Introduction

Melvin I. Urofsky

This particular issue provides an even greater potpourri than usual, since we have some articles that came in "over the transom," some from previous contributors, some from the Leon Silverman Lecture Series, and the "Judicial Bookshelf." While we are certainly delighted to offer you such a rich repast, there is also a note of sorrow.

In December 2018, a colleague, friend, and all around nice person passed away. David M. O'Brien, contributed his talents to the *Journal* as a member of the editorial advisory board, as a contributor, and as a sounding board for questions from time to time. He and I collaborated on a few projects, read each other's manuscripts, and as I have mentioned several times, the field of Supreme Court history is small in numbers, and David was one of its leaders. His **Storm Center: The Supreme Court in American Politics**, first published in 1986, is now in its eleventh edition, and is one of those books that both professionals as well as undergraduate tyros turn to with confidence. There is more about David and his work in Grier Stephenson's *Judicial Bookshelf,* and from conversations I have had with other scholars, there is no doubt that he will be greatly missed.

Saikrishna Bangalore Prakash is James Monroe Distinguished Professor of Law at the University of Virginia, and his article derives from the talk he gave in the Silverman Series on Justices serving in the Cabinet. His article notes that although the Constitution establishes separation of powers, it does not create a total separation, that is, although a member of the judiciary almost never simultaneously occupies an executive position, theoretically he or she could. In one hypothetical, Secretary of State Mike Pompeo could work in Foggy Bottom in the morning and sit on the Court of Appeals for the D.C. Circuit in the afternoon. In fact, from the beginning of the Republic members of the judiciary—many of whom had earlier served in a presidential cabinet—continued to advise Presidents, draft legislation, and do other things that clearly transcended what most people would consider separated powers.

Another contribution in the series also comes from the University of Virginia. Sidney Milkus is White Burkett Miller Professor of Politics, and Nicholas Jacobs is a doctoral candidate in that department. Although Justices leave the Court for many reasons, James F. Byrnes is unique as the only member to resign to serve in a cabinet

position. This occurred during World War II when several members of the high court chafed at hearing what they saw as routine and meaningless cases, at least compared to the great challenge of a country at war. Robert H. Jackson wanted to leave; Frank Murphy actually enlisted, and on occasion wore his uniform to Court, although the War Department never called him to active duty. Byrnes also wanted to leave, and in his case, President Roosevelt wanted him to.

Robert H. Jackson is one of the most enigmatic members of the Court; he is not considered one of the "greats" for the simple reason that he did not serve long enough. But while on the bench he made his mark, and also has a unique item in his record—without resigning from the Court he served as chief American prosecutor at the Nazi War Crimes Trial in Nuremburg. Jackson had been a close advisor to FDR, serving in several positions including Solicitor General (Justice Brandeis thought him so good he commented that Jackson should hold that office for life), then Attorney General, before being named to the high court. John Q. Barrett has become the leading Jackson scholar of our time and has been working on a comprehensive biography. From my point of view, it cannot come soon enough. His piece also derives from the Silverman series.

My friend Mark Killenbeck is the Wylie H. Davis Distinguished Professor at the University of Arkansas Law School and is recognized as the authoritative voice on *M'Culloch v. Maryland* (1819). Mark notes that although there were actually two issues in the case, he and most scholars have paid attention only to the question of Congress's power to establish a bank, and while aware of the second question, have dismissed it as an afterthought. In this article Mark pleads *mea culpa*, and atones for his sin of omission by tackling the second—and also important—question of the state's power to tax Bank of the United States notes, which passed for currency in the early nineteenth century.

One of the famous stories told about the early life of Oliver Wendell Holmes, Jr., is that he took an essay he had written criticizing Plato to show to Ralph Waldo Emerson. The famed poet read it and declared the argument not strong enough. "If you would strike at a king you must kill him!" Adam Hines studies history at the University of Oklahoma, and his argument is that the admiration of Holmes for Emerson lasted throughout the former's lifetime. Although Holmes is considered the father of modern American jurisprudence and considered as rejecting the past, Hines shows that in much of his philosophy, Holmes clearly valued and retained many of Emerson's ideas.

James Ely, Jr., is another old friend in the field, and he is now Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University. His work has long dealt with the relationship among law, property, and politics, and his most recent book on the Contract Clause will remain the definitive work on that subject for years to come. (Truth in advertising: I read the manuscript and wrote a glowing blurb for his book.) Jim's essay also comes from a lecture series, but an earlier one on the Supreme Court and the Progressive Era. As anyone with even the slightest knowledge of that era recognizes, the Supreme Court's property decisions were at the heart of much of the attack on the judiciary.

As usual, last but certainly not least, is Grier Stephenson's "Judicial Bookshelf." Grier is now, like Jim Ely and me, "semi-retired," and holds the title of Charles A. Dana Professor of Government Emeritus at Franklin & Marshall College. I have already mentioned his much-deserved tribute to David O'Brien, but there is also, as always, his acute analysis of some new books on the Court.

And as always, Enjoy!

All Banks in Like Manner Taxed? Maryland and the Second Bank of the United States

MARK R. KILLENBECK

Virtually everyone understands that there were two issues posed in *M'Culloch v. Maryland*.[1] The first was whether Congress had the power to create the Second Bank of the United States, given the Constitution's failure specifically to authorize Congress to create a national bank or charter a corporation. The Court held that Congress did, finding an implied power to do what was both "necessary" and "proper" to facilitate other enumerated powers. That made it appropriate to consider the second question: whether the State of Maryland could levy a tax on the notes issued by the Baltimore branch of the Bank.

Once again, most of us are well aware of the answer: no. Picking up on a phrase used by Daniel Webster in his argument for the Bank, Chief Justice John Marshall declared in no uncertain terms "that the power of taxing [the Bank] by the States may be exercised so as to destroy it, is too obvious to be denied."[2] Now known as the doctrine of intergovernmental regulatory immunity, the theory was simple. Taxation has a definite impact on an institution and its operations. If wielded inappropriately, the power to tax could indeed control or compromise institutional activities. The states may have been sovereigns, and for them the "power of taxation is one of vital importance."[3] But they could not employ it against the national government and its operations. "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."[4]

So far, so good. But there are two problems with this account, with the 200th anniversary of the decision providing an appropriate occasion for addressing them.

The first is that most treatments of *M'Culloch* tend to emphasize Marshall's take on implied powers, giving at best short

shrift to the taxation argument and issues posed by it. In October 2014, for example, the Frank C. Jones Reenactment of the *M'Culloch* argument dealt only with the first issue. This decision was largely dictated by time; there simply was not enough available to deal fully with two issues, but deleting the taxation argument in favor of that concerning implied powers was also an eminently logical decision given the manner in which most people view the case. The second problem is that the taxation issue is much more sophisticated than most people realize. In particular, counsel for Maryland argued that the tax was a largely *de minimus* exercise in raising needed revenue, a measure within which the levy on the federal Bank was consistent with the manner in which Maryland dealt with all such financial institutions.

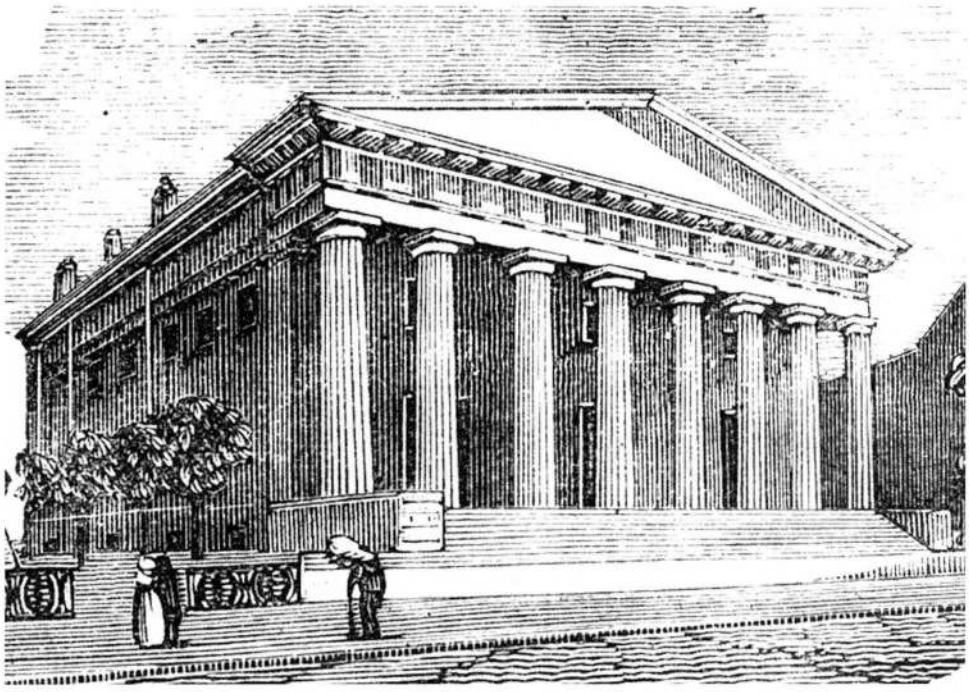
The contention that the Maryland tax was not a punitive measure has subsequently gained a certain degree of currency. For example, in his final work, **Aggressive Nationalism: *McCulloch v. Maryland* and the Foundation of Federal Authority in the Young Republic,** Richard Ellis focused his formidable skills and deep knowledge of the founding era on the problems posed by the decision. He stressed that his goal was to rectify the failure of many scholars to explore the full range of issues posed by *M'Culloch*. In particular, he argued for the need to "examine the case from the point of view of the losing side," as he believed this was the best way to deal "with relevant and important issues, many of which are crucial to understanding the case."[5]

When someone like Richard Ellis speaks, people must listen. As one reviewer stressed, adopting the Ellis rationales, so-called "conventional" scholarship on *M'Culloch* tends to be "uncritical," discussing the decision on Chief Justice Marshall's terms and focusing on his interpretation of the Constitution to the exclusion of the perspectives of the "losing side."[6] Accordingly, I use the work of Marshall's critics as my point of departure for a detailed examination of the taxation issue. This is not because I simply wish to dispute or discredit their work. Rather, it reflects the reality that the Ellis study in particular is the rare exception to the norm, one of the very few within which the taxation issue is recognized as important and discussed at length.

Ellis advanced three arguments "against the [Second Bank of the United States]" that he believed Chief Justice John Marshall deliberately ignored in his opinion for the Court, "probably because they would have seriously undercut his own argument."[7] All three are important and interrelated.

The first was the problem posed by the fact that the Bank was actually a private corporation. The second was that the Bank was empowered to establish branches in the states without first gaining the permission of those states, which posed issues both for state sovereignty and protection of state revenue streams. The third was the origins and nature of the tax itself.

The second argument regarding branches is arguably not a significant concern if one takes seriously the notion that the power to create the Bank included the power to take all steps "necessary and proper" to see that it was effective and efficient in its operations. But the fact that the Bank was technically a private corporation is a potentially serious omission that is only partially corrected by Marshall's subsequent more detailed analysis and rejoinder in *Osborn v. The President, Directors, and Company of the Bank of the United States*.[8] Ellis is not alone in making his point. As George Dangerfield emphasized, the Bank was at least in name if not in effect a private corporation and "[i]n his decision ... Marshall avoided *all* discussion" that fact.[9] Harold J. Plous and Gordon E. Baker do the same, stating with regard to the private, profit-making character of the Bank that "Marshall's famed opinion did not even undertake to answer the most challenging



The Second Bank of the United States (headquarters in Philadelphia, pictured), was popularly blamed for the economic downturn of 1819 that precipitated the closing of many small businesses. When Maryland and other states tried to restrict it by imposing a steep tax on its state branches, the Bank refused to pay and the case went to the courts. While other states intended to shut down their branches, Maryland merely sought to raise revenue by taxing its branch.

points raised by the state."[10] That said, neither of these studies addresses Ellis's third and, to my way of thinking, most important claim: the need to explore the nature of the tax itself. The sole exception is an indirect one, when Plous and Baker quote Charles Warren to the effect that the Maryland tax on the Bank's notes was a "heavy" one.[11] Warren includes the Maryland measure within a list of the various states taxes that he introduces with the characterization that "[r]adical legislation was ... enacted by [the Bank's] opponents."[12] Gerald Gunther, the editor of a third source listed by Ellis, does not discuss any of these issues, although he does collect contemporary criticisms of *M'Culloch* within which they are alluded to.[13]

The gist of the arguments against Marshall and his decision is that any fair assessment of *M'Culloch* and its impact must include a "close examination of the Maryland law, particularly in regard to its timing, its provisions, and its purpose."[14] Critics take issue with scholars who treat the Maryland tax as "anti-Bank legislation," a measure no different from those in Kentucky, Ohio, and Tennessee that were "thinly disguised" assaults on the Bank. I am admittedly the author of more than one such account.[15] My interest in these matters is then in some respects informed by the reality that critiques of Marshall's opinion may well call into question, by implication, my own work. I trust, however, that what I am about to say will be viewed in the same light that I treated **Aggressive Nationalism** in stating that perhaps the most important function of "high quality scholarship—which **Aggressive Nationalism** most assuredly is—remains "to

open new vistas and provoke us to think deeply about issues and events."[16]

I will do two things. First, I will examine the implications of the "mere revenue measure" postulate from a purely legal perspective. *M'Culloch* is after all first and foremost a legal opinion, the Court's answers to two specific constitutional questions. Arguments about the nature of the Maryland tax, and whether it was given its due by John Marshall and his colleagues, must accordingly account for legal contexts within which they are posed. Second, I will conduct what I hope is an appropriately close examination of the tax itself, with particular attention to the circumstances within which the Maryland legislature acted and the specific terms of the statute it passed. My conclusion is that Marshall's critics are wrong on both counts. The nature of the tax does not actually matter for constitutional purposes. And, when the Maryland law is examined with care, the inevitable conclusion must be that it was indeed a punitive measure directed at the Second Bank.

I

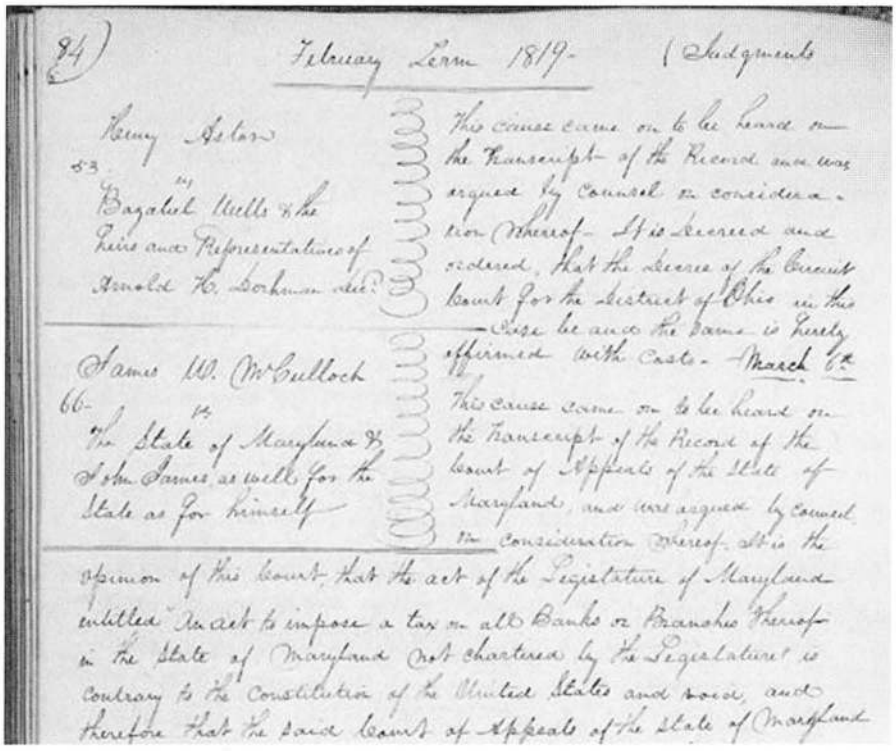
As a threshold matter, it is important to recognize that the precise nature of the Maryland tax is not dispositive for constitutional purposes. Regardless of its true purpose or effect, a Court intent on giving full force to the Constitution could not let it stand. As a law professor, I begin with an important legal observation: the recognition that as a matter of constitutional doctrine the precise nature of the Maryland bank tax does not matter. That is, even if the critics are correct, and the Maryland tax was a simple revenue measure, a Court intent on giving full purpose and effect to the Constitution would not let it stand.

The heart of the argument against Marshall's treatment of the tax is that the Maryland measure differed from those levied in other states, in that "[t]he purpose of the Maryland tax was not to destroy or even attack the Baltimore branch of the [Second Bank], but to raise revenue."[17] The theory is that if true, this has significant implications:

> What, in effect, Marshall did in his famous decision was to use a case that came up from Maryland to rule on developments in Kentucky and Ohio, even though the issues involved were significantly different. Consequently, he totally avoided discussing the differences between a tax levied for revenue purposes and one that was meant to make it impossible for a branch to continue doing business in a state.[18]

As part of this argument, Marshall's critics suggest that many astute contemporary observers felt that the constitutionality of a simple revenue tax was an open question at the time the case was argued and decided. They note, for example, that Henry Clay posed the possibility that a state could in fact constitutionally "lay a tax bona fide for the purpose of revenue and which shall only be equal to the tax imposed on similar monied institutions within their jurisdictions, respectively."[19] Clay subsequently stressed, however, that "[n]o proposition can be clearer than that, if Congress had the power to make the Bank, the States cannot have the power to break it. The two powers, being incompatible, cannot both exist."[20] The difficulty, Clay observed, lay in whether "such an exercise of power"—that is, a pure revenue measure—"could clearly be distinguished from that which would have for its object the banishment of a branch, and not revenue."[21]

Marshall did not in fact discuss the possible differences between the two types of tax. As a legal matter, however, the inevitable conclusion is that he did not shy away from this issue because he was afraid of the consequences. Rather, he recognized both that it did not matter and that this was not the sort of inquiry a court should undertake.



94) February Term 1819. (Judgments

Henry Astor
&c.
Bazabiel Wells & the
Heirs and Representatives of
Arnold K. Gorham dec'd

This cause came on to be heard on the Transcript of the Record and was argued by Counsel on consideration whereof. It is decreed and ordered, that the decree of the Circuit Court for the District of Ohio in this case be and the same is hereby affirmed with Costs. March 6th

James W. McCulloch
vs.
The State of Maryland &
John James, as well for the
State as for himself

This cause came on to be heard on the Transcript of the Record of the Court of Appeals of the State of Maryland, and was argued by Counsel on consideration whereof. It is the opinion of this Court, that the act of the Legislature of Maryland entitled "An act to impose a tax on all Banks or Branches thereof in the State of Maryland not chartered by the Legislature" is contrary to the Constitution of the United States and void, and therefore that the said Court of Appeals of the State of Maryland

The text of the *M'Culloch v. Maryland* decision, handed down March 6, 1819, as recorded in the minutes of the Supreme Court of the United States, in which the Court held that the separate states could not tax the federal government.

Marshall understood that, once the power to tax at all is conceded, "like sovereign power of every other description, [it] is trusted to the discretion of those who use it."[22] In effect he posed a familiar constitutional problem, the slippery slope: If the Court admits that the state has the power to tax, the question becomes to what extent it might be exercised. Consistent with one of the assumptions made about Maryland's true goals, Marshall did stress that "[t]he argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it."[23] He then made it clear that, even if true, this did not matter:

> We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of that power. The attempt to use it on the means used by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.[24]

This position lies at the heart of the applicable constitutional principle, intergovernmental regulatory immunity. The issue is not the scope of the power one sovereign attempts to exercise over the other. Rather, it is the mere fact that it tries to do so. For example, in the years immediately preceding *M'Culloch,* Spencer Roane and his colleagues on the Virginia Court of Appeals recognized as a general matter that both Article III and the Judiciary Act of 1789

Chief Justice John Marshall's ruling for the Court in *MCulloch* established the doctrine of national supremacy. Did his opinion gave short shrift to the tax issue in order to make its argument?

gave the Supreme Court appellate jurisdiction. They were nevertheless unwilling to accept that that power extended to the review of their own decisions. That dispute was finally resolved in *Martin v. Hunter's Lessee*,[25] decided in favor of the federal government given the realities imposed by the Supremacy Clause. In a similar vein, current federalism cases focus on what various members of the Court have characterized as the "sovereign dignity of the states," rejecting, for example, the authority of Congress to "commander" state legislative or executive actors, even where, as was the case in *Printz v. United States*,[26] the obligations imposed on a state officials were both temporary and *de minimus*.[27]

This assumes, of course, that the action in question does actually affect the sovereign itself, an issue highlighted by the contention that Marshall failed to deal fully "with the essentially privately controlled and profit-making characteristics of the bank."[28] As Ellis, for example, notes, "although [the Second Bank] performed a number of important financial services for the federal government, it hardly qualified, *in many people's minds*, to be considered an instrument of the federal government, which is the way Chief Justice Marshall characterized it ... by claiming it was analogous to the mint, the post office, the custom house, and the federal courts."[29]

The point is a fair one. The Bank was a private corporation, albeit one within which the federal government had a stake and to which were delegated various important tasks undertaken on behalf of the nation. Marshall's treatment of this issue in *M'Culloch* was at best cursory, and the analogies he drew based on the possible impact of state taxation on other undeniably national government entities were admittedly overblown. This treatment certainly lacked the detail offered in his pointed rejection of the same arguments five years later in *Osborn*, in which Marshall

addressed at some length "the supposed character of that institution."[30] Marshall conceded there that:

> [i]f these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being used by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual used in the same manner.[31]

Marshall continues, however, that "the premises are not true. The Bank is not considered a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes."[32] Indeed, he stresses, the "whole opinion of the Court [in *M'Culloch*] is founded on, and sustained by" that reality.[33] Even Justice William Johnson, who filed an important and vigorous dissent in *Osborn*, agreed with Marshall on this point, noting that "[t]he bank of the United States, is now identified with the administration of the national government."[34]

It certainly would have been better if Marshall had discussed this more fully in *M'Culloch* itself. But it is worth recalling that the threshold point of contention in that case was implied powers, that is, whether Congress could constitutionally create the Second Bank given that the power to create corporations was not mentioned in the text and had in fact been expressly rejected by the Framers during the Convention. Given that reality, which meant that twenty-five of the thirty-seven pages in the actual opinion were devoted to that issue, a more cursory treatment of the taxation questions is understandable.

Moreover, while it is certainly correct that in 1819 "many people" viewed the bank as a private enterprise, that was hardly the universal opinion. Clay, for example, characterized the Second Bank as "the mere instrument, in the hands of the Government, for collecting and afterwards distributing" the nation's funds and, as such, "indispensable."[35] Press accounts at the time echoed these sentiments. And, in the wake of and in response to the January 1819 Spencer Committee report, which considered and documented allegations of mismanagement and fraud in the administration of the Bank,[36] the House Committee on Ways and Means stressed the intimate connection with and importance of the Bank in the management of the federal government, given the role that it played in the nation's financial affairs:

> There are few subjects, having reference to the policy of an established Government, so vitally connected with the health of the body politic, or in which the pecuniary interests of society are so extensively and deeply involved. No one of the attributes of sovereignty carries with it a more solemn responsibility, or calls in requisition a higher degree of wisdom, than the power of regulating the common currency, and thus fixing the general standard of value for a great commercial community, composed of the confederated States.[37]

The proverbial bottom line is that, while there was some disagreement about the precise status of the Second Bank, a credible consensus had been formed that it was in fact

an instrumentality of the United States. The connections between the Second Bank and the government were extensive and critical to both its goals and daily operations. Marshall's failure to document this more fully in *M'Culloch* was unfortunate. It stretches the imagination, however, to characterize this shortcoming as a deliberate attempt to mask a supposedly fatal flaw.

II

What of the tax itself? Was it, as critics argue, a simple revenue measure? Three points are made in support of this position: That the political and social climate of "hatred and enmity" toward the Second Bank that prevailed in the other states taxing it did not exist in Maryland; that Maryland's dire financial situation in 1817-18 was the primary motivating factor for the tax; and that the tax itself was both modest when compared to those imposed by other states and no different from the tax Maryland assessed on its own, state-chartered banks.

Political and Social Climate in Maryland

There is little doubt that the political and social climate in Maryland was different from that that prevailed in other states in which the Second Bank was attacked, either through attempts to tax its operations or through heated expressions of the state's rights position in response to *M'Culloch*. The legislatures in Kentucky, Ohio, and Tennessee did in fact pass taxation measures that were clearly designed either to prevent the establishment of branches or to drive out ones that had already been put in place. Virginia, in turn, remained perhaps the single most virulently anti-Bank state, at least in terms of the role that individuals in that state played in attacking both *M'Culloch* and John Marshall.[38]

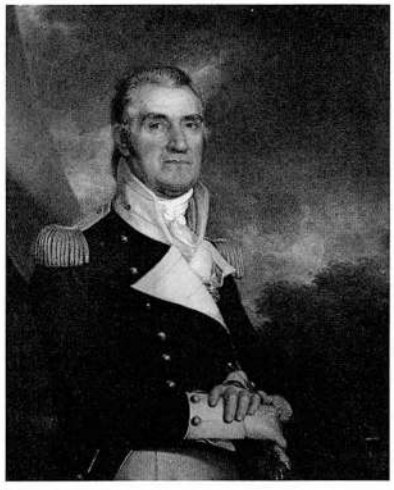
The situation in Maryland was, however, more complex. Maryland did not harbor anti-Bank spokesmen or states' rights activists of the stature and influence of Amos Kendall of Kentucky or Spencer Roane, William Brockenbrough, and John Taylor of Caroline in Virginia. But that does not mean that Maryland did not harbor important and influential opponents of banking and the Second Bank.

For example, the local press at the time reveals significant opposition to banks in general, and the Bank of the United States in particular. Hezekiah Niles used the pages of his Baltimore-based *Weekly Register* to rail against "the demoralizing and pernicious business on *banking*; which we seriously believe is the *Pandora's box* that is to fill the republic with all sorts of moral and political diseases."[39] He heaped particular scorn on the Second Bank. Niles argued, for example, that in creating it "the constitution was exceedingly strained; if not sensibly violated."[40] And he observed in his next issue that:

> [w]e are much pleased to find that our *warm* remarks ... about the bank of the United States, were not *above* the public temperament. So far as we have heard, they received the decided approbation of every *disinterested* and considerate man. The bank, like an *abandoned* mother, has most imprudently bastardized its offspring, and deserves not the countenance or support of honest people.[41]

Alfred Cookman Bryan, in his **History of State Banking in Maryland,** noted the significance of these and similar statements in the Maryland press when he discussed the motives for the passage of the Maryland tax on state-chartered banks; he stressed that "[a] large element of the people was hostile to the banks, either owing to fear of their

power or to personal reasons, or to dread of conditions in Maryland similar to those in other States, concerning the horrors of which the periodicals of the day, such as Niles,' expatiated with the utmost vigor."[42] Hugh Sisson Hanna, in his **Financial History of Maryland,** agreed, observing that "[t]he success of [the state banks] inspired the hostility of a large class of citizens, the more so because of the natural tendency of the banking capital to centralize in one city, namely, Baltimore," a reality that exacerbated "rural prejudice toward capitalistic institutions, from which, as the banks loaned only upon short-time notes, the farming element could expect little benefit."[43] Indeed, Robert J. Brugger linked this rural-agrarian split with Maryland's opposition to the first issue posed in *M'Culloch*, implied powers, observing that "Maryland planters knew well that if federal power reached far enough outside constitutional bounds it might fall on slavery. Controlled by rural delegates and senators, the General Assembly in 1818 sought to restrict one federal intrusion by requiring banks opened 'without authority of the state' to pay a tax on issued notes or an annual fee of $15,000."[44]



Successful Baltimore merchant and influential U.S. Senator Samuel Smith initially supported rechartering the Baltimore branch of the First Bank of the United States in 1811, but changed his mind after it tightened credit and withdrew funds it had deposited in local banks, provoking a recession in Maryland. Political concerns and local anti-Bank sentiments would carry over into opposition to the Second Bank.

A second important contextual factor largely overlooked is that the Baltimore branch whose activities lay at the heart of *M'Culloch* was the second incarnation of the Bank in that city and that the record of its predecessor left much to be desired. It is correct that in 1819, when the Second Bank was under attack in the wake of the Spencer Committee report, Maryland's representative in Congress opted for reform of the Bank rather than repudiation of it.[45] But that does not account for the significant role that Maryland politicians played in the events leading to the demise of the First Bank when its charter came up for renewal in 1811.[46] The realities surrounding those events do not in themselves prove that the political climate in Maryland was unremittingly hostile toward the Second Bank. They do nevertheless suggest that greater care must be taken when assessing the motivations for the Maryland tax.

Perhaps the most telling aspect was the role that Samuel Smith, a Revolutionary War hero and highly successful Baltimore merchant, played in both the defeat of the recharter measure in 1811 and, albeit indirectly, in the affairs of the Baltimore branch in 1817-19.[47] In 1811, Smith was one of the Senate's more influential members. He had considerable knowledge of banks and banking, both as a merchant who used their services and as a member of the boards of two local banks, the Bank of Maryland and the Bank of Baltimore. When the First Bank's charter came up for renewal, Smith was appointed to the committee created to consider the question. He had reservations about the organization and operations of the Bank as then chartered, but he believed that the plan presented to the Senate in March 1810 would eliminate most of the defects. That bill did not come to a final vote, and Smith returned to Baltimore that summer

with a clear and consistent record of support for renewing the Bank's charter, provided the measure doing so contained the modifications he sought.

Unfortunately, the Baltimore branch of the Bank and its supporters had waged an ill-advised campaign to force the Baltimore business community to support recharter. As part of that process, the branch tightened credit and withdrew funds it had deposited in local banks, provoking a recession in the area. Smith was furious and wrote Madison, demanding that federal funds be withdrawn from the Baltimore Branch and placed in local banks.[48] Smith declared that "if this course should not be pursued ... there will be members of Congress who will attribute it to improper motives, and who will believe that the Secretary of the treasury was thereby favoring the institution."[49] And he suggested that if action was not taken, there would be severe repercussions; he declared that "[w]e certainly had better have no such institution, if the consequence is that it can awe the government at it's pleasure."[50]

Madison solicited Gallatin's advice on the matter, albeit without specifically mentioning Smith's charges.[51] In his response, Gallatin indicated that the national fiscal situation was so dire that any changes in current policy would be disastrous.[52] The actions Smith demanded were accordingly not taken and, on August 29, Madison so informed him, stating that "any distributive transfer of [Treasury deposits] to the State Banks, would not be convenient to the public, and must soon become unimportant to them."[53]

As a result, when Smith returned to Washington for the final debates on the Bank, he was fully opposed to it and made it quite clear that recent events in Baltimore played an important part in his assessment. "Wherever [the Bank] extended its influence," he charged, "dissension commenced; wherever it placed its foot, it became absolutely necessary for the States to erect another ban to counterbalance its pecuniary and political influence."[54] Three individuals from Baltimore whose judgment Smith trusted had informed him "that granting this charter would be a death-blow to the politics of the State of Maryland" and "would be injurious to them, for neither they nor many of the manufacturers of Baltimore had received much advantage from the branch bank; they had their own banks, from which they generally received accommodation."[55] The Senate vote on extending the charter was tied, 17-17, with Smith voting against the Bank. This left the matter in the hands of Vice President George Clinton of New York, who made brief remarks and then cast the deciding vote against a new charter.

The fate of the First Bank was the product of an admittedly complex mixture of constitutional concerns, political considerations and, in some instances, personal issues. Looking back on the events, Gallatin captured a portion of the mix when he wrote in 1830:

> In 1810 the weight of the administration was in favor of a renewal, Mr. Madison having made his opinion known that he considered the question as settled by precedent, and myself an open and strenuous advocate. We had the powerful support of Mr. Crawford in the Senate and no formidable opponent in either House but Mr. Clay, a majority of political friends in both Houses, and almost all the Federal votes on that question: with no other untoward circumstances but the *personal* opposition to Mr. Madison or myself of the Clintons, the Maryland Smiths, Leib, and Giles.[56]

The close vote in both the House and the Senate means that no single individual controlled the outcome. But Maryland's opposition to the First Bank was telling, predicated on both traditional political concerns and local anti-Bank sentiments. And those considerations almost certainly carried over into the period during which the Second Bank was created and its Baltimore branch established.

Maryland Economics

A second argument is that one of the major motivations for the Maryland tax on the Bank was the need to address the state's "dire financial straits," in particular the problems posed by the need to recoup expenses incurred as a result of the War of 1812. The theory is that "[t]he unsuccessful defense of Washington, D.C., had fallen mainly on the Maryland militia, and it proved expensive, the cost being estimated at nearly a half million dollars. Although the federal government was expected to pay for most of this eventually, it was going to be a slow and difficult process to accumulate the necessary documentation. In addition, the federal government had its own financial problems during the years 1815-17 and was in no hurry to deal with Maryland's claims."[57]

Once again this was true, at least as a general matter. Indeed, one of the ironies of *M'Culloch* is that the Cashier of the Baltimore branch of the Bank, James William M'Culloh, served as a volunteer in the Maryland militia during the War of 1812. This led him to the Battle of Bladensburg on August 24, 1814, as a member of a group described accurately as one that "knew nothing of military service, and from their habits and pursuits were ill-fitted to endure so suddenly the hardships and exposures of war."[58] The British force they confronted included numerous veterans of the Napoleonic wars and was vastly superior. The resulting "battle" was a rout, memorialized by one puckish observer as the Bladensburg Races. The British captured Washington and destroyed much of the city, leaving in their wake a wounded James M'Culloh, who spent the next seven years on crutches but was able to parlay his experiences in the war into a position in the financial house Smith and Buchanan and eventually the role that would bring him infamy, Cashier of the Baltimore Branch of the Second Bank.

The war did have a serious, negative impact on Maryland finances, as a result of both losses of trade and the expenses it incurred defending itself and the nation from British attacks. Critics do not discuss the trade loses, but they were severe. Rather, they focus on the reality that the cost of defending the state and Washington was substantial, "being estimated at nearly a half a million dollars."[59] And they postulate that "[t]his was the driving force behind" the Maryland tax on the Second Bank.[60]

Once again, the reality is more complex. Maryland was in many respects a financial oddity at the time the war began, albeit in a sense that operated to its advantage until that conflict disrupted matters. The state had substantial investments and had been able since 1790 to fund its expenses on the interest realized on them. In addition, the state took a parsimonious approach in these matters, preferring to impose most of the costs of government on its counties and cities. The net result, as Hanna stressed in his financial history of the state, was that "the ordinary expenditures of the state were ... small" and "from the standpoint of financial legislation the years from 1790 to the close of the second English war were almost barren—from that of taxation entirely so."[61]

The sole exception to this tax-free state of affairs was a measure passed in the December 1813 legislative session: the tax on bank capital that was in effect at the time that the tax on the Second Bank

was approved in February 1818. As both Hanna and Bryan note, various attempts had been made to impose a tax on corporations in general and banks in particular since 1804. The theory was that "all corporations enjoying special privileges from the state—such as canal and road companies—should be compelled to make a return for such privileges."[62] These proposals were routinely defeated until the bank measure was passed.

The annual operating deficits for the state were lower than one might assume given the manner in which Marshall's critics characterize the situation. As Hanna notes, this "second period in the state's financial history began with the payment of the war loans in 1817. The capital of the state was reduced by $436,000, and its annual income by the amount of the interest thereon—$26,160."[63] This problem was compounded by the fact that a substantial portion of the state's income came from its investment in the stock of its state-chartered banks. They experienced financial difficulties, resulting in an additional loss of some $20,000 per year.[64] The net result was that Maryland went "[f]rom a condition in which the chief problem had been to dispose of an accumulating surplus, the treasury was suddenly reduced to a condition of deficit."[65]

These revenue losses were serious. On December 8, 1817—one week after the beginning of the legislative session that would produce the taxation of the Second Bank—the Committee of Claims in the House of Delegates submitted a report that projected a deficit of $52,213.73.[66] Three days later, the House appointed a special committee "to report what measures, if any, are proper to be adopted in relation to [that] deficiency."[67] The committee report was submitted on January 17, 1818.[68] It first offered a lower estimate of the shortfall, reducing it to $42,213.72.[69] It then set out three possible plans for dealing with the problem. Each based its solution on some combination of proceeds realized from increased subscriptions in state banks and a lottery.[70] None mentioned imposing any new taxes from which revenue would accrue to the state. The third plan did refer to the possibility of "tax[ing] sales at auctions, pleasure carriages and horses" and "doub[ling] the tax on retailers,"[71] but that taxing privilege was to be granted to the city of Baltimore, in return for which it would "pay into the treasury annually, the sum of 15,000 dollars."[72]

The committee noted the pendency of the state's claim for $295,000 against the federal government, stating that "should this sum be recovered, and advantageously invested, it will considerably augment the annual revenues of the state."[73] And it concluded with the observation that its:

> [e]stimates are ... founded upon calculations entitled to full confidence, and present to the people of Maryland the pleasing and consoling reflection, that notwithstanding the heavy debts incurred in the late war, that the resources of their treasury are such as to furnish, under judicious management, an annual revenue considerably beyond the expenses borne by it, without the imposition of a cent upon them.[74]

All of this transpired and was reported fully to the House of Delegates, several weeks before it took up and passed the bill imposing the tax on the Second Bank. All of these events also took place in an environment within which it was clear that the claim against the United States would be honored. As Hanna notes, "[t]he principle of reimbursement had been recognized by the United States Government at the time of the war; but the final adjustment of the various claims was not effected until some years later."[75]

The actual process of preparing and submitting the claim did take time. It had, however, come to a largely successful conclusion before the Maryland legislature took up, much less debated or approved, the tax on the Second Bank. In a message transmitted to the House on December 5, 1817, Governor Charles C. Ridgely noted that "the claims and vouchers against the United States for military expenditures have been fully arranged, and are now in a state of complete preparation, and will be submitted to the general government."[76] He then confirmed, on February 16, 1818, that the claim "has been assumed by the general government."[77] It was not paid in full at that time. But the events surrounding its resolution and the fact that the Maryland legislature knew it would be paid even as they started the process of taxing the Second Bank must be taken into account.

The Tax

What about the details of the tax itself? Was it in fact the equivalent of the levies imposed on state-chartered banks? Ellis, for one, argues, with considerable justification, that "the Maryland tax is particularly significant since it is the origin of the great Supreme Court case of *McCulloch v, Maryland.* This alone should have made scholars particularly curious about it, but this has not been the case."[78] I agree. Every individual who has written about these matters should have looked at the details of the tax on the Bank and compared them to the tax imposed on state-chartered institutions. It was negligent not to have done so, and Ellis has done us all a great service by challenging us to undertake that inquiry.

Two contemporary statements about the tax are offered in support of the contention that it was a revenue measure that treated all banks the same. The first is a portion of a statement by Hezekiah Niles, who observed in January, 1819 that "[it is well known that the state of Maryland, levied a tax upon the branch of the bank of the United States, located at Baltimore, and that all the banks in this city are in like manner taxed."[79] The second is from Joseph Hopkinson's argument on behalf of Maryland before the Court, during which he maintained that all the state sought was that the Bank "shall be submitted to the jurisdiction and laws of the State, in the same manner with other corporations and property; and all this may be done without ruining the institution, or destroying its national uses."[80]

These assessments of the nature of the Maryland tax were not universally shared at the time. A press account during the period that the Maryland House of Delegates was considering the measures noted that "[there was an opposition to this measure, some members considered it *impolitic*, and some both *impolitic* and *unconstitutional.*"[81] Other statements made about the tax and the process were more pointed. The Baltimore-based *Federal Gazette*, for example, criticized the tendency on the part of the "legislatures of several of the states [that] appear to be desirous of imposing a tax on the Offices of Discount and Deposit of the bank of the United States, or of preventing them from transacting business in their respective states" and stated, regarding the Maryland measure, that "if the Congress has constitutionally established a bank, there appears to be as little propriety in a state legislature imposing a tax on that institution as upon the loan offices, counting houses, or any other institutions established in the several states by the same authority."[82] This prompted a letter to the *Maryland Gazette* in which an anonymous writer stated that "the Editor of the Federal Gazette, and his correspondents, really seem to be in a terrible rage with our State Legislature, and State Executive."[83] William Glynn, the editor of the *Federal Gazette*, issued a denial that spoke volumes, declaring only that he had not intended to "express even the

slightest disapprobation of the present State Executive,"[84] even as he lamented that the legislature had passed "crude, ill digested and unnecessary if not pernicious laws."[85]

Hezekiah Niles, in turn, mounted a lengthy and impassioned attack on the Bank, expressly urging that if the Bank did not reform itself "the states ... tax the mother bank and the branches out of every resting place except the ten miles square," i.e., Washington, D.C.[86] He subsequently noted that the issue in which this statement appeared "made a great stir in this city," Baltimore, and that the "demand for it was unprecedented."[87] He disavowed any "special enmity against the bank of the United States," stating that "I owe ill will only to ill conduct."[88] But, on returning to the subject that fall, he stressed that "the people must rely on this right to tax the [Bank] for their own defense against the nabobs who govern it" and expressed his hope "that *Maryland* will vigorously prosecute her claims upon it."[89]

This may or may not constitute evidence sufficient to question the contention that the Bank tax "did not attract much public attention when it came up in the legislature."[90] But it does reflect a degree of editorial give-and-take that is entirely consistent with a political and social climate within which there was a sharp division of opinion between those supporting and attacking the Bank and, more generally, between those supporting a Jeffersonian as opposed to a Federalist view on the issues posed by states' rights and a broad reading of federal power. Indeed, one of the dominant themes in press accounts of Maryland's financial affairs at the time was a contentious give-and-take between Maryland's two political parties, with the Democrats and Federalists staking out sharply opposed positions regarding whether there even was a financial crisis and, if so, who should assume the blame it.

All of which brings us to the single most important consideration: the details of the tax itself. That annual charge of $15,000 is characterized as "substantially less than the amounts levied by Ohio, Kentucky, and Tennessee."[91] That is certainly true, as far as it goes. Tennessee imposed an annual tax of $50,000 on any bank in that state that did not hold a state charter.[92] Ohio levied a tax in the amount of $50,000 per year on each of the two branches of the Bank in that state.[93] And Kentucky had the highest rate of all, $60,000 per year, again to be imposed on two branches.[94]

Yet those numbers tell only part of the story, at least insofar as the question is whether the Baltimore Branch of the Second Bank and the state banks were "in like manner taxed." The Maryland system actually gave the Second Bank a choice. It could issue notes in certain stated denominations, but only if it paid a stamp tax that ranged from ten cents to twenty dollars, depending on the value of the note.[95] The $15,000 annual fee was in turn a way to avoid paying those individual note fees each year via single lump sum assessment.

Was this, as Niles observed, a tax that treated the Second Bank and the numerous Maryland chartered state banks the same? In a word, no. Exact comparisons are difficult, given variations in the respective laws. As indicated, the Bank measure imposed its tax on notes issued, requiring payment, for example, for "every one hundred dollar note upon a stamp of one dollar,"[96] a one percent charge, the lowest of the rates charged.[97] The state tax in turn was laid against stock, at a rate of twenty cents on every $100 in capital paid, a rate of point-two percent.[98] As Hanna notes, "the small tax on [state bank] capital stock—one fifth of one percent—was hardly a burden to the banks and could easily have been made larger."[99]

Nonetheless, there was a real and pronounced discrepancy, and it operated against the Second Bank and in favor of the state banks. Indeed, the actual taxation method embraced by Maryland was clearly

discriminatory. The Maryland tax on state banks was levied against the bank's capital. The state banks were likely undercapitalized, especially if the focus is on the amount of specie—actual gold and/or silver—they held. In this regard, the state banks' assets were likely substantially lower than those of the Second Bank. Further, the Maryland tax on the Second Bank was levied against its actual notes, that is, a key means by which it did business—and not coincidentally, competed with local banks. As such, it had an impact on operations, precisely the sort of state burden the Court held impermissible.

A more telling comparison arises when we examine the annual fee. To avoid the stamp tax, the Bank would have had to pay $15,000 a year for every year the Baltimore branch operated in the state. As an initial matter, it is important to note three things. First, the size of the levy does not matter; what counts is the principle that a state may not interfere with federal operations. Second, it could have been worse. During debate on the bill in the House, an attempt was made to raise the fee to $20,000. That amendment was defeated.[100] Third, the House did in some respects soften the bill before passage, deleting express reference to "the office of discount and deposit of the bank of the United States, established in the state of Maryland" and substituting in its stead the formulation that appears in the law as passed, "all banks or branches thereof in the state of Maryland not chartered by the legislature."[101]

The change was meaningless as a practical matter. The only entity to which the law applied was, of course, the Baltimore branch of the Second Bank. And, given its twenty-year charter, it was looking at a total charge of $300,000. The state banks, in turn, also enjoyed twenty-year charters. They could, however, avoid paying the tax on stock by making a single payment of $200,000. But that fee was to be paid by "said banks,"[102] that is, by all of the banks chartered by the state collectively. In December 1817, at the time the federal bank measure was introduced, there were twenty such banks in the state.[103] Payment likely would have been prorated based on the size of each individual bank. That meant, for example, that the largest Maryland-chartered bank, the Union Bank of Baltimore, would have owed a one-time payment of $45,000, a mere fraction of the charge for the Second Bank.[104] Nonetheless, in absolute terms, the exemption fee for the Second Bank was fifty percent higher than that required for all state banks together.

In addition, the state banks were given a guarantee that if they complied with the terms of the taxation scheme "the faith of the state is hereby pledged not to impose any further tax or burthen upon them during the continuation of their charters under this act."[105] The Second Bank was given no such promise. That was, obviously, a matter of considerable importance given the position taken by the bank before the Court, and accepted by Marshall and his colleagues, that dangers lay in accepting the premise that any tax was proper, much less one whose scope was subject to the will and whim of the state.

The proverbial bottom line is that, when examined with care, it becomes quite clear that the two taxes were not the same and that the imbalance operated in favor of the state banks.

III

In a chapter originally published in 1964, Bray Hammond envisioned what the situation might have been when John James, the state official charged with enforcing the tax on the Second Bank, arrived at its offices looking to secure either payment or "legal evidence that the Bank ... and its local cashier were violating the law."[106] Hammond was one of the foremost scholars of American banks and banking, and Ellis cites his work with approval.[107] Marshall's critics doubtless do

not, however, agree with Hammond's account:

> The law was to come into effect the first day of May [1818]. That day had now passed, with no sign that the law was to be obeyed. So Maryland, whose motto, roughly translated from the Italian, is that deeds are for men, and words are for women, was taking prompt action. There was a penalty of $100 for each note issued on unseamed paper since the effective date of the law, one-half for the state and one-half for the informer; but if John James expected to leave the bank richer than he came he was certainly stupid, for the tax was prohibitive, as he must have known, and not intended to provide revenue but to force the [Baltimore branch] to close. Maryland chartered banks for its people, and the state wanted the Bank of the United States, chartered by the federal government, to leave its sovereign soil and stay off it.[108]

James was not stupid. His visit to the Baltimore branch was part of a "negotiated" series of events designed to bring a case testing the constitutional issues before the Supreme Court.[109] That dispute was not, however, about an attempt by Maryland simply to extract from the Second Bank that which was due from its own state-chartered banks. It was rather a constitutional confrontation within which a punitive tax designed to force the Second Bank out of the state was enacted and a lawsuit was initiated to determine both whether the federal government had implied powers and whether its actions in exercising them could be questioned, perhaps even barred, by the supposedly sovereign states.

My conclusion—that those who argue against Marshall given his cursory treatment of the tax are wrong—in no way diminishes my respect for their willingness to make the argument and focus our attention on an issue that should not have been ignored for so long. My first reaction on reading their work discussing the tax was shock and shame: how could I have made this sort of mistake? I knew that the tax imposed on the Second Bank was an either/or: payment of a percentage charge on notes issued or a single annual fee. I also knew that Niles had declared the federal and state taxes to be roughly equivalent and that Hopkinson had argued that Maryland simply sought to treat the Second Bank the same as its own. What I did not do, in my book in particular, was to look with care at the details of the tax on state-chartered banks. Instead, I aligned myself with those who viewed the Maryland measure as a direct attack on an institution that many at the time, albeit not all, viewed as "monstrous."

That was a mistake. It was not good history. Ellis in particular provoked me to look at this with greater care and to do my best to get this matter right. In the process, I was forced to call into question both the points made and the evidence offered in support of them. That is, however, exactly the sort of give–and–take that good history requires.

Conclusion

So was the Baltimore Branch of the Second Bank of the United States simply taxed "in like manner" as its state colleagues and competitors? The answer must be "No." The Maryland measure may not have been as extreme as those enacted in other states. But there is no doubt that the political and financial climate in Maryland was hostile to the Second Bank and that the individuals who crafted the Bank tax did so with a view toward shackling its operations, if not driving it from the state. More tellingly, the

financial situation for the state itself was no longer "dire" at the time the tax was proposed and passed. None of that arguably matters. As the Court stressed in *M'Culloch*, it was the principle of non-taxation of a federal entity that was important, not the size of the tax itself.

That said, the taxation issue is much more complicated than most individuals have been willing to admit. It mattered greatly to the individuals defending Maryland's actions and it should matter greatly to us. Hopefully this article will assist in that process of recovery and reconciliation.

ENDNOTES

[1] 17 U.S. (4 Wheat.) 316 (1819). The defendant in the original state action against the Bank was James William M'Culloh. That spelling is the one that he appears to have consistently used. The Court, however, adopted a variant, *M'Culloch*, which is the one used here.

[2] *Id.*, at 427.

[3] *Id.*, at 425.

[4] *Id.*, at 426.

[5] Richard E. Ellis, **Aggressive Nationalism: *McCulloch v. Maryland* and the Foundation of Federal Authority in the Young Republic** (2007) [**Aggressive Nationalism**], p. 4.

[6] Sean Mattie, Review, "The View from the Losing Side," 71 *The Review of Politics* 513 (2009).

[7] **Aggressive Nationalism**, p. 4.

[8] 22 U.S. (9 Wheat.) 738 (1824). I discuss Osborn *infra* at text accompanying notes [].

[9] George Dangerfield, **The Awakening of American Nationalism 1815-28** (1965), p. 94.

[10] Harold J. Plous and Gordon E. Baker, "*McCulloch v. Maryland:* Right Principle, Wrong Case," 9 *Stan. L. Rev.* 710, 723 (1957).

[11] *Id.*, at 717 (quoting 1 Charles Warren, **The Supreme Court in United States History 1789-35** (rev. ed. 1926) [Warren], p. 505.

[12] 1 Warren at 505.

[13] Gerald Gunther, **John Marshall's Defense of *McCulloch v. Maryland*** (1969).

[14] **Aggressive Nationalism,** p. 68.

[15] Mark R. Killenbeck, ***M'Culloch v. Maryland*: Securing a Nation** 92, 68 (2006) [Killenbeck], pp. 92, 68. *See also* Mark R. Killenbeck, "James William McCulloh: The Second Bank of the United States," in Melvin I. Urofsky (ed.), **100 Americans Who Made Constitutional History** (2004), p. 133 ("In February 1818 the Maryland legislature enacted a measure that had but a single purpose: to banish from the state an institution it had come to view as 'monstrous,' the Second Bank of the United States.").

[16] Mark R. Killenbeck, Book Review, "**Aggressive Nationalism: *McCulloch v. Maryland* and the Foundation of Federal Authority in the Young Republic**," 27 *Law & History Review* 690, 690 (2007).

[17] **Aggressive Nationalism** p. 68.

[18] **Aggressive Nationalism,** p. 6.

[19] Letter from Henry Clay to William Jones (February 4, 1818), in 2 James F. Hopkins (ed.), **The Papers of Henry Clay** (1963) [Clay Papers], pp. 434, 435. Ellis quotes the language of the letter correctly, but his notes place it in a different letter, one from Clay to Hardin dated January 4, 1819. The Hardin letter does discuss this matter, but in it Clay also states that he "offer[s] no opinion" on the question. 2 Clay Papers, p. 623.

[20] Letter from Henry Clay to Martin D. Hardin (January 4, 1819), 2 Clay Papers, p. 623.

[21] *Id.*, Clay here anticipates a point Marshall will make in his opinion regarding the inadvisability of the Court undertaking such an inquiry.

[22] *M'Culloch*, 17 U.S. (4 Wheat.) at 427.

[23] *Id.*, at 427-28.

[24] *Id.*, at 430.

[25] 14 U.S. (1 Wheat.) 304 (1816).

[26] 521 U.S. 898 (1997).

[27] 521 U.S. 898 (1997). The regulations contested were interim measures, undertaken in anticipation of the Attorney General's developing a national background check system for gun purchases. They required only that the affected law enforcement officials undertake "a reasonable effort to ascertain within five business days whether receipt or possession would be in violation of the law," a formulation that, as the Court expressly noted, "does not require the C[hief] L[aw] E[nforcement] O[fficer] to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so." *Printz*, 521 U.S. at 903. That scheme stood in stark contrast to the one rejected in *New York v. United States*, 505 U.S. 144 (1992), which required states to "take title" to low-level radioactive waste generated within their borders and made them liable "for all damages directly or indirectly incurred ... as a consequence of the failure of the State to take possession of the waste." *Id.*, at 153-54. The Court saw no meaningful difference between the two and held that both were unconstitutional.

[28] **Aggressive Nationalism**, pp. 4-5.

[29] *Id.*, p. 5 (emphasis added).

[30] *Osborn*, 22 U.S. (9 Wheat.) at 859.

[31] *Id.*, at 859-60

[32] *Id.*, at 860.

[33] *Id.*

[34] *Id.*, at 372 (Johnson, J., dissenting). Johnson's primary concern was jurisdictional and his dissent offered a detailed argument against judicial expansion of federal court jurisdiction, especially where he suspected that the case was either not ripe or feigned. That tracks another point Ellis emphasizes, the implications of the reality that *M'Culloch* was in many important respects "a very 'amicable controversy.'" **Aggressive Nationalism**, p. 72. This is not the time or place to explore fully this issue, other than to observe that such cases had no more implacable and consistent foe than William Johnson, who for whatever reasons refused to take the bait in *M'Culloch*.

[35] Letter from Henry Clay to William Jones (December 26, 1818), 2 Clay Papers, p. 621; Letter from Henry Clay to Martin D. Hardin, February 21, 1819, *id.*, p. 673.

[36] January 16, 1819 Report, Committee to Inspect the Books And Examine the Proceedings of the Bank of the United States, M. St. Clair Clarke & D. A. Hall, **Legislative And Documentary History of the Bank of the United States Including the Original Bank of North America** (1832) [Clarke & Hall], pp. 714-32.

[37] April 13, 1819 Report, Committee of Ways and Means, Clarke & Hall, p. 735.

[38] Ironically, an attempt to impose a tax on the Bank in Virginia was defeated at about the same time that the Maryland tax was approved. *See Daily National Intelligencer*, February 17, 1818 ("In the House of Delegates of Virginia, the proposition to tax the Branches of the Bank of the United States in that state, has received a decided *negative*, by a vote of 127 to 24.").

[39] *Niles' Weekly Register*, February 21, 1818, 421.

[40] "Equalization of Exchange," *Niles' Weekly Register*, September 5, 1818, 25.

[41] "Bank of the United States," *Niles' Weekly Register*, September 12, 1818, 33.

[42] Alfred Cookman Bryan, **History of State Banking in Maryland** (1899) [Bryan], p. 44.

[43] Hugh Sisson Hanna, **A Financial History of Maryland** (1907), pp. 34-35. [Hanna]. This rural, agrarian hostility towards banks tracks closely the bases for Anti-Bank measures in many other states.

[44] Robert J. Brugger, **Maryland: A Middle Temperament** 1634-1980 (1988), pp. 197-98.

[45] *See* **Aggressive Nationalism**, p. 69.

[46] For example, one of the most widely quoted attacks against the First Bank in 1811 was voiced by Representative Robert Wright of Maryland, who complained that "All the directors of the mother bank, at all times, have been Federalist or worse—many of them Tories or Monarchists—so that being under such control, I have ever doubted the statement of its funds." Quoted in **Killenbeck, Securing a Nation**, p. 48.

[47] James M'Culloh took his first steps toward notoriety when he took a position in Smith's Baltimore firm, Smith & Buchanan.

[48] Letter from Samuel Smith to James Madison (August 8, 1810), in J. C. A. Stagg et al. (eds.), 2 **The Papers of James Madison: Presidential Series** (1992) [Madison Papers], pp. 470, 471.

[49] *Id.*

[50] *Id.*

[51] Letter from James Madison to Albert Gallatin (August 14, 1810), in 6 **Madison's Papers**, pp. 483-84.

[52] Letter from Albert Gallatin to James Madison (August 21, 1810), in *id.*, pp. 499-500.

[53] Letter from James Madison to Samuel Smith (August 29, 1810, in *id.* p. 514.

[54] Quoted in **Killenbeck, Securing a Nation**, p. 50.

[55] *Id.* Smith sought higher ground toward the end of his remarks, stating that "the question never came before me on a constitutional argument before" and that the "able arguments" of other Senators "have made a very serious impression on me, indeed, and have almost brought me to think, that, if there were no other objections, I should vote against the bill on constitutional grounds alone." *Id.*

[56] Letter from Albert Gallatin to Nicholas Biddle (August 14, 1830), in Henry Adams (Ed.), II **The Writings Albert Gallatin** (Antiquarian Press, 1960), pp. 431, 435.

[57] **Aggressive Nationalism**, p. 69. *See also* Hannam p. 60 ("The adjustment of Maryland's account was particularly difficult.").

[58] **Killenbeck**, pp. 90-91.

[59] **Aggressive Nationalism**, p. 69. Hanna largely concurs, stating that "the total cost of the war to the state was estimated to have been slightly less than $450,000." Hanna, pp. 38-39.

[60] **Aggressive Nationalism**, p. 69.

[61] Hanna, pp. 25, 23. The sole exception would be the 1814 bank tax, discussed *infra*.

[62] Hanna, p. 35.

[63] *Id.*, p. 44.

[64] *Id.*

[65] *Id.*

[66] **Votes and Proceedings of the Maryland House of Delegates**, December Session, 1817, at 10-11 [MHD].

[67] *Id.*, at 15.

[68] *Id.*, 53-56.

[69] *Id.*, at 53.

[70] The possible creation of a state lottery was a major issue in the session. Lotteries were immensely popular at the time and many states used them as a means to raise revenue.

[71] MHD at 55. *Compare*, **Aggressive Nationalism**, p. 69 ("To meet its various financial obligations, the state levied a series of taxes on auction houses, state banking institutions, and other private corporations to raise money.").

[72] MHD at 55-56.

[73] *Id.*, at 56.

[74] *Id.*

[75] Hanna, p. 60.

[76] 1818 MHD at 8.

[77] *Id.*, at 125. This came ten days after the February 7, 1818, vote in the House, *id.*, at 104-05, and six days after the February 11, 1818 vote in the Senate.

[78] **Aggressive Nationalism** p. 67.

[79] *Niles Weekly Register*, January 9, 1819, p. 362.

[80] *M'Culloch*, 17 U.S. (4 Wheat.) at 346. Hopkinson goes on to concede that if this is the result the Bank's "profits will be diminished by contributing to the revenue of the State." He then proceeds to undermine his point by stating that his goal is to "show, on the part of the State, a clear, general, absolute, and unqualified right of taxation, (with the exception stated)," presumably, the notion that such taxes be levied "in the same manner" on all such entities.

[81] **Aggressive Nationalism** p. 69; *Washington Daily National Intelligencer*, February 12, 1818.

[82] *Federal Gazette*, February 11, 1818.

[83] "A Looker On," *Maryland Gazette*, February 23, 1818. Bryan argues, without citing any specific accounts, that "the law was urged on both general grounds of hostility to the bank and on account of opposition to it by the State Banks, who feared its competition and restraining influence." Bryan, p. 72. Hanna does the same. *See* Hanna, p. 54 ("In 1818 a special tax was imposed on banks operating in Maryland without having obtained a state charter. The tax was a political measure, aimed at the Baltimore branch of the United States Bank").

[84] *Federal Gazette*, February 27, 1818.

[85] *Federal Gazette*, February 16, 1818.

[86] "Editorial Address," *Niles' Weekly Register*, February 28, 1818, 5.

[87] "Banks and Banking," *Niles' Weekly Register*, March 7, 1818.

[88] *Niles' Weekly Register*, March 7, 1818.

[89] "Brief Sentential Retrospect," *Niles' Weekly Register*, August 29, 1818, 4.

[90] **Aggressive Nationalism**, p. 69.

[91] *Id., p.* 68.

[92] *Id.*, p. 45.

[93] *Id.*, p. 152.

[94] *Id.*, p. 198.

[95] 1818 **Laws of Maryland,** Chapter 156, § 1.

[96] *Id.*

[97] The stamp taxes were, respectively: two percent on notes of five dollars, ten dollars, $500, and $1,000; one-point-five percent on a twenty-dollar note; and one percent on notes of fifty dollars and $100.

[98] 1814 **Laws of Maryland**, Ch. 122, § 7.

[99] Hanna, p. 36.

[100] MHD at 105.

[101] *Id.*, at 105; 1818 **Laws of Maryland**, Ch. 156.

[102] 1814 **Laws of Maryland**, Ch. 122, §12.

[103] *See* Banks in the State of December 27, 1817, *Niles' Weekly Register*, December 27, 1817, at 231.

[104] That sum is based on the Union Bank's capital of $3,500,000 prorated against a total state bank capital of $13,300,000. *See id.*

[105] 1814 **Laws of Maryland**, Ch. 122, § 11.

[106] Bray Hammond, "The Bank Cases," in John A. Gareth, Ed., **Quarrels that Have Shaped the Constitution** (rev. ed. 1987), p. 37.

[107] He notes that *M'Culloch* was "a case that was profoundly influenced by the banking problems that existed in the early nineteenth century," **Aggressive Nationalism**, p. 4, and cites the Hammond chapter for this proposition. *Ibid.*, p. 4 n.4. That is a curious choice, given the much richer and more detailed account available in Hammond's books on the subject. *See* Bray Hammond, **Banks and Politics in America from the Revolution to the Civil War** (1957); Bray Hammond, **Sovereignty and an Empty Purse: Banks And Politics in the Civil War** (1970).

[108] **Hammond**, "The Bank Cases," pp. 37-38.

[109] Governor Charles Ridgely made it quite clear in December, 1818 that the lawsuit reflected a concerted effort by both the Bank and the State after "negotiations ... to bring the question of Constitutional right before the legal tribunals of the country," with the full intention to "carry it to the highest appellate jurisdiction, the Supreme Court of the United States." C. Ridgely, Executive Communication to the Legislature, Maryland Gazette, and Political Advertiser, December 17, 1818.

Double Duty across the Magisterial Branches

SAIKRISHNA BANGALORE PRAKASH

Supreme Court Justices have full-time day jobs. Justices have duties as federal judges on the apex court and many reasonably regard these responsibilities as requiring their complete and undivided attention. But Justices can do so much more, and they can be so much more. The Constitution does not bar them from serving their country in other ways. From our nation's inception, several Justices also have occupied other high offices and taken on other vital responsibilities. This article considers early examples of double duty and the constitutionality of these off-the-bench pastimes.

The article makes two assertions. First, although the Constitution established three branches, each vested with a particular sort of power and thereby created what we call the separation of powers, it never demanded an absolute separation of personnel. To be sure, members of Congress cannot simultaneously serve in either of the other two branches because the Constitution specifically so proclaims.[1] Yet there is nothing in the Constitution that prevents someone from being both a judge and an executive.[2] Second, the founding generation did not read the Constitution as barring this particular practice. In fact, early Justices (and judges) simultaneously served their nation in other capacities. If that understanding and practice is still valid, as I believe it is, nothing today prevents Justice Samuel Alito from simultaneously negotiating with Kim Jong Un. Similarly, nothing bars modern executives from wearing two hats, hearing court cases in the morning and performing executive functions in the afternoon. Secretary of State Mike Pompeo could be a judge on the Court of Appeals for the D.C. Circuit in his spare time.

Doubly Dutiful Chief Justices

Before diving into the legal questions about cross-branch service, some comments about John Jay and John Marshall are appropriate, as these are our earliest multitaskers, Justices who ably spanned two branches. Our story begins with John Jay.

Jay was a scion of a patrician New York family. He attended King's College, now Columbia.[3] He took up lawyering in 1768. A little less than a decade later, he became involved in the disputes with Great Britain, eventually favoring a complete break from that nation.[4] In 1774 and 1775, he served as a New York delegate to the first and second Continental Congresses.[5] In 1777, at the ripe age of thirty-two, he helped draft the first New York Constitution and was selected as the first chief justice of the New York Supreme Court.[6] In 1778, New York returned him to the Continental Congress, where his fellow delegates elected him to serve as their presiding officer, the president of the Continental Congress.[7] This office was quite unlike our presidency, for its duties primarily consisted of chairing Congress's deliberations and proceedings. Jay simultaneously served as Congress's president and as New York Chief Justice until 1779, when he resigned the latter position.[8]

After a little less than a year as president, Congress sent Jay to convince Spain to recognize America's independence and to procure a loan. He secured the latter, but not the former.[9] From there, Congress dispatched him to Paris in 1782 to negotiate a peace treaty with the British.[10] Although Benjamin Franklin and John Adams also served as treaty commissioners, Jay was the principal American interlocutor. The envoys secured the 1783 Treaty of Paris, with the British belatedly recognizing America's independence.[11]

Of course, the diplomats received a strong assist from George Washington and the 1781 Battle of Yorktown.

Jay returned to the United States in 1784 and discovered that the Continental Congress in 1784 had appointed him as its second Secretary of Foreign Affairs.[12] Under the Articles of Confederation, there was no separate, independent executive. Rather, the Continental Congress exercised a few legislative authorities and the executive power over foreign affairs, wielding war powers and directing diplomacy. While serving as Congress's Secretary of Foreign Affairs through 1789, Jay wrestled with difficult matters related to piracy in the Mediterranean, Spanish control of the Mississippi, and the failure of the states to honor the Treaty of Paris. In each area, Jay favored greater national authority and a subordination of state autonomy and interests.[13]

An early example of cross-branch office holding was the appointment of the Chief Justice as an inspector of the coins produced by the U.S. Mint, a job that required a person who inspired public confidence. This double duty lasted from 1792 to 1837, when the U.S. District Court Judge from the Eastern District of Pennsylvania replaced the Chief Justice on the Assay Commission.

In 1787, delegates from twelve states gathered at a convention in Philadelphia to revise the Articles of Confederation. More radical elements prevailed, for what emerged was more like an amendment in the nature of a substitute, meaning an entire new framework. Though Jay did not attend the convention, he later championed its proposed Constitution.[14] His five Federalist Papers reflected his expertise in foreign affairs. He argued that the Constitution was necessary to strengthen the national government, which under the Articles had but a series of largely illusory foreign affairs powers.[15]

After nine states ratified the Constitution in 1787 and 1788, the Continental Congress resolved that the first Congress under the new Constitution would meet in 1789.

This gap between ratification and Congress's first legislative enactments created a transition issue. Under the Articles, the Continental Congress had a bureaucracy under its control. Recall that it was the plural chief executive. With the election of George Washington as President, the executive bureaucracy now came under his control. Recognizing that he was the new Chief Executive, the successor to the Continental Congress at least in this regard, Washington sent the holdover executive officers inquiries and directives. There was no statutory authority for any of this. But Washington supposed that he had constitutional authority to direct the executive apparatus.

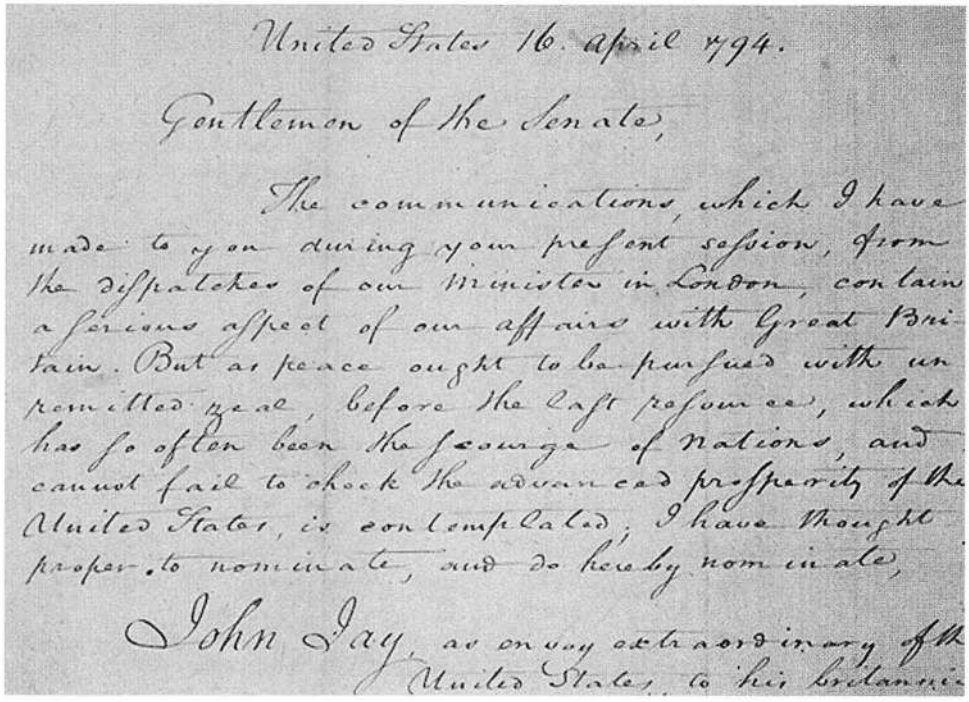
One of these holdovers was John Jay. Jay served as de facto Secretary of State for about a year under the new Constitution.[16] Again, although no statute provided as much, Jay was very much under Washington's control. Whereas congressional statutes from the Articles era made him subject to Congress's control, the Constitution had superseded those rules. As a constitutional matter, he had a new master—the President.

Because none of the laws passed under the old regime had any continuing validity, Congress had to recreate everything from the ground up. One of its most significant acts was the July 1789 creation of the Department of Foreign Affairs. Congress provided that the Department would again be directed by a Secretary. Congress also revealed its distinct impression that, as a constitutional matter, this Secretary would serve at the *President's* pleasure.[17] Washington offered Jay the position he already held, a wise move meant to capitalize on the latter's experience.[18] But Jay demurred. Washington then offered Jay any job he wanted.[19] Jay agreed to serve as the first Chief Justice of the Supreme Court and, after securing the Senate's consent, Washington appointed him in late September of 1789.[20]

The interesting point for our purposes is that Chief Justice Jay continued to function as the de facto Secretary of Foreign Affairs.[21] In all, Jay served as a carryover Secretary of Foreign Affairs and Chief Justice for about half a year. In March 1790, Thomas Jefferson took over the department, which Congress had renamed the Department of State, a change that reflected the domestic duties that Congress belatedly attached to the Department.

Jay's service as Secretary was not strictly lawful. First, even though Jay served as Secretary of State for months after Congress first met, Congress did not create a new office until July 1789. Second, the Senate had never consented to his appointment and, in fact, Washington had never even tried to appoint Jay to the new office.[22] The lesson here is a familiar one. Transitions do not always follow the letter of the law. Consider it a start-up cost of transitioning from one legal regime to a completely different one.

Jay's cross-branch exertions had not ended, however. He served double duty again. In the early 1790s it became clear that the Treaty of Paris—the 1783 peace treaty with Britain—was fraying from violations and tensions arising out of the war


United States 16. April 1794.

Gentlemen of the Senate,

The communications, which I have made to you during your present session, from the dispatches of our Ministers in London, contain a serious aspect of our affairs with Great Britain. But as peace ought to be pursued with unremitted zeal, before the last resource, which has so often been the scourge of nations, and cannot fail to check the advanced prosperity of the United States, is contemplated; I have thought proper to nominate, and do hereby nominate,

John Jay, as an envoy extraordinary of the United States, to his Britannic

In 1794, George Washington dispatched Chief Justice John Jay to negotiate a peace treaty with Britain because he had experience drawing up the 1783 Treaty of Paris (above is his commission). There was fierce opposition in the Senate, particularly from Aaron Burr, some of it grounded in constitutional objections.

between France and Britain.[23] Absent a readjustment and a restoration of amity, there was a chance that America might war against Britain again.

In 1794, Washington resolved to dispatch John Jay.[24] Sending Jay made sense because he had previously helped negotiate the Treaty of Paris. Jay agreed, although he likely suspected that accepting the assignment would put him in a no-win situation.[25] Negotiating with Great Britain was likely to damage his reputation. Indeed, had he declined Washington's request, Jay might have been our second President under the Constitution. Thankfully, his sense of duty to the nation prevailed.[26] Jay's nomination stirred a legal controversy: Could a federal judge simultaneously serve as a federal executive, in this case as a negotiator of a vital treaty? Part II considers this question in some detail.

The nation's next conspicuous cross-branch officer was John Marshall. Long an impressive figure, Marshall had been a distinguished Virginia lawyer who favored the Constitution in the Virginia ratifying convention.[27] President George Washington offered Marshall three offices, all of which he declined: district attorney for Virginia, Attorney General of the United States, and emissary to France.[28] Instead, Marshall concentrated on his lucrative and successful private law practice.[29] He argued a case before the Supreme Court, *Ware v. Hylton*, and lost,[30] but in so doing, he impressed all who heard his argument.

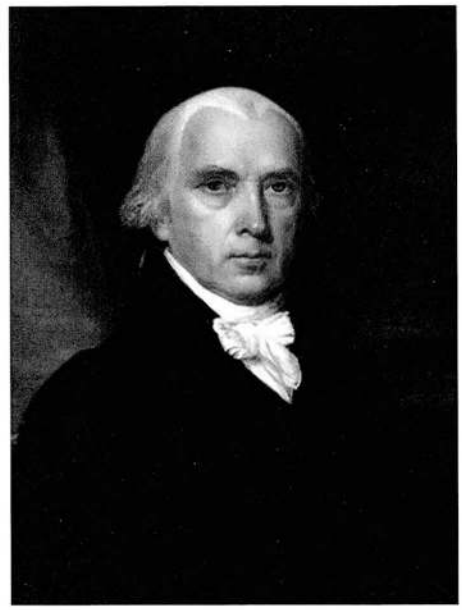
During the administration of John Adams, Marshall finally agreed to serve as one of three presidential emissaries to France.[31] France had been waging a naval war against American merchant shipping.[32] Adams hoped to resolve America's differences with France through negotiation. Yet Talleyr and, the French Foreign Minister, refused to negotiate with the Americans without a hefty bribe, a scandal that became known as the XYZ affair.[33] The three

commissioners returned to the United States empty-handed. When the bribery demands became known, the American public became incensed, leading Congress to declare a naval war against France, the so-called Quasi-War.[34]

In 1798, Marshall declined a Supreme Court appointment from Adams.[35] Impetuously, Adams nominated Marshall to serve as his Secretary of War.[36] Although the appointment received the Senate's consent, Marshall demurred and the appointment was never made. Adams then nominated Marshall to serve as Secretary of State. This time Marshall agreed.[37] As Secretary of State, Marshall successfully oversaw the negotiation of a peace treaty with France, the Convention of 1800. He also helped rebuild the Federalist Party, which was riven with factions that extended into the Adams cabinet.

After Chief Justice Oliver Ellsworth resigned, John Adams in late 1800 reappointed John Jay to serve as Chief Justice.[38] Adams appointed Jay without notice, much less consultation. Jay declined to serve as Chief Justice, immediately resigning the commission that Adams had sent him.[39] Jay hinted that the office was too insignificant and claimed that he was too old. Jay would be the only person to serve as Chief Justice twice, albeit rather briefly and inconsequentially the second time. Adams immediately turned to Marshall, his trusted aide. This time, Marshall accepted a seat on the Court and Adams appointed him Chief Justice in January 1801.[40]

Significant for our purposes is that at the request of President Adams, Marshall continued to serve as Secretary of State for a period of over two months.[41] His continued service helped trigger a series of unfortunate events that precipitated one of the most renowned Supreme Court cases, *Marbury v. Madison*.[42] As is well known, Marshall had affixed the seal of the United States to the commissions due the justices of the peace for Washington, D.C., a task that federal law required him to perform.[43] The seal helped authenticate the commissions. Marshall then asked his brother, James Marshall, to deliver these commissions on the last day of the Adams administration.[44] His brother was unable to deliver them all on that final day.[45]



In the eighteenth century some thought there were only two branches of government, with the judiciary a subpart of the executive. James Madison described judges as "shoots from the executive stalk."

Marshall had a chance to rectify the oversight. He could have seen to their delivery the next day, the first day of Thomas Jefferson's administration. Jefferson had asked Marshall to continue serving as Secretary of State until his nominee to that post, James Madison, was appointed.[46] By choosing not to resign at the end of the Adams administration, Marshall obliged his distant cousin. Although Marshall served as Thomas Jefferson's Secretary of State for two days, he never distributed the undelivered commissions.[47] This second, related, slip-up also helped generate the very controversy that lay at the center of *Marbury v. Madison*.[48]

The Constitutionality of Double Duty

Though John Jay's double duty in the first year of the Washington administration could have triggered a legal debate,

apparently nothing of the sort emerged. This may be because Jay was not properly appointed to any executive office under the new Constitution and because of the transitional nature of the period.

The Issue Is Joined

The legal issues surrounding double duty came to the fore when Washington in 1794 nominated Jay to negotiate a treaty with Britain. Recall that Washington sent Jay across the Atlantic to mend fraying ties and that Jay negotiated the so-called Jay Treaty. However, to send Jay, Washington believed he had to secure the Senate's consent. Although the eventual vote was eighteen-to-eight in favor of Jay's appointment, there was fierce opposition, some of it grounded in constitutional objections.[49]

Aaron Burr, who later served as vice president, killed Alexander Hamilton, and was tried for treason, sponsored a Senate resolution: "That to permit Judges of the Supreme Court to hold at the same time any other office or employment, emanating from and holden at the pleasure of the Executive, is contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, is mischievous and impolitic."[50]

Although the resolution failed, ten Senators endorsed it.[51]

Why was the appointment thought "contrary to the spirit of the Constitution"? Senators gave multiple reasons. First, as some noted, the executive might corrupt judges by offering alluring jobs in the executive branch.[52] The executive might dangle sinecures to secure complaisance or grant them and threaten to withdraw them should judges prove too autonomous. Alternatively, judges might hanker for prestige rather than money. Either way, judges might endorse the executive's legal arguments because they were, or hoped to be, part of the administration. Second, some claimed that the Constitution barred individuals from holding multiple offices at once.[53] Some pointed out that the Chief Justice presided over presidential impeachment trials, making it improper for that official to serve as an executive officer, even as a treaty negotiator.[54] How could the Chief Justice be impartial if he was part of the administration? Third, some observed that as an envoy, Jay would be negotiating an instrument that might become supreme federal law,[55] yet as Chief Justice he might have to hear cases involving his treaty. This would make John Jay both a legislator and a judge.

Outside the Senate, similar claims were voiced. One newspaper said it was "contrary to the intent and spirit of the constitution" and the "most unconstitutional and dangerous measure in the annals of the United States."[56] One private organization said the Constitution "hath been trampled upon" because the government had united executive, legislative and judicial powers in Jay's hands.[57] He would negotiate a treaty, an executive power; his compact might become law, and therefore he helped exercise legislative power; and he served as a judge.

Double Duty Is Constitutional

The constitutional objections to Jay's form of double duty are easily answerable. The Constitution does not bar all forms of dual office holding. The easiest case is holding two office *within one branch.* The Constitution certainly does not bar one person from simultaneously serving as Secretary of State and Secretary of Treasury or as a tax official and a United States Attorney. To be sure, there is a practical issue, namely whether one person can properly handle the duties of two significant offices. But this real-world problem does not generate a constitutional difficulty.

The related claim, that the Constitution categorically bars dual office-holding across two or more branches, seems more plausible. After all, why separate power across three branches, legislative, judicial, and executive, if the people wielding the powers can occupy all three branches? The separation of powers would seem illusory or irrelevant if the personnel exercising those powers are all the same. Another way of putting the point is that no sensible person or persons would create three branches and simultaneously permit one person to control all of those branches.

Moreover, had not the celebrated political philosopher Baron de Montesquieu warned that "there can be no liberty" if the same people could make, execute, and adjudicate the law?[58] Montesquieu was clearly talking about separation of personnel and not just separate branches. And Montesquieu exerted a profound influence on the Founding Fathers. A year before the Constitutional Convention, one American said that the "three great departments of sovereignty should be forever separated and so distributed as to serve as checks on each other."[59] They could not be separated or serve as checks if the same people populated all three. The patriot who said this was none other than John Jay, the man who later served his country in two rather different offices across two branches.[60]

Yet, whatever one thinks of the general desirability of the separation of personnel, I think the Constitution itself never requires an absolute separation of personnel. In the Incompatibility Clause, the Constitution specifically bans certain officeholding across branches.[61] In particular, members of Congress cannot simultaneously serve as executives or judges. This means that a member of Congress cannot simultaneously serve in the executive branch or as a federal judge. Conspicuously, the Incompatibility Clause does not bar executives from serving as

At the Constitutional Convention (which convened in Independence Hall, above), there were two proposals to bar judges from serving in other branches, but they were never enacted. The Framers did write an Incompatibility Clause, which specifically bans members of Congress from simultaneously serving in the executive branch or as a federal judge.

judges or vice versa. At the Philadelphia Convention, there were two proposals to bar judges from serving in other offices,[62] one of which was part of the famous New Jersey plan. But neither of these proposals were ever voted upon. Because of such inaction, they never became part of the Constitution.

The most natural reading of the text and the history leading to its creation is that the Framers were faced with a choice and decided to permit dual office-holding across the two magisterial branches. To be sure, the Constitution did not favor double duty. But nor did it disfavor the notion. Instead, the Constitution merely permits the practice. If the President wanted to avail himself of the expertise of a federal judge, he might appoint one to the executive branch. If Senators agreed that a particular form of double duty made sense given the context, they might consent to a durable second appointment. And if the judge wished to accept the executive office, she could do so.

The possibility that someone might serve in multiple offices across branches was hardly obscure. In fact, it was relatively common. British practice was rife with office-holding across branches. Hence the need for the Incompatibility Clause.[63] Legislators served as members of the King's cabinet, with the Crown using offices to secure compliant legislators.[64] The founders were also aware that jurists might concurrently serve the executive.[65] Consider Lord Mansfield, Chief Justice of the King's Bench in Britain. While he was Chief Justice, he continued to serve as an adviser to the King on his privy council.[66]

These customs continued in a few states. While most states expressly barred judges from holding any other office, others permitted some dual office holding.[67] For instance, the New Jersey governor was also the chancellor, the presiding judge of the highest state court of appeals.[68] Judging from the state experience, it seemed that constitution makers would expressly ban the practice when they wished to completely bar the custom.

Finally, it is worth mentioning that executives and judges were not conceived as being entirely distinct. Although we think there are three branches, some in the eighteenth century thought there were only two, with the judiciary a subpart of the executive.[69] After all, they both execute the law, albeit in different ways. As James Madison put it, the judges were but "shoots from the executive stalk."[70]

In light of these well-known conceptions and possibilities, the evident failure to ban cross-branch office holding categorically, and the decision to include a narrow cross-branch ban, the Congress and the President understandably concluded that the Constitution permitted some cross-branch appointments. In other words, by failing to unconditionally ban cross-branch office holding, officials sensibly judged that the Constitution implicitly permitted the one possibility not barred, namely office holding across the magisterial branches.

Indeed, early statutes and practices, some of which predate the Senate's 1794 decision to consent to Jay's appointment to negotiate a treaty with the British, repeatedly endorse just this reading. To begin, some early laws assigned executive duties to federal judges. By statute, the Chief Justice was a member of the Sinking Fund and Mint Committees.[71] The Sinking Fund was a committee composed of various officers charged with buying back federal debt to retire it. The Mint Committee examined newly minted coins to ensure their quality. In these instances, Congress took an existing judicial office, the office of the Chief Justice, and appended an executive function. These statutes apparently gave Chief Justices no choice in the matter.

Other early statutes imposed executive functions on the entire federal bench, as when Congress declared that federal judges had to serve as pension commissioners and

decide in *ex parte* proceedings whether individuals qualified for war pensions.[72] Although this was the most famous instance of extrajudicial duties, it was only the tip of the iceberg. Congress also required federal judges to find facts related to salvage claims, customs matters, naturalization proceedings, vessel seaworthiness disputes, and election disputes, often with the ultimate discretion lodged elsewhere, either in the executive or Congress.[73] These statutes made a good deal of sense. First, Congress trusted judges to find facts. Judges were in that line of work, after all. Second, federal judges already dispersed throughout the nation could use their extra time to handle executive tasks that might otherwise require the creation of a separate set of executive officers and employees. The point is that the double duty of Jay and Marshall was in no way singular. The practice was relatively rife during the first decade.

A Soft Custom against Double Duty

As with many practices, there are advantages and disadvantages of holding offices across branches. The advantages are obvious. Why should the nation be deprived of the talents of someone on the bench when that person might be diverted, temporarily or for a longer period, to a vital executive function or mission? Sometimes the best person for an executive job is someone on the bench and that person can both remain on the bench and carry out the executive task. The disadvantages and hazards are no less apparent. First is the diversion of time and effort. Judges who take on other tasks may well be distracted by those extra responsibilities. Second, as critics have noted, there is the possibility that judges will lose their objectivity and favor the executive in cases, either because they also serve in the incumbent's administration or because they wish to secure a simultaneous executive appointment. Third is the possibility that judges will become involved in political disputes that will eventually end up in court. Fourth is the awkward nature of certain cross-branch appointments. For instance, it would be rather wrong for judges to serve as prosecutors in their own courts.

The experiences of Jay and Marshall highlight some of these pitfalls. Chief Justice Jay was lambasted upon returning to the United States.[74] Opponents of the treaty burnt and hanged effigies of Jay.[75] People demonstrated in front of Washington's house. One colorful critic wrote "Damn John Jay! Damn every one that won't damn John Jay!! Damn every one that won't put lights in his windows and sit up all night damning John Jay!!"[76] Jay knew his chances at the presidency were over.[77] In serving his country, he had killed his chance at the nation's first office. Fortunately, he had been elected governor of New York,[78] and he elected to renounce his Chief Justiceship.[79] Whether or not the withering criticism influenced his decision to leave the Supreme Court, he must have known that his controversial treaty might tarnish the Court's reputation.

As for Marshall, his double duty enmeshed him in the waning days and hours of the Adams Administration and its feverish attempts to appoint as many officials as possible. Whether his judicial duties interfered with his executive tasks is unknown. What is clear is that his tenure as Secretary of State is best known for an act he did not take, an omission. His failure to deliver the commissions is often regarded as the precipitating event for William Marbury's suit against James Madison. Had the commissions been delivered, perhaps there would have been no suit.

Whatever the real or imagined failings of Jay or Marshall as they handled double duties, a soft custom against dual–office holding seems most advisable. Consider it a predisposition against the practice that can

be overcome in extraordinary circumstances. As a general matter, I suspect that we have long had a soft custom against double duty.

Yet it is also clear that Americans occasionally have overcome any soft custom for reasons of expediency. Congress placed three Justices on the Hayes-Tilden Commission to help resolve the disputed 1876 presidential election.[80] In the last century, Justice Robert H. Jackson served as a prosecutor for the United States during the Nuremburg war crime trials.[81] During that time, he took a leave of absence from the Court. Finally, judges have served on various fact-finding commissions, including the Commission investigating the Kennedy Assassination (Chief Justice Earl Warren),[82] the Bicentennial Commission (Chief Justice Warren Burger),[83] and the Iraq Intelligence Commission (Judge Laurence Silberman).[84] In some cases, Commissions have done more than merely investigate and generate reports. For instance, with its three sitting judges, the United States Sentencing Commission created mandatory sentencing rules.[85] In each of these situations, politicians of the day evidently sought to exploit the prestige and skills of federal judges, both of which are quite considerable.

All in all, it seems fair to say that while there is something of a soft custom against double duty, there certainly is no hard rule. If a modern President wanted Justice Brett Kavanaugh to serve as a treaty negotiator, many would object. If a President sought the aid of Justice Elena Kagan in the Interior Department, that would raise hackles. But if there were exceptional reasons, the Senate and the nation might acquiesce. Sometimes exceptional circumstances require the violation of soft norms.

Solutions to the Problem of Double Duty

For those opposed to double duty, there are ways of barring the practice. The easiest way is for the Senate to act upon such doubts. Senators can block presidential nominations submitted to them as a means of preventing double duty. If a President nominates a judge to serve as cabinet secretary, the Senate could refuse to grant its consent or condition its consent on the renunciation of the judgeship. Senators may adopt the same approach for an executive officer who seeks to perform double duty on a court. Having said this, a Senate check on double duty would hardly serve as a complete bar. Under the Constitution, Presidents can make temporary appointments during a Senate recess without first receiving Senate consent, so-called "recess appointments." So a President might temporarily appoint an executive to the federal bench and permit the officer to keep her executive office. Moreover, by law, Congress has delegated the ability to make appointments of inferior offices to the President, courts of law, and department heads. Using such authority, Presidents (or the others) might appoint federal judges to inferior executive offices.

The only viable means of completely barring double duty would be for Congress to pass a statute barring judges from serving, in any capacity, in the executive.[86] Congress has long exercised the right to limit who might serve as an officer of the United States. For instance, Congress has long had a statute barring some retired military from serving in a civilian capacity within the Department of Defense, a bar that Congress waived so that General James Mattis could serve as Secretary of Defense.[87] In a similar manner, Congress could provide that no member of the federal judiciary could simultaneously serve as a member of the executive branch. Steve Calabresi and Joan Larsen recount instances where members of Congress proposed legislation to bar some forms of double duty.[88]

Conclusion

Although there is perhaps a soft custom against double duty, as a matter of constitutional law and practice federal judges

certainly may serve in executive capacities. For those who oppose this possibility, the solution is clear. Congress can by law bar double duty by judges and force officers to choose one branch or the other.

Absent such a general law or more narrow rules barring particular instances of double duty, the cross-branch possibilities are endless. Justice Clarence Thomas could decide cases *and* negotiate with Vladimir Putin. I would personally like to see that. Justice Stephen Breyer could negotiate with the Iranians. If anyone could slay them with reasonableness and moderation, he could. Justice Ruth Bader Ginsburg could be a navy admiral, thereby combating ISIS *and* sex discrimination.

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ENDNOTES

[1] U.S. Const. art. I, § 6, cl. 2.

[2] Likewise, nothing in the Constitution prevents federal officials—legislative, executive, and judicial—from simultaneously serving as state officers or employees.

[3] George Van Santvoord, **Sketches of the Lives and Judicial Services of the Chief Justices of the Supreme Court of the United States** (1854), p. 5.

[4] *Id.*, pp. 9-10.

[5] George Pellew, "John Jay", *in* 9 *American Statesmen*, pp. 33, 43 (John T. Morse, Jr. ed., 1890).

[6] *Id.*, pp. 76, 88.

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

[8] *Id.*, p. 116.

[9] *Id.*, pp. 127, 128, 131, 134.

[10] Santvoord, p. 29.

[11] *Id.*, pp. 30-32.

[12] *Id.*, p. 34.

[13] Pellew, pp. 232-240.

[14] *Id.*, pp. 251-252.

[15] *Id.*, pp. 252-254.

[16] Santvoord, p. 46.

[17] Gaillard Hunt, **The Department of State of the United States: Its History and Functions**, (1893), pp. 43-44. For a general discussion of this congressional decision, *see* Saikrishna Bangalore Prakash, "New Light on the Decision of 1789", 91 *Cornell L. Rev.* 1021 (2006).

[18] Pellew, p. 262.

[19] Joseph J. Ellis, **The Quartet: Orchestrating the Second American Revolution**, 1783-1789 (2015), p. 214.

[20] Pellew p. 263.

[21] Harrington, p. 36.

[22] Hunt, p. 58.

[23] Santvoord, pp. 63-65.

[24] *Id.*, pp. 65-66.

[25] Pellew, pp. 298-299.

[26] *See* Letter from John Jay to Sarah Livingston Jay (April 20, 1794), *in* 1 **The Life of John Jay with Selections from his Correspondence and Miscellaneous Papers** (1833) ("So far as I am personally concerned, my feelings are very, very far from exciting wishes for its taking place. No appointment ever operated more unpleasantly upon me; but the public considerations which were urged, and the manner in which it was pressed, strongly impressed me with a conviction that to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comforts.").

[27] Santvoord, p. 315.

[28] Allan B. Magruder, "John Marshall", *in* 10 **American Statesmen**, p. 131 (John T. Morse, Jr. ed., 1885). *See also* Joel Richard Paul, **Without Precedent: Chief John Marshall and His Times** (2016), pp. 45, 97-98, 106.

[29] Magruder, p. 92.

[30] Edward Dumbauld, "John Marshall and the Law of Nations", 104 *Penn. L. Rev* 38, 38 (1955).

[31] Magruder, p. 101.

[32] *Id.*, pp. 102-103.

[33] *Id.*, pp. 107-126.

[34] Gregory E. Fehlings, "America's First Limited War", *Naval War C. Rev* (Summer, 2000) pp. 101, 106-110.

[35] Magruder, pp. 131-132.

[36] *Id.*, p. 150.

[37] *Id.*

[38] Santvoord, p. 348.

[39] *Id.*

[40] *Id.*

[41] 2 Albert J. Beveridge, **The Life of John Marshall**, (1919), p. 559.

[42] *Id.*, pp. 559-561.

[43] James F. Simon, **What Kind of Nation?: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States** (2002), pp. 173-174.

[44] *Id.*, p. 174.

[45] Michael J. Glennon, "The Case That Made the Court", *Wilson Q.* (Summer, 2003) pp. 20, 24.

[46] *See* R. Kent, Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001), p. 160.

[47] *Id.*

[48] For a discussion of when an appointment vests, why Jefferson removed Marbury, and the events leading up

to *Marbury v. Madison*, *see* Saikrishna Bangalore Prakash, "The Appointment and Removal of William J. Marbury and When an Office Vests", 89 *Notre Dame L. Rev.* 199 (2013).

[49] *See* Santvoord, p. 66; *see also* 1 *Journal of the Executive Proceedings of the Senate of the United States of America* 152 (1828) [hereinafter Executive Proceedings] (Motion on Nomination (April 19, 1794)).

[50] *Executive Proceedings* 152 (1828) (Mr. Burr's Motion (April 19, 1794)).

[51] *Id.*

[52] William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995) p. 89.

[53] *Id.*

[54] South Carolina Senator Pierce Butler also described the debate. 1 Pierce Butler, **The Letters of Pierce Butler**, pp. 322-323 (Terry W. Lipscomb ed. 2007) ("The opponents to the appointment of the Chief Justice give for reasons that it is improper to send a Chief Justice out of the Country; that as he does not resign the Office of Judge, it is at least a multiplicity of offices monopolized by one person, which is contrary to the constitution; that it is improper interference of the Executive with the Judiciary, in as much as by occasionally holding out to them such temptations of honorary distinctions attended also with some emolument, he in some measure biases or influences that independence, and impartial state of mind that is essential in the Judiciary Department. Lastly that in case of an impeachment of the President for an improper treaty, the man he employs as his agent is to preside by the constitution, at his trial.").

[55] Casto, p. 89 (For example, North Carolina Senator Martin wrote: "As Treaties are to be the supreme Law of the land, the judge in this business [Jay] on their opinion should a new Treaty be made will become a legislator, and on his return will assume the judicial Chair, and be the Expositor and Judge of his own legislation.").

[56] *General Advertiser*, May 10, 1794, 3 ("Resolved as the opinion of this Society that the appointment of John Jay, chief justice of the United States as envoy extraordinary to the court of Great Britain, is contrary to the Spirit and meaning of the constitution; as it unites in the same person judicial and legislative functions, tends to make him dependent upon the President, destroys the check by impeachment upon the executive, and has had a tendency to control the proceedings of the legislature, the appointment having been made at a time when Congress were engaged in such measures as tended to secure compliance with our just demands. . . Resolved, that the above resolutions be made public, that they be immediately transmitted to all the democratic societies in the union, as a protest of freemen against the most unconstitutional and dangerous measure in the annals of the United States, and as an evidence, that no influence or authority whatever shall awe them into a tacit sacrifice of their sacred rights."). *See also General Advertiser*, April 19, 1794, 3.

[57] The organization was the Democratic Society of Wythe Court House, Virginia. Chauncey M. Depew, "Justice to the Memory of John Jay", *in* VIII **Orations, Addresses, and Speeches of Chauncey M. Depew**, pp. 329-330 (John Denison Champlin ed., 1910) ("We lament that a man who hath so long possessed the public confidence as the head of the executive department hath possessed it, should put it to so severe a trial as he hath by a late appointment. The Constitution hath been trampled upon and your rights have no securitiy [sic]. Citizens, what is despotism? Is it not a union of executive, legislative, and judicial authorities in the same hands. This union then has been effected. Your chief-justice has been appointed to an executive office by the head of that branch of Government. In that capacity he is to make treaties. Those treaties are your supreme law; and of this supreme law, he is supreme judge! What has become of your Constitution and liberties?").

[58] Charles de Secondat, Baron de Montesquieu, **The Spirit of the Laws**, p. 216 (1748) (trans. Thomas Nugent 1750).

[59] Norman A. Graebner, et al. **Foreign Affairs and the Founding Fathers: From Confederation to Constitution**, 1776-1787 (2011), p. 107.

[60] *Id.*

[61] U.S. Const. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[62] Steven G. Calabresi & Joan L. Larsen, "One Person, One Office: Separation of Powers or Separation of Personnel?" 79 *Cornell L. Rev.* 1045, 1126 (1994). The Calabresi and Larsen article is the best, most complete, treatment of the separation of personnel.

[63] *Id.*, at 1053-1057.

[64] William Seal Carpenter, "The Separation of Powers in the Eighteenth Century", 22 AM *Pol. Sci. Rev.* 32, 35 (1928).

[65] English judges had commonly held positions in the King's inner cabinet, though this was less common with Chief Justices. Lord Mansfield was not only in this exclusive group but was also a member of the House of Lords because he was a peer. He had insisted on receiving the peerage, becoming a baron, along with his appointment to Chief Justice in 1756, despite there being royal resistance to automatically linking the two. Before 1731 it was extremely rare for Chief Justices to be raised to peerages though it had become more common in the

ensuing decades. *See* Stewart Jay, "Servants of Monarchs and Lords: The Advisory Role of Early English Judges", 38 *Am J. Legal Hist.* 117, 130-32 (1994).

[66] *Id.*, pp. 175-176.

[67] Calabresi & Larsen, pp. 1057-1058.

[68] N.J. Const. of 1776 art. VIII.

[69] Calabresi & Larsen, p. 1128.

[70] Saikrishna Bangalore Prakash, **Imperial from the Beginning: The Constitution of the Original Executive** (2015), p. 271 (quoting the Federalist No. 47, pp. 243, 245 (James Madison)(Garry Wills ed. 1982).

[71] Steven G. Calabresi & Joan L. Larsen, "One Person, One Office: Separation of Powers or Separation of Personnel?" 79 *Cornell L. Rev.* 1045, 1126 (1993-1994) p. 1133.

[72] *Id.*, p. 1132.

[73] Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court", *Sup. Ct. Rev.* 132-35 (1973).

[74] Frank Monaghan, **John Jay: Defender of Liberty** (1935), pp. 392-93; Santvoord, pp. 70-71.

[75] Monaghan, pp. 392-393; Pellew, pp. 315-316.

[76] Monaghan, p. 399.

[77] Pellew, p. 317.

[78] Santvoord, pp. 71-72.

[79] Pellew, p. 318.

[80] Calabresi & Larsen, at 1135 (citing C. Vann Woodward, **Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction**, 62 (2d ed. 1956), pp. 161-162.

[81] Calabresi & Larsen, at 1136 (citing Alpheus T. Mason, "Extra Judicial Work for Judges: The Views of Chief Justice Stone", 67 *Harv. L. Rev.* 193, 209-16 (1953)).

[82] Calabresi & Larsen, p. 1137.

[83] Jane Nevins, "The Constitution Chronicles", *N.Y. Times Mag.* (September 22, 1985), https://www.nytimes.com/1985/09/22/magazine/the-constitution-chronicles.html.

[84] David Stout, "Bush Names Panel to Examine Intelligence on Iraq Weapons", *N.Y. Times* (February 6, 2004), https://www.nytimes.com/2004/02/06/international/middleeast/bush-names-panel-to-examine-intelligence-on-iraq.html.

[85] 28 U.S.C. § 991(a) (2008) (requiring that at least three members of the Commission be federal judges). While the Sentencing Commission's Sentencing Guidelines were previously mandatory, the Supreme Court eliminated their binding effect in 2005. *See United States v. Booker*, 543 U.S. 220 (2005).

[86] Calabresi and Larsen discuss proposed constitutional amendments to bar double duty from the early part of the nineteenth century, proposals that went nowhere. Calabresi & Larsen, p. 1135.

[87] Brian Naylor, "Trump's Defense Pick Challenges Rules Regarding Civilian Control of the Military", NPR (December 2, 2016), https://www.npr.org/2016/12/02/504165486/trumps-defense-pick-challenges-rules-around-civilian-control-of-the-military.

[88] Calabresi & Larsen, p. 1135, 1138.

Ralph Waldo Emerson and Oliver Wendell Holmes, Jr.: The Subtle Rapture of Postponed Power

ADAM H. HINES

Scholars often equate the intellectual revolution of the late nineteenth and early twentieth centuries with a rejection of the past. As a leader of the contemporaneous legal realist movement, Oliver Wendell Holmes Jr. is remembered as an iconoclast who renounced the conventional wisdom of his era to blaze a new path for American law. Yet even this father of legal realism had tethers to an earlier time, connections to the towering writer and lecturer—Ralph Waldo Emerson. Holmes loved Emerson from his youth to his death, and his admiration for the renowned poet affected every stage of the Justice's life. Emerson informed not only the language but also the rationale behind much of Oliver Wendell Holmes, Jr.'s thought.

Emerson and Holmes alike exhibited a disdain for charity and those incapable of supporting themselves. They expressed a mutual belief in the unavoidable nature of war. Each thinker placed his faith in the posthumous power of the written word. Emerson showcased his confidence in the free trade of ideas, a principle that Holmes famously advanced from the bench. Although Emerson was not a jurist, he explained the law as a transcript of human life, an idea that commonly resurfaced in Holmes' writings. They shared motivations, philosophy, literary devices, and even language. Holmes used an Emersonian style of cosmic grandeur and fondness for rebuffing the past. As Emerson's influence extended into the law via Holmes, it is an important enterprise for both intellectual history and legal history to discern Emerson's role, however subtle.

Recovering Emerson's effect on Holmes' judicial philosophy contributes to a broader revision of the master narrative of classical and realist legal thought. Scholars commonly construe legal realism as a rebuke of earlier ideologies, largely regarding Holmes as the father of legal realism.[1] Morton Horowitz describes Holmes, his

famous essay "The Path of the Law," and legal realism at large as "a fundamental break with theological and doctrinal modes of thought."[2] By unearthing the Emersonian roots of Holmes' thought, this study suggests that Holmes' philosophy, and by extension legal realism itself, was not the sharp rupture with the past that scholars traditionally imagine it to be. This investigation also harmonizes with the work of legal scholars who challenge the putative originality of Holmes and legal realism. Both Brian Tamanaha and David Rabban posit a version of Holmes indebted to the past, and the stream of ideas from Emerson to Holmes contributes to this same revisionist take.[3]

Holmes' reluctance to acknowledge his intellectual debts supports an underlying premise of this study: Emerson's philosophy and literary style appears throughout Holmes' work, even though the Justice never cited Emerson in his legal articles or judicial opinions. David Rabban alleges that Holmes "obscured his relationship to the intellectual history of his age" by exaggerating "his own originality while minimizing the contributions of others to his thought."[4] Another legal scholar makes a persuasive argument for "substantial parallels, linguistic as well as thematic, between Pomeroy's *Municipal Law* . . . and *The Common Law*."[5] Still other legal academics assert a similar connection between Holmes and his contemporary Christopher Langdell, which is significant because Holmes positioned himself as something of a rebuttal to Langdell.[6] That Holmes borrowed implicitly from Emerson as well offers further evidence of the Justice's willingness to appropriate concepts and language from other writers without crediting them.

Some scholars have examined Holmes' literary debts and even pointed out the sizable impact of Emerson's poetics, but this article argues that Emerson's influence extended beyond style to a substantive, philosophical connection. Thomas Grey claims that "The Path of the Law" takes on the standard "shape of a quest narrative" with an arc like that of Dante's trek through hell, purgatory, and paradise in **The Divine Comedy**. Grey's comparison of "The Path of the Law" to the enlightenment that Dante discovers in paradise is compelling, but he missed a more apt parallel—Emerson's "The American Scholar."[7] Holmes' biographer G. Edward White showcases Holmes' admiration for Emerson and declares that "Holmes regularly appropriated phrases and lines from Emerson's poetry and essays in his own writing."[8] Allen Mendenhall investigates the extent of Emerson and Holmes' literary relationship by examining Holmes' "dissents as an aesthetic genre." Mendenhall's analysis exposes that Holmes' "prose . . . exhibits superfluity . . . a series of dactyls and spondaic feet" that "create the sense of building pressure and then of sudden release or combustion."[9] Whereas Mendenhall focuses on Emerson and Holmes' linguistic connection, the present study concerns the continuity of ideas between the two figures. Just as Emerson's poetic language carried over into Holmes' dissents, the principles that Emerson expressed in his essays also exerted a considerable impact on Holmes.

Biographical Background

Ralph Waldo Emerson was born in 1803. His father was a church minister in Boston, Massachusetts, the family's hometown. Discipline and learning characterized Emerson's early life. Wealth, on the other hand, did not. His father's salary was enough to support the family, but after the father's death in 1811, Emerson's mother struggled to provide for her children. Despite his humble roots, Emerson would eventually attend Harvard and serve as class poet at graduation, a distinction Holmes would later share. Following his initial education at Harvard, Emerson graduated from Harvard

Divinity School and worked as a minister during his first marriage. After only two years of wedlock, his wife, Ellen Tucker, passed away in 1831. The year after Ellen's death, Emerson left the church and soon after began a new career as a lecturer. In 1837, three years into his lecturing, he delivered his famed speech, "The American Scholar." As Emerson's essays and poetry grew in popularity, his cultural authority expanded. He was a founding member of the transcendentalist movement, inspiring many nineteenth-century writers, such as Henry David Thoreau and Margaret Fuller. Emerson influenced those outside the world of literature as well, including a local Boston doctor's young son: Oliver Wendell Holmes, Jr.[10]

Oliver Wendell Holmes, Jr. was born to Dr. Oliver Wendell Holmes, Sr. and Amelia Lee Jackson in 1841. Holmes, Sr. was a physician, poet, and consummate man of letters who wrote many of his own notable essays. Thanks to his father's profession and family history, Holmes Jr. was born into wealth and status. He experienced an intellectually challenging upbringing. G. Edward White describes the dinner table conversation in the Holmes household as a "competition" with "participants scrambling for attention."[11] Holmes Jr. gained renown relatively early in life as a Civil War veteran. Holmes' first battle was at Ball's Bluff, where more than half of the 1,700 Union soldiers were either captured, killed, or wounded. Holmes was among those harmed. After this injury, the twenty-year-old Holmes returned to the war. Following Ball's Bluff, he took a bullet to the neck at the Battle of Antietam and suffered a foot injury from cannon shrapnel. After his eventual third wound, Holmes left his original regiment to act as a staff officer, out of the direct line of fire. Holmes beheld some of the war's most vicious fighting at the Battle of the Wilderness before he finally left the army in July 1864. The war imparted to Holmes a deep-seated respect for duty and a general cynicism that he would carry with him for the rest of his life. After the war, Holmes attended Harvard Law School and soon began the legal scholarship that led to a professorship at Harvard. However, Holmes, ever the man of action, left Harvard after a few months to serve on the Supreme Judicial Court of Massachusetts for twenty years before his eventual thirty-year tenure on the U.S. Supreme Court. In these roles, Holmes left his indelible mark on American history.[12]

Emerson in Holmes' Youth

The bond between Emerson's writings and Holmes' beliefs began with Holmes' early admiration for the poet. Holmes' own description of Emerson's role in his adolescence is telling. Late in Holmes' life, he still discussed Emerson, who had died forty-eight years earlier, in his correspondence and labeled him the "firebrand of my youth." In fact, Holmes wrote the above quotation in a letter in 1930, his ninetieth year, and he went on to explain that Emerson still "burns as brightly in me as ever."[13]

Holmes' first publication was itself an implicit tribute to Emerson. In 1858, the Harvard student magazine printed Holmes' essay—"Books." White's biography of Holmes describes "Books" as a thinlyveiled regurgitation of Emersonian principles. Holmes' desire to emulate Emerson was predictable. The young man had received two complete copies of the poet's work from separate people on his seventeenth birthday only eight months before the publication of "Books." Holmes adored Emerson, and apparently his friends and family knew it.[14] Though Holmes grew more intellectually bold as an undergraduate and left behind loose recreations of Emerson, such as "Books," his respect for Emerson did not wane. Years after "Books," Holmes, still an

Writing influential essays in the mid-nineteenth century, Ralph Waldo Emerson became a leading voice of American intellectual culture and transcendentalism. Although Oliver Wendell Holmes, Jr. never cited him in his legal writings, he was clearly influenced both by Emerson's poetic style and philosophy, particularly his ideas on self-reliance.

eager undergraduate, wrote an essay critical of the philosopher Plato and sent the piece to Emerson. According to Elizabeth S. Sergeant, both a frequent correspondent and brief biographer of Holmes, Emerson replied, "I have read your piece. When you strike at a king, you must kill him."[15] With "Books," Holmes looked to Emerson's ideas for guidance on his beliefs; when Holmes applied his own ideas to another thinker, in this case Plato, he sought approval from Emerson.

The Justice's own words reinforce Emerson's outsize impact on him. He recounted the following story to a friend through a letter in 1912: "When . . . I was still young, I saw him [Emerson] on the other side of the street and ran over and said to him: 'If I ever do anything, I shall owe a great deal of it to you, which was true. He was one of those who set one on fire—to impart a thought was the gift of genius.'"[16]

Echoes of Emerson

Some of the strongest parallels between the two men center on the idea of self-reliance. Emerson admired those who trudged through life with their own will and derided the "foolish philanthropist," who enabled others' indolence. Early in "Self-Reliance," an essay from 1841, Emerson exclaimed, "[D]o not tell me . . . of my obligation to put all poor men in good situations. Are they my poor?" Emerson's conscience did not demand that he share his wealth with the less fortunate. People in poverty had allowed the "smooth mediocrity and squalid contentment" of the world to limit them. In Emerson's eyes, any worthy person would "affront and reprimand" the worst in society and rise above it. If people failed to ascend, it was their own fault.[17]

Emerson's perception of the unfortunate explains why he so derided charitable organizations. He called any donation to "popular charities" and "education at college of fools" a "wicked dollar." Emerson admitted that he sometimes contributed to such causes but hoped he "shall have the manhood to withhold" in the future. The famed poet saw such charity as an excuse for the unwilling to go through life without achievement. As Emerson said, "[D]o your work, and I shall know you. Do your work, and you shall reinforce yourself."[18] If a person strove and found success, it was because of hard work. If an individual tried and failed, incompetence or laziness was the culprit. These principles composed the core of Emerson's ideal of independence.

Holmes' decision in *Buck v. Bell* (1927) embodied an Emersonian premium on self-reliance. The case centered around Carrie Buck, a woman housed in a mental health institution. According to the State of Virginia at the time, her alleged mental enfeeblement had been present in her family for three generations, and state law allowed for forced sterilization of such inmates. It is

important to note that all modern research shows that Carrie Buck was not mentally handicapped, nor was any member of her family.[19] Buck challenged the procedure, and the case made its way to the Supreme Court. Holmes' argument for the forced sterilization of Carrie Buck rested on his view of Buck and any of her potential children as a "sap [on] the strength of the state." This woman could not support herself, and Holmes believed that was reason enough to prevent her from bearing children. Informed by his time as a soldier, he compared the duty of sacrifice thrust upon those in the military to the burden of sterilization that Buck should endure for the good of the state. The presumed dependency of Buck's future children obviously troubled Holmes, who notoriously declared, "three generations of imbeciles are enough."[20] For Holmes, the government had little obligation to support and enable the enfeebled. He also considered eugenics a legitimate scientific movement, as did much of the educated, liberal class in America at this time, and his faith in this pseudo-science contributed to his decision in *Buck*.[21]

Holmes reflected the Emersonian premium on self-sufficiency not only in *Buck v. Bell* but also in his personal letters. One of Holmes' letters to longtime friend Harold Laski—an economics professor and brief chairman of the British Labour Party—demonstrates the harmonies between Holmes and Emerson on this issue. Holmes saw no legitimacy in "government's undertaking to rectify social desires." For instance, he found no merit in welfare programs: "as to the right of citizens to support and education I don't see it." There was no right to livelihood for Holmes. If people wanted income and work, they should fight for it. As he declared, "I see no right in my neighbor to share my bread . . . except so far as he . . . has the power to take it."[22] Holmes and Emerson understood success as a consequence of hard work, and the thought of others gaining it without effort bothered them.

If self-reliance was one central Emersonian theme that influenced Holmes, then war was another. In his 1841 essay, "Heroism," Emerson considered war a defining piece of society: "our culture . . . must not omit the arming of man." Conflict fostered growth and well-being from Emerson's point of view. The fight made a person more capable and worthy of praise. He claimed that any man "should not go dancing into the weeds of peace" but rather "take both reputation and life in his hands . . . dare the . . . mob by the absolute truth of his speech, and the rectitude of his behavior."[23] For Emerson, this approach inspired the best in people. Even though Emerson never served in the military, he held a martial ideal in high regard.

Holmes' first Memorial Day address, in 1884, demonstrated that he understood war and heroism in much the same way. In some sense, he considered the experience of war enlightening. From Holmes' point of view, war taught him and his comrades "that life is a profound and passionate thing." He decreed, "through our great good fortune, in our youth our hearts were touched with fire."[24] The fervor of war was, in a way, worth cherishing. Eleven years later in his Memorial Day speech "The Soldier's Faith," the Justice proclaimed that "as long as man dwells upon the globe, his destiny is battle . . . sooner or later we shall fall; but meantime it is for us to fix our eyes upon the point to be stormed, and to get there if we can."[25] Overall, Holmes carried Emerson's same belief in war as an inevitable part of human life. Unlike Emerson, however, Holmes could exhibit pessimism about war. In the same address in which he labeled the war "our great good fortune," Holmes also described the death he witnessed as "certain and useless."[26] Holmes could detest and admire war, but he firmly believed, as did Emerson, in both the value of a soldier's

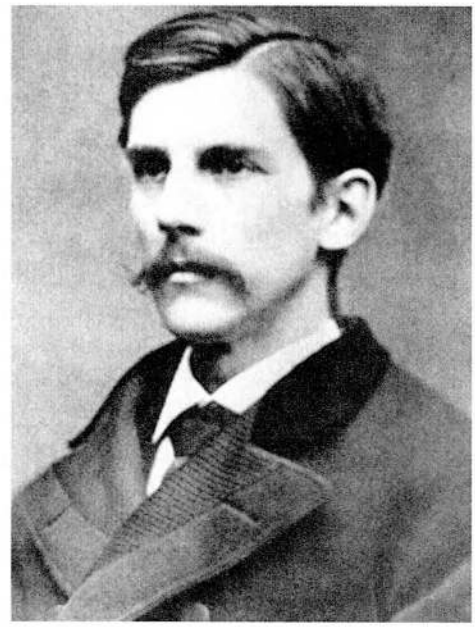
experience and the inevitability of human violence.

Alongside self-reliance and war, the abiding power of the written word was yet another Emersonian theme that reverberated in Holmes' work. In "The American Scholar," Emerson depicts the process of taking an idea from mere thought to an undying piece of writing: "It came to him, short lived actions; it went from him, immortal thoughts." For Emerson, once a thinker writes an idea down, it "flies" and "inspires . . . in proportion to the depth of the mind from which it was issued."[27] Emerson portrayed his belief in the power of ideas again in his essay "Intellect," where he asserted that the "intellections" of man can constitute "the immortality of man."[28] This trust in the posthumous power of the written word was fitting for a poet and lecturer such as Emerson. With his response to Holmes' essay on Plato, Emerson implicitly expressed this belief to Holmes. He directed the undergraduate Holmes to "strike at a king" only if he can "kill him." For in that case, the attack would be worthy for the lasting, even immortal, impact such a piece of writing would provide.

Holmes voiced a similar sentiment at the end of his lecture, "The Profession of the Law." He depicted a writer's ability for "postponed power" as the "secret isolated joy of the thinker." Holmes wanted students in the audience to understand the most alluring benefit of scholarship—that "a hundred years" after death, people "will be moving to the measure" of your thoughts.[29] Holmes' belief in the immortal longevity of words was consistent with his choice of profession, as judges often dissent in hopes that a future court will one day look back and vindicate their arguments. Holmes rebuked the Supreme Court in cases such as *Lochner v. New York* (1905) and *Abrams v. U.S.* (1919). Decades later in *West Coast Hotel Co. v. Parrish* (1937) and *Brandenburg v. Ohio* (1969), the Supreme Court validated Holmes' dissents in *Lochner* and *Abrams*, respectively. As a judge, Holmes used the enduring power of words to great effect.

Emerson promoted the marketplace of ideas, another concept that Holmes himself championed. Emerson explained in the 1844 essay "Politics" that only those "who build on ideas, build for eternity," and for these ideas to succeed they must prevail "in the population which permits" them. Emerson knew that principles held communities and nations together over time, as ephemeral human leaders came and went. Accordingly, he understood and promoted the importance of free speech in the proper functioning of democracy.

Holmes' dissent in *Abrams* relied on the same veneration of debate and the "free trade of ideas" that Emerson expressed in "Politics." In defending the right of Russian immigrants to distribute leaflets that denounced the U.S. government and called for revolution, Holmes reminded the Court



As an undergraduate at Harvard, Oliver Wendell Holmes, Jr. wrote an essay critical of the philosopher Plato and sent the piece to Emerson. Reportedly the poet and essayist replied, "I have read your piece. When you strike at a king, you must kill him." Above Holmes is pictured at age thirty-two.

that "time has upset many fighting faiths." Justice Holmes used this phrase to showcase that countless ideas populate the United States at any one time. Those "fighting faiths" most often fail because they lack the support to persevere over time. According to Holmes, the "best test of truth is the power" of such principles to be "accepted in the competition of the market."[30] Holmes ardently believed that the First Amendment protected the right to enter this battle of ideas.

Emerson also advanced a conception of law as a reflection of a society's humanity, a view that Holmes, too, endorsed. Toward the end of "Politics," Emerson contended that "we must trust infinitely to the beneficent necessity which shines through all laws. Human nature expresses itself in them as characteristically as in statues, or songs." The poet saw the ever-changing state of legal codes as an echo of humanity's own evolution. As people and societies transformed, so did their laws. "An abstract of the codes of a nation," he thought, presented a "transcript of common conscience."[31] In Holmes' canonical work **The Common Law** (1881), he portrayed a remarkably similar take of the law. Instead of music or sculpture, Holmes likened the law to a story that "embodies . . . a nation's development through many centuries."[32] Holmes believed in the same parallel relationship between humanity and its laws. The law acts as a "great anthropological document," according to an introduction he wrote for a compilation of legal histories. He went on to claim that the law "more than any other history tells the story of a race."[33] Legal realists often prided themselves on the supposed novelty of understanding law in a broader societal context, but as the parallels between Emerson and Holmes suggest, such novelty was overstated.

Legal history, like all of history, transpired as a piece of a broader era. Emerson's contributions to Holmes' thought underscore that legal history did not exist apart from external influences. The culture of any given period bleeds over into the work that people produce during that time. Consequently, legal historiography should always strive to account for the external influences on legal development, even when legal actors in history were obtuse about such influences acting upon them. An interdisciplinary approach is all the more necessary when writing about Holmes, who was influenced by non-legal thinkers such as Emerson. To put a finer point on it, a Holmesian approach is required to study Holmes.

"The American Scholar" and "The Path of the Law"

A close comparison of Emerson's "The American Scholar" with Holmes' "The Path of the Law" confirms the continuous line of thought between the two men. Emerson delivered "The American Scholar" in 1837 before the Harvard chapter of the Phi Beta Kappa society. In a sense, Holmes' connection to the work predates his birth; Oliver Wendell Holmes, Sr. was in the audience that night.[34] Holmes' essay "The Path of the Law," which appeared in the *Harvard Law Review* in 1897, developed into one of Holmes' most consequential works of legal theory. Although he never used the term "legal realism" in the essay, the article remains foundational for legal realism—a theory of the law that calls for an emphasis on social utility and lived experience.

In each articles' last pages, both Emerson and Holmes strive to provide an extra worldly weight to their respective fields, and the similarity of their final lines is striking. For Holmes it is the study of the law and for Emerson the study of letters, but they both apply a cosmic level of importance to their ideas. Emerson wrote,

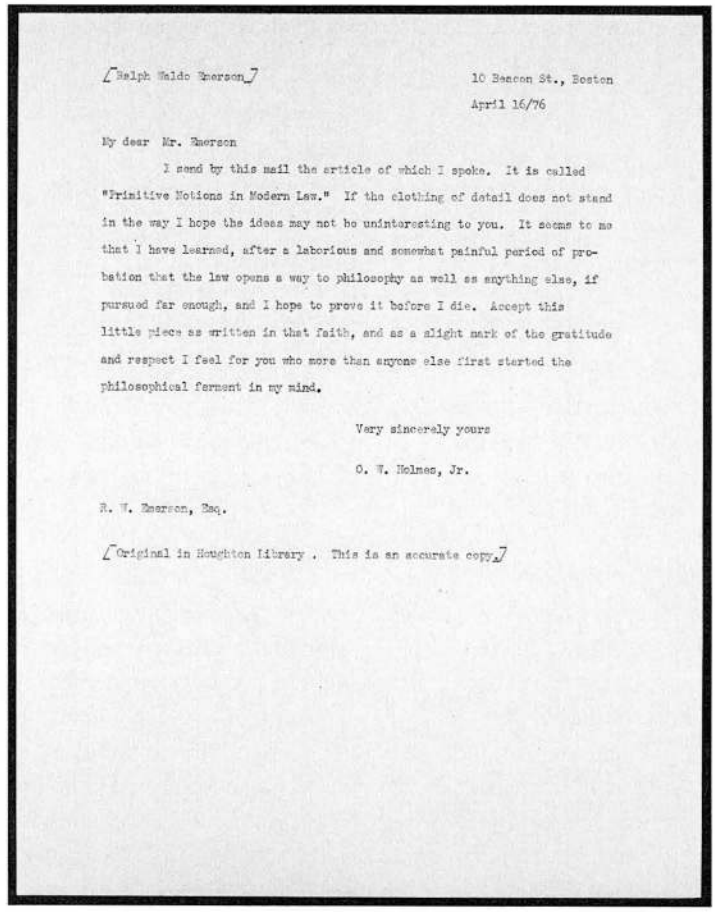
> We will walk on our own feet; we will work with our own hands; we will speak our own minds. The

> study of letters shall be no longer a name for pity, for doubt, and for sensual indulgence. The dread of man and the love of man shall be a wall of defense and a wreath of joy around all. A nation of men will for the first time exist because each believes himself inspired by the Divine Soul which also inspires all men.[35]

Holmes reached a similar level of grandeur in the final few lines of "The Path of the Law":

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[36]

Emerson labeled the inspiration as the "Divine Soul," whereas Holmes named his calling "an echo of the infinite" and "the



[Ralph Waldo Emerson]

10 Beacon St., Boston
April 16/76

My dear Mr. Emerson

I send by this mail the article of which I spoke. It is called "Primitive Notions in Modern Law." If the clothing of detail does not stand in the way I hope the ideas may not be uninteresting to you. It seems to me that I have learned, after a laborious and somewhat painful period of probation that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die. Accept this little piece as written in that faith, and as a slight mark of the gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind.

Very sincerely yours

O. W. Holmes, Jr.

R. W. Emerson, Esq.

[Original in Houghton Library. This is an accurate copy.]

Holmes sent one of his early pieces of legal scholarship to Emerson, accompanied by this April 16, 1876, letter. In the process, Holmes left behind an indication of his own perspective on their intellectual relationship. He explained to the poet and lecturer that, through the law, he hoped to find a way back to his love for philosophy, a piece of him that Emerson first inspired.

universal law," thereby emulating the passion and the prose of Emerson.

The essays share other stylistic similarities. Throughout "The American Scholar," Emerson identified the appropriate state of the scholar as "Man Thinking." For Emerson, this "Man Thinking" embodied an intelligent man of action. The role for "Man Thinking" was "to cheer, to raise, and to guide men." Emerson's other work was rife with this same literary device. Emerson habitually assigned a descriptor to a type of "man" or group of "men" and went on to use that idea to invoke an image or principle. In "Heroism," he used the "wise man" to showcase the benefit of "those rarer dangers which . . . invade men."[37] The "old statesman" was the source of authentic knowledge in "Politics."[38] In "The Poet," Emerson presented "the Knower, the Doer, and the Sayer" as three different kinds of love.[39]

In "The Path of the Law," Holmes' use of "the bad man" was a cynical use of the same literary construction. Where Emerson used "Man Thinking" to improve the public image of the scholar, Holmes applied "the bad man" to explain his technical take on the law. According to Holmes, if people perceive the law as a "bad man," they realize that "the material consequences" of the law matter more than any moral concern. The "bad man" became short hand for this idea in the same way that "Man Thinking" was Emerson's call sign for the ideal scholar.

The link between these two texts goes beyond language, style, or eventual success. Holmes' motivations in "The Path of the Law" parallel Emerson's desires for "The American Scholar." They both sought to buck the orthodoxies of an earlier day. Emerson proposed and successfully created a new standard for American literary culture with "The American Scholar." He declared that "we have listened too long to the courtly muses of Europe."[40] Emerson wanted Americans to tear themselves away from the past in favor of new American literature and philosophy. He emphasized the idea in "Self-Reliance" as well. Emerson admitted that he was "ashamed" of "how easily we capitulate . . . to large societies and dead institutions." Toward the end of "Self-Reliance," he proclaimed that he hoped "we have heard the last of conformity and consistency . . . a true man belongs to no other time or place."[41]

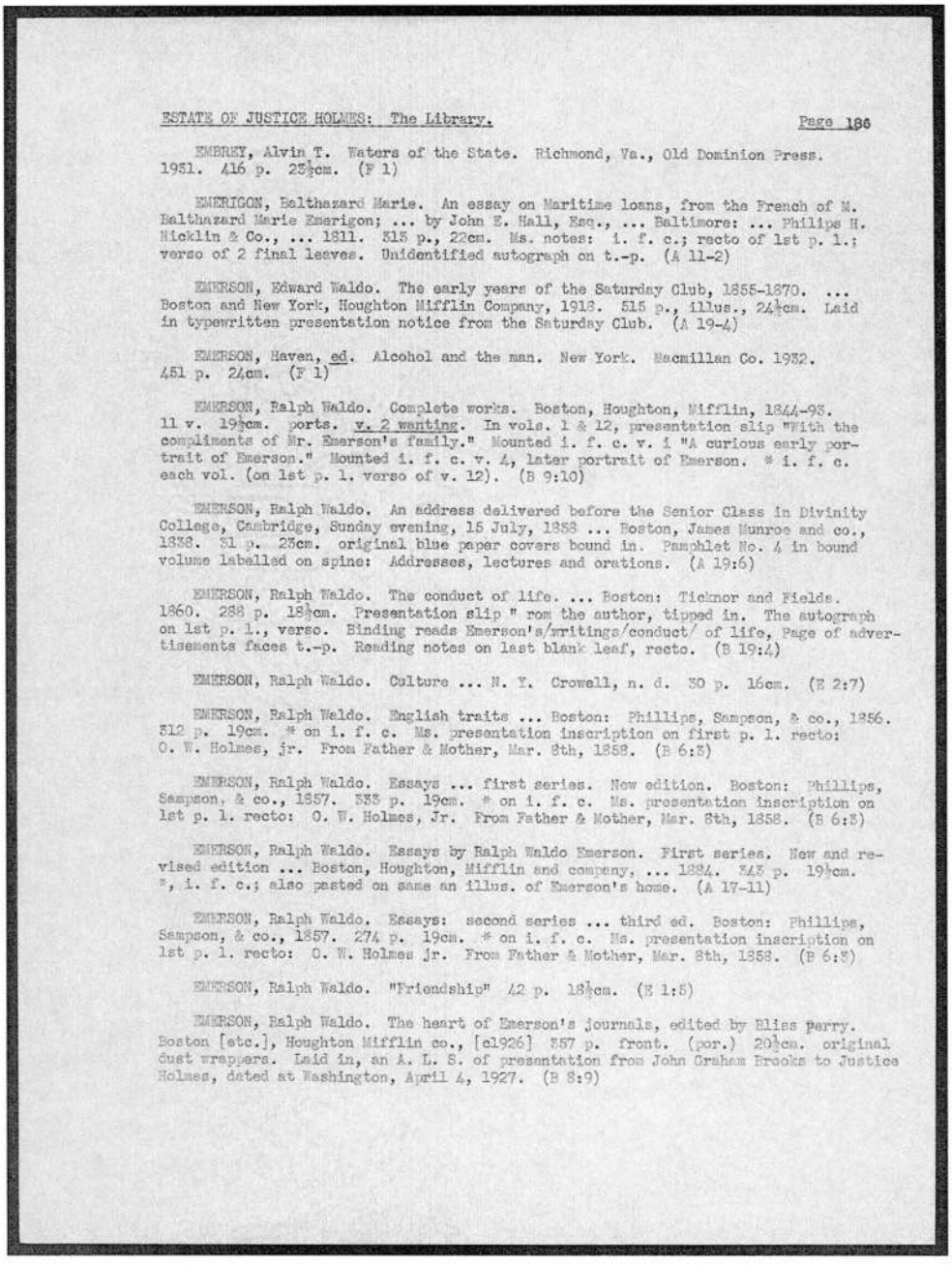
Holmes dwelled on this same goal in "The Path of the Law." He believed that if the law were to "lose the fossil records of a good deal of history," the profession would rid itself "of an unnecessary confusion" and "gain very much in clearness of . . . thought." Holmes went as far as to say that he looked forward "to a time when the part played by history . . . shall be very small." As Holmes described it, the legal field needed to "spend...energy on the study of ends" in the present moment.[42] An intense desire to effect change motivated both Emerson and Holmes.

Emerson's Scholar

Holmes was more than a soldier, scholar, and Supreme Court Justice. He was a poet. Allen Mendenhall's analysis reveals the importance of Emerson's poetics for Holmes' dissents. Indeed, under Emerson's definition, much of Holmes' work would qualify as poetry. Emerson characterized poetry in "The Poet" not as lines of verse but as "a meter-making argument."[43] Mendenhall demonstrates that Holmes' prose included literal poetic meter.[44] Holmes' most famous Supreme Court opinions persist today because they combined a convincing argument with this arresting literary style. He declared in *Abrams v. U.S.* (1919) that every day in America "we have to wager our salvation" upon the Constitution—a document he called a "prophecy based upon imperfect knowledge."[45] In *Gitlow v. New York* (1925), he reminded Americans that "eloquence may set fire to reason."[46] According to Emerson's

description in "The Poet," a poem is "a thought so passionate and alive" that it "adorns nature with a new thing."[47] Holmes' work perseveres because, with his own passion and lyrical prose, he adorned legal history with something new.

Holmes' voice echoed Emerson likely because Holmes' life adhered to Emerson's ideals. Oliver Wendell Holmes, Jr. was the American scholar whom Emerson hoped to inspire; Holmes was "Man Thinking." Emerson's model scholar was one who put



ESTATE OF JUSTICE HOLMES: The Library. Page 186

EMBREY, Alvin T. Waters of the State. Richmond, Va., Old Dominion Press. 1931. 416 p. 25½cm. (F 1)

EMERIGON, Balthazard Marie. An essay on Maritime loans, from the French of M. Balthazard Marie Emerigon; ... by John E. Hall, Esq., ... Baltimore: ... Philips H. Nicklin & Co., ... 1811. 515 p., 22cm. Ms. notes: i. f. c.; recto of 1st p. l.; verso of 2 final leaves. Unidentified autograph on t.-p. (A 11-2)

EMERSON, Edward Waldo. The early years of the Saturday Club, 1855-1870. ... Boston and New York, Houghton Mifflin Company, 1918. 515 p., illus., 24½cm. Laid in typewritten presentation notice from the Saturday Club. (A 19-4)

EMERSON, Haven, ed. Alcohol and the man. New York. Macmillan Co. 1932. 451 p. 24cm. (F 1)

EMERSON, Ralph Waldo. Complete works. Boston, Houghton, Mifflin, 1844-93. 11 v. 19½cm. ports. v. 2 wanting. In vols. 1 & 12, presentation slip "With the compliments of Mr. Emerson's family." Mounted i. f. c. v. 1 "A curious early portrait of Emerson." Mounted i. f. c. v. 4, later portrait of Emerson. * i. f. c. each vol. (on 1st p. l. verso of v. 12). (B 9:10)

EMERSON, Ralph Waldo. An address delivered before the Senior Class in Divinity College, Cambridge, Sunday evening, 15 July, 1838 ... Boston, James Munroe and co., 1838. 31 p. 23cm. original blue paper covers bound in. Pamphlet No. 4 in bound volume labelled on spine: Addresses, lectures and orations. (A 19:6)

EMERSON, Ralph Waldo. The conduct of life. ... Boston: Ticknor and Fields. 1860. 288 p. 18½cm. Presentation slip " rom the author, tipped in. The autograph on 1st p. l., verso. Binding reads Emerson's/writings/conduct/ of life, Page of advertisements faces t.-p. Reading notes on last blank leaf, recto. (B 19:4)

EMERSON, Ralph Waldo. Culture ... N. Y. Crowell, n. d. 30 p. 16cm. (E 2:7)

EMERSON, Ralph Waldo. English traits ... Boston: Phillips, Sampson, & co., 1856. 312 p. 19cm. * on i. f. c. Ms. presentation inscription on first p. l. recto: O. W. Holmes, jr. From Father & Mother, Mar. 8th, 1858. (B 6:3)

EMERSON, Ralph Waldo. Essays ... first series. New edition. Boston: Phillips, Sampson, & co., 1857. 333 p. 19cm. * on i. f. c. Ms. presentation inscription on 1st p. l. recto: O. W. Holmes, Jr. From Father & Mother, Mar. 8th, 1858. (B 6:3)

EMERSON, Ralph Waldo. Essays by Ralph Waldo Emerson. First series. New and revised edition ... Boston, Houghton, Mifflin and company, ... 1884. 343 p. 19½cm. *, i. f. c.; also pasted on same an illus. of Emerson's home. (A 17-11)

EMERSON, Ralph Waldo. Essays: second series ... third ed. Boston: Phillips, Sampson, & co., 1857. 274 p. 19cm. * on i. f. c. Ms. presentation inscription on 1st p. l. recto: O. W. Holmes jr. From Father & Mother, Mar. 8th, 1858. (B 6:3)

EMERSON, Ralph Waldo. "Friendship" 42 p. 18½cm. (E 1:5)

EMERSON, Ralph Waldo. The heart of Emerson's journals, edited by Bliss Perry. Boston [etc.], Houghton Mifflin co., [c1926] 357 p. front. (por.) 20½cm. original dust wrappers. Laid in, an A. L. S. of presentation from John Graham Brooks to Justice Holmes, dated at Washington, April 4, 1927. (B 8:9)

This inventory of Holmes' books shows that as a life-long reader of Emerson he possessed a large collection of the essayist's works.

his intellect to work. As he explained in "The American Scholar," a "true scholar" perceives "every opportunity of action past by, as a loss of power." According to Emerson, action set the scholar apart from the studious recluse. He believed that such deeds allowed "thought" to "ripen into truth." From Emerson's standpoint in "The American Scholar," a scholar should exert the force of his ideas on the world and "run eagerly" into the "resounding tumult." The resulting "fit actions" would have the "richest return of wisdom."[48] Emerson's American scholar would set forth with new ideas unbound to tradition and apply his mind to meaningful actions.

Holmes embodied these ideals. His undergraduate academic life was a success. He took part in many of Harvard's social clubs, involved himself in the appropriate amount of mischief, and acted as class poet during graduation.[49] But this world could wait. At twenty, he was willing to leave behind his education to fight in the Civil War. Holmes knew that by leaving early to enlist, he would forfeit his degree, and he did not care. For the young Holmes, this grave moment of action was more important than his bookwork. Nevertheless, Holmes' father stepped in and convinced his son to return for graduation before the war.[50] Toward the end of his service in 1864, Holmes wrote to a friend calling the war "a crusade in the cause of the whole civilized world."[51] The young Holmes saw a cause that he believed in and took Emerson's advice. He acted.

Holmes remained a man of action his entire life. Indeed, his choice of profession supported this ideal. Holmes applied his intellectual skill to the law, where he directly affected the course of people's lives and liberties. The legal field is scholarship-in-action. Whereas much of academia exists to expand human knowledge as an end in itself, the law exerts an active force on the lives of the entire population. In 1882, Holmes was less than a year into his tenure as an endowed professor at Harvard when he leapt at the chance to serve as a justice on the Supreme Judicial Court of Massachusetts. His abrupt transition from the ivory tower to the courtroom vividly captures Holmes' eagerness to put his intellect into action. Twenty years later, he left the Massachusetts court for the U.S. Supreme Court, where he toiled until the age of ninety-one, unwilling to step away from an arena where his ideas often had immediate and far-flung implications for public policy. Holmes, as much as any contemporary, was the persistent, intelligent, and lively American scholar whom Emerson idealized.

Holmes not only cultivated Emersonian ideals in his own life but also admired them in his peers. Justice Louis D. Brandeis personified Emerson's action-oriented scholar much in the same way as Holmes. Once Brandeis joined the Supreme Court in 1916, an intimate, intellectual relationship developed between the two. Five years later, Holmes expressed that Brandeis "always gives me a glow" and "feels to me as a friend—as certainly I do to him."[52] The seventy-nine-year-old Holmes explained later in the same year that Brandeis "seems to me to see deeper than some of the others —and we often agree."[53] Brandeis, like Emerson's "man thinking" and Holmes, applied his intellect to the public good. Before and during his tenure on the Court, Brandeis threw his will and time behind reform efforts. He conceived of and helped to implement savings bank life insurance, took part in some of the earliest *pro bono publico* legal work, and fiercely supported the creation of a Jewish state in Palestine.[54] His dissent in *Olmstead* even contains high-minded, poetic prose akin to that of Emerson and Holmes: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."[55] Holmes' and Brandeis' friendship suggests that Holmes' commitment to Emerson's principles ran deep enough to influence both his life and his relationships.

Nevertheless, Holmes did not fit the mold of Emerson's transcendentalist literary movement. Emerson wrote an essay dedicated to defining transcendentalism, appropriately entitled "The Transcendentalist," and his characterization of the subject suggests little of Holmes' ideology. Emerson asserted that a transcendentalist "believes in miracle" and maintains a trust in "inspiration" and "ecstasy."[56] Holmes' philosophy was not so bright. In one of his letters, he characterized mankind as "flies . . . swept away by a pestilence—here multiplying unduly and paying for it."[57] Holmes was a pragmatist and even a cynic, and no evidence suggests he went looking for "inspiration" or "ecstasy" through spirituality.

Conclusion

While it is difficult to know the extent to which the Emersonian cast of Holmes' thought was self-conscious rather than subconscious, Holmes was a lifelong reader of Emerson who consistently affirmed Emersonian beliefs. From the benefits of self-sufficiency and the ever-present threat of war to the immortality of writing and the nature of the law itself, their works reveal significant commonalities.

The harmony among these two men extended beyond influence and agreement. Emerson and Holmes also shared a common contradiction. They both exalted the "postponed power" of the written word and hoped that their ideas would maintain a lasting influence. Yet each man also encouraged breaking with the past in favor of fresh ideas. Emerson and Holmes wanted to elevate the enduring impact of their own ideas while rejecting the philosophies of past generations. This shared inconsistency reflects a paradox that exists within much of intellectual history. Although thinkers present new ideas, the various experiences and influences in their past inform their arguments. No creative act, whether academic or artistic, is wholly original. Additions to human knowledge are necessarily extensions of what came before them. But people desire ownership over their ideas and so often present their creations, as did both Emerson and Holmes, as a radical step forward. On the other hand, as human beings with only a fleeting amount of time on Earth, the immortal power of words has a natural appeal. People hope that the concepts they create will live on, giving them a longevity that their bodies cannot sustain.

The story of Emerson and Holmes reminds us of the powerful, if paradoxical, desire to efface the contributions of previous generations while still leaving an indelible mark on those yet to come. We thus cannot trust a given historical actor's footnotes, or even private correspondence, to furnish us with a total picture of their intellectual lineage. A proper study of the law's intellectual history must extend beyond recorded acknowledgements to the tenor of a text, with an eye toward unspoken debts. Then, we will find amid the most innovative ideas, the unmistakable echoes of an earlier day.

ENDNOTES

[1] For example, see the pieces first cited in Neil Duxbury, "The Birth of Legal Realism and the Myth of Justice Holmes," *Anglo-American Law Review*, 20, (1991): 81-100. B.R. Burrus, "American Legal Realism," *Howard Law Journal*, Vol. 8, (1962): 36, 37-38. R.J. Savarese, "American Legal Realism," *Houston Law Review*, Vol. 3, (1965): 180, 186-187. E. Hunter Taylor, Jr., "H.L.A. Hart's Concept of Law in the Perspective of American Legal Realism," *Modern Law Review*, Vol. 35, (1972): 606, 611. K.N. Llewellyn, "Legal Illusion, *Columbia Law Review*, Vol. 31, (1931): 82, 84. (From Llewellyn's point of view, Holmes was the seminal scholar "from whom we [realists] all derive."). *See also* Duncan Kennedy, **The Rise & Fall of Classical Legal Thought**, (Washington, D.C.: Beard Books, 2006), p. 264. (Duncan Kennedy's work defines Holmes' legal thought as one of "post-Civil War disillusionment with an old ethos.") William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in**

America, 1886-1937, (New York: Oxford University Press, 1998), p. 179. (Wiecek takes a more measured stance on legal realism's innovation but still states that Holmes "contributed to subverting classical legal thought" with legal realism.)

[2] Morton Horowitz, **The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy** (New York: Oxford University Press, 1992), p. 142.

[3] Brain Tamanaha, **Beyond the Formalist-Realist Divide** (Princeton: Princeton University Press, 2010), p. 215, 67-70. David Rabban, **Law's History: American Legal Thought and the Transatlantic Turn to History** (New York: Cambridge University Press, 2013), p. 215.

[4] Rabban, **Law's History**, p. 215.

[5] Eleanor N. Little, "The Early Reading of Justice Oliver Wendell Holmes," (8 Harvard Bulletin, 1954) in Rabban, **Law's History**, p. 181.

[6] R. Blake Brown and Bruce A. Kimball, "When Holmes Borrowed from Langdell: The Ultra Legal Formalism and Public Policy of Northern Securities (1904)," *American Journal of Legal History*, Vol. 45, (2001): 302, 321.

[7] Thomas Grey, "Plotting the Path of the Law," *Brooklyn Law Review*, Vol. 63, (1997): 28.

[8] G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (New York: Oxford University Press, 1993), p. 43.

[9] Allen Mendenhall, **Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon: Aesthetic Dissent and the Common Law** (London: Bucknell University Press, 2017), pp. 16, 20-22, 69-70. (Mendenhall argues that this poetic style lent Holmes' writing the power it still maintains and mainly attributes this elegance to Emerson's imprint on the Justice.)

[10] Robert Richardson, **Emerson: The Mind on Fire** (Berkeley: University of California Press, 1995), pp. 18-19, 577.

[11] White, **Law and the Inner Self**, pp. 10-13.

[12] *Id.*, pp. 52, 56, 60, 65.

[13] Holmes to Fredrick Pollock, May 20, 1930, in **The Essential Holmes**, ed. Richard Posner (London: University of Chicago Press, 1992), p. 16.

[14] White, **Law and the Inner Self**, pp. 35-36.

[15] Elizabeth S. Sergeant, **Fire under the Andes** (Port Washington: Kennikat Press, 1927), p. 315. *See also* Holmes to Elizabeth S. Sergeant, December 7, 1926, Harvard Law School Library Digital Suite, https://iiif.lib.harvard.edu/manifests/view/drs:43097596$20i (accessed January 16, 2019).

[16] Holmes to Patrick Sheenan, October 27, 1912, in **The Essential Holmes**, ed. Posner, p. 64.

[17] Ralph Waldo Emerson, "Self-Reliance," in **The Essential Writings of Ralph Waldo Emerson**, ed. Brooks Atkinson (New York: Random House, 2000), pp. 135, 139.

[18] Emerson, "Self-Reliance," in **The Essential Writings of Ralph Waldo Emerson**, pp. 136-137.

[19] Paul A. Lombardo, "Carrie Buck's Pedigree," *Journal of Laboratory and Clinical Medicine*, Vol. 134, (2001) pp. 278-282.

[20] Holmes, *Buck v. Bell* 274 U.S. 200, 207 (1927).

[21] Susan-Mary Grant, **Oliver Wendell Holmes, Jr.: Civil War Soldier, Supreme Court Justice** (New York: Routledge, 2016), pp. 158-159. "Eugenics at that time had solid scientific currency . . . and merges with some aspects of progressive thinking . . . Holmes' opinion, when delivered, may not have seemed as chilling to his peers as it has to posterity."

[22] Holmes to Harold Laski, July 23, 1925, in **The Essential Holmes**, ed. Posner, pp. 140-141.

[23] Emerson, "Heroism," in **The Essential Writings of Ralph Waldo Emerson**, ed. Atkinson, p. 228.

[24] Holmes, "Memorial Day," in **The Essential Holmes**, p. 86.

[25] Holmes, "The Soldier's Faith," May 30, 1895, in *ibid.*, pp. 88-89.

[26] Holmes, "Memorial Day Address," May 30, 1884, in *ibid.*, p. 84.

[27] Emerson, "The American Scholar," in **The Essential Writings of Ralph Waldo Emerson**, p. 46.

[28] Emerson, "Intellect," in *ibid.*, p. 266.

[29] Holmes, "The Profession of the Law," in **The Essential Holmes**, p. 220.

[30] Holmes, dissenting in *Abrams v. U.S.* 250 U.S. 616, 630 (1919).

[31] Emerson, "Politics," in **The Essential Writings of Ralph Waldo Emerson**, p. 384.

[32] Holmes, **The Common Law**, in **The Essential Holmes**, p. 237.

[33] Oliver Wendell Holmes Jr. in John Henry Wigmore, **A General Survey of Events, Sources, Persons, and Movements in Continental Legal History** (Boston: Little, Brown, and Company, 1912), p. 14.

[34] Louis Menand, **The Metaphysical Club** (New York: Farrar, Straus and Giroux, 2001), p. 17.

[35] Emerson, "The American Scholar," in **The Essential Writings of Ralph Waldo Emerson**, p. 59.

[36] Holmes, "The Path of the Law," *Harvard Law Review*, Vol. 10, 1897, in **The Essential Holmes**, p. 177.

[37] Emerson, "Heroism," in **The Essential Writings of Ralph Waldo Emerson**, p 234.

[38] Emerson, "Politics," in *ibid.*, p. 378.

[39] Emerson, "The Poet," in *ibid.*, p. 289.

[40] Emerson, "The American Scholar," in **The Essential Writings of Ralph Waldo Emerson**, p. 59.

[41] Emerson, "Self-Reliance," in *ibid.*, pp. 139-140.

[42] Holmes, "The Path of the Law," in **The Essential Holmes**, p. 174.

[43] Emerson, "The Poet," in **The Essential Writings of Ralph Waldo Emerson**, p. 290.

[44] Allen Mendenhall, **Dissent and the Common Law**, p. 20. "The sound of Holmes's prose in *Gitlow* exhibits superfluity. He follows a series of dactyls with spondaic feet ... 'Eloquence [stress/slack/slack] may set fire [stress/stress/stress/slack] to reason [stress/slack/slack].'"

[45] Holmes, dissenting in *Abrams v. U.S.* 250 U.S. 616, 630 (1919).

[46] Holmes, dissenting in *Gitlow v. New York* 268 U.S. 652, 673 (1925).

[47] Emerson, "The Poet," in **The Essential Writings of Ralph Waldo Emerson**, p. 290.

[48] Emerson, "The American Scholar," in **The Essential Writings of Ralph Waldo Emerson**, pp. 50-51.

[49] White, **Law and the Inner Self**, p. 8.

[50] Menand, **The Metaphysical Club**, p. 32.

[51] Holmes to Charles Eliot Norton, April 17, 1864, Harvard Law School Library Digital Suite, https://iiif.lib.harvard.edu/manifests/view/drs:4302614$1i (accessed September 20, 2018).

[52] Holmes to Harold Laski, January 12, 1921, in **The Essential Holmes**, p. 35.

[53] Holmes to Nina Gray, March 5, 1921, quoted in White, **Law and the Inner Self**, p. 319.

[54] Melvin I. Urofsky, "The Legacy of Louis D. Brandeis," *Journal of Appellate Practice and Process*, Vol. 13 (2012): 189-197.

[55] Louis D. Brandeis dissenting in *Olmstead v. U.S.* 277 U.S. 438, 479 (1928).

[56] Emerson, "The Transcendentalist," in **The Essential Writings of Ralph Waldo Emerson**, p. 84.

[57] Holmes to Harold Laski, July 23, 1925, in **The Essential Holmes**, pp. 140-141.

The Supreme Court and Property Rights in the Progressive Era

JAMES W. ELY, JR.

The Progressive Movement dominated American political culture during the first two decades of the twentieth century.[1] Although historians continue to debate the nature of Progressivism in those years, the movement was characterized by certain central tenets: Increase of governmental authority, both federal and state over the economy; hostility to the central role of private property rights in constitutional jurisprudence; rejection of individualism in favor of statist ideology; and confidence in administrative agencies, supposedly staffed by nonpartisan experts, to formulate and carry out policy. Progressives displayed little interest in claims of individual right and the plight of racial minorities. They were hostile to doctrines, such as the separation of powers, which constrained the reach of active government.[2] "Among the most durable and controversial characteristics of Progressive legal thought," Herbert Hovenkamp has perceptively observed, "were its distrust of the market and its faith that the governmental agency, whose salaried officials did not profit from their decisions, could regulate the economy better."[3] This statist philosophy set the stage for the administrative state and represented a sharp break from the prevailing constitutional norms of the nineteenth century, with its insistence on limited government and respect for property and contractual rights.[4]

For our purposes, it is important to bear in mind that political figures and scholars associated with the Progressive Movement directed much of their fire at the judiciary, including the Supreme Court, which they pictured as a barrier to their reform agenda. In 1912, Senator Robert M. LaFollette of Wisconsin forcefully articulated this sentiment: "Gradually the judiciary began to loom up as the one formidable obstacle which must be overcome before anything substantial could be accomplished to free the public from the exactions of oppressive monopolies and from the domination of the property interests."[5]

At the same time, Theodore Roosevelt launched a broadside against both state

courts and the Supreme Court, charging that they "have placed well-nigh or altogether insurmountable obstacles in the path of needed social reforms."[6] Deeply distressed by the federal and state courts, many Progressives reopened the question of the legitimacy of judicial review and advanced proposals for the recall of state judges and state judicial decisions.[7] They strongly urged judicial deference to legislative determinations.

A contrary thesis—that in the area of property rights, the Supreme Court largely accommodated the Progressive agenda, and that the barrage of criticism was in fact misplaced—is offered here, along with an argument maintaining that the Supreme Court of the Progressive Era diminished the protection afforded the rights of property owners under traditional constitutional principles. In so doing, the Supreme Court opened the door for New Deal jurisprudence to relegate property and contractual rights to a secondary place in constitutional law, one from which they have yet to recover. To develop these points, the rulings of the Supreme Court pertaining to property rights issues arising from Progressive Era legislation will be canvassed, even though in some cases the decisions came after the years of the Progressive Movement.

Tenement Reform

Tenement reform in the first decade of the twentieth century is a good place to start. Reformers repeatedly condemned urban congestion and urged the enactment of laws to secure better housing for the poor. Problems relating to light, ventilation, sanitation, and fire protection were especially

In 1906, the Supreme Court unanimously affirmed a lower court ruling validating the New York State Tenement House Act of 1901. The law required that new buildings must be built with outward-facing windows in every room, an open courtyard, proper ventilation systems, indoor toilets, and fire safeguards. The author argues that the decision, which demonstrated the Court's willingness to uphold regulations that imposed expenses on property owners in order to promote public health and safety, is but one example of the Justices' willingness to accommodate property regulation in the Progressive Era.

pressing. The landmark New York Tenement House Act of 1901, passed in response to these concerns, required owners of existing tenements to provide enhanced fire protection and to install windows as well as modern sanitary facilities, running water, and waterproof cellars. It also tightly regulated the construction of future tenement buildings. The owners disliked the sizeable expenses imposed by the law and contended that the measure amounted to a confiscation of property.[8] When New York City instituted enforcement procedures against a landlord, she mounted a challenge to that part of the measure that mandated the installation of new toilet facilities. The defendant, an owner of an existing tenement, argued that the expense of furnishing such new accommodations amounted to an unconstitutional taking of property without compensation. Brushing aside this contention, the New York Court of Appeals, the state's highest court, sustained the law as a proper exercise of the police power to safeguard public health.[9] In 1906, the Supreme Court unanimously affirmed the New York ruling without opinion, demonstrating its willingness to uphold regulations that imposed expenses on property owners to promote public health and safety.[10] Its decision paved the way for legislation to address the problems of slum housing, and the New York law became a model for legislation in other states.[11]

Land Use Regulations

Throughout the nineteenth century, the primary means of land use control was the common law doctrine of nuisance, which was codified in some cities. The Supreme Court was receptive to local laws that banned certain activities in the nature of nuisances. For example, in 1915, the Court had no difficulty in sustaining a Little Rock ordinance prohibiting the maintenance of livery stables in residential neighborhoods.[12] An even more striking example was presented in *Hadachek v. Sabastian* (1915). The petitioner owned a brickyard that had been established before there was any residential housing in the vicinity. The City of Los Angeles later enacted an ordinance barring brickyards in certain areas of the city. This action forced the petitioner to shut his business, incurring a sizeable loss in the value of his land. He charged that this measure amounted to a deprivation of his property without compensation in violation of the Fourteenth Amendment. But this plea fell on deaf ears. Invoking an almost unlimited understanding of the police power, which the Court recognized might "seem harsh in its exercise," it found no violation of constitutionally protected property rights.[13] Absent nuisance, however, generally speaking, individual property owners were free to develop land as they wished.

By the turn of the twentieth century, however, there was increased interest in improving the quality of urban life. Reflecting this spirit, many cities enacted ordinances restricting billboards.[14] The Supreme Court readily sustained such measures. Ruling that a Chicago ban on billboards in residential areas was a proper exercise of the police power to protect the health, safety, and morality of the community, the Court brushed aside a contention that the ordinance arbitrarily deprived the sign company of property without due process of law.[15]

Laws limiting the height of buildings, moreover, were enacted in a number of cities, including Chicago and Boston. Congress regulated the height of building in the District of Columbia in 1899. These restrictions were driven by safety and health considerations. Observers harbored concerns about the novel but untested construction technology that made it possible to erect tall buildings and about the difficulty of fighting fires in the upper floors of such structures. It

was also noted that the erection of tall structures could exclude light and air, thus affecting public health.

As with the tenement reform laws and measures banning nuisance-like activities, the Supreme Court again proved sympathetic to these fledgling efforts to impose land-use controls. At issue in *Welch v. Swasey* (1909) was a statute imposing a lower height limit on building in residential areas than in commercial areas in Boston.[16] The plaintiff alleged that the statute, as applied to districts with the lower height restrictions, amounted to a taking of property without compensation. Speaking for a unanimous Court, Justice Rufus W. Peckham rejected this argument. He reasoned that the distinction between commercial and residential areas was reasonable in view of the greater fire hazards with tall buildings. Peckham pointed out that the restriction did not deprive the owner of profitable use of his property. He raised no objection to reasonable and generally applicable height regulations. In 1911, Frank J. Goodnow, a prominent legal scholar, could accurately point out that the Supreme Court had been "emphatic as to the right of the state . . . to regulate the use of land and the construction of buildings in cities in the interest of public health and safety."[17]

In the same vein, the Court raised no objection to the establishment of building set-back lines, even though such measures curtailed the ability of owners to develop their land.[18] It did, however, invalidate a Richmond ordinance that empowered property owners on a street to require municipal authorities to impose set-back limitations on the construction of new homes. Stressing the absence of any standard governing how this power was to be exercised, the Court expressed concern that the ordinance conferred "the power on some property owners to virtually control and dispose of the property rights of others." This standardless delegation of power to private parties was found to deprive the complaining lot owner of the property without due process of law.[19] Yet the Court also made clear that the power of cities to enact a general law establishing building lines or regulating the height of building was not in question.

Although supportive of controls on urban land and buildings, the Supreme Court drew the line at laws that sought to separate residential areas along racial lines. Starting with Baltimore in 1910, a number of localities adopted residential segregation ordinances.[20] Such measures simply reflected the prevalent racial norms of the Progressive Era. In *Buchanan v. Warley* (1917), the Court was called upon to determine the constitutionality of such laws.[21]

A Louisville ordinance required separate residential areas for white and black people. It was made unlawful for a person to occupy a house in any block in which the majority of residences were occupied by persons of another race. The state attempted to justify the ordinance as an exercise of the police power to maintain racial harmony and to prevent the deterioration of property owned by whites. Justice William R. Day, writing for a unanimous bench, struck down the ordinance as a deprivation of property without due process in violation of the Fourteenth Amendment. He defined property in broad terms: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." Invoking "those fundamental rights in property" secured by the Fourteenth Amendment, Day emphasized that the Amendment entitled "a colored man to acquire property without state legislation discriminating against him solely because of color."[22]

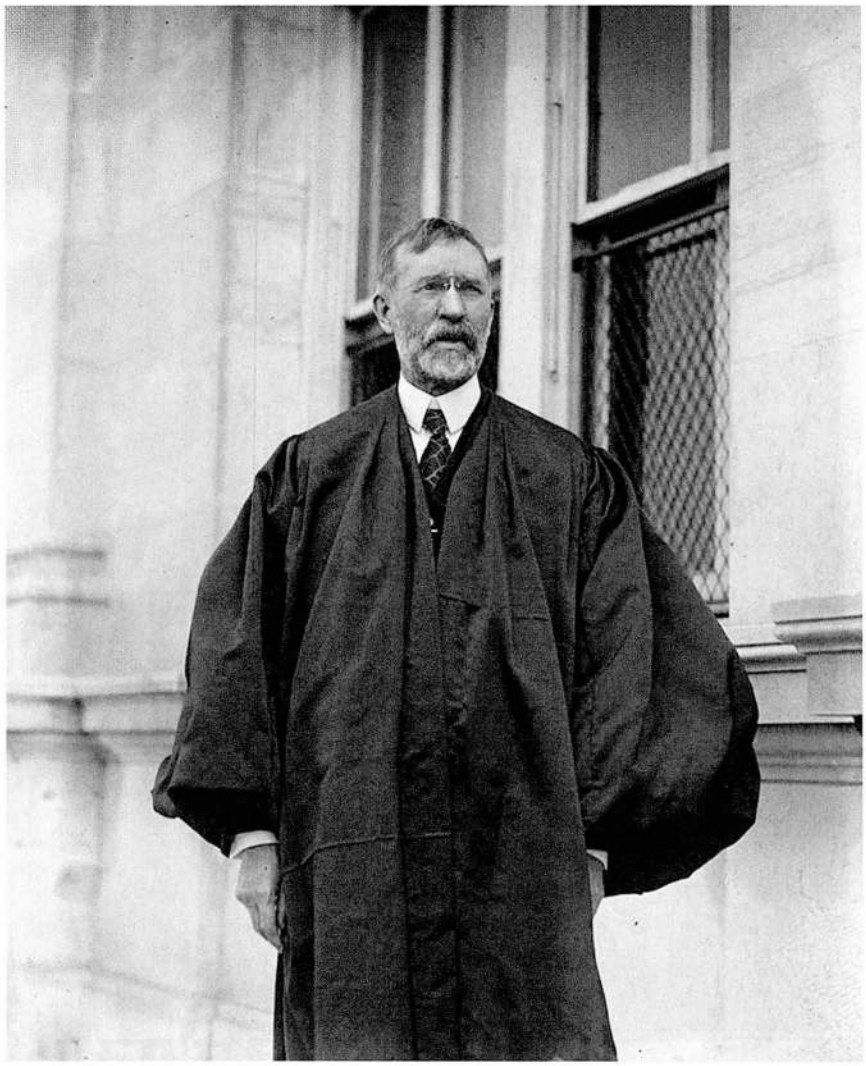
Buchanan is noteworthy in two respects. Decided at a time when segregationist attitudes were at full tide, *Buchanan* demonstrated that the Court's dedication to the rights of property owners trumped majoritarian wishes implicit in the residential segregation ordinances. In so doing, it

Appointed to the Supreme Court in 1903, William R. Day faced questions as to whether statutes regulating the workplace inevitably curtailed contractual freedom and the right of owners to utilize their property. Day authored the important opinion in *Buchanan v. Warley* invalidating residential segregation laws as a deprivation of property without due process of law.

signaled that there was a limit to judicial acceptance of laws imposing racial separation in American life. Moreover, the decision halted the movement to impose residential segregation by law in other communities.[23]

Piecemeal laws directed at particular problems, however, were soon seen as inadequate to deal with the complexity of urban life in the early twentieth century. The movement for comprehensive citywide zoning gained currency, fueled by the Progressive desire to shape the urban landscape. As was often the case with Progressive initiatives, the inspiration for dividing cities into districts based on usage can be traced to Imperial Germany.[24] Drawing upon German municipal codes, Progressives advocated the adoption of similar measures in the United States. As Morton Keller explained: "Citywide zoning found ready nourishment in the prevailing mindset of the Progressive years."[25] Zoning, with its promise of scientific management to replace the haphazard municipal development of the past, was congenial with the Progressive fondness for planning and reliance on experts.

New York City's pioneering zoning law of 1916 limited the use of certain property by establishing three land use districts: residential, business and unrestricted. The effect was to enlarge municipal control over activities on land. Zoning spread rapidly in the early 1920s, but such novel regulations raised legal issues. Although zoning was justified as an exercise of state police power to protect public health, safety, and morals, many observers nonetheless doubted that comprehensive zoning would pass constitutional muster. A number of state courts were initially skeptical about zoning and pictured the regulations as an infringement of the



Justice George Sutherland wrote the opinion in *Euclid v. Ambler* (1926) affirming zoning power, arguing that the separation of residential and commercial areas would enhance the security of home life. Zoning may have been acceptable to the Supreme Court because it promised to bolster land values and exclude undesirable uses, even if individual owners suffered a loss.

rights of property owners. They looked with disfavor, for example, on laws that excluded retail stores or apartment buildings from residential districts.[26]

The zoning ordinance in the Village of Euclid, a Cleveland suburb, provided the basis for the famous Supreme Court decision in 1926 sustaining municipal zoning authority. It bears emphasis that the federal district court struck down the ordinance as taking of property without compensation. The court insisted that "the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket," for the purpose of regulating "the mode of living of persons who may hereafter inhabit it." Declaring that private property ownership encompasses the right to use and dispose of such property, the district court concluded that comprehensive zoning limiting the right to develop property was not a reasonable use of the police power and could only be achieved by an exercise of eminent domain.[27]

Tenants, such as these Harlem protesters in 1919, complained about onerous rents, but landlords challenged the rent control laws that were passed in New York and D.C on the ground that they were taking away from the value of their property. In *Block v. Hirsh* (1921) Justice Oliver Wendell Holmes, Jr., upheld the validity of the Ball Rent Act, writing "the right of the owner to do what he will with his own and to make what contracts he pleases are cut down."

In the Supreme Court, however, zoning power was affirmed in an opinion by Justice George Sutherland. He analogized zoning to the power to abate a common law nuisance and maintained that the separation of residential and commercial areas would enhance the security of home life.[28] Scholars have debated why the Justices proved sympathetic to comprehensive land use controls, given their restrictive impact on the property rights of individual owners. The answer, it may be submitted, is that zoning promised to bolster land values and exclude undesirable uses, even if individual owners, as in *Euclid* itself, suffered a loss. Most landowners benefited from the new scheme of controls.[29] This explains why Americans so readily accepted this intrusive regulation of property.

For better or worse, the Supreme Court's affirmation of zoning in *Euclid* opened the door for extensive land use planning. The advantages and drawbacks of zoning are the subject of a continuing debate that cannot be reviewed here, but this legacy of the Progressives has proven a lasting contribution to the urban and suburban environment.[30]

Rent Control

The advent of rent control during the Progressive Era was a dramatic intervention into the housing market and presented a sharp challenge to the traditional rights of landlords. Aside from tenement reform laws aimed at health and safety concerns, the relations between residential landlords and tenants had long been governed by bargaining and leases. The outbreak of World War I caused the cost of labor and building supplies to increase. The entry of the United

States into the war in April 1917 brought residential construction to a halt, exacerbating the already existing housing shortage in many urban areas. Faced with rising expenses, landlords increased rents. This in turn prompted fears about rent profiteering and evictions. Reacting to concern over such rental practices, Congress in 1919 passed the Ball Rent Act, which imposed rent controls in the District of Columbia for a period of two years. Congress established a commission to determine "fair and reasonable" rents for residential apartments and prohibited the eviction of tenants who paid the rent fixed by the commission. A year later, the New York legislature enacted a similar measure for New York City, also limited in duration to two years. The legislation represented a sweeping overhaul of landlord-tenant relations. By regulating rents and curtailing evictions, the laws significantly restricted the control of landlords over their property. These laws were predicated upon the existence of a public emergency in housing conditions growing out of the war.[31]

Unsurprisingly, landlords promptly attacked the rent-control measures. They charged that the laws amounted to a taking of property, deprived the owners of their property without due process of law, and impaired the obligation of contract. Opinion was divided as to the constitutionality of the legislation, and lower courts reached different conclusions.[32] In *Block v. Hirsh* (1921) a sharply divided Supreme Court, in an opinion by Justice Oliver Wendell Holmes, Jr., upheld the validity of the Ball Rent Act.[33] Holmes acknowledged that, by virtue of this law, "the right of the owner to do what he will with his own and to make what contracts he pleases are cut down." Finding that rental conditions in the District of Columbia amounted to an emergency, he maintained that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." Holmes problematically compared rent controls to laws limiting the height of buildings, a regulation that pertained to the potentially harmful use of land not the regulation of charges. Stressing that the regulation was "justified only as a temporary measure," he saw no violation of the property rights of the landlords.[34] In a companion case, the Supreme Court, again by a 5-4 vote, sustained the New York rent control law as well.[35] Writing for the majority, Holmes largely disposed of the case on the basis of his opinion in *Block*. He also dismissed the Contract Clause argument in a cursory manner, a point to be examined below.

Speaking for the four dissenters, Justice Joseph McKenna strenuously argued that both the Ball Rent Act and the New York legislation ran afoul of constitutional provisions protecting property and contractual rights. He emphasized the importance of property in the constitutional system, observing that the "security of property, next to personal security against exertions of government, is of the essence of liberty." He vigorously rejected the contention that that a legislative assertion of an emergency justified overriding constitutional provisions, such as the contract clause. Further, McKenna was unimpressed by the limitation of the rent control laws to two years, correctly noting that the duration could be enlarged. He plaintively inquired whether the Constitution has become "an anachronism."[36]

As the emergency rationale bulked large in the disposition of the rent control cases, and a decade later would feature prominently in Supreme Court decisions enlarging governmental authority, it warrants careful examination.[37] There is, of course, a line of cases holding that the existence of emergency conditions does not override constitutional guarantees. In much quoted language from *Ex Parte Milligan* (1866) the Court declared:

> The Constitution of the United States is a Law for rulers and people equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[38]

Throughout the nineteenth century, moreover, the Supreme Court repeatedly rejected claims of economic distress as an excuse to abridge contractual undertakings.[39] In contrast, in the rent control cases the Court permitted legislators to invoke an enlarged police power that, as Holmes admitted, they likely would have been unable to do absent the perceived housing emergency.

The heavy reliance on emergency conditions as a justification for rent controls begs a number of questions. What constitutes an emergency? Who determines that an emergency exists? To what extent can courts inquire into the factual basis for a legislative declaration of an emergency? Is such a declaration conclusive on courts? Without some degree of judicial oversight, can lawmakers invoke a claimed emergency to augment their power heedless of constitutional restraints? How long does a proclaimed emergency last?

The final chapter in the rent control cases gave the Supreme Court an opportunity to consider these questions. As McKenna feared, both the Ball Rent Act and the New York City rent controls were repeatedly extended upon expiration of their original two-year period on the grounds that the housing emergency persisted. In *Chastleton Corp. v. Sinclair* (1924), a landlord challenged the extension of the Ball Rent Act, alleging that by 1922 housing conditions had changed and there was no longer an emergency that could justify continued rent controls consistent with the Fifth Amendment.[40] This time the Supreme Court signaled that there were limits to its acceptance of legislative declarations of an emergency. In another opinion by Holmes, the Court agreed that respect was due to legislative findings but maintained that "a Court is not at liberty to shut its eyes to an obvious mistake when the validity of the law depends upon the truth of what is declared." Holmes explained: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even if valid when passed." According to Holmes, it was "a matter of public knowledge" that the need for housing in the District of Columbia had diminished by 1924. He expressed the view that the increased cost of living by itself could not justify rent controls. Although observing that "upon the facts we judicially know, we should be compelled to say that the law has ceased to operate," the Court remanded the case to a lower court to ascertain the facts pertaining to local housing in 1922, the date of the order by the rent control commission at issue.[41]

Subsequently, the Court of Appeals for the District of Columbia readily concluded that the housing emergency had ended, hence there was no constitutional basis for a continuation of rent controls by Congress in 1924. Highlighting a concern with reliance on supposed emergencies that linger without a fixed date of expiration, the court pointed out that "if the emergency in question is not at an end, then this legislation may be extended indefinitely, and that which was 'intended to meet a temporary emergency' may become permanent law."[42]

Chastleton seemed to hold out the promise that there would be some degree of judicial examination into the factual basis for legislative determinations of emergency conditions.[43] Yet this promise was never fulfilled. Courts not only tended to accept legislative declarations of an emergency at

face value, but they treated an emergency as in effect enlarging the scope of the police power over the rights of property owners. Without judicial oversight, lawmakers could as a practical matter expand their authority by their own bootstraps. The legacy of the rent control cases, therefore, was to weaken the constitutional protection of property in the face of declared emergencies.

Taking of Property

The Supreme Court during the Progressive Era heard only a handful of cases pertaining to the taking of property. In some respects, the Court enlarged the understanding of a "taking" to encompass situations in which land was physically harmed even if the government did not acquire formal title. For instance, it decided that river improvement projects that subjected land to periodic floods constituted a compensable taking.[44] Likewise, it held that the discharge of smoke and gas from a railroad tunnel amounted to a taking by rendering the plaintiff's home less habitable and causing depreciation in value.[45] Further, the Court, speaking through Holmes, declared in dicta that regulation on the height of buildings that made a building lot useless would constitute a taking.[46] This comment anticipated the later emergence of the regulatory takings doctrine.[47]

On the other hand, the Court in these years made no attempt to put any teeth into the "public use" limitation on the exercise of eminent domain, even when the taking was primarily for private benefit.[48] For example, it upheld the practice in many western states of conferring eminent domain power upon private parties to obtain rights-of-way across the land of others for irrigation or mining. In *Clark v. Nash* (1905), Peckham, speaking for the Court, validated the acquisition by an individual in Utah of an enlarged irrigation ditch through the land of another, finding that the use was public.[49] He stressed the arid circumstances of certain western states, pointing out that, without irrigation, the property at issue was without value. It should be noted, however, that Peckham added some language seeking to cabin the reach of this decision.[50]

Contract Clause

Today the Contract Clause is something of a constitutional orphan.[51] The Supreme Court has not invoked the clause to invalidate a state law since the mid-1970s. Throughout the nineteenth century, however, the Contract Clause had been one of the most litigated provisions of the Constitution.[52] Nonetheless, the Progressive Era saw a marked decline in the significance of the clause. Several factors contributed to this result, but prominent among them was the emergence of new attitudes toward the place of contracts in society urged by scholars associated with the Progressive Movement. They called into question both the voluntary nature of contracts and the market economy. Wandering far from the views of the founding generation, Progressives argued that contracts were merely products of society that could be altered or abolished to serve the needs of society. They challenged the individualistic understanding of contracts and in essence maintained that agreements were not deserving of special constitutional protection. Progressives called for an expansive reading of the police power that could trump contractual provisions to promote the general welfare.[53] As society came to assign less value to contracts, the Contract Clause was necessarily viewed in a new and diminished light.

To be sure, the traditional understanding of the Contract Clause continued to have strong defenders during the Progressive. Era. In 1905, Elihu Root, a leading attorney and political figure, directly challenged the

Progressive premise regarding contracts. He argued before the Supreme Court:

> The legislature cannot violate the Constitution, and redeem the violation by the claim that it was done "for the public benefit." The repudiation of contract obligations is quite usually sought to be justified by the plea of "the public benefit," but the Constitution of the United States may not be nullified in so simple and easy a fashion.[54]

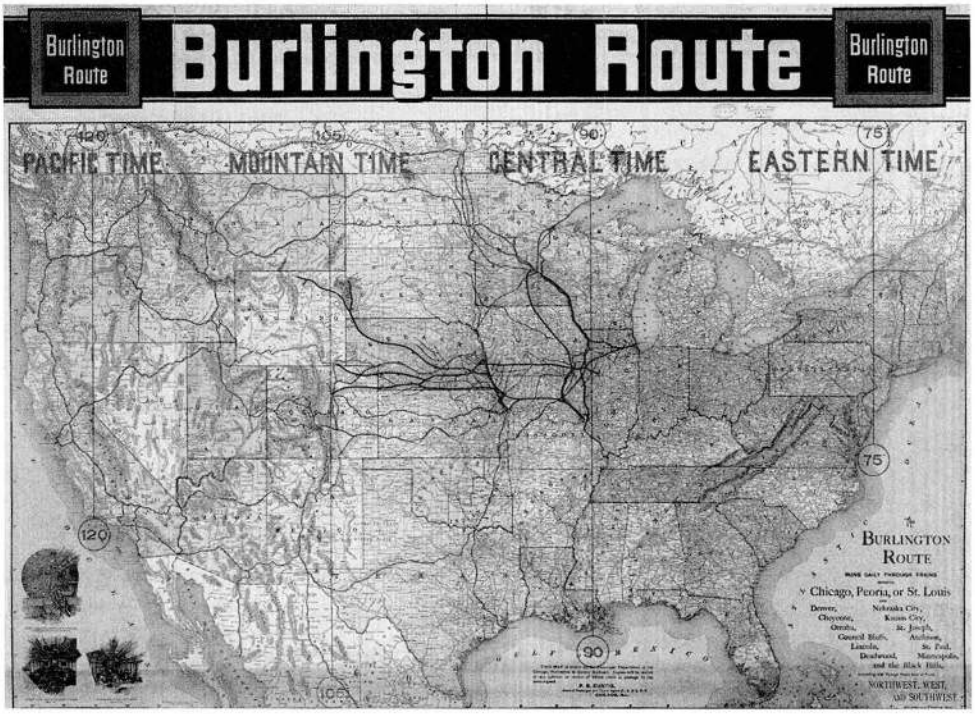
But Root was speaking against the day. The Progressive critique of contracts laid the intellectual groundwork for a jurisprudence that substantially stripped contractual rights of constitutional protection against state abridgement.

The Supreme Court had weakened the protection of public contracts under the Contract Clause in the late nineteenth century by determining that state legislatures could not bargain away their police power.[55] As a result, the Court during the Progressive Era frequently rejected claims based on language in corporate charters. It looked skeptically at arguments of business corporations seeking shelter under the Contract Clause from state taxation and regulation. For example, states were accorded broad latitude to regulate railroads and utilities.[56] Hence, the impact of Progressive ideas was most fully manifest with respect to contracts between private parties. To be sure, the Court did invalidate a retroactive change in state mortgage foreclosure procedures, adhering to a long-settled pattern of striking down debt-relief measures as applied to existing agreements.[57] Nonetheless, the security afforded private contracts began to erode in the early twentieth century.

In *Manigualt v. Springs* (1905), the Supreme Court opened the door to this result by holding that agreements between private parties were also subordinated to the inalienable police power.[58] At issue was a contract, between adjoining riparian owners on a navigable creek, that the stream should remain free of obstructions. A subsequent state law authorizing one party to erect a dam across the creek was attacked as an impairment of contract. Speaking for the Court, Justice Henry Billings Brown, without any analysis or explanation, announced that the Contract Clause "does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals be affected." He added that the police power "was paramount to any rights under contracts between individuals." Brown also insisted that state legislatures had wide discretion to ascertain what was necessary for the public good.[59] *Manigault* marked a watershed in the treatment of private agreements under the Contract Clause. One scholar perceptively observed that *Manigault* "was perilously close to saying that states could impair contractual obligations whenever they had a good reason."[60] It goes without saying that if private agreements could be abridged whenever a state legislature deemed it necessary, the Contract Clause did little to safeguard such arrangements.

During the Progressive Era, the Supreme Court several times reaffirmed that private contracts were subordinate to an exercise of the state police power. In 1908, for instance, Holmes commented, "One whose rights, such as they are, are subject to state restrictions, cannot remove them from the power of the state by making a contract about them."[61] As noted earlier, Holmes also abruptly rejected a Contract Clause challenge to New York's rent control law by citing *Manigault* and declaring that "contracts are made subject to the police power of the State when otherwise justified." [62]

Not only could the police power override contracts, both public and private, but



In *Chicago, Burlington and Quincy Railway Company v. Drainage Commissioners* (1906) the Supreme Court ruled that a railroad company could be required to bear the expense of building a new bridge to serve the public convenience. Brushing aside an argument that this mandate constituted a taking of property, the Court concluded that the cost of rebuilding was merely an incidental injury resulting from exercise of the police power. Pictured is that railroad line's map in 1900.

the understanding of the police power expanded beyond safeguarding public health, safety, and morals. In 1915, the Supreme Court defined the police power to encompass "regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety."[63] Such an open-ended conception of the police power paved the way for the virtual emasculation of the Contract Clause by the New Deal jurisprudence of the 1930s.[64]

Railroads

By 1900, railroads occupied a central place in the economic life of the nation. Not only did railroad capital represent a sizeable portion of national wealth, but railroad companies controlled allied businesses such as coal mines, steamships, and hotels. There was also a persistent trend toward the consolidation of lines, thereby reducing competition. As a paramount goal of the Progressive Movement was to redress the imbalance of economic power associated with the emerging industrial order, Progressives took particular aim at the rail industry and championed a host of regulatory measures.[65] At the heart of these laws was a modification of property rights. As one newspaper pointed out in 1906, "The whole movement against the railroads is predicated . . . on the idea that they are extremely prosperous and that some of their profits might be as well taken from them and appropriated for the benefit of shippers and the general public."[66] For the most part, however, the Supreme Court made no systematic attempt to shield railroads from even burdensome regulations.

With the enactment of the Hepburn Act of 1906 and the Mann-Elkins Act of 1910, Congress in effect removed control over the rate-making process from the carriers and vested such power in the Interstate Commerce Commission (ICC). In the late nineteenth century, the Court had stressed that state regulatory authority did not permit confiscation of railroad property through the imposition of unremunerative rates.[67] Reflecting this concern, it observed in 1908 that "railroads are the private property of their owners" and "in no proper sense, is the public a general manager."[68] Yet, despite this admonition, the Court upheld the enhanced power of the ICC in setting rates and largely withdrew from judicial review of railroad charges.[69]

Moreover, the Supreme Court ruled that railroads could be required to bear the expense of altering existing structures to serve the public convenience. In 1906, the Justices determined that a state, as part of a drainage project, could compel a railroad to remove an existing bridge over a creek and erect a new bridge with an enlarged opening at its own expense. Brushing aside an argument that this mandate constituted a taking of property, they concluded that the cost of rebuilding was merely an incidental injury resulting from exercise of the police power.[70] Dissenting alone, Justice David J. Brewer focused on the importance of the property rights issues raised by the drainage act. Stressing that railroads were private property, he sharply questioned whether the drainage project served the public health and safety or only conferred a benefit on the owners of adjacent farms. Skeptical about the open-ended invocation of the police power, Brewer declared, "It seems to me that the police power has become the refuge of every grievous wrong upon private property . . . But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property . . ."[71] His affirmation of the constitutional rights of property owners, however, did not carry the day.

Nor did the Supreme Court view claimed interference with property rights as an impediment to congressional intervention in a railway labor dispute. Anxious to forestall a strike in 1916, Congress enacted the Adamson Act mandating an eight-hour day instead of the ten-hour day standard for employees who operated trains. The effect was that overtime compensation would now be computed after eight hours of work, resulting in substantial cost to the carriers.[72] A sharply divided Supreme Court sustained the validity of the measure in *Wilson v. New* (1917).[73] The majority gave little attention to property-related issues and held that Congress, under the commerce power, was empowered in an emergency to resolve a wage dispute. In contrast, the four dissenters' several opinions squarely addressed the question of property rights. First, they found the Adamson Act unconstitutional as a deprivation of railroad property without due process of law. As Justice William R. Day explained, "Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another, in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection . . ."[74] Second, the dissenters strongly denied that a purported emergency could justify a violation of constitutional rights.

Property Rights and the Progressive Legacy

As contemporary commentators perceived, the Progressives urged an all-encompassing conception of the police power. In his 1904 treatise, prominent scholar Ernst Freund characterized the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property." He

added that experience "will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development."[75] In short, to Progressives the police power functioned as a sort of talisman that could trump constitutional provisions.

The implications for the rights of property owners of this open-ended reading of the police power was not lost on observers. George W. Wickersham, former Attorney General, complained in 1914:

> But the pressure is very great on the part of social reformers to compel legislation which transcends constitutional restrictions, and seeks justification under the elastic boundaries of the police power, and any interference with their programs by decisions of courts based upon constitutional limitations is received by them with impatience, and provokes them to intemperate attacks on the judges and the exercise of the judicial function just described.[76]

As we have seen, the Supreme Court, consistent with Progressive ideology, was broadly receptive to an open-ended definition of the police power and in effect allowed it virtually to devour the constitutional guarantees of property and contract. When coupled with the penchant of the Court to readily accept declarations of emergency, the scope of the police power became almost boundless.

Myth of a Property-Protective Supreme Court

The legend of a Supreme Court aggressively bent on the protection of property rights during the Progressive Era is badly exaggerated. As this review of the record has demonstrated, statutes restrictive of property were repeatedly upheld. Only rarely did the rights of owners prevail and bar Progressive legislation. In 1913, Charles Warren recognized the falsity of "the supposed tendency of the National Supreme Court to invalidate by its decisions the liberal and progressive State legislation of the day." Noting that the Progressive Era witnessed an outpouring of economic and social legislation, he concluded, "The National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type."[77] Elihu Root expressed similar sentiments in 1913. Declaring that contracts and private property were subject to the police power, he observed, "By a multitude of judicial decisions in recent years our courts have sustained the exercise of this vast and progressive power in dealing with the new conditions of life under a great variety of circumstances."[78]

How, then, can we explain the hostility toward the Supreme Court on the part of Progressives? This hostility seems to rest upon a handful of Court decisions dealing with workplace regulations and attempted congressional control of child labor.[79] The ruling in *Lochner v. New York* (1905) was, both then and later, paraded as a sort of bête noir.[80] As early as 1913, Warren noted the tendency to stigmatize this decision.[81] *Lochner* has received some significant revisionist treatment in recent years,[82] but that famous case is not addressed here because it has been considered at length in a vast literature and warrants separate treatment. Still, it should be noted that the *Lochner* ruling was atypical and the Supreme Court only rarely invoked the liberty of contract doctrine.[83] Further, the Supreme Court readily affirmed state child labor laws, rejecting due process challenges.[84] It drew the line at federal regulation of what had traditionally been a matter for the states. For

our purposes, however, the key point is that the Court's workplace and child labor decisions were not grounded on the property rights guarantees of the Constitution but instead on the liberty of contract doctrine and the scope of congressional authority under the Commerce Clause. Even with respect to employment relationships, moreover, the dire picture presented by the Progressives is simply inaccurate because the Supreme Court in fact upheld significant workplace regulations.[85]

This survey of the Supreme Court's handling of property-related issues calls into question the conventional narrative of a judicial roadblock hampering the Progressive agenda. Again, Wickersham is instructive. He lamented that "a more candid criticism might suggest that that great tribunal in common with other courts had yielded somewhat unduly to public criticism in giving effect to legislation, which, however desirable from the standpoint of social reform, yet involves a measurable encroachment upon some of those individual rights to secure which the Fourteenth Amendment was adopted."[86] Indeed, historians might fruitfully explore why the Supreme Court did so little to vindicate the constitutional guarantees of property during the Progressive Era. The comments made here do challenge much of the prevailing wisdom, but it is hoped that they might serve as a catalyst for a reconsideration of the work of the Supreme Court in this pivotal era of our constitutional past.

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ENDNOTES

[1] Michael McGerr, **A Fierce Discontent: The Rise and Fall of the Progressive Movement in America** (New York: Oxford University Press, 2003).

[2] James W. Ely, Jr., "The Progressive Era Assault on Individualism and Property Rights," 29 *Social Philosophy and Policy* 255, 256-258, 264-271 (2012). *See also* David E. Bernstein, **Rehabilitating Lochner: Defending Individual Rights against Progressive Reform** (Chicago: University of Chicago Press, 2011, p. 78 ("Most Progressive political and intellectual leaders shared the racism of the day, and did not support equal rights for African Americans.").

[3] Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," 81 *Iowa Law Rev.* 149 (1995).

[4] James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights**, 3rd ed. (New York: Oxford University Press, 2008), pp. 106-124. *See also* Richard A. Epstein, **How the Progressives Rewrote the Constitution** (Washington, D.C.: Cato Institute, 2006), p. 2 ("The tumultuous events of the New Deal Era did not take place in a vacuum, however. They grew out of the intellectual work of the Progressive Era, which inaugurated the fundamental shift in American constitutional thought.").

[5] Robert M. LaFollette, Introduction to Gilbert E. Roe, **Our Judicial Oligarchy** (New York: Huebsch, 1912), p. v.

[6] Theodore Roosevelt, "Judges and Progress," 100 *Outlook* 40, 42 (January 6, 1912). For Roosevelt's critical attitude toward the judiciary and his support of the recall of state court decisions, *see* Jean M. Yarbrough, **Theodore Roosevelt and the American Political Tradition** (Lawrence: University Press of Kansas, 2012), pp. 224-226, 229-233.

[7] William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Supreme Court, 1890-1937** (Princeton: Princeton University Press, 1994), pp. 49-69 (discussing Progressive denunciation of judicial review as a usurpation of power).

[8] Roy Lubove, **The Progressives and the Slums: Tenement House Reform in New York City, 1890-1917** (Pittsburgh: University of Pittsburgh, 1962), pp. 166-167; Judith A. Gilbert, "Tenements and Takings: *Tenement House Department of New York v. Moeschen* as a Counterpoint to *Lochner v. New York*," 18 *Fordham Urban Law Journal* 437 (1991).

[9] *Tenement House Department of the City of New York v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904).

[10] *Moeschen v. Tenement House Department of the City of New York*, 203 U.S. 583 (1906).

[11] David T. Beito and Linda Royster Beito, "The 'Lodger Evil' and the Transformation of Progressive Housing Reform, 1890-1930," 20 *The Independent*

Review 485 (2016) (noting the influence of the New York tenement law, and asserting that tenement reforms improved the quality of housing but reduced the affordability and availability of low-income housing as private developers largely abandoned that market).

[12] *Reinman v. Little Rock*, 237 U.S. 171 (1915) (Pitney, J.).

[13] *Hadacheck v .Sebastian*, 239 U.S. 394, 410 (1915) (McKenna, J.).

[14] Morton Keller, **Regulating a New Economy: Public Policy, and Economic Change in America, 1900-1933** (Cambridge, Mass.: Harvard University Press, 1990), pp. 184-186; Lawrence M. Friedman, "A Search for Seizure: *Pennsylvania Coal Co. v. Mahon* in Context," 4 *Law and History Rev.* 1, 11-13 (1986).

[15] *Thomas Cusack Company v. City of Chicago*, 242 U.S. 536 (1917). *See also St. Louis Poster Advertising Company v. City of St. Louis*, 249 U.S. 269 (1919) (upholding ordinance limiting the size of billboards).

[16] *Welch v. Swasey*, 214 U.S. 91 (1909) (Peckham, J.)

[17] Frank J. Goodnow, **Social Reform and the Constitution** (New York: Macmillan Company, 1911), p. 260. *See also* Joseph Gordon Hylton, "Prelude to Euclid: The United Supreme Court and the Constitutionality of Land Use Regulations, 1900-1920," 3 *Washington University Journal of Law and Policy* 1 (2000).

[18] *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (McKenna, J.).

[19] *Id.*, at 143.

[20] Garrett Powers, "Apartheid Baltimore Style: The Residential Segregation Ordinance of 1910-1913," 42 *Maryland Law Rev.* 289 (1983).

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

[22] *Id.*, at 74, 79.

[23] James W. Ely, Jr., "Reflections on *Buchanan v. Warley*, Property Rights, and Race," 51 *Vanderbilt Law Rev.* 953 (1998) (discussing link between respect for property rights and defense of individual freedom). *See also* Patricia Hagler Minter, "Race, Property, and Negotiated Space in the American South: A *Reconsideration* of *Buchanan v. Warley*," in Sally E. Hadden and Patricia Hagler Minter, eds., **Signposts: New Directions in Southern Legal History** (Athens: University of Georgia Press, 2013), pp. 345, 363 (observing that "the language used on the nature of property rights foreclosed any possibility that apartheid would come to America"); James W. Ely, Jr., "Buchanan and the Right to Acquire Property," 48 *Cumberland Law Rev.* 424, 424-434 (2018) (discussing *Buchanan* in the content of the evolving right to acquire property).

[24] Sonia A. Hirt, **Zoned in the USA: The Origins and Implications of American Land-Use Regulations** (Ithaca: Cornell University Press, 2014), pp. 134-141.

[25] Keller, **Regulating a New Economy**, p. 186.

[26] *See*, for example, *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921); *Ignaciunas v. Riley*, 98 N.J.L. 712, 121 A. 783 (Sup Ct. 1923), aff'd 125 A. 121 (N.J. Ct. Err. & App. 1924).

[27] *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

[28] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[29] *See* Alfred Bettman, 37 *Harvard Law Rev.* 834, 839-840 (1924) (asserting that zoning promotes single-family residence districts and stabilizes the living environment and property values). *See generally* Martha A. Lees, "Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926," 56 *University of Pittsburgh Law Rev.* 367 (1994) (exploring the web of motivations that animated the push for zoning).

[30] *See* Eric R. Claeys, "Euclid Lives? The Uneasy Legacy of Progressivism in Zoning," 73 *Fordham Law Rev.* 731 (2004).

[31] Robert M. Fogelson, **The Great Rent Wars: New York City, 1917-1929** (New Haven: Yale University Press, 2013), 17-152; Keller, **Regulating a New Economy**, pp. 178-179.

[32] Compare "Note: Constitutionality of the New York Emergency Housing Law," 34 *Harvard Law Rev.* 426 (1921) with Alan W. Boyd, "Rent Regulation under the Police Power," 19 *Michigan Law Rev.* 599 (1921).

[33] *Block v. Hirsh*, 256 U.S. 135 (1921).

[34] *Id.*, at 156-157.

[35] *Marcus Brown Holding Company, Inc. v. Feldman*, 256 U.S. 170 (1921). See also *Edgar A. Levy Leasing Company, Inc. v. Siegel*, 258 U.S. 242 (1922).

[36] *Block*, at 163-169.

[37] *See* Roger I. Roots, "Government by Permanent Emergency: The Forgotten History of the New Deal Constitution," 33 *Suffolk University Law Rev.* 259 (2000) (discussing the evolution of the emergency powers doctrine).

[38] *Ex Parte Milligan*, 71 U.S. 2, 121 (1866) (Davis, J.).

[39] James W. Ely, Jr., **The Contract Clause: A Constitutional History** (Lawrence: University Press of Kansas, 2016), pp. 87-88, pp. 126-128.

[40] *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

[41] *Id.*, at 547-549.

[42] *Peck v. Fink*, 2 F.2d 912, 913 (Ct. App. D.C. 1924), cert. den. 266 U.S. 631 (1925).

[43] Adrian Vermeule, "Holmes on Emergencies," 61 *Stanford Law Rev.* 163, 167-175 (2008); "Note: Judicial Declaration of the Termination of an Emergency," 47 *Yale Law Rev.* 124 (1937).

[44] *United States v. Lynah*, 188 U.S. 445, 470 (1903) (Brewer, J.) (declaring that "where the government by the construction of a dam or other public works so

floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land . . . ").

[45] *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914) (Pitney, J.).

[46] *Hudson County Water Company v. McCarter*, 209 U.S. 349, 355 (1908).

[47] *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). For the background of this landmark case and the regulatory takings doctrine, *see* William A. Fischel, **Regulatory Takings: Law, Economics, and Politics** (Cambridge, Mass.: Harvard University Press, 1995), pp. 14-48; Friedman, "A Search for Seizure," 1-22.

[48] *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1905) (Holmes, J.) (condemnation of right-of-way by the mining company); *Hariston v. Danville and Western Railway Company*, 208 U.S. 598 (1908) (Moody, J.) (condemnation by the railroad for construction of spur track).

[49] *Clark v. Nash*, 198 U.S. 361 (1905) (Peckham, J.). For Peckham's views about the "public use" limitation and the *Clark* case, *see* James W. Ely Jr., "Rufus W. Peckham and Economic Liberty," 62 *Vanderbilt Law Rev.* 591, 612-616 (2009).

[50] *Clark*, at 369 ("But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State.").

[51] Article 1, Section 10 of the Constitution provides in part that "No state . . . shall pass any . . . Law . . . impairing the Obligation of Contracts."

[52] Ely, **The Contract Clause**, p. 1.

[53] Richard T. Ely, **Property and Contract in Their Relation to the Distribution of Wealth**, vol.2 (New York: Macmillan, 1914), 615-618; Ray A. Brown, "Police Power—Legislation for Health and Personal Safety," 42 *Harvard Law Rev.* 866, 896-897 (1929). *See also* Barbara H. Fried, **The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement** (Cambridge, Mass.: Harvard University Press, 1998) ("Contract terms, Progressives argued, rather than being simple expressions of free will, were determined by each party's relative ability to hold out for more acceptable terms."), 16-17.

[54] *Muhlker v. New York and Harlem Railroad Company*, 197 U.S. 544, 550 (1905) (argument for plaintiff in error).

[55] Ely, **The Contract Clause**, pp. 160-167.

[56] *Id.*, pp. 202-203.

[57] *Bradley v. Lightcap*, 195 U.S. 1 (1904) (Fuller, C.J.)

[58] *Manigualt v. Springs*, 199 U.S. 473 (1905).

[59] *Id.*, at 480.

[60] David P. Currie, "The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910," 52 *University of Chicago Law Rev.*, 325, 334-335 (1985).

[61] *Hudson County Water Company*, at 356.

[62] *Marcus Brown Holding Company*, at 198.

[63] *Chicago & Alton Railroad Company v. Tranbarger*, 238 U.S. 67, 77 (1915). *See also Atlantic Coast Line Railroad Company v, City of Goldsboro*, 232 U.S. 554, 558 (1914) (describing the police power as "the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community").

[64] Douglas W. Kmiec and John O. McGinnis, "The Contract Clause: A Return to the Original Understanding," 14 *Hastings Law Quarterly* 525, 540-541 (1987) (asserting that the expansion of the scope of the police power in the twentieth century to include advancement of public welfare through redistribution of resources could produce results at odds with the purpose of the contract clause).

[65] James W. Ely, Jr., **Railroads and American Law** (Lawrence: University Press of Kansas, 2001), pp. 225-227.

[66] *Commercial and Financial Chronicle*, August 4, 1906.

[67] Ely, **Railroads and American Law**, 96-99. *See*, for example, *Reagan v. Farmers' Loan and Trust Company*, 154 U.S. 362 (1894); *Smyth v. Ames*, 169 U.S. 466 (1898).

[68] *ICC v. Chicago Great Western Company*, 209 U.S. 108, 118-119 (1908) (Brewer, J.) (dismissing complaint of unlawful rate discrimination by railroad).

[69] Ely, **Railroads and American Law**, pp. 228-229.

[70] *Chicago, Burlington and Quincy Railway Company v. Drainage Commissioners*, 200 U.S. 561 (1906).

[71] *Id.*, at 600.

[72] Ely, **Railroads and American Law**, pp. 256-257.

[73] *Wilson v. New*, 243 U.S. 332 (1917).

[74] *Id.*, at 370.

[75] Ernst Freund, **The Police Power: Public Policy and Constitutional Rights** (Chicago: Callaghan and Company, 1904), pp. iii, 3.

[76] George W. Wickersham, "The Police Power: A Product of the Rule of Reason," 27 *Harvard Law Rev.* 297, 315 (1914). *See also* Daniel F. Kellogg, "The Disappearing Right of Private Property," 199 *North American Rev.* 55, 62 (1914) (expressing concern that "the security of property is no longer looked upon, as it once was, as just as essential to the interests of society as the security of human life itself").

[77] Charles Warren, "The Progressiveness of the United States Supreme Court," 13 *Columbia Law Rev.* 294, 294-295 (1913).

[78] Elihu Root, **Experiments in Government and the Essentials of the Constitution** (Princeton: Princeton University Press, 1913), p. 78.

[79] *See*, for example *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down congressional act barring products from a factory employing child labor from interstate commerce as exceeding the authority of Congress and invading state jurisdiction).

[80] *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state law limiting work in bakeries to ten hours a day as an interference with the constitutionally protected freedom of contract, but raising no objection to regulations dealing with proper washrooms, drainage and plumbing on the premises to safeguard health.

[81] Warren, "The Progressiveness of the United States Supreme Court," 294 ("The reformers who claim that the Court stands as an obstacle to 'social justice' legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of *Lochner v. New York* . . .")

[82] Bernstein, **Rehabilitating Lochner**; David N. Mayer, **Liberty of Contract: Rediscovering a Lost Constitutional Right** (Washington, D.C.: Cato Institute, 2011), pp. 71-76.

[83] Kermit L. Hall and Peter Karsten, **The Magic Mirror: Law in American History**, 2nd ed. (New York: Oxford University Press, 2009), p. 264 ("The *Lochner* decision was in many ways an aberration with limited impact"); Gregory S. Alexander, "The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism," in F.H. Buckley, ed., **The Fall and Rise of Freedom of Contract** (Durham: Duke University Press, 1999), pp. 103, 108 (declaring that "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle").

[84] *Sturges & Burn Manufacturing Company v. Beauchamp*, 231 U.S. 320 (1913) (Hughes, J.).

[85] *See*, for example, *Knoxville Iron Company v. Harbison*, 183 U.S. 13, (1901) (law requiring employers to pay workers in money not script); *Atkin v. Kansas*, 191 U.S. 207 (1903) (law limiting hours of work on state and municipal projects); *Muller v. Oregon*, 208 U.S. 412 (1908) (law limiting working hours for women in factories and laundries); *McLean v. Arkansas*, 211 U.S. 539 (1909) (law requiring that miners' wages be calculated by the weight of coal mined before screening); *Bunting v. Oregon*, 243 U.S. 426 (1917) (law restricting hours of work for both men and women in manufacturing establishments to ten hours a day, and providing for overtime pay); *New York Central Railroad Company v. White*, 243 U.S. 188 (1917) (workers' compensation law). State courts also generally upheld workplace regulations. Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 72 *Journal of American History* 63 (1985).

[86] Wickersham, "The Police Power," p. 313.

Answering the Call: Leaving the Bench to Serve the President—James F. Byrnes and Franklin D. Roosevelt, 1932–1945

SIDNEY M. MILKIS AND NICHOLAS F. JACOBS

Perhaps no President in American history has figured so prominently in the development of constitutional democracy as did Franklin D. Roosevelt. At no point in the country's history did its leaders grapple with challenges more profound than those faced during the 1930s and 1940s, as they sought to come to terms with the disruptive effects of industrialization, mass migration, and the rise of totalitarian-populism overseas. Given the ambitious reform program he envisioned, Roosevelt could not have acted alone. There was his "Brains Trust"—the group of university professors who formulated some of the most revolutionary schemes to revive the nation's economy. There were Roosevelt's famed administrators—Harry Hopkins as the chief engineer of the Works Progress Administration; Harold Ickes as the relief coordinator for the Public Works Administration; Frances Perkins, the first woman ever to serve as a Cabinet Secretary, and who used her office to secure the rights of organized labor; and, of course, the indomitable First Lady Eleanor (the White House's gadfly in its reluctance to take on the most controversial liberal causes, especially civil rights). These and other stalwart New Dealers were critical FDR allies in constructing a liberal Democratic Party and forging an executive-centered administrative state that would make the aspirations of its partisan objectives possible.

However, only one New Dealer worked as diligently, persevered for so long, and remained so committed to the success of Roosevelt's "revolution," as he routinely referred to the New Deal: James Francis Byrnes. Only he was bedizened by Roosevelt as "The Assistant President." Byrnes and FDR were an odd couple: Roosevelt, the

New York patrician who relished the exercise of power, and Byrnes, raised in South Carolina by his widowed mother—a hard-working dressmaker of such modest means that her son dropped out of school at fourteen to seek gainful employment—who styled himself an honest broker, rather than a first mover, of government action. Yet, in spite of their economic and cultural differences—or perhaps because they so well complemented each other—Byrnes and Roosevelt formed a relationship that, although largely forgotten today, is of immense importance for understanding the scope of New Deal reform at home and the eventual triumph of American liberalism abroad. Their partnership and genuinely warm friendship also personifies the extraordinary tension within New Deal liberalism—a conflict between its nationalist aspirations and a reverence for America's constitutional legacy that still animates our political travails today.

Roosevelt—the President of the United States who audaciously broke the two-term tradition set by George Washington and served for just over twelve years—was the center of American life around which the fundamental political controversies of the 1930s and 1940s swarmed. Byrnes remained behind the scenes yet omnipresent—serving in all three branches of the federal government while Roosevelt was President. A first-term junior Senator from South Carolina at the birth of the New Deal, he rose to become one of the most important leaders in steering key reform legislation through a fractious Congress. In 1941, he moved to the Supreme Court and, although his tenure on the bench was a brief 452 days (only one other Justice in American history, Thomas Johnson, has spent less time on the Court), he wrote several important opinions during his brief stint that helped codify the new constitutional order.[1] But Byrnes' most important duty occurred in the wake of Pearl Harbor, which pulled America into the Second World War just three months into his tenure on the Court. After months of informally advising the President and the Attorney General on the most important matters related to economic mobilization for total war, Justice Byrnes left the Court to serve officially in the administration: first as Director of Economic Stabilization and then as Director of War Mobilization, both positions having been intentionally created to take advantage of Byrnes' rare combination of savvy politician and astute legal mind.

FDR's and Byrnes' fruitful partnership was so strong because, as different as they were, they shared the view that the New Deal represented a new understanding of the social contract—one that required the national government to assume new responsibilities at home and abroad. FDR gave voice to this new understanding of rights in his iconic State of the Union message of 1941. Traditional freedoms like speech and religion, he argued, needed to be supplemented by two new rights: "freedom from want" and "freedom from fear."[2] These new freedoms, representing for all intents and purposes the charter of the modern American state, were given institutional form by the welfare and national security states. Imbedded in a modern executive office and a growing national bureaucracy during the presidencies of Roosevelt and Truman, these pillars of the New Deal political order transcended partisanship. The New Deal state was embraced by Democrats and Republicans alike in the aftermath of World War II. President Dwight D. Eisenhower, the first Republican elected after the New Deal, bestowed bipartisan legitimacy on the liberal political order. Two years after his 1952 campaign victory, with bipartisan cooperation, he pushed through Congress an expansion of Social Security. The popular "Ike" also sustained Roosevelt's and Truman's commitment to liberal internationalism, the view that America and her allies (particularly

in the North Atlantic Treaty Organization) could be—must be—a force for good in the world.

Yet this partisan consensus eventually unraveled, in large part due to the emergence of civil rights as a contentious, riveting drama during the 1950s. When Byrnes resigned as Truman's Secretary of State in January 1947, he returned to his home in South Carolina to become a vociferous critic of the President and the Democratic Party. Elected as Governor in 1950, he became a leader of the massive resistance to the *Brown v. Board of Education* decision, which saw a unanimous Supreme Court denounce the invidious myth that separate could be equal. Byrnes not only joined most other Southern governors in lambasting the decision, he also became a leading architect of the Southern Strategy the Nixon Administration pursued to realign partisan politics below the Mason-Dixon Line. Having abandoned the New Deal Democratic Party he had so diligently worked to build, Byrnes supported Republican presidential candidates until his death on April 9, 1972.

It is only by taking stock of this momentous time in history that we can begin to make sense of this special relationship between Byrnes and Roosevelt, a critical but uneasy partnership that illustrates both the great potential and stifling limits of progressive reform in twentieth and twenty-first century America. Viewing history through the lens of this alliance sheds important light on the effort of a President and his assistant president to meet the profound challenges of economic catastrophe and the rise of totalitarianism in Europe. And it leaves us with a new vantage point to better grasp the causes of our present political discontents: to understand how a transformed Democratic Party almost succeeded in forging a new national community, but in the end, tragically failed to make the South an enduring partner in the New Deal political order.

A Junior Senator Becomes a President's Trusted Ally

Byrnes was such a critical ally to Roosevelt because in Congress, the Court, and the executive branch he provided a critical link between the White House and the bloc of impregnable Southern Democrats who posed the greatest opposition to the New Deal. As Thomas Stokes, the Pulitzer Prize–winning journalist from Georgia, wrote, Southern Democracy (dedicated to the states rights philosophy of Jefferson) was the "ball and chain which hobbled the Party's forward march."[3] Among the few Southerners who supported the New Deal through thick and thin, Byrnes was the President's most important ally in his determination to keep the South in the fold of a transformed, reimagined nation. Furthermore, Byrnes' pragmatism—his willingness to support what Roosevelt dubbed "bold persistent experimentation"—expressed the President's hope that the New Deal might forge a transformed coalition in the South dedicated to economic security. Byrnes shared Roosevelt's belief that the New Deal could work just as well for the sharecropper in low country South Carolina or the millworker in the state's new boomtowns as it could the urban factory worker. Both hoped that this new politics would compete with and then perhaps displace the virulent racial conflict that long had dominated democracy below the Mason-Dixon Line. Central to Roosevelt's New Deal Southern strategy, Byrnes was a permanent fixture in the White House during the early years of FDR's presidency, even spending Thanksgiving with the President before his inauguration to advise on Cabinet appointments and their prospects for Senate confirmation.[4]

Byrnes' political savvy proved indispensable to Roosevelt as the President sought to bring the executive office closer to the American people in a time of want and desperation. During the first press

conference of his administration, which inaugurated the practice of inviting participation by all correspondents regardless of their political posture toward the White House, Roosevelt requested that Byrnes attend and evaluate his performance. After all the newspapermen had left, Roosevelt asked him how he did. Byrnes, having watched the President handle a cascade of inquiries on a wide range of topics with seeming aplomb, responded that "it was fine for the reporters, but I fear the effect [on you]." In this display of wit and policy dexterity, Byrnes saw clearly that Roosevelt intended to lead—to draw unprecedented attention to the executive office. This ambition would give Roosevelt the unique opportunity to "enlist support for his programs"; at the same time, Byrnes, seeing the President's hand trembling and his shirt drenched in perspiration, recognized the strain this enhanced responsibility would place on Roosevelt and the hard challenges he would face in laying the cornerstone of a modern executive office.[5]

The strengthening of the presidency in the face of the imposing domestic and international issues the country confronted bespeaks the special importance of the Roosevelt-Byrnes alliance. The relationship between FDR and Byrnes only grew stronger and more essential to the preservation of the New Deal during Roosevelt's controversial second term. Roosevelt's first term was dedicated to the enactment of programs like Social Security and the Wagner Act (Labor's Magna Carta). These new programmatic rights were the signature New Deal policies that would secure freedom from want. In the midst of terrible economic despair, these innovations drew widespread support, even among many recalcitrant Southern Democrats. But Roosevelt pursued an institutional program during his second term that cast a brighter light on the constitutional transformation that he sought. Startling allies and enemies alike, he pursued two highly controversial measures that sharply divided the Democratic Party and aroused cries that he was a "dictator"—an indictment so resonant that the President had to go on the radio and formerly deny it. This program included the Executive Reorganization Act, announced in January 1937, and the "Court-packing" plan, proposed just a few weeks after the administrative reform program.

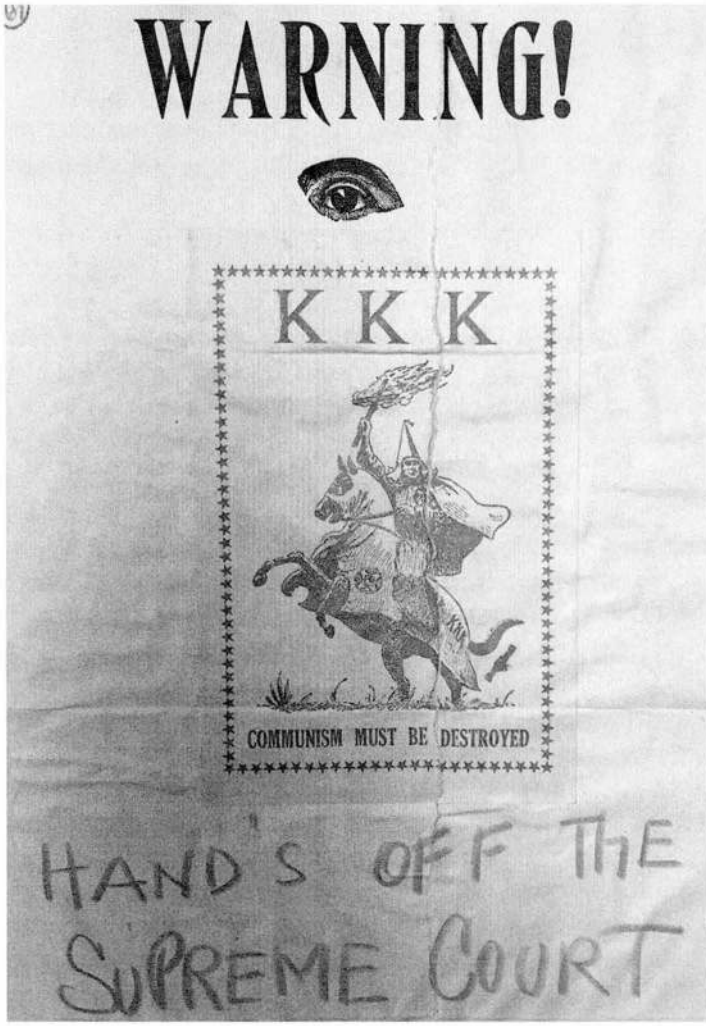
The plans to reorganize the federal judiciary and executive branch were bold efforts to increase the President's personal influence over a rapidly expanding national government, one that laid greater claim to promoting its citizens' welfare. They marked an effort to transform a decentralized polity, dominated by localized parties and court rulings that supported property and states' rights, into a more centralized, bureaucratic form of government that could deliver the goods championed by the New Dealers. Programmatic rights like Social Security and collective bargaining, Roosevelt believed, would not amount to anything—would not fulfill the freedom from want—unless new institutional arrangements were established to redistribute powers within the government and permanently secure these new commitments inside the federal bureaucracy.[6] Moreover, as early as 1937, Roosevelt anticipated that it would be impossible to stay out of the battles erupting in Europe and Asia: as he told Byrnes, the rise of fascism and imperialism, even more than the challenge posed by the Great Depression, required the strengthening of executive power—to give it the capacity to protect the freedom from fear.

Byrnes had serious reservations about Roosevelt's institutional reform program. He was an adamant defender of Congress and its constitutional prerogatives, which Roosevelt's commitment to executive dominion threatened. When reflecting on his long career in politics, he most fondly remembered his time in the Senate—a place where "there was independence of action,

and there was the pleasure of competing with men who displayed good sportsmanship, and whose friendships enriched my life." Coincidently, his office was the former robing room of the Old Supreme Court chamber in the Capitol. He loved this place, one of the perks that came with being a committee chairman. His memoirs detailed the fine historical eccentricities that decorated his legislative domain, especially the old White House chandeliers and the painting that hung on his wall of Henry Laurens, a South Carolinian and the only American ever to be imprisoned in the Tower of London.[7] Byrnes even enjoyed the chore of responding to constituent letters, taking the time to draft lengthy responses to inquiries whether they came from mayors of South Carolina towns or factory workers in the textile mills. When he joined the Supreme Court, he had to confess dutifully that it was inappropriate for a Justice to interfere with the same matters as he did when he was a Senator. Yet, taking advantage of the knowledge he had gained on the front lines of legislative oversight, Byrnes usually made sure to point his fellow South Carolinian to the appropriate source of influence deep inside the federal bureaucracy.

Despite his love of congressional politics and its traditions, Byrnes nevertheless shared Roosevelt's belief that the national government needed to be strengthened, lest the United States fall prey to a more radical solution to the crises at home and abroad. The first true test of the Roosevelt-Byrnes alliance developed during FDR's ill-fated Court-packing plan in the spring and summer of 1937. Almost all of Byrnes' fellow Southern and border state Senators, as well as many very vocal South Carolina constituents, viewed the Court as Horatio at the Bridge—the final line of defense against the rising tide of national statism. Significantly, the two Supreme Court decisions that enraged Roosevelt the most—handed down on May 27, 1935, soon known to New Dealers as "Black Monday"—were *Humphrey's Executor v. United States*[8] and *Schechter Poultry Company v. United States*,[9] both of which imposed constraints on the President's personal power. Byrnes was not the only Southern congressman to support Roosevelt during the Court-packing ordeal, but the esteemed Senator from the front lines of opposition to the New Deal was the most important.

In fact, FDR chose Byrnes to give a nationally broadcast speech to defend the Court-packing plain against the fierce attack of his close friend, the unreconstructed opponent of the New Deal, Virginia's Senator Carter Glass. For Glass and other influential Southern and border-state Senators, such as Josiah Bailey of North Carolina, Harry Byrd of Virginia, and Millard Tydings of Maryland, the Court-packing plan exposed the President's dangerous centralizing ambitions that threatened not only judicial independence but also the constitutional prerogatives of Congress. The South, as the vanguard of a "conservative manifesto" proclaimed in 1937, was largely united in seeking to "restore to Congress its proper responsibilities in making laws and enunciating policies for the country."[10] Southern resistance to legislation that would result in a more liberal Supreme Court, which proponents and adversaries alike anticipated would issue decisions more favorable to African Americans in civil rights litigation, placed Byrnes squarely in opposition to powerful political strains in his home state. The entire Supreme Court of South Carolina wrote directly to Byrnes in opposition to the President's plan. And, as a testament to how public and rancorous the Court-packing issue became, a missive arrived shortly thereafter at Byrnes' Washington office that was an ominous reminder of local politics back home: a single sheet of paper displaying an image of the Hooded White Knight of the KKK, with the red boldfaced words, "Hand's Off the Supreme Court," written underneath a watchful eye.[11]



Senator James F. Byrnes received this ominous missive from a constituent in South Carolina in 1937 after he announced his support for Franklin D. Roosevelt's proposal to enlarge the Supreme Court.

Despite the political pressure to oppose Roosevelt's controversial second-term initiatives, Byrnes remained committed to the institutional bulwarks of New Deal liberalism. Roosevelt argued that the Court had to be transformed to restore effective government in the face of aggressive totalitarian forces in Europe—at a time when representative democracies were widely thought to be weak and incompetent as compared to assertive regimes led by new dictators. Echoing the President, Byrnes argued that court "reorganization" was indispensable to the preservation of representative constitutional government. "The real dangers of dictatorship will not come from the most democratic President we have ever had," Byrnes argued:

> Nor will they come from younger men on the Federal courts. The real dangers of dictatorship will come from Justices who forget the warning of Chief Justice Marshall that the Constitution should be "adapted to the various crises in human affairs." They will come from those lawyers, who, jealous

> and fearful of the loss of prestige of their profession, want us to postpone social justice for years while they strive to block it forever. They will come from those who are blind to the fact that at this stage of world history time is of the essence, and that the difference between keeping faith with the people in 1937 and hoping to keep faith with them in future years may be the difference between a triumphant democracy, which works, and a disillusioned democracy, which fails.[12]

Although the Court-packing bill died in Congress, Roosevelt claimed that the highly contested initiative did its work. By April 1937, the Supreme Court began to uphold the constitutionality of important New Deal legislation. "A switch in time saves nine," was the by word of relieved congressional Democrats who viewed the pivot of Associate Justice Owen J. Roberts from the conservative to the liberal side of the Court a prudential strategy that would defuse the constitutional crisis. There is considerable scholarly dispute about whether Roosevelt's assault on the Judiciary influenced Roberts; but there is no gainsaying that in rapid succession the Justices approved a minimum wage law in Washington state very similar to a New York statute they had found unconstitutional just a year earlier and, more significantly, upheld both the Wagner Labor Relations Act and the Social Security Act. "I know not what effect the Wagner decision will have on the court plan," Byrnes told reporters, "but it seems that the court plan already had some effect on the Court."[13]

With the Court's apparent acceptance of the New Deal interpretation of the Constitution, Byrnes thought Roosevelt had little reason to continue his fight, especially after one of the President's nemeses, Associate Justice Willis Van Devanter, announced his retirement in May. As Byrnes asked Roosevelt, "why run for a train after you've caught it?"[14] But recalling the Court's 9-0 decision in the *Schechter* decision, Roosevelt believed that he still needed at least a modified version of the plan, which would allow him to appoint two or three Justices, to secure a majority that would accept the constitutionality of the New Deal state. "The unanimity of the Court," Barry Karl observed about the judiciary's firm rejection of the administrative discretion Congress granted the President to deal with the economic crisis, "properly emphasized the singularity of the issue among the many divided opinions of the opposition between the Court and the New Deal."[15]

It is a testament to the strength of the Byrnes-Roosevelt relationship that neither bore the scars of a protracted and bitter fight. Byrnes was frustrated by Roosevelt's refusal to declare victory and withdraw the highly contentious bill. However, he continued to support the President's court-packing plan through July, when the death of Democratic majority leader, Joseph Robinson, who had been promised a Supreme Court appointment if he obtained Senate passage of a revised court bill, effectively killed any hope that Roosevelt's plan would ever pass the Congress. Nevertheless, starting with the retirement of Van Devanter, Roosevelt was able to appoint a total of eight new Justices to the Supreme Court, thereby transforming the judiciary into a critical partner of the New Deal, and cementing the "Constitutional Revolution of 1937."

From the Senate to the Supreme Court

Roosevelt rewarded Byrnes' stalwart loyalty by making him one of those new Justices in 1941, replacing conservative stalwart James C. McReynolds. FDR knew that appointing Byrnes would pay off a large political debt and save Byrnes from facing a possible difficult re-election in 1942. But,

like his appointment of another Southern Senator, Hugo Black, in 1937, Roosevelt's selection of Byrnes testified to his belief that it was especially important to have loyal allies below the Mason-Dixon Line. Many ardent liberals urged FDR to forget about the North-South alliance—first forged during the 1790s in the mating dance between Thomas Jefferson and Aaron Burr—that underpinned a national Democratic coalition. Yet Roosevelt was hopeful that, with the help of effective allies like Byrnes, the deep South would support a liberalized Democratic Party—and remain in the fold—even if it celebrated Roosevelt rather than Jefferson as its patron saint. Roosevelt and Byrnes shared the belief that conservative democracy in this poorest part of the country was not an economic conservatism but rather was firmly established in reaction to the Populist movement at the end of the nineteenth century and by the near-constant exploitation of racial prejudice. As Byrnes stated in a speech in Charleston on August 8, 1936:

> It is my opinion that for the last twenty-five years, we have, in South Carolina, in political discussions, devoted too much time to "likker [liquor] and nigger," and too little time to those matters that vitally effect the welfare and happiness of the men, women and children of the state. In the heart of each of us there are certain prejudices. It is the duty of a good man to endeavor to control and subdue those prejudices; and I have little respect for a man who knows better, and for political gains, is willing to appeal to that which is worst in men, rather than that which is best in men.[16]

During his short stay on the Court, Justice Byrnes showed that this was not merely rhetorical flourish. He vindicated FDR's faith that the New Deal could hold the North and South together—and that eventually New Dealers could build a national state dedicated to extending the new constitutional order and overwhelm the stubborn tumor of racial prejudice. Byrnes did not have as substantial an influence on the Court as did Black, but two of his important majority opinions supported Roosevelt's reformist aspirations.

In *Edwards v. California,* Byrnes upheld the rights of individuals to travel freely from one state to another.[17] As poignantly depicted in John Steinbeck's **The Grapes of Wrath**, during the Great Depression, California treated desperate migrants, many of them victims of the Dust Bowl, harshly. A prime example of California's hospitality was the so-called "Okie Law," which made it a misdemeanor to bring into California "any indigent person who is not a resident of the State, knowing him to be an indigent person."[18] In pursuance of this statute, California prosecuted as a criminal offense attempts by its residents to bring unemployed relatives or acquaintances to live with them if the residents were unable to provide for the migrants' cost of living. The law was a deliberate attempt by the California government to reduce its relief roles, even though the federal government provided much of the social welfare benefits that indigent Californians received. Edwards was a Californian who had driven to Texas and returned with his unemployed brother-in-law. He was tried, convicted and given a six-month suspended sentence.

Departing from the advocacy of states' rights and opposition to an expansive welfare state, to which most of his Southern brethren adhered, Byrnes, in his first majority opinion, declared the California law unconstitutional. He argued that the Interstate Commerce Clause of the Constitution guaranteed individual men and women the right to move freely from one state to another. More to the point, Byrnes tied this broad defense of

President Roosevelt chose Senator Byrnes to give a nationally broadcast speech to defend his Court-packing plan against attacks by other Southern senators who felt the President's plan threatened not only judicial independence but also the constitutional prerogatives of Congress. While Byrnes was not the only Southern Senator to back FDR's initiative, he was probably the most powerful. This cartoon shows FDR asking Congress to allow him to add up to six new justices under the plan.

the Commerce Clause to the New Deal's reinterpretation of the social contract. Pushing back against California's argument that economic relief was purely a local affair, Byrnes, taking note that the plaintiff had been supported by the New Deal relief agencies, wrote in a revealing *obiter dicta*:

> The nature and extent of [California's] obligation to afford relief to newcomers is not here involved. We do, however, suggest that the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that, in an industrial society, the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government, as well.[19]

Byrnes also wrote a majority opinion that dovetailed with the work of the Fair Employment Practices Committee, which Roosevelt had created in 1941 to address racial injustice in the defense industry and the criminal justice system. In *Ward v. Texas*, decided in 1942, police in Texas had taken an accused African American, William Ward, from the church he was attending in the county where a white man had been murdered. Handcuffing the defendant and moving him without a warrant, police carried Ward more than a hundred miles, over a period of three days, to a series of Texas jails, ostensibly to protect him from pursuing lynch mobs. Such good intentions, however,

were suspect, given that, during this odyssey, Ward was deprived of sleep and allegedly tortured until he confessed—an admission of guilt that led a jury to convict him of murder. Byrnes wrote for the Court, which reversed the murder conviction on the grounds that moving "an ignorant Negro by night and day to strange towns and telling him of threats of mob violence and questioning him continuously" had resulted in an "inadmissible confession." The use of such a forced confession, Byrnes concluded, "is a denial of the due process and the judgment of the conviction must be reversed."[20]

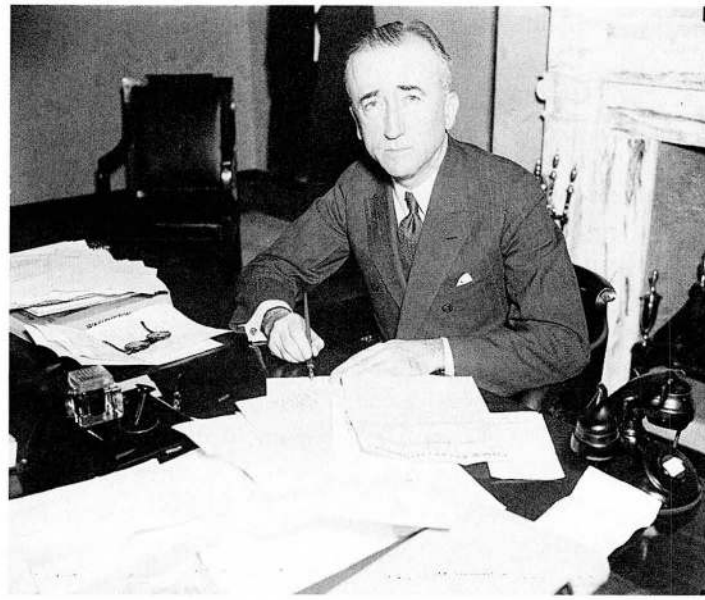
The term "ignorant Negro" grates, a sign that Byrnes—and the Court—still held a patronizing attitude toward African Americans. But Byrnes' decisions on civil rights, which included a concurring vote in a case finding an all-white grand jury to be *prima facie* evidence of racial discrimination against a black defendant, appeared to support FDR's belief that the Court's insulation from South Carolina politics—so rooted in race—would free his valued ally to confirm his commitment to the New Deal ambition to foster a new sense of national community.[21]

Byrnes' brief stint on the Supreme Court was important, but in truth, he was never at home in this chamber, perhaps seen in that only eleven pages, of the over 400 pages in his memoir, are devoted to his time on the bench. Unlike Hugo Black, another self-made lawyer who passed the bar without going to college or law school, Byrnes did not participate actively in the formulation of a new interpretation of the nation's legal doctrine. Throughout his brief tenure, Byrnes was more dedicated to the broader constitutional issue raised by the New Deal: how America could accept the authority of a national state and still stay true to its deep-rooted commitment to individualism and regional diversity. Preoccupied with that challenge, which was made all the more important with the approach of war, Byrnes wrote few opinions (he never wrote a concurring one), seldom participated actively in the discussion of cases in Conference, and was impatient with—indeed alienated from—judicial procedures that were so far removed from the hurly-burly of politics that he had mastered.

To be sure, Byrnes found his colleagues convivial. "Contrary to popular impression," Byrnes wrote in his memoirs, "justices are very human, and during my service, at least, they were very sociable."[22] Moreover, he believed that someone of his background could make an important contribution to a judicial system increasingly faced with the task of making legal sense of a modern state and its expanding and complex body of programs and policies. As an ever-increasing amount of the Court's work involved interpreting congressional statutes, Byrnes argued, "When the language of a statute is such as to create doubt as to the intent of the law-making body, it seems to me a knowledge of the mechanics of legislation should be helpful."[23] Nonetheless, he fretted that an individual who served on the bench for years "necessarily becomes, to a degree, isolated from the people."[24] When the Mississippi born reporter, Turner Catledge of the *New York Times*, paid him a social visit at his Supreme Court chambers, Byrnes urged him to stay longer than the journalist—sensitive to a judge's busy schedule—thought appropriate. Yet Byrnes urged him to stay a while—admitting: "I get so damn lonely here."[25]

From the Supreme Court to the White House

Roosevelt also experienced a strong sense of loss when his hitherto constant political companion entered the Court. Yet, Byrnes' leave of absence from political matters was short lived. In fact, part of his isolation in chambers was due to his "answering the president's call" to help with the war effort. With the formal



Two days after the Japanese attack on Pearl Harbor, FDR called Associate Justice Byrnes to the White House to ask him to lend his legislative expertise in shaping the laws and executive orders that would mobilize the government and economy for total war. After months of unofficially assisting the chief executive, Byrnes resigned from the Supreme Court on October 5, 1942 to become director of the Office of Economic Stabilization. FDR created the agency for Byrnes (pictured), who led the task of arbitrating the near constant government infighting over program jurisdiction and the distribution of resources between civilian and military production.

declaration of war in December 1941, it is not at all surprising that Roosevelt came calling on the sitting Justice. The impending war would stress the capacity of presidential government, just as it had for previous executives. And, just as he had been at the vanguard of Court reform, so Byrnes had been essential to modernizing the presidential office. Indeed, few knew the inner mechanics of modern administration better, because few had such a hand in crafting them. Administrative reform—embodied by the 1937 executive reorganization bill—was, as Roosevelt put it, at the "heart" of the New Deal's constitutional re-founding. Enacted only after a bitter two-year struggle in Congress, the 1939 Executive Reorganization Act created the Executive Office of the President, which included the newly formed White House Office (the West Wing) and a strengthened and refurbished Bureau of the Budget. The administrative reform law also strengthened the Chief Executive's control over what was becoming a maze of departments and agencies. Transforming what had been a modest office into an institution, administrative reform gave the President the power and support staff to truly become the Constitution's national office, an office capable of fulfilling the promise of the New Deal to provide security at home and abroad.

Byrnes helped to imagine and reify Roosevelt's vision of an executive-centered administrative state that would be accountable to, but not dominated by, Congress. Ever sensitive to the "conservative" aspect of the New Deal revolution, he drafted a lengthy history of administrative organization that contributed to Roosevelt's argument that an energetic and independent presidency would renew and enlarge rather than destroy the American Constitutional tradition. In spirit, if not in name, he tapped into Alexander Hamilton's claim that Presidents should pursue "extensive and arduous enterprises for the public benefit."[26]

The Hamiltonian executive forged by the Byrnes-FDR partnership was firmly established as an essential feature of American constitutional government during World War II. Franklin Roosevelt called Byrnes to the White House two days after the Japanese attack on Pearl Harbor, hoping the Associate Justice would give him the benefit of his legislative expertise in shaping the laws and executive orders that would mobilize the government and economy for total war. Byrnes had just written his first Court opinion, but after the White House called on him to assist in the war effort, he devoted every available minute to the "extracurricular activities" of his justiceship, as he called them. The relationship between the President and the Justice marked the sort of rare partnership that James Madison, at the time of the writing of the Constitution, hoped would become a regular feature of American constitutional government. Byrnes not only had the constitutional acumen from years of service in the U.S. Congress, but now as an Associate Justice, he was particularly well-suited to advise the administration on the constitutionality of proposed administrative actions. Roosevelt's Attorney General, Francis Biddle, was in constant communication with Byrnes throughout December 1941 and the following January. Their task was to weed out all "serious interferences with our war effort" and to strengthen the executive's control of the federal apparatus. Indeed, Roosevelt insisted that all persons proposing new executive powers or the reorganization of different departments had first to "talk to Jimmy Byrnes and Francis Biddle about it."[27] Roosevelt even gave Justice Byrnes final approval on the wording, legal rationale, and message to Congress explaining an executive order on wage freezes. But most important to the administration was Byrnes' active involvement in getting the set of War Powers Acts through the Congress. Here Justice Byrnes responded just as Senator Byrnes would have: telephoning Senators and House leaders, whipping votes, and taking pleasure that the bills "passed Congress in record time."[28]

After months of unofficially assisting the Chief Executive, Byrnes resigned from the Supreme Court on October 5, 1942, writing each of his "dear Brethren" that "only a sense of duty impelled me to resign from the Court."[29] Using the power granted by the 1939 Executive Reorganization Act, Roosevelt created a new agency designed for and by Justice Byrnes: the Office of Economic Stabilization. As director of this agency, Byrnes assumed the task of arbitrating the near constant government infighting over program jurisdiction and the distribution of resources between civilian and military production, all of which threatened to hamstring the administration's wartime efforts. While Roosevelt was dedicated to the art of diplomacy in his dealings with Churchill and Stalin, and the art of war in liberating North Africa, and then Europe, he needed the impartial leadership only a former Justice could provide. It was more than a courtesy owed to a former member of the Supreme Court that the memoranda that poured into Byrnes' small White House office always were addressed to the "Justice." As Roosevelt put it to Byrnes, "In these jurisdictional disputes, I want you to act as a judge and I will let it be known that your decision is my decision, and that there is no appeal. For all practical purposes you will be assistant President." [30]

As his title foretold, Byrnes commanded an extraordinary amount of power to oversee the nation's economy. The *New York Times* labeled him "Our No. 1 Stabilizer," while the liberal newspaper, *PM*, celebrated this Southerner as "America's No. 1 Inflation-Stopper." "He simply went to work," the papers reported, "He did not make a radio speech or pose for pictures"; "No one has taken a job in the war machine with less

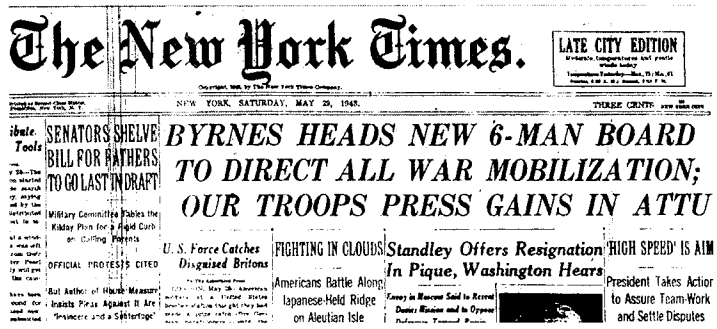
fanfare."[31] Byrnes' willingness to operate behind the scenes, his attention to detail, and his mastery of both administrative and parliamentary procedure helped the federal government stabilize the nation's economy.

Although Roosevelt had delegated prodigious authority to Byrnes, the assistant president was in constant communication with the President. Roosevelt was especially dependent on the success of the controversial war-time production policy that Byrnes implemented—the President's "Hold the Line" order. As the name suggests, during the war the overarching mission of every federal agency was to prevent price increases on the home front. This meant that wages would hold constant, even if defense industries were ordered to work a forty-eight-hour week or if unions had negotiated annual increases; rationing would continue to prevent the hoarding instincts of a generation who lived through the Depression; and prices for crops would be set by the government, even if market demand allowed farmers to charge more.[32]

The greatest challenge in enforcing Roosevelt's Hold the Line Order—the most troublesome task in negotiating the tension between Dr. New Deal and Dr. Win the War—was the coal miner strikes of 1943 and 1944. Led by the powerful and controversial head of the United Mine Workers, John L. Lewis, the strikes threatened to upend the President's war efforts and Byrnes' economic policies.[33] By the end of April 1943, Byrnes feared that the United States might not have enough coal to continue to fight a world war. At his urging, President Roosevelt issued an executive order on May 1, followed the next evening by a powerful fireside chat, ordering the Interior Department "to take possession and operate the coal mines for the United States Government" and to "call upon all miners who may have abandoned their work to return immediately to the mines and work for their Government."[34]

A compromise agreement was eventually secured, but official and unofficial strikes, including four general walkouts, continued, at times involving over a half million coal workers. Consequently, steel output dropped and unrest over wage demands spread to rubber and engineering plants. The government's battle with the United Mine Workers and federal control of many mines persisted well into 1944. During this long struggle, Roosevelt relied on Byrnes not only for his efforts to control organized labor—a nettlesome but valued political ally—but also to deal with the mine owners, who deeply resented the government's operation of their property. Caught in the middle of this contretemps, Byrnes began to fear that his principal role in enforcing wage and price controls would hurt Roosevelt's political standing, especially with labor. It did not help that he hailed from the South, which was at the forefront of opposition to an emerging industrial labor movement. As a supporter of the New Deal, Byrnes was relatively sympathetic to workers' rights. He had voted for the Wagner Act and, while on the Court, had written an opinion that circumscribed the scope of the Anti-Racketeering Act of 1934, a key initiative in the government's efforts to prevent strong-arm union tactics.[35] But his long-standing opposition to sit-down strikes, which were so central to labor's triumphs in the late 1930s, and the leading role he played in enforcing FDR's "Hold the Line" order placed Byrnes in a vulnerable position.

A sign of how important the assistant president was to Roosevelt is that the President not only kept Byrnes in charge of war mobilization, but he also increasingly sought to draw on his valued partner's vast experience in foreign affairs. With the support of Cabinet members like Harry Hopkins and the Attorney General, Byrnes sketched out a new role as Director of War Mobilization, a position he officially assumed on May 27, 1943. It is hard to imagine that Byrnes' charge in serving the President could expand, but as Director of



The New York Times. LATE CITY EDITION

NEW YORK, SATURDAY, MAY 29, 1943. THREE CENTS

SENATORS SHELVE BILL FOR FATHERS, TO GO LAST IN DRAFT

Military Committee Tables the Kilday Plan for a Rigid Curb on Calling Parents

OFFICIAL PROTESTS CITED

BYRNES HEADS NEW 6-MAN BOARD TO DIRECT ALL WAR MOBILIZATION; OUR TROOPS PRESS GAINS IN ATTU

U. S. Force Catches Disguised Britons

FIGHTING IN CLOUDS

Americans Battle Along Japanese-Held Ridge on Aleutian Isle

Standley Offers Resignation In Pique, Washington Hears

'HIGH SPEED' IS AIM

President Takes Action to Assure Team-Work and Settle Disputes

On May 27, 1943, FDR appointed Byrnes Director of War Mobilization, a newly created position in which he would be at once responsible for controlling wartime wages and prices while simultaneously managing the nation's defense industries. On behalf of the President, he oversaw the addition of $20 billion worth of industrial investments to speed up production; the manufacture of nearly $64 billion worth of armaments; the additional employment of 18 million persons in war industries; and the exportation of $24 billion worth of goods to America's allies.

War Mobilization, he enjoyed a realm of discretion unavailable to him when he was brokering disputes between different department heads and competing economic interests. Byrnes was now at once responsible for controlling wartime wages and prices while simultaneously managing the nation's defense industries. On behalf of the President, he oversaw the addition of $20 billion worth of industrial investments to speed up production; the manufacture of nearly $64 billion worth of armaments; the additional employment of eighteen million persons in war industries; and the exportation of $24 billion worth of goods to America's allies.[36]

Indeed, with Roosevelt increasingly abroad in late 1943 and 1944, Byrnes in effect became the Czar of the wartime economy. Significantly, as an extra precaution, the President before traveling out of the country left Byrnes with "an interesting form of blank check." These were official papers, signed by the President and locked in Byrnes' safe, on which executive orders might be issued in case of emergency. If such a grave situation arose, Byrnes, after consultation with Roosevelt by cable, was to unlock the safe and fill out the executive order, calling for whatever actions he thought necessary.[37]

Byrnes' lead role in mobilizing the economy and the arsenal of democracy was a dramatic success. However, this was not the first time in modern history that the American economy had successfully demonstrated itself on the battlefield. Both Byrnes and Roosevelt experienced the economic and social convulsions at the end of the First World War and they understood the challenge of restoring some separation between state and society, a barrier breached by the pressures of total war. It was with the particularly difficult problems of de-mobilization, or reconversion, where the assistance of Byrnes made the greatest difference. Failure to maintain high levels of employment as millions of men came back to work, failure to keep prices stable when the Army and Navy stopped buying goods, and the "economic defeatism" that would no doubt affect many returning veterans adjust to the uncertain conditions of peace were challenges that, as Byrnes put it, created a "crossroads" to "nobly gain or meanly lose the hope of the world."[38]

With hindsight, we know how this story ends: nearly twenty years of unparalleled prosperity and the crystallization of New Deal liberalism. But it was a fraught transition that preoccupied the President and his assistant president for the remainder of Roosevelt's life. The last memorandum

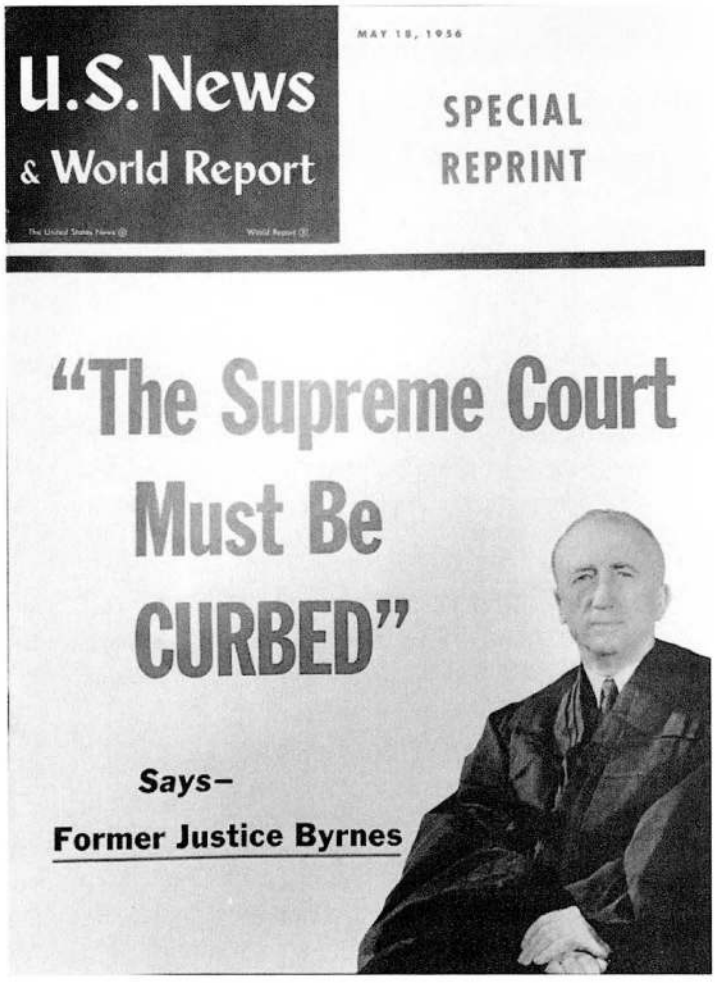
Byrnes sent to Roosevelt, six days before the President's death, concerned the need to avoid duplication in the federal government's planning obligations, a redundancy Byrnes proposed to solve by making an example of himself. Given the President's desire to bestow planning authority on the Bureau of the Budget after the war, Byrnes declared his intention to resign from the administration.[39] In returning to a peacetime footing, in restoring a degree of separation between government and business, these two strange bedfellows confirmed that a strong presidency, one that could provide for a greater sense security at home and abroad, need not become a dictatorship.

Conclusion: Byrnes, Roosevelt, and Partisanship in Modern America

The Byrnes-Roosevelt partnership revealed both the great strength of the New Deal and a powerful fault line that eventually fractured it. This odd coupling of two men was so essential because Roosevelt's constitutional revolution might never have gotten off the ground without an ally from the South, which was ground zero of the opposition to Roosevelt's grand experiment in forging a presidency-centered democracy. Byrnes' partnership with Roosevelt did not prevent Southern resistance to his most ambitious plans. But support by the highly regarded Byrnes for the constitutional transformation Roosevelt heralded—in particular his support of the Constitutional Revolution of 1937 and the Executive Reorganization Act—went far to ensure that the New Deal would not, like Lincoln's Republican Party, be confined to the North. Rather, the New Deal was born and became part of America's living Constitution with, for a time, strong multi-regional support—the embodiment of a newly imagined national community.

The national scope of the New Deal was especially important with the approach of war. Southern Democrats, with deep-rooted ties to Great Britain and great faith in an assistant President who was a South Carolinian, gave Roosevelt steadfast support as he maneuvered an isolationist country toward support of England in its desperate hour, participation in World War II, and plans to maintain a strong presence in world affairs after the struggle with fascism in Europe and imperialism in Asia ended. Just as the North and West invested their faith in Freedom from Want, so the South became a bedrock of Freedom from Fear. Would a partnership between Roosevelt and Felix Frankfurter—clearly a competent and trusted ally to the New Deal—have accomplished this delicate joining of the two pillars of the New Deal Charter? This is a counterfactual worth pondering, one that offers insights into the indispensable alliance between the patrician and, as the *Saturday Evening Post* described Byrnes, the "sly and able" politician from the heart of the Confederacy.[40]

Of course, the "Negro Question"—as New Dealers described the obstinate practice of racial segregation—was the serpent in the New Deal Garden of Eden. Knowing this, Roosevelt took pains to avoid a direct confrontation with the race issue, even maintaining a deafening silence as an anti-lynching bill, which had been before Congress since the beginning of his presidency, was killed by a Senate filibuster in 1938. The Fair Employment Practices Committee he formed was a modest measure—one that ultimately disappointed civil rights activists, such as A. Philip Randolph, who pressured Roosevelt to create the Committee as a sign that the New Deal really could advance a greater sense of security. In truth, FDR shared Byrnes' position that Jim Crow was a problem "to be solved by the White people of the South."[41] Roosevelt's so-called 1938 purge campaign, which saw the President interfere in several primary campaigns with the objective of defeating Southern and border state conservative Democrats, especially those



Secretary of State Byrnes left the Truman administration in 1947 and returned to South Carolina to become governor. He became a leader of the massive Southern resistance movement to civil rights reform and criticized the Supreme Court's *Brown v. Board* decision in an interview with *U.S. News and World Report* in 1956. He also became a leading architect of the Southern Strategy the Nixon Administration pursued to realign partisan politics below the Mason-Dixon Line.

who voted against the court-packing and executive reorganization initiatives, showed all too clearly that there would be strong resistance below the Mason-Dixon Line to a national effort to breach the color line. Although he focused intently on economic issues in that campaign, Roosevelt's effort to purge Byrnes' South Carolina colleague, "Cotton Ed" Smith, the sort of race-baiting politician whom Byrnes scorned, brought, as two journalists reported, "racial hatred to a peak which had not been reached since the palmiest days of Pitchfork Ben Tillman."[42]

Seeing how intransigent was the tension between his Northern and Southern flanks, Roosevelt accepted the civil rights leaders' veto of his desire to place the assistant president on the ticket with him in 1944, turning instead to the border-state moderate Harry Truman. Deeply embittered by Roosevelt's spurning of his candidacy, made worse when Truman so quickly ascended to the White House, Byrnes had a troubled relationship with the new President. He served Truman well as Secretary of State for two years, playing a key role in negotiating

difficult deals with an expansionist Soviet Union in the lead up to the Cold War. But when Truman, pressured by a rising civil rights movement, made the first important assaults on the ramparts of Jim Crow, most notably in integrating the armed services and supporting an *amicus curiae* brief in the Supreme Court in favor of the NAACP's suit against forced segregation in education, Byrnes cut his ties with the President.

It was this extension of the New Deal to civil rights, above all, that aroused Byrnes' desire to return to South Carolina, a hotbed of the fierce resistance to civil rights reform. Four years into his term as governor, the Supreme Court, in the landmark case of *Brown v. Board of Education,* ordered the end to the egregious "separate but equal" doctrine that sustained white supremacy in the South. Like many Southerners, Byrnes lambasted the decision.[43] But he drew on his experience as a former Justice of that Court, to showcase its supposed folly. Sounding a message that resembled more the idea of a "concurrent majority" that his home state's fabled Senator John C. Calhoun prescribed than FDR's New Nationalism, Byrnes urged the South to adhere to its states' rights doctrine and to abandon the Democratic Party in presidential elections. When Eisenhower won in 1952, Byrnes declared it the South's new "Independence Day"—freed from the trappings of a wayward, progressive Democratic Party.[44] Proudly proclaiming himself an "Independent Democrat," Byrnes helped to groom a generation of would-be segregationists and abandoned the New Deal coalition he had long nurtured.[45]

Byrnes' final political act was to help Richard Nixon and his political allies devise a Southern strategy that encouraged the growth of the Republican Party in the South. With the erosion of the Democrats' lock on Southern politics, the party's national standing faltered and the extent of the New Deal revolution waned. Officially spurning the Democrats in 1960, Byrnes became a senior Republican leader who in partnership with Nixon achieved "in only eight years what Republican leaders since Rutherford B. Hayes in 1876 had desired: the retrenchment of the Republican Party from a position of racial issues more liberal than that of the Democrats, and the rebuilding of the South as a solid GOP electoral base."[46]

The fulfillment of Byrnes' ambition to end the Democrat's Southern monopoly ultimately led to the dramatic political realignment that pulled the modern executive into the vortex of a fierce partisan struggle for the services of the executive-centered national state—a state that he, as Senator, Justice, and assistant president, had played such a pivotal part in creating. Yet amid this struggle, which has left the North and South as estranged as these regions have been since the Civil War, the institution of the modern presidency remains at the center of the current political storm. All elected Republican Presidents since the cosmic crack-up of the New Deal state—Nixon, Ronald Reagan, the Bushes, and Donald Trump—have embraced the modern presidency, even as they have sought to redeploy it as a force for conservative causes: wars against communism and terrorism, law and order, and the protection of "family values." This is the ironic denouement of the highly consequential relationship between Franklin Roosevelt and Jimmy Byrnes. This is the political conundrum they left us to solve.

Author's Note: The authors wish to express their appreciation to James Cross, the manuscript archivist in Clemson University's Special Collection Library, who patiently helped us navigate the James Francis Byrnes Papers. We also want to thank Brenda Burke, Head of Special Collections, for her gracious hospitality as we worked in the Clemson archives. Clare Cushman and Stephen L. Wasby provided excellent editorial counsel during the final preparation of this article.

ENDNOTES

[1] Thomas Johnson served nearly a year before being officially sworn in. But at 436 days his tenure is still shorter than Byrnes' by several days.

[2] Franklin Roosevelt, Annual Message to Congress on the State of the Union, January 6. 1941, http://www.presidency.ucsb.edu/ws/?pid=16092.

[3] Thomas L. Stokes, **Chip Off My Shoulder** (Princeton, NJ: Princeton University Press, 1940), p. 503.

[4] James F. Byrnes, **All in One Lifetime** (London, UK: Museum Press Limited, 1958.), pp. 66-69.

[5] *Ibid.*, p. 74.

[6] Sidney M. Milkis and Marc Landy, "The Presidency in History: Leading from the Eye of the Storm," in Michael Nelson, ed. **The Presidency and the Political System**, Eleventh edition (Washington, D.C.: CQ Press, 2018), 114: 93-130.

[7] Byrnes, **All in One Lifetime,** p. 135. In 1935, the Supreme Court moved from its quarters in the Senate to "the veritable palace of white marble" on First Street just across from the Capital Plaza. As Byrnes recounted, the shift from his Senate quarters, although commodious, to the Supreme Court Building marked a great change. The new judicial quarters "reflected a dignified strength and even aloofness far removed from the organized confusion of the Hill." As we shall see below, Byrnes was greatly honored by his appointment to the Court, but disconcerted by its insulation from the rest of government and public opinion.

[8] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[9] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[10] *Congressional Record*, 75th Congress, Second Session, 1: 934-937.

[11] Note is preserved and contained in the *James F. Byrnes Papers*, Series 2, Box 44, Folder 9.

[12] "Reorganization of the Federal Judiciary: Radio Address of Hon. James F. Byrnes." February 17, *1937.* Printed in *the Appendix to the Congressional Record, 75th Congress, Session 1. February 19, 1937,* pp. 276-278.

[13] Quoted in David Robertson, **Sly and Able: A Political Biography of James F. Byrnes** (New York: Norton, 1994), 260.

[14] Cited in: James T. Patterson. 1967. **Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939** (Lexington, KY: University of Kentucky Press), p. 120.

[15] Barry Karl, "Constitution and Central Planning: The Third New Deal Revisited," *The Supreme Court Review*. Eds., Philip B. Kurland, Gerhard Casper, and Daniel Hutchinson (Chicago and London: University of Chicago Press, 1989), 197: 163-201.

[16] James F. Byrnes, Senate Campaign Speech in Charleston, South Carolina, Radio. In *James F. Byrnes Papers*, Series 9, Box 2, Folder 18. "Likker" is the colloquial spelling of "liquor," and refers to anti-Catholic prohibition ordinances.

[17] *Edwards v. California*, 314 U.S. 160 (1941).

[18] § 2615 of the Welfare and Institutions Code of California, St. 1937, p. 1406.

[19] 314 U. S. 175.

[20] *Ward v. Texas,* 316 U.S. 547, 555 (1942).

[21] Robertson, **Sly and Able**, p. 302. The case was *Hill v. Texas*, 316 U.S. 400 (1942).

[22] Byrnes, **All in One Lifetime**, p. 136.

[23] James F. Byrnes to Clint T. Graydon. July 25, 1941. In *James F. Byrnes Papers*, Series 3, Box 3, Folder 5.

[24] Byrnes, **All in One Lifetime**, p. 140.

[25] Robertson, **Sly and Able,** p. 307.

[26] Alexander Hamilton. 1788. "Federalist 70: The Executive Department Further Considered, March 18." Available through the Avalon Project: http://avalon.law.yale.edu/18th_century/fed70.asp.

[27] Francis Biddle to James F. Byrnes. December 16, 1941. In *James F. Byrnes Papers*, Series 3, Box 2, Folder 12.

[28] James F. Byrnes to Alben Barkley. January 10, 1942; Oscar Cox to James F. Byrnes. January 14, 1942; Oscar Cox to James F. Byrnes. January 20, 1942. In *James F. Byrnes Papers*, Series 3, Box 6, Folder 16; Byrnes, **All in One Lifetime,** p. 149.

[29] James F. Byrnes to Members of the Supreme Court. October 5, 1942. In *James F. Byrnes Papers*, Series 3, Box 7, Folder 3.

[30] Byrnes, **All in One Lifetime,** p. 155.

[31] Delbert Clark. "Our No. 1 Stabilizer," October 18, 1942, *The New York Times*, Oct. 18, 1942, p. SM5; the *PM* article is one of few clippings saved by Byrnes: Henry Lieberman. "America's No. 1 Inflation Stopper," *PM,* Oct. 23, 1942, in *James F. Byrnes Papers*, Series 2, Box 1, Oversize File.

[32] "The War Against Inflation." February 9, 1943. In *James F. Byrnes Papers*, Series 9, Box 5, Folder 18; "Hold the Line Order." April 1943. In *James F. Byrnes Papers*, Series 9, Box 5, Folder 20; Walter Brown to James F. Byrnes. April 16, 1943. In *James F. Byrnes Papers*, Series 4, Box 10, Folder 10.

[33] James F. Byrnes to Franklin D. Roosevelt. May 14, 1943. In *James F. Byrnes Papers*, Series 4, Box 1, Folder 4.

[34] Executive Order 9340 on Seizure of Coal Mines, May 1, 1943.

[35] *United States v. Teamsters Local 807*, 315 U.S. 521 (1942).

[36] *Problems of Mobilization and Reconversion: First Report to the President, the Senate, and the House of Representatives*, January 1, 1944. Office of War Mobilization. In *Walter Brown Papers*, Clemson University Archives, Box 9, Folder 24.

[37] Byrnes documents in his memoirs how Roosevelt left him blank checks and the practice is corroborated in his personal papers, **All in One Lifetime,** p. 239.

[38] "Problems of Reconversion." September 27, 1944. In *James F. Byrnes Papers*, Series 9, Box 6, Folder 13.

[39] James F. Byrnes to Franklin D. Roosevelt. April 6, 1945. In *James F. Byrnes Papers,* Series 4, Box 12, Folder 2.

[40] Joseph Alsop and Robert Kintner, "Sly and Able: The Real Leader of the Senate, Jimmy Byrnes." *Saturday Evening Post*, July 20, 1940.

[41] *Congressional Record*, Appendix. 76th Congress, Session 1. January 4, 1939, p. 16.

[42] Allan Michie and Frank Ryhlick, **Dixie Demagogues** (New York, NY: The Vanguard Press, 1939) p. 266.

[43] James F. Byrnes. "The Supreme Court Must Be Curbed." May 18, 1956. *U.S. News & World Report, Special Reprint.*

[44] "Victory for Eisenhower." November 5, 1952. In *James F. Byrnes Papers*, Series 9, Box 13, Folder 8.

[45] Robertson, **Sly and Able**, Chapter 19.

[46] *Ibid.*, p. 540.

Attorney General Robert H. Jackson and President Franklin D. Roosevelt

JOHN Q. BARRETT

I had the privilege to meet Leon Silverman, in whose memory this lecture series is named, through his longtime close colleague and friend Judge Lawrence E. Walsh,[1] who was my employer, mentor, and friend. Mr. Silverman was a dedicated leader of the Supreme Court Historical Society and a giant of the private bar. In 1949, he joined the law firm that in time became Fried, Frank, Harris, Shriver & Jacobson, LLP, and ultimately he became its chairman.

In addition to Judge Walsh, another connection from Leon Silverman to this lecture is the fact that one of his senior colleagues and friends in his law firm was Samuel Harris.[2] In 1945-1946, four years before Silverman joined him in law practice, then-Captain Sam Harris, of the Office of the Judge Advocate General, United States Army, was a junior but quite important member of the U.S. team prosecuting Nazi war criminals at Nuremberg.[3] His boss heading that team was Justice Robert H. Jackson, who was away from his job as an Associate Justice on the U.S. Supreme Court. Justice Jackson is, of course, part of my focus in this lecture.

There are additional connections between past giants and this lecture. Another luminary who became, in due course, a name partner in Mr. Harris's and Mr. Silverman's law firm was Sargent Shriver. He was a brother-in-law of Robert F. Kennedy, who in the late 1950s, after Justice Jackson's lifetime, moved with Mrs. Kennedy and their growing family into what had been Jackson's home in McLean, Virginia: Hickory Hill. Indeed, a few years after that, Bob Kennedy also moved into one of Bob Jackson's former government offices, the Office of the Attorney General of the United States.

But I am getting ahead of myself. My real starting point in this lecture is this majestic Supreme Court building on two specific dates in the life of Robert Jackson. Although Franklin D. Roosevelt, the second person who is a subject of this lecture, was not present at the Court on either of the two dates that I am about to describe, his presence was felt on each.

The first date was Thursday, October 13, 1932. Robert H. Jackson, then a lawyer living in Jamestown in western New York State, was in Washington, D.C., for the Conference of Bar Association Delegates and then the American Bar Association's annual meetings, held one after the other at the Mayflower Hotel. Although Jackson was only forty years old, he had been active and risen high in local, state, regional, and national bar association activities. At the 1932 meeting, he was an officer and a program speaker at sessions of the Conference of Bar Association Delegates (a predecessor to today's ABA House of Delegates).[4]

On October 13, 1932, Jackson was, I assume, one of the many lawyers in Washington for the Bar meetings who was present outside this building, then under construction. Chief Justice Hughes and most of the Associate Justices were present. The Chief Justice and Bar leader John W. Davis each spoke. President Herbert Hoover wielded the trowel as the cornerstone was laid into place and secured with mortar.[5]

Given Jackson's relative obscurity, I suspect that he watched from a position quite deep in the crowd. On this evening, as Game Seven of the World Series is about to be played, it seems appropriate to guess that Jackson had what we would call a "Bob Uecker seat" at the big event.[6]

On that date in October 1932, the idea that Jackson, a young lawyer from western New York State, would someday occupy a judicial seat in this building would have been far-fetched. I doubt that that daydream occurred even in Jackson's own mind, even though he had great self-confidence and ambition. And yet that came to pass, and in less than nine years' time. Among myriad reasons for that, a key one, the necessary one constitutionally, was the person who that day was in Albany, New York: Franklin Delano Roosevelt, the presidential nominee of the Democratic Party who soon would defeat President Hoover.

The second date to consider in this story is Monday, May 12, 1952. That was a moment when President Roosevelt had been gone for seven years, but he came intensely to mind on that day, particularly to the mind of Jackson, then completing his tenth year as an Associate Justice. That day was one of two days of oral argument in *Youngstown Sheet & Tube, et al. v. Sawyer, et al.*, the Steel Seizure Cases. Steel companies were challenging the constitutionality of President Harry Truman's seizure of private property, the nation's steel mills. The President had acted to seize and run the steel mills because, in the absence of government action, the steel companies were not agreeing to steelworker wage demands, mediation had failed, the workers were about to go on strike, and that would cause the mills to shut down and cease production. President Truman concluded, in that moment when steel production was vital to supplying U.S. troops fighting in the Korean War (a hot war) and to building more nuclear missiles than was the U.S.S.R. (the Cold War), that he had to seize the steel mills and keep them producing steel to protect national security.[7]

On that day, the Solicitor General of the United States, Philip B. Perlman, who also was Acting Attorney General, directed part of his oral argument at Justice Jackson personally. Perlman argued that President Truman had constitutional power to seize private property because prior Presidents, indeed his immediate predecessor, Franklin D. Roosevelt, had done exactly that, and his lawyer, then Attorney General Robert H. Jackson, had advised Roosevelt that his property seizures were constitutional.[8]

Three weeks later, the Court announced its decision, holding by a 6-3 vote that President Truman lacked constitutional power to seize the steel mills. Justice Jackson was part of the Court's majority. He also filed a now-canonical concurring opinion.[9] Among many points, he explained that he regarded President Roosevelt's property seizures as distinguishable from

Assistant Attorney General Robert H. Jackson (left), and Ben V. Cohen, both FDR's "Braintrusters," were photographed leaving the White House in January 1938 after discussing anti-monopoly measures with the President.

President Truman's and, with commendable candor, that such matters looked different to Jackson as a jurist than they had when he was a lawyer for the President.[10]

As Justice Jackson thought in May 1952 about Perlman's claims regarding 1941 Roosevelt-related events, Jackson realized that public memories had faded. Indeed, Jackson was startled to determine that he was the last living participant in leading Roosevelt events that then were being misremembered in history.

So Jackson began to write about President Roosevelt. During the summer of 1952 and episodically over the next year or so, Jackson drafted most of a book. Fifty years later, it appeared in print as he had titled it: *That Man*. But Jackson had not completed the book before he died suddenly in October 1954. He left his manuscript in a file that I had the good fortune to locate and, with the generous permission and assistance of the Jackson family, to edit and publish, as the Chief Justice mentioned.[11]

Jackson's 1952 moment of realization during the *Steel Seizure* oral arguments and his perspectives on past events remind us that Franklin D. Roosevelt is, like each of our Presidents, always present in this Supreme Court chamber. Tonight, informed by Robert H. Jackson's work on Franklin D. Roosevelt and carrying it forward, I will discuss these two men in three parts: first, Jackson's own life path; second, Attorney General Jackson's eighteen months in President Roosevelt's Cabinet; and third, some dimensions of the Jackson-Roosevelt relationship.

Jackson's Life Path

Robert Houghwout (pronounced "HOW-it") Jackson was born in 1892 on a family farm

in Spring Creek Township, Warren County, Pennsylvania. It was (and is) beautiful rural wilderness. The family was self-sufficient, not rich, not poor, viable in their independence. They were Jacksonian—Andrew Jackson—Democrats.

By 1898, when Robert was six years old, the family had moved north to Frewsburg, New York, a hamlet in Chautauqua County. He attended the public school there. In 1909, age seventeen, he graduated as Frewsburg High School's valedictorian. Jackson spent the next year commuting by trolley up the valley to Jamestown, New York, a city with a bigger, more sophisticated high school. He took a second senior year of courses and received another diploma.

Then Jackson pursued no college education at all, not one day. Instead, at age eighteen, in Jamestown, he began his path to joining the legal profession by working as an apprentice to two Jamestown lawyers, Frank H. Mott and Benjamin S. Dean. They were law partners and, for young Jackson, a perfect training team. Mott was a talker, a wheeler-dealer, a trial lawyer, a politico, a Democrat. Dean was a former journalist, a scholar, cerebral, a writer, an appellate man, a theorist, a scholar of history and constitutional law, a Republican. Each poured much of himself into Jackson.

On the Mott side of Jackson's legal "upbringing," one particularly notable moment occurred in January 1911. Mott, who was Chautauqua County's Democratic Party leader and a figure of statewide political significance, took his apprentice Robert Jackson along on a trip across New York State to the capital, Albany. There, Mott introduced young Jackson to many people. Most were quite forgettable. But the name and face, and I assume a handshake, that Jackson did remember were those of a freshman State Senator from Dutchess County, New York. His name was "Frank" Roosevelt. He was twenty-eight years old or just twenty-nine when Jackson, age eighteen, met him. For Roosevelt, it seems, the moment was not memorable.

After that apprentice year, Jackson spent the next year, at Ben Dean's urging, getting some school learning in the law at the Albany Law School. It gave Jackson credit for his apprenticeship, so he in effect transferred into the senior year of its two-year program. Jackson was a very strong student. But by the end of that 1911-1912 academic year, he was still only twenty years old, too young to be admitted to practice law in New York. Albany Law School, adopting that age limit, declined to give Jackson a law degree, instead giving him only a diploma of graduation.[12]

Jackson was still a year short, in both age and in preparation, of Bar eligibility. So he returned to Jamestown and again apprenticed for Mott and Dean. Under the day's somewhat casual practices, Jackson began to try cases. In the fall of 1913, when Jackson was twenty-one years old and had completed the required three years of legal study and training, he took the New York State Bar examination, passed, and was admitted.

Jackson then embarked on his legal career. He hung out a shingle in Jamestown and, for the next three or so years, he had a kind of scruffy, underpaid, newest-youngest-lawyer-in-town kind of practice. But he was a talented speaker, he worked hard, and he began to win trials and appeals. Soon he was making a living and attracting more and bigger clients.

During Jackson's first years as a Jamestown lawyer, he was, following the lead of his mentor Frank Mott, involved in Democratic Party politics. Indeed, in 1913, Jackson was elected,[13] and a few years later he was reelected, as the District 1 (Town of Carroll) Leader of the Chautauqua County Democratic Committee. This far-from-prominent office, a position within the New York State Democratic Committee, was the only political office for which Jackson ever ran.

During these years, Jackson met Roosevelt—now "Franklin D." Roosevelt—for a second time, and this time they became acquainted. In 1913, newly-inaugurated President Woodrow Wilson appointed Roosevelt to serve as Assistant Secretary of the Navy. For Jackson, a Democratic Party leader in Chautauqua County, a Democrat in the White House—after sixteen years of Republican Presidents—meant that there were new opportunities to seek patronage appointments to federal offices, particularly local postmaster positions. And Jackson knew that Roosevelt was a young New Yorker whose political ambitions and bright future motivated him to be of assistance. So Jackson began to make trips to Washington to advance his candidates for postmaster appointments. His first stop, and the office that then made his appointments around the town, was the office of Assistant Secretary of the Navy Roosevelt and his secretary Louis Howe.

In 1916, Jackson—newly married to Irene Gerhart, whom he had met four years earlier as a law student in Albany—caught the eye of a Buffalo judge who was trying cases in Chautauqua County. He recommended Jackson to his former law firm in Buffalo, the tenth-largest city in the U.S., a metropolis booming with commercial activity. The law firm hired Jackson, and he and Irene moved from Jamestown to Buffalo. He spent about two years doing litigation, mostly in state courts. The firm's main client was the street railway company. Jackson defended it in many personal injury cases, in trials and on appeals.

As Jackson practiced law during 1917-1918 in Buffalo—today the site, in the heart of downtown, of the beautiful Robert H. Jackson United States Courthouse—he became less interested in politics and more focused on his legal career. In particular, he realized that in such a major city, climbing the ladder to legal prominence and power would be a long-term process. He thought that, by contrast, returning to base his law practice in smaller Jamestown, seventy-five miles away, would give him a chance to climb higher faster and to become in effect, while still young, a contemporary of leading lawyers in Buffalo, Rochester, Syracuse, Albany, New York City, Pittsburgh, Cleveland, and Chicago.

In 1918, Jackson returned to live in Jamestown. Its Republican mayor recruited him to serve as the city's corporation counsel. Jackson soon moved back into private practice. He was no longer a solo practitioner, and fewer—but still some—of his clients were non-paying. His practice and his bar association activities were local and regional, soon national. He began to argue cases in the New York Court of Appeals.[14] In the personal realm, Robert and Irene Jackson became parents of two children and had a full, prosperous life. They built a large house with white pillars. Jackson acquired an eighty-eight-acre horse farm nearby and he had a cabin cruiser on Chautauqua Lake. His business clients included many that made tangible, practical products and had loyal, predictable customers. His prosperity was Great Depression–proof.

Jackson had attained great professional success. The Jackson law firm, at its biggest, was about five lawyers. Its, and in particular his, work was corporate and individual, transactions and litigation, civil and criminal, trial and appellate, popular and unpopular; Jackson had the kind of general law practice that few lawyers, even in more remote locations, can accomplish today. In 1930, he was elected to membership in the American Law Institute with support from Benjamin N. Cardozo, the Chief Judge of the New York Court of Appeals. Cardozo had been impressed by Jackson's oral arguments in Albany and became one of his mentors. (I was very pleased to see that, in the Supreme Court's Conference Room today, the Cardozo portrait looks across the conference table at the portrait

of his protégé, Jackson.) In October 1932, Jackson participated in the annual meeting, here in Washington, of the National Conference of Bar Association Delegates. He was elected to become its president a year hence. And, I surmise, he joined throngs on this spot who witnessed the laying of the cornerstone of this Supreme Court building.

In the later 1920s, Jackson, whose life was filled with law practice, professional, and personal successes, became reinterested in politics. The reason was Franklin D. Roosevelt. In 1928, ahead of his own schedule for returning from illness and recovery to politics, Roosevelt was recruited to run for governor of New York. It was in part, perhaps mainly, an effort to help incumbent Governor Al Smith, then the Democratic Party's presidential candidate, carry his home state in the tough, anti-Catholic national context of Smith's race for the White House. Alas, Herbert Hoover defeated Governor Smith in New York. But Roosevelt won the governorship.

Jackson assisted Roosevelt's 1928 gubernatorial campaign and his 1930 reelection campaign by serving on committees and giving proxy speeches. He also met with Governor Roosevelt in Albany on various matters, most notably as a member, appointed by the State Bar Association, of the State's commission to study and reform the administration of justice. In 1932, Governor Roosevelt ran for and won the presidency. Jackson was again involved in the campaign. Thus in 1933, after twenty years of private law practice, he had a friend in the White House and the possibility of high-level government service. But during Roosevelt's first presidential year, Jackson stayed put in Jamestown. Jackson was ambivalent about leaving Jamestown and private practice for Washington and government, even for a short stint. He was nonetheless considered for and considered various jobs, such as general counsel of the Works Progress Administration.

In early 1934, President Roosevelt nominated Jackson to become Assistant General Counsel of the Bureau of Internal Revenue in the Department of the Treasury, the position that has become, today, General Counsel of the Internal Revenue Service. This was the first of Roosevelt's five nominations of Jackson to serve in high office, each followed by a Senate confirmation. In 1934, the Revenue Bureau, with 300 lawyers, was the largest law office on earth. It was bigger than any private law firm or any Washington government entity, including the U.S. Department of Justice.

Thus began Jackson's meteoric rise, as Washington became his home for the rest of his life. He became, in

- 1934: Assistant General Counsel of the Bureau of Internal Revenue, in which, over the next eighteen months, he became a national newspaper headline name, leading the successful civil prosecution of former Treasury Secretary Andrew W. Mellon for underpayment of taxes—and, in a related event, stimulating Mr. Mellon's generous gift to the nation, just down the hill from this Supreme Court building: the National Gallery of Art.
- 1935: Being detailed by Roosevelt from Revenue to the Securities and Exchange Commission to head the team that was defending in court—in the end, successfully—the constitutionality of the Public Utility Holding Company Act, a major New Deal statute.[15]
- 1936: Assistant Attorney General heading the Tax Division in the Department of Justice.
- 1937: Within Justice, Assistant Attorney General heading the Antitrust Division. He supervised its active law enforcement work and also handled high stakes Supreme Court cases in other areas, such as successfully defending the constitutionality of Social Security.[16]

- 1938: Solicitor General of the United States, the lawyer job he loved the most of any he held.[17] During the next two years, he argued, with great skill and quite successfully, about forty cases before the Supreme Court.[18] Yes, it was a Court with one and then more Roosevelt appointees, and it became more inclined than the previous Court had been to uphold the constitutionality of New Deal laws and progressive State laws. But Jackson's successes were considerable, including winning renown as an oral advocate and prevailing in almost all of his cases.
- January 1940: Promotion from Solicitor General to Attorney General of the United States, the department's top job and of course a Cabinet office.
- July 1941: On President's Roosevelt nomination and Senate confirmation, an Associate Justice of the Supreme Court, at the age of forty-nine.

At that point, Bob and Irene sold their Jamestown home, which they had been renting out during their "temporary" stay in Washington. Thereafter, they went back to western New York at least a few times each year to visit family and spend summer breaks, but they never lived there again. They purchased Hickory Hill in rural, undeveloped McLean, Virginia, outside Washington, D.C. At Hickory Hill, Jackson found a version of both his beloved homelands, Spring Creek, Pennsylvania, and Chautauqua County, New York. He gardened, on quite a grand scale. He kept horses in a small barn just behind the house. On many mornings, he would saddle up, ride out back and down past a former slave church, and write opinions in his head, which must have made first drafts easier to dictate when he later got to chambers.

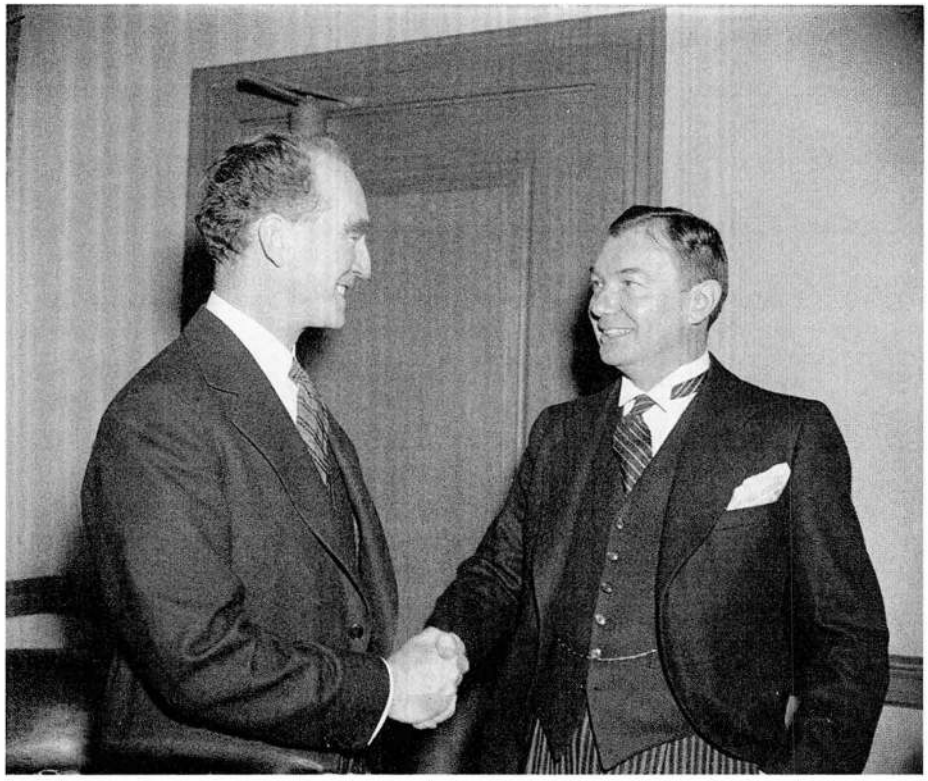
This was the man who quickly became Justice Jackson. I insert here a nod of apology to the late Justice Howell Jackson —yes, he served on the Supreme Court for two years, 1893-1895, but no one today thinks of him when they hear the words "Justice Jackson."

Our Justice Jackson, if I may put it that way, began in his first years on the Court to pen some of his notable, enduring opinions:

- for the unanimous Court in *Wickard v. Filburn*, on the scope of Congress's power under the Commerce Clause;[19]
- for a majority of six Justices, in *West Virginia State Board of Education v. Barnette*,[20] overruling the then-recent *Gobitis* decision upholding the constitutionality of expelling Jehovah's Witness schoolchildren who refused, based on their religious beliefs, to salute and to pledge allegiance to the American flag.[21] *Barnette* is an enduring testament to freedom of conscience and one's constitutional right not to be compelled by government to utter its orthodoxy; and
- a dissenting opinion in *Korematsu v. United States*, rejecting the Court's enforcement of military orders and criminal laws that directed the exclusion of Japanese-Americans, including many thousands of U.S. citizens such as Fred Korematsu, from the west coast of this country during World War II.[22]

In this period, Justice Jackson became regarded, as he is today, as the best writer in the Court's history, except for the current Justices plus every Justice with whom any of them has ever served. (I wish to be a good guest).

In the spring of 1945, President Harry Truman appointed Justice Jackson to serve as United States Chief of Counsel for the prosecution of Axis war criminals in the European Theater. This job made Jackson the world leader in creating the International Military Tribunal (IMT), the world's first international criminal court. Through the diplomacy of the London Conference in summer 1945, four Allied nations, the U.S.,



In 1939 Solicitor General Robert H. Jackson congratulated Attorney General Frank Murphy on being admitted to practice before the Supreme Court. Jackson would succeed Murphy the following year as Attorney General and then would join him as an Associate Justice on the Supreme Court in 1941.

the U.K., the U.S.S.R., and France, reached the London Agreement of August 8, 1945, which created the IMT and defined its jurisdiction to adjudicate alleged crimes by Nazi war criminals. Then these allies—war-fighting, war-winning, now law-building and court-creating allies—moved to Nuremberg, in the Allied-occupied land that had been Nazi Germany until its surrender.

Jackson served as the U.S. chief prosecutor at Nuremberg, but really he was the chief prosecutor, period, leading the prosecutions of principal surviving Nazi leaders. In the Nuremberg trial, Jackson delivered brilliant opening and closing statements. He personally, and mostly very successfully, handled witness examinations, both on direct and on cross. With captured, authentic, uncontested Nazi documents plus witness testimony, he and his colleagues proved the enormity of Nazi crimes, including what we understand today as the Holocaust.

In October 1946, after missing a full term of this Court's work, Justice Jackson returned to the bench. He served eight more terms. They were filled with notable, complex, sometimes quite divided, sometimes quite unanimous, decisions. Among Jackson's landmarks from these years are his concurring opinion in the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*,[23] which has become the meaning of that case in our constitutional law.[24] And Jackson was one of the unanimous nine in May 1954, as Chief Justice Warren led the Court to decide *Brown v. Board of Education*.[25]

Five months later, Robert H. Jackson, only sixty-two years old, died of a heart attack.

Jackson's Cabinet Service

My second topic is Robert Jackson's Attorney Generalship, which ran from January 1940 until June 1941. I will highlight nine dimensions of Jackson as Attorney General—there were many, many more dimensions to Jackson as a Cabinet officer, but these are some of the leading facets of him in that time of work and close contact with President Roosevelt.

First, that work could well have started earlier. As Solicitor General in 1938, Jackson was the number two official in the Department of Justice, and for many reasons, Attorney General Homer Cummings was ready to depart. But Roosevelt at that time had, already, by some measure, "too many" New Yorkers in the Cabinet, four of the ten: Treasury Secretary Henry Morgenthau, Jr., Postmaster General James A. Farley, Commerce Secretary Harry Hopkins, and Secretary of Labor Frances Perkins. Elevating Jackson to be Attorney General would have made half the Cabinet from the President's home state, and for a national politician that was too parochial. In addition, Frank Murphy, the just-defeated former governor of Michigan, was an ardent New Dealer who now needed a job. So in early 1939, Roosevelt appointed Murphy to be Attorney General and Jackson continued as Solicitor General. A year later, on appointing Murphy to the Court, Roosevelt appointed Jackson to be Attorney General.

Thus my second point: When Jackson became Attorney General in January 1940, he well knew, because he had been in the top ranks of the Department of Justice for the preceding four years, that the Department had problems, and he was not sure that he wanted the job of fixing it up. Frank Murphy was many fine things, but as Attorney General he had been more performance artist than substantive performer; he was great at talk, public events, and achieving national press coverage, but he embodied bad management, unwise cases, weak personnel, promises of action that were not real or impending, and demoralized department employees. That is the back story of Attorney General Jackson's much quoted, much lauded, April 1, 1940, "Federal Prosecutor" speech to the United States Attorneys, assembled from across the nation to hear Jackson's speech in the Department's Great Hall.[26] He told them, I am cleaning it up, and we are going to run this ship right, ethically, from now on.

Third, in early 1940, Jackson was a semi-serious presidential candidate. This idea had been percolating, among New Dealers at least and at high levels, for a couple of years.[27] In 1940, by all appearances, President Roosevelt was going to adhere to the American tradition and retire after two terms. (The Twenty-Second Amendment, which today requires that, was not part of the Constitution, as it was not ratified until 1951). The New Dealers, watching "the Boss" prepare to depart, of course were thinking about who would come next. That cohort, which included Tommy Corcoran, Ben Cohen, Justice William O. Douglas, and others, was united behind the idea that Robert Jackson would become the Democratic Party's next presidential standard bearer.[28] Apparently, President Roosevelt was enthusiastic, too; one leading report, for example, claimed bluntly that "Roosevelt's Choice for President Is Bob Jackson."[29] Public figures and press discussed, mostly with enthusiasm, the prospect of a Jackson presidency.[30]

Attorney General Jackson's activities from January-April 1940 were parts of this "boom." His speeches around the country were covered extensively in newspapers and often broadcast on radio. Jackson addressed such topics as the New Deal, law, liberty, and security.[31] He also urged that Roosevelt should seek and win a third term.[32] This was both clever cover for any personal ambitions Jackson might have, and, on the merits, an

argument that turned out to be a winner: as the world situation changed, certainly by May 1940 with Hitler conquering the Low Countries and invading France and it tilting toward surrender, Jackson's "We need Roosevelt" message was beginning to persuade the country.

A fourth, resulting dimension was the question, what about Jackson for Vice President? By 1940, Vice President John Nance Garner had broken with President Roosevelt over the third term possibility and was running against him in states that held presidential primaries. Postmaster General and Democratic National Committee chairman James A. Farley also seemed to be preparing to oppose the man whom he (Farley) had helped elect, twice, to the presidency. Assuming that the Democratic Party would renominate Roosevelt, who would be his running mate? There were many possibilities: Secretary of State Cordell Hull, Secretary of Agriculture Henry Wallace, Justice Douglas, Senator James F. Byrnes (D.-SC), and, yes, Attorney General Jackson.

To prepare for his possible candidacy, Jackson sat for new publicity photographs and had conversations with Roosevelt at the White House. They are frustratingly undocumented, but they could not all have been about Department of Justice business. Roosevelt was not planning to attend the Democratic convention, so some of their talk was, I think, the President planning political strategy with Jackson.

In July 1940, Jackson, his wife, and his son went to Chicago for the Democratic National Convention. (The Jacksons' daughter was occupied with summer employment and did not join them). In Chicago, the Roosevelt team was headquartered at the Blackstone Hotel. Jackson's son William, then in college (and later a law student, and still later a very leading U.S. lawyer), stayed one block away in the Stevens Hotel. If I may digress, that hotel also was a family business—as the Jacksons, father and son, pursued the law with interests in politics, the Stevenses, a father and sons, founded and ran the hotel. A grandson took a different path. After military service and schooling, he came to work here at the Supreme Court, as a law clerk in 1947 for Justice Wiley Rutledge, and then beginning in 1975 in his own right, as Justice John Paul Stevens.[33]

That leads to the fifth dimension, the 1940 convention and campaign. Henry Wallace became the Democrats' vice presidential nominee. Attorney General Jackson became a very active campaigner for Roosevelt and Wallace throughout the fall. By our standards, it is surprising to see how active the Attorney General was on the stump for the reelection of the President.

Sixth is Jackson's day job of being Attorney General. In DOJ during those seventeen-plus months, the work of the Attorney General heavily concerned legal issues related to war preparation. Most famous is the legal basis for the Destroyer Deal. Winston Churchill, the U.K.'s new Prime Minister that May, begged Roosevelt for military assets to protect North Atlantic shipping from German U-boat attacks. Churchill kept sweetening the pot. By summer, he proposed a swap: Give us fifty over-aged, moth-balled, World War I–era U.S. destroyers, and in return we will give you ninety-nine-year leases on British naval bases from Newfoundland to British Guiana (today, Guyana). As Jackson wrote in his famous legal opinion,[34] that was a net win for the United States: old boats for valuable bases. Jackson's legal opinion endorsed the legality of the deal that Roosevelt wanted to make and did make. It was not disclosed to Congress in advance. The deal was not authorized by legislation. Roosevelt, as the 1940 fall election campaign was commencing, simply announced it and released Jackson's legal opinion as explanation.[35]

Attorney General Jackson also worked on other war-related projects. These included winning legislation that resumed the military draft. The 1940-1941 U.S. defense buildup generally involved Jackson in lobbying and

Jackson was sworn in as Associate Justice in President Roosevelt's office before his daughter Mary and wife Irene.

legal analysis. He also supervised criminal investigations and prosecutions of real threats to national security while not getting carried away and targeting subversives who were merely feared or enemies who were more imagined than active; his 1940 "Federal Prosecutor" speech embodies this credo. Jackson also developed legal arguments in this period that Nazi Germany's military aggression was an international crime, a nugget of thought that became the legal theory of the Nuremberg prosecutions that he led five years later. And Jackson and the DOJ prepared, in the event of U.S. involvement in war, for law enforcement investigations and detentions of individuals in the United States who were enemy aliens and Americans who assisted them. These were individual Germans, Italians, German-Americans, Italian-Americans, and not Japanese people or Japanese-Americans—which shows which war was expected and which one really did strike as a surprise.

Seventh was Attorney General Jackson in the War Cabinet. On the foregoing issues and others, the heart of Roosevelt's Cabinet was the Secretary of War, Henry Stimson; the Secretary of the Navy, Frank Knox; and Attorney General Jackson. One particular matter that they addressed was seizing defense production facilities, threatened by labor strikes, that needed to remain in production. These were the legal matters and advice that Solicitor General Perlman cited as precedents to Justice Jackson in the Steel Seizure Cases in 1952.

Eighth and notable was Jackson's assistance to Senator Harry S. Truman. In 1941, this Missouri Senator called for the creation of a committee to investigate and correct corruption, fraud, waste, and abuse in the U.S. war production effort, a committee he then chaired. To get the committee off the ground, Senator Truman needed a chief counsel. So he called Attorney General Jackson. Truman asked Jackson for a great

Department of Justice lawyer and he gave him one: an aggressive, experienced young prosecutor named Hugh Fulton. He turned out to be great indeed, and the success of the Truman Committee made Harry Truman a national figure. He was very grateful to Jackson for Hugh Fulton.[36] Truman's high regard for Jackson played a role in his appointment by President Truman to prosecute Nazi war criminals.

Ninth and final was that Jackson was, in filling that job and every one he ever held, a "law man." President Roosevelt knew this well, and thus his design for Jackson came to be to appoint him to the Supreme Court. His appointment was part of a complex triple play as the Supreme Court term ended in June 1941. President Roosevelt already had one Supreme Court vacancy to fill because Justice James C. McReynolds had retired in January 1941. Then Chief Justice Charles Evans Hughes informed the President that age and health required Hughes's retirement. Roosevelt wanted to appoint Jackson to succeed Hughes as Chief Justice and Roosevelt told Jackson that directly. But in June 1941, early in Roosevelt's third term, with U.S. involvement in a second world war impending, he made a different choice in the interest of national unity. He elevated a Republican, Associate Justice Harlan Fiske Stone, appointed to the Court by President Coolidge in 1925, to be Chief Justice. Roosevelt simultaneously appointed a conservative Southerner, Senator James F. Byrnes from South Carolina, to succeed McReynolds. And Roosevelt appointed Jackson to be the junior Justice, filling the Associate Justice seat that had been Stone's, and Roosevelt told Jackson that he would appoint him to be Chief Justice at a later time.

Substance in the Jackson-Roosevelt Relationship

In *That Man*, Jackson himself chronicled moments and glimpses of the substance in the Jackson-Roosevelt relationship. He described Roosevelt in numerous roles: President, politician, lawyer, Commander-in-Chief, administrator, economist, companion and sportsman, and leader of the masses. That account is thick, interesting, and revealing. It also is deeply autobiographical: it is Jackson's biography of Roosevelt, and it is a form of Jackson autobiography. But it is incomplete. And it was limited by Jackson's memory—he wrote it from head and heart on legal pads as he traveled and in spare moments between Court work, not based on research. So here are some additions—seven points about these two men.

First is their mutual pleasure in each other's company. This was not a relationship of deep intimacy. Roosevelt was not a self-revealing type. To the extent that he was, he admitted very few people to his inner-most circle. Robert Jackson was not one of them. But in the next concentric circle outward, they took great pleasure in their time together. It included relaxation, including fishing trips, boat cruises, White House poker games, and swimming in the White House pool. Non–New Yorkers might have trouble understanding this, but they shared a fundamental "Upstate-ness." They had in common their backgrounds in and their love for land and people they shared and knew well, from Dutchess and Albany Counties across the State to Chautauqua County.

Second, Jackson had an independence of mind that Roosevelt must have valued. Maybe not at first. You will remember their meeting, an Albany introduction back in 1911, even if Roosevelt never did. A few years later, he knew who Jackson was. And this young fellow from the western New York sticks, a Democratic leader in a district with few Democrats, began to give Roosevelt, the Assistant Secretary of the Navy, a hard time about Wilson Administration failures to appoint Jackson's candidates to local

postmaster positions in western New York State.

Young Jackson's confidence is reflected in a long, tart, pushy letter that he typed (himself, it appears) and mailed to Roosevelt in 1916. Here is one paragraph about a Jackson postmaster candidate who had been rejected in Washington:

> Our friend Mr. Smith at Mayville was turned down for appointment as postmaster because sometime in the remote past he suffered from a venereal disease. Just how this disqualified him as a postmaster I am not able to see, but never having suffered from this affliction myself, I can not [sic] share the prejudice against it which the Postoffice [sic] officials seem to have.[37]

The letter went downhill from there. Jackson complained about the impossibility of getting mail delivered to his home in Jamestown or picking it up at the post office. He concluded by asking Roosevelt to explain why he (Jackson), with all these frustrations, should, some agreement on foreign policy issues notwithstanding, continue to support their Party:

> Of course I'll vote the Democratic ticket this fall because of heredity and prejudice. But if you can look over the situation and, leaving out the administration's hide-and-go-seek game in Mexico and the correspondence course in manners being given Germany, tell me one single reason why I should vote the ticket, I would like to have it so in case someone [sic] asked me, I would not be entirely at sea. Next time I am in Washington, maybe I will drop in for your answer. You'll need till then to think of a reason.[38]

In that moment, Roosevelt pushed some buttons and made postmaster-related appointments happen for Jackson.[39] Beyond that, to the extent that this all really registered on Roosevelt, he probably found Jackson to be annoying, and maybe worse than that. It might well be that Roosevelt, in dealings with Jackson, did not entirely value his independence and his spice in communicating his views. Jackson was not a yes-man. He was regularly a no-man. And he expressed himself, always, forcefully. To one who wants to hear "yes," that can irritate. But in the end, obviously, consistently, Roosevelt valued Jackson: look at how often, and how high, the President advanced him.

And look at President Truman. He inherited that awesome office at a deeply demanding moment. In April 1945, among many new burdens, Truman needed a U.S. legal figure of great stature and skill to become the American leader in the prosecution of what well could have been Adolf Hitler, plus Heinrich Himmler, Joseph Goebbels, Hermann Goering, Martin Bormann, and perhaps others in Hitler's inner circle. President Truman asked Justice Jackson to come from the Supreme Court to the White House and offered him that job.

Third, Jackson and Roosevelt shared a sense of propriety. After June 1941, Jackson was out of the Cabinet; he was a Justice of this Court. And during those years, while President Roosevelt and the United States were litigants and interested in the Court's work, these men had a continuing friendship.

What did that mean about improper influence and sway that Roosevelt might have had on Justice Jackson? According to Jackson, they discussed Supreme Court work only once. On April 6, 1942, during Jackson's first term on the Court, Justice James F. Byrnes announced the Court's decision in *Southern Steamship Company v. National Labor Relations Board*.[40] The

Court held that sailors engaging in mutiny were not strikers within the protections of the National Labor Relations Act. Subsequently, during a White House card game, the President leaned over and said, "Bob, by the way, how did you vote on that question of mutiny on shipboard?" Jackson was a little annoyed by the question, both because he thought Roosevelt was going to criticize him for being part of the majority at whose hands the administration had lost the case, 5-4, and because Jackson did not think it was something that the President should raise. But Jackson answered. He told the President, "Well, I voted that those fellows had no right to have a strike on shipboard. The captain had a right to order them to their posts. When they disobeyed, they were in trouble." Roosevelt responded by stating his total agreement: "My God, I don't see how anybody could take any different view of it." Of course, the Roosevelt-appointed National Labor Relations Board had taken a different view of it, as had four Roosevelt appointees to the Supreme Court who dissented in the case.[41] Jackson later said that "[t]his was the only decision of the Court that he ever asked me about or discussed with me as long as he lived, and I saw him quite frequently in a social way."[42]

Fourth and notable: the words. As Chief Justice Roberts mentioned, just read the words. Of course, I mean Jackson's words. But I also mean Roosevelt's writings and speeches. They were two gifted writers, and I think that each saw and valued that skill in the other. In Jackson's Cabinet years and earlier, they sometimes wrote together, in speech-writing conclaves at the President's bedside or in his office. Jackson saw Roosevelt mark up Jackson's words and make them better. I think that example pushed Jackson to care even more about his own words, to lift his writing higher.

Fifth: Roosevelt was the man for his moments, which is a definition of historical greatness, as Jackson was for his. Each had great confidence in himself. Each was drawn to compete in the tough contest. Each then had a knack for winning it. I think that "like" sees and is attracted to "like," and that their man-moment-ness was a part of the Jackson-Roosevelt linkage.

Sixth: They had distinct roles. Roosevelt was the client for Jackson the lawyer, with Jackson, before his Court years, having seen himself as representing the President.

And, finally, seventh: That sense of agency did not run in the opposite direction. President Roosevelt did not advance Jackson beyond what best fit Roosevelt's purposes and judgment.

Consider 1943 and 1944, when Justice Jackson was unhappy on the Court. He was disillusioned by a number of behaviors by his colleagues that he viewed as political and pre-committed rather than judicial and open-minded. He was also particularly upset about threats and bullying by some Justices of others who were weaker intellectually and as persons. So Jackson considered and explored a number of departure scenarios. One was to return to Jamestown to pick up the happy and independent law practice and life that he had left in 1934. A second was to move to New York City, to practice there, as former Associate Justice Charles Evans Hughes did between his resignation in 1916, with interruptions for Cabinet and World Court service, and his appointment as Chief Justice in 1930, or in something like the law practice of former Solicitor General and former presidential candidate John W. Davis, or the practice of former presidential candidate Wendell Willkie. Indeed, in 1943, in great secrecy, Jackson negotiated with the Simpson, Thacher law firm an agreement that would have brought him from the Court to lead a new firm: Jackson, Simpson, Thacher.

By early 1944, Jackson decided not to leave the Court for law practice. A third scenario that he did pursue, at least privately

with President Roosevelt that winter and spring as the question of whether Roosevelt would seek a *fourth* term was approaching, was again the vice presidency for Jackson, or should Roosevelt not run, perhaps a Jackson presidential candidacy, this in the context of Democrats, apparently including the President, not entirely desiring Vice President Wallace's continuation in office.

In those months, as part of getting ready for what might come next, Justice Jackson drafted an autobiography. Never published, it is a "meet the candidate" type of manuscript. Unlike today's campaign books, the prospective candidate actually wrote it himself. It sets out his heroic, Abraham Lincoln–like rise from the rural wilderness of Spring Creek to the Cabinet and then to the Supreme Court.

Justice Jackson also seems to have drafted in this same period, privately for President Roosevelt, a legal analysis that was supportive of the idea of Jackson as a Roosevelt running mate. The issue was the Twelfth Amendment, which prohibits presidential electors from any state from voting for both presidential and vice presidential candidates who are inhabitants of that same state.[43] For New York electors, that could be interpreted to bar them from voting for both New Yorker Franklin D. Roosevelt for President and New Yorker Robert H. Jackson for Vice President. And in a close election, which 1944 was expected to be and which it somewhat turned out to be, New York electors might reelect Roosevelt and, as Vice President, the Republican Party's nominee! From every Democrat's perspective, plus maybe for others as well, that prospect was not desirable.

As Justice Jackson later recounted to a friend, President Roosevelt called him to the White House and asked him to prepare a brief on the question of whether a state's electors could vote for presidential and vice presidential candidates from that same state. Jackson said that he prepared such a paper. To my knowledge, it has not survived or at least has not surfaced yet. In it, Jackson allegedly argued that the Twelfth Amendment was no obstacle to electors so voting.

Jackson also recounted that Roosevelt spoke with him about making the Justice his running mate. I speculate that in addition to his legal points, Jackson made some factual arguments. One might have focused on Jackson's Hickory Hill residence, which he had owned since 1941, which made him a Virginian, not a New Yorker. Another might have focused on the absence of any factor cutting the other way. For example, Jackson was not a New York voter; after he was appointed to the Court in 1941, he ceased voting because he did not believe that Justices should be seen going into polling places and voting.

This all went nowhere. President Roosevelt told Jackson that picking him as his running mate "was not the practical political thing to do."[44] When Roosevelt sought his fourth term, he let the Democratic Party convention choose the vice presidential nominee. It discarded Vice President Wallace and picked Senator Truman instead.

Justice Jackson was not present at that July 1944 convention, again held in Chicago. He believed, as with his decision to stop voting, that a Supreme Court Justice should not be seen attending a political convention. As the Democrats were meeting, Jackson was fishing on Lake Ontario with upstate New York friends. Jackson was just fine with that—he was, Roosevelt-like, in his place, with his own resources including the people he wanted to be with, and also on his own.

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I will conclude as I began, by turning to two specific dates. The first, just after the July 1944 Democratic Party convention, was August 24, 1944. On that evening, President Roosevelt hosted a White House "stag" dinner (no women) for Sveinn Bjoernsson, the first President of the new Republic of

Iceland. Justice Jackson was one of President Roosevelt's dozens of guests.[45] During the pre-dinner reception that evening, President Roosevelt introduced Justice Jackson to President Bjoernsson as "my Attorney General." Later, during Roosevelt's speech at dinner, he referred to three Cabinet members being present in the room, although in fact only two, Secretary of War Stimson and Secretary of Commerce Jesse Jones, were there, plus Jackson, who Roosevelt had promoted from Cabinet to Supreme Court three years earlier.

Jackson took these misstatements as evidence of Roosevelt's weakening health. To put it in our terms, Jackson thought that the President was "with it," but that he was so immersed in the war and international matters that he was not keeping up with domestic details. In that state of inattention, Roosevelt still thought, reflexively, of Jackson as what he had once been, his Attorney General.[46] In an important sense, Roosevelt was not wrong. Justice Jackson, three years on the Court, was still very much a government "attorney general," in the lower case sense; he was, whatever his job's location in the national government, still Roosevelt's, meaning the President's and the presidency's, and the country's, attorney.

The second date was March 17, 1945. It was Franklin and Eleanor Roosevelt's fortieth wedding anniversary. They celebrated that night with a small White House dinner. The guest of honor was Princess Juliana of the Netherlands. She was a refugee—her land was occupied and controlled by the Nazis, and she spent the war years in Canada and in the United States The other guests included Robert and Irene Jackson. President Roosevelt was a tired man that evening. He

Robert and Irene Jackson attended a White House dinner on March 17, 1945 to honor Princess Juliana of the Netherlands. President Roosevelt was just back from his "Big Three" summit meeting in Yalta and in great spirits. But as they drove home that night, Irene correctly predicted they would not see him again. FDR died a month later, at age sixty-three. Jackson died at decade later, a age sixty-two. The Jacksons are pictured at a White House reception in 1940.

was just back from his "Big Three" summit meeting in Yalta. He stayed in his wheelchair. But he was in great spirits. The war was going well. He mixed cocktails, told jokes, and laughed. He told stories about Churchill and Stalin at Yalta, and about his post-Yalta meetings with King Saud of Arabia, King Haile Selassie of Abyssinia, and King Farouk of Egypt.

As they drove home that night, Irene Jackson said to Bob, "I do not think we will ever see the President alive again." Jackson disagreed strongly. But Irene explained that she had been sitting right across from the President during the dinner. She had a full-on view of his face. She said that when he was not thinking about it, he looked very bad.[47] She was right, of course. In less than one month, FDR, age sixty-three, was gone.

In less than another decade, Robert H. Jackson, age sixty-two, also was gone.

During our times here, as we are passing through, we are extremely lucky to have the legacies of Roosevelt and Jackson. Each of these men gave us, in very direct senses, in fullness, for our learning from their examples and their lessons, for our better chances in facing our challenges, very much of the other.

Author's Note: This publication is based on my November 1, 2017, Leon Silverman Lecture at the Supreme Court of the United States. Video of this program is at www.c-span.org/video/?436652-2/justice-robert-h-jackson-franklin-d-roosevelt (last visited Oct. 24, 2018). I am very grateful to Chief Justice John G. Roberts, Jr., and to the Supreme Court Historical Society, and I thank my former St. John's University School of Law students Max D. Bartell and Michael D. Manzo for excellent research assistance.

ENDNOTES

[1] *See* LAWRENCE E. WALSH, *THE GIFT OF INSECURITY*: A LAWYER'S LIFE 165 (2003).

[2] *See* John Taylor, *Brief Encounters*, MANHATTAN, INC. (Mar. 1987) at 92-93 (describing Harris as "far and away the most dynamic of the younger attorneys at [Fried Frank]" and a "brilliant lawyer who had served on the SEC staff during its formative years and worked on the U.S. prosecutorial team during the Nuremberg trials").

[3] *See Naiveté & Skill*, TIME, Dec. 24, 1945, at 31 (reporting that Capt. Harris, after stating his nervousness, calmly and methodically presented evidence to the International Military Tribunal); Raymond Daniell, *Trial Data Reveal 6,000,000 Jews Died; Evidence at Nuremberg Cites Brutality Used by Germans in Extermination Campaign*, N.Y. TIMES, Dec. 16, 1945 at 8 (reporting Harris's use of documents to prove that the Germans had "systematically looted the countries they had conquered").

[4] *See Program for the Fifty-Fifth Annual Meeting*, 18 A.B.A. J. 645, 648 (Oct. 1932) (advance schedule showing that Jackson would be chairing the Conference Committee on Bar Reorganization's general discussion on October 10); *Crime Wave Laid to Rule of Politics*, N.Y. Times, Oct. 11, 1932, at 23 (reporting Conference approval of Jackson's proposal that it formulates a plan for bar association activities to be coordinated with state and local law enforcement agencies); *Successful Annual Meeting Crowns Year of Real Accomplishment*, 18 A.B.A. J. 705, 710 (Nov. 1932) (reporting that Jackson made one of the addresses at the Conference, held just before the ABA's annual meeting); *Proceedings of Fifty-Fifth Annual Meeting*, 18 A.B.A. J. (Nov. 1932), at 710 (reporting Jackson speaking at the Conference's "Coordination of the Bar" session); *Conference of Bar Association Delegates Meeting in Washington*, 18 A.B.A. J. 819, 823 (Dec. 1932) (reporting Jackson's election as Vice-Chairman of the Conference, its adoption of a resolution Jackson introduced regarding its finances, and his speech at its annual dinner with the American Judicature Society).

[5] *See Hoover Lays Supreme Court Cornerstone; Hughes and Davis Speak for Bench and Bar*, N.Y. TIMES, Oct. 14, 1932, at 1, 8.

[6] Uecker is a former Major League Baseball catcher, a television and movie star, and the longtime radio voice of the Milwaukee Brewers. In a famous 1984 television commercial for Miller Lite beer, *see* https://www.youtube.com/watch?v=DPh4iF76LbU (last visited Oct. 23, 2018), Uecker is at a baseball stadium, preparing to watch a game from the stands. He cockily waves the free ticket that he as "an ex-Big Leaguer" requested and got from the home team. He carries a Miller Lite and praises its excellence. He enters a row and climbs over annoyed fans to sit down in an empty box seat. An usher then tells him he is in the wrong seat and makes him get up. "Oh," says Uecker, "I must be in the front row." The final shot shows Uecker sitting alone near the far corner of the upper grandstand, shouting "He missed the tag!"

[7] *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977); Charles C. Hileman, Abner J. Mikva, James C.N. Paul, Neil P. Rutledge, Marshall L. Small, William H. Rehnquist, Gregory L. Peterson, John Q. Barrett & Ken Gormley, *Supreme Court Law Clerks' Recollections of October Term 1951, Including the Steel Seizure Cases*, 82 ST. JOHN'S L. REV. 1239 (2008).

[8] *See* Brief for Petitioner, No. 745, *Sawyer v. Youngstown Sheet & Tube Co.*, at 109 n.11 (filed 10, 1952) (asserting that President Roosevelt's 1941 seizure of the North American Aviation plant "was justified by the then Attorney General Jackson as an act within the 'duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense efforts of the United States a going concern'"), *in* 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW at 716 (Philip B. Kurland & Gerhard Casper, eds., 1975); Transcript of Oral Argument, No. 744, *Youngstown Sheet & Tube Co. v. Sawyer*, & No. 745, *Sawyer v. Youngstown Sheet & Tube Co.* (May 12, 1952) [p. 49 (unnumbered)] (Solicitor General Perlman telling the Court that "there were a total of nine seizures, Your Honors, made during the Administration of President Roosevelt and while Mr. Justice Jackson, who was not then Mr. Justice Jackson, but was the Attorney General in the Roosevelt Administration—nine seizures without express statutory authority of any kind; nine seizures under powers vested in the President of the United States under Article II of the Constitution"), *in Id.*, at 927.

[9] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

[10] *See Id.*, at 649 n.17 ("The [1941] North American [Aviation plant] seizure was regarded as an execution of congressional policy. I do not regard it as a precedent for this [seizure of the steel mills], but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy."); *cf. Id.*, at 634 ("The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause that it is invoked to promote, of confounding the permanent executive office with its temporary occupant.").

[11] *See* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett, ed., 2003).

[12] *See* John Q. Barrett, *Albany in the Life Trajectory of Robert H. Jackson*, 68 ALBANY L. REV. 513, 529 (2005).

[13] *See First Direct Primary in Chautauqua County*, JAMESTOWN EVENING JOURNAL, Sept. 17, 1913, at 9.

[14] *See* John Q. Barrett, *Robert H. Jackson's Oral Arguments before the New York Court of Appeals*, Historical Society of the Courts of the State of New York Newsletter Spring/Summer 2005.

[15] 15 U.S.C. §§ 79-79z (6). The Supreme Court upheld the Act's constitutionality in *Electric Bond & Share Co. v. Securities & Exchange Comm.*, 303 U.S. 419 (1938). The Public Utility Holding Company Act of 1935 was repealed by the Energy Policy Act of 2005, Pub. L. 109-58.

[16] *See Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[17] *See, for example*, Letter from Robert H. Jackson to Charles C. Burlingham, Nov. 20, 1939, *in* Papers of Charles C. Burlingham, Harvard Law School Library, Historical & Special Collections, Cambridge, MA: "I have found the Solicitor Generalship the most congenial work of my life, and I would really leave it only with a good deal of regret and misgiving as to whether I could do as good a job in an administrative task. It is only to understanding friends that one can say this without being misunderstood." I thank Professor William R. Casto for sending me a copy of this letter.

[18] *See* E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* 1992 JOURNAL OF SUPREME COURT HISTORY 75.

[19] 317 U.S. 111 (1942).

[20] 319 U.S. 624 (1943). For full background and analysis, *see* Gregory L. Peterson, E. Barrett Prettyman, Jr., Shawn Francis Peters, Bennett Boskey, Gathie Barnett Edmonds, Marie Barnett Snodgrass & John Q. Barrett, *Recollections of* West Virginia State Board of Education v. Barnette, 81 ST. JOHN'S LAW REVIEW 755 (2007).

[21] *See Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[22] *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting). For analysis, *see* John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's* Korematsu *Dissent*, 68 LAW & CONTEMPORARY PROBLEMS 57 (2005).

[23] *See* 343 U.S. at 634-55.

[24] *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful"); *Id.*, at 661 ("[both parties agree that] Justice Jackson in his concurring opinion in *Youngstown* ... brings together as much combination of analysis and common sense as there is in the area"); *accord Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); *Zivotofsky v. Kerry*, 576 U.S. ___, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework . . .").

[25] 347 U.S. 483.

[26] *See* Robert H. Jackson, *The Federal Prosecutor*, 31 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 3-6 (1940);

Robert H. Jackson, *The Federal Prosecutor*, 24 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 18-20 (June 1940).

[27] *See, for example*, Thomas L. Stokes, *F.D.R. For Jackson As President*, BUFFALO TIMES, Jan. 17, 1938, at 1.

[28] *See, for example*, Letter from Justice William O. Douglas to Dr. A. Howard Meneely, Feb. 14, 1940, at 1, *in* William O. Douglas Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 355: "I was much interested in your appraisal, gained from newspapers and periodicals, of Bob Jackson. I know him intimately. And my appraisal, colored as it is no doubt by friendship, coincides precisely with yours. There is no public office of which he is not worthy. When the President steps aside, Bob would in my judgment be the ideal standard bearer and head of the Liberals. I am gratified that you feel the same way—especially that you reached your conclusion without the aid of personal acquaintance." I thank Douglas biographer David Danelski for pointing me to this letter.

[29] *See* Drew Pearson & Robert S. Allen, *Roosevelt's Choice for President Is Bob Jackson*, Look (Mar 12, 1940), at 10; *cf. Roosevelt Holds Gains Within Party*, N.Y. TIMES, Feb. 25, 1940, at 37 (reporting that Jackson, registering in a Gallup survey some popularity as a presidential favorite, is "often mentioned as a White House favorite"). For a less sanguine view of Jackson's chances in the end, see Turner Catledge, *"If Not Roosevelt, Who?" Party Asking*, N.Y. TIMES, Mar. 10, 1940, at 75: "Attorney General Jackson is what might be called a good 'Washington' candidate. The ardent members of Mr. Roosevelt's 'palace circle' and their followers look upon the Attorney General as the best possible successor to the President. There is much to indicate that Mr. Roosevelt himself shares that view. But the Attorney General, able and available though he may be, is looked upon here [in Washington] as largely definitely blocked by practical political considerations. It is to be doubted that the Democratic party is prepared at this time to line up behind a man like Mr. Jackson, whom many party leaders regard as an exponent of New Deal extremism. It is possible, of course, for Mr. Roosevelt to hand the nomination to him; that is, if he (the President) controls the forthcoming convention in the degree he is expected to do."

[30] At Jackson's January 18, 1940, swearing-in at the White House as Attorney General, for example, Senator George Norris (R-NE) read a prepared statement that was generally interpreted as endorsing Jackson for President: "He has the right viewpoint of life . . . He fully sympathizes with the experiences of struggling mortals who are endeavoring to meet the demands of this trying house." *Murphy, Jackson Inducted Together*, N.Y. TIMES, Jan. 19, 1940, at 3.

[31] *See, for example, Jackson, Wadsworth Clash Over New Deal: 'Preview' of 1940 Campaign Is Given at Buffalo Forum*, N.Y. TIMES, Feb. 11, 1940, at 47 (reporting on Jackson debating Rep. James Wadsworth (R-NY)).

[32] *See, eg., Jackson Presses Draft*, N.Y. Times, Apr. 21, 1940, at 2 (reporting that Jackson, at April 20, 1940, Washington Young Democrats dinner, added his "second," when Senator Josh Lee (D-OK) "nominated" Roosevelt for a third term).

[33] *See* Charles Lane, *Finding Justice on a Small Scale*, WASH. POST, June 5, 2005.

[34] *See* Robert H. Jackson, *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 40 OP. ATT'Y GEN. 484 (1940).

[35] *See, for example*, Lewis Wood, *Ruling By Jackson: Opinion Holds Transfer by President Needs No Senate Action*, N.Y. TIMES, Sept. 4, 1940, at 1. Jackson's account of the Destroyer Deal is in That Man, at 81-103.

[36] *See* HARRY S. TRUMAN, MEMOIRS: YEAR OF DECISIONS 166-67 (1955).

[37] Letter from Robert H. Jackson to Hon. Franklin D. Roosevelt, Apr. 5, 1916, at 2, *in* Franklin D. Roosevelt, Papers as Assistant Secretary of the Navy, 1913-1920, Box 65, Franklin D. Roosevelt Presidential Library, Hyde Park, New York ("FDR, ASN Papers, FDRL").

[38] *Id.*, at 3.

[39] *See* Robert H. Jackson to Hon. Franklin D. Roosevelt, Apr. 20, 1916, *in* FDR, ASN Papers, FDRL, Box 64: "My dear Mr. Roosevelt: I am in receipt of your letter of April 18th, calling attention to the appointment [i.e., President Wilson's nomination] of Mr. [Adam] Hersperger at Mayville, [New York], and explaining your attitude in reference thereto. I can quite understand that the attitude of the Postoffice [sic] Department has been as annoying to you as it has to us. . . . Thanking you for your effort in these matters, and your many courtesies in other matters, I am, Very truly yours, [signed] Robert H. Jackson"

[40] 316 U.S. 31.

[41] *See Id.*, at 49 (Reed, J., joined by Black, Douglas, and Murphy, JJ., dissenting).

[42] JACKSON, THAT MAN, p. 74.

[43] *See* U.S. Const., Amend. XII.

[44] Letter from George J. Skivington, Sr., to Donald A. Dailey, Nov. 29, 1954 (in author's possession).

[45] *See White House Dinner Given By President*, WASH. POST, Aug. 25, 1944, at 10.

[46] *See* JACKSON, THAT MAN, pp. 154-55.

[47] *See Id.*, at 154.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

As scholars assess developments in American constitutional government a half century or even a full century hence, they will look back to the varied writings of those who preceded them. This is the opportunity afforded today's students as well. Insights into a particular period are sometimes enhanced by those who wrote at another time.

Consider **Popular Government**, a collection of four essays penned about a century-and-a-third ago by the English legal historian Sir Henry Sumner Maine, who recorded his observations just as Americans were beginning to observe the centennial of their national Constitution.[1] For today's reader, Maine's comments on the judiciary contain both the familiar and the unfamiliar —reflecting the Court of today as well as the Court of yesterday. Then as now, one sees an institution beset by the tension posed in the American political system between popular sovereignty and limited government, between "government by the people" and legal restraints on the people's government. The tension is the hallmark of a polity founded on both the consent of the governed and the expectation, in Justice Robert H. Jackson's words, "that we submit ourselves to rulers only if under rules."[2]

For Maine, the Supreme Court "was not only a most interesting but a virtually unique creation of the founders of the Constitution." In his view, the division of policy-making authority between the President and Congress, the concept of a national government of limited powers, combined with the existence of the states, required an institution both to expound the Constitution and to clarify the boundaries of political authority. Judicial review was therefore essential to American government. "The success of this experiment [judicial review] has blinded men to its novelty," Maine declared. "There is no exact precedent for it, either in the ancient or in the modern world." The Court's constitutional role was the product of "the unsatisfactory condition of English Constitutional law [at the time of the American Revolution], and of its many grave and dangerous uncertainties." The framers wanted to avoid "a system under which legal questions were debated with the utmost acrimony, but hardly ever solved . . . .".[3]

Yet there are sharp contrasts between the Court whose work Maine witnessed and the Court of today. Maine wrote at a time when the Court was chiefly still a supreme court of errors, with a docket overwhelmed mainly by private law matters, with constitutional issues still accounting for a small part of the Court's business. It was not until six years after the publication of **Popular Government** that Congress created the Circuit Courts of Appeals, the first true and lasting intermediate appellate benches in the federal judicial system. With the introduction of some certiorari jurisdiction—to be greatly expanded in 1925—and a soon-to-be-much enlarged corpus of federal legislation (being in Congress in Maine's day was still very much a part-time job), a different role for the Court would soon emerge. In contrast to the docket of the nineteenth century, public law in its constitutional and statutory as well as administrative forms came to consume the Court's time. While hardly abandoning its dispute-resolution role, the Court has become mainly a maker of public policy for uniform application across the nation.

Maine also wrote before a sizeable fraction of the constitutional cases that did arise involved the Bill of Rights. Indeed, for Maine, the Bill of Rights consisted of "a certain number of amendments on comparatively unimportant points."[4] Although he did not elaborate, one suspects that by "comparatively unimportant" he may have meant unimportant judicially, in that those provisions had not become a common source of federal litigation. That would not happen to any significant degree until provisions of the Bill of Rights were applied to the states through the Fourteenth Amendment, a process that had not yet begun in 1885. Moreover, the Fourteenth Amendment as well as the other two Civil War amendments seemed to Maine, with one notable exception, to have had little impact. "[A]t the present moment the working of the Constitution of the United States does not, save for the disappearance of negro slavery, differ from the mode of its operation before the civil convulsion of 1861-65."[5]

Change thus overtakes one's conclusions. Maine's depiction of the Court of long ago has to be understood in light of events he could not foresee, events that have become the scholarly grist for others, as recent books provide ample evidence that attention to what Maine called an "interesting" and "virtually unique creation" continues at a brisk pace.

When Maine's book was published, there were still some people alive who remembered John Marshall, a figure who continues to cast a large shadow on the Constitution and on the development of American political institutions. Indeed, to write about the fourth Chief Justice after 1800 is to write about the Supreme Court and, with only a few exceptions such as William Johnson and Joseph Story, to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall, the individual who is sometimes referred to as "The Great Chief Justice," as if no one else could ever be his equal. His place in the American pantheon means therefore that he has rarely been allowed to stray far from the center of scholarly attention. Alongside at least ten full or partial biographies or Marshall-focused books[6] is a host of more narrowly focused volumes, reams of articles, plus a multitude of other studies in which Marshall's handiwork figures prominently. At the 1955 bicentennial of his birth, one bibliography included nearly 750 titles.[7] The intervening years may now have pushed that number above 1,000.

To the current count should now be added **Without Precedent**, by Joel Richard Paul, a professor at University of California Hastings School of Law.[8] This major biography easily falls into the must-read category, not only because of the wealth of heavily documented information it contains

on Marshall, his times, and the Court but because its style so rivets the reader's attention that, once begun, the book is truly difficult to lay aside.

Surely anyone contemplating comprehensive scholarly writing on Marshall faces a challenge aside from the fact that Marshall's life has been a field frequently tilled. The discomforting truth for any author is that, plainly, there is so much to Marshall's life. For the prospective biographer, the essential task is to grasp and convey a remarkable variety of accomplishments that would fill a modern-day-styled resume even before one gets to his life-defining responsibility as fourth Chief Justice of the United States that spanned more than thirty-four years:

- Largely self-taught and educated at home in a family of modest means on the Virginia frontier
- Officer in the Culpepper Virginia Minute Men
- Officer in General George Washington's Army at Valley Forge
- Practicing attorney
- Member of the Virginia state legislature
- Member of the Virginia Convention to ratify the proposed U.S. Constitution
- Minister to France
- Member of the U.S. House of Representatives
- U.S. Secretary of State
- Biographer of George Washington

In short, the challenge Marshall presents for a biographer may well be similar to that posed by any one of the three or four most important American Presidents, especially when one remembers that most of Marshall's public service coincided with the formative years of the nation. Paul's book succeeds because he is able to get his arms around Marshall's multifaceted life and then to relate it so fully to the reader.

Marshall's story gives rise to key questions Paul attempts to answer. One focuses on the individual while the other places that individual in the context of an era with its personalities and events: "How does a man from such modest beginnings reinvent himself so successfully? And how does a judge transform an insignificant and impotent court into a powerful coequal branch of the federal government and breathe meaning and life into an untested constitution?"[9] Paul's response to his own queries is that "Marshall played many parts so well because he was at heart a master actor" so that in "the end his gift for illusion transformed not only himself but the Court, the Constitution, and the nation as well,"[10] where his political views "sprang not from theory but from his practical experience as a frontiersman, a soldier, and an attorney. Marshall believed in the practical necessity for collective action against the dangers facing his community at home and abroad. He was in all things a pragmatist."[11] (Paul's suggestion that Marshall excelled at illusion perhaps reflects Edward Corwin's assessment of him as a revolutionist *malgré lui*—in spite of himself).[12]

Paul's book also succeeds because, even when he is traversing episodes of Marshall's life that are familiar to many readers, he somehow manages to include facts or situations that are not widely known. The result is always informative and sometimes insightful, provocative, or even entertaining.

In the context of emphasizing the impact that Lieutenant General Baron von Steuben had on the young Marshall at Valley Forge, for instance, the author seems to enjoy adding that von Steuben was neither a general nor a Prussian baron. "Though his maternal grandfather may have been a German noble, Steuben possessed neither a title nor a fortune. He never rose above the rank of captain in the army of Frederick the Great." Yet in that pre-Internet era when snail mail was precisely that, "with his fictionalized curriculum vitae, Steuben was received by Americans as if he was a

world-famous warrior" even as he was feted by John Hancock in Boston and warmly greeted and compensated monetarily by the Continental Congress in York, Pennsylvania. Yet, as Paul explains, the Prussian "thought he had pulled off a great subterfuge until he arrived at Valley Forge and realized that Washington's army [given its woefully deficient condition] was a far more extravagant deception."[13]

Paul seems to have completed **Without Precedent** before publication of Paul Finkelman's **Supreme Injustice,** which took Marshall, Justice Joseph Story, and Chief Justice Roger Taney to task for their decisions on slavery.[14] Juxtaposing what might have been with what was, Finkelman concluded that through their actions as well as inactions the three jurists "almost always failed to consider liberty and justice in cases involving slavery and race. To the contrary, with only a few exceptions in their many years on the bench, they continuously strengthened slavery in the American constitutional order."[15] In doing so they squandered the chance to leave the nation "with a legacy of liberty and justice," consistent with America's founding ideology of equality and "unalienable rights" rather than one of "slavery, racism, and oppression."[16]

In contrast to several scholars whom Finkelman criticized because they "have mostly ignored [Marshall's] personal and judicial relationship with slavery,"[17] Paul addresses the subject directly and in some detail, against the backdrop, as Paul insists, that "slavery was the Constitution's original sin." The Framers had not merely tolerated slavery but had "enshrined it in the Constitution."[18] In a chapter entitled "Slaves and Hypocrites," for example, he recognizes that "Virginians of Marshall's generation saw no contradiction in their fierce advocacy of equality and their dependence on slavery. Slavery made it possible to regard all white males as equals regardless of of their social status."[19] Accordingly, "Marshall was not free of racial prejudice, and he did enjoy the comforts that his household slaves provided to him. He viewed slaves as family members who needed his guidance and support." In terms of treatment, "[t]here is no evidence that Marshall ever separated families or mistreated or whipped his slaves—as Thomas Jefferson did."[20]

William Marbury's counsel Charles Lee (above) read an affidavit signed by Chief Justice Marshall's brother, James, who had assisted the Chief Justice with the commissions, which provided crucial evidence that Marbury's commission had been properly signed and sealed. According to Joel Richard Paul, author of *Without Precedent: Chief Justice John Marshall and His Times,* James's testimony "was most likely a complete fabrication" and the Chief Justice had probably asked him to lie.

While Finkelman's approach was prosecutorial and emphasized Marshall's moral shortcomings, Paul is more inclined to stress the worth of Marshall's contributions in contradistinction to what later generations view as colossal ethical transgressions not only by Marshall but many of his contemporaries as well. His harshest statements about Marshall and slavery appear in discussion of *The Antelope*,[21] a factually complex admiralty case involving Spanish and Portuguese commercial interests along-

side the status of some 250 Africans who had been packed on board a vessel seized by a U.S. revenue cutter in Spanish waters. Declining to view the slave trade as a violation of the law of nations, Chief Justice Marshall concluded for the majority that, however "abhorrent" the slave trade was, it had "claimed all the sanction which could be derived from long usage and general acquiescence."[22] For this reason, the United States was obliged to recognize the rights of other nations to participate in the slave trade. However, because a number of the Africans in question had been captured aboard an American vessel, the United States retained possession of some of that total who were then returned to Africa the following year. The remaining Africans were sold to American slave owners with the proceeds conveyed to the Spanish and Portuguese claimants as restitution. Even though Paul insists that personally Marshall "viewed slavery and the slave trade as an abomination," his decision in *The Antelope* "betrayed this conviction." It also "revealed certain faults in Marshall's character: a readiness to submit to the authority of the law no matter how cruel or capricious it was and a failure of empathy for those seeking justice in his court."[23]

If, as Finkelman contended, some scholars have played down or even neglected Marshall's connections to slavery, surely none has overlooked *Marbury v. Madison*,[24] the case that is the one most indelibly linked to Marshall's name. It was in that decision that the Court not only invalidated an act of Congress but for the first time offered a reasoned defense of its authority to do so. In this "case of the missing commissions,"[25] Marshall was uncomfortably involved. He had been Secretary of State in the last weeks of the outgoing Adams administration when the Federalist Congress passed legislation[26] authorizing the President, among other things, to appoint magistrates for the District of Columbia, and it was Marshall's responsibility to make sure the commissions of office for these Senate-confirmed magistrates were delivered. Yet, when newly elected Thomas Jefferson was sworn in as President in March—barely five weeks after Marshall had become Chief Justice—several commissions, including one bearing the name of William Marbury, not only remained undelivered, but the new Secretary of State James Madison was determined that they would so remain.

However, when Marbury's counsel Charles Lee filed suit in the Supreme Court under section 13 of the Judiciary Act of 1789 for a writ of mandamus directing Madison to turn over Marbury's commission, Lee confronted "a challenging evidentiary hurdle" in that all the facts of the case had to be proven in a situation where Madison, who boycotted the proceeding, would not even acknowledge the Court's jurisdiction over him. The situation was thus especially awkward in that the "one person who was uniquely situated to testify that Marbury had been confirmed ... and that the commissions were properly signed and sealed was John Marshall. But as he was the sitting chief justice, that was impossible." Instead, Lee read an affidavit signed by the Chief Justice's brother, James, who had assisted the Chief Justice with the commissions.[27] This testimony "was the only evidence that the commissions were issued—and it was most likely a complete fabrication."[28]

"Historians," Paul explains, "have long accepted James's story but it made no sense." Paul reaches that conclusion because of a communication from Marshall to James that would have been unnecessary had James's account been accurate. "It is apparent that James Marshall perjured himself in the Supreme Court and that the chief justice not only knew this but probably asked him to lie," insists Paul. Admitting that it would be unthinkable today for a Chief Justice to suborn perjury in his own court or to participate in a case in which he was truly the principal witness, Paul explains that "the

time and circumstances were extraordinary. Facing a constitutional crisis . . . Marshall thought the ends justified the means . . . . The lie bridged an evidentiary gap by establishing in court the existence of the commissions, which the whole world knew was true."[29] Moreover, Paul points out that under the 1789 Judiciary Act, Lee should have begun the quest for a writ of mandamus in the circuit court, from which the statute gave the Supreme Court *appellate* jurisdiction. In what appeared to have been a tactically deliberate misreading of the law, Lee filed the petition in the Supreme Court as an *original* action instead, thus creating the basis for what the Court chose to do in the case.

Marshall's opinion in *Marbury*, which "ran more than forty pages or eleven thousand words [and] took four hour to read," was delivered at Stelle's Hotel, where the Court met temporarily because Justice Samuel Chase was confined there by illness. For Paul, it would "be remembered as the single most significant constitutional decision issued by any court in American history."[30] By refusing to issue the writ because the statute's section 13 violated the Constitution, the Court attempted to accomplish several objectives. First, and most immediately, the decision plainly avoided an unwinnable confrontation with the executive branch even as it enlarged the Court's authority. Marshall's assertion of power was therefore an acknowledgment of weakness. Second, in explaining why the judiciary could not apply a statute passed by Congress that, in the Justices' view, conflicted with the Constitution, Marshall implicitly countered the competing theories of his day that state legislatures or Congress would properly be the judge of the constitutionality of national policy. Third, Marshall's opinion explained why the executive must be answerable to the Court, although in doing so, Marshall was careful to distinguish between discretionary (that is, "political") actions that were not judicially cognizable and nondiscretionary actions that were. "By the constitution of the United States," conceded Marshall, "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and *is accountable only to his country in his political character and to his own conscience.*"[31] But delivery of commissions fell into the other category. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[32] Fourth, the Court was an independent entity of government. Rather than sit as the agent of one political force against another, the Court was the agent of the Constitution. Thus, an independent judiciary, moreover, was not the same as an administration-friendly or a party-friendly judiciary. Individuals claiming violations of rights might pursue judicial remedies. Or, as styled by a scholar slightly more than a century later, judicial review was expedient: "the substitute offered by political wisdom for the destructive right of revolution."[33]

Paul's treatment of *Marbury* follows his discussion of Marshall's nomination as Chief Justice by lame-duck President John Adams following Oliver Ellsworth's resignation. For Paul, it is "more surprising that Marshall accepted this appointment than it is that Adams offered it."[34] Yet the acceptance of what by then had become a difficult position to fill must be understood, the reader is told, in light of the deep animosity that already existed between Marshall and his cousin and fellow-Virginian Thomas Jefferson. By 1800, this antagonism had moved well beyond political rivalry into a fierce ideological tension about the future of the Republic so that Marshall and Jefferson appeared to be on "opposing sides of every major political issue."[35] Marshall was therefore willing to accept the nomination from Adams less because he had no political future in Republican-dominated Virginia or that his earnings from his law practice had usually been below the Chief Justice's salary, than

from a sense of duty that as Chief Justice he could resist "the onslaught of the Jeffersonians,"[36] a claim that would perhaps be more plausible had Marshall at the time of his nomination had prescience of *Marbury* and its progeny.

Truly, one of the delights of Paul's book is the occasional pithy contrast between Marshall and Jefferson, although each seems worded, if ever so slightly, to the Chief Justice's favor, as one might expect from a biographer of Marshall:

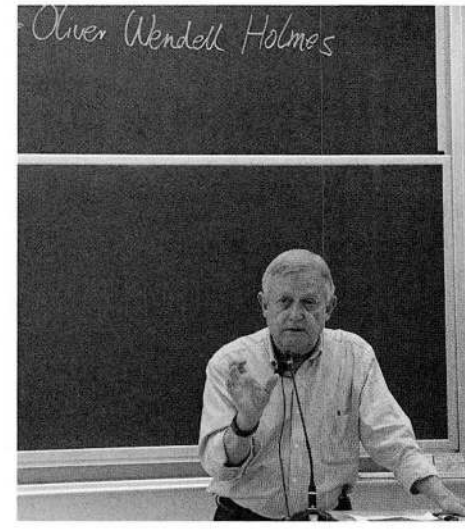
> Marshall's dress and manner were always plain and simple. He was not a philosopher like Jefferson [who] reigned over hundreds of slaves with a sense of privilege that most English lords would have envied . . . . Jefferson may have loved humankind, but he was not especially fond of most people, and he had few close friends. Though Marshall belonged to the party of elites, he practiced republicanism in his everyday life. By contrast, Jefferson preached democracy but lived more like the European aristocrats he despised.[37]

Dissimilarities played out in other ways as well as in that they had a fundamentally different relationship to authority figures. Jefferson was often skeptical and even disloyal, especially toward Washington and Adams; Marshall's whole career was defined by his loyalty to Washington, General Steuben, and Adams. Jefferson was as fiercely loyal to his ideology as Marshall was to his leaders. Marshall would compromise his own opinion before he would compromise his associates. On a personal level, Marshall was warmer and more gregarious; Jefferson preferred the world of books and ideas.[38]

Whether a reader chooses one or the other of these principal antagonists as a favorite, the clarity of Paul's analysis throughout remains a valuable window into the understanding of key actors in so crucial an era of American political and judicial history.

A useful ancillary to Paul's biography is ***Marbury v. Madison*** by William E. Nelson, a professor at New York University School of Law.[39] First published in 2000, Nelson's book has now been reissued in a second edition. Both editions are part of the Landmark Law Cases & American Society Series, published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull. Remarkably, this succession of case studies now claims more than five dozen titles, almost all of which treat decisions by the United States Supreme Court. The Kansas series fits comfortably into and has substantially enlarged and enriched an established scholarly category that has been an instructive part of literature on the judicial process for more than five decades.[40]

The Nelson addition adheres to the organization of, and pursues the objectives



David M. O'Brien, the Leone Reaves and George W. Spicer Professor of Politics at the University of Virginia since 1996 and a long-time member of the editorial board of this *Journal*, died in December 2018 at age sixty-seven. O'Brien was the author of *Storm Center: The Supreme Court in American Politics* and editor of *Judges on Judging*. He masterfully explained the workings of the Supreme Court to broad audiences.

of, most of the other books in this group. Like them, Nelson's helpfully includes a thorough bibliographical essay, and, essential for any case study, a detailed chronology. Also like them, his contribution sadly lacks footnotes or endnotes. (While footnotes or endnotes are not usually important for classroom use, where, one suspects the principal marketing thrust for the Kansas series is directed, their presence would greatly aid use of the bibliographical essay for general readers and scholars, with probably no loss of appeal to either a classroom or wider audience.)[41]

The fact that this volume is a second edition poses its own question. With, say, a book on American foreign policy that was first published in the 1990s, one can easily imagine the need for updating and even major revisions a decade or more later. The same might be said for a book on civil liberties and civil rights in the United States that made its first appearance at about the same time. Passing years invariably take their toll of obsolescence on what has been written. So, what is there about *Marbury v. Madison*, decided well over two centuries ago, that calls for a new edition less than two decades after the book first appeared? While correctly noting that "the case is an essential part of the adolescence of American democratic republicanism,"[42] the series editors seem not to address the need for revision, as one might expect. Neither does the author. Instead, the answer is found in a one-page "new book release" announcement from the publisher that accompanied the copy of Nelson's book that this author received. According to that promotional piece, the new edition is distinctive in that it includes coverage of colonial and early national institutions, events, and thinking that helped to create a highly receptive environment for what Marshall advanced. Additionally, the reader might also suppose that changing attitudes about judicial review—the key doctrinal contribution of *Marbury* to the art of government—and the increasing use of judicial review in other nations since the first edition appeared, would provide adequate justification for the re-issue.

In terms of content, **Without Precedent** and Chapters 7 and 8 of Nelson's book are most similar. Chapter 7 is a tightly compressed biographical overview of Marshall through the election of 1800. The focus of chapter 8 is the case itself, including a thorough discussion of the partisan differences that had developed. For Nelson, "clear cut party divisions had emerged by the second half of the 1790s. On one side stood the Republicans, avowing . . . 'the doctrine that mankind are capable of governing themselves,' and accused by their opponents of scheming 'to introduce a new order of things as it represents morals and politics, social and civil duties.' Opposite them stood the Federalists, claiming . . . to preserve 'that virtue [which] is the only permanent basis of a Republic,' and accused of attempting to restore monarchial government."[43]

Acknowledging that both parties or factions were internally divided, Nelson explains that, when forced to choose, "those who styled themselves Federalists generally proclaimed their preference for customary standards, while those who saw themselves as Republicans generally proclaimed their allegiance to the people's will." Significantly, such competing notions had been rooted in experiences that were comparatively fresh. "Republicans in 1800 could look back upon a quarter-century of fervid political activity during which a majority of the people had transformed the American constitutional landscape" and so could "plausibly hold that the popular majority would secure revolutionary improvements in government through continued exertion." By contrast, "Federalists recognized a tradition . . . of government by customary norms whose validity all right-thinking people accepted."[44] These were the contrasting outlooks that opposed each other in the

election of 1800, creating the environment during the time *Marbury v. Madison* came before the Supreme Court.

In addition, Nelson's volume enhances Paul's work in key respects. First, Nelson reconstructs the intellectual origins of Marshall's assertion of judicial review. As Paul's account of the case makes clear, a remarkable aspect of the Court's holding in retrospect is that, for the legal and political community of 1803, the decision was in at least one respect thoroughly unremarkable. That is, to the degree that Marshall's opinion ruffled feathers, its annoyance stemmed not from the claim that the Court would disregard a statute the Justices believed was in conflict with the Constitution. Indeed, what had troubled Republicans, aside from the Chief Justice's lecture on political etiquette to his cousin the President, was the claim that an executive officer was subject to the judicial process. Instead, Marshall's claim of judicial review—as with Alexander Hamilton's matter-of-fact assumption of it in *Federalist* No. 78—was unremarkable because it found a receptive intellectual environment that had already been nurtured by James Otis and the writs of assistance case of 1761 along with various reactions within the colonies to the Stamp Act of 1765 and the Townsend acts of 1767-68. Building on these developments were decisions in some state courts in the critical formative period during the two decades after 1776. Thus, avoiding either disapproval or praise for *Marbury*, Nelson insists throughout that his goal is "to assist the reader in understanding the decision as an elaboration of American, and, more recently, global constitutionalism."[45]

Second, Nelson contends that the judicial function and judicial review in Marshall's day had specific meaning in that "judicial review in *Marbury* ... granted judges authority to decide only issues of law and directed them to avoid political decision making."[46] Specifically, the Marshall Court "was striving to preserve what the justices and nearly all their fellow citizens found best in eighteenth century constitutionalism, while at the same time accommodating that constitutionalism to new nineteenth-century political realities." Americans of the mid-eighteenth century "did not want any government entity to engage in social policy choice. They understood law as fixed and immutable, not as something that government could change in response to shifting conceptions of social good." Indeed, "they equated fixed law with liberty and changeable law with arbitrary rule and tyranny."[47] Thus, the decision in *Marbury* was important because in it, Marshall drew a line "which nearly all citizens of his time believed ought to be drawn, between the legal and the political—between those matters that most Americans believed were fixed and immutable, and thus subject to legal control, and those matters open to fluctuation and change, and thus the subjects of democratic politics."[48]

Thus, while at one level, Marshall's use of judicial review in *Marbury* was an assertion of power, the Court's refusal to issue the writ of mandamus amounted to an abstention from political decision making and so "coincidentally [if ironically] strengthened the law." Before the decision, "courts were merely one more government entity performing the same legal-political functions that all other entities performed." Afterwards

> [i]n contrast, courts and law became distinctive and special, superior to and capable of invalidating political decisions in regard to matters subject to the law. In a sense, *Marbury* . . . thus accomplished what jurists have long assumed it accomplished—it did not establish judicial review, which was already in place, but over time it created the concept of the rule of law as a mechanism capable of controlling excesses generated in the democratic process.[49]

Third, Nelson's book outlines the transformation of judicial review in the years following *Marbury*. If at the beginning of the nineteenth century, judges were perceived not as political actors but as agents of the law, that understanding, not unexpectedly, would soon change. For instance, one would suppose that there would be different understandings of even presumably immutable legal principles, with the outcome of a case necessarily promoting one set of values in place of another. For an example, one need to look no further than the Marshall Court's decision and opinion in *McCulloch v. Maryland*[50] that sparked such an outrage precisely two hundred years ago that Chief Justice Marshall felt compelled to respond in print through essays by a "Friend of the Constitution."[51] Furthermore, Nelson points to "dictum in *Marbury* ... that the Constitution and its rule of law barred political actors from interfering with rights akin to the right of property." Accordingly, Nelson explains, for "more than a century after *Marbury*, judges continued to protect private property, as they had always done. In so doing they could understand that they were preserving the law of property as something fixed and immutable—that they were upholding Marshall's distinction between law and politics."[52]

Yet a changing economy that brought forth vast accumulations of wealth led to demands for "redistributive regulation" with the result that those who demanded more government intervention came to view the judiciary's continued protection of constitutional rights as "controversial and political rather than as legal and immutable."[53] The result for some was dissolution of the distinction between law and politics with "judicial review [passing] into the realm of policy choice." After the Court's about-face during the New Deal era and then pursuit of its newfound interest after 1938 in protecting non-property aspects of civil liberties and civil rights, "judicial review as we know it today came to fruition."[54] For Nelson, this change has come about at substantial cost, whether the context is the United States or another country where courts engage in judicial review. "Every policy decision judges make calls their impartiality into question and leads the electorate to demand the selection of judges who agree with majority views," writes Nelson in an echo of one of Justice Antonin Scalia's most memorable dissents.[55] "Judges who are so elected, insists Nelson, become only marginally better than legislators in protecting minorities."[56] Nelson seems to gaze back longingly to Marshall's "profound wisdom" that recognized "that the power of judges depends on their impartial adjudication of issues of law and their avoidance of political issues of social policy. Yet, there is apparently no turning back. Because "protection of minorities involves inevitable policy choices, judges today cannot totally avoid policy making. The protection of minority rights and judicial impartiality are simply in tension with each other, and judges must make an ultimate policy judgment about how much weight to give to each."[57]

The title Joel Paul chose for his biography of Marshall—**Without Precedent**—would have been equally appropriate for David Lynch to select for his study of the work of Justices on circuit during the Marshall era: **The Role of Circuit Courts in the Formation of United States Law in the Early Republic**, published in 2018.[58] A retired English circuit judge, Lynch is visiting research fellow at Liverpool John Moores University and a Master of the Bench of the Honorable Society of the Middle Temple in the United Kingdom, and so provides one more illustration that interest by English scholars in American constitutional government has persisted long after Maine.[59]

Among the notable departures from the Articles of Confederation that the Philadelphia Convention wrote into the Constitution was

provision for "one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish."[60] Acting upon this authority, the First Congress in September 1789 passed the Judiciary Act. Although the statute provided for three types of courts (district courts, circuit courts, and the Supreme Court), it authorized the appointment of judges only for the district courts and the Supreme Court. Except for a brief period in 1801-02, no separate circuit judgeships existed until 1855 (for California) and then in 1869 for the rest of the nation. Each circuit court was at first staffed by two Associate Justices—a number soon reduced to one—sitting with the single district judge. As a result, the early Justices spent far more time traveling their circuits and holding circuit court than they did sitting as the Supreme Court.

Lynch has taken this structure and used it as a window through which to view the work of some of the early Justices through their decisions on the circuit courts. In doing so, he provides a useful view, given the demands of the circuit "experiment," as he calls it in chapter one, of the significance and overall effects of this part of the Justices' professional time. Thus, he responds to the challenge posed some nine decades ago by Felix Frankfurter and James Landis when they wrote that "the actual volume of business in the various district and circuit courts, the manner of its disposition, . . . we shall not know until pride in the history of individual federal courts and an appreciation of the significance of their records leads to an illuminating writing of their story."[61]

To this end, Lynch has analyzed the work of four Associate Justices (hence circuit judges) who sat during the Chief Justiceship of John Marshall (1801-35), some fifteen individuals at a time when the High Court's roster was set at seven: William Cushing (1790-10), William Paterson (1793-06), and Samuel Chase (1796-11), appointed by President George Washington; Bushrod Washington (1799-29) and Alfred Moore (1800-04), appointed by President John Adams; William Johnson (1804-34), Brockholst Livingston (1807-23), and Thomas Todd (1807-26), appointed by President Thomas Jefferson; Gabriel Duvall (1811-35) and Joseph Story (1812-45), appointed by President James Madison; Smith Thompson (1823-43), appointed by President James Monroe; Robert Trimble (1826-28), appointed by President John Quincy Adams; and John McLean (1830-61), Henry Baldwin (1830-44), and James Wayne (1835-67), appointed by President Andrew Jackson.[62]

From this cohort of presiding judges in their circuits, Lynch chose to examine, in order of appointment, Washington, Livingston, Story, and Thompson. They were selected, Lynch explains, because, "whilst there are some similarities in their jurisprudence, each demonstrates a distinctive contribution to the development of federal law." Such contributions included "Washington's dependence on legal precedent; Livingston's advancement of commercial law; Story's admiralty expertize, and the championing of common law; and Thompson's states' rights stance and promotion of the Cherokee cause." Together, they "reveal how each, in his own way, shaped American law." Moreover, the four were among the most prominent of Marshall's colleagues, enjoyed substantial tenures, and, perhaps most importantly, produced enough primary material "to reach meaningful conclusions."[63]

That primary material of the fifteen circuit judges was undeniably substantial. Lynch reports analyzing some 1,317 circuit opinions, a figure that swells to 1,854 when he includes their Supreme Court opinions, and, for Cushing, Chase, Moore, Johnson, Livingston, Todd, Duvall, Thompson, McLean, and Wayne their opinions on various state courts. (Although Marshall sat on circuit as well, Lynch excluded the Chief Justice because Marshall has been studied so extensively, while most of his colleagues have enjoyed "scant attention"[64] at best.) Moreover, while the body of the book is rich in data throughout,

readers should not overlook Appendix A, which contains useful reversal rates by the Supreme Court for cases from state courts and the lower federal courts.

Lynch's book leaves the reader with several major impressions. The first is the sheer novelty of Federal Justice in 1789. What Congress put in place in the first Judiciary Act was truly without a model in what had become the United States. People had long been familiar with legislative assemblies, judges, and courts, first through their colonial governments and after 1776 through their state and local governments. Yet the Judiciary Act created an organizational overlay of something entirely new and different. What these new courts and their judges did, how well they did it, and how people would react to them would determine how, and, whether, this experiment in a national court system would work. There was certainly no guarantee.

Second, while it has been customary in biographies of Justices from the Marshall era and later to describe the physical and emotional hardships of circuit duty that persisted at least until interstate rail travel became widespread, more dependable, and comfortable by mid-century, Lynch provides perspective on what might be termed the professional or intellectual hardships that circuit duty entailed that contrasted sharply with conditions during the time they would spend when convened as the Supreme Court in Washington. "Once they reached their circuit destinations they had to dispense justice often without the benefit of a law library, contending with the absence of written state statutes and case citations which sometimes failed fully to record the issues and arguments." This was also at a time when the volume of congressional legislation and the Supreme Court's output in number of decisions, especially before Marshall, was still so puny "as to be of little assistance to the justices riding circuit who, individually and collectively, had to source and fashion American law to resolve the nation's criminal and civil litigation."[65] Moreover, working in relative legal isolation also meant that communicating with knowledgeable colleagues about some thorny or unfamiliar issue might take days or weeks.

Third, Lynch casts doubt on the view of some scholars "that the early Supreme Court rose to prominence, in the main, through its landmark decisions . . . . " Instead, "[a]s so few circuit opinions were appealed, they were generally regarded as final resolutions, and therefore, shaped that branch of the law for the circuit and, if followed by other justices, for the nation."[66] Thus, in Lynch's thinking, federal law was created not so much by judges who responded to cues from the top but more accurately grew from the bottom up as circuit rulings eventually found their way into, and became, the law of the land.

Fourth, the circuit system was crucial to education of both the American public and the Justices. That is, without circuit duty, reception of federal law in the young nation would have been more difficult and the Justices would have been much less informed about life in the various states. As scholars have known for decades, education of the public typically occurred through the circuit justice's charge to a grand jury. Initially heavy with political content, the charges gradually became less so "with the advent of John Marshall and the emerging concept of an independent judiciary," along with a fear of possible impeachment during the Jefferson administration. Once that threat subsided and "the new federal institutions began to gain general acceptance . . . there was no need to hammer home the virtues of central government."[67]

The circuit system in turn instructed the Justices by bringing them into direct contact with people in a variety of locations and circumstances. Lynch agrees with Jeffrey Morris's observation that an "itinerant justice had the opportunity of meeting everyone who

was anybody on his route—from state governors, to the president of Yale, to inventors, and even local beauties . . . swap political and other gossip, visit fledging industries and generally make himself 'enormously knowledgeable about the progress of manufacturing, the condition of farm crops and cattle."[68] Without such day-to-day exposure, Lynch believes that "the reception of federal law would have been infinitely more difficult and the justices much less informed about local conditions.'"[69] Indeed, he insists that their experience "underpinned the rise of the Supreme Court from a position of weakness to an authoritative and effective department of the federal government" and that "the experience and confidence gained on circuit was a factor in the federal judiciary's ability to withstand political attacks by Republican opponents during the vulnerable formative years of the Marshall Court."[70]

Fifth, Lynch makes two findings about the legal or constitutional views expressed in circuit opinions. The first is that, while Livingston, Story, and Thompson were "politically active in the Republican Party before appointment," each "disappointed their respective nominating presidents by failing to vigorously defend states' rights from federal encroachment." This Lynch finds unsurprising, as each came from similar backgrounds "and shared the same fundamental values." Moreover, given the attacks leveled at the federal judiciary, the general effect was to unite "the Supreme Court justices, whatever their political persuasion, against all opponents."[71] In addition, "the convention of the single opinion of the Court had the effect of achieving unanimity through compromise because of the need for unity in the face of a determined opposition," resulting in "all members of the Court being more amendable to the general view."[72] His second finding was that a Justice's circuit opinion was "generally a more reliable indicator of his jurisprudence than his opinion for the Supreme Court." While the latter "often required the compromise of strongly held views for unanimity," the situation for the former was often different. While a "justice on circuit sometimes sat with a district judge, the justice's view of the law or fact usually prevailed and

While the physical difficulties of circuit-riding have been well documented, in his new book, *The Role of Circuit Courts in the Formation of United States Law in the Early Republic: Following Supreme Court Justices Washington, Livingston, Story, and Thompson* David, Lynch emphasizes the intellectual ones. Once a Justice reached his circuit destination he worked "without benefit of a law library, contending with the absence of written state statutes and case citations which sometimes failed fully to record the issues and arguments." Moreover, the volume of congressional legislation and the Supreme Court's output in number of decisions was so small "as to be of little assistance to the justices riding circuit who, individually and collectively, had to source and fashion American law to resolve the nation's criminal and civil litigation."

the opinion occasionally expressed his personal and political views on the issues before him."[73]

Lynch's research adds considerably to what is known about both cases decided by the early federal judiciary and those Justices who served. These individuals "found American law a skeleton at the beginning of the nineteenth century" and in turn "left a fully formed body of federal law to which later generations have added"[74] —an outcome that was surely fortunate, yet hardly assured.

Among scholars of the Supreme Court, few have done more to explain and publicize the workings of the institution than David M. O'Brien, whose death on December 20, 2018, has left emptiness in the field.[75] The Leone Reaves and George W. Spicer Professor of Politics at the University of Virginia since 1996 and a member of the editorial board of this *Journal*, O'Brien was author, co-author, editor or co-editor of some seventeen books, including the widely read and quoted **Storm Center: The Supreme Court in American Politics**, first published by W. W. Norton in 1986 and now in its eleventh edition. O'Brien's sequence of books includes two that appeared as recently as 2017, the first being **Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*.**[76] This valuable monograph focuses renewed attention on one of the most important judicial figures of the post-1937 Supreme Court[77] and on one of the most consequential, researched, and commented-upon judicial decisions[78] of the twentieth century and appears at a time when a modern biography of this Pennsylvania-born and New York-bred legal figure is long overdue.[79] O'Brien's book is also important because of the additional light it sheds on Associate Justice and later Chief Justice William H. Rehnquist, who clerked for Jackson.

As the title promises, the book's focus is on an unpublished opinion Justice Jackson drafted while *Brown v. Board of Education* was being considered by the Court. This draft opinion has been a subject of some speculation, O'Brien notes, at least since Richard Kluger's **Simple Justice** (1975) made its existence well known, leading some to think the opinion had been prepared as a dissent, even though *Brown*, as it came down, was unanimous. Explaining that writing an opinion that was never published was not unique to Jackson, as his successor John Marshall Harlan kept his own numerous ones bound for use as reference in chambers, O'Brien found that Jackson's "considerable number of suppressed drafts . . . [in a variety of cases] reflect not only conversations with himself but also his thinking about fundamental issues of constitutional interpretation, law, and politics that still remain debated."[80] The unpublished opinion in *Brown*, which O'Brien included in full,[81] went through six drafts, "changing in length, structure, and substantive focus" as the length grew from fourteen to twenty-three pages, with material being added, deleted, and elaborated. This succession in turn reveals that "from the first to the last, the tone and analysis grow less pessimistic and more reconciled to the result," yet remaining anxious throughout about compliance and implementation—"less so than Frankfurter or Reed, but more so than Black or Douglas."[82]

Chapter three, entitled "Justice and Company," is alone worth the publisher's price of admission. Aside from being a worthwhile stand-alone discussion of the Justices' varying uses of law clerks in the modern era, O'Brien highlighted several reasons why Jackson's own misgivings about the growing reliance on clerks—O'Brien reports that Jackson "invariably" wrote the first draft of an opinion[83]—provide a context for appreciating the significance of his unpublished opinion in *Brown*. "First, it reveals Jackson's thinking unfiltered and unencumbered by the influence of clerks," of whom Jackson had one until after 1949 when Congress authorized two.[84] Second, it "reflected his intellectual struggles with

fundamental questions of constitutional interpretation" and so contributes to contemporary debates about competing theories. Indeed, in Jackson's case, the opinion expressed the tension between notions of a "living constitution" and original intent. Third, the opinion "further discredits claims made by Rehnquist" during the Senate Judiciary's Committee's hearings on his nomination as Associate Justice and again the same claims made at the hearings in 1986 on his elevation to the center chair when Chief Justice Burger retired. "On both occasions, Rehnquist contended that a 1952 memo on *Brown* that he wrote as a clerk, arguing against overruling *Plessy v. Ferguson's* doctrine of separate-but-equal, reflected Jackson's views not his own." O'Brien reprinted a reproduction of the 1952 Rehnquist memo[85] and insisted that the unpublished opinion makes "abundantly clear," contrary to Rehnquist and some scholarly speculation, that Jackson never planned on dissenting in *Brown*."[86]

Why then did the thorough and thoughtful opinion remain unpublished? There may be no demonstrable explanation, but O'Brien suggested the answer lies in Chief Justice Warren's well-known desire for unanimity, deemed particularly important in a case like *Brown*, and in Warren's nonaccusatory, narrow, and straightforward opinion" for the Court.[87]

The second O'Brien book published in 2017 is a new edition of his edited work **Judges on Judging**,[88] the first edition of which appeared in 1997. Compiled mainly for students of the judicial process, this collection is nevertheless serviceable to novice, seasoned scholar, and practitioner alike and of particular value to anyone desiring to read about what judges do as described not by outsiders but by judges themselves, as the subtitle—"Views from the Bench"—indicates. Moreover, perhaps to avert any confusion that the "bench" at hand is of the judicial and not the athletic variety,[89] O'Brien's introduction tellingly points to the common observation that most Americans know very little about the Supreme Court and the other federal courts—much less in fact than they do about Congress—yet hold the judiciary in much higher regard, an anomaly that once led former member of Congress and later U.S. appeals court judge Abner J. Mikva to comment, "I hate to think we're only beloved in ignorance."[90] The humor points to the book's objective of making accessible Justices' and judges' thinking about judicial activism and restraint, rival approaches to constitutional interpretation, and the judicial role in the political process. Moreover, with a balanced selection of entries, the volume seems well constructed to contribute to the ongoing debate about the propriety of certain off-the-bench remarks and to encourage readers to think about the qualities of judges—their temperaments, characters, judicial philosophies, and political views—as well as the role of courts in American politics. However, as O'Brien explained, judges' explanations are "only partial and must be supplemented with what we learn from social science, history, and philosophy."[91]

As such, **Judges on Judging** has proven to be what might be described as a self-replenishing book in that its selections do not represent a canon whose contents are locked or closed. Given the broad topics covered, one may safely predict that judges, including no doubt some who have yet to be heard from, will not only continue to speak and write about what they do, but perhaps will do so in occasionally uncommon ways that may rankle both the public and their colleagues. Yet, should circumstances someday happily allow for a new edition by a successor editor, this author hopes that it will include an index, a truly essential feature that would have made this very small part of O'Brien's considerable and impressive legacy notably more functional and convenient to use.

Organizationally, the new edition adheres closely to the structure of its predecessors, including an invaluable selected bibliography on off-bench commentary (Appendix C) that extends to twenty-four pages. As for substantive content, the book's thirty-four entries represent the work of thirty-one different judges, of whom seventeen are current or former members of the United States Supreme Court. With the exception of two state appellate judges, the remaining authors are or were judges on one of the United States district courts or one of the United States courts of appeals. To lend additional coherency to the volume, O'Brien grouped the selections into four parts and began each part with an introduction: (1) Judicial Review and American Politics: Historical and Political Perspectives; (2) The Dynamics of the judicial Process; (3) The Judiciary and the Constitution; and, injecting a federalism component (4) Our Dual Constitutional System: The Bill of Rights and the States. Readers will find both some well-known pieces and some that may be new for many. In the former category, there are entries such as Oliver Wendell Holmes' "The Path of the Law," published while the future Justice was still sitting on the Supreme Judicial Court of Massachusetts,[92] and Justice Hugo Black's signature discourse on "The Bill of Rights." Among the latter is Justice Ruth Bader Ginsburg's "Speaking in a Judicial Voice: Reflections on *Roe v . Wade*," which she wrote shortly before her nomination to the Supreme Court in 1993.

Collectively the selections in this edition, like its predecessors, continue to provide insight into the judicial process and will simulate conversations about its[93] relationship to what Justice Harlan Fiske Stone once termed, in the context of a bar association address, the "judicial instinct of self-preservation."[94] Certainly O'Brien's book, as well as the others surveyed here, demonstrate the High Court's continuing presence and prominence in scholarly literature.

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

LYNCH, DAVID. **The Role of Circuit Courts in the Formation of United States Law in the Early Republic: Following Supreme Court Justices Washington, Livingston, Story, and Thompson.** (Oxford, United Kingdom and Portland, OR, Hart Publishing, 2018). Pp. xxi, 233. ISBN: 9781509910854, cloth.

NELSON, WILLIAM E. ***Marbury v. Madison*: The Origins and Legacy of Judicial Review.** (Lawrence, KS: University Press of Kansas, 2nd ed., 2018). Pp. xiii, 170. ISBN: 978-0-7006-2640-3, paper.

O'BRIEN, DAVID, M. **Judges on Judging: Views from the Bench**. (Thousand Oaks, CA: CQ Press, 5th ed., 2017). Pp. x, 380. ISBN: 978-1-5063-4028-9, paper.

O'BRIEN, DAVID, M. **Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*: Conflict, Compromise, and Constitutional Interpretation**. (Lawrence, KS: University Press of Kansas, 2017). Pp. xii, 220. ISBN: 978-0-7006-2158-5, cloth.

PAUL, JOEL RICHARD. **Without Precedent: Chief Justice John Marshall and His Times** (New York, NY: Riverhead Books, 2018). Pp. 502. ISBN: 978-1-47259448-823-8, cloth.

ENDNOTES

[1] Henry Sumner Maine, **Popular Government** (1886). The English edition was published first in 1885, three years before Maine's death. The fourth essay is entitled "The Constitution of the United States" and is the one of interest here.

[2] *Youngstown Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[3] **Popular Government**, pp. 218, 221-22.

[4] *Id.*, p. 243.

[5] *Id.*, p. 245.

[6] For example, *see* Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916-19); Robert K. Faulkner, **The Jurisprudence of John Marshall** (1968); Stanley I Kutler, ed., **John Marshall** (1972); Leonard Baker,

John Marshall: A Life in Law (1974); Francis N. Stites, **John Marshall: Defender of the Constitution** (1981); Charles F. Hobson, **John Marshall: The Great Chief Justice and the Rule of Law** (1996); Jean Edward Smith, **John Marshall: Definer of a Nation** (1996); Herbert A. Johnson, **The Chief Justiceship of John Marshall** (1997); David Robarge, **A Chief Justice's Progress** (2000); R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001); and Richard Brookhiser, **John Marshall, the Man Who Made the Court Supreme** (2018).

[7] James Servies, **A Bibliography of John Marshall** (1956).

[8] Joel Richard Paul, **Without Precedent** (2018), hereafter as Paul.

[9] *Id.*, p. 2.

[10] *Id.*

[11] *Id.*, pp. 234-35.

[12] Edward S. Corwin, "John Marshall, Revolutionist *Malgré Lui*," 104 *University of Pennsylvania Law Review* 9 (1955).

[13] Paul, pp. 10-11.

[14] Paul Finkleman, **Supreme Injustice** (2018).

[15] *Id.*, p. 3.

[16] *Id.*, p. 2.

[17] *Id.*, p. 26.

[18] Paul, p. 350.

[19] *Id.*, p. 46.

[20] *Id.*, pp. 46-47.

[21] 23 U.S. (10 Wheaton) 66 (1824).

[22] *Id.*, 115.

[23] Paul, pp. 361, 363.

[24] 5 U. S. (1 Cranch) 137 (1803).

[25] The phrase within quotation marks is the title of the lead essay by John A. Garraty on *Marbury* in Garraty's **Quarrels That Have Shaped the Constitution** (rev. ed., 1987), pp. 1-19.

[26] The District of Columbia Organic Act of 1801.

[27] James was also one of the "midnight judges" Adams had named to the short-lived Circuit Court for the District of Columbia under the Judiciary Act of 1801.

[28] Paul, pp. 252-53.

[29] *Id.*, p. 254.

[30] *Id.*, p. 255.

[31] 5 U.S. (1 Cranch) 165-66 (emphasis added).

[32] *Id.*, p. 167.

[33] Edward S. Corwin, **The Doctrine of Judicial Review** (1914) p. 59.

[34] Paul, p. 222.

[35] *Id.*, p. 438.

[36] *Id.*, p. 224.

[37] *Id.*, pp. 234-35.

[38] *Id.*, p. 438.

[39] William E. Nelson, ***Marbury v. Madison*** (2nd ed., 2018) (hereafter as Nelson).

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

[41] In defense of the omission of footnotes or endnotes, the series editors explain that they "asked all authors to omit formal citations to make our volumes more readable, inexpensive, and appealing for students and general readers." Nelson, p. 157. The defect in that defense is easily illustrated by two useful quotations the reader finds on pages 131 and 132. The first is by Judge Learned Hand, the second by Professor John Dickinson. Suppose a reader wishes to examine the context for each. With a citation provided for neither, the reader is left wondering about the specific source of both statements. Perhaps they are from a publication mentioned in the bibliographical essay. If so, which one and where? If not, the reader is left adrift with little more than Google.

[42] Nelson, p. ix.

[43] *Id.*, p.76, emphasis omitted.

[44] *Id.*, pp 76-77.

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

[46] *Id.*, p. 6.

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

[48] *Id.*, p. 8.

[49] *Id.*, pp. 8-9.

[50] 17 U. S. (4 Wheaton) 316 (1819).

[51] Gerald Gunther, ed., **John Marshall's Defense of *McCulloch v. Maryland*** (1969).

[52] Nelson, p. 9.

[53] *Id.*

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

[55] "As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality, our process of constitutional adjudication consists primarily of making value judgments ... then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U. S. 833, 1000-01(1992), Scalia J., dissenting.

[56] Nelson, p. 153.

[57] *Id.*, pp. 153-54.

[58] David Lynch's book is hereafter cited as Lynch.

[59] Another recent example is **In Defense of the United States Constitution** by Robert S. Singh of the University of London. Singh's book was published in 2019 by Routledge.

[60] Article III, section 1.

[61] Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928), p. 52.

[62] In two places on the same page, Lynch refers to "14" Associate Justices who sat with Marshall. Lynch at xxi. However, Appendix C lists fifteen. *Id.*, 202-05. This author's count is also fifteen, not fourteen.

[63] Lynch, p. 3.

[64] *Id.*, p. xxi.

[65] *Id.*, p. 183.

[66] *Id.*, p. 1.

[67] *Id.*, p. 186.

[68] Lynch draws the quoted passage from Jeffrey B. Morris, **Federal Justice on the Second Circuit** (1987), p. 19.

[69] Lynch, p. 6.

[70] *Id.*, p. 184.

[71] *Id.*, p. 186.

[72] *Id.*, p. 187.

[73] *Id.*, p. 185.

[74] *Id.*, p. 194.

[75] https://www.nytimes.com/2018/12/28/obituaries/david-m-obrien-dead.html (last accessed January 6, 2019).

[76] David M.O'Brien, **Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*** (2018) [hereafter O'Brien (1)].

[77] Justice Jackson was appointed by President Franklin Roosevelt in 1941 and served until his death in October 1954.

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

[79] Eugene Gerhart's **America's Advocate: Robert H. Jackson** (1958) was written before some important judicial and other sources became available.

[80] O'Brien (1), p. 3.

[81] *Id.*, pp. 123-32.

[82] *Id.*, p. 3.

[83] *Id.*, p. 54.

[84] As a former clerk, William Rehnquist made public on at least two occasions his own misgivings about the influence of clerks. Rehnquist, "Who Writes Decisions of the Supreme Court?" *U. S. News & World Report* (December 13, 1957, p. 74, and "Another View: Clerks Might 'Influence' Some Actions," *U. S. News & World Report*, February 21, 1958, p. 116.

[85] O'Brien, p. 66.

[86] *Id.*, p. 55.

[87] *Id.*, p. 53.

[88] David M. O'Brien, **Judges on Judging** (5th ed., (2017) [hereafter O'Brien (2)].

[89] O'Brien's book is therefore not to be likened to Alan Williams's **Walk on: Life from the End of the Bench** (2006).

[90] O'Brien (2), p. 3.

[91] *Id.*, p. 8.

[92] Justice Holmes is counted with the former members of the U. S. Supreme Court.

[93] While O'Brien included a lecture from 1988 by Justice Antonin Scalia, one wishes the book featured an excerpt from **Reading Law: The Interpretation of Legal Texts** (2012), which Justice Scalia co-authored with Bryan A. Garner.

[94] Harlan F. Stone, "Fifty Years' Work of the United States Supreme Court," 14 *American Bar Association Journal* 428, 428 (1928).

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