Introduction

Melvin I. Urofsky

Last year marked the seven hundredth anniversary of Magna Carta. Pick up any constitutional history textbook and you will learn that there were several such documents. Every time a new king seized power, he promised not to abuse his powers and assured his barons that their privileges would be safe. In fact, the document that is so revered in the world of Anglo-American law itself reaffirmed the substance of pledges made in Henry I's Coronation Charter in the twelfth century. But the one signed by King John at Runnymede on June 15, 1215, holds a special place in our history.

To mark the anniversary, the Society invited the Rt. Hon. Brenda Hale, Baroness of Richmond, to give its annual lecture. An English barrister, jurist, and judge, she is currently the Deputy President of the Supreme Court of the United Kingdom, and therefore familiar with the Great Charter on a regular basis.

When former law clerks write about "their" judges, their reminiscences are usually overflowing with both praise and affection. Even the clerks of curmudgeonly Justices like William O. Douglas found much to like in recalling their year at the Court. There is one exception, however, and that is James Clark McReynolds, who served on the high court from 1914 to 1941, and was considered a nasty person not only by his clerks but by his fellow Justices as well. Several years ago scholars unearthed a manuscript memoir by one of his clerks, John Knox, which did nothing to redeem McReynolds's reputation.

Our managing editor, as well as Director of Publications at the Society, Clare Cushman, found a cache of letters at the Utah State Historical Society from Milton Musser, who clerked for McReynolds in the 1938 and 1939 Terms, to his mother. He wrote home regularly, and his letters are a fascinating glimpse into McReynolds's Chambers. The documents also confirm how difficult it was to work for the man.

Edward T. Sanford is not one of the better-known members of the Court, on which he served from 1923 until his sudden death in 1930. A member of the inaugural staff of the *Harvard Law Review*, he then returned to his native Knoxville and practiced

law there for fifteen years, until he entered government service and became assistant attorney general. In 1908 Theodore Roosevelt named him to a federal district court in Tennessee, and fifteen years later, Warren Harding named him to take Mahlon Pitney's place on the High Court. Today he is perhaps best remembered as the author of two First Amendment speech cases, *Gitlow v. New York* (1925) and *Whitney v. California* (1927), in which he ruled that states could limit anti-government speech.

Yet for all his low historical profile, this issue has two articles about him. John M. Scheb II, a professor of political science at the University of Knoxville, Tennessee, has written about Sanford's life in Knoxville, his law practice, and his tenure on the district court. Stephanie L. Slater is an attorney with the Tennessee Court of Appeals, and she examines in-depth Sanford's judicial opinions as a Justice on the U.S. Supreme Court.

Finally, in the Judicial Bookshelf, our resident book reviewer gives us a look at recently published volumes. D. Grier Stephenson, Jr., is the Charles A. Dana Professor of Government at Franklin & Marshall College, and has been writing the Bookshelf for many years now, for which all of us, especially me, are quite grateful

As always, an interesting buffet. Enjoy!

Magna Carta: Our Shared Heritage

BRENDA HALE

Editor's Note: Baroness Hale delivered this speech as the Supreme Court Historical Society's Annual Lecture in June 2015.

Both Supreme Courts [of the United States and the United Kingdom] are surrounded by reminders of Magna Carta. The great doors into this building are adorned with a bronze relief of King John granting the Charter in 1215 and an original of the 1297 Charter is the first document the visitor to your National Archives sees before going upstairs to view the Declaration of Independence, the Constitution, and the Bill of Rights. Above the doors leading into the building which now houses the Supreme Court of the United Kingdom is a stone relief of King John granting the Charter; and engraved on the glass doors leading from the entrance hall into our library is a facsimile of the 1225 Charter, with its most famous guarantee highlighted: "to no-one will we sell, to no-one will we deny or delay right or justice."

Those words, from chapter forty of the original Charter, together with the original chapter thirty-nine: "No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land"—still "have the power to make the blood race" (in the words of Lord Bingham of Cornhill, the greatest British judge of this century)[1]—are the embodiment of the rights to life, liberty and property, not to be infringed without due process of law, still to be found on the statute book of the United Kingdom and in the 5th and 14th Amendments to the Constitution of the United States.

My own blood raced too a few weeks ago—just after the last Parliament had been dissolved—when I received my own writ of summons, sealed with the privy seal, giving me exactly forty days' notice of "a certain Parliament to be holden at Our City of Westminster"—harking back, I felt sure, to chapter fourteen of the original Magna Carta:

> And to obtain the common counsel of the kingdom about the assessing of an aid . . . or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls and greater barons, individually by our letters—and, in addition, we will

> cause to be summoned generally through our sheriffs and bailiffs all those holding of us in chief–for a fixed date, namely, after the expiry of at least forty days, and to a fixed place . . .

That is the foundation of a second principle which we can trace at least as far back as Magna Carta—that the people from whom the taxes are levied should have a voice in deciding what they should be—which is now usually embodied in the slogan "no taxation without representation." As I understand it, it was disregarding that principle that lost us the American colonies getting on for six centuries later.

I ought, therefore, to protest, because as a member of the House of Lords I do not have a vote in the election of members of the House of Commons—I was summoned to the next Parliament weeks before the General Election, which told us who those members were going to be. But since the Law Lords left the House of Lords to become the Supreme Court of the United Kingdom in 2009, neither do I have the right to sit or vote on any Parliamentary business in the House of Lords.[2] So I am taxed without representation! In fact, the whole House of Lords ought to protest, because since 1911, when the House of Commons asserted their superiority over the House of Lords, they have not been able to interfere with "money bills." Perhaps it is we, as much as the sentenced prisoners, who should be complaining to the European Court of Human Rights that our rights have been violated.

Another of my favourite provisions from the original Charter is chapter forty-five:

> We will not make justices, constables, sheriffs, or bailiffs save of such as know the law of the kingdom and mean to observe it well.

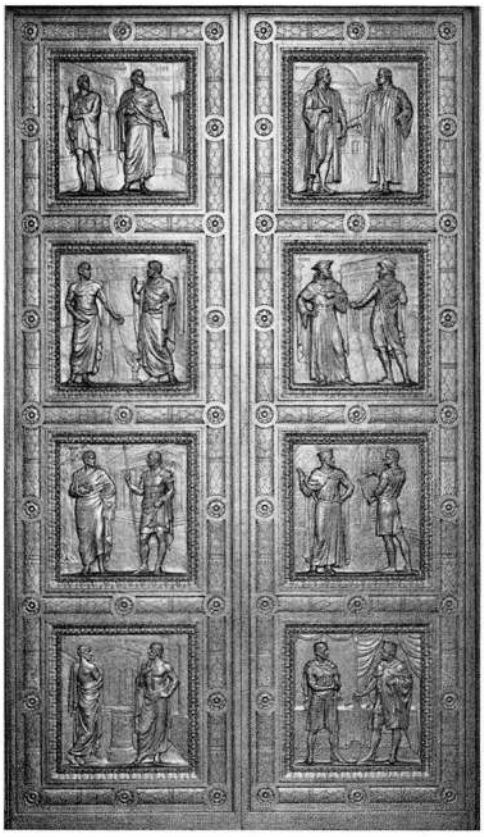
This is but one of the many embodiments in the Charter of the third idea with which it is most associated—the idea that the King and his officials were as much subject to the law as were the rest of his people. The rule of law is not one-way traffic, the law which only the governed have to obey; the governors have to obey it too. Indeed, by chapter sixty, the customs and liberties which the king had granted to "our men," the barons had also to observe towards "their men." They cascaded down through the feudal ranks.

Thus three great ideas, the essentials of modern constitutionalism, can all be found in the original Magna Carta of 1215: the idea that fundamental rights can only be taken away or interfered with by due process and in accordance with the law (though whether "and" means "and" or "or" is still controversial, as we shall see); the idea that government rests upon the consent of the governed; and the idea that government as well as the governed is bound by the law. No wonder the lawyers get so excited by it. All three ideas do, of course, beg the question of where the law comes from and who makes it, but I'll come back to that.

Historians tend not to be so excited about the Magna Carta of June 15, 1215. They point out that it was not so very different from the charters of other Kings; that much of its contents were simply reaffirming generally understood principles of feudal law; and above all that its most radical provisions were soon dropped. But, while the story of how the barons succeeded in extorting the Charter from King John is exciting enough, the story of what happened next is even more exciting.[3] Only a few days after the Charter was sealed on June 15, 1215, King John asked the Pope, Innocent III, to release him from his oath to observe it. On August 24, the Pope obliged. King John had sworn fealty to the Pope and the Pope owed him something in return. He denounced the Charter as extorted "by such violence and fear as might affect the most courageous of men," he forbad King John to keep his oath to observe it and the barons to try and make him do so, and he declared the Charter "null and void of all validity forever."

The result was civil war, between the barons who had extorted the Charter and the King and those loyal to him. It looked as if the barons were going to lose until they persuaded the son of the King of France, Prince Louis, to whom they had already offered the Crown, to invade. This he did in May 2016. Louis laid claim to the throne both by hereditary succession (unremarkable but untrue) and by election by the barons (remarkable but true). But he did not promise to abide by the Charter. By October, it looked as though John was heading for defeat when he set out across the Wash—a large shallow bay in the east of England—to reinforce his garrison at Lincoln Castle, one of the few still holding out for him. John made it across the Wash, but most of his baggage did not and sank into the sands. He struggled on to Newark, south of Lincoln, but died there on October 18. In the words of **1066 and All That** (a humorous account of all the history we think we can remember), "John finally demonstrated his utter incompetence by losing the Crown and all his clothes in the wash and then dying of a surfeit of peaches and no cider; thus his awful reign came to an end."[4] His body was conveyed to Worcester Abbey for burial.

Things did not look promising for his heir, his nine-year-old son, Henry III. But William Marshall, Earl of Pembroke, the greatest warrior of the day and the King's most loyal servant, quickly took charge. With the support of the papal legate, Cardinal Guala Bicchieri, he arranged for Henry's coronation in Gloucester and was (reluctantly) appointed regent of king and kingdom. The court travelled to Bristol[5] where the King's council reconvened. There the King was advised to reissue Magna Carta, which was sealed by Marshall and the Cardinal because the boy-king had no seal. This, the Magna Carta of 1216, reissued in 1217, formed the basis for the Magna Carta of 1225, which King Henry granted when he had acquired a great seal of his own.



The great bronze doors to the Supreme Court are adorned with a relief of King John granting Magna Carta (bottom panel on the right side).

The 1216 Charter was a very different document from the one exacted by the barons at Runnymede. One might call it a typical English compromise, designed to reassure the barons that the legal rights they cared about most were preserved but also to preserve the status of the monarchy. Most importantly, it did not contain the original chapter sixty-one (known as the "security clause"), which had given to twenty-five barons, to be chosen by the Runnymede rebels, extraordinary powers to enforce the provisions of the Charter against the King and his officials. These powers were what had most provoked the indignation of the Pope and the feudal purists. Some of the other chapters, in which King John had promised to put right particular grievances, were quietly dropped, because they were deemed specific to the political

situation in 1215. Other chapters were described in the 1216 Charter itself as "important yet doubtful"[6] and so were to be "deferred until we have fuller counsel, when we will, most fully in these as well as other matters that have to be amended, do what is for the common good and the peace and estate of ourselves and our kingdom." Among these were the chapters dealing with the levying of aids and scutage, including my favourite chapter, fourteen, but the principle of no taxation without common consent did come back in other ways.

Thus it was that, by losing those chapters, the famous chapters thirty-nine and forty of the 1215 Charter were combined to form chapter twenty-nine of the 1216 and all subsequent Charters, including that of 1297, which was enrolled on the English statute book (the notion that the King and his council, in Parliament assembled, could make laws having emerged during the thirteenth century). In granting the 1297 Charter, Edward I did no more than quote the 1225 Charter of his father Henry III. This had three significant changes from the 1215 and 1216 charters: it was granted by the King "of our own spontaneous goodwill"; it was not granted on the advice of his counsellors, who merely witnessed it; but "in return for this grant and gift of these liberties . . . the archbishops, bishops, abbots, priors, earls, barons, knights freeholders and all of our realm have given us a fifteenth part of their movables." No longer a product of coercion, it was nevertheless a contract with the people: liberty and the rule of law in return for the taxes the King needed to maintain his state and wage his wars.

That Henry III was still around in 1225 to reissue the charter was largely due to his regent, William Marshall, "the best knight in all the world." In 1217, he and the loyalists defeated the French army and their English supporters at the battle of Lincoln, and the French fleet was later defeated in a battle off Sandwich in Kent. Prince Louis renounced his claim to the English throne and promised never to assist the rebels again. The rebels were pardoned and their lands restored to them. As David Starkey puts it:[7]

> Magna Carta *was* revolutionary; the idea of monarchy *was* shaken to its foundations; the republican challenge *was* real. That it all ended in a classic English compromise was *not* inevitable. . . . But the central ideas of Magna Carta were retained in the reissue of the Charter in 1216 and became inviolable.[8]

Fast forward now to the seventeenth century: the century of the English revolutions and the century of the English colonisation of America. The English lawyers had not entirely forgotten about the principles underlying Magna Carta in the intervening years.[9] Magna Carta was, after all, on the statute book and procedures for putting the guarantees in chapter twenty-nine into effect had been developed. Magna Carta was first printed in Latin in 1508 and in English in 1534. Lawyers would also be familiar with Treatises attributed to Glanvill and Bracton on the **Laws and Customs of England**. Glanvill, writing before the Charter in about 1190, had said that "what please the Prince has force of law"; but Bracton, writing after the Charters in about 1230 had left this out, saying only that "whatever has been rightly decided and approved with counsel and consent of the magnates and general agreement of the community, with the authority of the king or prince first added hereto, has the force of law." As he explained, "the King ought not to be subject to man, but subject to God and the Law." Lawyers might also be familiar with the treatise of Sir John Fortescue, Chief Justice of the King's Bench under Henry VI in the mid-fifteenth century, "In Praise of the Laws of England," who said that "The King of England cannot alter nor change the laws of his realm at his pleasure. . . . he can neither change Lawes

without the consent of his subjects, nor yet charge them with strange impositions against their wils."

But Magna Carta as such was not much in their minds until it was resurrected in the second half of the sixteenth century and given almost mythical power by Sir Edward Coke,[10] appointed Chief Justice of Common Pleas by James I in 1606, just as the battle between the common law courts and the prerogative powers of the King was developing nicely, along with the battle between the King and Parliament. The three ideas, that a person should not be deprived of his liberty or his property without due process of law, that there should be no taxation without common consent, and that there were limits to the royal prerogative, featured prominently in each battle. The Great Charter of the Liberties of England was referred to in the Petition of Right of 1628, drafted by the House of Commons (of which Coke was now an elder statesman, having been sacked as Chief Justice in 1616), presented by Coke to the House of Lords and eventually accepted by them, and equivocally given royal assent by Charles I, as so often in return for the taxes he needed to raise.[11]

Eventually, as every school child in my country ought to know, the King tried to rule without Parliament, and there was a civil war between the Royalists, the cavaliers, who were "Wrong but Wromantic," and the Parliamentarians, the roundheads, who were "right and repulsive."[12] The roundheads won the war and the King was put on trial for treason and executed in 1649. His calls for the adjournment of his trial were met by "the good words in the great old Charter of England" (presumably meaning "to no-one shall we delay justice," but perhaps not in the way originally intended). But his conqueror, Oliver Cromwell, was not a great respecter of civil liberties either, famously declaring that "your magna farta cannot control actions taken for the safety of the Commonwealth."[13] The monarchy was restored in 1660, but once again became precarious when James II reasserted his prerogative powers. The "glorious revolution" of 1688 was the result. William of Orange, married to James's daughter Mary, invaded, James fled, Parliament offered the Crown to them both, but on conditions: the Bill of Rights was enacted in 1689 and the sovereignty of the King in Parliament was firmly established. The King alone could not make law or suspend or dispense with the laws which Parliament had made. Although the Bill of Rights also prohibits excessive bail and "cruel and unusual punishment," it is mainly about the power of Parliament and not about the rights of individuals.

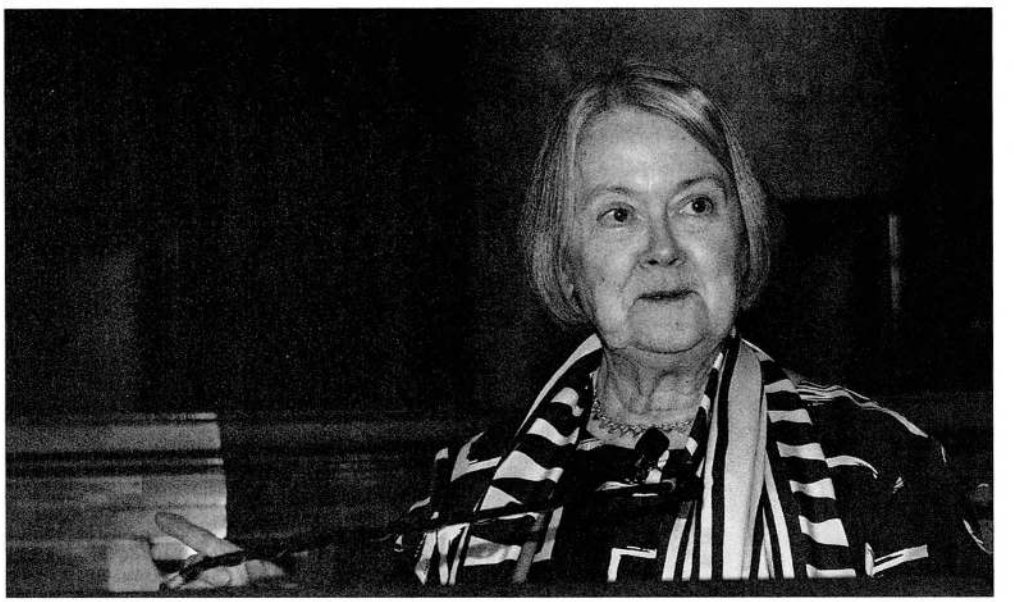
Meanwhile, of course, the English were establishing their American colonies on the other side of the Atlantic. They took the common law and Magna Carta with them. The Royal Charter granted to the colonists of Virginia in 1606 was partly the work of Coke and asserted that the English colonists were to enjoy the same rights as the English possessed in the homeland. Some colonists chose to create their own Magna-Carta-like constitutions, such as the Body of Liberties of Massachusetts Bay, the first section of which reads remarkably like chapter twenty-nine of the 1216 Charter, except that it refers to "in case of the defect of a law in any particular case by the word of God." William Penn is being credited with the first American printing of the Great Charter and used it in framing the laws of Pennsylvania (he had had, of course, first-hand experience of the battle for English liberties before he came to found the colony).[14]

So was it the common law and Magna Carta which motivated the Declaration of Independence in 1776 and the framing of the new Constitution in 1787? You will know much better than I, but it seems to me obvious that the denial of their heritage as Englishmen will have played a part in the demand for independence, but the framing of the new Constitution will have needed something

more. The lawyers will have known all about the writings of Sir William Coke and also of Sir William Blackstone, the pioneering academic scholar of English law, who in 1759 had disentangled the different medieval texts of Magna Carta.[15] They will have known about the struggles for civil liberties in late 18th century Britain. The colonists had no votes in the Parliament, which was now sovereign and could pass laws which overrode their ancient rights. When that Parliament voted to impose direct taxes upon them without representation, they could cite Magna Carta when they revolted and declared their independence.

On the other hand, important though the appeal to ancient history is, the framers of the Constitution were looking to create a new model of government. Magna Carta had at least three defects from their point of view: it was a grant from the King, rather than the work of the people; it could be overridden by a sovereign Parliament; and it limited only the operations of government, not of the legislature. For the framers, it was the people, not Parliament, still less the King-in-Parliament, who were sovereign, and invested the Constitution which they adopted with its authority. They were soon persuaded that it was also necessary to enshrine their freedoms in a Bill of Rights, in order to protect them from the potential tyranny of the majority. Much of its content is an echo of the rights in Magna Carta and the Petition of Right, and of the machinery developed to give effect to them, such as habeas corpus and trial by jury. But did its motivation and authority come, not so much from the appeal to ancient history, but from the appeal to nature and reason, from the puritan covenant between God and his people and John Locke's theory of natural rights?[16]

Be that as it may, having marched together for two centuries, the constitutions of the United States and the United Kingdom went their separate ways for the next two centuries. We in the United Kingdom had to wait until the Human Rights Act of 1998 before we had a proper Bill of Rights of the sort which citizens of the United States of America would recognise. This developed



Baroness Hale delivered the Annual Lecture in 2016 in the Supreme Court. She noted that: "We in the United Kingdom had to wait until the Human Rights Act of 1998 before we had a proper Bill of Rights of the sort which citizens of the United States of America would recognise."

out of the Universal Declaration of Human Rights of 1948, which Eleanor Roosevelt described as "an international Magna Carta of all men everywhere." Impatient at the lack of progress by the United Nations in translating its aspirations into binding obligations in international law, the Council of Europe enshrined a similar set of civil and political rights in the European Convention on Human Rights of 1950. Article 5, protecting the right to liberty and security of person, bears a remarkable resemblance to chapter twenty-nine of Magna Carta (at least if "or" means "and").

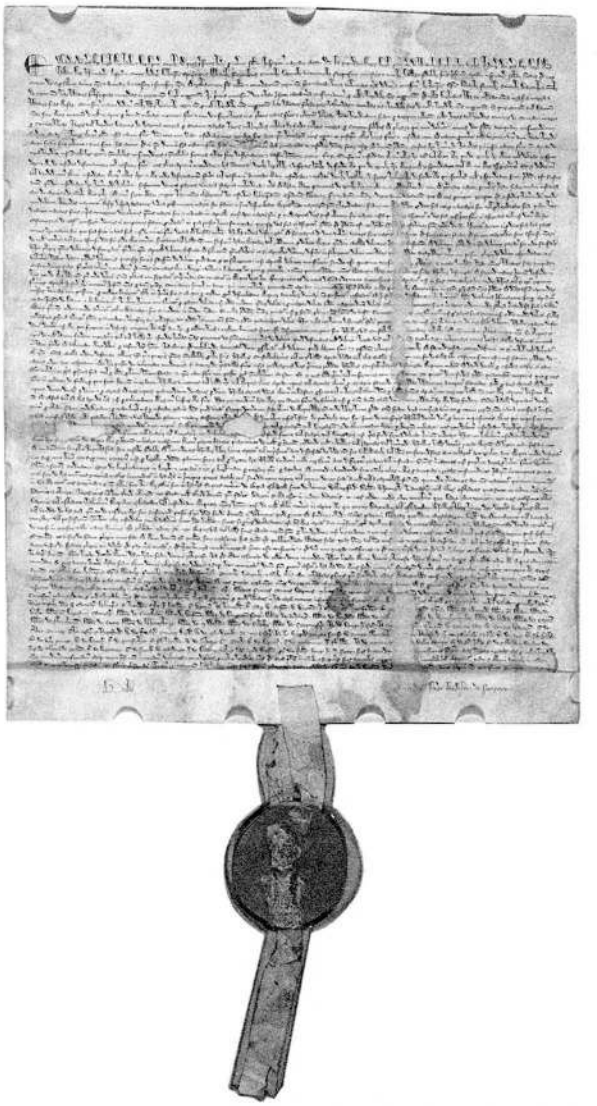
The jurisprudence of the European Court of Human Rights began to develop in earnest once the United Kingdom and other member states accepted the right of individuals to petition the court against their own governments; many of the seminal cases which established the fundamental doctrines by which the Convention is interpreted came from the United Kingdom;[17] the complacency of the English lawyers who thought that the Convention embodied rights which for the most part the English had enjoyed for centuries was shaken by a number of adverse decisions in Strasbourg; and eventually, our sovereign Parliament decided that these rights should become rights in United Kingdom law, enforceable in the United Kingdom courts.

It is still not a proper Bill of Rights in the American sense or indeed in the sense of any of the many other written Constitutions of the modern world. The UK courts do not have the power to strike down a provision in an Act of the UK Parliament which is incompatible with a Convention right. All we can do is, so far as this is possible, interpret the provision so that it is not incompatible (and a great deal can be achieved by interpretation);[18] or, if this is not possible, we can make a declaration of incompatibility.[19] Parliament then has three choices. First, it can swiftly approve a remedial Order in Council which removes the incompatibility;[20] this is suitable for simple cases where a single provision can easily be amended to make it fit. Second, it can pass an Act of Parliament providing a comprehensive scheme to deal with the incompatibility. Third, it can do nothing and risk the wrath of the Council of Europe. So far, all the nineteen surviving declarations have been acted upon by the UK Parliament, with one exception. They have not yet brought themselves to amend the so-called "blanket ban" on sentenced prisoners voting in elections.[21]

Not only that, of course: what Parliament has granted, Parliament can take away. The Conservative Party manifesto before the recent election promised to "scrap the Human Rights Act and introduce a British Bill of Rights. This will break the formal link between the British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights in the UK." However, in the Queen's speech to the new Parliament, on May 27, the new Government promised only to bring forward "proposals" for a British Bill of Rights, so we shall have to wait and see what they contain.

The Human Rights Act has given us the tools with which positively to protect fundamental rights against the organs of the state. But it has also made us think rather harder about the content of fundamental rights in the common law and to wonder about whether we too have a concept of constitutional statutes which are different from ordinary Acts of Parliament.[22] All of this has been taking place against a backdrop of the atrocities of 9/11 and later international developments, which have brought new challenges to the fundamental values which we associate with Magna Carta.

We in the UK tend to think that the American courts are far more conscious of Magna Carta than are we. Stivison calculated in 1991 that between 1940 and 1990 the Supreme Court of the United States had cited it in more than sixty cases.[23] We have found



The U.S. Supreme Court has cited Magna Carta in more than ninety cases, while the House of Lords, the Judicial Committee of the Privy Council, and the Supreme Court of the United Kingdom have referred to its judgments in only twenty-four cases. Above is the 1297 version of Magna Carta, one of four originals of the document.

another thirty-one U.S. Supreme Court cases since then, including nine in the last ten years. As far as we can discover, it has been referred to in judgments in only twenty-four cases before the House of Lords, the Judicial Committee of the Privy Council and the Supreme Court of the United Kingdom, but six of these are in the last ten years. Does this indicate a renewed interest in the values it embodies?

In 2003, in the Court of Appeal, Lord Justice Laws held that there is a category of constitutional statutes, including Magna Carta, but also the European Communities Act 1972, which cannot be impliedly repealed or modified by later ordinary Acts of Parliament.[24] Last year, in the *HS2* case,[25] the Supreme Court questioned whether one constitutional statute could impliedly modify another. This was a challenge to the government's decision

to gain planning consent and the necessary compulsory powers for the construction of a new high speed rail link between London and the English midlands by way of a bill before Parliament. The challengers argued that Parliamentary scrutiny would be inadequate to comply with the requirements of the European Directive on Environmental Impact Assessments, which we are obliged by the European Communities Act 1972 to observe. Until the case got to the Supreme Court, no one had taken the point that for us to enquire into the adequacy of the parliamentary process would be contrary to Article 9 of the Bill of Rights of 1689, which provides that "freedom of speech or debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament." Lord Neuberger and Lord Mance, in a joint judgment with which the rest of us all agreed, referred to a number of constitutional instruments, including Magna Carta, the Petition of Right 1628, and the Bill of Rights 1689, and continued,

> It is certainly arguable that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it passed the European Communities Act 1972 did not contemplate or authorise the abrogation.

This is heady stuff for those of us who were brought up to believe that "Parliament can make or unmake any law," although it falls well short of constitutional entrenchment.

Not only that, our courts have become more vigorous in applying the "principle of legality," by which Parliament is assumed not to have authorised the abrogation of a fundamental right by executive action unless it does so in plain language, so that any Parliamentarian would understand what was at stake and be prepared to take the political risk in agreeing to it.[26] Fundamental rights are not to be overridden by general or ambiguous words. This means, I think, that three of the earlier cases in which Magna Carta was mentioned in judgments in the House of Lords might have been decided differently today.

In *R v. Halliday*,[27] during the First World War, the majority decided that the broad enabling powers in the Defence of the Realm Act 1914 permitted regulations to be made which authorised the internment of persons with "hostile origins or associations." Lord Shaw of Dunfermline disagreed. The most famous provision of Magna Carta itself could not be abrogated in this way. He poured scorn on the majority view:

> No rights, be they as ancient as Magna Carta, no laws, be they as deep as the foundations of the Constitution: all are swept aside by the generality of the power vested in the Executive to issue "regulations." "Silent enim, leges inter arma."[28]

Then again, during the Second World War, in *Greene v. Secretary of State for Home Affairs*[29] and the more famous *Liversidge v. Anderson*,[30] the majority held that the Home Secretary's power to authorise detention where he had "reasonable cause to believe" that the grounds existed did not mean that he actually had to have such reasonable grounds, only that he had genuinely to think that he did. They rejected counsel's arguments that provisions which took away the fundamental rights to liberty and due process conferred by Magna Carta had to be narrowly construed. Interestingly, in his famous dissent, Lord Atkin did not refer to Magna Carta at all. He regarded it as a simple question of the meaning of words. The only authority for the view taken by the majority was Humpty Dumpty:

> "When I use a word, . . . it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said

> Humpty Dumpty, "which is to be master, that's all."[31]

Maybe Lord Atkin's reluctance to rely on Magna Carta had something to do with the protestations of the British Union of Fascists that these regulations put "Magna Carta in the dustbin." I do not know. These days, while I believe that we would share his view of the words themselves, we would also take the view that any legislation interfering so drastically with the liberty of the subject should be strictly construed.

The relaxed view taken by the majority of the House of Lords of the deprivation of liberty in times of war contrasts with the much stricter view taken of the deprivation of property. In both *Central Control Board (Liquor Traffic) v. Cannon Brewery Co Ltd*[32] and *Attorney General v. De Keyser's Royal Hotel*,[33] they contrived to find that wartime powers to requisition property had not deprived the owners of the right to compensation. Lord Parmoor in each case opined that, at least since Magna Carta, the Crown had had no prerogative power to confiscate property for its own benefit.

These days, we would have to judge such cases, not only against the fundamental principles of the common law, but also against the Human Rights Act. Derogation from its protection of the rights to liberty and to property is possible in times of war or "other emergency threatening the life of the nation," but even such derogations have to be justified. Thus, in the famous *Belmarsh* case,[34] we held that the power given to the executive, shortly after the atrocities of 9/11, to detain suspected foreign terrorists indefinitely without trial was unjustifiably discriminatory against foreigners. If there was a real need for such a measure, we had plenty of home-grown terrorists who needed it too.

I like to think that, with or without the Human Rights Act, we would have reached the same conclusion as the majority of your Supreme Court in the most famous of those nine recent cases in which Magna Carta has been cited in that Court, *Boumediene v. Bush*.[35] Under the Human Rights Act, it would have been easy. The Act governs the actions of the British authorities wherever they are in the world. The Convention rights protect "everyone," alien or citizen, who is "within the jurisdiction" of the United Kingdom. Those who are detained by the British authorities are undoubtedly within its jurisdiction.[36] Article 5 of the Convention therefore applies. Not only must there be good grounds for detaining them but the existence of these grounds must be proved before an independent and impartial tribunal established by law.

Without the Human Rights Act, it would have been a little more complicated. But aliens are undoubtedly entitled to apply for habeas corpus, just as the slave Somerset, a "negro of Africa,"successfully did in 1772.[37] The test of whether the writ will run against the British authorities is whether they have sufficient control over the person detained.[38] We recently held that this test was satisfied in the case of a Pakistani man detained by the British authorities in Iraq but handed over to the American authorities, who then transferred him to Bhagwan in breach of the memorandum of understanding between our two countries.[39] Two of us were not satisfied with the Government's return to the writ, and thought that it should have pushed harder for answers from your government, but that is another story. The point is that habeas corpus would undoubtedly have run against the British authorities detaining an alien in a British detention centre on foreign territory. The question would then be whether they had any legal right to do so.

These are the sorts of cases in which Magna Carta is mentioned, but more as a value underpinning later laws than as a surviving rule of law in itself. But we have had one case recently in which it might have made a difference.[40] This concerns the sorry tale of Diego Garcia. Diego Garcia is the largest

island in the Chagos archipelago in the Indian Ocean. The islands were a dependency of Mauritius, which was ceded to Britain by the French in 1814. In the 1960s the United Kingdom and the United States negotiated to make the islands available to the United States for a military base on Diego Garcia. For this purpose it was necessary both to sever the islands from their dependency on Mauritius (which might soon become independent and possibly non-aligned) and to remove the local Chagossian population. So, by Order in Council under the royal prerogative, without any need for Parliamentary approval, the British Government created a separate colony known as the British Indian Ocean Territory (BIOT). In 1971, when the United States wanted to move in, the Commissioner of the BIOT made an Immigration Ordinance, which prohibited anyone from entering or remaining on the territory without a permit. This was part of a "legal" constructed by the British government to deny that there was any indigenous population, for fear that their obligations towards a non-self-governing territory under article seventy-three of the United Nations Charter would be used to prevent the construction of the base on Diego Garcia. The local population were moved out, mainly to Mauritius and the Seychelles, with "a callous disregard of their interests."[41]

Many years later, one of the islanders, Mr. Bancoult, brought judicial review proceedings in England to quash the Immigration Ordinance on the ground that the Commissioner's power to legislate for the "peace, order and good government" of the territory did not include a power to expel all its inhabitants. In 2001, he succeeded.[42] The Government decided to accept this decision and investigate the feasibility of the islanders returning to the outer islands. In 2004, however, the Government decided that it would be "impossible to promote or even permit resettlement to take place." Accordingly, they made a new Constitution Order and a new Immigration Order prohibiting it. (They did not say whether this was precipitated by a plan by some of the islanders and their supporters to stage landings on the islands, which were seen as a security threat to the Diego Garcia base.) Mr. Bancoult brought a second set of proceedings to quash the new Orders. He succeeded in the High Court and Court of Appeal, but failed in the House of Lords, by a majority of three to two.

Among the many arguments deployed on behalf of the islanders was one based on chapter twenty-nine of Magna Carta: "No freeman shall be . . . exiled . . . but by the lawful judgment of his peers or by the law of the land." It was accepted that Parliament might pass a law exiling a person from his homeland, but it was argued that an Order in Council in the exercise of the royal prerogative to legislate for the colonies could not do so. Three of the Law Lords disposed of this argument by holding that the Orders were "the law of the land" for the purpose of chapter twenty-nine (thus holding that "or" means "or"). Two of the Law Lords held that there was no prerogative power so to legislate as to exile a population from its homeland. Magna Carta, and the later development of its principles by Blackstone and Lord Mansfield lay at the heart of their reasoning.

I was not a member of the panel which heard that case. I wonder which way I would have decided it. I wonder which way the Supreme Court of the United States would have decided it. Whatever the answer, it seems clear to me that the values which underpinned the Magna Cartas of 1215 and 1225 are as important in today's world as they were then and as much in need of protection in our courts.

ENDNOTES

[1] T. Bingham, **Lives of the Law** (Oxford, 2010), p 4.

[2] Constitutional Reform Act 2005, s 137(3).

[3] I have relied mainly on two secondary but learned sources: A. Arlidge and I. Judge, **Magna Carta Uncovered** (Oxford, Hart, 2014) and D. Starkey, **Magna Carta, The True Story behind the Charter** (London, Hodder, 2015). Fortunately they agree on all essential points.

[4] W.C. Sellar and R.J. Yeatman, **1066 and All That, A Memorable History of England, Comprising All the Parts You Can Remember, Including 103 Good Things, 5 Bad Kings and 2 Genuine Dates** (London, 1930; Methuen, 1999), 34-35.

[5] Then the second city in the country and one with which I am proud to be associated, as Chancellor of the University of Bristol.

[6] Chapter 42.

[7] *Op cit*, 135-136.

[8] Starkey, ***Magna Carta***, 135-136.

[9] *See, e.g.*, J.H. Baker, "Magna Carta and personal liberty," in R. Griffith-Jones and M. Hill (eds.), **Magna Carta, Religion and the Rule of Law** (Cambridge, Cambridge University Press, 2015).

[10] Sir John Baker has given a detailed account (with much new learning) of how this happened, not all down to Coke: "Magna Carta and the Templars 1215–1628," Inns of Court Magna Carta lecture series, 23 November 2015, Inner Temple, London.

[11] Very soon afterwards, the King ordered the recall of the formula of Royal Assent, "let right be done as is desired," and substituted his own, "right should be done according to the laws and customs of the realm," which begged the question.

[12] Sellar and Yeatman, *op cit*, 71.

[13] According to Clarendon, **History of the Rebellion** (not necessarily the most reliable of historians): *see* Arlidge and Judge, *op cit*, 143.

[14] It was his acquittal of riotous assembly in 1670 which led to *Bushell's Case* (1670) 124 ER 1006, establishing that jurors could not be punished for returning a verdict of which the authorities disapproved.

[15] **The Great Charter and the Charter of the Forest** (1759).

[16] D. Little, "Differences over the foundation of law in seventeenth and eighteenth century America," in Griffiths-Jones and Hill, **Magna Carta, Religion and the Rule of Law**.

[17] An account is given in "Beanstalk or Living Instrument? How Tall Can the European Convention on Human Rights Grow?" Gray's Inn Reading at Barnard's Inn, 2011, accessible at www.supremecourt.uk/news/speeches.html.

[18] Human Rights Act 1998, s 3(1). This is the preferred solution, and a surprisingly flexible one: *see Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

[19] Human Rights Act 1998, s 4.

[20] Human Rights Act 1998, s 10.

[21] Held contrary to Article 3 of the First Protocol to the Convention by a Grand Chamber of the European Court of Human Rights in *Hirst v. United Kingdom (No 2)* (2006) 42 EHRR 41, and declared incompatible by the Court of Session in *Smith v. Scott* 2007 SC 345.

[22] For an account, *see* "UK Constitutionalism on the March," keynote address to the Administrative Law Bar Association, 12 July 2014, accessible at www.supremecourt.uk/speeches-140712.pdf.

[23] D.V. Stivison, "Magna Carta in American Law," in D.V. Stivison (ed.), **Magna Carta in America** (1993), 103.

[24] *Thoburn v. Sunderland City Council* [2003] QB 161, at para 62.

[25] *R (Buckinghamshire County Council) v. Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

[26] *R v. Secretary of State for the Home Department, ex p Pierson* [1998] A 539; *R v. Secretary of State for the Home Department, ex p Simms* [2002] AV 115; *HM Treasury v. Ahmed* [2010] UKSC 5, [2010] 2 AC 534.

[27] [1917] AC 260.

[28] *Id.* at 289.

[29] [1942] AC 284.

[30] [1942] AC 206.

[31] Lewis Carroll, **Through the Looking Glass**, ch vi.

[32] [1919] AC 744.

[33] [1920] AC 508.

[34] *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

[35] 128 S Ct 2229 (2008).

[36] *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

[37] *Somerset v. Stewart* (1772) 98 ER 499.

[38] *Secretary of State for Home Affairs v. O'Brien* [1923] 2 KB 361.

[39] *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48, [2013] 1 AC 614.

[40] *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

[41] Lord Hoffmann at para 10.

[42] *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

Beyond Knox: James C. McReynolds's Other Law Clerks, 1914-1941

CLARE CUSHMAN

One of the more poignant scenes in John Knox's memoir of clerking for James C. McReynolds during October Term 1936 is when one of the Justice's former clerks pays a call at his apartment during lunchtime. Having been told that Maurice J. Mahoney was McReynolds's "most successful" clerk and had stayed with him for many years, Knox, new to the clerkship and still starry eyed, was curious to meet him. Spying on the clerk-Justice reunion in the dining room, however, Knox sees to his dismay that his new boss does not even invite Mahoney to sit, let alone dine, and that the Justice "maintained a cool, detached formality toward his caller and scarcely gave any indication that he had ever seen the young man before." "If he is as formal and cold as that with a Southerner who was the most successful secretary he ever had," Knox worries, "then there is absolutely no hope that I can be a success in this position."[1] Poor Knox's prediction ended up coming true, as his compelling chronicle of his abysmal experience clerking for McReynolds reveals.

Thanks to Knox's extraordinary document, a great deal about how McReynolds mistreated his private secretary in the 1936 Term is known. But what about the other seventeen clerks McReynolds engaged during his lengthy Court tenure (1914-41)? In his recent work examining the clerks of McReynolds, Barry Cushman has helpfully rescued these men from obscurity and given them their due alongside Knox.[2] We now know who they were, where they came from, when they clerked, and what they did after their clerkship. We can also conclude that Knox was an anomaly in that his post-clerkship career never took off and he had to cobble together various low-level legal jobs to remain solvent. By contrast, McReynolds's other clerks went on to solid, even stellar, careers in government, law, the military, and business.[3] But the question that remains unanswered is, was Knox's experience *during*

his clerkship typical? While Knox alone recorded an account of his clerkship for posterity, there are enough clues from other clerks to provide a framework in which to place Knox's experience, especially letters written home by Milton S. Musser, the Justice's penultimate clerk.

Clerk Selection

With the exception of Knox, a Northwestern Law School and Harvard Law School graduate, McReynolds recruited clerks from local D.C. schools.[4] An exception to this is Blaine Mallan, the only clerk the Justice selected from his alma mater, whom he met in D.C. at a University of Virginia Law School alumni banquet shortly after Mallan graduated law school in 1916.[5] McReynolds mainly hired from Georgetown University, which offered evening classes for students who needed to support themselves with day jobs in nearby government agencies.[6] Some of McReynolds's clerks had already finished law school, but others undertook the exhausting challenge of working as a stenographer during the day while pursuing their law studies in the evening. For example, T. Ellis Allison graduated from Georgetown Law School in 1918, halfway through his two-year tenure with McReynolds. His classmates viewed his clerkship as difficult, writing on his yearbook page: "Ellis admits that he likes the ladies but his social functions do not keep him from doing his arduous duties as Secretary to Supreme Court Justice James C. McReynolds." Norman Frost also finished his legal studies during his clerkship, double-duty, which his yearbook entry said took its toll: "Due to his rather strenuous life as Secretary to one of the U.S. Supreme Court Justices, Norman has not been as active in school affairs as some of his 'buddies.'"[7]

Hiring law students for Supreme Court clerkships was fairly common in the 1910s because the duties were mostly clerical. "Stenographic clerks," as they were then called, performed such humble tasks as taking dictation in shorthand and then transcribing the words on a typewriter, carrying written opinions to the printer, and running personal errands. In 1920, Congress began providing salaries for law clerks ($3,600) in addition to stenographic clerks ($2,000, raised to $2,240 in 1924), and some Justices began engaging two assistants. Although the Justices now had the opportunity to hire a second clerk who would be tasked with performing substantive legal research, not many immediately took advantage of the offer.[8] McReynolds chose to employ both a stenographic clerk and a law clerk for only two months in the 1921 Term, and one month in the 1925 Term, and then reverted back to one clerk.[9] McReynolds tended to write terse opinions that were less about scholarship than showing an unwavering faith in his conclusions, so he may not have thought he needed a second clerk's help with legal research.

(Mis)Treatment of Clerks

Aside from Knox, the best source for understanding how McReynolds generally treated his clerks is the political scientist Chester Newland, who conducted interviews with seven of them in 1959 (his notes were since destroyed in a flood). He concluded that the notoriously irascible McReynolds demeaned his clerks:

> McReynolds was plagued with troubles in locating and retaining clerks. Especially in his early years he insisted that his clerks remain single and refrain from the use of tobacco. Because of his strong language and asperity toward his subordinates, the atmosphere was too demeaning for some of his assistants. And, as his reputation spread, the Justice Department and

> acquaintances of the justice apparently found it difficult to locate clerks for him.[10]

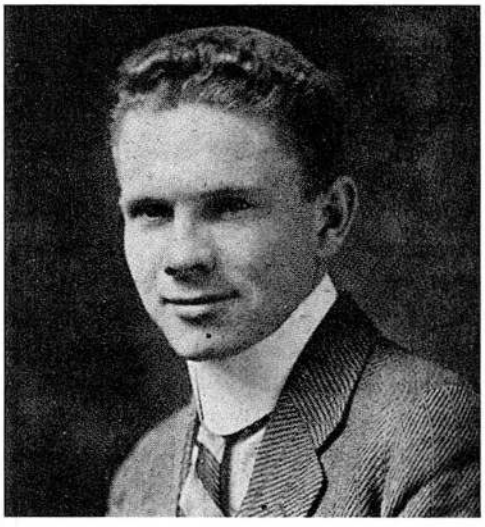
Newland's contention is supported by McReynolds's high turnover rate: he employed eighteen clerks in his twenty-seven years on the Court. In comparison, most of his contemporaries kept their clerks for multiple terms: Joseph McKenna (three clerks in twenty-two years), William R. Day (five in nineteen years), Willis Van Devanter (five in twenty-six years), Joseph R. Lamar (one in five years) Mahlon Pitney (two in ten years), John H. Clarke (one in six years), George Sutherland (four in fifteen years), Pierce Butler (six in seventeen years), Edward T. Sanford (one in seven years), and Owen J. Roberts (one in fifteen years). The others—Oliver Wendell Holmes Jr., Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone and Benjamin Cardozo—rotated their clerks frequently, but with good reason. They ascribed to the modern clerkship model whereby they recruited top students from elite law schools, gave them both clerical and substantive legal duties, and then mentored them on to successful careers after a single term. McReynolds's clerks also rotated, but he did not consider it his job to mentor them or interest himself in their welfare.[11]

Justice McReynolds hired nine of his eighteen clerks from Georgetown Law School. Several worked for him by day and pursued law studies at night, including T. Ellis Allison (above), who graduated in 1918. His classmates wrote in his yearbook entry: "Ellis admits that he likes the ladies but his social functions do not keep him from doing his arduous duties as Secretary to Supreme Court Justice James C. McReynolds."

Despite this high turnover, there is evidence that McReynolds did value continuity and sought to retain satisfactory clerks who were able to tolerate his behavior. Breaking in a new clerk had its downside. According to his longtime clerk Mahlon Kiefer, Justice Van Devanter believed "that a clerk, no matter how able, was of little real value to him until he had been on the work a year or more."[12] Accordingly, McReynolds rehired eight of his clerks.[13] As his first two clerks, he chose men who had been "confidential clerks" in the Office of the Attorney General during the year and a half McReynolds served as Attorney General: Leroy E. Reed (October Term 1914) and S. Milton Simpson (October Term 1915). Justice McReynolds recruited Simpson back into service for a third time to serve in October Term 1919, hiring him away from his position as special assistant to U.S. Attorney for the Southern District of New York.[14] Similarly, Harold Lee George, who served as stenographic clerk for the last few months of October Term 1918, was rehired at the higher law clerk position from April 12 to June 27, 1920 (to replace Simpson). Other stalwarts were T. Ellis Alison, who began clerking on March 1, 1917, and resigned April 20, 1919—his tenure stretching across three terms,[15] and Norman B. Frost, who was McReynolds's clerk for October Term 1920, but who filled in on two other occasions when the Justice needed him (April 9 to April 11,

1920, and January 19 to March 1, 1922).[16] More steadfastly, McReynolds retained John T. Fowler for five continuous terms and Maurice J. Mahoney for seven. Newland noted that the "former clerks interviewed varied sharply in their attitudes toward Justice McReynolds," which allows that some were content enough with their clerkship to agree to stay longer with McReynolds.[17]

McReynolds may also have been forced to press back into service former clerks when others did not work out. Indeed, Newland's assertion that the Justice had trouble retaining clerks is supported by their start and end employment dates, which are curiously irregular. Six of McReynolds's clerks did not even serve a full term, including Knox, who was fired in June, thirteen days before the end of the 1936 Term.[18] The 1921 Term was particularly disjointed: McReynolds employed four clerks, but only two overlapped and then only for three months.[19] In those days, clerks were hired directly by their Justices, who decided their salary (within a range) and their exact employment dates. According to Knox's diary, all it took to dismiss a clerk was a phone call from the Justice to the Clerk of the Court, and a man's salary was suspended.



As his first two clerks, McReynolds chose men who had previously worked for him as Attorney General: Leroy E. Reed (1914 Term) and S. Milton Simpson (1915 Term). For October Term 1919, he recruited Simpson (above) back into service for a third time, hiring him away from his position as special assistant to U.S. Attorney for the Southern District of New York.

We can only guess whether other clerks quit or were fired, because it is difficult to extrapolate from clerkship dates without knowing the full story. But in one respect that distinction matters little. All clerks were in a vulnerable situation because leaving a Justice's employ without a reference could lead to unemployment in an era when legal jobs were scarce. As Newland observed: "A challenging reality for a clerk in a dreadfully demeaning position was that, following acceptance of an appointment, early voluntary departure could result in an appearance of having been fired—and joblessness. Yet, clearly some had the luck and/or wisdom to quit or be fired early, preserving a modicum of human dignity."[20] Because of the job's low pay, low status, and tedium, most Supreme Court clerks in McReynolds's era hoped to move on to become practicing attorneys as soon as a position became available to them, but they all needed to stay long enough to ensure a good reference.

McReynolds, whom Knox characterized as "unbelievably stingy,"[21] may have had an ulterior motive for wanting to dispense with a clerk before the term was over. When Milton S. Musser signed on for October Term 1938, he repeated gossip he had learned about the Justice's modus operandi in a letter home: "[McReynolds] gives his law clerk the minimum and fires him every summer at the end of term and then hires a new one in the fall term so he won't have to pay a clerk over the summer months."[22] The Justice's parsimony may indeed explain why his clerks' employment end dates did not always extend into August or September: he did not see the need to keep them on the Court's payroll when the workload diminished at the end of the term. (Ideally, a clerk wanted to be engaged for twelve months and then earn a

month of accrued leave.) Although this seems harsh, it was not without precedent. In the nineteenth century, many low-level Court employees did not earn wages during the summer recess when the Justices were away.

Preference for Childless, Bachelor Clerks

Most pre-1940 Justices employed married men in their thirties with children for multiple terms.[23] Only those Justices who employed clerks for a single term (or two) demanded that their clerks be bachelors and give them their undivided attention and unfettered energy for a short time. [24] McReynolds seemed to want to have it both ways. Newland gleaned from clerk interviews that McReynolds insisted on bachelors "especially in his early years."[25] A 1939 clerk feared announcing his impending nuptials to the Justice because he had heard that "in the past [McReynolds] ha[d] fired two excellent secretaries for just such an offense."[26] The unlucky clerks were not identified, but one was probably McReynolds's first clerk, Leroy E. Reed, who came with him from the Office of the Attorney General. Reed served a full term, but then was replaced on November 4, 1915, by S. Milton Simpson, his law school classmate who had also worked for McReynolds in the Office of the Attorney General. Reed married Helena Doocy, a Washington College of Law graduate, on November 3.[27]

The other clerk may have been Chester Gray, who left McReynolds's employ on March 23, 1926—one month after he had started his clerkship.[28] Gray was married when hired, and his wife, Ruth, was four months pregnant with their daughter, Jane, at the time of the firing.[29] Dismissing Gray before the end of the Term would have put his wife and child in a precarious financial situation, a heartless situation he no doubt wanted to avoid. McReynolds had a soft spot for children. The Justice financially supported the local D.C. children's hospital, left part of his estate to children's charities, and was especially generous to the teenage pages at the Court, who were all sons of widows.

McReynolds nonetheless fired Gray when he failed to correct a small error in an opinion. In his diary, Knox recounted Harry Parker's version of the episode:

> I asked [Parker] if he thought I should ever "talk back" when McReynolds proved unreasonable, but Harry cautioned me not to do that. "He'll tell you to leave if you do!" said Harry. "And after you're fired he'll say there are plenty of other fish in the sea—meaning plenty of other secretaries available." Why Harry said that the Justice once discharged a secretary for just overlooking one error in the final proof of an opinion. The Circuit from which a case had originated was referred to incorrectly—such as the "Third Circuit" instead of the "Second Circuit." McReynolds was reading the opinion during a

Early in his tenure, McReynolds hired only bachelor clerks, but he eventually came to employ married ones. His first clerk, Leroy A. Reed (above), abruptly ended his clerkship the day before he wed.

> session of Court when the Chief Justice suddenly noticed the mistake. Either at that moment or later in the day Hughes brought the error to McReynolds' attention. Despite the fact that all the other Justices had failed to catch the same mistake when the proofs of the opinion were first circulated to them for comments, McReynolds rushed back to the apartment and immediately fired his secretary. "You have embarrassed me before the Chief Justice!" he declared in anger.... The secretary then pleaded for a second chance as it was in the middle of the term, his wife was going to have a baby, and he didn't have any other source of income. But the Justice was adamant, and since then he has insisted that his secretaries not only be infallible proof readers but also bachelors.[30]

Gray had learned stenography at age sixteen to support himself, and definitely "didn't have any other source of income." But Taft was Chief Justice in 1926, so for the clerk to be Gray, Knox must have misidentified the Chief Justice as Hughes.

McReynolds probably fired Chester Gray (above) only a month into his clerkship in 1926 for overlooking an error in the final proof of an opinion. The circuit from which a case had originated was referred to incorrectly and McReynolds was embarrassed when the Chief Justice caught the mistake. Gray, who was hired as a stenographic clerk to supplement James T. Fowler, McReynolds's law clerk, reportedly pleaded with the Justice to keep him on because his wife was expecting a child and he needed income.

Maurice J. Mahoney: The Longest Serving Clerk (1927-1933 Terms)

To replace Gray, McReynolds hired a bachelor, Maurice J. Mahoney, the aforementioned "successful" clerk Knox dishearteningly witnessed the Justice treat so diffidently. He stayed with McReynolds from October Term 1927 through October Term 1933. In return for providing the Justice with continuity, Mahoney had a positive experience. "Father spoke about the clerkship with respect and with happiness that he had done it," his son recalls. "Father didn't say anything negative about McReynolds."[31]

Born in the small town of Blythe, Georgia, Mahoney's southern upbringing helped him get along with the Kentucky-born Justice. His son speculates that McReynolds kept him on "probably because my father was 'genial,' liked by all, and a Southerner." Harry Parker, the Justice's African-American messenger and general factotum, told Knox that Mahoney was "real nice," was "real polite," and that even though he was from the Deep South, Mahoney was not "like some secretaries ... who never paid ... attention to me at all."[32] Having trained as a stenographer and a bookkeeper in Georgia, Mahoney came to D.C. to work as an accountant while attending evening classes at Georgetown Law School. His class of 1925 yearbook page calls him a "Southern Gentleman" who "has retained the goodwill and respect of the

class." His classmates also noted that he "divide[d] his time equally between the ladies and the law," and predicted "much success for him in these fields."[33]

Mahoney was twenty-eight years old when he began his clerkship, and his success with "the ladies" translated quickly into marriage. He wed Julia Johnson in June 1929—the end of his second term—and left McReynolds to take a job in the Admiralty Division at the Department of Justice. [34] Mahoney's son reports that, while his father knew "that marriage and children were frowned upon," the Justice "didn't get upset" when he wed. Indeed, within a month, Mahoney returned from the Justice Department to work for Justice McReynolds "at his urgent request."[35] It was not until two years after Mahoney's clerkship, however, that he and his wife had a child.

McReynolds may have relaxed the no-marriage rule for Mahoney, but in 1936 Harry Parker would warn Knox that if he wanted to survive the term, he could not even have "dates with girlfriends during the year. If anybody is going to do any dating, it will be the Justice and nobody else."[36] Parker was probably just telling him to play it safe, having witnessed years of McReynolds's mercurial behavior.

John Knox's Unforgettable Diary

The hiring of John Knox in 1936 came about in an unusual manner. A Supreme Court "groupie," in college and law school, he had corresponded with Justices Holmes, Van Devanter, and Cardozo, and invited himself to Washington to meet them. His letters to Van Devanter, which asked for career advice, led to the kindly Justice arranging for his friend McReynolds to hire him. With mediocre grades at Harvard Law School, Knox was not protégé material for Professor Felix Frankfurter, who fed his best students to Holmes, Brandeis, and Cardozo.

When he summoned Knox to Washington for an interview, McReynolds warned that he wanted "an all round man who can & will do everything possible to help me." While some Justices by then were employing both a law clerk and a female secretary, McReynolds insisted he "had no use for women secretaries and always prefer[red] my law clerk to do secretarial work, too." He asked Knox if he smoked (not allowed), took dictation, and typed, and for a handwriting sample. McReynolds gave Knox six weeks of unpaid time to get up to speed on shorthand and offered him a salary of $2,400 a year. Neither McReynolds nor Van Devanter asked him about his politics, but "just assumed [he] was a staunch Republican, or at least anti-new Deal." McReynolds did, however, ask which church he attended.[37]

Knox was hired on condition he rent an apartment in McReynolds's elegant building on Sixteenth Street, which was expensive. On Knox's first day of work, McReynolds announced he was bumping up his salary (at the urging of his messenger Harry Parker) to $2,750, but considering most other clerks were earning $3,000, this was not generous.[38] Like all the clerks before him, Knox worked in the library of the Justice's apartment even though McReynolds now had the option of moving his staff into the spacious new chambers awaiting him in the newly opened Court building. (The other Justices were equally reticent to move their offices out of their homes, and Brandeis, like McReynolds, never moved into his Supreme Court chambers.) McReynolds required Knox to stay in the apartment all day in case there were phone calls to answer and to "be available at all times in case I need you."[39] Isolated, it was a lonely year for Knox.

Initially, the most time-consuming task that McReynolds assigned Knox was digesting and summarizing the hundreds of petitions for certiorari that had poured in over the summer. Since Knox did not start until August, there was a huge backlog, and he

threw himself "into the task with a fervor."[40] At the bottom of each typed summary Knox would write his own "recommendation as to whether the petition should be allowed or denied." "I gradually became almost like an automaton," he wrote in his diary, "I read a certain number of petitions each day. . . . The pile of typed sheets grew ever higher."[41] While laborious, the continual cert. work pleased Knox, as he believed he was contributing substantive legal work. Indeed, not every clerk was tasked with summarizing petitions; Brandeis, for example, allowed his clerks to perform legal research, but insisted on reading all the cert. petitions himself.

Knox soon realized, however, that McReynolds did not rely on his summaries in discussing cert. petitions with the other Justices in conference. As the second most senior Justice, McReynolds could listen to the Chief Justice frame the debate and then the more junior Justices discuss the petition before it was his turn to vote on whether to take up the case, at which point he had a good handle on the issue. "Therefore," Knox concluded, "any recommendations which I might make in my digests of the petitions for certiorari were more or less superfluous." "Even if I had not read and briefed a single petition, it would not have been too much of a loss for the Justice," he theorized. After seeing the Justice blithely throw the summarized petitions in the wastebasket after an October conference, Knox suspected that McReynolds "regarded [his] work on these petitions as little more than a mental exercise to keep [him] busy and out of mischief."[42]

The Justice did once assign his clerk an opinion to draft, much to Knox's delight. "Like a fire horse waiting to run to the nearest conflagration,"[43] Knox sweated over four drafts of the opinion while the Justice was out of town for a few days. Upon his return, McReynolds called Knox to his office to "start writing the opinion as it should be written!" and "quietly reached across the desk and silently, almost gently" let Knox's work "glide downward into his wastebasket." Parker had warned Knox that the assigning of a draft opinion was just a "trick" to keep Knox busy while the Justice was away. "He's done the same with other secretaries, too," he cautioned.[44] While McReynolds's behavior seems disingenuous, it could also be seen as hearkening back to the apprenticeship model, when Justices had their clerks study and brief petitions, not to help the Justice with his work, but so the clerk could learn the law.[45] When a bitter Knox eventually read McReynolds's own draft opinion in the same case, he criticized the Justice's extensive quoting from the briefs and found overall that "it did not live up to [his] expectation of what a Supreme Court Justice should be able to write."[46]

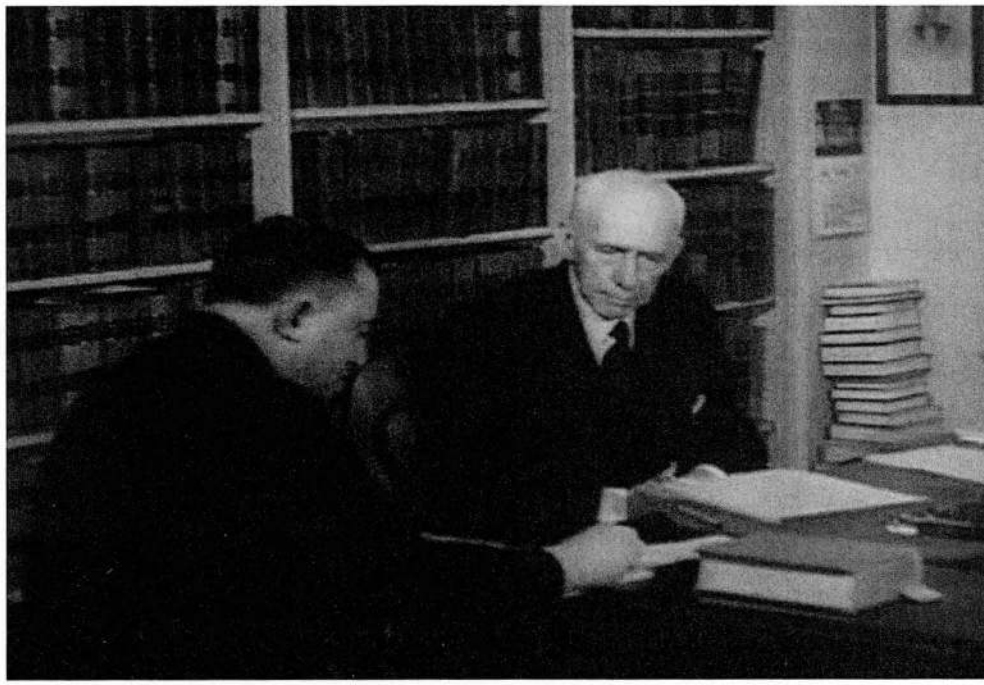
Knox chafed at being treated as a mere stenographer, calling himself "little more than a machine and an efficient one at that." When McReynolds was preparing an important dissent later in the term, Knox grumbled that he "merely typed his dictation and contributed nothing to the substance of the opinion." By March, Knox complained in his diary that his duties "had now become so routine that [he] almost never made an error either in taking dictation or in transcribing [his] shorthand notes."[47]

Despite Knox's proficiency, McReynolds mercilessly fired Knox on June 17, thirteen days before the term ended. When he returned from a trip, the Justice found that, instead of being in the apartment all day as required, Knox has been at the Court in the air conditioning studying for his upcoming bar exam. As there was no Court business left to deal with except for a few incoming cert. petitions, Knox was understandably furious. On hearing the news, Clerk of Court Charles Elmore Cropley was also dismayed because clerks were usually paid for a whole year's worth of work, and Knox had been expecting his summer wages. Indeed, Knox's premature termination on a flimsy pretext gives credence to McReynolds's reputation for

being averse to keeping clerks on the payroll when the workload diminished.

Cropley tried to comfort Knox by telling him that working for McReynolds was "too strenuous for a man just out of law school" (Knox was thirty), and should go to a man "over forty," such as his successor, John T. McHale, who was forty-seven with four teenage children.[48] McHale had been Van Devanter's clerk for eight terms when the Justice announced he would be stepping down and asked his friend McReynolds to hire his trusted clerk. Although in his diary Knox never expressed interest in staying on for a second term, one wonders if McHale had not been "given" to him whether McReynolds would have pressed Knox into staying another term instead of abruptly firing him. Before he left, Knox spent a day with McHale at the Court instructing him on "how to avoid various pitfalls during the coming year" and "bringing all of McReynolds' accounts for May up to date." He predicted that "the change from Justice Van Devanter to Justice McReynolds would be a very difficult one for [McHale] to make."[49]

Despite his aloofness and bursts of anger, Knox recorded in his diary that on occasion McReynolds "exhibited unexpected friendliness" or spoke "in a very pleasant and friendly tone of voice." But by the end of his clerkship he concluded that McReynolds was an unreconstructed curmudgeon. Nevertheless, Knox returned to Washington in July 1938 and paid a visit to his former employer. The Justice received him "with a cool and detached formality that almost made [him] believe that [McReynolds] had never seen him before." This led Knox to recall the interview he had witnessed between the Justice and Mahoney at the start of his clerkship, and to note that "the wheel of fate had now come full circle." Knox's last impression of the Justice was that he was



After McReynolds fired him thirteen days before the 1936 Term was over, John Knox spent a day training his successor, John T. McHale (pictured above with Justice Willis Van Devanter), whom McReynolds hired upon Van Devanter's retirement. Knox predicted that "the change from Justice Van Devanter to Justice McReynolds would be a very difficult one for [McHale] to make." McHale left after one term.

"attempting to break through some invisible wall that surrounded him, and to communicate with [his clerk] somehow, but this attempt was doomed to failure."[50]

As Knox predicted, McHale disliked clerking for McReynolds. In a letter to Knox, Harry Parker painted a miserable picture of life with the Justice the following term:

> [McReynolds] gets worse. Mr. McHale is having a hard time. I am sure he would not stay if he could get anything else to do. While writing this letter I had a run in with the Judge. You are lucky that you got out and don't have to go through what we have to it is next to hell.[51]

McHale took a job regulating motor carrier registrations at the Interstate Commerce Commission and left in May.[52]

Milton S. Musser's Letters to His Family

McReynolds's next clerk, a twenty-seven-year-old Utahan named Milton S. Musser, committed to two terms and stoically managed to stick through them. Letters he wrote home during his clerkship—May 1938 to October 1940—provide a valuable comparison to Knox's writings and corroborate Knox's characterization of McReynolds as being extremely difficult to work for.

Musser was born in 1911 into a well-known Utah family that continued to openly practice polygamy after the Church of Jesus Christ of Latter-Day Saints (LDS Church) renounced the practice in 1890. His family's papers are archived at the Utah Historical Society, but the biographical profile accompanying Milton's papers curiously fails to mention his clerkship at the Supreme Court.[53] It does, however, give a useful account of his formative years: "He graduated from Latter-day Saints High School and also attended LDS Junior College and LDS Business College, where he learned shorthand and business fundamentals. In 1930, he was called on a mission in the British Isles by the Church of Jesus Christ of Latter-Day Saints. During his final missionary year he worked in the European Mission Office at Liverpool under its president, John A. Widtsoe."

Musser's papers include correspondence with his mother, Ellis Shipp Musser, who received a B.A. in 1907 from the University of Utah and was working part-time as an insurance agent. Her husband, Joseph White Musser, spent his time shuttling between four wives, publishing pro-polygamy tracts, and trying to earn a living in the oil and gas business, leaving Ellis to struggle financially and to care for Milton and his four siblings. Joseph would be jailed in 1944 for openly practicing plural marriage, and he died in 1954. Ellis renounced polygamy in later life after being excommunicated from the LDS Church; her children did not follow their father in the practice of plural marriage.[54]

Musser's letters also include correspondence with his younger brother, Samuel; his older sister, Ellis; and with her husband, Francis R. Kirkham, whom she married in 1928. Kirkham had also grown up in Salt Lake City, where he earned the nickname "Czar" because of his strong leadership qualities. The couple moved to Washington, D.C., to attend George Washington University. Ellis earned a B.A. in 1931; Francis received his B.A. in 1930 and his J.D. in 1931, graduating first in his law school class. While still in school, he was hired by Supreme Court Justice George Sutherland, a fellow Utahan, and clerked for him for the 1930-33 Terms.[55] Remarkably brilliant, Kirkham was asked to stay on for the October Term 1934 by Chief Justice Charles Evans Hughes, who needed help with administrative matters at the Court.[56]

Milton Musser followed his brother-in-law's lead in moving to Washington in 1932 to enroll at George Washington University, first as an undergraduate and then for law school. Czar and Ellis looked out for him as

he studied law at night and worked by day as a legislative researcher on the staff of Senator William H. King, of Utah (1932-34), and then as a law clerk to Nathan Cayton, municipal court judge of the District of Columbia (1934-38). As such, Musser became the only McReynolds clerk other than McHale and Allison (who was secretary to the chief judge of the U.S. Court of Appeals for the District of Columbia Circuit) to have had previous clerkship experience with a judge.

When Musser decided to leave Judge Cayton and the municipal court for greener pastures, he was fortunate that his brother-in-law was a veteran Court insider who could help him navigate the ways of attaining a Supreme Court clerkship. In December 1935, Kirkham had decided to move to San Francisco to join the law firm of Pillsbury Madison & Sutro, but his work for Hughes continued. He coauthored a much-needed handbook for lawyers about Supreme Court practice, and drafted a report for the Chief Justice suggesting revisions to the way people filed for bankruptcy, a crucial subject in the wake of the Great Depression.[57]

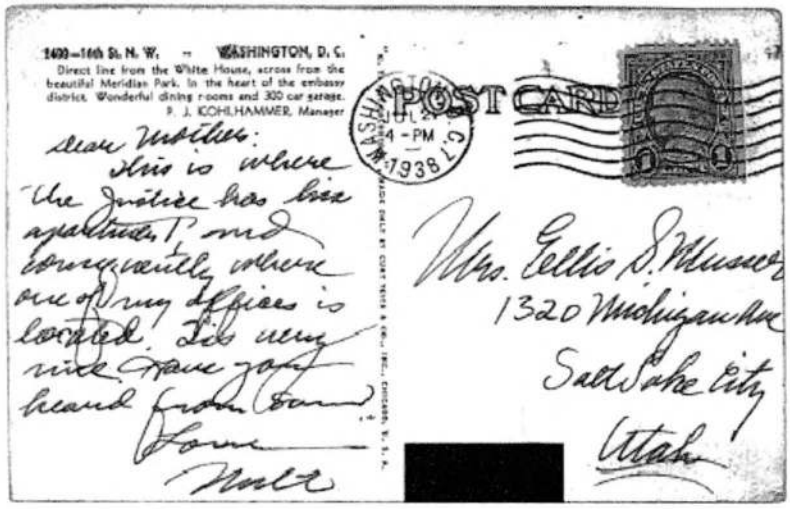
Kirkham no doubt would have liked to secure his brother-in-law a position with his former boss, Justice Sutherland, but John W. Cragun, whom both Kirkham and Musser knew from growing up in Salt Lake City, had already succeeded him. Like his fellow Utahans, Cragun had studied law at George Washington University while working by day as a stenographer.[58] While a law clerk to Sutherland in the 1934-37 Terms, Cragun, like Kirkham, was also assigned to work on special projects for Chief Justice Hughes. As Musser would later brag to Justice McReynolds in his job interview, he helped both Kirkham and Cragun with these extracurricular assignments.

When Sutherland announced he was retiring from the Court on January 17, 1938, Musser saw his opportunity and enlisted Kirkham to campaign for him. In the short time before Sutherland's successor, Solicitor General Stanley F. Reed, took his seat on January 31, Musser strategized that Cragun would be kept on as Justice Reed's new law clerk and that Reed would hire Musser as his second clerk. The term Musser used was "secretary," but he meant the lower paid "stenographic clerk" position.[59] The plan was for Cragun to stay until summer and for Musser "to take over [as law clerk] without breaking the routine of the office" when Cragun moved on.[60] Kirkham obligingly lobbied Cragun, Reed, Sutherland, and Clerk of Court Cropley to press his brother-in-law's case.[61]

Disappointingly, Cragun decided to go directly into private practice, having been counseled by Sutherland to move on. Reed brought Harold Leventhal, who was clerking for him in the Office of the Solicitor General, to his chambers at the Court to serve out the term. A Columbia Law School graduate, Leventhal was already experienced in the ways of the Court because he had clerked for Justice Harlan Fiske Stone the previous term. Reed also decided to retain his secretary, Helen Gaylord, who had assisted him since his days as general counsel of the Reconstruction Finance Commission, effectively hiring her for the second law clerk position that Musser was gunning for.

Thus it was not, as Musser feared, the lack of a completed law degree that hurt his chances of being hired, but changing employment norms. When Musser relayed the disappointing news to Kirkham, he said he supposed Justice Reed hired Gaylord "so she could help Mrs. Reed," revealing that Musser did not realize that female secretaries were already replacing male stenographic clerks in other Supreme Court Chambers.[62]

Shifting gears, Musser turned his focus to Justice McReynolds, but not without trepidation. He asked Kirkham whether he should take the McReynolds position being vacated early by McHale or wait for another opening at the Court:



"This is where the justice has his apartment and consequently where one of my offices is located," wrote Milton Musser to his mother in Utah at the beginning of his clerkship in 1938. Although he had Chambers in the new Supreme Court building, McReynolds liked his clerks to work out of his library in his elegant apartment on Sixteenth Street.

> Both [Richard Hogue, Chief Justice Hughes's clerk] and Cragun told me McReynolds is looking for a law clerk. He now has Van Devanter's old law clerk. They both tell me not to apply. What do you think? I would only consider it as an "in" to the court. I should like to have your advice on this matter.... Hogue and Cragun were very nice to me—Hogue especially. There is talk of both McReynolds and Brandeis retiring this spring. Also, the feeling is that Cardozo will not be back. Maybe other chances will come my way. Damn! I knew I should have been attending Church more regularly.[63]

Musser quickly realized, however, that a clerkship with McReynolds was his only viable option. Accordingly, he lobbied John T. Suter, a reporter who covered the Supreme Court for the Associated Press and whom McReynolds's had hired as his private secretary when he was appointed Attorney General twenty-five years earlier:[64]

> This morning I immediately arranged for an appointment with Suter and saw him. He was very nice—took down information about me relative to church affiliation, age, habits, experience as social secretary and otherwise, etc. et. He told me he was of the impression that McReynolds might resign at the end of this term. He was very cordial and I think I quite beneficially put over the impresario act. He said that if the Justice is in town he will see him tomorrow morning and try and arrange for an appointment.[65]

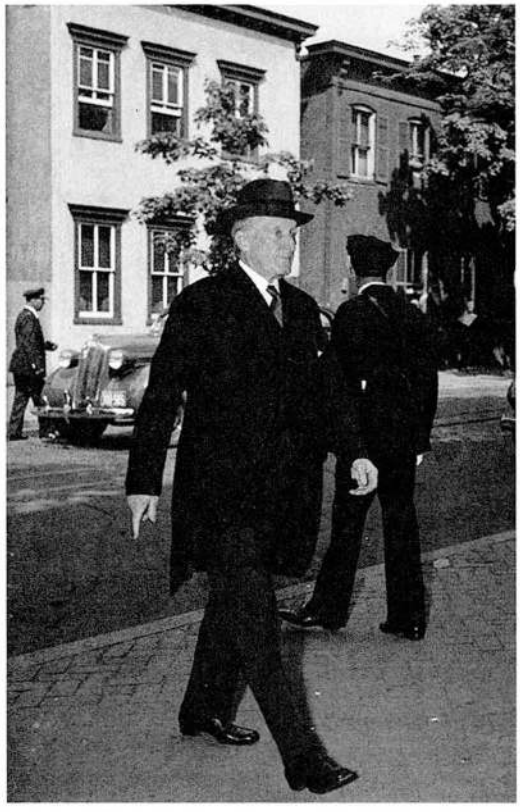
Musser was fully aware of the difficulties of working for McReynolds. "You, of course, know about McReynolds," he wrote his mother. "He is supposed to be a ? X ! X X = !"[66] But, he bravely asserted, the Justice's "apparent idiosyncrasies do not frighten me. They present a real challenge." His level of knowledge about the Justice's habits is telling. "I certainly can handle those Sunday morning teas [McReynolds] gives the fairer sex,"[67] Musser assured Kirkham, indicating that he had been apprised of the Justice's custom of hosting Sunday brunches and inviting his many female society friends. It would be interesting to know if Musser, Cragun, or Sutherland had spoken directly with Sherier, Knox, or McHale about their clerkship experiences with McReynolds or if the Justice's habits were common knowledge in Washington.

In any case, Musser was determined to "land the position": "If I get the interview I shall pull the poisonality [sic] out of the bag and try my best—holding out for the $3600 [top of the clerk salary range], being careful to become not too disappointed no matter how the outcome is. Here is one question. I don't think I made it too clear to Suter that I am still in school. I understand that this might be a very great drawback to my landing the position."[68]

Musser wired Kirkham to ask him to arrange a recommendation from Sutherland:

> McReynolds impressed by my conference with him. Left impression will be available if he makes immediate change but prefer to remain with Cayton until small claims court established.[69] Loyalty demands this. He agreed. Sutherland's immediate recommendation vital. Please arrange this. Will count on it. Letter follows. Affectionately. Milt.[70]

Kirkham duly wrote the retired Justice, reminding him that he had met his brother-in-law several times in Washington and had been acquainted with his grandfather in Utah. Not wanting to "impose," Kirkham only asked that he be willing to "speak favorably of Milton" should McReynolds inquire about him. Tellingly, Kirkham praised not only



When McReynolds hired him for the 1939 Term, Milton Musser (top), a George Washington Law School student, was optimistic that the Justice had been unfairly characterized. "I now start on something much more difficult," he wrote his mother, "working for a man who is known to never have a kind word for anyone. Yet, from a few sources I have heard that he has a heart of gold. I am going on the assumption that he is greatly misunderstood. I shall do my best for him. I hope that will be sufficient. I do think the old codger likes me."

Musser's legal and clerical qualifications but also his "qualities" which "will please" McReynolds: "his personality is unusually pleasant; he is unmarried; he does not smoke; and he is an exceedingly conscientious worker."[71] Whether McReynolds asked Sutherland for his input on Musser is unknown.

Musser's mid-April interview with McReynolds went well, and he followed it up with a letter touting the research support he had provided his brother-in-law and Cragun on their special assignments for Chief Justice Hughes:

> Frequent assistance which I have rendered members of the United States Supreme Court staff has made me familiar with the duties of a secretary to a Justice of that Court. Frequently during the past four years, Mr. Francis R. Kirkham and Mr. John W. Cragun (formerly law clerks to the Chief Justice and Mr. Justice Sutherland respectively) sought and obtained my help in the work of revising the Rules, research work on the Bankruptcy Act, and on petitions for certiorari.[72]

Given that he was clerking for a judge and in law school classes at night, one wonders how Musser had found time to help them. Was Musser paid by the Court, or paid directly by Kirkham and Cragun, or did he work pro bono? In any case, he went on to summarize for the Justice his other experience:

> I am twenty-six years of age and unmarried. Recently I passed the District of Columbia Bar examination and was admitted to the practice of the law on April 12, 1938. I have the degree of Bachelor of Arts from The George Washington University and will be awarded the degree of Bachelor of Laws at the next term. For the past year I have been a member of the Board of Editors of *The George Washington Law Review*.
>
> During my study of the law I have been law clerk and secretary to Honorable Nathan Cayton, Judge of the Municipal Court of the District of Columbia. This has involved extensive research and secretarial work in all its phases, both legal and personal. During the past two years I have been in complete charge of formulating and putting into effect, the plan for the organization of a Small Claims and Conciliation Branch in the Municipal Court. This plan was first proposed to be introduced by rule of court and later was enacted into law by the Congress. My duties consisted in supervising all the paper, drafting, and proof-reading work connected with this proposal. With Judge Cayton I drafted the rules, the Act itself the committee reports, and the great mass of paper work pertaining to this novel and widely discussed proposal.
>
> Prior to my service with Judge Cayton I had served for several months in a secretarial capacity with Senator William H. King of Utah, handling practically all of his personal correspondence and speeches. In that position I became thoroughly familiar with the routine of legislative and governmental procedure.[73]

Musser included a list of references, divided in two categories. He listed Senator King and Judge Cayton as references for "stenographic and secretarial ability," and for "personal references" he gave the names of Cropley, Kirkham, Cragun, Richard Hogue (Hughes's clerk), and John A. McIntire,

faculty editor-in-chief of the *George Washington Law Review*.

One unanswered question is whether McReynolds considered Musser's religion before extending a job offer. The Justice asked Knox his religious affiliation in his interview, and Suter queried Musser on his "church affiliation," so McReynolds knew that Musser was Mormon. Although Musser's father openly advocated plural marriage, it seems doubtful that McReynolds would have heard about his activities in Utah. In those days the Justices did not perform background security checks on potential clerks; they used letters of recommendation to screen candidates. One does wonder what McReynolds, intolerant of Jews, blacks, working women, and smokers, would have thought about hiring the son of a famous polygamist.

Musser promptly received an offer from McReynolds, and "was flattered to have made himself acceptable to the hardest man in America to work for." Wary, however, of McReynolds's "insatiable ability to make it tough for his clerks,"[74] he checked with Kirkham before accepting it. His brother-in-law's reply was encouraging but clear-eyed. He held out hope that McReynolds would retire and that Musser would be inherited by a new Justice:

> [I]t is my opinion that you should accept the job which is certain to be difficult and is unlikely to be pleasant. The consideration which would incline me to accept the place is that you have reached a point now where just a good job is not enough and you must plan on the future. If you expect to practice law you should begin immediately, now that you have passed the Bar, rather than stay in a related field in a good job. And I do think that work with McReynolds will be a better stepping off place into the practice . . . I do not see how accepting the job with McReynolds will prevent your taking a law class this summer; in fact, I should think it would be easier to do so with him than with Cayton. It will, of course, mean much harder work but your hours will be pretty much your own and you ought to be able to get some help on the certiorari from Dick Hogue.
>
> McReynolds' proposed retirement may, of course, work out more favorably than if he remains, since you may continue through the term with whomever is appointed. I hate to give an opinion on a question so important to you and in the end you, of course, must use your own judgment. I would not, however, let the amount of the salary be a determinative factor. If you make yourself indispensable he will increase your salary in order to keep you.[75]

Musser accepted the offer and then persuaded Judge Cayton to hire Kirkham's younger brother. He wrote to his mother: "I have been able to work Grant Kirkham into my old job. I owed this much to Czar who has done so much for me in shaping my legal career. I would have been unable to get with McReynolds without his help and past record at the Court." He also told her that he could "hardly wait to take over [his] new duties." While he had heard enough stories about the Justice to be nervous, he was determined to succeed: "Mother dear, . . . I must be successful in this position. This will require the exclusion of *everything* which does not fit in absolutely with McReynolds's plans. He is that way."[76] He was also optimistic that McReynolds had been unfairly characterized and was hiding "a heart of gold": "I now start on something much more difficult—working for a man who is known to never have a kind word for anyone. Yet, from a few sources

I have heard that he has a heart of gold. I am going on the assumption that he is greatly misunderstood. I shall do my best for him. I hope that will be sufficient. I do think the old codger likes me."[77]

Once in McReynolds's employ, his letters to his mother, to Kirkham, and to his younger brother, Samuel, echo some of Knox's complaints and reveal that Musser's optimism about the Justice was misplaced. Like Knox, Musser worked out of the Justice's apartment instead of in his chambers at the Court, where most of the other Justices were now ensconced. If he had been allowed to work inside the Court building, Musser, like Knox, might not been so much at the mercy of McReynolds's behavior. "His demands on my time are paramount to the last iota. That was the agreement and with that I must abide," he wrote his mother.[78] At least Musser was never required to rent a room in the same building, as Knox had been told to do for McReynolds's convenience.[79]

Musser took up his duties in May, and McHale, McReynolds's outgoing clerk, turned over the new cert. work to him. At first Musser's clerkship went reasonably well despite his "shaking knees." He wrote updates to Kirkham about his breaking-in period:

> My somewhat shaking knees have come to an abrupt though probably temporary stop. The Justice has just left for conferences with thirty-three of my briefs tucked away in an envelope. I had just four days in which to do them and during that time, was also busily engaged in performing my various and multifarious secretarial duties. You can well imagine that I have had little time in which to prepare for two [law school] examinations which I have taken this week....
>
> Of course, you know what it is like. I haven't seen McHale and other boys have been so busy that I did not have the heart to ask them any questions. Consequently, I have had to barge right in and make the best of this last Hell week. I should tell you that the Justice did compliment me this morning after he had gone over my briefs. He said, "They are done very well indeed." Don't you think that is quite a compliment to receive?
>
> The Justice is leaving tonight for the South. He will probably be gone a week. That will give me a breathing spell and an opportunity to associate myself with the office and all that is contained therein. It would be wonderful if he went to Europe thereafter.

However, Musser added an ominous last paragraph to the letter: "Professional integrity will not allow me to tell you many of the really hard things about the position. Anyway, why talk about them. I certainly knew, or should have known, what I was getting into."[80] Kirkham's reply was encouraging, recalling his own clerkship days:

> Thirty-three briefs to begin with! I certainly sympathize with you. It so happened that I started with Sutherland in the middle of the Term and, as luck would have it, the first week I had the fewest number of certs that I had in any one week while I was with the Court. I believe there were three. I also remember distinctly that I worked all week on the three of them. For you to have done thirty-three, and, quite evidently to have done them well, is a real achievement. I suppose you are willing to agree with me that there is no better way to learn a lot of law in a short time than to work on the certs.
>
> I hope the Justice goes to Europe so that your time will be your own

> while you are working in this summer. I hope the "really hard things" you mention are smoothing out and that the job will become enjoyable as well as profitable.[81]

Musser's complaints about the onerous workload particularly concerned his law studies. This additional burden was one with which Knox did not have to contend. Musser was anxious about the difficulty of both fulfilling the Justice's "every whim and wish" and completing his law school requirements over the summer, and desperately hoped McReynolds would travel to Europe with friends, as usual, despite war looming. He wrote Kirkham:

> I am not certain that the Justice is going abroad this summer. My position with him is quite unique. Confidentially, he is slowing down somewhat and has reached the stage in life where he desires and expects his secretary to be on hand all the time in order that he may satisfy his every whim and wish. It is needless to say that this, therefore, is my first duty. As I informed you, the Justice had told me before I accepted the position with him that I would be unable to attend summer school. Supposedly, the reason for this is that he may want me to drive with him down to Virginia and other nearby states for a few days at a stretch.
>
> Nevertheless, I must complete one more course at school if I die in the attempt. Therefore, I am registering for Government Corporations this evening. The course lasts six weeks. I understand the final examination is on or about July 25. If I am unable to make enough of these classes to pass the course I shall try again the second summer session.
>
> I, also, am more than anxious to vacation with you this summer. I would give almost anything to have that opportunity.... You may well understand that because of the definite characteristics of the man for whom I work, I shall do nothing to incur his disfavor if such is within my power, but I do hope we can get together if only for a short time.[82]

Musser's vacation with Kirkham never happened. "Certs, are now coming in at the rate of 25 a week. Who mentioned my taking a couple of weeks off," he wrote on June 30.[83] In the end, though, the Justice did go to Europe, and Musser managed to complete his law course in late July. Musser wrote to his mother triumphantly:

> Have been working very hard recently on my "certs." Have 85 of them to do but they are coming easier. Justice has been very nice to me. Has even told me to quit work early the last three days because of the heat. I took my *final* law exam last Monday. If I pass it, I am through. Do you realize what that means to me? Six years work has culminated in reaching one of my goals. I probably won't receive my LLB until next February but I am all through and can give my time to my work.[84]

Musser's letters during his clerkship capture the complexity of McReynolds's nature by showing that, while the Justice often behaved decently as an employer, his personality was repellant. And the Justice had such power over him that Musser, like Knox, continually walked on eggshells for fear of displeasing him, triggering his wrath, and getting fired. For example, after a week in the hospital because of food poisoning, he wrote: "Had to get back to the office today or the Justice might have fired me. He's funny that way. He just *can't* be inconvenienced."[85]

He also worried about the quality of his cert. petition summaries, praying that McReynolds would find "nothing fundamentally wrong with my briefs" while in conference at the Court.[86] Musser was keenly aware that McReynolds had once fired a clerk for a small error in an opinion.[87]

Yet McReynolds did not always prove to be as vindictive as feared. On February 18, 1939, Musser married his girlfriend, LaVeda Westover, who worked as a secretary for FBI director J. Edgar Hoover.[88] LaVeda was raised in a Mormon family in Arizona and had attended Brigham Young University from 1933 to 1935. Musser told his mother about his impending nuptials to his "beautiful and intelligent" fiancée, but expressed his fear about informing the Justice, knowing he did not want his clerks to marry and start families: "I may not tell McReynolds. In the past he has fired two excellent secretaries for just such an offense. I just don't feel like letting him hold back my happiness to that extent."[89] "I have no fear of getting another job," he reassured her, "but there is always that contingency."[90] Perhaps because he did not want to search for a new clerk, the Justice took the news with equanimity: "Finally told the Justice last night I intended to go ahead and get married. He was very nice about it. Said 'I'm sorry Musser—think you're making a mistake—but I suppose I can't stop you.' So I guess I did not get fired, at least not right away—and I am happy I decided to go ahead."[91]

As the end of 1938 Term neared, Musser weighed the merits of a second term for his postclerkship job prospects. Like Knox, the longer Musser worked for McReynolds, the worse his opinion of him as a person became:

> I have been illthinking [sic] quite seriously about my position with the Justice. Day by day it becomes more repulsive. He treats me splendidly as far as the work is concerned and I really think I have proved satisfactory to him. It is just that I hesitate to be around a man so small that no matter how hard he tries, will never become as big as his position.... Certainly, association with him for another year, will not help to improve my own chances of getting another position.... Well, life goes on and is never *too* hard to bear.[92]

In February 1939, Musser married his girlfriend, LaVeda Westover (above), who worked as a secretary to FBI Director J. Edgar Hoover. McReynolds took the news of the impending wedding with equanimity but told him he was making a mistake. "I guess I did not get fired, at least not right away—and I am happy I decided to go ahead," Musser wrote his mother.

But Musser did fulfill his promise to stay on for a second term, reporting a week later that the Justice "is just as cantankerous as ever but treats me well."[93]

Finances, more than his lack of respect for the Justice, were compelling Musser to consider seeking better employment. He regularly sent money to his mother to supplement her small commissions from writing insurance policies. In August 1939, LaVeda gave birth to a daughter, Marcia, and Musser began worrying increasingly about supporting a family on his clerk's income.

"The baby's early arrival has caught me with a flattened purse," he wrote. "Boy, I'll be glad when I am out of debt."[94] With his growing family, Musser had to put down a deposit for a larger rental apartment, but he still had debts from law school.

In his second term, Musser became increasingly exhausted by his duties and fed up with the Justice. "I am up to my neck in work," he complained. "Don't have time for anything."[95] "I shall be so happy when June comes," he wrote in November. "My work with McR. altho invaluable and constructive has been a sore trial."[96] In February, Musser let off steam to his mother: "If I had to stay with him another year I would probably hit him in the face. Not that he is so terrible—he is not, in his way—but only that I can't take it much longer. It will be so pleasant to kiss him goodbye."[97] Come April, he was determined to move on: "Working for McReynolds is like being in prison—maybe worse—and I certainly must leave him soon or go batty. Johnny Cragun who took Czar's place with Justice Sutherland told me some time ago I should stay with Mac no longer than one year, and in any event no longer than two.... Well my two years are up and I intend to leave. Don't know yet what my next step will be."[98]

As usual, the end of the term was particularly onerous. Musser dutifully continued to work on petitions for certiorari, which, as with Knox, the Justice had been asking him to read and summarize throughout his service. "During the last week of court I had fifty-seven petitions for certiorari to review compared with a general weekly average of perhaps fifteen," he wrote his mother. "Other work increased proportionately and altogether the place was quite a madhouse."[99] Unlike Knox, however, Musser made no mention of how little he believed McReynolds actually relied on his summaries. If he thought the Justice was not reading his work on the cert. petitions, Musser might be expected to complain about it in his letters.

The Justice must have been satisfied with Musser's performance because he saw fit to give him a raise. Stunned, Musser wrote his brother: "Instead of following his usual (too usual) custom of firing me at the end of term, the justice has seen fit to give me a 300 buck raise. Nice of him eh what? I was really startled not to say surprised because it was so voluntary on his part. I didn't even have to ask for it."[100]

With the outbreak of war in Europe, Musser had been hatching plans to join the army reserves. In September 1939, he had written his mother: "Did I tell you I am taking courses of instruction preparatory to receiving a commission in the Army? I think it is a smart idea would much rather be behind a desk in War Dept than cleaning mud off the captain's shoes when the deluge comes."[101] And in a letter to his brother, probably written in June 1940, he crowed: "Which reminds me that I'm already for war now. Received my Second Lieutenant papers a few weeks ago and mobilization. I am assigned to Camp Lee, Virginia where a training camp will be established. Quite exciting, n'est ce pas?"[102]

Musser delayed tendering his resignation for fear the Justice would avoid paying his summer salary, the way he had reportedly done to Knox and other clerks. He decided not to inform the Justice he was leaving until after he attended a two-week training camp in July. "I may not tell the Justice until the last day [of camp],"[103] he wrote his mother, noting that he had a commission in "the Quartermaster Reserves and that all Arm[y] and Service Assignment Officers are expected to attend Camp Holabird July 7–20." Musser worried that McReynolds "might say, 'I'm sorry to see you go but if you are going you might as well quit now.'" He would then have no income between July and the start of the new law firm job he had signed on to start in September. He complained to his mother:

> [I]f the Justice were only half a man he would give me my accrued leave

> to which I am entitled as a matter of right. I would then be on his payroll (without actually Working for him) at least until October 1st.... I'll have to work everything just exactly right, and then rely primarily on luck, or I'm bound to be out on a limb. The Justice will kick like a mule before he will give me a day's leave, especially if I resign.
>
> The whole thing is about as ticklish a proposition as telling him I was contemplating marriage. I will keep you informed, of course, and at the same time must ask for your good wishes when I approach the lion in his den.[104]

As with the marriage, McReynolds took the news of his military training better than expected:

> Concerning my own plans—Yesterday I told the Justice I had been ordered on a weekend trip to Southern Virginia by the Army, to familiarize myself with a location for one of the largest contemplated training and replacement centers in the United States. I also suggested that within the near future I expect to be ordered to camp for two weeks. Contrary to expectation the Justice did not grumble. He simply asked for notice a day or two in advance. What I now plan to do is wait until after camp (July 20th) and then inform the Justice I wish to terminate my services on September first. His reaction to my quitting will determine whether we can go out West this summer. If the Justice insists that I stay with him a month, I shall, of course, do so.[105]

To Musser's relief, when he returned from training camp and informed McReynolds on July 25 that he was resigning as of September 1, the Justice was "very nice" and even took an interest in his professional welfare. A surprised Musser reported home:

> I told the Justice I am planning to resign. Contrary to expectations he was very nice, said he wanted to do nothing to interfere with my future, his own plans were uncertain, etc. etc. He then quizzed me on the steps I wish to take, told me to consider everything very carefully before making a move, and suggested a complete investigation of the firm's possibilities before definitely making up my mind. I informed the Justice the firm wanted me as of Sept. 1st. Have, as yet, said nothing about annual leave from this job, but will approach him on that subject in 2 or 3 days. It is a grand relief to have informed the Justice of my contemplated resignation.[106]

Throughout August, Musser straddled two jobs: working for the law firm and "clearing up all the loose ends with McReynolds." He hoped to get paid for thirty days of accrued annual leave by working as McReynolds's clerk for the full year. (The propriety of performing overlapping duties to a law firm and the Supreme Court went unquestioned.) Musser complained about the situation to his mother:

> So a week ago I started my new labors (having *not* completed my job with the Justice who has been out of the city the past 3 weeks). I work at my law office in the daytime and at court at night. It's a real bad job, this clearing up all the loose ends with McReynolds....
>
> My name is already on the door of the law firm and I have a dozen cases on my desk—as a mere starter. The

> new activities are extremely interesting. If I can only finish my work with the Justice by September first I'll be happy, at least won't be quite so busy.[107]

A week later he wrote: "The Justice is still out of town—expected home this coming Saturday. I have just completed reviewing more than two hundred petitions for certiorari in my spare moments. During the day while I have been working at the law firm."[108]

In the end, McReynolds and Musser parted on cordial terms. And Musser did manage to receive a salary from the Court (approved by McReynolds) until October 1. He wrote home triumphantly: "The Justice returned last Friday and I had my last innings with him. I came out of the melee with never a feather ruffled. He even gave me a month's leave. That means that I get double pay for September, I hope. And will it be appreciated. The Justice was very nice to me, and asked me to keep in touch with him."[109]

The war, however, quickly interfered with Musser's career plans, and by April he was on active duty with the Army. His description of his duties at the firm of Roberts & McGinnis, however brief his stay there, is worth relaying because it reveals how stimulating it was to work as an attorney compared to being a law clerk, which he had found "dishearteningly monotonous":[110] "My new work is very exciting. Already I have been assigned cases involving dissolution of a corporation, auto collision, divorce, reorganization of RR, appeal and circuit court in Cleveland Ohio, Interstate Commerce Commission case, Supreme Court application for certiorari and others. In other words, it has proved to be an excellent step into the actual practice of the law."[111] The financial arrangement the firm offered him was also a step up: "Roberts specializes in utilities. The first year they *grossed* $55,000, the second year 75,000. My arrangements will be $3,000 per year plus 33 1/3 of all business I originate, plus an annual bonus undetermined. I think it is grand to be onto something more than a mere salary."[112] Yet he also found that the job was "twice as time consuming" as his clerkship with McReynolds.[113]

Musser stayed with the Army until November 1945, attaining the rank of lieutenant colonel. He started with the Corps of Engineers, supervising internal security at construction sites, but then transferred to the Office of the Inspector General in 1943, where he investigated alleged fraud in the building of the Pan American Highway. After his military service, he made his way to Los Angeles and cofounded the law firm of Musser & Wilson, where he spent the rest of his career.[114] He was, however, called back to active duty by the Army to work again as an investigator with the Inspector General for most of the 1950s. He traveled and worked all over the world, and for a time Musser was headquartered in Panama, conducting investigations throughout Central and South America.

Conclusion

Of McReynolds's eighteen clerks, apparently only Knox took the trouble to keep a diary of his clerkship experience. Nor did the others later write reminiscences of their Supreme Court clerkship. This is perhaps because none of McReynolds's clerks went on to academia, where memoirs of clerkship experiences are encouraged and valued. They may also have been eager to downplay their clerkship—both because of the Justice's cantankerous behavior and because their secretarial duties were lowly and not worth touting once they had moved up in their careers. Thus information about McReynolds's clerks is scarcer than with some of his contemporaries.

Little is known, for example, about how McReynolds recruited his clerks, except in the case of Knox, who was recommended by

Justice Van Devanter, and Musser, who was backed by Kirkham, Cragun, and Cropley. In those days, candidates were encouraged by friends and associates of the Justice, or personnel officers at the Justice Department, to apply directly to the Justice by letter. Clerk of Court Cropley also fielded letters from prospective candidates and passed them on to Justices in need of a clerk, which, according to Newland, McReynolds frequently was. Musser also reports that McReynolds used John K. Suter, a reporter for the Associated Press who covered the Supreme Court in the 1930s, to perform preliminary vetting. A longtime Washington correspondent for the *Chicago Record-Herald*, Suter had cut short his presidency of the National Press Club when McReynolds was appointed Attorney General in 1913 and hired him to be his private secretary. It seems unimaginable today that a member of the Supreme Court press corps would be asked to vet clerkship applicants for a Justice. There is no evidence of particular law school professors scouting clerks for McReynolds, or that he was screening for a particular ideological bent, although Musser being recommended by Sutherland's clerks may perhaps be considered ideological vetting. Knox reported that he was never asked about his politics by either Van Devanter or McReynolds, probably because the job was considered clerical.

McReynolds did not have a clear plan for breaking in new clerks. While Knox spent a day "training" McHale to succeed him, he himself was not indoctrinated by Joseph Sherier, whose last day was July 1, and Knox started in August. Musser was hired in April and overlapped with McHale in May, but complained, "I haven't seen McHale and other boys have been so busy that I did not have the heart to ask them any questions." Musser does not report breaking in his successor, Raymond Radcliffe, or even meeting him. McReynolds's longtime messenger, Harry Parker, apparently provided much of the training and continuity.

Musser's letters support his predecessor's portrait of McReynolds as a self-centered employer and an extremely unlikeable person. McReynolds's preference for unmarried clerks stemmed from this self-centeredness, and also reveals that he wanted his clerks to be expendable at a moment's notice. If they displeased him or did not have enough work to do, he needed to be able to fire them without having to think about the financial impact on a wife or child. As cold-blooded as his behavior was, Musser and Knox do point out that McReynolds was mostly polite in their daily working relations. Moreover, they both clerked for him toward the end of his tenure, and it is likely that McReynolds, who suffered from hearing loss and painful bouts of gout, became more ornery as he aged.

Knox's and Musser's frustration with their Justice may have stemmed from a deeper issue. In his third decade on the Court, McReynolds continued to treat them as old-fashioned private secretaries when the Supreme Court clerkship was evolving into a different model, whereby clerks were not personal servants but legal assistants. Moreover, they were disappointed that he may not have relied upon the only substantive legal work (summarizing cert. petitions) that he asked his clerks to perform. McReynolds assigned Knox to write a draft opinion he clearly never intended to read, using it as an exercise to keep him busy and perhaps to learn how to write an opinion—at best an archaic "teaching" model harkening back to Horace Gray, the first Justice to employ a clerk. Musser never mentions being assigned an opinion to draft, but Parker told Knox that McReynolds had "done the same with other secretaries, too" (we have to take Knox's word for what Parker said). His bench-mate, Justice John H. Clarke, criticized McReynolds for being "lazy" and not keeping up with the times, saying he "continued to the end living by the legal standards of his law school days."[115] While Clarke clearly was

referring to his jurisprudence, with which Clarke disagreed, McReynolds's reactionary views also infused the way he treated his staff.

Moreover, the grim job prospects of the Depression probably allowed McReynolds to continue to recruit highly intelligent lawyers and treat them as secretaries longer than he might have if the economy had given these young men better choices. And his clerks were willing to take a gamble working for him even though they knew they risked being fired, and that, even if he was satisfied with their work, the Justice would not help them find better employment (in contrast, for instance, to McReynolds's friend Van Devanter).[116] A gadfly like Knox, and Musser with his family connections, must have been aware that other Justices were giving their clerks more substantive duties and helping them with their careers. As for Mahoney, he probably put up with McReynolds more cheerfully than did Knox, who had already tasted Harvard elitism, both because he came from a tiny town in the Deep South and because he served during an earlier time period of lower clerkship expectations.

Yet McReynolds did not behave like "the lion in the den" to Musser and Mahoney the way he did to Knox. Mahoney had a positive experience with McReynolds and remembered his seven years of service fondly to his son. And, although he admonished his clerks not to start families during the clerkship, McReynolds surprisingly took the weddings of both Mahoney and Musser in stride. Moreover, McReynolds clearly appreciated Musser more than Knox. While Musser admitted that McReynolds "treats me nicely," "he treats me splendidly," Knox only conceded that the Justice could be "unexpectedly friendly." The Justice was accommodating of Musser's need to go to training camp, but not to Knox's need to prepare for the bar exam. He gave Musser a raise, allowed him to receive his summer salary while he was in Army training, and gave him a month of accrued annual leave when he resigned. In contrast, McReynolds fired poor Knox abruptly when he had no more use for him, depriving him of the wages he expected to receive for the end of June and the summer.

These discrepancies raise the question of whether McReynolds's mistreatment of Knox may have been more egregious than with other clerks. They are perhaps why, despite at times wanting to "hit him in the face," Musser's overall portrait of McReynolds seems more balanced. Musser and Mahoney were clearly more grounded and appealing people than Knox and thus better able to absorb the indignities of their clerkships. Indeed, in the stellar recommendation letter Judge Cayton wrote to McReynolds about Musser's three years of service to him, he praised not only his clerk's "mechanical excellence as a secretary and stenographer," but his "innate tact and wisdom" and his "outstanding ... ready personal adaptability."[117] Kirkham similarly touted his brother-in-law as "unusually pleasant." As for Mahoney, his son calls him "genial" and Parker praised the Southerner's kindness.

It is tempting to think that if Knox's personality had been different he might have had an easier time with McReynolds. Knox was a lonely, unconnected man who came to the Supreme Court through an unorthodox route. Perhaps if he had enjoyed a supportive family network like Musser, he would not have been so put out that he did not develop a social relationship with McReynolds, the way he managed to with Justices Van Devanter, Brandeis, and Cardozo. After his clerkship, Knox struggled to pass the bar and then drifted through a series of low-paying legal jobs, dying alone and broke.[118] In contrast, Mahoney would go on to steady employment at the Justice Department and a steel company, and Musser would develop a successful law practice in addition to his impressive career in the Army. However, despite the striking differences in their career outcomes, Musser's negative clerkship experiences are ultimately similar enough to

Knox's to confirm that the trouble in the relationship lay largely with the Justice.

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ENDNOTES

[1] Dennis J. Hutchinson and David J. Garrow, eds., **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Law Clerk in FDR's Washington** (Chicago: University of Chicago Press, 2002), 52 (hereafter cited as **Knox Memoir**). Harry Parker, the Justice's messenger, tells Knox that the clerk is from Georgia, which confirms that it is Maurice J. Mahoney. Parker served McReynolds from 1919 until the Justice's retirement in 1941 as messenger, chauffeur, butler, and confidant.

[2] Barry Cushman, "Clerks to the Four Horsemen, Part I" *Journal of Supreme Court History*, vol. 39, 2014: 386-424, "Clerks to the Four Horsemen, Part II" vol. 40, 2015: 1-25.

[3] *See ibid.* for an in-depth examination of McReynolds's clerks' careers. *See also* "Reed Secretary to McReynolds," *Washington Post*, October 24, 1914 "S. Milton Simpson, Lawyer Here, Dies," *Washington Post*, May 30, 1965; "Mallan Rites to Be Held on Monday," *Washington Post*, July 16, 1955; "T. E. Allison, Retired U.S. Attorney," *Washington Post*, October 31, 1974; "Harold L. George, Ex-Beverly Hills Mayor, Dies at 93," *Los Angeles Times*, March 30, 1986 "Carlyle Baer Dies Ex-Justice Lawyer," *Washington Post*, November 28, 1969; "Norman B. Frost, Lawyer in D.C. since 1923, Dies," *Washington Post*, August 23, 1973; "Tench Marye, Wife, Killed in Car Accident," *Washington Post*, December 16, 1971; "Andrew Federline," *Washington Post*, May 6, 1977; "James Fowler, Justice Dept Aide, Dies," Washington Post, July 30, 1953; "Chester H. Gray Dead, Chief D.C. Legal Officer," *Washington Post*, November 28, 1965; "Maurice Mahoney, Steel Firm Official," *Washington Post*, March 8, 1978; Ward Elgin Lattin Obituary, *Washington Post*, March 30, 1985; "J. Allan Sherier, 52, Government Attorney," *Washington Post*, December 29, 1965; "R. W. Radcliffe. 67," *Washington Post*, September 24, 1982.

[4] List of McReynolds's clerks with as precise dates as I have been able to ascertain:

Leroy E. Reed (1914 Term)

S. Milton Simpson (stenographic clerk, November 4, 1915, to August 25, 1916; law clerk October 1, 1919, to April 3, 1920)

Blaine Mallan (1916 Term)

T. Ellis Allison (stenographic clerk, March 1, 1917 to August 25, 1917. Reappointed September 11, 1917, and served 1917 and 1918 Terms, resigning on April 20, 1919)

Harold Lee George (stenographic clerk, April 23 to August 13, 1919; law clerk, April 12 to June 27, 1920)

Norman Burke Frost (April 9, 10, 11, 1919; September 28, 1920 to August 31, 1921; January 19 until February 28, 1922)

Carlyle Solomon Baer (November 5, 1921, to January 18, 1922)

Tench T. Marye (law clerk, March 1 to May 31, 1922)

Andrew P. Federline (stenographic clerk, March 1 to June 30, 1922)

John T. Fowler Jr. (stenographic clerk August 1, 1922 to November 30, 1922, promoted to law clerk December 1, 1922 to end of 1926 Term)

Chester Gray (stenographic clerk to supplement Fowler, but only served from February 25 to March 23, 1926)

Maurice J. Mahoney (1927 through to July 4, 1934 Term, with brief stint at Admiralty Dept. at DOJ Sept 2-18 of 1929)

Ward E. Lattin (Sept. 1934 to July 15, 1935)

J. Allan Sherier (Sept. 30 1935 to July 6, 1936)

John Knox (August 1936 to June 17, 1937)

John T. McHale (June 1937 to May 31, 1938)

Milton S. Musser (May 1938 to October 1940)

Raymond Wallace Radcliffe (September 16, 1940 to January 31, 1941, when McReynolds retired)

Sources: Barry Cushman, "Clerks to the Four Horsemen, Part I and Part II," Supreme Court Library, Supreme Court Office of the Curator Research Files, National Archives, Justice Department Personnel Files, U.S. Census.

[5] "College Men to Feast," *Washington Post*, April 9, 1916. McReynolds had whizzed through University of Virginia Law School in fourteen months, graduating in 1884.

[6] McReynolds's clerks who attended Georgetown Law School are Tench T. Marye (graduated 1911), Leroy E. Reed (1913), S. Milton Simpson (1913), T. Ellis Allison (1918), Norman Burke Frost (1920), John T. Fowler Jr. (1921), Maurice J. Mahoney (1925), and Ward E. Lattin (L.L.B. 1932, J.D. 1937, S.J.D. 1938). John T. McHale attended Georgetown but did not graduate (class of 1914). *Georgetown Alumni Directory*, 1947.

[7] *Ye Doomsday Booke*, (Georgetown University yearbook) 1918; *Ye Doomsday Booke*, 1920.

[8] *See* Clare Cushman, "Fountain Pens and Typewriters: Supreme Court Clerks Pre-1940" *Journal of Supreme Court History*, vol. 41, 2016: 39-71.

[9] In October Term 1921, McReynolds employed Carlyle Solomon Baer, Norman B. Frost, and Tench T. Marye for the newly created law clerk position: Baer served from November 15, 1921, to January 18, 1922, Frost from January 19 until February 28, and Marye from March 1 to May 31, 1922. Frost and Marye must have become acquainted as they argued a case together before the D.C. Court of Appeals in August 1922, representing the Episcopal Diocese in a real estate case, *Washington Law Reporter* (Washington, D.C.: Law Reporter Printing, 1922), 557. A fourth clerk, Andrew P. Federline, was brought in at the end of that term as a stenographic clerk at the lower salary, serving from March 1 to June 30, 1922. In October Term 1925, Chester Gray was hired as a stenographic clerk to supplement John T. Fowler, but he only served from February 25 to March 23, 1926. Supreme Court Office of the Curator Research Files. General clerkship dates are also provided by the Supreme Court of the United States Library in correspondence in April, May, and July 2013 (hereafter cited as Supreme Court Library). While there is no complete list of all Supreme Court law clerks, the library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may contain incomplete and unverified information.

[10] Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," *Oregon Law Review* 40 (June 1961): 306-307. Note, however, that Newland incorrectly states that "for three months in 1922 Justice McReynolds employed three assistants instead of his usual one" (303).

[11] Some accounts express surprise that McReynolds did not have better relationships with his clerks because he himself had served for two years as a secretary to Justice Howell E. Jackson. But he clerked for Jackson when Jackson was a Senator (D-TN), not a judge. One of McReynolds's first assignments for Senator Jackson was to help draft the legislation authorizing stenographers for the Supreme Court Justices, a bill that was passed in 1886.

[12] Mahlon D. Kiefer, "Memorandum for Mr. Wendell Berge, Assistant Attorney General, Re: Mr. Justice Van Devanter," February 24, 1942, Collection on Justice Van Devanter, Box 1, Folder 6, Supreme Court Office of the Curator Research Files.

[13] Leroy E. Reed, S. Milton Simpson, T. Ellis Allison, Norman B. Frost, Harold Lee George, John T. Fowler, Maurice J. Mahoney, and Milton S. Musser were all rehired.

[14] Justice McReynolds engaged Simpson as a stenographic clerk from November 4, 1915, to August 25, 1916, and then rehired him as a law clerk at the higher salary from October 1, 1919, to April 3, 1920. Supreme Court Office of the Curator Research Files. Simpson had previously served as a confidential clerk to Attorney General McReynolds from January to March 1914.

[15] Allison served as a stenographic clerk from March 1, 1917 (replacing Blaine Mallan, who enrolled in the Navy as an assistant paymaster lieutenant [j.g.]), to August 25, 1917. Allison went to work at the Justice Department, but after ten days was recalled by McReynolds when his replacement backed out. Allison was reappointed on September 11, 1917, and served October Terms 1917 and 1918, resigning on April 20, 1919.

[16] Clerking dates are from the Supreme Court Library and the Supreme Court Office of the Curator Research Files.

[17] Newland, "Personal Assistants," 307, n. 23.

[18] George, Baer, Marye, Federline, Gray, and Knox did not serve full terms. I am not counting Mallan because he was recruited to join the World War I effort, or Raymond Radcliffe, because his term ended when McReynolds retired in January 1941. A possible explanation for why George (April 23 to August 13, 1919, as stenographic clerk, and April 12 to June 27, 1920, as law clerk) quit early was his eagerness to return to flying, having seen action as a bombardier pilot in World War I. In 1920, he said he "threw his law books in an attic trunk and entered the Regular Army from the Reserve," embarking on what would become an illustrious military career. "Man of War: Harold Lee George," *Washington Post*, November 12, 1942.

[19] *See* note 9.

[20] Email to author from Chester A. Newland, Emeritus Professor of Public Administration, University of Southern California, August 15, 2013.

[21] **Knox Memoir**, 246.

[22] Milton S. Musser to Ellis Shipp Musser, n.d., [probably April 1938], Box 22, Folder 2, Musser Family Papers, 1852 to 1967, Utah State Historical Society.

[23] Cushman, "Fountain Pens and Typewriters," 46-47.

[24] Holmes required his clerks be bachelors and Brandeis implied it. *See*, I. Scott Messenger, "Oliver Wendell Holmes, Jr., and His Law Clerks," in **In Chambers: Stories of Supreme Court Law Clerks and Their Justices**, edited by Todd C. Peppers and Artemus Ward (Charlottesville: University of Virginia Press, 2011), 46-47. In "Justice Brandeis and His Law Clerks," Peppers and Ward, **In Chambers**, 79, Peppers quotes Brandeis law clerk Adrian S. Fisher: "[I]t was also implied that you should not be married. Nothing explicit, but it seemed clear."

[25] Newland, "Personal Assistants," 306.

[26] Milton Musser to Ellis Shipp Musser, January 2, 1939, Box 22, Folder 2, Musser Family Papers.

[27] "Washington Woman Named an Assistant U.S. Attorney," *Washington Post*, March 17, 1943.

[28] The identity of the second clerk fired for getting married is a matter of speculation. Simpson, Mallan, Marye, Federline and Radcliffe all married *after* their clerkship with McReynolds. George, Frost, Fowler, Gray, Ward E. Lattin, J. Allen Sherier, and John T. McHale were married *before* they were hired. Baer and Knox never married. Mahoney and Musser wed during their clerkships, but McReynolds did not dismiss them. That only leaves Allison, who married Minnie Esther Gorman in October of the 1918 Term but did not resign until April 20, 1919 (although he began applying for a job at the Bureau of Internal Revenue several months earlier, which may indicate he felt compelled to leave). *See* note 15.

[29] Birth date of Jane Gray Mangus was confirmed by Census records and in a phone interview with her in July, 2014.

[30] John Knox, "Experiences as Law Clerk to Mr. Justice James C. McReynolds of the Supreme Court of the United States during the year that President Franklin D. Roosevelt Attempted to "Pack" the Court (October Term 1936)," Box 10240-W, Knox MSS, Special Collections, Alderman Library, University of Virginia.

[31] Maurice J. Mahoney Jr., interview by Todd C. Peppers, May 30, 2012.

[32] **Knox Memoir**, 52.

[33] **Ye Domesday Booke**, 1925.

[34] "Mahoney-Johnson Wedding an Event of Great Interest," *Washington Post*, June 30, 1929. For Mahoney's employment record, see Barry Cushman, "Clerks to the Four Horsemen," 405-406.

[35] Cushman, "Clerks to the Four Horsemen," 405-406.

[36] **Knox Memoir**, 13.

[37] *Ibid.*, 7, 17, 10, 110, n.10.

[38] *Id.*, 6. Clerk of Court Charles Elmore Cropley revealed to Knox this $3,000 figure after he was fired at the end of the term. *Id.*, 256. Clerk pay varied; if a Justice employed two clerks then one would be paid the lower stenographic clerk wage. See Cushman, "Fountain Pens and Typewriters," 50-53.

[39] **Knox Memoir**, 10.

[40] *Ibid.*, 29.

[41] *Ibid.*, 23.

[42] *Id.*, 30, 29, 85-86.

[43] **Knox Memoir**, 134.

[44] *Ibid.*, 132.

[45] *Id.*, 133-34.

[46] Samuel Williston, clerk to Horace Gray in 1888, wrote: "Often he would ask his secretary to write opinions in these cases, *and though the ultimate destiny of such opinions was the waste-basket*, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavor." Quoted in Todd C. Peppers, "Horace Gray and the Lost Law Clerks," in Peppers and Ward, **In Chambers**, 21 (emphasis added).

[47] **Knox Memoir**, 192-93.

[48] 1940 Census.

[49] **Knox Memoir**, 259.

[50] *Id.*, 38, 113, 261.

[51] Harry Parker to John Knox, January 20, 1938, Knox MSS, Box 10240-A, Special Collections, University of Virginia.

[52] For McHale's biography, see Cushman, "Clerks to the Four Horsemen,"395.

[53] Musser Family Papers.

[54] Her finding aid in the Musser Family Papers provides a poignant description of her life:

> There is evidence that her excommunication from the Mormon Church in 1944 embittered her against polygamy and against what she felt was hypocrisy on the part of some officials who had, she said, accepted her tithes and the missionary labors of her sons knowing that she was a plural wife, but never rallied to her support. Despite profound shock at her excommunication, she remained firmly committed to the church of her birth. She took great pleasure and pride in the accomplishments of her children and in those of her mother, the well-known Dr. Ellis Reynolds Shipp. Yet, her own life and achievements were quite remarkable. She received her bachelor of arts degree from the University of Utah in 1907. In later life, she took courses at the University of California, Berkeley, and at age seventy she was the oldest student at the University of Utah. At a time when few women entered business, she achieved notable success in the insurance field.

[55] Supreme Court Library; "Death: Francis R. Kirkham," *Deseret News*, October 27, 1996.

[56] Mark Cannon, interview by author, July 22, 2013. In 1972, Congress appointed Cannon to be the first administrative assistant to the Chief Justice of the United States.

[57] **Jurisdiction of the Supreme Court of the United States; A Treatise Concerning the Appellate Jurisdiction of the Supreme Court of the United States, Including a Treatment of the Principles and Precedents Governing the Exercise of the Discretionary Jurisdiction on Certiorari** (St. Paul, Minn.: West Publishing, 1936); "Suggested Revisions to the General Orders and Forms of Bankruptcy," published in 1939. Material relating to this influential report can be found in the Francis R. Kirkham Law Clerk Papers, circa 1935-38, Biddle Law Library, National Bankruptcy Archives, University of Pennsylvania. Francis R. Kirkham was issued checks by Clerk of the Court Charles Elmore

Cropley "to cover certain expenses incident to certain specified work for this Court undertaken and performed by direction of the Chief Justice." Written orders from Chief Justice Hughes to Cropley are filed with the check receipts: March 3, 1936, $535; May 26, 1936, $250; November 14, 1938, $167.50; December 17, 1938, $400; January 4, 1939, $250; January 16, 1939, $505; Records of the Supreme Court of the United States, Records for the Office of the Clerk, Entry 46, Box 1, National Archives.

[58] Francis R. Kirkham graduated from George Washington Law School in 1931, Cragun in 1934, and Musser in 1938. Unlike Kirkham and Musser, Cragun was not a member of the LDS Church.

[59] *See* Cushman, "Fountain Pens and Typewriters," 49-50.

[60] Francis R. Kirkham to Stanley F. Reed, January 27, 1938, Box 25, Folder 1; Musser Family Papers.

[61] *See, for example*, Francis R. Kirkham to Stanley F. Reed, January 27, 1938, Box 25, Folder 1; Francis R. Kirkham to Milton Musser, January 27, 1938, Box 24, Folder 3; Charles Elmore Cropley to Francis Kirkham, January 21, 1938, Box 25, Folder 1; Musser Family Papers.

[62] *See* Cushman, "Fountain Pens and Typewriters," 61-63 for a discussion of the advent of female secretaries at the Supreme Court.

[63] Milton Musser to Francis R. Kirkham, February 2, 1938, Box 23, Folder 1, Musser Family Papers.

[64] "Secretary to McReynolds," *San Francisco Call*, August 23, 1913 **Congressional Directory**, 2nd ed., 1913, 1914 "Suter, Reporter of Supreme Court Scoop, Ends Long Career," *Palm Beach Post*, December 1, 1941.

[65] Milton Musser to Francis R. Kirkham, February 21, 1938, Box 23, Folder 1, Musser Family Papers.

[66] Milton Musser to Ellis Shipp Musser, n.d. [probably April, 1938], Box 22, Folder 2, Musser Family Papers.

[67] Milton Musser to Francis R. Kirkham, February 21, 1938, Box 23, Folder 1, Musser Family Papers.

[68] *Ibid.*

[69] Musser gives details of this effort in a letter to Ellis Shipp Musser, August 5, 1938, Box 21, Folder 2, Musser Family Papers.

> For the last two years I have been working my head off trying to assist the Judge [Cayton] in organizing the Small Claims Court. When we finally got the President's signature on the bill and it became law, we set up the court which has grown so much in the last three months that it is handling about 24,000 cases a year. Not only did the Judge give me all the credit but I was made the first Clerk of the Court. My dear, certainly I haven't taken that job. I GAVE IT UP TO GO WITH THE JUSTICE! [McReynolds].

[70] Milton Musser to Francis R. Kirkham, March 24, 1938, Box 23, Folder 1, Musser Family Papers.

[71] Francis Kirkham to George Sutherland, March 28, 1938, on letterhead from Pillsbury, Madison & Sutro in San Francisco, Box 25, Folder 1.

[72] Milton Musser to James C. McReynolds, April 16, 1938, Box 23, Folder 1, Musser Family Papers.

[73] *Ibid.*

[74] Milton Musser to Ellis Shipp Musser, May 1, 1938, Box 21, Folder 2, Musser Family Papers.

[75] Francis R. Kirkham to Milton Musser, April 27, 1938, Box 24, Folder 3, Musser Family Papers.

[76] Milton Musser to Ellis Shipp Musser, May 11, 1938, Box 21, Folder 2, Musser Family Papers. "In the classroom" is handwritten at the top.

[77] Milton Musser to Ellis Shipp Musser, May 1, 1938, Box 21, Folder 2, Musser Family Papers.

[78] Milton Musser to Ellis Shipp Musser, June 2, 1938, Box 21, Folder 2, Musser Family Papers.

[79] Milton Musser to Ellis Shipp Musser, October 3, 1938, Box 21, Folder 2, Musser Family Papers: "Please note that I have moved to Apt. 203, The Heatherington, 1421 Massachusetts Avenue, N.W. It is a delightful apartment.... Court convenes at noon today and everything is under control."

[80] Milton Musser to Francis R. Kirkham, May 28, 1938, Box 23, Folder 1, Musser Family Papers.

[81] Francis R. Kirkham to Milton Musser, June 10, 1938, Box 24, Folder 3, Musser Family Papers.

[82] Milton Musser to Francis R. Kirkham, June 13, 1938, Box 23, Folder 1, Musser Family Papers.

[83] Milton Musser to Francis R. Kirkham, June 30, 1938, Box 23, Folder 1, Musser Family Papers.

[84] Milton Musser to Ellis Shipp Musser, July 30, 1938, Box 21, Folder 5, Musser Family Papers. George Washington University Law School records Musser as having earned his L.L.B. in 1938.

[85] Milton Musser to Ellis Shipp Musser, October 24, 1938, Box 21, Folder 5, Musser Family Papers. He was absent for a week with food poisoning.

[86] Milton Musser to Ellis Shipp Musser, October 15, 1938, Box 21, Folder 5, Musser Family Papers.

[87] Milton Musser to Ellis Shipp Musser, n.d. [probably April 1938], Box 22, Folder 2, Musser Family Papers.

[88] Marcia Musser, interview by Todd C. Peppers, September 2013.

[89] Milton Musser to Ellis Shipp Musser, January 2, 1939, Box 22, Folder 2, Musser Family Papers. The identities of the two clerks allegedly fired for getting married are not identified.

[90] Milton Musser to Ellis Shipp Musser, January 10, 1939, Box 21, Folder 4, Musser Family Papers.

[91] Milton Musser to Ellis Shipp Musser, January 29, 1939, Box 21, Folder 5, Musser Family Papers.
[92] Milton Musser to Ellis Shipp Musser, March 23, 1939, Box 21, Folder 5, Musser Family Papers.
[93] Milton Musser to Ellis Shipp Musser, March 31, 1939, Box 21, Folder 5, Musser Family Papers.
[94] Milton Musser to Ellis Shipp Musser, August 31, 1939, Box 21, Folder 5, Musser Family Papers.
[95] Milton Musser to Ellis Shipp Musser, October 31, 1939, Box 21, Folder 4, Musser Family Papers.
[96] Milton Musser to Ellis Shipp Musser, November 28, 1939, Box 22, Folder 1, Musser Family Papers.
[97] Milton Musser to Ellis Shipp Musser, February 24, 1940, Box 21, Folder 5, Musser Family Papers.
[98] Milton Musser to Ellis Shipp Musser, April 8, [1940] (the year is omitted on letter), Box 21, Folder 5, Musser Family Papers.
[99] Milton Musser to Ellis Shipp Musser, June 4, 1940, Box 21, Folder 4, Musser Family Papers.
[100] Milton Musser to Samuel Musser, n.d., Box 22, Folder 7, Musser Family Papers.
[101] Milton Musser to Ellis Shipp Musser, September 16, 1939, Box 21, Folder 5, Musser Family Papers.
[102] Milton Musser to Samuel Musser, n.d., Box 22, Folder 7, Musser Family Papers.
[103] Milton Musser to Ellis Shipp Musser, May 4, 1940, Box 21, Folder 5, Musser Family Papers.
[104] Milton Musser to Ellis Shipp Musser, June 4, 1940, Box 21, Folder 4, Musser Family Papers.
[105] Milton Musser to Ellis Shipp Musser, June 26, 1940, Box 21, Folder 2, Musser Family Papers.
[106] Milton Musser to Ellis Shipp Musser, July 25, 1940, Box 21, Folder 2, Musser Family Papers.
[107] Milton Musser to Ellis Shipp Musser, August 28, 1940, Box 21, Folder 5, Musser Family Papers.
[108] Milton Musser to Ellis Shipp Musser, September 4, 1940, Box 21, Folder 4, Musser Family Papers.
[109] Milton Musser to Ellis Shipp Musser, September 11, 1940, Box 21, Folder 2, Musser Family Papers. *See also* Milton Musser to Charles Elmore Cropley, October 1, 1940, Box 23, Folder 1, Musser Family Papers.
[110] Milton Musser to Ellis Shipp Musser, n.d. [probably Spring 1939], Box 22, Folder 2, Musser Family Papers.
[111] Milton Musser to Ellis Shipp Musser, September 16, 1940, Box 21, Folder 5, Musser Family Papers. Letterhead with "Supreme Court of the United States Washington DC" has title scratched out and replaced with 4015 Benton St, NW.
[112] Milton Musser to Ellis Shipp Musser, May 4, 1940, Box 21, Folder 5, Musser Family Papers.
[113] Milton Musser to Ellis Shipp Musser, October 11, 1940, Box 21, Folder 5, Musser Family Papers.
[114] "Obituary: Woodrow S. Wilson," *Deseret News*, January 13, 2005. Musser and his partner's clients included Lawrence Welk, Liberace, and Betty White.
[115] John H. Clarke to Josephus Daniels, September 5, 1941, quoted in Carl Wittke, "Mr. Justice Clarke in Retirement," *Western Law Review* 1 (June 1949): 34.
[116] *See, for example*, a letter from R. V. Fletcher, General Counsel of Illinois Central Railroad System, to Willis Van Devanter, June 18, 1929, which thanks the Justice for his letter inquiring about a position for Arthur J. Mattson, who clerked for him for four years and is now seeking legal work. Willis Van Devanter Papers, Library of Congress.
[117] Nathan Cayton to Stanley F. Reed, January 31, 1936, Box 25, Folder 1, Musser Family Papers.
[118] *See generally* "Afterword" by Hutchinson and Garrow in **Knox Memoir**, 269-75.

Edward T. Sanford—Knoxville's Justice

JOHN M. SCHEB II

Six Tennesseans have served on the U.S. Supreme Court,[1] but only one—Edward T. Sanford—was from Knoxville. Sanford is also the only alumnus of the University of Tennessee to have ascended to the nation's highest judicial office. As a Knoxvillian, a member of the University of Tennessee faculty, and a student of American constitutional law and history, I have long been aware of Justice Sanford's service on the Supreme Court. In 2015, the Historical Society of the U.S. District Court for the Eastern District of Tennessee and the East Tennessee Historical Society held a symposium celebrating the life and career of Justice Sanford. I was asked to talk about Justice Sanford's background and judicial career and this short article is an adaptation of those remarks.

* * *

Edward T. Sanford was born in Knoxville in the final year of the Civil War, 1865. Edward's father, E.J. Sanford, had migrated from Connecticut in 1853 to seek his fortune in Knoxville. In 1864, he established E.J. Sanford and Company, a pharmacy business. In 1872, this firm merged with Chamberlain and Albers, which had been established by Knoxville businessmen Hiram Chamberlain and A.J. Albers, to form Sanford, Chamberlain and Albers. The new company would become one of the largest pharmaceutical companies in the South. Eventually, E.J. Sanford's business interests expanded into timber, mining, and banking. In the late 1860s, E.J. Sanford helped establish the Coal Creek Mining and Manufacturing Company, and in 1882, he helped organize the Mechanics National Bank. It is fair to say that E.J. Sanford was a member of Knoxville's business elite; one might even label him a tycoon.

Edward's mother, E.J. Sanford's wife, was Emma Chavannes, the daughter of Swiss immigrants who settled in Fountain City, just north of Knoxville, and developed a successful farming business there. E.J. Sanford and Emma Chavannes had eight children, two of

whom died as a result of a cholera outbreak in 1864. Edward was the oldest of the other six children, being born a year after the cholera epidemic and a few months after the end of the Civil War.

Young Edward proved to be an excellent student and, because opportunities for secondary education were so limited in Knoxville in those days, he enrolled at age fourteen in the Preparatory Department at East Tennessee University, which was renamed the University of Tennessee while he was a student there. In 1883, at age eighteen, Sanford graduated from the university with two degrees, a bachelor of arts and a bachelor of philosophy. Sanford then went off to Harvard, where he earned three degrees—another baccalaureate, a master's degree, and a law degree. Prior to law school, Sanford studied languages and economics in France and Germany for one year. He was among the very best law students at Harvard and served for a year as student editor of the newly founded *Harvard Law Review*.

Sanford was admitted to the Tennessee Bar while still in law school, having been examined by Tennessee Supreme Court Justice Horace H. Lurton, another of the six Tennesseans who have served on the U.S. Supreme Court. The examination consisted of a discussion of a hypothetical case in which Justice Lurton apparently did most of the talking! Later, Lurton would remember that exam as "the severest examination any man ever went through . . ."[2] Upon receiving his law degree in 1890, Sanford returned to Knoxville, where he established a law practice. It has been observed that, as "[a] Harvard graduate, Sanford was something of a unicorn, attracting a large number of persons to the Knox County Courthouse to observe him in action."[3]

In 1891, Sanford married Lutie Mallory Woodruff, the daughter of Knoxville hardware magnate W.W. Woodruff. They had two children: Dorothy (Metcalfe) in 1891 and Anna McGhee (Cameron) in 1892.

In 1899, Sanford partnered with Knoxville lawyer James A. Fowler, who would run unsuccessfully for governor and U.S. Senator and who served a term as Knoxville's mayor. As special assistant to the Attorney General under the Harding Administration, Fowler would exercise considerable influence over Sanford's appointment to the Supreme Court.

In addition to being a prominent lawyer, Sanford was active in many educational, professional, and charitable organizations. He served as president of the UT Alumni Association and later the UT Board of Trustees. He also served as a lecturer at the UT College of Law from 1898 to 1907.

Sanford was politically active, and by the late 1890s he was a leader of the Republican Party in Tennessee. He made what has been called the "best speech of his career" when he nominated Fowler, his law partner, for governor at the 1898 Republican state convention.[4] In 1904, Sanford ran for governor himself. Neither he nor Fowler was successful in their gubernatorial campaigns, as the Democrats dominated Tennessee politics until the 1970s. But this political activity made Sanford a well-known figure nationally, at least in Republican circles.

In 1906, Sanford was appointed special assistant to the Attorney General of the United States. This came about through the influence of James C. McReynolds—another of the six Tennesseans to serve on the Supreme Court—who was assistant attorney general at the time. McReynolds, a prominent Nashville lawyer before joining the Justice Department, had developed a high regard for Sanford's legal skills and recruited him to assist in prosecuting violations of the recently enacted Sherman Antitrust Act. In his capacity as special assistant, Sanford obtained indictments against thirty-one corporations and twenty-five individuals engaged in the so-called "fertilizer trust" in the Southeast.

Sanford's good work as special assistant led to his appointment as assistant attorney

E. J. SANFORD & CO.,
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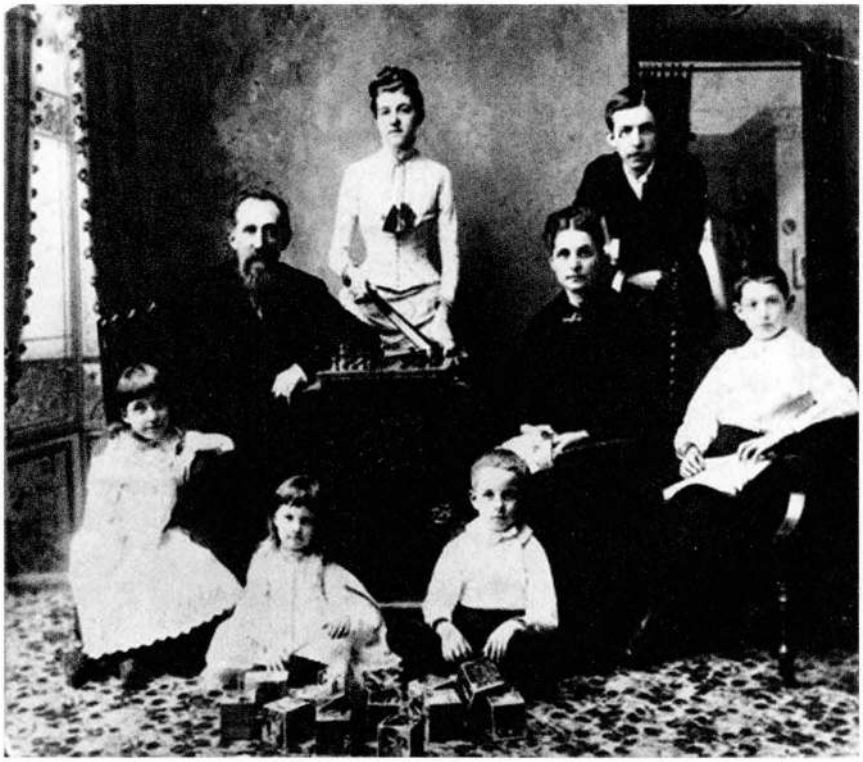
Edward J. Sanford, the Justice's father, established a pharmacy business in Knoxville in 1864 and published the above ad in a local paper two years later. In 1872, his firm merged with Chamberlain and Albers, and became one of the largest pharmaceutical companies in the South (below). When he expanded into the coal business in the 1880s, Sanford became an even wealthier and more influential citizen of Knoxville.

general in 1907. In a letter to Attorney General Charles J. Bonaparte, President Theodore Roosevelt wrote, "I would not attempt to dictate any of your appointments, but I would be pleased to see a southern man of the Sanford type named as one of your assistants."[5] As assistant attorney general, Sanford served on the prosecution team in the only criminal trial ever conducted by the U.S. Supreme Court. The case was *United States v. Shipp*,[6] which involved a Chattanooga sheriff who ignored an order from the Supreme Court and allowed an African-American prisoner under his supervision to be taken from the Hamilton County jail by a mob and lynched. Sheriff Shipp was convicted of contempt and served ninety days in the federal jail in Washington.

In 1908, President Roosevelt offered Sanford a judgeship on the United States District Court for the Middle and Eastern Districts of Tennessee. Sanford was initially reluctant, as he recalled in an interview in 1923:

> I did not want to go on the bench, for I loved the profession of the lawyer. I remember that one of the saddest days of my whole life was when I made my last argument before the Supreme Court in Washington when I knew that I would never have again that most delightful of intellectual exercises. I ... hope that I shall always be called a lawyer, in a profession that defends the weak and gives justice among men.[7]

He eventually accepted the position, of course, and was welcomed to the bench by Judge Horace Lurton, then serving on the U.S.



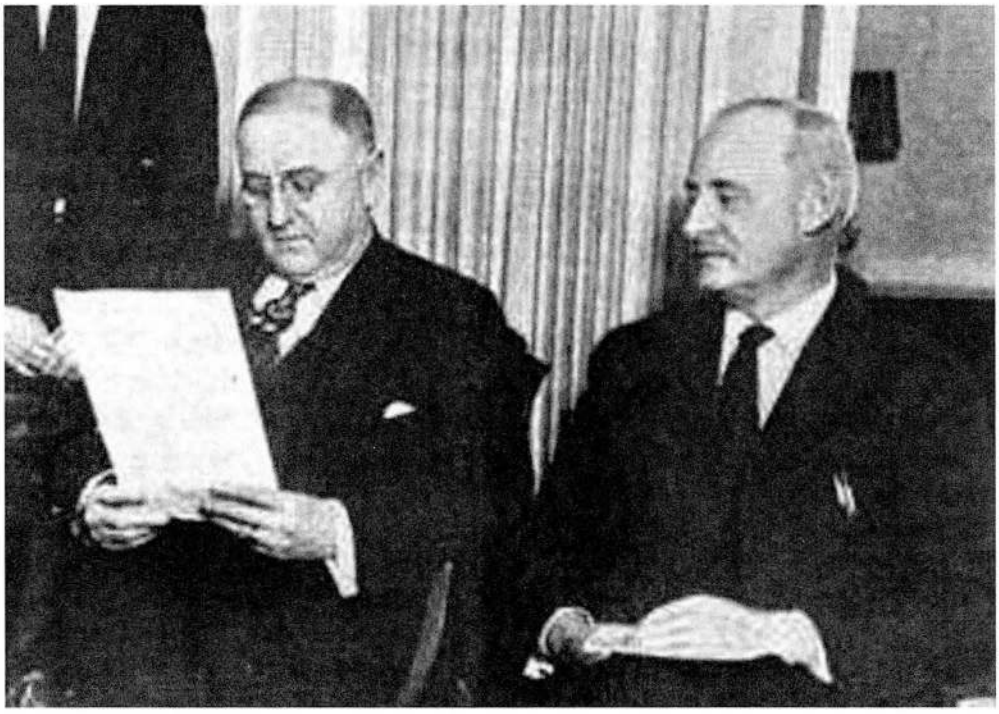
Edward J. Sanford and Emma Chavannes Sanford were photographed with their six children in 1886, two years after a cholera outbreak claimed the lives of two others. Born and a few months after the Civil War ended, future Supreme Court Justice Edward T. Sanford is standing at right behind his mother.

Court of Appeals for the Sixth Circuit. Lurton wrote a letter to Judge Sanford, saying, "Having admitted you to the bar through the severest examination any man ever went through, I now welcome you to the judiciary."[8]

As district judge, Sanford gained a reputation as a thorough, cautious, and impartial jurist. His performance on the bench, as well as his extensive civic involvement, brought him to the attention of Chief Justice William Howard Taft. In 1922, Justice Mahlon Pitney resigned from the Supreme Court after suffering a stroke. Chief Justice Taft and Attorney General Harry M. Daugherty persuaded President Warren G. Harding to select Judge Sanford to fill the seat. Sanford was not an obvious choice. For one thing, he was a district judge. Almost all of the federal judges who have been appointed to the Supreme Court have been elevated from the Court of Appeals. There are significant differences between the role of a trial judge on the district court and that of a judge on the Court of Appeals, with the work of the latter being more similar to that of Supreme Court Justices. Moreover, there were more illustrious candidates for the job, such as Learned Hand, an eminent federal judge in New York, and Judge Benjamin N. Cardozo of the New York State Court of Appeals.

Sanford was formally nominated by President Harding on January 24, 1923. Five days later, the Senate confirmed the appointment by a voice vote, which is how most Supreme Court nominees were confirmed prior to the 1960s. In Sanford's case, there was no committee hearing before the vote and the nomination faced only token opposition. Sanford was sworn in on February 19, 1923, and joined an impressive groups of Justices, including Oliver Wendell Holmes, Jr., and Louis D. Brandeis.

During Sanford's eight-year career on the Supreme Court, he wrote 130 opinions,



After graduating from law school, Sanford partnered with prominent Knoxville lawyer James A. Fowler (right). Appointed special assistant to Attorney General Harry M. Daugherty (left) in 1921, Fowler would exercise considerable influence over Sanford's appointment to the Supreme Court.

including opinions of the Court, concurrences, and dissents. He was closest, both personally and philosophically, to Chief Justice Taft. Sanford routinely voted with Taft and was one of several conservative justices who regularly met at the Chief Justice's house on Sunday afternoons for discussions and libations.

Most of Justice Sanford's opinions dealt with technical matters and procedural questions, and not many stand out as highly significant contributions to the Court's jurisprudence. One of Justice Sanford's best-known opinions is *Okanogan Indians v. United States* (1929),[9] which upheld the long-standing presidential practice known as the "pocket veto." (This occurs when the president fails to sign and return a bill to Congress within the constitutionally required ten-day period and Congress adjourns before the ten days are over.) Justice Sanford's opinion in the Pocket Veto Case shows a high level of judicial craftsmanship: it is careful, thorough and precise—all qualities that had distinguished Judge Sanford during his service on the federal district court.

Justice Sanford's principal contribution to American jurisprudence, however, was in the First Amendment area, specifically the vital freedoms of speech, press, assembly

Chief Justice William H. Taft (right) and Attorney General Daugherty persuaded President Warren G. Harding to select Judge Sanford to fill Justice Mahlon Pitney's seat. Sanford (left) was not an obvious choice, in part because he was a district judge, and had not served on a court of appeals.

and association. His First Amendment impact stems primarily from three cases in which he wrote for the Court: *Gitlow v. New York* (1925),[10] *Whitney v. California* (1927),[11] and *Fiske v. Kansas* (1927).[12] These cases are best understood if the political background that gave rise to this type of criminal prosecution is considered. In the early 1920s, the nation was experiencing a wave of political discontent that was much more extreme what we are seeing today. Of course, in those days, there was no Social Security system, no worker's compensation, and no minimum wage, at least not at the national level. Welfare programs were virtually nonexistent. Unionization and collective bargaining were not supported by federal law, and there was tremendous strife in the relations between companies and industrial workers. In this volatile atmosphere, newly formed left-wing groups agitated for reform, and some of the more radical elements even called for the overthrow of the government.

During the Red Scare that followed World War I and extended into the 1920s, Congress and the state legislatures enacted laws against sedition, "criminal anarchy," and "criminal syndicalism." Of course, prosecutions under these statutes raised serious constitutional concerns in that they impinged on First Amendment rights. In 1919, the Supreme Court had held that First Amendment rights could be limited when groups posed a clear and present danger to the national security.[13] By the time that Justice Sanford joined the Court, the prevailing view was that radical speech was *ipso facto* a clear and present danger to the government. The minority view on the Court, advanced mainly by Justices Holmes and Brandeis, was that radical speech should be tolerated to the greatest possible extent in a democratic

Justice Sanford developed uremic poisoning following a routine tooth extraction and died unexpectedly in Washington, D.C. on March 8, 1930. He had been on the Court for seven Terms and was only sixty-four years old. He is pictured here at a baseball game with his wife, Lutie Mallory, the daughter of Knoxville hardware magnate W.W. Woodruff.

society committed to a free marketplace of ideas.

Gitlow v. New York (1925)

Benjamin Gitlow, a founding member of the Communist Party USA, was arrested for distributing copies of a newspaper he published, *The Revolutionary Age*. The paper contained a radical manifesto, authored by Gitlow, which called for "the overthrow of Capitalism, and the establishment of Socialism through a Proletarian Dictatorship." Gitlow was convicted under a state criminal anarchy law, which punished advocating the overthrow of the government by force. At trial, Gitlow argued that as there was no resulting action flowing from the manifesto's publication, the statute penalized utterances without propensity to incitement of concrete action. The New York courts decided that anyone who advocated the doctrine of violent revolution violated the law. Gitlow was sentenced to five to ten years in prison but was released on bail after the U.S. Supreme Court agreed to review his case. Unfortunately for Mr. Gitlow, the Supreme Court sided with the state of New York in a 7–2 decision, and he was sent back to prison to complete his sentence.

Writing for the Court, Justice Sanford began his opinion with a bold assertion—the First Amendment guarantees of free speech and freedom of the press are applicable to laws and actions of the states via the Fourteenth Amendment: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states."[14]

This is an expression of the doctrine of incorporation, by which most of the provisions of the Bill of Rights have been extended to protect people from their state and local governments. Originally the Bill of Rights was held to apply only to laws and actions of the federal government,[15] but in the modern era, the Supreme Court has found that most of the rights contained in the Bill of Rights are subsumed within the broad terms "liberty" or "due process of law" found in the Fourteenth Amendment, thus making them applicable to state and local laws and actions. To cite the most recent example of incorporation, in 2010 the Court held that the Second Amendment right to keep and bear arms is enforceable against state and local gun control laws.[16]

Although the doctrine of incorporation has its roots in the late 19th century, it really is a 20th century development, and Sanford's opinion in *Gitlow* is widely cited in that regard. But lest one think that the *Gitlow* opinion was a libertarian manifesto, it should be noted that most of Justice Sanford's opinion supports the proposition that "a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means."[17] Despite his characterization of First Amendment rights as "fundamental," Justice Sanford concluded that the First Amendment "does not protect disturbances to the public peace or the attempt to subvert the government."[18] Thus, Gitlow's conviction was upheld. It should be noted that Justices Holmes and Brandeis dissented in the *Gitlow* case, as they did not perceive a clear and present danger to the national security in the mere publication of a document, no matter how radical. In their view, the First Amendment had been violated.

Whitney v. California (1927)

Charlotte Anita Whitney, a member of the Communist Labor Party of California, was prosecuted under that state's Criminal

Syndicalism Act. The Act prohibited advocating, teaching, or aiding the commission of a crime, including "terrorism as a means of accomplishing a change in industrial ownership . . . or effecting any political change." The essence of Whitney's offense was her effort in organizing a political party that called for the overthrow of capitalism and "the capitalist state" and the establishment of communism through the dictatorship of the proletariat." The Communist Labor Party of California was not a democratic socialist party; it made common cause with the Bolshevik Revolution and supported the form of government that had been established in the Soviet Union.

In a unanimous decision, the Supreme Court sustained Whitney's conviction and held that the Act did not violate the First Amendment. Justice Sanford, writing for the Court, observed:

> The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association....[19]

Even Justices Holmes and Brandeis went along with the Court's decision, although Brandeis expressed reservations in a concurring opinion. Interestingly, Anita Whitney never went to prison, as the governor of California pardoned her after the Supreme Court upheld her conviction.

Fiske v. Kansas (1927)

Harold B. Fiske was an organizer for the Industrial Workers of the World, better known as the "Wobblies." Fiske was indicted under the Kansas "criminal syndicalism" statute, which defined criminal syndicalism as "the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit...." The indictment charged Fiske with "knowingly and feloniously persuading, inducing and securing certain persons to sign an application for membership in . . . and by issuing to them membership cards in" the IWW. Fiske was tried, convicted, and sentenced to serve one to ten years in state prison. The conviction was upheld by the Supreme Court of Kansas, but in a unanimous decision, the U.S. Supreme Court reversed. Justice Sanford, writing for the Court, concluded that

> the Syndicalism Act has been applied in this case to sustain the conviction of the defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied, the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant....[20]

The Court did not strike down the criminal syndicalism law per se, something it would not do until much later,[21] but it did hold that the law had been unconstitutionally applied. This was the first time that the Supreme Court had reversed a conviction for unlawful advocacy on First Amendment grounds, so it really is a milestone in the development of civil liberties in this country.

Considering the opinions in *Gitlow v. New York*, *Whitney v. California* and *Fiske v. Kansas* together, one sees that the Court was not a reactionary behemoth bent on snuffing out all political dissent. Rather the Court, and Justice Sanford in particular, was determined to separate legitimate political activism from what was perceived to be a clear and present danger to the constitutional system. Looking back at the first Red Scare nearly a century later, it is easy to conclude that the country, and perhaps the Court, overreacted to the threat of communism, but at the time many enlightened and fair-minded people believed it to be a to the serious threat to the Republic.

* * *

Justice Sanford wrote many more opinions for the Court, but the ones identified here surely were the most important. Doubtless he would have written many more significant opinions had fate not cut short his career. In March 1930, Justice Sanford developed uremic poisoning following a routine tooth extraction. He died unexpectedly in Washington, D.C. on March 8, 1930. He was only sixty-four years old. Interestingly, Sanford's close friend and mentor, Chief Justice Taft, passed away that same day.

Sanford's funeral was held St. John's Episcopal Church in Knoxville and, as tradition dictated, the seven surviving Justices of the Supreme Court attended. It was said to be one of the largest funerals ever held in Knoxville. Immediately after the funeral, the seven attending Justices hurried back to Washington for the funeral of Chief Justice Taft.

Edward T. Sanford, although overshadowed by others who served on the Supreme Court during the 1920s, was an exceptionally well-qualified jurist who made an important contribution to American constitutional development. One wonders what he might have accomplished, and what impact he might have had on the Court, had he remained on the Bench until age ninety, as did his colleague Oliver Wendell Holmes, Jr. Would Justice Sanford have behaved the same way as did his successor, Owen J. Roberts, when the Court confronted the constitutional challenge of the New Deal in the 1930s? One can only speculate as to how American constitutional history might have been different had Edward T. Sanford been one of the "nine old men"[22] serving on the Court during President Franklin D. Roosevelt's first two terms in office.

ENDNOTES

[1] John M. Scheb II, "Six Tennesseans Who Sat on the United States Supreme Court." University of Tennessee, Knoxville Constitution Bicentennial Committee, June 1990 (unpublished ms.).

[2] Letter from Horace Lurton to Edward Terry Sanford, May 20, 1908. Quoted in John H.A. Maguire, "The Supreme Court Justice from Knoxville: The Politics of the Appointment of Justice Edward Terry Sanford." Master's Thesis, University of Tennessee, 1990, p. 25.

[3] Joe Jarret, "Edward Terry Sanford, UT alumnus, Associate Justice of the U.S. Supreme Court." Forthcoming in DICTA, April 2016, p. 14.

[4] Maguire, p. 31.

[5] "Justice Sanford Occupies Unique Position In Eyes of Tennesseans, Says New York World Biographer," *Knoxville Sentinel*, May 6, 1923. Quoted in Maguire, p. 40.

[6] *United States v. Shipp*, 214 U.S. 386 (1909).

[7] "Justice E. T. Sanford, U. S. Supreme Court, Honored by Bar Here," *The Tennessean*, February 14, 1923. Quoted in Maguire, p. 43.

[8] Letter from Horace Lurton to Edward Terry Sanford, May 20, 1908. Quoted in Maguire, p. 25.

[9] 279 U.S. 655 (1929).

[10] 268 U.S. 652 (1925).

[11] 274 U.S. 357 (1927).

[12] 274 U.S. 380 (1927).

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

[14] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[15] *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[16] *McDonald v. Chicago*, 561 U.S. 742 (2010).

[17] 268 U.S. at 668.

[18] 268 U.S. at 667.

[19] *Whitney v. California*, 274 U.S. 357, 371 (1927).

[20] *Fiske v. Kansas*, 274 U.S. 380, 387 (1927).

[21] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[22] See Drew Pearson and Robert S. Allen, **Nine Old Men** (New York: Doubleday, 1936).

Edward T. Sanford's Tenure on the Supreme Court

STEPHANIE L. SLATER

Introduction

An "urbane" and "genial southerner,"[1] Edward T. Sanford brought to the Supreme Court "a quiet moderation, a respect for precedent, and considerable erudition."[2] Yet Justice Sanford has not been the subject of extensive scholarly attention.[3] An in-depth examination of his jurisprudence is thus long overdue to afford him the same consideration as his brethren.

Justice Sanford has generally been thought of as a staunch conservative. However, it is of interest that, by 1928, he was seen as "leaning to the right, but only slightly."[4] This fact validated the 1923 observation of Courtwatchers: "Liberal opinion is quite as much pleased over the appointment of Edward Terry Sanford to the Supreme Court as it was distressed over that of Pierce Butler. Liberals in fact are claiming Judge Sanford as one of themselves just as they have claimed Justices Holmes and Brandeis."[5]

Writing Style

Before Justice Sanford's opinions are examined, an assessment of his writing style is in order. After Sanford's untimely death on March 8, 1930, the Supreme Court Bar adopted the following resolution: "His work upon the Supreme Court was thorough, conscientious and exacting, and he had the high commendation of his associates and of the Bar."[6] Indeed, a biographer later praised his writing for both its clarity and conscientiousness:

> His professional learning was supplemented by an intimate familiarity which gave to his judicial opinions an unusual clarity and attractive style. He had the rare gift of felicitous expression, which he used to good advantage at the Bar, and could not be satisfied with any judicial utterance that did not clearly show his views and disclose the reasons upon which he based his decisions. He was conscientious and carefully deliberated upon all cases turned over to him.[7]

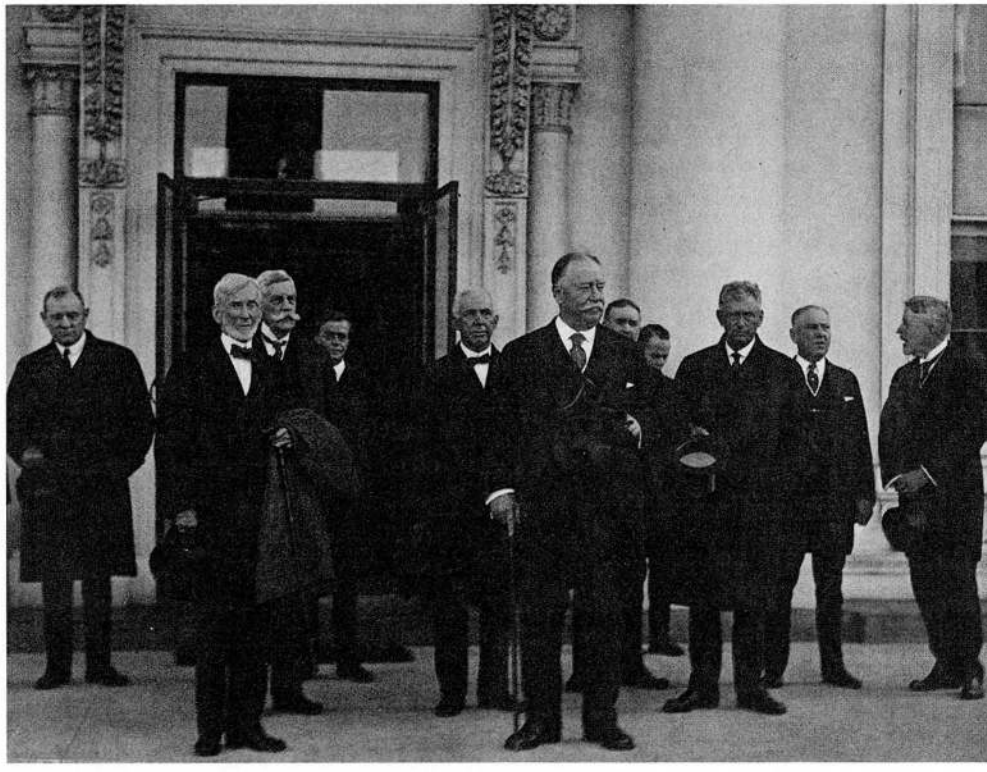
One of his brethren, however, indicated that there was room for improvement. In what must have been a difficult moment for the perfectionist Sanford, after he submitted one of his early opinions for approval, Oliver

Wendell Holmes, Jr., advised him as follows: "[Notwithstanding] the effective and powerful example of Brandeis to the contrary I don't think opinions should be written in the form of essays with notes—they are theoretically spoken."[8]

Sanford's 130 opinions are found in volumes 261-281 of the **U.S. Reports**. He wrote the Court's majority opinion in about eight percent of the cases in which he participated.[9] He wrote only seven dissents and joined twenty-three dissents and seven concurring opinions,[10] most notably in the infamous *Adkins v. Children's Hospital of D.C.*[11] case. Most of the cases in which he participated "were the ordinary cases that ground their way through the courts in the 1920s, including judicial review of economic regulations, war-related cases, and prohibition cases."[12] Regarding Sanford's opinions that addressed procedural issues and generated little public interest, Chief Justice Charles Evans Hughes remarked:

> [W]ith philosophic bent and conscientious application, he was faithful to the judicial tradition devoting the same care to every case which came before the Court, without regard to its rating in public opinion. He was ever intent upon the intrinsic quality of his work rather than upon adventitious circumstance.[13]

In his voting, Sanford was found most often with a conservative majority, particularly on economic issues.[14] The majority on the Court of Chief Justice William Howard Taft typically used the judicial power to



Justice Sanford (right) was easily co-opted by Chief Justice Taft (center) into his conservative economic group, and his written opinions usually were backed by Willis Van Devanter (left of Taft), Pierce Butler (left), George Sutherland, and James C. McReynolds. However, Sanford also exhibited progressive tendencies on the Court in tax law, certain types of government regulation, and civil liberties.

enforce their commitment to laissez-faire economic policies,[15] opposing government regulation of business and economic practices. A 1925 article observed that the majority on the Court desired to relieve business "from restraints imposed during the administrations of Presidents Roosevelt, Taft, and Wilson."[16] Sanford was easily co-opted into Taft's conservative economic group and his opinions usually were written for the solid majority of Willis Van Devanter, Pierce Butler, George Sutherland, and James C. McReynolds. In the view of Chief Justice Taft, he led this group against "radicals," "Progressives," "Bolsheviks," "Socialists," and others who favored "breaking down the Constitution" whether on or off the bench.[17]

Sanford, however, also had "progressive tendencies" and voted with the liberals to sustain the validity of the federal gift tax and state regulation of ticket scalpers.[18] He exhibited a "pre-New Deal liberalism" and felt "courts ought to defer to democratic lawmaking."[19] According to Henry Abraham, "On civil libertarian matters, too, the Sanford record betrays some mercurial behavior."[20] He was not rigid in his interpretation of the Constitution and felt interpretation of it should "be adjusted by the times."[21] In fact, Sanford, one of the Justices "closest to the Court's statistical center," often "leaned toward the Brandeis-Holmes pole rather than toward the McReynolds-Sutherland pole."[22]

Opinions on Technical Matters

Sanford was known for opinions involving the interpretation of difficult procedural or statutory matters.[23] The vast bulk of cases on which he worked addressed issues on technical matters relating to war claims, tax matters, government, admiralty, business, patents, and especially bankruptcy.[24] Additionally, Sanford was requested by Chief Justice Taft to write quite a number of opinions addressing federal jurisdiction.[25] His clear and precise writing style resulted in few dissents by the other Justices to these technical and jurisdictional opinions.[26]

In *I.T.S. Rubber Company v. Essex Rubber Company*,[27] the Court addressed the scope of a patent for a rubber heel. Writing for the Court, Sanford determined the claims in the suit were not infringed by the heels made by the defendant, as the heels at issue were not like those protected. He concluded:

> It is well settled that where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. . . . The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. . . .[28]

In *Hellmich v. Hellman*,[29] two taxpayers sued to recover additional income taxes assessed against them after they, as stockholders of a business, received payouts when the corporation dissolved. The issue raised was whether the amounts distributed to the stockholders out of the earnings and profits

accumulated by the corporation were to be treated under section 201(a) as "dividends" that were exempt from the normal tax, or under section 201(c) as payments made by the corporation in exchange for its stock, which were taxable "as other gains or profits." The Court, speaking through Sanford, concluded that

> when section 201(a) and section 201 (c) are read together, under the long-established rule that the intention of the lawmaker is to be deduced from a view of every material part of the statute, we think it clear that the general definition of a dividend in section 201(a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by section 201(c), which, dealing specifically with such liquidation provided that the amounts distributed should "be treated as payments in exchange for stock" and that any gain realized thereby should be taxed to the stockholders "as other gains or profits." This brings the two sections into entire harmony, and gives to each its natural meaning and due effect.[30]

In a decision superseded by the Declaratory Judgments Act,[31] *Liberty Warehouse Company v. Grannis*[32] dealt with a Kentucky law providing that parties who were before a general jurisdiction court of the state could petition for declaratory judgments announcing the rights of parties without requiring performance by anyone. A Kentucky corporation engaged in operating a loose-leaf tobacco warehouse filed a petition seeking a declaratory judgment from a federal district court of its rights under terms of the Kentucky law regulating the sales of leaf tobacco at public auction. Sanford ruled the federal court did not have jurisdiction to make such a declaration; he stated that jurisdiction under Article III extends only to "cases" and "controversies" and "does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."[33]

In *Sovereign Camp Woodmen of the World v. O'Neill*,[34] it was contended that the defendants had entered into an agreement and conspiracy to embarrass and attempt to ruin the Woodmen of the World Society. The action had been dismissed by the district court on the ground that the requisite jurisdictional amount was not present. The Supreme Court, speaking through Sanford, held that

> [a] conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy. We conclude, therefore, that, on the face of the bill, the District Court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy.[35]

The government sought in *United States v. State Investment Company*[36] to quiet title to a large strip of land claimed as part of public lands. The defendant company asserted title under the Mora Grant, a community grant made by the Republic of Mexico in 1835. The location of the west boundary of the Mora Grant, known as "the Estillero," controlled the issue. The district court concluded that the calls for natural objects and permanent monuments on the ground controlled and the United States by patent had conveyed the

land lying east and had no title to it. The Circuit Court of Appeals concurred. Sanford, for the Court, affirmed, noting that "[t]he general rule is that in matters of boundaries calls for natural objects and fixed monuments control those for distances. And calls for courses likewise prevail over those for distances."[37] No ground for exception was found to be apparent.

Sanford was the author of *Oklahoma v. Texas*,[38] involving the location of the true boundary line on the ground between those two states. After extensive analysis, he determined the boundary was the line of the true 100th meridian extending north from its intersection with the south bank of the South Fork of the Red River to its intersection with the parallel of thirty-six degrees thirty minutes and that this line should be accurately located and marked by a commissioner or commissioners appointed by the Court. A motion granted in this case on February 24, 1930, was the last time Sanford ever spoke for the Court because he died suddenly on March 8 of that year following a visit to the dentist for an infected tooth.[39]

In another boundary matter, *New Mexico v. Texas*,[40] New Mexico filed an action against its neighbor to settle a controversy concerning the location of the channel of the Rio Grande in 1850, at which time both parties agreed that the river marked the proper boundary between the two states. New Mexico claimed a monument of an 1859 survey, which had disappeared, was improperly relocated in 1911. The disputed distance was about four miles. Both parties filed exceptions to the report of a special master. Writing for the Court, Sanford held that

> the testimony of the witnesses as to their recollection of the old river is far from satisfactory, and does not, in view of the other evidence in the case, sustain the burden of proof resting upon New Mexico [of proving its claim that the location was farther east than the one claimed by Texas and found in this case and] according to the greater weight of the evidence, the river, in 1850 . . . ran southwardly . . . as shown by certain of the surveys, patents and maps relied on by Texas . . . on the course and in the location set forth and described in the master's report. . . .[41]

In discussing changes in the river course since 1850 resulting from accretion, Sanford further observed that New Mexico

> explicitly declared in its Constitution that its boundary ran [between parallels of 32 degrees and 31 degrees 47 minutes- following the main channel of the Rio Grande] as it existed on the ninth day of September, [1850] . . . . This was confirmed by the United States admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause . . . . New Mexico, manifestly, cannot now question this limitation of its boundary or assert a claim to any land lying east of the line thus limited.[42]

He concluded the boundary line between New Mexico and Texas ran in the middle of the channel of the Rio Grande as it was located in 1850.[43]

In *Prendergast v. New York Telephone Company*,[44] the defendant public utility commission conducted a hearing and entered an order that set a maximum rate the plaintiff telephone company was allowed to charge for its services. The company thereafter brought an action asserting that the rates were confiscatory in nature and, therefore, should not be enforced. An injunction was entered by the district court restraining enforcement of the rate restriction until a final hearing was conducted. Speaking through Sanford, the

Court held the telephone company was not required to request a new hearing before filing an action in the district court. The commission's order constituted a final legislative act, and, therefore, the company was entitled to injunctive relief until the rate-making process was completed.[45] The fact that the commission entered temporary rates did not deprive the company of its right to relief in the district court.

In cases concerning presidential power, the Taft Court usually resolved separation-of-power questions in favor of the executive.[46] One of the most important opinions on a procedural issue written by Sanford was *Okanogan Indians, et al. v. United States* (*The Pocket Veto Case*).[47] In that case, the Court clarified the rules by which a President could use the power of pocket veto, a question that had remained open for 140 years.[48]

Article I, section 7 of the Constitution provides that if a President does not return a proposed bill to Congress within ten days, the proposal shall become law "in like manner as if he had signed it." In the case before the Court, Congress had passed a bill allowing certain Indian tribes to sue for damages for the loss of their tribal land. The case involved monetary claims presented by a number of tribes in the State of Washington. When the bill went to President Calvin Coolidge, he neither signed it nor vetoed it. Congress adjourned before the expiration of ten calendar days (Sunday excepted) after the bill had been presented to him. The issue was whether the pocket veto clause applied only to final adjournments at the end of a Congress,

Sanford's landmark majority opinion in the *Pocket Veto Case* (1929) defined the precise circumstances under which the President could exercise the pocket veto power when Congress was not in session. At issue was a bill, passed by Congress but ignored by President Calvin Coolidge (pictured) once the legislature adjourned, giving certain Indian tribes the right to file claims in the U.S. Court of Claims. Coolidge posed for this photo with members of the Sioux Indian Republican Club in March 1925.

or whether it also applied to adjournments at the end of a session of Congress. It was urged that an adjournment of the first session of the Congress does not prevent the President from returning the bill because the legislative existence of the Congress is not terminated and the bill may be returned to an agent of the House in which the bill originated.[49]

Sanford held that the clause applied to adjournments at the end of a session as well as at the end of a Congress. He wrote that Article I's reference to ten days was ten calendar, not legislative days; he noted, however, that if Congress is not in session for the full ten days after sending a bill to the President, the bill did not become law if the President did not sign it and was instead conclusively vetoed because Congress cannot attempt to re-pass the unsigned bill.[50] Sanford observed that

> [w]hen the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired.[51]

The case approved a liberal interpretation of the President's power of the pocket veto by allowing bills to be vetoed by not returning them to Congress during adjournments, as well as at the end of a Congressional term.[52]

Statutory Construction

A significant aspect of Justice Sanford's approach to the law was his treatment of statutes. There are several cases that illustrate the Justice's approach to statutory construction. One was the first case in which Sanford spoke for the Court—*Baltimore & Ohio Railroad Company v. United States*, handed down on March 19, 1923.[53] The railroad asked for judgment for certain "extraordinary expenses" that it claimed to have incurred in constructing a branch railroad to an ordinance depot under "an informal or implied agreement" with the War Department for reimbursement for such expenses pursuant to the Dent Act.[54] Construing the provisions of the Dent Act, Sanford found there was no "agreement, express or implied" for the payment of the expenses the railroad incurred in expediting the building of the branch line. He observed:

> [T]he mere fact that, on the urgent insistence of the officers of the [War] Department that the construction of the railroad be hastened so as to handle construction materials for the Depot and other freight (necessarily yielding revenue to the railroad), the company, on its own determination, substituted the cost plan of construction for the unit-price plan, without any notice to the Department of its intention so to do or of the increased expenses that would result, does not, in the absence of any intimation that it would look to the United States for reimbursement . . . or of any suggestion by the Department that such reimbursement would be made, afford any substantial basis upon which an agreement for the payment of such expenses can be implied.[55]

Sanford also authored a related opinion, *Baltimore & Ohio Railroad Company v. United States*, several weeks later (April 9, 1923).[56] In that case, the railroad had leased piers to the government to allow shipment of war supplies overseas. When a fire broke out

Sanford was known for his careful statutory construction. For example, in *Sperry Oil & Gas Company v. Chisholm* (1924), which involved the complex terms of an Indian man's oil lease on his "homestead," he drew on his experience with tribal matters from his time in the Department of Justice. Above is a delegation of Osage Indians from Oklahoma meeting with Commissioner of Indian Affairs Charles Burke about leasing their oil lands on their reservation.

and the National Guard was sent to the area, the railroad quartered the soldiers in a train car set up as a temporary barracks. Compensation was requested thereafter under the Dent Act for constructing the housing. In rejecting the claim of the railroad, the Court held that the company failed to establish that the officials connected with the work had any authority to order the construction of a barracks and no express or implied agreement existed. Sanford observed that the railroad could not recover for the voluntary service it provided without mentioning compensation and that was based on the company's desire to provide for the troops that guarded its property. In Sanford's words:

> [T]he "implied agreement" contemplated by the Dent Act as the basis of compensation is not an agreement "implied in law," more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. . . .[57]

As the Dent Act authorized payment of expenditures connected with prosecution of war if based on an express or implied agreement entered into with an officer or agent acting under the authority of the President or the Secretary of War, both of these decisions are good examples of Sanford's strict construction of statutes. In *Merritt v. United States*[58] and *Jacob Reed's Sons v. United States*,[59] Justice Brandeis cited

both cases in his analysis of the Dent Act provisions.

In *St. Cloud Public Service Company v. City of St. Cloud*,[60] the action had been brought by the Public Service Company to enjoin the City from interfering with a proposed increase in the rates charged for fuel gas. Sanford, writing for the Court, ruled that

> the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the City and its inhabitants during the thirty-year period, at the maximum rate prescribed.... The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding $1.35 clearly implies that it shall not sell such gas at a higher rate.[61]

Sperry Oil & Gas Company v. Chisholm[62] involved oil and gas leases on tribal land. Chisholm, who was half-Cherokee, brought suit, along with his wife, to cancel a supplemental instrument that modified an existing lease upon Chisholm's "homestead" and "surplus" allotments of tribal lands because it was not executed or joined in by the wife. The lower courts determined that the extension lease executed by Chisholm was void under the provisions of the Constitution and the laws of Oklahoma because the wife did not join in or consent to it. Carefully distinguishing between the "homestead" allotment and the "surplus" allotment, Sanford, who had experience with tribal matters from his time in the Department of Justice, observed that Oklahoma law had no application to the extension lease over the tribal "homestead" of thirty acres:

> The authority thus given by the Act of Congress to an Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law . . ..[63]

According to Sanford:

> It results that the extension lease executed by Chisholm in 1914, which was made under the regulations of the Secretary of the Interior and was approved by him as to the "homestead" allotment of thirty acres, must be held to be valid as to such allotment.[64]

Sanford noted, however, "[a]s to the fifty acres of the 'surplus' allotment, also included in the extension lease, a different question is presented":

> When the extension lease was executed there was no limitation under the Acts of Congress upon Chisholm's right to alienate, encumber or lease the tract. It had become in all respects subject to his control, under the laws of the State, just as the property of other citizens. And since his wife did not join in the execution of the extension lease, there is nothing which estops her from asserting its invalidity, under the provisions of the Oklahoma statute . . ..[65]

Another example of Sanford's careful statutory construction is found in *Madera Sugar Pine Company v. Industrial Accident Commission of State of California*,[66] involving the constitutionality of California's Workmen's Compensation Act. The company contended that the Act, which required it to make compensation to employees' nonresident alien dependents for the employees' death occurring without fault, operated to deprive it of property without due process in violation of the Fourteenth Amendment. In finding the statute was not in conflict

with the Fourteenth Amendment, Sanford, on behalf of the Court, held that the law was designed to benefit all employees and did not provide less protection if the beneficiaries live abroad.[67] This decision likewise demonstrated Sanford's desire to benefit the public.

A Federal Employee Liability Act case, *Davis v. Wolfe*[68] involved a train conductor who was injured on the job when thrown from a car because of a defective grab iron. The conductor sought damages under Section 4 of the Safety Appliance Act, which stated, "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful to use on any railroad engaged in interstate commerce any car 'not provided with secure grab irons or handholds in the ends and sides . . . for greater security to men in coupling and uncoupling cars.'"[69] Sanford, for the Court, examined four prior cases and concluded:

> The rule clearly deducible . . . is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.[70]

After a careful examination of prior precedent and strict statutory construction, Sanford stated the holding:

> It results that in the present case, as there was substantial evidence tending to show that the defective condition of the grab iron required by Section 4 of the Safety Appliance Act was a proximate cause of the accident resulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to the jury under the Act; and the issues having been determined by the jury in his favor the judgment of the trial court was in that behalf properly affirmed.[71]

Sanford as Nationalist

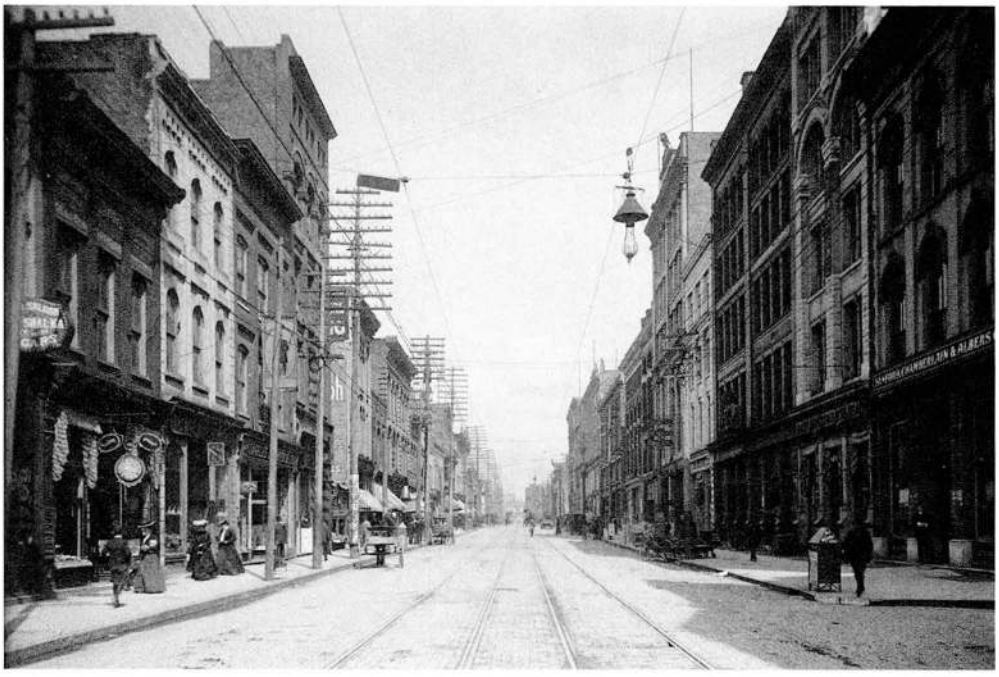
Sanford recognized the need for a strong national government to protect individuals from abusive state governments,[72] and his record was one of upholding federal power against so-called rights of states. This generalization is borne out by his stand on a wide variety of subjects. Sanford upheld the greatly increased regulatory power of the Interstate Commerce Commission under the Transportation Act of 1920.[73] He believed the federal control over interstate power lines should be broadened[74] and that the right of the City of Chicago to divert water from Lake Michigan for drainage purposes should be curtailed.[75] Sanford upheld the quarantine activities of the Department of Agriculture.[76] He voted to sustain federal regulation of grain elevators and stockyards against both substantive due process and Tenth Amendment challenges in *Tagg Brothers & Moorhead v. United States*[77] and *Chicago Board of Trade v. Olsen*,[78] in which Taft wrote for the Court that "it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."[79] Further,

Sanford defended activities of federal entities against state attempts to tax them.[80] Sanford generally was of the mindset that the Court should not interfere with legislative initiatives,[81] and he "was considerably more flexible" than Van Devanter, Butler, Sutherland, and McReynolds "on some aspects of governmental regulation."[82]

Admiralty. One aspect of national law in which Sanford wrote opinions is admiralty law. Examples of such rulings in admiralty cases involving the Merchant Marine Act of 1920 are *Pacific S. S. Company v. Peterson*[83] and *Lindgren v. United States*.[84] In *Peterson*, Sanford reviewed old maritime law and concluded that "[t]he right to recover compensatory damages under the new rule for injuries caused by negligence is . . . an alternative" to the old rules.[85] In *Lindgren*, he determined:

> By the Merchant Marine Act . . . the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act. It is plain that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States.[86]

After exhaustive review of prior law, Sanford observed "that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act—establishes as a modification of the prior maritime law a rule . . . in



Sanford was predisposed to favor Prohibition because his hometown of Knoxville had supported an active temperance movement as early as the 1870s. A 1907 referendum closed the city's 113 saloons, many of which were on Gay Street (pictured in 1910). Partial Prohibition became law in Tennessee in 1909, whereas National Prohibition did not go into effect until 1920.

reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go."[87] These decisions reflect his respect for precedent and preference for uniform laws.

Prohibition. The Eighteenth Amendment, which prohibited the "manufacture, sale, or transportation of intoxicating liquors within . . . the United States . . . for beverage purposes,[88] was "the most radical political and social experiment of our day," and Prohibition was "one of the most extensive and sweeping efforts to change the social habits of an entire nation recorded in history."[89] The Taft Court decided a number of cases relating to Prohibition, all of which supported efforts to enforce it.[90] This support for Prohibition was somewhat surprising, as most of the Court was opposed to the expansion of the national administrative state, "particularly in contexts in which the national government sought to displace local police power."[91]

After fifteen years as a district court judge with dockets clogged with moonshine and prohibition cases, Sanford "displayed a marked zeal for Prohibition enforcement," and on occasion was willing to go to greater limits than the other Justices in upholding the validity of acts of Prohibition agents.[92] For example, he voted with the majority in *Carroll v. United States*[93] in holding that the Fourth Amendment did not prohibit the police from stopping and searching an automobile on the public highway without a warrant, if the vehicle was believed to contain liquor.[94] The Court held that an "exception" exists allowing warrantless searches of cars based upon probable cause to believe contraband is present and that the "mobility" of the vehicle creates the "exigent circumstances" justifying the warrantless search.[95] Sanford also stood with the majority in *Olmstead v. United States*,[96] a controversial five-to-four decision upholding the legality of evidence obtained by tapping private telephone wires of a bootlegging ring operation.[97] The Court held that electronic interception of oral communications was not a search or seizure and that wire-tapping was not subject to the Fourth Amendment. One scholar described this vigorous support of Prohibition as a fusion of a conservative belief in social control with an embrace of legal positivism.[98] Opposition to the Eighteenth Amendment was interpreted as resistance to the legal order itself.[99] Sanford, along with Taft and Van Devanter, "committed judicial conservatism to a policy of respect for positive law in the context of what was surely the most controversial and momentous issue of their time."[100]

Sanford's background suggests that he was predisposed to favor the policy of Prohibition. Temperance forces had been active in his hometown of Knoxville, Tennessee, as early as 1872, circulating petitions in favor of a law to restrict the sale of "spirituous and vinous liquors."[101] By 1907, when closure of saloons was achieved by referendum, Knoxville had 113 saloons, concentrated mainly on downtown Central Avenue, Gay Street, and Market Square.[102] Partial Prohibition had become law in Tennessee in 1909, whereas National Prohibition did not go into effect until 1920.[103] Sanford and his father, E.J. Sanford, clearly supported temperance, as demonstrated by their designs for the Lenoir City Company, a planned city near Knoxville, where the sale of alcohol was to be prohibited. The newspaper in which Sanford's family held an interest, *The Knoxville Journal and Tribune*, was a staunch supporter of Prohibition legislation as well.[104]

In *James Everard's Breweries v. Day*,[105] the issue was whether a section of the Supplemental Prohibition Act of 1921[106] was constitutional, in so far as it prevented physicians from prescribing intoxicating malt liquors for medicinal purposes. The plaintiffs asserted that the prohibition of prescriptions for the use of intoxicating malt liquors for medicinal purposes was neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Eighteenth Amendment

and infringed upon the legislative power of the states in matters affecting the public health. For the Court, Sanford observed that "[t]he opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages under the guise of medicines . . .."[107] He concluded that "[a] provision . . . which tends to diminish the opportunity for clandestine traffic in avoidance of the tax, has a reasonable relation to its enforcement."[108] According to Sanford, Congress had determined that intoxicating malt liquors possessed no substantial and essential medicinal properties that made it necessary that their use for medicinal purposes should be permitted. He that noted neither beer nor any other malt liquor was listed as a medicinal remedy in the United States Pharmacopeia and neither was generally recognized as a medicinal agent.[109]

A Taft Court observer noted, "Sanford's opinion was ruthlessly nationalistic." He found that if the Prohibition "is within the authority delegated to Congress by the Eighteenth Amendment,"

> its validity is not impaired by reason of any power reserved to the States. . . . And if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States "powers not delegated to the United States by the Constitution."[110]

Sanford held that Congress had the power to achieve the purposes of the Eighteenth Amendment by "any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."[111] The newspapers reported that the Court "certified as to the perpetual airtightness of the Eighteenth Amendment, pointing out that Congress can do just about anything it wants to under that amendment, even to the abuse of the power it grants."[112] Taft regarded the *Everard's Breweries* case as "pretty important."[113]

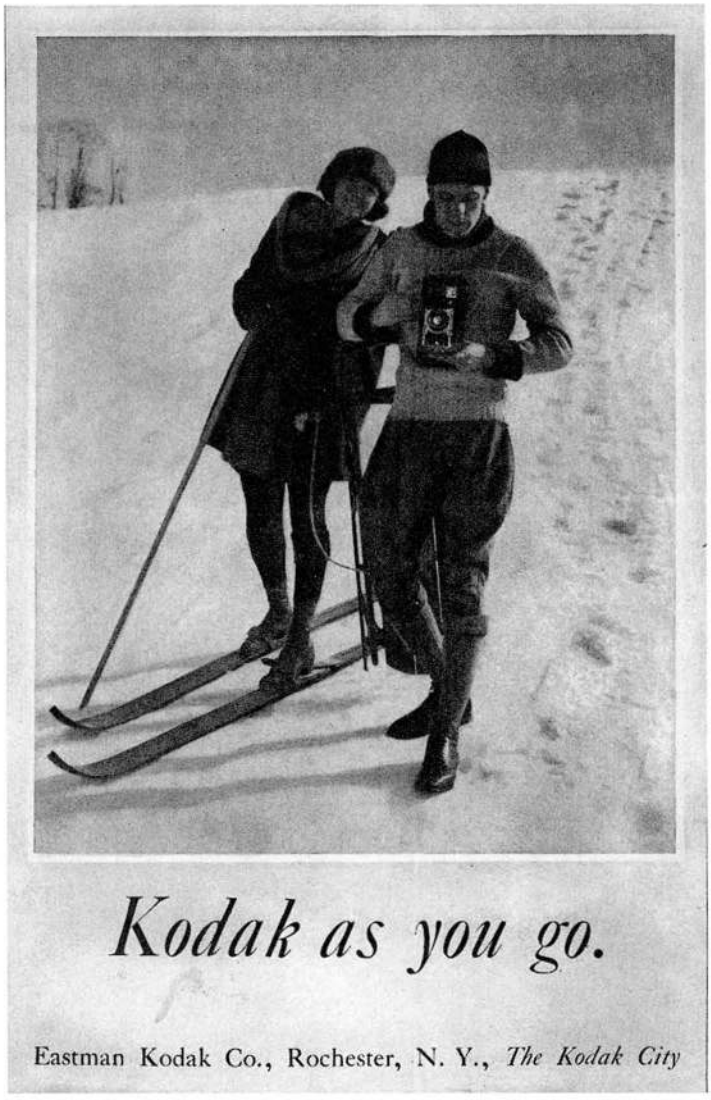
Another Prohibition case in which Sanford voiced an expansive view of congressional powers was *Ma-King Products Company v. Blair*.[114] The petitioner, in accordance with the National Prohibition Act, applied to the Commissioner of Internal Revenue for a permit to operate a plant for denaturing alcohol. The Commissioner, however, denied the application. Speaking for the Court, Sanford concluded:

> It is clear that the Act does not impose on the Commissioner the mere ministerial duty of issuing a permit to any one making an application on the prescribed form, but, on the contrary, places upon him, as the administrative officer directly charged with the enforcement of the law, a responsibility in the matter of granting the privilege of dealing in liquor for nonbeverage purposes, which requires him to refuse a permit to one who is not a suitable person to be entrusted, in a relation of such confidence, with the possession, of liquor susceptible of division to beverage uses.
>
> The dominant purpose of the Act is to prevent the use of intoxicating liquor as a beverage, and all its provisions are to be liberally construed to that end. It does not provide that the Commissioner shall issue a liquor permit, but merely that he may do so. It specifically requires the application to show "the qualification of the applicant," and authorizes the Commissioner to prescribe, "the facts to be set forth therein." These provisions, as well as the purpose of the Act, are entirely inconsistent with any intention on the part of Congress that the Commissioner

> should perform the merely perfunctory duty of granting a permit, to any and every applicant, without reference to his qualification and fitness; and they necessarily imply that, in order to prevent violations of the Act he shall, before granting a permit, determine, in the exercise of his sound discretion, whether the applicant is a fit person to be entrusted with such a privilege.[115]

Antitrust. Another aspect of Justice Sanford's nationalist predilections appears in his rulings on antitrust law. He favored strict adherence to them, perhaps because he had been influenced by his time as an antitrust prosecutor with the Department of Justice during Theodore Roosevelt's presidency.[116] He was said to support the enforcement of the antitrust laws "even more faithfully than old trustbuster Taft himself."[117] He joined Taft and McReynolds in dissent in *Maple Flooring Manufacturers' Association v. United States*[118] and *Cement Manufacturers Protective Association v. United States.*[119] In the former, the majority took the view that specified activities of trade associations in collecting and distributing trade information did not violate the Act, as there was no evidence that the actions of the trade associations had a "necessary tendency to cause direct and undue restraint of competition" prohibited by the Sherman Act.[120] The majority held that the Sherman Act was neither intended to "inhibit the intelligent conduct of business operations nor . . . suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce . . .."[121] Sanford and Taft dissented upon the ground that the cases fell substantially within the rules of *American Column & Lumber Company v. United States*[122] and *United States v. American Linseed Oil Company.*[123] In *American Linseed*, a unanimous Court had determined that the gathering of information under the guise of "intelligent competition" had a tendency to suppress competition.[124] Urging rigorous application of that case, McReynolds, Sanford's former Department of Justice colleague, argued in his dissenting opinion that the cases at issue "disclose carefully developed plans to cut down normal competition in interstate trade and commerce."[125]

Consistent with his support for vigorous antitrust enforcement, Sanford joined Taft's unanimous opinion in the second *Coronado Coal* case.[126] The case grew out of the efforts of the United Mine Workers to unionize southern coal mines to protect wage levels for union miners in other parts of the country. The company's owners sought to change its labor force from union to nonunion miners and shut down its mines in preparation for reopening on an open-shop basis. When the mines reopened, the union members went on strike and engaged in violent protests that eventually destroyed the mine property and equipment. The Taft Court found the union members' violence was aimed at stopping the interstate shipment of nonunion coal, and therefore the union could be held liable under the Sherman Act.[127] When unlawful activities are intended to "restrain or control the supply entering and moving in interstate commerce . . . their action is a direct violation of the Anti-Trust Act."[128] The decision reversed a lower court ruling holding that the United Mine Workers could not be sued under the Sherman Act and increased "the potentialities of the Sherman law as a weapon against unions."[129] Thus, Sanford joined the Taft Court in applying the antitrust laws more aggressively to labor unions than to the corporations that were the primary intended targets of the legislation. However, when faced the year before with a nonviolent local union strike in *United Leather Workers International Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Company,*[130] Sanford joined the majority in



Sanford wrote several opinions opposing the regulation of business. In *Federal Trade Commission v. Eastman Kodak Company* (1927), Sanford held that Eastman Kodak did not have to comply with the FTC, which had accused the company of engaging in acts constituting unfair methods of competition in interstate and foreign commerce and had ordered the company to divest itself of three laboratories.

holding that the union activity was beyond the reach of the Sherman Act.[131] Nonetheless, with Sanford's concurrence in *Coronado*, the Court held, for the first time, that unions were subject to suit and their funds subject to attachment.[132]

In *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association*,[133] Sanford was in the majority that upheld a ruling against a union for boycotting the company's store.[134] A number of union stone cutters refused to work on limestone cut by workers employed by the nonunion Bedford Cut Stone Company. Despite the fact that this particular strike appeared to have limited effect because of its local character, the Court concluded that the strike unduly burdened the stream of interstate commerce and violated the antitrust laws. Over and above the attempt to bring about a "change of conduct on the

part of [Bedford Cut Stone] in respect of the employment of union members in Indiana,"[135] the Court found that the strike was directed against the use of the company's products in the other states with the "plain design of suppressing or narrowing the interstate market."[136] To prevent a five-four split, Taft put pressure on Sanford and Stone to vote with the majority, and, with reluctance, the two finally agreed.[137] This case illustrated the Taft Court's use of antitrust laws as a weapon against the labor movement. As one scholar has noted:

> There was obvious incongruity between the narrow view of interstate commerce taken in cases such as *E. C. Knight* and *Hammer v. Dagenhart* and the Taft Court's opinion in *Bedford* where no distinction between local and national effects on commerce was noted. Many trade restrictions resulting from industry action "would be tolerated by the Court under the rule of reason." At the same time, the Court would disregard its rule of reason "when asked to apply it to the clearly reasonable activities of a labor union." Minimal local activity thus became interstate commerce when the Court felt the need to immunize a manufacturer from interference by a labor union.[138]

In *Eastman Kodak Company v. Southern Photo Materials Company*,[139] it was alleged that Eastman Kodak had engaged in a combination to monopolize the interstate trade in the United States in photographic materials and supplies and, indeed, had monopolized the greater part of such interstate trade by purchasing and acquiring the control of competing companies engaged in manufacturing such materials, along with the businesses and stock houses of dealers. Eastman Kodak unsuccessfully attempted to purchase the plaintiff's business and then refused to sell the plaintiff its goods at the dealer discounts and would furnish them only at retail prices, with the result that the plaintiff could no longer compete. Eastman Kodak defended on the ground that Southern Photo Materials could not prove its damages. Sanford found jurisdiction was proper and noted that

> a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.[140]

Pro-Business

Sanford was, as noted earlier, thought to have been conservative in economic matters. That would imply a pro-business inclination, and there are a number of cases in which that inclination can be seen. *Williams v. Great Southern Lumber Company*[141] was an action brought to recover damages for the alleged unlawful killing of the plaintiff's husband, who was the president of the local union. The complaint alleged a conspiracy had been formed between the Company, its officers, agents, and others to kill Mr. Williams and destroy organized labor. The widow asserted that her husband was killed by a mob composed of agents, officers, and employees of the Company acting within the scope of their employment. As articulated by Sanford, the Court held that the judgment for the widow must be reversed because "[t]he errors in the exclusion and admission of evidence directly affected the substantial rights of the Company."[142]

In *Federal Trade Commission v. Raymond Brothers-Clark Company*,[143] under review was a commission order requiring the defendant to desist from a method of competition. Sanford

found that the case disclosed no elements of monopoly or oppression. He observed that a retail dealer "has the unquestioned right to stop dealing with a wholesaler for reasons satisfactory to himself."[144] He acknowledged that

> [a] different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action in directed.[145]

In a "pro-business" decision, Sanford concluded that the defendant exercised its lawful right in withdrawing its trade from the other company.[146] The opinion restricted the power of the Federal Trade Commission (FTC) to declare business practices "unfair methods of competition."[147]

The FTC in *Federal Trade Commission v. Eastman Kodak Company*[148] contended that Eastman Kodak had engaged in acts constituting unfair methods of competition in the manufacture and sale of positive cinematograph films in interstate and foreign commerce. The defendant was ordered, in part, to sell and convey three laboratories. Sanford, writing for the Court, determined that the FTC, pursuant to the applicable statute, "had no authority to require the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission."[149]

Substantive Due Process. An important aspect of the Court's, or any individual Justice's, support for business was considering substantive due process. Sanford's strongest statement embodying substantive due process was his dissent in the infamous *Adkins v. Children's Hospital of D.C.*[150] case. The issue before the Court in *Adkins* was the legitimacy of an act of Congress fixing minimum wages for working women and children in Washington, D.C. This type of legislation epitomized the reforms of the Progressive Era. There were two challenges brought to the legislation, one by a hospital paying wages below the statutory minimum, the other by a female elevator operator who, it was alleged, would lose her low-paying job if her employer were forced to comply with the act.[151] The statute was attacked as violating "the freedom of contract included within the guarantees of the due process clause of the Fifth Amendment."[152] Turning the clock back to 1905 and *Lochner v. New York*,[153] the majority in *Adkins* concluded that the minimum wage law for women and children unconstitutionally invaded the liberty of contract. Using a property rights approach, the majority held "minimum wage legislation to be an unconstitutional infringement on the liberty of employees to negotiate employment contracts."[154] Justice Sutherland further wrote, "[I]t cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former."[155] According to Sutherland, "the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals . . . must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau."[156]

The news media of the day observed that it would be difficult for the American people to accept the *Adkins* decision because of the "striking division of opinion among

Four Justices who were all named by the same President." Noted was the difference between the "corporation lawyers" and the judges:

> Chief Justice Taft and Associate Justice Sanford had had long judicial experience before they became members of the Supreme Court. . . . Both Chief Justice Taft and Associate Justice Sanford affirmed the validity of the Minimum-Wage Law, along with Associate Justice Holmes, who had achieved a national reputation as a Judge in Massachusetts long before he was appointed to the United States Supreme Court.
>
> The two other Justices appointed by Mr. Harding helped declare the act of Congress unconstitutional, and one of them wrote the opinion of the court. Neither of these Associate Justices, Mr. Sutherland and Mr. Butler, had previous judicial experience. Both of them were successful corporation lawyers with conservative views on all modern economic questions, and it was their interpretation of the Constitution that prevailed in deciding the minimum-wage case.
>
> This implies no reflection on their intellectual integrity or their honesty of purpose. It is a significant fact, nevertheless, that of the Four Justices who were appointed by Mr. Harding, the two who had previously been corporation lawyers should have denied the power of Congress to enact a Minimum-Wage law for women in the District of Columbia and the two who had been Judges should have held that Congress had full power under the Constitution to enact that legislation.[157]

After Sanford's death, *Adkins* was overturned in *West Coast Hotel Company v. Parrish*.[158]

The Fourteenth Amendment provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[159] Substantive due process prohibits the government from infringing on fundamental constitutional liberties. The nature and scope of the liberty to be protected by the Constitution must be determined.[160] Sanford's record reveals that he was not a rigid and inflexible opponent of substantive due process. He joined the Court's opinions in *Meyer v. Nebraska*,[161] *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[162] and *Farrington v. Tokushige*.[163] In *Meyer*, a Nebraska school teacher was arrested for teaching the German language, in violation of a state law prohibiting such instruction.[164] The Court ruled that an act forbidding instruction in or of any language other than English violated the Due Process Clause of the Fourteenth Amendment, infringing on Meyer's right to work and the parents' right to determine the course of their children's education.[165] In *Pierce*, the Court ruled that Oregon's Compulsory Education Law (1922) "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children."[166] In *Farrington*, the Court disallowed mandatory permits in Hawaii required for teaching in a foreign language, finding "[e]nforcement . . . would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."[167] These were "first tentative steps to expand the Fourteenth Amendment's Due Process Clause to personal rights other than liberty of contract."[168] These cases shielded Catholics and immigrants from school regulations requiring children to attend public schools if their parents wanted to send them to private, religious schools while also recognizing important non-economic substantive liberties under the Fourteenth Amendment's Due Process Clause.

Pro-Government

In *Rindge Company v. Los Angeles County*,[169] the issue involved the acquisition of land along the Pacific Ocean for construction of public highways. Sanford concluded that the taking of the land was a taking for a public use authorized by the laws of California. In an opinion reflecting a liberal, "cultured" viewpoint, he wrote:

> Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. . . . [A] road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery.[170]

In a pro-government ruling, Sanford concluded that "the property of the ranch owners has been taken for highways constituting a public use authorized by law, and upon a public necessity for the taking duly established, and that they have not been deprived of their property in violation of the Fourteenth Amendment."[171]

R.E. Sheehan Company v. Shuler[172] involved the constitutionality of two recent amendments to the New York Workmen's Compensation Law. The substance of these two provisions was that, when an injury caused the death of an employee who left no beneficiaries, the employer or other insurance carrier was to pay the State Treasurer the sum of $500 for each of two special funds. The companies contended that the provisions conflicted with the Fourteenth Amendment and that the awards deprived them of their property without due process and denied them the equal protection of the laws. Sanford, speaking for the Court, determined that "the State acted within its power, and neither arbitrarily nor unreasonably, in providing that a portion of the compensation to injured employees . . . should be made from public funds established for that purpose by payments from employers whose own employees leave no beneficiaries."[173] He further provided that the provisions did not conflict with the Equal Protection Clause, as all employers alike become subject to the requirements of the law.[174]

In *White River Lumber Company v. Arkansas ex rel. Applegate*,[175] a state statute authorized the collection of back taxes on lands that, through inadequate assessment, had escaped their just burden of taxation. The statute was limited to the recovery of additional taxes on lands of corporations but not on the lands of natural persons.[176] Sanford distinguished *Quaker City Cab Company v. Pennsylvania*,[177] which had invalidated a Pennsylvania tax that applied only to receipts of cab companies operated by corporations, by saying that it contained no back tax. Quoting from his decision in *Whitney v. California*,[178] Sanford observed that a policy does not violate the Equal Protection Clause "merely because it is not all-embracing. . . . A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses."[179] The statute must be presumed to target "an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need."[180] Such a law is not to be invalidated "merely because other instances may be suggested to which also it might have been applied,"[181] and the classification is not open to objection unless it is "so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of legislative judgment and discretion."[182]

Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission[183] involved a British brewery

that manufactured and sold most of its ale in England but imported some of its product into the United States, where it was sold through branch offices in New York and Chicago. The brewery was assessed a franchise tax by the New York Tax Commission for its ale sales in the state. The company paid the tax but filed suit seeking a refund, arguing that the tax was not based on any net income made in the United States but on income made outside it. Furthermore, the company asserted that the tax deprived it of its property in violation of the Due Process Clause of the Fourteenth Amendment and imposed a burden upon its foreign commerce in violation of the Commerce Clause of the Constitution. In authoring the majority opinion upholding the government against the business, Sanford wrote that

> in the present case we are of the opinion that as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business.[184]

Furthermore, Sanford stated:

> We think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income. There is no sufficient reason why a foreign corporation desiring to continue the carrying on of business in the State for another year—from which it expects to derive a benefit—should be relieved of a privilege tax because it did not happen to have made any profit during the preceding year.[185]

In *United States v. River Rouge Improvement Company*,[186] a case arising under the Rivers and Harbors Act,[187] the United States filed five petitions for the condemnation of portions of numerous parcels of riparian[188] land needed for improvement of Michigan's Rouge River. The Government argued that the jury instructions were erroneous in reference to the extent and measure of the benefits to the remainder of the parcels. Speaking for the Supreme Court, Sanford noted:

> The right of the United States in the navigable waters within the several States is . . . "limited to the control thereof for purposes of navigation." And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.[189]

Sanford found the trial court's instructions resulted in prejudicial error. He noted that

> [i]t is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, he has in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law

> may construct landings, wharves or piers for this purpose. . . .
>
> This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigable rivers, but must suffer the consequences of the improvement of navigation, if Congress determines that its continuance is detrimental to the public interest in the navigation of the river.[190]

Sanford ruled that, while the charge recognized the right of the United States to the deduction for the special benefits, it erroneously minimized their nature and extent.[191] This led the jury to a lower estimate of the benefits than would have been made under the proper charge. He concluded:

> [W]e find that . . . the jury were left to determine the amount of the benefits to be deducted on the theory that a riparian owner on the improved river would have merely such uncertain and contingent privileges of access to the navigable stream and of constructing docks fronting on the harbor line, as the government, in the exercise of an absolute control over the navigation of the river might see fit to allow him, instead of being instructed that he would have a right to such access and the construction and maintenance of such docks until taken away by the government in the due exercise of its power of control over navigation. . . . [T]here was nothing in the evidence indicating any probability that the government would at any time abrogate or curtail [the rights of the riparian owners].[192]

Public Interest

Closely related to those cases in which Sanford's position was pro-government were those in which the question of action in the public interest arose. The majority on the Taft Court carefully distinguished between ordinary property and property in the "narrow category of having been 'affected with a public interest.'"[193] Sanford was partial to the public interest. In *Tyson & Bro.—United Theatre Ticket Offices, Inc. v. Banton*,[194] the plaintiff was a licensed ticket broker who regularly resold tickets for admission to places of entertainment. New York passed a statute that imposed restrictions on ticket scalping, providing that "the price of or charge for admission to theaters, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, is a matter affected with a public interest."[195] The statute also prohibited "the resale of any ticket or other evidence of the right of entry to any theater, etc., at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry."[196]

The majority of the Court held that a theater ticket brokerage was not a "business affected with a public interest" and that substantive due process prohibited government price regulation in that field.[197] In an opinion written by Justice Sutherland, the Court held that "[t]he right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments."[198] The majority opinion further held that there is no public interest here because "[a] business or property, in order to be affected with a public interest,

must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect *granted* to the public."[199] Thus, the majority found that the government lacked the authority to regulate the resale price of theater tickets.

Sanford wrote a short dissent supporting the state's right to regulate theater ticket brokers, contending that there is nothing in the Constitution prohibiting the type of regulation attempted by the State of New York.[200] Sanford observed that the ticket brokers "acquire an absolute control of the most desirable seats in the theaters, by which they deprive the public of access to the theaters themselves for the purpose of buying such tickets at the regular prices," and thus "are enabled to exact an extortionate advance in prices for the sale of such tickets to the public."[201] Sanford declared that

> the business of the ticket brokers, who stand in "the very gateway" between the theaters and the public, depriving the public of access to the theaters for the purchase of desirable seats at the regular prices, and exacting toll from patrons of the theaters desiring to purchase such seats, has become clothed with a public interest and is subject to regulation by the Legislature . . ..[202]

One year later, in *Ribnik v. McBride*,[203] Sanford concurred in the majority opinion that struck down a similar law. In *Ribnik*, the Court held that employment agencies were not "businesses affected with a public interest" and governmental regulation of their fees violated substantive due process.[204] The decision excluded most businesses from the public interest category and made them exempt from price regulation.[205] The majority determined that substantive due process bans price regulation in all but a few industries, such as public utilities and rail transportation.[206] Sanford probably concurred because *Tyson* was the controlling authority,[207] and he had the utmost respect for judicial precedent and frequently deferred to prior decisions even when they resolved questions of law in ways with which he had initially disagreed.[208]

In a decision favoring the public interests over private ones, Sanford defined the term "alien seamen" for the Court in *United States v. New York & Cuba Mail S.S. Company*.[209] A seaman from Chile was found by the immigration officials to be afflicted with a venereal disease and was placed at the Public Health Service hospital on Ellis Island for treatment. The steamship company refused to pay the hospital expenses and the United States brought suit. The issue before the Court was "whether the term 'alien seamen,' as used in the Act, means seamen who are aliens, as the Government contends, or seamen on foreign vessels, as the Steamship Company contends: that is, whether in applying the Act the test is the citizenship of the seaman or the nationality of the vessel."[210] Sanford noted: "We think the term 'alien seamen' is not to be construed as meaning seamen on foreign vessels."[211] He determined that "[i]t is clear that the term 'alien seamen' as used in the Act means 'seamen who are aliens.' . . . The Act does not qualify this term by any reference to the nationality of the vessels. . . ."[212] Sanford concluded that if seamen "are found to be diseased when brought into an American port, the vessel, whether American or foreign, may lawfully be required to bear the expenses of their medical treatment."[213]

Rights of Individuals

As he was during his time as a district court judge, on the Supreme Court Sanford was relatively sensitive to the rights of individuals. Like Theodore Roosevelt, the man who named him to the Department of Justice and the United States District Court for the Eastern and Middle Districts of Tennessee, Sanford was "interested primarily

In *Gitlow v. New York* (1926), Sanford upheld Benjamin Gitlow's conviction under a state anarchy statute for publishing an article in 1919 calling for workers to overthrow capitalism and the government by force. But Sanford's opinion also held that the states, not just the federal government, must adhere to the First Amendment's "fundamental" provision permitting free speech. Gitlow (above) published "Left Wing Manifesto" in *The Revolutionary Age*, a newspaper for which he served as business manager.

in human welfare rather than in property."[214] In *United States v. Manzi*,[215] he dissented from an opinion by Justice McReynolds denying citizenship to the widow of a deceased alien because her request was not timely filed. Mr. Manzi died two months after filing his declaration of intention to become a U.S. citizen. In order for the widow to obtain the statutory benefit of his declaration, she was required to file her petition for naturalization not less than two nor more than seven years after the deceased husband's declaration of intention.[216] The widow waited more than seven years.

Another case quite emblematic of Sanford's concern for the rights of individuals was the *Schwimmer* naturalization case. Perhaps influenced by the fact that his mother's family had been persecuted for their religious beliefs,[217] he dissented from the denial of American citizenship to Rosika Schwimmer, a pacifist who would not promise to bear arms in the nation's defense. As outlined in *United States v. Schwimmer*,[218] the Naturalization Act of June 29, 1906 required that:

> He [the applicant] shall, before he is admitted to citizenship, declare on oath in open court . . . that he will 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.[219]

Schwimmer testified that she "fully believed in our form of government,"[220] and her "'past work proves that [she had] always served democratic ideals.'"[221] She refused to take up arms, however, arguing that she could fight in other ways.[222] The Court, in an opinion by Justice Butler, denied citizenship due to Schwimmer's opposition to the forcible defense of the nation.[223]

Sanford's dissent in *Schwimmer* was recalled after his passing:

> In the current comments on his judicial career, it is commonly stated that he was one of the "conservatives" of the Supreme Court. Yet he broke away from the "conservatives" and acted with the "liberals" in a case that attracted national attention because of the moral issue of human rights and privileges involved.[224]

Among Sanford's papers are some penciled-out sections in a 1910 speech reflecting his

views of the Supreme Court's role—a view consistent with his dissent in *Schwimmer*:

> [I]t is invested with higher prerogatives than any court of ancient or modern times; its jurisdiction extends over the sovereign States and the sovereign Nation itself, as well as over the weakest of its citizens; it may annul alike the statutes of the States or of the Nation, if they exceed the limitations of the Constitution, the supreme law of which it is the defender and the living voice.

He further described the Court as "administering justice between the nation, the State, the citizen and the stranger within our gates, with equal and exact regard for the rights of each. . . ."[225]

At the time of his death, so shortly after the *Schwimmer* decision, Sanford was hailed by *The New York Times* as a "Champion of Individual Rights." Additionally, recognizing Sanford's reputation as a district court judge, the paper noted that

> [o]n questions of more individual character he was a staunch champion of the rights of the individual, and in his service on the bench there were many incidents to illustrate his zeal to protect the rights of an individual in his court, particularly when an individual appeared defenseless.[226]

First Amendment

Sanford is best known for his decisions in the seminal First Amendment cases of *Gitlow v. New York*[227] and *Fiske v. Kansas*.[228] In *Gitlow*, the Court considered New York's conviction of Benjamin Gitlow, one of the founders of the American Communist Party, who had published a pamphlet called the *Left Wing Manifesto* advocating the establishment of socialism by "class action . . . in any form."[229] Gitlow, inspired by the Russian Revolution, envisioned a Soviet America, and his writings and speeches were intended to bring that about.[230] In the view of the State of New York, voicing such ideas was enough to constitute a crime. Gitlow's 1919 arrest and trial were part of a New York version of the better-known "Palmer raids."[231] He was convicted under a state criminal anarchy law that punished advocating the overthrow of the government by force. He was not charged with the commission of any overt illegal act or with conspiracy to commit an illegal act, nor was it claimed that he advocated that anyone else go out and commit an overt act. Essentially, he was charged with advocating ideas that, if enough people agreed with them, might lead to illegalities at some point in the future.[232] At trial, Gitlow argued that, because no action flowed from the manifesto's publication, the statute penalized utterances that lacked a propensity to incite concrete action. According to the state, whether the words were actually likely to persuade anyone to do anything illegal was beside the point.[233]

Explicitly endorsing the "bad tendency" principle—"that speakers are responsible for the reasonable, probable outcome of their words, irrespective of how likely it is that those words will create an overt criminal act"—a majority on the Supreme Court agreed with the state.[234] Thus, while expanding First Amendment law, the *Gitlow* case demonstrated the Taft Court's conservatism.[235]

According to Sanford's opinion, "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[236] Earlier decisions, Sanford observed, had established that freedom of speech was not absolute.[237] It "does not deprive a State of the

primary and essential right of self preservation."[238] Sanford further noted that "utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion . . ."[239] And that was what the statute in *Gitlow* forbade: By punishing one who "advocates . . . the duty, necessity or propriety of overthrowing . . . organized government by force or violence," the state had penalized only "the advocacy of action," not "the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action."[240] In language revealing the tenor of the time, Sanford held that Gitlow had participated in the publication and circulation of the document and that "such utterances, by their very nature, involve danger to the public peace and to the security of the State."[241]

Sanford's most famous words as a Supreme Court Justice were expressed in *Gitlow* when he observed that the First Amendment's freedom of speech and press clauses were fundamental to personal liberty and protected from infringement by the states:

> For present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[242]

With these words, the Supreme Court took a major step down the road of nationalizing the Bill of Rights.[243] Milton R. Konvitz, in **Fundamental Rights: History of a Constitutional Doctrine**, describes Sanford's statement as "a revolutionary break with the past."[244] Konvitz opines that the *Gitlow* Court "thus took one broad, breathtaking leap, making a decision that was to have the most significant consequences for constitutional development and for the American people and its institutions."[245]

In *Fiske*,[246] Sanford, again speaking for the Court, showed a little liberal activism, upholding a defendant's federal right of free speech against a state criminal anarchy statute. Fiske had been arrested and charged with violating Kansas's Criminal Syndicalism Act for soliciting people to become members of the Industrial Workers of the World (IWW), a group advocating workers take possession of the machinery and earth and abolish the wage system.[247] For the first time, the Court overturned a state law on the grounds that it violated the First and Fourteenth Amendments to the Constitution by denying an individual his freedom of speech. Fiske's conviction, based solely on his soliciting members for the IWW, was thrown out.

The Kansas statute provided: "Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage, . . . is guilty of a felony. . . ."[248] Fiske was accused of distributing the preamble of the radical labor union:

> That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life. . . . Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth and the machinery of production and abolish the wage system. . . . Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition

> of the wage system." By organizing industrially we are forming the structure of the new society within the shell of the old.[249]

Sanford, writing for the Court, observed that

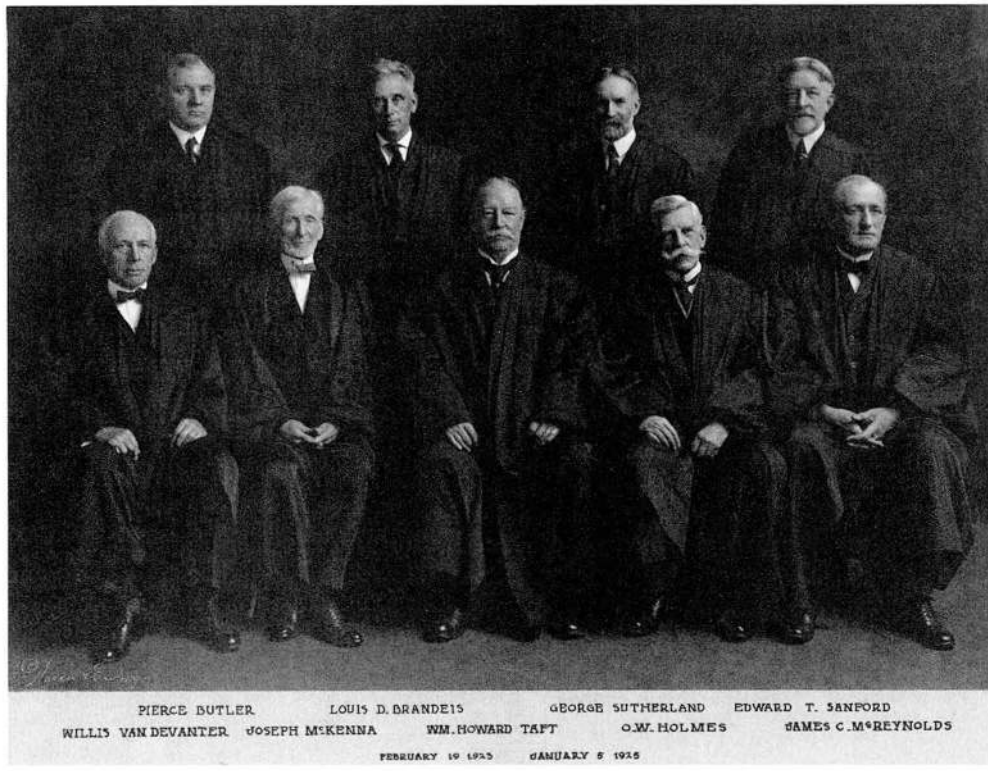
> [t]here is no suggestion in the preamble that the industrial organization of workers as a class for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, "the sinister meaning attributed to it by the state. . . ."
>
> The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment. . . .[250]

Fiske revealed that Sanford was not "emotionally committed to denying rights to radicals."[251] The case marked the first successful defense invoking the Fourteenth Amendment to guarantee the federal right of free speech against state statutes.

Rights of Blacks and Minorities

Sanford's positions in cases involving the constitutional rights of blacks and minorities were typical of those of legal thinkers of his time.[252] As the Civil War generation was relinquishing its dominant position in public affairs, an acceptance of white southerners' racial categorizations had become more prevalent. Taft openly admitted that black suffrage had been a failure and expressed the opinion that literacy restrictions were a positive requirement. The Republican legacy of liberation stemming from the Civil War had faded.[253] Across the country, American attitudes became southernized.[254] Sanford's record in this area is mixed. Because he did not join the Court until after *Moore v. Dempsey*[255] was argued, he did not participate in that 6–2 holding that the conviction of black defendants in a trial dominated by a mob deprived them of due process. The case was one of the earliest rulings to protect the civil rights of blacks.[256] Sanford did join the Court's unanimous opinion in *Nixon v. Herndon*,[257] holding that a 1923 Texas statute prohibiting blacks from voting in the Democratic primary violated the Equal Protection Clause. In that case, the statute provided "[I]n no event shall a negro be eligible to participate in a Democratic Party primary election held in the State of Texas."[258] The Court, speaking through Holmes, held that "[I]t seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]."[259]

At the same time, however, in *Gong Lum v. Rice* Sanford concurred in the Court's decision upholding segregated public education[260] under the separate but equal doctrine.[261] In *Gong Lum*, a child of Chinese descent was not allowed to attend the school of her choice because she was not a member



Sanford's positions in cases involving the constitutional rights of blacks and other minorities were typical of the Taft Court (pictured here as it was composed from 1923 to 1925). For example, Sanford wrote the Court's opinion in *Corrigan v. Buckley* (1926), which upheld restrictive covenants banning the sale of real property to racial minorities.

of the white or Caucasian race.[262] The Court, speaking through Taft, held that the child was not denied equal protection of the laws when she was "classed among the colored races and furnished facilities for education equal to that offered to all . . .."[263] One legal scholar has observed that the opinion in *Gong Lum* provided "a snapshot of the Supreme Court's late nineteenth and early twentieth century constitutional jurisprudence of race relations at the apogee of its influence."[264] It was also noted that the Justices deciding *Gong Lum* "considered the case an 'easy' example of a state's police power trumping private rights, whether based on the Due Process or Equal Protection Clauses."[265] Clearly, most whites during the time frame of the Taft Court were disinclined to give meaningful review to the segregationist policies in existence.

Similarly, a controversial case in which Sanford authored the opinion was *Corrigan v. Buckley*,[266] which upheld restrictive covenants banning the sale of real property to racial minorities. The case attracted wide attention because a decision in favor of the black purchaser would have had an impact on the laws in many states. Under the facts of this case, several neighbors entered into an agreement to prevent blacks from moving into their neighborhood. The case was set in the District of Columbia, over which, at that time, the Supreme Court's jurisdiction was limited to matters raising "substantial" federal claims.

In 1917, in *Buchanan v. Warley*, the Court had struck down a city ordinance mandating residential segregation.[267] In that case, substantive due process was employed

to hold that the law violated the property rights of blacks.[268] Previously, however, in the *Civil Rights Cases*,[269] the Court had ruled that racial discrimination by private persons could not be penalized by Congress. In *Corrigan*, Sanford relied on the rule of the *Civil Rights Cases* and concluded that the prohibitions of the Fourteenth Amendment "have reference to State action exclusively, and not to any action of private individuals."[270] He found that the Fourteenth Amendment did not prohibit the "wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."[271] He observed that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment"[272] and opined that neither the Fifth, Thirteenth, nor Fourteenth Amendments was applicable. He continued:

> [I]t is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. . . .[273]

Accordingly, the Court held that judicial enforcement did not make the government responsible for a privately imposed racial restrictive covenant. The *Corrigan* decision has been blamed for "legitimiz[ing] racial restrictive covenants" that "contributed to the solidification of the black ghetto in many northern cities."[274] One commentator described *Corrigan* as "a cowardly legal moment."[275]

Sanford did join a unanimous court in *Harmon v. Tyler*,[276] declaring invalid a Louisiana law that forbade any black to establish a home on any property in a white community, or any white person to establish a home in a black community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community, or portion of the city to be affected."[277] The Court, relying on the authority of *Buchanan*,[278] found that the state law violated the Fourteenth Amendment by interfering with property rights in this manner. Sanford's positions in these cases reflect his adherence to strict interpretation and respect for precedent.

Off the Bench

During Sanford's time on the Court, he rarely found time for relaxation. It was well known in Washington, however, that "the large quantities of the latest fiction which passed from the Library of Congress to the Sanford residence were for the Justice himself."[279] Additionally, Sanford, along with McReynolds and Butler, were the golfers on the Supreme Court.[280] At an earlier point in his career, Sanford observed that in the pursuit of golf, "the lawyer gains added strength and zest of life and energy for his work." He suggested only partly in jest that two hours a day should be spent playing golf.[281] While Sanford served on the district court, his secretary related, "He was intensely interested in golf, his only recreation. Judge Sanford had some two hundred golf clubs at home, and would always bring a new club or two to the office each morning."[282]

In a 1923 speech at a state bar association gathering after his elevation to the Supreme Court, Sanford noted that

> [t]he President defeated me pretty badly the other day. Justice McReynolds felt very badly about that and he has taken me under his wing and promised to show me just how he plays, so that next time I may be more successful, if I have that sort of contest.[283]

An article written by family friend William Rule observed, "[G]olf is [Sanford's] sole recreation and he is as serious and as intense in playing the game as he is in weighing the important cases that come to him for adjudication."[284] Even articles regarding his death mentioned his enthusiasm for golf when his duties would permit him to play.[285]

There was another enjoyment for Sanford in Washington—lunches at a little cafeteria almost within the shadow of the Capitol's dome. The name of the establishment was "The Ugly Duckling," and when Sanford found the time to leave his work, he would walk across the street to dine on stuffed egg salad prepared by Mrs. Hugh Fred, a "Lady from Tennessee."[286]

Besides literature, Sanford was also interested in travel, music and art.[287] Chief Justice Hughes praised the breadth of his colleague's interests in his memorial tribute after Sanford's sudden death in 1930:

> In addition to sound technical training as a lawyer and broad experience as a judge, Mr. Justice Sanford had resources of culture, developed by travel and liberal studies both here and abroad. He was interested in literature, music, and art, and those who enjoyed companionship with him were not disappointed because of limitations in his horizon. While the learning of the law was his supreme interest, it neither monopolized nor narrowed him.[288]

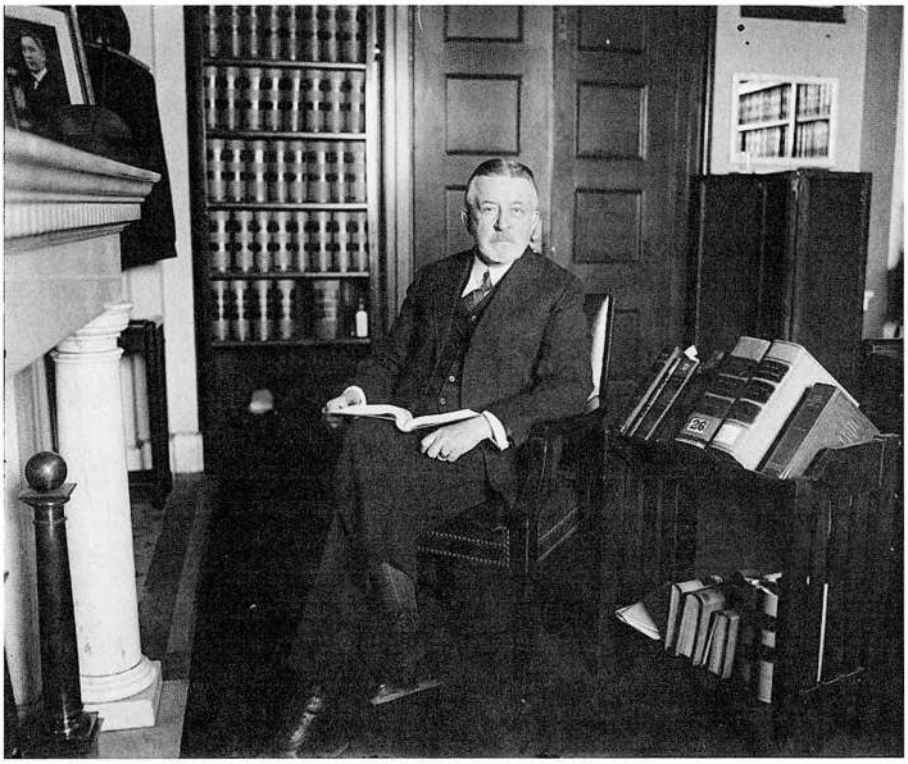
Conclusion

Resolutions commemorative of Sanford's life pronounced by the members of the Bar of the Supreme Court included the following paragraph:

> He served this Court with great distinction from the time of his qualification until his untimely death on the 8th day of March, 1930, at the early age of sixty-four. He had a personality of unusual charm and was a most gifted speaker. He was a lover of literature and the arts, was widely read and deeply experienced in law and jurisprudence. He had ardent patriotism and a high sense of public duty. His work upon the Supreme Court was thorough, conscientious and exacting and had the high commendation of his associates and the Bar. His death is his country's loss, and is mourned by the great circle of his admiring friends and associates both upon the Bench and at the Bar.[289]

A good summary of Sanford's time on the Court was provided by his former law partner and friend, James A. Fowler:

> A careful perusal of the opinions written by Justice Sanford, and also of the dissenting opinions with which he concurred, shows that he did not believe that the Constitution was intended to be a cast iron corset or a rope of sand, but by sensible interpretation it should be adjusted to new conditions as they arise in the progress of civilization. He was neither a reactionary nor a radical, but was one of the large majority of Justices of that great judicial body who from generation to generation have occupied consistently the middle of the road. And the force thus wielded has guided our Nation along a safe path; and has caused that body to be regarded as the key of the arch which supports and insures the preservation of our Republic.[290]



Among Sanford's papers are some penciled out sections in a 1910 speech reflecting his views of the Supreme Court's role. He described the Court as "administering justice between the nation, the State, the citizen and the stranger within our gates, with equal and exact regard for the rights of each."

ENDNOTES

[1] Milton M. Klein, "Prominent Alumni: Part III," "Volunteer Moments: Vignettes of the History of the University of Tennessee, 1794–1994" (1996). Volunteer Moments. http://trace.tennessee.edu/utk_libarcvol/1. Timothy L. Hall, **Supreme Court Justices: A Biographical Dictionary**, (New York: Facts on File, Inc., 2001) at 287 (quoting Holmes).

[2] Barry Cushman, "Edward Terry Sanford," **The Supreme Court Justices: A Biographical Dictionary**, Melvin I. Urofsky (ed.) (New York: Garland Publ. Co., 1994) at 395.

[3] I am writing a full-length biography of Sanford, currently under review by the University of Tennessee Press.

[4] Russell W. Galloway, "The Taft Court 1921-29," *Santa Clara L. Rev.* 1, 21 (1985). Galloway, "The Taft Court," at 32.

[5] "Keeping the Court Balanced," *The Decatur (Ill.) Herald* (Feb. 7, 1923).

[6] Barry Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 395.

[7] Charles A. Noone, "Edward Terry Sanford: Gentleman, Scholar, Lawyer, Jurist," 43 *Com. L. J.* 34, 38 (1938).

[8] Sheldon M. Novick, "Justice Holmes and the Art of Biography," 33 *William & Mary Law Rev.* 1219 (Letter from Oliver W. Holmes to Edward T. Sanford (Jan. 1, 1925)(Summer 1992). http://scholarship.law.wm.edu/wmlr/vol33/iss4/6

[9] Peter G. Renstrom, **The Taft Court, Justices, Rulings, and Legacies** (Santa Barbara, CA: ABC Clio, 2003) at 86.

[10] *Id.*

[11] 261 U.S. 525 (1923).

[12] Galloway, "The Taft Court," at 21.

[13] Noone, "Edward Terry Sanford," at 38.

[14] Allen E. Ragan, "Mr. Justice Sanford," 15 *East Tenn. Historical Soc. Pubs.* (1943) at 77, 87.

[15] Galloway, "The Taft Court," at 1. Such policies opposed governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights. "Laissez-faire," <dictionary.reference.com/browse/laissez-faire>

[16] *The Brooklyn Daily Eagle* (June 3, 1925) at 1.

[17] Harold M. Hollingsworth, "Tennessee and the Supreme Court of the United States," 47 *The East Tenn. Historical Soc. Pubs.* (1975) at 20 (quoting Alpheus Thomas Mason, **William Howard Taft: Chief**

Justice (New York: Simon and Schuster, 1965) at 163-64 and 296).

[18] Ragan, "Mr. Justice Sanford" at 77, 87; *See* Lewis L. Laska, "Mr. Justice Sanford and the Fourteenth Amendment," 33 *Tenn. Hist. Q.* 210, 219 (1974).

[19] Robert Post, "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era," 48 *William & Mary Law Rev.* 1, 2 (2006).

[20] Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** (Lanham, MD: Rowman & Littlefield Pub., Inc., 1999) at 145.

[21] Lewis L. Laska, "Mr. Justice Sanford and the Fourteenth Amendment," 33 *Tenn. Hist. Q.* 210, 233 (1974).

[22] Galloway, "The Taft Court," at 18.

[23] Tennessee Encyclopedia of History and Culture <http://tennesseeencyclopedia.net/imagegallery.php?EntryID=S003>. For example, *Public Utils. Comm'n. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); *United States v. Flannery*, 268 U.S. 98 (1925).

[24] *See Meek v. Centre Cnty Banking Co.*, 264 U.S. 499 (1924); 268 U.S. 426 (1925); *Harrison v. Chamberlin*, 271 U.S. 191 (1926); *Taylor v. Voss*, 271 U.S. 176 (1926).

[25] Ragan, "Mr. Justice Sanford" at 77; Cushman, "Edward Terry Sanford," **The Supreme Court Justices**, at 395.

[26] Tom W. Campbell, **Four Score Forgotten Men: Sketches of the Justices of the U.S. Supreme Court** (Little Rock, Ark.: Pioneer Publ. Co., 1950) at 354.

[27] 272 U.S. 429 (1926).

[28] *Id.* at 443-44 (internal citations omitted).

[29] 276 U.S. 233 (1928).

[30] *Id.* at 237 (internal citations omitted).

[31] 28 U.S.C. §§ 2201-2202.

[32] 273 U.S. 70 (1927).

[33] *Id.* at 74.

[34] 266 U.S. 292 (1924).

[35] *Id.* at 297-98.

[36] 264 U.S. 206 (1924).

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[38] 272 U.S. 21 (1926).

[39] Campbell, **Four Score Forgotten Men**, at 356.

[40] 275 U.S. 279 (1927).

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[43] 275 U.S. at 303; *see* John H. McNeely, "*New Mexico v. Texas*," **Handbook of Texas Online**, <http://www.tshaonline.org/handbook/online/articles/jrn01>; "Survey To Be Made Soon of Texas-N.M Boundary," *El Paso Herald* (Dec. 6, 1927).

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[45] *Id.* at 48-49.

[46] Paul Finkelman (ed.), **The Supreme Court: Controversies, Cases, and Characters from John Jay to John Roberts** (4 vols.) (Santa Barbara, CA: ABC-CLIO, 2014) at 594; "Pocket Vetoes Valid, Supreme Court Rules," *The News-Herald* (Franklin, Penn.) (May 28, 1929).

[47] 279 U.S. 655 (1929).

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[49] 279 U.S. at 674.

[50] Renstrom, **The Taft Court**, at 199.

[51] 279 U.S. at 678-79.

[52] Klein, "Prominent Alumni: Part III," Klein, Milton M., "Volunteer Moments: Vignettes of the History of the University of Tennessee, 1794-1994" (1996). Volunteer Moments. <http://trace.tennessee.edu/utk_libarcvol/1>

[53] 261 U.S. 385.

[54] Pub. Law 65-322, 40 Stat. 1272 (1919).

[55] 261 U.S. at 386.

[56] *Id.* at 592.

[57] *Id.* at 597; Campbell, **Four Score Forgotten Men** at 354.

[58] 267 U.S. 338 (1925).

[59] 273 U.S. 200 (1927).

[60] 265 U.S. 352 (1924).

[61] *Id.* at 362-63.

[62] 264 U.S. 488 (1924).

[63] *Id.* at 494.

[64] *Id.* at 497.

[65] *Id.* at 497-98 (internal citations omitted).

[66] 262 U.S. 499 (1923).

[67] *Id.* at 503-504.

[68] 263 U.S. 239 (1923).

[69] Act of Mar. 2, 1893, 27 Stat. 531, recodified, as amended, 49 U.S.C. § 20302.

[70] 263 U.S. at 243.

[71] *Id.* at 244.

[72] Ragan, "Mr. Justice Sanford," at 86.

[73] Esch-Cummins Act, Pub. L. 66-152, 41 Stat. 456 (approved Feb. 28, 1920). The law returned railroads to private operation after World War I. *Id.* President Wilson had nationalized them in December 1917. Presidential Proclamation 1419, December 26, 1917, under authority of the Army Appropriation Act, 39 Stat. 45 (August 29, 1916).

[74] *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (authored by Sanford).

[75] *Wisconsin v. Illinois*, 278 U.S. 367 (1929) (authored by Taft).

[76] *Thornton v. United States*, 271 U.S. 414 (1926) (authored by Taft).

[77] 280 U.S. 420 (1930) (authored by Brandeis); Robert C. Post, "William Howard Taft," **The Supreme Court Justices: A Biographical Dictionary**, Melvin I. Urofsky (ed.) (New York: Garland Publ. Co., 1994), at 460.

[78] 262 U.S. 1 (1923) (authored by Taft).

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[80] Ragan, "Mr. Justice Sanford" at 86.

[81] Hall, **Supreme Court Justices** at 289.

[82] Abraham, **Justices, Presidents, and Senators** at 144; Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 395.

[83] 278 U.S. 130 (1928).

[84] 281 U.S. 38 (1930).

[85] 278 U.S. at 138.

[86] 281 U.S. at 44.

[87] *Id.* at 46-47.

[88] U.S. Const., Amend. XVIII, sec. 1.

[89] Post, "Federalism, Positive Law . . ." at 12.

[90] Renstrom, **The Taft Court** at 9.

[91] Post, "Federalism, Positive Law, . . ." at 1. "Prohibition represented the greatest expansion of federal regulatory authority since Reconstruction. It caused a major crisis in the theory and practice of American federalism, as the national government, which lacked the courts or police necessary for implementing the Eighteenth Amendment, sought to conscript state judicial and law enforcement resources." *Id.*

[92] Ragan, "Mr. Justice Sanford" at 81. According to Taft biographer Robert Post, the Taft Court's support for Prohibition came from an unlikely alliance between two liberal Justices—Holmes and Brandeis—and three conservative Justices—Taft, Van Devanter, and Sanford. Conservatives McReynolds, Sutherland, and Butler were adamantly opposed to Prohibition. Post, "Federalism, Positive Law, . . . and the Emergence of the American Administrative State," at 1.

[93] 267 U.S. 132 (1925).

[94] *Id.* at 149. In *Carroll*, Taft completely reinterpreted Fourth Amendment jurisprudence so as to enable effective supervision of illegal vehicular liquor traffic. Post, "William Howard Taft," **The Supreme Court Justices** at 462.

[95] Galloway, "The Taft Court" at 20. "*Carroll* illustrates the law-and-order conservatism of the Taft Court." *Id.*

[96] 277 U.S. 438 (1928).

[97] Ragan, "Mr. Justice Sanford" at 81. *Olmstead* was overruled by the Warren Court in *Katz v. United States*, 389 U.S. 347 (1967).

[98] Post, "Federalism, Positive Law, . . . " at 3.

[99] *Id.* at 9.

[100] *Id.* at 102.

[101] *Knoxville Daily Chronicle* (Dec. 22, 1872).

[102] Posey, "The Anti-Alcohol City," at 64-65, 94. These three thoroughfares were the busiest in downtown Knoxville.

[103] "The Saloon and Anarchy: Prohibition in Tennessee. <http://www.tn.gov/tsla/exhibits/prohibition/temperance.htm>

[104] Posey, "The Anti-Alcohol City," at 65-66; *The Knoxville Journal and Tribune* (Feb. 11, 1907).

[105] 265 U.S. 545 (1924).

[106] Sec. 2, 42 Stat. 222.

[107] 265 U.S. at 561.

[108] Id.

[109] *Id.* at 562.

[110] *Id.* at 558 (internal citations omitted); Post, "Federalism, Positive Law, . . ." at 18.

[111] 265 U.S. 545 at 559.

[112] "Wets Lose In Supreme Court," *Palestine* (Ill.) *Enterprise* (Jun. 13, 1924) at 10.

[113] Post, "Federalism, Positive Law, . . ." at 91, n. 196 (Letter from William H. Taft to Charles P. Taft, II (Mar. 9, 1924)).

[114] 271 U.S. 479 (1926).

[115] *Id.* at 482.

[116] Tennessee Encyclopedia of History and Culture, http://tennesseeencyclopedia.net/imagegallery.php?EntryID=S003

[117] Abraham, **Justices, Presidents, and Senators** at 144.

[118] 268 U.S. 563 (1925).

[119] 268 U.S. 588 (1925).

[120] *Maple Flooring*, 268 U.S. at 578.

[121] 268 U.S. at 583.

[122] 257 U.S. 377 (1921).

[123] 262 U.S. 371 (1923).

[124] *Id.* at 388-89.

[125] *Id.*

[126] *Coronado Coal Company v. United Mine Workers of America*, 268 U.S. 295 (1925).

[127] Finkelman, **The Supreme Court: Controversies, Cases, and Characters from John Jay to John Roberts**, at 608.

[128] 268 U.S. at 310.

[129] Galloway, "The Taft Court," at 21-22.

[130] 265 U.S. 457 (1924).

[131] Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 39.

[132] Galloway, "The Taft Court" at 47. Sanford's view of unions was shaped by his past involvement with his father's business concerns as legal counsel, director, and/or stockholder. Land leased by Coal Creek Mining and Manufacturing, a Sanford family interest, was the scene of the "Coal Creek Rebellion." The conflict is "undoubtedly the best known labor story of nineteenth century Tennessee and one of the most dramatic and significant episodes in all American labor history." Perry C. Cotham, **Toil, Turmoil, & Triumph: A Portrait of the Tennessee Labor Movement** (Franklin, Tenn.: Hillsboro Press, 1995) at 55.

[133] 274 U.S. 37 (1927).

[134] Renstrom, **The Taft Court** at 86.
[135] 274 U.S. 37 at 47.
[136] *Id.*
[137] Alpheus Thomas Mason, **The Supreme Court from Taft to Burger**, at 66 (3d ed.) (Baton Rouge, LA: Louisiana State Univ. Press, 1980) (originally published as **The Supreme Court From Taft to Warren**, 1958); Alpheus Thomas Mason, "Chief Justice Taft at the Helm," *Vanderbilt Law Rev.* (March 1965) at 399 (*See* Letter from William H. Taft to Edward T. Sanford (Jan. 24, 1927)).
[138] *E.C. Knight*, 156 U.S. 1 (1895). The *Knight* decision found that commercial activities inherently local in nature fell outside of "interstate commerce" and beyond the scope of the Sherman Antitrust Act, thus diminishing federal power to regulate economic activity. The holding was replaced in 1937 by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which held void the Keating-Owen Child Labor Law of 1916 that prohibited shipment of articles manufactured by child labor in interstate commerce. Pub. L. No. 64-249, 39 Stat. 675 (1916). Paul Finkelman, **The Supreme Court: Controversies, Cases, and Characters from John Jay to John Roberts** at 608.
[139] 273 U.S. 359 (1927).
[140] *Id.* at 379; "Declares Dealers May Sue Eastman," *The New York Times* (July 24, 1927).
[141] 277 U.S. 19 (1928).
[142] *Id.* at 26.
[143] 263 U.S. 565 (1924).
[144] *Id.* at 573.
[145] *Id.* (citations omitted).
[146] *Id.* at 574.
[147] Galloway, "The Taft Court" at 15.
[148] 274 U.S. 619 (1927).
[149] *Id.* at 625. *See also United States v. International Harvester Company*, 274 U.S. 693 (1927), in which the Government alleged that the company had engaged in a combination restraining interstate trade and commerce in harvesting machines and other agricultural implements and monopolizing such trade in violation of the Sherman Antitrust Act. A consent decree was entered. Sanford determined that the company had shown compliance with the requirements. He specifically noted: "We conclude that not only has the International Company complied with the specific requirements of the consent decree, but that competitive conditions have been established in the interstate trade in harvesting machinery bringing about 'a situation in harmony with law.'" 274 U.S. 619 at 710. "High Court Upholds Harvester Company," *The New York Times* (Jun. 7, 1927).
[150] 261 U.S. 525 (1923).
[151] *Id.* at 542-543. Michael Allan Wolf, "George Sutherland," **The Supreme Court Justices**, Melvin I. Urofsky (ed.) (New York: Garland Publ., 1994) at 449.
[152] *Id.* at 545. Wolf, "George Sutherland," **The Supreme Court Justices** at 449.
[153] 198 U.S. 45 (1905). In *Lochner*, the majority held invalid a New York statute that limited employment in a bakery to ten hours per day as an arbitrary interference with freedom of contract. Campbell, **Four Score Forgotten Men** at 314.
[154] Galloway, "The Taft Court," at 11.
[155] 261 U.S. 525 at 556.
[156] *Id.*
[157] "A One-Man Constitution," *The Decatur (Ill.) Herald* (Apr. 14, 1923).
[158] 300 U.S. 379 (1937).
[159] U.S. Const., Amend. XIV, sec. 1.
[160] "Substantive Due Process," http://legal-dictionary.thefreedictionary.com/substantive+due+process
[161] 262 U.S. 390 (1923).
[162] 268 U.S. 510 (1925).
[163] 273 U.S. 284 (1927).
[164] 262 U.S. at 396-97.
[165] *Id.* at 400.
[166] 268 U.S. at 534-35.
[167] 273 U.S. at 298.
[168] www.kevincmurphy.com/uatw-legacies-laws.html at 4.
[169] 262 U.S. 700 (1923).
[170] *Id.* at 707-708 (internal citation omitted).
[171] *Id.* at 710.
[172] 265 U.S. 371 (1924).
[173] *Id.* at 378, 44.
[174] *Id.*
[175] 279 U.S. 692 (1929).
[176] *Id.*
[177] 277 U.S. 389 (1928).
[178] 274 U.S. 357 (1927).
[179] 279 U.S. at 696.
[180] *Id.*
[181] *Id.*
[182] 279 U.S. at 697.
[183] 266 U.S. 271 (1924).
[184] *Id.* at 282.
[185] *Id.* at 284.
[186] 269 U.S. 411 (1926).
[187] Ch. 425, sec. 9. 30 Stat. 1151, 33 U.S.C. § 407.
[188] Of, relating to, or situated on the bank of a river or other body of water. "Riparian," dictionary reference.com
[189] 269 U.S. 411 at 419 (internal citations omitted).
[190] *Id.* at 418-19 (internal citations omitted).
[191] *Id.* at 416.
[192] *Id.* at 420.
[193] Robert C. Post, "Chief Justice William Howard Taft and the Concept of Federalism," 9 *Constitutional Commentary* at 220 (Univ. of Minnesota Law School, Summer 1992). http://hdl.handle.net/11299/166449; *See*

Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 535 (1923).

[194] 273 U.S. 418 (1927).

[195] *Id.* at 427.

[196] *Id.*

[197] *Id.* at 445; Galloway, "The Taft Court" at 27.

[198] 273 U.S. at 429.

[199] *Id.* at 434. (emphasis in original).

[200] *Id.* at 454-55.

[201] *Id.* at 455.

[202] *Id.*

[203] 277 U.S. 350 (1928).

[204] Galloway, "The Taft Court" at 30.

[205] *Id.* This ruling upended *Munn v. Illinois*, 94 U.S. 113 (1877), the seminal case holding that all businesses that affect the public interest *are* subject to price regulation. In *Nebbia v. New York*, 291 U.S. 502 (1934), *Ribnik* and other similar decisions of the Taft Court were rejected and the *Munn* rule was reactivated. Galloway, "The Taft Court" at 30, n. 105.

[207] *See* David Burner, "Edward Terry Sanford," **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions**, Leon Friedman and Fred L. Israel (eds.) (New York: R.R. Bowker Co., 1969) at 2207-208; Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 395.

[208] Renstrom, **The Taft Court**, at 88.

[209] 269 U.S. 304 (1925).

[210] *Id.* at 310.

[211] *Id.*

[212] *Id.* at 310-11.

[213] *Id.* at 313-14.

[214] Theodore Roosevelt, "The New Nationalism, in Social Justice and Popular Rule," 19 **The Works of Theodore Roosevelt** (Charles Scribner's Sons, 1925) at 24.

[215] 276 U.S. 463 (1928).

[216] *Id.* at 464.

[217] David Babelay, **They Trusted and Were Delivered: The French-Swiss of Knoxville, Tennessee** (Vol. 1) (Knoxville, Tenn.: Vaud-Tennessee Publ., 1988) at 80. The Chavannes family, originally from Charmoisy, France, had fled into Switzerland due to persecution for their Protestant beliefs. *Id.* at 47. They left Switzerland in 1848 for the same reason. *Id.* at 1.

[218] 279 U.S. 644 (1929).

[219] *Id.* at 647 (citing 8 U.S.C. § 381).

[220] *Id.*

[221] *Id.*

[222] *Id.* at 647-48.

[223] *Id.* at 652-53.

[224] "When Justice Sanford Dissented," *The Coshocton (Oh.) Tribune* (Apr. 2, 1930).

[225] Edward T. Sanford, "The Establishment of the Federal Judicial System," Edward T. Sanford Papers, MPA.0303. University of Tennessee Libraries, Knoxville, Special Collections.

[226] "Sanford Collapsed In Dentist's Office," *The New York Times* (Mar. 9, 1930) at 28.

[227] 268 U.S. 652 (1925).

[228] 274 U.S. 380 (1927).

[229] 268 U.S. at 654-55.

[230] Lendler, *Gitlow v. New York* at 1-2. Interestingly, Sanford's uncle, Albert Chavannes, gained fame as a writer of utopian novels in which the economy is governed by socialist ideals rather than capitalism, and in which morality is based on social scientific experimentation instead of religion. He became known as an early American sociologist and edited and published what was perhaps the first periodical intended primarily for sociology, *The Sociologist.*

[231] Marc Lendler, **Gitlow v. New York: Every Idea an Incitement** (Lawrence, Kan.: (Univ. Press of Kansas, 2012) at 1. "Palmer raids," led by Attorney General A. Mitchell Palmer, were conducted by the U.S. Department of Justice in 1919 and 1920 to round up foreign anarchists, communists, and radical leftists. Encyclopedia Britannica, www.britannica.com. The raids led to the arrest of more than 6,000 persons. Renstrom, **The Taft Court** at 8.

[232] 268 U.S. at 655; Lendler, **Gitlow v. New York** at 20.

[233] Lendler, **Gitlow v. New York** at 2.

[234] *Id.* at 1-2, 21, 92-93.

[235] Galloway, "The Taft Court" at 19.

[236] *Gitlow*, 268 U.S. 652 at 669.

[237] *Id.* at 666-67. In support of this assertion, the Court cited, among others, *Fox v. Washington*, 236 U.S. 273, 277-78 (1915) (upholding punishment for expression interpreted to encourage indecent exposure); *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (upholding punishment for expression interfering with judicial proceeding); and several of the World War I cases, including *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (upholding punishment for encouraging draft resistance).

[238] 268 U.S. at 668.

[239] *Id.* at 669.

[240] *Id.* at 654, 664.

[241] *Id.* at 669. *See also Whitney v. California*, 274 U.S. 357 (1927) (authored by Sanford).

[242] *Gitlow*, 268 U.S. at 666.

[243] Joseph R. Marbach., Ellis Katz, and Troy E. Smith, (eds.), **Federalism in America: An Encyclopedia**, Vol. 1: A-J (Westport, Conn.: Greenwood Press, 2006) at 328.

[244] Milton R. Konvitz, **Fundamental Rights: History of a Constitutional Doctrine** (New Brunswick, NJ: Transaction Publishers, 2001) at 65.

[245] *Id.*

[246] 274 U.S. 380 (1927).

[247] Patrick Renshaw, **The Wobblies: The Story of the IWW and Syndicalism in the United States** (rev. ed.)

(Chicago, Ivan R. Dee, 1999) at 46 (citing Preamble to the Constitution of the IWW).

[248] 274 U.S., at 382.

[249] *Id.* at 382-83.

[250] *Id.* at 386-87.

[251] Burner, "Edward Terry Sanford," **The Justices of the United States Supreme Court, 1789-1969** at 2207.

[252] Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 395.

[253] Edward O. Frantz, **The Door of Hope: Republican Presidents and the First Southern Strategy, 1877-1933** (Gainesville, Fla.: Univ. Press of Florida, 2011) at 130.

[254] *Id.* at 12.

[255] 261 U.S. 86 (1923). The case was argued on January 9, 1923, and decided on February 19, 1923. Sanford was commissioned on January 29, 1923, and sworn in on February 19, 1923. Edward T. Sanford, Oyez, https://www.oyez.org/justices/edward_t_sanford

[256] Galloway, "The Taft Court" at 12.

[257] 273 U.S. 536 (1927).

[258] *Id.* at 540.

[259] *Id.* at 541.

[260] 275 U.S. 78 (1927).

[261] Cushman, "Edward Terry Sanford," **The Supreme Court Justices** at 395. Taft declared the matter of the constitutionality of segregated state public schools was "within the power of the state legislatures to settle without the intervention of the federal courts under the federal constitution." Alfred H. Kelly, "The School Desegregation Case," **Quarrels That Have Shaped the Constitution**, John A. Garraty (ed.) (New York: Harper & Row, Publishers, 1987 (rev. ed.)) at 310.

[262] 275 U.S. at 80.

[263] *Id.* at 85.

[264] G. Edward White, "The Lost Episode of *Gong Lum v. Rice*," 18 *Green Bag* 2d 191, 192 (Winter 2015).

[265] *Id. Gong Lum* was overruled in *Brown v. Board of Education*, 347 U.S. 483 (1954).

[266] 271 U.S. 323 (1926).

[267] 245 U.S. 60 (1917).

[268] Brent Rubin, "Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law," 92 *Texas Law Rev.* 477, 478 (2013).

[269] 109 U.S. 3 (1883).

[270] 271 U.S. at 330.

[271] *Civil Rights Cases*, 109 U.S. at 17; Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (Berkeley: Univ. of California Press, 1959) at 15.

[272] 271 U.S. at 330 (quoting *Civil Rights Cases*, 109 U.S. at 11).

[273] *Id.* at 330-31.

[274] Davison M. Douglas, "*Corrigan v. Buckley*, 271 U.S. 323 (1926)" http://uscivilliberties.org/cases/3650-Corrigan-v-buckley-271-US-323-1926.html

[275] Barry Gilmore, "A Neglected Civil-Rights Landmark Case" (Apr. 30, 2008) http://progressive.org/mp_gilmore043008. Twenty-two years later, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court still found covenants per se did not violate the Constitution due to want of state action. *Id.* at 13 (citing *Corrigan*, 271 U.S. at 330-31). However, because the state "made available . . . the full coercive power of government to deny [property rights] on the grounds of race or color" through the state's courts, the equal protection guarantee was not satisfied. *Id.* at 19-20. *See* Rubin, "Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law" at 497.

[276] 273 U.S. 668 (1927).

[277] 158 La. 439, 441, 104 So. 200, 200 (1925); *see Shelley v. Kraemer*, 334 U.S. 1, 12 (1948).

[278] *Buchanan v. Warley*, 245 U.S. 60 (1917).

[279] Ragan, "Mr. Justice Sanford" at 87.

[280] *Id.*

[281] Toast, Tennessee Bar Association (May 26, 1911).

[282] Noone, "Edward Terry Sanford: Gentleman, Scholar, Lawyer, Jurist" at 37.

[283] Address, Proceedings of the Annual Session of the Bar Association of Tennessee (June 1923). *See* "President in Big Foursome: Harding Finishes a Net 90 in Tourney of Press Golf Club," *St. Petersburg Times* (May 23, 1923).

[284] William Rule, "The New Supreme Court Justice," *The New York Times* (Feb. 4, 1923).

[285] "Final Tribute To Justice Sanford," *Altoona* (Penn.) *Mirror* (Mar. 10, 1930).

[286] *Oakland* (Cal.) *Tribune* (May 8, 1929) at 2.

[287] Campbell, **Four Score Forgotten Men** at 357.

[288] Noone, "Edward Terry Sanford: Gentleman, Scholar, Lawyer, Jurist" at 38.

[289] John W. Green, "Some Judges of the United States District Court of Tennessee (1878-1939)," 18 *Tenn. L. Rev.* 221 (1943-1945) at 238.

[290] James A. Fowler, "Mr. Justice Edward Terry Sanford," 17 *A.B.A.J.* (1931) at 233.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Reflecting more than a century ago on elections in the United States, James Bryce observed in **The American Commonwealth** that Europeans "are struck, by the faults of a plan which plunges the nation into a whirlpool of excitement once every four years, and commits the headship of the state to a party leader chosen for a short period." But "there is another aspect in which the presidential election may be regarded, and one whose importance is better appreciated in America than in Europe," he continued. "The election is a solemn periodical appeal to the nation to review its condition, the way in which its business has been carried on, [and the] conduct of the two great parties. It stirs and rouses the nation as nothing else does, forces everyone not merely to think about public affairs but to decide how he judges the parties. It is a direct expression of the will of voters, a force before which everything must bow."[1]

As the quadrennial "whirlpool of excitement" began to swirl for election of a President in 2016, Americans were reminded of a notable silence in the Constitution: While the framers were careful to include methods for *electing* Representatives (by the people), Senators (by state legislatures), and the President (by the virtual assembly of what has come to be known as the Electoral College), they included nothing about narrowing the field or *selecting* candidates for those offices. Partly this omission was as much the result of a concern about the corrosive effects of political parties—the "violence of faction,"[2] as James Madison called it in 1787, or the "spirit of party" that President George Washington counseled against in his Farewell Address in 1796, as he "decline[d] being considered among the number of those out of whom a choice [of a successor] is to be made." And partly it was a hope that the new constitutional system would minimize the strength of parties that indeed were emerging.[3]

Those parties, which have been labeled "endogenous institutions,"[4] formed for at least two reasons. First, parties were vote-generating machines, essential components for any system founded on government "by the consent of the governed" where marshalling a majority in an election determined the answer to the important question of who was to govern. Second, in the American context, parties proved to be necessary for effective

government. That is, in a polity constructed around the prudence of dispersed power as reflected in the Constitution's nod to the twin principles of separation of powers and federalism, parties became centripetal mechanisms to pull together some of what the Constitution had divided. Parties thus enabled like-minded individuals, provided they held enough offices, to move public policy in a desired direction.

Elections in turn have given rise to various devices over time to supply names for the ballot. At the Presidential level, early nominating procedures were vastly different from what one sees today. By 1800, party caucuses in Congress recommended Presidential nominees to the state legislatures, which in most states in turn directly chose members of the Electoral College. In 1832, the new Anti-Masonic party tried an alternative nominating device—the convention. In this instance, necessity was truly the mother of invention in that, with no substantial congressional representation, Anti-Masonics resorted to a meeting outside Congress that convened in a Baltimore saloon. Members of the new Whig party did the same thing and even met in the same saloon. A gathering composed of delegates of the state parties who had been selected by local party leaders impressed many observers as an ideal way of choosing a candidate who could in turn rally widespread support. Democrats were convinced and so also convened in Baltimore to re-nominate Andrew Jackson for a second term.[5]

Although the convention as a nominating device has persisted, it has been only since the 1970s that ordinary voters in most states have had a major say in the selection of Presidential nominees. By the 1860s, for example, delegates to the national conventions were selected by state party chieftains. Moreover, national conventions for both Democrats and Republicans often required multiple ballots to choose a nominee, sometimes with the choice being made behind the scenes by brokers in the proverbial smoke-filled room. To no one's surprise, this system made Presidential candidates acutely sensitive to the needs and wishes of state party organizations. (The record for multiple convention balloting remains held by the Democratic convention of 1924, at which John W. Davis was nominated for President on the 103rd ballot.)[6]

It was against this backdrop of leadership-directed conventions that the Presidential primary emerged. Progressive era leaders such as Senators Robert La Follette of Wisconsin and Hiram Johnson of California demanded a larger role for the people in the nomination process, whereby the voters would be empowered to select delegates to the national party convention and in the process to express a preference for their party's Presidential nominee. The idea was contagious. As early as 1912, nearly one-third of the states provided for some kind of popular election of convention delegates. By 1916, half the states had a Democratic or Republican Presidential primary, and a few had both. Among Democrats, fifty-four percent of the convention delegates were chosen by primaries in 1916, a figure that would not be surpassed until 1972. For Republicans, fifty-nine percent of the delegates were the products of primaries, a proportion not exceeded until 1976.[7]

Still, popular participation went only so far, as most primaries did not generate binding results. Party leaders influenced how delegates actually voted. Theodore Roosevelt learned this fact the hard way. In 1912, forty-two percent of the delegates for the Republican national convention were chosen in primaries. "TR" won nine of the ten primaries he entered, including the one in incumbent President William Howard Taft's home state of Ohio, but Taft got the nomination.

As the Progressive movement itself declined nationally after 1920, states began to abandon the primary as a delegate selection device. By 1936, only forty percent of the

convention delegates of the two major parties were chosen in primaries. Thus, during the first two-thirds of the twentieth century, primaries were *a* route to the nomination, but by no means *the* route. They were no substitute for careful cultivation of state party leaders. For example, in 1952 Tennessee Senator Estes Kefauver entered thirteen of the seventeen Democratic primaries, a large number for that day. He won twelve of the thirteen, and the party nominated Adlai Stevenson.[8] Events on the Republican side that year very probably inclined newly elected President Dwight Eisenhower later to choose California Governor Earl Warren (who himself had been a Presidential contender)[9] to head the Supreme Court following the death of Chief Justice Fred Vinson in 1953. It had been Warren, after all, "who was primarily responsible for swinging all but eight of California's seventy-member delegation at the Nominating Convention to Eisenhower rather than to Senator Robert A. Taft at a particularly critical stage in the jockeying that involved the seating of certain contested Southern delegations."[10]

The strategy for those aspiring to the Presidency became one of picking and choosing primaries carefully. In 1960, John Kennedy entered and won the primary in West Virginia, an overwhelmingly Protestant state, as a way of refuting the conventional wisdom that a Roman Catholic could not be elected President.[11] Until the 1970s, primaries mainly were seen by both candidates and state party leaders as devices to confirm consensus within a party. Few viewed the primary as a tool to forge such a consensus. That had to be done before the primary season.

An entirely different world of Presidential nominating politics emerged after 1968. It was in that year that Vice President Hubert H. Humphrey, the Democratic nominee, became the last Presidential candidate of either major party who did not enter a single Presidential primary in the year he was nominated. The ensuing controversy among Democrats witnessed the speedy rebirth and expansion of the La Follette-Johnson notion of popular control of the candidate-selection process. While Presidential and Vice Presidential candidates would still be designated by votes in convention, rules adopted first by Democrats and then by Republicans transformed the nomination process into one in which, by the 1970s, candidates competed for convention delegates in state Presidential primaries (or in Presidential caucuses) across the land. What had begun in the Progressive era as a means to transform Presidential politics by empowering voters finally swept the nation. This new political world was one that even someone as perceptive as James Bryce could never have imagined as the twentieth century began. Under the arrangement that had existed for most of American political history after 1800, party elites narrowed choices for the electorate. Today, that order of influence has become exactly inverted: the electorate, speaking through primaries and caucuses, narrows the choices for party elites. Thus, as this extra-constitutional process has evolved, an American Presidential election now encompasses two very distinct phases. There is first the delegate selection phase where the struggle is *within* a party. This stage is then followed by the general election phase where the struggle is *between* parties.

While the High Court has sometimes been an issue in Presidential elections—one thinks of 1936, 1968, and 1980 as especially notable examples—it has been less common for the Court to be a focus in the delegate selection or nomination stage of the process. Yet, even months before any votes were cast in the primaries and caucuses in 2016, some Democratic and Republican Presidential wannabes pointed to decisions by the Court that they abhorred and reminded party faithful of the impact the next President might have on the nation through appointments to the Bench, a realization only heightened after February 13, 2016, upon the news of Justice Antonin Scalia's death.

Even before that tragic event, candidates recognized that the composition of the Bench had remained unchanged for approximately a decade, historically an unusually long interval without a vacancy. Moreover, early references to the Court in the first part of the election cycle portended a similar presence in the second. The rhetoric once more served as a reminder—if one was needed—that the Court is never very far from the center of politics, a reality confirmed by recent books about the Justices and their work.

For an example, one need only to recall some of the effects on the Court of the Presidential election of 1992, after Governor Bill Clinton of Arkansas finished first among several Democratic contenders[12] and then denied a second term to the Republican nominee, President George H. W. Bush,[13] who had made two appointments to the Court: David H. Souter in 1990 and Clarence Thomas in 1992. During the fall campaign, Clinton had indicated a preference for Supreme Court nominees with stature in public life who had run for election, not necessarily those with prior judicial service. The forty-second President soon had his first opportunity when, on March 19, barely two months after the inauguration, Justice Byron White made known his intention to retire.

After reviewing multiple candidates in a remarkably public process during which, according to perhaps the most detailed account, the President offered White's seat to at least three men,[14] Clinton revealed his choice on June 14: Judge Ruth Bader Ginsburg of the Court of Appeals for the District of Columbia Circuit. Hers had been one of President Jimmy Carter's last nominations to the federal bench in 1980, and her appointment would be the first to the Supreme Court by a Democratic President since Lyndon Johnson picked Thurgood Marshall twenty-six years before.[15]

While Ginsburg had never held public office, she had surely been in public life. As co-founder and director of the Women's Rights Project of the American Civil Liberties Union, as well as a law school professor at Columbia University, she had participated in thirty-five cases in the Supreme Court, argued six, and won five. Among nominees to the High Court, perhaps only Thurgood Marshall surpassed her experience in the creative use of constitutional law to effect social change. After four days of hearings in the Judiciary Committee in July, the full Senate confirmed her by a vote of 96–3, and on August 10 she took the constitutional and judicial oaths as the 107th Justice.

Now in her twenty-second year of service on the Supreme Bench, she is the focus of **The Legacy of Ruth Bader Ginsburg**, a wide-ranging commemorative collection of eighteen essays by some eighteen authors[16] from several disciplinary perspectives, edited by Scott Dodson of the University of California Hastings College of Law.[17] As with many anthologies of essays, this one lacks a unifying theme or thesis except for the general focus throughout on the Justice and/or issues with which she has long been closely identified. The result is a useful examination both of her record as a Justice and her earlier path-marking work as a litigator. Yet to appreciate fully the professional contributions Justice Ginsburg has made in these dual roles, it may be helpful to review some context.

Because the Constitution has been the battleground for many decades in the struggle for racial equality, the casual reader might suppose that gender equality has occupied the attention of Congress and the courts for just as long. It has not. While there have been opponents of gender-based discrimination since the earliest years of the Republic, for a long time Justices of the Supreme Court did not seem to be among them. As late as 1961 (seven years after *Brown v. Board of Education*'s historic ruling against racial segregation in public education[18] and the first year of the launch of President John Kennedy's "New Frontier"), the Supreme

Court unanimously upheld a Florida law that excluded women from jury duty unless they affirmatively requested to be added to the list of potential jurors. "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men," wrote Justice John Harlan, "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[19] Public policies of both state and federal governments routinely took gender into account. Indeed, as of 1973, according to one source, some 900 gender-based federal laws were still on the books.[20] Ginsburg herself had been turned down for a Supreme Court clerkship in 1960 by Justice Felix Frankfurter, who is supposed to have explained to her professor at Harvard that he just wasn't ready to hire a woman.[21]

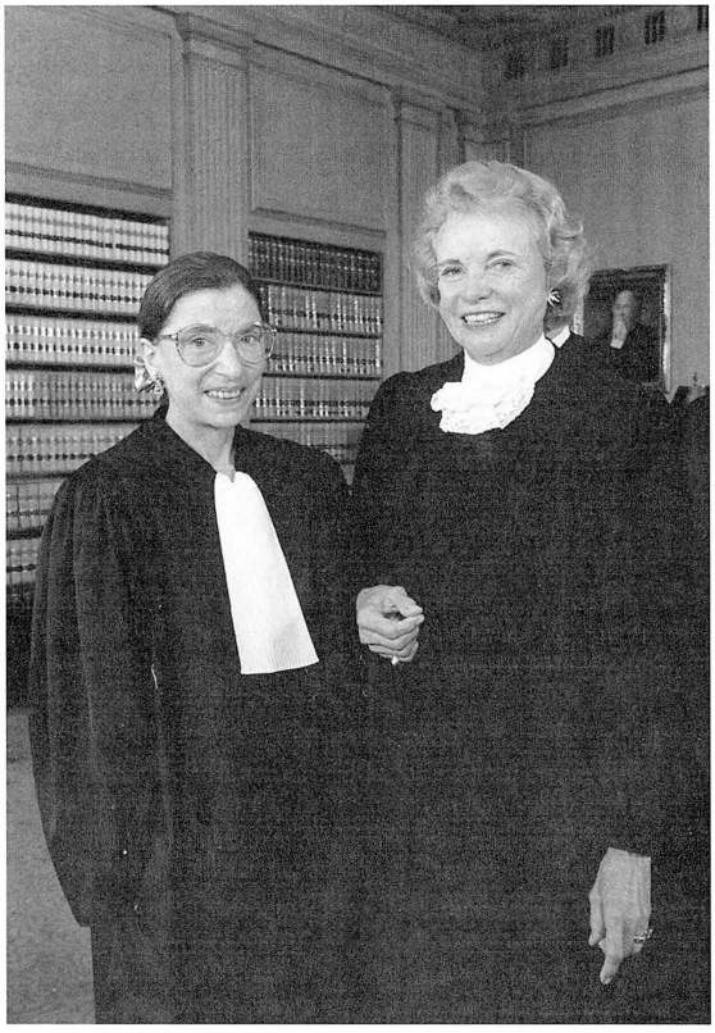
It is against that cultural and legal background that the volume assesses Ginsburg's professional life. The combination of her efforts and achievements, as Dodson explains with a coastal metaphor, has done much to erode "the sands of antiquated notions of a woman's place in society and in the eyes of the law."[22]

Yet, Dodson is quick to remind the reader that Ginsburg is "no one-trick pony. As the resident proceduralist on the Court, her opinions have fundamentally affected matters of federal jurisdiction and jurisdiction. She also has written notable opinions in the fields of federalism, international law, criminal procedure, racial equality, abortion, congressional power, and even tax. In some ways her impact in these areas is even more important to celebrate, if only because it has been overshadowed by her triumphs in gender equality."[23]

Appropriately, Dodson's collection includes a compact case study entitled "Before *Frontiero* There Was *Reed*" by University of Iowa historian Linda K. Kerber. Kerber's essay examines Ginsburg's role in *Reed v. Reed*, a seminal and unanimous Supreme Court decision that in many casebooks has strangely been all but relegated to brief mention in a footnote.[24] The litigation began after Richard Reed, the sixteen-year-old son of Cecil and Sally Reed committed suicide. Both Cecil and Sally Reed, by now divorced, applied to the court individually to administer the small estate. Under Idaho law, when a person died intestate, as had Richard Reed, the probate court appointed an administrator for the estate. In choosing among equally qualified persons for that responsibility, however, state law directed the court to prefer a male to a female. Similar statutes were in effect in the District of Columbia and several other states. Sally Reed took exception to the rule, and with the help of attorney Allen Derr, a general practitioner in Boise, her case advanced from the Supreme Court of Idaho to the United States Supreme Court.

According to Kerber, it was at this point that Professor Ginsburg at Columbia University's law school took note of the case and, with the help of Melvin Wulf of the American Civil Liberties Union (ACLU), undertook it on Sally Reed's behalf. Derr was agreeable to Ginsburg's principal authorship of the merits brief, although he argued the case before the Justices. The decision, which Ginsburg later described as a "turning point,"[25] struck down the gender preference in the statute as arbitrary. "But because *Reed* offered no broader mandate," Kerber notes, "more than four decades of often bitter argument have followed, with legislators and courts having to define what constitutes sex discrimination point by point, issue by issue, case by case."[26]

As Kerber's title anticipates, one of those subsequent cases was *Frontiero v. Richardson*,[27] decided just two years after



Justice Ginsburg (left) is the focus of *The Legacy of Ruth Bader Ginsburg*, a wide-ranging commemorative collection of eighteen essays by some eighteen authors from several disciplinary perspectives, edited by Scott Dodson of the University of California Hastings College of Law. She and Sandra Day O'Connor (right) are both profiled in Linda Hirshman's *Sisters in Law*, a new joint biography.

Reed. It involved a successful challenge to federal statutes that embodied a gender-based policy for determining dependent allowances for military personnel, and it came within a single vote of declaring gender to be a "suspect classification" in the nomenclature of the Court's Fourteenth Amendment's equal protection jurisprudence.[28] In contrast to *Reed*, however, *Frontiero* was brought not under the Fourteenth but instead under the due process clause of the Fifth Amendment. The Fourteenth by its own wording applies to states, while the Fifth Amendment has always limited actions by the national government. Yet, at least since *Bolling v. Sharpe*,[29] where the Court invalidated racially segregated schools in the District of Columbia, the Justices have recognized what amounts to an equal protection dimension within the Fifth Amendment's due process clause. Nonetheless, despite the visibility that time has attached to *Frontiero*, it is *Reed*—not the higher profile *Frontiero*—that remains particularly distinctive in that it marked the

first time that the Court invalidated a gender distinction as a violation of the Constitution. As such, it is *Reed*, not *Frontiero* or some other case loaded with greater social heft, that seems fairly to mark the beginning of successful constitutional challengers at the High Court against gender discrimination.

In a commemorative volume on any Justice, one would expect to find an entry on the appointment itself, and in this respect Dodson does not disappoint. Indeed, what the reader discovers in "Reflections on the Confirmation Journey of Ruth Bader Ginsburg, Summer 1993" is a unique perspective on her sojourn in the Senate by Robert A. Katzmann, who is now Chief Judge of the United States Court of Appeals for the Second Circuit. His recollection of his role in her confirmation process is offered admittedly from the perspective of a true admirer:

> In a life of extraordinary accomplishment, the justice has assumed iconic status for the American public. Greeting cards bear her likeness, operas are written about her, T-shirts with her images are popular gifts, Ruth Bader Ginsburg bobbleheads are hot commodities, a fan website records her wisdom. In a land where the loudest and flashiest often obtain the most celebrity attention, Ruth Ginsburg shares that stage of fame by dint of her intellect, achievement, and vision.[30]

Such esteem is presumably mutually felt. That Justice Ginsburg traveled to New York City in 1999 to administer the oath of office to Katzmann after President Clinton named him to the federal bench is entirely understandable in light of the fact that, at U. S Senator Daniel Moynihan's request in 1993, Katzmann, then a professor at Georgetown University and a fellow at the Brookings Institution, agreed to be "special counsel pro bono to him and then-Judge Ginsburg" to help her navigate successfully the confirmation process in the Senate." Katzmann thus became part of what he terms "Team Ginsburg."[31] Being fully aware of the world of "spin and handlers" in Washington, Senator Moynihan was very direct in his instructions to Katzmann: "Make sure that she is allowed to be herself." Given that Moynihan had to balance the demands of promoting the nomination with his other legislative and constituent duties, Katzmann in effect became eyes and ears for Ginsburg's Senate sponsor not only at White House strategy sessions that Katzmann attended but also in her meetings with individual senators as she made the rounds on Capitol Hill in what became a courtship process. Throughout, it was Katzmann's duty to communicate to Moynihan's colleagues "the importance of Ginsburg's nomination to him and his commitment to her."[32]

Yet Katzmann makes clear that the nominee remained "a person of independent mind and spirit" in the process. "As testament to her principles and loyalty, I well recall Judge Ginsburg's insistence that in meeting with senators or in the hearings, she would not distance herself from her past life as a litigator at the Women's Rights Project at the ACLU, or her opinions, or any of the organizations with which she had been affiliated. She was ready to be challenged alone, in front of a panel judging her in a highly televised and consequential setting."[33]

That "past life" certainly could have been a potential stumbling block to her confirmation, given the national political saliency of the abortion issue by the time of her nomination to the Supreme Court. As noted not in Katzmann's essay but in Linda Hirshman's **Sisters in Law** (that focuses both on Justice Ginsburg and on Justice Sandra Day O'Connor), one learns that, even though the ACLU was "legal counsel in one of the two companion cases that go by the name of *Roe* v. *Wade*, . . . Ginsburg was protected from the abortion problem for a crass reason. Aryeh Neier [then executive director of the ACLU] was eager to tap into the resources of the

Ford Foundation for the ACLU, and, he says, Ford, while explicitly open to appeals from the burgeoning feminist movement, would not fund anything related to abortion. Ginsburg's separation from the abortion issue was thus an accident of history but one with profound consequences. She might never have been confirmed for the Supreme Court had she been involved in the ACLU's extensive efforts to secure abortion rights for women. On the flip side, the abortion litigation, which was spun off to the nascent ACLU Reproductive Freedom Project, did not benefit from Ginsburg's theoretical grounding, discipline, and strategic bent."[34]

As appeals judges move to the Supreme Court from one of the circuit benches, as Ginsburg did, one difference a new Justice surely notices sooner or later is the presence of a far larger number of cases on the docket arising under the commerce clause from section eight of the Constitution's Article One. Its twenty-one words—"The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"—have been both a keystone of the federal fabric of the nation and a prolific source of litigation in the High Court since the Marshall and Taney eras. Justice Robert H. Jackson may have been only mildly exaggerating in his appraisal of the Philadelphia Convention when he wrote for a seven-Justice majority in 1949 that the "desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished."[35]

This constitutional provision is now a central focus of **The Passenger Cases and the Commerce Clause** by Tony Allan Freyer, a legal historian at the University of Alabama School of Law.[36] His book is among the latest to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this succession of case studies now claims about five dozen titles, almost all of them treating decisions by the United States Supreme Court. The Kansas series fits comfortably into an established scholarly category that has been an instructive part of literature on the judicial process for more than five decades.[37]

Professor Freyer's addition adheres to the organization and pursues the objectives of most of the other books in this group. Like them, sadly his volume lacks footnotes or endnotes but it does include a thorough bibliographical essay, and, essential for a case study, a helpful chronology. (While footnotes or endnotes are not usually important for classroom use, their presence would greatly aid use of the bibliographical essay for general readers and scholars, with probably no loss of appeal to a wider audience.).

Among the Constitution's many provisions, the commerce clause is distinctive as one of the few that has dual dimensions or ways of being. At one level, its wording confers an affirmative legislative power. At this level, the clause did not fully become a constitutional battleground until the late 1800s when a truly national economy, tied together by telegraph and telephone and the railroads, had developed. Then, two major questions arose. What did the word "commerce" actually encompass? Similarly, could the commerce power touch matters and relationships traditionally regarded as local in nature and within the purview of the states? Judicial answers to these questions have greatly affected national policy for well over a century.

Yet, alongside the importance of congressional enactments is the reality that most legislation in the United States comes from state and local governments. These laws are examples of the police power—that general, residual, and regulatory authority retained by

the states under the Constitution. Is such legislation valid when it also regulates commerce "among the several States" or in some way affects that commerce? Such questions have long implicated the commerce clause in its second or dormant or negative dimension as a restraint on state authority, and those questions date from the early years of the Republic. "The simple fact," Justice Anthony Kennedy has explained, "was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question. The Court's initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so."[38]

It is one important piece of commerce clause history relating mainly to this second dimension that Freyer's book engages. As a case study, his work has particular value because it opens multiple windows into several venues and subjects from the mid-nineteenth century—specifically the Court and its Justices, and state and national politics, as well as cultural divisions in a polarized America over free blacks, the future of slavery, and famine-induced immigration of whites from Ireland and the German states. Freyer also shows how the litigation ultimately affected policy responses to immigration and even the Compromise of 1850, as the issue of slavery in the western territories loomed ever larger. One suspects, however, that tighter editing by Hoffer and Hull or someone at the Kansas Press would have made the book's most important findings somewhat more prominent. Still the author places the Passenger Cases in a social, historical, and legal context by guiding the reader through what may well be several tracts of unfamiliar territory. In doing so, the volume makes a substantial contribution to Supreme Court history during a complex period of national life.

The litigation popularly known as the Passenger Cases[39] arose as challenges by shippers and others to alien tax laws that had been enacted by the states of New York and Massachusetts, where the proceeds were earmarked to support the Maritime [charity] Hospital on Staten Island in New York and to benefit programs for the destitute in Massachusetts. These statutes existed alongside the congressionally passed Passenger Act of 1819 that, although "poorly enforced, instituted regulations governing immigrant ships that included data collection" that documented the steadily rising number of immigrants entering the United States in both locations, with Boston and New York each far surpassing the numbers of immigrants arriving in other port cities such as Baltimore and Philadelphia.[40] These influxes sparked "fears of disease, competition for jobs, and radical politics" that made both New York and Massachusetts "home to the American Party (aka the 'Know Nothings') in the coming years."[41]

Hoping to avoid paying such taxes, shippers claimed not that the taxes imposed an economic burden but that they "conflicted with the federal passenger law, which regulated the same people aboard ship."[42] Complicating the cases almost from the beginning, however, was not the commerce clause itself but a subject completely absent from the state tax laws—slavery. "[E]veryone involved, from the legislators who framed the acts to the lawyers, litigants, and judges who adjudicated the suits, knew that slavery lurked in the shadows of the cases. If a state legislature could impose a tax on incoming passengers at its ports, could it also regulate slavery out of existence? Were slaves persons or objects in the stream of commerce?"[43]

Moreover, if slavery lurked silently within the shadows of the litigation, the litigation plainly lay within the long shadow cast by Chief Justice John Marshall's opinion in *Gibbons v. Ogden*, in which the Court struck down a New York steamboat monopoly because of its conflict with a coasting

license issued to one of the parties under a federal statute.[44] While Marshall could have simply and briefly explained the Court's ruling on that ground, he nonetheless went out of his way to provide an exceedingly broad reading of Congress's commerce power, hinting strongly with major ramifications that the national commerce power was not one, like the taxing power, held concurrently with the states, but one possessed exclusively by Congress. At the same time, Marshall seemed to countenance state and local regulations that bore on commerce, suggesting that such regulations were not themselves regulations of commerce and were therefore permissible.

The principal actors in the Passenger Cases were also fully cognizant of *New York v. Miln*,[45] which had begun late in the Marshall era but was not decided until 1837, after Roger B. Taney had succeeded Marshall as Chief Justice. In this case, the Court, 6–1, issued a confused set of opinions that upheld as a police-power regulation a state law requiring a ship's master on incoming vessels to furnish information concerning the ship's passengers and to post security for indigents, among other duties. Justice Smith Thompson, originally assigned the task of writing the opinion, treated the law as a police measure and permissible—in the absence of national action. Because four members of the Court balked at Thompson's analysis, however, Justice Philip Barbour wrote an opinion holding the state law valid purely as a police measure, but he added comments that persons were not "subjects of commerce," a view highly pleasing to the slave states and their allies.

Two years before the Passenger Cases came down, the equally confused posture in the License Cases[46] revealed the Court's apparent inability to settle on any one view of the commerce power. Even though the Court unanimously upheld the state laws in question that regulated imported liquor, it was difficult to understand why. Taney and at least three other Justices reasoned that Congress's power over commerce was not exclusive. Others insisted that the laws affected only internal commerce and derived from the state police power and so were not regulations of commerce "among the states."

Any observer in 1849 looking to the Court for clarification when the decision in the Passenger Cases was announced, however, was surely disappointed. The cases, after all, had been argued on three different occasions over a four-year period amid a Bench with changing personnel that was also plagued by absences. While the Court struck down the state tax laws 5–4, there were eight opinions. As Freyer charitably explains:

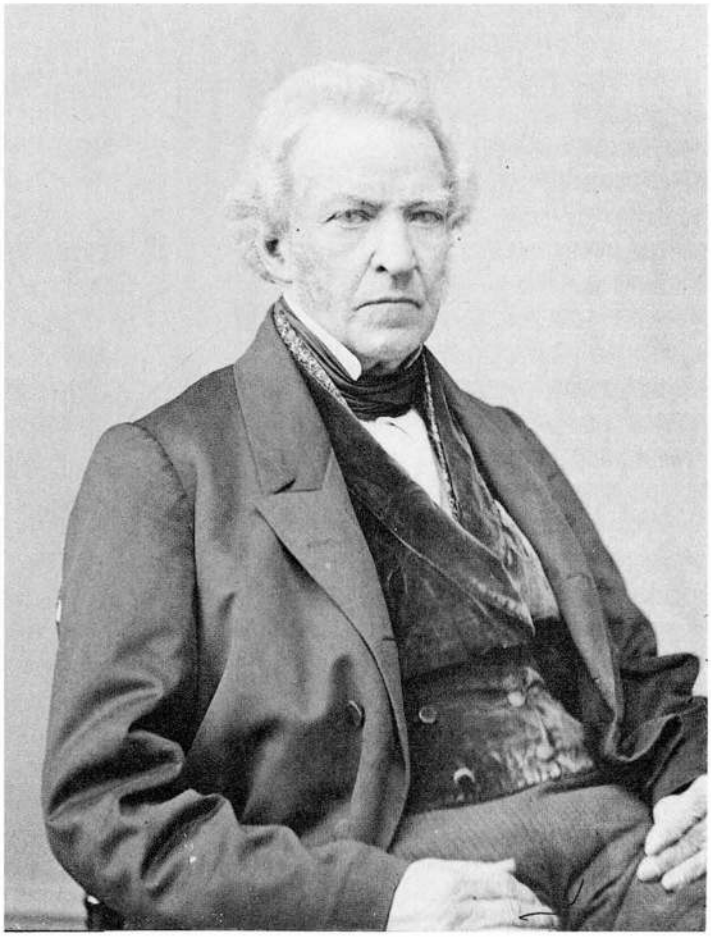
> [T]he majority thus applied diverse reasoning. Four justices applied Marshall's supremacy doctrine in *Gibbons*, while [Justice John] McKinley rested his fifth vote on *Brown v. Maryland*. . . . [Justice James] Wayne's opinion also showed that the majority carefully distinguished between federal supremacy promoting admissions more than exclusion of white immigrants and Southern states' police powers excluding free blacks. Wayne's opinion repeated the . . . admonition that the dissenters' fears of federal compulsion driving free blacks into the South were groundless.

Were that to happen, Wayne added, they would find that they "have a guard against it in the Constitution, making it altogether unnecessary for them to resort to the extreme law of nations implicating secession for their protection and preservation."[47]

In a link to the early years of the Taney Court, the decision also provided what Justice James M. Wayne called a "proper opportunity" to do something he had long wished to do: to indicate officially for the record that Justice Philip Barbour's persons-commerce

distinction in *Miln* "had not the assent of a . . . majority of the judges who concurred in the judgment" in that case. Taney and Wayne then defended their individual (and conflicting) recollections, although each "noted the fluid circumstances that confused the vote in *Miln*."[48] Nonetheless, despite the resulting lack of a centralizing clarity in the display of opinions, Freyer accepts lead anti-tax counsel Daniel Webster's assessment that the Passenger Cases amounted to "the most significant commerce power decision since *Gibbons*."[49]

It is surely not a characteristic unique to case studies, but one cannot finish reading a book like **The Passenger Cases** without noticing a few almost uncanny parallels between the conflicts of that bygone era and those of contemporary America where immigration and related security and economic concerns have again resurfaced as salient political issues. The same generalization may be made with respect to **Congress, the Supreme Court, and Religious Liberty**, by political scientist Jerold Waltman, who teaches at Baylor University.[50] This compact volume examines the circumstances that led to the Supreme Court's ruling in *City of Boerne v. Flores*,[51] a decision that



Tony Allen Freyer's new book, *The Passenger Cases and the Commerce Clause*, examines the social, historical, and legal context of that landmark 1847 case, and makes a substantial contribution to Supreme Court history by guiding the reader through a complex period of national life. Justice James Moore Wayne (above) opposed the exercise of state power in the *Passenger Cases*, which involved state attempts to regulate immigration by taxing newcomers, because he thought the state laws conflicted with federal supremacy.

remarkably not only involved the First Amendment's free exercise clause but also sparked a political controversy that in turn spawned an act of Congress along with a perhaps still unresolved tussle over the finality of Supreme Court decisions.

Throughout, Waltman's book is engaging, well-organized, and well-developed, one that should be a model for any author beginning a case study, especially on relatively recent litigation. The book succeeds in part because of the author's productive use not only of the expected published and archival sources but also of oral history, with Waltman able to meet with various participants in the case, many of whom were easily accessible, and, by Texas standards at least, not that far away from the author's home campus.[52] In short, he had opportunities and an availability of sources that the advance of time denied to Freyer for his look back at the commerce clause in the mid-nineteenth century.

As Waltman explains, the book pursues two objectives.

> The first is to faithfully tell the history and background of the case. It never hurts to be reminded that most Supreme Court cases originate from real life human problems. There are people with names, faces, and deep personal concerns connected with the deliberations about constitutional doctrine. This is one of those cases, in particular where it is impossible to even consider casting it as a tale of heroes versus villains.[53]

His second goal is "to place the case within the context of constitutional law." This objective links the case not merely to one of the Constitution's three guarantees of religious freedom[54] but also to the "twin issues of the interpretive power of the Supreme Court and federalism."[55]

Recall that an appreciation of the Passenger Cases in Freyer's book necessitated a look at the Court's earlier interpretation of the commerce clause. Similarly, Waltman understands that a full grasp of *City of Boerne* requires a look at what the Court had done with the free exercise clause before *City of Boerne* came down.

While religious persecution—that is, penalizing people *because of* their religious beliefs—was undoubtedly the most obvious evil the free exercise clause was intended to prevent when it became part of the Constitution in 1791, debate about this part of the First Amendment in the modern era has most often encompassed laws of general application that are religiously neutral in their content but in their application work a hardship on members of one faith or another. A law might forbid believers from doing what their faith requires, or it might require them to do something their faith forbids. Does the free exercise clause entitle them to a faith-based exemption from an otherwise valid law? The answer given to that question has largely followed from one's perception of the free exercise clause itself. Does it embody merely a nondiscrimination principle that protects believers from hostile legislation, or does it also elevate religious practice to a preferred status?

This tension lay at the heart of the first major decision by the High Court under the free exercise clause, when in *Reynolds v. United States*,[56] it upheld application of a law criminalizing polygamy in federal territories to a Mormon whose religion included the practice of polygamy. Chief Justice Waite emphasized the sovereignty of the individual over religious belief but the sovereignty of the state over conduct, a distinction that prevailed for over eight decades. "Congress was deprived of all legislative power over mere opinion," he wrote, "but was left free to reach actions which were in violation of social duties, or subversive of good order."[57]

The first occasion in which the Supreme Court, resting its decision squarely on the free exercise clause, ordered a faith-based exemption to an otherwise valid policy came

in *Sherbert v. Verner* in 1963.[58] In this case, South Carolina had denied unemployment compensation to a Seventh-Day Adventist who had lost her job when she refused to work on Saturday. No one claimed that South Carolina set out to persecute members of this particular church, but, as applied to her, the policy required her to choose between a job and religious disobedience on the one hand, and no compensation and religious obedience on the other. A majority of the Justices found the policy unconstitutional as applied to her because it unduly burdened her faith. The state had not convinced the Justices that it had compelling reasons for denying the unemployment benefits. Faith trumped law.

This decision encouraged adjudication of other free exercise claims which, however, only sometimes prevailed, especially when federal law was challenged. The Court appeared reluctant to apply the free exercise clause with full force. Then, in 1990, five Justices not only refrained from expanding the *Sherbert* principle, but they took a step that essentially confined *Sherbert* to its facts. In *Employment Division v. Smith*,[59] the Court ruled against two drug counselors who were fired from their jobs after they ingested the hallucinogen peyote as part of a religious ritual of the Native American Church. Oregon officials had denied them unemployment compensation because their loss of employment resulted from misconduct. Under state law, peyote was a controlled substance, and its use was forbidden, even for religious purposes. Even though the two ex-counselors cited scientific and anthropological evidence that the sacramental use of peyote was an ancient practice and was not harmful, the Court concluded that, when action based on religious belief runs afoul of a valid law of general application (even when, as in this case, the litigants had not been criminally charged), the latter prevails. Law trumped faith.[60]

Smith was widely criticized by religious organizations and civil liberties groups, and Congress responded. Believing that the Court in *Smith* made it too easy for government to infringe religious liberty, Congress in 1993 passed the Religious Freedom Restoration Act—unanimously in the House and 97–3 in the Senate, after which President Bill Clinton signed the measure into law. Resting on Congress's enforcement powers under Section 5 of the Fourteenth Amendment, RFRA, as it quickly came to be known, sought to reverse *Smith* and to restore *Sherbert v. Verner* fully in situations where laws of general application conflicted with religious liberty. A test of RFRA did not take long to materialize, and it was at this point that the story Waldman relates began in the perhaps unlikely setting of Boerne, Texas, a town of about 12,000, a half-hour's drive northwest of Antonio along Interstate 10.

St. Peter's Roman Catholic Church in Boerne faced an enviable problem: an overcrowded sanctuary. What was to be done? Should the congregation relocate and construct a more adequate building or enlarge the existing structure that seated about 230 worshippers and dated from its construction by parishioners in 1923?[61] After much sometimes acrimonious deliberation, the decision was made to enlarge the existing mission-style edifice while preserving the most architecturally significant parts of the original structure.[62] Because the church lay within a historic preservation distinct, however, any changes to the building required approval of the Boerne Historic Landmark Commission. As matters developed, the question of enlargement became not merely a matter of dispute within the church but one that engaged the larger community, as people aligned with one side or the other. After the Historic Landmark Commission refused to approve the enlargement plan, Boerne's city council affirmed its decision. As Waldman describes the imbroglio, "[t]hroughout] these deliberations, both sides offered various 'compromises,' all of which were regularly rejected by the other."[63]

It was then that an "exasperated"[64] Archdiocese of San Antonio filed suit under RFRA in the San Antonio Division of the U.S. District Court for the Western District of Texas against the city.[65] The argument was that, because denial of the permit infringed religious liberty, the Landmark Commission and city council were required under RFRA to demonstrate a compelling interest or justification explaining why the church could not proceed with the building plans that it deemed central to its religious mission. In other words, the church insisted that RFRA placed it in a preferred positon, one that would not be enjoyed in similar circumstances by, say, a Wal-Mart or a Walgreen's that wanted to expand. In response, the city's attorneys decided to challenge the constitutionality of RFRA, thus initiating what Waldman describes as "a rather odd case."[66] As he explains, "what occurred here is not the normal case generated when the legislative branch passes a law that allegedly restricts individual rights, with the court then having to decide where the line is between public needs and individual rights. It is instead an unusual instance of Congress trying to force the court to recognize broader rights than it was willing to do."[67]

The district court agreed with the city's contention about RFRA, but, after the United States Court of Appeals for the Fifth Circuit reversed, the case moved to the Supreme Court in time for the 1996–1997 Term.

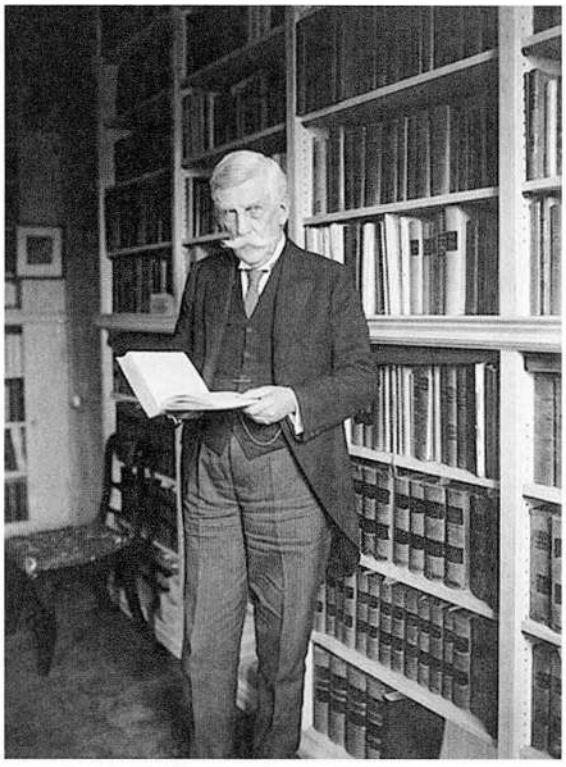
With a 6–3 vote and a principal opinion by Justice Anthony Kennedy, the Court ruled that Congress's noble intentions had exceeded its authority. *Smith* embodied the meaning of the free exercise clause, and, according to it, the church could claim no faith-based exception from the preservation ordinance. Because RFRA altered that meaning, the act was unconstitutional, at least as applied to state laws and policies.

Back in Boerne, however, despite the expenditure of much emotion, legal energy, time, and money, the opposing parties reached a compromise, one nearly identical to an earlier-floated proposal. "Important portions of the old church would be saved, most prominently its towers which face the street, but a new sanctuary would be added to it."[68] Yet even this plan was rejected by the Landmark Commission, but this time the city council overruled the commission. "With approval of the city now secured, construction began on the new church. Today the hybrid building garners mixed reviews. There is yet no plaque"[69] that commemorates the litigation.

Waltman notes three major effects wrought by the High Court's decision. First, "many states began enacting their own mini-RFRAs. Although they naturally varied somewhat the intent was the same: to restore the compelling interest test in free exercise cases involving state laws."[70]

Second, the decision sparked discussions in Congress about "how the decision might be circumvented."[71] The result was legislation in 2000, covering land use and prisoners, that was grounded not on Section 5 but on Congress's taxing and spending posers and the commerce clause. The Religious Land Use and Institutionalized Persons Act (RLUIPA), a much scaled-down version of a proposed Religious Liberty Protection Act that had foundered on legislative shoals, declares that no

> government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.[72]



***The Great Dissent*, by Thomas Healy, opens in the fall of 1919 in Oliver Wendell Holmes's study at his residence in Washington. The occasion was a visit from several colleagues from the Court who had anxiously called on Holmes to press him to withdraw or otherwise sharply modify the draft dissent he had circulated in *Abrams*. They were troubled by what Holmes had written, not only because they thought it was dangerous but because they found it fully inconsistent with what they expected from him.**

The law applies "even if the burden results from a rule of general applicability" and includes regulations by entities receiving federal funds and regulations that affect interstate commerce. With an opinion by Justice Ginsburg for a unanimous Bench, *Cutter v. Wilkinson*[73] upheld the statute against a facial challenge on establishment clause grounds.

Finally, *City of Boerne* contributed to a renewed discussion. Particularly among scholars, of a question that has resurfaced from time to time since the days of the Marshall Court: "whether the Supreme Court alone should be the authoritative and final interpreter of the Constitution."[74] If the debate continues, writes Waltman, "we may be witnessing the embryo of a new—actually an old—constitutional theory about the proper way separation of powers should work."[75]

In contrast to Waltman's book on *City of Boerne*, **The Great Dissent**, by Thomas Healy of Seton Hall University's law school, is not a case study but rather a strong example of intellectual history and a fascinating account of the development of the thinking of one person about freedom of speech.[76] The individual at the center of the volume is Justice Oliver Wendell Holmes, Jr., who sat on the Supreme Court from his appointment by Theodore Roosevelt as a member of the Fuller Court in 1902 until his retirement in 1932 during the administration of Herbert Hoover when Charles Evans Hughes was Chief Justice. The "great dissent" in play is Holmes's 1919 opinion in *Abrams v. United States*.[77] The Court's decision in

this case upheld application of the Sedition Act of 1918 that singled out for punishment any "disloyal, profane, scurrilous, or abusive language about the form of government, the Constitution, soldiers and sailors, flag or uniform of the armed forces," and in addition made unlawful any "word or act [favoring] the cause of the German Empire . . . or [opposing] the cause of the United States."[78] According to Justice John H. Clarke's opinion for seven members of the Court, pamphlets opposing the Allied intervention in Russia after the revolution of 1917 fell within its terms.

Joined by Justice Louis Brandeis, Justice Holmes argued instead for a broad reading of the First Amendment's guarantee of freedom of speech and for correspondingly tight limits on government's authority to punish speech. "Persecution for the expression of opinions seems to me perfectly logical," Holmes wrote.

> If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment . . .[79]

As if it were a play or a novel, Healy's book opens in the fall of 1919 in Holmes's study at his residence in Washington. The occasion was a visit from several colleagues from the Court who had anxiously called on Holmes to press him to withdraw or otherwise sharply modify the draft dissent he had circulated in *Abrams*. They were troubled by what Holmes had written, not only because they thought it was dangerous but because they found it fully inconsistent with what they expected from him. (Readers today are privy to this unusual visit thanks to notes made by future Secretary of State Dean Acheson who was then Holmes's "secretary" and who along with Holmes's wife Fanny was present that day.)[80]

Even though Holmes had introduced the seemingly speech-friendly "clear and present danger" test when he spoke for a unanimous Bench in *Schenck v. United States*[81] the previous March, that opinion had nonetheless affirmed Schenck's conviction under the Espionage Act of 1917[82] against a defense that Schenck's leaflets were protected speech under the First Amendment. Moreover, the essence of his dissent in *Abrams* was at variance with his opinion for the Court in *Patterson v. Colorado*[83] barely a decade earlier when he confined the guarantees of free speech and press to protections against prior restraints.

> [E]ven if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States, but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is

> "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.[84]

Aside from this, Holmes's colleagues were very much aware of his long-held position on judicial restraint—a position he had clearly articulated in many dissents—that, in a democracy, legislative majorities should only rarely be overruled by the Court. In short, Holmes seemed to be at odds with himself.

Explaining how Holmes came to this variance is the task Healy sets out to accomplish. His explanation is that, over a period of several years, an extraordinary intellectual transformation took place in this jurist, who was already well into his senior years. Thus, what the reader finds are instructive examples of openness, give-and-take, ample reading, correspondence, and conversations that cumulatively amounted to a kind of cross-pollination and a series of synergetic exchanges and adaptations that ultimately had profound effects. The list of individuals involved reads like a roster of the luminaries of his day, including Louis Brandeis, Zechariah Chafee, Jr., Herbert Croly, Felix Frankfurter, Learned Hand, Harold Laski, and Walter Lippmann.

At the real risk of overstatement, Healy maintains that the "centrality of free speech in our legal culture today . . . is due largely to his *Abrams* dissent."[85] Without doubt, prevailing views on freedom of speech today embody much of Holmes's thinking even as later Justices have added their own qualifications and expansions and in situations Holmes probably neither anticipated nor ever imagined. Yet, Holmes's influence stemmed not merely from the ideas in *this* dissent—after all, he expressed them elsewhere as well[86]—but also surely from the stature of the person who wrote them, someone who might fairly be regarded as having achieved true "folk hero" status by the third decade of the twentieth century. Moreover, the power of Holmes's ideas has also surely been a function of their utility to all varieties of people, causes, and points of view.

Healy properly insists that Holmes's dissent "endures on a deeper level as well. His metaphor of the marketplace of ideas and his concept of 'clear and present danger' have worked their way into our collective consciousness, becoming part of our language, our view of the world, and our identity as a nation. Without even knowing it, we have internalized his words and come to regard them as our own."[87]

Near the end of the volume, Healy reprints an exchange of letters between Zechariah Chafee, Jr., and Holmes that is a gem. Chafee had inquired of Holmes about the origin of "clear and present danger." Where had it come from, Chafee wanted to know? "The expression that you refer to," Holmes wrote in reply, "was not helped by any book that I know of. I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the earlier Paterson [sic] case, if that was the name of it, I had taken Blackstone . . . as well founded, wrongly. I simply was ignorant. But I did think hard on the matter . . . and much later found an English Nisi Prius case in which one of the good judges had expressed this notion in few words. That early effort no doubt made the formula easy if it is good, as I hope. . ."[88]

The Great Dissent, like each of the books surveyed here, amply validates Alexis de Tocqueville's observation from his tour of the United States in 1831 that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[89] Yet the flow of controversy moves not just in a single direction as judicial decisions similarly may routinely generate and even fuel partisan controversy.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW:

DODSON, SCOTT. **The Legacy of Ruth Bader Ginsburg**. (New York: Cambridge University Press, 2015). Pp. x, 313. ISBN: 978-1-107-06246-7, cloth.

FREYER, TONY ALLAN. **The Passenger Cases and the Commerce Clause: Immigrants, Blacks, and States' Rights in Antebellum America**. (Lawrence: The University Press of Kansas, 2014). Pp. xii, 204. ISBN: 978-0-7006-2009-8, paper.

HEALY, THOMAS. **The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America**. (New York: Metropolitan Books/Henry Holt, 2013). Pp. 322. ISBN: 978-0-8050-9456-5, cloth.

WALTMAN, JEROLD. **Congress, The Supreme Court, and Religious Liberty: The Case of *City of Boerne v. Flores***. (New York: Palgrave Macmillan, 2013). Pp. viii, 199. ISBN: 978-1-137-30063-8, cloth.

ENDNOTES

[1] James Bryce, **The American Commonwealth** (rev. ed, 1921) vol. 1, 73. Bryce's work was initially published as three volumes in 1888. He was British ambassador to the United States in 1907-1913. This quotation is from a two-volume edition that Macmillan published in 1921.

[2] *The Federalist*, No. 10 (1787).

[3] Joseph Charles, **The Origins of the American Party System** (1956), 83.

[4] John Aldrich, **Why Parties?** (1995), 19.

[5] Stephen K. Medvic, **Campaigns and Elections** (2d ed., 2014), 143-144.

[6] Wilfred E. Binkley, **American Political Parties: Their Natural History** (4th ed., 1962), 350.

[7] Stephen J. Wayne, **The Road to the White House 1996** (1997), 6-14.

[8] *Id.*, at 13.

[9] Warren had been the Republican party's Vice-Presidential nominee with Governor Thomas E. Dewey in 1948.

[10] Henry J. Abraham, **Justices, Presidents, and Senators** (5th ed., 2008), 200.

[11] Theodore H. White, **The Making of the President 1960** (1961). Democrats had nominated New York's Governor Al Smith, a Roman Catholic, in 1928. Garnering only eighty-seven electoral votes, Smith lost badly to Republican Herbert Hoover, who received 444.

[12] By the time of the "Super Tuesday" Presidential primaries on March 10, 1992, Clinton faced opposition mainly from former U.S. Senator Paul E. Tsongas, former Governor Edmund G. (Jerry) Brown, Jr., and U.S. Senator Tom Harkin.

[13] Bush had faced opposition in the Republican presidential primaries from Patrick J. Buchanan and David Duke.

[14] Abraham, **Justices, Presidents and Senators**, 303-304.

[15] President Johnson's attempt to elevate Associate Justice Abe Fortas to the Chief Justiceship in 1968, in place of retiring Chief Justice Earl Warren, was blocked by the Senate. Consequently, Johnson's nomination of Judge Homer Thornberry to fill the anticipated Associate Justice vacancy never moved forward. Inexplicably, Johnson left the filling of Warren's seat to his successor—Republican Richard Nixon.

[16] The count includes a "Postscript" by the Justice herself.

[17] Scott Dodson, ed., **The Legacy of Ruth Bader Ginsburg** (2015), hereafter cited as Dodson.

[18] 347 U.S. 483 (1954).

[19] *Hoyt v. Florida*, 368 U.S. 57, 63 (1961).

[20] *Frontiero v. Richardson*, 411 U.S. 677 (1973), appellees' brief, 20.

[21] Abraham, **Justices, Presidents and Senators**, 305.

[22] Dodson, at ix.

[23] *Id.*, at x.

[24] *Reed v. Reed*, 404 U.S. 71 (1971).

[25] Dodson, at 38.

[26] *Id.*

[27] 411 U.S. 677 (1973).

[28] A fifth vote would have required gender distinctions in statutes to be judged by the exceedingly demanding standard of strict scrutiny. Later decisions such as *Craig v. Boren*, 429 U.S. 190 (1976), embodied what might be called "near strict scrutiny" for gender discrimination cases that in practice has had the same result as strict scrutiny.

[29] 347 U.S. 497 (1954).

[30] Dodson, at 199.

[31] *Id.*, at 200.

[32] *Id.*

[33] *Id.*, at 201.

[34] Linda Hirshman, **Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World** (2015), 61.

[35] *Hood v. DuMond*, 336 U.S. 525, 533 (1949).

[36] Tony Allan Freyer, **The Passenger Cases and the Commerce Clause** (2014), hereafter cited as Freyer.

[37] For example, *see* Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959), and C. Herman Pritchett and Alan F. Westin, eds., **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[38] *United States v. Lopez*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring).

[39] 48 U.S. (7 Howard) 283 (1847).

[40] Freyer, at 8.

[41] *Id.*, at ix.

[42] *Id.*, at 17.

[43] *Id.*, at ix.

[44] 22 U.S. (9 Wheaton) 1 (1824).

[45] 36 U.S. (11 Peters) 102 (1837).

[46] 46 U.S. (5 Howard) 504 (1847).

[47] Freyer, at 93-94.

[48] *Id.*, at 94.

[49] *Id.*, at 85.

[50] Jerold Waltman, **Congress, the Supreme Court, and Religious Liberty** (2013), hereafter cited as Waltman.

[51] 521 U.S. 507 (1977).

[52] Google.com reports a distance of 199 highway miles between Boerne and Waco, Texas.

[53] Waltman, at 5.

[54] The First Amendment contains a prohibition on laws "respecting an establishment of religion" as well as those "prohibiting the free exercise thereof." Article VI includes a ban on a religious test for public office.

[55] Waltman, at 6.

[56] 98 U.S. 145 (1879).

[57] *Id.*, at 164.

[58] 374 U.S. 398 (1963). Earlier decisions such as *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)—sometimes known as the second flag-salute case—had invalidated application of state laws to religiously inspired conduct, but the Court treated these as free speech cases. In *Minersville School District v. Gobitis*, the first flag-salute case, the Court rejected a religious liberty claim advanced on due process grounds by Jehovah's Witnesses who refused to take part in a classroom flag-salute exercise as required by the local school board. 310 U.S. 586 (1940).

[59] 494 U.S. 872 (1990).

[60] Those interested in the *Smith* case should consult **Religious Freedom and Indian Rights: The Case of Oregon v. Smith** by Carolyn N. Long (2000).

[61] During the controversy preceding the litigation, Father Tony Cummins (the local priest) indicated that there were some 780 families registered in the parish of St. Peter. Waltman, at 54.

[62] The author helpfully includes photographs of the church both before and after the litigation and the compromise enlargement. *Id.*, at 164-165.

[63] *Id.*, at 4.

[64] *Id.*

[65] The suit therefore bore the title *P.F. Flores, Archbishop of San Antonio v. City of Boerne.*

[66] Waltman, at 7.

[67] *Id.*, at 6.

[68] *Id.*, at 5.

[69] *Id.*

[70] *Id.*, at 4.

[71] *Id.*

[72] 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2).

[73] 544 U.S. 709 (2005).

[74] Waltman, at 4.

[75] *Id.*, at 163.

[76] Thomas Healy, **The Great Dissent** (2013), hereafter cited as Healy.

[77] 250 U.S. 616 (1919).

[78] 40 Stat. 553.

[79] 250 U.S., 630 (Holmes, J., dissenting).

[80] Healy, at 251.

[81] 249 U.S. 47 (1919).

[82] 40 Stat 271.

[83] 205 U.S. 454 (1907).

[84] *Id.*, at 462.

[85] Healy, at 250.

[86] *For example, see* Holmes's dissent in *Gitlow v. New York*, 268 U.S. 652 (1925).

[87] Healy, at 250.

[88] *Id.*, at 243.

[89] Alexis de Tocqueville, **Democracy in America**, Phillips Bradley, ed., vol. 1 (1954), ch. 16, 290.

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Errata:
In the last issue, The American College of Trial Lawyers should have been listed as a Benefactor. We deeply regret the error.

On page 59, the sentence in column 2, line 10, should read "Widdifield had left Sutherland's employ in 1924 to work for the Mixed Claims Commission. . ."

Page 60, column 2 line 36, Cogswell stayed with McKenna until the Justice's retirement in 1925.

Page 63, the paragraph before "Conclusion," is incorrect. After Justice Roberts retired, his clerk Albert J. Schneider returned to Philadelphia and worked for Montgomery, McCracken, Walker and Rhoads, the firm that Roberts had founded.