Introduction

Melvin I. Urofsky

In this issue, I am pleased to say, we have our usual medley, ranging from one of the iconic Marshall Court rulings to the twentieth century. There is fraud, pestilence, bad science, the free press, and how little Abe Fortas grew up and thrived in Memphis. And we also have Grier Stephenson, guiding the reader on new books regarding the Court.

You have read many times in my introduction that the field of legal and constitutional history, while lively, is rather small, and that its practitioners, for the most part, all know each other. I can remember when one of my books came out, and my older son read the blurbs on the back cover, looked at who had written them, and then said to me "All the usual suspects." Actually, I think it rather rare that when a book in this field comes out the author would not know the blurb writers.

Charles Hobson is an old friend, whose work on the Marshall Papers is a model of manuscript editing. The case he is writing on is a favorite of law and history teachers because the great Yazoo land fraud is almost certain to get students talking. Why, they ask, should the fruits of bribery and corruption not be taken away from those who profited from them? Why, indeed. Hobson, who is retired after teaching for many years with the Omohundro Institute of Early American History and Culture at the College of William and Mary, shows that there are many sides to this case, and, although it remains the first time the Supreme Court declared a statute unconstitutional, by then it did not matter.

We don't get too many articles submitted about nineteenth-century state cases on the Bible, and we get about the same number about Stanley Matthews, who served on the Court from 1881 until his death in March 1889. As a Justice he is remembered primarily for three decisions that limited the power of the states, including the Supreme Court's ruling in *Yick Wo v. Hopkins* (1886). But if Stanley's tenure on the Bench appears rather drab, just the opposite is true of his pre-Court career: an antislavery Democrat in Ohio, a federal attorney responsible for enforcing the Fugitive Slave Act, a Union veteran of the Civil War, and one of the draftsmen of the Compromise of 1877, which

installed his Rutherford B. Hayes in the White House.

Although a devout Presbyterian, Matthews opposed religious instruction in the public schools, and led the campaign in Cincinnati to do away with Bible reading to start the school day. Linda Przybyszewski, associate professor of history at the University of Notre Dame, another well-known colleague whose work has previously appeared in the *Journal,* looks at the famous (at the time) Cincinnati Bible War, and the rather interesting—and highly religious—arguments Matthews made.

Although Oliver Wendell Holmes, Jr., is often ranked as one of the three greatest Justices to serve on the High Court (along with John Marshall and Louis Brandeis), there has always been one stain on his escutcheon, that of *Buck v. Bell* (1927). By a vote of 8-1, the Court upheld a Virginia forced sterilization law, and Holmes's short opinion is marked by the phrase "three generations of imbeciles are enough." As several scholars have since taught us, neither Carrie Buck, her mother, nor her daughter were feeble-minded.

In trying to explain the decision, the usual story is that in areas such as forced sterilization, Holmes and his Brethren believed the practice to fall within the police powers of the state. Daniel Frost, assistant professor of political science at Clemson University, however, shows that police power jurisprudence, with its insistence that there be no class legislation, was actually used in several state courts to strike down forced sterilization laws, and he asks why the High Court acted as it did.

For years now, many of us in the field of legal history have emphasized that students need to know not only the holdings in important cases, but the facts that led to the litigation, and especially the men and women involved in that litigation. The gold standard we all use is, of course, Anthony Lewis, **Gideon's Trumpet** (1964), a book I have admired and tried to emulate since I started writing about the Court.

So when we get an article submitted that takes an important case, and tells us about the man or woman behind it, I am always happy if we can accept that article and run it in the *Journal.* Scott Makar, a judge on the Florida First District Court of Appeal and an adjunct professor at the University of Florida, has written just such an article, about an important free press case from 1946, *Pennekamp v. Florida,* and the man behind it, John D. Pennekamp, then the associate editor of *The Miami Herald.* It is always good to know about the people who set the stage for a reaffirmation of constitutional rights.

Timothy Huebner is the Irma O. Sternberg Professor of History at Rhodes College in Memphis, but is better known in this neighborhood as associate editor of the *Journal.* When people—scholars or laypersons—talk about the Justices, or indeed about any prominent government official, they often want to know where he or she came from, and whether that earlier experience can be seen in current performance. To take but one example, Thurgood Marshall's experience as an African American growing up in Baltimore and then his leadership of the NAACP Legal Defense Fund clearly influenced his jurisprudence.

We sometimes forget that Abe Fortas, known primarily as one of Washington's most wired lawyers before going on the Bench, grew up in what was then a relatively small southern city. According to Tim, Fortas was just as much a product of his hometown as he was of the nation's capital.

Finally, our thanks to Grier Stephenson for the "Judicial Bookshelf," which has to be one of the longest running features of any journal.

So, enjoy the feast.

The Yazoo Lands Sale Case: *Fletcher v. Peck* (1810)

CHARLES F. HOBSON

In *Fletcher v. Peck,* decided in 1810, the Supreme Court for the first time invalidated a state law as contrary to the Constitution. It was also the first time the Court applied the Contract Clause of the Constitution. Among other things, Article I, section 10, declares that no state shall "emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any bill of attainder, ex post facto Law, or Law impairing the Obligation of Contracts." During Marshall's long tenure as Chief Justice, the Contract Clause emerged as the constitutional expression of the doctrine of "vested rights," which held that rights acquired by individuals under law—most importantly, the right to the security and free enjoyment of property—were to be regarded as inviolable, not to be infringed by governmental power. Vested rights, in the words of twentieth-century scholar Edward S. Corwin, became "the basic doctrine of American constitutional law."[1] The ruling in *Fletcher v. Peck* did not actually prevent a state from impairing vested rights the Supreme Court deemed to be protected by the Constitution, although it did contribute indirectly to bringing about a partial redress for this infraction. The Court in 1810 held that a law enacted in 1796 by the legislature of Georgia was unconstitutional; by that time, the proscribed act had long since achieved its purpose and was well on its way to becoming a revered milestone of state sovereignty. In *Fletcher,* Chief Justice Marshall could do no more than demonstrate the Contract Clause's great potential to be an effective restraint upon the state legislatures.

The case had its beginnings in January 1795, when the state of Georgia sold its western lands, encompassing most of present-day Alabama and Mississippi, to four land companies for $500,000. Then inhabited by the Choctaw, Chickasaw, Creek, and Cherokee tribes of Native Americans, this territory was known by the evocative name "Yazoo," after the river that flows into the Mississippi River near present Vicksburg. Yazoo was shorthand for the indefinite extent of country above and below a line running from the river's mouth due east to the

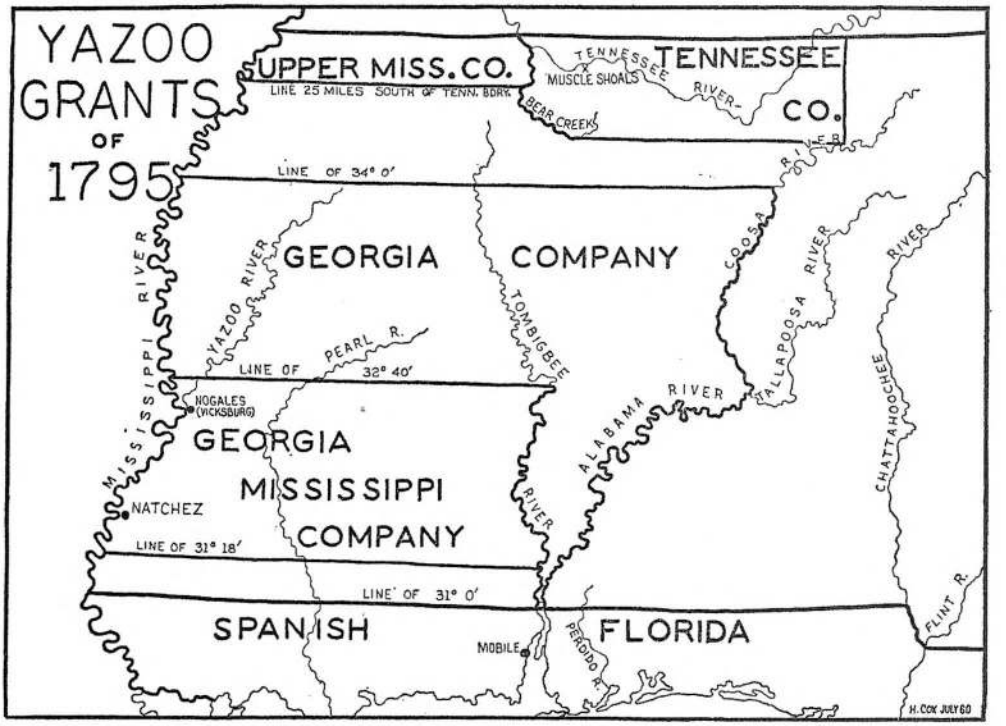
Chattahoochee River. That the Georgia legislature approved the sale for a seemingly paltry sum raised suspicions of fraud and bribery from the outset. Yet, as Henry Adams remarked, "No one could say what was the value of Georgia's title, for it depended on her power to dispossess the Indians; but however good the title might be, the State would have been fortunate to make it a free gift to any authority strong enough to deal with the Creeks and Cherokees alone."[2] In time, the Yazoo sale would earn the dubious reputation as the greatest land speculation venture in American history, perhaps unsurpassed in the scale of its operations, in the mania generated by its promise of untold wealth, in the pervasiveness of corruption attending the sale, and in the political and legal reverberations radiating from it.

The next year, in February 1796, a newly elected Georgia legislature, reacting to charges of bribery and corruption, revoked this sale and all contracts made under it and reclaimed the lands. Six years later, in 1802, Georgia ceded these lands to the United States for $1,250,000, more than twice the amount paid by the land companies. In the meantime, however, the companies had sold the lands to third-party purchasers in the Northeast, many of them residing in New England. By this time, the Yazoo sale had become embroiled in national politics, as the New England claimants, once it was clear they would not obtain actual possession of the lands, looked to the federal government for compensation. For nearly two decades they doggedly pursued their case in Congress. The lawsuit, brought by Robert Fletcher of New Hampshire against John Peck of Massachusetts in 1803, which culminated in the Supreme Court's decision in 1810, was inseparably connected with the goal of federal compensation. Ostensibly a legal dispute between private parties, *Fletcher v. Peck* provides a case study of the interplay of law and politics in the Early Republic, as C. Peter Magrath observed a half-century ago.[3] From the nation's beginning, organized interest groups have looked to government to accomplish their ends—typically, to ensure the success of an investment in a commercial enterprise. Courts no less than the political branches of government have been vital to this process, and *Fletcher* furnishes an early prototype. A central player in this case, though not an actual party, was the New England Mississippi Land Company, which simultaneously pursued its interests in Congress and in the federal courts.

Georgia's Western Lands

The founding of the colonies resulted from the first speculation in North America's "vacant" lands and many more would follow.[4] From the onset of colonization, governments relied on companies of investors to purchase large tracts and sell smaller parcels to settlers. Speculation was a routine and indeed essential part of the process of opening and settling new lands, providing an outlet for private ambition to serve public ends. This "public good" aspect was present in attenuated form even in the Yazoo sale act, which was blandly (and misleadingly) cast as an appropriation of "unlocated territory" for paying state troops and defending the state's frontiers. Georgia's western lands sale shared features of earlier speculative land ventures, differing mostly in degree rather than in kind. Great land speculating enterprises that preceded Yazoo, such as those formed to purchase the Northwest Territory and western New York, were accompanied by genuine attempts to colonize and settle the lands. A distinguishing feature of the purchase of Georgia's western lands was that it was conceived and executed not to settle the lands but to resell them immediately.

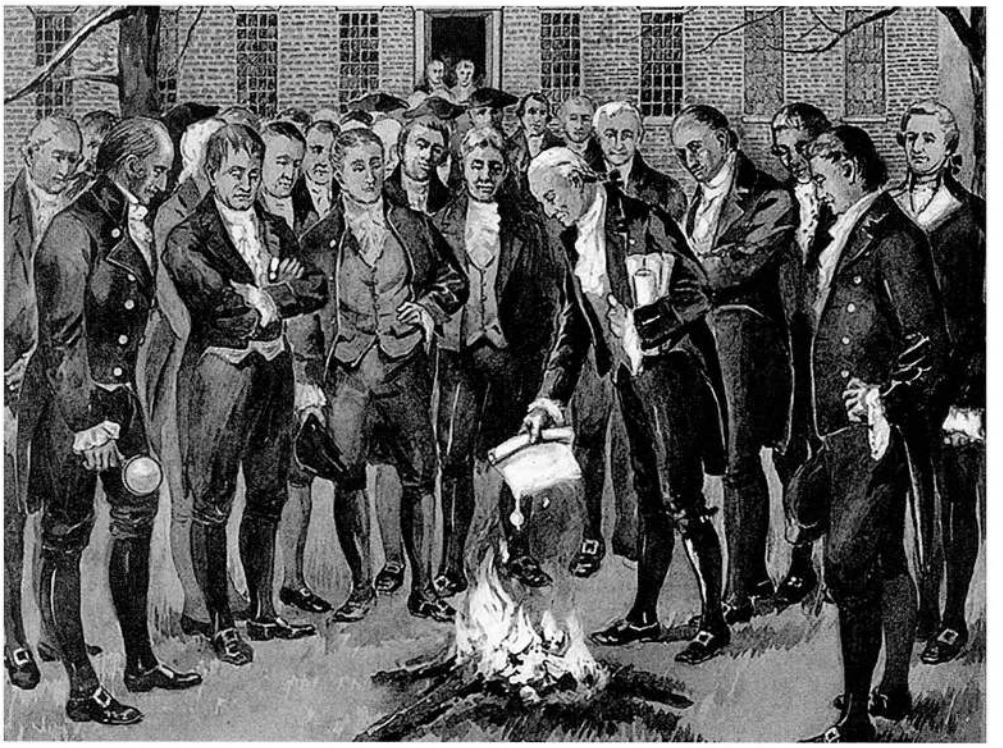
The sale originated in the particular circumstances of Georgia's postwar history as a thinly populated settlement on the margins of the new nation.[5] Among those



In 1795, Georgia Governor Georgia Mathews signed the Yazoo Act, which transferred thirty-five million acres of the state's western territory (encompassing most of present-day Alabama and Mississippi) to four separate companies for a sum of $500,000. Then inhabited by members of the Choctaw, Chickasaw, Creek, and Cherokee tribes, this territory was known as "Yazoo," after the river that flows into the Mississippi River.

states with western land claims, only Georgia had not ceded its claims to Congress before 1789. The state's continued possession of vast reaches of territory west of the Chattahoochee River mostly inhabited by Indian tribes was costly and ineffectual. After two earlier attempts to dispose of the lands, the Georgia legislature approved a sale to a consortium of land companies headed by James Gunn, then a U.S. Senator. Gunn was a representative type of postwar land speculator: a Continental army officer of modest origins who parlayed successful military service into political prominence, which in turn provided a platform to launch ambitious land schemes. A believer in the politics of interest and influence, Gunn skillfully pushed the Yazoo sale through, even resorting to bribing potentially friendly legislators with shares in the companies. In his mind, such tactics were an acceptable, even necessary, means of influencing the legislature. Gunn gained his grand prize but seriously miscalculated the degree to which revelations of bribery and corruption would provoke popular revulsion and bring forth a political movement dedicated to undoing the Yazoo sale.

As Gunn was the mastermind of the sale, so James Jackson, Georgia's other U.S. Senator, was the guiding genius who brought about its revocation. To this task he brought a crusading zeal that aimed to restore and preserve the republican character of Georgia. In a series of published letters in which he wrote as "Sicilius," Jackson spelled out the principles of a populist constitutionalism subsequently embodied in one of the most extraordinary laws in the annals of American legislation. Three-fourths of the text of Georgia's rescinding act of 1796 was preamble recapitulating Jackson's political and



Anti-Yazoo legislators publicly burned pages of the act in the state house square in Louisville, Georgia in 1796. According to undocumented lore, the "usurped act" was lit by drawing the sun's rays through a magnifying glass by "fire from heaven . . . consumed as by the burning rays of the lidless eye of Justice."

constitutional views.[6] The enacting clauses aimed not only to repeal but also to declare the sale act and all rights derived from it "null and void." Not content with a mere declaration, the law took special care to expunge "from the face and indexes of the books of record of the state" all the official records, documents, and deeds relating to the sale. Court clerks were given exact and minute directions to cut out "the leaves of the book" containing the offending records, with "a memorandum . . . expressing the number of pages so expunged." Before adjourning, the anti-Yazoo legislators staged a public burning of the reviled act.

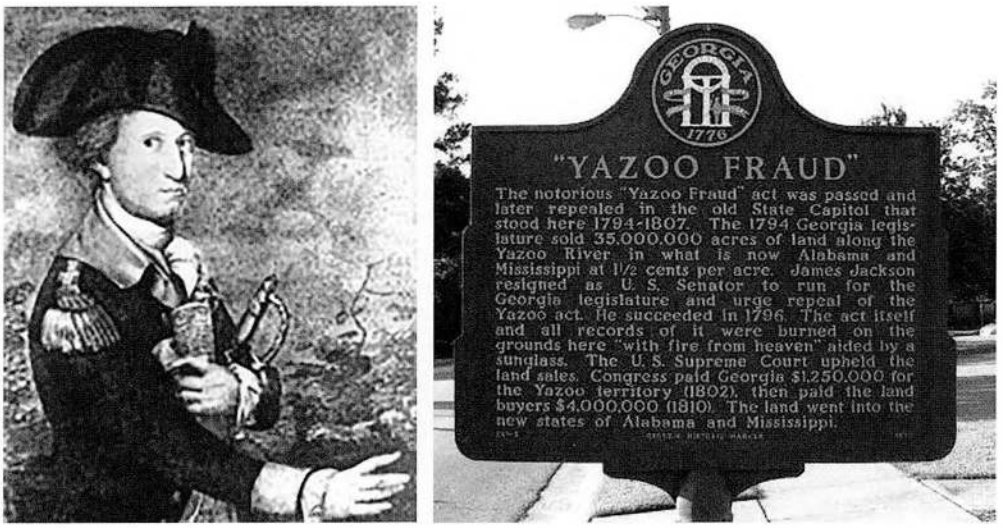
This solemn ceremony took place in the state house square in Louisville, Georgia, on February 15, 1796. Except for the script prescribed by a legislative committee, there is no contemporary description of what must have been an astonishing spectacle. In the popular and undocumented telling and retelling of the story, the fire that destroyed the condemned "usurped act" was not lit in the usual way but ignited by drawing the sun's rays through a magnifying glass. The act thus appropriately met its end not by earthly fire but by "fire from heaven . . . consumed as by the burning rays of the lidless eye of Justice." Even without this colorful detail, the scene, in the words of a nineteenth-century Georgia historian, "was sufficiently striking and impressive."[7] A historical marker with the heading "Yazoo Fraud" stands on the grounds of the old state house, commemorating the events of this day and serving as a permanent testament to the rescinding law's honored place in the state's history. Leaving nothing to chance in removing all traces of the detested act from the official record, Jackson and his fellow legislators aimed at nothing less than to reverse history, to restore Georgia, at least

in a legal sense, to a time preceding the Yazoo sale—as if the act and sale had never taken place. In a broader sense, they sought to remove a stain on the state's republican reputation, so grievously sacrificed to the idol of speculation.

New England Purchasers of Yazoo Lands

Before these events had transpired, the two largest Yazoo companies—the Georgia Company and the Georgia Mississippi Company—hastily sold their lands, mostly to purchasers in New England, where the speculative fever in Mississippi lands that swept through the region in 1795 and 1796 ran high. Showing no restraint, eager buyers pushed the price steadily upward until the bubble burst with news that Georgia had revoked the sale. "On this ocean of speculation," wrote Yale president Timothy Dwight, "great multitudes of sober, industrious people launched the earnings of their whole lives; and multitudes became indebted for large sums which they never possessed."[8] This unbridled pursuit of Georgia lands left its mark on the New England consciousness, inspiring native playwright Royall Tyler to write "The Georgia Spec; or, the Land in the Moon," a comedy (now lost) performed at Boston's Haymarket Theatre in October 1797.[9]

Once the Yazoo bubble burst, many imprudent buyers were unable to make good on the notes given to pay off their contracts and faced extreme financial distress, if not ruin. After the initial panic, however, New England purchasers gradually evolved into an organized and well-financed group of claimants who single-mindedly set about to salvage their investment in Georgia lands. By far the largest investor was the New England Mississippi Land Company, formed in 1796 to purchase the entire tract granted to the Georgia Mississippi Company. Within a short time, the N.E.M. Land Company was holding quarterly meetings, assessing taxes to defray expenses, hiring legal counsel, and drafting memorials. With no chance of redress from the state of Georgia, the New Englanders were further disappointed to discover that the federal government showed no disposition to



A historical marker with the heading "Yazoo Fraud" stands as a permanent testament to the rescinding law's honored place in the state's history. Senator James Jackson (left) and his fellow Georgia legislators had sought to remove a stain on the state's republican reputation, so grievously sacrificed to the idol of speculation.

come to their aid. Indeed, alarmed about the sale's potential to provoke conflict with the Choctaw, Chickasaw, and Creek tribes, whose titles had not yet been "extinguished" by treaties, the government was prepared to intervene to prevent any immediate colonizing or settlement plans that third-party purchasers might have contemplated. As of 1798, the N.E.M. Land Company still intended to colonize the recently established Mississippi Territory and sent agents to survey the lands. Territorial governor Winthrop Sargent, himself a New Englander, issued a proclamation against such actions and threatened to prosecute those who remained illegally on the lands, declaring that he knew "of no *right* in any Company to lands within the Mississippi Territory."[10]

At the same time arguments began to surface in Congress that title to all or part of the Mississippi lands actually belonged to the United States. Yazoo purchasers, who had made their purchases on the assurance that Georgia had complete authority to sell its western lands in 1795, viewed this development with alarm. Indeed, they perceived the assertion of a U.S. title to be a greater threat to their titles than Georgia's rescinding law. Two pamphlets published in 1797 defending the Yazoo title focused primarily on refuting the case for a U.S. title.[11] The prospects for Yazoo purchasers under Georgia's title remained in limbo until after Georgia ceded its western lands to the United States in 1802. Under that agreement, commissioners on behalf of Georgia and of the United States set aside five million acres to settle private claims in the territory. The U.S. commissioners, who had been empowered to settle these claims, presented a report to Congress in February 1803. Although they concluded that titles derived from Georgia's 1795 sale act could not "be supported," the commissioners acknowledged "equitable considerations" that rendered it "expedient" to compromise on "reasonable terms." They proposed to compensate the claimants out of the five million acres set aside in the Georgia cession compact.[12]

Congress Debates Yazoo

From 1803 onwards, the N.E.M. Land Company devoted all its attention and considerable resources to lobbying Congress for an act to indemnify the New England claimants for their investments in Yazoo lands. It hired lawyers to draw up memorials and serve as agents on the spot in Washington. Despite the commissioners' rebuff of the Yazoo title, the New England purchasers were optimistic that Congress would act promptly and favorably on their behalf. This possibility was soon foreclosed, however, when fierce resistance to the Yazoo claims arose in the House of Representatives, led by the redoubtable John Randolph of Virginia. Randolph combined deft political tactics with ideological passion that adamantly opposed compromise with the claimants as sanctioning corruption. He made Yazoo a test of Republicans' loyalty to party principles, turning it into a battle to preserve true republicanism.[13]

The ensuing debate was unmatched for intemperate language and vituperative personal attacks, exposing a division in the party between unbending purists and moderates willing to accommodate principle to expediency. The high—or low—point came in 1805, when Randolph launched a pitiless attack on U.S. Postmaster General Gideon Granger, who as agent of the N.E.M. Land Company had presented and signed the company's recent memorial to Congress. The Virginian denounced Granger as a peddler of official influence and outright bribery in awarding mail contracts and accused him of maintaining "a jackal" who "at night, when honest men are in bed," prowled "through the streets of this vast and desolate city, seeking whom he may tamper with." This provoked a withering response

from Matthew Lyon, a Republican who favored compromise with the claimants and who resented Randolph's insinuations that he was an apostate from the true republican faith. Himself a holder of a mail contract, he dismissed the bribery charges as "fabricated" in Randolph's "disordered imagination" and portrayed his accuser as a haughty aristocrat who turned up his nose as "the very sight of my plebeian face." Lyon delivered an incisive rebuke of Randolph as a wealthy and leisured heir to lands and slaves, possessed of a superior book education but lacking in worldly experience. But he could not refrain from a merciless taunt about Randolph's childlike physical features (apparently the result of a chromosome imbalance): "I thank my Creator that he gave me the face of a man, not that of an ape or a monkey, and that he gave me the heart of a man also."[14] Although an apparent majority in Congress was disposed toward compromise, Randolph and his followers maintained the upper hand for years by exploiting delaying tactics to prevent votes from taking place or postponing the subject to the next session or to a new Congress. Repeated frustration did not deter the claimants, who matched their adversaries in stubborn pursuit of their interests.

Fletcher Sues Peck

The lawsuit brought by Fletcher against Peck in the U.S. Circuit Court at Boston in June, 1803, was integrally connected to the New England claimants' broader campaign to obtain compensation from Congress. It was understood that a Supreme Court decision upholding the title would not put the claimants in possession of lands in Mississippi but might induce Congress to provide them monetary relief. The claimants had few legal options to get their case before the highest court in the land. As long as Georgia retained its western lands, a suit against that state in its courts was precluded by the 1796 Rescinding Act. In 1798, redress in the federal court was barred by the Eleventh Amendment, which prohibited the extension of federal judicial power to suits against states brought by citizens of another state. In 1802, Georgia ceded its lands to the United States. Yazoo claimants could have contested their titles against that of the United States by suing holders of U.S. patents for Mississippi lands in the territorial court of Mississippi. This remedy was not available in 1803 because there was no one to sue. The first land office in the Mississippi Territory did not open until 1805, and the earliest land grants were to citizens holding originally under patents from France, Great Britain, and Spain. In 1807, Congress passed an act preventing those whose claims had not been recognized or confirmed by the United States, that is, purchasers under Georgia's 1795 sale act, from entering upon lands ceded to the United States, which effectively prevented them from suing in the territorial court.

Yazoo claimants repeatedly requested Congress to pass an act referring the title question directly to the Supreme Court. Even in the unlikely event of such legislation, the Court might well have refused to act on the ground that it was being asked to give an advisory opinion. By this time, it was more or less settled that the Supreme Court would decide only cases or controversies and would not give opinions unconnected with adjudicating a legal dispute. To be sure, American lawyers had already proved adept at devising cases to obtain high court rulings on contested legal questions by resorting to legal fictions and feigned cases to circumvent the novel problems arising in a legal system whose organization and jurisdiction were creatures of the Constitution and statutes. For example, in a 1796 case testing the constitutionality of a tax on carriages, the lawyers and Justices accepted the fiction that the plaintiff owned 125 "chariots" (he actually owned just one) so that the tax and penalty for not paying met the

minimum amount for bringing a Supreme Court appeal.[15] In 1804, the court decided a case originally brought on a feigned wager of $2,500—the amount needed for an appeal—that the United States was entitled to the duty on sugar refined before the expiration of the law imposing a duty on that commodity.[16]

Fletcher v. Peck was also an arranged case brought originally in the U.S. Circuit Court for the purpose of an expeditious appeal to the Supreme Court. Lawyers hired by the New England claimants confronted the problem of contriving a case that would in effect produce an advisory opinion on the validity of the New England purchasers' titles to Mississippi lands. They carefully considered all aspects of the case—the venue, the parties, the type of action, and the pleadings—and left nothing to chance, even seemingly minor details such as who would be plaintiff and who defendant. The U.S. Circuit Court in Boston, composed of Supreme Court Justice William Cushing and U.S. District Judge John Davis, was the appropriate federal tribunal for bringing an original suit at common law. Cushing and Davis were cooperative and largely inactive participants in the proceedings, having nothing to do other than render a pro forma judgment on written pleadings and allow a writ of error for an appeal. They did not preside at a trial, hear arguments, or deliver an opinion. The choice of Fletcher of New Hampshire and Peck of Massachusetts as parties satisfied the diversity-of-citizenship requirement for federal jurisdiction. This requirement apparently explains why Peck rather than the N.E.M. Land Company was the defendant of record. The company's shareholders, though concentrated in Massachusetts, resided throughout New England, including New Hampshire. If the company was a party, the case might not meet the diversity test; indeed, in 1806 the Supreme Court held that no party on one side could be a citizen of the same state as a party on the other side.[17] That Peck, the party seeking to validate the Yazoo title, was defendant rather than plaintiff also indicated a calculated legal strategy. If Peck sued Fletcher and won in the circuit court, there would be no ground for an appeal to the Supreme Court, defeating the purpose for bringing the case. True, the parties and judges might agree to have judgment rendered against Peck so he could take an appeal. Yet even a pro forma judgment against Peck on the Yazoo title in a federal court would not look good. The more prudent course was for Fletcher to sue Peck.

Among the most conspicuous New England speculators in Yazoo lands, John Peck was by no means a nominal party to the case that bears his name. As a charter member and one of seven original directors of the N.E.M. Land Company, he subscribed to four shares amounting to one million acres. Exclusive of lands held under the company, he accumulated nearly two million acres in his own name. Born in 1770 to an established Boston family of tradesmen and merchants, Peck belonged to a younger generation of land speculators who came of age in the post-Revolutionary years. A portrait executed around the time of the 1795 Yazoo sale reveals a young man brimming with confidence. He had been a ship's boy in the Continental Navy during the Revolution and was twice captured by the enemy. After his father's death during the war, Peck entered the brokerage business under his stepfather's patronage and dealt in various securities before shifting his interests to real estate development and land speculation. Following his 1801 marriage into a wealthy family, he built a large mansion outside Boston. In time, his extensive investments, which included tracts close to home as well as Yazoo lands, resulted in financial reversals and forced him to sell his "elegant country seat." By 1817, Peck had moved from Boston and was residing in Lexington, Kentucky, where he reinvented himself and lived until his death in 1847.[18]

Peck himself might have recruited Robert Fletcher to be his opposite party in

the case. Fletcher was a real estate broker who sold farm properties in southern New Hampshire as well as in neighboring Massachusetts. With a large family to support, Fletcher had difficulty achieving prosperity. While the case was pending in the circuit court, he was forced to sell his New Hampshire homestead. He then moved to Boston, setting up as a broker and building a house on Beacon Street. He sold it soon afterwards, evidently again as the result of business failure. An investment in Canadian timberland and establishment of a lumber manufactory also proved unfortunate. Unlike Peck, Fletcher was content to be a passive spectator in his lawsuit. He died by his own hand in Montreal five months before the Supreme Court's decision in *Fletcher v. Peck*.[19]

Fletcher sued Peck just a few days after the latter sold him 15,000 acres of Yazoo land for $3,000. The brief interval between the sale and the lawsuit clearly indicated cooperation between the parties. Fletcher's complaint set forth a case of "covenant broken," the appropriate common law action to recover damages for breach of a sealed written contract or agreement between two individuals. The contract or "covenant" in this case was the deed of sale conveying the 15,000 acres. Fletcher asked for damages of $3,000, that is, the money he had paid for the land. This amount was more than enough to qualify for an appeal to the Supreme Court. Boiled down to its essence, Fletcher's complaint charged that Peck's deed was defective in not providing a good title as promised by the seller. The great advantage of this type of action was that it allowed the parties to put all the "facts"—that is, all the relevant documents—relating to the Yazoo title on the record. The record in *Fletcher v. Peck* swelled to great length, as there were reproduced verbatim various deeds and legislative acts, including the texts of Georgia's 1795 sale act and 1796 Rescinding Act, along with numerous charters, treaties, and acts relating to Georgia's boundaries. By means of pleading devices such as demurrers and the inclusion of a special verdict, the decision on the validity of the title was left entirely to the court.[20]

Anticipating timely approval of a compensation bill, the N.E.M. Land Company lawyers let *Fletcher* languish in the U.S. Circuit Court for several years, not bothering to obtain a judgment. Frustration with Congress's inaction apparently prompted resumption of the case at the court's October 1806 Term, when Judge Cushing sitting alone gave judgment for Peck. Although Fletcher's lawyer obtained a writ of error, no appeal was prosecuted, apparently because the New England claimants still confidently expected to make their case to Congress without the Supreme Court's aid. By June 1807, however, the cause had commenced anew in the circuit court. In October, Cushing, again sitting alone, ruled for Peck. A second writ of error issued and an appeal was filed with the Supreme Court in February 1808, placing the case on the docket of the February 1809 Term.

The Supreme Court Hears the Appeal

To argue the appeal, the N.E.M. Land Company hired John Quincy Adams, who had resumed the practice of law after resigning from the Senate. On arriving in Washington, Adams obtained the services of Robert G. Harper to join him in representing Peck. Harper had been an early investor in Yazoo lands and as a legislator and pamphleteer had vigorously supported the title under Georgia's 1795 sale act. Standing for the appellant Fletcher was Luther Martin, a formidable advocate who managed to stay in top form professionally over many years despite habitual drunkenness—"Lawyer Brandy Bottle," as he was known. After four days of argument in early March 1809, the Supreme Court unexpectedly accepted

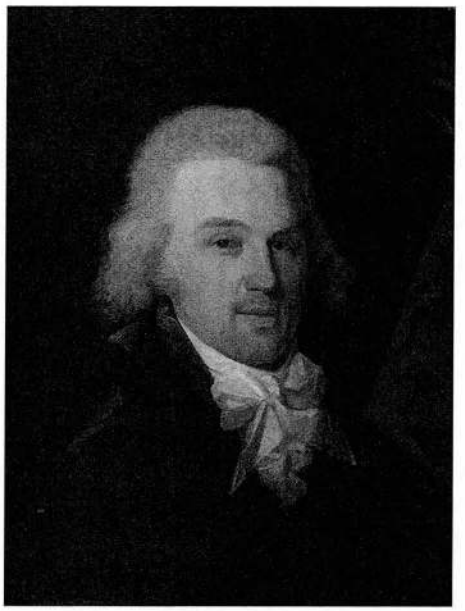
Martin's objections to the pleadings and ruled against Peck on a technical point. In a brief opinion, Chief Justice Marshall ordered the pleadings to be amended and the case sent back to the circuit court to begin again.[21] This likely meant a two-year delay in having the case reheard by the Supreme Court. Adams and Martin accordingly signed an agreement drawn by Adams that the parties would waive all exceptions to the pleadings and that the case would be "submitted to the Court, upon the Covenants contained in the plaintiff's declaration, and on the facts stated in the Special verdict."[22] The Supreme Court consented to the agreement and, rather than enter a formal judgment of reversal, left the case on the docket for further argument on the merits at the 1810 Term.

The Court's initial holding against Peck was in truth a convenient cover for its reluctance to decide the merits of a case so artfully designed to elicit an advisory opinion. Even before argument commenced, Adams heard doubts expressed by Justices whether to hear the case. Later, after argument had concluded, Adams reported conversations with both Marshall and Justice Brockholst Livingston in which they intimated "the reluctance of the Court to decide the case at all, as it appeared manifestly made up for the purpose of getting the Court's judgment upon all the points. And although they have given some decisions in such cases, they appear not disposed to do so now."[23]

Why did Chief Justice Marshall and his Brethren ultimately set aside their misgivings and proceed to hear the case? *Fletcher v. Peck* did meet the formal requirements of a "case or controversy." The parties were real persons, one of whom brought a common law action of covenant broken. Such an action between purchasers and sellers of Yazoo lands was not unknown. If the sale between Fletcher and Peck had taken place in, say, late 1795 or early 1796, the case between them would have presented a clear legal dispute. The actual sale having occurred in 1803, the Justices, as Marshall noted in 1809, "could not but see that at the time when the covenants were made the parties had notice of the acts covenanted against."[24] They were perhaps willing to accept the fiction that Fletcher entered into the sale contract oblivious to the rescinding act, because the pleadings presented legal issues appropriate for judicial decision. Critics of *Fletcher* contend that the case was a sham because there was no real adversarial dispute, each party having an interest in the vindication of the Yazoo title. But the plaintiff's interest was to recover $3,000 and the defendant's interest was to resist this claim. This was essentially the same issue at stake in the numerous cases between buyers and sellers of Yazoo lands that had taken place earlier in New England. It is not implausible that Fletcher would prefer to get his money refunded rather than retain a deed that was of no immediate value and whose long-run value was uncertain even with a Supreme Court opinion upholding the title.

Justice William Johnson overcame his scruples about deciding the case because he had "confidence" in the counsel who represented the parties and believed "they would never consent to impose a mere feigned case upon this court."[25] This motive must have operated on the other Justices as well, perhaps as they had John Quincy Adams, an exemplar of New England integrity, in mind. Adams, Peck's original counsel, had supported the Yazoo claimants in the Senate, although without much enthusiasm and he himself had no personal interest. His voluminous diary contains no hints that he harbored doubts about the authenticity of his client's case.

The Justices were perhaps the more willing to take the case because otherwise the Yazoo claimants would be deprived of a forum in which to assert their rights at law. The advisory opinion they were being asked to give in *Fletcher* would at least have the virtue of accompanying the decision of an actual case or controversy. They knew such a



Born in 1770 to an established Boston family of tradesmen and merchants, John Peck belonged to a younger generation of land speculators who came of age in the post-Revolutionary years. A charter member and one of seven original directors of the N.E.M. Land Company, he subscribed to four shares amounting to one million acres.

decision was bound to be controversial and particularly obnoxious to the sovereign pretensions of Georgia. But, unlike the Cherokee cases of the 1830s, the Supreme Court would not in this instance find itself in the awkward and vulnerable position of having to enforce its judgment against a state. The only legal effect of a decision upholding the Yazoo title would be to deny Fletcher or his legal representatives the recovery of his damages, a judgment that required virtually no enforcement. It is doubtful that the politically astute Chief Justice was under the illusion that the Court's legal pronouncement could or should resolve the Yazoo controversy, a question so deeply mired in politics. He did not want the Supreme Court to be perceived as intruding into the political sphere. Still, in *Fletcher,* Marshall might well have seen an opportunity to make an important statement of constitutional law, just as he had done in 1803 in the politically charged case of *Marbury v. Madison.* In both cases, the Court had virtually free rein to speak law without having to enforce its legal judgment. Such a motive for accepting the case could not, of course, be publicly acknowledged.

Adams did not appear for the re-argument of *Fletcher* in 1810, as he had accepted a commission as U.S. Minister to Russia. His place as Peck's lawyer was taken by Joseph Story, a rising young legal talent and Republican politician from Massachusetts. He was in Washington to lobby on behalf of the N.E.M. Land Company, as he had done on two earlier occasions. Within two years, Story would take a seat on the U.S. Supreme Court, at thirty-two the youngest person ever to serve on that tribunal. The rehearing of *Fletcher* required only one day, with Story and Harper representing Peck and Martin again speaking for Fletcher. Counsel evidently confined themselves to brief recapitulation of arguments that had consumed four days in 1809. William Cranch's report of the case is unsatisfactory, as it combines the 1809 and 1810 speeches and merges those of Adams, Harper, and Story into a single argument.[26] According to the report, the principal point of contention on the merits was the title question. Martin was apparently content to stake everything on denying that Georgia in 1795 had authority to sell the Yazoo lands because title to those lands belonged to the United States. This assertion was based on the proclamation issued by the British crown in 1763 prohibiting further settlement west of the Alleghenies. The crown, so the argument ran, claimed possession of the western lands, title to which subsequently devolved on the United States. Martin seems to have proceeded on the assumption that if he lost on this issue, he would lose the case. He gave no indication that he went beyond the pleadings to show that Peck's title was bad either on the ground that the sale was originally void because of legislative corruption or that the

sale had been legally and constitutionally voided by the 1796 Rescinding Act.

On Peck's behalf, Adams, Harper, and Story contended that title to the lands had belonged to Georgia from the time of its 1732 charter until the cession to the United States in 1802. They denied that the Proclamation of 1763 was intended to "disannex" Georgia's western lands and cited numerous public acts that explicitly or implicitly recognized Georgia's title. Asserting that Georgia had full authority to sell its western lands, Peck's counsel went on to deny that the state could revoke the grant once it was executed. The Rescinding Act of 1796, they maintained, was an exercise of judicial, not legislative power and a violation of the Constitution's prohibition against impairing the obligation of contract.

Chief Justice Marshall's Opinion

On March 16, 1810, the Supreme Court, speaking through Chief Justice Marshall, upheld Peck on all counts, most importantly in ruling that Georgia held rightful title to the Yazoo lands in 1795 with full authority to sell them and that Georgia's Rescinding Act of 1796 was invalid.

In fashioning an opinion that aimed as much as possible to speak abstract law and steer clear of the notorious facts and contentious politics of the Yazoo land sale, the Chief Justice relied on accepted norms of judicial modesty and restraint. He also took refuge in the dry language of the pleadings, which allowed him to treat the issue of corruption in a way that was amenable to principles applicable to this and other cases. These principles counseled against judicial inquiry into legislative motives even in so egregious a case as the Yazoo land sale. Again, because the pleadings admitted as fact that Peck was a purchaser without notice, the court was not permitted to inquire into a matter that was and continued to be, hotly disputed in Congress. Opponents of compromise with the Yazoo claimants loudly and repeatedly scoffed at the notion that the Yazoo purchasers were innocent and that they could claim to be unaware of the notorious circumstances of original sale.

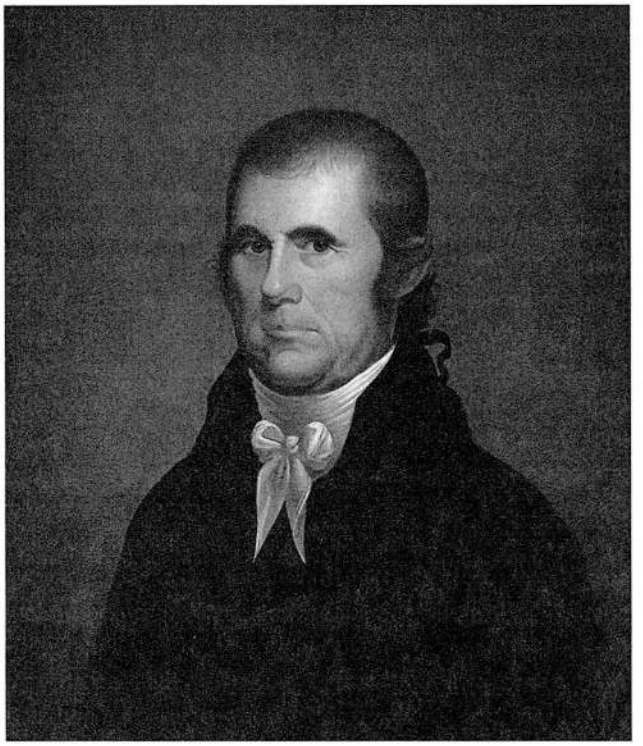
Perhaps to the surprise of close observers of this case, Marshall's opinion devoted little space to the question whether, at the time of the sale title to the Yazoo lands was in the United States or in Georgia.[27] Although this issue consumed much of the pamphlet literature on the Yazoo sale and also monopolized the argument of *Fletcher v. Peck,* the Court had little difficulty finding that Georgia had legal possession of and power to sell the lands. It rejected the plaintiff's principal arguments, that the Proclamation of 1763 detached the western lands from the colonies and that during the war the lands were acquired by joint arms for the benefit of the United States. The Court, said Marshall, understood the proclamation as a mere temporary suspension of settlement, not amounting "to an alteration of the boundaries of the colony." As to whether the western lands became a common national property or belonged to the individual states, that "momentous question" had been settled by the creation of the national domain by means of state cessions of western land claims. That "compromise" was "not now to be disturbed," said the Chief Justice.[28]

Marshall bestowed most of his attention on the third count, which asserted that, as a result of Georgia's 1796 Rescinding Act, Peck's title "was constitutionally and legally impaired, and rendered null and void." His ensuing consideration of the legality and constitutionality of the rescinding act filled eight of the opinion's sixteen printed pages, culminating in his ruling that the Georgia law impaired the obligation of contract and was therefore contrary to the Constitution. Although the validity of Georgia's 1796 rescinding act was one of the points to be determined, perhaps few could have predicted

that the Chief Justice would make it the central issue or that he would rely principally on a clause of Article I, section 10, prescribing prohibitions and restrictions on the state legislatures. Of course, the rescinding act since its inception had been censured as an "ex post facto Law" and "Law impairing the Obligation of Contracts." Yet these clauses, if invoked at all, were usually linked together indiscriminately and cited to supplement the broader argument that Georgia's revocation of the Yazoo grant was a deprivation of vested rights and contrary to fundamental principles of law.

The Contract Clause itself had not been introduced until late in the Federal Convention, and it was adopted and ratified without much commentary that could shed light on its intention. Its true origin, however, can be traced to efforts from the convention's outset to place limits on state legislative power. According to James Madison, anxiety about the security of private rights in the republican governments of the new nation had been a strong impetus to the reform that produced the Constitution. At one point, the convention approved Madison's radical expedient to give the national legislature a veto over state laws. The subsequent addition of specific restrictions and prohibitions on the states, including the Contract Clause, embodied the idea of the veto while placing its enforcement in the hands of the judiciary department. As a state legislator in the 1780s, John Marshall admired Madison as "the enlightened advocate of union and of an efficient federal government" and joined him in urging adoption of the Constitution at Virginia's ratifying convention. He attributed his own support for federal reform to the instability of state politics, which in turn led him to give "a high value . . . to that article in the constitution which imposes restrictions on the states."[29] No doubt this recent history, and his own part in it, was in his mind when he took up the Contract Clause in *Fletcher*.

None of the precedents and sources Marshall might have consulted was content to deny the validity of the rescinding act solely on the ground that it impaired the obligation of contract and was void under the Contract Clause. A widely circulated opinion prepared by Alexander Hamilton in 1796 came closest to bringing that act within the Contract Clause's prohibition, although not without first pronouncing it to be "a contravention of the first principles of natural justice and social policy."[30] Chief Justice Marshall framed his opinion in a similar way. Before turning to the Contract Clause, he dwelled at greater length on the rescinding act as having "annihilated" the vested rights of innocent purchasers and thus flouted established principles of law. He went beyond condemning the act on these grounds to conduct a short disquisition on the nature and limits of legislative power and to inquire whether legislatures could "as a mere act of power" adopt measures that infringed property rights. In keeping with his aim to extract law from controversial politics, the Chief Justice sought to identify the principle behind the rescinding act without speaking "with disrespect" of the Georgia legislature. This principle, which could "be applied to every case to which it shall be the will of any legislature to apply it," was "that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient." In short, the rescinding act, for all its good intentions in punishing fraud and purging the state of the stigma of corruption, was a dangerous precedent, with dire implications for the security of private vested rights in the republican governments of the United States. An act annulling vested rights "if legitimate" was "rendered so by a power applicable to the case of every individual in the community."[31] He stated the issue starkly: to acknowledge the validity of this act was in effect to concede that there were no limits to the legislative powers of the state governments.



In *Fletcher v. Peck* (1810), Chief Justice John Marshall (above) ruled that the Rescinding Act had been an unconstitutional violation of the right of contract and that Georgia held rightful title to the Yazoo lands in 1795 with full authority to sell them. In 1814 Congress finally resolved the issue, providing $5 million from the proceeds of land sales in the Mississippi Territory to be shared by the claimants.

Marshall acknowledged that a legislature could act as a judicial tribunal, but in that capacity it was seemingly bound by "certain great principles of justice, whose authority is universally acknowledged" and "ought not to be entirely disregarded." Georgia, for example, might on proof of fraud set aside the original conveyance from the state to the land companies, but it was bound "by the clearest principles of equity" to respect the rights of innocent purchasers. Likewise, said the Chief Justice, it would seem that Georgia's power to repeal the act of a former legislature was not unlimited. When a law was "in its nature a contract, when absolute rights have vested under that contract, a repeal of a law cannot devest those rights." He then asked, "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"[32]

After further musings on this topic, Marshall found himself having to concede the indeterminate nature of legislative power: "How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated." However much he might have been so inclined, the Chief Justice could not quite bring himself to pronounce Georgia's Rescinding Act void on the ground that it transcended inherent limits on legislative power prescribed by natural law. He could do no more than tentatively suggest that the act's validity "might well be doubted" if Georgia were regarded as "a single sovereign power."[33]

As soon became evident, Marshall's discourse on natural law and vested rights and the perplexing difficulties of prescribing boundaries to legislative power was mere preface to a triumphant announcement that this case could be decided by the Constitution. Georgia was not "a single sovereign power" but "part of a large empire"; it belonged to "the American union" whose Constitution was supreme law and imposed limits on the state legislatures. That Constitution, said Marshall, declared "that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."[34] In the concluding paragraphs of this section, the Chief Justice expounded on the Contract Clause for the first time, employing the rules and methods of statutory construction to the text of the Constitution in order to discover its intention. He adopted this technique in all his constitutional cases, in the process setting American constitutional law on a path in which its doctrines developed primarily by means of judicial exposition of the Constitution's text. In *Fletcher,* he exploited the Contract Clause's general language and invoked the Constitution's broad purposes to give an enlarged scope to the prohibition. His construction extended the Contract Clause's reach to public as well as private contracts, and to executory as well as executed contracts.

In ruling in Peck's favor on the third count, Chief Justice Marshall announced the Court's "unanimous opinion" that Georgia "was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."[35] Such a statement seems oddly equivocal given his preceding effort to demonstrate that the Rescinding Act clearly fell within the Contract Clause's prohibition. Such ambiguity was evidently necessary to obtain the Justices' "unanimous" agreement to strike down the rescinding act. For Marshall, it was more important that the Court express unanimity in voiding the act, whatever the precise basis of its decision. In a separate opinion that amounted to a dissent, Justice Johnson sharply disagreed with Marshall's construction of the Contract Clause, preferring to rely "on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."[36] It seems clear that Marshall himself was satisfied to rest the decision on the Contract Clause. Presumably, he spoke for Justices Washington, Livingston, and Todd on this point, though their silent acquiescence perhaps concealed doubts or disagreement.

Despite this victory in the courtroom, Peck and the other New England claimants were denied immediate satisfaction in the halls of Congress. Anti-Yazoo Republicans continued to block compromise in the House. With the onset of the War of 1812, however, their ideological grip on the party was weakening. More Republicans came around to the view that indemnifying the claimants was not a betrayal of republican principles but an honorable and just measure that served the true interests of the United States. The Supreme Court's decision of 1810 appears to have had a real if indeterminate influence in tilting opinion in the claimants' favor and bringing about the Yazoo compensation act of 1814.

Whatever effect it had in settling the Yazoo controversy, *Fletcher v. Peck* marked a critical step toward making good the Supreme Court's claim to enforce the law of the Constitution, to interpret and adjudicate this law as it did any other law. Although the Court in *Marbury v. Madison* (1803) had struck down a portion of a federal statute, the practice of what came to be known as "judicial review" had its true beginnings with the exposition of the Contract Clause and its application to an act of a state legislature in Fletcher. Ideas about the

judiciary's authority to void legislative acts were still in flux at the time of this decision, with jurists appealing to the extra-constitutional principles of natural justice and vested rights as well as to specific provisions of the Constitution. Chief Justice Marshall interpreted the Contract Clause in a way that ultimately resolved this debate in favor of invoking the written constitutional text, a development of profound significance in consolidating the practice of judicial review.[37] That Fletcher became the first Contract Clause case was largely his doing. He recognized the opportunity to show how the text of the Constitution, through its prohibition against impairing the obligation of contract, could be an effective means of enforcing the limits on the legislative powers of a state.

No part of the Constitution proved to be more important than the Contract Clause in establishing the Supreme Court as a tribunal for deciding on the validity of state legislative acts. Through much of the nineteenth century, it continued to be the Court's principal weapon to restrain state interference with the vested rights of property.[38] It was the means by which the original Constitution served as a charter of rights for protecting the American people from the acts of their state governments. As Marshall observed in *Fletcher*, "the constitution of the United States contains what may be deemed a bill of rights for the people of each state."[39] By the turn of the twentieth century, the Contract Clause began to lose its high standing in constitutional law, superseded by the far more comprehensive Due Process Clause of the Fourteenth Amendment. Although in our own time, the Contract Clause has largely receded into insignificance, the broader purposes of constitutional law that it served have proved enduring.

Author's Note: This article is drawn from my book, **The Great Yazoo Lands Sale: The Case of *Fletcher v. Peck*** (Lawrence: University Press of Kansas, 2016).

ENDNOTES

[1] Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," *Michigan Law Review* 12: 247-276.

[2] Henry Adams, **History of the United States of America during the Administration of Thomas Jefferson and James Madison** (New York: Library of America, 1986), Vol. 1, pp. 205-206.

[3] C. Peter Magrath, **Yazoo: Law and Politics in the New Republic: The Case of *Fletcher v. Peck*** (Providence: Brown University Press, 1966), pp. vii-viii.

[4] A. M. Sakolski, **The Great American Land Bubble; The Amazing Story of Land-Grabbing, Speculations, and Booms from Colonial Days to the Present Time** (New York: Harper Brothers, 1932), is still the classic work.

[5] George R. Lamplugh, **Politics on the Periphery: Factions and Parties in Georgia, 1783-1806** (Newark: University of Delaware Press, 1986).

[6] The Rescinding Act was one of many Yazoo documents that the U.S. House ordered to be printed in 1809: **Sundry Papers in Relation to Claims, Commonly Called the Yazoo Claims** (Washington, D.C.: A. and G. Way, 1809), pp. 13-26. The text is also reproduced in **American State Papers, Public Lands**, 1: 142-44.

[7] William Bacon Stevens, **A History of Georgia, from Its First Discovery by Europeans to the Adoption of the Present Constitution in 1798** (Philadelphia: E. H. Butler & Co., 1859), Vol. 2, pp. 492-94.

[8] Timothy Dwight, **Travels in New England and New York**, ed. Barbara Miller Solomon, (Cambridge: Harvard University Press, 1969), Vol. 1, pp. 158-61.

[9] A notice of the play by Royall Tyler was reprinted from a Boston paper in the Philadelphia *Aurora General Advertiser*, November 6, 1797.

[10] For Sargent's efforts to block the N.E.M. Land Co.'s attempts to settle the Mississippi Territory, see Dunbar Rowland, ed., **The Mississippi Territorial Archives, 1798-1804** (Nashville, Tenn.: Brandon Printing Company, 1905), pp. 59-60, 61-65, 68.

[11] Robert G. Harper, **The Case of the Georgia Sales on the Mississippi Considered . . .** (Philadelphia: Benjamin Davies, 1797); Jedidiah Morse, **A Description of the Soil, Productions, Commercial, Agricultural and Local Advantages of the Georgia Western Territory . . .** (Boston: Thomas & Andrews, 1797).

[12] "Georgia Land Claims," **American State Papers, Public Lands,** Vol.1, pp.120-23.

[13] David Johnson, **John Randolph of Roanoke** (Baton Rouge: Louisiana State University Press, 2012), is the most recent biography of the eccentric Virginian.

[14] *Annals of Congress*, 8th Cong., 2d sess. (1805), 1106, 1126.

[15] *Hylton v. United States*, 3 Dall. (3 U.S.) 171.

[16] *Pennington v. Coxe*, 2 Cranch (6 U.S.) 33.

[17] *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267.

[18] "Robert Maynard Peck, Midshipman & John Peck, Boy," online article posted on the website "The History and People of the Continental Navy" (http://continentalnavy.com/?s=peck). The sale of Peck's "elegant country seat" was advertised in the *Boston Daily Advertiser*, May 2, 1814.

[19] Daniel F. Secomb, **History of the Town of Amherst, Hillsborough County, New Hampshire . . .** (Concord, N.H.: Evans, Sleeper, and Woodbury, 1883), pp. 589-90; *The Boston Directory . . .* (Boston: Edward Cotton, 1807), p. 70; *The Farmer's Cabinet* (Amherst, N.H.), June 10, 1806; *Merrimac Intelligencer* (Haverhill, Mass.), October 28, 1809 (death notice); Norman W. Smith, "The Amherst Bubble," *Historical New Hampshire,* 20: 28 (1965).

[20] Records of the U.S. Circuit Court for the District of Boston, RG 21, National Archives at Boston. After the case was decided in 1807, the proceedings were printed as *Copy of the Record in the Case, Robert Fletcher vs. John Peck: Decided at the Circuit Court of the United States for the First Circuit, held at Boston* [October 20, 1807] (Boston: Munroe, Francis and Parker, 1808).

[21] *Fletcher v. Peck*, 6 Cranch (10 U.S.) 125-27.

[22] This agreement, dated March 15, 1809, is in the appellate case file: *Fletcher v. Peck,* App. Cas. No. 311, RG 267, National Archives.

[23] Charles Francis Adams, ed., **Memoirs of John Quincy Adams, containing Portions of His Diary from 1795 to 1848** (Freeport, N.Y.: Books for Libraries Press, 1969 reprint), Vol. 1, p. 544.

[24] *Ibid.,* Vol. 1, pp. 546-47.

[25] *Fletcher v. Peck*, 6 Cranch (10 U.S.) 147-148 (Johnson).

[26] *Fletcher v. Peck*, 6 Cranch (10 U.S.) 114-25.

[27] *Fletcher v. Peck,* 6 Cranch (10 U.S.) 127-43. An annotated text of Marshall's opinion is in Charles F. Hobson, ed., **The Papers of John Marshall**, (Chapel Hill: University of North Carolina Press, 1993), Vol. 7, pp. 225-41.

[28] *Fletcher v. Peck,* 6 Cranch (10 U.S.) 142.

[29] "The Events of My Life," **An Autobiographical Sketch by John Marshall**, ed. Lee C. Bollinger and John C. Dann, introduction by William H. Rehnquist (Clements Library, University of Michigan, and Supreme Court Historical Society, 2001), pp. 16, 17.

[30] Julius Goebel, Jr., and Joseph H. Smith, eds., **The Law Practice of Alexander Hamilton; Documents and Commentary,** (New York: Columbia University Press, 1980), Vol. 4, pp. 425-31.

[31] *Fletcher v. Peck*, 6 Cranch 132, 134-35.

[32] *Fletcher v. Peck*, 6 Cranch 133, 134-35.

[33] *Fletcher v. Peck*, 6 Cranch 136.

[34] *Fletcher v. Peck*, 6 Cranch 136.

[35] *Fletcher v. Peck*, 6 Cranch 139. An annotated text of Marshall's opinion is in Charles F. Hobson, ed., **The Papers of John Marshall**, volume 7 (Chapel Hill, N.C.: University of North Carolina Press, 1993), 225-41.

[36] *Fletcher v. Peck*, 6 Cranch (10 U.S.) 143 (Johnson, J.).

[37] Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (New Haven: Yale University Press, 1990).

[38] James W. Ely, Jr., **The Contract Clause: A Constitutional History** (Lawrence: University Press of Kansas, 2016).

[39] *Fletcher v. Peck*, 6 Cranch 128.

Scarlet Fever, Stanley Matthews, and the Cincinnati Bible War

LINDA PRZYBYSZEWSKI

In November 1869, two teams of lawyers squared off to argue whether the Cincinnati school board had the power to end a forty-year-old practice: starting the school day with a reading from the Bible and the singing of hymns. The majority of the school board supported this change. They hoped to attract the children of Catholics by removing from the schools the King James Version of the Bible, a Protestant version. But all hell broke loose as the board members considered their vote. Nasty anti-Catholic editorials came out in the national press, local protest meetings attracted thousands, and leading politicians, merchants, and ministers of the city launched a petition drive to keep the Bible in the schools. When the board voted to end the practice despite the protests, a lawsuit was quickly filed. All this came be called the Cincinnati Bible War. And the Ohio Supreme Court decision that allowed the school board to do as it wanted has long been identified as a turning point in the secularization of law.[1]

During the four days of oral arguments in Cincinnati Superior Court, one man made a point of putting on display both his faith in God and his belief in the Bible as God's revealed Word. This lawyer ended his argument with a prophecy: if the judges did their duty, this is what would happen:

> Then shall be hastened the promised time of the coming of our King when there shall be a new heaven and a new earth, wherein dwelleth righteousness—the holy city, New Jerusalem, coming down from God out of Heaven, prepared as a bride adorned for her husband, the tabernacle of God with men, where He will dwell with them and they shall be His people, and God himself shall be with them and be their God.[2]

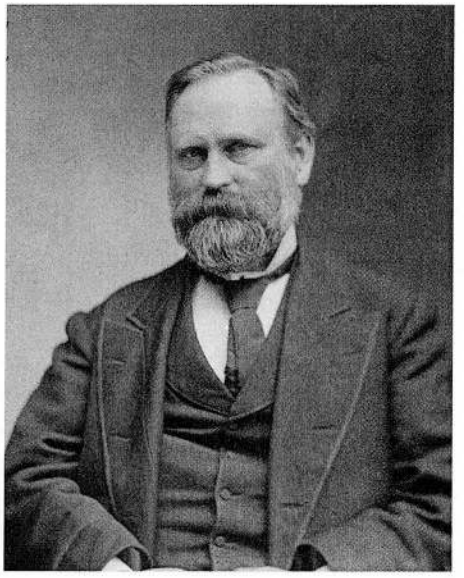
Yes, this lawyer was saying that if the judges did their duty, they would hasten the Second Coming of Christ.

If that was not surprising enough, consider which side he was on: This man was *not* arguing that the school board must continue requiring the reading of the Bible in

the schools. He was arguing that Bible reading must stop. This argument played a crucial role in winning the case when it was appealed to the Ohio Supreme Court and the man who made it was Stanley Matthews, the successful Ohio lawyer who led the anti-Bible legal team. Matthews would become a U.S. Senator in 1877 and would sit on the United States Supreme Court from 1881 until his death in 1889, but before then, and before he came to lead the anti-Bible team in Cincinnati, he underwent a remarkable spiritual journey that shaped his legal arguments in court. And the way he argued against the Bible in the schools probably explains why he remained a respectable enough man from the religious point of view to make his way to the Senate and the Supreme Court. Siding against the Bible in the wrong way could destroy a political career as Alphonso Taft, the patriarch of the Taft political clan and a judge in the Cincinnati Superior Court, learned to his dismay.

Thomas Stanley Matthews (called Stanley) was born in Kentucky in 1824, two years after Thomas Jefferson predicted that "there is not a *young man* now living in the U.S. who will not die an Unitarian."[3] Jefferson did not get it quite right with the Matthews family. Matthews's father, Thomas Johnson Matthews, who became president of Woodward College in Cincinnati in 1832, and then Professor of Mathematics and Astronomy at Miami University, in Oxford, Ohio, was known to have dismissed the divinity of Jesus as a foolish superstition.

Young Matthews followed his father's lead. One of his daughters described him before his conversion as a "free thinker," a liberal Unitarian, which would make him a believer in a distant, but benevolent God.[4] He regularly attended services at a Universalist Church.[5] The younger Matthews was radical enough in outlook to consider joining at least two utopian communities: North American Phalanx, near Redbank, New Jersey and the more famous Brook Farm, the Transcendental experiment.[6]



Stanley Matthews was a successful Cincinnati lawyer when he was hired by the city's Board of Education to lead the anti-Bible legal team. The case was brought by parents who were irate that the city, in response to a diversifying population, had ordered the cessation of regular morning Scripture reading in schools.

Instead, Stanley Matthews and his wife Mary Ann Black Matthews settled down in 1854 in the new community of Glendale, Ohio, just north of Cincinnati to live a more conventional life. There they built a three-gabled house that eventually grew to six gables and sported the grand name of Oakencroft.[7] Their house grew to make room for their family of six children, four boys and two girls. Then, in 1857, a scarlet fever epidemic struck and changed the course of Stanley Matthews's life.

Scarlet fever, or *streptococcus pyogenses*, most commonly strikes children between the ages of six and twelve. Today, it is rarely seen, and when it does appear, it is quickly and effectively cured with antibiotics. But in early America, scarlet fever struck fear in the hearts of parents. One early American writer described the course of the disease: "they feel at the first somewhat listless and heavy for a Day or two, and then begin to complain of a Soreness in the Throat, and if you look into the Motion you'l discover upon the Uvula and Parts adjacent the Cuticle

In 1843 Matthews married Mary Ann "Minnie" Black, the daughter of a prominent Whig politician. The following year the couple moved to Cincinnati, where Matthews, age twenty-one, was admitted to the bar.

raised in Spots of different Sizes, Sometimes to a quarter of an Inch in Diameter, And fill'd with a laudable colored Pus." After a day or two, the child has a cough, the next day, a fever and the patient has no voice and has trouble breathing. One more day and the patient can only make a wheezing noise, "And the next Day pays his Debt to Nature."[8] After less than a week of illness, the child is dead.

The first recorded epidemic in America hit New England in 1735 and lasted five years.[9] Some feared that the colonies themselves could not survive it. Like all good Calvinists who knew they were marked by original sin, the people of New England went to their churches and lamented their sins that they should deserve such a punishment. One account explained that the people cried out, "*How terrible had GOD been in his doings.* Numerous Families have been emptied . . . A great Number of *the Children are cut off from without, and the young Men from the Streets*. . . We may reasonably conclude that GOD is giving of us Warning to prepare for all Events."[10] Scarlet fever followed settlement into the interior. It appeared in Marietta, Ohio in the late 1790s with the first settlers, "attacking and destroying nearly all" the children in the settlements.[11]

Another wave of scarlet fever showed up in the late 1850s in New York and Boston. It hit Cincinnati in late 1857. In 1858, a year after the epidemic resurfaced in Ohio, a Philadelphia physician who had seen it tear through his community the year before wrote of how peculiarly horrifying it was to parents:

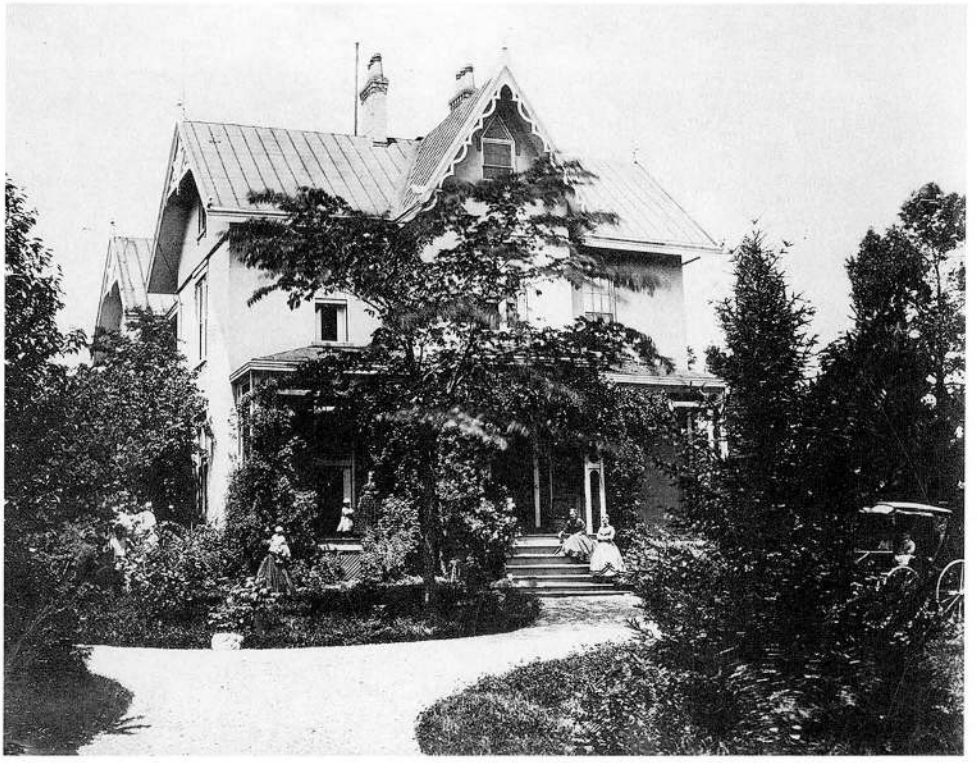
> So fatal have been the results in individual cases, so widespread the devastation caused by the epidemic prevalence of this disease, so

> interesting the period of life at which it commonly occurs, just as parental hopes are budding with promise, and the tendrils of affection entwining themselves the most closely round the heart, that the very name [of scarlet fever] is a signal of distress, and its introduction into the family circle is looked upon as the entrance of an angel of death with an irreprievable warrant to destroy.

He recounted how one week, "the parent sits down in the evening the happy centre of a group of smiling objects of affection, his heart swelling with delightful anticipation," and the next week, "half of them slumber in the embrace of death."[12]

Supposed cures abounded. A remedy called "as effectual as any which medical skill and sciences have yet discovered" in 1851 involved marshmallow root, saffron, and leeches.[13] A remedy from 1853 called for rubbing the body all over with bacon fat.[14] Doctors found themselves helpless: "in many cases the disease defies their utmost exertions of skill and attention."[15] At mid-century, doctors could not even agree whether scarlet fever was an infectious disease.[16] It is indeed infectious and can be carried in milk contaminated by those infected.

In one week in 1859, Stanley and Ann Matthews sat in the happy center of their six children. Before three weeks had passed, four of them were dead. Six-year-old Stanley died first on February 12. Mary, two-and-a-half years old, died the next day. Two days later, four-year-old Thomas died. And two weeks later, *The Daily Cleveland Herald* announced, "Another child of Stanley Matthews, of Cincinnati, has been swept off by the scarlet fever—making the fourth."[17] This was the



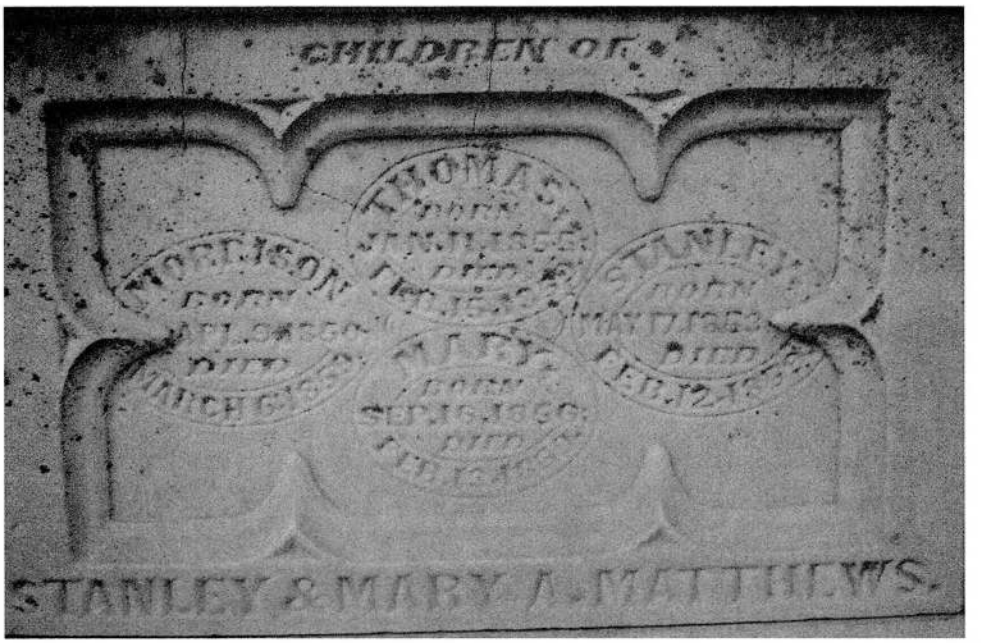
The Matthews built a three-gabled house that sported the grand name of Oakencroft. Their house grew to six gables to make room for their family of six children, four boys and two girls.

eldest son, nine-year-old Morrison. Only Isabella, who was seven, and William Mortimer, a baby, survived.[18] The Matthews buried the four children in the same grave on March 9, 1859.

Today, when the death of a child is rare, it is hard to imagine the grief the Matthews felt. In fact, some historians refused to imagine such grief by arguing that parents in the past chose not to care much about their youngest children because they expected to see some of them die. Indeed, forty percent of the total deaths in the nineteenth century were children under five years old.[19] Parents of the nineteenth century considered themselves very lucky if all of their children grew to be adults.

Although there is some evidence of a lack of caring on the part of parents, such as re-using of the name of a dead child for a later child, other scholars have found plenty of emotion in the letters and diaries of parents.[20] For example, Justice Joseph Story, who sat on the U.S. Supreme Court from 1811 to 1845, used the names Caroline and Mary for two sets of daughters, but his grief upon the death of his children threw him into depression from which he struggled to escape. He wrote a poem on the death of his first daughter Caroline: "Who can the utter wretchedness/ Of such a scene portray,/ When the last look, the last caress/ Is felt, and dies away?"[21]

Much has been written on the roles of women in the home in the nineteenth century, especially on motherhood, but "a father's care" was considered essential to children as well and such care could deepen grief.[22] Fathers could be found wrestling their boys on the floor, skating with their children on ponds, and pushing them on swings, both father and child enjoying themselves.[23] The youngest child particularly was indulged.[24] Sundays were especially given over to time with father, but middle-class professionals like Matthews were more likely to work near or at home, making them far more available to their



A scarlet fever epidemic in 1859 claimed the lives of Stanley (age six), Mary (age two) and Thomas (age four) within a week. Weeks later, Morrison (age nine) died, leaving only Isabella (age seven), and baby William Mortimer as survivors. The Matthewses buried the four children in the same grave at Spring Grove Cemetery. Isabella would die in 1868 at age sixteen.

Devastated by the deaths of their four children, the Matthews took solace in their Presbyterian faith. The couple would go on to have four more children: Grace, (left), Eva (third from right), Jane (second from right) and another named Stanley (right). In 1889 daughter Jane would marry her father's close friend and fellow Supreme Court Justice, Horace Gray—she was thirty years younger.

children. When serious illness struck, nineteenth-century fathers were there at their child's bedside, nursing, bathing, medicating, and talking to doctors.[25] Diaries and letters recount how parents worried and how children valued their fathers' efforts. One father in 1851, who was doomed to lose his son, wrote that he had hopes and fears: "I could not evade the thought that I might never more see his pleasant, winning blessed little face."[26]

Friends remembered Matthews's grief over the death of his children as so awful that it drove him almost insane. George Hoadly, who also argued the Bible War case, called their deaths, "this calamity, which overwhelmed him for a time almost to the upsetting of his mental equipoise . . . "[27] A friend and neighbor from Glendale recalled this as "the most crucial period of his life—a period filed with keen suffering . . . "[28] Matthews had to reconsider all of his most basic beliefs about life and death. The tragedy "led to his re-examination into the foundations of opinion upon the most serious of subjects," according to Hoadly.[29]

Matthews seems to have found no comfort or explanation in the benevolent God of Universalism who welcomes all mortals into heaven. After a period of thought and struggle, the thirty-three-year-old lawyer determined that the true God was the sterner God of Calvinism. This was a Deity who determined which mortals were destined for heaven and which would burn in hell before they were even born. This Deity was unimpressed with the good works done by earnest rationalists. This Deity demanded humility from believers. This Deity asked for faith alone. The doctrine of election, or predestination, followed from an interpretation of Biblical texts and from the

Calvinist belief that nothing a puny, mortal did—not prayer, not good works, not resistance to temptation, nothing—could make God do anything for him, including save his soul.

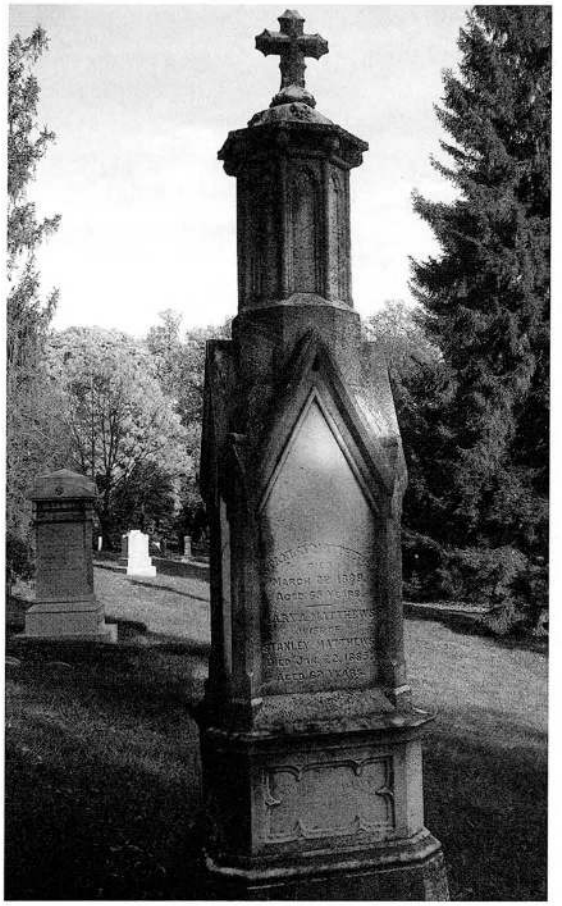
During his oral argument for the Cincinnati school board, Matthews said he could not prove the truth of his religious faith with argument. Instead, "his divinity shone into my heart, and proved itself by its self-evidence." He called upon his dead children as witnesses of his faith: "I have five—five witnesses in heaven to-day, that are calling to me to come to them."[30] (The fifth child was their daughter Bella, "the eldest and favorite" who had died at the age of sixteen in 1868).[31] Matthews had once looked on the Bible with skepticism, now it was his guide to truth. He told the court, "I would not abate a jot or a tittle of my belief in that book [the Bible], and in the God that it reveals, and the salvation that it offers for all that this world can give."[32]

Faith may have saved Matthews from madness and suicide. Years after the death of his children, Matthews spoke on religion at the University of Wooster and the consolation that the Last Judgment will bring to the good mortal. He compared the calm of "the wise and virtuous man" who "bears disappointment with patience and hope, till through their discipline he discovers that what he called failure was in truth success," with "the folly and madness of the suicide [which] perpetuate the despair from which he blindly sought escape."[33] Perhaps Matthews turned from thoughts of suicide in his agony over the death of his children to patience and hope through his new faith in a Calvinist God.[34]

Matthews and his wife joined the Presbyterian Church in Glendale. This church followed the Old School Presbyterian beliefs of Calvinism and rejected revivalism after the Presbyterians split over those issues in 1836. Old School Presbyterians emphasized the limits of human reason, the human faculty upon which Matthews the rationalist had once relied entirely. This church also followed the Westminster Confession, which dated back to 1647 when English-speaking "reformers" got organized.[35] Matthews announced years later that the Bible became to him "a manual of practical life."[36]

Almost a year after the deaths of their children, the Matthewses had a monumental gravestone placed in Spring Grove Cemetery that displays all the marks of Stanley's new-found Christian faith.[37] Spring Grove Cemetery in Cincinnati is a beautiful, park-like place filled with trees and shrubs with artfully sited turns and hillocks that make it seem far larger than its 733 acres. Such rural cemeteries were meant to comfort the living among the beauties of nature. As Justice Joseph Story explained at the opening of Mount Auburn Cemetery outside of Boston in 1831: "We shed our tears; but they are no longer the burning tears of agony . . . We return to the world, and we feel ourselves purer, and better, and wiser from this communion with the dead."[38]

The Matthewses' gravestone features a relief sculpture of an angel at the center of the four Matthews children. The angel and Morrison, now winged, hold little Mary between them, while Stanley holds onto the angel's arm and Thomas, also winged, takes hold of Stanley. The tombstone records each child's birth and death dates, while at the very top is a large cross.[39] Technically, no Calvinist could claim to know for sure if their children were among those predestined for heaven, and children so young could hardly have experienced the religious conversion that was taken as a good sign of predestination. But Calvinist parents had always balked at the idea of their little ones burning in hell, so the Matthewses' vision of all their children rising to heaven was a common one.[40] Like other families who found solace in the new rural cemeteries, Ann Black Matthews regularly brought her two surviving children and those four born after the epidemic to picnic and play around "the four little graves covered with ivy."[41] Either Ann or Stanley must have bought the blank book that their



Matthews would become a U.S. Senator in 1877 and would then sit on the Supreme Court from 1881 until his death in 1889. Minnie died in 1885 and Matthews married Mary Theaker in 1887 over the objections of his children.

oldest daughter Isabella filled with letters to her sister and brothers in heaven and her memories "of their baby lives," which she called *The Rosebud Album*.[42]

The death of these children forever shaped the Matthews family. One of the daughters born after the epidemic remembered Stanley Matthews as a man of "outward austerity" in manner.[43] Indeed, a former law partner felt he had to defend Stanley Matthews from the charge that he was "cold and unsympathetic."[44] But Grace Matthews remembered her family as "not sad" but "more serious" than others because of the deaths of the siblings she never knew, a family in which "duty was paramount."[45] The deaths of the four children did more than shape family life. They shaped Matthews's arguments in the Bible War.

The Cincinnati Bible War began when ward representative Samuel A. Miller offered the following resolution during a meeting of the Cincinnati school board in September 1869: "That religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship to enjoy alike the benefit of the Common School fund." The resolution was set to be voted on at the next meeting of the board.[46]

The idea was to bring more Catholic children into the public schools at a time when almost thirty-five percent of school-age children went to Catholic schools. [47] The Bible usually used by public school teachers was the King James Version, a Protestant English translation dating from 1611 and revised in 1789, while the Catholic Church had instead authorized the use of the Rheims-Douai Bible, whose English translation was finished in 1610 and revised in 1652. Protestant and Catholic Bibles differed in important ways, including how they numbered the Ten Commandments and which books made up the Bible.[48] Although the board had resolved a year earlier to allow children to bring any Bible to school, or to allow their parents to have them opt out of all religious exercises, many Protestants were troubled that such a great number of Catholics remained outside of the schools. All of Cincinnati's children were supposed to meet and mingle at the schoolhouse door. Catholic parents were also not happy. Their children encountered discrimination in the schools despite the rules, and they had to pay twice: once to the parish to educate their own children and then again to the city to educate other people's children.

What to do? Might there be some way for the public and the parochial schools to cooperate? Earlier that year, F. W. Rauch, a new member of the school board and a Catholic, had drawn up an even more ambitious plan: to consolidate the two school systems.[49] The city's board would be in charge of the new system, the Catholic Church would be paid for its school properties, and religious teaching would be banned during the regular school day. This plan fell apart. Instead, Miller's resolution ending daily Bible reading came up for a vote.

Some pious Protestants responded with fury to the idea of ending daily Bible reading. Richard Smith, an influential newspaperman at the *Cincinnati Gazette* let loose a bold accusation against the Catholic Church. Born in Ireland in 1823, the now grey-bearded "Deacon" Dick Smith, a Presbyterian, denounced the anti-Bible effort as a Catholic plot against Protestant faith. He claimed that wily Catholic priests wanted the Bible banned because godless public schools would drive desperate Protestant parents to send their children to the only schools left with religion: the Catholic schools. The priests would seize the opportunity to force the Douai Bible on the next generation.[50] Catholics would take control of Cincinnati's future through its children.

Thousands of citizens gathered in protest meetings in downtown Cincinnati.[51] The mayor, leading merchants, and several former school board presidents organized a city-wide petition drive against the resolution.[52] They presented over 8,000 signatures to the school board. Sunday school teachers organized their pint-sized charges and delivered the signatures of more than 2,500 children pleading that they might again start the school day with the Holy Bible.[53] When that failed, the pro-Bible people took to the courts.

Journalists, lawyers, and preachers across the nation weighed in as the war raged on. Some argued that it was wrong for the schools to force a Protestant version of the Bible on Catholic children. Others dismissed Catholic complaints as just another tactic in a papist plot to gain public funding for parochial schools. The *New York Times* urged its readers to "preserve our common schools intact, and the Bible with them. Our only motto now must be, 'No surrender.'"[54] As more Protestants took up the cry against Catholic interference in the schools, a Cincinnati newspaper editor wrote, "The gentleman who proposed the exclusion of the Bible from the Public Schools in our city exploded a bomb which seems to have awakened all Christendom."[55] Interest in the lawsuit was so keen that publishers put out a 400-page volume that combined the legal briefs and the local court's decision that sold for two dollars while a fancy version with gilt edges set you back fifty cents more. The volume got a review in the *Atlantic Monthly*.[56]

Although many legal and not-so-legal arguments came up in the briefs of the two Bible War teams of lawyers, the most important turned on the meaning of two clauses in the Ohio Constitution. Borrowing from the Northwest Ordinance of 1787, the Ohio Constitution of 1851 both guaranteed religious liberty and declared: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."[57] The question was whether reading the Bible and singing hymns in public schools—an activity that fell under the religion and morality and knowledge clause—also violated the religious liberty clause. And did it amount to forcing non-Protestant children to engage in public worship? These basic questions raised many others. John Stallo, a Free Thinker on the anti-Bible legal team, asked whether the Bible was not too full of sexual escapades to be read by children, while George Hoadly, his colleague, wondered whether anyone could agree on the correct translation of the Bible.[58]

For Matthews, many of these religious questions were not supposed to be in court at all, yet he made religion an essential part of his argument. The circumstances in which Matthews found himself—condemning the use of the Bible in the public schools alongside avowed non-Christians like Stallo—may have compelled him to speak more freely about his faith. When he opened his oral argument, Matthews confessed that appearing in court against the Bible was "the most painful experience" of his life, save for "the loss of dear children." He had heard muttering from a hostile crowd, and been told to his face, "that I am an enemy to religion, that I am an opponent of the Bible, that I have lost in this community my Christian character, and that my children and my grandchildren will reproach my memory for this day's work."[59] It surely did not help that he was physically ill and needed to stand in court for more than a day to make his argument.

Matthews announced that he felt compelled to speak as a lawyer, a citizen, and a Christian. "As a lover of my profession," he meant to stop an illegal act. As a citizen, he was determined to defend the public schools from "dangerous and mischievous" doctrines.[60] And as a Christian who believed the Bible is the Word of God, he objected to its being "bandied about as a foot-ball between political parties."[61] Lawyers and judges had "no business" arguing about religion in court, for they were not competent to answer "all these questions—questions of exegesis, questions of interpretation, questions of church authority, questions of inspiration."[62]

During the second day of his argument, after making a strong case for the appropriateness of religious education of children outside of the public schools, Matthews used even stronger language to make clear that government had no business taking on the job. It was not merely that state personnel were incompetent to act in religious matters, they sullied religion by touching it. "The State," Matthews explained, whether "through its law-making, judicial and executive administration; through its politics and its parties; through its secular agents and officers; through its boards of education and school teachers has, rightfully, and can have, nothing whatever to do [with religion]. *Procul, procul este profani!*" This last was a quotation from the *Aeneid* by Virgil, Latin for "Keep it far from what is profane."

And then as if the command of a pagan was not enough, Matthews added, "Let no unholy hands be laid upon the sacred ark."[63] His warning harked back to Ark of the Covenant of the ancient Jews, which held the stone tablets of the Ten Commandments and was kept in the Holiest Place of the Tabernacle, a tent during the time of Moses. In the Second Book Samuel, an unfortunate and unworthy Jew named Uzzah "put forth

his hand to the ark of God" in the time of David, "and God smote him there for his error; and he died by the ark of God." The oxen drawing the ark had shaken it, and Uzzah had only put out his hand to steady it. That Uzzah had meant well did not save him. You may mean well, and Jehovah will still smite you down. Quite a warning for the school board of Cincinnati!

The idea of the state as unworthy of touching religious topics harks back in American history to the colonial era. Roger Williams, a seventeenth-century New England Puritan who seems to have never found a church pure enough to suit him, argued that no true Christian would use force to impose Christianity.[64] During the eighteenth century, certain religious believers became as important to the adoption of early religious liberty laws in the new Republic as were religious radicals like Thomas Jefferson and James Madison.[65] A Presbyterian petition calling for the end of Anglican establishment in Virginia in 1776 reasoned that "when our Blessed Saviour declared his kingdom is not of this world, he renounced all dependence upon State Power . . . ."[66] Eighteenth-century Baptists were as wary as were deists of state interference in religious matters, but for entirely different reasons. While deists did not want religious truth forced upon those who doubted the truth of traditional Christianity, the Baptists did not want the state to take a role in religious truth because that was not its job. As one colonial Baptist explained it: the state gives fornicators, drunkards, and extortionists "equal votes with the best men in the land," which means that the state is far too sullied by sin to touch the subject of religion without doing it harm.[67]

In the Cincinnati Superior Court vote in 1869 Matthews did not go so far as to denounce all the fornicators who possessed the vote, but his legal argument made clear his approach to those who did not believe in his God. Compulsion made no sense when it came to religious conversion; only evangelism did. According to Matthews, compulsion did not follow in the spirit of Jesus Christ, his "Divine Master." He explained, "If he can not believe—oh! it is his misfortune, not less than his fault, and not to be visited upon him as a penalty by any human judgment." No civil rights must be denied to the non-Christian, nor should anyone scorn him in public. "Oh no," said Matthews, there was a better way to bring the lost to Jesus: by being just, good, kind and charitable as Jesus was and "to receive them all into the arms of my human sympathy, and to say to them, 'Sacred as I believe that truth to be, just so sacred is your right to judge it.'"[68]

The right to judge the truth carries the ring of the right of private judgment, a Protestant doctrine that held that the believer must read and interpret the Bible himself and herself (as opposed to the Roman Catholic who must follow the interpretation of the Church). Of course, reforming church authorities did fence around individual biblical interpretation, starting with Martin Luther himself, but the right of private judgment remained a rallying cry for Protestants of the nineteenth century. Bringing up the right to private judgment allowed Matthews to point back to Christian history to show the importance of conscience, to the willingness of men to defy the state in the name of Christianity, and to draw attention to the many reasons that Christian churches had splintered over the centuries. He laid out in detail everything from "a few words said over a wafer" to whether or not a sermon must be delivered from memory rather than from a written text.[69] Despite this bit of eye rolling at the petty details that had broken up churches, Matthews was willing to defend the right of conscience to believe in small things.

By using the King James Bible the school board, according to Matthews, violated religious liberty by establishing "Protestant supremacy."[70] Matthews backed up his argument with religious logic as well as

constitutional logic. The most important elements of his case went to the very essence of his view of Christianity. We treat the consciences of all tenderly, Matthews explained, "and apply the cardinal maxim of Christian life and practice," from the Gospel according to Matthew, "Whatsoever ye would that men should do unto you, do ye even so unto them."[71] He further backed up this religious logic for religious liberty with a long quotation from the Westminster Confession of Faith. It began: "Civil magistrates may not assume to themselves the administration of the word and sacraments, or the power of the keys of the kingdom of heaven, or in the least interfere in the matters of faith." The confession continued with its position on religious liberty: "it is the duty of civil magistrates to protect the church of our common Lord without giving the preference to any denomination of Christians above the rest, in such manner that all ecclesiastical persons whatever shall enjoy the full, free and unquestioned liberty of discharging every part of their sacred functions, without violence or danger."[72] (In truth, Episcopalians and Catholics were not officially tolerated in Scotland in the seventeenth century, but managed all right if they kept their heads down.)

Matthews was arguing that the defense of religious liberty, which we see as a civil obligation, was a religious one that the judges should vindicate in their decision-making. After recounting how "Protestants are a fighting people," whose religion "was born and baptized in blood" who would rather die "than surrender the right of private judgment," Matthews appealed to the judges as Protestants:

> All I ask is—being a Protestant—that we make manifest the value of our Protestantism to those we seek to convert, by showing what it can do for a man by making him magnanimous, and liberal, and great. Oh, what a solemn mission it is to which your Honors are called—to vindicate the truth of the religion you privately profess by showing how equal, how just it is![73]

Matthews was appealing in particular to Judge Bellamy Storer, an Episcopalian, and Judge Marcellus B. Hagans, a Methodist Episcopalian. The third man on the bench was Judge Alphonso Taft, a Unitarian, whom Matthews's argument could not touch.

Conversion had made Matthews intensely aware that spiritual salvation could only be obtained by a soul who chose freely to accept Jesus Christ as savior. Matthews may have been arguing against the Bible in the public schools, but he did it in the name of Christianity. Because salvation can only be obtained by a soul choosing freely, no student should be forced to read the Bible by the state. Children had to be saved through the *voluntary* efforts of the churches, not through the *compulsive* power of the state. Matthews ended his argument before the Cincinnati Superior Court with a ringing evangelical cry:

> Let [the Church] rise up in the full measure and majesty of her innate spiritual strength—let her gird her loins for the mighty task—let her address herself with all earnestness and heroic zeal to the great but self-rewarding labors of Christian love—let her prove herself by her works of self-denying charity, to be the true Church as Jesus proved himself to the disciples of John to be the true Messiah . . .[74]

Only then would religious believers witness the Second Coming of Christ. Matthews sounded more like a preacher in a pulpit than a lawyer at the bar, yet his brief helped win the case.

In the meantime, Matthews lost his case at the Cincinnati Superior Court. Both Judge Storer and Judge Hagans were happy to issue an injunction to stop the school board

on the grounds that the Ohio Constitution called for religion in the schools and the use of the King James Bible denied no one any religious liberties. Judge Taft dissented while carefully explaining that he had much respect for the Bible.

Then, the case was appealed to the Ohio Supreme Court, which in 1873 sided with the anti-Bible side. The legal grounds were narrow and technical: the Ohio Constitution did not require Bible reading in the schools and the Cincinnati school board had discretion under state law to remove the Bible *or* keep the Bible. This limited technical ruling explains why Bible reading survived all over Ohio until the 1960s.[75]

After ruling on the technical grounds, Chief Justice John Welch, who was speaking for a unanimous bench, began a discussion that he admitted was "really lying outside of the case proper."[76] Justice Welch was indulging in *obiter dicta*—comments outside of the rule that governs a decision. Lawyers are supposed to ignore *dicta* because they cannot be cited as legal precedent, but *dicta* let historians in on the thinking of the judges on the bench. And this is what Welch was thinking: that forcing children to read the Bible would be an abuse of state power. It was an abuse because the state constitution acknowledged the importance of encouraging "Religion, morality and knowledge," not "the Christian religion, morality and knowledge." When the federal and state constitutions speak of "all men" having certain rights, Welch insisted, they do not mean merely "all Christian men."[77]

His words became even more emphatic as they took an unexpected turn. The chief justice made a point of explaining that it was "unchristian" of the board to have required Bible reading. In words that other legal scholars often ignore, Welch asked, "is not the very fact that our laws do *not* attempt to *enforce* Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they *are* the laws of a Christian people, and that their religion is the best and purest of religions?"[78] Welch thought the answer obvious.

The judge explained that if he were a Cincinnati teacher who had to make his students read the Bible every morning, one of his first lessons would condemn "the law as *unchristian law*" because it violated the Gospel according to Matthew: "Whatsoever ye would that men should do to you, do ye even so to them; for this is the *law* and the prophets"[79] (emphasis his). So schoolmaster Welch would have taught his young charges that compulsory Bible-reading was wrong because it violated Christ's Golden Rule. According to Justice Welch, such compulsion was not "Christian republicanism," but a false Christianity unworthy of support.[80]

Only after he made these points did Welch turn to what can be called the arena theory of religion, which requires liberty of competition so that the truth can win out:—"the weakest—that is, the intellectually, morally, and spiritually weakest,—will go to the wall, and the best will triumph in the end."[81] Faith cannot be forced, declared Welch, and "even heathen writers" like Buddha have acknowledged this Christian truth. Despite his appeal to Christian Scripture and morals, Welch urged his listeners to believe that "three men—say, a Christian, an infidel, and a Jew—ought to be able to carry on a government for their common benefit" that protects all of them in their worship and search for truth.[82] Lastly, Welch quoted James Madison, "whose purity of life and orthodoxy of religious belief no one questions," that "Religion is not within the purview of human government." Welch had written so much in this case, he explained, in hopes of encouraging "a harmony of views and fraternity of feeling," so that the men managing the state of Ohio might be instrumental "in working out for us what all desire—the best form of government and the purest system of religion."[83]

If we see this decision as a turning point in the secularization of the law, we

oversimplify what happened. Welch justified his decision as much in the name of Christianity as through legal and constitutional logic. Clearly, the religious elements found in Matthews's legal brief shaped Welch's decision. Just as Calvinism had shaped Matthews's brief. Matthews had drawn upon his own conversion experience, a confession of faith dating to the seventeenth century, and a Bible that he had come to see as the Word of God. And further back of Matthews's argument was the long history of religious dissenters who had first challenged the Catholic Church, who had then quarreled among themselves and broken up many a Protestant church, and who eventually challenged and undid the establishment of state churches in the new United States.

The political fates of Matthews and Taft demonstrate how little political cost there was for removing the Bible in the name of Christianity and how much there was for doing it the wrong way. Alphonso Taft, father of future President William Howard Taft, and the man who put the "A" in Senator Robert A. Taft, found that his anti-Bible dissenting decision in the Cincinnati Superior Court worked against him in political life. Taft was a Unitarian, which put him on the more radical side of Christianity as he did not believe in the Holy Trinity of Father, Son, and Holy Spirit. He did not run for election as Cincinnati Superior Court judge in 1873. When the Republican Party chose whom to run as a candidate for Ohio governor in 1875, they picked Rutherford B. Hayes over Taft. A Hayes advisor wrote him that "*in no possible event*, would or could Judge Taft have been nominated" because the rural districts rejected Taft as hostile to religion. Hayes won the governorship, and a Republican newspaper put his victory down to two factors. First, that he was on the right side of the currency issue in a year when the country was still recovering from an economic depression (he was a gold standard man) and second, because of "the school question," which meant at this time that Republicans were accusing Democrats of wanting to share the public school fund with Catholics.[84] By siding against the Bible and by pointing out explicitly in his dissenting decision that the Catholics were not given access to one third of the Cincinnati school tax fund, Taft had become vulnerable to the charge that he was aiding the Catholics in their plot to grab tax money. In 1879, Republicans frankly admitted that if they dared to nominate Taft for governor, the *Cincinnati Enquirer* "would have come out the next morning with that [wood]cut representing Taft in the act of kicking the Bible out of the school-house door."[85] Meanwhile, Hayes had become governor in one of the most populous of states, which placed him in a good position to be nominated for President in later years.

When the Bible War decision came down from the Ohio Supreme Court in 1873, Mathews's pro-Bible faith countered his anti-Bible legal brief. The *Cincinnati Enquirer* recognized Matthews's unusual position upholding the power of the school board to do as it liked in taking out the Bible, while "all his feelings and sympathies were with the Bible."[86] When Matthews ran for Congress in 1876, he was condemned for having prosecuted a man for helping runaway slaves in 1858 as a U.S. District Attorney, not for his work in the Bible War case in 1869.[87] When one of Ohio's U.S. Senators resigned to take on a cabinet post, Matthews was elected to fulfill his term by the Ohio legislature in 1877, and in 1879 he clearly hoped to be elected again, but the Ohio legislature had gone Democratic in the election of 1877 and did not want to name a Republican.[88]

Rutherford B. Hayes, who owed much to Matthews for his work as counsel during the disputed presidential election of 1876, nominated him to the U.S. Supreme Court in January of 1881. Senators opposed Matthews's nomination for many reasons: he had helped Hayes into the White House, he would be yet another Justice from Ohio, he

had supported silver coinage while in the Senate, he had worked for railroads as a lawyer, and for other, far more petty, reasons, but *not* because of his work in the Bible War case.[89] The nomination never got out of committee and it lapsed in March, but then, in an unusual twist, the new President, James A. Garfield, re-nominated Matthews and the Senate argued about it until May when the committee voted against the confirmation, but the whole Senate voted approval by a single vote.

Justice Matthews served on the Court until his death in 1889. He is best known for his decisions in *Hurtado v. California*, which declared that due process did not require an indictment by a grand jury in capital cases, and in *Yick Wo v. Hopkins*, which declared that a hostile regulation of laundries amounted to discrimination against the Chinese immigrants who ran them.[90] Matthews did not decide any cases involving religious liberty per se because very few came up before the Court in the nineteenth century. And his term on the Court did not include either the Mormon polygamy case, which was decided in 1879 and which condemned the practice, nor *Church of the Holy Trinity* in 1892, which determined that a labor law restricting immigration could not possibly have been meant to apply to a Christian pastor.[91] But we know that Matthews, like the rest of the Court, believed that religious liberty did not extend so far as the practice of Mormon polygamy.

The Edmunds Act of 1882 punished Mormon polygamists by making bigamy, polygamy, and living in bigamous relationships a crime, and barred such people from voting, serving on juries, and holding public office. The 1885 case of *Murphy v. Ramsey* asked only whether the Edmunds Act violated the constitutional bar on *ex post facto* laws by preventing men and women who entered polygamous marriages before the law was passed from voting after it was passed (women could vote in Utah territory). *Ex post facto* laws were the legal issue, but Matthews found it impossible not to comment on the purpose of the law as well (rather as Justice Welch had found it impossible not to comment on the Bible War case).

Justice Matthews declared that, so long as any party was still married bigamously, a current and continuous action, the law barred them from voting. A man may be married to many women, not be living with them all, yet remain married bigamously. So bigamy was not an action in the past, but a current action. Congress certainly had power to legislate for U.S. territories, added Matthews, and there was no law more "wholesome and necessary in the founding of a free, self-governing commonwealth" than one that establishes family life upon "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."[92] Polygamy was not an exercise of religious liberty to the men on the Court, but a depraved and criminal act that struck at the very heart of civilization.[93]

Ironically, religious conversion may not have changed the side for which Matthews fought in the Bible War case. As a rationalist lawyer before his conversion, he might well have been anti-Bible in the way that the other members of the Bible team were. One scoffed at Christianity as an out-of-date, primitive faith, and the other pointed out that no one could agree on what texts made up the Bible in the first place. Instead, Matthews argued as a Presbyterian for the sacredness of the Bible, and for freedom of religion in order to encourage the search for personal salvation. His change of faith defined the way in which he argued his case, and, in turn, shaped the law of church and state.

Scholars today tend to tell the story of modern religious liberty in the United States as the triumph of religious doubters over religious believers, but Matthews's story shows that it was not so simple. Religious

believers, committed to religious liberty for religious reasons, were sometimes at the center of changes in state law in the nineteenth century. In fact, as Matthews's story tells us, religion could not be taken out of the public sphere without the blessing of Christianity.

ENDNOTES

[1] *See* Leo Pfeffer, **Church, State, and Freedom** (Boston, 1967), p. 443. Steven K. Green writes, "For the first time, judges had declared that Bible reading was not only unessential for a common education or republican society, it was inconsistent with the very principles upon which constitutional government was built," **The Bible, the School and the Constitution: The Clash that Shaped Modern Church-State Doctrine** (New York: Oxford University Press, 2012), p. 134. To his credit, Anson Phelps Stokes agreed *Minor* was a landmark case but noticed that "the people seem to have retained their faith in some form of religion in public education, for a large majority of the schools [in Ohio] maintain Bible reading or devotional exercise," Stokes, **Church and State in the United States** (New York: Harper & Brothers, 1950), Vol. II: p. 499.

[2] Argument of Stanley Matthews, **The Bible in the Public Schools. Arguments in the Case of John D. Minor et al. Versus the Board of Education of the City of Cincinnati et al., Superior Court of Cincinnati. With the Opinions and Decisions of the Court** (Cincinnati: Robert Clarke & Co., 1870), pp. 285-286.

[3] Thomas Jefferson to Dr. Benjamin Waterhouse, July 26, 1822 in Paul Leicestor Ford, **The Writings of Thomas Jefferson** (New York: G. P. Putnam's Sons, 1892-1899), Vol. 10, pp. 219-20.

[4] Mrs. Harland Cleveland, **Mother Eva Mary, C.T. The Story of a Foundation** (Milwaukee: Morehouse Pub. Co, 1929), p. 11.

[5] "Remarks of George Hoadly," **Proceedings of the Bench and Bar of the Supreme Court of the United States: In Memoriam Stanley Matthews** (Washington: Govt. Print. Off., 1889), pp. 10-15, 13.

[6] *See* William R. Wantland, *Jurist and Advocate: The Political Career of Stanley Matthews, 1840-1889*, Thesis (Ph. D. Miami University, 1994), pp. 61-62. A Brook Farm circular was signed by both Stanley and Mary Matthews according to Cleveland, **Mother Eva Mary, C.T.**, p. 12.

[7] On the house, *see* Cleveland, **Mother Eva Mary, C.T.**, p. 12 and Sidney D. Maxwell, **The Suburbs of Cincinnati: Sketches, Historical and Descriptive** (Cincinnati: G.E. Stevens & Co., 1870), p. 84.

[8] Quoted in Ernst Caulfield, **A True History of the Terrible Epidemic Vulgarly Called the Throat Distemper Which Occurred in His Majesty's New England Colonies between the Years 1734 and 1740** (New Haven, CT: Published for the Beaumont Medical Club by the *Yale Journal of Biology & Medicine*, 1939), 49.

[9] *See ibid.*, chart p. 23. There is some dispute among medical historians as to whether the so-called throat distempers were scarlet fever.

[10] Quoted in *ibid.*, p. 2.

[11] Daniel Drake, **A Systematic Treatise, Historical, Etiological, and Practical of Principal Diseases of the Interior Valley of North America, as They Appear in the Caucasian, African, Indian, and Esquimaux Varieties of Its Population**, (1854: New York: Burt Franklin, 1971), Vol. 2, p. 594.

[12] Caspar Morris, **An Essay on the Pathology and Therapeutics of Scarlet Fever** (Philadelphia & Blakiston, 1858), p.2.

[13] "SCARLET FEVER," *The Cleveland Herald*, September 4, 1851.

[14] "Scarlet Fever," *The Ripley Bee*, March 12, 1853.

[15] "SCARLET FEVER IN CINCINNATI," *The Cleveland Herald*, November 6, 1857.

[16] Drake, **A Systematic Treatise Historical, Etiological, and Practical of Principal Diseases**, 2: 596.

[17] "Another child of Stanley Matthews . . ." *The Daily Cleveland Herald*, March 9, 1859.

[18] *See* Cleveland, **Mother Eva Mary, C.T.**, p. 11. Three daughters and one son were born later, one of them was Eva Lee. Grace was another; she married Harlan Cleveland and she had a son named Stanley Matthews Cleveland who became an Anglican priest. Jane married Supreme Court Justice Horace Gray.

[19] Nancy Schrom Dye and Daniel Blake Smith, "Mother Love and Infant Death, 1750-1920," *The Journal of American History*, Vol. 73, No. 2 (Sep., 1986): 329-353, 330.

[20] Lawrence Stone argued that affection in families dated from the eighteenth century in **The Family, Sex and Marriage in England, 1500-1800** (New York: Harper & Row, 1977). Edward S. Morgan argued against this view early on, *see* **The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England** (New York: Harper & Row, 1966). For a survey of diaries and letters that disproves Stone, *see* Linda A. Pollock, **Forgotten Children: Parent-Child Relations from 1500 to 1900** (Cambridge; New York: Cambridge University Press, 1983), pp. 124-142.

[21] Quoted in S.M. Silverman, "Justice Joseph Story and Death in Early 19th-Century America," *Death Studies* 21 (1997): 397-416, 403.

[22] Historians first emphasized the separate lives of men and women, *see* Carroll Smith-Rosenberg, "The Female World of Love and Ritual: Relations between Women in Nineteenth-Century America," *Signs* 1 (1975): 1-29 and

Nancy F. Cott, **The Bonds of Womanhood: Woman's Sphere in New England, 1780-1835** (New Haven, CT: Yale University Press, 1977). They then challenged the idea, *see* Linda K. Kerber, "Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History," *The Journal of American History* 75, no. 1: 9-39 (1988) and elaborations by Kerber, Nancy F. Cott, Robert Gross, Lynn Hunt, Carroll Smith-Rosenberg, and Christine M. Stansell in "Beyond Roles, Beyond Spheres: Thinking about Gender in the Early Republic," *The William and Mary Quarterly* 46, no. 3 (1989): 565-85.

[23] *See* Shawn Johansen, **Family Men: Middle-Class Fatherhood in Early Industrializing America** (New York: Routledge, 2001), 135-137 and Stephen M. Frank, **Life with Father: Parenthood and Masculinity in the Nineteenth-Century American North** (Baltimore, MD: Johns Hopkins University Press, 1998), p. 130ff.

[24] Frank, **Life with Father**, p. 211, notes 32 and 38.

[25] *Ibid.*, p. 78

[26] Quoted in Johansen, **Family Men**, p. 80.

[27] "Remarks of George Hoadly" **Proceedings of the Bench and Bar of the Supreme Court of the United States**, 13.

[28] "Meeting of the Cincinnati Bar," *Weekly Law Bulletin*, XXI (April 1, 1889), 187.

[29] "Remarks of George Hoadly" **Proceedings of the Bench and Bar of the Supreme Court of the United States**, 13.

[30] Argument of Matthews, **The Bible in the Public Schools,** pp. 228-29.

[31] R.B. Hayes to William Henry Smith, November 3, 1868 in **Diary and Letters of Rutherford Birchard Hayes**, Vol. 3, p. 55.

[32] Argument of Matthews, **The Bible in the Public Schools,** 228-29.

[33] Stanley Matthews, **An Address Before the Literary Societies of the University of Wooster, Delivered June 20, 1876** (Cincinnati: Robert Clarke, 1876), p. 21.

[34] The only extensive treatment of Matthews attributes his choice of Old School Presbyterianism to its legalism, but many conservative faiths contained a measure of legalism, *see* Wantland, **Jurist and Advocate**, p. 72.

[35] Relying upon Hoadly's comments during the memorial for Matthews, the *American National Biography* entry on Stanley Matthews misses the death of Mary and misdates the deaths, *see* William M. Wiecek. "Matthews, Stanley"; http://www.anb.org/articles/11/11-00562.html; American National Biography Online Copyright © 2000 American Council of Learned Societies. Published by Oxford University Press. Last accessed July 2017.

[36] Stanley Matthews, **Address to Alumni of Kenyon College** (Cincinnati: R. Clarke &, 1880), 19. This speech is an expansion of **Address by Stanley Matthews Delivered Before the Thirty-Fourth Annual National Convention of the Society of the Beta Theta Pi, Held at Cincinnati, Dec., 29, 1873** (Cincinnati: Robert Clarke & Co, 1874).

[37] Scans of the records of the Matthews family re-burials can be located on the Spring Grove Cemetery website, http://www.springgrove.org/geneology-search.aspx.

[38] Joseph Story, **An Address Delivered on the Dedication of the Cemetery at Mount Auburn** (Boston: Joseph T. & Edwin Buckingham, 1831), p. 7.

[39] On such images, *see* Martha Pike, "In Memory Of: Artifacts Relating to Mourning in Nineteenth Century America," in **Rituals and Ceremonies in Popular Culture**, edited by Ray B. Browne (Bowling Green, Ohio: Bowling Green University Popular Press, 1980), pp. 296-315, 304.

[40] Gerald F. Moran and Maris A. Vinovskis "The Great Care of Godly Parents: Early Childhood in Puritan New England," *Monographs of the Society for Research in Child Development,* Vol. 50, No. 4/5, *History and Research in Child Development*, pp. 24-37, 25-26 (1985).

[41] Paul, Grace, Jean [Jane?] and Eva were born later according to Charles Theodore Greve, "Stanley Matthews. 1824-1889," **7 Great American Lawyers: The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation and Have Developed the Jurisprudence of the United States. A History of the Legal Profession in America,** edited by Willliam Lewis (1909), pp. 395-427, 427. Hayes mentions Eva, Grace, Mortimer, and Paul at Matthews's own funeral, **Hayes Diary and Letters**, p. 461. Jane married Justice Horace Gray.

[42] Cleveland, **Mother Eva Mary, C.T.,** p. 16.

[43] *Ibid.*, 15.

[44] William R. Ramsey's Eulogy in "Meeting of the Cincinnati Bar," *Weekly Law Bulletin*, XXI (April 1, 1889), 190.

[45] Cleveland, **Mother Eva Mary, C.T.,** p. 16. Ann Douglas sees mourning literature as the work of ministers and middle-class women who were losing status and dismisses the mourning of parents as "therapeutic self-indulgence," "Heaven Our Home: Consolation Literature in the Northern United States, 1830-1880," *American Quarterly,* Vol. 26, No. 5, Special Issue: Death in America: 496-515, 504 (1974).

[46] General chronology taken from Harold M. Helfman, "The Cincinnati 'Bible War,' 1869-1870," *The Ohio State Archeological and Historical Quarterly* 60: 369-86 (1951) and F. Michael Perko, **A Time to Favor Zion: The Ecology of Religion and School Development on the Urban Frontier, Cincinnati, 1830-1870** (Chicago: Educational Studies Press, 1988), pp. 165-175.

[47] Perko, **A Time to Favor Zion,** p. 157.

[48] Lutherans number the Ten Commandments as Catholics do.

[49] The school board members numbered eighteen Protestants, ten Roman Catholics, two Jews, and ten

"others," according to the Pro-Bible publication, **The Bible in the Schools: Proceedings and Addresses at the Mass Meeting, Pike's Music Hall, Cincinnati, Tuesday Evening, September 28, 1869 with a Sketch of the Anti-Bible Movement** (Cincinnati: Gazette Steam Book and Job Printing House, 1869), p. 1.

[50] *See* Helfman, "The Cincinnati 'Bible War,'" 168-169.

[51] **The Bible in the Public Schools: Proceedings and Addresses at the Mass Meeting**, 8-9.

[52] *Ibid.*, 3-4.

[53] *Ibid.*, 3.

[54] "Shall We Surrender Our Common Schools?" *New York Times*, March 21, 1870.

[55] "The Biblical Discussion, *Cincinnati Enquirer*, Sept. 14, 1869 p. 8. col. 1.

[56] Reviews and Literary Notices, "The Bible in the Public Schools . . . " *The Atlantic Monthly* Vol. 25, No. 151 (May 1870): 638-639.

[57] The petition asking for a restraining order to keep the school board from ending Bible reading cited the Northwest Ordinance, *not* the Ohio Constitutions of 1802 and 1851, which borrowed the language of these articles.

[58] Argument of Stallo, **The Bible in the Public Schools,** pp. 64-68; Argument of Hoadly, **The Bible in the Public Schools**, 134 ff.

[59] Argument of Matthews, **The Bible in the Public Schools,** p. 207.

[60] *Ibid.*, 207-208.

[61] *Ibid.*, 208.

[62] *Ibid.*

[63] *Ibid.*, 257.

[64] In this, Williams agreed with Matthews, *see* Edmund S. Morgan, **Roger Williams: The Church and the State** (New York: Harcourt, Brace, and World, 1967), p. 140, who admires Williams as utterly logical religiously. Both John Stallo and Judge Alphonso Taft cited Williams approvingly, but Matthews did not mention him. Perry Miller stresses that Williams could only become a hero to liberals once religious liberty became a reality, **Roger Williams: His Contribution to the American Tradition** (1953; New York: Atheneum, 1966), p. 29.

[65] For examples, *see* the work of Merrill D. Peterson and Robert C. Vaughan on Virginia, William G. McLoughlin on New England, Mark DeWolfe Howe, Thomas J. Curry, and more recently Daniel Dreisbach, Nicholas P. Miller, and John A. Ragosta.

[66] Quoted in John A. Ragosta, "Fighting for Freedom: Virginia Dissenters' Struggle for Religious Liberty during the American Revolution," *The Virginia Magazine of History and Biography* Vol. 116, No. 3 (2008): 226-261, 251.

[67] *Quoted in* Thomas J. Curry, **The First Freedoms: Church and State in America to the Passage of the First Amendment** (New York: Oxford University Press, 1986), p. 168.

[68] Argument of Matthews, **The Bible in the Public Schools**, pp. 229-30.

[69] *Ibid.*, 220.

[70] *Ibid.*, 213.

[71] *Ibid.*, 221.

[72] Westminster Confession of Faith, chapter xxiii, section 3 as *quoted in ibid.*, 272.

[73] *Ibid.*, 234-235.

[74] *Ibid.*, 285-286. While Matthews handed the work of Christian conversion over to the churches, Roger Williams worked himself into a logical corner by arguing that no man was authorized to convert since the time of the Apostles, a logic that makes it impossible to evangelize at all. *See* Morgan, **Roger Williams**, 45.

[75] The Cincinnati school board reacted to the Supreme Court decisions of the early 1960s against religion in the public schools by taking steps to remove it.

[76] *Board of Education of the City of Cincinnati v. John D. Minor et al.*, 23 Ohio St. 211, 245 (1872). The judicial term was dated 1872, but the decision was delivered in 1873.

[77] *Board of Education v. Minor*, 23 Ohio St. 211, 247 (1872).

[78] *Ibid.*, Steven K. Green ignores all the religious ideas and language of Justice Welch's decision, calling his "a Madisonian understanding of church-state relations," in Green, **The Bible, the School and the Constitution**, p. 133. As Welch quotes Madison *and* Jesus, it is just as accurate to call it a Christian understanding of church-state relations.

[79] *Board of Education v. Minor*, 23 Ohio St. 211, 250 (1872).

[80] *Ibid.*

[81] *Ibid.*, 251. This is often called the idea of marketplace of religion, but that seems an anachronistic reading as the nineteenth-century metaphor was gladiatorial rather than commercial, according to Nicholas P. Miller.

[82] *Ibid.*, 252.

[83] *Ibid.*, 254. Welch may be paraphrasing "Rel. not within purview of civil authority" from Madison's "Notes of Speech Against Assessment for Support of Religion. November 1784," which Welch might have found in William C. Rives, **History of the Life and Times of James Madison** (Boston, Little, Brown and Company, 1859-68), Vol. 1, p. 605, note 1. Welch also quotes letters of Madison to Edward Everett, March 19, 1823 and to Edward Livingston, July 10, 1822, which are also found in Rives's volume.

[84] *Quoted in* Clifford H. Moore, "Ohio in National Politics, 1865-1896," *Ohio Archaeological and Historical Publications* XXXVII (1928): 220-427, 298, 300. *See* "How Does Judge Taft Stand?" *Cincinnati Enquirer*, May 7, 1875.

[85] "Guernsey County Politics," *Cincinnati Enquirer*, July 15, 1879. Matthews also worked against Taft in

1879 in order to forward his own hope of being re-elected as U.S. Senator; two Cincinnatians would not have been looked on with favor, *see* Moore, "Ohio in National Politics, 1865-1896," 321-322.

[86] This editorial defends the Ohio Supreme Court decision as good law, "The Bible in the Schools," *Cincinnati Enquirer*, June 28, 1873.

[87] *See* "Matthews, Stanley," **The National Cyclopedia of American Biography** (New York: James T. White and Company, 1892), Vol. II, pp. 476-477.

[88] *See* "Ohio's Choice for Senator," *Cincinnati Enquirer*, November 26, 1879.

[89] *See* "Justice Stanley Matthews," *The Green Bag*, Vol. 1, No. 5 (May 1889): 181-182. Harold M. Helfman, "The Contested Confirmation of Stanley Matthews to the United States Supreme Court," *Bulletin of the Historical and Philosophical Society of Ohio*, Vol. 8, No. 3 (July 1950): 155-170.

[90] *Hurtado v. California* 110 U.S. 516 (1880) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[91] *Reynolds v. United States*, 98 U.S. 145 (1878) and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

[92] *Murphy v. Ramsey*, 114 U.S. 15, 57-58 (1885).

[93] *See* Sarah Barringer Gordon, **The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America** (Chapel Hill: University of North Carolina Press, 2002).

Protection against Eugenics: A Comparison of Two Jurisprudences

DANIEL FROST

Introduction

Buck v. Bell is widely regarded as one of the worst decisions in U.S. Supreme Court history.[1] In this case, the Court approved the forced sterilization, under Virginia's Eugenical Sterilization Act, of Carrie Buck, "a feeble-minded white woman" who was "the daughter of a feeble-minded mother" and "the mother of an illegitimate feeble-minded child." Speaking for eight members of the Court, Justice Oliver Wendell Holmes, Jr., wrote that "it is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough."[2]

Buck v. Bell occupies only three and a half pages in the *U.S. Reports*, suggesting that Justice Holmes and the seven Justices who joined him thought it was an easy case. What has not been sufficiently noted, however, is that under an earlier set of jurisprudential standards, *Buck* was an easy case—but with the opposite holding. This article will show that the "Police Powers jurisprudence," in decline at the time of *Buck*, afforded greater protection against forced sterilization for persons with mental and physical disabilities than did the Progressive jurisprudence that was ascendant at the time of *Buck* and that *Buck* embodies in important respects. With its requirement that there be no "class legislation" and its insistence that legislative means match legislative ends, the Police Powers jurisprudence was used to strike down several forced-sterilization statutes in state courts. Indeed, in striking down these laws, state judges drew on the core commitments of this jurisprudence. In contrast, Progressive jurisprudence was much more amenable to government regulation of social and economic matters, even against claims of individual right that might limit such regulation. Though the label "Progressive" suggests moving forward, the shift to Progressive jurisprudence was in fact a step backwards for the protection of "feeble-minded" persons.

The Menace of the Feeble-Minded

The eugenics movement was one manifestation of the Progressive impulse that animated many American reformers in the early twentieth century. These reformers believed that conscious, collective, and intelligent action alone could ensure the welfare of an increasingly industrialized and interconnected society. "Rational" reforms were applied to areas of social life as diverse as factory work, legal process, and human reproduction.[3] Eugenics—the conscious improvement of human nature by artificial selection—was a favorite cause of many Progressive reformers because it simultaneously embodied so many Progressive aspirations and goals. As David E. Bernstein writes, "coercive eugenics was a quintessentially Progressive movement in that it reflected ideological commitments to anti-individualism, efficiency, scientific expertise, and technocracy."[4]

Sir Francis Galton, the "father" of modern eugenics, began advocating the eugenics project in the 1860s and coined the term "eugenics" in 1883. Galton believed that by "careful selection . . . it would be quite practicable to produce a highly-gifted race of men" in a few short generations.[5] Galton developed various mathematical tools to explain and predict inheritance, but eugenics did not become widely accepted until the heredity studies of Gregor Mendel were rediscovered in 1900. Mendel's studies showed that certain traits, such as the color or shape of pea plants, could be passed from one generation to the next in a predictable, law-like fashion. Very quickly, Mendel's work came to dominate the biological discussion of heredity in the United States: "The enthusiasm with which biologists—in the United States in particular—began to endorse the Mendelian scheme cannot be overemphasized. Here, for the first time, was what seemed to be a generalized, predictive, and experimentally verifiable concept of heredity that applied to all living forms, including human beings."[6] Eugenicists postulated that many human traits, including criminality, alcoholism, immorality, shiftlessness, and "feeble-mindedness," could be passed from one generation to the next, and that such passing could be predicted with near-mathematical certainty.

Once the Mendelian approach to heredity was in place, the eugenics movement began to gain momentum in science, politics, and culture. In 1910, the Eugenics Records Office (ERO) was founded[7] as a research center and clearing-house for eugenics literature and other institutions would follow.[8] Various religious organizations saw value in eugenics and began preaching it from their pulpits.[9] Prominent figures in society endorsed eugenics and the idea seeped into popular culture.[10]

Preceding and later merging with such thinking was the practical issue of what should be done with "feeble-minded" people. In the late nineteenth and early twentieth centuries, "feeble-mindedness" was a kind of catchall term for people who were abnormally "slow," who could not care for themselves, or who could not compete on equal terms in society.[11] Both in the popular imagination and in elite opinion, at least through the early 1920s, feeble-minded persons were also considered to be inclined towards crime and vice. Thus, in **Feeble-mindedness: Its Causes and Consequences**, published in 1914, influential psychologist Henry H. Goddard linked feeble-mindedness to crime, alcoholism, prostitution, pauperism, "ne'er-do-wells," and truancy.[12] Advocates of eugenics argued that these tendencies created a public menace that required strong state intervention. A brief submitted for the state of Washington in the 1912 eugenics case *Washington v. Feilen* (discussed below) demonstrates the logic:

> the fact that the great number of public charges [are] recruited from the defective classes . . . That defects physical and mental are transmitted

> to the offspring . . . [that] the natural tendency is for the abnormal to mate with the abnormal, consequently defectives are rapidly increasing in numbers as well as becoming more pronounced in type . . . [that] a large number of this class fail to respond to moral or intellectual influences, are lacking in self-restraint and inhibitory power . . . [that] this class of persons is prolific, as they know no law of self-restraint, and refuse to take into consideration their ability to care for their offspring . . . That the absolute segregation in colonies and industrial refuges of so great a number of existing defectives would necessitate the expenditure of enormous sums of money.[13]

Institutionalization of the feeble-minded was one way to address the threat of feeble-mindedness and was on the legislative agenda in many states. In the mid- to late nineteenth and early twentieth centuries, schools and institutions designed specifically for the feeble-minded started to spring up, bearing names such as the "Virginia State Colony for Epileptics and Feeble-Minded," "Pennsylvania Training School for Feeble-Minded Children," and "Custodial Asylum for Feeble-Minded Women," (in Newark, New York). In 1904, the total U.S. institutionalized population of feeble-minded persons was 14,347. This number grew to 20,731 in 1910 and jumped to nearly 43,000 by 1923. In 1924 there were fifty-eight public and eighty private institutions for the feeble-minded nationwide, and all but six of the forty-eight states had at least one.[14]

However, as the brief for Washington argues, institutionalization is expensive. The single greatest concern about feeble-minded persons (particularly women) was that they would reproduce prolifically and, as Justice Holmes would eventually write in *Buck v. Bell*, "swamp[] [the world] with incompetence."[15] One alternative to permanent

Carrie Buck sat with her mother, Emma Buck, on the grounds of the Virginia State Colony for Epileptics and Feeble-Minded in Madison Heights, Virginia, near Lynchburg. Arthur H. Estabrook, a eugenics researcher, took this photograph in 1924 while interviewing them. He went on to testify in the case that would result in Carrie's forced sterilization.

institutionalization was sterilization. Many reformers believed that relatively intelligent feeble-minded persons, known as "morons" a term coined by Goddard in **Feeble-Mindedness**, could be safely released into the community if they were unable to reproduce. Thus, forced-sterilization statutes began to be introduced around the country. Indiana passed the nation's first sterilization legislation in 1907 and twenty-four more states would follow by 1925.[16] Some of these statutes were penal in nature, but over time the penal motive was removed from new statutes in order to avoid the charge that such laws constituted "cruel and unusual punishment." The "real purpose," said Harry Laughlin, a leading eugenicist, in his 1930 review of the eugenics cause, was "the prevention of hereditary degeneracy regardless of crime."[17]

The Police Powers Jurisprudence

Several of the sterilization laws were challenged in court. Prior to 1925, every time an American court ruled on a non-penal forced-sterilization law the law was struck down. The number of such cases is not large, but the form of legal arguments employed in them is remarkably consistent. In most of these cases, the courts held that forced-sterilization laws constituted "class legislation"—laws that placed burdens on some people that others, similarly situated, were not required to bear.

The prohibition on class legislation was not merely a convenient legal-moral argument; rather, it was the central feature of what Howard Gillman has called the "Police Powers jurisprudence." According to Gillman, this jurisprudence has roots in the structure and theory of the U.S. Constitution and was developed into a set of workable doctrines by state courts in the second quarter of the nineteenth century.[18] According to this jurisprudence, legislatures had relatively broad discretion to enact laws that advanced the interests of the entire community by protecting or promoting public health, safety, morality, or welfare. Legislation was illegitimate to the extent that it advanced only the interests of a few or targeted certain groups for disfavored treatment. Such legislation was known as "unequal, partial, class, or special legislation; that is, legislation which advanced the interests of only a part of the community."[19] Another requirement of this jurisprudence was that legislative means match legislative ends, or as the Court put it in 1894, "the means [of the law] are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[20] If the legislature failed to pursue the purported end of the legislation by means that were appropriately tailored to its achievement, as was the case, for example, in *Yick Wo v. Hopkins,*[21] judges were empowered to strike down the law on the assumption that the true intent of the law was to benefit one class of persons at the expense of another. The central task for this jurisprudence was to distinguish "class legislation" from legislation that was truly in the public interest.

This jurisprudence took factional politics as a given and sought to limit the power of particular groups to use the law as a method of gaining unfair advantages over others in the marketplace or society. The danger it sought to combat was the perversion of law into a tool of oppression or domination by one group over another. And, significantly, it was the courts' job to ensure that legislatures did not exceed their authority: "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."[22]

Judges who subscribed to this jurisprudence believed that the prohibition on class legislation was a matter of *constitutional* right, an idea that sounds foreign to readers whose understanding of constitutional rights was defined by the Warren Court and the Civil Rights movement. According to the Court in *Mugler v. Kansas*, decided in 1887, "[I]f, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."[23] Bernstein writes, "After the Civil War and through the end of the Gilded Age, leading jurists believed that the ban on class legislation was the crux of the Fourteenth Amendment, including both the Equal Protection and Due Process clauses."[24] Thus, although the ban on class legislation was most often located in the Fourteenth Amendment, jurists saw it as a fundamental precept of legitimate government; citizens had a constitutional right to not have the law used against them for partisan purposes.

Before turning to examine the Police Power jurisprudence's competitor, Progressive jurisprudence, we should note that the Police Powers jurisprudence was part of a larger set of background assumptions and practices of law that legal historian Morton J. Horwitz calls "Classical Legal Thought." This form of legal thought, which dominated from 1870 to 1905 but was influential through the 1930's, favored bright-line distinctions of legal phenomena, abstract concepts, formal classifications, deductive logic, and state neutrality on contested social, economic, and political questions.[25] The Police Powers jurisprudence was a very significant subset of Classical Legal Thought, accepting all of its basic presuppositions and operational guidelines and forming part of its core. Many Progressive criticisms were aimed at more than just the Police Powers jurisprudence, but it was the Police Powers jurisprudence that prevented Progressives from doing what they wanted most: to use law instrumentally to achieve social progress, especially advancing the interests of labor over the interests of capital. Classical Legal Thought and the Police Powers jurisprudence were so interwoven that the death of one meant the death of the other.

The Progressive Alternative

Major shifts in jurisprudence do not happen overnight, or even in a decade. However, as the twentieth century dawned, and especially after the Court's decision in *Lochner v. New York*,[26] we begin to see tendencies in legal thought that would eventually undermine the Police Powers jurisprudence. Although the Police Powers jurisprudence continued to hold significant influence for first few decades of the twentieth century, it was also the target of systematic and trenchant attacks from the turn of the century onward. Critics condemned Classical Legal Thought in general and the Police Powers jurisprudence in particular for relying too heavily on abstract concepts and logical deduction,[27] for ignoring the disadvantaged bargaining position of laborers by upholding an unrealistic conception of contract, for generally being tone-deaf to "social facts" and social scientific research, and for privileging individual economic rights over social progress. The conception of law as a neutral forum for resolving disputes between free and equal individuals gave way to an instrumental conception in which the law could and should be used to advance socially desirable goals: "The debunking of the role of logic in judicial decision-making was part of a larger shift from the abstract to the real in legal philosophy. Nineteenth-century conceptualism gave way

to twentieth century instrumentalism. Law was viewed as a means to an end, as purposeful human activity aimed at achieving social goals."[28]

Again, the change occurred slowly, and for many years the older orthodoxy existed somewhat uneasily alongside the ascendant Progressive alternative.[29] Furthermore, Progressive jurisprudence was less a self-conscious jurisprudential "system" than it was a loosely connected set of commitments, assumptions, and criticisms of the status quo. However, inasmuch as there is something that can be called "Progressive jurisprudence" in the early twentieth century, its key features included the following. First, Progressive jurisprudence was deferential to government intervention that advanced socially desirable ends, particularly in economic matters. Progressives came to believe that the unregulated market simply could not be trusted to ensure the welfare of the general population and advocated a more expansive role for government to check the destructive and amoral tendencies of the free market.[30] The idea that government should somehow strive to be "neutral" in the struggle between powerful industrial magnates and impoverished factory workers seemed both self-deceptive and an abdication of moral responsibility.[31] Progressives believed that conscious, intelligent action on the part of the government would ameliorate the plight of the working poor and solve social problems that would otherwise be left unsolved.

Second, Progressive jurisprudence gave much more credence to "social facts" and social scientific research than did the Police Powers jurisprudence. Louis Brandeis, both before and after his nomination to the Court, embodied the aspiration to integrate law and social scientific research. As a litigant before the Court, Brandeis's brief in *Muller v. Oregon*[32] broke new ground by staking nearly its entire argument on findings from the social sciences. The case concerned a law that limited the number of hours that women could work in certain industries, and Brandeis's brief had roughly two pages of legal analysis and over one hundred pages of social scientific research arguing that the legislature could have reasonably enacted the legislation. Many of the "facts" in the brief were later repudiated, but Brandeis won the case 9-0. As a Supreme Court Justice, he believed that judicial decisions should be made "in the light of facts, sociologically determined and more contemporary than those which underlay the judicial approach to labor questions at the time."[33] Progressive jurisprudence followed his lead.

The focus on social scientific research is connected to the third feature of Progressive jurisprudence—that it was less reliant on logical deduction and abstract concepts than Classical Legal Thought was. Because the "real" world is messier than any set of abstract categories can allow for, Progressives believed that the law needed to be flexible to accommodate the actual needs of society. In practice, this meant retreating from Classical Legal Thought's conception of law as a relatively autonomous set of abstract concepts connected by deductive reasoning. According to Thomas Grey, Progressives reinterpreted legal principles and abstractions as "pointers and guidelines meant to help decision-makers resolve social problems in light of public policies."[34] In Progressive jurisprudence, we see the beginnings of the "balancing" approach to constitutional law that would become self-conscious in the late 1930s and early 1940s,[35] not coincidentally, precisely the time that the Police Powers jurisprudence was unambiguously rejected. In contrast, the Police Powers jurisprudence "was essentially categorical—laws either promoted the general welfare or were arbitrary and unreasonable."[36] The bright lines and clear syllogisms of the nineteenth century blurred into instrumental reasoning that

most often came down on the side of state regulation.

Fourth, Progressive jurisprudence aspired to protect positive rights. Whereas the Police Powers jurisprudence mainly pursued the negative task of ensuring that the state did not take sides in the factional struggle for power, Progressive jurisprudence was sympathetic to the efforts of legislatures to improve the lot of the poor. Progressive jurisprudence was sympathetic to the right to a minimum wage, the right to maximum hours, and so on. The standing presumption in Progressive jurisprudence was in favor of government intervention and against rights claims to the contrary. As the state took responsibility for more and more aspects of social life, however, individuals lost the ability to "opt out" of government requirements and programs. Bernstein might overstate the point when he writes that leading legal Progressives "thought that the very notion of inherent individual rights against the state was a regressive notion with roots in reactionary natural rights ideology,"[37] but it is true that Progressive jurisprudence had little patience for individual rights claims that would frustrate Progressive legislation. All rights were held under such conditions as would conduce to the general good of society. This point would have special relevance for eugenics legislation.

From Class Conflict to Eugenics

Other features could be added to this list or elements could be subdivided, but the forgoing should give a general sense of the commitments and outlook of Progressive jurisprudence. Now, the irreconcilable issue that in many ways precipitated the Progressive discontent with the Police Powers jurisprudence was the conflict between capital and labor. At its foundation, the Police Powers jurisprudence assumed that the market was fundamentally conducive to liberty, and furthermore, that the vast American frontier provided a viable escape hatch for anyone unfortunate enough to fall into a pocket of economic or social dependency.[38] However, with the rise of industrial cities, big business, urban poverty, urban crime, sweatshops, political machines, and other incidents of the industrial revolution, many legal thinkers came to believe that the assumptions of the Police Powers jurisprudence were fundamentally mistaken. Progressives began to argue that the state should take a much stronger role in ensuring the wellbeing of laborers, and promoted (among other things) minimum wage and maximum hours laws as a way of improving the lives of laborers. According to reformers, such laws were necessary to offset the superior bargaining position of employers and to restrain the greed of capitalists.

Unfortunately, such laws constituted a direct violation of the central imperative of the Police Powers jurisprudence: no class legislation. Maximum hours and minimum wage laws were designed precisely to intervene in the conflict between capital and labor and to advance the interests of laborers. Pro-labor legislation could not be sustained without raising serious questions about the viability of the entire enterprise of the Police Powers jurisprudence.

Litigation over forced-sterilization statutes occurred during the live conflict between these two sets of jurisprudential standards. Early on, in the twentieth century's second decade, judges were more inclined to analyze forced-sterilization statues according to the standards of the Police Powers jurisprudence, asking whether the laws constituted class legislation. Around the mid-1920s, however, Progressive assumptions and standards began to inform legal decisions about eugenics laws. Progressive judges began to ask whether the laws advanced socially desirable goals in a reasonable way. The difference is not trivial, and the choice of standards led to very different outcomes in the cases.

Early Eugenics Cases

Forced-sterilization statutes were challenged on a variety of constitutional grounds: for violating the prohibition on cruel and unusual punishment, violating due process of law, and denying the equal protection of the laws, thus constituting class legislation. To summarize, prior to 1925, American courts in seven cases (five state and two federal) struck down forced sterilization laws, and one upheld a penal forced sterilization law. In New Jersey,[39] Michigan,[40] New York,[41] and Oregon,[42] the laws were struck down as class legislation under the Equal Protection Clause of the Fourteenth Amendment; in Oregon, the law was also found to violate due process of law. In Indiana,[43] a federal district court found that the law violated due process of law, and in Nevada,[44] a federal district court found that the law constituted cruel and unusual punishment. Before these anti-forced sterilization cases were decided, however, one forced sterilization law was upheld: in 1912 the Washington Supreme Court decided that a sentence of life imprisonment and sterilization for "carnal abuse of a female child" was not cruel and unusual punishment.[45]

The Washington case would soon become an outlier in a sea of contrary jurisprudence. In 1913, the New Jersey Supreme Court struck down a non-penal eugenics law in an opinion that is as straightforward a Police Powers jurisprudence decision as one can imagine. The assumptions and language of this jurisprudence pervade the decision at every point. The contrast between *Alice Smith* and Justice Holmes's later decision *Buck v. Bell* shows clearly how the Police Powers jurisprudence protected people with mental disabilities in this context and how the Progressive jurisprudence did not.

The case focused on whether Alice Smith, an epileptic woman who lived in a "State charitable institution" could be sterilized against her will, though she had committed no crime. After affirming the existence of the "police power"—"the exercise of the Legislature of a State of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health, or morals"[46]—the court stated that the power has limits. According to Judge Garrison, legislation cannot violate the "constitutional rights of the individual." Earlier we noted that it is crucial not to import contemporary notions of constitutional rights into early twentieth century statements like this. At that earlier point in constitutional history, none of the guarantees of the Bill of Rights had been incorporated against the states. According to the court, "constitutional rights of the individual" included, first and foremost, the right not to suffer adverse consequences from class legislation. The state had wide discretion to pass legislation in the public interest, but legislation could bestow neither benefits nor burdens on special classes of citizens.[47]

Standard Police Powers jurisprudence analysis asks whether a law has a permissible purpose and whether it pursues that purpose in a reasonable way. Judge Garrison stated the legislative purpose at a high level of abstraction: "the improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws." He was concerned with the implications of such a principle, as it "carries with it certain logical consequences having far-reaching results. For the feeble-minded and epileptics are not the only persons whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society." He went on to note that persons with communicable diseases would be potential targets of eugenic legislation. More ominously, he said that "there are other things besides physical or mental disabilities that may render persons undesirable citizens

or might do so in the opinion of a majority of a prevailing legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue."[48] Concerns with overpopulation might also lead a legislature to mandate forced sterilization as a way of keeping the population down. In sum, it is no trivial thing to invest the legislature with the power to improve society by forcibly preventing the existence of "unoffending but undesirable members."[49]

This is the strongest objection to forced sterilization laws in any of the cases during this period, but according to Judge Garrison, the fundamental problem with this law was *not* that it had an impermissible purpose, a concession similar to that made by judges in the other forced sterilization cases. It was rather that the law sought to accomplish its purpose in an irrational way. The New Jersey law only allowed the sterilization of persons *already* housed in state institutions; persons living outside state institutions were not affected. For Judge Garrison, this was a patent violation of the prohibition on class legislation:

> Not only will society at large be just as injuriously affected by the procreation of epileptics who are not confined in such institutions as it will be by the procreation of those who are so confined, but the former vastly outnumber the latter and are in the nature of things vastly more exposed to temptation and opportunity of procreation, which indeed in the cases of those confined in a presumably well conducted institution is reduced practically to nil... *The particular vice, therefore, of the present classification is not so much that it creates a sub-classification based upon no reasonable basis, as that having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the least, and in no event a sole application*, and to which indeed, upon the presumption of a proper management of our public institutions, it has no application at all."[50]

In other words, if the state really were serious about reducing the number of persons with epilepsy, it would target all of them or at least those who pose the greatest threat in being able to reproduce. The most irrational method it could have chosen was to target people who posed no threat, and yet that is exactly what it did. An editorial in the *Yale Law Journal* agreed that the approach was irrational and made the statement that "a more unreasonable classification could scarcely be imagined."[51] The disconnect between the ends and the means raised suspicions that the legislation was created to burden some people but not others similarly situated, for no good reason. Because the state was unwilling to employ means commensurate with the alleged end, Alice Smith could justifiably claim that she was the victim of class legislation.

Alice Smith would establish a strong persuasive precedent for similar cases in other states. In 1913, the Michigan Supreme Court reviewed a law that authorized "the sterilization of mentally defective persons" who lived full- or part-time in state institutions. The court recognized, in line with standard Police Powers jurisprudence analysis, that the classification of persons in legislation is completely legitimate if the classification is "germane to the object of the enactment." However, "if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub-classification, it comes within the constitutional prohibition on class legislation."[52] The court found that, because the

law only dealt with persons living in state institutions, it was "clearly class legislation without substantial distinction."[53]

Other states would follow. In New York, the Supreme Court of Albany County held that the forced sterilization statute in question "certainly denies to some persons of a class and similarly situated the protection which is afforded to others of the same class. The State has power, many times sustained by the courts, to protect the health, morals, and welfare of the people, but such protection cannot be afforded unless it applies to all alike."[54] A lower state court in Oregon held that a forced sterilization statute "clearly violates the provisions of the state and federal constitution prohibiting class legislation, for the reason that it is confined in its operation to the inmates of certain state institutions."[55] A federal district court in Nevada held that Nevada's penal forced sterilization statue was unconstitutional for violating the prohibition on cruel and unusual punishment, but the judge couldn't resist including the standard police powers analysis in *dicta*: "[L]egislation of that character must operate alike on all unfortunates of the same class, and the classification must operate reasonably with relation to the end sought to be accomplished."[56]

In sum, these cases show that Police Powers jurisprudence was the central lens through which state courts viewed this issue and that forced sterilization laws were routinely found unconstitutional under its standards. As a practical matter, the Police Powers jurisprudence provided a significant degree of protection for people with mental and physical disabilities. However, this jurisprudence was not without its limits and ambiguities. Each of the Police Powers cases reviewed here staked its holding on the fact that the laws did not treat like cases alike. Feeble-minded persons inside state institutions were subject to forced sterilization; those on the outside were not. The remedy had to fit the problem, and the problem of "hereditary degeneracy" was much larger than the persons living in state institutions. But this analysis leaves a crucial question unanswered: Does a state have the power to forcibly sterilize its "unoffending but undesirable members," if it makes a serious attempt to treat like cases alike?

1925 and the New Era of Eugenics Cases

In 1925, the legal tide turned in favor of forced sterilization statutes. Two state courts of highest appeal, one in Michigan, whose Supreme Court had previously struck down a different forced sterilization statute, and one in Virginia, in the case that would become *Buck v. Bell*, upheld non-penal forced sterilization statutes for the first time. In both of these cases, we see a mix of Police Powers jurisprudence standards and the tendencies of Progressive jurisprudence; in both cases, Progressive jurisprudence was triumphant.

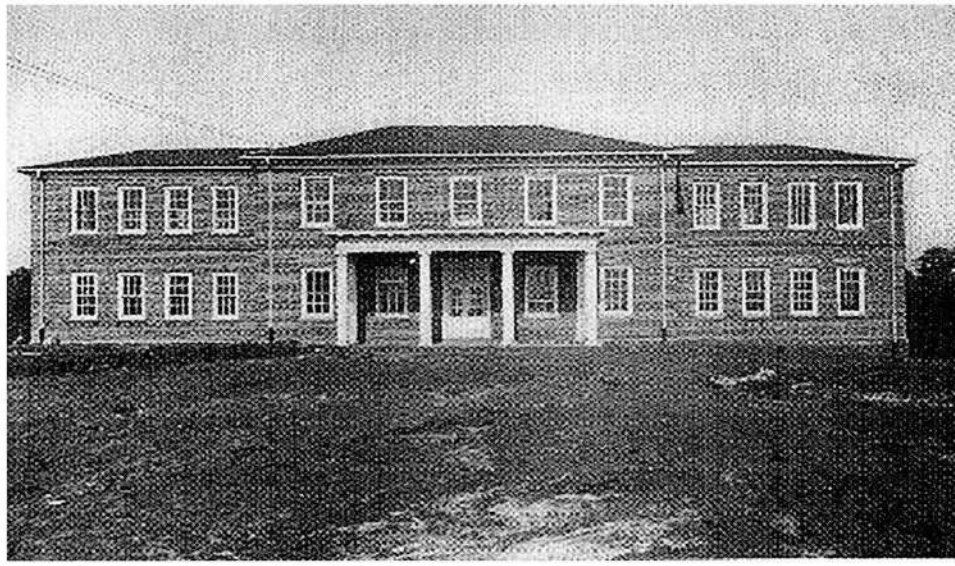
After Michigan's 1913 forced sterilization law was struck down in 1918, the pro-eugenics movement in Michigan went to work crafting a new law that could survive constitutional scrutiny. The first law had been struck down because, as we have seen, it only allowed sterilization for people already living in state institutions and was therefore ruled class legislation. The new 1923 law sought to get around this obstacle by making the determination of whether an individual was "mentally defective" independent of commitment to a state institution. A court hearing was required to ascertain whether the "defective" had sexual inclinations that would lead to the procreation of children with mental deficiencies, and whether there was no probability that the person would improve.

The opinion of the court manifests the tendencies of Progressive jurisprudence. Writing for four judges (another concurred), Chief Justice McDonald placed great weight

on findings from the social and biological sciences: "Biological science has definitely demonstrated that feeble-mindedness is hereditary."[57] These findings suggested that the problems of feeble-mindedness and heredity were "alarming" and "present[ed] a social and economic problem of grave importance." The "menace" of the feeble-minded gave rise to a concomitant need for strong government intervention. It was not only the legislature's "undoubted right, but it was its duty, to enact some legislation that would protect the people and preserve the race from the known effects of procreation of children by the feeble-minded, the idiots, and embeciles [sic]."[58] In addressing this problem, government need not be overly concerned about the individual rights of feeble-minded persons: "It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare... Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility?"[59] In other words, even though the court conceded that a "natural and constitutional right" had been violated, it held that the social benefits of the law trump the right. By relying heavily on scientific research, promoting the role of active government to address a perceived social problem, and dismissing notions of individual rights against the state, the court was clearly drawing on the commitments and assumptions of Progressive jurisprudence.

However, the Police Powers jurisprudence had not yet lost its influence, and the court had to make a reply to its requirements. The court found that the law was not class legislation because "It is made uniform upon all persons of the class to which it naturally applies." Because all "mentally defective" persons could be brought under its operation, the law "did not carve a class out of a class," but rather applied the same treatment to all persons similarly situated.[60]

A caustic dissent signed by three judges challenged the court's reasoning. The dissent pointed out that the very standards used to determine whether a person was feeble-minded for the purposes of sterilization



In 1904, the total U.S. institutionalized population of feeble-minded persons was 14,347. This number jumped to nearly 43,000 by 1923. Above is the Virginia State Colony for Epileptics and Feeble-Minded, where Buck was committed by her foster parents after she was raped and became pregnant.

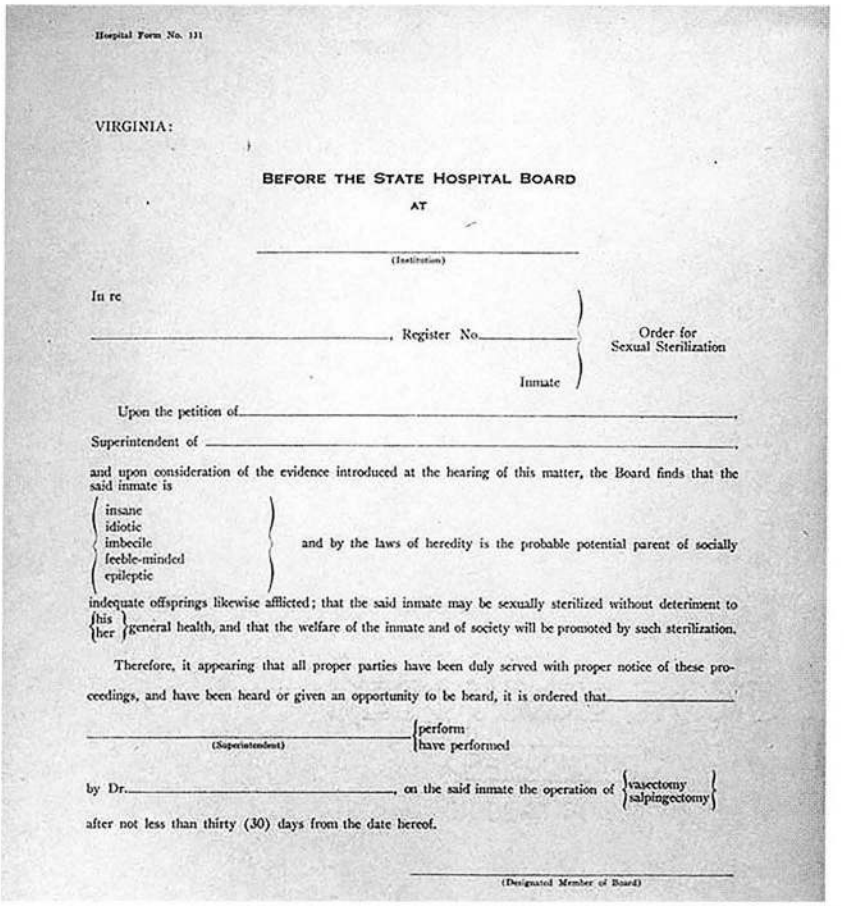
were taken from another statute that guaranteed such persons the right to institutional support from the state. "In other words," Judge Wiest wrote, "the victims of sterilization must be wards of the state, and judicially found to be proper subjects to receive the benefit of institutions required to be fostered and maintained by the state... Surely no one can successfully maintain that it is essential for the public safety or welfare to sterilize the unfortunates so segregated."[61] Although Michigan's new sterilization law did not say so directly, the only people who could be sterilized under it were people who were currently housed in state institutions or who had a right to be housed. It was the very institutional arrangement that had been struck down several times in state courts, including the Michigan Supreme Court.

The opinion of the court did find that one part of the law was class legislation and therefore unconstitutional. That was the part that provided an alternative means by which a "mentally defective" person could be sterilized by a showing that the person would not be able to "support and care for his children" and that such children "would probably become public charges by reason of his own mental defectiveness." According to the court, this was "an element inconsistent with the beneficial purpose of the statute." It was "not germane to the object of the enactment" and "carve[d] a class out of a class."[62] Therefore, the court found this section unconstitutional.

The Virginia case focused on Carrie Buck. Buck was seventeen years old when she was raped by her foster mother's nephew.[63] Buck became pregnant, and her embarrassed foster parents had Buck committed to the Virginia State Colony for Epileptics and Feeble-Minded in an attempt to save the family's reputation.[64] Dr. Albert Priddy, Superintendent of the Colony, was an enthusiast for sterilization, but he wanted to make sure the new Virginia law authorizing sterilization would stand up in court. Lawsuits from former patients who did not consent to sterilization nearly cost Priddy thousands of dollars, and Priddy wanted to ensure that he would be protected from future liability.[65]

Priddy believed that Buck offered the perfect test case for the new law because she, her mother, and her newborn daughter were all feeble-minded—or so he believed. The courts that heard Buck's case all believed the claim that the three generations were indeed feeble-minded, a claim that was made plausible by the inept, and probably collusive, performance of Buck's lawyer, Irving Whitehead.[66] However, subsequent research has shown that the feeble-mindedness of the Bucks was vastly overstated. Although Carrie Buck and her mother, who was also housed at the Virginia State Colony for Epileptics and Feeble-Minded, were diagnosed as "morons," or the most intelligent category of feeble-minded persons, it is unlikely that Carrie Buck should have received that designation, given the fact that her classification as feeble-minded was motivated by the desire to get her out of her foster parents' home.[67] No credible evidence has ever surfaced that suggests that Carrie Buck's daughter, Vivian, was mentally deficient in any way.[68] Justice Holmes's famous dictum, "Three generations of imbeciles are enough," is therefore literally false. None of the Buck women had been or could be classified, according to the science of the time, as "imbeciles," a more severe form of feeble-mindedness, and two of them were probably not mentally deficient at all.[69]

When the Virginia Supreme Court of Appeals heard Carrie Buck's case, it was not as overtly Progressive as the Michigan Supreme Court, but it also upheld the challenged statute. The court did not recite extensive social scientific research or lament about the menace of the feeble-minded; instead, in a rather mundane fashion, the court reviewed the law in question and accepted the trial court's rendering of the



Hospital Form No. 131

VIRGINIA:

BEFORE THE STATE HOSPITAL BOARD

AT

_____
(Institution)

In re

_____, Register No._____ } Order for Sexual Sterilization

Inmate }

Upon the petition of_____,

Superintendent of _____,

and upon consideration of the evidence introduced at the hearing of this matter, the Board finds that the said inmate is

{ insane / idiotic / imbecile / feeble-minded / epileptic } and by the laws of heredity is the probable potential parent of socially

inadequate offsprings likewise afflicted; that the said inmate may be sexually sterilized without deteriment to {his / her} general health, and that the welfare of the inmate and of society will be promoted by such sterilization.

Therefore, it appearing that all proper parties have been duly served with proper notice of these proceedings, and have been heard or given an opportunity to be heard, it is ordered that_____

_____ {perform / have performed}
(Superintendent)

by Dr._____, on the said inmate the operation of {vasectomy / salpingectomy}

after not less than thirty (30) days from the date hereof.

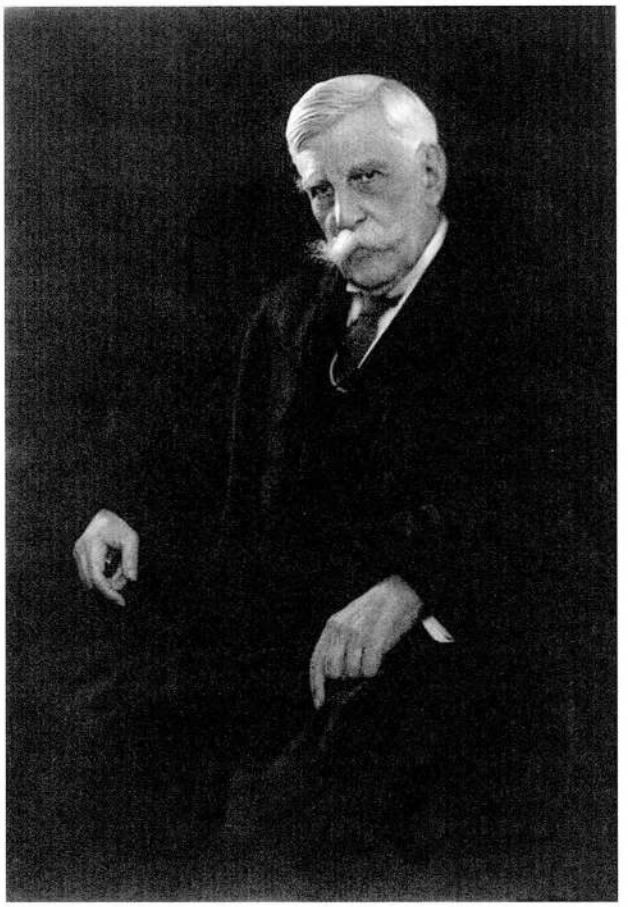
_____
(Designated Member of Board)

Dr. Albert Priddy, an enthusiast for sterilization, wanted to make sure the new Virginia law authorizing sterilization would stand up in court. He saw Buck as the perfect test case because he believed that she, her mother, and her newborn daughter were all feeble-minded. Above is Virginia's sterilization form.

facts. After showing that due process had been protected and that the law did not constitute cruel and unusual punishment ("the act is not a penal statute"), the court engaged the claim that the law constituted class legislation:

> It cannot be said, as contended, that the act divides a natural class of persons into two and arbitrarily provides different rules for the government of each. The two classes existed before the passage of the sterilization act. The female inmate, unlike the woman on the outside, was already deprived of the power of procreation by segregation, and must remain so confined until sterilized by nature, unless it is ascertained that her welfare and the welfare of society will be promoted by her sterilization under the act. There can be no discrimination against the inmates of the Colony, since the woman on the outside, if in fact feeble-minded, can, by process of commitment and afterwards a sterilization hearing, be sterilized under the act.[70]

In previous Police Powers jurisprudence cases, the courts had said that there was only one relevant class, namely, persons with mental disabilities who were likely to pass



The Court's decision in *Buck v. Bell*, written by Justice Oliver Wendell Holmes, Jr., had the practical effect of legitimizing eugenic sterilization laws that were already on the books in some states, and prompting several new ones to pass sterilization laws.

their "defective" characteristics to posterity. According to this court, however, there was not one "natural class" but two classes before the passage of the sterilization act: the "female inmate" and the "woman on the outside." The court claims that there is no discrimination against the inmate because, first, the inmate is already effectively sterilized by confinement, and must remain confined until she is sterilized by the state or "nature," and, second, the woman on the outside, if she is truly feeble-minded, can be brought into a state institution to be sterilized. This reasoning evades the central concern of previous cases by stating that all feeble-minded women *could be* institutionalized, and that mental institutions could function as "clearing houses" for feeble-minded persons.[71] Further, the court says nothing about the fact that institutionalized women do not pose the same "threat" to society that feeble-minded women on the outside do.

That there was a wide gap between those courts that upheld forced sterilization statutes and those that struck them down is clear. In *all* of the forced sterilization cases discussed thus far, the only persons subject to state sterilization were those who were currently housed in state institutions or those who had a right to such support. According to Judge Garrison in *Alice Smith v. Board of Examiners*, targeting the institutionalized

population—and only the institutionalized population—was clearly an irrational method for addressing the problem of inheritable feeblemindedness, and courts in several other states agreed. This "catch and release" approach was decisively rejected by Judge Garrison in *Alice Smith*: "The suggestion that the classification might be sufficient, if the scheme of the statute were to turn the sterilized inmates of such public institutes loose upon the community and thereby to effect a saving of expense to the public, is not deserving of serious consideration. The palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened Legislature."[72]

What explains the differences in how these courts decided similar cases? While no one factor was decisive, several considerations seem to have been relevant. First, the pro–forced sterilization courts seemed to be more willing to take an incremental approach to solving the problem. They were willing to uphold laws that seemed to take steps in the direction of progress, even if there was not a clear line from the purpose of the legislation to the means chosen to pursue that purpose. This is connected to a second difference, which is in some ways a restatement of the first: the Michigan and Virginia Supreme Courts were less concerned about the internal logical coherence of the legislation they upheld. The courts that struck down forced-sterilization laws demanded that there be a clear, rational connection between the purpose of the legislation and the means used to pursue that end. The courts that upheld the legislation only cared that the problem was being addressed and progress was being made towards a solution. And third, considerations of public expense and public welfare carried much more weight in the courts that upheld forced sterilization laws than they did in the courts that struck them down. Both *Smith v. Command* and *Buck v. Bell* are concerned with finding cost-effective ways of addressing the problem. Sterilizing people with mental deficiencies so they can be released into the community was a benefit, not a deficiency, of the laws.

We should note, however, that the main difference between the courts does not seem to be that one set was particularly concerned about the "rights" of feeble-minded persons, at least as we understand "rights" today. *Alice Smith* and the other anti–forced sterilization cases demanded logical coherence from the laws they reviewed; *Smith v. Command* and *Buck v. Bell* were more concerned that a serious social problem was being addressed by reasonable means. The right that the Police Powers courts sought to protect was the right not to be the target of class legislation, and this right had consequences for the protection that the courts gave to people with mental disabilities. Consistent with Progressive jurisprudence, the pro–forced sterilization cases disregarded individual rights and liberties if doing so would accomplish an important policy objective. The second Michigan case, *Smith v. Command*, was self-conscious about this choice: "It is an historic fact that every step forward in the progress of the race is marked by an interference with individual liberties."[73] Though the Police Powers jurisprudence did not single out feeble-minded persons for special concern or respect, its blanket prohibition on class legislation provided a measure of protection for feeble-minded people that was not present in Progressive jurisprudence.

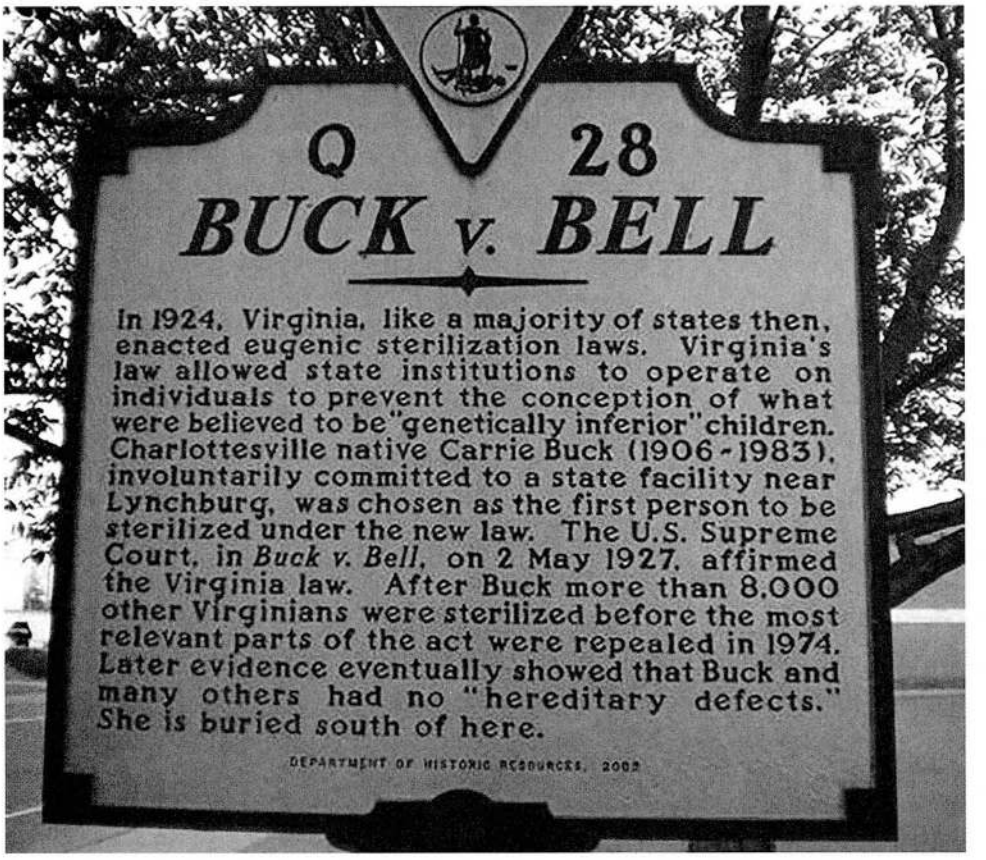
Buck v. Bell in the Supreme Court of the United States

Justice Holmes's opinion in *Buck* represents Progressive jurisprudence in certain important respect but not in all. This is unsurprising, for while Holmes was "canonized" by Progressives in the Twenties and Thirties, he was by no mean the prototypical Progressive judge. He cared little for social

scientific research or the plight of the working poor, and once he even said to Brandeis, "I hate facts."[74] What Holmes did share with the Progressives was a generally deferential attitude towards legislatures and state intervention, a rejection of bright-line reasoning and strict logical deduction, and a contempt for "natural rights" claims that would defeat the will of the majority. *Buck* follows these general commitments. In *Buck,* Holmes does not recite "social facts" that justified the legislation but hints at an extraordinarily broad conception of the state's ability to require sacrifices of its citizens, that is, to violate their rights: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."[75] Because the state asks its "best citizens" for the ultimate sacrifice, all other sacrifices, especially sacrifices expected from "those who already sap the strength of the state," are presumptively valid. Under this conception of state power, individual citizens are powerless in the face of state action that may harm them in the process of benefiting the community.

In the penultimate paragraph of the opinion, Holmes briefly addressed the claim, central to *Alice Smith* and other cases, that the Virginia law constituted class legislation:

> But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to



This historical marker was erected in 2002 in Charlottesville, Virginia, home to Carrie Buck.

> the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course, so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.[76]

Many commentators have interpreted Holmes's claim that this was the "usual last resort of constitutional arguments" as an indication that the Equal Protection Clause was effectively dead at this time. However, as Victoria Nourse and Sarah Maguire point out, "As close attention to his words suggests, it was a 'usual' argument, a frequent claim in the first three decades of the twentieth century."[77] Here we see Holmes attempting to show that Virginia's law did conform to traditional Equal Protection jurisprudence. According to Holmes, because all feeble-minded persons could eventually be sterilized, the statute did treat like cases alike. In fact, sterilizing inmates at state institutions would actually facilitate greater chances for equality, as allowing the sterilized to leave would make it possible for others to be admitted. The law need not be the most rational approach, or one that sought to solve the entire problem at once; it was only necessary that the policy make some progress in the direction accomplishing its goal. Also in conformity with Progressive jurisprudence, Holmes was happy to see the law used as an instrument of social progress and was deferential to legislative policy judgment.

Such reasoning would have had little appeal to Judge Garrison or the other state judges who struck down forced sterilization laws. Holmes's analysis warps the prohibition on class legislation to such an extent that it is no longer recognizable. Holmes was unconcerned about a direct link between the ends and the means of the law ("the law does all that is needed when it does all that it can"[78]) and was perhaps even less concerned about the rights of the feeble-minded persons who would be affected by sterilization laws. In a recent analysis of *Buck v. Bell*, Adam Cohen writes that Holmes's attempt to square Virginia's law with traditional Equal Protection jurisprudence "was not a convincing analysis. There was, in fact, no program or infrastructure in place for identifying members of the general public who were feeble-minded and then having them institutionalized . . . Saying the two groups were being treated equally 'was really a matter of form over substance.'"[79]

Eugenics Revisited: *Skinner v. Oklahoma*

Buck v. Bell suggests that the Police Powers jurisprudence was losing its influence, and indeed it was. The final blow for this jurisprudence came in *West Coast Hotel v. Parrish,*[80] in which the Court upheld a minimum wage law. From this point on, the Court gave Congress and state legislatures almost free reign to regulate economic matters, requiring only that there be some "rational basis" for legislative action that restricts economic transactions or arrangements in some way.[81]

However, it turned out that the influence of the Police Powers jurisprudence was not quite dead, for a variation of its analysis reappeared in the Court's next forced sterilization case, *Skinner v. Oklahoma.*[82] Fifteen years had passed since *Buck*, and public opinion on eugenics had changed markedly.

In the shadow of Nazi Germany's eugenics program, "American eugenics was becoming publically associated with racism."[83] At issue in *Skinner* was Oklahoma's "Habitual Criminal Sterilization Act," which allowed persons who had been convicted of certain crimes and who were found to be "habitual criminals" to be forcibly sterilized. Jack Skinner had been convicted of armed robbery twice and stealing chickens once, and as a "habitual criminal" faced forced sterilization.

In an opinion by Justice Douglas, the Court noted that only certain kinds of criminals could be reached by Oklahoma's law. For example, those who committed larceny three times could be sterilized, but those who were convicted of embezzlement —fundamentally the same crime, but committed under different circumstances—could not, "no matter how large his embezzlements nor how frequent his convictions."[84] Chicken thieves faced forced sterilization, but the law suspiciously exempted criminals at the higher end of the socioeconomic spectrum from the same treatment. Because this law required one class of persons to bear burdens that others, similarly situated, were not required to bear, it could not be sustained under the Equal Protection clause of the Fourteenth Amendment.

This analysis is, of course, very reminiscent of the Police Powers jurisprudence; the structure of the argument is essentially the same. But it could not be the same kind of analysis, for many of the fundamental features of the Police Powers jurisprudence had no place in the post-New Deal regulatory state. Justice Douglas and the other members of the Court had to come up with a new way of deciding when to apply this more searching form of judicial review to government action, and *Skinner* is an early case in what would eventually be known as the "tiers of scrutiny" approach to adjudicating issues of fundamental rights or equal protection.[85] Justice Douglas wrote that in the context of "one of the basic civil rights of man . . . strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[86] Although the Court would no longer police the boundaries of economic rights such as the right to contract, in *Skinner* the Court began to apply "strict scrutiny" against laws that discriminate in the provision of "basic civil rights" such as "marriage and procreation."[87] The phrase "strict scrutiny," which would be repeated so often in later years, appeared first here, and was an early attempt on the part of the Court to decide how to apply judicial review after the demise of the Police Powers jurisprudence.

Conclusion

Hitler probably had more to do with the ultimate discrediting of eugenics than the Police Power jurisprudence, but we should give credit where credit is due. By requiring that legislative means track legislative ends, Police Powers jurisprudence extended more protection of bodily integrity to people with mental and physical disabilities than did the only realistic alternative at the time, Progressive jurisprudence. With the benefit of hindsight, it is easy to believe that the government should have been more solicitous of the rights of persons with mental disabilities, but Justice Holmes's short opinion was nearly unanimous and "Press reaction [to *Buck v. Bell*] was overwhelmingly positive."[88] The lone dissenter in the case, Justice Pierce Butler, gave no reasons for his dissent. That eight members of the Court and popular press could endorse this decision shows how unproblematic forced sterilization appeared to many people. In lower court decisions prior to *Buck* and later in *Skinner*, the logic of the Police Powers jurisprudence was used to protect people against forced sterilization.

Such protection did not stem from a strong ethical commitment to people with mental disabilities or civil rights *per se*, but rather a commitment to logical coherence and a requirement that legislative means track legislative ends. At least some of the scorn heaped upon "mechanical jurisprudence" was deserved, but, in retrospect, it seems that logical coherence had its beneficiaries.

ENDNOTES

[1] *Buck v. Bell,* 274 U.S. 200 (1927). *See* Stephen A. Siegel, "Justice Holmes, *Buck v. Bell,* and the History of Equal Protection," *Minnesota Law Review* 90 (2005): 106.

[2] *Buck v. Bell*, at 207.

[3] For factory work, *see* Faith Jaycox, **The Progressive Era** (New York: Facts on File, 2005), 402; for law, *see* Michael Willrich, **City of Courts** (Cambridge: Cambridge University Press, 2003).

[4] David E. Bernstein, **Rehabilitating *Lochner*: Defending Individuals Rights Against Progressive Reform** (Chicago: University of Chicago Press, 2011), p. 96.

[5] Francis Galton, **Hereditary Genius** (London: MacMillan and Co., 1869), p. 1.

[6] Garland E. Allen, "The Eugenics Records Office at Cold Spring Harbor, 1910-1940," *Osiris* 2 (1986): 226.

[7] Paul A. Lombardo, **Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell*** (Baltimore: John Hopkins University Press, 2008), chapter 3.

[8] Allen, "The Eugenics Records Office," 227.

[9] Christine Rosen, **Preaching Eugenics: Religious Leaders and the American Eugenics Movement** (Oxford, Oxford University Press, 2004).

[10] Harry Bruinius, **Better for All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity** (New York: Knopf, 2006), chapter 7.

[11] Lombardo, **Three Generations**, pp. 5, 15.

[12] Henry H. Goddard, **Feeble-Mindedness: Its Causes and Consequences** (Norwood, MA: The MacMillan Company, 1914), pp. 7-19.

[13] *State v. Feilen*, 126 Pac. Rep. 75, at 157-58 (1912).

[14] James W. Trent, **Inventing the Feeble Mind** (Berkeley: University of California Press, 1994), p. 188.

[15] *Buck v. Bell*, at 208.

[16] Lombardo, **Three Generations**, appendix C.

[17] Harry H. Laughlin, **The Legal Status of Eugenical Sterilization** (Chicago: The Municipal Court of Chicago, 1930), p. 57; *see also* pp. 53-54.

[18] Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner-Era Police Powers Jurisprudence** (Durham: Duke University Press, 1993), pp. 20-21, 190-93.

[19] Gillman, **Constitution Besieged,** p. 49.

[20] *Lawton v. Steele*, 152 U.S. 133,137 (1894).

[21] 118 U.S. 356 (1886).

[22] *Lawton*, at 137.

[23] 123 U.S. 623, 661 (1887).

[24] Bernstein, **Rehabilitating Lochner**, p. 14.

[25] Morton J. Horwitz, **The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy** (Oxford: Oxford University Press, 1992), pp. 17, 19.

[26] 198 U.S. 45 (1905).

[27] Roscoe Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review,* 605 (1908).

[28] T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 *Yale Law Journal* (1987): 956.

[29] Thomas C. Grey, "Modern American Legal Thought," 106 *Yale Law Journal* (1996): 497.

[30] Richard A. Epstein, **The Classical Liberal Constitution: The Uncertain Quest for Limited Government** (Cambridge: Harvard University Press, 2014), p. 35.

[31] *See* Roscoe Pound, "Liberty of Contract," 18 *Yale Law Journal* (1909): 459.

[32] 208 U.S. 412 (1908).

[33] Dean Acheson, **Morning and Noon: A Memoir** (Boston: Houghton Mifflin, 1962), p. 82.

[34] Grey, "Modern American Legal Thought," 498.

[35] Aleinikoff, "Constitutional Law in the Age of Balancing," 948.

[36] Gillman, **The Constitution Besieged**, p. 54.

[37] Bernstein, **Rehabilitating Lochner**, p. 40.

[38] Gillman, **The Constitution Besieged**, p. 21.

[39] *Alice Smith v. Board of Examiners*, 85 N. J. L. 46 (1912).

[40] *Haynes v. Lapeer*, 201 Mich. 138 (1918).

[41] *Osborn v. Thomson*, 103 Misc. 23, 169 N. Y. Supp. 638 (1918).

[42] *Jacob Cline v. State Board of Eugenics* (1921) included in Harry Laughlin, **Eugenical Sterilization in the United States** (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, 1922), p. 150, was decided in the Circuit Court of the State of Oregon for Marion County.

[43] *Davis v. Berry*, 216 Fed. 413 (S.D. Iowa. 1914). The U.S. Supreme Court reviewed this case and a brief judgment appears in the *U.S. Reports*: 242 U.S. 468 (1917). However, by the time the case reached the Court, subsequent state legislation had made the case moot.

[44] *Mickle v. Hendrichs*, 262 Fed. 687 (D. Nev. 1918).

[45] *State v. Feilen*, 126 Pac. Rep. 75 (1912).

[46] *Alice Smith v. Board of Examiners*, at 51.

[47] *Id.*

[48] *Id.*, at 52.

[49] *Id.*, at 53.

[50] *Id.*, at 54-55, emphasis added.

[51] "Sterilization of Criminals," 23 *Yale Law Journal* 363 (1913).
[52] *Haynes v. Lapeer,* at 141-42.
[53] *Id.*, at 145.
[54] *Osborn v. Thomson*, at 644-45.
[55] As cited in Laughlin, **Eugenical Sterilization**, p.150.
[56] *Mickle v. Hendrichs,* at 688.
[57] *Smith v. Command,* 204 N.W. 140, at 141 (Mich., 1925).
[58] *Id.*, at 142.
[59] *Id.*
[60] *Id.*, at 143.
[61] *Id.*, at 146 (Wiest, J., dissenting).
[62] *Id.*, at 144.
[63] Paul Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," 60 *New York University Law Review* 30, 54 (1985)
[64] Lombardo, **Three Generations,** pp. 103-105.
[65] Lombardo, "Three Generations," 58-77.
[66] *Id.*, 50-57.
[67] Lombardo, **Three Generations,** pp. 105-106.
[68] Stephen Jay Gould, "Carrie Buck's Daughter," *Natural History* 93.007 (1984): 14-18.
[69] Lombardo, "Three Generations," 61.
[70] *Buck v. Bell*, 143 Va. 310, at 323.
[71] Adam Cohen, **Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck** (New York: Penguin Press, 2016), p. 206.
[72] *Alice Smith v. Board of Examiners*, at 55.
[73] *Smith v. Command*, at 145.
[74] G. Edward White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations," *N.Y.U. Law Review* 70 (1995): 588.
[75] *Buck v. Bell*, at 207.
[76] *Id.,* at 208.
[77] V.F. Nourse and Sarah Maguire, "The Lost History of Governance and Equal Protection," *Duke Law Journal* 58 (2009): 959.
[78] *Buck v. Bell*, at 208.
[79] Cohen, **Imbeciles,** p. 273.
[80] 300 U.S. 379 (1937).
[81] *Williamson v. Lee Optical*, 348 U.S. 483 (1955).
[82] 316 U.S. 535 (1942).
[83] Victoria F. Nourse, **In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics**. (New York: W.W. Norton & Co., 2008), p. 130.
[84] *Skinner v. Oklahoma*, at 539.
[85] Walter F. Murphy, James E. Fleming, Sotirios A. Barber, and Stephen Macedo, **American Constitutional Interpretation**, 4th ed. (New York: Thompson/Foundation Press, 2008), p. 951.
[86] *Skinner v. Oklahoma*, at 541.
[87] *Id.*, at 541.
[88] Lombardo, **Three Generations,** p. 174.

Free Press in 1940s Florida: *Pennekamp v. Florida*

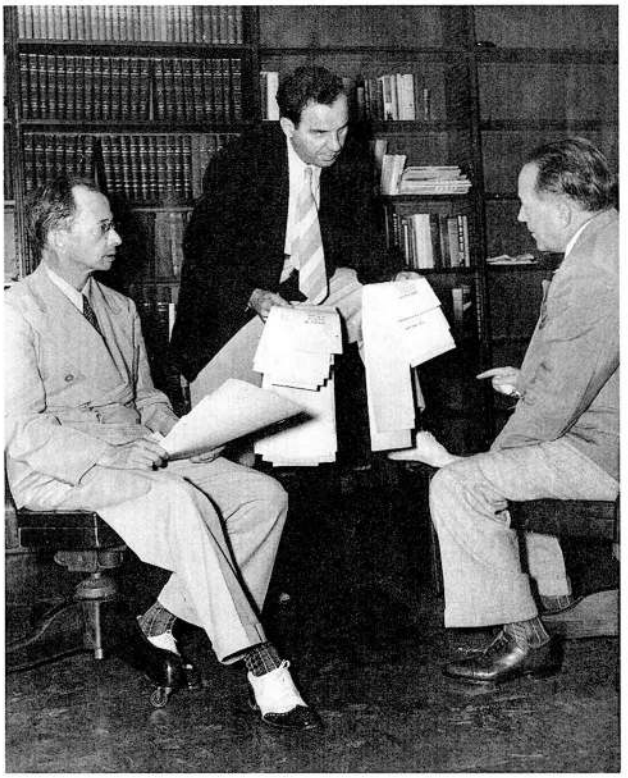
SCOTT D. MAKAR

On the morning of Monday, June 3, 1946, the associate editor of the *Miami Herald* sat pensively, awaiting word on whether the United States Supreme Court had ruled in a major free press case argued earlier that year. When word broke that the Court had unanimously upheld principles of freedom of the press, the editor momentarily sighed relief—but soon put his journalistic talents, along with those of others at the *Herald*, into high gear. They had just won a bitterly contested legal battle of epic proportions. The associate editor, John D. Pennekamp, would henceforth have his name enshrined in the *U.S. Reports* in *Pennekamp v. Florida*, 328 U.S. 331 (1946). His success in one of Florida's highest profile media cases[1] began a string of good fortune for Pennekamp, whose leadership led to the establishment in 1947 of the Everglades National Park and, decades later, a coral reef state park in the Florida Keys, by which most Floridians today associate his name.

Pennekamp Comes to Miami

At the turn of the century, Jacksonville was the center of commerce for and transportation gateway to Florida. But Miami made remarkable strides from 1920 to 1950 to best its North Florida neighbor in virtually every economic category. The 1920s had attracted many northerners to the Miami area, resulting in rapid economic growth. The land bust, major hurricanes, and the national economic depression stifled its development somewhat until World War II, when its strategic location for military operations energized the local economy. Tourism, both domestic and international, played a huge role in the area's development even through national economic downturns.[2] By the 1940s, Miami's population had exploded, experiencing double- and triple-digit percentage rates of increase.[3]

One of the northerners who moved to Miami during its transformative time was John D. Pennekamp, born on January 1, 1897, in Cincinnati, Ohio. He was a natural for the news business, beginning work in the industry at age fourteen and later becoming the news editor for the *Cincinnati Post*. In 1925, he moved to Miami to work for the *Herald*, at which he would hold many editorial positions



This *Miami Herald* press photo of H. Bond Bliss, John D. Pennekamp, managing editor, and Arthur Griffith, editorial writer and columnist, was taken a year after the Supreme Court decision. Pennekamp had been fined $250 and the *Herald* $1,000 when they lost their appeal in the Florida Supreme Court.

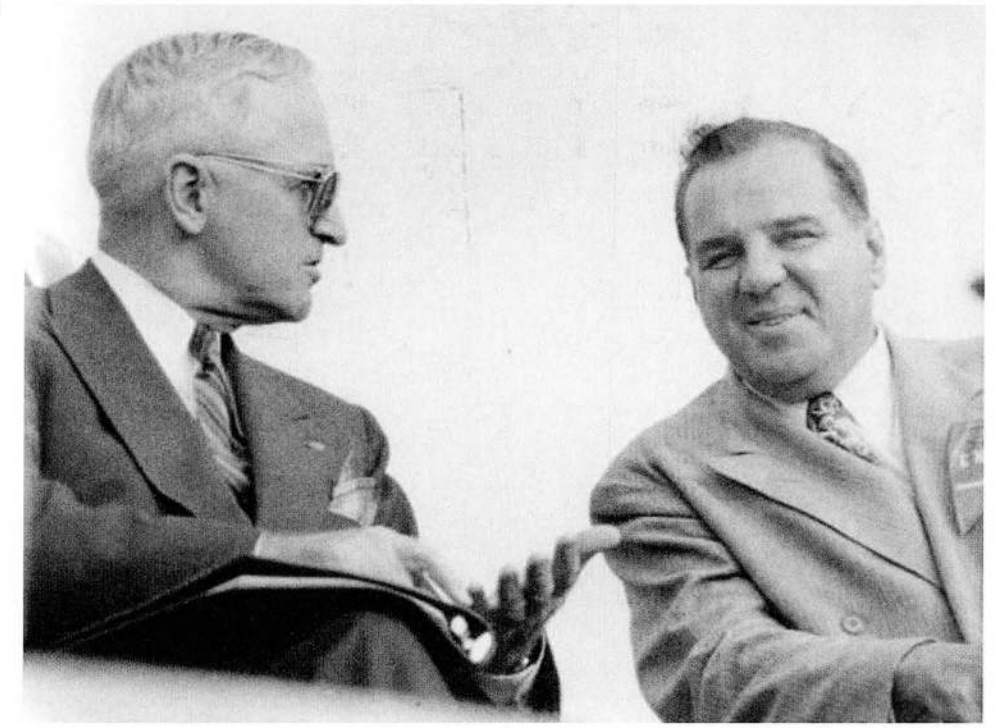
for the following "five exciting decades that saw Florida go from a sleepy tropical peninsula to a teeming metropolitan resort."[4] During this time, he reported on major issues arising in the rapidly developing Miami metropolitan area, starting with the real estate boom in the mid-1920s.[5] He wrote a column, "Behind the Front Page," that appeared in the *Herald* for thirty-five years.[6] Despite his later statewide prominence, he was a "very private person whose proud German bearing allowed no display of public sentimentality" and whose "social life revolved around a few close friends."[7]

His passion for the Everglades was reflected in his preservation efforts, and to a great extent, his legacy today is his association with helping to establish the Everglades National Park that President Truman dedicated in 1947. Over a decade later, he was instrumental in the creation of a seventy-five-mile offshore park named in his honor: John D. Pennekamp Coral Reef State Park.[8]

The *Herald* and the Newspaper Business in Florida

Founded in 1903 as *The Miami Evening Record*, the paper was renamed the *Miami Herald* in December 1910.[9] The newspaper business was vibrant in Miami, particularly during the 1920s when the *Herald* was the world's largest newspaper as measured by its amount of advertising.[10]

Newspaper publishing throughout Florida in the late 1930s was a robust—and at times—bare-knuckled venture; a number of competing newspapers vied for readership

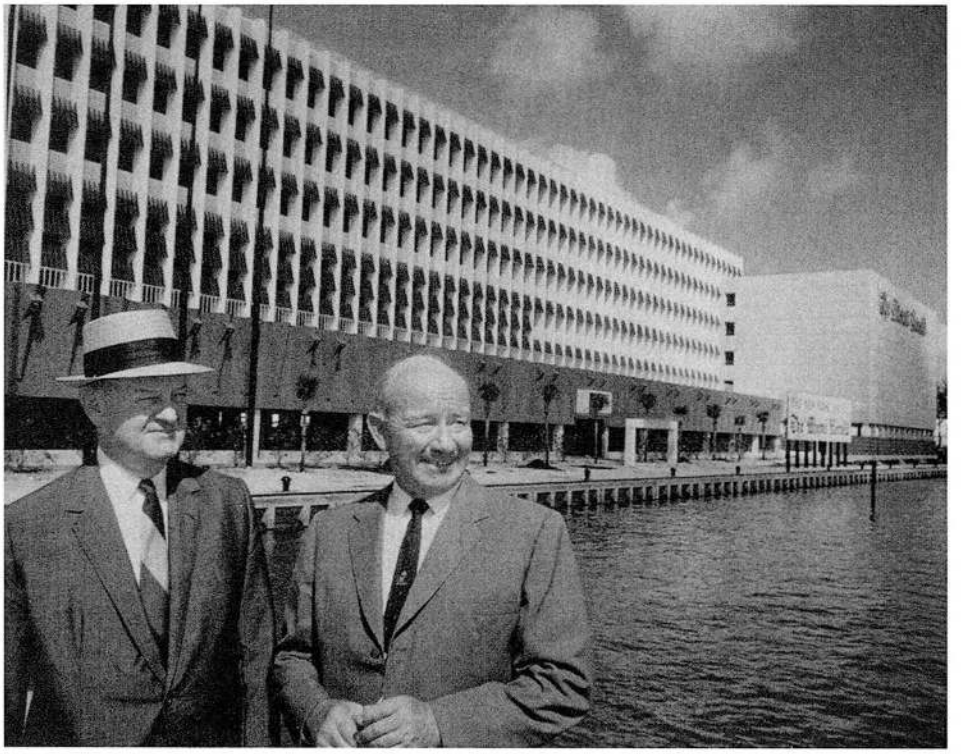


The Everglades National Park commission was reinvigorated by Pennekamp (right) in 1946 thanks to his passion for nature and extensive political connections. President Harry S. Truman (left) came to Florida for the dedication ceremony honoring Pennekamp, and praised his efforts on behalf of the park and the coral reefs.

and journalistic standards were loose. As recounted in **Florida: A Guide to the Southernmost State** in **The American Guide Series**:

> The early Florida editor, regardless of erudition, took his journalism raw. There were no 'weasel-word' qualifications, such as 'it is alleged,' or 'it has been charged.' If an editor believed a man to be a scoundrel he called him that and very likely a blackguard and coward as well. Consequently the life of a newspaperman was at times both exciting and hazardous. Libel laws eventually toned down the phraseology, and so rigid did restrictions finally become that the mere printing of testimony in a criminal trial made a paper liable for damages if the person under charges were acquitted.[11]

The combination of this laissez-faire journalistic climate with Miami's rapid urbanization—with all its attendant virtues and vices—was a tipping point for the *Herald*, which averted bankruptcy in the 1930s and was bought in 1939 by John S. Knight, the son of a successful Ohio lawyer and newspaper publisher.[12] Knight began his career as a sports writer for the *Beacon Journal* in Akron,[13] later becoming its managing editor in 1933.[14] He and his brother James, the *Herald*'s business manager, later formed the John S. and James. L. Knight Foundation, whose mission is to "support[] transformational ideas that promote quality journalism, advance media innovation, engage communities and foster the arts."[15]



Son of a successful Ohio lawyer and newspaper publisher, John S. Knight (left) bought the *Miami Herald* in 1939 and then expanded his newspaper empire to include *Knight Ridder* newspapers. With his brother, James L. Knight (right), he founded a non-profit in 1950 to promote quality journalism.

The *Herald*'s Editorial Criticism of Miami Judges

Knight's arrival was during "free-wheeling wide-open days" that required steadfastness in the *Herald*'s leadership, which explains why Knight and his brother gave Pennekamp greater responsibilities.[16] Knight was comfortable with Pennekamp "at the helm," because he "would be free of any conflict of interest or unsavory associations." He described Pennekamp as a "strong editor" who was "forthright, evaded no issue, and spoke and wrote the truth as he saw it."[17]

Into the 1940s, the *Herald* was a vibrant news organization, moving into a new Art Deco-inspired building in 1941. From these *Herald* offices came two editorials from Pennekamp's desk and a cartoon, each criticizing members of the judicial branch; they would ultimately solidify an ongoing shift in federal constitutional law in favor of a free press and bring unwanted attention to the state court system in Florida, including the Florida Supreme Court.

On November 2, 1944, the *Herald* published the first editorial and the cartoon, both of which were directed at legal proceedings about public nuisances such as illegal gaming. The editorial, "Courts Are Established—For The People," began by saying the judicial branch belongs "to the people" who "have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It."[18] It bemoaned that the local judges (consisting of six circuit judges, two civil court of record judges, and one judge each of the criminal court of record, the court of crimes, county court, and juvenile court) had all been

appointed by the governor to fill vacancies, excepting one who had been popularly elected. The editorial proclaimed: "These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld."[19]

It then scolded the judiciary for the delays and perceived leniency toward defendants in criminal cases.

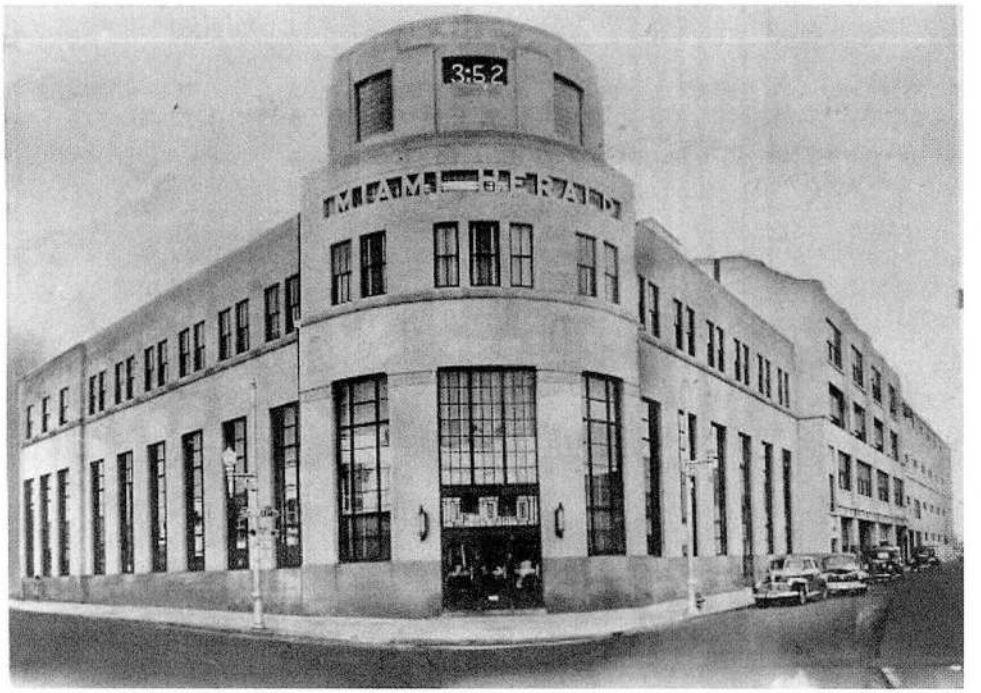
> Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified. . . . The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.[20]

The editorial criticized judicial actions in rape cases, a "padlock action" against a club, and a bookmaking operation, specifically naming the judges whose actions were deemed questionable. For example, it criticized Judge Marshall C. Wiseheart, who "appeared . . . out of the blue sky" after a five-month delay to dismiss the injunction in the club case; the *Herald* proclaimed the "defense got delay when it wanted and prompt decision from the court when it profited it."[21] It also complained about Judge George E. Holt, who struck affidavits in the bookmaking case because the "defendant cannot cross-examine an affidavit."[22] The editorial said "[t]his may be good law" but it causes "people to raise questioning eyebrows and shake confused heads in futile wonderment."[23] The editorial also took issue with procedures in criminal cases, saying "[i]f technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the dead wood and the entanglements."[24] Accompanying the editorial was a cartoon, depicting a judge dismissing a case with the "public interest"—depicted as a common man imploringly saying "But, Judge"—being ignored.

A second editorial appeared five days later on November 7, 1944, entitled "Why People Wonder," highlighting Judge Wiseheart's action in the club case as "an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions." It disparagingly characterized the judge as acting with "speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep."[25] Likewise, the immediate release on bail of a bus driver (who had beaten up a taxi driver, causing a bus strike) was criticized as another example of the legal system working "against prosecution. Speed when needed. Month after month of delay when that serves the better."

The Contempt Order

On November 2, 1944, citations were issued to Pennekamp and the *Herald* ordering them to explain why they should not be held in contempt for the editorials and cartoon.[26] Pennekamp and the paper unsuccessfully moved to dismiss the citation and defended themselves: they "admitted full responsibility for each publication but denied any intention to misrepresent the facts or to charge the individual judges with wrongdoing."[27] They claimed they sought to "correct abuses in the law of Florida and that they were protected in all they said by freedom of the press."[28]



In 1944 the *Miami Herald* began publishing a series of editorials criticizing the local courts for delays and perceived leniency toward defendants in criminal cases.

After a trial, they were found guilty of contempt; Pennekamp was fined $250 and the *Herald* was fined $1,000, neither insignificant amounts (they would be approximately $3,500 and $14,000, respectively, in 2017 dollars).[29] Pennekamp would later characterize the fines as minor, saying the "case would have ended more than a year ago if we had simply paid the relatively small fine. But The Herald realized that the case endangered the right of all Americans to freedom of speech and freedom of the press."[30] So off they went to the Florida Supreme Court, seeking to overturn the order and fines.

The Florida Supreme Court's Ill-Fated Decision

The case came to the Florida Supreme Court in 1945, when the court was still located in its 1913 Supreme Court building on Jackson Square (later named the Whitfield Building in 1952, but demolished in 1978).[31] Legislative authorization had just been given for its new courthouse on Duval Street, which opened in early 1949 (after much controversy and delay) and continues to operate today.[32]

On the court was Chief Justice Roy Harrison Chapman, along with justices William Glenn Terrell, Armstead Brown, Elwyn Thomas, Alto Lee Adams, Rivers H. Buford, and Harold L. "Tom" Sebring. Representing Pennekamp and the *Herald* were Edward E. Fleming, of Miami, Elisha Hanson, of Washington, D.C. (discussed below), and the law firm of Milam, McIlvaine & Milam, of Jacksonville. Florida Attorney General J. Tom Watson represented the state, along with Assistant Attorney General George M. Powell.[33] Filing an amicus brief in support of the state were attorneys F.M. Hudson, James M. Carson, M.L. Mershon, and Giles J. Patterson. All were members of the prominent Florida Historical Society[34] and two, Carson and Patterson, would represent the state in

This cartoon criticizing delays in judicial proceedings about public nuisances appeared in the actual written decision in *Pennekamp v. State*.

subsequent proceedings. Patterson, while Chairman of the American Bar Association's Committee on Cooperation between Bar, Press and Radio and a member of the Jacksonville (Florida) Bar, authored an academic book that chronicled the history of free speech and free press rights, extolled the virtues of a free press, and deplored departures from journalistic ethics that undermined public confidence in the news media. The book, entitled **Free Speech and a Free Press** (1939), held some prominence in the 1940s when publications on the topic had become popular.[35]

The case came to a court already hostile to the press. A decade earlier, in the 1935 case of *Cormack v. Coleman*,[36] the court affirmed contempt orders and fines against a reporter and the editor of the *Miami Beach Daily Tribune* who had erred by identifying the wrong judge in an article insinuating "a cozy relationship that supposedly existed between the judge and the case prosecutor."[37] The named judge, a former justice of the Florida Supreme Court, had been appointed by the governor to conduct a high-profile trial of a state senator facing gambling charges.[38] Per Chief Justice Whitfield, the court by a 5-2 vote perfunctorily affirmed the sanctions, finding the admitted factual error to be "necessarily contemptuous of the court and its processes."[39] The paper's prompt retraction and apology for the error did "not deprive the publication of its contemptuous nature,

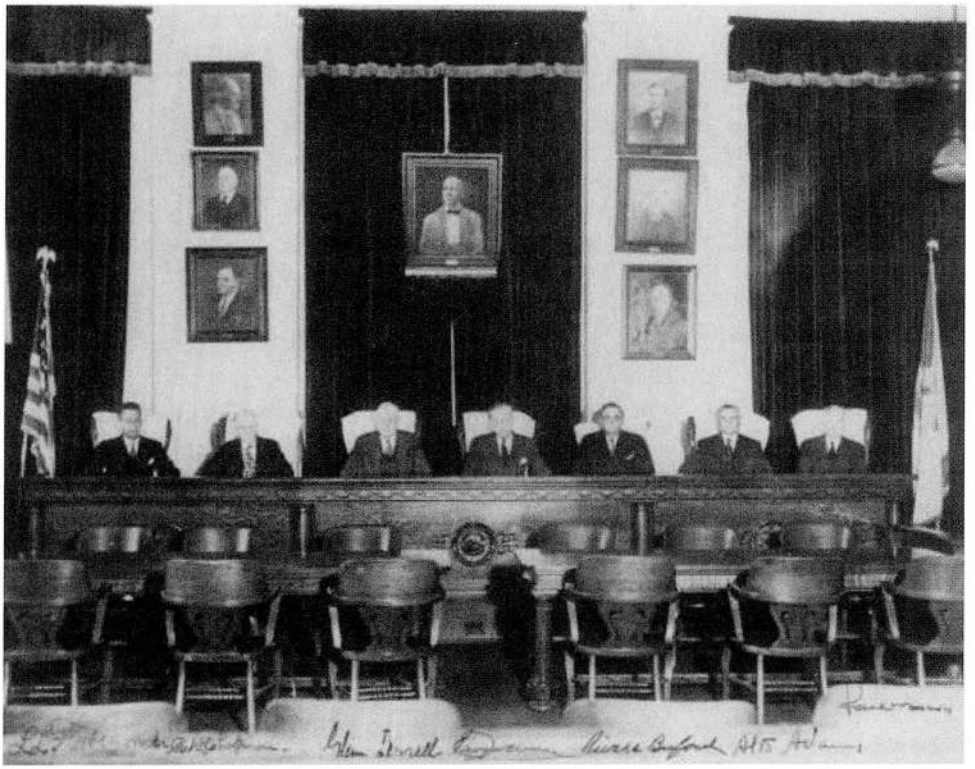
and the judge had authority to impose appropriate penalties for the contemptuous publication."[40] Justice Buford, the lone dissenter, found nothing contumacious in the error, stating the publication neither expressed nor insinuated "any improper conduct on the part of the trial judge who officiated at that trial, and one must draw heavily upon one's imagination to reach the conclusion that the language used carried an insinuation of improper conduct on the part of the trial judge."[41]

Cormack proved to be portentous of the fate of Pennekamp and the *Herald*. On July 24, 1945, the court issued its 5-2 decision in *Pennekamp v. State*, affirming the contempt orders. Justice Terrell, who had concurred in Chief Justice Whitfield's *Cormack* opinion, wrote for the majority, framing all issues raised as turning on "whether or not the cartoon and the editorials were of such content as to warrant the judgment for contempt."[42] Underlying the debate, however, was whether the clear and present danger test applied in state courts and whether it was met in this case. Justice Terrell's majority opinion found little merit to the *Herald*'s legal position and said that "the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges."[43] The opinion continued that the cartoon was deemed "if possible, a worse perversion than the editorial."[44]

> The symbol of the judge in the cartoon does not reflect one attribute of this well-known judicial concept. He wears the bloated "Beer blossom" face of the gay nineties and looks as though he had spent the night before on a jag. The symbol of the defendant fawning over the judge may typify the wishful thinking of the organized criminal gang but to one indoctrinated with respect for law and order it has more the likeness of the overlord of Pluto's kingdom. At any rate, a defendant seated on the dais by the side of and fawning over the judge is a gross slander of our method of administering justice and warrants severe censure. The symbol of a manikin representing the public imploring the court is likewise irrational and a prostitution of anything known to court room procedure.[45]

Furthermore, the cartoon and editorials combined showed a court "grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction any species of sham plea to give it the breaks."[46] In the majority's view, "[w]e can think of no better build-up on which the cerebral plummet could fathom a state of partisanship and unfairness more libelous to the court."[47]

Having determined that the *Herald*'s editorials and cartoon were libelous, Justice Terrell sidestepped the recent U.S. Supreme Court case of *Bridges v. California*, claiming it "did more than decide the law of that case."[48] He also interposed that federal interference in state governmental affairs was limited only to due process concerns and, invoking the Tenth Amendment, that "State Courts still have the power when properly authorized to punish for contempt" if not exercised "unreasonably or arbitrarily."[49] After much derogation of the newspaper, he asserted that "[p]artisan assaults on judges, juries, or witnesses are not within the compass of a free press so long as the case is pending" and that the clear and present danger test was inapt or, if applicable, revealed no arbitrary or unreasonable judicial act.[50] Accordingly, the contempt order was affirmed.[51]



En banc portrait of Florida Supreme Court justices in 1947, showing from left to right: Leo Fabsinski, Roy H. Chapman, Glenn Terrell, Elwyn Thomas, Rivers Buford, Alto Adams, and Paul Barnes. Two years earlier, Justice Terrell wrote the 5-2 majority opinion finding the *Miami Herald* editorials and cartoon libelous.

Justices Buford and Sebring dissented.[52] Justice Buford began by coyly agreeing "with much of what is said in the very able opinion prepared by Mr. Justice Terrell" but concluding that "it would be very easy to follow that opinion in the main and arrive at an opposite conclusion."[53] Pivoting from this premise, he explained:

> As I read the editorials and view the cartoon constituting the basis of the charge, there is nothing in either which imputes a want of fairness, impartiality of integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case then pending in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous, must, by the same token, see that the alleged rights of the unrighteous are determined.[54]

He concluded by saying he felt that *Bridges* "is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear."[55] In the briefest of opinion, Justice Sebring simply said the *Bridges* required reversal.[56]

The United States Supreme Court Weighs In

Defeated in Florida's highest court, Pennekamp and the *Herald* pushed onward

up the judicial ladder, Pennekamp pronouncing that they would "appeal [the court's] findings promptly, not only in behalf of The Miami Herald, but in behalf of the basic rights of free speech and free press generally."[57] On November 5, 1945, the United States Supreme Court accepted review.[58] Oral argument was set for just three months later, requiring much legal work in little time over the holidays.

Briefing was rapid: the petitioner's brief was filed on December 21, 1945 and the respondent's on January 26, 1945. Briefs, though prepared under tight time constraints, were detailed and spirited, each embracing the clear and present danger test but reaching widely divergent results. The "Question Presented," according to Pennekamp and the *Herald*, was whether state judges, who were "annoyed" by the newspaper's editorials and cartoon, must demonstrate a "clear and present danger of high imminence to the administration of justice" to impose punishment for contempt of court.[59] They viewed the decision in *Bridges* as decisive, claiming that the mere "possibility of disrespect for the judiciary" from the publications "is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press."[60] Florida's Supreme Court, by "enforcing silence in the name of preserving the dignity of the bench," acted in an "arbitrary and capricious" way that ran counter to *Bridges*—a decision that the state court all but ignored. The *Herald* spared nothing, claiming the Florida Supreme Court in effect declared that "the First Amendment, and the Fourteenth Amendment to the Constitution of the United States do not apply in Florida."[61]

Prominent D.C. attorney Elisha Hanson argued the case for Pennekamp and the *Herald* in the Supreme Court. He was chief counsel for the American Newspaper Publishers Association, which represented newspapers' interests nationwide.

The State of Florida, not to be one-upped, fired back that the publications were "false or distorted and that, pyramiding deception upon deception, The Herald had drawn unreasonable, unwarranted and false conclusions."[62] This, it claimed, established a "clear and present danger" that the state was entitled to punish as a way to protect the state's judicial system.[63] To accept the newspaper's argument would be to grant "immunity of the press from punishment for anything on earth it chooses to publish."[64] Moreover, the Florida constitution—like that in almost every other state—carved out a qualification on the rights of free speech and free press, which was to hold accountable those who "abuse" them.[65] With the Allied victory over Germany just months earlier, the state did not mince words, claiming somewhat hyperbolically that giving "the press an unlimited right to tear down our cherished institutions would undoubtedly mean that we were paving the road on which some future American Hitler might ride to power."[66] Its view was that each state has the right "to choose its own method of protecting its own institutions" and that the *Herald*'s "false, deliberate, willful and planned attack" on the state trial courts amounted to "a clear and present danger of high imminence to an institution the state is entitled to protect." As closing swipes, the State claimed the *Herald*'s attitude had been "defiant and contemptuous" and that it had

Justice Stanley F. Reed wrote the majority opinion overturning the Florida Supreme Court ruling in 1940. He held that, unless press editorials present a clear and present danger to the orderly administration of justice, courts cannot impinge on the First Amendment by punishing the press for its criticisms of the judiciary. "Weak characters ought not to be judges," wrote Justice Felix Frankfurter in a concurring opinion.

made "no attempt to apologize" for its intentional malevolence.[67]

The American Civil Liberties Union filed an amicus brief in support of the *Herald*, attorneys William Harrison Mizell of Florida and Osmond K. Fraenkel appearing on behalf of the organization.[68] Fraenkel was a legal giant, best known as former general counsel to the ACLU. He appeared in fifteen Supreme Court cases, championing for civil rights and constitutional freedoms.[69]

In addition to their Florida-based attorneys, Pennekamp and the *Herald* had top-flight national legal counsel: Elisha Hanson, a prominent D.C. attorney with much experience in the high court, who was chief counsel for the American Newspaper Publishers Association, which represented newspapers' interests nationwide.[70] Hanson's first Supreme Court argument was in *Grosjean v. American Press Co.*, a landmark case involving an unconstitutional Louisiana tax on larger, urban newspapers that were critical of Governor Huey Long.[71] *Grosjean* is known for its recognition of corporations as "persons" for purposes of due process and equal protection as well as its clarion calls exhorting homage to "an untrammeled press as a vital source of public information" and opining that "to allow [the press] to be fettered is to fetter ourselves."[72]

Oral argument in *Pennekamp* was held on Friday, February 8, 1946.[73] Robert R. Milam, a prominent Jacksonville attorney and former president of the Florida State Bar Association in 1941, commenced the argument.[74] After the state's response, Hanson closed the argument, which was the third of

six in his career and the last of three in the 1945 Term.[75]

Arguing for the State of Florida were Florida Attorney General J. Tom Watson of Tallahassee, who served throughout the 1940s, followed by former Florida State Bar Association presidents James M. Carson of Miami and Giles J. Patterson of Jacksonville.[76] Watson, who had appeared in many Supreme Court cases,[77] had a particularly busy day. After arguing in *Pennekamp*, he argued for himself in the next case, *American Federation of Labor v. Watson*, which involved complex state and federal issues related to a 1944 amendment to Florida's constitution involving the right to work and collective bargaining.[78] Patterson and Carson had also appeared in Supreme Court cases.[79] In one, Carson appeared in opposition to Justice Terrell, who was then in private practice.[80] Rounding out the State's legal team was Assistant Attorney General Sumter Leitner, who appeared on the brief.[81]

After four months of media anticipation, the Court issued its unanimous decision on June 3, 1946.[82] Following up on its recent precedent overturning restrictions on the media, Justice Stanley Reed's opinion for the Court issued a strongly worded denunciation of the Florida courts. Reed, a former Solicitor General of the United States and the last Justice who was not a law school graduate,[83] began by noting that the Court, in its recent *Bridges v. California*[84] decision, had "fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation."[85] *Bridges*, a 5-4 decision, was a watershed case because it applied the "clear and present danger" test from Justice Holmes's majority opinion for a unanimous Court in *Schenck v. United States*, upholding a conviction under the Espionage Act for distribution of circulars to draftees advocating against the draft.[86] By broadening the First Amendment's protection of media commentary on the judicial system, the Court in *Bridges* made the unanimous decision in *Pennekamp* seem almost a fait accompli.

In overturning the Florida Supreme Court, Reed touched upon a number of points about balancing free press rights with the administration of the judicial system in pending, live cases, concluding:

> In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.[87]

The Florida Supreme Court's majority opinion fared poorly. Reed acknowledged deference to Florida Supreme Court's findings but pointed out that the state court's "authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines."[88] As one commentator recently summarized:

> Justice Reed's majority opinion came down hard on Florida, applying the clear and present danger test to find that the contempt citations were inappropriately issued. He explained that, while judges retain some degree of latitude to restrict actions that may prejudice the administration of justice in cases before them, the ability of the press to discuss and critique the judicial system should rarely be impugned. In other words, unless there is substantial evidence to suggest the existence in press commentary of a clear and present danger to the orderly administration of justice, a court is not able, consistent with the First Amendment, to punish the media for its criticisms.[89]

Justice Reed's opinion, read together with the concurrences of Justices Frankfurter, Murphy, and Rutledge, reflects agreement with the basic assessment of Pennekamp and his legal counsel as to the core, free-press principles at stake. Of interest, a footnote in Reed's opinion quotes "Mr. Pennekamp's statement of the editorial policy of the Miami Herald":

> We are ourselves Free—Free as the Constitution we enjoy—Free to truth, good manners and good sense. We shall be for whatever measure is best adapted to defending the rights and liberties of the people and advancing useful knowledge. We shall labor at all times to inspire the people with a just and proper sense of their condition, to point out to them their true interest and rouse them to pursue it.[90]

Reed and the concurring Justices noted that the *Herald*'s criticism focused on judges and the technicalities and delays that were perceived as thwarting the prosecution of criminal cases. That this criticism might affect the mindsets of judges, some being "of a more sensitive fiber than their colleagues,"[91] was insufficient to "close the door of permissible public comment."[92] Justice Frankfurter went further, saying:

> Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations.[93]

In a delicious flourish, he ruminated that "[i]f men, including judges and journalists, were angels, there would be no problems of contempt of court. Angelic judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them."[94] Justice Murphy's short concurrence came quickly to the point. He asserted that the freedom of the press

> includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case.[95]

Indeed, contemporaneous commentary noted that the "Supreme Court has shown no tendency to recede from its strict interpretation of the contempt power, but, on the contrary, the direction has been to deprive even the state courts, under the guise of the Fourteenth Amendment, of the power to punish contempt by publication unless the latter presents a 'clear and present danger' to the administration of justice."[96] *Pennekamp* also was seen as following "logically from the tendency in the past decades to read into the Fourteenth Amendment increasing restrictions upon the states in the whole area of personal liberties."[97]

Reaction in Florida and Around the Country

Reaction to the Supreme Court's decision, understandably, was both swift and intense, the media deploying its ink by the barrel. Newspapers around the country proclaimed victory, effusively praising Pennekamp and the *Herald*.[98] The *Herald* provided highlights of editorials from *The Chicago Daily News*, *The San Francisco Chronicle*, *The Denver Post*, *The Portland Oregonian*, and *The Richmond News Leader*.[99] Florida newspapers joyously joined the victory dance. The *Herald* pointed out that "Florida newspaper editors who followed the Herald

contempt case through state courts into the federal court with the keenest interest, were among the first to congratulate Herald editors on the final outcome."[100] A representative response from the *The Daytona Beach Evening News* said: "We abandoned long ago the theory that 'the king can do no wrong.' We have now assigned to the same garbage can the anachronistic notion that the 'king's magistrate, is equally infallible.'"[101]

The *Herald* showcased its victory in a June 4th edition full of articles, analysis, and deserved self-congratulations. "U.S. SUPREME COURT UPHOLDS HERALD, BLASTS JUDGES IN CONTEMPT ACTION," its headline blared, noting that the "Unanimous Decision Backs Press' Right to Criticize Bench."[102] A prominent statement by the *Herald* above the fold on page one proclaimed "The Press Is Free," saying the "United States Supreme Court's unanimous decision which upheld the right of a newspaper to comment upon the conduct of a judge, should forever end the harassments to which newspapers and their editors have been subjected to autocratic judges."[103] Front page photographs of Judges Barns and Wiseheart, the judges "who convicted the Herald and Pennekamp," were festooned with Justice Frankfurter's statement that "[w]eak characters ought not to be judges"—a journalistic poke in both judges' eyes.

The next day, Radford Mobley of the *Herald*'s Washington Bureau noted that the "*Herald* case is the first unanimous decision handed down by a supreme court in a contempt case. It represents a long battle to obtain this final gain. It is one of the most important civil liberties cases in current history[.]"[104] Fuller Warren of Jacksonville, who would become Florida's thirtieth governor in 1949, said, "You have made a free press freer still by winning this victory."[105] Karl Bickel, a former general manager of the United Press, "wired from his home in Sarasota" to congratulate the *Herald*, saying, "I hope reading the decision will open up a few judicial minds and expand their mental horizon lines as to functions and social responsibilities of a modern newspaper."[106]

The overall effect of the decision and the media's frenzied coverage was "the [state supreme] court receiving a large and undesirable dose of negative publicity."[107] The *Herald* was in celebration mode, but recognized the reality that it would take time for the Court's ruling to change judicial practices and the culture of allowing contempt rulings against the media. It noted that the Supreme Court decision "closely paralleled the recommendations of two state newspaper groups which met in Miami Beach over the week end" to propose legal reforms regarding contempt proceedings.[108] One proposal was to allow for change of venue and trial by jury in such cases; the other was to "repeal a Florida statute relating to contempt as repugnant to the rights of free men in a free world, thus stripping courts of self-assumed 'despotic powers.'"[109] The newspapers' concern in part regarded legislation that had been passed in Florida that facilitated contempt actions against the press.[110] Future courtroom battles loomed. "In the years after [*Pennekamp*], no contempt cases involving out-of-court comment came before the Florida appellate courts, but related cases indicated that if the Florida judiciary had swallowed *Pennekamp*, it had failed to digest the decision."[111] Within months of *Pennekamp*'s issuance, the Florida Supreme Court said that "[a]s a general rule, any publication tending to intimidate, influence, impede, embarrass or obstruct courts in the due administration of justice in matters pending before them constitutes contempt."[112] No mention was made of *Pennekamp*, leading a commentator to say that "this repudiation [by the state supreme court] occurred hardly before the ink was dry in the *Pennekamp* decision."[113] And a decade later in the celebrated murder case of Ruby McCollum,[114] the Florida Supreme

Court—in upholding a contempt citation against a journalist for alleged interference with an ongoing criminal investigation—summarily dismissed the relevance of *Pennekamp* because it involved media commentary about "a case which had been disposed of, and not with reference to a pending case then before the Court."[115] It downgraded *Pennekamp*'s importance, saying it had been "misconstrued and misinterpreted" and "adopted by some as the beacon light and Bible, shield and protector, of those who would destroy public confidence in judicial processes and eventually in the courts themselves."[116] For the time being, the *Herald*'s victory in *Pennekamp* partially insulated Florida's media from judicial sanction for contempt, but not from judicial disdain.

It would not be the last time the *Herald* was to see its name in lights in a major free press case in the United States Supreme Court. Almost three decades later, shortly before Pennekamp retired from the newspaper in 1976, the *Herald* again sought to reverse a Florida Supreme Court decision, this one upholding a "right to reply" statute forcing a newspaper that "assails the personal character" of a candidate for office (or charges malfeasance, misfeasance, or otherwise "attacks his official record") to "publish free of cost any reply" the candidate may wish to make or face criminal sanction.[117] In *Miami Herald Publishing, Inc. v. Tornillo*, the Supreme Court unanimously invalidated the statute, again trumpeting the virtues and responsibilities of a free press ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" that is beyond governmental regulation under free press principles),[118] and providing the *Herald* with yet another victory notch in its First Amendment belt.

Pennekamp's Relevance Today

The decision in *Pennekamp* unanimously solidified the judicial movement toward curtailing judicial contempt powers in the face of free press and free speech interests, a trend that later manifested itself in many aspects of the High Court's First Amendment jurisprudence affecting the press. Today, the case may be viewed as quaint because the idea that a court could punish a journalist for criticizing a judge or judicial system seems both antiquated and inconsistent with modern notions of freedom of speech in an ever-expanding realm of media.

But the tensions between a free press and reportage on the judicial system are timeless. In commentary from *Pennekamp* that continues to have resonance, Justices Frankfurter and Rutledge spoke about the shortcomings of media coverage of court proceedings. Frankfurter deplored "trial by newspaper" and said that "administering justice ought not to be made unduly difficult by irresponsible print."[119] In a moment of levity, he footnoted the "skeptical remarks of H. L. Mencken, a stout libertarian" who viewed the "efficacy of journalistic self-restraint" as futile: "Journalistic codes of ethics are all moonshine. Essentially, they are absurd as would be codes of street-car conductors, barbers or public jobholders."[120] Justice Rutledge focused on standards of journalistic conduct as well, citing existing codes of ethics,[121] bemoaning that holding papers in contempt for factual inaccuracies or intentional misstatements would leave "few not frequently involved in such proceedings."[122] He continued his critique:

> There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news. Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias

> or more blameworthy causes. But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.[123]

Justice Rutledge concluded that "strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. . . . There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government."[124]

Despite today's proliferation of media outlets targeting highly-segmented demographic groups, it remains as it was in 1946—general news coverage of legal proceedings by traditional news outlets still has some of the shortcomings discussed in the Frankfurter and Rutledge concurrences. The internet and segmented coverage of courts have spawned exceptionally useful and highly accurate legal blogs and commentators; but the general public continues to get its legal news in a form that oftentimes reflects significant inaccuracies.

What can best be remembered about the case is the tenacity of Pennekamp and the *Herald* and their unflinching belief in a robust press. In a weekend address to the Associated Dailies of Florida in 1946, Pennekamp had been assigned the topic of "When Is a Newspaper In Contempt?" He concluded his talk as follows:

> You asked me when is a newspaper in contempt. I would say it is never in contempt as long as it is reporting the facts and honestly discussing, analyzing and commenting upon them even to the point of expressing opinions. I would say further that when our service to our readers is less than that we are in contempt of ourselves and of our obligation to our profession.

One can easily imagine a room of reporters and editors on their feet vociferously applauding Pennekamp with abandon. Upon Pennekamp's death at the age of 80 in 1978, then-*Herald* staff writer Carl Hiaasen noted that "Pennekamp once said the bright spot in his career was the Supreme Court fight in 1945-46 that scored a victory for freedom of the press."[125]

ENDNOTES

[1] *See* Joseph T. Eagleton, *Walking on Sunshine Laws: How Florida's Free Press History in the U.S. Supreme Court Undermines Open Government*, 86 FLA. B.J. 8, 22 (Sept./Oct. 2012) (recounting history of some of Florida's major free press cases). It is noted (with pride) that Mr. Eagleton's article flowed from his seminar paper in the author's Fall 2011 course at the University of Florida College of Law on "Florida, the Constitution, and the United States Supreme Court."

[2] Miami. *Wikipedia*, http://en.wikipedia.org/wiki/Miami (accessed Feb. 25, 2016).

[3] *Id.* The growth rate for the decades ending in 1920, 1930, 1940, and 1950 were 440%, 274%, 56%, and 45%, respectively. Florida's entire population in 1940 was about 1.9 million, of which about 172,000 lived in Miami. In contrast, the population of Miami's metropolitan area as of 2010 was about 5.6 million—essentially three-fold the state's entire 1940 population.

[4] Carl Hiaasen, "John Pennekamp Dies at 80; Led Fight to Save Everglades." *The Miami Herald*, June 18, 1978.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] "John Pennekamp Coral Reef State Park." *Wikipedia*, http://en.wikipedia.org/wiki/John_Pennekamp_Coral_Reef_State_Park (accessed February 25, 2016).

[9] "The Miami Herald." *Wikipedia*, http://en.wikipedia.org/wiki/Miami_Herald (accessed Feb. 25, 2016).

[10] *Id.*

[11] **American Guide Series, Federal Writers Project, Florida: A Guide to the Southernmost State (American Guide Series) 124-25** (Oxford Univ. Press 1939) (Newspapers and Radio).

[12] "Charles Landon Knight." *Wikipedia*, http://en.wikipedia.org/wiki/Charles_Landon_Knight (accessed Feb. 25, 2016). Knight expanded his portfolio of newspapers and later merged with Ridder Publications to create Knight-Ridder Newspapers.

[13] What connections, if any, Knight and Pennekamp may have had in the Ohio newspaper business is unclear.

[14] "Knight." *Wikipedia* entry, at 4.

[15] *Knight Foundation, History*, http://www.knightfoundation.org/about/history/

[16] Hiaasen, *John Pennekamp Dies at 80.*

[17] *Id.*

[18] *Pennekamp v. State*, 22 So. 2d 875, 878 (Fla. 1945).

[19] *Id.* at 878.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 879.

[24] *Id.*

[25] *Id.* at 879.

[26] The Florida Supreme Court decision does not explain how the November 2nd citation was expanded to include the November 7th editorial.

[27] *Pennekamp*, 22 So. 2d at 879.

[28] *Id.*

[29] A dollar in 1945 had buying power of about $13.84 in 2017 dollars. *See* **United States Department of Labor, Bureau of Labor Statistics, CPI**. *See* CPA Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm.

[30] "Decision Will Free Press of Harassment by Autocratic Judges, Miami Editor Says." *New York Times*, June 4, 1946, at 4.

[31] Walter W. Manley, II and Canter Brown, Jr., **The Supreme Court of Florida, 1917-1972** (Univ. Press of Fla., 2006), at 159, 164.

[32] *Id.* at 191-93.

[33] In 1938, Justice Thomas had defeated Tampa attorney J. Tom Watson in the primary for a vacancy on the Florida Supreme Court. Justice Thomas was described as "punctilious, courtly, a gentleman—a little stuffy and protocolish perhaps but when relaxed exhibited a gruff sense of humor—good speaker—good anecdote and joke teller." Manley & Brown, **The Supreme Court of Florida**, at 116.

[34] *See, e.g.*, List of Members, Florida Historical Society (1937) (available at University of Central Florida Libraries, UCF Digital Collections, https://ucf.digital.flvc.org/islandora/object/ucf%3A22293/datastream/OBJ/view/The_Florida_historica l_ quarterly.pdf).

[35] *See* Book Review, *A Free and Responsible Press*, 61 *Harv. L. Rev.* 905 (1948) ("Within the past ten years the American people have been immeasurably enriched by a number of works dealing with freedom of speech and of the press. In no period of our history have comparable writings on this subject appeared.") (citing Patterson's book).

[36] 161 So. 844 (Fla. 1935).

[37] Manley & Brown, **The Supreme Court of Florida**, at 135.

[38] *Id.*

[39] *Coleman*, 161 So. at 849.

[40] *Id.*

[41] *Id.* at 850.

[42] *Pennekamp v. State*, 22 So. 2d 875 (Fla. 1945).

[43] *Id.* at 882.

[44] *Id.*

[45] *Id.* at 882-83.

[46] *Id.* at 883.

[47] *Id.*

[48] *Id.* at 884 (citing *Bridges v. California*, 314 U.S. 252 (1941)).

[49] *Id.*

[50] *Id.* at 886.

[51] *Id.* at 887.

[52] Both justices had remarkable legal careers. Buford—who was known as the "most colorful member" of the supreme court—was a prosecutor, a state legislator, Florida's attorney general, and ultimately twice the Chief Justice of the Florida Supreme Court. Manley & Brown, **The Supreme Court of Florida**, at 57-63, 164. Sebring was Florida's "man for all seasons" due to his diverse experiences as an exceptionally decorated military veteran in World War II, a state trial judge, a "judge in the Nuremberg War Crimes Tribunal after World War II," a dean at Stetson University Law School, a trained architect, and the head football coach of the University of Florida. *Id.* at 122-28, 165. During his wartime election to the court, he "offered himself as a protector of constitutionally guaranteed rights and liberties in a time of national crisis and in the midst of calls for severe restrictions." *Id.* at 126.

[53] *Pennekamp v. State*, 22 So. 2d at 887 (Buford, J., dissenting).

[54] *Id.* at 887.

[55] *Id.* at 887. (citing *Bridges*, 314 U.S. 252).

[56] *Id.* (Sebring, J., dissenting) (citing *Bridges*, 314 U.S. 252).

[57] "Miami Herald Ruled Guilty of Contempt." *New York Times*, Dec. 19, 1944 at 19.

[58] 326 U.S. 709 (1945).

[59] *See* Brief of the Petitioners at 2.

[60] *Id.* at 24.

[61] *Id.* at 28.

[62] *See* Brief for Respondent at 5.

[63] *Id.*

[64] *Id.* at 7.

[65] *Id.* at 7-8, 13-14. An appendix to the State's brief, prepared by Giles, J. Patterson, set forth a digest of state constitutions as of 1908, all but six of which had language saying that persons exercising free speech and free press rights were "responsible for the abuse of the right" often termed an "abuse of that liberty." *Id.* at 22-36.

[66] *Id.* at 17-18.

[67] *Id.* at 21.

[68] *Pennekamp v. Florida*, 90 L. Ed. 1295, 1295 (1946).

[69] *See* David Margolick, "Osmond K. Fraenkel Dies at 94; Former Counsel to the A.C.L.U." *New York Times*, May 17, 1983.

[70] Hanson had just published a notable article on the precise topic at issue in *Pennekamp*. *See* Elisha Hanson, *Supreme Court on Freedom of the Press and Contempt by Publication*, 27 *Cornell L.Q.* 165 (1942). Other claims to fame were his publication of "Official Propaganda and the New Deal" in the May 1935 issue of The Annals of the American Academy of Political and Social Science and the sale of his home and estate on Georgetown Road to baseball Hall-of-Famer Walter Perry Johnson. http://msa.maryland.gov/megafile/msa/stagsere/se1/se5/018000/018000/018076/pdf/msa_se5_18076.pdf.

[71] *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

[72] *Id.* at 250.

[73] *Journal of the United States Supreme Court*, October 1945 Term at 147 (available at https://www.supremecourt.gov/orders/scannedjournals/1945_Journal.pdf) (accessed July 31, 2017).

[74] *Id.* Beyond his law practice, Milam had substantial fruit and fertilizer interests and a younger brother in the Florida Legislature. *See* David Nolan, **The Houses of St. Augustine 73** (1995).

[75] He argued, although unsuccessfully, for another newspaper on October 17-18, 1945, in a records subpoena case, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). He argued two months later on Dec. 5, 1945, in the interstate commerce case of *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946), likewise unsuccessfully. His last argument was in *American Newspaper Publishers Ass'n. v. NLRB*, 345 U.S. 100 (U.S. 1953), a successful defense of a labor ruling in the newspaper's favor. His last appearance in a United States Supreme Court case was in *Miami Herald Publ'g Co. v. Brautigam*, 369 U.S. 821 (1962), a libel case in which a state attorney obtained an award of $25,000 compensatory and $75,000 punitive damages against the *Herald* for two of its editorials criticizing him; review was denied. He took part in the trial hearing involving Judges Barns and Wiseheart. *See* "Miami Herald Ruled Guilty of Contempt." *New York Times*, Dec. 19, 1944.

[76] *Journal of the United States Supreme Court*, October 1945 Term at 147 (available at https://www.supremecourt.gov/orders/scannedjournals/1945_Journal.pdf) (accessed July 31, 2017).

[77] *See, e.g.*, *Hill v. State of Fla. ex rel. Watson*, 325 U.S. 538 (1945); *Watson v. Buck*, 313 U.S. 387 (1941).

[78] *Am. Fed'n of Labor v. Watson*, 327 U.S. 582 (1946). He fared no better, the Supreme Court reversing the district court, allowing the case to proceed against the state.

[79] *See Meredith v. City of Winter Haven*, 320 U.S. 228 (1943) (Patterson); *Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138 (1940) (same); *Ocean Beach Heights v. Brown-Crummer Inv. Co.*, 302 U.S. 614 (1938) (same); and *Forbes Pioneer Boat Line v. Bd. of Com'rs of Everglades Drainage Dist.*, 258 U.S. 338 (1922) (Carson).

[80] *Forbes Pioneer Boat Line*, 258 U.S. 338 (1922).

[81] *Pennekamp v. Florida*, 90 L. Ed. 1295, 1295 (1946).

[82] The vote was 8-0, with Justice Jackson taking no part in the decision. *Pennekamp*, 328 U.S. at 350.

[83] "Stanley Forman Reed." *Wikipedia*, http://en.wikipedia.org/wiki/Stanley_Forman_Reed (accessed Feb. 25, 2016).

[84] 314 U.S. 252 (1941).

[85] *Pennekamp*, 328 U.S. at 334.

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

[87] *Pennekamp*, 328 U.S. at 347.

[88] *Id.* at 335.

[89] Eagleton, *Walking on Sunshine Laws* at 30.

[90] *Id.* at 347 n.13.

[91] *Id.* at 348.

[92] *Id.* at 350.

[93] *Id.* at 357 (Frankfurter, J., concurring).

[94] *Id.* at 366.

[95] *Id.* at 370 (Murphy, J., concurring).

[96] *See Civil and Criminal Contempt in the Federal Courts*, 57 *Yale L.J.* 83, 88-89 (1947) (footnotes omitted) (noting that "[n]o such danger has yet been recognized in the three state publication cases reversed since" the Court's non-media contempt decision in *Nye v. United States*, 313 U.S. 33 (1941) (citing *Bridges*, 314 U.S. 252; *Pennekamp*, 328 U.S. 331; and *Craig v. Harney*, 331 U.S. 367 (1947)).

[97] Otto Preston Moore, Jr., *Recent Case, Constitutional Law—Freedom of the Press and Judicial Administration*, 25 *Tex. L. Rev.* 173, 173 (1946).

[98] *See, e.g.*, Lewis Wood, "High Court Upholds Right of Press to Criticize Judges." *New York Times*, June 4, 1946, at 1.

[99] "Congratulations Flood The Herald on Victory." *The Miami Herald*, June 4, 1946, at A5.

[100] "Congratulations Showered on The Herald after Decision." *The Miami Herald*, June 4, 1946 (quoting

editors from *The Daytona Beach Evening News, The Jacksonville Journal,* and *The Pensacola Journal*).

[101] *Id.*

[102] Front page, *The Miami Herald*, June 4, 1946.

[103] "The Press Is Free." *The Miami Herald*, June 4, 1946.

[104] "Decision Upholding Herald Hailed as Sweeping Victory." *The Miami Herald*, June 5, 1946.

[105] *Id.*

[106] "Congratulations Flood The Herald on Victory." *The Miami Herald*, June 5, 1946, at A5.

[107] Manley & Brown, **The Supreme Court of Florida**, at 135.

[108] "High Court Action Parallels Stand of State Press Groups." *The Miami Herald*, June 4, 1946.

[109] *Id.*

[110] *See* "Farrior Says Contempt Act Not Aimed at Press." *The Miami Herald*, June 6, 1946 (noting that Tampa state attorney J. Rex Farrior was the "father" of the legislation and that Farrior denied it was intended to apply to the press).

[111] D. Grier Stephenson, Jr., *Thorns in Their Sides: Courts and Their Critics in Florida*, 4 *Fla. St. U. L. Rev.* 449, 478 (1976).

[112] *State ex rel. Giblin v. Sullivan*, 26 So. 2d 509, 516 (Fla. 1946).

[113] Stephenson, *Thorns in Their Sides*, at 478.

[114] William Bradford Huie, **Ruby McCollum: Woman in the Suwannee Jail** (1956); *see also* Tammy D. Evans, **The Silencing of Ruby McCollum: Race, Class, and Gender in the South** (2016); C. Arthur Ellis Jr., **Zora Hurston and the Strange Case of Ruby McCollum** (2009); *see* generally "Ruby McCollum." *Wikipedia*, https://en.wikipedia.org/wiki/Ruby_McCollum (chronicling the "landmark trial in the struggle for civil rights" and media coverage despite a gag order resulting in a contempt order against Huie) (accessed July 31, 2017).

[115] *State ex rel. Huie v. Lewis*, 80 So. 2d 685, 686 (Fla. 1955).

[116] *Id.*

[117] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

[118] *Id.* at 258.

[119] *Pennekamp*, 328 U.S. at 357, 359 (Frankfurter, J., concurring).

[120] *Id.* at 366 n. 13 (citation omitted).

[121] *Pennekamp*, 328 U.S. at 357, 370 n.1 (Rutledge, J., concurring).

[122] *Id.* at 371.

[123] *Id.*

[124] *Id.* at 371-72.

[125] Hiaasen, *John Pennekamp Dies at 80*, at 2.

Memphis and the Making of Justice Fortas

TIMOTHY S. HUEBNER

> *I feel that my roots are here . . . and where a plant's roots are determine its characteristics.*
>
> Justice Abe Fortas
>
> Speaking at Southwestern at Memphis, 1966[1]

Abe Fortas, who served on the Supreme Court from 1965 through 1969, is often portrayed as a consummate Washington insider. Beginning in the early 1930s and for his entire career, Fortas lived and worked in the nation's capital. As a New Deal lawyer, he held positions in the Agricultural Adjustment Administration, the Securities and Exchange Commission, and the Interior Department. Afterward, he helped build the D.C. law firm of Arnold, Fortas & Porter, advising top corporate clients and taking on high-profile loyalty cases during the McCarthy Era. Along the way, he assisted Texas Congressman Lyndon Johnson in winning a disputed U.S. Senate election, thus cementing a lifelong friendship with a future President that culminated in an appointment to the Supreme Court. After his controversial nomination to be Chief Justice and his resignation from the Court, he continued to practice law until his 1982 death at his residence in Georgetown. But long before he became known as a wealthy Washington power broker, Fortas grew up in an immigrant Jewish family of modest means in Memphis, Tennessee. Justice Fortas was a creature of Washington, to be sure, but he was also in many ways a product of his hometown.[2]

Growing Up in Memphis

The city into which Fortas was born still bore resemblance to a rough river town. Located on a bluff in the southwest corner of Tennessee, Memphis lay just across the Mississippi River from Arkansas and just north of the Mississippi state line. It had grown up as an outpost for lawless flatboatmen in the early nineteenth century—a place for brawlers, gamblers, and desperados of every sort—and later, as steamboats began to

ply the river, it emerged as a bustling center for slave traders and cotton planters. Occupied by Union forces but spared physical destruction during the Civil War, Memphis in the 1870s endured repeated epidemics of Yellow Fever, which led to death, desertion, and de-population on a massive scale. But the last two decades of the century brought an economic and demographic resurgence, as new residents, black and white, flooded into the city from surrounding rural areas. Cotton, hardwood, and, of course, river transportation dominated the economy, and the opening of a railroad bridge across the Mississippi River in 1895, the third-longest bridge in the world at the time, transformed the city into a regional hub for trade. By the turn of the century, Memphis topped 100,000 residents, making it the second-largest city in the states of the Old Confederacy. Heavily Protestant and racially divided, the city was also known for its ethnic and cultural diversity, as significant numbers of Irish, Italians, and Jews called the city home. Despite its rapid growth and rebirth, high rates of murder and crime still dragged down the city's reputation.[3]

Abe Fortas's parents arrived in Memphis from England in 1905. Woolf Fortas and his wife Ray, as they were listed in the census, were originally from Russia and Lithuania, respectively, and they came to Memphis to join Woolf's older brother Joseph, who, after having immigrated decades before, managed a furniture factory in the Bluff City.[4] Although Joseph and his family rented a home in the "Pinch" district of Memphis, a predominantly Irish and Jewish neighborhood on the north end, Woolf and Ray bought a home on McLemore Avenue on the south side of town. The Fortases, who later appeared in the census as "William" and "Rachel," had three children at the time of their arrival—Mary, Nellie, and Meyer. A fourth, Esta, came along in 1907. The youngest—listed in the Shelby County Birth Records as "Abaram" but elsewhere always as "Abe"—was born on June 19, 1910.[5]

William Fortas initially worked as a carpenter and cabinetmaker in the Fortas furniture factory, but for reasons that are unknown, in 1919 he parted ways with his older brother to start a business of his own. Success seemed to elude him. During the 1920s, operating out of a small storefront on South Main Street in downtown, William tried his hand at a variety of businesses—operating a jewelry store, pawn shop, clothing store, then a pawn shop again, before finally turning his business back into a jewelry store. As Joseph Fortas's furniture business prospered and became synonymous with the Fortas name in Memphis, William struggled to establish a footing for himself and his family. During Abe's childhood, the family moved twice, first to Linden Avenue and then to Pontotoc Street—both houses were located on the south edge of downtown in a mostly immigrant neighborhood—but it is not clear that the Fortases were upwardly mobile. Although they initially owned a home, by 1930, William Fortas, sick with lung cancer, listed no occupation for himself, and his family rented the home in which they lived.[6] Describing William Fortas as "a linguist, musician, [and] man of letters," one writer concluded that he "had found the hard competitive world too much for him." Rachel, who apparently never learned to read and write English, never took a job outside of the home, as she devoted herself to the raising of her family and taking care of her ailing husband. With medical bills and no steady income by that time, William and Rachel relied on their children and extended family for support. Abe later claimed that his family had been "as poor as you can imagine," and that they had to make their way "in circumstances of limited resources and opportunity." There is little reason to think that this was not the case.[7]

Young Abe came of age during the era of Jim Crow, and the experiences of African Americans in the city reflected both the vibrancy of black life and the violence of

Operating out of a small storefront on South Main Street in downtown Memphis (pictured circa 1910), William Fortas, father of the future Justice, tried his hand at a variety of businesses—operating a jewelry store, pawn shop, and clothing store. A Russian immigrant who was interested in music and literature, he was unable to thrive in business.

white oppression. At the time, blacks accounted for approximately forty-eight percent of the county's total population. Both the Linden and Pontotoc houses lay just a few blocks south of Beale Street, so Abe grew up in the shadow of "the Main Street of Negro America." Although not far from Memphis's central business district, Beale Street seemed a world apart. Robert Church Sr., the city's leading black businessman, had acquired many of the commercial properties on the street during the 1880s and 1890s, and on weekends Beale beckoned black farmers and sharecroppers from the surrounding region, who, along with the local working-class black population, created a flourishing economic and cultural life that included the blues.[8] Black life on Beale obscured the tense race relations that often prevailed in the city. African Americans lived in the alley behind the Fortas family, and Fortas later recalled that he "played with Negro kids" until he went to school, which was of course segregated. Despite recollections of these innocent encounters, seven-year-old Abe surely remembered the horrific lynching that occurred in Memphis in May 1917. After the murder of a young white girl, 5,000 Memphians came out to witness the burning of Ell Persons, a black man who had supposedly confessed to the crime. After the lynching, three white men in a car tossed Persons's charred, severed foot and head out of the car window, into a group of African American men standing on Beale Street, just a few blocks away from the Fortas home. Four years later, in 1921, a chapter of the Ku Klux Klan was founded in the city.[9]

While the Klan sought to intimidate the Jewish population, Abe immersed himself in music and academics. William Fortas, an amateur musician, encouraged his son to take up the violin, and Abe relished learning to play. With a slender build and long fingers, he seemed suited to the instrument. Abe first took lessons at home from a family friend and then through a Catholic Church in his neighborhood. Eventually, he learned enough to teach others how to play. By teaching, in turn, he earned enough to take lessons through the Memphis Conservatory of Music. There he studied with Joseph Cortese, a Chicago-trained musician and the leader of a popular Memphis musical trio at the time.[10] By age thirteen, Fortas was good enough to begin earning money playing. His first job had been working in a women's shoe store, a job that Abe gladly left behind. In high school, he became director of a band, "The Blue Melody Boys," which played two or three nights a week at a local park, allowing him to earn the impressive sum of eight dollars an evening. The band also performed at parties, as well as high school and college dances throughout the city. The fact that he could make money while making music gave him enormous satisfaction, and by the time he graduated in 1926, Fortas had earned the nickname "Fiddlin' Abe." In his high school yearbook, Fortas attested to his love of music in the published quotation that appeared alongside his picture: "Music is one of the most magnificent and delightful presents God has given us."[11]

If Abe inherited his musical interests from his father, his academic talents set him apart from the rest of his family, none of whom ever went to college. According to his mother, "Making good marks in his school work always seemed to come natural to Abe." He went through the eight-year course of study at Memphis's Leath Grammar School in six years, and he finished the four-year course at South Side High School in three years, graduating at the age of fifteen with the second highest average in his class. "With Abe it was study, study, study. That is the thing I remember most," his older brother Meyer later recalled. Abe's musical talents helped support him—and his parents—throughout high school and beyond. "Abe's fine education cost me practically nothing," his mother observed later, just after he had completed law school. "His music and scholarships have put him where he is today."[12]

Focusing on the violin and his studies must have provided Abe with the inner strength necessary to thrive as part of an immigrant Jewish family in a sea of native-born Protestants. During the 1920s, a militant form of Christian fundamentalism was taking shape throughout the South, and one newspaper at the time described Memphis as a "Baptist Citadel." In 1921, the city appointed a three-member Board of Censors to determine the suitability and morality of theatrical performances and motion pictures. Meanwhile, the famous evangelist Billy Sunday twice visited the Bluff City during the era—first in 1924 and then again in 1925, when Sunday spent eighteen straight days in the city preaching to huge crowds that totaled over 200,000. Like other Christian fundamentalists of the age, Sunday warned of the dangers of modernism, theological liberalism, and the teaching of evolution, while praising biblical literalism. The second of Sunday's Memphis crusades occurred against the backdrop of the Tennessee state legislature's passage of the Butler Act. The law banned the teaching of evolution in public schools and, later that year, led to the Scopes Trial in the town of Dayton, located about three hundred miles to the east of Memphis. In the summer of 1925, the jury's quick conviction of biology teacher John T. Scopes for violating the statute—after two of the most famous attorneys in the country debated creation and evolution before the court—captured the attention of the city. After it was over, Memphis newspapers roundly praised

Scopes's conviction, and Edward Hull Crump, the city's political boss, advocated banning the defense attorney, Clarence Darrow, from the state of Tennessee.[13]

If Protestant fundamentalism dominated the culture, the local Jewish community nourished and recognized Abe's talents and contributed to his educational advancement. Jews had first arrived in Memphis during the late 1830s. In 1853, the first congregation formed in the city, and some years later Jacob Peres arrived from Philadelphia to serve as the city's first rabbi. During the first decade or so of the twentieth century, an influx of Eastern European immigrants like the Fortases doubled the Jewish population of the city, so that by 1912 six thousand Jews called Memphis home.[14] Jews in Memphis were divided between Reform and Orthodox in both their religious practices and social lives, and the Fortas family belonged to the Orthodox congregation, Baron Hirsch. But it was the secularly oriented social organization that emerged out of the Orthodox community—the Arbeiter Ring—that played the most important role in the lives of Abe's family members, who were not very religious. A philanthropic and cultural organization, the Arbeiter Ring sponsored concerts and taught Yiddish. It was at such events that young Abe came into contact with Hardwig Peres, the son of Jacob Peres and one of Abe's eventual Memphis mentors. On one occasion at the Arbeiter Ring Hall, when Abe was very young, he recalled his mother saying to him, "See, that's Mr. Peres." Hardwig Peres was a pillar of the Jewish community and a civic leader in Memphis. A successful merchandise broker, Peres served as a member of the board of directors of the Memphis Chamber of Commerce and as president of the local school board. His younger brother Israel Peres attained prominence as a local chancery court judge. After Israel Peres died of a heart attack in 1925, his brother gave $25,000 to endow a scholarship for local students to attend Southwestern, a small liberal arts college that had just opened its doors in Memphis.[15]

After graduating from Southside High School in 1926, Abe beat out twelve other applicants to become the first recipient of the Israel H. Peres Scholarship at Southwestern.

Attending Southwestern

Originally founded in 1848 in Clarksville, Tennessee as Montgomery Masonic College, Southwestern became affiliated with the Presbyterian Synod of Nashville in 1855. Sluggish enrollments and struggling finances prompted the college to move from Clarksville to Memphis in 1925, and by the time Fortas stepped foot on campus in fall 1926, the institution was known simply as "Southwestern." Its president, Charles E. Diehl, who had initiated the move to the state's largest city at the request of the college's board, had high hopes for the place. A graduate of Princeton Theological Seminary, Diehl had hired an impressive faculty—composed of a number of Ivy League alumni and a handful of Rhodes Scholars—and successful fundraising had allowed the college to begin building a grand campus in the gothic style on 124 acres opposite a large city park on the edge of the city.[16]

President Diehl believed deeply in traditional liberal education, as well as thoughtful moral instruction. The curriculum for the co-educational study body at Southwestern included two years of Bible, two years of English, and two years of Mathematics, Latin, or Greek, in addition to other requirements.[17] Chapel services were compulsory. Although an ordained Presbyterian minister who had served as pastor of a church in Clarksville before assuming the presidency of Southwestern, Diehl was no fundamentalist. In fact, just after Fortas's time at the College, Diehl found himself accused of heresy by a group of local Presbyterian ministers who believed he was not "sound

Charles E. Diehl, president of Southwestern from 1917-1949, had initiated the move from Clarkesville to Memphis the year before Abe Fortas enrolled.

in the faith"—because of his liberal and modernist sensibilities, including his non-literal reading of the Genesis account of creation. Diehl was eventually acquitted of all charges in a hearing before the Southwestern Board of Directors and later in a heresy trial in his home Presbytery. His reputation suffered among the more conservative elements within the denomination, but Diehl thought it a small price to pay for the type of institution he was attempting to build. Diehl and the faculty he hired exemplified a form of early twentieth-century liberal Protestantism that exposed Fortas to a combination of serious moral reflection and intellectual open-mindedness.[18]

For the smart and talented Fortas, who had mostly grown up on the margins and lacked academic role models, attending Southwestern was a transformative experience. Although he apparently lived at home, Abe jumped into college life with both feet. Fortas used the money he earned from his violin playing to buy a car, and he seemed constantly on the move—from sleeping at home to studying and attending class on campus to playing gigs at local concerts and dances. He excelled in his coursework while also devoting himself to a variety of extra-curricular activities. At first he considered studying music, but he eventually decided to focus his attention on English and political science. His professors loved him. "He was a very brilliant student," Dr. A.T. Johnson, a professor of English, later noted. A history professor, John Henry Davis, echoed these sentiments. "He had one of the most incisive minds I have ever seen in an undergraduate in all my teaching experience," Davis noted. "He saw through things into their deeper aspects more than most men do." Fortas earned high grades—A's with a handful of B's—and he later expressed a deep appreciation to the Southwestern faculty who, in Fortas's words, "opened for me new vistas into man's past and future."[19]

While achieving academic success, Fortas navigated student life with aplomb. Arriving at college at the age of sixteen while most of his peers were two years older, the Jewish teenager joined a Protestant student body of some 400 students, composed of young men and women drawn mostly from the city and the surrounding region. The freshmen and sophomore classes—those enrolled since the college had moved to Memphis—included a total of ten Jews, of whom eight hailed from the Bluff City.[20] A number of Southwestern's students were well-to-do. Fortas stayed away from the fraternity scene and the elite campus social clubs—Jews probably would not have been allowed to join—and instead focused on reading, writing, thinking, and arguing. In high school, Abe had made a name for himself as a debater, and as a freshman at Southwestern, he participated in a mock trial about the teaching of evolution, a performance that marked the beginning of his college debate career. During three years on the college's newly formed debate team, he reportedly won seventeen contests and only lost three, while debating such important topics as government regulation of hydro-electric power, international disarmament, and the future of the American jury system. The Southwestern team travelled to schools throughout the middle of the country, and these debate trips—to places such as St. Louis—were no doubt Fortas's first opportunities

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This is one of the six beautiful buildings on the campus on North Parkway

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A description of Southwestern, "The College of the Mississippi Valley," in 1926, at the time of Fortas's arrival on campus (it was renamed Rhodes College in 1984).

to travel far outside of his hometown. He eventually served as president of the debate club, known as the "Quibbler's Forum."[21]

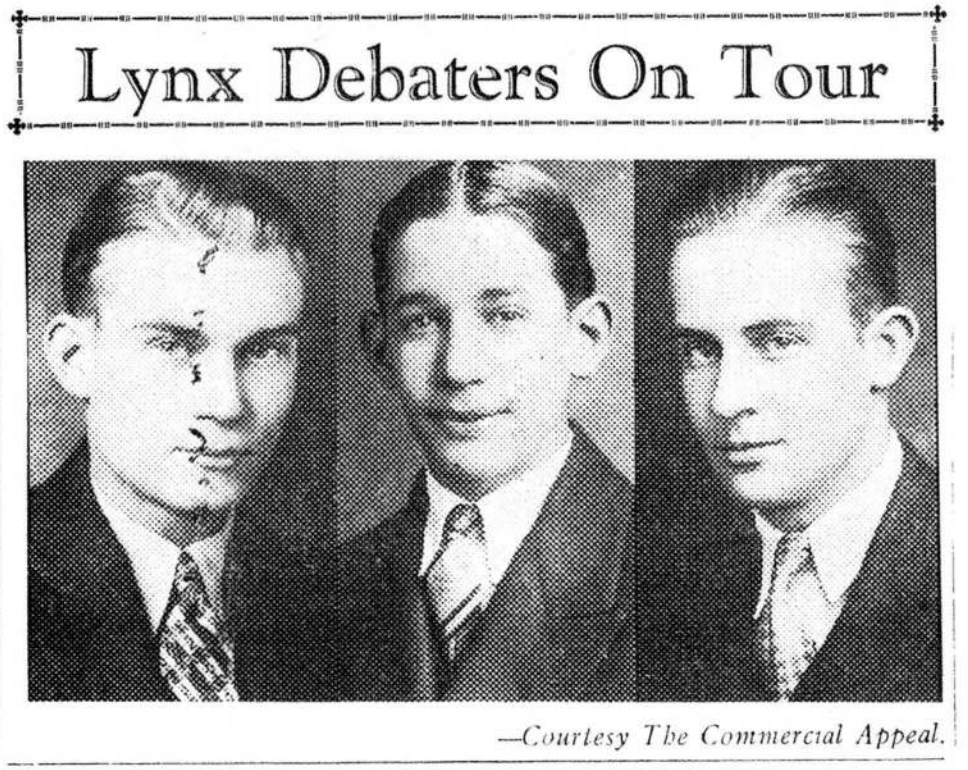
Aside from debate, Fortas took an active part in other student activities and organizations. He oversaw the poetry section of the college's literary magazine. He was inducted into both the national honorary fraternity for leadership, Omicron Delta Kappa, and the literary honor society, Sigma Upsilon, the latter of which he also served as president. In addition, he served as secretary-treasurer of Alpha Theta Phi, a scholastic honor society and forerunner to the college's Phi Beta Kappa chapter. Most interestingly, Fortas joined about a dozen-and-a-half students and a handful of faculty members as part of a campus philosophical club known as the "Nitists." "Each member," according to the yearbook, "contributes a paper during the course of the school year and reads it in meeting, whereupon it is discussed by others."[22] According to a friend's recollection, Abe presented on the topic, "Is Life Worth Living?" and concluded in the negative. For one who questioned the value of life, Abe certainly lived it to the fullest, never slowing down while in college. Noting his numerous interests and accomplishments in referring to these years in his life, one newspaper reporter described him as "a natural born hustler."[23]

Music also continued to be important to Fortas's social life during his college years. He played in the Southwestern orchestra and during his sophomore year served as its

director.[24] But apart from any formal responsibilities, he continued to play the violin for all sorts of occasions, as is evident from articles in the student newspaper. In Spring 1929, he conducted two orchestras that provided the musical entertainment for the Men's Pan-Hellenic Council's "All-Greek" annual dance. That fall, he joined with a group of students who went on a local radio station to promote an upcoming football game between Southwestern and the University of Arkansas, playing a piece on his violin as part of a program that included vocal solos and school cheers. Such was Fortas's reputation that one article, in describing the music to be played at a fraternity "tea-dance," noted that "collegians will tap the floor to measured beat and the jazz tunes of Abe Fortas and his orchestra." It seemed that any cluster of musicians that collaborated with Fortas took his name.[25] Playing the violin served to reinforce the work ethic, precision, and discipline that Fortas exhibited in other aspects of his life. In other words, violin not only rounded out his academic interests, it also shaped his personality and his relationships. While classmates enjoyed Fortas's musical talents, they also respected his maturity, humility, and confidence.

In college, finally, Fortas developed an activist streak that set him apart from many of his classmates. His studies in literature and politics, Bible and philosophy no doubt prompted the young scholar to consider his own place in society as a Jew, as well as that of others—African Americans and the poor—who existed on the margins. He certainly saw himself as an outsider. During his junior year, Fortas served as the president of the independent "non-fraternity club" and urged his fellow students to vote for socialist candidate Norman Thomas for President of the United States. At the end of that year, he tried his own hand at politics when he unsuccessfully ran for student body vice president. And as president of the Nitist club, he invited the leading local African American minister to speak on the Southwestern campus. Fortas later recalled that this was "the first Negro who had ever come there" and the first time he "shook hands with a Negro." Reflecting on how his liberal racial attitudes took shape, Fortas later mused, "It must have been sometime when I was in college, and it must have been the result of thinking or reading or something" that caused his own views to develop on the subject.[26]

In the spring of 1930, Fortas graduated with honors from Southwestern and, with the help of President Diehl and Hardwig Peres, secured a scholarship to law school. Having decided to pursue the law, Fortas considered Harvard and Yale, and both men did all they could to assist him. Diehl had gotten to know Fortas well during his time at the college. His academic accomplishments and musical talents, in addition to the fact that he was Jewish and younger than his peers, made Fortas stand out among the student body. Diehl liked him and wrote strong recommendations on his behalf. Describing Fortas as "one of our first honor men," Diehl made clear that Fortas did not have the means to attend law school. "His people are poor," Diehl wrote to Harvard Law School, "and he has secured his education by means of his own efforts, aided somewhat by friends who know and believe in him." Diehl went on: "The boy really needs all the help he can get, and you would not regret bestowing a scholarship upon him. He is a young man who will be heard from, and I commend him to you for your very careful consideration."[27] Peres favored Yale, and he again played a crucial role in charting young Abe's course. Israel Peres, the former Memphis judge, had attended Yale as both an undergraduate and law student, and Hardwig Peres wrote to Yale explaining that Fortas had been the first recipient of the Peres Scholarship at Southwestern. Playing up the rivalry between the two law schools, Peres also noted that the president of Southwestern was "corresponding with Harvard to get one of their scholarships." Peres continued, "[B]ut of course I



The March 21, 1930 edition of *The Sou'wester*, the school newspaper at Southwestern, reported that the college's debate team was off on a six-day trip through Illinois and Missouri, where they debated American disarmament. Young Fortas, an outstanding debater, is pictured in the center.

would prefer Yale." At the same time, Peres wrote to his friend Diehl, asking him to write a recommendation to Yale, a request with which Diehl happily complied.[28]

Because of Peres, young Abe preferred Yale. After completing the scholarship application that Peres had arranged to have sent to Fortas, the soon-to-be Southwestern graduate expressed his gratitude to Peres. "Nothing could be closer to my desire than to have the opportunity of going to Yale; not merely because of its excellence, but also because there I may have the opportunity—not of rivaling him whose memorial scholarship I now hold, but of following in his footsteps," Fortas wrote.[29] Fortas earned admission to both schools, which was apparently no great feat at the time. During the 1930s, both Harvard and Yale admitted large entering classes and then eliminated two-thirds of their admitted students through strict grading. More important was the fact that Fortas earned scholarships to both schools—quite an achievement during the Depression, a time of intense competitions for such awards. The Yale scholarship paid a bit more, which only confirmed Fortas's preference for following Peres's path. At that point in his life, Fortas had spent little time outside of the South. Although he had travelled with the debate team and had spent part of the summer in 1929 taking two courses at the University of Wisconsin, the young southerner had never been to the East Coast.[30]

Maintaining Hometown Ties

Yale Law School marked the start of Fortas's professional career, but Memphis continued to hold an important place in his life. His mother, siblings, and extended

family all remained in the Bluff City, and he would return from time to time over the next several years for visits. More important, having successfully launched Fortas to the top echelon of American legal education, his Memphis mentors continued to offer support and counsel from afar. Diehl and his young protégé formed a solid bond soon after Fortas's graduation from Southwestern. Midway through Fortas's first year at law school, in December 1930, William Fortas succumbed to cancer. Abe stayed in New Haven, choosing not to make the long, expensive train trip back home for his father's funeral.[31] The Diehls did all they could to offer support. Mrs. Diehl called on the widow Fortas at the family home, and President Diehl wrote to Abe to offer condolences. In his letter, Diehl recalled first learning of William Fortas's illness. "I well remember the day when you and I were going to have a talk, and your father was taken sick," Diehl wrote. "Instead of having our meeting you had to go to the Baptist Hospital, and we never did have that talk that I have wanted to have with you. Sometime when you are home on vacation, we will have it." Diehl went on, in a pastoral way, to discuss how his religious faith served as a "great consolation" at the time of his own father's passing. Touched both by Mrs. Diehl's visit to his mother and President Diehl's words of comfort, Abe sent an extended handwritten letter of thanks. Acknowledging the "kindness, genuineness, and thoughtfulness" of Diehl's letter, Fortas expressed his deep gratitude. "I treasure in my heart what you have done," he wrote. Abe went on to discuss his studies at Yale—which he described as "grueling"—and promised to see Diehl that summer when he returned home.[32]

In subsequent years, Diehl and Fortas developed a warm relationship based on mutual admiration and respect. Fortas graduated from Yale in 1933, and he immediately landed both a teaching post with Yale and a position in the Agricultural Adjustment Administration (AAA) in New Deal Washington. For the next five years, Fortas commuted back-and-forth between New Haven and the nation's capital. From Memphis, Diehl watched Fortas's rapid rise. The Southwestern president undoubtedly enjoyed his conversations and correspondence with Fortas, for whom he had great affection. Diehl also saw the value in promoting the success of the young alumnus. In the aftermath of Diehl's trial for heresy, during which Southwestern's reputation had suffered, in fall 1933 Diehl confided to Fortas some of the troubles the college was experiencing. "As you know, there are some people down this way who are not friendly to us," Diehl wrote. "I hear that some of them are circulating reports around Memphis to the effect that Southwestern is not much of a college, that its credits are not accepted by other institutions, and that the State Teachers College [now the University of Memphis] far outranks Southwestern." Dismissing such talk as "rubbish," Diehl asked Fortas to attest in writing to the value of his education at the school—to reiterate the words that he had expressed in person to Diehl the previous summer.[33]

In a spring, 1934 reply, Fortas offered an endorsement of his undergraduate experience. Not only did he reveal that he had recommended Southwestern to a Yale law professor and his wife, who were discussing where to send their son to college, Fortas also described his educational background as on par with those of "graduates of the large eastern universities." More to the point, Fortas spoke disapprovingly of the "standardization of personality" at the more established East Coast institutions and praised the atmosphere at Southwestern, "where playing chess with the professors is a favorite indoor sport, and where the influence of people in daily contact with the realities of city life is very noticeable." The following year Diehl saw fit to place Fortas on a list of notable alumni, used for purposes of promotion and development,

which included two U.S. Senators, a former U.S. Solicitor General, and former U.S. Attorney General. Only a handful of the alumni on the list had earned their degrees during the new century. By 1934, only four years after his graduation, Diehl obviously took great pride in Fortas's achievements. For many years afterward, Diehl reportedly kept a copy of Fortas's senior thesis on his desk as an example of what Southwestern's best students could accomplish.[34]

Memphis newspapers also took an interest in Fortas's career. During the 1930s, the Memphis *Commercial Appeal,* the morning paper, and the Memphis *Press Scimitar*, the afternoon paper, provided extensive coverage of Fortas's professional advancement. The *Commercial Appeal* noted in March 1933, that he had become editor of the *Yale Law Journal* and written an article on wage assignments in Chicago and later that year covered his hiring by the Agricultural Adjustment Administration under General Counsel Jerome Frank. When he came home to visit family in 1937, the *Press Scimitar* made his return to Memphis a headline story, and when in 1939 he left the Agricultural Adjustment Administration to become counsel for the Public Works Administration (part of the Interior Department), the paper even editorialized about Fortas's success, seeing it as a chance to tout the education that the city had provided to the young man. "Memphis is honored every time one of its citizens is honored..." the *Press Scimitar* wrote. "Memphis has great educational opportunities and they are available to those who have the ambition and determination to take full advantage of them."[35] Although these articles uniformly took note of Fortas having graduated from Southside High and Southwestern, none of the newspaper coverage of his early career mentioned that the successful young Memphian was Jewish. Civic pride seemed to matter more than his religious preference.

Meanwhile, Fortas maintained strong connections to Hardwig Peres and the Memphis Jewish community. Although he married a Protestant from the Northeast, Carolyn Eugenia Agger, in 1935, Fortas remembered his roots. When a prominent Memphis Jew, Sam Shankman, published a history of the Peres family in 1938, he asked Fortas to write a brief recollection of Hardwig Peres in the form of a letter to Peres, which the author included as a foreword to the book. "For many years, I thought of you with awe," Fortas wrote. "... Not until I entered Southwestern did I really meet you, and not until some years thereafter did I have the assurance and maturity to talk with you as boy to man." Fortas went on: "Awe yielded to admiration; and admiration to respect and affection. I hold no man in greater esteem than you."[36]

Like Diehl, Peres valued his friendship with Fortas, and he made continued efforts to assist the young man. When Fortas was serving as assistant director of the Public Utilities Division at the Securities and Exchange Commission (SEC), Peres apparently lobbied on Fortas's behalf for him to secure one of the leadership positions at the SEC. In an April 1939 letter, Fortas thanked his patron in advance for offering to communicate with U.S. Senator Kenneth McKellar and Congressman Walter Chandler on his behalf. Although grateful for the help, Fortas, by this time an experienced New Dealer, frankly acknowledged that anti-Semitism in Washington limited his opportunities. He noted in the same letter to Peres that it was impossible for him to have been appointed to serve with his friend Jerome Frank at the SEC, "because that would result in two Jews being on the SEC... a thing which in the present climate of opinion is neither possible nor desirable."[37] Nevertheless, Fortas continued to rise, and in the summer of 1942, after serving briefly as general counsel of the Public Works Administration, became Undersecretary of Interior. Harold L. Ickes, who went on to become the

longest serving Secretary of the Interior in U.S. history, made him his right-hand man.

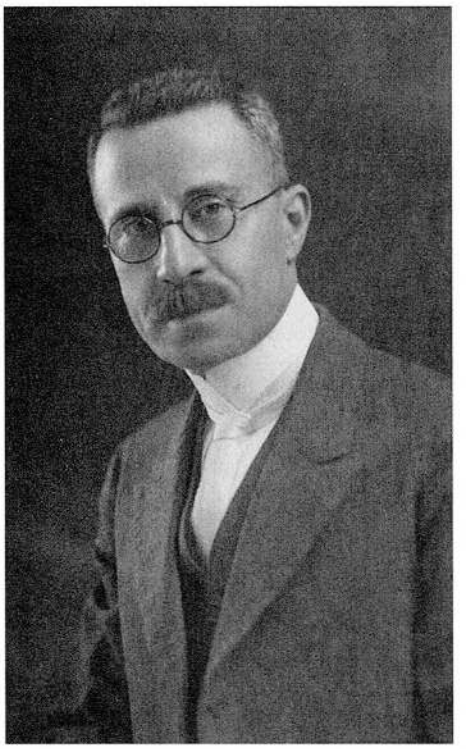
In the midst of World War II, Fortas continued to confide in Peres. The first political controversy of Fortas's career came in the summer of 1943 when New Deal critics objected to Fortas's draft reclassification at the behest of President Franklin D. Roosevelt and Secretary Ickes. At the time, Fortas actually held a number of positions in government, and his expertise on matters of policy—through his membership on various government committees and commissions—ranged from petroleum to Puerto Rico. Fortas knew how to get things done in Washington, and Ickes thought him an indispensable man. Still, when some congressional Republicans mounted character attacks, some of which included anti-Semitic remarks, Fortas chose to resign his position and enlist. The criticism stung. Fortas wrote to Peres throughout the wartime controversy. "I could not escape the feeling that another attack on a Jew in connection with the deferment issue would do tremendous damage to all Jews in this country," he wrote in September 1943. "This last consideration weighed most heavily with me. I felt that if there were in the future a strong wave of anti-Semitism in this country, I should never be able to evade the feeling that I had somewhat contributed to it." Fortas confided to his old friend, "I hope that I have done the honorable and decent thing." He concluded the letter with a statement about the sacrifices of public service, perhaps foreshadowing the financial scandals that would plague him at the end of his career. "The plain fact is that people generally do not understand the disadvantages and hazards of honest public service in a conspicuous post," he wrote. "They do not realize that it involves absolute rejection of financial or economic benefit." After resigning his position with the Interior Department, Fortas enlisted in the Navy, but within a month found himself discharged from the service for medical reasons—for "ocular tuberculosis," an eye condition that had afflicted him a few years before.[38]

The controversy over Fortas's draft status eventually blew over, but Peres's influence lingered. As Fortas wrote to Peres about these events, Peres responded by sending Fortas clippings of the Memphis newspaper coverage. The hometown papers demonstrated remarkable loyalty to Fortas throughout the controversy—they still never referred to his being Jewish—and one newspaper item announced that Fortas would be returning to Memphis, during which an open house would be held in his honor at the home of his brother Meyer. "All friends of the family are invited to call," the piece concluded. Peres, who was surely among the callers, remained active in Memphis on Fortas's behalf. After Fortas's discharge from the service, Roosevelt re-nominated him for his old position at the Interior Department, and Peres wrote to Senator McKellar and enlisted others—including Diehl—to lobby them as well.[39] Meanwhile, Fortas told Peres about his work on "Persian Gulf oil problems." "In connection with this work," Fortas explained, "I have been getting some information about Palestine. I hope that when I am in Memphis in March you will take time to talk with me about that problem." Peres, a lifelong Zionist, continued to exchange letters with Fortas over the next few years on the matter of a Jewish homeland, and Fortas too came to embrace the Zionist position.[40]

Meanwhile, Diehl and Southwestern continued to tug at Fortas. After delivering a speech at the City College of the City of New York in the fall of 1945, Fortas sent a copy to Diehl, who remained at the helm of Southwestern. Rather than a simple acknowledgement of the speech and accompanying note, Diehl instead offered a lengthy critique of the ideas of the alumnus. "With most of your address I am in hearty accord," the college president wrote. But he went on to gently admonish Fortas that he had left God out of his discussion of morality. "As you know quite well, most people are not guided

by reason, but by emotion, and I do not believe that we can have a just and enduring peace by relying upon reason, enlightened self interest, or mere material possessions," Diehl wrote. "Somehow I believe that we have got to have a higher authority than man's reason, a Divine authority, which we who are made in His image must obey, One to whom we must give account." The genteel Presbyterian pastor reminded the nonobservant Jew of a conversation that they had had many years before in Diehl's office about religious faith, and Diehl concluded the letter by noting that he had included a copy of a sermon written by a Presbyterian pastor friend and fellow Southwestern alumnus.[41]

The following June, Fortas returned to Southwestern, at the invitation of Diehl, to deliver the "Alumni Day Address" during the commencement celebration. It was a warm Memphis homecoming for Fortas, who, after a decade-and-a-half of important government service, had recently left his position at the Interior Department to start the D.C. law firm Arnold & Fortas with his old Yale professor and New Deal associate Thurman Arnold. The largest Alumni Day crowd in the college's ninety-eight-year history attended the event, and the audience included Fortas's family members, as well as both Diehl and Peres. A few years before, the *Press Scimitar* had referred to Fortas as "one of Washington's brilliant young men," and on this occasion the paper offered an adoring account of the former Memphian, calling him "probably Southwestern's outstanding graduate" and proudly quoting Fortas in saying that he considered Memphis "[his] first home."[42]



Beginning in 1926, Hardwig Peres took an interest in young Abe Fortas. Pictured here during the 1930s, Peres not only endowed the scholarship that allowed Fortas to attend Southwestern, he also received an honorary degree from the college in 1935. Peres corresponded with Fortas for more than two decades, until Peres's death in 1948.

In his 1946 speech at the college, "An Approach to Progressive Policy," Fortas offered a vision of an activist government at home and abroad, one that would combat the threats of famine and fascism overseas while tackling inequality and injustice in the United States. Perhaps taking some of the advice that Diehl had offered six months earlier, Fortas offered at least one direct reference to the connection between religion and morality, when he alluded to the dangers posed by atomic weapons: "Man's technology has so far out-stripped man's sociology that we are like a child who knows how to kill but is completely ignorant of the Sixth Commandment." Fortas concluded the speech with a call to action and an appeal to the role of Southwestern and other higher educational institutions in bringing about the change that he believed was required.

Most strikingly, Fortas made a handful of references to the issue of civil rights. Eight years before *Brown v. Board of Education*, Fortas urged his white southern audience to rethink their commitment to racial segregation. "It seems to me that our domestic problem and specifically the problem of the South must also be dealt with positively," he stated. "... We

must not fall into the trap of assuming that what is must be divinely right and must at all costs be protected from change." Fortas continued: "We must realize that in this country of ours the democratic and constitutional promises of opportunity for liberty and the pursuit of happiness are not the exclusive possessions of a few. They are the rights of all."[43] It would be another eighteen years before the first African-American students would enroll at Southwestern, and Memphis remained a deeply segregated city, but in his 1946 speech, Fortas offered a bold vision for the future of the college and the country. The minutes of the college's meeting of the Board of Directors later referred to the speech as "the high point of the year," and the college published and widely distributed Fortas's remarks, apparently without controversy. The *Press Scimitar* also carried a favorable account, although it focused on Fortas's foreign policy recommendations rather than his comments about segregation.[44]

During the late 1940s and 1950s, Fortas lost some of his most important personal connections to Memphis. Just a few months after the speech at Southwestern, his mother Rachel died of a heart attack at home after a long illness. Two years later, in November 1948, after a lifetime of service to the Memphis Jewish community, the venerable Hardwig Peres passed away at the age of eighty-nine. Appropriately, Fortas made a generous gift to the Israel H. Peres Memorial Fund in memory of Hardwig Peres, thus helping to allow future generations of Memphians the opportunity to study at Southwestern.[45] In 1949, Charles E. Diehl retired as president of the college, and Peyton N. Rhodes (for whom Southwestern was renamed in 1984) assumed the presidency of Fortas's alma mater.[46] Meanwhile, Diehl and Peres's common interest in Fortas—in whom both had taken such pride—seemed to have built an unbreakable bond between the Presbyterian college president and the Jewish businessman. They began corresponding at the time Peres endowed the scholarship for young Abe, and Peres proved to be one of the college's most important Memphis benefactors. Diehl responded to Peres's generosity by bestowing an honorary degree upon Peres in 1935, and the following year Peres donated an oil portrait of his brother Israel to the college. When Diehl warmly received it, Peres wrote to Diehl, lauding his "broad spirit as a wonderful asset to this community."[47]

Still, if Fortas lost some of his personal ties to his hometown, the relationships with family members, as well as with Southwestern and the Peres family, endured. His siblings and their children remained in the Bluff City, and his nephew Alan, the son of Abe's brother Meyer, went on to become a member of Elvis Presley's famous "Memphis Mafia."[48] Meanwhile, Southwestern maintained a strong relationship with its notable graduate. Fortas continued to give regularly to his alma mater, and he occasionally represented Southwestern at ceremonial occasions in Washington, such as the inauguration of Georgetown's president in 1949. "I am honored to represent Southwestern anywhere and at any time," he wrote at the time. President Rhodes corresponded with Fortas for several years and called him on the telephone when he had occasion to be in Washington. In 1955, Rhodes invited Fortas back to campus to speak at the alumni luncheon at his twenty-fifth reunion, at which time Fortas made the rounds in town, visiting with family members and talking with old friends. Hardwig Peres's nephew, Hardwig "Harvey" Peres Posert, meanwhile, carried on the tradition of community service in Memphis that had meant so much to his uncle, including championing the Israel Peres Scholarship at Southwestern. When Posert died in March 1958, Fortas made a gift to Southwestern in his memory. "As you know," Fortas attested in a note to President Rhodes, "my life was deeply affected by my association with the Peres family."[49] And Memphis newspapers continued to cover Fortas's

career with gusto. Of course, his appointment to the U.S. Supreme Court by President Johnson in 1965 prompted a fresh round of Memphis media profiles of the hometown boy who had fiddled his way through Southwestern, made a name for himself among Washington's rich and powerful, and landed a seat on the nation's highest court.[50] To all Memphians, it seemed, Fortas was a great source of civic pride.

The Making of a Justice

What does it mean to say that a person is a product of a place—to say that Memphis helped to make Justice Fortas? Certainly, it was in Memphis that Fortas learned his earliest lessons about life. It is where he formed family relationships and first friendships as a youth. It was where he acquired the skill and discipline to play the violin and where his mind expanded during his college years, beyond the immediate confines of his humble environment and into other realms of human culture, achievement, and possibility. But apart from these fundamental elements of personality, his Memphis upbringing also helped to shape some of Fortas's specific attitudes about law and justice. This influence was evident in at least three areas.

First, the experience of growing up poor in Memphis—living on the edge of society during his childhood years as his father

Abe Fortas, during the late 1930s, as a Yale Law School graduate and young New Dealer. His roots—Jewish, poor, and Southern—would continually inform his belief in justice for the poor, freedom for religious minorities, and civil rights for African Americans.

attempted to support his large family—surely affected Fortas's ideas about protecting the legal rights of the poor and marginalized. A pair of scholars who have analyzed the socio-economic backgrounds of the Justices of the Supreme Court describes Fortas, along with Thurgood Marshall, as one of the two most "underprivileged" Justices to ever occupy a seat on the Supreme Court.[51] When he first joined forces with Thurman Arnold in 1946, Fortas began a successful and lucrative career as a D.C. corporate lawyer, but because Fortas did not have the advantages enjoyed by others growing up, he sympathized with the plight of the poor and frequently referred to promoting the values "of compassion, of understanding, and of justice" in law and society.[52] For a corporate lawyer, Fortas retained, as Anthony Lewis put it, an unusual interest in the "philosophy of criminal law," as he frequently wrote and spoke on the subject.

Specifically, Fortas took a deep interest in indigent defendants securing the right to counsel. When the Justices asked him in 1962 to take the case of Clarence Earl Gideon, a drifter convicted of petty theft who had submitted an *in forma pauperis* petition to the Supreme Court from a Florida jail cell, Fortas embraced Gideon's cause. Knowing that arguing the case gave him a chance to convince the Court to overturn its 1942 decision in *Betts v. Brady*, which had denied that the right to counsel applied in state cases except in special circumstances, Fortas relished the opportunity. According to Lewis, Fortas and his associates spent months building an argument that the Sixth Amendment required the protection of the right to counsel for defendants accused of serious offenses in state courts. In Lewis's words, "[Fortas's] oral argument was as thorough, as dramatic, as suave and—most important to the Justices—as well-prepared as anything that could have been done for the best-paying corporate client."[53]

Fortas won Gideon's case, as in 1963 a unanimous Court in *Gideon v. Wainwright* overruled *Betts* and held that the right to counsel was included among the rights incorporated by the Fourteenth Amendment to apply to the states. It might not only have been Fortas'ss poverty that prompted his devotion to the right to counsel for poor defendants. Perhaps Fortas knew that in 1917, during his childhood, Memphis had established the first public defender east of the Mississippi River, only the third public defender office in the nation at the time. Regardless of whether he was aware of this bit of legal history about his hometown, Fortas believed deeply in the cause. As he noted in another speech at Southwestern, in 1966, Fortas felt that, with the due process revolution in cases such as *Gideon*, the Supreme Court was helping to bring about "the extension of the benefits of law and of our material achievements to all people and not just a fortunate few." In an interview that same year, Fortas lamented the sad state of legal services for the poor. "Lawyers have been the tool of the enemy—out of reach of the poor . . . Our traditional system of voluntary legal aid and legal aid societies is totally inadequate . . . Only about 10 per cent of those persons needing legal aid are actually serviced," he argued.[54] Even if the Court was eager to hear *Gideon* and overturn *Betts*, Fortas brought a personal passion to the subject that certainly helped Gideon's cause.

Second, the experience of growing up Jewish in Memphis during the Scopes Trial influenced his view of the appropriate place of religious doctrine in public policy. At the time of Scopes's conviction under the Tennessee anti-evolution law, a handful of other states in the South had passed similar statutes. One of those laws, from Arkansas, came to the Supreme Court in 1968 in the case of *Epperson v. Arkansas*. Three years before, Fortas had reached the pinnacle of his career when President Johnson appointed him to the Supreme Court. Given his Memphis public school education during the 1920s, Justice Fortas found it difficult to distance himself

from the matter of state anti-evolution legislation. While one of Fortas's law clerks advised against Fortas even voting to grant certiorari in order to hear the case as the state of Arkansas was not enforcing the statute, Fortas wanted the Court to get involved. In response to the clerk's memo, Fortas wrote, "I'd rather see us knock this out."[55]

The Justices were united in wanting to strike down the statute, but Fortas took the lead in arguing that the Arkansas anti-evolution statute violated the Establishment Clause of the First Amendment. In the Justices' conference, others thought the law overly vague or in violation of the free speech of teachers. Fortas had a different perspective. When asked to write the majority opinion, Fortas invoked the test laid out by the Court in 1963 in *Abington School District v. Schempp*, a case banning state-sponsored religious practices in public schools, in order to take aim at the statute for its sectarian purpose. Relying on a clerk's research on the matter of the statute's intent, Fortas framed the Arkansas case as akin to the Scopes Trial, as he started and ended the opinion in *Epperson* by discussing the Tennessee case, even citing autobiographies that had been written by the two famous attorneys in the trial, Darrow and William Jennings Bryan. "No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens," Fortas wrote in the opinion "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." He concluded by citing not the words of the Arkansas statute, but the Tennessee statute under which Scopes had been convicted. "Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language," he wrote, "but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." Most of Fortas's colleagues signed onto the opinion. Even if it failed to interpret the statute with precision, Fortas's opinion nevertheless reflected the dominant notion among the justices that minority rights, including the rights of religious minorities, stood at the center of the nation's evolving understanding of liberty.[56] Growing up Jewish in Memphis during the 1920s—a fundamentalist place at a fundamentalist time—undoubtedly shaped Fortas's view of the case.

Third, Fortas's experiences of seeing segregation and racial oppression in Memphis affected his outlook on matters of racial justice and civil rights. Having first considered the reality of Jim Crow during his college years, Fortas took a progressively more liberal stance on the question of the civil rights of African Americans, as was evident in his 1946 speech at Southwestern. Two decades later, in 1966, when the college awarded him an honorary degree and Justice Fortas spoke at its opening convocation, he again addressed his southern hearers in bold terms about his—and the nation's—commitment to the rights of all Americans. By that time, Congress had enacted the Civil Rights Act and the Voting Rights Act, and Southwestern at Memphis (as it had become known) had admitted its first black students. Fortas's hometown was changing. In his address, Fortas lauded "the great social revolution" in American life, "a revolution directed at the emancipation and upgrading of the Negro and the poor." With a unique southern perspective on the issues confronting the nation, Justice Fortas both praised and challenged his audience. He acknowledged the "formidable task" of the South in overturning segregation, in moving past "deep-seated customs and tradition." At the same time, Fortas urged a wholesale embrace of these revolutionary changes, in order create a "new and more vital South—richer and greater because it more closely approximates man's religious and moral conceptions—because it is based on the principle that all men are created equal before the law."[57]

During his brief tenure on the Court, Fortas demonstrated a rock-solid commitment to African Americans' civil rights. He voted with the majority in cases upholding the Voting Rights Act, striking down the poll tax, and advancing the desegregation of public schools. He wrote the majority opinion in *Brown v. Louisiana*, the 1966 case in which he struck down as a violation of the First Amendment a Louisiana breach of peace statute that had been used against African-American civil rights protesters in a public library. But it was the Fourteenth Amendment, with its ringing phrases of "due process" and "equal protection," that ushered in the civil rights revolution and that embodied Fortas's career-long commitment to racial justice. In a paper on the Fourteenth Amendment delivered in 1968, in commemoration of the centennial of its passage, Fortas expressed his deepest principles on the subject. "The revitalization of the Fourteenth Amendment that has occurred in the past generation or so has . . . [brought about] the mighty accomplishments of our time," he argued. "The great command of the Fourteenth Amendment—equality under the rule of law, protecting the fundamental rights of humanity—is, after all, basic in our religious and ethical ideals." In 1972, after his resignation from the Court and in the midst of President Richard Nixon's re-election campaign, Fortas offered a more intimate view. Warning against the dangers of rolling back these revolutionary changes, Fortas harkened back to his childhood in Memphis. "As a Southerner—born and brought up in the Mississippi Delta—I recall the outrages of the Ku Klux Klan, directed against Jews, Catholics, and Negroes," he wrote in an op-ed piece for *The New York Times*.[58] It was a rare public expression of a private man's personal commitments.

Of course, Fortas's constitutional values—a belief in justice for the poor, freedom for religious minorities, and civil rights for African Americans—have been obscured by the ethical scandals that ended his brief tenure on the Court. After President Johnson nominated him for the position of Chief Justice in June 1968, Senators questioned the appropriateness of his close relationship to the President, as well as his acceptance of a large honorarium raised by friends and clients for his teaching a course at American University. Senate opposition prompted Johnson, who by that time had announced that he was not running for re-election, to withdraw the nomination. Nearly a year later, *Life* magazine reported that Fortas had received a sizable honorarium for serving as a consultant to a charitable foundation, a financial relationship that many viewed as unethical. After spending many months mired in controversy, on May 14, 1969, Fortas resigned his seat on the Court.[59]

Whatever shortcomings or scandals typically associated with him, Fortas was an idealistic Justice who possessed a distinctive moral vision for society. "The Constitution is more than a set of precepts which can be enforced in the courts. It is more than a chart for litigation—it is a way of life; a national philosophy; a social theory; a political ethic; and a guide to national morality," he argued in a 1967 speech.[60] While we know much about the forces that shaped Fortas's life and work—especially the legal realism movement at Yale—Johnson always treated and trusted Fortas as a fellow southern liberal, as one whose background was similar to his own. Describing him as "a man of humane and deeply compassionate feelings," Johnson believed that, in nominating him for the Chief Justice position, Fortas would carry out the revolution in rights that had been the hallmark of the Supreme Court under Chief Justice Earl Warren.[61] Fortas's early life experiences—growing up poor and Jewish in a racially divided city, as well as his formative relationships with mentors Diehl and Peres—undoubtedly influenced his liberal attitudes about law and justice. Even if he ended up a consummate Washington insider, Abe Fortas was made in Memphis.

The Sou'wester

48TH YEAR SOUTHWESTERN AT MEMPHIS VOL. 48, NO. 1

U. S. Supreme Court Justice Returns To Give Opening Convocation Address

By DAVID ADCOCK

Supreme Court Justice Abe Fortas, who became known as "Fiddlin' Abe" when he helped pay his way through Southwestern as a part-time musician, returned to his Alma Mater last Friday to receive the honorary degree of Doctor of Civil Law.

Justice Fortas, who was graduated with honors from Southwestern in 1930 and studied law at Yale, was cited by President David Alexander as a "jurist who adorns your profession with your grasp of the law, the eloquence of your mind, and, above all, your compassion for your fellow man."

In his address, Justice Fortas reminded the students that "your generation in the South has the challenge and opportunity which the social revolution presents — the challenge to accept the revolutionary chance in the status of the Negro to create from the fragments of the old mainstream . . . a new and more vital South — richer and prouder because it is based upon the principle that all men are equal before the law; and because it will add to the South the full productive capabilities of its vast Negro population as receive generations gradually come to take advantage of the new opportunities opened to them for self-respect, dignity, and achievement."

At the same time, Justice Fortas chided "many of your generation" for responding "negatively and destructively." Some, he said, have viewed this social revolution as "a clarion call to action . . . perhaps as many of your generation . . . I regret to say . . . have responded negatively."

The war in Vietnam, Justice Fortas noted, has not acted as an energizing, unifying force as World War II did.

"I hope that this new isolationism will not be fatal—that it will not succeed in dissuading our President from the firmness and persistance needed to demonstrate to China that it, too, must tolerate the existence of nations of different ideology."

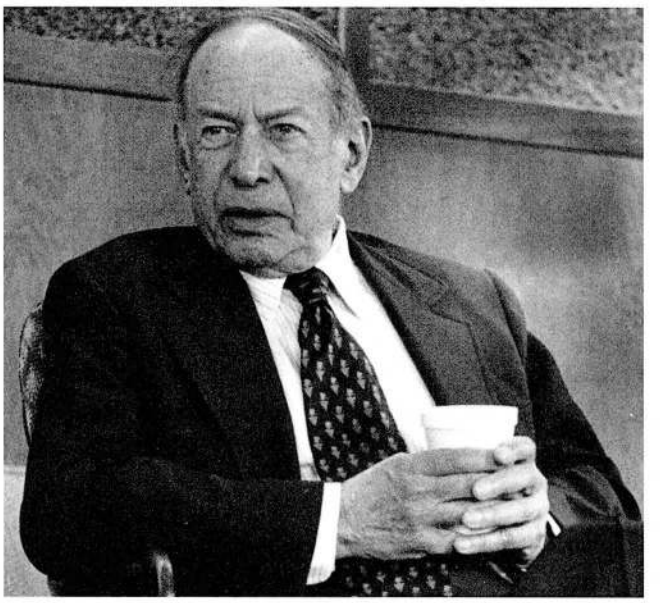
The degree was presented to Justice Fortas in Southwestern's Fisher Gardens by President Alexander. Four hundred were present, including two sisters, a brother, three nephews, and three nieces of the jurist. Justice Fortas flew back to Washington after attending an open-air reception following the ceremony.

Staff Photo by Jim Nicholas

DURING HIS ADDRESS to the first convocation of the school year, Supreme Court Justice Abe Fortas reminisced about his years at Southwestern. He was a member of the class of 1930.

The September 23, 1966 edition of *The Sou'wester* reported Associate Justice Fortas's return to campus for opening convocation. President David Alexander awarded Fortas an honorary degree, and the Justice urged his audience to embrace the revolution in civil rights.

Author's Note: The author would like to thank Regan Adolph of Temple Israel Archives, Wayne Dowdy of the Memphis/Shelby County Room at the Memphis Public Library, Bill Short of the Rhodes College Archives, DeAnna Adams of the Registrar's Office at Rhodes, and Marcia Levy, a Fortas descendant and current Memphis resident, for their assistance. The author also acknowledges the helpful comments of Laura Kalman, Michael Nelson, and Stephen R. Haynes.



Abe Fortas, speaking at Southwestern at Memphis for the last time, in 1981, just a year before his death.

ENDNOTES

[1] *Address by Abe Fortas, Associate Justice, Supreme Court of the United States, Southwestern at Memphis, Memphis, Tennessee, September 16, 1966*, Rhodes College Archives, Memphis, Tennessee.

[2] Fortas's early life in Memphis receives little attention in biographies. Bruce Allen Murphy, **Fortas: The Rise and Ruin of a Supreme Court Justice** (New York, 1988), pp. 2-7, devotes about five pages to Fortas's Memphis years, while Laura Kalman's excellent **Abe Fortas: A Biography** (New Haven, Conn., 1990) devotes about six pages.

[3] Gerald Capers, **The Biography of a River Town—Memphis: Its Heroic Age** (Memphis, Tenn., rep. ed., 1966); **Bond and Sherman, Memphis in Black and White** (Charleston, S.C., 2003), pp. 74-93; **Robert A. Lanier, Memphis in the Twenties: The Second Term of Mayor Rowlett Paine, 1924-1928** (Memphis, 1979), pp. 72-74. Coincidentally, one of the most enduring histories of Memphis was written by Capers, a friend of Fortas's and fellow member of the Southwestern class of 1930. A southern river town with a sizable immigrant population, Fortas's Memphis was not unlike Brandeis's Louisville—although Brandeis grew up more than fifty years before. On Louisville at the time, *see* Melvin I. Urofsky, **Louis D. Brandeis: A Life** (New York, 2009), pp. 1-24.

[4] It is astonishing how little can be said with certainty about the Fortas family. The census for 1910 lists them as "Woolf" and "Ray," whereas they call themselves "William" and "Rachel" thereafter. They are both listed in the 1910, 1920, and 1930 censuses as having been born in England. In 1910 and 1920, they also state that their parents were born in England, but in 1930, just before his death, Woolf listed his parents as having been born in Russia. In the 1940 census, Rachel, whose maiden name was Berzansky, continues to list her birthplace as England. Kalman's biography, relying on an interview with Esta Fortas, describes Woolf and Ray as having been born in Russia and Lithuania, respectively, and having later spent time in England before coming to the United States. A history of the Fortas family, obtained by the author from Fortas descendant Marcia Levy, contains the same information. Joseph Fortas, who arrived in the U.S. in 1884, was naturalized in 1899. His naturalization record shows him as having migrated from Russia, and it is highly doubtful that the brothers were born in different countries. Still, Rachel's 1946 newspaper obituary describes her as a native of Leeds, England. Thus, I am basing the idea of her Lithuanian heritage on Kalman's interview with Esta Fortas and the Fortas family history.

[5] Joseph Fortas and Woolf Fortas, **Thirteenth Census of the United States, 1910** (NARA microfilm publication T624, 1,178 rolls). Records of the Bureau of the Census, Record Group 29. National Archives, Washington, D.C., viewed at www.ancestry.com. Nowhere else in the records or sources for this paper was Abe Fortas ever referred to as "Abaram" or "Abraham." It was always "Abe."

[6] *R.L. Polk & Co.'s Memphis City Directory, 1919* (Memphis, 1919); *R.L. Polk & Co.'s Memphis City Directory, 1921* (Memphis, 1921); *R.L. Polk & Co.'s Memphis City Directory, 1922* (Memphis, 1922); *R.L. Polk & Co.'s Memphis City Directory, 1924*, (Memphis, 1924); *R.L. Polk & Co.'s Memphis City Directory, 1925* (Memphis, 1925); *R.L. Polk & Co.'s Memphis City Directory, 1926* (Memphis, 1926); *R.L. Polk & Co.'s Memphis City Directory, 1927* (Memphis, 1927); Woolf Fortas, United States of America, Bureau of the Census. Fifteenth Census of the United States, 1930. Washington, D.C.: National Archives and Records Administration, 1930. T626, 2667 rolls, viewed at www.ancestry.com; Bond and Sherman, **Memphis in Black and White**, p. 80.

[7] Charles Edmundson, "The Great Persuader," *Commercial Appeal*, December 11, 1966, Mid-South Section, 13; Charles B. Seib and Alan L. Otten, "Abe, Help!—LBJ," *Esquire*, 63 (June, 1965), 147. Kalman, relying on an interview with Fortas's sister Esta, offers a slightly different assessment of the Fortas family's socio-economic status, for Esta recalled that the family always owned an automobile and employed a domestic servant. It is hard to know—given the facts stated above—whether these were truly markers of the Fortas family's upward mobility. *See* Kalman, **Abe Fortas**, pp. 7-8.

[8] Population figures are from "U.S. Demography 1790 to the Present," viewable at https://www.socialexplorer.com/6f4cdab7a0/explore; Preston Lauterbach, **Beale Street Dynasty: Sex, Song, and the Struggle for the Soul of Memphis** (New York, 2015).

[9] Transcript, Abe Fortas Oral History Interview, 8/14/69, by Joe B. Frantz, Internet Copy, LBJ Library, 28; Bond and Sherman, **Memphis in Black and White,** p. 86; Lauterbach, **Beale Street Dynasty,** pp. 208-10; Kenneth T. Jackson, **The Ku Klux Klan in the City, 1915-1930** (New York, 1967), p. 46. On the lynching of Ell Persons, *see also* Kenneth W. Goings and Gerald L. Smith, "'Unhidden' Transcripts: Memphis and African American Agency, 1862-1920," in Goings and Raymond A. Mohl, eds., **The New African American Urban History** (Thousand Oaks, Calif., 1996), pp. 142-46.

[10] Edmundson, "Great Persuader"; Berkley Kalin, "The Cortese Brothers and the Early Memphis Sound," *Museum Quarterly* 1 (1972), n.p.

[11] Seib and Otten, "Abe, Help! – LBJ," 147; Kalman, **Abe Fortas**, pp. 8-9; "Fortas's Loves: Music, Law and

Kinfolks," *Memphis Press-Scimitar*, July 1, 1968; Southside High School *Scrapper* Yearbook, 1926. James Dickerson, based only on the fact that Fortas lived a few blocks from Beale, claims that Fortas "was a product of the wild and wooly Beale Street music scene." Not only does Dickerson imply that Fortas played on Beale Street, but he also asserts that Fortas "met the linchpins of Memphis's underworld community of drug dealers, criminals, bootleggers, and other nefarious types." He also implies that Fortas had a sexual relationship with the blues musician "Memphis Minnie." None of these claims is supported by evidence or corroborated by other sources. *See* Dickerson, **Goin' Back to Memphis: A Century of Blues, Rock'n'Roll, and Glorious Soul** (New York, 1998), pp. 38-40.

[12] Edmundson, "Great Persuader"; "Fiddling Abe Fortas, 22, Leaves Memphis Dancers For High Legal Post With Uncle Sam's Farm Bureau," Memphis *Press Scimitar*, November 27, 1933.

[13] Edward J. Larson, **Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion** (New York, 1997), pp. 24-25; Roger Biles, **Memphis in the Great Depression** (Knoxville, Tenn., 1986), p. 24.

[14] Selma Lewis, **A Biblical People in the Bible Belt: The Jewish Community of Memphis, Tennessee, 1840s-1960s** (Macon, Ga., 1998), pp. 9, 100.

[15] Lewis, **Biblical People**, pp. 98-99, 122-23; Sam Shankman, **The Peres Family** (Kingsport, Tenn., 1938), p. v. *See also*, Shankman, **Baron Hirsch Congregation: From Ur to Memphis** (Memphis, Tenn., 1957). Both of Fortas's biographers mistakenly refer to Hardwig Peres as "Rabbi Peres." He was not a rabbi; his father Jacob was the rabbi.

[16] Raymond Cooper, **Southwestern at Memphis: 1848-1948** (Richmond, Va., 1949), pp. 114-40; **Southwestern: The College of the Mississippi Valley** (formerly Southwestern Presbyterian University, Clarksville, Tennessee) **Catalogue.** (Memphis, Tennessee, 1927), pp. 22-29, Rhodes College Archives. Charles Diehl became president of the college in 1917. In 1920 the college first began making preparations to move to Memphis and changed its name from Southwestern Presbyterian University to Southwestern. Later, the institution changed its formal name again to "Southwestern at Memphis." It was never formally known as "Southwestern College." The college's largest enrollment while in Clarksville was 187 students.

[17] **Southwestern: The College of the Mississippi Valley**, p. 60.

[18] Cooper, **Southwestern at Memphis**, pp. 134-40; Stephen R. Haynes, **The Last Segregated Hour: The Memphis Kneel-Ins and the Campaign for Southern Church Desegregation** (New York, 2012), pp. 77-78.

[19] "Fortas Made Hit At Southwestern," *Memphis Press Scimitar*, July 30, 1965 Record of Abe Fortas, Rhodes College Registrar; *Address by Abe Fortas*, 1.

[20] At the time, the college asked each student to indicate a "church" preference, and a total of ten students listed "Jewish." Another smattering of students left this item blank. There were a total of 192 students in Fortas's freshman class and 155 students in the sophomore class. I have not tabulated these numbers for the junior and senior classes, which would have enrolled at the college during the time that the institution was still in Clarksville, Tennessee.

[21] "Try Co-Ed on Evolution Law," *The Sou'wester*, March 4, 1927; "Fiddling Abe Fortas, 22, Leaves Memphis Dancers."

[22] "Selection of Fortas Catches Friends Off Guard," *Commercial Appeal*, July 29, 1965; *The Nineteen Hundred Thirty Lynx Published by the Student Body of Southwestern, the College of the Mississippi Valley* (Memphis, Tenn., 1930), pp. 108-109, 115-17, 162-64.

[23] Robert D. Franklin to the Editor, *Commercial Appeal*, April 18, 1982; "Abe Fortas No Protégé Of McKellar or Stewart," *Press Scimitar*, June 20, 1942. The word "hustler" at the time carried none of the negative connotations that it later acquired. *See* **The English Dialect Dictionary**, v. III, H-L, (New York, 1962).

[24] *The Nineteen Hundred Thirty Lynx*, Rhodes College Archives; "Selection of Fortas Catches Friends Off Guard," *Commercial Appeal*, July 29, 1965.

[25] "Two Band to Play at 'Pan,'" *The Sou'wester*, March 15, 1929; "Pepsters Cheer Over WMC Tonight," *The Sou'wester*, November 1, 1929; "Visitors Guests of Beta Sigma," *The Sou'wester*, November 8, 1929.

[26] Kalman, *Abe Fortas*, p. 12; "Four Students are Aspirants for President," *The Sou'wester*, May 3, 1929; *The Lynx*, Southwestern (Memphis, Tenn., 1929), 45; Transcript, Abe Fortas Oral History Interview, 28.

[27] Diehl to Secretary of the Harvard Law School, April 8, 1930, Charles E. Diehl Papers, Rhodes College Archives, Memphis, Tennessee.

[28] Hardwig Peres to George Parmley Day, April 16, 1930, Hardwig Peres to Diehl, April 25, 1930, Fortas-Peres Papers, University of Memphis Special Collections, Memphis, Tennessee; Diehl to Charles Clark, April 29, 1930, Diehl Papers, Rhodes College Archives.

[29] Fortas to Hardwig Peres, May 1, 1930, as published in Berkley Kalin, "Young Abe Fortas," *West Tennessee Historical Society Papers*, 34 (1980), 97.

[30] Kalman, **Abe Fortas**, p. 13; The Alumni Magazine at Southwestern (October 1930) referred to this as the "Israel H. Peres Scholarship." Edmundson, "Great Persuader," 16; Record of Abe Fortas.

[31] William Fortas died on December 14, 1930 of "acute myocarditis" caused by "pulmonary malignancy"—lung

cancer. William Fortas, State of Tennessee, State Department of Health, Division of Vital Statistics, Certificate of Death, December 14, 1930, available at http://register.shelby.tn.us/imgView.php?imgtype=pdf&id=133219301214

[32] Diehl to Fortas, January 9, 1931, Fortas to Diehl, February 4, 1931, Diehl Papers, Rhodes College Archives.

[33] Charles E. Diehl to Abe Fortas, October 24, 1933, Fortas Papers, Rhodes College Archives, Memphis, Tennessee; Haynes, **Last Segregated Hour,** pp. 77-79. Working in the New Deal was a common career path for Jewish lawyers who, at the time, would not have had many opportunities on Wall Street. *See* Jerold S. Auerbach, "From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience," *American Jewish Historical Quarterly*, 66 (1976), 249-84.

[34] Fortas to Diehl, March 29, 1934; "A Few Prominent Southwestern Men," Diehl Papers, Rhodes College Archives. Attorney General Thomas Watt Gregory, Solicitor General W. L. Frierson, Senator Key Pittman of Nevada, and Senator Nathan Bachman of Tennessee all graduated from Southwestern Presbyterian University, as it was called, during the 1880s and 1890s. Southwestern President John David Alexander referred to Diehl keeping Fortas's thesis on his desk in his introduction of Fortas when he spoke on campus in 1966. *See* "Introduction of Abe Fortas by President Alexander, at Opening Convocation, September 16, 1966," 4, Fortas Papers, Rhodes College Archives.

[35] "Memphian Studies Wage Assignments," *Commercial Appeal*, March 26, 1933; "Excelsior is Motto of Young Abe Fortas," *Commercial Appeal*, October 12, 1933; "'Fiddlin' Abe Fortas Visiting Homefolk Here," *Press-Scimitar*, September 27, 1937; "Fiddling Abe Fortas, 22, Leave Memphis Dancers For High Legal Post With Uncle Sam's Farm Bureau," *Press-Scimitar*, November 27, 1933; "Memphis Abe Fortas Promoted—Chosen General Counsel of PWA," *Press-Scimitar*, April 22, 1939; "Abe Fortas Is Given Post of WPA Counsel," *Commercial Appeal*, April 23, 1939; "Abe Moves Up," *Press-Scimitar*, April 24, 1939.

[36] Shankman, **Peres Family**, p. v.

[37] Fortas to Hardwig Peres, April 19, 1939, as published in Kalin, "Young Abe Fortas," 98.

[38] Fortas to Hardwig Peres, September 15, 1943, as published in Kalin, "Young Abe Fortas," p. 101. *See also* Kalin, "Abe Fortas of Memphis," *Southern Jewish Heritage*, 5 (1992), 3; Kalman, **Abe Fortas,** pp. 105-107. Excessive exposure to the sun or physical exertion, according to Kalman, could have caused Fortas to go blind.

[39] "Abe Fortas to Visit," *Press-Scimitar*, May 11, 1943; Fortas to Hardwig Peres, January 20, 1944, as published in Kalin, "Young Abe Fortas," 105; Diehl to Senator Kenneth McKellar, January 17, 1944, Abe Fortas Papers, Temple Israel Archives, Memphis, Tennessee.

[40] Fortas to Peres, January 27, 1944, as published in "Young Abe Fortas," p. 106; Fortas to Peres, Peres Papers, Box 2, Folder 14, Temple Israel Archives, Memphis, Tennessee.

[41] Diehl to Fortas, December 14, 1945, Diehl Papers, Rhodes College Archives.

[42] "Abe Fortas's First Speech," *Memphis Press Scimitar*, May 7, 1943; "Abe Fortas, Who Saw History in Making, Returns for Southwestern Talk Tonight," *Memphis Press Scimitar*, June 3, 1946. Fortas notes starting the firm in a 1946 letter to Peres. Apparently, Paul Porter joined the firm later. *See* Fortas to Peres, January 21, 1946, Peres Family Papers, Box 2, Folder 14, University of Memphis Special Collections, Memphis, Tennessee.

[43] Abe Fortas, "Alumni Day Address: An Approach to Progressive Policy," *Southwestern Bulletin*, 33 (July 1946), 4, 7, Rhodes College Archives.

[44] *Minutes of the Board of Directors of Southwestern at Memphis, Held in the Directors' Room, Palmer Hall, September 10, 1946*, Rhodes College Archives, available at http://hdl.handle.net/10267/7497; "2 Withdrawn from the UN, Fortas Says," *Press Scimitar*, June 5, 1946.

[45] Diehl to Fortas, December 7, 1948, Diehl Papers, Rhodes College Archives. Fortas's gift was $500.

[46] "Services Sunday for Mrs. Fortas," *Memphis Press Scimitar*, October 11, 1946; Hardwig Peres, State of Tennessee, Department of Public Health, Division of Vital Statistics, Certificate of Death, November 5, 1948, available at http://register.shelby.tn.us/imgView.php?imgtype=pdf&id=399719481105; Charles E. Diehl, State of Tennessee, Department of Public Health, Division of Vital Statistics, Certificate of Death, February 27, 1964, available at http://register.shelby.tn.us/imgView.php?imgtype=pdf&id=10901964-02-27 Diehl remained in Memphis for the duration of his life—he died in 1964—but there is no surviving record of correspondence with Fortas beyond his tenure as president.

[47] Diehl to Peres, August 27, 1936, Peres to Diehl, August 28, 1936, Diehl Papers, Rhodes College Archives.

[48] Alan Fortas eventually wrote a book about his association with the King of Rock-n-Roll: **Elvis—From Memphis to Hollywood: Memories from My Eleven Years with Elvis Presley** (Ann Arbor, Mich., 1992). Many members of the Fortas family continue to live in Memphis. Many others are buried there.

[49] Fortas to Diehl, April 1, 1949, Diehl Papers, Rhodes College Archives; Peyton Rhodes to Fortas, June 10, 1955, Fortas Papers, Rhodes College Archives; Fortas to

Peyton Rhodes, March 24, 1958, Rhodes Papers, Rhodes College Archives; Frederic H. Heidelberg to Fortas, May 5, 1955, Fortas Papers.

[50] "Selection of Fortas Catches Friends Off Guard," *Commercial Appeal*, July 29, 1965; "Fortas Made Hit At Southwestern," *Commercial Appeal*, August 5, 1965; Edmundson, "Great Persuader."

[51] E. Digby Baltzell and Howard G. Schneiderman, "From Rags to Robes: The Horatio Alger Myth and the Supreme Court," *Society*, 28 (1991), 47. Arthur Goldberg, it should be noted, had similarly humble roots.

[52] Anthony Lewis, "A Tough Lawyer Goes to the Court," *New York Times Magazine*, August 8, 1965, 11; Fortas, "Approach to Progressive Policy," 8.

[53] Lewis, "Tough Lawyer Goes to the Court," 11. *See also* Lewis, **Gideon's Trumpet** (New York, 1964), pp. 118-38; *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See also*, "Abe Fortas Suggests 'Fresh Thinking' About Criminals," *Commercial Appeal*, May 14, 1964.

[54] John Brennan Getz, "The Shelby County Public Defender's Office," *West Tennessee Historical Society Papers*, 56 (2002), 122-27; *Address by Abe Fortas;* Edmundson, "Great Persuader," 13.

[55] *Epperson v. Arkansas*, 393 U.S. 97 (1968). Fortas quoted in Edward J. Larson, **Trial and Error: The American Controversy Over Creation and Evolution** (New York, 1985), p. 114.

[56] *Abington v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 107-109. *See also*, for a discussion of Fortas, the Scopes Trial, and *Epperson*, Larson, **Trial and Error,** pp.113-17; Larson, **Summer of the Gods,** pp. 253-57; Larson, "The Scopes Trial and the Evolving Concept of Freedom," *Virginia Law Review*, 85 (1999), 521-27.

[57] *Address by Abe Fortas,* 5. On the integration of Southwestern at Memphis, *see* Haynes, **Last Segregated Hour**, pp. 75-81; Timothy S. Huebner and Benjamin Houston, eds. "Campus, Community, and Civil Rights: Remembering Memphis and Southwestern in 1968—A Panel Discussion," *Tennessee Historical Quarterly*, 58 (Spring, 1999), 70-87.

[58] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663(1966); *Green v. New Kent County*, 391 U.S. 430 (1968); *Brown v. Louisiana*, 383 U.S. 131 (1966); Abe Fortas, "The Amendment and Equality Under Law," in Bernard Schwartz, **The Fourteenth Amendment: Centennial Volume** (New York, 1970), p. 113; Abe Fortas, "March to Decency," *New York Times*, July 18, 1972, 33.

[59] On the nomination of Fortas for Chief Justice and his subsequent resignation from the Court, *see* Murphy, *Fortas,* pp. 477-577; Kalman, **Abe Fortas**, pp. 319-78; Robert Shogan, **A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court** (New York, 1972); Robert David Johnson, "Lyndon B. Johnson and the Fortas Nomination," *Journal of Supreme Court History*, 41 (2016), 103-22; Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** (Lanham, Md., 1999), 214-19; Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, **The Supreme Court: An Essential History** (Lawrence, Kan., 2007), 344-45; John Anthony Maltese, **The Selling of Supreme Court Nominees** (Baltimore, Md., 1998), pp. 71-72.

[60] Abe Fortas, "Equal Rights—For Whom?" *New York University Law Review*, 42 (1967), 412.

[61] Quoted in Shogan, **Question of Judgment,** p. 23; Lyndon Baines Johnson, **The Vantage Point: Perspectives on the Presidency, 1963-1969** (New York, 1971), p. 544. On Fortas's Supreme Court career, in addition to the biographies listed above, *see* Justin Braun, "Did He Measure Up? An Analytic Appraisal of the Supreme Court Career of Justice Abe Fortas," *West Tennessee Historical Society Papers,* 61 (2007), 1-31.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

The last day of January 2017 was judicially notable as President Donald Trump introduced Judge Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit as his choice to fill the vacancy on the Supreme Court occasioned by the death of Justice Antonin Scalia on February 13, 2016. In his response minutes later to the President's announcement, Judge Gorsuch informed the nation that he began his "legal career working for Byron White, the last Coloradan to serve on the Supreme Court, and the only Justice to lead the NFL in rushing."[1] Yet it was also true that upon confirmation Judge Gorsuch would become only the second Justice ever appointed from the Centennial State.[2] Quoted in a news article the following day, U.S. Senator Gory Gardner of Colorado echoed a similar point, referring to the nominee as a "man of the West."[3]

Voting 11–9 along party lines, the Senate's Committee on the Judiciary cleared the nomination on April 3. After a filibuster by Democrats initially blocked consideration by the full Senate, the Republican leadership responded by deploying what has come to be called the "nuclear option." Effectively a change in the rules of the chamber, this move allowed the process to proceed by simple majority vote, rather than the sixty votes that otherwise would have been required to end debate. The Senate confirmed the nominee 54–45 on April 7, and he was sworn in on April 10 at ceremonies first at the Court and then the White House. Affirmative votes on the nomination were the fewest for a Supreme Court seat since Justice Clarence Thomas was confirmed in 1991 on a 52–48 vote. Reflecting increased congressional polarization, the Gorsuch tally also contained the smallest number of votes (three) from the opposition party since Justice Samuel A. Alito Jr.'s confirmation in 2006, with four.[4] [The new Justice's first opinion was issued on June 12 in *Henson v. Santander USA Consumer*,[5] in which he wrote for a unanimous Court.]

Ironically, the earlier comments by both Gorsuch and Gardner indirectly aligned with a concern that Justice Scalia had articulated when he dissented in the Court's ruling thirty months earlier on same sex marriage: "Judges are selected precisely for their skill as lawyers," he wrote. "[W]hether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is

hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count)."[6] While region may have played no part in the President's decision, the observations by both Judge Gorsuch and Senator Gardner brought to mind a consideration that at times has been highly influential in Supreme Court nominations: geography.

It is sometimes forgotten that the federal judicial system, including the Supreme Court, that was first made a reality by the Judiciary Act of 1789 and President George Washington's subsequent appointments, had no parallel under the Articles of Confederation. That early attempt at a governing charter for the United States offered no model of pre-existing national courts for the First Congress to follow. Therefore, "no Light of Experience nor Facilities of usage and Habit were to be derived," explained Chief Justice John Jay in a charge to a grand jury while sitting on circuit court in 1790. "The Expediency of carrying Justice to every Man's Door, was obvious; but how to do it in an expedient Manner was far from being apparent."[7]

In creating the first national courts for the United States in September 1789, Congress divided the eleven member states of the Union—North Carolina would not ratify the Constitution until November 1789, and Rhode Island not until May 1790—into three circuits: eastern (New York, Connecticut, Massachusetts, and New Hampshire); middle (Pennsylvania, New Jersey, Maryland, Delaware, and Virginia; and southern (South Carolina, and Georgia). Oddly perhaps from the perspective of someone today, the resulting system of three kinds of courts (district, circuit, and supreme) were to be staffed by only two categories of judicial personnel (district judges and Supreme Court Justices), an organizational arrangement that—except for the addition of circuits as settlement progressed westward—largely persisted for roughly a century.

In making nominations for the six High Court seats that Congress initially authorized, President George Washington methodically took region and the circuit system into account. Appointed as Chief Justice, John Jay was from New York, Associate Justice William Cushing from Massachusetts, James Wilson from Pennsylvania, Robert Harrison from Maryland, John Blair from Virginia, and John Rutledge from South Carolina. When Harrison, preferring service on his home state bench, declined to serve, Washington turned to James Iredell of North Carolina, who joined the Court in time for its second session. Thus, with Iredell's arrival, there were two Justices from the eastern, two from the middle, and two from the southern circuits. Plainly, along with merit and a record of discernible support for the Constitution, geography dictated selection at the outset.

While the circuit system understandably created the norm that, when a vacancy arose, Presidents would typically nominate from within the circuit, abolition of the circuit system with creation of the courts of appeals and elimination of circuit riding in 1891 accordingly freed Presidents to search more nationally. Henceforth, the importance of region diminished, even though regional "representation" would still occasionally be mentioned in the context of nominee selection and confirmation proceedings.

For example, Judge Willis Van Devanter's Wyoming residency, among other factors, made him the choice of President William Howard Taft in 1910 to fill the vacancy created when Taft named Associate Justice Edward Douglass White Chief Justice following Melville W. Fuller's death.[8] When Justice Louis D. Brandeis retired in 1939, President Franklin D. Roosevelt reportedly wanted a

"Westerner" on the Court and was quickly drawn to William O. Douglas, who, although born in Minnesota, had been reared in Washington State. Douglas, however, had spent the better part of his professional life in the East. Thus, it was the endorsement of Senator William Borah of Idaho, ranking member of the Senate's Judiciary Committee, that made the President's choice easier when Borah hailed Douglas as "one of the West's finest and brightest sons."[9] Region again influenced Roosevelt when Justice James F. Byrnes—utility player from South Carolina in the FDR and later Truman administrations—resigned after barely a year on the Bench. For this seat, FDR got full credit for making a trans-Mississippi appointment in his choice of Judge (and former law school dean) Wiley Rutledge of Missouri, over alternate contender Judge Learned Hand of New York.[10] Similarly reflecting a regional focus, the cover page of the printed hearings on a Supreme Court nominee distributed by the Judiciary Committee, at least through the hearings for Judge John Paul Stevens in 1975, specified the nominee's home state, and even today nominees are often accompanied and introduced at the committee's hearings by a home-state Senator.

Moreover, there have been notable examples of the reemergence of geography as a principal concern in appointments since the Roosevelt era. One was driven by a pertinacious localism bordering on extortion, Washington-style, and the other by political strategy. Neither experience is probably familiar today to anyone whose judicial awareness begins only with the late Burger Court years.

The first involved the recess appointment for Chief Justice that President Dwight Eisenhower—not ten months into his first term—tendered to California Governor Earl Warren on October 2, 1953, following Chief Justice Frederick Vinson's death on September 8. According to one chronicler of the incident, Eisenhower and Attorney General Herbert Brownell apparently anticipated routine confirmation after Congress reconvened in January 1954, at which time the President made the formal nomination on January 11. However, neither the President nor the Attorney General had "reckoned with the die-hard, perverse opposition of Republican Senator Robert Langer of North Dakota," who, as a member of the Judiciary Committee, "had then begun his prolonged six-year campaign of opposing any and all nominees to the Court until someone from his home state (which had never been so honored) received an appointment."[11] Senator Langer's "hold" on the nomination, combined with delaying tactics by some conservative Democrats held up a confirmation vote until March 1, 1954, when it proceeded successfully on a viva voce.

Senator Langer also delayed the Senate's consideration of President Eisenhower's nomination on November 8 of Judge John Marshall Harlan for the vacancy created by the death of Justice Robert H. Jackson in October 1954. The delay in this instance, however, was not over the absence of someone from Langer's home state but, as Professor John Q. Barrett has explained, was apparently done to accommodate Senator James Eastland, Democrat of Mississippi, who was wary of Harlan's views on racial discrimination at a time when the implementation of *Brown v. Board of Education*,[12] the landmark school segregation decision, decided the preceding May, was on the Court's docket.[13] (Harlan was confirmed 71–11 on March 16, 1955. Senator Langer died in 1959, and the roster of Justices has yet to include a North Dakotan.)

The second episode was more complex but merits review here in the context of continuing nomination contentiousness in the Senate. It followed in the wake of Justice Abe Fortas's resignation on May 16, 1969, the first such departure from the Court because of public criticism. For his seat, President Richard M. Nixon, who had been inaugurated only four months earlier, selected

Judge Clement Haynsworth of South Carolina, who sat on the Court of Appeals for the Fourth Circuit. Resistance mounted as civil rights organizations claimed the nominee was racially biased and pointed to cases in which he had taken a restrictive view of school desegregation. Similarly, organized labor argued that Haynsworth was unfit because of anti-union rulings. Yet ideological objections alone or even combined with hard feelings among liberal Democrats stemming from the Fortas resignation would probably have been insufficient to defeat Haynsworth. Looking for another way to scuttle the nomination, Birch Bayh of Indiana, leader of the anti-Haynsworth Senators, seized upon his insensitivity to judicial proprieties—specifically two cases in which Haynsworth arguably should have disqualified himself. Because ethics had been central to calls for Fortas's resignation, Bayh's strategy of combining ethics and ideology worked, as fifty-seven Senators, including some northern Republicans but no southern Democrats, voted against confirmation. (Some years later, John P. Frank, an expert on judicial ethics and a scholar not disposed to Haynsworth's jurisprudence, concluded that the ethical charges were vastly overblown and served only as a cover for Senators not willing openly to oppose Haynsworth on ideological grounds.[14]

Nixon countered with the nomination of Judge G. Harrold Carswell of the Fifth Circuit Court of Appeals, a Floridian with a tough law-and-order record. Described by Attorney General John Mitchell as "too good to be true,"[15] the nominee combined avowed racism (which he now disavowed) with minimal professional qualifications. Verifying the latter criticism, Senate supporter Roman Hruska of Nebraska gallantly attempted to convert the liability into an asset. "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They're entitled to a little representation aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[16] The 51–45 vote against Carswell marked the first time since the second Cleveland Presidency in 1893 and 1894 that the Senate refused to accept two nominees for the same Supreme Court vacancy.

In a televised address on April 9, 1970, Nixon accused the Senate of regional discrimination, concluding "with the Senate as presently constituted—I cannot successfully nominate to the Supreme Court any federal appellate judge from the South who believes as I do in the strict construction of the Constitution."[17] The administration's failures may well have reinforced the Republican strategy of gaining support in the South, where the Democratic Party had been dominant for decades. Nixon could blame the defeats on an ensconced anti-Southern liberal elite determined to maintain the Court as its own reserve.[18]

Appearing to have at least temporarily abandoned his regional preference for the Fortas seat, the President then turned to Chief Justice Warren Burger's longtime Minnesota friend, Harry Blackmun of the Eighth Circuit Court of Appeals. Arousing little concern, "old number three" (as Blackmun would later occasionally refer to himself) passed the Senate 94–0. When he joined the Court on June 9, nearly thirteen months had elapsed since Fortas's departure.

In the fall, however, the President indicated again a preference for a nominee from the South. Some observers thought the most likely spot to be vacated was the one occupied by eighty-four-year-old Justice Hugo Black. Asked for his reaction, the Alabamian replied, "I think it would be nice to have *another* Southerner up here."[19] A double opportunity was then handed the President in September 1971 when Justices Black and John Marshall Harlan, both ailing, resigned within days of each other. For Black's seat, Nixon named Lewis F. Powell, Jr., an attorney from Richmond, Virginia, and a Democrat, who received an easy approval

In his new work, *The Coming of the Nixon Court*, Earl M. Maltz argues that *Frontiero v. Richardson* illustrates the decisional pattern that typified the Bench in the 1972 Term. Above is Lt. Sharron Frontiero, who was denied a married housing allowance by the Air Force because her husband was not dependent on her for more than half his support.

vote of 89–1 in the Senate on December 6. For Black, the President chose Arizonan William H. Rehnquist, then serving as assistant attorney general in charge of the Office of Legal Counsel in the Department of Justice. The Rehnquist nomination ran into rough waters, but survived in a vote of 68–26 on December 10.

The Nixon episode—more consequential than Langer's—remains especially notable in that a President seemed to equate region at least partly with an assumed constitutional perspective, even as he pursued partisan advantage. The Nixon maneuverings were testimony to the widely shared conviction that those who sit on the Supreme Court matter significantly in terms of what the law of the land becomes, as recent books about the Justices and their work amply demonstrate. Moreover, the Nixon nominations helped to shape the subject of **The Coming of the Nixon Court** by Earl M. Maltz of the Rutgers University School of Law.[20]

As the author observes in the preface, historical studies of the jurisprudence of the Supreme Court typically "take one of a number of standard forms."[21] Among the most familiar is the doctrinally or topically focused project on a single decision or, more commonly, a range of decisions. Another might encompass many areas of law by way

of the work of a single Justice or perhaps a group of Justices during the tenure of a particular Chief Justice. Maltz has undertaken something entirely different: an in-depth study of the Court's performance during a single term—1972. His intent is "to situate that performance within the political and jurisprudential context of that period as well as to describe the approaches taken by the different members of the Court and to highlight the interactions that ultimately produced the pattern of decisions"[22] during that term. Maltz's approach is reminiscent of that taken by Gerald T. Dunne midway in his biography of Justice Joseph Story,[23] where part four is entitled "The Great Term," with its emphasis on the Dartmouth College case.[24]

Just as Dunne highlighted a particular term in Story's career for good reason, Maltz explains that several considerations guided his selection of the 1972 Term. That year marked the first complete term with the participation of all four Justices appointed by President Nixon, whose campaign for President in 1968 had included promises "to choose justices who would stem the tide of what he characterized as excessive liberal activism by the Warren Court."[25] Of the four, the author believes that the latter two—Lewis F. Powell, Jr., and William H. Rehnquist—had a significant impact on the evolution of constitutional doctrine, even though each came to the Court with no judicial experience, a background fact not repeated successfully[26] until Elena Kagan's appointment by President Obama in 2010.

Second, the Nixon quartet "substantially changed" the Court's "ideological balance." In the author's view, the Court during the late Warren era was "something of a historical anomaly—an institution dominated by progressives that also lacked any representation from true conservatives. Added to that Bench, the Nixon appointees "created a far more politically diverse Court, including not only committed progressives and conservatives but also justices with a wide variety of more moderate views. Thus, one could reasonably expect the behavior of such a Court to be fairly representative of the Court generally over time."[27]

Third, "one would be hard-pressed," writes Maltz, "to find another term in the late twentieth century in which the Court dealt with so many issues with major implications for the future of constitutional law." The 1972 Term, after all, included the court's groundbreaking and ground-shaking decision on abortion rights in *Roe v. Wade*,[28] the effects of which on culture and politics continue today. Alongside that ruling, moreover, were others on a range of salient issues: criminal justice, school desegregation, school finance, obscenity, poverty, gender bias, and government aid to religious schools.

Measuring the impact of Supreme Court decisions or ranking the importance of various terms raises a set of challenging empirical, normative, and methodological questions, and one suspects that it is intellectually less risky to follow the course Maltz has chosen here by identifying a term dense with decisions that seemed important nationally not only when they came down but that remain so with the benefit of distant hindsight. The list of rulings from1972 amounts to a vivid and continuing validation of Alexis de Tocqueville's characterization of America in the Jacksonian era that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[29]

In reviewing the Court's work on a range of topics, Maltz finds that a consistent pattern emerged. Progressives "could generally count on the votes of Justices . . . Douglas, . . . Brennan, and Thurgood Marshall. By contrast, Justice . . . Rehnquist was an equally reliable conservative vote and was usually joined by Chief Justice . . . Burger. Thus the balance of power rested with holdover Justices Potter Stewart and Byron R. White and Nixon appointees . . . Blackmun and . . . Powell, none of whom had views on constitutional law that could be described as either

consistently progressive or consistently conservative. Instead, the political orientation of each of these Justices depended on the particular issue being considered. Conservatives prevailed whenever they could attract the votes of three of the four centrist judges. Otherwise, the progressives emerged victorious."[30]

Given that dynamic, Maltz believes a general political or jurisprudential overview about the term would be misleading. "Instead, the overall pattern of the decisions is nothing more or less than the sum of a number of individual decisions, each of which was produced by interactions among nine men with widely disparate world views"[31] that flowed from a blend of individual judgments and compromises as opinions were drafted and shaped.

Methodologically the author arrives at this conclusion on the basis of a series of eight "independent stories,"[32] each of which focuses on a particular area of constitutional law as illustrated by the term's decisions and those related to them. Together these accounts comprise the bulk of the book's eleven chapters. Instructively, the chapters are much more than basic legal analysis, as important as that remains. Rather, Maltz enriches discussion of outcomes with a detailed look at the process within the Court through which various results were reached. These stories then come to life thanks to the author's extensive use of various manuscript sources, including the papers of Justices Blackmun, Brennan, Douglas, Marshall, Powell, Stewart, and White, with their memoranda and drafts of opinions that were circulated among the chambers.[33]

For example, chapter eight deals with gender discrimination, principally the Court's ruling in *Frontiero v. Richardson*,[34] a decision that illustrates the decisional pattern that Maltz believes typifies the Bench in the 1972 Term. But to appreciate *Frontiero*, one should keep in mind *Reed v. Reed*,[35] a seminal and unanimous Supreme Court decision that in many casebooks has strangely been all but relegated to brief mention in a footnote. The litigation began after Richard Reed, the sixteen-year-old son of Cecil and Sally Reed committed suicide. Both Cecil and Sally Reed, by then divorced, applied to the probate court individually to administer the small estate. Under Idaho law, when a person died intestate, as had Richard Reed, the court appointed an administrator. In choosing among equally qualified persons for that responsibility, however, state law directed the court to prefer a male to a female. Applying a traditional rational basis analysis, a unanimous bench held that to "give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[36]

Because the Constitution had been the battleground for many decades in the struggle for racial equality, the casual observer might have supposed that gender equality had occupied the attention of Congress and the courts for just as long. It had not. While there had been opponents of gender-based discrimination since the earliest years of the Republic, for a long time Justices of the Supreme Court did not seem to be among them. Future Justice Ruth Bader Ginsburg herself had been turned down for a Supreme Court clerkship in 1960 by Justice Felix Frankfurter, who is supposed to have explained to her professor at Harvard Law School that he just wasn't ready to hire a woman.[37]

Nonetheless, the decision in *Reed* was noteworthy in that it marked the first time that the Supreme Court invalidated a gender distinction. *Reed*'s resolution under the traditionally relaxed standard of rational basis, however, raised the question whether other gender-based classifications would be similarly adjudicated and therefore possibly

deemed permissible, or whether they would be labeled "suspect" and therefore made subject to the more demanding test of strict scrutiny that the Court employed with respect to race. As Maltz recounts, the Court confronted that option squarely in *Frontiero*. At issue was a federal law that treated male and female personnel in the armed forces differently in allocating support for dependent spouses. The wife of a male service member was presumed to be a dependent, while husbands of female members of the military were not accepted as dependents unless they could establish that they were reliant on their wives for over one-half of their support.

In contrast to *Reed*, however, *Frontiero* was brought not under the Fourteenth but instead had to rely on the due process clause of the *Fifth* Amendment. The Fourteenth Amendment by its own wording applies only to states and their subdivisions, while the Fifth Amendment has always limited actions by the national government, as Chief Justice John Marshall made clear in *Barron v. Baltimore*.[38] Yet, at least since *Bolling v. Sharpe*,[39] in which the Court invalidated racially segregated schools in the District of Columbia, the Justices have also recognized what amounts to an equal protection component within the Fifth Amendment's due process clause.

In *Frontiero*, however, even though a large majority of the Court was prepared to strike down this gender distinction in military pay—only Rehnquist was willing to accept its constitutionality—there was not majority agreement on the basis for such a conclusion. While Douglas, Marshall, and White were willing to follow Brennan's lead in elevating gender to the category of suspect classifications, the necessary fifth vote for that step failed to come forward. Instead, Blackmun, Powell, and the Chief Justice "relied on *Reed* and focused on the pendency of the ERA."[40] In other words, this trio believed that the Court should not intervene just as the Constitution's Article V amendment process seemed on the verge of making the same change. [Proposed by Congress in 1972, section 1 of the Equal Rights Amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The original seven-year time limit set by Congress for ratification was later extended to June 30, 1982, but even by then only thirty-five states—three short of the requisite thirty-eight—had ratified.] As Maltz explains, Brennan nonetheless attempted to persuade his hesitant colleagues by noting that the early momentum for ratification had slackened. He also urged them to keep in mind that Congress had legislated against gender discrimination in the Equal Pay Act of 1963 and in the Civil Right Act of 1964, arguing from those measures that a coequal branch of government had previously made the same determination he was urging on the Court. Yet, as Maltz injects, Brennan may have simultaneously undercut the persuasiveness of his own claim in that the same legislative record could also be viewed to demonstrate that the political process already factored the needs of women into legislation, thus making the need for bold action by the Justices at that time seem less compelling.[41] As for Justice Stewart, he concurred separately in the result, referenced *Reed*, and insisted that the statute "worked an invidious discrimination."[42]

Brennan's defeat in *Frontiero* was far from total, however. To be sure, the rational basis test had not been expressly abandoned by the Court for gender cases, but "eight of the nine justices plainly signaled that they would view discrimination with considerable suspicion."[43] Moreover, within three years, *Craig v. Boren*[44] made clear that gender cases would now be judged by a heightened scrutiny that came to be called near strict scrutiny whereby "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[45] In this

instance Justice Brennan may have lost the battle, but in large measure he won the war.

What the Court did and refrained from doing in *Frontiero* fits the overall pattern Maltz develops that was followed by the Court Nixon helped to fashion. While the progressives who dominated the Warren era at times "sought to fundamentally restructure the governmental decision-making process and US society generally, the centrists who controlled the Burger Court believed that the Court should focus almost exclusively on the injustice of individual decisions made by the government and generally resisted efforts to involve the Court in major structural reforms. More than any specific doctrinal innovation, this change in emphasis—clearly evident by the end of the 1972 term—was the most important jurisprudential development of the Burger era."[46]

Maltz's focus on the 1972 Term rested not only on a belief that those decisions mattered but also on an unarticulated assumption regarding the Court's ability to accomplish change. Effecting change undergirds **U.S. Supreme Court Opinions and Their Audiences**, a compact and instructive monograph by Ryan C. Black, Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth, who teach political science at Michigan State University, the University of Wisconsin–Madison, the University of Kentucky, and the University of Maryland, College Park, respectively.[47]

Interest in the Court's impact was the central concern of **The Nature of Supreme Court Power** by Matthew E. K. Hall, published several years ago.[48] As Hall noted in that volume, at least in the years since the Court's 1954 landmark ruling in *Brown v. Board of Education*, scholars have differed over what many in the general public probably accept without question about the Court—that the Justices collectively have real power in the political system. In one view the Supreme Court occupies a commanding position, capable of promoting justice and protecting minority rights by enforcing its interpretation of the Constitution or in other contexts at least being heavily influential during specific periods of American history. Yet, an alternate view has depicted the Court as a much less influential institution that may issue high-minded rulings but lacks the power to ensure that those rulings are actually implemented.

In Hall's view neither of these perspectives accurately depicts the Supreme Court's true influence. Were the Court entirely ineffective, one would wonder why individuals, corporations, and interest groups invest so much time, energy, and money in litigation. Neither would one realistically 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, Hall's conclusion was what one might have expected—that the true nature of the Court's power falls somewhere between these extremes. More specifically, the task his book set out to accomplish was to determine the circumstances and conditions that facilitated judicial influence and the conditions and circumstances that hindered or weakened such influence.

Hall found that the Court tended to be most influential in what he called vertical situations, where implementation of the Court's ruling was in the hands of judges. Somewhat more problematical for implementation were what he called lateral situations, where application of a ruling lay outside the judicial hierarchy, as occurs when application of a ruling is in the hands of and requires the cooperation and support of governors, state legislatures, municipalities, school boards, and or administrative agencies. A link between both books is that each is concerned with the impact of Supreme Court decisions, in both a general and specific sense. To one degree or another that subject has been on the minds of Justices for most of American national history and of students of the Court for at least several decades, as the work of

Jack Peltason, Stephen Wasby, and others illustrates.[49]

The focus by Black, Owens, Wedeking, and Wohlfarth on "audiences," as their title promises, connects with Hall's book in that the audiences—those who receive, read, and ponder decisions by the Supreme Court also include those who in many instances bear the responsibility for carrying them out. Moreover, as will be explained in detail below, it is significant that the authors speak in the plural. That is, the Court has not a single audience, but several. Significantly, to illustrate this point the authors' book opens with discussion of *Swann v. Charlotte-Mecklenburg Board of Education*,[50] a case decided in the spring of the 1970 term but nonetheless also discussed at some length in Maltz's book on the 1972 term.[51]

In this ruling the Court upheld an integration plan involving widespread busing within a single metropolitan school district in North Carolina. Among the larger districts in the United States, it encompassed some 550 square miles and enrolled 84,000 students. A previous desegregation plan had left in place large numbers of predominantly one-race schools. Not surprisingly, this residual segregation in the schools was caused partly by racially segregated neighborhoods, themselves shaped over the years by a system of legally enforced school segregation prior to 1954, as whites tended to live near schools legally mandated for white children and black families near those designated as black schools. The extensive remedial plan under review in *Swann* had been imposed by Judge James McMillan of the Western District of North Carolina and involved transporting large numbers of black children to Charlotte's suburbs and reverse busing of some white children from outlying neighborhoods into the city proper. Judge McMillan's order had been wildly unpopular with some residents who burned the judged in effigy. "The objective today," declared Chief Justice Burger in upholding the plan "remains to eliminate from the public schools all vestiges of state-imposed segregation."[52] The key point of *Swann* was that results, not merely the design of the plan itself, would determine whether constitutional standards had been met.

Swann came down sixteen years after the second Brown decision, often referenced as *Brown II*,[53] and had laid out the guiding principal for implementation of *Brown I*. Chief Justice Earl Warren, speaking for the Court in *Brown II* as he had in *Brown I*, expressed the conclusion that desegregation in public education would necessarily take place at varying speeds and in different ways, depending on local conditions. Federal judges, he wrote, employing the flexible principles of equity, now had the task of determining when and how desegregation should take place. Then in a historic pronouncement he concluded, "The judgments below . . . 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."[54]

Even in areas like North Carolina where implementation of *Brown* had not been met by the kinds of massive resistance seen in other Southern states, cases like *Swann* were themselves evidence that considerable uncertainty still prevailed among school boards and in courtrooms as to what compliance with *Brown* actually entailed. Part of the uncertainty lay in *Brown I* itself, where Chief Justice Warren had written that "[s]eparate educational facilities are inherently unequal."[55] That statement raised the question whether the constitutional violation stemmed from the fact of separateness itself or from the state's role in making and keeping facilities separate. Moreover, what kind of timetable was suggested by "all deliberate speed"? Except at the extremes, how would one distinguish compliance from non-compliance?

Thus, as the co-authors make clear, much was on the line as Chief Justice Burger crafted his opinion in *Swann*, the hope being that enhanced clarity would generate enhanced compliance. In particular, Justice William J. Brennan, Jr., was concerned that without careful wording the opinion might encourage resistance, not cooperation. "We deal here with boards that were antagonistic to *Brown* from the outset and have been noteworthy for their ingenuity in finding ways to circumvent *Brown*'s command, not to comply with it. I think any tone of sympathy with local boards having to grapple with problems of their own making can only encourage more intransigence . . . We might court a revival of opposition if we provide slogans around which die-hards might rally." Recognizing the importance of clear and direct language, Brennan continued. "For me the matter of approach has assumed major significance in light of signs that opposition to *Brown* may at long last be crumbling in the South . . . I nevertheless suggest that our opinion should avoid saying anything that might be seized upon as an excuse to arrest this trend. Some things said in your third circulation seem to me to present that hazard."[56]

Much more recently, Justice Clarence Thomas made a similar point in response to a question about his own opinion-writing, outside the context of any specific legal issue. "There are simple ways to put important things in language that's accessible . . . [and] the editing we do is for clarity and simplicity without losing meaning . . . We're not there to win a literary award. We're there to write opinions that some busy person or somebody at the kitchen table can read and say, I don't agree with a word he said, but I understand what he said."[57]

The Brennan and Thomas statements illustrate the link that may exist between language and compliance and suggest that an opinion should be tailored to its intended audience. This is a tenet that would seem obvious to any manager, teacher, or military officer who has ever given instructions with the hope of encouraging actions and achieving particular results from employees, students, or soldiers. Indeed, Black and the other authors suggest that clearly written opinions have four distinct advantages in that they remove or narrow leeway for discretion. Second, at least in an organizational setting, "opinion clarity can help whistle-blowers monitor and report on the behavior of actors who defy the Court." Third, clear opinions "can serve as instructions that help guide actors who are inclined to follow the Court's decisions but might not have the resources to do so." Finally, writing clear opinions helps the Court "manage its legitimacy . . . Those who read Court opinions expect them to be coherent and understandable, and when they are not, the Court might suffer. The rule of law supposes clarity. So when Justices write unclear opinions, they fail to fulfill one of their key obligations. By writing clear opinions, they can maintain—and perhaps even—improve the Court's reputation."[58] That is, increased clarity not only makes explicit what is expected and what is supposed to be achieved but thereby reduces opportunities for deviation or variation by those who might otherwise be hesitant, unenthusiastic, uncooperative, or downright obstreperous.

These managerial and leadership verities are applicable in a judicial context because, as the authors explain, Supreme Court decisions typically "do not mark the beginning or the end for most legal controversies but, rather, the end of the beginning. Rarely does the Court have the last say or take the last action in a case. Instead, others must implement or apply its policies." As the authors phrase the question at the level of the individual Justice, "do I seek out my own goals without regard to the response of my audiences, or do I try to anticipate and manage audience-based obstacles?"[59]

Thus the central objective of the book "is to examine whether justices modify the

clarity of opinions to enhance compliance with their decisions and to manage support for the Court." Recognizing that they are not the first to suggest that a particular audience may influence how judges behave, the authors do claim to be the first "to examine systematically how justices change the clarity of their opinions because of those audiences."[60]

The authors adhere to a familiar division of the Court's audiences. The *interpreting audience* consists almost exclusively of judges who read, construe, and apply Supreme Court decisions. In their study, statistically structured as it is, the authors focus nearly entirely on those who sit on the federal benches although, practically speaking, the interpreting audience necessarily must include the far more numerous judges on the state and local benches too. Second is the *implementing audience*, consisting of those who execute or put the Court's decisions into practice. This group is numerically enormous, surely outnumbering the first audience in that it consists of law enforcement and penal personnel, public school employees, and regulatory agencies and their staffs. Any tally jumps from hundreds into thousands. Moreover, the combination of the first and second audience groups, as the authors remind the reader, presents ample opportunities at different decision points for obstruction of the High Court's rulings for anyone so inclined. Third is the *consuming audience*—those who will receive benefits or suffer penalties because of what the Court does, and who therefore may dodge the Court's ruling by altering their behavior or situations. The last group is the *secondary audience*, or in common parlance, the general public. Because "the Court relies on public support to maintain its legitimacy" the public "stands in a position to assist the Court by supporting its decisions or, alternatively, opposing them and the Court."[61] One significant part of this secondary public would presumably be what Gabriel Almond many years ago called "the attentive public"[62]—that part of the population that follows and cares about what happens to an issue or issues.

While the need for clarity may seem apparent, can clarity be measured? Or is clarity mainly a subjective reaction or judgment by the reader in the way that beauty is sometimes said to lie within the eye of the beholder? The question in this instance is important because the core of the book is an examination of the variations in clarity across Supreme Court opinions as the Court addresses different audiences. Given that the authors' book relies heavily on comparative data, some standard and consistent way of determining clarity is imperative.

The authors explain that for them clarity is "textual readability," and they define readability as "the ease with which a layperson can read and understand the language of the Court's opinions." They then generate readability scores, which are quantified estimates of the difficulty of reading the selected prose. Developed originally by reading experts to define reading levels for school textbooks, these tools are today used in other settings by government agencies and insurance companies. Applied in this book, the resulting scores "measure the difficulty a general reader is likely to encounter when reading a court opinion"[63] where a larger score indicates more readable text, and a smaller score points to less readable text.[64] The authors discover an encouraging result. Among the many opinions they "graded," and with the exception "of a handful of very unreadable opinions, the distribution is a symmetric, bell-shaped distribution."[65]

The authors then test several hypotheses and report their findings. First, "when circuits are ideologically disparate from one another—and therefore more likely to conflict with each other over the proper interpretation of law—justices writer [*sic*] clearer opinions."[66] In these situations, the judicial motivation is probably two-fold: to reduce future conflicts *among* the circuits as

well as to reduce variation *between* lower court rulings and the Court's view of the law. In short, readability and anticipated compliance are positively linked.

Second, the Justices write clearer opinions when they rule against what the authors describe as a "lower quality agency," by which they mean a unit within the federal bureaucracy that is less professional than others and has a small staff, small budget, poor appellate legal advisors, and unclear goals.[67] Third, a similar finding occurs when the audience for an opinion consists of less professionalized state governments that tend to be characterized by citizen legislatures, as opposed to professionalized legislatures. This effect, they report, is exacerbated when the court faces a politically unified state. Fourth, with the secondary audience (public opinion), the finding is compatible with the others in that the "Court writes increasingly readable opinions when it rules against public opinion." Thus, "when justices have the most reason to expect the least compliance, they write clearer opinions."[68] The point may seem obvious, but it also poses the question how the Justices gage public opinion, and whether such gauging is done collectively or individually.

With their focus on assessing opinion clarity, the authors only tangentially refer to the legal and intellectual integrity of decisions, but were they someday to undertake polling of scholars to determine the ten most questionable decisions by the Supreme Court during the past twenty years, *Kelo v. City of New London*[69] might well make the list. Certainly, based upon **The Grasping Hand**, George Mason University law professor Ilya Somin would think the case belongs in such undistinguished company.[70] In this ruling from the last days of the Rehnquist Court, five Justices held that the homes of Susette Kelo and several neighbors who were long-term residents of the Fort Trumbull neighborhood of New London, Connecticut, could be taken by the municipality in condemnation proceedings under eminent domain for the purpose of economic redevelopment. Somin's title is therefore itself significant. As he explains, just as Adam Smith argued more than two centuries ago in his **Wealth of Nations** that private property together with a decentralized market generated prosperity as if by "an invisible hand," eminent domain relies on *the grasping hand* of government to accomplish its purposes.[71]

The constitutional provision at issue in *Kelo* was the last clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." Applicable to the national government since ratification of the Bill of Rights in 1791, this limitation was the first from the Bill of Rights that the Supreme Court, in 1897, made applicable to state governments and by inference to their municipal subdivisions as well.[72] Specifically, the outcome in *Kelo* turned on the meaning of "public use." Was the term meant to apply only to property seized by government, that would be maintained by government and generally open to or dedicated to the public such as roads, schools, and parks, or could it be something broader? Specifically, did public use also encompass "public purpose" where that purpose was economic revitalization? The Court's own most recent precedents hinted at a flexible approach. For example *Berman v. Parker*[73] allowed redevelopment in Washington D. C. while *Hawaii Housing Authority v. Midkiff*[74] presented a situation in which the state required large landowners to sell their property to others. Against the charge in the latter that the law took private property for private, not public, use, all eight participating Justices decided that Hawaii's plan served a valid public purpose. "Where the legislature's purpose is legitimate and its means are not irrational," declared Justice O'Connor, "our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in

the federal courts."[75] The hands-off approach represented by *Midkiff* may explain the willingness of the majority in *Kelo*—a majority that did not include Justice O'Connor, to approve New London's use of eminent domain.

Kelo was noteworthy not merely because of what it allowed but because it was a property rights case, a category of litigation that until the late 1930s populated the High Court's docket. Indeed, property had long held a central place in American political thought and in the way that people commonly viewed individual liberty. "The right of acquiring and possessing property and having it protected," Justice William Paterson wrote in an early circuit court opinion, "is one of the natural inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact."[76]

Paterson's point was echoed more than a generation later by Justice Joseph Story: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be sacred."[77] This link between property and liberty and between property and citizenship lies at the center of *Kelo* and Somin's book.

While publication of a case study on a Supreme Court decision is happily not an unusual event, it is uncommon to have two such books published close together on the same case. Readers may recall the pair of books that appeared concerning *McCulloch v. Maryland*[78] and another pair that was issued on *Gibbons v. Ogden*,[79] both landmark rulings from the Marshall era.[80] With *Kelo*, Lexington Books published Guy Burnett's **The Safeguard of Liberty and Property** in 2015 not long before the University of Chicago Press released Somin's book in 2016. Anyone interested in *Kelo* should read both. Given its substantially shorter length, Burnett's has the advantage of brevity. With endnotes alone extending over about 100 pages, Somin's displays a treasure of scholarship and should be of particular interest to students of constitutional interpretation in the nineteenth and early twentieth centuries. Moreover, in an appendix Somin includes four pages of tables with data on private-to-private condemnations in the states. Perhaps more than with most case studies, both authors emphasize the personal stories of the individuals directly involved in and adversely affected by New London's actions.

Somin's account in particular is powerfully hostile to the trend he observes whereby courts, especially the U.S. Supreme Court, have given constitutional property rights far less protection than that routinely granted to other constitutional rights. The result is a situation where property rights are now at "the mercy of the very government officials that they are supposed to protect us against." Moreover, nowhere "was the low status of constitutional property rights more clear than in the court's [*sic*] and society's toleration of the government's use of eminent domain to take private property and transfer it to other private interests, on the theory that such policies might provide often vague and uncertain benefits to the public."[81] Equally troubling to the author, who filed a brief amicus curiae when *Kelo* was before the U.S. Supreme Court, is the fact that the decision reinforced the view that a "public use" within the meaning of the Fifth Amendment was "almost entirely up to state and local governments,"[82] a result that Justice Thomas found rich with irony.

"Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."[83]

There was a second irony as well. In his opinion for the majority, Justice John Paul Stevens recognized "the hardship that condemnations may entail, notwithstanding the payment of just compensation [and] emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[84] Many jurisdictions have since taken that observation to heart in that dozens have enacted legislation or passed ballot or constitutional measures in response to *Kelo* that disallow a similar use of eminent domain in their particular locales.

For those like Somin who believe the Court's decision in *Kelo* was a grave error and a serious setback for proponents of property rights, he nonetheless finds that the decision represents "an important sign of progress for them in that the question posed in *Kelo* is now a live controversy among scholars, judges, and other experts." Moreover, it has caught the attention of the general public, and among salient issues, is one of the few that "cuts across race and ideological lines."[85]

Moreover, he explains, proponents of property rights have learned some key lessons through defeat. First, "for constitutional reform movements, legal action and political action are not mutually exclusive, but are mutually reinforcing." That is, without the negative publicity generated by the Court's ruling there would not have been the public interest generated in curbing the eminent domain powers in many states. Accordingly, the *Kelo* litigation "would not have gotten as far as it did if not for the careful work of a political movement that sought to make judicial protection for property rights more intellectually and politically defensible."[86] Second, the negative reaction to the decision may in fact make a future Court less hesitant to overrule it, even as the anti-*Kelo* "backlash has begun to wane." Third, a "less hopeful lesson of *Kelo* is that the political process often cannot be relied on to protect even those constitutional rights that enjoy strong support from majority public opinion" and in such instances "judicial intervention may still be a vital backstop to prevent rights violations facilitated by widespread public ignorance." Fourth, Somin points positively as a long-run consequence to "the breakdown of the post-New Deal consensus on judicial review of public use issues . . . "[87]

In his view, the close 5–4 division in the Supreme Court and the negative reaction of the public and elite opinion suggested that the scope of public use is far from settled. However, while the voting division in the case was close, the numbers alone do not necessarily suggest a different outcome in a future case. While only three members of *Kelo*'s majority continue to serve, it is also true that only one of the four dissenting Justices remains.

The personal and legal story that Somin tells handily illustrates the observation made in a wholly different context many years ago by William M. Beaney, professor of politics at Princeton University and later law school dean at the University of Denver, that "all members of a civilized society should be concerned with the means whereby any one of their number loses his liberty, for . . . each of us is threatened by an official act of injustice, which requires only acceptance and repetition to become part of our practical jurisprudence."[88]

The focus of each of the books thus far examined in this essay has at least one thing in common aside from the Court itself, and that is the work of attorneys. One states only a basic truth to observe that the federal judicial system could not function without them. However, books about the Court tend for obvious reasons largely to emphasize the Justices and their decisions, with members

of the Supreme Court bar and their work typically remaining in the background. For this reason, publication of **Fair Labor Lawyer** by Marlene Trestman, former special assistant to the attorney general of Maryland and law instructor at Loyola University of Maryland's Sellinger School of Management and Business, is a welcome event.[89] Her volume on Bessie Margolin (1909–1996) is one of the most recent additions to the Southern Biography Series issued by Louisiana State University Press, the contributions of which to the public law field date back at least to its publication of Edward S. Corwin's **Liberty Against Government** in 1948.

Trestman's well researched, meticulously documented, and engagingly written book should have wide appeal—to students of the New Deal era, the landmark Fair Labor Standards Act (FLSA), and the Department of Labor, as well as early twentieth-century Jewish life and culture in Memphis and New Orleans. Most especially her life is important for anyone interested in gender and the legal profession. A graduate of the law school at Tulane University, Margolin launched her legal career in 1930, when only about two percent of American lawyers were women. By the time she retired in 1972, she had argued dozens of cases before the federal courts of appeals plus twenty-four cases at the Supreme Court, where she prevailed in twenty-one. According to Trestman, she was one of only three women in the twentieth century to compile such a record at the High Court. Over those years she literally went from orphan to advocate.

Nonetheless, the actual writing of this book was also itself a remarkable feat, involving challenges well beyond those typically faced by someone trying to complete a manuscript. For a biography on a Justice or an elected official, there is usually a mass of public papers that are readily available and easy to consult. There may even be letters and Court memoranda available that have been carefully organized by a librarian or archivist. Such was not the case with Trestman's subject. Befriended by Margolin in 1974 when they discovered common beginnings, it was only after 2005 that Trestman seriously pursued the idea of a book on this labor lawyer and was given access to and long-term use of her personal papers by Margolin's nephew and his former wife.

It was perhaps only then that Trestman realized the full scope of the challenge she then faced. As she explains, "Margolin preserved only a hodgepodge of her work records, filling a pair of disorganized filing cabinets with correspondence, legal briefs, speeches, and news clippings." Moreover, there was no oral history, journal or scrapbook. "She left behind a few bundles of photos and private letters, many unidentified: in some cases addresses had been ripped from envelopes and postcards, while the most intimate letters she wrote and received had been penned with initials or a pet name, perhaps to confound prying eyes." That situation then compelled Trestman to look in other manuscript collections and depositories to locate "Margolin's needles in other people's haystacks."[90]

The results of the author's labors speak for themselves. Consider her recounting of what on December 19, 1935, must have been felt with a sense of drama and urgency. The occasion was the first day for oral argument in *Ashwander v. T.V.A.*[91] in the recently completed Supreme Court Building. On the motion of Solicitor General (and future Justice) Stanley Reed, Chief Justice Charles Evans Hughes admitted Bessie Margolin to the Supreme Court bar. Moreover, her name appeared on the TVA brief under the names of Attorney General Homer Cummings and General Reed, "making her the first and only woman whose name appeared on the Supreme Court brief of any of the New Deal cases" even though it would be another decade before she would speak for the government in oral argument at the High Court. *Ashwander* came

Marlene Trestman's biography *Fair Labor Lawyer* recounts how Bessie Margolin went from graduating law school at Tulane University in 1930, when only about two percent of American lawyers were women, to an illustrious career at the Labor Department. By the time Margolin retired in 1972, she had argued dozens of cases before the federal courts of appeals plus twenty-four cases at the Supreme Court, where she prevailed in twenty-one. In 1963, President John F. Kennedy honored her (second from left), and other recipients of Federal Women's Awards, at the White House.

down on February 17, 1936, with Justice James McReynolds as the lone dissenter, making the TVA the "first New Deal agency to survive Supreme Court scrutiny."[92] Similar vignettes are scattered throughout the book. The result is a volume rich in detail that not only chronicles a remarkable life but contributes to a fuller appreciation of litigation involving administrative agencies in the Supreme Court.

As with the other titles surveyed here—by Maltz, Black and his coauthors, and Somin—Trestman's contribution not only depicts the judicial process at work but is a reminder that the Court is part of a large and complex political system, with far-reaching impacts on the lives of all Americans.

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

BLACK, RYAN C., RYAN J. OWENS, JUSTIN WEDEKING, AND PATRICIA C. WOHLFARTH. **U.S. Supreme Court Opinions and Their Audiences.** (Cambridge, United Kingdom: Cambridge University Press, 2016). Pp. 185. ISBN: 978-1-107-13714-1, cloth.

MALTZ, EARL M. **The Coming of the Nixon Court: The 1972 Term and the Transformation of Constitutional Law.** (Lawrence, KS: University Press of Kansas, 2016). Pp. ix, 250. ISBN: 978-0-7006-2278-8, cloth.

SOMIN, ILYA. **The Grasping Hand: *Kelo v. City of New London* & the Limits of Eminent Domain.** (Chicago: University of Chicago Press, 2015). Pp. xii, 356. ISBN: 978-0-226-25660-3, cloth.

TRESTMAN, MARLENE. **Fair Labor Lawyer: The Remarkable Life of New Deal Attorney and Supreme Court Advocate Bessie Margolin.** (Baton Rouge, LA: Louisiana State University Press, 2016). Pp. xvii, 243. ISBN: 978-0-8071-6208-8, cloth.

ENDNOTES

[1] A full transcript of Judge Gorsuch's acceptance remarks appears at: http://www.denverpost.com/2017/01/31/neil-gorsuch-full-remarks-supreme-court-nomination. (Last accessed March 9, 2017.)

[2] Henry J. Abraham, **Justices, Presidents, and Senators** (5th ed., 2008), table 4, p. 50.

[3] Mark K. Matthews, John Frank, and David Migoya, "Going with Gorsuch," *Denver Post*, February 1, 2017, p. 13A.

[4] Republican Senator Johnny Isakson of Georgia did not cast a vote on Gorsuch.

[5] 137 S. Ct. 810 (2017).

[6] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015), Scalia, J., dissenting.

[7] Quoted in Maeva Marcus, ed., **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789** (1992), p. 3.

[8] Abraham, **Justices, Presidents, and Senators**, p. 136.

[9] *Id.*, 177.

[10] John M. Ferren, **Salt of the Earth Conscience of the Court** (2004), pp. 207-221.

[11] Abraham, **Justices, Presidents, and Senators**, p. 202.

[12] 347 U.S. 483 (1954).

[13] Professor Barrett writes the Jackson Blog. http://johnqbarrett.com, last accessed on April 9, 2017.

[14] John P. Frank, **Clement Haynsworth, the Senate, and the Supreme Court** (1991).

[15] Richard Harris, **Decision** (1971), p. 110.

[16] Quoted in Abraham, **Justices, Presidents, and Senators**, p. 11.

[17] The text of the address appears in the *New York Times*, April 10, 1970, p. 1. In the midterm election seven months later Republican opponents defeated Democratic Senators Albert Gore of Tennessee and Joseph Tydings of Maryland; in an earlier Texas primary, Democratic Senator Ralph Yarbrough lost to a conservative challenger. Their votes against Carswell may well have contributed to their defeats.

[18] Mark Silverstein, **Judicious Choices** (1994) p. 109.

[19] Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (16th ed., 2012), p. 8.

[20] Earl M. Maltz, **The Coming of the Nixon Court** (2016), hereafter Maltz.

[21] *Id.*, vii.

[22] *Id.*, viii.

[23] **Justice Joseph Story and the Rise of the Supreme Court** (1970), p. 175.

[24] *Dartmouth College v. Woodward*, 17 U. S. (4 Wheaton) 518 (1819).

[25] Maltz, vii.

[26] President George W. Bush's nomination of White House counsel Harriet Miers in 2005 was withdrawn before the Senate Judiciary Committee held hearings.

[27] Maltz, vii.

[28] 410 U.S. 113 (1973).

[29] Alexis de Tocqueville, **Democracy in America**, Phillips Bradley, ed. (1954), vol. 1, p. 290.

[30] Maltz, viii.

[31] *Id.*

[32] *Id.*, ix.

[33] *Id.*, 227.

[34] 411 U.S. 677 (1973).

[35] 404 U.S. 71 (1971).

[36] *Id.*, 77.

[37] Abraham, **Justices, Presidents and Senators**, 305.

[38] 32 U.S. (7 Peters) 243 (1833).

[39] 347 U.S. 497 (1954).

[40] Maltz, 144.

[41] *Id.*, 146.

[42] 411 U.S. at 691.

[43] Maltz, 144.

[44] 429 U.S. 190 (1976).

[45] *Id.*, 197.

[46] *Id.*, 193.

[47] Ryan C. Black, Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth, **U.S. Supreme Court Opinions and Their Audiences** (2016), hereafter Black.

[48] Hall's book was published by Cambridge University Press in 2011.

[49] Jack W. Peltason, **Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation** (1971); Stephen L. Wasby, **The Impact of the United States Supreme Court: Some Perspectives** (1970); George Alan Tarr, **Judicial impact and State Supreme Courts** (1977).

[50] 402 U.S. 1 (1971).

[51] Maltz, 84-90.

[52] 402 U.S. at 15.

[53] 349 U.S. 294 (1955).

[54] *Id.*, 301 (emphasis added).

[55] 347 U.S. at 495.

[56] Black, 2.

[57] *Id.*, 4.

[58] *Id.*, 10-11.
[59] *Id.*, 3.
[60] *Id.*
[61] *Id.*, 9.
[62] Gabriel Almond, **The American People and Foreign Policy** (1950), p. 228.
[63] Black, 46.
[64] *Id.*, 50.
[65] *Id.*, 51.
[66] *Id.*, 157.
[67] *Id.*, 81.
[68] *Id.*, 157-158.
[69] 549 U.S. 469 (2005).
[70] Ilya Somin, **The Grasping Hand** (2015), hereafter Somin.
[71] *Id.*, 1.
[72] *Chicago, B. & Q. R. Co. v. Chicago*, (1897).
[73] 348 U.S. 26 (1954).
[74] 467 U.S. 229 (1984).
[75] *Id.*, 243.
[76] *Van Horne's Lessee v. Dorrance, Cir. Ct. Pa.*, 2 U. S. 304, 310 (1795).
[77] *Wilkinson v. Leland*, 27 U. S. (2 Peters) 627, 657 (1829).
[78] 17 U.S. (4 Wheaton) 316 (1819).
[79] 22 U.S. (9 Wheaton) 1 (1824).
[80] On *McCulloch*, *see* Mark R. Killenbeck, ***M'Culloch v. Maryland*** (2006), and Richard E. Ellis, **Aggressive Nationalism** (2008). On *Gibbons*, *see* Thomas H. Cox, ***Gibbons v. Ogden*** (2009) and Herbert A. Johnson, ***Gibbons v. Ogden*** (2010).
[81] Somin, 1.
[82] *Id.*, 3.
[83] 545 U.S. at 518, Thomas J., dissenting.
[84] 45 U.S. at 469.
[85] Somin, 10.
[86] *Id.*, 241-242.
[87] *Id.*, 242-243.
[88] William M. Beaney, **The Right to Counsel in American Courts** (1955), p. 3.
[89] Marlene Trestman, **Fair Labor Lawyer** (2016), hereafter Trestman.
[90] *Id.*, xv-xvi.
[91] 297 U.S. 288 (1936).
[92] Trestman, 57. The question in *Ashwander* was whether Congress had exceeded its authority in setting up and having the government operate and sell the power generated by the hydroelectric dams of the Tennessee Valley Authority. The case is probably best remembered today for a concurring opinion by Justice Louis Brandeis in which he articulated a set of "rules" to guide the Court's resolution of cases, especially those involving constitutional issues. *See* 297 U.S. at 341.

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Illustrations

Page 241, This map was drawn for Thomas P. Abernethy's **The South in the New Nation** (1961), published by the LSU Press and is signed "H. Cox July 60." Harold Cox was one of Abernethy's graduate students at the University of Virginia and based his drawing on the map that appeared in Jedidiah Morse's **Description of the Western Country** (1797).
Page 242, C.H. Warren Illustration of the Burning of the Yazoo Act, MS 1675. Georgia Historical Society.
Page 243, Library of Congress.
Page 249, National Gallery of Art, c. 1795.
Page 252, John Marshall in 1810 by Cephas Thompson, National Portrait Gallery.
Pages 257, 258, 259, 261, Stanley Matthews Collection, Hayes Presidential Library & Museums.
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Page 297, *Florida Memory*, available at Fla. Dep't of State, Div. of Library Servs., Tallahassee, Fla., http://floridamemory.com/items/show/7420.
Page 298, http://www.knightfoundation.org/about/history/.
Page 300, *Florida Memory*, available at Fla. Dep't of State, Div. of Library Servs., Tallahassee, Fla., http://floridamemory.com/items/show/40747.
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Page 316, Library of Congress. LC-DIG-det-4a23577.
Pages 317, 319, 320, 322, 328, 332, Courtesy of Rhodes College Archives, Memphis, Tennessee.
Page 326, Courtesy of the Temple Israel Archives, Memphis, Tennessee.
Page 341, Courtesy of Sharon Frontiero.
Page 342, JFK Library.

Cover: Abe Fortas, speaking at his alma mater at the occasion of his 25th reunion, 1955. Courtesy of Rhodes College Archives, Memphis, Tennessee.

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.