Introduction

Melvin I. Urofsky

I have said this before, but I think it bears repeating from time to time, and that is how much the study of constitutional law in general, and of the Supreme Court in particular, has changed since I was a graduate student at Columbia, and taking a course with one of the truly great historians of the last century, Henry Steele Commager. We used as a text his **Documents of American History**, which had not only Supreme Court cases, but non-legal materials such as Lincoln's Gettysburg Address and Wilson's speech to Congress in April 1917 asking for a declaration of war. Our syllabus, however, consisted only of cases, although we did not parse them out as one did in law school. Commager was a great teacher, and he did what most books on constitutional studies did not do at that time, namely, try to place the case in some historic context. I think it was that lesson, more than the legal rulings of any particular case, that stayed with me long after I took that course.

Since then, we have seen constitutional history—and in fact many other branches of history—change greatly. We now have case studies that examine not only the doctrinal implications of the decision, but the whole background of how the case arose, who were the real litigants, and what impact it had and on whom. I think we can trace this development to the man who was the first full-time newspaper reporter covering the Court, Anthony Lewis, and his book, **Gideon's Trumpet** (1964). We now have something that was almost non-existent when I was a graduate student, biographies of Justices. At that time there were only two—Louis D. Brandeis and Harlan Fiske Stone—both by that pioneer in the field, Alpheus Thomas Mason.

I and many of my peers in constitutional history have been the beneficiaries of this change, and you, dear reader, have also benefited. You are all interested in the history of the Supreme Court of the United States, and only a generation or two back, you learned about the Court in the law school manner, studying cases current and historical. Now you read about events in the lives of Justices (who knew someone tried to shoot Stephen Field because he thought the Justice had insulted his wife, and the resulting case

made constitutional law), or why certain cases that seem to be about one thing are really about another (*New York Times v. Sullivan* is normally seen as a press freedom case, but it is actually a civil rights decision).

This issue of the *Journal* is once again a potpourri of articles, with nary a parsed case in sight.

Relations between President Abraham Lincoln and Chief Justice Roger Brooke Taney could never be described as cordial. Lincoln had run on a platform that attacked Taney's opinion in *Dred Scott* (1857), and Taney saw Lincoln as a constitutional usurper. When a case came up challenging one of Lincoln's policies, and Taney was to hear it while on circuit, rumors abounded that the President would imprison the Justice rather than face a hostile decision. Taney himself believed he would be arrested. Philip W. Magness of George Mason University explores the truth of these rumors, as well as the role of one of Lincoln's cronies, Ward Hill Lamon.

If one looks at the list of men and women who have served on the High Court, one will not find the name of Edwin M. Stanton. If one recognizes him at all, it would be as Secretary of War, one of Lincoln's "team of rivals." In 1869 a number of Senators and Congressmen took the unusual step of petitioning President Grant to name Stanton to replace Robert Grier. A reluctant President agreed, and the Senate confirmed the nomination immediately. Unfortunately, Stanton died four days later. Al Lawrence of the Empire State College in Saratoga Springs, New York, examines this little known episode.

Why do Justices dissent is, of course, a subject near and dear to me. My last book was on the role of dissent, and that did not require me to explore in much detail the various reasons that dissents arose at all. We now have Greg Goelzhauser, associate professor of political science at Utah State University, and his coauthors Madelyn Fife, Kaylee B. Hodgson, and Nicole Vouvalis—who do look at the reasons why some judges "note disagreement."

All of us who went to law school at some point studied the Federal Rules of Civil Procedure, but like many aspects of legal education, it was presentist, i.e., what are the rules now, and how do they work. The history of those rules? If I recall, there was probably a sentence or two in the preface or first chapter. Now comes George Rutherglen, whom I am happy to say I had as a teacher at the University of Virginia Law School (though not for civil procedure), who opens a door into the history of the FRCP, and why the Warren Court "discharged with thanks" the committee that worked on revising the rules.

Marlene Trestman received the Society's Hughes-Gossett Award in 2012 for her article on Bessie Margolin, adapted from her biography of Margolin, **Fair Labor Lawyer**. The book and the article stirred up curiosity about women lawyers before the High Court —a now common occurrence—and Trestman and others have now compiled data on this, which shows the initial scarcity of female members of the Supreme Court Bar, and their current status. Ms. Trestman is a former Special Assistant to the Maryland Attorney General.

Last but certainly not least, we have Grier Stephenson's "Judicial Bookshelf," and, I should add, Grier's exposition of some current constitutional practices. As always, the "Bookshelf" has books and more.

This is a wide range of topics. Enjoy!

Between Evidence, Rumor, and Perception: Marshal Lamon and the "Plot" to Arrest Chief Justice Taney

PHILLIP W. MAGNESS

A disquieting tension lingered over the streets of Baltimore on the morning of May 28, 1861. The city was barely a month removed from the Pratt Street riots that had claimed the lives of four soldiers and twelve civilians. Though the mobs had since calmed, secessionist sympathies were found in no shortage. The U.S. Army answered by training the guns of Fort McHenry on the city and, backed by a presidential authorization, had taken to arresting persons suspected of insurrectionary activities without recourse to the civilian courts. A legal chess game had played out over the previous three days in one such courtroom as attorneys for John Merryman, a suspected Southern sympathizer under military arrest, petitioned for a writ of habeas corpus.[1]

The *Merryman* case remains among the most widely discussed judicial actions of the Civil War, although it also suffers from an abundance of historical confusion surrounding the circumstances of its hasty genesis and equally chaotic case. John Merryman was arrested on the night of May 25, 1861, at his home in Baltimore County, although even the subsequent details are murky. His arrest likely stemmed from his participation in the destruction of railroad bridges into the city of Baltimore over a month earlier. He may have been acting in connection with a plan by Maryland state officials to force the diversion of arriving troops around the city and onto an alternative approach into Washington, D.C., from the east. This move sought to quell the Baltimore mobs and likely carried at least the tacit approval of Maryland Governor Thomas H. Hicks, although it also fueled rumors of a Confederate plot to cut off the capital. Curiously, the hastily drafted arrest order contained no specific charges, its only instruction being to capture an unnamed

militia captain for "spreading secessionist sentiments."[2] The ensuing drama around this contested set of instructions would soon push the executive branch to the brink of a collision with the federal judiciary.

When Roger B. Taney departed from the home of his son-in-law for the courtroom that morning, he "remarked that it was likely he should be imprisoned in Fort McHenry before night; but that he was going to Court to do his duty." Speaking to his daughter in similar fashion, he reportedly informed her "not to worry or feel anxious about him, for he hoped they would not keep him long in confinement." "But," Taney continued, to affirm the point, "I shall keep right on, doing what I believe to be my duty, and taking the consequences, whatever they may be."[3]

The elderly Chief Justice, reviled across the North for his *Dred Scott* decision and suspected of Confederate loyalties in his own right, was fulfilling his circuit court duties in Baltimore when Merryman's petition arrived on his bench. Taney had long operated in the same Maryland legal circles as his petitioner, a minor political figure from the outskirts of the city, and his attorneys. He likely traveled to Baltimore expecting just such a case as that of Merryman's arrest would arise, His rank might lend credibility to an opinion upholding the writ of habeas corpus, whereas lower judicial officers had only encountered roadblocks from the army thus far.[4] In short order, Taney would announce his finding in *Ex Parte Merryman*, a sweeping condemnation of President Lincoln's assertion of executive power wherein the Chief Justice declared the recent unilateral suspension of the privilege of the writ of habeas corpus unconstitutional.

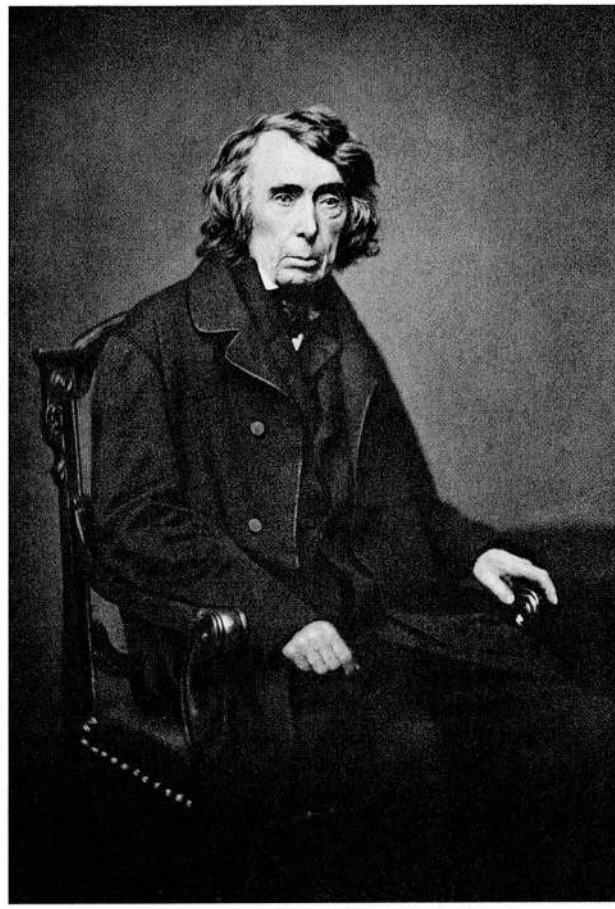
Taney moved with intentional boldness, first by quickly reaching a decision and next by taking the unusual step of forwarding his opinion directly to the President, even as it technically pertained to General George Cadwalader, the officer directly responsible for Merryman's captivity. Yet the sense of apprehension Taney alluded to that morning still troubled him. Turning to Baltimore Mayor George W. Brown in the courtroom, the Chief Justice once again intimated "that his own imprisonment had been a matter of consultation" by the government. He believed "that the danger had passed" for the moment, although he also warned Brown "from information he had received, that my [Brown's] time would come."[5]

Even with the case concluded, Taney continued to hold a pressing suspicion that he was being monitored by the Lincoln administration and remained at risk. "I looked at the envelope of your letter carefully," he wrote to former Congressman George W. Hughes of Maryland a few days after the *Merryman* case. "I think it had not been opened. And indeed if it had been read, there certainly was no opinion in it, nor anything said, that you could have any reason for wishing to conceal."[6] Addressing former President Franklin Pierce on June 12, some two weeks after the case, Taney made yet another guarded yet certain reference to the threat of his own detention. "But my duty was plain," he answered Pierce's complimentary assessment of the ruling, "and that duty required me to meet the question directly and firmly, without evasion—*whatever might be the consequences to myself.*"[7]

An additional and early repetition of the rumored plans to arrest the Chief Justice came from an improbable source: the 1880 biography of Taney's former Supreme Court colleague Benjamin R. Curtis by his brother and frequent legal collaborator, George Ticknor Curtis. Justice Curtis famously resigned from the court in protest against Taney's *Dred Scott* decision, a case in which his brother George had offered legal assistance to plaintiff Scott's arguments. Despite their falling out with Taney, the Curtis brothers both strongly opined against the constitutionality of Lincoln's unilateral suspension of habeas corpus, even going so far as to characterize *Merryman* as something of a

redemptive act for the Chief Justice's errors in *Scott.*[8] In George T. Curtis's retelling of the *Merryman* case, he reprimands Lincoln, a "rash minister of State," for actions that "came near to the commission of a great crime," a veiled reference to the contemplated arrest of Taney. Neither Curtis brother provided any indicator of the source that had imparted them with this purported knowledge, although the reference was sufficiently clear for Mayor Brown to enlist the passage as corroboration of Taney's courtroom comments in his own war memoir, published in 1887.[9]

The harsh judgment of public opinion may have contributed to Taney's lingering anxiety. Newspapers across the North denounced him as a "traitor" and "rebel sympathizer" in the wake of the decision, with some going so far as to affirm their concurrence in acting upon his stated fear of being arrested. As the *Cleveland Daily Herald* openly suggested, "[a] vacancy ought to be made on the Supreme bench, by placing the Chief Justice in the predicament of the traitor he is so anxious to relieve from military duress."[10] The pro-Lincoln *St. Louis Democrat* similarly opined against Taney and another local judge who had also affirmed the writ in an unrelated case. "Judge Treat here and Chief Justice Taney of Baltimore . . . have made themselves amenable to the most



The Late Chief Justice Taney.

After the outbreak of hostilities, it will be remembered that a habeas corpus case came before him as Circuit Judge of Maryland. He issued the writ. It was in favor of a man named Merryman, who had be arrested for treason. The military officers interfered and prevented the release of the prisoner.—Judge Taney directed the Clerk of the Court to certify this fact to President Lincoln. This was done but the President made no reply. The next day, before Taney went to Court, he told his daughters that he fully expected to be arrested before night; that, if so, they must not worry or feel anxious about him, for he hoped they would not keep him long in confinement. "But," said he, "I shall keep right on, doing what I believe to be my duty, and taking the consequences, whatever they may be." He was not arrested, although he was often threatened in the early years of the war. It was in the nature of such distinguished Generals as Schenck, who ruled in Maryland, to arrest as "dangerous traitors" such men as Taney—then upward of eighty years of age. It was by such patriotic services that Schenck won his stars.

While on circuit, Chief Justice Roger B. Taney boldly held in *Ex Parte Merryman* (1861) that President Abraham Lincoln's assertion of executive power to suspend the writ of habeas corpus was unconstitutional. Rumors circulated that the Lincoln administration was going to arrest Taney. The *McConnelsville Conservative* (Maryland) reported that Taney told his daughters he "hoped they wouldn't keep him long in confinement."

serious prosecutions," declared the Republican organ. "If the Government will follow up its suspension of the writ of habeas corpus with the suspension of two such worthies as Taney and Treat, it will be a good riddance for the country."[11] A Pennsylvania paper echoed that it "would be well for the old man however to keep cool . . . or perhaps he may be dealt with as Judge Hall was by General Jackson in New Orleans," alluding to the jailing of a federal judge for challenging the use of martial law during the War of 1812.[12] Even *The New York Times* offered a lightly concealed call for the Chief Justice's forcible ouster, suggesting "he will certainly be impeached" if he persists in challenging the president, "but if he is content to be a law abiding citizen, he will be permitted to totter into the grave without being officially branded a traitor."[13]

Such sentiments seem to have captured the mood of the times, at least in Republican quarters. Frederic Bernal, the British consul in Baltimore and one of the many witnesses to the courtroom scene on May 28, described the sudden scorn generated by Taney's decision. As Bernal informed his superiors in London, "[t]he northern papers have either passed by this momentous question with a contemptuous silence, or have noticed it merely to load Chief Justice Taney, at other times an object to them of pride, and admiration, with every epithet of abuse, down to counseling . . . the President to arrest him."[14] The arrest rumor, it seems, did not strictly originate from or end in Taney's own mind. It was also a widely acknowledged point of political advocacy for Taney's less tempered critics. While hardly sufficient to establish a willing audience to this unsolicited counsel from President Lincoln, as a measure of the mood of the times, it establishes a frenzied reaction often omitted from historical accounts of the *Merryman* case.

In the end, neither the Chief Justice's fear of an arrest nor the public opinion to countenance it bore fruit. Whereas Taney readied himself for an imminent clash with the executive, Abraham Lincoln settled upon the different and noticeably muted response of essentially ignoring the Chief Justice. He did ask Attorney General Edward Bates to prepare a formal legal argument defending the suspension of the writ, which engaged Taney's opinion briefly if carefully. Former Attorney General and Maryland lawyer Reverdy Johnson, who assisted Bates in the preparation of his response, also acknowledged the delivery of the *Merryman* ruling and confirmed its presence in the administration's consciousness as they crafted their legal arguments.[15] When Lincoln publicly pled his case on the suspension power to Congress in July, he consciously omitted any direct challenge to his judicial interlocutor.[16] Nor did the administration ever abide by Taney's ruling or appeal it to a higher court, although the administration's attempt to bring a criminal case against John Merryman continued for some time until eventually being dropped amidst a succession of delays and failed attempts to hold the prisoner for insurrectionist activities. Rather than answer Taney in his own setting, Lincoln's formal response was effectively to sidestep the judiciary. For all of Taney's trepidations, the rumored arrest plot seemed to be just that —a rumor, its source wholly unverifiable outside of the scant material that Taney revealed, and seemingly unfounded, as it was never acted upon.

After lingering in the realm of speculation for more than a century, Taney's apprehensions received an unexpected boost in 1973 when historian Harold Hyman investigated the theory that the Chief Justice "may have heard rumors" of an impending arrest, "leading to his perturbation" on the morning of May 28. The corroborating source was neither a Taney sympathizer nor a Republican newspaper editorial, but Ward Hill Lamon, the U.S. Marshal for the District of Columbia and a longtime associate of Abraham Lincoln.[17] Lamon's recollection of

the events is found in a memorandum from his papers at the Huntington Library:

> This decision of the Chief Justice at this time was most embarrassing to the war powers then being exercised. The legal operations of the civil authorities had not been suspended by a declaration of martial law, and apprehended conflicts of authority would greatly embarrass the military operations of the government; and at no point was a greater field for such obstruction than at Baltimore in Maryland. After due consideration the administration determined upon the arrest of the Chief Justice. A warrant or order was issued for his arrest. Then arose the question of service. Who should make the arrest and where his imprisonment should be? It was finally determined to place the order of arrest in the hands of the United States Marshal for the District of Columbia. This was done by the president, with instructions to him to use his own discretion about making the arrest unless he should receive further orders from him. This writ was never executed, and the marshal never regretted the discretionary power delegated to him in the exercise of this official duty.[18]

Despite being intended for publication in Lamon's lifetime as part of an unfinished memoir that he worked on between roughly 1884 and 1886, this story sat out of the public eye for some ninety years after its composition.[19]

In the intervening decades, many historians had come to view and dismiss Taney's comments and the accompanying rumors as "the overexcited fear of a partisan," perhaps a barometer of political chatter but also one with little actual evidence to back it.[20] By contrast, Lamon's account laid claim to specific knowledge that an arrest warrant received serious political consideration in the White House. It is conceivable that such an event would have entailed the makings of a constitutional crisis well beyond that already unfolding in the war if the head of one branch of government sought the detention of the head of another for suspected disloyalty. Yet no such warrant was executed, and Lamon's telling admits as much.

The document raises another question for consideration though, and one that continues to be confounded by Lamon's own complicated historical reputation. Although initial scholarly acceptance of the memorandum was favorable following Hyman, it was also predicated upon a mistaken double-citation that suggested a second corroborating source in another collection.[21] When traced to Lamon alone, historians have been far more reluctant to accept the story's implications. As legal scholar Brian McGinty noted in his 2009 book on the Civil War-era Supreme Court, Lamon's account has "never [been] confirmed by Lincoln's principal biographers." James F. Simon intentionally avoided wading into the issue in his otherwise comprehensive dual biography of Lincoln and Taney, as he had encountered difficulty sorting the evidence from a clutter of rumors about the episode. Don E. Fehrenbacher, who happened upon Lamon's account after Hyman, expressed similar skepticism "that Lincoln would have left such a critical decision to a minor official."[22]

Further complicating the matter, Lamon's account became a principal contention in a heated turf war between Lincoln's modern political defenders and detractors. The latter group eagerly added the arrest warrant to its arsenal of evidence of Lincoln's "despotism," while the former focused upon refuting this charge by disparaging the authenticity of Lamon's story.[23] This debate largely eschewed academic channels and has subsided somewhat since its peak in the early 2000s. It

Ward Hill Lamon, the U.S. Marshal for the District of Columbia and a longtime friend of Lincoln, claimed that a warrant was issued for Taney's arrest for Lamon to carry out. This writ was never executed. It has also never been found, which means Lamon's credibility is crucial to the question of whether the writ was ever issued.

had at least one unintended effect, however, as it proved a distraction from further scholarly investigation of Lamon's story. Engagement with the episode by historians accordingly remains in a state of certain but shallow and thinly reasoned doubt.

The skeptical modern reception of Lamon's account may actually be more

symptomatic of an under-acknowledged dearth of primary material surrounding Lincoln's reaction to the *Merryman* case and his handling of the political turmoil of those uncertain early months of his presidency. Assuming the Taney warrant ever existed, no copy of it has been found. Although often claimed as a reason to dismiss the tale, the lack of a warrant is itself unsurprising. Very few administrative records from the Marshal's office, excepting those placed in Lamon's personal papers, and almost none of the relevant D.C. civil authority records survived intact from the outbreak of the war.[24]

With equal significance, principal diarists on Lincoln's cabinet—Gideon Welles, Edward Bates, and Salmon Chase—as well as Lincoln's personal secretary John Hay were all silent or inactive during the *Merryman* affair, between them leaving no record of the case's certain discussion and debate at the highest levels of the government. Even Lincoln's personal papers are sparse where the subject of *Merryman* is concerned. Taking the window of time between Taney's *Merryman* ruling and Lincoln's Fourth of July message to Congress, the entire habeas corpus subject appears in only four documents: (1) the aforementioned letter from Reverdy Johnson about his work on the administration's counterargument; (2) a letter by Worthington Snethen, a Republican newspaper correspondent in Baltimore, accusing Taney of "treason"; (3) Lincoln's draft edits to his message to Congress, mostly written over a month after the case, where this document did at one point contain a vague reference to Taney's ruling "from a high quarter," later dropped; and (4) a May 30 directive from Lincoln requesting Bates's opinion on the constitutionality of the President's habeas corpus powers in the wake of the case, which the Attorney General delivered on July 5.[25] The copy of the *Merryman* ruling that Taney personally sent to the White House—much publicized in its time—did not survive in Lincoln's papers and apparently has never been located.

Lamon's account therefore stands in isolation, not by its departure from what is known of Lincoln's handling of the *Merryman* episode but precisely because so little else is known of the White House reaction outside of Lincoln's famous public counterargument in the Fourth of July message: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Lamon's corroborative value to Taney's suspicions accordingly turns upon a broader question to which many Civil War specialists are familiar: the assessment of Ward Hill Lamon as a well-positioned but imperfect witness to the high level discussions and decisions that happened in his presence in the opening weeks of the Civil War.

Reevaluating the Lamon Problem

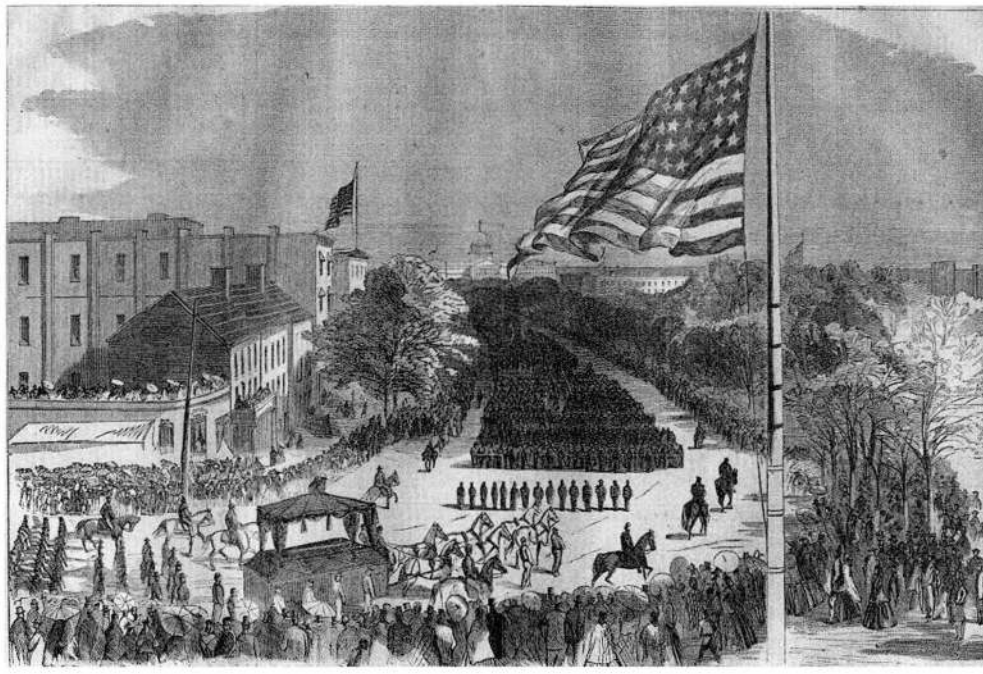
A large and physically imposing fellow, Ward Hill Lamon was a personal friend of the President from Illinois—some might say crony—who latched onto Lincoln's law practice as a sometimes-junior partner, joined his inner political circle in Springfield, accompanied him to Washington after the election, and received a sinecure appointment in early 1861 as the U.S. Marshal for the District of Columbia.[26] As an officer of the court, he was deemed ill-mannered for Washington society. His loud, jovial, impulsive, and occasionally bumbling personality —not to mention his own conservative politics—spawned frequent confrontations with Congress and other members of the executive branch. Yet Lincoln enjoyed Lamon's companionship on a deeply personal level, and the Marshal's official duties kept him on constant standby to conduct a variety of political and personal tasks for the President. William Herndon's research assistant Jesse Weik went so far as to describe Lamon as Lincoln's "closest and most confidential friend" from their days together

on the Illinois circuit. Their companionship, he notes, "began early and continued without interruption" until Lincoln's death, despite its having brought intense public criticism of Lamon by the President's political enemies. "Lincoln closed his eyes to the man's imperfections and clung tenaciously to him."[27] The feisty and frequently well-armed Lamon also served as something of an informal personal bodyguard to the President, the role for which he is best remembered today. In a stroke of unfortunate timing, he was in Richmond on a political assignment the night Booth's bullet struck its mark in Ford's Theater.

Lamon remains a source of many cherished anecdotes in Lincoln lore, albeit a problematic one whose own standing has not fared well in historical estimation. Rodney O. Davis, despite offering a cautiously favorable assessment, concedes that Lamon's "reputation was clouded by controversy during Lincoln's administration and by the mixed motives with which he approached the task of becoming a Lincoln biographer." Far more historians have followed Mark Neely's characterization of "this obscure man of limited abilities" or Joshua Zeitz's recent description of a "profoundly unsophisticated man boxing far above his weight."[28] Such apprehensions are not entirely unfounded given Lamon's less pleasant attributes, although they also venture beyond the evidence and into caricature. More than any feature specific to the *Merryman* episode, they also account for the instinctual disbelief, and perhaps neglect, shown to Lamon's arrest warrant account since its rediscovery.

It is still difficult to ignore Lamon, and neither is it sufficient to dismiss him as a "minor official," as Don E. Fehrenbacher did when expressing skepticism over the Taney story.[29] Lamon's wartime proximity to the President is easily established, and Lincoln's sometimes controversial habit of confiding in his friend is almost universally conceded among his contemporaries. Republican political operative Alexander McClure listed Lamon among "the closest men to Abraham Lincoln, both before and after his election to the Presidency . . . men who knew Mr. Lincoln better than all others." Leonard Swett, another of Lincoln's Illinois confidantes, wrote that Lamon "has for many years been one of [Lincoln's] most intimate friends." Wartime Secretary of the Interior John P. Usher referred to Lamon as Lincoln's "confidential friend during the time he was president," writing in 1885 that there "is now none living . . . in whom he so much confided." Former Secretary of War Simon Cameron similarly acknowledged the high level of trust Lamon enjoyed with Lincoln while questioning John Nicolay in 1875, incredulously querying "How came the President to have so much faith in Lamon?" Supreme Court Justice David Davis, a longtime Illinois associate of both men, left a more favorable assessment in a private letter to Secretary of State William H. Seward shortly after Lincoln's death, noting of Lamon "I doubt whether [Lincoln] had a warmer attachment to anybody & I know that it was reciprocated."[30]

In life, Lamon's knack for storytelling endeared him to the President. Unfortunately, the same habits that made him a skilled raconteur also introduced a tendency toward indiscretion and an element of exaggeration into Lamon's later reminiscences about his former friend and patron. Lamon's open feuding with the radical wing of the Republican Party also earned him many political enemies. As federal marshal and superintendent of the capital's jail, he aggressively enforced the Fugitive Slave Act in the District. This purposeful support of slaveowners from neighboring Maryland earned him the lasting indignation of abolitionists. The ensuing controversy required Lincoln to intervene on his friend's behalf more than once, nearly cost Lamon his job amidst a Senate investigation, and had an effect on hastening the passage of the D.C.



Supreme Court Justice David Davis, a longtime Illinois associate of both Lamon and Lincoln, noted in a private letter to Secretary of State William H. Seward shortly after the President's death: "I doubt whether [Lincoln] had a warmer attachment to anybody & I know that it was reciprocated." Lamon served as one of the pallbearers at Lincoln's funeral and helped direct the arrangements for the funeral procession in the nation's capital (pictured).

Emancipation Act in 1862 against Lincoln's desire to wait for a more opportune political moment.[31]

After Lincoln's death, Lamon further provoked the ire of the late President's son Robert in 1872 by lending his name to a ghostwritten biography of Lincoln's early life that, while based on William Herndon's famous collection of interviews, lacked diplomacy and tact. In particular, Lamon's ghostwriter inflated certain dubious claims about Lincoln's ancestry and suggested his irreligiosity—two sensitive subjects for persons of high social position in the late nineteenth century. Some years after the biography, Lamon again attempted to turn his famous presidential affiliation into something of a profit-making exercise, offering up Lincoln stories to willing audiences for payment and publicly feuding with former associates such as John Hay and John Nicolay, who approached their own biographical exercises with more discretion for their subject's faults and living family.[32] As a result of these factors, Lamon's reputation as a friend of Lincoln suffered greatly in his own lifetime and continues to pose a challenge to historians who wish to separate the truthful elements of his stories from his own politics, from the scorn he attracted in his own life, and from the embellishments he added to promote his later written works.

For all his shortcomings, Lamon was also an intimate friend of Lincoln, holding a well-positioned vantage point and serving as an eyewitness to events of critical and lasting significance in the course of the Civil War. Perhaps at no time does this become more evident than in the tumultuous spring of 1861. While awareness of the "Lamon problem" should guide consideration of his recollections in this and any other period, it is neither a basis for deprecation of his place among

Lincoln's closest associates, nor is it grounds for sidestepping his memory of events that carry contentious political implications and that were, by their nature, sufficiently limited as to the numbers of observers so as to make accounting for his presence unavoidable.[33] To this end, a cautious but not unduly dismissive reexamination of Lamon's role in the crucial early months of Lincoln's presidency permits a fuller contextualization and assessment of the sensitive discussions he probably heard and occasionally revealed, the Taney arrest rumor included.

An Appointment as U.S. Marshal

Clint Clay Tilton, Lamon's sole biographer, postulated that Lincoln had a recurring habit of strategically tapping his old Illinois friends as a type of informal buffer between himself and the Washington political class by employing them for personal, if "unofficial," tasks of a delicate nature. He identifies Lamon and their mutual lawyer friend from the Illinois circuit, Leonard Swett, as the primary presidential functionaries to operate in this capacity, and he notes that Lincoln kept them supplied with political appointments—the U.S. Marshal's office in Lamon's case—to retain them on hand as sensitive business arose, including those ill-suited for the authorized channels of government.[34] Tilton's theory collides with later deprecating portrayals of Lamon, particularly those disposed to the caricatured "bodyguard" image he has attained in the modern era, yet it clarifies the purpose of a presidential attachment that Washington society often found so outwardly baffling. It also helps to explain Lamon's seemingly paradoxical and even central presence in numerous high stakes political events.

Beginning with their journey to Washington in late February 1861, Lincoln began using Lamon as something of a gatekeeper for political liaisons. New York political boss Thurlow Weed arranged the President-elect's suite at Willard's Hotel such that Lamon would occupy the apartment "nearest him," apparently in conjunction with this purpose.[35] From this vantage point, Lamon coordinated many sensitive aspects of Lincoln's political business and persisted in this informal role for roughly the month preceding his official appointment as marshal in early April 1861.

Shortly after arriving in Washington, Lamon became a party to a series of still-shrouded discussions with outgoing California Senator William M. Gwin in a last-ditch effort to avoid war. A Southerner by birth but also a purported unionist, Gwin had the unenviable but potentially exploitable position of retaining both a personal friendship with Seward and political channels to Jefferson Davis. Since direct communications with the Confederate government risked conveying recognition, Gwin became a "neutral" intermediary with the secessionists in Montgomery at a time when Seward searched in increasing desperation for terms that might avert a war.

Lamon, or "Mr. Lemon . . . the confidential friend of Mr. Lincoln," as Gwin recorded it, handled arrangements to bring the President-elect and the California Senator together for a private hour-long meeting in a presidential reception room at the capitol shortly before the inauguration. While the conversation's parameters are only vaguely known, it seems to have yielded modest assurances of a peace overture as conveyed by Seward's impending appointment as Secretary of State, possibly in conjunction with Gwin's agreement to signal Lincoln's nonbelligerent intentions to his southern associates, thereby giving the incoming administration a friendlier depiction than it might expect from secessionist newspapers. Prodded further by Seward and facilitated by political operative Samuel C. Ward, Gwin would later secretly telegraph a peace message of this sort to Davis in conjunction with Lincoln's inaugural

address, pledging the "amicable settlement of all questions between the sections."[36]

Lamon's most famous and controversial task came on the eve of the Confederate bombardment of Fort Sumter and with it the outbreak of the war. On March 22, 1861, Lincoln provided Lamon with a two-week commission as a "Special Agent" of the post office.[37] The document afforded him cover to travel to Charleston, South Carolina, apparently on a political mission for the President to report on the condition of Fort Sumter. Lamon was joined on the journey by Stephen A. Hurlbut, another Illinois associate with similar instructions to investigate secessionist sentiments in the city. Over the course of two days, Lamon succeeded in gaining an audience with South Carolina Governor Frances Pickens and permission to meet with Major Robert Anderson at the fort, while Hurlbut's time was mostly spent visiting an old friend, James L. Petigru, where they conversed about the political strength of disunion in South Carolina.[38]

Lamon's exact purpose in South Carolina has long been a source of controversy, largely because he intimated to Anderson and Pickens alike that the fort would soon be abandoned. Seward simultaneously signaled a comparable message to the Confederates through another of his intermediaries, Supreme Court Justice John A. Campbell. Coming from an acknowledged personal friend of the new President, Lamon's unexpectedly conciliatory message made its way up the Confederate military command and slipped into the Charleston newspapers.[39] The puzzling and indeed never fully understood piece of misinformation has earned Lamon the ire of generations of historians, leaving them wanting of an explanation of this arguably reckless message.

Most historical assessments of Lamon's role in the mission range from dismissive to openly contemptuous, but those engaging in these assessments also remain at a loss to provide a sound explanation for his actions. "No conclusive explanation has ever been offered, either for the sending of Lamon to Charleston, or for his conduct after he got there," notes David M. Potter, who then speculates that Lamon might have been a bodyguard for Hurlbut, although this neither finds support in Hurlbut's account nor explains why the two men separated for most of their stay in Charleston. A more charitable hypothesis holds that Lamon was acting on behalf of Seward's known efforts to press for the abandonment of the fort as an attempt to deescalate secessionist tensions.[40] We may never know Lamon's true purpose at Fort Sumter, but he suffered no reprimand as one might expect of a botched endeavor resulting in a false message of potentially great political consequence. To the contrary, Lincoln provided Lamon with his political position almost immediately after his return to Washington.[41]

Lamon's appointment as U.S. Marshal for the District of Columbia was probably intended to provide him with local federal employment so that he could remain in the President's company and persist in his role of performing political tasks along the lines that his biographer Tilton describes. The office was not merely a titular role, however, and Lamon quickly assumed its routine duties. The District's Marshal was also the legally designated officer of the federal court system in the capital including the Supreme Court itself.

Lamon's duties included a multitude of judicial and administrative tasks. The position made him the superintendent of the District's jail, leading to his aforementioned clash with Congress over his role in the enforcement of the Fugitive Slave Act. He served as the D.C. Supreme Court's agent in the auction of ships and cargo items seized by the government as prizes of war following the landmark *Prize Cases* ruling of 1863.[42] Lamon was also directly involved in the execution of multiple routine warrants, writs of the courts, presidential pardons, and

directives of the State Department pertaining to other prisoners at the time of the Merryman arrest.[43] In 1863 he revised and improved the record-keeping procedures of the District's court system, and on numerous occasions he oversaw police protection for the White House. These and other activities in his official capacity brought him into regular contact with Justices of the Supreme Court, with Attorney General Bates and other officers of the executive branch, and with, of course, the President himself.

The actual duties of the district's U.S. Marshal run directly counter to the speculative dismissal of Lamon's account of the Taney episode by reason of his "low" office, as suggested by Fehrenbacher and echoed by McGinty. It is true that the unprecedented nature of a warrant for the Chief Justice ensures that such a task, if ever contemplated, would not sit easily with any existing officer of the government. The U.S. Marshal for the District was a natural candidate, however, on account of that position's official duties with the Supreme Court and law enforcement in the capital. Remaining mindful that Lamon mentioned only the contemplation of a warrant for Taney and not its actual execution, it is not difficult to demonstrate his connection to other political arrests or observe their parallel to his claimed role in the *Merryman* case.

Marshal Lamon's Other Political Arrest

Lamon's first week as U.S. Marshal coincided with one of the most trying moments of Lincoln's presidency. Lincoln opted against abandoning Fort Sumter, a course that broke from Lamon's signal to Governor Pickens the previous week as well as from Seward's informal negotiations, although the President's decision was also directly informed by information Lamon conveyed after his visit to the fort. Lincoln notified Pickens of his decision to send a relief expedition to the fort on April 6, the same day Lamon received his official commission.[44] As the country descended into armed conflict in Charleston harbor, a loosely related drama unfolded in the courtrooms and jails of the District of Columbia. The case involved William M. Gwin, the now ex-Senator from California who had confided with Lincoln through Lamon's arrangements and who had served as Seward's unofficial liaison with the Confederates in the week after Lincoln took office. Gwin had abruptly departed from Washington on March 12, following an impasse in Seward's surreptitious uses of his connections. Gwin's movements from that point on are thinly recorded, although he likely traveled south to Virginia to take the temperature of secessionist sentiments and settle some of his business affairs, with the probable intention of sitting out the war in the west.[45]

With his whereabouts unknown for almost three weeks, Gwin returned to the capital on April 4 to reconnect with his wife, herself a prominent figure of the 1850s Washington social scene. Unexpectedly, shortly thereafter he found himself under arrest and delivered to the D.C. jail, ostensibly to answer for an outstanding debt claim. Acting quickly, Gwin's attorney sought and obtained a writ of habeas corpus from Judge William M. Merrick of the D.C. Court of Appeals on April 9. Merrick declined to consider the specifics of the debt allegations and quietly ordered the prisoner released under the protection of his senatorial privilege on the grounds that it permitted transit to his home state after his term expired.[46]

Although ostensibly tied to a debt case, the sparsely documented arrest likely entailed another dimension, laden with the secrecy of unofficial Confederate diplomacy. In addition to his knowledge of Seward's sensitive politicking, the Californian's loyalties faced their own scrutiny from the government. Edwin M. Stanton, a Washington attorney who would later become Lincoln's Secretary of War, wrote to former President James Buchanan that he encountered Gwin in the

capital. The Californian, Stanton explained, had "just returned from Mississippi." He "speaks with great confidence of the stability & power of the Confederacy" and believes "that armed collision will soon take place."[47] On the day of his court appearance, several northern newspapers reported that Gwin and Delaware Sen. James A. Bayard would soon be departing for Montgomery, Alabama, on uncertain business, intimating an attempt to initiate negotiations of their own with the Confederate government. Other reports speculated that Gwin intended to return to California with the hope of aligning her with the Confederacy or of instigating a breakaway "Pacific Republic" of his own design along with outgoing Sen. Joseph Lane of Oregon. In the wake of Gwin's release, his teenage son, a cadet at West Point, suddenly resigned his commission and departed to fight for the South, although apparently against his parents' wishes.[48] To make matters worse, the entire episode played out against the unfolding backdrop of the Confederate decision to fire upon Fort Sumter.

Gwin would be arrested once more before the end of the war as a result of suspected collaboration with the Confederates. After spending the summer in California, he sailed east again by way of Panama in November and found himself placed under arrest for "disloyalty" by an overzealous Union general on board the ship and delivered into military custody upon arrival in New York. This second arrest triggered a political cat-and-mouse game at the highest levels of the government, with Gwin's knowledge of Seward's secretive dealings in the secession crisis lurking in the background. After meeting with Gwin in New York, Samuel Ward alerted Seward that "two judges of the U.S. Supreme Court offered to issue habeas corpus" although the ex-Senator's wife had declined, hoping for a more private resolution. With Seward apparently inclined to sustain Gwin's detention, possibly as a means of assuring his silence, the well-connected Californian's friends appealed directly to Lincoln. Gwin's case, the President explained, was "a very delicate subject, and Mr. Seward will be very mad about it." Lincoln nonetheless acquiesced and granted him a parole, summoning Gwin to Washington, where the two also conferred in private. Gwin reportedly told Ward at the time that "he had felt for six months on a volcano, and knew too much but to keep clear of gunpowder."[49]

A political cloud also hangs over the lesser-known first arrest of Gwin in April, carrying implications for Lamon's claimed role as the agent tasked with arresting Chief Justice Taney. Lamon later recounted to Leonard Swett his involvement in what is almost certainly the first Gwin case, albeit without identifying its still-living subject's name. The referenced incident took place "[s]hortly after I was appointed U.S. Marshall" and involved the arrest of "a gentleman of Washington, of some prominence." Lamon continued:

> I became well satisfied that he had more useful knowledge of some crookedness, I began to suspect and fear, than one man ought to possess, and I was desirous of having him divide his store of information with me. He was greatly frightened. At length I made a square proposition to him, after he had given an intimation that he would tell me all he knew about plots, conspiracies, dangers, persons &c., I would manage to give him immunity from the charge and get his matter hushed up.[50]

In exchange for the information, Lamon promised to protect his prisoner's name from association with the case. Noting that other "advisory parties were prominent men in Washington"—a likely reference to Seward, Ward, and perhaps other unnamed

participants in the informal negotiations with the Confederate agents—he "concluded no good to the country, and much harm to the individuals, would result if I were to violate the confidence and promises made to an unfortunate man, whose services had been so valuable." Lamon later repeated a shortened version of this story, referring to the prisoner as a man "in a position to know the secrets of the enemy in conspiracy."[51]

To the extent that we may establish Gwin's identity in the case—and given the very specific timing and stature of the person described, few if any other obvious candidates emerge—Lamon's note reveals a sensitive, secretive, and largely forgotten political intrigue that directly involved the U.S. Marshal's office. At the outset of the war, the Lincoln administration was still scrambling to identify its friends and check its enemies who still remained in the capital. Occupying a precarious space that did not fully qualify as either, Gwin was briefly swept up in the chaos before being allowed to quietly depart for San Francisco.[52]

The obscurity of Gwin's case attests to the messy and poorly documented nature of early arrests involving persons of ambiguous loyalty. Gwin's detention and release fell directly within Lamon's statutory jurisdiction. It is not difficult to see how Taney might have similarly landed under Lamon's watch. With the rapid militarization of the capital for defensive reasons, the D.C. Marshal's office quickly became something of a de facto repository for several early disloyalty cases.[53] Skeptics of the Taney arrest story have tended to present it as an unusual assignment for the marshal's duties so as to cast doubt upon Lamon's claims. In reality, political detentions had already become a regular function of Lamon's duties before Taney even entered his courtroom.

Assessing Lamon's Manuscript

Lamon's claimed role in an aborted arrest warrant for Roger B. Taney appears in the unpublished second volume of his ghostwritten 1872 biography of Lincoln. Unlike the first volume, Lamon actually composed the majority of this manuscript.[54] He was also engaged in the beginnings of a biographical turf war with Nicolay and Hay and was at pains to recover his own increasingly diminished reputation in the Lincoln White House from his competitors. Lamon approached something of a single working manuscript for the biography by 1886, although it suffered from severe disorganization and a tendency to intersperse his own narrative with several lengthy droning passages of military minutiae. He sold excerpts of the stronger passages, which were nationally circulated as newspaper articles, appearing between 1884 and 1888 under the recurring title "The Real Lincoln." This gave him a modest spike in income and prompted discussions with prospective publishers, all without result.

When Lamon died in 1893, his book was still incomplete and without a press, although he had not quite abandoned the project, and he left behind dozens of accompanying notes in the text indicating planned edits. Two years later, his daughter Dorothy Lamon Teillard used the unfinished manuscript along with the newspaper articles and other scrap writings to complete a book of her father's stories about Lincoln. While much of the original material in Teillard's **Recollections of Abraham Lincoln** came directly from this manuscript, she omitted the entire habeas corpus chapter and with it Lamon's potentially significant revelation about Chief Justice Taney. The exclusion was probably little more than a matter of editorial discretion. Teillard organized her father's writings thematically and tended to favor anecdotes attesting to the personal attributes of Lincoln rather than a chronological narrative of his presidency.

Although its existence was known from the time of Teillard's edited book and even occasionally sought by other Lincoln biographers, Lamon's unpublished draft saw little

further attention until the late twentieth century. Part of the reason was Teillard herself. "I think she would not only deny you the privilege [of inspecting it], but all who might ask her," wrote the early Lincolniana collector Gilbert A. Tracy in a 1914 letter to Jesse Weik. Tracy had been permitted to peruse the manuscript—described as a set of partially bound sheets—while visiting the Teillard home, although he hesitated to divulge its contents. "I do not know but I committed a breach of confidence in mentioning it, consequentially I am a little delicate about the matter myself," he explained.[55]

Teillard's handling of Lamon's papers carries interesting implications for the dissemination of their contents. Modern reception of the Taney arrest memorandum is as much a product of her editorial decisions and the subsequent handling of her father's papers as any revelation contained in its text. In considering the Taney story's provenance, historians must understand that it actually derives from the very same source material that they have long known and accessed, in part, through the edited **Recollections** that Teillard published in 1895. A simple discretionary change by Teillard might have easily introduced the Taney story to her own audiences for more than a century instead of leaving it to rediscovery by Hyman and its ensuing contested nature in a different political environment.

Clues about the Taney passage's purpose may be found in Lamon's full unpublished chapter, and indeed most modern skepticism around it seems to derive not from a reading in this context but from a perversion of its political implications through raging—and often amateur—debates in the modern era over Lincoln's legacy on civil liberties. Stepping away from this line of argument, it becomes evident that Lamon's story was neither the smoking gun to demonstrate the unconstrained abuses of executive power during the war nor the gratuitous libel upon Lincoln's memory that some of its skeptics have made it out to be. It was actually a personal detail affixed to a chapter that Lamon fully intended as a vindication of Lincoln's adopted course towards disloyal persons.

As with many of the omitted segments of the second manuscript, the "habeas corpus" chapter is exceedingly dry. It contains a short and generally accurate recounting of events surrounding John Merryman's arrest, much of it excerpted from military orders and reprinted government documents. It also lacks Lamon's characteristic storyteller's voice, offering only rote recitation of dates and events in sequential order. The Taney episode is a brief and inconspicuous component of this slow and unemotional retelling of *Merryman*, sitting between a quotation from Taney's ruling and an excerpt from Horace Binney's famous legal argument favoring the constitutionality of Lincoln's suspension.

Whatever the object of its inclusion, the arrest warrant passage was certainly not written to provoke outrage, reveal offending secrets, or elucidate upon the inner complexities of Abraham Lincoln's legal mind. Nor does it show any telltale characteristics of a self-serving insertion wherein Lamon stakes an embellished personal claim to the events around him, save its tempered assertion that Lincoln entrusted him with "discretion" in affecting the arrest.

A legal case for Lincoln's suspension of the writ develops throughout the chapter. Lamon uses Binney approvingly, followed by Lincoln's own justifications as stated in his famous public letter to Erastus Corning from 1863. He then closes the chapter in open praise of Lincoln's actions, justified by "the higher law of necessity in the face of danger to life and country," and he concludes in contempt for those who "clamored" about the Constitution while refusing to fight for the Union. Lamon's final judgment on Lincoln is entirely approving, leaving no doubt that he stands on Lincoln's side of the argument:

"Neither the decision of the Chief Justice of the United States, the remonstrance and deprecation of the New York Convention, the threats of the Ohio Democracy, nor the formidable army of the South had the effect of deterring Mr. Lincoln from his settled and determined duty."[56]

Recalling for the moment the political context of the *Merryman* case and the public clamor against Taney it provoked in the North, Lamon's "habeas corpus" chapter contains his own testimony to the sheer uncertainty of the times. Echoing passages from Lincoln, he notes that "[m]any things were necessarily done or authorized by him that were not specifically provided for by the Constitution and laws." Where specific matters of decorum and statute fell by the wayside or, more probably, were absent from the situation, he appeals to the necessity of improvisation: "In the midst of a fight there is little time to think of introduction, compliments, courtesies, modes, apologies, or inquiries as to who commenced the fuss."[57]

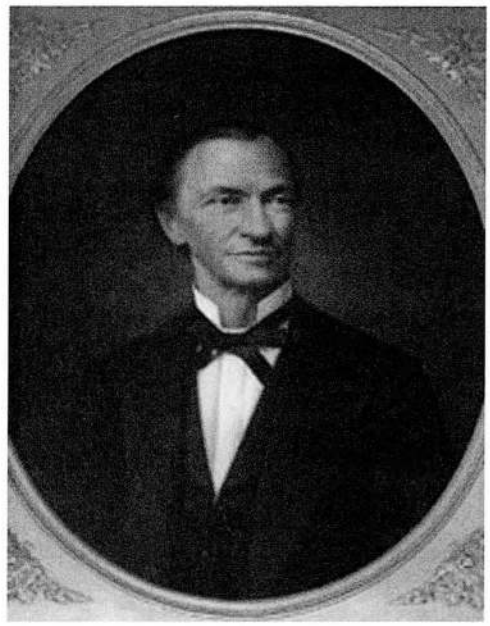
Assessing the Taney Arrest Story

On May 28, 1861, the day that Taney announced his ruling in the *Merryman* case from the Bench, President Lincoln hosted an evening reception for civil and military officials at the White House. Lamon stood by the President's side during the procession line and presided over the official introduction of dignitaries.[58] Few records document the other activities of either Lincoln or Lamon during the days surrounding Taney's ruling, although, as noted, a similar problem extends to primary source attestation of Lincoln's engagement with the entire case.

Remaining careful not to push the evidence too far, one may evaluate Lamon's account through his role as an officer of the federal courts as well as his employment by Lincoln in the preceding months. Examined in light of the parallel Gwin arrest, Lincoln's use of Lamon for sensitive tasks such as the Charleston mission, and the statutory functions of the D.C. Marshal's office at the time of the case, it becomes difficult to dismiss Lamon on the basis of either the capacities of his appointment or his proximity to the President. If an arrest order for Taney was ever contemplated at the White House in late May, 1861, Lamon was an entirely plausible witness to this discussion in Lincoln's presence and an appropriate official to serve the warrant under the statutes and practices of the time.

It is possible to scrutinize Lamon as a witness yet also assess his statement contextually against the Lincoln administration's handling of the political crisis caused by the outbreak of the war. The panic of the moment forced the administration into uncharted legal territory, and Taney's handling of the *Merryman* arrest must be included among the many confusions of those early months. The better part of a year would pass before the Lincoln administration settled on regular protocols for high-profile prisoner detentions, although arrests of prominent officials were actually very common in the border states.

Several of these arrests are well documented, and speak to the frenzied environment in which Taney handed down his decision. Just three days after Taney's ruling, former Maryland Governor Thomas Pratt was arrested by the military in Annapolis for suspicions of disloyalty and transferred to Fort Monroe.[59] U.S. Representative Henry May was arrested on September 11, 1861, along with several Baltimore newspaper editors and elected officials, although most were eventually released. There was little consistency employed to determine standards of evidence or even grounds for arrest. Mayor Brown of Baltimore was imprisoned in Fort McHenry, much as Taney had predicted, and held until his term in office expired in 1862, though scant evidence of his disloyalty was ever produced.[60] On September 17, former Governor Charles Morehead of Kentucky was arrested on suspicions of disloyalty. Although he obtained a writ of habeas corpus



Other judges were harassed for continuing to issue writs of habeas corpus. For example, in 1862 the Provost Marshal for the District of Columbia stationed an armed sentry outside the house of federal judge William M. Merrick (above) prompting the other justices on the D.C. Circuit Court to admonish the executive branch for its actions.

ordering his release, the War Department whisked him away to Fort Lafayette in New York to place him beyond the reach of the federal district court in Louisville.[61]

One of the oddest cases happened in late October when the Provost Marshal for the District stationed an armed sentry outside the house of federal judge William M. Merrick—the jurist from the Gwin case—in an apparent attempt to intimidate him over the continued issuance of writs of habeas corpus. Echoing Taney, the other justices on the D.C. Circuit Court admonished the executive branch for its actions—to no avail—and issued a formal protest against the harassment of their judicial colleague.[62] While these parallel cases do not directly corroborate Lamon's account of the contemplated Taney arrest, they do show the chaotic state of affairs that lasted for several months after the outbreak of hostilities. Given the devolving political situation that Lincoln inherited from the moment he took office, these conditions are not unexpected. As Gideon Welles candidly admitted over a decade later, "[o]ne third of the administration of Mr. Lincoln expired before he had a clear and well-defined policy as to the course" of the war.[63]

Ultimately, we find much noise and yet very little action in the administration's posited response to Chief Justice Taney. Lamon likely remembered a conversation with the President entertaining the option of arresting Taney, sometime shortly after he issued the initial writ on May 26. This was entirely conceivable or even expected discussion amidst a well-documented and public clamor for the Chief Justice's imprisonment, although also one that yielded no further results, and prudent attentiveness to its political fallout thereafter counseled Lincoln against pursuing further.

If the arrest "plot" offered little in the way of an advantage to Lincoln and much potential downside, a larger parallel may also be seen in *Merryman* itself. This closely examined collision between the executive and the judiciary over habeas corpus similarly generated far more noise than action involving its famous prisoner. Lincoln's adopted tactic of ignoring the courts over habeas corpus, although still a highly debated point concerning his constitutional legacy, achieved his objectives when evaluated on strict consequentialist grounds. The prostrate condition of the judiciary and the sheer numerical advantage of the military apparatus precluded a more rash action from being taken, if such was ever contemplated. To this end, Taney found himself with no practical means of effecting his decision upon the military, as he declined to pursue its delivery by *posse comitatus* upon a superior military force despite volunteers in his courtroom who were willing to make the attempt.[64]

Taney answered Lincoln's silence with a delaying tactic of his own, but it was of wholly subdued consequence. He impeded all additional attempts to bring about the

prosecution of John Merryman by asserting judicial prerogative over the case to keep it in his own courtroom. Yet citing a recurring bout of illness—a plausible if convenient circumstance for the octogenarian jurist—he was able to delay the case from coming to trial indefinitely. The irony of the episode, notes James F. Simon, is that, while the Chief Justice's ruling asserted the civil judiciary's power over the case so long as the courts remained functional, "[t]he Chief Justice denied the government the opportunity to prove its case."[65]

Merryman's prosecution underwent a curious progression of its own, suggesting an element of *post hoc* political justification for the military's own deficiencies. Whereas the original search order for Merryman struggled to even associate a name or charges to the case, the draft indictment evolved into an eight-page list of charges including treason, insurrection, the burning of six railroad bridges, and the destruction of specific telegraph wires.[66] The product, even if never advanced in court, was simultaneously a stronger case against the accused and an act of cleanup for hasty prior decisions, made in a period of heavy uncertainty for the administration's political detention policies and thus more vulnerable to Taney's judicial strike-down.

If Taney harbored disunionist sympathies, he retained them in private for the remainder of his life, although he also suggested to friends his own acquiescence in the Confederates' departure should such a result emerge from the war. When acting in an official capacity, he did little to conceal his disapproval of Lincoln's war policy, and he spent his time developing legal arguments for prospective cases that he anticipated coming before the full Supreme Court. The exercise was wishful at best, although he probably desired a chance to make a judicial assault upon Lincoln's most famous act, the Emancipation Proclamation, on grounds mirroring *Merryman*.[67] Taney also weathered the public clamor of his enemies just as Lincoln continued to steer around him, save the occasional formalities of interaction with his high judicial bench. He died on October 12, 1864, at the age of eighty-seven. In a final stroke of irony, Ward Hill Lamon, who had come to know the Chief Justice through his capacity as an officer for the High Court, served as one of the pallbearers and directed the arrangements for his funeral train.[68]

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Lamon's part in the rumored arrest "plot" unfortunately comes from a faulty witness in a period of Lincoln's presidency that was lightly documented. But the historical discussion of how to interpret his recollections has become grossly distorted into a running debate about the broader legacy of Lincoln's record on civil liberties. With *Merryman*, we find rumored plots and anticipated political fallout yet, ironically, very little in the way of outcome. In the end, Taney plainly was *not* arrested. Often lost in the present discussion is the fact that Lincoln ultimately opted for the very different habeas corpus strategy so long as he could afford to ignore the courts without judicial consequence.[69] This context signals the subtler lesson of the affair, as it may simply reflect the Lincoln administration's complex approach to what it saw as the larger problem of disloyalty, with urgency of unfolding events, with multiple options on the table, and with no single strategy prevailing for all instances of early political opposition to its wartime policies.

Lamon's recollection may therefore carry less gravity for the external debate over Lincoln's civil liberties legacy than its first appearance permits, although it may have more importance for the contextual complexities of the White House's temporarily panicked response to an unfolding and rapidly escalating crisis. Neither is there presently a compelling reason to reject

Lamon out of hand. The discerning historian may therefore find in the Taney arrest story a glimpse into the mood of the moment at the outset of a long and uncertain war, its contents revealing an accurate representation of sentiments being discussed but hardly intended as a mark of disparagement and, above all, far from an obscure story to be sidestepped on account of its complicated but unavoidable source.

ENDNOTES

[1] Jonathan W. White. **Abraham Lincoln and Treason in the Civil War** (2012), particularly the discussion of Merryman's motives on pp. 95-98

[2] Yoke to Cadwallader, May 21, 1861, in Letters Received, Adjutant General's Office, National Archives and Records Administration, Record Group 94, M 619, C 1163.

[3] Samuel Tyler, ed. **Memoir of Roger Brooke Taney, LL.D.** (1872), p. 427; "The Late Chief Justice Taney," *McConnelsville Conservative,* May 6, 1870.

[4] James F. Simon, **Lincoln and Chief Justice Taney** (2006), p. 187. An earlier habeas proceeding before U.S. District Judge William F. Giles was rebuffed in the weeks before Taney's arrival. *See* Carl Brent Swisher, **Roger B. Taney** (1935) pp. 548-50.

[5] George W. Brown. **Baltimore and the Nineteenth of April, 1861** (2001), p. 90.

[6] Tyler, **Memoir**, p. 431.

[7] Taney to Pierce, June 12, 1861, "Some Papers of Franklin Pierce, 1852–1862," *American Historical Review*, 10 (January 1905): 368 (emphasis added).

[8] G.T.C. [George Ticknor Curtis], "Has the President of the United States Any Lawful Authority to Suspend the Writ of Habeas Corpus?" *Boston Daily Courier,* July 12, 1861; Benjamin R. Curtis, *Executive Power* (1862).

[9] Benjamin R. Curtis, Jr. and George T. Curtis, ed. **A Memoir of Benjamin Robbins Curtis** (2002). p. 240; Brown, **Baltimore and the Nineteenth of April, 1861**, p. 91.

[10] "The Traitor Taney," *Cleveland Daily Herald,* May 31, 1861.

[11] Quoted in "From Baltimore" *Nashville Union and American,* June 6, 1861.

[12] "The War for the Union" *The Jeffersonian,* June 13, 1861.

[13] "Judge Taney Subsided," *New York Times,* June 4, 1861.

[14] Frederic Bernal to Russell, May 30, 1861, Dispatch No. 25, FO 703, National Archives of the United Kingdom.

[15] Bates to Lincoln, July 5, 1861, and Johnson to Lincoln, June 17, 1861, Abraham Lincoln Papers, Library of Congress, Washington, D.C. (hereafter AL-LOC).

[16] Lincoln's original handwritten draft included a more direct reference, "I have been reminded from a high quarter," although he later struck this line from the final version. *See* "Handwritten Draft, Message to Congress," July 4, 1861 in AL-LOC.

[17] Harold Hyman, **A More Perfect Union** (1973) p. 84.

[18] "Habeas Corpus," LN 2422, Ward Hill Lamon Papers, Huntington Library, San Marino, California.

[19] Lamon Papers, LN 2418 A & B, Huntington Library.

[20] Hyman, **A More Perfect Union**, p. 84.

[21] Hyman's citation error initially linked the document to Francis Lieber, whose papers are also at the Huntington Library, and was repeated in several works. *See* Frederick Calhoun, **The Lawmen** (1989), pp. 101-103; Jeffrey Rogers Hummel, **Emancipating Slaves, Enslaving Free Men** (1996), p. 154; William Safire, **Freedom** (1987) pp. 26, 981. Hummel, Huntington curator John Rhodehamel, and independent researcher Joseph Eros discovered the error in 2001. The 2nd edition of Hummel, **Emancipating Slaves** (2013) recounts this discovery.

[22] Brian McGinty, **Lincoln and the Court** (2009), pp. 76-77; Simon, **Lincoln and Chief Justice Taney** (2006) and interview with Simon, as quoted in Bob O'Connor, "Lamon's Life of Lincoln Uncovered," *The Lincoln Forum Bulletin,* Issue 29, (Spring 2011); Research note to LN 2422, Huntington Library; Don E. Fehrenbacher, **The Dred Scott Case** (1978) p. 716, n. 20.

[23] *See* Charles Adams, **When in the Course of Human Events** (2001), pp. 48-49, which has since become something of a *sin qua non* of the modern anti-Lincoln genre. *See also* Joseph Sobran, "The Right to Secede," *Sobran's: The Real News of the Month,* September 30, 1999; Thomas DiLorenzo, **Lincoln Unmasked**, (2006), pp. 93-94. A contextual discussion of the "anti-Lincoln tradition" may be found in John M. Barr, **Loathing Lincoln** (2014), and Don E. Fehrenbacher, "The Anti-Lincoln Tradition," *Journal of the Abraham Lincoln Association,* 4-1 (1982).

[24] Sources consulted include U.S. Marshal's Office Records, National Archives and Records Administration, Record Group 527; U.S. Attorney for the District of Columbia criminal docket book, NARA, Record Group 118.10; Records of the U.S. District Court for the District of Columbia, NARA, Record Group 21.10.02; and Adjutant General's "Letters Received" files, NARA, Record Group 94. Early Civil War era records from each are either sporadic or missing items. Lamon's own term as U.S. Marshal drew attention to the problem of poor recordkeeping practices in this office prior to 1863. "Local News," Washington *Daily National Republican,* May 25, 1863.

[25] Snethen to Lincoln, June 29, 1861; Bates to Lincoln, July 5, 1861; and Johnson to Lincoln, June 17, 1861 in AL-LOC.

[26] Yates to Seward, February 9, 1861, LN 731; Latham to Lamon, March 25, 1861, LN 1539, Huntington Library.

[27] Jesse W. Weik, Michael Burlingame, ed. **The Real Lincoln: A Portrait** (2002), pp. 217-18.

[28] Rodney O. Davis, "Lincoln's Particular Friend and Biography," *Journal of the Abraham Lincoln Association,* 19-1 (Winter 1998); Mark E. Neely, Jr. **The Abraham Lincoln Encyclopedia** (1982), p. 178; Joshua Zeitz, **Lincoln's Boys: John Hay, John Nicolay, and the War for Lincoln's Image.** (2014), p. 247.

[29] Fehrenbacher, **Dred Scott,** p. 716, n. 20.

[30] Alexander K. McClure, **Abraham Lincoln and Men of War Times** (1996) pp. 17-18; Swett to Col. Stone, February 17, 1861, Huntington Library, LN 639; Usher to Lamon, May 20, 1885, reprinted in Ward Hill Lamon, Dorothy Lamon Teillard, ed. **Recollections of Abraham Lincoln** (1994), p. xxv; Michael Burlingame, ed. **An Oral History of Abraham Lincoln: John G. Nicolay's Interviews and Essays** (1996), p. 42; Davis to Seward, May 26, 1865, LN 139, Huntington Library.

[31] "Draft of Letter to the Senate Prepared for Ward H. Lamon," in **Roy P. Basler, ed. Collected Works of Abraham Lincoln**, Vol. 5, p. 72 (hereafter CW-AL); *see also* Lamon, Chapter 12, unfinished manuscript, Huntington Library. For an example of Lamon's sustained enforcement of the Fugitive Slave Act, *see* Receipt for W.A.T. Maddox, February 6, 1862, LN 1077, Huntington Library.

[32] Robert Lincoln's ensuing feud with Lamon is recounted in Jason Emerson, **Giant in the Shadows: The Life of Robert T. Lincoln**. (2012), pp. 244-45. Hay and Nicolay's response to Lamon's attempts at memoir writing are detailed in Zeitz, **Lincoln's Boys**, pp. 246-47. Curiously, Lamon and Hay retained a private collegiality despite their public feuding and frequently wrote to each other about the progress on their respective Lincoln projects. *See* Hay to Lamon, September 23, 1887, LN 320; Hay to Lamon, September 27, 1887, LN 1009; Hay to Lamon, October 10, 1887, LN 321, Huntington Library.

[33] Zeitz **Lincoln's Boys**, pp. 248-51; Thomas F. Schwartz, "I have never had any doubt of your good intentions": William Henry Herndon and Ward Hill Lamon as described in correspondence from the Robert T. Lincoln Letterpress Volumes," *Journal of the Abraham Lincoln Association,* 14-1 (1993), 35-54.

[34] Clint Clay Tilton, **Lincoln and Lamon: Partners and Friends** (1931), p. 34; Lamon to Lincoln, May 27, July 4, August 17, August 23, and October 21, 1861 in AL-LOC.

[35] Weed to Willard, February 19, 1861, LN 697, Huntington Library.

[36] Evan J. Coleman, "Gwin and Seward—A Secret Chapter in Antebellum History," *Overland Monthly,* November 1891, 468-69; William Henry Ellison and William M. Gwin, "Memoirs of Hon. William M. Gwin, (Concluded)," *California Historical Society Quarterly,* Vol. 19, No. 4 (Dec. 1940), 363; Gwin's story is also corroborated in detail in the famous "Diary of a Public Man," now believed to have been written by journalist William Henry Hurlbert. *See* Daniel W. Crofts, **A Secession Crisis Enigma**, (2010), pp. 87-88, 220. *See* Hurlbut to Lamon, April 5, 1861, LN 338, Huntington Library. *See also* Walter Stahr, **Seward: Lincoln's Indispensable Man** (2012) pp. 244-45.

[37] Commission of Ward Hill Lamon by Postmaster General Montgomery Blair, LN 36, Huntington Library.

[38] Hurlbut's report of the trip survives. *See* Hurlbut to Lincoln, March 27, 1861 AL-LOC. Lamon filed no written report of the trip but verbally communicated his findings to the President. *See* Ward Hill Lamon, Dorothy Lamon Teillard, ed. **Recollections of Abraham Lincoln** (1994) pp. 68-79.

[39] Frances Pickens, "Evacuation of Fort Sumter—Secret History," published in the *Charleston Mercury,* August 6, 1861.

[40] For critical assessments of Lamon's role, *see* Richard Nelson Current, **Lincoln and the First Shot** (1963), pp. 72-73; David M. Potter, **Lincoln and His Party in the Secession Crisis** (1942), p. 340; Allan Nevins, **The War for the Union** (1950), p. 54; David Detzer, **Allegiance: Fort Sumter, Charleston, and the Beginning of the Civil War** (2002), pp. 222-23; **Maury Klein, Days of Defiance** (1999), pp. 343-44. A more charitable interpretation rooted in the Seward thesis may be found in Michael Burlingame, **Abraham Lincoln: A Life** (2008), Chapter 22.

[41] Lincoln to Bates, April 6, 1861, CW-AL, Vol. 4, p. 323.

[42] *Prize Cases,* 67 U.S. 635. *For example, see* Ward H. Lamon, "Auction notice for Schooner *Sarah Lavinia,*" Washington *Evening Star,* May 30, 1863.

[43] *For examples, see* Frederic Seward to Lamon on May 14, May 25, and June 8, 1861, Domestic Letters of the Department of State, NARA RG 59, M40, Volume 54; William M. Merrick, Writ of Contempt for General Graham, October 5, 1861, Habeas Corpus Case Records for the District of Columbia, 1820-1863, NARA RG 21, Entry 28, M434.

[44] Appointment of Ward Hill Lamon, April 6, 1861, NARA RG 59, Entry 787.

[45] Arthur Quinn, **The Rivals: William Gwin, David Broderick and the Birth of California** (1994), pp. 287-90; "Duplicity of Lincoln and his Instruments," *Charleston Mercury,* April 24, 1861.

[46] Writ of Habeas Corpus for William M. Gwin, April 9, 1861 and Case file for William M. Gwin, NARA RG 21, Entry 28, M434; "Local Items," *Alexandria Gazette,* April 11, 1861.

[47] Stanton to Buchanan, April 11, 1861, in John Bassett Moore, ed. **The Works of James Buchanan** (1910), Vol. XI, p. 178.

[48] Lately Thomas. **Between Two Empires: The Life Story of California's First Senator, William McKendree Gwin** (1969), p. 246; "News from the National Capital," *New York Herald,* April 9, 1861; "Letter from New York," *San Francisco Daily Evening Bulletin,* April 11, 1861 (reporting a letter posted March 30); "Journey to Pike's Peak, and to Oregon," *Portsmouth Journal of Literature and Politics,* April 27, 1861; "Letter from Washington," *San Francisco Daily Evening Bulletin,* May 11, 1861 (reporting a letter posted April 20); "Letter from New York," *San Francisco Daily Evening Bulletin,* May 29, 1861 (reporting a letter posted May 11); Quinn (1994), p. 290.

[49] George D. Prentice, "Some Reminiscences of Fort Lafayette, President Lincoln, and Mr. Seward," *Louisville Courier-Journal,* December 9, 1868; John A. Marshall, **American Bastille** (1881), pp. 617-20; Thomas, **Between Two Empires**, p. 272. *See also* **Official Records, War of the Rebellion** (1897), Series II, Vol. 2, pp. 1009-20.

[50] Lamon to Swett, July 28, 1885, LN 525, Huntington Library. Note that a page or more of this memorandum appears to be missing, including a referenced "enclosed paper."

[51] *Ibid.*, Lamon, "Chapter 14," Unfinished manuscript, Huntington Library.

[52] Gwin's April 1861 debt case was revived in connection with his second arrest. *See* "Correspondence," *Baltimore Sun,* December 9, 1862.

[53] Ball to Lamon, April 21, 1861, LN 1798, Huntington Library; The marshal's office connection to disloyalty cases is summarized in Calhoun, **The Lawmen,** pp. 104-107.

[54] Davis "Lincoln's Particular Friend," p. 21.

[55] Tracy's description suggests the possibility of other unaccounted versions of the manuscript, as the Huntington collection holds only two bound volumes. Tracy to Weik, March 14, 1914, in appendix to Weik, **The Real Lincoln**, p. 376; Dorothy Lamon Teillard to Edwin Markham, May 16, 1912, Special Collections, Hormann Library, Wagner College; "H.E. Huntington Buys Lincoln Treasures," *New York Sun,* March 24, 1914, and James V. Hutton, Jr. **Miss Dolly: The Remarkable Daughter of Ward Hill Lamon, Friend and Bodyguard of Abraham Lincoln** (2003) p. 39. In 2011, an edited version based on the Huntington manuscript was made available in print. *See* Bob O'Connor, ed. Ward Hill Lamon. **The Life of Abraham Lincoln as President** (Mont Clair Press, 2011).

[56] Ward Hill Lamon, "Chapter 6: Habeas Corpus," Unfinished manuscript, Huntington Library.

[57] *Ibid.*

[58] "Local News," Washington *National Republican,* May 29, 1861.

[59] "Important Arrests," *New York Herald,* June 1, 1861.

[60] **The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies**, (1900), Series II, Vol. II, p. 790.

[61] *Ibid.*, p. 805; William C. Harris, **Lincoln and the Border States** (2011), pp. 110-12.

[62] *United States ex rel. John Murphy v. Andrew Porter, Provost Marshal District of Columbia*, 2 Hay. & Haz. 394 (1861); Jonathan W. White, "Sweltering with Treason: The Civil War Trials of William Matthew Merrick," *Prologue Magazine,* Vol. 39-2 (Summer 2007); Robert O. Faith, "Public Necessity or Military Convenience?: Reevaluating Lincoln's Suspensions of the Writ of Habeas Corpus during the Civil War." *Civil War History* 62.3 (2016): 284-320.

[63] Gideon Welles, "Notes on the Treatment of Fugitive Slaves," ca. 1875. WE 408, Huntington Library.

[64] White, **Lincoln and Treason**, p. 32.

[65] Simon, **Lincoln and Chief Justice Taney**, p. 198; White, **Lincoln and Treason**, pp. 46-47.

[66] Yoke to Cadwallader, May 21, 1861, and James Whittemore and W.H. Abel, Arrest Report for John Merriman, May 25, 1861, in Letters Received, Office of the Adjutant General, RG 94, M 619, C 1163, NARA.

[67] Simon, **Lincoln and Chief Justice Taney**, pp. 222-23.

[68] "Local News," *Washington Evening Star,* October 15, 1864.

[69] In several other instances Lincoln simply ignored a habeas corpus proceeding in the civil judiciary, exhausting the court's options to enforce a writ. See *Ex parte Benedict*, 3 F.Cas. 159 (1862) N.D. NY; *In re Winder*, 30 F.Cas. 288 (1862) U.S. App. MA; *Ex Parte McQuillon*, 16 F. Cas. 347; 3 W.L. Monthly 440.

The (Very) Abbreviated Supreme Court Career of Edwin M. Stanton

ALBERT B. LAWRENCE

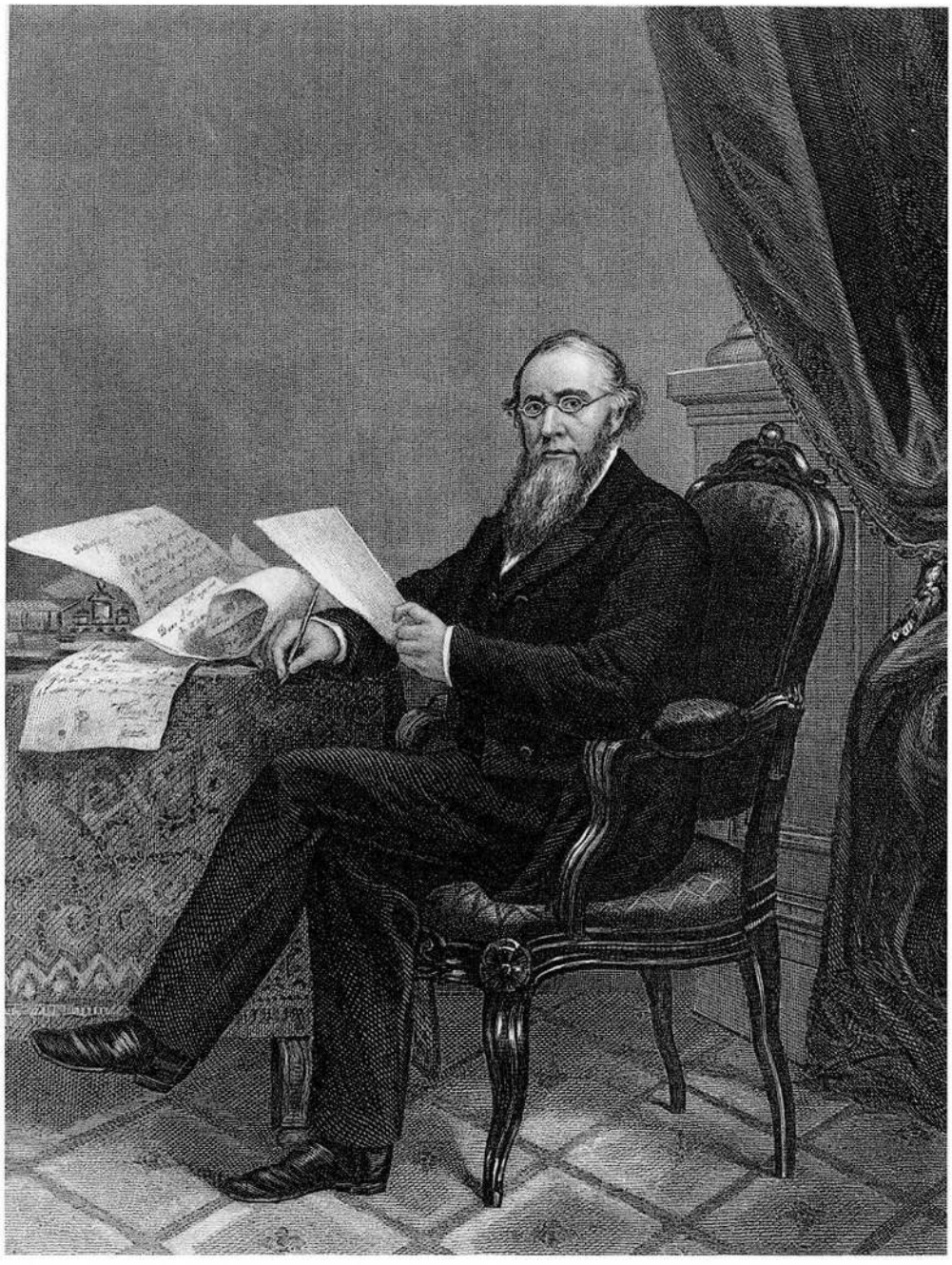
After an aged and ailing Justice Robert C. Grier announced in 1869 that he would retire from the Supreme Court when a replacement was named, a group began a movement to obtain the seat for Edwin M. Stanton.[1] On December 16, 1869, the Vice President and thirty-six Senators took the unusual step of petitioning President Ulysses S. Grant to nominate Stanton, and two days later 118 members of the House of Representatives added their support.[2]

Grant was reluctant at first.[3] Stanton had strong qualifications as a member of the Supreme Court bar, a former Attorney General, and President Lincoln's Secretary of War during the conflict between the states. He was respected and admired by many,[4] but he was in poor health. He also had enemies, having been the catalyst for the impeachment of President Andrew Johnson.[5] However, with two Supreme Court vacancies to fill because an additional seat had just been added by the Judiciary Act of 1869, Grant capitulated.[6] He offered Stanton the nomination on December 19, the nominee's fifty-fifth birthday, and forwarded it to the Senate the following day. Without even referring the nomination to committee, the Senate immediately confirmed Stanton by a vote of forty-six to eleven.[7]

There was, however, to be no body of Stanton jurisprudence, no legacy of Supreme Court decisions. He died at his K Street home four days later, on Christmas Eve. His commission was delivered to the family only posthumously as a tribute.[8] Was the nomination a serious one, or was the campaign to get him the nomination only a gesture to a dying statesman?

Early Life

Edwin McMasters Stanton was born on December 19, 1814, in Steubenville, Ohio, the son of a doctor. He was sickly even as a boy, suffering from asthma,[9] and, in 1833, he contracted cholera.[10] He was short and near-sighted and wore glasses at an early age.[11] As a result, his pursuits tended toward the



When President Ulysses S. Grant appointed him to one of two Supreme Court vacancies in 1869, Edwin M. Stanton was gravely ill. He died four days later. Was the nomination serious, or was it a gesture to a dying statesman? Above Stanton is shown in his prime as Secretary of War.

bookish and religious, rather than the athletic. He was considered somewhat imperious and pious.[12] His father died when he was thirteen,[13] and dwindling family funds forced him to abandon his studies at Kenyon College in his junior year. He had become an adherent of Andrew Jackson while in college, but he never became active in party politics. He

studied law after leaving Kenyon, was admitted to the bar in 1836, and joined the firm of a Steubenville judge, Benjamin Tappan, who had just been named to the U.S. Senate.[14] By the time he was in his twenties, Stanton had become a prosecutor in Ohio's Harrison County.[15]

Stanton's first wife, Mary A. Lamson, died in 1844.[16] Nearly every case on the court calendar in Steubenville had to be adjourned as a result because Stanton was representing a party.[17] He soon moved to Pittsburgh and left his two-year-old son in the care of his mother.[18] Twelve years later, at the age of forty-one, he married twenty-six-year-old Ellen Hutchinson.[19] They had three children. The youngest was only five when Stanton died.[20]

At the Bar

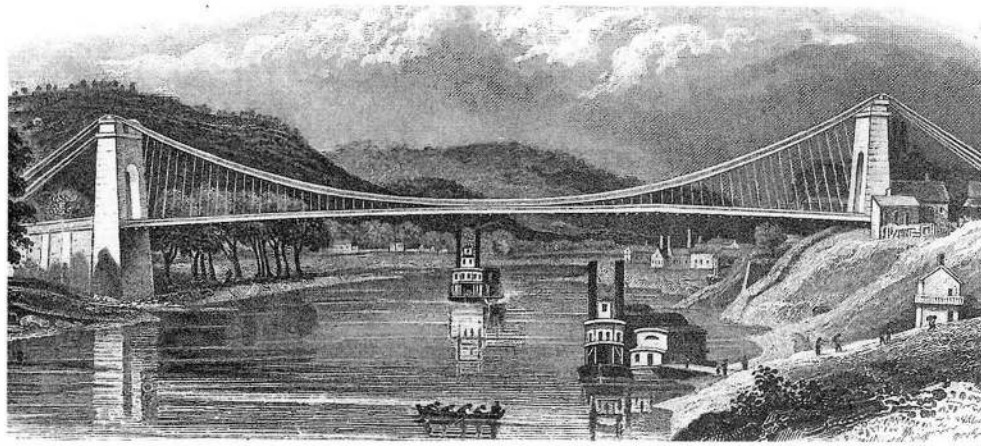
As a lawyer, Stanton was known as a hard worker,[21] and he amassed a considerable fortune.[22] He engaged in high drama in the courtroom and sometimes outside it.[23] He could be irascible, critical, caustic and ruthless when the situation demanded.[24] In Pittsburgh, he was hired to represent the Commonwealth of Pennsylvania in a lawsuit against the Wheeling and Belmont Bridge Co., which led to his appearing before the Supreme Court of the United States.[25] The company had built a wire suspension bridge across the Ohio River at what was then Wheeling, Virginia. The state had approved construction of the bridge in 1847 because it spanned its shores on both ends, but Stanton argued that the regulation of commerce on the river was within the purview of Congress.[26] Steamboats on the river carried to Pennsylvania 300,000 passengers and $50 million in rice, cotton, and sugar from the southern states and bacon, flour, tobacco, and other products from the western states to eastern markets. And Pennsylvania had invested in state-owned canals and railroads to facilitate passage of goods to Philadelphia and Pittsburgh.[27]

As a state was a party to the lawsuit, the U.S. Supreme Court had original jurisdiction.[28] Stanton sought an injunction on the grounds that the bridge obstructed navigation on the river.[29] Sitting on circuit in Philadelphia, Justice Grier, the man Stanton was ultimately nominated to replace, denied the injunction but ordered that the matter be argued before the full Supreme Court.[30] Stanton fell on an icy street in Pittsburgh and broke a leg, but he travelled to Washington to argue the matter on February 25, 1849. The Court accepted jurisdiction and appointed a commissioner to hear the facts.[31]

In 1850, Stanton chartered a steamboat and ran it under a bridge, knocking the boat's smokestack off, in a showy demonstration of the inadequate height of the bridge. It brought him and the case much publicity.[32] It also brought him a permanent disability; he fell on the boat's deck and injured the knee on the same leg he had broken, leaving him limping for the rest of his life.[33]

The Supreme Court's commissioner found that the bridge obstructed steamboat navigation.[34] In his argument to the Court, Stanton maintained that the bridge clearance would not allow steamboats with tall chimneys to pass, blocking commerce from New Orleans from the South and St. Louis and Cincinnati to the West.[35] "To the public works of Pennsylvania, the injury occasioned by this obstruction is deep and lasting," Stanton declared. "If these vessels and their commerce are liable to be stopped within a short distance as they approach the canals, and subject to expense, delay, and danger, to reach them, the same consequences to ensue on their voyage departing, the value of these works must be destroyed."[36] The full extent of the damages would be unceasing and could not be measured, justifying an abatement by injunction, he maintained.[37]

The Court agreed, in an opinion by Justice John McLean, who wrote that the

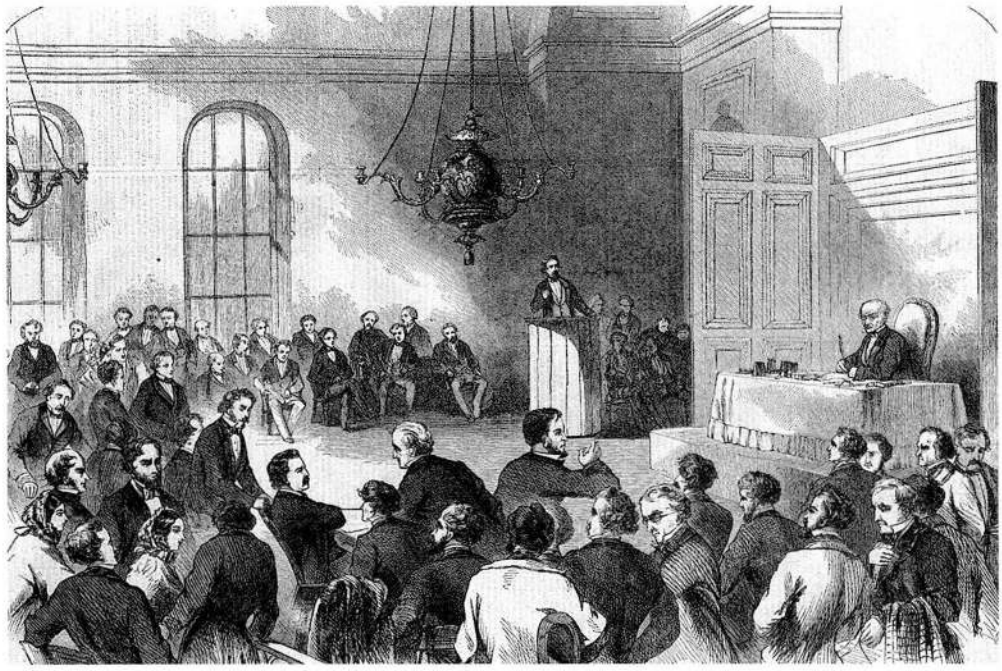


As a Pittsburgh lawyer, Stanton was hired to represent the Commonwealth of Pennsylvania in a lawsuit against the Wheeling and Belmont Bridge Co., which would lead to his arguing the case before the Supreme Court in 1852. To show the inadequate height of the bridge at trial, Stanton chartered a steamboat and ran it under a bridge, knocking the boat's smokestack off. In doing so, he fell on the boat's deck and injured his knee, adding to a leg injury and giving himself a permanent limp.

bridge was an obstruction to commerce, and Pennsylvania was irreparably injured "in her public works" and entitled to an injunction. The company had notice of the lawsuit before the bridge was built and should have suspended its work. As it had failed to do so, the Court ordered it to raise the elevation of the lowest point of the bridge to 300 feet above the channel by February 1, 1853, or "the bridge must be abated."[38]

His success in this case won Stanton a national reputation, and in 1856 he moved his law office to Washington, D.C.,[39] where he practiced primarily patent law.[40] Two years later, he was sent to California as a special counsel for the Attorney General to settle land claims on the territory seized from Mexico in 1846. A French merchant, J.Y. Limantour, claimed title to lands considered part of the public domain worth between and $10 and $12 million. Stanton collected and reconstructed 400 volumes of archival records of Mexican land holdings that discredited Limantour's claims. The special counsel also brought a suit against the Alameda Quicksilver Mining Co., alleging that documents giving it title to land in California were fraudulent. While in California, he argued a total of twenty-one cases concerning the land claims.[41]

Shortly after returning to Washington from California, Stanton was retained as part of a team of lawyers defending a New York congressman in a notorious murder case.[42] Daniel E. Sickles shot District of Columbia prosecutor Philip Barton Key, the son of the author of the national anthem and a nephew of Chief Justice Roger B. Taney,[43] outside the Sickles home on Lafayette Square, across the street from the White House, on a Sunday afternoon in February, 1859.[44] Sickles had learned that his young wife and Key were having liaisons at a house that Key rented for that purpose.[45] Meeting at Stanton's home, the defense team, led by New York lawyer James T. Brady, decided to concede that Sickles had killed Key but to argue that he was insane at the time.[46] Insanity had been established as a defense in England some sixteen years earlier,[47] and it had been used in the United States, but this was the first time a defendant maintained that, though he was insane at the time of the crime, he was no longer suffering a mental disease or defect. The concept was considered "revolutionary" at the time.[48] Even if Sickles was responsible for his behavior, the defense team claimed as an alternate defense that he was justified in avenging the adulterer of his wife.[49]



After he moved his law office to Washington, D.C. in 1856, Stanton represented Daniel E. Sickles, a politician who shot District of Columbia prosecutor Philip Barton Key, the son of the author of the national anthem and a nephew of Chief Justice Roger B. Taney. The murder trial created a sensation because Sickles had learned that his young wife and Key were having liaisons at a house that Key rented for that purpose.

Stanton's participation in the case may have been secured by the intervention of President James Buchanan.[50] "Stanton's very face on the team gave Dan's defense a seriousness it might not otherwise have possessed," according to one chronicler of the case.[51]

Stanton's co-counsel, James Brady, examined most of the witnesses,[52] who testified about the Congressman's emotional state after learning of the affair and seeing Key signal Mrs. Sickles by waving a handkerchief while standing in the park.[53] However, there was no medical testimony whatsoever and no evidence that Sickles had suffered from a mental illness before, during, or after the incident. Stanton sat at Sickles's side throughout the trial and handled most of the legal objections and arguments.[54] Brady provided the polite charm of the seasoned courtroom lawyer that he was. Stanton was a "sledge hammer," "hard-bitten" and "sour-faced."[55] Stanton summed up the case as to justification, casting Mrs. Sickles as a victim, as well as her husband.[56] "The consent of the wife cannot in any degree affect the question of the adulterer's guilt, and if he be slain in the act of the husband, then it is justifiable homicide," Stanton insisted.[57] There are three instances in which a defendant accused of homicide is justified in killing, he told the jury: in defense of his household, in defense of himself, and in "upholding family chastity and the sanctity of the marriage bed, the matron's honor and the virgin's purity." Key "took advantage" of Sickles's friendship and "debauched his house, violated the bed of his host, and dishonored his family . . . No man could enjoy any happiness or pursue any vocation if he could not enjoy his wife free from the assaults of the adulterer."[58] To find that a man could not defend his wife's honor would lead to prostitution and death, Stanton declared extravagantly. An adulterer's "lawless love" would soon be "supplanted by the object of some fresher lust, and then the wretched

victim is sure to be cast off into common prostitution, and swept through a miserable life and a horrible death to the gates of hell, unless a husband's arm shall save her."[59] The audience in the crowded courtroom applauded at his conclusion.[60]

There was a problem, however, because Stanton's version of the law was not the law of the District of Columbia at the time. Judge Thomas N. Crawford told the jury in his instructions that it was entitled to find justification if the defendant caught the couple in the act, saw the adulterer leave the bed chamber of the wife, or shot him while the adulterer was trying to escape from the wife's bedroom. Then the proper verdict would be a reduction of the murder charge to manslaughter.[61] Although no such facts existed in the Sickles case, the jury acquitted Sickles.[62] It was likely Stanton's justification argument, rather than the insanity defense, that saved him. As one commentator put it at the time, "[N]o American jury would find a man guilty of murder for slaying the seducer of his wife or daughter. The verdict in the Sickles case is simply another manifestation of a sentiment whose existence many previous verdicts have proved."[63] Reporters at the time declared that the case had set a precedent[64] as it was the first time that "temporary" insanity had been raised as a defense.[65] As James A. Hessler explained,

> Although complete insanity was a valid and previously-established defense, the Sickles team argued before an American jury for the first time what would become known as the "temporary insanity" defense . . . American jurors were now allowed to consider a defendant's sanity at the moment a crime was committed, and to give the defendant the benefit of the doubt if any uncertainty existed.[66]

Although it was a notorious case at the time,[67] its role in the establishment of the insanity defense was ultimately overshadowed by the case of Charles Julius Guiteau, who pleaded insanity in the assassination of President James A. Garfield in 1881.[68]

Appointment to the Cabinet

Although he did not become involved in party politics in either major party,[69] in Washington, Stanton became known for his extravagant praise of public officials.[70] His appointment to settle the California land claims had come from a close friend, Attorney General Jeremiah Black. After the election of Abraham Lincoln in November 1860, President Buchanan's cabinet began to dissolve during the long interregnum before the March 4 inauguration. Buchanan moved Black from being Attorney General to Secretary of State, but Black would accept the change only on the condition that Stanton be named to succeed him.[71] Stanton was arguing a case in Cincinnati when he received a telegram from Black summoning him immediately to Washington. When Stanton returned home on December 20, 1860, he read in the newspaper that he had been appointed Black's successor as Attorney General.[72] Stanton was then forty-six years old.[73] On the day that he took his commission as Attorney General, South Carolina seceded from the Union.[74]

When they both practiced patent law in Washington, Stanton had also become acquainted with William Henry Seward,[75] the former New York governor who became Lincoln's "right hand."[76] Stanton was soon giving Seward daily briefings on the activities of the Buchanan cabinet. They used an intermediary to courier information to each other. If they chanced to meet on the street, they would pretend not to know each other and walk off in different directions.[77] One Stanton biographer has written that such transfer of information "could be considered

an outrageous breach of confidence on the Attorney General's part, a kind of treason to the President who had appointed him, and who not unnaturally expected the inner workings of the government would be kept secret unless permission were given to release."[78]

Notwithstanding Stanton's surreptitious reports for the benefit of the incoming administration, when Lincoln came to office he replaced Stanton with a Missouri lawyer, Edward Bates.[79] Stanton was harshly critical of Lincoln,[80] especially of his early handling of the war, and Stanton did not meet with Lincoln after his inauguration.[81] Lincoln knew, however, that he was loyal to the Union, had furnished Seward with intelligence during the interregnum, and had a reputation for competence, attention to detail, and ethical behavior.[82] With Seward's endorsement,[83] the President nominated Stanton as Secretary of War on January 13, 1862. He was confirmed by the Senate two days later[84] and took office on January 20.[85]

Suspension of the Great Writ and the Detention of Civilians

One of the most controversial aspects of Stanton's career as Secretary, and the one most harmful to his reputation, involved the suspension of the writ of habeas corpus and the detention of civilians during the war. A little more than a month after taking office, Lincoln had suspended the use of the writ anywhere between Philadelphia and Washington.[86] By July 1861, he had extended it to New York.[87] Not trusting Simon Cameron, the first man he had chosen to be Secretary of War, to handle properly the arrest and detention of suspected spies and supporters of the South, Lincoln delegated the job to Seward, his Secretary of State.[88] The standards for detention were vague: "treasonous language," "recruiting for the rebel army,"[89] "treasonable practices against the government,"[90] "disloyal persons," and "treasonable utterances or membership in an organization that was critical of some phase of the war effort."[91] Civilians were arrested "for almost any act that indicated a desire to see the government fail in its effort to conquer disunion."[92] Actual proof was difficult to come by and the prosecution often relied upon hearsay,[93] rumor, or intercepted correspondence.[94] Detainees were denied visitors and attorneys. They were permitted only unsealed letters, and those were confiscated if they contained any objectionable statements.[95] Before long, more than 800 men and a few women were incarcerated in four forts.[96]

One of the early detainees was a Baltimore resident, John Merryman, who was pulled from his home at two a.m. on May 25, 1861, on the orders of an army general and imprisoned in Fort McHenry. The arrest was "upon general charges of treason and rebellion." When Merryman's attorneys sought to obtain his release by asking the military officer in charge of the fort to grant a writ of habeas corpus, the officer denied the request on the ground that the President had authorized the writ's suspension.[97] The lawyers nonetheless took the matter to court. Sitting as circuit justice, Chief Justice Roger B. Taney held that only Congress had the authority to suspend the writ. Taney noted that Article I, Section 9, Clause 2, states, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety shall require it," and makes "not the slightest reference to the executive department."[98] The President's powers are laid out in Article II, "but there is not a word in it that can furnish the slightest ground to justify the exercise of the power."[99] The Chief Justice sternly concluded,

> With such provisions in the constitution, expressed in language too clear to be misunderstood by any

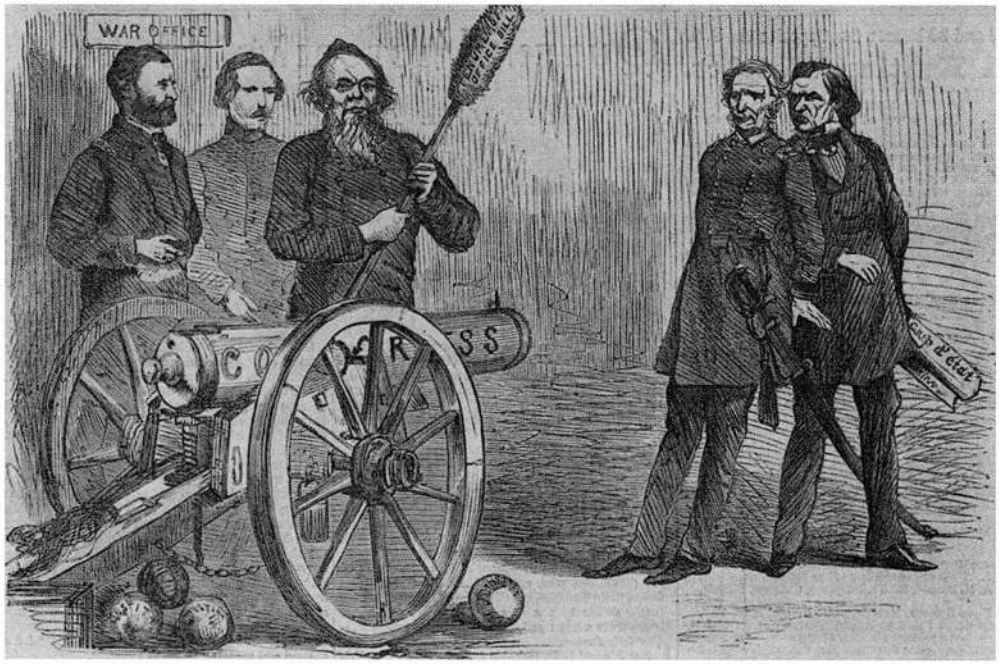
> one, I can see no ground whatever for supposing the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.[100]

Even if such power existed, there was no justification for the use of the military when civil authorities and the courts were functioning in Maryland at the time of Merryman's arrest, Taney wrote.[101] Nonetheless, the program proceeded apace.

Stanton felt that the power to arrest civilians should vest with the President as commander-in-chief and be carried out by the military.[102] Before he became Secretary, he and Lincoln agreed that the proper authority over political prisoners lay with the War Department, rather than the State Department. Without weakening security, Stanton wanted to make the program more reasonable, responsible, and humane and to be invoked only in the interests of public safety.[103] The day before Stanton was confirmed by the Senate, Lincoln signed an executive order reserving to "the military authorities alone" the power of "extraordinary arrest." The same order gave the Secretary of War the right to release "spies or others deemed a threat to public safety in his discretion," expressing a desire for "a return to the normal course of the administration as far as regard for the public welfare will allow." Political prisoners would be allowed parole if they agreed to "render no aid or comfort to the enemies in hostility to the United States."[104]

The Secretary of War appointed a two-man commission, Maj. Gen. John A. Dix and former New York Supreme Court Justice Edwards Pierrepont, to review the detention of those already incarcerated.[105] In short order, 120 detainees were released "upon honor that they will render no aid or comfort to the enemies in hostility to the Government of the United States . . ."[106] Another 100 were found to have been held without any cause at all.[107] Soon, however, the administration began to ratchet up the detention of civilians. On August 8, 1862, acting on what he said were verbal orders from the President, Stanton suspended the writ for anyone anywhere in the country attempting to evade the draft by leaving the country or their home states. He also ordered that those detained be tried by military commission—in effect, a court martial for civilians.[108] As Mark Neely has written, about 271 such trials were conducted during the war.[109]

"In fact, the orders of August 8 had momentous effect on civil liberties in the United States. The brief period of sweeping and unconstitutional arrests that followed their issuance constituted the lowest point for civil liberties in the North during the Civil War, the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in all of American history."[110] Without much legal guidance, petty bureaucrats were permitted to determine who was loyal and who was disloyal. At least 354 civilians were arrested the following month in the North; the figure may have been higher, but the precise total is unknown because of shoddy record-keeping.[111] However, over the total span of the war, arrests for speaking, writing or assembling for political purposes were relatively rare. Most of those arrested under Stanton's watch were from the Confederacy or border states, and most were deserters or draft evaders and could have been held even without suspension of the writ. At least 12,787 citizens were held at some point during the war.[112] Overall, there were more



This cartoon satirizes President Andrew Johnson's attempts to remove Stanton as Secretary of War in 1868 and replace him with Lorenzo Thomas. It depicts Stanton aiming a cannon labeled "Congress" at Johnson and Thomas to show that he was using Congress to defeat the attempt. He also holds a ramrod marked "Tenure of Office Bill," which was an act he successfully argued protected him from being fired without the consent of the Senate.

arrests than during Seward's jurisdiction over civilian detentions, "but they had less significance for traditional civil liberty than anyone has realized," according to Neely.[113]

In the mid-term elections of 1862, the Republicans lost their majority in the Congress. Apparently fearing that they might be reined in by Democrats, and, perhaps recalling the *Merryman* decision, Lincoln and Stanton promoted an act for congressional authorization of the suspension of habeas corpus. The law, approved on March 3, 1863—the last day the Republican majority held power before the new Congress was seated—allowed for civil, or military, trial of those detained, but it also placed some constraints on Stanton. It required him to provide the names of all of those held and required their release if they were held more than twenty days without a grand-jury indictment.[114] It was this law that Lambdin P. Milligan maintained saved him from the hangman's noose in the famous Supreme Court case arising out of suspension of the writ, *Ex Parte Milligan.* Milligan, an Indiana citizen who never served in the military, was arrested on October 5, 1864, charged with conspiracy to overthrow the government, tried and convicted by a military commission, and sentenced to be hanged. He got a circuit court in Indiana to empanel a grand jury and consider the charges in 1865, but no bill of presentment was issued.[115]

The case reached the Supreme Court after the war, at a time, it noted, in which more calm deliberation of the circumstances could be had. "This law was passed in a time of great national peril, when our heritage of free government was in danger . . . and the public safety required that the privilege of the writ of habeas corpus should be suspended," the Court wrote in an opinion by Justice David Davis. "The privilege of

this great writ had never before been withheld from the citizen . . ."[116] And, the Justice noted,

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety.[117]

The Court upheld the right of the President and the Congress to suspend the "privilege" of habeas corpus but rejected the notion that citizens who were not members of the military service could be tried by military commissions at a time and in jurisdictions in which there were functioning criminal courts.[118] The Court notes that, although the Fifth Amendment excepts those in military service, it requires grand-jury presentment for all others charged with a capital crime, and the Sixth Amendment guarantees trial by jury.[119] Thus, concluded the Justices, "One of the plainest constitutional provisions was therefore infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."[120] And, furthermore, "This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity."[121]

Justice Davis rejected the notion that a President can declare martial law and suspend liberties in a state in which the courts are functioning. "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."[122] If martial law were allowed in such circumstances, "it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[123]

The government had asserted that Milligan had already been hanged and, in effect, the case was moot. Oddly, the Court confessed that it did not know whether this was true but inferred that he was alive since the case was being pressed by counsel.[124] It ordered that, as his trial and conviction was illegal, he was entitled to release under the terms of the 1863 law that Stanton had initiated.[125] Four Justices filed an opinion, written by Chief Justice Salmon P. Chase, concurring in part.[126]

This, of course, came after most of the damage had been done. Despite the relatively low numbers of those held for political reasons, the arrest of civilians became a blot on Stanton's reputation. "This came about in some degree from his relish of power, but a more compelling factor was the magnitude of imminence of the peril the nation faced," according to biographer Benjamin Thomas. "Stanton's widespread dragnet often ensnared the innocent along with the seditionists . . . Many civilians were imprisoned on false or trivial charges. The fact remains, however, that most of the civilians who were arrested for disloyalty and tried before military commissions on that charge, were found to be guilty."[127] Another biographer has written of Stanton, "He had made arbitrary arrests in no small number, but it seemed to bother the legal part of his mind, and he resorted to the procedure less frequently than Seward had in the early days when jurisdiction in such matters lay with State, before Stanton came into office."[128]

The Assassination and the Johnson Impeachment

By April 14, 1865, the war had finally come to an end,[129] and the President was in the mood for some entertainment. Stanton thought it a security risk, and he advised General Grant to decline Lincoln's invitation to join him at Ford's Theatre. The Stantons were then offered the tickets as alternates, but the Secretary of War was no more willing to risk his own life than that of Lincoln or Grant. He chose, instead, to comfort Secretary of State Seward at his bedside, where he was recovering from a near-fatal carriage accident.[130] Stanton had only returned home a short while when he received word from a messenger that the President had been shot and Seward murdered. Stanton immediately returned to Seward's home to find that the Secretary of State had been knifed but had survived. Lincoln, however, expired from his wounds by 7:30 the following morning, and it was Stanton to whom the immortal words, "Now he belongs to the ages," are attributed.[131]

Vice President Andrew Johnson, a Democratic Senator from Tennessee who had voted against secession, had been chosen to run with Lincoln the previous year in a gesture toward national unity.[132] Johnson initially asked Lincoln's cabinet to remain, and he relied heavily at first upon Stanton for his efficiency and competence.[133] Johnson was a strong proponent of states' rights and wanted the southern states readmitted to the Union with the status they had held before the war. Although nominally a Democrat, Stanton had become allied with the radical Republicans of the North who wanted the South treated as a conquered territory, and he was advocating a model plan that he had first proposed to Lincoln that would require that freed slaves be given the right to vote.[134] In May 1865, with Seward still recovering from his carriage injuries and the assassination

As Lincoln's Secretary of War, Stanton backed the President's suspension of the writ of habeas corpus and the detention of civilians during the war. Above Stanton, sixth from left, is shown with other cabinet members at Lincoln's deathbed after he was assassinated.

attempt, the cabinet divided, three to three, over the question of Black suffrage. On other questions, Stanton insisted that Johnson be allowed discretion to do as he wished.[135] He decided to stay in the cabinet to moderate divergent political views.[136] He soon reverted to his role in the Buchanan administration, however, reporting to Johnson's enemies what was being considered in cabinet meetings.[137]

Three other Secretaries soon left the cabinet over differences with Johnson.[138] However, the President needed Stanton:

> The war secretary's close connection to Lincoln and his war service gave him a moral stature that Johnson respected. Stanton's force of character and intellectual abilities could not be denied, not by a president who was entirely self-educated. When Stanton actually executed Johnson's wishes, the results were swift and gratifying. The Secretary's personal integrity could not be questioned, and extended to principles, as well; on more than one occasion, Stanton took political heat for official actions he might have blamed on Johnson. And Stanton commanded broad support in the Republican Congress.[139]

The Secretary of War began to see Johnson's leadership as increasingly dangerous to the preservation of the Union as the President, over Stanton's objections, vetoed creation of the Freedman's Bureau, designed to aid the former slaves, and the civil rights bill, which would have empowered Congress to enforce the Thirteenth Amendment.[140] By 1866, Stanton's wife wanted him to leave the government,[141] but he remained in the cabinet to try to prevent Johnson from removing or reducing military troops from the southern states, where they were enforcing martial law.[142] After the three cabinet members left, Johnson began to remove hundreds of Republicans from federal posts,[143] and soon there was pressure on Stanton to leave, as well. He was offered a position in the foreign service if he resigned, but he countered that he had no desire to go abroad.[144] On March 2, 1867, Congress passed the Tenure of Office Act, requiring the consent of the Senate for the removal of any department heads during the term of the President who appointed them. It was primarily aimed at preventing a change of leadership in the War Department.[145] Whether this law was actually applicable to Stanton was questionable, as he was appointed by Lincoln and only asked to stay on by Johnson.[146] Despite the law's possible benefit to him, Stanton thought the statute improper, but, when Johnson asked him to prepare a veto message, he pleaded too much work, and Seward wrote the message instead.[147] When the statute became law over Johnson's veto, Stanton insisted that the President must enforce it.[148]

Believing that the states should be allowed to govern themselves, Johnson had vetoed the original Military Reconstruction Act because he felt it gave military commanders too much power over the provisional governments in the rebel states.[149] Stanton then drafted a supplemental act, approved by Congress on July 19, 1867, which gave the commanders unlimited power over state officers.[150] This proved too much for Johnson, who resolved to remove the Secretary of War, and, on August 5, demanded his resignation. Stanton refused to leave, insisting that the Tenure of Office Act meant he could not be fired without the consent of the Senate.[151] With the Senate in recess, Johnson suspended Stanton on August 12, charging him with insubordination for refusing to resign, and he named General Ulysses S. Grant as acting Secretary.[152] Stanton gave up the reins to the War Department until Congress reconvened in

January and rejected Johnson's reasons for the suspension and voted that Stanton should be reinstated.[153] Grant then left, and Stanton returned to the War Department, recovering $3,000 in back pay for the four months he was under suspension.[154] On February 21, 1868, the President fired Stanton outright and named Gen. Lorenzo Thomas interim Secretary. Stanton again refused to leave and remained in his War Department office day and night for several weeks. He kept infantrymen outside the building to keep the President from removing him forcibly. The Secretary sent messengers to his home for food and changes of clothes. He resisted demands from his wife that he come home and argued with her when she came to the department to insist that he leave.[155]

Two days after the Secretary's dismissal, the House voted to impeach Johnson on nine charges, most of which involved Stanton's firing.[156] Stanton was to be the primary witness at Johnson's Senate trial,[157] but he was never called because it was feared that, if he left his office, Thomas would take over the War Department.[158] As the Senate trial progressed, a deal was struck with the President's counsel, William M. Evarts, to name Gen. John M. Scofield to replace Stanton. Scofield was deemed acceptable because he was thought by some to be willing to uphold Congress's wishes with respect to reconstruction.[159] On the last day of the trial's closing arguments, Johnson nominated Scofield,[160] and a month later, the Senate failed to remove the President by a vote of thirty-five to nineteen, less than the two-thirds majority needed.[161] Without conceding that he had been removed, Stanton then surrendered the office.[162]

The Nomination

"The remainder of his life was uneventful," one of Stanton's early biographers has written.[163] Stanton's finances and his health had been drained by his government service and his generosity toward charities and patriotic causes.[164] He was said to have asked the Surgeon General to keep him alive until the war was over.[165] He returned to the practice of law,[166] but his poor health made arguing cases strenuous.[167] Despite increasing discomfort from asthma, Stanton campaigned for Grant in 1868.[168]

Stanton had been interested in the center chair when Chief Justice Taney died in 1864. His wife made overtures on his behalf, but the war was still raging and Lincoln felt Stanton couldn't be spared from the War Department[169] so he nominated Salmon P. Chase instead.[170] While Stanton was resting in New Hampshire and Massachusetts in the summer of 1869 in an effort to repair his health with the sea air, he learned of Justice Grier's impending departure and he set out to secure the Supreme Court seat. Through a friend, he suggested to Grant that his nomination would please congressional Republicans.[171] A group of friends began a campaign on Stanton's behalf.[172] The new President stood with Stanton on most issues during the war, but he didn't like him personally[173] and he was concerned about Stanton's health.[174] Yet, with two seats to fill on the High Court, he agreed to nominate Stanton in hopes of gaining support for his favored nominee, Attorney General Ebenezer R. Hoar, for the new seat.[175]

When copies of the congressional petitions were taken to Stanton, "The sick man was unable to speak. Tears coursed his eyes," according to one biographer.[176] Stanton was arguing a patent case before Supreme Court Justice Noah H. Swayne when he was summoned to the White House and told by Grant that the nomination was his. The next day, he was too ill to go to Court to resume the argument, and Justice Swayne agreed to hear the case in Stanton's home library. He never left the house again.[177] In accepting the nomination, Stanton wrote, "It will be my aim so long as life and health permit me to

perform the solemn duties of the office to which you have appointed me with diligence, impartiality and integrity."[178]

A few days before he died, Stanton was described as "in buoyant spirits and confident of future good health."[179] Yet he remained confined to his bedroom. His condition worsened on December 23; a doctor was summoned to the home, and Stanton was administered last rites.[180] At one point, the new Supreme Court appointee roused and proclaimed that he needed to prepare for the next Court session.[181] This was never to be. Without uttering any last words, Stanton died at 4 a.m. on Christmas Eve. His commission had been signed by the Secretary of State but not yet delivered. The President sent it to the family after his death "as evidence of the last official honors conferred by an appreciative Government."[182] The sitting Supreme Court Justices met to plan a funeral for their ill-fated colleague, but they were persuaded that it would be more appropriate for the War Department to plan his last rites.[183] In his memoirs, Grant wrote of the man he had begrudgingly nominated for the Court,

> He was a man who never questioned his own authority, and who always did in war time what he wanted to do. He was an able constitutional lawyer and jurist; but the Constitution was not an impediment to him while the war lasted. In this latter particular I entirely agree with the view he evidently held. The Constitution was not framed with a view to any such rebellion as that of 1861-5.[184]

Newspaper accounts of the time give no hint that Stanton's nomination was only an honorary gesture to a dying man.[185] Stanton's acceptance seems to acknowledge his precarious health but indicates that he expected to take his seat on the Bench.[186] Biographer Benjamin Thomas concluded, "It seems sure that Grant's naming of Stanton to the high bench was the result of the widespread conviction that he was the best man for the place, as well as a gracious though belated acknowledgement of his services and abilities. Certainly it was not a mere gesture."[187] And Edwards Pierrepont, one of the men appointed to handle the detention of civilians during the war and a close adviser to President Grant, insisted it was a serious nomination. In fact, Pierrepont even predicted that Grant would name Stanton Chief Justice if Chase ran for President in 1872. "Thank God they did not wait until you were dead to bestow the honors," Pierrepont wrote to Stanton after his confirmation, a remark which would seem particularly uncouth if he actually thought Stanton was dying. Pierrepont, who ultimately became Grant's Attorney General, invited Stanton to visit him in New York before the Supreme Court resumed hearing cases six weeks hence.[188]

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In modern times, fifty-five would be considered relatively young for a Supreme Court nominee, who might be expected to serve many years on the Court. Stanton's wartime service indicates how he might have ruled on questions of national security and civil liberties and the rights of the former slaves to vote and own property. He was well-versed in matters of business, especially patent law, and he had a record of industrious work, ethical standards, and political savvy. But the country was never to see what kind of Associate Justice Edwin McMasters Stanton would have been, what kind of decisions he might have written, what phrases and standards he might have added to the legal vernacular.

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[150] *Ibid.* at 373.
[151] *Ibid.* at 393, 395-96, 406.
[152] *Ibid.* at 405-06, 413.
[153] *Ibid.* at 407, 426; Stewart, **Impeached: The Trial of President Andrew Johnson**, at 118.
[154] Stewart, *ibid.* at 119-20; Thomas, **Seward**, at 569-70.
[155] Gorham, **Life and Public Service**, Vol. II, at 437, 444; Stewart, *ibid.* at 135-37, 149.
[156] Stewart, *ibid.* at 156, 159.
[157] Langguth, **After Lincoln**, at 208.
[158] Stewart, **Impeached: The Trial of President Andrew Johnson**, at 197.
[159] Gorham, **Life and Public Service**, Vol. II, at 449-50.
[160] Stewart, **Impeached: The Trial of President Andrew Johnson**, at 227.
[161] Gorham, **Life and Public Service**, Vol. II, at 453; Stewart, *ibid.* at 277.
[162] Stewart, *ibid.* at 281; Gorham, *ibid.* at 456.
[163] Gorham, *ibid.* at 465.
[164] Gorham, *ibid.* at 467; Thomas, **Seward**, at 633; "Edwin M. Stanton: Death of the Great Lawyer."
[165] Pratt, **Stanton: Lincoln's Secretary of War**, at 384.
[166] "Edwin M. Stanton: Death of the Great Lawyer."
[167] Thomas, **Stanton**, at 633.
[168] Gorham, **Life and Public Service**, at 468.
[169] Thomas, **Stanton**, at 336-37.
[170] Stahr, **Seward**, at 414-15.
[171] Thomas, **Stanton**, at 634.
[172] Gorham, **Life and Public Service**, Vol. II, at 469.
[173] Stewart, **Impeached: The Trial of President Andrew Johnson**, at 92.
[174] Thomas, **Stanton**, at 634.
[175] Abraham, **Justices, Presidents, and Senators.** The Senate did not return the favor, however. Hoar was not confirmed.
[176] Thomas, **Stanton**, at 635.
[177] *Ibid.*; "Edwin M. Stanton: Death of the Great Lawyer."
[178] Gorham, **Life and Public Service**, Vol. II, at 475.
[179] "Edwin M. Stanton: Death of the Great Lawyer."
[180] *Ibid.*; Gorham, **Life and Public Service**, Vol. II, at 475.
[181] Thomas, **Stanton**, at 638.
[182] "Edwin M. Stanton: Death of the Great Lawyer."
[183] Gorham, **Life and Public Service**, Vol. II, at 477.
[184] **Personal Memoirs of U.S. Grant** 639 (1962).
[185] "Mr. Stanton and the Supreme Bench," *New York Times*, Dec. 21, 1869.
[186] Gorham, **Life and Public Service**, Vol. II, at 475.
[187] Thomas, **Stanton**, at 636.
[188] Letter from Edwards Pierrepont to Hon. Edwin M. Stanton, Dec. 21, 1869, Edwin McMasters Stanton Papers.

Concurring and Dissenting without Opinion

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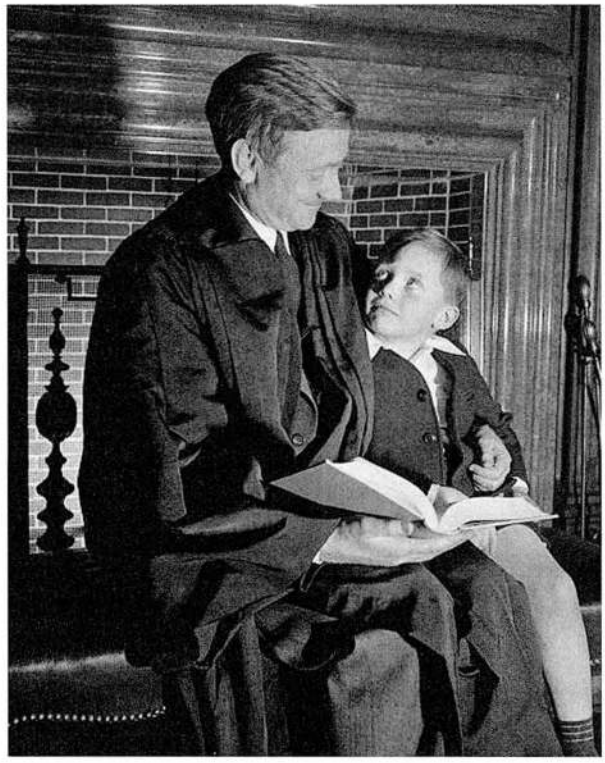
I. Introduction

In *Buck v. Bell*, the Supreme Court held by an 8-1 vote that a state's compulsory sterilization law for the intellectually disabled did not violate the Fourteenth Amendment's due process or equal protection clauses.[1] Writing for the Court, Justice Oliver Wendell Holmes, Jr. infamously concluded, "Three generations of imbeciles are enough."[2] Justice Pierce Butler dissented but did not write an opinion to explain his position. Rather, the opinion in *Buck* simply concludes: "Mr. Justice Butler dissents."[3] The popular account pins Butler's position on his affiliation with the Roman Catholic Church,[4] but as one scholar notes, "claiming a religious motive for Butler's dissent is mere speculation. He left no opinion, and no other evidence has surfaced."[5] Butler's decision not to write separates *Buck* from other anti-canon candidates such as *Dred Scott v. Sandford*,[6] *Plessy v. Ferguson*,[7] and *Korematsu v. United States*[8]—all of which contained celebrated dissenting opinions that subsequently helped guide the development of law.[9]

The practice of noting disagreement without explanation is puzzling in part because the value of disagreement on a collegial court comes from among other factors the beneficial effects of generating written explanations. As Justice Ruth Bader Ginsburg once wrote, separate opinions "may provoke clarifications, refinements, [and] modifications in the court's opinions."[10] Justice Antonin Scalia echoed this point, emphasizing that a "dissent or concurrence puts [an] opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points."[11] In the longer term, Chief Justice Charles Evans Hughes famously remarked, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have betrayed."[12]



During his time on the Court, Justice William O. Douglas's decision-making in tax cases showed an increasing tendency to merely note dissent or explain his position in perfunctory fashion. Some scholars have speculated that this behavior could be explained by his disdain for the IRS and tax code. Douglas is pictured here with his son, Bill Jr., at the time of his appointment to the Court in 1939.

Aside from improving the quality of judicial decision-making and potentially influencing the path of law, separate opinions may help foster public confidence in the judiciary and promote institutional legitimacy. Justice Antonin Scalia once suggested, for example, that separate opinions help demonstrate that legal conclusions are the "product of independent and thoughtful minds."[13] And as Chief Justice Harlan Fiske Stone once explained, separate opinions provide "some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion writing."[14] More sharply, Justice William J. Brennan referred to the "obligation" of explaining legal conclusions as "serv[ing] a function within the judicial process similar to that served by the electoral process with regard to the political branches of government."[15] For these reasons, concurrences and dissents without opinion have been described as "serv[ing] no useful purpose in the development of . . . jurisprudence, since [they provide] no indication of wherein the disagreement lies."[16]

Others, however, have indicated that the practice of noting disagreement may have salutary effects. Judge Richard Posner, who refers to noting as a "nonreasoned" opinion, "used to think that the only possible explanation for the nonreasoned separate opinion besides sheer laziness was the pressure that caseload growth was exerting on the time of federal judges," but "c[a]me to realize that there are other, more edifying explanations for this form of opinion: the maintenance of collegiality and the promotion of legal certainty."[17] While acknowledging that reason giving promotes core democratic values,

Mathilde Cohen emphasizes some of the costs associated with the practice, including entrenching public disagreement and eroding legitimacy, hampering collegiality, curbing the cognitive costs associated with motivated reasoning, and managing caseload pressures.[18] Of course, the costs and benefits of noting disagreement may vary across levels of the judicial hierarchy and by other institutional circumstances such as panel size.

Few scholars have thoroughly examined the practice of noting disagreement on any court. The first systematic study chronicled Justice William O. Douglas's decision-making in tax cases, highlighting an increasing tendency during his time on the Court to merely note dissent in these cases, explain his position in perfunctory fashion, or refuse to acknowledge well-settled jurisprudential principles in the field.[19] The authors of that study speculated that his behavior in tax cases could be explained by his disdain for the IRS and tax code.[20] With respect to noting dissent in particular, a practice that is difficult to explain by definition, the authors concluded that Justice Douglas "fail[ed his] . . . duties to the Court, to the parties before him, and to all who look for understanding to Supreme Court opinions, whether majority, concurring or dissenting."[21]

A more recent study attempts to understand why Justices sometimes silently concur in a majority opinion without explaining the nature of their disagreement.[22] To solve the inherent difficulty of understanding why Justices sometimes merely note their disagreement, this study utilizes private memoranda exchanged between Justices on the Burger Court to uncover the motivations behind noting concurrence. Not surprisingly, these archival records suggest that Justices sometimes settle for noting their disagreement due to time pressures and the perception that certain cases are not sufficiently important to warrant reasoned explanation for disagreeing with the majority position. However, there is also evidence that decisions to note are driven by a desire to maintain voting consistency across cases or withhold support for disfavored precedents discussed in majority opinions. Justices also sometimes resort to noting due to uncertainty or ambivalence about proper dispositions or as a result of bargaining failures over opinion language and scope.

To what extent have Supreme Court Justices noted their disagreement by concurring or dissenting without opinion? Little is known about the use of this opinion delivery practice over time. In this article, we recover the lost history of noting disagreement by manually reviewing every Supreme Court decision from 1791 through O.T. 2014 to compile instances of Justices concurring or dissenting without opinion. The resulting data offers new insight into an important but largely forgotten opinion delivery practice. We find that noting disagreement has been a common practice throughout much of the Court's existence, though of course it is relatively uncommon in contemporary times.[23] Furthermore, contrary to the somewhat popular association of the practice with Justice Douglas, we demonstrate that a majority of the Court's Justices noted their disagreement at one time or another, with two surpassing Douglas in use and others coming close. In addition to presenting original data concerning the practice of noting disagreement, we offer a detailed historical narrative exploring the types of cases in which this practice can be found over time, shifting norms concerning the provision of written opinions, and the influence of institutional changes on proclivities to concur or dissent silently.

This project contributes to several important literatures. As an initial matter, it contributes to the literature on opinion delivery practices by supplying the first comprehensive history of Justices noting disagreement, and demonstrating that the use of this form has been common throughout much of the Court's history.[24] Furthermore, it

contributes to the literature on changing norms concerning separate opinion writing over time.[25] In particular, this project emphasizes the regular use of an intermediate practice between silently acquiescing to majority positions, which characterized disagreement during the Court's earlier years, to the proliferation of written concurrences and dissents in the modern era.[26] Our empirical approach also contributes to a growing body of quantitative historical research using comprehensive data collection efforts to gain leverage over important questions concerning American legal history.[27]

This article proceeds as follows. In Part II, we begin by laying out a conception of noting disagreement that distinguishes it from what we call "perfunctory opinions," which provide at least some explanation to accompany a concurring or dissenting position. Next, we explain how we compiled comprehensive data on Justices noting disagreement over time. We then explore several attributes of the data, including overall trends in use and Justice-level breakdowns. In Part III, we use case law to develop a rich historical narrative explaining the practice's origins in the Supreme Court, the types of cases in which Justices noted disagreement over time, shifting norms concerning the practice, and the impact of institutional changes in areas such as jurisdiction and opinion assignment on tendencies to note concurrence or dissent without explanation. Part IV concludes.

II. Quantifying Concurrences and Dissents without Opinion

A. Defining Noted Disagreement

As an initial matter, it is important to be conceptually clear about what constitutes noting disagreement. The core of our classification rule emphasizes instances where Justices indicate their concurrence or dissent without explaining the nature of their disagreement.[28] Since our classification rule emphasizes a complete lack of explanation, we exclude two intermediate practices between noting and writing separately that are conceptually distinct and would otherwise inflate our numbers if counted. First, we exclude what might be called "perfunctory" concurrences and dissents, where Justices provide a cursory explanation of their position or at least an indication of where one might look for an explanation.[29] Perfunctory opinions indicate, for example, that a concurring or dissenting position rests on reasons explained in the lower court's opinion or in a different but related Supreme Court case.[30] Second, we exclude noted concurrences and dissents in cases where it is clear from an opinion that an explanation for a minority position is provided in a separate case.[31] Relatedly, we also exclude noted concurrences and dissents in cases that point to a different case with a complete explanation of the majority position where the noters in the second case also noted in the first.[32] In addition to providing a conservative estimate of the phenomenon of interest, these classification rules are consistent with the existing literature on separate opinion writing on the Supreme Court by counting each concurring or dissenting event only once.

Before discussing our search strategy, it is important to review one possible source of existing information on noted concurrences and dissents. Albert P. Blaustein and Roy M. Mersky's book **The First One Hundred Justices** includes term-aggregated data on the number of "concurrences and dissents without opinion" during the Court's first 100 years.[33] Understandably, given the wording, some have cited these data when referencing the number of noted concurrences or dissents during particular eras.[34] However, although Blaustein and Mersky included noted concurrences and dissents in this category, these instances were combined with the far more common practice of "join[ing] in [a] concurring [or dissenting]

opinion written by another justice."[35] Since the authors present only aggregate data, it is impossible to separate instances of Justices noting disagreement from joining separate opinions in their tabulations involving concurring and dissenting "without opinion."

Compiling our own data on noted concurrences and dissents proved to be a time-intensive and tedious task. First, we compiled a list of every Supreme Court decision from 1791 through O.T. 2014. For cases decided from 1791 through 2005, we utilized the list generated by Fowler et al. in their study of the impact of Supreme Court precedents over time.[36] This list excludes in-chambers opinions, per curiam decisions in cases that were not orally argued, and other orders. Next, we updated this list through O.T. 2014 using the Supreme Court Database.[37] These steps yielded a total of 27,394 Supreme Court decisions made throughout its history. To locate instances of Justices concurring or dissenting without opinion, we manually reviewed each opinion.

B. The Cases

Our search yielded a total of 553 cases (two percent) in which at least one Justice noted concurrence, and 1,225 cases (four percent) in which at least one Justice noted dissent. The average number of cases per year with at least one noted concurrence during this period was about three, with a range from zero to twenty; the average number of cases per year with at least one noted dissent during this period was six, with a range from zero to thirty-seven.[38] The average percentage of cases with at least one noted concurrence during this period was two percent, with a range from zero to thirteen percent; the average number of cases with at least one noted dissent during this period was four percent, with a range from zero to twenty-six percent.[39]

Figure 1 displays trends in noted concurrences and dissents over time. The first panel plots the number of cases each year with noted concurrences (dashed line) and dissents (solid line) throughout the Supreme

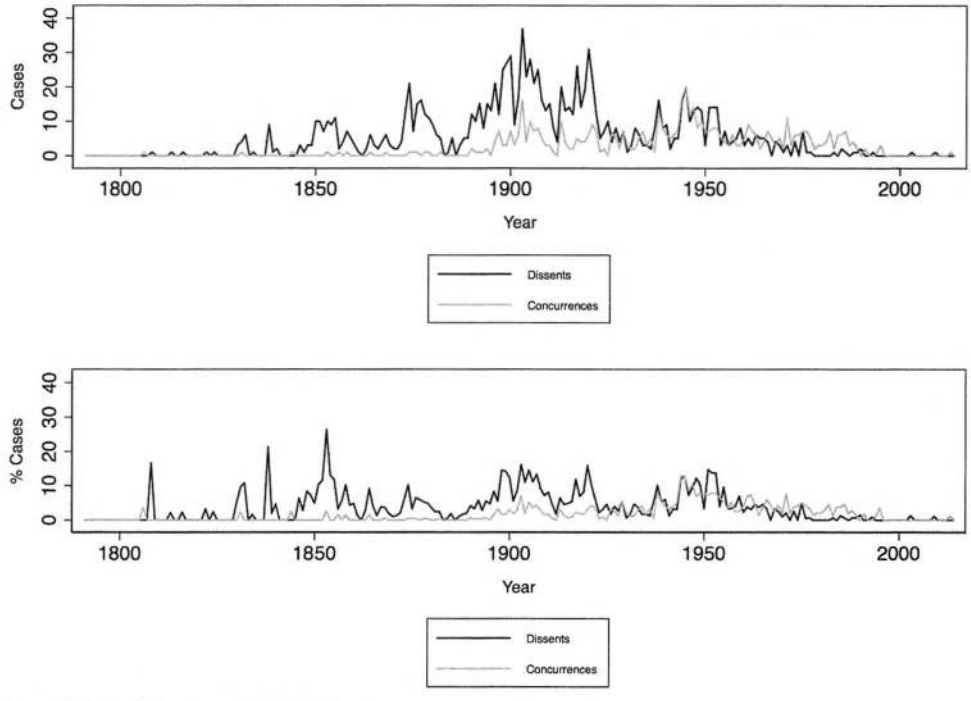


Figure 1. Noted Disagreement over Time.

Court's history. The second panel adjusts for varying caseloads over time by plotting the percentage of cases each year with noted concurrences (dashed line) and dissents (solid line). Looking at the caseload-adjusted second panel, it is clear that the peak period for noted dissents came during Chief Justice Roger B. Taney's tenure, with subsequent high points during the Fuller, White, and Vinson eras before quickly dissipating, beginning with Warren. For noted concurrences, the peak period came during Chief Justice Stone's tenure. While the use of noted dissents outpaced the use of noted concurrences for most of the Court's history, the Burger Court marked the point at which noted concurrences became more common. By the mid-1990s, the practice of noting disagreement had all but been eliminated.

The aggregate case statistics only partially convey the prevalence of noted disagreement throughout the Court's history. Overall, the 1,778 cases that yielded a noted concurrence or dissent during this period produced 2,661 votes without explanation—676 concurring votes and 1,985 dissenting votes. The number of votes to note is higher than the number of cases because it was not uncommon for more than one Justice to note in a single case.[40] Interestingly, in cases with noted dissent it was more common for two Justices to note than one. Overall, seventy-seven percent of cases with noted concurrence included one Justice noting while only thirty-eight percent of cases with noted dissent included one Justice noting.

The number of votes to note exceeding the number of cases with notes indicates that this practice was not merely reserved for instances where a Justice held a singular viewpoint—a common explanation for decisions to silently acquiesce.[41] Relatedly, it was not uncommon for Justices to note their disagreement in cases where at least one Justice wrote a separate opinion concurring or dissenting. Overall, about twenty-three percent of the cases that included noted disagreement had at least one separate opinion. This suggests that Justices differed considerably over whether it was worth the effort to write separately in particular cases.

C. The Justices

We now examine which Justices commonly noted their disagreement. Perhaps because of Wolfman et al.'s study of Justice Douglas dissenting without opinion in tax cases, the practice is sometimes associated with him in particular. Justice Ginsburg, for example, once cited the Wolfman et al. study "[f]or consideration of the unusual practice of Justice Douglas, who sometimes dissented without stating his reasons in federal tax cases."[42] As is no doubt clear from the data we have already presented, however, the practice of noting disagreement persisted throughout much of the Court's history. Indeed, we uncovered noted concurrences or dissents by eighty-eight of the Court's 112 Justices (seventy-nine percent) serving during the sample period. Although length of service may be one predictor of frequency, those who noted the most are a diverse group that varies considerably in terms of disposition and reputation.

Figure 2 displays dot plots of the top-twenty Justices in terms of the number of noted concurrences and dissents (though in the case of concurrences there are twenty-one listed Justices because of a tie between Owen J. Roberts and Thurgood Marshall at number twenty). Overall, while the perception that Justice Douglas frequently noted disagreement is borne out by the data (though his concurrences and dissents without opinion were not reserved solely for tax cases), he comes in with only the third most instances of noted disagreement behind Justices John Marshall Harlan I and Hugo L. Black. Between the latter two, Justice Black easily issued the most noted concurrences in the Court's history while Harlan I edged out Joseph McKenna for the most noted dissents.

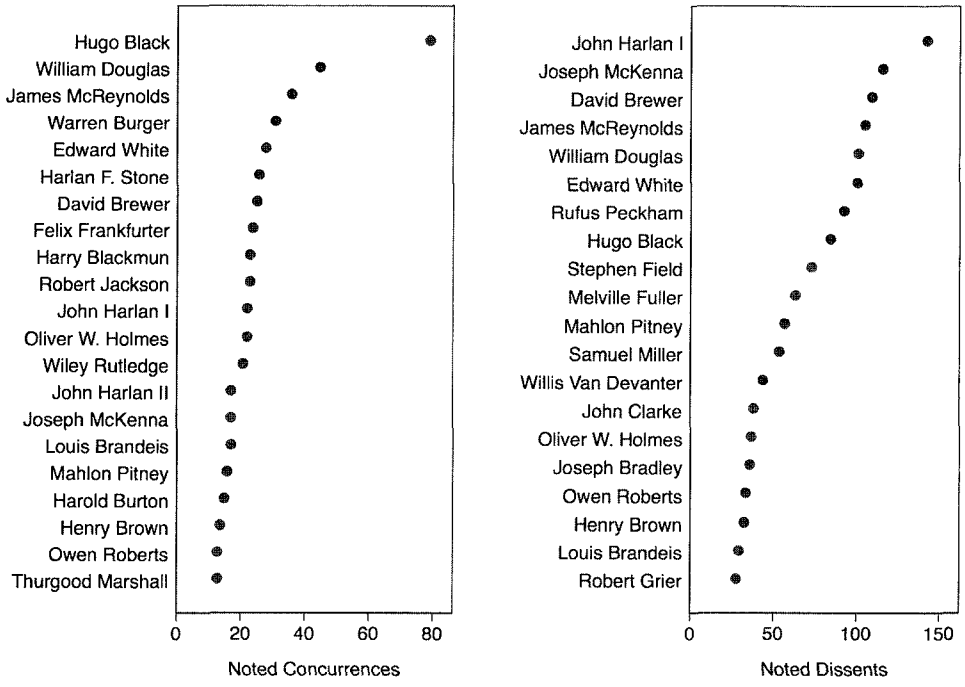


Figure 2. The Justices.

Justices who were in the top-twenty for noting concurrences but not noting dissents include Harry Blackmun, Warren Burger, Felix Frankfurter, John Marshall Harlan II, Thurgood Marshall, and Wiley Rutledge. Justices who were in the top-twenty for noting dissents but not noting concurrences include Joseph Bradley, John H. Clarke, Stephen Field, Melville W. Fuller, Robert Grier, Samuel F. Miller, Rufus Peckham, and Willis Van Devanter. While several Justices appear on both top-twenty lists, there is a clear sorting by period for many Justices who appear on one but not the other, with later-serving Justices compiling numerous noted concurrences and earlier-serving Justices being more likely to compile noted dissents. Overall, the lists are notable for their diversity both in terms of era and reputation.[43] While noting disagreement has sometimes been associated with "sheer laziness,"[44] several of the Court's most well-respected Justices appear on these lists. Moreover, it is notable that both of the Court's "great dissenters" (Justices Oliver Wendell Holmes, Jr., and John Marshall Harlan I) were among the most frequent to note dissent.

III. A Historical Narrative

A. Beginnings, 1806-1839

The first issuance of a noted concurrence or dissent seems to have occurred in *Randolph v. Ware*, decided in 1806.[45] The case arose after a Virginia tobacco planter's uninsured shipment of "50 hogsheads of tobacco"[46] was lost at sea on its way to a British merchant. The planter sought to recover from the merchant, arguing the merchant had a duty to insure and that its agent had promised to insure the shipment. Chief Justice Marshall recused himself, having decided the case below, and as sometimes occurred in his absence the remaining Justices delivered the opinion seriatim.[47] Writing separately, Justices William Johnson, Bushrod Washington, and

William Paterson agreed that the merchant was not liable because the norm had been for the merchant to provide insurance only upon direct request, adding that the agent's promise may have bound him to the planter but did not bind the merchant. The following note appears after the opinions: "Cushing, J. concurred."[48] Although Cushing's reasons for not writing are unclear, speculation suggests that he may have still been ill after missing the previous term in its entirety.[49] Cushing may have also battled "mental decrepitude"[50] during these later years of service, though Justice Johnson's well-known posthumous quip to Thomas Jefferson that "Cushing was incompetent" has been disputed.[51]

During the next twenty-three years, there were noted dissents in five cases and zero noted concurrences. In 1824, with Chief Justice Marshall and Justices Washington and Duvall not sitting, Justice Joseph Story noted dissent in a case concerning the appropriate grace period for a promissory note.[52] After Story's noted dissent, more than five years passed before the next. In 1829, Justice Washington died and in 1830 President Andrew Jackson appointed Henry Baldwin to the Bench. During the next decade, Justice Baldwin was almost single-handedly responsible for continuing the practice of noting disagreement. From 1830 through 1839, Justice Baldwin noted dissent twenty-four times and noted concurrence once. Although Justice Thompson joined Baldwin in noting dissent in one case,[53] Baldwin was otherwise the only Justice to note disagreement during this period. Baldwin's mental competence has been widely questioned,[54] with Judge Frank Easterbrook once referring to him as one "who alternated between periods of sullen quietude, sometimes delivering oral opinions but refusing to allow the Reporter to publish them, and bilious but absurd writings."[55] Indeed, several opinions during this time bear the unusual printer's note that "the opinion of Mr. Justice Baldwin was not delivered to the reporter."[56] In addition to suffering mental ailments, Baldwin may have been less inclined than other Justices to abide by the norm of acquiescence that dominated decision-making on the Marshall Court.[57]

B. Institutionalization and Fluctuation, 1840-1941

The institutional practice of noting disagreement seemed to become entrenched as a way for Justices to dispose of cases about midway through Chief Justice Taney's tenure. By that time, Baldwin had died and the Marshall era's norm of consensus had eroded to a considerable degree. Although opinion delivery practices changed little during Taney's early years, during the middle period Justices felt increasingly comfortable publicly disagreeing with majority positions. With Marshall gone, there is evidence "that Taney-era Justices began to conceive of their role more as an individual effort and less as part of a cohesive unit."[58] Recognizing the increase in dissents and concurrences without opinion during this period, one commentator notes that the practice was "useful only as a way of separating the individual Justice from the Court."[59] More specifically, the practice may have been considered a useful intermediate way to distance one's self from the majority position while building and maintaining a consistent voting record.[60] In addition, the mid-to late nineteenth century coincided with the westward expansion of circuit riding and a burgeoning mandatory docket.[61]

An examination of the cases in which Justices noted disagreement during this period reveals that the practice was reserved primarily for relatively mundane disputes that did not involve constitutional issues.[62] In 1849, for example, Justices James Moore Wayne and Peter Vivian Daniel noted dissent in a case concerning disputed title to "a tract of land of about six hundred acres, and forty-four slaves."[63] Similarly, Justice Nathan

Clifford noted dissent in a case concerning disputed title to "certain parcels of land included in the northeast fractional quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, and are situated in the city of Milwaukee."[64] In 1852, Justice Robert Cooper Grier noted dissent in a case determining, among other things, whether a testator's contract for land rent with a provision for transfer with later payment was an implied revocation of a devise to the testator's wife in his will.[65] And Justices Catron and Grier noted dissent in a case involving a contract dispute about whether commission should be paid by a land seller to his broker after the broker arranged sale of a parcel for $5,000 to a buyer that the seller ultimately refused to execute.[66]

Although noting in relatively mundane cases had been the norm since the practice's inception, *Bradwell v. Illinois* is one prominent case decided during this early period that included a noted dissent.[67] In *Bradwell*, the Court held that a state law prohibiting women from practicing law was constitutionally valid under the Fourteenth Amendment's privileges or immunities clause. In addition to the disposition, the case is remembered in part because of Justice Bradley's concurring opinion, joined by Justices Noah Swayne and Stephen J. Field, reasoning, "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother."[68] Chief Justice Salmon P. Chase was the lone dissenter, but merely had the following stated: "The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions."[69] Although one might surmise that Chief Justice Chase considered the case to be controlled by the dissenting opinion he joined not long before in *Slaughter-House Cases*,[70] the conjecture seems somewhat unsatisfactory as a complete explanation for not writing given that it was Field's dissent he had joined and that Justices Bradley and Swayne had also dissented in *Slaughter-House Cases* but joined the majority disposition in *Bradwell* through Field's concurrence. Chase's posture may have also been the result of illness, as he was suffering from numerous maladies at the time and would die later that year.[71] In any event, the case's salience and unusual coda to Chase's notation that he dissented "from all the opinions" makes this instance particularly noteworthy.

The second wave of noted disagreements during this period began around 1890 and persisted into the 1920s. Although the introduction of discretionary jurisdiction and gradual elimination of circuit riding duties eased workload pressures somewhat around the turn of the century, the Justices soon found themselves being consumed by a growing discretionary docket in the early years of the twentieth century.[72] And while new Justices occupied the Court, little seemed to change in the types of cases that were generating noted concurrences and dissents during this time. Justices George Shiras, Rufus W. Peckham, and Edward D. White noted dissent in a case concerning whether the *Benito Estenger*, a ship owned by a Spanish subject and captured near Cuba during the Spanish-American war, could be condemned as lawful enemy prize.[73] In a case described as being "in narrow compass" by Justice McKenna writing for the Court, Justice David J. Brewer noted dissent from a holding that adverse possession of land under state law prevailed over a claim of right owing to issuance of a land patent from the federal government.[74] Chief Justice White and Justices McKenna and James C. McReynolds noted dissent in an opinion affirming an order compelling a railroad "to stop two interstate trains, one numbered 17 and southbound, the other numbered 18 and northbound, at the City of Meridian, for a time sufficient to receive and let off passengers."[75] And Justice McReynolds noted dissent in a case determining that the Commissioner of Patents could not exclude

the phrase "Moistair Hearing System" as descriptive from a trademark described as: "A design like a seal, comprising the head of an Indian chief surmounting a scroll bearing his name, 'Doe-Wah-Jack,' and surrounded by a circle, outside of which appear the words 'Round Oak' and 'Moistair Heating System' in a circle, and the whole being surrounded by a wreath of oak leaves."[76]

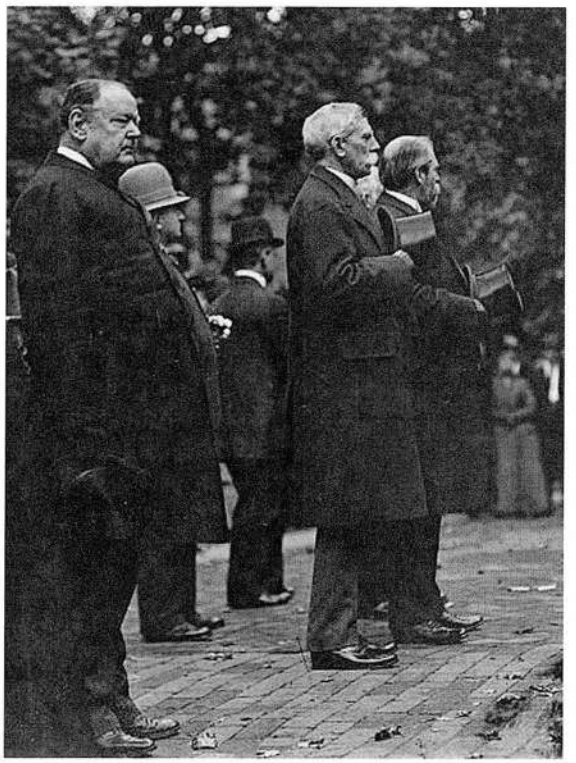
During this second wave of noted disagreement, there is evidence of institutional dialogue taking place in print concerning the proper circumstances under which Justices should settle for merely concurring or dissenting without opinion as opposed to writing separately. Not surprisingly, case importance was the primary point of emphasis. Of course, invoking issue importance was common when writing separately during this period.[77] In one constitutional case, for example, Justice William H. Moody prefaced a dissent by writing that, while "difference of opinion may well be left without expression" under some circumstances, "where the judgment is a judicial condemnation of an act of a coordinate branch of our government, it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates."[78] When these defenses of separate opinion writing are made in contradistinction to noted disagreement within the same case, however, it suggests an ongoing institutional dialogue about the appropriateness of disagreeing with the majority position while refusing to offer any explanation with respect to the nature of that disagreement. And it is no surprise that this type of dialogue often took place in constitutional cases, which are regularly thought to be a proxy for case importance.[79]

In *The Robert W. Parsons*, the Court reviewed a state court judgment construing the phrase "maritime contract" in a state statute to exclude work done on a dry dock to a canal boat used to ship merchandise intrastate between ports.[80] In light of the state court's construction, recovery on the resulting lien could be sought in state court instead of federal court. The Court reversed this judgment, holding that it was a maritime contract. As a result, the state statute was invalidated to the extent that it suggested otherwise by construction and any recovery related to it would have to be sought in federal court. As a case about the scope of state as opposed to federal court jurisdiction and reach of the federal commerce power, the state court indicated that the issue was "one which has provoked much discussion, and one concerning which the state and federal courts have apparently entertained and expressed somewhat diverse views."[81] While Justice Harlan noted dissent, Justice Brewer, joined by Chief Justice Fuller and Justice Peckham, began his dissent by stating, "I am unable to concur in the opinion and judgment in this case, and deem the matter of sufficient importance to justify an expression of my reasons therefor."[82]

A similar sentiment is found in *Muhlker v. New York & Harlem Railroad Co.*, where the Court reversed a lower court judgment dismissing an action to enjoin use of an elevated railroad structure on the street adjoining the plaintiff's residence.[83] Writing for himself and three others, Justice McKenna suggested that the resulting diminution in the quality of light, air, and access to the residence violated the contracts clause and constituted a taking without just compensation. The opinion had important implications for the tradeoff between private property rights and state power to promote economic growth. One contemporary commentator testified to the case's importance, referring to it as "a substantial aid to stability of contractual obligations and to justice."[84] In addition to McKenna's opinion, Justice Brown noted concurrence and Justice Holmes wrote for himself and three others in dissent. Perhaps because the judgment was left in a 4-1-4 posture, with its attendant uncertainty,[85]

Justice Holmes began his dissent by suggesting that, because the case "seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it."[86] While such a preface was not uncommon during this period, Holmes's distinction between the expression of dissent and giving reasons for it may have been directed toward Brown, who could have otherwise written the controlling "narrowest grounds" opinion.[87]

While there were more examples of noted disagreement occurring in constitutional cases during this era, many such cases were of the mundane variety. This is undoubtedly a result of the fact that many of the constitutional cases decided by the Court during this period reached the agenda through appeal or writ of error. In the illustrative *Omaechevarria v. Idaho*, Justices Willis Van Devanter and McReynolds noted dissent to the Court upholding a state statute that prohibited grazing sheep on public lands previously occupied by cattle.[88] Among other challenges, a convicted sheep herder argued that the statute abridged the "Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners."[89] The Court concluded that the law was not "unreasonable or arbitrary" because "experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders."[90] Given the nature of the underlying dispute, it is unlikely that any



During the Chief-Justiceship of Edward D. White (1910-1925), noted dissents were high. It is not surprising that Justices Oliver Wendell Holmes, Jr. (between White and Charles Evans Hughes at John Marshall Harlan's funeral in 1911), who dissented frequently, thus is also among the Justices to note dissent most often. Noted disagreement decreased as a result of eliminating much of the Court's mandatory jurisdiction in 1925.

written dissent countering these propositions would have contributed much to the broader jurisprudential principles.

The end of this second wave is marked by important institutional changes that may have dampened the frequency of noting disagreement. As an initial matter, the Judiciary Act of 1925 eliminated much of the Court's mandatory jurisdiction. The detrimental effect of a largely mandatory docket on the Court's performance during this era is well known.[91] It is possible that the occurrence of noted disagreement decreased as a result of eliminating much of the Court's mandatory jurisdiction in 1925, either because the Justices had more time to write separate opinions or because the pool of cases changed such that these notations were increasingly unnecessary. Although the Justices had been permitted funds to hire a stenographer for more than thirty years, Congress first authorized the hiring of a law clerk for each Justice in 1919.[92] The introduction of law clerks may have decreased the opportunity cost associated with filing a written dissent. During this time, the Justices also started the "informal and occasional" practice of circulating opinion drafts.[93] Noting disagreement may have been more appealing when majority opinions were simply presented to the Conference without going through the bargaining and accommodation process that structures opinion formation today.

A relative period of stasis marked the interregnum between passage of the 1925 Judges' Bill and the constitutional revolution of 1937. There appear to have been two primary reasons for initiation of the third wave of regular noted disagreements beginning with cases decided in 1938. First, Justice Black, who as mentioned earlier would become the Justice who noted most frequently, joined the Court in 1938. For cases decided in 1938 alone, Black registered ten noted concurrences or dissents.[94] Although Black was President Roosevelt's first appointment to the Court, and was seated during a time of intense political conflict, most of these notes were filed in otherwise unanimous and mundane cases. In *Calmar Steamship v. Taylor*, for example, Justice Black noted dissent to an otherwise unanimous opinion holding that a ship owner does not have an indefinite obligation to provide post-voyage medical care for treatment of an employee's incurable disease that manifested itself while aboard the ship during the scope of employment but was not caused by the owner's negligence.[95]

Increased productivity of noted concurrences and dissents by Justice McReynolds is the second major factor contributing to the initiation of the third wave of noted disagreement. Known for his combative personality and laziness,[96] McReynolds regularly noted disagreement throughout his career. Beginning with cases decided in 1938, however, there was a noticeable uptick. As was the norm, many of the cases in which McReynolds noted disagreement during this period were of the mundane variety. In *Guarantee Trust v. IRS*, for example, the Court held that an executor for a deceased member of a corporate partnership owed taxable income for the year of his death on corporate profits obtained prior to the firm's fiscal year ending on July 31 and between August 1 and the date of death, rather than just owing on the former.[97] Justices McReynolds and Roberts noted dissent.

Although most instances of noted disagreement during this period were in comparatively unimportant cases, there were exceptions. Justice Butler noted dissent in *Palko v. Connecticut*, where Justice Benjamin Cardozo wrote for the Court in holding that the Fourteenth Amendment's due process clause incorporated the Fifth Amendment's double jeopardy clause because the latter was "implicit in the concept of ordered liberty."[98] And when Justice Frankfurter wrote the Court's opinion in *Minersville School District v. Gobitis* holding that a

public school's policy of requiring students and teachers to recite the Pledge of Allegiance did not run afoul of the First Amendment,[99] Justice McReynolds noted concurrence.[100]

C. The Modern Era, 1941-present

While pinpointing a precise beginning to the modern era of noting disagreement is somewhat arbitrary, two junctures are worth special recognition. The first is the explosion of separate opinion writing that took place during the middle of the twentieth century. Scholars have proffered an array of explanations for the increase in separate opinions, including alterations to the Court's jurisdiction, evolving institutional norms, personnel changes, and leadership styles. One popular theory is that Chief Justice Stone was "an ineffective leader"[101] who precipitated the increase in separate opinion writing with the way he managed Conference and eschewed manufactured consensus. Indeed, a Bayesian change point analysis of separate opinion-writing found 1941—the year Stone became Chief Justice—to mark an important structural break in the production of dissents.[102]

We need not take a position in the broader debate over what caused the explosion of separate opinion writing to identify 1941 as a plausible beginning to the period that would mark the eventual demise of noting disagreement. As a general matter, it is reasonable to expect the increase in separate opinion writing to be associated with a decrease in the extent to which Justices settled for noting concurrence or dissent. It is important to emphasize, however, that the demise of concurring and dissenting without opinion was gradual. Indeed, while aggregate trends indicate that instances of noted disagreement declined around the time that the 1925 Judges' Bill eliminated much of the Court's mandatory jurisdiction, there was a subsequent spike in use of this practice after Stone's ascension to Chief Justice marked a stark increase in the number of written concurrences and dissents being produced. In 1945, for example, the number of cases with noted concurrences or dissents was second only to the 1903 peak. The simultaneous regular use of noted and written concurrences and dissents can be explained by thinking of these tools as variations of disagreement. Just as a variety of factors are thought to have led to the explosion of separate opinion writing, these same factors may have led Justices to note disagreement rather than silently acquiesce in cases not considered important enough to warrant a separate written opinion.

With the burdens of a primarily mandatory docket lifted, the cases fostering noted disagreement during this period tend to resemble the types of cases decided by the modern Court. Nonetheless, the norm of reserving mere notations of disagreement for narrow decisions persisted. In *United States v. Townsley*, for example, the Court held that government workers in the Panama Canal Zone who were paid a fixed monthly rate were nonetheless entitled to overtime pay when working in excess of forty hours per week under the Independent Offices Appropriation Act.[103] Although no separate opinion was written regarding this narrow issue of statutory construction, Justice Frank Murphy noted concurrence while Chief Justice Stone and Justices Robert H. Jackson and Wiley Rutledge noted dissent. A similarly narrow issue of statutory construction prompted a noted dissent from Justice Black in *McKenzie v. Irving Trust*, where the Court held that a debtor's payment mailed to a creditor more than four months before bankruptcy, but received and processed less than four months before bankruptcy, could not be recovered by the debtor's trustee under the Bankruptcy Act, which effectively negated transfers made within a four-month window to avoid favoring certain creditors.[104]

Justices also continued noting dissent in constitutional cases during the early years of the modern era, though none were important

or far reaching enough to become a part of the canon. This is not to suggest that the underlying issues were unimportant, however, only that the particular cases were often not noteworthy precedents meant to be central in guiding lower court decision-making. The Court's decision in *Adkins v. Texas* is illustrative.[105] In *Adkins*, the Court rejected a black criminal defendant's claim that the state's concerted effort to limit the number of black grand jurors to one violated the Fourteenth Amendment's equal protection clause. Justice Murphy wrote an impassioned dissent arguing that the decision "tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed."[106] In addition, Justice Rutledge noted concurrence while Chief Justice Stone and Justice Black noted dissent. Notwithstanding the obvious general importance of the underlying issue, the Court's relatively narrow decision in *Adkins* distinguished it from more canonical cases in the area such as *Strauder v. West Virginia*,[107] *Norris v. Alabama*,[108] and *Batson v. Kentucky*.[109]

This period also generated more active criticism of Justices who were content to

Hugo L. Black (pictured above with his wife, Josephine) is the Justice who noted most frequently. For cases decided in 1938 alone, the year he joined the Court, Black registered ten noted concurrences or dissents. Although Black was seated during a time of intense political conflict, most of these notes were filed in otherwise unanimous and mundane cases.

merely note disagreement, particularly by Justice Frankfurter. In *Niemotko v. Maryland*, the Court overturned the convictions of members of a Jehovah's Witness group for disorderly conduct after holding Bible talks in a public park despite a request for permission being denied by the city.[110] Although the judgment was unanimous, Justice Black noted concurrence in the result. While Justice Frankfurter also concurred in the result, he wrote what one commentator referred to as a "classic" opinion on the importance of balancing interests in free speech cases.[111] At the start of the opinion, Frankfurter included a thinly veiled criticism of Black (and possibly others who may have silently acquiesced in the majority opinion): "When the way a result is reached may be important to results hereafter to be reached, law is best respected by individual expression of opinion."[112]

In *Larson v. Domestic and Foreign Commerce Corp.*, the Court held that sovereign immunity barred the award of an injunction prohibiting the head of the War Assets Administration from selling or delivering surplus coal to a second purchaser allegedly in violation of a contract entered into by the federal agency with the plaintiff.[113] Justice Douglas issued a one-paragraph concurrence explaining that he agreed with the Court's position on sovereign immunity when the question involved sale of government property.[114] Justice Rutledge noted concurrence and Justice Jackson noted dissent. In a written dissent, Justice Frankfurter, joined by Justice Burton, emphasized the potential harms of narrow "[c]ase-by-case adjudication" in which "judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict."[115] Before going on to discuss the issue presented, Frankfurter indicated his disapproval of the Justices noting disagreement when he wrote: "The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going."[116]

The start of the Burger Court marks the second significant junction of special note for defining the modern era of noting disagreement. After a noticeable drop in the use of this practice during the Warren Court, two institutional changes made during the Burger Court era have been specifically tied to the decline of noting disagreement. First, the norm of having the senior Justice in the minority coalition assign the dissenting opinion was institutionalized during the Burger Court.[117] Prior to this innovation, there were sporadic attempts at coordination among members of a minority coalition but no accepted norm that a particular Justice would or should bear the burden of ensuring that a minority position be explained in writing.[118] By reducing coordination costs, this institutional change has been said to be associated with "[t]he abrupt end of the practice of notation (dissenting without opinion) at the beginning of the Burger Court."[119]

A second potentially important institutional change that took place during the Burger Court that may have dampened willingness to note disagreement was the introduction of a syllabus to each opinion in 1971. The syllabus now affixed to Supreme Court opinions clearly states each Justice's vote and the portions of any particular opinion a Justice joins. Prior to the introduction of the syllabus, voting coalitions were sometimes ambiguous. Corley et al. have suggested that "[t]he addition of a syllabus . . . made each justice publicly responsible for his or her votes."[120] As a result, this institutional change might have "led to the death of acquiescence and notation"[121] to the extent that prominent focus was placed on each Justice's behavior in any given case.

Although previously published evidence suggests that the practice of noting

disagreement survived through the Burger Court, instances of noted concurrence became more common than instances of noted dissent.[122] As with prior practice, however, instances of noting tended to occur in relatively unimportant cases. In *Oil Workers v. Mobil Oil Corp.*, for example, the Court held that federal law allowing states to prohibit agency shops did not permit them to "void an agency-shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas."[123] Although three other Justices wrote separate opinions, Chief Justice Burger merely had it noted that he concurred in the judgment.

While noted disagreement had always been uncommon in consequential constitutional cases, the Burger Court included what may have been the last notations in important and publicly visible opinions. Chief Justice Burger noted dissent in *Carey v. Population Services International*, where the Court invalidated various provisions of a state law dealing with the regulation and distribution of contraception.[124] There were also instances of noted disagreement in several First Amendment cases. For example, Justice Harry Blackmun noted concurrence in *New York v. Ferber*, where the Court upheld a state law prohibiting the promotion of sexual performances by children under sixteen. Justice Blackmun also noted concurrence in *Bethel School District v. Fraser*, where the Court held that a high school student's allegedly lewd speech at an assembly of the student body was not protected speech.

Instances of noted disagreement became exceedingly rare beginning with the Rehnquist Court, and are almost unheard of on the contemporary Court in cases disposed of after oral argument. Indeed, in the last decade of our sample period we uncovered only one instance of a noted concurrence or dissent in an orally agued case, and that was an unusual case. In *Los Angeles County Flood Control District v. Natural Resources Defense Council*, the Court reversed the Ninth Circuit and held that water flowing from one part of a navigable river into a concrete channel, then back into the river, does not constitute "discharge of a pollutant" under the Clean Water Act.[125] What made the case unusual was that the petitioner, respondent, and U.S. as amicus all agreed with the Court's answer to the question presented; they disagreed, however, on what that result meant for the parties to the case—a question that by itself would likely not have warranted review.[126] In this unusual posture, Justice Samuel Alito noted concurrence.[127]

In addition to the importance of previously discussed changes to institutional norms during the Burger Court, several factors may have helped contribute to the demise of noting disagreement in the modern era. Gradual membership turnover is one important factor. Although Justices Black and Douglas were the only two of the top-twenty noting Justices in the Court's history to serve as late as the Burger Court, gradual turnover means that varying degrees of exposure to the practice persisted as a plausible outcome at least in relatively unimportant cases well past the point that changes to formal institutional norms might have otherwise eradicated it. Even after Justices Black and Douglas were replaced, for example, most of the remaining Justices would have seen the practice utilized and may have noted disagreement themselves on occasion. Over time, however, this became less true and the practice may have increasingly been considered inappropriate.

A sentiment expressed by Justice Brennan toward the end of his career helps capture what was likely to have been a slow-emerging consensus in favor of explaining the nature of one's disagreement rather than noting. Not long after joining the Court in 1956, Brennan joined Chief Justice Warren and Justices Black and Douglas in noting dissent in *Thomas v. Arizona*, where the Court

upheld the conviction of a defendant who alleged that a confession introduced at trial had been unconstitutionally coerced by fear of lynching.[128] More than twenty-five years later, Brennan wrote a "defense of dissents" that carved out room for silent acquiescence in light of "trivial disagreements" but argued that "members of the Court [otherwise] have a responsibility" to articulate the reasons for disagreement.[129] He concluded with a statement that questioned the continuing institutional validity of noting disagreement: "This is why, when I dissent, I always say why I am doing so. Simply to say, 'I dissent,' I will not do. I elevate this responsibility to an obligation because in our legal system judges have no power to declare law."[130] This sentiment expresses the now common sense, as Justice Scalia once put it, that "legal opinions are important for the reasons they give, not the results they announce."[131] To the extent that these positions are now widely accepted, it may be that noting disagreement is no longer considered a legitimate practice for Supreme Court Justices.

More practically, caseload changes may help explain the demise of noted disagreements. In O.T. 2014, the Supreme Court delivered formal opinions in seventy-four cases.[132] In contrast, the Court averaged about 177 opinions per term during the 1940s.[133] With a high caseload, noting disagreement may be considered a valuable compromise position between silently acquiescing and writing separately. As Justice Ginsburg once explained, "In collegial courts, one gets no writing credit for dissenting or concurring opinions; however consuming the preparation of a separate opinion may be, the judge must still carry a full load of opinions for the court."[134] To keep up with other writing assignments, merely noting disagreement might sometimes seem to be the preferable course. But this argument loses much of its luster when comparatively few opinions are being written in any event. When the number of total cases is low, Justices can devote more time to separate opinions.

IV. Conclusion

The practice of noting disagreement has largely been considered an unusual relic of Supreme Court practice long ago discarded or an idiosyncratic behavior perpetuated by a relatively small number of Justices. By manually reviewing every Supreme Court opinion from 1791-2014 and systematically coding instances of Justices concurring or dissenting without opinion, we have recovered the lost history of this institutional practice. Contrary to the conventional wisdom, we have shown that Justices began noting disagreement in the early nineteenth century and continued doing so regularly into the last quarter of the twentieth century. Moreover, we demonstrate that this practice was widespread among Justices.

Although precise explanations for particular instances of noted disagreement are difficult to identify by definition, case narratives support the conventional understanding that the practice was primarily reserved for unimportant issues. Ultimately, the gradual demise of Justices merely noting their disagreement may have been precipitated by formal institutional changes in areas such as jurisdiction and opinion assignment along with a decreasing caseload and shifting norms about the importance of being transparent with respect to reasoning. While noted disagreement appears to have all but vanished from the modern Court, at least for orally argued cases, it was an important and pervasive practice that served an intermediate function between silently acquiescing to majority positions, as was common in the Court's early years, and emergence of a strong norm in favor of writing separately that emerged during the middle of the twentieth century. As such, it is an important institutional tool that offers a

window into the complexities of Supreme Court practice and institutional change.

ENDNOTES

[1] 274 U.S. 200 (1927).

[2] *Id.* at 207.

[3] 274 U.S. at 208 (Butler, J., dissenting).

[4] *See, e.g.*, VICTORIA NOURSE, Buck v. Bell: *A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 113 (2011) (detailing that "many speculate [Butler's noted dissent in *Buck*] was influenced by his Catholicism and Catholics' distaste for sterilization as bodily mutilation).

[5] PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 172 (2008).

[6] 60 U.S. 393 (1857).

[7] 163 U.S. 537 (1896).

[8] 323 U.S. 214 (1944).

[9] For a discussion of the anticanon in constitutional law, *see* JAMAL GREENE, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

[10] RUTH BADER GINSBURG, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 143 (1990).

[11] ANTONIN SCALIA, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 41 (1999).

[12] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

[13] SCALIA, *The Dissenting Opinion*, at 35.

[14] HARLAN F. STONE, *Dissenting Opinions Are Not without Value*, 26 J. AM. JUDICATURE SOC'Y 78 (1942).

[15] WILLIAM J. BRENNAN, JR., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1985).

[16] *Survey of the Work of the Colorado Supreme Court, 1936-1942*, 14 ROCKY MTN. L. REV. 213, 214 (1942).

[17] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 174-175 (1999).

[18] MATHILDE COHEN, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 514-25 (2015).

[19] BERNARD WOLFMAN ET AL., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PENN. L. REV. 235 (1973) [hereinafter WOLFMAN ET AL., *Behavior*]. This article was later published as a book. BERNARD WOLFMAN ET AL., DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES (1975).

[20] *See* WOLFMAN ET AL., *Behavior*, at 315-325.

[21] *Id.* at 328.

[22] GREG GOELZHAUSER, *Silent Concurrences*, 31 CONST. COMMENT. 351 (2016)

[23] But *see* WILLIAM BAUDE, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y. J. OF LAW & LIBERTY 1 (discussing several instances of contemporary Justices noting dissent in orders and summary opinions from the Court's "shadow docket").

[24] For discussion of opinion delivery practices at various points during the Court's history, *see* JOHN P. KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH U. L.Q. 137 (1999); ROBERT POST, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

[25] *See, e.g.*, PAMELA CORLEY ET AL., THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT (2013); GREGORY A. CALDEIRA & CHRISTOPHER J. W. ZORN, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); MARCUS E. HENDERSHOT ET AL., *Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the U.S. Supreme Court*, 66 POL. RES. Q. 467 (2012); MARK S. HURWITZ & DREW NOBLE LANIER, *I Respectfully Dissent: Consensus, Agendas, and Policymaking on the U.S. Supreme Court, 1888-1999*, 21 Rev. of POL'Y RES. 429 (2004); THOMAS G. WALKER ET AL., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

[26] For discussion of silent acquiescence, *see* GREG GOELZHAUSER, *Silent Acquiescence on the Supreme Court*, 36 JUST. SYS. J. 3 (2015) [hereinafter GOELZHAUSER, *Silent*]; GREG GOELZHAUSER, *Graveyard Dissents on the Burger Court*, 42 J. SUP. CT. HIST. 188 (2015) [hereinafter GOELZHAUSER, *Graveyard*]. *See also* LEE EPSTEIN ET AL., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001) (analyzing voting fluidity, much of which may have been acquiescence, on the Waite Court); KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 143-152 (discussing reluctance to dissent on the Marshall Court); POST, *The Supreme Court Opinion as Institutional Practice*, at 1344 (describing a "norm of acquiescence" on the Taft Court).

[27] *See, e.g.*, ERIC C. NYSTROM & DAVID S. TANENHAUS, *The Future of Digital Legal History: No Magic, No Silver Bullets*, 56 AM. J. LEGAL HIST. 150 (2016).

[28] Noted concurrences are special concurrences by definition.

[29] In his class of "nonreasoned" opinions, Judge Posner includes noting disagreement as a "limiting case" but also includes opinions that consist of a "short paragraph that announces a conclusion but merely hints at the reasoning process behind it" and those "that adopt by reference the reasoning of the lower court." POSNER, THE FEDERAL COURTS, at 174. Our approach is more restrictive in part because of the subjectivity inherent in designing any ex ante classification rule that distinguishes between perfunctory and sufficiently well-reasoned separate opinions. Moreover, we are specifically interested in

the phenomenon of Justices offering no explanation for their disagreement with the majority position.

[30] *See, e.g., Katchen v. Landy*, 382 U.S. 323, 340 (1966) (Black and Douglas, J., dissenting) ("Mr. Justice Black and Mr. Justice Douglas dissent for the reasons stated in the dissenting opinion of Judge Phillips in the Court of Appeals."); *Ylst v. Nunnemaker*, 501 U.S. 797, 807 (1991) (Blackmun, J., dissenting) ("For the reasons stated in the dissent in *Coleman v. Thomson*, *ante*, p. 758, I also dissent in this case.")

[31] To clarify our coding rule, consider two hypothetical opinions: in case A at time 1, every Justice's vote and reasoning is accounted for through writing or joining a reasoned opinion; in a related case B at time 2, the majority opinion writer from case A points the reader to case A for a detailed explanation of the reasoning behind the disposition while a Justice who wrote in dissent in case A merely notes dissent in case B. Although it requires nominal additional effort, a reader of case B can readily find the reason(s) for the disagreement noted in case B. In *Lemke v. Homer Farmers Elevator Co.*, 258 U.S. 65, 66 (1922), for example, the Court's opinion notes that the question at issue "was considered and passed upon in No. 456, just decided" and "the reasons therein stated for the conclusion reached are controlling here, and need not be repeated." Although Justices Holmes, Brandeis, and Clarke merely note dissent in *Homer Farmers Elevator*, the companion case mentioned by the majority opinion includes a reasoned dissent by Justice Brandeis, joined by Holmes and Clarke, in addition to a full majority opinion. *Lemke v. Famers Grain Co.*, 258 U.S. 50, 61-65 (1922).

[32] Consider the same hypothetical cases introduced in footnote 31 except that the noter in case B also noted in case A. These notes are not independent. As a result, including notes from case B would overstate the occurrence of noted disagreement. In *United States v. Ferger (No. 2)*, 250 U.S. 207, 207-208 (1919), for example, the Court's opinion reports that the "case is disposed of by the ruling just announced in No. 776 . . . for the reasons stated" therein. While Justice Mahlon Pitney noted dissent in *Ferger*, he also noted dissent in the companion case referenced by the majority opinion. *United States v. Ferger*, 250 U.S. 199, 206 (1919) ("Mr. Justice Pitney dissents."). As a result, the reason for Justice Pitney's disagreement on the underlying substantive issue is unclear from either opinion.

[33] ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 90 (1978).

[34] *See, e.g.*, KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 158.

[35] *Id.*

[36] JAMES H. FOWLER ET AL., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court,* 15 POL. ANALYSIS 324, 327 (2007).

[37] HAROLD J. SPAETH ET AL., 2014 Supreme Court Database, Version 2014 Release 01, http://supremecourtdatabase.org. After we completed this project, the Legacy Database of the Supreme Court Database was released, which includes each case decided by the Supreme Court throughout its history along with information regarding votes and opinion writing that may simplify the process of uncovering instances of noted disagreement. HAROLD J. SPAETH ET AL., 2016 Supreme Court Legacy Database, Version 2016 Release 01, http://supremecourtdatabase.org. Using the Legacy Database to uncover instances of noted disagreement may result in different findings due to different classification rules about what constitutes a case.

[38] Listed numbers are rounded to the nearest whole number. The standard deviation of the number of noted concurrences per year is four; the standard deviation of the number of noted dissents per year is seven.

[39] The standard deviation of the percentage of cases with a noted concurrence in a year was two percent; the standard deviation of the percentage of cases with a noted dissent in a year is five percent.

[40] The average yearly number of votes noting concurrence is three, with a standard deviation of four and a range from zero to twenty-six. The average yearly number of votes noting dissent is nine, with a standard deviation of thirteen and a range from zero to sixty-eight.

[41] *See, e.g.*, GOELZHAUSER, *Graveyard*, at 196-98 (discussing instances during the Burger Court when Justices referenced their solitary position as a reason to silently acquiesce); DONALD GRANBERG & BRANDON BARTELS, *On Being a Lone Dissenter*, 35 J. APPLIED SOCIAL PYSCH. 1849 (2005) (demonstrating empirically that unanimous opinions from 1953-2001 were overrepresented and solo-dissenter opinions underrepresented based on a rectangular distribution).

[42] GINSBURG, *Remarks on Writing Separately*, at 145 n. 68.

[43] Different Justices likely appear on these lists for different reasons. With respect to dissents, for example, it is well known that Justice Van Devanter struggled with producing written opinions, regularly having majority opinions reassigned. *See, e.g.*, BARRY CUSHMAN, *The Hughes Court Docket Books: The Early Terms, 1929-1933,* 40 J. SUP. CT. HIST. 103 (2014). As Judge Posner once recognized, however, "Holmes and Cardozo regularly resorted to this manner of dissent even though they could have found the time to write a full-scale dissent."[43] POSNER, THE FEDERAL COURTS, at 175. These Justices are thought to have noted disagreement in relatively unimportant cases. *See,*

e.g., MELVIN I. UROFSKY, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 929 (2012) ("Brandeis often dissented without opinion, because he did not believe the matter to be worth the great effort he poured into his written dissents."). *See also* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 579-81 (2009). For a related discussion of dissents that Brandeis wrote but ultimately chose not to publish, *see* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957).

[44] POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM, at 175.

[45] 7 U.S. 503 (1806).

[46] *Id.* at 510.

[47] *See* KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 144.

[48] 7 U.S. at 513.

[49] Charles C. TURNER ET AL., *Beginning to Write Separately: The Origins and Development of Concurring Judicial Opinions*, 35 J. SUP. CT. HIST. 93, 97 (2010).

[50] David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1001 (2000).

[51] *See* SCOTT DOUGLAS GERBER, *Deconstructing William Cushing*, IN SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 99-100 (Scott Douglas Gerber ed., 1998).

[52] *Renner v. Bank of Columbia*, 22 U.S. 581 (1924).

[53] *The Patapsco Insurance Co. v. Coulter*, 28 U.S. 222 (1830).

[54] *See* GARROW, *Mental Decrepitude on the U.S. Supreme Court*, at 1002-1003.

[55] FRANK H. EASTERBROOK, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 487 (1983).

[56] *See, e.g.*, KELLY V. JACKSON, 31 U.S. 622, 633 (1832); *Crane v. The Lessee of Henry Gage Morris*, 31 U.S. 598, 621 (1832). The most famous instance of this mark occurred in *Worcester v. Georgia*, 31 U.S. 515, 596 (1832). ("The opinion of Mr. Justice Baldwin was not delivered to the reporter.") In *Worchester*, however, there is a summary of Justice Baldwin's position. *Id.* As a result, it is not a pure example of noting dissent. For more information on Baldwin's dissent in *Worcester*, including a reprinting of the missing opinion, *see* LYNDSAY G. ROBERTSON, *Justice Henry Baldwin's "Lost Opinion" in* Worcester v. Georgia, 24 J. SUP. CT. HIST. 50 (1999).

[57] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 (1991).

[58] KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 159.

[59] *Id.*

[60] *Id.* at 166-170.

[61] *See generally* JOSHUA GLICK, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003); *see also* DAVID R. STRAS, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1721-1722 (2007).

[62] *See also* MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE (2014) 58, 64 (discussing notations of disagreement in the context of relatively unimportant constitutional cases).

[63] *Erwin v. Lowry*, 48 U.S 172 (1849).

[64] *Parker v. Kane*, 63 U.S. 1, 11 (1859).

[65] *Bosley v. Wyatt*, 55 U.S. 390 (1852).

[66] *Kock v. Emmerling*, 63 U.S. 69 (1859).

[67] 83 U.S. 130 (1873).

[68] *Id.* at 141 (Bradley, J., concurring).

[69] *Id.* at 142 (Field, C.J., dissenting).

[70] 83 U.S. 36 (1873). Justice Samuel Freeman Miller's opinion in *Bradwell* called the principles articulated in *Slaughter-House Cases* "conclusive for the present case." *Bradwell*, 83 U.S. at 139.

[71] *See* JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY, 444-48 (1995).

[72] *See* WILLIAM H. REHNQUIST, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986).

[73] *The Benito Estenger*, 176 U.S. 568 (1900).

[74] *Toltec Ranch Co. v. Cook*, 191 U.S. 532 (1903).

[75] *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 246 U.S. 58, 59 (1918).

[76] *Estate of P.D. Beckwith v. Commissioner of Patents*, 252 U.S. 538, 539 (1920) (quoting the application for trademark registration).

[77] *See* KELSH, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, at 162-63.

[78] *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 504-505 (1908) (Moody, J., dissenting).

[79] *See, e.g.*, UROFSKY, DISSENT AND THE SUPREME COURT, at 62.

[80] *Perry v. Haines*, 191 U.S. 17 (1903).

[81] *In re Haines*, 52 A.D. 550, 551-52 (1900).

[82] 191 U.S. at 38 (Brewer, J., dissenting).

[83] 197 U.S. 544 (1905).

[84] Wilbur Larremore, *Stare Decisis and Contractual Rights*, 22 HARV. L. REV. 182, 185 (1909).

[85] On the confusion that can be generated by these plurality opinions, particularly prior to the enunciation of the narrowest grounds doctrine, *see* PAMELA C. CORLEY, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30 (2009); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000); LINDA NOVAK, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

[86] 197 U.S. at 571 (Holmes, J., dissenting).

[87] Of course, it would be more than seventy years before the Supreme Court clarified that the holding in a case governed by multiple opinions is delivered by the

opinion concurring on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[88] 246 U.S. 343 (1918).

[89] *Id.* at 344.

[90] *Id.* at 347.

[91] On the consequences of mandatory jurisdiction for the Court's docket and performance during this era, *see* POST, *The Supreme Court Opinion as Institutional Practice*; EDWARD A. HARTNETT, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); STEPHEN C. HALPERN & KENNETH N. VINES, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 WESTERN POL. Q. 471 (1977).

[92] TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK, 83-84 (2006).

[93] G. EDWARD WHITE, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1505 (2006).

[94] *See, e.g., U.S. v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 126 (1938) (Black, J., concurring without opinion); *Lone Star Gas v. Texas*, 304 U.S. 224, 242 (1938) (Black, J., dissenting without opinion); *Denver Stockyard v. U.S.*, 304 U.S. 470, 485 (1938) (Black, J., concurring without opinion).

[95] 303 U.S. 525 (1938).

[96] *See* ALBERT LAWRENCE, *Biased Justice: James C. McReynolds of the Supreme Court of the United States*, 30 J. SUP. CT. HIST. 244 (2005).

[97] 303 U.S. 493 (1938).

[98] 302 U.S. 319, 325 (1937).

[99] 310 U.S. 586 (1940).

[100] *Id.* at 600 (McReynolds, J., concurring without opinion). Although it is not clear why McReynolds concurred without opinion, his dislike of Frankfurter is well chronicled. *See, e.g.*, LAWRENCE, *Biased Justice*, at 251-52.

[101] WALKER ET AL., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, at 379.

[102] ARTHUR SPRILING, *Bayesian Approaches for Limited Dependent Variable Change Point Problems*, 15 POL. ANALYSIS 387 (2007). But *see* BARRY CUSHMAN, *The Hughes Court Docket Books: The Late Terms, 1937-1940*, 55 AM. J. LEGAL HIST. 361 (discussing signals of increased dissensus prior to Stone's ascension); HENDERSHOT ET AL., *Dissensual Decision Making* (demonstrating the presence of multiple change points before and after 1941 when examining separate opinion writing at the Justice level rather than Court level).

[103] 323 U.S. 557 (1945).

[104] 323 U.S. 365 (1945).

[105] 325 U.S. 398 (1945).

[106] 325 U.S. 398, 410 (Murphy, J., dissenting).

[107] 100 U.S. 303 (1880). In *Strauder*, Justice Field filed a one-sentence perfunctory dissent pointing interested readers to another opinion released on the same day for explanation. 111 U.S. at 312 (Field, J., dissenting).

[108] 294 U.S. 587 (1935).

[109] 476 U.S. 79 (1986).

[110] 340 U.S. 268 (1951).

[111] R. GEORGE WRIGHT, *Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763, 764 (1990). On the broader dispute involving Black and Frankfurter over balancing interests in free speech cases, *see* LAURENT B. FRANTZ, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[112] 340 U.S. at 273 (1951) (Frankfurter, J., concurring). Frankfurter's concurring opinion begins: "The issues in these cases concern living law in some of its most delicate aspects. To smother differences of emphasis and nuance will not help its wise development." The cases Frankfurter refers to, argued on the same day as *Niemotko* and also involving free speech claims, include *Kunz v. New York*, 340 U.S. 290 (1951) and *Feiner v. New York*, 340 U.S. 315 (1951). Chief Justice Vinson wrote for the majority in each case—in favor of the free speech claimant in *Niemotko* and *Feiner*, and against the free speech claimant in *Kunz*. Black filed a written dissent in *Feiner*, but noted concurrence in *Kunz* in addition to *Niemotko*. Douglas also filed a written dissent in *Feiner* (joined by Minton), but silently joined the majority in *Niemotko* and *Kunz*. Jackson filed a written dissent in *Kunz*, but silently joined the majority in *Niemotko* and *Feiner*. Justice Frankfurter's concurrence in *Niemotko* covered all three cases separately. Given the circumstances, it is possible that the respective dissenters silently acquiesced while joining the majority in the other cases. Indeed, Chief Justice Vinson's brief and narrow majority opinions in each case may have been designed to allow Justices with differing views on first principles to join. If something like this occurred, Justice Frankfurter's criticism in *Niemotko* may have been directed at others in addition to Black.

[113] 337 U.S. 682 (1949).

[114] 337 U.S. at 705 (Jackson, J., concurring).

[115] 337 U.S. at 705-706 (Frankfurter, J., dissenting). Notwithstanding the opinions from Justices Jackson and Frankfurter suggesting that *Larson* was disposed of on narrow grounds, some commentators have suggested that *Larson*'s reasoning was broad. *See, e.g.*, VICKI C. JACKSON, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 557 (2003) (suggesting that "[a] closely divided Court upheld the plea of sovereign immunity, in very broad reasoning.").

[116] *Id.* at 706.

[117] CORLEY ET AL., THE PUZZLE OF UNANIMITY, at 87.

[118] *See* BEVERLY BLAIR COOK, *Justice Brennan and the Institutionalization of Dissent Assignment*, 79 JUDICATURE 17, 19-20 (2005).

[119] *Id.* at 20.

[120] CORLEY ET AL., THE PUZZLE OF UNANIMITY, at 87.

[121] *Id.* at 86.

[122] GOELZHAUSER, *Silent.*

[123] 426 U.S. 407, 410 (1976).

[124] 431 U.S. 638 (1977).

[125] 133 S. Ct. 710 (2013).

[126] *See* KEVIN RUSSELL, *Argument Preview: A Clean Water Act Question No One Cares to Debate*, SCOTUSBlog, December 3, 2012, http://www.scotusblog.com/2012/12/argument-preview-a-clean-water-act-question-no-one-cares-to-debate/.

[127] It is possible that Justice Alito disagreed with the Court's decision to hear oral arguments and dispose of the case on the merits despite agreement between the parties. One alternative, for example, would have been to summarily reverse the Ninth Circuit. *See* KEVIN RUSSELL, *Opinion Analysis: The Court Unanimously Agrees with Everyone Else*, SCOTUSBlog, January 10, 2013, http://www.scotusblog.com/2013/01/opinion-analysis-the-court-unanimously-agrees-with-everyone-else/ (questioning "why the Court bothered setting the case for briefing and argument, rather than just summarily reversing, given that all the parties have agreed on the answer to the question presented from the beginning."). Although not included in our sample period, Justice Alito later noted concurrence in a case finding that Nevada could not award greater damages to a citizen suing another state than it would allow a citizen to obtain against Nevada under the full faith and credit clause. *Franchise Tax Board of California v. Hyatt*, 132 S. Ct. 1277 (2016).

[128] 356 U.S. 390 (1958).

[129] BRENNAN, *In Defense of Dissents*, at 435.

[130] *Id.*

[131] SCALIA, *The Dissenting Opinion*, at 33 (1994).

[132] *The Supreme Court's 2014 Term—The Statistics*, 129 HARV. L. REV. 381, 389.

[133] RYAN J. OWENS & DAVID A. SIMON, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228 (2012).

[134] GINSBURG, *Remarks on Writing Separately*, at 142.

What Happened to the Framers of the Federal Rules? Generational Change and the Transformation of the Rulemaking Process

GEORGE RUTHERGLEN

On October 1, 1956, the Supreme Court entered an order that summarily "discharged with thanks" the Advisory Committee on Rules of Procedure.[1] That committee had written and proposed the original Federal Rules of Civil Procedure in 1938, under the guidance of its reporter, Charles E. Clark, previously professor and then dean of the Yale Law School and later Chief Judge of the Second Circuit. He is widely regarded as the leading procedural reformer of the twentieth century and a worthy successor to David Dudley Field in the nineteenth. Why then were he and the Advisory Committee, collectively the authors of the original Federal Rules, fired by the Supreme Court?

In its order of October 1, the Court took no action on amendments proposed by the Advisory Committee, although it had decided the previous April not to accept them, and it gave no explanation for the decision to discharge the committee. According to a leading treatise on federal practice and procedure, these decisions were made "[f]or reasons that have not been disclosed." In fact, the papers of Chief Justice Earl Warren make perfectly clear what happened: The amendments were thought to be too numerous and too controversial, especially among members of the defense bar; and the Advisory Committee was thought to have sat too long, with only piecemeal changes in membership since it had proposed the original rules.

This incident, although largely forgotten, foreshadowed issues that came to the fore as more and more adventurous amendments to the Federal Rules were proposed and approved. The Court's actions in 1956 created an opportunity for a new generation of rulemakers and a new means of proposing rules to the Supreme Court. These came to

fruition in 1966 and 1970 with a transformative set of amendments to the Federal Rules, notably on class actions and discovery, and later still, with the evolution of the rulemaking structure that we have today. This essay sets out how federal procedure started down the path that we have now been on for over sixty years.

Part I begins with what the proposed rules sought to accomplish and how they foreshadowed issues, such as jurisdiction, the scope of discovery, and class actions, that have been with us ever since. Contemporary events, notably the rise of the Civil Rights Movement and the persecution in the McCarthy Era, put these proposed amendments in perspective. Part II then discusses the reasons for rejecting the proposed rules and dismissing the Advisory Committee. These came about because the Advisory Committee threatened to become a standing committee of continuing revision without effective oversight by the Supreme Court. Part III turns to what the participants in these decisions could not have known: what came next in the rulemaking process and how it interacted with the flood of legislation and judicial decisions that greatly expanded the scope of private litigation.

I. Content and Context of the Proposed Amendments

The 1955 amendments came to the Supreme Court within two years of the landmark decision in *Brown v. Board of Education*, and while the Court was considering how to implement that decision in *Brown II* "with all deliberate speed."[2] Cases against Communists and their sympathizers also came before the Supreme Court, with four notable decisions during the same term as the decision not to adopt the 1955 amendments.[3] The Supreme Court's focus had shifted away from matters of pure process to substantive principles and how these could be implemented. This turn to substance became a continuing theme in the Court's decisions in the 1960s and 1970s, as Congress took steps to expand the constitutional rights recognized in landmark decisions like *Brown*.

Against the background of this impending shift, a detailed proposal to refine the operation of over a quarter of the existing Federal Rules might well have failed to engage the Justices' attention. A look at the 1955 amendments confirms that only a few of the changes truly stood out, and with the benefit of hindsight, we can see that they raised issues that would lead to continued controversy. The common theme to be found in these proposed changes can be summarized in one word: expansion, specifically of the scope and authority of the Federal Rules. Judges received expanded managerial authority; parties had expanded access to discovery; courts could exercise expanded jurisdiction. Moreover, all these changes favored plaintiffs. The only proposed change distinctly favorable to defendants was the attempt to recreate the device of judgment notwithstanding the verdict in Rule 50.[4] That device, unknown at common law, and therefore arguably inconsistent with the Seventh Amendment, was recast as a delayed ruling on a motion for directed verdict, a legal fiction that made it eventually into the present rule.

A proposed change to Rule 23, on class actions, exemplifies the overall trend. The change itself seems unproblematic in hindsight: granting authority to the district court to order notice to absent class members to assure that they are adequately represented, or to take other steps to protect their interests. Yet criticism of the proposed change fastened on the possibility that it would expand the effect of any resulting judgment on absent class members, especially if they received notice and failed to respond to it.[5] Similar provisions now appear

in Rule 23(d), fully endorsing the managerial role of the judge in protecting the class, and issues about the binding effect of class judgments have been thoroughly explored in judicial decisions. The 1955 amendments took a first step down this path.

The amendments took another step in a similar direction in a proposed change to Rule 16, on pretrial conferences, to expressly authorize extensive judicial control in managing "protracted litigation." The chief judge of the judicial district where such litigation was pending could assign it "to a designated judge for the trial of the action and for the direction and control of all matters preliminary to trial."[6] This proposal has analogues in the existing rule, which confers broad managerial authority on the district court to conduct pretrial conferences, and in a statutory provision for consolidating complex multidistrict litigation.[7]

From the beginning, the Federal Rules have elicited controversy over expanded discovery. The original rules took the limited discovery available in equity practice, expanded its scope to cover cases at law and to make a much wider range of information available to the parties. The 1955 amendments continued this trend by eliminating the requirement in Rule 34 that production of tangible evidence be made only on motion and for good cause. This change, too, eventually made its way into present Rule 34, which now only requires a request by one party served upon another.[8] No motion and no showing of good cause is required. This change nevertheless was criticized in 1955 as an unneeded expansion

Under the guidance of Charles E. Clark, a professor at Yale Law School, the Advisory Committee on Rules of Procedure proposed the Federal Rules of Civil Procedure in 1938. Why did the Supreme Court fire him and the Advisory Committee in 1956? Clark is pictured above as a judge on the U.S. Court of Appeals for the Second Circuit, where he served from 1939-1963.

of discovery, with the risk of abrogating the work-product doctrine as formulated in *Hickman v. Taylor*.[9] That decision had found the basis for the work-product doctrine in the showing of good cause originally required by Rule 34.

Other proposed changes, also now part of the Federal Rules, concerned expansion of personal jurisdiction under Rule 4. The changes would have allowed federal courts to exercise *quasi in rem* jurisdiction on the same terms as the courts of the state in which they sat and to validly serve process on certain added parties or necessary parties outside the boundaries of the state but within 100 miles of the federal courthouse.[10]

In light of subsequent developments, the 1955 amendments look nearly innocuous in their content. Most of the proposed changes eventually made their way into the Federal Rules in one way or another. Nor did the Advisory Committee's deliberations reveal any obvious deficiencies. Extensive comments were sought from the federal judiciary and from the bar. The committee had waited nearly a decade after the last major revision of the Rules, in 1946, and the only discordant note came from the dissenting opinion of James William Moore, a nationally recognized expert on procedure from Yale Law School and a former student and colleague of Charles Clark while he was at Yale. With the death of the Advisory Committee's chairman, Judge William D. Mitchell, Chief Judge Clark had taken over leadership of the Committee. The partnership of Clark and Mitchell had pushed through the original version of the Federal Rules, with the assistance of Moore as Clark's protégé. By the 1950s, Moore had established himself as an authority by way of his massive treatise on "Federal Practice."[11] The issuance of the Advisory Committee's report, over Moore's dissent, signaled a fundamental divide between the reigning experts on federal procedure. The cause and consequence of this divide form the subject of the next part of this essay.

II. Rule Change and Generational Change

The confluence of controversy over the proposed changes with turnover in the leadership on the Advisory Committee led to calls for the Committee to be disbanded. The Supreme Court did not act immediately on the proposed changes, simply postponing final action, but it did take the seemingly more drastic step of disbanding the Committee. The death of Judge Mitchell and the illness of another Committee member, Professor Edson Sunderland, foreshadowed the need for new membership on a committee appointed in the 1930s. The dispute over the content of the rule changes focused, then as now, on discovery, with groups of plaintiffs' and defendants' counsel lining up for and against the changes. All those opposed to the changes turned this dispute over the content of the changes into one over the Committee's membership. Critics on both sides—defense counsel who thought the changes went too far and plaintiffs' counsel who thought they didn't go far enough—alleged that the Committee was dominated by law professors and judges, both of whom were distant from the realities of current federal practice.

Moore took these objections and added a general critique of constant rulemaking as an overly intrusive interference with the natural process of interpretation in practice. Counting all the technical amendments recommended by the Committee, he found that the Committee had proposed too many changes, and in his words, showed "too little reliance upon the creative and corrective natures of the judicial process."[12] That was what he said in public, along with specific criticism of particular rule changes. In private, in a letter to Chief Justice Warren, he added that the current Advisory Committee should be disbanded and replaced

While a student at Yale Law School, James William Moore helped Clark push through the original version of the Federal Rules. He became a nationally recognized expert on both civil procedure and bankruptcy law. Moore's massive *Federal Practice: A Treatise on the Federal Rules of Civil Procedure*, was first printed in 1938.

by one that "would steer a different course; and that it would improve judicial administration at the cost of very minimal change in procedural rules."[13] Moore then went on to criticize the composition of the Committee. He concluded, to be sure, with a compliment to Mitchell and Clark as "two elder statesmen of the present Advisory Committee," but the addition of the word "elder" implied that their time had passed. After ushering in the era of modern federal procedure, Mitchell had died and Clark was being ushered off the Advisory Committee.

In a considerable understatement, Moore also offered specific criticism of the changes in the discovery rules, encompassed then as now in Rules 26 to 37. He opined that "the provisions of Rules 26 to 37 were the most revolutionary features of the Rules when promulgated, and some of their features still stir considerable controversy."[14] This observation still holds true, as it did in 1955. At the time, the International Association of Insurance Counsel took the trouble of printing up a brief in opposition to the proposed changes and filing it in the Supreme Court.[15] The merits of the arguments advanced in the brief, and others advanced in favor of the proposed change, matter less than the existence of the dispute. The brief followed paths now well-worn in debates over the Federal Rules: that certain changes would violate the *Erie* doctrine and the terms of the Rules Enabling Act; that overly broad discovery would infringe on the work product doctrine; or contrariwise, that plaintiffs' counsel would not get access to justice for their clients without broad discovery.[16] When the brief of Insurance Counsel was forwarded to the Advisory Committee, Clark responded in a detailed letter to Chief Justice Warren that plaintiffs' counsel were adamantly in favor of expanded discovery.[17]

These issues, familiar though they now are, fed into demands that the rulemaking process be more representative. Or, as one plaintiff's lawyer put this point: the Committee members "are either impractical theorists (professors) or counsel for defendants." An old friend of Chief Justice Warren, Forrest A. Betts, expressed similar sentiments from exactly the opposite perspective as a prominent defense lawyer. He wrote: "I have heard the comment made many times that this Committee is not sufficiently representative to justify its mission as an advisory committee to the Supreme Court."[18] Calls to disband the Advisory Committee evidently had leaked out, leading to suggestions both to retain the Committee and to Moore's advice to reconstitute its membership.[19]

The extent of controversy led the Supreme Court to appoint a Committee, consisting of Justices Stanley F. Reed, Felix Frankfurter, William O. Douglas, and John Marshall Harlan, to review the proposed amendments. They agreed with Moore that the proposed changes were unnecessary and "should not be adopted or rejected without

further experience with the present Rules." The proposed changes accordingly "should be retained for future reconsideration."[20] This recommendation immediately gained the approval of the Court in April 1956, and by the following October, when the Court reconvened for a new term, it had become an order to discharge the Committee and revoke its status as a continuing body.[21] Doubts about the work of the committee had crystallized into doubts about whether it was still needed in its current form. Moore and his allies in the bar, in short, had won. What they had won, however, was the battle, but not the war, as subsequent developments quickly bore out.

III. Looking Forward to the Sixties and Beyond

As the 1955 amendments lay on the shelf at the Supreme Court, Congress moved to give authority to review the rules to the Judicial Conference, composed of chief judges and district judges from the circuits, the latter appointed by the Chief Justice. This large group of federal judges—about two dozen—was newly charged "to carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law."[22] The Judicial Conference, in turn, convened a Standing Committee on Rules of Practice and Procedure and a new Advisory Committee, both of whose members were appointed by the Chief Justice.[23]

The new procedure had the advantage of relieving the Supreme Court of the burden of closely supervising the rulemaking process. The Court retained the authority to approve or disapprove of proposed rules, but the Judicial Conference did most of the detailed scrutiny of the Advisory Committee's work. The judges on the Judicial Conference provided a check on the Advisory Committee, both in evaluating its work and in appointing its members, and although approval by the Supreme Court still was required, the Judicial Conference acted as a crucial intermediary, which could devote the necessary time and attention to the review of proposed rules. Doubts nevertheless remained about the rulemaking process, leading Justices Hugo L. Black and Douglas to dissent regularly from approval of changes in the rules over the next decade.[24]

Participation by Congress remained the same: after approval by the Supreme Court, the rules were laid before Congress and it could reject them by enacting ordinary legislation.[25] Congress exercised this power in response to the initial version of the Rules of Evidence in the 1970s[26] and then took the further step of revising and enacting a different set of rules as a statute.[27] The flashpoint in that debate resembled the controversy over work product in 1955: claims of privilege that, according to critics, exceeded the scope of procedural reform and affected substantive rights. Appeals to the *Erie* doctrine in that debate echoed the criticism over expansion of the provisions in 1955 on personal jurisdiction and discovery. After the debacle of the Federal Rules of Evidence, the process of rulemaking would become still more formal and transparent.[28]

The underlying conundrum had to do with the essential tension in the rulemaking process. On the one hand, it raised complex and difficult issues of implementation and enforcement of the law, so much so that only expert lawyers, judges, and academics could fully appreciate the intricacy of the issues. On the other hand, the issues were so controversial, especially to concentrated interest groups within the bar, that they demanded a representative process so that disputes could be fully aired and properly resolved. Congress seemed to be the appropriate institution to make these decisions, but even Moore, the leading critic of the 1955 proposals, regarded

congressional intrusion into the rulemaking process as "a retrogression."[29] As a consequence, he favored reinstatement of the Advisory Committee, but with the expectation that it would not regularly propose significant changes to the rules.

Moore's hopes turned out to be deeply disappointed. A brief lull followed the appointment of a new Advisory Committee, with more members and a less prominent role for faculty members from Yale. Clark and Moore had been replaced by Benjamin Kaplan of the Harvard Law School, who took over as reporter.[30] The initial efforts of the new Committee resulted in minimal amendments in 1961 and 1963, which took up some of the proposals, particularly on expanded personal jurisdiction, from the 1955 amendments.[31] The bombshell fell in 1966, with revision of the rules on joinder, including the transformation of Rule 23 into the principal vehicle for large-scale litigation.[32] The changes recommended in 1955 to facilitate management of large cases through pretrial orders and through notice to class members blossomed into the modern class action, in civil rights cases and in actions for damages. This transformation of Rule 23 was accompanied by criticism of the original rule and of Moore as its principal drafter, further marginalizing him from the changes he had set in motion.[33] There followed in 1970 wholesale amendments to the rules on discovery, including the change from 1955 to do away with the requirements in Rule 34 for motions for production of documents upon a showing of good cause.[34] Within little more than a decade, Moore's vision of minimal change to the rules had been thoroughly repudiated by the new Advisory Committee.

Thereafter, regular changes to the rules every two or three years has continued unabated. Parallel to the ongoing process of judicial interpretation and application of the Federal Rules, we now have a kind of Federal Rules establishment, which continually monitors and recommends changes in the rules. Perhaps the rulemaking process had to evolve in the direction of continuous change. As litigation becomes more complicated, and the law governing it ever more intricate, looking to the Federal Rules as a kind of restatement of federal practice promises a welcome note of simplicity. Particular changes to particular rules can be debated with great skill and sophistication, as the Advisory Committee did in 1955. The comments on the proposed rules and the discussion recorded in the Committee's minutes reveal the highest level of knowledge and attention to detail. What gets lost in the analysis of these issues is whether it needs to be undertaken in the form of rulemaking at all. In 1955, this was an open question, but one that now represents a road not taken. It might be time to see if this road has been entirely closed off—whether in Moore's words, we can "confine the amending process to a minimum,"[35] rather than accept it as the engine of permanent change it has become.

Conclusion

The immense expansion of private litigation in federal court, which reached flood tide in the 1960s, illustrates how unexpected the consequences of procedural reform can be. Just to take a single example, the Advisory Committee note to the revision of Rule 23 cautioned that it could not be readily used for mass tort cases: "A 'mass accident' resulting in injuries to numerous person is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability would be present, affecting the individuals in different ways."[36] Several decades of mass tort litigation has given the lie to that pronouncement. Perhaps it was wrong when made, but that ignores the sophistication and expertise of the rulemakers.

A more likely possibility is that no one, no matter how sophisticated, could see how changes in substantive law, in fields as varied as antitrust, securities regulation, civil rights, employment discrimination, products liability, and torts generally, would transform the landscape of litigation. Reform focused on procedural rules can only dimly perceive the consequences of changes in substantive law, which remain outside its field of vision. Adjudication offers a much wider angle to take in the substantive consequences of procedural reform. The rulemaking process remains subject to inherent limits, in particular, that the rules "shall not abridge, enlarge, or modify substantive rights."[37] Channeling procedural change through the rulemaking process either trespasses upon this limit, as it did with the initial proposal for the Federal Rules of Evidence, or leaves adaptation to substantive rights to case-by-case adjudication that compromises the purported uniformity of the rules. That is the lesson to be learned from the firing of the framers of the Federal Rules in the 1950s.

ENDNOTES

[1] 383 U.S. 1031 (1956).

[2] 347 U.S. 483 (1954); 349 U.S. 294, 301 (1955).

[3] *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[4] 1955 Adv. Comm. Note at 662-64. This provision presently appears in Fed. R. Civ. P. 50(b).

[5] Adv. Comm. Note to proposed Rule 23(d) (1955), reprinted in 12A Wright, Miller, et al. 650-51 (2015) (hereafter 1955 Adv. Comm. Note); Separate Statement of James Wm. Moore, reprinted in 12A Wright, Miller, et al. 640 (2015) (hereafter Moore Statement). Clark also responded to such criticism in a letter directly to Chief Justice Warren. Letter of Charles E. Clark of February 11, 1956, in Papers of Earl Warren, Library of Congress, Box 655, Civil procedure, Amendments, Proposed 1954-1957 (hereafter Warren Papers).

[6] 1955 Adv. Comm. Note at 649-50.

[7] The current rule now identifies sixteen different purposes to be pursued in a pretrial conference, among them "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16 (c). The statutory provision on transfer of multidistrict cases is 28 U.S.C. § 1407 (2012).

[8] Fed. R. Civ. P. 34(a).

[9] 329 U.S. 495, 512 n. 10 (1947); see 1955 Adv. Comm. Note at 657-58.

[10] 1955 Adv. Comm. Note at 640-44. The current provisions to this effect are in Fed. R. Civ. P. 4(k)(1)(B), (n).

[11] **Moore's Federal Practice: A Treatise on the Federal Rules of Civil Procedure**. The first edition was published in 1938 and it remains in print in updated form today.

[12] Moore Statement at 639-40.

[13] Letter of James William Moore of October 20, 1955, at 2 (hereafter Moore Letter), in Warren Papers.

[14] Moore Statement at 640.

[15] Amicus Curiae Brief of the Officers and Executive Committee of the International Association of Insurance Counsel in Opposition to the Adoption of Proposed Amendments 34(b) and 4(f) (March 10, 1956), in Warren Papers. The Federation of Insurance Counsel made known their opposition in a telegram to Chief Justice Warren on February 12, 1956. Telegram from Robert T. Luce, in Warren Papers. For a similar statement from a Philadelphia lawyer, Philip Price, *see* his letter of April 19, 1956, in Warren Papers.

[16] Letter of B. Nathaniel Richter of February 9, 1956, at 2, in Warren Papers.

[17] Letter of Charles E. Clark, of March 24, 1956, in Warren Papers.

[18] Letter of Forrest A. Betts of February 24, 1955. Mr. Betts also made his views on the proposed rules changes known to the Advisory Committee, but not his views about the composition of the Committee. Letter of Forrest A. Betts to the Advisory Committee of February 23, 1955, in Warren Papers.

[19] Letter of G. Aaron Youngquist of November 8, 1954, and Letter of Clifford W. Gardner of November 16, 1954, in Warren Papers; Moore Letter at 2.

[20] Memorandum to the Conference of April 6, 1956, in Warren Papers.

[21] Order of Oct. 1, 1956, 352 U.S. 803 (1956).

[22] Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356, codified as amended as 38 U.S.C. § 331 (2012).

[23] Benjamin Kaplan, "Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)," 77 *Harv. L. Rev.* 601, 601-03 (1964).

[24] 368 U.S. 1012-14 (1961) (statements of Black and Douglas, JJ.); 374 U.S. 865-70 (1963) (statement of Black and Douglas, JJ.); 383 U.S. 1032-37 (1966) (Black, J., dissenting); 398 U.S. 979 (1970) (Black and Douglas, JJ., dissenting).

[25] 28 U.S.C. § 2074(a) (2012).

[26] Order of Nov. 20, 1972, approving Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972); *see* John Hart Ely, "The Irrepressible Myth of *Erie*," 87 *Harv. L. Rev.* 693, 693-97 (1974).

[27] Pub. L. No. 93-595, 88 Stat. 1926 (1975), codified as amended, in 28 U.S.C.A. (2016).

[28] By statute, Congress required the Judicial Conference to publish the procedures for considering proposed rules, to have most meetings to consider proposed rules open to the public, and to give notice of proposed rules so that the public could attend. 28 U.S.C. § 2073 (2012).

[29] Moore letter at 1.

[30] Kaplan, "Amendments of the Federal Rules of Civil Procedure," at 602 nn. 8, 9.

[31] *Id.* at 603, 639-43.

[32] Order of Feb. 28, 1966, approving amendment to the Rules of Civil Procedure for the United States District Courts, 383 U.S. 1031 (1966).

[33] Professor Benjamin Kaplan, the chair of the Advisory Committee in 1966, endorsed Moore's views on the preclusive effect of class actions, but found that the original text was "burdened with a categorization of rights at a high pitch of abstraction. The chief draftsman, Professor Moore, consulted an earlier analysis by Story, but the new master somewhat exceeded the old in the refinements of the nomenclature by which he sought to arrange or carve up the field." Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 *Harv. L. Rev.* 356, 377 (1967); *see id.* at 376-86 (specifying other inadequacies of original rule).

[34] Order of Mar. 30, 1970, approving amendment to the Rules of Civil Procedure for the United States District Courts, 398 U.S. 979 (1970).

[35] Moore Letter at 1.

[36] Adv. Comm. note to Rule 23 (1966), in 12A Wright & Miller et al., at 232.

[37] 28 U.S.C. § 2072(b) (2012).

A New Chief Justice in the Sight of His Predecessor: Stone and Hughes, Summer 1941

JOHN Q. BARRETT

In United States history, a Chief Justice of the United States entered into his office in the State of Colorado only once. On July 3, 1941, Harlan Fiske Stone received his judicial commission and took his constitutional and judicial oaths, and he thus became Chief Justice Stone, in Rocky Mountain National Park, where he was vacationing.

In addition to its unique Colorado location, Chief Justice Stone's entry into office was unusual because his predecessor, Chief Justice Charles Evans Hughes, was still living, and because Stone had served as an Associate Justice on the Hughes Court. Most Chief Justices have died in office. And very few new Chief Justices have been elevated from the Associate Justice ranks.

Together, the circumstances of Chief Justice Hughes seeing his successor take office, and he, Chief Justice Stone, being elevated from Associate Justice ranks, is almost unprecedented since the founding period.

Chief Justice successions in the United States have not typically featured an outgoing Chief Justice who was still alive to see the appointment of his successor, much less to see a successor rise from the ranks of his Associate Justice Court colleagues. Most of our seventeen[1] Chief Justices have died in office. Only five Chief Justices served previously as Associate Justices. Only three Chief Justices, and after the founding period only two later ones, lived to see a former Associate Justice colleague become a Chief Justice.

The following table illustrates these points:

	Chief Justice of the United States	Term of as Chief Justice	Previous Service as Associate Justice	Served with an Associate Justice Who Later Became Chief Justice	Year of Death	Lived to See Future Chief Justice(s)
1	John Jay	1789-1795	not applicable	Rutledge	1829	Rutledge (1795), Ellsworth (1796) & Marshall (1801)
2	John Rutledge	July 1-December 15, 1795	1789-1791	——	1800	Ellsworth (1796)
3	Oliver Ellsworth	1796-1800	——	——	1807	Marshall (1801)
4	John Marshall	1801-1835	——	——	1835 (in office)	——
5	Roger Brooke Taney	1836-1864	——	——	1864 (in office)	——
6	Salmon P. Chase	1864-1873	——	——	1873 (in office)	——
7	Morrison R. Waite	1874-1888	——	——	1888 (in office)	——
8	Melville W. Fuller	1888-1910	——	Hughes	1910 (in office)	——
9	Edward Douglass White	1910-1921	1894-1910	Hughes	1921 (in office)	——
10	William Howard Taft	1921-1930	——	——	1930	——
11	Charles Evans Hughes	1930-1941	1910-1916	Stone	1948	Stone (1941) & Vinson (1946)
12	Harlan Fiske Stone	1941-1946	1925-1941	——	1946 (in office)	——
13	Fred M. Vinson	1946-1953	——	——	1953 (in office)	——
14	Earl Warren	1953-1969	——	——	1974	Burger (1969)
15	Warren E. Burger	1969-1986	——	Rehnquist	1995	Rehnquist (1986)
16	William H. Rehnquist	1986-2005	1971-1986	——	2005 (in office)	——
17	John G. Roberts, Jr.	2005-present	——	not applicable	not applicable	not applicable

In narrative form, this is the history that is captured in the foregoing table.[2]

In the earliest years of our Supreme Court, the first three Chief Justices departed from the Court without also departing from the Earth, and thus they were here to see the appointments of their respective successors. The first Chief Justice, John Jay, resigned in 1795 after serving less than five years, but he lived on until 1829 and thus knew of the appointments of the next three Chiefs.[3]

The second Chief Justice, John Rutledge, who had been an Associate Justice serving with Chief Justice Jay from 1789 until 1791, served as Chief Justice for less than six months in 1795, and only by recess appointment. After the Senate in December 1795 rejected Rutledge's nomination to be Chief Justice, he lived on for five more years, through most of the tenure of his successor.

The third Chief Justice, Oliver Ellsworth, served from 1796 until his resignation in 1800. He lived until 1807, which meant that he saw many years, but much less than half, of his successor's tenure.

The fourth Chief Justice, of course, was John Marshall, who began the pattern of Chiefs serving for many years and then leaving office due to expiration. Marshall served from 1801 until his death in 1835. His successor, Roger B. Taney, served from 1836 until his death in 1864. The next Chief Justice, Salmon P. Chase, served from 1864 until his death in 1873. The next, Morrison R. Waite, served from 1874 until his death in 1888. Melville W. Fuller then served as Chief Justice from 1888 until his death in 1910. And Edward Douglass White, who in 1910 became the first sitting Associate Justice to be appointed Chief Justice, served until his death in 1921.

The next Chief Justice, William Howard Taft, became the first since Ellsworth in 1801 to live to know the identity of his successor. Chief Justice Taft served from 1921 until his resignation on February 3, 1930. On that same day, President Hoover nominated former Associate Justice Charles Evans Hughes to succeed Taft as Chief Justice.[4] Taft lived less than five weeks after resigning from the Court, but he lived long enough to know that Hughes would become the next Chief Justice.[5]

In 1941, Chief Justice Hughes became the first Chief Justice since John Jay in 1795 to live to see, in his retirement, a former Court colleague become his successor as Chief Justice. (Indeed, like Jay, Hughes lived to see the next two Chief Justices.) In June 1941, President Franklin D. Roosevelt, following advice that he had solicited and received privately from retiring Chief Justice Hughes,[6] nominated Associate Justice Harlan Fiske Stone, who had been appointed to the Court in 1925 and thus had served with Chief Justices Taft and Hughes, to serve as the twelfth Chief Justice.

In April 1946, Chief Justice Stone died in office. His successor, Chief Justice Fred M. Vinson, in 1953 also died in office. Thus Stone and Vinson, like their predecessors Marshall, Taney, Chase, Waite, Fuller, and White, did not know the identities of their respective successors as Chief Justice.

Chief Justice Earl Warren, who received a recess appointment in 1953 and then was nominated and confirmed as Chief Justice in 1954, retired in 1969 and lived until 1974. He thus replicated the original Jay, Rutledge, and Ellsworth experiences, which Taft and Hughes also had, of seeing his successor in office.

Chief Justice Warren E. Burger, who was appointed in 1969, served until his retirement in 1986 and lived until 1995, replicated the Hughes experience: he saw an Associate Justice who had served with him succeed him as Chief Justice.

That Chief Justice, William H. Rehnquist, served from 1986 until his death in September 2005. In formal terms, his experience thus resembled the experiences of eight previous Chief Justices (Marshall, Taney, Chase, Waite, Fuller, White, Stone and Vinson): he did not know who would

succeed him in office . . . unless, intuitively, and maybe just at the level of personal hoping, he did. In his final months, Chief Justice Rehnquist of course knew that President Bush had nominated one of the Chief Justice's former law clerks, then Circuit Judge John G. Roberts, Jr., to succeed Justice Sandra Day O'Connor after she announced her intention to retire. During summer 2005, Chief Justice Rehnquist thus was expecting to serve, beginning that fall, with his former clerk as the junior Associate Justice. But the Chief Justice, age eighty and gravely ill, also knew that his time would pass. It seems reasonable to speculate that in those circumstances, if Chief Justice Rehnquist thought about his possible successors, a leading candidate in his mind and a pleasing thought for him must have been the idea of a Chief Justice Roberts.[7]

In due course, history can hope to have access to some of the most recently departed Chief Justices'—both Chief Justice Burger's and Chief Justice Rehnquist's—thoughts, including those written about and to their known or hoped-for successors in office.[8]

The words and sentiments of Chief Justice Burger and Chief Justice Rehnquist may turn out to resemble the words that, in late spring and early summer 1941, Chief Justices Hughes (then age seventy-nine) and Stone (then age sixty-eight), who had served together as Supreme Court colleagues since 1930, exchanged as each was traveling outside Washington, D.C., and Stone was—in Colorado—succeeding Hughes as Chief Justice:

Hughes to Stone, June 12, 1941

I am greatly pleased. Heartiest congratulations.

Charles E. Hughes[9]

* * *

Stone to Hughes, July 3, 1941

Elkhorn Lodge

Estes Park, Colo.

Estate of Howard P. James

Carl Rohr, Manager

Dear Chief Justice

Today I have taken the oath of office as Chief Justice of the United States.[10] When I reflect upon the fact that I have taken it as your successor and upon the great service which you have rendered, as Chief Justice, to the Country and the Court, I bow my head in humility and pray only that I may in some modest degree prove worthy to be your successor. In these last few days—beset on every side by a publicity mad world—I am beginning to realize as I had not realized before that you have borne and I must bear with such equanimity as I can some burdens which John Marshall did not know.

We hope that you and Mrs Hughes are finding rest and refreshment in far way Jasper and that her health continues to improve. With warm regards and good wishes for you both from Mrs. Stone and me.

I am Yours Sincerely

Harlan Stone

The Hon Chas E Hughes[11]

* * *

Hughes to Stone, July 10, 1941

Jasper Park Lodge

Jasper National Park

Alberta, Canada

On July 3, 1941, Justice Harlan Fiske Stone (right) was vacationing with his wife, Agnes, in Rocky Mountain National Park in Estes Park, Colorado. In a log cabin in the Park, its Commissioner, Wayne Hackett, administered first the constitutional oath of allegiance and then the judicial oath to the new Chief Justice at the Sprague Hotel, where Stone and his wife were staying on vacation. Abner Sprague, owner of the hotel, is in the background and the figure of Isabelle F. Story, Service Chief of Information, is partially visible. Hackett had been assigned to be Stone's driver when he first started coming to the Rockies and they became friends, according to park historian D. Ferrel Atkins. "When Hackett was appointed a Magistrate, Stone would sit quietly in the corner while Hackett held court and afterward would privately advise him on finer points of the law, procedure, etc. Sometimes when the case was concluded, Hackett would advise the defendant of the identity of the guest and assure the defendant that 'You've been tried before the Supreme Court of the United States.'" When Stone was appointed Chief Justice, he felt that he should be sworn in promptly, so since he had a close relationship with Hackett, he asked him to come down to Sprague's to administer the oath.

Dear Chief Justice,

The humble spirit attested by your letter just received—as you approach the tasks of the Chief Justiceship is natural, and I am sure that the actual work will not change your attitude. I have always had the sense of inadequacy to the great responsibilities of the office and I have been able to find strength and consolation only in the feeling that, whatever might be thought of the result of my efforts, I was doing the best I could. You have the great advantage of long experience in the Court and I know your administration will be of the highest quality.

I have just read the Bar Association Journal and I am overwhelmed by the generosity of your article.[12] You have mercifully overlooked my shortcomings and I am deeply appreciative of the friendship which prompted you to write. I am only sorry that the burden of preparing such an article should have been laid upon you. In the midst of the kindly expressions which have come to me, nothing has been more gratifying than the fact that you have been chosen to carry the banner of the Court. Your service will not only be true to the worthiest traditions but will bring to the Court added respect and confidence.

My best wishes go with you. Mrs. Hughes, who, I am glad to say, is improving joins me in kindest regards to you + Mrs. Stone.

Faithfully,

Charles E. Hughes

P.S. Learning that you are about to leave Estes Park, I shall hold this letter pending your journey to San Francisco.[13]

Author's Note: I thank Chief Justice Nancy E. Rice (Colorado Supreme Court), Chief Judge Alan M. Loeb (Colorado Court of Appeals), and their colleagues for inviting me to lecture at the 2016 Colorado Judicial Conference; this opportunity, in the seventy-fifth anniversary year of Harlan Fiske Stone becoming, in Colorado, Chief Justice of the United States, prompted me to research and write this essay, and to describe the Stone anniversary at the beginning of my lecture. I thank my former students Eleni Zanias, Richard C. Spatola, Veronika Aleyeva, and Me'Dina Cook for excellent research assistance.

ENDNOTES

[1] Or maybe eighteen—Professor Ross Davies assembled the historical record indicating that William Cushing, who served on the Supreme Court as an Associate Justice from 1790 until 1810, also was appointed Chief Justice in February 1796 and thus should be recognized officially as our third Chief Justice. *See* ROSS E. DAVIES, *William Cushing, Chief Justice of the United States*, 37 TOLEDO L. REV. 597 (2006). *But see* NATALIE WEXLER, *In the Beginning: The First Three Chief Justices*, 154 U. PENN. L. REV. 1373, 1388 & nn. 70-72 (2006) (suggesting alternative explanations for notations in the Supreme Court's rough minutes of February 3 and 4, 1796, which identify Cushing as "Chief Justice"). In the remainder of this essay, I stick to the conventional view that there have been seventeen Chief Justices.

[2] Data on Chief Justices'—and all other federal judges'—terms of service can be found in the Federal Judicial Center biographies at www.fjc.gov.

[3] Indeed, former Chief Justice Jay himself was nearly one of his own successors in that office: in late 1800, President John Adams nominated Jay and the Senate confirmed his appointment to succeed Chief Justice Ellsworth, but Jay then declined to accept that second appointment as Chief Justice.

[4] Taft himself, as President of the United States, had appointed Hughes to the Court in 1910 as an Associate Justice. Justice Hughes served until June 1916, when the Republican Party nominated him as its presidential candidate and he then resigned from the Court.

[5] On the day of his resignation from the Court, Chief Justice Taft, in failing health, left Asheville, North Carolina, and traveled by train back to his home in Washington, D.C. *See Taft, Ill, Starts Back to Capital*, N.Y. TIMES, Feb. 4, 1930, at 1. According to his physician, Taft was told during the trip that Hoover had nominated Hughes, received the news warmly and expressed his pleasure. *See Taft's Night on Train Restful*, N.Y. TIMES, Feb. 4, 1930, at 2. Interestingly, in 1910 then President Taft had nearly nominated Associate Justice Hughes, whom Taft had appointed to the Court just two months earlier, to become Chief Justice following the death of Chief Justice Fuller. *See Hughes Put First for Chief Justice*, N.Y. TIMES, July 5, 1910, at 1; 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 278-81 (1951). In the end, however, President Taft appointed Chief Justice White.

[6] *See* 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 787-88, 802 (1951).

[7] Chief Justice Rehnquist's communications, if any, with President George W. Bush or his assistants about Supreme Court appointments have not been reported. In 1981, then Justice Rehnquist did support President Reagan's appointment of Rehnquist's law school

classmate, fellow Arizonan, and longtime friend Sandra Day O'Connor to the Court when Justice Potter Stewart retired. *See* STEPHEN WERMIEL, *In the realm of the Supreme Court, it seems, life doesn't imitate art*, BOSTON GLOBE, Sep. 29, 1981, at 1 (reporting that Rehnquist and Chief Justice Burger each gave O'Connor "high marks in prenomination checks by the Justice Department and White House"); *see also* JOAN BISKUPIC, SANDRA DAY O'CONNOR 100 (2005) (reporting that Justice Rehnquist assured Justice Lewis F. Powell privately in 1981 that O'Connor was qualified to join them on the Court).

[8] Chief Justice Burger's papers, which his son donated to the College of William and Mary in 1996, will be closed to researchers until 2026. *See* Warren E. Burger Collection webpage, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary, http://swem.wm.edu/departments/special-collections/about/burger.cfm. Some of Chief Justice Rehnquist's papers are now available to researchers at the Hoover Institution Archives, Stanford, California. See Register of the William H. Rehnquist papers, http://findingaids.stanford.edu/xtf/view?docId=ead/hoover/rehnquis.xml;chunk.id=headerlink;brand=default.

[9] Postal Telegram, Charles E. Hughes to Hon. Harlan F. Stone, June 12, 1941, in Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Washington, D.C. ("HFS LOC"), Box 35. Chief Justice Hughes sent this telegram to Justice Stone at his son Lauson H. Stone's home in Brooklyn Heights (41 Garden Place), where Stone then was visiting, within hours of President Roosevelt's announcement that he was nominating Stone to succeed Hughes as Chief Justice. *See id.* According to Stone's biographer, this telegram "[c]onceal[ed] a wealth of tribute in the aloof style that had won [Hughes] the political sobriquet 'Chillie Charlie' . . . " ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 570 (1956). The next day, Hughes's son, who had served as Solicitor General of the United States from 1929 until his father became Chief Justice in 1930, and who in 1941 was practicing law in Manhattan, wrote his own more visibly effusive letter to Stone and then sent it to him at Lauson Stone's home:

> Dear Mr. Justice Stone:
>
> I write to express my delight at your nomination as Chief Justice of the United States. It is the most fitting possible appointment, and I am glad to note that it is receiving from editorial comment in the press, and from people generally, the enthusiastic approbation which it deserves. On the more personal side, it is a source of deep gratification and happiness to me that my father is to be succeeded by one for whom I have such strong admiration and warm affection. I shall always be grateful for the privilege of having had some association with you, especially during the year [as Solicitor General] in Washington.
>
> With congratulations to you, the Court and the Nation, and kindest regards to Mrs. Stone, in which Mrs. Hughes joins . . .

Letter from Charles E. Hughes, Jr., to Mr. Justice Stone, June 13, 1941, in HFS LOC, Box 35, pp. 1-2.

[10] On July 3, 1941, Justice Stone was vacationing with his wife Agnes Stone in Rocky Mountain National Park in Estes Park, Colorado. At about 1500 local time, in a log cabin in the Park, its Commissioner, Wayne Hackett, administered first the constitutional oath of allegiance and then the judicial oath to new Chief Justice Stone. Newsreel footage of the event is here: www.gettyimages.com.au/detail/video/in-log-cabin-harlan-stone-raises-hand-and-receives-oath-news-footage/502793875.

[11] Letter from Harlan Stone to Chief Justice [Hughes], July 3, 1941, pp. 1-2, in Charles Evans Hughes Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 9. Stone, who apparently had no secretary to assist him in Colorado, wrote a second longhand copy of this letter for his own files. *See* Letter from Harlan Stone to Chief Justice [Hughes], July 3, 1941, pp. 1-2, in HFS LOC, Box 17.

[12] *See* HARLAN FISKE STONE, *The Chief Justice*, 27 AM. BAR ASSN. J. 407-08 (1941). Justice Stone prepared this article, a tribute to Hughes, before he (Stone) was nominated to succeed Hughes as Chief Justice. *Id.* at 407.

[13] Letter from Charles E. Hughes to Chief Justice [Stone], July 10, 1941, pp. 1-3, in HFS LOC, Box 17.

Women Advocates before the Supreme Court, from October Term 1880 through December 2016

MARLENE TRESTMAN

While writing **Fair Labor Lawyer**, the book-length biography of New Deal attorney and Supreme Court advocate Bessie Margolin (1909-1996), I learned much about the Supreme Court careers of other pioneering women lawyers. Only by compiling a list of the first 101 women to argue at the Supreme Court did I discover that Margolin was the twenty-fifth woman ever to do so.[1] That list also revealed that Margolin's twenty-four Supreme Court arguments earned her third place among the top women advocates of her time, right behind Mabel Walker Willebrandt and Beatrice Rosenberg, and right ahead of Helen Carloss, who argued twenty-nine, twenty-eight, and twenty-one arguments, respectively. As I earlier noted, the combined 102 arguments presented by this highly regarded foursome of federal government attorneys represents almost half of all arguments by women at the time.[2] But my list of 101 women ended with arguments in April 1974, and thus it could not answer my next question: Had any other woman, in the remaining years of the twentieth century, surpassed the number of Supreme Court arguments presented by Willebrandt, Rosenberg, Margolin or Carloss?

Fueled equally by curiosity and stubbornness, and using the same methodology I employed in compiling the list of the first 101 women, I completed the tedious yet intriguing tally of all female Supreme Court oral advocates of the twentieth century. As reflected in that tally, which accompanies this essay as Table 1,[3] I have now confirmed that, although several impressive female advocates came close, no other woman argued at the Supreme Court prior to the October Term of 2000 as often as any of the first fabulous four. The women with the next highest numbers of twentieth-century Supreme Court arguments were attorneys Harriet S. Shapiro (seventeen), Amy L. Wax (fifteen), Beth S. Brinkmann (fifteen), Kathryn A. Oberly (thirteen), Elinor Hadley

Mabel Walker Willebrandt, U.S. Assistant Attorney General from 1921 to 1929, handled cases concerning violations of the Volstead Act, federal taxation, and the Bureau of Federal Prisons, and argued twenty-nine times before the Supreme Court. Her record as a woman advocate has been eclipsed in recent years by Lisa S. Blatt and Patricia A. Millett, who have argued thirty-four and thirty-two times respectively.

Stillman (twelve), and Maureen E. Mahoney (eleven).

Like my original list, the expanded list begins with October Term 1880, during which Belva Ann Lockwood became the first woman known to argue at the Supreme Court, but continues through Katherine P. Baldwin's April 2000 argument (her fourth), at the close of October Term 1999. My expanded list identifies a total of 520 different women lawyers who presented a total of 938 arguments during those 136 years.

Having stopped my tally at the end of October Term 1999, I could only hope that some other curious researcher would continue the inquiry through the present. Imagine my delight when I learned, right before this essay went to print, that Julie Silverbrook and Emma Shainwald picked up the work where I left off and completed the tally through December 2016, as set forth in Table 2.[4] Silverbrook and Shainwald found that, in just the first sixteen years of the twenty-first century, women argued 491 times, an amount equal to more than half of all arguments presented by women during the entire twentieth century. Our combined work reveals that, as of the close of 2016, a total of 726 women have presented argument at the Supreme Court 1,430 times.

The accompanying bar graph (Table 3)[5] summarizes the numeric information set forth in both tallies. Up through October Term 1969, the number of Supreme Court arguments by women reached a maximum of ten to twelve during each of only five terms. Throughout the remainder of the twentieth century, the number of arguments by women remained at or above twelve per term, with the only exceptions being October Terms 1977 and 1994, during each of which the number of arguments by women dropped to nine. Indeed, beginning with October Term 1976 (during which the number of arguments by women rose for the first time to twenty-two) and continuing through the rest of the twentieth century, the number of arguments per term never dropped below twenty, with the same exceptions of nine arguments during each of October Terms 1977 and 1984. Women presented thirty or more arguments during each of eight terms spread across the last quarter of the twentieth century (1978, 1983-1986, 1992, 1996, and 1998), and presented the century's greatest number of arguments (forty) during October Term 1986.

During the twenty-first century, thus far, the number of arguments presented by women during a completed term has remained at or above twenty-five for all but one term (2003, twenty-four arguments); at the same time, the number of arguments presented by women during this century reached a maximum of only thirty-four during each of two terms (2001 and 2014).

These figures take on greater meaning when contrasted with the number of male

attorneys who regularly dominated the podium in the High Court. Taking October Term 1986, for example, when women advocates presented their all-time maximum of forty arguments, men presented 306 arguments, more than seven times the number of arguments by women. Moreover, the forty arguments presented by women were heard in thirty-six different cases; the 306 arguments by men were heard in 149 different cases. During October Term 1986, arguments were presented exclusively by women in only 2 of 151 cases.

As reflected in Tables 1 and 2, the voices of women advocates were prominent on other occasions. Women argued against (or with) other women in the same cases fifty-five times during the twentieth century, and sixty-three times during the first sixteen terms of the twenty-first century. In October 1955, Gloria Agrin and Blanch Freedman became the first women to argue against each other (*Nukk v. Shaugnhessy*, 350 U.S. 869 (1955)). Notably, in April 1969, April 1970, and November 1970, Eleanor Jackson Piel and Maria L. Marcus argued and then twice reargued against each other in *Samuels v. Mackall.*[6]

The largest number of women advocates ever to argue on the same day was five, which occurred only once during the twentieth century. On April 19, 1988, Susan S. Dickerson, Mandy Welch, Maureen Mahoney, Evalynn Welling, and Ellen Viakley presented arguments in four different cases, and outnumbered the four male advocates that day. Counting Justice Sandra Day O'Connor, who joined the Bench seven years earlier, that occasion also marked the first time in the Court's history that the voices of six women were heard during oral arguments on a single day. That number of women's voices did not reoccur until the penultimate term of the century. On January 12, 1999, four women, Verna L. Williams, Barbara D. Underwood, Barbara B. McDowell, and Donna D. Domonkos (and two men), argued two cases to a Supreme Court that included not only Justice O'Connor but also Justice Ruth Bader Ginsburg.

During the twenty-first century, the highest number of women advocates arguing on the same day is three, which has happened twenty-eight times. Thus, it wasn't until Justice Kagan joined Justices Sotomayor and Ginsburg on the Bench for the October 2010 Term that the voices of six women were again heard during oral arguments; it happened on March 1, 2011 when Leondra Kruger, Carolyn A. Kubitschek, and Melissa Arbus Sherry presented argument in two different cases, and has happened again eleven times.

As this extensive exercise was originally prompted by my quest to set straight Bessie Margolin's Supreme Court argument record, it seems only fitting to tie up loose ends. As of December 2016, only nine women have argued at the Supreme Court twenty times or more, and to this day only five of them have presented more arguments than Margolin.

1.	Lisa S. Blatt	34
2.	Patricia A. Millett	32
3.	Mabel Walker Willebrandt	29
4.	Beatrice Rosenberg	28
5.	Nicole A. Siharsky	27
6.	Beth S. Brinkmann	24
7.	Bessie Margolin	24
8.	Helen Carloss	21
9.	Maureen E. Mahoney	20

ENDNOTES

[1] The data is too voluminous to be published in this Journal, so the tables are accessible on the Supreme Court Historical Society's website. *See* http://supremecourthistory.org/history_oral_advocates.html.

[2] For additional information about the "fabulous four," *see* Marlene Trestman, "Willebrandt, Carloss, Margolin and Rosenberg: Four 20th Century Superstars of the Supreme Court Bar," 101 *Women Lawyers Journal* 19-23 (Summer 2016).

[3] *See* http://supremecourthistory.org/history_oral_advocates.html.

[4] *See* http://supremecourthistory.org/history_oral_advocates.html.

[5] *See* http://supremecourthistory.org/history_oral_advocates.html.

[6] 401 U.S. 66 (1971).

The Judicial Bookshelf

DONALD GRIER STEPHENSON JR.

Noon-hour events at the Capitol on January 20, 2017, were a reminder that inauguration of an American President is as remarkable as it is routine. In this distinctly republican rite, the Chief Executive-elect publicly subordinates himself to the fundamental law of the land. As the Constitution dictates, "Before he enters on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"[1] This exaction of constitutional fealty from Donald J. Trump by Chief Justice John G. Roberts, Jr., was remarkable because the variety of political systems, experiences, and cultures across today's globe vividly illustrates that the seamless and peaceful transfer of authority from one political party or individual to another is not everywhere always a foregone occurrence. Correspondingly, the January event in 2017 was routine in that, from the outset of government under the Constitution and with the notable and tragic exception of 1860, the defeated party or individual and assorted partisans have accepted, if not embraced, the judgment rendered by the electoral process. In short, the rite is nothing less than a reaffirmation of the rule of law.

Acceptance of defeat by the incumbent party was the result even in 1800 when the notion of a peaceful shift of control in a country founded on the principle of government by the "consent of the governed"—the phrase is found in the Declaration of Independence—was first put to the test at the presidential level. The assumption of authority by Thomas Jefferson and the Democratic-Republicans from John Adams and the Federalists marked the world's first nonviolent transfer of power from the vanquished to the victors as the result of an election.[2] Given the stark partisan differences that had crystallized in the short time since ratification of the Constitution and the fact that finalization of the election required intervention by the House of Representatives to break an Electoral College tie, this outcome was a greater achievement than is sometimes acknowledged. "Partisanship prevailed to the bitter end and showed no signs of abating,"

according to one historian who has revisited this critical and precedent-setting election. "Over the campaign's course, George Washington's vision of elite consensus leadership had died, and a popular two-party republic . . . was born."[3]

Among the powers that devolve upon a person when the presidential oath is taken, few are more consequential than what is conferred by the second paragraph of Article II of the Constitution, that the "President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the supreme Court . . . " Thus, as with some aspects of foreign policy, the Constitution made the selection of Justices a shared responsibility, decreeing a two-step process of selection and confirmation. The result has been that, in determining those who sit on the High Court, the House of Representatives is left completely out of the process. Representatives might admire or oppose those who are chosen, but they have no institutionalized role in the selection, consideration, or approval. Yet, whether the composition of the judiciary was to be positioned entirely in the hands of the executive, as proposed by the New Jersey Plan at the Philadelphia Convention, or divided between the President and part of Congress as the Framers ultimately chose, the central focus has understandably remained less on the process itself and more on those whom the process has placed on the Bench.

Inauguration Day presented the forty-fifth President with an uncommon situation for an incoming Chief Executive: existence of an empty seat on the Supreme Court. Some 188 years earlier, Andrew Jackson had found himself in a similar position in March 1829, with respect to Justice Robert Trimble's seat, which remained unfilled. President John Quincy Adams had nominated former Senator John Crittenden of Kentucky in December 1828, but in February, rather than approve a Whig, the Democratic Senate voted 23-17 to postpone the nomination, "thus consigning it to oblivion."[4]

Occasionally a vacancy on the Bench occurs very early in a new administration, as happened in March 1993, when Justice Byron R. White notified recently ensconced President Bill Clinton of his intention to retire. The nomination of Judge Ruth Bader Ginsburg followed in June. Yet Clinton's opportunity is hardly the routine experience for a new President. Instead, sometimes a President must wait, as happened to Franklin D. Roosevelt, who was into his second term before Justice Willis Van Devanter's retirement in 1937 allowed FDR to turn to Senator Hugo L. Black as his first nominee for the Court.

The open seat that awaited President Trump was occasioned by the death of Justice Antonin Scalia on February 13, 2016. Moving much more quickly than had Clinton with White's seat, President Barack Obama on March 16 announced his choice of Merrick B. Garland, who has been Chief Judge of the United States Court of Appeals for the District of Columbia Circuit since 2013 and a member of that court since his nomination by President Clinton in 1997 and was, confirmed by a Democratic-controlled Senate 76-23, a vote that included support from thirty Republicans. In 2016, however, with his third High Court nominee, President Obama faced a Senate controlled not by Democrats but by Republicans whose leadership adopted a block-then-wait-and-see approach, insisting that they would not act on any attempt to fill the Scalia seat until after the November presidential election.

Indeed, by July, inaction on the Garland nomination surpassed the previous record of 125 days between nomination and confirmation set in 1916 when President Woodrow Wilson named Louis Brandeis for Justice Joseph R. Lamar's seat on the Bench. "If Republicans in the Senate refuse even to consider a nominee in the hopes of running out the clock until they can elect a president

from their own party, so that he can nominate his own justice to the Supreme Court," cautioned President Obama in an op-ed essay, "then they will effectively nullify the ability of any president from the opposing party to make an appointment to the nation's highest court. They would reduce the very functioning of the judicial branch of the government to another political leverage point."[5] Stalemate nonetheless persisted as the Garland nomination expired at noon on January 3, 2017, when the new 115th Congress convened. It had languished for a total of 293 days.

Yet the plain truth is that for Obama, Trump, Wilson, Jackson, or any President, a vacancy on the Supreme Court is more than merely an "opportunity."[6] It is a gift. To grasp this point about the High Court fully, it may help to keep these words in mind: infrequency, irregularity, unpredictability, and probable longevity.

First, empty seats are infrequent. Over the entire time since Congress authorized the initial six seats for the Court in the Judiciary Act of 1789, through 2016 only 112 individuals have sat on its Bench. That number is only a dozen more than the current number of United States Senators, and only about two-and-a-half times the number of all American Presidents. The roster of Justices truly comprises an exclusive club.

Second, when they do occur, vacancies happen on an irregular basis. Upon taking the oath of office, no new President is guaranteed the chance to name anyone to the Court. President George W. Bush had two such opportunities, as did President Bill Clinton. President Reagan had four, but President Jimmy Carter had none. Yet early in the 20th century, William Howard Taft, a one-term President like Carter, had six. In the lottery-like world of Supreme Court vacancies, life can be unfair. Beneath this irregularity lies the fact that Justices do not serve for fixed terms. The expiration date of President Obama's second term was a known fact, as was the expiration date of the term of every Senator and member of the House of Representatives who sat in the 114th Congress. The same, however, cannot be said about any Justice on the Supreme Court.

Moreover, while vacancies on the Court occur on average about once every two to three years, there have been a few major departures from this norm. For example, there were no membership changes during the eleven years from Justice Breyer's arrival in 1994 until Justice O'Connor's retirement and Chief Justice Rehnquist's death in 2005. During the years since 1869, when Congress set the Court's roster at the current complement of nine, there was no other period of similar length without the departure of at least one Justice.

The asymmetry connects with the third word: unpredictability. Because Justices do not serve for fixed terms, the length of their service, and therefore when vacancies will occur, is unpredictable So, at the outset of any new administration, one can speculate that, given the ages of the current Justices, the President may have one or two appointment opportunities, but that would barely be more than a guess.

There is then the fourth word to consider: longevity. "The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them."[7] True when written in 1939, those words remain true today. After all, as 2017 opened, the Court was the result of appointments made by five Presidents—Reagan through Obama. Moreover, the length of service of individual Justices often far outlasts the service of the President who made the appointment. If one excludes the eight members of the Court who were sitting at the beginning of 2017, the record shows that forty-four Justices have served since 1900. Their average tenure is sixteen years, the equivalent of four presidential terms. While a very few, such as James Byrnes and Arthur Goldberg, served only briefly, several seemed to take up

residence. President Franklin D. Roosevelt named William O. Douglas to the Bench in 1939, but he did not retire until 1975, when Gerald Ford was President, thirty years after Roosevelt's death. For Douglas's successor, Ford turned to John Paul Stevens, who served until 2010. His service of thirty-five years—into the Obama presidency—stretched over more than eight presidential terms. As Alexander M. Bickel shortly before his death illustrated the process, "You shoot an arrow into a far-distant future when you appoint a justice and not the man himself can tell you what he will think about some of the problems he will face."[8]

Continued political maneuverings over the Court's membership remain a reminder that Supreme Court Justices are not merely lawyers who wear robes but major players whose distinctive work in interpreting the Constitution and acts of Congress helps to shape the political life of the nation. Thus, given the influence Presidents cast over future generations through their judicial appointments combined with what those appointees do through the cases they decide, it is hardly surprising that the Court remains at the center of civic attention, as recent books illustrate.

The attention that the Court attracts assumes a definite view of the institution's place in the political system—that through its dispute resolution function, the Court actually wields power. Divergent perspectives on this seemingly obvious point, however, predated even establishment of the Court itself, and they lie at the center of **The Nature of Supreme Court Power** by Matthew E. K. Hall, a political scientist at Saint Louis University at the time his thoughtful book was published and now on the faculty at Notre Dame University.[9]

The period between adjournment of the Philadelphia Convention in September 1787 and ratification of the Constitution in the summer of 1788 when New Hampshire became the required ninth state to assert its approval witnessed a spirited debate throughout the United States in pamphlets, speeches, and newspapers—the social media equivalents of that day—over the strengths and weaknesses of the proposed Constitution. Among Americans today, probably the best known of the essays from those months of intense national introspection are the *Federalist Papers*, a collection of eighty-five essays written by Alexander Hamilton, John Jay, and James Madison and published in newspapers in the state of New York for the express purpose of promoting the Constitution's virtues so as to secure a favorable vote on ratification at that state's convention in Poughkeepsie.

It was in Hamilton's No. 78 *Federalist,* among others, that he specifically addressed judicial power, not only projecting that the proposed Supreme Court would sit in judgment on the constitutional validity of legislation through judicial review—thus anticipating *Marbury v. Madison*[10]—but simultaneously and remarkably also insisting that, even with that authority, the judiciary would always be "the least dangerous to the political rights of the Constitution." This was to be true

> because it will be least in a capacity to annoy or injure them . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

For Hamilton, judicial review did not suppose "a superiority of the judicial to the legislative power." It only supposed that "the power of the people [whose will, he explained, the Constitution embodied] is superior to both."

Hamilton's minimalist estimate of judicial power in No. 78 was a defensive response to post-Convention and anti-ratification objections raised by Judge Robert Yates of New York, who with Albany mayor John Lansing returned home from Philadelphia before the Convention adjourned, once they realized the centralizing direction in which some of their colleagues were moving, thus leaving Hamilton as the sole remaining delegate from New York. Writing a series of letters as "Brutus"[11] for publication in New York newspapers, Yates predicted that judicial review, which, like Hamilton, he took for granted, would enable the Justices

> to mould the government into almost any shape they please . . . Men placed in this situation will generally soon feel themselves independent of heaven itself . . . When this power [construction of the Constitution] is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.[12]

Carried forward into the modern era, at least in the years since the Court's 1954 landmark ruling on school segregation,[13] the perspectives of Yates and Hamilton have manifested themselves in scholars' very different estimates of the Court's actual influence. With ties to Yates, one view "suggests the Supreme Court is a powerful institution, capable of promoting justice and protecting minority rights by enforcing its interpretation of the Constitution" or in other contexts at least being "particularly influential during specific periods of American history." However, with connections to Hamilton, an alternate view "depicts the Court as an almost powerless institution that may issue high-minded rulings but lacks the power to ensure that those rulings are actually implemented."[14]

As Hall explains, it "is unlikely that either of these perspectives accurately depict the Supreme Court's power." Were the Court entirely ineffective, one would wonder why individuals, corporations, and interest groups invest so much time, energy, and money in taking their litigation all the way there. Neither would one expect the Court to be all-powerful in a political system characterized by separation of powers and federalism that, combined, create multiple centers of political influence. Instead, "the true nature of the Court's power most likely lies somewhere between these extremes." The question at the core of Hall's book is therefore "when is the Supreme Court powerful and when is it not?"[15] In other words, the author's important goal is to identify the conditions or circumstances that explain why the Court in one situation might be resisted or even ignored, while on other occasions it is able to effectuate significant change.

Through examination of some twenty-seven issues and decisions between 1988 and 2000, Hall maintains that the Court's ability "to alter the behavior of state and private actors is dependent on two factors: the institutional context of the Court's ruling and the popularity of the ruling." (His use of the term "state" is generic—that is including any American governmental entity, not merely one or more of the fifty American state governments.) Specifically, the probability of a successful exercise of power by the Court increases when "(1) its ruling can be directly implemented by lower state and federal courts; or its ruling cannot be directly implemented by lower courts, but public opinion is not opposed to the ruling." However, the probability of successful implementation of a decision decreases when "its ruling cannot be directly implemented by lower courts and public opinion is opposed to the ruling."[16]

In that context, one especially thinks of the Court's ruling in 1954 that laws dictating racial segregation in public schools were unconstitutional[17] and its follow-up directive in 1955 regarding implementation. "The judgments below," wrote Chief Justice Earl Warren in the latter holding, "are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."[18] Not only were the rulings widely unpopular among white southerners in the affected areas, but some of the federal judges themselves were less than enthused over the Court's decisions. Although Border States showed a disposition to comply with the Supreme Court's mandate from the outset, some governors and legislatures in the Deep South adopted various tactics that delayed the implementation of *Brown*. Moreover, almost all southern Senators and Representatives joined in 1956 in issuing a "Declaration of Constitutional Principles," sometimes referred to as the Southern Manifesto, which advocated resistance to compelled desegregation by "all lawful means." Co-signers included eighty-two members of the U.S. House of Representatives and nineteen members of the U.S. Senate, about one-fifth of the membership of Congress.

The Eisenhower administration, initially lukewarm at best in support of *Brown*, did dispatch troops, to support the orders of a federal court in Arkansas, actions that were upheld by a powerful decision of the Supreme Court in *Cooper v. Aaron,*[19] which said that local resistance was not a reason for delaying compliance. The Court did not issue its next significant decision on school integration until 1964, when it ordered the reopening of a public school system in Virginia that had been closed to avoid compliance with *Brown*.[20] Throughout, dilatory tactics were effective in many places in keeping implementation to minimal levels. As Hall notes, as late as the "1963-64 school year, less than two-percent of African-American students in these states attended schools with white students."[21] Widespread resistance to implementation of *Brown* could flourish at the state and local level also partly because most African Americans in southern states were still denied the right to vote. Not until the late 1960s, after rigorous enforcement of the Voting Rights Act of 1965 had begun, would southern Representatives in Congress and local elected officials become more responsive to the needs of black citizens.

The pace of integration quickened after 1965 because of the combination of two congressional enactments that brought both administrative and financial pressure to bear on school districts. The mid-1960s witnessed the first mass infusion of federal funds into local school coffers by way of the Elementary and Secondary Education Act of 1965, and the Civil Rights Act of 1964 in several ways made continued receipt of Washington's largess conditional on integrated education. Whereas litigation often took years to effect even small changes in the schools, bureaucrats with their hands on the federal faucet could accomplish more substantial changes in months. Thus the decade from the mid-1950s to the mid-1960s demonstrated on the one hand the importance both of the work of judges on lower courts and the effectiveness of the "sword" and the "purse" in terms of implementation of Supreme Court decisions, and on the other hand the negative consequences for implementation during the period that preceded legislative and administrative support.

The decade after 1955 illustrates what Hall terms a lateral situation where the key to successful implementation of a decision lies at least partly or perhaps even largely outside the judicial hierarchy. Whether the Court's ruling becomes law *in fact* rests not so much with judges but with "non-court government actors, such as lawmakers, administrative

agencies, individual bureaucrats, city councils, school boards, and law enforcement officials."[22] Thus, when there is considerable opposition at the grass roots, implementation understandably encounters difficulty.

A lateral situation in turn should be distinguished from what Hall calls a vertical situation, which is characterized by the presence of issues that are to be handled within, not outside, the judicial hierarchy.[23] Under those conditions, implementation typically proceeds more smoothly and effectively because of the expectation that judges on lower courts will apply the rules as laid down by judges on higher courts. While allowing for vagaries of interpretation and rule application—the play-in-the-joints—there must be a high degree of conformity to that expectation, lest a system of hierarchical courts founded on the rule of law simply break down.

Among the issues Hall examines, one sees a vertical situation especially in criminal justice cases. Here the author makes a point that is as important, as on first consideration it may seem obvious.

> It is the Court's ability to free individuals from the punitive powers of the state that gives it real, independent power. In other words the Court may not hold the sword or the purse of our society, but it does hold the keys to our jail, and every time it turns a key it wields great power . . . Simply put, the Court can stop people from going to jail: The abortionist, the pornographer, and the gun owner will all go free if they win in court. This is the Court's great power: For better or worse, the Court can set them free."[24]

That is, by refusing to sustain punishments in certain circumstances, the Court makes it impossible for legislative majorities effectively to prohibit particular conduct, with the result that the Court remains in a unique position to protect individual liberty. Yet, even in these "vertical" situations, a "lateral" element necessarily remains in that the judge is not the jailer. Instead, in order for a judge's cell-unlocking ruling to become a reality, the judge needs the cooperation of the "sword"—the law enforcement and penal authority. Nonetheless, the ruling is an example of what Hamilton meant by "merely judgment," as it might also be exhibited by judges who, as Yates warned, attempt "to mould the government into almost any shape they please."

Hall's book concludes with a reflection upon the thesis of Robert McCloskey's classic book on the Court, first published nearly six decades ago,[25] that Americans have always ascribed to conflicting values in the public sphere. A belief in popular sovereignty manifested in the elected branches exists alongside a belief in fundamental law lodged with the courts. Hall maintains that it is the "persistent tension between these sometimes conflicting values that protects and perpetuates them both." Although the Court "controls neither the economic nor the enforcement powers of the state, it nonetheless enjoys the power to significantly alter society by relieving private individuals and government actors from legal penalties and spurring popular change against entrenched political interests." Although the Court is "seriously constrained when it initiates unpopular change . . . many of those who strive to reform society may hopefully turn to the Court to aid them in their struggle, and their opponents should be wary of the institution's great power."[26]

Most of the twenty-seven issues and decisions that Hall examines in terms of their popularity, unpopularity, and degrees of successful implementation concern different provisions of the United States Constitution. Of the twenty-seven, six involve or touch upon the First Amendment's guaranties of free speech and/or a free press. This concentration is hardly surprising, given the

large presence of free speech issues on the Supreme Court's docket in recent years.

Yet, free speech has not always been a federal constitutional issue. Indeed, protection of expression, especially in a political context, might be said to be one of the anomalies of the Constitution as it left the hands of the Framers in September 1787. Just as it seems strange today that a new national political system founded on the principle of government by the consent of the governed established no national right to vote—the Constitution in Article One left definition of the franchise[27] entirely in the hands of state legislators—it may seem equally strange that the national charter initially provided no protection for expression of opinion, presumably a prerequisite for any electoral process of conferring or withdrawing consent.

Critics of the proposed replacement for the Articles of Confederation made the same point in some of the ratification debates. Thus, as a member of the First Congress elected under the new Constitution, Virginia's James Madison drew up seventeen amendments. By December 1791, ten had been ratified as what are known today as the Bill of Rights. While ratification of the First Amendment with its safeguards for various forms of expression rectified the omission of 1787, its protections, as well as the other provisions of the Bill of Rights, were effective only against the national government, not the states, as Chief Justice John Marshall would explain for the Court four decades later.[28] Significantly, number fourteen on Madison's list was not ratified: "*No state* shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor the freedom of speech or press" (emphasis added). Believing that there was more danger of abuse of power by state governments than by the national government, Madison conceived number fourteen to be "the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments."[29] Application of the First Amendment's guarantees to state governments would not occur until long after ratification of the Fourteenth Amendment in 1868 through a process of "incorporation" that stretched well into the twentieth century.

The First Amendment's protection of freedom of speech is the central focus of **Speaking Freely** by political scientist Philippa Strum, a senior scholar at the Woodrow Wilson International Center for Scholars in Washington, D.C., and emerita professor at the City University of New York.[30] Given that the focus of the book is the High Court's decision in *Whitney v. California*,[31] Professor Strum was an ideal choice to write this volume for at least three reasons. First, her **Women in the Barracks**,[32] in which she explored the ultimately unsuccessful six-year struggle by the Virginia Military Institute in *United States v. Virginia*[33] to maintain its all-male status, shows that she is no newcomer to the case study genre. Second, because **Speaking Freely** is as much about Charlotte Anita Whitney as it is about free speech, Strum's **Louis D. Brandeis: Justice for the People** has shown her to be an accomplished biographer as well.[34] Third, and related directly to the second, it is only because of Brandeis's separate opinion that *Whitney* has not dropped into obscurity but remains a landmark case.

Strum's book is among the most recent to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this succession of case studies now claims some five dozen titles, almost all of them treating decisions by the United States Supreme Court. The series fits comfortably into and has substantially enlarged and enriched the established scholarly category of case studies that has been an instructive

part of literature on the judicial process for more than five decades.[35]

The *Whitney* addition adheres to the organization and pursues the objectives of most of the other books in this group. Like some of them, Strum's volume helpfully includes a thorough bibliographical essay, and, essential for any case study, a detailed chronology. Yet like others in the series, her contribution sadly lacks footnotes or endnotes. (While footnotes or endnotes are not usually important for classroom use, to which, one suspects, the principal marketing thrust for the Kansas series is directed, their presence would greatly aid use of the bibliographical essay for general readers and scholars, with probably no loss of appeal to either a classroom or wider audience.)

As in any well-written case study, Strum offers an abundant look into the life of the book's central figure. One finds a detailed portrait not only of a well-educated California-born young woman who attended Wellesley College, but also one who was well-connected, in that her father represented Alameda County, where Oakland is located, in California's senate. Moreover, in light of the causes in which she was to become active, it is especially ironic that one of her aunts was married to Justice Stephen J. Field, with whose family in Washington Whitney spent some of her childhood years and her college Christmas vacations. Indeed, Anita Whitney was such a favorite that "the childless Field left one third of his estate to her."[36]

Initially active in the Settlement House movement after Wellesley, Whitney became Alameda County's first juvenile probation officer and proceeded to campaign as "a good Progressive"[37] for women's suffrage and against the death penalty. Impressed by the ideas of Socialist Eugene Debs, she also paid close attention to spokespersons for the Industrial Workers of the World (I.W.W.), whose members were called Wobblies and who were very much in competition with activists for the American Federation of Labor (AFL).

Speaking Freely **by political scientist Philippa Strum is as much a biography of Charlotte Anita Whitney as it is about free speech and the *Whitney v. California* decision. Interestingly, one of her aunts was married to Justice Stephen J. Field, with whose family in Washington Whitney spent some of her childhood years and her college Christmas vacations. Indeed, Whitney was such a favorite that "the childless Field left one third of his estate to her."**

Through its treatment of Whitney's background and upbringing, an unexpected strength of the book is the window it provides into the various efforts by different organizations to improve the lives of factory workers in the very early twentieth century, a period when a division developed between those who favored progress through conventional political action and those who pointed to something more drastic. As Strum notes, "Although the Wobblies frequently emphasized nonviolence and passive resistance, much of their language was far less restrained than the actions some of them actually took, and at times they sent mixed messages, making it understandable that the average

citizen heard only the rhetoric of violent revolution."[38]

It was during this time of social and labor turbulence that Whitney became "more and more sympathetic to the Wobblies at precisely the moment when popular feeling was turning in the opposite direction."[39] Not only had she joined the Socialist Party in 1914, but she then moved more sharply to the left after the Oakland branch of the Socialist Party voted to leave the party and join "what was seen as the more energetic, more ideologically relevant and more likely to succeed Communist Labor Party."[40] For many, however, the CLP, with its widely known pledged allegiance to the Communist International in Moscow, seemed a threat to civilization. Moreover, it was the CLP's founding convention at Oakland's Loring Hall in 1919 that Whitney attended and where she remained when she was elected an alternate representative to the new party's executive committee. These developments —all against the backdrop of the "Red Scare," as it came to be known—would shortly have a profound impact on both Whitney's life and the United States Constitution.

April of the same year witnessed enactment of California's law banning "criminal syndicalism." Similar to laws passed in seven other states, the statute targeted advocacy by spoken, written, or printed word of "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change." Also forbidden was "personal conduct" that advocated syndicalism or joining an organization that did so. Punishment was not less than one nor more than fourteen years in prison.[41]

The case of *Whitney v. California* formally began with Whitney's arrest under the syndicalism act in November 1919 and her trial from January 27, 1920, until her conviction on February 20 at age fifty-three, after which she was sentenced to a prison term at San Quentin from one to fourteen years. The United States Supreme Court eventually affirmed her conviction on May 16, 1927, and Governor C. C. Young pardoned her on June 20. That seven-year interval encompassed a series of twists and turns of events, including actions at different stages by multiple counsel of varying ability, review by a state district court of appeal, refusal by the state supreme court to hear her case, and an unsuccessful initial effort to move her case to the United States Supreme Court, all of which occurred before final action by the High Court and entry of the decision into the *United States Reports*.

That so much is known about Anita Whitney's case is partly a result of Professor Strum's research efforts, of course. However, as the author explains, credit also goes to Justice Ruth Bader Ginsburg, who made "the Supreme Court's file on the Whitney case available to me." That assistance was apparently essential in that the "Superior Court in Alameda, where Anita Whitney was tried has been unable to locate the trial record,"[42] so the author had to piece together much of the account from other primary and secondary sources.

The most noteworthy thing about the *Whitney* case, however, is not Anita Whitney. Undoubtedly, she was a spirited person whose reformer zeal might well have made her a worthy subject for a fascinating biographical essay even if she had never been involved in litigation that reached the High Court. Yet, but for a concurring opinion by Justice Louis D. Brandeis, few today would probably know of Anita Whitney or care very much about the Court's opinion or decision in her case. This assessment seems reasonable because, without Brandeis's separate opinion, *Whitney v. California* would

practically be indistinguishable from *Gitlow v. New York*,[43] a case similar to Whitney's that was decided two years before hers.

The Supreme Court first began examining national authority to regulate speech in cases such as *Schenck v. United States*[44] and *Abrams v. United States*[45] that arose under the Espionage Act of 1917 and the Sedition Act of 1918, legislation that grew out of World War I. However, with the possible exception of *Patterson v. Colorado*,[46] the Justices did not begin to give serious regular consideration to limits imposed on speech by state governments until *Gitlow*. Indeed, it was in *Gitlow* that the Court for the first time expressly held that the First Amendment's protection of speech applied not only to the national government but to the states as well. "For present purposes," wrote Justice Edward T. Sanford for the majority of six, "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States."[47] Justices Oliver Wendell Holmes, Jr., and Justice Brandeis dissented. Justice Harlan F. Stone did not participate.

Gitlow is also remembered for Justice Sanford's articulation of the bad tendency test in upholding Benjamin Gitlow's conviction under New York's criminal syndicalism act that was nearly identical to California's in its most important respects. Unfriendly to free speech, the rule Sanford applied contrasted with the somewhat more speech-friendly clear and present danger test that had been articulated by Justice Holmes in *Schenck v. United States*: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[48]

Sanford's *Whitney* opinion, however, followed *Gitlow*:

> By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight . . . That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.[49]

In short, if a state, using its residual police power, could ban distribution of adulterated meat, it could ban distribution of adulterated ideas.

While the Court's decision in *Whitney* marked no change in the law, Justice Brandeis filed a concurring opinion, which Holmes joined, which has truly had a lasting effect. The Brandeis opinion not only attempted a reformulation of "clear and present danger" but also laid out a modern-day justification

for a generous view of constitutionally protected speech. Showing how this byproduct of the decision came about is one of the strengths of **Speaking Freely,** where the reader finds attention to the broadening outlook in the thinking of Holmes and Brandeis. Strum properly places them in a context of intellectual fermentation and cross-pollination among individuals such as Felix Frankfurter, Zechariah Chafee, Judge Learned Hand, Ernst Freund, and Roger Baldwin, and journals such as the *New Republic* and *The Nation.*

"I have never been happy with my concurrence" in the *Schenck* case, Strum reports Brandeis as having said to Professor Frankfurter in 1924. While *Schenck* is best remembered for Justice Holmes's introduction of the clear and present danger test in his short opinion for the Court, it is sometimes overlooked that the decision also upheld Schenck's conviction, rejecting his defense that had rested on free speech grounds. Brandeis then added, "I had not then thought the issues of freedom of speech out—I thought at the subject, not through it."[50]

"It is odd to realize now," observes Strum, "that as of 1927, Americans took the right of free speech for granted, but no member of the Supreme Court—perhaps no one in a position of political power in the United States—had ever laid out a thorough explanation for why allowing it was a good thing."[51] Doing precisely that was the goal Strum believes Brandeis accomplished through his opinion. Some of its paragraphs are lengthy, she warns, "but they must be read as a piece if they are to be understood and if the persuasive power of his prose is to be appreciated."[52]

"[W]e must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence," Brandeis probed near the beginning. "Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized . . . that the fitting remedy for evil counsels is good ones." Then in a tightening of clear and present danger, he argued,

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[53]

Given that strong defense of freedom of speech, why is the Brandeis opinion entered as a concurrence and not a dissent? The answer to that obvious query comes at the end of the opinion and is an insight into an older Court with older procedural expectations.[54] "She claimed below," Brandeis wrote,

> that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury.

On the other hand, he continued,

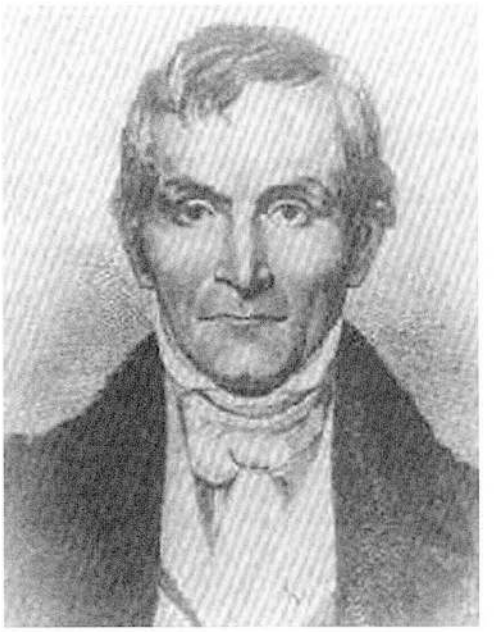
> there was evidence on which the court or jury might have found that such danger existed . . . Our power of review in this case is limited not only to the question whether a right

> guaranteed by the federal Constitution was denied, but to the particular claims duly made below, and denied. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. This is a writ of error to a state court. Because we may not inquire into the errors now alleged I concur in affirming the judgment of the state court.[55]

While the Court's holding in *Whitney* was not formally overruled until *Brandenburg v. Ohio,*[56] when a unanimous Court in 1969 invalidated Ohio's criminal syndicalism law that had been applied to a member of the Ku Klux Klan, Strum is quick to remind the reader that Brandeis's opinion has become "a canon of American law, and the basis of the uniquely permissive American approach to speech"[57] across a broad range of decisions. Suggestive of the influence Strum believes *Whitney* has had is her report that, as of 2015, *Whitney* had been referred to by the Supreme Court in "close to 100 cases and by state and lower federal courts in over 250."[58] While such numbers say nothing about *how* a decision was used in a later case, they nonetheless point to the possible effect of—in Brandeis's phrasing—thinking "through" and not merely "at" a subject.

Almost a full century before *Whitney* was decided, President Andrew Jackson named Philip Pendleton Barbour to the Supreme Court. The fifth of Jackson's six appointees to the High Court, the Justice is now the subject of a thoroughly researched and eminently readable biography by historian William F. Belko, who is executive director of the Missouri Humanities Council and who formerly taught at the University of West Florida.[59] Publication of **Philip Pendleton Barbour in Jacksonian America** provides a fitting rejoinder to a discouraging assessment made long ago by a prominent scholar about the prospects for serious work on the Justice: "Philip Barbour awaits the appearance of a biographer, but the absence of a concentrated collection of personal papers will probably deter those interested in undertaking such a worthwhile project."[60]

Happily, Belko seems to have overcome whatever obstacles in primary sources that once existed. Philip Barbour is not to be confused with his somewhat more famous older brother James. Accordingly, Belko sees a need to rescue Philip from an undeserved obscurity.[61] The author is probably correct. A Google search for Philip Barbour yielded mainly links for Philip Barbour High School and its football and soccer teams (The Colts) in Philippi, West Virginia. As Belko's book demonstrates, Philip Barbour offers an altogether varied and substantial life with which to work. He had both professional success as an attorney, including serving as unsuccessful counsel for Virginia when *Cohens v. Virginia*,



Philip Pendleton Barbour in Jacksonian America **by historian William F. Belko is a thoroughly researched and eminently readable biography of the fifth of Andrew Jackson's six appointees. Barbour, who served from 1836 to 1841 had been lacking a full-length biography.**

was argued[62] and financial success with a plantation ("Frascati") and several flour mills. Moreover, he had an extensive public career that extended from his election to the Virginia legislature as a delegate from Orange County in 1812 through his five years on the Supreme Court, where his tenure was cut short only by his death from a coronary thrombosis following a day-long judicial conference in 1841. In between were several terms as a delegate from Virginia to the U. S. House of Representatives, in 1815-1825 and 1827-1830, including service as Speaker in 1821-1823, thus making Barbour the only member of the Court to have also served as Speaker of the House. His judicial career began in 1830 with appointment by Jackson to the U.S. District Court for the Eastern District of Virginia, a position he held until he moved to the High Court. Barbour's resume also included being a delegate to the consequential Virginia constitutional convention, as were Chief Justice John Marshall, former Presidents James Madison and James Monroe, and other luminaries, about which Belko insists, "[a]t no time in Virginia's illustrious history had such an august body of men gathered together at the same time and place."[63]

Belko explains in the book's introduction the goal he sought to achieve. "A biography," he writes, "should always transcend a simple narrative of an individual's life and do more than merely recount that person's contributions to his day." Instead, it "should be the microcosm contributing to the macrocosm. It should show how the course of one figure's life helped shape the larger development of the world in which the person lived."[64] The author clearly succeeds. The result is a volume that should be of high interest not only to students of the Court but to anyone interested in Virginia history, congressional politics, and the evolution of American political parties.

These topics come to life because Barbour's public life spanned two important developments in American history. First, he was very much an active player as the first party system, during which the Federalists competed with the (Jeffersonian) Democratic-Republicans, that then transitioned to the second party system, during which the old Republicans became the Jacksonian Democrats and competed with the Whigs. Second, Barbour arrived at the Supreme Court during the transition from the Chief Justiceship of Federalist John Marshall to that of Democrat Roger Taney.

When Jackson picked Taney to succeed Marshall in 1836, many contemporary observers expected nearly revolutionary change, but Belko sides with most scholars in thinking that "no such judicial revolution occurred." There were changes, but "nowhere to the degree that opponents of Jackson had predicted"[65] or, one suspects, to the degree that some of Jackson's supporters and Marshall's critics had hoped. Instead, what the author provides in his examination of Barbour's relatively short time on the Supreme Bench is a glimpse into the workings of the early Taney Court. What the Court did was, admittedly, hard work. As Barbour confided to his daughter:

> I have great labor . . . We have had one course argued for seven days; my mind fatigued with thought, and I have just turned from writing an opinion already containing 33 pages & not yet finished; and then come three cases in succession . . . Never have I known what hard mental labor was; I rarely go to bed until after 10, sometimes 11, & c the other judges all sit up an hour or more longer than I do. I shall rejoice when I get home, to take a few nights *full sleep*."[66]

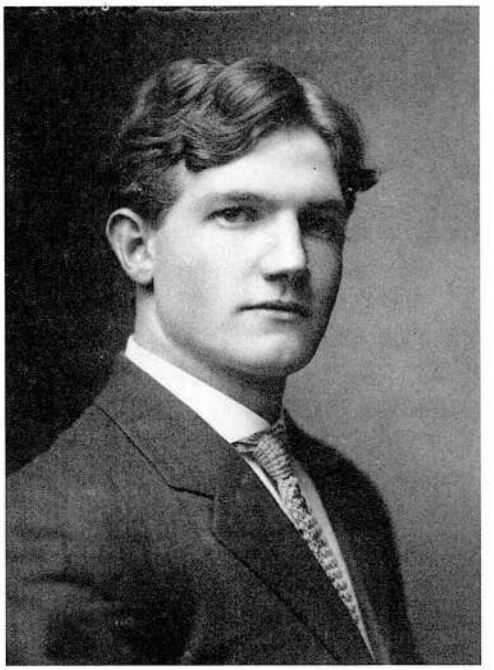
One of the strengths of the book is the focus Belko gives to Barbour's opinion for the Court in *New York v. Miln*,[67] analysis that deserves discussion here. *Miln*, which

reached the Court before Marshall's death but was not decided until after Taney and Barbour arrived, is one of the few major cases in which Barbour spoke for the majority during his brief time on the Court. Nonetheless, it remains among the most important post-Marshall decisions on the commerce clause. The case involved a challenge to a state law requiring a ship's master on incoming vessels to furnish information concerning the ship's passengers and to post security for indigents.

The case plainly lay within the long shadow cast by Marshall's opinion for the Court in *Gibbons v. Ogden*,[68] in which the Court struck down a New York steamboat monopoly because of its conflict with a coasting license issued to one of the parties under a federal statute. While Marshall could have simply and briefly explained the Court's ruling on that ground, he nonetheless went out of his way to provide an exceedingly broad reading of Congress's power to regulate commerce, hinting strongly, in language with major ramifications, that the national commerce power was not one, like the taxing power, held concurrently with the states, but one possessed exclusively by Congress. At the same time, Marshall seemed to countenance state and local regulations that bore on commerce, suggesting that such regulations were not themselves regulations of commerce and were therefore permissible. So in *Miln*, the question was whether to view the law as a regulation of commerce that fell within Congress's purview or a local regulation to protect the state's valid interests.

For Barbour, the law was not as a regulation of commerce but "one clearly of police, a power rightfully belonging to the states." The authority of a state to regulate "the emigration of foreigners into its jurisdiction by any means necessary" was a power "the sovereign states had never surrendered to Congress after adoption of the Constitution . . . " Thus, both the ends sought and "the means employed by New York . . . fell completely within the competency of the states."[69] Accordingly, Barbour rejected the notion of "a dormant federal commerce power that would bar state regulations that affected commerce, and he concomitantly approved the right of a state to regulate commerce even if Congress had acted, as long as no outright collision occurred . . . With such a narrow view in mind, then, it was not surprising that Barbour honestly found no issue in *Miln* concerning the commerce powers." The Justice's position on commerce apparently had deep roots, as he "had developed a very limited definition of the federal government's commerce powers early in his congressional career, and he never wavered . . . "[70]

Some four decades after Philip Barbour's death, Justice Horace Gray introduced a novelty at the Court: he hired a "secretary"



Of Courtiers & Kings: More Stories of Supreme Court Law Clerks and Their Justices **traces the history of the clerkship institution since its inception in 1882 and examines how clerks have been deployed in various ways to help the Justices cope with rising workloads. Above is Harvey Jacob, whom Horace Lurton brought with him to the Court from Tennessee in 1910 and who would later name his son after the Justice.**

at his own expense, and with that step, Supreme Court clerkships were born. In the years since 1882, some 2,000 men and women have served in that position, with Associate Justices today allotted four clerks and the Chief Justice one or more additional clerks. Yet, even though the identity of law clerks at the Supreme Court has long been a matter of public record, the nature and extent of their role have not. As an element in the judicial process, the clerkship institution at the Court—what Justice William O. Douglas once referred to as the "junior Supreme Court"[71]—has long been largely uncharted territory.

Systematic study of the clerkship institution is a relatively recent development, one limited to a short shelf of books.[72] This list has now been significantly enhanced by **Of Courtiers & Kings**, edited by Todd C. Peppers, who teaches political science at Roanoke College, and Clare Cushman, who is publications director at the Supreme Court Historical Society. Their work[73] is an instance where the subtitle is a perfect description of what one finds between the book's covers: "More Stories of Supreme Court Law Clerks and Their Justices." The collection is well compiled and rich with insights and information. In short, the book is not only inviting to begin but once begun, difficult to lay aside. The contents consist of twenty-one essays, including a substantive foreword by retired Justice John Paul Stevens and the editors' introduction. Most of the essays are written by former clerks and each essay is amply documented with endnotes. Some fifteen illustrations follow page 134, including one with Justice John Marshall Harlan in 1958 wearing his bowtie and dress hat while pitching in a softball game with his clerks against Covington & Burling. Another depicts Justice Sandra Day O'Connor with female law clerks at the morning aerobics class she inaugurated in the Court's gym on the top floor above the Courtroom, known as "the highest court in the land."

Several themes emerge from the book's rich content. First and probably most prominent is the list of responsibilities that clerks have acquired. Clerks today perform a larger number of significant tasks than earlier, although the essays also reveal some fairly menial ones that have passed by the wayside. Another theme is the varying use of clerks "to network for their respective justices, serving as ambassadors to clerks in other chambers."[74] Third, the essays show how "personal bonds between Justices and their clerks have changed as the number of law clerks has grown, the job duties assigned to those clerks have increased, and the rules surrounding the clerkship institution have become more formalized across chambers."[75] Fourth, there is the reassuring consensus among the contributors that "the justices do not delegate the decision-making process to their law clerks."[76] Finally, even with the necessarily brief individual treatments that Peppers and Cushman have provided, the careful reader will discover glimpses into the personality and character of a Justice of the sort that one would ordinarily expect to glean from a biography.

The cases with which the Justices and their clerks work truly reflect the substance of American life. As Charles Warren noted in the revised edition of **The Supreme Court in United States History**, his objective was to "revivify the important cases decided by the Court and to picture the Court itself . . . in its contemporary setting."[77] The books surveyed here have met the goal that Warren set for his classic work many decades ago.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

BELKO, WILLIAM S. ***Philip Pendleton Barbour in Jacksonian America: An Old Republican in King Andrew's Court.***

(Tuscaloosa: University of Alabama Press, 2016). Pp. xi, 263. ISBN: 9788-0-8173-1906-9, cloth.

HALL, MATTHEW E. K., ***The Nature of Supreme Court Power.*** (New York: Cambridge University Press, 2011). Pp. xiii, 248. ISBN: 978-1-107-00143-5, cloth.

PEPPERS, TODD C. AND CLARE CUSHMAN, EDS. ***Of Courtiers & Kings: More Stories of Supreme Court Law Clerks and Their Justices.*** (Charlottesville: University of Virginia Press, 2015). Pp. x, 426. ISBN: 978-0-8139-3729-7, cloth.

STRUM, PHILIPPA. ***Speaking Freely: Whitney v. California and American Free Speech Law.*** (Lawrence: University Press of Kansas, 2015). Pp. xii, 186. ISBN: 978-0-7006-2135-4, paper.

ENDNOTES

[1] U.S. Constitution, Article II, section 1, paragraph 8.

[2] Richard Hofstadter, **The Idea of a Party System** (1969), p. 128.

[3] Edward J. Larson, **A Magnificent Catastrophe** (2007), p. 270.

[4] Henry J. Abraham, **Justices and Presidents** (3rd ed., 1992), p. 94.

[5] Barack Obama, "Merrick Garland Deserves a Vote—For Democracy's Sake," *Wall Street Journal*, July 17, 2016.

[6] Nancy Maveety, **Picking Judges** (2016), p. ix.

[7] Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.

[8] *Time Magazine*, May 23, 1969, 24, as quoted in Henry J. Abraham, "A Bench Happily Filled,' Some Historical Reflections on the Supreme Court Appointment Process," **The Supreme Court in American Society: Equal Justice under Law**, ed. Kermit L. Hall (2001), p. 7.

[9] Matthew E. K. Hall, **The Nature of Supreme Court Power** (2010) (hereafter Hall).

[10] 5 U.S. (1 Cranch) 137 (1803).

[11] The authors of the *Federalist* essays used "Publius." It was common practice in the eighteenth and early nineteenth centuries for writers on public matters to adopt a signature as a means to ensure temporary anonymity.

[12] Several of the "Letters of Brutus" are reprinted as an appendix in Edward S. Corwin, **Court over Constitution** (1938), pp. 231-62. The quoted passages appear on pages 243 and 262.

[13] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[14] Hall, pp. 2-3.

[15] *Id.*, p. 4.

[16] *Id.*, 4-5.

[17] *See* note 14.

[18] *Brown v. Board of Education,* 349 U.S. 294, 301 (1955) (emphasis supplied).

[19] 358 U.S. 1 (1958).

[20] *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964).

[21] Hall, p. 129.

[22] *Id.*, p. 17.

[23] *Id.*, p. 16.

[24] *Id.*, p. 164.

[25] Robert G. McCloskey, **The American Supreme Court** (1960). Updating of McCloskey's book has been continued by Sanford Levinson, with the sixth edition published in 2016.

[26] Hall, p. 165.

[27] Initially, and until ratification of the Seventeenth Amendment in 1913 provided for direct election of Senators, members of the House Representatives were the only national officials directly elected by the people.

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

[29] Alpheus Thomas Mason and Donald Grier Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases**, 16th ed. (2012), p. 357.

[30] Philippa Strum, **Speaking Freely** (2015) (hereafter Strum).

[31] 274 U.S. 357 (1927).

[32] **Women in the Barracks** was published by the University Press of Kansas in 2002.

[33] 518 U. S. 515 (1996). For a brief look at the VMI case *see* D. G. Stephenson, "The Future of Single-Sex Education," *125 USA Today* (Jan. 1997), 80-82.

[34] **Brandeis** was published by Harvard University Press in 1984.

[35] For example, *see* Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959), and C. Herman Pritchett and Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[36] Strum, p. 3.

[37] *Id.*, p. 7.

[38] *Id.*, p. 10.

[39] *Id.*, p. 21.

[40] *Id.*, p. 23.

[41] *Id.*, p. 32.

[42] *Id.*, p. xii.

[43] 268 U.S. 652 (1925).

[44] 249 U.S. 47 (1919).

[45] 250 U.S. 616 (1919).

[46] 205 U.S. 454 (1907).

[47] 268 U.S. at 666.

[48] 249 U.S. at 52.

[49] 274 U.S. at 371-72.

[50] Strum, 93.
[51] *Id.*, 112.
[52] *Id.*, 114.
[53] 274 U.S. at 375-376.
[54] *See* the reference to Brandeis's opinion in Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928), p. 314, n. 46, published the year after *Whitney* came down.
[55] *Id.*, pp. 379-80.
[56] 395 U.S. 444 (1969).
[57] Strum, p. 133.
[58] *Id.*
[59] William S. Belko, **Philip Pendleton Barbour in Jacksonian America** (2016) (hereafter Belko).
[60] Frank Otto Gatell, " Philip Pendleton Barbour," **The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions, eds. Leon Friedman and Fred I. Israel** (1969), vol. I, p. 727.
[61] Belko, p. 5.
[62] *Cohens v. Virginia* 19 U.S. (6 Wheaton) 264 (1821), was argued before the Marshall Court.
[63] Belko, p. 143.
[64] *Id.*, 7.
[65] *Id.*, p. 185.
[66] *Id.*, 185. Emphasis in the original.
[67] 36 U.S. (11 Peters) 102 (1837).
[68] 22 U.S. (9 Wheaton) 1 (1824).
[69] Belko, p. 189.
[70] *Id.*, p. 194.
[71] Bernard Schwartz, **Decision: How the Supreme Court Decides Cases** (1996), p. 48.
[72] **Law Clerks and the Judicial Process** (1980) by John Bilyeu Oakley and Robert S. Thompson explored the use of clerks from the perspective of judges in California. H.W. Perry's **Deciding to Decide: Agenda Setting in the United States Supreme Court** (1990) built on the work of Doris Marie Provine's **Case Selection in the United States Supreme Court** (1980) in examining the certiorari-granting/denying process, and demonstrated that clerks played a major role in the Court's case selection process. Bradley J. Best's **Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court, 1935-1995** (2003) highlighted the role of clerks in opinion writing, the increase in the number of concurring and dissenting opinions, and the formation of voting coalitions within the Court. These were augmented by publication of **Sorcerers' Apprentices** (2006) by Artemus Ward and David L. Weiden and **Courtiers of the Marble Palace** (2006) by Todd C. Peppers. Todd Peppers and Artemus Ward have also compiled **In Chambers: Stories of Supreme Court Law Clerks and Their Justices**. (2012).
[73] Todd C. Peppers and Clare Cushman, eds., **Of Courtiers & Kings** (2015, (hereafter Peppers and Cushman).
[74] *Id.*, p. 9.
[75] *Id.*
[76] *Id.*, p. 8.
[77] Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 1, p. v.

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Errata

Please note the following corrections to the previous issue.

Page 18, in *Palko v. Connecticut* the Court rejected the double jeopardy claim and rejected the "incorporation" argument.
Page 191, endnote 112, in *Feiner v. New York*, 340 U.S. 315 (1951), the Court rejected the First Amendment claim.

Illustrations

Page 135, Library of Congress, photo by Mathew B. Brady.
Page 138, Library of Congress, photo by Mathew B. Brady.
Page 141, *Harper's Weekly*.
Page 149, Courtesy of the D.C. Circuit Court.
Page 155, Library of Congress. From a painting by Thomas Nast.
Page 157, Included as frontispiece to the Wheeling & Belmont Bridge Company's printed argument delivered to the Supreme Court in the case of *Pennsylvania v. Wheeling and Belmont Bridge Co.* (1850).
Page 158, Engraving of the Dan Sickles murder trial in Washington, D.C. by Currier & Ives, published in *Harper's Weekly* in 1859.
Page 162, Engraving by Currier & Ives published in *Harper's Weekly* (1868 March 7), Library of Congress.
Page, 164, Engraving by Currier & Ives published in *Harper's Weekly*, Library of Congress.
Page 172, Collection of the Supreme Court of the United States.
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Page 227, Courtesy of the family of Harvey Jacob.

Cover: When the Supreme Court convened on October 5, 1936 for a new Term, crowds lined up to hear cases argued on the validity of several New Deal measures. Library of Congress.