Introduction

Melvin I. Urofsky

As usual, we have a potpourri of subjects for you to enjoy in this issue, and we also have contributions from what might be called two generations of constitutional and legal history scholars.

David W. Levy is my exact contemporary. We started out together as instructors at the Ohio State University in the 1960s and worked together for many years as the co-editors of seven volumes of Louis D. Brandeis Letters. He is the official historian of the University of Oklahoma, from which he recently retired as David Ross Boyd Professor of History. Last year he asked me to read the manuscript of a new book he had written (tasks that we have done for each other for many years now), and while wearing my reader's cap, my hat as editor of this journal is always near at hand. I suggested an article, and what caught my attention—and what I thought would interest our readers—is the reaction of the University in the *McLaurin* case. In civil rights litigation, we often hear about what the plaintiffs went through, and often it was indeed terrible, but sometimes the defendant's actions are also impacted. Several years ago we ran an article by the attorney who argued the case for Kansas in *Brown v. Board of Education.* We think you will find this article just as interesting.

Louis Fisher is another old friend. For many years, he was a fixture in the Law Division of the Library of Congress, where he answered legal questions from senators and representatives on a variety of matters. He has retired from that position and is now a scholar in residence at the Constitution Project as well as a visiting professor at the College of William and Mary law school. He is now also free to file amicus briefs in his own name with the High Court. For many years, Louis Fisher has been arguing—and correctly—that Charles Evans Hughes's famous dictum "the Constitution is what the Supreme Court says it is" is wrong. Our constitutional heritage is developed by input not only from the judiciary, but from Congress, the executive branch, academia, and the people themselves. In this article, he takes on the notion that the courts have been the great protector of individual rights and argues that Congress should be given far more credit than it has in the past.

D. Grier Stephenson, Jr., the Charles A. Dana Professor of Government Emeritus at Franklin & Marshall College, has been writing "The Judicial Bookshelf" since before I took over as editor, and that is a long time. I always mention how grateful I am that he

keeps working along with me, but it is true. It would be hard to think of the journal without him.

Turning to younger scholars, Timothy R. Johnson is the Morse Alumni Distinguished Professor at the University of Minnesota, Rachel Houston is a doctoral candidate there, and Amanda C. Bryan is a newly minted Ph.D. who is an assistant professor at Loyola University in Chicago. They have been working a mine that will keep Court scholars busy for years to come, Justice Harry Blackmun's extra-judicial notes that he scribbled in green pencil through his 30+ years in the Marble Palace. During oral argument, Justice Blackmun took copious notes on the case in standard black pencil, but he also wrote about a lot of other things that were on his mind in green. In this article, we get a taste of what the Justice was thinking about.

James A. Todd is an assistant professor of politics at Palm Beach Atlantic University, and his subject is one of the great cases of the nineteenth century, *Cooley v. Board of Wardens* (1852). In that case the Taney Court essentially said that while the federal government under the Commerce Clause has power, if the national government has not acted, then the states are free to do so—even in interstate matters. While the Jacksonian Justices were more concerned with state than with federal powers, Professor Todd shows that the growing nationalism after the Civil War turned *Cooley* from an enabler of state powers into an affirmer of federal authority.

So, here is a broad array of subjects, and as usual, I urge you to Enjoy!

Cooley v. Board of Wardens and its Nineteenth-Century Legacy

JAMES A. TODD

According to Charles Warren, "it was not until...the case of *Cooley* v. *Port Wardens* was decided in 1852, that a lawyer could advise a client with any degree of safety as to the validity of a State law having any connection with commerce between the States."[1] Indeed, nineteenth-century Commerce Clause doctrine in the Supreme Court can neatly be divided into two periods: before and after *Cooley v. Board of Wardens*.[2] Prior to that decision, the Court never directly answered the divisive question of whether states could regulate interstate commerce in the absence of congressional action. The Constitution, in Art. I, Sec. 8, Cl. 3, clearly empowers Congress to "regulate commerce...among the several states," but the Constitution is silent about state regulation of interstate commerce.

Under Chief Justice John Marshall's leadership, the Court had invalidated state laws that were found to be in conflict with a federal statute enacted pursuant to the Commerce Clause.[3] However, Marshall-era opinions had seemed to leave room for state regulation of certain matters applicable to interstate commerce, such as the pilotage of ships and the inspection of goods.

By 1849, in a pair of cases called the *Passenger Cases*, the members of the Court read the Marshall precedents quite differently.[4] In these cases, a slim Majority of Justices invalidated New York and Massachusetts taxes on incoming ship passengers, but a majority failed to unify around the principle that the federal government had exclusive regulatory rights over such interstate commerce.[5] In the case, eight of the nine Justices wrote separate opinions. Only three members of the Court concurred that the federal government had exclusive power over interstate commerce.

Three years later, in *Cooley*, the Court attempted to reconcile the discordant prior opinions on state action and the Commerce Clause into something resembling a workable doctrinal framework.[6] *Cooley*'s ultimate principle—that the federal government has exclusive regulatory rights over at least *some* portions of interstate commerce—eventually

became the greatest doctrinal enabler of judicial review of state laws in the nineteenth century. As for its staying power, the Court recently made clear in a 2018 opinion that *Cooley* continues to serve as the baseline for analysis of state powers relative to the Commerce Clause.[7] Thus, the *Cooley* decision has an enduring place in the Court's history.

The post-*Cooley* behavior of the Supreme Court is the primary focus of this article, which seeks to answer the following questions: How, if at all, was *Cooley* applied in subsequent cases of purported state regulations of interstate commerce? How often did post-*Cooley* Courts use the federal exclusiveness principle to invalidate state laws? And when, if at all, was the Court most likely to invoke the principle of federal exclusiveness?

The general answer is that by the last decade of the nineteenth century, the Court had realized a potency in *Cooley* that had not been obvious at the time the case was decided. While *Cooley* was decided—and then initially applied—by Jacksonian Justices who mainly wanted to empower states, ironically *Cooley*'s major legacy was created by their Republican successors who sought to disempower states in order to protect commerce.

The findings of this study are based upon a close evaluation of all of the Court's Commerce Clause cases decided immediately after the *Cooley* decision until the reorganization of the federal judiciary that occurred in 1891—just under fifty years.[8] The main insight from the present analysis is that the "career" of *Cooley* federal exclusiveness can be broken down into three distinct periods: the Twilight of the State-Centric System (1852–1872); the period of Emerging Nationalism (1873–1885), and the period of Nationalism (1886–1891).

The *Cooley v. Board of Wardens* Decision

The *Cooley* case itself involved a Pennsylvania law that required every ship entering and exiting the port of Philadelphia to make a report to the port's warden and to use the services of a local pilot. Justice Benjamin R. Curtis, writing for the Court's five-member majority, found that the pilotage requirement involved a state regulation of interstate commerce.[8] However, he found the regulation to be compatible with existing federal statutes concerning the same commerce. According to Justice Curtis, the pilotage of ports of the United States, albeit a matter affecting interstate commerce, is of the type of regulation that is local in nature, and as such only affects the local incidents of interstate navigation. Such a regulation, the Court concluded, may exist concurrently with federal regulation of the same interstate commerce. To evidence this, Curtis pointed to a federal statute authorizing state and local regulation of the subject of pilots.[9] However, he continued, certain other incidents of interstate commerce "are in their nature national, or admit only of one uniform system, or plan of regulation, [and] may justly be said to be of such a nature as to require exclusive legislation by Congress."[10] State impositions on these incidents of interstate commerce are not permitted, even if Congress has not acted. Curtis expressly declined to offer an example of what things might be "within the exclusive control of Congress" or "what may be regulated by the States in the absence of all congressional legislation."[11] But he created the basic distinction between the *local* and *national* incidents of interstate commerce that would endure. Justice Curtis was the newest Justice on the Court at the time of *Cooley*. Unlike most of his peers, he was new to the constitutional questions at issue. Being free from the Court's contentiousness over this issue in the past, he was in a strong position to speak for the Court in *Cooley*. His fashioning of a truly pragmatic doctrine on behalf of the Court contributes to Curtis's reputation, in Bernard Schwartz's assessment, as the second greatest Justice of the Taney Court after the Chief Justice himself.[12]

Appointed by Millard Fillmore, Benjamin Curtis was one of the few Whig Justices to serve on the Supreme Court. In 1852 he wrote the Court's compromise majority opinion in *Cooley v. Board of Wardens*.

Justice Peter V. Daniel concurred separately. He believed that the Pennsylvania law was a proper exercise of the state's exclusive police power—a power having no relation to the Commerce Clause and, therefore, that did not depend upon the assent (or silence) of Congress.[13] Daniel's view—popular among states' rights Jacksonians at the time—was that any measure protecting public health and safety (like, he believed, the pilotage requirements at issue) fell within the exclusive power of a state. But Daniel went further than this. Even when it came to genuine regulations of interstate commerce, according to Justice Daniel, state regulatory authority was fully coextensive with that of Congress. For Daniel, a state law "regulating commerce" could only be deemed invalid

when Congress acted to preempt it using its lawful powers, not on the strength of congressional silence.

Justice John McLean, joined by Justice James M. Wayne, dissented, arguing the exact opposite of the Daniel position on interstate commerce: that states could *never* regulate interstate and international commerce. McLean also disagreed with the majority's holding concerning the implication of federal authorization of state pilotage regulations.[14] For the dissenters, the Pennsylvania law at issue was a pure regulation of interstate commerce that was within exclusive federal power and beyond any state power.

Cooley's Doctrine

In *Cooley*, the Court provided something that had been lacking before: doctrine on state regulation of commerce that could have applicability in almost every conceivable case. The doctrine was flexible, not dogmatic. The Court in *Cooley* supplied a framework of analysis for state imposition on interstate commerce cases that could be applied across a range of potential regulatory circumstances. Since interstate commerce is so vast, the Court reasoned, commerce can give rise to both local and national regulatory needs. As Schwartz has claimed, the flexibility of the *Cooley* framework allowed the law to evolve to suit the needs of the nation.[15]

Conceptually, the *Cooley* decision could be read at the time as authorizing four possible judicial determinations about a state's imposition on purported interstate commerce. In Outcome 1, the state's action could be found *not* to be a regulation of interstate commerce. If the Court so found, the state imposition should be upheld as a proper exercise of the police power that the state exclusively possesses—a power that exists to protect the state's public, not to regulate commerce per se. This was how Justice Daniel characterized the pilotage law at issue in *Cooley* in his concurring opinion. This is the principle of *state exclusiveness*.

However, under *Cooley*, a future Court may be warranted in finding that a state law was more than a simple police measure. If the Court found a state law to involve a true regulation of interstate commerce, as it did in *Cooley*, three possible determinations flow from this, under *Cooley*. In Outcome 2, the thing or activity regulated *is* interstate commerce, but the regulation only touches upon the local incidents of interstate commerce. The state, in such a case, has a *concurrent right* with the federal government to regulate this aspect of interstate commerce. If this finding is made, the law should be upheld, as the Pennsylvania law ultimately was in *Cooley*.

Alternatively, in Outcome 3, a future Court may find that the thing or activity regulated *is* interstate commerce, and that the state regulation touches upon an aspect of interstate commerce that is best handled by uniform national treatment even if it has not been yet regulated by Congress. If this finding is made—and the *Cooley* majority made it clear that this finding may be warranted in a future case—the state law must be invalidated. This was the two *Cooley* dissenters' view of the Pennsylvania law. This is the principle of *federal exclusiveness*.

Lastly, in Outcome 4, the Court could find that the thing or activity regulated *is* interstate commerce, and the thing or activity *has been* regulated by the federal government in such a way as to preclude the specific state and local regulation. In such a case, the state law should be invalidated. Though the expression does not appear to have been used in the context of the *Cooley* decision, this idea would come to be known as the principle of *statutory preemption*. This possible outcome is evident in the *Cooley* majority's approach, whereby the Justices reviewed the compatibility between the state and federal law in the case and deemed that there was no incompatibility, thus no preemption.

Cooley's "Selective Exclusiveness"

Often, constitutional scholars have referred to this *Cooley* framework as the doctrine of "selective exclusiveness."[16] If the Court rests on state exclusiveness, it means that the Court has determined that the imposition on commerce may be made *exclusively* by a state in the exercise of its general police power; if on federal exclusiveness, *exclusively* by the federal government under its power to regulate the national incidents of interstate commerce. If the Court finds that there is a concurrent regulatory right over a certain aspect of commerce, neither level of government has the exclusive right to exercise the regulatory power in question—states may regulate the commerce up until the point that Congress forecloses on the states by national legislation. Statutory preemption hearkens back to the Marshall Court. It acknowledges the Constitution's principle of national supremacy: that existing federal regulation of interstate commerce will be supreme over any conflicting regulation by a state.

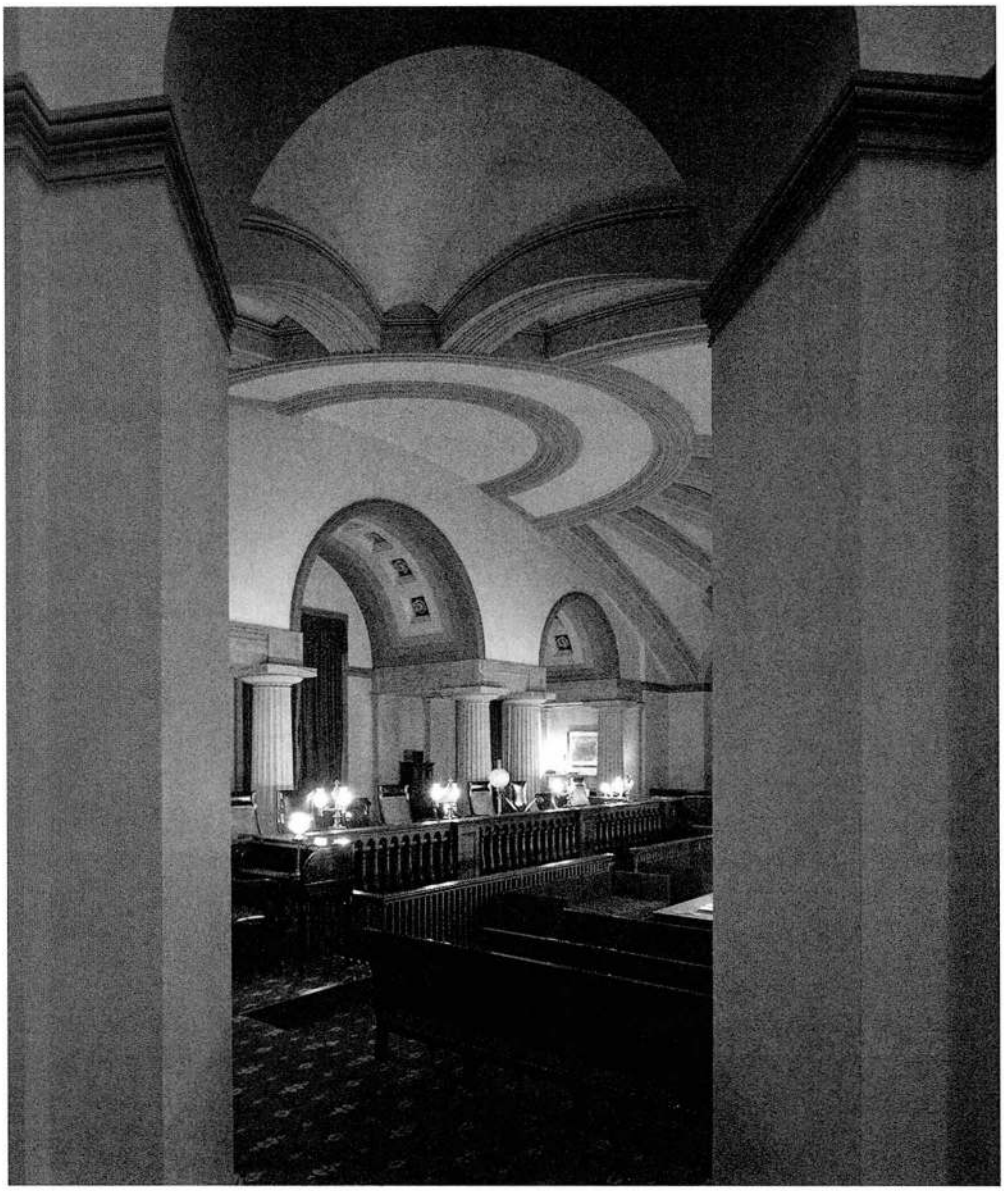
In the *Cooley* case, the Court found that while the requirements placed upon incoming and exiting vessels affected interstate commerce, state and local pilotage requirements of the type at issue had long been permitted. This longstanding permission suggests that each state can adopt its own localized pilotage regulations—that is, to suit the unique circumstances of its local ports—without greatly burdening interstate commerce, up until the point of preemptive federal action. While only intimated by the Court but not taken, statutory preemption was based upon well-established principles of national supremacy dating back to the Marshall Court's landmark decision in *Gibbons v. Ogden,* where Chief Justice Marshall, in dicta, suggested that for some cases a concurrent regulatory right is a possibility.[17] While federal preemption had often been a means of escape for the Marshall Court, state exclusiveness had often been a means of escape for the Taney Court, which often upheld contested state actions on the theory that the action was a state police measure, not a regulation of commerce.[18]

The *Cooley* principle of federal exclusiveness points to some aspects of interstate commerce for which the national government has the exclusive option to regulate or not. Federal exclusiveness had long been contentious as a textual matter: does the mere existence of a constitutional grant of federal regulatory power over interstate commerce mean that states were forbidden from exercising any power over such commerce? The question had never been squarely decided by the Marshall Court; some of the Justices in their separate opinions held to federal exclusiveness in the Court's decision two years prior to *Cooley* in the *Passenger Cases*, but no real consensus had emerged. In any event, whether warranted by the *Passenger Cases* precedent or not, in *Cooley* for the first time the Court majority clearly extended an invitation to future Courts to invalidate state laws on the principle of federal exclusiveness. The *Cooley* majority opinion has never been challenged or repudiated by a subsequent Court.

As it turned out, none of the *Cooley* Justices who supported federal exclusiveness were ever able to use the principle to invalidate a state law. Over twenty years would pass before a Court majority would clearly invoke the principle of federal exclusiveness against a state law. By then, every member of the *Cooley* Court was gone, the nation had undergone the throes of the Civil War, and a new political party had been born.

Period I: Twilight of the State-Centric System (1852–1872)

Cooley was decided by a Court of eight Jacksonian Justices in an era dominated by a sectional division between pro- and anti-slavery states.[19] The Jacksonian Justices



Except for Curtis, all the Justices who decided *Cooley* were Jacksonian Democrats. Above is the courtroom where Taney, McLean, Wayne, Catron, McKinley, Daniel, Nelson, and Grier heard arguments in the case.

consisted of Court members appointed by President Andrew Jackson (Taney, McLean, Wayne, and Catron) and Jackson's Vice President and successor, Van Buren (McKinley and Daniel).[20] John Tyler, a nominal Whig who supported states' rights as strongly as any Jacksonian Democrat, appointed Justice Nelson, and his Jacksonian Democratic successor Polk appointed Justice Grier.[21] Justice Curtis, the author of the *Cooley* opinion, was the Court's sole Whig—an appointee of Whig president Millard Fillmore.[22] Fillmore was as equivocal on the issue of federal power versus states' rights as his appointee's majority opinion had been.[23]

While the Court changed composition shortly after *Cooley*, Justices appointed by Democratic Presidents dominated the Court

during the Civil War era through the remainder of the Chief Justiceship of Taney to 1864, and they continued to hold a majority for most of Chief Justice Chase's tenure (1865–1873). Judicial decision-making during this time looked Jacksonian until about 1870, at which time a Republican majority was in place.[24]

While Jacksonians existed in every region, they were generally on the Southern side of the sectional divide.[25] They uniformly supported states' rights in ways that protected slavery, and traditionally wanted to permit any other kind of state action if such was at all defensible and—as in the 1830s cases of Cherokee Removal—at times indefensible. Jacksonian ideology, perhaps best represented by Chief Justice Taney himself, had long held to concurrent state authority and to the principles of dual state and federal sovereigns. Taney thought that state power to regulate interstate commerce was completely coextensive with the power of Congress over commerce, up until the point that state action was explicitly foreclosed by Congress.[26] That is to say, any limitations on state power had to be by virtue of a positive constitutional provision or statutory enactment—some express denial of state authority found in a valid federal law or the Constitution itself. Absent some explicit denial, the state's power should be upheld by the Court.

Jacksonian ideology further held that the preemptive power of the federal government over states was limited simply because the powers of the federal government were to be construed strictly. Certainly, constitutionally proper federal enactments were supreme over state power per the Constitution's Article Six (hence, most Jacksonians' rejection of nullification), but federal power was not, in itself, seen as broad in its scope. Just as state powers should be construed broadly, the enumerated and implied powers of the federal government should be construed strictly.[27] With Jacksonians in control of one or both chambers of Congress for all but two years (1841–1843) between President Jackson's first election and the Civil War, there were very few congressional enactments that pushed the limit of federal constitutional power, with the consequence that the scope of the powers of Congress was not judicially addressed.[28] In the rare instance that a judicial test came, as in the *Dred Scott* decision of 1857, federal power was restricted. As Gerard Magliocca notes, the ultimate opinion of federal power in Jacksonian America came in the form of presidential veto addresses and actions, not Supreme Court opinions.[29] President Jackson himself, in his Maysville Road Veto (1830) and then again in his Bank Veto (1832), denied that the powers of Congress could be construed so broadly as to authorize the building of a road within one state or the creation of the Bank of the United States, respectively.[30] Hence, the federal union of the Jacksonians was state centric: while the union itself was not destructible by any state, regulatory power within the union was presumptively vested in the level of government closest to the people.

A question arises: why would three Jacksonian Justices in the majority in *Cooley*—Justices Taney, McKinley, and Catron—agree to a decision that enshrines into constitutional law the principle of federal exclusiveness? Carl Swisher, the foremost historian of the Taney Court, has suggested that the states' rights Jacksonians would have gladly taken the bargain involved in *Cooley*.[31] In exchange for language supportive of the principle of federal exclusiveness that would secure the support of the Court's relative nationalists like Curtis, McLean, and Wayne, the states' rights Justices received an actual decision upholding the practice of state regulation of interstate commerce. Just as later Justices would come to see *Cooley* in light of the opening it gave to federal exclusiveness, Jacksonians of the time embraced *Cooley* for its actual holding that a state may regulate potentially substantial portions of interstate commerce.

The Jacksonian Court after *Cooley*

Consistent with Swisher's theory about *Cooley*, the subsequent behavior of the Jacksonian Court showed that the more immediately consequential part of *Cooley* was the idea that state regulation of interstate commerce can in many—perhaps most—cases be concurrent with federal power. Furthermore, the subsequent behavior of the Taney and Chase Courts indicated that the federal exclusiveness language in *Cooley* was, indeed, an empty promise made by the states' rights Justices on the *Cooley* Court.

In the two decades after *Cooley*, with Jacksonian Justices solidly in the majority on the Court, the Court issued twenty-two decisions concerning states' rights over interstate commerce. Almost all of the cases dealt with the issues that had long come before the Court. Primarily, they revolved around the right of a vessel to navigate the waters of the United States free of assessments and regulatory requirements created by a state. Despite all of the turmoil of the Civil War era, the nature of the cases had not changed very much since the time of Chief Justice Marshall. And neither, as it turned out, had the nature of the answers.

On the surface, it may appear that in the first two decades after *Cooley* the Court was relatively aggressive in imposing limitations on state power. In nine of the twenty-two cases, the Court invalidated the challenged state or local law.[32] Two of these invalidations were statutory preemption cases, as the challenged state laws were found to be in conflict with a particular federal law.[33] In these two cases, the Court relied on precedents that predated *Cooley*, given that *Cooley* itself had not been resolved on this ground.

None of the seven other invalidations in this period were pure federal exclusiveness cases stemming from *Cooley*, however. In no case did the Court explicitly rest its decision on the federal exclusiveness principle.[34] The Court appeared careful to avoid this fraught question in the context of national crises in the period over slavery, secession, war, and Reconstruction. Or perhaps, as has been suggested by Carl Swisher and given the obvious bargain involved in the *Cooley* holding, no majority of Jacksonian Justices was sincerely supportive of the principle to begin with.[35] As long as Jacksonians dominated the Court, federal exclusiveness was not a viable principle in American constitutional law.

The Court failed even to cite *Cooley* in any of its invalidating decisions, although a state's power over interstate commerce was plainly at issue in all of them. In voiding a state or local law, the Court applied another part of the Constitution that limited state power even when it could have opted for federal exclusiveness. For example, in *Almy v. California* and later in *Low v. Austin*, the Court found that a state tax on ships' bills of lading and a state tax on imports, respectively, violated the prohibition on state imposts on imports or exports under Article One, Section Ten, not the Commerce Clause.[36] Similarly, the invalidation of the state law in the *State Tonnage Tax Cases* involved impermissible taxes on tonnage under Article One, not impermissible taxes on interstate or international commerce.[37]

In addition to these express constitutional limitations, the Court also used novel rationales to invalidate laws rather than address the federal exclusiveness implications of them. In *Crandall v. Nevada*, the Court gestured toward *Cooley* by expressly noting that a tax on people exiting the state "does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country," but instead found that the tax unconstitutionally frustrated the military necessities of the federal government and violated the right of a U.S. citizen, whatever his state, to live under a common national government.[38] This was too much for the two dissenters. Justice Clifford, joined by Chief Justice Chase, wrote separately to express the view that the tax was

also "inconsistent with the power conferred upon Congress to regulate commerce among the several States...."[39] Justice Clifford was the first post-*Cooley* Justice appointed by a Democratic President (Buchanan) to find that federal exclusiveness should invalidate a state law.

The Court invalidated a city tax on ferry boats in *St. Louis v. The Ferry Company* because it found that the tax had extraterritorial application and was, therefore, "beyond the jurisdiction of the authorities by which the taxes were assessed."[40] As it had in *Crandall v. Nevada*, the Court used a novel rationale to invalidate a plainly unconstitutional state law in order to avoid the issue of federal exclusiveness: specifically in the *Ferry Company* case, to interpret state-enabling legislation to forbid extraterritorial taxation. Despite the fact that the Ferry Company had argued ("ably and learnedly," according to the Court) that the tax was an improper burden on interstate commerce, the Court expressly declined to offer an opinion on the issue.[41]

Andrew Johnson has been called the last Jacksonian President.[42] With the election of his successor, Ulysses S. Grant, to the presidency in 1868, a period of sixteen years of uninterrupted Republican control of the presidency began. As Grant appointed more Republicans to the Court, a division on the Court between the holdover Jacksonian Democrats and the newcomer Republican Justices began to appear. In 1871, in *Ward v. Maryland*, the Court majority found that a tax levied against out-of-state traveling salesmen violated the privileges and immunities of out-of-state residents.[43] However, in making this determination, the Court avoided the clear interstate commerce implications of the law in *Ward* so much that Justice Bradley, a Republican and the Court's newest member, authored a concurrence in which he offered that the tax also, in his judgment, violated the Commerce Clause. Bradley argued that the tax discriminated not just against out-of-state sellers but out-of-state goods, meaning that even if the tax had applied to resident sellers of out-of-state goods it would violate the Commerce Clause.[44]

At its most pro-national, the Court's basis for invalidation involved a finding of a "hybrid" constitutional violation: federal exclusiveness *as well as* some other more positive constitutional or statutory prohibition. For instance, in *Steamship Co. v. Portwardens*, without invoking *Cooley*, the Court found the state law to be an impermissible state regulation of foreign commerce as well as an unconstitutional duty on tonnage.[45]

What is clear from the cases is that if the Court majority had any basis for invalidating a law clearly burdening interstate commerce besides federal exclusiveness it seized upon it—to the point of simply inventing constitutional guarantees in *Crandall* or by practicing constitutional avoidance in the *Ferry Company* case. To the extent these decisions further developed the *Cooley* principle of federal exclusiveness as a restriction on state laws, they showed how deliberate the Court could be in avoiding such a finding.

While it goes too far to suggest that the Court abandoned the *Cooley* framework during the first two decades, the Court appears to have operated not just within the framework but often alongside it. It is clear that the Court used *Cooley*'s doctrine to empower states, but not to disempower them. The Court was willing to disempower states on different constitutional theories, just not federal exclusiveness. According to David Currie, "Cooley's dictum finally established that the commerce clause sometimes limited state power. When Taney died in 1864, however, no one could yet say confidently that the Court had ever found an instance in which it did."[46] It was merely dictum for a long time.

Almost 60% of the Court's interstate commerce decisions between 1852 and 1872 were decided in favor of the state. The Court's most likely decision in any such case (36.3%)

TABLE 1: Summary of the Twilight of the State-Centric System (1852–1872)

	n	%
Decisions Upholding State Laws		
Outcome 1: State Exclusiveness	8	(36.3)
Outcome 2: Concurrent Rights	5	(22.7)
Decisions Invalidating State Laws		
Outcome 3: Federal Exclusiveness	0	(0.0)
Outcome 4: Statutory Preemption	2	(09.0)
Other Constitutional Provisions/Hybrid	7	(31.8)
Total	22	

was to resolve it in favor of the state on *Cooley*'s state exclusiveness basis. In these cases, the challenged states' laws were held to be within the exclusive state sphere of action—actions found not to "regulate" or even affect interstate commerce.

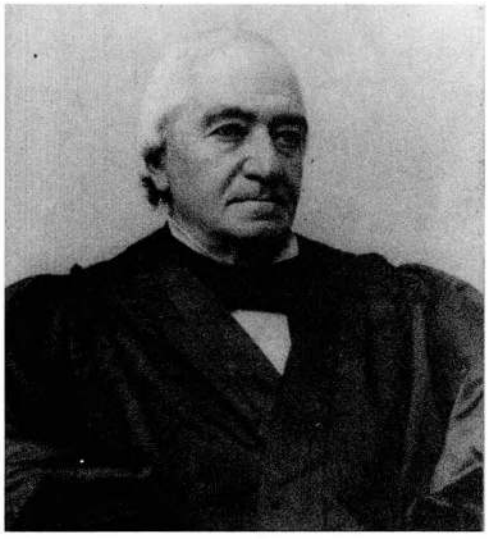
This tendency resembles what is generally understood about the Taney Court and demonstrates the persistence of the Jacksonian view of interstate commerce even into the 1870s. In this view, states are the nation's principal policy-making actors, even in matters seemingly entrusted to Congress. States are presumptively empowered to act unless some explicit legal prohibition is placed upon them. This explains why the Taney-era invalidations were almost always rooted in the few positive and express disempowerments placed on states in the Constitution, not on the negative implication of the Commerce Clause. This was indeed an era of strict constructionism.

As it turned out, however, state centricity as a doctrinal trend was indeed at its twilight for the Court. The federal judicial personnel were changing rapidly in this era of emerging Republican political dominance, as was the economy itself. At the same time, the number of Commerce Clause cases before the Court increased from an average of just over one per term before 1873 to over three per term after. Further, the tension between the Jacksonians and the Republicans began to emerge in the later part of this era, as Republican jurists like Bradley showed that they were inclined to use federal exclusiveness under *Cooley* as readily as the Constitution's express limitations on states.

Period II: Emerging Nationalism (1873–1885)

In the short time from the end of the Civil War to 1873, the Court changed from solidly Jacksonian Democrat to equally solidly Republican. In 1870, the Jacksonian Democrat Robert Grier retired, creating a vacancy that President Grant filled with a Republican jurist, William Strong. At about the same time, the Republican Congress created a ninth seat on the Court to give Grant an additional appointment opportunity. Grant nominated to that seat a prominent railroad attorney and Republican, Joseph P. Bradley.[47] While Justices nominated by Lincoln had controlled the Court since 1865, with the March of 1870 Bradley confirmation, the Court had a majority of avowedly Republican Justices for the first time. Two years later, Grant had the opportunity to fill another Court vacancy and placed another known Republican, Ward Hunt, onto the Court. Lastly, in 1874, Grant appointed Morrison Waite to the Chief Justiceship. These four Grant appointees joined Justices Swayne, Davis, and Miller to form a seven-member bloc of known Republicans on the Court. The lone remaining Democrat at the time Waite's Chief Justiceship began was Stephen Field—a pro-union Lincoln appointee.

Given Grant's unstated desire to put pro-business Republicans on the bench, and



Justice Joseph P. Bradley, appointed by Republican President Ulysses S. Grant, was an early proponent of federal exclusiveness under *Cooley*.

perhaps sensing that the future was bright for the Republican constitutional project, the Republican-dominated Congress approved substantial salary increases for the Justices in 1871 and again in 1873–to keep former railroad attorneys like Strong and Bradley happy with the much less lucrative life of a judge.

Cooley Rediscovered

Toward the end of Chase's tenure, in March 1873, the Court issued its opinion in the *Case of the State Freight Tax*, a case in which the *Cooley* doctrine was unequivocally applied to a tax laid directly on articles of interstate commerce.[48] In overturning the decision of the Pennsylvania Supreme Court, the Court found that the direct taxation of articles of interstate commerce at issue—in this case, rail shipments of coal passing through the state—could only be done "by exclusive legislation of Congress." Therefore, Pennsylvania's tax on freight in the form of coal was unconstitutional. After articulating the part of the *Cooley* doctrine concerning commercial subjects that by their nature require uniform national treatment by Congress, Justice Strong, for the Court, offered the following observations:

> Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.[49]

In the twelve years that followed the *State Freight Tax* decision, from the remainder of 1873 through the end of 1885, the Court invalidated sixteen state actions in forty opportunities to do so, the highest rate of invalidation of states' laws for any twelve-year period in the Court's history up to that time.[50] The reasons laws were either upheld or invalidated varied somewhat, but in making its decisions the Court increasingly looked to the *Cooley* framework and to federal exclusiveness specifically. The Court demonstrated a much greater incidence of federal exclusiveness findings after *State Freight Tax*. Of the sixteen invalidations, ten may be interpreted as having been solely based upon principles of federal

exclusiveness.[51] Only three were based upon preemption by federal law, while three others can be considered hybrid, with a Commerce Clause rationale coupled with some other constitutional limitation on a state.[52] Virtually as soon as Grant's Republican voting bloc was in place, the Court began to use the *Cooley* framework to invalidate state laws that touched on what they determined to be exclusive national matters.

In 1875, in *Henderson v. New York* and its companion case, the Court applied *Cooley* to invalidate state taxes on incoming ship passengers, finding that the matter of admission of passengers from other countries is "national in character" and, therefore, to be regulated only by "a uniform system or plan" put in place by the federal government.[53] Applying *Henderson* eight years later, the Court rejected yet another New York attempt to tax incoming ship passengers in *People v. Compagnie Generale Transatlantique*.[54] In cases such as these, according to Owen Fiss, the Court rejected the Jacksonian notion that simply because a state law was designed as a police measure, it does not amount to an impermissible regulation of commerce.[55]

In *Welton v. Missouri*, speaking through Justice Field, the Court invalidated a Missouri law that required a license only for dealers in goods "which are not the growth, produce, or manufacture of the State...."[56] The Court in *Welton* did not explicitly rely upon (or even cite) *Cooley*, but the Court strongly suggested a federal exclusiveness rationale for its action, relied upon nationalist Marshall Court decisions, and supported its decision with the *State Freight Tax* case. For the Court in *Welton*, congressional inaction concerning the goods in question "is equivalent to a declaration that inter-State commerce shall be free and untrammeled."[57] Similarly, in *Guy v. Baltimore*, the Court invalidated a city fee charged for using a city wharf that by its terms fell *only* on carriers of products not originating from the State of Maryland. The Court explained the general rule:

> [I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.[58]

The Court found that the law was "in conflict with the power of Congress over the subject of commerce."[59] The Court used the rationale of *Welton* to invalidate a Texas tax on the sale of out-of-state liquors and beers in *Tiernan v. Rinker*[60] in 1880 and a Virginia license on out-of-state goods in *Webber v. Virginia*[61] in 1881.

In *Railroad Company v. Husen*, the Court invalidated a Missouri law prohibiting the introduction of certain breeds of cattle into the state, on the theory that the law was "a plain intrusion upon the exclusive domain of Congress."[62] The Court further admonished that it was the "duty of the courts to guard vigilantly against any needless [state] intrusion" on interstate commerce.[63] For the Court, how a state characterized its regulation was unpersuasive—the effect of the regulation was the primary focus. Did the regulation infringe upon national commerce, such that a regulation of the type better fell within the province of Congress?

In *Foster v. Master and Wardens of the Port of New Orleans*, the Court found that a state law that required all ships arriving in the port of New Orleans to make a survey of the hatches and of any damaged goods on board violated the Commerce Clause.[64] The Court found that these requirements were "regulations of both foreign and inter-state

Traveling salesmen were the subject of much discriminatory state legislation in the 1870s that allowed the Court to advance the application of *Cooley* federal exclusiveness.

commerce" and a "clog and blow to all such commerce in the port to which they relate" whose "enactment involved a power which belongs exclusively to Congress, and which a State could not, therefore, properly exercise."[65] Another Louisiana law, requiring that all trains coming through the state not practice racial segregation in their accommodations, was held to violate the Commerce Clause in *Hall v. DeCuir*.[66] Because the law required certain adjustments to be made out of state in order to integrate the passengers on board for purposes of travel in Louisiana, the Court found that it placed a "direct burden" on interstate commerce so as to "encroach upon the exclusive power of Congress."[67]

In an 1882 case, *Telegraph Co v. Texas*, the Court struck down a Texas tax on any telegraph message sent from the state, on the finding that the tax burdened interstate telegraph messages the same way that the tax on freight burdened interstate coal shipments in *State Freight Tax*.[68] The Court further relied upon principles of national supremacy because the tax also applied to the federal government's messages.

Beginning with *State Freight Tax* in 1873 and continuing for twelve years thereafter, in marked contrast to the first decades after Cooley, one-fourth of all cases heard were resolved primarily on federal exclusiveness grounds. This rationale was the most frequently occurring basis (62.5%) for an invalidation. The Court was sharply increasing its tendency to find in favor of federal exclusiveness at the expense of all other rationales for rejecting state action. With the strong language of the *State Freight Tax* opinion setting an opening tone, this line of cases must have sent a powerful, pro-national message to lower courts to—in the Court's words in *Husen*—do their duty. Whereas inferior courts and state legislators prior to 1873 might have found ample room to maneuver in their decision-making given the Court's reluctance to invoke federal exclusiveness, and its seeming tendency toward state exclusiveness, afterward, the Court made plain that it was the duty of courts "to guard vigilantly"

TABLE 2: Summary of the Period of Emerging Nationalism, 1873–1885

	n	%
Decisions Upholding State Laws		
Outcome 1: State Exclusiveness	13	(32.5)
Outcome 2: Concurrent Rights	11	(27.5)
Decisions Invalidating State Laws		
Outcome 3: Federal Exclusiveness	10	(25.0)
Outcome 4: Statutory Preemption	3	(0.075)
Other Constitutional Provisions/Hybrid	3	(0.075)
Total	40	

against state regulations of interstate commerce using *all* of the tools that the *Cooley* framework provided.

The trend in the Court's decisions upholding a state law shifted as well. As in the pre–*State Freight Tax* period, the highest percentage of the cases favoring the state was decided on the ground of state exclusiveness, but that likelihood had fallen from one period to the next. Concurrent regulatory right had taken on relative parity with state exclusiveness, suggesting that the Court broadened its notion of what *is* interstate commerce for the purposes of whether state regulation affected such commerce. This shift toward a concurrent rights theory of commercial regulation was significant in the development of *Cooley*. It set the table for a more seamless transition in doctrine if circumstances changed. Action deemed as permissible state action because it merely "affects" interstate commerce might more easily be recharacterized as "burdening" interstate commerce as the nature and extent of interstate commerce continued to develop. Equally important, an expansive notion of interstate commerce also served as an invitation to Congress to preempt such state regulations. It opened up the field of federal action in a way that state exclusiveness findings did not.

Federal exclusiveness aligned with the preferences of the postwar Republican Party in the same way that state exclusiveness had fit the Jacksonian Democrats. While Jacksonians had preferred regulation of business enterprise at the level closest to the people, Republicans preferred no such regulation by any level of government. Historians of the era have noted the shift in Republican policy priorities in the mid-1870s, away from federal action protective of civil rights for African Americans and toward federal protection of corporate interests.[69] In their application of *Cooley*, the timing of Republican judicial behavior appears to be consistent with this thinking. Moreover, it was the case that a finding that some commerce was to be exclusively regulated by Congress was, for all practical purposes, tantamount to a declaration that the commerce go unregulated entirely. Republican members of Congress were not eager to exercise federal control over interstate commerce; except in the case of liquor, they wanted commerce to be free of all regulation.

Lastly, the statistical division between upholding and invalidating decisions (60%–40%) remained the same from one period to the next. Laws continued to come to Court with a fairly strong presumption of constitutionality—then, as now. State exclusiveness was still the rationale the Court used most frequently, and it upheld 32.5% of all challenged laws on that basis. Concurrent rights was the second most frequent finding at 27.5%. The Court's judicial review of state laws changed qualitatively—as the 40% of state laws that failed to survive Court review in the Period of Emergent Nationalism were invalidated for entirely different reasons than had been used by the Jacksonians—but not necessarily quantitatively.

Period III: Period of Nationalism (1886–1891)

In October 1886, the Court issued one of the truly landmark decisions of the era: *Wabash, St. Louis & Pacific Railway Company v. Illinois*.[70] In 1871, the State of Illinois had enacted a railroad regulation that required a railroad to charge the same rate per passenger or for freight regardless of the distance of the route. The Supreme Court of Illinois had upheld the law—which was intended to prevent the notorious discounts given by railroads to long-haul customers—on the theory that the regulation could easily segregate a route to cover only that part within the state. When the railroad appealed the ruling to the Supreme Court, counsel for the state admitted that the statute affected interstate commerce (as it applied, even if apportioned, to routes originating in Illinois but extending out to other states), and argued that the regulation was of the type that might be preempted by federal law but should be permitted to exist until Congress acted. The Court itself had said in many cases, the state argued, that not everything a state does that *affects* interstate commerce "regulates" interstate commerce within the meaning of the Constitution. Illinois relied primarily on four rate-regulation cases from the 1870s wherein the Court had upheld the regulations at issue.

The Court, speaking through Justice Miller, conceded that the Court had previously classified rate regulation as a concurrent state right–"as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states, in the absence of any legislation by Congress on the same subject."[71] At the same time, Justice Miller deprecated these precedents. In these cases, according to Justice Miller, though "the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the states, was presented, it received but little attention at the hands of the Court and was passed over with the remarks in the opinions of the Court which have been cited."[72] Miller made clear that if the Court had these cases to do over again, it might more closely consider the question of federal exclusiveness.

Justice Miller, a Lincoln appointee, noted that only three members of the Court's majority in those 1870s cases, himself included, remained on the Court to hear *Wabash*.[73] It was only fair that the Court's five newest Justices—all Republicans—be given a chance to consider the question of federal exclusiveness over rate regulations. Miller expressed seeming remorse for his own role in the 1870s precedents that Illinois had relied upon and that the Court was about to overturn. Justice Miller then moved to two of the federal exclusiveness opinions of the prior period pertinent to railroad activity: *State Freight Tax* and *Hall v. DeCuir*. The Court found that the federal exclusiveness rationales in those cases—one concerning the taxation of freight, the other the regulation of rail passenger compartments—applied with equal force to the Illinois rate law. The Court held: "It cannot be too strongly insisted upon that the right of continuous transportation, from one end of the country to the other, is essential in modern times to that freedom of commerce, from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure."[74] The Court continued:

> And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of

> this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.[75]

Three Justices dissented, arguing that the regulation could be sustained on the concurrent rights rationales offered up in the precedents relied upon by the state of Illinois. Among the dissenters was Justice Bradley, who was among those responsible for the revival of *Cooley* as a dissenter from the state-centric views of the Jacksonians. Bradley was not comfortable undoing the supposedly careful balance struck between federal and state power in the prior era—Emerging Nationalism.

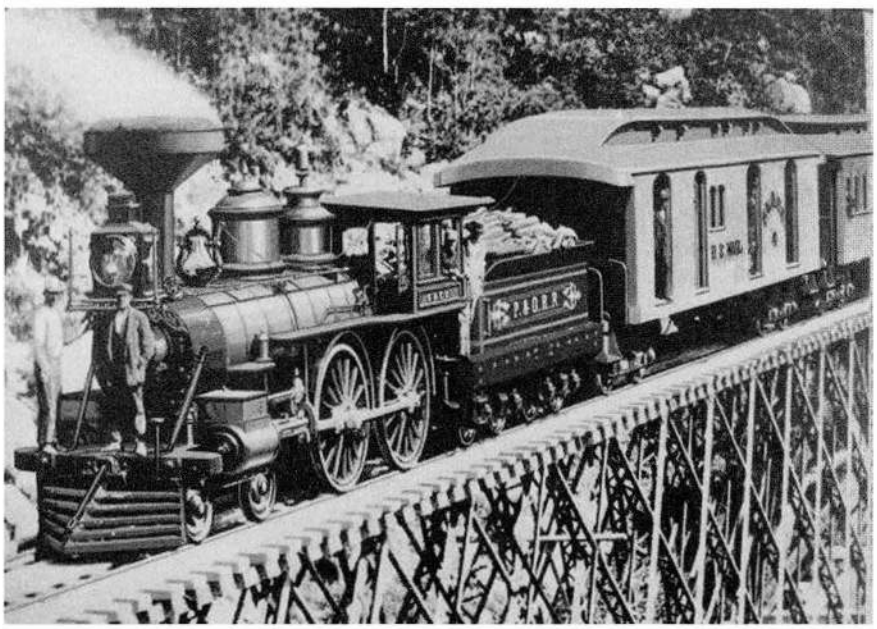
In this respect, Justice Bradley presciently sensed the near future. In repudiating these very recent precedents, the decision in *Wabash* seemed to mark a clean break from the prior period, where federal exclusiveness had emerged with full force after *State Freight Tax* but a good degree of deference still had been given to states. In seeming to overturn or at least diminish four such cases that the state of Illinois had relied upon to act, the Court was charting an even more pro-national course for itself. The wide language of *Wabash* seemed to speak preemptively against any state impositions on railroads that operated on an interstate basis. In fact, the case had such federal exclusiveness force that it prompted Congress to enact the Interstate Commerce Act of 1887—the first federal regulation of interstate commerce as such.[76]

Wabash did indeed set the tone for a new judicial dispensation under *Cooley*. In the period beginning in 1886, the year of *Wabash*, and for the five years following, the Court heard forty-three cases on state regulation of interstate commerce and overturned the state law in more than half (55.8%). Robert McCloskey has indicated that the "tempo of [federal exclusiveness] decisions increased still further" after *Wabash*, and that "the states' power to tax and regulate business was more and more constrained by the doctrine that national commerce must be controlled nationally...."[77] But it was more than a simple picking up the pace in applying federal exclusiveness compared to the prior era. Statistically, challenged state laws were *more likely than not* to be invalidated in this period. This rate of invalidation almost completely reversed the pattern of the previous two periods, where, as has been indicated, the proportion had been 60% in favor of states in each era.

More importantly to the legacy of *Cooley*, the Court relied upon the federal exclusiveness principle in twenty-two of these twenty-four invalidations. In fact, for the first time, a federal exclusiveness invalidation was statistically the most likely outcome in any case of purported state regulation of interstate commerce. Furthermore, the Court was two times as likely to use federal exclusiveness to invalidate a state law (51.1%) as it was to use state exclusiveness to uphold a law (25.5%). The Court was not merely applying federal exclusiveness more often, but most often.

In only two of the invalidations did the Court need to resort to a finding that the state action in some way was preempted by the exercise of federal power. The Congress of this era was not busy legislating on matters of interstate commerce. Notably, for the first time in the eras examined in this study, the Court did not resort to hybrid theories or to other constitutional limitations on states in order to achieve such a high rate of invalidation. The most pro-national of the *Cooley*-based outcomes, federal exclusiveness, dominated.

The Court continued in the *Wabash*, *State Freight Tax*, and *Hall v. DeCuir* line of cases prohibiting many, but not all, state impositions on railroads. In two cases, the Court struck down state taxes on Pullman cars involved in interstate commerce but in two



During a period of nationalism, industries in the post–Civil War economy, such as railroads, were often specially protected in the Court's application of *Cooley*.

other cases upheld taxes on railroad property apportioned to cover only property falling exclusively within the state.[78] In all, the Court invalidated five actions taken by states against railroads on federal exclusiveness grounds,[79] invalidated an additional one on statutory preemption grounds,[80] and upheld seven other actions challenged by railroads.[81] In the seven upholding decisions, the Court found in six of the cases that the state action was an appropriate police measure (Outcome 1),[82] while in the one other the Court found the regulation to be a proper local regulation of interstate commerce (Outcome 2).[83] In *Smith v. Alabama*, for instance, the Court held that a state could license locomotive engineers as a police measure even if such engineers were engaged in interstate commerce.[84] In *Nashville, Chattanooga, and St. Louis Railroad v. Alabama*, the Court held that the regulation of a railroad employee's conduct while he was passing through the state was a proper local regulation of interstate commerce.[85]

Beyond the railroad context, the Court continued in the line of cases begun in the decade before concerning state discriminations against out-of-state goods and merchants. In thirteen cases after *Wabash*, the Court found a particular state treatment of out-of-state goods, corporations, or agents to be discriminatory and, thus, in violation of the Commerce Clause. This included invalidating state inspection laws long thought to have been within the state's authority in the shipping context.[86] During this period, in only three cases in which discrimination against out-of-state interests was alleged did the Court side with the state.[87] In one, the Court upheld a grazing ban that applied only to "Texas cattle" as a proper local police regulation of interstate commerce.[88] Two others involved the most contested terrain of the era: liquor regulation. The Court of the period was—despite its nationalist tendencies—deferential to states in the matter of police power over liquor, holding that the state may ban the manufacture or (re)sale of *all* liquor, including that of out-of-state origin.[89] However, when a state attempted to ban or tax out-of-state liquor while it was still

TABLE 3: Summary of the Period of Nationalism, 1886–1891

	n	%
Decisions Upholding State Laws		
Outcome 1: State Exclusiveness	11	(25.5)
Outcome 2: Concurrent Rights	8	(18.6)
Decisions Invalidating State Laws		
Outcome 3: Federal Exclusiveness	22	(51.1)
Outcome 4: Statutory Preemption	2	(4.6)
Other Constitutional Provisions/Hybrid	0	(0.0)
Total	43	

in its original package, the Court invalidated the law.[90]

Overwhelmingly, a finding of federal exclusiveness was the most likely outcome in a case of state treatment of out-of-state goods, dealers, or corporations. The Court also used federal exclusiveness to invalidate three regulations burdening telegraph companies. Two of these laws involved unapportioned taxes on a telegraph company's gross receipts.[91] The third was a regulation that telegraphs be sent "in a timely manner."[92] In another case, the Court held that a state license requirement placed on a telegraph company conflicted with a company's federal license to operate.[93] No state regulations of telegraph companies per se were upheld in the period; federal exclusiveness prevailed entirely in the telegraph context.

Lastly, the traditional state regulations of waterborne commerce continued to come before the Court. The Court held that ship inspections and quarantines,[94] generally applicable lock-and-dam tolls,[95] wharfage fees,[96] and fishing regulations,[97] were all proper local regulations of interstate commercial carriers. The Court as late as 1885 held, per precedent, that bridges could obstruct navigable rivers so long as Congress had not acted to protect the river's commerce.[98] In fact, none of the invalidations of the *Wabash* period involved waterborne commerce.

This points to an important observation. Republican use of federal exclusiveness primarily extended to the industries dominant in the post–Civil War economic order: railroads, the industries (like coal) that were dependent on railroads, traveling sales, multistate business arrangements, and telegraphs. The Court was content to allow Jacksonian rationales of state exclusiveness or concurrent right to continue to govern the commercial vestiges of the Jacksonian economy. In fact, in vigorously protecting railroads but not waterborne commerce from state regulatory efforts, the Court put railroad interests at a distinct advantage in the competition for freight business. Another interpretation of these patterns would suggest that the Republican Justices were merely using the preexisting doctrine of *Cooley* to accommodate the new realities of an integrated, commercial, and industrial economy.

Conclusion

Cooley's doctrine was born of a desire by Jacksonian Justices to provide a doctrinal pathway for states to regulate the commerce occurring within their borders. But, ironically, the long-term legacy of *Cooley* was its use to disempower states and to free up economic actors from governmental regulation. This legacy was the result of Republican jurists exploiting the half of the *Cooley* doctrine that allowed for exclusive federal regulatory rights.

Regardless of the era, the *Cooley* doctrine did little to limit judicial discretion in deciding which regulatory matters were truly national and which were not. And regardless of era, the Court often struggled with this lack of any obvious line of de-

marcation between incidents of commerce that are exclusively national and those that are not. When legal doctrine does not limit judicial discretion, other factors such as judicial ideology and partisan loyalty typically explain decision-making. This is evident in the history recounted here. In the case of *Cooley*, Jacksonian Democratic Justices—even after the Civil War—tended to find that almost all matters pertinent to interstate commerce fell within the exclusive powers of a state unless some part of the Constitution expressly limited the state. The principle of federal exclusiveness, despite its Jacksonian origins, was avoided at all costs despite the Court's willingness to invalidate states' laws on other grounds. However, once Republican jurists were added to the Court by Presidents Lincoln and Grant, federal exclusiveness became a viable principle and was explicitly used—even embraced. A period of judicial nationalism ensued and reached its peak by 1890, where federal exclusiveness became the default finding in commerce cases, not a result to be avoided.

Lastly, it could be argued that Republican use of *Cooley* marks the beginning of systematic judicial activism in the Supreme Court. Beyond the outcome of any one case or series of cases, this may truly be the long-term legacy of *Cooley*. We have in the *Cooley* framework of state versus federal exclusiveness a doctrine entirely and unambiguously *of* the Court's creation—much like the "substantive due process" of later—that could be mobilized solely for the purpose of judicial review of state laws and that—also much like the "substantive due process" of later—involved ultimately the application of judicial values, not neutral legal analysis. Better doctrine—from the standpoint of neutrality—might have either denied state powers over interstate commerce altogether (extreme nationalism) or allowed state power up to the point of statutory preemption (extreme concurrent rights). But to indulge in this second guessing of *Cooley* is to wish for a history that did not occur, is to deny the real intersection of politics and law, and is to disparage the value of doctrinal compromise in answer to a difficult, but perennial, constitutional issue.

ENDNOTES

[1] Charles Warren, **The Supreme Court in United States History, Volume II: 1836–1918** (Revised Edition) (1926), 155.

[2] *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

[3] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[4] *George Smith v. William Turner, Health Commissioner of the Port of New York, James Norris v. City of Boston (Passenger Cases)*, 48 U.S. 283 (1849).

[5] *See* Tony Freyer and Daniel Thomas, "The Passenger Cases Reconsidered in Transatlantic Commerce Clause History," 36 *Journal of Supreme Court History* 3 (2011).

[6] For the revolutionary import of *Cooley*, see the discussion of David P. Currie, **The Constitution in the Supreme Court, The First Hundred Years: 1789–1888** (1985) 230–232.

[7] *South Dakota v. Wayfair*, 17–494, 7 (2018).

[8] *Cooley*, pp. 317–18.

[9] *Ibid.*

[10] *Ibid.*, p. 319.

[11] *Ibid.*, p. 320.

[12] Bernard Schwartz, **A History of the Supreme Court** (1993), 87–88.

[13] *Ibid.*

[14] *Cooley*, pp. 325–26.

[15] *Ibid.*, pp. 321–22.

[16] *E.g.*, Vincent M. Barrett, Jr., "The Supreme Court, the Commerce Clause, and State Legislation," 40 *Michigan Law Review* 1 (1941).

[17] 22 U.S. 1 (1824).

[18] *Mayor, Aldermen and Commonality of the City of New York v. Miln*, 36 U.S. 102 (1837); *Thurlow v. Massachusetts, Fletcher v. Rhode Island, Pierce v. New Hampshire (License Cases)*, 46 U.S. 504 (1847).

[19] *See, e.g.*, Earl M. Maltz, **Slavery and the Supreme Court, 1825–1861** (2009).

[20] Schwartz, **A History of the Supreme Court**, 97–101.

[21] *Ibid.*, p. 100.

[22] *Ibid.*

[23] Harold H. Bruff, **Untrodden Ground: How Presidents Interpret the Constitution** (2015), 118–19.

[24] For a general discussion of the trends in interstate commerce cases, see Warren, **The Supreme Court in United States History, Volume II**, 626–27.

[25] *See, e.g.*, Sidney Milkis and Michael Nelson, **The American Presidency: Origins and Development, 1776–2014** (7th ed.) (2016), 133.

[26] Schwartz, **A History of the Supreme Court**, 86–87.
[27] *See, e.g.*, Peter Zavodnyik, **The Age of Strict Construction: A History of the Growth of Federal Power, 1789–1861** (2007), 176–77.
[28] Gerard N. Magliocca, **Andrew Jackson and the Constitution** (2007), 75.
[29] *Ibid.*
[30] *Ibid.*, pp. 31–32 (Maysville Turnpike Veto) and p. 54 (Bank of the United States Veto).
[31] Carl B. Swisher, **History of the Supreme Court of the United States: The Taney Period, 1836–1864** (1974), 406.
[32] *Pennsylvania v. Belmont and Wheeling Bridge*, 59 U.S. 421 (1855); *Sinnot v. Davenport*, 63 U.S. 227 (1859); *Almy v. California*, 65 U.S. 169 (1861); *Steamship Co. v. Portwardens*, 73 U.S. 31 (1867); *Crandall v. Nevada*, 73 U.S. 35, 43 (1868); *Cox v. Collector, Trade Company v. Collector (State Tonnage Tax Cases)*, 79 U.S. 204 (1870); *Low v. Austin*, 80 U.S. 29 (1872); *St. Louis v. The Ferry Company*, 78 U.S. 423, 432 (1871); *Ward v. Maryland*, 79 U.S. 418 (1871).
[33] *Pennsylvania v. Belmont and Wheeling Bridge*, 59 U.S. 421 (1855); (holding that a state-authorized bridge "hinder[ed] or obstruct[ed] the free use of a license granted under an act of Congress ..." and that West Virgina "violate[d] the compact [between two states], sanctioned as it has been, by obstructing the navigation of the river"); *Sinnot v. Davenport*, 63 U.S. 227 (1859) (holding that a state vessel registration law conflicted with a federal licensing law).
[34] For similar analysis of the aftermath of the *Cooley* decision, *see* David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years**, 234–35.
[35] Swisher, **The Taney Period**, 406.
[36] *Almy v. California*, 65 U.S. 169 (1861); *Low v. Austin*, 80 U.S. 29 (1872).
[37] *Cox v. Collector, Trade Company v. Collector (State Tonnage Tax Cases)*, 79 U.S. 204 (1870).
[38] *Crandall v. Nevada*, 73 U.S. 35, 43 (1868).
[39] *Ibid.*, p. 49.
[40] *St. Louis v. The Ferry Company*, 78 U.S. 423, 432 (1871).
[41] *Ibid.*
[42] Magliocca, **Andrew Jackson and the Constitution**, 113.
[43] *Ward v. Maryland*, 79 U.S. 418 (1871).
[44] *Ibid.*, at 432–33.
[45] *Steamship Co. v. Portwardens*, 73 U.S. 31 (1867).
[46] Currie, **The Constitution in the Supreme Court: The First Hundred Years**, 236.
[47] Schwartz, **History of the Supreme Court**, 162.
[48] *Reading Railroad v. Pennsylvania, Erie Railway v. Pennsylvania (Case of the State Freight Tax)*, 82 U.S. 232 (1872).
[49] *Ibid.*, p. 280.
[50] For a similar claim about the Waite Court, see Robert G. McCloskey, **The American Supreme Court** (4th ed.) (2005), 82–83.
[51] *Henderson v. Mayor of New York*, 92 U.S. 259 (1875); *Welton v. Missouri*, 91 U.S. 275 (1876); *Foster v. Master and Wardens of the Port of New Orleans*, 94 U.S. 246 (1876); *Railroad Co. v. Husen*, 95 U.S. 465 (1877); *Hall v. DeCuir*, 95 U.S. 485 (1877); *Guy v. Baltimore*, 100 U.S. 434 (1880); *Tiernan v. Rinker*, 102 U.S. 123 (1880); *Webber v. Virginia*, 103 U.S. 344 (1881); *Telegraph Co. v. Texas*, 105 U.S. 460 (1882); *People v. Compagnie General Transatlantique*, 107 U.S. 59 (1883).
[52] The three federal preemption cases were *Morgan v. Parham*, 83 U.S. 471 (1873) (holding that a federal coasting license granted to a ship makes it immune to state taxation); *Pensacola Telegraph Co v. Western Union*, 96 U.S. 1 (1877) (holding that a state-granted telegraph monopoly conflicted with federal rights); *Moran v. New Orleans*, 112 U.S. 69 (1884) (holding that a federal coasting license granted to a ship makes it immune to state taxation). The three hybrids/others were *Peete v. Morgan*, 86 U.S. 581 (1874) (improper tonnage duty); *Cannon v. New Orleans*, 87 U.S. 577 (1874) (improper tonnage duty); *Cook v. Pennsylvania*, 97 U.S. 566 (1878) (improper tax on imports and commerce violation).
[53] *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).
[54] *People v. Compagnie General Transatlantique*, 107 U.S. 59 (1883).
[55] Owen Fiss, **History of the Supreme Court of the United States: The Troubled Beginnings of the Modern State, 1888–1910** (2006), 269–70.
[56] *Welton v. Missouri*, 91 U.S. 275, 277 (1876).
[57] *Ibid.*, at 282.
[58] *Guy v. Baltimore*, 100 U.S. 434, 439 (1880).
[59] *Ibid.*, at 443–44.
[60] 102 U.S. 123 (1880).
[61] 103 U.S. 344 (1881).
[62] 95 U.S. 465, 473 (1877).
[63] *Ibid.*, at 474.
[64] 94 U.S. 246 (1876).
[65] *Ibid.*, at 247.
[66] 95 U.S. 485 (1878).
[67] *Ibid.*, at 488–89.
[68] 105 U.S. 460 (1882).
[69] *See, e.g.*, Eric Foner, **Reconstruction: America's Unfinished Revolution, 1863–1877** (1988), 586–87.
[70] 118 U.S. 557 (1886).
[71] *Ibid.*, at 568.
[72] *Ibid.*, at 569–70.
[73] *Ibid.*, at 568.
[74] *Ibid.*, at 572–73.
[75] *Ibid.*, at 573.
[76] McCloskey, **The American Supreme Court**, 84.
[77] *Ibid.*, at 83.

[78] State law invalidated: *Tennessee v. Pullman Southern Car Co.*, 117 U.S. 51 (1886); *Pickard v. Pullman Southern Car Co.* 117 U.S. 34 (1886); State law upheld: *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Pullman's Palace Car v. Hayward*, 141 U.S. 36 (1891).

[79] In addition to *Wabash,* there was *Tennessee v. Pullman Southern Car Co.*, 117 U.S. 51 (1886); *Pickard v. Pullman Southern Car Co.* 117 U.S. 34 (1886); *Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888); *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U.S. 114 (1890).

[80] *Central Pacific Railroad v. California*, 127 U.S. 1 (1888).

[81] *Stone v. Farmers Loan and Trust*, 116 U.S. 307 (1886); *Smith v. Alabama*, 124 U.S. 465 (1888); *Nashville, Chattanooga, and St. Louis Railway v. Alabama*, 128 U.S. 96 (1888); *Louisville, New Orleans, and Texas Railway v. Mississippi*, 133 U.S. 587 (1890); *Maine v. Grand Trunk Railway*, 142 U.S. 217 (1891); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Pullman's Palace Car v. Hayward*, 141 U.S. 36 (1891).

[82] *Stone v. Farmers Loan and Trust*, 116 U.S. 307 (1886); *Smith v. Alabama*, 124 U.S. 465 (1888); *Louisville, New Orleans, and Texas Railway v. Mississippi*, 133 U.S. 587 (1890); *Maine v. Grand Trunk Railway*, 142 U.S. 217 (1891).

[83] *Nashville, Chattanooga, and St. Louis Railway v. Alabama*, 128 U.S. 96 (1888).

[84] 124 U.S. 465 (1888).

[85] 128 U.S. 96 (1888).

[86] *Minnesota v. Barber*, 136 U.S. 313 (1890); *Voight v. Wright*, 141 U.S. 62 (1891).

[87] *Kimmish v. Ball*, 129 U.S. 217 (1889); *Mulger v. Kansas*, 123 U.S. 623 (1887); *Kidd v. Pearson*, 128 U.S. 1 (1888).

[88] *Kimmish v. Ball*, 129 U.S. 217 (1889).

[89] *Mulger v. Kansas*, 123 U.S. 623 (1887); *Kidd v. Pearson*, 128 U.S. 1 (1888).

[90] *Leisy v. Hardin*, 135 U.S. 100 (1890); *Lyng v. Michigan*, 135 U.S. 161 (1890).

[91] *Ratterman v. Western Union Telegraph Co.*, 127 U.S. 411 (1888); *Western Union Telegraph Co. v. Alabama*, 132 U.S. 472 (1889).

[92] *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347 (1887).

[93] *Leloup v. City of Mobile*, 127 U.S. 640 (1888).

[94] *Morgan's Steamship v. Louisiana Board of Health*, 118 U.S. 455 (1886).

[95] *Sands v. Manistee River Improvement Company*, 123 U.S. 288 (1887).

[96] *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887).

[97] *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

[98] *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885).

Twenty-One Months of Hell and the Supreme Court to the Rescue in *McLaurin v. Oklahoma State Regents*

DAVID W. LEVY

I

Under our federal system, which divides power between a central authority in Washington, D.C., and the authorities in the fifty states, conflicts are bound to arise. No matter how carefully some powers are delegated to the federal government and others assigned to the states, there will inevitably be areas where both the federal and the state governments claim primacy and where each insists on implementing its own policy. When it comes to describing and analyzing such situations, we are too often content merely to explore the legal arguments marshaled by both sides and the judicial decisions aimed at resolving the conflict. Not enough attention is given to the harrowing difficulties faced by those who have to navigate between state and federal dictates and who find themselves improvising measures that they hope will satisfy the opposing requirements imposed upon them.

Between October 1948 and June 1950, officials at the University of Oklahoma were faced with just such a difficulty. In January 1948, a sixty-one-year-old African American named George W. McLaurin applied for admission to the University. He was a retired professor at Langston University, Oklahoma's all-black college, he had a master's degree from the University of Kansas, and he hoped to earn a doctorate in Education.[1] Langston offered no graduate work whatever, but the University of Oklahoma, in all of its fifty-six-year history, had never admitted a black person. McLaurin and five other African Americans had been encouraged to apply by the Supreme Court's ruling three weeks earlier in *Sipuel v. Board of Regents*.[2] In that case, the Court declared that because black Oklahomans had no access to legal training at a state institution while whites had studied law at the University for decades, Oklahoma was obligated, under the "equal protection" clause of the Fourteenth Amendment, to provide Ada Lois Sipuel Fisher the opportunity for a legal education

substantially equal to that provided to whites. Rather than admitting her to the University's law school, however, the state, desperate to preserve segregation, flung together in three weeks a bogus law school for blacks. Fisher and her National Association for the Advancement of Colored People (NAACP) lawyers, led by Thurgood Marshall, returned to the judicial system, arguing that the two schools could not possibly be considered equal. Meanwhile, the six African Americans, each hoping to pursue graduate work in a field not available to them at Langston, saw in the *Sipuel* decision enough similarity to their own circumstances to move them to apply for admission. The NAACP chose McLaurin to make the test case.

The segregation of blacks had a long history in Oklahoma education. It was practiced in the schools of four of the Five Civilized Tribes and legalized by the Territorial Legislature before statehood. Segregation in schools was enshrined in Oklahoma's constitution in 1907[3] and then enforced by the state legislature. In 1941, lawmakers fortified the system by mandating harsh daily fines against any administrator who enrolled a black student in a white school (or vice versa), against any teacher who taught in a mixed-race classroom, and against any student who willingly sat in such a classroom.[4] Nevertheless, McLaurin and his attorneys pressed their demand for admission through the state judicial system (unsuccessfully) and into the federal courts. Finally, on September 29, 1948, the three-judge federal district court for the western district of Oklahoma, citing *Sipuel*, ruled that McLaurin was entitled to be admitted to the graduate program he desired as long as Oklahoma offered that program to whites. The judges declared that those sections of the 1941 law that levied fines against administrators, teachers, and students were unconstitutional in this case. But then, they added a troubling sentence: "This does not mean, however, that the segregation laws of Oklahoma are incapable of enforcement."[5] The judges obviously felt that—except in a case like McLaurin's, where those laws infringed upon an individual's constitutional rights—overturning the segregation laws of the sovereign state of Oklahoma was beyond their jurisdiction. Thus it happened that officials at the University of Oklahoma confronted a federal insistence that McLaurin be admitted and, alongside it, a state insistence that Oklahoma's legal system of racial separation be maintained. Reconciling these two requirements would not be easy.

II

On Sunday, October 10, three days before McLaurin came to Norman to register for classes, the University's Board of Regents held a special meeting in the office of the school's president, George Lynn Cross.[6] There the Regents received for their consideration one of the most bizarre reports ever presented in any American university. Cross had asked Roscoe Cate, his financial vice president, to study and report on the matter that was on everyone's mind: how could the University of Oklahoma admit an African-American student and still maintain segregation?

Cate's report drew a crucial distinction between "complete" and "partial" segregation and came quickly to an obvious conclusion: the Regents could, if they wished, implement the complete segregation of McLaurin by the second semester; but if he were to be admitted for the present semester, "only partial segregation will be possible." Complete segregation would entail setting aside a classroom for his exclusive use and hiring a qualified teacher at the associate or full professor level. And even if that difficulty were somehow overcome, complete segregation would still be virtually impossible. For example, white graduate students had access to the book stacks in the University's library. To deny McLaurin that access was to invite further litigation on the ground

Law student Ada Lois Sipuel Fisher is pictured above with her attorneys Amos T. Hall (left) and Thurgood Marshall (center), along with NAACP Regional Director Dr. W.A.J. Bullock (right). In January 1948, the Supreme Court ruled that Oklahoma University must provide equal (yet still separate) facilities for Fisher to pursue her law studies. The state established a vastly inferior law school for her, which she refused to attend.

that he was not being treated equally. But how could he exercise that access and still be separated? Moreover, graduate students normally participated in seminars that were deemed an essential part of their education. How could McLaurin, the only black student in the College of Education, attend a seminar under conditions of complete separation? Then there was the matter of the money. Hiring a qualified teacher (if one could be found) would cost $6,000 a year, with another $1,000 needed to maintain separate facilities. These expenses had not been anticipated in the current budget. And then Cate raised the most alarming possibility of all: "this cost is for McLaurin only. If other Negroes are enrolled in other departments, comparable professors at comparable salaries would have to be provided." Cate's report was almost too much for the Regents to absorb. In the end, they agreed that McLaurin be admitted "under such rules and regulations as to segregation as the president of the University shall consider to afford Mr. G. W. McLaurin substantially equal educational opportunities ... and that the president of the University promulgate such regulations."[7] In short, the Regents, unable or unwilling to grapple with the intricacies of providing segregation, threw the responsibility to George Cross.

Cross, who thought that the state's segregation laws were ludicrous, unjust, and embarrassing, set about arranging the "disagreeable details."[8] They were simple enough. All of McLaurin's classes were to be held in a room that had an attached "alcove." He was to have a desk in the alcove where he could see the teacher and the blackboard at a forty-five-degree angle but where he would be separated from the white students. He could enter the library stacks at the same time as white graduate students but was to have his own table in the library where only he could sit; he could sit at no other table and no white student could sit at his. He was similarly assigned his own table in the student Union; he could sit nowhere else and no white student could sit at his table. The "Jug," a

snack shop in the Union, was open to him for lunch between noon and 1:00 P.M., and no white student could eat there during that hour. A toilet on the first floor of the Education building was set aside for his exclusive use. Under such conditions did the University's first black student begin his studies.

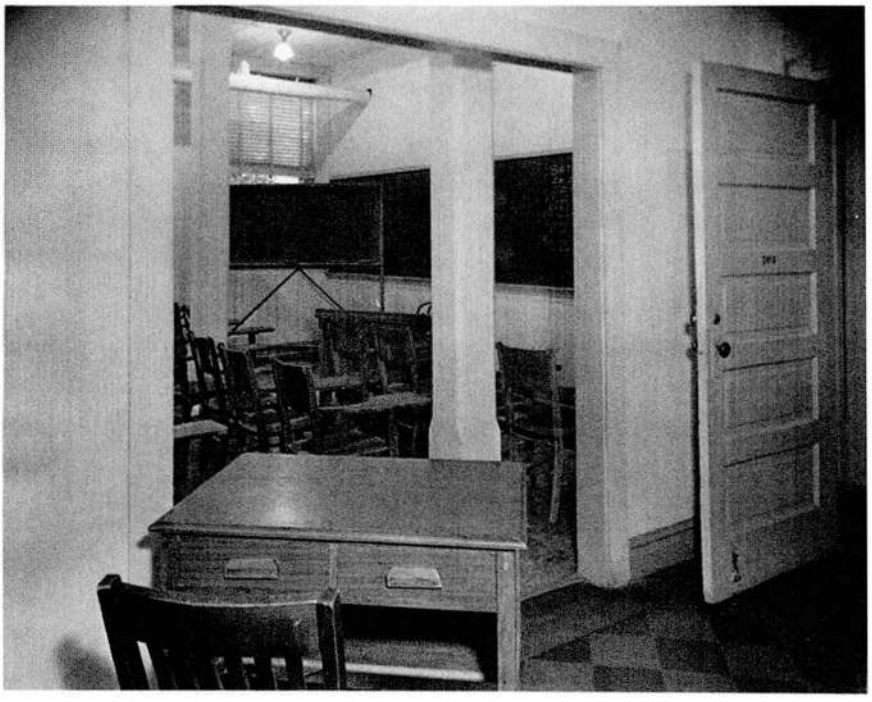
III

McLaurin's enrollment for the first semester of the 1948-1949 academic year led inevitably to the dire possibility mentioned in Cate's report. Other African Americans, undeterred by the grotesque conditions imposed upon McLaurin, began to apply. By early February 1949, the University received five such applications for the second semester. Each applicant was an Oklahoma citizen and each was qualified for graduate work. Cross, at the Regents' directive, forwarded each case to attorney general Mac Q. Williamson for an opinion, and as a result, two additional African American students joined McLaurin for the second semester.

Cross regarded the procedure for admitting black students as "complex" and "absurd,"[9] and he was not alone in his criticism. A *Norman Transcript* editorial called the process "nonsense" and so technical that "action by the Legislature ... is sorely needed."[10] On January 29, the State Regents for Higher Education urged lawmakers to let qualified black students enter graduate programs in white schools if those programs were unavailable at Langston.[11] By April, even Mac Williamson, tired of acting as the University's virtual admissions officer, urged the Legislature to modify the law.[12] Despite the mounting pressure, the politicians delayed for as long as possible any action that would ease the path of blacks into white colleges and universities. Finally, at the end of the session, a lawmaker introduced legislation. In its original form, House Bill 405 provided that qualified African-American students desiring a field of graduate study not available at Langston could automatically enter a state (white) college or university offering that field. It did not change the segregation laws but only suspended them in such cases. Although black students could now enroll in white schools, they were still to be taught on a segregated basis. But importantly, the bill let authorities at the white institutions decide exactly what measures constituted "segregation." Cross left for a trip to Chicago just before the bill was to be voted on. He was disappointed that segregation was still required, but he thought that if he and the Regents could determine the actual arrangements, the University could probably live with it.[13]

When Cross returned, he learned to his horror that at the last minute the Legislature had disastrously amended the bill under pressure from the Senate president. Instead of letting each white institution define what education on "a segregated basis" required, the amended bill defined the term to mean "classroom instruction given in separate classrooms or at separate times."[14] The amended bill was passed by both houses and signed by the governor on June 11, 1949. Cross saw instantly that it was unworkable. At least twenty-five black students were coming for the summer session. Finding separate rooms and additional faculty for the dozens of classes involved—most of them for only one or two students—was simply impossible. He told the press that to comply, the University needed $10,000 now and $100,000 by September.[15]

A worried Cross turned first to law professor John Cheadle, whose analysis of the new law was somber and sarcastic. "I assume that it will be construed to mean separate class facilities, separate living quarters, separate eating provisions (Negroes may not be eaten by lions or tigers which heretofore have eaten only white people), and separate rest rooms, etc." The astute Cheadle summed it all up in eleven words: "This 1949 act will cause us a great deal of trouble."[16] Cross also



A retired professor at Langston University, Oklahoma's all-black college, George W. McLaurin had a master's degree from the University of Kansas and he hoped to earn a doctorate from the Education Department at Oklahoma University. Because of his race, he had to sit in this segregated alcove in the University's classroom.

wrote to attorney general Williamson for his opinion: "In your interpretation, please indicate what constitutes a 'separate classroom.'" He also asked about "eating facilities, library facilities, toilet facilities, University housing, attendance at athletic contests, and other campus activities."[17] Cross was to call Williamson's response "most helpful,"[18] but it was actually a life saver for the University. Williamson affirmed that House Bill 405 required that blacks had to be taught in separate classrooms or at different times. However, he added, "what constitutes a 'classroom' ... can be more accurately determined by the governing board or other proper authorities of said institution than by this office."[19] Cross and his advisers promptly determined that if you used ropes or railings to mark off part of a room, you magically created two separate rooms where only one had existed before! Cross had his doubts about whether the authorities would sit still for this ruse but, believing that the University had no other choice, he ordered that barriers and railings and "Colored Only" signs be placed where black students would be taking classes.[20] Two weeks later, his actions were unanimously approved by the Regents.[21]

Senate president Bill Logan was not fooled by this devious device of dividing rooms with rails and ropes. On June 18, a week after the law was signed, he wrote Cross an angry letter denouncing the scheme as an obvious "subterfuge," revealing "scorn and disrespect" for the Legislature.[22] Logan's letter was unnecessary. It was clear to Cross, his assistants, and probably to the Regents that they were skating perilously on the edges of legality. Dodging the law's intent by the pretense that dividing a room with railings was enough to make two separate rooms was a bold step, but as no funds were forthcoming to implement the "different times" option, Cross could see no alternative.

As he remarked to a correspondent, we "have been walking a 'tight rope' in an effort to get the problem solved in a manner that would be just and at the same time legal."[23]

IV

The new law of 1949 encouraged a steady stream of black students eager for graduate work at the University. Some enrolled for study on the Norman campus, while others took classes at the Graduate Study Center in Oklahoma City. The Center, part of the University's Extension Division, specialized in the various subfields of Education, and students there tended to be women teachers hoping to improve their professional skills. Naturally, classes at the Center were segregated.[24] At the summer session of 1949, there were around thirty African-American students among the 5,100 whites. They were enrolled in more than forty classes. Approximately half of them did graduate work in Education, while the others studied various fields from English to Sociology, from Engineering to Home Economics. More than half were from Oklahoma City, and the others came from cities and towns across the state.[25] At the start of the 1949–1950 academic year, there were around fifteen black students on the Norman campus (among about 12,000 whites) with the same number at the Graduate Center. By the second semester, at least sixty-four black students were enrolled—forty-one at the Graduate Center. The breakdown by gender was significant: there were only four men among the thirty-seven women at the Center. In Norman, there were twenty-three black students, seven men and sixteen women. Of these, nineteen (including George McLaurin) were taking Education courses.[26] It was no longer a rare and startling thing for white students to encounter a black face on the campus of the University of Oklahoma. From McLaurin's entry in October 1948 to the end of the 1949–1950 academic year, the University enrolled close to 150 African-American students—almost four times as many women as men (118 to 32) and the vast majority (probably around 100) in various subfields of Education. There were as many as 100 black students at the University in the summer of 1950, and in the fall semester of the 1950–1951 academic year as many as sixty-four could be found on the Norman campus. By October 1950, the University had accepted for admission 231 African Americans, and by July 1951 that number had reached 314, although many of those who were accepted never actually enrolled. [27]

The arrival of McLaurin and these dozens of other black men and women forced both those long-suffering students and the University itself to face problems for which there were no precedents. These problems required hard decisions and produced embarrassing incidents; for the students they led to discrimination, hardships, and needless humiliations that it would be difficult to overestimate. For twenty-one months, school officials had to invent policies that steered the University between demands of the state's segregation laws and those of the federal courts for equal treatment of African Americans. The officials stumbled along as best they could, improvising in areas so far-ranging and unpredictable that no one in 1948 could have foreseen all the difficulties that lay ahead or imagined the contortions that would be required. One thing is certain. John Cheadle's remark to Cross ("this 1949 Act will cause us a great deal of trouble") had been prophetic.

V

The basic physical adjustments that were needed cost considerable effort and some expense. "Will you please put a 'Reserved for Colored' sign on one of the cubicles in the women's restroom in the basement of the Administration Building," vice president Carl Mason Franklin wrote to the head of the Physical Plant.[28] Signs also had to be

supplied to every department and every classroom where a black student might be present. In the rooms to be used by black students, barriers, railings, ropes, and separated rows of seats had to be arranged. Usually it was the back row of the room that was separated for this purpose, and usually only one student could be found sitting back there alone.

Problems arose immediately upon the admission of Orpherita Daniels, one of the two African Americans joining McLaurin for the second semester of the 1948–1949 academic year. Her classes were to meet in a room in the library, but that was a small seminar room seating "twenty students around a large conference table," and it would be hard "providing segregation similar to that used with Mr. McLaurin."[29] Some cases were easier than others. In September 1949, the dean of Arts and Sciences reported that the situation in the English Department was under control: "There is one [black] student enrolled and he is seated on the back row" in all his classes "with no white students in these classes on these rows." Zoology, however, was "more complicated" because "there are three negro students and laboratories are involved." In the lecture hall, "the negro students sit in front on the right hand side of the teacher with no white students on that row." The labs, however, were trickier. In one of them "negro students [*sic*] sit on one side of the laboratory desk with three white students on the opposite side facing him." In the second "the negro student sits in an area surrounded by the wall and two tables forming an 'U' to separate him from the white students." And in the third, the desks "are arranged around the room against the wall with students facing the wall. The negro student in this class is separated from other students by the sink and a vacant seat."[30]

Eating arrangements posed other difficulties. By a curious fact, neither the state constitution nor its statutory law required the separation of races at places where food was served. Legal advisor John Cheadle,

The responsibility for navigating the logistics and expenses of segregated facilities fell to George Lynn Cross, president of the University of Oklahoma. Cross thought the state's segregation laws were ludicrous, unjust, and embarrassing, and spelled out the numerous obstacles to enforcing them to the University's board.

after a study of the state's segregation laws, concluded that "there are no provisions forbidding the mixing of races in dining rooms and hotels." This omission, Cheadle believed, was "a sort of blind spot in our law."[31] Evidently, Cross and the Regents were unaware of this, simply assuming that the mixing of races in eating places was forbidden. In January 1950, this error was called to Cross's attention by a white undergraduate. In a note to her, Cross confessed that "I find that, after investigation, you are right in your statement that there is no state law in regard to segregation in public eating places." Nevertheless, he wrote, "it was thought best, apparently, to provide segregation in regard to all activities associated with education, and not merely segregate with respect to classroom activities."[32]

The plan that was devised for McLaurin to have lunch during his first semester was continued for the second, when he was joined by the two other African-American students present. They were to eat at the "Jug" in the

Union from noon to 1:00 P.M. No whites could use the place during that hour, and the African Americans could not use it at any other time. That arrangement was maintained during the summer session of 1949, but starting on June 30, two tables in the "Jug" were set aside for black students. At first, the tables were separated by a chain, but after "constant publicity regarding rails and chains," the chain was removed and signs indicating that the tables were reserved were added.[33] In early 1950, the "Jug" was closed, and black students were allowed to eat either at the Union cafeteria or at the cafeteria at the Wilson Center dormitory. At both places, they could go through the lines with the whites, but then they had to carry their trays to designated tables, at which no whites could sit.

Anyone who thought that this simple arrangement would settle the matter of providing food for African Americans was naive. A string of incidents soon complicated the business of human beings eating food. On April 16, 1948, Roscoe Cate got a nervous letter from the director of University Housing. The woman in charge of the dormitory cafeteria reported that W. H. Smith of the Art Department brought into the cafeteria "a negro man as his guest today." Luckily, "there was no incident or undue excitement" by the students eating there. Nevertheless, the superintendent "was considerably perturbed over the affair since she hardly knew what to do about the matter." The director begged for a "definite statement of policy" because he thought (erroneously) that "it is entirely possible that the segregation laws of Oklahoma would prohibit our serving white people and colored people in the same room."[34] The problem was referred to Cheadle, who replied that the Legislature prohibited the mixing of students, "but if the negroes are merely visiting the school or are there not as students but as invitees ... that prohibition does not apply."[35]

The hair-raising emergency caused by Smith and his guest occurred on school property. Most of the trouble, however, involved use of the Memorial Student Union. That building had been erected by a massive fund-raising campaign in the mid-1920s and no public money had been used. The Union was governed by a nonprofit corporation separate from the University. Union policy was made by a board of governors consisting of prominent alumni living all over the country, with the day-to-day affairs of the building entrusted to a board of managers.[36]

There was strong sentiment on the part of some important alumni, whether or not members of the Union's Board of Governors, to resist desegregation and keep things the way they had always been. The Governors knew that there would be black students on the campus, but some of them felt that those students should be "furnished only such facilities as are necessary for ... obtaining an education."[37] Tom Carey, a respected leader of the alumni association and twice its president, ventured an opinion on blacks using the Union in a letter written the same week as McLaurin's arrival for his first class. As access to the Union depended on paying annual fees, Carey wrote, "I would simply refuse to permit the collection or to accept fees collected for the use of these premises by any persons other than white students or students of Indian blood." Carey insisted that the absolute ban he was proposing arose "not from any animosity of the Negro," but "because I believe the usefulness of the Union facilities will cease if it is opened to the Negro race."[38]

On December 11, 1946, long before McLaurin's arrival, the University hosted a short course at the Union on the classroom use of audio-visual equipment. Among those attending were three faculty members of Langston's Education Division. A dinner was planned to conclude the course and the three from Langston bought tickets. The Union refused to serve them. It was, of course, humiliating to the three teachers but also to authorities at the University. When Cross

learned of the incident, all he could do was tell the director of short courses that in the future he should "frankly explain ... that the Oklahoma Memorial Union will not serve Negroes and that there are some luncheon or dinner meetings included in the conference to which Negroes cannot be invited." He also told the director to be more careful about selling dinner tickets to black guests and advised trying to find locations other than the Union where black people might be allowed to eat.[39]

In November 1948, the Student Senate hosted a statewide conference of student governments. A reception was scheduled for the end of the conference, and the Union was advised "that there was a possibility of both colored and white delegates being present at the reception." The lounge was "tentatively" reserved while the opinion of the Board of Governors was sought. The majority of the seventeen Governors voted no and the reservation was cancelled. Moreover, "this is official notification that facilities of the Oklahoma Memorial Union are not to be booked for assembly of white and colored students, under present regulations."[40] Then in May 1949, Lawrence Rogers of the Health Education Department held a conference called "Spotlight on Health." After booking the Union, he told the manager that one of the participants would be a professor from Langston. Rogers was told "that the colored professor would be required to take a seat aside from the white delegates at the conference." But that was not the end of it. What if Rogers wanted to serve coffee or refreshments? Would it be possible for the black professor to be served at a separate table in the conference room?[41] The answer returned to the manager of the Union was yes.

Finally, on October 11, 1949, the Union's Board of Governors gathered in Oklahoma City for the purpose of "dealing with the colored student matters." They arrived at some definite decisions. The first involved the campus YMCA and YWCA, both of which had offices in the Union. The question was "do negroes have access" to these offices for "mixed conferences" and counseling [*sic*]?" The Governors ruled that "they do not. A colored student may go to the YM or YW offices ... but not in mixed groups." It was next decided that black students who wanted to hold a luncheon or a banquet at the Union could do so "providing they meet the same priority, minimum number participating, etc., as do white students." The apparent benevolence of that concession was somewhat mitigated by the Governors' next decision: "It was definitely decided that rest room facilities could not be provided for colored students in the Union Building." In other words, they could have their banquet but anyone needing to use a bathroom would have to leave the Union and scurry to another building. The Governors naturally decreed "that colored students could not attend social functions with white students" in the Union. It was, however, grudgingly conceded, and grudgingly expressed, "that in case the negroes insist on participating in the use of the lounge facilities," a marked chair or divan could be set aside for them.[42]

VI

Other areas of University life were also problematic. What about use of the library? The arrangement made when McLaurin was the only black student at the University might serve for one student or even for half a dozen, but as the black population grew, it was no longer adequate. Blacks were then allowed to study in the reference room, but in November 1949, some of them complained that the noise and confusion inhibited their ability to study. The librarian said he was aware of the situation and that "the complaint was justified," but limited space and the segregation policy meant that there was little he could do. Cross weighed several options and then ordered that black students could study in the main reading room at tables marked for their

In the 1940s, the Oklahoma legislature had mandated harsh daily fines against any administrator who enrolled a black student in a white school (or vice versa), against any teacher who taught in a mixed-race classroom, and against any student who willingly sat in such a classroom. Although the law did not specify segregated library facilities, the University felt it necessary to reserve a separate table in the library for McLaurin.

use, even though reserving places for blacks would worsen already crowded conditions.[43]

What about black students who wanted to live on campus? The problem was complicated because virtually no landlord in town would rent to them. No African-American student requested campus housing during the summer of 1949.[44] In September, however, Cross told the Regents that a black male had done so, and the issue "was fully discussed." Once again, the Regents were at a loss about what to do, and once again they threw the task to Cross, directing him to "take such steps as necessary" to provide housing for black students in units "substantially equal" to those for whites "but on a segregated basis." The Board also asked Cross to explore the costs for two black dormitories—one to house fifty men and one for fifty women.[45] For the present, black students were assigned to the prefabs that had been built just south of the main campus to take care of the flood of veterans flocking to the University after the war.[46]

Black students had arrived at the start of the legendary football era of Bud Wilkinson, who was appointed head coach in 1947. His fabled teams were beginning their astounding string of fourteen consecutive conference championships, and enthusiasm for football reached a fevered pitch, even before the team won the national championship in 1950. It was hardly surprising that black students, like their white counterparts, would want to attend the games. But how on earth would it be possible to keep the races separated in the stadium? Cross raised the matter with the Regents on July 13, 1949. Admitting that the problem was difficult because "people are in much closer proximity to each other in the

stadium than in classrooms," he made his recommendations. Black graduate students, like whites, were entitled to sit on the fifty-yard line and each of them was allowed to purchase a ticket for a spouse. The president proposed that "a row or rows beginning at the top of the stadium ... be designated as required by [the segregation] statute." These rows should be separated from those for the white students, either by leaving empty a few rows in front of the black section or by "erecting a temporary solid 'wall' behind the first top row of white students; such wall to be as high as a person's head when seated on the row in front of the 'wall.'" The Regents voted for the wall. Cross noted that separate restrooms in the stadium would be needed. He also thought it would be a good idea to "privately instruct the colored students that they should plan to arrive early and in this manner try to avoid the surging crowds."[47]

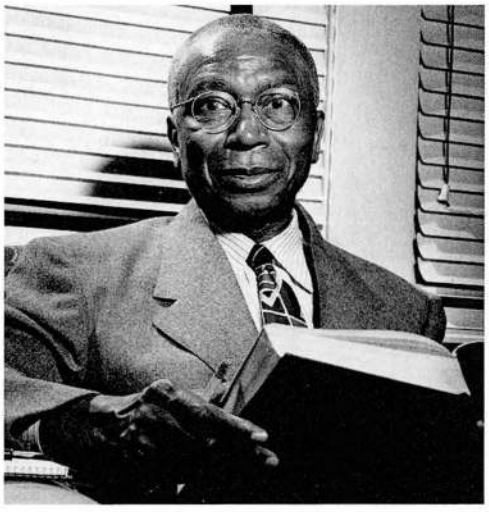
Cross and the Regents knew they were doing a disreputable and embarrassing thing in the stadium. This was clear from another provision that read, "Provide for markers with adhesive backs that may be put up the morning of the game and taken down soon after the game and in this manner avoid as much as possible publicity and photographs." Cross hoped for the "the least possible adverse publicity."[48] By mid-October, the "wall" had been pushed back by whites in the row in front of it by using it as a back rest. Blacks in the first row complained (justifiably according to vice president Franklin, who walked to the stadium to look) that it had become extremely uncomfortable for them. Because there had been "no trouble whatsoever with respect to Negroes attending football games," Franklin favored removing the barrier and just marking the reserved rows, but as the Regents had expressed a preference for the wall in July, the plywood was straightened and braced.[49]

African Americans who wanted to study medicine or nursing at the University's School of Medicine or School of Nursing in Oklahoma City were simply out of luck. They could have attended lectures under the same segregated arrangements as on the Norman campus, but how could separation be maintained during such required aspects of their training as going on rounds or observing in the operating room or doing the required number of "scrubs" or participating in clinical assignments? In the case of student nurses, the difficulties, thought the dean of the Medical School, would be "almost insurmountable." Nurses had to live and take meals in a dormitory, where providing segregation was next to impossible given the resources available. Moreover, only thirty-six beds were reserved for black patients at the University Hospital. This meant either that only a few black students could be admitted to the School or that black nurses would have to be assigned to care for white patients, and, according to the dean, "a repercussion by white patients who were attended by colored student nurses" might be expected.[50] In addition, as the Hospital provided no outpatient care for blacks, black student nurses would necessarily have to serve white patients.[51] As a consequence of these obstacles, no black student was admitted to medical or nursing studies until after the Supreme Court had spoken.[52]

VII

Some of the difficulties University administrators confronted and some of the questions they had to decide were so bizarre and unforeseeable as to defy classification. They came with the steadiness of hammer blows:

- November 1946: The American Veterans Committee, a recognized student group, wanted to bring the African-American editor of *The Black Dispatch* to speak on campus. Could this be permitted? Yes. Authorized student groups could hold meetings and invite speakers and, besides,



The NAACP chose McLaurin to be a test case "because he was old and married and dignified and always in a suit and tie," says the author. The aim was to mitigate racist arguments that black men were attempting to access college campuses to prey on white women.

state law did not prohibit black speakers from using University facilities.[53]

- October 1948: The director of the Guidance Service asked if he could "give the aptitude test for the American Council on Education to negroes" in school buildings. Yes, provided the test was administered on a segregated basis.[54]
- October 1948: The director had a second question. The Guidance Service (with the State Mental Hygiene Society) ran a "mobile psychological service." Black institutions asked for help. Could they comply? Yes. Cross approved use of the psychological service at two all-black towns.[55]
- March 1949: A black janitor from Tulsa asked if he could audit University classes there. Yes. But he would need to talk to the Tulsa authorities about classroom seating or field trips.[56]
- March 18, 1949: While Orpherita Daniels was eating lunch in the "Jug," three friendly white men and a woman entered the snack bar and asked for coffee and milk. They were told that the place was closed to whites from noon to 1:00 P.M. One of the men was allowed to buy a sandwich but was told not to eat it there. He complied, but the group then sat down and "remained at the table with Mrs. Daniels throughout the lunch period." If this should happen again, how should it be handled?[57]
- August 1949: A professor about to teach a class for black teachers in Oklahoma City asked whether the regular application form "would suffice for members of this class as it does for white enrollees," or whether he needed the special form for blacks as before. He was told that after House Bill 405, the regular form would suffice as graduate work in Education was not available at Langston.[58]
- May 1949: The Summer Institute for Linguistics held annual sessions in Norman. Could black students be enrolled for these courses? Yes, but only if they found living quarters in Oklahoma City and commuted to Norman. "The Student Union building is prepared to provide segregated food service, but there is no provision in Norman for segregated housing for Negroes."[59]
- October 1949: The University's American Legion branch hired Lionel Hampton, the famous jazz musician and composer, for a concert and dance after the homecoming game on October 29. The event was to be held at a University building south of the main campus. Ela Mae Reynolds, a black student who knew Hampton personally, wanted to attend the event. Could she? There were three options. One was to "exclude colored people from attending the concert." A second was to "rope off a section of the floor for them and allow them to participate in the dancing." The third was to admit blacks to the balcony as "listeners." The last option was chosen.[60]
- November 1949: The chair of the Psychology Department reported that a black student wanted to take the Graduate

Record Exam. "Will you please indicate how I may handle this situation?" Yes, the student could take the GRE along with white students provided that "as much segregation as possible be provided consistent with existing personnel and facilities."[61]

- November 1949: Thirty-nine-year-old Malcolm Whitby, the first black naval veteran of World War II to enter the University, was an experienced musician and bandmaster. He wanted to play in the University's marching band. Was this possible? No. Cross told him that "your qualifications to participate in this activity are not questioned ... but the state laws specify that instruction must be given to white students and Negroes under conditions of segregation which cannot be provided with respect to a marching band."[62]
- December 1949: Mauderie Wilson, one of the University's first black students, was ready to undertake her student teaching. She applied to the University School and was told that "at the present time we are unable to send you a favorable reply." The director pledged that she would be told when it would be possible to accommodate her.[63]
- February 1950: A professor who taught a popular course in Professional Writing reported that a black student, already enrolled at the University, wanted to take his course. The course, however, was listed at the undergraduate level although graduate students also enrolled. "Am I correct in believing that negro students are admitted only for graduate work, and if so what action should I take on his application?" Also, if the student is admitted, is segregation still required? The professor was advised that the student could be admitted. True, black students are admitted only for graduate work, but "in a few areas, undergraduate work has been certified by the Higher Regents" because such work is not offered at Langston. It is also required of black enrollees that the course in question be directly related to their desired graduate degree. Of course, "they should be given specially assigned seats in order to provide as much segregation as is consistent with the facilities available." Usually, "colored students are seated either in the back or to one side."[64]
- April 1950: Prior to McLaurin's admission, the Graduate Center gave non-credit Education classes for black teachers. Back then, the students "were more interested in the courses than they were in the credits." Now, however, some of those students were enrolled and they wanted credit in those courses taken before the University admitted blacks. Can this be allowed? Yes. "Under the circumstances ... credit should be given if the work done fully justifies it."[65]
- June 1950: If black visitors come for short courses or conferences, can the University feed and house them? Yes, it was once possible only to feed but not to house them. But as a result of a new judicial case, they may now be housed in University buildings north of the campus.[66]

VIII

Only thirty hours after George McLaurin's very first class—isolated in his "alcove" and separated from his fellow students in the library and the Union—Thurgood Marshall, the lead attorney for the NAACP, boarded a plane from New York City to Oklahoma to see what could be done. Ten days later, McLaurin and his NAACP attorneys returned to the three-judge federal district court to request a modification of their order requiring McLaurin's admission to the University.[67] They asked only that their client be treated the same way as any other student. This time, however, on November 22 the judges decided against McLaurin because, they said, he was being afforded the same educational *facilities*

as other students. The lawyers announced immediately that they would appeal to the U.S. Supreme Court.

The Justices agreed to hear the case, and they coupled it with other NAACP litigation arising out of Texas. There Heman Marion Sweatt wanted entry to the University of Texas law school. Rather than granting his wish, the state created a decidedly inferior law school for black Texans.[68] To these two cases, the Justices joined a third, not connected to the NAACP, involving segregation and discrimination against a black passenger in the dining car of an interstate railroad.[69] The Justices heard arguments in all three cases on April 3-4, 1950, and two months later, on June 5, they announced their decisions on all three. In all three, segregation suffered defeat and in all three the Justices were unanimous. Jack Greenberg, a young attorney with the NAACP, called it "a clean sweep."[70] Across the nation, the foes of segregation were ecstatic. "June 5, 1950," proclaimed the *New Republic*, "should be celebrated from now on as a banner day in the history of American democracy. On that day, segregation, the greatest social injustice in America was condemned by the Supreme Court."[71]

In one way, the decisions were less than entirely satisfying. The NAACP had hoped, especially in the *McLaurin* case, for an explicit reversal of *Plessy v. Ferguson* (1896) and a clear statement declaring that segregation based on race was unconstitutional even if, as in McLaurin's arrangements at the University of Oklahoma, the treatment of blacks was substantially "equal." Instead, the Court chose to decide the issues narrowly, and in the case of George McLaurin, Chief Justice Vinson's opinion appeared somewhat strained. The Court ruled that once a student was admitted to a college or university, that student could not be treated differently from other students solely on the basis of race. However, the Court reached that conclusion not because *Plessy* was wrong, but because McLaurin's separation from the other students violated the equal protection of the laws mandated by the Fourteenth Amendment. By setting him apart, he was "handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession"[72] The reluctance of the Court to go all the way therefore might have occasioned a small tinge of disappointment in the midst of the wild victory celebration.

Among the administrators at the University of Oklahoma, however, the sigh of relief was almost audible. They were miraculously released from the contortions, the embarrassing compromises with decency and justice, that they had been forced to perform for nearly two years. Those degrading "Colored Only" signs that had not already been removed by sympathetic white students disappeared within a day or two. Suddenly black students found that they could sit wherever they pleased in their classrooms, in the cafeteria, and at the library. There would no longer be any question about their right to University housing. The offensive wall in the stadium was gone before the season opener. Ada Lois Sipuel Fisher, after 1,251 days of waiting, had finally been admitted to the School of Law a year earlier in June 1949. For the ensuing year, she had been confined to a marked seat in the back row of the classroom. On June 6, 1950 she marched to a seat in the first row. "I have not sat in the back ever since," she was later to write. "*McLaurin* made that possible."[73]

The black students on the campus, who had, of course, been the chief victims of Oklahoma's humiliating and unjust segregation laws, were now freed from those legal restrictions. However, for them and the thousands of African Americans who would follow there was still a long way to go. Informal exclusion and social isolation would be a part of campus life for many years

to come, especially in such social activities as dances, and in the fraternity and sorority system on campus, but that was a different matter from state-required separation. It was not a small thing that, thanks to the nine Justices of the Supreme Court, black students and white students could now find their own ways toward improved social relations and better understanding.

ENDNOTES

[1] For the details of George McLaurin's life and his case, see my forthcoming book, **Breaking Down Barriers: George McLaurin and the Struggle to End Segregated Education** (Norman: University of Oklahoma Press, 2020).

[2] 332 U.S. 631 (1948). For Fisher's case, see her autobiography, **A Matter of Black and White** (Norman: University of Oklahoma Press, 1996), and Cheryl B. Wattley, **A Step Toward *Brown v. Board of Education*: Ada Lois Sipuel Fisher and Her Fight to End Segregation** (Norman: University of Oklahoma Press, 2014).

[3] Oklahoma Constitution, Article 13, Section 3 (repealed in May 1968).

[4] 70 *Oklahoma Statutes* (1941), Sections 452-64.

[5] 87 F. Supp. 526-28 (W.D. Ok. 1948).

[6] University of Oklahoma Board of Regents' Minutes, October 10, 1948, pp. 2893-98.

[7] *Id.*, p. 2896.

[8] George Lynn Cross, **Blacks in White Colleges: Oklahoma's Landmark Cases** (Norman: University of Oklahoma Press, 1975), p. 92.

[9] *Id.*, p. 108.

[10] "Abolish the Technicalities," *Norman Transcript*, February 7, 1949, p. 4.

[11] "Board Recommends End to Segregation in Graduate Schools," *Daily Oklahoman*, January 30, 1949, p. 1.

[12] Williamson to Bill Logan and Walter Billingsley, April 6, 1949, *George Lynn Cross Presidential Papers (GLCPP)*, University Archives, Western History Collections, University of Oklahoma, Box 50, Folder: "Negro Question (#3)." Logan was president *pro tem* of the Senate and Billingsley was Speaker of the House. See also, John T. Hubbell, "The Desegregation of the University of Oklahoma, 1946-1950," pp. 52-53 (Master's thesis: University of Oklahoma, 1961).

[13] Cross, **Blacks in White Colleges**, p. 111.

[14] 70 *Oklahoma Statutes, Supplement* (1949), Sections 455-57.

[15] "OU to Ask Extra Funds for Negro Instruction," *Norman Transcript*, June 19, 1949, p. 1; "Separate Instruction Will Require $100,000," *Oklahoma Daily*, June 21, 1949, p. 1.

[16] Cheadle to Carl Mason Franklin, September 19, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[17] Cross to Williamson, June 11, 1949, *GLCPP*, Box 50, Folder: "Negro Question (#2)."

[18] Cross, **Blacks in White Colleges**, p. 112.

[19] Williamson to Cross, June 14, 1949, *GLCPP*, Box 50, Folder: "Negro Question, (#2)." Williamson's opinion also gave governing boards authority to "adopt and enforce reasonable rules and regulations" as to eating, library, housing facilities, etc.

[20] Ed Dycus, "Segregation Procedure Announced by Cross," *Oklahoma Daily*, June 17, 1949, p. 1; "Railings Are Up at OU; Negroes Are Due Monday," *Daily Oklahoman*, June 19, 1949, p. 38.

[21] Regents' Minutes," June 29, 1949, p. 3179. One Regent abstained.

[22] Logan to Cross, June 18, 1949, *GLCPP*, Box 50, Folder: "Negro Question, (#3)." See also, "Bill's Author Has Criticism for Cross," *Daily Oklahoman*, June 18, 1949, p. 5 and *Oklahoma Daily*, June 18, 1949, p. 1.

[23] Cross to Fred McCuistion, October 19, 1950, *GLCPP*, Box 80, Folder: "Negroes."

[24] F. A. Balyeat to Laurence H. Snyder and Carl Mason Franklin, August 25, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[25] Cross **Blacks in White Colleges,** p. 116; J. E. Fellows to Carl Mason Franklin, August 1, 1949, *GLCPP*, Box 66, Folder: "Negroes." On June 29, Cross told the Regents that there were twenty-five black students in the summer session. The *Daily Oklahoman*, on June 19, fixed the number at twenty-six; the *Norman Transcript* reported the number to be twenty-nine; two days later, the *Daily Oklahoman* gave thirty as the correct number. The *Oklahoma Daily*, on June 23, reported that forty-seven rooms were being used by black students.

[26] George Lynn Cross to Dean Bowden, March 15, 1950, *GLCPP*, Box 66, Folder: "Negro Enrollment." See also, "Negro Enrollment for the Second Semester, 1949-1950," *Id.*, Folder: "Negroes."

[27] George Lynn Cross to Primus Wade, October 27, 1950, *GLCPP*, Box 80, Folder: "Negro"; Earnestine Beatrice Spears, "Social Forces in the Admittance of Negroes to the University of Oklahoma" (Master's thesis: University of Oklahoma, 1951).

[28] Franklin to Walter Kraft, November 16, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[29] J. E. Fellows to George Lynn Cross, February 9, 1949, *GLCPP*, Box 50, Folder: "Negro Question (#3)."

[30] Edgar Meacham to Carl Mason Franklin, September 19, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[31] Cheadle to Roscoe Cate, April 20, 1948, *GLCPP*, Box 50, Folder: "Negro Question (#1)." State law segregated only four areas: transportation facilities, telephone booths, mines, and education. Most of Oklahoma's segregation practices were carried out by municipal

ordinances and by widely understood, but unwritten custom.

[32] Cross to Mary Kathryn Hickman, January 6, 1950, *GLCPP*, Box 66, Folder: "Negroes."

[33] W. H. Freeland to Paul MacMinn, January 9, 1950, *Id.*

[34] Garner G. Collums to Cate, April 16, 1948, *GLCPP*, Box 50, Folder: "Negro Question (#2)."

[35] Cheadle to Cate, April 20,1948, *Id.*

[36] David W. Levy, **The University of Oklahoma: A History** (Norman: University of Oklahoma Press, 2015), Vol. 2, pp. 106-10. The corporation owns the building. With legislative approval, the Board of Regents leased the land on which the building sits for ninety-nine years.

[37] H. Hillyard Freeland to Paul MacMinn, January 9, 1950, *GLCPP*, Box 66, Folder: "Negroes."

[38] Tom F. Carey to Ted Beaird, October 18, 1948, *GLCPP*, Box 50, Folder: "Negro Question (#2)." Beaird was the secretary of the alumni association and manager of the Union.

[39] Cross to John B. Freeman, January 17, 1947, *GLCPP*, Box 50, Folder: "Negro Question (#1)."

[40] Ted Beaird to Gilbert Lincoln, November 17, 1948, *GLCPP*, Box 50, Folder: "Negro Question (#2)."

[41] Ted Beaird to Carl Mason Franklin, May 7, 1949, *GLCPP*, Box 50, Folder: "Negro Question (#3)."

[42] Ted Beaird to Paul MacMinn, October 12, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[43] Paul MacMinn to Cross, November 30, 1949, *GLCPP*, Box 66, Folder: "Negroes," and Carl Mason Franklin to MacMinn, December 2, 1949, *Id.*

[44] Emil Kraettli to Board of Regents, July 30, 1949, *GLCPP*, Box 66, Folder: "Negroes."

[45] Regents' Minutes, September 14, 1949, 3227. See also, Cross to Roscoe Cate, Walter Kraft, and Carl Mason Franklin, September 15, 1949, *GLCPP*, Box 66, Folder: "Negroes." At the next Regents' meeting (October 12, 1949, 3299) Cross reported that two such dormitories would cost $300,000.

[46] Cross, **Blacks in White Colleges,** p. 123.

[47] Regents' Minutes, July 13, 1949, p. 3184.

[48] *Id.*

[49] Franklin to Clee Fitzgerald, October 21, 1949, *GLCPP*, Box 66, Folder: "Negroes." The University did not sell football tickets to African Americans who were not students because of the fear of "the rather free expression of emotions found in a football crowd." See Roscoe Cate to George Lynn Cross, September 23, 1950, *GLCPP*, Box 80, Folder: "Negro."

[50] See the memo from Carl Mason Franklin to George Lynn Cross, August 6, 1949, *Id.*

[51] See Mark R. Everett and Alice Allen Everett, **Medical Education in Oklahoma: The University of Oklahoma School of Medicine and Medical Center, 1932-1964** (Norman: University of Oklahoma Press, 1980), p. 192; George Lynn Cross to C. G. Lowe, July 13, 1949, *GLCPP*, Box 66, Folder: "Negroes"; and Vernon D. Cushing to Mark Everett, July 9, 1949, *Id.*

[52] The first African-American medical student at the University was not enrolled until the 1951-1952 academic year; the first two African-American nursing students were admitted in February 1951.

[53] Royden Dangerfield to George Lynn Cross, November 8, 1946, *GLCPP*, Box 50, Folder: "Negro Question (#1)."

[54] W. B. Lemmon to Carl Mason Franklin, October 14, and Franklin to Lemmon, October 20, 1948, *Id.*

[55] *Id.*

[56] F. A. Balyeat to Charles Wesley Qualls, March 8, 1949, *GLCPP*, Box 50, Folder: "Negro Question (#3).

[57] Ted Beaird to Paul MacMinn, March 18, 1949, *Id.*

[58] F. A. Balyeat to Laurence Snyder and Carl Mason Franklin, August 25, 1949, *GLCPP*, Box 66, Folder "Negroes."

[59] Roscoe Cate to Eugene A. Nida, May 31, 1949, *Id.*

[60] Lois Brown to George Lynn Cross, October 21, 1949, *Id.*

[61] M. O. Wilson to J. E. Fellows, November 9, and Carl Mason Franklin to Wilson, November 14, 1948, *Id.*

[62] Cross to Whitby, November 3, 1949, *Id.*

[63] Carold D. Holstine to Wilson, December 1, 1949, *GLCPP*, Box 66, Folder: "Negro Enrollment."

[64] Walter S. Campbell to E. D. Meacham, February 22, 1950, and Carl Mason Franklin to Campbell, February 25, 1950, *GLCPP*, Box 66, Folder: "Negroes."

[65] Carl Mason Franklin to John Cheadle, April 7, and Franklin to L. H. Snyder, J. E. Fellows, and J. R. Rackley, April 14, 1950, *Id.*

[66] Thurman White to Carl Mason Franklin, June 12, 1950, *Id.*

[67] For the details of the legal struggle, see Levy, **Breaking Down Barriers.**

[68] *Sweatt v. Painter,* 339 U.S. 629 (1950). See Guy M. Lavergne, **Before *Brown*: Heman Marion Sweatt, Thurgood Marshall, land the Long Road to Justice** (Austin: University of Texas Press, 2010).

[69] *Henderson v. United States*, 339 U.S. 816 (1950).

[70] Jack Greenberg, **Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York: Basic Books, 1994), p. 78. The vote in *Henderson* was 8-0, as Justice Tom Clark recused himself because the Justice Department had issued a brief in support of passenger Henderson when Clark was the Attorney General.

[71] "Jim Crow in Handcuffs," *New Republic*, p. 112 (June 19, 1950).

[72] *McLaurin v. Oklahoma State Regents for Higher Education, et al.,* 339 U.S. 637, at 641-42.

[73] Fisher, **A Matter of Black and White,** p. 152.

Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument about Life, the Law, and the U.S. Supreme Court

AMANDA C. BRYAN, RACHAEL HOUSTON, and TIMOTHY R. JOHNSON

Introduction

On November 4, 1992, the U.S. Supreme Court heard oral arguments in *Bath Iron Works v. Workers' Compensation Programs*.[1] As attorneys presented their arguments, Justice Harry A. Blackmun, like the entire nation, had a lot on his mind because the night before William Jefferson Clinton had been elected the first Democratic President in twelve years. While the political implications of the Clinton victory would be undoubtedly vast, Blackmun was more concerned with how it would affect him personally. It was just days until Blackmun's eighty-fourth birthday, and it suddenly seemed viable for him to depart and allow the new President to make a politically and ideologically suitable replacement.

Thus, while Blackmun took his (usual) notes on Christopher Wright's arguments for the federal government, Blackmun's mind, and his pencil, wandered to how his life might quickly change. Writing in his characteristic green pencil, he mused about the implications of the election, "What do I do now. [R]etire at once, 6/30/93, 6/30/94." He added, perhaps nostalgically, "33 years ago today, I went on the fed bench! Seems like yesterday. What a privileged experience!"

We know what was going on in Blackmun's mind that day only because he was a habitual note-taker. In fact, as he did in *Bath Iron Works*, in almost every case Blackmun took copious notes about what transpired during oral arguments. As Linda Greenhouse wrote in **Becoming Justice Blackmun,** he seemed to keep these notes out of "an

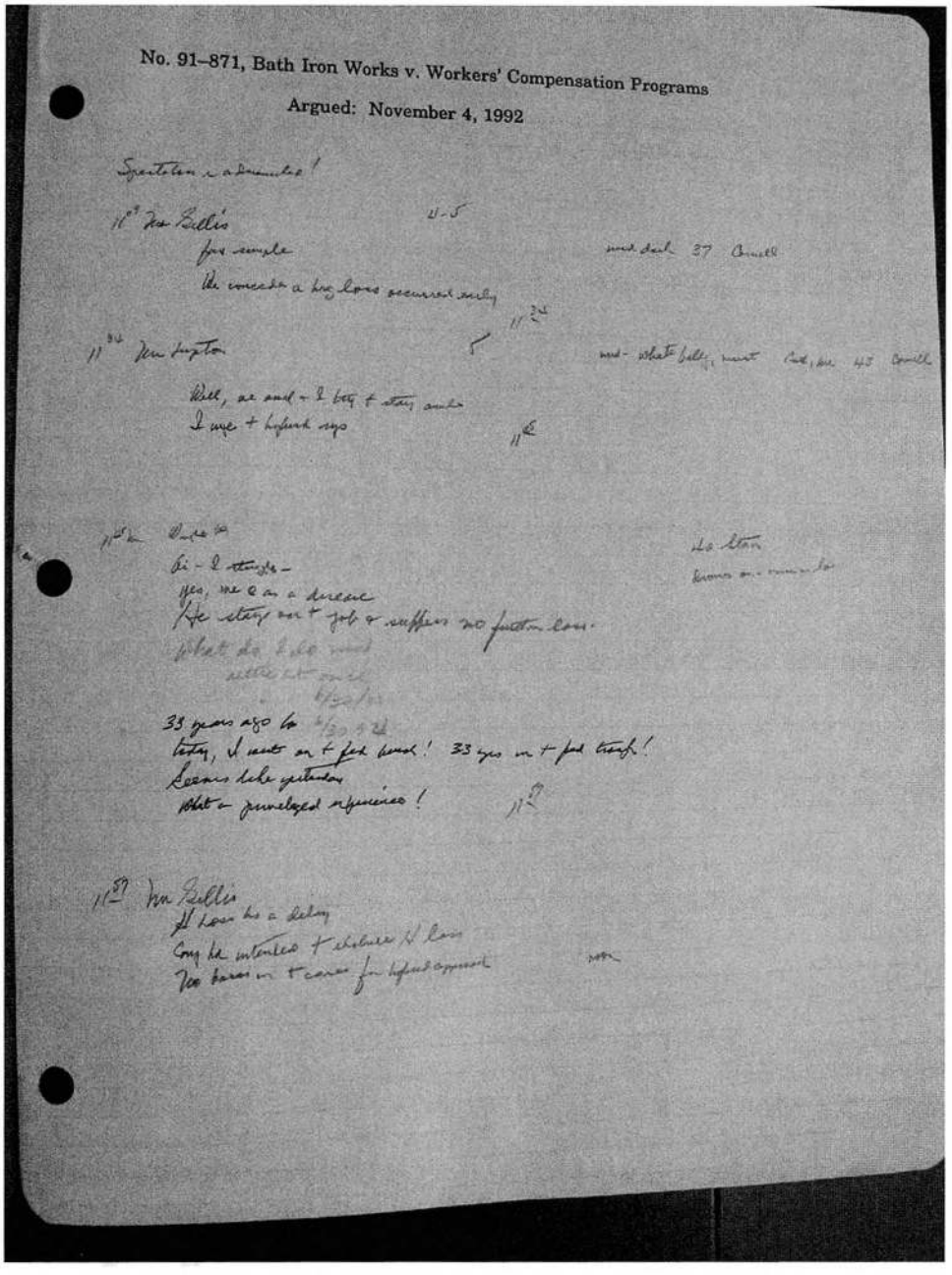


Figure 1. Harry A. Blackmun's oral argument notes in *Bath Iron Workers vs. Workers' Compensation Programs* (1993)

impulse to order [his] world … It was a deep impulse that reappeared throughout his long life."[2] While his notes (written with a traditional gray graphite pencil) focused mainly on the substance of the arguments,[3] Blackmun also wrote in green pencil to indicate comments outside of the legal and policy substance of the arguments themselves, including his musings about politics, personal life, and a plethora of other thoughts that

occurred to him while the attorneys argued their cases.

Blackmun's oral argument notes continue to be a treasure trove for scholars,[4] Court watchers,[5] and interested citizens.[6] However, his "green notes," the name we have given to these more personal reflections, have been paid far less attention. Our goal is to provide a better understanding of them while also providing readers with insights about the gray notes. Both are of particular interest for several reasons.

First, they offer a rare glimpse of the world through the eyes of a Justice who sat on the Court through some of its (and the nation's) most interesting and tumultuous years of the late twentieth century. Indeed, Blackmun's personal insights are one of the only opportunities scholars have ever had to peek into the mind of a U.S. Supreme Court Justice and, as such, they open the Court in a way our least publicly observable institution has not yet been open. Second, these notes add to our understanding of how Justices reach decisions. For decades, scholars have used Court outcomes (who wins, who loses, and why) to infer the factors that influence Justices' decisions, particularly their motives that are the quintessential black box of the decision-making processes. In a sense, then, Blackmun's notes allow us to open that box to explore his motivations. Third, the notes add a dimension to scholarly understanding of the Court in a way that even most historians cannot provide because these insights come, quite literally, from Blackmun's own hand as he watched law, politics, and history develop around him over the nearly quarter century he sat on the bench.

In the crux of the article we utilize Blackmun's oral argument notes to elucidate how he viewed the courtroom proceedings unfolding in front of him, including his assessment of the attorneys who appeared before the Court and his insights about his colleagues' behavior. We first explore his graphite notes (although sometimes his green notes as well) to better understand Blackmun's assessment of the arguments presented to the Court; we do so to determine whether these arguments were persuasive to him and his colleagues and to detail how he thought his colleagues would decide each case. From there, we turn more specifically to what Blackmun's green notes teach us about the Court's oral arguments, its inner workings, the dynamics between the Justices on the Burger and Rehnquist Courts, and American cultural and political history.[7] Finally, we utilize Blackmun's notes as evidence that the Justices, while certainly the top legal minds in the nation, are not particularly different from typical U.S. citizens. For instance, while listening to arguments, Blackmun sometimes thought about his favorite baseball team (the Minnesota Twins), entertained himself and his colleagues by playing games on his note paper, and reflected about his health and impending retirement. These are insights we believe serve to humanize Blackmun and his colleagues in an important way. Indeed, law is made by actual humans who possess fears, concerns, hobbies, and interests. Blackmun's notes therefore help us understand the human side of the Marble Palace.

Before completing these related analyses, however, we begin by highlighting the general historical period during which Blackmun built his legacy, from the history he lived through beyond the Court to the transformations he witnessed within the wall of the nation's highest court.

Justice Blackmun: Witness to History Within and Beyond the Marble Palace

While Justice Blackmun will always be remembered for his abortion jurisprudence,[8] he has left a much less appreciated legacy as a keen observer and record taker. His archival papers, publicly available at the Library of Congress, provide a wealth of insight into life, law, and the inner workings of the U.S. Supreme Court.[9] For more than fifteen years,

now, they have been an invaluable source of data and information that have enriched how political scientists, legal scholars, and historians understand the inner workings of the Court. Our goal in this section is not to provide a comprehensive recap of Blackmun's life but, rather, to highlight the extraordinary events that took place within and outside the Court during his twenty-four years on the bench.

Blackmun's tenure from 1970 to 1994 was a time of great international tumult for the United States. He joined the bench several years before the end of the Vietnam War and stayed long enough to witness the first Persian Gulf War. He also had a front row seat to the end of the Cold War and ultimate downfall of the U.S.S.R. Thus, his years on the bench were a time of important and transformative foreign policy for the United States.

Domestically, Blackmun sat on the High Court through six presidential elections, including the reelection of the President who appointed him and the election of the President who would ultimately replace him. In addition, he watched as scandal led to the resignation of Vice President Spiro Agnew and as Watergate led to the resignation of several Attorneys General and ultimately to the downfall of President Richard Nixon. Closer to his own bailiwick, Blackmun was front and center for two of the most hotly contested Supreme Court nomination battles in U.S. history: those of Judge Robert Bork and Justice Clarence Thomas.

Inside the Marble Palace, Blackmun observed a number of historically significant developments in the law, transformations of personnel on the bench, and changes in relationships among his colleagues. His tenure covered major jurisprudential developments on a host of landmark issues including reproductive rights,[10] gender and racial equality,[11] the free exercise and establishment of religion,[12] the reinterpretation of the Court's long-standing obscenity standard,[13] campaign finance,[14] and the death penalty.[15]

Beyond legal changes, Blackmun witnessed considerable ideological transformation on the bench and he often took notes about these dramatic shifts. During his first five terms, he watched the retirements of Justices Hugo L. Black and William O. Douglas, the final remaining New Deal appointees of President Franklin D. Roosevelt. As Douglas and Blackmun sat together in the Courtroom during their final day as colleagues and for Douglas's final oral argument, Blackmun wrote, "WOD retires today."[16] He then added, "My last day on this seat,"[17] meaning that he would be moving to a new seat closer to the center of the bench because more senior Justices sit nearer the center while new Justices sit nearer the wings.[18]

After Black and Douglas retired, only two of the Court's stalwart liberals remained, Justices William J. Brennan and Thurgood Marshall. Blackmun also remarked when Douglas's replacement, John Paul Stevens, joined the bench. As he sat for Stevens's first argument just two months after Douglas's departure on January 12, 1976, Blackmun wrote, "January 1976 Session. JPS #1."[19] This nomination was particularly important because, while a Republican President (Gerald Ford) nominated Stevens, Stevens, like Blackmun, moved well to the ideological left during his long tenure on the bench.[20]

Maybe more important than Stevens's nomination was President Reagan's first nomination just six years later. In 1981, Blackmun watched as the first woman, Justice Sandra Day O'Connor, donned the black robe. Oddly, despite Blackmun's penchant for noting historically significant events, he made no mention of O'Connor's ascension to the bench.[21] Two days later, however, he did note that she was missing at arguments.[22] While he may have missed recording O'Connor's first argument, toward the end of her first term, Blackmun made

Harry Blackmun ate lunch with Hugo Black (facing backward) on a sunny day in the courtyard at the Supreme Court shortly before the Alabama Justice stepped down from the bench. When a colleague retired, Blackmun carefully jotted down the event in his notes.

a prophetic notation about his newest colleague, predicting in *Union Labor Life Insurance Company v. Pireno*[23] that, "This case may well depend on SOC's vote." Of course, as is now clear, many cases depended on how she decided.[24]

While the ascension of Stevens and O'Connor did not fully signify a shift of the Court's ideological makeup, the movement toward a more conservative bench took its most obvious turn when Chief Justice Warren Burger made it clear that he was retiring after the 1985 term. His decision became official on September 26, 1986 when the Senate confirmed William H. Rehnquist as the new Chief Justice. Ten days later, on the first Monday of October, Blackmun kept record of the change, "OT 1986 WHR, CJ."[25] At the same time, perhaps the most conservative Justice to date—Antonin Scalia—joined the Court in the seat left vacant when Reagan elevated Rehnquist to Chief. Again, Blackmun did not mention Scalia's first day but, as with O'Connor, he noted the first time Scalia missed an argument, writing in *Meese v. Keene*,[26] "AS out."

Two years later, Justice Anthony Kennedy became Reagan's fourth appointee to the Court after Justice Lewis Powell retired. It was clear from the very beginning that Blackmun had a special relationship with Kennedy. What he and Blackmun had in common was ostensibly being the third choice of the appointing President. In fact, Blackmun often called himself "old number three" and then suggested to Kennedy—upon his arrival to the Court—that they were both "number 3's."[27] Again, Blackmun did not make specific note of Kennedy's first argument but did write "AK is quiet" during proceedings on February 22, 1988.[28]

The transition to perhaps the most ideologically conservative Court in U.S. history was complete with the confirmation of Justice Thomas in the fall of 1991. Thomas took the bench for the first time on November

4 and this time Blackmun noted the arrival of his new colleague. In his shorthand he wrote, "CT first on bench."[29] During the second case that day, beginning at 11:05 A.M., Blackmun also noticed what would soon become conventional wisdom about Thomas. Specifically, he noticed, "No? yet from CT?"[30] Of course, neither Blackmun nor anyone else would predict that Thomas would only ask twelve questions in the time they sat with each other or that, up until this point, he would ask a total of just thirty-three questions (1991–2019).

Now, a quarter-century after his departure from the bench, we take a closer look at Blackmun's oral argument notes that show how, amid these historic events and Court transformations, Blackmun assessed what transpired during these proceedings. We begin, in the next section, by analyzing how Blackmun assessed the attorneys who appeared at the nation's highest court.

Attorney Performance During Oral Arguments

Before entering into private practice and ultimately ascending to the federal bench, Blackmun was an adjunct professor at St. Paul College of Law (now Mitchell Hamline School of Law) and for a time at the University of Minnesota Law School.[31] Perhaps this early career teaching experience stuck with Blackmun when he joined the Court because he certainly acted like a professor in one respect: he regularly evaluated the oral arguments presented by each attorney. These grades provide insights into a number of fascinating questions, such as the criteria Blackmun used for his grades, whether these grades indicate who provided better arguments in a case, whether the grades indicate who would win, whether famous attorneys earned higher grades than their less experienced counterparts, and who earned the best and worst grades.

Initially, it is important to gain a sense of how, and on what basis, Blackmun graded counsel. Throughout many Court terms, the grades themselves changed as he employed three different scales: A–F from 1970 to 1974; 1–100 from 1975 to 1977; and 0–8 from 1978 to 1993.[32] Ninety-five percent of Blackmun's notes discuss the substantive legal and policy arguments made by counsel, while only five percent focus on presentation style or on the Justice's personal views of the attorneys.[33] Blackmun was not simply giving grades because he liked or disliked a particular attorney making the argument or because he agreed with the ideological rationale of an argument. Rather, the correlation between his notes and the final grades makes it relatively clear he was grading the substantive arguments presented.

Blackmun's own notes support our claim. Consider what he wrote of former Solicitor General, Kenneth Starr, "What a Boy Scout goodie-goodie."[34] While this comment indicates Blackmun may not have thought much of him personally, Starr still earned a relatively high grade of 6 on the eight-point scale.[35] Blackmun also did not let his subjective evaluations of the attorneys' descriptive characteristics influence his grading. Although he described Vernon Teofan as "plump" and "loud"[36] and Archibald Cox as "hoarse" and "deaf,"[37] both received 6s. In short, Blackmun seems to have been genuinely interested in determining whether an attorney presented a good argument, even if he wrote less-than-flattering personal notes about them.

Further, as a supplement to his grades, Blackmun often commented about the strength or weakness of each attorney's specific arguments. For example, in *Florida Department of State v. Treasure Salvors*,[38] he wrote ten substantive comments about the argument by respondent's attorney Paul Horan, who earned a 6, and then noted, "He makes t most with a thin, tough, case."[39]

Similarly, in *First National Maintenance Corp. v. NLRB*,[40] Blackmun indicated of Norton J. Come, the petitioner's attorney, who was assigned only a 5, "The argument has persuaded me to reverse."[41]

While the preceding analysis focuses on good grades attorneys earned, at times he also offered harsher evaluations. Of Nebraska Assistant Attorney General Terry R. Schaaf's argument in *Murphy v. Hunt*,[42] he noted "very confusing talk about Nebraska's bail statutes." Schaaf then earned a grade of 4. Cal Johnson Potter III's argument in *Godinez v. Moran*[43] received a 1.5, with Blackmun claiming it to be "one of the worst arguments" he had ever heard. Arthur Joel Berger, Assistant Attorney General of Florida, earned a 65 out of 100 for his argument in *Maness v. Wainwright*,[44] with Blackmun noting, "This guy for me is a bust."

It was one thing for Blackmun to have graded the arguments presented to the Court. The important question is to what end did he do so. Did his grades assess who was the better attorney during argument and does being the better attorney equate with winning a case? The answer to both queries is yes; Blackmun's oral argument grades correlate highly with Justices' final votes on the merits. Examining the votes of all Justices who sat with Blackmun, Johnson, and his colleagues demonstrates that a Justice who is ideologically predisposed to *vote against* the petitioner has a 32.2 percent chance of supporting the petitioner when the respondent attorney presents oral advocacy that in Blackmun's estimation is considerably better than the petitioner's argument. By contrast, the likelihood of voting for the petitioner's position increases to 47.6 percent when the same Justice encounters a petitioner who outmatches the respondent's attorney at oral arguments.[45] It is important to note that Johnson and his colleagues analyzed the votes of all the Justices who sat on the Court with Blackmun—rather than just Blackmun's own votes. In short, Blackmun's colleagues were picking up the same sense of attorney quality or lack thereof that Blackmun noted privately.

The magnitude of the effect of oral advocacy is even more pronounced for justices *who are ideologically supportive* of an attorney with the stronger oral argument. A justice who favors the petitioner ideologically in a case in which the respondent offers better arguments has a 64.4 percent chance of voting for the petitioner but, when the petitioner provides better oral arguments, this increases to 85.2 percent.[46] The bottom line is that, just as he did when grading his law students, decades before joining the bench, Blackmun had a good eye for arguments.

Flipping the Bench: Attorneys' Attempts to Persuade

Blackmun's copious oral argument notes certainly indicate he was a very good listener and that he knew well the attorneys' positions in each case he heard. Thus, it is no wonder the students sometimes persuaded the teacher to change his mind about a case. While our focus is on Blackmun, the persuasiveness of oral arguments is not limited to him, as other justices have been quite clear that they sometimes changed how they viewed a case after argument. Indeed, Rehnquist once wrote that, "In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench."[47] Systematically, one recent study reveals that Blackmun actually changed his votes in some cases based on the arguments counsel presented,[48] doing so just over ten percent of the time. That he switched at all suggests that attorneys can, and sometimes do, utilize their thirty minutes to persuade justices to change their positions.

Blackmun's notes provide specific instances of how he was persuaded by counsel's arguments. For example, during respondent's argument in *Allied Chemical & Alkali Workers of America, Local Union No. 1*

v. Pittsburgh Plate Glass Co.,[49] he wrote, "I was on board here B/4 argument but now definitely lean toward +."[50] Even when he was "on board" in a case, sometimes argument helped him rethink his position. In a 1983 term case, the argument by respondent's attorney led Blackmun to write, "I am shifting my view."[51] Likewise, in *Ford Motor Co.*,[52] he wrote, "I think I have turned around on this case, at least in part." At other times Blackmun seemed to have been fully persuaded to change his vote. Consider *First National Maintenance Corp. v. NLRB*, where he wrote, "The argument has persuaded me to +." Again, during the 1989 term Blackmun indicates that then Assistant Solicitor General John Roberts may have persuaded him to change his view of the case. During Roberts's rebuttal he noted, "Am I turned around in this case?"[53] Similarly, during *Fuentes v. Shevin*,[54] Blackmun penned that, "He persuades me but will he persuade all the others?"

Remembering Persuasive Attorneys

While Blackmun was probably familiar with many attorneys who argued before the Court, he could not have known them all—even those whom scholars might consider relatively famous. His notes, then, indicate that he had ways to remember who argued. Specifically, he wrote down characteristics of the attorneys including his (possible) estimates about their age and what they looked like at the rostrum. As with the other aspects of his notes, Blackmun was nothing if not meticulous in this area. Each description was made on the right-hand side of his lined paper and always appeared on the same lines as he wrote counsel's name, the time each argument began, and the grade he had assigned. These descriptors are exemplified in a single line about James Strain in *CTS v. Dynamics Corp.*:[55] "young, beard, 42, dull, Hastings, WHR Clerk like Jim Brudney."[56]

Physical cues were particularly important to Blackmun. For instance, he described attorney Frank Whalen, who argued in *Sarno v. Illinois Crime Commission*,[57] as "gravel voice, frowny, widow's peak, sclerotic." Martin Wald, who argued *Firestone Tire Co. v. Bruch*,[58] was "short, grey, glasses, 54, blunt." In contrast, Robert Fishell, arguing for the petitioner in *Owen v. Owen*,[59] was "large, soft spoken ... Pretty dull, slow." Blackmun even notated the appearance of attorneys with whom he was clearly familiar. He described the outfit of future Justice Ruth Bader Ginsburg in *Califano v. Goldfarb*,[60] even though it was not her first case before the Court, "in red and red ribbon today."

Possibly the most important information for Blackmun was attorneys' experience. In fact, his notations often focused on where attorneys attended law school, whether they clerked for the Court earlier in their career, or how they practiced law. These factors parallel research that suggests such factors may have an impact on who is likely to win a case.[61]

Consider, first, where attorneys attended law school. In *Firestone*, Blackmun remarked that petitioner attorney Wald attended "Chicago." Other times he used his prototypical shorthand when mentioning law schools. Thus, while Kathi Drew argued for the state of Texas in *Texas v. Johnson*,[62] Blackmun noted she was from "SMU."[63] In *McCarthy v. Bronson*,[64] he indicated Christopher Cerf was from "Colum."[65] In *Reed v. United Transportation Union*,[66] he pointed out that John Gresham was from BU (Boston University) and in *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*,[67] Blackmun noted that Harold Talisman was from OSU (The Ohio State University). In other cases, he wrote that Nina Kraut was from "Vt" (presumably Vermont), even though she actually attended law school in the neighboring state of New Hampshire. Similarly, he noted that Rex E. Lee and Chris Hansen attended "Chicago," David Soloway went to "Emory," and

Raymond K. LaJeunesse, Jr. attended "W & Lee" (Washington and Lee University).

Beyond where they obtained law degrees, Blackmun also categorized attorneys based on whether (and where) they taught law. In *Milton v. Wainwright*,[68] he wrote that Neil Rutledge was a "Duke Prof" and "(son of Wiley?)." In *Buckley*, Ralph K. Winter was a "Yale prof" and in *White v. Weiser*,[69] Charles L. Black was a "Yale professor." During other arguments, Blackmun wrote that Lewis B. Kaden was a "Colum prof,"[70] Vivian Berger was a "Columbia prof,"[71] and Gerald López was a "Stan prof."[72] He also noted professors without mentioning specific institutions, as he did with William Burnham, Edwin Bradley, George Colvin Cochran, Barry Nakell, and Archibald Cox.

Finally, whether an attorney clerked at the Court signaled experience to Blackmun. Thus, in *Firestone* he wrote that Mr. Sullivan was a "TM clerk." Interestingly, Blackmun initially noted when Christopher Cerf argued *Carella v. California*[73] in 1989 that he was a "CJ clerk," but there was a problem. Cerf never clerked for Rehnquist. However, when Cerf argued *McCarthy* in 1991, Blackmun properly identified that he had been an "SOC clerk."[74] During arguments in the landmark *Buckley v. Valeo*, Ralph Winter, Jr. was a "former TM Clerk." In *CTS v. Dynamics Corp.*, James Strain "was a WHR clerk like Jim Burway." Marsha Berzon in *International Union v. Johnson Controls*[75] was a "former WJB Clerk."[76]

It is interesting that Blackmun was so attuned to these details because research suggests the grades we discuss above are based on the quality of the attorneys who appear before the Court. Thus, attorneys who were former clerks or who taught at elite law schools were more likely to make winning arguments to the Court.[77] Combining this insight with cues in Blackmun's notations, it is intuitive that he would remember those who made the best (or sometimes the worst) arguments.

Blackmun's Judgment of His Colleagues' Oral Argument Behavior

Blackmun also spent much time listening to, and making notes about, his colleagues' actions, interactions, questions, comments, and general oral argument behavior. In this section, we analyze how he responded to his colleagues' behavior and what such behavior taught him about how a case may be decided.

Assessing Colleagues' Verbosity

Initially, we note that during Blackmun's tenure on the bench, there was a relatively major change in how Justices acted during oral arguments. There was a massive increase in the number of times Justices spoke during the mid-1970s, followed by a clear decline through the early 1980s (See Fig. 2). In particular, during the 1979 term each Justice spoke on average about twenty times per argument session; this decreased to twelve times per session in 1985. In addition, contrary to the conventional wisdom that Justices began to speak much more once Justice Antonin Scalia joined the bench in 1986, the increase happened prior to his ascension to the bench, with the Justices speaking more throughout the decade before Scalia's appointment. The substantial increase in the number of times Justices spoke while Blackmun was on the bench changed the dynamic of how they interacted with one another.[78]

While scholars debate how such prolific questioning affects case outcomes, Blackmun's own notes suggest he was often annoyed by his colleagues' behavior. Perhaps he would have preferred a return to the Marshall Court era (1801–1835), when attorneys were more likely to orate before the Court rather than engage in a fast-paced debate with the Justices.[79] We know this because Blackmun frequently commented on how often or how little his colleagues spoke, occasionally even

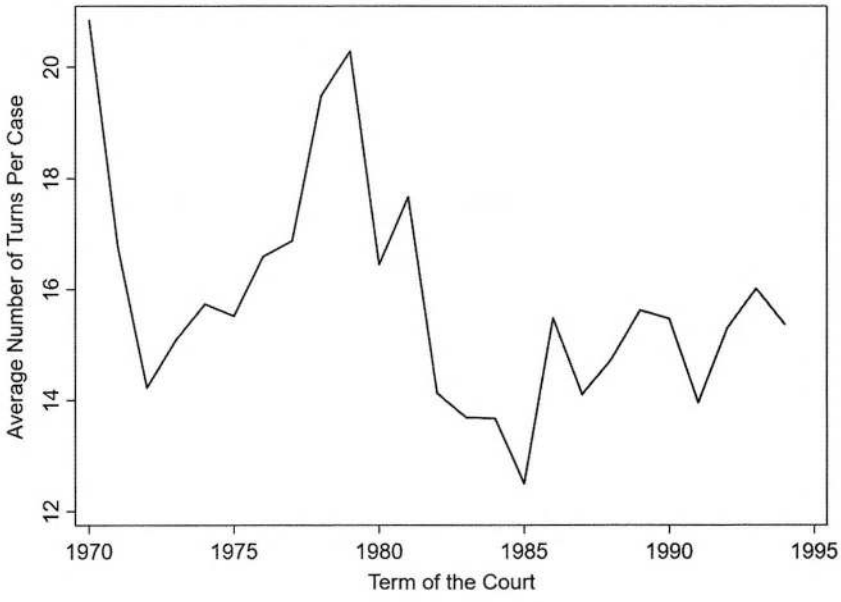


Figure 2. Average number of Justice utterances per case by term of the Court.

tallying their number of turns. For instance, in *Harris v. Forklift Systems*,[80] he counted the questions asked by three of his colleagues whom he often thought asked too many questions: Justices Ginsburg, Scalia, and Souter.[81] The upper right-hand corner of Figure 3 shows that these three colleagues spoke often during the proceedings: Ginsburg twenty-seven times, Scalia twenty times, and Souter eight times.

However, these notes do not tell the full story of the day *Harris* was argued. During the October 13, 1993, session, Blackmun kept an additional tally of how often his colleagues spoke across both cases argued that day.[82] In this note, Ginsburg, Scalia, and Souter spoke twenty-seven, fifteen, and eleven times, respectively. In the second case, *Landgraf v. Usi Film Products*,[83] they spoke twenty-one, eighteen, and seven times, respectively. In short, Blackmun often kept track of those colleagues he viewed as "going over the line" in speaking most often.

As his tenure wore on, Blackmun became increasingly annoyed at the number of questions asked by some of his colleagues. Consider the last years he spent on the bench, from 1986 to 1994. In the October 1986 term, the Court heard arguments in a highly salient establishment clause case, *Edwards v. Aguillard*.[84] During Jay Topkis's argument for Aguillard, Blackmun noted that "He jumps on AS—good!" Making clearer that Blackmun may have been less upset with Scalia's view of the case than with his verbosity is the fact that the next sentence says, "Why ds AS n shut up?"

Of course, while Blackmun often showed disdain for Scalia's verbosity, Scalia was not the only colleague about whom Blackmun complained. In *United States v. R.L.C.*,[85] Blackmun wrote that "CJ mentions JPS and AS are talking too much."[86] Not only was he often annoyed by his colleagues' loquaciousness, he was also sometimes unhappy when questions were asked. At the outset of the petitioner's argument in *Davis v. U.S.*,[87] Blackmun noted that "As usual, SOC has the first [question]."[88]

The key is that Blackmun was quite sensitive about his colleagues' behavior during oral argument. While this may not, in itself, be interesting, there is evidence that the number of times Justices speak affects

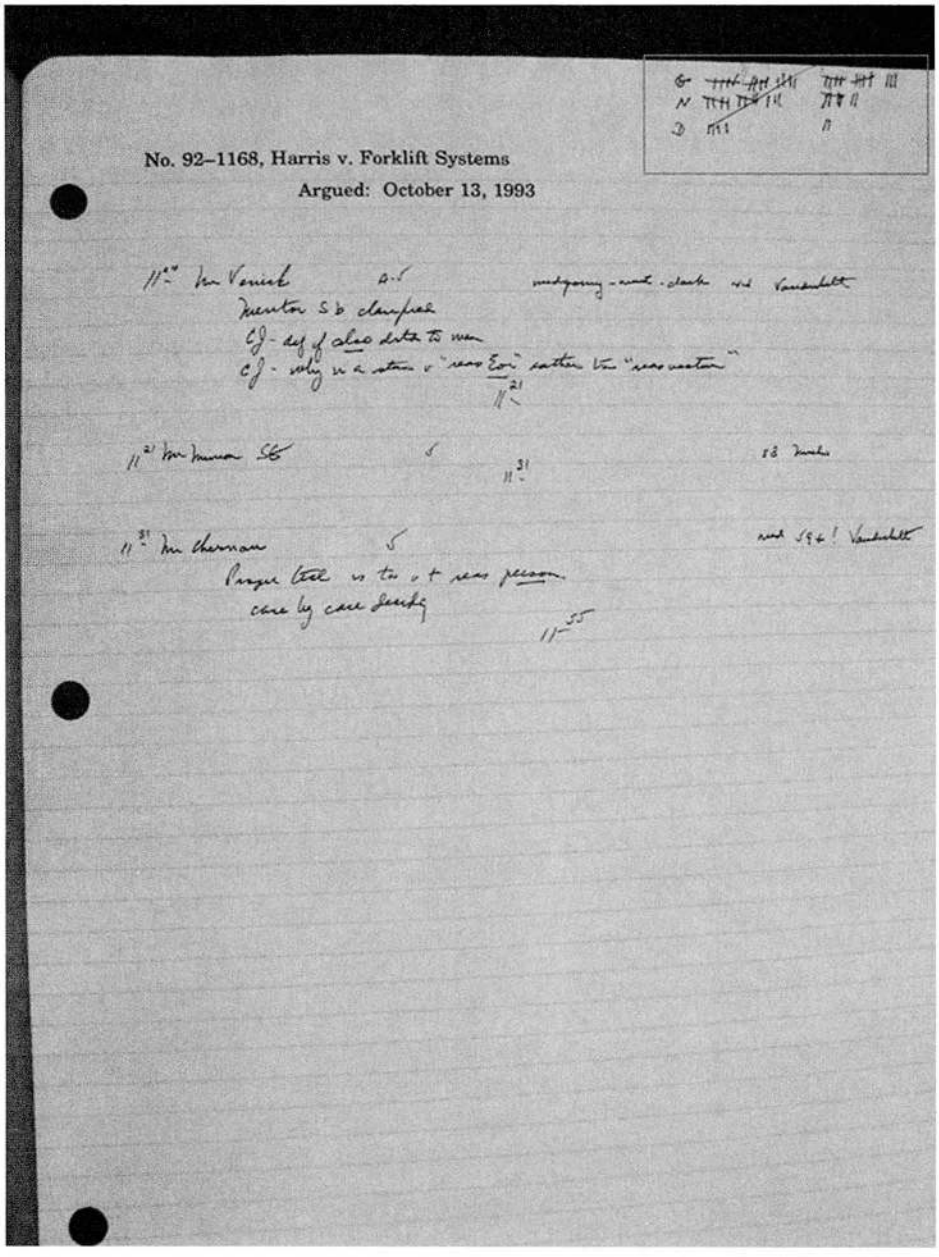


Figure 3. Harry A. Blackmun's oral argument notes in *Harris v. Forklift Systems* (1993).

case outcomes.[89] As a result, Blackmun's knowledge of who was asking how many questions, and to which side, probably helped him determine who would win the case. This is also evidenced by the fact that he also noted the frequency with which his colleagues posed hostile questions to the attorneys.

Because Blackmun was unhappy with the verbosity of some of his colleagues, what about his relationship with the Justice who is most famous for not speaking during oral arguments? Late in his career Blackmun formed an ideologically improbable relationship with Justice Thomas. Perhaps an early reason was that Thomas shared his

view of questions from the bench, or lack thereof.[90] Indeed, Thomas is notorious for asking almost no questions, and he actually went more than a decade without asking a substantive question of the attorneys.[91] This is not much different from how he acted when he joined the Court, when he asked so few questions during his time with Blackmun (eleven questions in three full terms) that Blackmun kept track of almost every time Thomas spoke. Interestingly, it took almost two full weeks for Thomas to first speak and, when he did so, Blackmun reacted by writing, in *Collins v. Harker Heights Texas*,[92] "T asks his 1st? 1:43 P.M."

While Thomas spoke four more times during his inaugural term, Blackmun noted none of them. However, he did record when Thomas asked his first question a month into the following term. On November 9, 1992, Blackmun indicated that "T asks his 1st? o t Fall."[93] Finally, he seemed to realize, well before Courtwatchers and the press did, that Thomas was probably not going to ask many questions during his tenure. Indeed, during the last case argued in the 1993 term, also the last case for which Blackmun sat, he wrote, "CT asks no? all term."[94] His sense of history was certainly prescient.

Predicting Colleagues' Votes[95]

However annoyed Blackmun may have been with how often his colleagues spoke during oral arguments, each speaking turn provided him with key insights into the positions each Justice would take in a case. In fact, recent work demonstrates that, overall, Blackmun predicted eight percent of his colleagues' votes but made at least one vote prediction in nineteen percent of the cases he heard.[96] What did he predict and how successful was he in doing so?

In *Spallone v. United States*,[97] a housing desegregation case, the Court focused its attention on a key procedural question. The City of Yonkers, New York, planned to build subsidized housing projects in an area already predominately populated by minority groups and litigation ensued under Title VII of the Civil Rights Act. The lower court ordered the city and council members (Spallone was one) to desegregate the residential housing and, after extensive delay by the council, they were held in contempt and received major sanctions. Each member remaining in contempt was fined $100 the first day with the fine doubling for each consecutive day of noncompliance; failure by any member to comply by August 10, 1998, resulted in commitment to the custody of the United States Marshall. The Supreme Court examined whether a District Court could impose such draconian sanctions on specific council members.

Blackmun's oral arguments notes in *Spallone* provide an example of how oral argument may provide a road map for the Court's action. In this case, he correctly predicted seven of his colleagues' votes and made clear how he would vote.[98] (See lower left part of Fig. 4 for Blackmun's predictions.) Yet he was uncertain about how O'Connor would vote, which he indicated by the "O?" This is important because she was the crucial fifth vote and Blackmun could not get a handle on which way she would vote based on oral arguments. In addition, and perhaps surprisingly, on the very bottom line, in green pencil, Blackmun notes "CJ will assign to himself." "CJ" in this case was Chief Justice Rehnquist and he, indeed, wrote the majority opinion. Thus, in *Spallone* at least, Blackmun gleaned more information from oral argument than simply the probable final voting pattern. Our point is that, while it was most common for Blackmun to predict the final merits vote and composition of the voting coalitions, he would also, on occasion, offer predictions about who would craft the majority opinion.

Unlike *Spallone*, Blackmun's predictions in *Cruzan v. Missouri Department of Health*[99] were perfect.[100] In other cases,

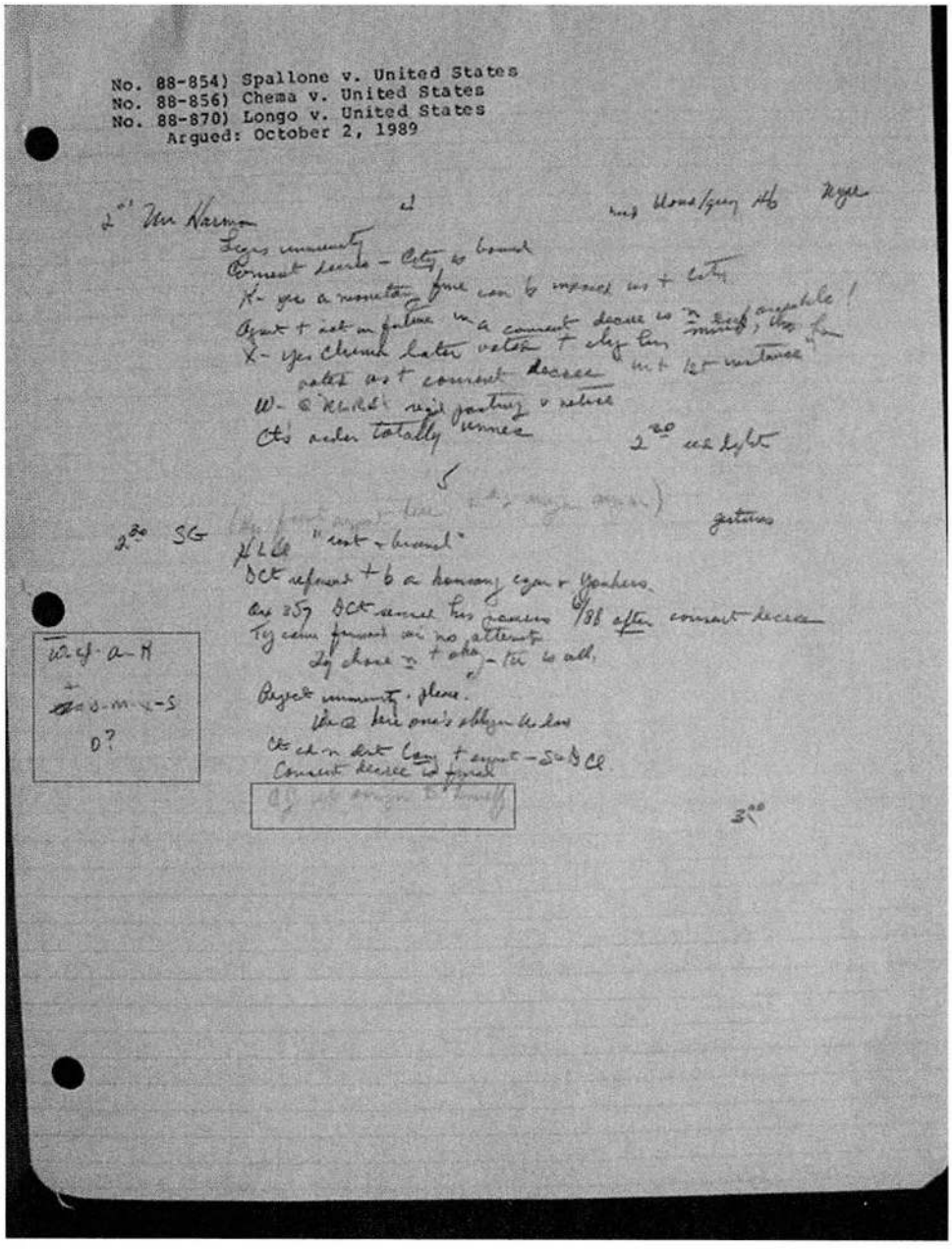


Figure 4. Harry A. Blackmun's oral argument notes in *Spallone v. United States* (1990).

he was less sure about how his colleagues would decide. *Tower v. Glover*[101] provides an example, as he wrote "– 5–4, I would guess or + 5-4."[102] More specifically, he predicted that Brennan, Marshall, and White would join in affirming while Burger, Rehnquist, and O'Connor would reverse but he was unsure about Stevens and Powell. This case indicates that Blackmun did not attempt to predict the ultimate position of every single colleague in every case and, even when he did, he sometimes expressed uncertainty about individual votes or the ultimate case outcome.

Even when Blackmun was uncertain about votes, he occasionally ventured an educated guess as to how a case would end. In *Barnes v. Glen Theatre Inc.*,[103] concerning whether a state prohibition against complete nudity in a public place violated the First Amendment, Blackmun correctly predicted there would be five votes to reverse and four to affirm, but he placed question marks next to four of the votes. This uncertainty was well-founded as he made two mistakes: he predicted Scalia would be in the minority to affirm and White would be in the majority to reverse (the other two question marks were O'Connor and Souter).

In other cases, Blackmun seemed especially confident in the signals he obtained from oral argument. During its 1991 term, in *Smith v. Barry*,[104] he wrote, "Justices telegraph their posit[ions] – CJ – A – K." Similarly, in *Williams v. Zbaraz*[105] and *Harris v. McRae*,[106] abortion cases decided during the 1979 term, Blackmun noted, "All Justices in their questions telegraph their attitudes. Result will be 6–3 or 5–4 to reverse." He proved prophetic as, by a 5–4 vote, the Court reversed and held that the Hyde Amendment, which prohibited the use of Medicaid funds to pay for discretionary abortions, was constitutional.

Overall, these examples indicate that during oral argument Blackmun often attempted to predict case outcomes as well as how some or all of his colleagues would vote.[107] However, there is significant variation in the frequency with which he made such predictions. During the Rehnquist Court (1986–1993 terms), he made predictions for twelve percent of the participating Justices, while he predicted at least one of his colleagues' votes in nearly thirty-four percent of those cases. As to how successful he was, seventy-six percent of Blackmun's predictions were correct and he was slightly more successful when he noted more of his colleagues' questions and comments. Indeed, when he recorded only one notation about a colleague's comments, he successfully predicted that Justice's final vote seventy-four percent of the time, but if he noted more than one reference, his success increased to eighty percent,[108] which is greater than the predictive power of the conventional political science models that predict how Justices votes.[109]

Blackmun's Thoughts Beyond the Substantive Arguments

Certainly, as he sat for oral arguments, Blackmun was most focused on the arguments, substance, and possible outcomes of each case. However, Justices, like anyone else, may sometimes allow their minds to wander. In this section, we complete our journey through Blackmun's notes as we examine his thoughts about history, his career, and his place on the Court. We also show what happens when a Justice becomes bored during argument, as anyone might. We begin with history—as we did in the introduction.

As we read, coded, and transcribed his notes, it became clear that Blackmun thought about historic (and historical) points in U.S. history that occurred on or around the day of a given argument, even if the events were not in any way related to the case at hand. In particular, Blackmun's mind often wandered to thinking about Presidents and presidential elections. For instance, during *Weinberger v. Rossi*,[110] a case that hinged on the definition of the word "treaty," Blackmun remembered the first President's birthday, "George Washington 250th birthday." While the case did not fall on the actual anniversary, it was only five days after the actual date.

Blackmun also took note of upcoming presidential elections. In *Edwards v. Arizona*,[111] he knew he and his colleagues were more concerned with the battle between Republican nominee Ronald Reagan and incumbent Jimmy Carter than they were with the arguments, "White has not listened to a word of this argument—election; who is in

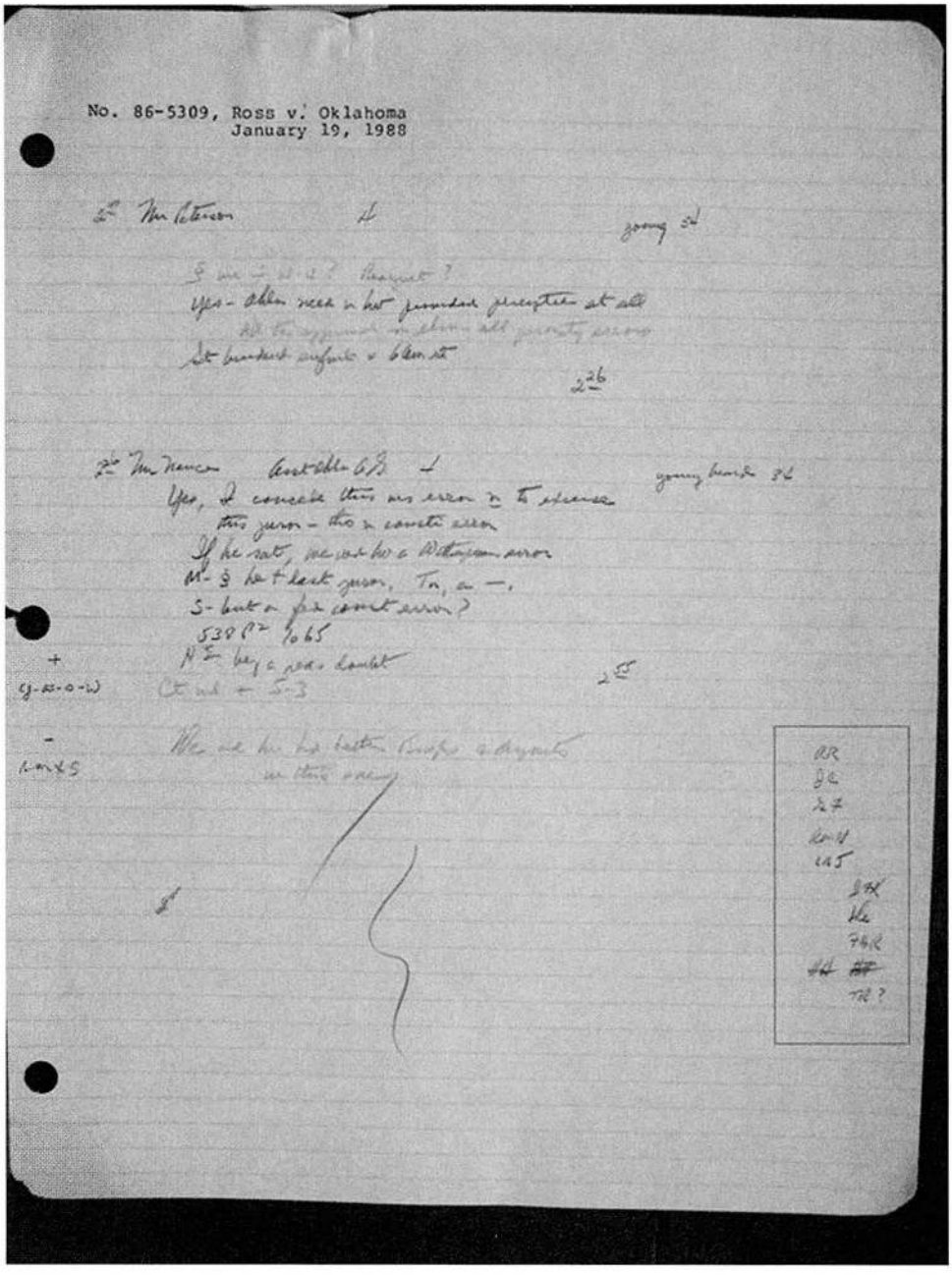


Figure 5. Harry A. Blackmun's oral argument notes in *Ross v. Oklahoma* (1988).

the courtroom? The Brethren is so excited by the election!" Blackmun likewise commemorated the 1992 election of President Bill Clinton when he wrote "Day after election."[112]

Relatedly, during a day on which he must have been particularly bored at argument, Blackmun's notes make him seem more like a distracted student, doodling in a classroom to pass time, than like an engaged adjudicator. During argument in *Ross v. Oklahoma*,[113] he tried to remember the order of the Presidents in the twentieth century (see Fig. 5). He

used the bottom corner of his page to write the initials of the Presidents in a reverse order, starting with Ronald Regan "RR" and ending with Theodore Roosevelt "TR," but he missed the four Presidents who served between Herbert Hoover and Theodore Roosevelt.

Beyond his notes about Presidents, the most interesting historical notations in Blackmun's notes focus on the anniversary of Pearl Harbor—the infamous 1941 attack that took place when he was just thirty-three years old. The first time he referred to it was in *Jones v. Rath Packing Co.*,[114] where he wrote, "35 years ago Pearl Harbor." It remained on his mind as six years later he wrote, "Pearl Harbor Day 41 years."[115] Again, the next year he penned, "Pearl Harbor Day 42 years."[116] And he continued to document the anniversary until 1992—in *United States v. McDermott et al.*[117]

While Blackmun had the image of being rather stodgy,[118] he had a lighter side as well. In fact, his thoughts often turned from important dates beyond the Court, to his favorite pastime (baseball), to his work environment, and to entertaining himself when arguments became boring. As to the first, he knew when it was "[i]ncome tax day"[119] and he noted when an argument fell on "Ash Wednesday"[120] or "Halloween."[121] Perhaps revealing his love of the winter holiday season, he liked to count the days until Christmas, "8 months hence is Christmas [e]ve."[122]

More important to his life than these hallmark dates were his beloved Minnesota Twins baseball team and his broader love for baseball. During argument in *Rufo v. Inmates of Suffolk County Jail*,[123] Blackmun wrote, "Twins 5 Blue Jays 4" about a close game against Toronto. He also exchanged notes with Justice Potter Stewart, who was also a baseball fanatic. The news of Vice President Agnew's resignation, on October 10, 1973, should have been (and was) a major news story for the Justices but it only slightly trumped the National League Championship Series (NLCS) Game five score of Stewart's Cincinnati Reds. Stewart passed a note to Blackmun from one of his clerks that read, "V.P. AGNEW JUSTICE RESIGNED!! METS 2 REDS 0." While the Court heard multiple cases that day, we know this note (and a few others about the game and resignation) were sent during arguments in *Department of Game of Washington v. Puyallup Tribe*[124] as they began (according to Blackmun's notes) at 1:23 Eastern Time, just twenty-three minutes after the start of the Reds' game.

Why both pieces of news in the same note? Perhaps because, while a resigning Vice President is important news, it was also the deciding game of the NLCS. Sadly, for Stewart, the Mets eventually won, sending them to the 1973 World Series. A couple of years later during a 1975 argument, Stewart and Blackmun bet on which team they thought would win the World Series. Blackmun waged $2.50 for the Red Sox, while Stewart felt a bit more confident, betting $4.00 for his Cincinnati Reds. Stewart's confidence ended up working in his favor, as the Reds won the series. He then graciously wrote to Blackmun two days after the game on October 23, 1975, "Dear Harry, Many thanks. It was a great season, and the Reds were darn lucky to win. P.S."[125]

On matters closer to the Court, Blackmun noted important changes to his workplace scenery. In *Jefferson v. Hackney*[126] after Chief Justice Burger carried out his plan to curve the courtroom bench, Blackmun wrote, "New bench separates Brennan and White, hurrah!" to express his excitement that the curve might help prevent their chitchat during argument.[127] More personally, in *Carter v. Stanton*,[128] he began his notes for the day by excitedly writing, "My new chair is here today!" Finally, Blackmun was a keen observer of changes or abnormalities in the courtroom. Such notes included when "the room [was] very dark,"[129] when the "electric

speaker [went] off,"[130] and when it was "very quiet in the courtroom."[131]

Amusingly, Blackmun sometimes poked fun at his colleagues. For instance, during a case argued in the midst of a 1984 winter storm, Blackmun wrote, "These old men panic about the snow."[132] He also noted that his colleagues "get so excited,"[133] and, at times, are "very excited! Like children!"[134] Blackmun was also amused in *Codd v. Velger*,[135] when Rehnquist "says these 2 attorneys deserve each other."

Mostly, however, when arguments lulled, Blackmun reflected on his own work life. He expressed frustrations on the bench in two ways: through contemplating whether he should be hearing a case and by noting when he was not paying as much attention to argument as he thought he should. He questioned whether he should have recused himself in some cases and also why he had voted to grant *certiorari* in others. For instance, in *Memorial Hospital v. Maricopa County*[136] and *Cantor v. Detroit Edison Company*,[137] he asked himself "Shd I recuse?" and "Do I recuse?" and in other cases, he specifically questioned whether he should recuse himself because of his connections to the parties. For example, in *Diamond v. Bradley*,[138] on whether computer firmware is patentable, Blackmun wrote, "Should I recuse because IBM?" referring to a possible financial interest in the company.[139] In *Roberts v. United States Jaycees*,[140] a case about whether women should be admitted as full members to Jaycees in Minnesota, he asked himself "I sat but shall I recuse?" and ultimately he did decide to recuse because he was a former member of the Minneapolis Jaycees.

As he grew older and his health began to deteriorate, Blackmun seemed to listen less to cases because he was losing his hearing and his ability to focus. In *Middlesex County Ethics Committee v. Garden State Bar Association*[141] in 1982, he first became frustrated with his hearing problem by writing "Hard for me to hear. I may as well stay home." Similarly, in *Pope v. Illinois*,[142] he wrote that it was "hard for me to hear." As time proceeded, he had increasing difficulty hearing the arguments. In one case he noted, "My h aid has gone out"[143] during *Voinovich v. Quilter*[144] in 1992.

In addition to his hearing, it appeared that as Blackmun spent more time on the bench, he was increasingly "having trouble with drowsiness,"[145] as he was sometimes "sleepy and drifted off"[146] because he "did not sleep well"[147] the prior night. At one point, he was sleeping so much that he seemed thrilled that he "stayed awake this week!"[148] This too distracted him from properly listening to oral arguments. As he drifted off, he sometimes made pen marks on his notepad and, as he indicated in *Mertens v. Hewitt Associates*,[149] he knew what they meant, "these marks are a result of my dozing. I hope it is not too noticeable."

It was clear that Blackmun's drowsiness made him self-conscious and he hoped it was not "noticed by spectators or Rehnquist."[150] During argument in *Edenfield v. Fane*,[151] he wrote, "My goodness, I struggle—Hope it is not too noticeable." In *Wright v. West*,[152] he nicely summarized his tiredness on the bench as he wrote, "Here again I am sleepy. Growing old and less fun. A year from now I should be out of this!" He also documented similar struggles with illnesses, writing when he felt "lousy today with a cold"[153] or when it had "been a long day for I feel lousy."[154]

Blackmun became increasingly worried that he was too old or infirm to continue doing the work on the Court, asking himself during *Hustler Magazine, Inc. v. Falwell*,[155] "Here I am again, what am I doing here?" He repeated this question during *Hadley v. United States*,[156] writing both "What really am I doing here?" and "What am I doing here?" a second time with the years "1970-1992-1993" attached, as he seemed to

contemplate (as he approached his eighty-sixth birthday) his twenty-three years as a federal judge.

Blackmun also documented his own history as a federal judge by noting his work anniversaries. In 1973, during argument in *National Railroad Passenger Corporation v. National Assn. of Railroad Passengers*,[157] Blackmun wrote, "14 years ago, first sat!" to record the anniversary of his first appointment as a judge to the U.S. Court of Appeals for the Eighth Circuit. He later wrote about this anniversary more than a decade later in *New York v. Class*[158] and *United States v. Paradise*.[159] In 1991, he began to see the end of his career when he wrote in *Edenfield et al. v. Fane*, "Am I nearing the end of all this business? 33 years on the federal bench!" More specifically, he bookmarked his time spent exclusively on the High Court when he wrote "My first Supreme Court argued case" in the landmark case *Swann v. Charlotte-Mecklenburg Board of Education*.[160] Many years later, during argument in *Beecham v. United States*,[161] he enthusiastically wrote "11 more day of my hearing cases here!"

As Blackmun thought about what he was still doing on the Supreme Court in his early eighties, he thought more and more about retirement, asking himself, "When do I retire and how?" and "What do I do now—retire at once?" during arguments *United States Dep't of Treasury v. Fabe*[162] and *Bath Iron Works*. When he started the 1992 term, he wrote, "OT 1992—here we go again."[163] Finally, in *Darby v. Cisneros*,[164] a case argued in 1993, he wrote "A year from now?" as he questioned himself about when he would retire. Blackmun seemed to know his retirement was within sight and it came the following year.

Conclusion

Harry A. Blackmun's copious oral argument notes provide the public and judicial scholars alike a rare opportunity to explore the mind of a Supreme Court Justice. Indeed, it is virtually impossible to know what goes on in the Justices' minds as they decide some of the most important legal questions facing the nation. Here, we provide a rare glimpse inside Blackmun's mind from the time he ascended the Supreme Court bench in 1970 until his eventual retirement in June 1994.

Several conclusions stand out for us. First, Blackmun was very observant of his surroundings and, as a result, he documented important events happening within the Court and beyond its walls. Second, Blackmun carried to the High Court the critical insight he developed during his time as an adjunct law professor. Indeed, he was quick to write down and grade what he saw unfolding in front of him, including insights about the attorneys who appeared before the Court and his colleagues' behavior. According to the data, Blackmun was fair and objective when it came to his assessments of the attorneys. That is, he graded every attorney based solely on the quality of their arguments.[165] Third, Blackmun was reflective and held himself accountable to uphold his responsibilities as a Justice. He was also honest with himself, seen in his observations about dozing during argument.

Arguably, the most important contribution of this article is the evidence that while Blackmun was one of the top legal minds in the nation, in a number of ways he was not particularly different from typical citizens of the United States. His mind (like everyone else's) sometimes wandered as he reflected about history transpiring around him, his emotions, and his health. As anyone would, Blackmun sometimes grew bored with arguments, became annoyed with his colleagues at times, was frustrated with the aging process, and contemplated his retirement (for several years) before deciding to do so. However, what is most notable about Harry A. Blackmun is that he was a Justice who liked to have fun, had a good sense of humor,

and enjoyed the simple pleasures of life and his job. He joked around with the attorneys and his colleagues during argument, played games using his pen and paper, and had a passion for baseball. As a Justice on the High Court, he was still himself, "even a little sentimental, [and] possessed of a sense of humor and a sense of humility..."[166]

ENDNOTES

[1] 506 U.S. 153 (1993).

[2] Linda Greenhouse, **Becoming Justice Blackmun** (New York: Times Books, 2005), pp. 2.

[3] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation on the U.S. Supreme Court: A Deliberate Dialogue** (University of Michigan Press, 2012); *see also* Timothy R. Johnson et al., *The Evaluation of Oral Arguments Before the U.S. Supreme Court*, 100 AMERICAN POLITICAL SCIENCE REVIEW 99 (2006).

[4] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *The Evaluation of Oral Arguments.*

[5] *See generally* Greenhouse, **Becoming Justice Blackmun**.

[6] A comprehensive archive of these notes, Blackmun took from the 1970 to 1994 terms containing all available notes, is accessed at https://sites.google.com/a/umn.edu/trj/oa-memos-1. This archive also includes notes taken by Justice Lewis F. Powell from the 1971 to 1986 terms.

[7] Every so often the green pencil was actually blue, such as when he noted Scalia's first case.

[8] *See Roe v. Wade,* 410 U.S. 113 (1973).

[9] *See* http://hdl.loc.gov/loc.mss/eadmss.ms003030.

[10] *See Roe*, 410 U.S. 113 (1973).

[11] *See Reed v. Reed,* 404 U.S. 71 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[12] *See Yoder v. Wisconsin,* 406 U.S. 205 (1972); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

[13] *See Miller v. California,* 413 U.S. 15 (1973).

[14] *See Buckley v. Valeo,* 424 U.S. 1 (1976).

[15] *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Gregg v. Georgia,* 428 U.S. 153 (1976); *Furman v. Georgia,* 408 U.S. 238 (1972).

[16] *Beer v. United States,* 425 U.S. 130 (1976).

[17] *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1975%20term/73-1869.jpg.

[18] Ryan C. Black, et al., *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions during Oral Argument.* 43 JOURNAL OF SUPREME COURT HISTORY 83 (2018).

[19] *United States v. Miller*, 425 U.S. 435 (1976). *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1975%20term/74-1179.jpg.

[20] *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NORTHWESTERN UNIVERSITY LAW REVIEW 1483, 1505–06 (2007); Ryan Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 JOURNAL OF POLITICS 2 (2012).

[21] In fact, Blackmun made no reference in any of the four cases argued that day. Perhaps this was because of his concerns about the future of *Roe.* As Greenhouse observes, "Nonetheless, Blackmun was wary of his newest colleague especially in light of Reagan's strong antiabortion stance in the 1980 presidential campaign." Greenhouse, **Becoming Justice Blackmun**, pp. 142.

[22] *Common Cause v. Schmitt*, 455 U.S. 129 (1982). *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1981%20term/80-847,%2080-1067.jpg.

[23] 458 U.S. 119 (1982).

[24] *See* Joan Biskupic, **Sandra Day O'Connor: How the First Woman on the U.S. Supreme Court Became Its Most Influential Justice** (New York: Harper Collins, 2006); *see also* Abigail Perkiss, *A Look Back at Justice Sandra Day O'Connor's Court Legacy*, NATIONAL CONSTITUTION CENTER CONSTITUTION DAILY (July 1, 2018), accessed at https://constitutioncenter.org/blog/a-look-back-at-justice-sandra-day-oconnors-court-legacy.

[25] *Hodel v. Irving,* 481 U.S. 704 (1987).

[26] 481 U.S. 465 (1987). *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1986%20term/85-1180.jpg.

[27] *See* Pamela Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 122 DICKINSON LAW REVIEW 297, 299 n.13 (2017).

[28] *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354 (1988). *See* http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1987%20term/86-1970.jpg.

[29] *Immigration and Naturalization Service v. Jairo Jonathan Elias-Zacarias*, 502 U.S. 478 (1992). *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1342.jpg.

[30] *Molzof v. United States,* 502 U.S. 301 (1992).

[31] Blackmun taught at the St. Paul College of Law from 1935 to 1941 and then at the University of Minnesota Law School from 1945 to 1947. His diary entries suggest that he enjoyed being an adjunct faculty member. In 1945, the dean at the University of Minnesota Law School tried to persuade Blackmun to become a full-time faculty member. He said he had always found the prospect of teaching law appealing but ultimately declined. *See* Tinsley Yarbrough, **Harry A. Blackmun:**

The Outsider Justice (New York: Oxford Univ. Press, 2007), pp. 54.

[32] The idea that this scale is 0-8 is based on the sample of cases used in an analysis of these grades by Johnson et al., *The Evaluation of Oral Arguments*, pp. 104. Our analysis is based on every grade Blackmun gave. There were two instances where an attorney earned a "9" both in the 1977 term. The first was Louis Loss, William Nelson Cromwell professor of Law at Harvard (who taught the likes of Ruth Bader Ginsburg, Antonin Scalia, Anthony Kennedy, and David Souter). The second was Solicitor General Wade H. McCree, who became the Lewis M. Simes Professor of Law at the University of Michigan until his death.

[33] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 104.

[34] *Rust v. Sullivan,* 500 U.S. 173 (1991).

[35] Our data indicate that fewer than fifteen percent of all attorneys earned such a grade.

[36] *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979).

[37] *Common Cause v. Schmitt,* 455 U.S. 129 (1982).

[38] 458 U.S. 670 (1982).

[39] Blackmun often used a set of cryptic abbreviations in his notes. Here, the t is short for "the." Thus, the note reads, "He makes the most of a thin, tough case." Of the other attorney in the case, Susan Smathers, Blackmun notes that "[s]he hangs in there."

[40] 452 U.S. 666 (1981).

[41] *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1980%20term/80-544.JPG.

[42] 455 U.S. 478 (1982).

[43] 509 U.S. 389 (1993).

[44] 430 U.S. 550 (1977).

[45] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 110.

[46] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 110.

[47] William H. Rehnquist, **The Supreme Court** (New York: Vintage Books 2001), pp. 243.

[48] Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POLITICAL RESEARCH QUARTERLY 2 (2013).

[49] 404 U.S. 157 (1971).

[50] Included in his shorthand notations Blackmun's used a "+" sign to indicate affirmance of the lower court opinion and B/4 means "before."

[51] *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984).

[52] *Ford Motor Co. v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982).

[53] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[54] 407 U.S. 67 (1972).

[55] 481 U.S. 69 (1987).

[56] "Hastings" refers to U.C. Hastings Law School and Jim Brudney refers to one of Blackmun's former clerks.

[57] 406 U.S. 482 (1972).

[58] 489 U.S. 101 (1989).

[59] 500 U.S. 305 (1991).

[60] 430 U.S. 199 (1977).

[61] *See* Johnson et al., *The Evaluation of Oral Argument*, pp. 109. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 JOURNAL OF POLITICS 1 (1995); Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?*, 41 LAW & SOCIETY REVIEW 2 (2007).

[62] 91 U.S. 397 (1989).

[63] "SMU" is Southern Methodist University.

[64] 500 U.S. 136 (*1991*).

[65] "Colum" is, of course, Columbia Law School.

[66] 488 U.S. 319 (1989).

[67] 489 U.S. 493 (1989).

[68] 407 U.S. 371 (1972). The note to son of Wiley refers to former Justice Wiley Rutledge. Blackmun ultimately wrote "yes" next to this parenthetical.

[69] 412 U.S. 783 (1973).

[70] *Pension Benefit Guaranty Corporation v. LTV Corporation,* 496 U.S. 633 (1990).

[71] *Saffle v. Parks,* 494 U.S. 484 (1990).

[72] *City of Riverside v. Rivera,* 477 U.S. 561 (1986).

[73] 491 U.S. 263 (1989).

[74] "SOC" is Justice Sandra Day O'Connor.

[75] 499 U.S. 187 (1991).

[76] "WHR" is Justice William Hubbs Rehnquist. "WJB" is William Joseph Brennan, Jr.

[77] *See* Johnson et al., *The Evaluation of Oral Arguments*. pp. 109. Kevin T. McGuire, *Lawyers and the US Supreme Court: The Washington Community of Legal Elites*, 37 AMERICAN JOURNAL OF POLITICAL SCIENCE 2 (1993).

[78] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOYOLA LAW REVIEW 331 (2009); Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the US Supreme Court?*, 29 WASHINGTON UNIVERSITY JOURNAL OF LAW & Policy 241 (2009); Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASHINGTON UNIVERSITY LAW REVIEW 457 (2007).

[79] *See generally* Timothy Johnson, **Oral Arguments and Supreme Court Decision Making** (New York: SUNY Press 2004).

[80] 510 U.S. 17 (1993).

[81] Note that Blackmun used shorthand names for his colleagues. *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *The Evaluation of Oral Arguments.* He typically used a colleague's last initial, as he did for Ruth Bader Ginsburg. However, in 1993 there were three Justices whose last name began with S (Scalia, Stevens, and Souter). Blackmun used the initial for Antonin Scalia's nickname—N for Nino. Because John Paul Stevens had the longest, he earned the S as his initial from Blackmun. However, until Potter Stewart left the bench, Blackmun referred to Stevens as V, as Stewart held the initial S. Finally, he used D to demarcate notes about David Souter.

[82] *See* http://www.polisci.umn.edu/~tjohnson/MEMOSfromOA-75percent/1993-10-13.jpg.

[83] 511 U.S. 244 (1994).

[84] 482 U.S. 578 (1987).

[85] 503 U.S. 291 (1992).

[86] Of course, "JPS" is John Paul Stevens.

[87] 512 U.S. 452 (1994).

[88] "SOC" is Justice Sandra Day O'Connor.

[89] *See* Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 JOURNAL OF POLITICS 2 (2011); Sarah Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument*, 6 JOURNAL OF APPELLATE PRACTICE and Process 271 (2004).

[90] *See* Kevin Merida & Michael A. Fletcher, *Thomas v. Blackmun*, WASHINGTON POST (Oct. 10, 2004), https://www.washingtonpost.com/archive/politics/2004/10/10/thomas-v-blackmun/dc5f2164-da58-4d44-8705-1f01b59f24f8/?utm_term=.dc36281acf45.

[91] *See* Ron Nell A. Jones & Aaron L. Nielson, *Clarence Thomas the Questioner*, 111 NORTHWESTERN UNIVERSITY LAW REVIEW 4 (2007).

[92] 503 U.S. 115 (1992).

[93] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Again, the shorthand, written in full, would read "Thomas asks his first question of the Fall."

[94] *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

[95] Portions of this section draw on Ryan C. Black et al., **Oral Arguments and Coalition Formation**, pp. 89-92.

[96] *See* Johnson et al., *Can Justices Predict Case Outcomes at Oral Arguments?*, paper presented to American Political Science Association, Washington D.C., 2010.

[97] 493 U.S. 265 (1990).

[98] Because there was another Justice whose last name began with the letter "B" (Brennan) Blackmun refers to himself with the letter "X." He did this throughout much of his tenure as at least one other Justice had a "B" name as well—Justice Hugo Black.

[99] 497 U.S. 261 (1990).

[100] For another example where he predicted every vote correctly, see *Bd. of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991). He did, however, originally express uncertainty about White before correctly predicting his vote.

[101] 467 U.S. 914 (1984).

[102] In *Tower v. Glover*, the case originated when Billy Irl Glover was arrested on robbery charges and subsequently convicted at trial in Oregon. He later filed and lost an appeal in state court. Glover also filed an action in federal court alleging that Bruce Tower and Gary Babcock, his public defenders at trial and on appeal, respectively, conspired with state officials to secure his conviction. The Federal District Court dismissed the action, citing precedent that suggested public defenders were absolutely immune. The Ninth Circuit later reversed the District Court's decision, citing different precedent. The Supreme Court was left with the question of whether public defenders were immune from liability for intentional misconduct. The Supreme Court ultimately affirmed the Ninth circuit and ruled that state public defenders are not immune from liability for conspiring with state officials to deny a plaintiff's constitutional rights.

[103] 501 U.S. 560 (1991).

[104] 502 U.S. 244 (1992).

[105] 448 U.S. 358 (1980).

[106] 448 U.S. 297 (1980).

[107] *See generally* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Shullman, *The Illusion of Devil's Advocacy.*

[108] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**, pp. 109.

[109] *See generally* Harold J Spaeth & Jeffrey A. Segal, **The Supreme Court and the Attitudinal Model**. (Cambridge Univ. Press 1993).

[110] 456 U.S. 25 (1982).

[111] 451 U.S. 477 (1981).

[112] *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

[113] 487 U.S. 81 (*1988*).

[114] 430 U.S. 519 (1977).

[115] *United States v. Hasting*, 461 U.S. 499 (1983).

[116] *United States v. Doe*, 465 U.S. 605 (1984).

[117] 507 U.S. 447 (1993).

[118] *See generally* Greenhouse, **Becoming Justice Blackmun**.

[119] *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

[120] *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488 (1979).

[121] *North Dakota v. United States*, 495 U.S. 423 (1990).

[122] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

[123] 502 U.S. 367 (1992).

[124] 414 U.S. 44 (1973).
[125] *See* "Notes Exchanged between Justices during Court Proceedings," Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Box 116.
[126] 406 U.S. 535 (1972).
[127] *See* Ryan C. Black et al., *Chief Justice Burger and the Bench*.
[128] 405 U.S. 669 (1972).
[129] *Cole v. Richardson,* 405 U.S. 676 (1972).
[130] *Lalli v. Lalli,* 439 U.S. 259 (1978).
[131] *United States v. MacDonald*, 456 U.S. 1 (1982).
[132] *New York v. Quarles,* 467 U.S. 649 (1984).
[133] *Board of Education of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687 (1994).
[134] *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981).
[135] 429 U.S. 624 (1977).
[136] 415 U.S. 250 (1974).
[137] 428 U.S. 579 (1976).
[138] 450 U.S. 381 (1981).
[139] Although it is unclear whether Blackmun held stock in IBM, he did recuse himself from numerous other cases because of a financial conflict of interest. *See* https://www.nytimes.com/1971/11/19/archives/justice-blackmun-sells-stocks-reenters-3-cases-before-court.html.
[140] 468 U.S. 609 (1984).
[141] 457 U.S. 423 (1982).
[142] 481 U.S. 497 (1987).
[143] The shorthand, written in full, would read "My hearing aid has gone out."
[144] 507 U.S. 146 (1993).
[145] *Liteky v. United States,* 510 U.S. 540 (1994).
[146] *Furniture Moving Drivers v. Crowley,* 467 U.S. 526 (1984).
[147] *Reiter v. Cooper*, 507 U.S. 258 (1993).
[148] *Vermont v. Cox,* 484 U.S. 173 (1987).
[149] 508 U.S. 248 (1993).
[150] *Furniture Moving Drivers v. Crowley,* 467 U.S. 526 (1984).
[151] 507 U.S. 761 (1993).
[152] 505 U.S. 277 (1992).
[153] *Webster v. Doe*, 486 U.S. 592 (1988).
[154] *Penry v. Lynaugh,* 492 U.S. 302 (1989).
[155] 485 U.S. 46 (1988).
[156] 506 U.S. 19 (1992).
[157] 414 U.S. 453 (1974).
[158] 475 U.S. 106 (1986).
[159] 480 U.S. 149 (1987).
[160] 402 U.S. 1 (1971).
[161] 511 U.S. 368 (1994).
[162] 508 U.S. 491 (1993).
[163] *Commissioner of Internal Revenue v. Soliman*, 506 U.S. 168 (1993).
[164] 509 U.S. 137 (1993).
[165] *See* Corley et al., *Does Quality Matter? Briefs versus Oral Arguments,* paper presented to Southern Political Science Association San Juan., 2020. Using Blackmun's oral argument grades, Corley and her colleague find that when the appellant's attorney is better than the appellee's attorney, the probability the Justice will vote for the appellant is .863 and this probability decreases to .247 when the appellee's attorney is better. This means that the quality of oral argument is statistically significant.
[166] *See* Glen Elsasser, *Courting Justice*, CHI. TRIBUNE (June 6, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-06-06-9002150974-story.html.

Protecting Individual Rights: A Broad Public Dialogue

LOUIS FISHER

Books and articles on constitutional law generally focus on Supreme Court decisions as though actions by elected officials and pressures from the general public are of little importance. Yet a broader look highlights how nonjudicial forces often identify individual rights and provide protection through the regular political process. Lord Radcliffe advised that "we cannot learn law by learning law." Instead, law must be "a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It is not strong enough in itself to be a philosophy in itself."[1] In a recent study, David Cole explains that when we look behind any significant litigation on constitutional law, we "will nearly always find sustained advocacy by multiple groups of citizens, usually over many years and in a wide array of venues."[2]

By examining more deeply the shaping of constitutional law, one discovers that disputes are generally settled by all three branches and the general public. Even after the Supreme Court issues a constitutional decision, the elected branches and the general public are at liberty to consider policies contrary to what the Court has decided. Although it may take decades, nonjudicial forces can prevail. There is a general belief that courts are reliable guardians of individual rights, but history does not support that claim. The record demonstrates that Congress and state legislatures often protect minority rights and civil liberties with much greater care. The subjects in this article cover the Bank of the United States, the rights of Blacks and women, regulating commerce, privacy rights, religious liberty, and the Japanese-American cases.

All three branches make mistakes. Time allows for corrections. Alexander Bickel noted in 1962 that the process of developing constitutional principles in a democratic society "is evolved conversationally not perfected unilaterally."[3] When appearing before the Senate Judiciary Committee on July 20, 1993, as nominee to be Supreme Court Justice, Ruth Bader Ginsburg explained, "Justices do not guard constitutional rights alone. Courts share that profound responsibility

with Congress, the president, the states, and the people."[4]

Early Precedents

In a 1989 study, Robert Lowry Clinton analyzed two widespread beliefs about *Marbury v. Madison*: (1) it established the institution of judicial review in the United States and (2) that power enabled the Supreme Court "to issue final interpretations on constitutional questions generally."[5] He regarded both propositions as "flatly false" and treated them as "the *Marbury* myth."[6] Ronald Rotunda stated that John Marshall "created judicial review in *Marbury v. Madison*."[7] However, judicial review had been established before Marshall joined the Supreme Court as Chief Justice. In a study published in 2005, William Michael Treanor identified thirty-one cases before *Marbury* where American courts invalidated a statute.[8]

Marbury is at times described as a decision by which Chief Justice Marshall declared the Court "the final arbiter of the Constitution's meaning."[9] In fact, the decision had many political complications. William Marbury and those who joined him in the lawsuit insisted on their right to positions as justices of the peace. They had been nominated for that post and the Senate confirmed their selections. However, in the remaining weeks of the John Adams administration, their commissions were never delivered to them. The person who failed to do that was John Marshall, at that time Secretary of State. Given his involvement in the dispute, how could he later not only participate in the case but issue the ruling?

It would be difficult to select a case more political than *Marbury*. Marshall understood that he lacked the power to order President Thomas Jefferson or Secretary of State James Madison to deliver the commissions to Marbury and the other plaintiffs. Marshall realized that any order he issued to that effect would be ignored by Jefferson and Madison. Chief Justice Warren Burger remarked in 1985, "The Court could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus that the Jefferson administration ignored.[10]

Marshall ruled that the statutory authority relied on by Marbury and his colleagues (Section 13 of the Judiciary Act of 1789) was unconstitutional, the first instance of the Supreme Court striking down legislation enacted by Congress. But that result was not required. Marshall could have told the litigants, "You have misinterpreted the statute. It provides you with no authority to bring this issue directly to the Supreme Court. You must begin in district court." However, Marshall chose to use the case to expound on the independent authority of the Court. He decided to act not only in a judicial manner but in a political one as well.

The political record during this period underscores that Marshall did not believe the Supreme Court provided the final word on legal or constitutional issues. With the impeachment hearings of Judge John Pickering and Justice Samuel Chase, it was evident that Marshall understood that constitutional questions needed to be shared with Congress and the President. He issued *Marbury* on February 24, 1803. The House impeached Pickering on March 2, 1803, and the Senate convicted him on March 12, 1804. After the House impeached Pickering it took aim at Chase. Had Chase been impeached and convicted, Marshall understood he was likely to be the next target.

Under this pressure, Marshall wrote to Chase on January 23, 1805, suggesting that it was not necessary for members of Congress to impeach judges whenever they disagreed with their rulings. Congress could simply reverse objectionable decisions through the regular legislative process. After the Supreme Court declared "what the law is," Congress could come along and change it. Marshall's letter might have referred to congressional

reversals of statutory interpretation, not constitutional interpretation, but he did not make that distinction. Given the marked hostility at that time between the Supreme Court and the elected branches, he most likely meant both types of interpretation.

Consider what Marshall wrote to Chase: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault."[11] Nothing in that language implies judicial superiority or finality. Following *Marbury*, Marshall never struck down another congressional statute. He upheld the power of Congress to exercise the commerce power, create a Bank of the United States, and discharge other legislative responsibilities, whether express or implied. To that extent, the Marshall Court acted jointly with Congress rather than superior to it.[12]

Marshall was well aware that constitutional decisions by the Supreme Court could be reversed by the elected branches. Consider the history of the Bank of the United States. In *McCulloch v. Maryland* (1819), the Supreme Court upheld the implied power of Congress to create a national bank. Writing for a unanimous Court, Marshall in his initial paragraph appeared to promote judicial finality. Of the various questions presented to the Court, he said that if the case had to be decided "by this tribunal alone can the decision be made." On the Supreme Court, "has the constitution of our country devolved this important duty."[13]

With regard to federal courts that would be true, but a decision to uphold the constitutionality of the Bank did not prevent members of Congress or the President from reaching a different conclusion. Lawmakers, after reviewing the record of the Bank, could use their own independent judgment whether to reauthorize it. If Congress at a later date supported renewal of the Bank, the President could exercise his own judgment and veto the bill. If Congress failed to override the veto, the "last word" would be with the President.

That is what happened on July 10, 1832, when President Andrew Jackson vetoed a bill to incorporate the Bank. He reviewed the checkered history of the Bank, with Congress favoring it in 1791, voting against it in 1811 and 1814, and reviving its support in 1816.[14] As to *McCulloch*, Jackson said that even if the decision "covered the whole ground of this act, it ought not to control the coordinate authorities of this government." Congress, the President, and the Supreme Court "must each for itself be guided by its own opinion of the Constitution." Each public officer in taking an oath to support the Constitution "swears that he will support it as he understands it, and not as it is understood by others." The opinion of judges "has no more authority over Congress than the opinion of Congress has over the judges, and on that point the president is independent of both."[15] Aware of this veto, Marshall fully appreciated the degree to which the elected branches could reverse constitutional decisions by the Supreme Court. He died on July 6, 1835.

Scholars and Supreme Court Justices continue to offer conflicting positions on whether the Court possesses the last word on the meaning of the Constitution. A good example is Justice Robert H. Jackson, who wrote in a 1953 decision: "We are not final because we are infallible, but we are infallible only because we are final."[16] Perhaps a clever and amusing sentence, but the Court has never been final or infallible. Jackson spoke more thoughtfully and realistically in a 1943 decision, saying, "There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous

judgments or doctrine."[17] The issue of judicial supremacy continues to add spice to Supreme Court rulings, scholarly discussion, and confirmation hearings for Supreme Court Justices.[18]

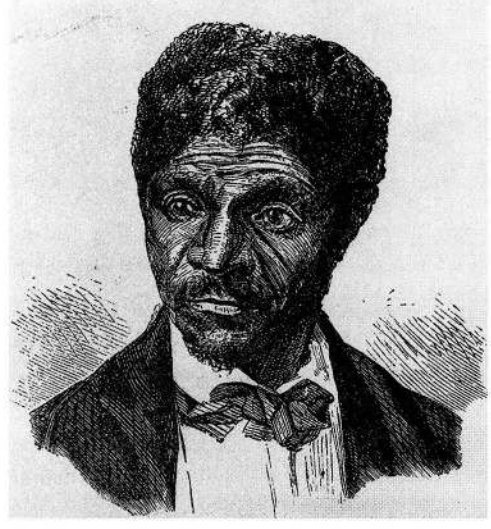
Rights of Blacks

As Justice Thurgood Marshall remarked in 1987, the Constitution "was defective from the start, requiring several amendments and a civil war."[19] Progress in protecting the rights of Blacks came mainly from public pressure and the elected branches, not from the courts. The balance between free states and slave states was challenged by land acquired through the Louisiana Purchase in 1803. The Missouri Compromise Act of 1820 admitted Missouri as a slave state but prohibited slavery in future states north of the 36° 30' line. Congress passed the Compromise Act of 1850 followed by the Kansas-Nebraska Act of 1854. The issue of slavery now shifted to new territories and future states by adopting the policy of "popular sovereignty." The decision of whether a new territory would be slave or not was left to voters in those regions.

Much of the pressure against slavery came from private citizens who viewed slavery as repugnant to fundamental political and constitutional principles. In expressing their views on constitutional issues, citizens deferred neither to Congress nor to the judiciary. Americans of the mid-nineteenth century "were not inclined to leave to private lawyers any more than to public men the conception, execution, and interpretation of public law... . Like politics, with which it was inextricably joined, the Constitution was everyone's business."[20]

In *Dred Scott*, Chief Justice Roger Taney addressed the issue of whether Congress possessed constitutional authority to prohibit slavery in the territories. He acknowledged that Congress had full power "to expand the territory of the United States by the admission of New States," a question reserved "for the political department of the Government, and not the judicial."[21] Yet he concluded that "the act of Congress which prohibited a citizen from holding and owning property of this kind [slaves] in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void."[22]

The decision in *Dred Scott*, formally overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments, met political repudiation long before. In his inaugural address in 1861, Abraham Lincoln said he did "not forget the position by some that constitutional questions are to be decided by the Supreme Court."[23] But regarding the claim of judicial finality, he spoke forcefully: "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will



The author argues that progress in protecting the rights of Blacks came mainly from public pressure and the elected branches, not from the courts. For example, the *Dred Scott* decision was repudiated long before the Supreme Court overturned it in the Civil Rights Amendments. Above is Scott, the former slave who sued for his freedom in the 1857 case.

have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[24] With legislation enacted the following year, Congress asserted its independent constitutional authority by prohibiting slavery in the territories.[25] What the Supreme Court in *Dred Scott* said Congress had no authority to do, it did.

In 1875, Congress passed legislation to provide Blacks with equal access to public facilities. All persons in the United States were entitled to the "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances [transportation] on land and water, theaters, and other places of public amusement."[26] This advance for the rights of Blacks was soon abolished by the Supreme Court in the Civil Rights Cases of 1883, which declared the public accommodations statute an encroachment on the states and an interference with private relationships.[27] That judicial hurdle was finally overcome by the Civil Rights Act of 1964, which included a section on public accommodations.[28]

From 1865 forward, the Supreme Court issued other decisions that undermined the promise of the Civil War Amendments. With *Plessy v. Ferguson* (1896), the Court upheld a Louisiana law that required railway companies to provide separate-but-equal accommodations for White and Black passengers.[29] *Plessy* remained in force until the Supreme Court decided *Brown v. Board of Education* in 1954.[30] Credit for this reversal goes to civil rights activists who spent decades challenging segregated education in law schools and graduate schools.[31] As John Denvir has pointed out, the issue of school desegregation was "overturned because a group of citizens refused to accept the Supreme Court's interpretation of the Fourteenth Amendment and engaged in a long, arduous, and ultimately successful struggle to have the Court correct its error."[32]

Rights of Women

Following the Civil War, women also discovered that their efforts to gain personal rights were better protected by legislative bodies than by the courts. Insight into this reality comes from the experience of Myra Bradwell. After studying law, she applied for admission to the Illinois bar in 1869.[33] She needed permission from a panel of all-male judges to practice law in the state. They rejected her application solely because she was a woman. Her appeal was rejected by the Supreme Court of Illinois.[34] Although the court had "no doubt" of her qualifications, it leaned heavily on British law and customs.[35] Female attorneys "were unknown in England" and the thought of a woman entering a court as a barrister would have provoked "hardly less astonishment" than a woman ascending the bench of Bishops or being elected to the House of Commons.[36]

The Illinois court reached even higher for guidance: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth."[37] Axiomatic means something self-evident and taken for granted. No need for further analysis or evidence. However, the court concluded that if change was necessary "let it be made by that department of the government to which the constitution has entrusted the power of changing the laws."[38] The legislative branch could decide whether permitting women to "engage in the hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, would not tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her."[39]

Bradwell took the court's advice and turned to the state legislature, which passed a bill in 1872 stating that no person "shall be precluded or debarred from any occupation, profession, or employment (except military)

When Chicago lawyer Myra Bradwell (above) petitioned the Supreme Court to allow women a national right to practice law, the Justices held that the right to regulate the granting of a license to practice law in a state court was not a power vested in the national government. Bradwell lobbied the Illinois legislature instead.

on account of sex."[40] That statute provided some limitations. Nothing in it was to be construed "as requiring any female to work on streets or roads, or serve on juries."[41] Bradwell and other women had the right to practice law within the state.

At that point, Bradwell decided to take the issue to the U.S. Supreme Court to gain for women a national right to practice law. In a brief opinion, the Court analyzed her claim that the Privileges and Immunities Clause of the Fourteenth Amendment included a woman's right to practice law. The Court acknowledged that certain privileges and immunities belong to citizens of the United States but "the right to admission to practice in the courts of a State is not one of them."[42] The Court agreed that many individuals who were not U.S. citizens or of any state had been allowed to practice in federal and state courts. Nevertheless, it concluded that the right to regulate the granting of a license to practice law in a state court was not a power vested in the national government.[43] In a concurrence, Justice Joseph P. Bradley discussed other reasons why women should not be permitted to practice law. The civil law, "as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." Echoing the views of William Blackstone, he concluded that man "is, or should be, woman's protector and defender." The "natural and proper timidity and delicacy" of women made them "unfit" for many occupations including law. Reaching to an even higher source, Bradley asserted that a "divine ordinance" commanded that a woman's primary mission in life is centered in the home. While some women do not marry, he nonetheless concluded that a general rule imposed upon women the "paramount destiny and mission" to fulfill the role of a wife and mother. To Bradley, this was "the law of the Creator."[44]

Women continued to insist on their right to practice law. An 1875 case involved a request by Levania Goodell to engage in law before the Wisconsin Supreme Court. It denied her motion, explaining that the "law of nature" destined women to bear and nurture children and love and honor their husbands.[45] The Court agreed that some jobs were "not unfit for female character," but law was not one of them. The "peculiar qualities of womanhood, its gentle graces, its quick sensibilities, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are certainly not qualifications for forensic strife."[46] The Court identified various "unclean issues" that find their way into the courtroom: sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, and divorce. Handling those issues "is bad enough for men." Discussions that enter the courtroom "are unfit for female ears."[47]

In the 1870s, the Supreme Court decided to adopt a rule that prohibited women from practicing before it. Belva Lockwood,

admitted to the District of Columbia bar in 1873, decided to take steps to challenge that rule. Instead of trying to succeed through litigation she turned to Congress, drafting legislation in 1876 to overturn the rule. Her bill provided that any woman admitted to the bar of the highest court of a state, or of the D.C. Supreme Court, qualified with three years of practice, and being a person of good moral character, might be admitted to practice before the U.S. Supreme Court. Her bill became law in 1879.[48]

Women continued to gain rights by seeking legislative relief. A contemporary example involves the issue of receiving equal pay. In 2007, the Supreme Court split 5–4 in deciding Lilly Ledbetter had filed an untimely claim against Goodyear Tire for pay discrimination.[49] In her dissent, Justice Ruth Bader Ginsburg remarked, "Once again the ball is in Congress' court."[50] Two years later, Congress passed legislation to allow women at any time to challenge an unlawful employment practice. Discriminatory actions carry forth with each paycheck, allowing women to file a timely complaint for relief.[51]

Regulating Commerce

Under Article I, Section 8, of the Constitution, Congress is empowered to provide for the "general Welfare of the United States" and to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Legislative efforts have led to many collisions with the Supreme Court, but the Court remarked in 1946 that "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, had been more largely one of retreat than ultimate victory."[52]

An early example of judicial-congressional conflicts over the commerce power concerns the Wheeling Bridge that Virginia built over the Ohio River. Pennsylvania complained in 1849 that the bridge was so low that it prevented ships from passing under it.[53] Several years later, the Supreme Court agreed that the bridge was "an obstruction and nuisance" and that Pennsylvania "has a just and legal right to have the navigation of the said river made free."[54] By issuing its position on this constitutional matter, did the Court have the last word? Not at all.

On August 12, 1852, the House of Representatives began debate on a bill that would make the Wheeling Bridge "a lawful structure."[55] Lawmakers pointed out that boats should not be allowed deliberately to construct artificially high chimneys that could not clear the bridge. Instead of tearing down the bridge, boats should lower their chimneys.[56] Legislation passed by Congress declared that bridges across the Ohio River were "lawful structures in their present position and elevation."[57]

The Court had acted without congressional guidance. How would it respond to this clear statutory direction? The Court now held that the bridge was a lawful structure.[58] In the first of several dissents, Justice John McLean objected that the "judicial power cannot legislate, nor can the legislative power act judicially."[59] However, this type of judicial-legislative collision happens frequently with Congress prevailing. There are many examples of a state losing a case but turning successfully to Congress for support. As the Supreme Court noted in 1946, whenever the judgment of Congress "has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress's silence was forbidden by the Commerce Clause, this body has accommodated its previous judgment to Congress's expressed approval."[60]

A good example of this judicial-congressional dialogue occurred in 1890 when the Supreme Court ruled that Iowa's prohibition on intoxicating liquors from outside its borders could not be applied to original package or kegs.[61] Yet the Court clearly recognized that Iowa acted without

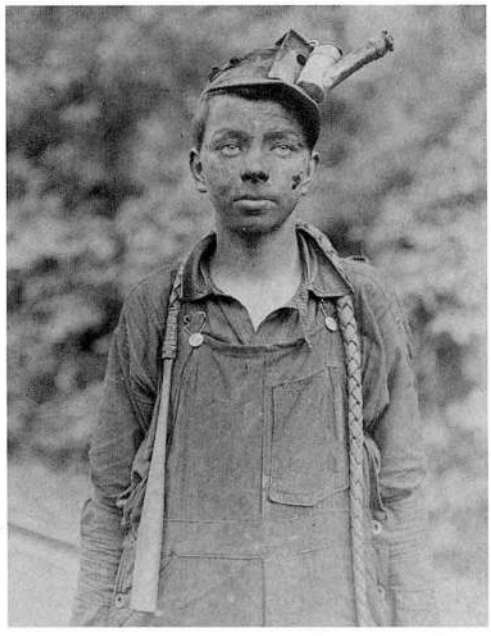
congressional permission. The final word would depend on what Congress decided to do. Justices Horace Gray, John Marshall Harlan, and David J. Brewer filed a thirty-five-page dissent, pointing out that states have an inherent police power that enables them to safeguard the inhabitants against disorder, disease, poverty, and crime. They understood that Congress could have the last word. Less than a month after the Court issued its opinion, the Senate reported a bill granting states authority to regulate incoming intoxicating liquors.[62] As debate continued, lawmakers offered remarks about the Court's capacity to decide constitutional issues. Senator George Edmunds described the Court as "an independent and co-ordinate branch of the Government" empowered to decide cases, but "as it regards the Congress of the United States, its opinions are of no more value to us than ours are to it. We are just as independent of the Supreme Court of the United States as it is of us, and every judge will admit it."[63]

Congress enacted remedial legislation on August 6, 1890, slightly more than three months after the Court's decision.[64] The statute made intoxicating liquors, upon their arrival in a state or territory, subject to the police power of a state as though the liquors had been produced in the state or territory. The constitutionality of that statute was upheld unanimously by the Supreme Court.[65] The reputation of the Supreme Court for constitutional interpretation was severely damaged in 1918 by a decision that struck down a congressional effort to regulate child labor.[66] In 1941, after Congress passed new legislation to regulate child labor, a unanimous Court not only apologized for its earlier decision but also said that the 1918 ruling had no basis in the Constitution.[67] Details of this legislative-judicial dispute will provide insights into how constitutional interpretation can depend on a lengthy and complex dialogue among the branches and the general public.

By the turn of the twentieth century, private organizations and political parties began to lobby Congress to eliminate the harsh and unhealthy conditions of child labor. Initial efforts began at the state level until it became clear that national legislation was needed. Congressional legislation in 1916 prohibited the shipment in interstate or foreign commerce of any article produced by children within specified age ranges: under the age of sixteen for products from a mine or quarry and under the age of fourteen from any mill, cannery, workshop, factory, or manufacturing establishment.[68] Two years later, the Supreme Court declared the statute unconstitutional. Divided 5–4, it claimed that the steps of "production" and "manufacture" of goods were local in origin and therefore not part of commerce among the states subject to congressional control.[69] Under that analysis, efforts to deal with child labor would have to be left to individual states. Members of Congress did not consider the Court's decision as the final word. They passed legislation to regulate child labor through the taxing power.[70] This time, an 8–1 Supreme Court declared that statute to be unconstitutional.[71]

Yet Congress pressed ahead with efforts to regulate child labor, passing a constitutional amendment in 1924 to support its authority. By 1937, only twenty-eight of the necessary thirty-six states had ratified it.[72] In 1938, Congress decided to pass legislation to regulate child labor and returned to the Commerce Clause for authority.[73] By that time, the composition of the Supreme Court was undergoing substantial change. Hugo Black had replaced Willis Van Devanter, Stanley Reed replaced George Sutherland, William O. Douglas replaced Louis D. Brandeis, Felix Frankfurter replaced Benjamin Cardozo, and Frank Murphy replaced Pierce Butler.

In 1940, a federal district court held the child-labor statute unconstitutional by relying on the 1918 decision in *Hammer v. Dagenhart*.[74] Yet a year later, a unanimous Supreme Court upheld the statute. To Justice Harlan Fiske Stone, the 1918 ruling "was novel when made and unsupported by any



When the Supreme Court struck down a congressional effort to regulate child labor in 1918, activists turned to state legislatures to protect children's welfare. Above is a young West Virginia miner in 1908.

provision of the Constitution."[75] His statement repudiated both the doctrine of judicial finality and the claim of judicial infallibility. Judgments on what goods to exclude from interstate commerce considered injurious to the public health, morals, or welfare were reserved to the elected branches, not to the judiciary.[76]

Privacy Rights

A zone of personal privacy is implicit in the Framers' support for individual rights and limited government. The Supreme Court often handles cases that deal directly with privacy in cases involving mandatory sterilization, obscenity, use of contraceptives, and a woman's right to abortion.[77] With little precedent to guide the Court, these decisions are extremely controversial in the political arena with little expectation of judicial finality. On a regular basis, the Court finds itself engaged in a dialogue with the elected branches, various states, and the general public.

During the early 1900s, courts began to examine state laws that required the vasectomy of criminals twice convicted of a felony. For example, an Iowa law counted as "felons" those who broke an electric globe and unfastened a strap on a harness.[78] A state court in 1914 regarded such laws as cruel and unusual punishment, deprivation of due process, and a full bill of attainder (legislative acts that inflict punishment without conviction in judicial proceedings).[79] State law authorized the surgical operation of vasectomy to induce sterility on "idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and made mandatory as to criminals who have been twice convicted of a felony."[80]

The Iowa court expressed concerns about vague categories and procedural deficiencies: "There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done." Witnesses were rarely called. If they were, they were not subject to cross-examination. "What records are examined is

not known. The prisoner is not advised of the proceedings until ordered to submit to the operation."[81] To the court, the procedures belong "to the Dark Ages."[82]

In 1918, a Nevada court expressed concerns about mandatory sterilization. State law allowed a trial court to subject certain criminals to a vasectomy. To the court, such a procedure would amount to cruel and unusual punishment. State policy covered individual convicted of rape, carnal knowledge of a female under the age of ten, and those adjudged to be a habitual criminal.[83] To the court, vasectomy itself "is not cruel," but when ordered as a punishment "it is ignominious and degrading, and in that sense is cruel."[84]

Highly damaging to the Supreme Court's reputation was its decision in *Buck v. Bell* (1927), upholding Virginia's policy of sterilizing certain individuals. The case involved Carrie Buck, who had been committed to the State Colony for Epileptics and Feeble-Minded at the age of seventeen. Her mother was committed to the same institution. Carrie had given birth to an illegitimate child claimed by the state to be of defective mentality. An 8-1 majority affirmed the state law. In the opinion for the Court by Justice Oliver Wendell Holmes Jr., which amounted to only three pages, he reasoned that society "may call upon the best citizens for their lives when called into combat." If society could require that sacrifice it seemed strange to him that a state could not call "for these lesser sacrifices ... in order to prevent our being swamped with incompetence." In his judgment, a state should be allowed to resort to mandatory sterilization to prevent those "manifestly unfit from continuing their kind." As to Carrie Buck: "Three generations of imbeciles are enough."[85]

The case lacked any adversarial quality. Had the regular judicial process been followed, the Court would have learned that school records indicated that Carrie was a normal child and that she became pregnant when raped by the nephew of the foster parents she lived with.[86] There was no evidence that Carrie's child was feebleminded. She lived barely eight years but in two years of schooling performed well and earned a spot on the school's "Honor Roll."[87]

Although never formally overruled, the reasoning and results of *Buck v. Bell* have been discredited by the elected branches and the general public. In 2002, Governor Mark Warner of Virginia formally apologized for the state's policy on eugenics, under which some 8,000 people were involuntarily sterilized from 1927 to 1979. Nationwide, the practice affected an estimated 65,000 Americans. Other states that apologized for their eugenics policy include California, Georgia, Indiana, North Carolina, Oregon, and South Carolina. In 2012, a North Carolina task force investigated the state's record of mandatory sterilization from 1929 to 1974 and recommended financial compensation for each living individual. In 2014, Governor Jerry Brown of California signed legislation to prohibit forced sterilization in prison.[88]

The Supreme Court has had great difficulty in deciding First Amendment issues involving obscenity. At what point, and for what reason, are books, movies, and artwork obscene? A 1957 decision by the Supreme Court faced the question of whether statutes prohibiting obscenity violate the constitutional freedom of speech or press. It ruled that obscenity is not protected by either the speech or press clauses. After stating that sex and obscenity "are not synonymous," the Court said that obscene material dealt with sex "in a manner appealing to prurient interest."[89] A footnote explained that "prurient interest" applies to material having a tendency to "excite lustful thoughts." According to one dictionary, prurient meant "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity; lewd... ." Justices would vary on how they

reacted to such materials. In this case, the trial judge offered his guidance: "Ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is... ."[90] Under that procedure, the "final word" would go not to the judiciary or to legislative bodies but to members of the community.

Over a period of decades, the Supreme Court was quite active in trying to provide guidance on what is and is not obscene, frequently dividing 5–4 in that task.[91] Justices became deeply at odds over the meaning of obscenity and their capacity to provide helpful, coherent, and consistent guidance. Obscenity law suffered because those standards were unavailable. Manners and tastes varied over time and from place to place. Books previously banned could become "required high-school reading."[92] Under those pressures and realities, the judiciary shifted issues of obscenity to legislative bodies and the general public.

Another area of privacy concerns the use of contraceptives. At times the Supreme Court avoided these cases by holding that a plaintiff lacked standing or a case lacked ripeness.[93] By 1965, the Court was prepared to decide the constitutionality of a Connecticut statute that empowered the state to convict an administrator and a physician for giving a married couple information and medical advice on how to prevent conception including prescribing a contraceptive device for the wife's use. Divided 7–2, the Court held that appellants had standing to successfully assert a constitutional right of marital privacy. To the Court, the First Amendment "has a penumbra where privacy is protected from government intrusion."[94] On what grounds was the Court divided? A dissent by Justice Potter Stewart, joined by Justice Black, described the statute as "uncommonly silly" and said that the use of contraceptives in a marriage "should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs." In terms of social policy, they thought professional counsel about birth control "should be available to all."[95] Then why dissent?

The constitutional right of a woman to abort her pregnancy led to Supreme Court rulings that divided—and continue to divide—the nation, requiring substantial changes from one decade to the next. In deciding *Roe v. Wade* (1973), the Court attempted to find middle ground by rejecting both abortion on demand and the absolute right to life. With a 7–2 majority, it held that state laws permitting abortion only to save a mother's life violated due process. It then held that states could protect a pregnant woman's health but also the potential life of a fetus. For the first three months, the decision to abort would be left to the woman and her physician. Once the fetus became viable, states could prohibit abortion except when necessary to preserve the life or health of the woman.[96]

Roe v. Wade was widely criticized as the work of a legislative body for having adopted the trimester analysis. The Court also noted that its ruling depended on "the light of present medical knowledge."[97]The point of "viability" could vary depending on medical competence and technology. As the Court acknowledged three years later, viability is "a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term."[98]

In 1985, in an article while a judge on the D.C. Circuit, Ruth Bader Ginsburg described *Roe v. Wade* as "a storm center" that provoked public opposition and academic criticism "because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."[99] At the time the Supreme Court issued its decision, abortion law "was in a state of change across the nation." There was a distinct trend in the states, noted by the Court, "toward liberalization of abortion statutes."[100] To Ginsburg, the Court "ventured too far in the change it ordered. The

In 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans during World War II. The Supreme Court's decisions in the Japanese internment and curfew cases, issued in the heat of war, have since been repudiated as unconstitutional.

sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."[101] She further noted: "Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[102]

Seven years later, in another article, Ginsburg cautioned that judges "play an interdependent part in our democracy." They do not "alone shape legal doctrine." Instead, they "participate in a dialogue with other organs of government, and with the people as well."[103] She described *Roe v. Wade* as "breathtaking," with the Court choosing to "fashion a regime that displaced virtually every state law then in force." The decision "halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deterred stable settlement of the issue."[104]

After the Court issued *Roe v. Wade*, abortion opponents began to apply pressure on elected officials at the state and national levels. Extreme actions included the bombing of abortion clinics, sending letter bombs through the mails, murdering physicians, and other tactics to intimidate women and their doctors. A major funding issue appeared with the Hyde Amendment, first passed by Congress in 1976. The language that reached the Supreme Court, which upheld it,[105] prohibited the use of federal funds to perform abortions "except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape

or incest has been reported promptly to a law enforcement agency or public health service."[106] A 5–4 Court upheld the Hyde Amendment.[107]

In 1992, seven Justices voted to discard Roe's trimester framework.[108] Justices continued to warn against claims of judicial supremacy.

In a book published in 2003, Justice Sandra Day O'Connor argued that if one looks at "the history of the Supreme Court, the country, and the Constitution over a very long period, the relationship appears to be more of a dialogue than a series of commands."[109] The Constitution "is not—and could never be—defended only by a group of judges."[110] The system of separation of powers "permits, and indeed requires, each branch of government to act as check against possible overreaching by another branch."[111]

Religious Liberty

We are often advised that legislative bodies, operating by majority vote, can be insensitive and unresponsive to minority interests including those of religious beliefs. Yet after examining the historical record, one finds little to demonstrate that judicial rulings regularly favor individual rights or religious liberty. For more than two centuries, American legislatures, both national and state, protected many minority rights. Judicial bodies during that same period were far less reliable. Some scholars claim it "advances the cause of realism in American constitutional law to say that the Constitution is what the judges say it is."[112] Such generalizations advance illusion and misunderstanding.

For the first century and a half in America, individual rights and liberties were often promoted and protected by the elected branches. During that period, federal judges were more likely to advance the interests of the national government and corporations rather than individuals and minorities.[113] A good example of an elected official protecting religious minorities can be seen in President Abraham Lincoln. During the Civil War, he was urged to force Quakers, Mennonites, and other conscientious objectors into military service. His response:

> No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. Besides, the attitude of these people has always been against slavery. If all our people held the same views about slavery as these people there would be no war.... We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun.[114]

The Supreme Court did little to advance the jurisprudence of religious freedom until 1940.[115] The case concerned Jehovah's Witnesses who solicited money, sold books, and played records on a portable phonograph. Some of those recordings included attacks on Roman Catholics. A unanimous Court struck down a state law that prohibited any person from soliciting funds for a religious cause unless they received approved from a designated official.[116] Two weeks later, however, the Supreme Court issued a decision that upheld a compulsory flag-salute in Pennsylvania. Jehovah's Witnesses, relying on their interpretation of the Bible, objected that saluting a secular symbol violated their religious beliefs and express language in the Ten Commandments not to bow down to a graven image. Yet an 8–1 majority rejected their position on this constitutional issue.[117] The Court's decision was subject to heavy criticism by the press, religious organizations, and law journals. Moreover, state courts in New Hampshire, New Jersey, Kansas, and Washington rejected the Court's analysis.[118]

In 1942, Justices Black, Douglas, and Murphy publicly apologized for their decision to be part of that majority and announced

that the case had been "wrongly decided."[119] Two members of the 1940 majority retired and were replaced by Wiley Rutledge and Robert H. Jackson, who joined with four Justices to produce a 6–3 majority in 1943 striking down the compulsory flag-salute.[120] Credit for the reversal belongs to those who refused to accept the Court's 1940 decision and the constitutional reasoning that accompanied it. Citizens and organizations around the country advised the Court it did not understand the Constitution, minority rights, or religious freedom.

A contemporary example of the political process offering greater protection to religious liberty than the judiciary is the congressional response to a 1986 Supreme Court decision that upheld an Air Force regulation that prohibited an observant Jew in the military from wearing his skullcap (yarmulke) while on duty. Lower federal courts upheld the ban but several judges on the D.C. Circuit, including Ruth Bader Ginsburg and Antonin Scalia, objected that the military order suggested "callous indifference" to religious liberty and ran counter to the American tradition of accommodating spiritual needs.[121]

The Supreme Court accepted the case for review. A brief submitted by Solicitor General Charles Fried supported the Defense Department regulation, but during oral argument Kathryn Oberly of the Justice Department advised the Court to stay out of the conflict and let the dispute be handled by the elected branches.[122] Divided 5-4, the Court held that the First Amendment did not prohibit the Air Force regulation, held to be a reasonable method of assuring uniformity, hierarchy, unity, discipline, and obedience.[123] However, Congress proceeded to pass legislation requiring the Air Force to change its regulation, relying on its constitutional authority under Article I, Section 8, to "make Rules for the Government and Regulation of the land and naval Forces." The bill, allowing the military to wear neat and conservative religious apparel while in uniform, was signed by President Ronald Reagan.[124]

Japanese-American Cases

In two decisions in 1943 (*Hirabayashi*) and 1944 (*Korematsu*), the Supreme Court upheld a curfew placed on Japanese Americans (two-thirds of them U.S. citizens) and their relocation to detention camps.[125] What followed in subsequent decades were scholarly attacks on the decisions, an apology more than thirty years later by President Gerald Ford, congressional legislation to acknowledge error, actions by lower courts to vacate the convictions of two Japanese Americans, and a 2018 admission by the Supreme Court that the second decision was wrong the day it was handed down, a very lengthy and insightful constitutional dialogue.

On February 19, 1942, President Franklin D. Roosevelt issued an executive order that led to a military curfew covering all persons of Japanese descent within a designated military area, requiring them to "be within their place of residence between 8:00 P.M. and 6:00 A.M."[126] A month later, Congress passed legislation that ratified the executive order.[127] The following year, a unanimous Court upheld the constitutional power of Congress and the President to prescribe the curfew order, stating that it "is not for any court to sit in review of the wisdom" of the elected branches "or substitute its judgment for theirs."[128] Writing for the Court, Chief Justice Harlan F. Stone claimed that the decision by General John L. DeWitt, who established the curfew, "involved the exercise of his informed judgment."[129] DeWitt's action was not informed. As a district judge noted in 1986, he believed that all Japanese, by race alone, are disloyal.[130]

President Roosevelt's executive order led to the transfer of Americans of Japanese descent to detention camps. Divided 6-3, the Court in *Korematsu* upheld this action.[131] In one of the dissents, Justice Murphy protested

that the exclusion order marked "the legalization of racism."[132] He objected to an "erroneous assumption of racial guilt" found in DeWitt's report, which referred to all individuals of Japanese descent as "subversives" belonging to "an enemy race" whose "racial strains are undiluted."[133]

On that same day, the Court released a ruling on Mitsuye Endo, an American citizen of Japanese ancestry who had been placed in a detention camp but who, the Justice Department acknowledged, "is a loyal and law-abiding citizen." There was no claim that she was detained on any charge or "even suspected of disloyalty."[134] Her case helped puncture DeWitt's claim that all Japanese by race alone are disloyal. The administration found her to be loyal and for that reason could not be detained.

Scholars had immediately begun to undercut the reasoning of *Hirabayashi* and *Korematsu*. In a lengthy critique in 1945, Eugene Rostow described the wartime treatment of Japanese aliens and citizens of Japanese descent as "hasty, unnecessary, and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war." The administration's policy "was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind."[135] He also said the Supreme Court "chose to assume that the main issue of the cases—the scope and method of judicial review of military decisions—did not exist." By deciding against overruling the government, the Court "weakened society's control over military authority."[136] It gave "prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society."[137] Rostow insisted that the Court had a duty to require evidence and cross-examination. DeWitt's motivation "was ignorant race prejudice, not facts to support the hypothesis that there was a greater risk of sabotage among the Japanese than among residents of German, Italian, or any other ethnic affiliation."[138]

In an article published in 1962, Chief Justice Earl Warren reflected on the quality of the Japanese-American decisions, which, in his judgment "demonstrate dramatically that there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity."[139] He offered this remarkable sentence: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is."[140] Put more directly, the Court in *Hirabayashi* and *Korematsu* announced that the government's action was constitutional when it was not.

On February 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans during World War II. The evacuation and detention were "wrong" because Japanese Americans "were and are loyal Americans." He urged that the public "affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated."[141] In 1980, Congress established a commission to gather facts and determine the wrong done by Roosevelt's order.[142]

The commission's report, released in December 1982, concluded that the order "was not justified by military necessity, and the decisions which followed from it—detention, ending detention, and ending exclusion—were not driven by analysis of military conditions." The principal values that shaped these decisions "were race prejudice, war hysteria, and a failure of political leadership." As a result, a "grave injustice" was done to American citizens and resident aliens of Japanese ancestry. In the commission's judgment, the Court's decision in *Korematsu* "lies overruled

in the court of history."[143] Congress passed legislation in 1988 to implement the recommendations of the commission. It apologized for the evacuation, relocation, and internment of Japanese Americans and provided a public education fund to inform the country about this internment and to prevent its recurrence. It also made restitution to individuals of Japanese ancestry who had been interned.[144]

In the 1980s, Gordon Hirabayashi and Fred Korematsu returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts and the general public. A 619-page document called the "Final Report" contained erroneous claims about alleged espionage efforts by Japanese Americans. As a result of this litigation, uncovering fraud against the courts by the executive branch, the convictions of both men were vacated.[145] Peter Irons provided important research for them. Acting through the Freedom of Information Act, he gained access to many documents in Justice Department files that uncovered the suppression of evidence and numerous "lies" and "intentional falsehoods" presented to the Supreme Court.[146]

On May 20, 2011, Acting Solicitor General Neal Katyal publicly acknowledged that in the Japanese-American cases Solicitor General Charles Fahy had failed to share with the Supreme Court and lower courts evidence that undermined the justification for internment. Because of those failures, Katyal announced: "Today, our Office takes this history as an important reminder that the 'special credence' the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans."[147]

On June 26, 2018, the Supreme Court upheld a travel ban ordered by President Donald Trump. Writing for a 5–4 majority, Chief Justice John Roberts pointed to Justice Sonia Sotomayor's dissent that repudiated *Korematsu*. After explaining the difference between *Korematsu* and the travel ban case, Roberts then said: "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution' 323 U.S., at 248 (Jackson, J., dissenting)."[148]

Conclusion

Expecting courts to protect individual liberties regularly is not supported by the historical record. Writing in 1962, Chief Justice Warren concluded that the American political system requires the judiciary to play a limited role: "In our democracy it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution."[149] He also cautioned against excessive dependence on the elected branches: "The day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen."[150] Reconciling constitutional law with self-government requires broad public participation. An open dialogue between the elected branches and the courts has been the general pattern from 1789 to the present time. Just as we generally do not accept the concentration of legislative power in Congress or executive power in the President, there is no reason to believe that constitutional interpretation resides only in the courts.

J. Harvie Wilkinson, III, a judge on the Fourth Circuit, offered this judgment about the relative performances between the judiciary and the elected branches: "The elected branches succeeded far more in attacking invidious racial discrimination than the Court had on its own."[151] Women discovered that their constitutional rights were protected far better by elected officials than

by the courts. Wilkinson noted that "good sense is more often displayed in collective and diverse settings than in a rarified appellate atmosphere."[152] Moreover, courts "are less adept than legislatures at assessing the precise content of society's values."[153]

ENDNOTES

[1] Lord Radcliffe, **The Law & Its Compass** (Oxford: Oxford Academy, 1960), pp. 92–93.

[2] David Cole, **Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law** (Washington, D.C.: ACS, 2016), p. 9.

[3] Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (New York, NY: Yale University Press, 1962), p. 244.

[4] Ruth Bader Ginsburg, **My Own Words** (New York, NY: Simon & Schuster, 2016), p. 125.

[5] Robert Lowry Clinton, ***Marbury v. Madison* and Judicial Review** (Lawrence, Kansas: University Press of Kansas, 1989), p. 125.

[6] *Id.*, p. 126.

[7] Ronald D. Rotunda, **John Marshall and the Cases That United the States of America: Beveridge's Abridged *Life of John Marshall*** (New York, NY: Carolina Academic Press, 2018), p. 175.

[8] William Michael Treanor, "Judicial Review Before *Marbury*," 58 *Stanford Law Review* pp. 455, 457–58 (2005).

[9] Joel Richard Paul, **Without Precedent: John Marshall and His Times** (New York, NY: Penguin Publishing Group, 2018), p. 3.

[10] Warren E. Burger, "The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury," in Mark Cannon and David O'Brien, eds. **Views from the Bench** (Chatham, NJ: Chatham Publishing House, 1989), p. 87.

[11] Albert J. Beveridge, **The Life of John Marshall** 3 (Champaign, Illinois: Project Gutenberg, 1919), vol. 3, p. 177.

[12] For further details on Marshall's record, see Louis Fisher, **Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 7–16.

[13] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

[14] James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (New York, NY: Bureau of National Literature, 1897-1925), vol. 3, p. 1145.

[15] *Id.*

[16] *Brown v. Allen*, 344 U.S. 443, 540 (1953).

[17] *Helvering v. Griffiths*, 318 U.S. 371, 400-01 (1943).

[18] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 17–21.

[19] Remarks of Justice Thurgood Marshall, Annual Seminar of the San Francisco Patent and Trademark Law Association, in Maui, Hawaii, May 6, 1987.

[20] Harold M. Hyman, **A More Perfect Union** (New York, NY: Barnes & Noble Press, 1975), p. 6.

[21] *Dred Scott v. Sandford*, 60 U.S. 393, 447 (1857).

[22] *Id.*, p. 452.

[23] Arthur M. Schlesinger Jr. and Fred L. Israel, eds., **My Fellow Citizens: The Inaugural Addresses of the Presidents of the United States, 1789-2009** (New York, NY: Facts on Files, 2010), p. 145.

[24] *Id.*, p. 146.

[25] 12 Stat. 432, Ch. 111 (1862).

[26] 18 Stat. 335, 336 (1875).

[27] *Civil Rights Cases*, 109 U.S. 3 (1883).

[28] Robert D. Loevy, **The Civil Rights Act of 1964: The Passage of the Law That Ended Racial Segregation** (New York, NY: State University of New York Press, 1997).

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

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

[31] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 52–53.

[32] John Denvir, **Democracy's Constitution: Claiming the Privileges of American Citizenship** (Hoboken, NJ: John Wiley & Sons, Inc., 2001), p. 16.

[33] Jane M. Friedman, "Myra Bradwell: On Defying the Creator and Becoming a Lawyer," 28 *Valparaiso University Law Review* pp. 1287, 1288 (1994).

[34] *In re Bradwell*, 55 Ill. 535 (1869).

[35] *Id.*, p. 536.

[36] *Id.*, p. 539.

[37] *Id.*

[38] *Id.*, p. 540.

[39] *Id.*, p. 542.

[40] Illinois Laws, 1871–2, 578.

[41] *Id.*

[42] *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1883).

[43] *Id.*

[44] *Id.*, p. 141.

[45] *In re Goodell*, 39 Wis. 232, 245 (1875).

[46] *Id.*

[47] *Id.*, p. 246.

[48] 20 Stat. 292 (1879). For further details on Lockwood's legislative efforts, see Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 65–67.

[49] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[50] *Id.*, p. 661.

[51] Public Law 111-12, 123 Stat. 5 (2009).

[52] *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946).

[53] *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 50 U.S. (9 How.) 647 (1850).
[54] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 626 (1852).
[55] Cong. Globe, 32d Cong., 1st Sess. 2195 (1852).
[56] *Id.*, p. 2440.
[57] 10 Stat. 112, sec. 6 (1852). For details on legislative debate, see Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 83–84.
[58] *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).
[59] *Id.*, p. 440.
[60] *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946).
[61] *Leisy v. Hardin*, 135 U.S. 100 (1890).
[62] 21 Cong. Rec. 4642 (1890).
[63] *Id.*, p. 4964.
[64] 26 Stat. 313 (1890).
[65] *In re Rahrer*, 140 U.S. 545 (1891).
[66] *Hammer v. Dagenhart*, 247 U.S. 252 (1918).
[67] *United States v. Darby*, 312 U.S. 100 (1941).
[68] Public Law No. 64-249, 39 Stat. 675 (1916).
[69] *Hammer v. Dagenhart*, at 272–73.
[70] 40 Stat. 1057, 1138 (1918).
[71] *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).
[72] John R. Vile, **Encyclopedia of Constitutional Amendments, Proposed Amendment, and Amending Issues, 1789-2002** (Stanford, CA: Stanford University, 2003), p. 63.
[73] 52 Stat. 1060 (1938).
[74] *United States v. F.W. Darby Lumber Co.*, 32 F. Supp. 734 (S.D. Ga. 1040).
[75] *United States v. Darby*, 312 U.S. 100, 116 (1941).
[76] For more details on child labor, see Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 94–100.
[77] *Ibid.* at 121–41.
[78] *Davis v. Berry*, 216 Fed. 413 (S.D. Iowa, E.D., 1914).
[79] *Id.*
[80] *Id.*, p. 414.
[81] *Id.*, p. 418.
[82] *Id.*, p. 416.
[83] *Mickle v. Henrichs*, 262 Fed. 687 (D. Nev., 1918).
[84] *Id.*, p. 690.
[85] *Buck v. Bell*, 274 U.S. 200, 207 (1927).
[86] Paul A. Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," 60 *New York University Law Review* pp. 30, 52–54 (1985).
[87] *Id.*, p. 61.
[88] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), p. 126.
[89] *Roth v. United States*, 354 U.S. 476, 487 (1957).
[90] *Id.*, p. 490.
[91] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 126–33.
[92] Rochelle Gurstein, **The Repeal of Reticence: America's Cultural and Legal Struggles over Free Speech, Obscenity, Sexual Liberation, and Modern Art** (New York, NY: Hill and Wang, 1998), p. 195.
[93] *Tileston v. Ullman*, 318 U.S. 44 (1943); *Poe v. Ullman*, 367 U.S. 497 (1961).
[94] *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).
[95] *Id.*, p. 527.
[96] *Roe v. Wade*, 410 U.S. 113 (1973).
[97] *Id.*, p. 163
[98] *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 64 (1976).
[99] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* pp. 375, 376 (1985).
[100] *Id.*, p. 379–80.
[101] *Id.*, p. 381.
[102] *Id.*, p. 385–86.
[103] Ruth Bader Ginsburg, "Speaking in a Judicial Voice," 67 *New York University Law Review* pp. 1185, 1198 (1992).
[104] *Id.*, p. 1208.
[105] *Id.*, p. 1198, 1199.
[106] 93 Stat. 926, sec. 109 (1979).
[107] *Harris v. McRae*, 448 U.S. 297 (1980).
[108] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[109] Sandra Day O'Connor, **The Majesty of the Law: Reflections of a Supreme Court Justice** (New York, NY: Random House Trade paperbacks, 2003), p. 44.
[110] *Id.*, p. 47.
[111] *Id.*, p. 251.
[112] Frank J. Sorauf, **The Wall of Separation: The Constitutional Politics of Church and State** (Princeton, NJ: Princeton Legacy Library, 1976), p. 3.
[113] Henry W. Edgerton, "The Incidence of Judicial Control over Congress," 22 *Corn. Law Quizlet* p. 299 (1937).
[114] U.S. Selective Service System, **Conscientious Objectors** (Special Monograph No. 11, Vol. 1 (1950), pp. 42–43. For further analysis of the treatment of conscientious objectors, see Louis Fisher, **Religious Liberty in America: Political Safeguards** (2002), pp. 91–104.
[115] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[116] For the protection of religious liberty in America for the first century, see Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 142–49.
[117] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[118] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), p. 153.
[119] *Jones v. Opelika*, 316 U.S. 584, 624 (1942).
[120] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[121] *Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir. 1984).
[122] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 157–58.
[123] *Goldman v. Weinberger*, 475 U.S. 503 (1986).
[124] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University Press of Kansas, 2019), pp. 159–60.
[125] *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).
[126] 7 Fed. Reg. 1407 (1942).
[127] 56 Stat. 173 (1942).
[128] *Hirabayashi v. United States*, 320, U.S. 81, 93 (1943).
[129] *Id.*, p. 103.
[130] *Hirabayashi v. United States*, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
[131] *Korematsu v. United States*, 323 U.S. 214 (1944).
[132] *Id.*, p. 242.
[133] *Korematsu v. United States*, 323 U.S. 214, 235–36 (1944).
[134] *Ex parte Endo*, 323 U.S. 283, 294 (1944).
[135] Eugene V. Rostow, "The Japanese American Cases—A Disaster," 54 *Yale Law Journal* pp. 489, 489 (1945).
[136] *Id.*, p. 503.
[137] *Id.*, p. 504.
[138] *Id.*, p. 520.
[139] Earl Warren, "The Bill of Rights and the Military," 37 *New York University Law Review* pp. 181, 192 (1962).
[140] *Id.*, pp. 192–93.
[141] Proclamation 4417, 41 Fed. Reg. 7741 (1976).
[142] 94 Stat. 964 (1980).
[143] Commission on Wartime Relocation and Internment of Civilians, **Personal Justice Denied** (Seattle, Washington D.C.: University of Washington Press, 1982), p. 18.
[144] Public Law 100-383, 102 Stat. 903 (1988).
[145] Fisher, **Reconsidering Judicial Finality** (Lawrence, Kansas: University of Kansas), pp. 172–76.
[146] *Id.*, p. 176; Peter Irons, **Justice at War: The Story of the Japanese American Internment Cases** (Berkeley, CA: University of California Press, 1983).
[147] Neal Katyal, "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases," U.S. Department of Justice. Available at www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.
[148] *Trump v. Hawaii*, 585 U.S. 1, 38 (2018), slip op.
[149] Warren, "The Bill of Rights and the Military," 37 *New York University Law Review* pp. 181, 202 (1962).
[150] *Id.*
[151] J. Harvie Wilkinson II, **Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance** (Oxford: Oxford University Press, 2012), pp. 17–18.
[152] *Id.*, p. 115.
[153] *Id.*, p. 22.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Reflecting about a century ago on elections in the United States, James Bryce observed in **The American Commonwealth** that Europeans "are struck, by the faults of a plan which plunges the nation into a whirlpool of excitement once every four years, and commits the headship of the state to a party leader chosen for a short period." However, he continued,

> there is another aspect in which the presidential election may be regarded, and one whose importance is better appreciated in America than in Europe. The election is a solemn periodical appeal to the nation to review its condition, the way in which its business has been carried on, [and the] conduct of the two great parties. It stirs and rouses the nation as nothing else does, forces everyone not merely to think about public affairs but to decide how he judges the parties. It is a direct expression of the will of voters, a force before which everything must bow.[1]

As the quadrennial "whirlpool of excitement" began to swirl well in advance of the 2020 elections, Americans were reminded of a notable silence in the Constitution: While the framers were careful to include methods for *electing* representatives (by the people), senators (by state legislatures), and the President (by the virtual assembly of what has come to be known as the Electoral College), they included nothing about *selecting* candidates for those offices.

Elections have thus given rise to various devices to supply names for the ballot. At the presidential level, early nominating procedures were vastly different from what one sees today. By 1800, party caucuses in Congress recommended presidential nominees to the state legislatures, which in most states directly chose members of the Electoral College. In 1832, the new Anti-Masonic party tried an alternative nominating device—the convention. In this instance, necessity was truly the mother of invention in that with no substantial congressional representation, Anti-Masonics resorted to a meeting outside Congress and convened in a Baltimore saloon. Members of the new Whig

party did the same thing and even met in the same saloon. A gathering composed of state party delegates who had been selected by local party leaders impressed many as an ideal way of choosing a candidate who could in turn command widespread support. Democrats were convinced and so also convened in Baltimore to re-nominate Andrew Jackson for a second term.[2]

Although the convention as a nominating device has persisted, it has been only since the 1970s that ordinary voters in most states have had a major say in the selection of presidential nominees. By the 1860s, for example, delegates to the national conventions were selected by state party chieftains, a practice that persisted into the early twentieth century. It was in reaction to this situation that the presidential primary emerged. Progressive era figures such as Senators Robert La Follette of Wisconsin and Hiram Johnson of California demanded a larger role for the people in the nomination process, whereby the voters would be empowered to select delegates to the national party convention and in the process to express a preference for their party's presidential nominee.

The idea was contagious. As early as 1912, nearly one-third of the states provided for some kind of popular election of convention delegates. By 1916, half the states had a Democratic or Republican presidential primary, and a few had both. In that year, among Democrats, fifty-four percent of the convention delegates were chosen by primaries—a figure that would not be surpassed until 1972. For Republicans, fifty-nine percent of the delegates were the products of primaries, a proportion not exceeded until 1976.[3] However, popular participation went only so far in that most primaries did not generate binding results, as party leaders often dictated how delegates voted.

As the Progressive movement itself declined nationally after 1920, states began to abandon the primary as a delegate-selection device, so that, by 1936, only forty percent of the convention delegates of the two major parties were chosen in primaries. Thus, during the first two-thirds of the twentieth century, primaries were *a* route to the nomination but by no means *the* route. They were no substitute for careful cultivation of state party leaders. Instead, the strategy for presidential aspirants became one of picking and choosing primaries carefully. In 1960, for example, John Kennedy entered and won the primary in West Virginia, an overwhelmingly Protestant state, as a way of refuting the conventional wisdom that a Roman Catholic could not be elected President.[4] Until the 1970s, primaries mainly were seen by both candidates and state party leaders as devices to confirm consensus within a party. Few viewed the primary as a tool to forge such a consensus. That had to be done before primary season.

An entirely different world of nomination politics emerged after 1968, when Vice President Hubert Humphrey, the Democratic nominee, became the last presidential candidate of either major party who did not enter a single presidential primary in the year he was nominated. The ensuing controversy among Democrats witnessed the speedy rebirth and expansion of the notion of popular control of the candidate-selection process. While presidential and vice-presidential candidates would still be nominated in conventions, rules adopted first by Democrats and then by Republicans transformed the nomination process into one in which candidates competed for convention delegates in state presidential primaries (or in caucuses, Iowa holding the first one in 1972) across the land. What had begun in the Progressive era as a device to empower voters swept the nation.

Under the arrangement that had existed for most of American political history after 1800, party elites narrowed choices for the electorate. Today, that order of influence has become exactly inverted: the electorate, speaking through primaries and caucuses,

narrows the choices for party elites. Thus, as this extra-constitutional process has evolved, an American presidential election now encompasses two very distinct phases. First, the delegate selection phase, where the struggle is *within* a party, followed by the general election phase, where the struggle is *between* parties.

While the Supreme Court has sometimes been an issue in presidential elections—one thinks of 1936, 1968, and 1980 as especially prominent examples—it has been less common for the Court to be a focus in the nomination stage of the process. Yet, even months before any votes were cast in the primaries and caucuses in 2020, some Democratic presidential wannabes pointed to decisions by the Court that they abhorred and reminded party faithful of the impact the next President might have on the nation through appointments of Justices. Some even advocated enlarging the size of the Court or abolishing life tenure. The rhetoric once more served as a reminder, if one were needed, that the Court is never very far from the center of politics, a reality confirmed by recent books about the Justices and their work.

If 1968 was notable because the Democratic nominee had not entered a single primary, 1952 remains significant as the last time at least as of 2020 the presidential nominee of either party (again, the Democrats) was not chosen on the first ballot. Democrats eventually coalesced around Adlai Stevenson in July, barely weeks after Republicans had picked Dwight Eisenhower in the same Chicago arena. The latter's victory in November later had enormous consequences for the Supreme Court and the nation because of the new President's choice of Governor Earl Warren of California to head the Court. It is the sometimes strained relationship between the thirty-fourth chief executive and the fourteenth Chief Justice of the United States that forms the subject of **Eisenhower vs. Warren** by James F. Simon, dean emeritus of New York Law School.[5]

An author hardly unfamiliar with the Supreme Court, Simon has written eight additional books on the judiciary, including a biography of Justice William O. Douglas. Significantly, five of these volumes are conspicuously constructed around conflict, suggesting that Simon prefers a research and writing focus on what might be called "great antagonists." One is therefore not surprised to find titles on Franklin Roosevelt and Chief Justice Charles Evans Hughes; Abraham Lincoln and Chief Justice Roger B. Taney; Thomas Jefferson and Chief Justice John Marshall, as well as one on Justice Hugo L. Black and Justice Felix Frankfurter. Even a sixth and very early title (**In His Own Image: The Supreme Court in Richard Nixon's America**) is hardly tension-free.

Along with a prologue and an epilogue, Simon's twelve chapters organize the Eisenhower-Warren story by attention to their lives before and after the impactful events of 1952 and 1953. With the period before Eisenhower's election, Simon provides engaging mini-biographies of the pair, who were born about six months apart (Eisenhower in October 1890, Warren in March 1891).[6] Readers already familiar with Warren's life will find a detailed account of Eisenhower's upbringing as well as his military, diplomatic, and educational accomplishments, and, as to Warren, his childhood, adolescence, and early professional years but also his administrative and political achievements in California that included election as governor three times.[7] For Eisenhower, Simon makes ample use of Eisenhower's four volumes of published memoirs as well as personal and official papers. For Warren, he draws from biographies, Warren's published memoirs, decisions of the Court, and the Warren papers at the Library of Congress as well as the papers of Justices who served with him.

The period of the public lives of the two beginning with 1952 comprises the major part of the book. It is here that the reader realizes that while Warren might never have

become Chief Justice without Eisenhower, it is entirely believable that Eisenhower might never have become the Republican nominee in 1952 without Warren. When Republicans opened their convention in Chicago, Eisenhower and Ohio's Senator Robert Taft seemed assured of the most delegates, but each was short the necessary number of 604. Warren, who had been his party's vice-presidential nominee in 1948, headed the California delegation, whose members were committed to Warren as a "favorite son,"[8] even as most in that delegation preferred Eisenhower to Taft. Meanwhile, the Minnesota delegation was committed to its favorite son, former governor Harold Stassen. Had Warren released the California delegation at the outset, according to Simon[9] the added votes would have clinched the nomination for Eisenhower, thus ingratiating Warren with the general. However, it turned out to be the votes from the Minnesota delegation that ultimately pushed Eisenhower over the top.

Yet the nominee already had reason to appreciate Warren, if in a less obvious way. Early in the convention, the struggle between Taft and Eisenhower centered on contested delegations from three states: Georgia, Louisiana, and Texas. Taft supporters dominated the credentials committee and voted to seat the Taft delegates from those states, moving the Ohio senator close to the number needed to nominate. When Eisenhower supporters challenged the action of the credentials committee, Herbert Brownell, Jr., Eisenhower's "chief strategist"[10] at the convention (and later Attorney General during the future President's first term) proposed an amendment that would require a floor vote on the seating of any contested delegation. Defeat of the amendment was seen as greatly advantaging Taft, while passage was expected to shift the momentum to Eisenhower. Attention then focused on the vote of the sizable delegation from the Golden State. Its senior senator, William Knowland, urged that the delegation split its vote on the amendment, while Warren supported a unit vote in favor, as did the state's junior senator, Richard Nixon. Warren's insistence on a unified vote from his delegation assured the amendment's adoption by the full convention, an outcome that assisted Eisenhower because it disfavored Taft.

Moreover, on the day before the convention voted on the presidential nomination, Warren indirectly boosted Eisenhower's chances when he rebuffed Taft's offer of "the cabinet position of his choice"[11] if the governor released his delegation—already pledged to him on the first ballot—in favor of Taft. According to Simon, Eisenhower replied firmly, "No, Senator, we will go ahead as promised,"[12] the promise being that the delegation would back its governor, perhaps on the outside chance that a convention deadlocked between Taft and Eisenhower might turn to him. Surely, by the time the convention adjourned, the nominee realized that the leader of the California delegation had had a hand in his victory.

Ironically, Taft had passed up an opportunity that might well have delayed Eisenhower's entry into national politics until well past 1952, thus smoothing the way for Taft's own ambitions. While still Columbia University's president, Eisenhower was asked by President Harry Truman to step back into uniform to head the fledgling North Atlantic Treaty Organization (NATO). NATO had been formed by a treaty that Taft had opposed. Convinced that NATO required solid bipartisan support in Congress if it was to succeed, Eisenhower sought to change Taft's mind in terms of favoring sufficient numbers of American troops to make the alliance viable. Expecting Taft's unqualified approval, Eisenhower had even drafted a statement indicating his decision to abandon any pursuit of the presidency and to remain at NATO. However, Taft's unexpected refusal to agree to Eisenhower's insistence on the need for collective security led the general to tear up his statement in the presence of

staff, thus leaving open the pursuit of elective office.

With Eisenhower already viewing his work at Columbia as a burden,[13] there was now in his mind no professional impediment to pursuing presidential aspirations. These aspirations dated from at least 1948, when Eisenhower, who refused to say publicly if he identified as a Republican or Democrat, was courted by activists from both parties after polls indicated he was more popular than either President Truman or several Republican presidential hopefuls. Indeed, in carrying four southern states, Eisenhower as a candidate in 1952 proved to have far greater national appeal than the most recent Republican presidential nominees. However, in describing Eisenhower's campaign that included events in southern states, Simon is incorrect in writing that "the South ... had been solidly Democratic since Reconstruction."[14] While this statement is generally true, Tennessee voted Republican in 1920, but the prominent exception came in 1928 when five states of the old Confederacy (Florida, North Carolina, Tennessee, Texas, and Virginia) deserted Democratic nominee Governor Al Smith of New York in favor of Republican nominee and former Secretary of Commerce Herbert Hoover. For the same reason, Simon is off the mark in stating that Eisenhower's dominance in four southern states in 1952 represented "the best showing of a Republican presidential candidate in that section of the nation since Reconstruction."[15]

After votes had been cast in November, most observers expected that Warren would have some role in the new administration, a prospect understandably shared by the governor himself. What that role might be, however, remained very much in doubt. Simon explains that Warren and Eisenhower had different understandings of a purported promise of an appointment to the Supreme Court.[16] Besides, no vacancy existed, and there had been no talk of a retirement.[17] Moreover, Eisenhower notified Warren that no cabinet post would be available for him, given that the most obvious one, Attorney General, had plausibly been handed to Brownell. Brownell in turn approached Warren to see whether he would consider leaving California, where Warren had been governor since 1942, to accept the post of Solicitor General. Accordingly, by early September Brownell had assured Warren that the position was his, and Warren announced on September 3, 1953, that he would not seek a fourth term as governor.

Chief Justice Vinson's sudden death five days later after seven years of service and only nine months into Eisenhower's presidency presented the new chief executive with a rare opportunity: While all of his thirty-three predecessors save three[18] had appointed at least one Justice, only ten had appointed a Chief Justice.[19] Simon's account of the search and the thinking in which the new President engaged leaves the reader with the impression that the selection of Warren was the product of a methodical procedure that one hopes is not rare, but one that in its thoroughness and scope stands as a model for any future President. Indeed, the series of considerations that led the President to nominate Warren seems akin to one Eisenhower plausibly might have used in selecting a key staff member or army group commander during World War II.

Simon emphasizes that for a person "with no training in law or the history of the Court, Eisenhower held strong opinions on the qualities he was looking for in a chief justice."[20] In a letter to his brother Milton, then president of Pennsylvania State University, the President indicated that he sought "a man (a) of known and recognized integrity, (b) of wide experience in government, (c) of competence in the law, (d) of national stature in reputation so as to be useful to restore the Court to the high position of prestige it once enjoyed."[21] He added that he thought the Court's prestige had been diminished by the appointments of Frank

Murphy, Wiley Rutledge, "and a few others." Accordingly, he indicated he wanted to avoid an appointment motivated by politics, but he insisted that such a disqualifying consideration did not exclude persons with political experience, citing specifically Chief Justices such as Charles Evans Hughes and William Howard Taft. Eisenhower's brother Edgar, an attorney in Seattle, Washington, appeared to be among those advocating Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court. Yet above all, Edgar warned, the President was to avoid politicians. "I have such a low regard for the legal ability of most politicians, including governors, that I naturally strike them off any list of judicial appointments," noting in particular that appointment of Warren "would be a tragedy."[22]

With the Senate out of session until January, Eisenhower announced his recess appointment of Warren at a press conference on Wednesday, September 30, in time for the Chief Justice to be present for the Court's new term, scheduled to open the following Monday, October 5. Explaining to reporters that he was impressed with the governor's honesty, experience in law and government, and moderate philosophy, Eisenhower predicted that his choice would make a "Great Chief Justice." Writing to Edgar, Eisenhower insisted what "you consider to be tragedy, I consider to be a very splendid and promising development.... Here is a man of national stature (and I ask you when we have had any man of national stature appointed to the Supreme Court), of unimpeachable integrity, middle-of-the-road views, and with a splendid record during his years in active law work." Moreover, the president insisted, "he is a statesman. We have had too few of these."[23]

In his diary, Eisenhower listed further considerations driving his selection, observing that he had eliminated well-qualified judges over the age of sixty-four (Vanderbilt was sixty-five, Warren sixty-two) and had looked for someone who would serve long enough to leave a legacy. He expressly mentioned that he passed over a prominent Republican like Governor Thomas Dewey of New York so that the appointment would not appear to be a political payoff, suggesting perhaps that he did not by then consider Warren's assistance at the Chicago convention essential for his nomination. As for Dewey in particular, he "is so political in his whole outlook that I could scarcely imagine him as a federal judge.... Earl Warren, on the contrary is very deliberate and judicial in his whole approach to almost any question."[24] Thus Warren, who had acquired a reputation as a politician who did not appear intensely partisan, seemed a perfect choice for a President who for many seemed also not intensely partisan.

Without question, Eisenhower had proceeded not merely in search of a Justice for the Court but in search of a *Chief* Justice in that he wanted this nominee to be someone who could lead the Third Branch. Compared to other Presidents in the post–World War II era, Eisenhower made a choice that fit what might be called a political rather than a judicial model of selection. Although presidents since Lyndon Johnson, with few exceptions, have looked to those with judicial experience,[25] that criterion initially seemed unimportant to Eisenhower, who instead looked for someone with broad experience in public affairs. Of Eisenhower's four Supreme Court nominees after Warren, however, each had judicial experience.

Yet all Eisenhower's efforts would come to naught without eventual confirmation by the Senate. The election of 1952 had produced a closely divided upper house of forty-eight Republicans, forty-seven Democrats, and one Independent. Despite the close party division, Eisenhower expected eventual approval, although his attitude was defiant: "If the Republicans as a body should try to repudiate him," read a diary entry, "I shall leave the Republican party and try to organize an intelligent group of independents, no matter

President Eisenhower wrote his brother that to replace Fred Vinson he sought to appoint as Chief Justice "a man (a) of known and recognized integrity, (b) of wide experience in government, (c) of competence in the law, (d) of national stature in reputation so as to be useful to restore the Court to the high position of prestige it once enjoyed." James Simon's new book examines the relationship between Eisenhower and his eventual appointee, Earl Warren, who had car campaigned for "Ike" in California.

how small."[26] Following a favorable 12–3 recommendation by the Judiciary Committee, the full Senate confirmed Warren in a voice vote on March 1, 1954.[27]

Because Warren had already occupied the center chair for seven months, the focus of most observers of the Court by this time was probably not on the new Chief Justice but on what he and his colleagues would do with a group of racial segregation cases that came to be known as *Brown v. Board of Education*[28] (*Brown I*) and for which the Court had heard arguments twice: first on December 9–11, 1952, when Chief Justice Vinson was still alive, and then again on December 7–9, 1953, with Warren in the center chair.

On May 17, a unanimous bench through an opinion by Warren declared government-mandated racially segregated public schools unconstitutional. Leaping far ahead of the official civil rights positions of both Democrats and Republicans as expressed in their party platforms in 1952,[29] the Court called for revolutionary change in the pattern of education for eight million white and 2.5 million black public school students not only in the seventeen states, mainly southern and border plus the District of Columbia[30] where laws required racial segregation but also in four other states that permitted segregation by local option. Moreover, if segregation in public schools was incompatible with the Constitution, then, by implication, any other

form of race-based public policy was also unacceptable. An entire social system and decades-old way of life were pronounced illegitimate or at least called into question by a single decision. Never had the Court directly touched so many Americans in matters of child-rearing and association. *Brown* in no small measure further energized the modern civil rights movement in all its dimensions, from continued legal attacks on racism to the direct action of marches, sit-ins, and other forms of mass protests.

It was this civil rights litigation along with a round of civil liberties decisions during Eisenhower's second term that led the President to question the wisdom of his first Supreme Court appointment and for Warren soon to look dimly upon Eisenhower. For Simon, the "disintegration of their professional relationship"[31] began at a dinner on the evening of February 8, 1954, where the Chief Justice, as honored guest, was seated next to the President. Seated close by was John W. Davis, who in the re-argument of the *Brown* cases had represented South Carolina. Already having told Warren that Davis was a great man, Eisenhower "compounded what Warren considered an unpardonable ethical lapse by taking him aside and assuring him that white southerners were not 'bad people' but only concerned that their sweet little girls are not required to sit in school alongside some big overgrown Negroes.'"[32]

At a press conference after the May 17 ruling, the President's comment on the historic decision was "conspicuously brief," in which he said little more than that the decision was now law and should be obeyed. In the following year, after the Court handed down its unanimous implementation order in *Brown II*,[33] directing the dismantling of public segregated school systems with "all deliberate speed," the President's support again remained minimal. While stating again that the law should be obeyed, he called for understanding of the white South, where both custom and law had been turned upside down. "Law alone, he said repeatedly, could not change people's hearts or minds."[34] For Eisenhower, the Court had needlessly disrupted the social order on his watch.

Yet it was after the second *Brown* decision dealing with the crucial matter of implementation that presidential support, or its absence, would be determinative, particularly in the context of the resistance to *Brown* that emerged in several southern states. The Court's 1955 ruling that embodied a gradualist approach had created ample opportunities for its opponents to delay. Although border states showed a disposition to comply with the Court's mandate, states in the deep South began a campaign of active and passive resistance, adopting various legal tactics and devices that hindered implementation. Several legislatures passed resolutions declaring the desegregation decisions "unlawful." Almost all southern senators and representatives joined in 1956 in issuing a "Declaration of Constitutional Principles" (the so-called "Southern Manifesto") and advocated resistance to compelled desegregation by "all lawful means."[35]

Without question, the story Simon recounts of the relationship between Eisenhower and Warren reached a precarious point in Simon's suspense-filled chapter 11 on "Little Rock," as local defiance to a federal court in Arkansas attempting to implement *Brown* dramatically demonstrated the consequences of the absence of unequivocal and continuous presidential support for judicial decisions. On September 24, 1957, President Eisenhower felt compelled to order units numbering about 1,000 troops of the 101st Airborne Division to be dispatched to Little Rock, so that, in conjunction with federalized units of the Arkansas national guard, African-American students could be peacefully admitted to the city's Central High School on September 25, after negotiations with Governor Orval E. Faubus had broken down. "It was the first time that an American president had used federal troops to

compel equal treatment of Black Americans in the South since Reconstruction." The action prompted South Carolina's governor (and former U. S. Supreme Court Justice) James Byrnes to declare that "civil war exists and that the United States Government has declared war on Arkansas."[36] This clash resulted in a powerful unanimous *per curiam* decision in *Cooper v. Aaron*[37] by the Supreme Court on September 12, 1958. In what was probably an unprecedented format, the opinion was signed by each Justice, asserted both constitutional and judicial supremacy, and was perhaps the Court's most forceful, forthright, and succinct statement on its role in the political system since *Marbury v. Madison*.[38]

If Eisenhower was distressed with the Court in the school cases, his displeasure was hardly lessened by a series of decisions in cases that pitted freedom of speech and association against national security interests. The Cold War litigation posed the dilemma every democracy faces sooner or later: what to do about antidemocratic forces, which, if they were to come to power, would surely destroy democratic politics as one of the first orders of business. Was the government to wait until subversive elements had committed particular overt criminal acts, or could it preemptively take steps to protect the nation and its political processes because of the noxious ideas that suspected subversives and their organizations preached? The Vinson Court had already upheld convictions of avowed communists.[39] Warren's Court, however, limited the authority of both state and federal governments to investigate and to punish suspected subversives.[40]

What followed was the most intense national debate on the Supreme Court since 1937, outside as well as inside Congress. Alongside protests by right-wing groups were mainstream attacks on Warren and the Court, as happened at a London meeting of the American Bar Association (ABA) in 1957 to which the Chief Justice had been invited, Warren was so embarrassed and offended by the ABA action that he resigned his long-standing membership. Another unprecedented rebuke followed in 1958 when the Conference of State Chief Justices adopted six resolutions that highlighted questionable decisions. Members of the House and Senate joined the chorus of naysayers, with measures introduced to withdraw the Court's jurisdiction in certain categories of national security cases, although only one relatively mild rebuke actually passed.[41] While Eisenhower himself was not publicly critical, he fumed privately and some of his negative remarks found their way to Warren.

Simon draws extensively from Warren's memoirs that were published in 1977 in describing a conversation between the two principals in 1965 when, at President Lyndon Johnson's request, they were on a plane to attend the funeral in London of Winston Churchill. Warren wrote that Eisenhower told him that he had been disappointed in Justice Brennan and Warren, mistakenly thinking they were moderate when appointed, but eventually concluding otherwise. When Warren asked Eisenhower which decisions in particular he had in mind, the reply was, "Oh, those Communist cases." When the Chief Justice pressed as to which cases, the former President replied, "All of them." When Warren asked, what he would do with Communists in America, Eisenhower was said to reply, "I would kill the S.O.B.s."[42]

For Simon, Warren's inclusion of this conversation in the first chapter of his memoirs indicated the importance the Chief Justice assigned to what Eisenhower said, that he probably intended to portray "the former president as hopelessly naive in his understanding of the court's work," a characterization Simon believes is both "unflattering and unfair." The depiction was unfair, Simon maintains, both because of the qualities Eisenhower displayed in selecting Warren in 1953 and in examples the author includes of Eisenhower's familiarity with the legal

process, including his even parsing of the language of the government's brief in the second *Brown* case. Moreover, Eisenhower's contrasting appreciation of Justice John Marshall Harlan suggested that "Harlan's judicial restraint more accurately reflected his concept of judicial decision-making than the chief justice's."[43] Nonetheless, Eisenhower's death in March 1969 meant that Warren, who lived until July 1974, got the last word.

In his opinion in *Brown I*, Chief Justice Warren famously declared: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[44] Eight paragraphs above this pronouncement Warren assigned provenance of the doctrine to the Supreme Court's decision fifty-eight years earlier in *Plessy v. Ferguson*,[45] when the Court infamously upheld the validity of Louisiana's separate car law, enacted in July 1890, against a Fourteenth Amendment challenge. This statute required railroad companies operating passenger trains in the state to provide "equal but separate" cars for white and black patrons and required railroad employees such as conductors to enforce the racially segregated seating.[46] Although *Plessy* is invariably cited as the source of the "separate but equal" doctrine, the phrase itself—so basic for so long in American constitutional law—ironically appears nowhere in the opinion of the Court by Justice Henry Billings Brown. One finds it only in the decision's sole dissenting opinion, filed by Justice John Marshall Harlan, whose namesake grandson would be President Eisenhower's second Supreme Court appointee.

Because the doctrine, and therefore *Plessy,* became the legal basis for government-mandated racial segregation not only in public conveyances but in all manner of public facilities such as schools, *Plessy* became both the target and the principal parapet in the struggle over the future of required separation of the races. For those who sought to maintain segregation, *Plessy* had to be defended and reaffirmed. For those working to eliminate segregation, the decision could not be allowed to remain controlling law. Thus when *Brown* was argued and decided, the precedent remained close to the center of attention and even today, along with ruinous decisions like Dred Scott,[47] retains a place in the canon of American constitutional law.

Understandably, therefore, *Plessy* has received ample attention in Court histories, biographies, commentaries, and even case studies. The most recent of the latter is **Separate**, by journalist Steve Luxenberg, senior editor at the *Washington Post*.[48] Without question, Luxenberg's captivating book is an impressive contribution both in its length of nearly 600 pages and in the depth of the author's research. Moreover, through his reexamination of *Plessy*, Luxenberg offers a restyling of the judicial case study in that he tells the story almost entirely through the eyes of its participants.

Fittingly, the Prologue in this book of twenty-one numbered chapters comprising five parts concludes with a detailed "cast of characters" just ahead of chapter one. Aside from Justices Brown and Harlan, one finds Albion W. Tourgée, the attorney and weekly newspaper columnist recruited to argue *Plessy* at the Supreme Court; Louis A. Martinet, editor of the New Orleans *Crusader* and the principal force behind the Citizens Committee to Test the Constitutionality of the Separate Car Law, also known as the *Comité des Citoyens*, a name that reflected the group's French Creole composition and leadership; Caroline (Pitts) Brown, first wife of Justice Brown; Malvina (Shanklin) Harlan, wife of Justice Harlan; Emma (Kilborn) Tourgée, wife of Albion Tourgée; Frederick Douglass, abolitionist author and orator; Rodolphe L. Desdunes, member of the Citizens' Committee; Daniel Desdunes, son of Rodolphe Desdunes and chosen by the Citizens Committee to test the separate car

law; Homer Plessy, chosen by the Citizens Committee to test the separate car law; John H. Ferguson, the state judge whose ruling was appealed by Plessy's legal team; and James C. Walker, a New Orleans lawyer hired by the Citizens Committee to work with Tourgée and to act as local counsel. To this play list, Luxenberg might well have added Samuel F. Phillips, a Washington attorney whom the committee had retained to "serve as its local eyes and ears at the court" and who would help write and file the brief at the U. S. Supreme Court.[49]

Given the number of "characters" involved in one way or another in *Plessy*, the reader is not surprised to find that **Separate** is more heavily biographical than strictly political or legal; given its setting in nineteenth-century Louisiana, the book is also partly cultural as well. Part I (Ambition) contains individual chapters on the future Justices Harlan and Brown as well as Tourgée, in addition to an overview of the free people of color of New Orleans in 1860. Part II (War) continues the focus on Harlan, Brown, and Tourgée in separate chapters as does Part III (Ascent). Part IV (Precipice) continues the focus on Harlan, Brown, and Tourgée with collateral attention to the sharpening color line in the South in the 1880s. Part V (Resistance) provides the denouement as Plessy's case is argued, decided, and then assessed.

Yet readers may be surprised to find that the Prologue begins not with Homer Plessy or in New Orleans but with a flash-forward to April 1896, at Albion Tourgée's home in Mayville on the northwestern tip of Lake Chautauqua in New York, a location about as far southwest in the Empire State as one can go without stepping into Lake Erie or wandering into Pennsylvania. The day's mail contained a two-page letter, dated April 1, which the fifty-seven-year-old read with disbelief: "There is some chance that the case will be argued tomorrow," wrote his co-counsel in Plessy's case. However, it was already April 3. "Tomorrow was now yesterday." If the letter were accurate, "then Tourgée had missed perhaps the most important oration of his career, one that he had spent more than three years preparing to give." He hurriedly composed a letter to the clerk at the Supreme Court, explaining "I have been ready for the hearing for three months, waiting every day to know when it would be reached, but have never heard a word from you. I represent an association of about 10,000 colored men of Louisiana who raised the money to prosecute these and other cases, and now by some inscrutable mishap they are deprived of the service they had secured."[50]

Having argued only two relatively minor cases at the Supreme Court some twenty-five years earlier, Tourgée was unfamiliar with the Court's current routine of notifying only local counsel about the scheduling of a case. Local counsel had thus known for several days that Plessy's case was in the Court's queue but inexplicably had failed to notify Tourgée promptly. Happily Tourgée soon learned from Court clerk James McKenney that the Justices had not reached as many cases as expected before adjourning for a week's recess. Plessy's case was next in line, with a probable argument date of Monday, April 13, thus allowing Tourgée ample time to make the journey to Washington.[51]

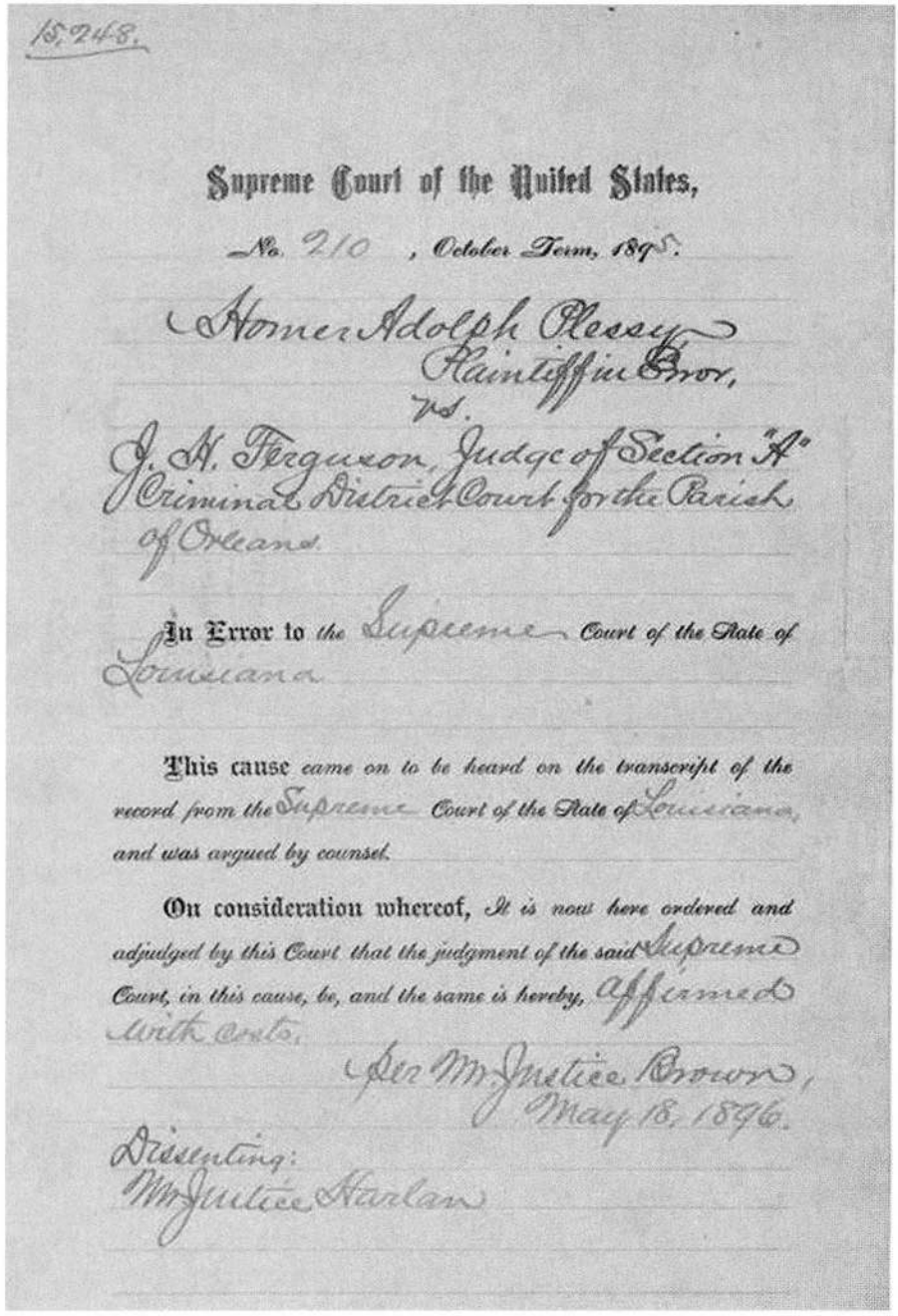
After the Prologue's description of that brush with professional misfortune comes chapter one's beginning with a flashback to August, 1838, twenty-four years before Homer Plessy was born. The occasion was the inauguration of regular passenger service on the Eastern Rail Road between East Boston and Salem, Massachusetts. The published fare was fifty cents for the thirteen-mile ride that would take less than an hour, half the charge stage coaches collected for a trip between the same two points that would consume more than half an afternoon. The Eastern's "white and colored passengers," however were assigned to different cars, a

practice that initially attracted no condemnation from the abolitionists, probably because, Luxenberg infers, "people with any shade of color" comprised barely one percent of the Commonwealth's population in the 1840 census. Remarkably, by October 1838, the term "Jim Crow" had already appeared in the Salem newspaper as a label for the "colored only" car, suggesting the term "was already well in circulation among passengers and railroad crews."[52] Yet controversy over the practice did develop, prompting the Massachusetts legislature to consider a bill to prohibit rail car segregation. While the measure never became law, the state's railroads eventually abandoned separate car seating, even as segregation on trains was becoming common elsewhere.

Thus, while Jim Crow laws requiring segregation gained "velocity in the South at the end of the nineteenth century," the practice of segregation "did not originate there. Separation had no role in the South before the Civil War," explains Luxenberg. "Slavery required close contact, coercion, and even intimacy to survive and prosper. It was the free and conflicted North that gave birth to separation, in different places and in different forms."[53] This perspective explains the second half of Luxenberg's subtitle: "America's Journey from Slavery to Segregation," as the new realities of carriage by rail spurred discrimination. "No existing form of transportation quite compared to a railroad car's opportunities for throwing together passengers without regard for status or social group. A gentleman could wind up next to a laborer, close enough to smell breakfast—or worse—on each other's breath."[54] First class accommodations might offer refuge for those able to pay, but only if a train offered them.

Once Luxenberg shifts the focus to Louisiana, the reader learns that the first attempt by the Citizens Committee to build a test case under the Fourteenth Amendment to attack the state's separate car law derailed even though the planning had been meticulous. On the morning of February 24, 1892, a young "light skinned" musician named Daniel Desdunes boarded a train of the Louisville and Nashville Railroad in New Orleans. "His stated destination: Mobile, Alabama. His first destination: the car reserved for white passengers. His hoped for destination: police custody."[55] The train crew had been alerted ahead of time, and there conveniently was a police captain already on board who, with the help of two detectives, escorted Desdunes off the train and into the Second Recorder's Court after he refused the request of a crew member to move to the proper car. Waiting at the recorder's court was Paul Bonseigneur, treasurer of the Citizens Committee, who paid the $500 bond and secured Desdunes' release. Meanwhile, local attorney Walker was in touch with Tourgée in Mayville working on final details for an appeal. However, in unrelated legal action by the Pullman Company, the Supreme Court of Louisiana ruled on Commerce Clause grounds that the separate car law was unenforceable with respect to interstate travelers.

The situation then called for a new defendant, and on the afternoon of June 7, 1892, a twenty-nine-year-old shoemaker named Homer Plessy bought a first-class ticket on the East Louisiana Railroad for a ride from New Orleans sixty miles north to Covington on the north shore of Lake Pontchartrain, an intrastate ride. As Luxenberg adds, Plessy's family tree featured "every color of the New Orleans spectrum, but no enslaved member since his great-grandmother had gained her freedom in 1779. He could trace both sides of his family's origins back to the century of French and Spanish rule. If *les gens de couleur libres* [free people of color] could be considered a club, his ancestors were founding members."[56] For this second test of the law, the committee again calculated carefully, this time hiring a private detective, Chris C. Cain, to be the arresting officer. When Plessy was taken off the train, five members of the committee met him at the



15,248.

Supreme Court of the United States,

No. 210, October Term, 1895.

Homer Adolph Plessy
Plaintiff in Error,
vs.
J. H. Ferguson, Judge of Section "A"
Criminal District Court for the Parish
of Orleans.

In Error to the Supreme Court of the State of
Louisiana.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, Affirmed with costs.

Per Mr. Justice Brown,
May 18, 1896.

Dissenting:
Mr. Justice Harlan

The Supreme Court issued its decision in *Plessy* v. *Ferguson* on May 18, 1896, advancing the "separate but equal" doctrine for assessing the constitutionality of racial segregation laws. Steve Luxenberg's compelling new book on the case tells the story almost entirely through the eyes of its participants.

Fifth Precinct police station to make sure he would not have to spend a night in jail.

In the trial court, Judge Ferguson had no reservations about dividing the races. For him, separate was legal in that other courts had said so. His only question: "Were the cars equal? If not, no one had said so." There was therefore no pretense that Plessy

was denied equal accommodations. "He was simply deprived of the liberty of doing as he pleased."[57] Judge Ferguson was correct in suggesting that racial segregation was breeding a growing body of case law. For example, *Hall v. DeCuir*[58] had held that a law *forbidding* racial segregation could not be constitutionally applied to a boat moving from one state to another, and more recently *Louisville N. O. & Tex. Railway v. Mississippi*,[59] involving nearly a mirror image of the facts of *DeCuir*, had upheld on Commerce Clause grounds a state law *requiring* segregation on interstate carriers. In the Mississippi case, however, the state court had construed the regulation to apply only to intrastate travel. While Justice Harlan's dissent in the latter case focused on the burden on commerce, he expressly reserved judgment on what he referred to as "other grounds" upon which the statute in question might properly have been held to be constitutionally repugnant.[60]

It is in chapter 22 ("In the Nature of Things") that Luxenberg thoroughly examines the brief filed in the U. S. Supreme Court on Plessy's behalf after the state Supreme Court let the conviction stand.[61] At oral argument in the courtroom in the Old Senate Chamber, "Tourgée had armored himself with a thick sheaf of notes, nearly fifty typewritten pages on half sheets of paper,"[62] but there is virtually no surviving record of what he actually said to the Justices. In the "Capitol Chat" column, a *Washington Post* reporter noted Tourgée's presence and only offered a sparse 100-word summary of the facts of the case, unaware presumably that the case began with an arranged arrest. The reporter then offered a view on Tourgée's chances for success by quoting a visitor to the proceedings in the courtroom who labeled it a fool's errand "as the practical questions at issue in the case have already been decided in favor of the validity of the law involved."[63] Coverage in most newspapers in New Orleans was equally thin.

Luxenberg's detailed attention to the contents of Tourgée's brief is important because his brief helps to explain Justice Brown's opinion for the Court when *Plessy* came down on May 18, 1896. Brown evidently took Tourgée's words very seriously in that his opinion in most respects offers a point-by-point rebuttal. That is, the Court's action in upholding the separate car law was evidently taken thoughtfully, not cavalierly. Yet the ruling "confirmed the worst fears"[64] of those who had advanced the litigation. Rather than achieve what even they knew was a long-shot victory for racial equality, they had instead accomplished something quite different. The compatibility of state-imposed racial segregation with the Fourteenth Amendment's guarantee of equal protection of the laws now had a reasoned defense from the Supreme Court, removing any legal objection to the practice and hastening its expansion, as Justice Harlan's dissent anticipated:

> It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. ...The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution....[65]

Among the "aggressions" that became a reality not long after *Plessy* came down was a perverse application of "separate but equal," where there was rigorous enforcement of separation but inattention to equality. Not only

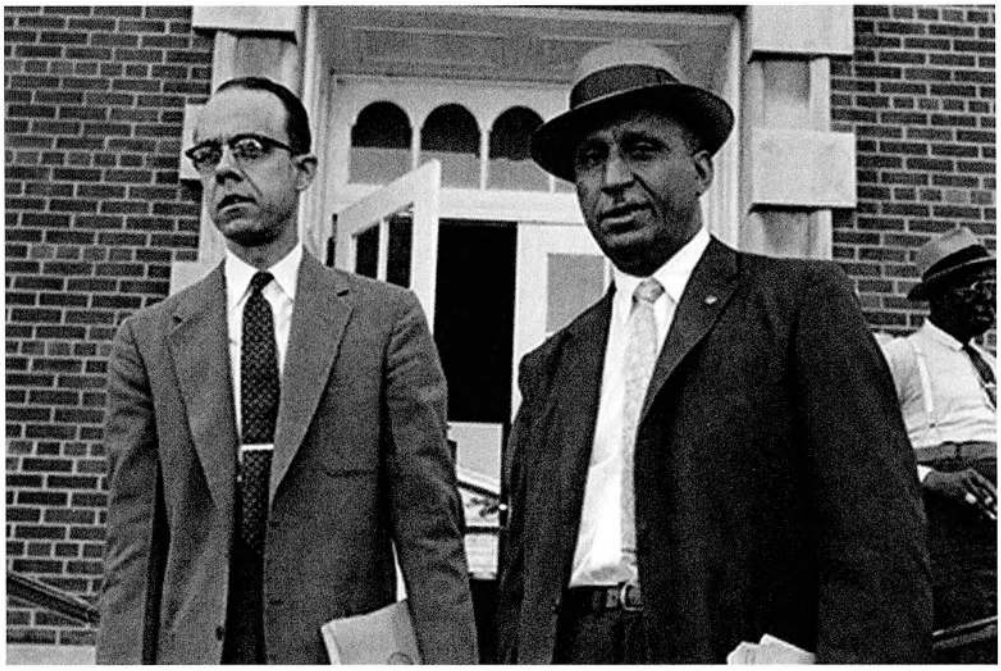
was this gap evident in rail transportation, where the Jim Crow car was often substandard while first class or dining options were unavailable for black patrons, but it was also widespread in public school systems, where teacher salaries and facilities were grossly unequal between blacks and whites. The disparities followed from increased racial discrimination in voter regulations and their implementation, as African Americans became politically powerless in many locations and thus had no say in allocation of tax dollars.

Scholarly examination over the years of the resort to the judicial system to demolish *Plessy*'s legacy, especially in public education, has resulted in a number of excellent books such as Richard Kluger's **Simple Justice** (1976), Jack Greenberg's **Crusaders in the Courts** (1994), Mark V. Tushnet's **Making Civil Rights Law** (1994), and Michael Klarman's **From Jim Crow to Civil Rights** (2004). To this list, one should now add **We Face the Dawn**, by Margaret Edds, a journalist now retired from the Norfolk *Virginian-Pilot*.[66] The plural first person pronoun in the title is explained by her subtitle: "Oliver Hill, Spottswood Robinson, and the Legal Team that Dismantled Jim Crow." Her readable and prodigiously researched volume, based on sources in most instances scattered among local and regional libraries and archives, should be of particular interest not only to students of the Court and civil rights, but also to anyone interested in Virginia history and politics and, by extension, the history of other southern states especially in the 1940s and 1950s.

Oliver Hill and Spottswood Robinson worked closely with Thurgood Marshall in the litigation that became *Brown v. Board of Education*. Both were on one of the briefs in *Brown* and Robinson participated with Marshall in the oral argument in *Davis v. School Board of Prince Edward County*, the Virginia case the Court joined with the *Brown* case from Kansas. Each advocate was Virginia-born as well as a graduate of the Law School at Howard University. Both were therefore familiar with life in a racially segregated Virginia. As Edds notes, Virginia enacted its first separate-car law for railroads in 1900, but "Jim Crow had long been the de facto policy of life in Richmond and elsewhere in Virginia in settings ranging from hospitals to cemeteries...." Segregation on street cars changed from local option to a statewide policy in 1906. As was often true elsewhere post-*Plessy*, separate "most assuredly did not mean equal." She reports, for example, that in the 1920s, Virginia spent "four times as much educating each white as it did educating each black child." While there were 400 public four-year high schools for whites, only eight existed for blacks.[67]

As one would expect, the bulk of Edds's book centers on Hill and Robinson's antisegregation litigation. The author begins the story in Gloucester County in extreme southeastern Virginia with the lawyers' efforts in 1948 to equalize black schools both materially and fiscally with their white counterparts. They were following a plan laid out some years earlier by Charles Houston, Howard Law School's vice dean, who had "articulated a desegregation strategy hinged on the absurdity of trying to make separate facilities for blacks and whites truly equal. Once the cost and impracticality of the effort became clear, Houston predicted, integration would follow."[68] The objective was to make operating dual yet constitutionally legitimate school systems prohibitively expensive by attacking the separate but equal standard at its weakest point: the absence of equality. The Virginians were busy indeed, "filing more lawsuits demanding equal schools than any other grassroots legal team in the nation."[69]

Attention much later in the book shifts to the preparation in New York that went into the briefs once *Brown* and its companion cases were on the Supreme Court's docket. While, according to Edds, no transcripts remain of the Legal Defense Fund's (LDF) planning session, she explains that the briefs reveal their conclusions. First, *Plessy*



Spottswood Robinson III and Oliver W. Hill, Jr., NAACP lawyers in Virginia and graduates of Howard University law school, worked closely with Thurgood Marshall in the litigation that became *Brown v. Board of Education.* Both were on one of the briefs in *Brown* and Robinson participated with Marshall in the oral argument in *Davis v. School Board of Prince Edward County*, the Virginia case the Court joined with the *Brown* case from Kansas.

was to be treated as a transportation, not an education, case. More recent decisions such as *McLaurin* and *Sweatt*, which for counsel spoke to the inherent inequality and injury of an education grounded in mandatory segregation, had supplanted *Plessy*.[70] Second, "social science research bolstered the commonsense understanding that forced segregation branded a minority group as inferior." Thus, rather than pursue Houston's earlier strategy of applying *Plessy* with a vengeance, the LDF leadership shifted to a more nuanced approach. Third, "those who warned of violence and social upheaval had sounded such alarms before. ...White southerners were not so lawless as to disobey the highest court in the land."[71]

At this point in her analysis, Edds might have queried the wisdom of the plan to push ahead with bolder attacks on school segregation before adequately securing voting rights, where progress, although modest at best, had already been made. After all, were the school litigation to be successful, implementation of court orders would depend on the cooperation in most instances of locally elected officials. If black citizens remained politically powerless, those officials would remain politically accountable to the voters who opposed—not favored—dismantling of the old order.

Alongside the emphasis on litigation, Edds has included generous amounts of biographical information on both Hill and Robinson. Hill had a long and successful law practice, but Robinson had public involvement. In 1961, President John Kennedy nominated Robinson to be one of the first members of the newly established Civil Rights Commission and the Senate confirmed him 73–17, with leading Democrats, including his home state's senators, in the opposition. Kennedy named Robinson to the U.S. District Court for the District of Columbia in October 1963, but the Senate took no action. Not until President Lyndon Johnson placed him on the

district court through a recess appointment in early 1964 did Robinson become a federal judge. Johnson then advanced Robinson to the U.S. Court of Appeals for the District in 1966, where he later shared the bench with judges such as Robert Bork, Antonin Scalia, and Ruth Ginsburg and served as chief judge from 1981 until 1986.

Edds includes Justice Ginsburg's recollection of Robinson's demanding work ethic and emphasis on perfection. "Ginsburg acknowledged being exasperated at her colleague's unwillingness to release an opinion until every possible thread had been woven into the cloth. 'He was meticulous. This was the biggest problem with him.'" Edds adds that the appeals court "adopted a rule, known informally as the Robinson Rule, requiring that any judge with three opinions pending for ninety days or more could not sit on another case until he had whittled down the backlog."[72]

Edds's book is an ample reminder of two important realities illustrated not only by the other books surveyed here but also by many sources cited here. First, judges in the United States are active participants in shaping public policy on a wide variety of issues, to a degree and extent beyond anything those of the framers' generation could have imagined. Second, cases that the Supreme Court decides do not materialize out of thin air. The Justices do not conjure them up. Instead, cases result from litigants who press forward with interests and values important to them. Yet in all but a small handful of instances, those litigants also require counsel who articulates those values and interests to the justices within the language of the law.

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

EDDS, MARGARET. **We Face The Dawn: Oliver Hill, Spottswood Robinson, and the Legal Team That Dismantled Jim Crow.** (Charlottesville, VA: University of Virginia Press, 2018). Pp. xii, 391. ISBN: 978-0-8139-4044-1, cloth.

LUXENBERG, STEVEN. **Separate: The Story of *Plessy* v. *Ferguson*, and America's Journey from Slavery to Segregation.** (New York: W.W. Norton, 2019). Pp. xix, 600. ISBN: 978-0-393-23937-9, cloth.

SIMON, JAMES F., **Eisenhower vs. Warren: The Battle for Civil Rights and Liberties.** (New York: Liveright Publishing, 2018). Pp. xvii, 427. ISBN: 978-0-87140-755-9, cloth.

ENDNOTES

[1] James Bryce, **The American Commonwealth** (rev. ed., 1921), vol. 1, p. 73. Bryce's work was initially published as three volumes in 1888. He was British ambassador to the United States in 1907–1913. This quotation is from a two-volume edition Macmillan issued in 1921.

[2] Stephen K. Medvic, **Campaigns and Elections** (New York: Routledge, 2nd ed., 2014), pp. 143–44.

[3] Stephen J. Wayne, **The Road to the White House 1996** (New York: St. Martin's Press, 1996), pp. 6-14.

[4] Theodore H. White, **The Making of the President** 1960 (New York: Atheneum Publishers, 1961). Democrats had nominated New York's governor Al Smith, a Roman Catholic, in 1928. Winning only 87 electoral votes, Smith lost badly to Republican Herbert Hoover who received 444.

[5] James F. Simon, **Eisenhower vs. Warren** (New York : Liveright, 2018), hereafter Simon.

[6] Eisenhower is the last American President born in the nineteenth century, just as Warren is the last Chief Justice to have been born before the twentieth century.

[7] The former Alameda County district attorney and state attorney general, Warren was the first person to win three successive terms as California governor.

[8] Until the widespread use of binding primaries and caucuses, it was common well into the 1950s for a state's convention delegation initially to support someone from its state as a tool allowing state leaders to negotiate with leading candidates for favorable treatment.

[9] Simon, p. 102.

[10] *Id.*, p. 100.

[11] *Id.*, p. 101.

[12] *Id.*

[13] *Id.*, 79.

[14] *Id.*, p. 105.

[15] *Id.*, p. 123. Eisenhower's four southern states in 1952 were Florida, Tennessee, Virginia, and Texas.

[16] *Id.*, p. 113, n.

[17] *Id.*, p. 133.

[18] William Henry Harrison, Zachary Taylor, and Andrew Johnson.

[19] Moreover, with the exception of George Washington, who named three Chief Justices, no other President has named more than one.

[20] Simon, p. 136.

[21] *Id.*, pp. 136-37.

[22] *Id.*, pp. 138-39.

[23] *Id.*, pp. 139-40.

[24] *Id.*, p. 140.

[25] Of the twenty-three Supreme Court nominees since the start of Richard Nixon's presidency (1969-1974), all but four (Lewis Powell and William Rehnquist in 1971, Harriet Miers in 2005, and Elena Kagan in 2010) had judicial experience.

[26] Simon, p. 140.

[27] Henry J. Abraham attributes the delayed confirmation to the "perverse opposition" of Judiciary Committee chair Senator William Langer of North Dakota, who had begun his "prolonged six-year campaign of opposing any and all nominees to the Court until someone from his home state (which had never been so honored) received an appointment." Abraham adds that Langer was assisted by "a few conservative Southern Democrats, who joined the attack on what they called Warren's left-wing, ultra-liberal views." See Henry J. Abraham, **Justices Presidents, and Senators** (Maryland: Rowman & Littlefield, 5th ed., 2008), p. 202. In contrast, Simon writes nothing about the home-state factor but attributes Langer's opposition to the senator's isolationist views and his belief that Warren was a "closet Marxist." Simon, p. 174.

[28] 347 U. S. 483 (1954).

[29] In their 1952 platform, Democrats carried over most of the 1948 platform provisions on civil rights and commended the Justice Department for pursuing "the elimination of many illegal discriminations, including those involving rights ... to enroll in publicly supported higher educational institutions." "Democratic Platform of 1952," in Arthur M. Schlesinger, Jr., **History of U.S. Political Parties**, vol. 4, (New York: Chelsea House Publishers, 1973), p. 3280. Republicans were at once both more and less bold. Advocating federal antilynching laws, abolition of poll taxes, the end of segregation in the District of Columbia, and laws banning "discriminatory employment practices," the party also recognized "the primary responsibility of each State to order and control its own domestic institutions," while recognizing the duty of the national government to "take supplemental action within its constitutional jurisdiction to oppose discrimination against race, religion or national origin." "Republican Platform of 1952," in *id.*, p. 3291.

[30] Because the District of Columbia was not a state and therefore not subject to section one of the Fourteenth Amendment, school segregation in the District was challenged in separate litigation under the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[31] Simon, p. xiii.

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

[33] 449 U.S. 294 (1955).

[34] Simon, p. xiv.

[35] "Declaration of Constitutional Principles Issued by 19 Senators and 77 Representatives of the Congress," *New York Times,* March 12, 1956, p. 19.

[36] Simon, pp. 306-307.

[37] 358 U.S. 1 (1958).

[38] 5 U.S. (1 Cranch) 137 (1803).

[39] *Dennis v. U.S.*, 341 U. S. 494 (1951).

[40] Probably the most controversial of these rulings included: *Pennsylvania v. Nelson,* 350 U.S. 497 (1956), holding invalid state laws punishing sedition against the United States, on grounds of federal pre-emption); *Jencks v. United States*, 353 U.S 657 (1957), overturning the conviction of a union official who had falsely sworn that he was not a member of the Communist party, after defense counsel had been denied access to FBI reports on the key witnesses; *Watkins v. United States*, 354 U.S. 178 (1957), overturning a conviction for contempt of Congress of one who, on First Amendment free speech grounds, had refused to answer questions posed by the House Committee on Un-American Activities, and boldly casting doubt on the constitutionality of Congress's investigatory power when used to expose someone's political beliefs; and, *Yates v. United States*, 354 U.S. 298 (1957), reversing convictions for subversive activity under the Smith Act by requiring a higher level of proof for the "advocacy" of overthrow that the statute prohibited.

[41] For a concise summary of the turbulence, see William Lasser, **The Limits of Judicial Power** (Chapel Hill: University of North Carolina Press, 1988), pp. 168-74. For a detailed account, see Walter F. Murphy, **Congress and the Court** (Chicago: University of Chicago Press, 1962), pp. 82-241.

[42] Simon, pp. 272-73.

[43] *Id.*, p. 273.

[44] 347 U.S., at 494.

[45] 163 U.S. 537 (1896).

[46] The Louisiana statute contained an exception that "nothing in this act shall be construed as applying to nurses attending children of the other race."

[47] *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

[48] Steve Luxenberg, **Separate** (New York : W. W. Norton & Company, 2019), hereafter Luxenberg.

[49] *Id.*, p. 446.

[50] *Id.*, xiii-xiv.

[51] *Id.*, p. 473.

[52] *Id.*, p. 9
[53] *Id.*, p. 4.
[54] *Id.* p. 5.
[55] *Id.*, p. 425.
[56] *Id.*, p. 431.
[57] *Id.*, p. 439.
[58] 95 U.S. 485 (1878).
[59] 133 U.S. 587, 592 (1890).
[60] Anyone interested in state and federal civil rights cases, statutes, and presidential statements prior to 1970 would do well to consult Richard Bardolph, ed., **The Civil Rights Record: Black Americans and the Law, 1849-1970** (New York: Crowell, 1970), a carefully compiled volume of 558 pages with documents and commentary that is a treasure.
[61] See 163 U.S. 539 (1896).
[62] Luxenberg, p. 476.
[63] *Id.*, p. 475.
[64] *Id.*, p. 480.
[65] 163 U.S., at 559-60.
[66] Margaret Edds, **We Face the Dawn** (Charlottesville: University of Virginia Press, 2018). Hereafter, Edds.
[67] *Id.* p. 19.
[68] *Id.*, p. 4.
[69] *Id.*, p. 6.
[70] *McLaurin v. Oklahoma State Regents*, 639 U. S. 337 (1950) is discussed in David W. Levy, "*Before Brown*: The Road to Integration of American Higher Education," *Journal of Supreme Court History*, vol. 24 (1999) pp. 298-313. In *Sweatt v. Painter,* 339 U.S. 629 (1950), an applicant who had been denied admission to the University of Texas Law School solely on the basis of color successfully argued that the instruction and resources available in the newly established state law school for blacks were markedly inferior to the main university's so that equal protection of laws was thus denied. The Court's unanimous opinion by Chief justice Vinson strongly suggested that it was virtually impossible in practice, at least in professional education, for a state to comply with the separate-but-equal doctrine. *Sweatt* thus anticipated the thrust of Chief Justice Warren's opinion in *Brown* and left *Plessy*'s creation hanging by a hair.
[71] Edds, p. 239.
[72] *Id.*, p. 98.

Contributors

Amanda C. Bryan is an Assistant Professor at Loyola University, Chicago.

Louis Fisher is Scholar in Residence at the Constitution Project and a Visiting Professor at the William and Mary Law School.

Rachael Houston is a Ph.D. candidate at the University of Minnesota.

Timothy R. Johnson is the Morse Alumni Distinguished Professor at the University of Minnesota.

David W. Levy is retired as the Irene and Julian J. Rothbaum Professor of Modern American History and David Ross Boyd Professor of History at the University of Oklahoma.

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

James A. Todd is an Assistant Professor of Politics at Palm Beach Atlantic University.

Illustrations

Page 9, Photograph by John Adams Whipple, Collection of the Supreme Court of the United States
Page 12, Photograph by Franz Jantzen, Supreme Court of the United States, Courtesy of the U.S. Senate
Pages 17, 23, Library of Congress
Page 19, drawing by C.G. Bush, 1868, Library of Congress
Page, 32, 34, 37, Western History Collections/University of Oklahoma
Pages 39, Oklahoma Historical Society
Pages 45, 54, 56, 59, Papers of Harry A. Blackmun, Library of Congress
Page 48, Collection of the Supreme Court of the United States
Pages 69, 71,74, 77, 91, Library of Congress
Page 97, National Archives
Page 100, Library of Congress, NAACP Collection

Cover: Photo by Franz Jantzen. Collection of the Supreme Court of the United States.