Introduction

Melvin I. Urofsky

Writing the introduction to some issues of this *Journal* is fairly easy, because the articles all derive from the Leon Silverman Lecture Series and—more or less—are bound together by a common theme, such as the Civil War and Reconstruction or the great dissenters. Those issues always interest me because they help me to understand that era or that practice much better.

On the other hand, more often than not, the *Journal* has a wonderful potpourri of articles that are all over the map, and so I learn new things about different topics. It makes writing the introduction a bit harder, but that is a small price to pay for seeing things—some of them old friends even—in a new light.

I have known Barry Cushman since he was a graduate student at the University of Virginia, and his dissertation on the New Deal cases made all of us who have written on that era rethink some of our assumptions. He has been a frequent contributor to the *Journal*, and his topics have included diverse areas such as clerks and docket books. In this issue he examines the judicial vote in an important case, *Coleman v. Miller* (1939), in which the Court declared that the question of limiting or extending the time needed to ratify a proposed constitutional amendment was a "political question," in the hands of Congress and not the courts. Barry is currently the John P. Murphy Foundation Professor of Law at the University of Notre Dame.

Another old case that gets a fresh look is *Allen v. United States* (1896), which involved what kind of charge a judge could give to an apparently hung jury, urging the minority members to reconsider. Known afterwards as the *Allen* charge, it applied only to federal courts. Gary Peterson is a practicing attorney in Oklahoma City.

One of the "great" cases in Commerce Clause jurisprudence is *Wickard v. Filburn* (1942), in which Justice Robert H. Jackson seemingly stretched congressional reach under that clause about as far as one could imagine, to cover wheat grown in a farmer's backyard for his family's consumption. James B. Barnes wrote this article when he was a law student at St. Mary's University

in San Antonio; he is now practicing commercial law in Austin, Texas, and is the managing attorney for the Barnes Law Group. Barnes is the student winner of the 2016 Hughes-Gossett Award.

We do not get many articles on bankruptcy cases, and truth be told, I do not remember any stirring cases I read in law school on this subject. Many cases are fairly limited, because the only law involved is the bankruptcy statute itself. But what happens when usual practice under bankruptcy, such as allowing a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate," (§554(a)) collides with an environmental statute requiring the owner of that property to clean it up after dumping carcinogens into the ground? That was the question before the High Court in 1986, and is examined by Ronald Mann, Albert E. Cinelli Enterprise Professor of Law at Columbia Law School and Co-Director of the Charles Evans Gerber Transactional Studies Center.

Although we do not rank Justices the way political scientists like to play at ranking Presidents, no one I know considers Gabriel Duvall, a Madison appointee who served on the Supreme Court from 1811 to 1835, in the top rank. During his tenure of the Court the issue of slavery, which would tear the country apart in 1861, began to find its way into judicial cases. Andrew Fede takes a new look at Duvall's opinions on hearsay used as evidence in court by slaves seeking their freedom. Fede is an attorney in private practice in Hackensack, New Jersey. He is also an adjunct professor at Montclair State University, Upper Montclair, New Jersey.

As I have mentioned a number of times, the field of constitutional history is not a large one, and nearly all of the practitioners know each other. Certainly I call two of the other contributors friends.

Charles Zeldon is professor of history at Nova Southeastern University, and normally he applies his robust intelligence to the law of elections; his book on *Bush v. Gore* (2000) is in my mind the very best and most objective work written on that contentious case. A year or so ago he came out with a short biography of Thurgood Marshall, and its length was for the most part dictated by the constraints of the series in which it appeared. I asked Chuck if there was more he wanted to say on Justice Marshall, and he did indeed. Marshall dissented a lot, especially in capital punishment cases, and he always made sure his clerks knew ahead of time that their tenure with him would involve dissents.

Finally, a book came to me from someone who is certainly not a stranger, since as you know, Timothy Huebner is the associate editor of this *Journal,* and without his work and that of our managing editor, Clare Cushman, you would not be holding this or any other issue in your hands. Every now and then, we run an essay review in the *Journal* for books that we think are very important, and Tim's book on the Civil War and Constitutionalism seemed to fit that bill.

Tim's book is not a radical revision of what we know about the period, but it does differ from what has been the standard work on it, Harold Hyman and William Wiecek's, **Equal Justice Under Law: Constitutional Development 1835-1875**, published in 1982 as part of the New American Nation series. I called Bill Wiecek, professor of law at Syracuse University, another friend of long standing, and asked if he would review it, and he very graciously said he would. And he did.

So, for this potpourri of a volume, learn about all sorts of things, and, of course, enjoy!

Not the Most Insignificant Justice: Reconsidering Justice Gabriel Duvall's Slavery Law Opinions Favoring Liberty

ANDREW T. FEDE

Joseph Story and Gabriel Duvall began their careers as Supreme Court Justices on the same day in February 1812, but the reputations of these nominees of President James Madison diverged widely. Story is ranked among the Court's leading Justices. Duvall's standing, in contrast, fell so far by the 1930s that Ernest Sutherland Bates, in his book **The Story of the Supreme Court**, labeled him "probably the most insignificant of all Supreme Court judges[.]" Bates implied that, at nearly sixty years of age, Duvall was too old when he was nominated to the Court; he thus devalued Duvall's nearly twenty-four years as a Maryland lawyer, state court judge, and legislator; his two years as a United States Congressman; and his nine years as the first Comptroller of the United States Treasury. Bates also suggested that Duvall should have resigned from the Court soon after his appointment because "he became a few years later so deaf that he could not hear a word said in Court[.]"[1] Others based later critiques on the dearth of Duvall's published Supreme Court output—fifteen opinions for the Court and one dissenting opinion—although they acknowledged that, during this era, Chief Justice John Marshall dominated the Court with his collegial approach to decision making and opinion writing.[2]

On the other hand, Irving Dilliard, who wrote the entry on Duvall in **The Justices of the United States Supreme Court 1789-1969**, accused Bates of making "a manifestly unfair judgment" about Duvall's almost twenty-three-year career on the Court.[3] Indeed, Duvall deserves further reevaluation, but not because of the recently revealed genetic link that he, President Barak Obama, and Vice President Richard Cheney have to Mareen Duvall, a mid-1600s Huguenot immigrant from France and an early

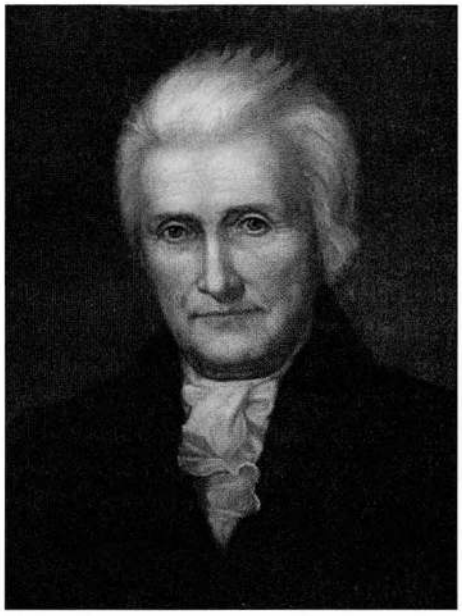
Maryland slave owner.[4] Instead, Duvall's two slavery-law opinions favoring liberty when enslaved peoples' freedom was at issue, reconsidered in their historical context, enhance Duvall's place in Supreme Court history. Duvall's only dissenting opinion, which he filed in *Mima Queen v. Hepburn* (1813),[5] contradicted Marshall's version of the hearsay rule, which Duvall believed would deny "reasonable protection" to "people of color." And in *Le Grand v. Darnall* (1829),[6] Duvall used the implied manumission doctrine to affirm a judgment in an interracial diversity suit confirming that Nicholas Darnall was freed by his father and owner. These opinions by Duvall, who in 1783 owned at least eight slaves and whose 1844 estate included thirty-six slaves, stand in contrast to the anti-manumission and pro-slavery trend that swept through the antebellum Southern courts and legislatures, reaching the Supreme Court in *Scott v. Sandford* (1857).[7]

Duvall's Freedom Suits and the Early Hearsay Rule

Duvall's experiences as a Maryland lawyer between 1778 and 1796, when he became a Maryland General Court judge, may have influenced his slavery law jurisprudence. He was among the lawyers who represented enslaved claimants seeking freedom under the law. Other prominent Maryland lawyers who pursued these claims included Philip Barton Key; Philip's nephew Francis Scott Key, writer of the lyrics to our national anthem; and Francis's brother-in-law, future Chief Justice Roger B. Taney. Maryland law, like the law in most slave societies, provided enslaved people with procedures to assert and establish that they were unlawfully held in bondage. The successful claimants generally advanced two primary theories of relief. Manumission suit claimants alleged that their masters freed them or one of their ancestors, and freedom suit claimants contended that they could not be enslaved under the applicable law.[8]

When the United States gained its independence, in most states only Africans or those with African female ancestors could lawfully be enslaved. Many Maryland freedom suits arose, however, because its legislature in 1664 adopted its first law intended to deter "freeborn English women" from marrying "Negro slaves." This law enslaved "freeborn women" who married "any slave" for the term of their husbands' lives. It also provided that the children of these marriages were to follow their fathers' condition, except for those already born, who were to serve until they were "thirty years of age and no longer." This act was amended in 1681, but 1692, 1715, and 1728 laws subjected both white women and their mixed-race children to fixed terms of servitude. This punishment of children for their parents' perceived indiscretions was repealed in 1796. These laws, and others freeing slaves illegally imported into Maryland, spawned freedom suits in which litigants claimed that they were no longer legally enslaved.[9]

Many of these freedom and manumission suit claimants relied on hearsay evidence to prove that they had non-African or free black maternal ancestors. Hearsay evidence, by the late eighteenth and early nineteenth centuries, was defined as an assertion offered at a trial or hearing to prove the truth of the matter asserted by a person who was not testifying at the trial or hearing and who thus could not be cross examined. This hearsay evidence often was the only proof available to enslaved litigants, in part because the testimony of slaves and free blacks against whites generally was forbidden.[10] The early Southern courts used the common law hearsay exception permitting evidence of family history, reputation, or pedigree. They allowed anyone who knew a freedom claimant's family to offer hearsay evidence of both the identities of the



Gabriel Duvall (left) and Francis Scott Key (right) were both Maryland lawyers who owned slaves and litigated on behalf of slaves for their freedom. Many of these freedom and manumission suit claimants relied on hearsay evidence to prove that they had non-African or free black maternal ancestors. One of Key's many cases for enslaved litigants included a successful 1828 freedom suit filed against Duvall on behalf of a family of Duvall's own slaves. Duvall never publicly condemned slavery, unlike Key, who called slavery "a great moral and political evil amongst us."

claimant's family members and the reputation or general understanding among people in the relevant community of those family members' race and servile or free status. This evidence was uniquely relevant in freedom suits.[11]

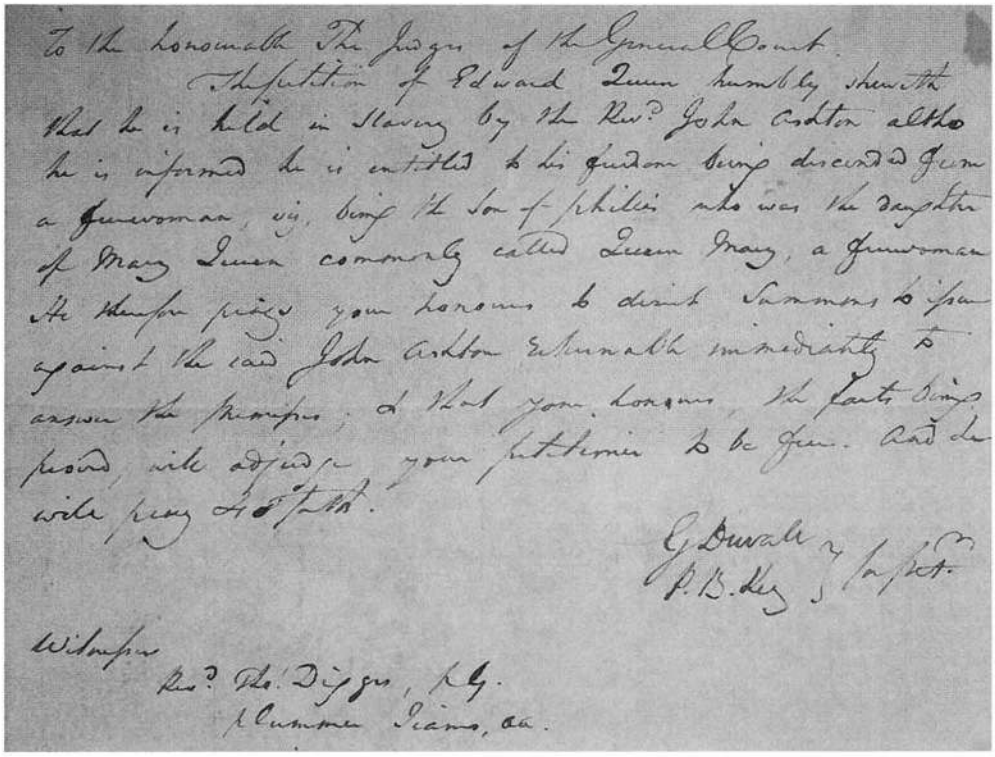
Duvall relied on this expansive hearsay exception in early reported Maryland freedom suits, including *Mahoney v. Ashton*.[12] Duvall started that case on October 18, 1791, by filing a freedom petition for Charles Mahoney against Father John Ashton, who claimed Mahoney was his slave. Ashton was an influential Jesuit priest who was among the founders of Georgetown College, now Georgetown University. By 1790 he also had eighty-two slaves under his command.[13] Duvall based Mahoney's case on a broad reading of Lord Mansfield's landmark decision in *Somerset v. Stewart*.[14] Duvall alleged that Mahoney was the great-great grandson of Ann Joice, who was freed in the 1670s by the laws of England when Lord Baltimore brought her from Barbados to England and then to Maryland. Duvall began a four-and-one-half-year search for evidence, and Jonathan Roberts Wilmer succeeded Duvall as Mahoney's lawyer when Duvall became a General Court judge in 1796. The case languished in Maryland's courts for almost eleven years. It was tried before juries three times. Maryland's General Court and Court of Appeals issued decisions permitting both sides to introduce hearsay pedigree and reputation evidence about Ann Joice from non–family members. The jury in the second trial, which was held in June 1799, found for Mahoney, apparently based upon Mahoney's hearsay pedigree and reputation evidence, but the Court of Appeals reversed this verdict. Another jury in October 1802 found for Ashton, apparently because they were convinced by Ashton's hearsay pedigree and reputation evidence, which included the depositions of Samuel Douglass and Thomas Lane.[15]

Although this liberal hearsay rule was not beneficial to Mahoney in court, Ashton manumitted Charles and Patrick Mahoney in 1804. One year later he freed their younger brother Daniel Mahoney. The Mahoney family members "were so grateful for Duvall's assistance that Charles's brother Patrick christened his son Gabriel."[16]

Duvall and Philip Barton Key in October 1791 filed another freedom petition with the General Court against Ashton on behalf of Edward (Ned) Queen, who alleged that he was the son of Phillis, whose mother, known as Mary Queen, was born a free person. Ashton admitted that Mary Queen was Edward's grandmother but alleged that she always was enslaved. Mary Queen was sold for a term of years to James Carroll, a successful planter and businessman. His home plantation, Fingual, was in Anne Arundel County on Maryland's western shore. Carroll was a Catholic single man when he died in 1729. His will left most of his property and slaves to the Catholic Church.[17]

At the May 13, 1794 trial, the lawyers for both sides relied on hearsay evidence confirming or denying Mary's free status. Edward Queen's case included four hearsay depositions. Richard Disney, who was seventy-five years old when he gave his May 14, 1792 deposition, stated that he knew Phillis and her sister Nanny Cooper since his childhood. He described Phillis as "a mulatto" and said that Nanny Cooper was "as black as most negroes," but he did not remember their mother. Disney also said he knew James Carroll and Fingual "very well[.]" His late mother was a midwife. She said that Nanny was the first child she delivered and that "it was a shame that the mother of Phillis and Nanny was [sic] kept in slavery[.]" Disney recalled being told a story about Captain Larkin bringing "a fine Lady from London," and that nobody would buy her until Carroll did so. Disney was referring to Thomas Larkin (1673-1731), the son of early Maryland settler John Larkin (1615-1702). Disney also heard John Jiams, an overseer, say that "Phillis ought to be free[.]" Disney worked at Fingual when Lewis Lee, who was many years older than Disney, was Carroll's overseer. Disney heard Lee say that "Phillis ought to be free, and Phillis then lived in a house by herself[.]"[18] Thomas Warfield stated that, in 1783, he was working as an overseer in Anne Arundel County. He heard the late John Jiams, the late Reverend John Carrick's overseer, say that Phillis's mother Mary Queen was free when Captain Larkin brought her to the county, that Mary was sold for seven years, and that Mary "was as free as he was if she had her right[.]" He recalled that Mary Queen "afterwards belonged to James Carrick who lived in Fingal in Anne Arundel County." James Carrick later left his plantation and personal property to the Catholic Church, according to Warfield, who also said that Phillis had a "yellow" complexion and "appears to be a bright mulatto[.]"[19] George Davis asserted that, "between twenty one and twenty two years" before his May 23, 1793 deposition, a man named Lewis Lee told him that Edward "ought to be free for his grandmother was a free woman[.]"[20]

Caleb Clarke was forty-seven years old when he was deposed on October 23, 1793. He was a member of the Duvall family. His mother Mary Clarke, who had died about eight years before the deposition when she was sixty-nine years old, was a daughter of Marsh Mareen Duvall, who was a son of Mareen Duvall, the family's immigrant ancestor. Caleb Clarke described Phillis as "a mulatto woman who lives with . . . Ashton[.]" He recalled hearing his mother speak of "a yellow woman called Mary Queen [who] was brought to the County by Captain [Thomas] Larkin," whose father John was Mareen Duvall's friend and neighbor. Thomas Larkin frequently visited Marsh Mareen Duvall's house, as did James



To the honorable The Judges of the General Court.
The petition of Edward Queen humbly sheweth
that he is held in slavery by the Revd. John Ashton altho
he is informed he is entitled to his freedom being descended from
a freewoman, viz, being the son of Phillis who was the daughter
of Mary Queen commonly called Queen Mary, a freewoman
He therefore prays your honours to direct Summons to issue
against the said John Ashton returnable immediately to
answer the premises; & that your honours, the facts being
found, will adjudge your petitioner to be free. And he
will pray &c &c.

G. Duvall
P.B. Key } for pet.

Witnesses
Revd. Th. Diggs, Md.
Plummer Ivans, do.

On October 15, 1791, Duvall signed this petition for Edward Queen in his case before the Maryland General Court, writing that Queen "humbly sheweth that he is held in slavery by the Revd. John Ashton altho he is informed he is entitled to his freedom being descended from a freewoman, viz, being the son of Phillis who was the daughter of Mary Queen commonly called Queen Mary, a freewoman. He therefore prays your honours to direct Summons to issue against the said John Ashton returnable immediately to answer the premises; & that your honours, the facts being found, will adjudge your petitioner to be free. And he will pray & so forth." Many witnesses presented hearsay evidence and the court ruled to grant Queen his freedom in 1794.

Carrick, who "owned" Mary Queen. Caleb Clarke said his mother "often in conversation" said "that her father had often heard . . . [James] Carrick and Mary Queen quarrelling and wrangling about her freedom[.]" In these arguments, James Carrick would say to Mary Queen "poh! have patience you will be free by and by, or you will get your freedom, by and by, or words to that effect, and would promise what he would do for her[.]" Caleb also heard his mother's older sisters Anne Carrick (who was married to John Carrick) and Susanna Fowler tell this story. James Carrick did not free Mary Queen; instead, Caleb said she "was left or given . . . to Anthony Carrick and sent across the Bay to him."[21]

The jury on May 23, 1794 found for Edward and the court's judgment freed him. Many Queen family members later won freedom judgments based on Edward Queen's success.[22]

Marshall vs. Duvall on the Hearsay Rule

Other Joice and Queen family members later filed freedom suits with the Circuit Court of the District of Columbia. They relied on much of the same hearsay evidence that the Maryland courts admitted. However, the Circuit Court advanced a more exacting hearsay rule beginning with its 1808 decision in *Joice v. Alexander*.[23] The court permitted

Francis Scott Key to use Thomas Lane's deposition on behalf of Key's slave owner client, Robert Alexander, to defeat the freedom claim of Clem Joice, who was another descendent of Ann Joice. But the court also sustained Key's objection to Joice's lawyer's questions about Ann Joice's "general reputation of the neighbourhood" and "whether she was a free white woman." The court ruled "that evidence of general reputation of a fact, can only be given when the reputation was among free white persons who are dead, or presumed from the length of time to be dead."[24]

The United States Supreme Court also adopted a more restrictive version of this hearsay rule exception, over Justice Duvall's dissent, beginning with Chief Justice John Marshall's opinion in *Mima Queen v. Hepburn*.[25] Francis Scott Key initiated that case in January 1810 with a petition filed with the Circuit Court of the District of Columbia for Washington County. He alleged that John Hepburn illegally held in slavery Minor or Mina Queen and her daughter Louisa. The official case reports spelled Mina's name Mima. Key also filed petitions at the same time against other defendants who claimed Priscilla, Alexis, and Hester Queen as their slaves. Mina's trial was held in late June 1810, when the judges were William Cranch, Nicholas Fitzhugh, and Bruckner Thurston. Key presented depositions from Edward Queen's case to prove that the claimants' ancestor, Mary Queen, was a free woman who was sold for a seven-year term of service. Key read to the jury part of Caleb Clarke's deposition. But the court sustained Hepburn's objection to Clarke's statement of what his mother told him she was told by her father Marsh Mareen Duvall.[26] Key read, without objection, Benjamin Duvall's deposition containing the declaration of Mary Queen, Mina's great grandmother. Benjamin was the name of Gabriel Duvall's father and his great uncle. The court also permitted Hepburn's lawyer to read depositions in response asserting that Mary was a slave. But the Court did not permit Key to read from the deposition of Freeders Ryland relaying Mary Queen's declarations about her residence, place of birth, and condition. The court also denied Key's request to read all of the depositions of Richard Disney, Thomas Warfield, and George Davis, although the court allowed the jury to hear, over Hepburn's objection, the portion of Davis's deposition containing Lewis Lee's statement that Edward Queen's grandmother was a free woman.[27]

The Court permitted Key to read Richard Disney's hearsay deposition stating what Disney said he heard others say about Mary Queen but instructed the jury that if they found that Disney gave evidence from what was communicated to him many years after the fact "without its [sic] appearing by whom or in what manner the same was communicated to him," then the evidence "is incompetent to prove either the existence of such report and noise or the truth of it[.]" The Court also allowed Key to read the part of Thomas Warfield's deposition that included John Jiams's assertions but again instructed the jury that if they "find from the evidence that these declarations of Capt[.] John Jiams . . . were founded on hearsay or report, communicated to him many years after the importation and sale of the said Mary Queen without its appearing by whom or in what manner such communication was made to him; then his said declarations are not competent evidence in this cause."[28]

The jury's verdict was for Hepburn. Key filed an appeal to the United States Supreme Court. He and James S. Morsell argued that the Maryland courts had in the past admitted hearsay evidence when enslaved people sued for their freedom and that if the courts were to exclude this evidence future freedom suits will likely fail. John Law and Walter Jones argued for Hepburn that the courts should

apply the common law hearsay rule with equal force to these suits.[29]

Chief Justice Marshall's majority opinion affirmed the Circuit Court's judgment with the "general principle" that he applied to all of the evidence rulings on appeal; "hearsay evidence is incompetent to establish any specific fact, which . . . is in its nature susceptible of being proved by witnesses who speak from their own knowledge." He also directed the courts to enforce the evidence rules of general application when enslaved people sued for their liberty:

> However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which the right to property may be asserted.

He quoted a "great judge" who stressed how the "rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in support of these rules," which reflect the "wisdom of the ages[.]"[30]

Marshall acknowledged hearsay rule exceptions that "are said to be as old as the rule itself[,]" including "cases of pedigree, of prescription, of custom, and in some cases of boundary." He also referred to "matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact." But he found that these exceptions did not apply to the hearsay evidence of Mary Queen's reputed free status as the plaintiffs' ancestor. He questioned the reliability of hearsay evidence and stated that the court "was not inclined to extend the exceptions further than they have already been carried."[31]

Justice Duvall's dissenting opinion appealed to both precedent and public policy. He wrote that, under Maryland law, it was:

> for many years settled that on a petition for freedom where the petitioner claims from an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the [G]eneral Court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct. Hearsay evidence was admitted upon the same principle, upon which it is admitted to prove a custom, pedigree and the boundaries of land; —because from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony. To exclude hearsay in such cases, would leave the party interested without remedy. It was decided also that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right. It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree or in controversies relative to the boundaries of land. It will be universally admitted that the right to freedom is more important than the right of property.[32]

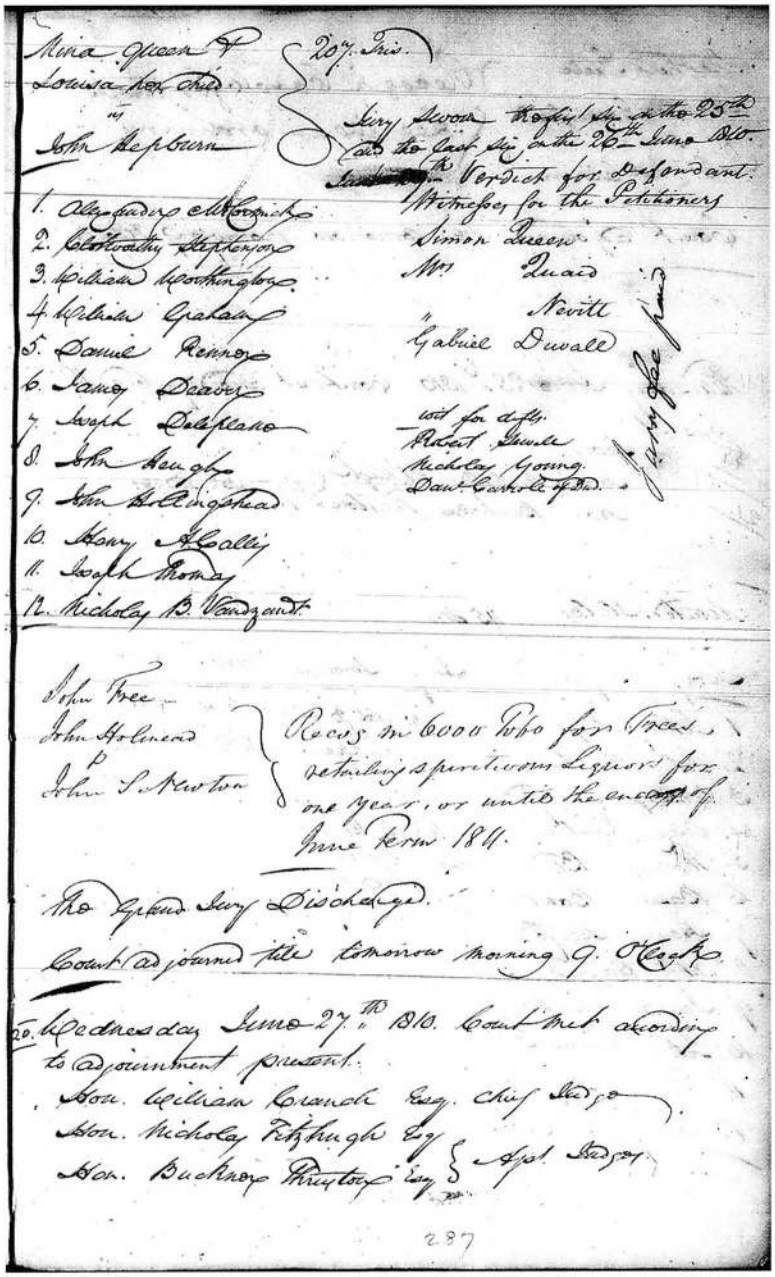
Duvall also noted that "people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection." He predicted that the majority's decision "cuts up by the root all claims of this kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur."[33] Marshall reaffirmed the *Mima Queen* rule in a very brief 1816 opinion. Duvall did not file an opinion dissenting from that decision affirming the dismissal of a freedom suit.[34]

Scholars have debated how best to understand Marshall's decisions in these cases. Was he "imposing the slaveholder's values on the hearsay rule," or was he "simply applying the technical rules of evidence in accordance with the English precedents he cites"?[35] The answer is not clear, but Duvall's dissenting opinion suggests that he and Marshall may have had different slaveholder values. It also is unclear why *Mima Queen v. Hepburn* was the only case in which Duvall filed a dissenting opinion, although he later dissented without an opinion in *Trustees of Dartmouth College v. Woodward*.[36] Duvall served on the Court during the era that produced the lowest percentage of dissenting or concurring opinions—only seven percent. This dissenting opinion's singularity suggests how important it must have been to Duvall.[37]

Duvall's Hearsay Rule Prevails—Eventually

The Southern courts at first offered mixed responses to Marshall's hearsay rule. However, the majority of the reported decisions in freedom and manumission suits eventually adopted Duvall's broader pedigree exception. For example, the Maryland Court of Appeals followed *Mima Queen* and rejected evidence of the claimants' maternal ancestors' general reputation while permitting evidence "identifying an ancestor from whom the pedigree is attempted to be traced[.]"[38] In contrast, the Tennessee Supreme Court of Errors and Appeals in *Vaughan v. Phebe*[39] adopted Duvall's approach. Phebe, who was born in Virginia, offered proof that her mother Beck "was always called an Indian by descent[.]" Phebe's great grandmother Murene "was a copper color," and, it was said, she "was always reputed an Indian, and was free[.]" Phebe also presented evidence that other family members won their freedom, including her maternal aunt Tab's Virginia Superior Court freedom judgment, which was supported by proof that Tab was a descendent of Murene. Justice Henry Crabb's opinion for the court noted that "[s]lavery, in our sense of the word, is not known in England." He therefore applied the hearsay rule and exceptions in view of the realities of slavery, stating that Marshall's hearsay decisions do not have "the approbation of our judgments, and we must dissent from them." Accordingly, Crabb held that hearsay evidence of the "pedigree or common reputation as to freedom" of Phebe and her maternal ancestors was admissible, unlike hearsay "evidence of several family members having recovered their freedom by due course of law[,]" which should have been proven with court records.[40]

This broader pedigree exception was a mixed blessing for freedom and manumission suit claimants, however, because slave owners also used the rule to offer hearsay evidence of the claimants' maternal ancestors' alleged enslaved status. Charles Mahoney's eleven-year freedom suit illustrates this point, as does the Kentucky Court of Appeals 1839 decision in *Chancellor v. Milly*.[41] The plaintiff in that case was Milly, "apparently a white woman, about forty years old," who had been treated as a slave from her birth. She filed a freedom suit, relying on her white color as the only evidence supporting her claim. The trial judge held that the defendant could



Justice Duvall's only dissenting opinion on the Supreme Court, which he filed in *Mima Queen v. Hepburn* (1813), contradicted Chief Justice John Marshall's version of the hearsay rule, which Duvall believed would deny "reasonable protection" to "people of color." Francis Scott Key had initiated that case in January 1810 with a petition filed with the Circuit Court of the District of Columbia (see above). Duvall must have felt strongly about his dissent as he served on the Supreme Court during the era that produced the lowest percentage of dissenting or concurring opinions—only seven percent.

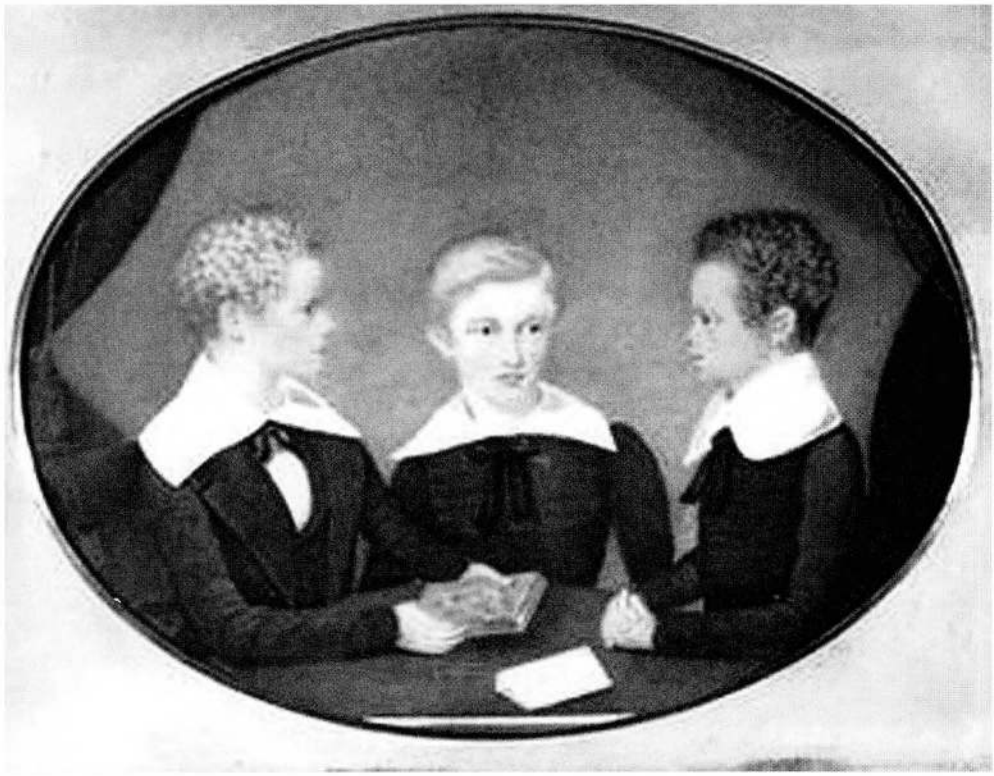
not rebut the presumption of freedom that arose from Milly's white color with hearsay evidence offered "to prove that, in the family in which she was born and reared from infancy, [Milly] had ever been called and reputed the child of a woman of color, who was a slave and the property of the family." The Court of Appeals opinion by Chief Justice George Robertson reversed a judgment for Milly, holding that the trial judge should have allowed the jury to hear the defendant's reputation evidence because, "[a]fter the lapse of forty years, such a fact would scarcely ever be susceptible of any other proof than that of reputation." Robertson "perceive[d] no reason" to exclude the evidence "in a suit for freedom, as well as in all other suits in which proof of pedigree becomes material." He also observed that the courts would permit reputation evidence in Milly's favor "if her reputed mother had been free; and that which she might have proved to create a presumption in her favor, her adversary should be permitted to show against her."[42]

The majority of the United States courts in other types of cases initially adopted Marshall's more restrictive hearsay exception limiting both the scope of hearsay pedigree evidence and the identity of those who could testify, while a minority of jurisdictions, including some Southern states, continued to follow Duvall's broader rule. Evidence law commentators also criticized the more restrictive majority rule.[43] Duvall's more liberal version eventually was included in *Federal Rules of Evidence* 803(19) and 804 (b)(4)(B), and it now is the prevailing rule nationwide. This is not to suggest that Duvall should be added to the list of the leading evidence law theorists. Nor does his only dissenting opinion rank among the most important in the Court's history. Yet a dissenting opinion's significance can be evaluated only over time, and many dissenting Justices eventually win the argument years in the future.[44]

Duvall and the Implied Manumission Doctrine

Duvall's other slavery law opinion, *Le Grand v. Darnall*,[45] also is significant because the Court adopted the implied manumission doctrine to affirm Nicholas Darnall's manumission by Bennett Darnall—his father and owner. Future Chief Justice Roger B. Taney was the lawyer for the appellant, Claudius F. Le Grand, in what one commentator called "[p]robably the friendliest case decided by the Court . . . ."[46] Bennett Darnall was a member of a prominent family in Anne Arundel County, Maryland. Nicholas and his brother Henry were the sons of Bennett and Susanna, a slave owned by Bennett. Bennett's August 4, 1810, will devised seven tracts of lands to Nicholas, including one 596-acre parcel in a larger tract that was called Portland Manor. Bennett's will also referred to manumission deeds that he executed in 1805 and in 1810, which included Nicholas among the slaves to be freed. (These deeds, however, were not exhibits in the case.) Bennett later signed two codicils to his will. The last was dated January 20, 1814, and was proved before the register of wills eleven days later. Bennett apparently died on January 23, 1814, when Nicholas was only about ten or eleven years old.[47]

After Bennett died, Nicholas and Henry were sent to Pennsylvania by their then guardian John Mercer to study under the care of Benjamin Tucker, a Quaker who ran a school near Philadelphia. Robert Welch, as the later guardian for Nicholas, on July 17, 1824, filed a petition with the Maryland Chancery Court seeking permission to sell part of Portland Manor for Nicholas because Nicholas did not wish to own the land, which was being worked by enslaved labor. The Chancellor appointed commissioners who valued the land at $13,495 (almost $300,000 in 2017 dollars) and recommended the sale. Welch was appointed trustee to sell the land, but the sale was not completed before Nicholas came of age.[48]



In Duvall's other slavery law opinion, *Le Grand v. Darnall* (1829), the Court adopted the implied manumission doctrine to affirm Nicholas Darnall's manumission by Bennett Darnall—his father and owner. Above is a miniature titled "Three Young Scholars Seated around a Table": Nicholas is at left, and his brother, Henry, at right. In the center is Richard Bennett Darnell, their first cousin.

After Nicholas achieved legal age, he entered into a contract on April 26, 1826, to sell Portland Manor to Le Grand for $13,112, payable in six annual installments with interest. Le Grand signed notes and Nicholas executed a bond agreeing to transfer title upon payment. Le Grand also agreed to care for several "old and infirm" slaves who lived on the property. In return, Nicholas permitted Le Grand to continue to use twelve named slaves for four years. Nicholas filed a manumission deed freeing these slaves effective May 4, 1830.[49] Le Grand entered into possession under this land sale contract. Later, however, doubts were suggested to Nicholas about his title's legality because a provision in a 1796 Maryland law permitted masters to free slaves who were "under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence."[50] The Maryland Court of Appeals in 1823, in *Hamilton v. Cragg*,[51] had interpreted this statute to prohibit the manumission of a young child. Nicholas deposited Le Grand's first $3,000 payment to be held by Benjamin Tucker, subject to an examination into the title to Portland Manor. Bennett Darnall's heir-at-law then claimed the land based on *Hamilton v. Cragg* and threatened to sue. Le Grand, further alarmed about the validity of his title, refused to make any more payments. Nicholas responded with a suit against Le Grand in the United States Circuit Court for the District of Maryland, most likely alleging that the Court had diversity of citizenship jurisdiction. Nicholas obtained a judgment against Le Grand for the second

payment. Le Grand responded with a bill of complaint in equity against Nicholas, which also was filed in the Circuit Court in Maryland. Le Grand obtained a preliminary injunction against any further proceedings at law by alleging that Nicholas was not more than ten years of age when his father died, was unable to work and gain a sufficient maintenance and livelihood, and thus was not free under Maryland's laws. Nicholas answered that he was able to work and gain a sufficient livelihood and maintenance when his father died.[52]

Le Grand's equity bill, however, sought to confirm Nicholas Darnall's manumission and Le Grand's title. John Mercer and Robert Welch testified at the trial that Nicholas was about eleven years old when his father died. They said Nicholas was "a fine, healthy, intelligent boy, able by his work to maintain himself." And Dr. James Stewart and Samuel Moore stated "that boys of eleven in Maryland are able to support themselves by their own labour, and specif[ied] the kind of work in which they may be usefully employed."[53]

The trial court found that this undisputed evidence confirmed that the manumission was valid. The court thus dissolved the injunction and dismissed Le Grand's equity bill. Le Grand filed an appeal to the United States Supreme Court, but his lawyer Taney "submitted the case without argument; stating, that it had been brought up merely on account of its great importance to [Darnall]; which rendered it desirable that the opinion of the [S]upreme [C]ourt should be had on the matters in controversy."[54] In contrast, Darnall's lawyer Stewart argued at length, stating, "It is proper to say, that the whole of these proceedings have been amicable that Le Grand is willing to pay if his title is a safe one, and that Darnall does not wish Le Grand to pay unless he can make a good title to him." Stewart further asserted, "By the [Maryland] act of 1796, chap. 67, sec. 13, slaves may be manumitted in Maryland by last will; provided they be under forty-five years of age, and able to work and gain a sufficient maintenance and livelihood; at the time the freedom given shall commence."[55] He contended that Nicholas was freed by Bennett's will, according to the Maryland Court of Appeals decision in *Hall v. Mullin*,[56] which "decided that a devise of property real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication."[57] He also distinguished *Hamilton v. Cragg*,[58] arguing that before that decision "it had been generally supposed" that the Maryland statute

> was intended to guard against the manumission of slaves who, although under forty-five years of age, were suffering under incurable diseases or constitutional infirmities which would most probably always disable them from maintaining themselves by their own labour, and make them a charge upon the public. It had not been generally supposed to apply to the case of children for whose maintenance provision could perhaps always be made by binding them to serve as apprentices, and especially was considered inapplicable to those children for whose support abundant provision was made by the testator who gave the freedom.

Stewart thus concluded that the proof offered at trial confirmed that Nicholas Darnall was entitled to his freedom when his father died.[59]

Duvall's opinion affirming the Circuit Court's judgment asserted that "[f]our respectable witnesses" from the neighborhood testified that when Bennett died "Nicholas was well grown, healthy and intelligent, and of good bodily and mental capacity: that he and his brother Henry could readily have found employment, either as house servant boys, or on a farm, or as apprentices; and that they were able to work and gain a livelihood."

Accordingly, Duvall concluded that Nicholas later conveyed good title to Le Grand. Duvall's reasoning consists of his statement that the Maryland Court of Appeals, in *Hall v. Mullin*, "decided, that a devise of property real or personal by a master to his slave, entitles the slave to his freedom by necessary implication. This Court entertains the same opinion." He also expressed no opinion "as to the correctness of the decision of the court of appeals in the case of Hamilton vs. Cragg. It is unnecessary in reference to the case under consideration."[60] Duvall thus validated Bennett Darnall's manumission of Nicholas Darnall.

With his title confirmed, Le Grand later sold Portland Manor and in 1836 moved to Louisiana, where he became a wealthy planter and slave owner.[61] In that year the Court applied Duvall's pro-manumission approach to the age limits in Maryland's 1796 act and affirmed a judgment enforcing a manumission deed freeing Sarah Ann Allen and her two young children. Justice James M. Wayne's opinion held that the children's manumission did not offend the statute's purpose because Allen was "able, by her labour [sic], to maintain her offspring[.]"[62]

The Southern Courts Reject Implied Manumission

Duvall's endorsement of the implied manumission doctrine is significant because this doctrine permitted lawmakers and judges to express in their actions any inclinations they had in favor of liberty when they interpreted ambiguous evidence of the masters' intentions to free their slaves. Roman law by the time of Justinian in 531 A.D. applied this doctrine of implied or tacit manumission to free slaves, as did the thirteenth-century Spanish law *Las Siete Partidas* and the 1685 French *Code Noir*.[63] Nevertheless, no statute in the Southern United States enacted this rule. In their decisions, the Southern courts also refused to favor freedom over slavery by applying this doctrine in doubtful cases, holding instead that "[a] slave cannot take by descent, there being no inheritable blood."[64] Even the Louisiana Civil Code, following the 1724 *Code Noir* that was adopted for Louisiana, stated that a master's intention to free a slave by will "must be express and formal, and shall not be implied by any other circumstances of the testament, such as a legacy, an institution of heir, testamentary executorship or other dispositions of this nature, which in such case, shall be considered as if they had not been made."[65]

A close reading of *Hall v. Mullin* also suggests that Duvall was not hostile to manumission because he may indeed have extended its holding interpreting the same Maryland law that was at issue in *Le Grand*. Henry L. Hall's 1817 will bequeathed to Dolly Mullin two young slaves named Joan and Aaron and a life tenancy in 141 acres of land, with the remainder after Dolly's death to go to her son Henry Mullin and his heirs. Hall's will mentioned by name his other slaves, whom he devised to other named beneficiaries, and it contained a residuary clause declaring that Hall set "all the remainder part of my negroes free." Hall apparently believed that Dolly was free when he wrote his will because, in 1810, he had sold Dolly to her father, Basil, who a month later executed Dolly's manumission deed. Hall also believed that the 1803 will of his father Benjamin Hall had freed "my carpenter, called old Basil." But Basil was older than forty-five when Benjamin Hall died. If Basil remained a slave, he could not buy and then free Dolly.[66] The Maryland Court of Appeals majority opinion by Judge John Johnson nonetheless held that Henry Hall's will freed Dolly because Henry intended "that none of his slaves should remain slaves after his death, other than those he named and bequeathed as slaves[.]"[67] Johnson also declared that "without the aid of the residuary clause [Dolly] would have a right to freedom,

under those parts of the will by which property was given to her; her freedom by implication is indispensably necessary to give efficacy to those clauses of the will." Chief Judge Jeremiah Chase's concurring opinion stated: "The testator imagined Dolly was free; she was not free, but a slave, at the time the will was made, and being a slave, the will operated to give her freedom, and the lands devised to her."[68]

The *Hall* holding, therefore, was based, at least in part, on Henry L. Hall's mistaken belief that Basil was legally freed or on the effect of the residuary manumission clause in Henry's will. The judges also may have been more willing to award freedom claims than other slave state judges who rejected the implied manumission doctrine because it was contrary to law or public policy. The one exception is the dictum in South Carolina Justice John B. O'Neall's opinion in *Guillemette v. Harper*,[69] which endorsed the implied manumission doctrine. This was not a freedom or manumission suit, although it involved the interpretation of the will of Edward Quinn, a native of Ireland, whose slaves included Patrick E. Quinn. As in *Hall*, Edward's devise of property to Patrick was not the only evidence supporting the conclusion that he intended to free Patrick. The other South Carolina cases decided before and after *Guillemette* held that bequests to slaves were void.[70] O'Neall, moreover, was unique among Southern antebellum judges because he resisted the anti-manumission trend. He even published a book calling for slave law reforms—including liberal manumission laws—which he thought would best protect and defend slavery.[71]

Duvall, Taney, and *Dred Scott*

Duvall's *Le Grand* opinion endorsing the implied manumission doctrine, like the dicta in *Hall* and *Guillemette*, was a "decided novelty" in the U.S. Southern slavery law.[72] Duvall also did not question the Circuit Court's diversity of citizenship jurisdiction under article 3, section 2 of the United States Constitution, which extends the federal judicial power "to Controversies . . . between Citizens of different States." Indeed, Nicholas Darnell's right as a Pennsylvania citizen to sue Maryland citizen Claudius Le Grand in federal court was the foundation for the "friendly" rulings in law and equity that resulted in what in today's practice would be a declaratory judgment establishing the parties' rights under the Maryland statute and their agreement. Le Grand's equity bill implicitly admitted that Darnall was a citizen of another state against whom Le Grand had a controversy that could be adjudicated in the federal courts.[73] Although no reported decision had explicitly held that free blacks could file diversity suits in the federal courts, *Le Grand v. Darnall* was not the first antebellum interracial federal diversity case. In 1793, Peter Elkay, an African American from Stockbridge, Massachusetts, had successfully sued two white Connecticut defendants who kidnapped Elkay's daughters. Stanton D. Krauss noted that many newspapers reported Elkay's $250 judgment, but Krauss found no evidence that members of the founding generation publicly criticized the federal court's exercise of interracial diversity jurisdiction.[74]

In contrast, Le Grand's lawyer Taney, later as Chief Justice, closed the federal courthouse door to African-Americans when, in his *Scott v. Sandford*[75] opinion, he included a section declaring that the founding generation intended to exclude African Americans from United States citizenship. Montgomery Blair, a well-connected Missouri free-soil Democrat who represented the Scotts before the Supreme Court, had cited the *Le Grand* decision and Taney's participation as Le Grand's counsel to support the Scotts' right to sue in diversity for their freedom. This argument no doubt prompted Taney to explain at some length why he believed he

was not being inconsistent when he denied the right to sue under the constitution's diversity jurisdiction clause to enslaved litigants like Dred Scott and his family and to free people whose ancestors were imported in the African slave trade.[76] Taney foreshadowed his interpretation in legal opinions that he authored in 1832 while serving as Andrew Jackson's Attorney General, and Taney repeated these views in an 1840 opinion for the Circuit Court for the District of Maryland.[77]

Conclusion

When Gabriel Duvall resigned from the Supreme Court, he sent a January 15, 1835 letter that is lost to history; this epitomizes his relative obscurity as a Justice. John Marshall's reply letter, which was not published in full until 2006, expressed his "regret at the separation that has taken place[.]" Marshall offered some insight into Duvall's personality by acknowledging "the cordiality with which we have proceeded together in the performance of our official duties, and the fidelity with which you have discharged the part which has devolved to you," while praising Duvall's "private virtues, and the purity of [his] public life . . . ."[78] After Duvall died in 1844, Joseph Story remembered Duvall's "irbanity [sic], his courtesy, his gentle manner, his firm integrity and undependence [sic], and his sound judgment," although not his contributions to the Court's body of precedent.[79] Like most of the Justices of his day, Duvall, who filed few opinions, played a supporting role to Marshall. Yet Duvall's two Supreme Court slavery opinions provided enslaved litigants with potential legal pathways to freedom. "These are not bad opinions to be remembered by."[80]

Duvall's work as a lawyer and his slavery law judicial opinions pose interesting contrasts to the actions and views of his fellow Maryland slave owners Francis Scott Key and Roger B. Taney. Duvall's advocacy for Charles Mahoney and Ned Queen was a model for Key, whose many cases for enslaved litigants included a successful 1828 freedom suit that Key filed against Duvall on behalf of a family of Duvall's own slaves.[81] Duvall never publicly condemned slavery, unlike Key, who called slavery "a great moral and political evil amongst us" and said that "duty, honor and interest call upon us to prepare the way for its removal." But Key made these statements while prosecuting Reuben Crandall for "publishing libels tending to excite sedition among [Washington's] slaves and free colored persons . . . ."[82] While Duvall was a Justice, Key argued before the Supreme Court for the liberation and return to Africa of the alleged slaves found aboard the slave ship *Antelope*.[83] John Noonan called Duvall the Justice with "the smallest reputation" among those who decided the *Antelope* case, but he cited Duvall's *Mima Queen* dissenting opinion to support his suggestion that Duvall was one of the three Justices who adopted Key's argument that the Africans claimed as slaves were presumed to be free people, thus requiring the claimants to prove their alleged ownership.[84] Key also testified before a congressional committee advocating legislation to prevent the kidnapping of free blacks into slavery, but he opposed slavery's immediate abolition and supported the colonization in Africa of free African Americans.[85]

Taney alone among the three freed all of his slaves during his lifetime, excluding those whom he contended could not provide for themselves. Moreover, in 1818, while successfully defending Reverend Jacob Gruber on the charge of conspiracy to raise a slave insurrection, Taney called slavery an "evil" to be "gradually, wiped away[.]"[86] But Taney also supported colonization. And his *Dred Scott* opinion later declared that all free and enslaved African Americans were people without rights under the United States Constitution.

In contrast, Duvall expressed no reservations when the federal courts exercised diversity of citizenship jurisdiction to establish Nicholas Darnall's legal rights as a mixed race United States citizen. This permits us to wonder whether Duvall would have dissented from Taney's opinion denying this legal right to African Americans, as he dissented when he thought that John Marshall denied "reasonable protection" to "people of color."[87]

ENDNOTES

[1] *See* Ernest Sutherland Bates, **The Story of the Supreme Court** (1936), pp. 109-10. For biographical summaries and evaluations of Duvall, *see* Shirley Baltz, **Gabriel Duvall: A Short Biography** (Society of Mareen Duvall Descendants, no date); G. Edward White, **The Marshall Court and Cultural Change, 1818-1835** (Abridged Edition, 1991), pp. 321-31, 697-98; Harry Wright Newman, **Mareen Duvall of Middle Plantation: A Genealogical History of Mareen Duvall** (1952), pp. 484-86; James O'Hara, "Gabriel Duvall: 1811-1835," in **The Supreme Court Justices: Illustrated Biographies, 1789-2012** (Clare Cushman, ed.) (2013), pp. 71-75; Christopher L. Tomlins, ed., **The United States Supreme Court: The Pursuit of Justice** (2005), pp. 476-77; Richard B. Ellis, "Gabriel Duvall (1752-1844)," in **The Oxford Companion to the Supreme Court of the U.S.** (Kermit L. Hall, *et al.*, ed.)(2d ed. 2005), pp. 278-79; Timothy L. Hall, "Gabriel Duvall (1752-1844)," in **Supreme Court Justices: A Biographical Dictionary** (2001), pp. 62-64; Jan Onofrio, "Duvall, Gabriel (1752-1844)," in **Maryland Biographical Dictionary** (1999), pp. 192-96; John Paul Jones, "Gabriel Duvall," in **The Supreme Court Justices: A Biographical Dictionary** (Melvin I. Urofsky, ed.)(1994), pp. 153-54; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789** (Edward C. Papenfuse, *et al.*, ed.)(1979), pp. 290-92; Irving Dilliard, "Gabriel Duvall," in 1 **The Justices of the United States Supreme Court 1789-1969** (Leon Friedman and Fred L. Israel, eds.)(1969), pp. 419-28; James B. O'Hara, "Justice Gabriel Duvall," 38 *The Supreme Court Historical Society Quarterly* 1, 8-10 (2015); Ross E. Davies, "Recognition and Volition: Remembering the Retirement of Justice Gabriel Duvall," 4 *Journal of Law: Opening Remarks* 1 (2014).

[2] *See* David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years 1789-1888** (1985), p. 142, n. 131; David P. Currie, "The Most Insignificant Justice: A Preliminary Inquiry," 50 *U. Chi. L. Rev.* 466 (1983) (endorsing the Bates view after analyzing only constitutional law opinions); *see also* Frank H. Easterbrook, "The Most Insignificant Justice: Further Evidence," 50 *U. Chi. L. Rev.* 481, 495-96 (1983) (rating Duvall the runner up to Thomas Todd as most inconsequential Justice after reviewing all of these Justices' Supreme Court opinions). On Marshall's influence on the Court's opinions, *see, e.g.*, Charles F. Hobson, "Defining the Office: John Marshall as Chief Justice," 154 *Univ. of Penn. L. Rev.* 1421, 1442-50 (2006).

[3] Dilliard, "Gabriel Duvall," in 1 **The Justices of the United States Supreme Court 1789-1969**, pp. 419-28, quotation at 428.

[4] *See* Nicholas Wade, "Cheney and Obama: It's Not Genetic," *New York Times* (October 21, 2007), accessed April 10, 2016, http://www.nytimes.com/2007/10/21/weekinreview/21basic.html; Anne E. Kornblut, "Obama and Cheney, Making Connection," *Washington Post* (October 17, 2007), accessed April 10, 2016, http://www.washingtonpost.com/wpdyn/content/article/2007/10/16/AR2007101602362.html; David Nitkin and Harry Merritt, "A New Twist to an Intriguing Family History," *Baltimore Sun* (March 2, 2007), accessed, April 10, 2016, http://www.baltimoresun.com/news/bal-te.obama02mar02-story.html.

[5] 11 U.S. (7 Cranch) 290, 3 L. Ed. 348 (1813).

[6] 27 U.S. (2 Pet.) 664, 7 L. Ed. 555, 1829 U.S. LEXIS 427 (1829).

[7] 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857). On Duvall's slaveholdings, *see* Newman, **Mareen Duvall of Middle Plantation**, p. 486; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789**, p. 291.

[8] *See* Andrew Fede, **Roadblocks to Freedom: Slavery and Manumission in the United States South** (2011), pp. 2-3, 148-49; *see also* Marc Leepson, **What So Proudly We Hailed: Francis Scott Key, A Life** (2014), pp. 5, 25-27, 101-02, 125, 159-60, 191; Edward S. Delaplaine, **Francis Scott Key: Life and Times** (1937), pp. 191-95; Victor Weybright, **Spangled Banner: The Story of Francis Scott Key** (1935), pp. 180-203; Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," 97 *J. of Am. Hist.* 17, 19 (2010). Other lawyers who represented enslaved clients included Thomas Jefferson, John Marshall, Abraham Lincoln, and Andrew Jackson. *See id.*; James W. Ely, Jr. and Theodore Brown, Jr., eds., **Legal Papers of Andrew Jackson** (1987), pp. 32-33; *see also* Anne Twitty, **Before *Dred Scott*: Slavery and Legal Culture in the American Confluence, 1787-1857** (2016), pp. 96-125 (discussing lawyers who represented St. Louis freedom claimants).

[9] *See, e.g.*, Ira Berlin, **The Long Emancipation: The Demise of Slavery in the United States** (2015),

pp. 54-57; Fede, **Roadblocks to Freedom**, pp. 12, 247-74; Paul Heinegg, **Free African Americans of Maryland and Delaware from the Colonial Period to 1810** (2000), pp. 1-12; Martha Hodes, **White Women, Black Men: Illicit Sex in the Nineteenth Century South** (1997), pp. 19-38; Peter W. Bardaglio, **Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South** (1995), pp. 51-52; George M. Fredrickson, **White Supremacy: A Comparative Study of American and South African History** (1981), pp. 94-108; John Codman Hurd, **The Law of Freedom and Bondage in the United States** (1858 & 1862), Vol. 2, pp. 19-20; *id.*, at Vol. 1, pp. 249, 250, 252, 253; Cynthia Hawkins DeBose, "'Colonial White Mater Privilege': An Above-Ground Railroad to Freedom and Land Reclamation," 55 *How. L. J.* 455, 459-91 (2012); Karen A. Getman, "Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System," 7 *Harv. Women's L. J.* 115, 122-34 (1984). On the legal history of Native American slavery in the United States, *see, e.g.*, Margaret Ellen Newell, **Brethren by Nature: New England Indians, Colonists, and the Origins of American Slavery** (2015); Gregory Ablavsky, "Making Indians 'White': The Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy," 159 *U. Penn. L. Rev.* 1457 (2011).

[10] *See, e.g.*, Thomas Peake, **A Compendium of the Law of Evidence** (1806), pp. 10-11; *see also* Fede, **Roadblocks to Freedom**, pp. 339-40; 2 **McCormick on Evidence** (Kenneth S. Broun, ed.)(6th ed. 2006) §246, pp. 128-31. On the history of the hearsay rule, *see, e.g.*, 2 *id.* §§244-45, pp. 122-28; David Alan Sklansky, "Hearsay's Last Hurrah," 2009 *Sup. Ct. Rev.* 1, 10-30; T. P. Gallanis, "The Rise of Modern Evidence Law," 84 *Iowa L. Rev.* 499, 509-37 (1999).

[11] *See* Fede, **Roadblocks to Freedom**, pp. 340-43; Duncan J. MacLeod, **Slavery, Race and the American Revolution** (1974), pp. 112-17; Michael L. Nicholls, "'The squint of freedom': African-American Freedom Suits in Post-Revolutionary Virginia," 20 *Slavery & Abolition* 47, 47-51 (2001); Michael L. Nicholls, "Passing Through this Troublesome World: Free Blacks in the Early Southside," 92 *Va. Mag. of Hist. & Bio.* 50, 56-60 (1984); *see also*, on the hearsay exceptions, 2 **McCormick on Evidence** §322, pp. 396-99; Peake, **A Compendium of the Law of Evidence**, pp. 11-13; *Jackson, ex dem. Wilson v. Cooley*, 8 Johns 128, 1811 N.Y. LEXIS 89 (Sup. Ct. 1811).

[12] 4 H. & Mc H. 295, 1799 WL 397 (Md. Gen. Ct. 1799), *rev'd*, (Md. Ct. App. 1802), 4 H. & Mc H. 210, 1798 WL 411 (Md. Gen. Ct. 1798), 4 H. & Mc H. 63, 1797 WL 583 (Md. Gen. Ct. 1797). The discussion of this case is in part taken from Fede, **Roadblocks to Freedom**, pp. 149, 294-96, 341-42, 347.

[13] *See* Maryland State Archives ("MSA"), Schweninger Collection, Document 8, Volume 4239-2, page 3, Race and Slavery Petitions Project, Petition 20979115; "Rev.; John Ashton (b. circa 1742 - d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715; Eric Robert Papenfuse, "From Redcompense to Revolution: Mahoney v. Ashton and the Transfiguration of Maryland Culture, 1791-1802," 15 *Slavery & Abolition* 38, 39 (1994). On Jesuit slaveholdings in Maryland and at Georgetown, *see* Thomas Murphy, **Jesuit Slaveholding in Maryland, 1717-1838** (2001); Rachel L. Swarns, "Georgetown Confronts Its Role in Nation's Slave Trade: What Does the University Owe Descendants of 272 Slaves?" *New York Times* (April 17, 2016), pp. 1, 16.

[14] Lofft 1, 98 Eng. Rep. 499, 20 How. St. T. 1 (K.B. 1772).

[15] *See* MSA, Schweninger Collection, Document 8, Volume 4239-2, page 3, Race and Slavery Petitions Project, Petition 20979115; Papenfuse, "From Redcompense to Revolution" at 38-62; *see also Shorter v. Boswell*, 2 H. & J. 359, 1808 WL 669 (Md. 1808); *Shorter v. Rozier*, 3 H. & McH. 238, 1794 WL 463 (Md. Gen. Ct. 1794).

[16] *See* Papenfuse, "From Redcompense to Revolution," at 55, n. 6; *see generally* Heinegg, **Free African Americans of Maryland and Delaware**, pp. 239-41; "Rev. John Ashton (b. circa 1742;d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715. For differing evaluations of Duvall's theory of the Mahoney case, *see* Fede, **Roadblocks to Freedom**, p. 296 (arguing that the case had a "sound basis" within the context of the cases decided when Duvall filed the petition); Robert B. Shaw, **A Legal History of Slavery in the United States** (1991), p. 116 (calling Duvall's reliance on the *Somerset* decision "certainly far fetched [sic] in the light of the prevailing attitudes and it is remarkable that it ever reached the courts at all.").

[17] *See Edward Queen v. John Ashton, Petition for Freedom*, October 15, 1791, *O Say Can You See: Early Washington, D.C., Law & Family* ("*Early Washington*"), accessed January 2, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0338; *Edward Queen v. John Ashton, Judgment*, May 23, 1794, at *Early Washington*, accessed January 2, 2016; Papenfuse, "From Redcompense to Revolution," at 52; *see also* Lorena S. Walsh, **Motives of Honor and Pleasure: Plantation Management in the Colonial Chesapeake, 1607-1763** (2010), pp. 324-29; Murphy, **Jesuit Slaveholding in Maryland, 1717-1838**, pp. 35-38.

[18] *See Edward Queen v. John Ashton, Deposition of Richard Disney*, May 14, 1792, filed July 28, 1792, at *Early Washington*, accessed January 2, 2016. On the Larkins, *see* Jane Wilson McWilliams, **Annapolis City on the Severn: A History** (2011), pp. 30-31; William Kenneth Rutherford and Anna Clay Zimmerman

Rutherford, **Genealogical History of the Gassaway Family** (1981), p. 122; J.D. Warfield, **The Founders of Anne Arundel and Howard Counties, Maryland** (1905), pp. 104, 171.

[19] *See Edward Queen v. John Ashton, Deposition of Thomas Warfield*, October 11, 1792, filed October 25, 1793, at *Early Washington*, accessed January 2, 2016.

[20] *See Edward Queen v. John Ashton, Deposition of George Davis*, May 27, 1793, filed June 1, 1793, at *Early Washington*, accessed January 2, 2016.

[21] *See Edward Queen v. John Ashton, Deposition of Caleb Clarke*, filed October 23, 1793, at *Early Washington*, accessed January 2, 2016; *see also* Newman, **Mareen Duvall of Middle Plantation**, pp. 209-10, 215, 222-24, 263-64.

[22] *See Edward Queen v. John Ashton, Judgment*, May 23, 1794, at *Early Washington*, accessed January 2, 2016; Papenfuse, "From Redcompense to Revolution," at 52; Heinegg, **Free African Americans of Maryland and Delaware**, pp. 296-99; "Rev. John Ashton (b. circa 1742 - d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715; *see also* Fede, **Roadblocks to Freedom**, p. 353 (discussing Edward Queen's unsuccessful damage suit *Queen v. Ashton*, 3 H. & McH. 439, 1796 WL 630 (Md. Gen. Ct. 1796)).

[23] 13 F. Cas. 907 (C.C.D.C. 1808)(7,435).

[24] *See Joice v. Alexander*, 13 F. Cas. at 908; *see also* Fede, **Roadblocks to Freedom**, p. 348; Papenfuse, "From Redcompense to Revolution," at 62, n. 95.

[25] 11 U.S. (7 Cranch) 290, 3 L. Ed. 348 (1813). The discussion of this case is taken in part from Fede, **Roadblocks to Freedom**, pp. 343-45.

[26] *See Mima Queen & Louisa Queen v. John Hepburn*, Petition, January 8, 1810, at *Early Washington*, accessed January 2, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0011; *Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 1*, June 26, 1810, at *Early Washington*, accessed January 2, 2016; Baltz, **Gabriel Duvall: A Short Biography**, p. 1; James O'Hara, "Gabriel Duvall: 1811-1835," in **The Supreme Court Justices: Illustrated Biographies, 1789-2012**, p. 71; *see also* William G. Thomas, III, "The Timing of *Queen v. Hepburn*: An Exploration of African American Networks in the Early Republic," at *Early Washington*, accessed January 2, 2016, http://earlywashingtondc.org/stories/queen_v_hepburn.

[27] *See Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 2*, June 26, 1810, at *Early Washington*, accessed January 2, 2016; *Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 5*, June 28, 1810 and Defendant's Bill of Exceptions, June 27, 1810, at *Early Washington*, accessed January 2, 2016; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789**, p. 290; Dilliard, "Gabriel Duvall," in 1 The **Justices of the United States Supreme Court 1789-1969**, pp. 420-22.

[28] *See Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 6*, no date, at *Early Washington*, accessed January 2, 2016. The petitioners also called as trial witnesses Simon Queen (who was freed by Ashton in 1796 along with other Queen family members), Gabriel Duvall, and two women identified only as Mrs. Quiad and Mrs. Nevitt. Their testimony is not preserved. *See Mima Queen & Louisa Queen v. John Hepburn*, Defendant's Bill of Exceptions, no date; *Mina Queen & Louisa her child v. John Hepburn*, Minute Book 287, no date, at *Early Washington*, accessed January 2, 2016.

[29] *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) at 290-93.

[30] *Id.* at 295.

[31] *See id.* at 296-98, quotations at 296-97.

[32] *Id.* at 298-99.

[33] *Id.* at 299.

[34] *See Davis v. Wood*, 14 U.S. (1 Wheat.) 6, 4 L. Ed. 22 (1816); *see also Wood v. Davis*, 11 U.S. (7 Cranch) 271, 272, 3 L. Ed. 339 (1812)(Justice Duvall refers to Maryland freedom suits including *Rawlings v. Boston*, 3 H. & McH. 139, 1793 WL 394 (Md. Gen. 1793)).

[35] *See* 30 Charles Alan Wright and Kenneth W. Graham, Jr., **Federal Practice & Procedure, Federal Rules of Evidence, Hearsay and Confrontation** (1997 & supp. 2014) §6321, p. 18, n. 83-84; *see also, e.g.*, on the Marshall court and slavery, R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001), pp. 426-31; Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996), pp. 165-66, 169-70; Peter Charles Hoffer, **The Law's Conscience: Equitable Constitutionalism in America** (1990), pp. 117-19; MacLeod, **Slavery, Race and the American Revolution**, pp. 117-18; Leslie Freidman Goldstein, "Slavery and the Marshall Court: Preventing 'Oppressions of the Minor Party'?," 67 *Md. L. Rev.* 166, 177 (2007); Kent Newmyer, "On Assessing the Court in History: Some Comments in the Roper and Burke Articles," 21 *Stan. L. Rev.* 540, 542-43 (1969); Donald M. Roper, "In Quest of Objectivity: The Marshall Court and the Legitimation of Slavery," 21 *Stan. L. Rev.* 532, 533, 537 (1969).

[36] 17 U.S. (4 Wheat.) 518, 713, 4 L. Ed. 629 (1819).

[37] *See* Melvin I. Urofsky, **Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue** (2015), pp. 46-54.

[38] *See Walkup v. Pratt*, 5 H. & J. 51, 1820 WL 912, at 5 (Md. 1820); *Walls v. Hemsley*, 4 H. & J. 343, 1817 WL 959 (Md. 1817); *see also Glover v. Millings*, 2 Stew. & P. 28, 1832 WL 551 at 6-7 (Ala. 1832)(citing *Mima Queen* with approval); Fede, **Roadblocks to Freedom**,

p. 345; MacLeod, **Slavery, Race and the American Revolution**, p. 118.

[39] 8 Tenn. (Mart. & Yer.) 5, 1827 WL 613 (1827).

[40] *Vaughan v. Phebe*, 1827 WL 613 at 1-2, 11-13. For other cases allowing reputation evidence of enslaved or free status, *see* Fede, **Roadblocks to Freedom**, pp. 345-47; MacLeod, **Slavery, Race and the American Revolution,** pp. 119-23; *see also Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 1831 WL 1924 (1831)(judges equally divided on the hearsay pedigree exception issue, but reversing freedom judgment on other grounds); A. E. Keir Nash, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *32 Vanderbilt L. Rev. 7*, 137-38 (1979).

[41] 39 Ky. (9 Dana) 23, 1839 WL 2577 (1839).

[42] *Chancellor v. Milly*, 1839 WL 2577 at 1; *see* Fede, **Roadblocks to Freedom**, pp. 348-49; Jason A. Gillmer, "Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South," 82 *N.C. L. Rev.* 535, 587 and n. 338 (2004); *see also Humphries v. Tench*, 12 F. Cas. 883, 2 Cranch C.C. 337 (C.C.D.C. 1822)(6,873)(denying defendant's request to read depositions from Maryland county court case in freedom suit, verdict for petitioner).

[43] *See* W. R. Habeeb, "Admissibility of Declarations of Persons Other Than Members of Family as to Pedigree," 15 *A.L.R.* 2d 1412 (1951)(listing and discussing majority rule and minority rule decisions). For antebellum Southern decisions adopting the minority rule in cases other than manumission and freedom suits, *see, e.g., State v. Patrick*, 51 N.C. (6 Jones) 308, 1859 WL 2030 (1859); *State v. Tucker*, 24 Ala. 77, 1854 WL 330 (1854); *Horry v. Glover*, 11 S.C. Eq. (2 Hill Eq.) 515, 1837 WL 1538 (1837); and for post–Civil War decisions citing slavery hearsay cases, including cases enforcing Jim Crow segregation and anti-miscegenation laws, *see, e.g., Stewart v. Profit*, 146 S.W. 563 (Tex. Ct. Civ. App. 1912); *Cole v. District Bd. of School Dist. No. 29, McIntosh County*, 32 Okla. 692, 123 P. 426 (1912); Frank W. Sweet, **The Legal History of the Color Line: The Rise and Triumph of the One-Drop Rule** (2005), pp. 403-32; Charles Frank Robinson II, **Dangerous Liaisons: Sex and Love in the Segregated South** (2003); J. Allen Douglas, "The 'Most Valuable Sort of Property': Constructing White Identity in American Law, 1880-1940," 40 *San Diego L. Rev.* 181 (2003).

[44] *See, e.g.*, Glen Weissenberger, "Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant," 55 *U. Cin. L. Rev.* 1079, 1129-34 (1987); *see also Porter v. Quarantillo*, 722 F. 3d 94, 97-99 (2d. Cir. 2013); *Blackburn v. United Parcel Service, Inc.*, 179 F. 3d 81, 98-102 (3d. Cir. 1999); *Ware v. Beach*, 322 P. 2d 635, 639-40 (Ok. 1957), *cert. denied*, 358 U.S. 819 (1958); *Daniels v. Johnson*, 216 Ark. 374, 226 S.W. 2d 571, 576-77 (1950); Richard J. Biunno, *et al.*, **Current N.J. Rules of Evidence** (2016), pp. 903-04; 2 **McCormick on Evidence** §322, pp. 396-99. On dissenting opinions, *see* Urofsky, **Dissent and the Supreme Court**, pp. 36, 339, 414-15; Mark V. Tushnet, "Conclusion," in **I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases** (Mark V. Tushnet, ed.)(2008), p. 221.

[45] 27 U.S. (2 Pet.) 664, 7 L. Ed. 555, 1829 U.S. LEXIS 427 (1829). The discussion of this case is taken in part from Fede, **Roadblocks to Freedom**, pp. 181-82.

[46] 13 Charles Alan Wright, *et al.*, **Federal Practice & Procedure, Jurisdiction and Related Matters 3d, The Federal Judicial System** (2008 & Supp. 2014) §3530, p. 717, n. 69.

[47] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 2-7; Robert Barnes, **Marriages and Deaths for the Gazette 1727-1839** (1973), p. 44; Pat Melville, "Research Notes," *The Archivists' Bulldog* Vol. 4, No. 31 (September 17, 1990), accessed, January 9, 2016, http://msa.maryland.gov/msa/refserv/bulldog/bull90/html/bull90.html.

[48] *See* Kathryn Grover, **The Fugitive's Gibraltar: Escaping Slaves and Abolitionism in New Bedford, Massachusetts** (2001), p. 74; Melville, "Research Notes;" "The Brothers Darnall," **Frontline: The Blurred Racial Lines of Famous Families**, accessed January 8, 2016, http://www.pbs.org/wgbh/pages/frontline/shows/secret/famous/darnall.html.

[49] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 3, 7-8; Deed of manumission and supporting papers, dated July 18, 1826 and recorded July 26, 1826, *Archives of Maryland Online*, Anne Arundel County Court, Manumission Record, 1816-1844, Volume 831, page 336-43, MSA CM 48-3, accessed January 8, 2016, http://aomol.msa.maryland.gov/000001/000831/html.

[50] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 11; "An ACT relating to negros [sic], and to repeal the acts of assembly therein mentioned," Votes and Proceedings of the Senate of the State of Maryland November Session, 1796, at *Archives of Maryland Online*, volume 105, page 251, 255, accessed January 21, 2016, http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000105/html/am105–1.html; Fede, **Roadblocks to Freedom**, p. 96.

[51] 6 H. & J. 16 (Md. 1823).

[52] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 8-11.

[53] *See id.* at 4.

[54] *See id.* at 2, 10, quotation at 10.

[55] *See id.* at 2-5, quotation at 5.

[56] 5 H. & J. 190, 1821 WL 476 (Md. 1821).

[57] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 5.

[58] 6 H. & J. 16 (Md. 1823).

[59] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 5-6.

[60] *See id.* at 11-12.

[61] *See* Saul S. Freidman, **Jews and the American Slave Trade** (1998), p. 177; Lyle Saxon, **Old Louisiana** (1989), p. 133-39; Clement Eaton, **The Growth of Southern Civilization** (1961), p. 138; Kaye Mason Rowland and Mrs. Morris L. Croxall, eds., "Biographical Sketch," in **The Journal of Julia LeGrand New Orleans 1862-1863** (1911), pp. 13-23. For other discussions of the case, *see, e.g.,* Bernie D. Jones, **Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South** (2009), pp. 23-24; Peter Wallenstein, **Tell the Court I Love My Wife: Race, Marriage, and Law—An American History** (2002), pp. 46-47.

[62] *See Wallingsford v. Allen*, 35 U.S. 583, 593, 9 L. Ed. 542 (1836); *see also Fenwick v. Chapman*, 34 U.S. 461, 9 L. Ed. 193 (1835)(affirming freedom judgment finding manumission was not prejudicial to creditors under 1796 act because decedent's real estate could be sold to pay estate's debts); *but see Miller v. Herbert*, 46 U.S. 72, 12 L. Ed. 55 (1847)(following Maryland cases strictly enforcing another provision of the 1796 act requiring that manumission deeds be recorded within six months of execution).

[63] *See* Fede, **Roadblocks to Freedom**, pp. 174-75.

[64] Thomas R.R. Cobb, **An Inquiry into the Law of Negro Slavery in the United States of America** (photo. reprint 1968) (1858), p. 238; *see* Fede, **Roadblocks to Freedom**, pp. 177-81.

[65] *See* **Civil Code of Louisiana with Annotations** (Wheelock B. Upton and Needler R. Jennings, ed.) (1838), p. 29, Art. 184.

[66] *Hall v. Mullin*, 1821 WL 476 at 2-3.

[67] *Id.* at 4.

[68] *Id.* at 5. For other discussions of the case, *see* Fede, **Roadblocks to Freedom**, pp. 175-76; 4 Helen Tunnicliff Catterall, **Judicial Cases Concerning American Slavery and the Negro** (reprint ed. 1968)(1926-1937), pp. 6-7.

[69] 38 S.C.L. (4 Rich.) 186, 1850 WL 2766 (1850).

[70] *See, e.g., Mallett v. Smith*, 27 S.C. Eq. (6 Rich. Eq.) 12 (1853); *Thorne v. Fordham*, 24 S.C. Eq. (4 Rich. Eq.) 222 (1852); *Swinton v. Egleston*, 24 S.C. Eq. (3 Rich. Eq.) 201 (1851); *Fable v. Brown*, 11 S.C. Eq. (2 Hill Eq.) 378, 1835 WL 1408 (S.C. App. 1835); Fede, **Roadblocks to Freedom**, pp. 176-77.

[71] *See* John Belton O'Neall, **Negro Law of South Carolina** (1848); *see also*, on O'Neall, Fede, **Roadblocks to Freedom**, pp. 372-73.

[72] *See* 4 Catterall, **Judicial Cases Concerning American Slavery and the Negro**, p. 6; *see also Smith v. Doe*, 33 Md. 442, 447-48, 1871 Md. LEXIS 4 (1871) (citing *Hall* and holding no implied manumission); *Bell v. McCormick*, 3 F. Cas. 107, 5 Cranch C.C. 398 (C.C.D.C. 1838)(No. 1,255)(denying implied manumission).

[73] *See U. S. Const.*, art III, § 2, cl. 1. On declaratory judgments, *see* Declaratory Judgments Act, 28 *U.S.C.A.* §§2201-2202 (2006 & sup. 2015); Donald L. Doernsberg and Michael B. Mushlin, "The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction while the Supreme Court Wasn't Looking," 36 *U.C.L.A. L. Rev.* 529, 547-93 (1989).

[74] *See* Stanton D. Krauss, "New Evidence That *Dred Scott* was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction," 37 *Conn. L. Rev.* 25, 27-65 (2004).

[75] 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

[76] 60 U.S. (19 How.) at 400-28. Taney's discussion of *Le Grand v. Darnall* is at 423-26. Justice Benjamin R. Curtis's dissenting opinion contended that the federal courts had diversity jurisdiction but did not dispute Taney's reading of the procedural history distinguishing *Le Grand*. *See id.* pp. 447-49; *see also, e.g.,* Earl M. Maltz, **Dred Scott and the Politics of Slavery** (2007), pp. 101-12, 118-21, 132-36; Austin Allen, **Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court 1837-1857** (2006), pp. 150-51; Walter Eherlich, **They Have No Rights: Dred Scott's Struggle for Freedom** (1979), pp. 90-92; Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (1978), pp. 281-82, 295-96, 362, 675, n. 42 (1978); Krauss, "New Evidence That *Dred Scott* was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction," at 26, n. 5.

[77] *See United States v. Dow*, 25 F. Cas. 901, 901-04, 1 Taney 34 (C.C.D. Md. 1840)(14,990);Walker Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney** (1965), pp. 355-60, 506-07; Carl Brent Swisher, **Roger B. Taney** (1935), pp. 149-59; Bernard C. Steiner, **Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court** (1922), pp. 136, 455-56; Michael A. Schoeppner, "Status across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision," 100 *Journal of American History* 46, 46-67 (2013); Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," at 34-37; H. Jefferson Powell, "Attorney General Taney and the South Carolina Police Bill," 5 *Green Bag* 2d 75-76, 84-86, 90-91, 99-109 (Autumn 2001); Paul Finkelman, "'Hooted Down the Page of History': Reconsidering the Greatness of Chief Justice Taney," 19 *Journal of Supreme Court History* 83, 90-91 (1994).

[78] *See* Davies, "Recognition and Volition," pp. 1-3; *see also* 12 **The Papers of John Marshall** (Charles F. Hobson, ed.)(2006), pp. 432-33; White, **The Marshall Court and Cultural Change**, p. 327.

[79] *See Obituary*, 43 U.S. x, xi-xii (1844).

[80] *See* William L. Reynolds, "Maryland and the Constitution of the United States: An Introductory Essay," 66 *Maryland L. Rev.* 923, 932 (2007).

[81] *See Butler v. Duvall*, 4 F. Cas. 901, 4 Cranch C.C. 167 (C.C.D.C. 1831)(2,239); *Butler v. Duvall*, 4 F. Cas. 898, 3 Cranch C.C. 611 (C.C.D.C. 1829)(2,238); *Thomas Butler, Sarah Butler, Matilda Butler, Airy Butler, Reason Butler, Sally Butler, Liddy Butler, & Eliza Butler v. Gabriel Duvall*, at *Early Washington*, accessed November 25, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0217; Leepson, **What So Proudly We Hailed,** pp. 26-27.

[82] *See* Leepson, **What So Proudly We Hailed,** p. 182; *see also* Newmyer, **John Marshall and the Heroic Age of the Supreme Court,** p. 95 (warning that "[l]awyer's arguments, like judge's opinions . . . are not always reliable statements of personal belief.").

[83] *See The Antelope*, 23 U.S. (10 Wheat) 66, 6 L. Ed. 268 (1825).

[84] *See* John T. Noonan, Jr., **The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams** (1977), pp. 107-08, 112-16; *see also* Jonathan M. Bryant, **Dark Places of the Earth: The Voyage of the Slave Ship Antelope** (2015), pp. 235-37, 346, n. 12; Leepson, **What So Proudly We Hailed**, pp. 103-07; White, **The Marshall Court and Cultural Change, 1818-1835**, p. 699, n. 92; Delaplaine, **Francis Scott Key: Life and Times**, pp. 208-16.

[85] *See* Nicholas Guyatt, **Bind Us Apart: How Enlightened Americans Invented Racial Segregation** (2016), pp. 262-75, 285; Leepson, **What So Proudly We Hailed**, pp. 77-107, 123-24, 191-93; P. J. Straudenraus, **The African Colonization Movement 1816-1865** (1961), pp. 25-30, 189-90, 208; Delaplaine, **Francis Scott Key: Life and Times**, pp. 191-218, 441-58.

[86] *See* Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," 19-26, quotation at 25; *see also* Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney,** pp. 360-62; Straudenraus, **The African Colonization Movement,** pp. 25, 70, 111. Key freed some of his slaves during his lifetime. His will freed any slaves he still owned upon his wife's death. *See* Leepson, **What So Proudly We Hailed**, pp. 190-91.

[87] For more discussion of antebellum theories and evidence of free black citizenship, *see* Mark A. Graber, **Dred Scott and the Problem of Constitutional Evil** (2006), pp. 46-57; *see also* Ryan C. Williams, "Originalism and the Other Desegregation Decision," 99 *Va. L. Rev.* 493, 511-20 (2013).

A Closer Look at *Allen*

GARY PETERSON

In what has become known as an *Allen* charge, a trial judge gets tough with jurors who believe they cannot agree. Jurors in the minority are told to reconsider whether their views are sound, given the greater number of jurors arrayed against them. Delivered with the right emphasis and tone, such an instruction can break a jury deadlock. The *Allen* charge gains its name from *Allen v. United States*,[1] an 1896 Supreme Court opinion that upheld such a charge. Nearly a century later, the Court praised the *Allen* opinion's reasoning as "beyond dispute."[2] Today, the *Allen* charge remains a staple of modern federal trial practice.

Yet there was more to Allen's case than the *Allen* charge. Alexander Allen was a poor black teenager convicted of murder. He was one of many whom the federal court in Fort Smith, Arkansas, sentenced to hang. After a harrowing series of trials and appeals, Allen ended up in the Supreme Court, sentenced to die, with no lawyer to represent him. By the 1890s, the Court had spent over a century deciding cases brought to it by lawyers. It now faced a new kind of appeal, brought by condemned prisoners who, like Allen, were too poor to hire a lawyer. This paper explores how Allen's case unfolded, and how the Supreme Court handled his appeals.

A Shooting in Farm Country

Alexander Allen was fifteen years old and black. During the spring of 1892, he ran away from his home and family in Kansas and spent three weeks living and working on a farm on the edge of Indian Territory. The farm, near Coffeyville, Kansas, was tended by William Marks, a former slave.[3] Two white boys, George and Willie Erne, lived on the farm next to the Marks place. A third white boy, Phillip Henson, lived nearby. Henson was eighteen years old. George Erne was fifteen, and his brother Willie was thirteen.[4]

One Saturday morning in May, William Marks hitched up a wagon and went to town with a load of hay. He left Allen in charge of the farm. As Allen was doing chores in the farmyard, Henson and the Ernes approached. Each of the white boys carried a long stick.[5] In the exchange that followed, Allen drew a pistol and fired several shots. Henson was hit in the side and back, and died within minutes.

Alexander Allen was a black teenager convicted of murder who was too poor to hire a lawyer. The Supreme Court's 1896 decision in his case upheld the right of a trial judge to admonish jurors in the minority to reconsider their views. In what has become known as an *Allen* charge, such an instruction can be used to break a jury deadlock.

George Erne was hit once in the arm. Allen fled but was arrested in a nearby Kansas town later that day. There was some talk of lynching Allen, but nothing came of it.[6]

During each of Allen's trials, the government's main witnesses were the two Erne boys. They recalled walking to a nearby fishing lake with Henson that Saturday. As the boys neared the Marks farm, they saw Allen, whom they barely knew. Allen told them to halt, hit Henson in the face with his fist, and then began shooting at them without provocation.[7]

During the same trials, the defense called two black boys, Harvey Marks and his older brother James. Harvey was age twelve when the shooting happened, and James was thirteen. Both worked on the Marks farm with Allen, and told a much different story.[8] James Marks described hunting for some escaped horses with Allen a few days before the shooting. The pair met up with Henson and the Ernes on Vinegar Creek, near the Marks farm. When Allen asked the white boys what they were doing there, Henson responded that they were "killing God damned niggers." Allen asked the white boys where to cross the creek but chose not to cross where Henson wanted them to. In response, Henson spewed out curses and threats and hurled clubs at the black boys. They parted company with an ominous promise from Henson to "settle this" with Allen the next weekend.[9]

On Saturday, Harvey Marks was working with Allen at the Marks farm. Not long after William Marks left for town, Henson and the Ernes showed up in the Marks farmyard, armed with sticks. Henson told Allen that he had "come to kill a damned nigger." Henson and George Erne then began beating Allen with their sticks. As the beating continued, Allen produced a pistol and shot both Henson and George Erne. The younger Erne boy, Willie, though carrying a stick, was not harmed.[10]

Allen was not kin to the Marks family. He was just a hired hand who stopped to work at their place for a few weeks before continuing his travels.[11] Because they hardly knew Allen, members of the Marks family had little reason to lie for his benefit. The Erne boys, on the other hand, had been in the

middle of the exchange that resulted in Henson's death. If they helped to provoke the shooting, they had good reason for trying to hide their involvement.

A key issue was where the shootings occurred. The Erne boys testified that the shootings happened in the middle of a wheat field on their farm, just over a fence from the neighboring Marks place. Harvey Marks, on the other hand, testified that the shooting occurred in the yard of the Marks farm, where Allen lived and worked.[12] If the Marks boys were believed, Allen shot in response to a vicious attack fed by race hatred. His crime, if there was one, was probably manslaughter. On the other hand, if the Erne boys were believed, Allen was guilty of murder.

Allen's First Trial

Prosecution Begins in the Parker Court. Because the shootings happened within Indian Territory, they were subject to federal criminal law. The United States Circuit Court for the Western District of Arkansas, sitting in Fort Smith, had jurisdiction over Allen's case. The sole resident judge in the Fort Smith district was Isaac C. Parker, the famed hanging judge of western lore. Parker's jurisdiction included a large swath of Indian Territory, where law enforcement was thin and violent crime commonplace. With no local courts to prosecute these crimes, those charged were brought to Fort Smith for trial.[13]

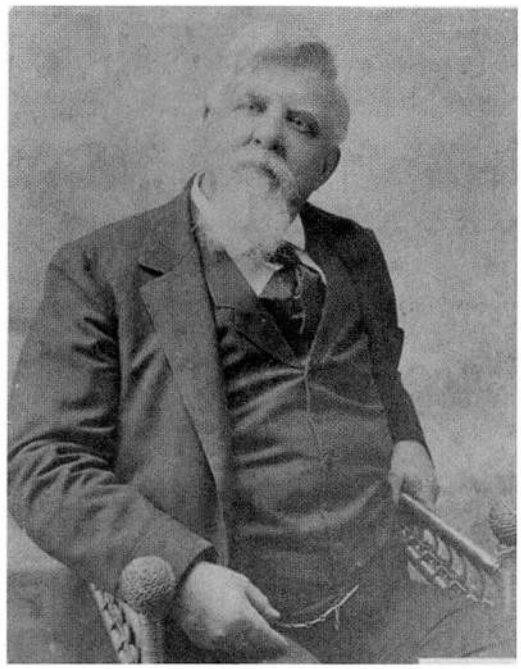
Fort Smith was a raw border city on the western edge of Arkansas. Sitting at the gateway to Indian Territory, the city was filled with hotels, saloons, and lawyers. All owed much of their business to Parker's court. Parker kept up with a huge and ever-increasing caseload by holding court six days a week, often late into the night. He spent about one-third of his time in the courtroom presiding over jury trials for murder.[14] Parker was a judicial celebrity of the day, probably better known to the public than members of the Supreme Court. Stories of crime and punishment from his court ran regularly in newspapers across the country, often with a box score of the judge's record-setting numbers of death sentences and executions. In Fort Smith, the judge's door was always open to reporters.[15]

In June 1892, Allen was transferred from Kansas to the crowded federal jail in Fort Smith. Due to the court's crush of criminal business, Allen's case did not reach a grand jury for another five months. He was finally indicted for murder in November 1892. It took Parker another two and one-half months to receive Allen's plea of not guilty.[16]

Defense Counsel Is Named and the Trial Begins. Most of those charged with capital crimes in Parker's court were able to hire lawyers. For those who could not do so, federal law guaranteed them court-appointed counsel. Parker spread these appointments among the Fort Smith bar's criminal practitioners, often naming multiple lawyers to a single case. Appointed lawyers received no pay for their work.[17]

With no money for a lawyer, Allen asked Parker to appoint him one. In response, the judge named C.J. Frederick of Fort Smith to the case. A Mississippi native, Frederick was forty-three years old, with seventeen years of legal experience. He graduated from the one-year law program at Tennessee's Cumberland University in 1876 and launched his law practice in Ripley, Mississippi, the same year. During the early 1880s, Frederick served a term in the Mississippi legislature and another term as county school superintendent.[18]

In 1887, Frederick moved from Mississippi to Fort Smith, to share in the bonanza of legal work that Parker's court brought to the city. Frederick specialized in criminal cases, and his peers rated his legal ability as first class. He defended his first murder case in Parker's court in 1889 and won an acquittal. His competent work brought him more clients. In 1892, the year before Allen's



The United States Circuit Court for the Western District of Arkansas, sitting in Fort Smith, had jurisdiction over Allen's case, with Isaac C. Parker (pictured in 1896) as the sole judge. The typical Parker murder charge was five times the length of the murder charges given by other federal judges of the day and was strongly slanted toward the prosecution.

first trial, Frederick tried seven murder cases to juries in the Fort Smith federal court.[19] Allen was fortunate to get a lawyer of such skill.

Parker scheduled Allen's first trial for February 10, 1893, just ten days after appointing Frederick. The lawyer moved quickly to secure subpoenas for four members of the Marks family. All appeared as defense witnesses at the trial. Allen himself testified as well, and said that he acted in self-defense.[20] After two days of testimony, Parker began the phase of the trial that is most closely identified with his unique style of judging: the jury charge. In his charge, Parker spoke directly to jurors and told them about the law that would govern their deliberations.

The Parker Jury Charges. One striking feature of Judge Parker's jury charges was their extraordinary length. The typical Parker murder charge was five times the length of the murder charges given by other federal judges of the day.[21] Parker might need two hours or more to deliver such a charge orally. While other judges were content to simply list the elements of murder and manslaughter for jurors, Parker preferred to illustrate these legal principles with extended discussions of past murder cases from other courts in both the United States and England. Parker brought his points home with lengthy quotations from legal treatises and appellate court opinions. Rather than provide jurors with a single definition of a term like "malice aforethought," Parker would offer them a half-dozen different definitions.[22]

But the Parker jury charges were not just long: they were also strongly slanted toward the prosecution. Parker liked to remind jurors about specific facts of the case they had just heard, often repeatedly and at length. But the only facts that Parker ever mentioned were those that favored the prosecution's theory of the case. In many cases, Parker's jury charge was virtually an argument for conviction.[23]

While Parker's charges warmly embraced the prosecution's proof, evidence from the defense was another matter. If a defendant testified, Parker questioned whether anyone on trial for murder could be believed. If a defendant called alibi witnesses, Parker would remind the jury about how often alibis were procured by fraud. If the defense called an expert witness, Parker would denounce such witnesses as paid charlatans. And character witnesses called by the defense always drew special scorn from Judge Parker.[24] No matter what the defense, the judge was always ready to belittle it in his charge.

Assistant Attorney General Edward Whitney represented the government in more appeals from Parker's court than anyone else. As Whitney saw it, Parker was biased and bloodthirsty. In an internal Justice Department memorandum, Whitney wrote that Parker "seems to have deemed it his duty to stop anarchy in the Indian Territory by hanging as many residents of that Territory as he can, and therefore to strain every point against the prisoner and give him as little benefit of the law as possible. It also seems to be a matter of pride to convict the prisoner."[25]

Judge Parker and Self-Defense. The "bloody wilds of the Indian country," as the judge termed them,[26] were places where many carried firearms, and shootings were frequent. Claims of self-defense were made in over half of the homicide cases eventually appealed from Parker's court. The judge's starting point on self-defense was the English common law, which was not always receptive to such claims. That law, developed long before repeating firearms, assumed that one faced with danger could often avoid it, if only by running away. But such antiquated doctrine was a poor match for conditions within Indian Territory, where death could follow instantly from a hail of gunfire.[27]

Parker embroidered the English common law with various refinements of his own making, all working against the accused. For example, a killing that was too brutal would not qualify for self-defense. Self-defense was available only to men who were good, and not to those who were bad. An accused's testimony, standing alone, was not enough to show self-defense. Threats by the deceased, rather than showing a reason for defending oneself, could be proof of the accused's spite and ill will.[28] In Parker's court, evidence of self-defense could easily transmute into proof of murder.

Solicitor General Holmes Conrad was the lawyer who represented the government in each of Allen's appeals. Conrad privately confided that Parker's jury charges on self-defense were "wrong in their whole structure from beginning to end." According to Conrad, Parker's ideas about self-defense were the product of "mediaeval doctrines," rather than modern-day law.[29]

The Verdict. Parker's charge to Allen's jury included a standard discussion of the elements of self-defense.[30] The tone and balance of the charge was relatively mild when compared to Parker's more typical output. The judge may well have entertained some doubts as to Allen's guilt. With the jurors charged, Parker sent them off to deliberate. They returned the next day with a verdict finding Allen guilty of murder. But they qualified their verdict with a request for mercy, asking both the judge and the President to spare Allen's life, "owing to his age."[31]

Death was the only possible punishment for murder at the time. Neither judge nor jury had discretion to impose any lesser sentence.[32] With no authority to grant mercy, Parker sentenced Allen to hang. Frederick responded by filing the papers needed to launch an appeal of Allen's conviction to the Supreme Court.[33]

The New Right of Appeal for the Condemned

When Allen was sentenced in 1893, an appeal was still a relatively new step under

federal law. For over a century, no appeal had been possible for those convicted of federal crimes in circuit courts. This changed in 1889, when Congress first allowed appeals to the Supreme Court by those sentenced to die.[34] The 1889 legislation had been sponsored by the Arkansas congressional delegation and was squarely aimed at the uncomfortably large number of death sentences coming from Parker's court. The appeals went straight to the Supreme Court, bypassing the courts of appeal set up by Congress in 1891.[35] While Parker remained on the bench, the lion's share of the new federal capital appeals, over seventy percent, would originate in his district.

This new class of appeals presented the Court with few of the constitutional questions that would occupy so much of its docket in decades to come. Instead, the cases involved the kinds of practical problems that judges and lawyers faced in capital trials of the day: matters of criminal law, trial procedure, and evidence. The right of self-defense was one such issue, but there were many others. With few criminal law precedents of its own, the Court had much to decide.

The Supreme Court and Judge Parker

The Court that would hear Allen's appeal enjoyed a remarkable degree of unanimity on the headline issues of the day. Its Justices were deeply conservative and were ardent defenders of property rights, freedom of contract, and limited government. Often, their decisions favored business and the wealthy.[36] But these Justices often found themselves divided on the capital cases that reached them from Parker's court.

Justice David J. Brewer was Parker's staunchest defender on the Court. Like Parker, Brewer was a Republican. He arrived at the Supreme Court with fifteen years of experience as a trial judge in Kansas. He had known Parker while serving as circuit judge for the Eighth Circuit, which included Arkansas. Parker enthusiastically endorsed Brewer for elevation to the Supreme Court, and then launched his own aggressive bid to succeed Brewer as circuit judge.[37] As federal circuit judges heard high-dollar civil cases involving railroads, corporations, and banks, Parker, with his focus on murder and hanging, may not have seemed the ideal match for such a position. Brewer did not reciprocate Parker's support, someone else succeeded Brewer as circuit judge, and Parker stayed behind in Fort Smith.[38]

On the economic issues that filled much of its docket, Brewer was one of the Court's leaders. He wrote key opinions in such fields as labor, antitrust and state business regulation.[39] But in the area of criminal justice, Brewer fell decidedly out of the Court's mainstream, to a degree verging on eccentricity. Brewer hated the idea of appeals in criminal cases, and urged their abolition in his writings and speeches. He believed that such appeals delayed justice, encouraged crime and endangered the public. In appeals from Parker's court, his voting usually reflected these attitudes. According to vote tallies kept by one Justice, Brewer voted to reverse Parker in only three of the thirty-four capital cases on which he sat, for a reversal rate just under nine percent.[40]

Justice Henry B. Brown, from Michigan, had been Brewer's undergraduate classmate at Yale. Like Brewer, Brown was relatively young, a Republican, and an experienced trial judge. Also like Brewer, Brown thought that criminal appeals frustrated justice and led to lynchings. But while Brown usually supported Parker, his support was less categorical than Brewer's. In twenty-seven percent of the capital appeals in which he participated, Brown voted to reverse Parker. Brown wrote more opinions for the Court in criminal cases from Parker's court than any other Justice: ten in all.[41]

Justice Rufus W. Peckham, a Democrat, joined the Court in early 1896, late in the

The Supreme Court (pictured in 1894) would reverse nearly seventy percent of the capital convictions coming from Parker's court often because of doubts about the guilt of the condemned and the fairness of the trial. Justice David J. Brewer (seated at right) was Parker's main defender on the Court; he had spent fifteen years as a trial judge in Kansas and had known Parker while serving as circuit judge for the Eighth Circuit, which included Arkansas.

Court's Parker era. A New Yorker, Peckham had experience as a prosecutor, trial judge, and appellate judge. Along with Brewer, he was one of the Court's intellectual stars, who would author many of its most important opinions. In Parker cases, Peckham proved a solid ally for Brewer and Brown, voting to reverse in only eighteen percent of capital appeals.[42]

Four older Justices were far more skeptical about Parker and his judging. The leader of this group was Justice George Shiras, Jr., a Republican who voted to reverse Parker in over seventy-six percent of his capital cases. Before joining the Court, Shiras had been a successful lawyer for business interests in Pittsburgh. His friends included steel magnate Andrew Carnegie, a mover behind Shiras's appointment to the Court. Although Shiras had not served as a trial judge, he seemed to hold higher expectations for trial courts than many of his colleagues. For Shiras, Parker's judging often failed to pass muster.[43]

Shiras was usually joined by the Court's three most senior members, Stephen J. Field, John Marshall Harlan, and Horace Gray. Field was a Democrat, while Harlan and Gray were Republicans. In capital cases, these veteran appellate jurists voted to reverse Parker about sixty-five percent of the time. Although Field was Brewer's uncle, their kinship seldom produced agreement in cases from Parker's court.[44]

Chief Justice Melville W. Fuller and Justice Edward D. White, both Democrats, were most likely to tip the balance between affirmance and reversal in the Court's Parker cases. The Shiras group was often, but not always, able to attract one or more of their

votes and form a majority for reversal. Before joining the Court, Fuller had been a business lawyer in Chicago. White, the youngest of the Justices and a future Chief Justice, had been a United States Senator from Louisiana. Neither had been a trial judge. In capital appeals, Fuller voted to reverse Parker fifty-one percent of the time, while White's reversal voting rate approached fifty-eight percent.[45]

Ultimately, the Court would reverse nearly seventy percent of the capital convictions coming from Parker's court. Doubts about the guilt of the condemned, and the fairness of the trial, seemed to drive many of these reversals, even though the Court's opinions would often assign other reasons for these outcomes.

Allen's First Appeal

Volunteer Counsel. The Justices seemed to pay more attention to the merits of their Parker cases than to the mechanics of how these cases reached them. Advocacy before the Court was a particular problem, because none of those appealing could afford lawyers.[46] Would these prisoners receive lawyers and, if so, where would they come from? For the first few years of the new appeal system, the Justices had little need to address this issue. Trial lawyers usually stepped forward to continue representing their condemned clients on appeal, even though no statute required them to do so. But appeal work by these lawyers was strictly a matter of charity, and such charity was bound to find limits.

Like most of his Fort Smith colleagues, C.J. Frederick volunteered to continue representing his client on his first trip to the Supreme Court. But Frederick faced a problem in pursuing Allen's appeal: he was not a member of the Supreme Court's bar. Only members of that bar could represent clients in the Supreme Court. While bar membership was open to any licensed lawyer with at least three years experience, admission required a trip to Washington and attendance at a formal Court session. Few lawyers practicing on the western frontier had the time or resources to take these steps, particularly for a charity client.[47]

A measure of help came from Augustus Garland, a Washington lawyer and former United States Senator and Attorney General. Garland offered to lend his name as Supreme Court counsel to the condemned prisoners appealing from Parker's court. Garland's involvement would be limited to use of his name, however. The actual legal work for the appeal would be done by the trial lawyer back in Fort Smith. Frederick and several other Fort Smith lawyers took Garland up on his offer.[48]

In Allen's appeal, Frederick prepared an eight-page brief under Garland's name, had it printed, and sent twenty-five copies to the Supreme Court in Washington. The brief cited no court decisions or legal authorities and made only the sparest of legal arguments, but it did provide the relevant facts of Allen's case and alerted the Court that Allen was challenging Parker's jury charge on self-defense.[49]

The government's response brief, with detailed arguments and case citations, was a far more polished and scholarly product than Frederick's. It was prepared by Holmes Conrad, then an Assistant Attorney General. Conrad regretted the "turgid and somewhat sophomoric rhetoric" of Parker's jury charge, but contended that it was nonetheless legally sound.[50]

The Conference Vote. When the Supreme Court called Allen's appeal for argument on November 16, 1893, its Bench was two members short. Justice Blatchford had died the summer before, and his seat was still vacant. Justice Harlan was also absent. No lawyer appeared to argue either side of Allen's case, and it was submitted on the printed briefs and record of what had transpired in the trial court.[51]

Justice Harlan showed up at the Court's Saturday conference and voted on Allen's case. The initial poll of the Justices produced a tie. Chief Justice Fuller and Justices Field, Harlan, and Shiras favored reversal, while Justices Gray, Brewer, Brown, and Jackson favored affirmance. Justice Gray shifted his vote after the tie was announced, producing five votes for reversal. Allen would have another trial.

The First Allen Opinion. Chief Justice Fuller wrote the Court's first *Allen* opinion, which opened by criticizing Parker's charge on the age of criminal responsibility. Parker told Allen's jury that a child becomes presumptively responsible for his crimes at age eleven. In fact, the correct age of accountability was fourteen. The Court declined to rest its ruling on this error, however, because it found a more serious flaw in Parker's charge on self-defense.[52]

Parker had opened his self-defense charge with a rhetorical question. He asked about when a man might sit as a judge passing on the law, a jury passing on the facts, and an executioner carrying out a decision. He then answered that question with his standard instructions on self-defense. The Court's opinion found no fault in Parker's answer, but ruled that his question required reversal. According to the Court, Parker's question might have led jurors to believe that one claiming self-defense must act with the same deliberation as a judge or juror in a trial.[53] Those under deadly attack must sometimes make quick decisions about how to respond. As the *Allen* opinion noted, those decisions must be made far more swiftly than those faced by a judge or jury. Parker's rhetorical reference to judge and jury was unnecessary and, considered in isolation, perhaps confusing. But no one found fault with Parker's separate description of the elements of self-defense, so Allen's jury may not have been misled.

Justice Brewer wrote a short dissenting opinion that Justice Brown joined. According to Brewer, the references in Parker's charge to the roles of judge, jury, and executioner were "strictly and accurately true." Because the charge required no "period of long deliberation" for self-defense, it was legally sound. Brewer added that it was "morally certain" that the Erne boys were telling the truth, and that Allen and the Marks boys were lying. Because Allen was guilty of murder, in Brewer's view, there was no reason to reverse his conviction.[54] Brewer seems right in his textual analysis of Parker's charge on self-defense, even though it failed to persuade the Court's majority. Brewer was wrong, however, in his insistence on the Ernes' truthfulness. It was for jurors, not Justices, to decide whom to believe. In a fair trial, a jury might well conclude that members of the Marks family were more believable.

Allen's Second Trial

Allen's second trial was held in May 1894. Once again, C.J. Frederick served as defense counsel. Members of the Marks family testified as defense witnesses, as did Allen himself. For Allen, this second trip to the witness stand was a disaster.

Though the broad outline of Allen's testimony remained the same as before, his account at the second trial differed from the first on a number of significant details. The prosecutor discredited Allen with these differences. Moreover, Allen offered his jury a wildly implausible tale about his arrest, claiming that he dodged multiple bullets and narrowly escaped death.[55] In the Fort Smith jail, Allen was housed in a tier of cells known as "murderer's row."[56] His courtroom tale of bravado sounds like something a callow young man might have concocted to impress his older and more hardened jailhouse peers. Allen seemed oblivious as to how his jurors might react to such a story.

Allen's second trial consumed four days. Parker's second jury charge, like his first, was relatively subdued. Allen's jurors soon returned a second verdict of murder, this time with no recommendation for mercy. Parker once again sentenced Allen to hang.[57]

Allen's Second Appeal

Allen Loses His Lawyer. Frederick prepared and filed the documents needed to launch Allen's second appeal. This time, however, Frederick declined to accompany the case to the Supreme Court. As the appeals in Allen's case multiplied, Frederick could not afford to continue handling them without pay.[58] He was kept busy enough with the unpaid trial work that Parker assigned to him. Time spent on charity appeals, like Allen's, was time taken away from feeding Frederick's family. Such a stance was not unusual. From mid-1894 onward, nearly two-thirds of the capital appeals taken from Fort Smith would go to the Supreme Court without a lawyer. These cases were something new for a court accustomed to hearing appeals framed by opposing advocates.

Some precedent existed for appointing appellate counsel for lawyerless prisoners. In 1891, the Court requested a Washington member of its bar to file a brief for a condemned Texas prisoner whose lawyer had become incapacitated by illness.[59] The Court might have invoked similar authority to recruit lawyers for those appealing from Fort Smith, but it did not do so. Instead, it chose to leave these prisoners unrepresented. It would decide these cases using only the brief filed by the Justice Department and whatever else it might discern from the record of proceedings in the trial court. The Court seems to have believed that, with care, it could still do justice in these one-lawyer cases.[60]

This stopgap system worked reasonably well for Allen on his second trip to the Court. The government's brief was again written by Holmes Conrad, now elevated to Solicitor General, the second-ranking position in the Justice Department.[61] Without a lawyer, Allen filed no brief of his own. When the Court called the case for argument on March 4, 1895, no one appeared to argue either side, and the case was submitted on the printed record and the government's brief.[62]

The Conference Vote. The Court that was to decide Allen's second appeal was once again short a member. Justice White had filled the vacant seat of Justice Blatchford, but Justice Howell Jackson was now ailing and unable to sit. At their first conference vote, the Justices once again found themselves tied. Justices Field, Harlan, Shiras, and White favored reversing Allen's conviction. Chief Justice Fuller and Justices Brewer, Brown and Gray favored affirmance. Two weeks later, Chief Justice Fuller changed his vote, producing five votes for reversal.[63] The only public dissenter was Justice Brewer, who filed no opinion. Though he had no lawyer, Allen's luck had held. He would have another trial.

The Second Allen Opinion. Justice Shiras wrote the Court's second *Allen* opinion. That opinion first addressed Parker's treatment of the white boys' sticks. Parker told the jury that, if Allen was assaulted with these sticks, and if they were not deadly weapons, there was no right of self-defense. The Court disagreed. Even if a stick was not deadly *per se*, it could become deadly in a fight. Conditioning the right of self-defense on whether a stick was a deadly weapon was wrong, said the Court. It was for the jury to decide whether self-defense existed under such circumstances, and Parker's instruction prevented that.[64]

The Court found a second reason for reversal in Parker's handling of Allen's arming himself with a gun. Parker told the jury that manslaughter could exist *if* Allen had *not* armed himself with a deadly weapon before any assault with sticks began. This instruction was found to be wrong because of

the evidence of Henson's prior threats. If credited, that evidence gave Allen a legitimate defensive reason for arming himself.[65] The Court had previously reversed two other murder convictions where Parker had told jurors that a defendant's arming of himself with a deadly weapon showed murder, and not manslaughter. The Court disagreed: when an accused armed himself for self-defense, it was not proof of murder.[66] The second *Allen* decision followed easily from this line of authority.

Allen's Third Trial

Allen's third trial was scheduled for the August 1895 jury term of the Fort Smith court. Parker usually vacationed during the first part of the August term, and delayed opening court until October. This year, however, the term was so crowded with cases that he cancelled his vacation and opened court on August 5. As Parker charged the term's grand jurors, his frustration with the Supreme Court was on display. While never mentioning the Court by name, Parker denounced appellate courts that ignored the merits of cases and encouraged a system of law practice that was "entirely in favor of the criminal and against the cause of right."[67]

The Telltale Sticks. Parker tried eighty-six jury trials over the next seven and one-half weeks; he finally reached Allen's case on Thursday, September 26. C.J. Frederick returned as Allen's court-appointed counsel; he focused his defense more closely than before on the sticks that each of the white boys had carried. Although the Erne boys had fishing poles, they did not bring them on their fishing trip that Saturday. Instead, they brought sticks.[68] And where these sticks were found was difficult to square with their story of an unprovoked attack by Allen.

Magdalene Erne, mother of the Ernes, said she found only one stick in the field where Henson had fallen. William Marks, grandfather of the Marks boys, said he found the other two sticks in the yard of the Marks farm. A deputy marshal who visited the scene confirmed each adult's testimony.[69] The locations of the sticks suggested that the Erne boys were lying about what had happened with Allen. If Henson and the Ernes were attacked without provocation in an open field, then how did two of their sticks find their way across a fence and into the yard of the Marks farm, where Allen lived?

Burned by his last experience on the witness stand, Allen did not testify at his third trial. However, Harvey Marks appeared once again, and told of seeing Henson and the Ernes attack Allen with their sticks in the yard of the Marks farm. As they were beating Allen on the ground, Allen drew his pistol and started firing.[70]

Parker began instructing Allen's jury at 9:00 a.m. on Saturday morning and needed two full hours to do so. This time, Parker pulled out the stops in his charge. Under the guise of telling jurors what evidence they might consider, Parker gave repeated and lengthy emphasis to the Erne boys' story while making only scant reference to Harvey Marks's account of what had happened.[71] The judge seemed more determined than before to gain a murder conviction.

Parker sent Allen's jury out at 11:00 a.m. Saturday morning and immediately started another murder trial, this time for John Brown. Like Allen's case, the Brown case had twice been reversed by the Supreme Court and was back for a third trial. Frederick turned up again in the Brown trial, this time as Brown's court-appointed counsel. It would be Frederick's fifth capital jury trial within a single week.[72]

Breaking a Deadlock. At 5:30 p.m. Saturday afternoon, Parker adjourned Brown's trial for the day.[73] Allen's jury still had not reached a verdict. Whether Allen's jurors told Parker they were deadlocked is uncertain. But there can be no doubt that the

judge did not care to try Allen's case a fourth time: he had too many other cases to hear. Parker concluded that Allen's jurors needed some prodding.

With Brown's jury gone, Parker brought Allen's jury back and delivered the verdict-urging instruction that has come to be known as the *Allen* charge. The instruction was drawn almost verbatim from *Thompson on Trials,* a well-known legal treatise of the day. [74] Parker ended his lengthy quotation from Thompson with a single sentence of his own: "A juror has not the right to take the position that he will no longer discuss the case and go off and sulk, but it is his duty to discuss it with his fellows, and have due deference to their opinions."[75] The likely targets of the verdict-urging charge were two black jurors, Frank Green and Nathan Hayes. During their term as jurors, Green and Hayes had served together on two other juries that ended in mistrials due to jury disagreement. These were the only mistrials of the ninety-two trials that Parker conducted during their term of service.[76]

Allen's jurors retired for further deliberations, but reached no verdict on Saturday. They probably deliberated on Sunday, September 29, as well, but reached no verdict. The jurors returned on Monday, as the Brown trial continued in the courtroom. After an hour, Parker halted the Brown trial and brought back the Allen jury. Some of the jurors wanted further instruction on mans laughter, which carried a maximum sentence of ten years imprisonment.[77] Parker first repeated his prior instructions on mans laughter. He then launched into a one-sided recitation of the prosecution's evidence against Allen. Parker recounted the Erne boys' story in great detail, while again ignoring the evidence of Harvey Marks. If the Ernes' story was true, he said, it showed "a condition of brutality, of savageism" that would preclude a finding of manslaughter: "there could be no manslaughter in it."[78]

Parker ended his charge by telling jurors that, if the Ernes' testimony was correct, "Phillip Henson and these little boys . . . were rightfully in the field . . . . They had a right to cross the field. They had a right to go fishing. There is no wrong in that." If that were the state of the case, Parker said, then Allen's "repeated firing and killing" could not be manslaughter. Soon, Allen's jury returned with a guilty verdict for murder, with no recommendation for mercy. Parker again sentenced Allen to hang.[79]

Parker's one-sided charge to Allen's jury had the tone and balance of a prosecutor's closing argument. When some jurors balked at a murder verdict, the judge delivered a series of increasingly emphatic supplemental charges aimed at browbeating them into submission. The last effectively told jurors that no verdict other than murder was possible. It was the sort of trial that an appeal was made for.

Allen's Third Appeal

C.J. Frederick prepared the papers needed to launch Allen's third appeal. As in the second appeal, Frederick bowed out from accompanying Allen's case to the Supreme Court. Once again, Allen was left on his own.

The Jury Charge on Retreat. As before, self-defense was central to Allen's third appeal. Parker had charged Allen's jury that one who is attacked may defend himself only if he first uses "all the means in his power" to retreat from the attacker.[80] Even if jurors believed that Allen had been attacked by Henson and the Ernes, this part of the charge blocked a finding of self-defense. Rather than running away, Allen had stood his ground.

Parker had given the same retreat instruction at each of Allen's prior trials, as he had in every one of his other reported trials in which self-defense was claimed. But since Allen's last appeal, the Supreme

Solicitor General Holmes Conrad was the lawyer who represented the government in each of Allen's appeals. He chose to exclude Parker's jury charge from the record in the third appeal because he said it would cost too much to print. Allen was lawyerless, so there was no objection. Above is an 1895 photo of Conrad (left) and Attorney General Judson Harmon, with senior Justice Department officials standing behind them.

Court had drawn the soundness of that instruction into question. In *Beard v. United States*, the Court ruled that a defendant could stand his ground and defend without retreating, if attacked on his own premises. With two Justices not voting, the Court was unanimous in *Beard.* Even Justice Brewer, Parker's most steadfast supporter, concurred in the *Beard* reversal.[81]

In Allen's third trial, Harvey Marks testified that the shooting happened after Allen was attacked on his own premises: the yard of the Marks farm, where Allen lived.[82] If jurors believed Marks, Allen was under no duty to retreat, and the judge's instruction was wrong under *Beard.* Moreover, even if jurors believed that the shooting happened in the neighboring wheat field, as the Ernes claimed, Allen still had a legal basis for standing his ground. In two other cases where killings had *not* happened on the defendants' premises, Parker delivered the same instruction requiring retreat, and in both cases, the Justice Department confessed error in the Supreme Court.[83]

In *Thornton v. United States*, the defendant was attacked on a public street. In *Davenport v. United States*, the defendant was attacked at the home of the person he killed. In each case, Solicitor General Conrad conceded that, although the defendant was not on his own premises, the retreat instruction was still wrong under the *Beard* decision.[84] The Court accepted the government's twin confessions of error and reversed each defendant's conviction. Because the reversals were ordered by the Chief Justice, and not voted on in

conference, some of the Justices may not have been aware of them.

Given *Beard*, *Thornton*, and *Davenport*, it appeared that Allen had a strong case for reversal of his conviction—even stronger than in his first two appeals. But Allen faced two serious handicaps. First, he had no lawyer. Second, Solicitor General Conrad was determined not to lose Allen's case a third time in the Supreme Court.

The Solicitor General Responds. Because all those appealing from Parker's court were poor, the Justice Department routinely paid for printing the record of the trial court proceedings, including the jury charge. Once printed, a copy of the record was distributed to each of the Justices. But in Allen's third appeal, Conrad chose to exclude Parker's jury charge from the printed record. According to Conrad, the jury charge would cost too much to print.[85] Conrad's printing choice was remarkable because all of Allen's challenges to his conviction related to the jury charge.[86] While a single unprinted copy of that charge was on file with the Supreme Court's clerk, no Justice was likely to look at it. Without Parker's jury charge in the printed record, the Justices would know only what Conrad's brief might tell them about it.

Conrad filed a six-page brief that was wholly silent about Harvey Marks's testimony and the rest of the evidence at Allen's trial. The brief made only the slightest reference to the jury charge on retreat and said nothing at all about *Beard*, *Davenport*, and *Thornton*. Instead, Conrad blandly assured the Justices that Parker's jury charge was legally sound.[87] These assurances were flatly inconsistent with the twin confessions of error Conrad had signed just months before in the *Davenport* and *Thornton* cases. But with no lawyer to file a brief, Allen could not point out the contradiction.

The Conference Vote. The Court called Allen's appeal for argument on October 23, 1896. The ailing Justice Jackson had died the preceding summer, and Justice Peckham was now sitting in his place. Justice Brewer was absent. When no one appeared to argue for either side, the case was submitted on Conrad's brief for the government and the trial record.[88]

In conference, the Justices immediately noticed the absence of Parker's jury charge from the record provided by the Solicitor General. Their first action was to delay voting until the charge could be printed in full. The cost, which Conrad had bemoaned as excessive, was $51.26. With the jury charge before them, the Justices took up Allen's case once again at their conference on Saturday, November 7.[89]

All nine Justices, including Justice Brewer, voted on Allen's case. Justices Brown and Peckham joined Brewer in voting to affirm, while Justices Shiras, Field, Harlan, and Gray voted to reverse. This division left the outcome in the hands of the Court's two swing voters, Chief Justice Fuller and Justice White, both of whom sided with the Brewer group. With five votes to affirm, Allen had lost his final appeal.[90]

The murder case of John Brown, decided at the same conference, shows where Allen's case might have gone with a lawyer's help. Another veteran of multiple trials in Parker's court, Brown often seemed to be shadowing Allen as their cases journeyed between Fort Smith and Washington. Both men claimed self-defense, and each of their appeals turned on Parker's jury charge. Brown's case was the more aggravated, with two deceased victims. Though neither man had a lawyer for his final appeal, Brown had the better luck—or at least an opposing lawyer less determined to win at any cost.

The lineup of Justices in the two cases was almost identical. Justices Brewer, Brown, and Peckham favored affirmance, for both, while Justices Shiras, Field, Harlan and Gray favored reversal for both. Chief Justice Fuller sided with the Brewer group, as he had in Allen's case. But Justice White,

who voted to affirm in Allen's case, voted to reverse in Brown's.[91] As a result, Brown's life was spared. On remand, Brown would agree to plead guilty to manslaughter in exchange for a sentence of one year and one day in prison.[92] In the meantime, Allen was headed to the hangman.

The Third Allen Opinion. The Chief Justice assigned Justice Brown to write the Court's final *Allen* opinion, which was released a month later. In a practice now known as "graveyard dissent," the four Justices who had dissented at conference made no public note of their disagreement.[93]

The opinion is a prime example of the perils of deciding a case where only one side has a lawyer. It opened by chiding Allen for not filing a brief: the Court confided that it had been "somewhat embarrassed" by Allen's dereliction.[94] Of course, Allen was nineteen years old, in jail, and waiting to be hung. To file a brief, he needed a lawyer. But he had no money to hire a lawyer, and no lawyer had volunteered to help him. If the Supreme Court did not appoint a lawyer for Allen, from where did it expect Allen's brief to come

After considering and rejecting several other challenges to the charge, the Court's opinion turned to Parker's instruction on the duty to retreat. That instruction was legally sound, said the Court. The opinion reasoned that *Beard* did not control in Allen's case, because *Beard* involved a defendant attacked "upon his own premises."[95] The opinion then moved on to several other complaints about Parker's charge, including the verdict-urging instruction best remembered today. All of these challenges were rejected.

The opinion's discussion of the retreat charge made no mention of witness Harvey Marks, who testified at trial that Allen was indeed attacked upon his own premises: the farm where he lived and worked.[96] Unfortunately for Allen, the Court had received no information about Harvey Marks's testimony from the solicitor general's brief, which wholly omitted any description of the evidence at Allen's trial. The opinion also ignored the Court's own decisions in *Davenport* and *Thornton*. There, defendants who were attacked away from their premises received new trials, based on the same retreat instruction given to Allen's jury. In time, the Court would recognize the unsoundness of its departure from the path charted in *Davenport* and *Thornton*, but not soon enough to do Allen any good.[97]

In sum, the most important point about the third *Allen* decision is that Allen had no lawyer. Without a lawyer, Allen had no way to provide the Court with the facts and law needed to produce a sound decision. The Solicitor General, weary of losing to Allen in the Supreme Court, did everything possible to hide the relevant facts and law from the Court. As a result, Allen's murder conviction was affirmed, when it should have been reversed.

The Court Holds Back Its Mandate. After deciding an appeal, the Supreme Court's normal practice was to issue a mandate thirty days after its decision.[98] That mandate summarized the Court's judgment and formally returned the case to the court from which it originated. For Allen, the mandate would have meant a new, and final, execution date. But the Supreme Court did not follow its normal procedure with Allen.

On December 21, two weeks after the Court's decision was announced, Chief Justice Fuller issued an order postponing the *Allen* mandate for sixty days. Near the end of that period, the Chief Justice told the Court's clerk to continue holding the *Allen* mandate until further notice.[99] As this was happening, the country was making ready for a new President. The month before the Court's *Allen* decision, William McKinley, a Republican, won the 1896 general election. The Democratic incumbent, Grover Cleveland, would surrender his office to McKinley in March 1897.

Why did the Court withhold its mandate? It appears that some of the Justices were

uncomfortable with the result reached in *Allen*, at least insofar as it required Allen's execution. The Court held its mandate so that some of its members could seek executive clemency for Allen while President Cleveland remained in office. Cleveland had been relatively generous with clemency, while McKinley's position was unknown.

Christmas at the White House, and Commutation

On Christmas day, 1896, President Cleveland hosted a holiday celebration in the White House library for his three young daughters. Invited guests included the children of his Cabinet members. Attorney General Judson Harmon brought his daughter.[100] Amid the festivities around the Christmas tree, the President spoke to Harmon about Alexander Allen. The President thought Allen might deserve executive clemency, and he asked Harmon to look into it. Harmon's Justice Department advised the President on clemency.

Harmon rarely involved himself in clemency matters, and the President's inquiry about Allen must have come as a complete surprise. But Harmon swiftly went to work on Allen's case the next day. Although Allen had not submitted the written application normally needed to launch the clemency process, the Attorney General proceeded as if he had. Harmon wrote James Read, the federal prosecutor in Fort Smith, and asked for his views about clemency for Allen. Normally, Parker would have been consulted as well, but the judge had died shortly before the Supreme Court announced its final *Allen* decision.[101]

Read responded on New Year's Day. He said that he had never intended to insist on death for Allen and that life imprisonment should be a sufficient punishment. While acknowledging Allen's youth, Read noted that Allen had been "one of the most unruly prisoners we ever had in the jail," had made "numerous assaults" on other prisoners, and had been in "some very desperate fights" with them. Read hoped that a long prison term for Allen would cause him to reform.[102]

Two days later, the Justice Department's pardon attorney sent a file containing Read's report to the President. A cover letter mentioned the Attorney General's "conversation with you on Christmas-day in reference to . . . Alexander Allen, a negro boy."[103] The thin file sent to the President was wholly silent about any of the facts of Allen's offense. Nor did it include any recommendation from the Justice Department concerning clemency. Because the idea of clemency for Allen had come from the President, the facts and recommendation normally furnished probably seemed unnecessary. The President kept Allen's file for over a month. Two weeks before leaving office, Cleveland commuted Allen's sentence to life imprisonment. The President wrote on Allen's file that he was following the "recommendation and desire of members of the Supreme Court," as well as prosecutor Read's advice.[104]

Who were the members of the Supreme Court who interceded for Allen? Neither Cleveland's papers nor the records of the Justice Department reveal their identities. But it seems likely that one of them was Chief Justice Fuller, an appointee and friend of the President.[105] Only the Chief Justice had the kind of presidential access that would have been needed to bypass normal clemency procedures for Allen. The Chief Justice had initiated a similar bid for clemency nearly two years earlier in the case of Willie Johnson, another man sentenced to hang by Parker. Justice Brewer, who had written the opinion affirming Johnson's conviction, lent his name to Fuller's effort. After a long delay instigated by Parker, the President finally commuted Johnson's sentence just a few days before his Christmas encounter with the Attorney General.[106]

Allen's Fate

With Allen's death sentence set aside, the Supreme Court ordered that the President's commutation be given effect. Before the case could formally return to Fort Smith, Parker's successor had already sentenced Allen to life imprisonment in the Ohio State Penitentiary in Columbus. Allen would stay in Ohio for eight years, after which he was moved to the newly opened federal penitentiary in Atlanta.[107]

Allen remained in Atlanta for fourteen years, and there were few bright spots during his time there. At five feet, three inches in height, Allen's stature and youth put him at risk for unwanted sexual attention from other prisoners. In July 1908, Allen struck another Atlanta inmate in the head with a hammer. He later told prison officials that the man had once tried to sodomize him.[108] As punishment, the warden ordered Allen to wear a twelve-pound ball on a two and one-half foot chain locked to his leg. The ball and chain stayed on Allen's leg for a year, but the episode would haunt him for much longer. Classified as a violent prisoner, Allen would be refused parole, and an application for further presidential clemency was denied.[109]

Julian Hawthorne was a journalist and son of the novelist Nathaniel Hawthorne. He served a one-year sentence for mail fraud in the Atlanta prison while Allen was there. After being released in 1914, Hawthorne wrote a book about his prison experiences. The book describes an unnamed fellow prisoner who was sentenced to death as a boy and whose sentence was later commuted to life imprisonment.[110]

Hawthorne says that this fellow prisoner deserved a whole chapter to himself. However, "his horoscope is still too cloudy to make it safe to tell his story." According to Hawthorne, "the best service I can do him now is to give him silence." Hawthorne does provide one additional clue about this prisoner's identity: he carried "terrible scars of severities practised upon him for trying to resist wrongs which no manly man could tamely endure."[111] As a boy, Allen received a death sentence, later commuted. Allen also would have been scarred by wearing a twelve-pound ball and chain on his leg for a year. It thus seems highly likely that Allen was the prisoner whom Hawthorne was describing. No other inmate then at Atlanta matches Hawthorne's description.

Hawthorne characterizes the unnamed prisoner as a "warm-hearted, generous, high minded man," even though prison experts might have termed him a desperate criminal. According to Hawthorne, the man's story was worthy of literature: "A Balzac might find in him a more human and lovable *Vautrin*; a Victor Hugo could make him the hero of another *Les Miserables* . . . "[112]

In 1915, the prison physician at Atlanta found that Allen was suffering from a painful kidney condition that would eventually need surgery, including possible removal of his kidney. Allen spent much of the year in the prison hospital. He was finally paroled on New Year's Eve, 1919, after more than twenty-seven years in confinement.[113]

Allen made his way back to Indian Territory, now Oklahoma. In the city of Muskogee, he worked as a laborer in a lumber yard. He met a younger woman, and they married in December 1922. But his health soon failed him. Nine months after marrying, Allen died of shock in a Muskogee hospital following an abdominal operation. He was forty-five years old.[114]

Conclusion

Today, Allen's case is remembered for the verdict-urging jury charge that the Supreme Court upheld. But the Court that made this decision did not understand the importance of lawyers for the soundness of its rulings. To reach the right result, lawyers

were needed to argue both sides of an appeal, even if one side was too poor to hire one. The need for counsel was magnified when the Court found itself closely divided, as it was in each of Allen's appeals.

Without the lawyer he needed, Allen was left to the mercy of a Solicitor General who tried to keep the Justices in the dark about what mattered most in the appeal. Allen survived, but only barely. But for an outgoing President's clemency, he would have hung. The balance of his short life was little more than a living hell.

This dismal outcome seems to have had little impact on the Court and its practices. Although the flood of capital appeals from Fort Smith ended in 1897, the Court continued to hear a few such appeals from elsewhere until 1911.[115] To the very end, the Court made no effort to appoint counsel for those prisoners too poor to hire a lawyer. In one of the last of these cases, the Court's opinion seemed almost wistful about the lawyer who never appeared: "[W]e should have been glad to have had the assistance of counsel for plaintiff in error ... "[116] The Court seemed unable to grasp that its own failure to appoint counsel was the reason for counsel's absence.

Change did not come until the 1930s, after Charles Evans Hughes became Chief Justice. Hughes had been president of New York's Legal Aid Society, and he took an active interest in the legal problems of the poor. In 1935, the Hughes Court started appointing counsel for lawyerless parties in those cases it chose to hear on the merits.[117] This practice continued under Hughes' successors.

Counsel on appeal eventually came to be seen by the Court as something more than a luxury for the wealthy. In 1963, the Court found that the Constitution guaranteed appointed counsel to those who, like Allen, were appealing as of right from a criminal conviction.[118] Forty years after Allen's death, the Court finally shut the door on the kind of lawyerless appeal that it provided to Allen, and then left him to lose.

ENDNOTES

[1] 164 U.S. 492 (1896).

[2] *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

[3] Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**: *Allen v. United States* (157 U.S. 675 (1895)) [hereinafter Allen 2 appeal filings], record at 11-12; *Allen v. United States* (150 U.S. 551 (1893)) [hereinafter Allen 1 appeal filings], record at 126, 139-40.

[4] Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**, *Allen v. United States* (164 U.S. 492 (1896)) [hereinafter Allen 3 appeal filings], record at 20, 32, 34, 38, 48; Allen 1 appeal filings, record at 8; *Journal* (Coffeyville, Kans.), May 20, 1892, 4.

[5] Allen 3 appeal filings, record at 7-8, 97; Allen 1 appeal filings, record at 121.

[6] Allen 3 appeal filings, record at 9-12, 64-65; Allen 1 appeal filings, record at 133-34.

[7] Allen 3 appeal filings, record at 8-9, 11, 47-48.

[8] *Id.*, record at 97, 115; Allen 1 appeal filings, record at 93, 103, 120.

[9] Allen 3 appeal filings, record at 88-89, 127.

[10] *Id.*, record at 97-98, 100-01.

[11] Allen 3 appeal filings, record at 108; Allen 1 appeal filings, record at 140.

[12] Allen 3 appeal filings, record at 48, 97-98.

[13] Rev. Stat. §§ 533, 572, 2145 (2nd ed. 1878); 1 **Official Register of the United States** 946 (1892).

[14] *St. Louis Republic*, Mar. 9, 1889, 13; *Trenton (N.J.) Evening Times*, Mar. 24, 1889, 6; J. Burton, **Indian Territory and the United States, 1866-1906** (U. Okla. Press, 1995), pp. 171-73, 195-96, 221-22.

[15] *See, e.g.*, *St. Louis Republic*, Sept. 8, 1895, 1; *Daily Inter Ocean* (Chicago), Feb. 10, 1896, 4; *Indian Chieftain* (Vinita, I.T.), Nov. 19, 1896, 2.

[16] *Topeka Daily Capital*, June 15, 1892, 4; Allen 1 appeal filings, record at 1-2.

[17] *See* Rev. Stat. § 1034 (2nd ed. 1878); *Testimony on the Condition of Certain Indian Tribes*, S. Rep. No. 1278, 49th Cong., 1st Sess., part 2 (1886) at 388 (testimony of William M. Cravens); Indian Chieftain (Vinita, I.T.), Oct. 3, 1895, 2 ("Judge Frederick gets nothing for his services except the advertising the case brings him").

[18] Allen 1 appeal filings, record at 2; *see* ancestry.com, Census records, C.J. Frederick, Ripley, Miss. (1870), Jefferson Frederick, Ripley, Miss. (1880); **Catalogue of Cumberland University 1875-76**, pp. 11, 33 (1876); R. Lowry & W. McCardle, **A History of Mississippi** (R.H. Henry & Co., 1891), p. 585; Mississippi Departments and Benevolent Institutions, **Biennial Reports, 1882-83**, State Superintendent of Public Education, p. 49 (1884).

[19] National Archives, U.S. District Court, W.D. Ark., common law record books [hereinafter district record

books], vol. 30 at 344, vol. 33 at 337; National Archives, U.S. District Court, W.D. Ark., common law record books, circuit court [hereinafter circuit record books], vol. 2 at 126, 155, 245-46, 259, 268, 270-71, 276-77; **Martindale's American Law Directory**, p. 28 (1896).

[20] Allen 1 appeal filings, record at 3-4, 91-133, 139-61.

[21] *Compare* Allen 1 appeal filings, record at 167-87 (21-page charge by Parker) and Allen 3 appeal filings, supp. record at 1-27 (27-page charge by Parker) *with* Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**: *Wallace v. United States* (162 U.S. 466 (1896)), record at 117-20 (4-page charge from D. Kans.); *Ball v. United States* (163 U.S. 662 (1896)), record at 128-33 (6-page charge from E.D. Tex.).

[22] *See, e.g.*, Allen 1 appeal filings, record at 172-79, 181-82.

[23] *See, e.g.*, Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**, *Brown v. United States* (159 U.S. 100 (1895)), record at 28-29; *Hickory v. United States*, 160 U.S. 408, 423 (1896) (Parker's charge "put every deduction which could be drawn against the accused . . . and omitted or obscured the converse aspect").

[24] *See, e.g.*, *Smith v. United States*, 161 U.S. 85, 89-90 (1896) (charge on character witnesses); *Allison v. United States*, 160 U.S. 203, 209-10 (1895) (charge on defendant's testimony); Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**: *Lewis v. United States* (146 U.S. 370 (1892)), record at 300-01 (charge on alibi); *United States v. Davis* (160 U.S. 469 (1895)), record at 30-31 (charge on expert witnesses).

[25] National Archives, Pardon Attorney, pardon case files, 1853-1946, file M-389 (Meredith Crow), Whitney memorandum at 16 (Dec. 10, 1894).

[26] *See* National Archives, U.S. District Court, W.D. Ark., defendant jacket files, *United States v. Kettenring*, no. 93, motion for new trial at 3 (July 8, 1895).

[27] *See* Kopel, "The Self-Defense Cases," 27 *Am. J. Crim. L.* 293, 308, 322-23 (2000).

[28] *See Allison v. United States*, 160 U.S. 203, 209 (1895) (accused's testimony not enough to show self-defense); *Brown v. United States*, 159 U.S. 100, 102 (1895) (brutality of killing negates self-defense); *Thompson v. United States*, 155 U.S. 271, 281 (1894) (threats by deceased showed defendant's malice); *Starr v. United States*, 153 U.S. 614, 622 (1894) (one claiming self-defense must have clean hands and pure heart).

[29] National Archives, U.S. District Court, W.D. Ark., defendant jacket files, no. 115, *United States v. Thomas J. Thornton*, Conrad letter to Read at 3-4 (Jan. 11, 1896).

[30] Allen 1 appeal filings, record at 182-85.

[31] *Id.*, record at 3-4.

[32] *See* Rev. Stat. § 5339 (2nd ed. 1878). Juries were not given the option of qualifying their verdicts to foreclose capital punishment until 1897. See 29 Stat. 487 (1897).

[33] Allen 1 appeal filings, record at 5-6, 191-94.

[34] *See United States v. More*, 7 U.S. 159, 172-73 (1805); 25 Stat. 655, 656, § 6 (1889).

[35] *See* S. 3733, 50th Cong., 2nd Sess., § 6 (1888) (introduced by Sen. Jones of Ark.); H.R. 11793, 50th Cong., 2nd Sess., § 6 (1888) (introduced by Rep. Rogers of Fort Smith); 19 Cong. Rec. 5611 (remarks of Sen. Jones), 7636-37 (remarks of Rep. Rogers) (1888); 26 Stat. 826, 827, § 5 (1891).

[36] *See* J. Ely, **The Chief Justiceship of Melville W. Fuller, 1888-1910** (U. of S.C. Press, 1995), pp. 69-82; O. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (Camb. U. Press, 2006), pp. 28-35.

[37] *See* M. Brodhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837-1910** (S. Ill. U. Press, 1994), pp. 11-15, 19, 52-70; R. Tuller, **"Let No Guilty Man Escape": A Judicial Biography of "Hanging Judge" Isaac C. Parker** (U. Okla. Press, 2001), p. 127; National Archives, Justice Dept., Personnel Records, Members of the Supreme Court, 1853-1932, David J. Brewer, Parker letter to Harrison (Nov. 29, 1889).

[38] *See St. Louis Republic*, Jan. 10, 1890, 9 ("His principal duties as a Judge have been hanging negroes and Indians for the past 10 years"); National Archives, Justice Dept., Appointment Files, Circuit Court Judges, Eighth Circuit, 1889-93, Isaac Parker.

[39] *See* Fiss, **Troubled Beginnings**, pp. 33-34.

[40] American Bar Association, **Report of the Eighteenth Annual Meeting**, pp. 441, 448 (1895) (Brewer speech to Section on Legal Education); Brewer, "The Right of Appeal," 55 *Independent* 2547, 2548 (1903); *see* Curator, U.S. Supreme Court, docket books of Justice Gray, Oct. Terms, 1890-97 [hereinafter Gray docket books].

[41] "Henry Billings Brown," 3 *Green Bag* 91, 92 (1891); H. Brown, **Address to Yale Law School Graduating Class**, pp. 13-14 (1895); *see* Gray docket books.

[42] *See* Fiss, **Troubled Beginnings**, pp. 32-34; Gray docket books.

[43] *See* W. Shiras, **Justice George Shiras Jr. of Pittsburgh** (U. Pitt. Press, 1953), pp. 75-77, 90; Gray docket books.

[44] *See* Gray docket books; Brodhead, **David J. Brewer**, p. 78.

[45] *See* W. King, **Melville Weston Fuller** (Macmillan Co., 1950), pp. 94-96, 189; Gray docket books.

[46] *See* **Annual Report of the Attorney General of the United States**, p. XVIII (1896) ("it is generally beyond [criminal defendants'] power to obtain counsel to argue their cases before the Supreme Court"). All of those convicted of capital crimes in Parker's court signed affidavits of poverty in support of their appeals.

[47] Rules of the Supreme Court, Rule 2(1), 108 U.S. 573 (1884). The need for a court appearance in Washington

was not relaxed until 1970. See Rules of the Supreme Court, Rule 5(3), 400 U.S. 1027 (1970).

[48] *See* Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**, *Alexander v. United States* (138 U.S. 353 (1891)), brief for appellant at 13 (Jan. 17, 1891) (handwritten addendum by Garland describing his arrangement with Fort Smith counsel).

[49] Allen 1 appeal filings, brief for Allen at 7 (Oct. 5, 1893).

[50] *Id.*, brief for United States at 8 (Nov. 3, 1893).

[51] National Archives, Supreme Court, minutes, vol. 60 (Nov. 16, 1893).

[52] *Allen v. United States*, 150 U.S. 551, 558-60 (1893).

[53] *Id.* at 561-62.

[54] *Id.* at 562, 565-66 (Brewer, J., dissenting).

[55] National Archives, U.S. District Court, W.D. Ark., transcripts of testimony, *United States v. Allen*, trial commencing May 18, 1894, at 236-73.

[56] *Indian Chieftain* (Vinita, I.T.), July 18, 1895, 2.

[57] Allen 2 appeal filings, record at 4-5.

[58] *See* **Martindale's American Law Directory**, p. 28 (1896) (estimating Frederick's net worth at $1,000 to $2,000).

[59] *See Caldwell v. Texas*, 141 U.S. 209, 210 (1891).

[60] *Cf. Davis v. United States*, 165 U.S. 373, 375 (1897) ("we have felt it to be our duty to carefully examine the record . . . in order to see that no injustice has been done the defendant").

[61] Allen 2 appeal filings, brief for United States at 11 (Mar. 1, 1895).

[62] Supreme Court minutes, vol. 1895 at 335, 376 (Mar. 4, 1895); King, **Melville Weston Fuller,** pp. 189, 207-12.

[63] Gray docket books, Oct. Term 1894, at 267.

[64] *Allen v. United States*, 157 U.S. 675, 678-80 (1895).

[65] *Id.* at 680-81.

[66] *Thompson v. United States,* 155 U.S. 271, 282-83 (1894); *Gourko v. United States*, 153 U.S. 183, 190-92 (1894).

[67] *Indian Chieftain* (Vinita, I.T.), Aug. 8, 1895, 2; *see* S. Harman, **Hell on the Border: He Hanged Eighty-Eight Men** (Phoenix Pub. Co., 1898), p. 470.

[68] Allen 3 appeal filings, record at 30.

[69] *Id.*, record at 39, 43, 74, 106-07.

[70] *Id.*, record at 97-98.

[71] *Id.*, supp. record at 1, 4, 6-7, 11, 15, 21, 24-26, 28.

[72] *See* circuit record books, vol. 4 at 19-21, 22-23, 33-34, 36-37.

[73] Allen 3 appeal filings, supp. record at 29.

[74] Allen 3 appeal filings, supp. record at 29-31; *see* 2 S. Thompson, **A Treatise on the Law of Trials** § 2303 (T.H. Flood & Co., 1889) ("Advising the Jurors to Yield their Individual Opinions to each other").

[75] Allen 3 appeal filings, supp. record at 31, record at 3.

[76] *See* Allen 3 appeal filings, record at 2-3 (identifying Green and Hayes as Allen jurors); district record books, vol. 48 at 545 (mistrial with Green and Hayes, Aug. 21, 1895), vol. 49 at 86-87 (same, Sept. 23, 1895); ancestry.com, Census records, Frank Green, Fort Smith, Ark. and Nathan Hayes, Ozark, Ark. (1900).

[77] Brown 3 trial transcript, at 85; Allen 3 appeal filings, supp. record at 31; *see* 18 Stat. 473 (1875).

[78] Allen 3 appeal filings, supp. record at 31-34.

[79] *Id.*, supp. record at 35, record at 4.

[80] *Id.*, supp. record at 20.

[81] 158 U.S. 550, 563-64 (1895); Gray docket books, Oct. Term 1894, at 275.

[82] Allen 3 appeal filings, record at 97-98.

[83] *Thornton v. United States*, 163 U.S. 707 (1896); *Davenport v. United States*, 163 U.S. 682 (1896).

[84] Gale Digital Collections, **U.S. Supreme Court Records and Briefs, 1832-1978**: *Thornton v. United States* (163 U.S. 707 (1896)), confession of error at 4 (Jan. 10, 1896); *Davenport v. United States* (163 U.S. 682 (1896)), confession of error at 5 (Jan. 27, 1896); National Archives, U.S. District Court, W.D. Ark., transcripts of testimony, *United States v. Davenport*, testimony commencing May 29, 1895, at 1-2, 297-302.

[85] Allen 3 appeal filings, record at 127, brief of United States at 2 (Oct. 21, 1896) ("it was not thought necessary to involve the Government in the expense of printing it"); *see* **1896 Attorney General Report**, p. XVIII (cost of printing records "generally falls on the Government").

[86] *See* Allen 3 appeal filings, record at 128-39.

[87] *Id.*, brief of United States at 2 (Oct. 21, 1896).

[88] Supreme Court minutes, vol. 1896 at 59-60 (Oct. 23, 1896).

[89] National Archives, Supreme Court, appellate jurisdiction case files, 1792-2010, no. 16081 [Allen 3 court file], order (Oct. 26, 1896), Public Printer bill (Dec. 3, 1896).

[90] Gray docket books, Oct. Term 1896, at 96.

[91] *Id.* at 116.

[92] *Brown v. United States*, 164 U.S. 221 (1896); circuit record books, vol. 4 at 416-17 (Dec. 24, 1896).

[93] *Allen v. United States*, 164 U.S. 492 (1896).

[94] *Id.* at 494.

[95] *Id.* at 498.

[96] Allen 3 appeal filings, record at 97-98.

[97] The Court implicitly overruled *Allen* and returned to an unqualified "stand your ground" doctrine, in *Brown v. United States*, 256 U.S. 335, 343-44 (1921). *See* Kopel, "The Self-Defense Cases," at 315, 318-19.

[98] Supreme Court Rule 39, 159 U.S. 709 (1895).

[99] Allen 3 court file, order (Dec. 21, 1896), Chief Justice memo to Clerk (Feb. 6, 1897).

[100] *Philadelphia Inquirer,* Dec. 26, 1896, 1; *Evening Star* (Washington, D.C.), Dec. 25, 1896, 7.

[101] Tuller, **Let No Guilty Man Escape**, p. 157.

[102] National Archives, Pardon Attorney, pardon case files, 1853-1946, file 30-669 [Allen pardon file], Read letter to Attorney General (Jan. 1, 1897).

[103] *Id.*, William Endicott, Jr. letter to President (Jan. 7, 1896 [should be 1897]).

[104] *Id.*, file jacket Q-277, Executive Mansion entry (Feb. 16, 1897).

[105] King, **Melville Weston Fuller,** pp. 98-104, 158-66.

[106] National Archives, Pardon Attorney, pardon case files, 1853-1946, file P-58 (Willie Johnson), Fuller and Brewer letter to Attorney General (Mar. 27, 1895), file jacket, Executive Mansion entry (Dec. 22, 1896); *see Johnson v. United States*, 157 U.S. 320 (1895).

[107] Supreme Court minutes, vol. 1896 at 407 (Mar. 1, 1897); circuit record books, vol. 4 at 479-80 (Mar. 9, 1897); Allen 3 court file, mandate (Mar. 17, 1897); Ohio History Connection, Ohio Penitentiary, register of prisoners, vol. 20 [Ohio prison register], at 61-63.

[108] National Archives, Bureau of Prisons, Atlanta inmate case files, 1902-21, no. 1040 [Atlanta prison file], file jacket, disciplinary report (July 28, 1908), Allen request to deputy warden (Dec. 26, 1908); Ohio prison register at 62.

[109] Atlanta prison file, disciplinary report and action (July 28, 1908), record clerk memo to warden (July 28, 1909); pardon file, application for executive clemency, White House entry (Aug. 24, 1917), Duehay memo to pardon attorney (July 12, 1916).

[110] J. Hawthorne, **The Subterranean Brotherhood,** pp. 147-48 (McBridge, Nast & Co., 1914).

[111] *Id.*, p. 148.

[112] *Id.*

[113] Allen pardon file, file jacket, Weaver letter to warden (Mar. 25, 1915), application for executive clemency at 3 (Feb. 8, 1916).

[114] Atlanta prison file, parole officer letter to Dickerson (Dec. 8, 1919); Muskogee County Dist. Ct. (Okla.), marriage records, vol. 1922 at 129 (Dec. 22, 1922); Okla. Board of Health, certificate of death, Alex Allen, Muskogee (Sept. 20, 1923).

[115] *See Stephan v. United States,* 319 U.S. 423, 425-26 (1943).

[116] *Perovich v. United States,* 205 U.S. 86, 92 (1907).

[117] National Archives, Supreme Court, appellate jurisdiction case files, 1792-2010, *Escoe v. Zerbst*, Oct. Term 1934, no. 773, order appointing counsel (Apr. 4, 1935); *see* W. Ross, **The Chief Justiceship of Charles Evans Hughes, 1930-1941** (U. of S.C. Press, 2007), p. 241.

[118] *Douglas v. California,* 372 U.S. 353, 356-57 (1963).

The Font of Federal Power: *Wickard v. Filburn* and the Aggregation Principle

JAMES B. BARNES

Introduction

Today, few activities or transactions are outside the reach of the federal government. This fact has not always been so. This is especially true with respect to non-economic activities that on their face do not appear to produce any substantial effect on interstate commerce. We take for granted that the federal government has the authority to regulate the price of a commodity, protect the collective bargaining rights of workers, establish a national minimum wage, and prohibit all manner of substances.

The point of intersection between these regulated and prohibited, economic and non-economic, activities and transactions is that they do in fact, either directly or in the aggregate, produce a substantial effect on interstate commerce. This effect and Congress's specific grant of authority to regulate "commerce among the states"[1] has allowed the federal government to enact such broad provisions since 1937. This now-familiar formulation of the scope of federal power with respect to interstate commerce is a relatively recent conception. It can be traced back to a line of cases that began at the turn of the twentieth century with *United States v. E.C. Knight Co.*[2] and culminated in the decisions of *NLRB v. Jones & Laughlin Steel Co.* in 1937,[3] *United States v. Darby* in 1941,[4] and ultimately *Wickard v. Filburn* in 1942.[5]

Article I, § 8, cl. 3 of the Constitution grants Congress the sole authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[6] Consequently, the scope of federal power in pursuance of its Commerce Clause authority is largely a product of how the Supreme Court interprets the word "commerce" and the phrase "among the several states." Throughout time, the Court's definition or conception of interstate commerce,

and consequently the scope of the federal commerce power, shifted. This shift in judicial philosophy or interpretation was from one of formalist notions of commerce, using clearly definable categories of economic activity, to a more pragmatic or realistic view of commerce and the scope of federal authority necessary to preserve it. This realist view sought to remove technical conceptions of commerce and instead to focus on the effect of an activity on interstate commerce, regardless of whether the activity technically fit into a category such as "commerce" or "manufacture." The influence of American Legal Realism on the Supreme Court's Commerce Clause jurisprudence was largely responsible for the shift away from the so-called "mechanical" jurisprudence, epitomized in the Court's decision in *E.C. Knight,* to a more realist view, which focused on the needs of society and the actual affect on commerce.

The shift in the Supreme Court's judicial philosophy allowed conceptions of federal power under the Commerce Clause to change from limited, clearly discernable categories of economic activity that largely ignore the circumstances of the case to a more expansive view of what commerce means drawn from the course of business. This progression from legal formalism to legal realism in the Supreme Court's judicial philosophy was influenced by the tenets of the American Legal Realism of Karl Llewellyn, along with his peers and predecessors. This movement shifted theory away from pure logical deduction and intellectual vacuums and attempted to move law into a role where it would be flexible and account for its effects on society. The Supreme Court's shift in judicial philosophy helped to produce its most expansive view of federal power under the Commerce Clause in the case of *Wickard v. Filburn,* which was simply a continuation of the Court's prior case law.

Case Law Prior to *Wickard v. Filburn*

At the turn of the twentieth century, the Supreme Court issued its decision in *U.S. v. E.C. Knight.* The language of the opinion is the epitome of legal formalism.[7] *E.C. Knight* draws a clear picture of the scope of federal commerce power. However, as the Court was asked to interpret the scope of this power in the face of changing circumstances throughout the next forty years, the Justices, even as early as 1905, encountered difficulties in applying this formal logic consistently. In 1937, amidst a severe economic depression, President Franklin D. Roosevelt proposed a Court reorganization plan that would have given the President authority to appoint a new Justice for each current Justice over the age of seventy. There were six Justices over seventy, which would have brought the total number of Justice to fifteen.[8] In that same year, the Supreme Court issued a landmark decision in *NLRB v. Jones & Laughlin Steel Co. Jones & Laughlin Steel Co.* represented a fundamental shift in the Supreme Court's interpretation of the scope of Congressional commerce power. The Court's Commerce Clause jurisprudence became more concerned with actual practice and experience. It no longer rigidly categorized economic activities into either "commerce" or "production" and did not shield its eyes to the reality of economic life.

U.S. v. E.C. Knight dealt with a combination of corporations that constituted a national sugar monopoly. The Sherman Anti-trust Act, adopted only five years earlier, was being challenged on the grounds that the Commerce Clause did not give Congress the authority it sought to exercise. In an 8-1 decision, the Court pronounced, "Commerce succeeds to manufacture and is not part of it."[9] The Justices drew a clear distinction between commerce and manufacturing, using traditional definitions of those words to do so. The Court acknowledged that a monopoly, with its virtual control over disposition of a commodity, affects commerce, but the

Justices were unwilling to concede federal authority when the effect on interstate commerce was only incidental to the activity of manufacturing. The Court was unimpressed with the substantial impact of a complete monopoly on a necessary of life, such as sugar, and dismissed such considerations by referring to them as incidental and indirect. Ultimately, the Court held that there was a clear difference between commerce and manufacturing or production and that Congress had no authority to regulate a manufacturing monopoly because commerce and manufacturing were distinct economic activities. The federal government has authority over commerce only because the Constitution mentions commerce. The Constitution is silent as to federal power over manufacturing and therefore the federal government has no power over such activities.

Chief Justice Melville W. Fuller quoted the language of *Kidd v. Pearson*[10] for what is a common distinction between commerce and manufacture. The Court decreed that "no distinction is more popular to the common mind . . . than that between manufacture and commerce."[11] For the Court in *Kidd,* the distinction between commerce and manufacture was clear: commerce constituted the acts of buying, selling and transporting those goods that had already been manufactured.[12] The fact that manufactured goods would eventually become part of a commercial transaction, such as transporting said goods, did not make the activity of manufacturing itself an object of federal commerce power.

The rigid categorization of the economic activities at issue in *E.C. Knight* as either commerce or manufacture is a classic example of legal formalism. Christopher Columbus Langdell was the Dean of Harvard Law School in 1870 and, to legitimize the scholarly study of law, he began his quest to characterize law as a science.[13] This view would later be called mechanical or formal jurisprudence by its detractors, but in the late nineteenth and early twentieth centuries, it dominated the landscape of legal philosophy. Formal jurisprudence placed conformity to logic, uniformity, and predictability as the goals for judicial decision making and legal thought. Langdell used the Socratic Method and emphasized the approach of distilling universal legal axioms from rigorous study of prior case decisions. John Chipman Gray, a contemporary of Langdell's, even as early as 1883 was criticizing Langdell's formal approach to law in saying, "the idols of the cave which a school bred lawyer is sure to substitute for facts" is better for intellectual gymnastics and that a school where the majority of professors and students eschew interaction with the actual facts, it is sure to be on its way to ruin.[14] Many of the methods currently in use in every law school around the country have their roots in Langdell's approach to legal learning.

In the 1905 case of *Swift & Co. v. United States,* the Supreme Court upheld the Sherman Anti-trust Act, as applied to prohibit a price-fixing scheme engaged in by independent meat dealers, as a legitimate exercise of federal commerce power.[15] Justice Oliver Wendell Holmes, Jr., wrote for a unanimous Court that there was a clear distinction between the situation involved in this case and the one at issue in *E.C. Knight.* Holmes used the formalistic language of *E.C. Knight* when he characterized the object of this price-fixing scheme, specifically to fix prices among independent meat dealers with respect to sales in interstate commerce, as directly affecting interstate commerce. *Swift & Co.* appears to be consistent with *E.C. Knight* in its language and application of the traditional notions of commerce and manufacturing. But Holmes seems to have rested his conclusion that the effect upon commerce in this case is direct on the fact that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of

business,"[16] Holmes laid the foundation from which the substantial effects doctrine grew by focusing on the effect rather than the character or nature of the activity in question.

Holmes was also a contemporary of Langdell and Gray's. He used lines of argument like Gray's and was a vocal opponent of Langdell's legal science approach. Holmes had radical ideas regarding his view of the law for his time. Whereas his contemporaries preferred clear and distinct legal doctrines, syllogistic reasoning, and predictability in the law, Holmes believed these preferences were the problem. Holmes expressed his view of what the law *is* in his 1881 treatise *The Common Law*, where he made his now-famous statement, "The life of the law has not been logic, it has been experience."[17] Much like Gray, Holmes believed understanding the facts of a case was of the greatest import and what a court *does* in fact is the law.

At the 1897 dedication ceremony of the new hall of the Boston University School of Law, Holmes delivered a speech that would become one of his most famous essays, "The Path of the Law."[18] In this essay, Holmes attempted to divorce the widely held view that morality and law were the same, and to accomplish this, he showed how the law was viewed from the perspective of the bad man. The bad man only cares for material consequences and considerations. Whether his actions are moral are irrelevant to him, if they are legal. Holmes did not believe the bad man cared for legal axioms or deductions but simply wanted to know what the courts would do in fact; Holmes believed "the prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by law."[19] Nine years after Holmes tried to focus the analysis of the scope of federal commerce power on the reality of normal experience in *Swift & Co.*, the Supreme Court issued its decision in *The Shreveport Rate Cases*.[20] There the Court analyzed the Interstate Commerce Commission's authority to require railroads to charge substantially similar rates for intrastate and interstate traffic. A limitation on the scope of federal power was that the rates charged for interstate and intrastate traffic had to be substantially the same when the distances traveled were substantially similar. The Court relied on formal notions of commerce, stating that the carriers at issue are "instruments of interstate commerce."[21] But drawing upon normal experience and common sense, Justice Hughes rejected the idea that federal authority over interstate commerce does not extend to those activities that have "such a close and substantial relation to interstate traffic that the control [of those activities] is essential or appropriate to the security of that traffic . . . "[22] In other words, the setting of a price is not commerce in the technical sense of the word; the facts of experience tell the Court that setting different rates for interstate and intrastate traffic traveling a similar distance would restrain interstate commerce in a way that *does* make such transactions the proper object of federal power. The Court was not going to adhere simply to a formal distinction to the point where it would lead to an absurdity and create a gap in the federal commerce power.

The next question the Court would have to answer was the degree to which an activity affected interstate commerce before it became the object of federal power over interstate commerce. In 1918, four years after *The Shreveport Rate* cases, in *Hammer v. Dagenhart* the Court held that prohibiting articles of manufacture from interstate transportation through federal commerce power was in fact an indirect attempt to standardize the ages of employees engaged in manufacturing and therefore unconstitutional.[23] Here the Court retreated to formal distinctions between the activities of commerce and manufacture or production, stating that the manufacture of a good is not commerce and, although Congress had authority to regulate interstate commerce, it

could not use that authority to regulate the activities of a manufacturer indirectly. The fact that those goods, produced in defiance of the federal prohibition on child labor, would eventually require the instrumentalities of interstate commerce did not make those goods and consequently the manner in which they are produced the subject of federal authority over interstate commerce.[24] In other words, the employment of child labor might have some impact upon interstate commerce because as a matter of logic, the goods produced by the firms that employ the children would eventually be transported using the instrumentalities of interstate commerce, but that impact was too indirect to be considered a legitimate exercise of the power to regulate interstate commerce.

The Court in *Hammer* was concerned with the fact that the federal act at issue in effect attempted to regulate manufacturing and the Court had already unequivocally held, in *E.C. Knight*, that the federal government had no authority to regulate manufacturing or production. The majority in *Hammer* viewed the indirect attempt to regulate the minimum ages of employees by prohibiting the articles produced by such under-age workers from interstate transportation as just as impermissible as Congress's direct attempt to restrain the sugar monopoly at issue in *E.C. Knight*. Once the Court had concluded that the regulation on transportation was an attempt to standardize the ages of workers across the nation, the formalistic distinction between commerce and manufacture applied with the same force as in prior decisions.

For Holmes, the issue was clear. He was concerned only with the character of the activity the regulation sought to reach, *transportation*, and the fact that child labor was clearly wrong and worthy of prohibition.[25] He believed that Congress has specific power to regulate interstate commerce; one of the traditional aspects of commerce is transportation, as stated in *E.C. Knight*; and the law at issue sought to prohibit certain articles from using the instrumentalities of interstate commerce. Holmes concluded that reference to the prohibition's indirect effects, when the prohibition was clearly within the scope of Congress's commerce power, was immaterial.[26]

The Court's majority opinion answered Holmes's criticism and factually distinguished prior Commerce Clause cases in which the Court had upheld Congressional authority to prohibit certain articles from interstate transportation.[27] The cases prior to *Hammer* established Congress's power to prohibit from interstate transportation those articles that were harmful in and of themselves.[28] For the majority in *Hammer*, the harmful nature of the prohibited articles was the crucial element that allowed Congress to prohibit such articles from interstate commerce. By contrast, the articles produced by underage workers were not harmful in and of themselves. Therefore, the harm Congress sought to curb in this instance was not the flow of harmful products among the states, but rather the general harm produced by employing underage workers.

Between 1918 and 1935, the Supreme Court had little to say about the scope of federal power over interstate commerce. But in 1935, while the American economy was in the grips of the Great Depression, the Court issued its decision in *Schechter Poultry Corp. v. United States* (the Sick Chicken Case).[29] In *Schechter,* the Court held that the federal government could not regulate the number of hours per workday nor the wages of workers employed in local slaughterhouses. The Court's conclusion that Congress did not have the authority it sought to exercise in this case hinged upon the degree of effect the transactions in question, the setting of hours and wages of slaughterhouse employees, produced upon interstate commerce.[30] The Court relied on formalistic line-drawing and declared that, "in determining how far the federal government may go in controlling intrastate transactions upon the ground that

Jones & Laughlin **determined that the proper test for the scope of federal commerce authority, whether the activity was traditionally understood as commerce or manufacture, was "necessarily one of degree." After the decision was handed down it became clear that the invocation of "production" or "manufacture" would no longer save an industry from the reach of federal regulation, if the activities subject to the regulation had a "close and intimate" effect on interstate commerce. Above is the Jones & Laughlin plant, which was the ninth biggest producer of steel when the case was heard in 1937.**

they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects."[31] The Court concluded that the transactions in question had "no direct relation to interstate commerce."[32]

For the Court in *Schechter Poultry,* the wages and prices of intrastate workers were not one of the traditionally defined transactions that comprised "commerce" and therefore had no direct relation to interstate commerce. Borrowing from the formalistic language of its prior opinions, the Court in *Schechter Poultry* was still concerned with clear distinctions between indirect and direct. It seemed unlikely the Court would find any in-state transactions to have the "substantial effect" on interstate commerce necessary to justify a legitimate exercise of federal authority, unless the act was commercial in nature.

After *Swift*, the *Shreveport Rate Cases*, and *Schechter*, it appeared that if Congress wished to regulate intrastate activity, the activity must bear a direct and substantial relationship to some traditional aspect of interstate commerce. The intrastate activity at issue in *Swift* was subject to Congressional commerce power because the impact of the activity was to constrain prices of goods moving in interstate commerce. Activity that constrains the price of goods within interstate commerce produces a direct effect on the same. The fact that intrastate activity could be part and parcel of traditional commerce, specifically buying and selling in *Swift*,

further increased the degree of connection and impact local and interstate activities had on each other.

The *Shreveport Rate Cases* presented a slight twist on the facts present in *Swift*. *Swift* concerned meat packers all signing contracts to set the price of meat in-state, and the Court held there was a direct and substantial impact on commerce among the states from a wholly in-state activity. While the railroads in the *Shreveport Rate Cases* did not have agreements to fix prices among themselves, the very fact that they charged differing rates for traffic going the same distance based on whether it was in-state or between states produced a direct and substantial effect on commerce among the states. The intrastate activity in the *Shreveport Rate Cases* was concerned with transportation, traditionally understood as an aspect of commerce so that the effect of an aspect of intrastate commerce on *interstate* commerce was substantial and direct.

Schechter further delineated those intrastate activities the Court would interpret as bearing such a close and substantial relationship to interstate commerce as to subject them to Congress's commerce power. The intrastate activity Congress sought to regulate in this instance was not an aspect of the traditional formulation of commerce, but neither was it part of manufacturing. Wages and workday hours were the two activities subject to regulation, and neither fit neatly into the formal categories of commerce or manufacture. In *Schechter*, the Court justified its conclusion by stating that whatever effect of wages and number of hours worked on prices in interstate commerce was too remote or indirect.

The Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Co.*[33] appeared to be a fundamental shift in its Commerce Clause jurisprudence. Prior to the case, the Court had rejected Congress's attempt to regulate manufacturing indirectly through its commerce power or to regulate directly those in-state activities that did not substantially affect interstate commerce. It seemed likely the Court would not allow Congress to preserve workers' collective bargaining rights, as such a right was clearly not part of the traditional definition of commerce to which the Court had adhered in the past. The Court shied away from deciding the scope of federal commerce power by reference to rigid categories and exclusively focused on the effects among the states that preserving workers' collective bargaining rights would have.

Unlike the Court's prior opinion in *E.C. Knight*, the Court in *Jones & Laughlin* determined that the proper test for the scope of federal commerce authority, whether the activity was traditionally understood as commerce or manufacture, was "necessarily one of degree."[34] Under the Court's analysis, the realities of the circumstances were always to be considered. In prior decisions, the Court was unwilling to continue the inquiry into the legitimacy of a federal regulation once it concluded that the regulation concerned those activities that comprised manufacture or production. After *Jones*, it was clear that the invocation of "production" or "manufacture" would no longer save an industry from the reach of federal regulation, if the activities subject to the regulation had a "close and intimate" effect on interstate commerce.

A large portion of the *Jones & Laughlin* opinion is concerned with analyzing just how much an effect the failure to protect the right of workers to self-organize would produce upon interstate commerce. The steel producer-respondent argued that, whatever impact on commerce among the states its alleged unfair labor practices might produce, the practices were nonetheless cut off from the "stream of commerce" by its manufacturing operations. The Court made plain that references to the character of an activity in question would no longer be dispositive. The fact that the manufacturer in this case had operations all over the United States gave the Court ammunition to conclude that a labor strike at the producer's manufacturing facility

would clearly lead to a direct and substantial effect on interstate commerce. The Court's opinion viewed interstate commerce as a practical consideration drawn from the "course of business." After *Jones*, it became "equally true that interferences with that commerce must be appraised by judgment that does not ignore actual experience."[35]

Before the stage for *Filburn* could be set, the Court had to resolve a major hurdle to more expansive federal power under the Commerce Clause. Could Congress directly exert its power over interstate commerce and, in doing so, indirectly regulate those activities of production and manufacture as it had attempted to do in *Hammer v. Dagenhart*? *U.S. v. Darby*[36] resolutely answered this question in the affirmative and in the same stroke expressly overruled the Court's holding in *Hammer*. The Court held that, when intrastate activities bear such a close and substantial relationship to interstate commerce that they produce an effect on interstate commerce, those activities are subject to federal power under the Commerce Clause. The out-of-state effects of local activity are the criterion of analysis as to whether federal power over commerce is properly exerted, not the particular category or character of the activity to which it belongs.

After *Jones & Laughlin* and *Darby,* it became increasingly clear that the Court's litmus test for determining the proper scope of federal commerce power was shifting. In 1895, if the character of the activity was such that it could be deemed manufacturing or production, then Congress clearly did not have authority to regulate such activity. The first dispositive inquiry for the Court in that case was whether the activity in question was manufacture or commerce. If the activity was manufacture, it was local and a matter of local regulation to be left to the States. If it was commerce, then the activity must be of a nature such that it was "among the several states" for it to be a proper object of federal power under the Commerce Clause. Meandering its way through the early twentieth century, this case law prior to *Wickard* produced substantial changes in how the scope of federal commerce power was interpreted and it is necessary to recap its trajectory.

In 1905, Justice Holmes gave the legal realist a new tool of analysis in the Commerce Clause context when he first introduced the concept of looking at the effects an activity had on interstate commerce. *Swift & Co.* still maintained an element of legal formalism, in that the activity in question was found to affect interstate commerce because the activity itself was part of commerce. *The Shreveport Rate Cases* added the "substantial" language to the test of out-of-state effects of in-state activity. The fact that the activity in question was itself an aspect of a traditional definition of commerce (transportation) indicates that the Court had not yet completely left behind its formalistic tendencies, but its focus on the effects of an activity on commerce among the states signaled that a deeper contextual analysis was gaining hold. *Hammer* was a sharp break from the substantial effects test the Court adopted in *Shreveport Rate Cases*, in that once the Court had decided the regulation was an indirect attempt to regulate manufacturing, the attempted exercise of federal power was held unconstitutional. Like the decision in *E.C. Knight*, the Court relied heavily on the character or nature of the activity not being commerce to claim that Congress did not have the authority it sought to exercise. In *Schechter*, the Court analyzed the effect of the activity in question, but summarily concluded that the effect was "indirect" and therefore not substantial and thus was outside the scope of federal commerce power. This indirect effect was based on supposition that wages and hours worked were not themselves aspects of a traditional definition of commerce and therefore could not have a substantial effect on interstate commerce. *Jones & Laughlin Steel Co.* and *Darby* both made clear that the degree of affect the

activity produced on interstate commerce was the proper test for determining the scope of federal commerce power and, in doing so, allowed the Supreme Court's Commerce Clause jurisprudence to embrace broader federal regulations on commerce.

Historical Background to *Wickard v. Filburn*

The year *Hammer v. Dagenhart* was decided, World War I ended. It was 1918, Germany had surrendered, and the Treaty of Versailles imposed harsh financial reparations. By 1931, Germany would be facing default on its reparation obligations to France and Great Britain, and Germany also owed approximately $2 billion in short term loans to American banks. It had to borrow money to fund its governmental activities beginning in 1918, because such a large portion of its national income went to repaying war reparations. American and German interests aligned because a default by Germany would cause domestic economic problems in America. Germany, like many other nations at the time, enacted tariffs and import controls to protect domestic goods as well as promote full employment. These tariffs in conjunction with German subsidy of domestic grain production all but closed the German market to American wheat exports.[37]

The war effort had also taken its financial toll on Great Britain. After liquidating its vast reserves, Great Britain borrowed huge sums from United States banks to fund its efforts during World War I. In 1931, British Prime Minister Ramsay McDonald attempted to induce President Hoover to forgive some

Congress passed the Agricultural Adjustment Act of 1938 to control the price of wheat flowing through interstate commerce by establishing "farm marketing quotas" to prevent the excess surplus and shortage of wheat. The Act granted the Secretary of Agriculture the authority to declare a quota in any marketing year in which it appeared that the total supply of wheat would exceed the combined international and domestic consumption by thirty-five percent. All wheat farms in the nation over fifteen acres were included in the quota system.

of Britain's war debt by linking forgiveness of American debt to British forgiveness of German war reparations. McDonald believed that if he assured Roosevelt that Britain would forgive German war reparations, America would forgive the war debt Britain amassed during the conflict. 1931 also saw Britain's abandonment of the gold standard, which caused the value of the British pound to devalue significantly relative to currencies that remained on the gold standard, such as the American dollar.

By 1932, Chancellor of the Exchequer Neville Chamberlain "rammed a protectionist" economic policy through the government at the expense of American wheat exports. British preferences for their colonial exports, protectionist tariffs, and their abandonment of the gold standard all combined to bring British imports of American wheat to "virtually nil" in 1932.[38] A key aspect to Chamberlain's 1932 economic policy was a preference for Imperial exports. Only five years earlier in 1927, Britain had imported four billion pounds of wheat at a value of approximately $106 million dollars.

Reciprocal protectionist tariffs were erected all around the world during this period. This was especially true concerning quotas and import restrictions on wheat. With these tariffs in place, American wheat farmers effectively had no foreign markets into which to offload their production surpluses. The various international tariffs depressed demand for American wheat exports by artificially increasing their price. Without an international market, the American domestic wheat surplus grew significantly and further caused domestic commodity prices to fall as domestic demand stagnated, a result of the demand for wheat being relatively inelastic. With inelastic demand, changes in price do not generally affect demand for the good. In addition to wheat, another inelastic good is oil, the price of which does not generally increase or decrease a person's consumption and therefore demand stays constant. "Necessaries of life" tend to have inelastic demand.

The inelasticity of wheat, combined with an ever-mounting wheat surplus, spurred Congress to pass the Agricultural Adjustment Act of 1938, which sought to control the price of wheat flowing through interstate commerce by establishing "farm marketing quotas" to prevent the excess surplus and shortage of wheat.[39] The Act granted the Secretary of Agriculture the authority to declare a quota in any marketing year in which it appeared that the total supply of wheat would exceed the combined international and domestic consumption by thirty-five percent. All wheat farms in the nation over fifteen acres were included in the quota system.

As the marketing year began on July 1, if the Secretary of Agriculture were to declare that the supply would exceed demand by thirty-five percent, he had to do so no later than the May 15 prior to July 1. The Act required that between the date the Secretary proclaimed the existence of excess supply of wheat and June 10, a referendum had to be conducted of farmers who were affected by the declared quota. In effect, these provisions combined to allow the Secretary to impose the marketing quota, and consequently the penalty for marketing over quota, well after the crop had been planted, as wheat farmers had planted their crop during the winter preceding the spring in which the Secretary announced the existence of a surplus, if any. The impact of these provisions on farmers was presumably lessened by allowing the farmers affected to use a referendum to approve or disapprove of the terms of the marketing quota.

In the U.S. District Court: *Filburn v. Helke*

Between 1938 and 1940, no marketing quotas were enforced by the Secretary of Agriculture, although he had announced the national acreage allotment for those marketing years. On May 13, 1940, Secretary of Agriculture Claude R. Wickard announced the national

acreage allotment for the 1941 wheat crop. For that crop, Roscoe Filburn was allotted 11.1 acres at a normal yield of 20.1 bushels per acre. In the winter of 1940, he planted twenty-three acres and harvested 462 bushels, 239 bushels over his quota. Unlike the previous years where the Secretary had not followed through on enforcing the marketing quota, on May 9, 1941, Secretary Wickard found that the total supply of wheat as of July 1, 1941, would exceed domestic consumption and exports by the required thirty-five percent and thus proclaimed the marketing quota in effect for the 1941-1942 marketing year. At the time Filburn planted his winter wheat crop on 11.9 acres, which was over his acreage allotment, the penalty for producing over the marketing quota was fifteen cents per bushel for wheat that was *actually* marketed. Thus, wheat produced over quota and used on the farm for seed, feed, and food were not subject to the fifteen-cent penalty because they were not actually marketed or intended for interstate commerce.[40]

On May 19, 1941, around 11:30 a.m., Secretary Wickard gave a radio address entitled "Wheat Farmers and the Battle for Democracy." He informed the farmers that the quota for the July 1, 1941 marketing year was in effect and that they would be given the chance to vote in a referendum on May 31.[41] The loans, and consequently the penalties of the Act, were conditioned on a two-thirds affirmative vote by the farmers affected by the quotas. In essence, if wheat farmers did not want to take their chances with the forty-cent per bushel world price and maintain their government subsidy, they had to approve the referendum. Wickard also mentioned a House and Senate bill currently being considered in Congress that would increase the subsidy amounts, but he failed to mention that this increase would also increase the penalty for exceeding the quota. In the winter of 1940, when the farmers had planted their 1941 crop, the world situation looked to be such that, as World War II was raging in Europe, the world market would be able to absorb any excess surplus and no marketing quota would be enforced. Unfortunately, the war had not increased world demand enough to avoid the need to impose the quota, and thus total supply would exceed demand by thirty-five percent in July 1941. On May 31, 1941, the referendum passed by a vote of eighty-one percent in favor to nineteen percent opposed. More than 559,000 farmers voted in the referendum.[42]

In the days intervening between Secretary Wickard's May 19 radio address and the May 31 referendum, the bill to which he had referred was passed on May 26, 1941, five days before the referendum. The bill amended the original Agricultural Adjustment Act of 1938 in a few very significant ways. The amendment increased the loan amount from sixty-four cents per bushel to ninety-eight cents per bushel, while it also increased the penalty for wheat marketed over quota from fifteen cents per bushel to forty-nine cents per bushel. The May 26 amendment defined all wheat produced in excess of the quota as "available for marketing" and thus subject to the new forty-nine cent penalty, regardless of whether it was in fact placed into the market, and also included wheat retained on the farm for home consumption.[43] The amendment also empowered local counties to place a lien on the farmer's entire wheat crop until the penalty was paid or the farmer turned over the portion of his crop that was in excess of the quota to the Secretary of Agriculture. By storing the wheat in a manner proscribed by the Secretary or turning the excess crop over to him, the farmer could avoid paying the marketing penalty.

In July 1941, Roscoe Filburn went to the County Agricultural Conservation Committee to obtain the marketing card the federal government required if he were to sell his wheat in the open market. The committee was charged with administering the Agricultural Adjustment Act in Filburn's home county—Montgomery County, Ohio—and they assessed the forty-nine cents per bushel penalty on his 239 excess bushels, a total of $117.11, and refused to issue him his marketing card;[44] a lien was also placed on his entire crop in favor of the United States until such penalty was paid.

Filburn could not place the excess bushels into the market and thereby avoid the penalty for going over quota, although, as he might have thought, the regulation was one on the *marketing* of wheat and not its production. But the May 26, 1941, amendment of the Act meant that all the wheat a farmer produced over his marketing quota was defined as "available for marketing" and subject to the penalty. This led Filburn to sue the county committee in the U.S. District Court for the Southern District of Ohio, where he challenged the constitutionality of the penalty levied against him.

District Judge John H. Druffle wrote for the three-judge district court that had been convened to decide the case. His opinion for the court, which divided 2-1 in *Filburn v. Helke,* was strangely devoid of any mention of the legitimacy of the Agricultural Adjustment Act as applied to Congress's commerce power. Instead, the judge focused on what he considered to be the "equities of the case."[45] He concluded that, due to the representations made by Secretary of Agriculture Wickard in his May 19 radio address, some of those who voted in favor of the measure might have been induced to vote against their interests, and consequently the Act, as amended, was void as applied against those misled farmers. In other words, the requisite two-thirds vote would not have voted in the affirmative but for the Secretary's unintentionally misleading statements, and thus the increased penalty of forty-nine cents per bushel could not be enforced against Filburn. The judge opined that "it would seem that the equities of the situation demanded that

Image Courtesy of Mary Lou Filbrun Spurgeon

Roscoe Curtiss Filburn had a ninety-five-acre farm near Dayton, Ohio, where, in 1940, he planted twenty-three acres of wheat that was to be used to make bread for his family, feed his livestock, and provide seed for the following season. However, Filburn was only allotted to plant 11.1 acres of wheat at a yield of 20.1 bushels per acre and in July 1941 the extra planting (11.9 acres) yielded 239 bushels of wheat. He was fined forty-nine cents per bushel ($117.11) but refused to pay. The U.S. district court ruled in his favor, limiting the fine to fifteen cents per bushel. However, the Secretary of Agriculture, Claude Wickard, appealed this decision to the U.S. Supreme Court.

the Secretary forewarn the farmers that in accepting the benefits of increased parity loans they were also subjecting themselves to higher penalties."[46] The court enjoined the county committee from collecting the penalty over and above the original fifteen cents per bushel, from placing a lien on Filburn's entire crop, and from collecting the penalty unless and until the excess crop was actually marketed, in accordance with the terms of the original Act.

Circuit Judge Florence Allen dissented. Either by close inspection of the Supreme Court's newly authored opinions in *Jones & Laughlin* and *Darby* or clairvoyance, she divined the future conclusion of the case. Still weary of the Supreme Court's decisions prior to *Jones & Laughlin*, Judge Allen characterized the Act as purporting only to control sale and use, not production.[47] She observed that Congress, through its commerce power, had the authority to regulate prices in interstate commerce and the fact that Congress attempted to regulate price through supply controls did not make illegitimate the means to achieve a permissible end. She continued by arguing that once it had been decided that Congress had the ability to reach an activity through exercise of its commerce power, the method by which Congress chose to regulate said activity is not for the court to decide. Judge Allen concluded that the local activities of wheat farmers affect interstate commerce and that controls on the supply flowing through interstate commerce was a means reasonably adapted to the end of normalizing wheat prices in interstate commerce. Although she was out-voted in the district court, Judge Allen was to have nine other Justices on her side although she did not yet know that.

In the Supreme Court: *Wickard v. Filburn*

In the district court, Judge Druffel was concerned about the influence of Secretary Wickard's unintentionally misleading statements on farmers voting in the referendum on May 31, 1941. In the Supreme Court, the Justices found no evidence in the record on which the district judge could have based this contention, and they declared his holding to be "manifest error."[48] The Court then turned its attention to the 800-pound gorilla in the room—whether the Agricultural Adjustment Act of 1938, as amended, was a proper exercise of Congress's commerce power.

The Court believed the question regarding the scope of federal power present in the *Filburn* case merited little consideration but for the fact that the Act extended federal regulation to a product never intended for interstate commerce. Absent the presence of this fact, the Court would have considered its decision in *Darby* to be controlling. *Darby* held that intrastate activity that resulted in products intended for interstate commerce, such as wheat farming, affected interstate commerce to a degree that subjected that intrastate activity to federal power.[49] The fact that Roscoe Filburn never intended to introduce his excess 239 bushels of wheat into the stream of interstate commerce and yet was still subject to the *marketing* penalty made it appear that the Act in effect regulated production and consumption of wheat. This troubled the government counsel in *Filburn* given that *E.C. Knight* was still good law. Consequently, he argued in the alternative that the Act was a "necessary and proper" means of exercising federal commerce power. The facts of this case served to distinguish the case from *Darby* to a degree that required thoughtful analysis by Justice Robert H. Jackson.

Justice Jackson acknowledged the source of trepidation in the government counsel's insistence that the Act only regulated sale and use, not production or consumption. With an air of dismissiveness, Jackson restricted this source of fear to simply "a few dicta and decisions" in which the Court had found the character of the regulated activity to be "manufacture" or "production" and therefore beyond federal

When Filburn's case came before the three-judge U.S. District Court for the Southern District of Ohio, Florence Allen dissented from the court's holding and wrote that Congress, through its commerce power, had the authority to regulate prices in interstate commerce and the fact that Congress attempted to regulate price through supply controls did not make illegitimate the means to achieve a permissible end. The Supreme Court would essentially take her view when it heard the *Wickard v. Filburn* case in 1942.

reach. He also conceded the fact that, with all the deference that had been granted to Congress in pursuance of its commerce power, no prior Supreme Court decision addressed federal authority to regulate activities where no part of the product was intended for interstate commerce. In a single sentence, Jackson implicitly overruled *E.C. Knight* while reaffirming the "substantial effects" analysis first enunciated in *Swift & Co.* and *The Shreveport Rate Cases*. Jackson proclaimed that "questions of the power of Congress are not to be decided by reference to *any* formula which would give controlling force to nomenclature such as 'production' or 'indirect' and foreclose consideration of the actual effect of the activity in question upon interstate commerce."[50]

Justice Jackson cited *Swift & Co.* and Holmes's desire to focus on the effect of an activity on interstate commerce to determine the proper scope of federal power. Next, he invoked *The Shreveport Rate Cases,* which allowed federal regulation of intrastate activity that produced "substantial economic effects" on interstate commerce. In light of these prior decisions, Jackson concluded for the Court that recognition of the relevance of economic effects had "made the mechanical application of legal formulas no longer feasible." This view of how to interpret the scope of federal authority properly under the Commerce Clause was the final blow against a formalist approach to the legal question at issue. No longer would reference to the character of the activity, such as "local" or "production," be a safe harbor for those seeking to avoid federal regulation. Only an activity's insubstantial effect on commerce among the states would save it from federal reach, regardless of how local it was.[51]

To determine the actual effect of wheat consumed on the farm from which it was

harvested on interstate commerce, the Court analyzed the economics of the international and domestic wheat markets. Nations that traditionally imported wheat were now producing more of their own wheat domestically, and the import restrictions, along with trade barriers they had erected, combined to depress the demand for U.S. wheat exports. The loss of reliable international markets to export excess domestic supply of wheat resulted in a dramatic increase of domestic supply. With demand for wheat being relatively constant irrespective of the price, or inelastic, a dramatic increase in supply resulted in significant price decreases of wheat in the interstate market. Consumption of wheat on the farm where grown accounted for more than twenty percent of the average production for a given year, while the total amount of wheat consumed nationally as food or used for reseeding was a relatively constant percentage of the total average production. Wheat consumed on the farm where it was grown presented the most variable factor in the national demand for wheat. Given that increasing demand increased the price just as surely as does decreasing the supply of a good, regulation of wheat consumed on the farm where grown would positively affect price. The Court found that, by defining the wheat produced over quota as "available for marketing," regardless of whether the wheat in fact reached the market, Congress had attempted to increase demand for wheat. Consequently, the price would increase as farmers had to resort to the open market to meet their own needs for personal consumption on the farm. The facts that Congress clearly had the authority to regulate commodity prices in interstate commerce and that increases in demand positively affected price allowed the Court to conclude that the Act was a permissible exercise of the federal commerce power.

One question remained in this case, whether Roscoe Filburn's individual act of abstention from the market by consuming his own wheat produced a *substantial* economic effect on price such that his activity is subject to federal regulation. In answering this question, the Court in *Filburn* pioneered what would lay the foundation for the modern federal government. Although Filburn's contribution to the total demand for wheat was trivial in isolation, the contribution by those farmers situated like Filburn was, as a matter of law, substantial and within the ambit of federal control.[52] In other words, the Court was saying that it will not simply look at the individual effect an activity had on interstate commerce to determine the scope of federal authority. Instead, it will analyze the impact of the activity in the aggregate to determine if it is a proper object of federal commerce power.

Ultimately, *Filburn* is a victory for legal realism. By adding the aggregate impact analysis to the substantial effects doctrine, the Supreme Court's Commerce Clause jurisprudence changed forever. *Filburn* foreclosed any notion that characterizing an activity as "local" or "production" or trying to describe its effects as "indirect" would decide the proper scope of federal commerce power. After the decision in *Filburn*, the Court would not only look at the degree of impact of a single instance of the activity in question but, instead, analyze the degree of effect, in the aggregate, the activity would produce on interstate commerce.

The "Substantial Effects" Doctrine post-*Filburn*

1964 saw the Supreme Court apply the "substantial effects" doctrine when it upheld the Civil Rights Act of 1964 as a legitimate exercise of federal commerce power in *Heart of Atlanta Motel, Inc. v. United States*[53] and *Katzenbach v. McClung*.[54] In both cases, the Court reaffirmed the aggregation principle seen in *Filburn* and assessed the degree of effect of the activity on interstate commerce, concluding that a single act of discrimination may not affect interstate commerce substantially, but, taken together, these acts of discrimination would substantially affect interstate commerce. In *Maryland v. Wirtz*,[55]

the Court again relied on *Filburn*'s aggregation principle to uphold federal regulation, holding that the Fair Labor Standards Act, first upheld as constitutional in *U.S. v. Darby,* was applicable to those hospitals, institutions, and schools that were operated by state and local governments. *Wirtz* concluded that trivial effects of individual instances of conduct do not relieve the conduct from federal regulation once the aggregate impact is found substantial.[56] These cases underscore the wide latitude granted to the federal government in pursuance of its commerce power in the years immediately following *Filburn* and helped to cement the role the aggregation principle would play in the Court's substantial effects doctrine.

However, more recently, the aggregation principle of *Filburn* has perhaps found its upper limit of applicability within the substantial effects doctrine. In 1995, the Supreme Court decided *United States v. Lopez,*[57] which held the Gun-Free School Zones Act of 1990 to be unconstitutional. The Act made it a federal crime to possess a firearm within the bounds of a school zone. The Court in *Lopez* acknowledged the wide latitude granted to Congress in pursuance of its commerce power by the Court's prior Commerce Clause decisions and identified *Wickard v. Filburn* as the most expansive interpretation of federal power.[58] Yet, in holding the Act unconstitutional, the Court noted that the activity of possessing a firearm in a school zone was not economic in nature in any sense of the word. The Court went on to say that, in the absence of any legislative findings as to the degree of impact the activity had on interstate commerce, as a matter of law, the activity in question did not substantially affect interstate commerce. The Court's focusing on the character or nature of the activity to assess its degree of impact on interstate commerce makes it appear that the Court's Commerce Clause jurisprudence is shifting back to a formal mode of analysis.

Five years after *Lopez*, the Court held the Violence Against Women Act (VAWA) to be an unconstitutional exercise of federal commerce power in *United States v. Morrison.*[59] The Court found that the activity that VAWA sought to prohibit was not economic in any way, just as it had in *Lopez.* In other words, because gender-motivated crimes are not of an economic nature or character, the impact of such crimes on interstate commerce is not substantial, even in the aggregate, and therefore cannot be subject to federal regulation. Unlike the situation in *Lopez*, in *Morrison* the Court had a plethora of legislative findings regarding the substantial effect on interstate commerce that violence against women produced. These findings were unpersuasive to the Court, which refused to extend federal commerce power solely on the basis that the legislature found that this type of violence substantially affected interstate commerce only in the aggregate. The Court concluded, "We reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[60]

Thus, in the wake of *Lopez* and *Morrison*, the Supreme Court has placed a formal hurdle in the way of establishing the substantial effect conduct may have on interstate commerce. In analyzing the degree of effect, the Court placed the nature or character of the activity in question in a position of paramount importance. If the conduct is noneconomic in nature, it must produce a substantial effect on interstate commerce in an individual instance to be subject to federal commerce power. However, if the effect of such conduct on interstate commerce is substantial only in the aggregate, it will no longer be subject to federal regulation under the Commerce Clause.

Conclusion

The scope of federal commerce power is a product of the Supreme Court's interpretation of

the Commerce Clause. That interpretation has shifted throughout our nation's history and, consequently, the scope of federal power has shifted with it. At the end of the nineteenth century, the Supreme Court interpreted the scope of federal commerce power very narrowly and relied on traditional definitions of commerce and manufacture to create distinct categories of activities that could and could not be regulated by Congress. This interpretation of the scope of federal commerce power is a classic example of legal formalism, in which historical definitions of commerce and manufacture are used and then those categories are applied in a logically deductive fashion. If the activity is manufacture, it is not commerce, and therefore it is not subject to the federal commerce power.

As a shift occurred in the academic view of what legal philosophy ought to be, from Langdell and legal formalism to Holmes's broader view, the Supreme Court issued its 1905 decision in *U.S. v. Swift & Co,* in which Justice Holmes placed his mark on the Court's Commerce Clause jurisprudence by looking to the effects of activity and not simply its character. Between 1905 and 1935, the Supreme Court held a view of the federal commerce power that mixed elements of legal formalism and legal realism. The Court would only uphold an exercise of federal commerce power over in-state activities that themselves were part of the historical definition of commerce, such as buying, selling, or transportation. The in-state activities that fell outside the historical definition of commerce produced an indirect effect on interstate commerce and were therefore not subject to Congress's power over interstate commerce. During this same period, the Court also viewed any attempt by Congress to regulate manufacturing, either directly or indirectly, to be patently unconstitutional because manufacturing was an in-state activity, clearly distinct from commerce, at best producing an indirect effect on it.

In 1937, the Court decided *Jones & Laughlin,* which discarded the view that only those intrastate activities that comprised traditional commerce produced a substantial effect on interstate commerce and therefore were subject to federal regulation. The Court's decision focused analysis away from the character of the activity in question and toward the effect of the activity to determine whether the exercise of federal power was permissible. *U.S. v. Darby* followed in 1941, where the Court simply expanded the scope of those intrastate activities that produced a substantial effect on interstate commerce to include the wages and maximum work hours of employees engaged in production of goods for interstate commerce. The Court in *Darby* also concluded that the proper test for the scope of federal commerce power was the degree of effect produced on interstate commerce, regardless of the activities character. Only a year after *Darby*, *Wickard v. Filburn* was decided. It removed any doubt that the Court had abandoned its formalistic notions of the scope of federal commerce power in favor of a much more expansive interpretation that focused on effects rather than character. *Filburn* added the aggregation principle to the substantial effects doctrine, thus further enlarging the number of activities that could be subject to federal regulation under the Commerce Clause. Not only would those activities that produce a substantial effect on interstate commerce in a single instance be subject to federal power, but this would also extend to those activities that produce a substantial effect on commerce in the aggregate.

Filburn's aggregation principle paved the way for more federal legislation in pursuance of its commerce power such as the Civil Rights Act of 1964, and it also allowed the national minimum wage and maximum work hours provisions of the Fair Labor Standards Act to be enforced on state and local government agencies. However, in more recent years, the aggregation principle has seemingly found an upper limit. In the Supreme Court's decisions in *Lopez v. United States* and *United States v. Morrison,* the Court held that Congress may

not regulate non-economic in-state activity solely because that activity produces a substantial effect on interstate commerce in the aggregate. The fact that the Court is again looking to draw a clear line between those activities subject to federal power and those that are not is reminiscent of the Court's Commerce Clause jurisprudence in the late nineteenth and early twentieth centuries. The Court has drawn a line using a clear distinction between economic and non-economic activity to prevent what it perceives as an attempt by Congress to exert a general police power. The Court has made clear that it will continue to limit Congress's ability to enact non-economic legislation in pursuance of its commerce authority and, without Constitutional Amendment, the pendulum of power will swing towards the states.

ENDNOTES

[1] U.S. CONST. art. I, § 8, cl. 3.
[2] 156 U.S. 1 (1895).
[3] 301 U.S. 1 (1937).
[4] 312 U.S. 100 (1941).
[5] 317 U.S. 120 (1942).
[6] U.S. CONST. art. I, § 8, cl. 3.
[7] *See* MICHAEL ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY (2012), pp. 106-8; G. EDWARD WHITE, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, in PATTERNS OF AMERICAN LEGAL THOUGHT (1978), pp. 99, 102.
[8] *See* ARIENS, pp. 123-25.
[9] *Id.* at 12.
[10] 128 U.S. 1 (1888).
[11] *E.C. Knight*, 156 U.S. at 14.
[12] *Kidd*, 128 U.S. at 10.
[13] WILLIAM W. FISHER III ET AL., AMERICAN LEGAL REALISM (1993), p. 4; WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1985), p. 10.
[14] TWINNING, p. 20.
[15] *Swift & Co.*, 196 U.S. 375 (1905).
[16] *Ibid.*, 398.
[17] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), p. 1.
[18] OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARVARD LAW REVIEW 457 (1897).
[19] *Id.*
[20] *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).
[21] *Id.* at 351.
[22] *Houston, East & West Texas Railway Co.*, 234 U.S. at 351.
[23] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
[24] *Id.* at 272.
[25] *Hammer*, at 277 (Holmes, J., dissenting).
[26] *Id.* at 278-81.
[27] *Hammer*, at 270-271.
[28] *Id.* at 271.
[29] *See* 295 U.S. 495 (1935).
[30] *Id.*, at 542-43.
[31] *Id.*, at 546.
[32] *Id.* at 548.
[33] 301 U.S. 1 (1937).
[34] *Id.* at 37.
[35] *Id.* at 42.
[36] 312 U.S. 100 (1941).
[37] *See* ELLIOT A. ROSEN, ROOSEVELT, THE GREAT DEPRESSION, AND THE ECONOMICS OF RECOVERY (2005).
[38] *Id.* at 16.
[39] Pub.L. 75–430, 52 Stat. 31, enacted February 16, 1938.
[40] Pub.L. 75–430, 52 Stat. 31, enacted February 16, 1938.
[41] *Filburn v. Helke*, 43 F.Supp. 1017, 1017-18 (S.D. Ohio 1942).
[42] *Wickard v. Filburn*, at 116.
[43] *Id.* at 128-29.
[44] *Id.* at 115.
[45] *Helke*, at 1019.
[46] *Filburn v. Helke*, 43 F.Supp. 1017, 1019 (S.D. Ohio 1942).
[47] *Id.* at 1021 (Allen, J., dissenting).
[48] *Wickard v. Filburn*, at 116-18.
[49] *U.S. v. Darby*, 312 U.S. 100 (1941).
[50] *Filburn*, 120.
[51] *Id.* at 125.
[52] *Id.* at 127-28.
[53] 379 U.S. 241 (1964).
[54] 379 U.S. 294 (1964).
[55] 392 U.S. 183 (1968).
[56] *Id.* at 192-93.
[57] 514 U.S. 549 (1995).
[58] *Lopez*, 514 U.S. at 556.
[59] 529 U.S. 598 (2000).
[60] *Id.*, at 614.

The Missing Justice in *Coleman v. Miller*

BARRY CUSHMAN

A mystery has surrounded the 1939 case of *Coleman v. Miller*.[1] The case concerned the status of the proposed Child Labor Amendment, which Congress had passed in 1924 but which had yet to be ratified by the requisite number of states. In January 1925, the Kansas state legislature had adopted a resolution rejecting the proposed amendment. In January 1937, however, the state senate had divided evenly on a resolution to ratify the amendment, and the state's Lieutenant Governor had cast the deciding vote in favor of ratification. The lower house then adopted a resolution of ratification. Members of the legislature, claiming that the Lieutenant Governor had no right to vote on the senate resolution, brought an action in mandamus seeking to restrain various state officers from taking steps to certify that the legislature had ratified the amendment. The petition also contended that the proposed amendment was stale and no longer subject to ratification because it had not been ratified within a reasonable time. The state supreme court found that the Lieutenant Governor had been entitled to vote on the resolution, that the proposed amendment remained vital and subject to ratification, and that the legislature had ratified the amendment. That court therefore denied the writ of mandamus.[2]

The threshold question before the Supreme Court of the United States was whether the Court had jurisdiction over the controversy. More particularly, the issue was whether the members of the state legislature who had brought the action had standing to seek a writ of *certiorari*. In the published opinion, the Court split on this issue 5-4, with Justices Owen J. Roberts, Hugo L. Black, and William O. Douglas joining Felix Frankfurter's opinion maintaining that the Court lacked jurisdiction because the petitioners lacked standing.[3] The numerical vote had been the same when the Justices met in Conference to deliberate on April 22, 1939, but the line-up had been different. On that occasion, Justice James C. McReynolds had taken the view that the Court lacked jurisdiction, while Roberts had voted to recognize jurisdiction. These two Justices switched places between the date

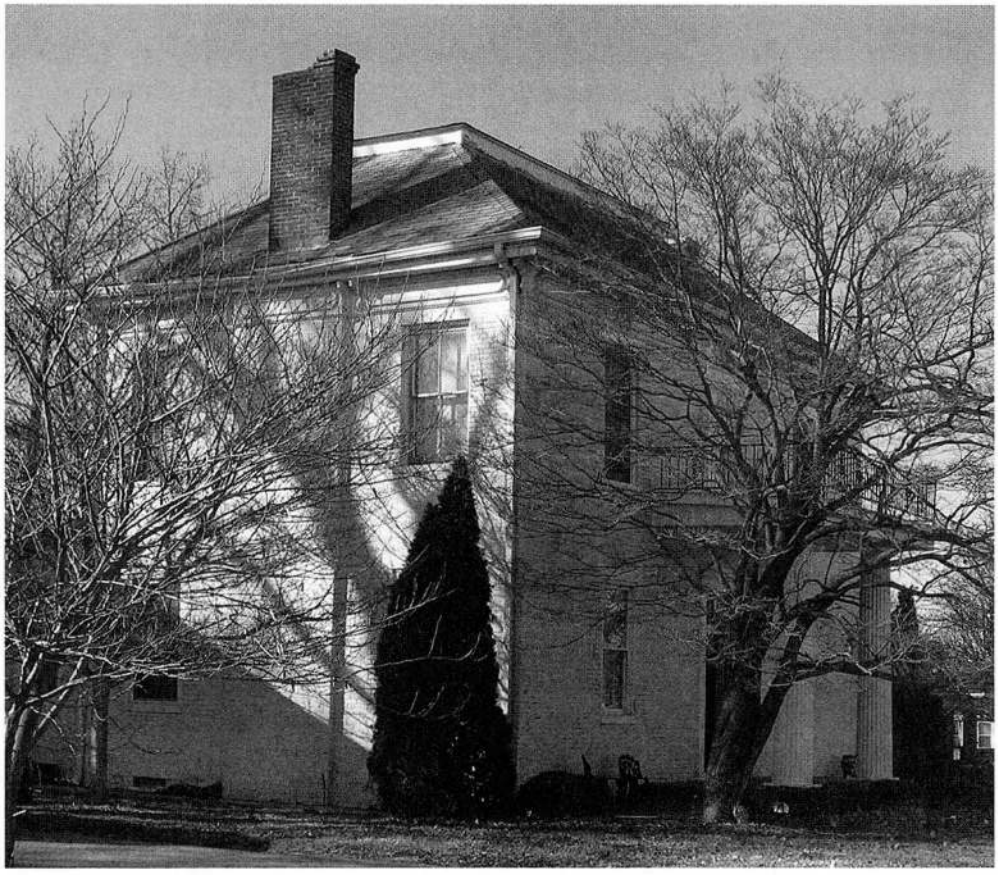
of the Conference and the announcement of the Court's decision.[4]

The second question was whether to affirm the judgment of the state court on the merits. Here the vote in the published decision was 7-2. Chief Justice Charles Evans Hughes's opinion for the Court held that the question of whether the ratification of the amendment was effective in view of its earlier rejection by the state legislature was a political question to be determined by Congress.[5] Hughes further opined that the question of whether the amendment had lost its vitality through lapse of time was similarly non-justiciable.[6] Roberts, Frankfurter, and Douglas joined Black's concurring opinion, which underscored their view that Congress alone held exclusive power over the political process of constitutional amendment, and that the courts had no business pronouncing upon that process.[7] McReynolds joined Justice Pierce Butler's dissent, which maintained that the proposed amendment was no longer subject to ratification because it had not been ratified within a reasonable time. Butler's opinion did not speak to the issue of the legislature's previous rejection of the proposed amendment.[8] Here again, however, the ultimate vote was at variance with the Conference tally. At the Conference, McReynolds had not voted on the merits, passing because of his view that the Court did not have jurisdiction of the case. Justices Harlan Fiske Stone and Roberts had been with Butler in dissent, though it appears from the question marks that Stone placed next to his and Roberts's votes in his record of the Conference that their votes to reverse had been tentative.[9] Stone ultimately joined Hughes on the merits, and Roberts ultimately joined Black. The deserted Butler had to be consoled by McReynolds's election to join him in dissent.

There is nothing particularly mysterious about any of these events. But there was a third merits issue in *Coleman*, which was not disaggregated in the tallies recorded at the April 22 Conference but that was given brief, separate treatment in Hughes's opinion. The petitioners claimed that the Lieutenant Governor was not a part of the "legislature" under the Kansas constitution as it had been construed by the state's highest court, and therefore he was not eligible under Article V of the federal Constitution to cast the deciding vote on ratification. And herein lies the mystery. For Hughes's published opinion reported that "[w]hether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point."[10]

Scholars understandably have been puzzled by how a decision in which all nine of the Justices participated could have been "equally divided" on this issue. Shortly after the decision was handed down, the *Yale Law Journal* published an anonymous Note, which Bennett Boskey later attributed to Yale Law Professor Harry Shulman,[11] entitled "Sawing a Justice in Half."[12] "Opinions of the Supreme Court delivered in the last weeks of this Term," the author wrote, "exhibit a capacity in that Court for division sufficient to confound prophets and critics of all schools—legalistic, metaphysical, psychological and economic. But the division in *Coleman v. Miller*, recorded June 5th, should astonish even a Yogi magician."[13] After surveying the various possibilities, the author concluded that

> [o]nly Justices McReynolds and Butler could properly refuse to consider the question; for they voted for the petitioners on other grounds and therefore could have found it unnecessary to pass upon additional reasons supporting the same conclusion. Yet, failing to carry a majority on those grounds, they were under some duty to see whether they could



James C. McReynolds missed the Court's final Conference on June 3, 1939 to return to his hometown of Elkton, Kentucky (pictured is his childhood home) to attend "a family reunion and celebration." The Court had announced on May 1 that it would adjourn for the summer on May 29, and McReynolds stuck by his commitment to attend the Elkton festivities.

> find a majority for their result on any of the other grounds urged.[14]

The still-perplexed author was left with a series of questions: "What really did happen? Did a Justice refuse to vote on this issue? And if he did, was it because he could not make up his mind? Or is it possible to saw a Justice vertically in half during a conference and have him walk away whole?"[15]

It would be more than half a century before an answer to these questions would find its way into print. In a conversation published in 2007, Boskey related that:

> I later found out through Felix Frankfurter what had really happened in that case. Justice McReynolds, who was a very ornery Justice, used to go off a little bit early before the end of the Term on vacation. And in this particular case, the point involved was a new point that came up after Justice McReynolds had gone off on vacation. And nobody was going to try and call him back—he would have told them, frankly, "Go to hell." He wouldn't have come back. So Hughes just said, "On this issue, the Court is evenly divided."[16]

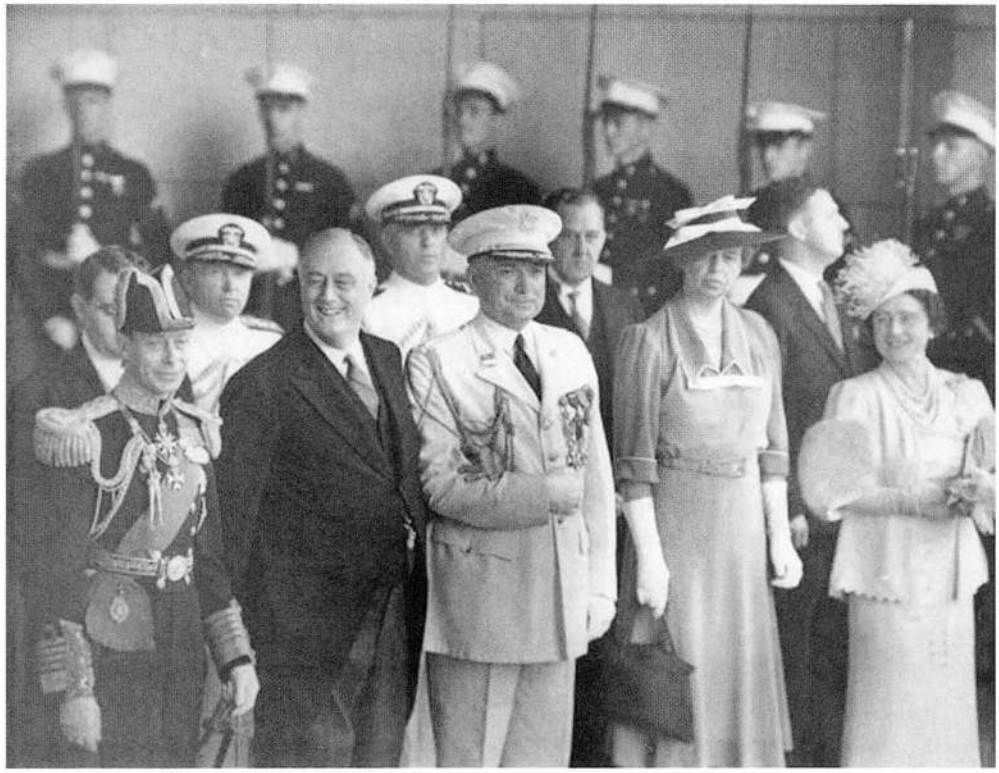
This Frankfurter/Boskey account never has been contradicted, but neither has it been corroborated. As I shall demonstrate, the Justices' papers and contemporary news

reports make it possible to determine with a high degree of confidence that McReynolds was indeed absent from the final meeting during which the Justices met to deliberate on the case. Yet those sources also cast doubt on some aspects of the Frankfurter/Boskey account.

Coleman was delivered on the final opinion day of the Term, June 5, 1939. On May 30, Chief Justice Hughes wrote to his colleagues that "[f]our opinions have been circulated" in *Coleman*—those written by Hughes, Black, Frankfurter, and Butler —"and, in view of the shortness of time, it seems to me desirable that we should have a conference as soon as possible in order to determine whether an opinion can be written for the Court and, if so, what it shall decide. Accordingly, I ask that the brethren meet in conference tomorrow, Wednesday, at noon."[17] We know that McReynolds was absent from the Court's final session on June 5,[18] and the docket books of his colleagues reveal that he also did not attend the Court's final Conference on June 3.[19] McReynolds's premature departure, though hardly commendable, may not, however, have been quite as irresponsible as the Frankfurter/Boskey account would suggest. The Court had announced on May 1 that it would adjourn for the summer on May 29,[20] and McReynolds, who was traveling to his birthplace for "a family reunion and celebration,"[21] appears to have relied upon that announcement in making his plans.

On June 16, McReynolds's clerk for that Term, Milton Musser, wrote to his mother that "[t]he Justice returned to Washington after having been away for two weeks visiting his old home in Kentucky."[22] Musser's letter does not supply specific dates of travel, but the *Washington Post* reported on June 12 that McReynolds had left his boyhood home in Elkton the preceding day in order to attend the funeral of Judge Charles H. Robb on Tuesday, June 13.[23] An absence of two weeks would place McReynolds's departure from Washington on May 30 or May 31. On June 2, 1939, the *Paducah Sun-Democrat* ran a story with the headline "Justice McReynolds Picks Elkton Visit over Fete for King." With a dateline from Elkton on June 2, the story related that McReynolds had declined an invitation to meet the King and Queen of Great Britain at a June 8 garden party held at the British embassy in Washington "because," as he told his interviewer in Elkton, "I simply preferred to be here."[24]

This evidence alone would suggest that McReynolds probably had left Washington by the time that the Justices convened on May 31. The journey from Washington to Elkton is one of approximately 725 miles. McReynolds allocated two days for his return trip from Elkton to Washington for Judge Robb's funeral, so he probably would have allocated the same amount of time for his transit from Washington to Elkton. McReynolds liked to travel in his 1929 six-cylinder Buick couple convertible, and he may well have journeyed by car to Elkton that year. Though he was reportedly an aggressively fast driver, he would not have covered the distance from Washington to Elkton on the roads of 1939 in a single day. On a 1936 drive from Washington to West Point, for example, a journey of under 300 miles, McReynolds allocated two days for transit, stopping for the first night at Delaware Water Gap, approximately 240 miles from Washington.[25] A journey from Washington to Elkton by train likewise would have consumed more than a single day. Even in 1947, the trip from Washington to Cincinnati on the Baltimore & Ohio Railroad was one of eleven and one-half hours.[26] The connecting train on the Louisville & Nashville Railroad to Guthrie, Kentucky, which might have required an overnight stay in Cincinnati, would as late as 1958 still have consumed another six and one-half hours.[27] McReynolds would then have faced a ten-mile journey to Elkton on the Guthrie & Elkton Railroad or possibly transportation by



In leaving town early, McReynolds declined an invitation to attend a garden party reception at the British Embassy for King George VI and Queen Elizabeth. Pictured are the King, President Franklin D. Roosevelt, General Edwin M. Watson, Eleanor Roosevelt, and the Queen posing outside Union Station on June 8.

automobile. Whether he traveled by car or by train, if McReynolds was in Elkton early enough on June 2 to grant an interview that would be published in Paducah's evening newspaper, then he probably would have departed Washington no later than May 31.

Any remaining doubt about McReynolds's presence at the May 31 Conference is removed, however, by the June 3 dateline edition of Drew Pearson and Robert S. Allen's *Washington Merry-Go-Round* column. Two days before the even division in *Coleman* was announced, the authors reported that McReynolds would not be present with his hardworking colleagues for the Court's June 5 session because he would be "taking things easy" in Elkton. "The Court originally had fixed its adjournment date for May 29," Pearson and Allen noted, but "under the pressure of an extra heavy docket, Chief Justice Hughes added another week to the term in order to clean up unfinished cases. Meanwhile McReynolds had arranged a reunion in Elkton and refused to change his plans notwithstanding the uncompleted calendar. He sat with the court on May 29, but the next day packed his bag and started on his vacation while his colleagues remained at their desks."[28]

It appears clear, therefore, that McReynolds was in fact the missing Justice in *Coleman*. Nevertheless, elements of the Frankfurter/Boskey report appear to be misleading. First, though McReynolds certainly was eminently capable of being "very ornery" or worse, the intimation that it was his custom to leave for vacation before the conclusion of the Court's Term appears to be an embellishment. He did so in 1939, to be sure, but an examination of the docket books from 1922 to 1940 reveals only one other instance in which McReynolds was absent

from the final Conference.[29] And as mentioned above, the 1939 instance was one in which the Court previously had announced plans to adjourn a week earlier. Surely it was at the very least "ornery" to depart prior to the actual conclusion of the Term, but McReynolds may have been honoring commitments that he had made in reliance on the Court's earlier announcement.

Second, as Hughes surely knew when he sent out his May 30 letters to his colleagues calling for a Conference on *Coleman* on May 31, McReynolds had just departed on a journey that would consume at least two days. If Hughes knew by May 29 that he would call a special Conference on *Coleman*, he could have communicated (and perhaps did communicate) that to McReynolds prior to the latter's departure. But if Hughes did not know this until May 30, the earliest that he could have reached McReynolds would have been upon the Justice's arrival at his hotel on the evening of May 30, and perhaps not until his arrival in Elkton on May 31. Hughes clearly thought it necessary to resolve the remaining issues in *Coleman* before the Court's regular Conference on June 3. Even had McReynolds returned to Washington as soon as he had heard from Hughes, he could not have been present for a Conference before June 1 if he had been reached in transit on May 30, or June 3 if reached in Elkton on May 31. It is not as if McReynolds already was settled at a nearby vacation destination

Chief Justice Charles Evans Hughes (left) felt compelled to add another week to the Term to clean up unfinished cases, including the *Coleman v. Miller* case that centered on whether the Lieutenant Governor of Kansas had the right to vote to break a tie in the state senate on a resolution to ratify the Child Labor Amendment. Above are Hughes and McReynolds in May 1938 leaving Holy Trinity Church after attending the funeral of Frank Key Green, who had served as the Marshal of the Supreme Court for twenty-three years.

and could return to participate in the discussion within what Hughes regarded as the necessary time frame. Hughes might have been able to contact McReynolds when he was either halfway to or had arrived in Elkton and asked him to return to discuss the question on which the Justices were evenly divided. And though McReynolds held Hughes in high regard,[30] one cannot be certain that, under such circumstances, McReynolds would not have told the Chief Justice to "go to hell."[31] But that is probably not why Hughes did not reach out to his departed colleague.

Because the question of whether the Lieutenant Governor was eligible to vote had been briefed and argued by the parties,[32] and because the original draft of Hughes's opinion had contained over five pages of text deciding the issue on the merits in favor of the officer's eligibility,[33] that issue cannot have been "a new point that came up" so late in the deliberations. Instead, it appears that the precise issue of whether the Lieutenant Governor's eligibility to vote presented a non-justiciable political question, which the parties had neither briefed nor argued, was "a new point" raised by one of the Justices late in the production of the opinions.

That Justice appears to have been Black, who wrote in the margin of his copy of Hughes's draft opinion that the issue of the Lieutenant Governor's eligibility presented "a political question for Congress,"[34] and scribbled "by Congress though" next to Hughes's assertion that the issue presented "a federal question to be determined in deciding whether the 'legislature' has acted as required by Article V."[35] In his concurring opinion, which was joined by Roberts, Frankfurter, and Douglas, Black asserted that "whether submission, *intervening procedure* or Congressional determination of ratification conforms to the command of the Constitution, calls for decisions by a 'political department' of questions of a type which this Court has frequently designated 'political.'"[36] Black went on to disapprove of "judicial review of or pronouncements ... as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification" as "judicial interference" in "matters that we believe were intrusted [sic] by the Constitution solely to the political branch of government."[37] The Amendment process, Black insisted, was "'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point."[38]

Hughes's draft opinion made clear that he disagreed with Black, Roberts, Frankfurter, and Douglas on the question of the justiciability of the issue of the Lieutenant Governor's eligibility, and it appears that Stone and Justice Stanley Reed agreed with him. Justice Butler's dissenting opinion closed by observing that the question of whether the issue of the proposed amendment's vitality was non-justiciable "was not raised by the parties or by the United States appearing as amicus curiae." Neither had that question been suggested by the Court when it ordered re-argument. It therefore would be inappropriate, Butler opined, "without hearing argument on the point," to hold that the Court lacked power to decide the question of whether the amendment was no longer subject to ratification.[39] Though his opinion did not speak to the issue of the Lieutenant Governor's eligibility, Butler may well have taken a similar view of the claim that the Court should declare that issue non-justiciable without appropriate briefing and argument. In any event, it appears that Butler joined Hughes, Stone, and Reed in opposing those who supported Black's position, producing a 4-4 tie. It appears that McReynolds simply was not there to break the deadlock.

Even if McReynolds had been present, however, it is not certain that he would have cast a vote on the issue. Douglas noted in his docket book that, at the April 22 Conference, "McReynolds having voted to dismiss did not

vote on the merits."[40] Even though he had lost on the jurisdictional issue, McReynolds nevertheless refused at Conference to engage the merits issues that his colleagues would of necessity address in view of the majority's holding that the petitioners had standing. As is suggested by the *Yale Law Journal* Note, McReynolds "could properly refuse to consider the question" of the Lieutenant Governor's eligibility to vote on the Amendment's ratification in view of the fact that he had voted to rule in favor of the petitioners on other grounds. Even if he was, as the Note author doubtfully intimated, "under some duty" to "find a majority for [his] result on any of the other grounds urged,"[41] he may have agreed with Hughes's draft opinion that the Lieutenant Governor was in fact eligible to vote on ratification, and taking that position would not have changed the outcome of the case. In short, it may be that the irascible Justice, who had declined to vote on any of the merits issues at the original Conference, would similarly have refused to vote on the issue of the Lieutenant Governor's eligibility had he been present for the later special Conference. McReynolds ultimately backed his friend Butler on the question of the proposed amendment's vitality, and for this it was necessary that he change his Conference position–probably quite reluctantly, in light of what we know of his jurisdictional views[42]—on the threshold question of standing. But having thus disposed of the merits on the ground that the proposed amendment was no longer subject to ratification, McReynolds might not have thought it necessary or proper to reach the issue of the Lieutenant Governor's eligibility. Indeed, the fact that Butler's dissenting opinion also did not speak to the issue of the Kansas legislature's previous rejection of the proposed amendment may have been a concession made to conciliate McReynolds. McReynolds may have determined not to reach the merits of either of these issues before departing on May 30, and he may have made that determination known before his departure. If so, Hughes would have been fully aware of the futility of recalling McReynolds for the special Conference. Thus, it may not have mattered that McReynolds was in fact the missing Justice in *Coleman v. Miller*.

Author's Note: Thanks to Matthew Hofstedt, Kent Olson, and Janet Rose for excellent research assistance, and to John Harrison for helpful conversation.

ENDNOTES

[1] 307 U.S. 433 (1939).

[2] *Id.* at 435-37.

[3] *Id.* at 460-70 (separate opinion of Frankfurter, J.).

[4] Harlan Fiske Stone OT 1938 Docket Book (hereafter "Stone OT 1938 Docket Book"), Office of the Curator of the Supreme Court of the United States (hereafter "OCSCOTUS"); Pierce Butler OT 1938 Docket Book (hereafter "Butler OT 1938 Docket Book"), OCSCOTUS; Owen J. Roberts OT 1938 Docket Book (hereafter "Roberts OT 1938 Docket Book"), OCSCOTUS; William O. Douglas OT 1938 Docket Book (hereafter "Douglas OT 1938 Docket Book"), William O. Douglas MSS, Manuscript Division, Library of Congress; Stanley Reed OT 1938 Docket Book (hereafter "Reed OT 1938 Docket Book"), Stanley Forman Reed MSS, Special Collections, M.I. King Library, University of Kentucky.

[5] 307 U.S. at 447-51.

[6] *Id.* at 451-56.

[7] *Id.* at 456-60 (Black, J., concurring).

[8] *Id.* at 470-74 (Butler, J., dissenting).

[9] Stone OT 1938 Docket Book; Butler OT Docket Book; Roberts OT 1938 Docket Book; Douglas OT 1938 Docket Book. Butler did not record a vote for Stone on the merits. Reed OT 1938 Docket Book records the merits vote as 6-2, with Butler and Roberts in dissent, and McReynolds not voting.

[10] 307 U.S. at 446-47.

[11] Bennett Boskey, "Recollections of *West Virginia Board of Education v. Barnette*," 81 ST. JOHNS L. REV. 755, 787 (2007).

[12] Note,"Sawing a Justice in Half," 48 YALE L.J. 1455 (1939).

[13] *Id.* (footnotes omitted).

[14] *Id.* at 1458.

[15] *Id.*

[16] Boskey, "Recollections," at 787.

[17] *See, e.g.*, Hughes to Black, May 30, 1939, Box 256, Hugo L. Black MSS, Manuscript Division, Library of Congress; Hughes to Douglas, May 30, 1939, Box 36,

William O. Douglas MSS, Manuscript Division, Library of Congress.

[18] *See Hague v. C.I.O.*, 307 U.S. 496, 500 (1939) ("Mr. Justice Butler, presiding in the absence of the Chief Justice and Justice McReynolds"). Hughes was absent due to illness with a duodenal ulcer. *See* "2 Members Away, High Court Plans to Finish Term," WASH. POST, June 5, 1939, 2.

[19] Stone OT 1938 Docket Book at 556 lists McReynolds as "abs[ent]" for the vote on the petition for rehearing in No. 945, *City & County of Denver v. The People of the State of Colorado*, while listing everyone else as voting to dismiss. Douglas Docket OT 1938 Book at 303 similarly lists no vote for McReynolds and a vote to dismiss for everyone else. Douglas OT Docket Book at 304, Stone OT 1938 Docket Book at 557, and Butler OT 1938 Docket Book at 608 also list no vote for McReynolds and a vote to dismiss for everyone else in No. 975, *The Kansas Farmers' Union Royalty Co. v. Hushaw*. With respect to petitions for *certiorari*, Douglas OT 1938 Docket Book records votes for everyone but McReynolds in No. 926, *Partridge v. Martin*, and No. 948 *Townshend v. Union Trust Co. of Maryland*. In none of the cases taken up at the June 3 Conference is there any indication of a vote cast by McReynolds at that Conference. *See* Butler OT 1938 Docket Book; Stone 1938 OT Docket Book; Roberts OT 1938 Docket Book; Douglas OT 1938 Docket Book. For the Conference list, *see* Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. On June 4, with a dateline of June 3, the Times-Picayune reported that McReynolds "already has left Washington to visit relatives in Kentucky." "Hughes Stricken Ill; Will Be Off Bench for Time," TIMES-PICAYUNE, June 4, 1939, 25.

[20] "Supreme Court to Quit May 29 for Summer," WASH. POST, May 2, 1939, 2 ("The Supreme Court announced yesterday that it will adjourn for the summer on May 29, barring unexpected developments"). It appears that the six-week absence of the Chief Justice owing to illness (March 4-April 15), compounded by the two-month hiatus (February 13-April 17) between the resignation of Justice Louis Brandeis and the confirmation of Douglas, put the Court a bit behind in its work. Though the Justices handed down thirteen decisions on February 27, *see* 306 U.S. at 240-397, they delivered only one more over the next month (*Texas v. Florida*, 306 U.S. 398 (1939), on March 13). The Court handed down ten more decisions on March 27, *see* 306 U.S. at 436-521, but only two more on April 3, *see* 306 U.S. at 522-30. When the Court was restored to full strength on April 17, the Justices announced twenty-one more decisions. *See* 306 U.S. at 531-614, 307 U.S. at 1-160. The Court announced one more decision on April 24, *see* 307 U.S. at 161-70; six more on May 15, *see* 307 U.S. at 171-218; and eight more on May 22, *see* 307 U.S. at 219-313. But despite handing down six more decisions on May 29, *see* 307 U.S. at 313-432, there remained seven more that had yet to be rendered. These included not only *Coleman* and its companion case from Kentucky, *Chandler v. Wise*, 307 U.S. 414 (1939), but also such other major cases generating multiple opinions as *Hague v. C.I.O.*, 307 U.S. 496 (1939), *U.S. v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), and *H.P. Hood & Sons v. United States*, 307 U.S. 588 (1939). Justice Douglas's files show that he was at work on an opinion concurring in the result of *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486 (1939), every day from May 29 to June 2. *See* Box 37, William O. Douglas MSS, Manuscript Division, Library of Congress. Douglas eventually scrapped the opinion and simply noted his concurrence in the result. 307 U.S. at 496. The Court heard argument in twenty cases during Hughes's absence in March, *see* 306 U.S. at 466-601; in late April and early May, after Hughes had returned and Douglas had joined the Court, the Justices heard argument or re-argument in seventeen cases. These included *Coleman*, *Chandler*, *Rock Royal*, *Hood*, *O'Malley v. Woodrough*, 307 U.S. 277 (1939), *Graves v. Elliott*, 307 U.S. 383 (1939), and *United States v. Powers*, 307 U.S. 214 (1939). *See* 307 U.S. at 171-588. *Rock Royal* and *Hood* were not argued until April 24-26, *see* 307 U.S. at 533, 588, and were not discussed in Conference until May 6. *See* Conference List, May 6, 1939, Box 36 William O. Douglas MSS, Manuscript Division, Library of Congress. Indeed, the Justices needed another Conference on June 3 in order to dispose of some remaining matters. *See* Conference List, June 3, 1939, Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. Justice Douglas's papers contain a document, apparently prepared some time before March 27, 1939, with the heading "Proposed Schedule for Remainder of October Term, 1938." The schedule anticipates Argument days on March 27, April 17, and April 24; Recess on April 3, April 10, and May 8; and Court Sessions on May 1, May 15, May 22, and May 29. Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. Both the Proposed Schedule and the May 1 announcement of the Court's remaining calendar appear in retrospect to have been overly optimistic.

[21] "Justice McReynolds 'Snubs' Royalty for Reunion," CHICAGO DAILY TRIBUNE, June 6, 1939, 9.

[22] Milton Musser to Ellis Shipp Musser, June 16, 1939, Box 21, folder 4, Musser Family Papers, Utah State Archives. Musser continued, "I hope he leaves again and soon." *Id.*

[23] "McReynolds Coming Here," WASH. POST, June 12, 1939, 17.

[24] "Justice McReynolds Picks Elkton Visit Over Fete for King," PADUCAH SUN-DEMOCRAT, June 2, 1939, 5. *See also,* "Justice McReynolds 'Snubs' Royalty for Reunion," CHICAGO DAILY TRIBUNE, June 6, 1939, 9.

[25] *See* DENNIS J. HUTCHINSON & DAVID J. GARROW, eds., THE FORGOTTEN MEMOIR OF JOHN KNOX (2002), pp. 23-27.

[26] http://www.american-rails.com/cincinnatian.html.

[27] http://www.lnrr.org/Magazine/Ln_passenger_timetable.pdf.

[28] Drew Pearson & Robert S. Allen, "McReynolds Jumps Gun on Court Associates by Taking Vacation Early," NASHVILLE TENNESSEAN, June 5, 1939, 5.

[29] McReynolds was absent from the June 2, 1934 conference, the last of the 1933 Term. Butler OT 1933 Docket Book; Stone OT 1933 Docket Book; Robert OT 1933 Docket Book. The reason for his absence is unclear. Other Justices appear occasionally to have missed the final conference. For instance, Chief Justice William Howard Taft was away from the final conference of the 1925 Term due to illness. Stone OT 1925 Docket Book; "Chief Justice Overworked, Ill," BOSTON DAILY GLOBE, June 8, 1926, 7; Justice Benjamin Cardozo missed the final conference of the 1937 Term due to illness. Roberts OT 1937 Docket Book; 304 U.S. iii. And it appears that Justice George Sutherland may have missed the final conferences of the 1924, 1927, and 1929 Terms. Stone OT 1924 Docket Book; Stone OT 1927 Docket Book; Stone OT 1929 Docket Book. Justice William O. Douglas later would become notorious (and resented by all of his fellow Justices) for habitually leaving Washington for the summer several weeks before the end of the term, sometimes without as much as a fare-thee-well. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (1980), p. 432.

[30] Stephen Tyree Early, Jr., *James Clark McReynolds and the Judicial Process* (unpublished Ph.D. dissertation, University of Virginia, 1954), p. 90 ("The only member of the Court for whom he had genuine and complete respect was Chief Justice Hughes. The Chief Justice, McReynolds thought, was too much for him; he was the only Justice on the bench to whom McReynolds would defer").

[31] In support of this possibility, consider William H. Rehnquist, "Chief Justices I Never Knew," 3 HAST. CON. L. Q. 637, 637-38 (1976) (Hughes was "meticulous in his desire that the Court, which then convened at noon, come through the red velour curtains at the very stroke of the hour. On several occasions, however, the senior associate, Mr. Justice McReynolds, had barely made it to the robing room in time. On one particular day the hour of noon was almost at hand, and Mr. Justice McReynolds had not yet appeared. The Chief Justice dispatched one of his messengers to Justice McReynolds' chambers to importune him to hurry. The messenger returned a moment or two later, but without Mr. Justice McReynolds. The Chief Justice asked the messenger if he had communicated the message to Mr. Justice McReynolds, and the messenger replied that he had. To the Chief Justice's next question the messenger replied, 'He said to tell you that he doesn't work for you'").

[32] Brief on Behalf of Petitioner, *Coleman v. Miller*, pp. 5-13; Brief on Behalf of Respondents, *Coleman v. Miller*, pp. 1-2, 4-6.

[33] Chief Justice Hughes, draft opinion in *Coleman v. Miller*, Box 256, Hugo L. Black MSS, Manuscript Division, Library of Congress, pp. 9-14.

[34] *Id.* at 9.

[35] *Id.* at 10.

[36] 307 U.S. at 457 (Black, J., concurring) (emphasis added).

[37] *Id.* at 458.

[38] *Id.* at 459. These three passages also appear in an earlier, undated, uncirculated draft of Black's separate opinion. Box 256, Hugo Black MSS, Manuscript Division, Library of Congress.

[39] *Id.* at 474 (Butler, J., dissenting).

[40] Douglas OT 1938 Docket Book.

[41] Note, "Sawing a Justice in Half," at 1458.

[42] *See, e.g.*, Melvin I. Urofsky, 'The Brandeis-Frankfurter Conversations,' 1985 SUP. CT. REV. 299, 317 (Brandeis opining that "McR. cares more about jurisdictional restraints than any of them").

"How Do You Feel About Writing Dissents"? Thurgood Marshall's Dissenting Vision for America

CHARLES L. ZELDEN

On October 2, 1967, with his family, friends, and admirers and President of the United States Lyndon B. Johnson in attendance, Thurgood Marshall stood up in the chamber of the Supreme Court of the United States, put his hand on a Bible, and swore to "administer justice without respect to persons, . . . [to] do equal right to the poor and to the rich, and that [he would] faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . under the Constitution and laws of the United States." With these words, Marshall became the nation's newest, and first African American, Associate Justice of the United States Supreme Court. A clearly emotional Marshall confessed at the time how "he wished his daddy could have been there." Still, Marshall added, he just knew that his father "was on some street corner in heaven shaking his finger and saying, 'I knew my boy would do it.'"[1]

Without doubt, this was one of Marshall's proudest days. Only his victory as a lawyer in *Brown v. Board of Education* (1954) came close to generating in him the feelings of accomplishment and professional vindication brought by his elevation to the Supreme Court. Marshall's ascent to the peak of the legal profession filled him with a profound feeling of satisfaction. As he later explained to biographer Carl T. Rowan, "How did I feel? Hell, like any other lawyer in America would feel. Real proud—because there is no greater honor a lawyer can get. I felt especially great because I knew President Johnson was using me to say something important to the nation."[2]

Marshall's feelings of pride and achievement did not last, however. As the ideological makeup of the Court and the political culture of the nation shifted over time to the right, Marshall increasingly became isolated from, and then marginalized by, his fellow Justices; with each passing year, a frustrated, angry, and often bitter Marshall saw the landmarks of his life's work—the social, political, economic, and constitutional changes that he had helped

bring about at such great cost as the head of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, Inc. (LDF)—being circumscribed, abandoned, or reversed. By the end of his tenure on the Court, Marshall, by now cantankerous and belligerent, would ask prospective law clerks a simple yet revealing question by which to determine their suitability to be one of *his* clerks: "How do you feel about writing dissents?"[3]

That bitter question was not one that Marshall had ever expected to have to ask. The Supreme Court that he joined in the fall of 1967 was filled with familiar and philosophically compatible friends and allies. Marshall and Chief Justice Earl Warren had a close relationship based on mutual admiration, respect, and genuine friendship. In William J. Brennan, Jr., Marshall found a friend and ally whose worldview and, more important, whose understanding of law and the Constitution, harmonized perfectly with his own. Although his relationships with the other Justices were not always as congenial and familiar as those with Warren and Brennan, Marshall nonetheless joined a Court with a clear liberal majority, one that his appointment as Justice strengthened.

For the next several years Marshall regularly voted in the majority, participating in the Supreme Court's ongoing redefinition of individual and group civil rights and liberties. He joined majorities in such landmark cases as *Green v. County School Board of New Kent County* (1968), in which a unanimous Supreme Court charged Southern school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination is eliminated root and branch";[4] *Jones v. Alfred H. Mayer Co.*(1968),[5] which applied the Thirteenth Amendment and the 1866 Civil Rights Act to preclude all forms of racial discrimination in the sale or leasing of private property, including, as in that particular case, when the discrimination was done entirely by a private citizen with no government support or action; *Allen v. Board of Elections* (1969),[6] in which a 7-2 majority expanded the reach of the Voting Rights Act of 1965 to cover not just cases of blatant race-based vote *denial*, but also the more "subtle" techniques of vote *dilution* that undermined the effectiveness of minority voting; *Alexander v. Holmes County Board of Education* (1969), a *per curiam* (by the Court) ruling declaring that it was "[t]he obligation of every school district . . . to terminate dual school systems *at once* and to operate now and hereafter only unitary schools";[7] *Swann v. Charlotte-Mecklenburg Board of Education* (1971),[8] which held unanimously that mandatory student busing and racial quota "guidelines" were appropriate remedies for the problem of racial imbalance among schools, even where the imbalance arose due to residential segregation and not a deliberate assignment based on race; *Furman v. Georgia* (1972), outlawing for a time the death penalty in America;[9] *Roe v. Wade* (1973),[10] which upheld the constitutional privacy justification for a woman's right to terminate her pregnancy by an abortion; and *U. S. v. Nixon* (1974), in which a unanimous Supreme Court rejected President Richard M. Nixon's claim to "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[11]

Marshall himself wrote majority opinions in several important civil rights and civil liberties cases during these years. His first opinion, *Mempa v. Rhay* (1967), confronted the question whether a felony defendant had a constitutional right to counsel during *post*-trial proceedings for "revocation of probation or a deferred sentencing." In an opinion that Justice Black praised for its "brevity, clarity and force," Marshall answered: yes, they did. Given that lawyers already were required during trials or guilty pleas, Marshall saw no reason why they should not also be required at the "deferred sentencing stage."[12]

In the next term, Marshall wrote a 7-2 majority opinion in *Benton v. Maryland* (1969), extending the Fifth Amendment's ban on double jeopardy (being tried twice

Cecilia Suyat gave her husband's robe a last minute check when Thurgood Marshall was sworn in at the Supreme Court in October 1967. Marshall wore the robe he had used when he sat on New York City's Second District Court of Appeals.

for the same crime) to include state-court proceedings. In doing so, Marshall expressly overruled the precedent established by *Palko v. Connecticut* (1937). "*Palko*'s roots [were] cut away years ago," Marshall explained. "We today only recognize the inevitable"—namely, that the "double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment."[13]

That same year, Marshall wrote the Court's opinion in *Stanley v. Georgia* (1969) supporting an individual's right to own and view pornography in the privacy of his or her own home. "It is now well established," wrote Marshall, "that the Constitution protects the right to receive information and ideas . . . regardless of their social worth." True, the state did have the authority to define certain materials as obscene, and hence illegal. However, this power had limits:

> We think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.

"Our whole constitutional heritage," Marshall concluded, "rebels at the thought of giving government the power to control men's minds."[14]

Yet, after the election of Richard M. Nixon as President in 1968, the ideological makeup of the Court began to shift. The legal revolution instigated by the Warren Court's expansive readings of individual civil liberties and its promotion of racial and social justice were highly controversial. Many Americans adamantly opposed these changes and blamed the Supreme Court for the wrenching social, economic, and cultural effects that the Court seemed to impose on their everyday lives. For conservative politicians seeking electoral success, tapping this discontent and attacking the Supreme Court for its liberal judicial activism became "a powerful tool for attracting votes."[15] Conservative candidates for President regularly vowed (in Richard M. Nixon's words) to appoint judges who would "interpret the Constitution, and not . . . place [themselves] above the Constitution or outside of the Constitution."[16]

Motivated by ideological and electoral imperatives, Republican Presidents beginning with Nixon strove to transform the Supreme Court's ideological balance by appointing to the Court those who they believed (or hoped) would be conservative Justices. Over time, these appointments succeeded in slowly, though inconsistently, shifting the Court's ideological and jurisprudential center rightward.

The change began not long after Marshall joined the Court. On June 26, 1968, President Johnson announced that Earl Warren was stepping down as Chief Justice. Johnson quickly nominated Associate Justice Abe Fortas to succeed Warren and Homer Thornberry, a judge on the United States Court of Appeals for the Fifth Circuit and an old friend of LBJ, to take Fortas's seat. Unfortunately for Johnson, the Senate balked at confirming Fortas. LBJ's mounting political weakness over the war in Vietnam, Fortas's unabashed liberalism, and an emerging scandal over the Justice's financial improprieties combined to derail Fortas's nomination. (It also didn't help that Fortas was Jewish; the Senate Judiciary Committee Chair, James O. Eastland (D-MS), later admitted: "After Marshall, I couldn't go back to Mississippi if a Jewish chief justice swore in the next President.")[17] The withdrawal of Fortas's nomination (after a failed vote of cloture to end a Senate filibuster) left no vacancy for Thornberry to fill, preventing his appointment as well.

Had Fortas and Thornberry been confirmed, the Court's liberal bloc would have been dominant for years to come. Instead, the delay caused by the Senate's refusal to confirm Fortas meant that it was Richard M. Nixon who named the next Chief Justice, and he chose conservative federal appellate judge Warren E. Burger as Warren's successor. Soon after Burger's appointment, the ongoing scandal over Fortas's financial improprieties forced Fortas to resign his seat rather than risk impeachment and possible criminal prosecution. Fortas's resignation gave Nixon a second vacancy on the Court, which, after two failed efforts to name a Southerner as Fortas's replacement, he filled in June 1970 by appointing federal appellate judge Harry A. Blackmun. In 1971, two vacancies caused by the retirements of Justices Hugo L. Black and John Marshall Harlan II allowed Nixon to appoint to the Court right-leaning moderate Lewis F. Powell and conservative William H. Rehnquist. Later appointments by Presidents Gerald R. Ford, Ronald Reagan, and George H. W. Bush followed the essentially moderate-to-conservative appointment patterns set by Nixon. (President Jimmy Carter was one of those rare Presidents who never had a chance to appoint a Justice to the Court.)

The Great Dissenter

Though it took years for the shift in a conservative direction to become clear, as some Justices proved less conservative than advertised, the appointments of Justices

Powell and Rehnquist in 1972 represented an important tipping point in the Court's ideological composition and doctrinal perspective. From then onward, Marshall found himself increasingly in the minority on key issues of civil rights, civil liberties, and social justice—the topics that mattered most to him—so that he was forced to write evermore acerbic dissents in defense of the Constitution as he understood it.

Not that Marshall never wrote majority opinions. It was the practice of the Supreme Court, then as now, to divide the workload of the Court as evenly as possible, so that each Justice wrote roughly an equal number of majority opinions each term. However, the cases in which Marshall was assigned majority opinions were, in Marshall's own words, those decisions "least likely to be cited by a person for any purpose under any circumstances."[18] This was, for the most part, a valid complaint on Marshall's part. The vast majority of Marshall's opinions for the Court under Burger and Rehnquist involved technical matters of civil and procedural law on which the Court was unanimous and in which the Justices' general consensus sharply curtailed the scope and inventiveness of Marshall's legal and constitutional arguments.[19]

It was in his dissents that Marshall was able to articulate fully his constitutional views, philosophies, and beliefs. Not surprisingly, given the ongoing importance of civil rights and liberties cases in the Supreme Court—along with the Court's rightward shift—Marshall dissented in forty percent of all of the cases handed down during his tenure on the Court. In fact, Marshall actually wrote more dissents (363) than majority opinions (322), in addition to the 962 times that he joined his name to another Justice's dissent.[20]

In terms of quantity, passion, and argumentative consistency, Marshall was the Great Dissenter of the Burger and Rehnquist Courts. Not only did Marshall

Shortly after Marshall joined the Court, Republican Presidents, beginning with Richard Nixon, strove to transform the Supreme Court by appointing new Justices who slowly shifted the Court's ideological and jurisprudential center rightward. Marshall increasingly found himself in the minority on key issues of civil rights, civil liberties, and social justice—the topics that mattered most to him—and issued frequent dissents. Above is Marshall (second from left) in 1981 with the other members of the Court when President Ronald Reagan came to visit his new appointee, Sandra Day O'Connor.

dissent regularly, but he also stood by his dissents long after the other members of the Court had moved on and accepted the majority's opinion as settled law. As former Marshall law clerk Martha Minow noted following Marshall's death in 1993,

> It is common practice for Justices whose views have not prevailed with the majority to agree eventually to abide by the majority's decisions. But Justice Marshall was an uncommon Justice. He believed in a rule of law that permitted and respected dissent. He imagined and evoked the lived experiences of a range of human beings. He brought critical historical perspectives to the tasks of analyzing the facts and interpreting the Constitution in a process designed to enlarge legal guarantees of human dignity. He worked to redeem the promise of this nation whose greatness he celebrated by devotion to law and by dissent.[21]

Once Marshall had made up his mind on the law's proper scope and content, he stood by his dissenting opinion. And, unlike his friend and colleague on the Court, William J. Brennan, Marshall regularly refused to modify his dissenting stance in the name of negotiating a less objectionable majority opinion. For Marshall there was a right and a wrong, and he always stuck with what he believed was the right interpretation of the Constitution.

Part of what made Marshall so bitter in his later years was that he increasingly found himself working with colleagues who, to varying degrees, had very different conceptions of the Constitution. To them, the Constitution did not reflect the evolving soul of a nation; it was not a means "of eradicating . . . entrenched inequalities" through law and legal institutions. Rather, these Justices saw the Constitution as fundamentally a conservative document, as a legal road map with sharply delineated limits, signposts, and constraints; its purpose, they thought, was to regulate and channel the energy of a nation along pre-determined paths. Yes, Marshall's colleagues conceded, those paths could be changed, the nation's road map could be updated for a new era, but this change could only be achieved, they insisted, by amending the document itself.

To Marshall, his colleagues' constricted view of the Constitution missed the point. As former law clerk and later Associate Justice Elena Kagan noted following Marshall's death:

> Marshall believed that one kind of law —the Constitution—was special, and that the courts must interpret it in a special manner. . . . [That] constitutional interpretation demanded . . . that the courts show a special solicitude for the despised and disadvantaged. [That] it was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government —to safeguard the interests of people who had no other champion.

In fact, to Marshall, "[t]he [Supreme] Court existed primarily to fulfill this mission."[22] The goal, the purpose, of being a judge was to use the Constitution to make things better—to apply its powers to those areas of life long ignored, marginalized, or denigrated. Or, to paraphrase a favorite saying of Marshall's mentor Charles Hamilton Houston, to Marshall a judge was either a social engineer improving society and building a *more* perfect union—or he was a parasite. To his dying day, Marshall refused to be a parasite.

Marshall's commitment to achieving a *more* perfect union shaped his vision of the law and of his role on the Court. Marshall believed with an unshakable faith that the American social and constitutional order was fundamentally sound; the racism and

discrimination that Marshall fought throughout his life were not a part of the legal and constitutional system but rather were a cancer afflicting it—a sickness that could be extracted, leaving behind a "cured" system. Law already provided for equality, Marshall argued. What was needed was for government officials to give effect to rules already on the books. Fix this procedural breakdown, Marshall believed, and problems of race and hate would work themselves out. As former law clerk Owen Fiss explained, Marshall was "sustained by his love of the law—not just its maneuvering, of which he never seemed to tire, but also its redemptive possibilities. For Marshall, the law [was] our last hope."[23]

Marshall's commitment to making things better, to healing what was ailing and fixing what was broken in the American body politic, shaped the content of his dissents. Those dissents were never simple rejections of the arguments made in the majority opinion; each of Marshall's dissenting opinions held true to a coherent vision of what a fully healed America would look and act like. Taking on matters of substance and of process alike, Marshall's dissents stressed the actual over the theoretical and emphasized that the needs of the many had precedence over the desires of the few and that the law had to treat everyone equally in practice and, where necessary, to provide a helping hand to those who were disadvantaged. Most important, Marshall understood, and his dissents explained, that the Court's rulings had real impacts on real people living normal lives—and that these impacts and lives mattered. Karen Hastie Williams,[24] Marshall's god-daughter and former law clerk, put it best when she noted how

> Marshall's opinions are characterized by his sensitivity to the effect of rules on people, a sensitivity which, in part, emanates from his experience as an advocate who was actively and personally involved in the struggles of the individuals that he represented. His approach always recognizes the importance of understanding the human element of an issue, he makes a conscious choice to ensure that the law protects individuals because law, untempered, often fails to give due consideration to the human reality.[25]

Economic Inequality

Marshall's emphasis in his dissents on the real over the assumed and on people over theory showed up early in the 1973 case of *United States v. Kras*. In 1971, Robert Kras sought to declare bankruptcy. However, he was unable to do so because he could not afford the required fifty-dollar filing fee. Though federal law allowed those with no assets to pay the fee in installments, the unemployed Kras still found the fee prohibitive. His lawyer argued that the imposition of the fifty-dollar fee as a prerequisite for bankruptcy deprived his impoverished client of the ability to declare bankruptcy, a clear violation of due process of law and equal protection. The lower courts agreed. Five Justices did not. Writing for the majority, Justice Blackmun contended that a fifty-dollar fee was "a reasonable exercise of Congress' plenary power over bankruptcy"; further, Blackmun noted, when paid in installments the fee imposed a negligible burden on a petitioner for bankruptcy, "a sum . . . less than the price of a movie and little more than the cost of a pack or two of cigarettes."[26]

Marshall found Blackmun's "unfounded assertions" and "cavalier[]" treatment of Kras offensive. He emphatically believed, as he noted in conference, that "no federal judicial proceeding can be denied anyone because he does not have . . . money."[27] To many Americans, poverty was a painful reality, and

fifty dollars was a significant sum. "It may be easy for some people to think that weekly savings of less than $2 are no burden," Marshall wrote in dissent. "But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."

> A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

"It is perfectly proper for judges to disagree about what the Constitution requires," Marshall scathingly concluded. "But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[28]

In 1978 Marshall once again took his fellow Justices to task for ignoring, with "callous Indifference," the "realities" of life for the poor. The case, *Flagg Brothers v. Brooks* (1978), arose when Shirley Brooks of Mount Vernon, New York, was evicted from her apartment in June 1973. The city marshal overseeing the eviction had arranged for the Flagg Brothers to move and store Brooks's possessions. In the months that followed, Brooks and the Flagg Brothers repeatedly argued over the storage costs. In August 1973, the Flagg Brothers gave notice to Brooks that she had to pay up or that they would sell her furniture as permitted under New York's Uniform Commercial Code. Brooks responded by hiring a lawyer and challenging under the Fourteenth Amendment—in a class action soon joined by others similarly situated—the mover's right to sell her property. The Flagg Brothers responded with a motion to dismiss on the grounds that Brooks had failed to state a proper claim for federal relief under the Fourteenth Amendment—namely proof of state action.

At trial, the District Court had dismissed the case for lack of federal jurisdiction. On appeal, the Second Circuit found proof of enough state action in New York's writing of the relevant commercial code provisions to warrant a Fourteenth Amendment challenge. When the case came before the Supreme Court, a six-member majority overruled the Second Circuit, holding that lack of any direct action on the part of New York State deprived this dispute of the necessary "public action" element that would allow Brooks to invoke the Fourteenth Amendment. This case, they insisted, was a private dispute that, though the procedures for resolution (the sale of the goods) were outlined by state law, did not directly involve the state as an actor.

Marshall disagreed with the majority's view of the state's actual role in this matter. To him, the state created adequate state action for federal jurisdiction by defining and controlling the interactions between debtor and creditor by law. The major part of Marshall's dissent, however, focused on the majority's blithe disregard for the realities of the appellant's situation. As supporting justification for its denial of jurisdiction, the majority had noted how one of the co-plaintiffs in the class action suit, Martha Jones, "could have sought to replevy her goods at any time under state law." Yet for this to happen, Marshall noted, Jones would have had to have posted a "surety" bond worth "not less than twice the value" of the goods involved. This requirement was simply beyond Jones's means. Jones, Marshall explained, only earned eighty-seven dollars per week from her job. She had already been evicted from her apartment and owed the Flagg Brothers "at least $335, an amount she could not afford." So, although the majority was technically correct in saying that Jones *could* have obtained a bond, gone to state

court, and recovered her property, it was "equally true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding eviction and the seizure of her household goods by the warehousemen." This, however, was not the reality on the ground; Jones did not have the necessary funds, and it was wrong for the Court to "close our eyes to the realities that led to this litigation."[29]

Educational Equality

The need for the Supreme Court to focus on actual reality—on the facts as they were on the ground—in determining its rulings, and not on mere theory, assumption, or narrow technical readings of constitutional doctrines, also underlay many of Marshall's most impassioned dissents. One especially poignant example came in 1973's *San Antonio Independent School District v. Rodriguez*. *Rodriguez* dealt with the issue of public school funding. Texas provided roughly eighty percent of the money needed to run the state's public schools. The remaining twenty percent had to be raised from within the districts themselves, "under a formula designed to reflect each district's relative taxpaying ability."[30] In practical terms, this formula meant that richer school districts could generate more local funding per student than poorer districts could. In the San Antonio area, the per-student disparity between the richest and poorest districts was $238 ($594 versus $356).[31]

In December 1971, a three-judge federal district court held Texas's school finance system unconstitutional under the equal protection clause of the Fourteenth Amendment.[32] On appeal, the Court voted, 5-4, to reverse the trial court's judgment. Writing for the majority, Justice Powell explained that education was *not* "a fundamental right explicitly or implicitly protected by the Constitution."[33] Consequently, Texas did not need to provide a "compelling" justification demonstrating that its system of unequal school funding was narrowly tailored to achieve an essential state interest; so long as it could show that the law "rationally furthers some legitimate, articulated state purpose," Powell declared, the state had met its constitutional burden under the Equal Protection Clause.[34]

A clearly angry Marshall could not disagree more. Describing the majority's ruling as "a retreat from our historic commitment to equality of educational opportunity" and "an emasculation of the Equal Protection Clause," Marshall stressed that attempting to compress all equal protection matters "into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality"—was a mistake. Not only did the Court's "decisions in the field of equal protection defy such easy categorization," Marshall insisted, but the Court regularly "applied a [wide] spectrum of standards" depending "on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." For these reasons, Marshall rejected "the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself."[35]

The process of "determining which interests are fundamental is a difficult one," Marshall admitted. "But I do not think the problem is insurmountable." Rather, the Court needed "to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution." After all, Marshall noted, the Court had used strict scrutiny for "procreation, the exercise of the state franchise, and access to criminal appellate processes." None of these subjects was mentioned in the Constitution's

Marshall's emphasis in his dissents on the real over the assumed and on people over theory showed up early in the 1973 case of *United States v. Kras*, which involved a $50 filing fee to declare bankruptcy. "It may be easy for some people to think that weekly savings of less than $2 are no burden," Marshall wrote in dissent, "but no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." Above is the South Bronx in 1970.

text; why not extend the same courtesy to educational funding? "In my judgment," Marshall concluded, "any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control." As such, it was a policy prohibited by the equal protection clause of the Fourteenth Amendment.[36]

One year later, Marshall reiterated these same points in *Milliken v. Bradley* (1974), a desegregation suit emerging from Detroit. As in many Northern cities, deliberate school policies and white flight to the suburbs had created within the city of Detroit a school district most of whose students were black. Judge Stephen J. Roth of the United States District Court for the Eastern District of Michigan was tasked with desegregating the Detroit schools. After ruling that segregation in the Detroit schools was, at least in part, *de jure* (that is, was the result of explicit policy choices by the school board and state government), Roth determined that there was no effective method of integrating the Detroit schools without including in the remedy the fifty-three mostly white suburban school districts surrounding Detroit. Treating the greater Detroit metropolitan area as a single community, Judge Roth adopted an integration plan embracing inter-district integration and the mandatory busing of students.[37]

When the *Milliken* case arrived at the Supreme Court in early 1974, it sharply divided the Justices. The fault line was Judge Roth's inter-district integration remedy. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Potter Stewart strongly believed that "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for

an inter-district remedy." The trial record, they argued, showed "evidence of *de jure* segregated conditions *only* in the Detroit schools." Accordingly, the majority held that "to approve the remedy ordered by the [trial] court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court." The majority therefore remanded the case to the trial court, instructing Judge Roth to adopt "a decree directed to eliminating the segregation found to exist in Detroit city schools," and those schools alone.[38]

The dissenting Justices—William O. Douglas, William J. Brennan, Jr., Byron R. White, and Marshall—agreed with Judge Roth that the only effective method for desegregating the Detroit schools demanded a regional approach to integration.[39] A clearly irritated Marshall—he was so angry that he chose to read part of his dissent verbatim from the Bench[40]—took the lead in attacking the majority's position. "After 20 years of small, often difficult steps toward . . . making 'a living truth' of our constitutional ideal of equal justice under law," Marshall began, the Court "today takes a giant step backwards."

> Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion . . . thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.[41]

This approach was unacceptable. Where proof of state-imposed segregation existed, it was the state's duty—and, where the state would not act, that of the federal courts—"to eliminate root and branch all vestiges of racial discrimination and to achieve the greatest possible degree of actual desegregation." As Marshall insisted, "The rights at issue in this case are too fundamental" to be ignored in so cavalier and superficial a manner. "We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens . . . Our Nation, I fear, will be ill-served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[42]

In conclusion, Marshall reminded the majority:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case . . . In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.[43]

Affirmative Action

Marshall's commitment to using the law and the Constitution as a tool to "fix" what

was broken in America—and his ongoing ire over his colleagues' inability to understand the real-world consequences of their rulings—perhaps came through strongest in his opinion concurring in part and dissenting in part in *Regents of the University of California v. Bakke* (1978).[44] As part of a system-wide affirmative action program, the University of California at Davis School of Medicine set aside sixteen of 100 available entering slots for "underrepresented" minority students. In 1973 and 1974, Alan Bakke—a blond, blue-eyed Vietnam veteran in his early thirties—applied for admission to the medical school, but he was rejected each time even though he had a higher GPA and higher test scores than all the applicants admitted to the sixteen minority-reserved seats. After his second rejection, Bakke sued in the Superior Court of California, challenging his rejection as reverse racial discrimination—which, he argued, violated the California Constitution, Title VI of the 1964 Civil Rights Act, and the Fourteenth Amendment's Equal Protection Clause. The Medical School countersued for a judgment that its special admissions program was lawful. The trial court ruled for Bakke. The Medical School's special admissions program, the state judge held, was to all effects a racial quota, as it admitted students who were evaluated *only* against one another and not against the general pool of applicants. The judge therefore prohibited the University "from considering respondent's race or the race of any other applicant in making admissions decisions."[45] The Medical School appealed to the California Supreme Court, which sustained the trial court's judgment of reverse discrimination; the Medical School then appealed this defeat to the Supreme Court of the United States.

Heard by the Justices on October 12, 1977, *Bakke* was highly controversial and very difficult to resolve. Following oral argument, the Justices endured months of heartfelt discussion and heated argument, with lengthy and intensely worded memoranda exchanged. (At one point, Justice Powell began a memorandum by noting, "[My] first impulse is to 'cringe' when I see another [memo]").[46] Well into 1978, the outcome of this case remained in doubt as Justices lobbied their wavering colleagues. In the end, the votes broke 4-1-4.

Chief Justice Burger, with Justices Stewart, Rehnquist, and Stevens, agreed with the California courts that the U.C. Davis affirmative action plan constituted a quota system and hence was unconstitutional as reverse discrimination. They also concluded that *any* race-specific remedy in these matters was inherently suspect and thus prohibited by a strict reading of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[47]

On the other side were Justices Brennan, Blackmun, White, and Marshall. Each believed that remediation was a necessary and proper response to a long history of racial discrimination. As Marshall noted in an April 13 memorandum:

> In the 60 years from *Plessy* to *Brown*, ours was a Nation where, by law, individuals could be given "special" treatment based on race. For us now to say that the principle of color-blindness prevents the University from giving "special" consideration to race when this Court, [when *Plessy v. Ferguson*] licensed the states to continue to consider race, is to make a mockery of the principle of "equal justice under law." . . . We are not yet all equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of color-blindness.

"It would be the cruelest irony," Marshall's memo concluded, "for this Court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions."[48]

In the middle was Justice Powell. Powell saw no problem in using race as a factor in

university admissions. "Race *per se*," Powell had explained in Conference, was not an "impermissible consideration in such a policy." It could and perhaps even should be "a factor that can lawfully be considered" in college admissions. On the other hand, using racial quotas undermined "the symbolic effect of the Fourteenth Amendment." On this point, Powell was adamant. When the UC Davis Medical School set aside a specific number of seats for minority students, it made a "colossal blunder," one that the Court could not constitutionally permit. "Taking race into account is proper," Powell concluded, but it should never be done "by setting aside a fixed number of places."[49]

As Powell's was the deciding vote in this matter, Chief Justice Burger assigned him the task of writing the opinion for the Court, even though it stated only Powell's position. Closely tracking his comments in Conference, Powell upheld the *concept* of affirmative action; quotas, by contrast, he deemed to be constitutionally invalid.[50] The Equal Protection Clause *had* to protect everyone equally—black and white. "Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"[51] Past acts of discrimination alone were *not* adequate grounds to justify race-specific, collective remediation. "It is far too late," Powell warned, "to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." In fact, this "disregard of individual rights . . . as guaranteed by the Fourteenth Amendment" produced the "fatal flaw" in any system of race-based and ethnic-based quotas.[52]

In the landmark affirmation action case *Regents of the University of California v. Bakke* (1978), Marshall was upset by Justice Powell's holding that race should be taken into account in university admissions but that racial quotas were impermissible. However, standing on principle and dissenting from Powell's opinion would have resulted in a 5-4 majority opinion invalidating all affirmative action efforts. So, at the urging of Justice Brennan, Marshall agreed to join Powell's opinion on one key point: that the Constitution permitted universities "to consider the race of an applicant in making admission decisions." On every other point, however, Marshall wrote a fifteen-page dissent reviewing the history of race in America. Above is a student protest against the California Supreme Court's decision in *Bakke* in 1977.

Marshall was "livid" at Powell's opinion. He had been fighting discrimination for most of his life. He understood the role that race played in shaping an individual's life choices—and the advantages that came from being white. Although Brennan's description of Marshall's position as "Goddamn it, you owe us" ignored the nuances in Marshall's views, it accurately distilled Marshall's fundamental understandings of this subject.[53] Marshall regarded Powell's position as "racist." He was especially offended by Powell's conclusion that time had run out for race-specific remediation under "the guarantee of equal protection." To Marshall's ears, this claim echoed the "insensitivity, if not racism" of earlier Supreme Court rulings upholding racial discrimination in the name of constitutional "fairness and balance."[54]

Marshall badly wanted to oppose Powell's opinion "in toto." Powell's insensitivity—to say nothing of what Marshall viewed as the overt racist assumptions of Burger, Stevens, Stewart, and Rehnquist—filled Marshall with disgust. However, standing on principle and dissenting from Powell's opinion would have resulted in a 5-4 majority opinion invalidating all affirmative action efforts. So at the urging of Justice Brennan, Marshall finally, if reluctantly, agreed to join Powell's opinion on one key point: that the Constitution permitted universities "to consider the race of an applicant in making admission decisions." On every other point, however, Marshall's opinion was a clear and very bitter dissent.[55]

That opinion filled fifteen blistering pages reviewing the history of race in America and calling his colleagues to task for ignoring the stark realities of race in the everyday lives of real people:

> While I applaud [and join in] the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. . . . The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. . . . The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

It was precisely for these reasons, Marshall continued, "that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes." This discrimination had to end: "If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible."[56]

Something changed in Marshall following *Bakke*. His optimism on racial matters began to show cracks. Whereas in the past he had stressed the need for patience, hard work, and diligence on issues of race and equal rights, he now warned of "traps" being laid for black America. "Be careful, of . . . people who say, 'You have made it . . . [of] people who say, 'take it easy; you don't need any more help'," he warned in a 1978 speech at Howard Law School. "People say,

'We've come a long way.' But so (have) other people come a long way. . . . Has the gap been getting smaller? It's getting bigger . . . " The black community needed "to refocus" and "rededicate" itself to the fight for equal rights, Marshall argued. Harking back to Benjamin Franklin, who said in 1787 that the framers of the Constitution had created "[a] republic, if you can keep it," Marshall warned: "It's a democracy, if we can keep it." And, to keep it, Marshall cautioned, "you can't stand still. You must move . . . if you don't move, they will run over you."[57]

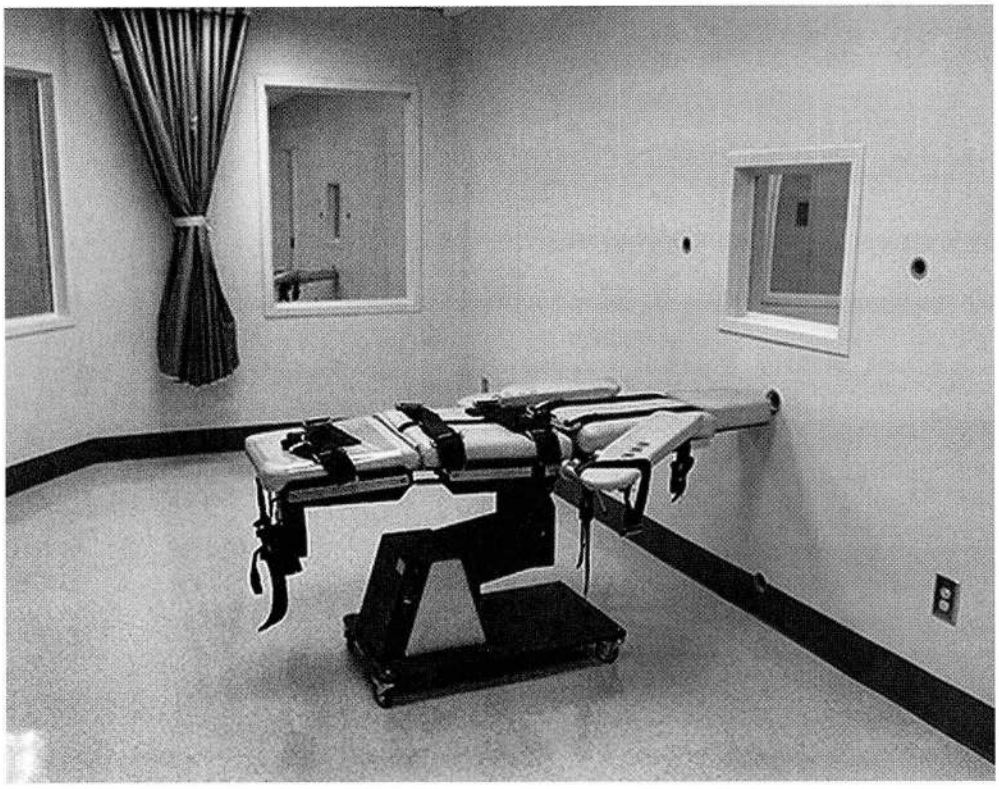
Despite his bitterness and the erosion of his optimism, Marshall never stopped fighting. One theme running throughout his dissents was the need to give substance to the rights promised in the Constitution and to do so for *all* Americans. "True justice," Marshall had explained to a group of law students in 1969, "requires that the ideals expressed . . . in the Bill of Rights and the Civil War Amendments . . . [are] translated into economic and social progress for all of our people . . . There can be no justice until [these rights], together with the broader ideals they embody, become more than mere abstract expressions."[58] Time had not sapped Marshall's beliefs on these matters. In fact, the Court's rightward movement intensified his commitment to working toward these ends.

Reproductive Rights

Marshall's commitment to providing constitutional protections to all Americans, especially those on the margins of American society, comes through strongly in his dissent in the abortion case *Beal v. Doe* (1977).[59] *Beal* arose over a Pennsylvania law that prohibited the use of Medicaid funds to pay for "nontherapeutic [i.e., nonlife-threatening] abortions." A 6-3 majority upheld Pennsylvania's law. As the Justices saw matters, their ruling in favor of the state did not challenge the central premise of *Roe v. Wade*; in fact, the majority in *Beal* reaffirmed abortion as a right. Funding abortions, on the other hand, was another matter. The states, Justice Powell noted for the majority, were not required by federal statute nor the Constitution to fund "*unnecessary*—though perhaps desirable—medical services." The decision rested with the state. As pointed out in *Roe*, Powell noted, the states had an "important and legitimate interest . . . in protecting the potentiality of human life." Hence, the states had a constitutional right to treat the desired outcomes of pregnancy—live birth vs. abortions—differently, *if they so choose*.[60]

Marshall disagreed strongly. "It is all too obvious that the governmental actions in these cases, ostensibly taken to 'encourage' women to carry pregnancies to term, are in reality intended to impose a moral viewpoint that no State may constitutionally enforce." Given opponents' failure to overturn these decisions, the battlefield had shifted to limiting a woman's *access* to a legal abortion. "The present cases involve the most vicious attacks yet devised," Marshall declared. For "the impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions." This was simply wrong.

> The governmental benefits at issue here, while perhaps not representing large amounts of money for any individual, are nevertheless of absolutely vital importance in the lives of the recipients. The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman,



Marshall dissented each time the Court refused to hear a death penalty appeal (about 150 times in all)—not only reiterating his opposition to capital punishment but castigating his fellow Justices for their failure to address the many procedural errors found in these cases. He fought against every Court decision allowing the death penalty, describing it as "in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."

> but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty . . . All chance to control the direction of her own life will have been lost.[61]

Worse yet, Marshall exclaimed, "the effect of the challenged regulations will fall with great disparity upon women of minority races." Over forty percent of minority women—more than five times the proportion of whites—were dependent on Medicaid for their health care. It was these women who would feel the greatest impact of Pennsylvania's refusal to pay for "nontherapeutic" abortions. "Even if this strongly disparate racial impact does not alone violate the Equal Protection Clause," Marshall insisted, surely "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."[62]

In conclusion, Marshall warned of the future impacts of this ruling on the legal right of a woman to receive an abortion. Whereas the majority argued that nothing in their ruling undermined the scope and power of *Roe*, Marshall feared that

> the Court's decisions will be an invitation to public officials, already

> under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions. The effect will be to relegate millions of people to lives of poverty and despair. When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.[63]

Capital Punishment

The death penalty was another topic that brought out Marshall's concern for the underdog. Marshall opposed the death penalty. Absolutely. Totally. The only Justice then and thereafter to have litigated a death penalty case, Marshall knew firsthand the "*extraordinary unfairness* that . . . surrounds the *administration* of the death penalty."[64] He had experienced personally the irrational, disproportionate, and racially-biased nature of the American criminal justice system—a system in which African Americans, composing just eleven percent of the nation's population, made up over three-quarters of all inmates executed.[65] As Marshall had explained in the Justices' Conference on *Furman v. Georgia* (1972), "the death penalty is available to anyone who is low man on the totem pole." To Marshall, "the death penalty [was] in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments."[66] End of story.

In his concurrence in *Furman*, Marshall had laid out his basic views on the death penalty:

> It is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the *status quo*. . . Ignorance is perpetuated, and apathy soon becomes its mate, and we have today's situation.[67]

Moreover, Marshall saw the death penalty as inefficient. Marshall concluded that state-sanctioned killing did not provide an effective deterrent to crime. As he explained to his law clerks, "Hell, if the death penalty was a deterrent, there never would have been a second execution after the first one."[68] In addition, capital punishment had the singular disadvantage of being permanent. "The difficulty is, if you make a mistake, you put a man in jail wrongfully, you can let him out. But death is rather permanent. And what do you do if you execute a man illegally, unconstitutionally, and find that out later? What do you say? 'Oops'?"[69] No, as Marshall noted in *Furman*, "Death is irrevocable, life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not." The weight of historical and statistical evidence, Marshall concluded, proved "that capital punishment serves no purpose that life imprisonment could not serve equally well . . . [That] there is no rational basis for concluding that capital punishment is not excessive. [That] it therefore violates the Eighth Amendment."[70]

Lastly, Marshall deemed capital punishment immoral: "Even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history." Marshall could not conceive how a compassionate and

fundamentally fair American public could support capital punishment did they but understand, as Marshall did, the death penalty's cruel and inhuman nature. "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone, capital punishment cannot stand."[71]

To his everlasting sorrow, the *Furman* ban on the death penalty lasted only four years. In *Gregg v. Georgia* (1976),[72] the issue once again came before the Court. The state argued that new procedures had made the death penalty constitutional once again. Marshall disagreed. As he had in 1972, Marshall regaled his Brethren in conference with stories of his experiences defending poor blacks before all-white juries; of how he saw innocent men put to death simply because they were black. This time, however, the other Justices weren't listening.[73] To Marshall's dismay, a change in the Court's membership (John Paul Stevens had replaced William O. Douglas) and a change of position by Justices White and Stewart left only Justice Brennan and himself in opposition to the death penalty.[74]

In his opinion for the majority, Stewart noted that in 1972 *Furman* had struck down inadequate death penalty *statutes*, not the death penalty itself. The new death penalty laws, on the other hand, "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Hence, Stewart concluded, with no "jury [able to] wantonly and freakishly impose the death penalty," the death penalty as now administered was constitutional.[75]

On his sixty-eighth birthday, a clearly frustrated Marshall read his *Gregg* dissent aloud in open court. He admitted with some sadness "how I would be less than candid if I did not acknowledge that" the enactment of the new death penalty statutes did "have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people." However, this change did not matter. The death penalty was wrong. Retribution was wrong. The death penalty still was "unnecessary to promote the goal of deterrence." Given these enduring facts, Marshall again declared the death penalty "an excessive penalty forbidden by the Eighth and Fourteenth Amendments."[76]

In the years that followed, Marshall dissented in almost every one of the Court's death penalty cases. He was in the majority on this issue only four times, each one a technical ruling on the *application* of the death penalty, not on its constitutionality.[77] Examples of Marshall's unending fight against capital punishment appear in every other death penalty case in which he participated. In fact, frustrated by the Court's growing tendency to "value[] expediency over human life," Marshall dissented each time the Court refused to hear a death penalty appeal (about 150 times in all)—not only reiterating his opposition to capital punishment but outright castigating his fellow Justices for their failure to address the many procedural errors found in these cases.[78] None of his defeats stopped Marshall from continuing his fight against the death penalty. Using the same words each time, Marshall stated his view "that the death penalty [was] in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." He then often provided specific reasons for denying the death sentence.

In *Gardner v. Florida* (1977), for instance, Marshall declared himself

> appalled at the extent to which Florida has deviated from the procedures upon which this Court expressly [called for in death penalty cases]. It is not simply that the trial judge, in overriding the jury's recommendation of life imprisonment,

> relied on undisclosed portions of the presentence report. Nor is it merely that the Florida Supreme Court affirmed the sentence without discussing the omission and without concern that it did not even have the entire report before it. Obviously that alone is enough to deny due process and require that the death sentence be vacated as the Court now holds. But the blatant disregard exhibited by the courts below for the standards devised to regulate imposition of the death penalty calls into question the very basis for this Court's approval of that system.[79]

In *Barclay v. Florida* (1983), a sarcastic Marshall noted disparagingly how, "based on a sentencing order rife with errors, the trial judge condemned petitioner Elwood Barclay to death. The Florida Supreme Court then conducted a perfunctory review and affirmed the sentence. Today the plurality approves this miscarriage of justice. In doing so it is utterly faithless to the safeguards established by the Court's prior decisions." He ended, simply, "I dissent."[80]

In *Lowenfield v. Phelps* (1988), an angry Marshall attacked his Brethren for not digging deeply enough into the facts of the case and the trial. "The Court offers a sanitized rendition of the facts," Marshall complained, "ignoring or glossing over evidence of coercion in its examination of 'all the circumstances' of the sentencing proceeding." Marshall continued:

> The Court then performs a mechanical and cramped application of our precedents regarding jury coercion, essentially restricting these cases to their facts. Moreover, the Court focuses on the impact of each challenged practice in isolation, never addressing their cumulative effect. Finally, the Court neglects to consider how the capital sentencing context of this case affects the application of principles forged in other contexts.

"In sum," Marshall concluded, "the Court's approach fails to take seriously petitioner's challenge and consequently fails to recognize its force. The Court's decision to condone the coercive practices at issue here renders hollow our pronouncement that 'the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.'"[81]

Access to Justice

Marshall's death penalty dissents, especially his dissents to *per curium* denials in death penalty appeals, point to another strong theme underlying Marshall's dissents: the absolute importance of having one's day in court. As a former litigator, Marshall had a deep and abiding faith in the power of litigation to right wrongs. However, as the years passed, the Court, especially under Chief Justice William H. Rehnquist, began issuing more and more summary *per curiam* opinions without briefing and argument, cases that Marshall would have allowed on the docket—if only to have the lawyers argue via their briefs *whether* they belonged on the docket in the first place. Marshall was deeply troubled by what he saw as a growing trend among his Brethren to ignore cases of constitutional importance—or sometimes just of importance to the people who were similarly situated to those seeking and denied their day in the Supreme Court.

As early as 1981, in *Harris v. Rivera*,[82] Marshall dissented from the use of summary *per curium* rulings in the strongest of terms:

> I write separately to underscore my disapproval of what I perceive to be

> a growing and inexplicable readiness on the part of this Court to "dispose of" cases summarily. Perhaps this trend is due to what is often lamented as our "increasing caseload." Whatever the reason for this trend, I believe that it can only detract from this Court's decisions in deserving cases by consuming time and energy better spent elsewhere . . . Moreover, by deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances. As Justice Jackson so aptly put it, although in a somewhat different context: "We are not final because we are infallible, but we are infallible only because we are final." I believe that this Court should reserve its final imprimatur for those cases to which we give plenary review, after full briefing and argument.[83]

Six years later, in *Montana v. Hall* (1987), Marshall reiterated his objections to summary rulings: "For years, I have been troubled by our disposition of appeals and petitions for certiorari through summary *per curiam* opinions, without plenary briefing on the merits of the issues decided . . . Our persistent indulgence in this practice . . . has tarnished what has long been considered one of this judicial institution's greatest qualities, the fairness and integrity of its decision-making process. Through summary dispositions, we deprive the litigants of a fair opportunity to be heard on the merits."[84] This was a dangerous trend, Marshall contended.

Later that same year in *Commissioner v. McCoy* (1987), Marshall declared:

> My doubts about summary dispositions encompass concerns about both the parties who seek our review and the integrity, perceived and actual, of our proceedings. The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking redress in this Court and deprives them of any opportunity to argue the merits of their claims before judgment . . . [Moreover], the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

Whenever the Court "contemplates a summary disposition," Marshall insisted, "it should review the full record below and invite the parties to file supplemental briefs on the merits if they wish. I remain unconvinced that this slight modification of our practice would unduly burden the Court. The benefits of increasing the fairness and accuracy of our decision-making and the value of according greater respect to our colleagues on this and other courts more than justify these modest accommodations."[85]

Even in his last term on the Court, a sick and tired Marshall challenged summary treatment of these cases, in the process seeking always to "temper hard legalism with compassion for the downtrodden" and thus to give "voice" to the "anguish of the silenced."[86] Responding in April 1991 to an administrative rule change that summarily

rejected "pauper" petitions deemed "frivolous or malicious" (but not similar petitions filed by fee-paying litigants), Marshall wrote a stinging memorandum and later dissented to remind his fellow Justices that their oath of office included the "inviolable obligation to treat rich and poor alike." The revised rule ignored this obligation, Marshall charged: "All men and women are entitled to their day in court. [Yet today] that guarantee has . . . been conditioned on monetary worth. It now will read: 'All men and women are entitled to their day in court only if they have the *means* and the *money*.'"[87]

******

By this point, Marshall's decades-long, rear-guard battle defending the Constitution as a living document had inflicted on him a high personal cost. Marshall's health, already compromised by the 1970s, deteriorated rapidly in the 1980s. By decade's end, Marshall suffered from glaucoma, a weak heart, and bad circulation in his legs. He had trouble hearing, seeing, and breathing. He had suffered heart attacks and recurring bouts of pneumonia. His emphysema (the result of his two-pack-a-day smoking habit) made walking up the steps to his seat on the Bench a challenge. As one commentator noted, "he was killing himself, and he knew it."[88]

Yet Marshall never gave up the fight; he never gave up hope; he always believed that "ill-conceived reversals should be considered as no more than temporary interruptions."[89] Marshall knew that, at least for the present, his was a losing battle; no matter how eloquent his prose or how deeply felt his arguments, the Court's conservative majority would brush aside his positions and rule as they pleased. Marshall accepted this reality, though grudgingly and often with a snarl. Nonetheless, he wrote his dissents and spoke out in defense of his constitutional views. In a real sense, Marshall was no longer speaking to his fellow Justices; rather, he was speaking to the future—to lawyers and judges yet to come—making his case for the Constitution as a living document whose overriding purpose was serving the interests of all people equally—white or black, rich or poor. As Marshall explained to biographer Juan Williams, who asked him why he wrote dissents: "Well much of Brandeis' dissents are now the law. That's the answer. I hope that some of my dissents will become the law in the future. I hope they will. I hope people start thinking the way I think."[90]

By 1991, it was time for Marshall to step down from the Court. But before Marshall departed, he had one final dissent to give. On the morning of June 27, 1991, hours before he formally announced his retirement, Marshall read aloud in open court parts of his dissent in *Payne v. Tennessee*.[91] The case dealt with the use of victim-impact statements in death-penalty cases. Twice before, in *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1990), the Court had barred the use of such statements as inflammatory and prejudicial to the defendant.[92] Yet in *Payne*, a six-member majority overruled both precedents. The majority justified its reversal by asserting that judicial precedent was "not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" Moreover, as Chief Justice Rehnquist noted for the majority, the existing precedents had been "decided by the narrowest of margins, over spirited dissents . . . [and have] defied consistent application in the lower courts." They were ripe for reversal.[93]

Alarmed at the majority's high-handed disregard for precedent, Marshall angrily announced, "Power, not reason, is the new currency of this Court's decision-making . . . Neither the law nor the facts supporting [either of the precedents in this matter] underwent any change in the last four years. Only the personnel of this Court did." In dispatching these cases "to their graves, today's majority . . . declares itself free to discard *any* principle of

constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree." The implications of this ruling staggered Marshall:

> The majority sends a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination . . . The continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court.

Everything that Marshall had spent his entire life fighting for was now at risk of summary reversal. This was Marshall's nightmare; this was why he had remained on the Court until he was physically unable to serve. "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court as a protector of the powerless." And, so for the last time (and with unintended irony given his hopes that *his* dissents would someday become majorities), Marshall declared, "I dissent."[94]

With these angry words of warning, Thurgood Marshall's career as a Supreme Court Justice came to an end. This was not the ending that he had envisioned twenty-four years earlier when he took his oath of office. What had started with such promise had evolved into a bitter, hard-fought, year-by-year retreat in defense of the rights of the poor, the despised, and the disadvantaged in American life. At his 1991 retirement press conference, reporters asked Marshall how he wanted to be remembered. After some thought, Marshall replied: "I guess you could say, 'He did what he could with what he had.' I have given fifty years to it, and if that is not enough, God bless'em."[95]

Marshall had given everything he had to give; dissent by bitter dissent, he had made his case for an optimistic and inclusive America; for a living constitution that encompassed protections for all Americans, rich and poor, white and black; for a Supreme Court that worked for the people—real, living people—helping out in their actual lives. It was now up to those who followed to carry the fight forward.

ENDNOTES

[1] Michael D. Davis and Hunter R. Clark, **Thurgood Marshall: Warrior at the Bar, Rebel on the Bench** (New York: Carol Publishing Group, 1992), p. 279; Clare Cushman, **Courtwatchers: Eyewitness Accounts in Supreme Court History** (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2011), p. 99.

[2] Carl Rowan, **Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall** (Boston, MA: Little, Brown and Company, 1993), p. 299.

[3] Linda P. Campbell, "Health May Be Failing, but Justice Marshall's Wit Still Sharp," *Chicago Tribune*, June 29, 1991, 1. Elena Kagan, "In Memoriam: For Justice Marshall," *Texas Law Rev* 71:6 (May 1993): 1125-30, at 1126; Rowan, **Dream Makers, Dream Breakers,** p. 347.

[4] *Green v. County School Board of New Kent County*, 391 U.S. 430 at 438 (1968).

[5] *Jones v. Alfred H. Hayer Co.*, 392 U.S. 409 (1968).

[6] *Allen v. Board of Elections*, 393 U. S. 544 (1969).

[7] *Alexander v. Holmes County Board of Education*, 396 U.S. 19 at 20 (1969) (emphasis added).

[8] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

[9] *Furman v. Georgia*, 408 U. S. 238 (1972).

[10] *Roe v. Wade* (1973) 410 U. S. 113 (1973).

[11] *United States v. Nixon*, 418 U.S. 683 at 684 (1974).

[12] *Mempa v. Rhay*, 389 U.S. 128 at 137 (1967); Black to Marshall, Nov. 9, 1967. Quoted in Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991** (New York: Oxford University Press, 1997), p. 32.

[13] *Benton v. Maryland*, 395 U.S. 784 at 794-95 (1969).

[14] *Stanley v. Georgia*, 394 U.S. 557 at 564-65, 588 (1969).

[15] Kevin J. McMahon, **Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences** (Chicago, IL: University of Chicago Press, 2011), 3.

[16] Tom Wicker, "Mr. Nixon's 'Philosophy'," *New York Times*, October 26, 1971, 41.

[17] Juan Williams, **Thurgood Marshall: American Revolutionary** (New York: Times Books, 1998), p. 342.
[18] Davis and Clark, **Marshall,** 330.
[19] This did not mean that Marshall took procedural or civil matters for granted. Marshall wrote a number of very important civil and procedural law rulings, including such landmark cases as *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
[20] Howard Ball, **A Defiant Life: Thurgood Marshall and the Persistence of Racism in America** (New York: Crown Publishers, 1998), pp. 405-6.
[21] Martha Minow, "A Tribute To Justice Thurgood Marshall," *Harvard Law Rev*, 105 (November, 1991): 66-76 at 75-76.
[22] Kagen, "For Justice Marshall," 1128-29.
[23] Owen Fiss, "A Tribute to Justice Thurgood Marshall," *Harvard Law Rev*, 105 (November, 1991), 55.
[24] Karen Hastie William's father, William Hastie, was one of Marshall's legal mentors and personal friend: first as a professor at Howard Law School, then as part of Marshall's "brain trust" while at the NAACP and the LDF, and finally as fellow judge (on the Third Circuit Court of Appeals).
[25] Karen Hastie Williams, "Humanizing the Legal Process: The Legacy of Thurgood Marshall," *Harvard Blackletter Law Journal* 6 (1989): 90-94 at 91.
[26] *United States v. Kras*, 409 U. S., 434 at 449.
[27] Ball, **A Defiant Life**, 218.
[28] *United States v. Kras*, at 441, 449, 460.
[29] *Flagg Bros., Inc. v. Brooks*, 436 US 149, 153, 166-68.
[30] *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 at 10 (1973).
[31] Del Dickson, ed., **The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions** (New York: Oxford University Press, 2001), p. 787 n. 354.
[32] *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D.Tx. 1972).
[33] Dickson, **The Supreme Court in Conference**, p. 788.
[34] 411 U. S. at 17, 23-24.
[35] *Id.*, at 98-99.
[36] *Id.*, at 99-103, 129.
[37] Joyce A. Baugh, **The Detroit School Busing Case: *Milliken v. Bradley* and the Controversy over Desegregation** (Lawrence: University Press of Kansas, 2011), pp. 127-30.
[38] *Milliken v. Bradley*, 418 U. S. 717 at 745, 753 (emphasis added).
[39] *Id.*, at 759, 763.
[40] Williams, **Marshall,** p. 357.
[41] *Milliken v. Bradley*, 418 U. S. 717 at 782.
[42] *Id.*, at 782-83.
[43] *Id.*, at 814-15.
[44] *Regents of the University of California v. Bakke*, 438 U. S. 265.
[45] *Id.*, at 270.
[46] Ball, **A Defiant Life**, p. 262.
[47] William H. Rehnquist, "Memorandum to the Conference," reprinted in Bernard Schwartz, **Behind *Bakke*: Affirmative Action and the Supreme Court** (New York: New York University Press, 1988), pp. 177, 189-90.
[48] "Memorandum to the Conference," Box 204., Folder 3, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington D. C.; *Regents of the University of California v. Bakke*, 438 U. S. at 395-96.
[49] The first of these comments was made in regards to an earlier affirmative action case, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Powell made specific references to them in the later conference on *Bakke*. Dickson, **Supreme Court in Conference**, pp. 738, 740.
[50] 438 U. S. 265 at 319.
[51] Powell was quoting from the interracial marriage case, *Loving v. Virginia*, 388 U.S. 1 (1967).
[52] 438 U. S. 265 at 294-95, 319-20.
[53] Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991** (New York: Oxford University Press, 1997), p. 129.
[54] Tushnet, **Making Constitutional Law**, pp. 128-29. *Bakke*, at 402.
[55] Williams, **Marshall,** pp. 366-67.
[56] *Bakke*, at 400-402.
[57] "Speech of THE HONORABLE THURGOOD MARSHALL . . . at Howard Law School, Saturday, November 18, 1978." Available online at http://www.thurgoodmarshall.com/speeches/equality_speech.htm. *See also* Jim Rowley, "Thurgood: 'Still much to be done'," Baltimore *Afro-American*, May 24, 1980, 1.
[58] Thurgood Marshall, "Group Action in the Pursuit of Justice," *New York University Law Rev*, 44 (October 1969): 661 at 662.
[59] *Beal v. Doe*, 432 US 438.
[60] *Id.*, at 445-46.
[61] *Id.*, at 445, 458-9.
[62] *Id.*, at 459-60.
[63] *Id., at* 462.
[64] "Justice Calls Death Penalty 'Extraordinary Unfairness'," South Florida *Sun-Sentinel*, September 6, 1985.
[65] David M. Oshinsky, **Capital Punishment on Trial: *Furman v. Georgia* and the Death Penalty in Modern America** (Lawrence: University Press of Kansas, 2010), p. 30; Edward Lazarus, **Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court** (New York: Times Books, 1998), p. 89.
[66] *Gregg v. Georgia*, 428 U. S. 153, at 231 (1976); Dickson, **The Supreme Court in Conference**, p. 618; Oshinsky, **Capital Punishment on Trial,** pp. 30-32, 34, 47.
[67] *Furman v. Georgia*, 408 U. S. 238 at 364.
[68] Davis and Clark, **Marshall,** pp. 318-19.
[69] Rowan, **Dream Makers, Dream Breakers**, p. 386.

[70] *Furman v. Georgia*, 408 U. S. 238 at 359.
[71] *Id.* at 360, 369.
[72] *Gregg v. Georgia*, 428 U. S. 153 (1976).
[73] Williams, **Marshall,** pp. 359-60.
[74] Dickson, **The Supreme Court in Conference**, 620-21.
[75] *Gregg v. Georgia*, at 180, 206-207
[76] *Id.* at 232, 239, 241.
[77] Tushnet, **Making Constitutional Law**, p. 155. *See* generally, Charles J. Ogletree, "Justice Marshall's Criminal Justice Jurisprudence: 'The Right Thing To Do, The Right Time To Do It, The Right Man and the Right Place,'" *Harvard Blackletter Law Journal* 6 (Spring 1989): 111 at 125-30.
[78] Ball, **A Defiant Life**, p. 308, quoting from a memorandum from Marshall to the other Justices over the Court's refusal to hear a last-minute appeal in the case of *McClesky v. Bowers*, 501 U.S. 1282 (1991). *See also Schiro v. Indiana* 475 U. S. 1036 (1986); *Moore v. Blackburn* 476 U. S. 1176 (1986).
[79] *Gardner v. Florida*, 430 US 349, 365-66 (1977).
[80] *Barclay v. Florida*, 463 US 939, 974 (1983).
[81] *Lowenfield v. Phelps*, 484 US 231, 248 (1988).
[82] *Harris v. Rivera*, 454 U. S. 339 (1981).
[83] *Id.*, at, 349).
[84] *Montana v. Hall*, 432 U. S. 400, 405 (1987).
[85] *Commissioner v. McCoy*, 484 U. S. 3, 7-8 (1987).
[86] Stuart Taylor, Jr., "Glimpses of the Least Pretentious of Men," *Legal Times*, February 8, 1993 available at http://stuarttaylorjr.com/content/glimpses-least-pretentious-men; Sandra Day O'Connor, "Thurgood Marshall: The Influence of a Raconteur," *Stanford Law Rev* 44 (Summer 1992): 1217.
[87] Ball, **A Defiant Life**, pp. 380-81; *In Re Amendment to Rule 39*, 500 U.S. 13 (1991).
[88] David N. Atkinson, **Leaving The Bench: Supreme Court Justices At The End** (Lawrence: University Press of Kansas, 1999), p. 158; Artemus Ward, **Deciding to Leave: The Politics of Retirement from the United States Supreme Court**, (Albany: State University of New York Press, 2003), pp. 204-205; Williams, **Marshall,** pp. 386-90; Savage, **Turning Right**, p. 345.
[89] Thurgood Marshall, "Remarks at the Second Circuit Judicial Conference," May 27, 1979. Reprinted in Mark V. Tushnet, ed., **Thurgood Marshall: His Speeches, Writings, Arguments Opinions, and Reminiscences** (Chicago: Chicago Review Press, 2001), p. 182.
[90] Thurgood Marshall interviewed by Juan Williams, available at http://www.thurgoodmarshall.com/interviews/controversial.htm.
[91] *Payne v. Tennessee*, 501 U.S. 808 (1991)
[92] *Booth v. Maryland,* 482 U. S. 496 (1987); *South Carolina v. Gathers,* 490 U. S. 805 (1989).
[93] *Payne v. Tennessee*, at 822, 828.
[94] *Id.*, at 822, 828-30, 844-45, 851, 856.
[95] Davis and Clark, **Marshall**, p. 382.

Balancing Bankruptcy and Environmental Law: *Midlantic National Bank v. New Jersey Department of Environmental Protection*

RONALD MANN

Introduction

Congress's 1978 adoption of the Bankruptcy Code was a legislative landmark, the culmination of a decade of attention to a woefully antiquated bankruptcy system largely left intact since the nineteenth century. Senate hearings in 1968 led to the appointment of a prestigious bipartisan Bankruptcy Commission, which produced a massive report, which served in turn as a template for a statute that brought wholesale change to almost every aspect of the bankruptcy system.[1] So what would the Supreme Court do with this new statute? The Court's persistent doubts about the constitutionality of the Code's broad allocation of authority to bankruptcy courts led to an extended series of decisions trimming back the Code's jurisdictional grant, starting with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[2] and continuing with *Granfinanciera v. Nordberg*[3] and *Stern v. Marshall*.[4] Less well known, by comparison, is the persistently narrow interpretation of the Code in the Court's statutory cases, which routinely subordinate the needs of a broad and effective bankruptcy process to the policies of other federal and state legal regimes.[5]

The roots of the Court's narrow interpretive frame lie in one of the earliest of the Court's decisions under the Code, *Midlantic National Bank v. New Jersey Department of Environmental Protection*.[6] *Midlantic* presented a classic problem of statutory interpretation, in which the Code's provisions

for the protection of the estate conflicted directly with developing rules for environmental law. More broadly, the case offered the Court its first chance to assess Congress's broadening of the bankruptcy regime: case law under the old Bankruptcy Act had limited the bankrupt's ability to ignore environmental law, but language in the Code suggested that Congress contemplated a much broader freedom of action going forward.

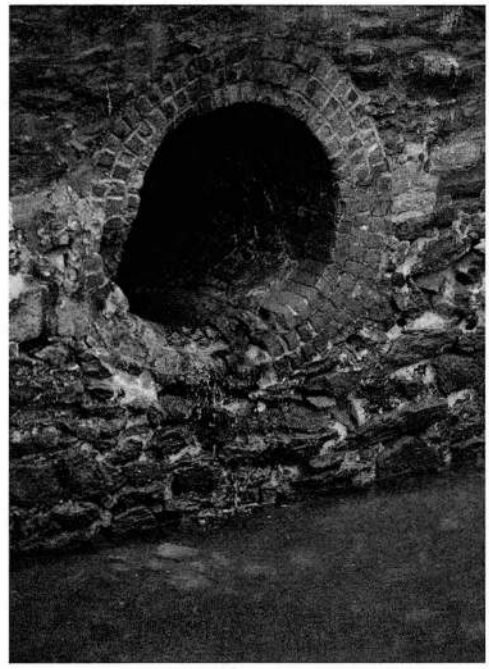
The result was a considered refusal to credit the broadened language of the new Code. Justice Lewis F. Powell's opinion for the Court adopted a clear-statement rule under which it would presume that provisions of the Bankruptcy Code have the same meaning as predecessor provisions of the Bankruptcy Act. What is most surprising about the decision, though, is not apparent on its face—how close the Court came to ruling in favor of the bankrupt. As the internal papers of the Justices show, Justice Powell "stole" a Court in this case. The decision at Conference favored the bankrupt; it was only a changed vote by Justice John Paul Stevens that led to the Court's adoption of *Midlantic*'s Code-narrowing clear-statement rule.[7]

Political Background

Midlantic came to the Court in the mid-1980s, just as state and federal efforts to curtail pollution reached their zenith. Environmental disasters in the post-World War II era, including the Cuyahoga River fire in 1969 and Three Mile Island in 1979, convinced much of the public that stricter measures were necessary to control industrial pollution.[8] State pollution programs began in earnest in the 1960s, but the federal government became involved in the 1970s with the creation of the Environmental Protection Agency, major amendments to the Clean Air Act, and the passage of the Clean Water Act.[9] Most important was the 1980 adoption of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The rise of federal activity in this period led to an uneasy tension with state efforts to combat environmental pollution. Although the premise of federal environmental intervention was that the federal government's efforts would complement state laws,[10] federal programs often preempted more aggressive state programs. Scholars routinely explain that the passage of federal environmental laws reflected rent-seeking by polluters who sought lax federal regulations to preempt the increasingly effective regulation at state and local levels.[11] Those critics often point to the 1965 enactment of the Motor Vehicle Pollution Control Act, which stymied state efforts to place harsh limits on automobile exhaust emissions. It surprised no one that major economic interests, sensing that some form of environmental regulation was inevitable, sought standardized (lower) federal pollution limits, often successfully.[12]

That left significant uncertainty about how state pollution laws would coexist with their federal counterparts. For example, the New York and New Jersey statutes at issue in *Midlantic* dated to the 1970s.[13] New York's statute explicitly attempted to integrate state law with federal environmental protection efforts; the statute's stated purpose was to "regulate the management of hazardous waste . . . in this state and to do so in a manner consistent with the Federal Solid Waste Disposal Act [and other federal laws]."[14] New York required the owners and operators of waste-processing facilities to go through a permitting process and prohibited the "disposal of hazardous waste without authorization."[15] Disposal under that statute included "the abandonment, discharge, deposit, injection . . . or placing of any substance so that such substance or any related constituent thereof may enter the environment."[16] New Jersey's pollution control laws were similar, explicitly prohibiting the unauthorized disposal of hazardous waste.[17]



Notorious polluter Russell W. Mahler operated Quanta Resources Corp. under a variety of names during the 1970s and early 1980s and was at the center of several high-profile dumping scandals. His companies collected waste oil from large industrial firms and separated out the reusable oil for resale. But then they dumped the highly toxic byproducts in rivers.

Widespread public concern about the environment drove the regulatory efforts. For example, polls throughout the 1970s and early 1980s showed a public anxious about the effects of pollution. A 1982 Roper survey showed that thirty-seven percent of Americans still thought that government environmental protection laws and regulations had not gone "far enough."[18] Similarly, forty-four percent of Americans told pollsters in 1984 that they thought environmental pollution was a "very serious threat" to citizens like themselves, and fifty-six percent thought there was "too little involvement by the government in the environment."[19]

Bankruptcy Abandonment under the Act and the Code

Midlantic would turn on the long-recognized power of the bankruptcy trustee to "abandon" property. Within bankruptcy law, abandonment is a technical term, which entails the relinquishment of title or control of property by the bankruptcy trustee. A trustee typically abandons property when it is burdensome to the estate, in the sense that there is little reason to expect that continued exploitation of the property will produce a return for creditors of the estate. Once the trustee has abandoned the property, lien holders on the property have the opportunity to foreclose and take title. If lien holders do not choose to foreclose and if the debtor has no interest in continued use of the property, the state takes over responsibility for the abandoned property.

As it happens, the old Bankruptcy Act, which had been in force from 1898 until the Code's 1978 adoption, had not codified the trustee's power to abandon. Rather, trustees abandoned burdensome property through the exercise of their larger power to dispose of the estate's assets. In discerning a right to

abandon as part of the right to dispose, case law under the Act limited the abandonment power in important ways. Specifically, with some variation, the leading cases generally prohibited abandonment that would violate a statute or endanger public health and safety. For example, a leading Fourth Circuit decision under the Act, *Ottenheimer v. Whitaker,* considered the power of a trustee to abandon the debtor's floating barges. The Fourth Circuit found abandonment impermissible, based on the conclusion that abandonment of the barges would have resulted in their eventual sinking, which would have violated a federal statute forbidding the obstruction of navigable waterways. That decision, like others, rested on the uncodified status of the abandonment power: "[T]the judge-made rule [of abandonment] must give way when it comes into conflict with a statute enacted to ensure the safety of navigation."[20] The oft-cited Pennsylvania bankruptcy court decision in *Lewis Jones* provides another salient example. The *Lewis Jones* court refused to permit three public utilities to abandon underground steam lines because the trustee's plan did not provide for the sealing of the abandoned lines. The bankruptcy court found that there were no applicable local health and safety laws forbidding abandonment, but nevertheless held that the court's equitable power to "safeguard the public interest" was broad enough to obligate the trustee to seal the steam lines.[21]

In the Code, however, Congress explicitly codified the abandonment power. Specifically, Section 554(a) provides broadly, with no exceptions, that "the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."[22] That set the stage for the obvious question: whether the unqualified codification should be read literally, thus permitting abandonment of property merely because it is burdensome, or more narrowly, implicitly adopting the qualifications developed in case law under the old Act.

The Factual Setting

Midlantic arises out of the sordid affairs of Quanta Resources Corp., a corporate waste-processing business owned and operated by notorious polluter Russell W. Mahler. Mahler had operated Quanta under a variety of names during the 1970s and early 1980s and had been at the center of several high-profile dumping scandals. Mahler, dubbed a "toxic waste entrepreneur" by *The New York Times*, was in the business of oil reclamation. His companies collected waste oil from large industrial firms such as Ford and Alcan Aluminum and treated the waste to separate out and then resell reusable oil; the byproducts of the waste oil reclamation process were highly toxic. Mahler operated three terminals for processing waste oil; two in New York, in Syracuse and Long Island City, and one in Edgewater, New Jersey. He also owned more than two dozen trucks that transported the waste oil. As it happens, instead of dumping the byproducts in state- designated and -authorized areas, Mahler directed his employees to dump the waste into sewers, landfills, and, in one case, an abandoned mine shaft. Contemporary observers concluded that Mahler had saved millions of dollars by dumping carcinogen- and mutagen-contaminated oil byproducts in unlawful locations in New York and New Jersey.[23]

Mahler was finally caught in 1978 after he began directing his truck drivers to an auto service garage near Wilkes-Barre, Pennsylvania. His drivers would hook their trucks to a hose outside the garage that led through a bore hole down into an abandoned coal mine. An anonymous tip led investigators to the garage and the bore hole.

Unfortunately, the mine overflowed before state officials were able to act, dumping hundreds of gallons of toxic waste oil into the Susquehanna River, which was, among other things, a source of drinking water for the nearby city of Danville. When Pennsylvania authorities investigated, they readily discovered many other instances of Mahler's illegal dumping. At that point, with the discovery of his activities in New York and New Jersey, the entire scheme unraveled. Subsequent investigations by New York and New Jersey officials revealed Mahler's deft maneuverings through state and city political circles. In one instance, Mahler, apparently through the payment of kickbacks to state officials, was able to secure a contract for the cleanup of a lagoon that Mahler's own illegal dumping had contaminated. Then, instead of transporting the lagoon's waste to an authorized dump site, Mahler simply piped some of the waste across the road and dumped the rest into a New York landfill. Mahler's activities eventually resulted in large fines, though not much jail time. Remarkably, his total sentences amounted to only four years—one year from a Pennsylvania conviction for illegal dumping and three years from a federal conviction for conspiracy to bribe city officials.[24]

In 1980, after the Pennsylvania criminal investigation was under way, Mahler sold his waste processing company to a Wall Street investment firm, Warburg Paribas Becker Inc. The investors renamed the business "Quanta," presumably hoping to obscure the Mahler connection. The new owners of Quanta were able to borrow $600,000 from Midlantic National Bank for working capital, in return for which they granted Midlantic a security interest in a variety of things, including Quanta's inventory (waste oil); apparently Mahler's continuing participation as vice president of sales did not trouble Midlantic.[25] Quanta also successfully obtained a temporary operating permit from New Jersey environmental regulators. Unfortunately, less than a month later, New Jersey regulators found PCB-contaminated oil during an inspection of Quanta's Edgewater facility. New Jersey authorities directed that Quanta promptly cease operations. The company entered bankruptcy in the fall of 1981, when negotiations between New Jersey regulators and Quanta officials about cleanup of the site proved unproductive.[26]

Quanta's waste oil storage containers and its processing facilities were in poor physical condition when the company entered bankruptcy. PCBs contaminated 400,000 gallons of waste oil at the Edgewater facility and 70,000 gallons at the Long Island City facility. To make matters worse, the storage tanks at both facilities had begun to leak; substantial PCB contamination extended beneath the surface of the soil at both sites. Still, because a portion of Quanta's waste oil inventory was not contaminated with PCBs, the estate was able to sell some of Quanta's waste oil for $288,000. It was the view of the bankruptcy trustee that the properties, in their contaminated state and factoring in their mortgages, had no value to the estate. Thus, because cleaning up the toxic contamination would have resulted in a net loss to the estate, the trustee sought to abandon both the New York and New Jersey properties.[27] If he were successful, the $288,000 would be distributed to Midlantic as proceeds of the inventory in which it had held a security interest. If not, the trustee would expend those funds to clean up the properties and Midlantic would take little or nothing.

Relying on the newly enacted Section 554, the trustee petitioned the bankruptcy court to allow abandonment of both sites. At the bankruptcy court hearing considering the proposed abandonment, regulators from New York and New Jersey argued that the trustee should not be allowed to abandon the properties in their present state because they presented a danger to the environment and the general public. New York also argued

that it should receive a first lien on the Long Island City property to the extent of any monies that New York might expend to bring the abandoned property into compliance with state law. The bankruptcy judge rejected those arguments, refusing to grant New York priority and permitting abandonment of the New York and New Jersey properties. When the district court agreed with the bankruptcy court's decision, the case came to the Third Circuit.[28]

At the Third Circuit, in addition to arguing that Congress had meant to incorporate pre-Code practices into Section 554(a), New York argued that 28 U.S.C. § 959(b) independently barred the trustee from abandoning property in contravention of state law. That statute provides that:

> a trustee . . . shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

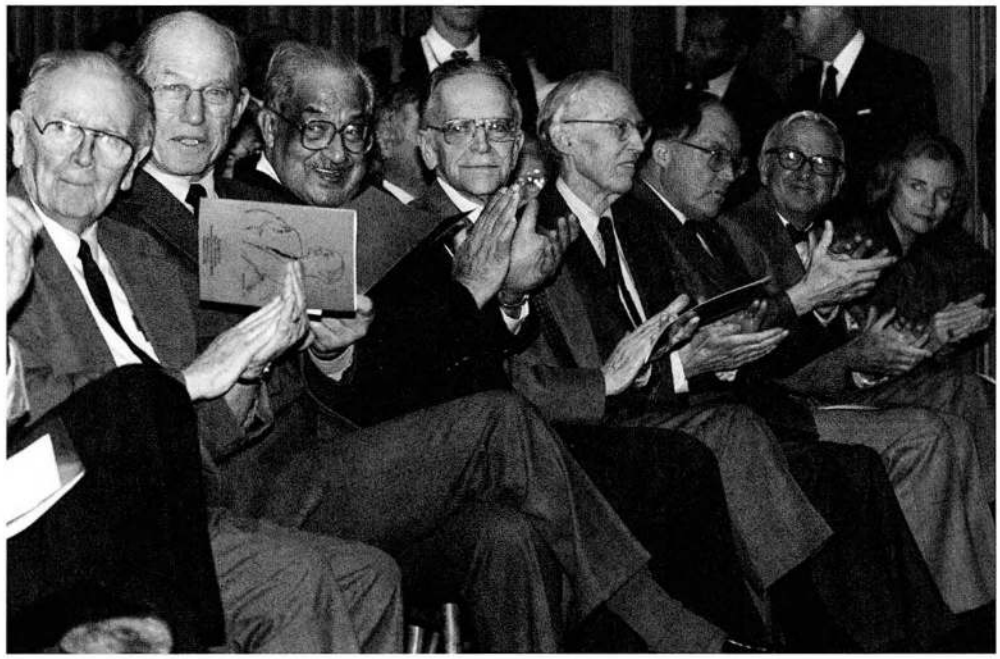
New York contended that the trustee's decision to abandon fell within his "management" and "operation" of the property and therefore had to be conducted in compliance with state law. The trustee disagreed, arguing that "management" and "operation" referred only to the trustee's responsibilities in a Chapter 11 bankruptcy where the trustee administers the estate as an ongoing concern. The Third Circuit devoted significant coverage to the Section 959(b) issue and concluded that the provision was not an independent prohibition on the trustee's abandonment power—but rather a clear indication that "the congressional scheme was not intended to subjugate state and local regulatory laws."[29]

On the bankruptcy question, the Third Circuit panel voted 2-1 to reverse the district court, holding that the Bankruptcy Code did not authorize the Quanta trustee to abandon the properties in contravention of state environmental law. The Third Circuit acknowledged the wide leeway that Section 554 (a) granted trustees to abandon burdensome property, but the court contended that Congress had intended to incorporate pre-Code judicial exceptions into the law. The judges explained that "where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable."[30] Because Congress had not explicitly overruled pre-Code exceptions to the abandonment power, the court concluded that Section 554 implicitly incorporated those exceptions. In dissent, Judge Gibbons harshly criticized the majority's use of an interpretive principle to overcome the unequivocal language of Section 554(a). He also argued that putting the financial cost of cleanup on the estate raised the specter of an unconstitutional taking by forcing the estate's secured creditors to bear the price of cleanup in the form of reduced payouts.[31]

Midlantic at the Supreme Court

The facts on the ground changed substantially before the case reached the Supreme Court. State regulators had stepped into the void left by the bankruptcy trustee and had secured both sites. New York cleanup efforts were complete; remediation in New Jersey was well under way. Thus, by the time the Justices considered the case, it was clear that no environmental catastrophe would flow from the trustee's unilateral abandonment of the contaminated sites.

That circumstance left the states in a less than ideal position. They had argued that the bankruptcy court should not permit



Members of the Supreme Court who decided *Midlantic National Bank v. New Jersey Department of Environmental Protection* in 1985 pictured during a ceremony held at the Supreme Court the following Term: from left to right, William J. Brennan, Jr., Byron White, Thurgood Marshall, Harry Blackmun, Lewis F. Powell, William H. Rehnquist, John Paul Stevens, and Sandra Day O'Connor.

the trustee to abandon the property because of the environmental havoc that would result. However, because they had stepped into the gap left by the trustee and eliminated that threat to public health and safety, the states refocused the Court's attention away from the public risk of a contaminated water supply and back to the private "Who should pay?" aspect of the case. Because the states had covered, or were preparing to cover, the costs of cleanup, the only live issue left in the case was whether the estate could be forced to reimburse the state treasuries for the funds they had expended to clean up the bankrupt's properties. The states argued that because the trustee should not have been allowed to abandon the sites, it was reasonable to force the estate to pay for cleanup that the estate should have conducted itself.

The resulting conflict between the environmental and bankruptcy laws split the Justices down the middle. For one group of Justices, a majority at the Conference, using restrictions on the trustee's power to abandon as a way to shift the cost of clean-up to the bankruptcy estate was an impermissible interference with the bankruptcy priority rules that would elevate the otherwise unsecured claims of environmental regulators above the secured claims of Midlantic. The remaining Justices, a minority at Conference but ultimately the prevailing group, could not tolerate the potential harm from unilateral abandonment, with the attendant removal of all oversight of dangerous public hazards.

When the case came to the Court, the law clerks from all sides of the Court, so far as the record appears, regarded the case as unexceptional. The pool memo from a clerk of Chief Justice Warren Burger recommended that the Court deny review, emphasizing that the Third Circuit had decided a question of first impression.[32] Justice Powell's clerk agreed, commenting in annotations on the pool memo that "CA3's holding appears to be

reasonable" and that "I think that this Court should wait for other CA's to consider the question." Justice Harry A. Blackmun's clerk thought that "CA3 certainly seems to have reached the sound result—I do not see why the private interests of creditors who dealt with the bankrupt sh[ould] prevail over the public interest in enforcement of its environmental laws." He agreed that he was "less prepared to say how firmly grounded in the statute is the result," but concluded that "given the . . . absence of other case law on the matter, the Court should probably hold off." No record of the Justices' discussions survive, but plainly at least four of the Justices took a contrary view; the Court granted review in February of 1985.[33]

The Bench memoranda from the Blackmun and Powell clerks, the only ones available, displayed similar views of the case. Both clerks found the pre-Code case law much more compelling than the language of the Code. Blackmun's clerk emphasized the pre-Code common law restrictions on bankruptcy courts' abandonment powers and argued that "nothing in the legislative history of the 1978 Act or § 554(a) suggests that Congress meant to disturb this traditional notion of the abandonment power."[34] Foreshadowing the discussion of Justice Powell's majority opinion, she argued that "[t]he normal rule of statutory construction is that when Congress intends for legislation to make an important change in the way a judicially created concept should be interpreted it says so."[35] Reducing the trustee's unqualified reading of Section 554(a) to absurdity, she argued that no court would permit a trustee to abandon a contaminated truck in the middle of a busy tunnel or abandon a stick of dynamite on a company furnace. Because these "abandonments" could not be acceptable, she concluded that the statutory abandonment power could not be unequivocal. For her, the question was one of the reasonableness of particular limits on the abandonment power.[36] Following a similar line of reasoning, Justice Powell's clerk argued that the Court should affirm the Third Circuit decision, applying the same general interpretive principle to conclude that Congress's adoption of Section 544 implicitly recognized the judicially created limitations on the trustee's abandonment power.[37]

Oddly inattentive to the operative language of the statute, the clerks found the policy arguments for the environmental side of the case powerful. The clerks pointed out that there were good reasons to impose the costs of cleanup on Quanta's creditors rather than on the public at large. Specifically, the clerks concluded that the creditors, unlike the general public, had assumed the risk that Quanta's violation of environmental statutes would adversely affect their economic fortunes.[38] Similarly, both clerks argued that allowing the trustee to abandon environmentally contaminated properties would risk allowing firms involved in toxic waste industries to transfer their liabilities for environmental cleanup to the state while distributing still-valuable property among the creditors.[39] The clerks were particularly critical of Midlantic's argument that forcing the trustee to clean up a property amounted to an unconstitutional taking of Midlantic's security interest. Because Quanta had been subject to environmental laws before it declared bankruptcy, neither clerk could see why the continuing application of those laws in bankruptcy would amount to an impermissible or unforeseeable change in the creditors' ability to recoup their investment.[40]

It was clear from the oral argument that the views of the Justices would be more disparate than the clerks' memoranda might suggest. The harshest questioning about the environmental hazards came from Chief Justice Burger, who seemed incredulous that the trustee could insist on an unqualified power of abandonment. For those Justices, the actual facts of the case were almost wholly irrelevant. What mattered were the implications for future scenarios: "Do you mean that the trustee could abandon a burning

building . . . ? . . . . [The court] cannot say, well, wait a minute, you can't abandon it without taking some precautions against having this property be a public danger?"[41]

For his part, Justice Stevens seemed concerned that a vote for the creditors would send the wrong message:

> Couldn't one argue . . . that the signal ought to be that you should not be lending money to these companies unless you are satisfied they will be able to comply with the environmental laws? That that is just another precaution that the business community ought to take before financing a venture like this . . . ?[42]

On the other side, equally skeptical questions challenged lawyers for New Jersey and New York about whether conditioning abandonment of a property on the trustee's clean-up efforts was akin to creating a priority claim for the state. For example, Justice Sandra Day O'Connor pressed New York's Solicitor General for much of his time on the priority problem: "[I]sn't this really a question of priority of claims? It seems to me the abandonment question in this context is pretty much of a red herring."[43]

The Justices also challenged the state's lawyers as to why the state should have a right of reimbursement after Quanta's bankruptcy filing that they would not have had under ordinary state law. Justice Rehnquist, for example, wanted to know whether, if the property had been abandoned from the bankrupt's estate, "how are you any worse off than before Quanta's bankruptcy?" When the New York Solicitor General responded that the debtor "was completely without assets to do anything about the situation," Justice William H. Rehnquist retorted, "But I presume that was the case on the day it filed for bankruptcy."[44] In a similar vein, Justice O'Connor was concerned that under state law the state "would have to come in and take whatever measures it wanted to take, and by its own law try to get priority to be recouped," and she wondered, "[W]hy should the filing of a bankruptcy change that outcome?"[45] For Justice Powell, at least, those interchanges seemed to present the strongest claims for affirmance; he noted that "WHR agrees with SO'C that the problem here is priority of claims, not abandonment."

At Conference on the Friday after the argument, the Justices voted to reverse the Third Circuit by a vote of 5 to 4. The Chief Justice and Justices White, Rehnquist, Stevens, and O'Connor favored the unqualified right to abandon urged by the trustee and the bank; Justices William J. Brennan, Thurgood Marshall, Blackmun, and Powell favored the regulators' concerns about public safety. Justice Powell's notes suggest that the Justices favoring the trustee stressed the language of the Code. The Chief Justice, for example, argued that the "[p]lain language of [the] statute permits abandonment. Here the CA created priority of claims not authorized by [the] Act [sic]."[46] Similarly, Justice White commented that the "statute rewrites Bankruptcy Act" and asked "Why should unsecured creditors be required to bear this burden?"[47] In the same vein, Justice Rehnquist thought that the trustee had a "clear right to abandonment" and that the question was one "of priority."[48] Most importantly in light of what was to come, Justice Stevens qualified his vote for reversal by characterizing the case as "close," commenting, as Justice Powell's Conference notes indicate, that there "must be some discretion [to limit abandonment] [i]f abandonment itself increases the hazard," and offering the example of a "bomb [that] may explode."[49]

For his part, Justice Powell's initial view of the case was quite conflicted. His preliminary memorandum, written after reading the briefs but before receiving anything from his clerk, suggested that he was "inclined to agree" with the court of appeals "[d]espite the unequivocal language of §554(a)."[50] He was particularly impressed with the argument, which he attributed to the Solicitor General, that

"§554 is a codification of a judge-made rule that . . . had recognized that the trustee's abandonment authority was subject * * * to general police powers of the states."[51] At the Conference, he professed that his vote in favor of the state regulators was "tentative," indicating that he would "want to re-read Gibbon[s's] dissent [from the decision of the court of appeals]."[52] Indeed, he was so uncertain about his vote that his Conference notes reported the vote on the case as 5-3, with his own vote excluded from the tally.[53]

Chief Justice Burger assigned the majority opinion to Justice Rehnquist, who quickly circulated a draft that closely tracked the position he had taken at the Conference. He noted that the "Bankruptcy Code expressly authorizes abandonment for the first time in the history of bankruptcy legislation," and that the language, "absolute in its terms, . . . makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations."[54] In his view, the legislative history suggesting ratification of case law under the Act fell "far short of" the "extraordinary clarity" necessary to "read into unqualified statutory language exceptions or limitations based upon legislative history."[55] Justice Rehnquist offered a pedestrian resolution, implementing the language of the Code as best as its text could be understood, buttressed by his sense of Congress's intent in the Code to make the bankruptcy process more comprehensively effective.

Justice Rehnquist did not, however, limit his analysis entirely to the text. Rather, reflecting the discussion at the argument and at the Conference, he closed his proposed opinion by repeating the point he made at the Conference, arguing that the regulators'

> interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc. . . . Barring abandonment and forcing a cleanup, however, would effectively place [the regulators'] interest in protecting the public fisc ahead of the claims of other creditors. Congress simply did not intend that § 554 abandonment hearings would be used to establish the priority of particular claims in bankruptcy.[56]

Apparently, in an effort to respond to the concerns of Justice Stevens, who was the fifth vote for Justice Rehnquist's Conference majority, Justice Rehnquist's draft also included a paragraph softening the statutory

---

Justice Stevens Rev

Close case.
If abandonment itself increases the hazard (bomb may explode) there must be some discretion. There may be a custodial duty to meet a new situation caused by abandonment

Justice Powell made this Conference note on October 18, 1985 regarding Justice Stevens's qualifying of his vote for reversal by characterizing the case as "close." It reads: "Close Case. If abandonment itself increases the hazard (bomb may explode) there must be some discretion. There may be a custodial duty to meet a new situation caused by abandonment."

analysis. The draft emphasized that the holding did "not exclude the possibility that there may be a far narrower condition on the abandonment power than that advanced by [the regulators] here, such as where abandonment by the trustee might itself create a general emergency that the trustee would be uniquely able to guard against."[57] Referring to an example from the Solicitor General's brief, abandonment of "dynamite sitting on a furnace in the basement of a schoolhouse," and commenting that he "kn[e]w of no cases in which trustees have sought to abandon dynamite under such circumstances," he suggested that "the existence of the narrow exception which we reserve would surely embrace that situation."[58]

Justice O'Connor joined Justice Rehnquist's opinion on the day that he circulated it, and Justice Byron R. White followed suit the following Monday.[59] Justice Rehnquist then circulated a second draft, which included only a single substantive revision, a footnote related to the question whether it was important that "abandonment itself violates state law."[60] That discussion, which appeared in footnote 4 of the draft majority opinion, would turn out to be the focal point of subsequent discussions. The footnote broadened Justice Rehnquist's discussion of that problem to emphasize the importance of bankruptcy policy, contending that allowing state law to trump the right of abandonment would "plainly frustrate the federal bankruptcy policy of expeditiously reducing the assets of the estate to money for distribution to creditors," and thus that the Bankruptcy Code should preempt any laws purporting to restrict abandonment.[61]

Justice Brennan assigned the dissent to Justice Powell, perhaps hoping to shore up Powell's hesitant vote.[62] Noting that his "vote to affirm was quite tentative" and that he "f[ou]nd the case troubling," Justice Powell nevertheless responded that he would "be glad to try [his] hand at a dissent."[63] Moving quickly, Justice Powell circulated his draft dissent less than two weeks after Justice Rehnquist circulated his draft majority opinion.[64]

The records include a typescript and a printed draft of Justice Powell's dissent that precede the first circulated draft. The main substantive revision softened the "verbal bomb shell" (Justice Powell's words),[65] with which his clerk began the draft for a dissent. Justice Powell worried that the rhetorical flourish might be "injudicious" unless it were "accurate in every respect."[66] The draft began with the same hypothetical discussed above, about the abandonment of dynamite on a stove in the basement of a school, followed by a caustic description of the environmental contamination at issue in *Midlantic*, both drawn almost word-or-word from the brief of the Solicitor General.[67]

The draft dissent could not have taken a methodological tack more different from that of the majority draft. Frankly acknowledging the limited importance of the statutory text to his position, Justice Powell rested directly on the scope of the abandonment power under the Act. Part I of the draft detailed the "judicially-developed doctrine designed to protect legitimate state or federal interests."[68] Justice Powell emphasized a "rule of statutory construction" requiring "specific intent" to recognize legislation as shifting the meaning of a statute that courts previously had interpreted.[69] Indeed, though he offered no citations to support the claim, Justice Powell went so far as to assert that "[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications."[70]

Part II emphasized that the all but unqualified abandonment power recognized by Justice Rehnquist's draft was unprecedented, an easy point given the paucity of prior judicial or legislative attention.[71] Finally, Part III emphasized Congress's undisputed concerns about "protecting the environment against toxic

pollution," as support for Justice Powell's "unwilling[ness] to presume that . . . § 554(a) . . . implicitly overturned long-standing restrictions on the common-law abandonment power."[72]

Notably, from the earliest stages of drafting, Justice Powell's opinion closely tracked several portions of the analysis offered in the brief of the Solicitor General. The Solicitor General did not present oral argument, but did file a brief in support of the states, arguing for a narrow reading of the trustee's abandonment power. For example, the discussion of Section 959(b) in the earliest drafts of the opinion imported quotes and significant analysis from the Solicitor General's discussion. Specifically, both the Solicitor General and Justice Powell concluded that Section 959(b) applied to abandonment, in part because Section 959 addresses both "management" and "operation" of property and courts are "obliged to give effect, if possible, to every word Congress used."[73] Justice Powell also borrowed the Solicitor General's analysis of the origins of Section 959 and accepted the Solicitor General's dismissive view of Midlantic's Takings Clause arguments by not addressing them.[74] The central substantive standard of Justice Powell's ultimate opinion —the requirements for abandonment—is closely rooted in the nuisance principles that the Solicitor General recommended to the Court.[75] Most importantly of all, Justice Powell found his core interpretive link—infusing the language of the Code with Bankruptcy Act jurisprudence—in the brief of the Solicitor General.[76]

Justices Brennan, Marshall, and Blackmun promptly joined Justice Powell's draft dissent without requesting any changes; those "joins" gave Justice Powell four votes for his draft dissent, while Justice Rehnquist still had only three votes for his draft majority opinion.[77] Justice Rehnquist responded with a third draft of his proposed opinion; the most important change was a revision trying to downplay Justice Powell's health and safety concerns and emphasizing that a requirement that the trustee provide notice before abandoning hazardous property would "[i]n almost all cases . . . give the State adequate opportunity to step in and provide needed security."[78] When Chief Justice Burger joined Justice Rehnquist's opinion that same day,[79] four Justices had agreed to each of the opinions, but there had been no word from Justice Stevens.

The next day, Justice Stevens weighed in with a detailed memorandum explaining that he had decided to switch his vote. He noted that the original draft majority opinion had troubled him in several ways and that he had started by trying "to formulate some suggested editorial changes that would clarify the scope of the holding, or perhaps identify the contours of the dynamite exception."[80] However, Justice Stevens went on to explain that "further study of the case has undermined my confidence in my Conference vote."

Justice Stevens expressed much more concern with Justice Rehnquist's policy views than with his statutory analysis. Specifically, he questioned Rehnquist's characterization of the issues in the case as solely about "who pays." He maintained that if the case had been about the simple shifting of financial responsibility for cleanup

> from one party to another—if abandonment did nothing more than . . . make an adjustment in the rights of various creditors—state law could be ignored in deciding whether or not to approve abandonment. But if the abandonment has health as well as financial consequences, and if it is prohibited by state law because of the health consequences, I think the trustee has some duty to comply with state law.[81]

Because the case as presented to the bankruptcy court in fact involved allegations

of health hazards related to the abandonment, Stevens thought it improper to dispose of the case solely as a financial matter. Once he had reached that conclusion, he had become "persuaded that the key to the case is the discussion in your [i.e., Justice Rehnquist's] footnote 4,"[82] discussed above. On that point, he could not conclude "[u]nder our normal preemption analysis" that Congress intended to preempt state laws about abandonment. Accordingly, "[w]ith some embarrassment, I have therefore concluded that I must change my vote."[83]

Because Justice Stevens's change of heart meant that Justice Powell was now writing for the majority, Justice Powell promptly circulated an opinion with the necessary revisions to serve as an opinion for the Court rather than as a dissent.[84] Again, Justices Brennan and Blackmun promptly joined, followed a few weeks later by Justice Marshall; none requested substantive changes.[85]

Justice Stevens, however, was not so easily satisfied. Just as Justice Stevens had found the abandonment power in Justice Rehnquist's opinion too broad, he thought Justice Powell's made it too narrow. Writing to Justice Powell in early January, Justice Stevens agreed that abandonment in *Midlantic* "was clearly improper" because the trustee took no steps to reduce danger related to abandonment.[86] Once again Justice Stevens was much less worried about the correct resolution of *Midlantic* than about problems that had not yet arisen. For example, he worried about what should happen in cases in which the trustee (or the judge) acted more cautiously: "[W]hat if the bankruptcy judge had imposed conditions that required the trustee to . . . forestall any imminent danger of a serious tragedy? The last paragraph of your opinion seems to state that such an abandonment would also be impermissible."[87] Justice Stevens made his problem quite clear:

> I found that I could not subscribe to Bill Rehnquist's proposed disposition because it seemed to authorize the trustee to abandon without any constraint whatsoever imposed by State law. You have convinced me that position is untenable. I am also inclined to believe that the opposite extreme would be equally unsatisfactory. Specifically, I could not subscribe to a holding that the State could veto any abandonment, no matter how many safety precautions were taken and no matter how much money the estate had spent in an effort to rectify the problem.[88]

Justice Stevens closed with a gentle suggestion that "it might be wise to narrow our holding."[89]

Anxious to gain a majority for his opinion, Justice Powell sent back revised pages of his opinion privately to Justice Stevens, indicating that he "believ[ed that] these meet your concerns" but noting that he would "of course, consider any language changes you may suggest."[90] Justice Stevens responded with a request for yet another round of clarifying revisions, in which he focused on the possibility that a state might seek to bar abandonment for reasons unrelated to public health and safety.[91] With little other choice, Justice Powell agreed to those revisions as well. Papering over the leverage Justice Stevens was exercising, Justice Powell commented with characteristic grace that he was "glad to make the changes suggested" and that he was "assuming that these changes will be satisfactory to [the Justices] who have joined me, as I view your language as a clearer statement of what the opinion already purports to say."[92] In any event, when Justice Stevens finally agreed to join the opinion,[93] Justice Powell had obtained his hard-fought majority.[94]

It was, in truth, an overstatement to suggest that the changes did not shift the opinion at all. They did, however, leave the core of Justice Powell's reasoning intact,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 5, 1985

95-(6) argument

Re: 84-801 - Midlantic National Bank v. New Jersey Department of Environmental Protection
84-805 - O'Neill v. City of New York

Dear Bill:

When I first read your circulating draft, I was troubled by three comments: (1) the statement on page 1 that the abandonment power is "not subject to any general requirement of compliance with state regulatory laws"; (2) the conclusion in footnote 4 on page 11 that a state prohibition against the disposal of hazardous wastes is preempted by § 554(a); and (3) the "dynamite-in-the-schoolhouse" example that is used on page 14 to illustrate the scope of a possible condition on abandonments that themselves create emergencies that the trustee is uniquely able to guard against. I therefore thought that I would try to formulate some suggested editorial changes that would clarify the scope of the holding, or perhaps identify the contours of the dynamite exception, but further study of the case has undermined my confidence in my Conference vote.

Justice Stevens weighed in with a detailed memorandum on December 5, 1985 explaining that he had decided to switch his Conference vote.

as the final version indicated that the abandonment power was conditioned on the bankruptcy court's "formulat[ion of] conditions that will adequately protect the public's health and safety" and specifically that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."[95] More importantly, the changes resulted in a majority opinion justifying a heavily skeptical treatment of the Code's reforms rather than the "we call them like Congress wrote them" approach Justice Rehnquist had offered.[96]

The Legacy of *Midlantic*

It is easy to speculate how things might have changed if just one vote were

different, if Justice Stevens had been slightly less engaged in the case, perhaps, and had maintained the view he expressed at the Conference. If Justice Powell's dissent had been slower to appear, would Justice Stevens have tried harder to reach an accommodation with Justice Rehnquist? A similar pattern appeared two Terms earlier in the deliberations over *NLRB v. Bildisco & Bildisco* (1984).[97] The Justices had divided 5-4 at Conference, Chief Justice Burger assigned the majority opinion to Justice Rehnquist, and Justice Stevens had substantial misgivings about his vote. In that case, however, after extended correspondence and structural recasting of the opinion, Justice Rehnquist managed to retain control of the outcome.[98]

More broadly, if Justice Powell's draft dissent had remained just that—the comments of four dissenters—would the Court ever have moved so far down the path it has chosen, in which the Bankruptcy Code so regularly gives way to the interests of other federal and state regulatory schemes? The legacy of *Midlantic* is plain; the Court has cited the decision with frequency, more than a dozen times, always for its strong presumption against derogation from prior statutory interpretation. If *Midlantic* is the turning point in the Court's bankruptcy jurisprudence, the interactions among Justices Rehnquist, Powell, and Stevens over the decision of that case are the crux of the entire subject.

In a case that divided the Court so closely, the involvement of the Solicitor General is especially noteworthy. It is not simply that Justice Powell's dissent-turned-majority relied so heavily on the Solicitor General's presentation for language, examples, and legal reasoning, although the level of borrowing on those points is itself remarkable. What is crucial is the borrowing from the Solicitor General, with no substantial precedential authority, of the central jurisprudential contribution of *Midlantic*, the presumption that Congress's labored recodification of bankruptcy law was designed to change nothing. We can only wonder whether the Solicitor General's contribution would have been more nuanced had the Solicitor General seen protection of the bankruptcy process as an important institutional interest. As it is, we know now that the Solicitor General's arguments here laid the foundations for what turned out to be a decades-long project of narrowing the impact of the 1978 Code.

ENDNOTES

[1] For good summaries of that process, *see* David A. Skeel, **Debt's Dominion: A History of Bankruptcy Law in America** (Princeton, N.J.: Princeton Univ. Press, 2003); Charles J. Tabb, "The Bankruptcy Reform Act in the Supreme Court," 49 *U. Pittsburgh L. Rev.* 477 (1987); Kenneth N. Klee, "Legislative History of the New Bankruptcy Code," 54 *Am. Bankr. L.J.* 275 (1980); Susan Block-Lieb, "What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to *Stern v. Marshall*," 86 *Am. Bankr. L.J.* 55 (2012).

[2] 458 U.S. 50 (1982).

[3] 492 U.S. 33 (1989).

[4] 131 S. Ct. 2594 (2011).

[5] The Court's persistently narrowing bankruptcy jurisprudence is the focus of my book: Ronald Mann, **Bankruptcy and the U.S. Supreme Court** (forthcoming, Cambridge Univ. Press, 2017).

[6] 474 U.S. 494 (1986).

[7] The papers of Justices Blackmun, Brennan, Marshall, Powell, and White are available for *Midlantic*. Images of the briefs in this case and of all of the Justices' papers are posted online at www.bksct.net. Citations in this article to briefs and to internal documents are to the files in No. 84-801, *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*.

[8] Jonathan H. Adler, "The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection," 55 *Case Western Reserve L. Rev.* 93, 101 (2004).

[9] The E.P.A. was organized under President Nixon in 1970, the major amendments to the Clean Air Act granting it authority in that area followed later that year, and the Clean Water Act followed in 1972.

[10] Brief for the United States at 1.

[11] Adler, "The Fable of Federal Environmental Regulation," at 102.

[12] *Id.*, at 103.

[13] New York passed a set of comprehensive environmental regulations in 1978, and New Jersey passed an environmental package in 1970.

[14] N.Y. Envtl. Conserv. § 27-0900 (McKinney 1980).

[15] N.Y. Envtl. Conserv. § 27-0914 (McKinney 1980).

[16] N.Y. Envtl. Conserv. § 71-2702 (McKinney 1980). ("[N]o solid waste facility shall accept or receive for disposal, any hazardous waste [or] chemical waste, . . . unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department for the entire system.")

[17] N.J. Stat. Ann. § 13:1E-42 (West 1980).

[18] Karlyn Bowman & Everett Carll Ladd, **Attitudes Toward the Environment: Twenty Five Years After Earth Day** (Washington, D.C.: AEI Press, 1995).

[19] *Id.*, pp. 20-23.

[20] 198 F.2d 289, 297-98 (4th Cir. 1952).

[21] *In re Lewis Jones*, 1 Bankr. Ct. Dec. 277, 280 (Bankr. E.D. Pa. 1974).

[22] The Bankruptcy Code is codified as Title 11 of the United States Code. References in this article to Sections refer to that enactment.

[23] Lydia Chavez, "Toxic Waste Entrepreneur," *New York Times* (May 27, 1982), D1.

[24] Chavez, "Toxic Waste Entrepreneur"; Ralph Blumenthal, "Accused Polluter Was Paid to Clean up Sites," *New York Times* (May 7, 1982), B20; The Associated Press, "$1.1 Million Fine in Dumping Case," *New York Times* (July 21, 1984), 31.

[25] Brief for Petitioner at 12. From the vantage point of the present era, the bank's casual approach to "know your customer" considerations is jarring.

[26] Chavez, "Toxic Waste Entrepreneur"; Josh Barbanel, "A Court Bolsters Toxic Waste Law," *New York Times* (July 28, 1984), A9.

[27] Brief for Petitioner at 12-13; Brief for the United States at 9.

[28] The text simplifies the procedural path considerably. The bankruptcy court decided the New York and New Jersey questions separately. When it decided the New York issues, the City appealed the decision to authorize abandonment, but the state, which had sought priority over Midlantic, did not appeal. After the district court affirmed, the case went to the Third Circuit, because the bankruptcy was in New Jersey, even though the relevant property was in New York, in the Second Circuit. When the bankruptcy judge later authorized abandonment of the New Jersey property, the parties consented to a direct appeal from the bankruptcy court to the Third Circuit, which consolidated the two cases for consideration. *In re* Quanta Res. Corp., 739 F.2d 927, 928 (3d Cir. 1984).

[29] *In re* Quanta Res. Corp., 739 F.2d 912, 919 (3d Cir. 1984) [hereinafter *In re* Quanta Res. Corp.].

[30] *Id.* at 916.

[31] *Id.*, at 925 (Gibbons, J., dissenting).

[32] Pool Memo (Jan. 26, 1985) (by Michael Lazerwitz).

[33] The comments of the law clerks appear on the copies of the pool memo in the files of Justices Powell and Blackmun, respectively.

[34] Bench Memorandum from Pamela Karlan to Justice Blackmun (Aug. 12, 1985), 26.

[35] Blackmun Bench Memorandum, 28.

[36] Blackmun Bench Memorandum, 28.

[37] Bench Memorandum from Cabell Chinnis to Justice Powell (Aug. 28, 1985), 3.

[38] Powell Bench Memorandum, 6; Blackmun Bench Memorandum, 32.

[39] Powell Bench Memorandum, 6-7; Blackmun Bench Memorandum, 33.

[40] Powell Bench Memorandum, 7; Blackmun Bench Memorandum, 31-32.

[41] Transcript of Oral Argument (Oct. 16, 1985), 7-8.

[42] *Id.*, 24.

[43] Transcript of Oral Argument, at 29.

[44] Transcript of Oral Argument, 28.

[45] *Id.*, 30.

[46] Conference Notes of Justice Powell (Oct. 18, 1985), 1.

[47] *Id.*

[48] *Id.*, 3.

[49] *Id.*

[50] Memorandum to File from Justice Powell (Jul. 26, 1985), 4.

[51] *Id.*, 5-6.

[52] Powell Conference Notes, 2.

[53] *Id.*, 1.

[54] Justice Rehnquist, first draft of Majority Opinion, circulated Nov. 15, 1985, 6-7.

[55] *Id.*, 8. The legislative history was quite weak, even by the standards of the 1980s. As the Rehnquist draft emphasized, the proffered history amounted to a citation to the Collier treatise in a document prepared not in support of the Bankruptcy Code itself but rather in support of a predecessor statute, the proposed Bankruptcy Act of 1973. The *Collier* treatise, in turn, though not quoted itself in the legislative history, stated that "recent cases illustrate . . . that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature." 4A **Collier on Bankruptcy** ¶ 70.42(3) (1967); see First Rehnquist Majority Draft, 10 (discussing the history). Justice Rehnquist noted with considerable justification: "A Senator or Congressman seeking to familiarize himself with the statutory provision for abandonment in the Code, therefore, in order to divine that the statutory power to abandon was to be conditioned on compliance with state police power regulations, would not merely have had to look at the legislative history of the precursor to the Code, but also would have had to read the several-page treatise section cited in that earlier legislative history." *Id.*, 10.

[56] *Id.*, 13-14.

[57] *Id.*, 13.

[58] *Id.*

[59] Memorandum from Justice O'Connor to Justice Rehnquist (Nov. 15, 1985); Memorandum from Justice White to Justice Rehnquist (Nov. 18, 1985).

[60] Second Draft of Majority Opinion of Justice Rehnquist (Nov. 21, 1985), 11 n.4.

[61] *Id.*

[62] Memorandum from Justice Brennan to Justice Powell (Oct. 21, 1985).

[63] Memorandum from Justice Powell to Justice Brennan (Oct. 21, 1985).

[64] Draft of Dissenting Opinion of Justice Powell (Nov. 26, 1985).

[65] Memorandum from Justice Powell to Cabell Chinnis, (Nov. 21, 1985).

[66] Memorandum from Justice Powell to Cabell Chinnis (Nov. 23, 1985).

[67] *Compare* First Chambers Draft of Dissenting Opinion of Justice Powell (Nov. 20, 1985), 1, *with* Brief for the United States, 23.

[68] Powell Dissent Draft, 2.

[69] *Id.*, 3.

[70] *Id.*

[71] *Id.*, 3-7.

[72] *Id.*, 7, 8.

[73] *Compare* Brief for the United States, 18 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), *with* Printed Chambers Draft of Dissenting Opinion of Justice Powell (Nov. 22, 1985), 6 (also quoting Reiter).

[74] *Compare* Brief for the United States, 20, *with* Powell Dissent Printed Chambers Draft, 7.

[75] *Compare* Brief for the United States, 39, *with* Third Draft of Majority Opinion of Justice Powell (Jan. 17, 1986), 12.

[76] *Compare* Brief for the United States, 25-26, *with* Powell Dissent Printed Chambers Draft, 2-3.

[77] Memorandum from Justice Brennan to Justice Powell (Nov. 26, 1985); Memorandum from Justice Blackmun to Justice Powell (Nov. 29, 1985); Memorandum from Justice Marshall to Justice Powell (Dec. 2, 1985).

[78] Third Draft of Majority Opinion of Justice Rehnquist (Dec. 4, 1985), 13.

[79] Memorandum from Chief Justice Burger to Justice Rehnquist (Dec. 4, 1985).

[80] Memorandum from Justice Stevens to Justice Rehnquist (Dec. 5, 1985), 1.

[81] Stevens Dec. 5 Memorandum, 3.

[82] *Id.*

[83] *Id.*, 4.

[84] First Draft of Majority Opinion of Justice Powell (Dec. 27, 1985).

[85] Memorandum from Justice Brennan to Justice Powell (Dec. 30, 1985); Memorandum from Justice Blackmun to Justice Powell (Dec. 30, 1985); Memorandum from Justice Marshall to Justice Powell (Jan. 21, 1986). Justice Blackmun sent a separate note mentioning two minor typographical errors. Private Memorandum from Justice Blackmun to Justice Powell (Dec. 30, 1985).

[86] Memorandum from Justice Stevens to Justice Powell (Jan. 7, 1986). Justice Powell's draft dissent had included a passage noting the trustee's failure to take "even relatively minor" protective steps. Powell Dissent Draft, 3 n.3. Justice Powell lengthened the passage substantially in the proposed majority (First Powell Majority Draft, 4 n.3), presumably in response to the concerns Justice Stevens had expressed in his Dec. 5 Memorandum.

[87] Stevens Jan. 7 Memorandum, 1.

[88] *Id.*, 1-2.

[89] *Id.*, 2.

[90] Memorandum from Justice Powell to Justice Stevens (Jan. 9, 1986).

[91] Memorandum from Justice Stevens to Justice Powell (Jan. 14, 1986).

[92] Memorandum from Justice Powell to Justice Stevens (Jan. 15, 1986).

[93] Memorandum from Justice Stevens to Justice Powell (Jan. 17, 1986).

[94] Although the last vote from Justice Marshall did not come in until a few days after Justice Stevens joined, the records do not suggest that Justice Marshall \had any concerns about the opinion. Memorandum from Justice Marshall to Justice Stevens (Jan. 21, 1986).

[95] Third Draft of Majority Opinion of Justice Powell (Jan. 17, 1986), 12. On December 30, Justice Powell had circulated a second draft of his majority opinion, which made only stylistic changes. Second Draft of Majority Opinion of Justice Powell (Dec. 30, 1985). Those revisions responded to Justice Powell's view, noted on his personal copy of the draft, that the first draft of the majority opinion had so many errors that it was "no credit to our Chambers," which prompted the question to his clerk whether he was following the Chambers policy that he should "have another clerk read a draft before it goes to the printer."

[96] In the vein of providing an objective assessment, Charles Tabb concludes that Justice Rehnquist has much the better of the argument, characterizing Justice Powell's opinion as "arguably at odds with the Code's distribution scheme." Charles Jordan Tabb, "The Bankruptcy Reform Act in the Supreme Court," 49 *U. Pittsburgh L. Rev.* 477, 540 (1987).

[97] 465 U.S. 513 (1984).

[98] I discuss those events in detail in a chapter of my forthcoming **Bankruptcy and the U.S. Supreme Court**.

Review of: Timothy S. Huebner, *Liberty and Union: The Civil War Era and American Constitutionalism*

WILLIAM WIECEK

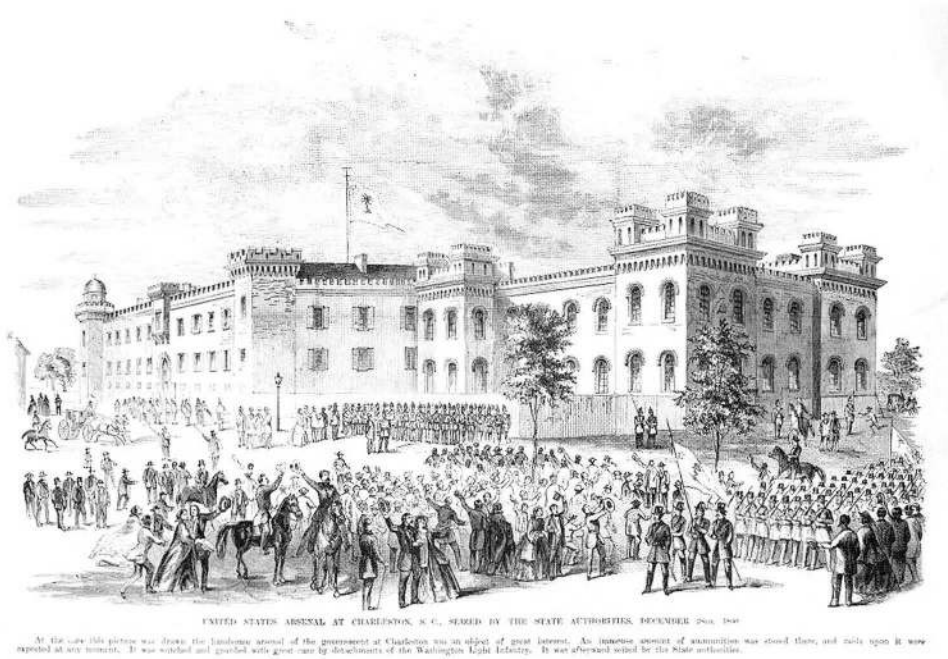
The constitutional historian Timothy Huebner has set himself a daunting task in **Liberty and Union**: to recapitulate within a single volume three "historiographical streams" (p. x) of American constitutional development—a history of the Civil War (and its political antecedents), the constitutional impact of the war and its aftermath in Reconstruction, and African-American history of the era.[1] Constitutionalism, as his title indicates, is his central theme: what it is, why it matters, and how it was understood by the American people, including African Americans and pro-slavery southern whites. Each of Huebner's three foci merits book-length treatment in its own right; blending all three into a coherent narrative for general readers is a challenge to virtuosity. Huebner pulls it off admirably.

There are surprisingly few studies that cover exactly the same ground Huebner does, but they are all classics, which makes his achievement all the more impressive. A generation ago, Harold M. Hyman and William M. Wiecek brought out one of the few studies that replicates Huebner's subject: **Equal Justice under Law: Constitutional Development, 1835-1875** (1982), one of the four constitutional volumes of the **New American Nation** series. The entire corpus of Harold M. Hyman's work, but principally **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** (1973), is dedicated to the war and Reconstruction. Laura Edwards's **A Legal History of the Civil War and Reconstruction: A Nation of Rights** (2015) is an important recent revision of the classical synthesis. All the other landmark studies cover only one part of Huebner's story. Daniel Walker Howe's Pulitzer Prize–winning achievement, **What Hath God**

Wrought: The Transformation of America, 1815-1848 (2007), interprets the antebellum era. David M. Potter's **The Impending Crisis, 1848-1861** (1976), another **New American Nation** series volume, brought the story up to the war. James McPherson's **Battle Cry of Freedom: The Civil War Era** (1988) covered both the coming of the war and the war itself. William W. Freehling's two-volume treatment of secession, **The Road to Disunion: Secessionists at Bay, 1776-1854** (1990) and **Secessionists Triumphant, 1854-1861** (2007) traced the southern component of the story. John Hope Franklin produced the magisterial account of the black experience in **From Slavery to Freedom: A History of African Americans** (1947, 8th ed. 2000). Don E. Fehrenbacher followed up his towering **The Dred Scott Case: Its Significance in American Law and Politics** (1978) with his refutation of the neo-Garrisonian critique of the pro-slavery Constitution: **The Slaveholding Republic: An Account of the United States Government's Relations to Slavery** (2001). Eric Foner's **Reconstruction: America's Unfinished Revolution, 1863-1877** (1988, 2014) is the definitive one-volume survey of the war's political and constitutional aftermath. Each of these books has framed the way that we think about the constitutional struggles of the Middle Period, providing the armature on which we structure interpretation and critique today. On purely constitutional matters, the Holmes Devise volumes of Carl B. Swisher (**The Taney Period, 1836-1864** [1964]) and **Charles Fairman (Reconstruction and Reunion, 1864-88** [1971, 1987]) were respectively dated and monumentally disappointing, and they have had little impact on our interpretation of the constitutional dimensions of the cataclysmic struggles of 1830-1880. Given this grand corpus of recent scholarship, our parlous times call for a synthesis that will make the constitutional learning of the last half-century accessible in the classroom and for public discourse.

Huebner's work traces the great constitutional themes that have dominated scholarly inquiry since the 1960s. Foremost among these is his foregrounding of African-American experience in this era. He emphasizes African Americans' contributions to the development of constitutional thought and doctrine, as what he calls "the black constitutional tradition" (pp. 52, 61, 84, 136, 322-323, 419, and *passim*). With few exceptions (Franklin, Foner), constitutional historians have slighted the contributions of black antebellum thinkers and activists to the development of public law.[2] Huebner explores the constitutional ideas and vision of black conventions and individual thinkers, from James Forten early in the century to Frederick Douglass through its end. African-American leaders emerge from the mists of Lost-Cause-tinged historiography to speak in their own voices. Restoring agency both to black intellectuals and to the countless but mostly nameless individuals who lived out their constitutional ideals by self-liberation, **Liberty and Union** begins to make up for missed opportunities by reminding readers that free and enslaved African Americans were at the forefront in promoting the ideals of freedom, rights, and equality. They insistently recurred to the Declaration of Independence as the touchstone of constitutional development, which Huebner calls a "distinctive vision of equality" (p. 48). Besides such well-known figures as David Walker and Frederick Douglass, in Huebner's account we encounter the thinking of Martin Delaney, Abraham Galloway, Robert Smalls, John Rock, Absalom Jones, Hiram Revels, Henry M. Turner, George Ruffin, Henry Highland Garnett, Samuel Cornish, and others who explored the meanings of liberty and citizenship. Huebner insists throughout that our understanding of freedom and equality owes as much to blacks' activism as it does to whites'.

African Americans called for the erasure of all racial distinctions in American law. This notion of equality as a



Timothy S. Huebner's new book *Liberty and Union* emphasizes that at all times—before, during, and after the Civil War—northern and southern understandings of federalism and the Constitution radically diverged. The Southern antebellum concept of state sovereignty rested on a theory of the Union in which a distant national government was driven by a relentless centripetal drive for power, which southern writers called "consolidation." Above the U.S. arsenal in Charleston is raided by South Carolina militia on December 28, 1860.

constitutional value was literally unprecedented in American constitutional discourse in 1865. Unlike concepts of due process, which dated back at least to *Magna Carta* (1215) and had undergone seven centuries of refinement in legal debate, or privileges and immunities, which like due process was grounded in the Constitution and drew on familiar common law understandings, interpersonal equality was unknown to the American constitutional tradition.[3] When abolitionists and black conventions began to articulate the egalitarian ideal in the 1830s, their fellow-citizens scorned them as crackpot idealists bent on creating an impossible interracial utopia. Similarly with the notion that African Americans could claim to be rights-bearing citizens with their status protected by the Constitution: citizenship itself at this time was so underdeveloped constitutionally that it could not usefully serve as a juristic category to define the civic status of people formerly enslaved. As for the idea that African Americans might have rights, southern slave law recognized "no rights which the white man was bound to respect" for enslaved people, as Chief Justice Roger B. Taney correctly asserted in *Dred Scott* (1857). Freedpeople at first could claim little beyond the bare right of locomotion, and even that was hedged about with constraints on mobility and residence that did not burden whites. The result was that, in 1868, equality was a new value, unknown to the original Constitution, that had to be given content and meaning through civic discourse and practice. Huebner describes the role that black voices played in that process of definition.

Huebner's narrative emphasizes that at all times—before, during, and after the Civil War—northern and southern understandings

of federalism and the Constitution radically diverged. The southern antebellum concept of state sovereignty rested on a theory of the Union in which a distant national government was driven by a relentless centripetal drive for power, which southern writers called "consolidation." Unconstitutional measures like the tariff or, potentially, any actions that threatened slavery endangered the liberty of individual citizens of the states. When their liberty was threatened by the "aggressions" of abolitionists, free states, or the federal government, the states could "interpose" their authority between the national government and the citizen, so that the illegitimate measure would be deflected. In this vision, the real threat to individual liberty came from the federal government; security for liberty rested in the states. The southern concept of the federal system fused white supremacy, state sovereignty, and pro-slavery constitutionalism.

The people of the free states saw it differently. Northerners saw that the real threat to individual liberty came from the states, not the national government. The mails controversy of 1835 and contemporary related First Amendment challenges threatened the liberties of whites. After the war, it was the states that enacted the Black Codes and trampled on democratic processes after Democrat Redeemers returned to power. The new constitutional regime of Reconstruction, based on the Thirteenth, Fourteenth, and Fifteenth Amendments and given effect by the Enforcement Acts of 1870-71, upended the southern antebellum theory of federalism. The federal government, acting through its courts, now stood as the guarantor of liberty in what Huebner calls a "revolution in the historic relationship between the national government and the states" (p. 446).

Nevertheless, the defunct southern theory of state sovereignty shambled on like some constitutional zombie throughout Reconstruction and after. At first thought to be buried at Appomattox, "states rights" lurched back immediately in southern politics, rotting but lethal. Having made its formal debut in the Kentucky and Virginia Resolutions of 1798-99, the theory of state sovereignty had moved inexorably from interposition (1798) to nullification (1798, 1832) to secession (1860-61). Such a fatally wrong idea took on a new life in Reconstruction as the formal claim for the power by the states to frustrate national policy, particularly in the matter of the status of the freedpeople. The fires of Petersburg and Richmond were still smoldering as southern state legislators, many of them Confederate military or civilian officials just months earlier, took their seats and promptly enacted the Black Codes. They backed up that act of defiance with constitutional theories that explained the workings of the Confederate Constitution[4] but were alien in the new constitutional regime of the United States. Southern Democrats and their abettor, President Andrew Johnson, ignored the fact that a revolution in American federalism had taken place during the war.

Throughout **Liberty and Union**, Huebner emphasizes the theme of *constitutionalism*, which he presents as a mélange of issues including the scope and meaning of national supremacy, popular sovereignty, state sovereignty, individual liberty, slavery, and democracy within a republican form of government. By 1860, it had become apparent—though not to most contemporaries—that the balance that had evolved among them had become fatally unstable. Abraham Lincoln saw his responsibility, as he assumed office, to be the preservation of liberty and union—hence the title of Huebner's work. But by then the north and south had diverged irreconcilably in their understandings of the underlying meaning of those two concepts. Northern constitutionalism was shaped by Whiggish visions of national power used to promote the well-being of all the American people, a nationalist vision that ran from Alexander Hamilton through John Marshall and Daniel Webster to Lincoln. Southern constitutionalism, by contrast, was based on the

sovereignty of the various states. White southerners understood liberty to consist above all of their ability to own slaves and maintain a slave society. Equality meant, as the southern intellectual Thomas Dew explained, "all who are white are equal" (quoted at p. 80).

When Lincoln announced the aims of his administration in 1861 to be the preservation of the Union and the supremacy of the Constitution, he did not recognize that these aims were fundamentally incompatible with bedrock southern understandings of their equivalents in a slave society, which were the security of white supremacy and black enslavement. Lincoln adumbrated his idea in his "House Divided" address (1858), but he did not at that time concede that liberty and union as the north saw it could not be secured without the destruction of slavery. It took him more than a year to realize that, if the Union were to be saved, slavery had to be eradicated. Huebner traces Lincoln's dawning realization of that first in the Preliminary Emancipation Proclamation in 1862 and then in its corollary, the vindication of democracy in the Gettysburg Address the next year. Huebner argues that, as the Emancipation Proclamation overthrew slavery, the Gettysburg Address (1863) repudiated white supremacy. That overstates or at least accelerates the evolution of Lincoln's views on race in 1863, but it captures the fusion of the President's constitutional thinking and that of African-American activists, who saw that liberty and union could be secured only around the third element of the American constitutional trinity, equality. In the Emancipation Proclamation, Lincoln referred to the objects of his executive action as "all persons held as slaves" rather than simply "slaves." This was not a circumlocution or merely clumsy phrasing. It was a careful choice of words, reflecting Lincoln's steadfast commitment to constitutionalism[5] as well as his recognition that there is a vast difference between a *slave* —an objectified, commodified though rational hominid—and an enslaved *person*—a fellow human trapped in an unnatural social status.

Huebner refers to the revolutionary accomplishments of the Civil War in the constitutional sphere, above all in the fact that the Thirteenth, Fourteenth, and Fifteenth Amendments constituted the core of America's third Constitution. Our first Constitution was the Articles of Confederation, which expired in infancy, and the second was the Constitution of 1787 plus the promptly appended Bill of Rights. The second Constitution had failed in 1860-61 and was substantially replaced by a revised document that excised slavery and substituted in its place a society based (aspirationally, at least) on equality among all people: the antebellum goal of black writers and their abolitionist allies. But the new constitutional regime immediately ran into implacable counterrevolutionary resistance, in effect a continuation of the war through terrorism and guerilla atrocities. The promise of the Reconstruction Amendments was betrayed and postponed for almost a century as white Americans tolerated a pretextual pseudo-equality as a fig leaf covering disfranchisement and Jim Crow subordination.

In tracing the development of these grand themes, Huebner guides the reader through a succession of constitutional issues: antebellum pro- and anti-slavery constitutional theories; the legal status of African Americans, both free and enslaved, north and south; the role of the Supreme Court of the United States and the lower federal courts in resolving these questions; the status of slavery in the territories and fugitives from slavery, the twinned constitutional issues that ultimately brought down the Union; the repeated failure of the constitutional order through the 1850s (1850, 1854, 1857, 1858, 1860) to resolve the territorial issue; Abraham Lincoln's evolving constitutional thinking; the recurrent impact of race and racial beliefs on constitutional interpretation; Confederate constitutionalism; the ways that the war impacted constitutional

development, including such matters as habeas corpus and Francis Lieber's code of the laws of war; presidential power; emancipation; the interrelated topics of citizenship, privileges and immunities, due process, and equal protection; evolving theories of federalism and sovereignty; the constitutional status of the freedpeople; suffrage, both for whites and for blacks, and for women; self-government; the ineradicable tensions between individual liberty and governmental power; the hierarchy of civil, political, and social rights of African Americans; the status of the states in the postwar constitutional order; the uses of the military in securing domestic order; impeachment; the jurisdiction of the federal courts; civil rights legislation, particularly the Civil Rights Act of 1866; and white supremacy as an organizing principle of government.

Liberty and Union is a welcome and satisfying synthesis of the constitutional scholarship of the last half-century that accords the Reconstruction Amendments their proper place as the basis of our modern constitutional order. Written for a general audience and meant to be used in the classroom, this volume could not be more timely.

ENDNOTES

[1] This review concentrates on the constitutional aspects of the narrative and ignores the military history chapters.

[2] To mention only one culprit: William M. Wiecek, **The Sources of Antislavery Constitutionalism in America, 1760-1848** (1977); Hyman and Wiecek, **Equal Justice Under Law**, 1-231. The list could be extended.

[3] The only mention of equality in the original Constitution came in Article V, which guaranteed each state "equal Suffrage" in Senate voting.

[4] The preamble to the Confederate Constitution declared: "We the people of the Confederate States, each acting in its sovereign and independent capacity . . ."

[5] The Constitution in Article IV section 2 refers to "Person[s] held to Service or Labour."

Contributors

James B. Barnes is the winner of the Hughes Gosset Student Prize for 2016. He wrote this article while a law student at St. Mary's University in San Antonio, Texas for an American Legal History course taught by Professor Michael Ariens. He now practices commercial law in Austin, Texas and is the Managing Attorney for Barnes Law Group.

Barry Cushman is the John P. Murphy Foundation Professor of Law at the University of Notre Dame.

Andrew T. Fede is an attorney in private practice in Hackensack, New Jersey. He is also an adjunct professor at Montclair State University, Upper Montclair, New Jersey.

Ronald Mann is Albert E. Cinelli Enterprise Professor of Law at Columbia Law School and Co-Director of the Charles Evans Gerber Transactional Studies Center.

Gary Peterson is a lawyer in private practice in Oklahoma City.

William M. Wiecek is Chester Adgate Congdon Professor of Public Law and Legislation Emeritus at Syracuse University College of Law.

Charles L. Zelden is a professor in the Department of History and Political Science at Nova Southeastern University.

Illustrations

Page 9 (both), Library of Congress, photograph by Theodor Horydczak
Pages 11 and 15, O Say Can You See Early Washington, DC, Law & Family
Page 17, Collection of E. Grosvenor Paine
Page 29, National Archives
Page 31, National Park Service
Page 34, Collection of the Supreme Court of the United States
Page 40, Stewart Bell Jr. Archives, Winchester, VA
Pages 54 and 57, Library of Congress
Page 60, Courtesy of Mary Lou Filburn Spurgeon
Page 62, George Grantham Bain Collection (Library of Congress).
Page 69, Google Maps
Page 71, FDR Library Collection
Page 72, Library of Congress
Page 79, AP Photo by Mark Lennihan
Page 81, Ronald Reagan Library and Presidential Museum
Page 86, Library of Congress, photograph by Camilo J. Vergara.
Page 80, University of California, Bancroft Library, Berkeley, CA. Pamphlet published by Anti-Bakke Decision Coalition.
Page 92, California Department of Corrections and Rehabilitation
Page 102, AP Photo by Henry Griffen
Page 107, AP Photo by Scott Stewart
Pages 110 and 114, Courtesy of the Lewis F. Powell, Jr. Archives
Page 120, *Leslie's Illustrated History of the Civil War*

Cover: Thurgood Marshall photographed in the White House in 1967 by Yoichi R. Okamato. National Archives and Records Administration.