Introduction

Melvin I. Urofsky

The war that enveloped Europe from 1914 to 1918 had an enormous impact on the countries fighting in that conflict. Great Britain, France, Germany, and, to a lesser extent, Russia lost a generation of their sons, many in trench warfare that saw thousands of lives snuffed out with hardly any measurable gains. For the United States, which did not declare war until April 1917, the losses were fewer and the fighting took place thousands of miles away. While we lost men, our casualties were far fewer than those of our Allies. Perhaps even more importantly, the fighting never touched our soil, and we did not have the thousands of killed and wounded civilians suffered in Europe.

But we did play an important role once we entered the war, and so the Society dedicated its 2018 Silverman Lectures to mark the centennial of what is still known in Europe as "the Great War." I was honored to give the first lecture in the series, and my task was to lay out the broad outlines of the role that the Constitution in general, and the Supreme Court in particular, played during the conflict.

Although normally the Supreme Court tries to hold off deciding cases that may have an immediate effect on governmental policy, sometimes the administration needs to have the Court make a decision. This was the issue in the Selective Draft Law Cases. Both Congress and the Wilson Administration needed to know if the Selective Service System that had been created was constitutional. If yes, the preparations for training American troops could go on; if not, no one wanted to send young men overseas to possibly be killed under the aegis of an illicit law. Christopher Capozzola, professor of history at MIT, talks about these cases, the Court's decision, and its impact.

During the Civil War, Abraham Lincoln faced the daunting challenge of not only preserving the Union but doing so in a legitimate manner. Where would the Union get its authority to wage war when the Constitution itself never mentions a civil war? Lincoln and a handful of legal scholars came up with what we now call the "adequacy of the Constitution" theory—namely, that even if the document itself did not specifically mention a civil war, common sense required that the Framers intended the Union to have the necessary powers to protect itself. Although Wilson probably knew about this, he must surely have been gratified that his opponent in the 1916 election, the former governor of New York, Charles Evans Hughes, endorsed an expansive view of the war powers. Matthew C. Waxman, Liviu Librescu Professor of Law

at Columbia Law School, takes us through Hughes's speech and its importance.

Everyone who has gone to law school since 1945 has studied the free speech cases that the Court heard after the war ended. But the laws that led to the cases were very much a part of the Wilson Administration's grand design, and at the time only a handful of people protested. But those protests led to the establishment of the American Civil Liberties Union and also led Holmes and Brandeis to change their minds. Laura Weinrib, Harvard Law School professor, guides us through those cases, and the famous opinions that mark the beginning of a major shift in judicial thinking and the beginning of First Amendment jurisprudence.

In addition, we have an article dealing with freedom in another wartime setting: when Cassius Clay, who had become Muhamad Ali, refused to be drafted to serve in Vietnam. Winston Bowman, the Associate Historian at the Federal Judicial Center, tells us the tale of a case that has remained an important landmark in First Amendment jurisprudence.

Last but certainly not least is our regular feature, Grier Stephenson's "Judicial Bookshelf." In this issue, Grier looks at how some older histories of the Court have held up, as well as some newer treatments of the Great Chief Justice, John Marshall. As always, Grier doesn't just mention books, but gives us a thoughtful essay on them.

While this issue may not be the wide potpourri we sometimes have, there is more than enough food for thought. Enjoy!

The Great War, the Constitution, and the Court

MELVIN I. UROFSKY

As I am a historian, let me do what my mentor, Bill Leuchtenburg, taught me: "Begin with a story."

Alice Brandeis was in her Washington apartment on a cold December day in 1917 catching up on Boston news with her old friend Elizabeth Evans when the phone rang a little after 4:00. "Who is there?" she asked the building operator. "The President." When Alice again asked who was calling, the operator said "President Wilson." Realizing it was no joke, she told the woman to transfer the call to 809, the small apartment Justice Louis D. Brandeis rented as a study. Within an hour, Woodrow Wilson arrived at Stoneleigh Court and went up to see the Justice, while the two Secret Service men who accompanied him waited outside the door.[1]

We will get to what they talked about shortly, but first we have to set the context—the United States in a war unlike any it had ever fought before.

My assignment is not, as it has often been in the past, to look at one particular Justice—although I will do a little of that—or discuss one set of cases, although I will do some of that as well. Rather, my task is to provide an overview, a context for the three remaining talks in this series of Leon Silverman Lectures.

The Great War, as it is still called in Europe, began in August 1914: a war that no one wanted and that nearly everyone predicted would never happen. There is disagreement about the total number of casualties, but conservative estimates say that before the fighting ended, more than eight million soldiers and twelve million civilians had died. Germany lost 1.7 million dead and another four million were wounded. The United States did not enter the conflict until April 1917, and its first troops arrived in France the following September. In the fourteen months before the armistice in November 1918, 50,000 Americans fell in battle.[2]

The last big war the United States had fought was between the states from 1861 to 1865, and while that conflict raised a number of constitutional issues—such as the legitimacy of the blockade, the emancipation

of slaves, and the suspension of habeas corpus—for the most part Supreme Court decisions played a relatively minor role. Abraham Lincoln has been accused, primarily by southern sympathizers, of ignoring the Constitution and acting as a tyrant. Lincoln did neither, but he did "stretch" the Constitution.[3]

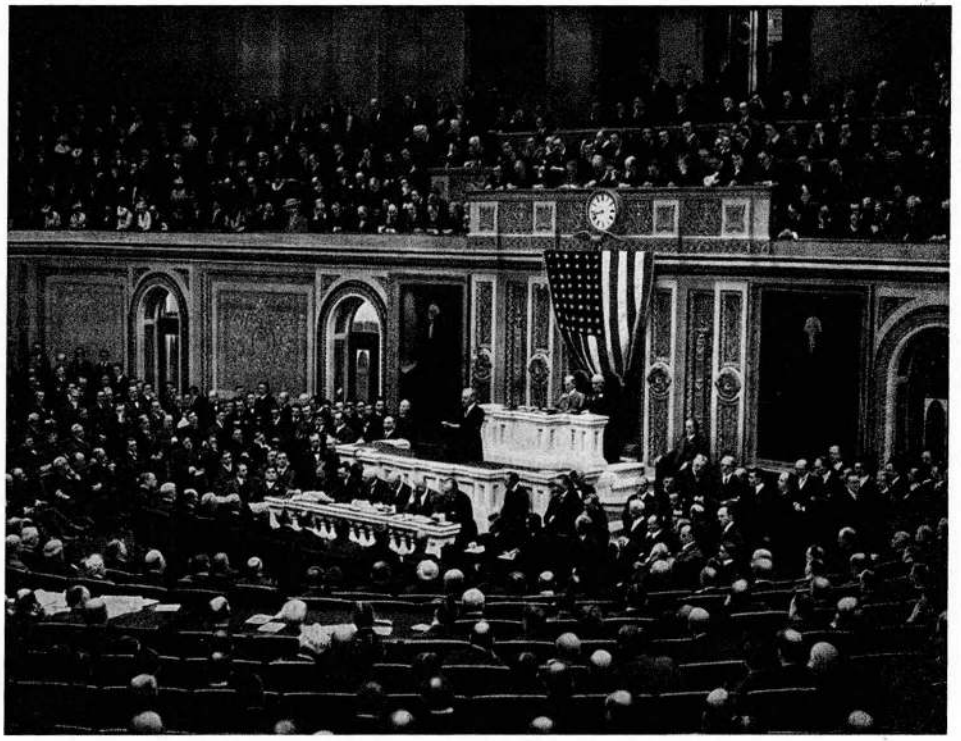
Before the Civil War, the accepted view held that the Constitution had created a government of restricted powers, which could act only in those areas specifically ascribed to it. Under John Marshall, the Supreme Court had broadly interpreted the reach of these delegated powers, but even Marshall often referred to the government as one of limited authority. While southerners took a narrower view of federal powers than did people in the North, even the latter shared this conceptual framework. If true, then the government in Washington had no powers to wage a war against the secessionist states, and the Union would collapse. While the obvious answer was to amend the Constitution, this route was impractical with eleven states in rebellion.[4]

To support Lincoln's prosecution of the war, northern legal writers developed what the abolitionist legal scholar Timothy Farrar called the "adequacy of the Constitution" theory. Farrar and others argued that the southern emphasis on the negative constraints in the Constitution hid the positive commandments for the government to act effectively to preserve itself and the Union. As Sidney George Fisher, another legal writer, explained, the President and Congress had the power to react to concrete situations such as the rebellion and they also had the discretion to choose the most effective means to do so. Preserving the Union constituted a positive requirement of government, even if the particular means had not been spelled out in constitutional detail.[5]

As Timothy Huebner explained in his recent study of constitutional issues during the Civil War, the Constitution would either need to be adequate to meet the crisis, or it would have to be abandoned. The latter choice was unthinkable, and so Lincoln expanded the understanding of constitutional power in his strong reaction to secession. In so doing, he also resolved the antebellum debate over state sovereignty versus national supremacy by asserting the idea of America as a unitary state, one that was empowered by and acted on the authority of the people—his famous assertion at Gettysburg that the war was fought so "that government of the people, by the people, for the people, shall not perish from the earth."[6]

While the federal government did grow in size and power during the war years, after the end of Reconstruction in 1877 the old theory of limited government returned, shared by all parts of the country. Between 1877 and 1917, the only wars the country faced involved the army subduing the Indian tribes, and what John Hay called "a splendid little war" against Spain that left the United States with new territories in both the Caribbean and the Pacific. Theodore Roosevelt's use of the "bully pulpit" presaged what modern Presidents could do, but although he would have liked to lead the nation in wartime, that task fell to Woodrow Wilson.

Wilson had been a former government professor and had written popular books on the state and national governments.[7] He undoubtedly knew the writings of scholars like Farrar and Fisher, and he did not criticize Lincoln's war leadership in any of his writings. Constitutionally, however, he remained an unreconstructed Jeffersonian who opposed big government. In the 1912 election, Wilson had countered Theodore Roosevelt's New Nationalism, in which big business would be controlled by big government, with his New Freedom, in which big business would be kept in check by the rules of competition. Wilson desperately tried to keep the United States out of war, but when Germany resumed unrestricted attacks by U-boats on neutral shipping going to the Allies—mainly American boats—Wilson had little choice



On February 3, 1917, President Woodrow Wilson announced before Congress that the nation was officially breaking off relations with Germany. The United States was unprepared to go to war.

but to ask Congress for a declaration of war on April 2, 1917.

To put it charitably, the United States was terribly unprepared to go to war. In May 1916, Congress, under intense pressure from the White House, passed the first measure to put the country in a state of preparedness should it become necessary to enter the war. At the suggestion of Secretary of War Newton D. Baker, Congress authorized the creation of a Council of National Defense, but although it had an implied mandate of helping to mobilize the private sector for war production, no one really knew what it could or should do, and it had little authority to exert. The Army and Navy initially saw it as a sort of a shield between them and pork barrel politics, but the bill passed by Congress envisioned something more vague, and the agency was given a budget of only $10,000. As far as Congress was concerned, the Council would play a minor advisory role.[8]

Just as in the Civil War, the Great War placed strains not only on American society but also on the Constitution itself. Here is a short list of constitutional questions that arose in the war:[9]

1. *Military conscription.* Although both the Union and the Confederacy had resorted to drafts during the Civil War, they had not been popular, especially as a well-to-do man could pay someone else to take his place. The constitutionality of the draft law did come before the Supreme Court,[10] and for that story see Professor Christopher Capozzola's article in this issue.
2. *Economic regulation.* The exigencies of war led to increased federal regulation of economic activity. A combination of congressional statutes and executive orders led to government intervention and regulation of areas as diverse as

The War Labor Policies Board, headed by Felix Frankfurter, tried to set policies for wages, hours, and union recognition at a time of deep labor unrest. Above is wreckage of Chicago's Federal Building in 1918 after the explosion of a bomb allegedly planted by the radical International Workers of the World.

agriculture, manufacturing, mining, railroads and telegraph, and even rents. Two of the most important laws passed by Congress, the Lever Act of 1917 and the Overman Act of early 1918, gave the federal government enormous control over both agriculture and industry, to an extent never before seen in our history.[11] Both these laws, it should be noted, formed part of the template for Franklin Roosevelt's New Deal efforts to fight the Great Depression. This will be discussed further because some of these issues did in fact come before the Court.

3. *Labor relations*. Years ago, the noted historian Richard Hofstadter wrote that war is the enemy of reform, yet during World War I, reform seemed to be strengthened rather than weakened.[12] The War Labor Board, co-chaired by former President William Howard Taft, worked to reduce labor–management strife; in doing so, it also forced management to pay workers a decent wage. The War Labor Policies Board, headed by Felix Frankfurter, tried to set policies for wages, hours, and union recognition. Wilson himself took a keen interest in hourly wages. Social welfare groups played a prominent role in training American troops, and urban reformers helped build the many army camps needed to house and train soldiers.
4. *The enfranchisement of women*. In an era of reform, it is little wonder that women saw an opportunity finally to win the suffrage. Because suffrage had always been considered primarily a matter of state power (and is so even today, despite the Fifteenth Amendment and the 1965 Voting Rights Act), women had begun lobbying state legislatures right after the Civil War. The Wyoming Territory granted suffrage to women in 1869, but by 1900, only

Led by Alice Paul (pictured in 1915), the Women's Party regularly picketed the White House, provoked arrests, and went on well-publicized hunger strikes in prison. When the United States entered the war to fight for democracy overseas, it made it increasingly difficult for Wilson and the Republican Party to deny enfranchisement to half the population at home.

four states allowed women to vote. The movement picked up steam after 1912, when Alice Paul, a Quaker and social worker, returned from an apprenticeship with the militant suffragists of England. Adopting the techniques she had learned in the mother country, the day before Wilson's inauguration, she led a march on Washington to promote the new goal of the movement—a constitutional amendment. When unruly opponents broke up the parade, the women had the publicity they needed. By 1916, the Republican Party had endorsed a women's suffrage amendment, and eleven states had given women the franchise.

Wilson, who had extremely traditional views about women, opposed giving them the vote. He refused to endorse the amendment, insisting that states should control suffrage.[13] But the President found himself in a rapidly shrinking minority. Under Paul's leadership, the new Women's Party regularly picketed the White House, provoked arrests, and went on well-publicized hunger strikes in prison. When the United States entered the war, allegedly to save democracy, political wisdom dictated that one could not send Americans to fight and die for an ideal overseas while denying it to half the population at home.

Wilson finally capitulated and went before Congress on September 30, 1918, to recommend a constitutional amendment. Congress had turned down similar proposals ever since Reconstruction, and while the House passed the proposal easily, the Senate rejected it, once in 1918 and twice in 1919. With Wilson's backing, however, Congress finally approved the Nineteenth Amendment on June 4, 1919, and on August 18, 1920, Tennessee became the 36th state to ratify it, in time for women to vote in that fall's presidential election.

5. *Prohibition of alcohol.* Prohibition has such a bad name in our history—the Great Experiment that totally failed—that we often forget it constituted one of the most important of Progressive Era reforms.[14] The Lever Act, under the mandate of preserving scarce food resources, authorized the President to limit or forbid the use of foodstuffs for the production of alcoholic beverages. On this issue there was to be extensive participation by the Court, and because of that, we will pay some attention to it.
6. *Personal liberties.* Here, of course, we have to deal with the emergence of modern notions of free speech and press, covered by Professor Laura Weinrib's article. Suffice it to say for now that during the war Congress, at the administration's behest, passed the most restrictive laws on speech and press since the Alien and Sedition Acts of the late eighteenth century.
7. *The League of Nations.* Too often the fight over American entry into the League is portrayed as a spitball fight between two recalcitrants, Wilson and Senator Henry Cabot Lodge of Massachusetts. That scenario is only partially correct.

   The Constitution gives the President treaty-making powers, but for an agreement to go into effect, it needs the approval of two-thirds of the Senate. This is a typical example of the checks and balances built into our system of government. Yet Wilson took no senator with him to the Paris conference, and when he returned with the treaty, he essentially brushed off the Senate, saying that the document had been signed, so the Senate must be committed to it as well. The Senate, jealous of its powers, did not agree.

   Moreover, Wilson should have known better. In his book **Constitutional Government** (1908), he had written that when faced by a stubborn Senate, a President might well follow a more conciliatory course, "which one or two Presidents of unusual political sagacity have followed, with the satisfactory results that were to have been expected."

   The Senate had some legitimate constitutional questions. None stood out more clearly than Article X of the League of Nations Covenant, which called for collective action against aggression. Did this mean that if the United States ratified the treaty and joined the League, it automatically had to go to war if aggression occurred? What did this imply for the constitutional requirement that only Congress could commit the country to war? The Allies were willing to yield on this point, but not Wilson, and his stubbornness—he would have no changes—doomed the treaty. His rigid interpretation of presidential powers, despite what he had written earlier, would not allow him to compromise, and together with the Senate's insistence on doing its constitutional duty of reviewing treaties, he played into the hands of his opponents.[15]

   This stand-off between the two branches of government had important effects. No President after Wilson dismissed the role of the Senate in making treaties. When Harry Truman went to the San Francisco conference in 1945, where the charter of the United Nations would be signed, he took senators from both parties with him. Truman would certainly have fit into Wilson's group of Presidents "with unusual sagacity."
8. *The growth of presidential power.* Congress delegated a great deal of power to the President, albeit often with many misgivings. Charles Evans Hughes, who had been the Republican candidate in 1916, justified the expansion of governmental power in a speech to the American Bar Association.[16] The importance of Hughes's arguments is explored in Professor Matthew Waxman's article. All of these issues presented

constitutional questions, but not all of them came up before the Court, nor, with one exception, did they involve members of the Court. We should keep in mind that, until fairly recently, Presidents often spoke with members of the Court about policy matters. In World War II, for example, Franklin D. Roosevelt consulted frequently with three Justices: Felix Frankfurter, Robert H. Jackson, and to a lesser degree William O. Douglas. In the first war, however, Wilson only trusted the advice of one member of the Court, Louis Brandeis, who became one of the President's closest wartime confidants.

Let us now return to our story on that late afternoon in December 1917. The matter that concerned Wilson involved railroads and their seeming inability to move raw materials to plants or desperately needed war supplies from plants to Atlantic ports. Wilson had been besieged by people clamoring for the government to take over the rail lines, join them into a unified system, and then give one man the necessary authority to run it. His Attorney General assured the President that such a step would be legal, as Congress had empowered the President to do so in the 1916 national defense act. Yet Wilson had his doubts, both about taking over the lines and about setting up such a powerful governmental agency.[17] And so he went to see the man whose advice he would trust, the man whom Wilson's biographer, Arthur Link, called "the intellectual architect of the New Freedom," and whom Wilson knew shared his views on government and the economy. Wilson also wanted Brandeis's evaluation of Secretary of the Treasury William Gibbs McAdoo, and whether he was capable.[18]

Justice Brandeis understood that in wartime, things had to be done differently and reassured the President that not only would the takeover be legitimate, but that he should name McAdoo to run the railroads. Although Wilson recognized McAdoo's energy and talents, he needed him at Treasury to cope with the problems of financing the war. Surprisingly, given his well-known views on the limitations of individuals to run large enterprises, the Justice told Wilson that McAdoo could do both jobs and do them well. Less than a week later, the White House announced that the government would take over the railroads for the duration of the war and named McAdoo as director general.

To an extent that would be deemed highly questionable these days, members of the administration frequently consulted with Justice Brandeis, although they, like Wilson, did so quietly. Throughout the war, Brandeis made recommendations of men for certain positions or met with cabinet members. Shortly after the declaration of war, Secretary of the Treasury McAdoo made the first of many trips to the Brandeis apartment, seeking recommendations for expanded Treasury agencies but also for a commission that Wilson planned to send to Russia. Newton D. Baker, the former mayor of Cleveland and now Secretary of War, who had only known Brandeis slightly before the war, also became a regular visitor. Brandeis let it be known to Wilson and others that, rather than go to Cape Cod after the Court recessed, he would stay in Washington over the summer of 1917. As he told Alice, he had a very busy schedule those months.

When Baker asked Felix Frankfurter, who was on leave from Harvard Law School and serving as his special assistant, to prepare a memorandum on dealing with strikes called by the radical International Workers of the World, Frankfurter submitted it with a note that Brandeis had read and approved it. Henry L. Stimson, General Enoch Crowder, Bernard Baruch, Col. Edward M. House, and many others all found their way to Stoneleigh Court to consult the Justice.[19]

Brandeis had great respect for Herbert Hoover, whom Wilson put in charge of food production and distribution. "The only person who seems to go forward is Hoover,"

Throughout the war, President Wilson and members of the administration frequently, but quietly, consulted with Justice Brandeis (above), who often made staffing recommendations. Wilson knew that Brandeis, if asked, would step down from the Court to serve in the Cabinet, but the President preferred to keep him on the high bench.

Brandeis told his wife, yet he "has no authority in law for practically anything."[20] When Alfred Brandeis, a grain merchant, told his brother that he had some ideas on how to improve the movement of foodstuffs, Louis immediately put him in touch with Hoover. After Alfred made his recommendations, Hoover asked him to join the Food Administration as a dollar-a-year man to serve as Hoover's special assistant.

Although Wilson recognized that he would not be able to utilize Brandeis's talents in any formal capacity while he remained on the Court, he continued to talk with him on everything from organization to appointments, and every time a new problem came up, people would suggest putting Brandeis in charge. Wilson knew that if he appealed to Brandeis as a matter of patriotism, the Justice would step down from the Court. But it had been too great a struggle to get him onto the bench, and the President had no intention of removing him. At a meeting with Rabbi Stephen Wise, after Wilson complained about how hard it had been to get someone for an important post, Wise had said, "Why don't you ask Justice Brandeis?" "I need him everywhere," Wilson responded, "but he must stay where he is."[21]

Brandeis must have surely anticipated that at least some of the administration's actions would have constitutional repercussions and could eventually come before the Supreme Court. In that case, would Brandeis recuse himself, and if so, how would that be explained? Or did he think that the advice he gave Wilson on wartime powers rested on such firm constitutional ground that should the matter reach the high court the Justices would overwhelmingly endorse it? As it turned out, a number of matters did come before the Court.

Before looking at these cases, we should note that the Court has always tried to avoid getting in the way of the other branches of government during wartime. The Justices would immediately hear cases involving life, but if property and other matters were at issue, the Court would put them off until after the war. In economic matters, if the government exceeded its authority during the war, monetary payment would make property owners whole again. But if lives were involved, that would be another story. The administration wanted the Court to hear challenges to the draft as soon as possible. If, for any reason, the high court found the draft law unconstitutional, the government did not want anyone to die because of an invalid law. The Court consolidated several challenges and heard them in late 1917, and upheld the law.[22]

The Court wanted to be as helpful in the war effort as it could within constitutional limits, although none of the Justices went to enlist in the military, as Frank Murphy did in World War II. When Felix Frankfurter

recognized that two labor cases were on the Court's calendar for which he was supposed to be counsel, he worried over it because as a government official now, he would be unable to argue them. The attorney general of Oregon was willing for the Court to decide only on the basis of the briefs, but Brandeis had been involved earlier in those cases and would have to recuse. Frankfurter was not sure a majority of the remaining Justices would support the laws.

He made an appointment to see Chief Justice Edward Douglass White and, after exchanging a few pleasantries, White said, "My son, what brings you here?"

Frankfurter, who knew White was a devout Catholic, said "Mr. Chief Justice, I am not at all clear that I should put to you this matter, but I come to you as though to the confessional."

Leaning forward, White said "Tell me. Just speak freely."

So Frankfurter did, and a few days later saw that the Court had turned down Oregon's request to have the case decided on the briefs.[23]

In a similar vein, the administration wanted the Court to delay deciding an important antitrust case initiated by the Justice Department against the U.S. Steel Corporation during the Taft administration. The case had slowly moved through the lower courts and was due to be argued before the Supreme Court in the October 1917 term. Whatever its other faults, U.S. Steel made steel, armor plating, and other products desperately needed by the Army and Navy. The Wilson administration was not willing to abandon the case, but neither did it want a decision in the middle of the war that, if the government won, would lead to the breakup of the giant corporation. The country needed that steel, and once again the Court quietly helped; it delayed hearing the case until March 1, 1920—nearly ten years after the complaint had been filed—and then dismissed the suit.[24]

Crusaders against alcohol had won their first victory in Congress with the passage of the Webb-Kenyon Act in 1913. That measure reinforced state prohibition laws by closing off the channels of interstate commerce to liquor destined for a state where its use or sale had been prohibited. The statute did not have any provisions for federal enforcement, as up until this point the Prohibitionists had always intended that states should enforce dry laws. A divided Court upheld that law in 1917.[25]

As many states refused to adopt Prohibition, reformers saw Webb-Kenyon as a sort of blueprint for their next step, a constitutional amendment. The law had a nascent concurrent enforcement provision, that is, it could be enforced by both state and federal power, but under a constitutional amendment, the federal power would certainly be exercised. The war gave the "drys" a great boost. In the draft law passed in the spring of 1917, Congress forbade the sale of liquor to servicemen, and also prohibited alcohol sales within five miles of military bases, which had the effect of closing dozens of saloons in many cities. As earlier noted, the Lever Act, under the mandate of preserving scarce food resources, authorized the President to limit or forbid the use of foodstuffs for the production of alcoholic beverages. The War Revenue Act discouraged drinking even without prohibition. In 1917 the tax on whiskey nearly tripled, from $1.10 to $3.20 per gallon, while the beer tax doubled from $1.50 to $3.00 per barrel. But the refusal of many local authorities, especially in large cities, led the drys to seek a constitutional amendment in order to get stronger federal enforcement. In December 1917, Congress passed a constitutional amendment and sent it to the states for ratification. (Please note that in order for Congress to pass a constitutional amendment, a two-thirds vote is required in each of the House and Senate. The Eighteenth Amendment was not foisted off on the country by a small cabal of Prohibitionists; it

clearly had widespread support, and was seen by many people as a reform measure.)

Wilson issued a series of war proclamations from December 1917 through September 1918 that in effect established near-total prohibition. One week *after* the armistice, Wilson signed the Wartime Prohibition Act, which made it illegal to sell alcoholic beverages in the domestic market. Even though the fighting had stopped and the armistice signed, a peace treaty had not been signed, and technically the United States remained in a state of war. The Kentucky Distilleries Company could not market whiskey it had in its warehouses and went to court arguing that since the war had ended, Congress could no longer exercise its war powers. The law, it claimed, violated the Tenth Amendment.

In December 1919, a unanimous Court upheld the law. As Brandeis explained, although the Tenth Amendment normally conveyed the power to regulate alcohol in the states, Congress had a legitimate interest in maintaining wartime mobilization even though the fighting had ended. Just because the hostilities had ceased, it did not mean they would not break out again. Congress had the responsibility for ensuring that the country would be prepared if that occurred.[26]

Because the various wartime measures had given the dry forces a great deal of momentum, it is important to note that in many ways Prohibition is one of the war's constitutional legacies. In January 1919, the thirty-sixth state ratified the Eighteenth Amendment, with nationwide prohibition to go into effect one year later. In October 1919, Congress, over Wilson's veto, passed the Volstead Act,[27] defining an intoxicating beverage as one with 0.5 percent or more alcohol by volume.

At the beginning of 1920, the Court heard a challenge to the Volstead Act and upheld the law by a slim 5–4 decision. In *Jacob Ruppert v. Caffey,* Brandeis again spoke for the majority and explained that the states, in legislation and judicial decisions, had consistently determined that prohibition laws were ineffective unless they embraced nearly all drinks that included alcohol. Since Congress had the power to prohibit intoxicating liquors, it could adopt such means as it concluded were "necessary to the administration of the law." Although the fighting had stopped, there was still no peace treaty, and so "the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectively prevent their sale." The plaintiffs had argued that a drink with 0.5 percent alcohol was not intoxicating, but Brandeis said that did not matter and it did not concern the Court. Congress had to establish some definitive standard, and the judiciary would not second guess the determination made by Congress.[28]

There is a dissent in this case, and it is a rare instance in which any Justice questioned the need for wartime interference with private property rights. The opinion by Justice James C. McReynolds, joined by Justices William R. Day and Willis Van Devanter, was incredulous that a ban on nonintoxicating beer could be imposed nearly a year after the end of the fighting. Food was now abundant, and the ban could no longer be justified as a war measure. As far as these three were concerned, the idea that war powers could still be exercised because a peace treaty had not been signed was a nonsensical fig leaf.[29]

The dissent, however, is important in foreshadowing how the conservative Court of the 1920s and early 1930s would behave. Because the Court had not heard any of the property cases during the war, the libertarian McReynolds and Van Devanter had not had the opportunity to comment on the administration's expansion of governmental powers as they now said that the expansion should never have taken place. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times,

and under all circumstances." The suspension of constitutional limitations during times of "great exigencies ... leads directly to anarchy or despotism." In the next "great exigency," the decade-long Depression that began in 1929, this view commanded a majority of the Court, and led to the great constitutional crisis of 1937.

Although all but two states eventually ratified the Eighteenth Amendment, there was still a great deal of anti-Prohibition sentiment in the country, and the "wets" went into court to challenge not only the implementing legislation—the Volstead Act—but the amendment itself. In 1920, a distinguished battery of lawyers, including William D. Guthrie and the venerable Elihu Root, attacked the amendment on two grounds. First, they claimed, the Constitution had not created an unlimited amending power, and the Eighteenth Amendment involved subject matter that should not be reached in the Constitution. Second, the unique enforcement provision of Section 2, giving both Congress and the states concurrent powers, undermined the federal system. According to Root, the amendment was "wholly inconsistent with the fundamental idea upon which the American Union is based," for it intruded upon "local self-government." The interests of free government, he argued, "will not endure too much limitation of personal liberty."

The Court brushed aside both arguments in the seven suits consolidated in the *National Prohibition Cases* (1920). The Eighteenth Amendment had to be treated the same as any other amendment, and Section 2 did not alter any of the traditional lines of authority. Congress had plenary power that could reach both interstate and intrastate commerce; the states' concurrent powers did nothing more than supplement federal power. In essence, the Court said that Section 2 meant nothing.[30]

There was another case that came down between the attacks on the Volstead Act and the Eighteenth Amendment. In June 1920, the high court in *Hawke v. Smith* unanimously thwarted efforts by opponents of both women's suffrage and prohibition to allow voter referenda to override the ratification of amendments by the state legislatures. In other words, even if a state legislature had ratified the prohibition amendment, a popular voter referendum could nullify that action. Justice Day spoke for a unanimous Court in holding that a state could not deviate from the ratification methods prescribed by the Constitution.[31]

In the summer of 1916, Congress, as part of its preparedness legislation, had authorized the President to take over the railroads in wartime; you will recall that Wilson did not act until he had consulted with Brandeis in late December 1917. After that meeting, Wilson ordered the takeover of the rail lines, and under the terms of the takeover, the government would run the railroads, finance the purchase of new equipment, and compensate the owners for the use of their property. The law under which Wilson acted did not suspend "the lawful police regulation of the several states" and allowed the states to tax the railroads.

Director General McAdoo established a rate system that covered intrastate as well as interstate service, and despite the statutory language, had no intention of submitting intrastate schedules to state regulatory agencies. The North Dakota Utilities Commission filed suit to block this action and won a victory in state courts, which ruled that the federal government had exceeded its authority under the Commerce Clause. McAdoo appealed to the Supreme Court, and thirty-seven states joined the suit on behalf of North Dakota.

The Supreme Court unanimously reversed with Chief Justice White, writing a sweeping opinion upholding the authority of the President. In taking over the roads, the chief executive had not been bound by the limits of the Commerce Clause but operated under the war powers of the country that, according to White, reached as far as

Foreshadowing Prohibition, the Lever Act, under the mandate of preserving scarce food resources, authorized the President to limit or forbid the use of foodstuffs for the production of alcoholic beverages. Patriotic Americans were urged to cut their liquor consumption as a part of the war effort.

necessary. Moreover, since the government had promised to compensate the railroad owners, it had not violated the Takings Clause.[32]

There are several things noteworthy in this decision:

First, Brandeis did not recuse even though his advice had been critical in Wilson's decision.[33]

Second, although he did not use the word "adequate," White's opinion is definitely within the parameters of the "adequacy of the Constitution" theory on which Lincoln had relied, and very much paralleled the Hughes speech covered in Professor Waxman's article.

Third, the Court had been in no rush to hear this case. It had not been argued until May 5, 1919, and decided one month later. This case did not involve lives, and the government had already promised the railroad owners to compensate them for any losses.

The Lever Act, which governed the production and distribution of food, proved to be the only wartime statute to run afoul of the courts, and that in only one provision. The Cohen Grocery Company was charging $10.07 for 50 pounds of sugar, and $19.50 for a 100-pound bag, prices that were outrageously high even during the inflation that followed the war.

In 1919, Congress amended Section 4 of the Lever Act, which criminalized the making of "any unjust or unreasonable rate." The law was intended to prevent usurious rates of interest—that is, rates so high as to be completely unfair and unethical. It also made it illegal to charge unreasonably high rates for necessities. Congress, however, failed to define what constituted either a usurious rate of interest or an unreasonable price, and instead delegated that task to the courts.

The owner of Cohen Grocery Store argued that Congress cannot assign its legislative powers to another branch, and that the Lever Act amendments were unconstitutional for having done so. The Court agreed unanimously and struck down the law as overbroad and vague. To declare something illegal, Congress had to do more than merely describe it as "unreasonable."[34]

Two things to note about this case. First, because the Court voided the law on vagueness grounds, it did not have to decide whether Congress had unconstitutionally delegated its powers. Second, the Court made it clear that the federal government during wartime did have the power to fix food prices. Remember what Brandeis said about Hoover: He gets things done, yet he "has no authority in law for practically anything." In this case, the Court was validating what Hoover—and the government—had done in wartime.

Among the various things that the government did during the war that no administration had done before was to fix rental prices. In October 1919 (although hostilities had ceased, much of the federal government remained on a wartime footing), Congress established a commission with the power to regulate rental property in the District of Columbia. The size of the government had expanded enormously during the war, not only through the creation of new agencies, but by the expansion of older ones. Bernard Baruch had hundreds of people working for the War Industries Board, nearly all of whom had come to Washington from other places. Similarly, William Gibbs McAdoo, faced with the complex job of financing the war, also hired on hundreds of people, and again, most of them came from out of town. Home building had practically stopped, not only in Washington but around the country, as the government took all building materials to erect the various training posts needed to turn civilians into soldiers. The housing shortage in the capital led many landlords to raise their rents to a point that many government workers could not afford.

The statute essentially said that tenants could stay in their rented property past the day their leases expired. As long as the tenant paid the rent, he could stay in the property indefinitely, and the landlord could not change the lease terms, including the rental. Block was a tenant in an apartment building on F Street. Hirsh had recently purchased the building, and wanted Block to leave so he and his family could move in. The statute required that if the owner wanted to occupy the premises, he could evict the tenant but had to give the tenant a thirty-day notice. Hirsh did not give the requisite notice, Block refused to move, and Hirsh went to court, where the Court of Appeals held the statute unconstitutional. Block appealed to the Supreme Court.

In a 5–4 decision written by Justice Oliver Wendell Holmes, the Court upheld the validity of the law. Wartime circumstances, wrote Holmes, "have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law." In times of trouble, such as war, governmental action otherwise considered impermissible must be allowed.[35]

One line in Holmes's opinion deserves special notice. The question, he declared, was "whether Congress was incompetent to meet [the emergency] in the way in which it has been met by most of the civilized countries of the world." He took a very broad view of the federal police power—a power that many conservatives denied even

When the North Dakota Utilities Commission challenged the 1917 law authorizing the President to take over the railroads, the Supreme Court ruled that the chief executive had not been bound by the limits of the Commerce Clause but operated under the war powers. At issue was the rate system established by William G. McAdoo (above), Director General of Railroads, which interfered with railroad taxation by state regulatory agencies.

existed—and that he claimed extended "to all the great public needs." It could be exerted to meet whatever the prevailing morality or preponderant public opinion deems necessary.

In this case, as in several others, the Court majority essentially said that emergencies could clothe the government with expanded powers, not only under the specific constitutional clauses, but also under a general police power. The law, Holmes concluded, had been carefully crafted, its criteria clear, and its tenure limited to two years. In a companion case, *Marcus Brown Co. v. Feldman,* the Court upheld a similar New York statute.[36]

Not everyone agreed with Holmes, and White, McKenna, Van Devanter, and McReynolds dissented. White had argued in the Cohen Grocery case that emergencies did not create new powers or wipe away constitutional limits. Justice McKenna took the same position. Where Holmes had essentially put forward an "adequacy of the Constitution" argument, McKenna, while admitting that war constituted an emergency, it neither created new powers nor abolished the Constitution. The argument had not been settled when another emergency arose a decade later, the Great Depression, and once again raised the question of how far the government could go in trying to deal with it.

By the time the Court heard the case, its two-year limit had already expired; the last shots on the front had been fired two-and-a-half years earlier, the League of Nations had been defeated, and Warren Harding, not Woodrow Wilson, lived at 1600 Pennsylvania Avenue. Within a few months, White would be dead, and William Howard Taft would be Chief Justice.

Nonetheless, the commission remained in business, and in August 1922, it ordered that rents in the Chastleton apartment building be reduced. The owners brought suit, and when the case reached the Supreme Court

Holmes again delivered the opinion, this time for a unanimous bench. The emergency had passed, he wrote, and government could no longer exercise the powers that had come into being with the war.[37]

The Great War left an indelible constitutional footprint on American history, and the decisions that came before the high court would have a lasting influence. When the United States had to prepare itself for World War II, no one questioned the constitutional legitimacy of the draft or of the huge expansion of governmental powers exercised by the administration.

Although we tend to think of the 1920s as a reactionary period, with the Taft Court striking down one reform measure after another, that picture is not entirely true, and needs refinement. Although McReynolds, Van Devanter, and other conservatives wanted to treat the war as a constitutional anomaly, the Court majority upheld the expansion of federal powers even in peacetime, and certainly privileged federal authority over that of the states.

In addition, the Supreme Court in the 1920s slowly began the incorporation of the Bill of Rights through the Fourteenth Amendment's Due Process Clause so as to apply those protections against the states as well as the national government. That debate began with the speech cases in 1919.[38]

During the Great War, one person paying very close attention to how the government's authority expanded to meet the crisis was the young assistant secretary of the Navy, Franklin Delano Roosevelt. As William Leuchtenburg has shown, the New Deal often employed the analogue of war. Roosevelt promised in his inaugural that if Congress could not solve the problems caused by the Depression, he would ask for "broad Executive authority to wage war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." The key legislative proposal, the National Industrial Recovery Act, was modeled on the War Industries Board, and Roosevelt, like Lincoln, intuitively understood that the Constitution would be adequate to meet the demands both of Depression and of war.[39]

ENDNOTES

[1] Alice Goldmark Brandeis to Susan Goldmark, April 20, 1918, *Louis D. Brandeis Papers*, Brandeis Law School Library, Louisville, Kentucky.

[2] There are many books on the Great War, but American participation is well handled in two older works, Robert H. Ferrell, **Woodrow Wilson and World War I, 1917–1921** (New York, 1985), and David M. Kennedy, **Over Here: The First World War and American Society** (New York, 1982).

[3] James G. Randall, **Constitutional Problems Under Lincoln** (Urbana, 1926, rev. 1951) is the classic and outdated statement of Lincoln exceeding the Constitution. For a lawyerly approach, see Daniel Farber, **Lincoln's Constitution** (Chicago, 2003).

[4] The best overview of the Civil War period is James M. McPherson, **Battle Cry of Freedom** (New York, 1988; 2nd ed. 2003).

[5] Harold M. Hyman and William M. Wiecek, **Equal Justice Under Law: Constitutional Development, 1835–1875** (New York, 1982): 234.

[6] Timothy S. Huebner, **Liberty & Union: The Civil War Era and American Constitutionalism** (Lawrence, 2016); see especially ch. 6.

[7] Among Wilson's academic writings, see **State of Federal Governments of the United States** (Boston, 1889); **Congressional Government: A Study in American Politics** (Boston, 1885); and **Constitutional Government in the United States** (New York, 1908). For Wilson's pre-presidential career, see Arthur S. Link, **Wilson: The Road to the White House** (Princeton, NJ, 1947).

[8] For the Council, see Robert D. Cuff, **The War Industries Board: Business-Government Relations during World War I** (Baltimore, 1973), *passim.*

[9] I am following in large part the topical list in William G. Ross, **World War I and the American Constitution** (New York, 2017).

[10] *Selective Draft Law Cases,* 245 U.S. 366 (1918).

[11] The Food and Fuel Control Act, also known as the Lever Act, is at 40 Stat. 276 (1917); the Departmental Reorganization Act, also known as the Overman Act, is at 40 Stat. 556 (1918).

[12] See Otis L. Graham Jr., **The Great Campaigns: Reform and War in America, 1900–1928** (Englewood Cliffs, NJ, 1971), and Ellis Wayne Hawley, **The Great War and the Search for a Modern Order, 1917–1933** (New York, 1979).

[13] Christine A. Lunardini and Thomas J. Knock, "Woodrow Wilson and Women Suffrage: A New Look," 95 *Political Science Quarterly* 655 (Winter 1980–81).

[14] A good overview is Richard F. Hamm, **Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920** (Chapel Hill, 1995).

[15] There are numerous works on the treaty fight, but a balanced view is John Milton Cooper Jr., **Woodrow Wilson: A Biography** (New York, 2009), chs. 21 and 22.

[16] Charles Evans Hughes, "War Powers Under the Constitution," *Report of the Fortieth Annual Meeting of the American Bar Association* (Baltimore, 1917).

[17] See Daniel D. Stid, **The President as Statesman: Woodrow Wilson and the Constitution** (Lawrence, KS, 1998).

[18] Link, **Wilson: Road to White House**: 489.

[19] Melvin I. Urofsky, **Louis D. Brandeis: A Life** (New York, 2009): 498.

[20] Brandeis to Alice Brandeis, July 10, 1918, Brandeis mss.

[21] Stephen S. Wise, "Justice Brandeis," sermon delivered following Brandeis's death, *Stephen S. Wise Papers*, American Jewish Historical Society, New York.

[22] *Selective Draft Law Cases,* 245 U.S. 366 (1918).

[23] Harlan B. Phillips, ed., **Felix Frankfurter Reminisces** (New York, 1960): 99–101.

[24] *United States v. United States Steel Corp.,* 251 U.S. 417 (1920).

[25] *Clark Distilling Co. v. Western Maryland Railway Co.,* 242 U.S. 311 (1917).

[26] *Hamilton v. Kentucky Distilleries & Warehouse Co.* (also known as the *Wartime Prohibition Cases*), 251 U.S. 146 (1919).

[27] Also known as the National Prohibition Act, 41 Stat. 305 (1919).

[28] *Jacob Ruppert v. Caffey*, 251 U.S. 264 (1920).

[29] *Id.* at 304.

[30] *National Prohibition Cases,* 253 U.S. 350 (1920).

[31] *Hawke v. Smith,* 253 U.S. 221 (1920).

[32] *Northern Pacific Railway v. North Dakota,* 250 U.S. 135 (1919); the same day the Court upheld the government's takeover of telephone, telegraph, radio, and marine cable communications systems in *Dakota Central Telephone Co. v. South Dakota,* 250 U.S. 163 (1919).

[33] He did, however, concur separately in the railroad case, and dissented in the telegraph decision, in both cases without opinion.

[34] *United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921).

[35] *Block v. Hirsch,* 265 U.S. 135 (1921).

[36] *Marcus Brown v. Feldman,* 256 U.S. 170 (1921).

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

[38] Melvin I. Urofsky and Paul Finkelman, **A March of Liberty: A Constitutional History of the United States** (3rd ed., New York, 2011), chs. 28 and 29.

[39] William E. Leuchtenburg, "The New Deal and the Analogue of War," in John Braeman et al., eds., **Change and Continuity in Twentieth Century America** (Columbus, 1964).

Constitutional War Powers in World War I: Charles Evans Hughes and the Power to Wage War Successfully

MATTHEW C. WAXMAN

On September 5, 1917, at the height of American participation in the Great War, Charles Evans Hughes famously argued that "the power to wage war is the power to wage war successfully." This moment and those words were a collision between the onset of "total war," *Lochner*-era jurisprudence, and cautious Progressive-era administrative development. This article tells the story of Hughes's statement—including what he meant at the time and how he wrestled with some difficult questions that flowed from it. The article then concludes with some reasons why the story remains important today.[1]

Hughes and the Fighting Constitution

Hughes's "war powers axiom"—that the power to wage war is the power to wage war successfully—has been widely cited and quoted for the past century in court decisions and briefs. It is often used in executive branch opinions about war powers, including recent ones concerning wars against terrorist organizations. It frequently appears in legal scholarship about war powers. But when Hughes uttered those words that day, he was not doing so as a Supreme Court Justice—or in his other public roles, such as Secretary of State. He was speaking as a private member of the bar.

There is some irony that Hughes's voice would reverberate so influentially in war powers jurisprudence, given that he never ruled on a major war powers case as a judge. He served first on the Supreme Court from 1910 until 1916, when he stepped down to run for President as the Republican candidate against incumbent Democrat Woodrow Wilson, whose supporters stressed that he kept us out of the Great War. Hughes then served again, this time as Chief Justice, from 1930 to 1941. Both of these happened to be relatively peaceful, dry spells for significant war powers cases, and in both instances,

Hughes left the Court less than a year before the United States declared war.

In September 1917, when Hughes gave his most detailed analysis of constitutional war powers, he did so in a private capacity, not as a government official of any kind, in a speech to the annual meeting of the American Bar Association titled "War Powers Under the Constitution."[2] Hughes defended expansive government powers invoked by Wilson and the Democrat-controlled Congress to wage modern, industrial-age and industrial-scale warfare.

By way of context, this was five months after the United States declared war on the side of the Allies against the Central Powers—a war that had already been destroying Europe for three years.[3] During those months, the United States had built from near scratch a massive army unlike any previous American force. In doing so, the federal government had assumed unprecedented powers over American society. When President Wilson had requested a war declaration from Congress, he pledged not only to defend the United States from immediate aggression but also to prevent the recurrence of war and to make the world safe for democracy. These aims are especially important later in the story.

It is hard to imagine today a speech by any modern figure about major constitutional issues that would carry the weight of Hughes' words. The *New York Times* covered his American Bar Association speech on the front page, beneath the headline: "War Power Ample, Hughes Declares: He Tells Bar Association There Is Full Warrant for All that We Are Doing."[4] Many other major newspapers across the country covered or even distributed the remarks. For example, the *St. Louis Post-Dispatch* reprinted the entire speech in its Sunday editorial section later that week.[5] It did not hurt that, in the later words of Justice Robert H. Jackson, Hughes "look[ed] like God and talk[ed] like God." Indeed, Hughes carried personal authority and credibility on constitutional issues to an extent that would be hard for anyone—especially in a private capacity—to match today.

So what were the issues Hughes was concerned with in this speech about "War Powers Under the Constitution"? Today's biggest constitutional war powers controversies tend to focus on the President, especially the question of whether the chief executive has the power to launch a military action or the scope of his exclusive powers over how military operations are carried out. But in 1917, there was no serious doubt that, in those circumstances, only Congress could take the nation formally into the Great War. In any event, Wilson sought and received Congress's war declaration in April of that year, as well as very broad delegations of power for all the other actions he took. At that time, the most contentious and consequential war powers questions were less about the President than about the scope of Congress's powers in wartime.

When Hughes proclaimed that "the power to wage war is the power to wage war successfully," he was making a detailed Article I argument about legislative power, namely, that by virtue of the Necessary and Proper Clause, Congress's powers expanded during war as necessary to provide the means needed for victory. If required by wartime exigency, Article I powers were to be read more expansively than during peacetime. Meanwhile, restrictions on those powers were to be loosened. This included loosening the principle of nondelegation, the idea that Congress could not transfer its policy-making function to the President. Hughes also envisioned a loosening of basic rights in wartime. Again, this was the *Lochner* era, so the most significant rights at that time were economic rights, such as freedom of contract.

Hughes described in his research notes these flexible, elastic wartime features as part of the "Genius of our institutions."[6] He by no stretch invented the core idea that constitutional powers must match unpredictable and

evolving security needs; he credits Alexander Hamilton for laying the idea's foundation in *The Federalist*, for example, and especially *Federalist* essay numbers 23 and 26. In those essays, Hamilton wrote about the core power of the government to protect the Union and the dangers of imposing immovable limits on its ability to do so. Hughes also credits President Lincoln for putting these ideas into action during the Civil War, a conflict that also required new levels of national mobilization and that generated many legal precursors to the specific powers Hughes discusses. But Hughes both expanded on the theory and lent special political and intellectual credibility to this understanding at a time of simultaneous upheaval in constitutional law and in military technology and strategy.

Over the past century since Hughes spoke, this basic view—that the Constitution bends to meet wartime needs—has been accepted by all three branches of government. At the time, however, he was pushing against two other powerful schools of thought in American constitutional thinking.

One of those contrary schools viewed war powers as "extra-constitutional": The Constitution did not have to accommodate wartime needs because its requirements would naturally be suspended in wartime. Hughes, by contrast, lodged all necessary war powers firmly within the Constitution.

Another school viewed congressional powers as fixed in both war and peace: The Constitution already built in all the express powers needed to wage war effectively, and the dangers of interpreting implied powers fluidly were too great to allow. Rejecting this rigid view, Hughes saw war powers as evolving, because warfare itself evolved. As he said in concluding his 1917 War Powers speech:

> It has been said that the Constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution....

In the end, Hughes's view won out. In World War I, our "fighting Constitution" was marching at a very fast clip. No other single document better shows it.

War Powers Controversies of 1917

So what, then, were the specific controversies that Hughes had in mind in September 1917? Why did he feel the need to offer such a strong constitutional defense of the U.S. government's wartime actions?

In constitutional law discussions today, World War I is mostly remembered for free-speech restrictions. Most notably, after Congress passed the Espionage Act of 1917 and the Sedition Act of 1918, the Wilson Administration aggressively prosecuted hundreds of cases against publishers and dissenters for allegedly interfering with the war effort. Hughes does not say a word in his 1917 war powers speech about the Espionage Act, even though it had been passed several months earlier after considerable debate. He does not say anything about free expression at all, in fact, on which there was little judicial precedent at the time.

Instead, the two big issues that Hughes addresses—the ones at which his "power to wage war successfully" axiom aimed—were (1) the national draft and (2) extensive economic regulation. These were radical expansions of federal government authority based on Congress's war powers.

Note that these particular radical expansions—a national draft and extensive economic regulation—were actions taken on the home front. Controversial war powers were not about actions "over there"; they were about actions over here. They were domestic national powers deemed necessary

to waging modern combat thousands of miles away—necessary because twentieth-century warfare looked nothing like the Framers could have imagined. These are also policies that are now constitutionally uncontroversial even in peacetime, following the New Deal-era expansion of Congress's power over the domestic economy and following early Cold War experiences in maintaining permanently high levels of military readiness.

As to the draft, when the United States entered the war in April 1917—a war that had been devouring European soldiers at an unprecedented pace—the nation had only a few hundred thousand troops, mostly on the Mexican border. The political leadership knew that only a national draft, and more specifically a "selective service" system, could efficiently and rapidly grow that force by an order of magnitude while also keeping workers in critical industries in their jobs on the home front.

The draft was an emotional issue for Hughes. In the six weeks leading up to the speech, he had spent a lot of his time as chairman of the New York City Draft Appeals Board, reviewing petitions for draft exemptions submitted by city draftees. By the time Hughes spoke, the board was deciding hundreds of cases a day. Aware that he was sending young men to risk their lives overseas, Hughes insisted on personally signing each appellant's papers.[7] The day before his war powers speech, he stood alongside former President Teddy Roosevelt and others in front of the New York Public Library to watch recently drafted soldiers march up Fifth Avenue.[8] Many of those on parade likely had only weeks earlier received rejection letters bearing Hughes's signature to their draft appeals.

Doctrinally, the constitutionality of a draft might seem like a pretty easy question, given that Article I gives Congress an unqualified power to "raise and support armies,"[9] but throughout American history to that point there had been significant doubt whether the federal government could conscript soldiers and additional doubt about whether those conscripted soldiers could be sent abroad. Hughes, therefore, devoted a lot of his speech to this issue, and his notes contained vast research on it.

The strongest constitutional objection to a national draft was not, as one might guess, one based on individual rights. It was a structural argument about federalism. Involuntary conscription, ran the argument, was an integral aspect of traditional state militia powers protected by the Constitution's Militia Clauses. Those clauses give states the power to keep and train well-regulated militias (historically made up heavily of local conscripts) that could be called into service by Congress for limited purposes. To allow the federal government to conscript able-bodied men directly could, in effect, nullify these state prerogatives and protections. This constitutional objection had carried powerful weight when Secretary of War James Monroe unsuccessfully recommended a federal draft during the War of 1812 and during the Civil War, when the constitutionality of a federal draft was hotly contested and never firmly resolved.[10]

Until World War I, a national draft was at least constitutionally suspect, but for Hughes its readily apparent military necessity—he had watched the European armies rely on it for several years—made its constitutionality an easy matter: "There is no limitation upon the authority of Congress to create an army and it is for the president as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on." For Hughes, the needs of modern warfare had displaced early-American faith in state militias as safeguards of republican government.

As it happened, Hughes's argument was vindicated the next year by the Supreme Court in a set of challenges grouped together as the *Selective Draft Law Cases*.[11] Drawing on the widespread international practice of conscription, the Court, in a unanimous

Charles Evans Hughes issued the phrase "The power to wage war is the power to wage war successfully" in an address he delivered as a private citizen at an American Bar Association conference on September 5, 1917, in Saratoga Springs, New York. He is pictured above walking with his daughter, Katherine.

opinion in those cases, held that the Militia Clauses were not a limitation on Congress's power to institute a national draft—at least not in the context of twentieth-century warfare.

Moving from the question of the draft to economic regulation, Hughes defended on war powers grounds vast new federal authority, as well as congressional delegation of that authority to the executive branch. In the words of historian and political scientist Clinton Rossiter, the wartime economic power granted by Congress was "infinitely more … than had ever been given to an American president. In absolute terms, it far exceeded Lincoln's, for it extended to a control of the nation's economic life that would have caused a revolution in 1863."[12]

In the months prior to Hughes's war powers speech, Congress had passed several far-reaching laws committing to President Wilson vast authority. Among the most famous was the Food and Fuel Control Act (also known as the Lever Act), which gave the President broad powers "to make such regulations and to issue such orders as are essential" to ensure adequate and equitable supply and distribution of those critical resources.[13] This went against peacetime limitations on congressional power. It went against peacetime limits on congressional delegation of policy discretion. And it went

This photo shows Hughes (second from left) on the day before his war powers speech, standing alongside former President Theodore Roosevelt (left), in front of the New York Public Library watching 7,000 recently drafted soldiers march up Fifth Avenue. Many of those on parade likely had only weeks earlier received rejection letters to their draft appeals bearing Hughes's signature.

against peacetime understandings of Fifth and Fourteenth Amendment rights protecting so-called "private" economic activities.

Hughes argued that those peacetime limitations on Congress's powers must give way to wartime needs. Congress, he argued, "is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success." In these ways, Hughes's flexible and adaptive interpretation of the war power addressed the major problem he saw in September 1917, namely, how to mobilize the entire national industrial economy for modern, expeditionary war.

Again, in the end, the Supreme Court validated Hughes's views on wartime economic regulation and administration. Despite plenty of challenges and opportunities for judicial repudiation, no significant wartime economic regulation was struck down as beyond Congress's powers, as an unconstitutional delegation, or as violating constitutional economic or contractual rights.

This was, as Hughes would say, the Constitution marching in step with changes in warfare.

The Problem of War Termination

In addressing one constitutional problem, however, Hughes walked into another one that echoes today. For him, the elasticity of the power to wage war successfully was justified on two confident assumptions: that clear lines exist between wartime and peacetime, and that following successful war, there would be a reversion to

constitutional normality. War-waging power would be only temporary. But what if it were not so temporary?

On November 11, 1918, the Allies and Germany signed the Armistice that ended the remaining fighting on the Western Front. Often an armistice is only a pause, or a cease-fire pending further negotiations, but this was a much more dramatic and decisive event. Two days earlier, German Kaiser Wilhelm II had abdicated. Under the Armistice terms, Germany had to withdraw its troops and hand over the bulk of its navy. President Wilson declared that day to Congress, "The war thus comes to an end, for, having accepted these terms of armistice, it will be impossible for the German command to renew it."[14]

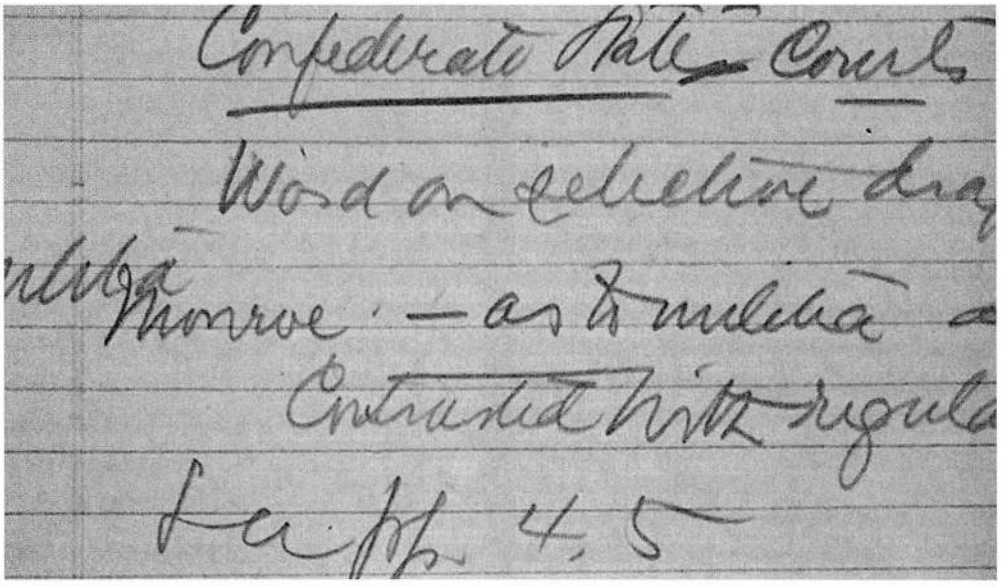
The ultimate mission was not yet accomplished in November 1918, however. Although Germany had been subdued militarily at that point, President Wilson had taken the country to war with a boldly ambitious set of international security and diplomatic aims. He said we were making the world safe for democracy. Wilson viewed as essential to American security the replacing of traditional European balance-of-power politics with a new system of diplomatic rules, ideals, and collective responses to threats—and he had requested a war declaration from Congress on those terms. This ambitious, global agenda greatly complicated the task of determining when some baseline level of security was achieved and, therefore, when the expansive war powers of Congress and the President were required to retract back to peacetime form.

Put another way, if "the power to wage war is the power to wage war successfully," should those war powers have come to an end on November 11, 1918? Is the war successfully waged when the fighting stops on the battlefield? Or when the goals are achieved? Or something else? The U.S. government's position was that, although military victory was achieved in November 1918, as a legal matter war powers continued to operate.

At this point, the story of Hughes and war powers takes a major twist. For the next couple of years, Hughes repeatedly spoke out, wrote—and litigated—against the government for war powers overreach.

Hughes's statements after the November 1918 Armistice show anxiety about constitutional adjustment, not the confidence of his 1917 speech. In a Columbia University lecture just weeks after the Armistice, he remarked that the "astounding spectacle of centralized control ... has been the manifestation of the Republic in arms, fighting as a unit, with powers essential to self-preservation, which the Constitution not only did not deny but itself conferred."[15] He went on to warn, however, that wartime conditions could be used pretextually to advance political and legal agendas, and he expected courts to play a checking role to ensure that the return to peace brought also a dismantling of the wartime administrative apparatus. "What will it profit the Republic if it gains the whole world and loses its own soul?" he asked in a 1919 New York Bar Association address.[16] Once modern war powers were turned on, Hughes worried that the government would resist turning them off.

In a fascinating 1919 case, *Commercial Cable Co. v. Burleson*,[17] Hughes unsuccessfully litigated this issue of when World War I ended as a legal matter. The specific dispute went as follows. Pursuant to a broad delegation of power over telecommunications systems, the federal government seized control of the undersea cables operated by private American companies. This would not have been very legally controversial, especially under Hughes's theories of expansive and flexible war powers, except for an important wrinkle: The government's seizure of the cables did not occur until about a week after the Armistice. Combat operations in Europe had halted. Hughes, who was in 1919 litigating cases at an incredible pace, regarded the seizures as "wholly unwarranted



Hughes sketched out the rough outline of his argument by hand. His research notes for the speech are in his personal papers at the Columbia University manuscript and rare book library.

and arbitrary," and so he represented one of the cable companies.[18]

A notable aspect of this case is that it featured a dramatic courtroom debate in the Southern District of New York between Hughes and Judge Learned Hand—two of the greatest legal minds of the time—over how to measure the end of war. Was it based on readily observable military conditions, or did it depend on a political assessment that war aims had been achieved? Thanks to an extensive *New York Times* report of the courtroom arguments, we have a good record of their exchange across the bench.[19]

The main crux of Hughes's argument was that the cable seizure exceeded statutory authority, which was tied to the existence of an ongoing war and a threat to national security or defense, but there was also a constitutional dimension: He argued that in light of present circumstances, the broad delegation of power was illegitimate. Hughes argued that the war was, in a practical sense, over, and therefore the government's expansive, wartime regulatory authorities had expired.

Judge Hand pressed Hughes hard on this point in court: "[T]he security or defense of the nation depends, does it not, upon the objects for which the war was fought, and until those objects have been ascertained authoritatively by a peace, it cannot be said that the security and defense is established....Is that not so?"

Hughes responded:

> I think that what may be achieved, in the sense of the final results of the war, will probably not be determined during our lifetime. ... It was not a danger in the sense of a nebulous regard for possible policies, which could not be vindicated and carried through by force, that Congress had in mind. It was an actual state of applied force that we were looking to in arming the President with these extraordinary powers....

Hughes pushed further in saying that this was not just any armistice: He pointed out that the President himself had told Congress that the enemy had been reduced to a state of helplessness. The President had stated that the enemy could not have resumed the war.

The president acknowledged that the war no longer posed a direct security threat to the people of the United States.

Judge Hand then turned Hughes's axiom back on him, essentially saying that if the power to wage war is the power to wage war successfully, then success should be gauged not just by the absence of immediate danger but by reference to the ultimate war aims—and the President and Congress should determine what those aims are. "[S]urely all means necessary to the achievement of that final end are necessary to the security and defense of the nation."

Hughes lost that case—Judge Hand interpreted the President's cable seizure power as unreviewable,[20] and Hughes's appeal to the Supreme Court was mooted when the government relinquished control over the cables—but Hughes continued to press this war termination issue. In fact, in a 1920 speech, he ramped up his warnings, declaring that "we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged."[21] Around that time, Hughes litigated other claims that the security threat had sufficiently diminished so that the government's war power should cease, too, but those cases were all resolved on other grounds.

The story of Hughes and his war powers axiom then takes another turn, however. Just a few years later, Hughes curiously seems to have backed off his earlier concerns, taking him back around to his core 1917 position, as his worries about war termination and indefinite war powers were apparently allayed. In a series of 1927 Columbia University lectures, Hughes, without at all addressing the end-of-war issue, re-emphasized his arguments that the power to wage war is the power to wage war successfully.[22] As Chief Justice, in a 1934 opinion about a state mortgage regulation during the Great Depression, he doubled down on this war powers axiom by using it now to help justify general emergency powers.[23]

Part of the answer to why Hughes returned to this position is probably the result of political process. Upon taking control of the White House in 1921, President Warren Harding had pledged the return to "normalcy." Hughes would serve as Harding's Secretary of State, and Hughes negotiated the formal peace treaty with Berlin soon after the President signed Congress's joint declaration finally ending World War I in July 1921. Another factor in Hughes's apparent return to comfort with vast war power probably has to do with the judiciary. Also in the early 1920s, the Supreme Court seemed to reserve at least some minimal role for courts in policing the durational boundaries of war powers.[24] These precedents, especially when combined with the political shifts just mentioned, would likely have mitigated Hughes's concerns that war powers would be perpetuated indefinitely. Yet it remains somewhat of a mystery how Hughes reconciled his expansive theory of wartime legislative powers with the concern—so clearly illustrated in the cable seizure case—that they could and would be extended in time well beyond what he thought was justified.

The Fighting Constitution a Century Later

Studying Hughes's 1917 speech today, a little more than a century later, one is struck by both its timeless and its anachronistic features. The specific controversies—the draft and economic regulation—are of a bygone era, but the central claim that our "fighting constitution" confers flexible powers to "wage war successfully" still holds.

Today's war powers controversies are rarely about the extent and limit of Congress's powers, as they were in 1917. They are mostly about the scope of the President's unilateral war powers. One reason for this shift in emphasis is the growth of presidential power, especially since the

For Hughes, there was an assumption that following a successful war, there would be a reversion to constitutional normality. But the power to wage war turned out to not be as temporary as he envisioned. Above, men of the U.S. 64th Regiment, 7th Infantry Division, celebrated the news of the Armistice on November 11, 1918.

early Cold War. But another reason, so apparent in reflecting on Hughes's speech, is that Congress's other powers—its nonwar powers—have expanded so dramatically since World War I. All of the domestic economic regulations justified during World War I as an exercise of constitutional war powers could, by the end of World War II, easily have been justified under a far-broadened reading of the commerce power—even in peacetime. Doctrines and the exercise of nonwar emergency legislative powers have expanded, too. Since World War I, Congress has enacted hundreds of emergency power provisions that the President may activate by proclaiming a national emergency, whether or not the country is in a state of war.

Looking back, then, World War I was probably the pivotal moment in American history when the differential between the federal government's war powers and its normal, peacetime powers reached its apex. Once warfare became "total" in the early twentieth century, legislative war powers became the basis for completely transforming a largely laissez faire system into a centrally administered statist one and for subordinating a state militia system to the federal government's army powers. War has continued to become more complex, but legislative war powers have not had to keep up in part because other constitutional powers now provide such vast authority. Reading Hughes's speech today is an important reminder that war no longer opens much otherwise locked-up legislative power.

I say "much," because it does open some powers. The wars against al-Qaeda and the "Islamic State" terrorist organization in recent decades have reopened the issue of the substantive scope of legislative war powers. In particular, they have raised questions (sometimes answered using citations to Hughes's 1917 axiom), such as the scope of wartime constitutional powers to detain enemy fighters or to try them in military

commissions.[25] On the one hand, these claimed powers seem exceptional because the war against sprawling transnational terrorist groups lacks the organizational, geographic, and temporal boundaries usually associated with modern warfare, although this story is a good reminder that struggling with temporal boundaries of warfare is not a new problem. On the other hand, powers such as detaining enemy fighters or trying them in military commissions are quite ordinary and limited. The context in which the government seeks to use these powers is extraordinary, but the measures themselves are traditional to military conflict, much more akin to the wartime powers that the constitutional framers envisioned than those Hughes defended during World War I.

Finally, the ongoing war with transnational terrorist groups has made Hughes's post-Armistice concerns about enduring war powers seem forewarning. One hears echoes of Hughes' cable-seizure-case arguments in today's arguments against indefinite wars with terrorist groups. The challenge of indefinite war against terrorist organizations is not simply one of attaining a successful military outcome. As with determining whether World War I had been "wage[d] successfully," it is also a matter of defining the terms of victory.

ENDNOTES

[1] For a more detailed version of this story, see Matthew C. Waxman, "The Power to Wage War Successfully," 117 *Columbia L. Rev,* p. 613 (2017).

[2] Charles E. Hughes, "War Powers Under the Constitution," *Annual Report of the American Bar Association*, vol. 40, 1917, p. 232. All further quotes or references to his 1917 speech are from the same source.

[3] David M. Kennedy, **Over Here: The First World War and American Society** (1980), 3–44.

[4] *N.Y. Times*, Sept. 6, 1917, 1.

[5] Charles E. Hughes, "War Powers Under the Constitution," *St. Louis Post-Dispatch*, Sept. 9, 1917, pp. 1, 11.

[6] All quotes or references to Hughes's notes come from *Charles Evans Hughes Papers, 1914–1930*, Columbia University Rare Book & Manuscript Library, Box 56.

[7] Merlo J. Pusey, **Charles Evans Hughes**, vol. 1, 371 (1951); "Hughes Board Speeds Up; Decides 178 Cases in Day," *N.Y. Tribune*, Aug. 21, 1917, p. 6.

[8] "City to Review Draft Army in March Today," *N.Y. Tribune*, Sept. 4, 1917, p.1.

[9] U.S. Constitution, Article 1, Section 8.

[10] James G. Randall, **Constitutional Problems Under Lincoln** (1926), 11–12.

[11] 245 U.S. 366 (1918).

[12] Clinton Rossiter, **Constitutional Dictatorship** (1948), 241–42.

[13] Pub. L. No. 65-41, §1, 40 Stat. 276, 276 (1917).

[14] President Woodrow Wilson to Joint Session of Congress, November 11, 1918.

[15] This lecture was published several months later as Charles Evans Hughes, "Our After-War Dangers: In Saving the World Have We Lost Our Republic?" 61 *Forum* p. 23 (1919).

[16] Charles E. Hughes, President, N.Y. State Bar Ass'n, "The Republic After the War," in *Proceedings of the Forty-Second Annual Meeting of the N.Y. State Bar Association* (Jan. 1919). Pp. 224, 233.

[17] 255 F. 99 (S.D.N.Y.), rev'd as moot, 250 U.S. 360 (1919).

[18] David J. Danelski & Joseph S. Tulchin eds., **The Autobiographical Notes of Charles Evans Hughes** (1973), 191.

[19] "Hughes Assails Seizure of Cables," *N.Y. Times* (Dec. 28, 1918), p. 5. All quotations from this hearing come from this source.

[20] *Commercial Cable Co. v. Burleson*, 255 F. 99, 103-104 (S.D.N.Y. 1919).

[21] Charles E. Hughes, Some Observations on Legal Education and Democratic Progress 4 (June 21, 1920).

[22] Charles Evans Hughes, **The Supreme Court of the United States** (1928), 102–103.

[23] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

[24] Daniel J. Hulsebosch, "The New Deal Court: Emergence of a New Reason," 90 *Colum. L. Rev.*, pp. 1973, 2006 (1990).

[25] Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes, General Counsel of the Dep't of Def., *Authority for Use of Military Force to Combat Terrorist Activities Within the United* States 15 (Oct. 23, 2001); *Legality of the Use of Military Commissions to Try Terrorists,* 25 Op. O.L.C. 238, 245 (2001); *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay* at 6 n.2, In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases

LAURA WEINRIB

In the history of the First Amendment, the free speech cases of World War I have long assumed a leading, if unsavory, role. According to the conventional account, the nation's constitutive commitment to free speech emerged phoenix-like from the wreckage of the war. The Supreme Court's decisions upholding convictions of wartime political dissenters reflected, on this view, an indefensible departure from American values. Yet judicial complicity was generative. It provoked an awakening to the importance of constitutional rights and inspired courageous dissenting opinions from Justices Oliver Wendell Holmes Jr. and Louis Brandeis. Thus, the cautionary tale of wartime capitulation culminates in a shared celebration of American constitutional heritage. The great dissents marked a watershed in constitutional understanding, the dawn of a new age of judicial review.[1]

There is truth to this familiar narrative. Certainly, the enforced conformity of World War I was stifling and pervasive. The arbitrary application of coercive state power inflicted great personal harms and depleted democratic discourse. As contemporaneous critics alleged, a war ostensibly intended to defeat autocracy abroad produced domestic repression on an unprecedented scale.[2]

Yet the pat progression from tyranny to liberation misrepresents the history of civil liberties in the United States in two fundamental ways. First, as a matter of historical causation, the World War I cases were less formative for the modern First Amendment than scholars have long assumed. Among the most notable features of the wartime repression was its persistence after the Armistice. Whereas parallel expansions of state power receded with the cessation of hostilities, censorship spilled over into peacetime. More than wartime conformity itself, it was the prospect of perpetual suppression that provoked public concern. Moreover, even during the postwar Red Scare, free speech advocates

were far more likely to endorse executive restraint or congressional oversight than judicial intervention.

Second, and relatedly, the widespread aversion to what now seems an obvious alternative to state overreach—namely, the judicial enforcement of the First Amendment to invalidate democratically enacted laws—is more intelligible than it appears at first blush. Demands for judicial review of wartime legislation were dampened not only by war hysteria but by deeply rooted concerns about counter-majoritarian courts.[3]

This article endeavors to explain why opposition to the wartime cases was so muted despite mounting concern for preserving free speech. To make sense of this seeming disjunction, it seeks to unsettle the dominant depiction of the wartime decisions as an inexplicable lapse in judgment and instead to take seriously the debates about judicial role that roiled American society before and after World War I. To that end, the attempt here is to disaggregate the judicial enforcement of the First Amendment from a democratic commitment to freedom of speech.

I

In his foundational 1919 article, **Freedom of Speech in War Time,** Zechariah Chafee Jr. described an "unprecedented extension of the business of war over the whole nation."[4] According to Chafee, the government's wartime propaganda campaign had transformed the United States into a "theater of war."[5] Operations on the home front were multifaceted. The Committee on Public Information, under the leadership of George Creel, sought to mobilize public opinion by issuing inflammatory pamphlets, political cartoons, and motion pictures, among other materials.[6] Propaganda of this kind inflamed anti-immigrant sentiment and anti-radicalism along with antipathy to the Kaiser. Patrioteering groups formed for the purpose of sniffing out German sympathizers. Sometimes they reported their suspicions to the authorities. Often they took matters into their own hands, engaging in unlawful surveillance and vigilante violence, including brutal lynchings.[7] Years later, George Creel acknowledged the pernicious effects of these "'patriotic' bodies," whose "patriotism was a thing of screams, violence and extremes."[8] Others anticipated Creel's retroactive assessment. Norman Thomas, the Presbyterian minister who would go on to lead the Socialist Party, described a "war psychology" that "invaded the home, the street and the marketplace."[9] The esteemed legal scholar Ernst Freund complained of "waves of militant nationalism" that threatened America's "free institutions."[10] In short, opposition to the war was treated as tantamount to treason.

Rather than discourage such excesses, wartime judges often encouraged them or at least deferred to them. Across the nation, as ordinary Americans organized patriotic parades, public officials turned to prosecuting dissenters. In the thousands of cases that resulted, judges and juries eagerly convicted. With a handful of exceptions, appellate courts upheld their draconian sentences. They affirmed convictions for stray remarks about the inefficacy of the armed forces and for petitions to state officials to adjust the administration of the draft. They approved official actions that today would qualify as patently unconstitutional incursions on freedom of speech.[11]

Generations of historians have endeavored to explain this apparent anomaly. Some have cast prosecutorial zeal and judicial deference as efforts to contain mob violence, that is, to divert the tide of vigilantism into ostensibly lawful channels. Others have assumed that the courts fell victim to the same virulent patriotism that was infecting the other branches. War fervor often supplanted rational argument; as Ernst Freund put it, "the voice of reason [was] not heard."[12] The few judges who issued speech-protective decisions exposed themselves to scathing

critique, negative career repercussions, and in some cases threats of violence. Even for life-tenured judges, the crushing conformism of World War I was difficult to escape.

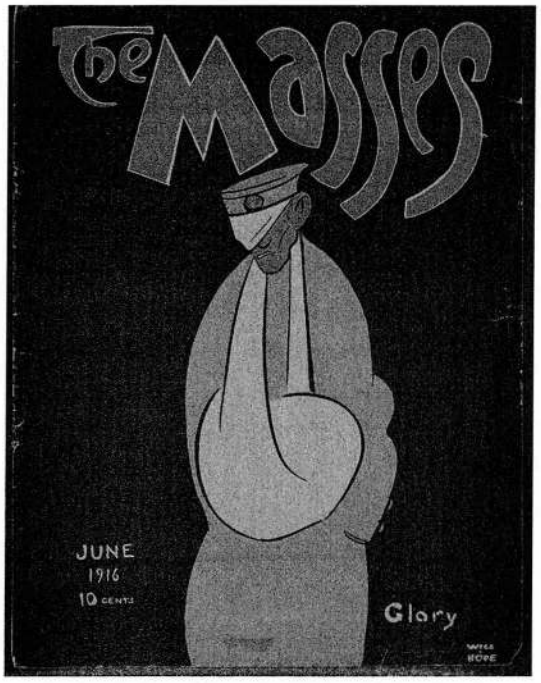
Such assessments, which depict judicial non-enforcement of the First Amendment as a concession to wartime pressures, are informative but incomplete. As an initial matter, the wartime cases rarely turned on constitutional interpretation. Hardly anyone regarded the First Amendment as a serious obstacle to the prosecution of antiwar dissenters. More to the point, those scholars and judges who expressed the most anxiety about the repressive political climate were often the most reluctant to address the problem through judicial enforcement of constitutional rights.

Explaining their reluctance requires a wider historical lens. The wartime cases did not arise in an ideological or jurisprudential vacuum. Rather, they lay along a trajectory of contestation over judicial review that began decades before the initiation of hostilities in Europe. From the earliest years of the twentieth century, conflicts over constitutional rights were at the center of public debate. Instead of the speech clause of the First Amendment, however, controversy centered primarily on the due process clauses of the Fifth and Fourteenth Amendments, with their purported protection of liberty of contract. To use the language of contemporaries, the courts of the Progressive Era policed *property* rights, not *personal* rights.

Among the many prewar constituencies who accused the courts of pandering to industrial interests were mainstream progressives. The progressives of the early twentieth century differed on many issues, but they converged on a deep-seated distrust of court-centered constitutionalism. After all, the courts had relied on alleged interference with property rights and liberty of contract to invalidate some of the most celebrated reform initiatives of the progressive era, including workers' compensation and minimum wage laws. The most notorious example, the Court's 1905 decision in *Lochner v. New York*,[13] struck down a state maximum-hours law and furnished the label "the *Lochner* era" as shorthand for the judiciary's approach to so-called constitutional limitations. Many progressives also shared concerns raised by labor leaders about the courts' more routine and active role in policing labor disputes through criminal law and labor injunctions. Some accepted the common charge that judges—whether by temperament, training, or outright graft—inevitably privileged capital over labor.[14]

Progressive hostility to judicial power carried over to the conception of individual rights on which the courts' decisions were purportedly grounded. In place of the autonomous individual, progressives championed the common good. Roscoe Pound, who shaped the progressive school of legal thought known as sociological jurisprudence, was emblematic of this approach. In Pound's view, individual rights deserved protection only insofar as they promoted the public welfare. The problem with *Lochner*-era constitutionalism was that it "exaggerate[d] private right at the expense of public interest."[15] He and other progressives rejected the formalist fiction that individuals are autonomous social actors with equal bargaining power, along with the notion that courts should protect personal autonomy from the encroachment of state laws.[16]

In short, on the eve of American entry into World War I, progressives had articulated a fierce critique of the judiciary as an institution and especially of the judicial enforcement of constitutional rights. Even a congressional commission linked labor unrest to a perception among workers that justice was unavailable to them in capitalist courts.[17] Notably, few progressives suggested that the solution to judicial preference for property rights was to supplement enforcement of personal rights. Instead, they sought to curb judicial power. They issued proposals to strip jurisdiction, enable the popular recall



An early example of the government using expansive wartime legislation as a lever for suppressing radical agitation was the postal censorship of the *Masses*, a graphically innovative monthly magazine of socialist politics founded in 1911. In 1917, federal prosecutors brought charges against its editors for conspiring to obstruct conscription and it was forced to end publication.

of judges and judicial decisions, and eliminate judicial review.[18]

It is unsurprising that this thoroughgoing critique of court-centered constitutionalism should have impeded the development of a speech-protective First Amendment jurisprudence during World War I. Significantly, no such jurisprudence yet existed, notwithstanding the judiciary's active involvement in reviewing legislation and executive action in other domains. Periodic efforts to expand the sweep of the First Amendment during the nineteenth and early twentieth centuries had failed to produce a meaningful constitutional commitment to expressive freedom. The First Amendment did not bind the states until the mid-1920s, and courts consistently declined to curtail even federal encroachments on expression.[19]

Indeed, this perceived hypocrisy was part and parcel of the progressive critique of the courts. Conservatives who otherwise favored a judicial approach were hesitant to pursue an aggressive interpretation of First Amendment freedoms. Although they included freedom of speech among the rights purportedly guaranteed by the Constitution and enforceable by the courts, they distinguished between *liberty* and *license* and assigned radical agitation to the *license* side of the line.[20]

Yet progressives had done little to redress the deficiency. At first blush, their inaction is puzzling. At the level of policy, many progressives were hostile to censorship and suppression. The progressive era was marked by rapid social and scientific transformation premised on robust intellectual exchange. Moreover, progressive officials and advocates regarded the suppression of subversive beliefs as counterproductive. In the early twentieth century, economic dislocation and income inequality prompted massive strikes, work site sabotage, and occasionally assassinations and bombings. As they

would during World War I, hostile officials cast unrest as a threat to public safety and American institutions. They routinely prosecuted political radicals who were critical of capitalism, along with labor leaders who engaged in picketing and boycotts. To many progressives, repression of this kind appeared more likely to trigger violence than to thwart it. Some even supported efforts by socialists and Wobblies, assisted by the pioneering Free Speech League, to provoke arrest for street speaking and thereby to draw attention to the uneven application of constitutional rights.[21]

Still, their antagonism to *Lochner*-era legalism led most progressives to pursue discursive openness through politics rather than litigation. Progressives trusted that a strong state could exercise restraint in the public interest. They urged legislatures and executive actors not to criminalize or prosecute dissent, rather than asking judges to invalidate convictions.[22]

In short, in the years leading up to World War I, conservatives opposed the extension of constitutional protection to speech that threatened law and order, and those progressives who disagreed were typically loath to litigate the matter, which threatened to empower the courts. Judicial enforcement of the First Amendment lacked an effective champion, and few judges were eager to intervene of their own accord.

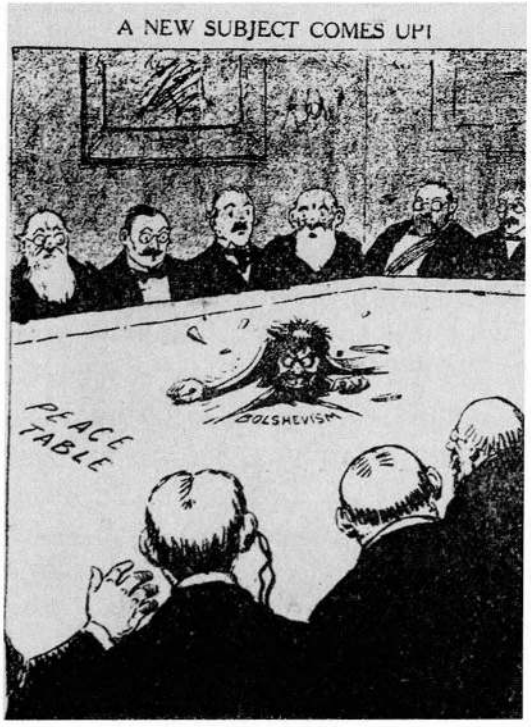
II

Given this background, judicial acquiescence to suppression during World War I appears less an aberration than a reprise of prewar themes. Certainly, the repressive climate was more palpable and swept in more constituencies, but the basic terms of the problem were familiar ones, and the solutions were similarly recognizable.

As before the war, conservatives distinguished between liberty and license and assigned antiwar advocacy to the latter bucket. It was not that conservatives suspended their emphasis on liberty altogether. On the contrary, the notion that a strong judiciary was necessary to preserve American liberties from the long arms of the state only intensified after the 1917 Bolshevik Revolution, which almost immediately dismantled most existing courts.[23] The panicked bar invoked the Bolshevik threat to private property—what they decried as the "menace of Socialism."[24] Yet what motivated conservatives in this moment was "free competition," not free speech.[25] More to the point, conservatives evinced little discomfort about framing their concerns in straightforward language about the danger of economic redistribution: the courts, they assured the public, would serve as a bulwark against "extreme collectivism."[26]

In later years, civil liberties would emerge as a foil to Soviet-style authoritarianism. New Deal conservatives eager to preserve substantive due process understood that property rights had lost their luster, and they touted judicial review for its defense of free speech and minority rights instead.[27] During World War I, by contrast, conservative lawyers unabashedly cautioned against the unprecedented expansion of government power into Americans' economic life. The president of the American Bar Association lamented that state regulation was eroding "individual freedom," but what he decried as "astonish[ing]" was the baldness of congressional economic regulation, which extended to "fixing hours of labor and rates of wages upon the transportation system"[28]—not postal censorship or the policing of private beliefs. To be sure, the war effort had required the "temporary suspension" of constitutional limitations; but according to an ABA committee, radicals were contriving to make such concessions permanent.[29] In preventing this evil from taking root, the suppression of dissent was a tool, not a barrier.

For their part, progressives believed that individual rights must yield to public welfare. As Roscoe Pound had put the point, "The



After the Armistice, war hysteria in the United States gave way to the Red Scare and the state retooled its suppression tactics to target radicals. This cartoon shows the impact of the Bolshevik Revolution in Russia on the Paris peace talks in 1919.

individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions."[30] Balanced against infringement on personal liberty, the national interest in a successful war effort seemed clearly to prevail. Of course, progressives also recognized a public interest in open debate. They had long advised state actors to tolerate disfavored speech, if for no other reason than what Ernst Freund described as "political prudence."[31] Such policy interests, however, proved inadequate to safeguard free speech during wartime. Many progressives felt that the window for democratic deliberation had closed when war was declared—and in any case, that free speech could not come at the expense of victory in the war, which they considered essential to preserving democracy.

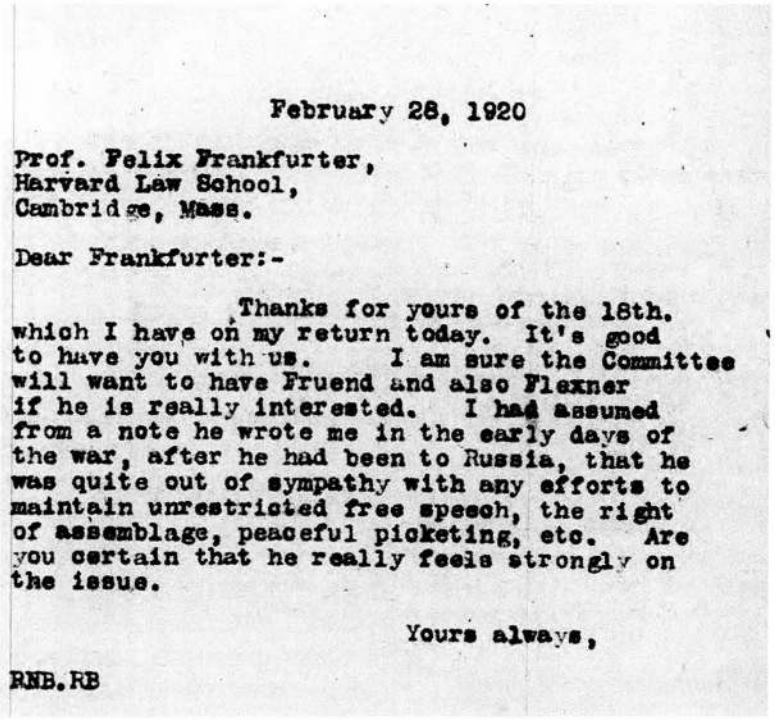
As a result, there was little public opposition to the 1917 Espionage Act, the federal statute that served as the basis for many of the wartime prosecutions. President Woodrow Wilson signed the bill in June 1917, two months after the United States entered the war. Enacted at his urging, the Espionage Act made it unlawful to interfere with the recruitment of troops or to disclose information that would be damaging to the war effort. More than a thousand convictions eventually resulted, along with the exclusion of one hundred publications from the mails. That the statute did not provoke greater opposition at the time of its passage is partly a function of legislators' misguided expectations. When it was debated, few anticipated that defendants would face twenty-year prison terms and $10,000 fines for impolitic remarks about deficiencies in the nation's war policies. By contrast, there was extensive discussion of a section conferring unilateral power on the post office to ban the mailing of any

It was the Red Scare, not World War I, which prompted the drafting of foundational First Amendment opinions involving wartime prosecutions. Government persecution of socialists, anarchists, immigrants, and labor leaders (some of whom, as shown above, were deported back to their native Russia) exposed the dangers of unbridled administrative discretion.

communication unlawful under the statute. Still, the Espionage Act passed with considerable progressive support.[32]

As war fervor intensified, however, some scholars and public figures began to grow uneasy. Their ambivalence flowed in part from the sheer scale of the wartime repression, which pervaded private life. Even more salient was the sense that the Espionage Act was serving as cover for the suppression of groups that had long aggravated government officials but were only incidentally opposed to war. Chief among these were the socialists, anarchists, and labor radicals who regarded American militarism as a concession to industrialists and profiteers. It was not lost on contemporaries that almost all of the important wartime cases involved radical defendants. Some, like perennial Socialist Party presidential candidate Eugene V. Debs, were familiar targets.[33] Many who were less prominent are recognizable to today's lawyers from the names of the foundational First Amendment cases. Charles Schenck,[34] Jacob Frohwerk,[35] and Jacob Abrams[36] all were radicals who asserted, as the Supreme Court put it in *Frohwerk v. United States*, "the usual repetition that we went to war to protect the loans of Wall Street."[37] In the progressive mindset, it was one thing to suspend civil liberties to beat the Kaiser, to win the war to end all wars. It was an entirely different matter to use expansive wartime legislation as a lever for suppressing radical agitation.

Concerns of this sort were amplified by postal censorship of the *Masses*, a respected socialist magazine. As it happened, the editor of the *Masses* was Max Eastman, whose sister Crystal had served as executive secretary of the American Union Against Militarism and helped to found its Civil Liberties Bureau, which subsequently reorganized as the National Civil Liberties Bureau, or NCLB, and eventually became the ACLU.[38] In typical progressive fashion, the first reaction to



February 28, 1920

Prof. Felix Frankfurter,
Harvard Law School,
Cambridge, Mass.

Dear Frankfurter:-

Thanks for yours of the 18th, which I have on my return today. It's good to have you with us. I am sure the Committee will want to have Fruend and also Flexner if he is really interested. I had assumed from a note he wrote me in the early days of the war, after he had been to Russia, that he was quite out of sympathy with any efforts to maintain unrestricted free speech, the right of assemblage, peaceful picketing, etc. Are you certain that he really feels strongly on the issue.

Yours always,

RNB.RB

Roger Baldwin recruited Harvard Law School professor Felix Frankfurter, an expert on injunctions against labor unions and union organizers, to serve on the ACLU National Committee. In this letter, Baldwin queries him about inviting Paul Freund and Bernard Flexner to join the committee as well.

the censorship of the *Masses* by the future founders of the ACLU was to attempt to negotiate with administration officials. But the Postmaster General refused to budge and invited them to pursue the matter in court.[39]

Despite their real reservations about a court-centered approach, they accepted the challenge. Within months, the NCLB had assembled a team of cooperating attorneys throughout the country who were assisting in an average of 125 cases a week. The organization defined itself as a clearinghouse for information and legal aid, providing legal advice and representation to individuals whose constitutional rights were violated.[40] With a few exceptions, its core leadership embraced the substantive causes of the radicals they represented. In their outward communications, however, they dissociated their civil liberties work from the underlying communications of their clients. As co-founder Roger Baldwin explained to a correspondent in the Socialist Party, the NCLB was in "entire sympathy" with the socialist program but would leave to other groups the task of mobilizing the masses.[41] The role of the NCLB was to "keep people's mouths open, and their printing presses free."[42]

This strategy, of course, would become the hallmark of the ACLU, and in subsequent decades it proved wildly successful. During World War I, however, the litigation campaign generated few genuine victories. In fact, the NCLB failed to save even the *Masses*, despite an auspicious start that had made litigation appear promising. In one of the most celebrated speech-protective decisions of the war, Judge Learned Hand decided in late July as a matter of statutory interpretation that the suppression of the *Masses* on the basis of its antiwar editorials and political cartoons exceeded the authority

Despite their compelling dissents in First Amendment cases, Justices Oliver Wendell Holmes Jr., left, and Louis Brandeis (pictured in 1928) did not manage to sway their fellow Justices. The Supreme Court in the 1920s upheld a slew of convictions for subversive speech, first under the Espionage and Sedition Acts and later under state criminal syndicalism laws.

conferred on postal officials by the Espionage Act.[43] In contrast to the "bad tendency" test that judges typically applied in the wartime cases, which held speakers criminally accountable for statements likely to lead to prohibited conduct, Hand would have required direct incitement to violation of the law. But in early November, the Second Circuit reversed Hand's decision.[44] Deprived of its second-class mailing privileges, the *Masses* was forced to shut down. Courts throughout the country followed the Second Circuit in deferring to the administration's expansive interpretation of the Espionage Act.[45]

If the NCLB failed to shield its radical clients from conviction under the Espionage Act, it proved moderately more successful in its fallback task. Even judicial defeats, according to Baldwin, could "show up miscarriage of justice" and thereby stimulate change.[46] Indeed, motivated by cases like the *Masses*, progressive outlets began by the fall of 1918 to feature ambivalent appeals to free speech. The *Nation* insisted in October that "the right to free speech must be upheld, throughout the country"—that "freedom of legitimate criticism" must not be denied.[47] In the *New Republic*, the philosopher John Dewey initially doubted the prospect of widespread suppression, though he enjoyed the irony of "ultra-socialists rallying to the … sanctity of individual rights and constitutional guaranties."[48] Two months later, Dewey revised his views. He remained skeptical of claims to individual autonomy, but he articulated a defense of wartime tolerance that emphasized pluralism and the social good.[49]

It bears emphasis, however, that these defenses of free speech typically sidestepped constitutional constraints. Even Judge Hand's opinion in *Masses* mentions neither the "First Amendment" nor the "Constitution." Subsequent scholars have portrayed progressive silence on the First Amendment as a failure of imagination or a concession to pragmatic

constraints. In its moment, however, the progressive preference for statutory interpretation and policy moderation was understandable. After all, even as it upheld massive extensions of government power during war, the Supreme Court remained deeply committed to its traditional conception of individual rights. In December 1917, the same month that it heard oral argument in *Arver v. United States*,[50] in which it affirmed the legality of conscription, the Court issued a bitterly divisive decision in a labor case. In *Hitchman Coal and Coke Company v. Mitchell* it upheld a sweeping injunction against the United Mine Workers of America for interfering with the "constitutional rights of personal liberty and private property" that inhered in employers and anti-union employees.[51] According to the *New Republic,* the case would "confirm the popular feeling ... that a majority of the Supreme Court are endeavoring to enforce their own reactionary views of public policy, in direct opposition to the more enlightened views prevailing in legislatures and among the public."[52] It is little wonder that progressives proved unenthusiastic about defending the rights of dissenters through constitutional litigation in the courts.

Developments over the following months led a few progressives to reconsider their views. In the spring of 1918, President Wilson endorsed the Sedition Act amendments to the Espionage Act. The new provisions explicitly empowered the government to suppress undesirable speech. They forbade all "disloyal, profane, scurrilous, or abusive language about the form of government of the United States," the Constitution, the armed forces, and the American flag.[53] Significantly, they also prohibited advocacy of "any curtailment of production in this country" of anything "necessary ... to the prosecution of the war."[54] In other words, the law seemed expressly to outlaw strikes and slowdowns in war-related industries. The bill engendered a heated debate, and a few legislators balked, citing the dangers of bureaucratic censorship, the absence of protection for truthful criticism, and the potential for partisan abuses. Nonetheless, the Sedition Act passed easily, and on May 16, President Wilson signed it into law.[55]

The new legislation posed a difficult challenge for progressive critics of countermajoritarian constitutionalism. In practice, some of the old arguments for pursuing administrative moderation remained available. Wilson's Attorney General was concerned about the reach of the statute, and he immediately cautioned U.S. attorneys that the Sedition Act "should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of Government policies."[56] A few months later, he issued a supplemental circular requiring his express authorization of any prosecution under the statute.[57] Still, plenty of prosecutions went forward. The Sedition Act demonstrated palpably that democratic majorities were capable of enacting laws that were deeply inconsistent with progressive principles, and that administrators were capable of enforcing them. The new statute made it practically impossible to engage in hand waving about statutory authority or prosecutorial overreach.

Even then, though, comparatively few progressives favored the reversal of convictions on First Amendment grounds, let alone judicial invalidation of the Sedition Act. Their hesitation was not simply another concession to the war hysteria. Rather, it was based on extensive experience defending progressive measures from constitutional litigation and, correspondingly, a thoroughgoing critique of the judiciary as an institution. Progressives remained disinclined to invest the courts with more authority and thereby risk the further entrenchment of judicial review.

Such was the situation, then, on the eve of the Armistice. Conservatives tended to regard the Espionage and Sedition Acts

as salutary checks on dangerous agitators. Progressives worried about stifling legitimate dissent but retained their strong aversion to court-centered constitutionalism. There were as yet no effective champions for the modern First Amendment.

III

On November 11, 1918, hostilities in Europe ceased. The Selective Service and Sedition Acts elapsed with the Armistice, although some pending prosecutions continued. The end of the war did not, however, bring an end to state suppression. As the nation transitioned from war hysteria to "Red Hysteria," the machinery of repression was quickly retooled to target radicals directly.[58] As the *Nation* later lamented, "When war is declared on a foreign foe, it is also declared on every forward-looking cause, every liberal, every reformer at home."[59]

The postwar Red Scare was triggered in part by reports of radical violence abroad, especially the Russian Revolution. Its primary impetus was, however, domestic. During the war, the foreign deployment of millions of workers had increased the bargaining power of organized labor. Although the government had targeted radical unions, the American Federation of Labor, with the weight of the administration behind it, had made significant gains. But the concessions it attained during the war proved fleeting. After Republicans took control of Congress in 1918, Wilson shifted his favor from labor to industry. Meanwhile, the reintegration of soldiers into the labor force sparked race riots and hostility to immigrants along with union militancy. Shortages of consumer goods increased the cost of living, fueling support for labor radicalism as well as anxiety about revolution.[60]

In the spring of 1919, the frenzied climate intensified when bombs were mailed to public figures, along with a leaflet signed "The Anarchist Fighters." J. Edgar Hoover worked quickly and thoroughly to locate subversives, and Attorney General A. Mitchell Palmer initiated the deportation of foreign-born radicals. Congress, too, joined the crusade, and the Senate's Overman Committee convened hearings on alleged Bolshevik elements in the United States. At the state level, legislatures enacted a flood of criminal syndicalism and sedition laws. Meanwhile, within a few short months, four million workers went on strike. For the most part, state and federal officials responded by assisting employers and ushered in a crushing defeat for the American labor movement.[61]

In assessing the legacy of the wartime speech cases, several features of the Red Scare are particularly salient. First, to American progressives, the specter of Bolshevism appeared contrived, a political lever as opposed to a legitimate threat. Repressive government practices could no longer be justified as incidental to an expansive war power, and in contrast to Wilson's wartime policies, the Red Scare targeted only the Left. During the war, the expansion of state power had assumed an even-handed cast. Businesses resentful of Wilson's relationship with the AFL had accused the administration of abusing its war power to pander to labor. In fact, they complained repeatedly that their own "civil liberty" was under attack.[62] But this uneasy equilibrium did not survive the war. In contrast to other wartime expansions of power, enforced conformity did not retreat with the Armistice. As civil liberties lawyer Gilbert Roe complained in December 1918: "The President told us yesterday that the moment the armistice was signed he took the harness off from business, but he did not say anything about taking the halter off from free speech."[63]

This constellation of features provoked progressives to repudiate state repression more explicitly than they had in wartime. As before the war, progressives who rejected radical methods and aspirations nonetheless believed that it was better to tolerate dissent than to push it underground or make

martyrs of agitators. President Wilson himself purported always to have "believe[d] that the greatest freedom of speech was the greatest safety."[64] In March 1919, a socialist newspaper welcomed the news that American liberals were willing at last "to aid in the struggle to restore political democracy in the United States."[65] Eventually, even establishment lawyers acknowledged the excesses of Red Scare repression. When the New York Assembly expelled its socialist members in January 1920, Charles Evans Hughes wrote a letter condemning the action on behalf of the New York bar.[66] Hughes was celebrated for his courageous stance, as *Literary Digest* reported, in "Republican, Democratic, and Socialist newspapers alike."[67]

Crucially, it was during the Red Scare, not the war, that the foundational First Amendment cases involving wartime prosecutions were drafted. Even more than the war, the Red Scare prompted progressives—who increasingly rallied to the label liberal—to consider the potential pathologies of majoritarian democracy and the dangers of unbridled administrative discretion. It was not that liberals doubted the legitimacy of state power; on the contrary, they believed that the increasing complexities of modern society required careful coordination by a robust administrative state. More and more, however, they saw free speech as a necessary prerequisite for its prudent exercise. That is, free speech would serve to buttress and legitimate the state's role in regulating social and economic decisions, not to undermine it.[68]

It was an understanding of this kind that the pioneering free speech scholar Zechariah Chafee articulated in the *Harvard Law Review* in 1919, shortly after the first of the Supreme Court's wartime cases came down. Like his progressive forebears, Chafee emphasized what he called the "social interest in the attainment of truth," not individual rights.[69] Unlike prewar progressives, who typically urged restraint in the political branches,[70] Chafee carved out a role for the judiciary in delimiting the scope of constitutional protection, or as he put it, of defining "where the line runs."[71]

Chafee's article, expanded in 1920 to book form, is widely considered to be the blueprint for modern First Amendment theory and a powerful influence on Justice Holmes.[72] Chafee lamented in his piece that Holmes had squandered an opportunity to demarcate the boundaries of protected free speech. He also argued, disingenuously, that the "clear and present danger" standard that Holmes had introduced in his majority opinion in *Schenck*, affirming the defendant's conviction under the Espionage Act, meant that speech could be punished only at the brink of unlawful action.[73]

Chafee enlisted a small cadre of prominent intellectuals and jurists in a campaign to disseminate the new constitutional understanding. Together with Felix Frankfurter, Harold Laski, and Learned Hand, he scored some considerable successes. The most notable convert to the cause was Justice Holmes himself.[74] In the summer of 1919, Laski arranged a meeting between Holmes and Chafee. In November, Holmes, joined by Justice Brandeis, penned the first of his famous dissents. "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas," he poignantly proclaimed in *Abrams v. United States*.[75] Just over a year after insisting to Learned Hand that freedom of speech "stands no differently than freedom of vaccination,"[76] Holmes declared that open intellectual exchange was the only sound basis for strong public policy. In Holmes's revised view, "only the present danger of immediate evil or an intent to bring it about [would warrant] Congress in setting a limit to the expression of opinion."[77] A more restrictive rule, he reasoned, would run afoul of the First Amendment.

The Holmes and Brandeis dissents in the remaining Espionage and Sedition Act cases certainly spurred support for free speech. Some progressives immediately embraced the new First Amendment understanding. Many, however, retained reservations about a court-centered approach that rested on constitutional rights, even if they were grounded in social interests. Frankfurter fretted about judicial overreach and preferred to pursue administrative tolerance, notwithstanding the proven limitations of that approach.[78] Ernst Freund was less sanguine about administrators but no more enthusiastic about the courts. He criticized the Supreme Court's interpretation of the Espionage Act, which traded an "arbitrary executive" for "arbitrary judicial power."[79] The distinguished constitutional scholar Edward Corwin preferred to pursue the "responsibility of legislators," not their "lack of power."[80] Even Chafee considered the First Amendment to be "an exhortation and a guide for the action of Congress," anticipating subsequent calls for constitutionalism outside the courts.[81]

In any case, such squabbles were reserved for academic debate. However stirring their language, the great *dissents* were just that. Despite their stubborn adherence to the retooled clear-and-present-danger test, Holmes and Brandeis did not manage to sway their fellow Justices. Over the course of the 1920s, the Supreme Court upheld a slew of convictions for subversive speech, first under the Espionage and Sedition Acts and later under state criminal syndicalism laws. Compelling though the dissents may appear in retrospect, there was little reason in 1920 to believe that they would woo a majority. After all, Justice Holmes had issued another iconic dissent, in *Lochner v. New York*.[82] His insistence there that "a constitution is not intended to embody a particular economic theory,"[83] repeated resolutely over the years by Holmes and Brandeis, was further removed from the majority position in 1920 than it had been when it was decided.

IV

How, then, did the modern First Amendment take root? I have argued elsewhere that the constitutionalization of free speech in the United States was the product of a peculiar coalition comprising those progressives who hewed to the Holmes and Brandeis dissents and conservatives who distrusted state regulation and hoped to buttress judicial legitimacy, along with socialists and radical unionists.[84] At the helm of this awkward alliance was the ACLU, which explicitly committed itself at its founding in 1920 to the cause of organized labor, and which sought to preserve a "right of agitation" encompassing labor's most powerful weapons: the rights to picket, boycott, and strike. The founders of the ACLU had started out as progressive reformers, and as such they were deeply skeptical of the judiciary. For the first half of the 1920s, they undertook constitutional litigation above all to discredit the courts, with the goal of eroding their power. But as the prospect of meaningful labor agitation dimmed, the ACLU set in for a more protracted fight. It began to litigate in less controversial areas, such as academic freedom and sex education, in which a speech-protective stance might garner mainstream support. In its radical and labor cases, it argued about procedural irregularities and insufficiency of the evidence instead of demanding invalidation of repressive laws. Well into the New Deal, the ACLU's leadership distrusted the courts, and they helped to draft the legislation that stripped the federal courts of their injunctive power in labor disputes. But their gradual victories made it increasingly plausible that the Court might someday identify a First Amendment right to engage in concerted labor activity, a goal that came to pass, however fleetingly and incompletely, on the brink of World War II.

In short, ambivalence about judicial enforcement of a strong First Amendment persisted among both progressives and

conservatives, albeit for different reasons, well into the 1930s. Among the last holdouts were New Deal liberals, who were convinced that the judicial enforcement of free speech would eventually undermine democratic gains. The free speech coalition included business groups and corporate lawyers who hoped to use the First Amendment as a stand-in for substantive due process, a mechanism for protecting commercial advertising, lobbying, and workplace anti-unionism as constitutionally protected speech. That fact was not lost on New Dealers, who worried that civil liberties lawyers had inadvertently supplied judges with a new tool to strike down the same pressing social and economic reforms that the "constitutional revolution" had ostensibly insulated from judicial review. Fully two decades after the World War I defendants first pleaded their case in court, many of the most ardent admirers of Justice Holmes and Brandeis's substantive due process dissents continued to believe that "[j]udicial protection for civil liberties by means of the power to invalidate laws cannot be separated from judicial protection for the selfish interests of large property."[85]

These debates over the role of a counter-majoritarian judiciary in a democracy, which preoccupied lawyers and public figures on the eve of American entry into World War II, would shape judicial review for the remainder of the twentieth century. In the immediate aftermath of World War I, they would have seemed fanciful. In 1921, the first item on an ACLU list of factors suppressing civil liberties after the war was the "reactionary decisions of federal and state supreme courts."[86] The *Abrams* case, despite Justice Holmes's dissent, had left "the status of civil liberty hopeless so far as it is the concern of the courts of law."[87] What the conventional account has heralded as the arrival of the modern First Amendment was only a distant prelude.

At one level, the upshot of a fuller history of the emergence of modern First Amendment doctrine is the decentering of some of the most storied opinions in the history of the constitutional law; the effects of the great dissents were more attenuated than the constitutional law casebooks have suggested. Viewed differently, however, the wartime cases are more, not less, instructive. Rather than a caricature of patriotic complicity, they reflect an earnest debate among lawyers, litigants, and judges confronting new challenges to their deeply held conceptions of America's legal and political institutions.

To be sure, the free speech cases of World War I will continue to serve as a reminder of the dangers of patriotic exuberance as well as the vital role of political dissent in democratic governance. But they deserve an even more capacious legacy. They offer insights of profound importance for a constitutional democracy that is struggling simultaneously to establish the appropriate limits of executive and legislative power and to determine, with new urgency, the role of the judiciary in defining the purpose and meaning of the First Amendment.

ENDNOTES

[1] This is the standard narrative in constitutional law casebooks as well as historical scholarship. See, for example, Geoffrey R. Stone et al., **Constitutional Law** (New York, 7th ed. 2013): 1039; David M. Rabban, **Free Speech in Its Forgotten Years, 1870–1920** (New York, 1997): 1 (summarizing the scholarly consensus). Literature on the suppression of dissent during World War I and the seminal wartime speech decisions is vast. See, for example, Mark Graber, **Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism** (Berkeley, 1991); Thomas Healy, **The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America** (New York, 2013); Paul Murphy, **World War I and the Origin of Civil Liberties in the United States** (New York, 1979); Richard Polenberg, **Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech** (New York, 1987); Harry Scheiber, **The Wilson Administration and Civil Liberties** (Ithaca, NY, 1960); Geoffrey R. Stone, **Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism** (New York, 2004).

[2] See generally Christopher Capozzola, **Uncle Sam Wants You: World War I and the Making of the Modern American Citizen** (New York, 2008); David M. Kennedy, **Over Here: The First World War and American Society** (New York, 1980).

[3] These arguments are developed in Laura Weinrib, **The Taming of Free Speech: America's Civil Liberties Compromise** (Cambridge, MA, 2016); Laura Weinrib, "The Myth of the Modern First Amendment," in Lee C. Bollinger & Geoffrey R. Stone, eds., **The Free Speech Century** (New York, 2019): 48–67; Laura Weinrib, "Against Intolerance: The Red Scare Roots of Legal Liberalism," *Journal of the Gilded Age and Progressive Era* 18 (2019): 7–31.

[4] Zechariah Chafee, "Freedom of Speech in War Time," *Harvard Law Review* 32 (1919): 932–73, 937.

[5] *Ibid.*

[6] On the Creel Commission, see Kennedy, **Over Here**: 59–63; Robert Zieger, **America's Great War: World War I and the American Experience** (Lanham, MD, 2000): 78–84; Stephen Vaughn, **Holding Fast the Inner Lines: Democracy, Nationalism, and the Committee on Public Information** (Chapel Hill, 1980).

[7] On vigilantism, see generally Capozzola, **Uncle Sam Wants You**.

[8] George Creel, **Rebel at Large: Recollections of Fifty Crowded Years** (New York, 1947): 195–96.

[9] Norman Thomas, "War's Heretics," *Survey*, December 7, 1918, p. 323.

[10] Ernst Freund, "The Debs Case and Freedom of Speech," *New Republic*, May 3, 1919, p. 13.

[11] See, for example, Stone, **Perilous Times**: 183–91; Donald Johnson, **Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union** (Lexington, KY, 1963): 97–98; Paul Murphy, **World War I**: 80, 98–103; Rabban, **Free Speech in Its Forgotten Years**: 250–55.

[12] Freund, "Debs Case," p. 13.

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

[14] On the tensions within progressivism and progressive and labor antipathy toward the courts, see, for example, Daniel T. Rodgers, "In Search of Progressivism," *Reviews in American History* 10 (December 1982): 113–32; Morton J. Horwitz, **The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy** (New York, 1992); Laura Kalman, "In Defense of Progressive Legal Historiography," *Law and History Review* 36 (2018): 1021–88; William E. Forbath, **Law and the Shaping of the American Labor Movement** (Cambridge, MA, 1991).

[15] Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454–87, 461.

[16] See, for example, Morton White, **Social Thought in America: The Revolt against Formalism** (New York, 1949).

[17] The Commission on Industrial Relations is the subject of Graham Adams Jr., **Age of Industrial Violence 1910–1915: The Activities and Findings of the United States Commission on Industrial Relations** (New York, 1966).

[18] See Weinrib, **Taming of Free Speech**, ch. 1. On judicial recall, see William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937** (Princeton, NJ, 1994), ch. 5; Stephen Stagner, "The Recall of Judicial Decisions and the Due Process Debate," *American Journal of Legal History* 24 (1980): 257–72.

[19] On civil liberties advocacy before World War I, see Michael Kent Curtis, **Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History** (Durham, 2000); Rabban, **Free Speech in Its Forgotten Years**.

[20] For example, James A. Emery (general counsel, National Association of Manufacturers), "Building a Political Platform for Industry," *American Industries* 20 (1920): 36–38, 37; William H. King, "'Bloc' Menace in Law Making," *Nation's Business*, November 1921, p. 11. On the conservative civil liberties tradition, see David Bernstein, **Rehabilitating Lochner: Defending Individual Rights against Progressive Reform** (Chicago, 2011); Kenneth I. Kersch, **Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law** (New York, 2004).

[21] See Rabban, **Forgotten Years**: 77–128.

[22] *Ibid.*; Weinrib, "Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties," *Emory Law Journal* 65 (2016): 1051–137.

[23] Richard Pipes, **The Russian Revolution** (New York, 1990), p. 797.

[24] Walter George Smith, "Civil Liberty in America," *ABA Journal* 4 (1918): 551–66, 562.

[25] *Ibid.*, 559.

[26] *Ibid.*, 566.

[27] Weinrib, **Taming of Free Speech**, ch. 6.

[28] Smith, "Civil Liberty in America," pp. 558–60.

[29] Statement of the Committee to Oppose Judicial Recall, quoted in Smith, "Civil Liberty in America," pp. 558–60.

[30] Roscoe Pound, "Interests of Personality" (pt. 2), *Harvard Law Review* 28 (1915): 445–67, 453.

[31] Freund, "Debs Case," p. 13.

[32] See Stone, **Perilous Times**: 183–91.

[33] *Debs v. United States*, 249 U.S. 211 (1919).

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

[35] *Frohwerk v. United States*, 249 U.S. 204 (1919).

[36] *Abrams v. United States*, 250 U.S. 616, 630 (1919).

[37] Frohwerk, 249 U.S. at 207.

[38] On Crystal Eastman's role in founding the NCLB, see John Fabian Witt, **Patriots and Cosmopolitans: Hidden**

Histories of American Law (Cambridge, MA, 2007), ch. 3.

[39] Johnson, **Challenge to American Freedoms**: 58–59.

[40] NCLB, "The Need of a National Defense Fund," 15 November 1917, in *American Civil Liberties Union Records, The Roger Baldwin Years, 1917–1950*, Seeley G. Mudd Manuscript Library, Public Policy Papers, Princeton University, Princeton, NJ (ACLU Papers), vol. 26.

[41] Roger Baldwin to Adolph Germer, December 10, 1917, ACLU Papers, vol. 3.

[42] Roger Baldwin to John Codman, October 11, 1917, ACLU Papers, vol. 25. Descriptions of the ACLU's early operations include Roger Baldwin to Mrs. Leo Simmons, September 21, 1917, ACLU Papers, vol. 36; NCLB, statement to members of the AUAM, November 1, 1917, in American Union Against Militarism Records, 1915–1922, Swarthmore College Peace Collection, Swarthmore, Penn. (AUAM Papers), reel 10-1 (summarizing operations).

[43] *Masses Publishing Company v. Patten*, 244 F. 535, 538 (S.D.N.Y. 1917), reversed, 246 F. 24 (2d Cir. 1917).

[44] *Masses Publishing Company v. Patten*, 246 F. 24 (2d Cir. 1917).

[45] On the *Masses* case, see Gerald Gunther, "Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27 (1975): 719–73; Gerald Gunther, **Learned Hand: The Man and the Judge** (New York, 1994).

[46] Roger N. Baldwin to John S. Codman, October 11, 1917, ACLU Papers, vol. 25.

[47] "The Case of Columbia Professors," *Nation,* October 11, 1917, p. 388.

[48] John Dewey, "Conscription of Thought," *New Republic,* September 1, 1917, p. 129.

[49] John Dewey, "In Explanation of Our Lapse," *New Republic,* November 3, 1917, p. 17.

[50] *Arver v. United States,* 245 U.S. 366 (1918).

[51] *Hitchman Coal v. Mitchell,* 245 U.S. 229, 251 (1917).

[52] "Breaking the Labor Truce," *New Republic,* December 22, 1917, p. 197.

[53] Sedition Act of 1918, 40 Stat. 553 (1918).

[54] *Ibid.*

[55] On the debate over the Sedition Act, see generally Stone, **Perilous Times**: 183–91.

[56] T. W. Gregory, Attorney General, Circular No. 838, October 28, 1918, in **Annual Report of the Attorney General of the United States for the Year 1918** (Washington: Government Printing Office, 1918): 674.

[57] T. W. Gregory, Attorney General, Circular No. 908, February 16, 1918, *ibid.*

[58] "The Red Hysteria," *New Republic*, January 28, 1920, p. 250.

[59] Editorial paragraph, *Nation*, Nov. 8, 1920, p. 489.

[60] See Joseph A. McCartin, **Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912–1921** (Chapel Hill, 1997); David Montgomery, **The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925** (New York, 1987), pp. 388–89.

[61] See generally Robert K. Murray, **Red Scare: A Study in National Hysteria, 1919–1920** (Minneapolis, 1955), pp. 122–34; Regin Schmidt, **Red Scare: FBI and the Origins of Anticommunism in the United States, 1919–1943** (Copenhagen, 2000), pp. 136–46; Paul L. Murphy, **The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR** (Westport, CT, 1972), p. 42; William Preston Jr., **Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933** (Cambridge, MA, 1963), pp. 88–117; Symposium, "Reassessing the Red Scare of 1919–1920 at Its Centennial," *Journal of the Gilded Age and Progressive Era* 18 (2019): 3–98.

[62] Smith, "Civil Liberty in America."

[63] Gilbert E. Roe, "Repeal the Espionage Law: An Address Delivered before the Civic Club of New York, December 3, 1918," *Dial,* January 11, 1919, pp. 21–22.

[64] Woodrow Wilson, **The Triumph of Ideals: Speeches, Messages and Addresses Made by the President Between February 24, 1919, and July 8, 1919, Covering the Active Period of the Peace Conference at Paris** (New York, 1919), p. 78.

[65] "The Liberals Wake Up," *New York Call*, March 24, 1919.

[66] Brief of Special Committee Appointed by the Association of the Bar of the City of New York (New York, 1920), p. 41.

[67] "Albany's Ousted Socialists," *Literary Digest*, January 24, 1920, p. 19.

[68] This argument draws on Weinrib, "Against Intolerance," pp. 7–31. Progressive attitudes toward the expansion of administrative power are discussed in Daniel R. Ernst, **Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940** (New York, 2014), pp. 1–77; Daniel R. Ernst, "Ernst Freund, Felix Frankfurter, and the American *Rechtstaat:* A Transatlantic Shipwreck, 1894–1932," *Studies in American Political Development* 23 (2009): 171–88; Mark Tushnet, "Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory," *Duke Law Journal* 60 (2011): 1565–637.

[69] Zechariah Chafee, "Freedom of Speech in War Time," *Harvard Law Review* 32 (1919): 932–73, 937.

[70] Although some progressives supported the Free Speech League in its advocacy of a strong, court-enforced First Amendment in the prewar period, that organization made few concrete gains. See generally Rabban, **Forgotten Years.**

[71] Chafee, "War Time," 958–59.

[72] Zechariah Chafee Jr., **Freedom of Speech** (New York, 1920).

[73] *Ibid.*, 89.

[74] Holmes's transformation is discussed in Rabban, **Forgotten Years**: 299–315; Healy, **Great Dissent**.

[75] *Abrams,* 250 U.S. at 630 (1919) (Holmes, J., dissenting).

[76] Letter from Oliver Wendell Holmes Jr. to Learned Hand, June 24, 1918, reprinted in Gerald Gunther, "Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27 (1975): 756–57.

[77] Abrams, 250 U.S. at 628 (Holmes, J., dissenting).

[78] See Samuel Walker, **In Defense of American Liberties: A History of the ACLU** (New York, 1990): 81; Ernst, "Transatlantic Shipwreck," pp. 171–88.

[79] Freund, "Debs Case," p. 13.

[80] Edward S. Corwin, "Freedom of Speech and Press under the First Amendment: A Resume," *Yale Law Journal* 30 (1920): 48–55, 55.

[81] Zechariah Chafee, **Freedom of Speech**, pp. 3–6.

[82] *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting).

[83] *Ibid.*, 75.

[84] See generally Weinrib, **Taming of Free Speech**.

[85] International Juridical Association, "Curbing the Courts" (1937), in *William Gorham Rice Papers,* Wisconsin Historical Society Archives, Madison, Wisc., box 19, folder 7.

[86] Walter Nelles, "Suggestions for Reorganization of the National Civil Liberties Bureau," undated, ACLU Papers, reel 16, vol. 120.

[87] *Ibid.*

Body and Soul: The Selective Draft Law Cases and World War I

CHRISTOPHER CAPOZZOLA

By most accounts, the career of the Selective Service Act of 1917 before the Supreme Court of the United States was remarkably short. In January 1918, the Court dispensed with constitutional challenges to the recently adopted military conscription law in a brief, unanimous opinion following a session of oral argument in which the Justices were widely reported to be bored by the case and impatient to issue their ruling. But the Supreme Court's engagement with conscription and its enforcement marked a contingent and transformative moment for the Constitution, the Court, and the United States. The legacies of the Court's ruling in *Arver v. United States* include a surprising cast of characters: not only drafted soldiers and conscientious objectors, but a Hungarian refugee, a Canadian nurse, and an unwed teenage mother from rural Virginia. A century later, as Americans continue to grapple with the obligations of citizenship, the limits of federal power, and the extent of personal privacy, we might pause to consider a crucial moment when war brought the federal government into direct contact with the body and soul of every American citizen.[1]

The Selective Service Act asserted the federal government's power at its most extreme. During the war, the basic premise that political obligations implied military ones was rarely challenged, and the general sense of compliance was not lost on a reporter for the *New York Times* who spent one registration day in the rough-and-tumble neighborhood around Peck Slip on the East River waterfront in Manhattan. There, 3,528 men—among them the longshoremen, dock workers, and drifters who filled the neighborhood's lodging houses—registered, without complaint, at the makeshift offices of New York Local Board No. 92. "There was no use complaining," wrote the reporter:

> To ask the average registrant what he thought of the whole affair would be to receive a shrug of the shoulder and the acknowledgment that he really saw no use in having any thought on the subject at all, further

> than that it was the law of the land, and that every loyal citizen owed it to himself and to his country to obey that law.[2]

The New York newspaper reporter marveled that this unprecedented registration for military service looked almost like "part of America's second nature." But, in fact, it wasn't. Adopting, enforcing, and upholding America's first universal military draft required a remarkable departure from the nation's political traditions of civic voluntarism and militia service. That was a point made by the law's opponents, who were not so quick to shrug their shoulders. By the war's end, conscription brought America courtroom battles, shootouts in the Ozark Mountains, and even a fistfight in the cloakroom of the United States Senate. There were torchlight parades and midnight raids; a Kaiser hanged in effigy, a man hanged in a noose. Through it all, the registration forms poured into Selective Service headquarters. And to those we ought to pay a bit of attention.

"Accustomed to consider themselves more or less outside of the social organism of society," the reporter noted, draft-age men "were suddenly compelled to locate themselves ... ask themselves many questions that had not concerned them before—who they were—what they were—where they were." To the men, the forms were nuisances, beside the point. What the registrants of Peck Slip did not realize was that filling out the forms, "locating" themselves before the state, was the main fact—and their cards were symbols of the new terms of citizenship. Selective Service created new categories of citizens: conscripts, conscientious objectors, draft dodgers. As drafted men and their families interacted with military administrators, they reworked the meanings of American citizenship and its relation to our bodies and our souls. When the Supreme Court joined the debate, it left a remarkably long legacy for such a short opinion.[3]

Conscription and Coercion

World War I represented a drastic transformation in the power of the federal government. By almost any metric, from the size of the federal budget to the number of federal employees, to the number of soldiers in the standing army, government expanded dramatically during the war and never went back to its prewar size. Before the war, the largest federal budget was $762 million. After the war, the smallest federal budget was $2.8 billion. In 1913, the Sixteenth Amendment brought America the income tax, and the Seventeenth Amendment established the direct election of senators. The war confirmed this constitutional mind-set and accelerated the expansion of federal power. During the war, the government began to regulate alcohol, first as a temporary wartime measure in 1917 and then in the Eighteenth Amendment, ratified in 1919. The government intervened in disputes between business and labor. It nationalized the railroads and the coal industry. It administered the first IQ tests. It instituted daylight savings time. Uncle Sam was truly everywhere in Americans' lives.[4]

The Selective Service Act of May 1917 is a clear example of the dynamic relationship between expanding state power and voluntary participation during World War I. The idea of universal male obligation to military service was not unknown, but the draft did not come easily to the United States in World War I. During the Civil War, both the Union and the Confederacy adopted conscription, but these notorious systems—marked by violent uprisings in the North and widespread desertion in the South—sent relatively few men into the Civil War armies; only 8% of the Union military force came from conscription. In 1917, support for the war was broad, but opposition to the draft was widespread. Facing objections from southern populists and northern progressives in his own party, President Woodrow Wilson made common

By the end of World War I, the War Department had printed four million copies of James Montgomery Flagg's famous recruitment poster. He supported the war effort as an artist in many ways, including offering a free poster to anyone who bought a $1,000 Liberty Bond.

cause with Republicans across the aisle to push the bill through Congress.[5]

Political debates and bureaucratic concerns led to a compromise, the Selective Service Act of 1917, which required all male citizens of draft age, and aliens who had taken out first papers of citizenship, to register with local draft boards. Liability to registration was universal, but liability to service was, in the language of that day (and ours), "selective." A man's health, his engagement in a "useful" war industry, or his obligations to dependent family members determined whether he would stay home or end up in uniform. But adopting conscription and implementing it were two different things. Although the draft boards had help in the task of identification from the United States Census Bureau, local post offices, and private insurance companies, the state could not locate or identify all those who lived under its authority. A generation later, draft officials could track a man down through his birth certificate, his driver's license, voter registration, passport, or Social Security card. In 1917, however, the average American man lacked most of these documents; many carried none of them at all.

Voluntarism thus played an important role in the spirit of Selective Service. Casting the registration process as a volunteer "service" to the state—which would do the "selecting" based on its principles of efficiency—gave the draft an aura of consent. Thus we see President Woodrow Wilson's puzzling formulation of the 1917 draft law: "it is in no sense a conscription of the unwilling; it is a selection from a nation which has volunteered in mass."[6]

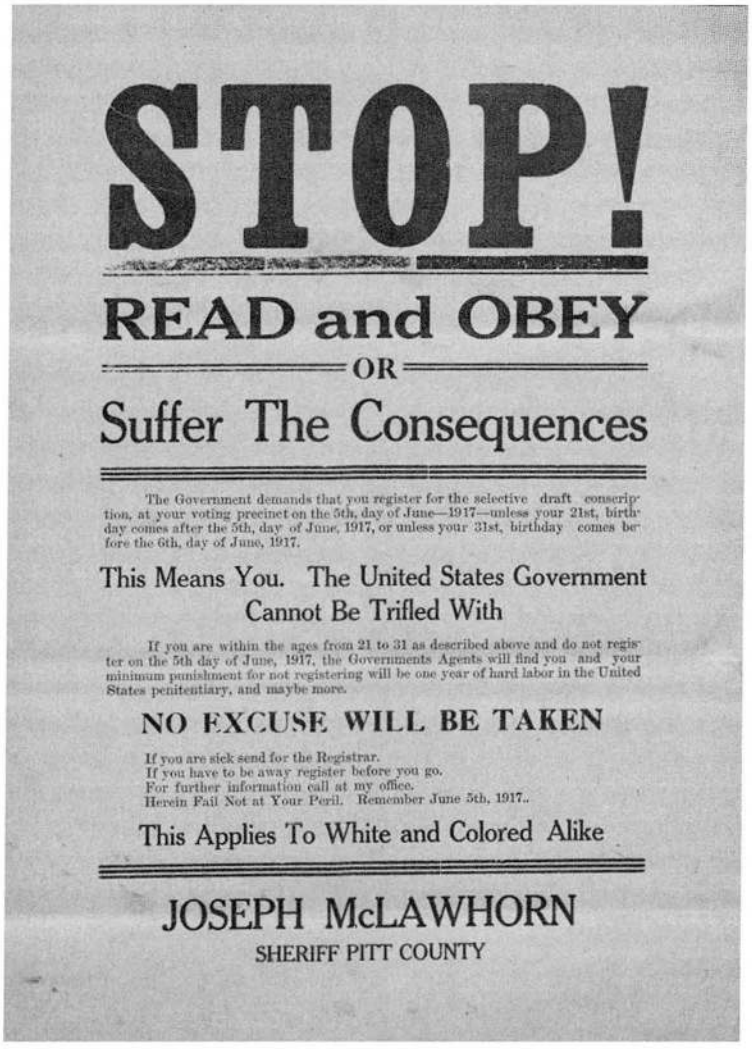
Arver v. United States

Some of those unwilling men pursued their claims in the nation's courts. Georgia's Tom Watson, a leading figure in populist politics of the previous generation, emerged as the most prominent opponent of military conscription. In the summer of 1917, Watson recruited two men, and $100,000, for a test case. Joining in an unlikely alliance with civil libertarian and veteran New York litigator Harry Weinberger, Watson argued that Selective Service legislation violated the Constitution. First of all, Watson said, it violated the Thirteenth Amendment's prohibition against "involuntary servitude"—an ironic deployment of the Thirteenth Amendment by one of Jim Crow's most ardent supporters. Nor, he argued, did the Constitution, which mentions a militia but does not speak of conscription, authorize the raising of armies by such means. Weinberger added his own line of reasoning: by exempting clergymen and divinity students from the draft, the Selective Service Act had also violated the First Amendment's Establishment Clause separating church and state.[7]

Their arguments went nowhere. On January 7, 1918, the U.S. Supreme Court unanimously upheld the constitutionality of conscription. Chief Justice Edward D. White wrote for the Court in a series of cases collected as the Selective Draft Law Cases and headed by *Arver v. United States.* He located the power of the government to exact enforced military duty in the "raise and support armies" clause of the Constitution's Article I. Citizenship, the Court ruled, implies the "reciprocal obligation of the citizen to render military service in time of need and the right to compel it." Any other notion, asserted Chief Justice White, "challenges the existence of all power, for Governmental power which has no sanction to it and which can only be exercised provided the citizen consents is in no substantial sense a power." White thus believed that citizens' fundamental duties to the state preceded the opinions they might have about any one particular policy. Consent followed from citizenship, not the other way around. Watson's Thirteenth Amendment claim, White remarked, was "refuted by its mere statement," and the "unsoundness" of Weinberger's religious establishment claim was "too apparent to require" a counterargument. This was justice by assertion, but no matter. *Arver,* while authoritative, announced nothing new. Every single court that heard a challenge to the draft denied it.[8]

Enforcing the Draft

No matter how forcefully the Court spoke in the Selective Draft Law Cases, however, opposition to the draft persisted. At least as many as 350,000 Americans dodged the draft and became—in the slang of the period—"slackers." The response of Americans to draft dodging marked a crucial moment in the evolution of federal power. During the course of the war, thousands of letters arrived at Selective Service headquarters alleging slackerism on the part of neighbors, colleagues, and even family members. Edna Shaw of St. Louis, Missouri, wrote to draft officials to turn in her friend Otto Schaflitzel. "I wouldn't say anything about it," she wrote, "only he is so disloyal for only being 24 years of age and single. [He is] hurting my feelings, when he talks about the country, cause I have brothers in service and I will almost think ... if I only had a



STOP!

READ and OBEY

OR

Suffer The Consequences

The Government demands that you register for the selective draft conscription, at your voting precinct on the 5th, day of June—1917—unless your 21st, birthday comes after the 5th, day of June, 1917, or unless your 31st, birthday comes before the 6th, day of June, 1917.

This Means You. The United States Government Cannot Be Trifled With

If you are within the ages from 21 to 31 as described above and do not register on the 5th day of June, 1917, the Governments Agents will find you and your minimum punishment for not registering will be one year of hard labor in the United States penitentiary, and maybe more.

NO EXCUSE WILL BE TAKEN

If you are sick send for the Registrar.
If you have to be away register before you go.
For further information call at my office.
Herein Fail Not at Your Peril. Remember June 5th, 1917..

This Applies To White and Colored Alike

JOSEPH McLAWHORN
SHERIFF PITT COUNTY

The county sheriff in Pitt County, N.C., threatened significant penalties for draft evaders in June 1917. Despite the Supreme Court's rulings in Selective Service Draft Law cases, more than 350,000 Americans dodged the draft.

gun I would kill him." Emma Wolschendorf of East Bridgewater, Massachusetts, wrote to the draft board in May 1918 asking them to draft her husband. "He is not a good father to his two little babies, and therefore I want our great 'Uncle Sam' to take care of him."[9]

Some mechanisms of coercion were more personal. Parents often accompanied children to draft registration centers, where they received registration buttons that they were asked to wear prominently on their lapels. The wartime draft also attached the nation-state to the bodies of draft-age men in the form of draft cards—the first mass state-issued identity documents in U.S. history—that men were legally bound to carry at all times and show upon request. Churches read out the names of members of their congregations who had registered for the draft, a process ostensibly aimed at honoring the registrants, but that also acted to ensure compliance.

Swamped with requests for investigation of draft dodging, the Justice Department's Bureau of Investigation (which would later

become the FBI) supported a group of Chicago activists in the formation of the American Protective League in early 1917. By the time of the League's dissolution in February 1919, as many as 250,000 men—and a small number of women—may have served in this secret organization. The APL was best known for conducting the so-called slacker raids, massive dragnets designed to ferret out men who had not registered for the draft and therefore were not in possession of their draft cards. In the course of three days in September 1918, slacker raiders in New York City interrogated as many as 500,000 men and held almost 60,000 in custody. The APL reflected the historical transition that it participated in: it was a private voluntary association with roots in local habits of vigilantism, but it was also an arm of an emergent federal surveillance state that employed modern methods of social control to uphold the law. The APL's methods eventually generated press criticism and Congressional debate. On the extent of the APL's authority to enforce the draft, the Supreme Court was never asked to rule.[10]

Testing Sincerity

If Selective Service registration and its enforcement transformed the federal government's relationship to the American body, the law's provisions on conscientious objection reflected an equally invasive transformation of the American soul. The new draft law included a provision that allowed exemption for members of "any well-recognized religious sect or organization organized and existing May 18, 1917, and whose then existing creed or principles forbid its members to participate in war in any form." Nearly 65,000 registrants filed initial claims when they filled out their draft cards.[11]

Americans actively opposed draft exemptions for conscientious objectors. Their methods ranged from scriptural argument in the pews of the nation's churches to physical harassment in its military prisons. Against great odds, objectors earnestly tried to reconcile the dictates of personal conscience with the needs of the state, and after extensive lobbying from peace groups and religious organizations, military officers and civilian legislators ultimately crafted an official policy that recognized the category and found a small and fragile place for objectors in the American polity. At least on paper.

But once again, the question for a small federal government fighting a great war remained: How would the policy be enforced? The soul was even less amenable to investigation than marriage or employment, and Americans demanded tangible measures to regulate the invisible consciences of their fellow citizens. The War Department embarked on a campaign of scrutiny, officially evaluating the contents of American citizens' minds and hearts. This can be seen most clearly in the work of the Board of Inquiry. Under the authority of an executive order, the War Department established the board in June 1918 to "discover and weigh and measure the secret motives which actuated the objector to resist authority." Three legal heavyweights comprised it: Major Walter G. Kellogg of the U.S. Army Judge Advocate Corps; progressive judge Julian W. Mack; and Harlan Fiske Stone, then the Dean of the Columbia Law School. Between June 1918 and the Armistice that November, the three men traveled across the United States interrogating 2,294 conscientious objectors stationed at the nation's military camps. The board traveled to every major military installation where COs had been encamped, and based on brief interrogations, usually no more than a few minutes, fulfilled its obligation to fix, with legal authority, the "sincerity" of each of the men they interviewed.[12]

Much depended on the board's decisions: Those deemed sincere could be assigned to noncombat alternatives such as a farm furlough, while the insincere faced the choice of

donning a uniform and embarking for France, or awaiting an Army court-martial with the power to execute the guilty. Board members such as Stone subjected the men to interrogations about scriptural evidence, suggested pacifism's inability to defend mothers and sisters from marauding Germans, and offered counterarguments linking the war effort to Christianity and presenting it as a spiritual crusade. One of Stone's favorite questions asked whether objectors had used postage stamps since the outbreak of war, convincing evidence (in Stone's mind, anyway) that these consciences could bear the benefits of the state but not its burdens.

The interrogations did what they were implicitly meant to do: reduce the number of objectors. Take, for example, the operations of the Board of Inquiry at Camp Gordon near Atlanta. After the board interviewed 177 objectors there in June 1918, it persuaded 72 men to choose noncombatant service; 54 failed to convince the board of their sincerity and were forced to accept any service ordered by their commanding officer. Twelve men withdrew their objections "or it was found by the board that they had misunderstood the original questions" and weren't really conscientious objectors in the first place. In total, the Board of Inquiry heard 2,294 cases during its existence, and a majority of its subjects either relinquished their claims or were deemed insincere.[13] Between May 1917 and November 1918, of the 24 million men who registered for the draft, only 3,989 men pursued their objections after they had spent some time at camp—not even two hundredths of one percent. In a sense, then, Stone's tests worked. It is highly unlikely that among the 3,989 objectors who resisted all forms of military service there remained anyone whose stance was insincere, but the policy's success came at a cost—namely, that numerous citizens with sincere objections to organized killing found it impossible to claim a legal right that had been designed precisely for them.[14]

Years after the Armistice, then presiding over the Supreme Court, Harlan Fiske Stone received a letter from a former CO, who wanted to know if the Chief Justice who had ruled against most objectors' claims had had a change of heart. Even as he crafted a more durable legacy of civil libertarianism during his tenure on the nation's highest court, even as he voted in *West Virginia Board of Education v. Barnette* (1943) to affirm the rights of Jehovah's Witness children not to be required to salute the flag or recite the Pledge of Allegiance, Stone's answer was: he hadn't. "I believe that inasmuch as I must live in and be a part of organized society, the majority must rule, and that consequently I must obey some laws of which I do not approve, and even participate in a war which I may think ill advised," he wrote. In the later twentieth century, as America did battle with totalitarian enemies, the toleration of conscientious objectors was sometimes lauded as a sign of liberalism's durability. During the Vietnam War, CO provisions expanded, and the Supreme Court generally upheld them. The draft itself ended in 1973. But in America's first world war, objectors found little shelter in public opinion or the Constitution.[15]

Carrie Buck

It is thus clear that the Selective Service Act of 1917 shaped the lives of American men, whether they fought or not. But how did Selective Service affect American women? Little in the Selective Service Act applied directly to women, but the war's coercions of all its citizens' bodies laid the groundwork for new understandings of women's relationships to the state in the postwar era. And, significantly, the justification for that coercion provided by the Supreme Court in *Arver v. United States* would reappear in some surprising places.

In the 1929 case *United States v. Schwimmer,* the Supreme Court ruled that a pacifist woman who said she would not

Between June 1918 and the Armistice that November, Columbia School Law Dean Harlan Fiske Stone (pictured), Major Walter Kellogg of the U.S. Army Judge Advocate Corps, and Judge Julian Mack traveled across the United States interrogating 2,294 conscientious objectors stationed at the nation's military camps to determine their sincerity.

bear arms to defend the United States should be denied naturalization as a citizen. Rosika Schwimmer was a fifty-two-year-old Hungarian citizen who supported progressive, feminist, and pacifist causes. In 1921 she fled political persecution in Hungary and moved permanently to the United States. In September 1926, not as a test case but because she believed it would help her support her family, she applied for naturalization. Statutes at the time required that applicants be "attached to the principles of the Constitution" and take an oath to defend the United States "against all enemies, foreign and domestic." Asked on a form if she were "willing to take up arms in defense of this country," Schwimmer wrote that "I would not take up arms personally." Federal officials, likely

lobbied by the Women's Auxiliary of the American Legion, denied her naturalization petition. A series of cases brought Rosika Schwimmer before the U.S. Supreme Court in April 1929.[16]

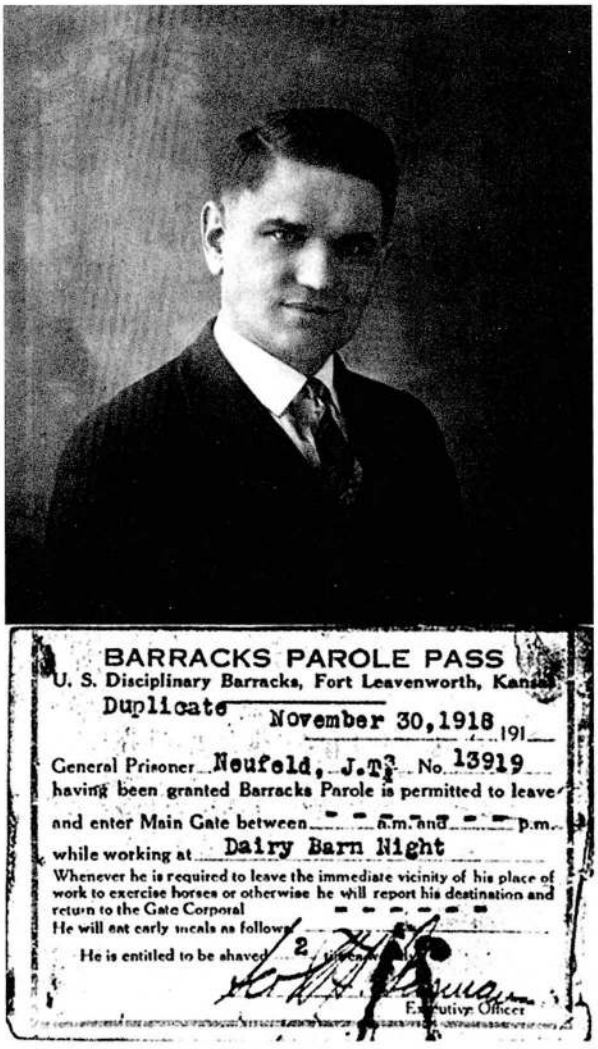
Ruling for the Court that May, Justice Pierce Butler insisted that Schwimmer's refusal to take up arms disqualified her for citizenship. "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution," he announced, and he cited *Arver v. United States* to support his views. Butler deemed irrelevant the fact that Schwimmer, a 52-year-old woman, was unlikely to be included in any military force. It was the principle that mattered. Rosika Schwimmer lived for the next twenty years in New York City as a resident alien. So did Marie Bland, a Canadian nurse whose petition for naturalization was struck down two years later. Relying on *Schwimmer* and *Arver* as precedents, the Court ruled that Bland's religious pacifism also made her ineligible for citizenship, despite the fact that she had actually served as a volunteer nurse for American soldiers in France during World War I.[17]

A more indirect—and deeply disturbing—appearance of *Arver* came in *Buck v. Bell,* a 1927 ruling by the Supreme Court upholding the provisions of a Virginia statute that authorized the sterilization of teenager Carrie Buck, then a patient at the State Colony for Epileptics and the Feeble Minded. The opinion is notorious for a remark by Justice Oliver Wendell Holmes, Jr. Reflecting upon the fact that Carrie Buck was purported to be the daughter of a "feebleminded" woman and the mother of another, Holmes opined cruelly that "three generations of imbeciles are enough."[18]

State sterilization laws such as Virginia's were relatively new, and some had been extended as part of wartime regulation of sex work around military camps—a federal power authorized by Section 13 of the Selective Service Act and upheld by the Supreme Court in the forgotten 1919 case of *McKinley v. United States,* which cited as its primary authority *Arver v. United States.* During the war, women suspected of prostitution were disproportionately young, working-class, immigrants, or women of color, often guilty of little more than enjoying public amusements or appearing in public in the company of a uniformed serviceman. The women soon found themselves detained, interned, and forced to submit to medical examination, at times without legal authority. At best, women were quickly released; others, particularly those with sexually transmitted diseases, languished indefinitely in hospitals and prisons, in makeshift detention centers, or workhouses—some behind barbed wire—where they performed manual labor under the watchful eye of armed guards.[19]

Suspected prostitutes were subjected to psychological examinations, and women found to be "feebleminded" were regularly turned over to institutions without their consent and with no formal hearing. Further complicating matters, between 1910 and 1917, sixteen states passed laws authorizing the sterilization of the feebleminded, and some of the presumptive prostitutes were sterilized. It is unclear how many women faced the strong arms of the law, of medicine, and of the nation's moral vigilance groups during the war. Official documents from the period report as few as 15,000 women arrested as prostitutes, but the number may be closer to 30,000 in federal facilities alone, excluding an even greater number who encountered local laws and organizations but were never formally arrested. It was, as Army Lieutenant George Anderson boasted, "a united and coherent front ... for the drastic suppression of the offence."[20]

Arguing on behalf of Carrie Buck before the Supreme Court in May 1927, attorney I.P. Whitehead urged the Court to recognize that the Virginia law "violates her



When John T. Neufeld, a Mennonite, claimed conscientious objector status, he was sentenced to fifteen years hard labor in the military prison at Leavenworth. After serving five months of his sentence, he was paroled to do dairy work and released.

constitutional right of bodily integrity and is therefore repugnant to the due process clause of the Fourteenth Amendment." Handing down the Court's opinion just ten days later, Justice Holmes disagreed. "The rights of the patient," he concluded, "are most carefully considered." In 2018, the United States marked the centennial of the end of World War I with small-town parades, statewide ceremonies, and an official service at Washington's National Cathedral. But the war was not memorialized in the Charlottesville, Virginia, cemetery, where Carrie Buck's small gravestone stands as a silent—and surprising—memorial to America's first world war. The passage in *Buck v. Bell* to which we must attend is not Holmes's remark about the "imbeciles," which was a trademark Holmesian epigram, but a distraction—an offhanded comment inconsequential to his argument. Rather, we should examine the analogy in Holmes's opinion that actually structured his thought. The involuntary sterilization of a feebleminded

woman, he claimed, was legally analogous to the noble sacrifices of a citizen-soldier. "We have seen more than once," Holmes wrote, "that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices." In his sweeping opinion, Justice Holmes cited no authority for this claim. Had he wished to, there was one close at hand: *Arver v. United States.*[21]

ENDNOTES

[1] My thanks to Clare Cushman, Jennifer Lowe, and David Pride at the Supreme Court Historical Society. Portions of this essay have previously appeared in Christopher Capozzola, **Uncle Sam Wants You: World War I and the Making of the Modern American Citizen** (New York: Oxford University Press, 2008).

[2] "Eighteen to Forty-Five," *New York Times,* September 15, 1918, sec. III, p. 10; Enoch H. Crowder, **Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918** (Washington, DC: Government Printing Office, 1919), 557.

[3] "Eighteen to Forty-Five."

[4] David M. Kennedy, **Over Here: The First World War and American Society** (New York: Oxford University Press, 1980); Joseph A. McCartin, **Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912–1921** (Chapel Hill: University of North Carolina Press, 1997); Lisa McGirr, **The War on Alcohol: Prohibition and the Rise of the American State** (New York: Norton, 2016); Ronald Schaffer, **America in the Great War: The Rise of the War Welfare State** (New York: Oxford University Press, 1991). On the Court's general deference to the expansion of federal authority during the war, see Alexander M. Bickel, **The Judiciary and Responsible Government, 1910–1921** (New York: Viking, 1990), 516–31.

[5] 40 Stat. 76 (1917); John Whiteclay Chambers II, **To Raise an Army: The Draft Comes to Modern America** (New York: Free Press, 1987), 41–71, 153–171.

[6] Quoted in Alfred Cornebise, **War as Advertised: The Four Minute Men and America's Crusade, 1917–1918** (Philadelphia: American Philosophical Society, 1984), 66.

[7] Fred D. Ragan, "An Unlikely Alliance: Tom Watson, Harry Weinberger, and the World War I Draft," *Atlanta Historical Journal* 25 (Fall 1981): 19–36.

[8] *Arver v. United States,* 245 U.S. 366 (1918), at 378. See also John Remington Graham, **A Constitutional History of the Military Draft** (Minneapolis: Ross and Haines, 1971); "Judge Speer to Hear Watson Cases Today," *Atlanta Constitution,* August 18, 1917, p. 10; "Draft Law Upheld by Supreme Court," *New York Times,* January 8, 1918, p. 3.

[9] Edna Shaw to Enoch Crowder, Box 179, Folder Missouri 17 (41–60), and Emma W. Wolschendorf to Enoch Crowder, Box 158, Folder Mass. 17 (81–100), both in States Files, Records of the Selective Service System (World War I), Record Group 163, National Archives and Records Administration, College Park, MD.

[10] Joan M. Jensen, **The Price of Vigilance** (Chicago: Rand-McNally, 1968).

[11] 40 Stat. 76 (1917), at 78. In March 1918, President Wilson identified provisions for alternative noncombatant service. "Defines Service for War Objectors," *New York Times,* March 22, 1918, p. 6.

[12] Alpheus T. Mason, **Harlan Fiske Stone, Pillar of the Law** (New York: Viking, 1956), 100–114; Mason, "Harlan Fiske Stone: In Defense of Individual Freedom, 1918–1920," *Columbia Law Review* 51 (February 1951): 147–69; Harry Barnard, **The Forging of an American Jew: The Life and Times of Judge Julian W. Mack** (New York: Herzl Press, 1974); "Draft Objectors to Be Segregated," *New York Times,* June 1, 1918, p. 5.

[13] Lillian Schlissel, ed., **Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967** (New York: E.P. Dutton, 1968), 130; Mason, **Harlan Fiske Stone**, 103; Walter Guest Kellogg, **The Conscientious Objector** (New York: Boni and Liveright, 1919), 127–30; "Sifts Draft Objectors," *New York Times,* June 28, 1918, p. 8. The remaining sixteen objectors at Camp Gordon were either transferred to Fort Leavenworth for further examination, were determined to be enemy aliens not subject to the draft, or in the hospital and unavailable for interview.

[14] Edward M. Coffman, **The War to End All Wars: The American Military Experience in World War I** (New York: Oxford University Press, 1968), 74; Frances H. Early, **A World Without War: How U.S. Feminists and Pacifists Resisted World War I** (Syracuse, NY: Syracuse University Press, 1997), 93; H.C. Peterson and Gilbert C. Fite, **Opponents of War, 1917–1918** (Seattle: University of Washington Press, 1968 [1957]), 123; Schlissel, ed., **Conscience in America,** 130–31. For an official account of the military's handling of conscientious objectors, see Crowder, **Second Report of the Provost Marshal General**, 56–60.

[15] Harlan Fiske Stone to Fred Briehl, in Mason, **Harlan Fiske Stone**, 105. On World War II, see Milford Q. Sibley and Philip E. Jacob, **Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947** (Ithaca, NY: Cornell University

Press, 1952); Rachel Waltner Goossen, **Women against the Good War: Conscientious Objection and Gender on the American Home Front, 1941–1947** (Chapel Hill: University of North Carolina Press, 1997); Shawn Francis Peters, **Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution** (Lawrence: University Press of Kansas, 2000).

[16] *United States v. Schwimmer,* 279 U.S. 644 (1929), at 646, 647; Ronald B. Flowers, **To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court** (Lanham, MD: Scarecrow Press, 2003); Beth S. Wenger, "Radical Politics in a Reactionary Age: The Unmaking of Rosika Schwimmer, 1914–1930," *Journal of Women's History* 2 (Fall 1990): 66–99.

[17] *United States v. Schwimmer,* at 650, 649, 651, 652; Henry B. Hazard, "Supreme Court Holds Madam Schwimmer, Pacifist, Ineligible to Naturalization," *American Journal of International Law* 23 (1929): 626–32; *United States v. Bland,* 283 U.S. 636 (1931); "Citizenship Denied to Arms Objectors," *New York Times,* May 26, 1931, p. 1. *Bland* was later reversed in *Girouard v. United States,* 328 U.S. 61 (1946).

[18] *Buck v. Bell,* 274 U.S. 200 (1927), at 207; Stephen Jay Gould, "Carrie Buck's Daughter," in **The Flamingo's Smile: Reflections in Natural History** (New York: Norton, 1985), 306–18; William E. Leuchtenburg, "Mr. Justice Holmes and Three Generations of Imbeciles," in **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York: Oxford University Press, 1995), 3–25.

[19] *McKinley v. United States,* 249 U.S. 397 (1919); Nancy K. Bristow, **Making Men Moral: Social Engineering during the Great War** (New York: New York University Press, 1997), 118–19; Mary Macey Dietzler, **Detention Houses and Reformatories as Protective Social Agencies in the Campaign of the United States against Venereal Diseases** (Washington, DC: Government Printing Office, 1922), 64; Estelle B. Freedman, **Their Sisters' Keepers: Women's Prison Reform in America, 1830–1930** (Ann Arbor: University of Michigan Press, 1981), 147; Barbara Meil Hobson, **Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition** (Chicago: University of Chicago Press, 1990), 176; Donald J. Pivar, "Cleansing the Nation: The War on Prostitution, 1917–1921," *Prologue* 12 (Spring 1980): 34; "Houses of Detention Planned for All Camps," *Atlanta Constitution,* April 2, 1918, p. 10. Women were the only targets of the wartime raids on prostitution; authorities ignored the calls of some reformers to crack down on their male solicitors.

[20] George J. Anderson, "Making the Camps Safe for the Army," *Annals of the American Academy of Political and Social Science* 79 (September 1918): 150; Dietzler, **Detention Houses,** 3–4, 47, 56; figures from **Allan M. Brandt, No Magic Bullet: A Social History of Venereal Disease in the United States since 1880,** expanded ed. (New York: Oxford University Press, 1987), 234, n. 118. Hobson, **Uneasy Virtue,** 176–77, suggests that no more than one third of interned women were actually commercial sex workers. Henrietta S. Additon, "Work Among Delinquent Women and Girls," *Annals of the American Academy of Political and Social Science* 79 (September 1918): 156, reports that in one study, a whopping forty-two of eighty-eight women examined were found to be feebleminded.

[21] *Buck v. Bell,* at 201, 207.

Feat of *Clay*: Muhammad Ali's Legal Fight against the Vietnam Draft

WINSTON BOWMAN

Introduction

Few cases are simultaneously as well known and as misunderstood as *Clay v. United States* (1971), the Supreme Court decision that overturned boxing legend Muhammad Ali's conviction for draft evasion.[1] Even many of those who remember the case erroneously believe that Ali served time for his beliefs.[2] Other observers have described *Clay* as a landmark in the history of religious freedom, although the Court's *per curiam* decision had little to say on that issue.[3] Moreover, the case broke relatively little new ground in the law of conscientious objection, even though it is probably the best-known conscientious objection case in Supreme Court history; indeed, the Court never actually held that Ali was a conscientious objector.[4] As an exemplar of the premise that personal belief is illegible to the machinery of the legal system, however, the case is virtually without parallel.

The whole investigative apparatus of the modern American state was brought to bear on the interrogation and interpretation of Ali's beliefs after he claimed that, as an adherent and minister of the Nation of Islam, he could not serve in the military. Often labeled the world's most famous man in his prime, Ali never lived a private life.[5] As his pleas progressed through the Selective Service System and the federal courts, however, the scrutiny accompanying his every word and deed increased. The Federal Bureau of Investigation (FBI), for example, conducted a remarkably detailed investigation into his background, interviewing his family, business partners, ex-wife, neighbors, and even high school teachers.[6] Recently declassified documents suggest the FBI also employed informants within the Nation of Islam who reported, *inter alia*, on Ali's activities with the group.[7]

Nevertheless, what strikes one who pores over the thousands of pages of Ali's court records is the extent to which the objective reality of his subjective beliefs remains utterly inscrutable for all that scrutiny. This is not simply a byproduct of the hesitancy

to dig into religious convictions that federal courts espoused both before and since *Clay*.[8] Indeed, as Jeremey Kessler has shown, conscientious objection stood as an exception to that general trend. In the draft context, many saw greater bureaucratic attention to individual belief as a bulwark of religious conscience.[9] Instead, Ali's case exemplifies the breakdown of that vision and the broader failure of attempts to fashion the administrative state into a guardian of individual freedom in mid-century America.

Ali's Conversion

Ali was born in Louisville, Kentucky, in 1942. His parents named him Cassius Marcellus Clay, Jr., and raised him in the Baptist tradition.[10] It seems likely that he was first exposed to the Nation of Islam in or around 1959. Over the course of the early 1960s, he attended events at mosques, but it is hard to say when he became a regular devotee.[11] Witnesses questioned as part of the FBI inquiry into Ali's conscientious objector status placed his conversion in every year from 1959 to 1964.[12] Although Ali's brother Rahman (née Rudolph) also converted, the rest of his family seems to have disdained Islam, and Ali appears to have kept his religious views to himself initially, at least in part because he feared their revelation would adversely affect his career.[13]

Shortly after scraping through high school, Ali won gold at the 1960 Olympics in Rome.[14] He subsequently turned professional and worked his way up the ranks until he astounded critics by defeating heavily favored champion Sonny Liston in 1964.[15] The young boxer's growing reputation in the ring was eclipsed only by his ebullient and self-aggrandizing public persona. Ali had a quick wit and a knack for playing both the heel and the clown. He also covered doubts and uncomfortable truths with boasts.[16] The champion's tendency to fudge facts in this way makes it difficult to gauge the accuracy of claims he later made about his religious conversion.[17] The swirl of controversy that followed him throughout the 1960s makes that task even harder.

Although he eventually became a national hero, Ali was, for a time, deeply unpopular with a breed of sports fan unaccustomed to a black athlete eager to tell anyone within earshot just how "great" and how "pretty" he was.[18] His association with a religious order mired by allegations of racial hatred and criminality damaged his public image for an even broader cross section of the public.[19] Prominent sports writer Jimmy Cannon went so far as to claim that Ali had embraced a "more pernicious hate symbol than [German champion Max] Schmeling and Nazism."[20] Ali became a national pariah in 1966 when, on finding his draft status had been reclassified such that he was now eligible for immediate induction, he pronounced that he had "no quarrel with them Viet Cong."[21] Coming at a time before many public figures had spoken against the war, Ali's statements ignited a blaze of negative public sentiment.[22] His lawyers later claimed, with some plausibility, that this unpopularity clouded the administrative decision-making process as Selective Service System officials received piles of mail demanding that they deny Ali objector status.[23]

Ali and the Selective Service System

As required by law, Ali had registered for the draft when he turned eighteen in 1960.[24] With American involvement in Vietnam then still in its infancy, he seems to have given little thought to the prospect of being inducted. Low scores on a military aptitude test meant that Ali was initially classified I-Y, a designation that rendered him unlikely to be called up for military service. As American involvement in the war intensified and the demand for troops grew, however, the military lowered its test standards and Ali was reclassified I-A on February 18, 1966.[25]

Cassius Clay celebrated his victory against Henry Cooper, heavyweight champion of Great Britain, in 1963. He had converted to Islam by then, having been first exposed to the Nation of Islam in 1959.

As his infamous "Viet Cong" remark suggested, Ali had no intention of joining the army. On February 28, 1966, he filed a form with his local draft board indicating for the first time that he would claim conscientious objector status.[26] In subsequent letters to the board, Ali articulated multiple arguments against his induction, including financial and family hardship.[27] The Department of Justice (DOJ) subsequently placed significant weight on these alternative justifications, arguing they showed that Ali's beliefs were insincere or, at the very least, that his religious objections were ancillary to his desire to maintain a lucrative boxing career.[28]

These arguments played into a conception of conscientious objection that dogged Ali's case: that to be sincere, an objection had to be an all-consuming and exclusive belief. This concept was nowhere contained in either the U.S. Code or the **U.S. Reports**, but it suffused both the public and legal dialogue about the case in a way seldom seen in other types of cases employing multiple alternative defenses or legal arguments. There is no inherent contradiction, for example, in claiming that joining the military would cause financial hardship *and* violate one's religious beliefs. Yet lawyers and judges routinely insinuated that the introduction of mammon into the conversation cast doubt on Ali's sincerity. This attitude also seems to have flown in the face of Supreme Court precedent, which held that an objector's secular criticisms of war did not negate his religious ones, although it seems to have been in keeping with the more widespread culture of skepticism toward any but the most pious forms of conscientious objection.[29]

Draft legislation placed most determinations of sincerity in the hands of local boards like the one Ali faced in Louisville. These boards were composed of laypeople recommended by governors and notionally appointed by the President. Should Ali fail to convince the board, he could appeal to a board of appeal, which would rule based on a hearing conducted by a lawyer or judge, an investigation report compiled by the FBI, and a legal recommendation from the DOJ. If the board members disagreed or the Director of the Selective Service System intervened, the National Selective Service Appeal Board (also known as the "Presidential Board") could hear a final appeal.[30]

To facilitate the rapid induction of hundreds of thousands of men, Congress excluded the draft bureaucracy from the sort of judicial review applied to decisions of other federal agencies.[31] There were only two routes open to most inductees seeking judicial review: (1) submit to induction and petition for a writ of habeas corpus or (2) refuse induction and face a criminal trial. Even when an objector came before a federal court, however, judges could only reverse draft board determinations unsupported by any "basis in fact," a standard of review courts often called "the narrowest known to the law."[32] Given the inherently ambiguous and abstract nature of the beliefs implicated in conscientious objection claims, it was rare that government lawyers could fail to find a single fact supporting a denial of objector status.

In an attempt to circumvent this process, Ali's attorneys launched a series of federal lawsuits in Kentucky and Texas that existed in parallel with his administrative proceedings in the Selective Service System.[33] These suits challenged the validity of the draft system itself, arguing that the selection process for draft boards systematically excluded blacks.[34] There was little question that the draft process involved few black decision-makers and tended to produce kinder results for whites. Even so, these suits were uniformly dismissed on procedural grounds, primarily because Ali had not exhausted his remedies in the Selective Service System or the criminal courts.[35]

Ali fared no better with the draft bureaucracy. The Louisville board rejected his initial request for a conscientious objector exemption, and he appealed.[36] At the next stage in the administrative proceedings, retired Kentucky state court judge Lawrence Grauman conducted a hearing using the FBI's detailed background report, Ali's live testimony, and evidence from witnesses Ali adduced to explain the Nation of Islam's attitudes to war.[37] Like virtually everyone the FBI had questioned, Judge Grauman concluded that Ali's pacifism was sincere, and he recommended that the board of appeal grant Ali's request for conscientious objector status.[38]

The DOJ Opinion Letter

Nonetheless, the DOJ's opinion letter recommended that the board reject Ali's appeal, arguing that he failed all three of the conscientious objector criteria. While he acknowledged that many witnesses had attested to Ali's sincerity, T. Oscar Smith, the Chief of the DOJ's Conscientious-Objector Section, emphasized the more ambiguous elements of those statements. For example, an attorney for the group of businesspeople sponsoring Ali's boxing exploits stated that Ali was as sincere "to the extent [he] could be sincere in a belief[,]" noting that Ali was prone to changing his mind. In view of Ali's capriciousness, the attorney stated that he "would not be surprised 'if a year from now [Ali] becomes disenchanted with the Muslims and voluntarily joins the United States Marines.'"[39] These ambiguities were reinforced, in Smith's view, by Ali's failure to assert his religious objections until his induction became imminent.[40]

The letter's reliance on the timing of Ali's objections was probably a stretch, however. Late-in-the-day conversions were

not uncommon in draft cases and sometimes posed difficulties for decision-makers. Although judicial precedents suggested that boards could *consider* the timing of claims in assessing sincerity, there was no rule *barring* delayed claims in the way the letter intimated. Smith incorrectly asserted that "a registrant has not shown overt manifestations sufficient to establish his subjective belief where ... his conscientious-objector claim was not asserted until military service became imminent." To the contrary, several judicial decisions both before and after *Clay* referenced the nick-of-time biblical conversion of Paul the Apostle on the road to Damascus in stressing that late objections did not preclude a finding of sincerity.[41]

On the religious belief and training component of Ali's claim, Smith attempted to parse the religious, racial, and political tenets of the Nation of Islam's teachings to make the case that "insofar as [Ali's objections] are based upon the teachings of the Nation of Islam, [they] rest on grounds which primarily are political and racial."[42] The Nation's status as a religion was complex, as it blended elements of political and racial theory with Islam and premillennial eschatology.[43] And the DOJ's view of the Nation, while it was contested, was mainstream in the 1960s. In 1964, for example, the Court of Appeals for the Second Circuit ruled that, despite possessing "some characteristics of a religious sect[,]" the Nation was primarily a political organization. On that ground, the Second Circuit questioned the view that the Nation's adherents should be "treated in the same way as are Catholics, Protestants and Jews."[44]

Despite this wariness of the Nation's religious bona fides in legal circles, however, the Warren Court's capacious interpretation of "religious belief" in draft cases should have militated strongly in Ali's favor. In *United States v. Seeger* (1965), the Court had held that seemingly secular beliefs that "occupie[d] a place in the life of its possessor parallel to that filled by the orthodox belief in God" were sufficient to meet the statutory requirements for religiosity.[45] The Court had reached this interpretation to avoid possible First and Fourteenth Amendment claims that the law discriminated against nonbelievers.[46] It was hard to argue that Ali's devotion to the Nation failed this standard even if one accepted the view that the group's tenets fused religion and politics in unusual ways. Ali was a frequent participant in events at mosques, a regular speaker at Nation events, and appears to have divorced his first wife in large part because she was unwilling to devote herself to the Nation.[47]

The letter's final claim was that Ali did not object to all military conflict, but only to fighting on the side of the white-dominated American government or, at most, for non-Muslims.[48] This position was more difficult to gainsay. As Justice William O. Douglas would later point out, although it was the draftee's individual beliefs that counted, Ali was affiliated with a global Islamic tradition that propounded a complex, but long-standing, doctrine of holy war.[49] And the Nation's more specific teachings rejected the notion of fighting for one's oppressors more than the concept of war itself.[50]

Smith's legal opinion letter emphasized Ali's testimony that he would join a war if Elijah Muhammad instructed him to do so on Allah's authority.[51] As Justice John Marshall Harlan later concluded, this language likely invoked religious wars akin to those contemplated by otherwise pacifist sects. Nonetheless, Ali did occasionally countenance the possibility that he would fight in a war furthering secular causes that he considered just. Shortly before he was charged with draft evasion, for instance, he claimed that, "[i]f I thought my joining the war and possibly dying would bring peace, freedom, justice and equality to 21 million so-called Negroes, they would not have to draft me. I would join tomorrow."[52] Off-the-cuff, hypothetical remarks like these might not necessarily have foreclosed Ali's conscientious objector

claims. Even so, they clouded the evidence of Ali's pacifism to an extent that it is at least plausible that the Supreme Court might have upheld Ali's conviction had the DOJ relied solely on selectivity.

For the time being, however, there was little sign that Ali's draft eligibility faced any chance of reversal. Apparently acting on the DOJ's recommendation, the board of appeal upheld Ali's classification. Although the board's decision was unanimous, Lieutenant General Lewis Hershey, the Director of the Selective Service System, initiated an appeal to the Presidential Board, which again upheld Ali's eligibility.[53] It is not entirely clear why Hershey appealed the decision, but it is plausible that he was keen to maintain an appearance of fairness in the induction of the nation's most high-profile draftee.[54] As Ali's setbacks began to pile up, he increasingly despaired of the chances that the government would recognize his objections. "[W]e're over there so that the people of Vietnam can be free[,]" he claimed, "[b]ut I'm here in America and I'm being punished for upholding my beliefs."[55]

To vindicate those beliefs in the courts, Ali would now have either to accept induction and petition for a writ of habeas corpus releasing him from the military or else refuse to join entirely and risk prosecution. On April 28, 1967, he chose the latter path by declining induction at a draft center in Houston (where he had relocated during the draft proceedings).[56] Moments after receiving news that Ali had formally refused to enter the military, the New York Athletic Commission, a powerful regulatory body in the boxing world, suspended Ali's boxing license.[57] Other licensing organizations soon followed suit, making it virtually impossible for Ali to box in the United States. On May 8, 1967, a federal grand jury in the U.S. District Court for the Southern District of Texas indicted Ali for failure to submit to induction.[58]

Ali's legal team for the trial was led, as it had been throughout much of the administrative process, by Hayden Covington and Quinnan Hodges. A Texas attorney, Hodges served as Covington's local counsel and provided assistance at several phases of the case. Himself originally from Texas, but long since based in New York, Covington had been general counsel to the Watch Tower Tract and Bible Group, the primary national organization of Jehovah's Witnesses, for more than two decades. Although he had won several landmark Supreme Court victories for the Witnesses, who frequently claimed objector status, in the 1940s and 1950s, Covington had fallen out with the sect's hierarchy and been "disfellowshipped" in 1963.[59]

At trial, Covington opted not to emphasize the potential weaknesses in the DOJ's legal recommendations, primarily relying on other defenses including arguments that Ali should be classified as a religious minister and that the draft process itself was unfair.[60] Covington likely should have been aware that the DOJ's recommendations offered a real opportunity to attack Ali's classification, however. Several years earlier, he had successfully argued an analogous case, *Sicurella v. United States* (1955), in which the Supreme Court reversed the conviction of a conscientious objector because of a flawed DOJ recommendation.[61] Importantly, in *Sicurella* the Court had held that erroneous advice on *any* element of a conscientious objector claim required reversal of a draft evasion conviction even if the board might have decided the case on other, valid grounds. The Court reasoned that, because boards did not produce written opinions stating the rationale for their decisions, it was impossible to tell whether an objector's claim had been denied on proper or improper grounds.[62]

Ali's trial began on June 19, 1967, and lasted less than two days. The prosecution case was straightforward: Ali was draft-eligible and he refused to be drafted. After District Judge Joe Ingraham restricted his ability to introduce evidence on the racial disparities in the draft system, Covington

attempted to establish that the government had rushed through the classification process and could not possibly have considered the thousands of pages of documents in the file in the time taken to decide Ali's initial classification and subsequent appeals. He also sought, without much success, to establish that the boards had been influenced by a host of negative press clippings and correspondence that was included in Ali's draft record.[63]

The court then heard protracted argument from Covington, Hodges, and District Attorney Morton Susman as to whether there was a basis in fact for Ali's draft classification. At this stage, Covington arguably missed a chance to drive home the flaws in the DOJ's legal assessment of Ali's sincerity and religious beliefs, as again he focused on other arguments. Judge Ingraham ruled that there had been an adequate basis in fact for denying Ali's conscientious objector claims, based largely on the timing of those claims. This logic was akin to that employed by the recommendation letter itself: the timing of Ali's conscientious objection was too convenient to be credible. At the very least, the judge reasoned, it provided *some* basis for the board's determination, and the court could not go beyond that baseline assessment to evaluate whether the board had in fact reached the "correct" result.

Judge Ingraham's logic on that point was conventional, even though it was ultimately overruled, and the trial itself was so straightforward that one could scarcely fault the judge's impartiality before the jury. Nevertheless, his language outside the presence of the jury occasionally suggested that Ingraham had little love for Ali or the positions he represented. Indeed, at a few points, Ingraham let slip statements that today would likely give rise to accusations of racial bias. He lamented, for instance, that the manner of address for older black men had changed over the years, referred to Mexican immigrants as "wetbacks," and feigned ignorance of the meaning of the word "discrimination."[64]

With the basis-in-fact question resolved, there was little surprise when the jury returned a guilty verdict in approximately twenty minutes.[65] Judge Ingraham sentenced Ali to the maximum penalty of five years in prison and a $10,000 fine. In setting the sentence, the judge noted that the case would almost certainly be appealed and that, even if the appeal was unsuccessful, the sentence could be subject to reduction. The judge indicated that if he showed Ali clemency in the initial sentence and that sentence was subsequently reduced, it could produce an unduly liberal result. Although there were several other examples of judges imposing the maximum sentence on draft evaders, it appears that Ali's punishment was unusually severe. Covington claimed that the average sentence was eighteen months, and even Susman indicated he would not oppose a lighter sentence. Importantly, however, the judge permitted Ali to remain free on bail during his appeal, which meant that he stayed out of prison.[66]

Ali's freedom was limited in other important ways by the verdict, however. Shortly after the trial, he filed a motion requesting permission to leave the country for a boxing match in Japan. While Ali had not testified during his trial, he took the stand in support of this motion. Although Ali assured the court he would not flee once abroad, Susman used the opportunity to paint him as a disloyal citizen who would likely stay abroad if permitted to leave. The prosecutor launched a series of pointed questions about Ali's participation in a peace rally in California, for instance, suggesting that he had encouraged other young people to follow his example in evading military service. Although Ali insisted that, for all his criticisms of the war, he remained a loyal American, Judge Ingraham denied his motion and ordered him to turn in his passport.[67]

Since Ali could neither fight abroad nor at home, this ruling seemed to spell the end of his professional boxing career.

Initial Appeal

When Ali appealed his conviction to the Court of Appeals for the Fifth Circuit, he did so without Covington's assistance. It appears the two fell out shortly after the trial, and Hodges took charge of the hearing on Ali's travel request. Covington subsequently sued Ali for $284,615 in fees he claimed Ali had failed to pay him.[68] Though the grounds for this disagreement were unclear and Ali subsequently expressed his gratitude for Covington's work, the attorney's legal strategy had not borne much success to that point, and even Judge Ingraham had seemed unimpressed with several of the arguments at trial.

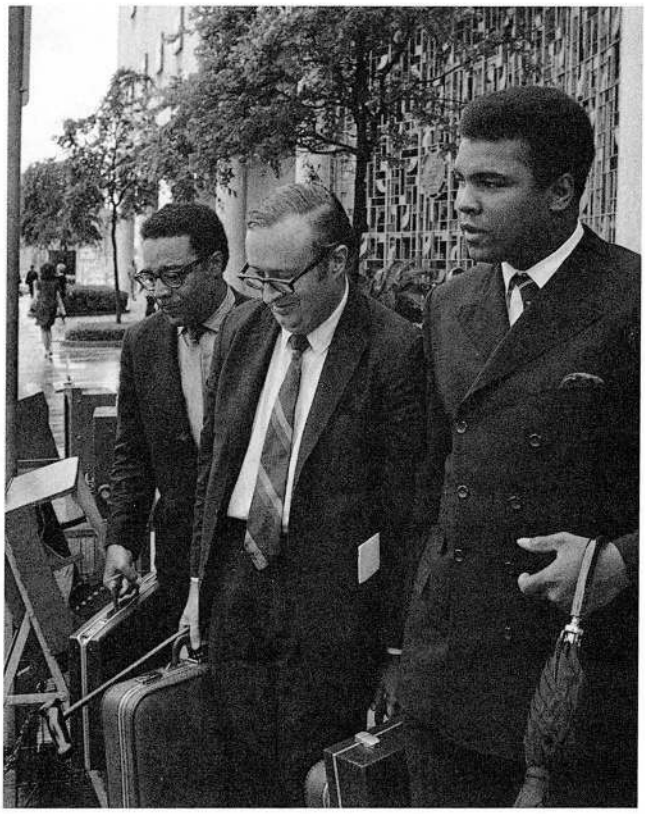
Ali's new legal team was led by civil rights lawyers Charles Morgan, Jr., and Chauncey Eskridge. Morgan had built a sterling reputation as an advocate capable of ruffling feathers in his native south. His most famous victory came in the seminal voting rights case of *Reynolds v. Sims* (1964), in which the Supreme Court established the "one person, one vote" standard for electoral apportionment, enhancing the efficacy of urban and African-American votes in many previously gerrymandered areas of the country.[69] Eskridge, who had previously worked with Ali on other legal matters, was among the nation's best-known black lawyers and had represented the Southern Christian Leadership Conference, an important civil rights organization, along with its founding president, Martin Luther King.[70]

Morgan and Eskridge focused much of their attention on attacks on the fairness of the trial and administrative procedures. Although they also argued that Ali was entitled to conscientious objector status, the court appears to have given little credence to this argument. Judge Robert Ainsworth, Jr.'s opinion for the unanimous Fifth Circuit three-judge panel relied on the evidence presented in the DOJ letter to hold there was an adequate basis in fact for the finding that Ali's beliefs were not "truly held[.]" The court of appeals did not, however, delve further into the adequacy of Smith's reasoning, but simply stated that "the threshold question of sincerity" was one for the draft bureaucracy, rather than the courts.[71]

Although Ali and his lawyers had failed to persuade the court, by the time the Fifth Circuit issued its opinion in 1968, the nation was gradually beginning to reevaluate both the war in Vietnam and the value of objections like Ali's. When Ali decried American intervention in Vietnam in 1966, he spoke for a small minority of the public. At that time, most Americans continued to credit the Johnson Administration's argument that the war was essential to stem the spread of Communism in Asia.[72] Indeed, this attitude briefly entered Ali's case when Susman expressed disbelief that Ali did not consider the Vietnam War a defensive war against Communism.[73] As the death toll began to mount and news from the front became increasingly negative, however, many Americans soured on the war. Protests on university campuses and city streets across the nation spread a growing sense of dissatisfaction with the war that was not mollified by the election of Richard Nixon. Although Nixon announced that he had a plan to end the war quickly, it continued to drag on as the decade came to a close, leading an increasing number of Americans to question the war's purpose and the legitimacy of the draft.[74] As Ali's case moved its way up and down the judicial system during the appeals process, it did so against a backdrop of changing attitudes about his claims.

Remand and Second Appeal

Even so, the Supreme Court might not have taken Ali's initial appeal from the Fifth



Chauncey Eskridge (left) and Charles Morgan Jr. (center) represented Muhammed Ali in the Fifth Circuit appeal in 1969. Their arguments focused on the fairness of the trial and on administrative procedures, not on the sincerity of Ali's conscientious objector views.

Circuit's decision. The case was saved when the DOJ revealed, while the Supreme Court appeal was pending in 1969, that the FBI had engaged in a series of illegal wiretaps that might have affected several cases then before the Court, including Ali's.[75] The Court then remanded the case to the trial court for a hearing as to whether the wiretaps had tainted Ali's conviction.[76]

On remand in the District Court, Judge Ingraham again presided. Although he made no explicit mention of the gravity of the government's actions, he seems to have taken the surveillance issue, with its corresponding risk of reversal, very seriously; indeed, the hearing on remand lasted considerably longer than the initial trial. At issue were five wiretapped conversations involving Ali, including two conversations with Elijah Muhammad and a conversation between Ali and the now-deceased King, with both Muhammad and King having been the subjects of sustained surveillance efforts.[77] The government argued that one of the five messages had been authorized by the Attorney General for the purpose of foreign intelligence surveillance and that its contents should not be divulged to the defense for security reasons.[78] Each of the other conversations was recorded only in the form of a brief memorandum summarizing the content of the conversation.[79]

Ali's attorneys argued that the revelation of these conversations warranted substantial investigation into any other surveillance involving Ali and whether the contents of the eavesdropped conversations had tainted the FBI's and Justice Department's handling of Ali's draft case.[80] Judge Ingraham, however,

Between the time Ali publicly objected to the Vietnam War in 1966 and the Supreme Court heard his case, the death toll mounted and public opinion turned against the war. Above, U.S. troops of the 173rd Airborne Brigade pursued the Viet Cong along the Cambodian border in March 1967.

denied both these claims, citing concerns that Ali's lawyers were attempting to use the litigation process to create a fishing expedition into government practices.[81] Judge Ingraham did, however, rule that Ali's attorneys were entitled to view the contents of the four domestic conversations and to question the FBI agents involved in the surveillance. He also permitted the lawyers to question the attorneys who contributed to the DOJ's recommendation letter to the board of appeal.[82]

This testimony, the judge ruled, established that the conversations formed no part of the determination of Ali's draft case.[83] Moreover, he reasoned that the content of the conversations themselves was so innocuous that it could have had no meaningful impact even if the information had been disclosed to the Justice Department lawyers.[84] For instance, in his conversation with King, Ali apparently warned the civil rights icon to "watch out for them whities."[85] Ali's lawyers argued that this use of a pejorative racial term could have informed the DOJ's conclusion that Ali's objections to the draft were primarily predicated on racial and political, rather than on religious, grounds. Judge Ingraham, however, reasoned that:

> The common slang reference was not within a context which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, ... there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt.[86]

Finally, Judge Ingraham ruled that the defense was not entitled to disclosure of the fifth conversation on the grounds that its secrecy was in the national interest. After reviewing the conversation *in camera*, however, the judge ruled that its contents were unlikely to have prejudiced the government's handling of Ali's draft case.[87] To whom Ali was talking and what they discussed remain unclear.

After a second appeal to the Fifth Circuit failed, Ali again found himself before the Supreme Court in the 1970–1971 term.[88] Though his distinct lack of success at every prior phase of the case might not have augured well for his chances in this final appeal, several developments inside and outside the courtroom may have given the former champion cause for cautious optimism by the early 1970s. Arguments that conscription unfairly discriminated against racial minorities and poor whites further undermined the legitimacy of the system in the eyes of an increasing number of Americans. As a consequence, views on the fairness of both the war and the draft that had once seemed radical had become increasingly commonplace. In a special message to Congress in 1970, for example, even President Nixon acknowledged that "[w]e all know the unfairness of the present system[.]"[89] Against this backdrop, many began to see Ali's lengthy opposition to mandatory military service as a principled stand against an arbitrary system rather than an act of petulance or cowardice.

Ali channeled this changing mood effectively. He arguably made an attractive symbol for the antiwar movement, as his race and manifest masculinity helped to counter the stereotype of the effete, privileged, white objector. He turned this quality, along with his personal charm and passion for conscientious objection, into a second career, touring the nation's universities to give a popular series of speeches about his draft resistance.[90] This, in turn, led to renewed invitations to appear on mainstream television shows for interviews and self-parodying acting cameos. He endorsed a fast-food chain known as "Champ Burger." He even appeared on Broadway.[91] Much as the public attitude toward the war had cooled over the course of Ali's legal case, perceptions of Ali himself began to warm as the image of the gregarious former champ displaced that of the militant black radical in the public imagination. Finally, in 1970, Ali had regained the right to fight. An important part of that process came in a federal civil suit in the U.S. District Court for the Southern District of New York, where Judge Walter Mansfield found that the New York Athletic Commission had unfairly singled Ali out for sanctions in violation of the Fourteenth Amendment's Equal Protection Clause.[92] Ali won two bouts before narrowly losing to "Smokin' Joe" Frazier in the so-called Fight of the Century just weeks before oral arguments in *Clay v. United States*.[93] For once, however, Ali would have better luck in court than in the ring.

Clay v. United States in the Supreme Court

In contrast to many other phases of the case, which had dealt with multiple legal issues, in this appeal the Supreme Court focused on a single question: Should Ali's conviction be vacated "because the denial to [Ali] of a conscientious exemption may have been based upon the DOJ's erroneous characterization of his objections to participate in wars as 'political and racial' rather than 'religious'"?[94] Justice William J. Brennan seems to have felt that, in view of the mounting suspicion that the draft process itself was not fairly administered, the Court should not reject such a high-profile conscientious objector claim without at least hearing Ali's arguments. Although Brennan believed the Court's review should have been broader, he apparently persuaded some of his more reluctant colleagues to grant certiorari in *Clay* on this single issue.[95]

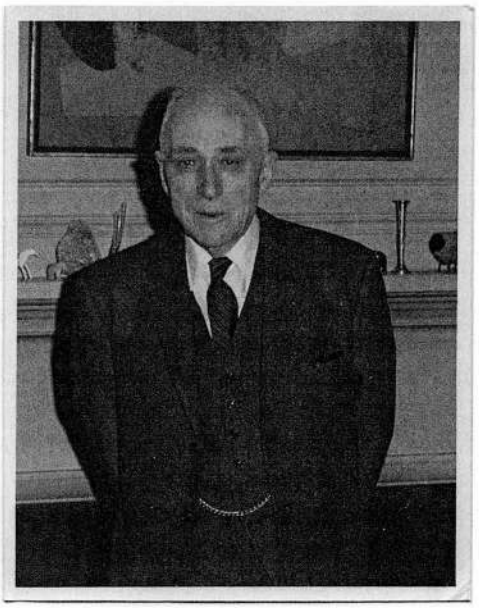
Both sets of lawyers seemed intent on broadening the appeal well beyond the question presented at oral argument, however. Solicitor General Erwin Griswold effectively conceded that Ali's beliefs were sincere and religious, but he attempted to sidestep those issues by claiming that the only material ground on which the DOJ had made its recommendations was that Ali's objections to war were selective.[96] As law clerk Robert Gooding, Jr., noted in a memorandum to Justice Harry Blackmun, this was probably not a "fair reading" of Smith's recommendation.[97] Griswold, however, likely felt that the selectivity issue provided the government with its strongest argument in light of the apparent weaknesses in the DOJ's earlier analysis.

Arguing the case for Ali, Eskridge claimed that Ali met all three conscientious objection criteria. Some commentators, and a few of the Justices, criticized Eskridge's approach for needlessly confusing the issues in the case.[98] By broadening his arguments to include questions of selectivity, Eskridge also risked playing to the strengths of the government's case. Indeed, the lawyers debated that issue to such an extent at oral argument that Justice Potter Stewart expressed concern that the lawyers were arguing a different case from the one for which the Court had granted certiorari.[99] This seemed to suit Griswold's purpose. As the question of selectivity was a close one, the Court was less likely to overturn the Selective Service System's ruling on that issue, particularly given the level of deference accorded to draft classifications.

Following oral argument, the eight Justices who heard the case—Justice Thurgood Marshall had recused himself because he was Solicitor General when the DOJ dealt with the selective service appeal—met to deliberate and to give initial indications as to their likely votes.[100] It appears that a 5–3 majority tentatively voted to affirm Ali's conviction. Notes taken by Justices Blackmun and Douglas, however, indicate that some of those voting to affirm considered the case very close.[101] Justice Blackmun's interoffice memoranda suggested that he was undecided prior to oral argument but was unimpressed with the case laid out by Eskridge (Blackmun, who had a habit of grading lawyers' performances, gave Eskridge a "C").[102] Similarly, Justice Byron White appears to have specifically acknowledged that he might ultimately change his vote.[103]

Chief Justice Warren Burger assigned the writing of the Court's majority opinion to Justice Harlan. At the urging of a clerk, who evidently favored reversing Ali's conviction, Harlan read excerpts from Elijah Muhammad's **Message to the Black Man**, which eventually persuaded Harlan that the government's conclusion on the question of selectivity was erroneous.[104] Harlan reasoned that the wars countenanced by the Nation of Islam were comparable to the apocalyptic fight between good and evil contemplated by members of other pacifist religions.[105] Ali's testimony at Judge Grauman's hearing confirmed a similar reading of his belief that he should fight only in the unlikely event that Allah, acting through Elijah Muhammad, commanded him to do so. On June 9, 1971, Harlan wrote a letter to the Chief Justice informing him that he would be changing his vote and lamenting that this left the Court both in a 4–4 tie and with little time before the end of the Court's term to produce a new opinion.[106] Apparently attempting to persuade the other Justices in the erstwhile majority, Harlan then circulated a memorandum containing a draft opinion reversing Ali's conviction.[107]

Justice Stewart followed suit by circulating an alternative opinion based on the ground that Griswold had conceded that the DOJ had erred in advising the board that Ali was insincere and that his beliefs were not religious.[108] This opinion relied squarely on *Sicurella*'s rule that selective service decisions supported by multiple legal rationales must be overturned if any of the those rationales turned out to be flawed. In



At the urging of his clerk, Tom Krattenmaker, who opposed the Vietnam War and favored reversing Ali's conviction, Justice John M. Harlan (pictured in 1970) read excerpts from Elijah Muhammad's book *Message to the Black Man*. Harlan concluded that wars countenanced by the Nation of Islam were comparable to the apocalyptic fight between good and evil contemplated by members of other pacifist religions.

Ali's case, as the board could have reached its decision on the incorrect grounds that his objections were neither sincere nor religious, there was no need to decide the harder selectivity question. Stewart's opinion persuaded a majority of his colleagues, who adopted it as the Court's *per curiam*.[109]

Although Justice Harlan had initially turned the case in Ali's favor, he felt that the *per curiam*'s reasoning pressed Griswold's concessions too far. While Griswold had acknowledged Ali's sincerity and religiosity, he had also claimed that the DOJ had only mentioned those issues to support its defensible argument that Ali's beliefs were selective. The *per curiam* rejected that reading, stating that Smith had advanced three separate rationales, two of which were incorrect. These errors would be dispositive regardless of any government concessions on appeal. Adopting a more limited approach, Justice Harlan wrote a brief concurring opinion that abandoned his original theory. He noted that part of Smith's letter might be read to set up a bright-line rule that barred all conscientious objector claims made shortly before induction. Several precedents had established there was no such bar on last-minute objections provided that they met other statutory criteria. As the board might have relied on this erroneous advice, Harlan argued the conviction should have been reversed.[110]

Justice Douglas also wrote a separate concurring opinion that in places showed that Douglas had initially drafted it as a dissent. Engaging in an analysis of Islamic traditions he had learned about on his personal travels in the Middle East, Douglas argued that Ali's objections *were* selective. However, in Douglas's view the statutory distinction between selective and universal objections to war was unconstitutional because it improperly discriminated between religious sects, like the Quakers, that embraced a broad-based pacifism and those whose teachings only forbade adherents from engaging in "unjust" wars.[111] Douglas's concurring opinion, not joined by any other member of the Court, was the only judicial opinion to hold that Ali's beliefs were protected by the Constitution.

On the day the Court heard oral arguments in *Clay*, Justice Blackmun privately despaired that "[t]he Court will be excoriated whether it upholds or reverses" Ali's conviction.[112] Some detractors griped that Ali had avoided the draft largely through his ability to afford a lengthy legal challenge beyond the financial reach of ordinary inductees. Nevertheless, fading support for the war and Ali's surging personal popularity ensured that the Court's decision was heralded by most observers.[113] Much of the reaction arguably focused on issues other than those on which the Court had ruled. While some media outlets noted that the Court's decision turned on the DOJ's flawed legal advice, many saw the decision as a broader vindication of Ali's religious rights

or a symbolic validation of the ability of one man to speak truth to power, an impression that grew stronger over time.[114] Ali's decision to follow a more moderate path as the Nation of Islam splintered in the 1970s made his religious and racial views more palatable to a broader range of white Americans than they had been in the mid-1960s. Increasingly, public portrayals of Ali's draft resistance deemphasized the more radical elements of his opposition to the war. A series of popular books and films portraying his accomplishments further inculcated a heroic view of Ali's objections to the draft. In 2005, President George W. Bush awarded Ali the Presidential Medal of Freedom, the nation's highest civilian honor, noting, in language that would have been unthinkable forty years earlier, that Ali's "deep commitment to equal justice and peace has touched people around the world."[115]

Conclusion

There are a few striking takeaways from Ali's legal saga. The first is relatively banal, but one should acknowledge that Ali's case reflected his remarkable level of personal tenacity and courage. His contemporary critics were almost certainly right that he would never have been able to sustain his five-year legal fight had he not been extraordinarily wealthy. And it seems likely that even with all his resources, the Supreme Court might not have taken his case had he not also been one of the most famous figures in American life.[116] Yet Ali's dogged insistence that the government could not force him to fight was an essential ingredient of the case, as it gave the lie to suggestions that his stated convictions were insincere or prompted by convenience. In 1966, it was probably fair for a witness to muse about the prospect of Ali one day joining the marines on a whim.[117] By 1971 no one could seriously make such a remark. This may also suggest ways that the arduous litigation process, and especially the swirl of hatred and controversy that enveloped Ali in the aftermath of his "Viet Cong" remark, reinforced and deepened his beliefs, including his pacifism.

Arguably, however, the ways American culture dealt with and processed beliefs like Ali's had at least as much impact on the case's outcome as the beliefs themselves. The Justices, after all, spent relatively little time scrutinizing Ali's individual beliefs in determining whether they comported with the statutory and precedential standards for conscientious objection. A radical black man protesting the draft may not have been embraced by mainstream America in the early 1970s, but he might well have been better understood then as a cultural "type" than he was in 1966.

Finally, the fact that the Supreme Court went from a 5–3 decision against Ali to a unanimous decision in his favor suggests the surprisingly open texture of seemingly rigid and narrow legal principles once they were overlaid on such a malleable and unknowable subject as individual belief. Perhaps, in the end, the case is also a caution about the folly of trying to fit such beliefs into boxes in the first place.

Author's Note

The views expressed in this article do not necessarily reflect those of the Federal Judicial Center or the federal judiciary. I am grateful to Clara Altman, John Cooke, Jake Kobrick, Susanna McCrea, and Kara Swanson for their advice and assistance in developing this article. Any errors or omissions are my own.

ENDNOTES

[1] *Clay AKA Ali v. United States*, 403 U.S. 698 (1971).

[2] *Cf.*, Eileen Sullivan, "Trump Says He's Considering a Pardon for Muhammad Ali," *New York Times*, June 9, 2018, p. A12 (discussing President Trump's suggestion of an unnecessary posthumous pardon for Ali).

[3] *See, e.g.*, L.I. Brockenbury, "Patience Pays off for Muhammad Ali," *Los Angeles Sentinel*, July 1, 1971,

p. B2 (equating the significance of the case to that of *Brown v. Board of Education*, 347 U.S. 483 (1954) and claiming that the Court held that Ali "measured up in all respects to that of conscientious objector on religious grounds"). In fact, only Justice William O. Douglas's concurring opinion reached the issue of religious freedom, and the Court nowhere stated that Ali had been entitled to conscientious objector status. *Clay*, 403 U.S. at 705–10 (Douglas, J., concurring).

[4] Perhaps the most generous account of its legal significance states that it "compendiously set forth" existing standards. Andreas F. Quintana, "Muhammad Ali: The Greatest in Court," *Marquette Sports Law Review*, vol. 18 (2007), pp. 171, 193.

[5] *See* Bob Greene, "Muhammad Ali Is the Most Famous Man in the World," in Gerald Early, ed., **The Muhammad Ali Reader** (New York: Harper Collins, 1998): 215–26.

[6] *See* T. Oscar Smith to Chairman, Appeal Board, November 25, 1966, reproduced as Defendant's Exhibit No. 103 in *United States v. Cassius Marsellus Clay, Jr. Also known as Muhammad Ali*, Case no. 67H94, Criminal Case Files, 1908–1979 (48SO69A); Records of the U.S. District Courts for the Southern District of Texas, Record Group 21; National Archives at Fort Worth, Texas, folder 9 (hereinafter, "DOJ Opinion Letter").

[7] *See* Memorandum, SAC, Chicago to Director, FBI (February 28, 1966), Federal Bureau of Investigation, *Muhammad Ali Vault Records*, Part 1, 9 available at https://vault.fbi.gov/muhammad-ali (relaying information from a Nation of Islam meeting involving Ali).

[8] *See, e.g., United States v. Ballard*, 322 U.S. 78, 86 (1994); *Thomas v. Review Bd.*, 405 U.S. 707, 715–16 (1981).

[9] *See* Jeremy Kessler, "The Administrative Origins of Modern Civil Liberties Law," *Columbia Law Review*, vol. 114 (2014), p. 1083. The broad definition of religious belief and training articulated by the Supreme Court in 1960s selective service cases may be consonant with the Court's religious inquiry exception. *Cf.*, William P. Marshall, "*Smith, Ballard*, and the Religious Inquiry Exception to the Criminal Law Fifth Annual Criminal Law Symposium: Criminal Law & The First Amendment: Is (Should) *Brandenburg* (Be) Good Law in a Post-9/11 World: Should Free Exercise of Religion Ever Be a Defense to an Otherwise Valid Criminal Law, or Did *Smith* Get It Right," *Texas Tech Law Review*, vol. 44 (2011), pp. 239–59.

[10] DOJ Opinion Letter, 72; Muhammad Ali, "The Champ," in Alice Lynd, ed., **We Won't Go: Personal Accounts of War Objectors** (Boston: Beacon Press Books, 1968): 226.

[11] *See* Howard L. Bingham and Max Wallace, **Muhammad Ali's Greatest Fight: Cassius Clay vs. The United States of America** (Lanham, MD: Rowman & Littlefield Publishing Group, Inc., 2000): 62–63. Ali himself pegged his conversion to 1961 at a draft board hearing, but Bingham and others have questioned this date. *See* Muhammad Ali, "The Champ," p. 226.

[12] *See generally*, DOJ Opinion Letter. Ali himself gave contradictory timings for his conversion, although the one on which he based his initial request for objector status in 1966 stated he had been a member of the Nation of Islam for "upward of five years." Quoted in *ibid.*, p. 75.

[13] *See* William Verigan, "Clay Most Controversial Champion Since Johnson," *Indianapolis News*, April 24, 1967, p. 30.

[14] Earl Ruby, "Clay Wins Gold Medal in Olympic Boxing," *Louisville Courier-Journal*, September 6, 1960, p. 1.

[15] Jack Cuddy, "Clay Wins Title in TKO—Liston Can't Start 7th," *Philadelphia Inquirer*, February 26, 1964, p. 40.

[16] Although he could barely swim, for example, to get a photo spread, he lied to *Life*'s underwater photographer that he trained by running in pools. Before his fight with Liston, he distracted people from rumors about his involvement with the Nation of Islam by posing for humorous photos with The Beatles. By all accounts, he was privately terrified of Liston's punching power, as Liston had twice knocked out the previous titleholder in less than three minutes. Nevertheless, he publicly boasted that he would "float like a butterfly and sting like a bee" and that he couldn't wait to crush the "big ugly bear" in the ring and then "build myself a pretty home and use him as a bearskin rug." *See* Bingham and Wallace, **Muhammad Ali's Greatest Fight,** 51–52.

[17] Ali produced a ghostwritten autobiography in 1971, for instance, several of the claims in the book were inserted or modified at the request of the Nation of Islam, and Ali subsequently acknowledged that many of the details were inaccurate. *See generally*, Muhammad Ali and Richard Dunham, **The Greatest: My Own Story** (New York: Random House, 1975). Perhaps the most prominent example of this penchant for apocrypha included a frequently recounted story that Ali became disillusioned with white America when he was refused service at a restaurant in his hometown while wearing his gold medal and that he tossed the medal in the Ohio River in response. In fact, the whole story was fabricated; Ali simply had misplaced his medal.

[18] *See, e.g.*, George Hower, "The World Is Full of Surprises Today," *Santa Rosa Press Democrat*, February 26, 1964, p. 21 (quoting a radio interview in which Ali made such boasts); Jose Torres, "*Sport* Interview: Muhammad Ali," in Early, **The Muhammad Ali Reader,** 207.

[19] For a further-reaching exploration of the perception of the Nation and related black power organizations in

mid-century America, *see* Peniel E. Joseph, **Waiting 'Til the Midnight Hour: A Narrative History of Black Power in America** (New York: Holt, 2007).

[20] *Quoted in* Thomas S. Newman, "Muhammad Ali nee Cassius Clay (the *New York Times*' coverage of Muhammad Ali from September 6, 1960, to April 30, 1967)" M.A. thesis, University of Montana, 1981, p. 23.

[21] *Quoted in* "Board in Kentucky Refuses to Reclassify Clay as Conscientious Objector," *New York Times*, January 11, 1967, p. 62.

[22] *See* Hugh McIlvanney, "The Fight," *The Observer*, May 15, 1966, p. 21 (noting that "most white Americans and some Negroes" turned against Ali on the announcement of his affiliation with the Black Muslims, but even his remaining supporters "were soured" by his Viet Cong remark).

[23] *See Brief and Appendix for Appellant*, 75–79 in *Cassius Marsellus Clay, Jr. v. United States of America*, May 6, 1968; Case no. 24991, Case Files, 1891–1978 (5–9); Records of the United States Court of Appeals Fifth Circuit; Record Group 276; National Archives at Fort Worth, Texas.

[24] DOJ Opinion Letter, 73.

[25] *Ibid.*

[26] *See Clay v. United States*, 397 F.2d 901, 905 (1968).

[27] DOJ Opinion Letter, 82–85.

[28] *Ibid.*

[29] *See, e.g., Sicurella v. United States*, 348 U.S. 385, 391 (1955) (noting that once a registrant "comes within §6(j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.").

[30] *See generally, Universal Military Training and Service Act*, 65 stat. 75 (1951).

[31] *See ibid.* at §(6).

[32] *See, e.g., Blalock v. United States*, 247 F.2d 615, 619 (5th Cir. 1957); *Matyastik v. United States*, 392 F.2d 657, 658 (5th Cir. 1968); *Clay v. United States*, 397 F.2d 901, 915 (5th Cir. 1969).

[33] *See Ali v. Breathitt*, 268 F. Supp. 63 (1967); *Ali v. Connally*, 266 F. Supp. 345 (1967).

[34] *See, e.g., Complaint, Muhammad Ali, also known as Cassius M. Clay, Jr. et al v. John B. Connally, Governor of Texas et al*, April 25, 1967; Case no. 67H333, Civil Case Files, 1938–1976 (48SO60C); Records of the U.S. District Courts for the Southern District of Texas, Record Group 21; National Archives at Fort Worth, Texas, folder 1, 4–74.

[35] Both President Lyndon Johnson and his successor Richard Nixon acknowledged these flaws in the system. Ali's attorneys reasserted these claims at his criminal trial and during some phases of the appeal but met with a similar lack of success. *See, e.g., Clay*, 397 F.2d at 909–13.

[36] *Ibid.*, 397 F.2d at 918.

[37] DOJ Opinion Letter, 74–78.

[38] *Clay*, 397 F.2d at 918.

[39] DOJ Opinion Letter, 77–78.

[40] DOJ Opinion Letter, 83–86.

[41] *See, e.g., United States v. Hagaman*, 213 F. 2d 86, 94 (3d Cir. 1954) (conceding the possibility of a rapid conversion "a very short time before one may become liable for military service," but noting that whenever such a conversion takes place "the question is suggested whether the conversion is a real or pretended one"); *Bishop v. United States*, 412 F.2d 1064, 1068 (9th Cir. 1969) (making a similar statement).

[42] DOJ Opinion Letter, 82.

[43] *See* Sarah Barringer Gordon, **The Spirit of the Law: Religious Voices and the Constitution in Modern America** (New York: Belknap Press, 2010): 96–132.

[44] *Sostre v. McGinnis*, 334 F.2d 906, 908 (2d Cir. 1964). This case involved a religious discrimination claim by prison inmates in New York. The inmates ultimately prevailed in the suit. *See Bryant v. McGinnis*, 364 F. Supp. 373 (W.D.N.Y. 1978).

[45] *United States v. Seeger*, 380 U.S. 163, 166 (1965).

[46] *See* Kent Greenwalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," *Supreme Court Review*, vol. 1971 (1971), pp. 31, 38–40.

[47] *See generally*, Ali, "The Champ," 226–33 (quoting Ali's testimony about his religious devotion in the hearing before Judge Grauman).

[48] *See* DOJ Opinion Letter, 83.

[49] *See* Oral Argument, *Clay v. United States*, docket no. 783, accessed at https://www.oyez.org/cases/1970/783 (hereinafter "Supreme Court Oral Argument").

[50] *See* Gordon, **The Spirit of the Law**: 106.

[51] *See* DOJ Opinion Letter, 80.

[52] "Clay's Induction Set for April 28 as 3 Pleas Fail," *New York Times*, March 30, 1967, p. 57. Despite his fame, it was clear that Ali did not anticipate that remarks like these would be scrutinized in legal forums. "If I knew everything I had said on politics would have been taken that seriously[,]" he lamented, "I never would have opened my mouth[.]"*Quoted in* Jonathon Eig, **Ali: A Life** (New York: Houghton Mifflin Harcourt, 2017), p. 215.

[53] *See Clay*, 397 F. 2d at 906.

[54] In subsequent litigation, Ali's attorneys attempted to make hay out of Hershey's expression of confidence that Ali would be enlisted, but, for the time being, it seemed as if he was stating the obvious. *Ibid.*, at 924, n. 23.

[55] Dave Anderson, "Clay Prefers Jail to Army," *New York Times*, March 17, 1967, p. 50.

[56] *See* Testimony of Steven B. Dunkley in *Transcript of Proceedings, The United States v. Cassius Marsellus Clay, Jr. Also known as Muhammad Ali*, May 8, 1967; Case no. 67H94, Criminal Case Files, 1908–1979

(48SO69A); Records of the U.S. District Courts for the Southern District of Texas, Record Group 21; National Archives at Fort Worth, Texas, folder 4, pp. 135–37 (hereinafter "Trial Transcript.")

[57] *See* Bingham and Wallace, **Muhammad Ali's Greatest Fight**: 159–60.

[58] *See* Criminal Docket and Proceedings in *The United States v. Cassius Marsellus Clay, Jr. Also known as Muhammad Ali*, May 8, 1967; Case no. 67H94, Criminal Case Files, 1908–1979 (48SO69A); Records of the U.S. District Courts for the Southern District of Texas, Record Group 21; National Archives at Fort Worth, Texas, folder 1.

[59] *See generally*, Jennifer Jacobs Henderson, "Hayden Covington, the Jehovah's Witnesses and their Plan to Expand First Amendment Freedoms" (Ph.D. Diss., University of Washington, 2002).

[60] *See generally*, "Argument of Hayden Covington on Motion" in *Trial Transcript*, 234–98.

[61] *Sicurella v. United States*, 348 U.S. 385 (1955).

[62] *Ibid.*, 348 U.S. at 392 (reasoning that "where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds.")

[63] *See generally*, Trial Transcript, 57–363.

[64] *See generally*, Trial Transcript.

[65] *See ibid.*, 351–52.

[66] *See ibid.*, 354–61.

[67] *See ibid.*, 364–406.

[68] Eig, **Ali: A Life**: 252.

[69] *Reynolds v. Sims*, 377 U.S. 533 (1964); Roy Reed, "Charles Morgan, Jr., Dies; Leading Civil Rights Lawyer," *New York Times*, January 9, 2009, p. B8.

[70] *See* "Chauncey Eskridge, Lawyer for Dr. King," *New York Times*, January 22, 1988, p. 18.

[71] *Clay*, 397 F.2d at 920–21.

[72] *See* Geoffrey R. Stone, **Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism** (New York: W.W. Norton & Co., 2004): 437–39.

[73] *See* Trial Transcript, 381–82.

[74] *See* Stone, **Perilous Times**: 427–526.

[75] *See Alderman v. United States*, 394 U.S. 165 (1969).

[76] *See Giordano v. United States*, 394 U.S. 310 (1969).

[77] *See Clay v. United States*, 430 F.2d 165 (1970).

[78] *See* "Reporter's Transcript of Proceedings" in *United States v. Cassius Marsellus Clay, Jr. Also known as Muhammad Ali*, Case no. 67H94, Criminal Case Files, 1908–1979 (48SO69A); Records of the U.S. District Courts for the Southern District of Texas, Record Group 21; National Archives at Fort Worth, Texas, folder 10 (hereinafter "*Alderman* Hearing Transcript"), 17.

[79] Testimony from FBI agents at the hearing indicated that the conversations were electronically recorded, but the recordings themselves were destroyed after the agents made notes on them and no transcripts existed. The defense appeared incredulous about these claims, particularly when it emerged that Eskridge had participated in one of the conversations himself. He took the unusual step of taking the stand to testify that the memorandum did not adequately reflect the length or content of the call. *See generally, ibid.*

[80] *See ibid.*, 25–87.

[81] *See ibid.*, 106.

[82] *See generally, ibid.*

[83] *See United States v. Clay*, 386 F. Supp. 926, 930-31 (N.D. Tx. 1969).

[84] *Ibid.*, at 931.

[85] *Ibid.*

[86] *Ibid.*

[87] *Alderman* Hearing Transcript, 66–67; *Clay*, 386 F. Supp. at 931–32.

[88] *See United States v. Clay*, 430 F. 2d 165 (5th Cir. 1970).

[89] Richard Nixon, *Special Message to Congress on Draft Reform*, April 23, 1970.

[90] *See, e.g.*, "Muhammad Ali Will Talk at Platteville Forum," *Capital Times*, March 30, 1970, p. 4.

[91] *See* Bingham and Wallace, **Muhammad Ali's Greatest Fight**: 209–36.

[92] *See Ali v. Division of State Athletic Commission*, 316 F. Supp. 1246 (S.D.N.Y. 1970).

[93] Dave Anderson, "Frazier Beats Ali in 'Fight of the Century'," *New York Times*, June 10, 2016, p. F8 (reproducing an original article from March 9, 1971).

[94] *Clay v. United States*, 400 U.S. 990 (1971) (order granting certiorari).

[95] *See ibid.* (noting that Justice Brennan believed the Court should have granted certiorari on two additional issues).

[96] *See* Supreme Court Oral Argument.

[97] *See Harry A. Blackmun Papers*, Library of Congress Manuscript Division, Washington, DC, box 130, folder 70-783 (hereinafter "Blackmun Papers").

[98] *Cf.*, William O. Douglas, "Memorandum to the Conference," April 22, 1971, in *Papers of William J. Brennan*, Library of Congress Manuscript Division, Washington, DC, box I: 247, folder 11 (lamenting that the case had been "so poorly briefed and argued[.]").

[99] *See* Supreme Court Oral Argument.

[100] Marshall's recusal may well have been fortunate for Ali. In 1959, Marshall had engaged in a war of words with Elijah Muhammad and denigrated the Nation as an organization "run by a bunch of thugs organized from jails." *Quoted in* Gordon, **Spirit of the Laws**: 115.

[101] *See* Blackmun Papers; *Papers of William O. Douglas*, Library of Congress Manuscripts Division, Washington, DC, box 1519, no. 783 (hereinafter "Douglas Papers").

[102] *See* Blackmun Papers.

[103] *See* Douglas Papers.

[104] *See* Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon & Schuster, 2005) (originally published, 1979), pp. 163–64.

[105] *See* "Memorandum to the Conference from Mr. Justice Harlan," June 10, 1970, in *Blackmun Papers* (hereinafter "Harlan Memo").

[106] *See* John Marshall Harlan to Warren Burger, June 9, 1971, in *Papers of Thurgood Marshall*, Library of Congress Manuscript Division, Washington, DC, box 73, folder 70-783.

[107] *See* Harlan Memo.

[108] *See* Woodward and Armstrong, **The Brethren**: 164–65.

[109] *See Clay*, 403 U.S., at 698.

[110] *See ibid.*, at 710 (Harlan, J., concurring).

[111] *See ibid.*, at 705 (Douglas, J., concurring).

[112] Blackmun Papers.

[113] For such a dissent, see Jim Murray, "It's Okay to Set Ali Free—Many Others Have Paid the Price," *Boston Globe*, July 1, 1971, p. 63.

[114] *See, e.g.*, Brockenbury, "Patience Pays off for Muhammad Ali."

[115] *President Honors Recipients of the Presidential Medal of Freedom*, November 9, 2005, accessed at https://georgewbush-whitehouse.archives.gov/news/releases/2005/11/20051109-2.html

[116] Even a handful of modern critics insist these arguments devalue Ali's claims. *See, e.g.*, Jack Cashill, **Sucker Punch: The Hard Left Hook that Dazed Ali and Killed King's Dream** (Nashville: Nelson Current, 2006).

[117] *Quoted in* Resumé of Inquiry, 91.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Introduction

Judges, attorneys, scholars, and most certainly readers of this journal will surely agree on one fact concerning the U.S. Supreme Court: an abundance of literature in print and, increasingly, in digital form exists about this capstone institution of the third branch of government. For confirmation, one needs merely to conduct a subject search in even a modest-sized library or on Google to reveal literally hundreds of titles on virtually every aspect of the Court's work as well as on the Justices. Yet in contrast to this present-day cornucopia of analysis, perspective, and information is the truth that, with barely a handful of exceptions, systematic study of the Court began only about a century ago as history, law, and political science emerged as distinct professional academic disciplines.

For example, the first edition of so essential a mainstay today of judicial history, particularly for the early nineteenth-century Court, as Charles Warren's **The Supreme Court in United States History** was not published until 1922. Warren's three-volume work (a revised edition in two volumes became available in 1926) itself appeared a scant six years after Senator Albert J. Beveridge's magisterial four volumes of **The Life of John Marshall**. This was also shortly after Edward S. Corwin[1] and Charles Grove Haines[2] began to publish their seminal studies of the origins of judicial review. The timing of the works by these authors was revealing. While it had been fully apparent at least since Marshall's day that the Court was a politically and not merely a legally significant institution, it had become abundantly clear, if any doubters remained, by the second decade of the twentieth century, that the Court had moved well beyond its initial dispute-resolution role and had become in many ways a maker of public policy for uniform application across the nation.

Indeed, as Warren noted in the 1926 revised edition of **The Supreme Court in United States History**, his objective was to provide "a narrative of a section of our National history connected with the Supreme Court.... As words are but 'the skin of a living thought,' so law cases as they appear in the law reports are but the dry bones of very vital social, political and economic contests: they have lost all fleshly interest." For Warren, his book was an attempt to

"revivify the important cases decided by the Court itself from year to year in its contemporary setting."[3] Yet, surveying the books of his day, Warren lamented the fact that "few published works" existed for "those who wish to view the Court and its decided cases, as living elements and important factors in the course of the history of the United States." Indeed, aside from Beveridge's foray into Marshall, there was little serious work on a large-scale basis besides Gustavus Myers's **History of the United States Supreme Court,** which Warren, perhaps disdainfully, described as written "from a purely Socialistic standpoint."[4]

Fortunately, most of the deficiencies in the literature that Warren noted have long since been corrected. While it would clearly be an error to insist that subsequent writing on the Court can be traced back to Beveridge and Warren, it does not seem an exaggeration to suggest that their scholarship helped to stimulate much of what followed. Historians, lawyers, and students of politics in subsequent years have sought to understand what the Court has done not because of a client-centered necessity to win cases but because of the reason-centered desire to comprehend the Court, as Beveridge and Warren did, as a component in the political system and a force in shaping the nation.

Moreover, more recent scholars inspired by legal realism have endeavored through a behavioral focus to move beyond or beneath the "what" and the "how" by seeking also to explain judicial decisions, that is, to probe the "why" as well. This multifaceted thrust accounts for much of the multidisciplinary character of judicial studies today. The cumulative result of these labors has been a vast body of serious scholarship that falls into several categories that are nicely illustrated by recent books. Aside from commentary on particular decisions, probably the most venerable of these groupings, as illustrated by Beveridge's trailblazing work on Chief Justice John Marshall, is biography.

New Marshall Biographies

Indeed, two biographies of Marshall appeared within weeks of each other in 2018, with Joel Paul's **Without Precedent** being quickly followed by political journalist Richard Brookhiser's **John Marshall.**[5] Paul's addition to the Marshall bibliography was assessed in a recent issue of this *journal,*[6] and a close look at Brookhiser's is merited here.

Each volume has added to the probability that the fourth Chief Justice remains the principal subject of more publications than any other single member of the Court. Alongside some ten full or partial biographies or Marshall-focused books,[7] a number that includes Paul's and Brookhiser's, 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.[8] The intervening years may now have pushed that number above 1,000.

Such attention is understandable if also somewhat surprising. The considerable scholarship on Marshall could be expected because of a long-standing consensus among scholars, as well as among his contemporaries—admirers and detractors alike, that he had exercised outsized influence on American constitutional law and on the Supreme Court as both took shape in the early nineteenth century. To write about Marshall after 1800 was to have written about the Supreme Court, and to have written about the Supreme Court in the first third of the nineteenth century was, with only a few exceptions such as William Johnson and Joseph Story, to write about 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 has meant, therefore, that he has rarely been allowed to stray far from the center of scholarly attention. Any dispute

that remains about his jurisprudential and institutional contributions concerns not their existence but the scope and dimensions of their magnitude. In one appraisal, there are very few individuals

> in our legal history over whom one hesitates in making [a] general denial of individual influence: in the Federal Constitutional Convention, Madison; on the bench, Marshall alone....Generally what has made men "great" in our law has been that they saw better where the times led and took their less imaginative, less flexible, or less courageous brethren in that direction faster and with a minimum of waste and suffering.[9]

Yet the attention Marshall has attracted from biographers and others is in some respects also surprising. Surely anyone contemplating a comprehensive study of Marshall faces a challenge aside from the fact that Marshall's life is a field that has been frequently tilled. The discomforting truth for a prospective author is that plainly there is so much to Marshall's life. For the biographer, the essential task is to grasp and convey a remarkable variety of accomplishments that would fill a modern-day resume even before one arrives at his life-defining responsibility as Chief Justice, a tenure that spanned more than thirty-four years.

In short, one challenge Marshall presents for an author 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. Thus, a test of success for biographies of Marshall is whether authors are able to get their arms around Marshall's multifaceted life and then to relate it to the reader comprehensively, intelligibly, and engagingly. Brookhiser's successful contribution is no doubt aided by the fact that, although he may be a newcomer to judicial biography, he is already a well-published biographer, with volumes on Abraham Lincoln, James Madison, George Washington, John and John Quincy Adams, and Alexander Hamilton.

The attractiveness of Marshall for scholars is surprising also because of challenges that range beyond the breadth and depth of his life—what Brookhiser calls a "long story."[10] As he suggests, there might be even more books on Marshall but for his career in law, the very thing that has allowed him to be an alluring subject. Brookhiser's point is that the technical nature of the law "keeps the numbers down."[11]

Similarly, one suspects that time itself compounds the complexity of Marshall's life—as it would for the study of any Justice from that period—because the Supreme Court of today is so vastly different from the Court of Marshall's time, both jurisprudentially and institutionally. Despite Marshall's deserved reputation in constitutional law, one must realize that the bulk of the Court's work then and for years afterward was nonconstitutional in nature. Private law cases vastly outnumbered public law cases. In fact, of the 1,121 cases the Court decided during Marshall's tenure (1801–1835), only 76 raised federal constitutional issues. Instead, the majority involved admiralty and maritime issues (which were numerous given the fact that most of the nation's commerce before the Civil War was waterborne), common-law matters, and diversity disputes. Such topics are unfamiliar to many scholars today and so present obstacles of their own. Even the body of congressional statutes was only a shadow of what it would become in the decades after the Civil War. The Court Marshall knew was still largely a tribunal for the final settlement of disputes between individual parties. The Court's role as policymaker that is so familiar today was decidedly secondary. Moreover, while the Justices of yesteryear assembled in Washington as the Supreme Court as they do today, most of their working time

was spent not there but as individual circuit judges, holding court in the far reaches of an expanding union.

As Brookhiser explains, the study of Marshall is also made more difficult because alongside his long-accessible Supreme Court and circuit court opinions, there "are gaps in the record of [his] life. He left less to work with than other founders; he kept no diary or journal and was careless with his papers."[12] While there are twelve volumes of the Marshall papers in print,[13] Brookhiser notes that the comparable edition of the papers of Alexander Hamilton, who lived thirty-two years fewer than Marshall, numbers twenty-seven. Finally, anyone approaching Marshall's public career must master the nuances of not only an event-filled life but one that extends from the Virginia frontier and the Revolutionary War through the founding era and into the Jacksonian period, with judicial rulings touching on "corporations and steam power, the Napoleonic Wars and the campaign against the slave trade."[14] Fortunately, none of these challenges proved to be a debilitating obstacle for Brookhiser, who has provided a thorough, engaging addition to the shelf of Marshall biographies, one that anyone encountering the Chief Justice for the first time should find especially accessible and serviceable. Along with helpful documentation and a thorough bibliography and index, the book also contains an unexpected gem tucked between pages 150 and 151: some sixteen handsomely reproduced illustrations, most of which are in color.

Brookhiser's subtitle—"The Man Who Made the Supreme Court"—captures the principal theme of the book. Finding the Court the national government's "fledging, almost its orphan," Marshall transformed it into "a pillar of the nation" so that by his death in 1835, "he had rebuked two presidents, Congress, and a dozen states and laid down principles of law that still apply."[15]

Alongside that primary thesis are several familiar secondary ones prominent not only near the beginning but that surface periodically throughout: the influence of George Washington in Marshall's life and the Chief Justice's constitutional populism. The first resulted from the "most formative experiences of Marshall's life" that came "not in court but in battle." Planted indelibly in his memory were the lessons he learned from the general's talents and courage so that for the "rest of his life" he "saw Washington as his commander and himself as one of his troops."[16] Thus, when Washington urged Marshall to run for Congress in 1798, Marshall obeyed. After Washington's death in 1799, Marshall eulogized him on the floor of the House as "first in war, first in peace, and first in the hearts of his countrymen."[17] As a national party system emerged and Marshall identified himself with the Federalists, his policies were the same as Washington's: "a strong federal government that could pay its debts, foster commerce, and sustain a unified nation in a turbulent world."[18]

An additional secondary theme was Marshall's understanding of the Constitution, a vision that lay at the basis of his view of the role of the Supreme Court in the new political system as expounder of the nation's fundamental charter. This was an idea he articulated in *Marbury v. Madison*[19] and in other cases throughout his career. For Marshall, the Constitution—itself "a very great exertion [not] ... to be frequently repeated"[20]—represented the supreme will of the people and so both authorized and limited the actions of those officials whom the people chose to rule over them. Yet because the Constitution was also law, it was "emphatically the province and duty of the courts to say what the law is."[21] Consequently, any law enacted in violation of the Constitution was void and it was the duty of the Court to pronounce it so. This function, however, did not imply a superiority of unelected judges over elected legislators. "It only supposes," as Alexander Hamilton had written in *Federalist* No. 78, "that the power of the people is

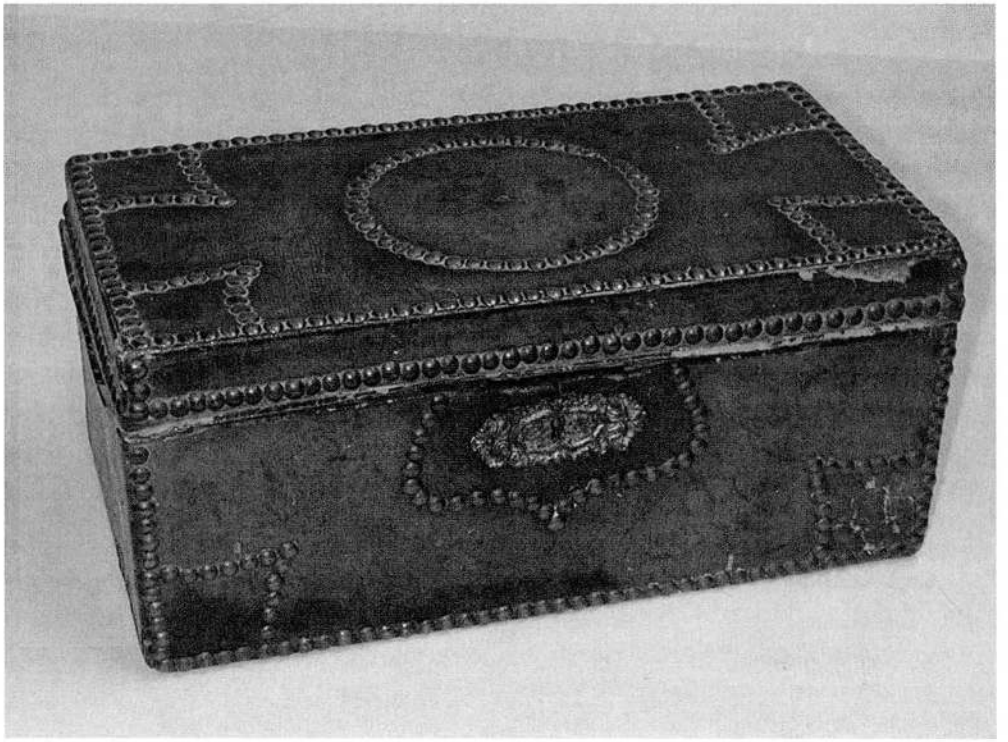
superior to both [so] that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." Considering the *Federalist* a "complete commentary on the Constitution,"[22] Marshall, who had purchased one of the first printings of the essays, would have been thoroughly familiar with them by his time on the Supreme Court.

It is this particular secondary theme that prompts Brookhiser to pose a central question and variations on it in his introduction: Given the pivotal role that the Supreme Court has played in the political system, "[w]as John Marshall right? Is his vision of the Constitution as the supreme statement of popular will and the Supreme Court as its defender in fact workable? Do judicial guardians inevitably decay into unelected legislators? Are we too far away from the Constitution to think about it as intelligently, or care about it as passionately, as he did?"[23] Or, to reframe the author's concern, has the Court become the "proud preeminence"[24] as Pennsylvania jurist (and Marshall critic) John Banister Gibson claimed in 1825? Brookhiser's concluding chapter on the Chief Justice's legacy appears to leave answers to the reader, particularly in light of his point that "Marshall was virtually the last jurist, and certainly the last justice of the Supreme Court, to have a living relationship to the Constitution," thus making it difficult for successor Justices to "recapture his intimacy with a document ratified" many decades before they were born.[25]

As Brookhiser tells his story, Marshall's life unfolds in four sections of the book: (I) Early Life, (II) Beleaguered Chief Justice, (III) Magisterial Chief Justice, and (IV) Chief Justice: The Waning Years. Aficionados of Marshall will find *Marbury* and *Fletcher v. Peck*[26] considered in the first, with *Dartmouth College v. Woodward*,[27] *McCulloch v. Maryland*,[28] and *Cohens v. Virginia*[29] in the second.

It is in the fourth section that the reader comes across an unexpected find: a thorough discussion of *Barron v. Baltimore*,[30] a case that occasioned Marshall's last opinion in a constitutional case and that sometimes receives only passing mention in Marshall biographies, or is ignored altogether. *Barron* remains memorable principally because of what the Court did *not* do and because of the superb example it provides of Marshall's style of legal reasoning.

The case arose after the city of Baltimore, under acts of the Maryland legislature, diverted the flow of storm runoff from several streets and streams, resulting in the deposit of silt around a wharf that was owned by John Barron and John Craig just east of the inner harbor. Because the resulting silt made the wharf unfit for shipping, Barron and Craig sued for damages and won a judgment from a local court that was then reversed by a state appeals court. The case then advanced to the U.S. Supreme Court, where counsel for the wharf owners claimed that the city's action had deprived them of property without just compensation in violation of the last clause of the Constitution's Fifth Amendment. Representing the city was Roger Taney, then U.S. Attorney General[31] and whom President Andrew Jackson would name as Marshall's successor in 1836. As Brookhiser explains, what Taney "might have told the Court will never be known, because after Chares Mayer, counsel for Barron and Craig's successor, had presented his argument, Marshall "told Taney to say nothing at all."[32] Presumably the Justices had already discussed the case and reached a decision. The Chief Justice's 1,800-word opinion followed five days later. Rejecting Barron's claim, Marshall observed that the case "raised a question of great importance, but not of much difficulty," and he concluded "that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation of the power of



In political journalist Richard Brookhiser's new biography of Chief Justice John Marshall, the author argues that "Marshall was virtually the last jurist, and certainly the last Justice of the Supreme Court, to have a living relationship to the Constitution." Above is a deerskin-covered pine box that Marshall may have used to carry his papers.

the United States, and is not applicable to the legislation of the states."[33]

That result followed from both the text and history of the Constitution. The Constitution contained limitations on national power in section 9 of Article I and on state governments in section 10 of the same article. The seeming repetition could be explained by the view that, unless states were specifically referenced, "all the Constitution's powers and restrictions referred to that government alone."[34] Therefore, the Fifth Amendment applied to the national government but did not restrain the states. History was similarly dispositive. With echoes of what he had written in his **Life of George Washington**,[35] Marshall insisted that in "almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general [federal] government, not against those of the local [state] governments."[36]

Brookhiser queries why Marshall "had decided so quickly and written so tersely." His not entirely satisfying answer is that ruling "on the Fifth Amendment took him away from those parts of the Constitution with which he was most comfortable" yet [c]onfirming the power of the states, and so broadly, was equally unusual for him."[37] Here, however, Brookhiser might have kept in mind Marshall's position in *Gibbons v. Ogden*, in which, although he toyed with the notion that the federal commerce power was exclusive, Marshall, nonetheless, allotted ample room for states to legislate under their police power and left to his colleague Justice William Johnson to insist forthrightly

in a concurring opinion on the exclusivity of the commerce power. Moreover, Brookhiser maintains that *Barron* is explained by the fact that "Marshall was in unfamiliar territory. He had been so for much of his career as chief justice, especially in his earlier days, when there were precedents to establish and enemies to be fought. But now Marshall was old."[38] True, by 1833 Marshall was eight years past the biblical summit, but one suspects the conclusion in the case may have rested on something besides senectitude or unfamiliar textual turf.

A contrary ruling would have had immense consequences for the jurisdiction of the Court, resulting in a vast change in the content of its docket. As a result of *Barron*, most legal disputes between a state government and one of its citizens remained outside the federal judicial system, unless the Commerce or Contract Clauses, for example, were at issue. This is important to remember because, until the twentieth century, government action and government policy largely meant the action and policy not of the national government but of state and local governments. In addition, Marshall's many years of public service may have prompted him to be especially cognizant of the limits to judicial power, as reflected in his reply to a toast from the Philadelphia bar, in which he insisted that he and his associates "have never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."[39]

Also, Brookhiser is not entirely correct when he observes that the "Bill of Rights would not be applied to the states until the twentieth century"[40] in that the Supreme Court took its first step on the long road to that objective in 1897, when it applied the just compensation clause of the Fifth Amendment—the same provision involved in *Barron*—to the states,[41] not, however, by overruling *Barron*, but through interpretation of the Fourteenth Amendment, which had become part of the Constitution in 1868, thirty-three years after Marshall's death. Indeed, it was in 1947 that Justice Hugo Black lamented his colleagues' failure to act decisively upon an opportunity to inter *Barron*:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed, its submission and passage persuades me that one of the chief objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.[42]

Ely's *The Contract Clause*

Biographies like Brookhiser's are enriched by another category of judicial literature: constitutional history, or accounts of the developing interpretations of various parts of the Constitution. In that group one places **The Contract Clause** by James W. Ely Jr., emeritus professor of law and history at Vanderbilt University.[43] His book, the first thorough book-length look at this part of the Constitution since Benjamin F. Wright's classic treatment over eight decades ago,[44] is a useful companion to a pair of Ely's other books: **The Guardian of Every Other Right: A Constitutional History of Property Rights** (1992) and **Railroads and American Law** (2001). In **The Contract Clause,** Ely's focus is the provision tucked

into Article I, section 10 that is distinctive because it is one of a very few express prohibitions on the exercise of power by the states in the document of 1787: "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...," phrasing that John Marshall referred to in the Yazoo land case (*Fletcher v. Peck*) as "a Bill of Rights for the people of each State."[45]

Referring in his **Commentaries on the Constitution** to the protection afforded contracts, Justice Joseph Story insisted "there is not a single clause of the constitution, which has given rise to more acute and vehement controversy; and the nature and extent of whose prohibitory force has called forth more ingenious speculation, and more animated juridical discussion."[46] Writing near the end of the nineteenth century, Michigan's Judge Thomas M. Cooley noted that the prohibition was inserted "almost without comment" at the Philadelphia Convention and in the *Federalist* essays

> is barely alluded to twice.... Apparently nothing was in view at the time except to prevent the repudiation of debts and private obligations, and the disgrace, disorders, and calamities that might be expected to follow. In the construction of this provision, however, it has become one of the most important, as well as one of the most comprehensive, in the Constitution; and it has been the subject of more frequent and more extended judicial discussion than any other.[47]

Ely adds a latter-day echo to those observations, remarking that under John Marshall's leadership, the Supreme Court "construed the provision expansively, and it rapidly became the primary vehicle for federal judicial review of state legislation before the adoption of the Fourteenth Amendment," with the result that the clause turned out to be "one of the most litigated" parts of the Constitution "throughout the nineteenth century."[48]

Indeed, for those concerned about inroads by state legislatures on private rights, resort to the Contract Clause was essential in the wake of the decision by the pre-Marshall Court in *Calder v. Bull*,[49] which had given a narrow construction to the ex post facto clause, a companion provision in section 10. At issue in that early case was the validity of a Connecticut statute that altered an existing statute so that one party in an inheritance dispute could then challenge the ruling by a probate court. Confining the application of ex post facto laws to retroactive penal legislation, the Court held that "the restraint against making any ex post facto laws was not considered by the framers of the Constitution as extending to prohibit the depriving a citizen even of a vested right to property or the provision 'that private property should not be taken for public use, without just compensation' was unnecessary."[50] While all ex post facto laws were retrospective, all retrospective laws were not necessarily ex post facto laws. Thus, if even "vested" property rights could be subject to retroactive laws, the Court's holding appeared to create a wide breach in the protection that otherwise might be afforded individual rights. The four participating Justices[51] wrote *seriatim* in the case. Justice Chase seemed nearly apologetic for the outcome, even suggesting that legislation adversely affecting vested rights might alternatively be set aside as violation of natural law. "There are certain vital principles," he observed, "in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power. An act of the legislature (for I cannot call it a law) contrary to the great principles of the social compact cannot be considered a rightful exercise of the legislative authority."[52]

Yet, as Ely explains, even after invigoration of the Contract Clause, "courts carved out several malleable exceptions to the

constitutional protection of contracts—most notably the notion of an inalienable police power—thereby weakening the protection of the Contract Clause and enhancing state regulatory authority"[53] in what was a continuing tug-of-war between public power and private rights. Eventually, Ely summarizes, the "exceptions gradually began to swallow the provision," diminishing its importance, with a "near fatal blow" being dealt by *Home Building and Loan Association v. Blaisdell*[54] when a narrow majority of the Court upheld a mortgage moratorium during the Great Depression. As an ever more permissive judicial view of government authority in economic matters gained ascendancy after 1937, the Contract Clause became "a casualty of this jurisprudential change and largely fell into disuse for several decades."[55] Moreover, despite some judges' modest revival of interest in the clause in very recent years, anecdotal evidence suggests that it is no longer emphasized even in the classroom outside the context of study of the Supreme Court during the Marshall and Taney eras.

Given the clause's slide into relative obscurity and its failure to regain its previous vigor, one wonders, therefore, what now justifies another look at a piece of constitutional history that Benjamin Wright analyzed so thoroughly in 1938. Ely offers several reasons to justify his readable, thoroughly researched, and productive reconsideration of this bit of the framers' legacy.

In addition to incorporating more recent research on the framers' understanding of the contract clause, Ely has broadened the scope beyond Wright, who concentrated on decisions by the Supreme Court of the United States. The result is a volume that now blends decisions by state courts and lower federal court in each of the time periods surveyed. As Ely explains,

> I have also considered the extent to which state constitutions might be construed to provide enhanced protection for contracts. It is important to remember that state courts did much of the heavy lifting in interpreting and enforcing the contract clause. They are an integral, if too often overlooked part of the story.[56]

Second, because "constitutional questions are not decided in a vacuum," Ely has endeavored, perhaps beyond Wright's objectives, "to place evolving contract clause jurisprudence within the broader context of the legal culture, which values contracts as an expression of individualism and a market economy."[57] Pursuing that goal means that the author also "takes account of social, political and economic developments as they illuminate the role of contracting in US society."[58] [However, one questions the editorial decision to substitute "US" in place of "United States" or "U.S." throughout. Perhaps the publisher's rationale was mere convenience in that surely little page space or ink was actually saved. When it appears, the stark upper case "US" nearly jumps from the page, reminding one of the brands seared onto the backsides of Army mules during the heyday of the Contract Clause.]

Third, as was certainly true with Wright's study, a close inspection of the evolution of the Contract Clause "provides a window into the shifting concerns in assumptions of Americans" implicating "matters central to US constitutional history, including the protection of economic rights, the growth of judicial review, and the role of federalism."[59] In short, one suspects that there probably has been no serious aspect of economic life in the United States that has remained untouched by the Contract Clause.

As befits a volume of constitutional history, Ely has organized his book chronologically. The first chapter is devoted to the origins of the clause in the post-Revolutionary era up to the advent of Marshall's chief justiceship. It is here that Ely highlights the irony of the framers' insistence

James Ely's book on the Contract Clause sheds new light on the *Blaisdell* case, which reviewed a Minnesota statute enacted in 1933 to authorize county courts to extend the period of redemption from foreclosure sales on financially distressed farmers and homeowners. Above, Minnesota farmers marched to the state capitol in 1935 to protest foreclosures.

on the inclusion of protection of contracts in the document at the same time that some of them argued that a bill of rights was unnecessary. It is also in this initial chapter that the author contends from admittedly fragmentary evidence that the "provision could reasonably be construed to safeguard both private and public agreements from state abridgement"[60]—a view that would be critical to Marshall's opinion in *Fletcher v. Peck*. Discussion of that first instance of the Court's invalidation of a state statute on constitutional grounds appears in chapter 2, where the author demonstrates that the Contract Clause was "a centerpiece of Marshall Court jurisprudence."[61]

In the third chapter, Ely addresses the impact of the Jacksonian movement and the chief justiceship of Roger B. Taney on Contract Clause jurisprudence. Indeed, Taney's tenure was still in its early years when the Court decided *Charles River Bridge v. Warren Bridge*,[62] perhaps the most significant Contract Clause case of his twenty-eight years in the center chair. For the majority, the clause embodied the principle that corporate charters were to be strictly construed, so that privileges such as monopoly or tax exemption were never to be implied. "The continued existence of a government," Taney insisted,

> would be of no great value, if by implications and presumptions it was disarmed by the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations....While

> the rights of private property are sacredly guarded, we must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation.[63]

As a leading scholar of the decision concluded, the "touchstone of Taney's opinion was its practicality, its responsiveness to contemporary reality—in short it was a document of public policy."[64] Yet Ely makes clear that Taney hardly waged war on contracts; in other cases, the Court "vigorously invoked the provision to safeguard the rights of parties under private agreements and to uphold clearly expressed tax exemptions." By the time of Taney's death in 1864 "the basic contours of contract clause jurisprudence had been established."[65]

After the abundant contract cases that arrived at the Court during the Civil War and Reconstruction are examined in chapter 4, chapter 5 explores what Ely terms "a seeming paradox." That is, even "as courts in the late nineteenth century developed a vigorous property-conscious jurisprudence, the contract clause declined in importance" as judges increasingly relied on other constitutional provisions—principally the due process clause of the Fourteenth Amendment—to shield economic rights. Alongside this development was a wave of mounting criticism aimed at the notion of the inviolability of corporate charters, with the Court embracing "the principle that states could not bargain away the police power to preserve public health and safety." Combined with the rule of strict construction of corporate charters, "the police power exception did much to undercut the sanctity of corporate charters."[66]

The final seventh and eighth chapters treat what a reader might regard as the "twilight" of the Contract Clause. These chapters review the clause from the end of World War II to approximately the present time, but it is in chapter 6, with its focus on interpretive developments from about 1900 to 1945, that the author explores a period during which the constitutional force of what once had been a major restraint on state legislatures diminished considerably. In Ely's analysis, that part of the story is suitably characterized by the *Blaisdell* case decided in 1934 and among the Supreme Court's early rulings from the New Deal era.

Blaisdell, also known as the Mortgage Moratorium Case, highlighted the tension that arose between the Contract Clause and state legislative efforts to temper some of the Great Depression's harsh effects. Citing economic emergency, Minnesota lawmakers in 1933 enacted a statute that attempted to limit deficiency judgments by authorizing county courts to extend the period of redemption from foreclosure sales, provided that the debtor could pay the creditor a reasonable amount toward the payment of taxes, insurance, interest, and principal mortgage indebtedness. While the obvious beneficiaries of the measure would be financially distressed farmers and homeowners, Ely notes that "relatively few" individual mortgagors actually sought protection under the law. Moreover, the *Blaisdell* litigation involved neither a farm nor traditional homeowner, but instead a Minneapolis boardinghouse that had fallen upon hard times.

The Court's 5–4 decision upholding the law was significant not only because it became the basis "for the modern reading of the contract clause"[67] but for other reasons as well. It encouraged what shortly proved to be a misimpression that the Court would also look favorably on various New Deal policies then emerging from Congress, and it occasioned Chief Justice Charles Evans Hughes to advance what Ely describes as a "Janus-faced approach" to the Contract Clause in his opinion for the majority of five. That is, the existence of the emergency justifying the moratorium was itself subject to judicial inquiry, thus allowing Hughes to "cabin the reach of his opinion" so that it

would not "undercut the future efficacy"[68] of the constitutional limitation.

Hughes's position then led Justice George Sutherland to issue one of the most powerful dissents of his sixteen-year career as he lamented the prospects of "future gradual but ever-advancing encroachments upon the sanctity of private and public contracts," noting accurately that the clause had been framed with times of economic hardship clearly in mind. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[69]

Finally, the Chief Justice's opinion itself took shape as a result of a serious exchange of views within the majority, so *Blaisdell* is important not only for its impact on the Contract Clause but also because of what it teaches about the workings of the Court itself. With a majority consisting of himself and Justices Louis D. Brandeis, Benjamin N. Cardozo, Harlan F. Stone, and Owen J. Roberts, Hughes tried to distinguish between the obligation of the contract and the remedy; he emphasized that the moratorium did not impair the obligation but merely modified the remedy. Justices Cardozo and Stone read the Chief Justice's first draft with misgivings so serious that each considered writing a concurring opinion. Cardozo actually prepared a draft, never officially published, that advocated a Contract Clause that would adapt with the times. The "contract clause is perverted from its proper meaning," urged Cardozo,

> when it throttles the capacity of the states to exert their governmental power in response to crying needs.... [T]he welfare of the social organism in any of its parts is bound up more inseparably than ever with the welfare of the whole.... The state when it acts today by statutes like the one before us is not furthering the selfish good of individuals or classes as ends of ultimate validity. It is furthering its own good by maintaining the economic structure on which the good of all depends. Such at least is its endeavor, however much it miss the mark."[70]

It was Cardozo's theme that Hughes built into his final draft. "It is manifest," Hughes explained,

> that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.... With a growing recognition of public needs and the relation of individual right to public security, the Court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests....[71]

Perspectives on Scalia

Akin to judicial biographies and constitutional histories are volumes that focus on a particular Justice. That category is illustrated by two very different kinds of books on the same Justice: Antonin Scalia. The first of these, **The Conservative Revolution of Antonin Scalia,** is edited by political scientists David A. Schultz of Hamline University and Howard Schweber of the University of Wisconsin–Madison.[72] Their volume was occasioned by the sudden death of the 103rd Justice on February 13, 2016, just four weeks shy of his eightieth birthday and by the widely shared view that he was truly both an important and uncommonly rare jurisprudential figure.

Justice Scalia's passing meant the loss of not only a rapier wit, critic of an imperious judiciary, and perhaps in recent years the most energetic questioner at oral argument but also one of the modern era's most dependable and enthusiastic judicial advocates of originalism

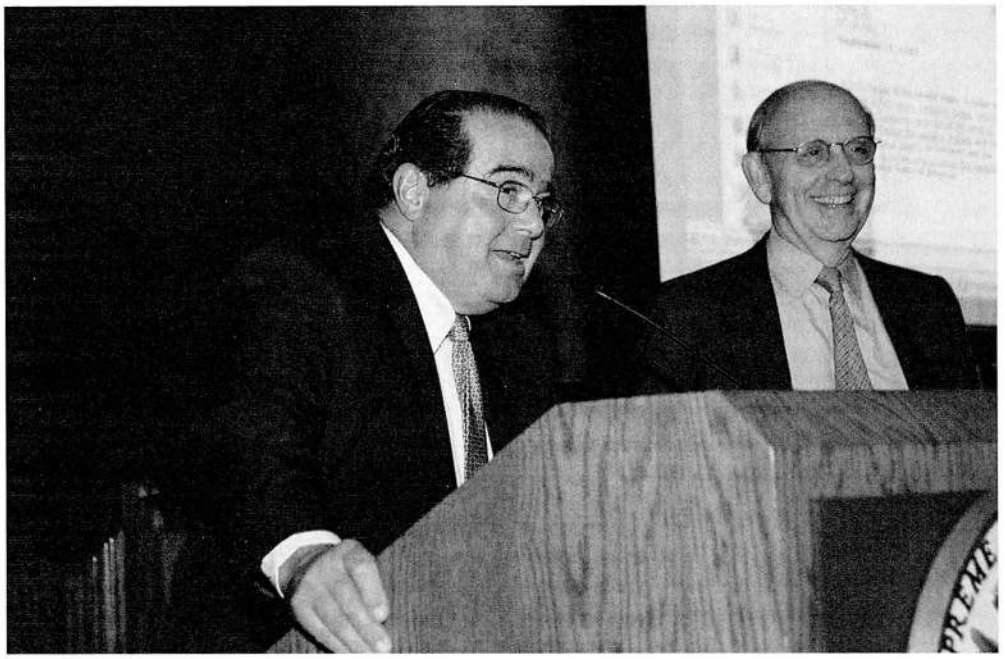
and textualism as interpretative methods. The departure of so distinctive a voice quickly made it apparent that the Court's public sessions had fundamentally changed as had, as many suspected, its internal dynamics as well. Also different would be the public face that the institution's decisions and opinions projected.

Moreover, once Republican leaders in the U.S. Senate announced that they would not consider a replacement nominee until after the presidential election in November 2016, the Court faced the prospect of functioning for an undetermined period with only eight Justices, fewer if another Justice recused. The resulting state of affairs was characterized by partisan-driven neglect and inaction not witnessed since the nineteenth century. Thus, despite President Barack Obama's nomination on March 16, 2017, of Chief Judge Merrick Garland of the Court of Appeals for the District of Columbia Circuit, Scalia's seat remained vacant until after the Senate confirmed President Donald Trump's nomination of Judge Neil Gorsuch of the Tenth Circuit Court of Appeals in April 2017.

Ironically, Scalia's appointment to the Supreme Court had come about through the confluence of a rare judicial event and another unusual political situation. On June 17, 1986, President Ronald Reagan, then midway through his second term, made two important announcements: the retirement decision of Chief Justice Warren E. Burger, who had succeeded Earl Warren as Chief in 1969, and the nomination of Justice William H. Rehnquist as Chief Justice, a move that would make Rehnquist only the third Chief to have been selected from within the Court itself. Applying a variation on the double switch in baseball, Reagan then revealed his choice of Judge Antonin Scalia of the Court of Appeals for the District of Columbia Circuit to fill Rehnquist's seat as Associate Justice. Scalia had sat on the appeals court since 1982 and would become the first Italian American to serve on the nation's highest court. His appellate judicial service was preceded by seven years of private practice in Cleveland, Ohio (1960–1967), followed by teaching positions in the law schools at the University of Virginia, University of Chicago, Stanford University, and Georgetown University. He had also been general counsel in the Office of Telecommunications Policy in the Executive Office of the President, 1971–1972, and assistant attorney general, Office of Legal Counsel, in the Department of Justice during 1974–1977, as well as chair of the U.S. Administrative Conference, 1972–1974.

The timing of Scalia's nomination was auspicious, in that Republicans had been the majority party (53:47) in the U.S. Senate since 1981 for the first time since the early 1950s, assuring that direction of the confirmation process in the Judiciary Committee and the scheduling of floor debate and a vote would be in Republican, not Democratic, hands, important because party control is a significant consideration in confirmation politics, as Judge Robert Bork, whom Reagan seriously considered naming in 1986 in place of Scalia, painfully discovered in 1987, after Democrats regained control of the Senate following the 1986 elections.[73] Probably also a "positive" for Scalia's nomination was that the Court of the mid-1980s was widely perceived as ideologically balanced in a way that adding Scalia would not cause a major shift in its position on the most politically and legally salient issues. Rather Scalia "represented an even trade for the Rehnquist vote, as Rehnquist did, more or less, for Burger's."[74] However, the success of Scalia's nomination first required Rehnquist's confirmation.

From the outset, the Rehnquist nomination encountered intense opposition in what Utah's Senator Orrin Hatch called a "Rehnquisition."[75] In part a repeat airing of concerns that had surfaced during the hearings in 1971,[76] when President Richard Nixon named Rehnquist to replace Justice John M. Harlan, and in part a review of his



Christopher Scalia and Edward Whalen have collected Justice Scalia's lectures on a wide variety of topics in their book *Scalia Speaks*. Their aim is to make Scalia's ideas accessible to a wider range of readers than his opinions alone. Above are Justice Scalia and Justice Breyer.

tenure of some fifteen years on the high court, hearings by the Judiciary Committee on the Rehnquist nomination consumed four days, and Senate floor debate five. Confirmation by a vote of 65–33 came on September 17. Not since 1836, when the Senate confirmed Roger Taney, had a nominee for Chief Justice been approved by a ratio of less than two to one.

Perhaps because the Senate's scrutiny of Rehnquist was so intense, Scalia's nomination generated only mild turbulence. It was as if the Senate's negative energy had already been fully expended. The prospect of two back-to-back anti-nominee crusades may have seemed unappealingly daunting for many Democrats. Besides, particularly in light of the nominee's Italian heritage, many Democratic senators could hardly ignore their ethnic constituencies. Remarkably brief in light of more recent confirmation proceedings, the Judiciary Committee's hearings on Scalia lasted only two days and produced a favorable vote of 18–0. Floor debate did not exceed five minutes. Following the vote on Rehnquist, the Senate confirmed Scalia, 98–0. (Rehnquist is indeed distinctive in that both of his confirmations occurred in the context of paired nominations.)

Schultz and Schweber explain that when Scalia took his seat on the Court, some observers "hoped or feared" that his arrival "would guarantee a conservative counter-revolution that would reverse the liberal jurisprudence of the Supreme Court under Chief Justice Earl Warren which had continued to some extent and the Burger Court through the influence of Justice William Brennan."[77] By 2016, while the Court had moved somewhat to the right by most measures, some of that shift was already underway before his arrival. Thus, the question arises about the "depth or scope of his contribution or his impact."[78]

Intriguingly, the title chosen for their book suggests a concluding answer to that question: that there was a jurisprudential revolution of sorts and that Scalia had a major part in achieving that result. However, their

introduction quickly casts considerable doubt on that initial impression in much the same way as did the subtitle of Vincent Blasi's edited volume on the Burger Court: **The Counter-Revolution That Wasn't** (1986). As Schultz and Schweber maintain, while

> Scalia's proclivity in oral arguments and sting in his opinions, mostly dissents, may have earned him headlines in the news, they also often guaranteed that he would be alone (or joined by Clarence Thomas) in his views. Unlike Brennan, who was legendary in his ability to win over others and build coalitions, Scalia was not famous for that. His professional attitude toward others may have cost him influence and majorities.[79]

The editors then nudge the reader again by suggesting that Scalia's influence may have "turned out to be far less than it could have been, and his ability to persuade other justices to adopt his legal views—both substantively and methodologically—was perhaps less than many mainstream media accounts recognize." They also ask alternatively whether Scalia was "among the greatest justices ever on the Supreme Court, or even its intellectual leader."[80] Those contrasting back-and-forth possibilities set up as the challenge for the book, to assess Scalia's legacy. To achieve that objective, the editors, in addition to contributing a jointly authored introduction, assembled an impressive collection of a dozen essays by sixteen scholars. The result is a major contribution to the literature, a book that any future student of Scalia's work on the Court will need to consult.

Moreover, given the topics covered by the essays, one suspects the book will be seen as a model for other books seeking to assess a particular Justice's legacy. For example, a pair of essays examines Scalia's theory of politics and his connection to the legal conservative movement. Another pair looks at his originalist approach from different perspectives. Others examine the Justice and the difference he made institutionally at the Court through his propensity to write concurring opinions and his emphasis on an unusually active and even combative style at oral argument. Still other essays treat substantive areas such as administrative law, employment discrimination law, "culture war" issues, employment discrimination law, and criminal justice.

Another contributed chapter, "Justice Scalia's Confirmation Hearing Legacy," by Alexander Denison and Justin Wedeking, finds a connection among Justice Scalia's placid confirmation in the Senate, his judicial career, and some of the more recent and far from placid Senate hearings and floor debates on Supreme Court nominees. That connection is that, "despite the lack of conflict at that hearing both the event and Scalia's own later influence helped usher in an era of highly partisan ideological examinations of judicial candidate [*sic*], a development of which Scalia himself personally approved."[81] That is, Scalia's success as a Justice in articulating with nearly evangelistic fervor his particular view of constitutional and statutory interpretation as both respectable and serviceable has sometimes prompted senators supporting or opposing later nominations to base their votes on the degree to which the nominee seems like, or unlike, the former Justice in those respects. Thus, one supposes that unanimity in confirmation votes on a Supreme Court nominee in the post-Scalia era will be rare indeed. (In their summary of the Dennison and Wedeking essay, the editors are mistaken when they write that "Scalia's own hearing followed the extremely contentious hearings addressing the nomination of Robert Bork."[82] Rather, examination of Scalia in the Senate for the Supreme Court *preceded* Bork's by about a year.) Nonetheless, the paradox remains in that a nominee (Bork) was rejected in 1987 partly because he professed a jurisprudential

outlook barely distinguishable from Scalia's in 1986. Ironically, in the wake of Judge Bork's emphatic rejection by the Senate in 1987, the Senate's vote in February 1988 to approve Judge Anthony M. Kennedy for Justice Lewis F. Powell's seat—a seat that otherwise would have been Bork's—was 98–0. Thus, the decade of the 1980s witnessed two unanimous votes for a Supreme Court nominee, barely seventeen months apart.

Schultz and Schweber's collection concludes with an unexpected finding in an essay by James Staab, "Was Antonin Scalia a 'Great' Supreme Court Justice?" The question posed by his title reminds one of a parlor game Court watchers might play on a rainy evening, where views about favored and disfavored Justices do battle with others' evaluations. However, Staab has moved well beyond a simple level of verbal skirmishes by bravely laying out criteria by which one might gauge judicial greatness. While his method hardly banishes controversy—one might want to add or subtract a criterion from his list or quibble about how a particular criterion might apply to a particular Justice—the virtue in his approach, which he acknowledges builds on the work of others, is that it does make explicit a basis on which Justices might be evaluated, so that, at the outset of any appraisal, every Justice is being measured against the same benchmarks as the others.

Staab's analysis of greatness employs seven criteria: (1) length of service; (2) judicial craftsmanship, where Staab insists that Scalia's judicial opinions "set a high bar and are a lasting testament to his hard work ethic and attention to detail"[83]; (3) influence, "or whether the judge has left an indelible mark on the law; (4) judicial temperament, or the qualities of being dispassionate and even-tempered; (5) impartiality, or the qualities of disinterestedness and maintaining a strict detachment from partisan activities; (6) vision of the judicial function, or the proper role of judges in a constitutional democracy; and (7) game changers, or whether the judge foreshadowed the future direction of the law and was on the right side of history."[84]

Judging whether one was or is on the "right side of history" raises complex questions of historiography and epistemology, but that seems not to deter Staab, who counts Scalia's role as a dissenter as a distinct negative because he sees dissents as unlikely to be "vindicated by future generations."[85] After he completes his estimate, Staab awards Scalia "very high marks for (1), (2) and (3); low marks for (4) and (5); an average mark for (6); and a low score for (7)." He thus places Scalia "in the category of a 'near great' justice."[86] Alongside the 105 predecessor Justices, achieving a mark that seems easily to amount to B+ or perhaps even A− for one's career seems commendable, provided Staab allowed no grade inflation to creep into his calculations.

The second book on Justice Scalia is **Scalia Speaks**,[87] a collection, edited by Christopher J. Scalia and Edward Whalen, of the late Justice's speeches, to which Justice Ruth Bader Ginsburg contributed the Foreword. Christopher Scalia, the eighth of the Justice's nine children, is a former professor of English who now works in public relations near Washington, DC, and Edward Whalen, who was a law clerk to Justice Scalia during the 1991–1992 term, is president of the Ethics and Public Policy Center in Washington.

This valuable set of Justice Scalia's public remarks on some forty-eight occasions that approximately span his time on the Supreme Court—from as early as June 14, 1986, to January 7, 2016—is divided into six sections: On the American People and Ethnicity, On Living and Learning, On Faith, On Law, On Virtue and the Public Good, and On Heroes and Friends. The principal virtue of a book like **Scalia Speaks** is that it opens a window into the thoughts, personality, and character of a man whose previously known principal public contributions largely have

derived from his judicial service, on both the Court of Appeals and the Supreme Court. Contributions from Justice Scalia's Supreme Court tenure consist of his questions during oral argument and his judicial opinions, a literally voluminous collection. By one count, the Justice authored 870 opinions during his thirty years on the Supreme Court, including 281 majority or plurality opinions, 274 dissents, and some 315 concurring opinions.[88] If those opinions embody the bulk of Scalia's professional identity, this book, as Justice Ginsburg explained in her Foreword, "capture[s] the mind, heart, and faith of a Justice who has left an indelible stamp on the Supreme Court's jurisprudence and on the teaching and practice of law."[89] Or, as Christopher Scalia explained in the Introduction, he and Whalen "were eager to work on this collection because we think it's important that Americans have an accessible way to encounter Justice Scalia's ideas and personality."[90] The operable word in that sentence is "accessible." The Justice's oral presentations on such a variety of topics make him *accessible* to a wider range of readers than do his opinions alone. Indeed, as well-crafted as were many of those opinions, they were still legal documents, necessarily at times cast not in casual prose but in the technical and often specialized language of the law.

Yet the desire to share someone's words with a wider public is distinctly different from carrying out that desire. As the Introduction recounts, "Ed and I sorted through hundreds of files and documents, as well as dozens of floppy disks that we received from Dad's secretary." (Mention of "floppy disks" suggests the magnitude of technological change over the time of the Justice's service.) Apparently the searching and sorting yielded surprises in that neither Whalen nor the younger Scalia had been aware of "the number of speeches, the breadth of their subject matter, and their consistent high quality. Neither of us knew that he'd delivered so many speeches that weren't about legal subjects, or to so many groups unassociated with the law. The sheer variety of material and the many surprises we encountered made the process a joy."[91] With reference to a statement that the Justice once made to son Christopher that good writing was hard work, the editors found in one speech an elaboration where he indicated that the main things separating ordinary writing from good writing were "time and sweat—writing, revising, rethinking, and writing again."[92]

The editors reveal that while Justice Scalia sometimes spoke from a prepared text, he just as often relied on what they simply call "The Outline"—a "barebones series of prompts...though that's giving it too much credit—which he took to every speaking engagement, even if he was delivering a different, unrelated set of remarks." The Justice's assistant "Angela Frank still laughs at the idea of Justice Scalia taking his security blanket with him, but she was always sure to have multiple copies available and a copy ready for every trip he took."[93] At other times, depending on the type of occasion, "The Outline" would be only a single sheet of paper with a few words typed and perhaps even misspelled in a font that indicated it might have originated in a typewriter.

As a collection of addresses and less formal talks, **Scalia Speaks** falls into a rich subcategory of judicial literature that perhaps originated with the tenures of Justices David J. Brewer[94] (1889–1910) and Oliver Wendell Holmes Jr.[95] (1902–1932) and continued with Justice Felix Frankfurter (1939–1962)[96] and Chief Justice Earl Warren (1953–1969).[97] Such compilations of speeches and similar public papers have allowed scholars and others access to glimpses, apart from judicial opinions, into the minds, interests, and concerns of Justices. Similar books of speeches by Charles Evans Hughes predated his first appointment to the Supreme Court[98] as were his important six lectures on the Court at Columbia University in 1927,

published as **The Supreme Court of the United States** in 1928.

Certainly, in what may be considered a major addition to the body of published out-of-Court materials by Justices of the modern Court, Christopher Scalia and Edward Whalen have given readers a more complete picture of the person who was Antonin Scalia.[99] One quickly discovers that he was not merely a jurist, but also a masterful wordsmith and performer with eclectic interests. His judicial service as well as the political maneuverings that ensued in filling his seat are themselves vivid reminders of the continuing role of the Justices in not only the legal but in the political life of the nation, a reality amply illustrated by each of the books appraised here.

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

BROOKHISER, RICHARD. **John Marshall: The Man Who Made the Supreme Court** (New York: Basic Books, 2018). Pp. 324. ISBN: 978-0-465-09662-0, cloth.

ELY, JAMES W., JR. **The Contract Clause: A Constitutional History** (Lawrence, KS: The University Press of Kansas, 2016). Pp. 376. ISBN: 978-0-7006-2307-5, cloth.

SCALIA, CHRISTOPHER J., AND EDWARD WHELAN, EDS. **Scalia Speaks: Reflections on Law, Faith, and Life** (New York: Crown Publishing Group, 2017). Pp. xi, 420. ISBN: 978-0-525-57332-6, cloth.

SCHULTZ, DAVID A., AND HOWARD SCHWEBER. **The Conservative Revolution of Antonin Scalia** (Lanham, MD: Lexington Books, 2018). Pp. xiv, 376. ISBN: 978-1-4985-6448-9, cloth.

ENDNOTES

[1] Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Michigan Law Review* 247 (1914); Corwin, **The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays** (1914). See Richard Loss, ed., **Corwin on the Constitution** (1981), vol. 1, pp. 17–18. Corwin's work followed the path-breaking article by James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893).

[2] Charles Grove Haines, **The American Doctrine of Judicial Review** (1914). Haines later authored **The Role of the Supreme Court in American Government and Politics, 1789–1835** (1944), and, posthumously with Foster Sherwood, **The Role of the Supreme Court in American Government and Politics, 1835–1864** (1957).

[3] Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926, vol. 1, p. v. Warren's poetic reference to words as "the skin of living thought" comes from a sentence in an opinion by Justice Oliver Wendell Holmes, Jr.: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

[4] Warren, vol. 1, p. v. Myers's **History** had been published at the relatively early date of 1912.

[5] Richard Brookhiser, **John Marshall** (2018) [hereafter Brookhiser].

[6] See "The Judicial Bookshelf," 44 *Journal of Supreme Court History* (No. 1, 2019), 110–118.

[7] For example, see Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916–1919); 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); Richard Brookhiser, **John Marshall, the Man Who Made the Court Supreme** (2018).

[8] James Servies, **A Bibliography of John Marshall** (1956).

[9] James Willard Hurst, **The Growth of American Law** (1950), pp. 17–18.

[10] Brookhiser, p. 7.

[11] *Id.*

[12] *Id.*

[13] The Marshall Papers project is apparently complete, with the final volume being published in 2006. In 2015, the University of North Carolina Press published a paperback edition of all twelve volumes.

[14] *Id.*, p. 9.

[15] *Id.*, pp. 1, 5.

[16] *Id.*, pp. 1, 3.

[17] Marshall attributed the phrasing to Representative and fellow-Virginian Henry ("Light Horse Harry") Lee.
[18] Brookhiser, p. 4.
[19] 5 U.S. (1 Cranch) 137 (1803).
[20] *Id.*, p. 176.
[21] *Id.*, p. 177.
[22] Brookhiser, p. 173.
[23] *Id.*, p. 8.
[24] *Eakin v. Raub*, 12 *Sergeant & Rawle,* 330, 348 (PA, 1825) (Gibson, J., dissenting).
[25] Brookhiser, p. 273.
[26] 10 U.S. (6 Cranch) 87 (1810).
[27] 17 U.S. (4 Wheaton) 518 (1819).
[28] 17 U.S. (4 Wheaton) 316 (1819).
[29] 19 U.S. (6 Wheaton) 264 (1821).
[30] 32 U.S. (7 Peters) 243 (1833).
[31] As Brookhiser notes, Attorneys General, like senators in that day, "maintained sideline careers as Washington lawyers." Brookhiser, p. 250.
[32] *Id.*, p. 251.
[33] 32 U.S. at 251.
[34] Brookhiser, p. 252.
[35] John Marshall, **The Life of George Washington** (rev. ed., 1848), vol. 2., pp. 166–167.
[36] 32 U.S. at 250.
[37] Brookhiser, p. 254.
[38] *Id.,* p. 255.
[39] Beveridge, **The Life of John Marshall**, vol. 4, p. 522.
[40] Brookhiser, p. 254.
[41] *Chicago, B & Q. R. Co.,* 166 U.S. 226 (1897).
[42] *Adamson v. California*, 332 U.S. 46, 71–72 (Black J., dissenting).
[43] James W. Ely, Jr., **The Contract Clause** (2016) [hereafter Ely].
[44] Benjamin F. Wright, **The Contract Clause of the Constitution** (1938).
[45] 10 U.S. 87, 138 (1810).
[46] Joseph Story, **Commentaries on the Constitution of the United States**, 2d ed. (1851), vol. 2, pp. 229–230.
[47] Thomas M. Cooley, **The General Principles of Constitutional Law in the United States of America**, 3d. ed. (1898), p. 318.
[48] Ely, p. 1.
[49] 3 U.S. (3 Dallas) 386 (1798).
[50] *Id.*, p. 394, Chase, J.
[51] Chief Justice Oliver Ellsworth and Justice James Wilson did not take part.
[52] 3 U.S. at 388.
[53] Ely, p. 1.
[54] 290 U.S. 398 (1934).
[55] Ely, p. 1.
[56] *Id.*, p. 3.
[57] One suspects that the editors at the University Press of Kansas encouraged the inclusion of the cultural aspects of the contract clause, in that emphasis on the cultural dimensions of constitutional issues has long been an objective of the same publisher's series of case studies on landmark Supreme Court decisions.
[58] *Id.*, p. 2.
[59] *Id.*
[60] *Id.*, p. 3.
[61] *Id.*, pp. 3–4.
[62] 36 U.S. (11 Peters) 420 (1837).
[63] 36 U.S. at 548.
[64] Stanley I. Kutler, **Privilege and Creative Destruction: The Charles River Bridge Case** (1972), p. 93.
[65] Ely, p. 4.
[66] *Id.*, p. 5.
[67] Ely, p. 220.
[68] *Id.*, p. 222.
[69] 290 U.S. at 483 (Sutherland, J., dissenting).
[70] An excerpt from Justice Cardozo's unpublished opinion in *Blaisdell* is reprinted in Alpheus Thomas Mason and Donald Grier Stephenson Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (17th ed., 2018), p. 340.
[71] 290 U.S., at 443–444, Hughes, C.J.
[72] David A. Schultz and Howard Schweber, eds., **The Conservative Revolution of Antonin Scalia** (2018) [hereafter Schultz and Schweber].
[73] The battle that ensued over Judge Bork was the most vitriolic since President Woodrow Wilson's nomination of Louis Brandeis in 1916. The Judiciary Committee, chaired by Senator Joseph Biden, forwarded Bork's nomination to the floor with a recommendation that it be rejected. The 42–58 vote on the Senate floor on October 23 against Bork included six negative notes from Republican senators.
[74] Henry J. Abraham, **Justices, Presidents, and Senators** (2007), p. 354.
[75] Barry Friedman, **The Will of the People: How Public Opinion Has Influenced the Supreme Court** (2009), p. 314.
[76] See David M. O'Brien, **Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*** (2017), pp. 67–68.
[77] Schultz and Schweber, pp. vii–viii.
[78] *Id.*, p. viii.
[79] *Id.*
[80] *Id.*, xiv.
[81] *Id.*, xiv.
[82] Schultz and Schweber, xiv.
[83] *Id.*, p. 319.
[84] *Id.*, p. 316.
[85] *Id.*, p. 340.
[86] *Id.*, p. 316.
[87] Christopher J. Scalia and Edward Whelan, eds. **Scalia Speaks** (2017) [hereafter Scalia and Whelan].
[88] *Resolutions of the Bar of the Supreme Court of the United States In Gratitude and Appreciation for the Life,*

Work, and Service of Justice Antonin Scalia, November 4, 2016, p. 22.

[89] Scalia and Whelan, xi.

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

[91] *Id.*, pp. 7–8.

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

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

[94] Michael J. Brodhead, **David J. Brewer** (1994). The volume's bibliography, at pp. 239–252, lists some seventeen addresses by Brewer published as pamphlets and no fewer than forty-four of his addresses published as articles in various periodicals.

[95] Oliver Wendell Holmes, **Collected Legal Papers** (1920), containing twenty-five articles and addresses by Holmes between 1885 and 1918; **The Occasional Speeches of Justice Oliver Wendell Holmes** (1962), containing forty-two addresses by Holmes between 1880 and 1931); **Speeches** (1934), containing twenty addresses by Holmes delivered between 1880 and 1931.

[96] Felix Frankfurter, **Law and Politics** (1939), containing occasional papers dating between 1913 and 1938; **Of Law and Men** (1956), containing papers and addresses between 1939 and 1956; **Mr. Justice Holmes and the Supreme Court**, 2d ed. (1961), containing three lectures of 1938 on Holmes in addition to an essay on Holmes from (1944). **Of Law and Life** (1965), containing material between 1956 and 1963.

[97] **The Public Papers of Chief Justice Earl Warren** (1966), containing material by Warren from his tenure as governor of California into his chief justiceship; **A Republic If You Can Keep It** (1972), containing twelve essays and talks.

[98] **Addresses and Papers of Charles Evans Hughes, Governor of New York** (1908); **Conditions of Progress in Democratic Government** (1910); **Foreign Relations** (1924); **Our Relations to the Nations of the Western Hemisphere** (1928); **Pan American Peace Plans** (1929).

[99] In the far more scholarly category, see also Antonin Scalia's **A Matter of Interpretation** (1997) and with Bryan A. Garner his **Reading Law** (2012).

Contributors

Winston Bowman is Associate Historian at the Federal Judicial Center.

Christopher Capozzola is Professor of History at MIT.

D. Grier Stephenson, Jr. is Charles A. Dana Professor of Government, Emeritus, at Franklin & Marshall College.

Melvin I. Urofsky is Professor of Law and Public Policy and a Professor Emeritus of History at Virginia Commonwealth University.

Matthew C. Waxman is Liviu Librescu Professor of Law at Columbia Law School.

Laura Weinrib is Professor of Law at Harvard Law School and Suzanne Young Murray Professor at Radcliffe Institute for Advanced Study.

Illustrations

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Cover: Capt. George E. West, American Red Cross, talking to Private James McCoy, Co. H. 326th Infantry in the Argonne Forest, Ardennes, France in 1917. Library of Congress.

Corrections to vol. 44, no. 2.

Cover photo caption—the hike was about 175 miles and started at Lock 72, about 10 miles south of Cumberland, and they walked east to Washington.

Page 149—photo credit, Franz Jantzen, Collections Manager for Graphic Arts, Office of the Curator, Supreme Court of the United States
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