Introduction

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The articles in this issue cover a large spectrum of Supreme Court history—how the Justices decided certain cases, dissents that never appeared, a reminiscence of the fourteenth Chief Justice, some little-known aspects of important cases, a rebuttal to an article that appeared in an earlier issue, and, last but certainly not least, Grier Stephenson's review of books.

Docket books are little notebooks that, at least in the time with which I am familiar, had small locks opened by an even smaller key, somewhat akin to a teenage girl's diary. But instead of comments on Mary's dress or how interesting the new boy in class is, the comments are on cases argued before the Supreme Court and the discussions on those cases in the Conference following oral argument. In the ones I have used, the jottings may be quite lean—A, B, and C voted to reverse; everyone else to affirm—to lengthy, and sometimes near-verbatim, transcripts of who said what. Given the secrecy with which the Court surrounds its internal deliberations—there are no clerks, secretaries, or messengers at the Conference—the docket books allow historians a limited but often illuminating glance at how Justices discussed certain cases.

The Court recently made docket books in the possession of the Curator more easily available to scholars, and Barry Cushman has examined the entries for the first five Terms of the Hughes Court. These are important years, as the country entered the Great Depression following the boom years of the Roaring Twenties. Initially the cases coming to the Court were fairly similar to those in the preceding five Terms, but as the states tried to deal with widespread economic problems, mortgage foreclosures, unemployment, and the like, the measures they experimented with pushed the bounds of what the Justices had previously allowed to the state police powers. Professor Cushman, who is the John P. Murphy Foundation Professor of Law at the University of Notre Dame, leads us in an exploration of the Court in a time of important transition.

Most textbooks, including mine, pay very little attention to *Champion v. Ames* (1903), the Lottery Case, except to note that it is somewhat of an anomaly in the Court's Commerce Clause jurisprudence at the time. John W. Compton, an assistant professor of political science at Chapman University, argues that it is, in fact, more than an anomaly. Up until that case, most scholars, lawyers, and jurists assumed that only the states had police powers, that is, the authority to enact measures for the health, safety, and welfare of their citizens. The federal government, of course, had plenary authority in those areas assigned to it by the Constitution, such as regulation of interstate commerce, but police powers analogous to those of the states supposedly did not exist. Professor Compton shows how the decision in the Lottery Case marked the demise of this form of dual federalism, although it would be many years before the Court would acknowledge the existence of a federal police power.

The *Schwimmer* case (1929) is usually remembered for one of Justice Oliver Wendell Holmes's most striking aphorisms, namely, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." Rosika Schwimmer had her application for citizenship denied because, as a pacifist, she could not in good conscience declare that she would take up arms in defense of her country. Holmes pointed out the silliness of this reason, noting that the U.S. Army did not take women and that Schwimmer was then over fifty years old, an age that would have disbarred men as well.

We are so enthralled by Holmes's language—as well we should be—that often we do not look much beyond the dissent. Why did the government turn her down? Who was she, and how did the whole ordeal reflect on the burgeoning women's movement of that decade? Why did the government allow conscientious objectors to avoid combat but penalized a religious pacifist who wanted to become a citizen? These issues are explored by Megan Threlkeld, associate professor of history at Denison University. Her article is a fine example of that historiography that has argued that we learn a great deal from a case if we look at both sides—one being the jurisprudential, what the Court decided and what the dissenters may have said, and the other being the social, political, and economic history of the nation that led to the case arising in the first place.

A few issues back (vol. 39, no. 2) we published an article by Professor Craig Alan Smith, in which he argued that William O. Douglas's claim to have written not only the dissenting opinion in *Meyer v. United States* (1960), but the majority opinion ascribed to Charles E. Whittaker as well, was false. Since Douglas's memoirs are riddled with errors and exaggerations, it made sense that this story might not be what it appeared. Wait a minute, says David J. Danelski, who called me soon after Smith's article appeared. David, the Boone Centennial Professor of Political Science Emeritus at Stanford, has been working for many years on a biography of Douglas. While he agrees that much of what Douglas wrote in his book needs to be treated skeptically, in this case, according to Danelski, the story is true. We invited Professor Danelski to submit his article, and then asked Professor Smith if he wished to respond. His comments follow the article.

Historians rarely claim that the story they are telling is absolutely accurate. We agree, for example, that the Japanese bombed Pearl Harbor on December 7, 1941, but are not so sure that July 4 is really the date of American independence. The discovery of new materials, or new ways of looking at old materials, is what the historical profession is all about. We leave it to our readers as to which version of the events they find more convincing.

I have just finished a fairly good size book on dissent on the Supreme Court, and

there are numerous examples of Justices writing but not publishing their dissents. There are a variety of reasons for this, the most common being that the majority writer accepted enough of the dissenter's arguments and made the resulting changes in the holding that the dissenter believed a separate opinion no longer necessary. But I had never heard of the phrase "graveyard dissents" until I read the article by Greg Goelzhauser, assistant professor of political science at Utah State University.

Professor Goelzhauser does a fine job of explaining why Justices consign dissents to the graveyard, and in fact, at least since the Burger Court, have used that phrase. We should keep in mind, however, that the practice of implying a dissent is in the offing, and then withdrawing it, is not a new phenomenon. As Justice Hugo Black used to say, "There's nothing like the threat of a dissent to keep the boys on their toes."

Chief Justice Warren Burger holds a very special place in the annals of the Supreme Court Historical Society, since it was with his urging and support that the Society came into being forty years ago.

Robert Fabrikant served as a law clerk to Burger his last year on the D.C. Circuit and his first on the Supreme Court, and got to know him fairly well. Fabrikant, a partner at Manatt, Phelps & Phillips, LLP, remembers the man he knew and highlights lesser-known aspects of the fourteenth Chief Justice.

It has now more than twenty years since I became editor of the *Journal*, then just a Yearbook, and there has been one constant that whole time—I could rely on Grier Stephenson, the Charles A. Dana Professor of Government at Franklin & Marshall College, to keep us up to date on books concerning the Court and its history. Grier's job has become more difficult in those two decades, as the volumes on the Court have increased, seemingly exponentially. But I hope we can continue to rely on him for many more years to come to write the Judicial Bookshelf.

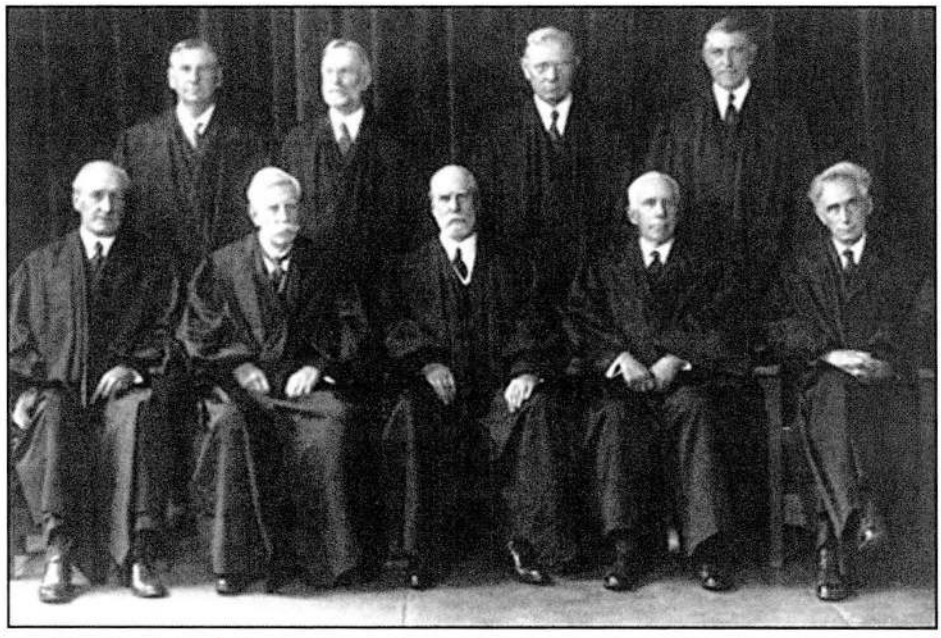
As always, a feast! Enjoy!

The Hughes Court Docket Books: The Early Terms, 1929-1933

BARRY CUSHMAN

For many years, the docket books kept by a number of the Hughes Court Justices have been held by the Office of the Curator of the Supreme Court. Yet the existence of these docket books was not widely known, and access to them was highly restricted. In April of 2014, however, the Court adopted new guidelines designed to increase access to the docket books for researchers. This article offers a report and analysis based on a review of all of the docket books that the Curator's Office holds for the early Hughes Court, comprising the 1929-1933 Terms. Only one of the entries in these docket books has been examined and reported on before.[1]

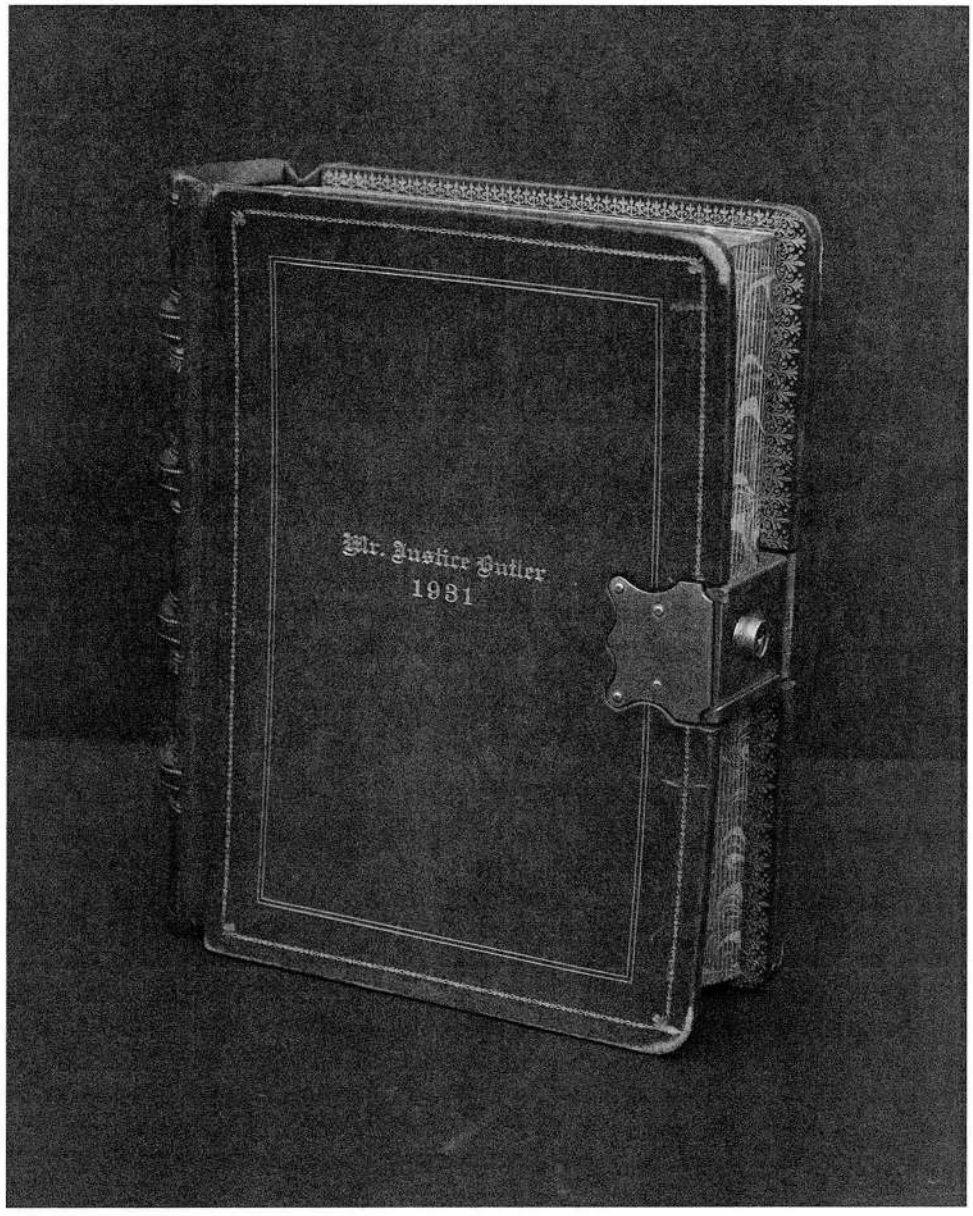
This article canvasses the available docket book entries relevant to what scholars commonly regard as the major decisions of the early Hughes Court.[2] This review includes fifty-nine cases concerning areas of law as diverse as the Commerce Clause, the dormant Commerce Clause, substantive due process, equal protection, fair trade, labor relations, intergovernmental tax immunities, criminal procedure, civil rights, and civil liberties. The information in the docket books sheds particularly fascinating new light on decisions such as *Nebbia v. New York*,[3] *Home Bldg. & Loan Assn. v. Blaisdell*,[4] *New State Ice Co. v. Liebmann*,[5] *Powell v. Alabama*,[6] *Nixon v. Condon*,[7] and *Burnet v. Coronado Oil & Gas Co.*[8] In addition, for these and the many other cases examined, this article also reports on whether a unanimous decision was also free from dissent at conference or became so only because one or more Justices acquiesced in the judgment of their colleagues, as well as on whether non-unanimous decisions were divided by the same vote and with the same alliances at conference. The docket books also provide records of instances in which a case that initially was assigned to one Justice was later reassigned to another. These records afford us some insight into the kinds of cases in which this tended to occur, and provide an opportunity to document for the first time the long held suspicion that the notoriously slow-writing Justice Van Devanter frequently was relieved of his opinions by the Chief Justice.



By examining the docket books for the early Hughes Court (pictured in 1930), comprising the 1929-1933 Terms, the author was able to report whether a unanimous decision was also free from dissent at conference or became so only because one or more Justices acquiesced in the judgment of their colleagues, as well as on whether non-unanimous decisions were divided by the same vote and with the same alliances at conference. The docket books also provide records of instances in which a case that initially was assigned to one Justice was later reassigned to another.

A review of the early Hughes Court docket books also makes possible two contributions to the political science literature on judicial behavior. The first is to the scholarship on vote fluidity and unanimity norms in the Supreme Court. It is widely agreed that the period from the Chief Justiceship of John Marshall through that of Charles Evans Hughes was characterized by a "norm of consensus," "marked by individual justices accepting the Court's majority opinions."[9] It is generally believed that this norm of consensus collapsed early in the Chief Justiceship of Harlan Fiske Stone,[10] though some scholars have pointed to causes that antedate Stone's elevation to the center chair.[11] Still others have suggested that there may have been "an earlier, more gradual change in norms" on the late Taft and Hughes Courts.[12] Political scientists who have had access to the docket books of various Justices serving on other Courts have demonstrated that much of the consensus achieved by the Court throughout its history has resulted from the decision of Justices who had dissented at conference to join the majority's ultimate disposition. A substantial body of literature shows that Justices commonly have changed their votes between the conference and the final vote on the merits.[13]

Of the different types of vote fluidity between the conference vote and the final vote on the merits in major early Hughes Court cases, by far the most common was for a Justice to move from a dissenting or passing vote to a vote with the ultimate majority. An examination of the docket books permits us to illuminate several features of this phenomenon: the major cases in which it occurred, how frequently it occurred in major cases, the frequency with which each of the Justices did so, and the comparative success of early Hughes Court Justices in preparing majority opinions that would either enlarge



The Justices have traditionally used special docket books to record votes and take notes on case deliberations in Conference. Bound red-leather books embossed in gold with a hefty locket, such as this one belonging to Pierce Butler, came into use in the 1870s and were issued by the Government Printing Office until the 1940s.

the size of the ultimate winning coalition or produce ultimate unanimity from a divided conference.

The second contribution concerns the behavior of newcomers to the Court. In 1958, Eloise C. Snyder published an article in which she concluded that new members of the Court tended initially to affiliate with a moderate, "pivotal clique" before migrating to a more clearly ideological liberal or conservative bloc.[14] Seven years later, J. Woodford Howard argued that Justice Frank Murphy's first three Terms on the Court were marked by a "freshman effect" characterized by an "instability" in his decision making that rendered the Justice "diffident to the point

of indecisiveness."[15] These studies in turn spawned a literature on the "freshman" or "acclimation" effect for Justices new to the Court. These studies generally characterize the freshman effect "as consisting of one or more of the following types of behavior: (1) initial bewilderment or disorientation, (2) assignment of a lower than average number of opinions to the new justices, and (3) an initial tendency on the part of the new justice to join a moderate block of justices."[16] While some studies have confirmed the existence of some feature or another of the freshman effect,[17] others have cast significant doubt on the hypothesis, maintaining that it is either non-existent or confined to limited circumstances.[18] Studies of the freshman period for individual Justices on the whole have not lent much support to the hypothesis.[19]

Professor Howard suggested that the freshman effect might also be manifested by a tendency of new Justices to change their votes between the conference vote and the final vote on the merits. Howard listed a number of considerations that might prompt a Justice to shift ground in this manner, but first among them were "unstable attitudes that seem to have resulted from the process of assimilation to the Court." For instance, he remarked, "Justice Cardozo, according to one clerk's recollection of the docket books . . . frequently vot[ed] alone in conference before ultimately submerging himself in a group opinion."[20] Howard reported that Justice Murphy exhibited "a similar instability" during his freshman years on the Court.[21] Subsequent studies from the Vinson, Warren, and Burger Court docket books have produced divergent conclusions with respect to this reputed feature of the freshman effect.[22]

The only freshman Justices on the early Hughes Court were Owen J. Roberts, appointed in 1930, and Benjamin N. Cardozo, appointed in 1932.[23] A review of the voting behavior of these newcomers to the Court does not disclose any appreciable freshman effect with respect to voting fluidity. Instead, one finds that, in the major cases examined here, these two Justices were among the least likely to change their positions between the conference vote and the final vote on the merits.

The Early Hughes Court Justices and Their Docket Books

The early Hughes Court was a remarkably stable Court. After Hughes was confirmed to the center chair on February 13, 1930,[24] and three months later Roberts was confirmed to the seat vacated by the untimely death of Edward Terry Sanford,[25] the Court saw only one personnel change over the next seven years. Oliver Wendell Holmes, Jr. retired on January 12, 1932,[26] and Cardozo was confirmed as his successor on March 2 of that year.[27] Hughes, Roberts, and Cardozo joined six holdovers from the Taft Court: Justices Van Devanter, James Clark McReynolds, Louis D. Brandeis, George Sutherland, Pierce Butler, and Stone. This was the Court that would encounter the legislative and regulatory responses to the ravages of the Great Depression.

The Office of the Curator has in its collection the docket books of five of the early Hughes Court Justices. Unfortunately, the docket books of Chief Justice Hughes and Justices Holmes and Sutherland do not appear to have survived. During this period Justice McReynolds burned his docket books at the conclusion of each Term,[28] and Paul Freund, who clerked for Justice Brandeis during the 1932 Term, reports that his Justice did the same.[29] But the collection does have a complete run of the docket books of Justice Stone, from the 1929 through the 1933 Terms. The Stone docket books contain records of the conference votes in most cases, and occasionally some notes on the remarks made by colleagues during conference discussions. Unfortunately, Stone's handwriting

is very difficult to decipher, so the content of these notes too often remains obscure. The collection also has nearly a complete run of the docket books for Justice Roberts, including the 1930-1933 Terms. The Roberts docket books similarly contain records of the conference votes in most cases, along with an occasional but none-too-frequent note on conference discussions.

The Curator's collection likewise contains a nearly complete run of Pierce Butler's docket books, including the 1931-1933 Terms. Unfortunately, the Butler docket book for the 1930 Term does not appear to have survived. Butler's docket books provide not only a record of conference votes, but also a remarkably rich set of notes on conference discussions. The collection contains as well Justice Cardozo's docket book for the 1932 Term, which has records of some conference votes but no significant notes on conference discussion. Finally, the collection holds Van Devanter's docket books for the 1931 and 1933 Terms. Though these docket books contain entries for most of the cases decided by the Court during those terms, they contain no records of conference votes or conference discussion. As a consequence, they are of little use to the historical researcher.[30]

In discussing the post-conference voting behaviors of the early Hughes Court Justices, I will be using several defined terms. I shall use the term *acquiescence* to denote instances in which a Justice who either dissented or passed at conference ultimately joined in the majority's disposition.[31] In other words, acquiescence denotes instances in which a Justice who was not with the majority at conference moved *toward* the majority. I will refer to movements from dissent at conference to the majority in the final vote on the merits[32] as instances of *strong acquiescence*, and to movements from a passing vote at conference to the majority in the final vote on the merits as instances of *weak acquiescence*.[33] Of course, such movement might have occurred either because the Justice in question became persuaded that the majority was correct, or because, though remaining unpersuaded, he elected to go along with the majority for the sake of some other consideration such as collegiality or public perception.[34] The information contained in the docket books does not enable us to discriminate between these two possibilities, and therefore I shall not attempt to do so here. I will use the term *non-acquiescence* to denote instances in which a Justice who dissented at conference remained steadfast in his opposition to the majority's disposition. In cases of non-acquiescence, there was no post-conference change in the vote of the Justice in question. I will use the term *quasi-acquiescence* to denote a situation in which a Justice who was inclined in conference to oppose the majority's disposition withheld his dissent and instead publicly concurred in the result with the written statement that he was doing so only because he felt bound by the authority of an earlier decision with which he disagreed. Finally, I will use the term *defection* to denote instances in which a Justice who was either a member of the conference majority or passed at conference later dissented from the published opinion.[35] In other words, defection denotes instances in which the Justice in question moved *away* from the majority. Again, I will refer to movements from the majority at conference to dissent in the final vote on the merits as instances of *strong defection*, and to movements from a passing vote at conference to the majority in the final vote on the merits as instances of *weak defection*.[36]

The Cases

Unanimous Decisions with No Vote Changes

There were several cases from the early Terms of the Hughes Court in which the Justices unanimously upheld state exercises of the police power or the taxing power in the

face of challenges under the Fourteenth Amendment and/or the dormant Commerce Clause. The vote in each of these cases was also unanimous at conference.[37] For instance, *Magnano Co. v. Hamilton*[38] upheld a state tax on butter substitutes. Hughes opened the conference discussion of *Magnano* by saying, "Would have to be a very strong case to hold tax invalid as excessive." Butler records that Van Devanter, McReynolds, and Brandeis agreed with the Chief Justice. McReynolds apparently mentioned *McCray v. United States*, a 1904 decision that had upheld a steep federal excise tax on oleomargarine colored to resemble butter. At this point Van Devanter interjected that "fed & state taxes not on same plane."[39]

Several cases contributed to the line of authority distinguishing production from commerce in both affirmative and dormant Commerce Clause jurisprudence, and would soon be relied upon by the Court in a major New Deal decision limiting federal regulatory authority.[40] In *Utah Power & Light Co. v. Pfost*,[41] for example, the Court unanimously upheld a state tax on the production of electricity to be transmitted outside the state of production, despite the fact that interstate and intrastate generation were inseparable. Butler records Hughes characterizing the measure as an "Occupation tax," and noting that "There is an intra[state] activity."[42]

The flip side of this local/national distinction, of course, was that Congress enjoyed significant authority to regulate the interstate activities of common carriers. Three railway regulation cases decided by unanimous conference vote illustrate this principle. In *Texas & New Orleans Railway Co. v. Brotherhood of Railway Clerks*,[43] the Court unanimously upheld the self-organization provisions of the Railway Labor Act of 1926. And in two decisions applying the doctrine of the *Shreveport Rate Case*,[44] the Court unanimously upheld the power of the Interstate Commerce Commission (ICC) to raise intrastate rates for rail shipment in order to prevent discrimination against interstate commerce.[45]

Another major question of structural constitutional law also produced unanimity. In *Monaco v. Mississippi*,[46] the Court unanimously held that it had no jurisdiction over a suit brought by a foreign sovereign against a state of the United States without that state's consent. The suit was to recover principal and interest on government securities that had been issued in the 1830s, and had matured between 1850 and 1866.[47] At the conference, Hughes observed that there was no statute of limitation governing the claim. He noted, "This is first case brought by foreign," and encouraged his colleagues to "lay down the proposition that no foreign can sue one of our states without its consent."[48] There was some disagreement among those in the majority concerning the proper rationale for the decision. Van Devanter, Sutherland, and Butler favored resting the decision on "laches," maintaining that Monaco was presenting a "stale claim."[49] Hughes agreed that "as to laches in much trouble" but preferred to use the opinion to clarify the broader jurisdictional issue.[50] Brandeis, Roberts, and Cardozo agreed with the comments of the Chief Justice,[51] and, though Stone did not record the rationale for his own vote, Butler and Roberts record him as concurring with the views expressed by Hughes.[52] The Chief's theory of the case found expression in his opinion for the Court, which contains no reference to the doctrine of laches.

There also were a number of cases concerning criminal law and criminal procedure in which the votes both at conference and in the published opinion were unanimous.[53] For example, *Nathanson v. United States*[54] invalidated a warrant to search a private dwelling for liquor on the ground that it had been issued based on mere belief and suspicion rather than upon probable cause, while *Quercia v. United States*[55] overturned a narcotics conviction where the trial judge's charge to the jury had expressed the view that

the accused's testimony consisted almost entirely of perjury.

Finally, all of the Justices agreed in *Cochran v. Board of Education*[56] that taxation to support provision of non-sectarian school books to children attending parochial schools did not constitute a taking of private property for a private purpose in violation of the Fourteenth Amendment.

Unanimous Decisions with Vote Changes

The Justices of the early Hughes Court also often managed to produce a united public front even where they had been divided in conference. In four cases involving state regulatory power, a Justice who had disagreed or passed at the conference vote ultimately joined the opinion of the Court. In *Smith v. Cahoon*,[57] the Court unanimously reversed a judgment upholding a statute requiring private carriers for hire to obtain certificates of necessity in order to use public highways. At the conference, however, McReynolds passed, and Stone recorded the disposition as "Tentative."[58] *Minnesota v. Blasius*[59] unanimously upheld that state's taxation of cattle bought in another state and held briefly before resale, but at conference Sutherland was not with the majority. Though *P.F. Petersen Baking Co. v. Bryan*[60] unanimously upheld a Nebraska statute regulating bread weights, Stone and Butler record that Van Devanter passed at the conference vote. And while *W. B. Worthen Co. v. Thomas*[61] unanimously invalidated as a violation of the Contracts Clause a debtor exemption statute applied retroactively, Stone had passed when the case was voted on in conference.

Two seminal interpretations of the Federal Trade Commission Act similarly managed to elicit acquiescence from a conference holdout. In *Federal Trade Commission v. Algoma Lumber Co.*,[62] McReynolds, who had passed at conference, ultimately joined the Court's opinion holding that competition may be "unfair" within the meaning of the Act even if it does not constitute actual fraud and even if the consumer suffers no financial injury. McReynolds also joined the unanimous opinion in *Federal Trade Commission v. R.F. Keppel & Bro.*,[63] even though he had been the lone dissenter at conference. There the Court held that a practice may be "unfair" within the meaning of the Act even if it does not involve any fraud or deception, and even though competitors may maintain their competitive position by adopting it.

The Justices of the early Hughes Court also forged a united front despite disagreements in conference in two significant federalism cases. In *Fox Film Corp. v. Doyal*,[64] the Court unanimously held that revenue from copyrights issued by the federal government were not exempt from state taxation under the doctrine of intergovernmental tax immunity. At the conference, however, McReynolds and Sutherland had voiced contrary views. Those two Justices also had cast dissenting votes at the conference on *United States v. Louisiana*,[65] which upheld an ICC order raising intrastate rates, though Stone recorded a question mark next to Sutherland's vote, indicating that Sutherland was uncertain of his position. Brandeis passed at the conference vote, raising the prospect of three dissenting votes. Indeed, it appears that Brandeis was inclined toward the dissenting views expressed by McReynolds. Butler's record indicates "4[Brandeis]=3 [McReynolds]."[66] In the end, however, each of these three Justices acquiesced in the judgment of the majority.

The same pattern of acquiescence can be seen in contemporary cases involving criminal law and criminal procedure. In *United States v. LaFranca*,[67] a case that figured prominently in the recent decision of *NFIB v. Sebelius*,[68] the Court unanimously construed a putative "tax" under the Prohibition Act as not truly a tax but instead a "penalty," and held that a civil action to recover such a "tax" was constitutionally barred by a prior conviction based upon the same transaction.

Surprisingly, the notoriously cantankerous and disagreeable Justice James Clark McReynolds (above) was the Justice who most frequently acquiesced in the majority's opinion after dissenting or passing at the conference vote.

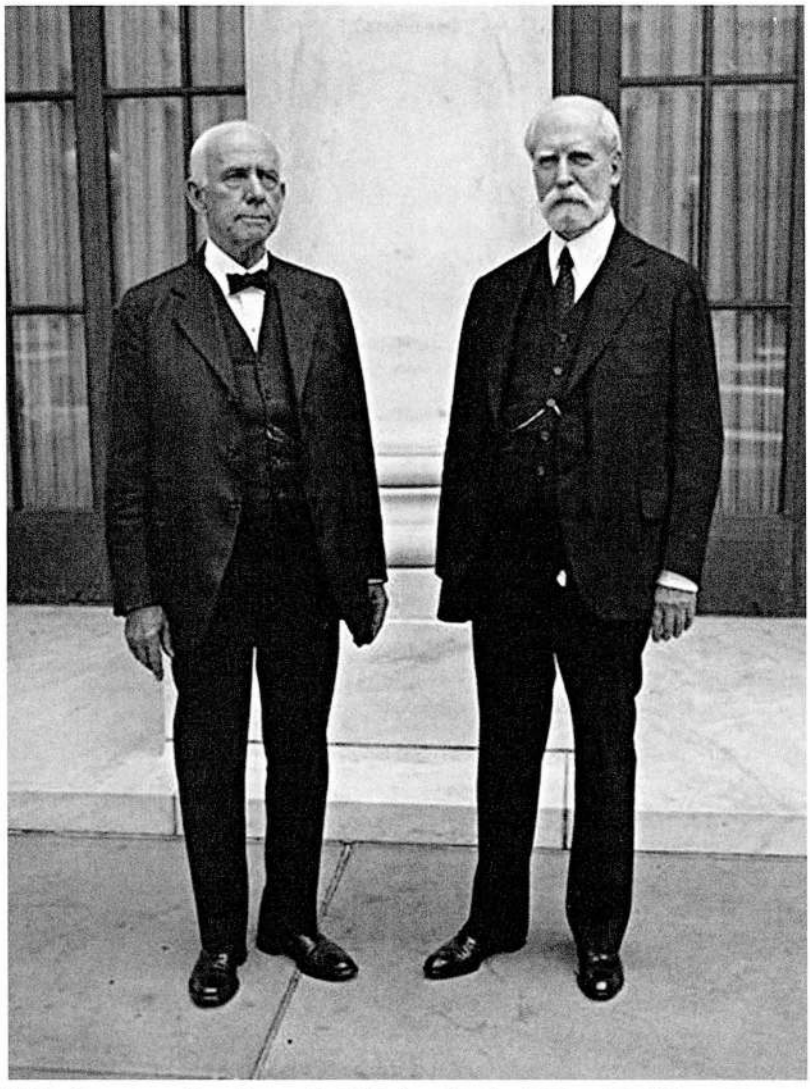
At the conference, however, Holmes, Stone, and probably Brandeis disagreed.[69] *Patton v. United States*[70] confirmed that the jury trial guaranteed to those accused of crime required the unanimous verdict of a panel of twelve jurors, but that this right could be waived by the defendant. The published decision registered no dissent, with Holmes, Brandeis, and Stone concurring in the result. At the conference, however, Butler had disagreed with his colleagues.[71] And in *Alford v. United States*,[72] a unanimous Court vigorously confirmed the right of the accused's counsel to attempt to discredit a hostile witness on

cross-examination. At the conference, however, McReynolds had voted to dismiss the defendant's appeal.

McReynolds again passed in conference[73] but ultimately made a unanimous Court in *United States v. Lefkowitz.* There the Court reversed a conviction where police, acting pursuant to an arrest warrant for violation of the liquor laws, arrested defendants at their place of business and proceeded to search desks and filing cabinets in the office, and to seize various papers for use against the defendants at trial. The Justices held that the papers in question were not in plain view and that the search of the desks and cabinets therefore was not a lawful search incident to arrest.[74] It appears that Stone may also have had doubts about his position in conference: Butler records a question mark next to Stone's vote. A clue to the reasons for Stone's ambivalence might be found in the remarks of McReynolds. Butler records McReynolds as saying "Murder—Pistol. Narrow space," which suggests that he may have believed that the search of the desks and cabinets was justified as a means of insuring the safety of the officers. The other Justices do not appear to have shared this hesitation. Butler records Hughes as saying "Search attending arrest may not be exploratory"; Van Devanter as "Is the same. Papers from person"; and Brandeis as "Papers even persons ought to be protected."[75] Finally, the published decision in *Gebardi v. United States*[76] was unanimous, with Cardozo concurring in the result, but at the conference both Cardozo and Brandeis cast dissenting votes. There the Court reversed the conviction of a man and woman for conspiracy to violate the Mann Act, which prohibited the interstate transportation of a woman for an immoral purpose. The couple admittedly had taken an interstate journey whose itinerary included frequent stops for fornication. Yet the Court held that the transported woman was capable neither of committing nor of conspiring to commit any offense under the Act. As the man had conspired with no one else for the forbidden transportation, his conspiracy conviction had to be vacated as well. As Hughes put it at conference, "Woman n.g. [not guilty] of such offense. She merely consents....No conspiracy."[77]

Non-Unanimous Decisions with No Vote Changes

Some of the most important non-unanimous decisions of the early Hughes Court were decided with no vote changes between the conference vote and the final vote on the merits. This was the case in three major cases upholding state power to regulate economic matters, in each of which Van Devanter, McReynolds, Sutherland, and Butler cast dissenting votes. The first was *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*,[78] which upheld against a Due Process challenge state regulation of the commission rates charged by agents selling fire insurance policies. The second was *Home Bldg. & Loan Assn. v. Blaisdell*,[79] a Contracts Clause landmark upholding Minnesota's mortgage moratorium law as an emergency measure. Butler's exasperation with his colleagues suffuses his account of Hughes's presentation to the conference. Virtually every mention of the term "emergency" is placed in scare quotes. The native Minnesotan records Hughes's statement as marked by "Much exordium." Hughes apparently referenced the "preamble" to the statute, which declared that the extremely distressed financial conditions in Minnesota had generated a mortgage foreclosure crisis that constituted a "public economic emergency";[80] "Holt's picture," presumably a reference to the description of the financial condition of the housing market provided by Justice Andrew Holt's opinion for the Minnesota Supreme Court upholding the act;[81] "Olson's statement," referring to Justice Ingerval Olsen's concurring opinion in the case, in which he likened the nationwide and worldwide financial crisis to a natural disaster such as a flood or



Justice Willis Van Devanter suffered from writer's block and by the 1931 and 1932 Terms his production had slowed down to one opinion a year. The docket books show instances when Chief Justice Hughes (right) would reassign an opinion because Van Devanter (left) couldn't finish it. They also reveal other examples of cases initially assigned to one Justice later being transferred to another.

earthquake;[82] "Atty Gen," referring to Minnesota Attorney General Henry Benson's statement of general economic conditions in the state in his argument before the Court;[83] and "mobs etc," referring to the "serious breaches of the peace" in the state that the Attorney General had mentioned at oral argument.[84] "All" of this, Hughes declared, "shows 'Emergency.' 'Emergency' does not create power—no provision can be suspended by 'emergency.'" Hughes also cited the "Manigault case 199 U.S.," a reference to the 1905 decision of *Manigault v. Springs*,[85] which the Chief Justice would cite in his majority opinion as standing for the proposition that "[t]he economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."[86]

The third such case was *Nebbia v. New York*,[87] which upheld the state's regulation of the price of milk and in the process retired the category of "business affected with a public interest" from the Court's due process jurisprudence. Interestingly, the remarks of Hughes at the *Nebbia* conference suggest that initially he advocated an opinion that would have been narrower and less sweeping than the one ultimately produced by Roberts. Butler records Hughes as remarking "'Common calling.' Distinguishing Ice Case—Wolf Case."[88] The "Ice Case" was the 1932 decision of *New State Ice v. Liebmann*, in which a 6-2 Court had invalidated an Oklahoma statute conditioning issuance of license to manufacture, sell, or distribute ice on the applicant's successful showing that existing licensed facilities in the community were inadequate to meet the public's needs, on the ground that the ice business was not "affected with a public interest."[89] The "Wolf Case" was the 1923 decision in *Wolff Packing v. Kansas Court of Industrial Relations*, in which the Court had held that a meatpacking concern could not be subjected to a mandatory system of compulsory arbitration of labor disputes because it was doubtful that it was "affected with a public interest," and even if it was, it was not the sort of business affected with a public interest that could be compelled by the state to continue its operations.[90] Hughes continued, "Milk business regulated in NY. 'listed regulations.' 'Clear as sunshine.'"[91] These remarks suggest that Hughes agreed with New York's lawyers that it was not necessary to jettison the category of businesses "affected with a public interest" in order to uphold the state's scheme of price regulation.[92] The New York statute did not constitute a barrier to entry into a common calling as the Oklahoma regulation of the ice business had. And it did not seek to compel continuity of operations as the Kansas Industrial Court Act at issue in *Wolff Packing* had. It seems that Hughes regarded the milk business as sufficiently "affected with a public interest" to support the system of price regulation to which New York had subjected it.

A similar pattern can be observed in several cases involving civil rights and civil liberties. Consider first *Powell v. Alabama*,[93] the famous case involving the trial of the "Scottsboro Boys," several young African-Americans charged with raping two white girls on a train in Alabama.[94] There the Justices held that the Fourteenth Amendment's Due Process Clause entitled indigent defendants in a capital case to effective, court-appointed counsel. The trial judge had appointed the entire local bar rather than a specific attorney to represent the defendants, which resulted in a lawyer from outside the state with no criminal defense experience in Alabama representing the defendants. The majority held that this procedure was plainly inadequate. The vote both at conference and in the published decision was 7-2, with McReynolds and Butler dissenting.[95] Butler records that at the conference Hughes stated, "(a) 'Show of force,'" apparently referring to the large presence of intimidating local whites at the trial. Butler here interjects in brackets, apparently capturing his own thoughts that were not necessarily voiced, "But did not that make for a 'fair trial.' Did not hold 'mob domination.'" Here Hughes continued, "(b) Under circumstances court failed in its duty in appointing counsel. (c) Trial a 'farce'. (d) Need not go equal protection in respect of negroes on jury." Van Devanter spoke next, saying "Not due process. Does not find 'mob domination'—went on sole ground of 'lack of opportunity' to get counsel of their own choice and to confer re." McReynolds said "Not void trial," and Brandeis stated, "Agree with V also with C.J. Absence of negroes on jury and circumstances." The last Justice whose remarks Butler recorded was Sutherland, who ultimately wrote the majority opinion. "States generally provide counsel—part of due process," Sutherland maintained.

"To appoint all is a farce. Denial of counsel."[96]

In *Sgro v. United States*,[97] a federal officer had obtained a warrant to search the premises of the accused for intoxicating liquors in early July. Under the National Prohibition Act, such warrants expired ten days after their issuance. The officer did not search the premises until late July, but before doing so he returned to the magistrate and had the warrant re-dated and reissued based upon the original affidavit. The accused was convicted based on evidence obtained during the subsequent search. Over the dissents of Stone and Cardozo, the Court held that the warrant had been invalid—once the original warrant had expired, a new warrant had to be issued based on a finding of probable cause existing at that time. The vote at conference was also 7-2 and with the same line-up,[98] but some intracurial developments between the initial vote and the announcement of the decision shed light on McReynolds's separate concurrence. After the October 15 conference at which the initial vote was taken, the case was assigned to McReynolds. However, at the November 12 conference, held after McReynolds's opinion had been circulated, the Justices discussed a memorandum on the case that had been prepared by the Chief Justice.[99] From the published opinions it appears that McReynolds favored a "definite rule" that "no search warrant should issue upon an affidavit more than ten days old."[100] Hughes, by contrast, argued that, though the statute did not "fix the time within which proof of probable cause must be taken" by the magistrate, "the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Whether the proof met this test, Hughes maintained, "must be determined by the circumstances of each case."[101] Van Devanter remarked that he "Thought memo an improvement," but Butler records that "C.J.'s memo not accepted by McR. . . . Supported his op.—aff. and state why (?)—Leaves every case on its own bottom."[102] The conference then voted to accept the Hughes memo. Both Butler and Roberts record the vote as 5-3, with McReynolds, Stone, and Cardozo dissenting, and Butler passing.[103] The case was then reassigned to Hughes,[104] who produced the majority opinion.[105]

Two landmark First Amendment cases and a naturalization case round out this category of early Hughes Court decisions. In *Stromberg v. California,*[106] which invalidated California's statute prohibiting display of a red flag as "a symbol or emblem of opposition to organized government," McReynolds and Butler were the only dissenters both at conference and in the published decision. All Four Horsemen dissented both in conference and from the published opinion in *Near v. Minnesota*,[107] which invalidated as an unconstitutional prior restraint a statute authorizing suits to enjoin newspaper publishers of "malicious, scandalous and defamatory" material from future publication on pain of contempt. *United States v. McIntosh*,[108] which upheld the denial of naturalization to a Canadian citizen who declined to take the oath of allegiance without qualification, was also 5-4 both at conference and in the published decision. This time, however, the Four Horsemen and Roberts were in the majority, with Hughes, Holmes, Brandeis, and Stone in dissent.

Vote Changes in Non-Unanimous Decisions

Perhaps the most prominent early Hughes Court decision in this category is one about which the internal evidence for its inclusion is conflicting. In the 1927 case of *Nixon v. Herndon*,[109] the Court had unanimously invalidated a Texas statute excluding African Americans from participation in the state Democratic party's primary elections. The 1932 case of *Nixon v. Condon*[110] invalidated a revised version of the "white primary" concocted in the wake of *Herndon*.

Rather than the state directly specifying the eligibility criteria for participation in primary elections, the Texas legislature authorized the political parties to do so. The Democratic party in turn promulgated qualifications that excluded African Americans. The central question was whether the action of the legislature in authorizing the parties to promulgate qualifications under which African-American voters would be excluded from voting constituted state action triggering application of the Fourteenth and Fifteenth Amendments. The intracurial proceedings produced divergent accounts in the docket books. Stone records the conference vote as identical with the final vote of 5-4, with the Four Horsemen dissenting, but he does not date the conference.[111] Roberts's account suggests that a vote taken at the January 9 conference may initially have been unanimous to reverse the lower court decision upholding the arrangement, with Brandeis not voting. But the vote notations suggesting this are then crossed out, and the case was "Restored to docket for reargument at a time to be later fixed by the Court." The case was reargued March 15, and Roberts records that on March 19 the Court voted 5-4 to reverse.[112] Butler, by contrast, records the initial conference as taking place on January 16. At this conference, Butler records Hughes as saying, "Party control important. Regulation not enough—15[th] Am[endment] no[t] appl. to primary. 'Much' then came out as holding 'state action.'" Hughes concluded, "No state action." To this Holmes replied, "That attitude is form of words." Van Devanter agreed with Hughes, McReynolds voted to affirm, and Brandeis maintained "This is state action." Sutherland is recorded as "1+," that is, agreeing with Hughes with some qualification. Butler agreed with Hughes, and Roberts and Cardozo both agreed with Holmes. The conference vote appears to have been equally divided with Holmes, Brandeis, Roberts, and Stone arrayed against the Four Horsemen, and the Chief Justice not voting. The case was restored to the docket on January 18, and, after the March 15 reargument, the Court met again to discuss the case on March 19. Here again Hughes is recorded as saying, "Reg. by state of primaries not enough." It appears that the vote may again have been equally divided, with Cardozo taking the position previously adopted by the now-retired Holmes. Butler never recorded a vote in the case for Hughes, and Butler's record of Hughes's comments at the March 19th conference does not suggest a vote to reverse. It may be that the docket book entries made by Stone and Roberts were recorded after that conference, when the Chief announced his conclusion. The decision was not announced until May 2, so it appears that the Chief Justice may have taken some time in finally seeing his way clear to joining the majority.[113]

In *Funk v. United States*,[114] the Court held that in a federal criminal trial the wife of the accused is a competent witness on his behalf. The final vote was 7-2, with McReynolds and Butler dissenting, and Cardozo concurring in the result. At the conference, however, Van Devanter and Brandeis also had cast dissenting votes. In *United States v. Murdock*,[115] the Court held, over the dissents of Stone and Cardozo, that it was reversible error for the trial judge to inform the jury of his view that the accused was guilty beyond a reasonable doubt. The conference vote was 6-2, with McReynolds passing.[116] And, in *Sorrells v. United States*,[117] the Court reversed a conviction on the grounds that the Prohibition Act had not been intended to apply to circumstances in which an otherwise innocent defendant had been lured into a sale of liquor at the instigation of a Prohibition agent—and evidence of entrapment had not been permitted to go to the jury. The final vote was 5-4, with McReynolds, Brandeis, Stone, and Roberts dissenting, but this was preceded by a good deal of movement behind the scenes. At the conference the vote was 5-2, with McReynolds and Roberts in the

minority, and Stone and Cardozo passing. Before the decision was announced Cardozo would join the majority, Stone would cast his lot with the dissenters, and Brandeis would defect from the majority to the dissent.

Two important immigration and naturalization decisions also witnessed vote shifts between the conference vote and the final vote on the merits. In *United States v. Bland*,[118] the Court upheld denial of naturalization to a Canadian citizen who declined to take the oath of allegiance without qualification. The final vote was 5-4, with Hughes, Holmes, Brandeis, and Stone dissenting. At the conference, however, the vote had been 6-3, with Stone in the majority. And in *Hansen v. Haff*, [119] the Court rejected an attempt to deport a Danish woman who returned to the United States with the intention of continuing to engage in illicit sexual relations with a married man, refusing to characterize her entry as one for an "immoral purpose." Butler authored a lone dissent from the published decision, but at the conference he had been joined in opposition by Brandeis.

Finally, in *United States v. Limehouse*,[120] the Court upheld the conviction of a man for mailing "filthy" letters containing language Brandeis's majority opinion described as "coarse, vulgar, disgusting, indecent, unquestionably filthy" and "foul."[121] The published opinion notes a lone dissent without opinion by McReynolds, with Cardozo taking no part. At the conference, however, Stone records that Sutherland and Butler were also in the minority.[122] Butler records that the vote was initially 4-4, but that Roberts "changed to get majority," making it 5-3. Butler further records Hughes as saying of Mr. Limehouse's missives, "Yes filthy. Foul."[123]

In the domain of economic regulation, two important state police power cases saw changes in alignments between the conference vote and the final vote on the merits. As mentioned above, *New State Ice Co. v. Liebmann*[124] struck down a statute that required those seeking a license to manufacture, sell, or distribute ice to demonstrate that existing licensed facilities in the community were inadequate to meet the public's needs. The final vote was 6-2, with Cardozo taking no part and Stone joining Brandeis's now-famous dissent. At the conference, however, the vote was 6-1, with Stone passing. It is clear, however, that Stone was already leaning toward dissent. Butler records him at conference as saying, "Can't say *a priori* state can't do this."[125] McReynolds, who had narrower notions of federal jurisdiction than did most of his colleagues,[126] stated, "Fed court doesn't deal with this." In presenting the case, Hughes stated, "No satisfactory criteria of 'affected with a public interest.' Differs in relation of things. Test: 'inherent in liberty' right to engage in ordinary occupation."[127] These remarks indicate that Hughes objected to the fact that the statute created a barrier to entry for a common calling—something to which he had objected as an Associate Justice,[128] and to which he would again object later in the decade.[129] Roberts, who would vote with Hughes in these later cases as well, expressed his agreement with the Chief Justice. Butler records Hughes as making one other remark: "'Cotton Ginning' dif—." Butler likewise has Sutherland agreeing that "Cotton Gin is different."[130] The reference here was to a recent Tenth Circuit decision sustaining a statute treating the business of cotton ginning as affected with a public interest,[131] which the appellant in *Liebmann* invoked in support of the constitutionality of Oklahoma's similar treatment of the ice business.[132] In his opinion for the majority, Sutherland explained that cotton gins were affected with a public interest because they held a *de facto* monopoly in the provision of a necessary service, and therefore were in a position to subject growers to "exorbitant charges and arbitrary control."[133] By contrast, Sutherland argued, the business of ice making was not a practical monopoly, and therefore could not be

regulated as a business affected with a public interest.[134]

In *Stephenson v. Binford*,[135] the Court upheld a regulation issued by the Texas Railroad Commission requiring private contract carriers to charge certain minimum rates for transport. The regulation had been imposed in order to protect the state's rail carriers from the destructive competition of private carriers. The Court did not consider whether the competitive threat alone justified the regulation, nor did the Court reach the issue of whether the private carriers conducted a business affected with a public interest. Instead, Sutherland's opinion for the majority upheld the regulation on the grounds that "the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit."[136] The impression that the Justices were casting about for a rationale upon which the order might be sustained is confirmed by Butler's account of the conference. Hughes opened the conference by asserting, inter alia, "Price fixing is good." Van Devanter passed, at which point McReynolds opined that "State should regulate. But can't fix prices." Sutherland told his colleagues, "Want to sustain. Not a business impressed with a public interest. Might be sustained as a [illegible] measure."[137] After this discussion, the conference vote yielded a 7-2 majority in favor of upholding the order, with McReynolds and Butler dissenting.[138] Before the judgment was announced, however, McReynolds abandoned his friend and acquiesced in the opinion of the majority. In the end, Butler dissented alone.[139]

Similar dynamics were at play in the divisive domain of intergovernmental tax immunity. In *Educational Films Corp. v. Ward*,[140] a 6-3 majority held that a state tax that included as income royalties received from copyrights obtained under federal law did not infringe the constitutional tax immunity of the federal government. The conference vote was 5-4, with all Four Horsemen in the minority, but in the end McReynolds acquiesced in Stone's majority opinion. In *Indian Motorcycle Co. v. United States*,[141] only Brandeis and Stone dissented from the holding that a sale of a motorcycle to a municipal corporation of Massachusetts could not be subjected to federal taxation. Holmes had voted with them at the conference, but in the published decision he dutifully engaged in his common practice of quasi-acquiescence, noting that he regarded the decision in *Panhandle Oil Co. v. Knox*[142] "as controlling in principle and upon that ground acquiesces in this decision."[143]

Burnet v. Coronado Oil & Gas Co.[144] involved land that the federal government had granted to the state of Oklahoma for the purpose of supporting common schools. The state in turn leased the land to the company for the purpose of extraction of oil and gas. A portion of the gross production from the site was reserved to the state, with the balance being sold by the company. The Court held that the company was an instrumentality of the state for purposes of generating revenue to support the public schools, and that the income from sales of the oil and gas produced at the site was constitutionally immune from federal taxation. In doing so, the majority felt bound by the precedent of *Gillespie v. Oklahoma*,[145] and McReynolds's opinion for the Court pledged to construe that precedent strictly.[146] This was not enough to satisfy the dissenters, who called for *Gillespie* to be overruled.[147] It was in *Burnet* that Brandeis famously wrote that "*Stare decisis* is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible . . . this court should refuse to follow an earlier constitutional decision which it deems erroneous."[148]

Brandeis must have been particularly disappointed by the result in *Burnet*, because there was a time when it seemed that a majority was within his grasp. The original argument was held on January 15, 1932,[149] and the conference was held the following day. The conference vote was 4-4: the Four Horsemen voted to invalidate the tax as applied, while Hughes, Brandeis, Stone, and Roberts voted to uphold application of the tax.[150] It is likely that Holmes would have been inclined to join with Brandeis, *et al.*, but he had resigned from the Court just three days before the argument.[151] In his presentation to the conference, Hughes opined that "Oil Co. not state instrumentality."[152] But because Hughes was unable to persuade any of the Horsemen to his views, the case was held over for further consideration, and passed over at the February 13 conference.[153] On February 15, President Hoover nominated Cardozo to replace Holmes. Cardozo's rapid confirmation seemed assured,[154] and there was probably little doubt in the minds of his future colleagues which way he would vote in *Burnet*. At the February 20 conference, the Justices restored the case to the docket for reargument,[155] and Cardozo took his seat on March 2. The second argument was held March 16,[156] and on March 19 the Justices again met to vote on the case. As anticipated, Cardozo voted with Brandeis. In the meantime, however, the Chief Justice had slipped away. Apparently lured by the call of *stare decisis*, Hughes defected from what would have been a majority to overrule *Gillespie* to create instead a majority to preserve and follow it.[157] It may well have been these frustrating events behind the scenes that inspired Brandeis to select this particular occasion to deliver his celebrated remarks on the role of precedent in constitutional adjudication.[158]

Consider finally *Crowell v. Benson,*[159] a 1932 decision upholding and construing the Longshoremen and Harbor Workers Act of 1927, and a landmark in the development of administrative law. At the conference on October 31, 1931, the vote was 8-1 to affirm, with only Brandeis dissenting. Between the time of the conference vote and the announcement of the final decision, there were two important developments relative to the case. First, Holmes retired the following January, shrinking the majority to seven Justices, and Cardozo was not confirmed until after the opinion had been delivered. Second, Stone and Roberts defected from the majority to join Brandeis in dissent. The result was the 5-3 division that appears in the published report of the decision.[160]

Reassignments

It is well known that Van Devanter was the Hughes Court's least productive writer of opinions.[161] In 1960, Professor Arthur Schlesinger, Jr. reported that:

> In conference, Van Devanter's lucidity, knowledge, and sweetness of manner commanded the respectful attention even of brethren who detested his conclusions. But at his desk, an awful paralysis overtook him; and he could only rarely get his views down on paper. By 1931 and 1932 his production had slowed down to one opinion a year. Sometimes Hughes would take cases back from him. "You are overworked," he would say with ambiguous and sardonic courtesy. "Let me relieve you of some of your burden."[162]

The docket books enable us to verify the substance of this claim, and to identify other instances in which a case initially assigned to one Justice was later transferred to another. During the 1930 Term, Van Devanter gave up three cases, one each to Holmes,[163] Roberts,[164] and McReynolds.[165] The following year, Van Devanter relinquished two cases to Hughes,[166] while Stone accepted one

from the Chief Justice[167] and Cardozo took a case from McReynolds[168] in which the latter ultimately dissented.[169] For the 1932 Term, Van Devanter handed off an opinion each to Roberts[170] and Hughes,[171] and Roberts relieved Stone of a case[172] in which the latter ultimately dissented.[173] As discussed above, Hughes assumed control of the opinion in *Sgro v. United States* after the conference expressed its preference for his memorandum over McReynolds's draft opinion.[174] And during the 1933 Term, Van Devanter released opinions to Stone[175] and Cardozo,[176] while accepting one from McReynolds.[177] Most of the reassignments that Hughes ordered during the early years of his tenure as Chief Justice thus resulted either from changes in the vote after the conference, or from Van Devanter's inability to produce an opinion in a case with which he had been entrusted.

Conclusion

In addition to the information that they provide about the Court's deliberations in particular cases, the docket books of the early Hughes Court Justices teach us some larger lessons. First, they confirm Arthur Schlesinger, Jr.'s claim that Hughes occasionally was obliged to relieve Van Devanter of his literary burdens, and they show that the few other instances in which Hughes reassigned cases typically involved a post-conference voting shift.

Second, the docket books teach us that McReynolds's published record in cases involving political economy would lead one to believe that he was more amenable to regulation and taxation than his conference conduct would indicate. Though he ultimately joined the majorities in *Federal Trade Commission v. R.F. Keppel & Bro.*, *United States v. Louisiana*, *Stephenson v. Binford*, *Fox Film Corp. v. Doyal*, and *Educational Films Corp. v. Ward*, he cast a dissenting vote in each of these cases at conference. In addition, though he ultimately voted to uphold government regulation in *FTC v. Algoma Lumber Co.*, at the conference vote he passed. The published decisions can also be misleading concerning McReynolds's views in cases involving civil rights and civil liberties. Though he ultimately joined majorities favoring such claims in many cases, at conference he passed in *United States v. Lefkowitz* and *United States v. Murdock.* And assuming that Butler's notes on the conference discussion in *Nixon v. Condon* faithfully record the Chief Justice's remarks, Hughes was less inclined to strong protections of voting rights than his vote in the published opinion would suggest.

The civil liberties views of Stone and Cardozo also are illuminated by the docket book records. These two Justices publicly dissented from a number of decisions reversing criminal convictions[178]—indeed, Stone complained that Butler was soft on crime[179]—but their conference votes reveal them to be even less favorably inclined toward claims of the accused than their published votes would suggest. Cardozo joined the majority in *Gebardi v. United States*, but at conference he had dissented. Stone ultimately joined the majorities in *Sorrells v. United States* and *United States v. LaFranca*, but at conference he passed in the former and dissented in the latter. And, though Stone ultimately joined the dissenters in *United States v. Bland*, at the conference he voted with the majority.

The docket books also reveal considerable fluidity between the initial conference vote and the final vote on the merits among the Justices of the early Hughes Court. First, there were nine instances of defection in major cases. Stone was responsible for six of these, departing from a conference vote with the majority in *Bland* and *Crowell*, and from a passing conference vote in *Sorrells*, *Liggett*, *Rock Island*, and *Liebmann*, though Butler's conference notes indicate that Stone was already inclined to join Brandeis in his

Liebmann dissent. Holmes departed from a passing conference vote in *Rock Island*, Brandeis ultimately abandoned his vote with the *Sorrells* conference majority, and Roberts joined in Stone's defection from the *Crowell* conference majority. Thus, four of these defections were of the strong variety, and five of the weak variety. Second, there also were shifts in voting that created majorities where none had formed at the conference. Hughes was responsible for two such instances, shifting his vote to form new 5-4 majorities for positions that he had initially opposed in conference in *Nixon v. Condon* and *Burnet*. Similarly, Roberts shifted his initial conference vote in *Limehouse* in order to transform a 4-4 deadlock into a majority for affirmance. Third, though Holmes voted with the dissenters at the *Indian Motorcycle* conference, he ultimately adhered to his custom of quasi-acquiescence.

The most common form of vote fluidity on the early Hughes Court, however, was acquiescence. Of the thirty-four unanimous decisions discussed here, twenty-one (61.8%) also were unanimous at conference, but thirteen (38.2%) were not. This observation is consistent with earlier studies finding that conformity voting is the most common form of vote fluidity.[180] The frequency with which each of the Justices acquiesced in the views of the majority is worthy of note. The notoriously cantankerous and disagreeable Justice McReynolds was actually the member of the Court most likely to acquiesce in a decision in order to produce unanimity. Of the thirteen unanimous decisions examined here that were not unanimous at conference, McReynolds acquiesced in seven (53.8%). By contrast, Sutherland did so in three (23.1%), Brandeis and Stone in two (15.4%) each, and Holmes, Van Devanter, Butler, and Cardozo in one (7.7%) each. Of these eighteen instances of acquiescence, eleven were of the strong variety, six of the weak variety, and the character of the last cannot be determined with confidence.[181]

With respect to cases that did not produce unanimity, McReynolds and Brandeis each acquiesced in three, while Van Devanter, Sutherland, Butler, and Cardozo each acquiesced in one. Of these ten instances of acquiescence, eight were of the strong variety, and two were of the weak sort.[182] Thus, of these twenty-eight instances of acquiescence in major cases decided by the early Hughes Court, nineteen were of the strong variety, eight of the weak variety, and the character of one cannot be determined with confidence. McReynolds alone was responsible for 35.7% of these instances of acquiescence, recording ten in all. By contrast, Brandeis accounted for five (17.9%), Sutherland for four (14.3%), and Van Devanter, Butler, Stone, and Cardozo for two (7.1%) each. Expressed as a percentage of acquiescences per conference vote in which he participated, McReynolds acquiesced in 18.2% of such cases, Brandeis in 8.5%, Sutherland in 6.8%, and Van Devanter, Butler, and Stone in 3.4% each.[183] Of all of the early Hughes Court Justices, the only Justices who did not acquiesce in any of the cases examined here were the two who sat at the Court's center of gravity: Hughes and Roberts. The fact that McReynolds was the early Hughes Court Justice most likely to acquiesce in major decisions echoes Professor Saul Brenner's finding that on the Vinson Court "extreme justices [were] most likely to be closer to the mean at the final vote than at the original vote," because "extreme justices are likely to lose more often at the original vote."[184]

The fact that two of the most senior Justices—McReynolds and Brandeis—were those who most frequently acquiesced in the conference majority's judgment in major cases also indicates that newcomers to the early Hughes Court did not experience the kind of freshman effect with respect to voting fluidity that some scholars have found on other Courts. Indeed, the only Justices to acquiesce in fewer major cases than Cardozo were Hughes and Roberts, and Roberts acquiesced in none. Moreover, both Roberts

and Cardozo would continue to acquiesce in major cases at comparable or higher rates later into their tenures on the Court.[185] This finding would appear to be in tension with Paul Freund's recollection that Cardozo often changed his vote between the conference vote and the final vote on the merits during the 1932 Term. However, Freund reported that, "As far as I could make out, [Cardozo's] disagreements [with the majority in conference]—this being his first full term on the Court—derived from the fact that in New York he had been accustomed to a rather different set of procedural rules and substantive rules intermeshed with procedure, so that some things which were decided one way in the federal courts would have been decided differently in New York," and that this is what may have accounted for the Justice's allegedly frequent changes of vote between the conference and the final vote on the merits.[186] This suggests the possibility that Cardozo may have exhibited greater freshman vote fluidity in less salient cases not examined here.[187]

The Justices of the early Hughes Court, seven of whom were holdovers from the Taft Court, thus carried forward the practices so carefully cultivated by Hughes's predecessor as Chief Justice. Taft is famous for his "consuming ambition" to "mass the Court"—to build unanimity so as to give "weight and solidity" to its decisions.[188] The Taft Court achieved unanimity in a remarkable percentage of its cases. For the 1921-1928 Terms, 84% of the Court's published opinions were unanimous;[189] taking into account all of its decisions for the entirety of Taft's tenure, the unanimity rate was 91.4%.[190] This rate of unanimity was in line with the rates achieved by the White Court, on which Holmes, Van Devanter, McReynolds, Brandeis, and Hughes each had served,[191] and the attitudes formed under White and his predecessors appear to have contributed to the persistence of this phenomenon. Taft discouraged dissents, believing that most of them were displays of egotism that weakened the Court's prestige and contributed little of value.[192] As a consequence, he worked hard to minimize disagreement, often sacrificing the expression of his own personal views.[193] Van Devanter shared Taft's distaste for public displays of discord, and strongly lobbied his colleagues to suppress their dissenting views.[194] Butler similarly regarded dissents as exercises of "vanity" that "seldom aid us in the right development or statement of the law," and instead "often do harm."[195] He therefore commonly "acquiesce[d] for the sake of harmony & the Court."[196] McReynolds and Sutherland expressed similar views, and suppressed dissenting opinions accordingly.[197] Even the "great dissenters," Holmes and Brandeis, believed that dissents should be aired sparingly, and often "shut up," as Holmes liked to put it, when their views departed from those of their colleagues.[198]

Like Taft, Hughes "sought to present a united Court to the public,"[199] frequently suppressing his own views for the sake of unanimity. As he wrote on his return of one of Stone's draft opinions, "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views."[200] In his efforts "to find common ground upon which all could stand," Hughes "was willing to modify his own opinions to hold or increase his majority; and if this meant he had to put in some disconnected thoughts or sentences, in they went."[201] And while Hughes dissented at a higher rate as Chief Justice than had White or Taft, he did so at a much lower rate than would Stone, Fred Vinson, or Earl Warren.[202]

A variety of factors may have contributed to what Dean Robert Post calls this "norm of acquiescence."[203] Here I wish to highlight just a few. First, the literature of the period illustrates among the bench and bar a widely held aversion to dissents as excessively self-regarding, and as weakening the force of judicial decisions by unsettling the law.[204]

This conviction found expression in Canon 19 of the American Bar Association's Canons of Judicial Ethics, which exhorted judges not to "yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort." Instead, "judges constituting a court of last resort" were admonished to "use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision."[205] Taft was the chair of the committee that drafted the Canons, and Sutherland was a committee member before his appointment to the Court.[206] Second, the norm of acquiescence promoted a collegiality and reciprocity among the Justices that smoothed over potential conflicts and avoided alienating colleagues whose support one might need in future cases.[207] Third, during this period nearly all of the Justices had only one clerk rather than the four that Justices typically have today, and most of the Justices wrote their own opinions.[208] With such comparatively limited resources at their disposal, the cost of preparing a dissenting opinion was considerably higher.[209]

The unanimity rates of the early Hughes Court were remarkably similar to those of the White and Taft Courts. For the 1930 Term the rate was 89.2%; for the 1931 Term it was 82.7%; for the 1932 Term it was 83.9%; and for the 1933 Term it was 83.5%. Even during the height of the Court's encounter with the New Deal, unanimity rates remained robust: 85.9% for the 1934 Term; 82.1% for the fractious 1935 Term; and 79.2% during the 1936 Term. With the addition of the Roosevelt appointees beginning in the 1937 Term, however, unanimity rates began a decline from which they would never recover: 69.7% for the 1937 Term; 64% for the 1938 Term; 69.3% for the 1939 Term; and 71.5% for Hughes's last Term as Chief Justice. And after Hughes departed the Bench, it would be the exceedingly rare Term that would produce a unanimity rate exceeding 50%.[210] The early Terms of the Hughes Court thus constituted the twilight of a longstanding set of institutional norms and practices.

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ENDNOTES

[i] Professor Daniel Ernst has reported on Justice Butler's entry for *Crowell v. Benson*, 285 U.S. 22 (1932), in DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940, p. 176 n.9 (quoting Butler OT 1931 Docket Book).

[2] The cases selected as "major" or "salient" are those that regularly appear in scholarly treatments of the early Hughes Court. *See, e.g.*, WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930-1941 (2007); MICHAEL E. PARRISH, THE HUGHES COURT: JUSTICES, RULINGS, LEGACY (2002); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). Scholars may differ concerning the inclusion or exclusion of particular cases from this category, and the statistical discussion in the Conclusion must be read with that caveat in mind.

Notwithstanding such potential differences, however, my effort has been to select cases about which I believe there would be a broad measure of agreement. For other scholarship employing this analytic category, *see* Forrest Maltzman & Peter J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 589 (1996); Robert H. Dorff & Saul Brenner, *Conformity Voting on the United States Supreme Court*, 54 J. POLITICS 762, 772, 773 (1992); Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 WESTERN POLITICAL QUARTERLY 119, 124 (1991); Saul Brenner, Timothy Hagle, & Harold J. Spaeth, *Increasing the Size of Minimum Winning Coalitions on the Warren Court*, 23 POLITY 309 (1990); Saul Brenner, Timothy M. Hagle, & Harold J. Spaeth, *The Defection of the Marginal Justice on the Warren Court*, 42 WESTERN POLITICAL QUARTERLY 409 (1989); Saul Brenner, *Fluidity on the Supreme Court: 1956-1967*, 26 AM. J. POL. SCI. 388, 389 (1982); Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 530 (1980); Ellliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60 (1979).

[3] 291 U.S. 502 (1934).

[4] 290 U.S. 398 (1934).

[5] 285 U.S. 262 (1932).

[6] 287 U.S. 45 (1932).

[7] 286 U.S. 73 (1932).

[8] 285 U.S. 393 (1932).

[9] Pamela C. Corley, Amy Steigerwalt, & Artemus Ward, *Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus*, 38 J. SUP. CT. HIST. 20, 22 (2013); Mark S. Hurwitz & Drew Noble Lanier, *I Respectfully Dissent: Consensus, Agendas, and Policy-making on the U.S. Supreme Court, 1888-1999*, 21 REVIEW OF POLICY RESEARCH 429, 429 (2004); Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 376 (2001); Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 874-75 (1998); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 161-62 (1999); Thomas G. Walker, Lee Epstein, & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 JOURNAL OF POLITICS 361, 361-62 (1988).

[10] HERMAN C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 40, 251 (1948) ("In 1941 divisive forces of some kind hit the Court full force"); Corley, Steigerwalt, & Ward, 38 J. SUP. CT. HIST. at 47; Caldeira & Zorn, 42 AM. J. POL. SCI. at 874-75; Walker, Epstein, & Dixon, 50 JOURNAL OF POLITICS 362; David Danelski, *The Influence of the Chief Justice in the Decisional Process*, in JOEL B. GROSSMAN & RICHARD S. WELLS, eds., CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 175 (1972).

[11] *Compare* Stephen C. Halpern & Kenneth N. Vines, *The Judges' Bill and the Role of the U.S. Supreme Court*, 30 WESTERN POLITICAL QUARTERLY 471, 481 (1977) (arguing that the enactment of the Judges' bill of 1925, which made the Court's docket almost entirely discretionary, increased the proportion of cases that were legally or politically salient and thus less likely to elicit acquiescence from colleagues inclined to disagree with the majority), *with* Walker, Epstein, & Dixon, 50 JOURNAL OF POLITICS at 365-66 (agreeing that "it is possible that a discretionary docket may be one factor, and a necessary one at that, in maintaining high levels of conflict once such patterns are established," but disputing the contention that the 1925 statute was "the primary factor in the alteration of the Court's consensus norms," pointing out that "significant escalation in both the dissent and concurrence rates did not occur until almost fifteen years" after the dramatic increase in the discretionary share of the Court's docket); *accord*, Caldeira & Zorn, 42 AM. J. POL. SCI. at 875; Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1319-31 (2001) (rejecting the Halpern & Vines hypothesis on the ground that unanimity rates in *certiorari* cases were higher than in those falling under the Court's mandatory jurisdiction, and offering alternative reasons, such as changes in external circumstances, in Court personnel, and in the quality of Taft's leadership, for the decline in unanimity on the late Taft Court).

[12] Caldeira & Zorn, 42 AM. J. POL. SCI. at 892. *See also* Aaron J. Ley, Kathleen Searles, & Cornell W. Clayton, *The Mysterious Persistence of Non-Consensual Norms on the U.S. Supreme Court*, 49 TULSA L. REV. 99, 106 (2013) ("the proportion of unanimous decisions was declining prior to Stone's Chief Justiceship"); Marcus E. Hendershot, Mark S. Hurwitz, Drew Noble Lanier, & Richard L. Pacelle, Jr., *Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court*, 20 POLITICAL RESEARCH QUARTERLY 1, 8 (2012) ("the Court's norm of consensus was first challenged by growing levels of dissent in the later years of the Hughes Court"); David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in CORNELL W. CLAYTON & HOWARD GILLMAN, eds., SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 103 (1999) ("the demise of the norm of

consensus preceded Stone's chief justiceship"); Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 JOURNAL OF POLITICS 1158 (1992) (arguing that Stone consolidated a shift in behavioral expectations that began under Hughes). *See also* Kelsh, 77 WASH. U. L. Q. at 162 ("The most unusual thing about the nonunanimity rate for the 1864-1940 period is that the last ten years saw a sustained increase. This rate was to shoot up dramatically in the first years of the Stone Court, but the beginnings of the rise can be seen around 1930"); *id.* at 173 ("By the 1930s . . . Justices had fully accepted the view that separate opinions had a legitimate role in the American legal system.") *Compare* BENJAMIN N. CARDOZO, LAW AND LITERATURE 34 (1931) (characterizing dissenters as "irresponsible").

[13] *See, e.g.*, Epstein, Segal, & Spaeth, 45 AM. J. POL. SCI. 362 (Waite Court); Maltzman & Wahlbeck, 90 AM. POL. SCI. REV. 581 (Burger Court); Dorff & Brenner, 54 J. POLITICS 762 (Vinson, Warren, and Burger Courts); Hagle & Spaeth, 44 WESTERN POLITICAL QUARTERLY 119 (Warren Court); Brenner, Hagle, & Spaeth, 23 POLITY 309 (Warren Court); Brenner, Hagle, & Spaeth, 42 WESTERN POLITICAL QUARTERLY 409 (Warren Court); Brenner, 26 AM. J. POL. SCI. 388 (Warren Court); Saul Brenner, *Ideological Voting on the U.S. Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote*, 22 JURIMETRICS 287 (1982) (Vinson and Warren Courts); Brenner, 24 AM. J. POL. SCI. 526 (Vinson and Warren Courts); J. Woodford Howard, Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968) (Stone and Vinson Courts).

[14] Eloise C. Snyder. *The Supreme Court as a Small Group*, 3 SOCIAL FORCES 232, 238 (1958).

[15] Woodford Howard, *Justice Murphy: The Freshman Years*, 18 VAND. L. REV. 473, 474, 476, 477, 484, 488, 505 (1965).

[16] Timothy M. Hagle, *"Freshman Effects" for Supreme Court Justices*, 37 AM. J. POL. SCI. 1142, 1142 (1993). *See also* Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L. J. 679, 718-19 (2007); Saul Brenner & Timothy M. Hagle, *Opinion Writing and Acclimation Effect*, 18 POL. BEHAV. 235 (1996); Paul C. Arledge & Edward W. Heck, *A Freshman Justice Confronts the Constitution: Justice O'Connor and the First Amendment*, 45 WESTERN POL. Q. 761, 761-62 (1992); Edward V. Heck & Melinda Gann Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. POLITICS 852, 853-54 (1981); Elliot E. Slotnick, *Judicial Career Patterns and Majority Opinion Assignment on the Supreme Court*, 41 J. POLITICS 640, 641 (1979).

[17] *See, e.g.*, Lee Epstein, Kevin Quinn, Andrew D. Martin, & Jeffrey E. Segal, *On the Perils of Drawing Inferences about Supreme Court Justices from Their First Few Years of Service*, 91 JUDICATURE 168, 179 (2008) (finding evidence of ideological instability in the merits voting of "virtually all" freshman Justices); Mark S. Hurwitz & Joseph V. Stefko, *Acclimation and Attitudes: "Newcomer" Justices and Precedent Conformance on the Supreme Court*, 57 POL. RES. Q. 121 (2004) (finding freshman effect with respect to conformity to precedent); Charles R. Shipan, *Acclimation Effects Revisited*, 40 JURIMETRICS 243 (2000) (finding evidence of ideological instability in the merits voting of some but not most freshmen Justices on the Warren and Burger Courts); Sandra L. Wood, Linda Camp Keith, Drew Noble Lanier, & Ayo Ogundele, *"Acclimation Effects" for Supreme Court Justices: A Cross-Validation, 1888-1940*, 42 AM. J. POL. SCI. 690, 694 (1998) (finding "some evidence of an acclimation effect for at least some of the justices" with respect to ideological instability in merits voting); Brenner & Hagle, 18 POL. BEHAV. 235 (finding freshman effect with respect to opinion output); Timothy M. Hagle, *A New Test for the Freshman Effect*, 21 SOUTHEASTERN POL. REV. 289 (1993) (finding evidence of ideological instability in the merits voting of some freshman Justices on the Burger and Rehnquist Courts); Hagle, 37 AM. J. POL. SCI. 1142 (finding evidence of ideological instability in the merits voting of some Justices joining the Court between 1953 and 1989); S. Sidney Ulmer, *Toward a Theory of Sub-Group Formation in the United States Supreme Court*, 27 J. POLITICS 133, 151 (1965) (finding some evidence of freshman effect in bloc voting for Justices joining the Court between 1946 and 1961).

[18] *See, e.g.*, Paul J. Wahlbeck, James F. Spriggs II, & Forrest Maltzman, *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AMERICAN POLITICS QUARTERLY 488, 503-04 (1999) ("Contrary to the freshman effect hypothesis, freshman justices are no less likely to join or author a concurring or dissenting opinion than their more senior colleagues"); Richard Pacelle & Patricia Pauly, *The Freshman Effect Revisited: An Individual Analysis*, 17 AM. REV. POLITICS 1, 6, 15 (1996) (finding no freshman effect with respect to ideological instability in merits votes in the aggregate, and "only limited evidence" of such an effect with respect to individual justices joining the Court between 1945 and 1988); Terry Bowen, *Consensual Norms and the Freshman Effect on the United States Supreme Court*, 76 SOC. SCI. Q. 222, 227 (1995) (finding no freshman effect for separate opinion writing on the Hughes and Taft Courts, but finding such a freshman effect during the 1941-1992 period); Terry Bowen & John M. Scheb II, *Freshman Opinion Writing on the U.S. Supreme Court, 1921-1991*, 76 JUDICATURE 239 (1993) (finding no freshman effect with respect to opinion assignments); Robert L. Dudley, *The*

Freshman Effect and Voting Alignments: A Reexamination of Judicial Folklore, 21 AM. POLITICS Q. 360 (1993) (finding no freshman effect with respect to bloc voting even when using Snyder's data); Terry Bowen & John M. Scheb II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90*, 15 POL. BEHAV. 1 (1983) (finding no freshman effect with respect to bloc voting); Heck & Hall, 43 J. POLITICS 852 (finding very little evidence of a freshman effect in bloc voting on the Warren and Burger Courts); Slotnick, 41 J. POLITICS 640 (finding no freshman effect with respect to opinion assignments). For efforts to explain the divergences in scholarly findings, *see* Hagle, 21 SOUTHEASTERN POL. REV. 289; Hagle, 37 AM. J. POL. SCI. 1142; Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6, 13 (1990); Heck & Hall, 43 J. POLITICS at 859-60.

[19] *See, e.g.*, Thomas R. Hensley, Joyce A. Baugh, & Christopher E. Smith, *The First-Term Performance of Chief Justice John Roberts*, 43 IDAHO L. REV. 625, 631 (2007) (finding no freshman effect with respect to bloc voting); Christopher E. Smith & S. Thomas Read, *The Performance and Effectiveness of New Appointees to the Rehnquist Court*, 20 OHIO N. U. L. REV. 205 (1993) (finding a freshman effect with respect to Justice Souter but not with respect to Justice Thomas); Arledge & Heck, 45 WESTERN POL. Q. 761 (finding no freshman effect); Melone, 74 JUDICATURE 6 (finding a freshman effect only with respect to majority opinion assignments); Thea F. Rubin & Albert P. Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98 (1988) (finding a freshman effect only with respect to majority opinion assignments); John M. Scheb II & Lee W. Ailshie, *Justice Sandra Day O'Connor and the Freshman Effect*, 69 JUDICATURE 9 (1985) (finding evidence of a freshman effect only with respect to majority opinion assignments in her first Term); Edward V. Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PAC. L. J. 707, 714-16, 722-25 (1979) (finding little evidence of a freshman effect).

[20] Howard, Jr., 62 AM. POL. SCI. REV. at 45. The clerk to which Howard referred was Paul Freund, who clerked for Justice Brandeis during the 1932 Term. *See* Paul Freund, *A Tale of Two Terms*, 26 OHIO ST. L. J. 225, 227 (1965) ("I was struck in the 1932 Term with the number of occasions on which what came down as unanimous opinions had been far from that at conference. I had access to the docket book which the Justice kept as a record of the conference vote—these books are destroyed at the end of each term—and I was enormously impressed with how many divisions there were that did not show up in the final vote. I was impressed with how often Justice Cardozo was in a minority, often of one, at conference, but did not press his position.")

[21] Howard, Jr., 62 AM. POL. SCI. REV. at 45.

[22] *Compare* Maltzman & Wahlbeck, 90 AM. POL. SCI. REV. at 589 (finding that "freshmen justices are significantly more likely to switch than are their more senior colleagues"), Saul Brenner, *Another Look at Freshman Indecisiveness on the United States Supreme Court*, 16 POLITY 320 (1983) (finding that between the 1946 and 1966 Terms freshman Justices exhibited on average greater fluidity between the conference vote and the final vote on the merits than did senior Justices, and that this fluidity tended to diminish between a Justice's first and fourth Terms on the Court), and Dorff & Brenner, 54 J. POLITICS at 767, 769-71 (finding that freshman Justices were "more likely to be uncertain regarding how to vote at the original vote on the merits and more likely to be influenced by the decision of the majority at the final vote") *with* Hagle & Spaeth, 44 WESTERN POLITICAL QUARTERLY 119 (finding that the voting fluidity of freshman Justices on the Warren Court did not differ significantly from that of their more senior colleagues, and that the voting fluidity of such freshman Justices had not diminished by their third and fourth Terms on the Court). *See also* Timothy R. Johnson, James F. Spriggs II, & Peter J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOCIETY REV. 349, 369 (2005) (finding that freshman Justices on the Burger Court did not pass more frequently than their senior colleagues).

[23] I do not treat Hughes, who was appointed Chief Justice in 1930, as a freshman, due to his prior service as an Associate Justice from 1910-1916.

[24] 280 U.S. iii.

[25] 281 U.S. iii.

[26] 284 U.S. iii.

[27] 285 U.S. iii.

[28] DENNIS J. HUTCHINSON & DAVID J. GARROW, eds., THE FORGOTTEN MEMOIR OF JOHN KNOX 84 (2002).

[29] Chief Justice William H. Rehnquist and Professor Paul A. Freund: "A Colloquy," Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1989), *reprinted in* 124 F.R.D. 241, 347 (1988).

[30] With the exception of the Van Devanter OT 1931 Docket Book, which was donated to the Curator's office in the 1990s by a descendant of a former law clerk, each of these docket books remained in the Supreme Court building after the respective Justice either retired or died while in office. It is not known why these volumes were retained, nor why not all of the sets of docket books are complete. In 1972 all of the "historic" docket books held in the Supreme Court building were boxed up by the Court's Marshal at the order of Chief Justice Warren

Burger, and were later transferred to the Curator's Office. Email communication from Matthew Hofstedt, Associate Curator, Supreme Court of the United States, August 26, 2014.

[31] This is also sometimes referred to as "conformity voting," *see, e.g.*, Dorff & Brenner, 54 J. POLITICS at 763; or "minority-majority voting," *see, e.g.*, Saul Brenner & Robert H. Dorff, *The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective*, 4 JOURNAL OF THEORETICAL POLITICS 195, 197 (1992).

[32] I borrow this term from Brenner, 22 JURIMETRICS at 287. What Professor Brenner calls the "original vote on the merits" I refer to as the "conference vote."

[33] These two terms are adapted from Brenner, 26 AM. J. POL. SCI. at 388, and Brenner, 24 J. POL. SCI. at 527 (referring to such movements as "strong fluidity" and "weak fluidity," respectively.)

[34] *See, e.g.*, Brenner & Dorff, 4 JOURNAL OF THEORETICAL POLITICS at 200 (concluding that Justices acquiesce "for non-attitudinal reasons, including small-group reasons"); Howard, Jr., 62 AM. POL. SCI. REV. at 45 (1968) (same).

[35] This is also sometimes referred to as "counter-conformity voting," *see, e.g.*, Dorff & Brenner, 54 J. POLITICS at 763; or "majority-minority voting," *see, e.g.*, Brenner & Dorff, 4 JOURNAL OF THEORETICAL POLITICS at 197.

[36] *Id.* There also are instances in which a docket book entry does not record a vote for a particular Justice. Often that was because the Justice was absent from the conference, and where that was the case, I do not treat that Justice as having engaged in any of the defined voting behaviors.

[37] *See, e.g.*, *Sproles v. Binford,* 286 U.S. 374 (1932) (upholding statute limiting the size and weight of vehicles), Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book; *Mintz v. Baldwin*, 289 U.S. 346 (1933) (upholding power of state to require inspection and certification of imported cattle in order to prevent the spread of infectious disease), Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; and *Corporation Commission of Oklahoma v. Lowe*, 281 U.S. 431 (1930) (refusing competing cotton ginner's request that licensure of a farmer's cooperative cotton gin be enjoined), Stone OT 1929 Docket Book. Sanford and McReynolds were absent from the conference, but all of those present voted to deny the injunction.

[38] 292 U.S. 40 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[39] Butler OT 1933 Docket Book. By contrast, the Justices unanimously protected private property rights from executive interference in *Sterling v. Constantin*, 287 U.S. 378 (1932). There the Court held that alleged overproduction of oil in Texas had not created an emergency authorizing the governor to declare martial law, seize control of private oil wells by military force, and discontinue their production of oil. The vote in conference also was unanimous. Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[40] *See Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (citing *Champlin* and *Pfost*).

[41] 286 U.S. 165 (1932); Roberts OT 1931 Docket Book. Stone's OT 1931 Docket Book does not make it clear whether Cardozo voted, and Butler's OT 1931 Docket Book contains no record of the vote.

[42] Butler OT 1931 Docket Book. *See also Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210 (1932) (sustaining an Oklahoma statute prohibiting wasteful production of petroleum on the ground that it applied only to "production"), Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book; *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103 (1933) (holding that a strike and boycott for a closed shop in the building industry was a "local matter" beyond the reach of the Sherman Act), Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book (Butler reporting that at the conference McReynolds voted with the majority "doubtfully"); *Chassaniol v. City of Greenwood*, 291 U.S. 584, 587 (1934) (upholding local occupation tax on cotton buyers on grounds that their activities were "intrastate commerce"). Both Butler and Roberts record the conference vote, like the final decision, as unanimous. Butler records Hughes as stating at the conference, "Enough intra state." Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book. Stone's OT 1933 Docket Book contains an indication that the opinion was assigned to Brandeis, but no account of the conference vote.

[43] 281 U.S. 548 (1930); Stone OT 1929 Docket Book. McReynolds did not participate.

[44] *Houston, E. & W. T. Ry. Co. v. United States*, 234 U.S. 342 (1914).

[45] *Florida v. United States*, 292 U.S. 1 (1934) (upholding power of ICC to increase intrastate rates); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book; *Ohio v. United States*, 292 U.S. 498 (1934) (upholding ICC order raising intrastate rates for shipment of bituminous coal in order to end interstate discrimination); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book. Butler records that at the *Ohio* conference Hughes stated, "Read findings. Interstate rates reasonable. Intra unduly pref. & prej. We can't go into qu of relation of outer crescent. No qu of law presented." Butler OT 1933 Docket Book.

[46] 292 U.S. 313 (1934); Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[47] 292 U.S. at 317.

[48] Butler OT 1933 Docket Book.

[49] Stone OT 1933 Docket Book; Butler OT 1933 Docket Book.

[50] Butler OT 1933 Docket Book.

[51] Stone OT 1933 Docket Book; Butler OT 1933 Docket Book.

[52] Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[53] *See, e.g., United States v. Benz,* 282 U.S. 304 (1931) (upholding trial judge's order shortening the sentence that a convict already had begun to serve against the claim that it usurped the executive's pardoning power), Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book; *District of Columbia v. Colts,* 282 U.S. 63 (1930) (holding that one prosecuted for reckless driving in the District of Columbia was entitled to be tried before a jury), Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book; *Morrison v. California,* 291 U.S. 82 (1934) (reversing conviction for conspiracy to violate California's Alien Land Law), Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book; *United States v. Chambers,* 291 U.S. 217 (1934) (holding that all prosecutions for violations of the Prohibition Act pending at the time the Twenty-First Amendment had been ratified had to be dropped), Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book (McReynolds was absent from the conference); *Taylor v. United States,* 286 U.S. 1 (1932) (reversing conviction based on evidence secured through warrantless search of garage from which Prohibition agents had detected the odor of whiskey), Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book. Butler records Hughes as stating, "Garage within curtilage part of the dwelling. . . .Generally unreasonable." Butler OT 1931 Docket Book.

[54] 290 U.S. 41 (1933); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[55] 289 U.S. 466 (1933); Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book.

[56] 281 U.S. 370 (1930); Stone OT 1929 Docket Book. Sanford and McReynolds were absent from the conference, but all of those present voted to uphold the appropriation.

[57] 283 U.S. 553 (1931).

[58] Stone OT 1930 Docket Book. This characterization may be a reflection of notations in Roberts's docket book indicating that three of the Justices initially voted the other way. Roberts's record shows votes to affirm crossed out, with votes to reverse entered next to them, for Holmes, Brandeis, and Stone. Roberts OT 1930 Docket Book.

[59] 290 U.S. 1 (1933); Stone OT 1933 Docket Book records Sutherland as dissenting at conference; Butler OT 1933 Docket Book records him as passing; Roberts OT 1933 Docket Book records him as "Not Voting."

[60] 290 U.S. 570 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book. Roberts recorded the vote as unanimous. Roberts OT 1933 Docket Book.

[61] 292 U.S. 426 (1934) (Van Devanter, McReynolds, Sutherland, and Butler concurred specially); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[62] 291 U.S. 67 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[63] 291 U.S. 304 (1934); Stone OT 1933 Docket Book; Roberts OT 1933 Docket Book; Butler OT 1933 Docket Book (Hughes describing the practice in question as "reprehensible").

[64] 286 U.S. 123 (1932); Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts 1931 OT Docket Book. Stone has an erased vote in the Chief Justice's column, which might suggest a possible change of vote on his part. However, no such record appears in either the Butler or the Roberts docket books.

[65] 290 U.S. 70 (1933); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[66] Butler OT 1933 Docket Book.

[67] 282 U.S. 568 (1931).

[68] 132 S. Ct. 2566 (2012).

[69] Stone records Brandeis as voting with Holmes and Stone, and records no vote for McReynolds. Stone OT 1930 Docket Book. Roberts, by contrast, lists both McReynolds and Brandeis as voting with the majority, though he has a crossed-out vote the other way in the Brandeis column, suggesting that Brandeis may have changed his vote at the conference. Roberts OT 1930 Docket Book. Stone later wrote to Felix Frankfurter that Brandeis's opinion in *Helvering v. Mitchell*, 303 U.S. 391 (1938) "reaches finally a result which I tried very hard to have the Court adopt in the La Franca case." Stone to Frankfurter, March 7, 1938, quoted in MASON, HARLAN FISKE STONE at 556.

[70] 281 U.S. 276 (1930). Hughes took no part in the decision. Sanford agreed to the disposition before his untimely death. *Id.* at 313.

[71] Stone OT 1929 Docket Book.

[72] 282 U.S. 687 (1931); Stone OT 1930 Docket Book; Robert OT 1930 Docket Book.

[73] Stone OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[74] 285 U.S. 452 (1932). Cardozo took no part in the decision.

[75] Butler OT 1931 Docket Book.

[76] 287 U.S. 112 (1932); Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[77] Butler OT 1932 Docket Book.

[78] 282 U.S. 251 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[79] 290 U.S. 398 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[80] Butler OT 1933 Docket Book. *See* 290 U.S. at 421 n.3.

[81] Butler OT 1933 Docket Book. *See* 189 Minn. 422, 429-30 (1933).

[82] Butler OT 1933 Docket Book. *See* 290 U.S. at 423.

[83] Butler OT 1933 Docket Book. *See* 290 U.S. at 423 n.4.

[84] Butler OT 1933 Docket Book. *See* 290 U.S. at 423 n.4.

[85] 199 U.S. 473 (1905). Butler OT 1933 Docket Book.

[86] 290 U.S. at 437. Hughes also made "Reference to difference between 'direct' and 'incidental.' 'Emergency' may authorize direct-earthquake & 'Economic' may be the same—The question is 'does such an emergency exist?'" Butler OT 1933 Docket Book.

[86] 291 U.S. 502 (1934).

[87] 291 U.S. 502 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[88] Butler OT 1933 Docket Book.

[89] 285 U.S. 262 (1932). *See infra.*

[90] 262 U.S. 522 (1923).

[91] Butler OT 1933 Docket Book.

[92] 291 U.S. at 511-14.

[93] 287 U.S. 45 (1932).

[94] *See* JAMES GOODWIN, STORIES OF SCOTTSBORO (1994); DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979).

[95] Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book.

[96] Butler OT 1932 Docket Book.

[97] 287 U.S. 206 (1932).

[98] Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[99] Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book.

[100] 287 U.S. at 215-16.

[101] *Id.* at 210-11.

[102] Butler OT 1932 Docket Book.

[103] Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book.

[104] Roberts OT 1932 Docket Book.

[105] *See also Grau v. United States,* 287 U.S. 124 (1932) (holding 7-2, with Stone and Cardozo dissenting both at conference and from the published decision, that the warrant authorizing a search was invalid); Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[106] 283 U.S. 359 (1931); Roberts OT 1930 Docket Book.

[107] 283 U.S. 697 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[108] 283 U.S. 605 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book. *MacIntosh* was anticipated by the late Taft Court decision in *Schwimmer v. United States*, 279 U.S. 644 (1929), which upheld the denial of naturalization to a forty-nine-year-old foreign woman who would not swear to take up arms in defense of the United States. The final vote was 6-3, with Holmes, Brandeis, and Sanford dissenting. Stone listed the conference vote as 5-3 with Sutherland absent, but he placed a question mark next to Sanford's dissenting vote, and wrote next to his own ultimate vote with the majority, presumably entered later, "passed on the final vote." Stone OT 1928 Docket Book. *See* RONALD B. FLOWERS, TO DEFEND THE CONSTITUTION: RELIGION, CONSCIENTIOUS OBJECTION, NATURALIZATION, AND THE SUPREME COURT (2003).

[109] 273 U.S. 536 (1927).

[110] 286 U.S. 73 (1932).

[111] Stone OT 1931 Docket Book.

[112] Roberts OT 1931 Docket Book.

[113] Butler OT 1931 Docket Book.

[114] 290 U.S. 371 (1933); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[115] 290 U.S. 389 (1933).

[116] Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book. Stone OT 1933 Docket Book records the vote as 5-2 with Brandeis not voting, but this appears to be an error.

[117] 287 U.S. 435 (1932); Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[118] 283 U.S. 636 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[119] 291 U.S. 559 (1934); Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[120] 285 U.S. 424 (1932).

[121] *Id.* at 425.

[122] Stone OT 1931 Docket Book.

[123] Butler OT 1931 Docket Book.

[124] 285 U.S. 262 (1932); Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[125] Butler OT 1931 Docket Book.

[126] *See, e.g.*, Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations,* 1985 SUP. CT. REV. 299,

317 (Brandeis opining that "McR. cares more about jurisdictional restraints than any of them").

[127] Butler OT 1931 Docket Book.

[128] *See Truax v. Raich*, 239 U.S. 33, 31 (1915) (Hughes, J.) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.").

[129] *See, e.g., Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 273 (1936) (Roberts, J., in an opinion joined by Hughes, C.J.) (striking down a statute that effectively provided that "during the life of the law no person or corporation might enter the business of a milk dealer in New York City"); *United States v. Rock Royal Cooperative*, 307 U.S. 533, 587 (1939) (Roberts, J., in a dissenting opinion joined by Hughes, C.J.) (objecting to a federal milk marketing regulation that "inevitably tend[ed] to destroy the business of smaller [milk] handlers by placing them at the mercy of their larger competitors.").

[130] Butler OT 1931 Docket Book.

[131] *Chickasha Cotton Oil Co. v. Cotton County Co.*, 40 F.2d 846 (10th Cir. 1930).

[132] 285 U.S. at 263.

[133] 285 U.S. at 276-77.

[134] *Id.* at 277-79.

[135] 287 U.S. 251 (1932).

[136] 287 U.S. at 264.

[137] Butler OT 1932 Docket Book.

[138] Stone OT 1932 Docket Book; Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book.

[139] A third state police power case, *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933), held that a statute imposing a heavier privilege tax per store on an owner whose stores were in different counties than on an owner whose stores were all in the same county was arbitrary and violated the guarantees of the Fourteenth Amendment. The final vote was 6-3, with Brandeis, Stone, and Cardozo dissenting, but at the conference Stone passed. Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book; Cardozo OT 1932 Docket Book. Stone records the vote as 5-3 to reverse, with Brandeis, Roberts, and Cardozo dissenting and Stone passing, suggesting that Roberts changed his vote after conference. Two years earlier, the Court had upheld a progressive tax on chain stores in *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931). Both the conference vote and the final vote on the merits had been 5-4, with the Four Horsemen in dissent. Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[140] 282 U.S. 379 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[141] 283 U.S. 570 (1931); Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[142] 277 U.S. 218 (1928).

[143] 283 U.S. at 579.

[144] 285 U.S. 393 (1932).

[145] 257 U.S. 501 (1922).

[146] 285 U.S. at 398.

[147] 285 U.S. at 401.

[148] 285 U.S. at 406-10.

[149] 285 U.S. 393.

[150] Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[151] 284 U.S. iii.

[152] Butler OT 1931 Docket Book.

[153] Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[154] 285 U.S. iii.

[155] Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[156] 285 U.S. 393.

[157] Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[158] Another notable case involving a question of federal power that witnessed vote changes between conference and final decision was *Chicago, Rock Island & Pacific Railway Co. v. United States*, 284 U.S. 80 (1931), which invalidated an ICC order exempting certain "short line" railroads from the obligation to pay a reasonable daily rental fee for the use of other railroads' cars under certain circumstances. The vote in conference was 6-1, with Brandeis dissenting and Holmes and Stone passing. Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book. In the published decision, however, both Holmes and Stone joined Brandeis's dissent.

[159] 285 U.S. 22 (1932).

[160] Stone OT 1931 Docket Book; Butler OT 1931 Docket Book; Roberts OT 1931 Docket Book. Mason mistakenly asserts that "[a]t conference they had split 5 to 3." MASON, HARLAN FISKE STONE at 337. Mason was perhaps led to this view because Stone wrote to Hughes after the conference, "At the conference I expressed doubt as to the construction given to the statute by the majority of the Court, which doubt still persists." Stone to Hughes, Dec. 18, 1931, quoted in MASON, HARLAN FISKE STONE at 338. The details of the Stone and Roberts defections are well explained in DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940, pp. 176 n.9, 177 n.12 (2014).

[161] *See* MERLO J. PUSEY, CHARLES EVANS HUGHES 284 (1951) (discussing what Sutherland referred to as Van Devanter's "pen paralysis").

[162] ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 456 (1960).

[163] No. 66, *Northport Power & Light Co. v. Hartley*. Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[164] No. 81, *Choteau v. Burnet*. Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[165] No. 263, *Maas & Waldsetin Co. v. U.S.* Stone OT 1930 Docket Book; Roberts OT 1930 Docket Book.

[166] Nos. 170, 245, *Gregg Dyeing Co. v. Query*, Butler OT 1931 Docket Book; No. 790, *Edwards v. U.S.*, Stone OT 1931 Docket Book.

[167] No. 158, *Shriver v. Woodbine Savings Bank*. Stone OT 1931 Docket Book; Roberts OT 1931 Docket Book.

[168] No. 598, *Michigan v. Michigan Trust Co*. Stone OT 1931 Docket Book. Butler records that the initial vote was taken on April 23, 1932, but that on April 30 McReynolds "Returned case to conference—new vote." Butler OT 1931 Docket Book.

[169] 286 U.S. 334, 346 (McReynolds, J., dissenting).

[170] No. 1, *Texas & Pacific Ry. Co. v. United States*. Stone OT 1932 Docket Book; Butler OT 1932 Docket Book.

[171] Nos. 5-8-9, Original, *Wisconsin v. Illinois*. Stone OT 1932 Docket Book.

[172] Nos. 316-318, *U.S. v. Dubilier Condenser Corp*. Butler OT 1932 Docket Book.

[173] 289 U.S. 178, 209 (1933).

[174] No. 55, *Sgro v. U.S.* Butler OT 1932 Docket Book; Roberts OT 1932 Docket Book. McReynolds filed a concurring opinion, 287 U.S. 206, 212 (1932) (McReynolds, J., concurring).

[175] No. 298, *Nickey v. Mississippi*. Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[176] No. 561, *International Milling Co. v. Columbia Transport Co*. Stone OT 1933 Docket Book; Butler OT 1933 Docket Book; Roberts OT 1933 Docket Book.

[177] No. 463, *Elliot v. Lombard*. Stone OT 1933 Docket Book; Butler OT 1933 Docket Book.

[178] *See, e.g., Sgro v. United States*, 287 U.S. at 212 (Stone and Cardozo dissent from opinion holding search unconstitutional); *Grau v. United States*, 287 U.S. at 129 (Stone and Cardozo dissent from opinion holding search unconstitutional); *see also Palko v. Connecticut*, 302 U.S. 319 (1937) (Cardozo writes and Stone joins opinion holding that the Double Jeopardy Clause does not apply to state criminal prosecutions).

[179] Recollection of Herbert Wechsler in KATIE LOUCHHEIM, THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 53 (1983) (Stone "thought Butler was too soft in dealing with criminal matters").

[180] *See, e.g.*, Maltzman & Wahlbeck, 90 AM. POL. SCI. REV. at 590-91 (finding that Justices were more likely to move from a dissenting conference vote to the majority than to defect from the conference majority); Brenner & Dorff, 4 JOURNAL OF THEORETICAL POLITICS at 198 (finding that movement from conference minority to ultimate majority is the most frequent type of vote fluidity); Brenner, 26 AM. J. POL. SCI. at 389 (finding that 68% of the cases in which there was vote fluidity resulted in an increase in the size of the majority); Brenner, 24 AM. J. POL. SCI. at 531, 534 ("justices are more likely to switch from the minority or nonparticipation at the original vote to the majority position at the final vote than to shift in the opposite direction . . . Clearly, some of the justices, once they have lost at the original vote or failed to participate in that vote, are willing to conform to the opinion of the court's majority and vote with them at the final vote. Indeed, over three-quarters of the vote changes moved in a consensus direction.")

[181] Four of McReynolds's seven acquiescences in ultimately unanimous case were strong (*Keppel Bros., Fox Film, U.S. v. Louisiana, Alford*), while three were weak (*Cahoon, Algoma Lumber, Lefkowitz*). Of Sutherland's three such acquiescences, at least two (*Fox Film, U.S. v. Louisiana*) were strong, while his acquiescence in *Blasius* may have been either strong or weak, depending upon which docket book one consults. Brandeis's acquiescence in *U.S. v. Louisiana* was technically weak, though Butler's conference notes suggest that he was initially inclined to dissent. The docket books also suggest that his acquiescence in *LaFranca* was of the strong variety. Stone strongly acquiesced in *LaFranca* but only weakly in *Worthen*. The acquiescences of Holmes in *LaFranca*, Butler in *Patton*, and Cardozo in *Gebardi* each were strong, while Van Devanter's acquiescence in *Bryan* was weak. Roberts's docket book also suggests that Holmes, Brandeis, and Stone may have acquiesced in *Cahoon*, but Stone's record does not corroborate this.

[182] McReynolds acquiesced strongly in *Binford* and *Educational Films*, but weakly in *Murdock*. Brandeis acquiesced strongly in *Gebardi, Funk*, and *Hansen*. Van Devanter acquiesced strongly in *Funk*, as did Butler and Sutherland in *Limehouse*, while Cardozo did so weakly in *Sorrells*. Stone's docket book suggests that Roberts may have acquiesced strongly in *Liggett*, but this is corroborated by neither the Butler nor the Roberts nor the Cardozo docket books.

[183] McReynolds did not participate in the conference votes in *Railway Clerks, Lowe, Chambers*, or *Cochran*.

[184] Saul Brenner, *Ideological Voting on the Vinson Court: A Comparison of Original & Final Votes on the Merits*, 22 POLITY 157, 163 (1989). An examination of these cases also provides some indication of the comparative success of the Justices in preparing opinions that would attract colleagues who had dissented or passed at conference. There were thirteen major cases that became unanimous after a divided conference vote. Hughes (*Cahoon, Blasius, Worthen, Doyal*) and Stone (*Keppel Bros., U.S. v. Louisiana, Alford, Gebardi*) each accounted for 30.7% of these cases. Butler (*Petersen*

Baking, *Lefkowitz*) and Sutherland (*LaFranca*, *Patton*) each accounted for 15.4%, and Cardozo (*Algoma Lumber*) accounted for 7.7%. Neither Holmes, Van Devanter, McReynolds, Brandeis, nor Roberts was responsible for any of these decisions. This phenomenon can also be examined by looking at the percentage of unanimous opinions authored by a Justice that were not unanimous at conference. Here Stone ranked first at 100% (4/4), Butler (1/2) and Cardozo (2/4) second at 50%, Hughes third at 30.7% (4/13), and Sutherland fourth at 28.6% (2/7). The remaining Justices were of course tied at 0%. These data also should be viewed in light of divided major decisions in which the author failed to increase the size of the conference majority. Neither Holmes, Van Devanter, McReynolds, Butler, Stone, nor Cardozo authored any such decisions; but of the thirteen such cases, Hughes was the author of 46.1% (*Blaisdell*, *Sgro*, *Stromberg*, *Near*, *Sorrells*, *Crowell*), Sutherland of 30.8% (*Powell*, *McIntosh*, *Liebmann*, *Bland*), Roberts of 15.4% (*Nebbia*, *Grau*), and Brandeis (*O'Gorman*) of 7.7%. One should also consider cases in which the author of an opinion managed to attract additional votes, but failed to achieve unanimity. Roberts did so in four of twelve such cases (*Murdock*, *Hansen v. Haff*, *Liggett*, *Jackson*); Sutherland did so in three (*Funk*, *Stephenson v. Binford*, *Rock Island*); and Van Devanter (*Indian Motorcycle*), McReynolds (*Burnet*), Brandeis (*Limehouse*), Stone (*Educational Films*), and Cardozo (*Condon*) in one each. Neither Holmes nor Butler accounted for any such cases. These data also should be read in light of the observation that, "[f]rom 1932 to 1937, Hughes . . . assigned 44 percent of the important constitutional cases to Roberts and Sutherland . . . When the liberal bloc dissented, Roberts, who was then a center judge, was assigned 46 percent of the opinions. The remaining 54 percent were divided among the conservatives," with Sutherland taking 25%, Butler 18%, and McReynolds 11%. "When the conservative bloc dissented, Hughes divided 63 percent of those cases between himself and Roberts." Danelski, *The Influence of the Chief Justice*, at 173-74.

[185] *See, e.g.*, Barry Cushman, *The Hughes Court Docket Books: The Late Terms, 1937-1940*, 55 AM. J. LEG. HIST. __ (forthcoming, December 2015). Other studies have shown that neither Roberts nor Cardozo exhibited a freshman effect with respect to bloc voting. *See* Dudley, 21 AM. POLITICS Q. at 364-65; Bowen & Scheb II, 15 POL. BEHAV. at 7, 11.

[186] Freund, 26 OHIO ST. L. J. at 227.

[187] Some studies of voting fluidity conclude that "justices were no more likely to change their votes in important, or salient, cases than in those of lesser importance." Hagle & Spaeth, 44 WESTERN POLITICAL QUARTERLY at 124. *See also* Maltzman & Wahlbeck, 90 AM. POL. SCI. REV. at 589 (finding that "justices are not less likely to switch in salient cases"); Brenner, Hagle, & Spaeth, *The Defection of the Marginal Justice*, 42 WESTERN POLITICAL QUARTERLY 409 (concluding that the defection of the marginal member of the minimum winning coalition on the Warren Court is best explained not by the importance of the case, but instead by that Justice's ideological proximity to members of the dissenting coalition and, secondarily, to that Justice's relative lack of competence). Other studies conclude that acquiescence was in fact more likely to occur in cases that were not "salient." Dorff & Brenner, 54 J. POLITICS at 772, 773; Brenner, Hagle, & Spaeth, *Increasing the Size*, 23 POLITY 309. *Compare* Brenner, 24 AM. J. POL. SCI. at 530 (finding that the percentage of total vote switches was no greater in "nonmajor" than in "major" cases, but that vote switches occurred in a higher percentage of "nonmajor" cases); Brenner, 26 AM. J. POL. SCI. at 389 (reaching similar conclusions with a different data set).

[188] ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 198 (1964); MASON, TAFT TO WARREN at 57; Alpheus Thomas Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J. PUB. L. 20, 31-32 (1968).

[189] Post, 85 MINN. L. REV. at 1309.

[190] LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 147, 161 (1994).

[191] Post, 85 MINN. L. REV. at 1310.

[192] Post, 85 MINN. L. REV. at 1310-11, 1356; MASON, WILLIAM HOWARD TAFT at 198; William Howard Taft to Harlan F. Stone, Jan. 26, 1927, Box 76, Harlan F. Stone Papers, Manuscript Division, Library of Congress, *quoted in* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 47 (1964); Danelski, *The Influence of the Chief Justice*, at 174.

[193] 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 1049 (1939) (Taft "shrank from all dissents, including his own"); Post, 85 MINN. L. REV. at 1311-12.

[194] Urofsky, 1985 SUP. CT. REV. at 330; Post, 85 MINN. L. REV. at 1318, 1340, 1341, 1343.

[195] HENRY J. ABRAHAM, THE JUDICIAL PROCESS 214-15 (2d. ed. 1968); MURPHY at 52; Post, 85 MINN. L. REV. at 1340.

[196] Post, 85 MINN. L. REV. at 1341-43.

[197] Post, 85 MINN. L. REV. at 1341-44; James C. McReynolds to Harlan F. Stone, Apr. 2, 1930, Box 76, Harlan F. Stone Papers, Manuscript Division, Library of Congress, *quoted in* Corley, Steigerwalt, & Ward, 38 J. SUP. CT. HIST. at 30; MURPHY at 52-53.

[198] Urofsky, 1985 SUP. CT. REV. at 327, 328, 330; Post, 85 MINN. L. REV. at 1341-42, 1344-46, 1349-51; MASON, TAFT TO WARREN at 58 ("For the sake of

harmony staunch individualists such as Holmes, Brandeis, and Stone, though disagreeing, would sometimes go along with the majority"); *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("I think it useless and undesirable, as a rule, to express dissent"); ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 18 (1957) ("'Can't always dissent,' [Brandeis] said . . . 'I sometimes endorse an opinion with which I do not agree.'")

[199] Epstein, Segal, & Spaeth, 45 AM. J. POL. SCI. at 365. *See also* O'Brien, *Institutional Norms*, at 98.

[200] Danelski, *The Influence of the Chief Justice*, at 174; O'Brien, *Institutional Norms*, at 98.

[201] Danelski, *The Influence of the Chief Justice*, at 174.

[202] In cases decided by written opinion, White dissented in 1.35%, Taft in 0.93%, Hughes in 2.24%, Stone in 13.49%, Vinson in 12.44%, and Warren in 12.13%. S. Sidney Ulmer, *Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger*, in SHELDON GOLDMAN & CHARLES M. LAMB, eds., JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 53 (1986).

[203] Post, 85 MINN. L. REV. at 1344.

[204] Post, 85 MINN. L. REV. at 1344, 1348-49, 1354, 1356-57; Evan A. Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120, 123-26 (1938) (quoting various criticisms of dissents made by members of the bench and bar); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 205-06 (1923) (quoting various professional criticisms of dissenting opinions); William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 693 (1905) ("the Dissenting Opinion is of all judicial mistakes the most injurious"). *See also* Ulmer, *Exploring the Dissent Patterns,* at 50–51 ("dissent diminishes the image of monolithic solidarity, which allegedly enhances respect for the Court and obedience to its mandates").

[205] ABA Canons of Judicial Ethics, Canon 19 (1924), in LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 137 (1992). In 1972, the American Bar Association replaced the Canons with a *Code of Judicial Conduct*, which does not contain a provision similar to Canon 19. Wahlbeck, Spriggs II, & Maltzman, 27 AMERICAN POLITICS QUARTERLY at 508 n.1.

[206] Post, 85 MINN. L. REV. at 1284 n.55.

[207] Post, 85 MINN. L. REV. at 1345. *See also* Caldeira & Zorn, 42 AM. J. POL. SCI. at 877; MURPHY at 61 ("A Justice who persistently refuses to accommodate his views to those of his colleagues may come to be regarded as an obstructionist. A Justice whose dissents become levers for legislative or administrative action reversing judicial policies may come to be regarded as disloyal to the bench. It is possible that either appraisal would curtail his influence with his associates.")

[208] During this period, Justices were authorized to employ a law clerk and a secretary. Pierce Butler used each to perform the duties of a law clerk, and one of them, John Cotter, wrote first drafts of most of Butler's opinions. The other Justices, however, tended to employ only one law clerk, and to do their own drafting. *See* Barry Cushman, *The Clerks of the Four Horsemen, Part I*, 39 J. SUP. CT. HIST. 386 (2014); Barry Cushman, *The Clerks of the Four Horsemen, Part II*, 40 J. SUP. CT. HIST. 55 (2015); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 465 (2009). Congress did not authorize the Justices to hire two law clerks until 1941, though most of them continued to employ only one clerk until 1946. *See* ARTEMUS WARD & DAVID L. WEIDEN, SORCERER'S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 36-37 (2006).

[209] *See* BRADLEY J. BEST, LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS OF THE UNITED STATES SUPREME COURT, 1935-1995 at 214, 232 (2002) (finding "a positive, statistically significant relationship between the number of law clerks on the Court and the frequency of dissenting and concurring opinions"); Ley, Searles, & Clayton, 49 TULSA L. REV. at 112-13, 121 (concluding that "the opportunity for cost-lowering effects of law clerks" is "significant to our understanding of the persistence of non-consensual norms.")

[210] LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 247-49 (5th ed. 2012).

Easing the Shoe Where It Pinches: The *Lottery Case* and the Demise of Dual Federalism

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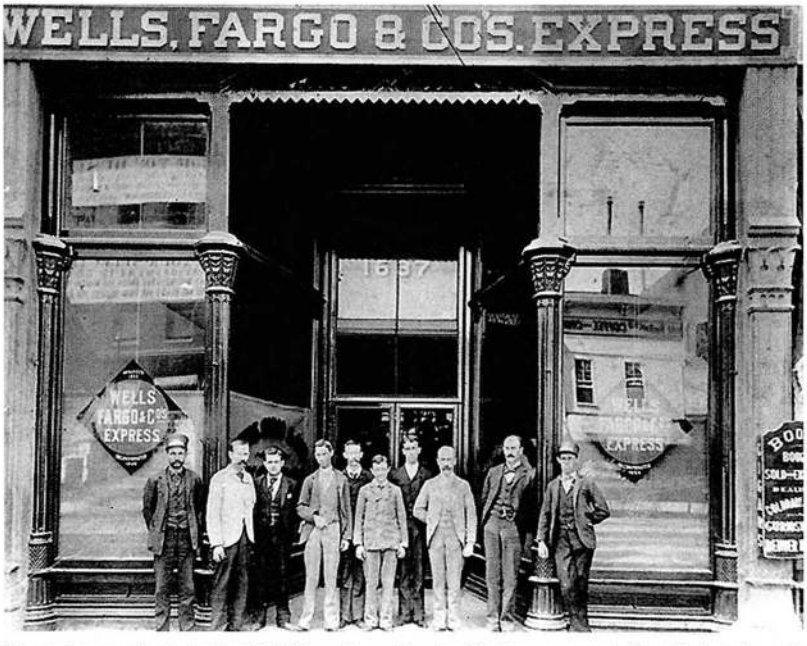
The decades around the turn of the twentieth century are remembered as the high point of dual federalism—the theory of state-federal relations that regards each level of government as sovereign within its own exclusive regulatory sphere. In the popular mind, the era is associated with Supreme Court decisions that eviscerated significant federal laws on the grounds that Congress had exceeded the scope of its enumerated powers, or else impinged on powers reserved to the states under the Tenth Amendment. In *U.S. v. E.C. Knight*, for example, the Court reasoned that Congress's commerce power could not be used to break up a sugar refining monopoly, since the authority to regulate manufacturing processes belonged exclusively to the states.[1] Similarly, in *Hammer v. Dagenhart*, the Court struck down the first federal child labor on the grounds that the measure was not a legitimate regulation of commerce, as Congress had claimed, but rather a surreptitious attempt to invade the state-controlled sphere of labor regulation.[2] Manufacturing monopolies and child labor were undoubtedly serious policy problems, but the Court insisted that they would be addressed at the state level or not at all. In the words of Chief Justice Melville Fuller's opinion for the *Knight* majority, "acknowledged evils, however grave and urgent... had better be borne" than "the risk be run" of blurring the boundary between state and federal authority.[3]

And yet, the Fuller Court upheld at least one federal law that threatened to transform the state-federal relationship in ways arguably more profound than either the Sherman Antitrust Act or the Keating-Owen child labor law. The law in question was the Lottery Act of 1895, a measure that, under the auspices of the commerce power, criminalized the interstate transportation of lottery tickets and other lottery-related materials.[4] To many observers, both in the 1890s and more recently, the Lottery Act appeared

patently at odds with the basic precepts of dual federalism. For starters, there was considerable evidence to suggest that the Framers had not viewed Congress's power to "regulate" interstate commerce as entailing the power to prohibit such commerce. In addition, it was widely believed that the lottery industry, like the insurance industry, was not "commercial" in nature and therefore not subject to federal regulation under the commerce power.[5]

Finally, there was the obvious fact that Congress's primary purpose in enacting the Lottery Act had not been to protect or promote commerce, but rather to regulate public morality—a function that traditionally belonged to the states, and that is not listed among Congress's Article I powers.

But in *Champion v. Ames* (1903)—popularly known as the *Lottery Case*—a bare majority of the Court rejected each of these constitutional objections.[6] According to Justice John Marshall Harlan's majority opinion, Congress's power over interstate commerce was "plenary" in nature. If an interstate traffic in lottery tickets existed, Congress was free to regulate that traffic in any way it saw fit, up to and including outright prohibition. Justice Fuller, writing on behalf of the four dissenters, acknowledged that Congress's power to "regulate" interstate commerce could in some instances entail the power to prohibit it. And yet he insisted that the prohibitory commerce power extended only to items that were "themselves injurious to the transaction of interstate commerce." Congress could constitutionally prohibit the interstate transportation of diseased cattle, for example, because this protected an important market from a product that might otherwise destroy it.[7] But, unless one could show that lottery tickets "communicate[d] bad principles by contact," Fuller wrote in jest, Congress could not prohibit their interstate transportation. If the Court failed to draw this line in the sand—the line between prohibitory



Charles F. Champion was indicted in 1899 for attempting to ship Paraguayan lottery tickets from San Antonio to Fresno via the Wells Fargo Express Company. The nation's express companies, fearing that the Lottery Act represented the first step towards full-scale federal regulation of their industry, quickly took charge of the case and advised Champion to request a writ of habeas corpus on the grounds that the Lottery Act had exceeded the scope of Congress's interstate commerce power.

regulations that facilitated or protected commerce and those that did not—the result would be "a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."[8]

Such reports of dual federalism's demise were, of course, greatly exaggerated. Indeed, the Court aggressively reasserted the idea of mutually exclusive state and federal spheres in later decisions such as *Hammer*. But in a larger sense, Fuller's warning proved prescient. In the years following *Champion*, federal lawmakers relied on the lottery precedent to justify federal oversight of a range of subjects—from liquor, to impure food and drugs, to prostitution, to automobile theft and kidnapping—that were traditionally regulated at the state level. These measures, all of which were upheld by the Court, established the commerce power as Congress's preferred vehicle for the regulation of subjects that were not clearly committed to its care in Article I—subjects that, in fact, had little to do with interstate "commerce" as that term was traditionally understood. By the early 1930s, there was no denying that the gradual accretion of federal "police" measures had fundamentally altered the balance of power within the constitutional system. In the words of the 1934 **Encyclopedia of the Social Sciences**, Congress had "grafted on" to its enumerated powers a "federal police power," which "was once but another name for 'the residual sovereignty' of the states."[9]

The present essay has two aims. The first is to explain how a law that promised to transform the nature of the state-federal relationship could have been enacted by Congress and upheld by the Court in a period when the vast majority of lawmakers and jurists seem to have been sincerely committed to the idea of mutually exclusive state and federal spheres. Put another way, if most members of the Fuller Court were committed proponents of dual federalism, and if the Court was not averse to invalidating popular statutes that it deemed incompatible with the orthodox conception of the federal system, then why did the Justices waver on the seemingly insignificant subject of lottery gambling? Even as recent years have witnessed an increase in scholarly interest in the *Champion* decision and its role in the construction of the modern commerce power, this critical question remains largely unanswered.[10]

The essay's second aim is to shed light on *Champion*'s role in undermining dual federalism as a credible characterization of the state-federal relationship. Although few scholars have detected any direct connection between *Champion* and the transformative decisions of the New Deal period, I argue that *Champion* contributed in two distinct ways to the collapse of the dual federalism framework. First, Justice Harlan's decision to ground the decision, at least in part, on the "harmful" or "evil" nature of the lottery industry introduced a subjective element into the Court's Commerce Clause jurisprudence—an element that, in time, led many observers to suspect that the Justices were manipulating key doctrinal categories for reasons of their own. Second, as mentioned above, *Champion* facilitated the emergence of a formidable federal regulatory apparatus dedicated to combating crime and policing morality. Although the new federal police measures were enacted under the auspices of the commerce power, they typically targeted activities that were far removed from traditional understandings of "commerce." During the 1930s, when the Court invalidated key New Deal measures as exceeding the scope of the commerce power, the Roosevelt Administration and its allies responded by using *Champion* and other decisions upholding federal morals laws to paint the Court's conservative members as hypocrites. It was simply unreasonable, they argued, to suppose that the "commerce" power entailed the authority to punish adulterers, car thieves, and kidnappers, while leaving Congress powerless to address truly significant

economic ills, from falling commodity prices to labor unrest in the coal industry. This line of argument, as I demonstrate in the paper's final section, helped cement the popular perception of dual federalism as a fig leaf for the policy preferences of the Justices themselves.

"A Precedent Which May Be Troublesome Hereafter"

In the spring of 1894, Massachusetts Senator George F. Hoar introduced an "Act for the Suppression of the Lottery Traffic through National and Interstate Commerce." The measure was not the first federal law aimed at curbing the interstate market in lottery tickets; Congress had previously enacted legislation banning lottery tickets and related materials from the mails. But by 1894 it was apparent that at least one lottery firm, the Louisiana Lottery Company, had managed to circumvent postal regulations by using private express companies to transport its wares throughout the nation. In response to public outrage at the Louisiana Lottery's disregard for state law—lotteries were by now illegal in virtually every state—Hoar proposed using Congress's commerce power to put the company out of business. The resulting bill, which threatened fines and imprisonment for any person who arranged for the interstate transportation of lottery materials, quickly passed the Senate without a recorded vote. A slightly modified version of the bill passed the House in early 1895, after receiving the unanimous endorsement of the House Judiciary Committee. As in the Senate, the measure ultimately passed with little debate and without a recorded vote. The House bill was then approved by the Senate and signed into law by President Cleveland.[11]

Because the law encountered so little opposition in Congress (for reasons discussed below), it fell to the nation's lottery operators and express companies to highlight the measure's constitutionally problematic features. The opportunity for a test case arose in 1899 when Charles F. Champion was indicted for attempting to ship Paraguayan lottery tickets from San Antonio to Fresno via the Wells Fargo Express Company. The nation's express companies, fearing that the Lottery Act represented the first step towards full-scale federal regulation of their industry, quickly took charge of the case. While Champion was awaiting trial in the Northern District of Texas, he was advised to request a writ of habeas corpus on the grounds that the Lottery Act had exceeded the scope of Congress's interstate commerce power. (Ames, the other party in the litigation, was the U.S. Marshall responsible for Champion's detention.) By the time Champion's case reached the Supreme Court, the lottery agent was represented by several of the nation's top attorneys, including former Secretary of the Treasury John G. Carlisle and prominent corporate attorneys William D. Guthrie and James G. Carter.[12]

By all appearances, Champion had every reason to hope for a favorable outcome. After all, less than four years had passed since the Court had eviscerated the Sherman Antitrust Act in its eight-to-one decision in *E.C. Knight*. And yet it soon became clear that the Champion litigation would not end in a lopsided victory for the appellant. After an initial oral argument in October 1900, the case was scheduled for reargument the following year. A second round of oral arguments in October 1901 also failed to produce a decision, and a third argument was scheduled for December 1902. Rumors circulated that the Court's members were evenly divided on the question of the Lottery Act's constitutionality. Still, Champion's attorneys remained optimistic.[13] Given that five members of the *E.C. Knight* majority remained on the Court, it seemed entirely plausible that the Lottery Act would in the end be declared unconstitutional.

And yet, in February 1903, the Court handed down a five-to-four decision upholding the law in its entirety. What explains the Court's apparent shift from a narrow to an expansive conception of the commerce power? Changes in the Court's personnel do not seem to have been a significant factor. True, the Court's two newest members, Justices Oliver Wendell Holmes, Jr., and Joseph McKenna, were known to take a broad view of national authority. But the core of the *Knight* majority remained on the Bench.[14] Perhaps the five members of the *Champion* majority were motivated by animosity towards the lottery business. Although some scholars have dismissed *Champion* as a decision in which the "Court was judging lotteries and not the Lottery Act," it is far from clear that the Justices' personal moral sentiments were determinative of the outcome.[15] For starters, one can find noted moralists on both sides of the *Champion* divide. Thus, while John Marshall Harlan's belief that lotteries were "a form of pollution" may well have played a role in his decision to uphold the Act, other religiously devout opponents of lottery gambling, including Justice David J. Brewer—the son of Congregationalist missionaries and a Sunday School teacher throughout his life—did not hesitate to subordinate personal moral conviction to the perceived dictates of the federal system.[16] More to the point, it is clear that the Fuller Court was in other contexts quite willing to side with "evil" industries when necessary to preserve the basic structure of the federal system. During the same period in which *Champion* was decided, for example, the Court handed down numerous decisions weakening or invalidating state and federal restrictions on the interstate movement of liquor. Needless to say, these decisions, which the Court deemed necessary to protect the Framers' vision of an unencumbered national market, represented a serious setback for the prohibition movement—a cause that many of the Justices, or at least the religious denominations to which they belonged, enthusiastically supported.[17]

A final possibility, recently explored by Barry Friedman and Genevieve Laker, is that the views of the *Champion* majority have been widely misconstrued. In their view, Harlan did not *intend* to orchestrate a sweeping reorganization of the federal system. Rather, *Champion* "simply countenanced a federal regulatory ban on the interstate shipment [of products] in a situation where all states already had banned" domestic sales of the goods in question. Stated differently, the *Champion* majority regarded the 1895 anti-lottery statute as a "helper" law that aided the states in enforcing their own police regulations, and not as an instance of Congress exercising an autonomous federal police power.[18] Barry Cushman likewise reads Harlan's opinion as merely confirming Congress's power to prohibit the interstate movement of products that were universally condemned at the state level.[19] Only years after was the decision was handed down, the argument goes, did commentators begin to *misread* Harlan as endorsing a plenary federal power to prohibit the movement of goods across state lines.

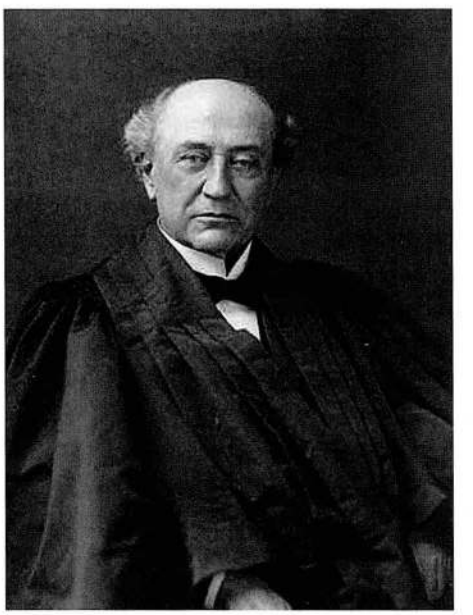
These commentators have rightly drawn attention to passages in Harlan's opinion that hint at the existence of constitutional limits to the prohibitory commerce power. For example, Harlan warned that this power was not to be wielded in an "arbitrary" fashion, and he also observed that most of the states, and "perhaps all of them," had outlawed lotteries prior to the enactment of the federal lottery ban.[20] But, if it was Harlan's intent to craft a narrow decision, the general tenor of his opinion was strikingly ill-suited to this end. At no point did he explain what an "arbitrary" use of the commerce power might entail, nor did he declare that universal state prohibition was a constitutional prerequisite for federal prohibitory legislation. Indeed, his use of the phrase "*perhaps* all of them" in reference to the number of states that had banned lotteries

suggests that Harlan was not particularly concerned with the precise extent of state-level prohibition. More important, the effect of any limiting language was greatly diminished by the repeated use of the word "plenary"—the adjective appears no less than five times—to describe Congress's commerce power, and by the nationalistic rhetoric that permeates the opinion. In the opinion's most cited passage, Harlan declared that "the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." "What provision in that instrument," he then asked rhetorically, "can be regarded as limiting the exercise of the power granted? What clause can be cited which in any degree countenances the suggestion that one may of right carry . . . from one state to another that which will harm the public morals?"[21]

In the end, however, the question of Harlan's *intent* is somewhat beside the point. For the most important practical effect of the *Champion* decision was to shift the burden of proof from advocates of a plenary commerce power—who were on the defensive in the aftermath of the *Knight* decision—to those who sought to protect an inviolable sphere of state sovereignty. Indeed, contemporary commentators were virtually unanimous in concluding that the Court had conceded Congress's authority to prohibit the interstate movement of any commodity, and for any reason.[22] As a writer in the *Michigan Law Review* explained, *Champion* had opened the door for Congress to block the interstate movement of "any property which [it] considers detrimental to the interests of the whole people."[23] A contributor to the *Central Law Journal* agreed that Congress was now possessed of "a police power as vast and wide reaching as that of the states, at least to all persons and property forming any part of, or having any connection with interstate commerce."[24] In the words of the *Wall Street Journal*, "Congress under this decision has the right to prevent transmission of products from one state to another, and it makes no difference whether the product is a lottery ticket or sugar or oil."[25]

Whether the writer in question was supportive or critical of the *Champion* decision seems to have made little difference in how Harlan's opinion was interpreted; even the most ardent proponents of dual federalism agreed that the Court had paved the way for an open-ended expansion of the commerce power.[26]

Clearly, existing accounts of the *Champion* decision leave a great many questions unanswered. But, before turning to the task of proposing an alternative explanation, it is worth asking why a measure that promised to transform the state-federal relationship did not attract greater constitutional scrutiny *outside* of the Court. In particular, why did



Justice John Marshall Harlan's belief that lotteries were "a form of pollution" may well have played a role in his decision to uphold the Act. But other religiously devout opponents of lottery gambling, including Justice David J. Brewer (above), the son of Congregationalist missionaries and a Sunday School teacher throughout his life, did not hesitate to subordinate personal moral conviction to the perceived dictates of the federal system.

the law encounter so little resistance in Congress? According to one school of thought, the passage of the Lottery Act is best understood as a knee-jerk response to an unprecedented moral panic. For a brief period in the early 1890s, the argument goes, Americans were gripped by an irrational fear that the Louisiana Lottery was corrupting the moral sense of the nation. The sense of impending doom bridged the usual divides of party and section, with Northern Republicans and Southern Democrats joining hands to condemn the lottery traffic. As Herbert F. Margulies has written, "the feeling in Congress and among opinion-makers in the country was almost unanimously" supportive of aggressive federal lottery regulation.[27] A "concern for ends" thus "caused an overlooking of means." Congressional leaders shepherded the legislation through Congress with little discussion or debate. The popular press breathlessly reported on the bill's progress while "ignoring the constitutional innovation" at the heart of the legislation.[28]

As we shall see in the next section, there is a good deal of truth to these claims. Americans were indeed gripped by a momentary moral panic, and any lawmaker, from whatever party or region, who raised constitutional objections to a federal lottery law would likely have incurred the wrath of his constituents. And yet, any suggestion that the constitutionally problematic aspects of the 1895 lottery bill became evident only in retrospect is belied by the numerous essays on the "lottery evil" that appeared in American periodicals in the years preceding the bill's passage. The most important of these was an 1892 *Atlantic Monthly* essay penned by Thomas M. Cooley. Cooley, the most influential legal commentator of the late nineteenth century, began by reminding his readers that the Constitution gave "congress . . . no jurisdiction to act upon the subject" of lottery gambling.[29] If Congress wanted to abolish the interstate lottery traffic, its only recourse would be to employ one of its enumerated powers in an "indirect" manner—that is, as a proxy for a federal police power. Although Cooley used the remainder of his essay to argue for the constitutionality of using Congress's taxing power to drain the company's coffers, the most noteworthy feature of his essay was its frank discussion of the transformative potential of such "indirect" regulation. Indeed, Cooley acknowledged that "under a constitutional government," there were "serious objections to the powers conferred upon [Congress] being exercised in an indirect way, which keeps the actual purpose out of view." And, while he believed that the threat of electoral accountability would ultimately prevent lawmakers from abusing the "indirect method" of regulation, Cooley was forced to admit that this "method, though [here] employed in such a manner as to be . . . a benefit to the people," constituted "a precedent which may be troublesome hereafter," embodying "within itself the possibilities of unknown future mischief."[30]

Cooley's essay, published in a widely read periodical, suggests that Americans were not unaware of the Lottery Act's transformative potential. That again begs the question: Of all the pressing policy issues of the late nineteenth century, why would political and legal elites set aside longstanding constitutional concerns in an effort to address the comparatively minor problem of lottery gambling?

Moral Reform in a Commercial Republic

Cooley's ambivalence with respect to the "indirect" use of federal power is reflective of a deeper tension within the nineteenth-century polity. Simply put, Americans of Cooley's generation inhabited a polity whose basic institutions were designed with the aim of promoting interstate commerce, not restricting it. The original purpose of the

Commerce Clause, for example, was almost certainly to remove state and local barriers to trade.[31] Frustrated by the "interfering and unneighbourly" trade restrictions of the post-Revolutionary period, the Framers hoped that the new Constitution, by vesting Congress with exclusive authority over interstate commerce, would "open the veins of commerce" and facilitate an "unrestrained intercourse" between the states.[32] That federal lawmakers might use the commerce power to *prohibit* the movement of goods in interstate markets seems not to have occurred to any significant political or legal figure during the founding period.[33]

Over the course of the nineteenth century, however, a radical shift in social mores caused many Americans to question founding-era assumptions regarding the benefits of an unencumbered national market.[34] More specifically, the great religious revivals of the early nineteenth century left millions of northern Americans convinced that a series of "national sins"—including slavery, intemperance, and lottery gambling—threatened the moral health of the republic. By the 1820s, the problem of suppressing immoral markets had become a serious concern. Moral reformers, including Lyman Beecher, accused liquor dealers of using the channels of interstate commerce to spread a "moral miasma" "over the entire land."[35] Lottery operators, in turn, were denounced for "scattering the seeds of corruption" to "sister states" in which lotteries were prohibited by law.[36] Perhaps inevitably, reformers seized on the interstate commerce power as a potential tool in the struggle for national regeneration. The first such proposal appears to have been made in 1819, when abolitionists suggested that Congress use its commerce power to end the interstate traffic in slaves—an idea that was swiftly denounced as unconstitutional by no less an authority than James Madison.[37]

What was particularly worrisome, from a constitutional perspective, was that nineteenth-century reformers such as Beecher were theologically committed to the *eradication*, rather than regulation, of "immoral" commodities. At the time of the founding, it was not implausible to believe that an unencumbered national market could coexist with a considerable degree of local autonomy in matters of police regulation, since existing morals laws rarely disrupted the flow of goods in interstate markets. In the case of liquor regulation, for example, there was little reason for local authorities to care whether a retailer obtained his wares from domestic or out-of-state sources, so long as he was duly licensed. (And, indeed, the founding era witnessed the emergence of a thriving and perfectly legal interstate market in whiskey.)[38] But reformers such as Beecher had little use for license laws and other traditional forms of morals regulation. Having shed the relatively orthodox Calvinism of the founding generation in favor of an evangelical theology that stressed the possibility of moral perfection at both the individual and societal levels, nineteenth-century evangelicals believed that licensing schemes implicitly sanctioned evil industries, thus making the entire community complicit in their crimes.[39] The only morally acceptable course of action with respect to liquor and lottery tickets, on this view, was "banish[ment] . . . from the list of lawful items of commerce."[40]

It soon became clear, however, that the Constitution's Framers had constructed a federal system in which neither level of government was well positioned to effect the eradication of immoral forms of property. In particular, the Framers' decision to vest Congress with authority over interstate commerce meant that any *state* effort to restrict the interstate traffic in immoral goods would be met with a presumption of unconstitutionality.[41] But neither was it clear that reformers could turn to Congress for help, since *federal* regulatory authority was limited to those powers specifically enumerated in Article I of the Constitution, a list that did not include the police power. Many moral

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reformers, at least prior to the 1890s, were surprisingly frank in acknowledging these constitutional obstacles. As late as 1887, the Senate's foremost supporter of prohibition, Henry W. Blair, complained that the "police power" was the only power "under which the traffic in intoxicating drink [may] be controlled and prohibited." But, while this power belonged exclusively to the states, the "general government" was vested with exclusive authority over "commerce . . . among the several States." The upshot was that "[s]o long as any State . . . continues to permit the manufacture of alcohol and the traffic therein," the federal government was bound to "exercise all its power of legislature, judicature and execution to protect and facilitate the continued infliction of the curse."[42] The nation's federal system, Blair went so far as to declare, was "the great legal fortress of intemperance" and "the great almighty obstacle in the way of . . . reform."[43]

As Blair's lament suggests, there was a basic incompatibility between the traditional federal system and *any* reform movement that aimed at the eradication of a traditionally valid commodity. What distinguished the anti-lottery movement, however, was that each level of government had by the early 1890s reached the accepted limit of its constitutional authority. Where liquor prohibition was the law of the land in less than half a dozen states, lotteries were illegal in every state in the Union except Louisiana. At the same time, Congress had enacted a series of increasingly restrictive postal regulations designed to prevent the Louisiana Lottery from cashing in on the pent-up demand for lottery tickets in states where lotteries were prohibited by law.[44] With the enactment in 1890 of a comprehensive ban on the mailing of lottery materials, Congress bumped up against the limits of its own authority. (The Court had in 1878 endorsed the constitutionality of federal postal regulations, on the grounds that the postal service was a federal creation over which Congress exercised plenary authority. But the Justices also made clear, in the same decision, that Congress did not possess "the power to prevent the transportation in other ways, as merchandise, of [lottery] matter which it excludes from the mails.")[45]

But, even as both levels of government tightened the regulatory noose, the Louisiana Lottery refused to die. After being denied the use of the mail, the company shifted to distributing tickets through express companies and traveling agents.[46] And, indeed, it even survived the 1892 expiration of its corporate charter. When the Louisiana legislature refused to renew the charter, company officials went searching for a new home, which they soon found in Florida.[47] By early 1894, the company was up and running again, printing tickets in Florida while holding

drawings in Honduras or on steamers located in international waters. It is only in this context that one can begin to make sense of the moral panic that gripped the nation in the mid-1890s. The belief that lotteries threatened the moral health of the nation was, of course, nothing new. What *was* new was the realization that the "lottery evil" was sheltered by the orthodox conception of the federal system. With each level of government having reached the limits of its authority, Americans could only watch in horror as company officials exploited what Edward Corwin would later call the "no man's land" between state and federal authority.[48]

Ironically, public outrage peaked at the precise moment that the actual strength of the lottery industry was in rapid decline.[49] During 1894 and early 1895, many of the nation's major newspapers and periodicals published virtually day-by-day accounts of the Louisiana Lottery's activities in Florida. The mortally wounded company, now operating out of a few hastily constructed shacks on an otherwise deserted strip of beach, was regularly described as a dire threat to the moral health of the nation. In the judgment of the *Outlook*, it represented a "menace to every city, town, and village of the United States."[50] The *New York Times* likewise accused Floridians of "debauching the moral sense of the country," while the *Congregationalist* warned that the reconstituted Louisiana Lottery would soon "impoverish and demoralize the people" of the nation.[51] Significantly, doubts about the constitutionality of federal intervention under the Commerce Clause seem to have vanished in the wake of the Louisiana Lottery's revival, at least in the popular press. In February 1894, the *Independent* deemed it "entirely within the power of Congress to forbid interstate commerce in lottery matter."[52]

The exhaustion of orthodox regulatory capacities may also help to explain why the Fuller Court, which was not averse to invalidating popular reforms in the name of federalism, ultimately endorsed the Lottery Act's constitutionality. Viewed in the broader context of nineteenth-century moral reform, it is clear that the Lottery Act forced the Justices to confront, for the first time, the fact that the orthodox understanding of the federal system provided no means by which the nation could rid itself completely of "evil" commodities or transactions. In previous cases involving the use of interstate commerce for nefarious purposes, the Court had successfully dodged the problem, typically by suggesting that at least one level of government had not yet exhausted its regulatory resources. In *E.C. Knight*, for example, Justice Fuller, after declaring that "manufacturing" monopolies were beyond the reach of Congress's commerce power, had emphasized that *the states* were free to regulate such monopolies in any way they saw fit.[53] (Whether state regulation of the American Sugar Refining Company was actually feasible was, of course, an open question.)[54] Similarly, in its decisions striking down state-level bans on the importation of liquor, the Court had suggested that the constitutionally problematic state laws would pass constitutional muster if only Congress would use its commerce power to authorize them (which it eventually did). [55] By contrast, in the case of the interstate lottery business, there was no denying that a decision invalidating the Lottery Act would give rise to a regulatory vacuum, leaving the Louisiana Lottery free to carry on its interstate operations indefinitely.

And it is here that we come to the crux of the disagreement in *Champion*. To Fuller and the dissenters, the regulatory vacuum in which the Louisiana Lottery had set up shop was an indispensible component of the Framers' design. Stated differently, the Framers had vested Congress with the commerce power as a means of opening markets, not closing them. The states were of course free to regulate morality to the best of their abilities, but the absence of a federal

police power in Article I meant that they could expect little help from Congress on this front. The claim that state laws "had been found ineffective" in suppressing the lottery traffic was immaterial, since considerations of expediency "could not be availed of to justify action by either Congress or . . . the courts." In short, "the homely maxim 'to ease the shoe where it pinches'" had no place in a polity where jurisdictional boundaries were fixed by a written constitution.[56]

But to Harlan and the majority, it was equally self-evident that "the Framers of the Constitution" would have been appalled to discover an "evil" market lurking in the recesses of the federal system. Simply put, Harlan could not countenance the suggestion that the founding generation had "intended" to leave the nation "incapable" of abolishing an industry "professedly injurious to public morals." If state lottery bans had failed to secure the demise of this evil industry, then it followed that the federal government *must* possess the constitutional authority to act. "We should hesitate long," Harlan declared, "before adjudging that an evil of such appalling character . . . cannot be met and crushed by *the only power competent to that end.*"[57]

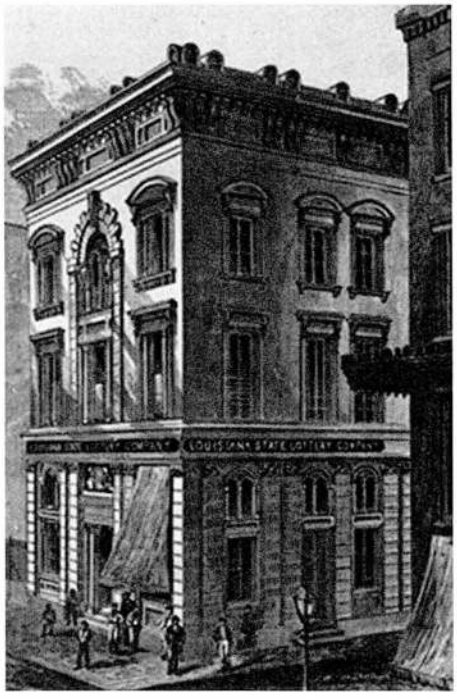
This is not to suggest, however, that Harlan and the other members of the *Champion* majority were blind to the potentially transformative impact of a decision upholding the Lottery Act. As noted above, several careful readers of Harlan's opinion have recently drawn attention to passages that point—albeit implicitly—to the existence of limits to the newly discovered federal police power. At one point, for example, Harlan seemed to imply that Congress's power to prohibit interstate movement was limited to objects that were inherently "injurious" or "offensive." "[T]he *nature* of the interstate traffic which [Congress has] . . . sought to suppress," he declared, was a question that could "not be overlooked" when considering the extent of Congress's power to enact regulations that "have the effect of prohibition."[58] That Congress possessed authority under the Commerce Clause to eradicate an "evil" traffic, such as the traffic in lottery tickets, did not necessarily imply a similar authority with respect to commodities that were "useful or valuable."[59]

Although this limiting language largely escaped the notice of contemporary commentators, the claim that the extent of Congress's power over interstate commerce varied in accordance with the nature of the commodity lawmakers were seeking to regulate can nonetheless be seen, at least in retrospect, as an important turning point in American constitutional development. Indeed, as we shall see in the paper's final section, Harlan's inquiry into the "nature" of the lottery traffic set in motion a chain of events that would in time cause many Americans to question the objectivity, and hence legitimacy, of the broader dual federalism framework.

The Federal Police Power and the Unraveling of Dual Federalism

To date, scholars have detected few links between the *Champion* decision and the eventual collapse, in the New Deal period, of the dual federalism framework. To be sure, *Champion* is viewed as a landmark decision, in the sense that it facilitated the growth of a federal regulatory apparatus dedicated to promoting public health and safety. But the Court's shift from a "dual" to a "cooperative" conception of the federal system is typically described as a development more or less distinct from the rise of the federal police power.[60]

The transformative Commerce Clause decisions of the New Deal period, including *NLRB v. Jones & Laughlin Steel* and *U.S. v. Darby*, were, after all, handed down more than thirty years after *Champion*.[61] In addition, the Court's 1918 ruling in *Hammer v.*



Moral panic gripped the nation in the mid-1890s, fueled by the realization that the "lottery evil" was sheltered by the orthodox conception of the federal system. Above are the headquarters of the Louisiana State Lottery Company on Charles Street in New Orleans and a publicity poster for the lottery.

Dagenhart is often described as limiting *Champion*'s usefulness as a precedent for further expansion of the commerce power. In *Hammer*, as we have seen, the Court held that the commerce power could only be used to prohibit interstate movement in cases where the goods in question were inherently harmful, or where the channels of interstate commerce were being used in such a way as to endanger public safety or morality. Thus, while Congress possessed the constitutional authority to ban the interstate transportation of liquor, lottery tickets, and prostitutes, it lacked the authority to prohibit the interstate movement of child-made goods, which posed no direct threat to the citizenry. The practical effect of the decision was to prevent Congress from using the threat of prohibitory legislation to regulate working conditions, agricultural outputs, and other subjects in the state-controlled sphere of "production." *Hammer* was, of course, overruled by the New Deal Court, but for reasons that seem, at first glance, to have had little to do with the Court's thirty-five-year-old decision in *Champion*.

Although space does not permit a full discussion of the origins of the New Deal "constitutional revolution," this section will challenge the conventional wisdom by arguing that *Champion* worked in two distinct ways to undermine the legitimacy of the dual federalism framework. First, the Court's efforts to cabin the *Champion* holding—most notably in *Hammer*—relied heavily on the distinction between harmful and harmless commodities, a distinction that proved particularly damaging to the popular legitimacy of the Court's federalism jurisprudence. Second, *Champion*'s endorsement of "indirect" federal regulation of crime and morality facilitated the enactment of a range of "commercial" regulations that were far removed from the lay definition of commerce. Although the new measures enjoyed broad public support, they also invited scrutiny—

and eventually ridicule—of a commerce power that could reach prostitutes and lottery agents, but that was all but useless in addressing the momentous economic challenges of the Depression years.

To appreciate *Champion*'s broader impact on the federal system, one must recall that the Fuller Court's previous rulings on the scope of the commerce power were for the most part rigidly formalistic, in the sense that they tended to define the scope of both state and federal regulatory authority without reference to the social consequences of particular industries or regulations. An obvious example is Fuller's *E.C. Knight* opinion, with its formal distinction between "commercial" and "productive" activities. But consider as well *Kidd v. Pearson* (1888), the decision in which the commerce-production dichotomy was originally formulated. Confronted with a Commerce Clause challenge to an Iowa law that banned the manufacture of liquor for export to other states or countries, the Court might easily have cited the negative social consequences of liquor as a reason to uphold the state's police regulation. And, yet, a careful review of the majority opinion reveals no reference whatsoever to the "injurious," "dangerous," or "evil" side effects of the liquor traffic. Instead, Justice Lucius Q.C. Lamar grounded his opinion solely on the distinction between productive (or manufacturing) and commercial processes. The former, which by definition took place inside the boundaries of particular states, were exclusively subject to state control. In contrast, interstate *commercial* processes—in essence, the transportation and exchange of goods across state lines—were within the domain of the federal government. The preemptive force of the Commerce Clause, Lamar reasoned, took effect only *after* an item was manufactured. As with any other product, the question of whether the manufacture of liquor should be permitted in the first place was for the state to answer.[62]

The absence of moralistic language in decisions such as *Kidd* was no accident. In fact, it was widely believed that the legitimacy of the dual federalism framework was closely tied to the perceived permanence and objectivity of doctrinal categories such as "commerce" and "police." As Owen Fiss has written, the Fuller Court's decisions in cases such as *Kidd* and *E.C. Knight* were motivated by a "determination to protect the limited character of the central government, as a government among governments, and to do so by using two categories or spheres of activity . . . to mark the bounds of the commerce power and the police power." To adjust the scope of either the commerce or the police power in response "to the desirability or need of the good manufactured would not yield the sharp distinctions" that were required for this task.[63] Indeed, to vary the reach of congressional power in response to the allegedly harmful (or beneficial) effects of a particular commodity or traffic would only encourage similar demands involving other allegedly harmful (or beneficial) forms of property. The resulting cases would expose the entire dual federalism framework to public scrutiny, inviting the challenge that the foundational concepts of commerce and police were simply social constructs that were susceptible to manipulation by lawmakers and judges. This was the point of Justice Fuller's warning in *E.C. Knight* that "acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run" of blurring the "vital" distinction between "the commercial power and . . . the police power."[64]

Justice Harlan, however, did not share this understanding of the federal system. The lone dissenter in *E.C. Knight*, Harlan had long argued for a more flexible approach to federalism questions, one that would afford greater leeway to both state *and* federal regulators in the case of commodities and transactions that were widely regarded as "harmful" or "evil."[65] But until the Lottery

Act reached the Court, Harlan's view had never commanded a majority. Indeed, on at least two prior occasions, both involving state liquor importation restrictions, the Court had explicitly rejected Harlan's efforts to incorporate what were essentially moral judgments into its Commerce Clause jurisprudence. In the first, *Bowman v. Chicago and Northwestern Railway Co.* (1888), Harlan argued in dissent that state importation bans did not impinge upon the federal commerce power, since the states' police powers entailed the right to prohibit importation of any item that "the people of a state believe, upon reasonable grounds" to be "dangerous" to public health or morals. Harlan's Brethren rejected this solution to the importation problem precisely on the grounds that the proposed standard was too subjective to provide a workable foundation for the federal system. To permit Iowa to ban the importation of a commodity simply because a majority of Iowans regarded the item in question as "dangerous" or "deleterious," Justice Stanley Matthews wrote, would be to subordinate the "interstate commerce of the country" to the "caprice and arbitrary will" of a temporary majority within a single state. The result would be "commercial anarchy."[66] The warning was repeated by Justice Fuller in *Leisy v. Hardin*, another liquor importation case decided two years after *Bowman*. Writing over the dissent of Harlan and two others, Fuller insisted that the boundary between state and federal authority must remain unaffected by "our individual views . . . as to the deleterious or dangerous qualities of particular articles."[67]

Although *Bowman* and *Leisy* were *dormant* Commerce Clause cases, a careful reading of the *Champion* dissent reveals that the reasons behind the Fuller Court's initial rejection of Harlan's dangerous property standard were equally relevant in the context of the affirmative commerce power.[68] If the concept of "harm" or "evil" was too subjective to effectively demarcate the outer limit of the states' police powers, the dissenters reasoned, then it was for the same reason unlikely to be an effective check against abuse of the federal commerce power. The discovery that Congress possessed the constitutional authority to eradicate "injurious" or "offensive" markets would almost certainly give rise to a steady stream of requests to sanction indirect uses of Congress's enumerated powers in cases where "present views of the public interest" seemed to require federal action.[69] Such cases would confront the Court with a pair of unappealing options: either it would defer to Congress on the question of whether particular commodities were in fact harmful, thus permitting Congress to define "the extent and limit of [its own] powers," or else the Court would itself become the arbiter of whether particular subjects of commerce were sufficiently harmful as to justify federal prohibition.[70] To choose the first option would, by definition, mean the demise of dual federalism. But the end result of choosing the second option, the dissenters seem to have believed, would likely be the same, since the federal system would then rest on nothing more substantial than the Justices' inevitably subjective judgments concerning the "offensive" or "injurious" nature of particular commodities.[71] The shell of the dual federalism framework would remain in place under this scenario, but the core tenet of an inviolable sphere of state sovereignty would be missing. As Fuller put the point, "it is with governments, as with religions, the form may survive the substance of the faith."[72]

One need only survey the aftermath of the Court's controversial *Hammer* decision to appreciate the prescience of Fuller's remarks. In particular, a careful review of the contemporary reaction to *Hammer* reveals that the task of distinguishing "harmful" and "harmless" commodities was every bit as difficult—and every bit as damaging to the Court's credibility—as the *Champion* dissenters had feared. Recall that Justice

William R. Day's opinion for the *Hammer* majority asserted that the products of child labor were "of themselves" harmless, and thus distinguishable from the interstate markets in liquor, lottery tickets, and prostitutes, all of which were by now subject to federal regulation under the commerce power. This claim was certainly not implausible, but neither was it self-evidently true; indeed, it was widely accepted, at least within the scholarly community, that the existence of an interstate market in child-made goods depressed prices and wages, thereby inflicting a tangible harm on residents of importing states.[73] In dissent, Justice Holmes accused the *Hammer* majority of substituting "its own moral conceptions" for those of lawmakers and the broader public, and the law reviews immediately picked up the theme.[74] William Carey Jones, writing in the *California Law Review*, concluded that there was "no substantial basis for making a distinction" between the "harms" addressed by the child labor law, and those addressed by previous federal laws regulating lotteries and prostitution. So flexible and subjective was the Court's conception of harm that it amounted to "no constitutional principle at all."[75] Thomas Reed Powell likewise responded to the *Hammer* decision by contrasting the Court's efforts to keep "intoxicants from inebriants" with its refusal to protect "the young from the perils of the mine and mill." When it came to judging the relative harms of particular commodities, it seemed that the Justices "think as for some reason they like to think."[76] Thurlow Gordon, writing in the *Harvard Law Review*, averred that the question of "[w]hether or not commodities work evil" was "a matter largely of opinion."[77] As more than one commentator pointed out, the Court would have been on firmer ground in invalidating the child labor law had it followed Fuller's lead and limited Congress's power to prohibit interstate transportation to commodities that threatened tangible harm to commerce itself. But having endorsed congressional regulations that "outlawed lottery tickets, and other articles innocuous in themselves"—articles that could only be said to "pollute" interstate markets in a metaphorical sense—the Court was ill positioned to resist demands for further easing of the proverbial pinching shoe.[78]

At the same time, the rapid proliferation of federal morals laws—a development clearly facilitated by the Court's ruling in *Champion*—posed a serious problem in its own right. In the years between the *Champion* and *Hammer* rulings, Congress used the commerce power as a vehicle for targeting prostitution, liquor, and impure food and drugs.[79] The trend continued in *Hammer*'s aftermath with the enactment of federal "commercial" regulations targeting kidnappers and car thieves.[80] The Court invalidated none of these measures; and indeed, *Hammer* explicitly endorsed the use of the commerce power to prohibit the use of interstate commerce for immoral or dangerous purposes. But the endorsement of the federal police power would return to haunt the Court during its confrontation with the Roosevelt Administration, as the existence of an expansive, Court-sanctioned federal regulatory apparatus dedicated to the control of *morality*—perhaps the most quintessential of traditional state functions—suggested that the boundaries of the federal system were far from immutable. Given that the Court had adjusted the boundaries of the federal system to accommodate the eradication of liquor and lotteries, the argument went, was it not obligated to be similarly accommodating of innovative economic regulations at a time when the national economy teetered on the brink of collapse?

A favorite line of attack, in both popular and academic critiques of the New Deal Court's federalism jurisprudence, was to juxtapose the sorts of federal laws that the Court had deemed valid uses of the commerce power with those it had declared to be beyond the ambit of "commerce." Thus, in the

aftermath of decisions invalidating key New Deal measures—including the National Industrial Recovery Act (NIRA), the Agricultural Adjustment Act (AAA), and the Guffey Coal Act—commentators drew attention to the irony of a "commerce" power that could reach moral deviants, but that was all but useless in addressing truly significant economic problems, such as labor unrest and agricultural overproduction. As a pair of commentators in the *Virginia Law Review* explained, the Court had held that "if *one* individual willfully transported *one* stolen automobile, or *one* woman across a state line for immoral purpose . . . or transported lottery tickets, prize fight films or intoxicating liquors," then the individual in question was "engaged in interstate commerce and subject to federal regulations." But to "regulate the production and sale of coal, or to forbid the interstate transportation of articles manufactured by child labor, was unmistakably beyond the federal power." In sum, the Court's Commerce Clause jurisprudence seemed to reflect "a peculiar blend of sweet morals and bad economics."[81] For a more sober formulation of the same point, one need only consult the Roosevelt administration's briefs supporting the constitutionality of New Deal reforms, particularly during the so-called Second New Deal. For example, in their defense of the second Agricultural Adjustment Act—a case they would win—administration attorneys observed that the stabilization of commodity prices was surely "much more closely related to the underlying objectives of the commerce clause than protection of the public morals against lotteries, prostitution, [automobile] theft, or kidnapping."[82]

Such criticisms were not limited to academic or official circles. In 1937, on the eve of the Court's dramatic reinterpretation of the Commerce Clause, *Time* magazine published a satirical essay in which a fictional Supreme Court Justice attempted to explain the definition of "interstate commerce" to a confused public.[83] The essay's author, a law professor named Thomas Cowan, began by acknowledging that many Americans were likely perplexed by the Court's decision to uphold the 1932 Federal Kidnapping Act as a valid commercial regulation while simultaneously invalidating the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Guffey Coal Act as exceeding the scope of the commerce power.[84] To the layperson who assumed that "commerce" had to do with "trade, business, commercial enterprise," it would no doubt appear that the latter statutes were more closely related to the regulation of "interstate commerce" than the federal kidnapping statute. The seasoned constitutional lawyer would know, however, that the true function of the commerce power was to provide for the disciplining of car thieves, prostitutes, and other moral deviants. In fact, the types of activities that most Americans associated with interstate commerce were virtually the only activities that Congress could *not* reach with this power. "For example," Cowan wrote, "it would never do to presume that the United States Steel Corporation is engaged in interstate commerce. Similarly, we could not presume that dealers in live poultry"—the industry at heart of the NIRA decision—"are engaged in interstate commerce. In fact, we cannot conceive how this could even be proved. If Congress, by statute should presume that the products of the bituminous coal industry"—the target of the Guffey Coal Act—"move in interstate commerce, we should have no hesitation in setting the act aside." On a polemical level, the essay was highly effective. As *Time*'s legal editor observed, Cowan had shown that the Court was "willing to expand the meaning of 'interstate commerce' when a law involves 'morals,' but [had] narrowly circumscribed Congress' power where business and industry were concerned."[85]

Had Justice Fuller lived to witness the Court's confrontation with the New Deal, he

no doubt would have viewed the *Time* essay as confirming the wisdom of his *Champion* dissent. At a critical juncture in American constitutional development, the Court had adjusted the scope of the commerce power in an effort to reconcile late-nineteenth-century social mores with Founding-era constitutional principles. But having once "eased the shoe where it pinched," the Court was unable to provide a persuasive justification for its refusal to do so again in the midst of the Great Depression.

This is not to suggest that *Champion* single-handedly sealed the fate of dual federalism as a viable theory of state-federal relations. Rather, it is simply to say that the Court's decisions upholding federal police measures deserve a far more prominent role in the story of the New Deal–era federalism revolution than they have traditionally received. Indeed, it is clear *Champion* and its progeny provided a backdrop of judicial pragmatism against which decisions invalidating major components of the New Deal could plausibly be described as rigidly formalistic and even hypocritical. At a time when the Court could ill afford challenges to the objectivity of its federalism jurisprudence, *Champion* stood as a constant reminder that the boundaries of the federal system were not as inflexible as the more conservative members of the Hughes Court were wont to claim.

ENDNOTES

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

[2] 247 U.S. 251 (1918).

[3] 156 U.S. 1 at 13.

[4] "An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States," 28 Stat. 963 (1895).

[5] This objection was based on the Court's recent ruling, in *Paul v. Virginia*, that insurance contracts did not involve a tangible exchange of commodities, and were thus excluded from the ambit of interstate commerce. 75 U.S. 168 (1869).

[6] 188 U.S. 321 (1903).

[7] In 1884, Congress had enacted a law, the Animal Industry Act, that banned diseased cattle from interstate commerce. Although the law's constitutionality was never directly challenged, the Court implicitly endorsed the measure in *Reid v. Colorado* (187 U.S. 137 [1902]).

[8] *Ibid.* at 371, 374.

[9] Walton H. Hamilton and Carlton C. Rodee, "Police Power," in Edwin R.A. Seligman, ed., **Encyclopedia of the Social Sciences**, vol. 12 (New York: Macmillan, 1934), 190-92.

[10] In the aftermath of the constitutional challenge to the Affordable Care Act, for example, a number of prominent scholars have drawn attention to *Champion*'s role in the construction of the modern commerce power. *See, for example*, Frank H. Easterbrook, "Federalism and Commerce," *Harvard Journal of Law & Public Policy* 36 (2013): 935-40, 935; John Valauri, "Baffled by Inactivity: The Individual Mandate and the Commerce Power," *Georgetown Journal of Law & Public Policy* 10 (2012): 51-88, 63; Michael S. Greve, **The Upside-Down Constitution** (Cambridge: Harvard University Press, 2012), 175. Other prominent scholars, intent on rolling back the post–New Deal expansion of the commerce power, have recently argued that *Champion* was wrongly decided, or at least wrongly applied in subsequent cases, and should therefore be overturned. Richard A. Epstein, **The Classical Liberal Constitution: The Uncertain Quest for Limited Government** (Cambridge: Harvard University Press, 2014), 165-66; Barry Friedman and Genevieve Lakier, "'To Regulate' Not 'To Prohibit': Limiting the Commerce Power," *The Supreme Court Review*, 2012 (2012): 255-320); Randy E. Barnett, **Restoring the Lost Constitution: The Presumption of Liberty** (Princeton: Princeton University Press, 2004), 310-312.

[11] On the legislative history of the lottery law, and on Senator Hoar's role in shepherding the legislation through Congress, *see* Herbert F. Margulies, "Pioneering the Federal Police Power: *Champion v. Ames* and the Anti-Lottery Act of 1895," *The Journal of Southern Legal History* 4 (1995-96): 45-60; and Gaines M. Foster, **Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920** (Chapel Hill, NC: University of North Carolina Press, 2002), 120-30.

[12] On the express companies' involvement in the litigation, *see* Robert T. Swaine, **The Cravath Firm and Its Predecessors, 1819-1948** (New York, 1946), 1:743-44; Margulies, "Pioneering the Federal Police Power," 46.

[13] Swaine, **The Cravath Firm and Its Predecessors**, 1:743-44.

[14] The *Champion* majority contained two Justices, White and Brown, who had earlier signed on to Fuller's *E.C. Knight* opinion.

[15] Alan N. Greenspan, "The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism," 41 *Vanderbilt Law Review* (1988): 1019-55, 1026. William Eskridge and John Ferejohn likewise argue that *Champion* reflected the Court's "puritan ideology." "The Elastic Commerce Clause: A Political Theory of American Federalism," 47 *Vanderbilt Law Review* (1994): 1355-400, 1383.

[16] On Harlan's religious commitments and opposition to the lottery industry, *see* Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (Lexington: University of Kentucky Press, 1992), 203. *See also* Linda Przybyszewski, **The Republic According to John Marshall Harlan** (Chapel Hill: University of North Carolina Press, 1999), 58. On Brewer, *see* Michael J. Broadhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837-1910** (Carbondale: Southern Illinois University Press, 1994), 128; Linda Przybyszewski, "Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer," *Journal of American History* 91 (2004): 471-96.

[17] *In Leisy v. Hardin* (1890), for example, the Court ruled that the Commerce Clause protected the right of individuals to import and sell out-of-state liquor, so long as it remained in its "original package," thus subjecting dry states to a massive influx of imported liquor. When Congress responded by enacting legislation that explicitly authorized state importation restrictions, the Court eviscerated the law in an 1898 decision authored by Justice White (who later joined the *Champion* majority). *Leisy v. Hardin*, 135 U.S. 100; *Rhodes v. Iowa*, 170 U.S. 412.

[18] Friedman and Lakier, "'To Regulate,' Not 'To Prohibit,'" 259.

[19] Barry Cushman, "Carolene Products and Constitutional Structure," *The Supreme Court Review*, 2012 (2012): 321-77, 342-44. Although these two characterizations of *Champion* differ in some important respects—Cushman reads the majority opinion as grounded on due process concepts, while Friedman and Lakier do not—they agree that the decision did not effect a fundamental restructuring of constitutional authority.

[20] 188 U.S. 321 at 362, 357.

[21] *Ibid.* at 356.

[22] Only a handful of commentators, citing Harlan's warning that Congress's "plenary" power over interstate commerce was not to be wielded "arbitrarily," urged a more cautious reading of the decision. *See, for example*, "Not a Blow at the Trusts," *New York Times*, February 25, 1903, p. 8; "Still an Open Question," *New York Times*, February 26, 1903, p. 8; "The Lottery Decision," *Chicago Daily Tribune*, February 25, 1903, p. 12.

[23] Edward B. Whitney, "The Latest Development of the Interstate Commerce Power," *Michigan Law Review* 1 (1903): 615-23, 623.

[24] "Right of Congress under Its Power to Regulate Commerce to Prohibit the Interstate Shipment of Any Specific Articles," *Central Law Journal* 56 (1903): 341.

[25] "Decision in Champion Case," *Wall Street Journal*, February 25, 1903, p. 8. *See also* "Trusts and the Lottery Decision," *The Independent* 55 (1903): 574: "Congress has power, under this decision, to prohibit transportation . . . and it may reasonably be inferred that the five justices of the majority would not attempt to restrain that power if it should be exercised to suppress evil practices injurious to the public welfare"; Russell, "Three Constitutional Questions," 507: "[*Champion* holds that] the commercial power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution itself. Important consequences may flow from this decision . . . Congress may [now] prohibit the transportation between states of goods manufactured in violation of antitrust laws"; *"Supreme Court and Lotteries," Zion's Herald*, Mar 4, 190, p. 2: "This decision fully sustains the anti-trust policy of President Roosevelt. It resolves doubt as to the force of the Sherman law and other measures that have been passed at the session just closed ... Any form of interstate traffic—intoxicating liquors, cigarettes, obscene literature and other abominations—may now be prohibited by Congressional legislation regardless of State laws on the subject"; "The Anti-Lottery Decision," *Outlook*, Mar 7, 1903, p. 505: "[The *Champion* decision] indicates a probability that the SC will decide, whenever the question is presented, that Congress may prohibit the use of interstate commerce for any articles so controlled that the conditions of their sale are oppressive and work injustice to the people'; "The Lottery Case," *Columbia Law Review* 3 (1903): 410-11, 411: "the ground of the limitation [of the decision] to lottery tickets . . . is not apparent . . . Nor can the power to prohibit be limited to what is against public health and morals."

[26] For example, John W. Davis, a prominent attorney and future Democratic presidential nominee, warned in the *American Lawyer* that *Champion* had made it possible for Congress to "declare what articles shall be the subject of commerce and then regulate commerce as so defined," thus expanding "its own power under the guise of definition." William Sutherland, another critic of the decision, noted in the *American Law Review* that Congress was now free to use its "prohibitory power with reference to other articles, as beef, wheat, fruit, or coal, which have hitherto been justly deemed articles of commerce." A commentator in the *Harvard Law Review* went further, perceiving in *Champion* a "tendency towards an obliteration of state lines and a centralization of power in the federal government." John W. Davis, "The Growth of the Commerce Clause," *The American Lawyer* 15 (1907): 213; William A. Sutherland, "Is Congress A Conservator of the Public Morals?" *The*

American Law Review 38 (1904): 194-208, 208; "The Lottery Case," *Harvard Law Review* 7 (1903): 508-9, 509.

[27] Margulies, "Pioneering the Federal Police Power," 51.

[28] *Ibid.*, 55.

[29] Thomas M. Cooley, "Taxation of Lotteries," *Atlantic Monthly* 69 (April 1892): 523-34, 525.

[30] *Ibid.*, 526, 534.

[31] For a recent and comprehensive overview of the Clause's origins, *see* Mark R. Killenbeck, "A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States," *Journal of Supreme Court History* 38 (2013): 281-308.

[32] *Federalist*, No. 22; *Federalist*, No. 11, in **Alexander Hamilton, James Madison and John Jay, The Federalist Papers**, ed. Garry Wills (New York: Bantam, 1982), 104, 53.

[33] Friedman and Lakier, "'To Regulate' Not 'To Prohibit,'" 263-70; David Brion Davis, **The Problem of Slavery in the Age of Revolution**, 1770-1832 (Ithaca: Cornell University Press, 1975), 128-29; David L. Lightner, **Slavery and the Commerce Power: How the Struggle against the Interstate Slave Trade Led to the Civil War** (New Haven: Yale University Press, 2006), 36.

[34] On the disjunction between nineteenth-century social mores and Founding-era constitutional principles, *see* John W. Compton, **The Evangelical Origins of the Living Constitution** (Cambridge: Harvard University Press, 2014).

[35] Lyman Beecher, "Six Sermons on Intemperance," 66, 72.

[36] "Lotteries," *Friends' Review* 8 (1855): 394; "The Lottery Humbug," *Saturday Evening Post*, August 18, 1860, p. 2.

[37] Friedman and Lakier, "'To Regulate' Not 'To Prohibit,'" 269-70.

[38] Indeed, W.J. Rorabaugh notes that the early nineteenth century witnessed the emergence of a thriving interstate market in liquor, as transportation networks improved and the opening of the frontier produced a glut of grain. In fact, the vast majority of the liquor consumed in the eastern seaboard states in the early nineteenth century was produced on the Western frontier. Rorabaugh, **The Alcoholic Republic: An American Tradition** (New York: Oxford University Press, 1979), 76-92.

[39] Thus, Justin Edwards, chief propagandist for the American Temperance Society, declared that license laws made "the whole community . . . partakers in the guilt of [the liquor traffic]. They not only license a man to do what is wrong, but they take the price which he pays for it, and put it into the public treasury." "Temperance," *Christian Watchman* 17 (February 19, 1836), 32. For summaries of the key theological shifts associated with the Second Great Awakening, *see* Perry Miller, **The Life of the Mind in America: From the Revolution to the Civil War** (New York: Harcourt, Brace, Jovanovich, 1965), 27-35; Hatch, **The Democratization of American Christianity**, 17-46; E. Brooks Holifield, **Theology in America: Christian Thought from the Age of the Puritans to the Civil War** (New Haven: Yale University Press, 2003), 341-69; Hirrell, **Children of Wrath; Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815-1848** (New York: Oxford University Press, 2009), 285-327.

[40] Lyman Beecher, **Six Sermons on the Nature, Occasions, Signs, Evils and Remedy of Intemperance** (New York: American Tract Society, 1827), 63.

[41] It should be noted that the Court's 1847 rulings in the *License Cases* (upholding state liquor regulations against a Commerce Clause challenge) is sometimes described as confirming the constitutionality of state liquor prohibition measures. Yet it is important to note that this case involved license laws and local option measures, not statewide prohibition. And, indeed, several of the Justices who authored opinions in the *License Cases* emphasized that the challenged laws did not significantly hinder the movement of liquor in interstate commerce. As Justice Woodbury observed, "importations" still went on "abundantly into each of [the] states" in question. 46 U.S. 504 at 619-20. *See also* Justice McLean at 46 U.S. 591 and Justice Daniels at 46 U.S. 617. For the view that the *License Cases* confirmed the states' authority to prevent the importation of liquor, *see, for example*, Owen M. Fiss, **History of the Supreme Court of the United States: The Troubled Beginnings of the Modern State** (New York: Macmillan, 1993), Chapter 9.

[42] Henry William Blair, **The Temperance Movement** (Boston: W.E. Smythe, 1887), 378.

[43] *Ibid.*, 388, 389.

[44] On Congress's efforts to curb the mailing of lottery materials, *see* Wayne W. Fuller, **Morality and the Mail in Nineteenth-Century America** (Urbana, IL: University of Illinois Press, 2003), 192-206; Gaines M. Foster, **Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920** (Chapel Hill, NC: University of North Carolina Press, 2002), 119-23.

[45] *Ex Parte Jackson*, 96 U.S. 727, 735 (1878). *See also In Re Rapier*, 143 U.S. 110 (1891).

[46] "The 'Central American Express,' *New York Times*, Feb. 9, 1894, p. 4; "The Great Lottery Fraud," *New York Times*, Feb. 26, 1894, p. 4; "The New Anti-Lottery Campaign," *Outlook*, February 10, 1894, p. 259.

[47] "The Lottery and Florida Law," *New York Times*, Feb. 4, 1894, p. 4; "The Lottery Swindlers," *New York Times*, April 19, 1894, p. 4; "The Country to the Rescue of Florida!" *The Independent*, February 8, 1894, p. 10. Lotteries were technically illegal in Florida, but a

loophole in the law—inserted at the company's behest—permitted lottery companies to operate in the state, provided that drawings were conducted elsewhere.

[48] Edward S. Corwin, **The Twilight of the Supreme Court: A History of Our Constitutional Theory** (New Haven: Yale University Press, 1934), 35.

[49] No less than 157 anti-lottery petitions poured into the first session of the Fifty-third Congress (1894-95). *See* Ezell, **Fortune's Merry Wheel**, 264-65; Alwes, "History of the Louisiana State Lottery Company," 1083-85.

[50] "The Anti-Lottery Campaign," *Outlook*, February 17, 1894, p. 308.

[51] "The Lottery in Florida," *New York Times*, February 3, 1894, p. 4; "The Lottery Still With Us," *Congregationalist*, February 15, 1894, p. 222.

[52] "The Country to the Rescue of Florida!" *The Independent*, February 8, 1894, 10. In the very same week, the *Outlook* declared it the duty of "the patriotic and Christian people of the whole Nation" to urge Congress to use its commerce power to "prohibit . . . transmission" of lottery matter "from State to State." "The New Anti-Lottery Campaign," *The Outlook*, February 10, 1894, 259. The *New York Times* was one of the few outlets that refused to endorse the constitutionality of a federal lottery law. The *Times* was "not prepared to say" exactly "how far the transportation of lottery material in the charge of express companies and their agents can be dealt with under the inter-State commerce [power]." "The Great Lottery Fraud," *New York Times*, February 26, 1894, p. 4.

[53] 156 U.S 1 at 12-16.

[54] This point is discussed in Charles W. McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (1979): 304-42. *See also* James W. Ely, **The Chief Justiceship of Melville W. Fuller** (Columbia: University of South Carolina Press, 1995), 130.

[55] On the legislative history of the Wilson Act, *see* Richard F. Hamm, **Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920** (Chapel Hill, NC: University of North Carolina Press, 1995), 79-88.

[56] 188 U.S. 321 at 372.

[57] 188 U.S. 321 at 357-58 (emphasis added).

[58] *Ibid.* at 355.

[59] *Ibid.* at 362.

[60] For examples of major studies of the New Deal–era federalism revolution that either omit *Champion* or else mention the decision only in passing, *see* Bruce Ackerman, **We the People: Transformations** (Cambridge: MA, Belknap Press, 1998); Barry Cushman, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution** (New York: Oxford, 1998); G. Edward White, **The Constitution and the New Deal** (Cambridge, MA; Harvard University Press, 2000).

[61] 301 U.S. 1 (1937); 312 U.S. 100 (1941).

[62] 128 U.S. 1 (1888). This is not to suggest that Lamar was guilty of employing a naïve brand of formalism. As Barry Cushman has pointed out, the *Kidd* decision was probably influenced by the very practical fear that a decision invalidating state prohibition laws on dormant commerce clause grounds would trigger a flood of litigation aimed at invalidating other state-level manufacturing regulations. Such a decision, he writes, might well "have been the single greatest act of deregulation in American history." Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," *University of Chicago Law Review* 67 (2000): 1089-150, 1124.

[63] Fiss, **The Troubled Beginnings of the Modern State**, 116.

[64] 156 U.S. 1 at 13.

[65] On Harlan's approach to the Commerce Clause, *see* Fiss, **Troubled Beginnings of the Modern State,** 114-17; Przybyszewski, **The Republic According to John Marshall Harlan,** 152-57.

[66] 125 U.S. 465, 494 (1888).

[67] 135 U.S. 100, 114 (1890).

[68] On the interconnected nature of the Fuller Court's dormant and affirmative Commerce Clause jurisprudence, *see* Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1126. As Cushman writes, "Affirmative Commerce Clause doctrine during this period . . . was the flip side of the Court's dormant Commerce Clause jurisprudence." Both areas of doctrine were "driven" by the twin goals of "secur[ing] a national market for the products of an increasingly vibrant and integrated economy, while at the same time preserving state and local prerogatives to regulate business in an era of comparative federal lassitude."

[69] 188 U.S. 321 at 372.

[70] *Ibid.* at 367.

[71] The question of whether it was possible to arrive at an objective definition of "harmful" or "injurious" property was much debated in the 1890s as a result of the Court's decision in *Mugler v. Kansas* (upholding a Kansas prohibition law against a Fourteenth Amendment due process challenge). Any suggestion that there existed, at the time of the *Champion* decision, an uncontroversial definition of "harmful" property is belied by the numerous law review articles attacking the *Mugler* decision. *See, for example*, W. Frederic Foster, "The Doctrine of the United States Supreme Court of Property Affected By a Public Interest, and Its Tendencies," *Yale Law Journal* 5 (1895): 49-82, 57; Everett V. Abbot, "The Police Power and the Right to Compensation," *Harvard Law Review* 3 (1889): 189-205, 205; George Hoadly, "The Constitutional Guarantees of the Right of Property

as Affected by Recent Decisions," *Journal of Social Science* 26 (1890): 13-55, 53-55; J.I. Clark Hare, **American Constitutional Law** (Boston: Little, Brown and Company, 1889) 2: 772, 776-77; Christopher G. Tiedeman, **A Treatise on the Law of Sales of Personal Property** (St. Louis: F.H. Thomas, 1891), 513.

[72] *Ibid.* at 374.

[73] *See, for example*, Thurlow M. Gordon, "The Child Labor Law Case," *Harvard Law Review* 32 (1918): 45-67, 55.

[74] 247 U.S. 251 at 280.

[75] William Carey Jones, "The Child Labor Decision," *California Law Review* 6 (1918): 395-417, 408, 410.

[76] Thomas Reed Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," *Southern Law Quarterly* 3 (1918): 175-202. *See also* Walter F. Dodd, "Extra-Constitutional Limitations on Legislative Power," *Yale Law Journal* 40 (1931): 1188-1218, 1212. Dodd cited the Court's recent decisions on the question of whether "the power to regulate interstate commerce includes the power to prohibit" as evidence that the Commerce Clause "derives its real content" from the Justices' idiosyncratic "considerations of wisdom and morality."

[77] Gordon, "The Child Labor Law Case," 49, 54, 58.

[78] Jones, "The Child Labor Decision,"408. As Theodore Cousens observed in the *Virginia Law Review*, "[p]rostitution and lotteries" were "evil things, but no less evil is a system of commerce which drags down wage scales and work standards all over the Union to feed the callous greed of a few backward states." "The Use of the Federal Commerce Power to Regulate Matters within the States," *Virginia Law Review* (1934-35): 51-75, 68, 75.

[79] For the Court's decisions upholding these measures, *see Hoke v. United States*, 220 U.S. 45 (1911); *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311 (1918); *United States v. Hill*, 248 U.S. 420 (1919); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

[80] *See Brooks v. United States*, 267 U.S. 432 (1925); *Gooch v. United States*, 297 U.S. 124 (1936).

[81] James William Moore and Shirley Adelson, "The Supreme Court: 1938 Term," *Virginia Law Review* 26 (1939): 1-69, 15 (emphasis in the original). This juxtaposition of decisions upholding "commercial" regulations that targeted personal vices with decisions invalidating economic regulations as beyond the scope of the commerce power was a constant theme in the law review literature of the mid-1930s, and can also be found in many popular periodicals. *See, for example*, D.O. McGovney, "Reorganization of the Supreme Court," *California Law Review* 25 (1937): 390-412, 402-3; "Recent Decisions," *N.Y.U. Law Review* 13 (1935-36): 286-89, 288; "Editorial Notes," *Brooklyn Law Review* 5 454-72, (1935-36): 463-64; Douglas B. Maggs, "The Constitution and the Recovery Legislation: The Roles of Document, Doctrine, and Judges," in Max Radin and A. M. Kidd, eds., **Legal Essays in Tribute to Orrin Kip McMurray** (Berkeley: University of California Press, 1935), 399-438, 426, 403-4; Morris R. Cohen, "What to Do with the Supreme Court," *The Nation*, July 10, 1935, 39-40.

[82] *Mulford v. Smith*, Brief for the United States, 88-89.

[83] "Ex Parte Snatch," *Time*, March 15, 1937, pp. 36-37. The essay was a condensed version of a law review article by Professor Thomas A. Cowan. "Ex Parte Snatch," *Illinois Law Review* 31 (1937): 737.

[84] The Federal Kidnapping Law (or Lindbergh Law), which used the commerce power to impose federal criminal penalties for kidnapping in instances where the kidnappers crossed state lines, was upheld in *Gooch v. United States*, 297 U.S. 124 (1936).

[85] "Ex Parte Snatch," 37.

Citizenship, Gender, and Conscience: *United States v. Schwimmer*

MEGAN THRELKELD

In the spring of 1929, fifty-one-year-old Rosika Schwimmer had every reason to feel confident that she would soon be a United States citizen. She had filed a petition for naturalization four-and-a-half years earlier in Chicago, Illinois. A District Court judge denied that petition in late 1927, but the following spring his decision was reversed by the Seventh Circuit Court of Appeals. When the United States appealed to the Supreme Court, Schwimmer's supporters—among whom she counted Jane Addams, Roger Baldwin, Carrie Chapman Catt, and other prominent Americans—mobilized on her behalf, raising money, writing letters, and making public statements. By April 1929, when the Court heard arguments in the case, Schwimmer and her lawyers believed she would win. Even the U.S. Solicitor General thought his own chances of victory slim. But on May 27, in a 6-3 decision, the Court denied Schwimmer's petition on the grounds that she was not sufficiently "attached to the principles of the Constitution," as required by naturalization law. Their evidence? When asked if she would be willing to bear arms in defense of the nation, Schwimmer said "no."

Born in Hungary in 1877, Schwimmer had spent considerable time in the United States, giving lectures and attending conferences on pacifism and women's rights. She settled permanently in Chicago in 1921 after being exiled from Hungary for her political beliefs. Her pacifism was evident on her original petition:

> 22. If necessary, are you willing to take up arms in defense of this country?
>
> A. I would not take up arms personally.[1]

No women were allowed to serve in the U.S. military in the 1920s, let alone those over fifty. Schwimmer argued her pacifism

did not preclude her ability to take the oath of allegiance because no woman was asked to bear arms in defense of the nation. Why then was this woman rejected for her unwillingness to perform an action she would not have been allowed to perform even if she were willing? The explanation lies in the shifting terrain of citizenship, gender, and nationalism in the 1920s.

The Petition

The 1920s was a profoundly contentious decade. Religious and political conservatives felt threatened by the emergence of modern, secular, commercial culture. Women voted, attended college, worked outside the home, and occasionally pushed the boundaries of socially acceptable behavior, but gender norms and expectations were still fully entrenched. After decades of watching millions of immigrants land on its shores, the United States closed the door on immigration between 1921 and 1924, following a groundswell of nativism and calls for "100% Americanism." Even as new ideas and new forms of cultural expression circulated widely in magazines, movie theaters, and advertisements, the government frequently clamped down on radicalism and dissent. The decade of the Jazz Age, the New Woman, and the Harlem Renaissance was also the decade of the first Red Scare, the *Scopes* trial, and the execution of Sacco and Vanzetti.

Schwimmer was already a rather notorious figure by the mid-1920s. After several decades of activism in her own country, she came to the United States for the first time in August 1914, where alongside U.S. colleagues she attempted to persuade Woodrow Wilson to intervene and mediate the European conflict. That attempt was unsuccessful, but over the next several months she toured the country, speaking to large crowds about the horrors of war and helping to organize peace associations. In late 1915, she persuaded Henry Ford to send an envoy of pacifists and social reformers to Europe to convene a conference on mediation. The "Peace Ship" was ridiculed in the press and failed to have any measurable impact on European leaders, and it was at that point that Schwimmer began to develop a reputation in the United States as a troublesome meddler, a swindler, and even a German spy. Her continued efforts on behalf of peace over the next few years only furthered suspicions of her, especially after the United States joined the war in 1917 and the country entered a frightening period of hyper-patriotism, condemning dissent in any form and rallying behind 100% Americanism. In the early 1920s, Schwimmer was also accused of being a Bolshevik agent, even though her final exit from Hungary came about when she refused to serve in the government of Communist Béla Kun. She settled permanently in the United States in 1921, but her efforts to establish some kind of journalistic career were thwarted by continued attacks from political conservatives. One of the reasons Schwimmer wanted U.S. citizenship was that she thought officializing her status would help clear her name against charges of disloyalty. "Getting citizenship is the only means to disprove all the accusations and rumors against me," she wrote to her lawyer in December 1926. "*I must get citizenship*—besides all other reasons—*to clear my name*."[2]

Schwimmer did not think her pacifism precluded her loyalty to the United States. When she filed her preliminary petition for citizenship in December 1924 she did not answer question twenty-two, believing it applied only to men. Her application was returned to her with the demand that she answer the question.[3] Schwimmer had already established a cordial relationship with Fred Schlotfeldt, the District Director of Naturalization in Chicago—himself a naturalized German immigrant. She described Schlotfeldt as very helpful and encouraging;

he agreed to expedite her preliminary petition so that it would not get stuck in the long line of others filing at the same time. But when the Department office in Washington returned Schwimmer's preliminary petition, she felt Schlotfeldt underwent a "metamorphosis." He urged her to answer question twenty-two affirmatively, and declared she "had not the ghost of a chance" of gaining citizenship if she declared her refusal to bear arms. Schwimmer persevered: "Having, as I now know, obsolete ideas about Americanism, I insisted on going through the whole process of examination, unable to believe the U.S.A. would be the first civilized country to compel women to take up arms."[4] As a woman, she considered the issue of her pacifism moot.

The first formal step in her examination was an official interview with Schlotfeldt on September 22, 1926. He again pressured Schwimmer to answer "yes" to question twenty-two, declaring he could not approve her application if she remained unwilling to defend the United States. Schwimmer assured him she could very well defend the country without doing so by force of arms.[5] But this was not enough for Schlotfeldt, who denied her petition, ruling that Schwimmer qualified for citizenship "except in so far as . . . [she] is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."[6] Schlotfeldt took that language from the Naturalization Act of 1906, which established the federal government as the arbiter of naturalization policy (rather than individual states), set a uniform standard for evaluating naturalization petitions, and detailed the manner in which those petitions would be submitted and evaluated. The act required

A Budapest-born women's rights advocate and pacifist, Rosika Schwimmer worked for female suffrage and peace both in her native Hungary and internationally. She moved to Chicago in 1921 as a political exile and applied for naturalization. When asked on the form whether she would "bear arms" for the United States, as a conscientious objector she answered "no."

candidates to renounce any allegiance to any foreign authority, and to declare that they would "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." The act also mandated that applicants for citizenship had to live in the United States for at least five years; during that time any applicant had to demonstrate to the presiding court's satisfaction that in those five years he or she had evinced "good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."[7] These two passages of the 1906 act became the focal point not only of Schlotfeldt's decision on Schwimmer's petition, but also of the Supreme Court's deliberations on her case.

The District Court

After Schlotfeldt's preliminary ruling, Schwimmer waited over a year for a hearing before a District Court judge. During that time, Schlotfeldt asked her to elaborate on her "so-called pacifist theory or inability to defend the country."[8] Schwimmer did so at length. The core of her argument was gendered: as a woman, her refusal to bear arms for the United States did not preclude her loyalty or her ability to defend it. "I can not see that a woman's refusal to take up arms is a contradiction of the oath of allegiance," she explained. "Promising to support and defend the Constitution and the laws of the United States of America I have—for the fulfillment of this duty—other ways and means in mind." These included participation in civic life through reading, attending meetings, and giving lectures. Schwimmer made clear her desire to renounce her loyalty to Hungary and pledge her allegiance to the United States. "I have chosen to apply for American citizenship," she declared, "because the United States of America seemed to me a haven of refuge from a country where social prejudices and feudal institutions have grown intolerable to self-respecting men and women. I am therefore whole-heartedly prepared . . . to 'support and defend the Constitution and the laws against all enemies, foreign and domestic.'"[9]

But the statements that resonated most strongly for Schlotfeldt—and later for both the District Court judge and the Supreme Court—came from words Schwimmer had written to another person in another context. In 1925, the Military Intelligence Association of Chicago, a non-governmental organization dedicated to publicizing information about "subversive" or "dangerous" people and activities, accused Schwimmer of jeopardizing national security because of her pacifism, and of having been a German agent during the war.[10] In a letter to Colonel Lee Alexander Stone, the head of the Association, Schwimmer explained that, while she was indeed a radical pacifist, she was loyal to the United States, and she demanded that Stone retract his accusations. Professing her desire to be as honest and transparent as possible, Schwimmer articulated her core beliefs to Stone as proof that she was not a foreign spy. "I am an uncompromising pacifist," she told him, "for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. I have no sense of nationalism, only a cosmic consciousness of belonging to the human family."[11] Those words would follow her all the way to the Supreme Court.

Sometime in early 1927, Stone sent the letter to Schlotfeldt. When pressed, Schwimmer confirmed her statements. She pointed to her refusal to expedite her application by answering "yes" to question twenty-two as evidence of her "uncompromising" pacifism, but she saw no reason why that should disqualify her for U.S. citizenship. She considered it her duty "to uphold most emphatically the American Constitution and the American form of government in which I believe, and to oppose such forms of

Labor lawyer Olive Rabe was the fourteenth woman to argue before the Supreme Court. She had met Schwimmer in Chicago while teaching citizenship classes as a sideline to her labor law practice. Several years after losing the case in the Supreme Court, Rabe moved to Arizona for health reasons and went on to co-author children's plays, children's books, and biographies of Louisa May Alcott and Emily Dickinson.

government which are not based on democracy and self-government." She had already and would continue to argue against any attacks on the United States when she came across them in publications and in meetings, she asserted. As far as her atheism, Schwimmer argued it was a private matter, but she stated her admiration for the separation of church and state as a fundamental principle of the United States. Her lack of "nationalistic feeling," finally, was proved by her desire to give up the nationality of her birth. Olive Rabe, Schwimmer's lawyer, argued further that nationalism had negative connotations in Central Europe that it did not have in the United States. "Is it strange," she asked, "that a subject of Hungary should disavow a sense of nationalism when we remember that in Europe the concept does not embrace as it does with us the idea of good will toward other nations and an unwillingness to aggrandize at the expense of the rights of other nations?"[12] And Schwimmer's "cosmic consciousness of belonging to the human family," as she argued herself, was shared not only "by all those who believe that all human beings are the children of God," but also by the American Legion, which had adopted a resolution in 1925 encouraging the education of children in the basic principles of internationalism.[13]

Rabe, who came on as Schwimmer's lawyer sometime in early 1927, prepared a brief that she believed would effectively refute Schlotfeldt. "From a purely legal point of view," Rabe wrote to Schwimmer, "we can make [him] look ridiculous."[14] Rabe's

argument rested on four points, all of which would continue to make up the basis for Schwimmer's defense over the next two years. First, Rabe pointed out the lack of legal ground for requiring applicants for U.S. citizenship to declare their willingness to bear arms in defense of the country. Congress had power over naturalization, and the Naturalization Act of 1906 made no mention of taking up arms. Second, Rabe argued that Schwimmer could take the oath of allegiance and swear her willingness to defend the United States without being obliged to bear arms. "The tongue is mightier than the sword," she contended, and "the tongue of a woman applicant would surely be a more effective weapon than a rifle in her hands." Third, Rabe pointed out that conscientious objectors had already been recognized by Congress and exempted from military service; therefore COs could not be barred from citizenship on that ground alone. Finally, Rabe called attention to the fact that authority to raise an army and a navy rested solely with Congress, and Congress had limited membership in the armed forces to men. A woman's willingness to bear arms was therefore irrelevant. "A woman is debarred by law from entering the armed forces of the United States and the militia of all the States comprising this Naturalization District," Rabe wrote, "and still a federal judge is asked to deny a woman citizenship because she says she would not take up arms personally in defense of her country. So far as we know, nobody but the District Director of Naturalization wants her to."[15]

Unfortunately for Schwimmer and Rabe, District Court Judge George Carpenter, who heard the case in October 1927, dismissed not only their arguments about gender, but the rest of Rabe's legal contentions as well. Carpenter was a Chicago native who had been appointed to the court in 1910 by William Howard Taft, who in 1927 was serving as the Chief Justice of the United States. He made his views on Schwimmer's case clear from the start. In a preliminary meeting with Schlotfeldt and Rabe on September 19, Carpenter told the latter "in a very decided manner" that, unless Schwimmer was "willing to give the last drop of [her] blood in defense of this country," she would never get citizenship in his court. When Rabe pointed out that every piece of legislation passed by Congress concerning the armed forces "provided that only able bodied male citizens should serve . . . *Judge Carpenter said this made no difference.* . . . [He] maintained insistently that it was not possible to take the oath of allegiance unless the applicant was willing to bear arms in defense of the country."[16]

Carpenter displayed this same attitude at the hearing. He pointed out repeatedly that women were not in fact called on to fight—"We have not as yet a regiment of Amazons," he noted—but relentlessly pressed Schwimmer on her unwillingness to do so. He asked whether she would be willing to serve as a nurse or as auxiliary support. Schwimmer answered, "I am willing to obey every law that the American Government compels citizens to do." He asked about her "uncompromising pacifism," he pressed her on whether she would try to influence others, and he admonished her about the proper duties of citizenship. Schwimmer remained steadfast. She repeated several times that she would not fight in defense of the United States, but said she would not actively prevent others from doing so. In the end she declared again: "I am willing to do everything that, to my knowledge to this day, American women are asked to do."[17]

Carpenter pushed her further, putting to her a hypothetical situation. If she were serving as a nurse in a war, and saw an enemy solider enter a building "with a pistol in his hand to shoot the back of an officer of our country, and you had a pistol handy by, would you kill him?" Schwimmer responded she would not. With his next breath Carpenter denied her petition. It was

only at the urging both of Rabe and of Schlotfeldt's representative that he allowed the hearing to continue. When asked further questions by William Gemmill, Olive Rabe's co-counsel, Schwimmer clarified that she would not stand idly by as a U.S. officer was gunned down. She would warn him, and she would try to throw herself at the enemy soldier, even if it meant she ran the risk of being shot herself. But Carpenter again denied the petition. "I am really refusing this," he stated, "because . . . it is an attitude—the attitude of the applicant—that I think is not common with the women of this country."[18] On November 14, 1927 Carpenter issued his official ruling. He agreed with Schlotfeldt that Schwimmer was "not attached to the principles of the Constitution" and therefore unable to take the oath without reservation.

Carpenter had already made up his mind about Schwimmer based on her pacifism. Even before the hearing, he decided that she would not get citizenship in his court as long as she remained unwilling to bear arms in defense of the United States. Even as he repeated that American women were not asked to fight, and even though he clearly believed they should not be asked, he demanded that Schwimmer be willing to do so. His reference to "Amazons" and his repeated assurances that women would never be called on to fight laid bare his defense of traditional gender roles. He did not want Schwimmer to fight, but he demanded that she be willing to do so. To his mind, this was the proper "attitude" for "women of this country." They should express their willingness to fight, with the understanding that they would never be asked—or allowed—to do so. Schwimmer's refusal to agree to this implicit, hypocritical bargain proved her downfall.

As a fifty-one-year-old woman, there was no chance that Schwimmer would actually be asked by her country to bear arms. To the Supreme Court, however, the chance that Schwimmer could influence others—including men eligible for service—to conscientiously object far outweighed the chance she would be asked as a citizen to carry a gun.

The Appeal

Schwimmer's case came before the United States Circuit Court of Appeals for the Seventh Circuit in the spring of 1928. In her brief for the appellate court, Rabe relied on and expanded the arguments she had made at the district level. The core of her argument was that Congress alone had the power to regulate both naturalization and to raise armies and navies, and therefore in attempting to set the rules for naturalization beyond what Congress had stated and in demanding that Schwimmer be willing to bear arms when Congress did not allow women to do so, the judicial system was usurping its authority.[19] The United States, for its part, relied on the notion that Schwimmer's refusal to bear arms proved she was not "attached to the principles of the Constitution," as required by the Naturalization Act of 1906. U.S. Attorney George E.Q. Johnson began by attacking the notion of conscientious objection in general. He argued that privileging individual religious beliefs over state concerns was not in fact "conscientious," and he labeled pacifism

a vice equivalent to thievery and anarchy. Johnson dismissed any idea that Schwimmer should be exempt from declaring her willingness to bear arms just because she was a woman. Schwimmer herself was not saying she would not bear arms because she was a woman, but because she was a pacifist. Therefore, in Johnson's opinion, "the willingness of the petitioner to assume all the duties of citizenship, including that of military service, *if deemed necessary* by the Government, is no more irrelevant than in the case of a man who was above the draft age."[20]

The Seventh Circuit Court of Appeals sided with Schwimmer. The three-judge panel pointed explicitly to Schwimmer's gender in reversing the district court's opinion and granting her application for citizenship:

> Women are considered incapable of bearing arms . . . Appellant, if admitted, cannot by any present law of the United States be compelled to bear arms. Judging by all the conscription acts of which we have knowledge, she never will be required to do so; yet she is denied admission to citizenship because she says she will not fight with her fists or carry a gun.[21]

The appellate court relied on a gendered interpretation of citizenship in its ruling, deciding that since Schwimmer, as a woman, would never be asked to bear arms in defense of the United States, her refusal to do so was not grounds to deny her admission. The judges argued that male and female citizens did not have identical obligations to the state, and ruled that therefore they should not be held to identical standards for naturalization. The Court of Appeals thus disagreed with the United States that Schwimmer's gender was irrelevant.

Solicitor General William D. Mitchell and his staff initially had no interest in appealing the case to the Supreme Court—not because they thought Schwimmer deserved citizenship, but because they thought the case against her weak. Mitchell agreed with Judge Carpenter that the real threat came not from Schwimmer's refusal to bear arms, but from her ability to influence others. Carpenter, however, had not pressed her sufficiently on this point; he had gotten her to admit that she did not care whether other *women* bore arms, but he had not asked her whether she would try to influence those who were actually eligible for military service—men. Gardner P. Lloyd, who served as Acting Solicitor General while Mitchell was away from the office for most of August 1928, contended "there is nothing *in the record* to show that the woman is not attached to the principles of the Constitution." And Henry Ridgely, a Justice Department lawyer and one of the attorneys who had signed the government brief to the Circuit Court of Appeals, found himself unable to argue with that court's opinion: "The whole record—and that is all we have to consider—does not, it seems to me, make a case which would cause the Supreme Court of the United States to search for a reason to uphold her ineligibility to citizenship." In late August, Mitchell's office spread word that they would not seek to appeal the case to the Supreme Court.[22]

Within a month, however, Mitchell was bullied into reversing his decision by Robe Carl White, Acting Secretary of Labor. Why White should have taken such a strong position against Schwimmer—against the legal judgment of his colleagues—is unclear, but the Labor Department in the 1920s was a hotbed of "100% Americanism."[23] White presented his case against Schwimmer on several different occasions throughout the late summer and fall of 1928. In July he wrote a detailed letter to Mitchell outlining several points in which he thought the appellate court had erred in its interpretation of the Naturalization Law of 1906. When he could not sway Mitchell, White took up his case with the Attorney General, arguing that granting

Schwimmer citizenship would irretrievably weaken the naturalization law. Although Acting Attorney General Alfred A. Wheat agreed the U.S. case was weak, he pressured Mitchell to file a petition for certiorari. Sometime in late September, Mitchell changed his mind. "I am not at all sanguine that we will gain anything by filing the petition," he told White, "but because of the unanimity in your department and the emphatic statements in your letter . . . I have concluded to yield my own judgment in the matter and proceed as you have requested."[24]

Despite his own misgivings about the case—or perhaps because of them—Mitchell pulled no punches in his petition. Schwimmer was a dangerous person and a menace to the safety of the nation, he argued: "The record justifies the statement that her opposition to the forcible defense of the Constitution and laws of the United States, or of any other organized government, has been and will be actively reflected in her speeches and writings, and that she can be depended upon to agitate against the discharge by others of this duty of citizenship." Her age and sex were irrelevant, Mitchell contended, because of her power to influence others and because she was "opposed in principle to the bearing of arms in defense of the Government" even by qualified men. Quoting Schwimmer's statement to Colonel Stone that she was an uncompromising pacifist with no sense of nationalism, Mitchell argued that her "tone . . . shows that she is an extremist." He went on to portray her as not only an extreme pacifist, but as an anarchist:

> She does not believe in organized government as we understand it, because organized government can not exist without military defense. She is not attached to the principles of the Constitution and Government when she rejects the fundamental principle that they must be defended by military force if necessary. She would see the Constitution and Government of the United States destroyed by an enemy rather than have one citizen lift a finger in their defense. If every citizen believed as she does, and acted as she will, we would have no Constitution and no Government.[25]

Believing as he did that the legal case against Schwimmer was weak, Mitchell emphasized what he saw as the danger of Schwimmer's pacifism and offered her conscientious objection as proof of her lack of attachment to the Constitution. He may not have known it, but this was exactly the right approach for him to take with this particular Court.

The Court heard oral arguments in the case on April 12, 1929. A. A. Wheat appeared for the government; he reiterated that Schwimmer's "exceptionally brilliant mind" and "extraordinary intellect" necessitated keeping her out. "If she were a simple housewife and held these opinions," Wheat explained to the Court, "it would not matter," but given her mind and her intellect, "she would have an immense influence." Olive Rabe confined herself to legal arguments, claiming that denying Schwimmer citizenship "would be an infringement on Congressional prerogatives." The Justices asked very few questions, and the proceedings took no more than half an hour. Rabe, Schwimmer, and their supporters thought they had carried the day. "The analysis of those who pretend to read faces," Schwimmer wrote to a friend, "was that six of the judges will be in favor, one opposed, and one doubtful. We'll see."[26] For the moment there was nothing to do but wait.

The Supreme Court

The Taft Court was neither well prepared nor well equipped to navigate the social and

cultural tensions of the 1920s. Though stocked with conservatives, the Court tried to temper its protection of the rights of businesses and corporations with limited attempts to protect the rights of individuals. But, in general, the Court responded to the upheavals of the decade "much as the nation did—with some resolution and a great deal of confusion."[27] In Schwimmer's case, the Court had to weigh the right of an individual to conscientiously object against the right of the government to expect certain obligations from its citizens. Despite having made some allowances for property rights and limited civil liberties, the Court was not yet willing to weaken the government to the point of what it saw as defenselessness. The Justices resolutely decided against Schwimmer. Pierce

Pierce Butler, who wrote the majority opinion in *Schwimmer*, had long argued that individuals were not entitled to the protection of the government unless they were willing to defend it in return. "The influence of conscientious objectors is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age, or other cause, they may be unfit to serve does not lessen their purpose or power to influence others," wrote Butler (pictured here with his wife, Annie).

Butler authored the majority opinion; he was joined by Chief Justice William Howard Taft, George Sutherland, Willis Van Devanter, James C. McReynolds, and Harlan Fiske Stone. Oliver Wendell Holmes, Jr., and Edward Sanford wrote dissenting opinions; Holmes was joined by Louis Brandeis.

Schwimmer's pacifism, and especially the statements taken from her letter to Colonel Stone, lay at the heart of the majority opinion. The Court cited Schwimmer's refusal to bear arms as evidence of her lack of "attachment to the principles of the Constitution," and thus as grounds for denying her petition. "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises," wrote Butler, "is a fundamental principle of the Constitution." The Constitution had been ordained in part to "provide for the common defense," and several provisions established the authority of Congress and the President to raise and command military bodies. Citizens' service in those bodies was the price they paid for the protection of the state. Therefore, according to the majority, "whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government."[28]

But it was not just Schwimmer's refusal to bear arms that was the problem. Here the Court leaned heavily on the United States' brief. "The influence of conscientious objectors . . . " Butler wrote, "is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age, or other cause, they may be unfit to serve does not lessen their purpose or power to influence others."[29] Schwimmer, the Court argued, had demonstrated her desire and capability to exercise just such an influence. Butler likewise took her professed lack of nationalism as evidence of her unfitness: "One who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization."[30]

Holmes disagreed, arguing that Schwimmer's beliefs did not pose any kind of viable threat to the United States. "Some of her answers might excite popular prejudice," he conceded, "but, if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate."[31] That line became one of Holmes' most famous, often invoked by supporters of free speech. He also pointed out the absurdity of denying Schwimmer citizenship, much as Schwimmer herself and the Seventh Circuit had done before him: "So far as the adequacy of her oath is concerned, I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to."[32]

The decision shocked Schwimmer, her supporters, and much of the country. "Those idealists who fought in the last war believing it was a war to end all wars cannot be more shocked by the decision than I am," she wrote to a friend.[33] In a letter of condolence to Olive Rabe, Roger Baldwin of the American Civil Liberties Union described it as a "most reactionary decision." Given the strengths of Schwimmer's case and the weaknesses of the government's arguments, he felt it incredible "that these old gentlemen should have fallen for the prejudices of unthinking men in the street. Not even the most pessimistic of our friends predicted any such result, despite the Supreme Court's bad record since the war on all such issues."[34] *The New York Times* protested the decision, lauding Holmes' dissent and pointing out that the United States had signed the Kellogg-Briand Pact only the year before. "It is a little anomalous," the *Times* noted, "that a country which has renounced war should exclude from its

citizenship a person whose chief offense is her opposition to war."[35] Fiorello LaGuardia in *The New York Evening Graphic*, Walter Lippmann in *The New York World*, and dozens of editorialists across the country concurred. Given these reactions, and the sentiments of all parties going in to the case, the Court's decision requires some explanation.

That Butler, perhaps the Court's most steadfast conservative, decided against Schwimmer would not have raised many eyebrows. His biographer David J. Danelski points out that "in the fourteen nonunanimous cases that presented substantive issues of freedom, such as freedom of speech or conscience, he voted for the individual only 29 percent of the time, compared with majority's score of 50 percent." Danelski speculates that in seventy-one-percent of those cases, "some competing value was present that was more important to him than freedom. [In *Schwimmer*], the competing value was apparently patriotism."[36] Butler believed that pacifists lacked any sense of patriotism or nationalism. For evidence, he pointed to World War I, noting that "several thousand" conscientious objectors had been imprisoned in the United States in 1917 and 1918 on charges of desertion, sedition, and other crimes. Butler tied Schwimmer's pacifism directly to his concerns about COs during the war: "It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act."[37]

Butler had long argued that individuals were not entitled to the protection of the

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Solicitor General William D. Mitchell and his staff initially had no interest in appealing the *Schwimmer* case to the Supreme Court, but Robe Carl White, Acting Secretary of Labor, bullied Mitchell. White's stance reflected the anti-immigrant mood at the Department of Labor in the 1920s.

government unless they were willing to defend it in return. Fidelity and duty were the price of safety. In a 1916 speech to the Minnesota Bar Association, he argued "Allegiance to government and protection by it are reciprocal obligations, and stripped of all sentiment, the one is the consideration for the other; that is, allegiance for protection and protection for allegiance."[38] Thirteen years later, he expressed almost the identical point in *Schwimmer*: "All [citizens] owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other."[39] For Butler, patriotism and nationalism took precedence over Schwimmer's individual right to freedom of conscience.

Sutherland agreed. In a speech at the University of Michigan in 1920, he railed against what he called the "current theory" of internationalism, proclaiming that "the nation is something more than so many millions of people occupying a geographical subdivision of the earth's surface, speaking the same language and subject to the same laws. These are its visible and tangible constituents, but what gives it organic life and meaning is the spirit of unity which dwells within . . . The institutions under which we live are of such transcendent worth that their protection is the imperious and paramount duty of all whose rights are made safe by the marvelous counterpoise of liberty and law which they afford."[40] Sutherland would not have responded well to Schwimmer's claim that she had no sense of nationalism, and likely disdained her claim to belong to the "whole human family."

The two other conservative Justices whose crusade against the New Deal would later earn them, along with Butler and Sutherland, the label "The Four Horsemen of the Apocalypse," also sided against Schwimmer. Butler cited key opinions written by both. In *Luria v. United Statesem* (1913) Van Devanter argued, "Citizenship is membership in a political society, and implies the reciprocal obligations as compensation for each other of a duty of allegiance on the part of the member and a duty of protection on the part of the society."[41] Butler drew on *Luria* when he argued that allegiance was the price U.S. citizens paid for protection. McReynolds, meanwhile, had established a precedent for weighing the interests of the United States more heavily than the interests of the petitioner when ruling on naturalization. In *United States v. Manzi* just a year earlier he wrote a line that Butler quoted directly in *Schwimmer*: "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally, at least, they should be resolved in favor of the United States and against the claimant."[42]

Taft was in bad health by 1929, and likely would not have been able to participate actively in any deliberations. He did not attend oral arguments in the case on April 12. But his lifelong attitudes in favor of Social Darwinism and preservation of the status quo, and his antipathy to social reform and social democracy, help explain his decision to join Butler. Taft had also sided with the majority in *Manzi* the year before, as he had in the two mid-decade decisions curtailing civil liberties—*Gitlow v. New York* in 1925 and *Whitney v. California* in 1927.

Stone sided with the majority, but he was not entirely satisfied with Butler's opinion. In fact, he later told a friend, he agreed in principle with Holmes' dissent, "but thought it not quite applicable to the situation created on the record." For Stone, the case hinged on his belief that Schwimmer would not only refuse to bear arms herself if asked, but would also encourage others to do the same. "That being the case, it seemed to me that the applicant did not show attachment to the principles of the Constitution . . . The question was not merely, as Justice Holmes seemed to think, that the applicant was a person who believed that the Constitution could be improved. Such persons, if they are willing to obey it until such time as it is changed by

the prescribed procedures, may become good citizens and be attached to the principles of the Constitution. When their objections carry them further than that, I think Congress, rightly or wrongly, has prescribed that they should not be admitted." Thus the key for Stone was Schwimmer's behavior rather than her ideas. He pressed Butler to stress that point in the opinion, fearful that Butler's emphasis on "feelings of dislike and distrust" would suggest the Court was "actuated by feelings of prejudice."[43] Butler took Stone's advice and incorporated the concerns about Schwimmer's actions, though he left in his original concerns about her ideas themselves.

Stone also had well-documented attitudes on conscientious objection. In 1918 he had been appointed by Woodrow Wilson to the Board of Inquiry, a government tribunal charged with interviewing men who claimed to be conscientious objectors. In 1936 he exchanged letters with one of the men he had interviewed who wanted to know whether Stone had changed his mind about compelling conscientious objectors to fight. He had not, and his reply to the man suggests what his attitude may have been toward Schwimmer: "I believe that inasmuch as I must live in and be a part of organized society, the majority must rule, and that consequently I must obey some laws of which I do not approve, and even participate in a war which I may think ill advised. I respect the views and opinions of those whose objections to all war, or to a particular war, are so great as to forbid their participation, but it has always seemed to me that those who take that extreme position should accept the consequences without complaint."[44] In Schwimmer's case, that consequence was the denial of her application for citizenship.

So much for the majority. Holmes' dissent would have been easier for Schwimmer to understand. Since 1919 he had written opinions on some of the most high-profile civil liberties cases heard before the Court. In *Abrams v. United States* (1919), Holmes argued that a pamphlet denouncing the sending of U.S. troops to Russia did not present a "clear and present danger" to the nation, and was thus protected by the First Amendment. In *Gitlow*, Holmes argued for overturning the conviction of Benjamin Gitlow for publishing a socialist manifesto. The State of New York claimed the manifesto was an "incitement" to violence, but as Holmes famously pointed out, "every idea is an incitement."[45] In 1927 Holmes joined Brandeis' concurrence with the majority in *Whitney*, which upheld Anita Whitney's conviction for communist organizing, but disagreed with the majority's argument that any speech that had a "bad tendency" to incite violence was unlawful.[46] But none of these was a majority opinion. Holmes' arguments were laying the foundations for the Court's protections of civil liberties beginning in the 1930s, but the only Justice on whom Holmes could rely for support in 1929 was Brandeis.

It is possible that Brandeis felt some personal sympathy for Schwimmer. Like her, his radical Jewish parents had fled political and ethnic persecution in Central Europe. But emotion aside, Brandeis was firmly in Holmes' camp on free speech. His concurrence in *Whitney* emphasized its critical importance: "To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."[47] Brandeis did not agree with the majority's contention that Schwimmer should be denied citizenship because she might incite others to conscientious objection and thus endanger the nation's defense.

Lastly—and, in this instance, least—Sanford's one-sentence dissent merely said he agreed with the Seventh Circuit's decision and thought it should be affirmed. Despite the fact that Sanford had written the majority opinions in *Gitlow* and *Whitney* curtailing free speech, he likely sided with Schwimmer

because she posed no threat of violence. Her refusal to bear arms was not sufficient grounds for denying her citizenship, Sanford argued, just as the Court would never deny citizenship to anyone for disobeying the Eighteenth Amendment.[48]

Gender Considerations

After considering the backgrounds and previous rulings of Butler, Sutherland, Van Devanter, McReynolds, Taft, and Stone, it is perhaps more surprising that Schwimmer and Rabe were so confident of their victory than that the Court ruled against her. These were men who valued patriotic loyalty above individual conscience. They were very much products of their time in their fears of radicalism and pacifism, and they believed a citizen's duty to the nation superseded adherence to any political doctrine.

What *is* surprising about the case—and not a little ironic—is that in order to defend their demand for proof of Schwimmer's loyalty the Justices implicitly accepted the premise of gender equality. This particular standard for naturalization had to apply to women as well as men, they contended. Taken at face value, the majority opinion reads like an argument for equal citizenship. Butler relied on gender-neutral language, referring to "citizens" and "conscientious objectors." He even went so far as to argue that women pacifists had just as much power to influence others as did men.[49] Regardless of their ability to serve, women were required to declare their willingness to bear arms in defense of the nation just as men did.

Once again, the historical context is suggestive. The 1920s offered just enough trappings of gender equality to provide a justification for the Court's position on Schwimmer. The Nineteenth Amendment was one example. The fact that women were allowed to vote was a highly visible and tangible piece of evidence for anyone looking to marshal an argument that they should therefore be subject to the same treatment as men in other arenas. Among those in the majority on *Schwimmer*, only Sutherland was on the record as a defender of women's suffrage, but the very fact of the amendment offered symbolic cover for equal treatment.

Less prominent but more significant was the Court's ruling in *Adkins v. Children's Hospital* (1923). In 1918, Congress passed a federal minimum wage law for female employees in Washington, D.C. Well aware that since the 1890s the Court had looked with disfavor upon any governmental attempt to regulate working conditions—to interfere with workers' "liberty of contract"—Congress framed the law as an attempt to protect the health and morals of women. In *Muller v. Oregon* (1908), the Court had upheld an Oregon state law that restricted the number of hours women could work each day, arguing that, because women were mothers or potential mothers, their health was a public interest and therefore their bodies could be regulated by the state. Even though protective labor legislation was not permissible for all workers, it might therefore be permissible for women. But the Court struck down the D.C. minimum wage law on the grounds that liberty of contract was "the general rule, and restraint the exception."[50]

Writing for the majority, Sutherland not only relied on previous rulings regarding liberty of contract, he also cited recent changes in the status of women:

> In view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter . . . we cannot accept the

> doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[51]

Sutherland was not arguing for comprehensive equality between men and women; his opinion still pointed to physical distinctions between the sexes. But the Court promoted women's equality to the extent that it suited them in order to make a larger argument against the minimum wage. Following the logic of *Adkins*, it is reasonable to assume that Sutherland would have argued against restricting women's obligation to bear arms in the same way that he argued against restricting their liberty of contract—even if he would never have gone so far as to argue that women should actually participate in combat. *Adkins* thus provided additional cover for a Justice like Sutherland in the form of superficial support for women's equality. Women could not be excused from stating their willingness to bear arms.

Not all the Justices were willing to go even so far as a token acknowledgment of gender equality. Butler, Van Devanter, and McReynolds all sided with the majority in *Adkins*, but Taft was not prepared to accept any suggestion of equality. He dissented in *Adkins* on the grounds that employers and employees were not upon "a full level of equality of choice," and that women in particular needed protection from harsh labor conditions. Granting women the right to vote did not erase their physical differences, he argued: "The Amendment did give women political power, and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment."[52] Taft was a traditionalist when it came to gender, and would not have condoned allowing women to serve in the military. But he was also a traditionalist when it came to opposing radical pacifism, and that seemed the more immediate threat in Schwimmer's case.

All the Justices in the majority made a similar call. In the end, nationalism trumped gender as the measure of Schwimmer's fitness for citizenship. The Court never entertained the idea that women *should* serve in the military; therefore they could demand that Schwimmer express her willingness to do so without seriously threatening the traditional gender order. But her pacifism represented a much greater danger. To the Court, the chances that Schwimmer could influence others—including men eligible for service—to conscientiously object far outweighed the chances she would be asked as a citizen to carry a gun. In the 1920s, fundamental challenges to the gender order were actually quite minimal. "New women" may have worn shorter hair and shorter skirts, and pushed limits on behavior and sexuality, but ultimately they still married, had children, and followed traditional domestic paths. The perceived social threats of radicalism, anarchy, communism, and other "dangerous" ideologies ran much deeper. The Red Scare and the trial of Sacco and Vanzetti only heightened those fears. In order for an immigrant—especially a Jewish woman from Eastern Europe—to be considered "fit" for citizenship, there could be no question about her loyalty to the United States. She had to prove she was 100% American.

Thus, within the hyper-patriotic context of the 1920s, the Court's decision in *Schwimmer*

is less surprising than many observers felt at the time. While the Court would not have been prepared to support real gender equality, the Nineteenth Amendment and *Adkins* had gone far enough to give them rhetorical cover for arguments that men and women should be treated equally when it came to this particular duty of citizenship. In the matter of national defense, Schwimmer's gender was no excuse. The perceived threat of her uncompromising pacifism and her career as an activist outweighed any considerations the Court might have been willing to give to her as a woman. This does not mean the Court would in fact have supported real gender egalitarianism; the Nineteenth Amendment and the *Adkins* decision were not true measures of equality. But the majority could point to them in order to hold Schwimmer to the highest possible standard for naturalization.

It was not until 1946, in *Girouard v. United States*, that the Court overturned *Schwimmer* and ruled that applicants for citizenship could not be barred for being conscientious objectors. After *Girouard* was handed down, a group of Schwimmer's friends, led by Carrie Chapman Catt, discussed the possibility of trying to secure Schwimmer's citizenship at long last. Desperately ill with diabetes, Schwimmer was unwilling to go through the entire application process again, but she agreed to a course of action suggested by Roger Baldwin, which was to secure an act of Congress granting her citizenship. But Catt and the ACLU ultimately determined such a course was not possible.[53] Rosika Schwimmer remained stateless until her death in 1948.

ENDNOTES

[1] *Transcript of Record, United States v. Schwimmer* 279 U.S. 644 (1929), 6.

[2] Rosika Schwimmer to Olive Rabe, 20 December 1926, Box 116, Folder 14, Edith Wynner Papers, Manuscripts and Archives Division, New York Public Library (NYPL). Emphasis in original.

[3] Rosika Schwimmer, "Adventure in Citizenship," 1-2, Box 473, Folder 2, Rosika Schwimmer Papers, NYPL.

[4] *Ibid.*, 5.

[5] *Ibid.*, 6.

[6] *Transcript of Record*, 13-14.

[7] "An Act to Establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States. Approved June 29, 1906" *The American Journal of International Law* 1, no. 1, Supplement: Official Documents (January 1907), 34.

[8] *Transcript of Record*, 6-7.

[9] *Transcript of Record*, 8-9.

[10] Ronald B. Flowers, **To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court** (Scarecrow Press, 2003), 91-92.

[11] Rosika Schwimmer to Lee Alexander Stone, 19 September 1925, Box G5, Folder 3, Olive Rabe Papers, NYPL.

[12] *Brief for Respondent, United States v. Schwimmer*, 15.

[13] *Transcript of Record*, 12.

[14] *Quoted in* Flowers, 95.

[15] "In re: Petition of Rosika Schwimmer for Naturalization to be argued before Judge Carpenter of the District Court of the United States for the Northern District of Illinois, October 13, 1927," Box 494, Folder 9, Schwimmer Papers.

[16] Rabe to Schwimmer, 19 September 1927, Box 116, Folder 15, Wynner Papers. Emphases in original.

[17] Ibid., 507.

[18] "In the District Court of the United States for the Northern District of Illinois, Eastern Division; In re Petition of Rosika Schwimmer for Naturalization," 13 October 1927, 5-7, Box 494, Folder 8, Schwimmer Papers.

[19] *Brief for Appellant, Schwimmer v. United States*, 27 F.2d 742 (1928), 6, 12.

[20] *Brief for Appellee, Schwimmer v. United States*, 36-37, 40. Emphasis in original.

[21] *Schwimmer v. United States*, 27 F.2d 742 at 744.

[22] William D. Mitchell, memorandum for Mr. Luhring, 30 July 1928, Box 76, Folder 3, Wynner Papers; Gardner P. Lloyd, memorandum, 27 August 1928, Box 76, Folder 3, Wynner Papers (emphasis added); Henry S. Ridgely, "Memorandum for the Solicitor General," 25 August 1928, Box 76, Folder 3, Wynner Papers; Luhring to the Secretary of Labor, 31 August 1928, Box 76, Folder 3, Wynner Papers; Luhring to J. Edgar Hoover, 4 September 1928, Box 76, Folder 3, Wynner Papers.

[23] Immigration was under the purview of the Labor Department in the 1920s, thus the restrictive quotas originated there.

[24] Flowers, 103-105; A.A. Wheat to Robe Carl White, 13 September 1928, Box 76, Folder 3, Wynner Papers; Mitchell to White, 28 September 1928, Box 76, Folder 3, Wynner Papers.

[25] *Petition for Certiorari*, *United States v. Schwimmer*, 5, 17.
[26] Schwimmer to Lola Maverick Lloyd, 1-2 May 1929, Box 10, Folder 3, Lola Maverick Lloyd Papers, NYPL.
[27] Melvin I. Urofsky, "The Taft Court, 1921-1930," in **The United States Supreme Court: The Pursuit of Justice,** ed. Christopher L. Tomlins (Houghton Mifflin, 2005), 199.
[28] *United States v. Schwimmer*, 279 U.S. 644 (1929) at 650.
[29] *Ibid.*, at 651.
[30] *Ibid.*, at 652.
[31] *Ibid.*, at 654-655.
[32] *Ibid.*, at 653-654.
[33] Schwimmer to Margery Corbett Ashby, 27 May 1929, Box 192, Folder 1, Schwimmer Papers.
[34] Roger Baldwin to Rabe, 28 May 1929, Box G6, Folder 5, Rabe Papers.
[35] "A Dissenting Opinion," *The New York Times*, 29 May 1929, 28.
[36] David J. Danelski, **A Supreme Court Justice Is Appointed** (Random House, 1964), 183.
[37] 279 U.S. 644 at 652-653.
[38] *Quoted in* Danelski, 183-184.
[39] 279 U.S. 644 at 649.
[40] *Quoted in* Joel Francis Paschal, **Mr. Justice Sutherland: A Man against the State** (Princeton, 1951), 218-219.
[41] *Luria v. United States*, 231 U.S. 9 (1913) at 9.
[42] *United States v. Manzi*, 276 U.S. 463 (1928) at 467; 279 U.S. 644 at 649-650.
[43] *Quoted in* Alpheus Thomas Mason, **Harlan Fiske Stone: A Pillar of the Law** (Viking, 1956), 519-520.
[44] *Quoted in* Mason, 105.
[45] *Gitlow v. New York*, 268 U.S. 652 (1925) at 673.
[46] *Whitney v. California*, 274 U.S. 357 (1927).
[47] 274 U.S. 357 at 376.
[48] David Burner, "Edward Terry Sanford," in **The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions** (R.R. Bowker, 1969), 2207.
[49] 279 U.S. 644 at 651.
[50] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) at 546.
[51] *Ibid.*, at 553.
[52] *Ibid.*, at 562, 567.
[53] Carrie Chapman Catt to Schwimmer, 15 October 1946, Box 495, Folder 4, Schwimmer Papers; Schwimmer to Catt, 17 December 1946, Box 495, Folder 4, Schwimmer Papers; Baldwin to Schwimmer, 22 January 1947, Box 495, Folder 4, Schwimmer Papers; Frances Levenson to Schwimmer, 5 May 1947, Box 495, Folder 4, Schwimmer Papers. It is worth noting that, because *Girouard* only covered those who conscientiously objected due to "religious scruples," there was no guarantee the United States would have admitted the atheistic Schwimmer. The Court did not allow conscientious objection on non-religious grounds until 1965. *Girouard v. United States*, 328 U.S. 61 at 64 (1946); *United States v. Seeger*, 380 U.S. 163 (1965).

Justices Douglas and Whittaker in *Meyer v. United States:* A False Claim Rebutted

DAVID J. DANELSKI

In a recent issue of the *Journal of Supreme Court History,* Craig Alan Smith claimed that the following passage in William O. Douglas's autobiography, **The Court Years**, was, "from first to last," a fabrication:[1]

> In one case when the vote was five to four, Whittaker was assigned the opinion for the majority. I had already written the dissent and went to his office to discuss a wholly different matter. When I entered he was pacing his office, walking around his desk with pursed lips as if possessed. I asked him what was wrong. He said, referring to the five-to-four decision, that he had been trying to write the majority opinion but simply could not do it.
>
> "That is because you are on the wrong side," I said.
>
> "Not at all. Not at all. I am right but cannot get started."
>
> "Would you like me to send you a draft of the majority opinion?"
>
> "Would you please?"
>
> Within an hour the draft was in his office, and when the opinion came down (*Meyer v. United States*, 362 U.S. 410) it was one of the few in which the majority and minority opinions were written by the same man.[2]

Charging Douglas with "deceit,"[3] "fraudulence,"[4] and "besmear[ing] Whittaker's reputation,"[5] Smith wrote

> Nothing Douglas reported about *Meyer* was true: it was not a five to four decision; Whittaker was not assigned the opinion of the Court; Douglas had not already written a dissent; and, most significant, Douglas did not write both decisions announced.[6]

To assess the accuracy of Smith's claim, I examined the papers of all members of the Court who had *Meyer* files—Earl Warren, Felix Frankfurter, William O. Douglas, Tom C. Clark, John Marshall Harlan II, and William J. Brennan, Jr.[7] The documents in those files and the published and unpublished interviews of Douglas's and Whittaker's law clerks are the main data for this article. I begin with a chronology of the events in *Meyer v. United States*. Next, I consider the Douglas–Whittaker relationship. I then present evidence from primary sources and assess the Smith's argument based on secondary sources. Finally, I state my conclusion that Smith's claim is false.

The *Meyer* Chronology

November 23, 1959. The executors of the Estate of Albert F. Meyer filed a petition for a writ of certiorari in the Supreme Court of the United States, seeking a refund of an overpayment of estate taxes. The petitioners claimed that, under Section 812 (e) of the Internal Revenue Code, they were entitled to a marital deduction for a portion of the proceeds of two life insurance policies that guaranteed (1) monthly payments to Meyer's wife for a period of twenty years after his death unless she died during that period, in which case the payments were to go to Meyer's daughter and (2) monthly payments to Meyer's wife for the rest of her life if she lived more than twenty years after Meyer's death. The insurers, by entries in their books, allocated two specified amounts, one to fund the guaranteed monthly installments for twenty years and the other to fund monthly payments to the wife as long as she lived. The U.S. District Court for the Western District of New York, relying on *In Re Reilly's Estate v. Commissioner*, 239 F2d 797 (3d Cir 1957), held that, under Section 812 (e) of the Internal Revenue Code, the petitioners were entitled to the marital deduction. On appeal, the Court of Appeals for Second Circuit reversed in a split decision.[8]

January 2, 1960. Steven Duke, Douglas's law clerk for the 1959 Term, summarized the case's facts and the parties' contentions in a certiorari memorandum and recommended that certiorari be granted.[9]

January 11, 1960. The Supreme Court voted unanimously to grant certiorari in *Meyer*.[10] The case was docketed as No. 13 in the Court's 1960 Docket.

October 14, 1960. Chief Justice Warren presented the case in conference. Douglas recorded Warren's views and those of the rest of his colleagues as follows:

> CJ he could go either way—very close case—circuits both ways
>
> Black affirms—favors US
>
> FF close case—he will circulate an opinion on each side—reverses
>
> WOD reverses
>
> TC [reverses]
>
> JMH reverses—agrees with 3rd Circ
>
> WJB reverses
>
> CEW clearly affirms—neither beneficiary acquired any interest in fund—control alone creates right—widow gets annuity as long as she lives
>
> PS 3rd Cir's position is sound but novel—a portion of that contractual right was not terminable—he leans to affirmance . . .[11]

The Court then voted five to four as follows:

> Reverse: Brennan, Harlan, Clark, Douglas, and Frankfurter.
>
> Affirm: Stewart, Whittaker, Black, and Warren.[12]

March 2, 1957

My dear Judge Whittaker:

It was a great pleasure meeting you this morning. As I told you, I was dictating a letter of congratulations to you when you came into my office. I repeat what I said, that it will be wonderful to have you here as a colleague. I look forward eagerly to many years of close association with you in the great work of the Court.

We have a wonderfully fine group under a great Chief Justice and you will make a great contribution to our work. I hope your confirmation is speedy and that you will be sitting with us in a few weeks.

With warm personal regards and best wishes.

William O. Douglas penned Charles E. Whittaker this welcome letter the same day Eisenhower nominated him to the Supreme Court in 1957. Although they would prove to have different judicial philosophies, both Justices had risen from humble origins and were introverted workaholics.

In recording the votes in their Docket Books, Warren and Douglas each put a question mark after Warren's vote.[13]

October 17, 1960. As he said he would, Frankfurter circulated two printed memoranda written by his clerks titled respectively "The Case for the Government" and "The Case for the Petitioners." He said that he had sent the memoranda because "all but two members of the Court were in a state of dubiety about No. 13, *Meyer v. United States*."[14] The most important comment in either memo is the following sentence in "The Case for the Government": "The legislative history [of Section 812 (e) of the Internal Revenue Code] is not compelling one way or the other."[15] The comment is important because the legislative history of Section 812 (e) was the basis of the Second Circuit's decision and would be the basis of the Supreme Court's decision. The next day Whittaker sent Frankfurter a note, thanking him for the clerks' memos. "Both are commendably clear and to the point," he wrote, "but in my humble judgment, the demonstrations made by 'The Case for the Government' settle the matter beyond doubt."[16]

October 24, 1960. Frankfurter, as senior associate justice in the majority, assigned Douglas the majority opinion in *Meyer*.[17]

November 2, 1960. Douglas circulated his majority opinion in *Meyer*, which relied on *In Re Reilly's Estate* and Section 812 (e)'s legislative history.[18] The same day Brennan joined Douglas's opinion.[19] Harlan, in a draft of a letter to Douglas, which he did not send, indicated that Douglas's opinion would have to be substantially revised before he could agree to it.[20]

November 3, 1960. Whittaker circulated a two-paragraph dissenting opinion that cited no precedents and did not consider the legislative history of Section 812 (e).[21]

November 4, 1960. Clark joined Douglas's opinion of the Court, saying "Okey."[22] Whittaker recirculated his dissenting opinion,

which indicated that Black and Stewart had joined his opinion.[23] Douglas recirculated his majority opinion.[24]

November 7, 1960. Frankfurter sent the following memorandum to his colleagues: "After arguing back and forth with myself, I have come to rest in finding it less uncomfortable to go with the Government than with the taxpayer. Accordingly, I am joining the dissent, although the result is not as obvious as Charlie's dissent makes it appear to be."[25] On the same day, Frankfurter sent the following note to Douglas: "I owe you an apology for not having been mindful that I was the swingman, for as I stated at Conference I could decide either way. I am sorry not to have assumed the burden & the excitement of writing in this case. I am afraid that Charles won't feel I feared his opinion."[26] Whether Douglas still had a majority depended on Warren's vote, which was uncertain.[27]

November 14, 1960. Harlan informed his colleagues that he was switching his vote from reverse to affirm.[28] Attached to his letter was a "Memorandum" printed in the form of an opinion, which concluded that the Court of Appeals for the Second Circuit was correct in applying to the case its version of the legislative history of Section 812 (e), which differed from Douglas's version.[29] To Douglas, Harlan wrote: "Dear Bill—Sorry to have to leave you."[30]

November 15, 1960. Warren, who was now in a majority of six, assigned Whittaker the majority opinion in *Meyer*.[31] According to Douglas, Whittaker told him that "he was unable to write the opinion in the Meyer case," and Douglas said that if Whittaker "would like, [he] would give him a draft of a majority opinion because [he] had just about finished [his] dissent."[32] The same day, Douglas circulated his dissenting opinion in *Meyer*.[33]

November 16, 1960. Brennan joined Douglas's dissenting opinion, saying, "I'm still with you."[34]

November 17, 1960. Whittaker circulated the majority opinion in *Meyer*,[35] which was five times longer than his brief dissenting opinion and covered matters not in his dissenting opinion. The opinion's first paragraph was virtually identical to the first paragraph of Douglas's majority opinion that had been circulated on November 2 and 4, 1960.[36] The same day, Douglas recirculated his dissenting opinion.[37]

November 19, 1960. Harlan wrote to Whittaker: "Dear Charlie: I join your opinion with gratitude for your having steered some of us original doubters to the right result. I have written a short piece which I hope you will consider not an inappropriate reinforcing supplement to your opinion. You should have it shortly, and so far as I am concerned, there is no reason why the case should not come down on Monday."[38] Harlan did not circulate his concurring opinion, apparently because Whittaker made the revisions Harlan had requested.[39]

November 21, 1960. Warren joined Whittaker's opinion.[40] Later the same day the Court announced *Meyer v. United States* in an opinion by Whittaker joined by Warren, Black, Frankfurter, Harlan, and Stewart. Douglas dissented in an opinion joined by Clark and Brennan. Whittaker's majority opinion and Douglas's dissenting opinion each contained eight paragraphs, and each covered five pages.[41]

Smith's account of *Meyer* does not square with the above chronology.

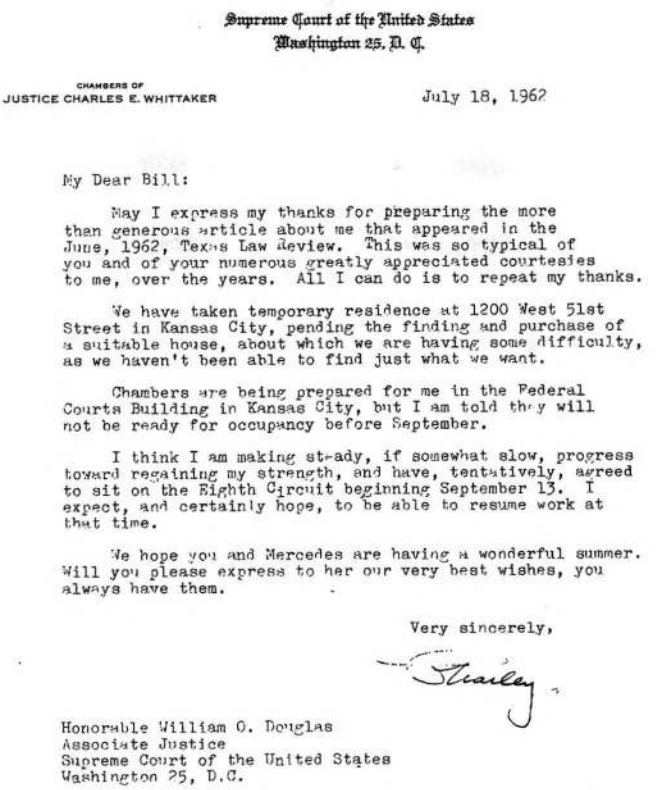
Contrary to Smith's assertion that "[i]nitially, Whittaker appeared to be the only Justice dissenting in *Meyer* when on Thursday, November 3 . . . he circulated his dissent,"[42] Whittaker was one of four dissenters in the conference vote on October 14, 1960.[43]

Contrary to Smith's assertions that Whittaker had not been assigned the Court's opinion in *Meyer*,[44] Chief Justice Warren assigned Whittaker the majority opinion in the case on November 15, 1960, and Warren

Suffering severe depression and contemplating suicide, Whittaker had difficulty functioning on the Court and on March 6, 1962 entered Walter Reed Hospital for observation. The previous day Mercedes Douglas had called on Winifred Whittaker (pictured) and urged her to get psychiatric help for her husband, and Justice Douglas, who had received psychotherapy when he was in his late twenties, had urged Whittaker (pictured here the day he was sworn in) to do the same.

recorded that assignment in both his Assignment Book and his Docket Book.[45]

Contrary to Smith's assertion that Brennan "did not join Douglas until a few days before the decision was announced,"[46] Brennan joined Douglas's majority opinion on November 2, 1960, the day of its first circulation, and he joined Douglas's



Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE CHARLES E. WHITTAKER

July 18, 1962

My Dear Bill:

May I express my thanks for preparing the more than generous article about me that appeared in the June, 1962, Texas Law Review. This was so typical of you and of your numerous greatly appreciated courtesies to me, over the years. All I can do is to repeat my thanks.

We have taken temporary residence at 1200 West 51st Street in Kansas City, pending the finding and purchase of a suitable house, about which we are having some difficulty, as we haven't been able to find just what we want.

Chambers are being prepared for me in the Federal Courts Building in Kansas City, but I am told they will not be ready for occupancy before September.

I think I am making steady, if somewhat slow, progress toward regaining my strength, and have, tentatively, agreed to sit on the Eighth Circuit beginning September 13. I expect, and certainly hope, to be able to resume work at that time.

We hope you and Mercedes are having a wonderful summer. Will you please express to her our very best wishes, you always have them.

Very sincerely,

Charley

Honorable William O. Douglas
Associate Justice
Supreme Court of the United States
Washington 25, D.C.

After Justice Whittaker stepped down, four of his colleagues—Warren, Douglas, Clark, and Harlan—wrote tributes to the departed Justice in the *Texas Law Review*. In this letter Whittaker warmly thanks Douglas for his article, which had praised him for his "thoroughness" in writing opinions, his preeminence as a trial judge, and his "passion for justice."

dissenting opinion on November 16, the day after its first circulation.[47]

Contrary to Smith's assertion that "[n]either opinion in *Meyer* [cited] a single legal precedent,"[48] Whittaker's majority opinion cited *In Re Reilly's Estate v. Commissioner*, 239 F.2d 797, in its first paragraph, and Douglas's dissenting opinion cited the same case in its fourth footnote.[49]

The Douglas–Whittaker Relationship

Douglas met Whitaker the same day Eisenhower nominated him to the Supreme Court. Douglas told Whittaker that it would be "wonderful" to have him as a colleague and that he looked "forward to many years of close association in the great work of the Court."[50] Two months later, Douglas gave Whittaker an autographed copy of his Tagore Lectures at Calcutta University, *We the Judges,* which compared Indian and American constitutional law.[51] In a handwritten note, Whittaker thanked Douglas for the volume, saying, "This was so good of you."[52]

In the months that followed, the two judges developed a friendly relationship. Douglas "liked Whittaker"[53] and found him to be "an affable companion."[54] Their similarities and some of their differences drew them together. They were of the same generation, had graduated from law school within a year of each other, and had risen from humble origins. Both were also workaholics and lonely introverts.[55] They differed in their education, experience, confidence, and decisiveness, but those differences did not

separate them. Education had been Douglas's ladder to success—high school valedictorian, Phi Beta Kappa college graduate, law review editor, and a graduate of an elite law school.[56] Whittaker graduated from a big-city, proprietary law school without having attended either high school or college, but he was bright, ranked first in his law class, and had been admitted to the bar before he finished law school.[57] Douglas's experience had been academic and administrative;[58] Whittaker's experience had been practical and confined mostly to trial practice.[59] Whittaker admired Douglas's academic brilliance;[60] Douglas admired Whittaker's trial experience.[61] As for confidence, Charles Fried, who clerked for Harlan during the 1960 Term, recalled that Whittaker "was the least confident of the justices (Douglas the most)."[62] Douglas's confidence and decisiveness impressed Whittaker; Whittaker's lack of confidence and decisiveness evoked sympathy from Douglas.[63] What separated them were their approaches to the law: Whittaker was a formalist and Douglas a realist. Their ideologies also separated them. Whittaker was a conservative and Douglas a liberal. But, in some cases, Whittaker voted with Douglas and other liberal Justices, which one of his law clerks, James M. Edwards, attributed to Whittaker's "populist" background. "I always understood him," said Edwards, "to have come from a comparatively humble beginnings, which caused him to be more philosophically aligned with Black (and some of the other liberal justices from comparable backgrounds) than with Frankfurter or even Harlan."[64]

Although Douglas and Whittaker seldom visited each other's offices, they did so occasionally. Alan C. Kohn, Whittaker's first law clerk, recalled one such visit by Douglas at Whittaker's office in April 1958. At the time, wrote Kohn, Whittaker "was having difficulty writing the majority opinion in *United States v. Hvass,*" a perjury case. "Douglas," wrote Kohn in a reminiscence, "offered to help and a short time later he sent over two key sentences that Whittaker adopted as his own. The opinion was adopted by the Court, 8-1. Ironically, it was Justice Douglas who filed the sole dissent."[65] When an interviewer asked Kohn why Douglas offered to assist Whittaker in *Hvass,* Kohn replied, "I think he was genuinely trying to help; he felt sorry for Whittaker."[66] Douglas's assistance to Whittaker in *Hvaas* foreshadowed what happened in *Meyer.*

An odd event affecting the Whittaker–Douglas relationship occurred at the Supreme Court on December 14, 1959. In delivering a concurring opinion in a Federal Employment Liability Act case,[67] Whittaker "poked fun"[68] at Douglas's dissenting opinion. Whittaker's remarks evoked laughter in the Courtroom, at which point "Justice Douglas, pale with anger, began stating the dissent . . . 'The case is rather an important one . . . It cannot be dismissed by this attempted humor . . . The gravity of the issue belies the rather smart-alecky things that have been said.'"[69] Douglas's outburst shook Whittaker. He "had no idea that anyone would take personal offense" at his remarks. He returned to his chambers "very upset," and soon thereafter he "went to see Douglas to smooth [the whole thing] over."[70]

A former Whittaker clerk made the following observation about the *Inman* incident:

> Whittaker was upset that he caused that kind of outburst from Douglas. . . [I]t would be my guess that he was not upset that Douglas said he was smart-alecky but upset because Douglas was upset. [Whittaker] is a very gentle guy . . . Douglas was a friend of his . . . Douglas had helped him write opinions when he was on the other side . . . I remember very specifically where Douglas helped him write a paragraph and Whittaker was very grateful.[71]

The clerk's reference to Douglas helping Whittaker write "opinions" in cases in which Douglas was "on the other side" is significant, for the clerk was most likely referring to *Hvass* and *Meyer.*

After *Inman,* Douglas praised Whittaker's opinions when he could. "Dear Charlie," he wrote on May 13, 1960, "I agree with your fine opinion [in Nos. 25 and 26, *Hoffman v. Blaski* and *Sullivan v. Behimer,* in which Frankfurter, Harlan, and Brennan dissented]. And I only add that I cannot imagine me changing my mind no matter who writes, no matter how long his dissenting opini- ., no matter how many footnotes, etc. In other words, I think you are dead right and I think you have done a fine job."[72] On November 2, 1960, the day before Whittaker first circulated his dissenting opinion in *Meyer,* Douglas praised his opinion in another case. "Dear Charlie," he wrote. "Please join me in your fine opinion—No. 21, *Aro Manufacturing Company v. Convertible Top Replacement Company.*"[73]

Whittaker did not finish the 1961 Term. Suffering severe depression and contemplating suicide, he could hardly function in the Court.[74] Almost no one knew what he was going through. Two who did know were Douglas and his wife, Mercedes. After Douglas and his wife discussed the matter, Mercedes called on Winifred Whittaker and urged her to get psychiatric help for her husband, and Douglas, who had received psychotherapy when he was in his late twenties, urged Whittaker to do the same.[75] The next day—March 6, 1962—Whittaker entered Walter Reed Hospital for observation. Douglas visited him at the hospital, where Whittaker asked him what he should do. Douglas told him to forget about the Court for six months, come back in October, and then make up his mind.[76] Instead of taking that advice, Whittaker officially retired from the Court for medical reasons on April 1, 1962.[77]

Soon thereafter, the *Texas Law Review* dedicated one of its issues to Whittaker. Four of his colleagues—Warren, Douglas, Clark, and Harlan—wrote tributes. Douglas wrote: "Justice Whittaker made a valuable contribution to the work of the Court. Each and every case he processed was done with thoroughness never exceeded . . . He was pre-eminently a trial lawyer; and as a result, every record became a drama involving human rights. He could bring the printed page to life, making it eloquent and meaningful . . . [A]s a trial judge—and an appellate judge, as well—justice was a passion of his life."[78]

Whittaker thanked Douglas for the tribute. "My Dear Bill," he wrote. "This is so typical of you and your numerous greatly appreciated courtesies to me over the years. All I can do is repeat my thanks . . . We hope you and Mercedes are having a wonderful summer. Would you please express to her our very best wishes. You always will have them. Very sincerely, Charley."[79]

Given his relationship with Douglas, Whittaker thought he could turn to him for help if he had difficulty writing an opinion. James Adler, one of Whittaker's clerks during the 1961 Term, thought Whittaker and Douglas were friends. "I think they liked each other," he recalled. "Although they disagreed on civil liberties cases, they were close on business cases. If Whittaker had a concern about a case, turning to Douglas would be no surprise."[80] Smith wrote in **Failing Justice**, his 2005 biography of Whittaker: "If Whittaker were having trouble getting started on *Meyer* and Douglas had offered to assist, undoubtedly Whittaker would have been grateful."[81]

Primary Sources Contradicting Smith's Claim

During the week following Whittaker's retirement, Douglas drafted his tribute to Whittaker for the *Texas Law Review.* On April 7, Douglas's secretary, Fay Aull (later Deusterman), typed the tribute and sent it to the Court printer.[82] When it came back, Fay

and Thomas (Tom) Klitgaard, Douglas's law clerk during the 1961 Term, proofread it. A few days later, while Fay and Tom were having a drink together, they had a conversation about Whittaker.[83] Fay told Tom that during the previous Term Douglas had drafted a majority opinion for Whittaker. Douglas did so, she said, because Whittaker had "writer's block." She also told Tom that Whittaker was in Douglas's office when Douglas wrote the draft on his yellow pad, and Whittaker took Douglas's handwritten draft with him when he left. She added that Bernard (Bernie) Jacob, who was Douglas's law clerk during 1960 Term, had not been told that Douglas had written in *Meyer* for Whittaker.[84] In 1991, Fay Aull Deusterman told Bruce Allen Murphy in an interview that she knew firsthand that Douglas had drafted a majority opinion for Whittaker in *Meyer*, which corroborated Tom Klitgaard's account of his 1962 conversation with her.[85]

On a Saturday afternoon in late April or early May of 1962, Douglas took Fay Aull and Tom Klitgaard to lunch at Jimmie's, a restaurant near the Court, where they had a conversation about Whittaker. Tom, "touched by Justice Douglas's humanity in writing his tribute to Justice Whittaker," asked him about the draft opinion he had written for Whittaker the previous Term.[86] Douglas acknowledged that he had written a draft in *Meyer* for Whittaker but asked Tom not to tell anyone about it.[87] Tom recalled that Douglas had earlier told him "he was fond of Justice Whittaker and respected him."[88] Prior to 2014, Tom never told anyone about Douglas having written a draft majority opinion for Whitaker, except his wife, Rita, and one other person in an off-the-record interview in 2003. I was the other person.[89]

In October 2014, Evan Schwab, Douglas's law clerk during the 1963 Term, recalled that in January 1964 Douglas asked him to find a tax opinion by Whittaker in which Douglas "wrote both sides."[90] According to Schwab, Douglas did not remember the name of the case. After completing a search of Whittaker's opinions in which Whittaker had written for the Court and Douglas had dissented, Schwab, on January 14, 1964, wrote a memorandum listing the fourteen cases he found. Douglas looked at the memorandum and wrote at the top of it: "No.13, Oct. Term 1960," which was *Meyer v. United States*.[91] Douglas then drafted the following "Memorandum for the Files":

> No. 13—October Term, 1960
>
> *Meyer v. United States*
>
> After argument in this case and assignment of it to Justice Whittaker, I happened by chance into his office where he was pacing the room like a caged lion. He seemed very upset and I asked him what was wrong. He said that he was unable to write the opinion in the Meyer case—that every time he started it his hand froze and his mind went blank. I told him it was a simple case and if he would like, I would give him a draft of a majority opinion because I had just about finished my dissent. So I drafted an opinion which is substantially the one filed in 364 U.S. 410.
>
> WOD (signed)
>
> William O. Douglas[92]

Fay Aull showed Evan Schwab the Memorandum and told him that it "was to be placed in the files for historians to find." "She said," Schwab recalled, "that WOD wanted historians to know that he had written both sides of a case." Schwab added that Douglas had never discussed the case with him nor did he say anything about the Memorandum for the Files.[93]

Chief Justice Warren's Appointment Book also provides evidence that contradicts Smith's claim, for it establishes two facts: (1) that on November 15, 1960, Warren assigned the majority opinion in *Meyer* to Whittaker and (2) that, on the same day, Douglas, who had just lost his majority, circulated his dissenting opinion in *Meyer*. From those two facts, one can infer that Douglas drafted a majority opinion in *Meyer* for Whittaker on November 15, because Douglas, in offering to draft that opinion, said that he "had just about finished [his] dissent [in *Meyer*]," and he circulated his dissent on November 15.[94] Warren's Appointment Book also establishes the fact that Whittaker circulated the majority opinion in *Meyer* on November 17, only two days after he received his assignment. Aside from his "writer's block," Whittaker could not have written and circulated his majority opinion in *Meyer* in that brief period without Douglas's help for the following reasons:

First, Whittaker emphasized thoroughness of preparation prior to writing opinions. When a case has been assigned to a Justice, he wrote, "that justice must make a more detailed and concentrated study of the records and briefs," and only when he is "fully saturated with the case" can he "prepare the proposed opinion . . . [T]his task, because of the complexities and importance of cases, is a most painstaking and arduous one."[95] It was especially "painstaking and arduous" for Whittaker in *Meyer* because Frankfurter, in changing his vote, wrote his colleagues that "the result [in *Meyer*] is not as obvious as Charley's dissent makes it appear to be,"[96] and Harlan wrote an impressive five-page memorandum arguing that *Meyer* should be decided on grounds other than those in Whittaker's dissenting opinion.[97] Therefore, transforming a two-paragraph dissenting opinion into a full-blown majority opinion that would satisfy Frankfurter and Harlan and answer Douglas's dissenting opinion was formidable and would have taken more than two days to accomplish.

Second, Whittaker did not permit his law clerks to write drafts of his assigned opinions. As one of his law clerks said in an interview: "[N]o clerk was going to write his opinions. . . [O]pinion writing was his function."[98] Whittaker wouldn't even use his clerks as sounding boards. As he told Judith Cole in an interview: "[You] must realize that these [clerks] are just youngsters, bright boys, but they have no experience practicing law [and are] necessarily quite immature and not very adequate as a sounding board. Besides I don't think [a] Supreme Court Justice need[s] a sounding board. He knows what is right to him."[99]

Third, Whittaker, unlike Douglas, did not write quickly or easily. Putting words on paper was for him a heavy burden.[100] He "told friends that when he wrote an opinion, he felt as if he was carving his words into granite."[101] "He labored over every word," wrote Smith in **Failing Justice**, "which caused delays and frustration for the rest of the Court."[102]

Other primary sources that contradict Smith's claim are drafts of Douglas's unpublished majority opinion in *Meyer* and drafts of Whittaker's unpublished dissenting and majority opinions in the case.

A comparison of the first paragraphs of Douglas's majority opinion circulated on November 4, 1960,[103] and Whittaker's majority opinion circulated on November 17, 1960, both of which are in the Clark and Douglas Papers, reveals the following:

> MR. JUSTICE DOUGLAS delivered the opinion of the Court.
>
> Executors of the estate of Albert F. Meyer brought this suit to recover an alleged overpayment in federal estate taxes. The District Court granted the relief asked. 166 F. Supp. 629. The Court of Appeals reversed, 275 F.2d 83. We granted the petition for certiorari because of

> a conflict of decisions in the circuits. Cf. *In Re Reilly's Estate,* 275 F. 2d 797, decided by the Court of Appeals, Third Circuit.
>
> MR. JUSTICE WHITTAKER delivered the opinion of the Court.
>
> Petitioners, who are executors of the estate of Albert F. Meyer, brought this suit to recover an alleged overpayment of federal estate taxes and the District Court granted the relief asked. 166 F. Supp. 629. The Court of Appeals reversed, 275 F. 2d 83, and we granted the executors petition for certiorari because of a conflict of decisions in the circuits, Cf. *In Re Reilly's Estate,* 239 F. 2d 797, decided by the Court of Appeals for the Third Circuit.

Douglas's and Whittaker's first paragraphs are virtually identical. That could not occur by chance. In transforming his majority opinion into a dissenting opinion, Douglas deleted his first paragraph and used it as the first paragraph in his draft of a majority opinion in *Meyer* for Whittaker.[104] Thus the origin of the first paragraph of Whittaker's majority opinion in *Meyer* is obvious.

The origin of the last two paragraphs of Whittaker's eight-paragraph majority opinion in *Meyer* is also obvious. Except for two sentences, the paragraphs are almost identical to those in Whittaker's two-paragraph dissenting opinion circulated on November 3.

The first five paragraphs of Whittaker's majority opinion, which comprise more than half of the opinion, track Douglas's majority opinion in *Meyer* and are substantively similar. Smith, noting the similarity, wrote, "Since the outcome in *Meyer* involved Whittaker and Douglas exchanging the majority, there were considerable similarities to their arguments."[105] Though substantively similar, the second through fifth paragraphs vary stylistically and exhibit both Douglas's and Whittaker's writing styles. Douglas's style was clear and pithy. The sentences in his majority opinion in *Meyer* average twenty-five words each. Whittaker's style, according to his law clerks, was "prolix."[106] He wrote "long sentences containing many clauses which were not always clear."[107] His sentences in two of his majority opinions, which he wrote within a month of *Meyer*, average forty-three words.[108] Eight of the thirteen sentences in the first five paragraphs of Whittaker's majority opinion in *Meyer* that circulated on November 17 average twenty-five words; the remaining five sentences average sixty-five words, which suggests that Whittaker revised portions of Douglas's draft of paragraphs two through five, retaining some of Douglas's sentences and adding some of his own.

The sixth paragraph adopted the Second Circuit's view of Section 812 (e)'s legislative history, citing the Senate Committee report, which Douglas had cited in his majority opinion and Whittaker had not mentioned in his dissenting opinion. The paragraph reflects the writing styles of both Douglas and Whittaker, which suggests that Douglas drafted the paragraph and Whittaker revised it.

Smith's Reliance on Inaccurate Secondary Sources

Relying principally on Bruce Allen Murphy's **Wild Bill** and Richard Posner's review of Murphy's biography, Smith implicitly argues by analogy that since Murphy and Posner asserted that Douglas had fabricated his accounts of having suffered polio as child, having served in the U.S. Army, and having received an honorable discharge, he also fabricated his account of having written a majority opinion for Whittaker in *Meyer.*[109] The fatal flaw in Smith's argument is that Murphy's and Posner's assertions are demonstrably inaccurate. There is documentary

evidence proving that Douglas in fact had polio as a child,[110] that he had served in the U.S. Army, and that he had received an honorable discharge.[111]

Conclusion

Smith's claim that Douglas fabricated his account in **The Court Years** of having drafted a majority opinion for Whittaker in *Meyer* is false. The best evidence showing that Douglas drafted an opinion for Whittaker in *Meyer* comes from Douglas's secretary, Fay Aull Deusterman, who told Bruce Murphy in a 1991 interview that she had first-hand knowledge of the event. Hence, Klitgaard's recollection that she told him the same thing in 1962 is believable. So are Klitgaard's statements in 2003 and 2014 that Douglas told him that during the 1961 Term he had written a draft opinion for Whittaker the previous Term. Also persuasive is the documentary evidence in the Warren, Douglas, Harlan, Brennan, and Clark Papers, showing that Douglas wrote parts of Whittaker's majority opinion that was circulated on November 17, 1960, and Chief Justice Warren's Assignment Book, showing that the majority opinion in *Meyer* had been written in two days or less, which Whittaker could not have done without Douglas's help.[112]

There is nothing in Douglas's account of *Meyer v. United States* in **The Court Years** that justifies Smith's charges that Douglas was guilty of "deceit,"[113] "fraudulence,"[114] and "besmear[ing] Whittaker's reputation."[115]

It is not surprising that Douglas recalled *Meyer* as a five-to-four decision, rather than a six-to-three decision, for the conference vote was five to four, and the vote remained five to four until a week before the Court announced its decision. Further, the Court's vote in *Meyer* is a minor detail in an event recalled more than a decade later.[116] Douglas's most important statement in his account is that he wrote a "draft" opinion in *Meyer* and gave it to Whittaker. After making that statement, Douglas continued: "[W]hen the opinion came down (*Meyer v. United States*, 364 U.S. 410) it was one of the few in which the majority and minority opinions were written by the same man."[117] In view of Douglas's statement that he had written a "draft" of the majority opinion for Whittaker, the quoted sentence is ambiguous. One interpretation is that Douglas had written a draft that was the basis of the opinion Whittaker handed down. Another interpretation is that Whittaker handed down the draft just as Douglas had written it. The first interpretation is the correct one, for Douglas wrote in his Memorandum for the Files in 1964: "I drafted an opinion that is substantially the one filed in 364 U.S. 410,"[118] which indicates that Whittaker revised the language but not the substance of Douglas's draft before he circulated his majority opinion.[119]

Smith's charge that Douglas "besmear[ed] Whittaker's reputation"[120] reflects a misreading of **The Court Years**. Victoria Saker Woeste, who wrote a brief biography of Whittaker, read Douglas's autobiography differently. Douglas's **The Court Years**, she wrote, "contains some useful information about Whittaker. Although Justice Douglas objected to Whittaker's . . . conservatism, he respected Whittaker personally, and the few Whittaker anecdotes here are told with warmth and charity."[121]

Author's Note: I thank Jill Parmer Danelski, David E. Cote, Greg Caldeira, and Artemus Ward for reading and commenting on earlier drafts of this article. Their comments were very useful.

ENDNOTES

[1] Craig Alan Smith, "Debunking Douglas: The Case against Writing Both Majority and Minority Opinions," *Journal of Supreme Court History* 20, no. 2, (2014), 232.
[2] William O. Douglas, **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (New York: Random House, 1980), 173-74. Douglas wrote this passage more than two years before his stroke on

December 31, 1974. See Vol. 2, Proposed Autobiography, manuscript, Oct. 1972, chap. 12 at 10-11, Container 948, William O. Douglas Papers, Manuscript Division, Library of Congress.

[3] Smith, "Debunking Douglas," 228.

[4] *Ibid.*, 242.

[5] *Ibid.*, 240.

[6] *Ibid.*, 239.

[7] The Earl Warren, William O. Douglas, and William J. Brennan, Jr., Papers are at the Manuscript Division, Library of Congress. The Felix Frankfurter Supreme Court Papers are at the Harvard Law Library, and a microfilm version is available at the Manuscript Division, Library of Congress. The John M. Harlan II Papers are at the Seeley G. Mudd Manuscript Library, Princeton University. The Tom C. Clark Papers are at the Tarlton Law Library, University of Texas, Austin. The Hugo L. Black Papers, which are at the Manuscript Division, Library of Congress, and the Potter Stewart Papers, which are at Archives and Manuscripts, Sterling Memorial Library, Yale University, contain no materials on *Meyer v. United States.* Charles E. Whittaker did not preserve his Court Papers. Smith, "Debunking Douglas," 236. Smith examined only the Clark Papers.

[8] U.S. Supreme Court Briefs and Records, *Meyer v. United States,* 364 U.S. 410 (1960).

[9] Steven Duke, Certiorari Memorandum, No. 13, *Meyer v. United States,* Jan. 2, 1960, Container 1244, Douglas Papers.

[10] *Meyer v. United States,* No. 13, Warren's Docket Book, 1960 Term, Container 374, Warren Papers.

[11] Douglas's conference notes, No. 13, *Meyer v. United States,* Container 1244, Douglas Papers.

[12] Douglas's and Warren's Docket Books for the 1960 Term, Container 1232, *ibid.*; Container 374, Warren Papers.

[13] *Ibid.* Container 110, Harlan Papers.

[14] Frankfurter to Brethren, Oct. 17, 1960, Container 1244, Douglas Papers; Container A105, Clark Papers.

[15] "The Case for the Government," 3, *Ibid.*

[16] Whittaker to Frankfurter, Oct. 18, 1960, Frankfurter Papers, Harvard Law School, on microfilm at the Library of Congress, Reel 67.

[17] Assignment Sheet, 1960 Term, Oct. 24, 1960, Container 1232, Douglas Papers.

[18] Douglas's majority opinion, Nov. 2, 1960, Container 1244, *ibid.*

[19] Brennan to Douglas, Nov. 2, 1960, Container I-48, Brennan Papers.

[20] Harlan to Douglas, draft, n.d., Container 110, Harlan Papers.

[21] Whittaker's dissenting opinion, Nov. 3, 1960, Container 1244, Douglas Papers; Container A105, Clark Papers.

[22] Clark to Douglas, Nov. 4, 1960, Container 1244, Douglas Papers. Accompanying Clark's note was his copy of Douglas's majority opinion circulated on Nov. 2, 1960, with marginal notes suggesting minor revisions.

[23] Recirculation of Whittaker's dissenting opinion, Container I-48, Brennan Papers.

[24] Recirculation of Douglas's majority opinion, *ibid.*

[25] Frankfurter, Memorandum for the Conference, Nov. 7, 1960, Container A105, Clark Papers.

[26] Frankfurter to Douglas, dated by Douglas "11/7/60." Container 1244, Douglas Papers. The note contained no greeting. Douglas and Frankfurter were not getting along at the time. *See* Melvin I. Urofsky, ed., **The Douglas Letters: Selections from the Private Papers of William O. Douglas** (Bethesda, Md.: Adler & Adler, 1987), 89-91.

[27] *See supra*, 174.

[28] Harlan to Brethren, Nov. 14, 1960, Container 110, Harlan Papers.

[29] Harlan, Memorandum, Nov. 14, 1960, *ibid.*

[30] Harlan to Douglas, Nov. 14, 1960, Container 1244, Douglas Papers.

[31] Whittaker Assignments, 1960 Term, Warren's Assignment Book, 1959-1964, Container 127, Warren Papers.

[32] William O. Douglas, Memorandum for the Files, No. 13, *Meyer v. United States*, ca. Jan. 14,1964, Container 1244. Douglas Papers. *See infra*, 180.

[33] Douglas's first circulation of his dissenting opinion in *Meyer, ibid.*

[34] Brennan to Douglas, Nov. 16, 1960, Container I-48, Brennan Papers

[35] Whittaker's Assignments, Warren's Assignment Book, 1959-1964, Container 127; No. 13, *Meyer v. United States,* Warren's Docket Book, 1960 Term, Container 374, Warren Papers.

[36] *See infra*, 181-82.

[37] Douglas's recirculation of his dissenting opinion, Nov. 17, 1960, Container I-48, Brennan Papers.

[38] Harlan to Whittaker, Nov. 19, 1960 Harlan, draft of concurring opinion, n.d., Container 110, Harlan Papers.

[39] *Ibid.*

[40] Warren to Whittaker, Nov. 21, 1960, Container 474, Warren Papers.

[41] *Meyer v. United States,* 364 U.S. 410 (1960).

[42] Smith, "Debunking Douglas," 236.

[43] *See* Chronology, *supra*, Oct. 14, 1960.

[44] Smith, "Debunking Douglas," 236, 239.

[45] Whittaker's Assignments, 1960 Term, Warren's Assignment Book, 1959-1964, Container 127; Warren's Docket Book for the 1960 Term, No. 13, *Meyer v. United States,* Container 374, Warren Papers.

[46] Smith, "Debunking Douglas," 237.

[47] *See* Chronology, *supra*, Nov. 2, 16, 1960.

[48] Smith, "Debunking Douglas," 235.

[49] *Meyer v. United States,* 364 U.S. at 411, 418.
[50] Douglas to Whittaker, March 2, 1957, Container 382, Douglas Papers.
[51] Whittaker to Douglas, May 3, 1957, *ibid.*
[52] *Ibid.*
[53] Urofsky. **Douglas Letters**, 128.
[54] Douglas, **The Court Years**, 250.
[55] William O. Douglas, **Go East Young Man** (New York: Random House, 1974), 34; Richard Lawrence Miller, **Whittaker: Struggles of a Supreme Court Justice** (Westport, Conn.: Greenwood Press, 2002), 2-3, 50, 74; Craig Alan Smith, **Failing Justice: Charles Evans Whittaker** (Jefferson, N.C.: McFarland & Co., 2005), 36-37, 132.
[56] James F. Simon, **Independent Journey: The Life of William O. Douglas** (New York: Harper & Row, 1980), *passim.*
[57] Miller, **Whittaker**, 1-4.
[58] Simon, **Independent Journey**, ch. 7-15.
[59] Miller, **Whittaker**, 50.
[60] Smith, **Failing Justice**, 189.
[61] William O. Douglas, "Justice Was a Passion in His Life," *Texas Law Review*, 40 (1962), 746.
[62] Charles Fried quoted in Smith, **Failing Justice**, 190.
[63] Alan C. Kohn quoted, *ibid*, 316.
[64] James M. Edwards quoted, *ibid.*, 138.
[65] Alan C. Kohn, "Supreme Court Law Clerk 1957-1958: A Reminiscence," *Journal of Supreme Court History,* 23, no. 2 (1998), 47. In "Debunking Douglas," Smith ignored Douglas's assistance to Whittaker in *Hvass,* though he had mentioned it nine years earlier in **Failing Justice**, 190-91.
[66] Quoted in Smith, **Failing Justice**, 316.
[67] *Inman v. Baltimore & Ohio Railroad,* 361 U.S. 138 (1959).
[68] Theodore M. Vestal, **The Eisenhower Court and Civil Liberties** (Westport, Conn.: Praeger Publishers, 2002), 272.
[69] "Douglas Berates a Fellow Justice," *The New York Times,* Dec, 15, 1959, 25. This is Smith's assessment of the event: "Douglas's outburst was a response to Whittaker making the spectators laugh, momentarily giving him the limelight, which Douglas craved more." "Debunking Douglas," 245.
[70] Whittaker clerks quoted in Judith Cole, "Mr. Justice Charles Evans Whittaker: A Case Study in Judicial Recruitment and Behavior," M.A. thesis in political science, University of Missouri-Kansas City, 1972, Richard Lawrence Miller Papers, Dwight E. Eisenhower Library, 146. Cole interviewed Whittaker as well as several of his law clerks.
[71] *Ibid.* (ellipses in original).
[72] Urofsky, **Douglas Letters**, 129.
[73] Container 1234, Douglas Papers.
[74] Smith, **Failing Justice**, 205, 216, 220-21.
[75] Author's interview, Mercedes Eichholz, 1994; Smith, **Failing Justice**, 219; Douglas, **Go East, Young Man**, 184.
[76] Transcriptions of Interviews between Walter F. Murphy and William O. Douglas, 153, Seeley G. Mudd Manuscript Library, Princeton University.
[77] Smith, **Failing Justice**, 221-22. According to Smith, "Warren saw to it that Whittaker had to resign." *Ibid.*
[78] Douglas, "Justice Was the Passion of His Life," 745-46.
[79] Whittaker to Douglas, July 18, 1962, Container 382, Douglas Papers.
[80] Quoted in Smith, **Failing Justice**, 189.
[81] *Ibid.*, 190.
[82] William O. Douglas's draft of "Mr. Justice Whittaker," with Fay Aull's note that she typed it on April 7, 1960, Container 867, Douglas Papers.
[83] Tom Klitgaard liked and respected Whittaker. Smith quoted him as saying: "I knew Justice Whittaker when I was at the Court and liked him very much. I thought that he was a very kind and considerate man." **Failing Justice**, 132.
[84] Klitgaard to author, Oct. 19, 22; Dec. 2, 2014.
[85] Bruce Allen Murphy, **Wild Bill: The Legend and Life of William O. Douglas** (New York: Random House, 2003), 637.
[86] Klitgaard to author, Dec. 2, 2014.
[87] Klitgaard to author, Oct. 19. 22; Dec. 2, 2014.
[88] Klitgaard to author, Dec. 2, 2014.
[89] AI, Thomas Klitgaard, 2003. Klitgaard first spoke of the event on the record on Oct. 19, 2014.
[90] Evan Schwab to William O. Douglas, Memorandum, "The Whittaker case in which you wrote both sides," Jan. 14, 1964, Container 1244, Douglas Papers.
[91] *Ibid.*; Schwab to author, Oct. 23, 2014.
[92] William O. Douglas, Memorandum to the Files, ca. Jan. 14, 1964, Container 1244, Douglas Papers.
[93] Schwab to author, Oct. 23, 2014.
[94] Douglas quoted *supra*, 180.
[95] Whittaker quoted in Cole, "Mr. Justice Whittaker," 130.
[96] Frankfurter, Memorandum for the Conference, Nov. 7, 1960, Container 474, Warren Papers.
[97] Harlan, Memorandum, Container 110, Harlan Papers.
[98] Whittaker clerk quoted by Cole, "Mr. Justice Whittaker," 120.
[99] *Ibid.*, 128.
[100] *Ibid.*, 150.
[101] Anthony Lewis, **Gideon's Trumpet** (New York: Random House, 1964), 83.
[102] Smith, **Failing Justice**, 129.
[103] The first paragraphs of Douglas's majority opinion, as circulated on November 2 and 4, 1960, are virtually identical. I quote the latter because it is in the Clark Papers, which Smith examined. Clark's copy of Douglas's

November 2 circulation is not in Clark's papers because Clark sent it to Douglas with marginal notes suggesting minor revisions. Cf. Smith, "Debunking Douglas," 236.

[104] Draft of Douglas's dissenting opinion circulated on Nov. 15, 1960, Container 1244, Douglas Papers.

[105] Smith, "Debunking Douglas," 240.

[106] Whittaker law clerks' interviews quoted in Cole, "Mr. Justice Whittaker,"148. Smith wrote in **Failing Justice** that Whittaker's style was "exceedingly dull, formal, convoluted, and wordy." 187.

[107] Whittaker law clerks' interviews quoted in Cole, "Mr. Justice Whittaker," 148.

[108] The majority opinions analyzed by Whittaker were in *McPhaul v. United States,* 364 U.S. 372 (1960) and *Aro Manufacturing Co. v. Convertible Top Replacement,* 365 U.S. 336 (1961). They were Whitaker's first assignments during the 1960 Term, Assignment Sheet, Oct. 24, 1960, Container 1232, Douglas Papers.

[109] Smith, "Debunking Douglas," 228, 234, 243-44; Murphy, **Wild Bill**, 282-85, 478, 663; Richard A. Posner, "The Anti-Hero," *The New Republic,* Feb. 23, 2003 at 27. Smith misreported the title of Posner's review as "The Anti-Hero: Another Lying Lefty Exposed."

[110] On March 16, 1975, Dr. Roland R. Blanck, Lt. Col., MC, U.S. Army, after examining Douglas, wrote in his medical record at the Walter Reed Medical Center: "[William O. Douglas] had polio as a child affecting his left side without much damage or disability." Copy in the possession of Cathleen Douglas Stone.

[111] Douglas's honorable discharge from the U.S. Army is in Container 1771 of the Douglas Papers at the Library of Congress. It certifies that "William O. Douglass [sic], serial number 5 200 182, Private, S.A.T.C., Whitman College," **THE UNITED STATES ARMY**," was "[i] nducted on October 4, 1918, and **HONORABLY DISCHARGED** from military service of the United States on December 10, 1918." (Bold face in original document.) The War Department's Special Regulations No. 103, Student Army Training Corps (1918), provided that a member of the S.A.T.C. "is a soldier in the Army of the United States. As such, he is subject to military discipline at all times," and, upon induction, he is "placed on active duty status." This document is available at the Library of Congress. See also Charles Lane, "Falls of Justice: What Happens When a Biographer Attacks His Subject and Gets His Facts Wrong," *Washington Monthly*, April 2003, at 42-45.

[112] *Supra*, 180-81.

[113] Smith, "Debunking Douglas," 228.

[114] *Ibid.*, 242.

[115] *Ibid.*, 240.

[116] *See supra*, 172.

[117] *Ibid.*

[118] Douglas quoted *supra*, 180.

[119] *Ibid.*, 181-82. Douglas's writing a draft for Whittaker in *Meyer* was not without precedent. During the 1926 Term, Willis Van Devanter occasionally rewrote the opinions of Harlan Fiske Stone "from beginning to end," which appalled Stone's law clerk, Milton C. Handler. "I don't know why he doesn't attend to his own assignments, rather than messing with yours," said Handler to Stone. "Have you ever read the first line of a Supreme Court opinion?" asked Stone, who then pointed to one of his own opinions from which he read aloud, "Mr. Justice Stone delivered the opinion of the Court," emphasizing the word "Court." "Thus admonished," wrote Handler, "I never thereafter expressed any indignation at Van Devanter's practice of rewriting opinions of others." Milton C. Handler, "Clerking for Justice Harlan Fiske Stone," *Journal of Supreme Court History,* 20, no. 1, (1995), 119.

[120] Smith, "Debunking Douglas," 240.

[121] Victoria Saker Woeste, "Charles Evans Whittaker," in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York: Garland Publishing, Inc., 1994), 534.

Statement of Craig Alan Smith

When I received the editors' invitation to remark upon Professor Danelski's rebuttal, I was surprised that anyone would take such strong exception to my article. Danelski certainly gave considerable thought and attention to an incident that, by any account, was a trivial sidelight in Supreme Court history. Having prompted Danelski's rebuttal, I am disinclined to offer a substantive rejoinder. My article and its arguments will have to stand—or fall—on their own. I trust that readers with a continuing interest in this subject will carefully weigh all of our arguments to reach their own conclusions. Considering that the dispute over Douglas's reliability has gone on for some time and will likely continue, I doubt that anyone with a fully-formed opinion on the matter will be easily swayed by either side. Ten years ago I first presented my suspicions about Douglas' story in **Failing Justice**; and subsequent research findings—including Danelski's account—have only reinforced my view.

In a larger sense, our differences of opinion reflect a concern for how history remembers one of the Court's most interesting Justices. As an historian, I teach my students about the nature and development of historical scholarship. We learn how historians can be selective in their use of evidence, and how even the same evidence can lead to different conclusions. We discuss historical relativism, which to some extent views history as a never-ending story where one definitive truth may not be possible because the story changes with each re-telling, depending largely on who tells the story. When my students, most of whom still believe in one absolute historical truth, express concern about the uncertainty of historical knowledge, I reassure them that certainty is not our goal. Instead, our goal is to engage other scholars in a lively discourse where differing views compete to gain acceptance. I believe Danelski's rebuttal provides a useful lesson for my students: differing opinions—even unresolved differences—are part of the ongoing discourse at the heart of historical scholarship.

Graveyard Dissents on the Burger Court

GREG GOELZHAUSER

In *Allis-Chalmers Corp. v. Lueck* (1985), the Supreme Court held that the Labor Management Relations Act preempted a tort claim under state law for improper delay in making disability payments in accordance with a collective-bargaining agreement.[1] Although the Court delivered a unanimous opinion in *Allis-Chalmers*, Justice William H. Rehnquist had concealed his disagreement. Nearly one month after Justice Harry Blackmun first secured a majority coalition for his opinion in *Allis-Chalmers*, Justice Rehnquist wrote to him with copies to the Conference: "You may consider this letter as both a 'graveyard dissent' and a 'join.'"[2] Justice Rehnquist's reference to a "graveyard dissent" meant that he would silently acquiesce to the majority position despite his disagreement.

The origin of the phrase "graveyard dissent" is unclear. Justice Blackmun sometimes associated the phrase with Justice Charles Whittaker. In *Mills v. Rogers*,[3] for example, Blackmun wrote to Justice Lewis F. Powell: "I do not feel strongly enough . . . to write separately and thus shall give you one of Charlie Whittaker's 'graveyard dissents.'"[4] Similarly, in *Summa Corp. v. California ex rel. State Lands Commission*,[5] Blackmun wrote to Rehnquist: "I'll give you one of Charlie Whittaker's 'graveyard dissents' and go along in this case."[6] And in *Irving Independent School District v. Tatro*,[7] Blackmun wrote to Chief Justice Warren Burger: "I can give you a Charlie Whittaker 'graveyard dissent' and join your opinion."[8] Whittaker famously struggled with the Court's workload and opinion-writing responsibilities; he also suffered from debilitating physical and mental conditions that ultimately led to his retirement in 1962 after serving only five years.[9] As a result of these difficulties, it would not be surprising to learn that Whittaker regularly silently acquiesced to majority opinions rather than expending the effort associated with dissenting.

Although Blackmun regularly associated the phrase "graveyard dissent" with Whittaker, it is not even clear that it originated with the Supreme Court. Blackmun's tenure on the

Court began eight years after Whittaker retired, but Blackmun joined the Eighth Circuit about two years after Whittaker left to join the Court. Thus, Blackmun may have associated the practice with Whittaker's behavior on the Eighth Circuit. In *Mills*, Blackmun sent a follow-up note to Justice Powell assuring him that he was not trying to be "funny" by using the phrase "graveyard dissent," adding that it was meant to signal a "reluctant joinder . . . [a]t least, that is what I have assumed for some years to be the definition."[10] This exchange suggests that Powell was not aware of the phrase as late as 1982. Nearly a decade earlier, Justice Potter Stewart gave Justice Thurgood Marshall a "graveyard dissent" and told him that the phrase was employed during Stewart's tenure on the Sixth Circuit from 1954–1958.[11]

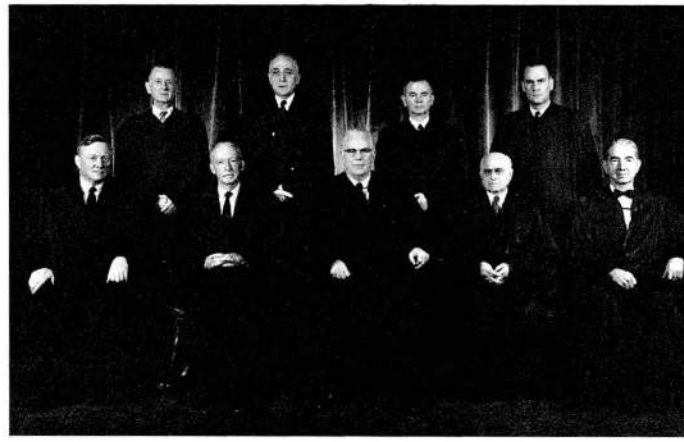
Regardless of where or how the phrase "graveyard dissent" originated, the practice of silently acquiescing to the majority judgment and opinion rather than dissenting enjoys a storied history on the Supreme Court. Prior to Chief Justice John Marshall's tenure, Justices often issued seriatim opinions explaining the rationale behind their individual votes.[12] Under Marshall's leadership, however, the Court typically issued unanimous opinions for the Court.[13] But the fact that Justices on the Marshall Court rarely dissented did not necessarily mean that they agreed on a case's proper disposition. Indeed, dissenting opinions issued during Marshall's era sometimes emphasized the prevailing norm of silently acquiescing with the majority despite continuing disagreement. Chief Justice Marshall, for example, prefaced a rare dissent by noting that it was his "custom, when I have the misfortune to differ from this Court, [to] acquiesce silently in its opinion."[14] And Justice Joseph Story once expressed "regret . . . [at] hav[ing] the misfortune to differ from a majority of the Court," adding that "[h]ad this been an ordinary case I should have contented myself with silence."[15]

Even President Thomas Jefferson lamented the delivery of opinions "with the silent acquiescence of lazy or timid associates" during Marshall's tenure.[16]

The norm of silently acquiescing to majority dispositions continued well beyond the Marshall Court. Indeed, scholars studying the Waite[17] and Taft[18] eras have uncovered extensive evidence of this practice. During the mid-twentieth century, however, there was an explosion in the production of dissenting opinions—a trend that continues through the present day.[19] In addition to more regular dissenting opinions, several institutional changes made during the modern era may have resulted in the "death of acquiescence."[20] These changes, which were instituted during the Burger Court's early years, include increases in the number of law clerks allocated to each Justice, introduction of the syllabus, and institution of the norm giving the minority coalition's senior Justice power to assign dissent-writing responsibilities.[21] The increase in dissenting opinions and subsequent institutional changes potentially affecting separate opinion writing raise two fundamental questions about the continued use of graveyard dissents during the modern era. First, do Justices on the modern Supreme Court continue to withhold dissents? Second, if so, why?

This article offers evidence that Justices withheld dissents throughout the Burger Court. Furthermore, archival evidence from the Justices' private papers suggests that dissents are withheld in comparatively unimportant cases, particularly when the opportunity cost of drafting a dissenting opinion is high.[22] As commonly assumed, dissents are often withheld by would-be lone dissenters. However, dissents are also withheld when minority coalitions fall apart. In any event, graveyard dissents regularly lead to unanimous opinions.

This article exclusively focuses on clear graveyard dissents as that phrase is traditionally understood—that is, silent acquiescence



Although frequent dissents and separate opinion writing became the norm on the modern Court, the practice of "graveyard dissents," or having a Justice silently acquiesce to the majority position despite disagreeing with it, continued at least to some extent in the Burger Court era.

to a majority judgment and opinion despite the would-be dissenter's continuing disagreement. As a result, two conceptually related but fundamentally distinct practices are not discussed. First, Justices regularly go along despite disagreeing with opinion authors over issues such as dicta, style, and scope. This type of acquiescence occurs between members of a majority coalition, and is inescapable at times on a collegial court. Second, I do not discuss would-be dissenters joining majority coalitions in exchange for substantial opinion modifications. Although Justice Stanley F. Reed's capitulation in *Brown v. Board of Education*[23] may be the best-known example of acquiescence, for example, it is thought to be the product of considerable compromise with Chief Justice Earl Warren drafting a narrow opinion avoiding discussion of the proper remedy.[24] In the classic graveyard dissent, such as Justice Rehnquist's acquiescence in *Allis-Chalmers*, a Justice simply joins the majority coalition without bargaining for substantial opinion modifications.

This project is important for several reasons. First, it draws from archival records to provide the first sustained qualitative analysis of why Justices on the modern Supreme Court sometimes withhold dissents. Second, it offers the first analysis of the relationship between coalition size and the decision to withhold dissents.[25]

This project also contributes to the literature on judicial decision-making. Collectively, the results presented here suggest that a range of institutional goals motivate Justices. This study also has practical implications for the normative debate surrounding graveyard dissents, and recent increases in consensual decision-making on the contemporary Court.

The Value of Published Dissents

Graveyard dissents are somewhat puzzling in part due to the value of published dissents. Indeed, although "[a]quiescence was a common practice for most of the Court's history,"[26] the Supreme Court's modern era is marked by ubiquitous dissent. Published dissents are valuable for several reasons. First, a published dissent is a vehicle for expressing one's sincere legal or policy preference when that preference conflicts with the majority's position. Given that sincere voting is a key element in the judicial utility function,[27] there is little mystery in the fact that Justices use published dissents to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 6, 1984

Re: No. 82-708, Summa Corp. v. California
Ex rel. State Lands Commission

Dear Bill:

I'll give you one of Charlie Whittaker's "graveyard dissents" and go along in this case.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

As this letter from Harry Blackmun attests, the phrase "graveyard dissent" was associated with Justice Charles E. Whittaker, but the reason why remains a mystery. When Blackmun says he will "go along," he is using a phrase commonly employed by the Justices to indicate that they have reservations about an opinion but are going to suppress their dissent.

note their positions. As Justice Hugo L. Black once put it, "a failure to dissent where there is not agreement would be strange for one who has opinions."[28]

Apart from voting's purely instrumental value, dissenting opinions help establish a Justice's jurisprudential legacy. Justices John Marshall Harlan and Oliver Wendell Holmes, Jr., for example, were both commonly referred to as "the Great Dissenter" due to the influence some of their dissenting opinions had on the law.[29] Importantly, dissenting opinions allow Justices to express their style and positions free from the internal constraints associated with forging majority coalitions on a collegial court. As Justice Antonin Scalia once explained: "To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure."[30] Aside from bringing the Justice personal satisfaction, expressing judicial style is a fundamental component of reputation building.[31]

The value of published dissents extends past the individual. Indeed, a dissenter's greatest hope may be that the opinion ultimately influences the development of law. Forming the foundation for a subsequent overruling opinion is the most obvious way

for this to occur. As Chief Justice Charles Evans Hughes famously noted: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have betrayed."[32] Even if that "future day" never comes, a dissenting opinion might still make a legal impact. Chief Justice Harlan Fiske Stone once noted, for example, that the dissent's "influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law," adding that "[a] considered and well stated dissent sounds a warning note that legal doctrine must not be pushed too far."[33]

Chief Justice Stone argued in those same remarks that "the dissenting opinion is likely to be without any discernible influence in the case in which it is written."[34] But other Justices have noted that a dissenting opinion can help shape and sharpen a majority opinion. Justice William J. Brennan once noted, for example, that a dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[35] And referring to her landmark opinion in *United States v. Virginia* invalidating the Virginia Military Institute's male-only admissions policy under the Fourteenth Amendment's Equal Protection Clause,[36] Justice Ruth Bader Ginsburg noted that "[t]he final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent."[37]

Time Constraints and Case Importance

If published dissents are so valuable and prevalent in the modern era, why would Justices continue to silently acquiesce? The Justices' private papers lend insight into this question. Although Justices do not always formally explain their graveyard dissents, the justifications they do offer often focus on time constraints and case importance. The rest of this section explores these factors as justifications for withholding dissent.

Time is a precious commodity for Justices. And as Justice Ginsburg once noted: "When to acquiesce and when to go it alone" in dissent is "subject to one intensely practical constraint: time."[38] Time constraints are particularly prevalent near term's end, which Justice Louis D. Brandeis said brings about "haste and fatigue."[39] Indeed, social scientists have found that end-of-term pressures influence a variety of decisions.[40] The same seems to be true for the decision to withhold dissent. In *Blum v. Bacon*, the Court held that the Social Security Act preempted the state of New York from refusing aid to recipients of the Aid to Families with Dependent Children provision under the state's federally funded Emergency Assistance Program.[41] The Court heard oral argument in *Blum* on April 28, 1982, and Justice Marshall circulated the first draft of an opinion for the Court one month later on May 28. Marshall secured a majority coalition on June 2, and all but Justice Rehnquist's vote by June 5. On June 7, with the end of the Term nearing, Rehnquist wrote to Marshall with copies to the Conference: "If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your pre-emption discussion. Since it is June, however, I join."[42] The Court released its opinion in *Blum* on June 14, with no indication of Rehnquist's disagreement.

End-of-term pressures may have led to a dissenting coalition falling apart in *DeBartolo Corp. v. NLRB*.[43] In *DeBartolo*, the Court vacated and remanded a case raising a constitutional question concerning a union's ability to distribute handbills asking consumers not to trade with a certain group of employers, with an order to resolve a statutory question concerning whether the handbills were exempted from a prohibition

on secondary boycotts imposed by the National Labor Relations Act. The Court heard oral argument in *DeBartolo* on March 22, 1983. On April 4, Justice Brennan wrote to Justice Marshall indicating that they were together in dissent and that he would draft an opinion. Justice John Paul Stevens circulated his first draft of an opinion for the Court on May 27, and Brennan replied on May 31, indicating to the Conference that he would be circulating a dissent. On June 7, Justice Blackmun indicated to Stevens that he "would like to see what the dissent has to say" before deciding whether to join the majority. As the end of the Term neared on June 21, however, Brennan followed up with a note to Stevens that read: "I give up. The dissent won't write. Please join me."[44] What at a minimum would have been a 7-2 disposition, and possibly 6-3 had the dissent convinced an undecided Blackmun, ultimately resulted in a unanimous opinion.

Although time constraints may be particularly prevalent near the end of term, they can motivate graveyard dissents at any point. In *Roe v. Doe*, the Court considered the validity of a state court injunction to enjoin the publication of a psychiatrist's book that allegedly contained a detailed discussion of the plaintiff's case history from her time as one of the psychiatrist's patients.[45] Ultimately, the Court voted at Conference to dismiss the case as improvidently granted ("DIG"), i.e. that the writ of certiorari should never have been granted and the case never heard by the Court.[46] After reminding Chief Justice Burger that he disagreed with the Court's decision to DIG *Doe* at Conference, Justice Rehnquist informed him on February 10 that "[i]n the interim the pressure of circulating paper overwhelmed me, and I am now content to let the matter go."[47] As a result of Rehnquist's silent acquiescence, the Court disposed of *Doe* with a unanimous one-sentence per curiam opinion.

A similar concern with workload and the opportunity cost of dissenting animated Justice Powell's decision to silently acquiesce in *Huddleston v. United States*.[48] *Huddleston* concerned the narrow statutory question of whether a federal prohibition on knowingly making false statements when acquiring a firearm from a licensed dealer covered redeeming pawned firearms. In an opinion written by Justice Blackmun, the Court concluded that the statutory prohibition on making false statements in connection with the acquisition of firearms also applied to re-acquiring them at a pawnshop. Responding to Blackmun's circulation, Powell wrote: "I still lean towards dissenting. Recording my views in this case, however, has a relatively low priority compared to other issues which I am addressing. I will, therefore, await other circulations, if any."[49] Although Justice Douglas ultimately dissented, his brief opinion simply noted his view that ambiguities of the sort presented in *Huddleston* should be resolved in favor of the accused. Powell, despite his reservation, ultimately joined the majority opinion without separate writing.

As Powell's note in *Huddleston* exemplifies, a case's comparative importance is an important determinant in whether to silently acquiesce or dissent. Explaining Justice Brandeis's regular acquiescence, for example, law clerk Alexander Bickel noted that "at times [Brandeis] suppressed his dissenting views on questions which he considered to be of no great consequence."[50]

Evidence from private papers suggests that Justices on the modern Supreme Court adopted a similar position toward comparatively unimportant cases. In *Burlington Northern, Inc. v. United States*, the Supreme Court reviewed a technical judgment by the D.C. Circuit concerning the Interstate Commerce Commission's (ICC) authority to set and review shipping rates.[51] In a unanimous opinion written by Chief Justice Burger, the Court held that primary authority to regulate shipping rates rested with the ICC rather than the federal courts. Burger's *Burlington*

Northern opinion sought to correct a mistake by the D.C. Circuit and clarify existing precedent with respect to the allocation of authority between the federal courts and ICC rather than create new precedent. As a result, despite disagreeing with the majority position, Powell wrote to Burger: "As a dissent in this case is hardly worthwhile, you may record me as a 'join.'"[52]

Chief Justice Burger conveyed a similar sentiment in *Carbon Fuel Co. v. United Mine Workers of America*, where the Supreme Court held that an international union that did not encourage or support strikes by local unions could not be held liable for strikes by local unions in violation of a collective-bargaining agreement.[53] As the senior Justice in the majority coalition, Brennan kept the opinion for himself.[54] Less than one week after Brennan circulated a first draft to the Conference, Burger informed Brennan that he was working on a dissent and would soon know whether it was "worthwhile."[55] Four days later, Burger notified Brennan that he would simply go along with the majority rather than continue with his dissent, writing: "This will confirm my 'graveside' acquiescence."[56] The Court released a unanimous opinion in *Carbon Fuel* three days later.

In *Procunier v. Martinez*, the Supreme Court unanimously invalidated administrative regulations enacted by the California Department of Corrections censoring prisoner mail and limiting prisoner access for legal purposes to state-licensed investigators or attorneys.[57] The Court's opinion in *Martinez*, written by Justice Powell, is particularly noteworthy because of the high burden it placed on state regulations concerning prisoner correspondence, and it is widely considered an important contribution to the jurisprudence on prisoners' constitutional rights. Nonetheless, despite apparently disagreeing with the judgment, Justice Rehnquist chose not to dissent. Instead, Rehnquist wrote to Powell: "You have written a good opinion, and I don't think the legal literature would be enriched by my dissenting on the basis of my Conference vote. Please join me."[58]

Justice Stewart expressed a similar sentiment with respect to the value of dissenting in *Federal Maritime Commission v. Seatrain Lines, Inc.*[59] *Seatrain* asked whether the acquisition of a carrier's assets by another carrier such that there were no further obligations between carriers constituted an agreement under the Shipping Act, thereby bringing it under the Federal Maritime Commission's jurisdiction. Writing for the Court, Justice Marshall noted that the case was of "some importance" because any agreement subject to the Commission's jurisdiction and subsequently approved enjoyed immunity from antitrust liability.[60] In a unanimous opinion, the Court held that Congress did not intend to grant the Commission power to shield agreements of this sort from antitrust liability. Although the opinion was unanimous, Stewart had privately suggested that he acquiesced to the majority position only because he considered the case to be comparatively unimportant when he wrote to Marshall that he "concluded that not many souls would be saved by any dissenting opinion I might be able to produce."[61]

Coalition Size

The previous section demonstrates that time constraints and case importance are key determinants in the decision to withhold dissenting opinions. With respect to coalition size and withholding dissent, the most common argument has been that silent acquiescence on the modern Supreme Court is likely to arise when a would-be lone dissenter gives in to the majority position. One explanation for this behavior is that cognitive pressure dictates acquiescence in a group setting. Beginning with Solomon Asch's seminal work on the tendency toward conformity in groups, social psychologists have demonstrated that group members tend to defer to the majority position

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1985

83-1620 - First National Bank of Atlanta
v. Bartow County Board of Tax Assessors

Dear Harry,

My dissent in this case will be a silent one -- the graveyard type.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

This 1985 letter by Byron White indicates a straightforward use of the term "graveyard dissent," with no indication why he chose to silently acquiesce to the majority opinion.

when they find themselves alone in disagreement—even when they know that their own position is correct.[62] Applying this literature to Supreme Court decision-making, Granberg and Bartels find that unanimous opinions are the most overrepresented coalition split, and lone-dissenter opinions the most underrepresented coalition split, among all possible splits from cases decided during the 1953–2001 Terms using a rectangular distribution that assumes an equal probability for each split.[63] Similarly, Wrightsman interprets the underprediction of unanimous opinions and overprediction of lone-dissenter opinions by participants in the Supreme Court Forecasting Project as evidence that "when most justices vote one way, pressures exist on the holdout justice to go along, and often they do."[64]

Scholars have also considered acquiescence through the lens of broader collegial dynamics. Judge Posner, for example, once noted that dissenting is a "source[] of irritation" on a multimember court and thus potentially has deleterious consequences for collegiality.[65] Similarly, Justice Brandeis once noted that the "[g]reat difficulty of all group action . . . is when [and] what concessions to make. Can't always dissent."[66] These collegial dynamics are a popular explanation for "dissent aversion" on circuit courts.[67] Even though Supreme Court Justices may face lower collegiality costs on average than circuit court judges due to differing institutional norms, scholars have suggested that collegiality concerns may nonetheless help explain the production of dissenting opinions.[68]

Doing what is in the institution's best interest is another justification for withholding dissent in light of coalition size. Unanimity is widely considered to have beneficial

institutional consequences.[69] Chief Justice John G. Roberts, for example, regularly emphasizes the institutional value of unanimity and has suggested that issuing more unanimous opinions will help "the Court acquire more legitimacy [and] credibility."[70] Justice Ginsburg expressed a similar sentiment when she suggested that "[c]oncern for the well-being of the court on which one serves . . . may be the most powerful deterrent to writing separately." As a result of the prevailing view concerning unanimity's institutional benefits, Justices may be inclined to silently acquiesce when they would otherwise be alone in dissent.

The historical records indicate that would-be lone dissenters are sometimes sensitive to their solitary position, and ultimately decide to silently acquiesce to the majority position. Indicating that a graveyard dissent is conditional on no other Justice publishing a dissent is one manifestation of this sensitivity. In *United States v. Kordel*, the Court upheld the federal government's use of evidence obtained in nearly contemporaneous civil proceedings to help secure criminal convictions in the face of a claim that this practice violated the Fifth Amendment's protection against compulsory self-incrimination.[71] One day after Justice Stewart circulated the first draft of an opinion for the Court, Justice Douglas wrote to him: "I voted the other way. But I have decided not to note my dissent nor to write in dissent, but to acquiesce in the opinion as you have written it. If, however, someone else writes in dissent, I will reconsider the whole question at that time."[72] Ultimately, with no other Justice writing, Douglas adhered to his graveyard dissent and the Court delivered a unanimous opinion.

Two days after Douglas informed Stewart that he would withhold dissent absent another Justice writing in *Kordel*, Stewart returned the favor in a pair of influential standing cases: *Association of Data Processing Service Organizations v. Camp*[73] and *Barlow v. Collins*.[74] The opinions in these cases introduced the "zone of interests" test, which holds that parties have standing when an injury arises that is within the "zone of interests" protected by the relevant statutory or constitutional provision. Stewart wrote an identical note to Douglas for each case that read: "I have decided to acquiesce in your opinion, unless somebody else writes in dissent."[75]

Justice Byron R. White provided another example of a conditional graveyard dissent in *Blackledge v. Allison*.[76] In *Blackledge*, the Court held that a district court erred by summarily dismissing a petition for a writ of habeas corpus by an inmate who had presented substantial evidence that the prosecutor secured a plea bargain with an unkept promise. After Justice Stewart circulated a draft opinion for the majority, White wrote to him: "I shall acquiesce in this case but may reconsider if a dissent is written."[77] Ultimately, no other Justice wrote separately and the Court delivered a unanimous opinion.

Even Justice Rehnquist, whom a former clerk referred to as "the lone dissenter" because he was "not a 'go along to get along' guy" and "had the intellectual confidence to state his views, even if this frequently meant standing alone," sometimes appeared sensitive to being a lone dissenter.[78] In *Torres v. Puerto Rico*, for example, the Court held that the Fourth Amendment's prohibition against unreasonable searches and seizures applied to Puerto Rico. The Court also invalidated a Puerto Rican law allowing authorities to search the luggage of anyone arriving in the territory from the United States without a warrant.[79] Responding to Chief Justice Burger's circulation of a draft opinion for the Court, Rehnquist wrote: "Although I was in dissent in Conference, I would imagine there is little probability of my solitary position prevailing. I therefore join your opinion."[80]

Justice Powell also referenced his status as a prospective lone dissenter when acquiescing to the majority's position in *Thor*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
STICE WILLIAM H. REHNQUIST

June 7, 1982

Re: No. 81-770 Blum v. Bacon

Dear Thurgood:

If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your pre-emption discussion. Since it is June, however, I join.

Sincerely,

Justice Marshall

Copies to the Conference

Justice Rehnquist's amusing and candid note to Thurgood Marshall is a good example of a common reason why a Justice might withhold dissent: running out of time and energy at the end of the Term.

Power Tool Co. v. Commissioner of Internal Revenue.[81] In *Thor Power Tool*, the Court upheld an Internal Revenue Service decision to disallow a company's claimed offset and deduction for bad debts. After most of the other Justices had joined Justice Blackmun's majority opinion, Powell wrote to Blackmun: "In view of the universal acclaim of your fine opinion . . . I don't want to be a discordant note. Accordingly, I cheerfully join you, despite continuing reservations."[82] Ultimately, the Court issued a unanimous opinion in *Thor Power* without separate writing.

These exchanges demonstrate that Justices sometimes reconsider their positions as would-be lone dissenters. However, the historical evidence also indicates that graveyard dissents sometimes materialize after a prospective dissenting coalition falls apart. This was evident in *DeBartolo Corp.*, discussed previously.[83] Another example occurred in *Golden State Bottling Co. v. National Labor Relations Bd.*, where the Court affirmed a lower court judgment that the National Labor Relations Board could order the purchaser of a business to reinstate an employee who had been discharged by the previous owner when the purchaser had knowledge that an unfair labor practice had occurred.[84] At Conference, Justices Stewart, Powell, and Rehnquist voted to reverse. Shortly after Justice Brennan circulated a draft of the majority opinion, however, Stewart joined, noting in a letter to Brennan with copies to the Conference that he had "concluded . . . that it would be a waste of time and printer's ink to dissent on [a] factual issue."[85] Rehnquist joined Brennan's opinion on the same day, without mentioning his previous inclination to dissent.[86] One day later, apparently not yet having received Rehnquist's join note, Powell wrote to Rehnquist: "As Potter has deserted us, and all others (except the Chief) also have joined Bill Brennan, I am on the verge of surrendering."[87] Then, presumably having learned about Rehnquist's defection in the interim, Powell wrote to Brennan and the Conference: "While I still do not agree with the conclusion you reach, there is much to Potter's view that the issue is factual and there is little point in dissenting on this ground." In exchange for going along with the opinion, Powell requested that Brennan eliminate a footnote touching on the question of where the burden of proof lied in demonstrating a purchasing

corporation's knowledge. Brennan accommodated this minor request, and the Court subsequently delivered a unanimous opinion in *Golden State Bottling* with no remaining trace of the original three-Justice minority coalition.

In *P.C. Pfeiffer Co. v. Ford*, the Supreme Court clarified the meaning of the phrase "maritime employment" for purposes of coverage under the Longshoremen's and Harbor Workers' Compensation Act.[88] After Justice Powell circulated a draft opinion for the Court, Justice Stewart replied: "It seems to me that our function in this case is to give authoritative construction to this miserably written Act so as to resolve the conflicts and minimize future litigation as to its coverage."[89] Stewart continued: "While I hold another view as to the coverage of the Act, I have decided not to write anything in dissent and shall acquiesce in your opinion for the Court unless somebody else circulates an expression of dissenting views."[90] On the same day Stewart circulated his memo, Justice Stevens responded: "My views are the same as Potter's."[91] This left Justice Rehnquist alone in dissent, although he conceded nearly one week later with a note to Powell that read: "I have decided to surrender my dissenting vote in Conference to superior numbers, and hereby join your opinion."[92] The exchanges in *P.C. Pfeiffer* illustrate how a prospective dissenting coalition can unravel into a series of graveyard dissents while further demonstrating the impact of perceived case importance on decisions to acquiesce.

One additional example reinforces these themes. In *First National Bank of Atlanta v. Bartow County Board of Tax Assessors*, the Supreme Court held that a state need not allow a bank to deduct the full value of tax-exempt United States obligations from its net worth.[93] Justice Blackmun circulated a first draft of the Court's opinion on February 4, 1985, and quickly received joins from all but Burger, Powell, and White, who were together in dissent. Although Powell had agreed to draft a dissenting opinion, he subsequently sent a private note to Burger on February 12 observing that he had lost his enthusiasm: "I find Harry's opinion sufficiently convincing that I would rather not take the time to prepare a dissent. I hope you will let me off the hook."[94] Two days later, Powell joined Blackmun's majority opinion, leaving Burger and White alone in dissent. About one month passed before White notified Blackmun of his decision to acquiesce: "My dissent in this case will be a silent one—the graveyard type."[95] On the following day, Burger capitulated as well with a letter to Blackmun that read: "I will join Byron's 'graveyard' dissent so this case can come down next week."[96] Five days later the Court delivered a unanimous opinion in *First National Bank*.

Conclusion

The old consensual norm governing Supreme Court decision-making eroded during the twentieth century. Frequent dissents and separate opinion writing are now the norm. Nonetheless, a vestige of the old norm seems to persist even after the explosion of separate opinion writing through the use of graveyard dissents. Drawing from private memoranda exchanged by Justices during the Burger Court, the historical evidence presented here suggests that the norm of silent acquiesce continued at least to some extent into the modern era. Moreover, this historical evidence yields important insights into Supreme Court decision-making. As an initial matter, time constraints and case importance seem to be critical considerations in deciding whether to withhold dissent. Although graveyard dissents often come from would-be lone dissenters, the evidence presented here suggests that they also arise when prospective dissenting coalitions fall apart.

Understanding why Justices withhold dissent helps inform the normative debate

over this practice's continuation. Justice Stevens has been the norm's most vocal critic. In his memoir, for example, Stevens noted that Justice White regularly issued graveyard dissents and criticized the practice because "the institution and the public are better served by an accurate disclosure of the views of all of the justices in every argued case."[97] This argument may carry less weight, however, if graveyard dissents tend to be issued in comparatively unimportant cases with little public visibility. Moreover, since graveyard dissents typically result in unanimous opinions, any institutional benefits generated by unanimous opinions may outweigh the costs associated with withholding dissent in comparatively unimportant cases. Graveyard dissents may also have positive collegiality effects.

This project also has important implications for our understanding of what motivates Supreme Court decision-making. The conventional wisdom is that Supreme Court Justices are motivated by a desire to implement their legal and/or policy preferences.[98] From these perspectives, one seemingly puzzling aspect of graveyard dissents is that they involve Justices voting contrary to their sincere preferences. Notwithstanding the conventional wisdom about Supreme Court decision-making, however, a recent interdisciplinary stream of research contends that a broad range of institutional goals motivates judicial behavior.[99] By widening our theoretical perspective on Supreme Court decision-making to incorporate a host of institutional goals, it is clear that graveyard dissents are not necessarily evidence of Justices voting against their sincere preferences; rather, graveyard dissents are indicative of the fact that institutionally grounded preferences sometimes trump legal or policy preferences—particularly in comparatively unimportant cases.

Whether Justices on the contemporary Supreme Court continue to issue graveyard dissents is an important remaining question. After all, graveyard dissents are a potential explanation for recently observed increases in consensual decision-making.[100] That consensus on the contemporary Court is typically observed in cases that many would deem comparatively unimportant is consistent with the evidence regarding acquiescence presented here. Nonetheless, publicly available information does not allow us to ascertain whether graveyard dissents are currently in use. This fact raises a separate question about whether the evidence presented here is applicable to other time periods. Although this study specifically focuses on the Burger Court, there is reason to think that the findings may not be time bound. As an initial matter, the evidence presented here demonstrates that graveyard dissents continued even after institutional reforms during the Burger Court could have resulted in the "death of acquiescence."[101] Furthermore, one factor that raises generalizability concerns when focusing specifically on the Burger Court is that it is perceived to have been a Bench marked by deep interpersonal frictions.[102] But, if anything, this fact should have decreased the proclivity to withhold dissent. Indeed, we might even expect to observe a greater inclination to withhold dissent during more collegial periods. In addition, evidence from more recent Terms on voting patterns and coalition splits that is consistent with the issuance of graveyard dissents eases concerns about generalizability.[103] Last, it is worth noting that some of the evidence presented here comes from Justices who served before and after Burger.

ENDNOTES

[1] 471 U.S. 202 (1985).

[2] Docket #83-1748, Letter from Rehnquist to Blackmun (April 9, 1985). The memoranda discussed in this article can be accessed electronically through the Supreme Court Opinion Writing Database's document archive. Paul J. Wahlbeck et. al., The Burger Court Opinion-Writing Database, *available at* http://supremecourtopinions.wustl.edu

[3] 457 U.S. 291 (1982).

[4] Docket #80-1417, Letter from Blackmun to Powell (June 10, 1982).

[5] 466 U.S. 198 (1984).

[6] Docket #82-708, Letter from Blackmun to Rehnquist (April 6, 1984).

[7] 468 U.S. 883 (1984).

[8] Docket #83-558, Letter from Blackmun to Burger (June 13, 1984).

[9] For a description of Justice Whittaker's struggles on the Supreme Court, *see* David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," 67 *U. Chi. L. Rev.* 995 (2000).

[10] Blackmun to Powell, *supra* note 4.

[11] Docket #71-1647, Letter from Stewart to Marshall (May 3, 1973).

[12] John P. Kelsh, "The Opinion Delivery Practices of the United States Supreme Court," 77 *Wash U. L.Q.* 137, 141 (1999).

[13] G. Edward White, **The Marshall Court and Cultural Change, 1815-1835** (1991).

[14] *Bank of United States v. Dandridge*, 25 U.S. 64, 90 (1827).

[15] The Nereide, Bennett, Master, 13 U.S. 388, 455 (1815).

[16] Thomas Jefferson, Letter to Thomas Ritchie (December 25, 1820).

[17] *See* Lee Epstein et al., "The Norm of Consensus on the U.S. Supreme Court," 45 *Am. J. Pol. Sci.* 362 (2001).

[18] *See* Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," 85 *Minn. L. Rev.* 1267 (2001).

[19] *See, e.g.,* Gregory A. Caldeira & Christopher J. W. Zorn, "Of Time and Consensual Norms in the Supreme Court," 42 *Am. J. Pol. Sci.* 874 (1998); Pamela C. Corley et al., "Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus," 38 *J. Sup. Ct. Hist.* 20 (2013); Marcus E. Hendershot et al., "Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court," 66 *Pol. Res. Q.* 467 (2012); Thomas G. Walker et al., "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 50 J. Pol. 361 (1988).

[20] Pamela C. Corley et al., **The Puzzle of Unanimity: Consensus on the United States Supreme Court** 86 (2013).

[21] *See id.*

[22] Specifically, I draw from the private papers of Justices Hugo L. Black, William O. Douglas, John Marshall Harlan, William J. Brennan, Thurgood Marshall, Harry Blackmun, Lewis F. Powell, and William H. Rehnquist during their time on the Burger Court (OT 1969 through OT 1985). These documents are available online as part of the Supreme Court Opinion Writing Database. Paul J. Wahlbeck et. al., *supra* note 2.

[23] 347 U.S. 483 (1954).

[24] For a detailed discussion of the Justices' views in *Brown*, *see* Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (2004). See *also* Jack M. Balkin, "The History of the Brown Litigation," in **What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision** 34-41 (Jack M. Balkin, ed. 2001) (explaining that Warren drafted a narrow opinion to secure a unanimous coalition). In many subsequent desegregation cases the Court also forged unanimous opinions through extensive bargaining over opinion content. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 420 U.S. 1 (1971), Docket #70-281; Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958," 68 *Geo. L.J.* 1 (1979).

[25] For an empirical analysis demonstrating that graveyard dissents are less likely to occur in constitutional and non-salient cases, *see* Greg Goelzhauser, "Silent Acquiescence on the Supreme Court," 36 *Just. System J.* 3 (2015).

[26] Corley et al., *supra* note 19, at 41

[27] Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," 3 *Sup. Ct. Econ. Rev.* 1 (1993).

[28] Roger K. Newman, **Hugo Black: A Biography** 275 (2d ed. 2003).

[29] Even "the Great Dissenter" Justice Holmes once suggested that he thought "it useless and undesirable, as a rule, to express dissent." *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).

[30] Antonin Scalia, "The Dissenting Opinion," 19 *J. Sup. Ct. Hist.* 33, 42 (1994) (emphasis omitted).

[31] *See* Richard A. Posner, **Law and Literature** (1988).

[32] Charles Evans Hughes, **The Supreme Court of the United States** 68 (1928).

[33] Harlan F. Stone, "Dissenting Opinions Are Not Without Value," 26 *J. Am. Jud. Soc.* 78, 78 (1942).

[34] *Id.*

[35] William J. Brennan Jr., "In Defense of Dissents," 37 *Hastings L.J.* 427, 430 (1986).

[36] 518 U.S. 515 (1996).

[37] Ruth Bader Ginsburg, "The Role of Dissenting Opinions," 95 *Minn. L. Rev.* 1, 3 (2010).

[38] Ruth Bader Ginsburg, "Remarks on Writing Separately," 65 *Wash. L. Rev.* 133, 141-42 (1990).

[39] Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Sup. Ct. Rev.* 299, 303 (1985) (quoting Brandeis).

[40] *See, e.g.*, Forrest Maltzman & Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," 40 *Am. J. Pol. Sci.* 421 (1996); James F. Spriggs et al., "Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts," 61 *J. Pol.* 485 (1999).

[41] 457 U.S. 132 (1982).

[42] Docket #81-770, Letter from Rehnquist to Marshall (June 7, 1982).

[43] 463 U.S. 147 (1983).

[44] Docket #81-1985, Letter from Brennan to Stevens (June 21, 1983).

[45] 33 N.Y.2d 902 (1973).

[46] 420 U.S. 307 (1975).

[47] Docket #73-1446, Letter from Rehnquist to Burger (February 10, 1975).

[48] 415 U.S. 814 (1974).

[49] Docket #72-1076, Letter from Powell to Blackmun (March 8, 1974).

[50] Alexander M. Bickel, **The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** 28 (1957).

[51] 459 U.S. 131 (1982).

[52] Docket #81-1008, Letter from Powell to Burger (December 6, 1982).

[53] 444 U.S. 212 (1979).

[54] Docket #78-1183, Letter from Brennan to Burger (November 8, 1979).

[55] Docket #78-1183, Letter from Burger to Brennan (December 3, 1979).

[56] Docket #78-1183, Letter from Burger to Brennan (December 7, 1979).

[57] 416 U.S. 396 (1974).

[58] Docket #72-1465, Letter from Rehnquist to Powell (March 8, 1974).

[59] 411 U.S. 726 (1973).

[60] Id. at 728.

[61] Docket #71-1647, Letter from Stewart to Marshall (May 3, 1973).

[62] *See, e.g.,* Solomon E. Asch, "Opinions and Social Pressure," 193 *Scientific Am.* 31 (1955).

[63] Donald Granberg & Brandon Bartels, "On Being a Lone Dissenter," 35 *J. Applied Soc. Psy.* 1849 (2005).

[64] Lawrence S. Wrightsman, "Persuasion in the Decision Making of U.S. Supreme Court Justices," in **The Psychology of Judicial Decision-Making** 69 (David Klein & Gregory M. Mitchell, eds., 2008). The Supreme Court Forecasting Project involved predictions about cases decided during the Court's 2002 Term.

[65] Richard A. Posner, **How Judges Think** 33 (2008).

[66] Urofsky, *supra* note 39, at 309 (quoting Justice Brandeis).

[67] Lee Epstein et al., **The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice** (2013) [hereinafter **Behavior**]; Posner, *supra* note 65; Lee Epstein et al., "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis," 3 *J. Legal Analysis* 101 (2011) [hereinafter "Dissent"].

[68] Lee Epstein et al., **Behavior**, *supra* note 67; Lee Epstein et al., "Dissent," *supra* note 67.

[69] *But see* Cass R. Sunstein, "Unanimity and Disagreement on the Supreme Court," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466057

[70] Jeffrey Rosen, "Roberts's Rules," *The Atlantic* (2007).

[71] 397 U.S. 1 (1970).

[72] Docket #69-87, Letter from Douglas to Stewart (February 7, 1970).

[73] 397 U.S. 150 (1970).

[74] 397 U.S. 159 (1970).

[75] Docket #69-85, Letter from Stewart to Douglas (February 9, 1970); Docket #69-245, Letter from Stewart to Douglas (February 9, 1970).

[76] 431 U.S. 63 (1977).

[77] Docket #75-1693, Letter from White to Stewart (April 14, 1977).

[78] John M. Nannes, The "Lone Dissenter," 31 *J. Sup. Ct. Hist.* 1, 3 (2006).

[79] 442 U.S. 465 (1979).

[80] Docket #77-1609, Letter from Rehnquist to Burger (May 18, 1979).

[81] 439 U.S. 522 (1979).

[82] Docket #77-920, Letter from Powell to Blackmun (January 10, 1979).

[83] *See supra* notes 43 and 44 and accompanying text.

[84] 414 U.S. 168 (1973).

[85] Docket #72-7202, Letter from Stewart to Brennan (November 15, 1973).

[86] Docket #72-7202, Letter from Rehnquist to Brennan (November 15, 1973).

[87] Docket #72-7202, Letter from Powell to Rehnquist (November 16, 1973).

[88] 444 U.S. 69 (1979).

[89] Docket #78-425, Letter from Stewart to Powell (November 8, 1979).

[90] *Id.*

[91] Docket #78-425, Letter from Stevens to Powell (November 8, 1979).

[92] Docket #78-425, Letter from Rehnquist to Powell (November 13, 1979).

[93] 470 U.S. 583 (1985).

[94] Docket #83-1620, Letter from Powell to Burger (February 12, 1985).

[95] Docket #83-1620, Letter from White to Blackmun (March 13, 1985).

[96] Docket #83-1620, Letter from Burger to Blackmun (March 14, 1985).

[97] John Paul Stevens, Five Chiefs: A Supreme Court Memoir 156 (2011).

[98] *See, e.g.,* Richard L. Pacelle, Jr., **Decision Making by the Modern Supreme Court** (2011); Jeffrey A. Segal & Harold J. Spaeth, **The Supreme Court and the Attitudinal Model Revisited** (2002).

[99] *See, e.g.,* Lee Epstein et al., **Behavior**, *supra* note 67; Lee Epstein & Jack Knight, "Reconsidering Judicial Preferences," 16 *Annual Rev. Pol. Sci.* 11 (2013).

[100] On the recent increase in consensus, *see* Neal K. Katyal, "The Supreme Court's Powerful New Consensus," *New York Times*, June 26, 2014.

[101] Corley et al., *supra* note 20, at 86.

[102] *See, e.g.*, Bob Woodward & Scott Armstrong, **The Brethren: Inside the Supreme Court** (1979).

[103] *See supra* notes 63 and 64 and accompanying text.

Remembering Warren E. Burger

ROBERT FABRIKANT

Editor's Note: This year marks the 40th anniversary of the Society and it seems fitting to remember its inception with a few paragraphs by William F. Swindler about the founding of the Society. Swindler was a law professor at William and Mary and one of the leading organizers and founding members of the new Society in 1974:

> The least known branch of government—for many members of the legal profession as well as the general public—now may have parts of its story told, accurately and interestingly, through the program of the Supreme Court Historical Society. This newest agency in the world of scholarship and information was inaugurated formally at a dinner at the Court May 22, 1975, giving the judicial department of government its counterpart to the White House Historical Association and the United States Capitol Historical Society. The new organization sponsored ceremonies reopening the restored Old Supreme Court Chamber in the Capitol (used from 1810 to 1860) on the afternoon of the same day as the inaugural dinner, thus making May 22 a red-letter date in High Court annals . . .
>
> Like its counterparts for the executive and congressional branches, the Supreme Court Historical Society is an independent, nonprofit organization, incorporated in the District of Columbia on November 20, 1974. It has no legal connection with the Court, but a major purpose is to collect information, memorabilia, and significant items associated with the Court's history. These will be utilized in an interpretative program under the direction of the Court's own curator and in the society's publications, which are soon to be undertaken. The new agency will also have an obvious role to play in the bicentennial plans for the federal judiciary now being drafted.
>
> The new group is the product of nearly three years of planning by an ad hoc

committee appointed by Chief Justice Warren E. Burger, who has long been concerned with the need to tell the Court's story to the American people, particularly to the hundreds of thousands of visitors to the Court's building each year.[1]

It also seems appropriate to use this occasion to pay tribute to the Society's founder, Warren E. Burger. Accordingly, we asked Robert Fabrikant, who clerked for Burger during his last year on the District of Columbia Circuit Court of Appeals, and his first year as Chief Justice of the United States (1969 Term), to provide a few anecdotes about aspects of Burger's career and life that are little-known or remembered. As there is of yet no full length biography of the 15th Chief Justice, we are grateful to him for highlighting these unsung aspects of Burger's career.

Burger and Civil Rights

Though not widely known, Warren E. Burger had a strong humanitarian bent. Notably, he became actively involved in securing protection for Japanese families fleeing the West Coast at the onset of World War II. These families were being uprooted by various governmental actions precipitated by the Japanese bombing of Pearl Harbor in December 1941 Some of the victims of these measures sought refuge in Minnesota. Then in private practice at a St. Paul firm, Burger took the lead in creating a committee of the St. Paul Human Relations Council to resettle them, and took into his home for nearly a year a Japanese family, including their infant daughter. When Burger later lectured in Japan in 1974, he received a surprise visit from a lady who had been the two-year-old living in his house. This seemed like a déjà vu moment for the Chief and Mrs. Burger because the young lady brought with her a baby daughter.

Burger also helped organize the St. Paul Council on Human Relations, and served as its first president. Among other things, the Council sponsored police training programs to improve relations with minority groups. Specifically, the police training programs designed by the Council were "pioneer" programs to improve police treatment of African-American and Mexican-American minorities. "Years later, when other cities exploded, St. Paul, whose top police commanders were Burger alumni, remained tranquil," recalls Burger's friend Eugene Methvin. Moreover, Methvin notes that, as president of the Council, Burger "negotiated with hotels and restaurants to abandon segregation practices—twenty years or more before the Supreme Court decision in *Brown I*."[2]

Burger supported racial equality in his judicial opinions as well. While serving as Assistant Attorney General of the Civil Division from 1953 to 1956, Burger was asked by Attorney General Herbert Brownell to oversee the implementation of *Brown I* and *Bolling* in the District of Columbia. Even before the Court issued its opinion in *Brown II*,[3] calling for implementation "with all deliberate speed," Burger urged that the District of Columbia begin implementing *Brown I* immediately. Burger had been instructed by Brownell that President Eisenhower believed it was important that his administration demonstrate early compliance with *Brown I*, that desegregation of the District of Columbia schools should start immediately, and that this was necessary in order to send a message to the rest of the country.[4] Burger signed and submitted a brief reflecting this position, and made a personal appearance to argue the matter in the United States District Court for the District of Columbia in 1954.[5] In 1956, Eisenhower appointed Burger to the U.S. Court of Appeals for the District of Columbia Circuit, where he remained for thirteen years.

When Nixon appointed him Chief Justice of the United States in 1969, Burger

continued his support for racial equality, even if it put him at odds with the President. His earliest Court opinions show his deep aversion to racial discrimination, and his strong commitment to desegregation. In his first autumn as Chief Justice, after being on the Court for less than four months, the Court was confronted with the monumental question of whether to grant a request from President Nixon's Justice Department to delay implementation of *Brown I* again.

The case, *Alexander v. Holmes County Board of Education*,[6] received an expedited hearing, and was decided a mere twenty days after certiorari had been granted. Burger took the lead in crafting a per curiam opinion denying the request, and requiring Mississippi schools to no longer "operat[e] a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color."[7] The Court's holding was directly contrary to the position President Nixon had taken at a press conference one month earlier: "There are those extremists who want instant integration and those who want segregation forever. I believe we need to have a middle course." *Time Magazine* aptly concluded that "Burger has proved to be what Nixon described as an 'extremist.'"[8]

In other respects, Burger may have also looked like an "extremist" to Nixon. Soon after *Alexander*, again in his first Term, Burger penned *Williams v. Illinois*,[9] holding that a criminal defendant could not be imprisoned beyond the statutory maximum for failure to pay a fine. And five years later, in *Lubin v. Panish*,[10] Burger authored an opinion holding that a state "in the absence of reasonable alternative means of ballot access . . . may not, consistent with constitutional standards require from an indigent candidate filing fees he cannot pay."[11]

The following Term, Burger wrote two unanimous opinions in the hotly contested area of school desegregation. First, in *Swann v. Charlotte-Mecklenburg Board of Education*[12] (*Swann I*), Burger's opinion upheld a district court order that took race into account in drawing school zones and permitted the use of busing of students outside their neighborhood. Burger's opinion in *Swann I* has received considerable acclaim as an attempt to craft judicial solutions to the problem of racial desegregation.[13] But his unanimous opinion in a related case, *Swann II*, has been virtually overlooked by judges and the legal academy,[14] though that decision reveals more about Burger's character and judicial philosophy than perhaps any other case.

In *North Carolina State Board of Education v. Swann*[15] (*Swann II*), issued the same day as *Swann I*, the Court invalidated a state statute that prohibited the assignment of students to schools on account of race or for the purpose of creating a racial balance. Burger's opinion captures several of his most important attributes as a judge and as a person: first, the ability not to allow form to defeat substance; second, a strong pragmatic approach to problem-solving; and third, a deep-seated hostility to racial discrimination. This is what he said:

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann I*. But more important, the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation would render illusory the promise of Brown v. Board of Education [supra]. Just as the race of students must be

The author was photographed in May 1970 with Chief Justice Warren Burger and his October Term 1969 law clerks. They are from left to right: seated, Robert Fabrikant, the Chief Justice, and Michael Zimmerman; standing, David Hanes, Charles Lettow, Harry Rissetto, and Jerry Snider. Fabrikant had also served as Burger's clerk the year before on the District of Columbia Circuit Court of Appeals.

> considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.[16]

Chief Justice Burger's two opinions in the *Swann* cases mark perhaps the first time that the Court endorsed the use of "racial conscious remedial measures."[17] Burger saw the need to take extraordinary measures to solve extraordinary problems, in this instance the violent, prolonged Southern resistance to *Brown I*. Though Burger was fully committed to the notion of a "color-blind" Constitution, he would not allow others to invoke that praiseworthy principle in order to deny black children their constitutional rights. And, what Burger said in the *Swann* cases has come to occupy an exalted place in the pantheon of constitutional law. As Justice Stephen Breyer stated more than thirty-five years later:

> In [*Swann I*] Chief Justice Burger . . . in a case of exceptional importance . . . set forth [as a basic principle of constitutional law] that the Equal Protection Clause permits local school boards to achieve positive race-related goals, even when the Constitution does not compel it."[18]

Breyer rightly described *Swann I* as not setting forth a "technical holding, but a basic principle of constitutional law—a principle of law that has found 'wide acceptance in the legal culture . . .'"[19]

Surprisingly, many Court-watchers have overlooked Burger's opinion in *Swann II,* where the permissibility of using race conscious measures was even more clearly enunciated than in *Swann I*. But whether we look to *Swann I* or *Swann II*, Burger surely was among the first, if not the very first, Supreme Court Justices to endorse the proposition that it was constitutionally permissible to use race to solve constitutional problems. Had Burger not been deeply committed to correcting the injustice of racially segregated schools, he could have taken refuge behind the shibboleth of the "color-blind" constitution. But he didn't.

That tells us as much about Burger's character, as it does about his jurisprudence.

Two years later, Burger authored an opinion striking down state aid to racially segregated private schools in *Norwood v. Harrison.*[20]

In later opinions Burger upheld Congressional set-asides for minority businesses (*Fullilove v. Klutznick*),[21] and affirmed the Internal Revenue Service's denial of tax exemptions to private schools that practiced racial discrimination (*Bob Jones University v. United States*).[22]

But perhaps Burger's most poignant opinion involving race was *Palmore v. Sidoti*,[23] where he wrote, "the law cannot, directly or indirectly, give effect [to private racial biases]."[24] This was said in the context of reversing a lower court decision awarding custody of a white child to a white father, after his former white wife married an African-American, on the ground that the child would be stigmatized by living in an interracial home.

Burger and Women's Rights

Within two years of becoming Chief Justice, Burger authored the unanimous opinion in *Reed v. Reed*,[25] where the Court, for the first time, found that gender distinctions violated the Equal Protection Clause. It would not be too much of an exaggeration to say that *Reed* was to gender-based discrimination what *Brown I* had been to racial discrimination. While *Reed* is a celebrated landmark case, Burger's personal support of women's rights also bears discussion.

When President Eisenhower appointed Burger Assistant Attorney General for the Civil Division at the Department of Justice in 1953, there were few female lawyers in the Department. But Burger would show his early commitment to gender equality by hiring and promoting Carolyn Graglia. She graduated Columbia Law School in 1954, along with another student, Lino Graglia, who was later to become her husband. The two neophytes had been selected by Burger and Attorney General Herbert Brownell to become members of the Justice Department's first Attorney General's Honors Program. Shortly after arriving at the Justice Department in the summer of 1954, Carolyn was summoned by Assistant Attorney General Burger to his office. He assigned her to perhaps the most important matter then within the Justice Department—the implementation of *Brown v. Board of Education*, and *Bolling v. Sharpe*, which had been handed down by the Supreme Court a month or so before, in May 1954. She was the only subordinate who worked with Burger on the matter. When Burger was appointed to the D.C. Circuit Court of Appeals in 1956, he asked Graglia to be his first law clerk. She served for approximately one year, and then returned to the Justice Department.[26]

The 2013 HBO movie, **Muhammad Ali's Greatest Fight,** erroneously tells a different story. It portrays Chief Justice Burger in a Court conference in 1971 telling other Justices that his first law clerk was a woman, and that he was unhappy with her work because, among other things, she left chambers early most every day to take care of her child and to make dinner for her husband. However, Graglia did not have children until several years after clerking for Burger. She recalls that she rarely, if ever, left chambers before Burger did, and that he knew her husband did all the cooking at that point in their marriage. She believes it highly unlikely that Burger was unhappy with her work as a law clerk, or expressed any such unhappiness, especially in light of the fact that he was instrumental in securing her a position as an associate at Covington & Burling.[27]

Burger and Legal Services to the Poor

Chief Justice Burger's enormous contributions in the area of judicial administration have been commented upon widely, but his efforts in the areas of legal services to the

Warren Burger and his messenger Alvin Wright had a close relationship and always celebrated their mutual birthday together at the Chief Justice's home in Northern Virginia. Both men thought of themselves as accomplished cooks, and were not shy about showing off to one another. They are pictured here with their wives, Vera (right) and Lottie (left), at Wright's retirement party in 1978.

poor and in legal education have not been highlighted. In 1972, Burger joined forces with two of the most well-known anti-Establishment lawyers in the country, Jean Camper Cahn and Edgar Cahn, to support two of their most public, and controversial, projects: Antioch School of Law ("ASL") and the Legal Services Corporation ("LSC"). Perhaps Burger's most significant contributions to helping the poor have come in the form of his support for those entities.[28]

The Cahns were an interracial, married couple who had become prominent left-wing activists when they graduated from Yale Law School in the early 1960s. The Cahns helped found ASL in the early 1970s. It was considered the first law school to have public interest law as its mission (though Howard University School of Law may argue otherwise), and the first to emphasize clinical, as opposed to classroom, legal education.

There was considerable resistance to ASL within the legal establishment. Many, including many members of the American Bar Association ("ABA") thought that clinical legal education was an inferior method of learning, and made ASL sound more like a trade school than a graduate professional school. Burger and the Cahns came from polar ends of the political spectrum, but this did not stop Burger from playing a critical role in supporting them. At the request of the Cahns, Chief Justice Burger enthusiastically lobbied the ABA and eventually helped secure their strong support for ASL. Without ABA support, ASL may never have been launched. Burger also spoke at the opening of its law library, and brought in ASL students to be among his first interns at the Supreme Court. The first two interns he selected were an African-American male, and then a female. It is also noteworthy that seventy-percent of ASL's first class was female. Such a figure would be astounding even by today's standards, but it was truly revolutionary in the early 1970s.

The Lyndon B. Johnson administration created the Office of Economic Opportunity

("OEO"), which in turn created the Legal Services Corporation. These two entities were seen as leading symbols of Johnson's Great Society programs. The LSC was intended to provide legal services to help poor people and to even the legal playing field against propertied interests. Conservative groups quickly identified LSC as a burgeoning threat to the status quo, and targeted it for elimination during the Nixon administration.

The Cahns had been heavily involved in the formation and implementation of the OEO and the LSC, and worked to keep them alive. The Cahns recognized that Burger could be a singularly effective advocate on their behalf. Not only was he the Chief Justice of the United States, but the Cahns believed, quite rightly, that Burger had special credibility with the enemies of the LSC due to his Republican pedigree and his reputation as a "law-and-order" judge. The Cahns reached out to Burger, and he became a "fellow traveler" to the maximum extent permitted by his high office.

Burger, in turn, reached out to Congress and to the Nixon Administration to preserve the LSC. Burger was a very willing and effective advocate for the Cahns. Burger effectively used his office as a "bully pulpit," and recognized early in his tenure that he could accomplish nearly as much outside of the Court by the force of his personality as he could in his role as Chief Justice.

Burger and His Messenger, Alvin Wright

Another little-known area of Burger's life is his relationship with his messenger and valet, Alvin Wright. It is hard to conceive of two men more different in appearance and background. The Chief was tall and of patrician bearing; with conspicuously white skin and a white mane. He had been born and raised in the racially homogenous, upper Midwest. Wright was short, stout, and coal black. He had been raised in Jim Crow Arkansas. Wright's raison d'être was to serve the Chief, literally and figuratively. He also served as the staff person in the robing room, helping the Justices put on their robes, and was responsible for "guarding" the outside entrance to the Justices' private conference room whenever the Justices were in conference.[29]

While Wright had proudly served in that same capacity for more than ten years for Chief Justice Earl Warren, when Chief Justice Burger came to the Court the two men bonded like brothers. They discovered they had the same birthday, September 17, which, according to one of Wright's sons, "was a very meaningful and significant thing to my Dad, because . . . it exemplified the closeness of their relationship and the high esteem in which they held each other."

Burger early on established the tradition of hosting a joint birthday party at his Virginia home. Wright had no car, so the Chief had his driver pick up Alvin and his wife, Lottie, in Northeast Washington, D.C., and drive them to his Northern Virginia home. During my year at the Court, also Burger's first, the Chief Justice seemed to spend more time with Wright than he did with any other person at the Court. They often lunched together, with the Chief just as often serving Wright as Wright served the Chief. Both men thought of themselves as accomplished cooks, and were not shy about showing off to one another.

Burger never forgot that he came from working class stock. During his first Term Burger significantly increased the salaries of messengers and other low-wage Court employees, most of whom were African-Americans. As he explained to me, it was "pathetic" they were paid "barely subsistence wages." When the law clerks complained that they had not received the same salary increases as the messengers, Burger reminded them that they "would all wind up rich as a result of their time at the Court, but the messengers would not." Wright's son recalls that Burger changed the working conditions

for his father and for "all the other messengers' families." "It was a domino effect to that kind of change . . . I could tell in [my father's] speech, in his manner, in his approach . . . to his job. That he was somebody who was at a higher level after that than he was before."

Author's Note: The author owes a special debt to Edgar Cahn, Jan Horbaly, Timothy Flanigan, Carolyn Graglia, and to the family of Alvin Wright, for sharing important information about Warren Burger and Alvin Wright. The author wishes to express his deepest appreciation to Warren Burger and to Alvin Wright for all they taught him.

ENDNOTES

[1] 61 *American Bar Association Journal* 1096-1100 (September 1975).

[2] Timothy Flanigan, a former Burger clerk, has provided me with notes he made summarizing interviews with Chief Justice Burger and with Burger's friends, including Methvin, which I have drawn upon in this essay. I also wish to thank Jan Horbaly, David Knerr, and Erica Fabrikant for their many contributions to this essay.

[3] *Brown v. Bd. of Education*, 349 U.S. 294 (1955) (*Brown II*).

[4] F. Carolyn Graglia, "His First Law Clerk's Fond Memories of a Gracious Gentleman," 74 *Tex. L. Rev.* 232 (1995).

[5] *Ibid.* The position espoused by Burger was consistent with the position adopted by the United States in *Brown II*: "Specifically, the lower courts should be instructed to require the defendants either to admit the plaintiffs, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as possible." *Brief for the United States on the Further Argument of the Questions of Relief, 1954 U.S. Briefs 2; 1954 U.S. S. Ct. Briefs Lexis 14 at 30.*

[6] 396 U.S. 19, (1969).

[7] *Ibid.* at 20.

[8] *Time Magazine*, November 77, 1969. In campaigning for the Republican Presidential nomination in 1968, Richard Nixon told southern Republican leaders he believed "all deliberate speed" should be revisited, and that he opposed compulsory busing. *See* Theodore H. White, **The Making of the President**: 1968 (Atheneum, 1969), at 137-38.

[9] 399 U.S. 235 (1970).

[10] 415 U.S. 709 (1974).

[11] *Ibid.* at 718.

[12] 402 U.S. 1 (1971).

[13] For example, Justice Clarence Thomas has stated that the remedies authorized in *Swann I* "were exceptional," but quite justified in response to "[S]ustained resistance to Brown [I]." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 753 n.6 (2007) (Thomas, J., concurring).

[14] For example, *Swann II* is not mentioned in the following scholarly literature: Earl E. Pollock, **Race and the Supreme Court, Defining Equality** (The Peppertree Press, 2012); Earl Maltz, **The Chief Justiceship of Warren Burger** 1969-1986 (University of South Carolina Press, 2000); G. Edward White, **The American Judicial Tradition** (Oxford University Press, 2007); Bernard Schwartz, **A History of the Supreme Court** (Oxford University Press, 1993); Bruce Rosenblum, "Warren E. Burger and the School Desegregation Cases, in Symposium: The Jurisprudence of Chief Justice Warren E. Burger," 45 *Okla. L. Rev.* 93 (1992) (Rosenblum had been a law clerk to Chief Justice Burger, and was writing a favorable piece on him). Nor is *Swann II* included in any of the many editions of leading constitutional casebooks.

[15] 402 U.S. 43 (1971).

[16] *Id.* at 45-46 (emphasis added).

[17] *Parents Involved*, 701 U.S. at 753 n.6 (Thomas, J., concurring).

[18] *Parents Involved*, 701 U.S. at 823 (Breyer, J., dissenting).

[19] *Ibid, quoting* from *Dickerson v. United States*, 530 U. S. 428, 443 (2000).

[20] 413 U.S. 455 (1973).

[21] 448 U.S. 448 (1980).

[22] 461 U.S. 574 (1983).

[23] 466 U.S. 429 (1984).

[24] *Id.* at 433.

[25] 404 U.S. 71 (1971).

[26] F. Carolyn Graglia, "His First Law Clerk's Fond Memories of a Gracious Gentleman," 74 *Tex. L. Rev.* 231 (1995).

[27] Author interview with Carolyn Graglia, 2014.

[28] The following paragraphs reflect several discussions I had in 2014 with Edgar Cahn, formerly the dean and a co-founder (along with his now-deceased wife Jean Camper Cahn) of ASL.

[29] These remarks are based upon my many discussions with Alvin Wright when I worked with him from June 1969 to June 1970, and with his family members. The same, or similar, points were made by Alvin Wright's son, Alvin Wright, Jr., when he spoke to the Charles Hamilton Houston National Moot Court Team at Howard University School of Law on November 20, 2013. A transcript of those remarks is on file with the author.

THE JUDICIAL BOOKSHELF

DONALD GRIER STEPHENSON, JR.

National midterm elections on November 4, 2014, understandably attracted widespread attention, even though the occasion was two years shy of the climax of the next Presidential contest. Voters were able in 2014 to determine not only the occupants of all seats in the House of Representatives but the identity of thirty-three of the Senate's 100 members. While any member of the Philadelphia Convention of 1787 would perhaps be impressed today that the membership of the House of Representatives had swelled to 435 from the original 1789 roster of only sixty-five, and that the size of the Senate now reflected a union of fifty—not thirteen—states, they would undoubtedly be astonished that one key feature of their overall congressional design had been entirely discarded: Senators were no longer being elected by state legislators.

Echoing the twin principles of state equality and state power from the Articles of Confederation, Section 3 of the Constitution's Article I provided that the two Senators from each state were to be "chosen by the Legislature thereof...." Indeed, for 125 of the first 226 years of our national history under the Constitution, Senators were chosen as Section 3 directed—by state legislators and not by the people, as Article I dictated for the House of Representatives. The shift to direct election of Senators by ordinary voters came about as a result of ratification of the Seventeenth Amendment in April, 1913,[1] one of three additions to the Constitution that, along with the Sixteenth, Eighteenth, and Nineteenth Amendments, were among the products of what historians call the Progressive Era. However, as has sometimes been the case with constitutional change in the United States, the Seventeenth Amendment only reflected the realization of a movement that had been underway for some time. An amendment for popular election had been introduced in the House of Representatives as early as 1826, with several resolutions to that effect actually passing in the lower chamber during the 1890s, only then to meet a frosty reception in the Senate.[2] Moreover, a few states such as Oregon (as early as 1904) had effectively directed in various ways that their state legislators merely ratify the choices

voters had previously expressed at the polls.[3] The year 2014 thus marks the centennial of the first national[4] Senate elections under this highly significant alteration of the Framers' handiwork.

The impact of the Seventeenth Amendment, not merely on Article I but on Articles II and III as well, was unequivocal in that it introduced into the American political system a partly democratized selection of federal judges, including Supreme Court Justices. The new amendment removed judicial confirmation from the hands of those chosen only indirectly by the voters and transferred that power to those who were now chosen directly. In discarding this key bulwark of Federalism ensconced by the Framers, the amendment freed election of Senators from what could be the debilitating internal politics of state legislatures that occasionally found some states actually incapable of choosing a Senator and that therefore were left and with reduced or no representation. Nonetheless, for Senators the amendment may have merely exchanged one yoke for another: the need to appease or at least to avoid antagonizing a new set of constituents.[5] In more recent years, the amendment also may well have contributed to the heightened contentiousness of some judicial nominations, given the increased polarization of the electorate, where there are far fewer progressive Republicans and conservative Democrats than was common barely a generation ago.[6]

Under the electoral and congressional calendar in place in 1914, however, Senators elected in November of that year did not take their seats in January 1915 as current practice would suggest, but in December 1915, nearly thirteen months later. This schedule therefore produced a so-called "lame duck" session of Congress to meet for some four months, even though its members would include some who had been defeated in November—an oddity that was not eventually eliminated until adoption of the Twentieth Amendment in 1933. Because of this delayed seating of popularly elected Senators, the first Supreme Court nominee of Woodrow Wilson (James x2009;C. McReynolds in August 1914) was considered under the rubric of 1787, while his second and third nominees (Louis D. Brandeis in January 1916, and John H. Clarke in July 1916) fell under the new regimen. Accordingly, William Howard Taft was the last President all of whose High Court nominees fell under the old system, and Warren G. Harding's was the first administration where all Supreme Bench nominees were judged by a Senate where at least some members had been chosen under the new order. (The operative word in the preceding sentence is "some," given the staggering effect of six-year term cycles and the "grandfathering" in the amendment's third paragraph: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.") Still, the toxic politics of the Brandeis confirmation and the new amendment could easily have intersected in a politically amusing way, given Massachusetts Republican Senator Henry Cabot Lodge's fierce hostility to the nominee. As events unfolded in the spring of 1916, Henry Morgenthau, Sr., prominent Democrat and Wilson and Brandeis supporter, advised Brandeis to decline the appointment after confirmation and then to run against Lodge for his Senate seat. "You must consider this. The present senators from Massachusetts have both opposed your confirmation and have charged you with dishonorable acts in the practice of your profession in that state. You have a right to present your case in public to your neighbors in Massachusetts . . . and to demand from them a public vindication."[7]

Far more generally, the Seventeenth Amendment highlighted what might be called the anomaly of 1787. The Preamble of the Constitution had proclaimed that "We the people . . . do ordain and establish this Constitution . . ." But exactly who were "We the people?" Phrased differently, what

was the definition of the American political community? The Framers, it seems, had left the answer to such a critical question open ended and indeterminate. Oddly perhaps, the Constitution in 1787 established no national right to vote even though readers now removed well over two centuries from the founding era may find this omission a strange one indeed. After all, the Declaration of Independence insisted in 1776 that governments "derive[ed] their just powers from the consent of the governed." Yet, the Constitution neither conferred nor denied the right to vote on anyone even though it would be through the ballot that such consent would be given or withdrawn. Instead, in the parlance of contemporary American politics, the Framers kicked the can down the road. First, they entrusted the conduct of elections for congressional offices to the governments of the pre-existing states, subject to modifications that Congress might make. "The Times, Places and Manner of holding Elections for Senators and Representatives," specified section 4 of Article I, "shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . ." Second and similarly, states would control access to the ballot. According to the first sentence of the first paragraph of Section 2 of Article I, selection of members of the lower house of Congress would be in the hands of persons in each state eligible to vote for "the most numerous Branch of the State Legislature." Consequently, until the arrival of the Seventeenth Amendment a century and a quarter later, House members were the only officials of the new national government directly elected by individual voters. Each state was left to define the political community for itself, controlling the franchise not only for state elections but effectively for national elections, too. A person possessed the right to vote only if that person's state government had conferred the right on her[8] or him. Access to the ballot was a right that inhered in state, not national, citizenship. At the outset, therefore, the American constitutional system in practice enshrined a principle of selectivity that reflected the influence of both federalism and localism and the view that admission to the political community was to be conferred, not assumed. And states would be the entities that did the conferring, a power and function that remain today, subject of course to later amendments and implementing statutes that have qualified and restricted what was initially an unbounded state prerogative.

Perhaps it was fortunate that the Framers skirted the delicate matter of defining the franchise. Establishing a uniform policy for the nation on what has been called "the first liberty"[9] might have deadlocked the convention, as the related issue of representation nearly did, given the variations in access to the ballot already in place among the states. Most certainly such specificity would have delayed and perhaps even endangered ratification. The Constitution, after all, already contained (or lacked) provisions that opponents of the Constitution, called Antifederalists, viewed with alarm. Consequently, there seemed little point in handing naysayers yet one more target at which they might take aim.

Nonetheless, as it linked the people directly with the Senate, the Seventeenth Amendment symbolized the broad intersection of law and politics that the Constitution enabled, adding a new dimension to the partisanship that has long tinted the process of staffing the courts.[10] In so doing, the amendment reinforced one of the ironies of the Constitution. Structural provisions arguably designed to shield the judiciary against politicization seemingly assure that partisan motivation at least influences judicial selection. Nowhere is this connection more evident than in the context of the Senate's critical role as gatekeeper for the Supreme Court, a duty that continues to be reflected in recent volumes on the Court, its Justices, and their work.

Yet as accustomed as Americans are today to open and well-publicized (and since 1981 televised) hearings, the practice was decidedly otherwise for most of American history. As a standing committee of the Senate, the Judiciary Committee dates only from 1816, with nominations prior to that date being handled by the full Senate alone. Between 1816 and 1867, some two-thirds of the nominations were referred to the Judiciary Committee, with nearly all of them being processed in that way since 1868.[11] The modern practice began to take shape only with Louis D. Brandeis's nomination in 1916, when the Committee first held an open hearing with outside witnesses testifying, although the nominee himself was not present. Supreme Court nominees did not appear before the committee to answer questions until 1925, when President Coolidge's nomination of Attorney General Harlan F. Stone to replace Justice Joseph McKenna ran into difficulty. Even here, however, Stone was present only to respond to specific allegations growing out of his work as Attorney General. The second nominee to testify was Felix Frankfurter in 1939; he agreed to appear only when supporters informed the professor that he would probably be rejected if he did not. Indeed, Frankfurter was the first to take a variety of questions in an open, recorded public hearing. Still, such appearances did not become routine until after 1954. Since then, all nominees have been expected to appear. Moreover, hearings since 1965 have usually been both exhaustive and, for the prospective Justice, often exhausting. Gone forever, apparently, are the days of the cursory Senate probing like that of Kennedy-nominee Byron White in 1962, where the public hearings in the Judiciary Committee lasted a scant one hour and thirty-five minutes.[12]

A probing analysis of these proceedings is the focus of **Supreme Court Confirmation Hearings in the U.S. Senate** by Dion Farganis and Justin Wedeking who teach political science at Elon University and the University of Kentucky, respectively.[13]

Although there have been no hearings on a High Court nominee since those for Solicitor General Elena Kagan in 2010, the Farganis and Wedeking volume is the second in as many years to examine this significant aspect of the Senate's work. Theirs was preceded in 2013 by **Confirmation Hearings and Constitutional Change** by Paul M. Collins, Jr. and Lori A. Ringhand. While Farganis and Wedeking cite some article-length pieces by Ringhand and a jointly authored piece by Collins and Ringhand, the combined timing of research, writing, and production of their later study probably precluded any reference to the earlier book itself. Yet, the starting point for each book is what the four authors see as a widely shared perception that judicial confirmation hearings, at least as they have unfolded in recent years, are inefficacious and plagued with shortcomings. As then Senator Joe Biden complained in 2006, "The whole point here, is that nominees now, Democratic and Republican nominees, come before the United States Congress and resolve not to let the people know what they think about important issues."[14] Biden articulated what had come to be called the "Ginsburg Rule" by which "any issue that might conceivably come before the Court, no matter how remote the possibility, is off limits" as a subject for discussion during a judicial confirmation hearing.[15] Biden's view ironically was the unmistakable message of a book review[16] published in 1995 by Elena Kagan, then a tenured professor at the law school of the University of Chicago. It was in that essay that she famously insisted that hearings after Judge Robert Bork's in 1987 "have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."[17]

Alongside such concerns, the findings of the Collins-Ringhand and Farganis-

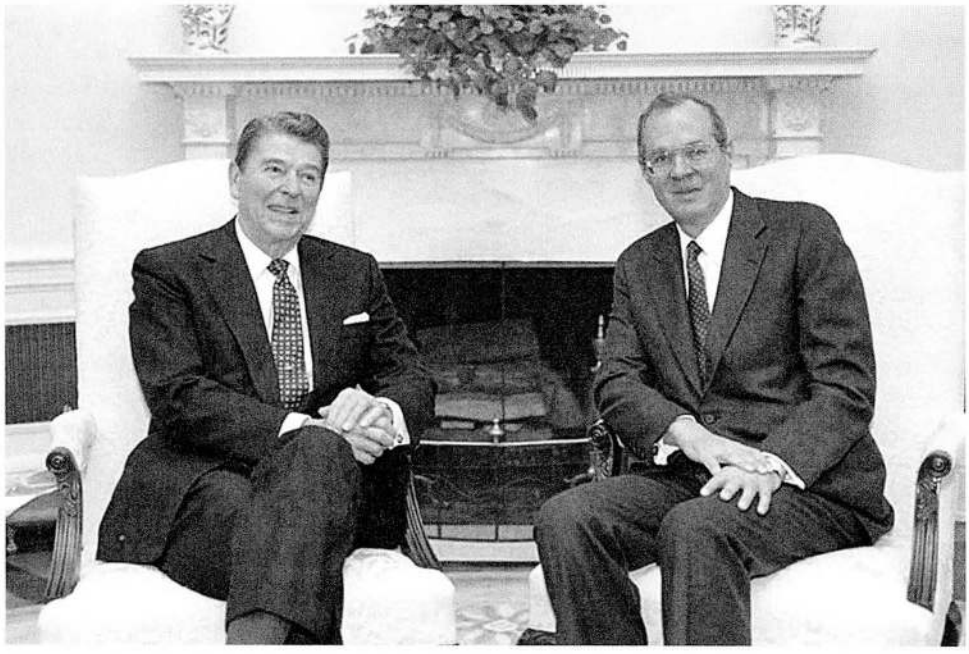
Wedeking projects are thoroughly complementary even as they make different contributions to a wider understanding of the Judiciary Committee's labors. In contrast to the widely shared opinion that judicial confirmation hearings are little more than a demonstration of vapidity or an exercise in futility, Collins and Ringhand adopted what might be called a celebratory view. In their view, hearings represent "important constitutional moments"[18] in that they "are one of the important ways in which the public contributes to constitutional change."[19] As such, the hearings have become an integral part of democratic politics, a determination Collins and Ringhand reached based on a meticulous content analysis of available hearing records. As they summarized their findings, when

> constitutional choices made by the Court gain acceptance by the public at large, nominees are expected to pledge their adherence to those choices at their confirmation hearings. Over time, subsequent nominees from across the political spectrum voice their support for those changes, allowing the hearing to function as a formal mechanism through which the Court's constitutional choices are ratified as part of our constitutional consensus—the long-term constitutional commitments embraced by the public. In doing so, the constitutional choices made by an otherwise largely insulated judiciary are affirmed through a formal, public, and law focused process.[20]

Thus, whatever their shortcomings as public displays of governing, they concluded, confirmation proceedings succeed politically and make a continuing legitimizing contribution in spite of themselves.

In response to the insistence by Kagan and others that hearings have little value unless and until nominees offer thoughtful responses to probing questions,[21] as Bork had done, Farganis and Wedeking similarly maintain that so negative a characterization thoroughly misses the mark. Hence the subtitle of their study: "Reconsidering the Charade." Rather, write Farganis and Wedeking, the gloomy assessment offered by Kagan "is predicated on a belief that there was a time when hearings were more substantive, but that in the 1980s nominees began strategically avoiding controversial queries that could sink their confirmation prospects."[22]

As they contend, however, "that is not really what happened." Instead, a close analysis of the transcripts of confirmation hearings shows that Supreme Court nominees have actually been "answering questions in roughly the same way since the hearings began in the mid-1950s."[23] Moreover, "nominees are not nearly as evasive as we have been led to believe. On average they only refuse to respond to about one out of every ten questions they are asked, and they give forthcoming answers to nearly seven out of those ten."[24] Yet, even if the conventional wisdom needs to be reconsidered, the authors admit that it seems "logical enough." After all, after Judge Bork's lengthy, candid, but self-destructive testimony in 1987, "it would be only natural for subsequent nominees to be reticent and cagy in their responses. 'Say too much and get rejected' seemed to be the lesson of the Bork hearings."[25] Their startling finding, however, is that the Bork proceedings in 1987 were not the turning point that many have believed them to be. Rather, Bork's time before the Judiciary Committee was an "outlier." Well before the 1980s, nominees were exhibiting comparable degrees of candor and "nominees since Bork have not been dramatically less forthcoming." Instead, nominee testimony—how forthcoming nominees are when they answer Judiciary Committee questions—looks largely the same both before and after the 1980s."[26] Notably, the operable word in that sentence is "largely." Somewhat further



***In Supreme Court Confirmation Hearings in the U.S. Senate: Reconsidering the Charade*, political scientists Dion Farganis and Justin Wedeking examine the history of Supreme Court confirmation hearings before the Senate Judiciary Committee and conclude that there is a misperception that nominees since the 1980s are significantly less forthcoming and less substantive in their answers than earlier nominees. Anthony Kennedy was photographed above with President Ronald Reagan in November 1987 before he underwent Senate hearings about his nomination.**

into the book, the reader learns that in terms of the responsiveness of nominees "there has been only a mild decline since the hearing for Anthony Kennedy, and this drop-off has stabilized over the last four nominees. Moreover, when one looks at the full period since 1955, it becomes

> clear that this slight Kennedy-to-Kagan decline is not only more modest than previously advertised but it is also not unprecedented. There have, in fact been at least three downward trends: the first from Arthur Goldberg (1962) to Abe Fortas's Chief Justice hearing in 1968, the second from Clement Haynsworth in 1969 to Antonin Scalia in 1986, and the third, as noted since Bork.

Accordingly, rather than there having been a dramatic decline in candor, "what we actually found was a series of ebbs and flows over time."[27]

Farganis and Wedeking reach this result through "the first large-scale empirical analysis of nominee responsiveness or 'candor'" from the beginning of modern-day regular hearings in 1955 (on the nomination of John Marshall Harlan II) through the proceedings on Elena Kagan's nomination in 2010.[28] That objective in turn entailed a breadth of research and a methodological challenge for the authors that were daunting. They coded every question and response in the hearings over this period—nearly 11,000 exchanges. The authors classified each exchange in the transcripts as generating one of three qualitatively different types: forthcoming responses, less-than-forthcoming responses, and interruptions. Forthcoming responses included those where the nominee answered a question thoroughly and directly without any qualification. The second category encompassed

all responses that fell short of the standard defined by the first, including non-answers. "Interruptions" were those exchanges "in which the nominee was not given a chance to offer even a partial response."[29] These criteria formed a codebook to be used by those coding the responses. Here, of course, the need for consistency and reliability was paramount, and to assure those ends, the authors explain that they instituted various checks and re-checks on the coding process.[30]

Significantly, Farganis and Wedeking explain that their response categories "were designed primarily to identify the degree to which a response was forthcoming, not the degree to which it was honest or satisfying." That is, they did not attempt

> to intuit the motivation of the nominee when answering questions . . . Thus it is entirely possible, for example, that when a nominee said that they could not answer a question because they did not know enough about the issue, they were being honest. But for our purposes, that response was coded as 'Not Forthcoming'—meaning the nominee did not come forward with an answer, irrespective of whether they could have or not.[31]

The authors' findings that recent hearings are not noticeably less substantive and revealing than earlier ones examined in their study, however, does not mean that confirmation hearings have remained unchanged over the past six or so decades. Instead, there have been substantial changes. First, hearings are now longer, not only because more senators ask more questions but because they feel compelled to make lengthy individual statements, commenting either on the nominee in particular or the Court and constitutional interpretation generally. It is almost as if Senators, or at least their individual staffs and the Judiciary Committee staff, now feel compelled to demonstrate that they are alert and hard at work. Second, the increase in questions has led to more structure in the hearings in that questioning no longer resembles a free-for-all but follows some semblance of order. Third, and as one would expect, the focus of those questions has shifted as well, reflecting the salient issues of the day. Fourth, voting on the nominee tends to "fall along party lines more than it used to,"[32] a development that should hardly be surprising, given the increased political polarization in the Senate. The authors attribute some of these changes—especially the number and length of questions and statements—to the beginning of televised hearings in 1981. Helpfully, the authors present a summary of the growth of judicial confirmation coverage on television, beginning with C-SPAN, traditional broadcast newscasts, and the growth of cable news channels.[33]

Especially, awareness of the impact of television coverage of hearings seems to be key to grappling with one important question: "If nominees today are not significantly more evasive than in years past, then what exactly is driving the *perception* . . . that the hearings have become so 'vapid and hollow'?"[34] Farganis and Wedeking point to three factors that have probably encouraged what they regard as a misperception. First, in the years before 1981, when hearings were not televised, less attention was paid to them. While one might inject that major newspapers treated hearings as newsworthy events, the authors contend that print and blog coverage today plainly dwarfs the journalistic pattern of the past, noting the single article the *New York Times* published on Charles Whittaker's hearings in 1957, compared to more than thirty for Samuel Alito a half century later.[35] "As a result, critics have a tendency to romanticize earlier proceedings, significantly 'rounding up' the degree to which nominees before the first televised hearings for Sandra Day O'Connor, answered questions—which has made recent hearings look less

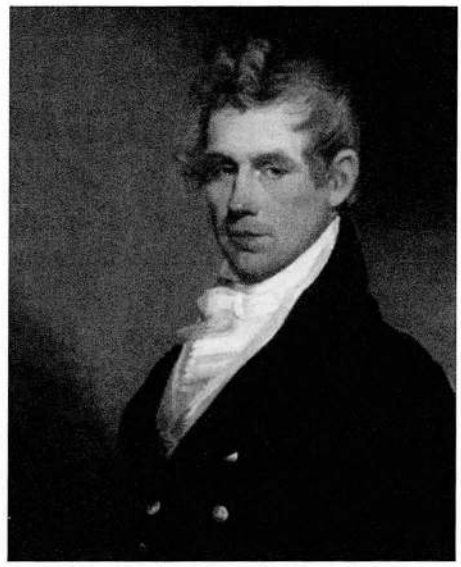
substantive by comparison."[36] The second explanation derives from how observers construe a nominee's failure to answer a question. Typically, a refusal to answer has been coupled with either a concern that the issue might come before the Court for decision or a claim that the nominee does not know enough to respond—claims critics today regard as "particularly evasive." Finally, "the public appetite for answers from nominees is incredibly strong, as indicated by public opinion survey data. Together these three factors have created a kind of 'perfect storm' whereby recent nominee performances have been framed as being significantly less forthcoming and less substantive than earlier nominees, when in fact the differences are not that great."[37]

Finally, the authors confront the policy or normative implications of their findings. If, thanks to the Framers and later to the Seventeenth Amendment, confirmation hearings inject some democratic accountability into the shaping of an unelected federal judiciary, proceedings that are perceived as a charade may have serious negative consequences for long-term public confidence in the courts. On the other hand, if that perception itself is flawed, then the problem is not so much one of reform of the process but one of reporting and education. Although they believe that no nominee to the Supreme Court has yet been rejected by the Senate because of evasiveness, Farganis and Wedeking admit that this may indeed someday occur. So serious a step should therefore only be taken based on accurate perceptions about not only the nominee but the process as a whole across time. Surveying various critiques of the process and proposals for change—in fact generating critiques and proposals seems to have evolved into nearly a cottage industry over the past few years—the authors find that the latter fall generally into two groups. One calls for Senators to ask fewer questions and therefore to cast their votes based on fewer criteria, while the other calls for Senators to post more questions with the expectation that nominees answer them. Both sets of proposals strike the authors as too sweeping and therefore unlikely ever to be taken seriously by Senators and fully adopted.

Admitting that the hearings are hardly perfect, the authors suggest "a more modest solution"[38] that specifically draws on data from their study. Their fourth chapter shows that, over the years since 1955, nominees provided forthcoming responses to about sixty-five percent of the questions Senators posed and qualified answers to about twenty-five percent, and declined to answer the remaining ten percent. Using these figures as a baseline, Senators who are particularly concerned with candor could hold nominees to a standard of responsiveness. Thus, if a nominee were forthcoming as to only perhaps fifty-five percent of the questions and declined to answer another twenty percent, that pattern would raise a "red flag," providing the

> Senators "with a powerful piece of objective evidence to justify a 'no' vote should they wish to use it. Over the long haul, as Senators began to hold nominees to this sort of responsiveness standard, our expectation is that nominees would be—at the very least—unlikely to drop below historic norms in terms of their candor. More optimistically, we think it is not implausible that with the specter of this baseline hovering above their hearings, nominees might well make an effort to stay above—perhaps even well above—this average."[39]

Yet, despite the imagination inherent in their suggestion, the reader suspects that their data trump any enthusiasm for substantial change. Instead they insist that the hearings deserve a higher degree of public support and confidence. As they conclude, "[i]n truth, however, we are not sure that there is a pressing need to overhaul the hearings. They



Steven Brown's splendid new work, *John McKinley and the Antebellum Supreme Court*, is the only book-length account of the Alabama Justice's life and years of public service—not only as a Justice, but as a practicing attorney, state legislator, state university trustee, member of the U.S. House of Representatives, and U.S. Senator. The book refutes the usual assessment that McKinley was at best a very average jurist who failed to carry his share of the judicial burden and was unable to hold his own among his judicial colleagues.

may be imperfect, but they have been that way from the start. As such, our view is that if anything is in need of change, it is probably the overall perception of the hearings, rather than the hearings themselves." Somewhat anticlimactically, their concern thus merges with a hope. Because the "widespread misunderstanding about evasiveness in Supreme Court nomination confirmation hearings has potentially problematic consequences" the book's "findings should help restore at least a bit of confidence in the process."[40]

Barely two decades after the Judiciary Committee became a standing committee in Congress's upper chamber, the Senate confirmed, by voice vote, President Martin Van Buren's nomination of fifty-six-year-old John McKinley of Alabama to fill one of two new seats on the Supreme Court, as its roster increased from seven to nine because of enactment of a major realignment of the circuits in 1837. Sitting on the High Court until his death in 1852, McKinley served with thirteen Justices including Chief Justice Roger B. Taney. The twenty-seventh Justice is now the subject of an important and splendidly written biography by Steven P. Brown who teaches political science at Auburn University.[41]

Publication of *any* judicial biography is a noteworthy event because the genre—along with case studies, jurisprudential and statistical analyses, and appointment and institutional studies—forms a central part of the literature on the Third Branch. In fact, over the past five or six decades judicial biography has offered a window into the Supreme Court (and to lower courts to a lesser extent) in terms of increased understanding of the individual Justices at different periods of Court history and the process and environment by which and in which they have done their work.

Publication of **John McKinley and the Antebellum Supreme Court** is noteworthy for several reasons. First, it is the only book-length account of Justice McKinley's life and years of public service—in his case not only as a Justice but previously as a practicing attorney, state legislator, state university trustee, member of the U.S. House of Representatives, and U.S. Senator. In fact, it is one of the few published pieces on McKinley of *any* length in that scholarly work on McKinley has previously been generally confined to short essays in biographical dictionaries and similar collections.[42] As such, Brown has rescued McKinley from what then Professor Felix Frankfurter once called the "limbo of impersonality."[43] Second, the book at least calls into question the assessment prevalent in the literature that McKinley was at best a very average jurist whose fifteen "colorless years"[44] reflected someone who failed to carry his share of the judicial burden and who was unable to hold his own among his judicial colleagues. Brown's work certainly pleads for a restatement of the prediction made

by historian Frank Otto Gatell, who, in his very brief essay on McKinley for the **The Justices of the United States Supreme Court**, wrote, "McKinley remains virtually unknown, and the paucity of scholarly writing on antebellum Alabama does not indicate any change in the near future."[45]

In fact, as Brown explains, the "impetus that ultimately led to this biography arose of a desire to better understand the dismissive attitude of McKinley's modern day critics."[46] This dismissive attitude, he explains, rests on five commonly held beliefs about McKinley: (1) that he secured his appointment to the Court through opportunism; (2) that his complaints about circuit-riding "bordered on the pathological"; (3) that he was intellectually out of his league on the Bench; (4) that as a southern Justice he "was a dependable states' rights vote where slavery, federalism and other issues were concerned"; and (5) that his "insignificance is demonstrated, perhaps even justified, by the fact that he has virtually nothing to show for his tenure on the Court."[47]

In challenging each of those assessments, Brown develops a series of counter-arguments. First, if McKinley's political loyalties shifted as the years went by, so did the allegiances of many notables from that era in that party attachments tended to be fluid. Second, his "vociferous complaints about circuit court responsibilities were really different from those expressed by virtually every other member of the Court in one very significant way. Other justices complained about the difficulties of their circuit duties; McKinley's were impossible to complete in their entirety."[48] Third, alongside the fact that "Joseph Story was the undisputed intellectual star of the Taney Court, . . . McKinley could hold his own with the other justices with whom he served." Fourth, although a product of the antebellum South, McKinley's "voting behavior and opinions on the bench clearly demonstrated his appreciation for the power of the federal government in several important ways . . . [as] a faithful adherent to the central tenets of Jacksonian democracy, which 'insisted that the power of the federal government was limited, but . . . that the federal government was supreme within those limits.'"[49] Fifth, while McKinley's total Supreme Court output of only twenty-three opinions (majority, concurring, or dissenting) might point strongly to insignificance, that judgment, Brown insists, overlooks the context of both his circuit court duties and serious health problems that began soon after his appointment to the Bench that, in turn, caused him to miss several terms of Court entirely. Such a judgment also reflects more of a modern-day bias of Court scholars in that it neglects the extensive circuit court responsibilities just as it neglects whatever influence McKinley might have among his colleagues during the few months of the year when the Court was in session in Washington. "In short," Brown maintains, "to understand both John McKinley and the antebellum Supreme Court, it is necessary to set aside modern ideas and expectations with regard to the justices and appreciate the Court for what it was and what it did during that era."[50]

Publication of this biography is noteworthy for a second reason as well. It paints a vivid picture of the nature of the business that dominated dockets of the lower federal courts more than 150 years ago and also of exactly what circuit riding entailed in the nineteenth century before railroads became well established. Given the undeveloped infrastructure, McKinley's was a time when the traveler was fortunate to have river or canal transportation available, and much less fortunate when the only options included horseback or stage coach. Brown's account in this respect is matched in vivid detail probably only by John P. Frank's discussion of circuit riding in his biography a half century ago of Justice Peter Daniel,[51] whose Court tenure (1841-1860) overlapped part of McKinley's.

Full appreciation of what McKinley confronted is possible only when one recalls

the structure of the federal judiciary prior to establishment of the courts of appeals and the elimination of circuit riding in 1891. 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. Although 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. And the extent of travel annually required was a function of the congressionally determined boundaries of the circuit to which a Justice was assigned. And, in McKinley's day, Justices were personally responsible for their own travel expenses.

In contrast to the more compact circuits such as the first and third, the original Ninth Circuit to which McKinley was assigned included Alabama, Arkansas, and the eastern portion of Louisiana and Mississippi. "As the first and only Justice ever to preside over this massive circuit, John McKinley had to deal with more than just the geographical and transportation-related difficulties that existed in this wild and sparsely populated area. The congressionally mandated circuit court schedule also required him to crisscross the region within a ridiculously short time frame. Indeed, so unrealistic was this schedule that it appears that no one in Congress had ever traversed the actual route within the time constraints Justice McKinley was expected to meet" before the circuit was carved.[52] The load must have been truly staggering in that his circuit docket alone initially contained two-thirds of the cases pending in *all* of the federal circuit courts.[53]

Yet McKinley seemed aware of at least some of the probable tolls, both physical and fiscal, that the new position would entail, at least as suggested by a letter he wrote to House Speaker (and future President) James K. Polk of Tennessee, who had had a hand in his nomination:

> I have accepted the appointment, although it is certainly the most onerous and laborious of any in the United States . . . I shall have to travel upwards of five thousand miles every year. These are four or five times greater than many of the judges have; and besides my expenses in attending courts alone will not be less than $1500 a year while the other judges will not have to expend five hundred. These inequalities could not, I know, be cancelled in passage of the bill. But I hope for the sake of justice, no matter who may be the Judges, that some mode will be hereafter adopted, by reorganizing the circuits, adding another judge, allowing of mileage or some other means proper in themselves to equalize the duties and compensation.[54]

Similarly, just as the biography sheds much light on the professional lives of Justices in the antebellum United States, it opens a window into the politics of what for many Americans is a foggy period in our national history. One might be well grounded in the formative period surrounding ratification of the Constitution and even in the crises that resulted in the Civil War, yet remain thoroughly murky on political goings-on just before and after the two terms that Andrew Jackson occupied the White House. This was the era of the emergence of what scholars often call the second party system, as political parties, on the scene since the beginning of

the nineteenth century, transformed themselves into organizations that existed to mobilize mass support for favored candidates and to secure jobs and other "spoils" for the victors.

This biography is also significant because it illustrates clearly the element of serendipity that is so often present in the process through which judicial selection occurs. Near the end of President Andrew Jackson's second term, Polk recommended both McKinley and John Catron to fill the two newly minted seats on the High Court. Jackson followed through on the nomination of fellow Tennessean Catron, but in place of McKinley turned to William Smith, a good friend and U.S. Senator from South Carolina. After confirmation, however, Smith, who was already seventy-five, declined the appointment. In April 1837, Jackson's successor Martin Van Buren acted on Polk's recommendation of McKinley with a recess appointment for the still unfilled seat. McKinley then declined his second Senate seat that had been handed him the previous December by the Alabama legislature and accepted instead the position on the Supreme Court.[55]

Brown explains that while McKinley insisted he had not solicited the position on the Court after Senator Smith declined it, McKinley "had previously made it clear to several people who might have any influence over such a decision that he yearned for any seat that might become available on an expanded Supreme Court."[56] Still, what benefitted McKinley most "was not his relationship with Polk . . . but his loyalty toward and political efforts on behalf of Jackson and Van Buren." Indeed, Brown finds credible Tennessee Representative John Bell's claim that Van Buren had already promised McKinley an appointment to the Supreme Court as a means of securing his support among southern Democrats for a spot on the Democratic ticket in 1832 when Jackson ran for reelection. "Van Buren may well have considered the mutual benefits of promising an open seat on the Court to someone of McKinley's caliber in an effort to secure his support."[57]

Aside from assurances that may or may not have been given, Van Buren's choice of McKinley for the Bench reflects the political rather than the judicial model of selection. The latter is the model Presidents have followed during the past few decades. It stresses the value of choosing nominees with judicial experience because of an observable "track record" and because of their presumed familiarity and intellectual dexterity with respect to the jurisprudential concerns likely to take center stage in questions from Senators on the Judiciary Committee. Yet, it is the contrasting political model, which stresses the value of broad public and off-the-bench experience—including electoral politics—that has more typically described the nomination patterns of many Presidents before 1970.

Remarkably, the book reveals much about the requirements for successful scholarship in that Brown's rediscovery of Justice McKinley very probably could not have been accomplished a generation ago. As the author explains, McKinley is one "of just twenty-three justices for whom there is no collection of private papers."[58] Moreover, there is no known collection of letters he received from others or copies of his own correspondence, and unlike some of his Supreme Court colleagues he did not arrange for his circuit court opinions to be published.

In short, aside from his barely two dozen Supreme Court opinions, some of the essential resources that any scholar would expect to explore have not been easily accessible. Instead, Brown has benefitted markedly from the era of digitization. In addition to tapping into the collected and published correspondence of other notables from McKinley's era, "modern newspaper databases allow researchers to conduct multiple word searches through massive numbers of scanned nineteenth-century newspapers [that] open up a

window into the world of McKinley and the antebellum Supreme Court that simply was not available to legal historians of an earlier day." Thus, the engaging and motivating prospect raised by Brown's study is "whether a reevaluation of other early members of the Supreme Court is in order given the technology that is now available."[59]

Sixty-one years after Justice McKinley's death and eleven years after his own appointment to the Supreme Court, Justice Oliver Wendell Holmes, Jr. provoked some controversy[60] when he remarked in an address that he did not think "the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views."[61] Holmes was making reference partly to the significant authority given the Supreme Court by section 25 of the Judiciary Act of 1789, under which the Court could review a decision by the highest court of a state where a federal question was involved,[62] a provision that helped to add force to the Supremacy Clause of Article VI. Indeed, as Holmes knew, by the start of the twentieth century, the Court had invalidated far more state laws than acts of Congress. Yet, a century after Holmes's observation, his precise point could be expanded: The Court's role as well as the United States would be far different today were the Court to lack the authority to interpret and examine the application of federal statutes and administrative regulations. To grasp that point, one need only to recall the phenomenal increase in the sheer number of congressional enactments and administrative regulations over the past eight decades since the onset of the New Deal in the mid-1930s. A look at the Court's docket today, for instance, reveals that, while there is, as usual, an ample number of constitutional cases, a significant part of the docket is non-constitutional in nature, concerning mainly federal statutes and the handiwork of federal regulatory agencies. In truth, today's docket is nearly the inverse of the docket in Justice McKinley's day, when a smattering of constitutional cases would typically be dwarfed by much admiralty and maritime litigation (such 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.

It is a sliver of the non-constitutional side of the contemporary Court's docket that is the focus of **War of the Whales: A True Story**, an engaging volume by Washington, D.C. resident Joshua Horwitz, who is founder and publisher of Living Planet Books (his book is published, however, by Simon & Schuster).[63] As riveting and as involved as a good novel with a lengthy cast of characters, his book follows the events, circumstances, and individuals that culminated in the Supreme Court's decision in *Winter v. Natural Resources Defense Council* in 2008.[64] Along the way, Horwitz introduces the reader to the anatomy and evolutionary development and the hunting and navigational talents of whales (particularly the deep-sea diving beaked whales) and a few other cetaceans, sonar technology, and modern American naval training challenges and practices involving acoustic warfare.

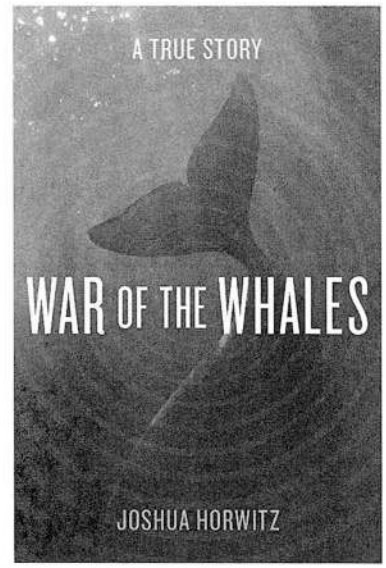
Horwitz's book opens with a recounting of a series of whale strandings and beachings—situations where whales become disoriented, enter shallow inlets, and find themselves on land or nearly so—in the waters around the Bahamas and a few other locations. Extensive investigation of some whale carcasses then attributed the unusual sea mammal activity to man-made, specifically naval, causes.

The complex litigation[65] that the author tracks developed over the Navy's decision to conduct fourteen integrated training exercises off the coast of southern California—an area that had been used for training purposes for some forty years—and whether that plan complied with several federal statutes,

including the National Environmental Policy Act (NEPA) of 1969, the Coastal Zone Management Act (CZMA) of 1972, and the Endangered Species Act (ESA) of 1973. Throughout the controversy, senior Navy officers testified that antisubmarine warfare exercises employing the use of mid-frequency active (MFA) and other types of sonar were essential to military readiness, particularly in detecting and tracking the many near-silent modern submarines already in the fleets of several nations that might choose to do harm to the United States. Environmentalists insisted that the use of sonar in the training area would cause serious injury to some thirty-seven species of marine mammals and that the Navy was not adequately considering these effects in environmental analyses prepared pursuant to NEPA, the CZMA, and the ESA.

Finding the possibility of irreparable harm to marine mammals, and concluding that this harm outweighed the benefit of further naval training, a United States district court in California issued a preliminary injunction that prohibited the Navy from engaging in the challenged exercises. After an emergency appeal, the Ninth Circuit Court of Appeals held that the lower court's total injunction on MFA sonar was neither narrowly tailored nor did it adequately take into account the interest in national security. On remand, the district court allowed the exercises to proceed but required the Navy to implement certain mitigation measures during the training. The Navy challenged the court-imposed conditions on its training exercises that included shutting down sonar use when a marine mammal was sighted within 2,000 meters of a Navy vessel, and powering down MFA sonar by seventy-five percent when certain ocean conditions were observed.

In the meantime, President George W. Bush exempted the training exercises from the requirements of the CZMA and the Council for Environmental Quality determined that the Navy could take alternative



Joshua Horwitz's new book recounts the riveting story of a series of whale strandings and beachings in 2000, which were eventually attributed to the use of sonar in nearby naval training exercises. The Court's ruling sided with the Navy in a case brought by the National Resources Defense Council. The Navy emphasized its need "to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines."

steps to ensure compliance with NEPA. Believing that these actions removed the legal basis for the district court's injunction, the Navy sought unsuccessfully to have the Ninth Circuit vacate the injunction altogether. The Navy then was able to advance its case to the High Court where a divided Bench[66] reversed the appeals court, and the exercises were allowed to proceed. Chief Justice John G. Roberts's opinion for the majority stressed that in such situations trial judges were to give great deference to the professional judgment of military authorities, a principle that tilted the outcome toward the Navy's position. While not discounting the importance of NRDC's "ecological, scientific, and recreational interests in marine mammals," those interests, he concluded, "are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines."[67] In this clash of environmental

and national security concerns, therefore, the Justices found that the latter plainly trumped the former.

Yet, to emphasize only the legal back-and-forth of the conflict overlooks much of the flavor of Horwitz's account, as illustrated by a passage past the midpoint of the book that tries to describe the encounter between some whales and sonar pulses, a passage that leaves no doubt as to the author's own sensibilities and personal commitment to the importance of the story he relates:

> At 500 feet below the surface, the ascending whales collided against a ceiling of sound waves trapped in the surface duct of warm water. Instinctively, they dove back down to where the pressure was less intense. They tried to gather intelligence from other whales in their pod, but all their normal communication frequencies were jammed with intense, head-rattling pressure waves that pounded the tiny air pockets inside their sinuses and ears. They couldn't distinguish their own panicked calls from those of the whales around them, couldn't find the early-morning light above the water's surface, couldn't tell up from down. They were drowning in sound. The whales that couldn't penetrate the duct of funneled noise were overcome by oxygen debt and a lethal buildup of lactic acid. Without air in their lungs, their bodies surrendered to free fall.... Some of the whales were able to fight their way through the surface duct to open air. But the oxygen in their lungs competed for absorption with the nitrogen bubbling in their blood and tissues. There seemed to be no escape from the acoustic storm—except the shallow shelf beyond the canyon walls.[68]

War of the Whales is but an additional reminder that the Supreme Court's work frequently implicates national security interests. Those occasions highlight a tension that is as old as the Republic: security versus freedom. Measures designed to increase security often entail a constriction of liberty. Too much insistence on maintaining liberties may jeopardize security. American constitutional history is partly an attempt to find an appropriate balance between the two, even if sometimes lost amidst shifting policies is recognition that the nation's strength perhaps derives as much from the ideas and values it reflects as from the armies and munitions it deploys.

This tension is the centerpiece of **Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War** by Arthur H. Garrison,[69] who teaches criminal justice at Pennsylvania's Kutztown University. In providing a historical perspective, Professor Garrison's extensively documented compendium is as relevant as today's news.

With the infamous attacks of September 11, 2001 and the immediate responses to them as a starting point, this ambitious volume serviceably reviews the growth of presidential power in times of military and other crises from President Abraham's Lincoln's actions during the Civil War through suppression of freedom of speech in President Woodrow Wilson's administration to the internment camps of President Franklin D. Roosevelt's years in World War II, and President Harry Truman's attempt to commandeer the country's steel industry in the Korean War. Brief case studies on those episodes and discussion of pertinent documents comprise part I of the book. Part II, which absorbs about forty-one percent of the book, is a helpful examination of the key terrorism cases decided by the Supreme Court after 2001, concluding with *Boumediene v. Bush*.[70] A reflective essay on "the rule of law and the judiciary in times of crisis" follows this progression.[71] Excerpts from *Boumediene*, *Rasul v. Bush*[72] and

Hamdam v. Rumsfeld[73] are reprinted in an appendix.[74] Garrison's assessment is that the Court's work—alongside some rather notable exceptions—has largely reinforced what he terms a Madisonian view of the Constitution, that "the principles of limited powers and separation of powers require that the rule of law govern presidential action in both peace and war." The Court, he writes "has historically agreed that in times of war the elected branches can approach the outer limits of Constitutional power but as the muse of the Constitution, the Court has historically said to the proud waves of national protection and security: You may come so far and here your proud waves must stop."[75]

Whether the period is the first decade of the twenty-first century, the Court of Justice McKinley or the years since ratification of the Seventeenth Amendment, the books surveyed here confirm the significance of the observation offered by then Attorney General (and very soon to be Justice) Robert H. Jackson in 1940, less than six months after the outbreak of war in Europe: "However well this Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to summit its conflicts to adjudication and to subordinate power to reason."[76]

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

BROWN, STEVEN P. ***John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest*** (Tuscaloosa: The University of Alabama Press, 2012). Pp. xi, 313. ISBN: 978-0-8173-1771-3, cloth.

FARGANIS, DION, and JUSTIN WEDEKING. ***Supreme Court Confirmation Hearings in the U.S. Senate: Reconsidering the Charade*** (Ann Arbor: University of Michigan Press, 2014). Pp. xi, 262. ISBN: 978-0-472-11933-2, cloth.

GARRISON, ARTHUR H. ***Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War*** (Lanham, MD: Rowman & Littlefield, 2012). Pp. xvii, 481. ISBN: 978-0-7391-5102-0, cloth.

HORWITZ, JOSHUA. ***War of the Whales: A True Story*** (New York: Simon & Schuster, 2014). Pp. xiii, 426. ISBN: 978-1-4516-4501-9, cloth.

ENDNOTES

[1] The Seventeenth Amendment was proposed by Congress in May, 1912 and ratified by the requisite three-fourths (then thirty-six) of the forty-eight states just eleven months later. Massachusetts was the first state to ratify, Connecticut the thirty-sixth.

[2] http://www.archives.gov/legislative/features/17th-amendment/ (last accessed on September 24, 2014.)

[3] William Bernhard and Brian R. Sala, "The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness," 68 *Journal of Politics* 345, 346 (2006).

[4] Although the midterm elections of 1914 witnessed the first use nationwide of the new amendment, the first application of the new rule had occurred in a special Senate election in Maryland in November 1913. Larry Sabato, "The People's Senate at 100," p. 1. http://www.politico.com/magazine/story/2014/08/the-peoples-senate-at-100-109918.html#.VA9ne890x9A (Last accessed on March 9, 2015.)

[5] Lee Epstein and Jeffrey A. Segal, **Advice and Consent: The Politics of Judicial Appointments** (2005), 100.

[6] David G. Lawrence, **The Collapse of the Democratic Presidential Majority: Realignment, Dealignment, and Electoral Change from Franklin Roosevelt to Bill Clinton** (1996), 169-181; Nicol C. Rae, **The Decline and Fall of Liberal Republicans from 1952 to the Present** (1989), 123.

[7] Alpheus Thomas Mason, **Brandeis: A Free Man's Life** (1946), 492.

[8] While male suffrage was the national norm at the outset, New Jersey did allow women to vote between 1797 and 1807, at which point the franchise was restricted to men.

[9] Marchette Chute, **The First Liberty: A History of the Right to Vote in America, 1619-1850** (1970).

[10] Henry J. Abraham, "'A Bench Happily Filled': Some Historical Reflections on the Supreme Court Appointment Process," 66 *Judicature* 282 (1983).

[11] *See* Denis Steven Rutkus and Maureen Bearden, CRS Report for Congress, "Supreme Court Nominations, 1789-2009: Actions by the Senate, the Judiciary Committee, and the President" (2009). http://fpc.state.gov/documents/organization/124658.pdf (last accessed on November 17, 2014).

[12] Author's data, based on examination of the transcript of the hearings. White was deputy attorney general in the U.S. Department of Justice at the time of his nomination to the Supreme Court.

[13] Dion Farganis and Justin Wedeking, **Supreme Court Confirmation Hearings in the U.S. Senate** (2014), hereafter cited as Farganis and Wedeking.

[14] *Id.*, at 42.

[15] *Id.* The authors point out that the tradition for such reticence may have begun not with Ruth Bader Ginsburg, but with Felix Frankfurter. *Id.*, at 140, n. 13.

[16] Elena Kagan, Book Review, 62 *University of Chicago Law Review* 919 (1995). Her review examined Stephen L. Carter's **The Confirmation Mess**, published by Basic Books in 1995.

[17] *Id.*, at 942.

[18] Paul M. Collins, Jr. and Lori A. Ringhand, **Supreme Court Confirmation Hearings and Constitutional Change** (2013), 1.

[19] *Id.*, at 3.

[20] *Id.*

[21] In testimony, when the Senate Judiciary Committee considered her nomination to the Supreme Court in 2010, Kagan moved away somewhat from the degree of candor that her 1995 book review had insisted nominees display, particularly with respect to issues coming before the Bench. *Senate Committee on the Judiciary, Hearings on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States* (2010), 62-64.

[22] Farganis and Wedeking, 2.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*, at 3, emphasis in the original.

[27] *Id.*, at 48.

[28] *Id.*, at 4.

[29] *Id.*, at 48.

[30] *Id.*, at 40–41.

[31] *Id.*, at 40. Throughout the authors wisely use the collective pronoun "they" to refer to single nominees, rather than employing the more awkward "he or she."

[32] *Id.*, at 3.

[33] *Id.*, at 98–99. The authors note that precise figures on audience size for televised hearings are not available because C-SPAN "does not participate in Nielsen ratings." *Id.*, at 145, note 1.

[34] Farganis and Wedeking, 7, emphasis in the original.

[35] *Id.*, at 18.

[36] *Id.*, at 7. The quoted sentence is awkwardly phrased. More helpful is the discussion of the same point on page 96.

[37] Farganis and Wedeking, 7.

[38] *Id.*, at 8.

[39] *Id.*, at 135-136.

[40] *Id.*, at 137.

[41] Steve P. Brown, **John McKinley and the Antebellum Supreme Court** (2012), hereafter cited as Brown.

[42] See for example Elizabeth Brand Monroe's brief entry on McKinley in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (1994), 291-292. Even briefer are the barely eight column inches allotted to McKinley in R. Michael McReynolds's "John McKinley," in Kermit L. Hall., ed., **The Oxford Companion to the Supreme Court of the United States** (1992), 540. Both Urfoksy and Hall's volumes were published in a twin-column layout. More substantial is F. Thornton Miller's essay on McKinley in Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789-2011** (2011), 131-135.

[43] Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite** (1937), 6.

[44] Henry J. Abraham, **Justices, Presidents, and Senators** (5th ed., 2008), 89.

[45] Frank Otto Gatell, "John McKinley," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions** (1969), vol. 1, 769, 777. Gatell's entry is under ten pages in length. The two opinions reprinted following his essay to indicate McKinley's work on the High Court are the opinion for the Court in *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212 (1845), and his dissenting opinion in *Bank of Augusta v. Earle*, 13 Peters (38 U.S.) 519 (1839).

[46] Brown, at 5.

[47] *Id.*

[48] *Id.*, at 6.

[49] *Id.*, at 8.

[50] *Id.*, at 10.

[51] John P. Frank, **Justice Daniel Dissenting** (1964), 277-279.

[52] Brown, at 6-7.

[53] Elizabeth Brand Monroe, "John McKinley," in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary**, 291.

[54] Brown, at 110-111.

[55] Senate confirmation for McKinley followed in September 1837. McKinley had been U.S. Senator

from Alabama from 1826 until 1831 when he was denied reelection. He shortly was elected to the U.S. House of Representatives and served from 1833 until 1835.

[56] Brown, at 107.

[57] *Id.*

[58] *Id.*, at 4.

[59] *Id.*, at 6.

[60] *See* Charles Evans Hughes, **The Supreme Court of the United States** (1928), 95.

[61] Oliver Wendell Holmes, Jr., "Law and The Court," Speech at a Dinner of the Harvard Law School Association of New York, February 15, 1913. http://pds.lib.harvard.edu/pds/view/43198558?n=1&print-Thumbnails=no (last accessed on January 15, 2015).

[62] Initially, the statute allowed the High Court's jurisdiction only where the federal claim had been rebuffed in the state court. In the twentieth century, that jurisdiction was expanded to include instances where the federal claim had prevailed.

[63] Joshua Horwitz, **War of the Whales** (2014), hereafter cited as Horwitz.

[64] 555 U.S. 7 (2008). The petitioner in the case is Donald C. Winter, who was Secretary of the Navy from January 2006 until March 2009. The respondent, Natural Resources Defense Council, is an environmental interest group and advocacy organization. As an indication of the expanded use of submarines by multiple countries, see "Sub Industry Rises as Militaries Flex around the Globe," *Wall Street Journal*, May 2, 2015.

[65] Horwitz helpfully provides a "cast of characters" and a list of acronyms near the outset, ix-xiii. What is lacking, but would have been an equally helpful addition, is a chronology.

[66] Justices Scalia, Kennedy, Thomas, and Alito joined the Chief Justice's opinion. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined in part. Justice Ginsburg filed a dissenting opinion in which Justice Souter joined.

[67] 555 U.S. 7, 32.

[68] Horwitz, at 279-280.

[69] Arthur H. Garrison, **Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War** (2012), hereafter cited as Garrison.

[70] 553 U.S. 723 (2008).

[71] *Id.*, at 423.

[72] 542 U.S. 488 (2004).

[73] 542 U.S. 557 (2006).

[74] Garrison, at 356.

[75] *Id.*, at xvi.

[76] Robert H. Jackson, "Address" of February 1, 1940, on the Sesquicentennial of the Supreme Court of the United States, Appendix xv, 84 L. ed. 1428, 1429 (1940). The full text is also available at http://http://www.justice.gov/ag/speeches-14 (last accessed on January 29, 2015).

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