Introduction

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This issue, like so many others, again illustrates how varied the history of the U.S. Supreme Court can be, and how far we have expanded the parameters of that subject. As I have often remarked, when I was in college and even in law school, all we heard about the high court was its opinions. A very famous jurist on the Fifth Circuit even said that judicial biographies were irrelevant; the only thing that counted was what ended up in *U.S. Reports*.

As anyone who paid attention to the 2016 Presidential contest knows, Donald Trump's call to build a wall at the Mexican border with the United States resonated strongly with many Americans who saw unfettered immigration as a major cause of the nation's economic problems. As Polly Price shows us, this idea is not new in our history, and in one of its earlier iterations, came before the Supreme Court in several cases that Justice Stephen Field labeled the *Chinese Exclusion Cases*. Field, it should be noted, was probably the only member of the Court who had first-hand knowledge of Chinese workers in the United States. His opinions showed little sympathy for the immigrants, and as Price, the Asa Griggs Candler Professor of Law at Emory University School of Law shows, this attitude eventually became that of the Court.

In 1916, following Woodrow Wilson's nomination of Louis D. Brandeis to the Court, reporters besieged Alice Grady, Brandeis's secretary and administrative aide, for information about him. It is not surprising that the man who essentially invented the legal right to privacy had kept his personal life private. Bowing to Ms. Grady's importunements, Brandeis finally dictated a very rough autobiographical sketch that eventually wound up buried in the Special Collections section of the Brandeis University Library. I say "buried," because I used that collection, and nothing called my attention to its existence.

I wish that Scott Campbell of the Brandeis Law School Library at Louisville had found this document earlier; it would have saved me a lot of work. Scott, by the way (here comes the truth in advertising message) is an old friend and more than that, a valued

colleague who over the years has helped me greatly in my own research on Brandeis. In reading the "Lost Memoir," please keep in mind that Brandeis never meant to publish it; it was solely for Alice Grady's use as she saw fit in dealing with press inquiries. But it is very interesting.

Brandeis spent every summer at Chatham on Cape Cod, and at some point Felix Frankfurter, then a professor at the Harvard Law School, and his wife would come for a visit. The two men would walk on the beach, and Frankfurter was one of the very few people with whom Brandeis felt comfortable discussing the work of the Court and its members.

One time Brandeis wondered why Taft, whom he had considered a terrible President, could be so effective a Chief Justice. Frankfurter said it was because Taft never wanted to be President but always wanted to be Chief Justice. Kevin Burns, assistant professor of political science at Christendom College, follows up on this comment to show that Taft, who did have a great deal of executive ability, used it very effectively as Chief Justice in ways that he failed to accomplish in the White House.

The struggle of the NAACP's Legal Defense Fund to reverse *Plessy v. Ferguson* and end racial segregation is fairly well-known. What we are learning in a number of recent works is that the Justice Department, which scholars thought either stood aside or actively opposed the LDF, proved to be valuable and forceful allies in the 1940s and 1950s. The latest addition to this unfurling history is from Ian Fagelson, a solicitor of the Senior Courts of England and Wales and a graduate student of United States History and Politics at University College London, who shows that not only did Truman's Justice Department (headed for a while by Tom Clark) actively interceded to work with civil rights lawyers, it did so with the active encouragement of Truman himself.

It has been so long since Chief Justice Warren E. Burger arranged for the reshaping of the high court's bench that there are not that many people who recall what it was like to argue before the original straight bench erected with the building of the Court in the 1930s. I have spoken with a few of the reporters who covered the Court before 1972, and their stories confirm what Ryan Black, associate professor of political science at Michigan State University, Timothy Johnson, professor of political science at University of Minnesota, and Ryan J. Owens, professor of political science at University of Wisconsin, relate, that something as seemingly simple as a small realignment could effectively change the way the nine members of the Court function.

As always, a nice potpourri, and I wish you much enjoyment from it.

A "Chinese Wall" at the Nation's Borders: Justice Stephen Field and *The Chinese Exclusion Case*

POLLY J. PRICE

In 1882, Congress passed the first of a series of acts to exclude Chinese laborers from the United States.[1] Known as "The Chinese Exclusion Act,"[2] the popular title of the legislation also became the informal title of the ensuing constitutional challenge in the U.S. Supreme Court. Although the litigation officially came before the Court as *Chae Chan Ping v. United States,*[3] Justice Stephen Field entitled it "*The Chinese Exclusion Case,*" no doubt drawn from the term used by the popular press, who followed the case as closely as any in its day. The name stuck. Indeed, to this day *The Chinese Exclusion Case* is the most common citation form for the momentous decision that set the parameters of legal debate over immigration for the next century and through the present.

The Chinese Exclusion Case was the first of a series of cases in the early Progressive Era about Chinese immigration. With uncanny echoes of political discourse today, those following the case spoke of a deleterious effect on American workers, and argued the morality and constitutional permissibility of banning an entire race, given that the United States had viewed itself to be a welcoming nation for all immigrants. Even whether a wall (and yes, the term "Chinese wall" was used) could stop the flow of illicit entry via land borders—from Canada primarily, but also by way of Mexico. The "Chinese wall" was mostly figurative, not literal, but it signified an increased demand for border guards and the rise of an administrative structure designed to enforce the terms of Chinese exclusion as set by Congress.[4]

The Court's unanimity in *The Chinese Exclusion Case* could lead the modern observer to overlook a highly contentious set of issues. Headlines from news articles bore remarkable similarity to recent division of opinion in America about immigration, including "The Chinese Invasion: Alleged Violations of the Exclusion Law,"[5] "Anti-Coolie Agitation,"[6] "Still They Come: The

This 1870 Thomas Nast cartoon depicts Irish and German immigrants who have scaled the "Emigration" wall now declaring that Chinese access to America is closed. At the time, political debate over stopping the illicit entry of Chinese via Canada and Mexico included discussions of building a "Chinese wall," which meant increasing the number of border guards and implementing an administrative structure to enforce the terms of Chinese exclusion as set by Congress.

Chinese Exclusion Act a Dead Letter in San Francisco,"[7] and "Exclusion of the Chinese: Efforts to Manufacture Political Capital Out of the Question."[8] Arguments about Chinese exclusion pitted labor against employers and restrictionists against those favoring open immigration, and posed the question whether unauthorized immigration could effectively be stopped. These debates continued throughout the Progressive Era, well beyond *The Chinese Exclusion Case* of 1889.

It is not my aim to engage current debates over immigration, or attempt to draw lessons from the racial tenor of the Supreme Court's decisions in the Chinese exclusion era. Instead, I provide some observations about *The Chinese Exclusion Case* that have received less attention but are worthy of more. Given its importance as a foundational case of modern immigration law, the historical terrain is well traveled, including a 2015 article in this journal examining Justice Field's view of immigration as a national police power.[9]

Yet there is some new ground to cover, and I will make three points. First, the sweeping implications of *The Chinese Exclusion Case* had as much to do with the Supreme Court's concerns about its relationship with both Congress and the President as it did with the Chinese as a disparaged racial group. There are other dimensions beyond race, and one of these was the Supreme Court's view of its role with respect to the other branches of government. Importantly, the Court did not decide the balance of authority between the President and Congress on matters of

immigration, an omission that surely lessens its precedential value today.

Second, the Court's pronouncement in the *Chinese Exclusion Case* validated another Act of Congress that applied to *all* immigrants brought in for cheap labor, not just the Chinese. Throughout the progressive era, the Alien Contract Labor Act limited the rights of industrialists, manufacturers, and owners of capital to hire non-citizens.[10] There was no serious question of the constitutionality of this sweeping legislation because the nation's ability to exclude sources of cheap immigrant labor had been settled by *The Chinese Exclusion Case*. While undoubtedly animated by racial hatred, the Chinese Exclusion Act specifically targeted Chinese laborers, ostensibly allowing merchants, teachers, tourists, and some skilled workers to enter and to remain in the United States. The Alien Contract Labor Act, best known to lawyers through the case of the *Church of the Holy Trinity v. United States*,[11] rested its foundation on the structure and function of the Chinese Exclusion Act of 1882.

Third, in the midst of Chinese exclusion and a new concern about porous land borders, the Supreme Court handed down the most significant citizenship case it ever decided, *United States v. Wong Kim Ark*.[12] The same era of Chinese exclusion saw the Supreme Court resolve another highly contentious issue, again involving the Chinese: whether all persons born within the United States were citizens, or whether the Fourteenth Amendment's citizenship clause applied only to former slaves. After citizenship by birth in the United States was established for all races, the administrative process for exclusion and deportation of Chinese laborers was forever changed, altering in turn the role of the executive branch and the judiciary with respect to the Chinese question.

The Plaintiff, Chae Chan Ping

Chae Chan Ping was a Chinese laborer who had come to San Francisco in 1875. Twelve years later, he took a trip to China to visit his family. When he left San Francisco, Congress had already banned new immigrant laborers from China. But Congress made an exception for Chinese laborers who were already living here. Those who wanted to leave the United States temporarily would be readmitted if they had a U.S. government certificate to prove that they had been in America before the ban took place.[13]

Chae Ping obtained one of these certificates before he went on his trip to China. He returned with his certificate, but by then the law had changed. A few days before his arrival, a new law went into effect precluding the entry of *all* Chinese laborers, even if they held a certificate of re-entry issued by the United States government.[14]

These are the facts of the Supreme Court's decision in *The Chinese Exclusion*

The Scott Act (1888), authored principally by Congressman William Scott of Erie, Pennsylvania, expanded upon the Chinese Exclusion Act of 1882, and was the statute at issue in the *Chinese Exclusion Case*. The Act prevented even those with government-issued certificates from returning to the United States.

Case of 1889. The Supreme Court held that the government's certificate promising Chae Ping a right to reenter the United States had no legal effect. He was refused admission to the country where he had lived and worked for twelve years—even though he could not have known about the new law before he sailed, and even though Congress's action violated a treaty with China.[15]

The Chinese Exclusion Case was unanimous and sweeping in its scope. The Supreme Court established that the power to control all aspects of immigration is inherent in the sovereignty of the United States, even though not enumerated in the Constitution. It was the first of a series of cases concerning Chinese immigration that are still considered the "foundation cases" of modern immigration law.[16]

The Court soon extended the holding of the *Chinese Exclusion Case* to declare an unqualified right to deport non-citizens. In *Fong Yue Ting v. United States*,[17] the Court specified that the nation could deport any alien or all aliens, for any reason or for no reason. Its power of deportation, like its power of exclusion, the Court deemed to be "absolute and unqualified." There was to be no role for the judiciary. The wisdom of such decisions were not matters for judicial review.

To situate Chinese exclusion in the era in which it occurred, the progressive era was a critical phase in the history of immigration in America. The foundation of modern immigration law was set, not in the context of the immense numbers flowing from Europe, but in the much smaller scale of Chinese immigration to the West Coast. In fact, between 1889 and 1920, the Supreme Court heard some seventy cases involving Chinese litigants. Through advocacy groups such as the Chinese Benevolent Association, the Chinese on the West Coast hired some of the best lawyers of the day, and they pursued a litigation strategy seeking judicial protection of the Chinese against the white race.[18]

At this time, of course, other racial divisions were certainly evident. It was an era of black/white segregation and violence as well as exclusion from the vote. *Plessy v. Ferguson*[19] was decided in 1896, just a few years after the *Chinese Exclusion Case*.

It was also a turbulent time for labor. The Pullman strike of 1894 and labor unrest in general led to conflict between industrialists and workers. Class divisions and disparity of wealth in the progressive era marked what Owen Fiss characterized as "the beginnings of the modern state."[20] As the noted legal historian Robert Gordon put it, the 1890s was "a society riven by violent class conflict; mass unemployment, industrial injury and poverty-stricken old age, unspeakable levels of urban and rural squalor, corporate domination of politics and systemic racial oppression . . . a truly nightmarish prospect to anyone who knows anything at all about it."[21]

Chinese immigration had been encouraged as a source of cheap labor in the United States from the 1840s through the 1870s. Chinese labor contributed greatly to building the western portion of the Transcontinental Railroad, but upon its completion in 1869 these hired laborers turned to other endeavors such as mining. Railroad interests were largely finished with their intense need for Chinese labor by the time Congress began to restrict further Chinese immigration.[22]

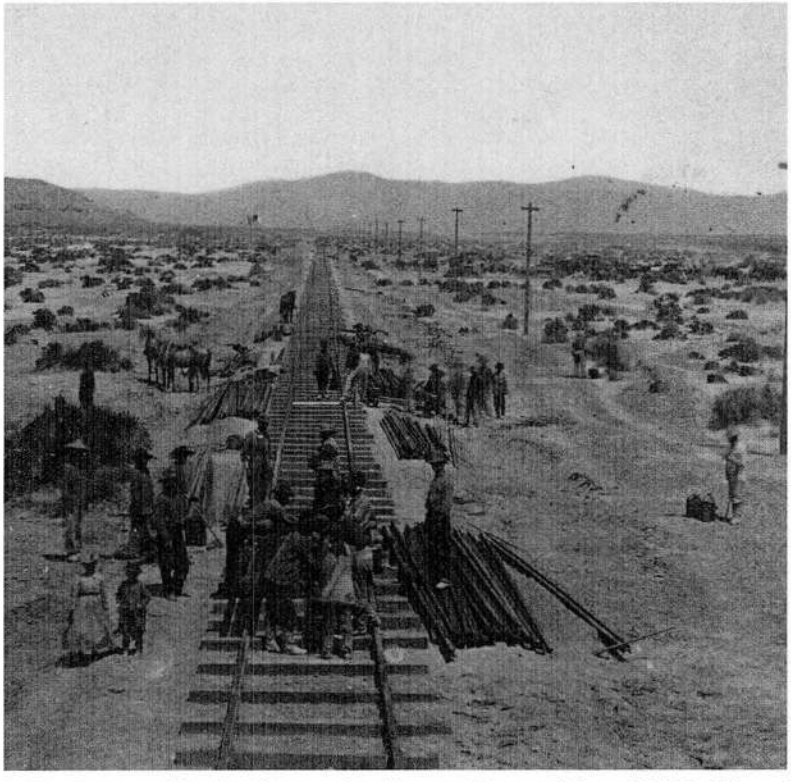
Before 1852, the Chinese population in the United States amounted to about 10,000 people. But by 1854, more than 40,000 had arrived in three years. Thereafter on average more than 20,000 Chinese arrived each year. By the turn of the century, one in three persons in San Francisco was of Chinese descent.[23]

This influx caused dissatisfaction among the white laborers of California, who would not compete with the cheap labor provided by the Chinese. Unemployment and economic depression drove resentment against immigrants, and especially the Chinese, leading to disturbing acts of violence in California and elsewhere. In 1886, United States troops

were ordered to Seattle to quell rioting by white laborers against the Chinese in that city, after the Governor of Oregon Territory had declared martial law.[24] The *North American Review* wrote that a war of races seemed imminent.[25] In a referendum on Chinese immigration held in California in 1879, the white voting population was decidedly against further immigration from China—only 883 voted in favor, with over 150,000 against.[26] But by then Stephen Field, while serving as a Circuit judge, had already settled that states could not regulate immigration; it was solely a federal power.[27]

Western states pressured Congress to act. In 1876, both the Republican and Democratic National platforms "took strong ground" against the Chinese, and they did so again in 1880.[28] In 1882 Congress passed the Chinese Exclusion Act, the first legislation to exclude would-be immigrants by race. It suspended for ten years the immigration of new Chinese laborers (but merchants, teachers, and others of the professional class could still enter). Ultimately the ban against laborers would become permanent through World War II.[29]

Initially, Chinese laborers who were already here were allowed to travel abroad and return to the United States, but even that possibility was soon removed by Congress.[30] Later, Congress would add the requirement that all Chinese residents must obtain and carry with them an identity certificate proving they had come to the United States before the ban went into effect, or proving that they were of the exempt class of merchants, teachers, students, or diplomats. Each certificate required



Risking their lives because of harsh winters and perilous working conditions, 12,000 Chinese immigrants constructed the western section of the Transcontinental Railroad. They earned one third less than other workers and were given the most difficult and dangerous jobs. Upon the completion of tracks in 1869, railroad interests no longer lobbied for Chinese labor, allowing Congress to restrict further Chinese immigration.

at least one white witness. Anyone who could not produce this certificate could be deported.[31]

In the background to all of this, the U.S. government had been anxious to open up trade with China, in competition with Great Britain. In 1868 the United States entered into the Burlingame Treaty, a provision of which specified "the inherent and inalienable right of man to change his home and allegiance, and... the mutual advantage of free migration" between the United States and China. Each government's citizens were to receive the privileges and immunities that were accorded citizens of "the most favored nation." Congress would pass legislation inconsistent with this treaty a number of times by the turn of the century.[32]

"The Political Departments of Government": Congress or the President?

With this historical backdrop in mind, I turn to the *Chinese Exclusion Case* of 1889. The holding disavowed any role for the judiciary in reviewing the immigration choices made by Congress. The Supreme Court did not locate Congress's power over immigration in any specific provision of the federal Constitution. Instead, it held that power over immigration was inherent in the existence of any national government and need not be located in the Constitution itself. The Court viewed this to be self-evident, stating simply that this was "a proposition which we do not think open to controversy."[33]

Justice Field, the author of the opinion, spent much of his career in California and had served on the California Supreme Court. He replaced the former Chief Judge of that court who had killed a U.S Senator from California in a duel, and immediately afterward fled the state. Field was serving as Chief Judge of the California Supreme Court when he was appointed to the United States Supreme Court by President Lincoln, where he had a long career.[34] As a sitting Justice, he made two unsuccessful attempts to become the Democratic party's nominee for President. Distancing himself from the perception that he favored Chinese immigration and was sympathetic to their plight, his campaign literature denied this: "I have always regarded the immigration of the Chinese in large numbers into our state as a serious evil, and likely to cause great injury to the morals of our people as well as their industrial interests."[35] Again, in 1882, Field told a friend, "You know I belong to the class who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race—the Caucasian race."[36]

Field's prior experience and his knowledge of the western region made him a good choice to write for the unanimous Court. His opinion in the *Chinese Exclusion Case* is the Supreme Court's clearest articulation of the "plenary power" doctrine. The Court stated that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security... its determination is conclusive upon the judiciary."[37] In other words, Congress's power over immigration was "plenary" in the sense that the judiciary would not review what it considered to be purely a political question. Congress and the President—the "political departments" of government, as Field put it—had complete power over such issues.[38]

The Court's opinion includes numerous references to international law. But in U.S. constitutional law, prior to the *Chinese Exclusion Case* there was no suggestion that the *international sovereignty* of the United States, by itself, implied powers for the federal government that were not enumerated in the Constitution. The strongest proponents of federal authority sometimes talked about "implied powers," but most would consider it heresy that federal power might exist unsupported by constitutional language.[39]

The Court could have, but did not, anchor an enumerated power for Congress in the Commerce Clause, the Naturalization Power, or even the Migration and Importation Clause. None seemed to quite fit the question presented to the Court. Instead, the Court's pronouncement of an unreviewable power outside of the Constitution strengthened the reach of the federal government. *The Chinese Exclusion Case* seemed to endorse a "police power" for Congress for the first time.[40]

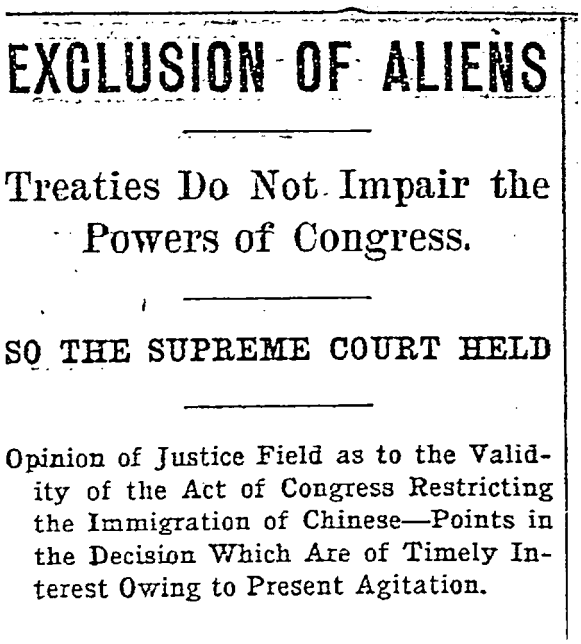
In briefs before the Court, Chae Ping's lawyers argued that he was a returning U.S. resident from a country at peace with the United States. If the two countries were at war, Ping's lawyers conceded that he could be excluded. But the Supreme Court declined to accept any link between Chinese exclusion and the ability of the nation to protect itself from foreign hostile invasion. Instead, the Supreme Court equated the protection of domestic prosperity and tranquility with the right of national self-preservation.[41] It declined to consider the notorious Alien and Sedition Act of 1798 as any sort of precedent.[42] In a few sentences, the Court elevated the protection of domestic labor interests to equal wartime necessity—a right of self-preservation against other nations.[43]

This basic proposition of unreviewable federal power was widely accepted at the time.[44] But for most observers, the issue was not federal immigration power per se, but whether Congress could abrogate a treaty by legislation. As the *Washington Post* explained in a headline, the Court's opinion confirmed that "Treaties Do Not Impair the Powers of Congress."[45] Because the unanimous court upheld views promoted by both Congress and the President, we seem to have a happy agreement among all three branches about a federal immigration authority unlimited by the Constitution. And while the immediate question was the validity of an Act of Congress alleged to violate a treaty with China, Justice Field said the judiciary would defer to "the political departments" of the national government.[46] Thus, properly read, the "plenary power" of the national government resides somewhere between the other two branches—Congress and the President.

The Supreme Court has used this doctrine to say that in certain substantive areas, especially immigration, the judiciary will not intervene because Congress and the executive—the "political department" of government—have complete power. The plenary power doctrine became a cornerstone of federal law governing American territories such as Puerto Rico.[47] The *Insular Cases*[48] of 1901 determined the status of U.S. territories acquired in the Spanish-American War. The Supreme Court held that the U.S Constitution does not automatically extend to all places under American control.

All of this came within a larger effort to determine what was "civilized" and essential to the American character defining the country. The Chinese were not. Residents of Guam and the Philippines were not. They could not assimilate with us or respect our institutions, it was said, while at the same time others wished to preserve America as a "Christian nation." Justice Field had written that the Chinese "remained strangers in the land, residing apart by themselves and adhering to the customs and usages of their own country."[49] Field said, "It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[50] Justice Field acknowledged the political pressure that Congress faced from California. Quoting Field again —"As the Chinese grew in numbers each year, the people of the coast saw great danger that at no distant day, that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration."[51]

In fact, just four years after the *Chinese Exclusion Case* the Supreme Court went out of its way to once again disavow any judicial role over immigration. In a case known as



EXCLUSION OF ALIENS

Treaties Do Not Impair the Powers of Congress.

SO THE SUPREME COURT HELD

Opinion of Justice Field as to the Validity of the Act of Congress Restricting the Immigration of Chinese—Points in the Decision Which Are of Timely Interest Owing to Present Agitation.

A 1902 article in *The Washington Post* framed *The Chinese Exclusion Case* as a "treaty" issue. It also noted the "Present Agitation" over Chinese immigration, indicating the continued contentiousness of the issue.

Fong Yue Ting,[52] the Supreme Court held that aliens reside in the United States under the absolute authority of Congress to expel them whenever it feels their removal is necessary. Justice Horace Gray wrote for the Court, "The right of a nation to expel or deport foreigners rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[53]

But unlike *The Chinese Exclusion Case*, this one was not unanimous. Justices Brewer, Field, and Fuller dissented. Justice Brewer was particularly incensed at what the majority had done. He believed strongly that *all* persons lawfully residing within the United States were within the protection of the Constitution. He emphasized that the Chinese had been invited here. But now, he said, "a hundred thousand people are subject to arrest and forcible deportation from the country."[54] Such action against them, he wrote, was a "grievous wrong."[55] He emphatically denied that Chinese residents were "beyond the reach of the protecting power of the Constitution."[56]

That Justice Field was among the dissenters is surprising, given that he wrote for the unanimous court in *The Chinese Exclusion Case*. But for Field, an unqualified right to exclude operated on a different principle from a nation's relationship with persons within its borders.[57] Within U.S. borders, all immigrants who entered with permission and were "from a country at peace with us" are entitled to "all the guarantees for the protection of their persons and property which are secured to native-born citizens."[58]

Whatever the Court intended in all of its Chinese cases in this period, they have been taken to mean that there were no constitutional limitations on the power of Congress to regulate immigration. Deportation is not considered "punishment," for example, and so the usual constitutional rights applicable to criminal defendants do not apply in deportation proceedings.[59] Congress could determine whether to admit aliens, how many to admit, whom to admit, and also that entire classes of persons could be excluded or deported.

Both political parties supported the Chinese Exclusion Acts, and only one President during this period negotiated with Congress in a feeble effort to salvage the earlier treaty with China.[60] It was a mild gesture indeed—President Cleveland asked Congress to reduce the ban on Chinese immigrant laborers from twenty years to ten years, which it did, although as expected, the ban was soon made permanent.[61]

The Supreme Court seemed not to foresee that there would *ever* be disagreement among "the political departments" on immigration issues. This led to the easy step of judicial deference to a general "federal power," with no need to anticipate any potential clash between the President and Congress. Locating the power as one "inherent in the sovereignty and nationhood of the United States" says nothing about how Congress and the President might divide that power. The contours of presidential versus Congressional authority simply did not arise.

The Supreme Court did not entirely abandon the Chinese. In California, the Workingman's Party and other labor groups pursued all sorts of legislation designed to make life harder for the Chinese, so that they would essentially "self deport."[62] In the case of *Yick Wo v. Hopkins*,[63] decided in 1886, a unanimous Court ruled that the Fourteenth Amendment's equal protection clause protected the Chinese against a California law aimed at shutting down Chinese laundries. But with respect to Chinese immigration, Congress could do what the states could not.

Paving the Way for the Alien Contract Labor Act

My second point has to do with the larger conflict between labor and capital in this period, and the Supreme Court's role in mediating that conflict.

Another act of Congress passed just three years after the Chinese Exclusion Act—the Alien Contract Labor Act of 1885[64]—bears consideration because of its relationship to the exclusion of Chinese laborers and the habeas petition of Chae Chan Ping. Noteworthy is its full title: "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor or service of any kind in the United States."[65] This legislation prohibited the importation of immigrant laborers of any race or nationality, especially those coming through the Atlantic crossing. The problem that Congress sought to remedy was the importation of cheap labor, recruited abroad, who were contracted to work in mines, railroads, and other labor-intensive occupations at substandard wages. It was an idea first drawn from the Chinese Exclusion Act, then expanded by Congress to *all* imported contract labor.

The Alien Contract Labor Act was designed to protect the American labor market. The act made it unlawful to assist or procure the immigration of any alien under contract to perform labor in the United States, or knowingly transporting any such alien. It declared void all contracts of labor made by aliens prior to their landing. The law made an exception for actors, artists, lecturers, singers, and (no doubt of benefit to members of Congress) domestic servants.[66] Just as they had with respect to Chinese immigration, big businesses, including railroads, steamship, and mining companies, opposed any restrictions on importing European labor. They opposed the Alien Contract Labor Act because it removed additional sources of cheap labor, unless they could work around its restrictions.[67]

Legislators had learned from the Chinese experience that the problem was the draw of the labor market—the desire of capitalists to import cheap labor from whatever source. Henry Cabot Lodge, for instance, wrote that the legislation excluding Chinese laborers had led to an "awakening" nationwide that "great reservoirs" of cheap labor "threatened with a flood of low-class labor which would

absolutely destroy good rates of wages among American workingmen by a competition which could not be met."[68] Like the Chinese Exclusion Act, Lodge wrote, the Alien Contract Labor Law was "intended to stop the importation of this low-priced labor."[69]

The political debates surrounding the Alien Contract Labor Act make clear that Chinese exclusion served as a model to extend the ban on imported labor universally. The Labor Reform party resolved that they were "inflexibly opposed to the importation by capitalists of laborers from China *and elsewhere* for the purpose of degrading and cheapening American labor."[70] The Democratic and Republican parties followed with similar resolutions. The Alien Contract Labor Act enjoyed broad support in Congress and with the President.

The Supreme Court considered the Alien Contract Labor Act only once, in the case of the *Church of the Holy Trinity* in 1892, just three years after the *Chinese Exclusion Case*. Because of that earlier decision, the constitutionality of the Alien Contract Labor Act was not in question. *The Chinese Exclusion Case* had settled recently and emphatically that Congress had the authority to exclude immigrant laborers.[71] Instead, as Justice Brewer wrote, the case turned on who was meant to be excluded by use of the statutory term "labor," not on Congressional power to prohibit the entrance of cheap labor at all. Whoever else might be covered by the term "labor or service of any kind" (manual labor only, or skilled labor as well?), the Act was certainly *not* intended to prevent religious groups from bringing over a minister. Congress meant *manual* labor, even if it had not used or defined that word in the text.[72] The Court could have noted, but did not, that "labor" was defined in the Chinese Exclusion Act to include "both skilled and unskilled laborers."[73] (Justice Brewer's opinion is also noted for his statement "this is a Christian nation," meaning that Congress could not have intended to exclude ministers in its general ban on contract labor.)[74]

Because no case challenged the constitutionality of the Alien Contract Labor Act, the Supreme Court had no occasion to revisit this limitation on economic rights of industrialists. That issue had been settled with the exclusion of Chinese laborers. In *The Chinese Exclusion Case*, the Court implicitly rejected the commercial interests of business owners, and paved the way for restricting immigrant laborers from anywhere in the world. At least one contemporary thought that the Chinese Exclusion Act and the Alien Contract Act should have been drafted as one piece of legislation:

> The Chinese exclusion acts proceed, first of all, on the theory that our country and its laborers should be protected against the cheap labor of China. In this aspect, the question is in its nature one that arises with respect to immigrants from many other countries. General legislation, not alone applicable to Chinese persons, would be here more properly in order, and the result would be that we would not then run counter to such fundamental principles of democratic government as find expression in our Declaration of Independence in asserting the equality of all men.[75]

Property rights were at stake more prominently in the debates over the Alien Contract Labor Act than with respect to the Chinese. In opposition to organized labor, some members of Congress argued in favor of "natural rights" for employers to engage whomever they wished, as well as for immigrant laborers to earn a living.[76] There was some hope for a sympathetic ear on the Supreme Court. Earlier, Justice Field, then sitting as a Circuit Justice in California, had overturned a California statute penalizing corporations who employed "any Chinese or

Mongolian."[77] Moreover, freedom of contract would reach its peak just over a decade later in *Lochner v. New York*.[78] Although state legislation was at issue, not an Act of Congress, the *Lochner* Court stated that "the freedom of master and employee to contract with each other in relation to their employment . . . cannot be prohibited or interfered with, without violating the Federal Constitution."[79]

Chae Ping's lawyers had also argued from natural rights—that his certificate of reentry was not only a contract but also represented a vested right.[80] The liberty to continue to reside and labor in the United States, as guaranteed in the treaty with China, was a valuable right like an estate in land. This vested right was acquired by contract, suggesting that domestic employers had a right to employ labor without government restrictions. Chae Ping's lawyers were speaking the language of economic liberty, but the Court did not engage it. Justice Field never addressed this claim in *The Chinese Exclusion Case*. Instead, in both *The Chinese Exclusion Case* and *Church of the Holy Trinity* we see a judicial passivity to the claims of industrialists and manufacturers to be able to hire anyone they chose.

As with the Chinese, the restriction on immigrant contract labor of any sort was considered "no more than a measure of peaceful self-defense." Legislative debate over the Alien Contract Labor Act included many references to the earlier example of Chinese exclusion, such as the need to "Build a Chinese Wall" to prevent the entry of "Coolie Labor." "Coolie labor" became a description of *all* low-wage labor—it became a generalized term to include all foreigners willing to work for substandard wages and in appalling working conditions.[81]

Thus, the Alien Contract Labor Act shows that the concern with imported cheap labor was not limited to the Chinese. Chinese exclusion was about cheap labor, recalling that Chinese merchants, students, teachers, professionals, or "travelers for curiosity, but not laborers" were not barred from admission to the United States.[82] A lengthy article in the *New York Times* termed these persons "the privileged, non-laboring class," distinguishing between two classes of Chinese applicants, the "privileged class," who were allowed in, and the laboring class, who were excluded. Allowing in the "privileged class" was the only concession Congress was willing to make to salvage the earlier treaty with China.[83]

As one proponent of the Chinese Exclusion Act put it, "The chief opposition to the exclusion of Chinese comes from a certain section of employers of labor who think of nothing but their profits. They rise superior to patriotic feeling, and appeal to economic interests."[84]

Industrialists and employers favored the importation of labor, but religious groups also lobbied Congress for the free entry of Chinese laborers, raising a distinct ground of opposition to Chinese exclusion. They feared for the safety of American missionaries living in China because of anger in China over the Exclusion Act. On the same day the Supreme Court handed down its decision upholding Chinese exclusion, The Presbyterian Board of Foreign Missions telegraphed the news to its missionaries in China, to alert them to the possibility of retaliation. "Missionaries fear violence" was one U.S. headline.[85] A coalition of Protestant groups called for a day of special prayer, "That our government may be led to just and right action in this emergency."[86] Justice David Brewer, soon to join the Court and a nephew of Justice Field, had been born abroad to missionary parents.[87] He surely took note of these pleas. After he joined the Court, Brewer took part in another Chinese exclusion case, stating in dissent: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?"[88]

Religious groups emphasized the damage to trade as well as to religious conversion —"all American interests" were in peril, they said, including those of American businessmen who owned property there. One missionary, the Rev. Gilbert Reid, said: "There are open doors for Americans to enter for selling the things that the Chinese empire needs in her mining, railway, steamship, and war equipment. If American legislators can do nothing to help, they can at least refrain from utterly destroying American trade relations with China." He continued, "Americans should consider what would be thought of this government if Congress has the right to pass a law which takes precedence over a treaty."[89]

But *The Chinese Exclusion Case* gave Congress a green light to make any laws it saw fit. According to Justice Field, "If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject."[90] The Court disavowed any opinion on the merits: "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."[91] Then, in *Fong Yue Ting*, Justice Horace Gray doubled down on judicial withdrawal from the field:

> The question whether and upon what conditions these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the Government, the Judicial Department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.[92]

Wong Kim Ark, a cook, was born in San Francisco in 1873 to parents who had emigrated from China but were not U.S. citizens. In November 1894, Wong sailed to China for a temporary visit, but when he returned in August 1895, he was detained at the Port of San Francisco by the Collector of Customs, who denied him permission to enter the country, arguing that Wong was not a U.S. citizen because his parents were Chinese. Wong (pictured in 1904) was confined for five months on steamships off the coast of San Francisco while he challenged the government's refusal to recognize his citizenship.

As the progressive era unfolded, so too did further restrictions on immigrants, particularly those from southern Europe, including the rejection of any immigrant based on education, physical and mental health, and poverty. The Supreme Court, by endorsing the racial animus driving Chinese exclusion, had freed Congress to choose any immigration conditions it wished, including siding with domestic labor over capital if it so chose.

In fact, the progressive era saw an explosion of immigration restrictions from Congress:

1903: Anarchists, epileptics, polygamists, and beggars were barred. (Excluding "anarchists," by the way, was the first exclusion based on political views—communists would be barred later.)

1906: Knowledge of English became a basic requirement

1917: Literacy tests were introduced for those over sixteen, and *all* immigrants from Asia were barred, not just the Chinese.

1921: The National Origins Act of 1921 established a quota for the first time, limiting immigration from many areas of the world whose people were considered "undesirable." This cut the number of new immigrants dramatically, especially from southern and eastern European. In 1924 the quotas were further restricted, and were made permanent in 1929. Asians were still barred entirely.

The National Origins Act of 1921 clamped down on immigration in a big way, so that by the end of the progressive era, the number of new immigrants each year was dramatically reduced. In 1922, for example, only around 200,000 immigrants passed through Ellis Island, compared to over one million just fifteen years earlier.

Birthright Citizenship Intervenes

In 1898, in the midst of Chinese exclusion supported by all three branches of the federal government, the Supreme Court determined the question of birthright citizenship in the United States. This was the case of *Wong Kim Ark*,[93] decided almost ten years after *The Chinese Exclusion Case*. Wong Kim Ark's situation was similar to that of Chae Chan Ping. In 1890 Wong Kim returned from a trip to China only to be denied entry on the basis of the Scott Act. Wong Kim's case was different, however, because he had been born in San Francisco, and as a result claimed United States citizenship under the Fourteenth Amendment to the U.S. Constitution. The very first sentence of that amendment, after all, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The U.S. Solicitor General had argued before the Supreme Court that the Fourteenth Amendment's citizenship clause applied only to former slaves, and not to the Chinese race. He pointed to the fact that Chinese were barred by law from naturalization.[94] But a majority of the Court disagreed. In a 7-2 decision, the Supreme Court sided with Wong Kim, holding that the simple fact of birth within the territorial United States—and not race or parentage—determined that he was a U.S. citizen. The decision came thirty years after ratification of the Fourteenth Amendment, and it meant that Wong Kim, unlike Chae Ping, must be allowed to re-enter the United States.

John Marshal Harlan was notably in dissent, joining Chief Justice Fuller. We might be surprised by this, given Justice Harlan's eloquent dissent in *Plessy v. Ferguson*.[95] In *Plessy* he wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[96] But in that same dissent he also contrasted the status of black

Americans, who were citizens, with the Chinese. He wrote: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[97]

Justice Field, who had joined the majority in *Plessy v. Ferguson*, was no longer on the Court at the time Wong Kim Ark's case was decided, so we can only speculate about his views on birthright citizenship for the Chinese. Justice Field had sometimes sided with the Chinese when the issue was discriminatory *state* legislation, and indeed he was viewed in California as a protector of the Chinese. This characterization lost him a Presidential bid in both 1880 and 1884.[98] (Field did not resign from the Supreme Court while he campaigned for the Presidency, a situation difficult to imagine today.) In order to win over California, his campaign rhetoric indicated that he would be "tough on the Chinese." Analogous, perhaps, to modern campaign rhetoric of being "tough on crime."

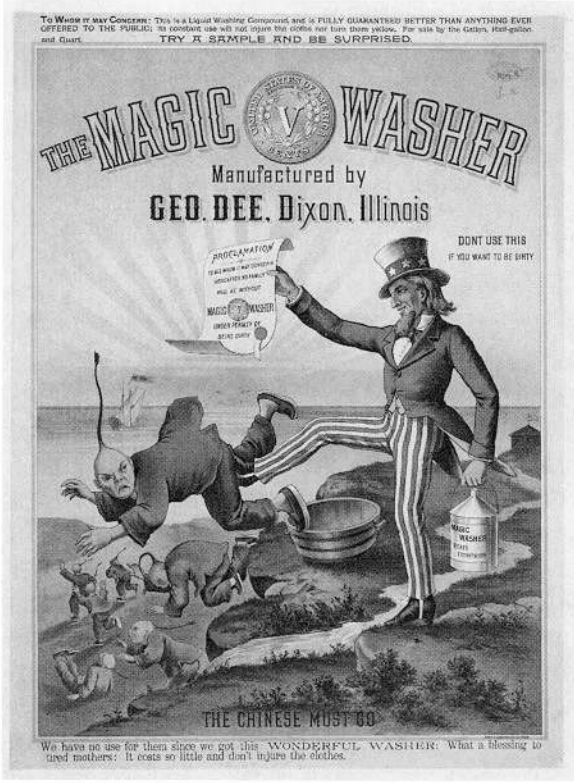
From this point over the entirety of the Progressive Era, many lawsuits turned on issues of proof, particularly as to place of birth. If a person could prove birth in the United States, that made him or her a citizen. But birth certificates were not the norm, and the Chinese were precluded from serving as witnesses.

This matters because Congress still excluded Chinese from becoming citizens through naturalization. But the stakes had changed—throughout the late nineteenth and early twentieth centuries, Chinese immigrants allegedly found other ways in. There was strong suspicion that American industrialists connived with British steamers and Canadian railroads to get the workforce they needed. In 1891, Secretary of the Treasury Charles Foster claimed "unremitting efforts of the Department to enforce the Chinese exclusion act," but he added: "Any legislation, however, looking to exclusion will fail of its full purpose so long as the Canadian government admits Chinese laborers to Canada, when, armed with Canadian permits to leave and return to Canada at pleasure, they are at liberty to invade our territory along its entire northern frontier."[99]

To be clear, the fact that some Chinese might be U.S. citizens by birth did not ameliorate their treatment at the hands of federal inspectors and other law enforcement officers.[100] Claims of citizenship were met with deep skepticism, and insurmountable proof issues (the burden was on the subject, who had to acquire white witnesses to testify) meant undoubtedly some U.S. citizens were deported, and life remained difficult for all those whose papers were questioned.[101] A contemporary noted in 1901, "Chinese persons, who have violated no law, or persons appearing to be Chinese subjects—for they are as likely as not to be American citizens of Chinese extraction—are now constantly arrested and are treated as felons . . ."[102]

In the case of *Fong Yue Ting,* the Court had answered the bigger question gripping the country at the time. The federal government's power to expel entire classes of noncitizens was as absolute as its power to deny them entrance in the first place. It also held that residence in the United States, for however long, did not create a "vested right" subject to judicial protection. Thus, the case of Wong Kim Ark located rights in citizenship status rather than race, at a time of nativist discontent and amid concerns that poor and undesirable persons from abroad would destroy American civilization.

It also made securing the borders of greater importance to labor restrictionists. The explosion of immigration legislation in the early twentieth century, including quotas and the exclusion of poor or unhealthy immigrants, is surely tied to the Supreme Court's strong stance on birthright citizenship. Such persons—however undesirable on



The Geo Dee company advertised its new washers in 1886 by exploiting anti-Chinese sentiment and touting that its washers could replace Chinese launderers. Chinese immigrants began setting up laundries in the 1850s because the work required no special skills or venture capital and Americans considered it undesirable work. By the 1870s, Chinese laundries were operating in all U.S. towns with Chinese populations.

grounds of race or poverty—would give birth to United States citizens if not prevented from entry.

Why this period is important is not just because it set the foundation of U.S. immigration law, but because at the same time the Court recognized our most basic principle of citizenship. If Justice Field could peremptorily title *Chae Chan Ping v. United States* as *The Chinese Exclusion Case*, we might as well refer to the decision in *Wong Kim Ark* as the "Chinese *Inclusion* Case."

Modern Resonances of Chinese Exclusion

Although I disavowed at the outset the purpose of drawing lessons from historical events, the modern resonance inescapably sheds some light on issues with which the Supreme Court has continued to struggle. The plenary power doctrine in particular is contested, especially as to the notion that the same power to exclude persons from entering the country implies the power to expel. The latter contention has been consistently undermined by Supreme Court decisions involving due process rights of immigrants. A plethora of legal scholars have criticized the plenary power doctrine over the years, including Louis Henkin, who termed it "a constitutional fossil." He continued, "Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional."[103]

In addition, some question today the doctrine of birthright citizenship for the children of undocumented immigrants. The Supreme Court has not revisited the case it decided in 1898, although some suggest that it should. Most scholars, however, agree that the language of the Fourteenth Amendment is clear, and that Wong Kim Ark's case was correctly decided.[104]

Another modern resonance is the difficulty of preventing the free movement of labor. This country's labor needs are to some extent dependent on immigrants with whom we have an ambivalent relationship. The draw of jobs makes it difficult to control unauthorized immigration, whether this comes from visa overstays or clandestine border crossing. Justice Brewer in 1889 wrote of Congress's authority to "build a Chinese wall" at the nation's borders.[105] Senate debates and newspaper editorials did the same.[106] (Although I must point out there was no suggestion that China should pay for it.)

Immigrants found ways to avoid Angel Island, the official port of entry on the West Coast. Here is how this concern was expressed more than 100 years ago:

> Like water from a sieve, the Chinese are showered upon us from every conceivable point on Puget Sound, and all along the line from Victoria to Halifax. So with reference to the Mexican border. They cross the fifteen hundred miles of our Southern boundary without detection into the United States.[107]

The author claimed 16,000 Chinese laborers entered the United States from Canada after the completion of the Canadian Pacific Railroad.[108] Contemporaries recognized the difficulty of excluding immigrant labor, especially when it was encouraged and even subsidized by U.S. employers.

We tend to see the exclusion of Chinese as aberrational in our immigration history. And in many ways it is, but Chinese exclusion also pointed the way to political success in the progressive era of other sweeping immigration restrictions held to be within the power of Congress, not subject to judicial oversight. It began with a pronounced racism against the Chinese, but we also see a strong theme of labor protectionism for American workers that moved across races.

It is helpful to understand the Supreme Court's work from this additional angle. What began as Congressional acquiescence to demands from the western states paved the way, with the Court's explicit blessing, to bans on all immigrant labor imported from abroad, not just Chinese labor.

It is also important to keep in mind that *The Chinese Exclusion Case* was decided well before the due process revolution of the twentieth century. Indeed, inroads into the plenary power doctrine have been identified especially in cases involving individual due process, not in questions of the ability of Congress to exclude entire classes of persons on grounds that could not possibly be applied to American citizens.

In striking contrast to the modern emphasis on both substantive rights and due process in individual immigration cases, Justice Field never once used Chae Chan Ping's name in his opinion for the Court in *The Chinese Exclusion Case*. To Field, the case was simply a challenge to the Scott Act of 1888, and nothing more. Not only did Justice Field avoid any reference to Chae Ping, Field never responded to Ping's claims that he had money on deposit and property in San Francisco, and debts owed to him that he should be entitled to collect. All of those would be forfeited if the Supreme Court ruled against him.[109]

But one wonders about the fate of Chae Ping, the Chinese laborer whose certificate of re-entry was held to be worthless. Initially, Ping was held on board the ship he had arrived in, resulting in the habeas petition that allowed him to leave the ship under a security bond. He had about nine months of relative

freedom in San Francisco during the pendency of his case, although under conditions very close to house arrest. His pursuit of litigation, according to the *San Francisco Call*, "has given the United States courts a great deal of trouble in his endeavors to force his unwelcome presence upon the citizens of this fair and free country."[110]

Shortly after the Supreme Court's decision against him, Chae Ping was escorted by a U.S. Marshal to the sailing ship *Arabic*, where he was locked in a room, under guard, until the ship's departure to China. The Captain of the ship tried to get Chae Ping to pay for his own passage, which he understandably refused. He said: "I don't want to go back to China. I want to stop in California. If they make me go back they must pay the passage. I don't care, I won't pay." The U.S. government also refused to pay. In the end, Chae Chan Ping was transported "as a guest" of the shipping line.[111]

Some speculated that Chae Ping would attempt to return in the guise of a merchant or tourist, and thus be allowed back in, but we do not know. We have lost sight of him in history.

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ENDNOTES

[1] For a summary of legislation involving Chinese exclusion—in 1882, 1884, 1888, 1892, and 1902—*see* Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910**, The Oliver Wendell Holmes Devise, History of the Supreme Court, Vol. VIII (Macmillan, 1993), p. 301.

[2] The Chinese Exclusion Act of 1882, 22 Stat. 58.

[3] 130 U.S. 581 (1889).

[4] Scholars have noted the growth of a federal immigration bureaucracy in response to the Chinese Exclusion Acts. *See, e.g.*, Emily Ryo, "Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration during the Chinese Exclusion Era," 31 *Law and Social Inquiry* 109 (2006); Kitty Calavita, "The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910," 25 *Law and Social Inquiry* 1 (2000).

[5] "The Chinese Invasion: Alleged Violations of the Exclusion Law," *Chicago Daily Tribune*, Nov. 3, 1883, p. 3.

[6] "Anti-Coolie Agitation," *Los Angeles Times*, Nov. 28, 1885, p. 4.

[7] "Still They Come: The Chinese Exclusion Act a Dead Letter in San Francisco," *Detroit Free Press*, Sept. 21, 1889, p. 4.

[8] "Exclusion of the Chinese: Efforts to Manufacture Political Capital Out of the Question," *The Baltimore Sun*, Sept. 21, 1888, p. 1.

[9] Adam Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History* 20 (2015). In-depth histories of the Chinese exclusion era include Beth Lew-Williams, **The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America** (Harvard Univ. Press, 2018); Mae M. Ngai, **Impossible Subjects: Illegal Aliens and the Making of Modern America** (Princeton Univ. Press, 2014); Deirdre M. Maloney, **National Insecurities: Immigrants and U.S. Deportation Policy since 1882** (U.N.C. Press, 2012); Estelle T. Lau, **Paper Families: Identity, Immigration Administration, and Chinese Exclusion** (Duke Univ. Press 2007); Hiroshi Motomura, **Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States** (Oxford Univ. Press, 2006); Erika Lee, **At America's Gates: Chinese Immigration during the Exclusion Era**, 1882-1943 (U.N.C. Press 2003); Andrew Gyory, **Closing the Gate: Race, Politics, and the Chinese Exclusion Act** (U.N.C. Press 1998); and Lucy E. Salyer, **Law Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law**, (U.N.C. Press 1995).

[10] Alien Contract Labor Act of 1885, 23 Stat. 332.

[11] *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892).

[12] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[13] The facts of the case are drawn both from the Court's opinion in *The Chinese Exclusion Case*, 130 U.S. 581 (1889), as well as briefs filed on behalf of the appellant.

[14] The Scott Act of 1888, 25 Stat. 476, expanded the Chinese Exclusion Act of 1882. An estimated 20,000 Chinese holding certificates of return were stranded in China upon passage of the act. *See* Lee, **At America's Gates**, p. 45.

[15] *See* Joan Fitzpatrick & William McKay Bennett, "A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States," 70 *Wash. L. Rev.* 589, 606 (1995).

[16] *See* T. Alexander Aleinikoff, **Semblances of Sovereignty: The Constitution, the State, and American Citizenship** (Harvard Univ. Press, 2002); Louis Henkin,

"The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 *Harv. L. Rev.* 853 (1987); Hiroshi Motomura, "Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation," 100 *Yale L.J.* 545, 554 (1990); Peter H. Schuck, "The Transformation of Immigration Law," 84 *Colum. L. Rev.* 1, 14 (1984).

[17] *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893). The majority opinion stated emphatically that "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country." 140 U.S. at 707.

[18] *See* Paul Yin, "The Narratives of Chinese-American Litigation during the Chinese Exclusion Era," 19 *Asian Am. L.J.* 145 (2012).

[19] *Plessy v. Ferguson*, 163 US 537 (1896).

[20] Fiss, **Troubled Beginnings of the Modern State**. *See also* Michael McGerr, **A Fierce Discontent: The Rise and Fall of the Progressive Movement in America** (Oxford Univ. Press, 2003); Benno C. Schmidt Jr., "The Court in the Progressive Era," 22 *Journal of Supreme Court History* 14 (1997).

[21] Robert W. Gordon, "The Constitution of Liberal Order at the Troubled Beginnings of the Modern State," 58 *U. Miami L. Rev.* 373, 400 (2003).

[22] Natsu Taylor Saito, "The Enduring Effect of the Chinese Exclusion Cases: The 'Plenary Power' Justification for on-Going Abuses of Human Rights," 10 *Asian L.J.* 13, 14 (2003). *See also* Chinese Railroad Workers in North America Project at Stanford University, "Timeline," available at http://web.stanford.edu/group/chinese railroad/cgi-bin/wordpress/timeline.

[23] Fiss, **Troubled Beginnings of the Modern State**, pp. 298-99.

[24] *See, e.g.*, "Holding the Mob at Bay: United States Troops Ordered to Seattle," *New York Times*, Feb. 10, 1886, p. 1.

[25] Charles Frederick Holder, "The Chinaman in American Politics," *The North American Review*, Feb. 1898, at 227.

[26] *See* Samuel E. Moffett, "The Constitutional Referendum in California," *Political Science Quarterly*, March 1898, p. 1.

[27] *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (Field, J., Circuit Justice) (striking down a California inspection statute on the grounds that immigration power is "exclusively within the jurisdiction of the General Government, and is not subject to State control or interference").

[28] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.

[29] The Chinese Exclusion Act of 1882 was repealed in 1943 by the Magnuson Act, 57 Stat. 600.

[30] The Scott Act of 1888, 25 Stat. 476.

[31] Fiss, **Troubled Beginnings of the Modern State**, pp. 303-306.

[32] *Id.*

[33] 130 U.S. at 603.

[34] For these facts and other insights I am indebted to Paul Kens's excellent biography of Justice Field. *See* Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Kansas Univ. Press, 1997).

[35] Quoted in Kens, **Justice Stephen Field**, p. 205.

[36] *Id.*, p. 212.

[37] 130 U.S. at 606.

[38] 130 U.S. at 609.

[39] Henkin, "The Constitution and United States Sovereignty," 100 *Harv. L. Rev.* p. 855.

[40] *See* Adam Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History* 20 (2015); Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 *Harv. L. Rev.* 853, 854-55 (1987).

[41] 130 U.S. at 608.

[42] 130 U.S. at 602.

[43] 130 U.S. at 608.

[44] *See* Aleinikoff, **Semblances of Sovereignty**, p. 12. ("Throughout this period, the foundational plenary power cases were not questioned.") There were some critics as to both content and application, primarily legal scholars. *See, e.g.*, "The Injustice of Chinese Exclusion," *The Central Law Journal*, Jan. 13, 1905, p. 21; Max J. Kohler, "Our Chinese Exclusion Laws: Should They Be Modified or Repealed?" *New York Times*, Nov. 24, 1901, p. 4; R.T. Colburn, "The Chinese Exclusion Act in Court and Council," *The Independent*, June 20, 1889, p. 5.

[45] "Exclusion of Aliens: Treaties Do Not Impair the Powers of Congress," *The Washington Post*, Jan. 27, 1902, p. 4.

[46] 130 U.S. at 602.

[47] *See* Aleinikoff, **Semblances of Sovereignty**, pp. 74-94.

[48] The *Insular Cases* are generally considered to be six Supreme Court cases all decided in 1901. These include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901). *See generally* Juan R. Torruella, "Ruling America's Colonies: The Insular Cases," 32 *Yale L. & Pol'y Rev.* 57, 58 (2013).

[49] 130 U.S. at 595.

[50] *Id.*

[51] *Id.*

[52] *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).
[53] 149 U.S. at 707.
[54] 149 U.S. at 744 (Brewer, J., dissenting).
[55] *Id.*
[56] *Id.*
[57] Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History*, p. 32.
[58] 149 U.S. at 754 (Field, J., dissenting).
[59] *See Wong Wing v. United States*, 163 U.S. 228 (1896) (deportation is not "punishment" in the criminal sense, and thus is a civil matter).
[60] *See generally* Earl M. Maltz, "The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment," 17 *Harv. J.L. & Pub. Pol'y* 223, 249 (1994); Stuart C. Miller, **The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882** (University of California Press, 1969); R.G. Ingersoll, "Should the Chinese Be Excluded?" *The North American Review*, July 1893, p. 52 ("Both of the great political parties pandered to the leaders of the crusade against the Chinese for the sake of electoral votes.").
[61] The political background of the various Chinese Exclusion Acts is ably described in Salyer, **Law Harsh as Tigers**, pp. 15-21, *passim*.
[62] *See* Mary D. Fan, "Post-Racial Proxies: Resurgent State and Local Anti-'Alien' Laws and Unity-Rebuilding Frames for Antidiscrimination Values," 32 *Cardozo L. Rev.* 905, 914-20 (2011).
[63] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[64] Alien Contract Labor Act of 1885, 23 Stat. 332.
[65] *Id.*
[66] *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892). *See also* William S. Blatt, "Missing the Mark: An Overlooked Statute Redefines the Debate over Statutory Interpretation," 104 *Nw. U.L. Rev. Colloquy* 147 (2009).
[67] *See* John Hawks Noble, "The Present State of the Immigration Question," *Political Science Quarterly*, June 1892, p. 232.
[68] Henry Cabot Lodge, "The Restriction of Immigration," *The North American Review*, Jan. 1981, p. 27.
[69] *Id.*
[70] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.
[71] For analyses of the Court's decision in *Holy Trinity* as statutory interpretation, *see* Carol Chomsky, "Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation," 100 *Colum. L. Rev.* 901 (2000); Adrian Vermeule, "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church," 50 *Stan. L. Rev.* 1833 (1998).
[72] 143 U.S. at 462. Labor groups urged enforcement of the Contract Labor Act in a variety of circumstances, including an attempt to exclude Strauss's Vienna Orchestra from a U.S. tour. *See* "What Is an Artist? The Attempt to Prevent Strauss's Orchestra from Coming Here," *New York Times*, Feb. 13, 1890, p. 8.
[73] The Chinese Exclusion Act of 1882, 22 Stat. 58, Sec. 15.
[74] 143 U.S. at 471.
[75] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?" *The New York Times*, Nov. 24, 1901, p. 14.
[76] "Contract Labor: The Senate Debates the Bill to Prohibit the Importation of Foreigners under Contract," *Chicago Daily Tribune*, Feb. 14, 1885, p. 7.
[77] *In re Tiburcio Parrott*, 1 Fed. 481 (C.C.D. Cal. 1880). For an insightful analysis of the case, *see* Paul Kens, "Civil Liberties, Chinese Laborers, and Corporations," in Gordon Morris Bakken, ed., **Law in the Western United States** (U. Okla. Press, 2000).
[78] 198 U.S. 45 (1905). *See generally* Schmidt, "The Court in the Progressive Era," 22 *Journal of Supreme Court History*, p. 19.
[79] 198 U.S. at 64.
[80] *See* Brief of Appellant, No. 1446, *Chae Chan Ping v. United States*, pp. 7-11.
[81] Senate Committee on Education and Labor, June 28, 1884, 48th Cong., 1st Sess. (Report on the Alien Contract Labor bill) (comparing with "coolie labor" and Chinese exclusion); "A Day in Congress," *Los Angeles Times*, April 24, 1892, p. 5 (Senator's use of the term "Chinese Wall").
[82] Kohler, "Our Chinese Exclusion Laws," p. 14.
[83] *Id.*
[84] M.J. Farrelly, "The United States Chinese Exclusion Act," *The American Law Review*, Sept/Oct 1894, p. 7.
[85] "Missionaries Fear Violence: Believed That the Geary Act Will Cause Retaliation," *New York Times*, May 18, 1893, p. 9.
[86] *Id.*
[87] Fiss, **Troubled Beginnings of the Modern State**, p. 311.
[88] *Fong Yue Ting* v. *U.S.*, 149 U.S. 698, 744 (1893) (Brewer, J., dissenting); Fiss, **Troubled Beginnings of the Modern State**, p. 311-12.
[89] "Would Cause Retaliation: Missionary Reid on the Effect of the Geary Act," *New York Times*, April 17, 1893, p. 6.
[90] *The Chinese Exclusion Case*, 130 U.S. 609. In this and other instances, Justice Field uses the term "political department" in the singular to refer to both Congress and the President.
[91] 130 U.S. 602.
[92] *Fong Yue Ting v. U.S.*, 149 U.S. at 731.
[93] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).
[94] Brief for the United States, *U.S. v. Wong Kim Ark*, no. 449 (1898). Some legal scholars also believed the

Fourteenth Amendment did not confer automatic citizenship, although usually on grounds of international law and comity. *See, e.g.,* Marshall B. Woodworth, "Citizenship of the United States under the Fourteenth Amendment," *The American Law Review*, July/Aug 1896, p. 535. The same author later conceded the point, following the Supreme Court's decision. Marshall B. Woodworth, "Who Are Citizens of the United States?," *The American Law Review*, Jul/Aug 1898, p. 554.

[95] *Plessy v. Ferguson*, 163 US 537 (1896).

[96] 163 U.S. at 559 (Harlan, J., dissenting).

[97] 163 U.S. at 561 (Harlan, J., dissenting).

[98] *See* Kens, **Justice Stephen Field**, p. 205-206.

[99] "State of the Treasury: Annual Report of Secretary Foster on the National Finances," *The Washington Post*, Dec. 10, 1891, p. 2.

[100] *See* "Application of the Procedure under the Chinese Exclusion Acts to the Determination of the Right of Entrance of Persons of Chinese Descent Asserting American Citizenship," *The Central Law Journal*, June 17, 1904, p. 481.

[101] *See generally* Estelle T. Lau, **Paper Families: Identity, Immigration Administration, and Chinese Exclusion** (Duke Univ. Press 2007); Hiroshi Motomura, **Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States** (Oxford Univ. Press, 2006).

[102] Kohler, "Our Chinese Exclusion Laws," p. 4.

[103] Henkin, "The Constitution and United States Sovereignty," 100 *Harv. L. Rev.*, p. 862.

[104] *See, e.g.,* "Birthright Citizenship on Trial: *Elk v. Wilkins* and *United States v. Wong Kim Ark*," 37 *Cardozo L. Rev.* 1185 (2016).

[105] *Fong Yue Ting v. U.S.*, 149 U.S. at 738 (Brewer, J., dissenting).

[106] *See, e.g.,* "A Day in Congress," *Los Angeles Times*, April 24, 1892, p. 5 (attributing "Chinese Wall" sentiment to Senator William P. Frye); "No Chinese Wall in America," *New York Observer and Chronicle*, Jan. 24, 1878, p. 30.

[107] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.

[108] *Id.*

[109] *See* Brief of Appellant, No. 1446, *Chae Chan Ping v. United States*, pp. 12-13.

[110] "Chan Ping Leaves US," *New York Times*, Sept. 2, 1889, p. 3 (reprinting article from the *San Francisco Call*).

[111] *Id.*

Notes for a Lost Memoir of Louis D. Brandeis

PETER SCOTT CAMPBELL

Woodrow Wilson's January 28, 1916, nomination of Louis D. Brandeis to the United States Supreme Court hit the nation like a bombshell. Nominees from the previous few decades tended to be corporation lawyers with conservative backgrounds, and Brandeis's progressive views and public service background galvanized the American public into opposing camps. While many citizens voiced their support for Wilson's choice, many large financial and political interests began a campaign against Brandeis's confirmation.

The Senate confirmation hearings lasted for eighteen weeks. As nominees at the time were not invited to testify before the committee, Brandeis remained in Boston and coordinated a response to the campaign against him. One strategy was a public relations drive designed to humanize him and showcase his legal career. Instrumental to this effort was Alice H. Grady.

Grady had been hired by Brandeis to be his secretary, but she had proved to be so competent that her duties continually expanded. She ended up in charge of Brandeis's firm's secretarial pool and worked closely with Brandeis on his many public service crusades. Grady became so invested in one of Brandeis's causes, savings bank insurance, that she ended up working for the Massachusetts agency involved in regulating the service, eventually becoming a deputy commissioner.

Grady also helped do research for the team representing Brandeis, gathering information about old cases to refute accusations made against him during the hearings. She also collected information about his personal life and career for journalists covering the nomination. At one point, she even traveled to Brandeis's hometown of Louisville, Kentucky to interview his family members and childhood friends.

The following document appears to have been part of that effort. It is hard to know with certainty, however, as there is next to no background information about it. Presumably donated by someone related to Grady, it is housed in the Robert D. Farber University

Archives and Special Collections department at Brandeis University. Given the dearth of accession data, any information about the document has to be gleaned from the text itself.

On the surface, the document is a first person narrative of Brandeis's life up to his nomination to the Supreme Court. However, rather than proceeding in a straight chronological order, the text jumps around and frequently doubles back. Near the end, the narrative thread simply stops as Brandeis seems to free-associate facts, with little context to connect them, almost as if he was expecting Grady to fill in the gaps.

Given the disjointed nature of the text, and the fact that Brandeis once uses the second person, it would appear that the document was dictated to Grady, presumably during a number of sessions. The manuscript is typewritten, with numerous penciled edits (presumably made by Grady): dates and names are inserted, and in one section, the tense of the narrative has been changed from the first person to the third.

It would appear that this material was gathered for use in a newspaper or magazine, but, for whatever reason, most of it was never published, although a few paragraphs about Brandeis's school days in Germany and at Harvard were converted into third tense and used in a profile of Brandeis published in the June 4, 1916, issue of *The Boston American*. Various other facts and anecdotes found their way into the published records of Brandeis's life, but as no researcher appears to have seen this document before, many facts and incidents related here have yet to make it into any of Brandeis's biographies.

Brandeis describes in detail the many factors that influenced his life: the loss of his family's fortune while he was growing up; his years alone as a teenager in Germany where he had to talk his way into admission to a school there; and the various ailments and illnesses that affected him throughout his life. He relates with pride his successes in the early years of his career and in his public service efforts. And a note of wistfulness appears to creep in when he describes the social world of Boston that took him in, only to turn on him when its members felt betrayed by his devotion to his career and progressive causes.

Given the fact that the document appears to be notes hurriedly taken down while Brandeis spoke, it would be best not to view this as a "lost writing." Brandeis was known for rewriting his work over and over again until it met his standards. This document is presented here for its historical properties rather than its literary qualities. Still, I have edited it lightly to make it more readable. Compound sentences have been broken up, while incomplete sentences have been made whole. Names and pronouns were added occasionally to clarify meaning, and repetitive phrases have been removed. Most of Grady's penciled additions were superfluous and have been removed, although some have been incorporated when they genuinely illuminated the text. Endnotes have been added to identify people mentioned by Brandeis, although this was not possible in every case.

Unfortunately, the first page of the document is missing, so the memoir begins in mid-sentence as Brandeis describes the emigration of his parents from Prague to America.

—

. . . they were all in a state of upheaval from the revolution, and they finally decided to settle at Madison, which was on the Ohio River, half way between Cincinnati and Louisville in Indiana. It was expected to be a great city, because it was the terminus of a railroad that ran from Madison through Indianapolis towards the Northwest.

In September 1849, my mother Frederika Dembitz, to whom my father had been engaged[1] before he left Prague, came over with her father, who was a physician, and her brother, who was afterwards a lawyer, Lewis Dembitz,[2] and this large body of relatives and

others, which included also the grandfather of Mrs. Brandeis.[3] They all went together and settled in Madison, and my father went there, and in a certain sense became a guide for the community, and left his business connections in Cincinnati.

My mother's mother was from Prague. She was a Wehle. And her father[4] was a native of Pressburg in Austria. He was born in 1797. He was a physician, a graduate of Konigsburg in Prussia. He practiced in the Eastern part of Prussia. My mother was born in Prussia, and met my father when she was visiting her grandparents and her relatives in Prague.

My grandfather Dembitz traced his ancestry back to the Portuguese Jews who were expelled from Portugal at the time of the Inquisition, and went to Holland and settled in Amsterdam.

In 1851, my father moved from Madison to Louisville, and shortly after coming to Louisville entered into the wholesale grain business, which he carried on for many years, a very large business, called Brandeis and Crawford. They carried on that business from 1851 to 1872, when the firm was dissolved, at the time our family went abroad. After he came back from abroad, my father entered into the grain business again with my brother Alfred, who still continues it under the name A. Brandeis and Son. I have recently received a congratulatory letter from William W. Crawford, who is a grandson of the Crawford who was my father's partner.[5]

Father was one of the most respected men in Louisville; he had an extraordinary business reputation. He was a very good and successful business man and was considered


BOSTON AMERICAN——*A Paper for People Who Think*——*Largest Ev*

MISS GRADY SHOWING THE JUDGE HOW SAVINGS INSURANCE HAS GROWN

WEDNESDAY, AUGUST 31, 1921

THIRTEEN YEARS AFTER

Judge Brandeis conceived the system of Savings Bank Life Insurance [illegible] at the State House he saw it in actual operation for the first time through Commissioner Alice H. Grady, who was his private secretary for twenty-five years.

This is a rare photo of Louis D. Brandeis and Alice L. Grady together. It depicts Grady, who had started her career as Brandeis's secretary, showing him some reports from the Division of Savings Bank Life Insurance, of which she was now deputy commissioner.

In 1851, Adolph Brandeis moved to Louisville and entered into the wholesale grain business with William W. Crawford. They carried on that business from 1851 to 1872, and Crawford died four years later. Crawford is the man on the ground at the far right with the beard; Brandeis is on the ground and second to the left (with the bow tie.)

then, back in the Sixties and Seventies, one of the wealthy men of Louisville.

From the latter part of the Sixties down to 1872, there was a readjustment after the war, which was very great in the territory in which my father was. He was gradually losing, his investments were shrinking and he finally concluded that there was nothing he could do to stay that situation, and he was prevailed upon to go abroad, which he always wanted to do. He went abroad with his family, with the expectation of staying 15 months, seeing his old friends whom he had not seen since 1848, and introducing his family to Europe.

While he was abroad first came the Panic of 1873, which swept away a large part of his investments, leaving only his mortgages intact. At first he didn't care to come back until the storm blew over, and then he couldn't come back because first one sister and then the other became ill. Amy was ill with typhoid. She had hardly recovered when Fanny was taken ill. As the result, all of us—with the exception of my brother Alfred, who returned home in September, 1873 to go back into business clerking—stayed over there until May 1875.

My father had a very interesting experience. After having been called rich, instead of doing as most people do and lose their money quickly, it took about ten years to complete the readjustment. Things in which he had no part, and could not help, just practically wiped out everything he had except one or two equities in some real estate. And that went on until about 1879 or 1880. And then after he had lost everything, he began business again, and the rest of his life he was in comfortable circumstances, and never again had any business troubles.

This experience had for me, and I think for my brother, the greatest advantages, and I have attributed my own attitude toward money and life a good deal to the fortunate circumstances of my father's troubles, in a way. As a boy, I had everything that money could buy. We were not rich according to modern notions, but well off, and in that community were considered rich. But in the important years of my life, age 13 to 14 and up to the time I became independent, I had to pass through the experience of having practically nothing. So that even in Germany, while I was in school there, I earned money by teaching English, and translating.

I went to the Harvard Law School on money lent me by my brother who was then clerking. And I earned while I was in the Law School not only enough to pay that back and pay the rest of my way, but I had $1200 when I got out of the Law School. I was paid $2.50 an hour for tutoring. I had some of the "crowned heads" of Boston as my pupils. One lesson that I gave here in Boston, I got $5.00 an hour for.

At that time we had to give a bond for $400 to cover our tuition. I didn't know anyone to go on my bond. I was introduced to Jacob H. Hecht,[6] who said, "Of course I will go on your bond."

The first school I went to when I was six years old was a school kept by an English lady, named Mrs. Wood, together with her maiden aunt Miss Price.[7] The next year I went to a school kept by a Mr. Knapp, a German, where there was some instruction given in German. After a couple years there was organized in Louisville what was called the German-English Academy, under the management of Knapp and Hailmann.[8]

That was a school like the Knapp school, where German was taught as one of the studies. I attended that. These were all private schools. I attended these until I was 14 years old. Then I went to what is the Public High School. It was then called the University of Louisville.[9] It was what we should call a high school. That was in December 1870. I graduated at the third year of that with a gold medal. I was 15 years of age.

In August 1872, I went abroad with the whole family, intending to stay 15 months, but our stay was prolonged by the illness of my two sisters.

We went first to England, and then along the Rhine, then to Ischgl, a summer resort in the Austrian Alps. From there to Vienna. I intended to enter the Gymnasium in Vienna, but unfortunately I failed to pass the examination. I then saw how little I knew as compared with what I needed to know. The result was that I took some private lessons, and attended some lectures at the university. But the principal thing that I was doing was devoting myself to music and art and the drama and literature, and seeing people.

My family had always been a cultured family. Music, art, and literature were the things they had been particularly interested in. My sister Fannie was a rather extraordinary musician. I myself played the violin for many years, and was familiar with musical things. We spent a good deal of the winter on those things and then went in March to Italy. We stayed four months. That is where my sister got typhoid. We went from there to Switzerland, intending to go back to America in the fall. But the panic had come, and Amy wasn't well enough. So we stayed, and my brother went back to America, and I went off alone to Dresden to go to school. I was then 16. The family was to follow later. I had a most interesting experience, because for the first time I was entirely on my own footing.

It was expected that I would go to one of the private schools, but after inquiring about things there in Dresden, I made up my mind I wanted to go to the public school. I had a couple of letters to certain persons in Dresden. One wasn't there, and the other I called on on the first Sunday after my arrival. I put up at a little hotel, the Hotel Meissner, and then I went in the next day to see the gentleman to whom I had a letter, a

German-American. I talked with him and he told me about the school his sons were in, and about other schools. I made some other inquiries, and made up my mind to go to the public school. He said he would take me there, but couldn't do it until Wednesday, because he was moving. Well, I said I had made up my mind. I couldn't wait until Wednesday and that I would go myself. So on Monday morning, the first thing I did was to move out of the hotel and look for lodgings, which I found in the neighborhood of the school.[10] Then I circled around the school like a moth around the candle. I worked my way up into the room of the principal (called the "rector") who said he couldn't admit me into the school unless I should pass an examination. I didn't want to make a try at the examination. I said I thought I knew enough to get into the second class, called the Secunda.

"But," I said, "I can't pass the examination. I have been studying for 15 months very different things and under very different conditions, and it wouldn't be a fair test."

Well, he said I couldn't do it without. But I talked quite a little with him, and he said, "If you will take some private lessons, it will be three weeks before the mid-year examinations, and you can take the examination then."

I concluded I would take private lessons in all of the different subjects in which he said I would have to perfect myself. Then what I would have to have besides that were a birth certificate and a vaccination certificate. I said I could provide the vaccination certificate by having someone look at my arm, and my presence was evidence that I had been born.

I took lessons from various professors and teachers in the school and worked about 13 hours a day for three weeks. The holiday came along and when the new term commenced, I slipped into that school, without having to try for an examination. Nobody ever wanted one. This was in the October term of 1873. At the end of six months, when it came to the Easter term, this school was going to interpolate an additional Secunda. It was a school which prepared for the Polytechnic. The highest class was a Prima. But they had an upper and a lower Prima, which were two years, but only one Secunda, and one Tertia. They were going to interpolate an extra Secunda, and they were going to divide that class, some to go into the Ober Secunda, and some to the Unter Prima. I was among those who went into the Unter Prima.

When it came to the next Easter term, 1875, I was pretty well recognized as the leader of that class. There were two other boys who stood about as well—the only other boys in the school who were Americans. They were the Harjes boys, nephews of the Drexel Harjes of Philadelphia, who used to be the Paris correspondents of J. P. Morgan and Company.

I have now a book which was presented to me as a prize for high standing in the school. They let me select the book, and I selected Becker's "Art."[11]

It was while I was there in Dresden that I was earning some money by teaching English.

During that period, from 1873 to 1875, was our panic in America. Hardly a letter came to my father that did not bring news of more losses. The family was most of the time not in Dresden, but were away on account of my sister's illness.

All of the rules were in a certain way relaxed on my account. The rule was that you had to live either in an accredited dormitory, or with your parents. I lived absolutely alone and never had any supervision. Nobody ever raised a question.

The rule was that you could never absent yourself unless you had an excuse or certificate from your parents. I was away—visiting my parents in fact—and was delayed even for an examination. The rule was never enforced with me. I had very good standing—particularly so with the rector of the school,

who was a lover of English. His name was Job. He was a man of very great tact.

There used to be a rule of the school that you had to bow (take off your hat) to every teacher in the school whether you knew him or not. The Harjes boys and I, and a good many of the boys objected. The Harjes boys and I didn't choose to bow to all those teachers, some of whom we didn't know. One of these men made a complaint to the rector. The rector, in one of his discussions in class one day said, "It is strange how people sometimes go to a good deal of trouble to do what would come naturally. Now, you see the English very often have in their hats little holes to ventilate them. Now if they, instead of that, would like our people to be disposed to take off their hats to people, they would get better ventilation, even with the ordinary hat."

Nobody knew what it was in reference to except us boys, but after that we always bowed.

By the time I got through I was in the Ober Prime, but we concluded to come back to America in May. I didn't go back to the school, but spent the latter part of March and April in the town of Blankenburg, where my parents had been living with my two sisters for about a year. There we stayed until May 5th, 1875, when we started back for America.

When I came my sister was somewhat recovered from her long illness, but was far from well. It was deemed inadvisable for her to go to Kentucky. She came here [Boston] to stay with a young girl whom we had met in Vienna and who travelled with us through Italy—a young girl named Lillie Rogers who had gone as companion with the Morningstar family.[12] She was the daughter of a man who was an assistant in the treasurer's office at the State House. She herself had worked for a year, I think, as clerk in the State House—a very charming girl. She was just about the age of my sister. Fanny went to stay with her. I brought her over here. It was just the end of May, about Decoration Day. That was the first time I had seen Boston.

We had met abroad in the winter of 1873 Ephraim Emerton,[13] who was travelling over there and was at the same pension with me in Dresden. He was an 1871 man at Harvard and talked up Harvard tremendously, so I had an idea I would go there. When I came here, besides bringing my sister, I also came to look at Harvard to see what class I could enter. The friend of Lillie Rogers who came with her to meet us was Rufus K. Wood.[14] And the friend at Harvard who took me around and showed me through was Charlie Lord,[15] the great friend of Denman W. Ross,[16] and the son of Mrs. Frances Lord—a charming fellow in the Class of 1875, of which Denman Ross was also a member.

My sister was at that time engaged to Mr. Charles Nagel.[17] He came on and I returned to Louisville. While I was in Louisville, in the summer of 1875, my father's financial condition proved even worse than it had seemed from a distance. So I concluded that instead of entering college, I would go direct to the Law School. And I came back and studied through the summer more or less, with a view to the law, and at the end of the summer, came on here to the Law School.

Of course, I became very much interested in the law and was recognized pretty soon by a number of good men. I was elected into the Pow Wow Club,[18] which was perhaps the best law club, being composed mainly by Harvard graduates, the only exception being John Aiken,[19] who later became Chief Justice of the Superior Court.

While I was at Law School (it was a two years course at the time), my eyes gave out in 1877 from overwork. I had also done a lot of tutoring. Shortly after that, the election came on. At that time, the rule was that the class elected six men to write the oration, and then the faculty was to select one man to deliver it. I led the class on the popular vote. Then the faculty felt itself in a desperate position. Because the law of the University provided

that nobody could graduate who was not 21. The question came up, how could a man who was not 21 be the orator when he couldn't get a degree? Professor Langdell[20] was terribly troubled. He really wanted me to have the oration, and he thought and thought and stroked his beard, but he couldn't do anything. Finally he sent me to President Eliot[21]—the first time I had seen the President. He said, "The rule is that the orator is to be one of those who receive a degree. The law says that you can't have a degree before you are 21. You won't be 21 until November. Commencement is in June. I don't see, Mr. Brandeis, how you can be the orator."

It took about three minutes for him to decide that question. I thought, "There is an example of an efficient executive." I wasn't so sorry for it, because I couldn't use my eyes much. I was tutoring, and I knew I couldn't write an oration without a great deal of work. So I felt rather relieved—quite content to get a degree later—particularly as I was contemplating spending an extra year for a post graduate course at the college.

To my surprise, on the morning of Commencement Day, it was announced that a special vote had been passed, in view of the very high standing I had, that under a special dispensation I was to get a cum laude degree then.

As I remember it, Starbuck,[22] a Nantucket man had the oration.

My eyes were in pretty poor shape. I thought the summer would cure them. But instead of that, when I got back in the fall, they were worse off than they were in the spring. I went through with a good deal of tutoring. But I went on with my work, both of teaching and studying, by having readers. To a great extent I had paid readers. This trained my mind so that if I went to a course I could carry the whole thing without writing it out.

I did quite a little studying with Mr. Warren,[23] who used to do the reading with me. We worked together. That summer most of my teaching had been in the law, but I had taught also Saunders Bradley, the son of Chief Justice Bradley of Rhode Island, the father also of Charles Bradley of Bradley and Angell—afterwards Edwards and Angell.[24] I taught Saunders and was in Providence at Judge Bradley's all that summer, taking a cure by gradually building up my eyes. I was supposed to read three times a day, one minute each time, the next day two minutes each time, and so on. When I got up to reading something over an hour each time, then the eyes gave out again.

I came back and took pretty good care of myself—went up to the mountains and did a good deal of walking. When I came back, my oculist said he thought I had better give up the thought of practicing law, that I never would be able to use my eyes.

When I wrote my father that, he said, "Well, there is a great physician in New York, Dr. Knapp, a German oculist." This was in the fall of 1878—October. I was staying out at Cambridge, where I was proctor—29 Thayer Hall. I had been proctor there since the spring of 1877. It gave me a room free, and an opportunity to earn some money.

Then I went over to see Dr. Knapp, and he tried me out, and said, "Nonsense! What you need is to take care of your eyes. If you use them right, they will grow stronger, and if they hurt you, it won't do you any harm. But you have to use them with reason. Be a reasonable man. See that you get good light, under good conditions. Don't use the eyes unnecessarily and they will gradually grow stronger."

So when that announcement came, I made up my mind to go to St. Louis. There had been a plan of my going, and I went on the agreement that I was to have a position in the office of Mr. James Taussig.[25] He was one of the leading lawyers in St. Louis, and was an uncle of Frank W. Taussig.[26] He was counsel at that time in large corporation matters. He was also one of the trustees of the Kansas, Pacific Railroad, which was in litigation at that time, in receivership proceedings. So

I went out there, lived at the same time at the house of my sister, Mrs. Charles Nagel. There had always been a thought that sometime I would go into partnership with Mr. Nagel. But I hadn't any more than gotten out there when Mr. Warren, who in the meantime had been in the office of Shattuck, Holmes, and Munroe[27] and wanted to start in business on his own account. He began early in the autumn writing to me to come back and join him.

Well, I didn't like St. Louis life very well, although I plunged right into it. I knew pretty much everybody after one winter. But it seemed to me to be a pretty crude life. There seemed to be an absence of culture. Also I had malaria, which probably had a good deal to do with my dissatisfaction. I felt homesick for Boston and for Cambridge. Without making up my mind, I came on here to see whether I would settle here. This was in June 1879. I wanted to be sure of a living. At that time I had offered to me a secretaryship to Chief Justice Gray.[28] This meant not a continuous job, but sitting with him five hours a day when he wasn't on the bench, in his intervals of time, while he was writing his opinions.

With that and the other opportunities afforded, it seemed pretty clear that I could make a living. So, in July—just after the Fourth of July—I made up my mind on the toss of a penny, as to whether I would go back to St. Louis or stay here. I decided to remain here, and in 1879 we formed the firm of Warren and Brandeis, and begun business at 60 Devonshire Street.

We stayed there until 1889, when we moved to 220 Devonshire Street; then moved here [161 Devonshire Street] in 1904.

I was secretary to Chief Justice Gray that summer and tapering off into January or February the following year. It was the understanding that I would not go to him if it interfered with other things I had to do.

By the early part of 1880, I began to have a lot of business. In the first place, we had a certain amount of business here almost at once through S. D. Warren and Co. and friends of Mr. Warren—Train Hosford and Co.,[29] and a few other people, who on their account of their friendship for the senior Warren came in to us.

Then in 1880, I was called by ex-Chief Justice Bradley into an important case down in Providence, Rhode Island to write the brief. The senior lawyer in the case couldn't be expected to write the brief and the junior was busy in the Legislature. And so, Judge Bradley wanted me to write the brief, a very important one, in the . . . Woonsocket Company case.[30]

I worked on that brief day and night for about six weeks and wrote a very learned and very effective brief. When they came to consider the brief, they concluded that the man who wrote it would have to argue it. So I went down there, and for four or five days we argued that case. That gave me a certain standing. There were other stages in the case where I was called upon to act. That was the start of my Providence practice that came later.

Shortly after that, James Taussig, with whom I had been in St. Louis, had a case here: a suit against the Illinois and St. Louis Bridge Company—a stockholders' liability case.[31] We brought that suit here. Russell and Putnam,[32] the leaders of our Bar here, were the lawyers on the other side. And we succeeded in winning one suit in the State court, and once in the Federal court, before Judge Lowell, the father of the present John Lowell.[33] We won on a demurrer in the State court sufficiently so that the defendants got frightened and settled. We got a good fee out of that. So that by 1881, through these connections, and those that Mr. Warren had, we already had a pretty good practice, and people began to come in.

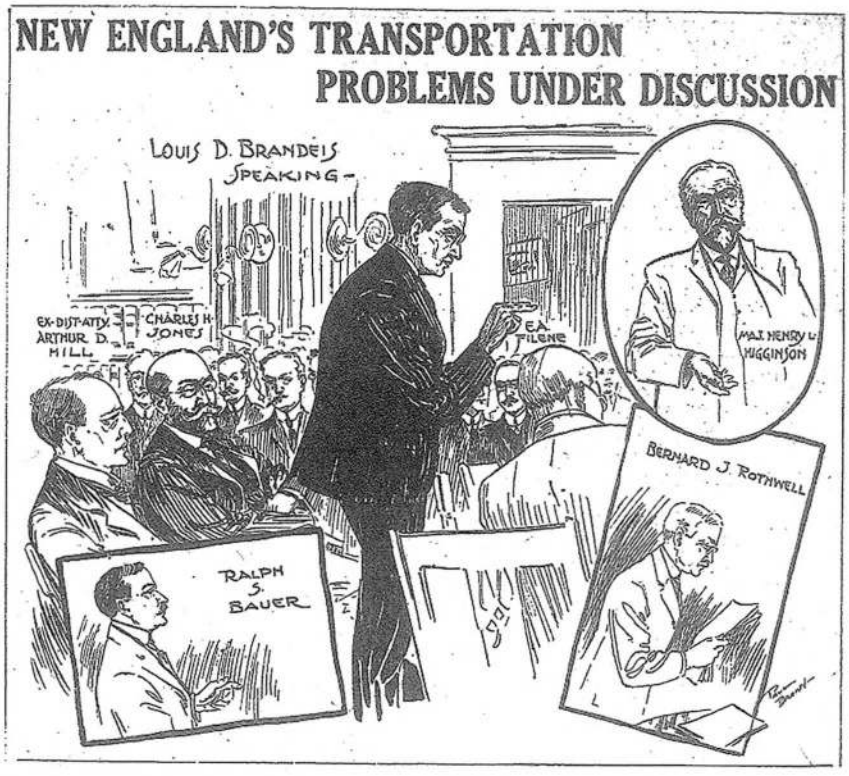
I had my first case before our Supreme Court through Mr. Jacob H. Hecht, who brought me the case of the Hebrew Benevolent Association against a subscriber who had impudently refused to pay—the United Hebrew Benevolent Association v. Benshimol.[34]

I became acquainted in that way with the Supreme Court, the Federal Court, and with the Rhode Island court. And very shortly after that, in 1881, Mr. Albert Otis[35] got me to give an opinion on a matter connected with railroad litigation. The Consolidated European & North American Railroad had inflated its bonds. That was down in Maine in 1881. I gave a very learned opinion there on that subject. Mr. Otis was asked for his opinion, and he said he hadn't time to deliver the opinion, "but here is an opinion, written by a young friend in whom I have great confidence," etc.

That led to my being retained in that Consolidated European & North American litigation,[36] which took about ten years, nearly, and which gave us a good deal of money, for those days, and which made me familiar with railroad questions, and took me down into Maine. I got to know the federal court down in Maine, and the lawyers there. And I also went down into New Brunswick.

And meanwhile I was getting pretty well known around here. In 1881 Ezra Thayer's father, James B. Thayer,[37] who was one of my teachers, was expecting to take his Sabbatical year, and he asked me to give the course on Evidence. I was disposed to do it. Then he changed his mind—postponed going. He said he would want me to do it the next year. That gave me a chance to work it up for another year. So I did work it up, and when he went abroad, I went out and gave the course on Evidence. That was in 1882-3. It made a very pronounced success—quite a striking impression at Harvard.

In that winter Mr. Holmes[38] was the professor. He resigned in mid-winter—Christmas week—to take a place on the



This 1913 cartoon from the March 7, 1913 issue of *The Boston Globe* depicts a hearing before the Boston Chamber of Commerce over the New Haven Railroad question. Brandeis advocated the dissolution of the railroad's merger; his former friend Henry Lee Higginson was one of the railroad's defenders who claimed that the railroad's decline was due to Brandeis's attacks on it.

Supreme Court. He was to be appointed before Ben Butler[39] came in. They wanted me to come out as assistant professor, with the promise of a professorship.

I had been intimate with Professor Langdell, who was a great friend of mine, but I said, "If this were ten years later, I would be inclined to come, but I don't feel that I want to come now."

He said, "In ten years you may not get the chance." But I said I would rather take the chance of not getting it when I wanted it than to take it when I didn't want it. So I didn't do it.

During all this time I had taken a very great interest in the Law School. As a matter of fact, I had been instrumental in getting the money for the very professorship which put Mr. Holmes there.

One of the young men to whom I had taught law was William [F. Weld],[40] who was the grandson of William G. [Weld], a very rich ship owner. The grandfather died and left Billy [Weld] three million dollars. Billy was afterwards a member of the Polo Club and had a beautiful place near the Country Club.

I knew of the desire to get Holmes out there, and I happened to meet [Weld] just after he had inherited this money. I got hold of him and told him we wanted to establish a professorship. He wanted to know how much. I said, "Ninety thousand dollars." I had been talking with Professor Thayer about it. He said, "Well, I would like to meet Professor Thayer." I said, "Tomorrow morning." On the following morning, Saturday, he saw Professor Thayer and agreed to put up the ninety thousand to establish the professorship.

Then I helped raise some more money for the library from Nickerson,[41] one of the fellows I had taught, and from one or two other sources. I had been giving a good deal of thought to the Law School. And in 1885, when it came to the time of the preparation for the 250th anniversary, Professor Thayer took up with me the matter of doing something for the School. It was then in rather a parlous position. The new Langdellian system of teaching law by cases had made its way very slowly. The old fashioned lawyers protested very much against it, and the result had been that the School, instead of growing, had gone back.

During my two years there were about 190 in the school. When they had a three-year course, nearly ten years later, they had about 150 or 160. The School was in need of money and in need of students. I talked with Professor Thayer to the effect that they had a remarkably good thing but that people didn't know about it—that the thing to do was to make it known, and we concluded to get up the Law School Association. I entered upon that task with very great diligence, and called in Winthrop Wade,[42] who was one of the students while I was out there with the class of '84. I taught Evidence in the second year class of '82-3. He was of that class and had been a good student. I knew him well, and met him one day at lunch, and told him about it. He said he would come in as treasurer, and he was a faithful worker. I planned to reach out to every state, and get hold of all the people. We had the 250th anniversary, a great meeting, at which, as I remember it, Justice Holmes delivered the address.[43]

We built up the organization, and the effect was marvelous. The School began to grow very rapidly. Soon it was embarrassed by growth. It ran up to 300, 400, 500, 600 students. I kept working as long as it was desirable to have it grow, and then stopped working.

Meanwhile, the *Law Review* had been started. Mr. Nutter[44] was, I think, the first editor-in-chief. They couldn't make the thing go. I suggested the thing to do was to get publicity. People must know what the *Law Review* was. I got some money from Mr. Warren and Mr. Hecht, and concluded to distribute among all the member of the Association who were not already subscribers copies of the *Review* for one year. I said, "One issue won't do any good. Let these fellows

have every number for a year, and then you have some chance."

So I got the money for that, and the plan proved a great success. That put the *Review* on its feet.

I then became trustee of the *Law Review*, and have remained so ever since. Mr. Nutter, James Barr Ames,[45] and I were the trustees during Mr. Ames's life.

It was largely my service to the Law School, I suppose, which induced them afterwards to give me the honorary degree of A.M. [Master of Arts] in 1891.

That was really the important public work that I did at that time. I spent a tremendous amount of time and got in touch with lawyers all over the country. I don't know whether we still have the correspondence, or whether I sent it to Cambridge when I ceased to be secretary. But our letter books would show the tremendous correspondence which I conducted.

But I had taken some part in public work from the very start. The first thing I did when I came here, which was as early as October 1879, I first became a visitor for the Associated Charities. After a few weeks, I became a member of the Executive Committee for Ward 8, of which George Wigglesworth and Dr. Charles P. Putnam[46] were also members. Dr. Putnam was chairman, and I think George Wigglesworth was afterwards chairman. I went on that as the most advanced thing in helping poor people that there was.

Then I went into the Civil Service Reform movement[47]—composed of the people who afterward were the Mugwumps[48]—the most advanced thing in the political world.

I also went into the social municipal work with Curtis Guild[49] in Ward 9, where I then lived.

Then there was formed the Citizens Association, that Herbert Harding[50] was in. That didn't do very great things, and I went into the Municipal League, with Samuel B. Capen.[51]

All those local reform organizations were composed of Boston's elite, but they never accomplished very much. In my connection with the Citizens Association I had my first relations with the street railway problem.[52] I then came to many of the very conclusions that I was afterwards able to work out—that the street railways were getting a great deal out of the public for nothing.

On one of these occasions—I think '92 or '93—when I appeared at a meeting and spoke

Sketch of Brandeis from the August 9, 1913 issue of *Truth*, which was a magazine that was secretly funded by the New Haven Railroad to counter the campaign against the railroad's merger. *Truth* ran scathing, and often anti-Semitic, attacks against Brandeis in nearly every issue.

against allowing the Tremont Street tracks to be extended into the Common, which was then proposed as a means of meeting the congestion, I stated that on the contrary the railroad was getting so much out of the city, that out of its earnings it ought to provide some other way to meet the congestion.

It was largely the speech on that occasion, I think, at which Mrs. Alice N. Lincoln[53] was present, that induced her to get me to represent her in the Public Institutions matter.[54] I had been acting a good deal in public institution matters and generally in public charitable matters, because I became intimate with Mr. and Mrs. Glendower Evans[55] shortly after they were married, in 1882 or 1883—was intimate with Glen from then until 1886 when he died. Immediately after his death Dr. Putnam, who was his physician, got Mrs. Evans appointed to the board of State Institutions, really to mitigate her terrible sorrow. That put her mind on impersonal things, and she began at once to consult me about all of her charitable propositions.

So I knew all of these things beginning with '88. Afterwards, in '90 Mayor Matthews[56] had occasion to appoint a committee to investigate our institutions, on account of the holler that had been made by Mrs. Lincoln. Mrs. Evans was appointed a member of that committee, so that I was associated with all of those problems. That led up to the Public Institutions hearing. Of course, when I got into the matter, I hadn't any idea that I was in for a long period. At that time I had already a very large practice. Reed and Curtis[57] were counsel for the officials there (Curtis afterwards became Mayor) and they thought I couldn't give the matter attention, and so the hearings began to be dragged out. There were 84 hearings. At most of them I was present. Then the question came up as to what I should do. I made up my mind I would charge Mrs. Lincoln a reasonable fee. I charged her $3000. The city was charged $15,000 for much less service than I rendered.

I made up my mind then to give away my share of that money and not to keep any of it for myself. I made one gift to the Children's Aid, one to the Associated Charities, one to the Municipal League (with which I was then connected), one to the Ethical Society[58] in New York, and some other gifts.

Long before that I had become well known here, and had been invited, back in 1888 or 1889, to deliver the course on Business Law at the Institute of Technology by President Walker,[59] but really through Alexander Wheeler, of Hutchins and Wheeler,[60] who was an important man there. I intended to deliver it in 1891-2, but I had to postpone it until 1892-3, and I delivered it three years, with one intermission.[61]

But before that, in 1889, Mr. Edwin H. Abbot[62] had a very important case in Washington coming up in the fall of that

This photo was published in *The Boston American* on January 28, 1916, the day that Brandeis's nomination to the Supreme Court was announced. Owned by William Randolph Hearst, the newspaper frequently aided Brandeis in his public service campaigns.

year. The counsel whom he had relied upon to take the case couldn't take it. It had also rankled with him that he had been one of the stockholders in that Illinois Bridge Co. case. He had made up his mind that when he wanted counsel he would come to me, so he asked me to prepare the brief in the Wisconsin Central[63] case. But he was at first a little fearful that I couldn't handle it, and he retained Judge Jeremiah Smith[64] who had been on the New Hampshire Supreme Court, and was then at Harvard as a professor, and an excellent lawyer, to be senior counsel. So I prepared the brief and then they concluded that I was the man to argue it. In fact, I was the only man who did argue, because Senator Spooner,[65] who was to be on the other side, didn't arrive in time to argue the case. I submitted the brief and the case was won. That led to my getting other cases for the Wisconsin Central, and becoming their Eastern counsel, and afterwards counsel for the receivers.

But in the meantime, our business had developed very much throughout the country, and the business in Boston began to grow—my personal business as distinguished from Mr. Warren's. Mr. Warren had practically retired from the firm—not actually—but practically in 1888. The firm was not dissolved until 1897. Mr. Warren had taken no active part since 1888. Of course I became pretty widely known during that period. I had written somewhat:

"Trust Estates."[66]

And at the time of our Anniversary I had written the article on "The Harvard Law School" in The Green Bag.[67] Then came "The Right to Privacy,"[68] which attracted a good deal of attention.

Mr. Warren and I had worked out largely together the Watuppa Pond decision.[69]

By the early '90's I had a good deal of business, and had appeared so often in different parts of the country that I was pretty well known to the Bar outside of Massachusetts. You [Grady] came in 1894. Soon after that I had so much business I began to withdraw from the trial of ordinary cases and to go into the special things.

The thing I used to see Judge Bradley about mostly—he was a great buyer of pictures, and he would hesitate about buying anything. He liked to have me go with him to see the picture before he bought it.

One of the reasons I was taken up as I was in Boston society was because of the culture which I had. I knew more about art and music than most of the people did. Boston did give this to me: I was then a very serious minded individual, with terribly [the manuscript has a blank space here] views of life, and Puritan ideals. Boston came nearer my ideal than anything I had ever found anywhere else.

The real fact is that I haven't changed as much as these people have whom I used to be with. The old Puritan New England has vanished. Early New England was built up on the Old Testament, and I think it was that a good deal which made me feel so much at home in New England. The reason why I was at home everywhere in the circles in which I moved was that very thing. As Albert Otis said, "You are of older family than these people."

There was John Gray.[70] The Thayers. And the Thayers were great friends of Emerson.[71] Also partly through Mr. Warren I was thrown in with all of Boston society. Instead of having the trouble a fellow usually has to gain admittance, I was simply taken up. Was a great deal at the home of Mrs. James T. Fields,[72] which was a sort of literary center.

Then I was with musical people all the time. I was one of the first to rejoice in the Symphony Concerts.[73]

Quite intimate with Hughes.[74]

In 1889 and 1890, the high-brows undertook to take the *Boston Post* and make it a worthy Bostonian sheet. I, with Joe Lee[75] as representing the Lee-Higginsons,[76] and

This cartoon accompanied an article in the April 26, 1913 issue of the *New York Globe* commenting on Brandeis's fearlessness in taking on big business.

Mr. Hughes, as representing the Forbses,[77] went in to try to run that. We lost what money there was, through Mr. E. M. Bacon,[78] who died recently. He was the editor at that time and lost our money for us, until Mr. Grozier[79] came in and bought it out. Then in 1907, Mr. Grozier asked me whether I would become editor of his paper.

I met the Child family through a very intimate friend of ours, Edith Harlan, daughter of Justice Harlan, who married a brother of H. Walter Child.[80] I became acquainted with the Child family in 1877. I went up there to Worcester.

The feeling that these people have is that I was right in the midst of them and was treated as well as anybody could possibly be treated, and that I withdrew from them—that I didn't believe in their ways.

Mrs. Frank Peabody's brother, Mr. Edward B. Bailey, was a client of mine—a large shipping house. Used often to dine with the Frank Peabodys,[81] and go to the Symphony concerts with them. That was back in the 1880's. Then afterwards, I attacked their pet enterprises, and gradually it began to spread to other people. Savings Bank Insurance[82] alienated a good many people. And in the interval, I had alienated a good many in the gas matter.[83] For instance, Laurence Minot[84] had been a great friend while we were fighting the Elevated Railway. But when we got on to gas and electricity, he became violent, and when we got onto the New Haven[85] he became rampant.

The first person who called on Mrs. Brandeis when we came to Boston was Mrs. Henry L. Higginson.[86] And the first weekend

party we were invited to was to Mrs. Frank Lowell's.[87]

The thing that got my mind specifically on to labor problems—the first I knew very much about it—had been gradually picking up some knowledge in connection with the Haverhill shoe strike[88]—the Homestead strike[89] in connection with the lectures for the Institute in 1882.

I always felt I had a truer sense of the value of money than any of the people that I went around with. It was always easy for me to earn money, and I never let money earn me. I wasn't reckless with money, like some of the other people. I saw the value of it, because it gave a man freedom. On the other hand, I was never willing to sacrifice my freedom for money. The only use that it could have would be:

> To give freedom
>
> To do what you wanted to do
>
> To be what you wanted to be
>
> To accomplish what you wanted to accomplish

You know that I have been extremely free in paying out money for any purpose that I believed in. I was just as economical on the other hand and didn't waste a cent on something I didn't believe in.

It was Emerson who said—what his friends are apt to forget—it struck me as a boy —"Spend for your expense, and retrench in the expense which is not yours." The moment that I arrived in the practice of law at the point of having more than I needed, I began to find somebody to do the things that I didn't believe were educating. When I got Mr. Hoar[90] in here the first time, it was to do certain work in our office that I thought he could do that would save my time. I would rather study. I didn't have much more than I was spending. I had enough to have a pleasant margin, and decided that I would never do any work unnecessarily that was not educating, and that whatever I did would be to make me able to do something else better. I never worked less hard. As you know, I was working harder, almost all the time. But whenever I found that the work was taking something out of me instead of my taking something out of the work in the way of growth, I stopped doing it.

Of course I had to be extremely careful of my health, because I was always going the limit. I had had several lessons which I thought taught me what the limit was. I had the lesson with my eyes. After I began to stop using my eyes, and used my head to save my eyes, I found there was such a thing as misusing your head. Then I got nervous indigestion, which took hold of me for about seven years. So that I had to be careful for about seven years—until about 1886. Then I thought I reached a time where I was in fine shape to do what I wanted, and I landed in 1901 with insomnia, which occupied me for . . .

I used to run right along during one of those attacks, so that by Saturday noon I was all worn out, and it was a question whether the reservoir could be filled by Monday morning.

I, who had been a singularly sociable individual, began to find that if I wanted to do my work I must withdraw. I used to go practically into retreat. My habit of avoiding people was not that I was not sociably inclined, but it was a question of doing one thing or another. So I began to lead a pretty solitary life. I made up my mind to work, and said, "If I work, I am going to make that work pleasurable." And whenever I found that work was not a pleasure, then I knew I was in bad shape, time to run away. You have seen me run away once in a while.[91]

It was important for me that I should have clients. My clients didn't have a lawyer. I made up my mind: "I will give my advice for results, not for money."

ENDNOTES

[1] Adolph Brandeis (1822-1906) and Frederika Dembitz (1829-1906) were married in 1849, before they moved to

Louisville. They had four children: Fannie (1851-1890), Amy (1852-1906), Alfred (1854-1928), and Louis (1856-1941).

[2] Frederika's brother, Lewis Dembitz (1833-1907), would become one of Louisville's leading lawyers and a major influence on Brandeis. In his teenaged years, Brandeis would change his middle name from David to Dembitz to honor his uncle.

[3] Brandeis is referring here to his wife, Alice Goldmark Brandeis (1866-1945), and her grandfather Gottlieb Wehle (1802-1881). Other members of the party included Gottlieb's wife and their twelve children, as well as his two brothers and sister, as well as Adolph Brandeis's brother Samuel (1819-1899).

[4] Little is known of Sigmund Dembitz, who did not migrate to Madison or Louisville, preferring instead to settle in New Orleans, where he appears to have died sometime around 1856.

[5] Adolph's partner William W. Crawford (1820?-1876) died four years after the dissolution of Brandeis and Crawford. His obituary in the *Louisville Courier-Journal* called the firm "the largest grain business in the city." Crawford's grandson, also named William W. Crawford (1878-1944) was a lawyer. He earned his law degree in 1901 at the University of Louisville Law School, which would later rename itself after Brandeis.

[6] Jacob H. Hecht (1834-1903) was one of the leaders of the Boston Jewish community.

[7] The 1858-59 *Louisville City Directory* lists a school run by a Miss Z. M. Price on Sixth Street.

[8] The German-English Academy (sometimes also known as the German-American Academy) was opened in 1859 by John C. Knapp (1827-1901). In 1863, he was joined by William N. Hailmann (1836-1920), a former public high school teacher. By 1868, Hailmann was running the school by himself. Brandeis's father Adolph was one of the directors of the school until the family left for Europe in 1872.

[9] The high school Brandeis attended is now known as Male High School, although for a brief period in the nineteenth century it was called The University of the Public Schools of Louisville. For more on the relationship between Brandeis, Male High School, and the University of Louisville, see Peter Scott Campbell, "Was Louis D. Brandeis a University of Louisville Alumnus?," *Brandeis and Harlan Watch*, September 7, 2012, *available at* https://brandeiswatch.wordpress.com/2012/09/07/was-louis-d-brandeis-a-university-of-louisville-alumnus.

[10] The Annen-Realschule.

[11] A. Wolfgang Becker, **Charakterbilder aus der Kunstgeschichte** (Leipzig: E. A. Seemann, 1869).

[12] The Morningstars were a New York City family the Brandeises presumably met while travelling in Europe.

[13] Ephraim Emerton (1851-1935) would become a professor of ecclesiastical history at Harvard.

[14] Rufus K. Wood (1848-1909) is best known for designing and managing the steel mill company town Sparrows Point, Maryland.

[15] Charles Chandler Lord would die three years after meeting Brandeis while studying in Europe.

[16] Denman W. Ross (1853-1935) was a painter and professor of art at Harvard.

[17] Charles Nagel (1849-1940) would become a lawyer and politician, eventually serving as President Taft's Secretary of Commerce and Labor. Nagel would marry Fannie, and he and Brandeis would become close friends. The friendship of Brandeis and Nagel would be ruptured by Brandeis's excoriation of Taft during the Ballinger-Pinchot affair, and they would remain barely on speaking terms after that.

[18] The Pow Wow Club was a club devoted to moot court competitions.

[19] According to most biographies of John A. Aiken (1850-1937), he got his law degree from Boston University, but he is listed in a Harvard Law School alumni directory as having attended there in 1876.

[20] Christopher Columbus Langdell (1826-1906) was a Harvard law professor who developed the case method of teaching law that is still being used today. Langdell took an early interest in Brandeis and continued to exert an influence on him for years after he graduated.

[21] Charles William Eliot (1834-1926) served as Harvard's president from 1869 to 1909, during which time he transformed the school into a world-renowned university.

[22] Henry Pease Starbuck (1851-1918) would become a professor at the Columbia Law School and a lawyer in New York and California.

[23] Samuel D. Warren (1852-1910) graduated second in the Harvard Law School class of 1877—right behind Brandeis. In 1879, the two of them started the firm Warren and Brandeis. In 1888, Warren left the practice of law to run his father's paper business.

[24] Charles S. Bradley (1819-1888) was not only the Chief Justice of the Rhode Island Supreme Court for two years, but he was also a Harvard Law professor. His youngest son, James Saunders Bradley (1859-1880), died from typhoid fever a few years after being tutored by Brandeis, but his brother Charles Bradley (1845-1898) lived to become a prominent lawyer in Providence.

[25] James Taussig (1827-1916) was a friend of Adolph's back in Europe and the two families remained close after they emigrated.

[26] Frank W. Taussig (1859-1940) earned his law degree from Harvard in 1886, nine years after Brandeis did. He ended up becoming one of the leading economists of his day. His sister Jennie married Brandeis's brother Alfred.

[27] Shattuck, Holmes, and Munroe was the firm at which Oliver Wendell Holmes, Jr., worked before he was appointed to the Massachusetts Supreme Judicial Court. His partners were George O. Shattuck (1829-1897) and William A. Munroe (1843-1905).

[28] Horace Gray (1828-1902) was made a justice of the Massachusetts Supreme Judicial Court in 1864 after he had been practicing law for thirteen years. He was named Chief Justice of the Supreme Judicial Court in 1873. In 1881, he was appointed onto the United States Supreme Court.

[29] Train, Hosford and Company was a Boston paper company.

[30] The state case is *Philip Allen & Sons v. Woonsocket Company*, 13 R.I. 146 (R.I. 1880). The appeal to the federal court was not reported.

[31] *Dormitzer v. Illinois & St. Louis Bridge Co.*, 6 F. 217 (D. Massachusetts, 1881).

[32] Russell and Putnam was the name of law firm of William G. Russell and George Putnam.

[33] John Lowell (1824-1897) was a judge on the First District Court of the U.S. Court of Appeals during 1878 to 1884. His son, John Lowell (1856-1922), was a Boston lawyer who in the same class at Harvard Law School with Brandeis.

[34] 130 Mass. 325.

[35] Albert B. Otis (1839-1897) was a Maine native who graduated from Harvard Law School in 1866 and, like Brandeis, remained in Boston to practice.

[36] *Norton v. European & N. A. R. Co.*, 32 F. 865 (D. Maine 1887).

[37] James Bradley Thayer (1831-1902) was a graduate of Harvard Law School who became a longtime and influential professor there. His son Ezra Ripley Thayer (1866-1915) was also a graduate of Harvard Law. Like Brandeis, he clerked for Horace Gray after graduation before joining Brandeis's law firm in 1892. In 1910, he was appointed Dean of Harvard Law, a position he held until his death in 1915.

[38] Brandeis and Oliver Wendell Homes, Jr. (1841-1935) were friends long before the two of them ended up on the Supreme Court. Holmes had been an acquaintance of Samuel Warren's and was one of the celebrants at the opening party for the Warren and Brandeis office.

[39] Benjamin F. Butler (1818-1893) was a lawyer, Civil War general, military governor of New Orleans, Congressman, and governor of Massachusetts. Holmes's first day on the Supreme Judicial Court was January 3, 1883, one day before the beginning of Butler's term as governor.

[40] The manuscript says William G. Wells, but Grady likely misheard Brandeis here. It was William F. Weld (1855-1893) who donated the money to create the professorship for Holmes. The Weld Professor of Law Chair continues to be a position at Harvard today.

[41] George A. Nickerson (1854-1901) was an 1879 graduate of Harvard Law School the president of the Arlington Mills Corporation and served on the board of trustees of the Atchison, Topeka, & Santa Fe Railroad.

[42] Winthrop H. Wade (1860-1952) graduated from Harvard Law School in 1884. He was also the secretary of the Harvard board of overseers for a number of years.

[43] The address was published as "The Use of Law Schools" in Oliver Wendell Holmes, Jr., *Speeches* (Boston: Little, Brown and Company, 1881), pp. 28-40.

[44] George Read Nutter (1863-1937) graduated from Harvard Law School in 1889 and joined Brandeis's law firm the following year. He proved so indispensable that Brandeis sometimes referred to him as "my first lieutenant," and his importance would be reflected in the firm's current name—Nutter, McClennen & Fish. Nutter was on the editorial board of the *Review* during its first volume but he was not the Editor-in-Chief until the journal's second year.

[45] James Barr Ames (1846-1910) graduated from Harvard Law School in 1872 and then spent the rest of his life teaching there. He was instrumental in the development of the case method of teaching law.

[46] George Wigglesworth (1853-1930) got his law degree from Harvard in 1878, one year after Brandeis. Besides being a lawyer, he was on the board of directors of various companies and was a trustee for various charities. Charles Pickering Putnam (1844-1914) was a Boston physician who devoted considerable time to various charities.

[47] Brandeis was a member of a number of organizations that aimed to improve the political system, such as the Civil Service Reform Association of the Fifth Congressional District, the Massachusetts Civil Service Reform Association, and the Election Laws League.

[48] "Mugwumps" was a term used to denote Republicans who refused to support James G. Blaine's nomination. This reaction against Blaine was particularly strong in Boston.

[49] Curtis Guild, Jr. (1860-1915) was a Boston journalist and politician who was Massachusetts's governor during 1906-1909.

[50] Herbert L. Harding (1852-1933) graduated from Harvard Law School in 1876 and had a long career as a lawyer in Boston, while also devoting a lot of service to the Boston Citizens' Association.

[51] The Municipal League of Boston was formed in March,1892, by Samuel B. Capen (1842-1914), a Boston merchant. It was devoted to the reform of Boston's political structure. The group had disbanded by 1900 and would be replaced by the Good Government Association, which included Brandeis, Capen, and George Nutter as members.

[52] Brandeis spent many years fighting against the Boston Elevated Railway Company's efforts to monopolize public transportation.

[53] Alice N. Lincoln (1853-1926) was a Boston philanthropist who devoted her life to helping the poor and the sick.

[54] In 1894, Brandeis initiated a number of public hearings in an effort to get the city to improve conditions at the Boston Almshouse and Hospital, a neglected institution for housing the destitute and mentally ill.

[55] Glendower Evans (1856-1886) was a lawyer who worked at Shattuck, Holmes and Munroe and was close friends with Brandeis and William James. After his death, his wife, Elizabeth Glendower Evans (1856-1937), embarked on a long career as a social reformer and journalist. She was a close friend of both Brandeis and his wife, Alice.

[56] Nathan Matthews, Jr. (1854-1927) was an 1880 graduate of Harvard Law School who was mayor of Boston during 1891-1894.

[57] Edwin U. Curtis (1861-1922) and William Gardner Reed (1858-?) were friends from Bowdoin College who formed a law firm together. Curtis became mayor of Boston in 1895, the year after the Public Institution hearings. Reed had been an alderman of Boston in 1889-1990. He made the news in 1903 when he disappeared with over $100,000 in investment money he had collected for a Colorado silver mine.

[58] The New York Society of Ethical Culture was founded in 1877 by Alice Brandeis's brother-in-law, Felix Adler.

[59] In addition to being president of MIT, Francis Amasa Walker (1840-1897) was one of the leading economists of his day.

[60] Alexander Wheeler (1820-1907) served on the Executive Committee of the Board of Trustees of MIT from 1882 until his death.

[61] Brandeis's business lectures laws have been published. See Robert F. Cochran, Jr., editor, **Louis D. Brandeis's MIT Lectures on Law (1892-1894)** (Durham: Carolina Academic Press, 2012).

[62] Edwin H. Abbot (1834-1927) was an 1861 Harvard Law graduate and president of the Wisconsin Central Railway.

[63] *Wisconsin Central R. Co. v. Price County*, 133 U.S. 496 (1896), marked Brandeis's first appearance before the U. S. Supreme Court.

[64] Jeremiah Smith (1837-1921) was a justice on the New Hampshire Supreme Court from 1867 to 1874. He was named the Story Professor of Law at Harvard in 1890, actually the year after the Wisconsin Central case.

[65] John Coit Spooner (1843-1919) was a Republican senator for Wisconsin for the years 1885-1891 and 1897-1907.

[66] Louis D. Brandeis, "Liability of Trust Estates on Contracts Made for Their Benefit," *American Law Review* 15 (1881): 449-462.

[67] Louis D. Brandeis, "The Harvard Law School," *Green Bag* 1 (1889): 10-25.

[68] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.

[69] Samuel D. Warren and Louis D. Brandeis, "The Watuppa Pond Cases," *Harvard Law Review* 2 (1888): 195-211.

[70] John Chipman Gray (1839-1915) was a professor at Harvard Law School and a half-brother of Horace Gray.

[71] Ralph Waldo Emerson (1803-1882), the transcendental author. Brandeis once heard him speak at Thayer's house.

[72] James T. Fields (1817-1881) was a publisher and editor of *The Atlantic*. His second wife, Annie Adams Fields (1834-1915), was a writer. Their home was a noted literary salon and was visited by many authors, such as Charles Dickens, Nathaniel Hawthorne, and Ralph Waldo Emerson.

[73] The Boston Symphony Orchestra was founded in 1881 by Henry Lee Higginson.

[74] The information here is too vague to make a positive identification. Brandeis may be referring to John Murray Forbes's son-in-law, William Hastings Hughes.

[75] Joseph Lee (1862-1937) was an 1887 graduate of Harvard Law School and Henry Lee Higginson's cousin. He founded the Massachusetts Civic League and is considered to be one of the founders of the playground movement.

[76] Lee, Higginson and Company was a prominent Boston investment bank. Formed in 1848 by John C. Lee and George Higginson, the firm grew in size and prominence once Higginson's son Henry Lee Higginson (1834-1919) joined. The younger Higginson was one of Boston's largest philanthropists and supporter of the arts. Over time, Higginson and Brandeis would clash over many of Brandeis's civic crusades.

[77] Brandeis could be referring to the investment firm J. M. Forbes and Company or perhaps to one of J. M. Forbes's sons, William and John.

[78] Edwin Monroe Bacon had been the editor of a number of newspapers before taking over *The Boston Post*. After leaving the *Post*, he retired from journalism to concentrate on writing literary works. He died on February 24, 1916, so this portion of the interview must have taken place after that date.

[79] Prior to owning *The Boston Post*, Edwin Atkins Grozier (1859-1924) had been a journalist, and he later was a private secretary to Joseph Pulitzer and Editor-in-Chief of *The Evening World*.

[80] Edith Harlan Child died in 1882, a little over a year after she married Frank Linus Child (1848-1902), a Boston lawyer. His brother, H. Walter Child

(1852-1931), was a Boston businessman and one of the first friends Brandeis made in Boston.

[81] Brandeis is presumably talking about Francis Peabody (1854-1938), who was involved in many of Boston's reform movements. He would be one of the Boston lawyers who testified against Brandeis's character in his nomination hearings.

[82] In response to abuses committed by life insurance companies upon the working poor, Brandeis proposed that Massachusetts savings banks be allowed to offer insurance to their customers. His efforts led to the creation of SBLI, which is still in business today.

[83] The "gas matter controversy" began when various businessmen tried to consolidate the companies that provided gas to Boston. Brandeis alienated many of his former allies when he chose not to oppose the consolidation but instead took steps to ensure that the consolidated company charged fair rates.

[84] Laurence Minot (1865-1921) studied at Harvard Law School but never graduated. He became known as a financier and became a trustee of a number of Boston corporations as well as a member of the Good Government Association.

[85] Brandeis's opposition to the merger of the New York, New Haven and Hartford and the Boston and Maine railroad companies led to a years-long fight and made him nationally famous. However, while Brandeis opposed the merger because he believed that it violated Massachusetts law and would lead to a deterioration of service, many Boston businessmen believed it was inevitable and were in favor of it.

[86] Ida Higginson (1837-1935) was the daughter of prominent Harvard natural science professor Louis Agassiz.

[87] Presumably, Brandeis is talking about Francis Cabot Lowell (1855-1911). Lowell graduated from Harvard Law School in 1879 and, like Brandeis, became a clerk for Horace Gray before being appointed to the U.S. District Court for Massachusetts in 1898, and the U.S. Court of Appeals, 1st District in 1905. His wife was Cornelia Prime Ray Lowell (1859-1922).

[88] The Haverhill shoe strike of 1894-95 involved many factories in Haverhill, Massachusetts. Elizabeth Glendower Evans's friend, union organizer Mary Kenney O'Sullivan, had been at the strike and helped influence Brandeis's views on unions.

[89] The Homestead strike took place at a steel mill near Pittsburgh in 1892. The violence employed by both management and the strikers shocked the nation and set back the cause of unionism for decades.

[90] D. Blakeley Hoar (1855-1923) was the first lawyer to join Warren and Brandeis. He was their real estate lawyer and was committed to conservation efforts.

[91] At this point, the document gets fragmentary and the text reads: "Dunbar in 1887. Nutter in 1889. Thayer in 1892. I was in close touch with the Law School, and selected the men who had high standing in the School." This is presumably part of a larger discussion of the growth of Warren and Brandeis as each name represents a lawyer who joined the firm. William Harrison Dunbar (1862-1935) graduated from Harvard Law School in 1886, and, like Brandeis, clerked for Horace Gray. Dunbar actually joined the firm in 1888 and Nutter in 1890. After Brandeis's nomination was confirmed in June 1916, the firm's name changed to Dunbar, Nutter & McClennen. In 1929, the name changed to Nutter, McClennen & Fish, the name it has retained to this day.

Chief Justice as Chief Executive: Taft's Judicial Statesmanship

KEVIN J. BURNS

William Howard Taft is the only American to have served as the head of two branches of the national government. After his term as President (1909-1913), he was appointed Chief Justice in 1921 by his fellow Ohioan, Warren G. Harding. Taft was a remarkable success as Chief Justice, putting his formidable abilities to work strengthening the powers of the Chief Justice and reshaping both the Supreme Court and the federal judiciary as a whole. As a result of his lobbying, in 1922 Congress created the Conference of Senior Circuit Judges (now the Judicial Conference) and gave the Chief Justice and senior circuit court judges the ability to eliminate delays in the nation's busiest courts by transferring judges between courts.[1] Three years later, he convinced Congress to pass the 1925 Judges' Bill, which tremendously expanded the Supreme Court's certiorari jurisdiction and allowed it to focus on the most important constitutional and statutory questions of the day.[2] These two reforms, taken together, made the Chief Justice the formal head and chief executive of the federal judiciary and greatly increased the power of the Supreme Court. Felix Frankfurter wrote that for his reform work, "Chief Justice Taft had a place in history . . . next to Oliver Ellsworth, who originally devised the judicial system."[3]

The scholarship on Taft, the Chief Justiceship, and the Supreme Court typically tells us two things about Taft and the Taft Court. First, it tells us that William Howard Taft was a judge at heart; he had never been a competent executive and had always wished to be Chief Justice rather than President. As Chief Justice, he was finally freed from executive responsibility and his true talents as a knowledgeable judge and skillful administrator were allowed to show themselves. Louis D. Brandeis summed up the sentiment well: "It's very difficult for me to understand why a man who is so good a Chief Justice . . . could have been so bad as President."[4] Second, it views the Taft Court as reactionary; the major modern work on the Taft Court insists that under Taft, the Court "retreated from progressivism," giving "high

priority to protection of private property."[5] Even his judicial reforms have been seen as attempts to strengthen the courts in order to repress progressive legislation. One author argues that Taft was a "conservative" reformer, rejecting "social reform" and accepting "efficiency progressivism" only "to ward off specific threats to an independent federal judiciary and to preserve a social and political equilibrium which seemed ever precarious." Thus, he concludes that Taft's interest in judicial reform was "but rhetoric" to hide his true desire to protect property against democratic reformers.[6] As Felix Frankfurter would later opine, "The Supreme Court under Taft had reached the zenith of reaction."[7]

I will argue that the traditional view of Chief Justice Taft and his Court is incomplete. First, modern scholarship, by seeing Taft as nothing but the Court's chief bureaucrat, may not only miss Taft's real executive abilities, but it may also fail fully to understand the executive powers wielded by the modern Chief Justice. I will show that as Chief Justice, Taft made himself a true chief executive, institutionalizing a political-executive power over a newly strengthened judiciary. Second, in contrast to the traditional view that claims that Taft simply worked to strengthen the Court as an oligarchic defender of property, I will contend that Taft's work to increase the Court's efficiency was an explicit effort to decrease the costs of litigation in order to make the administration of justice more affordable and available to the poor.

This article will be divided into three parts. First, it will examine Taft's work as Chief Justice to strengthen and expand the executive powers of his office; second, it will show the effects his reforms had in rejuvenating the federal judiciary as a whole and strengthening the Supreme Court in particular; and finally, it will explain, in Taft's own terms, the progressive results of his judicial reforms.

The Chief Justice

Taft was deeply devoted to the judiciary, praising judges as "high priest[s] in the temple of justice . . . [with] obligations of a sacred character."[8] He saw that courts played a critical role in protecting the rights of individuals, yet he also realized that the great duties placed on the shoulders of the judiciary created high expectations. If the courts failed to dispense justice and appeared incapable of addressing the needs of the common man, Taft feared that the people would eventually reject not only the courts but the Constitution itself. Thus, he made the reformation of the judiciary a consistent theme of his tenure on the Court.[9]

The federal courts of the early twentieth century were highly decentralized and bogged down by cumbersome procedures; while the country was modernizing, the structure of the judiciary lagged far behind. Because most Chief Justices had been stringently apolitical—even refusing to advise Congress as it attempted to reform the judiciary[10]—the courts lacked a spokesman capable of articulating their needs to the political branches. As Chief Justice, Taft transformed his office, imbuing it with distinctly political and executive duties and making the Chief Justice the Court's official representative and emissary to the political branches. In contrast to his predecessors, Taft insisted he had a duty to strengthen the courts by "suggest[ing] needed reforms and . . . becom[ing] rather active in pressing them" to Congress.[11] He believed that the Chief Justice had a political role as chief executive of the Court, even comparing his role to the executive function of the British Lord Chancellor.[12]

Taft entered office with a reform agenda for the Court. In a 1922 article for the *American Bar Association Journal*, in what can easily be seen as the new Chief Justice's State of the Judiciary missive, Taft proposed three specific reform measures to address the major problems besetting the courts. First,

because of the increase in the number of federal cases, Taft called on Congress to create additional judgeships and establish a judicial conference that would provide "executive direction" to the judicial force. Second, he insisted that the federal rules of procedure ought to be simplified and streamlined by the judiciary, and to that end he asked Congress to permit the Supreme Court to reformulate the rules of procedure for suits at common law, just as it was allowed to formulate rules for equity and admiralty. Finally, he argued that the mandatory jurisdiction of the high court should be reduced and its certiorari jurisdiction concomitantly increased. By giving the Court broader discretion over its workload, he hoped to free it from hearing trivial suits and to allow it to act as the highest court of appeals for the nation, ruling on key constitutional questions and settling circuit splits.[13] Although Taft's hopes for simplifying judicial procedure would not be achieved in his lifetime, he inaugurated a significant push for reform and convinced Congress to create the judicial conference and expand the Court's certiorari jurisdiction soon after he took office.

As Chief Justice, the former President aggressively promoted his reforms, exerting every ounce of political influence he had, seeking support from his extensive network of allies in Congress, the judiciary, and the bar, and even among newspapermen.[14] He launched vigorous campaigns to advance the 1922 and 1925 bills, testifying before Congress and speaking to various bar associations to whip up support for his proposals.[15] As Taft's judicial biographer Alpheus Thomas Mason wrote, no Chief Justice "before or since, worked so hard at lobbying."[16] Consequently, he was able not only to encourage Congress to consider what reforms might be necessary for the judiciary, but also to guide the legislative debate and advance the specific policies he believed were most critical.[17]

His success relied on informal power and personal influence, but by his efforts, Taft institutionalized the Chief Justice's power to affect the political branches. He increased the Chief Justice's formal power, particularly his ability as head of the Judicial Conference to lobby and engage in politics for the sake of reform. Thus, Taft not only gained significant reform legislation in the 1920s, he also set a precedent for future Chief Justices. His work "expand[ed] the very concept of the Chief Justiceship," transforming the office and virtually requiring his predecessors to serve as "chief judicial reformer[s]."[18]

1922 Reform: The Chief Executive of the Judiciary

In 1921, when Taft assumed the Chief Justiceship, the federal courts faced two connected problems: the judiciary needed a greater number of district judges to keep up with its rapidly growing workload and it lacked "a head charged with the responsibility of the use of the judicial force."[19] Although there was a hierarchy of courts, there was not a hierarchy of judges. Thus, although the Supreme Court was supreme (having the power to review the decisions of lower courts), there was no formal structure that permitted either the Chief Justice or senior circuit judges to preside over their colleagues in executive or administrative matters.[20] As Felix Frankfurter wrote, "The system was without direction and without responsibility. Each judge was left to himself, guided in the administration of his business by his conscience and his temperament."[21] The 1922 reform bill helped to ameliorate these two problems by increasing the size of the federal judiciary and creating an institutional executive force in the form of the Conference of Senior Circuit Judges, headed by the Chief Justice.

Only a few days after he was sworn in, Taft emphasized the need for executive direction in the judiciary, writing to Brandeis, "We must have machinery of quasi-executive

character to mass our Judicial force where the congestion is, or is likely to be."[22] Thus, he lobbied Congress for a "flying squadron" of eighteen new federal judges, assigned not to specific states or districts, but to the nation at large. According to Taft's proposed plan, the President would appoint eighteen judges with the advice and consent of the Senate, but the Chief Justice would have the power to determine, either by himself or after consultation with other judges or Justices, where these judges would hold court, moving them to the districts most in need of additional personnel, either to clear backlogs or keep up with the districts' workloads.[23] Taft's suggestion went far beyond mere administrative efficiency. While shifting low-level civil servants between offices for the sake of efficiency would undoubtedly be an administrative duty, Taft asked for a power that was essentially executive.[24]

The political implications of the transfer power raised substantial objections, especially in regard to prohibition and the enforcement of federal criminal law.[25] In response to fears that judges from "dry" districts would be moved indiscriminately to "wet" areas, or vice versa, Taft insisted that he would refrain from playing prohibition politics.[26] Yet even aside from the enforcement of the Volstead Act, the power to transfer judges would have enormous political repercussions. Since Taft was deeply concerned about rising disrespect for law and the seeming inability of some state courts to punish criminals and maintain order,[27] it seems almost certain that he would have been tempted to move rigid law-and-order judges to areas known for lax enforcement of the law. The power to transfer judges would give the Chief Justice a significant political role in taking care that the laws were faithfully executed.

Congress rejected Taft's proposal for a group of at-large judges. Aside from concerns that imported judges would not understand local affairs, it was unwilling to separate the creation of new judgeships, which all acknowledged to be necessary, from the political benefits of patronage. Nevertheless, it did agree to create a total of twenty-four new district judgeships.[28] Moreover, the legislature created a mechanism by which judges could be transferred between courts. Under the new law, senior circuit judges could move district judges between districts and the Chief Justice could move district judges between circuits, with the agreement of the senior circuit judge in both circuits.[29] Essentially, Congress created two levels of executive chiefs by increasing the formal powers of both the Chief Justice and the senior circuit judges.

Moreover, Taft's endeavors to create an executive head of the judiciary were further realized with the creation of the Conference of Senior Circuit Judges. The Conference served a key bureaucratic function by providing detailed reports on the work of each circuit and district. At its yearly meetings, the senior judges submitted statistics for their circuits, showing the amount of business completed and remaining in each federal court and allowing a more complete understanding of the workload and productivity of individual judges.[30] This information showed

> how the different districts and different judges dispose of their business, the demands of different classes of litigation upon court time, the expedition or delay in adjudications . . . the relation between federal courts and state courts, and the work of the federal courts in regard to litigation involving no peculiar federal questions.[31]

This information permitted Taft and the Conference to exercise its executive powers efficiently.

Most importantly, Taft believed that reports on the productivity of individual judges would be beneficial in "stimulat[ing] effective work of each judge in the reduction of arrears."[32] If a district or circuit remained

continuously behind, the statistics and reports would allow the Chief Justice and the local senior circuit judge to understand the problem fully and transfer judges to correct it. And if, despite the best efforts of its judges, a circuit or district remained consistently behind, the Conference would have the data necessary to see what changes should be made by Congress in order to ensure "a more vigorous and scientific approach to the problems of administration of justice."[33]

The Conference presented information on the administrative and personnel needs of each circuit and offered suggestions for policy changes to improve the administration of justice, helping to institutionalize the Chief Justice's role as a lobbyist for the courts. Taft used the annual reports of the Judicial Conference as a platform from which to tell Congress and the country the state of the judiciary and recommend measures necessary for the health of the courts.[34] Once again, Taft's work was clearly both executive and political, not simply administrative. Felix Frankfurter explicitly pointed to the political nature of this role, arguing that the bill interjected the courts directly into the process of judicial legislation. Modern commentators have followed his lead, with one calling the Judicial Conference "the principal policy-making body of the federal judiciary."[35]

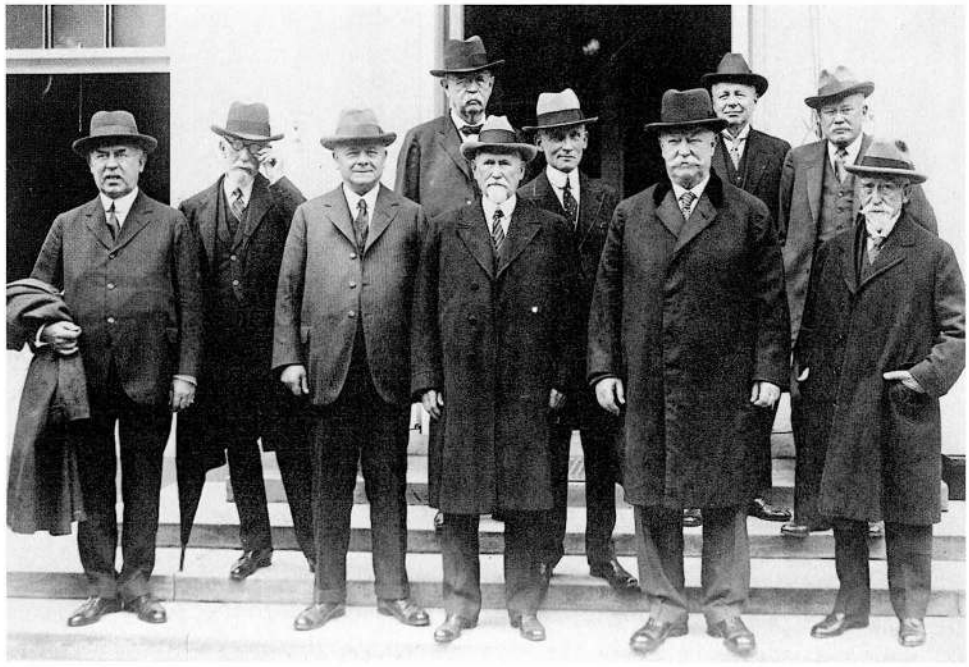
Taft had become Chief Justice when the judiciary was disjointed and lacking in structure and accountability. Only one year after assuming office, he secured a tremendous reform that made the judiciary, in the words the Taft Court's most prominent scholar, "a coherent branch of government" with the Chief Justice as the source of unity to promote efficiency in the administration of justice.[36]

The Court's General Manager and Chief Lobbyist

As a result of the new formal powers granted him by the 1922 act, Taft saw the potential to expand the Chief Justice's informal influence further. Taft is famous for having advised Presidents on judicial appointments and for lobbying for the creation of an independent Supreme Court building; however, his extensive work to unify the federal courts, through soliciting needed information from lower court judges and serving as a general manager and unofficial disciplinarian, has too often gone unnoticed.

As Chief Justice, Taft advised, sometimes without being invited to do so, Presidents Harding, Coolidge, and Hoover on their appointments to the high bench. During his tenure on the Court, Taft wielded significant influence over judicial appointees. Even today, modern literature continues to cite Taft as the exemplar of a Chief Justice who could control appointments to the high bench.[37]

As a practical matter, Taft had the greatest influence over judicial appointments during the Harding Administration, playing some part in the selection of Justices George Sutherland, Pierce Butler, and Edward T. Sanford.[38] Harding's Attorney General, Harry M. Daugherty, apparently assured the Chief Justice that he would only put forward judicial nominees of whom Taft approved.[39] Taft's impact can perhaps be best seen in the appointment of Butler. Not only did he personally advise Butler during the nomination and confirmation process, but he also appeared before the Senate Judiciary Committee to defend Butler's reputation after Wisconsin Senator Robert LaFollette attempted to paint Butler as a corporate lawyer with inappropriate ties to railroads.[40] His influence with Coolidge and Hoover was less pronounced, yet even during his later years, Taft seems to have had some pull with the White House. He supported Coolidge's appointment of Justice Harlan F. Stone and reportedly refused to resign, even on his deathbed, until Hoover had promised to appoint Charles Evans Hughes as his replacement![41]



Chief Justice William H. Taft worked hard to unify the federal courts, through soliciting needed information from lower court judges and serving as a general manager and unofficial disciplinarian. Above he is shown with the U.S. Circuit Court judges calling on President Calvin Coolidge at the White House in 1929.

Obviously, it is ultimately impossible to determine how much his recommendations influenced any President to nominate a candidate for the high bench. The Chief Justice had a large role in promoting Butler's appointment and played a part in supporting the nominations of Justices Sanford and Stone. But in many cases Taft's preferred candidate was passed over or overlooked; even Butler was only his second choice. He was merely Chief Justice, not President, and he lacked the power to ensure that his favored candidates were nominated. Nevertheless, his influence was substantial, and he seems to have wielded a veto over Supreme Court nominations. As Walter Murphy notes, "if Taft was only partially successful in getting his own candidates on the Court, he was completely successful in keeping out men who he thought would misinterpret the Constitution."[42]

While his actions have raised questions of propriety, he believed that his involvement was necessary for three reasons. As Chief Justice, he saw a duty, first, to guarantee that the Supreme Court did its work well; second, to protect the reputation of his Court; and third, to ensure that the judiciary would protect constitutional progressive reforms enacted by the political branches.

Upon taking the center seat, Taft was faced with a Court behind in its work, largely due to the infirmity of its older members. Between 1921 and 1924, Justice Mahlon Pitney had suffered a nervous breakdown, Justices William R. Day and Oliver Wendell Holmes, Jr. had absented themselves due to illness, and Justice Joseph McKenna was becoming mentally incapable of continuing to serve on the Court.[43] Taft sought to ensure that new Justices would be capable of the labors required of a member of the Supreme Court, and he used his influence to support the nomination of judges who were up to the task. As he wrote to Harding in late 1922, he wanted Justices who were "hard hitting,

industrious . . . and very able lawyer[s]" marked by "eminent ability and judicial experience" and possessing the respect of "the Bar and the community."[44]

Furthermore, Taft recognized that the Court's legitimacy could easily be called into question because Republicans had so consistently controlled the Presidency, and therefore federal judicial appointments, for decades. Between 1897 and 1921, when Harding named Taft Chief Justice, four Republican Presidents had appointed eleven Supreme Court Justices while Woodrow Wilson, the sole Democratic President during those years, had appointed only three. As Chief Justice, Taft argued that a bipartisan Court was necessary in order to protect the Court's reputation. When Justice Day retired, he informed Harding that it would "aid the Court to increase the number of Democrats on the bench, there now being only two," and he similarly wrote to Justice Willis Van Devanter that the appointment of a Democrat "would be a good thing for the Court and politically."[45] As the appointment process moved forward, Taft argued for Butler's appointment in part because "[h]e is a Democrat."[46]

Finally, Taft argued that the Court needed progressive jurists who were deeply attached to the Constitution. Taft has often been accused of seeking to appoint rigid conservatives to the bench,[47] although Jonathan Lurie's work has recently offered a more balanced reassessment,[48] but Taft believed the Court needed to recognize that significant progressive reforms could be enacted under the Constitution and without violating its strictures. As he wrote to Elihu Root in 1922, he sought a delicate balance: "we ought not to have too many men on the Court who are . . . reactionary on the subject of the Constitution . . . [instead] we need men who are liberal" but who also believed that the maintenance of the Constitution's guarantees of individual rights remained "the corner stone of our civilization."[49] This was not a new theme for Taft, who as early as 1919 had insisted that lawyers should play a key role in protecting progress, maintaining "the nice balance between private right and public necessity . . . in order that individual initiative and the spur of the advance of all by the advance of each shall not be lost."[50] It is worth recalling that Taft, traditionally depicted as a rock-ribbed reactionary, opposed the Court's rulings in *Lochner v. New York*[51] and *United States v. E.C. Knight*[52] and authored a stinging dissent in *Adkins v. Children's Hospital*.[53]

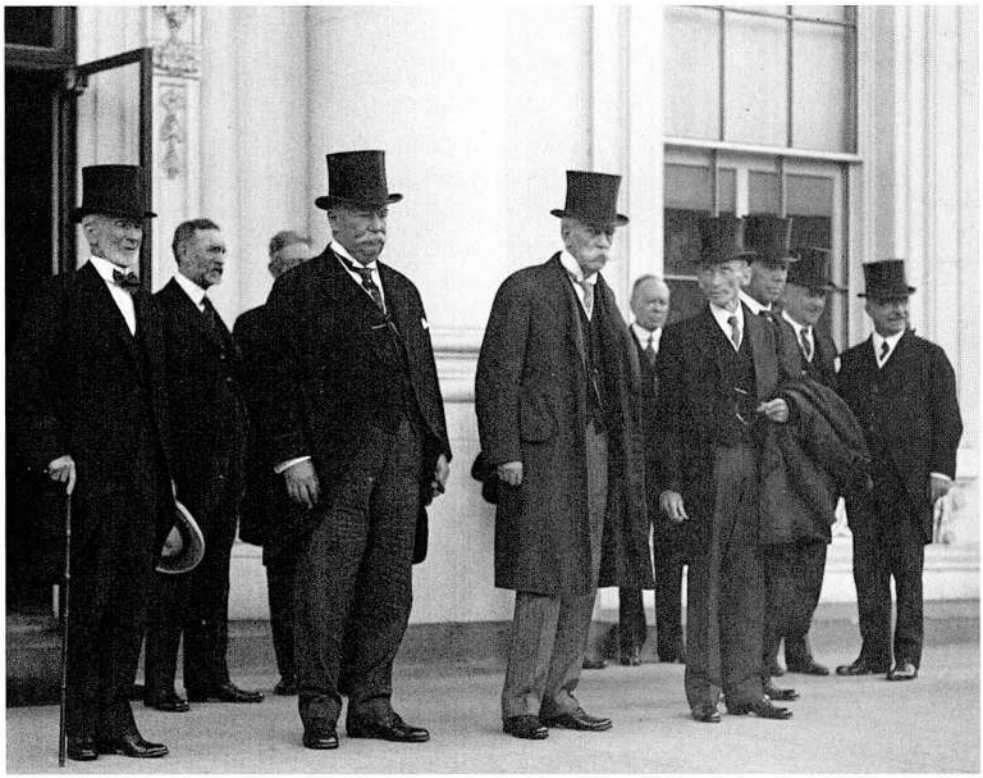
Moreover, Taft's influence went beyond judicial appointments and extended to a general managerial role in overseeing the personnel of the courts. He not only sought the appointment of strong new judges, but he also worked to hasten the retirement of weak sitting judges. In 1924, he wrote to then-Attorney General Stone, encouraging him to seek the retirement of an elderly judge on the Ninth Circuit who was no longer capable of fulfilling his duties. Taft even went so far as to recommend that, if the judge could not be prevailed upon to retire, Stone invoke a relatively unknown provision of the judiciary laws, which would allow the President to appoint a new judge to the Ninth Circuit, not replacing the older judge but effectively relieving him of his duties.[54] Closer to home, Taft played a leading role in convincing the ailing Justice Joseph McKenna to retire. Having consulted with McKenna's family and personal physician, Taft called a meeting of the other Justices, who agreed not to hand down any decisions when McKenna's vote would determine the outcome of the case and encouraged Taft to pressure the Justice to resign.[55] Despite his desire to remain on the Court, McKenna consented to retire out of respect for the unanimous opinion of his brother Justices.[56]

Finally, Taft used his personal influence to improve the administration of justice throughout the federal judiciary. He often wrote to his fellow judges to ask them for

information on the state of affairs in their district or circuit. Upon assuming the Chief Justiceship, he almost immediately wrote personal letters to every senior circuit judge, asking for information about their circuits and soliciting suggestions for reform.[57] By all accounts, the judges appreciated the gesture; they understood that the Chief Justice was making a concerted effort to show that they were all "parts of an articulated system of courts."[58]

In other instances, Taft's efforts were more disciplinary. He would write personal letters to slow judges, asking them to increase their efforts, both to protect the reputation of the federal judiciary and to give justice to the litigants before them. To one tardy judge, who had put off deciding a case for four years, he wrote "I write in the interest of the administration of justice, and for the reputation of the Federal Judiciary . . . I urge that you drop everything else and decide this case."[59] To another, he stressed the importance of dispensing speedy justice: "I think it is a source of considerable irritation among litigants that their cases are not decided . . . One can acquiesce in an adverse conclusion by taking an appeal, but when two people have no means of taking an appeal, it leaves both in a situation of which they may properly complain."[60] He used every ounce of influence he had, even reminding one judge "my pride in you as one of my appointments is so great, that I thought it [appropriate] . . . to call this [delay] to your attention."[61]

These letters went beyond mere verbal prodding from the Chief Justice, for Taft and the Conference had before them actual data from each court. Effectively, the Conference helped to institutionalize at least an informal

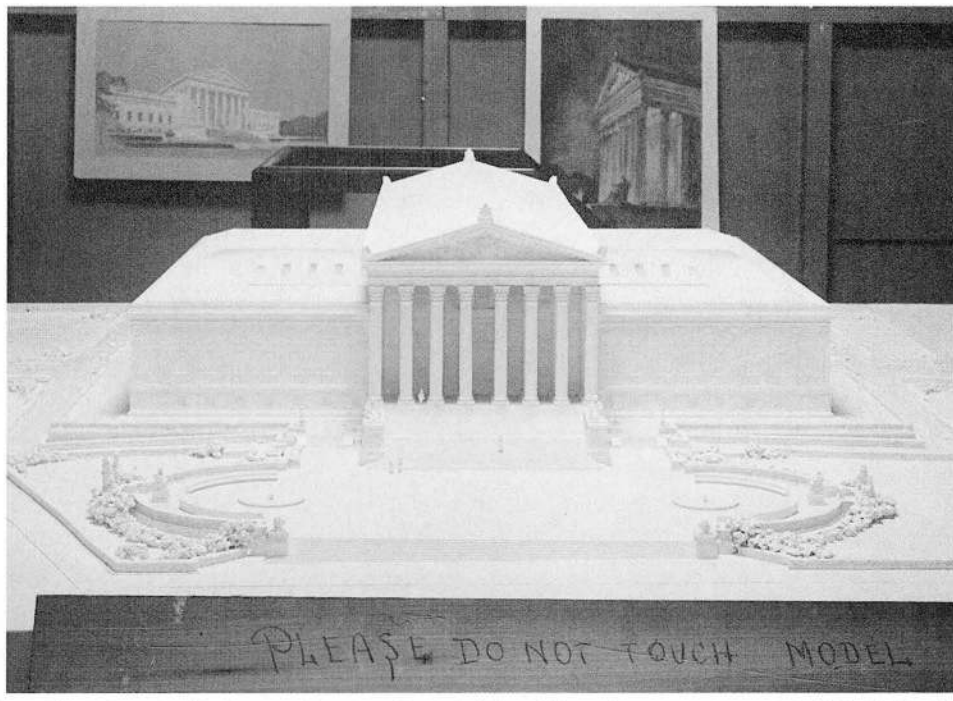


Chief Justice Taft not only sought the appointment of strong new judges, but he also worked to hasten the retirement of weak sitting judges. On his own court, he persuaded the ailing Justice Joseph McKenna (pictured with cane) to retire.

sense of responsibility in the federal judges. Thus, Taft believed that the Conference "solidifies the Federal judiciary," bringing "all the district judges within a mild disciplinary circle" and making "them feel as if they are under real observation by the other judges and the country."[62] Of course, Taft had no formal authority over any federal judge. The purpose of creating executive power in his office was not to dominate lower court judges but simply to increase efficiency. As Taft himself acknowledged, "Judges should be independent in their judgments, but they should be subject to some executive direction as to the use of their services."[63] Thus, Taft not only understood the need for an executive to manage the judiciary but also recognized the importance of limiting the Chief Justice's power to purely executive—not judicial—matters.[64]

Taft also engaged in more clearly political affairs. Believing that the Supreme Court needed a home of its own, he successfully lobbied Congress for funds to construct a separate building for the Supreme Court.[65] Taft did not live to see the erection of the current Supreme Court building, but his efforts ensured the ultimate success of the project. At the laying of the cornerstone for the new building, Chief Justice Hughes observed, "we are indebted to the late Chief Justice William Howard Taft more than to anyone else . . . this building is the result of his intelligent persistence."[66] It is thanks to Taft that the Supreme Court no longer meets beneath the Capitol but has its own home, physically independent of the legislature. And this physical independence—now as then—is critically important for guaranteeing the political independence of the third branch.[67]

By expanding his influence beyond mere administrative duties to explicitly political matters, he helped guarantee strong appointments to the bench, sought to ensure judicial accountability, and worked to promote the



Cass Gilbert's model for the new Supreme Court building. When the cornerstone was laid in 1932, Chief Justice Charles Evans Hughes said of Taft, "This building is the result of his intelligent persistence."

judiciary's unity and independence. Overall, Taft successfully developed executive management in the judiciary by making the Chief Justice the "substantive head of the third branch of government"[68] endowed with "a distinctive managerial outlook."[69]

The Supreme Court

If the 1922 Judiciary Act made the Chief Justice the formal head of the judiciary, the Judges' Bill of 1925 made the Supreme Court fully supreme over the lower courts of the federal judiciary. It "established the basic jurisdiction of the modern Supreme Court" and gave it the power to "decide what to decide,"[70] allowing it to focus exclusively on issues of constitutional and national importance. As a result, Taft's work to draft and lobby for the enactment of the 1925 law helped to reinforce the already burgeoning power of the Chief Justice and further unify the judiciary by transforming the Supreme Court into the highest appeals court in the land.

The Judges' Bill

By 1925 the Supreme Court was inundated with work. The growth of the federal government, the modernization of industry, military contractors' claims in the wake of the First World War, and litigation following the passage of the Volstead Act had overburdened its docket. This problem was exacerbated by the outdated structure of the federal courts. Although the 1891 Evarts Act had constituted permanent circuit courts, composed of two circuit court judges and one Supreme Court Justice, these circuit courts had relatively limited jurisdiction and did not function as true intermediate courts of appeals.[71] Because the circuit courts had relatively narrow jurisdiction, the Supreme Court's obligatory jurisdiction typically accounted for over eighty percent of its docket. As a result, litigants often waited for up to two years for a hearing, and the Court frequently took another three years to hand down a decision in important cases.[72] The Judges' Bill of 1925 alleviated these difficulties by substantially restricting the Court's mandatory jurisdiction and increasing its discretionary certiorari jurisdiction.

The 1922 bill had strengthened the Chief Justice's ability to ask Congress for legislation to aid the Court and by 1925, Taft was using that power enthusiastically. Indeed, not only Taft but the Supreme Court as a whole actively supported the enactment of the Judges' Bill. Because the American Bar Association had convinced Congress that a jurisdiction bill would be too complicated for the legislature to formulate on its own, Senator Albert B. Cummins of the Judiciary Committee had invited the Justices of the Supreme Court to author a reform bill.[73] Taft created a drafting committee made up of Justices Day, Van Devanter, and James C. McReynolds, which was later aided by both Justice Sutherland and the Chief Justice himself.[74] The entire Court—with the exception of Justice Brandeis—approved of the bill, and Taft and Justices Van Devanter and McReynolds each spent two or three days lobbying for it on Capitol Hill.[75] The bill was approved, without amendment, by a voice vote in the House and with only one dissenting vote in the Senate.[76]

By limiting direct appeals to the Supreme Court to a small class of cases, the Judge's Bill reduced the Court's burden by requiring most cases to be filtered through the circuit courts.[77] Freed from the burden of hearing trivial cases and direct appeals, the Court could limit its docket to cases of true national importance. It retained mandatory jurisdiction over cases in which a state supreme court had struck down a federal statute or a state statute was held to be valid against a claim of unconstitutionality or conflict with a federal law.[78] At the same time, the Court's newly

expanded certiorari jurisdiction permitted it to review any lower court decision that determined the constitutionality of a federal statute or treaty, affected the validity of a state statute said to be repugnant to the United States Constitution, laws, or treaties, or any decision in a case affecting "any title, right, privilege, or immunity" claimed under the Constitution.[79]

Essentially, the Judges' Bill turned the Supreme Court into a real final appellate court for important national issues involving individual rights or the power of the federal government. The Supreme Court could now focus solely on its higher duties, "first to secure uniformity of decision between those courts in the nine circuits, and second to bring up cases involving questions of importance which it is in the public interest to have decided by this Court."[80] As a result of its new discretionary power, the Court gained a tremendous amount of political power, guaranteeing it a key role in buttressing the authority of the federal government. In this way, the bill not only expanded the influence of the Supreme Court over lower courts, but also gave it an increasingly significant role in deciding questions of federalism, private rights, and public policy.

"Massing the Court"

As the Supreme Court began to focus on a different class of cases, the Chief Justice's influence over the Court rose, particularly in the realm of building up and maintaining strong majorities of the Court in support of key decisions. During his tenure, he suppressed more than 200 dissenting votes,[81] employing his power to assign cases,[82] personal persuasion, and influence over legal culture to dissuade dissents, mass the Court around majority opinions, and strengthen the Court's institutional reputation.

As Chief Justice, Taft used his power to assign opinions to promote unanimity, assigning opinions to the Justice with expertise in the subject matter. He typically assigned patent cases to Justices John H. Clarke and McKenna, tax and rate cases to Justice Brandeis, admiralty cases to Justice McReynolds, and land and Indian disputes to Justices Van Devanter and Sutherland.[83] This strategy went beyond assigning cases to the Justice most interested in the subject; Taft intentionally gave cases to the Justice most likely to produce a clear, well-written decision that would unite the Court and deter dissents.[84] From his brother judges, he demanded "carefully crafted opinions to meet the concerns of all of the Justices," and he reserved the right to reassign a case simply because a Justice's draft majority opinion failed to win sufficiently strong support.[85]

Thus, Taft had originally assigned the opinion in *Sonneborn Brothers v. Cureton*[86] to Justice McReynolds, but because of serious objections to the draft opinion, the Chief Justice took over the case himself, carefully considered the dissenters' views, and proposed a more conciliatory opinion. Although McReynolds authored a two-paragraph concurrence expressing his own ideas, the Court supported Taft's opinion unanimously.[87] Similarly, when McReynolds's opinion in *Railroad Commission v. Southern Pacific Co.*[88] failed to convince the more progressive members of the Court, Taft finally reassigned the majority opinion to himself. Holmes and Brandeis approved of his new opinion and joined the majority and McReynolds, although he initially protested and threatened to dissent, eventually conceded quietly.[89]

Taft held himself to this same high standard, and frequently altered his opinions to conciliate his brother Justices. In 1929, he agreed to eliminate a long discussion of the Interstate Commerce Clause from his opinion in *Wisconsin v. Illinois*[90] to avoid dissenting opinions. As he wrote to Justice Butler, "it is a real sacrifice of my personal preference. But it is the duty of us all to control our personal

preferences to the main object of the Court."[91]

Beyond personal preferences, Taft recognized that due concern for the constitutional and legal objections of potential dissenters would help to unite the Court. Thus in several cases, he accepted criticisms or concerns from draft dissents and incorporated these ideas into his own opinions to appease the dissenting Justices.[92] In *United Mine Workers v. Coronado Coal Co.*, Taft adopted much of Brandeis's reasoning and held that, while a union and its local branches could be sued for lawless acts during a strike, the national board of the United Mine Workers could not be held liable for the actions of local strikers, as it had not sanctioned or participated in the illegal acts.[93] Brandeis was satisfied with the compromise and the decision was handed down unanimously.

Similarly, in *American Steel Foundries v. Tri-City Trades Council*, Taft helped to unify a badly fractured Court. The White Court had heard the case twice, but the Justices remained divided and heard the case again in 1921 after Taft took the center seat. Taft's opinion, relying in part on arguments set forth by the liberals on the Court, upheld an injunction against a violent labor strike but also held that the workers had a right to strike and picket.[94] As a result, Holmes joined the majority and Brandeis chose to concur separately rather than dissent, merely noting that he "concurs in substance in the opinion and the judgment of the Court."[95] When Justice Pitney hesitated to join the new, more liberal, opinion, Taft both incorporated several of Pitney's suggestions and convinced him to suppress his other objections, arguing that "it is so unusual to get as many of the Court together . . . that we better let it go as the opinion has been approved."[96] Justice Clarke remained the lone holdout, but he did not write a dissent.[97]

Thus, Taft showed the potential of carefully refined legal arguments that would appeal to virtually the entire high court, from Brandeis to Butler. Indeed, even Brandeis, more than any other Justice the ideological opposite of Taft, admitted that the Chief Justice showed great skill in addressing his constitutional concerns. With respect to *Southern Pacific*, Brandeis wrote, "I had written a really stinging dissent . . . [but] I suppressed my dissent because . . . the worst things [in the majority opinion] were removed by the Chief."[98] Similarly, he accepted Taft's opinion in *Chicago & Northwestern Railway Co. v. Nye Schneider Fowler Co.*[99] because "the opinion handles the matter so deftly that I think there will be no such lasting harm done as to require dissent. So as our Junior [Justice] says: 'I'll shut up.'"[100]

Taft's successes in suppressing dissents arose in large part from his personality and generosity. Particularly in interpersonal matters, he ensured ease, efficiency, and consensus. Holmes praised the genial Chief Justice, writing that "never before . . . have we gotten along with so little jangling and dissension."[101] Taft used personal persuasion to convince his fellow Justices to modify their own views to bring in dissenters. When the Court was deciding *American Railway Express Co. v. Kentucky*,[102] he recognized that Brandeis had valid complaints against McReynolds's majority opinion; managed to make Brandeis's more liberal views palatable to McReynolds's more conservative ear; and ultimately convinced McReynolds to adopt Brandeis's arguments as his own. This compromise evidently caused Brandeis, Holmes, and Stone to suppress dissents.[103] The Court decided the case 7-2, with only Sutherland and Butler dissenting without opinion.

Beyond his powers of personal persuasion and his use of the assigning power, Taft also helped to craft a legal culture that frowned on dissents. The 1924 code of judicial ethics emphasized the importance of unanimity in Cannon 19:

Chief Just Taft was successful in suppressing dissents on the Court because of his jovial personality, generosity, efficiency, and determination to build consensus. Oliver Wendell Holmes, Jr., (standing to the right of Taft in front of the White House at the annual courtesy call on the President) wrote that "never before . . . have we gotten along with so little jangling and dissension."

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision.... Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.[104]

This reigning legal culture undoubtedly helped Taft to promote unanimity on the Court. But while legal culture helped the Chief Justice mass the court, Taft himself helped to maintain that culture, as he had chaired the committee that authored Cannon 19.[105]

The Court's efforts to maintain unanimity were critical for countering the more radical political forces of the day, and the policy of suppressing dissents helped to protect the Court and its legitimacy. As Taft wrote to Justice Stone, "I am quite anxious, as I am sure we all are that the continuity and weight of our opinions on important questions of law should not be broken any more than we can help by dissents."[106] The Court understood that the frequent public airing of disagreements would simply provide fodder for attacks on the judiciary. Using dissents to attack the legitimacy of the Court was so common among the more radical progressives that Taft once complained that Senator LaFollette "could find a good deal of material in Brandeis's dissenting opinions."[107]

Taft may have been somewhat unfair to Brandeis, for the political repercussions of

dissents were abundantly clear to all of the Justices—even those most prone to dissent. Brandeis and Holmes, now often best remembered for their dissenting opinions, often hesitated to disagree openly with the Court. Holmes, the "Great Dissenter," was known to be reticent "to express his dissent, once he's 'had his say' on a given subject."[108] Brandeis, for his part, not only feared radical attempts to limit the Court's power but recognized the importance of protecting the Court's solidarity and reputation. As he wrote, "I have differed from the court recently in three expressed dissents and concluded that, in this case, I had better 'shut up.'"[109] Following an effort by Senator William Borah of Idaho to require a seven-vote majority on the Supreme Court to strike down a federal statute, Brandeis recounted the Court's deliberations on one case, telling Frankfurter that the Court had "deemed [it] inadvisable to express dissent and add another 5 to 4 [decision]... The whole policy is to suppress dissents, that is one positive result of Borah['s] 7 to 2 business... You may look for fewer dissents."[110]

Throughout his tenure, Taft worked tirelessly to protect and strengthen the reputation of the judiciary by "massing the court" to hand down unanimous (or nearly unanimous) decisions.[111] The percentage of unanimous Supreme Court decisions had fallen sharply just before Taft's ascent to the center seat. In 1912, almost ninety percent of the Court's opinions were unanimous, but by 1919 that number had fallen to just over sixty percent. In Taft's first term as Chief Justice, the Court's unanimity rate spiked back up above ninety percent and throughout his tenure, the Court would maintain unanimity in an average of 91.4% of its opinions. Moreover, the Taft Court almost wholly eliminated one-vote decisions, with only 1.77% of cases being decided by a single vote.[112]

Through his efforts to ensure the passage of the Judges' Bill, Taft helped to buttress the Court as a whole, but he also saw the potential to expand the prerogatives and influence of the Chief Justice. And by using his personal influence alongside the Chief Justice's assigning power, Taft unified and strengthened the Court as an institution, protecting its reputation and guarding its influence. Taft has often been seen as a judge at heart, but his leadership on the Court shows that he also had the mind of a successful executive.

Progressive Reforms in Service of the Constitution

As the federal government's role expanded, the courts had been called upon to address vast new fields of litigation arising from the government's broadening role in American life. Taft saw that the courts needed to be strengthened to meet the new demands placed on all three branches of American government. In this sense, his work to rejuvenate and strengthen the courts clearly aligned with the Progressive Era's expansion of the role of government.[113] Taft's reform efforts on the Court were in line with progressive goals insofar as they both helped to centralize national power and institutionalized a "scientific approach to the problems of administration of justice."[114] His interest in efficiency and his strong nationalism have received fairly wide recognition.[115] But Taft's goals extended beyond nationalism and efficiency, for he recognized that judicial reform would also advance social reforms, most notably by making access to the courts of justice more affordable for poor litigants. Thus, while he advanced efficiency-based reforms, he also understood that these reforms pointed to and promoted social progress. Finally, by showing that the Constitution and the government it created were capable of and open to reform, he also strengthened the Courts as a vehicle by which the Constitution and its

protections of individual rights could be preserved.

The Courts and Progressivism

Typically, Progressives believed that the courts, and especially federal courts, should be substantially weakened in order to protect social reforms. For example, James Bradley Thayer's classical argument for judicial restraint insisted that judicial review should be employed only in the most extraordinary circumstances, leaving the business of "checking and cutting down... legislative power" to the political process.[116] Many members of the progressive movement sought to embody this principle of judicial humility in law. The Progressive Party platform of 1924 actually called for constitutional amendments to permit Congress to override a Supreme Court precedent by a simple majority and to do away with life terms for federal judges, instead shifting them to fixed, elective terms of office.[117] These principles would have substantially altered the constitutional system of separation of powers; by severely limiting the power of the courts to act, they would have removed the courts as an institutional barrier against unconstitutional action by Congress.

While many progressives feared the courts and saw them as defenders of wealth, Taft pointed to the critical role played by the Court in our constitutional system of separation of powers and in Justin Crowe's words, "successfully invoked Progressive era aims" to address the very "critiques of federal judicial power offered by Progressives."[118] The Chief Justice argued that the Constitution, including the federal courts created by Article III, was the foundation of American government and could continue to function alongside progress and reform. He believed that a written Constitution's central feature was its permanence. Unlike the unwritten British constitution, which left Parliament all but "omnipotent," the United States had a written Constitution, a "fundamental law" that "imposes limitations upon the powers of all branches of the Government."[119] Because the written Constitution creates permanent barriers to protect individual rights, the courts were a necessary instrument by which those rights could be protected against unconstitutional laws.[120]

Taft recognized the legitimacy of many Progressive complaints against the courts, but he sought to provide remedies for these concerns while also protecting the federal judiciary. He believed that much of the anger against the federal judiciary arose not because the courts had struck down unconstitutional laws, but because they were inefficient and failed to treat poor litigants fairly.[121] Thus, while many progressives argued that the judges were unelected, life-tenured defenders of wealth and property, Taft sought to reform the courts while pointing out how these reforms would help to protect the poor against moneyed interests.[122] In so doing, he strengthened the federal courts, but he did so while also attempting to alleviate the concerns of progressives who feared that the judiciary was unresponsive to the poor. He hoped that by "promoting dispatch in the disposition of litigation and reducing the cost thereof to the poor litigant," he could help to remedy "the only real arguments that they have against our judicial system" and to legitimize and strengthen the federal judiciary.[123]

Thus, Taft's goals were twofold. While he believed strongly in the importance of courts and constitutional government and was a firm advocate of judicial power, at the same time his clearly stated goals for judicial reform also show his interest in assuaging the plight of poor litigants who had suffered from the inefficiencies of the judiciary. He worked by traditional constitutional means to achieve ends sought by many progressives.

Cutting Costs, Simplifying Appeals, and Protecting Rights

In 1908, Taft had argued that the greatest defect of the national government was its "failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts." Because the judicial machinery was "slow and expensive" it often failed to secure speedy justice, undermining the public's faith not only in the courts, but even in the justice of the laws and the Constitution.[124] Moreover, Taft recognized that the slowness of the judicial system did not harm all litigants equally. Instead, inefficient courts often helped the rich at the expense of the poor, as delays provided "a great advantage for that litigant who has the longest purse... [who] can almost always secure a compromise... because of the necessities of the poor plaintiff."[125] Taft believed that it was his duty to alleviate this "unequal burden" by reducing the "delays and expense of litigation."[126]

By creating true intermediate courts of appeal and limiting the Supreme Court's mandatory jurisdiction, the Judges' Bill had reduced the costs of litigation by ensuring that most cases were appealed no more than once—from a district to a circuit court. Theoretically, guaranteeing poor litigants as many appeals as possible seemed to ensure just results, but Taft argued that, in practice, a right of appeal through numerous courts typically allowed a rich litigant, whether an individual or a corporation, "to hold these [poorer] litigants off from what is their just due by a lawsuit for a period [of several years], with all the legal expenses incident" to a lengthy legal battle. By limiting the number of possible appeals in most cases, the 1925 reform bill promoted a less expensive process, thereby helping to protect the poorer party.[127]

Similarly, Taft's plans for reforming and simplifying the federal judiciary's antiquated system of procedure would have reduced the expense of litigation. Under the Conformity Act of 1872, Congress had required federal district and circuit courts to adopt state rules of procedure for all civil cases at common law, effectively requiring the judiciary to use four dozen systems of procedure. Taft asked Congress to delegate rulemaking for procedures at common law to the judiciary. Although his efforts were stymied by legislative inaction, the reforms he championed would be achieved by his successor, Charles Evans Hughes, who finally convinced Congress to delegate rulemaking power to the Court and secured legislative approval of the Federal Rules of Civil Procedure.[128]

Moreover, Taft worked to decrease the direct costs of litigation in a number of small ways. As he wrote to Brandeis, "I am itching to reduce expenses to the litigants in our Court."[129] In 1926, he cut the Court's printing costs by nearly fifty percent;[130] having long believed that employing court officials on a fee-based income unduly raised costs for litigants, he encouraged Congress to shift the Supreme Court's clerk to a fixed salary;[131] and, in response to a plea from a country lawyer, Taft convinced the administration and Congress to guarantee a criminal defendant a free copy of his indictment, ending the practice of charging the accused for access to his own court records.[132]

Finally, the Taft Court began to expand federal protections of individual rights. More often than not, Taft is thought of as a reactionary conservative on the issue of rights, most memorably for his reticence to accept a more modern understanding of free speech, for example, in *Gitlow v. New York*,[133] *Whitney v. California*,[134] and *United States v. Schwimmer*,[135] and for his majority opinion in *Olmstead v. United States*, which held to the common law "Trespass Doctrine" and rejected more expansive readings of the Fourth Amendment.[136] Nevertheless, Taft believed his reforms would give the Court the power it needed to protect individual rights. The Judges' Bill freed the Court to

give appropriate attention to "genuine issues of constitutional right of individuals," expanding the national government's role in protecting rights against state action.[137] For Taft, this was a critical part of the federal judiciary's duty. He had vehemently opposed proposed restrictions to the federal judiciary's jurisdiction over claims of federal rights, not only because he believed that such limitations would unduly weaken the Court, but also because he recognized that such restrictions would give southern states *carte blanche* to strip African Americans of their rights.[138] Without strong federal courts to reign in errant states, vulnerable minorities could be subject to "a practical deprivation of their Federal rights and protection."[139]

Moreover, the Judges' Bill played a large part in allowing the Supreme Court to begin the process of incorporating the Bill of Rights. In 1916, Taft had written that the Fourteenth Amendment "vests in the National Government the power and duty to protect against the aggression of a State, every person within the jurisdiction of the United States in most of the personal rights, violation of which by Congress is forbidden in the first eight amendments to the Constitution."[140] Almost a decade later, the passage of the Judges' Bill coincided perfectly with the beginning of the process of incorporation; the bill was enacted in 1925, the same year the Court handed down *Gitlow v. New York*,[141] its first case incorporating a provision of the Bill of Rights. As Chief Justice, Taft was a part of the *Gitlow* majority, and he also supported the Court's decisions in *Meyer v. Nebraska*[142] and *Pierce v. Society of Sisters*.[143] By convincing Congress to free the Court from the crushing burden of hearing trivial appeals, he ensured that the high court could give due attention to the protection of national rights through the process of incorporation. The Taft Court is almost universally viewed as hardline and conservative, but it did take critical initial steps toward protecting the vulnerable against moneyed interests and guarding sidelined minorities against unconstitutional laws.

Clearly, Taft's efforts as Chief Justice show his desire to promote efficiency and speed in the federal courts. But his own testimony suggests that Taft was attached not only to efficiency-based reform, but that he was even interested in encouraging social reform. By reducing expenses and simplifying procedures, he showed that the Constitution and the federal courts created under it were capable of continuing to function justly and fairly even as the country developed. The most radical of the progressives had launched assaults on the federal courts, seeing the judiciary's role in interpreting the Constitution as an anti-democratic check on social legislation. Taft, seeing that the Courts had sometimes failed adequately to provide for the needs of the litigants before them, sought to reform the courts to ensure greater efficiency in attaining justice and protecting the Constitution's guarantees of rights. His work was in line with progressive goals, but he met those goals by conservative means—working through the existing constitutional system and avoiding more radical reform measures that would have altered the structure of the government or affected the separation of powers.

Conclusion

In an era of change and reform, the Court's function would inevitably have been altered. Had then-President Taft appointed Charles Evans Hughes as Chief Justice in 1910 rather than elevating Edward D. White to the center seat, reform might have come sooner. But the specific reforms Taft achieved were hardly inevitable; they came about as a direct result of his political abilities and executive leadership on the Court.[144] Indeed, Alpheus Mason actually argues that "[a]s a judicial architect, Taft is without peer," even insisting that Hughes merely built up from a

foundation laid by Taft.[145] It was Taft, particularly through the executive-political role he envisioned for the Chief Justice, who ensured the success of these reforms. As Allan Ragan has observed, if Taft was conservative in his desire for slow, steady reform in many areas, he was a liberal in the realm of judicial reform, "if not a confirmed radical."[146]

Not only did Taft display impressive administrative and executive abilities, his interest in reform was tinged with progressivism, particularly in his concern for poor litigants in federal courts. Taft recognized that many Americans had real grievances against the inefficient and expensive federal courts. By working to remedy legitimate arguments against the inefficiency and expense of the judiciary, he sought to show that the courts could continue to function and protect rights even as change continued in the United States.[147] In effect, by making the administration of justice more just, Taft hoped to prove to the nation that the Constitution and the Courts created by Article III were worthy of being maintained.

Taft's efforts helped to maintain the constitutional system of separation of powers by making the Court sufficiently "strong and independent . . . [to] fulfill its constitutional purpose." He faced no easy task, for at the time he assumed the bench "the federal courts were perilously close to abdicating their role."[148] It has sometimes been said that Taft's reforms buttressed the power of the judiciary and helped the "Four Horsemen" to stanch the tide of the First New Deal until 1937. But if his work strengthened the Court in the early 1930s, it also invigorated the courts after 1937. Just as the "Four Horsemen" owed much of their power to Taft's work, liberal Justices from Harlan F. Stone to Earl Warren may thank Taft for establishing the modern federal judiciary. By expanding the executive role of the Chief Justice and making the Supreme Court a true court of final appeal, Taft helped to strengthen the judiciary, making it a fully coequal branch of the national government.[149] As a later Chief Justice would recognize, the effects of Taft's work remain "immeasurable."[150]

ENDNOTES

[1] Conference of Senior Circuit Judges, 42 Stat. 837 (1922).

[2] Judges' Bill, 43 Stat. 936 (1925).

[3] Felix Frankfurter, **Felix Frankfurter on the Supreme Court,** ed. Philip Kurland (Cambridge: Harvard University Press, 1970), pp. 487-88. Ellsworth authored the Judiciary Act of 1789 while in the United States Senate. He would go on to serve as the third Chief Justice of the United States, immediately preceding John Marshall.

[4] Felix Frankfurter and Harlan Phillips, **Felix Frankfurter Reminisces: An Intimate Portrait as Recorded in Talks with Dr. Harlan B. Phillips** (New York: Reynald & Company, 1960), p. 85. *See* Donald Anderson, "Building National Consensus: The Career of William Howard Taft," *U. Cincinnati L. Rev.*, 68 (2000): 351-53; Alpheus Thomas Mason, **William Howard Taft: Chief Justice** (New York: Simon and Schuster, 1964), pp. 234, 269, 271, 299-301; Alpheus Thomas Mason, "President by Chance, Chief Justice by Choice," *Amer. Bar Ass'n J.*, 55, no. 1 (January, 1969): 35-36, 39; Peter Renstrom, **The Taft Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2003), pp. 35-36, 74, 184; Judith Resnik, "Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist," *Indiana L. J.*, 87 (2012): 433-34. Note, however, that a handful of scholars have noted (albeit very briefly) the executive nature of Taft's work: Robert Post, "Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft." *J. Supreme Court History*, 23, no. 1 (1998): 56, 59, 61, 67; Kenneth Starr, "William Howard Taft: The Chief Justice as Judicial Architect," *U. Cincinnati L. Rev.* 60 (1992): 963, 965-66; also possibly Justin Crowe, "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *J. of Politics*, 69 (2007): 82; Mason, **William Howard Taft,** p. 232; Robert Post, "Judicial Management: The Achievements of Chief Justice William Howard Taft," 25-26, 29; and William Rehnquist, "Chief Justices I Never Knew," *Hastings Constitutional Q.*, 3 (1976): 637, 641.

[5] Renstrom, p. xii, *also* pp. 27, 30, 186.

[6] Peter Fish, "William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers," *The Supreme Court Review* 1975 (1975), 124-25, 145; also p. 126-30, 137, 144.

[7] Frankfurter, **Felix Frankfurter on the Supreme Court** p. 228. *See variously,* Anderson, "Building National Consensus,"324-25, 340-41, 344, 354; Fish, "William Howard Taft," 125-28, 139, 144; Stanley Kutler, "Chief Justice Taft and the Delusion of Judicial Exactness. A Study in Jurisprudence," *Virginia L. Rev.*, 48 (1962): 1407-408, 1416-19, 1422, 1424 (but cf. 1412, 1423); Mason, **William Howard Taft,Chief Justice,** pp.13-16, 43-45, 48, 52-53, 58-60, 64-65, 156-59, 174-77, 262, 264-45, 291-95, 303; Mason, "President by Chance," **Chief Justice** p. 37; Carl McGowan, "Perspectives on Taft's Tenure as Chief Justice and Their Special Relevance Today," *U. Cincinnati L.Rev.* 55 (1987): 1149-50, 1153-54; Henry Pringle, **The Life and Times of William Howard Taft**. (New York: Farrar and Rinehart, Inc., 1939), Vol. II, pp. 967-68, 978-81; Allen Ragan, **Chief Justice Taft** (Columbus, Ohio: Ohio State Archaeological and Historical Society, 1938), pp. 7, 30, 44, 93-94, 119-21 (but cf. pp. 4, 41, 89); Bernard Schwartz, **A History of the Supreme Court** (Oxford: Oxford University Press, 1993), pp. 206-7; Robert Steamer, **Chief Justice: Leadership and the Supreme Court** (Columbia, SC: University of South Carolina Press, 1986), pp. 161-62, 164, 167.

[8] Taft, **The Collected Works of William Howard Taft,** ed. David Burton (Athens: Ohio University Press, 2001-2004), Vol. I, p. 123.

[9] *See, e.g.* Taft, **Collected Works,** Vol. I: pp. 25-29, 336-41; Vol. II: pp. 10-16; Vol. IV, pp. 39-40; Taft, "Needed Changes in Criminal Procedure," *Proceedings of the Academy of Political Science in the City of New York*, 1, no. 4 (July, 1911): 620-24.

[10] Van Devanter to Taft (May 11, 1927), Taft Papers.

[11] Taft to Frank H. Hiscock (April 12, 1922); *see also* Taft to Chauncey M. Depew (October 15, 1910), Taft Papers.

[12] Taft, "Attacks on the Courts and Legal Procedure," *Kentucky L. J.*, 5, no. 2 (1916): 14.

[13] Taft, "Three Needed Steps of Progress," *Amer. Bar Ass'n J.*, 8, no. 1 (Jan., 1922): 34-36. *See also* his earlier thoughts on reform proposals, Taft, "The Attacks on the Courts," 14-15.

[14] Lawrence Baum, **The Supreme Court**, 11th ed. (Los Angeles: CQ Press, 2012), p. 11; Crowe, "The Forging of Judicial Autonomy," 79; Post, "Judicial Management and Judicial Disinterest," 26; Schwartz, **A History of the Supreme Court**, pp. 216-17.

[15] Starr, "Judicial Architect," 965-66.

[16] Mason, **William Howard Taft,**, pp. 14-15; *see also* David O'Brien, **Storm Center: The Supreme Court in American Politics**, 10th ed. (New York: W. W. Norton & Company, 2014), pp. 90, 101.

[17] Crowe, "The Forging of Judicial Autonomy," 78.

[18] Fish, "William Howard Taft and Charles Evans Hughes," 124; Post, "Judicial Management and Judicial Disinterest," 53.

[19] Taft, "Attacks on the Courts," 16.

[20] Crowe, "The Forging of Judicial Autonomy," 81; Felix Frankfurter and James Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** (New Brunswick: Transaction Publishers, (New Brunswick: Transaction Publishers, 1928 [2007]), p. 218.

[21] *Ibid.,* p. 220.

[22] Taft to Louis Brandeis (July 27, 1921), quoted in Mason, **William Howard Taft, Chief Justice,** p. 199.

[23] Mason, **William Howard Taft,** p. 100.

[24] Indeed, as President, Taft and his Attorney General had been responsible for shifting federal judges between courts in order to avoid conflicts of interest. *See* George W. Wickersham to Taft (January 20, 1910); Taft to Edward E. Cushman (January 21, 1910); Taft to Thomas R. Lyons (January 21, 1910); Taft to Peter D. Overfield (January 21, 1910). The President had this power solely over judges in the federal territories (the letters above usually referred to judges in Alaska), not over district judges sitting in the states.

[25] Taft to Frank H. Hiscock (April 12, 1922), Taft Papers.

[26] Taft, "Possible and Needed Reforms in Administration of Justice in Federal Courts," *American Bar Association Journal*, 8, no. 10 (Oct., 1922): 602.

[27] *E.g.* Taft, "Attacks on the Courts," 22; Taft, "Needed Changes," 621-24; Taft, **Collected Works,** Vol. I, pp. 336-37, 340-41; Vol. II: p. 9; Vol. III, p. 156.

[28] Conference of Senior Circuit Judges, 42 Stat. 837 (1922) at 837-38; *also* Frankfurter and Landis, **The Business of the Supreme Court,** pp. 236-78; Mason, **William Howard Taft,** p. 100.

[29] Conference of Senior Circuit Judges, 42 Stat. 837, 839 (1922).

[30] Crowe, "The Forging of Judicial Autonomy," 82.

[31] Frankfurter and Landis, **The Business of the Supreme Court,** pp. 253-54.

[32] Taft, "Attacks on the Courts," 16.

[33] Frankfurter and Landis, **The Business of the Supreme Court,** p. 254.

[34] Indeed, it is largely an outgrowth of Taft's work that the Chief Justice gives a yearly report on the state of the judiciary. Peter Fish, **The Politics of Federal Judicial Administration,** (Princeton: Princeton University Press, 1973), p. 50; Post "Judicial Management and Judicial Disinterest," 57-58.

[35] Frankfurter and Landis, **The Business of the Supreme Court,** p. 240; O'Brien, **Storm Center**, pp. 100-101.

[36] Post, "Judicial Management and Judicial Disinterest," 54.

[37] *See, e.g.* Henry Abraham, **The Judicial Process,** 7th ed. (New York: Oxford University Press, 1998), p. 31; G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** (Oxford University Press, 2000), p. 179.

[38] Anderson, "Building National Consensus," 351; Ragan, **Chief Justice Taft**, pp. 96-97; Renstrom, **The Taft Court,** pp. 30-31, 33.

[39] Henry Taft to Taft (October 26, 1922), Taft Papers.

[40] Ragan, pp. 96-97; Taft to Pierce Butler (October 25 and November 2 and 17, 1922), Taft Papers.

[41] Anderson, "Building National Consensus," 349, 351; Renstrom, **The Taft Court**, p. 34.

[42] Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," *The Supreme Court Review* (1961): 188; *also* Anderson, 347; Steamer, 147.

[43] Murphy, "In His Own Image," 165-67, 183-85.

[44] Taft to Warren G. Harding (December 4, 1922), Taft Papers.

[45] Taft to Pierce Butler (October 25, 1922); Taft to Van Devanter (September 16, 1922), Taft Papers.

[46] Taft to Harding (October 30 and November 17, 1922), Taft Papers.

[47] Paulo Coletta, **The Presidency of William Howard Taft** (Lawrence: University Press of Kansas, 1973), p. 153; Lewis Gould, **The William Howard Taft Presidency** (Lawrence: University Press of Kansas, 2009), p. 128; Pringle, **The Life and Times**, Vol. I, p. 536; Schwartz, **A History of the Supreme Court,** pp. 206-7; Steamer, **Chief Justice,** p. 174.

[48] Jonathan Lurie, **William Howard Taft: The Travails of a Progressive Conservative** (Cambridge: Cambridge University Press, 2012), pp. 120-29.

[49] Taft to Elihu Root (December 21, 1922); *also* D. L. Cease to Taft (December 7, 1909), Taft Papers: "you referred to the necessity for a more liberal judiciary . . . prior to the [1908] Republican Convention and I know that you meant every word you said." Taft's letter to Root is open to misinterpretation, for he insisted that "the corner stone of our civilization is in the proper maintenance of the guarantees of the 14th Amendment and the 5th Amendment." While this could suggest that Taft was a *Lochner*-supporting proponent of absolute freedom of contract, it is worth remembering that Taft had unabashedly voiced support for a broad understanding of the Due Process Clause's protections, one that guaranteed not only property, but also life and liberty. *See* Taft, **Collected Works, Vol. V**, p. 193, *see also* 86-87.

[50] Taft, "Introduction" to **Law as a Vocation,** quoted in Ross Davies, "Debate and Switch: William Howard Taft on Law as a Vocation," *J.of Law* 6 (2016): 4.

[51] *Lochner v. New York*, 198 U.S. 45 (1905).

[52] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). For his rejection of *Lochner* and *Knight*, *see* Taft to Elihu Root (October 15, 1910), Taft Papers.

[53] *Adkins v. Children's Hospital,* 261 U.S. 525 (1923).

[54] Taft to Harlan F. Stone (December 17, 1924), Taft Papers. Under a 1919 law, Congress gave the President power to appoint a new justice to a circuit or district court, if a judge who had served for ten years and attained the age of seventy suffered from "mental or physical disability of permanent character." While the President could not replace the older judge, the older judge would immediately be ranked as the least senior judge on his court: he "shall be held and treated as if junior in commission to the remaining judges . . . who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority." 40 stat. 1157, 1157-58 (1919). Effectively, Taft recommended that the judge be retired from his duties, but kept on the payroll.

[55] Murphy, "In His Own Image," 184.

[56] Mason, **William Howard Taft,** pp. 214-15; Murphy, "In His Own Image," 184-85.

[57] Taft to Each Senior Circuit Judge (December 19, 1921). *See also* Taft's letters to the entire federal judiciary: Taft to All Circuit and District Judges (November 29, 1924 and June 16, 1925), Taft Papers.

[58] Frankfurter and Landis, **The Business of the Supreme Court**, p. 242; Murphy, "Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration," *J. of Politics*, 24 (1962): 454; Post, "Judicial Managementt," 27.

[59] Taft to John A. Peters (October 11, 1927), Taft Papers.

[60] Taft to William N. Runyon (March 12, 1928), Taft Papers.

[61] Taft to Ferdinand A. Geiger (November 17, 1927), Taft Papers.

[62] Taft to Robert A. Taft (October 2, 1927), Taft Papers.

[63] Taft, "Three Needed Steps of Progress," 35; *see also* Post, "Judicial Management and Judicial Disinterest," 26.

[64] Post, "Judicial Management and Judicial Distinterest," 267.

[65] Baum, **The Supreme Court**, p. 11; Schwartz, **A History of the Supreme Court,** p. 226.

[66] Charles Evans Hughes, "Address of Chief Justice Hughes," in "Corner Stone of New Home of Supreme Court of the United States Is Laid," *Amer. Bar Ass'n J.*, 18, no. 11 (1932): 728.

[67] *See especially* Resnik, "Building the Federal Judiciary," 888-89, 937.

[68] Steamer, **Chief Justice**, p. 16.

[69] Post, "Judicial Management and Judicial Distinterest," 25.

[70] O'Brien, **Storm Center,** p. 100; Kenneth Starr, "The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft," *Minnesota L. Rev.*, 90 (2006): 1364.

[71] The Evarts Act provided for a direct appeal to the Supreme Court in federal jurisdiction cases, prize cases, important criminal cases, cases involving the construction of the United States Constitution or the validity of federal or state statutes under the Constitution, and all civil cases disputing any amount over $1,000. Evarts Act, 26 Stat. 826 (1891), at 826-28.

[72] Pringle, **The Life and Times, Vol. II,** p. 973; Carolyn Shapiro, "A 'Progressive Contraction of Jurisdiction': The Making of the Modern Supreme Court," *125th Anniversary Documents*, Paper 3 (2013): 81, 83; Starr, "William Howard Taft," 964, 967.

[73] *See especially* Murphy, "Chief Justice Taft and the Judicial Bureaucracy" 456-57.

[74] Crowe, "The Forging of Judicial Autonomy," 80; Pringle, **The Life and Times, Vol. II.,** p. 998; Renstrom, **The Taft Court,** p. 54.

[75] Mason, **William Howard Taft,** pp. 109, 218; Pringle, **The Life and Times, Vol. II,** p. 1000. Brandeis believed the bill would not be effective. Taft, speaking to the House Judiciary Committee, stated, "I am told by all the members [of the Court] that I can say that the court is for the bill. There may be one member—I do not think there are more—who is doubtful about it, or I should say, doubtful as to its efficacy: but he said to me that I could say the whole court were in favor of the bill." Taft, **Collected Works, Vol. VIII,** p. 422.

[76] Frankfurter and Landis, **The Business of the Supreme Court,** pp. 274, 279-80; Mason, **William Howard Taft,** p. 114; Crowe, "The Forging of Judicial Autonomy," 80.

[77] The Court would hear cases on direct appeal from a district court in only four areas: certain cases arising under the antitrust law or the interstate commerce law, a limited class of criminal appeals, and attempts to enjoin the enforcement of a state statute because it violated the federal Constitution. Judges' Bill, 43 Stat. 936, 936-38 (1925); *see also* Taft, **Collected Works, Vol. VIII,** p. 401; Frankfurter and Landis, **The Business of the Supreme Court**, pp. 262-63.

[78] Judges' Bill, 43 Stat. 936, 937, 939 (1925); *see also* Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," *Minn. L. Rev.*, 85 (2001): 1272 n.23.

[79] Judges' Bill, 43 Stat. 936, 937-38 (1925).

[80] Taft, writing in *Magnum Import Co., Inc. v. Coty*, 262 U.S. 159 (1923) at 163. *See also* Taft's opinion in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) at 393, and his statement to the House Judiciary Committee in 1922, Taft, **Collected Works**, Vol. VIII, p. 397.

[81] Mason, **William Howard Taft,** p. 223; O'Brien, **Storm Center,** p. 302; Sandra Day O'Connor, "William Howard Taft and the Importance of Unanimity," *J. of Supreme Court History*, 28 (2003): 160; *see also* Rehnquist, "Chief Justices I Never Knew," 341.

[82] After the Supreme Court votes on a case in Conference, the senior Justice in the majority determines which Justice will author the majority opinion. Taft, who only dissented nineteen times in his eight-and-a-half-year tenure on the Court, was virtually always in the majority and therefore almost always had the power to assign the majority opinion.

[83] O'Brien, **Storm Center**, p. 276.

[84] O'Connor, "William Howard Taft and the Importance of Unanimity,"160.

[85] *Id.*, 161.

[86] *Sonneborn Brothers v. Cureton,* 262 U.S. 506 (1923).

[87] Alexander Bickel, **The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** (Cambridge: Belknap Press of Harvard University Press, 1957), pp. 111-14; Mason, **William Howard Taft,** p. 203.

[88] *Railroad Commission v. Southern Pacific Co.,* 264 U.S. 331 (1924).

[89] Mason, **William Howard Taft,** p. 211.

[90] *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

[91] Taft to Pierce Butler (January 7, 1929), Taft Papers.

[92] Lurie, "Chief Justice Taft and Dissents," 182.

[93] *United Mine Workers v. Coronado Coal Co., 259* U.S. 344 (1922) at 390-91, 393-94. *See* Bickel, **The Unpublished Decisions**, pp. 97-98; David Danelski, "The Chief Justice and the Supreme Court" (PhD diss., University of Chicago, 1961), p. 189.

[94] *American Steel Foundries v. Tri-City Trades Council,* 257 U.S. 184, 206-11 (1921).

[95] *Id.,* at 213.

[96] Taft to Mahlon Pitney (December 3, 1921), Taft Papers.

[97] Danelski, "The Chief Justice and the Supreme Court," pp. 180-81.

[98] Urofsky, "The Brandeis-Frankfurter Conversations," 329.

[99] *Chicago & Northwestern Railway Co. v. Nye Schneider Fowler Co.,* 260 U.S. 35 (1922).

[100] Louis Brandeis to Taft (undated, Reel 614), Taft Papers; *quoted in* Post, "The Supreme Court Opinion as Institutional Practice," 1341, n. 220.

[101] Quoted in O'Connor, "William Howard Taft and the Importance of Unanimity," 160.

[102] *American Railway Express Co v. Kentucky,* 273 U.S. 269 (1927).

[103] Bickel, **The Unpublished Opinions**, p. 212.

[104] *Quoted in* O'Connor, "William Howard Taft and the Importance of Unanimity,"160.

[105] *Id.*

[106] Taft to Harlan F. Stone (January 26, 1927), Taft Papers.

[107] *See* Jonathan Lurie, "Chief Justice Taft and Dissents: Down with the Brandeis Briefs!" *Journal of Supreme Court History*, 32, no. 2 (2007): 181; Post, "The Supreme Court Opinion," 1317 n. 158. Taft to Gus Karger, (August 30, 1924), Taft Papers.

[108] Melvin Urofsky, "The Brandeis-Frankfurter Conversations," *The Supreme Court Review* 1985 (1985): 330.

[109] Louis Brandeis to Taft (December 23, 1922), Taft Papers.

[110] Urofsky "Brandeis-Frankfurter Conversations," 330.

[111] Taft to Charles P. Taft, II (May 12, 1929), Taft Papers.

[112] *See* Post, "The Supreme Court Opinion as Institutional Practice," 1310, 1313; Renstrom, 99. It is worth noting that these two formidable scholars present slightly different statistics for this period.

[113] Taft, "Three Needed Steps of Progress," 34; Taft, "Possible and Needed Reforms," 601.

[114] Frankfurter and Landis, **The Business of the Supreme Court,** p. 254.

[115] Crowe, "The Forging of Judicial Autonomy," 73, 76, 78-9, 81; Fish, "William Howard Taft and Charles Evans Hughes," 125, 129-30, 134-35, 140, 145; Mason, **William Howard Taft**, pp. 13-14, 115-21, 194-97, 211-12, McGowan, 1153; Robert Post, "Chief Justice William Howard Taft and the Concept of Federalism," *Constitutional Commentary*, 9 (1992): 199-203, 216; Post, "Judicial Management and Judicial Disinterest," 24; Steamer, **Chief Justice**, p. 193; Ragan, **Chief Justice Taft**, pp. 44, 53, 79, 89, 104-105; Starr, "William Howard Taft," 964, 969-70.

[116] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard L. Rev.* 7 (Oct., 1893): 156; *see also* 142, 144, 147-48, 150-52. For a more radical view, *see* Herbert Croly, **The Promise of American Life** (Princeton: Princeton University Press, 2014), pp. 44, 163, 335; Herbert Croly, **Progressive Democracy** (New Brunswick: Transaction Publishers, 2009), pp., 44, 165.

[117] Arthur Schlesinger, **History of American Presidential Elections: 1789-1968** (New York: Chelsea House Publishers, 1971), Vol. III, p. 2520.

[118] Crowe, "The Forging of Judicial Autonomy," 79.

[119] Taft, **Collected Works, Vol. V,** p. 105, cf. Vol. II, p. 8.

[120] *Id.,* Vol., IV, pp. 152-53; Vol. V: pp. 118-19, 123, Vol. VII, pp. 36-37.

[121] Taft was not alone in this belief. *See* Franklin A. Shotwell to Sen. Norris Brown (February 24, 1912); O. Ellery Edwards, Jr. to William Howard Taft (October 26, 1911), Taft Papers.

[122] *See especially* Taft, "Administration of Justice," 191-96.

[123] Taft, "Attacks on the Courts," 24.

[124] Taft, "Delays and Defects in the Enforcement of Law in this Country," *North American Review*, 187 (June-July, 1908): 851.

[125] Taft, "Administration of Justice," *Central Law Journal*, 72, no. 11 (January-July, 1911): 194; *see also* Taft, **Collected Works, Vol. II,** pp. 10-11.

[126] Taft, "Administration of Justice," 193.

[127] Taft, "Possible and Needed Reforms," 603.

[128] Harold Burton, "'Judging Is Also Administration': An Appreciation of Constructive Leadership," *American Bar Association Journal*, 33 no. 11 (Nov., 1947): 1100; Fish, "William Howard Taft and Charles Evans Hughes," 138; Starr, "William Howard Taft," 970.

[129] Taft to Brandeis (December 18, 1926), Taft Papers.

[130] Taft to Brandeis (December 18, 1926), Taft Papers.

[131] O'Brien, **Storm Center**, 147; Crowe, "The Forging of Judicial Autonomy," 78. Taft had called for removing court officers from a fee-based salary as President. See Taft, **Collected Works, Vol. III,** p. 159.

[132] 44 Stat. 1022 (1927); Post, "Judicial Management and Judicial Disinterest," 58.

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

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

[135] *United States v. Schwimmer,* 279 U.S. 644 (1929).

[136] *Olmstead v. United States,* 277 U.S. 438 (1928).

[137] Taft, "The Jurisdiction of the Supreme Court under the Act of February 13, 1925," *Yale L. J.*, 3, no. 1 (Nov., 1925): 2-3.

[138] *See* Post "Judicial Management and Judicial Disinterest," 61-62; Taft to Henry Taft (April 5, 1928) and Taft to Casper Yost (April 5, 1928), Taft Papers.

[139] Taft to Henry Taft (April 5, 1928) and Taft to Casper Yost (April 5, 1928), Taft Papers.

[140] Taft, **Collected Works, Vol.V,** p. 87.

[141] *Gitlow* at 666. I am indebted to Matthew Brogdon of the University of Texas at San Antonio for this observation.

[142] *Meyer v. Nebraska,* 262 U.S. 390 (1923).

[143] *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

[144] Crowe, "The Forging of Judicial Autonomy," 83.

[145] Mason, "President by Chance, Chief Justice by Choice," *Amer. Bar Ass'n J.*, 55, no. 1 (January, 1969): 39.

[146] Ragan, **Chief Justice Taft**, p. 110.

[147] Taft, "Attacks on the Courts," 24.

[148] Starr, "William Howard Taft," 964.

[149] Crowe, "The Forging of Judicial Autonomy," 73-74.

[150] Rehnquist, "Chief Justices I Never Knew," 348.

President Truman's Justice Department and the Fight for Racial Justice in the Supreme Court

IAN B. FAGELSON

Introduction

2017 marked the seventieth anniversary of an important landmark in the history of the Supreme Court. Although the Court's decisions in the *Brown* cases[1] that destroyed the legal foundations of state-sanctioned racial discrimination were handed down during Dwight D. Eisenhower's Presidency, much of the groundwork was laid on President Harry S. Truman's watch. Faced with an unhelpful Congress, Truman's contributions to civil rights were effectively confined to the bully pulpit (as witness, his speech to the NAACP at the Lincoln Memorial)[2] and executive actions (such as establishing the President's Committee on Civil Rights and endorsing its recommendations;[3] desegregating the federal government[4] and the military).[5] Even before he pledged support for civil rights at the Lincoln Memorial in June 1947, he engaged with Attorney General Tom C. Clark on how to combat the rise in Southern white terrorism and committed his Justice Department to tackling lynching.[6] Moreover, on December 5, 1947, the Justice Department broke with tradition by intervening[7] for the first time in a case between private litigants where no concrete federal interest such as the interpretation of a U.S. statute was involved.[8] At issue was the enforceability of racially restrictive housing covenants. Between 1947 and 1952, Truman's Justice Department participated five times, via written briefs and oral arguments, in private lawsuits urging the outlawing of segregation. The cases concerned housing,[9] transportation,[10] public accommodations,[11] higher education,[12] and, most controversially, elementary and high schools in *Brown* itself. In each case, the Supreme Court ruled unanimously in favor of the position argued by the

Justice Department. However, there is little direct evidence of Truman's personal involvement in the Department's actions.

Whether the Department's actions were true instances of Truman administration policy, rather than the work of liberal civil service lawyers in which the top level of the administration merely acquiesced, has been the subject of debate, as has the question of what considerations drove the interventions. This article demonstrates that the story is more complicated than many scholars have suggested. After a brief literature survey and a description of the unique status of the Solicitor General, a study of each case in its historical context reveals that the level of engagement of the President and cabinet-level officials and the considerations that motivated them were not uniform throughout the period. Nonetheless, the Department's interventions must be regarded as acts of administration policy for which the President deserves considerable credit.

Literature Survey

Some scholars write on the basis of unstated assumptions as to whether the Justice Department acted at Truman's behest.[13] Michael Gardner, without citing hard evidence, asserts that Truman personally caused the Justice Department to act.[14] According to Richard Dalfiume, Truman "allowed" the Justice Department to intervene.[15] William Berman claims, without citing evidence, that Truman did not authorise, or even know about, several of the briefs.[16] However, again without citing evidence, he also asserts that Truman personally authorised the Department's first intervention in 1947.[17] Barton Bernstein views the briefs as primarily the work of Justice Department lawyers in which the administration acquiesced and says that it is unclear whether Truman was "an enthusiastic supporter or a reluctant endorser of placing the Federal government on the side of civil rights in these cases."[18] In **Cold War Civil Rights: Race and the Image of American Democracy**,[19] Mary Dudziak devotes an extended endnote to the question, concluding that the briefs should be viewed as an important part of Truman's civil rights program and as "consciously adopted Truman administration policy."[20]

The question of the extent (if any) of Truman's personal involvement with the interventions is intertwined with controversy over Truman's motivation for supporting civil rights. At one extreme, Richard Dalfiume and Michael Gardner see Truman's commitment to civil rights as driven primarily by moral convictions.[21] At the other extreme, William Berman and Derrick Bell argue that Truman's contributions to civil rights, were motivated primarily or exclusively by political considerations.[22] Bell, in particular, views the question through the lens of his "interest convergence" thesis, which holds that black interests receive favorable treatment from powerful whites only to the extent that they coincide with white interests. Many scholars see a combination of moral and political considerations at play.[23] Dudziak places greatest emphasis on the Cold War imperative—the need to repair the damage to America's international relations caused by legally sanctioned racial discrimination in America when the U.S. and the Soviet Union were vying for world influence.[24] The other political motivation most often cited is the need to secure the support of black and liberal white voters.[25]

The Solicitor General

Doubt over the President's involvement is partly attributable to the quasi-independent role of the Solicitor General. In the early post-war period, as now, the Solicitor General had responsibility for government litigation

Although President Harry S. Truman was not personally involved in five lawsuits in which the Justice Department urged the Supreme Court to outlaw segregation in the years 1947 to 1952, the author argues that the Department's interventions should be regarded as acts of administration policy for which Truman deserves considerable credit.

in the Supreme Court. Furthermore, prior to the establishment of the Civil Rights Division in 1957, the Solicitor General's office assumed the leading role within the Department in relation to civil rights cases in the higher courts generally.[26] The Solicitor General is the government's lawyer but is not bound to act on the government's instructions. As one modern Solicitor General observed in an address to the Supreme Court Historical Society:

> The Solicitor General is of course an Executive Branch officer, reporting to the Attorney General, and ultimately to the President, in whom our Constitution vests all of the Executive power of the United States. Yet as the officer charged with, among other things, representing the interests of the United States in the Supreme Court, the position carries with it responsibilities to the other branches of government as well. As a result, by long tradition the Solicitor General has been accorded a large degree of independence.[27]

Solicitor General Simon E. Sobeloff put it this way in 1955:

> The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.[28]

When the government wins a case in court, the defeated opponent may appeal and the Solicitor General may decide that the opponent was right and the government was wrong. In such a case, the Solicitor General may "confess error" and urge the appellate court to reverse the government's victory. As another (acting) Solicitor General noted, "That is a remarkable thing for an advocate to do."[29] In four of the cases under consideration, the government was not a party in the litigation, but the Solicitor General nevertheless intervened as *amicus curiae* (friend of the court). In the fifth, the government won in the lower court, but the Solicitor General confessed error and asked the Supreme Court to reverse the victory.

In theory, and sometimes in practice, the Solicitor General may act without taking into account the President's wishes and occasionally will act in defiance of them.[30] However, at other times, the Solicitor General

Solicitor General Philip Perlman (above) did not operate independently in submitting the government's brief in *Shelley v. Kraemer* (1947) challenging racial covenants in home ownership. As Attorney General Tom Clark co-signed the brief with Perlman, he would have given his approval.

will deliberately act to advance the President's policies as the Solicitor General sees them or may even act in accordance with direct instructions from the President or the Attorney General.[31] The historian's problem is that it is not always easy to tell in which category any particular action by the Solicitor General belongs. We can, however, attempt to characterise the actions taken in the Solicitor General's office in the period 1947-1952 by studying each intervention in its historical context.

The Cases

Shelley v. Kraemer[32]/*Hodge v. Hurd*[33] (brief filed December 5, 1947)

In 1945, white homeowners in Michigan, Missouri, and Washington DC sued to evict black families who bought homes in their neighborhoods in breach of private agreements (known as racial covenants) affecting the legal titles to the properties dating back to the early twentieth century. Although the covenants in question were specifically aimed at African Americans, similar covenants were in effect throughout the country affecting other minorities such as "Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, Filipinos, and 'non-Caucasians.'"[34] The evictions were upheld by lower courts and the families petitioned the Supreme Court in 1947, by which time the NAACP had taken up their cases. In December 1947, the Solicitor General's office filed a lengthy brief arguing strongly against racial discrimination in general, and racial covenants in particular, with Solicitor General Philip Perlman arguing the case in person before the Supreme Court in January 1948.

The argument[35] that this intervention was primarily the result of actions of Justice Department staff lawyers in which the administration merely acquiesced rests on the activities of two government lawyers, only one of whom was actually in the Justice Department. The attorney in the Solicitor General's office with primary responsibility for civil rights was Philip Elman, an opponent of racial discrimination who exploited his post to support the civil rights struggle.[36] Phineas Indritz, an Interior Department attorney, was a founder member of civil rights and gender equality organisations (the American Veterans Committee, a multiracial equal rights organization of U.S. servicemen and women formed during World War II, and the National Organization for Women). He was also an Olympic standard fencer and an accomplished juggler. He was particularly active in efforts to end segregation in Washington DC.[37] Indritz's government position provided him with a platform to enlist the Interior Department in the fight against racial covenants on the basis of their "impact upon the administration of Indian affairs and of the territories and insular possessions of the United States."[38] Such was Indritz's commitment to the cause that he

joined the legal team representing the Washington families and argued their case in the Supreme Court on his own time.[39]

Indritz and Elman played key roles in the orchestration of an avalanche of correspondence addressed to the President and the Attorney General from other government officials and prominent organisations urging the Justice Department to intervene.[40] This correspondence was forwarded to Elman, as the civil rights specialist in the Solicitor General's office, who then recommended the submission of a brief supporting the appellants.

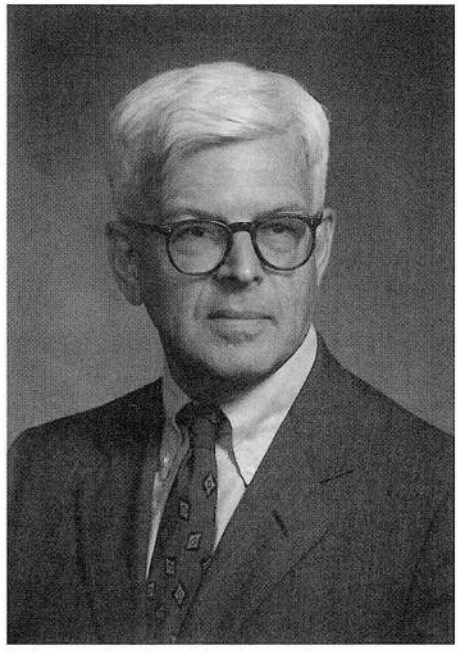
With Solicitor General Philip Perlman's approval, Elman, assisted by other staff attorneys (all of whom, like Perlman and Elman, were Jewish), wrote a brief attacking all forms of state supported racial discrimination. According to Elman, Perlman accepted his draft in its entirety but Arnold Raum (Perlman's first assistant and himself a Jew) deleted the staff attorneys' names because:

> It's bad enough that Perlman's name has to be there, but you have also put four more Jewish names on. That makes it look as if a bunch of Jewish lawyers in the Department of Justice put this out.[41]

As a result of this discriminatory act, the government's brief condemning racial discrimination was filed in the names of only Attorney General Clark and Solicitor General Perlman.

The submission of the brief in the names of Clark, a cabinet level official, and Perlman indicates that this was not a case where the Solicitor General acted independently; Perlman would not have authorised the filing of the brief in Clark's name without the latter's approval. The content of the brief was in accordance with Truman's stated policy and the act of filing it was precisely what the President's Commission on Civil Rights had recommended in its report published a few weeks prior to the filing.[42] Running to 123 pages, Elman designed the brief as "a statement of national policy" rather than an "ordinary" legal argument[43] and Truman publicly took credit for the intervention after the victorious outcome even if there is no conclusive evidence that he approved it in advance.[44] Indeed, the administration was so pleased with the brief as a statement of government policy that it was published as a book soon after the victory under the title **Prejudice and Property** naming Tom Clark and Philip Perlman as authors.[45]

In support of her Cold War imperative thesis, Dudziak claims that the briefs filed by the U.S. Justice Department in *Shelley* and the other cases "gave only one reason for the government's participation in the cases: segregation harmed U.S. foreign relations."[46] However, this is not an accurate characterisation of any of the briefs—and certainly not of the *Shelley* brief, which describes (quoting

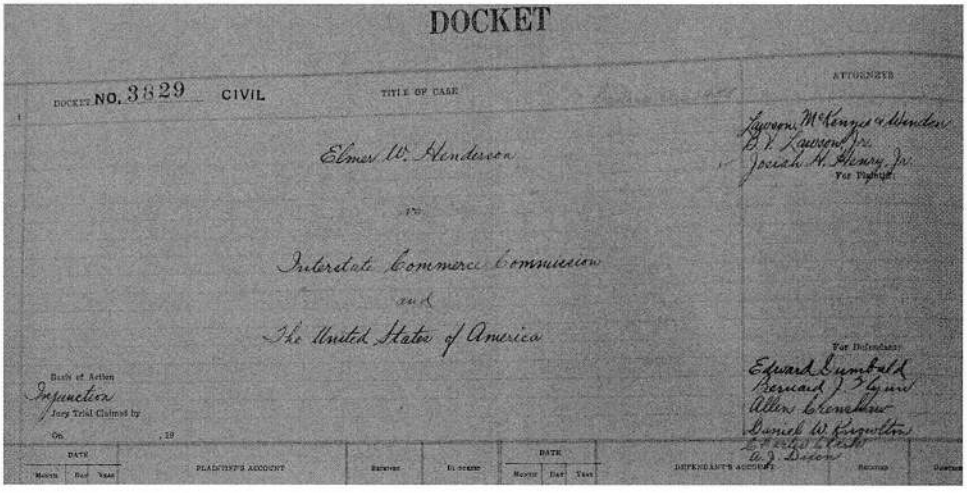


T.S.L (Ted) Perlman, the last surviving member of the team in Truman's Justice Department that helped persuade the Supreme Court to strike down Jim Crow.

expressions of support from the relevant departments) five areas of government responsibility that were adversely impacted by racial covenants: housing and home finance, public health, the protection of native racial minorities, foreign affairs, and the protection of civil rights.[47] Of these, the protection of civil rights was singled out as the "most important concern of the Government."[48]

Of course, the reasons stated in the brief may not accurately reflect the true priorities of the administration (see *DC v. Thompson* below) and foreign policy considerations were clearly significant concerns as stated in the brief and in the State Department letter quoted in it.[49] It must, however, be remembered that the administration's involvement in *Shelley* occurred in late 1947 and early 1948—before the full onset of the national obsession with the Cold War that later resulted in most domestic issues being debated in Cold War terms.[50] It was, however, a time when memories of the war against European fascism/racism were still fresh in the minds of white liberal and black voters whose support Truman needed in the 1948 Presidential election.[51] To the extent that the decision was motivated by political considerations, domestic concerns must have weighed as heavily as foreign policy concerns.

Gardner disputes the suggestion that Truman's civil rights stance was motivated by partisan political considerations, noting that Truman continued to press for civil rights out of moral conviction at times during the 1948 election when polls revealed his civil rights initiatives to be unpopular and although black votes gained might be offset by white Southern votes lost (though he concedes that eventually black votes proved crucial). Truman's private correspondence with his sister and a segregationist friend showing his personal commitment to the ending of segregation lends support to Gardner's contention.[52] In 1947-1948, the morally correct choice was also the politically expedient one, a point that would not have been lost on the politically savvy Truman.



DOCKET

DOCKET NO. 3829 CIVIL

TITLE OF CASE

Elmer W. Henderson

vs.

Interstate Commerce Commission

and

The United States of America

ATTORNEYS

For Plaintiff:

Lawrence McKenzie & Marsden
D. F. Lawrence Jr.
Josiah H. Henry Jr.

For Defendant:

Edward Dumbald
Bernard J. Flynn
Allen Crenshaw
Daniel W. Knowlton
Edward Bell
W. J. Dixon

Date of Action
Injunction
Jury Trial Claimed by

Oct. , 19

DATE | PLAINTIFF'S ACCOUNT | DATE | DEFENDANT'S ACCOUNT

The U.S. District Court docket reveals that, at the same time the Solicitor General's office was attacking racial covenants in *Shelley*, other Justice Department lawyers were striving to uphold railroad segregation in the case of *Henderson v. U.S.A* (Maryland civil docket is pictured). However, when the case reached the Supreme Court the Solicitor General changed sides and supported Henderson's challenge to racially segregated dining cars in railroads.

Henderson v. U.S.A.[53] (brief filed October 5, 1949)

In 1942, Elmer Henderson travelled by train to Alabama to investigate, on behalf of the federal government, alleged violations of President Franklin D. Roosevelt's Executive Order No. 8802 (desegregation of defense industries). There were segregated on-board dining facilities but Henderson was denied service because some of the seats reserved for blacks were occupied by whites. The symbolic significance of this insult cannot be overstated. Aside from the purpose of Henderson's journey and his status as a government lawyer, as Gunnar Myrdal noted in **An American Dilemma**, "the Jim Crow car is resented more bitterly among Negroes than most other forms of segregation."[54] Furthermore, the entire Jim Crow legal structure was built on the Supreme Court's decision in *Plessy v. Ferguson,*[55] which itself concerned segregated railroad cars. Unsurprisingly, Henderson sued the railway, the Interstate Commerce Commission and, because the latter was a government body, the United States. The case was still rumbling through the courts when Truman's Justice Department made its historic intervention in *Shelley*. In view of all this, and the fact that in a similar case Franklin D. Roosevelt's Solicitor General had argued against segregation,[56] one might have expected Truman's Justice Department to support Henderson.

However, the U.S. District Court docket reveals that, at the same time the Solicitor General's office was attacking racial covenants in *Shelley*, other Justice Department lawyers were striving to uphold railroad segregation in *Henderson.* On December 24, 1947, barely three weeks after the filing of the Solicitor General's brief in *Shelley*, the Department's Antitrust Division filed its answer to Henderson's complaint, denying all his substantive allegations. The case was argued on June 5, 1948 and on September 25 the District Court (by a two to one majority) dismissed Henderson's complaint. Henderson appealed to the Supreme Court and the Antitrust Division proposed to continue to fight him. However, once the Supreme Court was involved the matter reached the Solicitor General's office—where Elman recommended that the Solicitor General should confess error and switch sides.[57] On October 5, 1949, the Justice Department duly filed its brief—not only supporting Henderson but also arguing that the entire "separate but equal" doctrine established in *Plessy* should be discarded as a matter of law.[58]

The brief was signed only by Solicitor General Perlman, Elman, and the head of the Antitrust Division. Neither the Department's original support of railway segregation, during a period that included the 1948 Presidential election, nor its changing sides following escalation of the Cold War imperative after the Soviet atomic bomb test in August 1949, seems to have involved the Attorney General or any other cabinet level figure. Having set the precedent in *Shelley,* the administration left the Solicitor General free to deal with subsequent cases as he thought fit. Perlman was a shrewd political operator and well attuned to Truman's political agenda and it may be that, in switching sides, he was acting to further the President's policies and interests as he perceived them (as suggested by former Justice Department staff attorney T.S.L. Perlman, no relation, in a telephone conversation with the author on November 29, 2016).

McLaurin v. Oklahoma State Regents[59] and *Sweatt v. Painter*[60] (brief filed February 3, 1950)

The *Henderson* brief is one of two that Berman claims to have been submitted to the Supreme Court "without President Truman's foreknowledge."[61] The other was filed in *McLaurin* and *Sweatt*. George W. McLaurin was a black retired history professor who had previously brought a successful action

against the refusal of the University of Oklahoma to admit him to its graduate school. However, when the university reluctantly admitted him, it provided him with entirely segregated facilities. Heman Marion Sweatt, had been refused admission to the School of Law of the University of Texas on the grounds that the Texas State Constitution prohibited integrated education. Both university cases came before the Court in the same term as *Henderson* and all three cases were heard together in April 1950. The fourteen-page brief filed in *McLaurin/Sweatt* was basically a postscript to the sixty-six-page tome filed four months earlier in *Henderson*. The *McLaurin/Sweatt* brief was signed by Solicitor General Perlman and Elman, again without any evidence of engagement by the President or the Attorney General—J. Howard McGrath, who replaced Clark on the latter's elevation to the Supreme Court bench in August 1949.

Attorney General McGrath did eventually take a hands-on interest in the cases, participating together with the Solicitor General in the oral arguments.[62] By that time, in addition to the Soviet atomic test, the government was beginning to grapple with the implications of the Rosenberg/Fuchs nuclear spy ring, Senator Joseph R. McCarthy had denounced communist infiltration in the federal government, the Berlin Airlift had been conducted and tension was rising between the United States and Soviet client states in Korea. The Cold War imperative must have risen in the government's hierarchy of concerns since *Shelley*.

District of Columbia v. Thompson (brief filed September, 1951)

Restaurants and other public accommodations in Washington DC were segregated in the early 1950s. Civil rights activists in Washington discovered that two local Reconstruction era statutes prohibiting such segregation that had never been enforced had also never been formally repealed. On January 27, 1950, a multiracial group of activists sought to test the legislation by seeking, and being denied, service in a DC restaurant and then pressuring the District to prosecute the restaurateur.[63] The case reached the U.S. Court of Appeals for the District of Columbia where, on September 19, 1951, three months after the start of the Korean War and three months before Truman established the Committee on Government Contract Compliance to increase the pressure on the defense industry to refrain from racial discrimination,[64] the Solicitor General filed a brief in support of the prosecution.

A copy of the 1951 brief in the U.S. Court of Appeals was obtained from the University of Iowa Law Library. Signed by Solicitor General Perlman, Elman and T.S.L. Perlman, it was drafted by Elman with T.S.L. Perlman's assistance.[65] The brief presents the technical argument for the validity of the statutes and also speaks of the importance to the nation of ending segregation in the capital:

> This city is the window through which the world looks into our house. The embassies... of all nations are here... The United States is now endeavoring to prove to the entire world that democracy is the best form of government yet devised by man. We must set an example in showing firm determination to remove existing flaws in our democracy.[66]

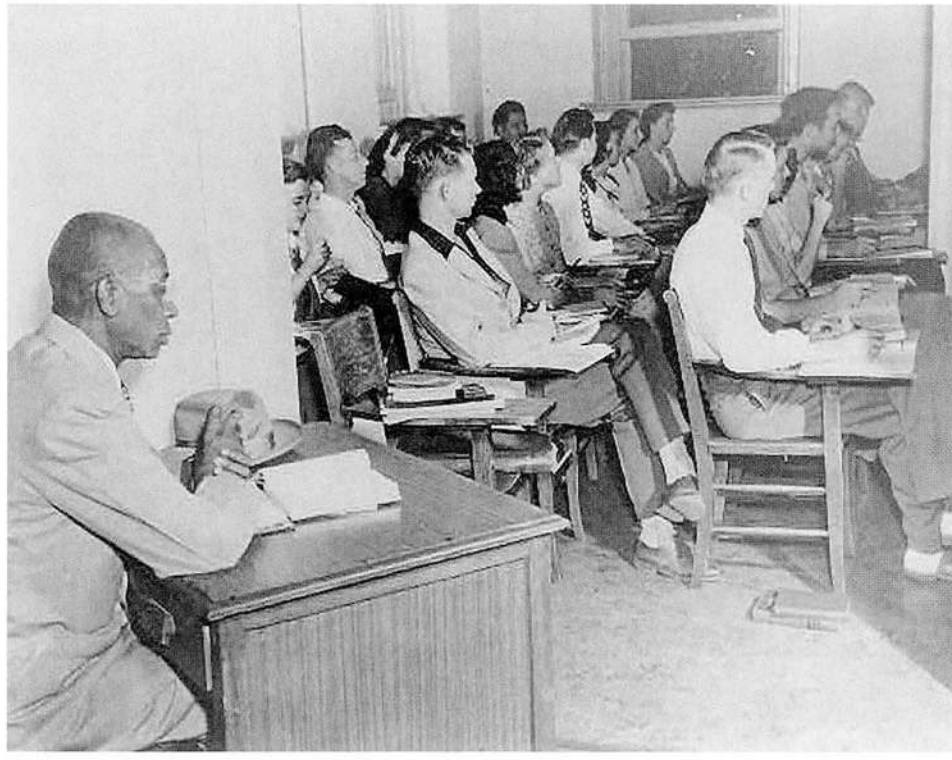
In 1953, the case reached the Supreme Court, where Elman participated in the oral arguments on the basis of new briefs, again drafted by himself and T.S.L. Perlman.[67] The 1953 (Eisenhower era) briefs are strikingly different from the 1951 (Truman era) version; all the Cold War rhetoric has been removed—with the later briefs comprising merely an expanded technical analysis of the legislative status of the old statutes. It is tempting to conclude that the 1951 brief

reflected Truman's preoccupation with Cold War issues. However, the truth is more mundane. Neither Truman nor any cabinet level official took any interest in the 1951 brief and the draftsmen were concerned only with framing the argument in the way most likely to impress the judges of the Court of Appeals. Elman had used the Cold War rhetoric from the 1951 *Thompson* brief in the *Brown/Bolling* Supreme Court brief (filed December 2, 1952) but dropped it when *Thompson* came before the Supreme Court the following year. By Spring 1953, based on his knowledge of the Supreme Court Justices (and especially his close personal friendship with Justice Felix Frankfurter), Elman decided it would be more productive to eschew colourful rhetoric and focus in the Supreme Court solely on the narrow legal issues.[68]

Brown[69]/*Bolling*[70] (brief filed December 2, 1952)

This last of the Truman era anti-segregation briefs, addressing the thorny topic of school segregation, was filed towards the end of the President's lame-duck period after a shakeup at the top of the Department. Attorney General McGrath and Solicitor General Perlman had both departed, the latter after vetoing Elman's proposal to participate in *Brown*. The incoming Attorney General, James P. McGranery, overturned Perlman's veto and the brief was submitted in the names of McGranery and Elman.[71] McGranery demonstrated his enthusiasm for the intervention by seeking permission to participate in the oral argument.[72]

The brief, drafted by Elman, urged the Court to overrule *Plessy* and outlaw *de jure*



George W. McLaurin, a history teacher, brought a successful action against the refusal of the all-white University of Oklahoma to admit him to its graduate school of education. However, when the university reluctantly admitted him, it provided him with entirely segregated facilities. This 1948 photograph shows how he was segregated to the anteroom of a classroom.

segregation in state elementary and high schools. It described domestic and foreign concerns of the government that were impacted by segregation and included, in relation to Washington DC, the "window through which the world looks into our house" rhetoric copied directly from the 1951 *Thompson* brief. It also contained the seeds of the "all deliberate speed" compromise that the Court eventually adopted in *Brown II*[73] by urging a step by step approach to integration taking account of local conditions. Based on his private conversations with Frankfurter (the ethical propriety of which later became the subject of controversy),[74] Elman considered this necessary to win the votes of hesitant Justices.[75]

It may be argued that Perlman, a fellow border state politician, was more in tune with Truman's thinking in vetoing intervention than was the Philadelphian McGranery in pursuing it. However, Truman's own attitude in favour of gradual school integration taking account of local conditions is exemplified by his November 1951 veto of congressional action requiring re-segregation of integrated schools on Southern military bases. In his veto message, Truman castigated the measure as:

> . . . a backward step in the efforts of the Federal Government to extend equal rights and opportunities to all our people. During the past few years, we have made rapid progress toward equal treatment and opportunity in those activities of the Federal Government where we have a direct responsibility to follow national rather than local interpretations of non-discrimination.

Continuing:

> We have assumed a role of world leadership in seeking to unite people of great cultural and racial diversity for the purpose of resisting aggression, protecting their mutual security and advancing their own economic and political development. We should not impair our moral position by enacting a law that requires a discrimination based on race. Step by step we are discarding old discriminations; we must not adopt new ones.[76]

However, he also made it clear that he favoured integration on a "step by step" basis, taking into account "local factors."[77]

School integration was far more controversial than the areas dealt with in the earlier cases. Even some NAACP members and supporters thought it unwise or premature to tackle the issue in the early 1950s.[78] McGranery's decision to overturn Perlman's veto cannot have been taken lightly and probably required Presidential approval. Elman's suggestion for gradual implementation may have been directed at the Justices rather than the administration. However, it so closely mirrored Truman's own approach that it must have helped to gain Truman's support for the intervention.

In late 1952, at the end of his Presidency but in the depth of the Cold War, Truman could not have been greatly concerned with partisan electoral politics. In permitting the intervention in *Brown* he was most likely concerned about his legacy, the moral rectitude of the case, and America's standing in the battle for world opinion.

Conclusion

Truman arguably bears responsibility for everything done by his administration (after all, the buck famously stopped at his desk). However, as demonstrated by the muddle over *Henderson*, the administration's left hand did not always know what its right hand was doing. Without the pressure generated by Elman and Indritz, the Department might not have intervened in *Shelley* and, if Solicitor

General Perlman had remained in post, it probably would not have intervened in *Brown*. Nonetheless, Truman's public condemnations of racial discrimination and his adoption of the recommendations of his Committee on Civil Rights empowered the Department to respond to the demand for intervention in *Shelley*—even absent definitive proof that Truman personally authorised the intervention. The administration's public celebration of the *Shelley* intervention empowered the Solicitor General to intervene (with occasional Attorney General support) in subsequent cases without the need for express Presidential authorisation until the NAACP raised the stakes in *Brown*. Attorney General McGranery's overruling of Solicitor General Perlman's veto (most probably with Presidential approval) qualifies the *Brown* intervention as an act of high administration policy and, anyway, the brief so closely mirrored Truman's own published position on school integration that it must be viewed as such.

The government departments and officials involved in the cases had a variety of reasons for supporting, or occasionally opposing, civil rights litigants. Illustrating the wisdom of Miles's Law that "where you stand depends on where you sit,"[79] the State Department's support was based solely on foreign policy considerations. However, the occupant of the Oval Office needs to see the whole picture. A combination of moral and political considerations placed civil rights at the heart of Truman's personal post-war policy agenda. The political considerations were both domestic and international, with the latter growing in importance as the Cold War intensified.

Acknowledgments

This article is dedicated to the lawyers of the Solicitor General's Office and especially to T.S.L. Perlman, last surviving member of the team who helped to dismantle Jim Crow laws in the early 1950s and to whom I am grateful for sharing his recollections of these momentous events. I am also indebted to: Aleksandra Chernin, Research Services Librarian, Reed Smith LLP, Chicago for kindly providing me with copies of briefs via her firm's digital subscriptions and for locating a copy of the unpublished docket of the U.S. District Court, Maryland Division in *Henderson*; Connie Fleischer, Reference Librarian, The University of Chicago D' Angelo Law Library for kindly providing me with photographic copies of original briefs that are not available through digital subscriptions and guidance on where to look for unpublished briefs; Katherine L. Hall, Associate Director University of Iowa Law Library for kindly providing me with a copy of the Justice Department brief in the U.S. Court of Appeals, District of Columbia in *Thompson*; William Thomas III, John and Catherine Angle Professor in the Humanities and Professor of History at the University of Nebraska, Dr. Zoe Hyman, Lecturer in U.S. History at University College London and legal historian, Arthur Downey, for their insightful comments on earlier drafts of this Article; and Dr. Althea Legal-Miller, Lecturer in American History and Culture Canterbury Christ Church University for introducing me to the topic of the Justice Department briefs. The errors are all my own.

Bibliographical Note

Parts of the narrative in this article are derived from oral history interviews conducted by Norman Silber with Philip Elman during 1983 and 1984 and their subsequent correspondence and conversations, which have been published in a variety of locations but most recently and completely in Silber's **With All Deliberate Speed: The Life of Philip Elman, an Oral History Memoir** (2004). I am conscious of the controversy that

surrounds some aspects of Elman's recollections (see: Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History," *Harvard Law Review* 100, no. 4 (February, 1987), 817; Randall Kennedy, "A Reply to Philip Elman," *Harvard Law Review* 100, no. 8 (June, 1987), 1938; and Philip Elman. "[A Reply to Philip Elman]: Response." *Harvard Law Review* 100, no. 8 (June 1987), 1949). Therefore, I have only cited those of Elman's recollections that are factually uncontested or are corroborated by other sources.

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[1] *Brown v. Board of Education* 347 U.S. 483 (1954); *Bolling v. Sharpe* 347 U.S. 497 (1954); *Brown v. Board of Education* 349 U.S. 294 (1955).

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[5] Executive Order 9981, July 26, 1948.

[6] Harry S. Truman, Letter to Attorney General Tom C. Clark (September 20, 1946), *available at* https://www.trumanlibrary.org/flip_books/index.php?pagenumber=2&titleid=250&tldate=1946-09-20&collectionid=ihow&PageID=1&groupid=3721/ (last visited January 6, 2017).

[7] The Justice Department participated as *amicus curiae* and therefore was not technically an "intervenor." Nonetheless, scholars have traditionally characterized such action as "intervention" and the Department as "intervening" (see *e.g.* Barton J. Bernstein, "The Truman Administration and Minority Rights: A Review Essay", 1 *The Journal of Ethnic Studies*, 66, pp. 71, 73 (1973); Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (Oxford: Oxford University Press, 2004), p 210).

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[11] *District of Columbia v. John R. Thompson Co.*, 92 U.S. App. D. C. 34, 203 F. 2d 579. (D.C. Cir.1953); *District of Columbia v. John R. Thompson Co.* 346 U.S. 100 73 (1953).

[12] *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950); *Sweatt v. Painter,* 339 U. S. 629 (1950).

[13] Klarman, **From Jim Crow to Civil Rights**, pp. 210, 215; Alonzo L. Hamby, **Beyond the New Deal: Harry S. Truman and American Liberalism** (New York; London: Columbia University Press 1973), p. 50.

[14] Michael R. Gardner, "A President Who Regarded Civil Rights as a Moral Imperative", pp. 17-30 at 23 in Raymond H.Geselbracht, ed., **The Civil Rights Legacy of Harry S. Truman** (Kirksville, Mo.: Truman State University Press, 2007); Gardner, **Harry Truman and Civil Rights: Moral Courage and Political Risks** (Carbondale and Edwardsville: Southern Illinois University Press, 2002), p. 173.

[15] Richard Dalfiume, **Desegregation of the United States Armed Forces: Fighting on Two Fronts, 1939-1953** (Columbia: University of Missouri Press, 1969), p. 137.

[16] William C. Berman, **The Politics of Civil Rights in the Truman Administration** (Columbus: Ohio State University Press, 1970), p. 172.

[17] *Ibid,* p. 77.

[18] Barton J. Bernstein, "The Truman Administration and Minority Rights", p. 71. *See also* Barton J. Bernstein, "The Ambiguous Legacy: The Truman Administration and Civil Rights," in Barton J. Bernstein, ed., **Politics and Policies of the Truman Administration** (Chicago: Quadrangle, 1970), pp. 296-67, 303, 312-14.

[19] Mary L. Dudziak, **Cold War Civil Rights: Race and the Image of American Democracy** (Princeton: Princeton University Press, 2000), pp. 275-77.

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[21] Dalfiume, **Desegregation of the United States Armed Forces,** pp. 132-39; Gardner, **Harry Truman and Civil Rights** and "A President Who Regarded Civil Rights as a Moral Imperative."

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[32] 334 U.S 1.

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[42] Truman, Speech at the Lincoln Memorial; President's Committee on Civil Rights, *To Secure These Rights.* (Washington, D.C.: U.S. Government Printing Office, October, 1947), at 169.

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[49] *Ibid*, pp. 19-20.

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[55] *Plessy v. Ferguson* 163 U.S. 537 (1896).

[56] *Mitchell v. U.S.A* 313 U.S. 80 (1941).

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[62] Jack Greenberg, **Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (Basic Books: New York, 1994), pp. 75-76.

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[65] Silber, **With All Deliberate Speed**, at 207; conversation with T.S.L. Perlman 2016.

[66] U.S. brief in *Thompson* 1951, pp. 6-7.

[67] Quigley, **Just Another Southern Town**, p. 217; Silber **With All Deliberate Speed**, p. 207; conversation with T.S.L. Perlman 2016.

[68] Conversation with T.S.L. Perlman 2016.

[69] 347 U.S. 483.

[70] 347 U.S. 497.

[71] Silber, **With All Deliberate Speed**, pp. 201-02; *Brown/Bolling* brief 1952.

[72] Silber, **With All Deliberate Speed**, pp. 202-03.

[73] 349 U.S. 294, at 349.

[74] Elman's oral history recollections were first published in a special 100th anniversary edition of the *Harvard Law Review* (100, no. 4, February, 1987) 817. A number of commentators pointed out that it was improper for an attorney and a Justice to discuss privately a pending case in which the attorney was involved. Elman later claimed that all the discussions pre-dated the government's participation in the case at a time when it seemed unlikely the government would intervene (*See* Silber, **With All Deliberate Speed**, pp. 395-97).

[75] Silber, **With All Deliberate Speed**, pp. 201-05; U.S. brief in *Brown / Bolling* 1952, at 4-8, 27-31.

[76] Truman: "Memorandum of Disapproval of Bill Requiring Segregation in Certain Schools on Federal Property," November 2, 1951, *available at* https://www.trumanlibrary.org/publicpapers/index.php?pid=548/ (last visited on December 15, 2016).

[77] *Ibid.*

[78] James T. Patterson, **Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy** (New York: Oxford University Press, 2001), p. 19.

[79] Rufus E. Miles, Jr., "The Origin and Meaning of Miles' Law" *Public Administration Review* Vol. 38, No. 5 (Sep.-Oct., 1978), p. 399.

Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions during Oral Argument

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During the first oral argument of the Supreme Court's February 1972 sitting, Justice Blackmun scrawled the following in his notes: "New bench separates Brennan and White, hurrah!"[1] The reason for Blackmun's glee? Chief Justice Burger recently hired carpenters to cut the Court's straight bench into thirds so it would resemble a U-shape that wrapped toward the lectern from which counsel argue cases. The change meant that Blackmun would no longer have to sit immediately next to Justices Brennan and White and hear them chit chat during oral argument. The bench angle would now separate them. More broadly, the change meant the Justices could see each other better and more clearly hear one another's questions during oral argument. In short, Burger's hope was that this curved bench would minimize the occurrence of Justices talking over one another while questioning the attorneys.

Did Burger's bench change actually transform how the Justices behaved at oral argument? To answer this question, we analyze the oral argument transcripts from the 1962 to the 1982 Court terms. These data reflect all cases the Court heard ten terms prior to the bench change and ten terms subsequent to the change. Using these data, we examine whether, after the bench change, Justices interrupted their colleagues less frequently than they did when the bench was straight. Our analysis demonstrates that they did. Burger's bench change appears to have been effective.

These results are important for several reasons. First, they tell us something important about how the Court changed at a pivotal point in its history. Such a change had clear ramifications for future Justices and litigants who discuss cases with one another. It also marks another consequential physical change Chief Justice Burger made to the Court that seems to have flown under the radar of historians, legal scholars, and political scientists. Second, the results tell us about how collegial courts might become *more* collegial. Our findings could be applied to other appellate courts in an effort to enhance their collegiality. Third, the results offer some insight into how Chief Justices and chief judges can lead more effectively. By making the structural changes he did to the Court's bench, Burger enhanced collegiality among his brethren. This is important because scholarship on small group decision-making suggests that it is easier to lead more collegial groups. Leaders, such as Chief Justices, might consider making similar changes to enhance their own leadership capacity. In short, while this may seem a small act, small acts can, and often do, add up to major changes.

The remainder of the article unfolds as follows. We begin by discussing Chief Justice Burger's decision to change the shape of the Court's bench. We then examine how oral arguments generally operate at the Court and how Justices use these proceedings. We next discuss scholarship on visual and auditory effects on behavior. We then explain how we retrieved our data and turn to the results of our analysis. We conclude by discussing what these findings mean more broadly about judicial collegiality.

Chief Justice Burger's Decision to Change the Shape of the Bench

Almost immediately upon his swearing in as Chief Justice in 1969, Warren E. Burger set his sights on reforming the Supreme Court and the federal judiciary—and reform them he did. In fact, by the time he retired in 1986 Burger had changed many aspects of the federal judiciary. Consider that he helped establish the Supreme Court Historical Society, the Institute for Court Management, the National Center for State Courts, the Judicial Fellows Program, and the National Institute of Corrections. He also saw potential in the Federal Judicial Center and improved its function. More broadly, Burger secured increased funding from Congress for more judgeships and worked with Congress to create the United States Court of Appeals for the Federal Circuit.[2] As Chief Justice of the United States, he adopted the practice of issuing a state of the judiciary document.

Many of Burger's reforms targeted the Supreme Court itself. For example, he ensured that the *Court Reporter* would prepare and publish the syllabus—a summary of the Court's opinion—when opinions came down, rather than after they were published. This decision assisted the media in reporting timely on the Court. Without these summaries, journalists sometimes found it difficult to report accurately on the Court's decisions, especially when they worked under tight deadlines.[3] Burger also secured funding to hire more Supreme Court law clerks. In 1970, he persuaded Congress to increase the number of clerks from two to three (the Justices had been able to hire two law clerks per term since 1946). In 1976, he again persuaded members to increase the number of clerks to four per Justice, where the number remains today.[4]

More important for our immediate purpose is how Burger changed the inside of the Supreme Court building. As Woodward and Armstrong tell it, in the summer of 1969 Burger toured the Court with his clerks and the Court Marshal.[5] He saw a dilapidated building, overlooked like an abandoned country farmhouse. Within the courtroom itself, he believed the Justices should have the same sized and shaped chairs rather than the

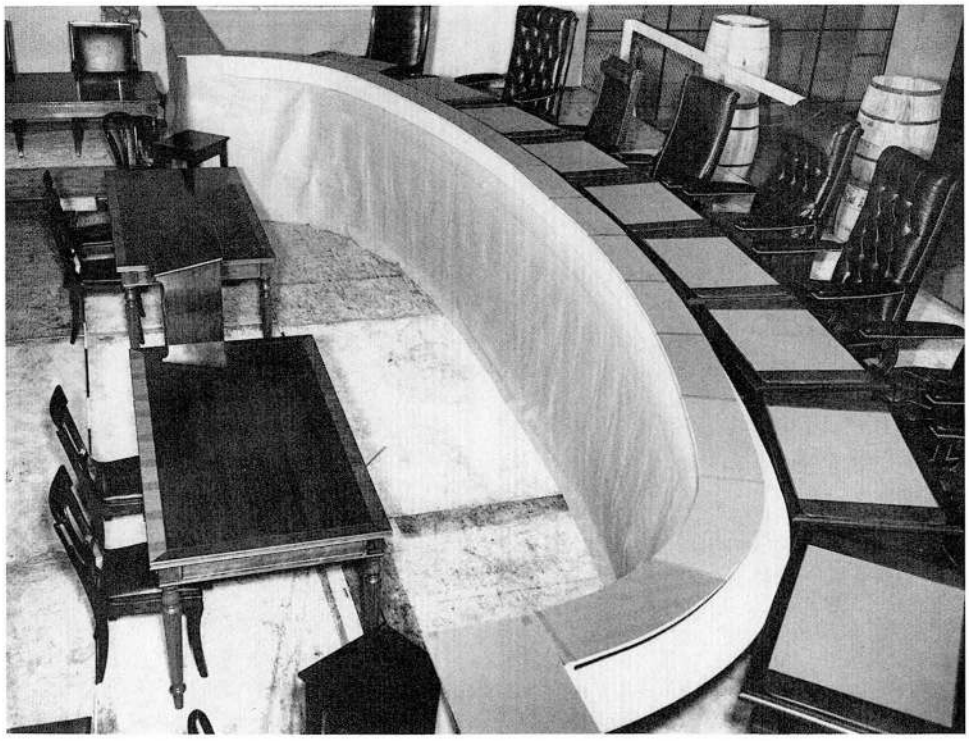
When he became Chief Justice in 1969, Warren E. Burger set out to change the shape of the bench so the Justices could hear and see each other better during oral argument. He told his clerks that he remembered the Justices frequently interrupting each other when he argued cases before the high bench in the 1940s and '50s.

mishmash of chairs they used at the time. Aesthetically, Burger wanted walls repainted, lights replaced, busts of Justices created to line the hallways, and the acoustics improved within the courtroom.[6] For efficiency, he updated the Court's technology with "increased computerization and streamlined docketing."[7] Throughout the building, Burger insisted on adding flowers to make the space more inviting. In short, he turned the Supreme Court into an episode of "This Old House."

A critical change—at least for the lawyers who appeared at oral arguments and the Justices who sat through these proceedings—was Burger's decision to alter the physical bench inside the Court chamber. When he and his clerks toured the courtroom during that summer of 1969, Burger stood at the lectern where he once argued a case before the Justices. As he reminisced, Burger told his clerks that during his oral argument the Justices interrupted one another because they could not see or hear each other very well. "That situation should be changed," he said, "...by curving the bench so each Justice could see his colleagues."[8] In other words, Burger wanted to change the shape of the bench so as to improve the communicative experience and cut down on Justice-to-Justice interruptions.[9]

In the fall of 1971, the Chief announced his decision to change the bench. The public information office released a statement declaring that, during the Christmas recess, the Court would have carpenters come in, cut the bench, and reshape it. As the *Wall Street Journal* put it:

> The Chief Justice is changing the traditional long, straight bench so that the Justices can better see and hear each other. During the Court's



The Supreme Court experimented with building an alternate Courtroom arrangement in the 1950s utilizing an experimental, curved bench that was temporarily assembled in the gymnasium. Each Justice's chair and desk from behind the bench was brought up to the gym and used in this layout, which was never implemented.

> Christmas recess, workmen are to cut the bench into three sections and reposition them in the shape of a half-hexagon.[10]

Other news outlets, including the *New York Times*, reported that the change would cost $8,600.[11]

Not everyone was happy with the change, though. Justice Douglas thought it was unnecessary. As Clare Cushman notes, Douglas believed the Court's new microphones mooted the need for the change. Not one to hold back, Douglas remarked that the bench change was "as useless and unnecessary as a man's sixth Cadillac."[12] The change also moved the location where the press pool sat during oral argument. As the *Wall Street Journal* put it: "The reporters lost . . . the best seats in the house, a few feet from the Justices and from the lectern at which lawyers address the court . . . "[13]

Figure 1 depicts the layout of the Courtroom before and after the change. As Burger requested, the edges of the bench were turned inward to make it easier for the Justices to see and hear one another and for the attorneys to interact more easily with the Justices.

What is more, as Figure 2 indicates, the new bench had the greatest impact on the junior Justices. It improved the experience particularly for Justices Powell and Rehnquist, who flanked the Court's bench. It also

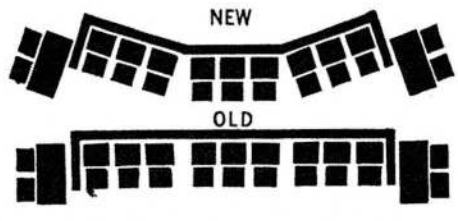


Figure 1. Depiction of the Supreme Court bench before and after Burger's January 1972 change.[14]

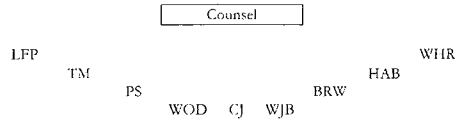


Figure 2. Location of Justices' seats after the January 1972 bench change.

improved the experience for Justices Marshall and Blackmun, who were next farthest from the middle, as well as for Justices Stewart and White. Only the Chief and Justices Douglas and Brennan stayed in their original positions.

The question that motivates us is whether the bench change actually led to fewer interruptions, as Chief Justice Burger intended.

Strangely, scholars have essentially ignored the impact of the bench change despite the fact that the American Bar Association suggested such an analysis may be warranted: "No one responsible for the change has discussed publicly the effect on the lawyer arguing his case at the bar of the Court."[15] Further, in a 1995 interview, former Burger aide Mark Cannon responded to a question about whether the change had the effect his former boss intended it to have. He stated simply: "that's a speculative question. I would only say I think it might have reduced the amount of interruptions; they still occurred occasionally."[16]

Put plainly, whether Burger's change influenced questioning at oral argument remains an unanswered empirical question. We seek to answer that question. But before we do, we describe how oral argument works at the Supreme Court and how it influences the decisions Justices make.

Oral Arguments at the United States Supreme Court

The Court normally sits for oral arguments between the first Monday in October and the last week in April. It schedules cases for argument in two-week sittings. During each sitting, the Court hears two (although sometimes one or three) arguments per day on Mondays, Tuesdays, and Wednesdays. Generally, the Court allots one hour of argument time for each case, with the petitioner and respondent attorneys each speaking for thirty minutes. In highly salient cases the Court sometimes allots more than an hour. For example, oral argument in *Bush v. Gore*[17] lasted an hour and a half while the Affordable Care Act Cases[18] lasted six and a half hours over three days. In addition to the attorneys who argue for each litigant, the Court occasionally allows an interested non-party (*amicus curiae*, or "friend of the Court") to share oral argument time.

At precisely 10 o'clock on argument days, the Justices enter the Courtroom through the red velvet curtains behind the bench. The Court Marshal then rises to proclaim:

> The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

After the Court announces any opinions and concludes motions for admissions to the bar, the Chief Justice bangs his gavel and calls the first case to order. The petitioner's attorney approaches the lectern and begins his or her argument, declaring: "Mr. Chief Justice, and may it please the Court" (Attorneys may use the hand crank on the side of the podium to raise or lower it to an appropriate height). The attorney then stands before the bench and delivers his or her argument to the Justices. To aid attorneys, so they do not exceed their allotted time, the lectern has two lights. When the white light illuminates, the attorney has five minutes left

to argue. When the red light turns on, the attorney's time has expired and she must conclude quickly. Occasionally, such as when the Justices have been particularly loquacious in their questioning, the Chief will extend counsel's time by a few minutes.

Despite the attorneys' best efforts at making a coherent and persuasive argument, the Justices often interrupt them with questions, comments, and hypothetical scenarios related to the case. Consider the 681 cases argued from 1998 to 2007. The Justices asked questions or made comments a total of 87,941 times—an average of more than 129 utterances per case.[19] Put plainly, today's Court is a hot bench. Attorneys must be prepared for regular questions—and for interruptions from the bench. They must also be wary of the Justices interrupting each other.

Today's hot bench is quite different from the Court's early days when great lawyers such as Daniel Webster, John Calhoun, William Pinkney, Francis Scott Key (the same man who wrote the "Star Spangled Banner"), and Henry Clay often appeared before the Justices. Then, oral arguments were elaborate oratories. More importantly, though, they provided the Justices with their only source of information about a case because attorneys rarely, if ever, submitted written briefs.[20] As a result, the Justices placed no time limitation on the argument sessions. This meant that advocates sometimes spoke for many hours over multiple days. In *McCulloch v. Maryland*,[21] for instance, Webster and five other attorneys argued for a full nine days. In stark contrast to contemporary arguments, historians suggest that the early Justices rarely interrupted the advocates with questions or comments.[22]

The Value of Oral Argument as a Discussion among Justices

Justices use oral argument to discuss the merits of cases with each other. In fact, it is the first occasion Justices have to discuss the merits of a case with one another. As Justice Kennedy put it: "The first time we know what our colleagues are thinking is in oral arguments from the questions."[23] In an earlier interview, Kennedy explained how he and his colleagues use oral argument: "When the people come . . . to see our arguments, they often see a dialogue between the justices asking a question and the attorney answering it. And they think of the argument as a series of these dialogues. It isn't that. As John [Justice Stevens] points out, what is happening is the court is having a conversation with itself through the intermediary of the attorney."[24] After all, "Court protocol does not permit justices to address one another directly from the bench, so, as often happens when justices want to do so anyway, the debate between the two was conducted through questions that each posed."[25]

Of course, Justice Kennedy is not the only Justice who believes oral arguments are conversations among the Justices. Justice Scalia, who once publicly suggested oral argument were a "a dog and pony show,"[26] later recanted as he learned that it "isn't just an interchange between counsel and each of the individual justices; what is going on is to some extent an exchange of information among justices themselves."[27] Chief Justice Rehnquist similarly declared: "The judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues. A good advocate will recognize this fact and make use of it during his presentation."[28]

Attorneys who appear before the Court likewise recognize that oral argument is really a discussion among the Justices. Former Solicitor General Theodore Olson once stated: "It's like a highly stylized Japanese theater . . . The justices use questions to make points to their colleagues."[29] Walter Dellinger, another former Solicitor General, pointed out that attorneys are "... speaking with not only the justice who

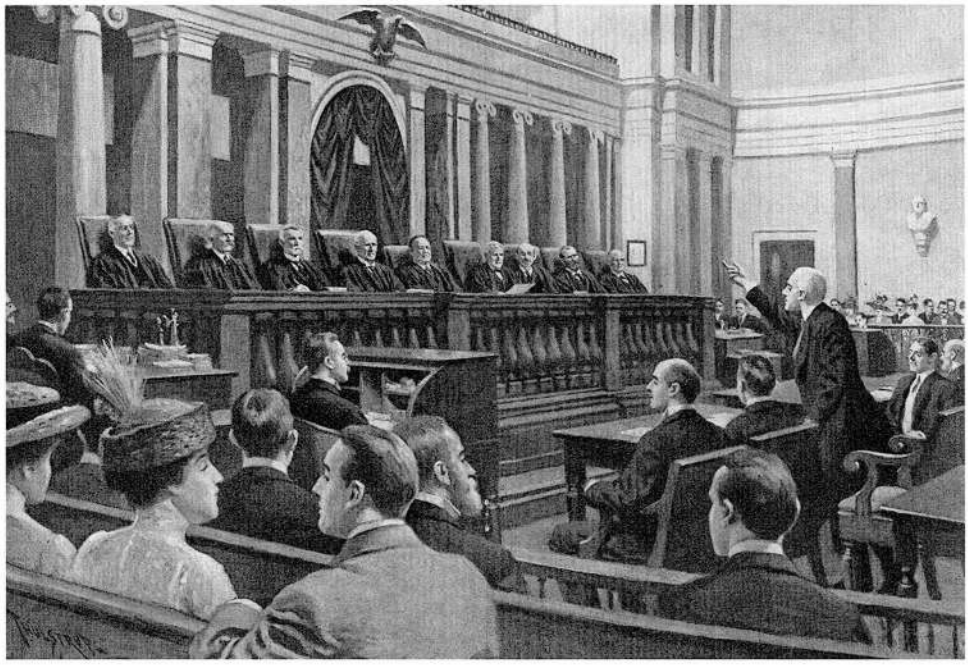
has asked the question, but the one to whom the question is actually addressed."[30] This position is also supported by Shapiro, who notes that: "during the heat of debate on an important issue, counsel may find that one or more justices are especially persistent in questioning and appear unwilling to relent. This may be the case *when a Justice is making known his or her views in an emphatic manner*..."[31] One lawyer summed up this process well saying: "Sometimes I think I am a post office. I think that one of the Justices wants to send a message to another Justice and they are essentially arguing through me."[32]

Court watchers concur with the assessments made by Justices and attorneys. Joan Biskupic points out that "[t]he hour-long sessions in the ornate courtroom also offer the justices a chance to make their own case —to each other."[33] She goes on to suggest that the Justices sometimes make explicit points through the attorneys. In *Garcetti v. Ceballos*,[34] for example, she argues that Chief Justice Roberts tried to get one of the lawyers to alter her arguments when he said to her: "we would have thought you might have argued that it's speech paid for by the government... so there's no First Amendment issue at all."[35] Similarly, after observing arguments in *Danforth v. Minnesota*,[36] Lyle Denniston noted: "...there were sustained moments when it appeared that the Justices were only talking among themselves, often correcting or contradicting each other..."[37] Finally, Linda Greenhouse describes how the Justices sparred with one another in *Reno v. Shaw*[38] to the point where it was as if Chief Justice Rehnquist and Justice Scalia were coaching Shaw's attorneys on how to answer questions from Justice Stevens.[39] She concluded, "While sympathetic Justices occasionally throw lawyers a hand, it is hardly common for members of the Court to assume the role of debate coaches, as Chief Justice Rehnquist and Justice Scalia did in this instance."

Empirical studies support the intuition that Justices use oral argument to persuade each other—or at least to learn where their colleagues stand on the case. For example, Black, Johnson, and Wedeking discover that Justice Blackmun was more likely to record the comments of his ideologically distant colleagues at oral argument than those of his ideologically close colleagues.[40] He did so to "determine what his ideological adversaries think about how they plan to decide a case in an effort to create counterarguments he may make when crafting or joining a majority argument."[41] Similarly, Johnson and Black, Johnson, and Wedeking find that Justice Powell recorded notes of his colleagues' questions at oral argument "to listen to those with whom he may join a coalition."[42]

Beyond providing Justices with an opportunity to discuss a case with one another, Justices also use oral argument to gather information. Indeed, these proceedings can provide Justices with information not contained in briefs, including new information about the facts of a case and the legal or policy consequences of their decisions.[43] Empirical evidence supports the view that Justices use oral argument to gather information beyond what exists in the record. For example, Johnson finds that Justices use oral arguments to obtain additional information about their policy options as well as about the preferences of external actors who will be charged with applying and executing their decisions.[44] Justices also use these proceedings to probe how Congress or the President might respond if the Court decides in a particular way. What is more, roughly eighty percent of the issues raised in Justices' questions appear for the first time in the case at oral argument; that is, the particular issue did not appear in the attorneys' briefs or courts below. Ultimately, thirty-three percent of the issues raised uniquely at oral argument make it into the Court's final opinions.[45]

Simply put, oral argument is important to Justices because (among other reasons) it



The Justices listening to oral argument in the antitrust case *Standard Oil Co. of New Jersey v. United States* in 1911 when the Courtroom was still in the Capitol Building. They posed significantly fewer questions to oral advocates than they do now.

offers them a chance to persuade their colleagues about a case. But why is it that a simple bench change might influence justices' behavior at oral argument? What is it about being able to see and hear their colleagues that might increase collegiality? To answer these questions, we turn to scholarship on visual and auditory connections and small group theory.

A Theory About Visual and Auditory Connections at Oral Argument

We begin with literature on visual dynamics. Scholars have demonstrated that nonverbal communication between and among humans is highly informative and often quickly received.[46] One scholar commented that "the nonverbal channels [of communication] carry more information and are believed more than the verbal band."[47] Humans can often size each other up while glancing at someone in a tenth of a second.[48] It is no wonder, then, that so many Court watchers tell counsel to make careful eye contact with judges.[49]

Eye contact is important for a number of reasons. Generally, it can help a speaker make a point more persuasively; it can also make speakers appear more attractive and more dominant. Higdon[50] describes a number of studies showing that eye contact can achieve sought-after outcomes, including obtaining more charitable donations,[51] getting people to accept pamphlets as they walk by,[52] and getting jurors to rate witnesses as credible.[53]

More important for our purpose, eye contact can foster greater cooperation among individuals. Research tells us that individuals are less likely to interrupt one another when they can see each other. Luo et al. find that eye contact from an interactive partner increases cooperative behavior.[54] Other scholars demonstrate that direct eye contact triggers social behavior.[55] As Conty, George, and Hietanen

describe, eye contact can enhance mimicry and altruistic behavior.[56] Eye contact can lead individuals to judge others to be more likable and credible and to ascribe other positive values to them.[57] One study discovered that subjects were more likely to hire interviewees who held eye contact.[58] Boyle, Anderson, and Newlands find that speakers who cannot see each other are twice as likely to interrupt one another and, conversely, that speakers are better able to transfer information and solve problems when they can see each other.[59]

Auditory dynamics influence behavior as well. Being able to hear another speaker can foster greater cooperation and collegiality among individuals. An inability to hear another speaker strains relationships. The reason is intuitive. As Arlinger indicates, trying to compensate for one's hearing loss makes a person fatigued which, in turn, strains his or her relationships with others.[60]

And the consequences can be dramatic. Blair and Viehwed find that children with even mild hearing loss perform worse academically than their peers.[61] Arlinger reviews literature that shows that older men with hearing loss have reduced cognitive function compared to their peers without such hearing loss. Individuals who strain to hear also commonly experience depression.[62] One study employed an experiment in which the authors provided hearing aids to one group of people suffering from hearing loss but not to another to determine how the groups differed.[63] The results were clear and convincing. The group that received the hearing aid showed "significant improvements in social, emotional, and communicative functions, as well as in cognitive function and depression" while the still-hearing-impaired group did not.[64]

In a brief note about hearing loss and judges, Mullins and Bally make the following point: "the impact of the communication breakdown that accompanies a hearing loss. . . may have a tremendous impact on the function of any professional, especially those [like judges in oral argument] for whom personal intercommunication is essential."[65] Taken together, these findings suggest that, when people cannot hear, decision-making and collegiality can suffer.

At the Supreme Court, evidence suggests that Justices can become frustrated during oral arguments when they cannot hear one another or the attorneys who argue cases. We already mentioned Justice Blackmun's frustration with Justices Brennan and White for making it hard for him to hear during oral argument. His oral argument notes are replete with other notations about his inability to hear various attorneys as well. For instance, in *Ohio v. Akron Center for Reproductive Health*, he wrote: "Hard to hear. Strange voice."[66] Again, in *Suter v. Artist M.*, he noted: "Hard to u[nderstand]."[67] Finally, in *International Union v. Brock*, he wrote: "voice hard for me to hear."[68] The fact that Blackmun took the time to write such words in his notes suggests he was indeed frustrated. The point is that if Justices wish to use oral arguments to help them decide cases, they must be able to hear the attorneys and each other.

Based on the scholarship we discuss above, we expect that Justices interrupted each other less regularly after the bench change than they did before it. The reason is intuitive; being able to see each other likely enhanced their capacity to know when to speak and, similarly, being able to hear each other more effectively likely led to fewer interruptions. Moreover, we expect the largest changes in behavior to have come from Justices farthest from the center of the bench, as their lots improved the most from the bench change.

Analysis of Burger's Bench Change

To gain empirical leverage on our questions of interest, we turn to the cases decided by the Supreme Court from its 1962 to 1982 terms. Interestingly, ours is the first large-scale empirical analysis to use

individual-level oral argument data from terms prior to 1998. Only recently have voice-identified transcripts prior to 1998 become available. Prior to the 2004 term, Supreme Court oral argument transcripts did not identify which Justice spoke. Historically, then, all remarks from the Justices in pre-2004 transcripts were denoted with the moniker "Question" rather than with a Justice's name. Thankfully, the Oyez Project began voice-identifying cases back through 1998 and, since 2015, has cleaned the identification data back to the inception of the Court's oral argument recordings in 1955. These data allow us to test the degree to which Burger's bench change minimized Justice-to-Justice interruptions. To do so, we downloaded transcripts from the Oyez Project and processed them with a computer program to calculate the number of times the transcript indicated that overlapping talking occurred when each Justice was speaking (See the Appendix for additional details).

Consider Figure 3. We plot the average number of interruptions per term from 1962-1982. The black vertical line reflects the 1972 term, the first full term in which the Court sat at the curved bench. Gray horizontal lines reflect the average per term interruptions from 1962-1971 and from 1973-1982, respectively. The figure suggests that there were more interruptions before the bench change than after it. We also performed a simple *t*-test to examine the total number of interruptions in each case. Even this very basic test confirms ($p < 0.001$, two-tailed test) the differences in interruptions before and after the bench change are significant.

While Figure 3 provides a descriptive glimpse into our data of interest, Figure 4 speaks more directly to which Justices benefited the most from the redesigned bench (For the underlying statistical analysis used to generate this figure, see the Appendix at the end of the article). Along the horizontal axis of the figure we indicate how far a Justice is from the middle seat. The vertical axis in the figure identifies the number of interruptions. The circles in this figure represent our prediction about the frequency of interruptions. We use solid circles for the curved bench and hollow circles for the straight bench. The vertical lines running through the circles express our uncertainty around those estimates (i.e., confidence intervals). The differences between a straight and curved bench are large and clear. Consider the center position (i.e., the Chief's seat). The center position under a straight bench experienced 0.31 interruptions while that same position

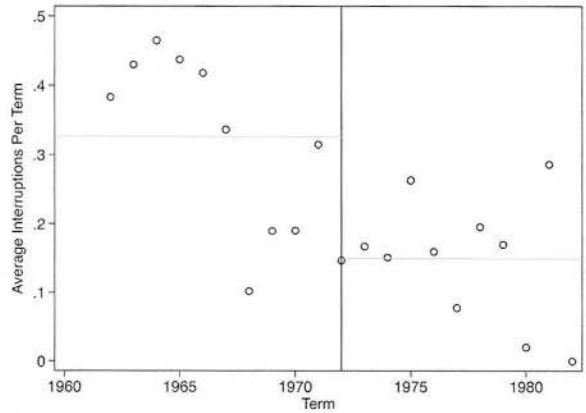


Figure 3. Average Justice interruptions per term 1962-1982. The circles represent the average number of interruptions per term. The black vertical line reflects bench change in the 1972 term. The two gray horizontal lines reflect average per term interruptions from 1962-1971 and from 1973-1982. The difference between the two lines is statistically significant ($p < 0.001$, two-tailed test).

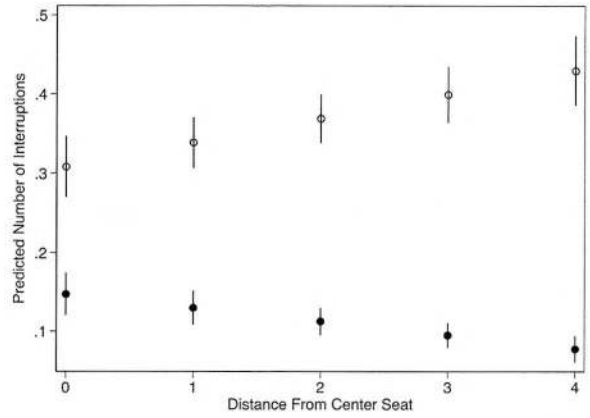


Figure 4. Predicted interruptions with straight (hollow circle) and curved (filled circle) bench.

under a curved bench experienced 0.15 interruptions—less than half.

Looking, next, to the seats immediately to the left and right of the Chief, we observe a more pronounced effect. Under a straight bench, these seats experienced 0.34 interruptions but only 0.13 interruptions under the curved bench. The next seats—those two away from the Chief—see an even greater effect. These, of course, were the first seats to be winged under the new curved bench. Under a straight bench, they experienced 0.37 interruptions. Under the curved bench, however, they experienced only 0.11 interruptions. Three seats from the Chief experienced 0.40 interruptions under a straight bench but only 0.09 interruptions under the curved bench. Finally, consider the flanks: under a straight bench, the flanks experienced 0.43 interruptions but only 0.08 under the curved bench. What is clear is that the Justices farthest from the center of the bench became considerably less likely to be interrupted with the curved bench.

Figure 5 highlights the dramatic shift after the bench change. It shows the effect of changing from a straight bench to a curved bench for each seat location from the center. Importantly, the effect for all seats on the bench is negative, which means that all Justices "benefitted" from the bench change —they all were interrupted less often after the bench change. But, the figure also shows that not all seats benefited equally. Consistent with the results from the previous figure, the bench change had the largest effect on

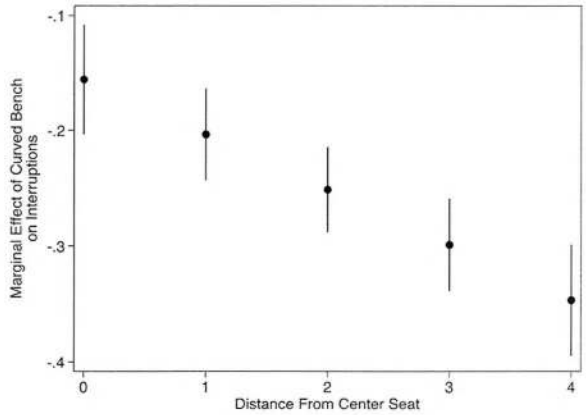
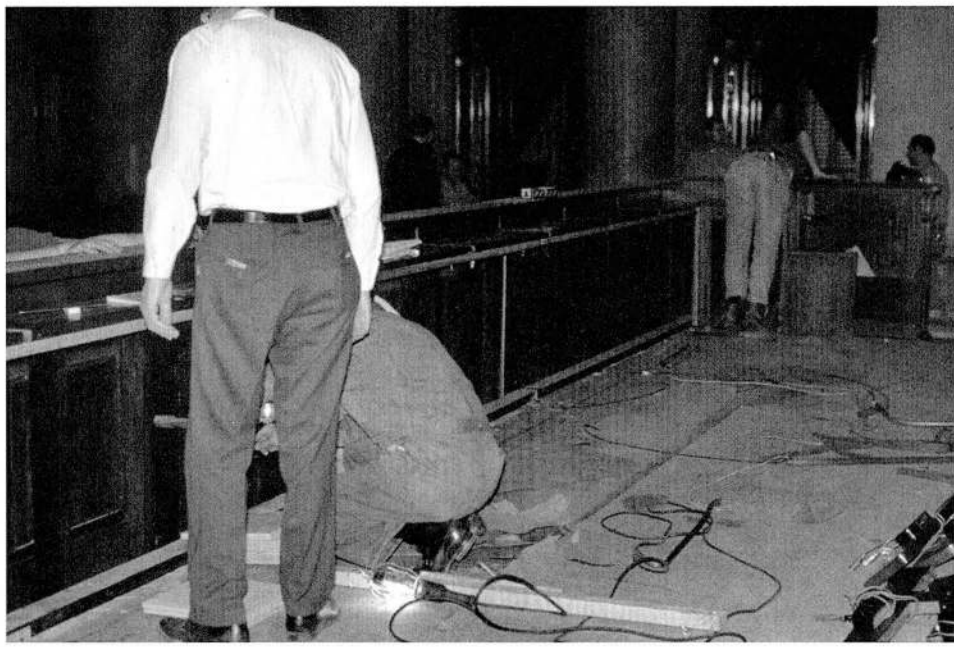


Figure 5. Marginal effect of curved bench on Justice interruptions.



Photograph of the bench in the Supreme Court Courtroom in January/February 1972, when it was altered to create three angled sections for improved viewing and sound. The authors conclude that the bench change led to fewer interruptions by the Justices, particularly of those sitting at the ends of the bench.

Justices farthest from the center position. For example, while the Chief saw a −0.17 decrease in interruptions, the Justices at the flanks enjoyed a −0.35 decrease—over twice the size as the Chief. Simply put, while the bench change led all Justices to be interrupted less often, it had the greatest impact on the Justices at the ends of the bench.

Discussion

Collegiality among governing actors is more important today than ever. Collegiality is what allowed President Reagan to work effectively with House Speaker Tip O'Neill in an era of divided government. It is what allowed Chief Justice Rehnquist to lead a Court effectively with Justices as different as Clarence Thomas and John Paul Stevens. Collegiality is critical for any collective body to operate effectively. Yet, leaders must sometimes grease the wheels to enhance collegiality. People cannot simply step into a moving river and expect to divert its direction. Sometimes collegiality needs a "nudge." And helping actors determine those collegial nudges is becoming more important than ever.

Within collective bodies, leaders can have a significant impact on group cohesion.[69] Those who have a high degree of warmth, an indirect style of leading group interaction, and an internal locus of control (a belief that one can control events that affect their lives) can achieve higher cohesion in their small groups. In an examination of sports team coaches, for instance, Shields et al. found that a group's task cohesion can be strengthened by leadership that is "strong in training and instruction, social support, democratic behavior, and positive feedback."[70]

Here, we examined whether changing the physical structure of the Court's bench—a seemingly trifling matter—influenced how Justices behaved during oral argument. The results indicate that the change had an ameliorative effect on how Justices treated one another. That is, Justices tended to interrupt each other less often after the change than they did before it. And, while

the effects were not huge—one should not expect them to be dramatic given that Justices actually do not interrupt each other all that often—they indicate a positive change.

Perhaps other institutions could adopt similar structural changes to enhance collegiality (and, therefore, effective governance). Surely, we are not likely to return to times where government officials lived with each other in boarding houses—and took their dinners with one another each night—as Chief Justice Marshall insisted the Justices do during his time. But less severe change can, and may, be effective. The Israeli Supreme Court, for example, employs a circular bench with attorneys arguing from the center.[71] Whether this leads to collegiality is unclear, though our results suggest that it does. Closer to home, consider the United States Court of Appeals for the Ninth Circuit, which now has twenty-nine active judges. The circuit must hear cases in modified *en banc* from time to time in panels of eleven judges. When they do so, the judges sit on straight benches that appear like bleachers at a high school football game, with one row behind the other.[72] If our findings have anything to say about the matter, it is that such a configuration reduces collegiality.[73]

The decision to change the shape of the Court's bench may seem like a small matter. But for leaders of collective bodies, any advantage gained in collective harmony is worth considering.

Appendix: Data and Measurement

We coded the transcripts of every oral argument in our sample to determine each time a Justice interrupted a colleague. Specifically, for each case, we downloaded the voice-identified transcripts from the Oyez Project and counted the number of times each Justice spoke during oral arguments. This process yielded a total of 163,094 Justice utterances across 2,015 cases. Consistent with Johnson's findings, these numbers indicate that the Justices collectively asked an average of eighty-one questions per case.[74] And even though eighty-one questions per case is less than the average of more than 120 questions the Roberts Court asks, the number nevertheless reflects an active bench.

We employed a computer script to assess whether, for each Justice utterance, the speaker immediately after the Justice was also a Justice. We are able to accomplish this task because every utterance in the oral argument transcripts begins with a description of who is speaking (e.g., Justice Marshall), followed by a colon. The computer script, then, allowed us to count every time one of the nine Justices' names appeared in the speaker section of an utterance.[75] Our dependent variable, *Overlap*, is the number of times during a session that voice overlap from another Justice appears while each Justice spoke. For example, consider the following exchange in *United States Parole Commission v. Geraghty*,[76] where Justice Stewart interrupts Justice Stevens:

> **John Paul Stevens:** Mr. Jones, are you saying this, so I get your point that if in this case, the District Judge had ordered the man paroled and the Government had acquiesced in the order and said we won't appeal then it would not have been moot? Would that be a different case?
>
> Did someone (Voice Overlap) —
>
> **Potter Stewart:** It'd be more ahead on the previous case.
>
> **Kent L. Jones:** It would—it would be different from the case we have.

Our main independent variable, *Curved Bench*, accounts for whether the bench was straight (=0) or curved (=1) in the case. The first oral argument the Court heard after curving the bench change took place on February 23, 1972. Thus, all cases argued before that date take on the value of zero and all cases argued after that date take on the value of one.

We expect *Curved Bench* to have a negative relationship with *Overlap*. That is, we should observe less cross-talking (interruptions) after the bench change than before it.

Next, we code *Distance from Center*, which is the absolute value of the distance between the center seat and the speaking Justice's seat (we do not code this variable by seat number because we expect Justices equidistant from the center to act in a similar manner to one another). The Chief Justice always receives a value of zero while the Justices at the flanks always receive a value of four. To examine the effects of the curved bench on distance from the center, we interact *Curved Bench* with *Distance from Center*.

We also account for the log of the number of words each Justice spoke, since the more a Justice speaks, the more he or she could be interrupted. *Log Justice Words* measures this dynamic. Finally, we count the *Number of Amicus Curiae* briefs filed in each case to account for the fact that some cases are more salient than others—and might therefore generate more interruptions.[77]

The table below presents parameter estimates from our linear regression model.

Variable	Coefficient (Standard Error)
Curved Bench	−0.161*
	(0.024)
Distance From Center	0.030*
	(0.007)
Curved Bench ×	−0.048*
Distance from Center	(0.008)
Log Justice Words	0.093*
	(0.004)
Number of Amicus Curiae	0.003*
	(0.001)
Constant	−0.039*
	(0.017)
Observations	20,497
R-Squared	0.104
Root MSE	0.777

*denotes $p < 0.05$ (two-tailed test)

ENDNOTES

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[18] *National Federation of Independent Business v. Sebelius* 567 U.S. 1 (2012).

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[71] To see the Israeli configuration, navigate to: http://elyon1.court.gov.il/eng/siyur/index.html.

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[73] We are aware of recent findings that suggest male justices are more likely to interrupt female justices (than male justices) during oral argument. See Tonja Jacobi and Dylan Schweers, "Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments." 103 *Virginia Law Review* 1379-1496 (2017). While that dynamic is an interesting one and worthy of study, we are hesitant to cite the purported findings as fact, as we believe the analyses demand much more extensive empirical scrutiny than heretofore provided. Future studies require a greater number of observations, greater statistical controls, and a deeper analysis of how oral arguments are transcribed. We simply note that further empirical analysis is required before the interruption narrative can be taken as fact.

[74] Johnson, **Oral Arguments and Decision Making on the United States Supreme Court.**

[75] While there is some noise in the data (an interruption that is one word or a "u" for instance), this noise is random and the resulting data generally paint a clear picture of how the Justices treat each other during oral arguments.

[76] *United States Parole Commission v. Geraghty,* 445 U.S. 388 (1980).

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Illustrations

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