Introduction

MELVIN I. UROFSKY

We go to press just a few weeks after the death of Justice Ruth Bader Ginsburg, who in her nearly three decades on the high court was a good friend of the Society and of the *Journal*. We will have tributes to her in our next issue.

This issue is notable in that we have two articles on the same subject, Justice Willis Van Devanter, as well as two articles by the *Journal's* family, as it were.

Clare Cushman had been the managing editor of the *Journal* even before I became editor in the early 1990s, and the high quality of its production is entirely due to her. But Clare is also an officer of the Society, in that she is Director of Publications, as well as a practicing historian. In fact, one of her many titles is Resident Historian at the Society. Her contribution to this issue is "Sons of Ohio: William Rufus Day, Nepotism and his Law Clerks."

The practice of Supreme Court justices hiring young men (and they were all men until the 1940s) as clerks, or as they were often called, "secretaries," began in the 1870s, although it would be many years before all justices had clerks. Day, whom Theodore Roosevelt appointed to the bench in 1903, had four sons, and he hired three of them as his clerks. Not only would this nepotism be frowned upon today, but so would the fact that at least one of them kept up an active private law practice while working for the Justice.

Timothy S. Huebner's day job is Associate Provost and Sternberg Professor of History at Rhodes College in Memphis. But he also puts in great effort as the associate editor of the *Journal*. His *Liberty and Union: The Civil War Era and American Constitutionalism* (2016) is now considered one of the leading studies of that subject.

Tim's article discusses a phenomenon that very few of us knew about, or even that it existed, "Black Constitutionalism." As he shows, there was an articulate constitutional thought within the African-American community well before the Civil War, as people of color, even if free in Northern states, tried to develop a theory of how they—and their enslaved brethren—fit into the American constitutional scheme. When the Taney Court handed down its decision in *Dred Scott*, they now had to respond to the Chief Justice's opinion that blacks could not be citizens.

We have two articles on Justice Willis Van Devanter, remembered primarily as one of the Four Horsemen who tried to scuttle reform legislation in the 1920s and then

the New Deal in the 1930s. Because he did not write as many opinions as most of his brethren, Van Devanter often shows up on lists of "forgotten justices." However, Louis D. Brandeis thought highly of him, and often sought "Van's" thoughts on his majority opinions before circulating them. He told Felix Frankfurter that Van Devanter was like a Jesuit, quietly exerting great influence.

Both Robert Post, Sterling Professor of Law and former dean of the Yale Law School, and Mark Tushnet, William Nelson Cromwell Professor of Law emeritus at Harvard Law School, are past contributors to the *Journal*. Moreover, both articles are adopted from the volumes they are writing for the Holmes Devise, Post for that on the Taft Court, and Tushnet for the one on the Hughes Court. It is a usual practice for the authors of the Holmes Devise to write biographical sketches of the men who served on that Court. Tushnet is here looking at the man behind the robes, while Post is looking at the unique role Van Devanter played on the Taft Court.

Berea College v. Kentucky (1908) is one of the main pillars of the Supreme Court's ratification of Jim Crow apartheid. Ronald S. Rauchberg is a retired litigation partner at Proskauer Rose, and he writes here about a little known aspect of that case, how the justices adopted scientific racism in deciding that case. Scientific racism was certainly no stranger to Americans in the early decades of the 20th century, and it did not go out of fashion until the Nazis used it to justify their persecution and then murder of Jews and other minorities.

Finally, although Grier Stephenson now bears the title of Charles A. Dana Profess of Government emeritus at Franklin & Marshall, he, like many other emeriti, just keeps on contributing to scholarship. Grier has been writing the judicial bookshelf for many years, and we hope he will continue to do so for many more to come.

As usual, it is a feast, and we invite you to enjoy.

"In Defiance of Judge Taney": Black Constitutionalism and Resistance to *Dred Scott*

TIMOTHY S. HUEBNER

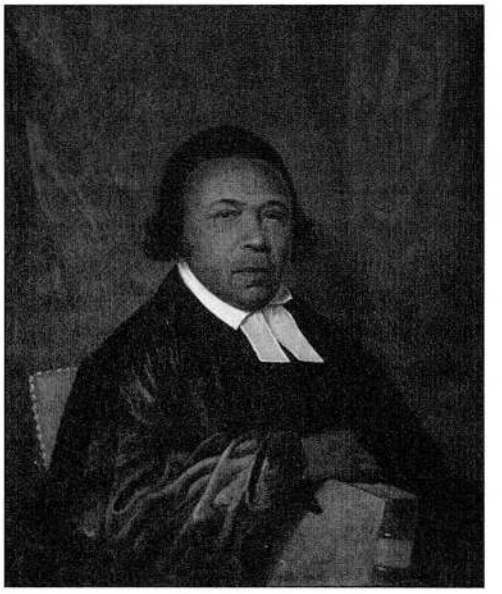
In 1857, in *Dred Scott v. Sandford*, the most infamous decision in the history of the United States Supreme Court, Chief Justice Roger B. Taney denied that African Americans, whether enslaved or free, could be citizens of the United States. In doing so, Taney wrote these memorable words: "It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence.... They had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race ... and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[1] Decades before the Court's decision, African-American leaders in the North had fashioned their own understanding of their relationship to America and its founding documents. Confronted with the Supreme Court's decision, African Americans refused to surrender. They neither accepted the ruling's legitimacy nor its claim that they had no place in the national community. Instead, African Americans held tightly to their own distinctive vision of equality—black constitutionalism—and in so doing helped redefine citizenship in the Civil War era.

Black Citizenship and Black Constitutionalism

Citizenship was an elusive concept in the early American republic. The Constitution itself used the term sparingly. The word "citizen" appeared mostly in referring to requirements for holding federal office and in describing the types of suits heard by federal courts. The one part of the Constitution that referred to the rights of citizenship—Article IV, Section 2—seemed to leave the matter of defining such rights to the states: "The

Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." From the text alone, moreover, the relationship between U.S. citizenship and state citizenship was unclear. Equally ambiguous was whether the Bill of Rights served as a list of rights for all U.S. citizens, or whether it also limited state power and thus related to state citizenship. In some instances, the Constitution and the Bill of Rights seemed to use the words "citizen," "person," and "people" interchangeably, a source of further confusion. During its early history, Congress passed no specific legislation to clarify such matters. Given the indeterminate nature of the concept of citizenship, as well as textual ambiguity about the institution of slavery (the word "slavery" was never actually mentioned in the Constitution), the question of black citizenship was an open one.[2] At the time of the ratification of the Constitution, apart from an enslaved population of nearly 700,000, approximately 59,000 free black people lived in the United States, which included about 27,000 free blacks who resided in the northern states.[3]

Soon after the ratification of the Constitution, northern free blacks attempted to craft their own understanding of the founding documents and blacks' relationship to the nation. In doing so, they championed citizenship and rights for all African Americans, free and enslaved.[4] In 1799,for example, the free black community of Philadelphia, an emerging center of black protest, submitted a petition to Congress making such an argument. Led by Absalom Jones, a remarkable former slave from Delaware who had purchased his freedom and become the first priest of the first black Episcopal Church in the United States, the Philadelphia black community called for the end of the African slave trade and criticized the federal Fugitive Slave Act of 1793. The petitioners noted that neither the Constitution nor the Fugitive Slave Act mentioned black people or slaves. Rather, when slaves were referred to, it was always as "persons."[5] For this reason, they continued,



Leader of the free black community of Philadelphia, Absalom Jones called for the end of the African slave trade. He argued it violated the Constitution, which referred to slaves as "persons."

> If the Bill of Rights or the Declaration of Congress [Declaration of Independence] are of any validity, we beseech, that as we are men, we may be admitted to partake of the Liberties and unalienable Rights therein held forth—firmly believing that the extending of Justice and equity to all Classes, would be a means of drawing down the blessings of Heaven upon this Land.

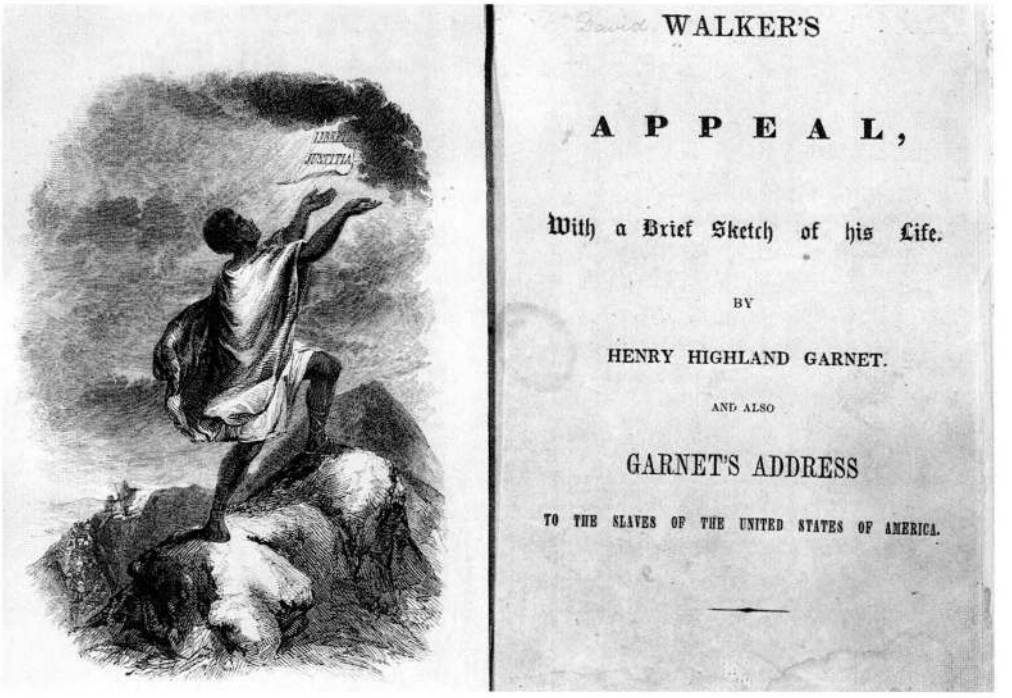
In so arguing, Jones not only asserted that slavery violated the U.S. Constitution, he also claimed that all blacks should possess rights of citizens. Although Congress ignored the petition, black constitutional activism had made an auspicious debut.[6]

During the first few decades of the nineteenth century, free African Americans did secure some rights in northern states. A majority of states in the North allowed blacks

to testify in court against whites, but Ohio, Illinois, and Indiana all had laws preventing free blacks from even settling within their borders. In five New England states (where few blacks actually lived), free African Americans possessed the right to vote, but only in Massachusetts could blacks serve on juries. Between 1818 and 1820, Connecticut and New Jersey amended their constitutions to end black voting, and at around the same time, New York imposed property qualifications for black voters. In the midst of these struggles, black leaders continued to advance their own understanding of equality, by using the language of the American founding. One of the signers of Jones' Philadelphia petition, James Forten, a successful businessman, emerged as a particularly powerful voice within the black community. In his **Series of Letters by a Man of Color,** written in 1813 in response to proposed restrictions on the rights of blacks in Pennsylvania, Forten appealed to the Declaration of Independence. "We hold this truth to be self-evident, that God created all men equal," Forten wrote, "is one of the most prominent features of the Declaration of Independence, and in that glorious fabric of collected wisdom, our noble Constitution. This idea embraces the Indian and the European, the savage and the Saint, the Peruvian and the Laplander, the white man and the African, and whatever measures are adopted subversive of this estimable privilege, are in direct violation of the letter and spirit of our Constitution."[7]

Within a few years, some African-American voices called for American blacks to migrate to Africa, thus supporting the establishment and subsequent settlement of the African nation of Liberia. Still, the vast majority of black activists joined Forten in both claiming the American constitutional heritage as their own and in aiming to improve the lot of blacks in the United States. Despite the grim economic realities of second-class status—most worked in some service capacity or performed menial labor, particularly in cities—free blacks in the North enjoyed far more rights and experienced far better living conditions than their free counterparts in the South, with the presumption of freedom constituting a key difference.[8]

Northern freedom fueled further black protest. In 1827, Samuel Cornish and John Brown Russwurm began publishing the nation's first black newspaper, *Freedom's Journal*, in New York City. The paper emphasized American and Christian ideals, promoted moral uplift among the black population, and hoped to advance the cause of freedom by helping African Americans earn the respect of whites. David Walker took a harsher tack. Born a free black man in North Carolina, Walker learned to read and write, joined the Methodist Church, and eventually moved to Boston. In 1829, Walker published in four parts his *Appeal to the Coloured Citizens of the World*, in which he sharply criticized the nation's treatment of its black population. Walker echoed Forten in using the Declaration of Independence as the standard against which to measure the nation's treatment of its black population. "See your Declaration Americans!!!" Walker implored his readers. "Do you understand your own language? Hear your language, proclaimed to the world, July 4th, 1776—'We hold these truths to be self evident—that ALL MEN ARE CREATED EQUAL!! that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness!!'" Walker went on: "Compare your own language above, extracted from your Declaration of Independence, with your cruelties and murders inflicted by your cruel and unmerciful fathers and yourselves on our fathers and on us—men who have never given your fathers or you the least provocation!!!!!!"[9] Walker surely inspired the black people, free and enslaved, who read or heard of his stirring words. In making such arguments rooted in the American founding—whether or not they included the charge of white hypocrisy—free black



David Walker's galvanizing pamphlet, originally published in 1829, urged African Americans to take the risk of fighting for their freedom and equality.

activists asserted absolute political equality as a fundamental American principle.[10]

In 1830, the year after the appearance of Walker's *Appeal*, a small group of African-American leaders held the first national convention devoted to black advancement. At the urging of Hezekiah Grice, a Baltimore activist, forty delegates from Delaware, Maryland, Massachusetts, Pennsylvania, and New York gathered at Bethel Church in Philadelphia.[11] Although they ended up passing a resolution endorsing black emigration from the United States, more important than the substance of the discussion was the precedent that it set. Belief in emigration waned, but the mode of assembling in convention, rooted in the history of the founding of America, proved an enduring model of black activism. Motivated by protest pamphlets and newspapers and connected through a network of black churches and Masonic lodges, free African Americans embraced this overtly political and constitutional model of protest. That is, assembling as a body of delegates, discussing issues, voting on resolutions, and announcing those resolutions to the public both revealed the American identity of those who assembled and set a course for the next four decades of black activism in the United States. In fact, for the next five years in a row, national conventions of free African-American delegates met, usually in Philadelphia, to discuss a broad range of issues, and such meetings continued sporadically over the next few decades. Between 1830 and 1861, African Americans held eleven national conventions, as well as scores of state and local conventions throughout the northern states.[12] Convention delegates included ministers, writers, editors, businessmen, and other professionals—almost all of them men—who constituted the antebellum era's most distinguished black leaders.

The black convention movement, as well as the leaders and ideals that it spawned,

wrought a slow transformation in the legal treatment of northern blacks. Beginning in the early 1840s, the legal status of northern African Americans gradually improved. State judges in some instances began freeing slaves who were traveling in the North, while many northern states began to enact personal liberty laws to protect fugitive slaves who had escaped from the South. Over the next two decades, northern blacks made concrete gains under the law. In 1841, New York enacted legislation that guaranteed public education to all children in the state, regardless of race. In 1849, the Ohio legislature repealed its repressive "black laws," thereby allowing unrestricted black immigration, providing some public education for African Americans, and permitting blacks to testify in court against whites. And in 1855, Massachusetts enacted legislation providing public education to students on a racially integrated basis. Most of the free states became increasingly hospitable to African Americans, and the growth rate of the northern free black population—nearly five-fold between 1800 and 1860—outpaced that of the enslaved or free black populations of the South during the same period.

Black conventions not only helped bring about concrete legal advances for northern blacks, they also embodied the spirit of black constitutionalism. The notion of a written constitution as a supreme law figured prominently in the thinking of the founding generation. Because it supposedly embodied higher principles, the Constitution became a sacred public text, and constitutionalism, the belief in adhering to and governing under a constitution, became a central feature of mainstream American life and thought.[13] Through their convention activities, black leaders offered their own expression of constitutionalism, their own interpretation of the American founding. Idealist in their orientation, they combined the principle of political equality inherent in the Declaration of Independence, the notion that the Constitution referred to slaves as "persons" rather than property, and the ideal of Christian brotherhood under the fatherhood of God into a powerful, comprehensive critique of both slavery and white supremacy. In contrast to Garrisonian abolitionists who condemned the Constitution as pro-slavery, black constitutionalists viewed the document as "the foundation of American liberties."[14] Unlike white abolitionists generally, moreover, who narrowly attacked southern slavery, black constitutionalists took aim at the entire legal apparatus of white supremacy in both the North and the South. While white abolitionists mostly avoided questions about what rights blacks should possess in a postemancipation republic, black constitutionalists unabashedly took a moral stance in support of equality. Through newspapers, pamphlets, books, and speeches, and through organizing in local churches, lodges, and national conventions, black activists consistently advocated this distinctive brand of American constitutionalism.[15]

Black constitutionalism was an expression of both belonging and aspiration. It revealed the American identity of African Americans, a people whose roots in the country often went back generations and who had a hard time imagining themselves outside of the American republic. At the same time, black constitutionalism aspired to a better America, a more inclusive nation in which liberty would triumph over slavery and transcend any distinctions of race or color.[16] It included both a reading of the past and an agenda for the future. "We are Americans. We were born in no foreign clime," explained the delegates of the 1840 Convention of the Colored Inhabitants of New York. "We have not been brought up under the influence of other strange, aristocratic, and uncongenial political relations. In this respect, we profess to be American and republican."[17] More than a rhetorical tradition or "a counter-narrative of slavery and freedom," black constitutionalism represented the deepest hopes and beliefs within the black community—the desire to claim

all they thought they deserved as Americans, clinging to the promise of human dignity inherent in their Christian beliefs and implied in Jefferson's Declaration of Independence.[18] To be sure, black constitutionalism was not the only strain within the black protest tradition. Some continued to advocate emigration, particularly after the passage of the Fugitive Slave Law of 1850, and during the 1850s occasional calls emerged for violent resistance to slavery and racial oppression. But black constitutionalism did represent the dominant and most persistent way of thinking within the black community, for it encompassed both principles and processes, which were simultaneously sincere and strategic.[19]

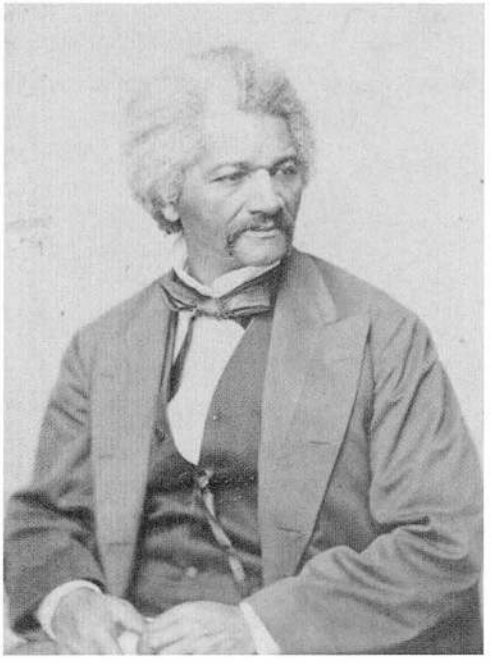
No one personified antebellum black constitutionalism better than Frederick Douglass. Born into bondage in Maryland in 1818, the son of a white father and a slave mother, Douglass proved a powerful firsthand witness against the horrors of slavery. Douglass' most famous oration, "What to the Slave Is the Fourth of July," emphasized America's failure to live up its principles. Delivered in Rochester, New York in 1852, the speech praised the founders of the country as brave, heroic men who had been willing to sacrifice their lives for the sake of liberty. Douglass urged his audience to honor the founders, the Declaration of Independence, and the date on which it was signed. "The 4th of July is the first great fact in your nation's history—the very ring-bolt in the chain of your yet undeveloped destiny."[20] But Douglass lamented that the ideals which it enunciated did not apply to those of his race, a fact which made a celebration of the nation's birth little more than a charade.

> What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; ... your shouts of liberty and equality, hollow mockery.

If Douglass criticized Americans for failing to live up to their own principles, in the process he exalted and venerated both the Declaration and the Constitution, the latter of which he described as "a glorious liberty document." Offering a critique of the Garrisonian position to which he had once subscribed, Douglass characterized the Constitution in favorable terms. "Read its preamble, consider its purposes. Is slavery among them? Is it at the gateway? Or is it in the temple? It is neither." Arguing that both the Declaration of Independence and the Constitution served as foundational texts for black advancement, by the 1850s Douglass became the foremost advocate of black constitutionalism.[21]

The Black Response to Dred Scott, 1857–1859

Five years after Douglass' famous speech, Taney rendered his infamous opinion. The case of *Dred Scott v. Sandford* (1857) involved an enslaved Missourian, Scott, who alleged that his travels and residence in free territory with his deceased former master, army surgeon John Emerson, made him a free man. Although Scott initially filed his freedom suit in 1846, it took a decade for his case to make it to the nation's highest court, and it did so at a time when the question of the extension of slavery into new territories dominated national politics. The chief justice devoted close to half of his opinion to the issue of Scott's citizenship, for only if he was a citizen of Missouri was Scott eligible to bring the case into federal court in the first place. Taney ruled that neither slaves nor free blacks could claim citizenship under the Constitution. "[T]he legislation and histories of the times, and the language used in the Declaration of Independence," Taney wrote, "show, that neither the class of persons



Frederick Douglass argued that both the Declaration of Independence and the Constitution served as foundational texts for black advancement. Born in bondage in Maryland, the son of a white father and an enslaved mother, Douglass is pictured here in 1870 at age 52.

who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument." Taney continued by claiming that blacks "had no rights which the white man was bound to respect."[22]

Taney wrote with a single-minded desire to deny black citizenship.[23] Two clauses of the Constitution, he argued, specifically identified the black race as a separate category excluded from the American political community: the Slave Trade Clause, which referred "unquestionably," in Taney's words, to "persons of the race of which we are speaking," and the Fugitive Slave Clause, which mandated the delivering up of escaped slaves. "[C]ertainly these two clauses were not intended to confer on [slaves] or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen," the chief justice asserted.[24] Because the Framers had deemed blacks inferior to whites, African Americans—whether slave or free—had no legitimate claims to citizenship. Neither could a state confer citizenship upon a black person within the meaning of the U.S. Constitution. Taney offered a racial notion of citizenship that presupposed white supremacy and disregarded any legal distinction arising from emancipation. "We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States," Taney wrote.[25] Although their precise legal status under the opinion remained unclear, the decision had an immediate effect on free African Americans. In response to the ruling, the federal government abruptly halted their preemption rights (the right to settle on new territorial lands), as well as their ability to obtain passports.[26]

Taney's denial of black citizenship reflected the dominant view on the Court and in the country. Although most of the other justices wrote shorter opinions that avoided the citizenship question, thus allowing the chief justice to speak for the Court, Justice Peter V. Daniel, a Virginian, struck a tone similar to that of Taney. "[T]he African negro race never have been acknowledged as belonging to the family of nations," Justice Daniel argued, "... and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term." The two antislavery northerners on the Court wrote dissenting opinions, in which they attacked Taney's view of citizenship. Justice John McLean emphasized slaves as "persons" under the Constitution and as human beings made in the image of God. "A slave is not a mere chattel," McLean wrote. "He bears the impress of his Maker, and is amenable to the laws of God and man;

and he is destined to an endless existence." Justice Benjamin Curtis' dissent made the point that, before the adoption of the Constitution, five states had granted blacks the right of suffrage, evidence that Curtis used to contradict Taney's claim that blacks could not be counted as members of the political community at the time of the founding.[27] Still, the majority of state courts in the North and the South during the era had ruled that African Americans could not be citizens. Even if his "they have no rights" rhetoric went beyond the legal language of these decisions, Chief Justice Taney's attempt to settle the matter of black citizenship probably reflected the general state of white legal opinion—and white public opinion—on the subject.[28]

African Americans, though, were determined to have their say in the matter, and Douglass led the way in rejecting Taney's interpretation of the founding. Barely two months after the decision, in a speech marking the anniversary of the American Abolition Society, the leading black abolitionist delivered a stirring oration. Outlining the recent history of attempts to "settle" the slavery issue, Douglass mocked the idea that Taney's decision offered the final word on slavery and the status of black people. "The fact is," Douglass argued, "the more the question has been settled, the more it has needed settling." Then, summarizing Taney's opinion, Douglass offered his response. "You will readily ask me how I am affected by this devilish decision—this judicial incarnation of wolfishness! My answer is, and no thanks to the slaveholding wing of the Supreme Court, my hopes were never brighter than now." Describing the decision as "a scandalous tissue of lies," Douglass asserted that abolitionists and African Americans should remain steadfast in their commitment to reform. "This very attempt to blot out forever the hopes of an enslaved people may be one necessary link in the chain of events preparatory to the downfall and complete overthrow of the whole slave system," he argued.[29] Douglass took the long view. Seeing the opinion as a necessary step toward arousing the national conscience, Douglass seemed certain that slavery was doomed.

Remarkably, Douglass grounded his hope in the American system of government. Drawing on the deep well of black constitutional values, Douglass succinctly stated these clear-eyed ideals:

> I know of no soil better adapted to the growth of reform than American soil.... The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime.[30]

Linking Taney's pro-slavery view of that Constitution with that of the abolitionist William Lloyd Garrison, Douglass dismissed their interpretation of the nation's founding document with regard to slavery, as well as Garrison's disunionist solution to the problem. The text of the Constitution was not the same as the administration and construction of it given by the Court, Douglass argued, and because the Constitution itself offered no specific "warrant for slavery," Douglass rejected the Taney/Garrison pro-slavery interpretation as "a most scandalous and devilish perversion of the Constitution, and a brazen misreading of the facts of history." To Douglass, the task at hand was simple and straightforward: "[A]ll I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit, and enforce its provisions."[31]

If Douglass focused mostly on undermining Taney's pro-slavery view of the Constitution, others emphasized blacks' status as citizens. A few months later, in a Fourth of July Address, Charles Lenox Remond, a

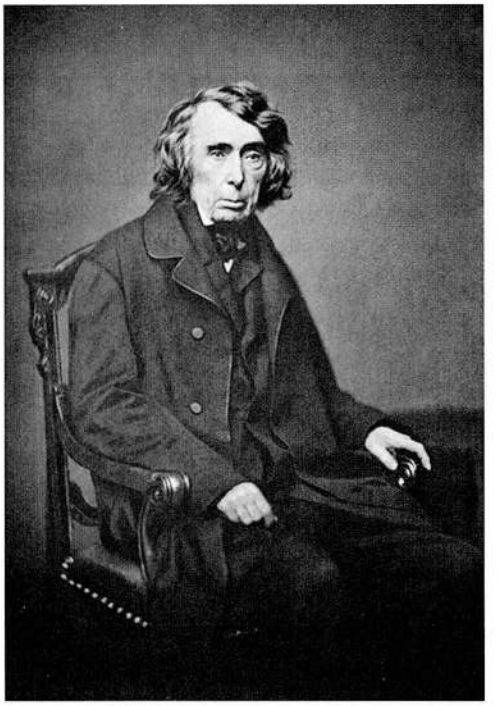
black abolitionist from Massachusetts, offered a sharp critique. "Shame on Judge Taney! Shame on the United States Supreme Court! ... My God and Creator has given me rights which you are as much bound to respect as those of the whitest man among you, if I make the exhibitions of a man," he stated. "And black men did make the exhibition of manhood at Bunker Hill, and Lexington, and Concord, as I can well testify." To Remond, who had been born to a prominent free black family in Salem, Massachusetts, it was not up to the justices to decide whether blacks possessed citizenship or rights. Instead, blacks' humanity, as well as their service and sacrifice in the American Revolution, conferred on them rights and dignity that demanded white Americans' recognition and respect. Noting Taney's "ingratitude," Remond went to so far as to lament the price that blacks had paid in participating in the Revolution, if such a decision was to be their reward. "I regret exceedingly that there is one single drop of blood in my own veins that mingle with the blood of the men who engaged in the strife on Bunker Hill and Lexington," Remond continued. "Better that any such man had folded his hands and crossed his knees, during the American Revolution, if this is the reward we are to derive from such hypocrites, such cowards, such panders to American slavery, as Judge Taney and his co-operators."[32]

Blacks' interpretation of American history played a critical role in resisting the Court's opinion and making the case for citizenship. A year after *Dred Scott*, in March 1858, two black abolitionists from Massachusetts, William Nell and Lewis Hayden, organized a public celebration to honor the memory of Crispus Attucks, one of the first martyrs of the American Revolution. Held at Boston's historic Faneuil Hall, the event included a host of abolitionist speakers, black and white, who drew a seamless connection between black sacrifice and black citizenship. For years, Nell had been researching and writing about Attucks, a Massachusetts slave who had lost his life in the Boston Massacre. In 1851, Nell had published the **Services of Colored Americans in the Wars of 1776 and 1812,** and four years later he wrote **Colored Patriots of the Revolution**. Both works contended that blacks had played an important role in the nation's founding and early history, and both made an impact on the push for citizenship. Drawing upon the historic connections between citizenship and soldiery, in some states African Americans went so far as to form vigilance committee and military companies in order to protect against slavecatching and kidnapping. Invoking the memory of the black patriot, many of these informal organizations used the name of Attucks.[33]

Some months after the Attucks celebration, in August 1858 the Convention of the Colored Citizens of Massachusetts, the first black convention to meet in the case had been decided, took a strong stance in opposition to the ruling based largely on this reading of the American past. William Wells Brown, the convention president, proclaimed "that we have rights, not granted by the American government, but by the Creator" and urged the assembled delegates to "recommend to the State to assume a defiant attitude towards the Dred Scott decision."[34] Lauding Justice Benjamin Curtis' dissent in the case, delegates agreed with his conclusion that blacks had been citizens in some states at the time of the founding and that Article IV of the Constitution thus affirmed that they possessed "the privileges and immunities of citizens in the several states." Moreover, proclaiming their devotion to their "native land" and describing "the claims of colored people" as "the claims of Americans," delegates offered their own version of the history of America, one that included the contributions of blacks in building the republic. They highlighted the role of Attucks, while also noting black American military sacrifice during the War of 1812.[35] Finally, delegates pledged to oppose the en-

forcement of *Dred Scott* with all their might, regardless of the cost, and in rejecting the notion of emigration, cast their lot with the country of their birth. On this point, Remond spoke for the convention: "We must resolve to remain here, in defiance of Judge Taney."[36]

Blacks' emphasis on citizenship and belonging stood in stark contrast to mainstream criticism of the decision. Across the North, Republican newspapers focused mostly on how the *Dred Scott* decision protected the interests of the Slave Power and undermined the possibility of sectional compromise.[37] In August 1858, just weeks after the Massachusetts Convention, Abraham Lincoln and Stephen Douglas began their debates for the U.S. Senate seat in Illinois which stretched over the next two months. They too debated *Dred Scott* as a slavery decision rather than as a citizenship decision, as a matter of slaveholders' rights rather than as a matter of blacks' rights. On black citizenship, the two were generally of the same mind. Douglas summarized his position in the first debate, which he repeated again and again. "I believe this government was made on the white basis," he announced. "I believe it was made by white men, for the benefit of white men and their posterity for ever, and I am in favour of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians and other inferior races." If Lincoln avoided Douglas' white supremacist rhetoric, he nevertheless admitted that, although he opposed the *Dred Scott* decision, he had "never complained especially of the *Dred Scott* decision because it held that a negro could not be a citizen."[38] Lincoln repeatedly attacked Taney's claim that Congress could not interfere with slaveholding in the territories, arguing that the founders had no intention to enshrine slaveholding as a constitutional right.[39] But he remained silent on Taney's conclusions about black citizenship. So, although Douglas and Lincoln profoundly disagreed over the issue of the rights of slaveholders in federal territories, they generally agreed that blacks could not be citizens.



Black Americans expressed outrage over Roger B. Taney's opinion in *Dred Scott* on the ground that it violated both the Constitution and the Declaration of Independence.

While Lincoln and Douglas debated in Illinois, black critics throughout the country went well beyond Lincoln's critique of *Dred Scott*. Taney's claim that blacks "had no rights that the white man was bound to respect" became a rallying point for the growing group of northern black activists who sought not only to end slavery but also to advance the cause of black citizenship and rights.[40] In September 1858, the Suffrage Convention of the Colored Citizens of New York, for example, excoriated the Court. "The Dred Scott decision is a foul and infamous lie—which neither black men or white men are bound to respect," the delegates exclaimed. They expressed particular outrage at Taney's interpretation of the Constitution and Declaration of Independence. "In order to satisfy the wolfish appetite of the oligarchy, Judge Taney and his concurring confederates were

obliged to assume that the once revered signers of the Declaration of Independence, and the framers of the Constitution, were a band of hypocritical scoundrels and selfish tyrants," the delegates proclaimed. Asserting that Taney's opinion violated American principles and precedents, including the Northwest Ordinance of 1787, (which had banned slavery north of the Ohio River), the delegates claimed the common humanity of blacks and whites, affirming a radically inclusive vision of equality. "We therefore, called upon all who subscribe to the theory of human rights set forth in the Declaration of American Independence, to trample, in self-defense, the dicta of Judge Taney beneath their feet, as of no binding authority."[41] The Convention of the Colored Men of Ohio, held in Cincinnati in November 1858, just a few weeks after Douglas' defeat of Lincoln, repudiated the decision in similar terms. "[W]e trample the Fugitive Slave Law and the dicta of the Dred Scott decision beneath our feet, as huge outrages, not only upon the Declaration of Independence and Constitution of the United States, but upon humanity itself." Delegates not only called for the abolition of slavery, but also for the repeal of "all laws that make complexional discriminations." Rejecting emigration, they resolved to remain and "achieve our rights at home."[42]

Strikingly, free blacks never attempted to argue with Taney by attempting to distinguish their own legal status from that of slaves. Instead, northern free black activists consistently made unequivocal claims to citizenship for all blacks, whether free or enslaved, thus emphasizing unity within the black community. African Americans in New York, for example, revolved that the Court's decision "is aimed not simply at the rights of the colored citizens of the Republic, but as slavery is the common enemy of man, and as its political supremacy has been authoritatively proclaimed by the majority of the Supreme Court, the natural rights of all who form a part of the nation are impudently invaded."[43] Similarly, Ohio delegates denounced slavery in no uncertain terms: "Millions of our brethren are publicly sold, like beasts in the shambles, that they are robbed of their earnings, denied the control of their children, forbidden to protect the chastity of their wives and daughters, [and] debarred an education and the free exercise of their religion." In doing so, delegates affirmed that "the great principles of Liberty and Equality which are the boast of our nation, were intended to apply to us and our unfortunate brethren, the slaves."[44] Taney had grouped all African Americans together, and rather than emphasizing their own legal advantages over slaves and free blacks in the South, free blacks in the North accepted the legal challenge posed by Taney's opinion. All blacks—slave and free—deserved citizenship.

The following year black leaders continued to criticize the *Dred Scott* decision, affirm their status as Americans citizens, and express hope for the future. In August 1859, the president of the New England Colored Citizens' Convention, George T. Downing of Rhode Island, made a passionate address, in which he argued that African Americans had an "inseparable, providential identity" with the United States that included a deep connection to the principles upon which it had been founded "which were the uplifting of man—universal brotherhood." Although he took note of "Fugitive Slave Laws, Dred Scott decisions, American Colonization Societies," he argued that while such things "annoy," they "cannot permanently affect us." Above all, he wanted his audience to know that he remained hopeful. "I wish it to be emphatically noticed, that WE DO NOT DESPAIR—that we are scanning the bright future." Unwilling to accept the notion of America as a white man's country in which blacks had no rights, the assembly crafted a resolution that rejected the decision as "marked by a brutality of spirit, ... a wanton perversion of the Constitution of the United States with regard to the rights of American

citizens [and] an audacious denial of all the principles of justice and humanity." Delegates not only rejected emigration as an alternative, they also decided to form a committee that would, in consultation with black leaders throughout the North, petition Congress to "remove the disabilities under which we now labor, on account of the unrighteous Dred Scott decision."[45] Black New Englanders made it clear that, remaining in America, they would continue to organize and petition for progress. In Massachusetts, for example, their petitions were heard. The state allowed black critics of the decision—Nell, Hayden, and Robert Morris—to address a state legislative committee hearing on the subject.[46]

To be sure, there were other types of black responses to the *Dred Scott* decision. Just a few months after the Court's ruling, Robert Purvis, a mixed-race abolitionist from Pennsylvania, delivered a powerful speech before the American Anti-Slavery Society in which he lambasted the notion that the Constitution was antislavery or conducive to the advancement of the rights of blacks. While critical of whites who argued that the Constitution was antislavery, he found African Americans' devotion to constitutional principles particularly galling. "Are we to clank the chains that have been made for us, and praise the men who did the deed?" he wondered. "Are we to be kicked and scouted, trampled upon and judicially declared to '*have no rights which white men are bound to respect*,' and then turn round and glorify and magnify the laws under which all this is done?" Purvis thought such arguments "at variance with common sense" and "an idle phantasy." A significant minority of African Americans surely shared Purvis' sentiments. And during the late 1850s African-American leaders such as Martin Delany and Henry Highland Garnett turned increasingly toward the possibility of emigration.[47]

Still, the promise of America resonated with African Americans on a deep level, and the struggle to make the nation's founding principles a reality would continue. As the historians James O. Horton and Lois E. Horton argue, "The most common response among African Americans to the federal assaults of the 1850s was an even greater commitment to liberty and equality."[48] During the years after the *Dred Scott* decision, the voices of African Americans loudly and clearly rejected Taney's narrow, race-based definition of citizenship and rights. Never questioning the legitimacy of the U.S. Supreme Court or its power of judicial review, black activists always argued with the decision on principle, disagreeing with how the Court had interpreted the Constitution. Black leaders offered their own interpretation of the American founding, one that they had been developing for decades. Linking their humanity, American identity, and historic military service to citizenship, they championed their belief that rights came from God, from the Declaration of Independence, and from the U.S. Constitution. Determined to defy Taney and continue the struggle, they remained hopeful that history and justice were on their side.

The Civil War and the Culmination of Black Constitutionalism

The Civil War expanded the scope of black constitutionalism. The presidential election of 1860 and the outbreak of the war abruptly shifted the theater of black activism from the North to the South. When the Republican Lincoln, who had pledged opposition to an extension of slavery, won election to the presidency in 1860 and southern states seceded from the Union, some enslaved African Americans sensed an opportunity. Barely a week after Lincoln took the oath of office, enslaved people fled to Fort Sumter in Charleston Harbor, as well as to Fort Pickens in Pensacola, Florida. Although federal military officers at both sites sent the escapees back to their owners, the Confederate attack on Fort Sumter and

the outbreak of war in April 1861 changed the Lincoln Administration's policy, thus opening the door for continued action on the part of enslaved African Americans. In May, while in command of Union forces at Fortress Monroe, Gen. Benjamin Butler confronted a Virginia planter requesting that three of his escaped slaves, who had fled to the fort, be returned to him under the Fugitive Slave Act. Noting that Virginia claimed it was no longer part of the United States, Gen. Butler offered to return the slaves only if the planter swore an oath of loyalty to the Union. When the Virginian refused, Butler, a lawyer, claimed the slaves as "contraband of war." In the ensuing weeks, escaping slaves began streaming into U.S. forts and camps, and by summer—with nearly a thousand enslaved people having already made their way to Union lines—the administration expressed support for this "contraband" policy.[49]

War presented the opportunity for both enslaved and free to take up arms in defense of the Union in order to stake a claim to citizenship. Just weeks after Fort Sumter, Douglass urged the arming of black men. "Let the slaves and free colored people be called into service, and formed into a liberating army, to march into the South and raise the banner of Emancipation among the slaves," Douglass thundered in his monthly newspaper. At the end of May 1861, a meeting of African-American activists in Boston boldly described the conflict as "a contest between liberty and despotism" and offered, quoting the Declaration of Independence, to "defend the Government as the equals of its white defenders—to do so with 'our lives, our fortunes, and our sacred honor' for the sake of freedom."[50] For his part, Douglass viewed military service as the surest path to citizenship. "Once let the black man get upon his person the brass letters U.S.; let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket," he continued, "and there is no power on earth which can deny that he has earned the right of citizenship in the United States."[51]

Some black leaders were more circumspect. John Rock, a free-born black man from New Jersey, saw the war as an opportunity for blacks not only to gain their freedom but also to overturn the *Dred Scott* decision. "Seventy-five thousand freemen capable of bearing arms, and three-quarters of a million of slaves wild with the enthusiasm caused by the dawn of the glorious opportunity of being able to strike a genuine blow for freedom, will be a power that 'white men will be bound to respect,'" he argued in a January 1862 speech in Boston, in a mocking paraphrase of Taney's opinion. Still, he argued that military service and sacrifice needed to be explicitly linked to citizenship and rights. "Let the people of the United States do their duty, and treat us as the people of all other nations treat us—as men; if they will do this, our last drop of blood is ready to be sacrificed in defence of the liberty of this country," Rock continued. "But if you continue to deny us our rights, and spurn our offers except as menials, colored men will be worse than fools to take up arms at all."[52]

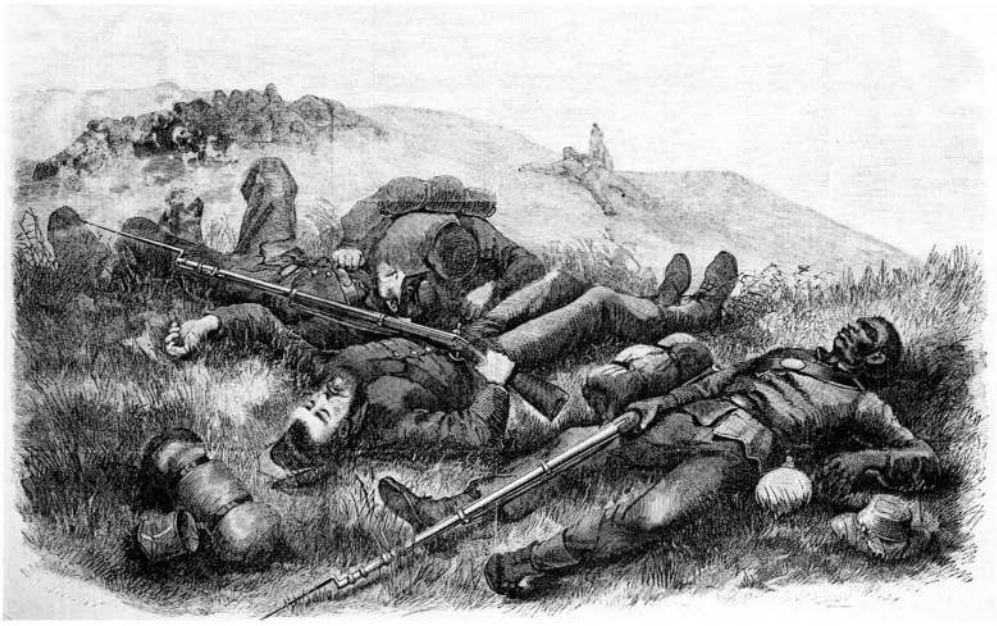
Over time, white Republicans came to see the war as a means of ending slavery, and they enacted policies they believed would hurt the Confederacy, help the Union, and liberate the enslaved.[53] In April 1862, Congress and Lincoln abolished slavery in Washington, D.C., and a few months later, they banned slavery in all existing federal territories and any that might be acquired in the future. Not only did the law liberate the handful of enslaved blacks who resided in Nebraska, New Mexico, and Utah, the legislation also directly challenged *Dred Scott*, which had denied to Congress power to prohibit slavery in the territories. In July, Congress passed legislation liberating all slaves held by Confederates and their supporters, repealed the Fugitive Slave Law for all slaveowners engaged in the rebellion, and provided for the raising of black troops on behalf of the Union.

Most significantly, in terms of citizenship, in November 1862 Attorney General Edward Bates responded to an official query from the secretary of treasury about "whether colored men can be citizens of the United States." In a carefully reasoned legal opinion, Bates claimed that all people born in the United States possessed American citizenship. Relying heavily on European precedents stretching back to ancient Rome, as well as the U.S. Constitution's reference to "natural born" citizens, Bates argued for birthright citizenship. Sidestepping the issue of slaves born in the United States, Bates concentrated on free blacks—those referred to in the secretary's query—and concluded that no person born in the United States could be denied citizenship solely on the basis of their race or color. Bates dismissed the portion of the *Dred Scott* decision that pertained to citizenship as irrelevant, arguing that the ruling applied only to Scott's specific plea and possessed "no authority as a judicial decision."[54]

Blacks coming out of slavery wanted the same guarantee of citizenship and rights that Bates' opinion offered to free blacks. Lincoln's Emancipation Proclamation of January 1, 1863, not only claimed to liberate all the enslaved people in the Confederacy, it also affirmed the evolving Union policy on black military service.[55] The War Department subsequently created a Bureau of Colored Troops and began actively recruiting and raising black regiments on a grand scale in those parts of the South that had already come under Union control. But black leaders still wanted to know if citizenship and rights were forthcoming. At a contentious public meeting over enlistment in New York in April 1863, Frederick Douglass admonished a crowd of potential recruits for their lack of enthusiasm. According to one observer, a Mr. Robert Johnson suddenly rose and defended the skeptical attendees, noting that "a proper respect for their own manhood" lay behind the unwillingness to enlist. "If the Government wanted their services, let it guarantee to them all the rights of citizens and soldiers," Johnson argued, to great applause.[56] In New Bern, North Carolina, white abolitionist Edward Kinsley found in spring 1863 that only if he submitted to a list of black demands would local African Americans, under the charismatic leadership of Abraham Galloway, respond to his efforts to recruit and enlist soldiers for the Union Army. A former fugitive slave who had travelled to the North and to Haiti, Galloway wanted equal pay for black soldiers, provisions for their families, schooling for their children, as well as the promise that captured soldiers would be treated as prisoners of war, rather than re-enslaved or executed.[57]

Unable to enlist, African-American women emerging from slavery made their own claims to freedom and citizenship. Through their interactions with Federal military authorities, African-American women took unprecedented actions demonstrating their demand for equality. In wartime Missouri, a state where the Emancipation Proclamation did not even apply, black women claimed freedom and more. They petitioned provost marshals for "free papers," lodged complaints against their former owners in military courts, and "joined the army" by following their husbands to Union lines and working as cooks, laundresses, and nurses. They sought legal recognition of their marriages, moreover, and, when their husbands died in battle, claimed pensions as the widows of war veterans. These assertions of black agency, which often flummoxed Union military officers, showed that African Americans took the lead in ensuring that emancipation and equal rights emerged from war.[58]

By 1864, an emerging black leadership class in the South, combined with the seasoned cadre of black leaders in the North, laid the groundwork for thoroughgoing constitutional change. On April 29, Galloway, the former slave who had recruited black soldiers in North Carolina, led a delegation of African



This print, which portrays the dead bodies of two African-American men and two white men, all Union soldiers, appeared in the November 11, 1865, edition of *Harper's Weekly* and was titled "The True Defenders of the Constitution." Four months later, Congress enacted the first civil rights bill in the history of the United States.

Americans to meet with President Lincoln at the Executive Mansion.[59] Remarkably, after thanking Lincoln for issuing the Emancipation Proclamation, Galloway and his colleagues recited the words of the Declaration of Independence to the president—that "all men are created equal"—and pressed their case for black rights, including suffrage. In the days and months that followed, Galloway and other black leaders took their campaign for freedom and equality to the northern public, and in October 1864, 144 black delegates from seventeen states (including some from the South) and the District of Columbia assembled in convention in Syracuse, New York. Just as they had done since first meeting in Philadelphia in 1830, black leaders met to claim their share of America's heritage of constitutional liberty. They drafted the "Declaration of Rights and Wrongs," a formal statement modeled on the American Declaration of Independence, which listed the historical grievances of African Americans while also lauding black military service. Dismissing emigration, the delegates made their own claim to American citizenship. "Here were we born," they wrote, casting their lot with the country that had mistreated those of their race for nearly two and a half centuries. "For this country our fathers and our brothers have fought, and here we hope to remain in the full enjoyment of enfranchised manhood and its dignities." Asserting their rights "as citizens of the Republic," the delegates defined these rights as "a portion of what we deem to be our rights as men, as patriots, as citizens, and as children of the common Father."[60]

The subsequent abolition of slavery marked both an end and a beginning. In January 1865, at the urging of President Lincoln, Congress enacted the Thirteenth Amendment to the U.S. Constitution, which provided that "neither slavery nor involuntary servitude" shall exist. By the end of the year, after Lincoln's assassination and the surrender of Confederate armies to Union forces, the Amendment won ratification by the requisite number of states. The Amendment certainly was a milestone, in that it abolished an institution

that had existed on North American soil for nearly 250 years. But for African Americans, emancipation was just the start. Citizenship and equal rights—rather than mere freedom from bondage—had always been the goal. While official state conventions convened during the summer of 1865 to establish new governments in the southern states in accordance with President Andrew Johnson's lenient program of reconstruction, African Americans held their own conventions in order the press the case for rights.

In conventions throughout the ex-Confederate states during 1865, African Americans repeatedly invoked the spirit of the American founders and sounded familiar themes: their loyalty to the Union, their service and sacrifice as soldiers during the war, and their shared constitutional inheritance as Americans. The Rev. James D. Lynch of Nashville perhaps best captured the spirit of these assemblages when he announced to delegates of his state's freedman's convention: "We have met here to impress upon the white men of Tennessee, of the United States, and of the world that we are part and parcel of the American Republic." Sergeant Henry J. Maxwell, who had served in the 3rd U.S. Colored Heavy Artillery in Memphis before travelling to the convention in Nashville, made explicit what African Americans were seeking: "We want the rights guaranteed by the Infinite Architect. For these rights we labor: for them we will die. We have gained one—the Uniform is its badge. We want two more boxes besides the cartridge box—the ballot and the jury box. We shall gain them. Let us work faithfully unto that end."[61] In September 1865, black leaders formed the National Equal Rights League. Gathering in Cleveland, delegates criticized President Johnson's Reconstruction policies for seemingly leaving the freed people in the hands of their former masters. By that time, many southern states had passed laws restricting the behavior and economic opportunities of formerly enslaved people, laws that derisively became known in the North as "black codes." Delegates to the National Equal Rights League called for the nation "to guarantee to us the full enjoyment of our liberties, protection to our persons throughout the land, complete enfranchisement...until all are equal as American citizens before the law." Calling on the U.S. Congress to take swift action, the delegates advocated a constitutional amendment that prohibited any legislation "against any civilized portion of the inhabitants, native born or naturalized, on account of race or color."[62]

Decades of constitutional activism, bolstered by a bloody civil war, made a difference. In March 1866, Congress enacted the first civil rights bill in the history of the United States. The Civil Rights Act of 1866 established citizenship for all born in United States and for the first time articulated a list of rights to which all citizens could lay claim. The legislation provided that all citizens possessed the "right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." The bill also provided that the federal courts would have jurisdiction in cases involving any offenses under the act. Clearly, the bill did not include all that African Americans wanted. The right to vote, hold office, and serve on juries, for example, were not included in the rights of citizenship under the statute.[63] Still, the law did establish the citizenship of all people born in the United States, including all African Americans. Despite a presidential veto, in April 1866 Congress enacted the bill into law with the requisite two-thirds majority in both houses of Congress.

Further congressional action on behalf of the citizenship of African Americans followed. After a white-on-black massacre in Memphis, Tennessee in May 1866 cost

at least 46 African Americans their lives, outraged congressional Republicans saw a new amendment to the Constitution as the best long-term solution to the problems in the South. Johnson's speedy re-establishment of civilian governments in the South had yielded horrific violence, a fact that only served to rally Republicans to push for further federal oversight of southern affairs. Many white Republicans, who had witnessed blacks' service and sacrifice in wartime, favored a constitutional amendment that would reform the South and protect black civil rights. A constitutional amendment, they reasoned, could not be easily repealed by future Democratic majorities in Congress. The Senate had first agreed on language for a proposed amendment in April, and southern atrocities played into the hands of the measure's proponents in the House.[64] In June 1866, the amendment passed in the House of Representatives. The first section of the amendment wrote into the Constitution the principle that all born on American soil are "citizens of the United States and of the state wherein they reside" and guaranteed "equal protection of the laws." Two years of political conflict between President Johnson and congressional Republicans ensued, but in 1868 the requisite number of states ratified the Fourteenth Amendment to the Constitution. Ratification of the Fifteenth Amendment, which protected the voting rights of black men, followed two years later.[65]

Black resistance to the U.S. Supreme Court's decision in *Dred Scott v. Sandford* came at a critical juncture in nineteenth-century U.S. constitutional history. African-American opposition to the decision culminated a long, determined effort to make America live up to the promise of its founding. From the early decades of the republic, black activists had argued that slavery violated the Constitution, that the Declaration of Independence established political equality, and that God granted rights to all human beings. The crucible of war accelerated blacks' post-*Dred Scott* activism, prompted the policy of emancipation, and helped legitimize the rights claims of African Americans, culminating in the passage of the Fourteenth and Fifteenth Amendments. By standing "in defiance of Judge Taney," African Americans' constitutional expressions of belonging and aspiration helped redefine citizenship and create a new discourse of rights in the post-Civil War United States.[66]

Notes

[1] *Dred Scott v. Sandford*, 60 U.S. 393, 407, 451. The literature on the *Dred Scott* case is voluminous, but see especially Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (New York: Oxford University Press, 1978); Walter Ehrlich, **They Have No Rights: Dred Scott's Struggle for Freedom** (Westport, CT: Greenwood Press, 1979); Paul Finkelman, **Dred Scott v. Sandford: A Brief History with Documents** (Boston, MA: Bedford, 1997); Earl M. Maltz, **Dred Scott and the Politics of Slavery** (Lawrence, KS: University Press of Kansas, 2007); Austin Allen, **Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857** (Athens, GA: University of Georgia Press, 2006); Mark A. Graber, **Dred Scott and the Problem of Constitutional Evil** (New York: Cambridge University Press, 2006); Lea VanderVelde, **Mrs. Dred Scott: A Life on Slavery's Frontier** (New York: Oxford University Press, 2009).

[2] Stephen Kantrowitz, **More Than Freedom: Fighting for Black Citizenship in a White Republic, 1829-1889** (New York: Penguin Books, 2012): 33–40. On legislation pertaining to blacks enacted by Congress during this period, see Leon F. Litwack, "The Federal Government and the Free Negro, 1790-1860," *Journal of Negro History*, 43 (1958): 261–263.

[3] *Return of the Whole Number of Persons within the Several Districts of the United States* (Philadelphia, 1793), available at http://www2.census.gov/prod2/decennial/documents/1790a.pdf

[4] Manisha Sinha, **The Slave's Cause: A History of Abolition** (New Haven, CT: Yale University Press, 2016): 139–140.

[5] The Fugitive Slave Clause, Article IV, Section 2 of the Constitution, refers to "a person held to service or labour." The Three Fifths Clause and Slave Trade Clause referred to the enslaved simply as "other persons," although it is clear from the context in both clauses that slaves are the persons described.

[6] "Petition of Absalom Jones and Others, December 30, 1799," as published in Raymond Smock, **Landmark**

Documents on the U.S. Congress (Washington, DC: CQ Press, 1999): 93; Sinha, **Slave's Cause,** 139. On activism in the free black community of Philadelphia, see Gary B. Nash, **Forging Freedom: The Formation of Philadelphia's Black Community, 1720-1840** (Cambridge, MA: Harvard University Press, 1991); Richard Newman, **Freedom's Prophet: Bishop Richard Allen, the AME Church, and the Black Founding Fathers** (New York: New York University Press, 2008).

[7] Paul Finkelman, "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," *Rutgers Law Journal*, 17 (1986): 421–425; Leon Litwack, **North of Slavery: The Negro in the Free States, 1790-1860** (Chicago: University of Chicago Press, 1961): 91–94; James Forten, "Series of Letters by a Man of Colour," as published in Richard Newman, Patrick Rael, and Phillip Lapsansky, eds., **Pamphlets of Protest: An Anthology of Early African American Protest Literature, 1790-1860** (New York: Routledge, 2001): 67. Another abolitionist within Philadelphia's free black community, William Whipper, similarly expressed the idea that slavery violated the "letter and spirit of the Constitution." See Whipper, "An Address Delivered in Wesley Church, on the Evening of June 12, Before the Colored Reading Society of Philadelphia, for Mental Improvement," in Dorothy Porter, ed., **Early Negro Writing, 1760-1837** (Boston, MA: Beacon Press 1971): 114.

[8] Finkelman, "Prelude to the Fourteenth Amendment," 462–463. In 1820, Congress engaged in an extensive debate over black citizenship while considering Missouri's admission to the Union. But the discussion yielded no federal legislation, and subsequent opinions on the status of free blacks issued by the U.S. Attorney General were mostly inconsistent. William M. Wiecek, **The Sources of Antislavery Constitutionalism in America, 1760-1848** (Ithaca, NY: Cornell University Press, 1977): 122–125; Herman Belz, **A New Birth of Freedom: The Republican Party and Freedman's Rights, 1861-1866** (Westport, CT: Greenwood Press, 1976): 17–18; Litwack, "Federal Government and the Free Negro," 273–275; James Kettner, **The Development of American Citizenship, 1608-1870** (Chapel Hill, NC: University of North Carolina Press, 1978): 300–324.

[9] David Walker, **Walker's Appeal in Four Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to those of the United States of America** (Boston: David Walker, 1830): 85. On Walker, see Peter P. Hinks, **To Awaken My Afflicted Brethren: David Walker and the Problem of Antebellum Slave Resistance** (University Park, PA: Pennsylvania State University Press, 1997).

[10] Ira Berlin, **The Long Emancipation: The Demise of Slavery in the United States** (Cambridge, MA: Harvard University Press, 2015): 41, 47–105.

[11] "The First Colored Convention," *Anglo-African Magazine*, 1 (1859), reprinted in Howard Holman Bell, ed., **Minutes of the Proceedings of the National Negro Conventions, 1830-1864** (New York: Arno Press, 1969).

[12] The black convention movement has largely escaped the gaze of historians. Eddie S. Glaude Jr. **Exodus! Religion, Race, and Nation in Early Nineteenth Century Black America** (Chicago: University of Chicago Press, 2000), argues from the perspective of a religious studies scholar and focuses only on the early phase of the convention movement. He focuses almost exclusively on the internal dialogue among African Americans rather than on how African Americans imagined their relationship to the nation. On black conventions more generally, see Howard Holman Bell, **A Survey of the Negro Convention Movement, 1830-1861** (New York: Arno Press, 1969); Jane H. Pease and William H. Pease, "Negro Conventions and the Problem of Black Leadership," *Journal of Black Studies*, 2 (1971), 29–44. See also, for a terrific digital project that includes the records of these conventions, "Colored Conventions," available at www.coloredconventions.org

[13] On constitutionalism, see Michael Kammen, **A Machine That Would Go of Itself: The Constitution in American Culture** (New York: Routledge, 1986); Herman Belz, **A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective** (Lanham, MD: Rowman & Littlefield, 1998); Gordon S. Wood, **The Idea of America: Reflections on the Birth of the United States** (New York: Penguin Books, 2011): 171–187. Rather than a manifestation of "popular constitutionalism" that served the specific purpose of challenging judicial review, black constitutionalism reflected a broader culture of constitutionalism in the nineteenth-century U.S. See Timothy S. Huebner, **Liberty and Union: The Civil War Era and American Constitutionalism** (Lawrence, KS: University Press of Kansas, 2016).

[14] "Minutes of the State Convention, of the Colored Citizens of Ohio, Convened at Columbus, January 15th, 16th, 17th, and 18th, 1851," as published in Philip S. Foner and George E. Walker, eds., **Proceedings of the Black States Conventions, 1840-1865,** v. 1 (Philadelphia: Temple University Press, 1979): 262.

[15] The term "black constitutionalism" comes from Christopher Waldrep, **African Americans Confront Lynching: Strategies of Resistance from the Civil War to the Civil Rights Era** (Lanham, MD: Rowman & Littlefield Publishers, 2009): 13–38. See also Donald G. Nieman, "The Language of Liberation: African Americans and Equalitarian Constitutionalism," in Nieman, ed., **The Constitution, Law, and American Life: Critical Aspects of the Nineteenth Century Experience** (Athens, GA: University of Georgia Press, 1992): 67–90; Benjamin Quarles, "Antebellum Free Blacks and

the 'Spirit of '76,'" *Journal of Negro History*, 61 (1976):229–242.

[16] Black constitutionalism conforms to Patrick Rael's contention: "[B]lack elites crafted challenges to racial inequality that appealed to cherished American values rather than stepped outside the bounds of the American ideological landscape. Constrained like all contemporary Americans by existing language and systems of explanation, black elites found themselves challenged to develop rhetorical strategies rooted in the American tradition. They sought not to revolutionize existing discourse but instead to appeal to its core values in changing the 'public mind' on racial matters." In nineteenth-century America, constitutionalism was a core value. See Rael, **Black Identity and Black Protest in the Antebellum North** (Chapel Hill, NC: University of North Carolina Press, 2002): 5.

[17] "Address of the New York State Convention of Colored Citizens, To the People of the State," as published in Foner and Walker, eds., **Proceedings, v.** 1, 21. I join Stephen Kantrowitz in taking issue with Manisha Sinha's assertion that "black abolitionists drew inspiration from the Haitian rather than the American Revolution." See Sinha, "To 'cast just obliquy' on Oppressors: Black Radicalism in the Age of Revolution," *William and Mary Quarterly*, 3rd Ser., 64 (2007), 149–160, quoted from 159; Kantrowitz, **More Than Freedom, 473**, n68.

[18] Jacqueline Bason, "'Do You Understand Your Own Language?' Revolutionary 'Topoi' in the Rhetoric of African-American Abolitionists," *Rhetoric Society Quarterly*, 28 (1998): 55–75; Sinha, *Slave's Cause*, 150–151. Bacon describes the rhetoric of African-American abolitionists as either "adaptory" or "advisory," with adaptory rhetoric being based on common cultural expectations and advisory being more critical in tone. Black constitutionalism, I am arguing, encompassed both these traditions. Sinha explicates the black "counter-narrative" of the American founding in her discussion of the black liberation theology evident in sermons at the time of the ending of the slave trade in 1808. I take no issue with her analysis here, but I am arguing that black constitutionalism was broader than this counter-narrative—that it included practices such as assembling in convention.

[19] The major counter-traditions to black constitutionalism were represented by Martin Delany and Henry Highland Garnett. See Delany, "Political Destiny of the Colored Race on the American Continent," as published in Newman, et al., *Pamphlets of Protest*, 226–239; Howard H. Bell, "Expressions of Negro Militancy in the North, 1840-1860," *Journal of Negro History*, 45 (1960): 11–20.

[20] Frederick Douglass, "What to the Slave is the Fourth of July? An Address Delivered in Rochester, New York, on 5 July 1852," **Frederick Douglass Papers, Series One: Speeches, Debates, and Interviews, Volume 2: 1847-1854,** John Blassingame, ed. (New Haven, CT: Yale University Press, 1982): 363.

[21] Douglass, "What to the Slave," 371, 385. On Douglass' view of the Constitution, see James A. Colaiaco, **Frederick Douglass and the Fourth of July** (New York: St. Martin Publishing group, 2006): 73–108. Paul Finkelman, in outlining Douglass' changing views on the subject, portrays him as much more "pragmatic" than principled. See Finkelman, "Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican," *Missouri Law Review*, 81 (2016): 1–73. See also David W. Blight, **Frederick Douglass: Prophet of Freedom** (New York: Simon & Schuster, 2018): 202–227. Blight describes how Douglass' view of the Constitution related to his embrace of political abolitionism.

[22] 60 U.S. 393, 407.

[23] Fehrenbacher offers a devastating critique of Taney's reasoning in the citizenship portion of the opinion. See Fehrenbacher, *Dred Scott Case*, 335–364. On Taney and the slavery issue more generally, see Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking Beyond—and Before—Dred Scott," *Journal of American History*, 97 (2010): 17–38.

[24] 60 U.S. 393, 411.

[25] 60 U.S. 393, 404–405. Taney conveniently overlooked the fact that the Constitution distinguished between "free persons" and "other persons" in the Three-Fifths Clause.

[26] Herman Belz speculates that Taney intended that they were either "subject nationals" or "quasi-citizens." See Belz, **New Birth of Freedom**, 20–21. On preemption and passports, see Litwack, "Federal Government and the Free Negro," 269, 272.

[27] 60 U.S. 393, 475, 550. On Curtis' dissent, see Stuart Streichler, **Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism** (Charlottesville, VA: University of Virginia Press, 2005): 119–150.

[28] Graber, **Dred Scott and Problem of Constitutional Evil**, 28–30.

[29] **Two Speeches, by Frederick Douglass; One on West India Emancipation, Delivered at Canandaigua, Aug. 4, and the other on the Dred Scott Decision, Delivered in New York, on the Occasion of the Anniversary of the American Abolition Society, May, 1857** (Rochester, NY: C.P. Dewey, 1857): 30–32.

[30] **Two Speeches, by Frederick Douglass**, 35.

[31] *Ibid.*, 43, 45, 46.

[32] "Speech of Charles L. Remond," *Liberator*, July 10, 1857, p. 110, available at http://fair-use.org/the-liberator/1857/07/10/the-liberator-27-28.pdf

[33] Mitch Kachun, "From Forgotten Founder to Indispensable Icon: Crispus Attucks, Black Citizenship, and Collective Memory, 1770-1865," *Journal of the Early*

Republic, 29 (2009): 249–286; Kantrowitz, **More Than Freedom,**. 219–222.

[34] "Convention of the Colored Citizens of Massachusetts, August 1, 1858," as published in Philip S. Foner and George E. Walker, **Proceedings of the Black State Conventions, 1840-1865,** v. 2 (Philadelphia: Temple University Press, 1979): 97.

[35] "Convention of the Colored Citizens of Massachusetts," 99.

[36] "Convention of the Colored Citizens of Massachusetts," 101. At least one scholar makes a sharp distinction between Remond's rhetoric about the decision and that of Douglass, labeling Remond's an "insular" response and Douglass' a "redemptive" one. Despite Remond's harder edge, manifested most clearly in his occasional disunionist flourishes, in their common emphasis on citizenship, rights, and American identity in critiquing *Dred Scott*, Remond and Douglass seem more alike than different. See Todd F. McDorman, "Challenging Constitutional Authority: African American Responses to *Scott v. Sandford*," *Quarterly Journal of Speech*, 83 (1997): 192–209.

[37] For an extensive sampling of newspaper opinion, see Finkelman, *Dred Scott v. Sandford*, 127–167. For a discussion of the larger political consequences of the decision, see Fehrenbacher, **The Dred Scott Case**, 449–550.

[38] "First Debate with Stephen Douglas at Ottawa, Illinois," August 21, 1858, and "Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois," October 15, 1858, in Roy Basler, ed., **Collected Works of Abraham Lincoln**, v. 3 (New Brunswick, NJ: Rugers University Press, 1953): 10, 299–300.

[39] Basler, ed., **The Collected Works of Abraham Lincoln,** v. 3 (New Brunswick, NJ: Rugers University Press, 1953): 299–300. *See also* Lincoln, "First Inaugural Address—Final Text," March 4, 1861," in Basler, ed., **Collected Works**, v. 4, 269–270, where Lincoln portrays the existence of slavery in the South and the enforcement of the fugitive slave law as settled questions, while describing the issue of the spread of slavery into the territories as the only issue dividing the country.

[40] Taney's infamous words may well have been the most offensive phrase—and the one that had the most galvanizing effect on a segment of the population—in the history of the U.S. Supreme Court. On this point, see Timothy S. Huebner, "'The Unjust Judge:' Roger Taney, the Slave Power, and the Meaning of Emancipation," *Journal of Supreme Court History*, 40 (2015): 249–262.

[41] "Suffrage Convention of the Colored Citizens of New York, Troy, September 14, 1858," as published in Foner and Walker, eds., **Proceedings**, v. 1, pp. 99–100.

[42] "Proceedings of a Convention of the Colored Men of Ohio, Held in the City of Cincinnati, on the 23d, 24th, 25th, and 2th Days of November, 1858," in Foner and Walker, 336, 335.

[43] "Suffrage Convention of the Colored Citizens of New York, Troy, September 14, 1858," id., 100.

[44] "Proceedings of a Convention . . . ." 333.

[45] "New England Colored Citizens Convention, August 1, 1859," in Foner and Walker, v. 2, . 211–212, 214, 219.

[46] Kantrowitz, **More Than Freedom**, 230–231.

[47] "Speech by Robert Purvis, Delivered at the City Assembly Rooms, New York, New York, 12 May 1857," as published in C. Peter Ripley, et al, eds., **The Black Abolitionist Papers, Volume IV: The United States, 1847-1858** (Chapel Hill, NC: University of North Carolina Press, 1991): 364; James Oliver Horton and Lois E. Horton, **In Hope of Liberty: Culture, Community, and Protest Among Northern Free Blacks, 1700-1860** (New York: Oxford University Press, 1997): 258–263.

[48] Horton and Horton, **In Hope of Liberty,** 263. For a contrasting view, see Vincent Harding, **There Is a River: The Black Struggle for Freedom in America** (New York: Mariner Books, 1981): 195–218; Hugh Davis, **"We Will Be Satisfied With Nothing Less": The African American Struggle for Equal Rights in the North During Reconstruction** (Ithaca, NY: Cornell University Press, 2011): 10–11.

[49] On July 4, Secretary of the Treasury Salmon P. Chase sent a report to Congress recommending, in general terms, the seizure and sale of "the property of those engaged in insurrection." Over the next several weeks, the Senate Judiciary Committee crafted legislation that gave statutory structure and authority to Butler's initial order. *Cong. Globe*, 37th Cong., 1st Sess. Appendix 5 (1861). Allen Guelzo, **Lincoln's Emancipation Proclamation: The End of Slavery in America** (New York: Simon & Schuster, 2006): 31–46; Laura F. Edwards, **A Legal History of the Civil War and Reconstruction** (New York, 2015): 64–89; Steven Hahn, **A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration** (Cambridge, MA: Belknap Press, 2003): 70.

[50] Frederick Douglass, "How to End the War," *Douglass' Monthly*, May, 1861, as published in Philip S. Foner, ed., *Frederick Douglass: Selected Speeches and Writings* (Chicago, 1999, orig. pub. 1950), 448; "Resolutions of a Negro Mass Meeting," *Liberator*, May 31, 1861, in Herbert Aptheker, ed., **A Documentary History of the Negro People in the United States** (New York: Citadel, 1951), v. 1, 464–465.

[51] Frederic May Holland, **Frederick Douglass: Colored Orator** (New York: Createspace Independent Publishers, 1891): 301.

[52] John S. Rock, "What if the Slaves are Emancipated?" in Philip S. Foner and Robert James Branham, eds., **Life Every Voice: African American Oratory, 1787-1900** (Tuscaloosa, AL: University of Alabama Press, 1998): 367.

[53] James Oakes, **Freedom National: The Destruction of Slavery in the United States, 1861-1865** (New York: W. W. Norton & Company, 2014).

[54] Edward Bates, **Opinion of Attorney General Bates on Citizenship** (Washington, D.C.: U.S. Government Printing Office, 1862): 3.

[55] "Emancipation Proclamation," January 1, 1863, in Roy P. Basler, ed., **The Collected Works of Abraham Lincoln** (New Brunswick, NJ: Rugers University Press, 1953), v. 6, 30. On the Proclamation, see Guelzo, **Lincoln's Emancipation Proclamation**.

[56] Quoted in James M. McPherson, **The Negro's Civil War: How American Negroes Felt and Acted During the War for the Union** (New York: Pantheon Books, 1965): 177. On the debate over military service among African Americans, see Brian Taylor, "A Politics of Service: Black Northerners' Debates over Enlistment in the American Civil War," *Civil War History*, 58 (2012): 451–480.

[57] David S. Cecelski, **The Fire of Freedom: Abraham Galloway and the Slaves' Civil War** (Chapel Hill, NC: University of North Carolina Press, 2012): xiii-xvi.

[58] Sharon Romeo, **Gender and the Jubilee: Black Freedom and the Reconstruction of Citizenship in Civil War Missouri** (Athens, GA: University of Georgia Press, 2016).

[59] Cecelski, **Fire of Freedom,** 115–116.

[60] "Proceedings of the National Convention of Colored Men, held in The City of Syracuse, N.Y., October 4, 5, 6, 7, 1864; with the Bill of Wrongs and Rights, and the Address to the American People," 42–43, as published in Howard Holman Bell, ed., **Minutes of the Proceedings of the National Negro Conventions, 1830-1864** (New York: Arno Press 1969).

[61] *Nashville Daily Press and Times*, as quoted in Steven Hahn, **A Nation Under Our Feet: Black Political Struggles in the Rural South, from Slavery to the Great Migration** (Cambridge, MA: Harvard University Press, 2003): 120; Judy Bussell LaForge, "State Colored Conventions of Tennessee, 1865-1866," *Tennessee Historical Quarterly*, 65 (2006): 236–237.

[62] "Proceedings of the First Annual Meeting of the National Equal Rights League, Held in Cleveland, Ohio, September 19, 20, and 21, 1865," in Foner and Walker, **Proceedings,** v. 1, 65.

[63] The Civil Rights Act had the effect of narrowing the privileges and immunities of citizenship that had been outlined in a federal circuit court case on the subject, *Corfield v. Coryell* (1823). See Michael Les Benedict, "'Membership of a Nation, and Nothing More': The Civil Rights Act of 1866 and the Narrowing of Citizenship in the Civil War Era," in Christian G. Samito, ed., **The Greatest and Grandest Act: The Civil Rights Act of 1866 from Reconstruction to Today** (Carbondale, IL: Southern Illinois University Press, 2018): 9–36.

[64] Stephen V. Ash, **A Massacre in Memphis: The Race Riot That Shook the Nation One Year After the Civil War** (New York: Hill and Wang, 2013); Stevens, "Speech on the Fourteenth Amendment," May 10, 1866, in Beverly Wilson Palmer and Holly Byers Ochoa, eds., **Selected Papers of Thaddeus Stevens, v. 2: April, 1865-August 1868** (Pittsburgh: University of Pittsburgh Press, 1998): 138.

[65] Belz, **New Birth of Freedom**, 17-34. See also, Carole Emberton, "'Only Murder Makes Men': Reconsidering the Black Military Experience," *Journal of the Civil War Era*, 2 (2012): 369–393.

[66] Constitutional historians and legal scholars have written a great deal about the origins of the Fourteenth Amendment, particularly how the ideas behind it emerged from the anti-slavery movement. Focused on understanding the original intentions of white lawmakers, they have devoted relentless attention to the Amendment's legal and doctrinal origins. See, e.g., Jacobus tenBroek, **Equal Under Law** (London: Collier Books, 1965); Wiecek, **Sources of Antislavery Constitutionalism in America**, 249–275; Belz, **New Birth of Freedom**; idem, **Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era** (New York: Norton, 1978): 108–110; Finkelman, "Prelude to the Fourteenth Amendment"; William E. Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (Cambridge, MA: Harvard University Press, 1988); Earl M. Maltz, "Fourteenth Amendment Concepts in the Antebellum Era," *American Journal of Legal History*, 32 (1988): 305–346; Garrett Epps, **Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America** (New York: Henry Holt and Company, 2006); Louisa M.A. Heiny, "Radical Abolitionist Influence on Federalism and the Fourteenth Amendment," *American Journal of Legal History*, 49 (2007), 180–196; Gerard N. Magliocca, **American Founding Son: John Bingham and the Invention of the Fourteenth Amendment** (New York: New York University Press, 2013); Eric Foner, **The Second Founding: How the Civil War and Reconstruction Remade the Constitution** (New York: W. W. Norton & Company, 2019): 61–78.

Sons of Ohio: William Rufus Day, Nepotism, and his Law Clerks

CLARE CUSHMAN

Justice William R. Day and his wife, Mary Schaefer Day, had four strapping sons who carried on the Day family tradition and became distinguished lawyers: William Louis Day (1876–1936), Luther Day (1879–1965), Stephen Albion Day (1882–1950), and Rufus Spalding Day (1884–1963). During his nineteen years serving on the Court, Justice Day, a devoted father, would invite three of his sons to live in his home and serve as his clerk: Luther for two terms, Stephen for one term before passing him on to Chief Justice Melville Fuller for a second term, and Rufus for nine terms in two stints: 1907–1910 and 1917–1922.[1] These acts of nepotism bear scrutiny as Day is the only justice to have engaged his children as clerks, with the exception of John Marshall Harlan, who hired his youngest son, John Maynard Harlan, to be his first clerk in 1878—and also persuaded Fuller to take his second son, John S. Harlan, to briefly become Fuller's first clerk in 1888.[2] Moreover, Rufus Day maintained an active law practice, including appealing cases to the Supreme Court, while serving as his father's clerk, a double transgression of nepotism and conflict of interest that merits closer examination.

Nature of the Clerkship

Justices hiring family members as staff would raise eyebrows today, but in the early 1900s there were no consistent guidelines about how to recruit or whom to select as clerks. Congress had not appropriated funds for Supreme Court clerks until 1886, when it finally recognized that Court members were severely overburdened; prior to that justices had paid their "private secretaries" out of their own pockets. The yearly salary of a Supreme Court "stenographic clerk" rose from $1,000 to $1,600 in 1895 and continued at that meager level until 1911.[3] When Day was appointed in 1903, most justices hired men who were working as stenographers in the federal government and had attended or were enrolled in local law schools at night. Because justices worked out of their homes until the Supreme Court building opened in

1935, there was no centralized or regularized practice for recruiting these young men. New justices were often content to inherit clerks from their predecessors. Moreover, most pre-1935 justices used their clerks as stenographers, proofreaders, typists, chauffeurs, and errand-goers, although notable exceptions were Horace Gray, Oliver Wendell Holmes, Jr., and Louis D. Brandeis, who actively recruited top Harvard Law School graduates and gave them substantive legal work to perform. As long as the duties were mainly clerical, the selection process remained fairly uncompetitive and underscrutinized. Nonetheless, these early "stenographic clerks" were keenly aware that being employed by a Supreme Court justice would help advance their legal careers.[4]

Family Tradition, Family Culture

Justice Day would have favored his sons as clerks because his family had produced several illustrious judges, and he wanted to give the sons an entrée into the elite legal world so they could carry on the family tradition. It was quite a legacy to follow: he named one of his sons after Luther S. Day, his father, who served as chief justice of the Ohio Supreme Court from 1866 to 1875, and another after Rufus P. Spalding, his maternal grandfather, who served as associate justice on that court from 1849 to 1852. A maternal great-grandfather had served as chief justice of the Connecticut Supreme Court.[5] To give them the best start, Day sent his sons to elite prep schools and later arranged for them to have apprenticeships "reading law" at his old law firm in Canton, Ohio.

During his tenure on the Court, Justice Day was known for his "exceptionally" happy family life.[6] A devoted husband and father, he was a quiet homebody who did "not care for society, in the ordinary acceptance of the word. To social life in Washington he preferred rather his chosen sphere of action at home."[7] Day had been a trial lawyer in Canton for twenty-five years, but had left private practice for government service in 1896 when his close friend William McKinley became president. Accordingly, Day may also have shied away from socializing because reciprocal entertaining was expensive. The Days lived modestly on his judicial salary of $14,500 at a time when a reporter wrote: "It is hardly possible for a member of Congress to make any figure in the social life of the capital on less than $20,000 a year."[8]

Small and gaunt with reddish brown hair, Day was also by nature shy.[9] He eschewed small talk and "carried reticence to an extreme."[10] A Holmes clerk reported that "Day swallows his words against the impression of embarrassment."[11] Yet he was well liked and evidently saved his energy for Conference discussions. Charles Evans Hughes said Day was "mentally very vigorous, clear in his views and precise in his statements, while enlivening his discussions with a ready wit."[12] Louis D. Brandeis went farther, calling him a "fighter, a regular game cock.... A hot little gent."[13]

The Justice's introversion was likely partly the result of a weak immune system, as he suffered recurring bouts of pneumonia and bronchitis that forced him off the bench from time to time.[14] His wife, Mary, was also frequently ill, and on several occasions he hired a nurse to look after her.[15] "I hope to lead a quiet life here [in Washington]," he told the nurse in 1905. By "keeping out of the society whirl," he hoped her good health would "be fully restored."[16] With two frail constitutions, the couple would have benefited from having a son who lived in the comfort of their home keeping them company and working as the Justice's private secretary.

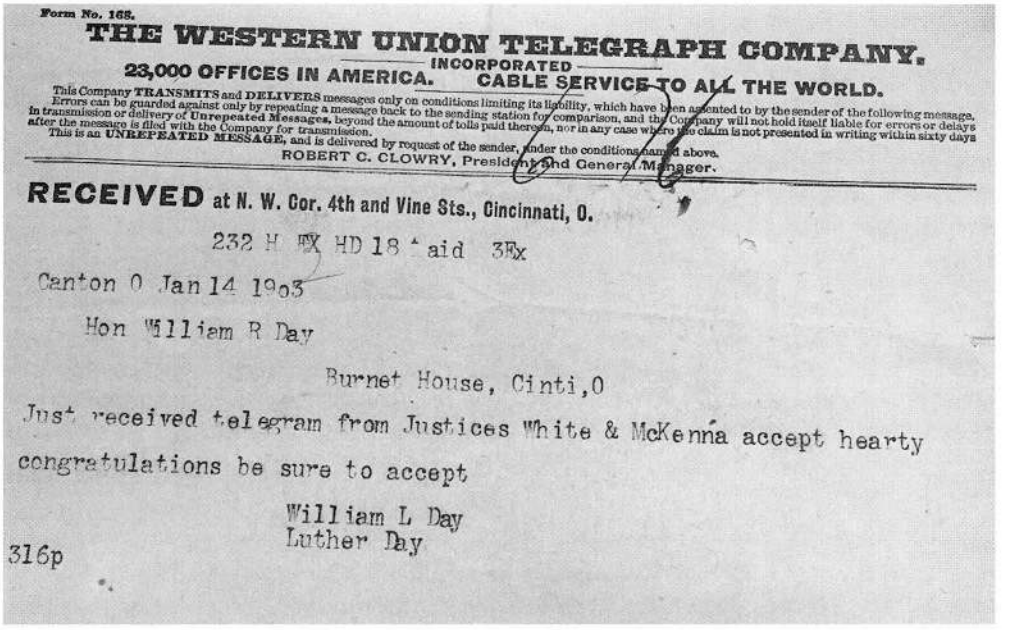
Justice Day's Work Habits

There is little record of what duties Day assigned to his clerks, but most justices in his era deployed them to take shorthand, type,

William Rufus Day's four sons (clockwise Luther, Rufus, William and Stephen) grew up in Canton Ohio, where their father was a prominent attorney. When President William McKinley appointed Day, a childhood friend, to the State Department in 1897 his sons stayed behind with their uncle in Canton to continue their schooling.

read proofs, perform legal research, answer correspondence, fetch books from the library, and carry out chores such as chauffeuring and paying bills. A February 1906 letter from Justice Day to his son Luther does give a clue as to the nature of the work (proofreading) and show the collective nature of the family's endeavor to support the Justice. Luther's clerkship had ended the previous term and his brother Stephen had replaced him, but Luther was apparently still scanning for errors in the printed decisions in the *Supreme Court Reporter* and discussing them with his father:

> When the sentence to which you call attention was written, Steve [current clerk Stephen] and I had some discussion as to whether the verb should be "have" or "has." As written in the opinion it is taken literally from the act, and is probably correctly used, materials and labor together suggesting a single thing furnished. However I have followed the words of the act and I think it is right to do so, I shall be glad if you will call my attention to things of this nature as you read the Reporter, as slips will sometimes occur, where the intentions are the best. I have had the busiest February recess since my being here and the end is not yet.[17]



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William L Day
Luther Day

316p

William and Luther wired their father on circuit to congratulate him on being appointed by President Roosevelt to the Supreme Court in 1903.

Most of Day's brethren did not ask their clerks to write bench memos or summarize cert. petitions and he was probably no exception, especially because he never employed more than one clerk per term.[18] Yet having clerks provide substantive legal help might have ameliorated the badly congested docket that the justices struggled with during Day's tenure. As the Court did not gain its modern form of discretionary review until 1925, they were unable to control the size of the docket by turning down mundane federal cases and were constantly behind. When Day first took his seat, he complained to a judge with whom he had served on the Sixth Circuit that compared to the appeals court, "[w]e have three times as many cases to consider to say nothing of the numerous applications for writs of certiorari" and "there is little time for anything else."[19] In the 1910 Term, for example, the Court disposed of 466 cases but still had 650 cases left over at the end.[20]

Even with his precarious health, Day rose to the challenge and proved to be a workhorse.[21] Despite several medical absences, he wrote 439 majority opinions and eighteen dissents during his nineteen years on the Supreme Court. By 1910, Justice Harlan noted that Day "has been indefatigable in his judicial labors. Indeed, since he has been with us no member of the Court has held to his work more persistently or steadily nor done a greater amount of work than Justice Day. His opinions in my judgment will always be highly regarded. They show unusual care in preparation."[22] Clearly, Day would have required the services of good clerical assistants to manage such a heavy workload so skillfully.

Luther Day: His First Clerk

The four Day boys all grew up in Canton, Ohio, where their father was a trial lawyer specializing in both criminal and corporate law at Lynch & Day. They got their first glimpse of Washington in 1897 when Day was named assistant secretary of state (soon promoted to secretary of state) by President McKinley, his Canton neighbor and close

friend. Except for the eldest son, William, who was at the University of Michigan, during the McKinley administration the boys remained at home in Ohio supervised by David B. Day, the Justice's half-brother and former law partner. The Day brothers were all athletes who played baseball and football at school, hunted and fished together, and organized tennis tournaments and golf outings on Mackinac Island in the summer. A reporter once remarked that "all four young men represent the best type of keen, energetic, aggressive manhood."[23]

In 1899, President McKinley appointed Day to the U.S. Court of Appeals for the Sixth Circuit. Judge Day engaged his second son to serve as his clerk on that Cincinnati-based appeals court. Luther, nicknamed "Luth," had attended Kenyon College and Wittenberg College as an undergraduate. He left his father's employ to matriculate at the University of Michigan Law School (1900–1901), where his father had also taken classes.[24] Without graduating, Luther returned to Canton to learn stenography and read law at his father's old firm. Judge Day served on the appeals court for four years, taking time off to grieve when he lost his close friend McKinley to an assassin's gun in 1901.

President Theodore Roosevelt elevated Day to the Supreme Court in 1903. When he took his seat in March, he brought Luther with him to Washington as his stenographic clerk.[25] It was not as if there were not well-qualified applicants vying for that position. Indeed, Raphael Hayden, who had clerked for Justice Day's predecessor, Justice George Shiras (and for Justice Joseph P. Bradley before that), sent Day a plaintive letter asking not to be let go.[26] Charles H. Bradley, a graduate of Princeton and a student at Columbia Law School, also wrote to Day offering his services as "private secretary." "I am not a stenographer," he admitted, "but knowing that Mr. Justice Holmes has a secretary who is not a stenographer, and thinking you also not might require [shorthand skills] of your secretary," he had decided to apply for the position.[27]

During Luther's two-year Supreme Court clerkship, he married Ida Barber, niece of the late President McKinley.[28] In Washington, the young couple lived with his parents in the corner Victorian row house perched on a hill at 1301 Clifton Street, NW, that would be Justice Day's home until his death. The turreted ten-room house, with a beautiful view of the Capitol building, was "high and airy," according to the Justice, and "reasonably roomy for our family."[29] (Justice John Marshall Harlan and Chief Justice Fuller also lived in the neighborhood, called Columbia Heights.) Luther and Ida enjoyed the services of the resident staff, which consisted of a butler, cook, and governess. They also accompanied his parents to White House social events, such as the annual dinner for the Supreme Court and the reception for the judiciary.[30] As Justice Day worked from home, Luther was conveniently available whenever needed, especially evenings. "As all one's work outside the court work and conference is done at home," Day wrote to a friend shortly after joining the high bench, "we always have the work with us."[31]

Despite the agreeable working conditions, Luther passed the Ohio bar in 1904 with the intention of leaving his father's employ and becoming a lawyer.[32] He and Ida left Washington for Canton in June 1905, and Luther set up a law firm with a partner, Harvey Ake, defending clients at trial.[33] Luther struggled at first, writing to his father that he could not come to their summer house on Mackinac Island because, "summer months constitute the dull season in the law business for those struggling for the means of existence and we have taken in practically nothing for over six weeks."[34] It would not be long, however, before Luther became a successful trial lawyer in Canton.[35] In 1911 he moved to Cleveland in search of greater career opportunities. He was admitted to the Supreme Court bar in 1916 and began


JUSTICE DAY AND HIS FOUR STURDY YOUNG SONS

Interesting Family of the Ohio Jurist Recently Elevated to the Supreme Bench—Like Their Father They Are Serious in Their Tasks, and Begin Life With Good Educations

WILLIAM. RUFUS. LUTHER. STEPHEN.

Fashionable Butterfly Society of Washington Not Likely to See Much of These Keen, Energetic, and Aggressive American Youths From the Buckeye State

During 12 of his 19 Terms on the Court, Justice Day employed either Luther, Stephen or Rufus to serve as his clerk. They each lived with Justice Day in his large Victorian home during their clerkships.

representing Ohio clients on appeal from the Sixth Circuit.[36]

Stephen A. Day: Nepotism Concerns

When Luther moved on, Justice Day naturally wanted to give a turn as secretary to his third son, Stephen, who graduated from the University of Michigan in 1904.[37] After a year of law school at Michigan, Stephen had been reading law in Canton under the direction of his eldest brother William. In considering employing a second son, Justice Day expressed qualms about nepotism. He later confided to Chief Justice Fuller: "When Luther started in the profession, Stephen desired his place. I felt a reluctance to appoint a second son to the place for reasons which will occur to you."[38] Before engaging Stephen, Justice Day sought advice about whether his hiring would violate antinepotism legislation from attorney general William Henry Moody[39] and Associate Justice David J. Brewer. Day may have queried Brewer because he was the senior associate justice, or because the Kansas justice was known for his congeniality. Justice Brewer's views on nepotism may have been colored by the fact that he sat on the Supreme Court bench for eight years with his uncle, Justice Stephen J. Field. There is no record of Day consulting Chief Justice Fuller who had employed Justice Harlan's son, John S. Harlan, in 1888.

There is no record of the attorney general's response, but Justice Brewer replied to Day's query by citing the relevant Congressional statutes from 1887 and 1888 regarding kinship hiring in the judicial branch:[40]

> The language of the act is 'That no person related to any justice or judge on any court of the U.S. by affinity or consanguinity–within the degree of 1st cousin—shall hereafter be appointed by such Court or judge to be employed by such court or judge in any office or duty—in any court of which each justice or judge may be a member.'[41]

But Brewer carefully reasoned that this rule does not apply to "private secretaries" because a clerk works directly for a justice, not for the public, and does not take an official oath:

> The language is undoubtedly broad & sweeping—"any office or duty"—But technically, strictly, it does not reach to or include the private secretary. His place is not an office—He is not required to take an official oath._This was told by the accounting officers in respect to my own secretary[42] & I was told by Mr. [James] Maher in the Clerk [of Court]'s office that such was the rule.... Of course he is

Luther Day served as his father's first Supreme Court clerk, having been his stenographer on the court of appeals. During Luther's two-year clerkship he married Ida Barber, niece of the late President William McKinley.

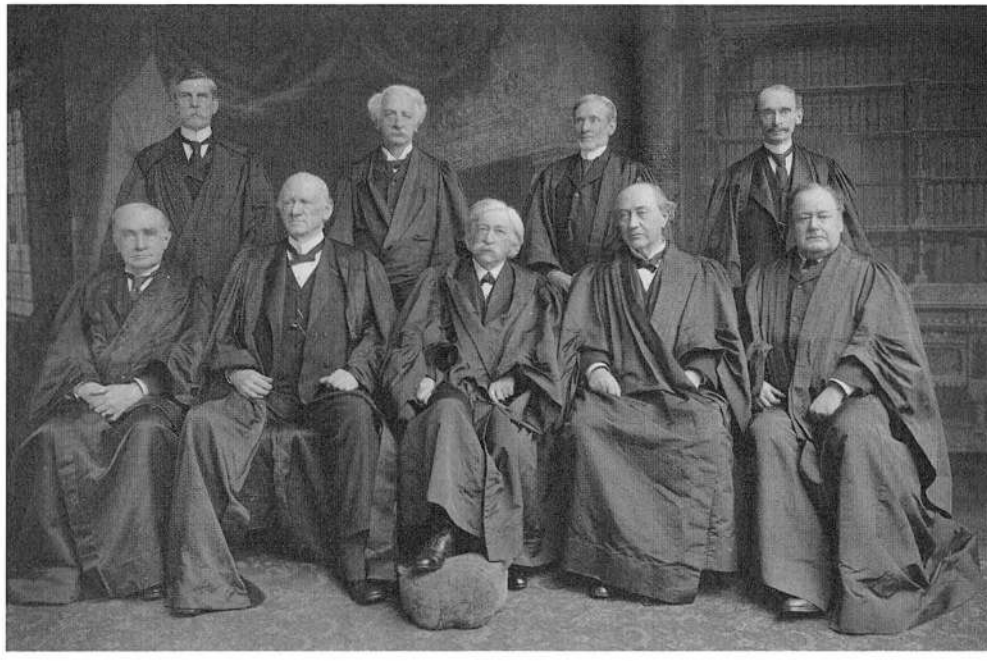
> of great assistance to the judge & helps him to do his judicial work. But in a certain sense (the same in character if not in degree) so does every employee who renders the judge service, from the one who drives him to the capitol to the one who brings him books from the library__ The duty performed [does]not stand between the judge & the public. He does not act officially through his secretary. In this, his secretary differs from the secretary of an executive officer. Included in the statute I saw he is not called Secretary, but Stenographer. In other words, he is simply a typewriter, a fountain pen, used by the judge to facilitate his work....
>
> And clearly it is not within the spirit thereof. Understandably the object was to prevent the judge from placing a relative between himself and the public. The latter would be loath to complain to the judge of any neglect or misconduct on the part of his relative and so suffer in silence. And if complaint was made the judge might naturally turn a deaf ear to it. Relationship would be apt to bias his judgment. But the private secretary does to the judge & not a part of that from or by the court or judge to the public. So I think the private secretary is not within the letter of the act.

Brewer did, however, acknowledge that the new climate of civil service reform was critical of nepotism:[43] "While I am clear that this is the true view to be taken of the scope of the act, I am not insensible to the fact that weeding out official wrongdoers is the political fact of the hour." He went on to caution that Day might face criticism for employing his son and that he did right to seek clarification of the rules. Moreover, Day may have been subject to greater scrutiny than other justices because he had served in the Cabinet and was still connected in Republican circles.

> It is not impossible that some overzealous friend of reform or some enemy of the court or yourself may, when finding that your son is your stenographer, criticize the appointment__ And I think you have done well to secure the opinion of the Atty Genl [Attorney General Moody].

Brewer concluded by offering to let Day publicize his letter as proof that he had sought advice and had not hired Stephen blithely or secretly. "If occasion should arise, you are at liberty to publicize this letter. So that it may be known you acted on advice & neither thoughtlessly, nor in deliberate disregard of the mandate of Congress."[44]

Justice Day must have been satisfied by Brewer's response because he hired Stephen for the 1905 Term.[45] "Wishing to give Stephen the advantages which I think the



When Justice Day consulted him about hiring his own son, Justice Brewer cited the statute governing nepotism in the judiciary, but reasoned that it did not apply to "private secretaries" because a clerk works directly for a justice, not for the public, and does not take an official oath. Day is top right and Brewer is seated second from right in this 1904 group photo of the Court.

place offers to a young man preparing for the law," he later wrote Chief Justice Fuller, "I hired him at $100 per month, which ...I have since paid and am now paying to him, as he has a wife [he married Mary Thayer in November 1905] to support as well as himself."[46] Justice Day probably meant he was supplementing out of his own pocket the stenographic clerk salary ($1,600) authorized by Congress, as did several other justices.[47] Having Stephen living and working under his roof must have been particularly useful to the Justice when Rufus was quarantined at home for eight weeks with scarlet fever in the winter of 1906; although the Justice continued his duties, it would have been difficult to have an outside clerk come to the house and risk infection.[48]

When Chief Justice Fuller's clerk died in a tragic accident on June 20, Justice Day quickly proposed that Fuller hire Stephen to replace him. The Justice vouched that Stephen was "industrious and reliable, a fairly good stenographer, and very desirous of doing good work." He arranged the commission directly, without Stephen even applying, by asking Fuller to "give him a trial." While Justice Day said he would "esteem the favor highly," he also did not want Fuller to feel pressured and said he would withdraw his request if it in "any way embarrasses you."[49] Fuller replied that he would appoint Stephen "with pleasure. I have no doubt he is all right. I really need a stenographer but if Stephen is 'fairly good,' as you say, he will improve as he goes along. ....This appointment does not interfere with any plans of my own or embarrass me in any way."[50] Day thus became the only Supreme Court justice other than Harlan to have persuaded a bench-mate to hire his offspring.[51]

Stephen thanked his father profusely, saying he was "more than delighted,"[52] and spent the summer living with Luther in

Canton working "hard at his stenography."[53] Although Stephen's commission started on September 1, 1906,[54] Fuller did not return to his F Street home in Washington until nearly October. His absence gave Stephen plenty of time to practice his typing and shorthand skills, a monotonous activity he complained about to his father:

> Once more does the click-click of the Smith Premier [typewriter] keep the air in the upper regions of 1301 Clifton Street in a state of monotonous activity, only second in its intensity to the ??___?–:: of the brain of the elevated amanuensis, busy with his well meaning hieroglyphics. A heart breaking session of two hours per day with Affleck's official thermometer registering 95 degrees and the velocity of the wind somewhere near-oo miles per day, has been the regular diet of your erstwhile abbreviator of the Queen's English..... Our friend, Mr. Fuller, has not yet put in an appearance but we are still hopeful. I trust that he will come soon, as my speed by the time he arrives will be something outrageous."[55]

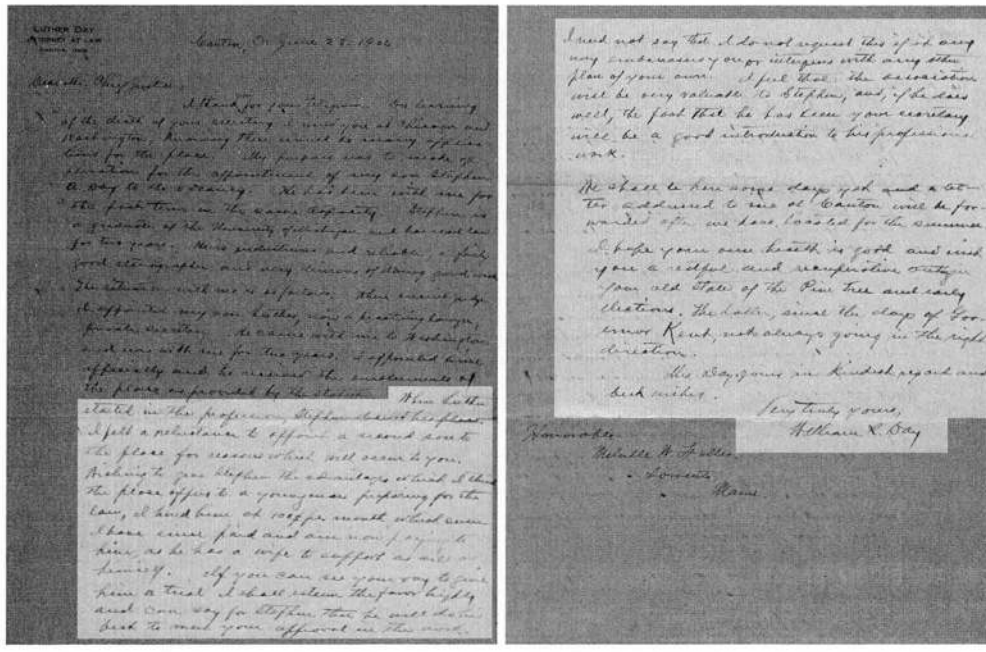
Stephen chose to return to private practice in Ohio at the end of one Term with Fuller.[56] He resigned his clerkship officially on September 30, 1907, having passed the Ohio bar in June.[57] Before informing the Chief Justice he was leaving, Stephen secured a partnership at the Cleveland law firm of Solders, Thayer, Mansfield[58] so as "to be able to resist the temptation to return to Washington," he told Fuller, "and associate with you for a longer period of great pleasure and to enjoy its inestimable advantages." "I need not try to express my gratitude and appreciation to you for we were together too long and the association too intimate," he continued, "to permit any other feeling on my part than great affection and the most sincere respect and honor for you."[59] Significantly, Stephen listed himself in biographical dictionaries as Fuller's clerk from 1905 to 1907 and neglected to mention his service to his father during the 1905 Term, perhaps indicating he wanted to hide his nepotistic start.[60]

Stephen moved to Chicago, where he enjoyed a successful legal career and he and Mary had four daughters. In 1910 he became the first of Justice Day's sons to bring an appeal to the Supreme Court when he was on the brief in a case from the Seventh Circuit.[61] Unlike his brothers, he did not develop an appellate practice before his father's court: a pair of companion cases from the Supreme Court of the State of Illinois in 1912 marked the second and last time he petitioned the high court.[62] Stephen went on to serve as special counsel to the Comptroller of the Currency from 1926 to 1928. He was elected to Congress as a Republican from Illinois's At-Large District in 1941, but as an ardent isolationist he lost his congressional race in 1944.[63] Stephen resumed the practice of law in Evanston, Illinois, until he died in 1950, at age of sixty-eight.[64]

Rufus Spalding Day: Preparing the Fourth Son

When Justice Day had placed Stephen with Chief Justice Fuller, he knew he could count on his youngest son to clerk for him. "How is the third incumbent and possessor of the title coming along," Stephen inquired about young Rufus.[65] In the Day family, nepotism by now was apparently considered a matter of course. "I think it would be for my best interests to qualify myself for the position [vacated by Stephen]," Rufus told his father, "as to what you wish to pay me, that is entirely immaterial from a moral view of it."[66]

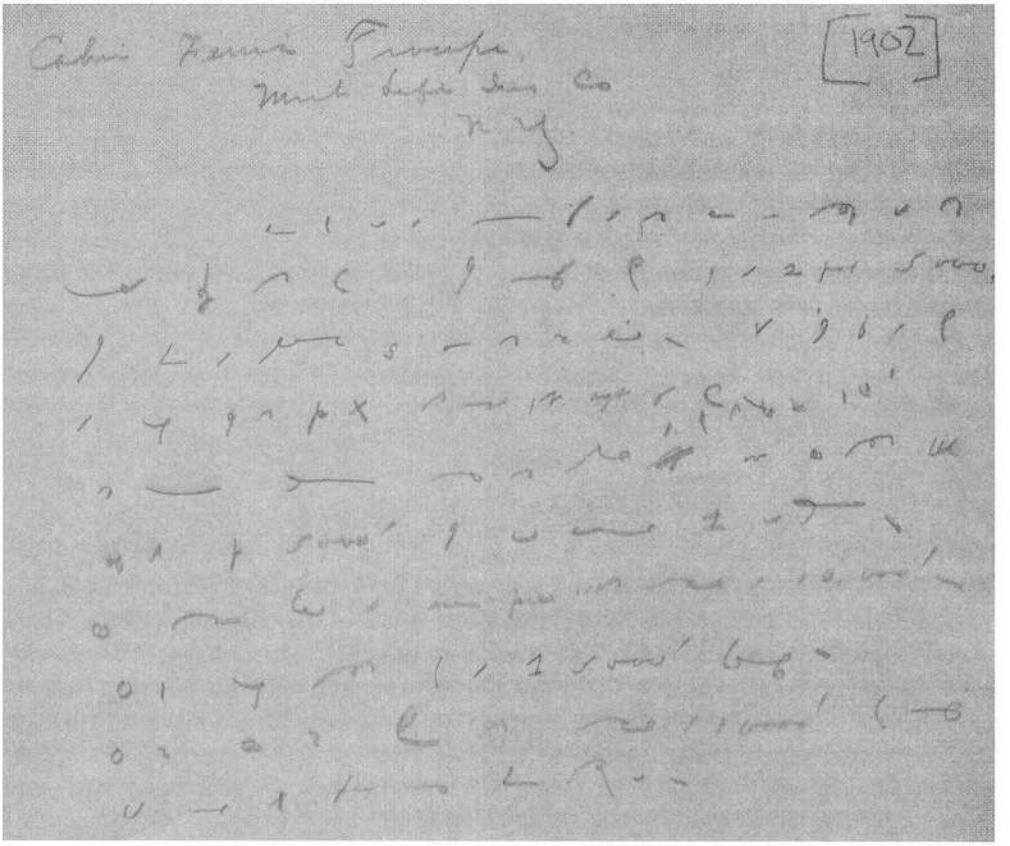
Rufus was in no position to negotiate his salary given that, unlike Luther and Stephen, he had no law school experience or legal



In 1906 Justice Day asked Chief Justice Fuller to hire Stephen as his clerk, vouching that his son "was "industrious and reliable, a fairly good stenographer, and very desirous of doing good work." While Day said he would "esteem the favor highly," he also told Fuller he would withdraw his request if it in "any way embarrasses you.

training. Like Stephen, Rufus had attended the Asheville School in North Carolina, an elite college preparatory school, but he repeatedly got into trouble for smoking and struggled to bring up his academic record "to the right point."[67] Judge Day wrote to the headmaster that when Rufus came home for break, he would endeavor "to impress upon him the importance of obedience to the discipline of your school." Rufus "is a boy worth saving if we can only arouse his pride and self-respect sufficient to start him on the right track," his father added.[68] Agreeing that he had been "lax" in his work, Rufus vowed to try harder so he could gain entrance to the University of Michigan and make his father happy.[69] "I have a heart," he wrote him, "one that beats in harmony with yours and with everything you think or do, believe me."[70] When Day joined the Supreme Court, Rufus asked to transfer to a school in Washington so he could live at home "to foster domestic tranquility."[71] He graduated from the Emerson Institute, a local prep school, in 1904. He then enrolled in a B.S. degree program at George Washington University in 1905 but did not graduate. Rufus, who had barely turned twenty-two when he began clerking for his father, would clearly be considered under-qualified in a competitive hiring process for a Supreme Court clerkship, even in that era.

The chore of hastily getting Rufus up to speed as a stenographer for the 1906 Term fell to Luther in Canton. "I wish as soon as you hear from the Chief [about hiring Stephen] you would let me know," Luther wrote Justice Day, "so that I could talk to Rufus about picking up shorthand. There is not very much time remaining until the first of October, so if he is going to attempt anything in that line he should begin work at once."[72] Luther offered "to spend an hour or two every morning trying to have him take up shorthand,"[73] until his younger brother could enroll in stenography school.



As Rufus was unable to master stenography quickly, Justice Day had to make do without a full-time clerk in the 1906 Term. This document found in Day's papers shows the type of shorthand his clerks needed to know.

Rufus clearly felt time pressure to get up to speed in dictation and typing, reporting to his father:

> I entered upon my shorthand work this morning. I reported at the Canton Actual Business College and tomorrow I recite my first lesson. You may rely on me to do my best work in the short time I have to qualify myself. I shall spend every morning at the school and devote my time in the afternoon to typewriter work. I shall have no time to study law. The point now is—pitch in and qualify for the position.[74]

He continued to give Justice Day reassuring updates about his progress:

> I have a first-class start in my shorthand work and find it intensely interesting. I spend all my time at shorthand and writing. I believe I can qualify myself for the position in the time allowed me. I am taking good care of myself and am very ambitious. I believe I can someday prove myself a worthy son....[75]

Eldest son William, who had received his LL.B. degree from the University of Michigan in 1900 and was practicing law at Lynch, Day & Day in Canton, was less upbeat about Rufus' dedication. "While his conduct is very good," he wrote Justice Day, "he seems little inclined to read law or to practice his shorthand."[76] William himself had excelled academically: Luther once described


Rufus married Madge Carnahan of Canton in June 1908 at the end of his first term clerking for his father. Rufus Day clerked for four Terms (1907-1910) and then would return for another six Terms (1917-1922).

him as "undoubtedly the most popular man at the University, and also enjoys the reputation of being one of its best students."[77] His high standards led William to heartily recommended a man working in his firm to be the Justice's stenographic clerk instead of his youngest brother.[78]

Meanwhile, at Ake & Day, Luther gave Rufus his first opportunity to learn the practice of law, informing his father:

> [Rufus] made his first appearance in court in the trial of a man charged with intent to kill his wife. Rufus opened the argument to dismiss the case and occupied about ten minutes in the citation of numerous authorities and a summary of the facts adduced. He did remarkably well and I think his taking part has done more than anything else to make him ambitious to be a lawyer.[79]

Nine days later, he wrote again that Rufus had "tried a rather technical garnishment case and "won the issue without assistance from me and received a fee of $1.00 for services rendered. I am going to try him out on another case...."[80] As Rufus was not admitted to the Ohio bar until 1910, it is not clear how he was allowed to practice in court.

Rufus yearned to return to the nation's capital and live with his parents again. "I am very homesick for Washington," he wrote to his father,[81] "[m]y main object in taking the position is to be with you and mother a few years longer."[82] He acknowledged his immature behavior but was confident he could fill his brothers' shoes: "I have already abused your kindness and patience in loitering away my time. The other boys are headed right and I believe that the brains and talent did not die out when the fourth son entered the world of defeats and victories."[83]

As William predicted, Rufus was not ready to start in October.[84] Justice Day apparently went without a clerk in the 1906 Term as he waited for his youngest son to get up to speed, instead rounding out his Chambers staff with a dependable messenger, George G. Brown, recommended to him by his predecessor, Justice George Shiras.[85] In December, Hawkins Taylor, who had been assistant clerk to the Committee on Foreign Relations in 1897–1898 when Day was serving as Secretary of State, wrote to the Justice: "I am informed that you are at present without the services of a private secretary and you may need someone to do at least a portion of your work." Taylor noted that while he worked in the Senate by day for Henry A. DuPont (R-DE), he was "at leisure late in the afternoon and at night if you can use my services."[86] Taylor did some stenography work for the Justice and sent him a bill in January. As late as mid-May, Justice Day continued to receive applications for the unfilled clerkship position.[87] The fact that Day made do with temporary stenography services for a whole term indicates that at that juncture he was not relying on his clerks for substantive legal work.

In the end, Rufus started as his father's clerk on October 31, 1907.[88] He had spent the summer in Canton to work on his shorthand and typing while the family vacationed at their summer house on Mackinac Island. Yet Rufus was distracted from stenography lessons by local Canton beauty Madge Carnahan, whom he proposed to during the

summer. Rufus was clearly ambivalent about becoming a private secretary, wanting to please his father but also expressing his reluctance:

> I shall certainly act 'the man' this year and will try to be an aide to you instead of an encumbrance.... I am ever mindful of your great kindness in making me the offer you have, which is, I obviously admit, an offer I must reluctantly accept.[89]

Rufus would serve as his father's clerk for four terms. He married Madge in June 1908,[90] and the couple moved in with his parents at their Clifton Street house.[91] They engaged in an active social life. Madge was admired about town as "an exceedingly attractive young matron, who mingles in the social world here under the happiest auspices."[92] Handsome Rufus had auburn hair and blue eyes like his father but, like his brothers, was half a foot taller than the diminutive judge. He enjoyed accompanying his father to his beloved baseball games, taking their seats behind the *Nationals'* dugout.[93] At the end of the 1910 Term, Rufus, who had passed the Ohio bar in June 2010, returned to Canton to practice law with Luther, no doubt seeking greater remuneration and a household all his own.[94]

William Scouts a Nonfamily Clerk, 1911

Having run out of sons, for the 1911 Term Justice Day hired his first nonfamily clerk. William, who had been appointed district attorney for the Northern District of Ohio in 1908, acted as his father's scout.[95] He had become acquainted with James G. Bachman,[96] a summa cum laude graduate of the Cleveland Law School serving as a stenographer to Judge Robert W. Tayler of the District Court for the Northern District of Ohio.[97] Tayler died unexpectedly on November 26, 1910, and William hired Bachman to work in the district attorney's office.[98]

For the 1911 Term Justice Day hired James G. Bachman, (above) a graduate of the Cleveland Law School serving as a stenographer to Judge Robert W. Tayler of the District Court for the Northern District of Ohio. The Justice's eldest son, William L. Day, had scouted Bachman and urged him to apply for the position.

He urged Bachman to write Justice Day to present his credentials, presumably because Rufus had already announced his intention to move back to Canton.[99] Bachman writes that he had three years' experience as a stenographer at the law firm Henderson, Quail and Siddall, and that since Judge Tayler's death, he has been working for District Judge John M. Killits. But he revealed that he will not be kept on by Killits and was waiting for his successor to be appointed before moving on. After interviewing with the Justice, Bachman wrote: "I am convinced that, compared along the lines suggested by you when I saw you in Canton the other week, the ultimate benefits of the position as your secretary are superior to my present position."[100]

Justice Day hired Bachman on June 30, 1911, and he proved to be a satisfactory clerk during his three terms of service.[101] Unlike Day's three previous clerks, Bachman

Mary Schaefer Day's death in 1912 from spinal cancer was a blow to the family as she was only 61. Rufus and Madge moved back from Canton to Washington to live with Justice Day, now a widower, to keep him company.

did not live with him but spent long days at the Clifton street house. He would take a daily break to chauffeur the Justice around in "auto rides" and then "[make] up for it by working at home evenings."[102] The clerkship got off to a difficult start, as Mary Day, age sixty-one, was gravely ill with cancer of the spine. She suffered terribly for eight months, and Justice Day did not return to the bench until January 6, 1912, two weeks after his beloved wife's death.[103] In February, a weary Day told a friend: "I find the court work never so pressing as at present, and every member has all he can do from now until the adjournment in June."[104] Despite being in mourning, with Bachman's help Justice Day managed to crank out twenty-six opinions in the 1912 Term, second only to Justice Holmes' thirty-two.[105]

After his mother's death, Rufus returned to Washington to live with Justice Day so his father would not be alone.[106] Madge took over hosting the elaborate Monday afternoon tea receptions at the Clifton Street home that were expected of the wives of Supreme Court justices.[107] A son, Rufus Spalding Day. Jr., was born in 1913. A daughter, Madge, would arrive three years later. To support his growing family, Rufus passed the D.C. bar in 1912 and set to work building up a legal practice, joining a six-person firm.[108] He became a member of the Supreme Court bar on January 26, 1914, sworn in the same day as Bachman, his father's clerk.[109] While Rufus would put his elite bar membership to use filing his first cert. petition in October 1915,[110] Bachman did not practice appellate law. Instead, at the end of the 1913 Term, he left Washington for New York to take a higher paying job as assistant to the vice president of the Electric Bond and Share Company.[111] When Justice Day asked him to consider coming back to work for him, Bachman turned him down, reporting that his new employer did not expect him to do "routine clerical work" as there were two secretaries.[112] Nonetheless, Bachman had mixed feelings when October rolled around: "As the usual time for your return to Washington and work draws near, my thoughts often turn in that direction, and I wish I could be with you. Everything is going quite well with me. I am getting into real work more and more, and find it very fascinating."[113]

John A. Lombard: An Unsatisfactory Clerk

Once more it fell to the eldest Day brother, now at the Cleveland law firm of Squire, Sanders & Dempsey, to scout for a replacement clerk for the 1914 Term. William, who had just stepped down from the bench of the District Court of the Northern District of Ohio, where he had served from May 9, 1911, to May 1, 1914, recommended that court's Deputy Clerk, John

Justice Day's second non-family clerk, John A. Lombard, proved unsatisfactory. Lombard expressed his "perplexity and disappointment" when Day informed him he was trying to persuade Bachman to return as his clerk.

A. Lombard.[114] "I am 23 years old and have been serving in the office for the past four years as stenographer and Deputy Clerk [of the district court], meanwhile studying law at Toledo University and Cleveland Law School," wrote Lombard to Justice Day, by way of introducing himself.[115] Meanwhile, Bachman was also advising the Justice about whom to hire as his replacement. "I do not know Mr. Lombard," he wrote, instead recommending Joseph Curtis White, a law school graduate in charge of the Supreme Court Library: "A fine young fellow, familiar with Federal Matters and quite familiar with law books,"[116] and Charles F. Wilson, former private secretary to Justices Henry B. Brown and William Moody, who had applied for the job directly to the Supreme Court Clerk's Office.[117] Bachman's description of White's job experience suggests that, in addition to clerical work, Justice Day needed help with legal research and looking up relevant statutes.

In the end, Justice Day chose Lombard, officially appointing him on October 1, 1914.[118] He may have been swayed by a letter of recommendation from Judge John H. Clarke, who had just replaced William on the Northern Ohio district court:

> He was my deputy in Toledo for several years until I resigned the clerkship, and since that time has been my deputy in the office at Cleveland. I know him to be straightforward in every way, ambitious and willing to devote his energies to you, should he be fortunate in obtaining the vacant secretaryship..... It is not my usual practice to write such letters but I have a very strong interest in the young man.[119]

Two years later, Clarke would join Justice Day on the Supreme Court bench and would have had occasion to run into his former protégé.

In Lombard's second term as Day's clerk, the Justice suffered a serious bout of pneumonia and was absent from the Court during the winter of 1916. "Justice Day very ill and the Justice extremely worried," reported a Holmes clerk. "'I do hope Day pulls through,' [Holmes told his clerk] 'I am very fond of him. He is one of the most high-minded men and loyal friends I know.'"[120] The Court continued its breakneck pace that term, docketing 1,069 cases and publishing 234 merits opinions.[121] In March, Chief Justice Edward D. White proudly reported to Day that the justices "took off the docket more than we took last year, which you know was a record breaking one, and we left fewer cases on the docket than we did when we rose last year."[122] Yet a weakened Day managed to write only eight majority opinions the entire term, compared with his average of about twenty-two in his first seven Terms.

Although he stayed with Justice Day for three Terms (1914–1916), Lombard did not stack up to Bachman. He may have been preoccupied by his courtship of Caroline Gray, whom he married in September 1915.[123] Lombard passed the Ohio bar in June 1917, confidently informing Day before he got his results: "I have a vain idea I hit the thing right between the eyes."[124] But studying for the bar may have further distracted him from his clerk duties, because, after Lombard gained admission to the bar, the Justice reached out to him again to woo him back from his position as assistant general attorney at Utah Power and Light Co. in Salt Lake City. "I would like very much to get you to assent to review your position with me as Secretary," Day wrote, adding, "You know the character of work...." To sweeten the deal, Justice Day offered him $1,000 out of his own pocket to supplement the stenographic clerk salary, which now was $2,000.[125] Day wrote Bachman again in July, this time with more urgency because he wanted to give Lombard enough notice to be able to find a new position before the opening of the term:

> you are a young man and I am an old one, and the most of your career is ahead of you. I cannot say that your return to my service as Secretary will not be in a considerable measure a repetition of experience you have already had. I have reached a time of life when I desire the best service I can secure, and my experience with you leads me to believe that if you consent to return to me I shall find it with you.[126]

Meanwhile, with the United States now at war with Germany, Lombard was asking Day to get him an occupational exemption with the draft board.[127] Lombard wrote that he was "in the comparative front rank for the draft, being 2239 in order of call," and noted that secretaries to Congressmen were using occupational exceptions on the grounds that they were "indispensable." "If, in consideration of breaking in a new secretary, together with other considerations, you care to make an affidavit similar to those made by the Congressmen I mention, I will put in that claim...," Lombard offered. "I would appreciate your frank advice on this," he continued, "and don't be afraid of hurting my feelings."[128] The Justice declined to help, writing "I have had several excellent secretaries. —including yourself,—for none of them could I make an affidavit [to a draft board] swearing their services were indispensable."[129]

Clearly Lombard was more dispensable than Bachman, and Day finally informed his current clerk that he had made his former clerk an offer to return on October 1 and was awaiting his reply. "I took this step, not because of lack of appreciation for your faithful service to me, but for the reason that I have found in Mr. Bachman very unusual qualifications for the duties of secretary" he explained.[130] But Bachman turned the Justice down, leaving him no choice but to ask Lombard to stay on. His feelings hurt, Lombard resigned:

> This situation of being discharged and re-hired, practically, has the effect of making one doubt whether our mutual interests could not best be served by my resigning. You are dissatisfied, evidently with my work, and I cannot under the circumstances look forward to taking a happy interest in the court work. Bar study has interfered with my best efforts, and I have looked forward to making myself more useful this year, with that off my mind. But to feel that I am with you against your honest wish, and holding the position only because your stay in Washington is not to be long, will necessarily have its effect.

After signing on again to be his father's clerk in 1917, Rufus Day continued his private litigation practice. His wife Madge (pictured) was a prominent social hostess who entertained regularly, and Rufus may have felt pressured to support their lifestyle.

> For that reason, and others of a kindred nature, I feel you should continue your search for another secretary. I realize I will suffer financially, and yet I feel the embarrassment so keenly that that fact becomes immaterial. You have always been so kind and good to me that I will of course be willing to continue with you indefinitely until you get the man you want.

Lombard closed by registering his "perplexity and disappointment" and noting that he was "grateful" for Day's "friendship and three years of association."[131] "You do not so express yourself," he queried a week later, "but I trust I may have the privilege of referring any prospective employers to you?"[132] In the same letter, Lombard announced that he was effectively reneging on a bet with Rufus. "In remembering me to the family," he asks, "please tell Rufus I do pay my bets, but conscience must go hand in hand with convenience, and as soon as I think of my obligation at the same time I have the money I will come across in real style." Justice Day thanked him for "faithful service" and wished him a "successful career at the bar."[133] Officially Lombard's last day of service was October 1, 1917, but he returned only briefly to Washington from Cleveland, where he had spent the summer working for a real estate firm, to arrange to ship his furniture and return the Justice's house key.

Unable to detach fully, Lombard sent Justice Day a proofing correction to his printed opinion in *Buchanan v. Warley*, which held that a Louisville, Kentucky, ordinance prohibiting the sale of real property to blacks violated the Fourteenth Amendment.[134] Having read the briefs in the spring, Lombard had asked Day for a copy "to know what disposition was made on certain points, principally on the contention of equal operation of whites on blacks."[135] After receiving his copy in the mail, Lombard complimented Day, saying the opinion "reads well" and was a "lucid exposition of a delicate point." He apparently also found some typos, noting that "Mr. Justice Pitney's eagle eye sometimes winks, and that Mr. Justice Holmes is not reinforcing Boston ideals." "[M]y service to you is too recent to have permitted me to lose the habit of protecting you from printer's errors," he wrote, questioning "the use of the word 'principle' on page six, about the middle of the second paragraph."[136]

Lombard also noted that he had found work at the Cleveland law firm Baker, Hostetler & Sidlo, and sent news of Bachman, who had moved back to Cleveland and was practicing at the rival firm of Bulkley, Hauxhurst, Inglis & Saeger. "He is looking fine and expresses himself as well satisfied

with his connection," Lombard reported to Day. The two former Day clerks now faced each other as litigators in court, but with Lombard admitting he could use "an antidote to stage fright."[137] Lombard continued his career as a solo lawyer,[138] while Bachman practiced with a firm located in the same building as Luther and William's firm.[139]

Rufus Returns for a Second Clerkship

After Lombard quit abruptly in September, Rufus, now thirty-three and a father of two, was hurriedly pressed back into service as clerk for the remainder of his father's tenure on the high bench: October 1, 1917, to November 11, 1922.[140] Rufus heeded the call of duty but did not relinquish the robust legal practice he had developed since returning to Washington from Canton nearly five years earlier.[141] While Bachman and Lombard had been arriving every day at Clifton Street to serve Justice Day, former clerk Rufus had been commuting downtown to the Westory building, where he practiced law. He advertised himself in legal directories as an "Associate in Federal Courts Practice" and developed an appellate law practice before the D.C. Court of Appeals and the Supreme Court.[142] His law partner was Samuel Herrick, an established attorney who specialized in public land and mining claims against the Department of the Interior.[143]

Why did Justice Day tacitly allow Rufus to continue his law practice? Was it to compensate him for taking a step backward to be his low-paid private secretary? Or was it that the country was now at war with Germany and Day worried there was a shortage of eligible clerkship candidates.[144] As for Rufus, he could thus have it both ways: loyally helping his father while continuing to generate a private income. Indeed, Rufus did not stop taking on clients. To the contrary, he continued to advertise himself in law directories as specializing in "Practices before the Federal Courts, Executive Departments, and the Federal Commissions."[145] He made no mention in these directories of being a law clerk to a Supreme Court justice, however. This omission is curious, given that the insider knowledge he picked up reading briefs and being privy to the business of the Supreme Court would have been valuable to clients. Further, clients would likely have expected that Rufus could write petitions in a way that the justices, or at least Day, would see their appeal favorably and take up their case for review.[146] Perhaps, to protect his father, he did not want to trade on this advantage, or perhaps he was concerned that his clients would be unimpressed that he was also performing a secretarial job.

Did Rufus's legal practice shortchange his dedication to his clerkship duties? For someone who had been lax in his work in high school, this dual career would have been a challenge. However, the fact that Rufus juggled both jobs confirms that Justice Day relied on him mostly for clerical tasks. It is also possible that Rufus mainly filed motions at the Supreme Court on behalf of other attorneys and had minimal involvement in the legal work or the writing of briefs. As a Washington lawyer, his proximity to the Court was an asset to attorneys appealing cases from Ohio, where many of his clients and co-counsel, including William and Luther, resided. For a litigant or an out-of-state legal team to hire a local Washington attorney was insurance against travel snafus and the uncertainty of predicting when an argument would be scheduled. Indeed, in that era the Court's practice was to notify only local counsel about the scheduling of a case.[147]

No doubt Rufus needed the additional income from private practice to support his wife and two children and their fashionable lifestyle. Madge was considered "the most beautiful and accomplished woman in Washington social circles."[148] "She entertains extensively," gushed a society columnist, and

"recently was hostess at one of the most beautifully appointed luncheon parties of the season, given in honor of Mrs. Marshall, wife of the vice president."[149] Rufus and Madge were regularly included in high-profile social events, including White House dinners given by Presidents Taft and Wilson to honor the Supreme Court justices, as well as embassy dinners.[150] President Warren Harding and his wife, Florence, fellow Ohioans, were particularly solicitous of the popular couple.[151]

Yet Rufus continued his legal practice even after he received a significant raise in 1920 when Congress authorized each justice to hire a law clerk ($3,600) in addition to a stenographic clerk ($2,000).[152] Like most of his brethren, Day promoted Rufus to law clerk at the higher salary but did not hire a second clerk as stenographer. Apparently, however, Rufus had not been a shoo-in for the promotion, as Justice Day had considered hiring an outside applicant, Assistant Clerk of Court Robert F. Cogswell, who had written to Rufus asking if his father was going to promote him to the law clerk position or if the position was available.[153] Justice Day queried Clerk of Court James D. Maher about the competency of his assistant:

> Assuming that I shall make no change in the position of Stenographic Clerk, would Mr. Cogswell be qualified to act as Law Clerk, himself doing the necessary stenographic work in that position? I need hardly say that I wish a competent man for the duties of Law Clerk, which the position implies.[154]

Justice Day stuck with Rufus when Maher replied that Cogswell "would not, in my estimation, fill the bill as Law Clerk."[155] Justice Joseph McKenna would hire Cogswell as his clerk nine months later.

Rufus dutifully stayed on as clerk until President Harding appointed his father on August 10, 1922 to be Umpire of the Mixed Claims Commission to arbitrate war claims against Germany. A series of telegrams between father and son indicate that Day wanted Rufus to continue as his secretary in his new job. "I OFFER TO SERVE AS SECRETARY IN NEW CAPACITY AS I CONSIDER THIS EVEN MORE IMPORTANT THAN MY SERVING IN PRESENT POSITION FOR REASONS EASY TO UNDERSTAND," Rufus wired the Justice, who was vacationing on Mackinac Island. "PLEASE WIRE YOUR VIEWS AS NEW LEGAL ASSOCIATIONS MUST BE WITHHELD TILL I HEAR FROM YOU AS SOON AS POSSIBLE," he urged.[156] Apparently, Rufus would have to drop his legal work in order to join the Commission, something he did not feel he had to do as a law clerk. Justice Day resigned officially from the Supreme Court on November 13 to take up his new position. Rufus served as "secretary to the umpire" from November 15 to March 1, at a salary of $3,600, the same amount he was earning as a clerk.[157] Fighting pneumonia, his father was forced to retire in May, shortly before his death in July, but he had first secured Rufus a job working for Solicitor General James M. Beck, preparing the petitions and briefs filed by the government in the Supreme Court, where his title was special assistant to the attorney general.

Nepotism Discussion

As a loving father, Justice Day hired his sons principally to help them launch their careers and carry on the Day family tradition of excellence in the law. Yet nepotism had its advantages for the Justice as well: "Close family members, if they are on good terms, can communicate quickly and efficiently. Family ties can engender respect, love, and other wholesome qualities that presumably advance, rather than retard, the quality of work," writes Michael Solimine in his study of nepotism in the federal judiciary.[158] Day family dynamics were indeed harmonious,

and having a clerk who lived at home and was available around the clock was an asset. The familiarity of Rufus serving as his clerk for nine terms must have been both comforting to the Justice and an efficient way to manage the workload. Justice Day was not an anomaly in preferring long-serving clerks: Justices Horace Lurton, Mahlon Pitney, John H. Clarke, Edward Sanford, and Owen J. Roberts retained their loyal assistants for their entire tenures on the bench. William H. Pope served Chief Justice Edward D. White for eighteen terms although he was not Taft's only clerk.[159]

Because clerks worked out of the justices' homes during Day's tenure, they were considered private secretaries and not treated as institutional staff. This arrangement seems to have blinded Day to the fact that they were government employees paid by the U.S. Treasury. His confusion is understandable given that individual justices had control over exactly how much to be paid to his clerk and could arbitrarily choose the start date he was put on the payroll. Justices would simply inform the Clerk of Court about their wishes in terms of hiring date and pay. In many instances, they augmented their clerk's pay out of their own pockets, blurring the lines further. In Day's correspondence about nepotism with Justice Brewer, it is clear that neither man viewed their stenographic clerk, (whom Brewer called "simply a typewriter") as a public official subject to government nepotism rules.[160]

Moreover, the lack of a regularized, open recruitment process for clerk selection in Day's era meant that hiring practices were haphazard and not subject to much scrutiny. Vacancies for clerkships were not advertised, but news about them spread through word of mouth. Candidates did provide letters of recommendation from employers and law professors, something the Day boys unfairly did not have to do. There were always many highly qualified candidates vying for a vacancy, and, as Justice Day knew, a Supreme Court clerkship was a springboard to becoming an attorney in a federal agency.[161] Moreover, having developed "keen political judgment" while serving in the McKinley administration, Day should have been more concerned about the bad optics of hiring his sons.[162]

While the antinepotism statutes for the judiciary passed in 1887–1888 were unclear about lower level staffing, as Justice Brewer noted, they came out of a general movement to professionalize employment in the federal government and were unquestionably aimed in part at preventing judges from hiring or appointing relatives.[163] If Justice Day did not heed this shift toward more professionalized staffing practices, it was because these practices were not applied to the Supreme Court as an institution until it had been give its own building with space for the justices and their staffs so all would work under the same roof. Accordingly, Justice Day's practice of nepotism reflects less a personal ethical lapse than a lack of awareness of changing hiring practices and tolerance for nepotism outside the Supreme Court arena, where the norm continued to elevate the personal over the professional.

The civil service reform movement at the turn of the nineteenth century successfully redefined the "ideal" federal employee as a "politically neutral, ethical, technically qualified expert."[164] To determine whether Justice Day compromised his ethical judgment in hiring his sons, it is useful to evaluate whether, as clerks, his sons met this "ideal" standard. As the Justice mainly relied on them for shorthand and proofreading, "political neutrality" probably was not a factor. Day's four sons, along with Bachman and Lombard, were solid Ohio Republicans, so they all had the advantage of political compatibility with the Justice even if it did not factor much in their work.[165] While a clerk charged with proofreading might go beyond correcting typos, grammar, and punctuation to alter the tone or meaning of the next,

there is no evidence that the Justice's sons did that. In terms of "technical proficiency," the sons all studied law and worked hard to master stenography. Young Rufus was clearly the weakest in terms of legal training, having read law only briefly but possessing neither an undergraduate diploma nor any law school experience. He also made his father wait a whole term while he got up to speed in shorthand. Rufus clearly would not have been hired by another justice. Yet despite his weak qualifications and initial immaturity, Rufus must have proved a satisfying clerk as his father rehired him term after term. In contrast, Stephen was engaged by Chief Justice Fuller subject to pressure from his father, but he had a B.A., had taken law school classes, read law, and had spent a valuable year clerking for a Supreme Court justice. As all the Day brothers went on to stellar careers in private practice, their competency at practicing law is unchallenged.

Lastly, Rufus fails the third criterion—"ethical"— for having practiced appellate law while serving as a Supreme Court law clerk. As he was typing up materials and reading briefs for his father, he was privy to the decision-making of the justices. The insights he gleaned as a clerk, even if much of the work was clerical, would have benefitted his outside legal work and given his clients an unfair advantage. To eliminate this type of inequity, the Supreme Court promulgated a rule in 1939 that instituted a two-year rule cooling off period for law clerks:

> No one serving as a law clerk or secretary to a member of this court shall practice as an attorney or counsellor in any court while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court, or permit his name to appear on a brief filed in this court, until two years shall have elapsed after such separation.[166]

Only Rufus would have been in violation of this 1939 rule because Luther and Stephen began their appellate practices several years after their clerkships.

Justice Day's sons' stints as Supreme Court clerks served them well as important steps toward a higher rung on the elite legal ladder. They were the last children of Supreme Court justices to be given the opportunity to develop their talents and gain prestigious experience in this capacity. As nepotism concerns increased in the Progressive era and clerking duties became more substantive, the selection process for hiring Supreme Court clerks would become more competitive, regularized, and subject to scrutiny.[167] While Justice Day's practice of nepotism is problematic for the integrity of his reputation, his hiring his sons to serve as stenographic clerks probably had only a negligible effect on the other justices or the business of the Supreme Court, with the possible exception of giving Rufus' clients an edge. Of greater concern for the judicial integrity of the Supreme Court is that they practiced appellate law before their father—a topic that will be examined in a forthcoming article. While Justice Day deserves to be admonished for not recusing when his sons argued cases, there is minimal basis for criticizing him for having his sons clerk for him, especially given the inchoate nepotism standards of the time.

Notes

[1] Clerkship dates are from the Supreme Court Library and the Supreme Court Office of the Curator Research Files.

[2] Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (California: Stanford University, 2006): 51, 54.

[3] See generally, Clare Cushman, "Typewriters and Fountain Pens, Supreme Court Stenographers and Law Clerks, 1910-1940" *Journal of Supreme Court History*, 41, 2016, pp. 39–71.

[4] *Ibid.*, 58–60.

[5] Rufus Paine Spalding (b. 1798) married Lucretia Swift, daughter of Zephaniah Swift, the Chief Justice of Connecticut, in 1822.

[6] **Joseph E.** McLean, **William Rufus Day: Supreme Court Justice from Ohio** (Johns Hopkins Press, 1946): 62.

[7] "Judge William R. Day," *Worcester Daily Spy*, January 17, 1903, 6.

[8] Quoted in Kathryn Alamong Jacob, **Capital Elites: High Society in Washington After the Civil War** (Smithsonian Institution, 1995):129. Day had, however, been earning about $15,000 annually in private practice in Ohio prior to being appointed assistant secretary of state in 1897 at a salary of $4,500. Day rented his Clifton street house for $2,500 a year.

[9] "Justice Day and His Four Sturdy Sons," *Washington Times*, March 8, 1903, 4.

[10] William L. McPherson, "A Politician Against His Will," *New York Tribune*, July 11, 1923, 11.

[11] Todd C. Peppers, Ira Brad Matetsky, Elizabeth R. Williams, Jessica Winn, "Clerking for 'God's Grandfather': Chauncey Belknap's Year with Justice Oliver Wendell Holmes Jr.," *Journal of Supreme Court History*, 43, 2018, 275.

[12] Charles Evans Hughes, "Biographical Notes," *Hughes Papers*, quoted in Alexander M. Bickel and Benno C. Schmidt Jr. **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Vol. IX: The Judiciary and Responsible Government** (New York: Macmillan, 1984), vol. 9, 72. [Hereinafter OWH Devise IX].

[13] The Brandeis-Frankfurter Conversations, quoted in *ibid.*, 72.

[14] For example, immediately after joining the Court, Justice Day became seriously ill with pneumonia, the first of many bouts. "Justice Day's Illness Takes a Serious Turn," *The Stark County Democrat*, March 13, 1903, 1.

[15] See, for example, William R. Day to Sophie Dalmas, October 19, 1902. Papers of William R. Day, LOC Box 16, Letter D [hereinafter Day Papers].

[16] William R. Day to Sophie Dalmas, Day Papers, October 7, 1905. Box 20 Letter D.

[17] William R. Day to Luther Day, Day Papers, February 12, 1906.

[18] Justices who did ask their clerks to summarize petitions during Day's era were Holmes, Hughes, Van Devanter, McReynolds, Sutherland, Butler, and Taft.

[19] William R. Day to Horace Lurton, December 25, 1903, Papers of Horace Lurton, Library of Congress, undated A-J [hereinafter Lurton Papers].

[20] https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-1878-2017

[21] For an assessment of Justice Day's jurisprudence, see Jesse Bair, "The Silent Man: From *Lochner* to *Hammer v. Dagenhart*, a Reevaluation of Justice William R. Day," *Journal of Supreme Court History*, 40, 2015, 38–54, and Joseph E. McLean, **William Rufus Day: Supreme Court Justice from Ohio** (Baltimore: The John Hopkins Press, 1946).

[22] John Marshall Harlan to William H. Taft, July 11, 1910, quoted in OWH Devise IX, 37. Harlan was trying to persuade Taft to elevate Day to Chief Justice and may have been exaggerating his qualities.

[23] "Justice Day and His Four Sturdy Sons," 4.

[24] *University of Michigan Law School Bulletin* lists Luther Day as a second-year law student in 1901. In 1870 Justice Day graduated from the University of Michigan with a B.S. degree, after which he took some classes at the University of Michigan Law School.

[25] F.M. Chandler, Office of United States Marshal Northern District of Ohio, to William R. Day, Day Papers, March 5, 1903. Box 19, Letter C.

[26] Raphael Hayden to William Rufus Day, Day Papers, February 21, 1903. Box 18 Letter H.

[27] Charles H. Bradley to William Rufus Day, February 28, 1903, Day Papers, Box 18 Letter B.

[28] "Social and Personal," *The Washington Post*, May 13, 1903. Her first fiancé was killed in the Spanish American War, as was her brother.

[29] William R. Day to Horace Lurton, October 17, 1903, Lurton Papers, undated A-J.

[30] "At the White House," *Evening Star*, February 5, 1904, 17; "At the White House," *Evening Star*, January 13, 1905, 10. Stephen and Rufus would also attend White House functions when they became their father's clerks.

[31] William R. Day to Horace Lurton, October 17, 1903.

[32] Luther was admitted to the Ohio bar in June 1904, William B. Neff, **Bench and Bar of Northern Ohio** (Cleveland: The Historical Publishing Co., 1921)359.

[33] See, for example, "Four Suits Filed," *The Stark County Democrat*, December 8, 1905, in which Luther Day is named as a defense attorney in one of the cases.

[34] Luther Day to William Rufus Day on "Ake and Day, Attorneys at Law, Canton Ohio" letterhead, August 17, 1906. Day Papers, Box 21 Letter D.

[35] See for example, "Knockbloch Will Testify in Own Behalf Today," *The Stark County Democrat*, March 3, 1910, 8; "Courthouse," *The Stark County Democrat*, December 17, 1908.

[36] *Journal of the Supreme Court* [hereinafter *JSCT*], October 16, 1916, 19. Luther's appellate practice will be examined in Clare Cushman, "Father on the Bench: Justice William R. Day and Kinship Recusal," *Journal of Supreme Court History*, forthcoming.

[37] "Congressman Carries on Fame of Great Alumni Family," *Michigan Alumnus*, 1943/1944, vol. 50, 244.

[38] William Rufus Day to Melville W. Fuller, June 28, 1906. Papers of Melville W. Fuller, William Rufus Day Correspondence File, Library of Congress.

[39] Day consulting "the Attorney General" is referenced in a letter from David Brewer to William Rufus Day, August 13, 1905. Day Papers, Box 20 A-C. There is no

query letter from Day in Moody's papers, nor is there a response from Moody in Day's papers.

[40] 24 Stat. 555 (March 3, 1887) and 25 Stat. 433, 437 (August 13, 1888). When the statute was later recodified in Act of March 3, 1911, ch. 231, §297, 36 Stat. 1168, the words "by such court or judge" were deleted.

[41] David Brewer to William Rufus Day, August 13, 1905.

[42] Brewer employed Frederick J. Haig from 1893 to 1910.

[43] For example, the California State Senate had just enacted Section 844 on February 25, 1905, making it "unlawful for any State or county official to appoint either his wife, brother, sister, son or daughter to office under him."

[44] David Brewer to William Rufus Day, August 13, 1905.

[45] In 1915, five years after Brewer's death, Justice Day would help to secure a position for his grandson, David Brewer Karrick, a second year student at George Washington University Law School, in the Supreme Court Marshal's Office. See David Brewer Karrick to William R. Day, June 30, 1915, and David Brewer Karrick to William R. Day, July 7, 1915. Day Papers, Box 29 Letter D.

[46] William Rufus Day to Melville W. Fuller, June 28, 1906.

[47] See Cushman, "Typewriters and Fountain Pens," 49–51.

[48] William Rufus Day to William L. Day, January 15, 1906. Day Papers, Box 3 Letter D, "We begin our seventh week of quarantine and scarlet fever...."

[49] William Rufus Day to Melville W. Fuller, June 28, 1906.

[50] Melville W. Fuller to William Rufus Day, July 10, 1906. Day Papers, Box 21 Letter F.

[51] Neal P. Rutledge was hired as a clerk by Justice Hugo L. Black in 1951, two years after his father, Justice Wiley Rutledge, died suddenly at age 55. In selecting Neal, Black may have been swayed by the memory of his strong friendship with his father. Neal was eminently qualified, having graduated from Yale Law School and clerked for Judge Charles Fahy, U.S. Court of Appeals for the D.C. Circuit.

[52] Stephen A. Day to William Rufus Day, June 27, 1905. Day Papers, Box 20 Letter D.

[53] Luther Day to William Rufus Day, July 15, 1905. Day Papers, Box 20 Letter D.

[54] Melville W. Fuller to William Rufus Day, [date illegible, July] 1906. Day Papers, Box 21 Letter F. Fuller turned down a request by the widow of his previous clerk, Clarence York, to have her husband's appointment—and salary—extend until October 1.

[55] Luther Day to William Rufus Day, September 24, 1906. Day Papers, Box 20 Letter D.

[56] No descriptions exist of what type of work Stephen did for Fuller. Stephen A. Day's undated notebook in the William R. Day Collection at the University of Michigan Library (Special Collections Library) contains summaries of cases that do not appear to be connected to his Supreme Court clerkship.

[57] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40 (National Archives, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1); *Official Register of the United States*, (Washington, D.C.: Government Printing Office, 1907) vol. 1, 85.

[58] *The Ohio Law Bulletin*, vol. 52, 1907, 59.

[59] Stephen Day to Melville W. Fuller, October 8, 1907. Papers of Melville W. Fuller, Correspondence File Miscellany.

[60] See, for example, *Biographical Directory of the United States Congress*, https://history.house.gov/People/Detail/12031; "Stephen Day," **The National Cyclopedia of American Biography**, (New York: James White, 1920), vol. 17, 353.

[61] *Central Trust Co. v. Central Trust Co. of Illinois*, 216 U.S. 251 (1910). For Day's recusal practice when his sons petitioned the Supreme Court, see Clare Cushman, "Father on the Bench," forthcoming.

[62] *Gersch v. City of Chicago*, 226 U.S. 451 (1913); *Preston v. City of Chicago*, 226 U.S. 447 (1913).

[63] For his political theories, see Stephen A. Day, **We Must Save the Republic: A Brief for the Declaration of Independence and Constitution of the United States** (Scotch Plains NJ: Flanders Hall, 1941).

[64] *Biographical Directory of the United States Congress*, https://history.house.gov/People/Detail/12031

[65] Stephen A. Day to William Rufus Day, September 24, 1906. Day Papers, Box 20 Letter D.

[66] Rufus Day to William Rufus Day, July 30, 1906. Day Papers, Box 21 Letter D.

[67] William Rufus Day to C.A. Mitchell, Asheville School, January 10, 1903. Day Papers, Box 19 Letter M.

[68] William Rufus Day to Newton Anderson, December 17, 1902. Day Papers, Box 16 Letter D.

[69] Rufus Day to William Rufus Day, January 8, 1903. Day Papers, Box 18 Letter D.

[70] Rufus Day to William Rufus Day, undated, on Ashville School stationary. Day Papers, Box 18 Letter D.

[71] Rufus Day to Mary Day, August 25, 1903. Day Papers, Box 18 Letter D.

[72] Luther Day to William Rufus Day, July 19, 1906. Day Papers, Box 21 Letter D.

[73] Luther Day to William Rufus Day, July 28, 1906. Day Papers, Box 21, Letter D.

[74] Rufus Day to William Rufus Day, August 6, 1906, letterhead of Alice and Day, Canton Ohio. Day Papers, Box 21 Letter D.

[75] Rufus Day to William Rufus Day, August 8, 1906. Day Papers, Box 21 Letter D.

[76] William L. Day to William Rufus Day, August 3, 1906. Day Papers, Box 21 Letter D.

[77] Luther Day to William Rufus Day, November 19, 1899. Day Papers, Box 1 Letter D

[78] William L. Day to William Rufus Day, August 3, 1906.

[79] Luther Day to William Rufus Day, August 17, 1906. Day Papers, Box 21 Letter D.

[80] Luther Day to William Rufus Day, August 26, 1906. Day Papers, Box 21, Letter D.

[81] Rufus Day to William Rufus Day, August 6, 1906.

[82] Rufus Day to William Rufus Day, August 8, 1906.

[83] *Ibid.*

[84] The local press in Ohio already announced he had been hired as Justice Day's clerk. "Rufus Day Will be Private Secretary to his Father, Supreme Court Justice W. R. Day," *The Stark County Democrat*, October 9, 1906, 5.

[85] See George Shiras Jr. to William Rufus Day, February 17, 1903. Day Papers, Box 29 Letter S. Justice Shiras writes that Brown had become "quite indispensable" in the ten years he worked for him (having been Justice Bradley's messenger previously). Brown helped with "the marketing, and knows everything about the city," Shiras said, but did no secretarial work.

[86] Hawkins Taylor to William Rufus Day, December14, 1906. Day Papers, Box 21 Letter T. Taylor had worked for the Senate in various clerk jobs since the 1890s. He served as clerk to the Committee on Post-Offices and Post Roads from 1904 to 1906 and was "special agent" at the Interstate Commerce Commission from September 29 to November 24, 1906. *United States Congressional Serial Set*, vol. 5, December 3 1906-March 4 1907, 11.

[87] For example, see John Robert Cox to William Rufus Day, January 4 and May 13, 1907. Day Papers, Box 22 Letter D.

[88] List of Stenographic Clerks, Stenographic Clerks Correspondence, Marshall's File, General Accounting Records, Folder 74, National Archives.

[89] Rufus Day to William Rufus Day, August 27, 1907. Day Papers, Box 22 Letter D.

[90] "A Brilliant Social Function was Day-Carnahan Wedding," *The Canton Morning News*, June 10, 1908.

[91] The 1910 Census reports him as a "secretary" living at Justice Day's residence.

[92] "Charming Young Matron," *Sunday Star*, March 21, 1909. Rufus Spalding Day Jr. Family Papers 1790-1983, Western Reserve Historical Society, Container 2, Folder 14.

[93] For example, "Princeton, 7: G.U., 7,"*Washington Post*, March 27, 1910, 2. For Day's love of baseball, see Ross E. Davies, "A Crank on the Court: The Passion of Justice William R. Day" *The Baseball Research Journal* 2009, 94–107.

[94] *The Ohio Law Reporter*, Vol. 8, 1910, 519.

[95] *Annual Report of the Attorney General*, vol. 6215, 1911, 298. James G. Bachman is listed as a stenographer and law clerk for the District Court of the Northern District of Ohio working for a salary of $1,100.

[96] The Supreme Court Library incorrectly lists his first name as Joseph, but correctly lists him as Day's clerk for the 1911, 1912, and 1913 Terms. He was born in Bellevue Ohio in 1888.

[97] William B. Neff, **Bench and Bar of Northern Ohio** (Cleveland: The Historical Publishing Co., 1921) 274. Cleveland Law School was Ohio's first evening law school and also the first to admit women. It merged with John Marshall School of Law in 1946 to become Cleveland–Marshall College of Law, which in 1969 became part of Cleveland State University.

[98] William L. Day would replace Judge Tayler on the district court bench on May 9, 1911.

[99] James G. Bachman to William Rufus Day, December 20, 1910. Day Papers, Box 26 Letter B.

[100] James G. Bachman to William Rufus Day, June 15, 1911. Day Papers, Box 26 Letter B.

[101] James McKenney, Clerk of the Court, to William Rufus Day, June 30, 1911. Day Papers, Box 26 Letter M.

[102] James G. Bachman to William Rufus Day, August 14, 1914. Day Papers, Box 28 Letter B.

[103] "Wife of Justice William R. Day Dead," *The New York Times*, January 6, 1912.

[104] William Rufus Day to James Angell, February 18, 1912. Day Papers, Box 3 Letter A. Angell was the former president of the University of Michigan.

[105] "Opinion Record to Holmes," *New York Times*, April 19, 1913, 2.

[106] The 1915–1922 Census records all list Rufus as a "lawyer" living in the Justice's home at Clifton Street, as does his 1917 draft registration card.

[107] See for example, Sallie V.H. Pickett, "Society," *Washington Star*, March 7, 1920, 4.

[108] "Son of Judge Day Admitted to Bar," *The Washington Herald*, May 20, 1912. He worked for the firm of Ellis & Donaldson, **The Lawyer's List**, (Hubert R. Brown, 1913) 45.

[109] *JSCT* 1913, 124.

[110] *Pennsylvania Co. v. Donat*, 239 U.S. 50 (1915).

[111] James G. Bachman to William Rufus Day, August 14, 1914. Day Papers, Box 28 Letter B.

[112] James G. Bachman to William Rufus Day, September 8, 1914. Day Papers, Box 28 Letter B. Day's letter to Bachman asking him to return is not in Day's papers.

[113] James G. Bachman to William Rufus Day, October 7, 1914. Day Papers, Box 28 Letter B.

[114] Born in Toledo in 1892, Lombard was appointed on April 16, 1913, as Deputy Clerk. W. V. Goshorn, **Legislative Manual of the State of Ohio Eighth General Assembly, 1913-1914** (Columbus, Ohio: F.J. Herr Printing Co., 1914) 255.

[115] John A. Lombard to William Rufus Day, August 24, 1914. Day Papers, Box 29 Letter L.

[116] James G. Bachman to William Rufus Day, September 11, 1914. Day Papers, Box 29 Letter B. Joseph Curtis White also applied to newly appointed Willis Van Devanter for a clerkship.

[117] Clerk of the Court James D. Maher to William Rufus Day, September 21, 1914. Day Papers, Box 29 Letter M.

[118] James D. Maher to William Rufus Day, October 5, 1914. Day Papers, Box 29 Letter M.

[119] John H. Clarke to William Rufus Day, August 24, 1914, on letterhead of Clerk's Office, District Court of the United States, Northern District of Ohio, Cleveland Ohio. Day Papers, Box 29 Letter C. Clarke was appointed district judge on July 15, 1914; prior to that he was in private practice in Cleveland and in politics.

[120] Peppers et al., "Clerking for God's Grandfather," 282. Chauncey Belknap's diary entry is dated January 14.

[121] U.S. Department of Justice, Annual Report of the Attorney General of the United States 93 (1917).

[122] Edward D. White to William R. Day, March 9, 1916. Day Papers, Box 31 Letter W.

[123] John A. Lombard to William Rufus Day, August 5, 1915. Day Papers, Box 29 Letter L. Lombard describes his lengthy honeymoon.

[124] John A. Lombard to William Rufus Day, June 11, 1917. Day Papers, Box 32 Letter L.

[125] William Rufus Day to James G. Bachman, June 28, 1917. Day Papers, Box 32 Letter L.

[126] William Rufus Day to James G. Bachman, July 9, 1917. Day Papers, Box 32 Letter L.

[127] John A. Lombard to William Rufus Day, August 13, 1917, on letterhead of The Riverside Realty Company, John A. Lombard Vice President, Canton. Day Papers, Box 32 Letter L.

[128] *Ibid.* Although Justice Day apparently did not secure him an exemption, Lombard was not in active or reserve military service during World War I, but he did have a draft card.

[129] William Rufus Day to John A. Lombard, August 17, 1917. Day Papers, Box 32 Letter D.

[130] *Ibid.*

[131] John A. Lombard to William Rufus Day, September 6, 1917. Day Papers, Box 32 Letter L.

[132] John A. Lombard to William Rufus Day, September 11, 1917. Day Papers, Box 32 Letter L.

[133] William Rufus Day to John A. Lombard, September 10, 1917. Day Papers, Box 32 Letter B.

[134] 245 U.S. 60 (1917). Day's opinion, issued unanimously, was in such high demand that the Clerk of Court informed him that it "exhaust[ed] the number supplied for the use of the court." Letter from James D. Maher to William Rufus Day, December 3, 1917. Day Papers, Box 32 Letter M.

[135] John A. Lombard to William Rufus Day, November 27, 1917. Day Papers, Box 32 Letter L.

[136] John A. Lombard to William Rufus Day, December 5, 1917. Day Papers, Box 32 Letter L.

[137] *Ibid.*

[138] "All by myself in the practice and I like it much better," John A. Lombard to William Rufus Day, June 27, 1922. Day Papers, Box 34 Letter L. Lombard died tragically young at the age of 40 in 1932. His obituary, "John A. Lombard," *The New York Times*, May 24, 1932, erroneously says: "Several years after being admitted to the bar he became secretary to former Judge William L. Day. Later he was secretary to Supreme Court Justice John H. Clark [sic] in Washington, but resigned to practice law."

[139] Bachman enjoyed a long legal career in Cleveland before retiring to Santa Barbara with his wife. He died at age 87 in 1975.

[140] Supreme Court Office of the Curator Research Files. **Who's Who in American Law** (New York: J.C. Schwartz, 1937) lists him as secretary to Justice Day from 1912 to 1917, which are almost precisely the dates when neither Rufus nor his brothers worked for their father.

[141] In the Washington D.C. *City Directory*, Rufus is listed as a lawyer in the years 1915–1922.

[142] *The Daily Washington Law Reporter*, vol. 44, 1916, 611, 818; **Hubbell's Legal Directory (New York: Hubbell Publishing Co.)** vol. 53, 1916, 58. For Rufus' Supreme Court practice and his father's recusal practice, see Cushman, "Father on the Bench," forthcoming.

[143] "Honorable Samuel Herrick," *The Lawyer and Banker and Bench and Bar Review*, vol. 5, 368–369; "Samuel Herrick," **Who's Who in the Nation's Capitol**, 1921-22, 180.

[144] For example, Blaine Mallan quit his clerkship to Justice James C. McReynolds in 1917 to join the war effort. See Clare Cushman, "Beyond Knox: James C. McReynolds' Other Law Clerks," *Journal of Supreme Court History*, 41, 2016, 171.

[145] **Hubbell's Legal Directory**, 1916, 58; **Martindale's American Law Directory** (Chicago: J.B. Martingale) 1918, 1227.

[146] For more on conflict of interest, see Clare Cushman, "Father on the Bench," forthcoming.

[147] Kevin T. McGuire, **Legal Elites in the Washington Community** (University Press of Virginia, 1993) 13.

[148] "Hostess in Home of Justice Day A Capital Favorite," *Grand Forks Herald*, February 1, 1917, 1.

[149] Lois Marshall was the wife of Thomas Marshall, Woodrow Wilson's vice president. "Justice's Daughter-in-Law One of Washington's Most Charming Hostesses" *Richmond Palladium*, December 13, 1919, 1.

[150] See, for example, invitations and calling cards in Rufus S. Spalding Papers, Western Reserve Historical Society, Box 1, Folder 13: President Woodrow Wilson invited them to their daughter Jessie's wedding on November 25, 1913; "Supreme Court Justices at White House," *New York Herald*, February 3, 1922, 1, notes that Rufus and his wife attended President's Harding's dinner for Chief Justice Taft and the Supreme Court Justices without his father, who stayed home because of an "epidemic of grippe."

[151] See, for example, Evelyn C. Hunt, "Mrs. Harding at Concert" *Washington Herald*, December 2, 1921, 7. Mrs. Harding invited Madge Day to attend a Christmas concert in her box at the National Theater.

[152] 41 Stat. 209 (July 19, 1919).

[153] Robert F. Cogswell to Rufus S. Day, July 9, 1919. Day Papers, Box 33 K-Z. There is no reply from Rufus.

[154] William R. Day to James D. Maher, July 26, 1919. Day Papers, Box 33 K-Z.

[155] James D. Maher to William Rufus Day, July 30, 1919. Day Papers, Box 33 Letter M.

[156] Rufus S. Day to William Rufus Day, Western Union Telegram, August 4, 1922. Day Papers, Box 34 Letter D.

[157] First and Second Reports of Robert C. Morris, Agent of the United States Before the Mixed Claims Commission United States and Germany (Washington: GPO, 1923) 35.

[158] Michael Solimine, "Nepotism in the Federal Judiciary," *University of Cincinnati Law Review*, 71, 2002, 563, 575. Solimine discusses nepotism among judges but does not address the hiring of clerks or other staff.

[159] Cushman, "Typewriters and Fountain Pens," 55.

[160] David Brewer to William Rufus Day, August 13, 1905. Day Papers, Box 20 A-C.

[161] *Ibid.*, 44–47.

[162] McPherson, "A Politician Against His Will," 12.

[163] 24 Stat. 555 (March 3, 1887) and 25 Stat. 433, 437 (August 13, 1888).

[164] David H. Rosenbloom, **Federal Service and the Constitution: The Development of the Public Employment Relationship** (Georgetown University Press, 2014) 4.

[165] Their political party affiliations are clearly listed in legal directories as Republican. In 1921, however, Bachman is identified as "Independent politically" in William B. Neff, **Bench and Bar of Northern Ohio** (Cleveland: The Historical Publishing Co., 1921) 274.

[166] https://www.supremecourt.gov/ctrules/rules/Rules_1939.pdf

[167] Although not that much more centralized, as the Justices continue to do their own selecting and hiring of clerks.

Berea College v. Kentucky: Scientific Racism in the Supreme Court

RONALD S. RAUCHBERG

Introduction

Shortly after the end of the Civil War, at a moment when it seemed that one outcome of the war and its devastation might be civil equality for the emancipated slaves, Berea College, in Berea, Kentucky, opened itself to black students. Berea College thus became the only racially integrated college anywhere in the South. It remained racially integrated, as well as coeducational, for nearly forty years, through Reconstruction and the onset of Jim Crow, until, in 1904, Kentucky's legislature enacted the Day Law. That law made it a crime for a college to educate black and white students together. The law also made it a crime to teach at such a college or to attend such a college as a student.

Berea College was indicted under the Day Law, convicted in the Kentucky courts, and sentenced to a fine. The college contended that the Day Law was unconstitutional under the Fourteenth Amendment and appealed to the U.S. Supreme Court, where its conviction was upheld.[1] The Day Law plainly limited the liberties of the trustees, teachers, and students who were willing participants in the college's venture of racially integrated higher education. Were there constitutional justifications for the law's limits on these liberties? Was the law a reasonable exercise of Kentucky's police power?

The opinion for the Court in *Berea College* did not contend with these questions. Rather, the Court decided the case on the basis of a theory of the nature of corporations known as "the grant theory": corporations are artificial beings, created by the state, existing only as a consequence of a positive legislative act. The state has the power to charter any activities it chooses, in its sole discretion, and can deny, revoke, or condition a charter for any reason at any time. The Supreme Court characterized the Day Law as an amendment to the college's corporate charter and upheld the law as an exercise of the state's inherent right to control the activities of its creations. So ended racially integrated higher education in Kentucky until 1950, when the Day Law was repealed.

In the Supreme Court, Kentucky had not advanced any argument based on the grant theory as a reason for affirming the judgment of conviction below. Kentucky argued, rather, that the Day Law was a reasonable exercise of the state's police power—the power to legislate to protect the health, welfare, safety, and morals of the populace. Requiring the separation of the races, as Kentucky saw it, served public welfare by helping to avoid miscegenation. Miscegenation was an evil because it would undermine racial purity. Kentucky went so far as to argue that, as only the superior white race in its pure state could insure the future progress of civilization, miscegenation was a threat to that progress.

Scholarly efforts to explain *Berea*'s use of a corporate law principle to resolve the parties' constitutional law dispute have been, as discussed below, unsatisfactory.[2] It will be argued here that the Supreme Court's reliance on a theory of the nature of corporations to uphold the Day Law was pretextual. The Court, rather, was persuaded by, or at least respected and was prepared to defer to, the anti-miscegenationist argument advanced by Kentucky. The Court decided the case at a time when racist views had been blessed by prevailing scientific opinion—"scientific racism"—and the nation's elites generally shared those views. Berea College's claims on behalf of itself and its trustees, teachers, and students to Fourteenth Amendment protections were strong but could not survive the Court's sympathy for racist views and their implementation in Jim Crow legislation.

Scientific Racism[3]

At the core of racist thinking is the belief that there is a hierarchy of ethnic groups based on traits that are essentially immutable. Members of an inferior race cannot become the equals of a superior race through education or improvements in their environment; their inferiority is innate, inheritable, and fixed.[4] Such thinking was well established in the United States both before and after the revolutions in the science of heredity brought about by Darwin's **Origin of Species**, published in 1859, and Mendel's work on genetics, published in 1866 although not widely known until later. George Cuvier and Charles Lyell, the greatest naturalists of the nineteenth century before Darwin, and then Darwin himself, all believed in the inferiority of the black race.[5]

Ralph Waldo Emerson can serve as an example of pre-Darwinian thinking. In 1856, he wrote that the English were "a powerful and ingenious race." He extolled "English greatness"; observed how the English have "predominated," having encompassed perhaps one-fifth of the world's population within the British Empire; and asked, "Is this power due to race, or to some other cause?" He answered:

> It is race, is it not? that puts the hundreds of millions of India under the dominion of a remote island in the north of Europe... . Race is a controlling influence in the Jew, who, for two millenniums, under every climate, has preserved the same character and employments. Race in the negro is of appalling importance... . [He went on to discuss the French, German, and Irish races.][6]

Emerson read several books on race in the 1850s, when he was actively engaged in antislavery activities; while the need to justify slavery contributed to racist thinking, Emerson and other abolitionists could oppose slavery without believing in racial equality. One book Emerson read was by Robert Knox, a medical doctor and lecturer on anatomy.[7] Dr. Knox wrote that "human character, individual and national, is traceable solely to the nature of that race to which the individual or nation belongs ... . [This] is simply a fact ... . Race is everything: literature, science, art, in a word, civilization depend on it."[8] Racial

characteristics were immutable.[9] Knox discussed his scientific observations, saying, for example, "in a dark or colored person, whose structure I had an opportunity of observing, the nerves of the limbs were at least a third less than those of the Saxon man of the same height."[10] "Dark" races, moreover, have measurably smaller brains than whites.[11] (Ernst Haeckel, known as "the Darwin of Germany," was among the prominent scientists who later subscribed to the supposed correspondence between intelligence and brain size,[12] a notion that was later thoroughly debunked.[13]) Knox had special praise for what he called the "Scandinavian race": it had its origins in "Norway, Denmark, Sweden, Holstein—on the shores of the Baltic ... by the mouths of the Rhine, and on its northern and eastern bank." Members of this race are "democrats by nature, the only democrats on the earth, the only race which truly comprehends the meaning of the word liberty."[14]

Concerns about miscegenation, and a consequent need to keep the races separate, also pre-date Darwin and Mendel. Harvard's world-famous zoologist and geologist Louis Agassiz believed blacks and whites were separate species; he was "horrified" at the possibility of racial "amalgamation."[15] Dr. Knox wrote that "when the Negro is crossed ... with the white race, the result is a scoundrel."[16] Count Arthur Gobineau published in 1855 what became a "foundational text" of scientific racism, "Essay on the Inequality of Human Races." He identified three races, white, yellow, and black. The white race was responsible for civilization. Separation of the races was necessary so that the white race could remain pure; "proximity" of whites and blacks was to be avoided because it inevitably yields miscegenation.[17]

Focus on race in the United States became more urgent at the end of the Civil War, with the emancipation of four million enslaved black men and women, but the certainty that racial characteristics were immutable remained. For example, William Benjamin Smith, professor of mathematics at Tulane University, published **The Color Line** in 1905. He argued that any idea of equality between blacks and whites had been scientifically undermined and that it was "idle to talk of education and civilization ... as corrective or compensative agencies." They are "weak and beggarly as over against the almightiness of heredity; the omnipotence of the germ plasma."[18]

By the 1890s, a radical form of racist thinking had arisen in the South, advancing a theory of black "retrogression": black Americans, without the uplifting and civilizing effects of slavery, were retrogressing into bestiality. Radicals believed that crimes by blacks were increasing precipitously; particularly disturbing were what they saw as increased sexual assaults by black men on white women and girls. Radicals saw no cure for black criminality; education, for example, was only counterproductive as it increased the capacity of blacks to do evil.[19]

These radical racists had scientific support for their views. Nathaniel Southgate Shaler was a natural scientist, a popular Harvard professor, and dean of Harvard's Lawrence School of Science. He had been trained by Agassiz and assumed Agassiz's chair on the latter's death. Shaler advanced the retrogression theory in an 1884 article in the *Atlantic Monthly*. One consequence of emancipation, he argued, was "a strong tendency, for many generations to come, for [black Americans] to revert to their ancestral conditions." In 1904, he wrote that "Negroes ... when uplifted from without [by slavery] have shown an obvious tendency to fall back into their primitive estate as soon as the internal support was withdrawn." He found evidence for his thesis in what he understood to be the increasing number of sexual assaults by black men on white women. "The Negro is sexually a very brutal creature who cannot be trusted in contact with white women."[20]

Frederick L. Hoffman, a statistician for the Prudential Insurance Company, advanced

the concept of retrogression from a different perspective. In a study published in 1896 by the American Economic Association, Hoffman argued that retrogression had begun earlier but became more intense after emancipation. He found in the data from the 1890 census a rapid increase in mortality among blacks from syphilis and other diseases that were the product of the "race trait" of "immense ... immorality." He too believed that the number of rapes of white women by black men was growing at an alarming rate, finding supportive evidence in "the rate of increase in lynching [which] may be accepted as representing fairly the increasing tendency of colored men to commit this most frightful of all crimes.... All the facts ... prove that the colored population is gradually parting with the virtues ... developed under the regime of slavery."[21]

The scientific consensus by the turn of the century strongly opposed miscegenation. Edward Drinker Cope, Professor of Zoology and Comparative Anatomy at the University of Pennsylvania, accounted for what he considered to be lower intelligence in blacks by the structure of their skulls. He argued in the 1890s that all blacks should be deported, else "the finest race on earth," the white race in the South, would be destroyed by miscegenation.[22] Charles Davenport, a Harvard-trained biologist and author of a widely used textbook, and two scientists on the Harvard faculty, William Ernest Castle and geneticist Edward M. East, also favored prohibitions of interracial sex and marriage. And since many relationships are formed when people are students, they also opposed integrated education.[23] Somewhat later, in 1917, former Harvard professor, then Colonel, Robert M. Yerkes supervised a program that administered intelligence testing to about 1.75 million U.S. Army recruits. Among the explanations Yerkes offered in his analysis of the disappointing average performance of white recruits was the spread of "Negro" blood through the white population as a result of miscegenation.[24]

Scientific measurements, some dating from the Civil War, were understood to confirm the dangers of miscegenation. A study of Civil War autopsy reports showed average lung capacities of soldiers as follows: white, 185 cubic inches; black, 164; mulatto, 159. In consequence, "mulattos were chronically unhealthy and unfit for hard labor.... They died much younger than either blacks or whites."[25] Frederick L. Hoffman's studies, he thought, showed that "all mulattoes were inferior to members of either race." Agassiz's student Professor Shaler believed "that the mulatto was less healthy, shorter-lived, and less fertile than members of either the black or white race."[26]

These racial views served social and political purposes. "Darwinian thinking," as Eric Foner has pointed out, "became yet another justification for laws that restricted black rights."[27] America's "egalitarian norms required special reasons for exclusion [of black citizens from civil equality],"[28] and the supposed inferiority of blacks served this purpose. Racism enabled white Anglo-Saxon elites, both industrial and agricultural, in both the North and the South, to understand their position of relative wealth and power as the consequence of a superior genetic endowment rather than unjust economic or social arrangements.

Government, as elites throughout the country believed at the time, needed to be reformed; "reform" meant lower taxes and control of government firmly placed in the hands of "the best men"; the "best men," of course, were white Anglo-Saxons.[29] Widely held racial attitudes also meshed well with the then-prevailing ideology among white elites that property rights were sacred[30]; that labor posed a danger to property; and thus that laborers—whether understood to be black sharecroppers in Alabama or Hungarian coal miners in Pennsylvania—needed to be kept under firm control. Rising economic

Pseudo-scientific measurements of corpses of black and white soldiers in the Civil War were used in an attempt to show the superiority of whites and the dangers of miscegenation. By the end of the war, ten percent of the Union army was composed of black Americans.

inequality around the turn of the century underscored both the need to protect property and the dangers that the lower orders posed to property.[31] Black laborers—who would work only if subjected to coercion (as was widely believed[32])—and strikers who turned to violence against strikebreakers or their employers' property could be understood as the products of their own racial inferiority. Genetically deficient labor, thus, should be left "unprotected ... at the mercy of unregulated capital."[33]

Equal opportunity, valued at the time because it permitted the most able to emerge, to the benefit of all, did not need to be extended to people of the lesser races since the best, it was thought, could never emerge from their ranks. In 1893, when Howard University opened a law school for black students, for example, the editors of the country's leading law review were supportive even while doubting that "members of that race will ever be able to achieve distinction in that profession...."[34] In a subsequent note, the editors observed that the "negro skull" closes on a smaller brain with an inferior texture, and so the Negro cannot compete intellectually with the white man.[35]

Sharing these views, and favoring an end to sectionalism through a reconciliation of the states, white elites in the North and the South could bond in celebration of their common racial superiority. As Jackson Lears observed, "after Reconstruction, politi-

cal leaders in both sections redefined the war as an epic expression of Anglo-Saxon martial virtue."[36] This virtue was to be found in both the Union and the Confederacy. President Theodore Roosevelt, in 1902, speaking on the occasion of Justice John Marshall Harlan's 25th anniversary on the Court, noted the "homage we pay" to the men who wore blue and to the men "who, with equal sincerity, with equal devotion to the right as it was given to them to see the right, wore the gray ...."[37]

The perceived superiority of white Anglo-Americans was not limited to their martial spirit. Descended from liberty-loving, blue-eyed warrior-barbarians from the North of Europe, they alone could appreciate and support American political institutions.[38] The president of the American Bar Association in 1893 described the glorious American system of federalism, liberty, and peaceful foreign relations as one of the "trophies, and ... triumphs" of "our Anglo-American race."[39] "Inferior races have everywhere gained by being admitted to the protection of [the Anglo-American race's] laws, and ultimately, the privileges of its citizenship."[40]

Such attitudes were also expressed by the justices of the Court, who were themselves a homogeneous group of white men. Twenty-seven different justices were members of the Courts that decided *Slaughterhouse Cases* (1873),[41] the Court's first decision under the Fourteenth Amendment, *Berea College* thirty-five years later, and the cases in between. One, Joseph McKenna, appointed by President Cleveland in 1898, was the Roman Catholic son of Irish immigrants and was poor as a small child, although his father moved the family to California and there prospered as a bakery owner. None of the others grew up poor, all coming from old established families of lawyers, doctors, teachers, merchants, clergymen, or farmers. All were Protestants until 1894, when President Cleveland appointed Edward Douglass White, the only other Roman Catholic to sit on the Court during this period, although he was the scion of a wealthy and powerful family—his father owned a large plantation and was a Congressman, and later governor of Louisiana. (Justice White, who joined in the majority's opinion in *Berea*, was himself a Klansman before he sat on the Court.[42]) It was observed in 1888 and true throughout this period that "the whole bench [of the Supreme Court] might be described as being a selection from the best blood of the country.... None ... like Lincoln or Andrew Jackson ... hewed their way up from the bottom.... All are thoroughly educated."[43]

Justice Stephen J. Field in 1890 admired "the fiery courage and martial spirit" of the Confederacy; "we are all of the same warrior race."[44] Justice Brewer, in a speech defending the Supreme Court's exercise of judicial review as essential to liberty, explained in racial terms why liberty lives in Great Britain despite the absence of judicial review there. He attributed Britain's liberty to limited suffrage, the checks inherent in its system of government, and the control of its government by a conservative homogeneous Anglo-Saxon race. In the United States, by contrast, he said we have universal suffrage and a racially heterogeneous population, which but for our judicial institutions "would certainly sweep on to despotism of the mob, whose despotism is always followed by the man on horseback."[45]

That the Court through World War I and beyond was inhospitable to the claims of black citizens to equal rights under the Fourteenth Amendment has been well studied elsewhere.[46] That the Court's decisions were influenced by the justices' sharing in the racist attitudes of the time cannot be doubted.[47] Sometimes the racism was evident in the Court's opinions rather than lurking quietly in the undertones. *Plessy v. Ferguson*, famously, observed that "a legal distinction between the white and colored races [is] a distinction which is founded in the color of the two races and which must always exist so

Born into a slaveholding family in Bracken County, Kentucky, John Gregg Fee became an evangelical Christian abolitionist and established Berea College in 1855. The college admitted men and women and all races.

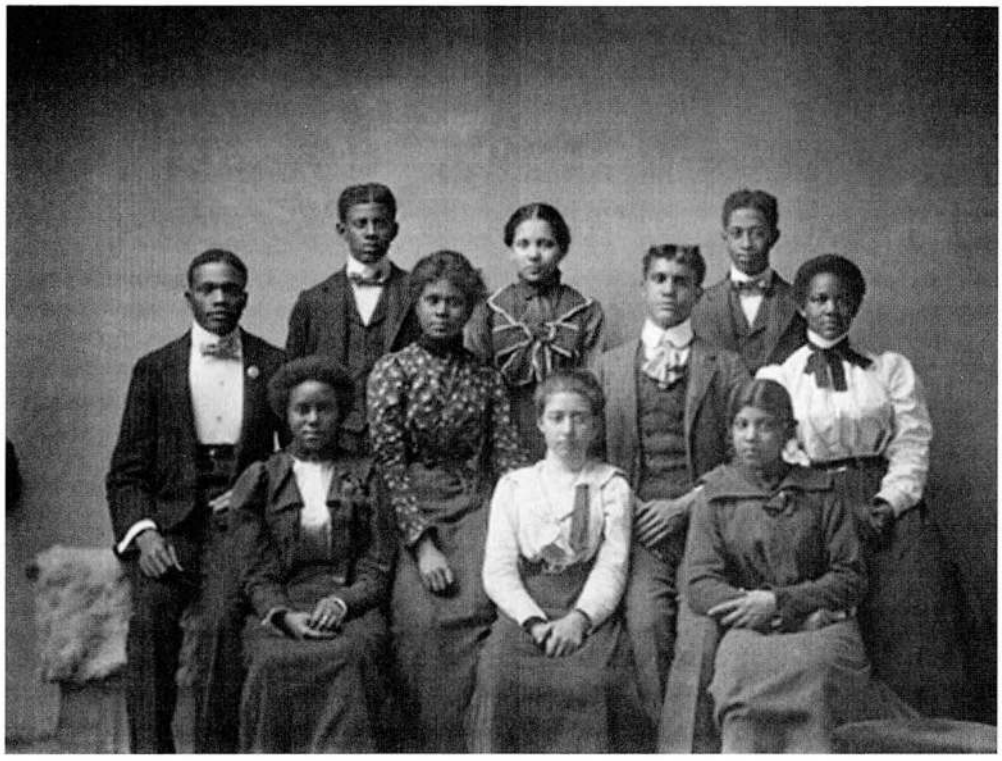
long as white men are distinguished from the other race by color. [The Fourteenth Amendment] … could not have been intended to abolish distinctions based on color."[48] In *Hall v. DeCuir*,[49] and again in *Louisville, New Orleans, and Texas Railway Co. v. Mississippi*,[50] the Court, in opinions by, respectively, Chief Justice Waite and Justice Brewer, expressed its sympathy for passengers in "a cabin set apart for the use of whites … [who might be required to] share the accommodations of that cabin with such colored persons as may come on board afterwards …."[51]

Berea College

Evangelical Christian abolitionists received a corporate charter from Kentucky and started Berea as an academy in 1855. The school was closed during the Civil War and reopened in 1866, adding a college at that time. The college charged only modest tuition or none at all and admitted both men and women. The college founders adopted a motto: "God has made of one blood all the peoples of the earth."[52] At the outset, the college had only white students but later in 1866, consistent with the principle expressed in its motto, it began admitting black students as well. The proportion of black students among the student body varied, at times reaching half, and in Berea College's last year of operations as an integrated college was about 15%. The program at Berea College rested on three foundations: Christianity, manual labor, and a rigorous academic curriculum for all students including Latin, Greek, physics, chemistry, history, literature, rhetoric, and music.[53]

Some white students left Berea College in consequence of its decision to admit black students, and some local white men occasionally harassed the college's students and faculty. But things settled down and the school went on for some four decades, with occasional incidents that did not cause any actual physical injuries: "The Ku Klux Klans or the coarse jeers of drunken, hostile men and the careless firing of their pistols through the streets and the whizzing of bullets sometimes dangerously near did not often produce any permanent fear."[54]

When the Day Law was proposed, in 1904, Berea College was still the only racially integrated college in Kentucky. The college opposed enactment of the Day Law but without ever arguing in favor of racial equality and certainly not in favor of miscegenation. To the contrary, William Goodell Frost, then president of Berea College, testified that "the Berea way of preventing the mingling of the races is not by repressing the Negro and calling him by humiliating names, but we put such character and self-respect into the Negro that he keeps himself in order." Frost also said "keeping the two races in substantial equality … had never been an essential part of Berea's program."[55] The



When the Day Law was enacted in 1904, Berea College was still the only racially integrated college in Kentucky. Some of its students are pictured above.

college's founding vision that all the world's peoples were made of one blood had not, it seems, survived the turn of the century.

Once the Supreme Court had affirmed Berea College's conviction under the Day Law, the college faced a choice: accept only white students, accept only black students, or move to another state. President Frost perceived "the increasing lack of interest in interracial education, as well as wider society's increasing hostility toward social equality between the races." The college decided to remain open for white students only and to begin a new school at a separate location. It established The Lincoln Institute, near Louisville, Kentucky, for black students only. Lincoln had a very different, and less rigorous, curriculum, one emphasizing "industrial education and teacher training."[56]

The Lincoln Institute was itself party to a litigation in Kentucky presenting a constitutional question. Lincoln acquired more than 400 acres of land on which to open its campus. A Kentucky statute required that any school occupying more than 75 acres be approved by local voters. The Kentucky Court of Appeals held the statute to be invalid. Lincoln Institute could use its property as it pleased unless prevented by a valid police regulation. The court explained that there was nothing harmful or dangerous about education and so Kentucky's police power did not extend to regulating it in this manner.[57]

The Berea College *Litigation in the Kentucky Courts*

Kentucky leveled two indictments at Berea College: one charged it simply with operating a school for both whites and blacks in violation of the Day Law. The other charged a violation of a different section of

Berea College decided to remain open for white students and established The Lincoln Institute, near Louisville, for black students, which offered a less rigorous curriculum.

the Day Law that declared that nothing in the statute "shall be construed to prevent any ... school ... from maintaining a separate and distinct branch ... not less than twenty-five miles distant, for the education exclusively of one race or color." This section, without any prohibitory language, does not read as though it defines an offense. The second indictment, nevertheless, charged the college with operating an "institution of learning where persons of the white and negro races are both received, and within a distance of twenty-five miles of each other."[58]

The college demurred to both indictments, arguing that the Day Law was unconstitutional under the Kentucky and U.S. Constitutions because, among other things, it prevented teachers and students at the college from enjoying their liberties, interfered with the college's property rights, and denied the college and its teachers the right to follow their usual occupation. The Kentucky circuit court overruled the demurrer, finding the law to be a proper exercise of the state's police power. After reviewing numerous cases from courts in both the North and the South that upheld measures requiring separation of the races, the court wrote: "No well informed person in any section of the country will now deny that the position of the Southern people that 'segregation in school, church and society is in the interest of racial integrity, and racial progress,' is sound [nor] will deny that that is a laudable desideratum."[59]

The circuit court proceeded to conduct a trial that lasted a few minutes and consisted of one witness, a Berea College teacher, who testified that, acting under the direction of the college, he taught a black and a white student together.[60] The college was convicted on that evidence.

The Kentucky Court of Appeals affirmed the conviction. It did not decide whether the constitutional rights asserted by the college existed, holding that such rights would in any event be subject to the state's police power to secure the general welfare and the public peace. The Day Law, the court held, was a reasonable exercise of that power, aimed at the danger of racial "amalgamation." The public policy of Kentucky, declared the court, is to prevent intermarriage of the two races.

Agreeing with the circuit court below, the Court of Appeals wrote:

> The mingling of the blood of the white and negro races by interbreeding is deemed by the political department of our state government as being hurtful to the welfare of society.... The result would be to destroy the purity of blood and identity of each. It would detract from whatever characteristic force pertained to either.[61]

The court went on at some length about the "wisdom" of the "divinely ordered" separation of the races and the "natural law," equally "divine," which forbids intermarriage. The court also addressed the step between racially integrated education and intermarriage:

> If then it is a legitimate exercise of the police power ... to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum—the purity of racial blood.[62]

Moreover, "the tendency of intimate social intermixture is to amalgamation, contrary to the [natural] law of races. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."[63] That prior decisions upholding segregationist measures addressed instances of involuntary association, for example in public schools and common carriers, made no difference to the court. Whether voluntary or involuntary, "the main idea is that such association at all, under certain conditions, leads to the main evil, which is amalgamation of the races."

The court found further support for the Day Law in natural "antipathies" between the two races which could lead to violence. The court quoted with favor from a decision of the Supreme Court of Pennsylvania:

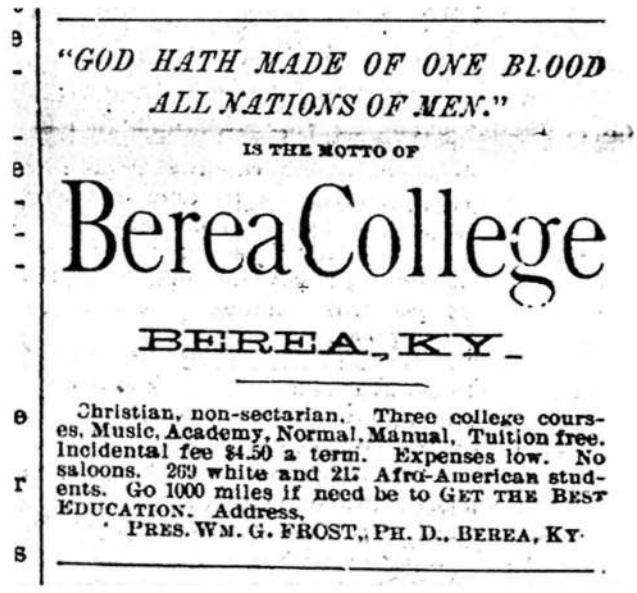
> The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied.... If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the feeling of aversion which some will feel.... It is much wiser to avert the consequences of this repulsion of race by separation, then to punish afterwards the breach of the peace it may have caused.

Kentucky thus requires a "separation of the races" to reduce the "mingling ... which is found to lie at the cause of the trouble."[64]

The court therefore affirmed the conviction of Berea College under the first indictment, for educating black and white students together at the same location and at the same time.[65] It reversed the conviction under the second indictment, however, holding that it was "oppressive" to require a minimum of twenty-five miles between locations at which black and white students are educated. Kentucky itself, the court noted, operated separate schools for black and for white students within lesser distances.[66]

The court ended with the observation that the right to teach was not a property right and, with a brief nod to Kentucky's power over its corporate creations, wrote, "besides, appellant, as a corporation created by this state, has no natural right to teach at all.... The state may withhold [that right] altogether, or qualify it."[67]

As noted above, the Kentucky court had been careful to frame its holding as designed to avoid dilution of the "characteristic force" of either race. Similarly, it spoke of racial animosities as though they were mutual, but the only example the court gave was the feeling a white man would have when a black man took a seat next to him, his wife,



The president of Berea College in African-American newspapers. William G. Frost, did not speak out for racial equality, while promoting mixed-race classrooms in advertising the college.

or his daughter. Despite these gestures of even-handedness, it is apparent which race's "purity of blood" was the principal object of the Kentucky's legislation. Its law against racial intermarriage prohibited whites but not blacks from marrying mulattoes. Kentucky's focus was typical in this regard. Generally, miscegenation law around the country:

> depended on playing fast and loose with the logic of maintaining several pure races; it translated to an actual commitment to white supremacy .... So even as judges clung to the constitutional fiction that miscegenation laws "applied to all races alike," miscegenation laws actually prohibited Whites from marrying other groups like "Negroes," "Mongolians," or "Malays," without prohibiting "Negroes," "Mongolians," or "Malays" from marrying each other.[68]

It is perhaps one mark of the power of the views supporting the Day Law and the decisions of the Kentucky courts upholding it that they continued to find expression in judicial opinions for at least another 60 years. For example, Judge Leon M. Bazile of the Caroline County, Virginia, Circuit Court, in 1965 denied a motion to set aside the conviction of the Lovings, a mixed-race couple. Judge Bazile wrote: "Almighty God created the races white, black, yellow, malay, and red, and placed them on separate continents.... The fact that he separated the races shows that he did not intend them to mix."[69]

The Arguments and the Decision in the Supreme Court

In the Supreme Court, Berea College put its principal reliance on the argument that the Day Law imposed unconstitutional limits on the liberties of students and teachers. The college emphasized that its students and teachers all freely chose to study and teach in a racially integrated school. The Day Law's limits on their liberties in turn harmed the college because they reduced the value of its investment in facilities for biracial education. Further, the statute's provisions applicable to

the college could not be severed from those applicable to students and teachers, and so the entire statute was unconstitutional.[70]

The college addressed the state's reliance on its police power by saying that power was generally invoked to justify regulation of matters such as gambling, liquor, and bawdy houses, which are inherently injurious. Berea College, by contrast, was engaged only in the laudable endeavor of education.[71] The college also addressed Kentucky's reliance on the importance of maintaining racial purity by aiming to negate any substantial connection between the prohibition in the statute and the evil Kentucky sought to prevent:

> No influence in the entire South has been so potent against the evil of racial amalgamation as that of Berea College. The College has always recognized the inherent differences in the races. There is nothing before this Court to show that any teaching of social equality has ever been promulgated. Such is not the fact.[72]

Nothing in Berea College's briefs made any reference to the nature of corporations or addressed Kentucky's power to control the entities it created. Kentucky, likewise, did not refer to such concepts. Kentucky's brief, rather, identified what it said was the only question before the Court: does the Day Law abridge the privileges or immunities of the college's teachers and pupils, or deprive them of liberty, or is the law instead a valid exercise of the police power?[73]

Kentucky's asserted police power justification for the law rested on the same themes that the Court of Appeals had emphasized. Kentucky's brief began by detailing its various laws which separated the races: its prohibition of intermarriage, its provision of separate public schools for the two races, and its separate car law. The brief went on to demonstrate that such laws had been consistently upheld in the courts. In Kentucky, "these laws had but one common purpose ... to preserve race identity, the purity of blood, and prevent an amalgamation."[74] The Day Law, too, Kentucky argued, served this salutary purpose:

> While [the races are] guaranteed equal civil rights, it is the policy of the State of Kentucky to maintain a separate social status.... If the young white and colored children are permitted to go voluntarily to school together ... to associate together and become guests of each other, may we ask what more is needed to constitute social equality? But let social equality be once established, and mutual attachment will follow as surely as the day does the night; first, among the weaker members of each race, and finally among all, resulting in the destruction or blotting out the individuality and identity of each race.... The associated education of the two races would lead to social equality, to intermarriage and to an amalgamation.[75]

That racial amalgamation was an "evil" was not seriously in dispute. As noted above, Berea College did not deny it; rather, it argued that it was a force in resisting it. Nonetheless, Kentucky devoted much of its brief to establishing the validity of that idea. Quoting from prior decisions, Kentucky argued that the races are different; each "'color carries with it natural race peculiarities.'" Their separation is "'natural'" and "'providential.'" "'All social organizations which lead to their amalgamation are repugnant to the law of nature.'"[76]

Nearing the end of its brief, Kentucky moved from arguing mere black and white racial difference to arguing white racial superiority. Here Kentucky supplemented its reliance on the divine and natural with reliance on the empirical science of the day, but there was none of this science in the record below.

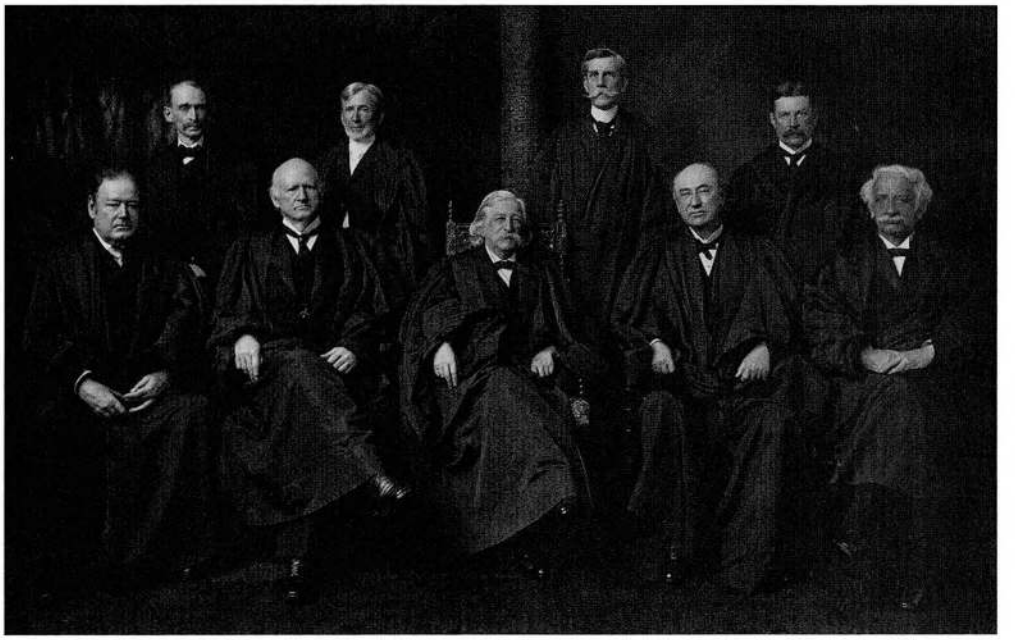
Kentucky thus asked the Court to "notice" certain facts that are "universally known" and "part of the common information of mankind." These included the measurements made by Dr. Sanford B. Hunt, a surgeon, who concluded that "the standard weight of the negro brain is over five ounces less than that of the white." (Hunt said his investigations also revealed that the brains of mulattos were smaller still, showing that miscegenation was harmful to blacks as well as whites.) Similarly, Dr. J. Bernard Davis had concluded that the average internal capacity of brain matter was seven percent less in blacks than in whites. "This 'mental gap' ... is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race." Making plain that the future of civilization depended on upholding laws like the one at issue, Kentucky observed that "the historian and adventurer found the negro race, centuries ago, in barbarian darkness, and the race, as a whole, so remains, a warning and an admonition against social advancement and equality." Thus, "if the progress, advancement and civilization of the 20th century is to go forward, then it must be left not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race."[77]

It is of interest that with this discussion of scientific data, Kentucky provided the Court with a version of what came to be known as a Brandeis brief. In *Muller v. Oregon* (1908),[78] where the issue was whether an Oregon law limiting the hours women could work in laundries and factories to ten per day was constitutional, Louis Brandeis, representing Oregon, submitted a brief that had nearly one hundred pages of summaries and extracts from (as characterized in the *Muller* opinion) reports of "bureaus of statistics, commissioners of hygiene, [and] inspectors of factories ... to the effect that long hours are dangerous to women."[79] The Court observed that such material "may not be, technically speaking, authorities, and in them there is little or no discussion of the constitutional question presented to us for determination, yet they are significant .... We take judicial cognizance of all matters of general knowledge."[80] Kentucky's brief, while filed after Brandeis's, was filed before this express statement by the Court of its willingness to consider such materials.

With the Court prepared to accept scientific data not in the record, with Kentucky having shown that the science of the day established the superiority of the white race and the importance of maintaining its purity, and with Berea College not contesting either white supremacy or the need to prevent miscegenation, one could have expected an opinion from the Court that proceeded from those premises. Yet in affirming the conviction the Court issued an opinion resting entirely on corporate law principles.

The opinion was written by Justice David J. Brewer, with four justices joining (Chief Justice Melville W. Fuller and Justices White, Rufus Peckham, and McKenna) and two concurring in the judgment but not joining the opinion (Justices Oliver Wendell Holmes and William H. Moody). Justice Brewer opened with a reference to "the general power of the state in respect to the separation of the two races,"[81] but he did not use this consideration as the basis for the affirmance. Rather, he relied on the "grant theory" of corporations: corporations are artificial beings, created by an act of the state, existing only as a consequence of positive law. Incorporators who are granted a charter by the state thereby acquire the privilege of holding property and making contracts in the corporate name, but only at the sufferance of the legislature, which retains the right to revoke the grant or add conditions to it for any reason at any time.

Justice Brewer marched through a straightforward analysis premised on Kentucky's power to set or alter conditions to a corporate charter as it saw fit. He characterized the Day Law as an amendment



In his majority opinion, Justice David Brewer (seated second from right) characterized the Day Law as an amendment to the Berea College corporate charter and upheld the conviction as an exercise of Kentucky's control over its corporations.

to the Berea College corporate charter and upheld the conviction as an exercise of the state's control over the activities of one of its creations. Kentucky was under no obligation to treat corporations and individuals alike; as a corporation chartered by Kentucky, Berea College had only such right to teach as Kentucky chose to give it. There was no need to consider the rights of teachers or students as the statute's provisions relating to them were severable from those relating to corporations.

There was no discussion in the opinion of whether the Kentucky statute was reasonable, or even rational, in not allowing Berea College to continue in its teaching mission; apparently, the states' control over the charters of the corporations they create, in this respect to be distinguished from the states' police powers, was not required to be exercised in a reasonable manner and was not otherwise subject to judicial supervision.

Justice Harlan dissented. He was unwilling to view the issue presented solely in terms of the scope of activities permitted to a corporation under a charter Kentucky controlled. He noted that the Kentucky Court of Appeals' decision dealt at length with the constitutional issue; the idea that a corporation has only those rights the state chooses to give it was added without any discussion, as an "incidental ... makeweight in the decision of the pivotal question."[82] Reaching that pivotal question, the constitutional issue, he emphasized the benefits of education regardless of the racial composition of those being educated and concluded that a law limiting those benefits was beyond the police power of the state. Berea College's right to teach, moreover, especially when tuition is charged, was in fact a property right within the meaning of the Fourteenth Amendment's protection of property.[83] Justice William R. Day dissented as well, although without opinion.

The stark disconnect between the arguments advanced by the parties and the issue addressed by the Court's majority has

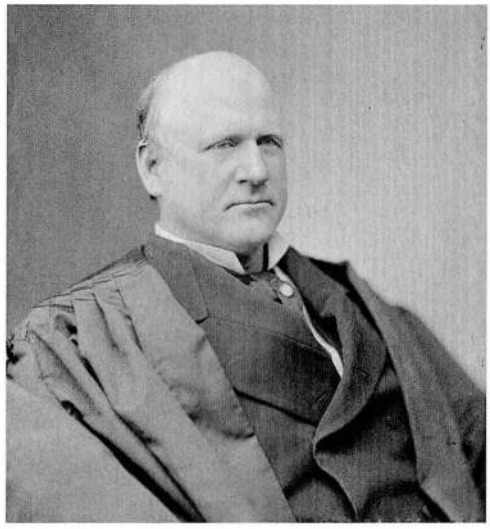
attracted the attention of scholars. Their analyses, however, have not been persuasive. One, Adam Winkler, argues that the Court prior to *Berea College* distinguished between the Fourteenth Amendment's due process protection of property rights and its requirement of equal protection of the laws, on the one hand, and liberty rights on the other. Corporations enjoyed the former but not the latter. As the Day Law did not deprive Berea College of any property or of equal protection of law, upholding the law, Winkler argued, simply followed this established distinction.[84] But as noted above, the college did present an argument based on the law's impact on its property and Justice Harlan saw the college's property rights as being at stake. Winkler's explanation does not account for the Court's failure to consider the college's property rights.

It is, moreover, not correct that the Court's prior decisions limited constitutional protections for corporations to equal protection and property. *Bank of the United States v. Deveaux*,[85] for example, held that a corporation, while not a "citizen," may nevertheless invoke the constitutional right to access to the federal courts by reason of diversity of citizenship as provided in Article III, Section 2, of the Constitution. *Hale v. Henkel*,[86] decided just two years before *Berea College*, acknowledged the grant theory but held that a corporation is entitled to the protections that the Fourth Amendment provides to "persons" against "unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."[87]

Of particular interest is Justice Brewer's concurring opinion in *Hale*, written for himself and Chief Justice Fuller. Justice Brewer, expressing in his concurrence views that he had previously put forth in an opinion for the full Court,[88] agreed that a corporation could rely on the Fourth Amendment. His opinion took a broad view of a corporation's constitutional rights, arguing that if a corporation was a "person" under the Fourteenth Amendment—the Court having said it was in *Santa Clara v. Southern Pacific Railway Co.*,[89] where Fourteenth Amendment protections for corporations began—it was also a person within the meaning of the Fourth and Fifth Amendments. He gave several examples, including *Deveaux*, of cases treating corporations as persons under the Constitution and under various statutes. He concluded, "the immunities and protection of articles 4, 5, and 14 of the amendments to the Federal Constitution are available to a corporation so far as, in the nature of things, they are applicable."[90] He explained that corporations have the rights of their constituent individuals:

> [A corporation] is essentially but an association of individuals to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised.... "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."[91]

Finally, while the Court repeatedly said that only natural persons, and not corporations, enjoyed the "liberty" protected by the Fourteenth Amendment, there was authority showing that corporations enjoyed something that might be understood as liberty's practical equivalent. *Northwestern National Life Ins. Co. v. Riggs* is an illustration.[92] There the Court considered a Missouri statute providing that no misrepresentation made by an insured in obtaining a life insurance policy could permit the insurer to avoid the policy,



Justice John Marshall Harlan's dissent examined the larger constitutional question with its emphasis on the benefits of education regardless of the racial composition of those being educated. Harlan concluded that a law limiting those benefits was beyond the police power of the state.

"unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable." The particular insurance policy that led to the litigation had a clause providing that every statement by the insured was a warranty material to the risk. Application of the Missouri statute, thus, would override the (presumably) freely made contract of the parties. The Court upheld the constitutionality of the statute.

Justice Harlan, writing for a unanimous Court, acknowledged that the statute "in some degree restricts the company's power of contracting." He also acknowledged that the statute meant that the beneficiaries of a policy "may sometimes reap the fruits of fraud." But he would not for those reasons hold it unconstitutional. He invoked the corporate grant theory as a reason to uphold the statute: "such a restriction as that founded in the Missouri statute, if embodied in the original charter of a life insurance corporation, would of course be binding upon it .... If, however, no such restriction was imposed by its charter, it could yet be imposed by subsequent legislation ...."[93]

If that were all Justice Harlan had to say, the case would be Berea College's twin. But he also invoked the police power "in each state ... [if] not forbidden by its own constitution or by the Constitution of the United States ... 'to regulate the relative rights and duties of all persons and corporations ... to provide for ... the public good.'"[94] He explained why the Missouri statute was a reasonable exercise of the police power. Prior judicial decisions in Missouri had addressed the "long and hurtful practice" by insurance companies of using "harsh" provisions to avoid their policy obligations.[95] That "evil" was "to be remedied by legislation":

> The business of life insurance ... is so intimately connected with the common good that the state creating the insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions.[96]

Justice Harlan also observed that the "liberty" protected by the Fourteenth Amendment "is the liberty of natural, not artificial, persons,"[97] but his opinion makes it clear that the regulatory power over corporate behavior is not unlimited and must serve reasonable ends in a reasonable manner—in *Riggs* itself, preventing "injustice." *Riggs* thus differs from *Berea College* in not having rested solely on a state's power over the corporations it has created, and instead going on to find that the state exercised its power reasonably, to curb a harmful practice.

Justice Harlan took the same approach a year later, writing for the Court in *Western Turf Association v. Greenberg*. Citing *Riggs*, he said that only natural persons had a Fourteenth Amendment liberty right, but

again in the context of finding the statute under examination to be a proper exercise of the police power, one that "merely requires defendant [corporation] to honor its contract ... [and] promotes good order."[98]

At the time of Riggs and *Western Turf Association*, the area beyond a reasonable exercise of the police power was considered an area of protected liberty. Thus, the question whether a given governmental measure was a reasonable exercise of the police power, and the question whether the protected liberty of those affected had been transgressed, were the same question expressed in different ways.[99] If as *Riggs* suggests, police regulation of corporate behavior was required to be "reasonable"—stated otherwise, if corporations had a right to be free of unreasonable regulation—it would follow that corporations had what could fairly be understood as a liberty interest protected by the Fourteenth Amendment.[100]

In view of these authorities from *Deveaux* in 1809 to *Hale* and *Riggs* in 1906, the *Berea* Court's unwillingness to address the college's constitutional claims or the reasonableness of the Day Law cannot be explained as resting on what Winkler said was a settled understanding of highly limited corporate access to constitutional protections. Both as a rights-holder itself and as one entitled to advance the claims of the members of its collective body, the college had constitutional arguments that merited consideration under then-applicable practice.

Another scholar, David Bernstein, has argued that in *Berea College* the Court was presented with a stark choice between what he terms the sociological jurisprudence, racism, and statism seen in *Plessy v. Ferguson*,[101] where the Court upheld a law requiring separate railway coach cars for black and white passengers, and the libertarianism and suspicion of state power of *Lochner v. New York*,[102] where the Court found a limitation on the hours that could be worked by bakery employees to be an unconstitutional infringement of liberty. In *Berea College*, Bernstein argues, the Court found a way to avoid choosing between *Plessy* and *Lochner*.[103]

Plessy, deferring to a state legislative judgment that a race-based segregation measure was "reasonable," would skew toward upholding the Day Law as a valid exercise of the police power. *Lochner*, on the other hand, refused to defer to a legislative judgment that it was unhealthy to spend long hours inhaling heated flour dust while working in a bakery. *Lochner*, moreover, insisted on a bakery worker's liberty to work such hours as he chose and a bakery operator's liberty to employ people for as long as he chose. Reliance on *Lochner* would tend to support a conclusion that the Day Law should be struck down. Bernstein is correct that the *Berea* Court did not expressly do either of those things. Bernstein praises what he calls this "evasion" because, by upholding Kentucky's segregationist measure without characterizing it as a reasonable exercise of the police power, the Court preserved its ability to use *Lochner*-like "skepticism of state power" later, as a "weapon in the battle against state-sponsored segregation." He argues that *Berea College* had the virtue of leaving the field open to permit the Court to hold, as it did in 1917 in *Buchanan v. Warley*,[104] that a law requiring residential segregation was unconstitutional.

But to speak of *Berea* College as preserving the Court's ability to be skeptical of state power is far from what the Court actually did. The majority opinion upheld Kentucky's control over corporate behavior without pausing to examine whether the manner in which it was exercised was reasonable or justified. The Court could hardly have exhibited less skepticism about state power.

If, moreover, the Berea Court had explicitly considered whether the Day Law was "reasonable" and held that it was, it would not at all have hindered the result in *Buchanan*. *Buchanan* considered a city

ordinance that made it unlawful for whites to move into residences on blocks where the majority of houses were occupied by blacks, and for blacks to move into residences on blocks where the majority of houses were occupied by whites. The unanimous Court, in an opinion by Justice Day, had little difficulty in holding that, as a practical matter, the ordinance prevented a landowner from selling his property to whomever he chose and was therefore inconsistent with the Fourteenth Amendment's protections of property rights. *Buchanan* did not dispute the propriety of segregationist laws in general. To the contrary, *Buchanan* acknowledged the "serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration ...." It explicitly affirmed the desirability of promoting public peace through racial segregation. It cited *Plessy* favorably and observed with apparent agreement that "this Court has held laws valid which separated the races ... in public accommodations."[105] But when the Court's commitment to upholding property rights conflicted with the desirable goal of separating the races, property rights overrode segregation. Had there been an opinion in *Berea* characterizing the Day Law as reasonable, it would not have required any change to *Buchanan*'s reasoning or outcome.

In all events, after *Berea* the Court did not bring skepticism about state power to bear on laws implementing Jim Crow measures. Rather, the Court in the main found reasons, just as it did in *Berea*, to adopt a hands-off approach when faced with cases of state-sponsored segregation or, more broadly, measures by Southern lawmakers that disadvantaged black citizens.[106] Thus, Bernstein, seeing *Berea* as temporizing, overstates its benignity.

Parting ways with both Winkler and Bernstein, one asks, should *Berea College* be taken at face value and understood as defining an area of state power over corporations that can be exercised without justification, that somehow escapes all constitutional scrutiny? No, it should not. The Court did not intend, cannot have intended, to allow the states the ability, unlimited and unsupervised by the courts, to regulate the activities of corporations so long as the regulation was done through control over corporate charters or legislation deemed to amend charters. There are compelling considerations pointing in this direction.

Preliminarily, it should be noted that the grant theory on which Justice Brewer relied had been under attack for about 25 years when he wrote his opinion in *Berea College*. Academics had begun to undermine the theory in the 1880s. In the 1890s, the influential scholar Ernst Freund argued that "the law does not create the corporate person, but finding it in existence invests it with a certain legal capacity."[107] By the time of *Berea College*, corporations were being characterized as natural rather than artificial, the products of private agreements (like partnerships or trusts) rather than positive law. The grant theory was soon a dead letter, generally in American law and in the Supreme Court.[108]

The Supreme Court, though, did have a reason to cling to the old concept: limiting corporate activity to whatever was specifically allowed by charter was a weapon useful to the Court in combating corporate consolidation and thereby preserving competitive markets. A corporation not authorized by its charter to make contracts that would effect a merger could be held to have acted ultra vires if it went beyond its charter in this regard. As Morton Horwitz observes, "during the late nineteenth century ... an old conservative majority [on the Supreme Court], favoring small competitive units of production and fearing large-scale enterprise, never really abandoned the traditional view of the corporation as an artificial creature of state power."[109] But apart from whatever utility the grant theory may have had in resisting corporate consolidation, its use in

the *Berea* case, as Michael J. Klarman noted in his comprehensive study of the Court's civil rights decisions, was "contrived."[110]

No hint of the declining force of the grant theory can be found in Justice Brewer's opinion. But even the most full-throated version of the theory would not have left the states with the unchecked power seemingly seen in *Berea*. Could Kentucky have chartered a bank to make loans and accept deposits, but only for white customers? No other opinion for the Court, either before or after *Berea*, seems ever to have seriously entertained such a broad reading of state power. The Court never cited *Berea* for any proposition concerning the breadth of state power, the police power, or the ability of corporations to make constitutional claims. The Court had previously made general statements to the effect that a state's reservation of power to amend or rescind grants of corporate charters "places under legislative control all rights, privileges, and immunities derived by [the corporation's] charter directly from the State."[111] But the Court had never applied this general principle to uphold a regulation attacked as unreasonable or to defeat a claim that a regulation of corporate activity was constitutionally impermissible. Indeed, to the contrary, in *Southern Pacific Co. v. Denton*,[112] the Court addressed the analogous area of a state's power to set conditions to allowing a foreign corporation to do business within its borders, a power roughly as broad as that to govern the corporations the state created itself.[113] *Denton*, however, held that the power could not extend to requiring an out-of-state corporation to surrender a constitutional right. Similarly, as the Court observed two years after *Berea* in *Western Union Telegraph Co. v. Kansas*, at least with respect to corporations engaged in interstate commerce, "'in all the cases in which this Court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted *that no conditions can be imposed ... which are repugnant to the Constitution....*'"[114]

While twenty years before *Berea*, the Court was quite deferential to the states in the exercise of their police power,[115] by 1908 the Court had entered the so-called *Lochner* era. In *Lochner*, New York's legislature had made a judgment about the health effects of inhaling heated flour dust; the Court substituted its own, different judgment. At around the time of *Berea*, the Court, rather than defer to legislatures, aggressively used the Fourteenth Amendment and parallel concepts in the Fifth Amendment to scrutinize state and federal legislation that arguably infringed on property rights or on liberty of contract. One example is *Adair v. United States*, where the Court cited *Lochner* and held unconstitutional a measure prohibiting employers from discharging employees by reason of their union membership.[116] This is not to suggest that the Court routinely rejected economic legislation; rather, under careful scrutiny the Court also upheld many economic measures.[117] But leaving states with *carte blanche* to regulate corporate activity through charter amendments would not have been consistent with the new role the Court had assumed of supervising state legislatures, especially given the ever-larger role played by corporations in the economic life of the nation.[118] The unqualified power, free of judicial oversight, that *Berea College* appears to grant to the states over their corporate creatures is a mirage.

Further undermining the notion that *Berea* stands for Kentucky's unlimited control over corporate charters is the fact that the Kentucky Court of Appeals made clear that as a matter of state law, Kentucky was not exercising such power in upholding the Day Law's application to the college and, moreover, Kentucky did not claim that it had such power.[119] As noted above, the Kentucky Court of Appeals reversed the conviction of the college for teaching white and black stu-

dents within 25 miles of each other, holding the relevant provision of the Day Law to be "oppressive." No issue of oppressiveness would arise, however, under Justice Brewer's approach to the case. Rather, one would simply hold that Kentucky had revoked the Berea College charter to the extent it allowed teaching white and black students within 25 miles of each other, without any need to consider whether such action was oppressive.

A word should be added about the general approach the author of the *Berea* opinion took to matters of governmental power during his twenty years on the Court. As Arnold Paul writes in a biographical essay, throughout his tenure, "Justice Brewer held to a strictly conservative, sometimes reactionary, position on the Court opposing firmly the expansion of government power, state or federal."[120] A milder view, one that would object to characterizing Justice Brewer as "reactionary," was expressed by Joseph Gordon Hylton, although he too found Justice Brewer to be "antistatist."[121] As a circuit judge, Justice Brewer had held that a Kansas prohibition statute that rendered a brewery valueless was unconstitutional; the Supreme Court reached the opposite conclusion in *Mugler v. Kansas*. In *Munn v. Illinois*, the Supreme Court upheld a state regulation of pricing by a grain elevator[122]; as a circuit judge, Justice Brewer declined to follow it.[123] While he sat on the Supreme Court, it decided *Champion v. Ames* (expansive view of Congressional power under the Commerce Clause),[124] *Holden v. Hardy* (upholding a state provision limiting the hours that could be worked in certain dangerous occupations),[125] and *Knoxville Iron Co. v. Harbison* (upholding a state provision limiting the payment of wages in scrip)[126]; Justice Brewer dissented in all. In *Brass v. North Dakota ex rel. Stoeser*, where the Court upheld a state law that regulated grain elevators and fixed the rates they could charge, Justice Brewer worried in his dissent "that the country is rapidly traveling ... to that point where all freedom of contract and conduct will be lost."[127] Justice Brewer's understanding that property rights were sacred[128] and his view that Fourteenth Amendment protections extended to corporations were part of his same project to rein in the states. One cannot imagine Justice Brewer being the author of a ground-breaking opinion opening for the states' new paths of unsupervised corporate regulation. He must have had something else in mind.

Berea College *as a Jim Crow Decision*

The best way to understand *Berea* is to grasp that the majority of the Court simply believed that Kentucky was reasonable to insist on preventing miscegenation, and reasonable to pursue that goal through prohibiting voluntary interracial association at the college level. The Court in 1883 had upheld an anti-miscegenationist measure against an equal protection challenge.[129] Twelve years before *Berea*, in *Plessy*, the Court noted with apparent approval that "laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State."[130] This brief dictum in *Plessy*, while without analysis, makes explicit that the Court did not then recognize any constitutionally protected liberty that overrode the importance of anti-miscegenation.

A decade after *Berea*, in *Buchanan v. Warley*, discussed above, the Court said it understood the *Berea College* decision, in upholding an anti-miscegenation statute, to have upheld a *reasonable* rule.[131] In discussing *Berea*, *Buchanan* first characterized it as resting on Kentucky's authority over its own creations.[132] But then *Buchanan* referred to an opinion of the Supreme Court of Georgia that addressed an ordinance similar to the one before the *Buchanan* Court and which, the Court said, "dealt with *Plessy v. Ferguson and The Berea College Case* in language so

apposite that we quote a portion of it: ... '[those cases] require ... conform[ity] with reasonable rules in regard to the separation of races.'"[133] Thus, *Buchanan*, in quoting this language with express approval, categorized *Berea* with *Plessy* and recast *Berea* as an expressly segregationist decision, one that found the Day Law to be a *reasonable* exercise of the state's police power.

Contemporary commentary on the Supreme Court's *Berea* decision understood it in precisely this way. It was seen as, and commended for, upholding a beneficial regime of racial separation and avoiding miscegenation.[134] *The Harvard Law Review*, for example, stated the issue in the case as "whether the state has made such proper use of its police power that teachers and pupils the freedom of whose action is thereby limited cannot successfully invoke the fourteenth amendment." Concluding that the statute was a proper exercise of the police power, the article reasoned that the state's right to prohibit miscegenation is "unquestioned" and to prohibit integrated education "is not much more a step."[135] Lower court cases since *Berea* joined in seeing it as a Jim Crow decision rather than a corporate law case and, prior to *Brown*, it was cited in support of upholding the constitutionality of state statutes requiring segregated schools.[136]

Thus, in sum, *Buchanan* got *Berea* right: it was not about state power over corporate charters, it was about segregationist measures understood to be reasonable. Kentucky made a legislative judgment that miscegenation was an evil to be avoided; the Court, no doubt sharing in the racism of the times and aware that Kentucky's judgment was supported by then-contemporary science, was not prepared to reject that judgment as irrational or as inconsistent with any constitutional guaranties. The Kentucky legislature further judged, in the words of the *Harvard Law Review*, that it "was not much more a step" from legislating against miscegenation to legislating against biracial education. The Court apparently accepted that proposition as well. *Berea* thus takes its place alongside other Supreme Court decisions of the era—including those allowing disenfranchisement of black voters,[137] acquiescing in the exclusion of black citizens from Southern juries,[138] refusing to recognize federal jurisdiction to act against lynching,[139] and overlooking the vastly smaller allocation of resources to the education of black children compared to schools for white students,[140] to mention some—that upheld a Jim Crow regime that persisted for another fifty years.

Notes

[1] *Berea College v. Kentucky*, 211 U.S. 45 (1908).

[2] See Adam Winkler, **We The Corporations—How American Businesses Won Their Civil Rights** (New York: Liveright Publishing Corp., 2018), 222; David E. Bernstein, **Rehabilitating *Lochner*: Defending Individual Rights against Progressive Reform** (Chicago: University of Chicago Press, 2011), 76–78; David E. Bernstein, "*Plessy* versus *Lochner*: The *Berea College* Case," 25 *Journal of Supreme Court History* 93 (2000); David E. Bernstein, "Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective," 51 *Vanderbilt Law Rev.* 797 (1998).

[3] Valuable works discussing scientific racism include Daniel Okrent, **The Guarded Gate** (New York: Scribner, 2019); George M. Frederickson, **Racism: A Short History** (Princeton, NJ: Princeton University Press, 2002); Daniel J. Kevles, **In the Name of Eugenics: Genetics and the Uses of Human Heredity** (Berkeley, CA: University of California Press, 1986); Stephen Jay Gould, **The Mismeasure of Man** (New York: W. W. Norton & Co., 1981).

[4] E.g., Okrent, **Guarded Gate** 60–62; Frederickson, **Racism**, 154–155.

[5] Gould, **Mismeasure**, 35–36.

[6] Ralph Waldo Emerson, **English Traits** (London: Macmillan & Co., 1883; originally published in 1856, 27–29, 36–39.

[7] Robert D. Richardson Jr., **Emerson—The Mind on Fire** (Berkeley, CA: University of California Press, 1995), 518.

[8] Robert Knox, **The Races of Men** (Philadelphia: Lea & Blanchard, 1850), 7.

[9] E.g., *ibid.*, 85, 103–104, 123, 130–131, 145.

[10] *Id.* 10.

[11] *Id.* 151. Knox also believed there were differences in the texture and structure of the brains of whites and

blacks, although he claimed only limited experience in that regard. *Id.*

[12] Ernst Haeckel, **Last Words on Evolution** (London: A. Owen & Co., 1906), 98.

[13] Gould, **Mismeasure**, 77–112.

[14] Knox, **Races of Men**, 40–41.

[15] Randall Fuller, **The Book that Changed America: How Darwin's Theory of Evolution Ignited a Nation** (New York: Penguin Books, 2017), 114.

[16] *Ibid.* 161.

[17] Gobineau is discussed in Okrent, **Guarded Gate,** 86–88.

[18] Quoted in Herbert Hovencamp, "The Progressives: Racism and Public Law," 59 *Arizona L. Rev.* 947, 965 (2017).

[19] Joel Williamson, **The Crucible of Race: Black–White Relations in the American South Since Emancipation** (New York: Oxford University Press, 1984), 115–116.

[20] *Ibid.* 119–120, quoting from Shaler, "The Negro Problem," 54 *Atlantic Monthly* 703 (November 1884) and Shaler, **The Neighbor: The Natural History of Human Contacts** (Boston: Houghton Mifflin, 1904).

[21] Hoffman, **Race Traits and the Tendencies of the American Negro** (Publications of the American Economic Association; New York: Macmillan, 1896), quoted in Williamson, **Crucible of Race,** 122.

[22] Williamson, **Crucible of Race,** 123–124.

[23] Hovencamp, The Progressives, 965.

[24] See Gould, **Mismeasure**, 196.

[25] *Ibid.*, citing Benjamin Gould, "Investigations in the Military and Anthropological Statistics of American Soldiers" (1869); Herbert Hovencamp, "Social Science and Segregation Before Brown," 1985 *Duke Law Journal* 624, 654–661.

[26] *Ibid* 654.

[27] **Reconstruction: America's Unfinished Revolution, 1863–1877** (New York: Harper & Row, 2014) (updated ed.), 239.

[28] Frederickson, **Racism,** 68.

[29] Nicholas Lemann, **Redemption: The Last Battle of the Civil War** (New York: Farrar, Straus & Giroux, 2006), 66–67.

[30] Supreme Court Justice David Brewer, for one, spoke of the "sacredness" of property rights in his commencement address to Yale Law School, June 23, 1891, printed at 55 *New Englander and Yale Review* 97 (August, 1891).

[31] Robert Wiebe, **The Search for Order, 1877–1920** (New York: Hill & Wang, 1967), 47, 51–52; Sven Beckert, **The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896** (Cambridge, UK: Cambridge University Press, 2001), 76, 177–179, 211, 295; Joyce Appleby, **The Relentless Revolution: A History of Capitalism** (New York: W. W. Norton & Co., 2011), 200–227. Beckert points out, for example, that the end of the nineteenth century was marked by a massive build-up in state militias and construction of armories.

[32] Foner, **Reconstruction,** 198–200. See also *ibid.*, 563: the Southern "campaign for white supremacy also involved a struggle to maintain the planter's economic domination."

[33] Jackson Lears, **Rebirth of a Nation: The Making of Modern America, 1877–1920** (New York: HarperCollins Publishers, 2009), 81.

[34] "The Howard University Law School," 27 *The American Law Review* 249 (1893).

[35] "Colored Members of the Chicago Bar," 30 *The American Law Review* 922 (1896).

[36] Lears, **Rebirth of a Nation,** 2.

[37] Theodore Roosevelt, "At the Banquet to Justice Harlan, The New Willard Hotel, December 9, 1902," at www.theodore-roosevelt.com/images/research/txtspeeches/35.txt. See also "President Cleveland and 'President Debs,'" 28 *The American Law Review* 591, 592–593 (July/August, 1894), extolling the readiness of Civil War veterans, both from the North and the South, to defend "the integrity of [American] institutions."

[38] Albert W. Gaines, "The Growth, Aggressiveness, and Permanent Character of Anglo-Saxon Law and Institutions," paper read to the Tennessee Bar Association, August 10, 1906, printed at 40 *The American Law Review* 694 (September/October 1906).

[39] Annual address on Congressional and state legislation to the American Bar Association by John Randolph Tucker, printed in Notes, 27 *The American Law Review* 741 (1893).

[40] "Constitutional Objections to Hawaiian Annexation," 28 *The American Law Review* 87, 88 (1894).

[41] 83 U.S. 36.

[42] Williamson, **Crucible of Race**, 176.

[43] Ausburn Towner, "The United States Supreme Court and the New Chief Justice," 26 *Frank Leslie's Popular Monthly* 1, 2 (July 1888).

[44] Address by Stephen J. Field on the occasion of the 100th Anniversary of the Supreme Court, printed in 24 *The American Law Review* 351 (1890).

[45] Address by David J. Brewer at the Lincoln's Birthday celebration at the Marquette Club of Chicago, "The Nation's Anchor," printed in 57 *The Albany Law Review* 166 (March 12, 1898).

[46] Several examples are cited at nn.137–140, *infra*. A few selections from the vast literature on this subject: Elizabeth Reilly, ed., **Infinite Hope and Finite Disappointment: The Story of the First Interpreters of the Fourteenth Amendment** (Akron, Ohio: University of Akron Press, 2011); Gerard N. Magliocca, **The Tragedy of William Jennings Bryan: Constitutional Law and**

the Politics of Backlash (New Haven: Yale University Press, on-line ed., 2011); Robert Kaczorowski, **The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876** (Bronx, New York: Fordham University Press, 2005); Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (Oxford: Oxford University Press, 2004), 3–60; Akhil Reed Amar, **The Bill of Rights: Creation and Reconstruction** (New Haven: Yale University Press, 1998); Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham, NC: Duke University Press, 1986); C. Vann Woodward, **The Strange Career of Jim Crow** (2d. rev ed., New York: Oxford University Press, 1966); Pamela Brandwein, "A Lost Jurisprudence of the Reconstruction Amendments," 41 *Journal of Supreme Court History* 329 (2016); Laura F. Edwards, "The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Government," 41 *Journal of Supreme Court History* 310 (2016); Michael A. Ross, "The Supreme Court, Reconstruction, and the Meaning of the Civil War," 41 *Journal of Supreme Court History* 273, 278 (2016); Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 *Supreme Court Review* 39.

[47] E.g., Klarman, **From Jim Crow,** 9.

[48] 163 U.S. 537, 543–544 (1896).

[49] 95 U.S. 485 (1877).

[50] 133 U.S. 587 (1890).

[51] 95 U.S. at 489; 133 U.S. at 590–591.

[52] Adapted from the New Testament, Acts 10:34.

[53] Shannon H. Wilson, **Berea College: An Illustrated History** (Lexington, KY: The University Press of Kentucky, 2006), 12–23, 88 (available at https://books.google.com/books?id=UOPWalHC-rcC&pg=PA150&lpg=).

[54] John A. R. Rogers, **Birth of Berea College: A Story of Providence** (Philadelphia: Henry T. Coates & Co., 1903), 106–108, 142.

[55] Wilson, **Berea College,** 83–84.

[56] *Ibid.* 84–88.

[57] *Columbia Trust Co. v. Lincoln Institute of Kentucky*, 138 Ky. 804 (1910).

[58] *Berea College v. Commonwealth*, 94 S.W. 623 (Kentucky Court of Appeals, 1906).

[59] Transcript of Record, *Berea College v. Kentucky*, 211 U.S. 45 (1908), filed January 7, 1907, at 18.

[60] *Ibid.*, at 12–13.

[61] 94 S.W. at 625.

[62] 94 *Ibid.*, at 626.

[63] *Id.* at 628.

[64] *Id.* at 627.

[65] *Id.* at 628.

[66] *Id.* at 628–629.

[67] *Id.* at 629.

[68] Peggy Pascoe, **What Comes Naturally: Miscegenation Law and the Making of Race in America** (Oxford: Oxford University Press, 2009), 120.

[69] Quoted in Peter Wallenstein, "Interracial Marriage on Trial: *Loving v. Virginia*," included in Annette Gordon-Reed, ed., **Race on Trial: Law and Justice in American History** (Oxford: Oxford University Press, 2002) 185–186. (The Lovings' conviction was subsequently overturned in the Supreme Court. *Loving v. Virginia*, 388 U.S. 1 (1967).)

[70] Brief of Plaintiff in Error, *Berea College v. Kentucky*, particularly at 6–7.

[71] *Ibid.*, 8–9.

[72] Plaintiff in Error's Reply Brief, 12.

[73] Brief for Defendant in Error, *Berea College v. Kentucky*, 2–3.

[74] *Ibid.* 4.

[75] *Id.* 39.

[76] *Id.* 18–19.

[77] *Id.* at 39–41.

[78] 208 U.S. 412 (1908).

[79] *Ibid.* at 423.

[80] *Id.* at 420–21.

[81] 211 U.S. at 53.

[82] *Ibid.* at 60–61 (dissenting opinion).

[83] *Id.* at 61–62, 65 (dissenting opinion).

[84] Winkler, **We The Corporations,** 222.

[85] 9 U.S. 61 (1809).

[86] 201 U.S. 43 (1906).

[87] *Ibid.* at 76. (Emphasis in original.)

[88] See *Gulf, Colorado, & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1891).

[89] 118 U.S. 394, 396 (1886).

[90] 201 U.S. at 83–84.

[91] *Ibid.* 85, quoting from *Providence Bank v. Billings*, 29 U.S. 514, 562 (1830) (Marshall, C.J.).

[92] 203 U.S. 243 (1906).

[93] *Ibid.*, at 254.

[94] *Id.* at 252–253, quoting from *Lake Shore & Michigan Southern Railway Co. v. Ohio*, 173 U.S. 285, 297 (1899).

[95] 203 U.S. at 251.

[96] *Ibid.* at 253–254.

[97] *Id.* at 255.

[98] 204 U.S. 359, 363 (1907). To similar effect, see *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), which cited both *Riggs* and *Western Turf* for the proposition that corporations cannot claim a Fourteenth Amendment liberty interest. It nonetheless allowed incorporated schools, harmed by a statute limiting the liberties of students' parents, to challenge the statute and held the statute to be unconstitutional for lack of any "reasonable relation to some purpose within the competency of the State."

[99] See generally Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (Vol. VIII of the Oliver Wendell Holmes Devise History of the Supreme Court), 12, 389–392 (New York: Macmillan Publishing Company, 1993). *Compare Lochner v. New York*, 198 U.S. 45, 56–60 (1905).

[100] *Compare Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897), where, a few years before *Riggs*, the Court referred to a corporation's right to make a contract with a natural person as a "correlative[ ]" of a person's right to make a contract with a corporation.

[101] 163 U.S. 537 (1896).

[102] 198 U.S. 45 (1905).

[103] Bernstein, **Rehabilitating *Lochner***, 76–78; Bernstein, "*Plessy* versus *Lochner*: The *Berea College* Case," Bernstein, "Philip Sober Controlling Philip Drunk."

[104] 245 U.S. 60 (1917).

[105] 245 U.S. at 81.

[106] See cases cited at nn. 137–140.

[107] Ernst Freund, **The Legal Nature of Corporations** (Chicago: University of Chicago Press, 1897) 13.

[108] The evolution in American law of the concept of a corporation from an artificial to a natural entity is thoroughly explored in Morton J. Horwitz, **The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy** (New York: Oxford University Press, 1992), 65–107.

[109] **The Transformation of American Law**, 86.

[110] Klarman, **From Jim Crow**, 9, 24.

[111] *Tomlinson v. Jessup*, 82 U.S. 454, 459 (1872). To similar effect, see *Polk v. Mutual Reserve Fund Life Association of New York*, 207 U.S. 310, 325–326 (1907); *Looker v. Maynard*, 179 U.S. 46, 52–53 (1900); *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Close v. Greenwood Cemetery*, 107 U.S. 466, 476 (1883).

[112] 146 U.S. 202 (1892).

[113] See, e.g., *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 314 (1892).

[114] 216 U.S. 1, 36 (1910) (quoting from *Barron v. Burnside*, 121 U.S. 186, 200 (1887)). (Emphasis in original.)

[115] See, for example, *Powell v. Pennsylvania*, 127 U.S. 678 (1888), and *Mugler v. Kansas*, 123 U.S. 623 (1887), where the Court upheld laws rendering previously lawful businesses near worthless.

[116] 208 U.S. 161 (1908). *Adkins* was followed in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 611 (1936) (*Adkins* shows "that the State is without power ... to prohibit, change, or nullify contracts between employers and adult women workers as to the amount of wages to be paid.")

[117] See James W. Ely Jr., "The Supreme Court and Property Rights in the Progressive Era," 44 *Journal of Supreme Court History* 53 (2019).

[118] See Horwitz, **Transformation of American Law**, 74.

[119] The Kentucky Court of Appeals made this observation about its *Berea* decision in *Columbia Trust Co. v. Lincoln Institute of Kentucky*, 138 Ky. 804 (1910).

[120] Arnold M. Paul, "David J. Brewer," in Leon Friedman and Fred G. Israels, eds., **II The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions,** 1515 (New York: Chelsea House Publishers, 1969).

[121] Joseph Gordon Hylton, "David Josiah Brewer: A Conservative Justice Reconsidered," 1994 *Journal of Supreme Court History* 45. Hylton makes no mention of *Berea College* or any other case bearing on the rights of black citizens.

[122] 94 U.S. 113 (1877).

[123] *Chicago & Northwest Railway Co. v. Dey*, 35 Fed. 866 (C.C.S.D. Iowa).

[124] 188 U.S. 321 (1903).

[125] 169 U.S. 366 (1898).

[126] 183 U.S. 13 (1901).

[127] 153 U.S. 391, 410 (dissenting opinion) (1894).

[128] See n.30.

[129] *Pace v. Alabama*, 106 U.S. 583 (1883), considered a statute that made it a crime for a man and a woman to live together in adultery or fornication. If the man and the woman were of different races, the penalty for violating the statute was more severe. The Court held that since the statute treated blacks and whites equally, there was no violation of the Equal Protection Clause.

[130] 163 U.S. at 545.

[131] 245 U.S. 60 (1917).

[132] *Ibid.* at 79.

[133] *Id.* at 80. (Chief Justice White and Justices McKenna and Holmes were, along with Justice Day, members of both the *Buchanan* and *Berea* Courts.)

[134] Andrew Alexander Bruce, "The *Berea College* Decision and the Segregation of the Colored Race," 68 *Central Law Journal* 137 (1909); "Constitutionality of a Statute Compelling the Color Line in Private Schools," 22 *Harvard Law Review* 217 (1909). Bruce also noted that the Day Law impacted whites and blacks equally, with this observation: the law "is as equally afraid of the white seducer of the black as it is of the black rapist of the white." 68 *Central Law Journal* 42. We are thus informed of the ways in which white men at the time believed miscegenation occurred.

[135] 22 *Harvard Law Review*, 218.

[136] E.g., *Gray v. Board of Trustees*, 100 F.Supp. 113, 115 (E.D.Tenn. 1950). The Supreme Court too, in its more recent references to *Berea*, has cited it as a case about segregation, not state control of corporations. See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 491 (1954); *Regents of University of California v. Bakke*,

438 U.S. 265, 371 (1978) (opinion concurring in part and dissenting in part).

[137] *Giles v. Harris*, 189 U.S. 475 (1903).

[138] *Strauder v. West Virginia*, 100 U.S. 303 (1880), held that a state statute barring blacks from jury service was unconstitutional under the Fourteenth Amendment. But the Court adopted what Klarman, **From Jim Crow**, 39–43, calls subconstitutional rules that overcame the formal commitment to principle so that "for the first three decades of the twentieth century, essentially no blacks sat on Southern juries," and yet, between 1904 and 1935, "the Court did not reverse the conviction of even one black defendant on the ground of race discrimination in jury selection."

[139] *Hodges v. United States*, 203 U.S. 1 (1906).

[140] *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

Willis Van Devanter: Chancellor of the Taft Court

ROBERT POST

Although William H. Taft was president for only four years, he appointed a remarkable five justices to the Supreme Court.[1] But only two of these appointments remained on the Court when Taft became chief justice–Mahlon Pitney and Willis Van Devanter. Pitney would be gone within eighteen months, but Van Devanter would remain as "one of the most enduring achievements of the Taft Administration, and very possibly its greatest."[2]

Early Life

Willis Van Devanter was born on April 17, 1859, in Marion, Indiana. He was about eighteen months younger than Taft. Van Devanter's father was a successful local lawyer. Although Van Devanter wanted to go into farming, his father prevailed upon him to attend Indiana Asbury University (now DePauw University) and then Cincinnati Law School, where Van Devanter was a year behind but nevertheless acquainted with Taft himself.[3]

Unlike both Taft and Oliver Wendell Holmes, who followed well-worn career paths, Van Devanter elected to move as a young man to the distant and lawless West. In 1884, within a week of President Chester A. Arthur's appointment of Van Devanter's brother-in-law (John W. Lacey) as Chief Justice of the Territorial Court for Wyoming Territory, Van Devanter relocated to the frontier town of Cheyenne. In 1885, he offered his services to the new territorial governor, the loyal, shrewd, and astute Francis E. Warren, stalwart Republican, wealthy rancher, and Civil War recipient of the Medal of Honor.

Van Devanter's rise in the new territory was "little short of sensational."[4] He became a commissioner tasked with revising the laws and statutes of Wyoming Territory in 1886;[5] the city attorney of Cheyenne in 1887;[6] a member of the Territorial House of Representatives in 1888;[7] and, in 1889, at the age of thirty, the Chief Justice of the Territorial Supreme Court.[8] When Wyoming became a state 1890, Van Devanter was elected to its new Supreme Court and became its first Chief Justice.[9] Advising a friend to try his luck in the western territories, Van Devanter

At age 25, Willis Van Devanter moved from Indiana to Cheyenne, WY (pictured in 1890) and became a successful lawyer representing the Union Pacific Railroad and large cattle ranchers. He also became active in the Wyoming Republican Party.

wrote, "A man grows fourfold more than he would under other conditions."[10]

Within four days of his election as Chief Justice, Van Devanter suddenly and unexpectedly resigned,[11] returning to the successful law practice that he had maintained throughout his time in Wyoming. He traveled the state in stagecoaches and on horseback. In 1890 he formed with his brother-in-law the firm of Lacey and Van Devanter. It quickly became "Wyoming's most prominent law firm,"[12] representing the most important economic interests in the state, including cattlemen's associations and the state's most significant railroad, the Union Pacific. Most memorably, Van Devanter defended the cattlemen who, along with a contingent of Texas gunman, had traveled to the northern reaches of the state to exterminate the "rustlers" who they claimed were stealing cattle.[13] After murdering two suspected rustlers, the excursion was itself surrounded by angry residents and survived only after extraction by federal troops. The invasion was the outgrowth of ongoing disputes between southern Republican cattle interests and northern settlers. Van Devanter conducted a masterful and effective defense of the gunmen in what later became known as the Johnson County War.[14]

From the moment he arrived in the territory, Van Devanter sought to become an important player in Wyoming Republican politics. Largely because of his close connection to Warren, he "served as Chairman of the Republican State Committee from 1892 to 1895, as a delegate to the Republican National Convention in St. Louis in 1896, and as a member of the Republican National Committee from 1896 to 1900."[15] After Warren became a powerful United States Senator,[16] Van Devanter became "Senator Warren's man in Wyoming, his confidant, counsel, and political manager."[17] Van Devanter subsidized Republican newspapers;

arranged for political torchlight parades and rallies; provided Republican speakers with free Union Pacific passes (essential in such a large, unpopulated state); financed the transportation of Republican voters to the polls; created a statewide network of Republican clubs; waged election campaigns; drafted platforms and legislation; whipped the unruly Wyoming legislature into line; and in general was the first lieutenant of what became known as the "Warren machine."[18]

Van Devanter remained throughout absolutely loyal to Warren.[19] "A good listener, organizer, and financial manager, Van Devanter could purchase railroad fares, bands, newspapers, and election officials with aplomb and tact, leaving few traces except Republican success in his wake."[20] Van Devanter was an "ideal tool" who was content never to threaten Warren's authority.[21]

> Van Devanter was discreet, kept Warrant's confidences, but faithfully relayed political gossip and intelligence to Warren, giving Warren a trustworthy guide to Wyoming's political climate.... Van Devanter, as legislative draftsman and political negotiator, could translate Warren's program into speeches and bills and see that the territorial and state legislature responded. Van Devanter, however, never intruded on questions of policy. Warren decided on the ends; Van Devanter took care of the means.... In crisis after crisis, other Republicans would falter or whine, but Van Devanter never wavered in his willingness to defend Warren and his program. For such devotion, Warren repaid Van Devanter with the highest gifts he could command.[22]

Becoming a Judge

Warren's gifts included, first and foremost, a relentless effort to advance Van Devanter's career, including helping Van Devanter achieve his intense ambition to become a federal judge[23] and ultimately a Supreme Court justice.[24] The first step was vigorously to lobby Attorney General Joseph McKenna to secure Van Devanter's appointment in 1897 as an Assistant Attorney General assigned to the Department of the Interior. Describing his interview with McKenna, Warren wrote Van Devanter:

> I then told him and I will admit my voice was tremulous and emotional in the conversation at this juncture, that if the President turned us down in this I felt I had no further interest in the patronage of my State, for the gap would be too wide to fill; that we all were intent upon it, and that personally it was the one thing I felt I must have for I should feel disappointed and humiliated beyond measure if it was not granted.[25]

Van Devanter proved an "efficient bureaucrat,"[26] impressively and effectively managing his department, reducing backlogs, and successfully arguing important cases before the Supreme Court.[27] During this period, he acquired his famous expertise in Indian, mining, and water law, as well as the law of public lands and patents, all of which was of considerable importance to the governance of the West. But Van Devanter never lost his thirst for judicial office. And when Warren—ever loyal, effective, and imaginative—secured the passage of legislation creating an extra position on the Eighth Circuit, Van Devanter was nominated to the seat by Theodore Roosevelt and confirmed in 1903. Van Devanter acted the part of a moderate Roosevelt liberal, voting (unlike Holmes) to apply the Sherman Antitrust Act to dismantle the Northern Securities Co.[28] and the Standard Oil Co.,[29] and taking a strong stand in favor of national power with regard to the control of federal lands[30] and Indians.[31]

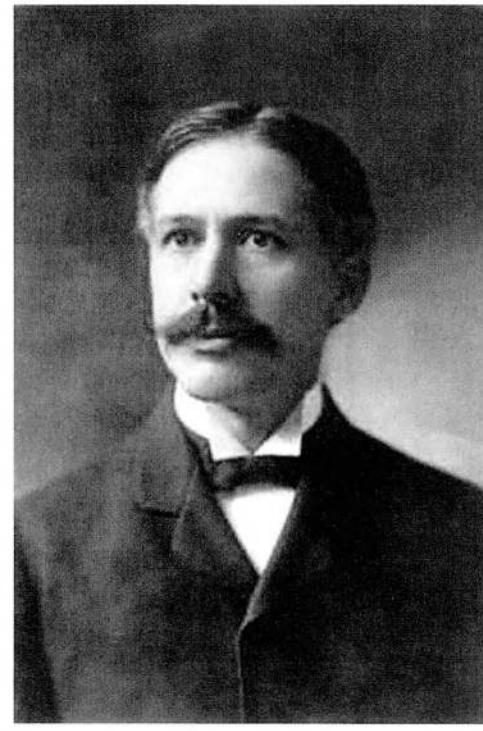
Supreme Court Appointment

"From the moment that he was appointed to the Eighth Circuit Court of Appeals, Van Devanter actively sought a position on the United States Supreme Court."[32] Senator Warren was fully supportive. "We must keep our eye on the sight and our thumb on the keyhole, and not miss a single trick, because the thing will not be complete until you become one of the nine."[33] Pushing for Roosevelt to appoint Van Devanter to the vacancy left open by Henry Billings Brown, for example, Warren wrote Van Devanter:

> Things seem to be working rather favorably toward the general end we are seeking. Of course it may be necessary to have lots of time, lots of patience and some close figuring, but we might as well fix our aim directly on the spot we desire to hit, and then bend our energies diplomatically and continuously in that direction.[34]

Almost as soon as William H. Taft became president, Warren let him know in no uncertain terms, "Probably I shall desire nothing during your administration so intensely as I desire the promotion of Judge Willis Van Devanter to the Supreme Court when a vacancy occurs."[35] Warren's opportunity came in 1910 with the death of Chief Justice Fuller[36] and the retirement of Justice William H. Moody[37] One of the new appointments would almost certainly have to come from the Eighth Circuit.

The story of Van Devanter's nomination is told elsewhere,[38] but for present purposes it is important to emphasize a curious and mysterious memorandum tabulating the efficiency of Circuit Court judges that somehow ended up in Taft's files as he contemplated the appointment.[39] The memorandum purported to show that Van Devanter was a "shirker" who was unable to keep up his share of the Eighth Circuit's work.[40] Van Devanter had earlier heard of the memorandum from Charles Nagel, Taft's Secretary of Commerce and Labor (and Brandeis' brother-in-law). Van Devanter responded to the allegation with indignation. "It gives me no little pain because it does me an injustice."[41] Van Devanter pointed to the number of original trials that he had had to conduct, the difficulty of the opinions that he had undertaken, as well as the fact that "I have proceeded upon the theory that quality and accuracy are more important, particularly in appellate work where binding precedents are made."[42]



From the moment Van Devanter (pictured) was appointed to the Eighth Circuit Court of Appeals in 1903, he began his campaign to join the Supreme Court. President Taft elevated him to the high court in 1910, but worried that he was dilatory in turning out opinions.

Matters came to a head in December 1910 as Taft contemplated his options. Taft angrily said to Warren that Van Devanter was not working hard enough. "Almost certainly" with Warren's connivance,[43] Van Devanter

responded with a public telegram taking his name out of consideration:

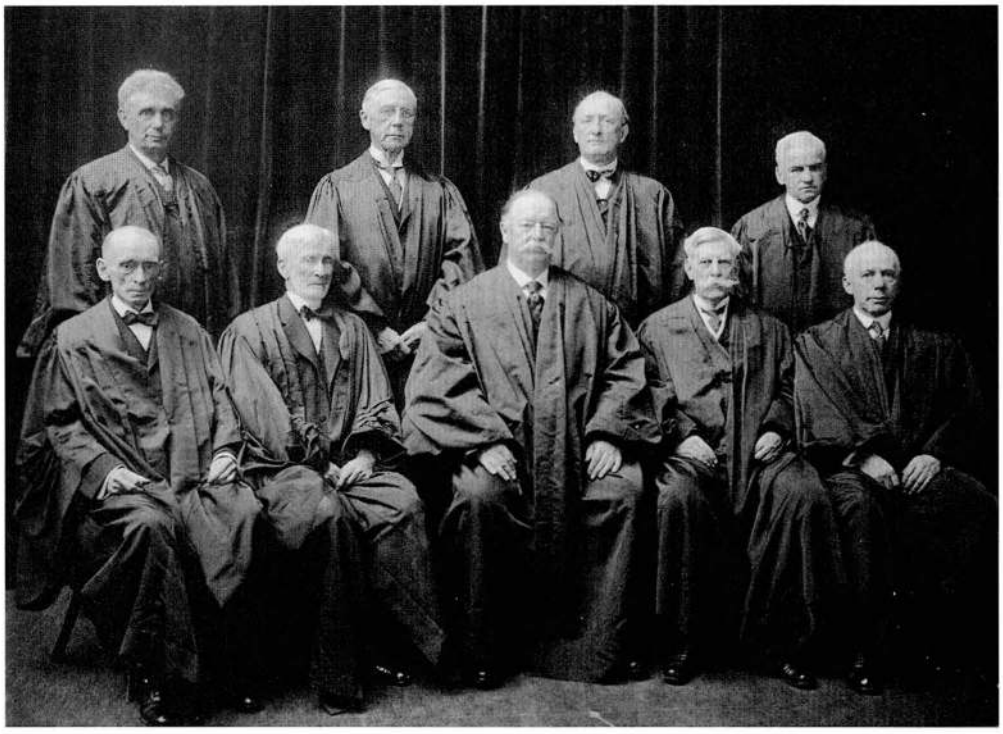
> It is true that I am now behind in Circuit Court of Appeals work but not to extent apparently represented. While this is to be regretted it does not arise from indolence or timidity in reaching conclusions, or hesitancy in giving effect to them. I may have given too much attention to closely contested and important cases, especially where there have been differences of opinion, and may have been too tenacious of my own views, but I have felt justified in my course because it almost always has resulted in unanimity and has tended to produce harmonious rules of decision. I have done much important work in Circuit Courts which, if added to my appellate work, makes my total easily up to average of my associates. I emphatically protest against impressions which seem to have been created, but make no complaint of President's attitude for it is obviously reasonable. I cannot prepare and submit showing in my own behalf now without assuming attitude which would be distasteful to me. For this reason I prefer that further consideration of my name be omitted. Then at some later time when there are no appointments at stake I shall hope President will permit me personally to make full statement of my work to him and yourself. I will owe this to both because of his consideration of my name and because of your interest in presenting it.[44]

Accompanying the telegram was a long impassioned "private" letter undermining the memorandum's statistics, casting personal doubt on its author, and defending Van Devanter's own performance.[45]

Warren presented the telegram to Taft, who found it "very dignified,"[46] and then cleverly induced Taft himself to request to see Van Devanter's "private" justificatory letter. As Warren recounted the story to Van Devanter, Warren informed Taft about the letter, coyly observing, "Mr. President, I ought not to withhold anything from you, and if you will consider, in reading it, that it was absolutely a confidential, quickly-written, friendly letter such as husband and wife or brothers might write to each other, I will bring it over and let you see it." At that point Taft became "very anxious to see [the letter] and [said he] would treat it as I desired him to."[47]

On December 9, Warren, meeting at 7 pm with a sleepy Taft to discuss irrigation matters, also suggested to Taft that appointing Van Devanter's chief rival from the Eighth Circuit, Judge William Cather Hook, would encourage insurgent Republicans to believe that they were controlling Supreme Court appointments. "By this time Mr. Taft's sleepiness had entirely disappeared and he was the most thoroughly awake man you ever saw, his eye snapping fire," Warren wrote Van Devanter, "and the way he raked over the insurgents and what he said about them would not look at all well in print."[48] Taft also reported to Warren that the Cabinet, including Nagel, had met and recommended Van Devanter.[49] Taft had been worried that Senator Knute Nelson of Minnesota, "the high man on the Judiciary," might be "bucking." "Nelson said to-day," Taft commented, that "'I have no candidate, myself, but ask you not to appoint any railroad attorney like Van Devanter and others.'"[50]

Three days later Taft announced his selection of Van Devanter, who was confirmed on December 15, 1910.[51] To Judge Walter H. Sanborn, Van Devanter's colleague on the Eighth Circuit and likely author of the offending memorandum, Taft wrote,



The Taft Court in the 1921 Term, with Van Devanter seated at right. He wrote significantly fewer opinions than his brethren and was slow at getting them out.

> I took Van Devanter only after a long investigation in which I found that he had been sick and his wife had been ill and after a full letter of explanation from him. I think perhaps the dilatory habit in respect to turning out opinions could be corrected by close association with a court that sits all the time in the same city, and where the comparison between him and the other judges will be constant and when he knows why it is that I seriously hesitated before taking him.[52]

Opinion Shy

Unfortunately for Taft, Van Devanter never did learn to correct his "dilatory habit in respect to turning out opinions." Indeed, Van Devanter was far and away the least productive member of the Taft Court. Alongside of Van Devanter, four other justices sat continuously on the Taft Court from its inception in the 1921 Term through the conclusion of the 1928 Term. During that time, Taft authored 249 opinions, Holmes 205 opinions, Brandeis 193 opinions, McReynolds 172 opinions, and Van Devanter only 94 opinions. If one considers the period between the outset of the 1923 Term and the conclusion of the 1928 Term, Taft authored 176 opinions, Holmes 146 opinions, Brandeis 143 opinions, Butler 137 opinions, McReynolds 129 opinions, Sutherland 113 opinions, Sanford 113 opinions, and Van Devanter only 70 opinions.

Not only did Van Devanter write fewer opinions than his colleagues, but he was also the slowest author on the Taft Court. From the outset of the 1921 Term through the conclusion of the 1928 Term, it took an average of 143 days from oral argument for Van Devanter to announce a unanimous

opinion. If one sets aside Pitney's spotty performance during the 1921 Term when he was ill, the next most delinquent member of the Taft Court was Sanford, whose unanimous opinions averaged 92.5 days from argument to announcement. By contrast, the average number of days from argument to announcement for a unanimous opinion for Taft was forty-seven days; for Brandeis, it was forty-nine days; for McReynolds it was forty-nine days; and for Holmes it was twenty-six days. Overall, the average period of time between argument and announcement of a unanimous opinion during the era of the Taft Court was fifty-five days.

Van Devanter was also the most prolix member of the Taft Court. From the beginning of the 1921 Term through the end of the 1928 Term, Van Devanter's unanimous opinions averaged 9.05 pages in length, which was the longest of any justice on the Court. By contrast Holmes' unanimous opinions averaged 3.27 pages, McReynolds' 4.73 pages, Brandeis' 6.05 pages, Sutherland's 6.29 pages, Butler's 6.39 pages, Sanford's 6.39 pages, and Taft's 8.85 pages. Overall, a unanimous Taft Court opinion averaged 6.33 pages in length.

Van Devanter's opinions did, however, possess the merit of singular clarity. John W. Davis, pointedly contrasting Van Devanter to Holmes, observed in a commemorative tribute that Van Devanter's

> written style ... was Doric rather than Corinthian in its architecture. There was no striving for adornment, no search for novel words, no effort to coin epigrams. At the moment, I do not recall a single sentence of his that might be called epigrammatic. Instead ... he aimed to be a Judge and not a litterateur, and endeavored always to make his meaning so plain that a wayfaring man could not mistake it. And this I take to be the quintessence of merit in a judicial utterance.[53]

Attorney General William D. Mitchell seconded this conclusion. He noted that Van Devanter's

> style is simple and clear. He was not a phrasemaker and he did not import into his vocabulary words having no settled meaning in the law. His opinions are wholly free from such affectations. No one can fail to understand his reasoning and his conclusions; and, above all, his opinions not only dispose of the cases under consideration, but furnish to the profession a guide and a chart for the future.[54]

Brandeis privately commented to Frankfurter that Van Devanter, in contrast to Taft, "sufficiently work[s] over materials" to provide adequate guidance to the Bar.[55]

Van Devanter's difficulty in drafting opinions was a source of pain and concern to Taft. Van Devanter "is very slow in writing his cases," Taft observed to his son. "He is opinion-shy, and he is never content to let an opinion go until he has polished it and worked on it until it is a gem."[56] "It means fine opinions, but very few of them."[57] The "trouble" with Van Devanter, Taft wrote his brother Horace, "is that he insists on writing opinions which involve too great individual investigation and he is not content therefore to get through an opinion within a reasonable time, so that now he has carried opinions for one or two years and he is way behind and this has become a nerve straining situation."[58]

In the Fall of 1927, Van Devanter's wife, Dollie, suffered a debilitating stroke. "The illness of Van Devanter's wife has made him very slow in his opinions, slower than he ever was, and he was always slow," lamented Taft.[59] Van Devanter never recovered his footing. "We are not getting along as well in getting rid of opinions as I would like," Taft worried in 1929, and "Judge Van Devanter is the worst offender in this regard. He is opinion-shy. He writes admirable opinions and he is the man whom we could least spare

in the Court, and yet his list of opinions is very small."[60]

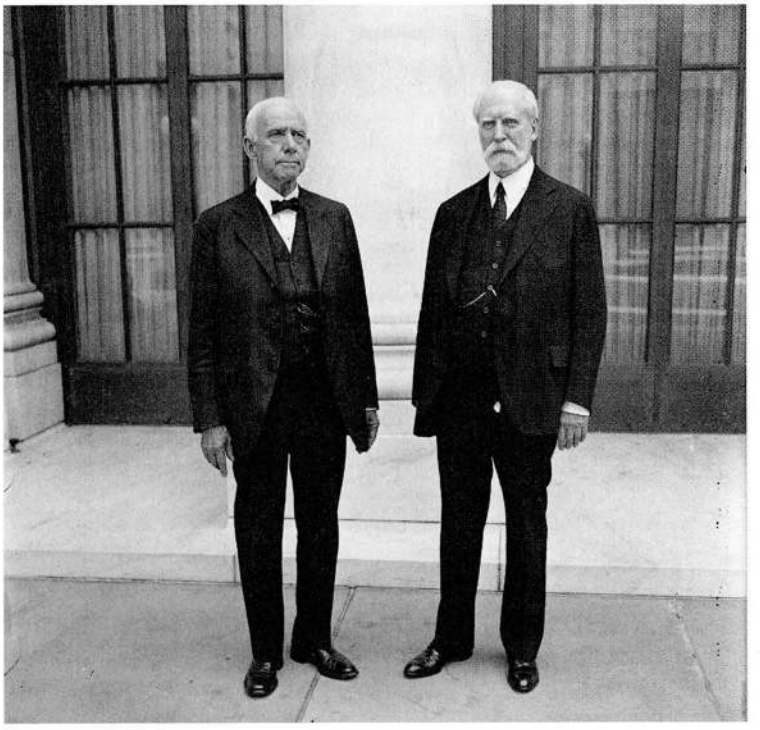
Van Devanter tended to justify his writer's block by adverting to the special difficulty of the opinions assigned to him.[61] "I have not been able to do much of anything in the way of writing opinions," he wrote retired Justice John H. Clarke in 1927. "It so happens that those assigned to me call for particular care and do not admit of hasty or rapid disposal."[62] Clarke abetted Van Devanter in these excuses: "I have noted that you are not writing as much as usual & fear that you are not well. And yet it may be that, as heretofore, you have been loaded up with a volume of work which no one else seemed equal to and are buried in it. You have been the 'burden bearer' of the Court ever since I have known you—and it's not fair."[63] It is not obvious to a contemporary observer, however, that Van Devanter's opinions were especially difficult. *Bunch v. Cole*, for example, was a relatively simple case involving federal preemption of Indian land ownership; it nevertheless took Van Devanter some eight months to complete.[64]

Given his urgent need to keep the Court current with its docket, Taft occasionally felt impelled "to take most of his cases away from [Van Devanter] and distribute them among the other Justices."[65] As early as 1924, the Chief Justice wrote his wife

> I am just through Conference and have assigned the cases. Poor Van Devanter works so slowly with his opinions that he has thirteen cases assigned to him. I didn't give him any to-day. Holmes is so quick that I gave him two.... What disturbs me is the necessity for helping Van Devanter. I am going to talk with Holmes and with Sutherland about it, and then with Van Devanter, to see if we can not relieve him. He has had one case that was assigned to him that has taken a great deal of time. That was the controversy between Texas and Oklahoma over their boundary and a lot of oil which we found to belong to the United States, and out of which our Receiver, Fred Delano, has taken several millions dollars worth of oil. Van Devanter has done very well and it has taken him a good deal of time. Apparently he writes opinions slowly and is not under great pressure to get them disposed of.[66]

After Van Devanter's productivity declined during the 1926 Term, Taft was forced to "redistribute" some of his cases. Taft complained to his wife that Van Devanter "is very sensitive cross and unreasonable. He does not write and yet he hates to have any comment made or action taken in respect to the matter. I turned over two of his cases to Brandeis but B. thought Van would cherish resentment against him. So I had to take Van's cases myself and turn over some of mine to Br. I told Br. that the experiences of a Ch. Justice were like those of an impresario with his company of artists."[67] Taft explained to Holmes how he had finessed the situation:

> Brother Brandeis whom I called on to help out with two other of Van Devanter's cases objected because he thought Van rather resisted any one else taking one assigned to him. So he suggested that I transfer to him some of my own cases and take Van's myself. He thinks Van will be less disturbed if the matter is wholly settled between him and me. I am going to do this for B. and perhaps I would better do it for you.... I greatly appreciate your willingness to help out. The brethren are feeling jaded. They grow a little sensitive and the life of a C.J. is not all roses.[68]



Chief Justice Charles Evans Hughes (right), who shared the Bench with Van Devanter (left) from 1910-1916, and then again from 1930 to 1937, said that his "careful and elaborate statements in conference" were "of the greatest value." His predecessors Chef Justices White and Taft had also relied heavily on Van Devanter in Conference discussions.

Taft diplomatically approached Van Devanter, saying, "You have too many cases for this recess and not be expected to clean up.... I really assigned you too many."[69] Despite his pride, Van Devanter acceded to Taft's plan. "I must assent to the change in assignment proposed in your very considerate note of yesterday. It gives me no little pain and embarrassment to have to say this, but I recognize the full propriety of what you propose. The cases must be disposed of."[70]

Other justices agreed with Taft's assessment of Van Devanter. Sutherland diagnosed Van Devanter with a case of "pen paralysis" that grew steadily worse during his time on the Court.[71] Writing to Taft about his visit to Van Devanter's rural summer home in Canada, Sutherland gently mocked Van Devanter's obsessive perfectionism, which no doubt contributed to his paralysis: "Van Devanter has an excellent garden and keeps a cow, chickens and ducks. He looks after them all conscientiously, and every teat yields milk and every hen lays eggs with logical exactness and strict conformity to the settled precedents and rules of procedures."[72]

The Most Valuable Man on the Court

Van Devanter's paucity of opinions is likely why a 1972 study evaluating justices listed Van Devanter among the eight "failures" in the Court's history.[73] Yet almost all members of the Court who worked with Van Devanter testified to his powerful and disciplined legal acumen, which commanded "their respect and attention."[74]

Charles Evans Hughes, who shared the Bench with Van Devanter from 1910 to 1916, and again from 1930 to 1937, praised Van

Devanter's "careful and elaborate statements in conference" as "of the greatest value." Ironically, "if these statements had been taken down stenographically they would have served with but little editing as excellent opinions."[75] After Van Devanter's retirement, Hughes observed that "[i]t was in ... conference that Justice Van Devanter's wide experience, his precise knowledge, his accurate memory and his capacity for clear elucidation of precedents and principle contributed in a remarkable degree to the disposition of the court's business.... Few judges in our history have rivaled him in fitness by reason of learning, skill and temperament for the judicial office."[76]

Van Devanter, said Brandeis, "both in purpose & abilities can't be compared. He is too much superior to—P[ierce] B[utler]."[77] When Van Devanter retired in 1937 Brandeis, who had sat with him since 1916, observed that "no one could fully appreciate [Van Devanter's] value who has not observed his work in conferences, particularly in the days of White and of Taft."[78] Indeed in 1934 Brandeis had even urged Van Devanter not to retire from the Court. As Van Devanter wrote his brother-in-law:

> It may be of a little interest to you to know that after the term closed Justice Brandeis particularly asked an opportunity to have a talk with me. In the course of the talk he said that he wished specially to urge that I should not think of retiring; that he did not wish to see any changes in the Court just now, and quite apart from that he wished me to continue on the Court; that the Court specially needed me; that no one could take my place in conference; and that he thought it would be a great misfortune for the Court if I should leave. I thanked him for what he said and indicated that I was not prepared to say what I would do. He then renewed his request in even stronger terms and I pleasantly ended the talk. I told Sutherland, and only Sutherland, about it. He said that he believed that Brandeis was sincere in what he said about me and that Brandeis really had more confidence in me than in any other member of the Court. Sutherland then added: "Brandeis probably never talks to you about matters where he knows you and he differ in opinion, but in other matters of general law he usually wishes to know what you think before he comes to a conclusion, and he usually accepts what you say on such questions." It is possible that Justice Brandeis is losing faith in the present administration and its policies. There have been some indications of this, but I have supposed that they would not be carried very far.[79]

Although Harlan Fiske Stone would eventually come to regard Van Devanter as "the commander-in-chief of judicial reaction,"[80] he nevertheless freely acknowledged "the vigor, sanity, and precision" of Van Devanter's mind.[81] Stone remarked that members of the Court "know well that the public evidences of his judicial activities conceal rather more than they reveal what was his greatest service to the Court and to the public."[82] "At the conference table [Van Devanter] was a tower of strength. When his turn came to represent his views of the case in hand, no point was overlooked, no promising possibility left unexplored. His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court's opinion in the case."[83]

Taft himself regarded Van Devanter as "the strongest Judge in this country."[84] Van

Devanter was "the mainstay of the Court,"[85] "the most indispensable man we have in the Court."[86] "He is of the utmost value in the Court, even if he writes no opinions," Taft wrote his brother. "Indeed, it would be better if he did not write any opinions, because then the others could keep up with the work."[87]

In his successful appeal to Yale University to bestow an honorary degree on Van Devanter, Taft wrote Yale President James R. Angell:

> Even members of the Bar who follow the Court's decisions are often not advised of the very great function that one Judge may play in guiding the decisions of the Court, by reason of his experience, his judicial statesmanship, his sense of proportion and his intimate familiarity with the precedents established by the Court of which he is a member, and to which the Court ought to make itself conform as near as may be. The value of a Judge in Conference, especially in such a Court as ours, never becomes known except to the members of the Court. Now I don't hesitate to say that Mr. Justice Van Devanter is far and away the most valuable man in our Court in all these qualities.... Van Devanter exercises more influence ... than any other member of the Court, just because the members of the Court know his qualities.[88]

To Yale professor William Lyon Phelps, Taft wrote that Van Devanter

> is one of the ablest Judges in this country and one of the ablest Judges that we have ever had on the Court, but he is a very modest man and nobody knows the position he occupies on the Court but those who have to do with him in Conference. No one can appreciate his influence except through knowledge gained from the intimacy of the deliberations of the Court over opinions.... He is better versed than any member on the Bench in our decisions and keeps us straight. He does not write so many opinions, but they are all admirable when he writes them. I don't know how we could get along without him in Conference. I don't think the Bar realizes generally what a commanding figure he is on the Court. He never advertises and he never seeks publicity.... The truth is I think those who refer to the Court who are in the 'know' think when they refer to the Court that they are referring to Van Devanter.[89]

Taft wrote his son that "Van is so modest that his merits are not recognized, but I am determined that they shall be."[90]

The Cardinal

Taft was apparently blind to Van Devanter's deep wells of vanity and ambition, as illustrated by Van Devanter's secretive and abortive campaign to succeed Chief Justice Edward Douglass White in 1921. Seven days after White's death, Van Devanter wrote his close friend district judge John C. Pollock:

> Confidentially, Justices McKenna, Day, McReynolds and Clarke have said to me that they would be glad to see me appointed, but I realize that an expression of their views may not be solicited and cannot with propriety be given unless solicited. Senator Kellogg has volunteered to me the statement that he intends to recommend me and to recommend that ex-Senator George Sutherland be named in my place. Ex-Senator Bailey seems to think I will be the man, and others have volunteered a friendly interest, but I am neither

saying nor doing anything nor permitting any of these statements to bring me any sense of elation or to change the current of my mind.[91]

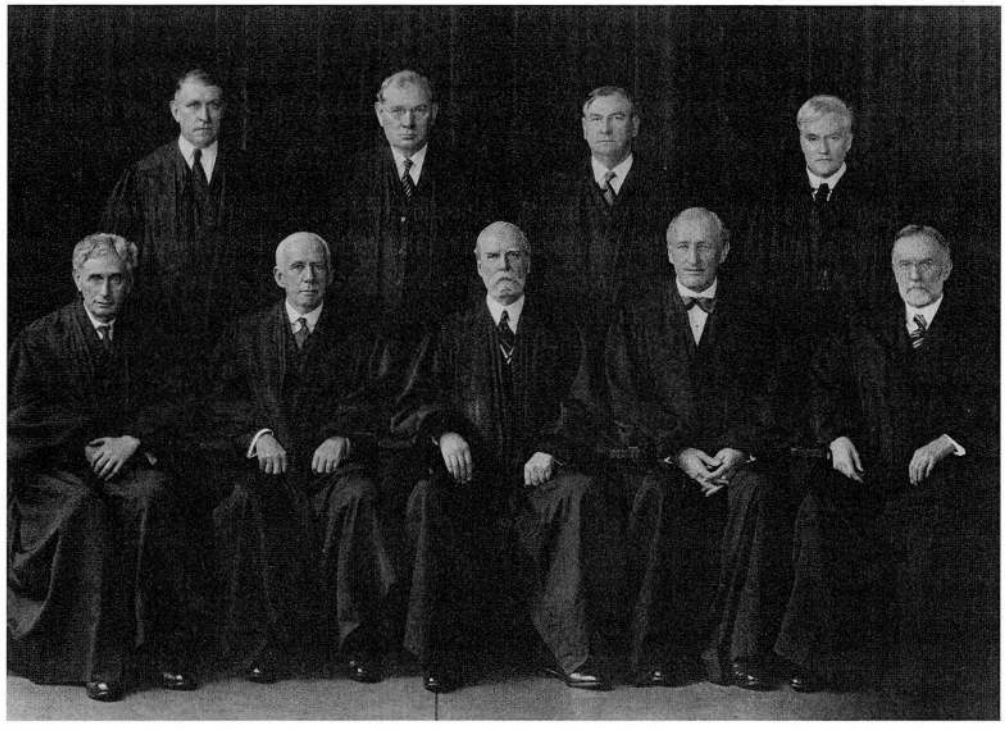
A week later, he added:

Of course, there is nothing which I can do with propriety. No doubt there will be those who think that my opinions represent the only work which I do, and of course it would be quite inadmissible for me or my friends to intimate that I have any responsibility for the opinions of others or have done any work on them. At all events, no one outside of the court itself could speak of this no matter what they surmise. Aside from other elements of impropriety it would give offense in quarters where offense would be harmful. This has been a term in which dissents were quite frequent, and yet there has not been a single dissent from any of my opinions during the term. There are some who merely count the number of opinions regardless of their substance or the direction in which they go. When one does work on that line he can do what superficially seems a volume, and then the other federal courts and the state courts may grope as best they can in an effort to find out what was intended. My ideas and inclinations are not in that direction. It leads to uncertainty and confusion, makes for instability and in the long run results in tremendous waste. The number of petitions for rehearing during the term has been unusually large, but in my cases only one was presented. People outside do not know this and in the nature of things would not be supposed to know. Again, comment on it, save by someone inside, might arouse resentment where a kindly feeling now exists.[92]

Three days later, Van Devanter threw in the towel and conceded the inevitability of Taft's appointment. "My impression is that nothing more should be done by my friends. I fear that under the circumstances it would not be welcome, and this becomes a little more pointed with me when I reflect that Mr. Taft appointed me to my present place and also that I must serve with whomever is appointed for a considerable time."[93]

Van Devanter's letters illustrate his explicit ambition, highly honed from his days with Warren, to *appear* discretely and modestly useful to those around him. Ever since his telegram to Taft withdrawing his name from consideration as a potential nominee to the Supreme Court bench, self-effacement was always a potent weapon in Van Devanter's arsenal.

Van Devanter knew very well how to make himself indispensable to those he wished to serve. His long history with Warren was a perfect apprenticeship. As early as Fall 1922, Brandeis could observe to Frankfurter that "Van D. runs Court now .... He is like a Jesuit general; he is always helpful to everybody, always ready for the C.J. He knows a deal of federal practice & federal specialties, particularly land laws, and then he is 'in' with all the Republican politicians."[94] A year later, Brandeis commented that "Van D. was influential with [Chief Justice] White, as he is with Taft – a very useful man. Ein treuer Diener seines Herrn. He would make an ideal Cardinal. He has a mind that can adjust itself to two such different temperaments as Taft and White."[95] Van Devanter "keeps close track of the Chief & of some others—Mc. (who has to be tactfully treated), Sanford, Sutherland. Intimidates some, influence that [comes] from experience."[96] Chief Justice Hughes remarked that Van Devanter's "perspicacity and common sense made him a trusted adviser in all sorts of matters. Chief



Brandeis (seated at left) greatly admired Van Devanter (seated second from left) "both in purpose & abilities" during the time they served together on the Court from 1916 to 1937. Brandeis said Van Devanter would have made a good medieval Cardinal and in 1934 (photo depicts Court seating from 1932–1937) he urged him not to resign.

Justice White leaned heavily upon him and so did Chief Justice Taft, especially when the latter began to fail in health."[97] Hughes remembered that "it was a familiar scene to see [White] trudging along, generally with Justice Van Devanter in close consultation, and stopping every few blocks to rest his feet."[98]

Brandeis mused that he himself "could have had much influence with White—I did in beginning, but I made up my mind I couldn't pay the price it would have cost in want of directness & frankness. He required to be managed."[99] The contrast with Van Devanter was explicit and pointed. "In the middle ages, Van Devanter would have been the best of Cardinals. He is indefatigable, on good terms with everybody, knows exactly what he wants & clouds over difficulties by fine phrases & deft language. He never fools himself, and his credit side is on the whole larger than his debit. But he is on the job all the time."[100]

It seems clear that Van Devanter enjoyed good if not excellent relationships with almost all members of the Court. He was John H. Clarke's closest companion on the Bench. Van Devanter told Clarke in 1922 that he was "one of the very few with whom [Mrs. Van Devanter and I] have been proud to maintain really affectionate relations."[101] Van Devanter was like a "brother" to Butler.[102] To Sutherland he was "the 'salt of the earth' and no one could be a pleasanter companion."[103] Van Devanter had, as Stone observed, "a large capacity for friendship.... His relations with his colleagues were marked by his uniform courtesy and helpfulness and by their mutual regard."[104] Van Devanter would often go hunting and present his colleagues with a brace or two of ducks. He also socialized over a good round of golf.

Taft was correct to conclude that Van Devanter exercised great influence on the Court's deliberations.[105] It can be statistically shown that he was more likely than any other Taft Court justice to persuade others to alter their conference votes to join his opinions. Sutherland once wrote Taft that "if Van Devanter writes the opinion I shall unhesitatingly agree to it. If written by anybody else, I will agree to what you and he accept."[106] Dean Acheson, Brandeis' law clerk during the 1919 and 1920 Terms, later recalled that

> Justice Van Devanter was, I think, the most beloved Member of the Court among his colleagues. He was gentle and wise and kind and thoughtful. His colleagues regarded him, so far as Justice Brandeis and Justice Holmes who talked with me were concerned, with the greatest respect in conference. He was the one who made wise and helpful observations. He was the one who in the returns which came from the circulation of draft opinions, made the suggestions or corrections which both Judge Holmes and Judge Brandeis always accepted.[107]

Another clerk noted that Brandeis was confident that "the opposition will collapse" after receiving Van Devanter's assent to a circulated opinion that had been five to four in conference, "so great was Van Devanter's standing with his colleagues in matters of procedural law."[108] Extant case files contain ample evidence of the influence exerted by Van Devanter on the work of Brandeis, Butler, Holmes, Stone, McKenna, McReynolds, and Sanford, which at times even extended to the precirculation of draft opinions to Van Devanter for his comments and suggestions.

It was Taft, however, with whom Van Devanter developed an especially close relationship. Taft regarded Van Devanter as "really the closest friend I have on the Court."[109] Most unusually, Taft would close his letters to Van Devanter with "love."[110] Taft considered Van Devanter a "really a fine constitutional lawyer, and he writes most admirable opinions."[111] Unlike Holmes, Van Devanter "has not what some of our Judges have by reason of their relations to Law Schools—a claque who are continually sounding their praises."[112]

Almost as soon as Taft became Chief Justice, Van Devanter began to insinuate himself into the administration of Court business,[113] and Taft quickly came to trust and rely on Van Devanter's discretion and judgment. For example, in his first Term Taft sent Van Devanter a tentative opinion in a case, writing "I wish you would look it over and cut and slash as you think wise.... I have not sent this to the whole Court, because I want to have the benefit of your suggestions and corrections before doing so."[114] Taft worked closely with Van Devanter in pushing Harding to nominate Pierce Butler to the Supreme Court.[115] When handling the delicate business of Joseph McKenna's retirement, Taft turned to Van Devanter to consult with McKenna's doctor and family.[116] He conferred with Van Devanter about the use of Court funds[117] and the administration of Court personnel,[118] as well as about the assignment[119] and composition[120] of opinions. Van Devanter was Taft's proxy in the never-ending process of vetting potential nominees to the lower federal courts.[121] Taft turned to Van Devanter to design and draft the Judiciary Act of 1925[122] as well as the Supreme Court rules necessary to implement the Act.[123] When Holmes' wife broke her hip and was close to death in 1929, and when Taft had to take over arranging matters for his domestically inept patrician colleague, Van Devanter was right at his side consulting at every step.[124] Van Devanter was Taft's loyal assistant during the planning of the new Supreme Court Building.[125]

In short, as Van Devanter wrote to a Kentucky lawyer, "the Chief Justice ... and I are not prone to differ."[126] Frankfurter would later capture the essence of their relationship: "Taft ... himself said, and he was very happy to say, with that generosity of his which politicians would do well to, but do not often, imitate, that whatever he did as Chief Justice was made possible by his great reliance on him whom he called his 'lord chancellor,' Mr. Justice Van Devanter."[127]

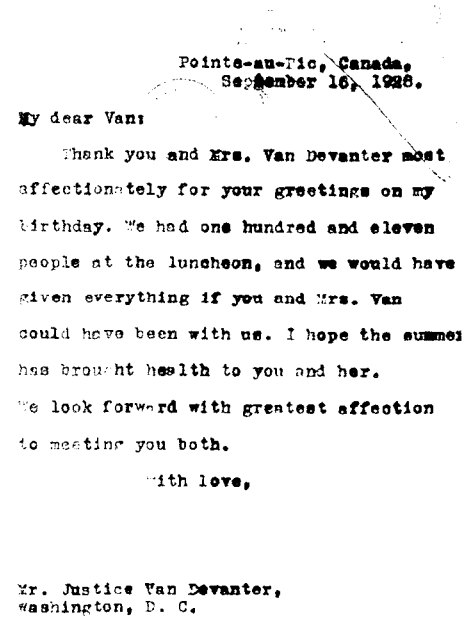
Taft's reliance on Van Devanter became ever stronger as Taft experienced his own mental acuity diminish over the decade.[128] Once, after Van Devanter returned from a vacation, Taft confided in him that "It is a real comfort to have you back. I am always afraid we may go wrong without you."[129] In 1927, Taft wrote his son:

> I sometimes feel that I do not have time enough in making ready for Conferences to examine with the closeness they deserve the argued and submitted cases, but they are examined by the Court with care. They have more time than I have and sometimes they humiliate me with their pointing out matters that I haven't given time enough to the cases to discover. The familiarity with the practice and the thoroughness of examination in certain cases that Van Devanter is able to give makes him a most valuable member of the Court, and makes me feel quite small, and as if it would be better to have the matter run by him alone, for he is wonderfully familiar with our practice and our authorities. Still I must worry along until I get to the end of my ten years, content to aid in the deliberations when there is a difference of opinion.[130]

Throughout the 1920s, Van Devanter and Taft stood at the dead center of the Taft Court. From the beginning of the 1921 Term until the end of the 1928 Term, they each either authored or joined the opinion of the Court in 98.8% of the cases in which they participated, more than any other justices. Although Pierce Butler was slightly less likely to join Taft Court opinions—through the conclusion of the 1928 Term he authored or joined the opinion for the Court in 97.8% of the cases in which he participated —it may perhaps be most accurate to conceive the Taft Court as oriented along an axis that consisted of Taft, Van Devanter, and Butler.[131] Taft regarded Butler as "one of my dearest friends";[132] Van Devanter and Butler were also extraordinarily close, sharing deep roots in the Eighth Circuit.

In conference, Taft, Van Devanter, and Butler voted with each other more than with any other justices. Taft voted with Van Devanter 88% of the time, and with Butler 86.8% of the time. The next justice with whom Taft was most likely to vote was Stone, with whom Taft agreed in 82.7% of cases. Van Devanter, in turn, voted in conference with Butler 89% of the time and with Taft 88% of the time. He voted with Sanford, the next closest justice, in only 81.4% of cases. In conference Butler voted with Van Devanter 89% of the time, and with Taft 86.8% of the time. He voted with Sanford, the next closest justice, in only 80.4% of cases. Throughout the course of the decade, it is fair to say that Van Devanter and Butler together pushed Taft further and further to the right.[133]

By the time of the New Deal crisis, Van Devanter would be pilloried in the popular press as "the court's most ardent defender of property rights and ... its most consistently conservative member."[134] As early as 1931, he would be branded by *The New Republic* "as reactionary a judge as ever sat on the Supreme Court," which could be inferred "from his inevitable vote in favor of annulling state welfare acts, against labor unions and against the regulatory findings



Pointe-au-Pic, Canada,
September 16, 1926.

My dear Van:

Thank you and Mrs. Van Devanter most affectionately for your greetings on my birthday. We had one hundred and eleven people at the luncheon, and we would have given everything if you and Mrs. Van could have been with us. I hope the summer has brought health to you and her.

We look forward with greatest affection to meeting you both.

With love,

Mr. Justice Van Devanter,
Washington, D. C.

Taft and Van Devanter had such a warm relationship that Van Devanter signed his letters "your loving colleague" and Taft signed his "with love." They stood together at the dead center of the Taft Court, with each either authoring or joining the opinion of the Court in 98.8% of the cases in which they participated.

of state and federal utility commissions."[135] Yet these characterizations do not capture the subtlety and adroitness of Van Devanter's work during the Taft Court years. Brandeis himself never lost sight of the formidable, elegant, and far-sighted legal technician that Van Devanter had always been. Brandeis discerned in Van Devanter the "conflict of two deep impulses. Appetite for power & ambition that Court be right. If first is satisfied and not involved, second is strong.... That's [the] great thing about V. Once having established power he will try to confine his own errors."[136]

Editor's Note: This article is derived from the forthcoming Volume X of the **Oliver Wendell Devise History of the Supreme Court of the United States**, which will cover the period 1921–30 when William Howard Taft was Chief Justice.

Notes

[1] Horace Lurton, Charles Evans Hughes, Van Devanter, Joseph R. Lamar, and Pitney. Taft appointed six justices if the promotion of Edward Douglass White to Chief Justice is counted.

[2] ALEXANDER M. BICKEL AND BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921 (MacMillan Publishing Co.: New York 1984): 44.

[3] WVD to Chauncey R. Hammond (June 21, 1930) (Van Devanter papers); Willis Van Devanter: Associate Justice of the Supreme Court of the United States, in WVD to W.E. Chaplin (April 15, 1929) (Van Devanter papers).

[4] James Joseph McArdle, *The Political Philosophy of Willis Van Devanter* 9 (M.A. Thesis, University of Wyoming, 1955).

[5] Maurice Paul Holsinger, *Willis Van Devanter, The Early Years: 1859-1911* 67 (Ph.D. Dissertation, University of Denver).

[6] M. Paul Holsinger, *Willis Van Devanter: Wyoming Leader, 1884-1897*, 36 ANN. WYOMING 171, 177 (No. 2., October 1964). Van Devanter resigned the position in 1888. *Ibid.* at 178.

[7] *Id.*, 177.

[8] *Id.*, 182-83.

[9] *Id.*, 186-88.

[10] WVD to Melville W. Miller (November 8, 1902) (Van Devanter papers).

[11] Holsinger, *Wyoming Leader*, 178.

[12] Holsinger, *Wyoming Leader*, 178.

[13] Lewis L. Gould, *Willis Van Devanter and the Johnson County War*, 17 MONTANA: THE MAGAZINE OF WESTERN HISTORY 18 ((no. 4.) (Autumn 1967).

[14] The best account is in Lewis L. Gould, *Willis Van Devanter in Wyoming Politics* 103-30 (Ph.D. Dissertation, Yale University, 1966). *See also* Holsinger, *Wyoming Leader*, 190-92.

[15] McArdle, *Political Philosophy*, 10-11.

[16] Warren, the father-in-law of John J. Pershing, served in the Senate from 1890 to 1893, and from 1895 until his death in 1929.

[17] BICKEL AND SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 46.

[18] Daniel A. Nelson, *The Supreme Court Appointment of Willis Van Devanter*, 53 ANNALS OF WYOMING 2, 4 (NO. 2 FALL 1981); Gould, *Willis Van Devanter in Wyoming Politics*, 28-29, 131-221.

[19] "Van Devanter suppressed any budding ideological convictions, and became a political craftsman whose success depended not upon his ability to make decisions, but on his willingness to carry out the decisions of others. Paradoxically, this intellectual repression provided the key to his advancement. Warren admitted Van Devanter to his confidence in the certain knowledge that Van Devanter would never prove a threat to Warren's power." Gould, *Willis Van Devanter in Wyoming Politics*, 28-29.

[20] *Id.*, 175.

[21] *Id.*, 29.

[22] *Id.*, 29. Wallace H. Johnson, *Willis Van Devanter—A Re-Examination*, 1 WYOMING LAW REV. 403, 409 (2001) ("To Senator Warren's credit, he seemed to really care what happened to Willis Van Devanter. As much as anything, Willis Van Devanter's history is the story of Governor, and then Senator, Warren's loyalty and the good fortune that befell Willis Van Devanter by aligning with Warren when he moved to Wyoming."). Thus when Warren, after being defeated in his bid to become a United States Senator in 1892, began to mull about not running for re-election, Van Devanter immediately wrote him, "Personally I want you re-elected to the Senate, and in this I am prompted by a desire to assist the State, to assist the party, to assist you and to assist myself." WVD to Francis E. Warren (April 9, 1892) (WVD papers).

[23] Asking Van Devanter if he would like a judicial appointment, Van Devanter replied, "Would like position beyond measure." WVD to Francis E. Warren (February 25, 1891) (Van Devanter papers).

[24] Francis E. Warren to WVD (February 3, 1897) (Van Devanter papers) ("About the Supreme Bench . . . I only mentioned it in passing because I took it for granted every lawyer would like to reach that goal, though knowing full well that but few of the many can reach it. There is no reason why you should not aim as high as that with the many years you still expect to live and thrive.").

[25] Francis E. Warren to WVD (March 10, 1897) (Van Devanter papers).

[26] Paul Holsinger, *The Appointment of Supreme Court Justice Van Devanter: A Study of Political Preferment*, 12 AM. J. LEGAL HISTORY 324, 328 (1968).

[27] Holsinger, *Willis Van Devanter, The Early Years*, 180-215.

[28] 120 F. 721 (8th Cir. 1903).

[29] 173 F. 177 (8th Cir. 1909).

[30] *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905).

[31] *Oakes v. United States*, 172 F. 305 (8th Cir. 1909).

[32] Holsinger, *The Appointment of Supreme Court Justice Van Devanter*, 329.

[33] Francis E. Warren to WVD (March 12, 1906) (Van Devanter papers).

[34] Francis E. Warren to WVD (March 21, 1906) (Van Devanter papers).

[35] "I could not, even if I should write countless pages, overstate his character, ability, and desirability from all points, as to age, temperament, resourcefulness, environment, breadth of view and knowledge, etc. I believe that you know Judge Van Devanter quite well. I shall desire at a later date to discuss the matter with you more fully." Francis E. Warren to WHT (March 19, 1909) (Warren papers).

[36] Chief Justice Fuller died on July 4, 1910.

[37] Justice Moody retired because of illness on November 20, 1910. Crippled by rheumatism, Moody's retirement had been anticipated for many months.

[38] *See* BICKEL AND SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 44-64; Daniel S. McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. POLIT. 478 (1950); Holsinger, *The Appointment of Supreme Court Justice Van Devanter*; Nelson, *Supreme Court Appointment*, 239.

[39] *See* BICKEL AND SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 53-57.

[40] Judge Alexander Van Orsdel to Francis E. Warren (August 1, 1910), quoted in Nelson, *Supreme Court Appointment*, 8.

[41] WVD to Charles Nagel (April 19, 1910) in National Archives, DOJ File # 348 ("Willis Van Devanter").

[42] *Ibid.*

[43] Holsinger, *The Appointment of Supreme Court Justice Van Devanter*, 333.

[44] WVD to Frances E. Warren (December 4, 1910) (Van Devanter papers).
[45] WVD to Frances E. Warren (December 5, 1910) (Van Devanter papers).
[46] Frances E. Warren to WVD (December 7, 1910) (Van Devanter papers).
[47] Frances E. Warren to WVD (December 9, 1910) (Van Devanter papers).
[48] *Ibid.*
[49] *Id.*
[50] *Id.*
[51] 44 CONGRESSIONAL RECORD, 61st CONG., 3rd SESS., PT. 3, 335. In one contemporary account, "There certainly can be no doubt that destiny was working overtime when she landed the young Van Devanter at Cheyenne," for his career "proves to all ambitious young men that there are but two things to do if they have the stuff in them. The first is to hook up with destiny; and the second is to let destiny land you in a state where live two men who are going to be tremendous powers in the United States Senate. Simple, is it not?" *Who's Who and Why: The Darling of Destiny*, SATURDAY EVENING POST (March 8, 1911), 25. When "this article was brought to Van Devanter's attention . . . he did not like it. He thought it 'not in keeping with the dignity and surroundings of the office which I now hold.'" BICKEL AND SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT 63 (quoting WVD to W.A. Richards (June 2, 1911) (Van Devanter papers)).
[52] WHT to Walter H. Sanborn (December 15, 1910) (Taft papers).
[53] *Proceedings in Memory of Mr. Justice Van Devanter*, 301 U.S. XXVXXVI (1941).
[54] *Ibid.*, XX.
[55] Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUPREME COURT REVIEW 299, 307 (July 1, 1922).
[56] WHT to Robert A. Taft (May 3, 1925) (Taft papers).
[57] WHT to Robert A. Taft (January 16, 1927) (Taft papers).
[58] WHT to Horace D. Taft (January 17, 1927) (Taft papers).
[59] WHT to Robert A. Taft (March 4, 1928) (Taft papers).
[60] WHT to Robert A. Taft (March 10, 1929).
[61] *See, e.g.*, WVD to JHC (June 23, 1927) (Van Devanter papers).
[62] WVD to JHC (December 13, 1927) (Van Devanter papers).
[63] *See* JHC to WVD (December 12, 1927) (Van Devanter papers).
[64] 253 U.S. 250 (1923).
[65] WHT to Robert A. Taft (January 23, 1927) (Taft papers). *See* WHT to HFS (January 26, 1927) (Taft papers); WHT to GS (January 27, 1927 (Taft papers); WHT to Butler (January 28, 1927) (Taft papers); WHT to Mrs. Frederick J. Manning (April 10, 1927) (Taft papers); WVD to OWH (February 13, 1925) (Holmes papers); *See* WHT to Helen Taft (May 25, 1924 (Taft papers) ("some are pretty far behind especially Van Devanter"); WHT to Robert A. Taft (April 7, 1929) (Taft papers).
[66] WHT to Helen Taft (April 28, 1924) (Taft papers).
[67] WHT to Helen Taft (May 3, 1927) (Taft papers). *See* Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 SUP. CT. REV. 345, 397-400; Cases Assigned to Justice Van Devanter (Memorandum, February 1927) (Taft papers). *See* WHT to LDB (May 3, 1927) (Taft papers); WHT to OWH (May 3, 1927) (Taft papers); WHT to HFS (May 3, 1927) (Taft papers) (I don't think it is necessary for you to speak to [Van Devanter] about it. He is very sensitive on all matters of this kind."); WHT to Charles P. Taft 2nd (June 5, 1927) (Taft papers).
[68] WHT to OWH (May 3, 1927) (Taft papers).
[69] WHT to WVD (May 3, 1927) (Taft papers).
[70] WVD to WHT (May 4, 1927) (Taft papers).
[71] CHARLES EVANS HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 171 (Harvard University Press: Cambridge, 1973, David J. Danelski and Joseph S. Tulchin, eds.).
[72] GS to WHT (July 3, 1925) (Taft papers). *See* WVD to WHT (July 1, 1925) (Taft papers). It is not surprising that Van Devanter's surviving letters contain intricate remedies for constipation. *See* WVD to William Meyers (October 13, 1924) (Van Devanter papers). It is difficult to imagine that this repressed individual— "as conservative as a Dutch canal, and as calm," *The Judiciary: Supreme Convention*, 10 TIME (No. 15) (October 10, 1927), 8—had begun life in "the turbulent days of the great Wyoming cattle ranges," *Justice Van Devanter*, THE NEW YORK TIMES (February 10, 1941), 16, and that he had as a young man joined hunting parties with the legendary Buffalo Bill Cody. Holsinger, *Willis Van Devanter, The Early Years*, 107 n.1; *see* Attorney General Francis Biddle, *Proceedings in Memory of Mr. Justice Van Devanter*, 316 U.S., XXXIII (1941).
[73] Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 AM. BAR ASSOC. J.1113, 1186 (1972). Two other "failures" were also members of the Taft Court: James C. McReynolds and Pierce Butler. Twelve justices were rated "Great," of which three were members of the Taft Court: Holmes, Brandeis and Stone. Fifteen Justices were rated "Near Great," of which two were members of the Taft Court: Taft and Sutherland. On Van Devanter's notorious writer's block, *see* PEARSON & ALLEN, NINE OLD MEN 187 ("Van Devanter's third claim to fame is the fact that during the six years since 1930 he has handed down only twenty-two opinions....").

[74] PEARSON & ALLEN, NINE OLD MEN, 188. Van Devanter "was not a judge of whom the public generally could gain any very sharply defined impression. He was quiet and unassuming and appeared seldom in public. He made very few speeches, even before gatherings of lawyers, and those were of the conversational and unpretentious sort. He left practically no writings except his opinions. But his comprehensive learning, his industry, his passion for thoroughness and exactness, and his power of clear analysis and forceful exposition marked him, among all those who really knew the work of the Court, as one of its most conspicuously valuable members."

[75] AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, 171.

[76] *Address of Justice Hughes at Law Institute*, THE NEW YORK TIMES (May 13, 1938), 8.

[77] *Brandeis-Frankfurter Conversations*, 316 (July 1, 1923). William Douglas recalls that Van Devanter's "highest credentials were, as Brandeis said, that he was an honest, able, forthright and dependable man who always kept his word. At the end of an argument he could summarize it, state the pros and cons and what the Court should decide. If his words had been recorded, they would have made a perfect opinion. . . . We were at opposite poles on many phases of constitutional law, but what drew me to him was our shared love of the outdoors. Van Devanter had been a hunter, fisherman and camper in his early years in Wyoming and I spent many hours listening to his tales. I found him a genuine human being." WILLIAM O. DOUGLAS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS: THE COURT YEARS 1937-1975 11 (Random House: New York, 1980).

[78] in "Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter 597 (University of Oklahoma Press: Norman 1991 Melvin I. Urofsky and David W. Levy eds.).

[79] WVD to John L. Lacey (June 23, 1934) (Van Devanter papers).

[80] M. Paul Holsinger, *Mr. Justice Van Devanter and the New Deal: A Note*, 31 THE HISTORIAN 57, 58 n.3 (November 1, 1968). *See* HFS to Children (February 13, 1941) (Stone papers) ("I have always felt [that Van Devanter] conceived it his duty to declare unconstitutional any law which he particularly disliked.").

[81] *Proceedings in Memory of Mr. Justice Van Devanter*, XL-XLI.

[82] *Ibid.*

[83] *Ibid.*, XLII.

[84] WHT to Samuel H. Fisher (December 25, 1926) (Taft papers).

[85] WHT to Mrs. Frederick J. Manning (June 11, 1923) (Taft papers). *See* WHT to Mrs. Frederick J. Manning (January 23, 1927) (Taft papers). Van Devanter "is the mainstay of the Court and if he wrote no opinions at all, we could hardly get along without him." WHT to Robert A. Taft (January 16, 1927) (Taft papers).

[86] WHT to Charles P. Taft 2nd (January 23, 1927) (Taft papers).

[87] WHT to Horace D. Taft (January 17, 1927) (Taft papers). *See* WHT to Charles P. Taft 2nd (January 16, 1927) (Taft papers) (Van Devanter is "the most valuable man we have in the Court, and we can not afford to lose him.").

[88] WHT to James R. Angell (December 2, 1926) (Taft papers). "Sutherland is an excellent man, a man of great experience and a man of force and strength of character," Taft added, "but as compared with Van Devanter, I am sure the friends of both would accord the precedence which the official rank in the Court gives to Van Devanter."

[89] WHT to William Lyon Phelps (May 30, 1927) (Taft papers).

[90] WHT to Charles P. Taft 2d (January 16, 1927) (Taft papers). Taft believed that "Van Devanter is a modest man and needs somebody to play his trumpet, and I am delighted to fill that function." WHT to Robert A. Taft (January 16, 1927) (Taft papers).

[91] WVD to John C. Pollock (May 26, 1921) (Van Devanter papers).

[92] WVD to John C Pollock (June 7, 1921) (Van Devanter papers).

[93] WVD to John C. Pollock (June 10, 1921) (Van Devnter papers).

[94] *Brandeis-Frankfurter Conversations*, 310 (November 30, 1922).

[95] *Brandeis-Frankfurter Conversations*, 322 (August 6, 1923).

[96] *Brandeis-Frankfurter Conversations*, 336 (June 15-16, 1926).

[97] AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, 171. John W. Davis commented in 1941 that "I have heard the statement from Chief Justice White, who leaned on him heavily, that in the conference he was the most helpful member of the Court. More than one of his judicial brethren have expressed the same opinion." *Proceedings in Memory of Mr. Justice Van Devanter*, 301 U.S. XXVI (1941).

[98] AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, 169.

[99] *Brandeis-Frankfurter Conversations*, 322 (August 6, 1923).

[100] *Ibid.*, 328 (July 2, 1924).

[101] *See* WVD to JHC (September 3, 1922) (Clarke papers).

[102] *Brandeis-Frankfurter Conversations*, 330 (July 6, 1924). Butler had been a long-time law partner with William D. Mitchell, *In Memory of Mr. Justice Butler*, 310 U.S. VII (1939), who had also been Van Devanter's personal lawyer. Dollie Van Devanter to William D.

Mitchell (April 19, 1924) (Van Devanter papers); Dollie Van Devanter to Messrs. Doherty, Rumble, Bunn & Butler (June 17, 1925) (Van Devanter papers). Butler and Van Devanter together contrived (with Taft's support) to secure Mitchell's appointment as Solicitor General. WVD to William D. Mitchell (February 1, 1925) (Van Devanter papers); William D. Mitchell to WVD (February 18, 1925 (Van Devanter papers); WVD to William D. Mitchell (February 25, 1925) (Van Devanter papers); William D. Mitchell to WVD (June 6, 1925) (Van Devanter papers). Mitchell went on to become Attorney General under President Hoover.

[103] GS to WHT (June 11, 1925) (Taft papers).

[104] Chief Justice Stone, *Proceedings in Memory of Mr. Justice Van Devanter*, 301 U.S. XLIII (1941). Merlo Pusey refers to "the genial and versatile Van Devanter." 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 667 (MacMillan: New York 1951).

[105] *See, e.g.*, Paul A. Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 AM. JEW. HIST. (No. 1, September 1978), 12

[106] GS, Memorandum for the Chief Justice (May 15, 1928) (Sutherland papers) (referring to *Quaker City Cab Co. v Pennsylvania*, 277 U.S. 389 (1928); *Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737 (1929); *Highland Russel Car & Snow Plow Co.*, 279 U.S. 253 (1929)).

[107] Dean Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW. 355, 361 (1957). On Brandeis' respect for Van Devanter, *see* Paul A. Freund, *The Supreme Court: A Tale of Two Terms*, 26 OHIO STATE LAW J. 225, 226-27 (1965) ("Brandeis had very deep regard for Van Devanter").

[108] Freund, *Justice Brandeis*, 12.

[109] WHT to Charles P. Taft (June 8, 1927) (Taft papers). *See* WHT to Charles P. Taft 2nd (June 8, 1927) ("Justice Van Devanter and I are the closest friends on the Bench"); WHT to Robert A. Taft (June 8, 1927).

[110] WHT to WVD (September 16, 1928) (Taft papers). *See* WHT to WVD (August 1, 1929) (Taft papers).

[111] WHT to Charles P. Taft (June 8, 1927) (Taft papers).

[112] WHT to William Lyon Phelps (May 30, 1927) (Taft papers).

[113] *See, e.g.*, WVD to WHT (February 10, 1922) (Taft papers) (suggesting that steps be taken to instruct the Clerk to enforce a new rule requiring the assessment of expenses for the printing of records); WHT to WVD (February 10, 1922) (Van Devanter papers) ("I'll direct the clerk to section 2 Rule X just as you suggest. I'll write him today on the subject."); WHT to William R. Stansbury (February 10, 1922) (Taft papers); William R. Stansbury to WHT (February 16, 1922) (Taft papers).

[114] WHT to WVD (December 7, 1921) (Taft papers). The case was *Truax v. Corrigan*, 257 U.S. 312 (1921). See also, WHT to WVD (April 11, 1923) (Van Devanter papers) ("I hope you will consent to help me out by coming to a conference on Sunday afternoon next at three o'clock at my house. I shall not ask such a favor again this year. Can't you take your golf on Saturday instead of Sunday? A critical meeting of the Yale Corporation comes on Saturday. The policy and the right policy of the University may be dependent on my vote. Bear with me."); WHT to WVD (December 26, 1924) (Van Devanter papers) ("Here is a long screed. I sent it to Butler and Sandford [sic] and McKenna. Run it over—It needs some more citations."); WHT to OWH (June 5, 1926) (Taft papers); WHT to OWH (June 6, 1926) (Taft papers).

[115] On Van Devanter's central role in assisting Taft in securing the nomination of Pierce Butler, *see* DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (Random House: New York 1964); WVD to George B. Rose (September 23, 1927) (Van Devanter papers).

[116] Memorandum, November 10, 1924 (Taft Papers), reprinted in WALTER MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 199-201 (3d ed. 1979). With regard to McKenna's last opinion, which he insisted on publishing before retiring, Taft wrote Van Devanter, "I enclose McK's opinion. The latter part I had not seen. Run it over-send me your suggestions on a separate paper so that I can incorporate them in my handwriting. The old man is in a hurry to send it out. Let me have your suggestions tonight." WHT to WVD (December 9, 1924) (Van Devanter papers).

[117] WHT to LDB (November 11, 1923) (Taft papers).

[118] WHT to OWH (June 5, 1926) (Taft papers); Charles Cropley to WHT (June 20, 1928) (Taft papers); WHT to WVD (June 23, 1928) (Van Devanter papers); WVD to WHT (June 27, 1928) (Van Devanter papers); Horatio Stonier to WHT (June 27, 1928) (Taft papers); WHT to WVD (June 28, 1928) (Van Devanter papers); WHT to WVD (July 1, 1928) (Taft papers).

[119] "I am thinking of assigning [*Ford v. United States*, 273 U.S. 593 (1927)] to Brandeis. It involves the British Treaty over the 12 mile limit and the conspiracy at San Francisco and Vancouver. Holmes and Stone dissented. They may come in. Don't you think we can be safe in that?" WHT to WVD (February 20, 1927) (Van Devanter papers). Eventually Taft took over the opinion himself and wrote for a unanimous Court.

[120] While drafting his opinion in *Harkin v. Brundage*, 276 U.S. 36 (1928), Taft wrote Van Devanter, "Brandeis suggests that I say something in the Chicago Receivership case like this. I am entirely willing to do it because I think the use of receiverships in the Federal courts has become too easy and frequent. It is not necessary in the case but it is entirely relevant. What would you think of it?" WHT to WVD (January 31, 1928) (Van Devanter papers).

[121] WHT to Harry M. Daugherty (June 5, 1922) (Taft papers); WHT to WVD (June 1922) (Van Devanter papers).

[122] Pub. L. No 68-415, 43 Stat 936.

[123] William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L. J. 1, 12 (1925). WHT to WVD (August 15, 1925) (Taft papers); WVD to WHT (September 5, 1925) (Taft papers); WHT to WVD (September 9, 1925) (Taft papers); WHT to PB (September 16, 1925) (Taft papers); Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 MICH. STATE LAW REV. 1, 77-83 (2020).

[124] WHT to Charles P. Taft 2nd (May 5, 1929) (Taft papers) ("Mrs. Justice Holmes died on Tuesday night. She had been dying for some days. She had suffered three falls since September and then had one that broke her hip. . . . Mrs. Holmes has been a protector of Justice Holmes and has attended to everything connected with his living. She has a niece, a Mrs. Clark, who came to me on Sunday last and told me that Mrs. Holmes was dying, but that the doctor, who is my doctor, had not communicated to Justice Holmes what the impending result would be. Dr. Clayton was afraid that it might shock the Justice and that he would save him this. But Van Devanter and I sent for the doctor and told him that Holmes was a man who wanted to know the facts, and therefore he ought to tell him.").

[125] Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 151-75.

[126] WVD to Edmund F. Trabue (April 26, 1926) (Van Devanter papers).

[127] FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 487 (Harvard University Press, Cambridge, MA 1970, Philip B. Kurland, ed.) ("Mr. Justice Van Devanter is a man who plays an important role in the history of the Court, though you cannot find it adequately reflected in the opinions written by him because he wrote so few. But Van Devanter was a man of great experience. . . . He had a very clear, lucid mind, the mind, should I say, of a great architect. He was a beautiful draftsman and an inventor of legal techniques who did much to bring about the reforms which were effectively accomplished by Taft as Chief Justice.").

[128] On Taft's declining mental acuity, see Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 6-11.

[129] WHT to WVD (March 7, 1927) (Van Devanter papers).

[130] WHT to Robert A. Taft (October 23, 1927) (Taft papers).

[131] C. Dickerman Williams, *The 1924 Term: Recollections of Chief Justice Taft's Law Clerk*, 1989 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 40, 50 (Van Devanter and Butler were the justices "closest" to Taft).

[132] WHT to Myron Herrick (June 3, 1928) (Taft papers). *See* David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695,708 (2009).

[133] *See, e.g.*, *White River Lumber Co. v. Arkansas*, 279 U.S. 692 (1929).

[134] *Van Devanter Dies; Ex-Justice was 81*, NEW YORK TIMES (February 9, 1941), 47. *See Former Justice Van Devanter*, 27 ABAJ 154 (1941).

[135] Joseph Percival Pollard, *Four New Dissenters*, 68 THE NEW REPUBLIC 61, 63 (August 19, 1931) (no. 872).

[136] *Brandeis-Frankfurter Conversations*, 336 (June 17, 1926). Brandeis also observed that "Van Dev. knows as much about jurisdiction as anyone—more than anyone. But when he wants to decide all his jurisdictional scruples go." *Ibid.* at 313 (June 28, 1923).

Willis Van Devanter: The Person

MARK TUSHNET

Introduction

Willis Van Devanter is best known as one of the Four Horsemen who found important components of Franklin D. Roosevelt's New Deal programs unconstitutional, not for any opinions he wrote, like his most important one, in *McGrain v. Daugherty* (1927), a case arising out of the Teapot Dome scandal of the 1920s, in which the Court upheld a broad scope for congressional oversight inquiries.[1] Indeed, to the extent that he is known for anything else, it is that he wrote an extraordinarily small number of opinions—346 majority opinions in his twenty-six years on the Supreme Court, a rate of just over thirteen per term, far fewer than that of any of his colleagues, such as Chief Justice William H. Taft's "astonishing" 249 opinions, Louis D. Brandeis' 193, and James C. McReynolds' 172.[2] His low productivity is attributed to "pen paralysis"[3] or a "writing block,"[4] which, as I argue below, is a somewhat inaccurate characterization of the difficulty. Not surprisingly, then, one of the few discussions of Van Devanter's work on the Court comes in a chapter in a book, **Unknown Justices of the United States Supreme Court,** which by its own description "profile[s] some of the more obscure" justices.[5]

No one could plausibly contend that Van Devanter deserves a full biography or even an article length one.[6] There are aspects of his life, though, that I believe are of some interest, and a few are sketched here. After a brief overview of Van Devanter's pre-Court career and his appointment to the Court, Van Devanter's role on the Supreme Court is examined, with an explanation offered for his low productivity that supplements, though it does not completely displace, the "writing block" narrative. Material on Van Devanter's personal life then sheds further light on his role on the Court, including his decision to retire in 1937.

Van Devanter before the Supreme Court

Willis Van Devanter was born in Indiana in April 1859; his mother, Violetta, lived there until her death in 1933 in her nineties.[7] After attending public school, Van Devanter went to Indiana Asbury University, founded in 1837 as a Methodist college (and renamed DePaul University in 1994), but he did not graduate because his father, Isaac, became

ill and could no longer support him. After his father recovered, Van Devanter went to the Cincinnati Law School, from which he graduated in 1879. Two years later he married Delice "Dollie" Burhans.

Van Devanter's father had a law practice in Cincinnati with John W. Lacey, and young Willis joined the firm. Lacey, who had married his partner's daughter Elizabeth, Van Devanter's sister, whom Van Devanter addressed as "Lizzie" in his letters to her, Lacey left the firm in 1884 when Isaac retired, to accept appointment by President Chester Arthur as chief justice of the Wyoming Territorial Court.[8] Van Devanter decided to go with Lacey and his sister to Wyoming.

Van Devanter joined a prominent Republican lawyer Charles N. Potter for several years in a business-oriented practice that dealt with disputes over land title and had the Burlington Railroad as a client.[9] Van Devanter also became active in the Republican Party, winning an election as city attorney in 1887 and a seat in the territorial legislature the next year. A year later, President Benjamin Harrison appointed Van Devanter chief justice of the territorial court, but—like Lacey before him—Van Devanter served only briefly, returning to law practice in 1890 in a renewed partnership with Lacey. This time the Union Pacific Railroad was a main client, in addition to "the Wyoming Stockgrowers and most of the powerful and sizable stock ranches in the state."[10]

Van Devanter became the principal lawyer for the Department of the Interior after William McKinley's election in 1896, and he specialized in land claims and Indian law. Seven years later, Theodore Roosevelt nominated him to a seat on the United States Court of Appeals for the Eighth Circuit, then sitting in St. Paul, Minnesota, which covered a wide swath of the American West, including Colorado, the Dakotas, and Wyoming.[11] Van Devanter and his wife moved to St. Paul, where they became part of the city's circle of legal elite families. In December 1910, William Howard Taft nominated him to the Supreme Court. He was confirmed within a week and took his seat in January 1911.

As this barebones account of his career indicates, Van Devanter was a politically active Republican throughout his time in Wyoming. He remained active in Wyoming Republican politics in Washington, including "for many years after he joined the Court."[12] Soon after his arrival in Wyoming, he supported then territorial governor Francis Warren, who in turn became Van Devanter's principal political sponsor over the next decades. After his Civil War service and some time in Massachusetts, Warren followed Horace Greeley's advice to veterans, "Go West, young man, go West and grow up with the country."[13] Moving to Wyoming, he became a successful businessman and Republican activist. President Chester Arthur appointed him territorial governor in 1885; after Warren was replaced by Democratic President Grover Cleveland, he returned to the office following President Benjamin Harrison's election. When Wyoming became a state, Warren was elected its first governor, though he served for only six weeks before resigning to become U.S. Senator. He served as Senator for two years before he was replaced by a newly elected Democratic legislature. Then in 1895 he was returned to the Senate, where he served until 1929.

Warren's return to the Senate resulted from a Republican victory in Wyoming's 1894 elections, which Van Devanter had engineered as the state Republican Party chair.[14] Warren reciprocated by pressing Mark Hanna, William McKinley's campaign manager and prime adviser, and followed up with Attorney General Joseph McKenna, to have McKinley appoint Van Devanter Solicitor General. Those efforts failed,[15] but Van Devanter got a consolation prize in his appointment to the Department of Justice. And, for the first time, Warren raised the possibility that Van Devanter would someday end up on the Supreme Court. Acknowl-

Van Devanter became confidant, counsel, and political manager to Francis E. Warren (above), a Wyoming businessman who went on to serve as governor and U.S. Senator. Warren used his influence to get Van Devanter appointed to the Eight Circuit and then to the Supreme Court.

edging his own ambition, Van Devanter was skeptical, but the goal remained on Warren's agenda. In 1902 Warren simultaneously felt out a siting judge on the Eighth Circuit to see if the judge would soon resign (he did not) and introduced legislation to add a new seat to that Circuit Court. The statute was enacted in early 1903 and signed by President Theodore Roosevelt with Warren and Van Devanter at hand. Roosevelt announced at the signing that he would nominate Van Devanter, which he did four days later.

Van Devanter never lost sight of his ultimate goal, the Supreme Court, writing Warren within a year of his appointment to the circuit court that he hoped to get the seat assigned to the Eighth Circuit and then occupied by David J. Brewer, when Brewer retired (within a few years, Van Devanter hoped). Warren continued to look out for Van Devanter, unsuccessfully urging that Roosevelt appoint Van Devanter to a vacancy that arose in 1906, then again (and again unsuccessfully) urging President William Howard Taft to appoint Van Devanter to the Cabinet. Van Devanter thought his chance had come when Justice Brewer died in March 1910. Warren kept pushing Van Devanter's name forward but failed, apparently because Taft worried that he would be recused from too many important cases that might be appealed from the Eighth Circuit to the Supreme Court. (Charles Evans Hughes received the nomination.)

Soon enough, two other vacancies arose: Chief Justice Melville W. Fuller died (to be replaced by Edward Douglass White), and Justice William H. Moody resigned. Again Warren pushed Van Devanter's name forward, this time in the face of rumors that Van Devanter had not carried his fair share of his court's work—rumors supported by statistics about the number of circuit court opinions Van Devanter had written. Taft looked into the matter. Van Devanter sent Warren a telegram requesting that his name be taken out of consideration, a telegram that Taft found "very dignified."[16] And, according to Warren, Taft concluded that Van Devanter's opinion rate was low because "he had been sick and his wife ill" and hoped that Van Devanter's "dilatory habit ... [will] be corrected."[17] (Apart from his own share of ailments, Dollie was quite fragile medically.) Warren contributed to Taft's decision-making by "lin[ing] up as many G.O.P. leaders as possible" to support Van Devanter's appointment. This maneuver signaled to Taft, facing internal party difficulties in connection with his potential renomination in 1912, that Warren and his allies would come to Taft's side if he nominated Van Devanter.[18]

Van Devanter (and Warren) actively exploited their political connections in advancing his career. It seems clear, though, that both Warren and Van Devanter had overly optimistic evaluations of Warren's influence, even though in the end Warren's efforts paid off. As we will see, Van Devanter continued

to rely on those connections—and to some extent to be overly optimistic about them—even after he was appointed to the Court.

Van Devanter's Work on the Supreme Court

While Van Devanter wrote relatively few opinions for the Court, he played an important role within it. He was a forceful voice within the Court's deliberations, especially at the Conference sessions devoted to discussing cases. And Chief Justice Taft used him as something like a chief administrative aide, drawing upon Van Devanter's political connections during Taft's campaign in the 1920s to have Congress enact major statutory revisions in the Court's jurisdiction, a campaign that culminated in the Judiciary Act of 1925.

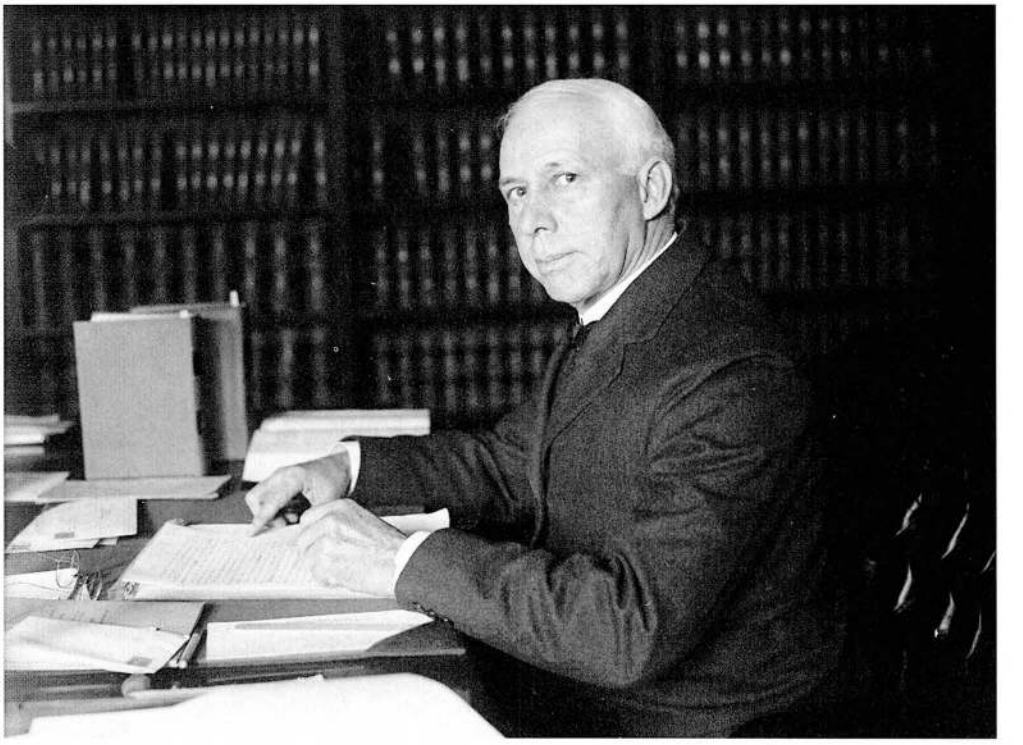
A. Writing Opinions

As the story of Van Devanter's appointment to the Supreme Court shows, his low productivity on the circuit court almost derailed his nomination. And, as we have seen, his low productivity defined his entire career as a judge. Van Devanter was "very sensitive" about his low productivity, a sensitivity that manifested itself when both Taft and Hughes had to exercise great tact in reassigning opinions away from Van Devanter because too much time had passed without his having circulated a draft.[19] Was the source of the problem writer's block or pen paralysis or something else?

There can be no definitive answer, but we can find hints in several places. Most important, perhaps, is that Van Devanter was an inveterate letter writer. He wrote almost daily to one or another family member, his sister Lizzie and his mother the ones receiving the most letters. He pursued an active correspondence over many years as he tried to track down his family genealogy from the Netherlands to the United States, and he kept up a sporadic correspondence with distant cousins discovered in the course of that effort. He regularly wrote letters to his political acquaintances about pending judicial appointments and potential vacancies. Though his letter writing may have been one way in which he displaced latent anxiety about writing judicial opinions, it shows that Van Devanter had no difficulty with writing as such.

Nor did his difficulty lie in doing legal analysis step by step. His colleagues regularly praised his analytic ability. His presentations at the Court's Conferences were said to have been clear and astute.[20] His problem was that he often found it difficult to get "at the bottom" of a legal problem.[21] Indicating his own criteria for what an opinion should do, he criticized one of Justice Oliver Wendell Holmes' opinions for failing to "give an adequate portrayal of the case in hand or of the grounds of the decision," nor to "get at the salient features in a case to give them the weight and consideration to which they are entitled."[22] During the brief controversy before his nomination over his productivity as a judge on the court of appeals, Van Devanter "affirm[ed]" to a friend "that I have not been averse to bestowing a large amount of labor upon a single case when there has been occasion therefor...."[23] He described his work on *McGrain v. Daugherty* as involving an effort to "reach[] back into antiquity and gathering together everything bearing on the subject," including "legislative journals of several of the American colonies—journals which are now kept under lock and key in the Congressional Library...."[24]

We can infer that Van Devanter's difficulty lay in coming to closure, not on a result, but on the legal analysis to reach the result. For Van Devanter, each step in the arguments he was developing revealed another problem to be analyzed—not a diversion, but something like a lemma that had to be established to support the proposition he was using. And each lemma generated its own lemma. As Chief Justice Taft put it, Van Devanter "never



Van Devanter (pictured in 1924) had difficulty finishing writing legal opinions, not because he could not reach a result, but because each step of his legal analysis revealed another problem to be analyzed.

gets done looking over the various features he would like to consider."[25]

Van Devanter's difficulty in writing opinions appears to reflect a defensible jurisprudence—the jurisprudence of law as a seamless web. And it seems that for Van Devanter, judicial opinions should be transparent, that is, should openly display every step of legal reasoning that the author finds necessary to get to the bottom of the problem. Yet, if law is a seamless web, transparency to that degree is impossible: Every opinion would have to display the entire corpus juris. Other judges, including Holmes, adhered to the same jurisprudence but had a different view of what judicial opinions should, or perhaps could, do. Their opinions lay out the main propositions and do something, perhaps through the cases they cite and the ones they do not cite, to point in the direction of the further work that would have to be done to fully support the conclusion.

Justice Thurgood Marshall's dissenting opinion in *United States v. Kras* provides one example, Justice William O. Douglas' opinion-writing practices late in his career another. The Court in *Kras* upheld the constitutionality of a federal statute requiring persons seeking bankruptcy to pay a $50 filing fee. Marshall's dissent argued that the filing fee violated Kras's constitutional right of access to the courts. In developing that argument, Marshall wrote, "There is no way of determining [Kras's claim that he had a right under the bankruptcy statutes to discharge of his debts] except by adjudicating his claim." At that point, Marshall dropped a footnote: "It might be said that the right he claims does not come into play until he has fulfilled a condition precedent by paying the filing fees. But the distinction between procedure and substance is not unknown in the law, and can be drawn on to counter that argument."[26] Van Devanter's understanding of what opinions

had to do would have led him to lay out the way in which the asserted distinction actually could counter the argument about the fee as a condition precedent.

Justice Douglas' approach was even more condensed. His opinions would state a legal proposition, then provide citations to one or two cases. Readers were supposed to infer that those cases supported the proposition even though they did not state the legal rule that Douglas implicitly asserted was founded in the precedent cited. In an interview with Melvin Urofsky, Yale Law Professor Jan Deutsch described Douglas' approach: Deutsch "would meet with Douglas's clerk, Jerome Falk, and would say 'Jerry, it doesn't work. It does not work!' Then Falk would show him that it did work, because Douglas did not take just the bare holdings, but all the glosses that went with the earlier opinions, and from those wove his own conclusions."[27] Again, Van Devanter would have thought it necessary to spell out what all those glosses were and to show the steps taken in weaving them together.

On the view set out here, Van Devanter's difficulty in writing opinions flowed from a combination of a sensible, indeed probably correct, jurisprudence, with a failure to appreciate the fact that the demands of getting the work done made it impossible to reflect that jurisprudence fully in an opinion.

B. Inside the Court

When President Taft was considering Van Devanter's nomination to the Supreme Court and the concerns about the jurist's productivity surfaced, Van Devanter noted that "the mere number [of opinions] ... is not an indication of the amount of work done,"[28] which included pre-writing deliberations and administration of the court's docket. Van Devanter continued to have these additional workload components while on the Supreme Court.

Chief Justice Taft described Van Devanter as "most learned in questions of jurisdiction" and "more familiar with our rules than anyone on the bench,"[29] but Van Devanter's real strength was behind the scenes. According to Justice Brandeis, Van Devanter was particularly effective in "lobbying with the members individually, to have them suppress their dissents."[30] Both Chief Justice Hughes and Chief Justice Stone were effusive about Van Devanter's performance at the Court's Conference. According to Hughes, Van Devanter's "careful and elaborate statements in conference, with his accurate review of authorities, were of the greatest value. If these statements had been taken down stenographically they would have served with but little editing as excellent opinions."[31] Stone's observations were to the same effect:[32]

> At the conference table he was a tower of strength. When his turn came to present his views of the case in hand, no point was overlooked, no promising possibility left unexplored. His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court's opinion in the case.

Perhaps we might discount these comments as ceremonial praise for a departed colleague, but Van Devanter's correspondence offers some confirmation. On January 8, 1934, the Court announced its decision in *Home Building & Loan Assn v. Blaisdell*, upholding the constitutionality of Minnesota's mortgage moratorium law, with an opinion by Chief Justice Hughes and a dissent by Justice Sutherland.[33] Two weeks later, Van Devanter wrote an unusually candid and detailed letter to his sister:

> Work on that case preparatory to its consideration in conference did me some real physical harm.... My impression is that I never did better than on the occasion when this case was considered.... I endeavored to be both thorough and plain in my statement. The occasion was one of tremendous intensity. I spoke for easily an hour and was not interrupted. When the conference was over, my brother McReynolds, who makes it a practice never to compliment anyone, came to me and said: "Your statement and presentation of the Minnesota case was the best and most thorough of any I have ever heard in conference."[34]

As senior associate justice in dissent, Van Devanter assigned the dissent to Justice George Sutherland. "He wrote it in his best style and did it as nearly perfectly as possible. From beginning to end, citations, reasoning and all, the dissent follows my presentation in conference." Sutherland told him that the dissent attempted "to reproduce what I had said." Though "extremely disappointed at the outcome of the case," Van Devanter's pride about his contribution to the dissent is evident.[35]

Political scientist David Danelski described Van Devanter as the "task leader" on the Court in which Taft was the "social leader." As task leader, he had charge of ensuring that the Court's work got done, in contrast to Taft's role in "relieving tension and showing solidarity and agreement."[36] In Danelski's words, Taft "was the best-liked member of his Court, and he wanted to be liked,"[37] while the "dignified and reserved" Van Devanter helped keep the conference on track with his summaries of the cases and the relevant precedents.[38] (Van Devanter appears to have played a similar role, though perhaps a bit less so, for several years of his service with Chief Justice Edward Douglass White.)

According to Felix Frankfurter, Taft called Van Devanter "my chancellor," the official charged with administering the courts and their work.[39] This was especially important when Taft turned outside the Court in an ultimately successful effort to persuade Congress to revise the statutes governing the Court's jurisdiction. Van Devanter was the principal drafter of what became the Judiciary Act of 1925, which sharply reduced the Court's mandatory docket and gave it wide discretion to decline to hear cases that litigants sought to have it decide.[40] Van Devanter's personal connections to important Republican Senators, especially Senator Warren, made him a good envoy to Congress, as did his expertise on questions relating to the Court's jurisdiction and workload. The statute's enactment allowed the Taft Court to eliminate a large backlog of cases and to become essentially current in disposing of cases expeditiously after the Court received applications for review.

Van Devanter's role inside the Court led him to think that he was a plausible candidate for promotion to the chief justiceship when White retired. In 1921, he wrote his friend federal judge John C. Pollock that "Justices McKenna, Day, McReynolds and Clarke have said to me that they would be glad to see me appointed" to the center chair. He reported that Minnesota Senator Frank Kellogg "intends to recommend me," and that "Ex-Senator [Joseph W.] Bailey seems to think that I will be the man," though he cautioned Pollock, "Pleasant commendation by intimate friends ... is not to be taken for anything beyond what it really is, so I am not counting on anything...."[41]

The promotion Van Devanter either hoped for or fantasized about went to Taft, of course, largely because Van Devanter overestimated the power of his friends in the Senate. Even by 1921, Van Devanter's circle of influential political friends had contracted as they left the Senate because of age or political defeat. Still, at most he was overopti-

President Taft appointed Van Devanter to the Court in 1911, and in return he later helped Taft, as chief justice, successfully lobby for the Judges Bill of 1925. Van Devanter's connections to Republican Senators made him an effective emissary to Congress.

mistic about his prospects for promotion, not delusional.

Family Life

Scholars of constitutional law focus so intensely on the Court's decisions that they often lose sight of the fact that, like the rest of us, justices have families to support both financially and emotionally, and have human characteristics like those attributed to Van Devanter of being "genial and versatile" and "stolid and colorless," although these may have been drawn from his public career.[42] As we have seen, Van Devanter may have displaced into attention to his family some of his anxieties about getting to the bottom of cases through thorough research. His copious letters to family members show him to have been an attentive son, husband, and father. They also show his deep concern about the financial resources available to him both for what he regarded as important to him and to help support his elderly mother. His friend William Mitchell's description of Van Devanter as "dignified and reserved, even in his family life" might perhaps have captured some parts of Van Devanter's outward affect.[43] His letters do reveal him to be somewhat like a paterfamilias, counseling his relatives about their personal lives. But his attention to his wife Dollie's medical frailty shows deeper emotional commitments. The following section deals primarily with financial matters but sometimes deals with his role as paterfamilias.

A. Finances

Van Devanter worried about his finances a great deal. In 1914, he wrote to a company from which he bought various household supplies objecting to a 20 cent charge for

a scrub brush (about $5 in today's dollars) and 10 cents for a baking sheet.[44] When he moved to Washington to take his seat on the Court, he left his children behind because "[t]o have taken so many to a suitable hotel would have been to incur an expense which have been too large for me just now.... Living here is going to entail an enormous expense upon us, and we will have to exercise much care to keep within my salary."[45] Van Devanter did reunite his family by renting the home owned by the widow of his predecessor David Brewer, but he may not have been easy tenant over the course of his nearly twenty years there. He once complained about the conditions in some rooms and later haggled over a proposed rent increase.[46] He resigned from the Cheyenne Industrial Club because he had "to curb [his] expenses as much as possible."[47] In 1913, he described himself as "extremely poor," because, "through the misfortunes of others who have a close claim upon me, I found it necessary during the last year to make advances which probably will never come back," as a result of which he had "practically stripped myself of available income."[48] In one such situation, in response to a solicitation to contribute to his old fraternity house, he sent $100, about $2,600 today.

As a family, the Van Devanters had substantial assets, but the justice treated Dollie's assets as hers rather than his.[49] About the stock market crash, he wrote a friend, "Happily it has not affected us much. Mrs. Van Devanter's investments were generally in a class which would not be affected much, and even then only temporarily."[50] However, Dollie's finances were not entirely unaffected by wider developments in the economy. During the 1920s, Dollie invested $70,000 (about $1 million in current dollars)—"nearly one-half of all that I have"—in mortgage-backed securities, in a scheme run by Grant Van Sant, the scion of a prominent Minnesota family.[51] Van Devanter quickly came to believe that the family's confidence in Van Sant had been "misplaced,"[52] though the investment's failure—"severe losses," in Van Devanter's words—may have been due at least as much to the farm crisis of the 1920s as to Van Sant's mismanagement or worse.[53]

Despite all these concerns, Van Devanter sent a monthly check to his mother, at first $25 a month (about $650 today), then $40 (still about $650 today because of inflation in the 1920s). No admirer of Roosevelt, Van Devanter nonetheless praised FDR's "courageous" decision to close the nation's banks even though it caused him some difficulties in dealing with his recently deceased mother's affairs.[54]

Even more, in 1913 Van Devanter managed to buy a small island in Georgian Bay, off Lake Huron and almost due north of Toronto.[55] For Van Devanter, for whom "[f]ishing and out-of-door life of all kinds has a particular attraction for me," the island was "a place of diversion, comfort and recuperation."[56] "There are but few people in that particular section, and the fishing is very good," he wrote.[57] He devoted a great deal of attention—and more than a little money—to organizing and maintaining the house on the island, which at one point included having to deal with a break-in at the cottage, which led to much follow-up correspondence, including a letter to the Minister of Justice opposing early release for two of the burglars.[58]

One of the handymen who took care of the house out of season gave Van Devanter the chance to act as a sage adviser, a role he played within his family. This is how Van Devanter described the situation: "You are a white man and claim to have some real pride and self-respect. You are turning down a white woman, who has been your wife for about fifteen years and has borne nine children for you. You are taking up in her place a negro woman, who is leaving a negro husband a child to go with you. This is all wrong." The rest of Van Devanter's letter turned away from the racial dimension and toward more general themes of family and,

Van Devanter's wife, Dollie, died in 1932, having long suffered medical problems. He invited his youngest sister Louise (Mrs. Sanford L. Rariden above) to accompany him to White House functions after Dollie's death.

in particular, of the handyman's relation with Van Devanter:

> When a man works for me as you do, when I trust him as much as I do you, and when I pay him as much in a year as I have been paying you, it makes a very great deal of difference to me whether he is a self-respecting man, or has lost his self-respect.... A man who becomes careless in these other ways is likely to be negligent and careless in all.[59]

A year and a half later, Van Devanter referred to the handyman's "inclination towards immoral women," and then praised his work as a caretaker and handyman.[60]

The casual racism of that advice was displayed again when Van Devanter referred to "the Jap who was with me the first summer" as a housekeeper and cook.[61] For present purposes, though, what may be more informative is the fact that Van Devanter *had* servants at the cottage. In 1927, he explained to his sister Mary that "his finances are not such as to enable me to do all that I would like to do" in providing financial assistance to Mary and his mother. It was "indispensable for my health and continued work that I go [to Georgian Bay] where I can build up for the next year's work." All well and good, but before all that, Van Devanter wrote, "Out of a spirit of economy I am taking two servants instead of three" to Georgian Bay, seemingly unaware of the tension between his plea of poverty and his employment of merely two servants.[62]

And then there were two trips to Europe with Dollie and her medical attendants to the spa at Weisbaden, "to obtain treatment for a period of some duration at one of the water cures over there," although Dollie, who

hired a "courier maid" in Europe, apparently paid for a trip out of her own funds.[63] Van Devanter accompanied Dollie on the second trip in 1932. She suffered a heart attack while in Germany and died at their hotel in Wiesbaden.

Van Devanter's concern about his financial condition seems exaggerated though not entirely misplaced, particularly because some of the demands on his finances—family duties and medical care—could not be reliably predicted. The "island property ... cost ... quite a little and represents the greater part of my savings," he wrote his sister Elizabeth. His family obligations certainly weighed on him, as seen in his remark, "If I could reasonably do so, I would increase the monthly allowance which I make" for his mother, "but my situation is such that I ought not to do so unless it is imperative."[64] And, on top of all this were the costs of medical care both for himself and, more important, for Dollie.

B. Dollie's Health (and Van Devanter's)

Van Devanter had to worry about Dollie's health—and his own—all the time. A simple chronology of their medical travails conveys how central ill health was to Van Devanter's life. Occasionally it seems as if Van Devanter might have been hyperalert to medical problems that others might have sloughed off, but even if that is so, his attention to medical issues is itself significant for understanding how he perceived his life. In a revealing phrase, he once wrote to his son Winslow, "Your mother is fairly well for her."[65] In some modest ways, how Van Devanter dealt with medical problems resembles how he understood his finances: seemingly beset by problems but getting along reasonably well, until Dollie had a serious stroke in 1928.

I begin with Van Devanter himself, using dates of letters in which he referred to the illnesses, which likely began earlier, then turn to the much more serious problems Dollie faced.

Willis: August 1910—kidney "gravel" problems.[66]

June 1920—"awful" back trouble.[67] His doctors, believing that the trouble "was largely or entirely due to permitting my suppurating upper teeth to remain my mouth too long. They think the poison got into my system and took hold of the lumbar sciatic nerves."[68] As a result, several of Van Devanter's teeth were removed.

April 1931—"Acute arthritis in my right shoulder was for a time very painful. They have now removed all of my remaining teeth and think they have eliminated the source of the trouble." A month later, Van Devanter observed that the removal "made an old man of me."[69]

October 1931—"ptomaine poisoning" for three days.[70]

January 1932—a tonsillectomy "which is supposed to make my arthritic shoulder better."[71]

Dollie: June 1910—"a surgical operation of some moment," after which "extra precautions were taken to reinforce the fastening together and to prevent the recurrence of the trouble,"[72] delicate phrasing suggesting that the ailment was gynecological.

> April 1911—an unspecified illness that required her confinement to bed.[73]
>
> December 1911—exhaustion.[74]
>
> July 1912—"pronounced stomach and bowel trouble."[75]
>
> May 1917—hospitalized for what "we were inclined to think [was] ... something in the nature of a cancer, but that does not prove to be the case, although we do not know quite what the trouble is."[76]
>
> Early 1919—anxiety: "When Dollie is driving her car and suddenly sees an approaching fire engine or anything of that sort, she involuntarily stops in the middle of the street ...

or wherever she is, and it is practically impossible for her to move on...."[77]

February 1920—influenza (along with Willis), after which "she will need a period of rest to put her on her feet properly."[78]

Winter 1921–22—"a trying winter" that "has made more than the usual draft on her nervous energies."[79]

March 1923—an unspecified gastroenterological problem, so identified in a later letter.[80]

December 1926—"a small but irritating growth in a delicate place which was removed by radium treatment at Baltimore."[81]

And then on October 27, 1928, a severe stroke that paralyzed her left side and from which she never fully recovered.[82] A letter from Brandeis has been read to assert that his colleague, rather than Dollie, had had a stroke, leading some to attribute the Justice's writing problems to it. Van Devanter reported to his family and friends the very gradual improvements Dollie experienced over the next several months: early in November she could feel things on her arm, a few weeks later, she could move her knee but not her arm or foot, a month after the stroke she had acute pain in her limbs.[83] By January, helped by "two nurses and three servants," Dollie was able to do the "prescribed exercise" of walking around the room "with little assistance," and then down a flight of stairs and outside to get to the car for a ride.[84] Three months after the stroke, Van Devanter reported a major achievement: Dollie "lifted her affected hand to her face and with it removed her spectacles."[85] During this time, Van Devanter understandably had even more difficulty than usual in doing "any constructive writing," although he reassured his former colleague John H. Clarke that he had been able to "keep up my share of the routine work of the Court."[86]

Then Dollie's improvement seemed to stall. By June, Van Devanter reported, "It has been such a long siege that she is more easily discouraged than otherwise she should be."[87] Van Devanter's reports on Dollie's medical condition dropped off dramatically, probably because she and he had become accustomed to the permanent changes in her physical ability. Still, two years after the stroke, Van Devanter reported that she was constantly in pain, sometimes to a degree that "prostrates" her.[88] Her condition varied dramatically: "getting along very well now" in March 1930, "most uncomfortable" and "suffering much pain and ... accordingly unable to get sufficient sleep and rest" a few months later.[89]

Dollie's first trip to Wiesbaden provided temporary relief at best but had been enjoyable enough that she and Willis decided to return in 1932, but as noted earlier, she passed away during this second trip, at age seventy-two.

C. Paterfamilias

Even Van Devanter's letters about his financial condition sometimes reveal how often he took on the role of paterfamilias, offering advice about all sorts of life choices. His sons Isaac and especially Winslow, his brother Spencer, and his mother were particular subjects of concern, but Van Devanter dispensed his advice quite freely to many of his correspondents. Three of Van Devanter's siblings had died early in their lives (Nora, at eight weeks of age in 1866, Isaac, at age seventeen in 1881, and Florence at age three in 1878). But Van Devanter corresponded extensively with his sisters Elizabeth, Mary, and (less extensively) Louise, although he had only intermittent contact with Spencer, who nonetheless figured in his correspondence.

Van Devanter's advice moved from the small to the large. He chastised Isaac for

misspelling a word: "Perhaps it was a mere oversight, but it is well to have it properly in mind."[90] He advised him about clothing and food: "It will also be well for you to drink plenty of good water, not too cold, and to drink only some kind of good bottled water, such as White Rock or Appolinaris."[91] In 1919, Isaac, at the age of thirty-four, moved in with his parents, and undoubtedly Van Devanter continued to provide him with paternal advice in person even though Isaac, who worked in various government bureaus, "was so busy that he does not spend much time at home."[92] More letters to the younger son Winslow are found in Van Devanter's records, probably because Isaac was already pretty much making his way in the world when Van Devanter started preserving copies of the letters he wrote. Van Devanter told Winslow he was worried about his grades, advised Isaac against smoking when he visited Winslow, and offered Winslow advice on how to keep healthy:

> Try and keep in good physical trim. Get good fruit whenever you need it. And clean out your bowels whenever they get clogged or sluggish. Your shirt bands and your collars should not be too tight. When they are they help produce throat troubles because they interfere with the circulation. A good circulation is what helps to keep the several parts of the body in healthful condition. It is a good practice to massage your neck every evening when you go to bed and every morning when you get up.... It is also a splendid practice to devote a few minutes several times a day to breathing in such way as to fill and extend every part of the lungs, the upper as well as the lower. Indian club exercises help in this way.[93]

Even when Winslow was in his twenties and had had a successful stint in the Army, his father was still correcting his writing.[94] Sometimes the Justice sounded like Polonius, offering bland home truths: "It is not a good thing to borrow trouble, but is a good thing always to make yourself useful and agreeable without becoming unduly familiar."[95] Or, "Keep at your work with just as good cheer and persistency as you can command. The persistency is indispensable and the good cheer will go a very long ways towards making the persistency effective as well as making you happy."[96] Or, in what might seem a near-quotation from *Hamlet*, "Do not make a choice in haste, and, on the other hand, do not defer it too long."[97] Winslow got married in 1925 and took a job as a bank manager in Washington,[98] and his father's letters of advice ended, though as with Isaac he probably continued to give advice to his son in person.

Willis and his siblings became estranged from their brother Spencer, an alcoholic and spendthrift[99] who, young Willis thought, preyed upon their mother's sympathies. He manifested this concern early and late. In 1914 he wrote to his aunt Elizbeth Winchell,

> It surprises me beyond measure that mother should have gone to him ... after all that she has passed through and the very severe treatment which she has received at his hands. In doing so she has taken large chances, because when he dissipates he seems to be wholly irresponsible. ... Of course, I understand her motive. It is a noble motherly instinct, but is not well directed. ... The great difficulty is that she has pampered him, his wife has done so, and both have given him everything they had. ... Of course, I have talked the matter over with her until the subject is threadbare, but all with no real effect.[100]

He sounded the same themes fifteen years later. Writing to his sister Louise after he had sent Spencer's wife some clothes

Van Devanter stepped down in 1937 when Congress passed a bill giving Supreme Court justices their full salaries as pensions, and just a short time after FDR announced his Court-packing plan. As early as 1921, Van Devanter wrote, "There is only one way of retiring, and that is to do it while you are still in good condition.... As with sleigh-riding, the time to go is when the sleighing is good."

when her husband was in a car accident, Van Devanter gave his most extensive description of Spencer, a description showing at least exasperation, perhaps more:

> Spencer always has had a false pride which has served him badly.... He always wished to be considered a millionaire notwithstanding he was merely making a living. It is doubtful that we can do anything which will really help him.... I do not know what business or employment he is engaged in. His wife's letters indicate that he is an oil promoter.... It is the kind of business for which he is not qualified. With him it is just a gamble—a mere hope that he will be some good luck get a good deal for a little.... No one can have very much influence over them in writing from a long distance.[101]

Van Devanter resented Spencer's importunings because he had to husband his limited resources "for my own situation and for those who are properly dependent upon me and who have some appreciation of what is done for them."[102] His sharpest comment was critical of Spencer's attempts to get money from their mother, who, Van Devanter observed, "feels some kind of responsibility for Spencer's misfortune and

this added to her natural affection for a child makes her exceedingly anxious to do anything she can for him."[103] In the end, Van Devanter wrote directly to Spencer, telling him that he could not get any additional money from their mother and setting strict guidelines for their contact.[104]

Willis's mother Violetta was his most constant source of concern after Dollie, particularly as Violetta grew older and more frail. She remained in Marion, Indiana, and her daughter Mary took care of her, with Van Devanter sympathizing with the burdens that placed upon Mary.[105] (Once, with his own financial situation on his mind, he seemed to think that Mary should have made larger financial contributions.) Van Devanter described his mother, at age 88, as "a remarkable woman, [who] has withstood many trials and tribulations, and has developed a positive character and a self reliance which will tend to manifest themselves disadvantageously at time when her faculties are impaired."[106] The reference to "disadvantage" may refer to Violetta's resistance to changing her ways and her vulnerability to Spencer's requests for help.

Van Devanter cautioned his mother against spending too much money; he criticized her gently for sending a Christmas telegram rather than a letter, and advised her to follow his lead in "do[ing] but little in the way of holiday gifts.[107] Mostly, though, Van Devanter expressed concern about his mother's physical condition. In 1917 when Violetta was in her late seventies, Van Devanter told her,

> [Y]ou must ... have due regard for your own age and failing strength and avoid anything approach exhaustion. You can only do about so much in the way of physical exertion, and it is particularly important with one of your years that you should avoid unnecessary anxiety and nervious [sic] strain.[108]

Five years later, Van Devanter wrote his sister Lizzie that their mother's "life will have less of worry in it" because Violetta's sister Lizzie had recently passed away.[109] By 1925 if not earlier, Van Devanter seemed to regard his mother as always near death's door. He thought that she understood that "her life was pretty certainly approaching its end"[110]; six months later her handwriting suggested that she was "writing without being able to see what she writes";[111] he made a special effort to see his mother in Marion when she was 90 because her age "admonishes me that there will be few opportunities of seeing her again."[112] That was indeed the last time he saw her. Violetta Van Devanter died in February 1933.

Retirement

Van Devanter had been thinking about retiring from the Court as early as 1929. Writing to his sister that February, he observed, "I will be 70 in April and unless there is a great change for the better in Dollie's condition I shall retire during the year. I am making no public announcement but my mind is becoming pretty well fixed on retirement."[113]

"Pretty well fixed" turned out to be "not really fixed," but Van Devanter continued to think about retirement. A year later he wrote his cousin Mary Warren, "Because of Dollie's illness I am some times inclined to give up my work which is very exacting, but as yet I have come to no definite conclusion about it."[114] In the spring of 1932, he wrote his sister, "I rather definitively concluded to retire as soon as the election was over and regardless of the outcome," even though he thought Franklin Roosevelt "a dreamer, ... far from stable, and ... inclined in directions which will not make for the country's good." President Hoover's austerity budget intervened, however, as it limited the pension available to retired Supreme Court Justices to $10,000, and Van Devanter, with his typical concern about finances, did "not like the idea

of losing half my salary by retiring" and "reconsider[ed] his "former purpose."[115]

Apparently attuned to Van Devanter's thinking, and as the Court's conservatives were beginning to show their opposition to New Deal-like programs, Justice Brandeis approached Van Devanter:

> [H]e said he wished specially to urge that I should not think of retiring; that he did not wish to see any change in the Court just now, and quite apart from that he wished me to continue on the Court; that the Court specially needed me; that no one could take my place in conference and that he thought it would be a great misfortune for the Court if I should leave.

Van Devanter thought that this might reflect Brandeis' loss "of faith in the present administration and its policies," suggesting that Brandeis wanted him to stay on the Court because of Van Devanter's conservative views.[116]

Dollie's death and Van Devanter's own health kept retirement on his mind. What tipped the balance was a new statute dealing with judicial pensions, adopted while the Court-packing plan was under siege in Congress.[117] The statutory background was complex. An 1869 statute allowed lower court judges to retire at full pay. Retired judges could sit occasionally after retirement. This implied that their salaries—for retired judges, their pay during retirement—could not be reduced because of Article III's guarantee against such reductions. The statute did not apply to Supreme Court justices because of concern that they could not sit on any other court after they retired; the result was that Supreme Court justices had to resign, not retire, and once they resigned, what they received as pensions *could* be reduced, as had occurred in 1930.

Hatton Sumners, the chair of the House Committee on the Judiciary, had been trying to eliminate this anomaly for several years. Roosevelt's Court-packing plan gave him the chance to repackage his long-standing proposal as part of a general rethinking of court organization, though his proposal was not formally bundled with the Court-packing plan. Sumners was at best a lukewarm supporter of the Court-packing plan, but he used his role as chair to leverage support for his own proposal in exchange of his support of the plan.

The Judiciary Committee approved Sumners's bill shortly after Roosevelt announced the Court-packing plan, and on February 10 it passed the House 315–75; with only ten Democrats voting no. The Senate followed on February 26, supporting the bill 76–4. Roosevelt saw no contradiction between the judicial retirement bill and the larger plan and signed it into law on March 1. Justice Van Devanter took advantage of the opportunity to retire at full pay, announcing his retirement on May 18; his letter specifically referred to Sumners' bill.

Journalists Joseph Alsop and Turner Catledge offered a more conspiratorial account, apparently based upon what they heard from their Washington sources. According to them, Senator William Borah of Idaho, who they describe as "an intimate friend" of Van Devanter, "knew that the justice was anxious to retire." He "dropped a hint to Van Devanter that his retirement would strengthen the opposition," and Van Devanter decided to step down. "The thing was planned in the utmost detail." Alsop and Catledge observed that "Van Devanter even decided to send his letter of resignation to the President on the very day" that the Senate Judiciary Committee voted down the Court-packing plan.[118] There is reason to be skeptical of this account. Alsop and Catledge do not identify their sources, but it seems likely that Senator Borah was one of them. Nothing in Van Devanter's extensive correspondence, including more than a few letters to political figures, suggests that Borah and Van Devanter were

intimate friends. And, more important, Alsop and Catledge make no mention of Sumners' judicial retirement bill; that bill precipitated Van Devanter's decision to retire, although perhaps (though I think it unlikely) he coordinated his announcement with the Judiciary Committee vote. For what it is worth, I note that in 1921, in the course of a letter filled with anecdotes about judicial vacancies and retirements, Van Devanter wrote, "There is only one way of retiring, and that is to do it while you are still in good condition.... As with sleigh-riding, the time to go is when the sleighing is good."[119]

Van Devanter spent the remaining years of his life in New York and Washington, where he passed away on February 8, 1941. His contribution to the Supreme Court's jurisprudence was slim except to the extent that he voted with the Court's conservatives during the New Deal, yet this account of his life should help the reader understand that Supreme Court justices are in many ways people like the rest of us, worrying about money, health, and our loved ones. That, I think, is a lesson worth learning.

Author's Note: This essay is based upon research done for, and draws upon, MARK TUSHNET, THE OLIVE WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT—THE HUGHES COURT, 1930–1941: FROM PROGRESSIVISM TO PLURALISM (forthcoming 2021). In the course of that research, I read Van Devanter's correspondence from 1910 to 1937—his period of Court service. I note that some of my conclusions might be supplemented by material from his pre-Court correspondence, though I doubt that such material would change the views offered here in any substantial way.

Notes

[1] 273 U.S. 135 (1927).

[2] *See, e.g.*, Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1291 n. 74 (2001) (referring to the period 1921–28, and observing, "Despite his onerous duties as Chief Justice, Taft wrote an astonishing 249 opinions. Brandeis authored 193 opinions, McReynolds 172, and Van Devanter only 94."). Of the justices serving more than a handful of terms and with whom Van Devanter served, his average of thirteen majority opinions per term was the lowest; George Sutherland came next, with eighteen, and every other justice who served at least nine terms averaged twenty or more majority opinions per term. I thank Joshua Boston, Political Science Department, Bowling Green State University, for extracting the relevant data for me, from the Supreme Court Data Base, and to Arevik Avedian of the Harvard Law School Library for providing me with a helpful tabular presentation of the data.

[3] The first use of this phrase I have found is in MERLO PUSEY, CHARLES EVANS HUGHES, 667 (1951). Pusey places the phrase in quotation marks but does not cite a source for it. *See also* DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 186 (1974, originally published in 1936) (writing that Van Devanter "is afflicted with what psychiatrists call 'neurotic pen' ....").

[4] The phrase is used by Herbert Wechsler, quoted in THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 53 (Katie Louchheim ed. 1983).

[5] WILLIAM D. BADER & FRANK J. WILLIAMS, UNKNOWN JUSTICES OF THE UNITED STATES SUPREME COURT xi (2011).

[6] There are two dissertations dealing with Van Devanter's career in Wyoming: Lewis Gould, *Willis Van Devanter in Wyoming Politics, 1884–197* (Ph.D. dissertation, Yale University, 1966); M. Paul Holsinger, *Willis Van Devanter: The Early Years, 1859–1911* (Ph.D. dissertation, University of Denver, 1964).

[7] This and the following paragraphs are based upon "Willis Van Devanter (1859-1941)," in SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 252 (Timothy L. Hall ed. 2001): David Burner, "Willis Van Devanter, 1859–1941," III THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (Leon Friedman & Fred L. Israel eds. 1995); and PEARSON & ALLEN, NINE OLD MEN,186–95, which appears to be one source on which the preceding short biographical sketches draw.

[8] Lacey served as chief justice for two years, then left the court to open a practice in Cheyenne.

[9] "Willis Van Devanter, 1911–1937," THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012, 283–84 (3d. ed. Clare Cushman ed. 2013).

[10] Wallace H. Johnson, *Willis Van Devanter – A "Re-Examination*," 1 WYOMING L. REV. 403, 407 (2001).

[11] On the history of the circuit, see The Historical Society of the United States Courts in the Eighth Circuit, "Short History of the U.S. Court of Appeals for the Eighth Circuit," available at

https://www.lb8.uscourts.gov:444/pubsandservices/histsociety/coa8_shorthist.html, archived at https://perma.cc/S46Q-TQVZ.

[12] FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, 218 (1956). Van Devanter contributed financially to the Wyoming Republican party after he joined the Supreme Court, and he occasionally corresponded with some of the state's Republican leaders, commenting and offering advice on local politics, but the correspondence was not extensive or detailed. For an example, see Willis Van Devanter to Samuel T. Corn, Oct. 25, 1913, Van Devanter Letters, Willis Van Devanter Papers, Manuscript Division, Library of Congress, Box 9, letterbook 24 (Corn had been a member of the Wyoming Supreme Court) [hereafter cited as Papers].

[13] Greeley used the phrase in an editorial published on July 13, 1865, in the *New York Herald*.

[14] The information in this and the following paragraphs is drawn from M. Paul Holsinger, *The Appointment of Supreme Court Justice Van Devanter: A Study of Political Preferment*, 12 AM. J. LEGAL HIST. 324 (1968).

[15] McKinley appointed John Richards, a fellow Ohioan, to the position.

[16] Holsinger, *Appointment of Supreme Court Justice Van Devanter*, 334.

[17] *Ibid.*, 334–35.

[18] *Id.*, 334.

[19] David J. Danelski, "An Exploratory Study of Opinion Assignment by the Chief Justice Revisited," in THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE 50 (David J. Danleski & Artemus Ward eds. 2016).

[20] *See* text accompanying notes 35–36 *infra*.

[21] Willis Van Devanter [hereafter WVD] to John C. Pollock, May 16, 1921, Papers, Box 12, letterbook 32.

[22] WVD to Justice John C. Clarke, June 9, 1928, Papers, Box 14, letterbook 39.

[23] WVD to Charles Nagel, April 19, 1910, Papers, Box 8, letterbook 19.

[24] WVD to A.C. Campbell, Jan. 17, 1927, Papers, Box 14, letterbook 37.

[25] William Howard Taft to Robert A. Taft, Mar. 17, 1929, *quoted in* Robert A. Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1294 n. 86 (2001).

[26] *United States v. Kras*, 409 U.S. 434, 463 (1973) (Marshall, J., dissenting).

[27] Melvin I. Urofsky, *William O. Douglas As a Common Law Judge*, 41 DUKE L.J. 133, 147 n. 103 (1991) (quoting Urofsky's interview with Deutsch).

[28] WVD to Nagel, April 19, 1910.

[29] *Quoted in* BADER & WILLIAMS, UNKNOWN JUSTICES, 118.

[30] *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 330 (Melvin I. Urofsky ed., 1985).

[31] THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 171 (David J. Danelski & Joseph S. Tulchin eds., 1973).

[32] Harlan Fiske Stone, *Associate Justice Van Devanter: An Appraisal*, 28 A.B.A. J. 458, 459 (1942)

[33] 290 U.S. 398 (1934).

[34] WVD to Mrs. Lacey, Jan. 23, 1934, Papers, Box 17, letterbook. I note that Van Devanter rarely wrote in his letters about the Court's work except to his retired colleague John Hessin Clarke.

[35] *Ibid.*

[36] Danelski, "The Influence of the Chief Justice," 25–26.

[37] *Ibid.* at 26.

[38] *Id.* at 73 (quoting William D. Mitchell).

[39] Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 788 (1957). *See also* BADER & WILLIAMS, UNKNOWN JUSTICES, 118 (quoting a letter from Taft to Robert A. Taft describing Van Devanter as "the mainstay of the Court" and "my Chancellor").

[40] "Willis Van Devanter, 1911–1937," THE SUPREME COURT JUSTICES, 285.

[41] WVD to John C. Pollock, May 26, 1921, Papers, Box 12, letterbook 32.

[42] PUSEY, CHARLES EVANS HUGHES, 667, and "stolid and colorless," WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941, 21 (2007).

[43] Quoted in Danelski, "The Influence of the Chief Justice," 73.

[44] WVD to T. Eaton & Co, Oct. 23, 1914, Papers, Box 10, letterbook 25.

[45] WVD to Mrs. Isaac Van Devanter, Jan. 9, 1911, Papers, Box 8, letterbook 21.

[46] WVD to Mrs. David J. Brewer, Oct. 9, 1914, Papers, Box 10, letterbook 25; WVD to William Corcoran Hill, Nov. 30, 1925, Papers, Box 13, letterbook 36. In 1929, Van Devanter and Dollie moved to an apartment "where housekeeping will be attended with less effort." WVD to Mary Lawrence Kelley (his sister), Oct. 4, 1929, Papers, Box 15, letterbook 41. Van Devanter's son Isaac sometimes resided at the apartment after he took a job, and Van Devanter's sisters moved in after Dollie died, one temporarily in 1937 and the other permanently.

[47] WVD to Industrial Club, Dec. 23, 1911, Papers, Box 9, letterbook 23.

[48] WVD to George W. Switzer, June 21, 1913, Papers, Box 9, letterbook 24.

[49] In 1929, Van Devanter wrote a friend, "My expenses have been very heavy of late but they have all been paid currently. I am not in debt, nor have I made any draft

on Mrs. Van Devanter's funds." WVD to Dennis Flynn, April 29, 1929, Papers, Box 15, letterbook 41.

[50] WVD to Montgomery Webster, Nov. 4, 1929, Papers, Box 15, letterbook 42.

[51] Mrs. Van Devanter to Grant Van Sant, Dec. 15, 1922, Papers, Box 12, letterbook 33. The letter is signed in Dollie's name but clearly was written by her husband.

[52] Mrs. Van Devanter to William Mitchell, May 26, 1923, Papers, Box 13, letterbook 23.

[53] WVD to Webster, Nov. 22, 1828, Papers, Box 15, letterbook 40. Mrs. Van Devanter to Mitchell, April 19, 1924, Papers, Box 13, letterbook 34, recounts the investment's history.

[54] WVD to Mrs. John W. Lacey (his sister Elizabeth), March 14, 1933, Papers, Box 17; WVD to Lacey, March 7, 1933, Papers, Box 17. (The letterbook numbers for these letters are unavailable because of the closure during the pandemic of the Manuscript Reading Room of the Library of Congress.)

[55] Van Devanter sold the island in 1929. For a description life in Georgian Bay from the early 1900s through the 1930s, see PAUL MCMAHON, ISLAND ODYSSEY: A HISTORY OF THE SAN SOUCI AREA OF GEORGIAN BAY 99–149 (1990).

[56] WVD to Lee Miles, June 16, 1926, Papers, Box 14, letterbook 37; WVD to Lucille Jennings, May 9, 1922, Papers, Box 12, letterbook 33.

[57] WVD to James B. Sheehan, Oct. 5, 2014, Papers, Box 20, letterbook 25.

[58] WVD to M.H. Ludwig, Feb. 7, 1916, Papers, Box 10, letterbook 26. WVD to C.J. Doherty, May 2, 1916.

[59] WVD to Herb Hudgin, Oct. 25, 1922, Papers, Box 12, letterbook 23.

[60] WVD to Walter Haight, June 14, 1924, Papers, Box 13, letterbook 35.

[61] WVD to Mrs. S.L. Hariden (his sister Louise), May 31, 1917, Papers, Box 11, letterbook 28.

[62] WVD to Mary, June 24, 1927, Papers, Box 14, letterbook 38.

[63] WVD to C.O. Vandevanter, March 9, 1927, Papers, Box 14, letterbook 37. Dollie, who hired a "courier maid" in Europe, apparently paid for the trip out of her own funds. WVD to Lizzie (Elizabeth), March 17, 1929, Papers, Box 14, letterbook 37 (asking whether Lizzie would like to go along and noting that Dollie would pay); WVD to Mary, June 7, 1927, Papers, Box 14, letterbook 38 (referring to the courier maid).

[64] WVD to Mrs. John W. Lacey, Nov. 3, 1919, Papers, Box 11, letterbook 30.

[65] WVD to Winslow, Jan. 26, 1921, Papers, Box 12, letterbook 32.

[66] WVD to John Lacey, August 3, 1910, Papers, Box 8, letterbook 20.

[67] WVD to Winslow Van Devanter, June 14, 1920, Papers, Box 12, letterbook 21.

[68] WVD to John C. Pollock, June 14, 1920, Papers, Box 12, letterbook 21. The tooth removals are referred to in a letter to his mother-in-law. WVD to Mrs. Burhans, June 15, 1920, Papers, Box 12, letterbook 21.

[69] WVD to Marion Lacey, April 15, 1931, Papers, Box 16, letterbook 44; WVD to William Meyers, May 13, 1931, Papers, Box 16, letterbook 44.

[70] WVD to Lizzie, Oct. 6, 1931, Papers, Box 16, letterbook 45.

[71] WVD to Lizzie, Jan. 31, 1932, Papers, Box 16, letterbook 45.

[72] WVD to Mrs. Koebke, June 6, 1910, Papers, Box 8, letterbook 19; WVD to Lizzie, June 21, 1910, Papers, Box 8, letterbook 20.

[73] WVD to Isaac Van Devanter, April 7, 1911, Papers, Box 8, letterbook 21.

[74] WVD to John Salyer, Dec. 26, 1911, Papers, Box 9, letterbook 23.

[75] WVD to Mother, July 2, 1912, Papers, Box 9, letterbook 23.

[76] WVD to Mother, May 17, 1917, Papers, Box 11, letterbook 28.

[77] WVD to [Elizabeth], Feb. 11, 1919, Papers, Box 11, letterbook 30.

[78] WVD to Samuel VanSant, Feb. 3, 1920, Papers, Box 12, letterbook 31.

[79] WVD to Lucille Jennings, May 9, 1922, Papers, Box 12, letterbook 33.

[80] WVD to —, April 12, 1923, Papers, Box 13, letterbook 34. WVD to Martin Rehfuss, Oct. 16, 1923, Papers, Box 13, letterbook 34.

[81] WVD to Mary, Dec. 9, 1926, Papers, Box 14, letterbook 37.

[82] WVD to Mary, October 28, 1927, Papers, Box 14, letterbook 38. "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER (Melvin I. Urofsky & David W. Levy eds., Norman, University of Oklahoma Press, 1991), 310 (letter dated Nov. 13, 1927, several weeks after Dollie's stroke: "And Van Devanter has had a stroke which bears heavily upon him. But his work in conference is unimpaired."). Presumably Brandeis intended to write "Van Devanter's wife."

[83] WVD to Mary, Nov. 3, 1927, Papers, Box 14, letterbook 38; WVD to Dennis Flynn, Nov. 11, 1927, Papers, Box 14, letterbook 38; WVD to Braden Vendeventer, Dec. 10, 1927, Papers, Box 14, letterbook 38.

[84] WVD to Braden Vandeventer, Dec. 15, 1927, Papers, Box 14, letterbook 38; WVD to Braden Vandeventer, Jan. 9, 1928, Papers, Box 14, letterbook 38; WVD to Braden Van Devanter, Jan. 12, 1928, Papers, Box 14, letterbook 38.

[85] WVD to Mrs. Braden Vandeventer, Jan. 24, 1928, Papers, Box 14, letterbook 38.

[86] WVD to Braden Vandeventer, Dec. 15, 1927, Papers, Box 14, letterbook 38; WVD to Justice Clarke, Dec. 15, 1927, Papers, Box 14, letterbook 38.

[87] WVD to Mary, June 8, 1928, Papers, Box 14, letterbook 38.

[88] WVD to Lizzie, Dec. 26, 1929, Papers, Box 15, letterbook 42.

[89] WVD to Lizzie, March 6, 1930, Papers, Box 15, letterbook 42; WVD to Dennis Flynn, Papers, Box 16, letterbook 43.

[90] WVD to Isaac, June 27, 1911, Papers, Box 9, letterbook 22.

[91] WVD to Isaac, Sept. 12, 1911, Papers, Box 9, letterbook 22.

[92] WVD to Emma Hammond, Sept. 26, 1928, Papers, Box 15, letterbook 40.

[93] WVD to Winslow, Feb. 11, 1916, Papers, Box 10, letterbook 26.

[94] WVD to Winslow, May 12, 1919, Papers, Box 11, letterbook 30 ("a part of the resignation [letter, from Army service] is not expressed in good English, and it is too long.... Don't let my criticism worry you, but give it a lodgment in your mind so that it may serve you as a guide in the future.").

[95] WVD to Winslow, March 10, 1919, Papers, Box 11, letterbook 30; WVD to Winslow, May 14, 1918, Papers, Box 11, letterbook 29 ("Always maintain a state of composure as nearly as you can. Do not worry unnecessarily and don't pay undue attention to mere rumors or conjectures. It is entirely right to be looking to the future, but never let that take your attention from what you have in hand. Always avoid getting into an undue state of anxiety.").

[96] WVD to Winslow, March 8, 1918, Papers, Box 11, letterbook 28.

[97] WVD to Winslow, May 6, 1920, Papers, Box 12, letterbook 31. The letter also advised Winslow against starting out with a job in the government: "Occasionally it is instructive, affords some opportunity for demonstrating one's ability and leads to something better in public or private life, but generally it is the other way."

[98] WVD to Mother, Feb. 9, 1925, Papers, Box 13, letterbook 35.

[99] Declining to pay for some medical costs Spencer incurred, Van Devanter wrote, "I very sincerely hope that you have not been drinking again ... and yet am fearful that you may have been." WVD to Spencer, Jan. 14, 1914, Papers, Box 9, letterbook 24.

[100] WVD to Elizabeth Winchell, April 3, 1914, Papers, Box 9, letterbook 24.

[101] WVD to Louise, Jan. 11, 1929, Papers, Box 15, letterbook 40.

[102] WVD to Mother, April 8, 1915, Papers, 10, letterbook 25.

[103] WVD to Lizzie (Elizabeth), Oct. 30, 1930, Papers, Box 16, letterbook 43.

[104] WVD to Spencer, Oct. 7, 1931, Papers, Oct. 7, 1931, Box 16, letterbook 45.

[105] WVD to Lizzie, Papers, Box 16, letterbook 45. *See also* WVD to Lizzie, Oct. 30, 1930, Papers, Box 16, letterbook 43 ("Mary does a very great deal for Mother," visiting her often and having her to dinner.). *See* WVD to Lizzie, Jan. 11, 1923, Papers, Box 12, letterbook 33 ("Mary does very little for others [referring to finances] considering what she has to do with, but she thoroughly believes that she is very liberal. Of course Mary has been subjected to severe illness and full allowance should always be made for that.").

[106] WVD to Mary, Dec. 28, 1926, Papers, Box 14, letterbook 37.

[107] WVD to Mother, Jan. 3, 1918, Papers, Box 11, letterbook 28; WVD to Mother, Dec. 17, 1917, Papers, Box 11, letterbook 28.

[108] WVD to Mother, Feb. 27, 1917, Papers, Box 10, letterbook 27.

[109] WVD to Lizzie, Oct. 8, 1922, Papers, Box 12, letterbook 33.

[110] WVD to Lizzie, Oct. 19, 1925, Papers, Box 13, letterbook 36.

[111] WVD to Lizzie, April 7, 1926, Papers, Box 14, letterbook 37.

[112] WVD to Lizzie, May 7, 1929, Papers, Box 15, letterbook 41.

[113] WVD to Lizzie, Feb. 12, 1929, Papers, Box 15, letterbook 40.

[114] WVD to Mary Warren, Dec. 18, 1930, Papers, Box 16, letterbook 43.

[115] WVD to Mrs. John W. Lacey, Oct. 26, 1932, Papers, Box 17, letterbook —; WVD to Lacey, Oct. 7, 1932, *ibid.*

[116] WVD to Lacey, June 23, 1934, Papers, Box 18, letterbook —. Burt Solomon reports that in 1935 Brandeis "helped to dissuade" Van Devanter from retiring in 1935 because of ill health, quoting a note saying, "The Court never needed you more." BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY 195 (2009).

[117] For a full account of the events described in the following paragraphs, see Judge Glock, *Unpacking the Supreme Court: Judicial Retirement and the Road to the 1937 Court Battle*, 106 J. AM. HIST. 47 (2019).

[118] JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 206 (1938).

[119] WVD to John C. Pollock, May 7, 1921, Papers, Box 12, letterbook 32.

The Judicial Bookshelf

DONALD GRIER STEPHENSON JR.

Along with other horrific events, the year 2020 will remain haunting because of the covid-19 scourge with its widespread, upending, and enduring hardships and effects that, in reaching the Supreme Court, closed the building, caused the justices to announce decisions and opinions digitally, and in May for the first time necessitated oral arguments via tele-conferencing with real-time public audio streaming. Wholly unrelated to the virus, the nation had already witnessed an event akin to only three previous occasions in American history: the trial in the Senate chamber of a president of the United States following impeachment by the House of Representatives.[1] The development called for application of one of the Constitution's unequivocal provisions: "When the President of the United States is tried, the Chief Justice shall preside."[2]

The single reference in the Constitution to the chief justice in the context of an impeachment trial offers a hint that while most of the Framers from the outset of the Convention of 1787 assumed the need for a national judiciary to correct what Alexander Hamilton in *Federalist* No. 12 described as a "circumstance which crowns the defects of the Confederation," the document they crafted speaks only sparingly about the federal judiciary. As one finds in Articles I, II, and III, the words "supreme court" occur six times, "justice," apart from "Chief Justice," appears not once, and the word "judges" only three. Throughout their deliberations members of the convention seem nonetheless to have given some thought to the role a supreme judicial figure might play in the new political system. Even though neither the Virginia nor New Jersey plans—the two principal competing models introduced at the convention—specifically mentioned a chief justice, the former's council of revision was to possess authority to invalidate state and national laws. That the council's membership included members of the national judiciary suggested participation by a presiding judge.[3] Furthermore, Connecticut delegate Oliver Ellsworth, who would have a large hand in drafting the Judiciary Act of 1789 and became the third chief justice, proposed that the new government contain a council consisting of department heads to assist the president, with the chief justice as a member.

This, however, was an idea Elbridge Gerry opposed, believing that "[t]hese men will also be so taken up with other matters as to neglect their own proper duties."[4] The suggestion for what would be called a council of state reappeared in proposals by Pennsylvania's Gouverneur Morris and South Carolina's Charles Pinckney, with the chief justice being charged with recommending

> such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice and such as may promote useful learning and inculcate sound morality throughout the Union.[5]

In their view, the chief justice would be the presiding officer of the council in the absence of the president. Yet their proposal failed to gain traction, thus eliminating what would have been a blending of the judicial with the executive function. Then some thirteen days before the convention adjourned, the Committee on Postponed Matters urged that the chief justice replace the vice president (already designated as president of the Senate) in a situation where the president had been impeached and was on trial.[6] After the title "chief justice" survived the final vote at the convention, the actual existence of the office awaited the discretion of Congress.

Congress acted on September 24, 1789, declaring that "the supreme court of the United States shall consist of a chief justice and five associate justices,"[7] and thereby shifting the initiative to the president who made his initial judicial nominations on the same day. Filling the Bench was a responsibility George Washington took seriously, as he indicated three days later to Edmund Randolph,[8] the first attorney general: "Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." According to Charles Warren, the selection of a chief justice "was by far the most important and had given to the President the greatest concern. Rightly he felt that the man to head this first Court must be not only a great lawyer, but a great statesman, a great executive and a great leader as well."[9] For Chief Justice, Washington's choice was John Jay,[10] a "gentleman" who in John Marshall's estimation "[f]rom the commencement of the revolution... has filled a large space in the public mind,"[11] and who, as Washington expressed to Jay himself, possessed the "talents, knowledge and integrity" necessary to head "that department which must be considered as the keystone of our political fabric."[12]

In choosing Jay, the president passed over James Wilson, who was instead named one of the five initial associate justices but who in April had shamelessly offered himself "to your Excellency without reserve" noting "that my aim rises to the important office of Chief Justice of the United States."[13] Interestingly, Wilson had anticipated the title of the Court's presiding officer that is familiar today, although Jay himself and successor chiefs John Rutledge, Oliver Ellsworth, John Marshall, Roger B. Taney, Salmon P. Chase, and Morrison R. Waite were each commissioned "Chief Justice of the Supreme Court of the United States." Not until President Grover Cleveland appointed Melville Fuller was the Court's head commissioned "Chief Justice of the United States,"[14] in a delayed reflection of the Act of July 13, 1866,[15] providing that the Court shall "hereafter consist of a Chief Justice of the United States and six associate justices," phrasing repeated in the act of April 10, 1869,[16] when the Court's roster was re-set at eight associate justices plus the chief justice.[17] The fine-tuning of the title symbolically manifested the mammoth constitutional and statutory changes brought about by the Civil War and Reconstruction as

the "nation, distinct from the states, became a permeating conception."[18]

Washington's view of and expectations for the office of chief justice anticipated both stability and influence, objectives, however, not realized until the tenures of Marshall (1801–1835) and Taney (1836–1864). This remarkable stretch of sixty-three years followed the Court's initial twelve years, a period that alone witnessed three chiefs. Such turnover suggested that whatever distinction the office "first enjoyed was diluted by the attitude of early incumbents toward it."[19] The eleven chiefs following Taney (from Chase through William H. Rehnquist) enjoyed tenures ranging from five years (Harlan Fiske Stone) to twenty-two years (Fuller) with an average of thirteen and a median of eleven.[20] Moreover, by the early twentieth century, if not before, the names of chief justices became synonymous with periods of Supreme Court history, as in the Marshall Court, Taney Court, Waite Court, and so on. Use of such designations, however, has been typically more for historical convenience than for historical accuracy in terms of a particular chief's influence with other justices. The office has thus guaranteed not that the Court's head will be a leader but only that a chief justice will be *primus inter pares*, first among equals. As in most small group settings, actual leadership is earned, not conferred, a reality that continues to be reflected by books on the Supreme Court.

The Burger Court and the Rise of the Judicial Right

The tenure of the fifteenth chief justice is the subject of **The Burger Court and the Rise of the Judicial Right** by Michael Graetz and Linda Greenhouse.[21] The former is on the law faculty at Columbia University and holds an emeritus position at Yale's law school, and the latter for several decades reported on the Supreme Court for the *New York Times* and now teaches at Yale University's law school. Among contemporary journalists, she surely must be the only one whose surname has become synonymous with a supposed phenomenon of judicial behavior (the so-called Greenhouse Effect). According to a speech to the Federalist Society in 1992 by Judge Laurence Silberman of the Court of Appeals for the District of Columbia Circuit, some justices were believed at the time to have adopted a more progressive position in deciding cases as a way of achieving favorable coverage by journalists.[22]

Graetz and Greenhouse direct the reader's attention to a judicial era that began with President Richard Nixon's selection of Warren E. Burger as chief justice in mid-1969.[23] His arrival at the Court handily illustrates an observation made some twelve years later by Justice Sandra Day O'Connor. Reflecting generally on Supreme Court appointments two years after her own, she observed that the "decision from the nominee's viewpoint is probably a classic example of being the right person in the right spot at the right time."[24]

For Burger, it proved truly to be the *right time* as a pair of events combined to produce a vacancy on the Court. On June 26, 1968, President Lyndon Johnson announced Chief Justice Earl Warren's intention to retire, with his departure to become effective upon the confirmation of a successor, news that was quickly followed by the nomination of Justice Abe Fortas to take Warren's place. Opposition to Fortas, however, formed nearly immediately along several fronts—resistance which even the president, a former Senate majority leader, uncharacteristically was incapable of surmounting. After four days of deliberation, the Senate voted 45–43 on October 1 to cut off debate, well shy of the margin necessary to end the anti-Fortas filibuster. Two days later, and less than a month before the 1968 elections, the president, at Fortas's request, withdrew the ill-fated nominee's name. The occasion marked not only the first time nomination of

a member of the Court had been stymied by a filibuster but only the second failed Supreme Court nomination in the twentieth century. Lame-duck since his surprise announcement on March 31 not to seek reelection, Johnson declined to submit another nominee to the Senate. This inaction ensured that the choice of a new chief justice would fall to his successor.

Thus, with the new president in need of a chief justice, time and circumstance combined to make Burger the *right person*. Nixon's campaign in 1968 for the White House had been in major part a campaign against the Warren Court, particularly some of its decisions on criminal justice that too often had favored, Nixon contended, the "criminal forces" as opposed to "the peace forces of the country."[25] Furthermore, Burger, as a judge on the Court of Appeals for the District of Columbia Circuit since 1956, had been openly critical of some of the same decisions.[26] Significantly, in May 1967, Burger, in a commencement address at Ripon College, continued the same theme, with his remarks being excerpted in a major news weekly magazine that soon came to Nixon's attention.[27] Thus, for the new president, Burger seemed made to order not only in filling a judicial seat but manifestly in making good on a campaign pledge to begin to roll back some of the Warren Court's handiwork.[28]

Finally, as a judge on what many regard as the second most important tribunal in the nation, Burger, age sixty-one, had also been in the *right place*. His seat on the appeals court not only had provided visibility for his views, but followed years of experience in government that began with his selection in 1953 as head of the civil division in the Department of Justice, a position itself made possible by work on candidate Dwight Eisenhower's behalf, as a member of the Minnesota delegation, at the Republican national convention in Chicago in 1952.

Burger's swearing in on June 23 not only marked the end of the Warren Court but occurred barely five weeks after Justice Abe Fortas's resignation under ethical clouds on May 14. Arrival of the new chief justice also coincided with the beginning of some eighteen months of what can only be described as turbulence in the Supreme Court's roster. This period witnessed both a protracted struggle to achieve confirmation of Justice Fortas's successor as well as the retirements and replacements of two members of the Court in quick succession.[29] Including the continuing members of the Warren Court after June 23—themselves a coterie of seven justices appointed by four presidents—Burger served with a total of twelve justices, three of whom (William J. Brennan Jr., Byron R. White, and Thurgood Marshall) for his entire seventeen-year tenure. Three of the twelve (Harry A. Blackmun, Lewis F. Powell Jr., and William H. Rehnquist) like himself were named by Nixon, one (John Paul Stevens) by President Gerald R. Ford, and one (Sandra Day O'Connor) by President Ronald Reagan. It is the record of this baker's dozen, especially the pattern woven by the Nixon appointees, on which Graetz and Greenhouse largely focus.

Analysis of the Supreme Court's work over any stretch of seventeen years presents a sizeable challenge, one generally overcome in this instance not only by the authors' straightforward writing style but also by the thoroughness of their research and the serviceable structure chosen for their book. Along with an introduction and conclusion, the book is divided into five parts: Crime, Race, Social Transformation, Business, and the Presidency. Each part in turn consists of at least two and as many as four chapters. It is through this structure that the authors attempt to digest many of the Burger Court's 2,738 decided cases.[30] An appendix helpfully includes biographical sketches of Burger and his colleagues, although the addition of a separate index of cases would have been

immensely helpful. (As it is, the index contains an entry labeled "cases of the Supreme Court" followed by the names of dozens of cases. Case names also appear following the name of the particular justice who filed an opinion in the case.)

For some readers, the authors might beneficially have commented near the beginning on part of the second half of their title: the "Judicial Right," a term or phrase that is not entirely self-defining. The authors appear to use it as contemporary journalists often do in referring to judges who favor fewer rights for criminal suspects, favor less sensitivity to claims of race and gender discrimination, stress fewer restrictions on business operations, and so forth. "Judicial right," however, might also bring to mind debates over different approaches to constitutional interpretation, as in originalism, literalism, and whether one should view the Constitution as a "living" document, the meaning of which expands with a changing nation. While debates over such approaches continue unresolved in the public sphere, they were especially lively and frequent during the 1980s as illustrated by exchanges between notables such as Judge Robert Bork and Professor Laurence Tribe.[31] Similarly, "judicial right" would have a specific meaning in the mid-1930s and again a different one in the 1950s and 1960s with debates on the Bench about judicial activism and restraint.

That quibble aside, the introduction appropriately alerts the reader to two narratives that resurface and compete throughout the book. One narrative appeared in remarks in Philadelphia on September 17, 1987, by the then retired chief justice taking part in the celebration of the bicentennial of the United States Constitution: "If we remain on course, keeping faith with the vision of the Founders, with freedom under ordered liberty, we will have done our part to see that the great new idea of government by consent—by We the People—remains in place."[32] Justice Thurgood Marshall, then in his twenty-first year on the Court and still its only African-American member, had articulated the other narrative in Hawaii four months earlier. Cautioning his audience to be wary of "flagwaving fervor" surrounding the celebrations of 1987, he opined that they invited "a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it is said we now enjoy. ...I cannot accept this invitation." Instead, the government the framers devised was "defective from the start, requiring several amendments, a civil war, and momentous transformation" to realize its promise. Credit for what the Constitution had wrought belonged instead "to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality' and who strived to better them."[33]

Also in the introduction one finds the authors' central question: whether the "received learning"[34] about the Burger Court is correct. They characterize that scholarship as viewing the Burger era as one "during which nothing much happened," as suggested by the subtitle of a volume published in 1983: "The Counter-Revolution That Wasn't."[35] Yet to probe whether or not a major change occurred makes sense only alongside an exposition of what came before, that is, the Supreme Court during Chief Justice Earl Warren's tenure (1953–1969). For the authors, the "overarching theme" of the Warren Court was equality. During Warren's tenure, criminal "defendants acquired enforceable rights against compelled self-incrimination and illegally seized evidence. The political dominance that rural America held over the nation's legislatures was ended by the new jurisprudence of one person, one vote. Organized prayer was ejected from public school classrooms,"[36] thus marking a period during which the Supreme Court not only made a profound difference in American life but did so as surely the most result-oriented Court in American history. By one count, in the approximately 150 years

before Warren's appointment, the Court had overruled eighty-eight of its precedents. In Warren's sixteen years, it added another forty-five to the list. Truly barely an aspect of life went untouched by its decisions. While not in the least downplaying the significance of the Warren years, Graetz and Greenhouse reach the conclusion that something of major significance happened during the Burger era as well, even if they do not venture as far as another scholar more than a decade earlier who maintained that "next to its predecessor" the Burger Court "may have been the most activist in our history."[37]

Acknowledging the Warren Court's tendency to paint "in broad strokes," the authors concede that any successor court would have to "fill in the blanks," provide details, and to "make highly consequential choices that in many ways shaped the society we live in today."[38] In exploring the "choices" made by the Burger Court alongside those of its predecessor, however, the authors offer a grim appraisal.

> For Earl Warren and his Court, the Constitution was an engine of social change. It was the quest for greater equality... that drove constitutional interpretation. No such lodestar drew the Burger Court," with equality "taking a backseat to other values: to the prerogatives of states and localities...to the preservation of elite institutions, to the efficiency of the criminal justice system, to the interests of business, and above all to rolling back the rights revolution the Warren Court had unleashed."[39]

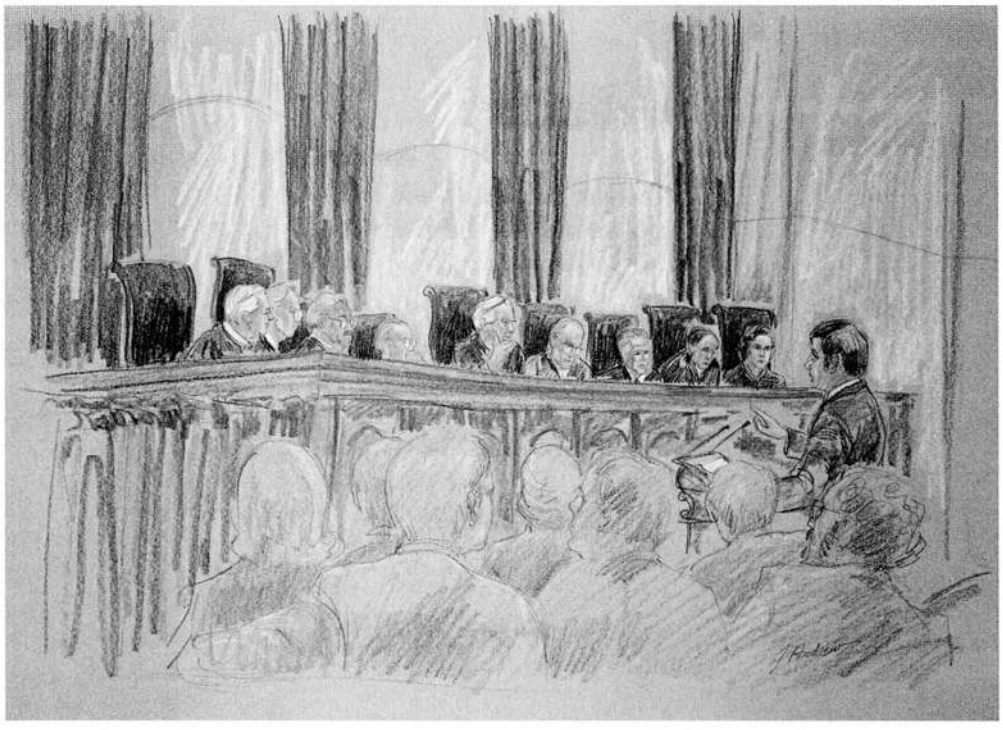
Yet so bold a statement, made as it was near the end of the book seems even harsher than one made in the Introduction:

> True, the Burger Court defied expectations in failing to overturn the Warren Court's leading criminal law precedents. But it left those precedents hollowed out, while also erecting daunting barriers to defendants seeking to vindicate their right in federal court. The school prayer precedents remain, but Burger Court decisions gave religion and its symbols a more prominent place in the public square.[40]

The "glaring exception" to the Burger Court's "conservative profile" was in the area of rights for women, including abortion, but even this in their view was a surface exception at most. While "no Warren Court decision suggested that the Constitution's guarantee of equal protection had anything to do with discrimination on account of sex," the Burger Count never "opened the door wide enough to encompass the understanding that discrimination on the basis of pregnancy is a form of sex discrimination. ... And the right to terminate a pregnancy did not, in the Court's view, include a right to public financial assistance in obtaining an abortion."[41]

Moreover, admitting that "both Courts shared a deep concern for racial equality," the authors contend that the Burger Court's"concern was to make sure that white applicants to schools and jobs were not being asked to pay too heavy a price for the nation's racial past."[42] Disavowing an intention "to depict the Burger Court as serving the Reagan Revolution," Graetz and Greenhouse nonetheless insist that the Burger Court "played a crucial role in establishing the conservative legal foundation for the even more conservative Courts that followed."[43]

At least since the publication of Alpheus Thomas Mason's biography of Chief Justice Harlan Fiske Stone well over six decades ago,[44] study of particular justices and understanding of the judicial process have been enriched by use of the papers of the justices archived in various collections. **The Burger Court** is no exception. Throughout, Graetz



The Burger Court and the Rise of the Judicial Right **by Michael Graetz and Linda Greenhouse is divided into five sections: Crime, Race, Social Transformation, Business, and the Presidency. Above is a sketch of the Burger Court in the 1980s.**

and Greenhouse make use of the papers of Justices Blackmun, Powell, and Stewart. (Chief Justice Burger's papers, housed at the College of William and Mary, are closed to the public until 2026.[45]) Moreover, because justices routinely send notes or comments to other justices, elements of one justice's papers in effect become part of another's. Moreover, a justice's papers routinely include exchanges between a justice and one or more law clerks, so access to a single collection may cast a broad net across various Chambers.

Use of such manuscript sources enhances traditional reliance on the text of cases themselves, as illustrated by the authors' treatment of *Washington v. Davis*,[46] which they maintain "would prove to be one of the Burger Court's foundational constitutional rulings."[47] Involving workplace discrimination, the decision mirrored *Griggs v. Duke Power Company*,[48] because of a major difference in its outcome. Coming as it did early in the Burger years, *Griggs* involved Title VII of the Civil Rights Act of 1964 and remains important because it construed the statutory provision to encompass not only instances where a policy or practice of an employer—here a privately owned electric utility—embodied intentional discrimination but also where the policy had a disparate or discriminatory impact not justified by business necessity. The distinction was crucial in litigation because *effect* would ordinarily be easier to demonstrate than *intent*.

In contrast, while *Washington v. Davis* likewise involved a claim of racial discrimination, the employer was not a private company but the police department of the District of Columbia. In 1970, two years before Congress made Title VII applicable to local governments, African-American applicants who had been rejected for employment filed suit claiming that the department's written

test of verbal aptitude (which black applicants failed at a rate four times that of whites) was racially discriminatory. Importing the idea of disparate impact from *Griggs* into this case, the Court of Appeals for the District of Columbia Circuit held for the plaintiffs, and the District appealed. In the Supreme Court, however, the District prevailed 7–2. Graetz and Greenhouse find the High Court's decision remarkable because "no one, not even the justices, anticipated the crucially important question the court would end up deciding" and because the "landmark" ruling illustrates "the almost random way that law evolves."[49] (In their analysis of *Washington v. Davis*, Graetz and Greenhouse write that "the plaintiffs brought their case directly under the Constitution's equal protection guarantee."[50] This, however, is a somewhat misleading statement that is clarified neither in the passage nor in an endnote. The Equal Protection Clause resides in section one of the Fourteenth Amendment, itself expressly directed to the states. Even though the District is not a state, the Supreme Court in 1954 nonetheless applied the assurance of equal protection to the District by finding an equal protection component within the Due Process Clause of the Fifth Amendment,[51] a provision that has always been applicable to the District.)

Kenneth Starr, one of Chief Justice Burger's clerks, received the assignment to write the "pool memo" for the justices to assist in their decision whether to grant review. The authors explain that nothing "in his memo indicated that the case was anything special or that it involved anything other than an application of *Griggs*."[52] This view, they explain, was hardly surprising in that neither the parties nor the lower court had suggested that the constitutional claim required a different standard from that of Title VII. Starr's memo made no recommendation but noted only that the employer seemed to be on firmer ground than Duke Power had been in *Griggs*. Even after the Court granted review, the authors conclude that the justices regarded the case as "just one among many, and not a very interesting one at that." Notes that Justice Blackmun made for argument queried "Is this case really very important?" Moreover, there was nothing in his notes hinting "that the disparate impact standard might itself be in question."[53]

However, a clerk for Justice Powell urged her justice to consider alternatively whether the case indeed raised an important question, and if so whether a remand to the trial court would be appropriate. "This Court," she noted, "must decide either (explicitly or implicitly) whether ordinary equal protection analysis or Title VII law is to be applied in this case," and observed from emerging case law that "mere discriminatory impact was insufficient in constitutional cases without evidence of discriminatory purpose." After the case was argued, discussion in Conference resulted in a 7–2 division, with Justices Brennan and Marshall in the minority. The majority position was that since they were not faced with a Title VII case, discriminatory intent would have to be established in order for the claim of discrimination to prevail. Yet a distinct and somewhat awkward problem remained: the Court "was about to answer a question that no one had asked it to consider. The parties had not briefed the question." Indeed, the petition for certiorari had not presented the matter as a ground for reversal. "But the Court's appetite was whetted." Accordingly, Justice Byron White's opinion for the majority succinctly stated that the appeals court had applied the wrong standard and that a rule of the Court[54] allowed the justices "to notice a plain error not presented," and so proceeded to address the question nonetheless.[55]

For the authors, the case merits substantial attention at this distance because of its far-reaching effect on "any claim that a law or policy neutral on its face nonetheless discriminates on the basis of race, sex, or other protected category." The decision has "thus migrated far beyond employment, cutting off

claims of unconstitutional discrimination in the context of the death penalty, the disfranchisement of prisoners and former prisoners, and numerous others."[56]

As Graetz and Greenhouse note in several places, part of the legacy of the Warren Court consists of its revolutionary rulings on legislative districting. In mandating the one person, one vote rule, the justices reshaped the balance of political power in the United States. Accordingly, given the thoroughness of their book, a reader may be puzzled by the apparent absence of any discussion of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[57] In this first benign race-conscious districting case to reach the Supreme Court, the justices turned back a challenge to a New York plan that split a Hasidic Jewish community among several state legislative districts in order to increase representation of African Americans. The decision signaled that such steps were not only appropriate under the Voting Rights Act but were permitted by the Constitution, yet only hinted at future cases involving majority–minority districts that would pose legal difficulties for successor Courts. For at least one scholar, this case, not *Regents v. Bakke*,[58] was the Court's first affirmative action case decided on the merits.[59]

A reader might wonder as well why the book seems to omit analysis of the Burger Court's foray into yet another side of representation. With their emphasis on achieving equal numbers across districts, the Warren Court's decisions may also have obscured some of the complexities of representation, in particular the distortions that can be caused by gerrymandering. As old as the republic itself, this example of political shenanigans in its classic form has entailed the drawing of district lines to boost or reduce the influence of a political party in a legislative body. As Justice David Souter described the practice long after Burger's retirement, "the spectrum of opportunity runs from cracking a group into impotent fractions, to packing its members into one district for the sake of marginalizing them in another. However equal districts may be in population as a formal matter, the consequence of a vote cast can be minimized or maximized."[60] Hence, for critics of the device, achieving equal numbers among districts is only the beginning, not the end, of devising an acceptable plan of representation. While the Warren Court notably prohibited racial gerrymandering in *Gomillion v. Lightfoot*,[61] it had left partisan gerrymandering alone.

Thus, it was the Burger Court that ventured first into this corner of what Justice Felix Frankfurter decades earlier had famously termed the "political thicket."[62] A hint of what was to come appeared in the second of a pair of cases decided on the same day in 1983 by different majorities of five justices. In the first, *Brown v. Thomson*,[63] the Court approved a districting plan for the Wyoming state House of Representatives that revealed an average deviation of 16 percent from population equality and a maximum deviation of 89 percent. Probably crucial in the majority's willingness to overlook such huge numerical disparities were the isolation and vast distances separating some sparsely settled regions of the Equality State. In the second, *Karcher v. Daggett*,[64] at first glance an ordinary districting case, the Court disallowed a plan from New Jersey for the Garden State's fourteen congressional districts that had a maximum population deviation of less than one percent. The case arose after Republicans claimed that Democrats had unfairly advantaged themselves at the former's expense in drawing district lines. For this five-justice majority, the deviations, though small, were not the result of a "good faith effort to achieve population equality." Silently persuasive perhaps were the unusually strange shapes of a few of the districts, often an indication of a gerrymander. One of the districts resembled a swan and took in part of seven counties. Another looked like a fishhook. In a concurring opinion, Justice

Stevens wrote that the "judiciary is not powerless to provide a constitutional remedy in egregious cases" of gerrymandering.[65]

It was in *Davis v. Bandemer*,[66] decided at the end of Burger's last term, that a majority accepted Stevens's assessment. In a challenge to a districting plan for the Indiana legislature, the Court concluded that partisan gerrymandering presented a judicially cognizable issue under the Equal Protection Clause. Yet only two justices found a constitutional defect in the Indiana plan. For future cases, the Court announced a standard much less precise than one, person, one vote, thus making it difficult to show a constitutional violation: "Unconstitutional discrimination occurs," explained Justice Byron White's opinion for the plurality, "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[67] Left in doubt was the kind of evidence and the span of time required to use in proving an unconstitutional gerrymander, particularly in light of the fact that redistricting occurs in every state after each decennial census.

Gerrymandering in America

What the Burger Court left unresolved has continued to perplex later Courts, a reality that has made publication of **Gerrymandering in America** especially timely, if also unusual in that the book is the work of four authors. The quartet of political scientists is composed of Anthony J. McGann of the University of Strathclyde in Scotland, Charles Anthony Smith of the University of California, Irvine, Michael Latner at California Polytechnic State University, San Luis Obispo, and Alex Keena of Virginia Commonwealth University.[68] Their book is both compact and densely, if pleasingly, written. It is compact in the sense that, minus the bibliography and index, the page count barely exceeds 200 pages. To say that it is densely written is merely a forewarning that nearly every sentence matters. To say that the writing is appealing is to suggest that, once opened, the book is hard to put down, an effect that results from the authors' skills and the importance of the subject they engage. In terms of the window it opens, the book skillfully does for gerrymandering what Royce Hanson's **The Political Thicket** (1970) did with a similar length decades ago for the redistricting struggle during the Warren Court.

Redistricting and hence the opportunities for gerrymandering are initiated by the decennial census that is prescribed by the Constitution: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [Congress] shall by Law direct."[69] Among other uses, census data in turn literally enable vital parts of the electoral process, affecting a state's representation in the U. S. House of Representatives. This number, when combined with each state's equal representation in the U.S. Senate, then determines a state's electoral vote in elections for president and vice president. Moreover, the changes that result from the census persist for a decade. Thus, the reapportioning of House seats among the states that occurs once the numbers from the 2020 census become final will be in place until after the next census in 2030.

With a principal goal of identifying, highlighting, and explaining the effects of partisan gerrymandering, the authors' apparent motivation was the Supreme Court's 2004 decision in *Vieth v. Jubelirer*[70] that the authors believed erected a well-nigh impenetrable barrier to legal challenges to alleged gerrymanders. Their expectation apparently became reality in 2019 after the book's publication when the Supreme Court decided *Ruchov v. Common Cause*.[71]

The authors' analysis unfolds through three sections; there are also an introduction

and conclusion. Consisting of a single chapter, the first section offers a short course on the jurisprudence of redistricting, including the Warren Court's revolutionary rulings on representation in the 1960s, particularly *Wesberry v. Sanders*[72] that mandated the one person, one vote standard for each state's congressional districts. With three chapters, the second section presents an empirical analysis of partisan gerrymandering before and after *Vieth*. The two chapters of section three then focus on the merits of *Vieth* and its constitutional consequences.

While much of the book deals with gerrymandering generally and so is applicable to state legislative districts and other representative structures, the authors' chief concern is captured by their subtitle: "The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty." Given that the Warren Court in *Wesberry* held that states could not advantage some voters over others by creating congressional districts of different population sizes, the authors significantly contend that the Court most recently has effectively created a loophole through *Wesberry* that allows state legislatures to disadvantage some voters by manipulating not the populations but the shapes of districts. The same evisceration applies to *Reynolds v. Sims*[73] that mandated equally populated districts for both houses of a state legislature.[74] Gerrymandering at either level of government allows state legislatures not only to influence the outcomes of elections but in doing so to influence the outcomes of public policy debates in terms of what becomes law. The result is what the authors term a remarkable situation. "Drawing districts with different population sizes is prohibited by the Constitution. However, achieving the same partisan advantage by cleverly manipulating the shape of the districts apparently is permitted."[75]

The book makes several important points. First, gerrymandering is not a uniform practice across the United States. Of the thirty-eight states with three or more House districts (where districting bias is thus possible), eighteen are generally free of gerrymandering. Second, among the remaining eighteen, gerrymandering is often pronounced. Third, contrary to some who believe that bias in districts is usually the result of demographics or geography, the authors contend that in most states, it is possible to draw unbiased districts. Furthermore, in the few states where that goal is unattainable, the remaining bias is modest.

Fourth, partisan gerrymandering is truly partisan. That is, substantial bias among districts occurs "almost exclusively where one party controls the entire districting process,"[76] as happens when a single party controls both houses of a state legislature and the governorship. A high degree of partisan bias "occurs almost exclusively in those states where there is both a political motive and a political opportunity." As the authors elaborate, there "is nothing to be gained from having partisan bias in a state where your party is overwhelmingly strong. You can just benefit from the fact that first-past-the-post elections favor the larger party."[77] Thus, in states where there is no unified party control or in states where redistricting is done by a commission structured to reduce control by a single party, significant bias does not exist. Instead, in place of partisan advantage, one finds an emphasis on protection of incumbency regardless of party. Fifth, the outlook for the future suggests greater, not declining, bias. That is, when the authors compare the redistricting following the 2000 census with that after the 2010 census, they find that the bias occurring after the later significantly exceeded what had taken place a decade earlier. Thus, where the situation permits, parties appear to be increasingly motivated to pursue party interest aggressively.

Sixth, redistricting even by an independent nonpartisan body does not guarantee districts free of bias. In the United Kingdom, districting is done by the Boundary

Commission. While its members "are required to only take [sic] into account technical, geographical criteria,"[78] partisan bias appears in districting nonetheless in that the rules "do not allow the Boundary Commission to pursue political fairness. Indeed they empower interested parties to entrench existing advantages." Thus, while eliminating consideration of political factors might at first glance seem desirable, "if political inequities do emerge, you cannot deal with them if you are not allowed to consider them."[79]

Finally, gerrymandering in the United States in the modern era has had not only electoral consequences but a major constitutional consequence as well. The new reality is that the composition of Congress will be determined as much by how districts are drawn as by how people vote. Yet the "Great Compromise at the Constitutional Convention was that the House of Representatives was to represent the people as a whole, while the Senate was to represent the states. It now appears that the composition of the House will also be determined by state governments. This represents an unlikely victory for the Anti-federalist vision of government."[80]

What Justices Want

Most of the decisions examined in the books on the Burger Court and on gerrymandering are part of the database utilized in **What Justices Want** by political scientist Matthew E. K. Hall of Notre Dame University.[81] His book, which could easily also be entitled "Who Justices Are," is a study of the personality traits of members of the Court and how those traits influence judicial behavior. At least since publication of Walter F. Murphy's **Elements of Judicial Strategy** in 1964, it has been widely understood among students of the judicial process that deciding cases in a small group setting like the Supreme Court typically occasions judges' pursuit of multiple goals. Hall advances a somewhat different thesis: that the personality traits of justices

What Justices Want **by political scientist Matthew E. K. Hall is a study of the personality traits of members of the Court and how those traits influence judicial behavior. Above is a cartoon of the Burger Court in 1972, with the justices' signatures below.**

determine the relative importance of the goals they pursue.

Drawing from the study of personality, the author lays out five predominant traits that psychologists have identified. The reader is assured that these traits are "highly stable after the age of thirty and extremely stable after the age of fifty."[82] Known among specialists as "The Big Five," the group consists of extraversion, conscientiousness, agreeableness, neuroticism (or its inverse, emotional stability), and openness. The first reflects the degree to which a person prioritizes influence and attention. For Hall, this trait is positively associated with behaviors that exert influence over colleagues such as "authoring majority opinions and circulating opinion drafts." It also includes following popular preferences "especially in cases that have already attracted attention from relevant audiences."[83] The second incorporates two sub-traits: industriousness and dutifulness. Accordingly, someone in whom this trait is strong emphasizes fulfilling judicial duties and "resisting the temptation to pursue policy objectives and expressing honest disagreement."[84] Agreeableness, the third, likewise embodies two aspects: politeness and compassion (or altruism). Thus, someone with a strong rating on agreeableness would promote social harmony within the Court and would be inclined to support decisions intended to help disadvantaged persons. Neuroticism suggests a person who tends to avoid or retreat from risky activities and to avoid unpleasant situations. A justice whose personality leans heavily in this direction would try to avoid potential criticism, to be supportive of government actions, and to tend to file fewer opinions. Openness in turn implies an individual's interest in philosophical discussions and abstract ideas but also a willingness to change one's practices and to enjoy new experiences. In Hall's construct, a justice leaning toward openness would be eager to engage new ideas, to circulate bargaining memos, to alter legal precedent and to compromise as a majority position is emerging.

Hall's obvious challenge was to find a way to rate members of the Court on the various traits, given that interviews and questionnaires would be out of the question. His chosen method was to glean personality traits from what the Justices have written by using a textual analysis program called the Personality Recognizer, a tool that the author insists has been adequately validated. As he explains, "by comparing written essays to self-assessed personality ratings, the program's creators trained machine learning models to accurately estimate [sic] personality scores for each of the Big Five.... In other words, individuals with certain personality traits tend to use certain types of language; therefore, a person's language can be used to estimate their personality traits."[85]

To minimize the effects of appropriated or stylized language, Hall applied the program exclusively to concurring opinions (both regular and special),[86] believing that their authors have little incentive to accommodate colleagues' views so that the resulting opinion is more likely to be the justice's preferred expression. Concurring opinions were preferred over a justice's questions or other statements at oral argument because, Hall reports, prior to the 1970s, justices typically said little at oral argument, and prior to 2004 were not individually identified in the transcripts. Hall also downplays distortions that might be caused by prose composed not by the justice but by a clerk, reminding the reader that a clerk would ordinarily be present for only a single term and that it is the justice who retains "primary control"[87] over an opinion's language.

The fruits of the author's labors are Supreme Court Individual Personality Estimates (SCIPEs) for the thirty-four Justices serving from the 1946 through the 2015 terms. However, Hall cautions that the generated sores should be understood

only as comparing Justices to each other, not to the general population.[88] Even with that caveat, readers may understandably wonder whether the justices themselves will be curious about the table of SCIPEs found on page 40.[89] While Hall tests some of the generated results against scholarly information about a few of the Justices and anecdotal and journalistic information about others, it will be left to Hall or to other researchers in later projects to determine the overall accuracy and worth of the book's findings.

Nonetheless, a reader is left with two puzzlements. The first concerns an unfinished story. A large part of chapter one is a review of *Griswold v. Connecticut*,[90] the Supreme Court's landmark 7–2 ruling on birth control that expressly gave constitutional status to a right of privacy. Many may also know the case as a mini-textbook on constitutional interpretation, in that seven of the nine justices filed opinions that at heart revealed each author's conception of the Constitution. Here Hall explores the highly divergent opinions of Hugo L. Black and William O. Douglas in that case, insisting that to understand the differences between them "one must look beyond their partisan affiliation, political ideology, and institutional context" to "their personalities."[91] Hall produces SCIPEs for both Black and Douglas, but his analysis never returns to this particular clash when he begins to elaborate on the findings from his study with respect to this pair of highlighted justices. The gap represents a missed opportunity, especially as Black and Douglas appear to have somewhat similar SCIPEs on openness.[92] The second is the mystery as to the identity of one or more coauthors. In no fewer than three places, Hall refers to "my coauthors and I,"[93] yet only Hall's name appears on the front cover and title page. On the acknowledgments page,[94] while thanks are extended to various individuals, there is again no mention of anyone as coauthor or even contributor.

Voting Rights in America

Among the cases that the Court decided during the terms in Hall's study were those involving the franchise, a subject now comprehensively and serviceably explored in **Voting Rights in America**, a timely reference work[95] by Richard A. Glenn and Kyle L. Kreider, political scientists at Millersville University and Wilkes University, respectively.[96]

As they remind the reader, government by consent of the governed "is a powerful idea. And it is not achievable without elections and the right to vote, the crucial mechanisms by which the people determine who will govern. Elections thus bestow upon government a legitimacy that is otherwise unattainable."[97] Moreover, in the United States, as in other countries, the right to vote "does not, and has never, applied universally across the population. Unlike freedom of speech and the free exercise of religion, for example, which are civil *liberties* and extend to all persons, voting is a civil *right*, a privilege conferred selectively upon citizens by governments."[98]

Thus, of various forms of government, government by consent is surely high-maintenance government in that it requires not only significant levels of popular participation but also knowledge and, one hopes, an accompanying comprehension. What Glenn and Kreider have done exceptionally well is to offer essential content that helps contribute to a grasp of the history of the consent-giving process in its American context, provides insights into its current operation, and examines contemporary challenges confronting that process.

Their labors have resulted in a book of seven substantial chapters ably constructed to achieve those goals. Wisely beginning with the debates at Putney in 1647 during the English Civil War, chapter one briskly traces the history of the franchise from the colonial era to about 2000. The second chapter explores

a series of fifteen problems, controversies, and solutions ranging from disfranchisement of felons to the Electoral College. Entitled "Perspectives," chapter three consists of ten stand-alone essays by eleven contributors who in turn inject a variety of outlooks on topics such as voter identification, non-citizen voting, partisan gerrymandering, and Americans' views on voting rights.[99] While this chapter has no piece dedicated to majority–minority districts, the subject is briefly treated as "racial gerrymandering" in the second chapter.

Entitled "Profiles," chapter four consists of essays on fifteen persons, agencies, or organizations "that have made contributions to voting, voting rights or elections in America."[100] This collection can best be described as eclectic, including pieces on Justice Ruth Bader Ginsburg, Abraham Lincoln, the American Civil Liberties Union, Chief Justice John Roberts, Francis Parkman, the Texas Democratic Party, and the Waite Court (1874–1888). The fifth chapter consists of data and documents. The former embrace a series of helpful maps, tables, and graphs relating to topics previously covered in the book. In the latter one finds the Declaration of Sentiments from 1847, *Smith v. Allwright*,[101] and *Shelby County v. Holder*,[102] among other items. The final two chapters contain an extensive annotated bibliography, a guide to voting and election resources on the Internet, a chronology, glossary, and—what is particularly essential for a hybrid subject like voting rights—a well-constructed index. In short, one's time with this book is time well spent.

Throughout their thorough and careful portrayal of access to the ballot across American colonial and national history, the authors make abundantly clear that, at least since the 1870s and in multiple ways, the Supreme Court has never been far removed from the political process and questions about the franchise, a fact amply demonstrated by the other books surveyed here. As Graetz and Greenhouse observe near the end of their study of the Burger Court, "tethered to the past, defined by the present, the Supreme Court inevitably shapes the future."[103]

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

GLENN, RICHARD A., AND KYLE L. KREIDER. ***Voting Rights in America: A Reference Handbook*** (Santa Barbara, CA: ABC-CLIO, 2020). Pp. xxi,381. ISBN: 978-1-4408-7092-7 (print), 978-1-4408-7093-4 (e-book)

GRAETZ, MICHEL J., AND LINDA GREENHOUSE. ***The Burger Court and the Rise of the Judicial Right*** (New York: Simon & Schuster, 2018). Pp. x, 468. ISBN: 978-1-4767-3250-3, (print), 978-1-4767-3252-7 (e-book).

HALL, MATTHEW E. K. ***What Justices Want: Goals and Personality on the U.S. Supreme Court*** (New York: Cambridge University Press, 2018). Pp. xi, 214. ISBN: 978-1-108-46290-7 (paper).

MCGANN, ANTHONY J., CHARLES ANTHONY SMITH, MICHAEL LATNER, AND ALEX KEENA. ***Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*** (New York: Cambridge University Press, 2016). Pp. iv, 261. ISBN: 978-1-316-50767-4 (paper).

Notes

[1] The House of Representatives approved two articles of impeachment (abuse of power and obstruction of Congress) against President Donald J. Trump on December18, 2019. Trial by the Senate began on January 22, 2020, and concluded with an acquittal for both articles on February 5.

[2] Article I, Section 3.

[3] John R. Vile, **The Constitutional Convention of 1787** (2005), vol. 1, 84.

[4] Max Farrand, **The Records of the Federal Convention of 1787** (rev. ed. 1936), vol. 2, 239.

[5] *Ibid.*, p. 342.

[6] *Id.*, 498.

[7] 1 Stat. 73.

[8] Randolph was appointed on September 26.

[9] Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 1, 33.

[10] At the time, Jay was secretary of foreign affairs and from 1775 to 1777 had been chief justice of New York.

[11] John Marshall, **The Life of George Washington**, vol. 2 (2d ed., 1848), 169.

[12] Warren, **The Supreme Court in United States History, vol. 1, 36**.

[13] *Ilbid.*

[14] This author is privileged to have in his possession Chief Justice Fuller's commission of office as well as the constitutional and judicial oaths that Fuller signed. It is unclear why these items had been separated from the rest of his papers that have long been housed at the Chicago Historical Society. Some years ago, a former student found the Fuller items amid a rack of motion picture publicity posters at a collectibles shop in the eastern part of Lancaster County, Pennsylvania. The Fuller items are mounted in a heavy double-sided frame: the commission, signed by President Grover Cleveland and Secretary of State Thomas Bayard, is on one side; the oaths, signed by Fuller and witnessed by Justice Samuel Miller, are on the other, along with the letter of transmission from the Justice Department.

[15] 39 Stat 209.

[16] 41 Stat 44.

[17] Warren, **The Supreme Court in United States History**, 11, n. 2.

[18] Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928), 59.

[19] Alpheus Thomas Mason, "The Chief Justice of the United States," 17 *Journal of Public Law* 20, 20 (1968).

[20] For White, Hughes, Stone, and Rehnquist, who were also associate justices, the data include only their years as chief justice.

[21] Michael Graetz and Linda Greenhouse, **The Burger Court and the Rise of the Judicial Right** (2016) (hereafter Graetz and Greenhouse).

[22] Martin Tolchin, "Press Is Condemned by a Federal Judge for Press Coverage," *New York Times*, June 15, 1992, p. A-13. In a somewhat different context, the late Judge Silberman was mentioned again in "The Whitehouse Effect," *Wall Street Journal*, April 29, 2020, A-4.

[23] Burger was confirmed on June 9, 1969, by a vote of 74–3.

[24] Henry J. Abraham, **Justices, Presidents, and Senators**, 5th ed. (2008), 3. The occasion was an address by Justice O'Connor to the American Law Institute, May 19, 1983.

[25] Robert B. Semple, Jr., "Nixon Withholds His Peace Ideas," *New York Times*, March 11, 1968, 1, 33. This was phrasing Nixon often used in campaign speeches. It reappeared in his nomination acceptance speech in Miami on August 8, 1968.

[26] Warren Burger, "Who Will Watch the Watchman," 14 *American University Law Review* 1 (1964).

[27] Burger, "What to Do about Crime in the U.S.: A Federal Judge Speaks," *U.S. News & World Report*, vol. 63, August 7, 1967,70–73. Also see Burger's "Paradoxes in the Administration of Criminal Justice," 58 *Journal of Criminal Law, Criminology, and Police Science*, 428 (1967). The latter piece contains some of the major themes from his Ripon College address.

[28] Leonard W. Levy, **Against the Law: The Nixon Court and Criminal Justice** (1974), 20–21.

[29] In attempting to fill the Fortas seat, President Nixon encountered two failed nominations: the first in the fall of 1969 with the Senate's rejection of Judge Clement F. Haynsworth, and the second in the spring of 1970 with the rejection of Judge G. Harrold Carswell. Only with the confirmation of Judge Harry A. Blackmun in May 1970 did the Court regain full strength. Yet even that stability was tested in the fall of 1971 with the retirements of Justice Hugo L. Black and Justice John Marshall Harlan, with the full roster remaining incomplete until the confirmations of Justice Lewis F. Powell Jr. and of Justice William H. Rehnquist in December 1971.

[30] Graetz and Greenhouse, 9.

[31] See Laurence H. Tribe, "The Holy Grail of Original Intent," and Robert H. Bork, "Original Intent and the Constitution," *Humanities*, vol. 7 (February. 1986), pp. 23–25, 26–27. Both essays are reprinted in Alpheus Thomas Mason and Donald Grier Stephenson Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (17th ed., 2018), 81–84.

[32] Appropriately, for one who had retired from the Court in 1986 in order to lead the national observances of the Bicentennial, the celebration in 1987 fell on the former chief's birthday, his eightieth.

[33] Graetz and Greenhouse, 1–2. According to one account, Burger wanted the entire Court present for the celebration in Philadelphia, but Marshall announced "that he would only go if the ceremony were historically authentic: 'I'll wear the knee breeches and serve the coffee,'" he announced. The collective trip never took place. Abraham, **Justices, Presidents, and Senators**, 230.

[34] Graetz and Greenhouse, 7.

[35] Vincent Blasi, ed., **The Burger Court** (1983).

[36] Graetz and Greenhouse, 2.

[37] Bernard Schwartz, ed., **The Burger Court: Counter-Revolution or Confirmation?** (1998), vii.

[38] Graetz and Greenhouse, 8.

[39] *Ibid.*, 341.

[40] *Id.*, 8.

[41] *Id.*, 9.

[42] *Id.*, 341.

[43] *Id.*, 344.
[44] **Harlan Fiske Stone: Pillar of the Law** (1956).
[45] Graetz and Greenhouse, 10.
[46] 426 U.S. 229 (1976).
[47] Graetz and Greenhouse, 288.
[48] 402 U.S. 424 (1971).
[49] Graetz and Greenhouse, 288.
[50] *Ibid.*, 287.
[51] *Bolling v. Sharpe*, 397 U.S. 497 (1954). This case, which invalidated racially segregated public schools in the District of Columbia, was decided with *Brown v. Board of Education*, 347 U.S. 483 (1954), which invalidated racially segregated public schools in the states.
[52] Graetz and Greenhouse, 288.
[53] *Ibid.*, 289.
[54] Rule 40(1)(d)(2).
[55] Graetz and Greenhouse, 290.
[56] *Ibid.*, 288.
[57] 430 U.S. 144 (1977).
[58] 438 U.S. 265 (1978).
[59] Jesse H. Choper, "Affirmative Action and the Supreme Court," in D. Grier Stephenson Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 134.
[60] *Vieth v. Jubelirer*, 541 U.S. 267, 343, Souter, J., dissenting.
[61] 364 U.S. 339 (1960). The case involved redrawing the boundaries of the city of Tuskegee, Alabama, as a way of disfranchising black voters.
[62] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).
[63] 462 U.S. 835 (1983).
[64] 462 U.S. 725 (1983).
[65] *Ibid.*, 761.
[66] 478 U.S. 109 (1986).
[67] *Ibid.*, 131.
[68] Anthony J. McGann, Charles Anthony Smith, Michael Latner, and Alex Keena, **Gerrymandering in America** (2016), hereafter cited as McGann.
[69] Article I, section 2.
[70] 541 U.S. 267 (2004).
[71] 588 U.S. ___, 139 S. Ct. 2484 (2019).
[72] 376 U.S. 1 (1964).
[73] 377 U.S. 533 (1964).
[74] Since 1936 Nebraska has been the only one of the American states with a unicameral legislature.
[75] McGann, 2.
[76] *Ibid.*, 5.
[77] *Id.*, 228.
[78] *Id.*, 139.
[79] *Id.*, 145.
[80] *Id.*, 3.
[81] Matthew E. K. Hall, **What Justices Want** (2018), hereafter cited as Hall.
[82] *Ibid.*, 15.
[83] *Id.*, 20.
[84] *Id.*, 24.
[85] *Id.*, 35–36.
[86] A regular concurrence is a separate opinion filed by a justice who also joins the opinion of the Court, while a special concurrence is an opinion filed by a justice who votes with the majority but does not join the opinion of the Court.
[87] *Ibid.*, 36–37.
[88] *Id.*, 40–41.
[89] Curiosity alone might lead some Justices to take a peek. In the spring of 1966, this author was enrolled in a graduate school seminar (Politics 515) at Princeton University taught by Walter F. Murphy. Professor Murphy, who had worked with Justice William O. Douglas on some of his papers, shared with us one evening a comment, perhaps received second-hand, from the Supreme Court Librarian that after publication of Alpheus Mason's biography of Justice Harlan Fiske Stone a decade earlier, the Library needed to purchase extra copies because the initial single copy was in such high demand. Apparently some justices had been anxious to find out what their colleagues may have said about them.
[90] 381 U.S. 479 (1965).
[91] Hall, 7.
[92] See Figure 3.1 in *id.*, 40.
[93] *Ibid.*, 36, 38, 39.
[94] *Id.*, xiii.
[95] The volume is part of the publisher's Contemporary World Issues Series that currently includes some 14 titles on a variety of topics ranging from the American Congress to Waste Management.
[96] Richard A. Glenn and Kyle L. Kreider, **Voting Rights in America** (2020), hereafter cited as Glenn and Kreider.
[97] *Ibid.*, xvi.
[98] *Id.*, xvii.
[99] For chapter three, this author contributed the essay entitled "The Supreme Court's Decisions on Representation: An Unfinished Revolution." See *id*, 144–149.
[100] Glenn and Kreider, 201.
[101] 321 U.S. 649 (1944).
[102] 570 U.S. 2 (2013).
[103] Graetz and Greenhouse, 345.

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Illustrations

Page 216, Portrait by Raphaelle Peale, 1810, Delaware Art Museum
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Page 221, Library of Congress, photograph by George F. Schreiber
Page 224, photograph by Mathew Brady, Collection of the Supreme Court of the United States
Page 229, *Harper's Weekly*, wood engraving by James Walker
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Page 239, Papers of William R. Day, Library of Congress
Page 241, *Washington Times*
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Pages 245 and 246, Papers of William R. Day, Library of Congress
Page 247, *Canton Morning News*
Page 248, William B. Neff, **Bench and Bar of Northern Ohio**
Page 249, *Washington Times*
Page 250, Cleveland Law School
Page 252, *Washington Times*
Page 266, Library of Congress
Pages 268, 269 and 270, courtesy of Berea College
Page 272, *The Appeal*, Minnesota newspaper, 1900
Pages 275, 277, Collection of the Supreme Court of the United States
Page 288, photo by C.D. Kirkland, **Photographs of Cheyenne, Wyoming** (1890)
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Page 301, Papers of Willis Van Devanter, Library of Congress
Page 310, 312, 315, 321, Library of Congress
Page 334, sketch by Joan Andrew
Page 339, photo by Michael Weizmann, *Time Magazine*

Cover: Willis Van Devanter and his sister Louise Rariden leaving a White House reception for the Judiciary on Jan. 12, 1937.