in 1951 as a laborer, remained a laborer in 1967 (with a salary of $1.645 per hour), and was unable to transfer to a better job, while three white employees—with fifth-grade, seventh-grade, and eighth-grade educations, provide a contrast: they had been promoted and one, as labor foreman of the

plaintiffs in 1966, supervised three of the plaintiffs who had a high school education.

The circumstances that eventually led the plaintiffs to file a charge of racial discrimination with the EEOC against Duke Power were powerfully captured in a 1991 *Los Angeles Times* article based on an interview with Willie Boyd:

> [The Dan River Station's] 81 white employees were supervisors, machine operators and technicians. They monitored shiny dials and gauges that operated the massive boilers. Each job could lead to one better. [African American employees] on the other hand were all janitors, and that is what they could expect to do for the rest of their life.
>
> Trains would haul in huge loads of Appalachian coal, rolling along tracks besides the slow, brown-green waters of the Dan [River]. White workers would mechanically transfer the freight, adding it to the plant's coal pile that rose higher than any building in this part of the Carolina upland.
>
> Sometimes dust and grime would clog the iron claws as they scooped up the lumpy fuel. The janitors were then summoned to help with the filthy work of unclogging the machinery. Only whites, however, were allowed the job title of "coal handler," and only they earned the extra pay.
>
> Willie Boyd was one of the [African American employees]. Son of a sharecropper, he had dropped out of high school in 1938 after his father took ill. Someone had to help the family meet the landowner's quota of tobacco production.
>
> Like millions of other Southern black men, Boyd escaped the farm in the post-war boom. Factories were springing up all around the Piedmont [area in North Carolina]. And with them came a demand for power—and more generating stations.
>
> Boyd's job at Duke Power was hard, though no harder than chopping tobacco. It was a big step up for him. And it paid actual cash. Pretty soon he had enough money to meet his bills and even to buy a few items on installment.
>
> As the years wore on, however, something always rankled him. White men—many with no more education than he had—rose up through the ranks to become managers or supervisors, taking spots in comfortable offices with bathrooms down the hall.
>
> Blacks cleaned those toilets—ones they themselves were forbidden to use. For them, the company built a "colored" bathroom outside across the railroad tracks, behind the coal pile.
>
> Why can't black folks get some of the better jobs? Boyd asked his bosses. And they "would tell us we had no chance," he recalled.[8]

The question Boyd raised—"why can't black folks get some of these better jobs?"—was a question that the members of the LDF litigation team heard many times from plaintiffs and class members they represented. In 1966, Boyd began to take action on behalf of his co-workers to find an answer to his question.[9] The president of the Reidsville, North Carolina, NAACP chapter was J.A. (Jay) Griggs, related to but not the lead named

plaintiff in *Griggs*, who was named Willie Griggs. Boyd was active in the Reidsville Chapter, and he and Jay Griggs were neighbors. On many occasions, Boyd complained to Jay Griggs about the racially discriminatory practices at Dan River and about the fact that African American employees at the Reidsville facility of the American Tobacco Company were beginning to take steps to seek relief from racial discrimination at that plant.[10] Jay Griggs had assisted a number of African Americans in preparing charges to file with the EEOC, so he finally told Boyd to fill out a charge to be filed with the EEOC or stop complaining.[11] Jay Griggs knew and had worked with Julius Chambers, a very active LDF cooperating attorney with an office in Charlotte, North Carolina, on other important civil rights cases, and he was to become one of the lead attorneys in *Griggs*. Jay told Boyd about Chambers. So Boyd, with the assistance of Jay Griggs, composed a petition to give to J.D. Knight, the superintendent at the Dan River Station. The petition stated that the signees had given Duke Power satisfactory service for a number of years and, therefore, were justified in requesting the opportunity for promotion to jobs in coal handling, maintenance, and other "inside" departments.[12] All fourteen of the African American employees signed the petition. The petition was dated March 1, 1966, and the plaintiffs left it on Knight's desk the same day.

When Knight arrived at work on the morning of March 3, he scheduled a meeting around 10:00 a.m. with the plaintiffs to find out what the petition was all about. The plaintiffs had selected Lewis Hairston to be their spokesperson at the meeting because "he was the kind of guy who was afraid of nothing, no how," and he had "more nerves" than some of the others had. Hairston boldly told Knight that the plaintiffs "wanted a crack at some of the better jobs" because the most the plaintiffs could earn was $1.65 per hour and the white employees started at $1.81 per hour. Knight's response was that no one without a high school diploma would be promoted to an inside job because Duke Power was moving into the atomic age. He also said the plaintiffs could be considered for promotion to inside jobs under the same policy Duke Power had adopted in September 1965 for white employees in coal handling; that is, if the plaintiffs who did not have a high school diploma successfully passed the test battery they could be promoted to inside jobs as if they had a high school education. The plaintiffs also complained to Knight about the segregated facilities, such as showers, drinking fountains, and locker rooms.

After the meeting with Knight, the plaintiffs concluded that Duke Power did not consider their petition meritorious. A few days later, the plaintiffs went to Chambers' office in Charlotte and, with his assistance, prepared a charge of racial discrimination to be filed with the EEOC. The plaintiffs met at a funeral home in Reidsville on March 14, 1966, to sign fourteen separate but identical EEOC charges to be filed with the EEOC.

The EEOC received the charges on March 15, 1966. A day later, a Duke Power official, A.C. Thies, met with some of the plaintiffs at the Dan River station. This meeting took place before the EEOC had served a copy of charges on Duke Power in April, so the company did not know that the plaintiffs had, in fact, filed their EEOC charges. The plaintiffs again raised the issue of the unfairness of subjecting them to the test battery as condition for consideration for inside jobs. This raised the possibility that Duke Power would provide tuition refunds for those who opted to obtain a high school diploma or its equivalent instead of passing the test battery. But when pressed about which courses Duke Power would approve for tuition refund, Thies told them that they would have to talk with the superintendent of the Dan River facility and that courses would be reviewed on an individual basis. Prior to this meeting, however, Thies had discussed with the superintendent what courses might be

available locally to allow the plaintiffs to obtain a high school diploma.[13] Duke Power made no mention whatsoever of the tuition refund in its September 22, 1965, memo to supervisors notifying them that it had adopted a policy on September 10, 1965, to provide employees in jobs in coal handling, watchman, and labor who did not have a high school education the option of passing the test battery for promotion to inside jobs.[14] Eventually, only one person, Willie Boyd, opted to take advantage of the tuition refund program. Only five employees, two blacks and three whites who did not have a high school education, took the test battery; none passed.

The EEOC initiated its investigation of the plaintiffs' charge on April 21, 1966, when several of its investigators visited the Dan River Steam Station. In its final report, the EEOC stated that Duke Power officials were reluctant initially to cooperate and gave misleading answers to their questions. The next day, the investigators toured the steam station, during which they saw for themselves the racially segregated locker rooms, drinking fountains, showers, and toilet facilities. The investigators returned to the Dan River facility on April 26, 1966, to do a thorough investigation of the plaintiffs' EEOC charges that they were unable to do on their earlier visit. Two days later, on April 28, 1966, Thies sent a memo to all of the superintendents at Duke Power's stations advising them to immediately take steps to move all of their employees into one locker room. The reason for this decision, as stated in the memo, was that even though Duke Power had "no specific segregation of our negro employees into one Locker Room since last July 1965, we are now informed that we are in violation of Title VII, of the Civil Rights Act of 1964, by permitting our negro employees to occupy separate facilities."[15] Immediately after these facilities were desegregated, plaintiff Lewis Hairston, whose duties as a laborer included, among others, cleaning the white locker room and toilet facilities, used the shower in the formerly all-white locker room. After this episode, white employees refused to use the shower for a period of time.[16]

On May 4, 1966, just over a week after the last visit by the EEOC investigators, Duke Power wrote a letter to the EEOC denying the allegations that its practices with respect to the plaintiffs were in violation of their rights under Title VII. Based on the investigators' final report, the EEOC issued an administrative decision on September 21, 1966, in which it found reasonable cause to believe that the allegations the plaintiffs made in their charges constituted a violation of their rights under Title VII. On the same date, the EEOC notified the plaintiffs of their right to bring a civil action and notified Duke Power that it would undertake an effort to conciliate the plaintiffs' charge. On October 5, 1966, an EEOC conciliator, Jules Gordon, met with officials of Duke Power to discuss the possibilities of resolving the case without the need for the plaintiffs to sue in federal court. Duke Power and Gordon met for several hours but were unable to resolve the plaintiffs' charges because Duke Power disagreed with EEOC's finding of cause. Duke Power's position then, and throughout the litigation, was that its employment practices, including its use of the test battery, complied with its obligations under Title VII.

Griggs was not the first Title VII complaint filed on behalf of private plaintiffs. The complaint in *Griggs* was filed by the Legal Defense Fund's litigation team in the U. S. District Court for the Middle District of North Carolina on October 20, 1966, about three months after the EEOC issued its first testing guidelines and a year after the first Title VII complaint on behalf of private plaintiffs, in *Brinkley v. Great Atlantic & Pacific Tea Co.*, on October 18, 1965.[17]

LDF's Enforcement Strategy

Those are the basic facts of the situation at Duke Power leading to the initiation of the *Griggs* case. But what was the organizational

context leading to the filing of the complaint in the case? How did *Griggs* fit into the LDF's work? There were very few opportunities for public interest legal organizations like the LDF to undertake a major law development program on employment discrimination prior to Title VII to show, for example, that employment practices like neutral-seeming tests and seniority systems were highly discriminatory. No right of private enforcement existed under the federal fair employment practice orders and regulations beyond the opportunity to file a complaint. If the complaint was dismissed, or if the complaint was valid but efforts to conciliate failed, no further private recourse was available against private employers, unions, or employment agencies. Some state laws provided aggrieved individuals the opportunity to seek judicial review of adverse commission actions, but the chances of obtaining a favorable judicial ruling were slim because federal and state courts normally give considerable weight to administrative determinations. Some private litigation to remedy employment discrimination in federal, state, and local governments was conducted under the Fifth and Fourteenth Amendments, but the constitutional equal protection ban on discrimination is not applicable to private parties absent a showing of state action.

Although claims of discrimination under Title VII can be, and often are, brought by individuals without the assistance of a private civil rights organization like the LDF, litigation, including civil rights litigation, is costly. Even though some courts have deemed employment discrimination litigation to be tort-type cases, and this became particularly true after Congress made compensatory and punitive damages available in the Civil Rights Act of 1991, immediately after Title VII's enactment only a few attorneys in private practice were willing to accept these kinds of cases on a contingency-fee basis as they regularly did in the more traditional tort cases. Costs, litigation expenses, and attorney's fees were, and continue to be, major factors imposing a general limitation on private enforcement to remedy employment discrimination through individual cases precisely because victims of such discrimination rarely have the resources to finance the costs of litigation. The plaintiffs' costs, expenses, and attorney's fees in *Griggs* were over $65,000[18] and the plaintiffs, who were employees paid low hourly wages, simply were not financially able to shoulder these costs of the litigation.

Another factor limiting private enforcement of laws prohibiting discrimination in employment is that civil rights cases, particularly ones involving claims of race discrimination, generally top the list of unpopular cases among attorneys. Thus, even assuming that costs were not a barrier, the probability of finding a private attorney willing to represent African American victims of employment discrimination was severely limited in the early stages of the enforcement of Title VII. Cognizant of these economic disparities between the plaintiffs and defendants, the United States Court of Appeals for the Fifth Circuit characterized employment discrimination cases as David and Goliath confrontations.[19]

The LDF Campaign

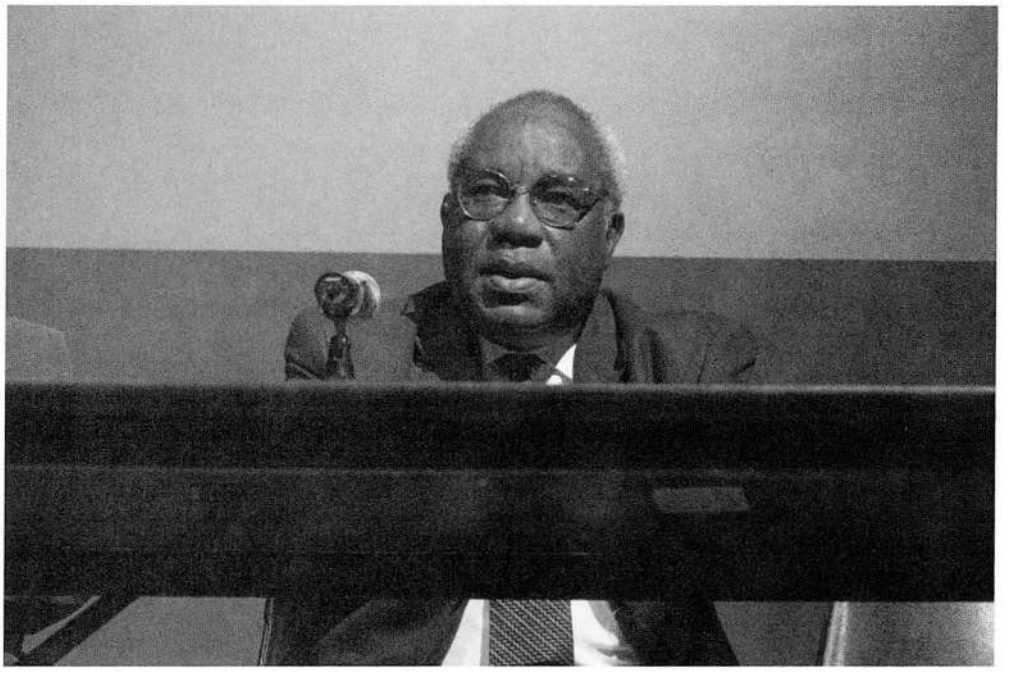
Other civil rights organizations, for example, the NAACP; the Lawyers Committee for Civil Rights Under Law (LCCRUL); the Women's Legal Defense Fund; the ACLU-sponsored Lawyers Constitutional Defense Committee (LCDC); the National Employment Law Project; and the Employment Rights Project of Columbia Law School, also played important roles in the development of the law during Title VII's first decade. However, for years after Title VII became law, no other organization, including the Department of Justice, had a docket of employment discrimination cases approaching the number of active cases the LDF had.[20] The LDF's objective was to establish a body of Title VII law that would provide the most

effective relief possible to African Americans. The LDF could not easily have undertaken its program earlier, but some important changes took place between the LDF's more well-known campaign in *Brown v. Board of Education* and the beginning of its employment discrimination litigation campaign in 1965, including an increase in the size of its staff, which was necessary to handle the "massive workload of employment discrimination grievances required a substantial number of attorneys, and, concomitantly, the additional resources to handle trials involving questions of fact."[21]

In June 1965, the LDF launched the employment discrimination enforcement campaign out of which *Griggs* arose. Although Congress emphasized cooperation and voluntary compliance as the preferred means of eliminating unlawful employment discrimination, it was highly unlikely that this "preferred means" would have any teeth until there was a body of substantive and procedural law that established the legal rights of members of the protected classes and the scope of the obligations imposed on employers and unions. Because Congress gave the federal courts the final responsibility for the enforcement of Title VII and authorized private enforcement, the employment discrimination litigation campaign became a major part of the LDF's work.

The Educational and Outreach Phase

The initial phase of the litigation campaign was a massive education and outreach program launched in late June 1965, even before the EEOC first officially opened its doors for business. The purposes of the LDF's education and outreach phase were to inform African American applicants and employees of their newly created rights under Title VII; to assist them in filing charges of unlawful employment discrimination with the EEOC; and to encourage individuals and organizations in the African American



Julius Chambers (above) and Robert Belton were the lead attorneys in *Griggs v. Duke Power Co.* (1971). In 1964, Chambers had graduated from Columbia University Law School and served as the first intern at the NAACP Legal Defense Fund (LDF). He then set up a law practice in Charlotte, which eventually became the first integrated firm in North Carolina history. Chambers would later become Director-Counsel of the LDF.

communities in southern states to become activists in the enforcement of Title VII.

Since the South has historically been one of the testing grounds for the development of civil rights law, ten southern states were targeted. Private employers' racially discriminatory practices were easier to document in southern states because the discrimination was rather blatant, as seen through official acts and long-standing customs and practices. The LDF hired eight African-American law students as field workers for the summer of 1965 to work in eight of the ten states under the supervision of Ruth Abram, a seventeen-year-old Sarah Lawrence College student who worked out of the LDF's headquarters in New York and whom Jack Greenberg, the LDF's Director-Counsel, had hired to coordinate the education and charge-gathering phase.

Before leaving for their assignments, the students were briefed on Title VII by the LDF attorneys and given written guidelines on assisting individuals in filing discrimination charges with the EEOC. The students then went to their assigned states, where they met with local leaders; made presentations to African American churches and business groups; worked with civil rights and social groups to establish community-based fair employment committees; set up speaking engagements; contacted newspapers to do articles on their activities;[22] held press conferences; conducted workshops on Title VII; identified industries that warranted study by the EEOC; contacted and worked with other civil rights groups such as the NAACP, Congress of Racial Equality (CORE), and Southern Christian Leadership Conference (SCLC); reviewed help wanted ads in newspapers for race-designated employment opportunities; used African American and white testers to audit employers' compliance with Title VII; made use of television and radio to explain the LDF's program; undertook publicity campaigns to spread the word about Title VII; and distributed fliers about Title VII in African American communities. The students also took steps to stimulate and train local leaders to continue the educational work and the preparation of charges after they returned to their colleges and universities at the end of the summer. Notably, one of the major problems students encountered was the reluctance of some African Americans to fill out charges of discrimination for fear of losing their job if their names were disclosed.

The students sent all employment discrimination charges to Abram, who then bundled the charges to be filed with the EEOC. Working with Herbert Hill, National Labor Secretary for the NAACP, the LDF and the NAACP submitted 475 charges of racial discrimination to the EEOC shortly after the EEOC officially opened for business. Another 374 racial discrimination charges arising out of the summer project were filed with the EEOC soon thereafter.[23] The initial phase of the litigation campaign was very successful because the LDF and the NAACP assisted African Americans in filing 1800 charges with the EEOC during the agency's first eighteen months of existence.[24] The EEOC expected no more than 2,000 charges during its first year of operation, and its initial budget of $3.25 million and staffing requirements had been geared to that expectation. The agency, however, received 8,854 charges during its first fiscal year, most of which were claims of race discrimination and a substantial number of which were filed as a result of joint effort between the LDF and the NAACP. Eleven southern states accounted for almost half of the charges filed with the EEOC during its first fiscal year, with the most coming from North Carolina, Alabama, and Tennessee, which were three of the states to which the LDF summer interns had been assigned.[25]

In the fall of 1965, Greenberg created the LDF Division of Legal Information and Community and hired Jean Fairfax as its director of community services. She and her field workers were instrumental in identifying major industries, such as steel, railroads, tobacco, trucking, pulp and paper,

shipbuilding, and southern textile, that generated a substantial number of charges of racial discrimination filed with the EEOC.[26] Many of the charges involving these industries ultimately became cases in the litigation campaign out of which some of the most important LDF landmark employment discrimination decisions arose.

The Litigation Team

Michael Meltsner, later dean at Northeastern University School of Law, and Leroy Clark, later EEOC general counsel and a law professor, were the two LDF attorneys who had the initial responsibility in the very early stages of the campaign. When I joined the LDF in December 1965, I joined Clark, who had assumed most of the responsibility for the campaign, and Al Feinberg, but he soon left. Around March 1966, Clark recommended to Greenberg that I should be assigned the lead role in the litigation campaign.

As an African American, I personally had experienced racial discrimination in all of its manifestations. I was born and raised in High Point, North Carolina, the fourth oldest of eighteen children of Daniel and Mary Lendon Belton. I grew up in the segregated South. Racial segregation was the order of the day in all aspects of my life growing up in High Point, not only in public education but also in access to restaurants, hotels, theaters, employment, parks, cemeteries, buses, trains, drinking fountains, hospitals, lunch counters, retails stores, recreational and sporting events, barber shops, churches, rest rooms, housing, and transportation. I graduated from the state law-mandated racially segregated William Penn High School in 1953, a year before the Supreme Court's May 1954 decision in *Brown v. Board of Education*. Many of my high school teachers, all of whom were African Americans, had Ph.D.s and some were unable to pursue their career aspirations to teach on a college level because racially discriminatory hiring practices prevented them from even entering the applicant pool of those seeking appointments at historically white colleges and universities and because there were a limited number of jobs as professors at historically African American colleges and universities.

I still have vivid recollections of African American men and women, including my father, who, if hired at all, were employed only in low-paying, physically demanding, dirty, and dead-end jobs in many of the furniture manufacturing businesses in High Point, a city that is known as the "Furniture Capital of the World." I also recall the help-wanted ads in the local newspapers under the heading of "Help Wanted—Colored," "Help Wanted—White," or "jobs for colored man," "colored boy," or "colored woman."[27] Many of these African American workers rode to work in the back of segregated buses, as I did, operated by Duke Power Company, the same Duke Power Company that was the defendant in *Griggs*. I witnessed firsthand the discrimination my father endured on his job because of his race, and on two occasions my oldest brother, Dan, and I were with him when his life was threatened by mobs of angry white men. My firsthand, day-to-day experience with racial segregation and particularly the two episodes with my father were major factors that ultimately informed my decision to be a civil rights lawyer. Another factor that shaped my decision was the opportunity to study the contributions that African Americans such as Charles Hamilton Houston and Thurgood Marshall had made in the field of civil rights and the history of the long struggle to gain equality for African Americans.

My civil rights activism began when I was in undergraduate school at the University of Connecticut (UConn) where, among other things, I was a founding member of the campus chapter of the NAACP. There were only a few African American students at UConn at that time in the mid- and late-1950s. On one occasion while attending UConn, I made a trip by car from Connecticut to North Carolina with a white female

professor to visit with my family. Because of racial segregation, I sat in the back seat of the car from Washington, D.C., to North Carolina to avoid the risk of harm to either of us at the hands of whites because I was driving with a sole white female through the South. That leg of the trip was a harrowing experience, and I decided to return to UConn by a different mode of transportation. Later, after graduating from Boston University Law School in 1965, I began working at the LDF in December 1965 and in 1970 joined the racially integrated law firm Chambers, Stein, Ferguson and Lanning in Charlotte, North Carolina. Pursuant to an arrangement with Greenberg I remained on the payroll of the LDF in order to litigate a number of employment discrimination cases in which I served as counsel for plaintiffs while engaged in the process for admission to the North Carolina bar. I left private practice in 1975 to join the faculty at Vanderbilt University Law School.

The two other persons who formed the core of the LDF's employment discrimination litigation team were Gabrielle Kirk McDonald, who joined the LDF in June 1966 and later became a U.S. district judge and, still later, a judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Albert J. Rosenthal, a member of the Columbia Law faculty who served as a consultant to the employment discrimination litigation campaign for about ten years. In addition to serving as counsel in a number of landmark employment discrimination cases on the LDF's docket, including *Griggs*, Al brought together a consultative group of distinguished labor law practitioners and scholars as well as labor economists to meet periodically with members of the employment discrimination litigation team to discuss critically some of the thorny substantive and procedural issues that had to be litigated. Al also recruited an amazing and energetic group of bright young lawyers, many of whom were employed at major New York City law firms, to assist pro bono in legal research, drafting pleadings and discovery documents and writing briefs and other legal memoranda on new or novel issues.

Some of the law professors Rosenthal recruited also wrote briefs, particularly appellate briefs, involving novel substantive and procedural issues arising under Title VII. Professor George Cooper of Columbia Law School, for example, drafted the court of appeals brief in *Griggs* and also wrote the petition for certiorari and the plaintiffs' briefs the LDF filed in the Supreme Court in the case. Another professor, Sandy J. Rosen, then at the University of Maryland Law School, took a lead role with the LDF's consultative group of lawyers and professors to develop litigation strategies in the Fund's seniority discrimination cases. Other law professors served as "sounding boards" on procedural and substantive issues that we expected to be raised or supervised law students who researched novel issues or drafted legal memoranda or discovery demands. The LDF's use of academics in its employment discrimination litigation campaign was similar to the assistance it received from academics in some of its other major litigation campaigns including *Brown v. Board of Education* and the death penalty project.

Gaby, Al, and I worked closely together developing and implementing the various litigation strategies for the campaign. We compiled an extensive bank of complaints, legal memoranda, discovery documents such as interrogatories, and briefs on many issues that provided a ready resource for other LDF attorneys who handled a few employment discrimination cases, cooperating attorneys, and other attorneys in private practice who represented plaintiffs in employment discrimination cases. These litigation documents served as a model for many years not only for the LDF and its cooperating attorneys but for other lawyers as well. We also had the first line of responsibility for evaluating cases to be litigated, and we requested Greenberg's input about any cases in which there was any doubt

as to whether we should proceed. I cannot recall any instance in which he rejected our litigation recommendations, but it was rare indeed for us not to recommend assistance for cooperating attorneys, particularly with respect to charges that had been filed with the EEOC with some assistance from the LDF.

The Role of the Cooperating Attorneys

Although the core LDF litigation team consisted of Gaby, Al, and me, it is important to note that the litigation team of necessity in particular cases included cooperating attorneys. Cooperating attorneys, as used in public interest litigation, generally are lawyers in private practice who represent plaintiffs on either a pro bono basis or for a significantly lower attorney's fee. The success the LDF had in its employment discrimination litigation campaign could not have been achieved without their participation; the staff worked with about 200 of them.[28] Most of the LDF's cooperating attorneys in the early years of the employment discrimination litigation campaign were African Americans, many of whom practiced law in southern states and had graduated from historically black law schools, such as Howard University, Northern Carolina Central, Southern University, Florida A&M, and Texas Southern. Many of the cooperating attorneys assisted African Americans with the filing of charges with the EEOC, with charges often becoming the basis of lawsuits on the LDF docket. The LDF established a Civil Rights Institute to provide a form of continuing legal education on civil rights developments and to provide the opportunity for the cooperating attorneys and staff attorneys to have a bit of respite from the trench warfare of civil rights litigation. As Meltsner described it:

> The Fund had an enormous interest in keeping the Southern black lawyers who were a source of its cases, and ultimately its power, well informed of the dizzying developments in civil rights, a legal specialty with its own technicalities, as complex as tax or copyrights law. One means of doing this was periodic Civil Rights Institutes, held at Howard Law School in Washington. The front-line troops, most of them Howard graduates, were invited from the battle zone to hear three days of lectures and not incidentally, to bivouac in the District's watering places. By 1963 these conferences had acquired a prestige as the birthplace of many a civil rights strategy, but the assorted pleasures of liberty were a constant distraction, and so they were moved first to New Orleans, then to Atlanta, and finally to Airlie House, a pleasant and relatively isolated conference center in the Virginia hunt Country.[29]

The LDF Airlie House Civil Rights Institute and its previous iterations had become an integral part of the culture of civil rights and related educational mission of the LDF when I joined in 1965. After the employment discrimination litigation campaign was initiated, developments in employment discrimination law, legal theory, trial strategy, and remedies became an important part of the curricula. Representatives from other civil rights groups and the EEOC often attended the Airlie House conferences as either speakers or participants, and the litigation team maintained regular communication with other organizations, such as the NAACP, that were engaged in the Title VII enforcement process in order to coordinate the various strategies of enforcement when advisable.

The employment litigation campaign also benefited from other LDF initiatives. Beginning in 1962, the Field Foundation provided funding for what later became the Earl Warren Legal Training Program to alleviate the shortage of African American lawyers in southern states, under which some

recent African American law school graduates participated in a post-graduate fellowship program that included a year of internship with the LDF at its headquarters in New York or in the office of one of the LDF's cooperating attorneys. After the year, the fellows began to practice law in a mutually agreed upon location, primarily in the South, where few or no black lawyers were available to serve black citizens. They were paid a diminishing subsidy for three years, and one of the most important benefits of this subsidy served to help these new lawyers establish a law library for their newly opened offices.[30] Some white law graduates were also beneficiaries of the Legal Training Program, and the inclusion of white law graduates led to some of the first integrated law firms in the South. A number of the cooperating lawyers who were the beneficiaries of the training program carried a substantial load of employment discrimination cases; one of the program's first beneficiaries, Julius Chambers, returned to his native state of North Carolina and opened one of the first integrated law firms in Charlotte.[31] Chambers and I were the lead attorneys in *Griggs*.

A Litigation Strategy Emerges: Representing Private Attorneys General

In order for the courts to decide the many issues related to Title VII that had to be decided, they had to be raised by one of the two instrumentalities Congress had authorized to seek judicial enforcement: the Department of Justice, under its authority to litigate "pattern and practice" cases, or individually aggrieved "private attorneys general," through private litigation. The private plaintiffs the LDF represented in its litigation campaign were "private attorneys general." The private attorney general philosophy is based on the view that private individuals have important roles to play in vindicating the public policy of civil rights legislation because the goals of civil rights legislation cannot be achieved solely by enforcement initiatives undertaken by the Attorney General and the Department of Justice. In *Newman v. Piggie Park Enterprises, Inc.*, an early 1968 LDF case that arose under the public accommodations provision of the Civil Rights Act of 1964 (Title II) and in which LDF had advanced the private attorney general theory in its brief, the Supreme Court endorsed the view that Congress, by allowing private suits under the Civil Rights Act of 1964, had empowered private individuals to become private attorneys general to vindicate the civil rights policy objectives of the statute.[32]

As the first steps in devising its litigation strategy in the fall and winter of 1965, the LDF litigation team analyzed and tabulated the large number of charges it and the NAACP had helped African Americans file with the EEOC. The analysis also showed that seniority systems and pen-and-paper tests that seemed neutral on their face were among the most discriminatory practices engaged in by employers and labor unions. These findings from the analysis about the discriminatory effects of seemingly neutral practices were shared with a number of historians, sociologists, and labor law and civil rights professors, who generally confirmed the LDF's preliminary analyses. The analysis of the charges also identified several industries that should be examined closely as targets of litigation. The litigation team targeted industries where African American unemployment and economic growth were high and focused on semi-skilled and skilled blue-collar jobs, which paid well but did not require much formal education.[33] These industries included railroads,[34] pulp and paper,[35] steel,[36] tobacco, [37] textile,[38] trucking,[39] and public utilities.[40] Many of the employers in these industries used tests in making employment decisions, and practically all of them were unionized and had a history of using facially neutral seniority practices to make employment decisions that adversely affected the employment opportunities of African Americans because of race.

The railroad industry, for example, had a long history of excluding blacks from jobs that paid well or blatantly segregating them into all-black seniority units. This blatant segregation by employers and unions in highly visible and closely related jobs, such as porters and conductors, made the railroad industry such a symbol of discrimination that its inclusion as a target was required despite its general economic decline. A positive aspect of focusing on the railroad industry was that there were a large number of black employees who were willing to assert their rights and had done so historically while the segregated black unions gave them an organizational base for support.

The paper industry, meanwhile, was a high-paying growth industry with plants located throughout the southeastern part of the United States, where a large number of blacks were available for work and the plants were often a primary employer in the community. Blacks in the paper industry were relegated to menial, lower-paying jobs and pen-and-paper tests were used to screen applicants for jobs traditionally reserved for whites. More often than not, many of the big unions were named as defendants because the seniority agreements in the LDF's seniority discrimination cases were the product of collective bargaining between unions and employers. As with the railroad industry, international unions had sanctioned and charted separate racially segregated unions.

The EEOC conducted its first-ever hearings on January 12 and 13, 1967, in Charlotte, North Carolina, and focused on racial discrimination in employment in the textile industry.[41] The textile industry in the South then became another potential target of opportunity in the campaign.

One of the major problems in deciding upon a litigation strategy was that employment discrimination litigation did not fit neatly into the traditional civil rights law reform model that the LDF had honed to a fine art in the campaign leading to *Brown v. Board of Education*. Under the *Brown* model, organizational control over the sequence and pace of the litigation was the cornerstone of the successful implementation of the LDF's goals.[42] Leroy Clark, a participant in the early phase of the employment discrimination litigation strategies, described the differences in the two classes of cases:

> The attorney must have sufficient facts about the internal operation of the plant in order to judge whether a violation of [Title VII] has occurred. Such information is difficult to ascertain; whereas in school desegregation suits the discriminatory pattern in one school district resembled the pattern in another, employment discrimination patterns differ from industry to industry. Also, the typical voting rights suit involved a Southern state agency with mediocre attorneys; the defendants in employment cases were the largest companies in the country, retaining highly paid, competent counsel who offered vigorous opposition and were extremely adept at delay. With the added ingredient of a hostile federal Southern judiciary, a single suit could last two years or more. In the interim, the plaintiffs may have lost faith in the efficacy of litigation, moved to other jobs, or accepted inadequate settlements. It is in this kind of trench warfare, with limited staff, limited financial resources, and the inherent capacity in the law for delay, that civil rights attorneys will face serious difficulties in having a major impact on employment discrimination.[43]

Another problem in thinking about a litigation strategy was that employment discrimination litigation prior to Title VII presented easy and obvious targets, such as explicit policies or union contracts excluding

African Americans from desirable jobs, segregated departments and facilities, or discriminatory pay scales. Much of the more blatant and overt racial discrimination was eliminated by the federal Plans for Progress and state FEPC activities. After July 1, 1965, overt discrimination on the basis of race became unlawful and employers and unions began to abandon obvious and blatant racially discriminatory policies and practices. However, the effects of those earlier obvious and blatant racially discriminatory polices and practices were carried forward into the post-July 2, 1965, period. Discriminatory employment practices became more subtle, although, unlike with racial discrimination, many overt manifestations of sex discrimination continued after 1965 because employers believed that the "bona fide occupational qualification" exception exempted some sex-based employment practices from the prohibitions of Title VII. Major employers and unions began to adopt testing and educational devices and seniority systems that appeared facially neutral or colorblind but that operated to perpetuate the effects of past and societal discrimination.

With many of the overt incidents of racial discrimination abandoned or about to be abandoned by employers and unions, what was left was systemic and institutional discrimination imbedded in basic personnel policies or organizational structures of companies and unions. This more subtle brand of racial discrimination did not constitute the easiest target for an effective litigation campaign to eradicate job discrimination. Consequently, it soon became obvious that Title VII litigation would require substantial manpower in pre-trial preparation, including an analysis of voluminous records and extremely technical factual and legal questions. Proving the existence of discrimination in hiring, testing, seniority, and promotion practices would be demanding. One can see this from the fact that over 1,000 lawyer hours were devoted to litigating *Griggs* through the Supreme Court, and *Griggs* was a relatively easy case to prepare for trial compared to most cases tried during the early stages of Title VII enforcement. The great effort required to litigate a class action Title VII case would severely strain the limited resources of the private plaintiffs' bar, while defendants would be able to bear the demands and costs of litigation with less difficulty.

While some federal and state case law on employment discrimination existed at the time of Title VII's enactment, a coherent body of law on the subject did not exist. The existing case law did not become useful until efforts were devoted to the development of legal concepts of discrimination that could be applied to private employers. There were, however, three overarching, simply-stated but difficult, issues that informed the LDF's litigation campaign. The first and most critically important issue was defining a theory or theories of discrimination. The second was deciding what kind of evidence would be relevant to proving a claim of unlawful discrimination in light of the fact that no defendant was likely to readily admit that it practiced racial discrimination. The third issue was determining the specific kinds of relief that would be appropriate to remedy proven claims of unlawful employment discrimination.

For several reasons, a litigation strategy patterned primarily on the *Brown* campaign to develop a body of employment discrimination law on these simply stated but difficult issues would not have been feasible. First, the LDF could not ethically put some cases on the back burner while more forcefully pressing other and perhaps more favorable cases. Second, unlike in the *Brown* campaign, where there was some possibility of controlling the manner in which issues should be raised and the kinds of cases that would be most helpful in raising them, it was literally impossible to exercise control over issues and cases in the employment discrimination litigation campaign because other entities

such as the Department of Justice and other law reform organizations also had an interest in developing the law under Title VII. Third, the *Brown* paradigm was ill-suited for the more subtle discriminatory tactics that had replaced the earlier more blatant forms of discrimination. In most of the pre- and early post-*Brown* cases, the real issue was not so much whether a school board had, in fact, engaged in racial discrimination but rather what the remedy should be. Overt racial discrimination in employment was less prevalent in 1965 than in earlier years, but the effects of the pre-1965 overt discrimination continued pervasively. Fourth, the requirement of exhaustion of administrative remedies before the EEOC made it a possibility that ideal "test cases" would be settled or conciliated in an unsatisfactory way, and conciliation is not a process for establishing judicial precedents. Finally, Title VII presented procedural technicalities to private enforcement that required judicial clarification before substantive interpretations could be reached.

Lawyering skills and law development techniques could have been devoted to trying to make the EEOC administrative process a more responsive conflict resolution device for employment discrimination claims, but the experience under older administrative enforcement procedures and the uncertain start of the EEOC suggested that the limited private resources could better be used in the judicial enforcement process. A major factor that ultimately determined the LDF's strategy in the litigation phase was the reality of the difficulty in identifying the constellation of facts that would best raise the issues considered critical to programmatic law development. Because of the difficulty of making an informed decision about which issues should be raised first and in what kinds of factual paradigms, the LDF finally settled upon an initial litigation strategy that involved filing suit in any and all cases in which cooperating attorneys had been retained and the attorneys had requested the assistance of the LDF and dealing with substantive and procedural issues as they arose. Specific industries were targeted later, but two of the most important categories of cases that bubbled to the surface early were seniority discrimination and testing cases. And, as it happened, those were the issues that predominated in *Griggs*, because of Duke Power's use of a battery of tests and those and other obstacles to racial minorities' achieving their seniority rights.

* * *

Outcome of the *Griggs* Case, by Stephen L. Wasby

What, then, happened with the *Griggs* case itself? In the district court, Judge Eugene Gordon ruled against the plaintiffs, saying they had failed to prove intentional violation of Title VII, that the high school educational requirement did not discriminate on the basis of race, and that Duke Power's test battery was professionally developed. The judge also rejected the "present effects of past discrimination" theory, the idea that there could be a remedy for continuing effects of pre-Act discrimination.[44] On appeal to the Fourth Circuit, a majority of the three-judge panel hearing the case, with Judge Herbert Boreman writing for himself and Judge Albert Bryan, reversed Judge Gordon on the "present effects of past discrimination" theory but rejected all the LDF's arguments about the legality of the education and testing requirements.[45] However, Judge Simon Sobeloff wrote a strong partial dissent that was to influence the outcome in the Supreme Court. He found no need to prove intentional discrimination in a challenge to facially neutral employment discrimination policies and practices and, more important, he argued for the disparate impact theory of discrimination.

Then came the Supreme Court's unanimous (eight–zero) ruling reversing the Fourth Circuit. Through Chief Justice Burger, in a short opinion the Court upheld the disparate impact theory; ruled that proof of intentional



Robert Belton (left) grew up in High Point, North Carolina, and received his law degree from Boston University Law School in 1965. He, along with Gabrielle Kirk McDonald and Albert J. Rosenthal, formed the core of the LDF's employment discrimination litigation team litigating the *Griggs* case. McDonald (middle) became a district judge and then a judge of the International Criminal Tribunal for the former Yugoslavia; Rosenthal (right) served as Dean of Columbia University Law School from 1979 to 1984; and Belton became the first tenured African-American professor at Vanderbilt Law School, having joined the faculty in 1975.

discrimination was unnecessary and Congress had meant to deal with consequences of employment practices; and said that tests must be job-related, with the defendant having the burden of proving business necessity for and job-relatedness of tests used. Asked about the cases from that Term of the Court, the Chief Justice took notice of *Griggs*'s importance, even if he did so somewhat back-handedly: "I wouldn't want to say that was one of the terribly important cases but experts in that field of law considered it so, but it is not the kind of case that received any public attention."[46] In hindsight, we can say that was "clear understatement."

ENDNOTES

[1] 401 U.S. 424 (1971).

[2] Paul Burstein and Susan Pitchford, "Social-Scientific and Legal Challenges to Education and Testing Requirements in Employment," 37 *Soc. Probs.* 243, 244 (1990).

[3] David Goslin, **The Search for Ability: Standardized Testing in Social Perspective** (New York: Russell Sage, 1963) 96–98.

[4] For one version of the history of Duke Power, *see* Robert F. Durden, **Electrifying the Piedmont Carolinas: The Duke Power Company, 1904–1977** (Durham, N.C.: Carolina Academic Press, 2001).

[5] Interview with plaintiff Willie Boyd, August 6, 2004.

[6] These data were compiled from Duke's answers to the plaintiffs' interrogatories. Exhibit Volume, 105b-109b, *Griggs*, 401 U.S. 424 (1971) (No. 124).

[7] *Griggs*, 401 U.S. at 428 n. 3.

[8] Barry Bearak and David Lauter, "Tense Steps to Ending Racial Bias," *Los Angeles Times*, November 3, 1991, A1.

[9] The facts leading to the plaintiffs' decision to file a charge with the EEOC are based on an interview with Boyd.

[10] Interview with Willie Boyd. The LDF litigation team represented the plaintiff in the American Tobacco Co. case, *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

[11] Interview with Willie Boyd; Bearak and Lauter, "Tense Steps to Ending Racial Bias," A1.

[12] Reported in Bearak and Lauter, "Tense Steps to Ending Racial Bias," A1.

[13] A.C. Thies, memoranda to the file in the Duke Power materials received from Joseph Mosnier.

[14] A.C. Thies, letter to Duke Power superintendents, September 22, 1965.

[15] A.C. Thies, letter to Duke Power superintendents, April 28, 1966.

[16] Interview with Willie Boyd.

[17] *Brinkley v. The Great Atlantic and Pacific Tea Co.*, No. 1107 (complaint, E.D.N.C.).

[18] In 1964, it was estimated that a suit involving a trial in a district court, an appeal to a circuit court, and a petition for certiorari to the Supreme Court cost between $15,000 and $18,000. Litigation in *Brown v. Board of Education*, 349 U.S. 294 (1954), cost over $200,000. 110 Cong. Rec. 6541 (1964) (remarks of Senator Humphrey in the debate over Title VII).

[19] *Pettway v. American Cast Iron Pipe* Co., 411 F.2d 998, 1005 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

[20] **Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York: Basic Books, 1994), 413.

[21] Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law," 28 *Stanford L. Rev.* 207, 217 (1976).

[22] *E.g.*, "Workshop Planned to Explain Negro Job Rights," *St. Petersburg Times*, July 7, 1965, Section A; Ray Boone, "My Job Is to Get People to Complain," *The Richmond Afro-American*, June 19, 1965; "N.C. Compliance Studied," *The Charlotte Observer*, August 3, 1965, A5.

[23] Greenberg, **Crusaders in the Courts**, 4; "Complaints Filed Under Rights Act," *New York Times*, July 30, 1965.

[24] NAACP Legal Defense Fund, **30 Years of Law Which Changed America** (1970).

[25] EEOC First Annual Report. 5 (1967). *See also* EEOC, **Employment Patterns in the Textile Industry** 10 (1967).

[26] Greenberg, **Crusaders in the Courts,** 382–383, 415.

[27] These race-designated help-wanted ads were published in the local newspapers the *High Point Enterprise* and the *Greensboro Daily News.*

[28] Greenberg, **Crusaders in the Courts**, 366.

[29] Meltsner, **Cruel and Unusual: The Supreme Court and Capital Punishment** (New York: Random House, 1973), 78; *see also* Greenberg, **Crusaders in the Courts**, 377–378.

[30] Annual Report 1976/77, NAACP Legal Defense and Educational Fund, Inc., 9.

[31] Chambers later became Director-Counsel of the NAACP Legal Defense Fund.

[32] 390 U.S. 400 (1968) (per curiam).

[33] Greenberg, **Crusaders in the Courts**, 414.

[34] Railroad: *Rock v. Norfolk & W.R.R.*, 473 F.2d 1344 (4th Cir.), *cert denied*, 412 U.S. 933 (1973); *English v. Seaboard Coastline R.R.*, 10 Empl. Prac. Dec. ¶ 10,476 (S.D. Ga. 1975).

[35] Pulp and Paper: *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975); *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Gatlin v. West Virginia Pulp and Paper Co.*, 734 F.2d 980 (4th Cir. 1984); *Jones v. International Paper Co.*, 720 F.2d 496 (8th Cir. 1983); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976); *Roger v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *vacated and remanded*, 423 U.S. 809 (1975); *Stevenson v. International Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Long v. Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971); *Powell v. Georgia Pacific Corp.*, 535 F. Supp. 713 (W.D. Ark. 1982); *Miller v. Continental Can Co.*, 544 F. Supp. 210, 211 n. 2 (S.D. Ga. 1981) (noting long history of employment discrimination litigation involving the paper industry). *See* Timothy J. Minchin, **The Color of Work: The Struggle for Civil Rights in the Southern Paper Industry, 1960–1980** (Chapel Hill: University of North Carolina Press, 2001).

[36] Steel: *Hardy v. United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973).

[37] Tobacco: *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert denied*, 429 U.S. 920 (1976); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert dismissed*, 404 U.S. 1006 (1971); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

[38] Textile: *Lea v. Cone Mills*, 438 F.2d. 86 (4th Cir. 1971).

[39] Trucking: *Franks v. Bowman Transportation Corp.*, 424 U.S. 747 (1976); *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975).

[40] Public Utilities: *Griggs v Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[41] United States Civil Rights Commission, *Civil Rights Enforcement Efforts*, 116 (1971).

[42] *See* Jack Greenberg, "Litigation for Social Change: Methods, Limits, and Role in Democracy," 29 *Rec. N.Y. C.B.A.* 320 (1974).

[43] Leroy D. Clark, "The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter Revolutionary?" 19 *Kan. L. Rev.* 459, 468 (1971).

[44] *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N. C. 1968).

[45] *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970).

[46] Conversation with the Chief Justice, ABC News, July 5, 1971 (TV interview of Chief Justice Warren Burger by Bill Lawrence).

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

The absence of a national judiciary, declared Justice Story in his **Commentaries on the Constitution of the United States**, "was one of the vital defects of the confederation. And every government must, in essence, be unsafe and unfit for a free people, where such a department does not exist." Without courts, he continued, "the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding disobedience, to the destruction of liberty. The will of those who govern, will become, under such circumstances, absolute and despotic; and it is immaterial, whether power is vested in a single tyrant, or in an assembly of tyrants. In every well organized government, therefore, with reference to the security both of public rights and private right, it is indispensable that there should be a judicial department to ascertain, and to decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation."[1] Thus, the provision within the Constitution for a system of national courts was intended, Story maintained, to serve two objectives "of paramount importance" and "fundamental to a free government." The first is "a due execution of the powers of the government; and the second is a uniformity in the interpretation and operation of those powers, and of the laws enacted in pursuance of them."[2] In service of those objectives, the "universal sense of America has decided that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments, so far as they are capable of being made the subject of judicial controversy."[3]

Story's suggestion that inclusion of a national judiciary was practically a foregone outcome at the Philadelphia Convention anticipated Justice Robert H. Jackson's much later but similar claim about the commerce power denied Congress under the Articles of Confederation but then given to Congress at the federal Convention in 1787: "The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the State's power over its internal affairs. No other federal power was so universally assumed to be necessary. No other state power was so readily relinquished."[4]

Story's view was similarly echoed in thoughts that Justice Stephen J. Field expressed in 1897, toward the end of his then record-setting High Court tenure of nearly thirty-five years.[5] For him, in the judiciary's power to declare the law "is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government."[6]

Yet determination to institutionalize a system of national courts also required a decision on how judges would be selected. The method chosen—nomination by the President coupled with confirmation by the Senate—yielded blended responsibility and was the outgrowth of the competing proposals at Philadelphia. There the Virginia Plan called for selection of judges by the lower house of a bicameral legislature, and the New Jersey Plan called for a unicameral legislature (as did the Articles of Confederation) and assigned judicial selection to the executive.[7] As one study has argued, many of the "framers did not want the power of appointment to be vested solely in the hands of the president. Their colonial experience cautioned them against such an institutional arrangement because royal governors had abused their appointment power by giving offices to personal supporters, and because judges so appointed had felt no connection with the people whose law they were entrusted with administering." Similarly, experience after 1776 had taught them that placing selection solely in legislative hands "was equally troublesome, as battles ensued over patronage and no clear lines of responsibility were drawn."[8] Or, as Delaware delegate John Dickinson advised at Philadelphia, "Experience must be our only guide. Reason may mislead us."[9] Still, the widely held expectation that George Washington would be the new nation's first chief executive surely eased formation of the eventual consensus toward placing such significant appointing authority in the hands of a single person. "I do not believe," one delegate wrote, "the [executive powers] would be so great had not many of the members cast their eyes toward General Washington as President and shaped their Ideas of the Powers to be given a President by their opinions of his Virtues."[10] As Gouverneur Morris insisted to the future President, "No constitution is the same on paper as in life. The exercise of authority depends on personal character. Your cool, steady temper is *indispensably necessary* to give firm and manly tone to the new government."[11]

The true significance of any President's exercise of the appointing power lies of course in what those appointees do, as suggested by the title of a seminal book on judicial decision making: **The Choices Justices Make.**[12] Recent books about the Supreme Court continue to highlight the importance of both selection opportunities and the business conducted within the Marble Palace.

Choices made or the positions members of the Court take in deciding cases are today routinely expressed and reported through voting alignments that their published opinions reveal. When decisions come down from a full Bench, for example, they are said to be unanimous (nine–zero), or split in one way or another (eight–one, seven–two, six–three, or five–four.) News accounts about the Court's work, however, whether appearing in print, on television, or on the internet, tend more frequently to emphasize those where disagreement is present. This is perhaps understandable. As has been observed about news coverage of the electoral and law-making arenas generally, while politicians typically define success in terms of conflict management and reconciling differences among individuals and groups, journalists tend to prefer stories that highlight conflict and differences among people.[13]

Occasions when the Justices agree, rather than disagree, however, are the focus of **The Puzzle of Unanimity** by Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, who teach political science at Southern Methodist

University, Georgia State University, and Northern Illinois University, respectively.[14] Acknowledging that the Court is sometimes sharply divided, they begin their important and statistically sophisticated study[15] by demonstrating that the Justices frequently reach consensus.[16] Indeed, over the years 1953–2004, on which their research was focused, the proportion of unanimously decided cases routinely fell between thirty and fifty percent. The authors also report data on what they call "opinion consensus," where there is only one opinion issued from the Bench, with no dissents or concurrences. Here the consensus rating drops during the designated time span to one in four cases, but in several terms, the number was one in three. Either count, the authors believe, runs counter to widely held perceptions among the public and in press reports.[17]

Yet, to write about the presence or absence of judicial consensus on the modern Court is an indirect reminder that much of current practice stands in contrast to earlier periods. Indeed, as those well-grounded in Supreme Court history know, John Marshall is deservedly remembered for achieving a high degree of institutional unanimity after becoming Chief Justice in 1801. The norms that he successfully urged upon his colleagues included the minimization of open dissent and internal disputation and maximization of a willingness to compromise. These in turn promoted internal harmony, cooperation, and teamwork. Political necessity and prudence, especially in Marshall's first decade, may have dictated adherence to such norms, but for whatever reasons, the Marshall pattern remains remarkable. For example, William Johnson, President Thomas Jefferson's first appointee to the Court soon learned the power of the collegial norms that Marshall fostered. "[I] was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he was willing to take the trouble and it is a mark of respect to him." As Johnson explained to Jefferson in 1822, "some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other. . . . At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all."[18]

Moreover, it may well be that Marshall helped to establish institutional expectations that endured well after other jurists had taken his place, so that a norm of consensus exerted influence on the Court not only for much of the rest of the nineteenth century but into part of the twentieth century as well. If so, that influence would help to account for what one finds for example during the Chief Justiceship of Morrison R. Waite (1874–1888). Here, the actual number of dissenting votes initially cast by the Justices was considerably greater than the published record reveals. That is, many seemingly unanimous decisions were in fact initially decided with one or more dissenting votes; likewise, decisions reporting only one or two dissents may have been initially reached with three or four dissenting votes. This is known not merely anecdotally but because of very precise records that Chief Justice Waite maintained in his docket books that indicate the vote among the Justices at the conference where the case was decided. Waite's data can then be compared to data drawn from the official United States *Reports*.[19] The most thorough study of this phenomenon finds that dissenting votes at conference were recorded in forty percent of the cases,[20] or about four times the percentage indicated by the *Reports*.

Some scholars have argued that the sharp increase in dissents in the modern era is a function of the Court's increasing control over its docket. That is, in contrast to the situation in Waite's time when the Court was obliged to

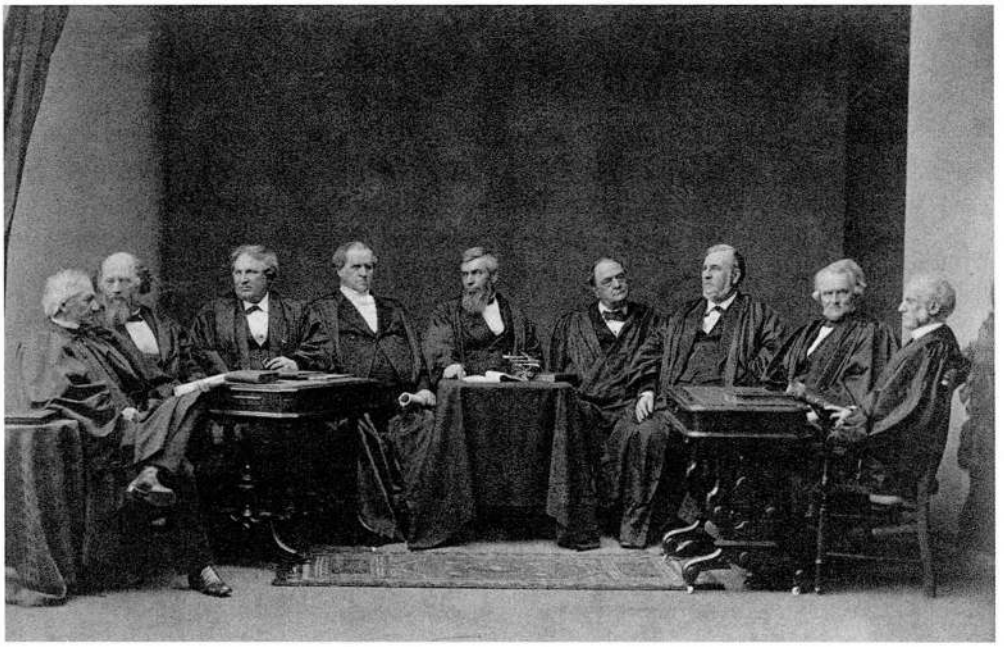
decide practically every case that qualified jurisdictionally, the Court, in a small step after 1891, and in a giant step after 1925, found itself able to select cases for decision, and to turn away the rest. The abundance of routine and "easy" cases therefore disappeared from the docket, and "hard" cases, with a greater tendency to provoke disagreement perhaps, took their place.

While the increase in the Court's discretion may explain some of the contrast between the fourth quarter of the nineteenth century and more recent decades, it does not account for the many instances in which Waite Court Justices dissented at conference, only later to join with the majority. If the bulk of nineteenth-century cases were easy, involving only perfunctory appellate review of correctly decided cases from courts below, that fact presumably would have been apparent at conference. So, what else could account for the divergence between the private-public dissent rate among the Waite Court Justices? One answer is the norm of consensus, dating from the Marshall Court that discouraged the public display of a divided bench. Accordingly, a Justice who indicated disagreement at conference would later feel a need to acquiesce in what the majority decided unless there were countervailing concerns present. It is that norm that later collapsed.

Still an additional factor should be considered as well for the Waite era: workload. The number of cases on the Court's docket mushroomed during Waite's tenure, due both to congressional expansion of federal jurisdiction and to economic and social changes underway. By the time of Waite's death in 1888, the Court had fallen more than four years behind in its work. This was also at a time when the Justices had practically no support staff. The Justices truly did their own work.[21] Even manual typewriters were not widely marketed until after Waite's tenure began. So, while a growing backlog itself might not discourage dissent, the number of opinions of the Court that the Justices had to write might do so. A Justice might well conclude that practicality counseled writing a dissent only in exceptional circumstances.[22]

Whatever conditions fostered the norm of consensus of the nineteenth and early twentieth centuries, Corley Steigerwalt and Ward conclude that its breakdown into an era of "dissensus"[23] began "during Stone's tenure [as Chief Justice] and was firmly entrenched by the time Earl Warren became chief."[24] While Harlan Stone's "leadership style almost certainly exacerbated discord, it was a series of institutional changes, both internal and external to the Court that ultimately helped usher in this new era." In the latter category were legal realism and Franklin Roosevelt's appointment of new Justices who were critical of traditional jurisprudence. In combination both developments encouraged individual expression. Within the former category were changes in traditional practices, "including the erosion of acquiescence and delays in opinion circulation." Certainly noteworthy for anyone interested in the Court during the middle and late 1940s and very early 1950s is the authors' insistence that the dissensus that emerged during this time "could not be erased simply by installing a chief with a style vastly different from Stone's; rather the internal and external institutional changes instituted during the Roosevelt Court [defined as the period between 1937 and 1947 during which the appointees of Franklin D. Roosevelt dominated the Court] so fundamentally altered it that a return to the norm of consensus was virtually impossible."[25]

Whether a pattern of consensus or dissensus prevails is important, the authors believe, in terms of the Court's position and influence in the political system. They note that some extremely important decisions have been rendered by a unanimous Bench, as seen, for example, in cases such as *Brown v. Board of Education*,[26] *Gideon v. Wainwright*,[27] *United States v. Nixon*,[28] and *Clinton v. Jones*,[29] although the *Gideon* and *Jones* cases,



In trying to explain why there has been a sharp increase in dissents in the modern era, scholars have argued that it is a function of the Court's increasing control over its docket. But that does not account for the many instances in which Waite Court Justices dissented in conference, only later to join with the majority opinion, posit the authors of the new book *The Puzzle of Unanimity*.

decided nine–zero in each instance, did not achieve opinion unanimity. (Of course one also thinks of the far more numerous non-unanimous cases decided in the same period that also merit "landmark" or near-landmark status.) Moreover, the added authority and perhaps clarity projected when opinion unanimity exists are said to make it more difficult for a later Court to overrule the earlier holding, just as it tends to promote more faithful adherence in the lower courts and implementation by state or federal administrative personnel. For example, the authors note a memorandum that accompanied Chief Justice Warren Burger's first draft of the Court's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*[30] that was among the most significant of the post-*Brown* school integration decisions: "I am sure it is not necessary to emphasize the importance of our attempting to reach an accommodation and a common position. . . . Separate opinions, expressing divergent views or conclusions will, I hope, be deferred until we've exhausted all other efforts to reach a common view."[31] In this instance, the Chief's pleadings carried the day. Burger's published opinion on April 20, 1971, was for a unanimous Bench.

In addition to highlighting a degree of consensus that has been common in the period under study, the book's second objective is to explain why this is the case. "We do this," they write, "by constructing a model reflecting the variety of forces that concurrently influence the Court's decisions."[32] And it is at this point that the title of the book assumes special meaning in terms of solving or dissembling the "puzzle." The question about the presence or absence of unanimity is significant in light of the persuasive findings of modern social science research that one's "attitudes" or values and ideology play a heavy role in the mental calculus that eventually yields a Justice's vote in a case. In other words, social scientists have been very effective in

demonstrating what most American Presidents seem to have known when selecting nominees for the Bench: that a nominee's values matter. Yet attitudes do not amount to the only force at work. A second factor, emphasized by the legal model, stresses the influence of the statutory and constitutional text as illuminated by precedent and professionally acquired legal norms. Still another model emphasizes strategic considerations, where Justices take into account the "effects of their choices on collective results."[33]

Thus the overarching question or "puzzle" becomes one of explaining how Justices in the post-consensus norm era ever manage to do what they in fact frequently do: achieve either unanimity or at least an outcome that falls just short of a unanimous Bench. Phrased differently, how do Justices who are often characterized as highly polarized manage to reach the same legal conclusions so often?

The authors find that, during the 1953–2004 period under study, agreement most commonly occurred (1) "in cases with a high degree of legal certainty as to the strongest legal answer," (2) in cases "that involve nonsalient economic or governmental power issues," and (3) cases "in which the Court ultimately reaches a liberal decision."[34] (In the authors' research design, "nonsalient" cases include those that, when decided, are not likely to be the subject of front-page coverage in a major American newspaper such as *The New York Times*. Still one wonders whether this element skews the results in that decisions handed down by a sharply divided Court may be deemed more newsworthy not because of the division itself but because of the issue that caused the Justices to divide.) Altogether, the authors report five categories of forces or influences that, when present, combine to enhance consensus: attitudinal, legal, strategic, institutional, and case specific.[35] Their findings are strikingly similar to those of Jeffrey Hockett in **Storm over This Court**,[36] a multi-Justice study of decision-making in a single case—*Brown v. Board of Education*—where unanimity was famously achieved.

Finally, **The Puzzle of Unanimity**, while showing that consensus is a product not of any single factor but rather "a function of multiple, simultaneously acting forces" reinforces the importance of law as both a direct and indirect decisional force where law is "measured as the degree of legal certainty present in each case."[37] Here, the authors insist, is another contribution of their research in that the proposition that the Justices "reach agreement when the legal answer is more obvious and clear" had "never been empirically or systematically tested" even though intuitively the claim would seem to be correct.[38] In such situations, "the influence of attitudes on opinion consensus is mitigated." This point in turn leads the authors to suggest that, if neither law nor attitudes are dispositive, then what is needed is a "theory that takes into account not just how one or the other influences decision making," but an approach that shows "how law and attitudes interact."[39]

Among relatively recent significant decisions where unanimity was not achieved is *Lawrence v. Texas*,[40] in which the Court, voting six–three, struck down the Lone Star State's same-sex sodomy statute,[41] first enacted in 1973 and one of only a handful of such laws still remaining in the nation. The case and its outcome, which seem to have energized contemporary culture storms, is now the focus of **Flagrant Conduct**,[42] by Dale Carpenter who teaches law at the University of Minnesota and who co-authored one of the many amici briefs filed in *Lawrence*.[43] His labors have given birth to a richly detailed, extensively documented, and highly engaging volume that in a few places reminds one of a John Grisham novel, although the reader should not be surprised to find that, from Carpenter's perspective, the case involved some people whom he considers heroes and others whom he considers something much less.

Supreme Court rulings only rarely appear foundationless, and *Lawrence* was no exception. It had direct antecedents. Before 1965, the Justices' institutional contact with sexuality was passing at most, limited largely to eugenics cases such as *Buck v. Bell* and *Skinner v. Oklahoma*.[44] But the Warren Court's decision in *Griswold v. Connecticut*[45] made a paradigmatic shift in constitutional law, as a majority struck down a state law dating from 1879 that criminalized the use of birth control devices and drugs, as well as the counseling on their use. Although Connecticut's statute violated no express provision in the Constitution, the ban foundered on a right of privacy implicit in the Constitution. Justice William O. Douglas announced that no fewer than eight amendments (he named the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth) "have penumbras, formed by emanations from those guarantees that give them life and substance." In other words, the specific guarantees in the Constitution implied others, equally important though unenumerated. By impinging on "an intimate relation of husband and wife" the state had violated a right "older than the Bill of Rights."[46]

Griswold in turn formed the basis of *Eisenstadt v. Baird*,[47] a successful 1972 challenge to a Massachusetts statute that confined distribution of contraceptive devices to married people. "If under Griswold," Justice Brennan reasoned, "the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[48] Yet abortion laws also affected the decision to bear a child. If a state could not proscribe birth control devices, could it nonetheless ban most abortions? The Court issued its answer in the negative less than a year later in *Roe v. Wade*.[49]

The string of privacy rulings made many wonder just how much this penumbral right might encompass. Ironically, barely four years before *Griswold*, in a case,[50] which proved to be an unsuccessful attack on Connecticut's birth control ban, Justice John Marshall Harlan had attempted to place sandbags against what might prove to be a jurisprudentially slippery slope even as he voted to accept the Connecticut case and to strike down the ban on due process grounds: "The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . . [S]ociety is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[51]

The Court then encountered the details of sexual intimacy squarely in 1986 in *Bowers v. Hardwick*,[52] where five Justices upheld the constitutionality of Georgia's sodomy statute. In contrast to the Texas law later reviewed in *Lawrence*, however, Georgia's law applied to heterosexual as well as homosexual behavior, although Justice Byron White's opinion for the Court seemed to consider the law as if it

made only the latter criminal.[53] Indeed, many observers were surprised at the ruling, given the Court's post-*Griswold* expansion of the scope of protected privacy. Close reading of Justice White's opinion and the principal dissent by Justice Blackmun perhaps provides insight. To discover what rights, though not expressly mentioned, are constitutionally protected, White looked to two sources: those "implicit in the concept of ordered liberty" and those "deeply rooted in the nation's history and tradition." Framing the investigation in this way, White concluded "that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[54] For Blackmun, the majority asked the wrong question. The case was not "about 'a fundamental right to engage in homosexual sodomy.'... Rather, this case is about 'the most comprehensive of rights . . . the right to be let alone.' [W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[55] White scanned a category of rights. Blackmun focused on a constitutionally protected realm of intimate association.[56] (As students of the Court learned later, Justice Powell was initially inclined to strike down the Georgia law, but changed his vote before the case actually came down.[57] "I think I probably made a mistake in that one,"[58] he acknowledged specifically of the Georgia anti-sodomy law case. Even more oddly, there might never have even been a ruling on the merits in *Hardwick*,[59] in that Carpenter reports Linda Greenhouse's finding from her book on Justice Blackmun[60] that the Court initially voted not to hear the case but "Justice Byron White, who wanted to uphold sodomy laws, persuaded Chief Justice Burge and Justice William Rehnquist and Thurgood Marshall to vote for cert."[61] Without four votes, the resulting denial of certiorari would have left in place the ruling by the Eleventh Circuit Court of Appeals that Georgia's statute violated the Constitution.)

Of the nine Justices who decided *Lawrence*, only three—Chief Justice Rehnquist, Justice John Stevens, and Justice Sandra O'Connor—had been on the Bench when *Hardwick* came down, and Rehnquist was then an Associate Justice. The Bench in *Lawrence* was thus a remarkable cohort that had been together for a decade without a change in personnel. Thus, with six new faces added since *Hardwick*, the Court of 2003 was essentially a new Court.

On the day *Lawrence* was decided, Justice Anthony Kennedy began his opinion for the majority with a brief summary of the facts from September 17, 1998, paradoxically Constitution Day. "In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace."[62]

However, this "bare-bones version" of the facts, Carpenter insists, "is in almost every important respect incomplete and questionable. It flattens a complex web of emotions, motivations, and deceptions. It omits the accidents and serendipity without which the case would have been lost to history." In short, the "pancaked conventional tale remains—years after the landmark . . . decision —a stubborn myth."[63] His research, "including interviews with most of the important participants in the events and their immediate aftermath" led the author to a "surprising, but only probabilistic conclusion: It is unlikely that sheriff's deputies actually witnessed Lawrence and Garner having sex. . . . If the police did not observe any sex, the whole case is built on law enforcement misconduct that makes it an even more egregious abuse of

liberty than the Supreme Court knew."[64] In that conclusion lies the full meaning of the book's title. And as **Flagrant Conduct** unfolds, the reader discovers the twin layers of irony that the book attempts to bring to light. "Since sodomy laws, like the one in Texas, were never really about stopping sodomy, it is fitting that they got their comeuppance in a case in which there was probably no sodomy. A law rarely enforced was upended in a case of phantom enforcement."[65]

Carpenter has organized his book chronologically in three parts. Part one serves two purposes. It places the Lawrence case in context by providing historical and cultural background on the Texas law's origins and enforcement history and discusses the lives of each of the several individuals involved in the case. Part two reviews the night of the arrests, examining the different versions of the facts as presented by the police and the defendants. It is here that Carpenter introduces the possibility that the arrest was arranged as a way to create a test challenge of the Texas statute, although he then concludes that possibility is far-fetched. Part three logically follows the case and the participants after the arrests "as the case went from a simple charge of petty crime to the highest court in the land."[66] Especially helpful for non-Texans is the detail and attention given in this part to the operation of the state's judicial system.

Aside from the information the reader gleans about the very human dimension and the various participants in the case, the material value of the book for students of the Supreme Court is the emphasis Carpenter provides in chapters fourteen and fifteen (entitled "The Constitutional Mainstream" and "Mismatch at the Supreme Court" respectively) on the legal arguments developed by the different teams of counsel, especially in writing briefs (including those submitted by amici on both sides) and in preparing for and delivering the oral argument. First, with respect to the petitioners' merits brief, there was such a strong "reticence"[67] about *Roe v. Wade* that the decision was effectively closeted—being mentioned only five times in the merits brief and never in a substantive way—because it remained part of "a very controversial strain of constitutional law."[68] Instead the Lawrence team opted "to emphasize past decisions involving contraception." Even the reference to *Planned Parenthood v. Casey*,[69] the critically important abortion decision from 1992, where Justice Kennedy had played a key role, was described "only as protecting individual autonomy against state interference, without mentioning a woman's right to choose to terminate her pregnancy."[70] For Carpenter, this legal tactic was nearly historic. "Now in the most important gay-rights case yet to reach the Supreme Court, the lead attorneys were rhetorically downplaying ties with both sex discrimination as theory and with reproductive choice as practice."[71] Similarly, the factual circumstances from the record were played down. Instead, words such as "intimate" and "intimacy," and "relationship" (used sixty and thirty-five times, respectively) or "privacy" or "family or "families" (used seventy and fifteen times, respectively) were chosen in place of references to particular sex acts.[72] Such emphasis on word choice seems to have resonated with a majority of the Court, the author believes, in that the word "relationship" or "relationships" appears eleven times in Justice Kennedy's opinion.[73]

Second, with respect to oral argument, Carpenter explains the concern among those closest to the legal battle that mistakes of the past not be repeated. The conviction remained strong that *Hardwick* had been an example of the adage that oral argument at the Supreme Court may not win a case but that it may well lose a case. Memories remained fresh from 1986 of the widely shared feeing at the end of oral argument in *Hardwick* that the case had been won, only to have those expectations crushed three months later. Lead role in oral

argument now lay in the hands of former Powell clerk Paul Smith, not Laurence Tribe, who had argued *Hardwick* and who, according to Carpenter, sought that position again.[74] Although Tribe already had a sterling reputation as a seasoned Supreme Court advocate and was thoroughly familiar with the issues *Lawrence* presented, "reviews of his performance in the earlier case were mixed." Justice Powell "panned Tribe's 'usual overblown rhetoric' but did concede that he had focused narrowly on the precise issue of state power before the Court. A former clerk for Justice White . . . was even more critical. 'Tribe blew the oral argument. He was failing from the beginning.'"[75] Also absent from the presentation in 1986 was clear articulation of a "limiting principle that would allow states to criminalize incest, bigamy, and bestiality—the very 'slippery slope' fears the *Lawrence* team would be so well prepared to swat away."[76] The consensus in 2003 was that careful emphasis on such a principle in 1986 would have solidified Justice Powell's position in favor of the respondent.

Carpenter properly highlights one particularly distinctive element of the Court's decision in *Lawrence* when he observes that it "is rare enough for the court to overrule itself. It is rarer still for the Court to confess that it had been wrong from the beginning."[77] This much is clear enough from the words in Justice Kennedy's opinion: "*Bowers* was not correct when it was handed down and it is not correct today."[78] The statement was reminiscent of Justice Hugo Black's characterization of *Betts v. Brady*[79] when the Court overruled that case twenty-one years later in *Gideon v. Wainwright*:[80] Betts was "an anachronism when handed down."[81] As Carpenter notes, even in *Brown v. Board of Education*, when the Warren Court unanimously interred *Plessy v. Ferguson*[82] and its separate-but-equal doctrine, the Bench "did not quite confess that it had been wrong from day one."[83] With *Bowers v. Hardwick*, however, a majority did.

Nonetheless, the reader might wish that Carpenter had explored one other distinctive aspect about Justice Kennedy's opinion. In the process of making explicit the majority's conclusion that *Hardwick* had been wrongly decided, the opinion seemed to go out of its way not merely to disagree with Justice Byron White's opinion for the Court in the 1986 decision but also fundamentally to impugn its intellectual integrity. It would have been instructive if Carpenter's research had shed light on that prominent element, particularly since Justice White, having died barely fourteen months before *Lawrence* was decided, could not come to his own defense. Aside from a statement that "nothing about the Court's internal deliberations of *Lawrence* has been made public so far"[84] there is not even speculation provided in **Flagrant Conduct** concerning how the Court's opinion might actually have taken shape, even though other research and even numerous Justices themselves have made clear over the years that majority opinions typically proceed though many drafts before they are actually announced in open court. In any event, short of an impromptu disclosure, full understanding of the making of Justice Kennedy's opinion of the case will presumably have to await access to pertinent judicial papers some years hence.

Lawrence, however, is only one of the more recent products of a mature judicial system that has been developing and changing for over two centuries. While one suspects that someone like Oliver Ellsworth, who helped to draft the Judiciary Act of 1789 in the First Congress, would be amazed at the contents of the Supreme Court's docket today, he would most certainly be nearly equally amazed at the Court itself and the vastness and complexity of the federal courts overall. While Congress was created practically full blown by Article I of the Constitution and even glimpses of a strong and energetic executive were present in Article II, nothing similar can accurately be said about the

federal judiciary and Article III. Of the three great structural components of the Constitution, Article III is not only the briefest, but the least illuminating when one compares what the constitutional language has enabled with the constitutional text itself: "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."[85]

One is almost astounded contemplating the scope of change that has come to pass. In the beginning, in addition to sitting collectively as the Supreme Court, Justices sat as judges of the circuit courts, one of the two types of lower federal courts established by the Judiciary Act of 1789. Though the act provided for three types of courts (district courts, circuit courts, and the Supreme Court), it authorized the appointment of judges only for the district courts and the Supreme Court. Except for a brief period in 1801–1802, no separate circuit judgeships existed until 1855 (for California) and then in 1869 for the rest of the nation. Each circuit court was at first staffed by two Justices (a number soon reduced to one) and one district judge. As a result, the early Justices spent far more time holding circuit court than they did sitting on the Supreme Court.

Despite Chief Justice John Marshall's deserved reputation in constitutional law, the bulk of the Court's work in his time and for years afterward was non-constitutional in nature. Private law cases vastly outnumbered public law cases, with the large majority involving admiralty and maritime issues (these cases were numerous given the fact that most of the nation's commerce before the Civil War was waterborne), common-law matters, and diversity disputes. The Court of the nineteenth century was still mainly a tribunal for the final settlement of disputes between individual parties. Its role as policymaker remained decidedly secondary. Though secondary, however, policymaking was hardly unimportant. Congress recognized as much in a series of statutes that altered the number of Justices. Between 1789 and 1869, Congress changed the number of Justices from six to five, five to six, six to seven, seven to nine, nine to ten, ten to seven, and seven to nine (the number authorized today)—each time partly with an eye toward influencing the Court's decisions.

Moreover, beginning in the late nineteenth century, the federal judiciary underwent important structural changes. For example, in 1891 Congress authorized intermediate appellate courts called circuit courts of appeals. For the first time on a regular basis, the federal judiciary had appellate tribunals below the Supreme Court. For most cases, the old circuit courts had not been appellate tribunals; a case began in either the district or circuit court depending on the subject matter. The old circuit courts were soon merged into the district courts. Circuit riding by the Justices, already reduced substantially, came to an end (ironically just as interstate rail transportation had become faster, more reliable, and more comfortable). Then, the 1891 statute also introduced some certiorari, or discretionary, jurisdiction. This meant that there were fewer categories of cases the Justices were legally obliged to hear and that the new courts of appeals became the courts of last resort for many cases. These adjustments set the stage for what was to come. Thanks in part to the influence of Chief Justice and former President William Howard Taft, the Judges Bill of 1925 became law that allowed the Court for the first time almost complete control of its docket. Rounding out the changes during the previous 136 years were several significant alignments and realignments of the circuits that affected not only access to the courts but even the politics of judicial selection and ideological character of the Supreme Court.

A comprehensive account of this institutional *becoming* or emergence is the focus of **Building the Judiciary** by Justin Crowe, who teaches political science at Williams

College.[86] The result of his work is a carefully researched, extensively documented, though unduly wordy study[87] that attempts to place this remarkable story of institutional growth within a context of a political and developmental theory.[88] Moreover, while the cover of a book is almost never discussed in its review, the one chosen for Crowe's merits special mention in that it visually captures part of one theme of the book in a way only rarely achieved. Shown in horizontal position is a perhaps seven-foot segment of a marble column that is being carved for the west portico of the Supreme Court Building, then under construction. As the cover photo caption reads, "Photo of an unidentified Vermont Marble Company craftsman as he measures the width of a groove on the lowest drum of a Corinthian column for the Supreme Court Building at the company's factory in Proctor, Vermont, c. 1933."[89]

A good research project begins with a question, and Crowe has his—one that he frames in various ways. Viewing the changes over time in the Supreme Court's place in the political system, he asks how "did such a dramatic evolution occur? How did the federal judiciary in general and the Supreme Court in particular, transcend its early limitations and become a powerful institution of American government? How, in other words, did it move from a Court of political irrelevance to one of political centrality?"[90]

According to Crowe, the usual answer given to such questions begins with *Marbury v. Madison*[91] in 1803 and the Court's well-known role in constitutional interpretation. Indeed, given the obvious expansion of judicial power since the Court's inauspicious beginnings in 1790, it is difficult to avoid overstating and over-inflating the importance of John Marshall and others in this process. As one who has been burping undergraduates for over four decades in an introductory course on American government and politics, the author of this review essay understands this common tendency all too well. It is so very easy to conclude that judicial power comes to life in 1803 as if the incubation process has passed and the egg has hatched. Thus, in "this understanding, judicial power expands when judges issue opinions that directly expand it . . . with little or no interference from other political actors." In this "internal view" the Court occupies the central position with "all the other actors and forces relegated decidedly to the background."[92]

Crowe credits this emphasis on judicial prerogative to a "problematic" attitude of "judicial exceptionalism" that he finds pervasive in much writing about the Court. This perspective tends both to overstate the judiciary's power position stemming from its decisions and to obscure the variety of ways in which judges gain and exercise power. Instead, "judicial power grows from more than merely constitutional decisions and the exercise of judicial review; indeed it more commonly and more foundationally derives from interaction with political elites, from empowering legislation, and from public, media, and interest group support."[93] The result, he believes, is that in "seeking to understand *how* judges rule, we have largely neglected the conditions that have made it possible *for* judges to rule." Similarly, "in emphasizing how the judiciary acts *upon* politics, we have minimized the ways in which it is equally acted upon *by* politics."[94]

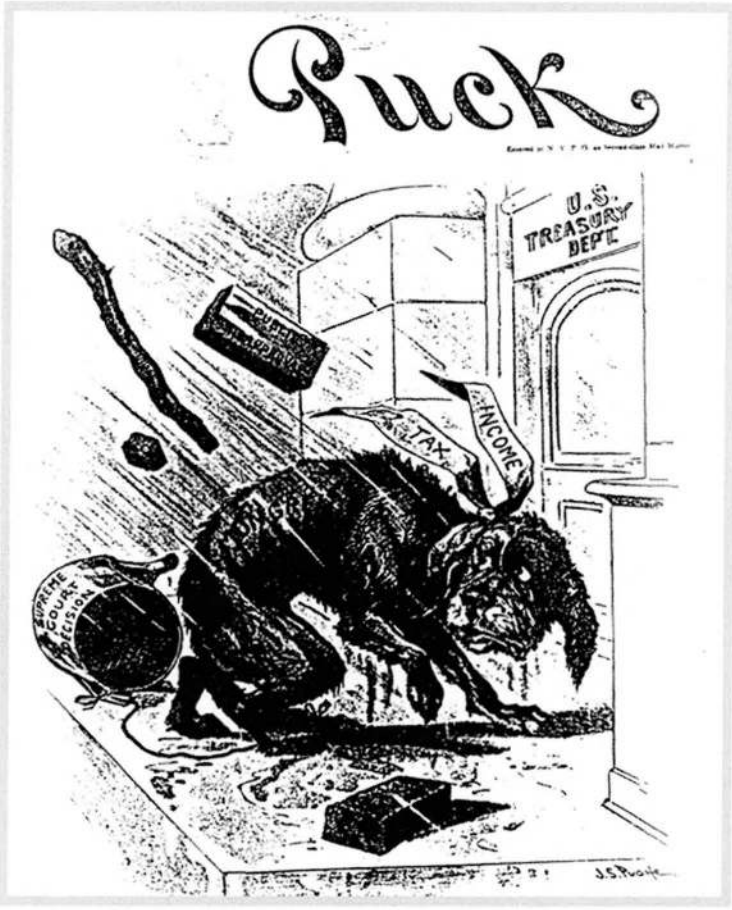
The label that the author places on his endeavor is "what might be called 'architectonic politics': the politics of actors seeking to shape the structures of government in order to further their own interests."[95] He explains that this approach has already been productively applied to Congress, the presidency, and the federal bureaucracy. His goal is examination of "the puzzle of 'judicial institution building'—the puzzle of understanding how the process of 'building' the judiciary unfolded over the course of American political development."[96] Because "an active and interventionist third branch of government was far from a foregone

conclusion . . . , it had to become so largely through a continuous process that was both politically determined and politically consequential." It was a judiciary "outlined in pencil rather than pen . . . built piece by piece." In short, his emphasis is less on what is internal and more on what is external to the judiciary.[97]

From 1789 through the end of the twentieth century, Crowe seeks answers to three questions: *why* was judicial institution building pursued, *how* was judicial institution building accomplished, and *what* did judicial institution building achieve? Answers to these questions are then forthcoming through a series of seven chapters that move chronologically after a comprehensively theoretical introductory chapter. Accordingly, the second chapter examines the establishment of the federal judiciary from the Washington administration through the end of President Thomas Jefferson's first term in 1805. Chapter three progresses from the beginning of Jefferson's second term until the eve of the Compromise of 1850. Chapter four covers the changes in the judiciary from the Compromise of 1850 to the Compromise of 1877, with chapter five moving from the inauguration of President Rutherford Hayes in 1877 to the inauguration of President Woodrow Wilson in 1913. It is at least by this point that one fully begins to appreciate the wisdom in the observation by Felix Frankfurter and James M. Landis that "[f]ramers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time."[98] The sixth chapter examines what Crowe calls the "bureaucratization of the judiciary"[99] between the dawn of World War I in 1914 and the edge of World War II in 1939. Chapter seven probes the judiciary's "specialization"[100] from 1939 until the presidential election of 2000. The concluding eighth chapter appropriately incorporates both an assessment of what had transpired and a look into the future, with the latter including some thoughts on the necessary interplay between judicial power and [small d] democratic politics. The reader then grasps Crowe's important point that the shape of the Third Branch that Americans have today was "hardly preordained" and that a very different judiciary was "readily possible." What is in place today is the result of a continuous process of "policy, politics, and performance; of constraints and catalysts; of elections and entrepreneurship."[101]

If the lack of a national judiciary was one of the principal defects of the Articles of Confederation, as Justice Story observed, the absence of a taxing power was another. "[W]eakness . . . at home," insisted John Jay in Federalist No. 5, "would invite dangers from abroad." Therefore, it is not surprising that, although members of the Philadelphia Convention were sharply divided on many issues in 1787, they were almost unanimous in their insistence that Congress should have broad power to tax and spend. Heading the list of enumerated powers in Article I, Section 8, stands the provision that Congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." It would be difficult to fashion more sweeping language. In the exercise of its taxing and spending power, the national government acts directly on individual citizens and their property as though there were no states. Nor are there any limits (apart from those imposed on Congress at the ballot box) on the amount Congress may attempt to collect through taxation. The only limitations on the taxing power are those that the Supreme Court has established and those that the Constitution specifically provides in Article I.

This important Article I power, and its judicial interpretation are the subject of **The Supreme Court, Federal Taxation, and the Constitution** by Jasper L. Cummings, Jr., who is counsel in the Federal Tax Group of Alston & Bird in Raleigh, North Carolina and Washington, D.C.[102] As the title of this



The Supreme Court, Federal Taxation, and the Constitution **by Jasper L. Cummings, Jr., is a very readable account of the history of the national taxing power. This cartoon satirizes opposition to Congress's proposal of the Sixteenth Amendment in 1909, which allowed for a national income tax.**

inclusive volume of nine chapters suggests, Cummings's center of attention is on the national taxing power, not the concurrent taxing power of the states, an arena that presents its own set of federal constitutional questions that have long been a mainstay of the Supreme Court's docket. Particularly, given the technical nature of the subject matter, the result is a surprisingly readable treatment, one that is serviceable not only by the specialist but by the novice as well.[103]

The Constitution, Cummings writes, "best exemplifies the adjective, protean. It is versatile, capable of being nearly all things to all people." Accordingly, "the constitutional tax history of the United States is largely a history of (certain types of) taxpayers' search for constitutional reasons not to pay taxes. In turn that history is an important window on the United States itself, given the seminal roles of issues related to property—first and foremost slavery, state versus federal sovereignties, and laissez faire economics, to name just three general historical subjects—that strongly shaped both the nation and federal taxation." Whether in the distant past or current times, it "only takes one disgruntled taxpayer who can afford to wonder why a certain tax can be applied in a certain way to

generate a new constitutional challenge."[104] Moreover, past controversies in turn seem routinely to resurface in new forms. Thus the tax-related arguments made in 2012 against the Patient Protection and Affordable Care Act "are direct descendants of arguments made in constitutional tax cases dating back to the *License Tax Cases* of 1867, *Pollock* [*v. Farmers' Loan & Trust Co.*] in 1895, the *Child Labor Tax Case* in 1922, but last seen in the Supreme Court in attacks on New Deal legislation."[105] Happily for the reader, Cummings includes an article-length explication[106] in chapter three of the taxing power dimension in the landmark decision[107] on the health care law.

The author's reflection that tax cases open a useful window into the nation's history is especially well demonstrated by *Pollock*, the Income Tax Case of 1895, the oral argument in which was the subject of the cover illustration of a recent issue of this *Journal*.[108] This litigation and its aftermath show that what is now the mainstay of revenue for the federal government became established only after a defeat at the High Court and ratification of the Sixteenth Amendment to the Constitution eighteen years later.

As part of the Wilson-Gorman Tariff Act of 1894, Congress imposed a tax of two percent on income, derived from a variety of sources, above $4,000. This was not the nation's first experiment with such a tax. Congress had imposed an income tax during the Civil War (but failed to renew it in 1872), and the Supreme Court had upheld this type of taxation in 1881 as applied to a lawyer's professional earnings.[109] Nor was the tax levied in 1894 a burdensome one. Whereas the tax in 1865 incorporated both progressivity and a rate as high as ten percent, was paid by 1.3 percent of the population, and constituted nineteen-percent of federal revenues, the tax of 1894 was flat, was paid by barely 0.1 percent of the population (almost all of whom lived in the Northeast), and contributed less than four percent of revenues.[110] The law was thus neither redistributory nor lucrative but largely symbolic. It essentially preserved the status quo against attacks from those on the economic and political right and left. The great bulk of federal expenditures continued to be paid from revenues generated by tariffs. Nonetheless, advocates of redistribution and greatly enlarged federal appropriations could look at the 1894 law as a "foot in the door," all the while those who saw the tax as class legislation and a harbinger of socialism could for that reason oppose the tax.

In April 1895, with Justice Howell Jackson absent because of terminal illness, the Court invalidated parts of the new tax law. As applied to income from bonds issued by states and municipalities, all eight Justices declared the tax to be unconstitutional since it amounted to a tax on state and local governments themselves and hence violated the principle of state sovereignty. As applied to income from real property, six Justices (Edward Douglass White and John Marshall Harlan dissenting) thought that the tax was no different from a tax on land itself. As such, it was a "direct tax," which according to Article I, section 9, in the Constitution, had to be apportioned among the states on Basis of population. As for the validity of the tax on other income such as wages and income derived from corporate bonds and stocks (the latter being that part of national income most affected by the tax), the Court was evenly divided. The most probable alignment placed Chief Justice Melville Fuller and Justices David Brewer, Stephen Field, and Horace Gray on one side against the tax, and Justices White, Harlan, George Shiras, and Henry Brown on the other.

With Jackson making a special trip to Washington from his sick bed for a hearing on this issue on May 6–8, 1895, the Justices announced a five–four vote against the validity of the rest of the tax statute on May 20. When Jackson, the supposed tie-breaker, joined only White, Harlan, and Brown, it became immediately apparent that one Justice, previously voting to uphold this part of the law, had

changed his mind. Court lore assigns that distinction to Justice Shiras.[111]

A tax on personal property was a direct tax, reasoned Chief Justice Fuller for the majority, and so must be subjected to the rule of apportionment, thereby making the tax unworkable.[112] As for wages in various occupations, most Justices agreed that Congress could tax them as an excise, although the Court avoided saying that a tax on earned income was either direct or indirect. However, since all other provisions of the tax law had been found constitutionally deficient, this part fell too because Congress probably would not "pass the residue independently." If the tax on earned income was left standing, Fuller argued, "what was intended as a tax on capital would remain in substance a tax on occupations and labor."[113] Thus the Court put beyond the reach of Congress the proceeds of invested wealth.

Cummings correctly emphasizes the extraordinary political context of *Pollock*, both in the reasons for enactment of the tax and the Court's fatal objections to it that "produced the opposite constitutional conclusion from that of earlier cases," reversing "them as to their tenor if not their narrow holdings. . . . The political foundations of *Pollock* are further evidenced by the fact that it is generally viewed as part of a trilogy of reactionary opinions, the other two being [*United States v.*] *E. C. Knight* (holding that manufacturing was local and so not a part of commerce and not subject to the monopoly laws, and *In re Debs* (upholding labor injunctions in the Pullman strike of 1894)."[114]

"Democratic institutions are never done," reflected Professor Woodrow Wilson not long after writing his classic book about Congress.[115]" [T]hey are like living tissue—always a-making. It is a strenuous thing, this living the life of a free people."[116] As the books appraised here have shown, that observation by a future President encompasses the judiciary as well as other institutions of American government.

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

CARPENTER, DALE. **Flagrant Conduct: The Story of *Lawrence v. Texas*.** (New York: W.W. Norton, 2012). Pp. xv, 345. ISBN: 978-0-393-34512-4, paper.

CORLEY, PAMELA C., AMY STEIGERWALT, AND ARTEMUS WARD. **The Puzzle of Unanimity; Consensus on the United States Supreme Court.** (Stanford, CA: Stanford University Press, 2013). Pp. xi, 201. ISBN: 978-0-8047-8472-6, cloth.

CROWE, JUSTIN. **Building the Judiciary: Law, Courts, and the Politics of Institutional Development.** (Princeton, NJ: Princeton University Press, 2012. Pp. xiv, 295. ISBN: 978-0-691-15293-6, paper.

CUMMINGS, JASPER L., JR. **The Supreme Court, Federal Taxation, and the Constitution.** (Washington, DC: American Bar Association Section of Taxation, 2013). Pp. xvi, 628. ISBN: 978-1-61438-720-6, paper.

ENDNOTES

[1] Joseph Story, **Commentaries on the Constitution of the United States**, vol. 2 (2d ed., 1851), 365–366.

[2] *Id.*, 367.

[3] *Id.*, 369.

[4] *Hood v. Dumond*, 336 U. S. 525, 534 (1949), Jackson, J., dissenting.

[5] Field's longevity record stood until it was topped by Justice William O. Douglas, who served for thirty-six years.

[6] 168 U. S. 717, 42 L. Ed. 1221, Appendix I, Oct 13, 1897.

[7] John R. Vile, **The Constitutional Convention of 1787** (2005), vol. 2, 530.

[8] Mitchell A. Sollenberger, **Judicial Appointments and Democratic Controls** (2011), 7.

[9] Max Farrand, ed., **The Record of the Federal Convention** (1937), vol. 2, p. 278.

[10] *Quoted in* Henry F. Graff, "Federal Government, Executive Branch: The Presidency," in Paul S. Boyer, ed, **The Oxford Companion to United States History** (2001), 246.

[11] *Quoted in* Samuel Eliot Morrison, **The Oxford History of the American People** (1965), 317, emphasis in the original.

[12] The book, published in 1998, is authored by Lee Epstein and Jack Knight.

[13] Herbert Schmertz, "The Media and the Presidency," 26 *Presidential Studies Quarterly* 21 (1986).

[14] Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, **The Puzzle of Unanimity** (2013), hereinafter cited as Corley, Steigerwalt, and Ward.

[15] *See* the Appendix and its tables in *id.*, following page 168.

[16] Corley, Steigerwalt, and Ward, 5. By comparison, for the October 2013 Term, forty-eight or sixty-six percent of merits cases were decided nine–zero. http://www.scotusblog.com/2014/06/final-stat-pack-for-october-term-2013-and-key-takeaways-2/, last accessed on September 17, 2014.

[17] For example, *see* Adam Liptak, "The Polarized Court," *New York Times*, May 11, 2014, p. SR 1. Liptak's piece reports that, for the first time, when the Justices divide, they tend to divide along what he calls "partisan lines," although it is not entirely clear whether his measure of partisanship is determined by the party of the appointing President or the party identification of the individual Justice. The two measures are usually, but not always, the same.

[18] *Quoted in* Donald G. Morgan, **Justice William Johnson: The First Dissenter** (1954), 181–182. *See also* Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership, 36 *University of Pittsburgh Law Review* 785 (1975), reprinted in *Journal of Supreme Court History* 63 (1992).

[19] It was in 1875, the year after Waite became Chief Justice, that the Court's decisions began carrying the "U.S." designation in citation, instead of being cited according to the name of the Court's official Reporter of Decisions.

[20] Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court, 45 *American Journal of Political Science* 362, 366 (2001).

[21] Justice Horace Gray was the first Justice with a law clerk; in 1882 he hired a recent law school graduate and paid him out of his own salary.

[22] C. Peter Magrath, **Morrison R. Waite** (1963), 272–274.

[23] Corley, Steigerwalt, and Ward, 11.

[24] *Id.*, 161.

[25] *Id.*

[26] 347 U. S. 483 (1954).

[27] 372 U. S. 335 (1963).

[28] 418 U. S. 683 (1974). *Nixon* was decided eight–zero, with Justice Rehnquist not taking part.

[29] 520 U. S. 681 (1997).

[30] 402 U. S. 1 (1971).

[31] Corley, Steigerwalt, and Ward, 9.

[32] *Id.*, 5.

[33] *Id.*

[34] *Id.*, 160.

[35] *Id.*, 7.

[36] Hockett's book was published in 2013.

[37] Corley, Steigerwalt and Ward, 140.

[38] *Id.*, 7.

[39] *Id.*, 140.

[40] 539 U.S. 558 (2003).

[41] Justice Kennedy wrote the opinion of the Court. Justice Scalia filed a dissent that was joined by Chief Justice Rehnquist and Justice Thomas. Justice O'Connor concurred separately in the judgment on other grounds.

[42] Dale Carpenter, **Flagrant Conduct** (2012), hereinafter cited as Carpenter.

[43] Brief of Amici Curiae Republican Unity Coalition and the Honorable Alan K. Simpson in Support Of Petitioners (2013).

[44] 274 U. S. 200 (1927); 316 U. S. 535 (1942).

[45] 381 U. S. 479 (1965).

[46] *Id.*, at 486. In December 1965, the author of this review essay, then in his second year of graduate school, attended a roundtable discussion of Griswold at the annual meeting of the American Political Science Association. Noted panel participants included professors Robert P. McCloskey of Harvard University and John P. Roche of Brandeis University. Perhaps the most memorable assessment offered at this event was McCloskey's pithy utterance that in his opinion Douglas had "played Scrabble with the Bill of Rights."

[47] 405 U. S. 434 (1972). Between *Griswold* and *Baird*, the Court struck down a state ban on interracial marriages in *Loving v. Virginia*, 388 U. S. 1 (1967).

[48] *Id.*, 453.

[49] 410 U. S. 113 (1973).

[50] *Poe v. Ullman*, 367 U. S. 497 (1961). Five Justices voted to dismiss the case because of an absence of standing in that the law had not been enforced against the plaintiffs.

[51] *Id.*, 546.

[52] 478 U. S. 186 (1986).

[53] *See* David A. J. Richards. **The Sodomy Cases** (2009); the Richards book treats *Lawrence* as well as *Hardwick*, but contains a fuller account of the latter.

[54] 478 U. S. at 191–192.

[55] 478 U. S. at 199, 205.

[56] A sodomy case had reached the Supreme Court prior to *Hardwick* in the form of an appeal from a divided three-judge district court that had upheld Virginia's sodomy statute against a *Griswold*-inspired attack [*Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va.1975)]. Although the High Court held no oral argument for this case, it affirmed the lower court in a summary memorandum order (*Doe v. Commonwealth's Attorney*, 425 U. S. 901 (1976)), which read: "Judgment affirmed. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument." *Doe v. Commonwealth's*

Attorney occurred well before Congress greatly narrowed the "appeal" or obligatory component of the Supreme Court's appellate jurisdiction in 1988. Given the subject matter, today such a case would be heard by a single district judge, not by a three-judge panel, and would fall within the Supreme Court's certiorari, and therefore entirely discretionary, jurisdiction.

[57] *See* John C. Jeffries, Jr., **Justice Lewis F. Powell, Jr.** (1994), 552. For further discussion of Justice Powell's position, *see also* Elizabeth Sheyn, "The Shot Heard Around the LGBT World," 4 *Journal of Race, Gender, and Ethnicity* 2, 9, n. 48 (2009). Carpenter's book refers to Powell's change of mind on p. 253.

[58] Quoted in Joan Biskupic and Fred Barbash, "Retired Justice Lewis Powell Dies at 90." *Washington Post*, August 26, 1998, p. A1.

[59] Carpenter generally refers to this case as "Bowers," but in this essay it will be referenced as "Hardwick." The latter usage follows the common, although not consistent, shorthand practice of denoting cases by the name of the non-governmental party in the case. Michael Hardwick was the person who had been arrested for with violating Georgia's sodomy law. Michael Bowers was the attorney general of Georgia. Thus, one usually speaks of *Gideon v. Wainwright* as "Gideon," not "Wainwright."

[60] Linda Greenhouse, **Becoming Justice Blackmun** (2006).

[61] Carpenter, 192.

[62] 539 U. S. at 562–563.

[63] Carpenter, xii.

[64] *Id.*, xii-xiii.

[65] *Id.*, xiv.

[66] *Id.*, xiii.

[67] *Id.*, 198.

[68] *Id.*

[69] 505 U. S. 833 (1992).

[70] Carpenter, 195.

[71] *Id.*, 196.

[72] *Id.*, 193.

[73] *Id.*, 259.

[74] Carpenter noted that Professor Tribe declined to be interviewed for his book. Carpenter, 317, n. 1.

[75] Carpenter, 209–210.

[76] *Id.*, 210.

[77] *Id.*, 259.

[78] 539 U. S. at 578.

[79] 316 U.S. 455 (1942).

[80] 372 U. S. 335 (1963).

[81] *Id.*, at 345. Justice Black had filed a dissenting opinion in *Betts*, where the majority opinion had been written by Justice Owen J. Roberts.

[82] 163 U.S. 537 (1896).

[83] Carpenter, 259.

[84] Id., 251.

[85] United States Constitution, Article III, Section 1.

[86] Justin Crowe, **Building the Judiciary** (2012), hereinafter cited as Crowe. Readers interested in the development of America's federal courts will also want to consult Peter G. Fish, **The Politics of Federal Judicial Administration** (1973) and Scott Gerber, **A Distinct Judicial Power: The Origins of an Independent Judiciary** (2011).

[87] More thorough editing might well have reduced the length of the book, by perhaps as much as ten percent and correspondingly increased the book's accessibility too.

[88] Secondarily, the reader quickly discovers two major benefits that the book offers. First, there are actually footnotes. In the book publishing business, concerns over production costs have nearly driven footnotes into extinction. Far more common but less convenient today is the use of endnotes almost exclusively. While use of endnotes is not a concern in a journal article or a volume with a relatively small number of citations and/or in a volume where there are only a few explanatory endnotes, a large number of citations combined with many explanatory endnotes often has the unintended consequence of consigning many of the endnotes to eternal obscurity or neglect in that they are only occasionally, if ever, consulted, and then usually only by the most curious and persistent reader. Because many of the notes in Crowe's book *are* explanatory notes, the publisher's use of footnotes is therefore a blessing. Second, and related to the first, many of the endnotes amount to a running dissertation-style literature review of the important sources related to the particular event, trend, or policy under examination.

[89] *Id.*, rear cover. The west portico of the building is the side most commonly seen by visitors and in photographs.

[90] Crowe, 2.

[91] 5 U. S., (1 Cranch) 137 (1803).

[92] Crowe, 3.

[93] *Id.*, 4.

[94] *Id.*, 5.

[95] *Id.*, 6.

[96] *Id.*, 8.

[97] *Id.*

[98] Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928) 107.

[99] Crowe, 20.

[100] *Id.*, 21.

[101] *Id.*, 17.

[102] Jasper L. Cummings, Jr., **The Supreme Court, Federal Taxation, and the Constitution** (2013), hereinafter cited as Cummings.

[103] While the book features an index of cases, it would be even more useful if it also contained a conventional index of names and terms.

[104] Cummings, 3–5.

[105] *Id.*, 2. *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1866); *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S.

601 (re-hearing, 1895); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

[106] Cummings, 225–250.

[107] *National Federation of independent Business v. Sibelius*, 183 L. Ed. 2d 450 (2012).

[108] 38 *Journal of Supreme Court History*, no. 3 (2013).

[109] *Springer v. United States*, 102 U.S. 586 (1881).

[110] Robert Stanley, **Dimensions of Law in the Service of Order:** (1993), 133.

[111] Loren P. Beth, **John Marshall Harlan** (1992), 242.

[112] As Harlan noted in dissent, "No such apportionment can possibly be made without doing gross injustice to the many for the benefit of the favored few in particular States." 157 U.S. at 671.

[113] 158 U.S. at 637.

[114] Cummings, 383. *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895); *In re Debs*, 158 U.S. 564 (1895).

[115] Woodrow Wilson, **Congressonal Government** (1885).

[116] Woodrow Wilson, **An Old Master and Other Essays** (1893), 116.

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