Introduction

Melvin I. Urofsky

We note with great sorrow the passing of Associate Justice Ruth Bader Ginsburg. During her tenure on the Court, she was a friend of the Society, *Journal*, and also of its editor. Few members of the high court have been the focus of such great personal renown in the outer world; in fact, the only other justice I can think of who had a movie made about them would be Oliver Wendell Holmes Jr.

As is our custom, we mark the passing of a justice with two brief articles, one by a colleague on the bench and the other by a clerk. Justice Clarence Thomas, who served with Justice Ginsberg throughout her tenure, writes about the esteem, respect, and affection she enjoyed while on the bench. Ms. Ruthanne Deutsch clerked for the justice in the 2007 Term. One recalls the picture of the justice's coffin being carried up the steps of the Supreme Court, with her former clerks lined up as an honor guard on either side. Ms. Deutsch is currently an attorney in private practice in D.C.

We also note that the longtime executive director of the Society, David Pride, has retired after four decades of service to the Society. When I became editor, David was not only a mentor but became a friend. His wisdom in guiding the Society, and facilitating the move into its current quarter, will be long remembered. We wish him and his wife many years of a happy and healthy retirement.

Our regular selection of articles once again displays how broad the subject of Supreme Court history has become; it also displays the wealth of talent that is tied to the Court and to the *Journal.*

The first article, about the color of the justices' robes, is by Matthew Hofstedt, who is the Associate Curator of the Supreme Court. We often take for granted that the justices' robes are black, and in recent years when Chief Justice William H. Rehnquist added some stripes, and Justices Sandra Day O'Connor and Ginsburg added lace collars, the basic robe remained black. Was it always that way? Mr. Hofstedt gives us an answer.

A number of years ago when I was researching a book, I asked Justice Ginsburg a question involving judicial ethics, i.e., what could they do extrajudicially? She sent me to the office that answers these questions for the Court, and I was told that this question—and its answers—have changed over time. Our managing editor, Clare Cushman, who is also the Society's Director of Publications and Resident Historian, wrote in the last issue about how William R. Day hired his sons to

DOI: 10.1111/jsch.12253

serve as his law clerks, then called "secretaries." It turns out that Justice Day's sons also practiced before the Supreme Court, with their father recusing most, but not all, of the time. While this would cause great alarm today, it apparently did not upset bench, bar, or the public in those days.

Tom C. Clark is an often underrated member of the Supreme Court, remembered primarily for the fact that he resigned in order to make it possible for President Lyndon B. Johnson to appoint Clark's son Ramsey as Attorney General. What is not as well known is what happened a few years later, when Johnson wanted to get rid of Ramsey. Craig Alan Smith, professor of history and political science at California University of Pennsylvania, tells us that story. Professor Smith is currently at work on a much-needed biography of Clark.

We have two student essays in this issue. The first is by Rachael E. Jones, a law student at the University of Virginia who wrote this article under the mentorship of Professor Micah Schwartzman. The *Rosenberger* case is one that is taught in nearly every constitutional law course, because it marks, although not always clearly, a shift in the Court's Establishment Clause jurisdiction. Ms. Jones agrees that the case is an inflection point, but she also points out that there is a great deal more involved in the case, much of it unrelated to jurisprudence. It is a case in which we really do want to know more about, as Brandeis put it, "all the facts that surround."

The other student essay comes from Joseph Angelillo, who wrote this while a student of our associate editor, Timothy Huebner, at Rhodes College. Mr. Angelillo is now pursuing a doctorate in American constitutional history at the University of Florida. L.Q.C. Lamar was the first pro-secessionist southerner appointed to the high court after Reconstruction. Although his nomination by Grover Cleveland was hailed as a sign of reconciliation between North and South, feelings about the war still ran high more than two decades after Appomattox. Mr. Angelillo reveals that Lamar was not the great conciliator he is made out to be and takes us on a tour of the press reactions to his controversial appointment.

Finally, Henry S. Cohn is a judge trial referee in Connecticut, whose attention was grabbed by a book written by another Nutmeg Stater, Professor Donald W. Rodgers. The object of their interest is the landmark free-speech case of *Hague v. CIO* (1939).

As always, we offer you a large palette of topics. Enjoy!

Remembering Ruth Bader Ginsburg

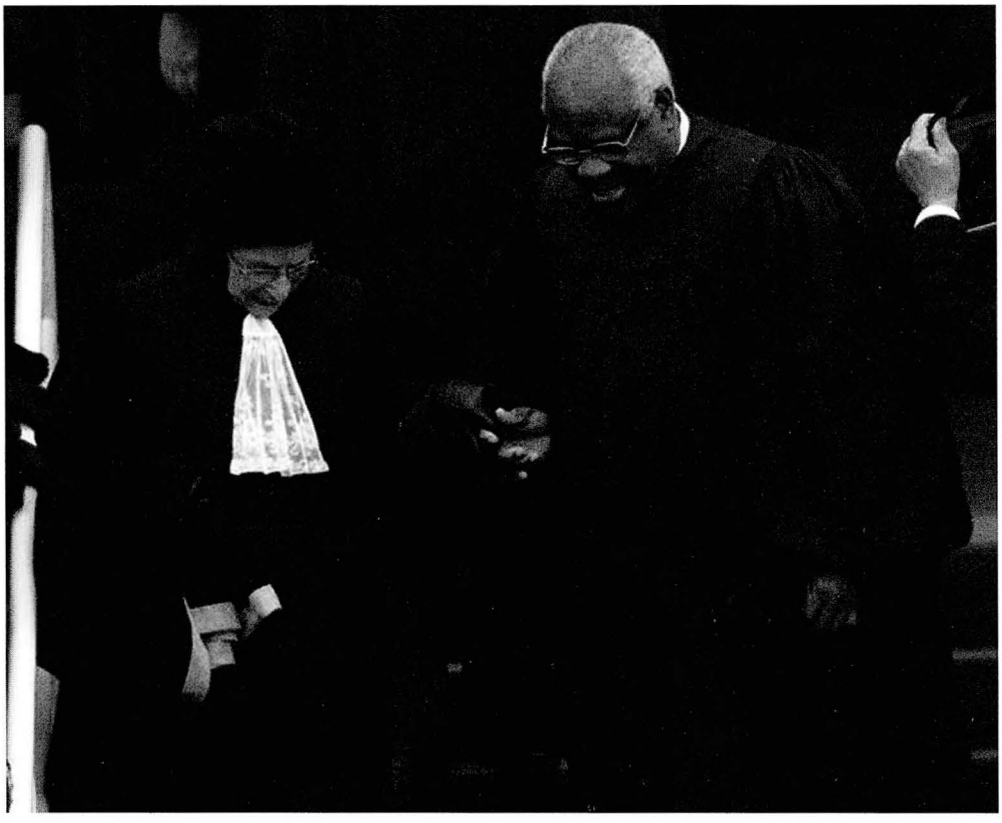
Clarence Thomas

Justice Ginsburg and I served together as federal judges for almost three decades, beginning on the U.S. Court of Appeals for the District of Columbia Circuit. Though my tenure there was all too brief, I very much enjoyed my time with then-Judge Ginsburg. Early on, she and her husband, Marty, invited Virginia and me to dinner at their home. Of course, Marty was an accomplished chef, and both were a delight to be around. At the court, Judge Ginsburg was simply a joy to work with. Though we sat together only a few times, I found her knowledgeable, thorough, and delightful. Whether we were working jointly in her office on opinion language or I was perusing her line edits on a circulating draft, her deep commitment to the craft of judging always was clear. Also clear, and invariable, was her commitment to working collaboratively and civilly with her colleagues, whether in agreement or disagreement.

Later on, as I completed my second Term on the Supreme Court, then-Judge Ginsburg was nominated to replace Justice Byron White. One of my colleagues asked whether I knew her and whether I thought she would be a good colleague. I immediately responded that she would be an outstanding Justice and a delight to work with. In my short time as a judge and as a member of the Court, I had learned that, unlike elsewhere in the city, disagreement was not the controlling factor in relationships among judges. Character and work ethic were far more important. I expected Judge Ginsburg would be an excellent colleague, and her tenure converted my assessment to a prophecy.

Justice Ginsburg proved to be an outstanding Member of this Court from the beginning to the end of her long tenure. In the early days, the Court's docket was significantly heavier, and Chief Justice Rehnquist placed a premium on a fast turnaround of opinion assignments. Justice Ginsburg was stellar when it came to this, quickly producing well-written, concise opinions. She was also routinely one of the fastest to respond to her colleagues' circulating opinions—either joining, asking for changes, or advising that she intended to write or await further writing. In fact, her efficiency became a source of humorous banter as well as a thing of legend.

DOI: 10.1111/jsch.12263



Justice Thomas escorted Justice Ginsburg to her seat at the second Inauguration of President Obama in 2013. She joined the Supreme Court bench in 1993 for his third Term, and they served togther for 27 years.

As could be imagined, Justice Ginsburg expected the rest of us to be equally conscientious in responding to her circulating opinions. From time to time, after a few days had passed and someone had not responded, she would call to quietly and politely ask if the colleague had yet had a chance to look at her opinion. Not once did she come across as discourteous or even pushy, only conscientious and quick. Over the years, there was so much respect for her and the way she did her work that it almost seemed discourteous not to respond to her opinions as soon as possible. It was as though we all owed it to her to reciprocate her conscientiousness. I cannot recall a single colleague who felt burdened by this. In fact, it often served as a source of laughter. When we discussed circulating opinions, she might quietly note that several colleagues had not responded to her opinion that circulated a day or two before. And, because it was her opinion, we would laughingly chide the "tardy" colleague.

Justice Breyer followed Justice Ginsburg on the Court, completing a Court that would be together for over a decade. That was a wonderful Court. It seemed like family in many ways. During those years, Justice Ginsburg and I discovered that her wedding anniversary—June 23—was also my birthday. From that day on, she never failed to send me a card or note on my birthday. I endeavored to do the same for her. Marty would prepare a cake for each of our birthdays, and Justice Ginsburg would be the bearer of these delectable gifts.

Although Justice Ginsburg was normally quiet and controlled, her friends and family

could bring out a different side in her. It was obvious that Marty was special, and Justice Ginsburg would light up whenever he was around. His sense of humor was keen, and she seemed to enjoy it as much or more than anyone else, laughing loudly at Marty's jokes or turns of phrase. It was delightful to see and to be a part of. Justice Scalia, her close friend of many, many years, also could make her laugh and bring broad smiles to her face.

In fact, Justice Scalia and Justice Ginsburg knew each other before either became a judge. Coincidentally, while working at Monsanto Company in St. Louis, I attended a symposium, "The Quest for Equality," at Washington University in 1978. One portion featured a discussion between Professors Ruth Bader Ginsburg and Thomas Sowell. Among the other notable participants were Professors Antonin Scalia and Robert Bork. None of us could have known then what lay ahead for each of us.

Justice Ginsburg and I often disagreed, but at no time during our long tenure together were we disagreeable with each other. She placed a premium on civility and respect. This approach did not lessen her strong convictions, but rather facilitated a respectful environment in which disputes furthered our common enterprise of judging. Whether in agreement or disagreement, exchanges with her invariably sharpened our final work product.

But as outstanding a Justice and colleague as Justice Ginsburg was, what will always stand out for me was her courage during her many health challenges and the death of Marty. Either of these would have been enough to mire most in despondency, or at least compromise one's ability and desire to work. But not once did these challenges affect her work. Though frail in body, she remained intellectually rigorous and characteristically productive in her work. Despite her strength and perseverance, however, it was profoundly sad to see her physical suffering.

Justice Ruth Bader Ginsburg will always have a special place in my heart and memory as a dear and wonderful colleague. It was my good fortune to have shared the bench with her for so many years.

Snapshot Memories of RBG

Ruthanne M. Deutsch

Like many of her law clerks, I first met Justice Ginsburg during my interview to clerk for her. And also like many others, I came to the interview armed with advice to hold my tongue during her pauses, and be sure to let her finish her thought before speaking (hard advice to follow for a fast-talking New Yorker). "Count to 3 Mississippi," I was told. So I did. And during our one-hour sedately paced chat, instead of talking about law, as expected, we talked about attending law school while raising children (an experience we both shared), Vladimir Nabokov (an author we both loved, who was also one of her professors at Cornell), and our shared passion for international travel. She toured me around her office, showing me photos, and ending with one of her favorites—a picture of her son-in-law snuggling with her grandchildren. "This," she said, "gives me hope for the future."

Fast forward a few years to the first day of my clerkship, which coincided with my eldest son's tenth birthday. She couldn't have been more welcoming to my family when they came to Chambers. And throughout my clerkship year, it was an unquestioned premise that I should be able to parent, and clerk, and manage my time as I saw fit. I remember the first time I diffidently went to her office to ask whether I could step out for a few hours to attend a classroom presentation (on edible bugs). She looked at me puzzled that I had even thought to ask. And, upon my return to work, was eager to hear about which bugs we ate and what they tasted like.

As for the work, RBG taught me to focus on clarity and precision, and that only the hardest work and persistence yields writing that is effortless to read. Her unparalleled attention to detail, combined with an uncanny ability to distil a case to its essence, yielded opinions that both did justice and provided road maps to lawyers and judges on complex areas of the law. Some of the most joyful moments of my clerkship were discussing the trickier questions with her, and seeing her light up when something clicked, and she decided where to land.

In the years after my clerkship, I was grateful to keep in touch through visits to Chambers, work on her Portrait Committee, and various DC gatherings. She always asked after my family. And at every career

DOI: 10.1111/jsch.12254

The author with Justice Ginsburg, for whom she clerked in the 2007 Term.

inflection point offered sage advice, wishing me a "thriving" practice when I launched my own firm. I have a collection of handwritten notes from her, praising the "delectable," "scrumptious," and "best-ever" handmade chocolates I would bring her after our trips to my husband's family in Peru. While she shared many gifted goodies with her Chambers staff and clerks, she never shared those Peruvian choco-tejas.

In January of 2021, I had the privilege of presenting my first Supreme Court argument. While my three co-clerks had all been able to argue before her, I sadly did not get there in time. But the day before my argument I received this note from former RBG clerk Joseph Palmore, which made my day, while also making me weep. He wrote:

> Hi Ruthanne,
>
> When her former clerks argued for the first time in front of her, RBG would make eye contact and beam with a smile as soon as she came onto the bench. And she would also try to ask the first question. She of course never pulled any punches – she voted against me plenty of times. But she did everything she could to put me at ease and be a friendly and supportive presence. I'm so sorry she won't be there physically for you tomorrow. But know that she would have been extraordinarily proud of you and the accomplishments that brought you to the podium. Best of luck tomorrow.
>
> Joe

The wisdom and compassion that RBG gave to every member of her law clerk family lives on through her former clerks. She modeled for us all how to work hard in service of justice, and live a full and rich life while doing so. I am eternally grateful to have known her.

Ruthanne M. Deutsch is an attorney with Deutsch Hunt PLLC, and served as Justice Ginsburg's law clerk in October Term 2007.

The Switch to Black: Revisiting Early Supreme Court Robes

Matthew Hofstedt

"Did they really wear robes like that?" is usually the first question a visitor to the Supreme Court Building asks when gazing upon the portrait of Chief Justice John Jay in an elaborate robe, black overflowing with red sleeves and stole trimmed with white. Jay strikes quite a contrast to the other portraits depicting justices in more solemn all-black robes now synonymous with American judges. The answer to the question is "Yes," but the evidence surrounding Jay's robe and the Supreme Court's early attire is piecemeal and at times contradictory. Making things more confusing are the various historical accounts of the Court's dress, based on little firsthand knowledge.

These mostly undocumented accounts have led to a now generally accepted "fact" that the Court's adoption of the all-black robes was due to the arrival of Chief Justice John Marshall in 1801. The story is that Marshall adopted the plain black robe on his first day with the Court to symbolize a new era. By adopting a more "republican" robe, Marshall was signaling a move away from the "aristocratic" colored robes worn by the other justices, which were seen by some as a symbol of the Federalist stance of the Court during the 1790s.[1] The argument goes that the switch to black was one of the ways "the great Chief Justice" began to unify the Court, show judicial modesty, and form the Court's new identity. Despite its appeal, there is little documentation to support this claim, and as will be explored, what evidence there is suggests the change occurred before Marshall became chief justice.[2]

What follows is an attempt to sort the facts from the fiction to come to a better understanding of the Court's early judicial attire. Starting with the Jay robe and all of the myths surrounding it, this article will review the documentation that supports the use of the colorful robes by the early justices and add some new discoveries that perhaps narrow in on when the switch to black actually happened. While robes are admittedly a minor part of the Court's history, they are one of the few pieces of material culture created specifically for the justices.

DOI: 10.1111/jsch.12255

Chief Justice Taft declined the Jay family's offer to lend Chief Justice Jay's robe to the Supreme Court. Instead, it was loaned to the Smithsonian until the family donated it to the National Museum of American History in 1973.

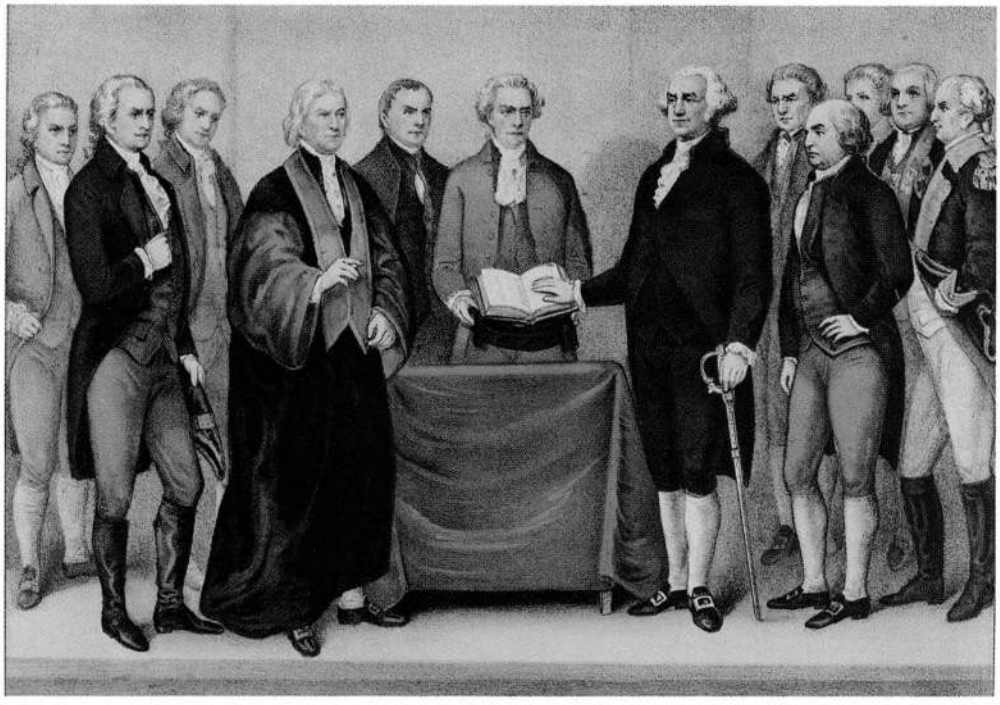
The Court's eventual move to the black robe would influence the visual representation of judges throughout the United States to the present day.

The John Jay Robe

The story of the Supreme Court's early attire begins with the robe seen in perhaps the most widely known portrait of a Supreme Court justice: Gilbert Stuart's Chief Justice John Jay.[3] While many have wondered if this was indeed a judicial robe, the Jay Family understood it to be so. In August 1794, Sarah Jay wrote to her husband about Stuart's progress on the portrait, noting that their nephew, likely Peter Jay Munro, was modeling the robe for the artist. "It is your very self," she wrote, "it is an inimitable picture & I am all impatience to have it to myself." Stuart had painted portraits of Jay earlier in London, but upon returning to New York, the Chief Justice only had time to sit for the head of this portrait. Stuart delivered the portrait to Mrs. Jay on November 15, 1794, and she immediately hung it in the family's home.[4]

In 1808, Jay gave the portrait to his son, Peter A. Jay, who added this postscript in a letter to his father, "I have put up your portrait by Stuart which you were so kind to give me. It is an excellent likeness but the unfinished state of the Drapery makes it look ill & I wish to have that part completed by some other painter. For that purpose, I will be obliged to you, if you will be so good, as to bring with you when you next come to Rye, **your Chief Justice's Robes**."[5] Stuart had a reputation for not completing some of his portraits, and Peter A. Jay is clearly referring to the portrait of Jay in his robes, so if Peter followed through on his plan it may explain why descriptions of the portrait often note the difference between Jay's head and the rest of the painting. A 2004 Gilbert Stuart exhibition catalog provides an excellent analysis of the portrait, suggesting "[i]t is possible that Stuart did not complete the robes in the portrait. This could explain the rapidly painted, awkward areas of the robe along Jay's left shoulder and arm."[6]

Throughout the nineteenth century, the Jay Family commissioned copies of Stuart's portrait for relatives and others, and eventually engravings of it began to appear in print. In 1815, Joseph Delaplaine commissioned William Levy to make an engraving of the portrait for his **Lives & Portraits of Distinguished Americans**.[7] This is likely the first widely published image of Jay in his robes of office. Delaplaine sent a copy of the print to former President John Adams, who replied, "Thanks for the Portraits of my Friends Rush and Jay. The latter appears with proper Dignity **in his Robes of Chief Justice** and



This 1876 Currier & Ives engraving of the 1789 inaugural of George Washington shows Chancellor Robert Livingston in a robe much like the colorful robe worn by Chief Justice John Jay. There is no evidence, however, to support the notion that Livingston wore a robe that day nor that Jay later borrowed the robe from Livingston for use on the Supreme Court.

the Likeness of the Countenance is correct."[8] Adams was Vice President during the years of Jay's service on the Court so he recognized the robe.

Jay appears in a few historical paintings during the nineteenth century, sometimes in what appears to be an academic robe, but it was not until the 1870s that a renewed interest in the Jay robe itself surfaced.[9] One of the catalysts may have been the 1876 publishing of a Currier & Ives engraving titled, "The Inauguration of Washington."[10] This imagined scene depicts Chancellor Robert Livingston administering the presidential oath of office to George Washington back in 1789 wearing a robe that is strikingly similar to the one Jay wore in the Stuart portrait. Some surviving copies of the print even have hand-colored red sleeves on the robe. Livingston was the highest judicial officer in New York, but whether he wore any robe during the inaugural ceremony is undocumented.[11]

The following year, one of Jay's grandsons, also named John Jay, presented a copy of Stuart's portrait by Henry Peters Gray to the Supreme Court. It was the second oil portrait of a justice acquired by the Court, and it took a place of honor above the fireplace mantel in the Justices' Robing Room in the United States Capitol.[12] With the colorful portrait prominently displayed, speculation about its history began to appear in newspaper articles, speeches, and books about the Court. Did it really depict Jay in his robe of office? Where had the robe come from? Did the other justices wear something similar?

Over the next few decades, several theories on the origin of the robe appeared. One, perhaps based on the Currier & Ives engraving and reportedly affirmed by an unnamed member of the Court, suggested Jay had borrowed the robe from Chancellor Livingston, his former law partner

and friend[13]; another stated the robe was given to Jay as part of an honorary degree from the University of Dublin (Trinity College)[14]...or was it the University of Edinburgh in Scotland[15]...or perhaps Harvard University[16]...or his alma mater, King's College (Columbia University).[17] Today, one wonders if it was bestowed by Hogwarts![18]

The truth is that Jay's robe was not magically conjured nor a flourish from the artist's paintbrush. As noted in the Jay Family correspondence, the robe itself existed—and still exists. In the early 1880s, amid the growing speculation about the robe, the Jay Family sent it to the Supreme Court in Washington to allow the justices to inspect it for themselves. The deep red colors of the Stuart portrait had faded on the actual robe to a somewhat "salmon-pink" hue and the sleeves were a bit shorter, but overall it looked very similar to the one featured in the Robing Room portrait. A period newspaper reported,

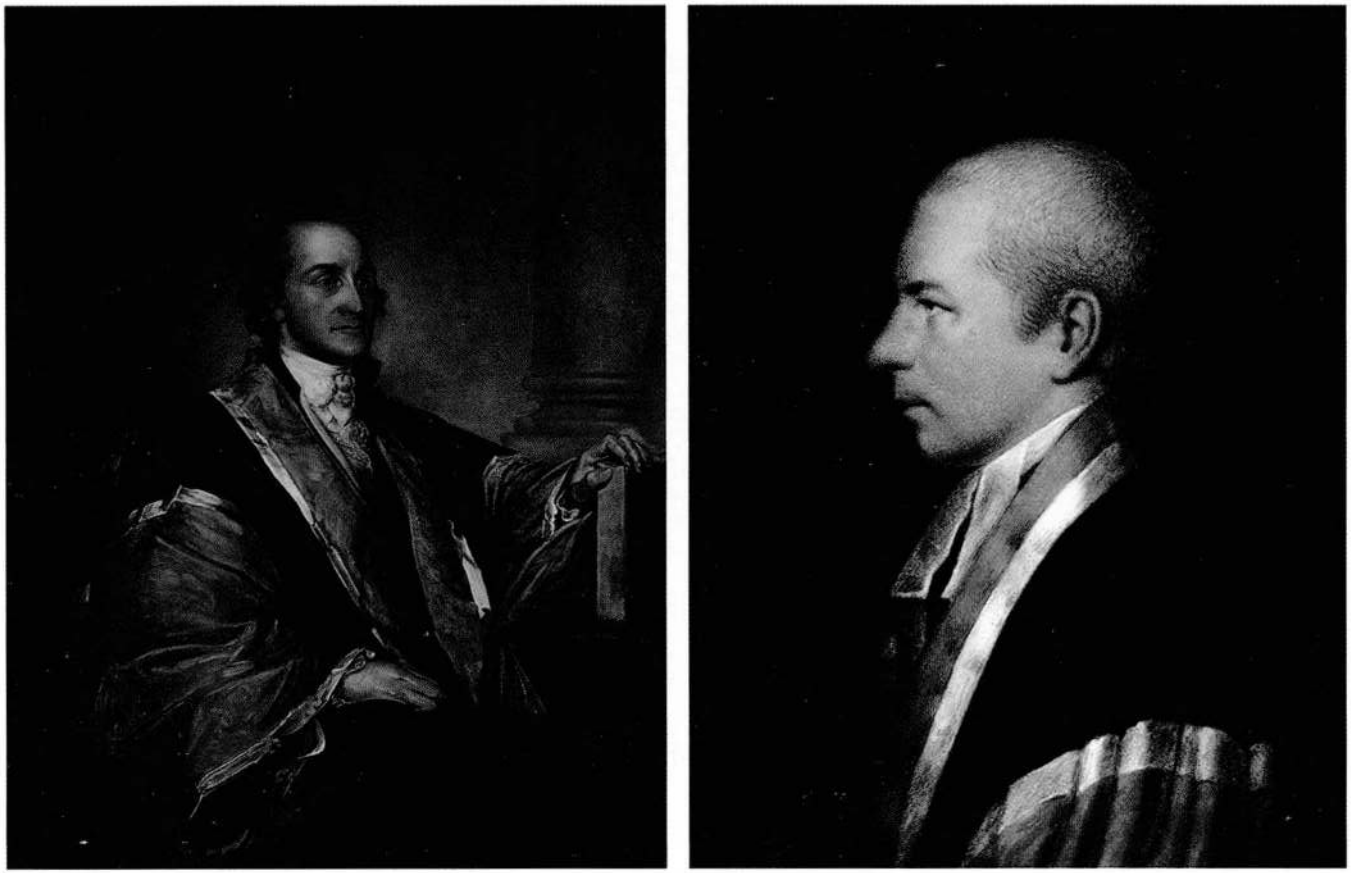
> The special occasion of the exhibition of this historic robe to the court now is to settle a much-controverted point as to whether the members of the court ever did wear a black robe with pink facing, as exhibited in the portrait which was suspended upon the walls of the robing chamber. It was supposed that the robe worn by Chief Justice Jay in the portrait was borrowed for the occasion from Justice Livingston, chancellor of New York, and in which he administered the oath of office as president of the United States to George Washington in 1789 in New York city. The exhibition of the actual robe worn by Chief Justice Jay when he sat upon the bench settles this question to the satisfaction of the entire court.[19]

In an apparently unanimous decision, the Waite Court justices deemed the robe to be the one worn by Jay "on the Bench" and discounted the story of its being borrowed from Livingston. (Had Jay borrowed the robe, he clearly never gave it back.) With the matter seemingly decided, the Court returned the heirloom to the Jay Family in New York, but questions about why the Court chose to wear judicial robes and what the other justices wore remained unanswered, allowing for continued speculation.

Debunking Some Sartorial Myths

Despite the Jay Family, John Adams, and eventually the Supreme Court concluding that the robe was Jay's official one, there was little evidence outside of the robe itself to explain its origin and actual use, and almost nothing about what the other justices wore. Two of the early Court histories, George Van Santvoord's **Lives of the Chief Justices** (1854) and Henry Flanders' **Lives of the Chief Justices of the Supreme Court of the United States** (1858), are biographical in nature, and neither describes what Jay or his brethren wore during the Court's first sitting or in the decades thereafter.[20] Other nineteenth-century scholars, commentators, and reporters writing about the history of the Supreme Court latched onto various stories of the robe's origins noted above. The most prevalent assumed the robe must be an academic robe, and the association with the University of Dublin widely reported.

This particular story received a stamp of approval when featured in a speech by New York lawyer William Allen Butler at the Centennial Celebration of the Supreme Court in 1890, subsequently published in Hampton L. Carson's **History of the Supreme Court of the United States**.[21] The association may stem from the school's academic regalia, referred to as the "Pinks," that has a similar salmon-pink color. Butler also claimed the associate justices wore "the ordinary black robe which has since come into vogue as the



The only two known life portraits showing early justices in their robes of office. On the left, Chief Justice John Jay, copy by C. Gregory Stapko (1964), after Gilbert Stuart (1794). On the right, Associate Justice William Paterson, by James Sharples, Sr. (c. 1797). The Jay portrait is oil on canvas and measures 52″H × 40″W while the Paterson portrait is pastel on paper and measures 10″H × 8″W.

vestment of all the members of the Court" but offers no evidence for this conclusion. Of the early Jay biographers, George Pellew wrote in his book, **John Jay** (1898), that the robe was "perhaps" a Doctor of Laws robe. Frank Monaghan, in **John Jay, Defender of Liberty** (1935) describes the Court's first sitting but used descriptions from the February 1792 Term, and he then recounts the robe's Dublin origin story as the most likely source for the robe.[22]

One version of this story evolved to claim Jay had his Dublin doctoral robe altered to become his chief justice's robe; this version of the story appeared in many publications, including the February 24, 1894, issue of *Harper's Weekly*.[23] Later that year, another version published in *Kate Field's Washington* newspaper mentions the robe among several stories told by Court staff during a "behind the scenes" tour of the Court's rooms in the U.S. Capitol:

> The furniture is not the only interesting feature of the robing room. Over the fireplace is a large portrait of Chief-Justice Jay—the first to hold [t]his exalted office. He is dressed in a brilliant red gown trimmed with ermine, the earliest attempt at judicial costuming in this country. It was decided that the Supreme Court must have some sort of official robe, but as the cut and material were not yet chosen, the first Chief-Justice trimmed his Dublin University gown with ermine, to bridge over the emergency. This was probably thought too fine for a republic, so the material of the judicial robes was changed to heavy black silk. If you are fortunate enough to gain admission to the robing room, Archie, the negro attendant, who has been there for many years, will proudly point out the beautiful workmanship on one of these gowns, and will possibly let you slip your arms through the wide sleeves and survey the effect in the glass. A woman's first thought is that she must at once have a lounging gown cut after the same graceful fashion, with the ample fullness shirred into a narrow yoke, and great sleeves that look, when the arm is dropped, like part of the voluminous folds of the main garment.[24]

The special tour provided to Alice M. Whitlock apparently included the experience of trying on a judicial robe, one not likely to happen today. The story of the Dublin robe now includes it being altered with ermine and probably stems from mistaking the white trim of Jay's robe for the white fur associated with royal and judicial robes in European nations. It may also derive from an 1831 quote of Daniel Webster who said, "When the spotless ermine of the judicial robe fell upon John Jay, it touched nothing less spotless than itself."[25] A few reports from the early 1790s, to be reviewed below, also describe the justices as wearing scarlet robes trimmed with ermine but there is no evidence that any justice ever added ermine trimmings to a robe.[26] More importantly, the Irish university has no record of awarding a degree to Jay.[27] It is likely that the University of Dublin was confused over time with the University of Edinburgh because that school did award Jay an honorary Doctor of Laws degree in May 1792, but as will be seen, Jay would have procured his judicial robe by this time.[28]

A few years later, several new wrinkles enter the story of the Court's early attire, apparently stemming from the work of a somewhat self-proclaimed historian, Lucien B. Proctor.[29] A lawyer near Albany, New York, Proctor wrote biographical sketches of famous lawyers from his home state as well as historical accounts of famous legal trials. His articles and books are full of chatty anecdotes written in a conversational style

This sketch of Messenger Archie Lewis holding a judicial robe was published in 1894 when *Harper's Weekly* wrote a "behind the scenes" story about the Supreme Court. Lewis was a messenger in the Marshal's Office starting in 1849 at age 18 and served the Court for almost 64 years.

and are chock-full of wonderful quotations, many of which have no other known source. In early 1896, Proctor published two virtually identical articles, one in *The American Lawyer* titled "First Federal Chief Justice," the other in the *Michigan Law Review* called "John Jay and other Chief Justices of the Supreme Court of the United States." In these articles, Proctor wrote a remarkable story:

> Before [Jay took] his seat on the bench of the Federal Court a curious and animated discussion arose concerning the habiliments of its judges while on the bench. By some the scholarly gown was preferred; others advocated the classic toga; others desired the more sacred stole. But it was the question of the English judicial wig, which is associated with Blackstone, Bacon, Coke, Mansfield, Buller and other English judges, over which the most exciting controversy arose. To the use of this appendage Jay most emphatically objected. The subject was discussed [outside] judicial circles. Hamilton, then secretary of the treasury, who favored the methods, costumes and fashions of England, strongly sustained, not only the judicial wig, but the toga; while Jefferson, 'whose simple manners and opposition to the aristocratic tendencies of the federal leader exhibited themselves in the combing of his hair out of the fashionable pigtail, discarding hair powder, wearing pantaloons instead of breeches, fastening his shoes with strings instead of elaborate buckles,' indulged in denunciations of all unnecessary apparel for the judges. He said to Hamilton one day, when the subject was under discussion: 'I have been reading your letter to Jay concerning the apparel of the judges of the Supreme Court.'
>
> 'Well, what do you think of it?'
>
> 'That I have no patience with the prevailing custom of imitating everything English in our democratic institutions, particularly the organization of our courts. If we must have peculiar garbs for the judges, I think the gown is the most appropriate. But, for heaven's sake, discard the monstrous wig, which makes the English judges look like rats peeping through bunches of oakum,' was the reply.

> When Aaron Burr was asked his opinion in regard to the attire of the judges, he said: 'It has long been the custom in all civilized nations to place the outer garb of Roman Senators, Grecian orators and jurists on modern judged, eminent scholars and divines. But I have never seen or read of a flowing English wig on a statue of an illustrious Roman or Grecian orator or statesman. I am in favor of giving our judges the judicial robes of Mansfield, copied from those of Cicero. But let us forego the great inverted woolsack, termed a wig, which disguised the majestic head of the great English jurist.'[30]

Unless Proctor had access to now lost documents capturing this debate, it seems highly unlikely that a virtual "Who's Who" of early America—Jefferson, Hamilton, and Burr—had a debate over judicial attire, although it would have made for an interesting addition to the Broadway hit *Hamilton* had the trio engaged in a rap battle over judicial robes and wigs! To date, none of these quotes is found in any of the writings of the three men, nor is there a surviving letter to John Jay from Hamilton discussing the apparel of the Court.[31]

Proctor's account might have receded into the mists of history had it not been given an important push forward by former President Benjamin Harrison, who published a shortened version, also without citation, in the December 1896 issue of *Ladies' Home Journal*, and then in his 1897 book, **This Country of Ours**,

> When the constitutional organization of the Court had been settled and the high duty of selecting the Justices had been performed by Washington, the smaller, but not wholly unimportant, question of a court dress loomed up, and much agitated and divided the minds of our public men. Shall Justices wear gowns? And if yea, the gown of the scholar, of the Roman Senator, or of the priest? Shall they wear the wig of the English Judges? Jefferson and Hamilton, who had differed so widely in their views as to the frame of the Constitution, were again in opposition upon these questions relating to millinery and hair-dressing. Jefferson was against any needless official apparel, but if the gown was to carry he said; 'For Heaven's sake discard the monstrous wig which makes the English Judges look like rats peeping through bunches of oakum.' Hamilton was for the English wig and the English gown. Burr was for the English gown, but against the 'inverted wool-sack termed a wig.' The English gown was taken and the wig left, and I am sure that the flowing black silk gown still worn by the Justices helps to preserve the court room that dignity and sense of solemnity which should always characterize the place of judgment.[32]

This fascinating account, seemingly created by Proctor and retold by Harrison, turns up in other histories of the Court. The most notable of these was Charles Warren's multivolume work **The Supreme Court in United States History** that won the 1923 Pulitzer Prize in History. Warren states incorrectly that at its first session in New York City, "the Judges were attired in robes, probably of black and red," and then his footnote perpetuates many of these stories.[33] As entertaining as Proctor's work is, it should be considered fiction until some other source is located to confirm some aspect of it, and subsequent works such as Warren's that rely on it should

not be cited as documentation of the Court's early attire.

Beyond Proctor's interesting but problematic work, another explanation for the Court's adoption of the colorful robes comes from George Hazelton's **The National Capitol: Its Architecture, Art and History** first published in 1897. After recounting some of the theories noted above, Hazelton wrote:

> There is some authority to show that, at the earlier sittings of the Court, a tri-colored scarf, probably occasioned by the French craze, was sometimes worn; and in the picture of John Jay on the walls of the robing room, the gown itself has a border of brick-red, the sleeves being almost entirely of that color.[34]

Hazelton acknowledged the Court's portrait of Jay in the robes as a source for his speculation and repeats Harrison's comments, but he offered no evidence for his suggestion that the "French craze" was the cause for the choice, nor what the third color may have been. Jay, often accused of being an Anglophile, especially in the outrage following the Jay Treaty, was more likely to have been influenced by English sartorial traditions in outfitting the Court than those of the French.

In 1922, Hampton Carson, the author of the earlier **Centennial History of the Supreme Court**, returned to the subject of the robes in a speech given during the rededication of the Old City Hall courtroom used by the Court:

> These walls, without decoration, are today in the same unadorned state that they were then in, and yet the Bench was not without a touch of color. The Chief Justice sat in a robe of black silk faced with scarlet and white facings, with vermilion colored sleeves of large size. The Associate Justices sat in black robes faced with scarlet and white, but with far narrower stripes than those of the Chief Justice and the sleeve instead of being a single color, coming all the way to the shoulder in a fold, as in the case of the Chief Justice, had a white stripe, at right angles across, in order to mark the yoke of the gown. When that judicial dress was dispensed with I know not, but such was the appearance of the Bench as eight members of the Philadelphia bar stepped to the front to be sworn in as counsellors of this court.[35]

Carson is likely describing the robe seen in the Stuart portrait when discussing Jay's robe having "vermillion colored sleeves of large size" and wider facings than the Associate Justices. The red sleeves seen in the portrait are much longer than the ones on the actual robe, and Gilbert (or the anonymous painter who may have followed him in filling out the robes) left off the details found on the actual robe. The source for the very specific details about the associate justice's robes, heretofore unseen, may be based on a portrait of Justice William Paterson, of which more will be discussed below.

More recently, the association with Harvard took root based on an identification made by the historian and Jay scholar Richard B. Morris who attributed the robe to the Ivy League school that had given Jay an honorary degree in 1790.[36] Harvard's honorary robes are almost entirely red, and they do not resemble Jay's robe.[37] In November 1790, Harvard's President wrote to Jay informing him of the honor bestowed in July, thus, Jay was not present for the ceremony. The letter mentions delays in engraving the diploma and makes no mention of a robe.[38] In the early 1970s, the Supreme Court's Curator confirmed with Harvard's University Archives there was no documentation to support the presentation of a robe to Jay

because there was no evidence that academic robes were in use at the school during the late eighteenth century other than perhaps plain black robes for undergraduates.[39] The erroneous Harvard connection resurfaced in a description of the Jay portrait in a 2004 exhibition catalog, **Gilbert Stuart**, again attributed to Morris.[40] A more recent biography repeats the unsubstantiated notion that Jay may have worn the robe at the first sitting of the Court, citing Charles Warren and this exhibition catalog.[41] As for an association with Jay's alma mater, Kings College (now Columbia University), no documentation exists and any connection is likely based on the Oxford LL.D. robes worn by early presidents of the school seen in some portraits.[42] In summary, most of the facts about the Jay robe that have been cited for years are at best educated guesses, and the quotations attributed to Jefferson, Hamilton, and Burr likely pure fiction. Throughout the twentieth century, these various stories reappear but eventually most Court historians and commentators concluded that Jay did wear some sort of robe with red and white when he sat with the Supreme Court. Whether it was an academic or judicial robe, and what the other members of the Court wore, was still in dispute.

To Robe or Not to Robe

Looking at the Jay robe today, it does appear quite colorful compared with the all-black robe the Court eventually adopted. Historically, the use of color in judicial attire was common across Europe, especially in England. The larger story of the evolution of judicial robes is beyond the scope of this article other than to note that several of the British colonies in what would become the United States had adopted forms of judicial attire following English tradition.[43] After the American Revolution, most courts cast off their judicial robes and wigs in keeping with the republicanism of the early Republic that would have cut against the continuation of these European traditions, especially those of England from which the young country had just rebelled.[44] A few state supreme courts, however, reportedly continued to don colorful traditional judicial attire before abandoning it, including Massachusetts, Maryland, and Pennsylvania.[45] Most state courts did not adopt the use of robes again until the late nineteenth and early twentieth centuries.

At the national level, the Articles of Confederation authorized the Congress to create a federal court in 1780, the Court of Appeals for Cases of Capture, to handle maritime prize cases. In 1781, James Madison recommended the judges of this court receive a black robe from the government, but there is no documentation to show if these judges ever received or wore robes.[46] With the ratification of the Constitution in 1787, the steps to form the new federal government began. The Constitution left most of the details of the organization of the Supreme Court and the Federal Judiciary to Congress. One of the first congressional actions was the Judiciary Act of 1789 that created the original federal court system of regional district courts, circuit courts (comprised of a district court judge and two Supreme Court justices), and the Supreme Court. The courts themselves were to determine the other more mundane details, such as judicial attire.

The decision to do away with the much disliked English judicial wigs may have been an easy decision, and wigs in general were going out of style, but the reasons why the Supreme Court chose to wear judicial robes remain a mystery. Did the justices discuss the notion of providing a symbolic, visual representation of the new federal Supreme Court that would help to bind the new United States together under the federal government as they uniformly applied federal law across the nation?[47] Perhaps not so directly, but they were aware they were creating a new judicial system as reflected in the grand jury charges they issued in the early 1790s.[48] More likely,

tradition played a part. Many of the Court's first members had some experience as judges before joining the Supreme Court or were prominent lawyers and were therefore familiar with the legal traditions of the colonial and state courts.[49] A few may have owned judicial robes or "bar gowns" worn as attorneys from their prior duties, as some advocates wore when arguing in colonial and state courts. The use of a judicial robe, therefore, would have been a natural thing for them to consider to give their proceedings the solemn dignity they were accustomed to seeing in the courts.

The Court's New Robes

So what really happened when the justices first came together in New York City in February 1790? Honestly, nobody really knows. Unlike the opening of Congress and the Inauguration of President George Washington in 1789, the initial sitting of the Supreme Court received little attention, and the few newspaper accounts remark only that many prominent people were present and that it was "uncommonly crowded."[50] Based on reports from Philadelphia the following year, the Court may have undertaken a modified version of a traditional "opening of the court" ceremony practiced in England and elsewhere wherein the justices were met by local officials attending the court and escorted to the site designated, the Exchange building at the foot of Broadway. No contemporary description of what the Justices wore those first days has been located despite many later descriptions of the Court's first sitting repeatedly claiming some, or all, of the Justices wore robes. Without any documentation, it is more likely that they appeared in the usual professional attire of the day, a dark suit coat and breeches for the initial session.[51]

On February 2, 1790, with a quorum of John Jay, William Cushing, James Wilson, and John Blair, the Supreme Court officially opened and took care of some administrative matters surrounding the formation of the Court: the Minutes note the reading of the justices' commissions, the naming of a Clerk and Crier, and the determination of what the Court's Seal would look like.[52] The Court met for several more days admitting lawyers as Counselors and Attorneys, a distinction carried over from English courts, and then adjourned until August because there were no cases to hear. As to what the justices (or other federal judges) were to wear, no known records exist, and little commentary appears in surviving correspondence of the justices or others.[53]

Another clue that the first Court probably did not wear robes comes from the lack of direction provided by the highest federal court on several issues, including expectations for judicial attire. On February 13, 1790, William Loughton Smith wrote to Edward Rutledge, "I have to inform Mr. [William] Drayton [a federal judge in South Carolina] that the Supreme Court have not fixed any thing as to the dress of the Courts."[54] Later that month, another federal district judge, Richard Law, inquired of Chief Justice Jay about "any uniformity particularly Formality of Dress" that was to be expected when the circuit court would convene. Jay responded, "No particular dress has as yet been assigned for the Judges on the Circuits."[55] Even new Supreme Court justices were in the dark. On March 21, 1790, Senator Samuel Johnston of North Carolina wrote to his brother-in-law, Associate Justice James Iredell, who was recently named to the Court and preparing to ride the Southern Circuit. "I don't know what kind of Gowns the Judges wear," wrote Johnston, who was advising Iredell from New York, "but supposed that your Bar-Gown may answer your purpose till you can be better informed which will not probably be till you come to this place."[56] Had the justices adopted judicial robes or worn academic robes at their first sitting as some have contended, someone would probably have noted their choice of garments instead of recording that no decision had been made.

As Senator Johnston predicted, it appears the discussion about attire for the members of the Supreme Court happened when they reconvened in New York City for the August Term 1790. The first indication the Court had decided to wear robes comes in a postscript to a February 2, 1791, letter from Justice John Blair to Justice James Wilson,

> P.S. If you [would] Wish, that I send you the Copy [which] you were so kind as to lend me of your speech to the G[rand] jury, before I can have the pleasure to deliver it with my own hand (as I once expected to do about this time) please to instruct me. **Probably by this time our gowns may be finished & the judges may appear in them this term.** The cost of them ought to be defrayed without delay & on your application to the Treasurer of the U.S. for what I owe on that account he will, I am sure, pay it on demand. I would give an order for it if I knew the amount. I wish to be informed of that circumstance, that I may be enabled to draw from my true balance, in favour of a gentleman here who has promised to furnish me with cash & take my order on the Treasurer.[57]

From Blair's note, it is clear the order for "our gowns" occurred before February 1791, and presumably, the next time Blair would be able to deliver the borrowed speech "with my own hand" would be at the Court's next meeting in August 1791, at which point the gowns might be ready. A week later, Blair wrote to the Treasurer of the United States, Samuel Meredith, regarding his account,

> I have lately written to Judge Wilson, desiring him to apply to you for **the price of a judge's gown**, which he was to procure for me, but for which I did not send him a formal order, as I was not acquainted with the amount.[58]

Whether Justice Wilson was able to follow Blair's instructions is unknown, but just a few weeks later, on February 24, 1791, a John Shields sent a receipt to Chief Justice Jay on behalf of Wilson in reference to making a robe,

> Agreeably to the request of the Honorable James Wilson, Esq. [to me?] I have this day drawn on you in favor of Mr. George Douglas for 53 dollars and Eight Seven Cents at three days sight which you will please to Honor. **This sum is for a Robe** and making agreeably to the Account.[59]

The sum of $53.87 appears to be a substantial sum for one judicial robe so Jay may have had other items to pay off to make "agreeably the account," or perhaps this was the amount due for several robes ordered from Douglas. John Shields was a Philadelphia merchant located at "the Sixth door below Chestnut in Second-Street" who may have also been the Treasurer of the Philadelphia chapter of the Society of St. Andrew, a group that honored its Scottish heritage—and whose president was none other than the Scottish-born Justice Wilson.[60]

The identification of George Douglas is harder to pin down because that name does not appear in the 1791 or 1793 Philadelphia city directories. Was he a tailor, another merchant, or someone else? Looking back to New York City, there are two possible suspects: a father and son with that name listed in the city directory in 1790.[61] Both were merchants, with George Douglas, Jr., listed at No. 236 Queen (now Pearl) Street as an importer of dry goods and clothing from Hull, London, and Bristol, with possible associations with a large trading company.[62] This address would have been just down the street from the Exchange building where the

Court had met in New York the previous summer. It is not hard to imagine, admittedly based on these scant details, the justices walking down the street to place their order for robes. It is also possible that the Court tasked Justice Wilson with coordinating the acquisition of the robes when he returned to his home in Philadelphia, and where the Court knew it would meet the following year.[63] Questions remain, therefore, about whether the robes could have come from a tailor in New York City or Philadelphia, or if the order for such fine goods required a specialized robe maker from Scotland or England, possibly through the connections of the Douglas trading company.[64]

All of the original six justices were present in New York during the August Term 1790, including John Rutledge who did not sit with the Court due to an attack of gout.[65] The discussion to don robes, therefore, may have included Rutledge that summer, but he missed the next February Term and then resigned on March 5, 1791, following his election as chief justice of his home state of South Carolina. Thomas Johnson of Maryland filled the vacancy under a temporary commission dated August 5, 1791, under which he took his oaths on September 19 before Richard Potts in Frederick, Maryland.[66] On January 9, 1792, Johnson wrote to James Wilson from Georgetown, Maryland,

> I have been here several Days indeed longer than I expected. Early next month I hope to see you in Phila[delphia] and you will oblige me **by having a Dress made for me agreeable to those intended for the other Judges**. I have no Vanity to gratify in this outward Mark of Office. I should have rather inclined against it but am not so perverse as to be singular in Things in themselves indifferent.[67]

Due to illness, Johnson would miss the coming February Term, but this letter reveals that Johnson thought he would need a robe made to match the others that were apparently already in the works. That Johnson might have argued against wearing robes had he been involved with the initial discussions is an interesting side note and the lack of other surviving correspodence on the topic frustrating.

In any case, a set of robes was in hand by the February Term 1792, when it met in the courtroom in the new City Hall (see Figure X), and *The Gazette of the United States* reported,

> SUPREME COURT OF THE UNITED STATES
>
> Friday, Feb. 10, 1792
>
> The Court met pursuant to adjournment – present
>
> The Hon. William Cushing
>
> James Wilson
>
> John Blair
>
> James Iredell
>
> No business being before the Court, it adjourned till to-morrow 11 o'clock.
>
> **The Judges appeared on the bench in their robes of office.**[68]

Several other newspapers reported similar information,

> Friday, Feb. 10. – PURSUANT to Adjournment, the Honorable William Cushing, James Wilson, John Blair and James Iredell, Esq'rs. Associate Justices, this day met at the City-Hall, and there now appearing a sufficient number of Justices to constitute a Court, proclamation is made, and the Court is opened.
>
> There being no business at present before the Court, it is adjourned until to-morrow as [sic] eleven o'clock.

Extract from the minutes of the Court,

SAMUEL BAYARD, Clerk.

A CORRESPONDENT observes, that he was highly pleased today, with the appearance of the Judges of the Supreme Court of the United States in their ROBES OF JUSTICE, the elegance, gravity and neatness of which, were the subject of remark and approbation with every spectator.[69]

As noted, Thomas Johnson was absent and missed the unveiling of the robes due to illness, but James Wilson wrote to him on March 13, 1792, to discuss circuit duties and update him on the status of his request for judicial dress, ending his letter, "Your Robes are made."[70] This comment suggests Johnson's gown was either made in Philadelphia, or if Wilson had the robe ordered for Rutledge altered, it was done by a tailor there. Chief Justice Jay was not able to enjoy this moment either because he had remained at home in New York with his pregnant wife, Sarah Jay. Mrs. Jay was well enough for him to depart on his circuit riding duties by April, and she wrote to him on April 22, 1792,

> Your friends at Philadelphia seem to relinquish the expectation of seeing you there again, at least in your official capacity, as Mr[s]. Morris has sent your Robe to you, which Mr[s]. [Soderstrom] was so obliging to leave here this morning.[71]

This letter confirms that Jay was not wearing his robe on circuit that spring, and that the other justices expected Jay to leave the Court if elected governor of New York and were therefore sending him his robe as a farewell token.[72] Sarah Jay does not indicate she will forward the robe to her husband, nor has a letter from him asking for it been located, and this suggests that the justices did not intend to wear the robes while on circuit.[73] Of note, the volumes of the very thorough **Documentary History of the Supreme Court** show no reports of any justice wearing robes while on circuit,[73] nor that Associate Justice William Cushing or Chief Justice Oliver Ellsworth wore a robe when swearing in, respectively, George Washington in 1793 or John Adams in 1797, two events that may have required wearing their official attire outside of a court sitting.[74]

Some stories about the Court's robes, as noted above, claimed they were red and trimmed with ermine, or even matched those worn by English judges from the King's Bench. This confusion could stem from someone in the courtroom audience not able to see the details of the judge's robes up close and mistaking the white trim for ermine, the white fur associated with English judicial attire. One such comment came soon after the Court first appeared in their robes. Benjamin Bourne, one of Rhode Island's Representatives in Congress and a future U.S. District judge, wrote on February 21, 1792, the "Supreme Court...has been sitting [but] have done little or no business" and that "The Judges were habited in Scarlet Robes Richly & fully ermined." Bourne is certainly describing the federal Supreme Court in his letter because he mentions a case before the Court and goes on to discuss the future of Chief Justice Jay.[75] Assuming Bourne saw the court firsthand, the red in Jay's robe as seen in the Stuart portrait may have been described as scarlet and the white trim mistaken for ermine.

In August 1792, a letter written by "Russell" appeared in Philadelphia's *Federal Gazette* under the title "On the Dresses of the Judges." Like Bourne, the author appears to be describing the federal Supreme Court, although his critique could be directed at the Pennsylvania courts as well. Either way, his notice says much about how many people viewed the colorful robes worn by any judges:

Having by accident chanced the other day to walk by the court house, and observing a crowd by the door, I was tempted to enter for an instant, to see what was the object of attention; when I was surpised, at my going in, to behold upon the judicial seats; six gentlemen, arrayed in a robe as unsuitable to the season, as it was new in point of fashion. I was for some time at a loss to discover the kind of dress they had on, till, on a nearer approach, **I found it to be scarlet trimmed with ermine.** Such a dress in August was truly surprising; for in point of convenience, it must be exteremely oppresive, and in point of show or appearance, it certainly is much less solemn and decourous than the black coats, till lately observed on those seats.

The dress, I have been told, is borrowed from a country we are but too ambitious to copy, though we were lately so fond of disdaining.—I am sorry our judges should have imitated an example, originating, probably, in barbarous times, and probably preserved only in England on account of its antiquity...

But, seeing that constitution of the United States has not warranted any distinctions of dress used in regal courts to be adopted by our own; but, on the contrary, forbids expressly, by its spirit, the introduction of orders of nobility so connected with distinctions of dress:—Seeing also, our amiable President does not assume the royal robes at his levees, to which he has, at least, as much apparent right:—I have not been able to forbear these strictures; might always to oppose them to every novelty which appears to me calculated to alter the habits of our plain republican system.[76]

There are some inconsistencies with Russell's account, for example, he states he stopped by the "Court House" but the federal Supreme Court met in the new City Hall starting in August 1791, and at that time the term "Court House" usually referred to a building located elsewhere in the city.[77] Whether Russell intentionally or mistakenly described the white trim of the robes as ermine, that detail connects the Court's robes to the aristocratic trappings of the English judges. For Russell and many others, such associations should not be seen in the courts of the new nation where simple "black coats" (confirming the court's earlier sittings had no robes) are more in keeping with republican virtues.

At the federal Supreme Court's subsequent sitting, a similar comment on the justices' robes again made the newspapers, and not for their fashionable style but for their European associations. The February 9, 1793, issue of *Dunlap's American Daily Advertiser* included the following notice:

> In my usual round in royal square, from Congress hall to the house of state, in which places the wise akers [sic] of America are framing laws for the citizens of these United States, I carelessly sauntered into the city court-house, where the federal supreme court was sitting. I had been there but a few minutes, when I was accosted, by a plain, decent, elderly looking man, thus; **"Canst thou tell me, friend, whether those servants of the people on you elevated seats, dressed in party coloured robes or livery, cannot pass sentence according to law, on right and wrong, without being cloathed in the Harlequin dress?"** I replied, "I had heard they could not." He shrugged his shoulders and

> said, "Poor Americans! If that is the case, your independency has not mended your condition much—your liberty is but a shadow indeed, when you carry the badges of European slavery on your backs to your seats of justice." A.B.C.[78]

Another anonymous letter appeared in the city's *National Gazette* a few weeks later, with the correspondent noting "with pleasure" the spread of republican ideals and removal of "every vestige of royalty and regal pomp" from the country. "I cannot help viewing with a jealous eye," the writer continues,

> **the gaudy trappings of our very worthy judges of the supreme court of the United States.**—Plainness and simplicity are fundamental principles of a republican government, and we are all aware of the prevalency [sic] of examples; when I see, therefore, our chief magistrates upholding the relicks [sic] of aristocracy, I really am surprized [sic], and not a little fearful of the consequences; people seem to be pretty generally agreed, with regard to the evil tendency of bestowing titles. And to me it appears as great an impropriety, and will eventually have the same effect, to retain the idle pomp of office, as the ridiculous epithets annexed thereto.[79]

A year later, in September 1794, a long-running series of letters authored by "A Citizen" titled "A Review of the Revenue System in Thirteen Letters" included this reference to the Supreme Court in Letter XII,

> Guided by the same principle, and directed by same influence [as seen as President Washington's levees], **even the grave Judges of the Supreme Court, when on the solemn seat of judgment, distinguished themselves from their fellow citizens by robes of gaudy and fantastic form**. With these they might have amused the fancy and excited the ridicule of their beholders; but never could have added to their own dignity or respectability in the opinion of men of real discernment....The judges indeed continue to wear their party colored robes, but it is probable they do it more from pride which prevents their acknowledging their mistake, then from any conviction of their utility. Some of those who have been lately appointed, refuse to wear them.[80]

Describing the Court's robes in a derogatory way, calling them "party colored," "gaudy," and "Harlequin" dress are among the tropes used by the anti-Federalist press when referring to the Court. "Parti-coloured" is a technical term used to describe a garment divided vertically and of two different colors; it would be a useful shorthand to describe the red and white colors of the Court's robes.[81] At the same time, it held the double meaning suggesting the Court was supportive of the Federalists, one of the nascent political parties forming in the 1790s. The term appears several times in newspapers during this period in other uses, including "party colored cockades" seen on hats to indicate a person's support for one party over the other so it was not reserved for the Supreme Court alone.[82] Importantly, these notices reinforce the idea that all of the justices were in colored robes, not just Chief Justice Jay. The suggestion made by "A Citizen" that new members of the Court were refusing to wear the robes echoes the notion of reluctance to don judicial robes in Justice Thomas Johnson's earlier letter when he requested a robe be made for him. There is no known documentation to support the notion that some of the justices wore robes and others did not, but the enthusiasm for the

colorful robes may have been waning as the membership of the Court changed.

The August Term 1795

Chief Justice Jay did not win the New York governorship in 1792 as many suspected and continued to serve through 1795; however, he missed the August Term 1794 and February Term 1795 while on a diplomatic mission to England that resulted in the treaty that would bear his name. When the terms of the Jay Treaty reached the public, there was a great uproar claiming that Jay had given up too much to the English. At the same time, he was the leading candidate for governor of his home state. One commentator captured this dichotomy while mocking Jay in the March 30, 1795, issue of the *Aurora General Advertiser*,

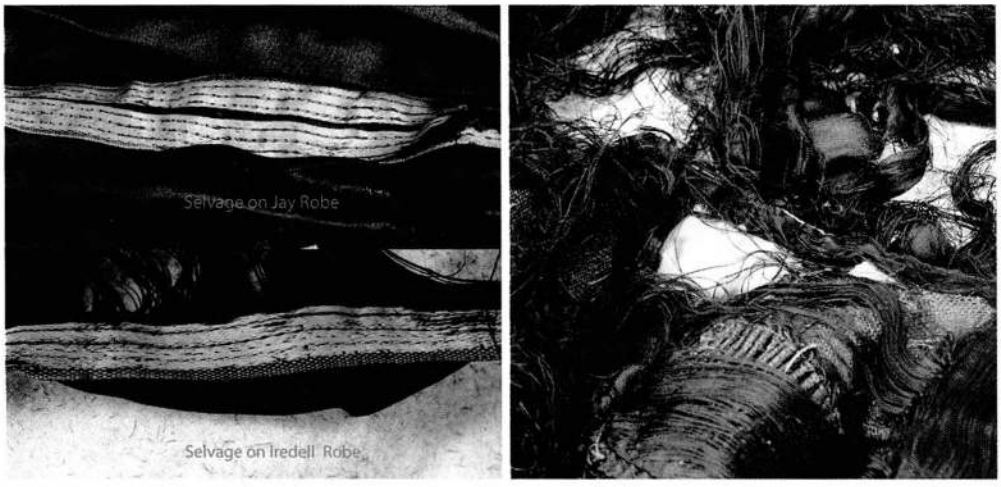
> It is to be presumed that the philanthropic and republican toast of our judicial envoy [Jay] will add to his other merits, and secure him an honourable and affectionate reception on his return; for freemen must certainly welcome the man to their shores, with hearts overflowing with delight, who proclaimed a wish, that thrones and tyranny might have an honourable security! The citizens of New-York will, doubtless, hold this in remembrance, and place it as a stepping stone for redoubtable envoy to mount the chair of their government; & lest the bottom should be too hard, **the Harlequin robe** which would then be useless, might be converted into a cushion upon which a friend of kings might loll at his ease.[83]

Upon learning of his election, Jay resigned from the Court in late June 1795, but in celebrating the nation's independence that July 4, effigies of Jay burned in several cities, and newspaper accounts of these proceedings almost always noted his visage was dressed in robes.[84]

With Jay's departure, President George Washington named John Rutledge of South Carolina as chief justice. As noted earlier, Rutledge had previously served on the Court as one of the original associate justices but resigned to become South Carolina's chief justice. Now, under a recess appointment, Rutledge arrived in Philadelphia during the August Term, and made contact with James Iredell, whom he knew from his earlier tenure on the Court,

> I thank you for your very kind Letter, & shall be happy to see you, as soon as convenient—I cannot take my Seat at the Bench, today—when the Court rises, I will be obliged to you, **for a Sight of your Gown**, or, if Mr. Jay's, or Mr. Blair's, is here, be pleased to order the Officer of the Court, or the person who has Charge of 'em, to send one of them, to my Lodgings.[85]

This letter reinforces the notion that all of the justices were wearing a similar robe at the August 1795 Term and that either Jay's or Blair's robe might be used by Rutledge when he assumes his position as chief justice. Importantly, this suggests—at least to Rutledge's knowledge—that the chief justice's robe would be interchangeable with that of an associate justice, something he may have known if he was included in the discussion to adopt robes back in August 1790. What Rutledge could not have known was that Jay's robe was in New York with the Jay Family, but he must have known Blair was ill and not present and therefore his robe might be available.[86] Rutledge did preside as chief justice that summer, only for the Senate to reject his nomination later in the year. No comments on the appearance of the Court appear at the time so perhaps he was able to make do with Blair's robe.



Close examination of the robe worn by Associate Justice James Iredell suggests that it was originally similar to the color Jay robe and was likely later dyed black, but further testing is required to confirm that suspicion. On the left is a comparison of the two gold selvages with the Jay robe (top) and the Iredell robe (bottom). On the right is a detail of the inside collar area of what remains of the body of the Iredell robe; the piece of light-colored fabric at center could be a piece from the missing stole similar to the Jay robe.

At about the same time, another piece of this puzzle enters the story: a pastel portrait by James Sharples Sr. of Associate Justice William Paterson wearing what appears to be a similar robe to that of John Jay.[87] Sharples was an English artist, whose family first traveled to the United States in late 1794, remaining through 1801. With members of his family, he made portraits of many prominent Americans of the day, including several members of the Supreme Court and at least one of their wives. The significance of the Paterson portrait is that Sharples had a reputation of making a faithful likeness of his subjects. He worked not in oil but pastel, producing a small portrait in about two hours that he gave to the sitter when completed, charging $15 for a profile like Paterson's portrait. This is a stark contrast to Stuart, who as noted earlier, took months, if not years, to complete his works, allowing backgrounds or other details to be filled in later from memory or by other artists.[88] The Paterson robe depicted by Sharples is actually closer to how the extant John Jay robe appears than is the one in the Stuart portrait.

Unfortunately, the Paterson portrait is difficult to date: it could have been painted anytime between 1795 and 1801, but likely dates to 1796–98 when Sharples mostly worked in Philadelphia. At least one other justice, William Cushing, sat for Sharples around this time based on a 1797 letter from Cushing to his niece that mentions two separate portraits Sharples made of him. The Sharples family also captured other members of the Court, but possibly at other times including Oliver Ellsworth, Bushrod Washington, Governor John Jay, Brockholst Livingston, and possibly Alfred Moore. Based on Sharples' technique, it would be surprising for him to depict Paterson in a robe he did not wear, but he is also the only member of the Court Sharples portrayed in this way.[89] If taken as a "document" of what Justice Paterson was wearing the day he was drawn, the Sharples portrait pushes the use of the colored robes into the second half of the 1790s.

Another Early Robe Rediscovered

Taken together, the evidence so far—both physical and documentary—suggests

that all of the members of the Court up until Jay's departure likely wore the same type of robe with red and white trim, from the February Term 1792 through at least the August Term 1795, and the Paterson portrait indicates the colorful robes may have been in use into the later 1790s. In addition to Jay's robe, however, at least five others should have existed, one each for William Cushing, James Wilson, John Blair Jr., James Iredell, and John Rutledge/Thomas Johnson. Without a firm date for the order of first robes, the one requested by Thomas Johnson in January 1792 and that was ready by March could have been the one ordered for Rutledge and altered for Johnson's use. Whether there were five, six, or seven colorful robes, the question remainsof what happened to them?

As described above, the one robe known to have survived was that of John Jay, and it remained with the family into the twentieth century. In the late 1920s, a Jay descendant, Peter Jay, wrote to Chief Justice William Howard Taft and offered the robe for use when the planned Supreme Court Building opened. Despite Taft's interest in one day having a place to show the Court's history in the new building, he declined the offer citing a lack of space while the Court was still meeting in the Capitol building. He recommended the Smithsonian, and, in turn, the Jay Family placed the robe on loan there while Peter Jay was overseas. Despite a second conversation in 1931 with Chief Justice Charles Evans Hughes, the robe remained on loan with the Smithsonian until donated to the National Museum of American History in 1973. The robe did make it to Supreme Court Building once as a featured object in a short-term exhibition.[90] Today, the robe is in fragile but remarkably good condition in the museum's collection, having undergone a major conservation treatment after the donation. Even when first cataloged, the curators there were not sure if the robe was an academic or judicial robe.[91]

With only Jay's robe to study, however, it was difficult to determine if it was a unique robe, one of a matching set, or if there were differences between the chief justice's robe and those of the associate justices. Recently, a second robe of what appears to be a design identical to that of Jay's robe was located: the one worn by Associate Justice James Iredell who served on the Court from 1790 to 1799. The key to locating Iredell's robe was a 1907 exhibition catalog from the North Carolina Historical Exhibit at the Jamestown Ter-Centennial Exposition that listed the robe.[92] Following this lead, the robe was located in the collection of the North Carolina Museum of History in Raleigh, a donation dating to 1914.[93] Finally, the physical proof of a second early Court robe could confirm the existence of a set of robes for all of the justices—or would it?

Importantly, with the help of the North Carolina Museum's staff, the author was able to inspect the robe in the museum's conservation lab.[94] Unfortunately, the body of the near 230-year-old garment was mostly in tatters, having been on exhibit in the state's Hall of History as early as 1884. Its deteriorated condition confirmed the description in the early exhibit catalog that it had "fallen a victim to the ravages of time."[95] From the segments that were intact, it was clear certain features in its manufacture were nearly identical to Jay's robe, indicating the two robes were likely from the same tailor's shop, made with the same material, and were of the same pattern. This is most apparent in the pleated area found on both "outer sleeves," where there are seven folds held in place by strings looped over four buttons, and along the back shoulder seam area with a solitary button with looped string. Importantly, the ends of the silk fabric of the main robe, called selvedges, have a gold edge on the inside seam which is similar to matches the ones on the Jay robe.[96] All of this appears to confirm a common source, but there were two surprises: the red and white colored "stole"

running down the front of Jay's robe was missing from Iredell's robe, and even more unexpected, the outer sleeves of the Iredell robe were all black.

The existence of the black Iredell robe leads to other questions; most notably, did the associate justices wear a black robe and the chief justice alone wear the one with the red-and-white embellishment? Some historians had suggested such a distinction in rank, but the Sharples portrait of Justice Paterson and the other documentation discussed earlier argues that the robes were all the same, or at least all had colorful aspects, thus refuting that idea. The most logical explanation could be that the changes to Iredell's robe occurred at some point while he was still on the Court.

To this layperson's eye, the construction of these early robes is such that there is a black silk inner robe, with the fabric pulled together along the shoulders and back to create the flowing body of the gown. Narrow, inner sleeves of black fabric end in turned back cuffs. To this black gown, the colorful outer sleeves and stole are attached, with the stole running around the neck and down the two sides of the front of gown. The Jay robe preserves the original color patterns of the outer sleeves and stole while on the Iredell robe these pieces are black or missing. The condition of the Iredell robe is so poor that the extant outer sleeves were detached from the robe's body.

If one wished to turn the more colorful robe into an all-black one, the outer sleeves could be removed, dyed black or replaced with black fabric, and reattached. At the same time, the stole could be detached and the result would be an all-black robe.[97] During inspection, the exterior sides of the outer sleeves showed a slightly different sheen and color that hints to a possible dyeing process, but long exposure to light could be the culprit. Intriguingly, inside the top collar of the Iredell robe is a very small piece of fabric, close in color to the faded colors found on the stole of the Jay robe and possibly a remnant of this piece that was removed.

It was impossible from visual observation alone to determine if the fabric on the outer sleeves of the robe were originally black, dyed later, or were a complete replacement. (The inner and outer sleeves were in much better shape than the body of the garment so perhaps they were completely replaced.) However altered, the North Carolina museum staff did think this black color on the outer sleeves was from early in the garment's life because the fabric was extremely brittle, likely caused by the use of iron in the making of black dyes in the late eighteenth and early nineteenth centuries.[98] The Jay robe in the Smithsonian also suffered damage over the years from light exposure, fading of the original dyes used in the fabric, and the naturally deteriorating silk. At this time, plans to bring the robes together for a full analysis by historic textile experts at one of the museums, or at least to undertake a comparable study, are on hold due to the COVID-19 pandemic.[99]

If the alterations to make the Iredell robe appear black prove correct through further analysis, it would be definitive proof that all of the Court's robes once had the red and white details. It would mean that Iredell's robe was most likely changed to black at some point after Jay resigned in June 1795 but before Iredell's death in October 1799. This would explain the difference between the two original 1792 robes, and it could mean that the switch to black for all the other robes occurred at some point during the 1796–99 period. This moves the Court's change to the all-black robe back a few years, and rather than attributing this change to John Marshall, it would have occurred during the chief justiceship of Oliver Ellsworth.

From a purely practical standpoint, this analysis may make more sense. With the departure of Jay and Blair in 1795, two new justices, Ellsworth and Samuel Chase, joined the Court the following year. Assuming each

departing justice kept their robe as Jay did, the Court had at most four original robes for six justices. If the Court retained Justice Blair's robe after he resigned, there may have been five. If the original robes were made overseas, there would be a long wait for a new matching custom robe, but if made in Philadelphia it could have been a few weeks or months. Perhaps the new chief justice decided to move to a more easily obtained black robe for its new members, and the others phased out the older robes or altered them to match. Another possibility is that the change occurred later, perhaps after the death of James Wilson in 1798. If Jay and Wilson had been the main advocates for the colored robes, Wilson's death may have allowed the newer members of the court make such a change, especially if some of the reports that new justices did not wish to don the colorful robes held some truth. Unfortunately, there is no known correspondence about this change and no robes of any sort associated with Ellsworth, Chase, or Bushrod Washington have been located to date. In addition, no life portrait of any of these justices shows them wearing a robe, let alone one like those of Jay or Iredell.[100]

The new physical evidence of the Iredell robe seems to put a limit on the timeframe for the switch to the black robes, but at least two documentary references to the justices wearing "party colored robes" appear after 1800 and may support the argument that the justices continued to wear the multicolored robes after Iredell's death in October 1799. The phrase returned to newspapers in regard to the Supreme Court in "A Card for Judge Chase" published in several newspaper in mid-1800:

> The writer of a letter, dated at Philadelphia, May 7th, 1800, of which an extract appeared in the Examiner of the 20th of the same month, though willing to gratify Judge Chase and the public, by establishing in a court of justice the truth of the allegations contained in that publication, is not disposed to enter into controversy in the federal court, with a Judge of that court, under the existing practice of common law, 'that the greater the truth, the greater the libel'–a doctrine too monstrous to be longer tolerated even in England, but which might be forced down in this country by **Mr. Chase and his brethren of the party-colored robe**.[101]

Chase's behavior on the bench while on circuit court duties was under fire from the rising ranks of the Jeffersonian-Republicans. Eventually, Chase's reported partisan actions from the Bench would lead to his impeachment in 1804, of which he was acquitted. The author of the May 7, 1800, letter that began this newspaper war of words with Chase was tentatively identified as Stevens Thomson Mason, a Senator from Virginia.[102] The writer claims to have been in the courtroom watching Chase while he was attending to his circuit court duties and must have thought the full Supreme Court was still wearing colorful robes in mid-1800.

A year and half later, on January 13, 1802, the same Senator Mason used the phrase on the floor of the U.S. Senate during the debate over the repeal of the Judiciary Act of 1801:

> But if the gentleman from New York wishes to be gratified – with a more modern idea of sovereign degradation, I would refer him to the memorable threat of an individual, a servant of the people to humble a whole State, a great State too, in dust and ashes. A State upon her knees before **six venerable judges, decorated in party-colored robes, as ours formerly were, or arrayed in more solemn black, such as**

> **they have lately assumed,** hoping, though a State, that it might have some chance for justice, exhibits a spectacle of humble and degraded sovereignty far short of the dreadful denunciation to which I allude![103]

If Mason was indeed the author of the May 7, 1800, letter, and thus the author of the "Card for Judge Chase" in June 1800, he must have learned by his January 1802 speech that the Court no longer wore the colorful robes. This does not mean, however, that the change necessarily occurred between those two dates.

The sentence from Senator Mason's speech, with its vague "lately assumed" timeframe, combined with the arrival of Chief Justice John Marshall the year before in February 1801, appears to be the basis for the claim that Marshall ordered, or led, the switch to the black robe. The influential biography of Marshall by Jean Edward Smith suggested the new Chief Justice made this change purposefully to show new leadership at the Court but offers only this one quote as the proof that "verifies the change to the black robe under Marshall."[104] In light of the rediscovered Iredell robe, and without additional confirmation, Senator Mason's remark alone can no longer sustain the attribution crediting Marshall as much as it fits the narrative of how he unified the Court.

The connection of Marshall to the black robe made by Smith and others may also have been influenced by the existence of an all-black robe worn by Marshall and preserved at the John Marshall House in Richmond, Virginia. Prior to the rediscovery of the Iredell robe, it was the oldest all-black robe known to exist. Recently, the Marshall robe has gone through a much-needed conservation treatment and will be on exhibit for a short time starting in April 2021.[105] Unlike the Jay or Iredell robes, the Marshall robe does not have outer sleeves nor a stole and appears more like the black robes worn today. The recent study was unable to determine if this robe was made in 1801, but with a near thirty-five-year tenure it is likely Marshall required more than one robe; therefore, the surviving one may be his second or third.[106] Despite the existence of this robe, there are no eyewitness accounts that Marshall wore a black robe when he joined the Court on February 2, 1801, nor if he did so at the inauguration of Thomas Jefferson on March 4, 1801. Despite the lack of documentation, Marshall presumably found a black robe to wear at the Court's first sitting in Washington, DC, only a week after his Senate confirmation, but the black Iredell robe suggests he did so to conform to the all-black robes already in use by the Court.[107]

If one entertains, however, the idea that the change to black robes did occur under Marshall when he arrived in February 1801, how does one explain why Iredell's pre-1799 robe is black? Several theories are possible, but all of them point to some explanation other than coming from John Marshall. One would be that the outer sleeves of the Iredell robe were always black, so despite the other evidence reviewed herein suggesting all of the justices wore similar colorful robes, it would mean the switch to black robes predated Marshall. Another is that the alteration of Iredell's robe happened within his lifetime, so also before Marshall joined the Court. A third possibility could be that the robe remained with the Court after Iredell's death and was modified later for the use of another justice, but if so, why was the robe retained by the Iredell Family as an heirloom?[108] One other possibility is that the alteration of the robe happened much later in its life, possibly to make it look like an all-black Supreme Court robe that had been adopted, but that also seems like an unlikely outcome for a cherished family heirloom. The most probable answer is that it happened during Iredell's life, before John Marshall became chief justice.

Conclusions

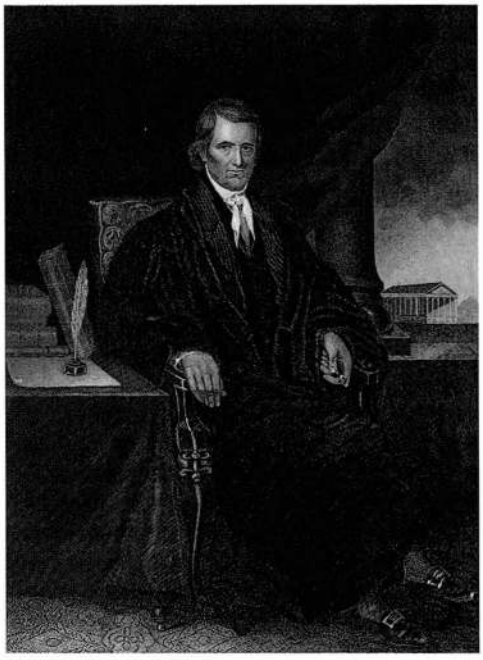
Even with the new physical evidence of the Iredell robe and the review of reliable documentation about the Court's early robes, there is still uncertainty about when the switch to black occurred. Was it in 1796 with the arrival of Chief Justice Ellsworth and Justice Samuel Chase, or in 1798 after the death of James Wilson, or at some other point yet to be determined? Whenever it happened, one other aspect remains a mystery: why did only Senator Mason seem to notice? For over 200 years, there have been articles, speeches, and books written about the Supreme Court, many of which touched on the Supreme Court's attire but only one obscure quote has been located that actually notes this change. One would think someone else would have commented on the symbolism of the move away from the aristocratic "party colored" robes to more simplistic "republican" ones, either in the press or in a letter somewhere. Perhaps this article will lead to new findings to help clarify what actually happened.

Allowing for a bit of speculation, there is one moment in American history that may provide an explanation for the oversight of this admittedly minor, but hard-to-miss event: the death of George Washington. Perhaps the story went something like this: Following Wilson's death in 1798, the justices began contemplating a change to an all-black robe. Only two of the original justices who had agreed to wear the colorful robes were still on the Court, William Cushing and James Iredell, and perhaps the newer, younger members wanted to switch. In addition, the Court was coming under increased fire from the Jeffersonian-Republican press as being too pro-Federalist, so at some point during 1799, the Court decided to make the switch to the black robes. Some opted for new robes and others, like Iredell, had their old robes altered. Such a move at this time would agree with all of the physical and documentary points noted in this article previously.

The Court's next scheduled sitting was in February 1800, but before the justices could appear in their all-black attire the news of former President George Washington's death would have swept the nation. As the news spread, the entire country went into mourning, with the House of Representatives voting to have all members wear black and the Senate opting for a black armband for the remainder of their sessions. Both opted to drape their chambers with black mourning cloth. When the Supreme Court arrived for its Term in early February, the entire city of Philadelphia was preparing for a National Day of Mourning on February 22, 1800; Washington's birthday.[109] In this scenario, when the justices took the Bench in their now all-black robes, there was little comment because it appeared as another gesture of mourning to the former president. To be clear, this fictional account is not suggesting the justices changed their robes to black in order to mourn Washington, but the complete lack of commentary on the Court's switch to black robes "could" have been lost amidst the nation's mourning of Washington. Such a story would also bring Senator Mason's remark of the Court's switch to black "lately assumed" in line as well.

Of course, locating another robe from the early 1790s set—regardless of its condition—or a robe associated with Chief Justice Ellsworth or Justices Chase, Washington, or Alfred Moore might help settle the matter...and there is hope that at least one other robe survived and may still exist somewhere. Within the historic collections held by the Supreme Court's Curator is a handwritten note retained by the Marshal of the Court that appears to date to the late nineteenth century. It starts with Senator Mason's 1802 quote written out, but after the quote another hand added,

> In addition to the above I will say that about two years ago my family were in the house of descendants



Did Chief Justice John Marshall order his brethren to switch from colored to black robes when he was appointed in 1801, to show unity, humility, and a break with English tradition? Marshall is shown above in his black robe in an 1863 engraving.

> of Mr. Justice Patterson [sic] of the U.S. Supreme Court, and saw there a portrait of the Judge in a black robe or gown with a broad red stripe on it – this portrait was said to represent him in his official vestment as a justice of the U.S. Supreme Court.
>
> WAM
>
> **(Gown mentioned above was at that time in possession of Mrs. Patterson of Cooperstown, NY)**[110]

The portrait mentioned is likely a version of the Sharples portrait of Justice Paterson discussed earlier, of which several may exist. The parenthetical postscript implies that Paterson's judicial gown—possibly retaining its colorful aspects as seen in the portrait—had survived into the late 1800s. No direct descendants of Justice Paterson are known to have lived in Cooperstown, and efforts to find it and other early robes have, to date, been unsuccessful.

After a sifting through two centuries of stories about the Court's robes, the documented facts suggest that the first justices did choose to create a unique design for the robes of the new Supreme Court. Wearing a matching set of robes would signify a unified Court and bring a solemnity to its proceedings, while importantly maintaining a symbolic connection to the long traditions of the law and the role of the federal Supreme Court in the new nation. These robes became a target for some to criticize the Court for such aristocratic regalia, but for the early justices the robes likely symbolized their continued belief in building a new nation through what became known as the Rule of Law, something all of them had been a part of for much of their lives.

The intentional decision of the first Supreme Court justices to don judicial robes was perhaps surprising during a time of casting off the traditions of the Old World while forming the new nation. Retaining judicial robes was one way to signify a continuation of the legal system people knew, even if it was now in the form of federal courts whose role was still to be fully determined. James Fennimore Cooper, in his **Notions of the Americans**, had his fictional "Traveling Bachelor" describe the 1828 Supreme Court in one of his letters, "No civil officer of the government has a costume except for the judges of the supreme court. The latter wear, in court, plain black silk gowns. They commenced with wigs and scarlet robes, but soon discarded them as inconvenient."[111] While this account is not entirely accurate, it may be correct in that the eventual switch to the all-black robe was due to being "inconvenient" and not made with an overt symbolic or political purpose as has often been suggested. Continued research may one day find more answers to the remaining questions, but the decision to switch to black robes impacted the symbolic visualization

of judges in the United States, and around the world.

Editor's Note: The author continues to conduct research on robes and other attire worn by the justices and will continue this story in a future article. He hopes that anyone with any clues about what happened to one of the other early robes will contact the Supreme Court Historical Society or the Curator's Office at the Supreme Court.

Notes

[1] When the story that Marshall instituted this change first appeared is hard to determine, but seems like a relatively recent one. See Smith, **John Marshall: Definer of a Nation,** 1996, 285–86, and footnotes 33 and 34. The reference to Justice Cushing as a "contemporary" example of wearing robes is correct but it points to him wearing scarlet robes as a Massachusetts state judge in 1784, not as a member of the Supreme Court.

[2] For more on the Court before John Marshall, see Gerber, editor, **Seriatim, The Supreme Court Before John Marshall,** NYU Press, 1998.

[3] The original portrait resides at the National Gallery of Art in Washington, D.C., a gift of the Jay Family.

[4] McLanathan, **Gilbert Stuart,** 1986, 76–79; Sarah Jay to John Jay, August 2, 1794, Papers of John Jay, Rare Book & Manuscript Library, Columbia University; Ide, **The Portraits of John Jay,** The New-York Historical Society, 1938, 26–27.

[5] Peter A. Jay to John Jay, July 8, 1808, The Papers of John Jay, Rare Book & Manuscript Library, Columbia University.

[6] Barrett and Miles, **Gilbert Stuart,** Metropolitan Museum of Art and National Portrait Gallery, Yale University Press, 2004, 120–123. Also see Voss, **Portraits of American Law**, National Portrait Gallery, University of Washington Press, 1989, 26–29.

[7] Ide, **Portraits of John Jay**, 1938, discusses numerous copies in oil, many made for members of the Jay Family. See engravings by William Levey, 1815, published in Delaplaine's **Lives & Portraits of Distinguished Americans**, 157; and Alonzo Chappel, 1858.

[8] John Adams to Joseph Delaplaine, December 17, 1815, Tulane University, George H. and Katherine M. Davis Collection.

[9] See Daniel Huntington's *The Republican Court* painted in 1861 where Jay appears in a pink and red robe that appears to be modeled on an Oxford Doctor of Laws robe.

[10] See "Currier & Ives | The Inauguration of Washington as First President of the United States, April 30th 1789 – At the Old City Hall, New York – The oath of office was administered by Chancellor Livingston of the States of New York – Mr. Otis the Secretary of the Senate holding up the Bible on a crimson cushion. | The Metropolitan Museum of Art (metmuseum.org)."

[11] Firsthand accounts of the first inauguration such as the **Diary of William Maclay** do not mention Livingston being in robes, although it is possible he could have worn one. Later paintings and illustrations of the event show Livingston in both plain clothes and a robe.

[12] *Chief Justice John Jay*, by Henry Peters Gray, after Gilbert Stuart, circa 1852, Collection of the Supreme Court of the United States, accession number 1877.2. The first was *Chief Justice John Marshall* by Rembrandt Peale, bequeathed to the Court by Chief Justice Salmon P. Chase in 1873.

[13] *Century Magazine*, December 1882, Volume 25, No. 2, 165.

[14] "Address of William Allen Butler, Centennial Celebration of the Supreme Court, 1890," in Carson, **The Supreme Court of the United States, Its History and Centennial,** John Y. Huber Co., Philadelphia, 1891, 594–620.

[15] Example in Keim's **Illustrated Hand-Book: Washington and Its Environs,** 1887, 85.

[16] Jay awarded an honorary doctor of laws from Harvard in 1790, **Quinquennial Catalogue of the Officers and Graduates of Harvard University, 1636–1910**.

[17] McClellan, **Historic Dress in America, 1607–1800,** 1904, 340, citing a "contemporary authority" and directing to Mason, **Life and Works of Gilbert Stuart,** 1879/1894, which does not make this claim.

[18] The mythical school for Witchcraft and Wizardry in the Harry Potter book and film series.

[19] "The Judicial Robe – The Garment Worn by Chief Justice Jay," Special to *The Evening News* [location not determined], April 15, [after 1881 as it refers to the "late" Justice Clifford]. Described as "Black silk, with a board border of pink, with a narrow facing of drab on the sleeves and front," Clerk's Office Scrapbook, Vol 1; Justice Samuel Blatchford (1882–93) may have instigated the request to see the robe, Marshal's Office notecard, Collection of the Supreme Court of the United States. Another source erroneously dates story to "around 1850."

[20] Van Santvoord, 47, and Flanders, Volume I, 384.

[21] Butler's assertion noted earlier also repeated in Hazelton, **The National Capitol; Its Architecture, Art and History, 1903 (orig. 1897),** and Monaghan, **John Jay,** Bobbs-Merrill Company, New York & Indianapolis, 1935, 305, with the caveat that it is "probably" from this source.

[22] Pellew, **John Jay,** 1980 reprint of 1898 edition, 250; Monaghan, **John Jay, Defender of Liberty,** The Bobbs-Merrill Company, New York & Indianapolis, 1935, 305.

[23] *Harper's Weekly*, February 24, 1894, "The United States Supreme Court," 173 and 175, including illustrations.

[24] Whitlock, "In and Around the Supreme Court," *Kate Field's Washington*, Vol. 10, No. 25, December 19, 1894, 389–90. "Archie" was John Archibald Lewis (1831-1913), a messenger in the Marshal's Office, starting in 1849 at age 18, who served the Court for almost 64 years.

[25] Knapp, **A Memoir of the Life of Daniel Webster**, Stimpson and Clapp, Boston, 1831, 196.

[26] Benjamin Bourne to [William Channing], February 21, 1792, Benjamin Bourne Papers, Rhode Island Historical Society; and "On the Dresses of the Judges," *Federal Gazette* (Philadelphia), August 25, 1792.

[27] The University of Dublin (Trinity College) has no record of an honorary degree awarded to Jay, email correspondence with author from Registrar's Office of the University, 2007.

[28] *Caledonian Mercury*, May 17, 1792, and confirmed on the University of Edinburgh's online honorary degree database.

[29] Proctor (1830–1900), lived mostly in Dansville and Albany, NY, and was the Secretary of the State Bar Association.

[30] Proctor, "First Federal Chief Justice," *The American Lawyer*, 4, no. 4 (April 1896), 152–54; and L. B. Proctor, "John Jay and Other Chief Justices of the Supreme Court of the United States," *Michigan Law Review*, Vol. 5, No. 5 (May 1896), 153–64.

[31] No earlier source for these stories could be located. Internet searches of correspondence of Jay, Hamilton, Jefferson, and Burr yielded no results that discuss judicial attire in any way.

[32] Appearing about nine months later, Harrison's version appears to be a condensed version of Proctor's account. *Ladies' Home Journal*, Volume XIV, No. 2, January 1897, 10, and Harrison, **This Country of Ours**, 1897, 319–20.

[33] Warren, **The Supreme Court in United States History,** Volume I of III, 1923, 48.

[34] Hazelton, **National Capitol**, 142–43.

[35] Carson, "At the Cradle of Its Greatness," *American Bar Association Journal*, Volume 8, No. 6, June 1922, 338.

[36] Morris, "John Jay and the New England Connection," *Proceedings of the Massachusetts Historical Society*, 1968, Third Series, Vol. 80, 16–37, mistakenly claims the robe was "tangible" evidence of this degree although there is no evidence Harvard provided Jay with a robe.

[37] Current Harvard honorary degree robes are all red with black details on the sleeves. Descendants of Justice Joseph Story had two mostly red academic robes, one was an Oxford LL.D. robe and the other a Harvard robe, but was dated to the second half of the nineteenth century. Neither looked like the Jay robe. Details in Curator's Office files relating to Joseph Story's black academic robe.

[38] Joseph Willard to John Jay, November 3, 1790, The Papers of John Jay, Rare Book & Manuscript Library, Columbia University. Willard notes a delay in engraving the diploma and that he will deliver it to Jay later in New York. Jay also noted receiving the letter in his diary while on circuit.

[39] Correspondence with Harvard Library, July 12, 1973, Office of the Curator, Supreme Court of the United States. The school awarded an honorary doctor of law degree even though Harvard's law school did not open until 1817. Details of whether early American universities gifted robes when awarding honorary degrees are lacking, but the formalization of academic regalia in the United States did not happen until the late nineteenth century.

[40] See **Gilbert Stuart** (New York: Metropolitan Museum, 2004). The exhibition opened at the Metropolitan Museum of Art in October 2004 and traveled to the National Gallery of Art in 2005.

[41] Stahl, **John Jay,** Hambledon and London, 2005, 273.

[42] **Historic Dress in America**, 340. Several portraits of early Kings College presidents show them in their Oxford LL.D. robes, which are red and pink, see portrait of Rev. Myles Cooper. Jay did receive an honorary degree in 1794 from Brown University several years after he had his judicial robe.

[43] There are several articles and books written about the evolution of legal attire. See O'Neill, "Why Judges Wear Black Robes" for a short summary, and for more of a global perspective, Woodcock, **Judicial Habits**, Ede & Ravenscroft, 2003; "The Judicial Robe," James Claiborn, *Yearbook of the Supreme Court Historical Society*, 1980; Yazdani, **The Habit of a Judge**, 2019.

[44] No documentation about whether Supreme Court justices discussed wearing judicial wigs has been located to date, and none are known to have worn a judicial wig while the Court sat. For the well recounted story of William Cushing and his wig, see *Address by J. D. Hopkins, before the Members of the Cumberland Bar of Maine*, 1833, and repeated elsewhere, including Flanders, **Lives of the Chief Justices** (1858), Volune II, 37. For one take on wigs with illustrations, see **Latrobe's View of America, 1795-1820**, Maryland Historical Society, Yale University Press, 1985, entries 38 and 48.

[45] For Massachusetts, see Devlin, "It Is Well That Judges Should Be Clothed in Robes," 2 Supreme Judicial Court Historical Society Journal, 123, and McNamara, **From Tavern to Courthouse**, Johns Hopkins Press, 2004,

58-59; for Maryland, see Lamy, "A Study in Scarlet: Red Robes and the Maryland Court of Appeals," 2006; for Pennsylvania, see Brown, The Forum, 1858, reporting on Thomas McKean wearing robes, and possibly use of red as noted in Meehan, "Courts, Cases, and Counselors in Revolutionary and Post-Revolutionary Pennsylvania," Pennsylvania Magazine of History and Biography, Vol. 91, No. 1, 1967, 27, footnote 64, also Konkle, **George Bryan and the Constitution of Pennsylvania, 1731–1791**, mentions the Supreme Court switching between black and red robes.

[46] *Journals of Congress*, Thursday, April 12, 1781. Motion made by James Madison, "That the Judges by complimented with a black robe by the United States as proper to appear in during the sitting of the Courts." This court handled about 120 cases, mostly from 1780 to 1784. In one instance, William Paca of Annapolis, MD, was ill but held court from his bed; thus, the formal use of robes seems unlikely. Email correspondence with Historic Annapolis Historian Glenn Campbell, 2020. Paca later served as a U.S. District judge.

[47] For Jay on unity, see VanBurkleo, "Honour, Justice and Interest": John Jay's Republican Politics and Statesmanship from the Federal Bench," Journal of the Early Republic, Autumn 1984, Vol. 4, No. 3, 239–74.

[48] *Duty and Justice at "Every Man's Door": The Grand Jury Charges of Chief Justice John Jay, 1790–1794*, Journal of Supreme Court History 31, Issue 3, November 2006, 235–251.

[49] For the legal background of the early Justices, see Table 4-9, Prior Judicial Experience of the Justices, **Supreme Court Compendium, Sixth Edition**, CQ Press, 2015.

[50] *Gazette of the United States*, February 3, 1790, and *The New York Daily Advertiser*. Marcus, **The Documentary History of the Supreme Court of the United States, 1789–1899, Volume I, Part 2**, includes a list of other newspaper accounts that reprint the one found in the *Gazette*, 686–95.

[51] Taylor, "First Appearances: The Material Setting and Culture of the Early Supreme Court" in **The Supreme Court of the United States: The Pursuit of Justice,** Edited by Christopher Tomlins, 2005, 362–4. See McNamara, **From Tavern to Courthouse**, for descriptions of an "Opening of Court" ceremony in Massachusetts. One commentator in 1792 noted "black coats" had been used prior to the adoption of robes.

[52] **Documentary History, Volume 1, Part 2,** 689–95. John Rutledge did not attend and Robert Harrison had declined the appointment due to health after attempting to make the journey to New York.

[53] **Documentary History, Volume 2**. There are a few comments in letters and newspapers that could refer to the attire of the Justices but are not clear enough to be sure they do. For example, a May 1790 letter noted that Jay while on circuit "appears quite in Court Stile [sic] with respect to attendance," and then refers to him as a plain dressed man, Vol 2, 67. A commentator in the *New-York Journal* states a national judiciary "may administer justice in simple habits and *bag wigs*; scarlet robes will not purge away the offence of violated contract...", Vol 2, 74–75. Neither can confirm the Supreme Court justices were wearing robes.

[54] **Documentary History, Volume 1, Part 2,** 695.

[55] A 1931 auction sale of a Jay letter to the Hon. Richard Law, U.S. Judge for the District Court in Connecticut. See *Papers of John Jay*, Columbia University. Law's letter to Jay, February 24, 1790, Ernest Law Papers, Connecticut Historical Society.

[56] Initially, there were three Judicial Circuits: the Northern, Middle, and Southern. March 21, 1790, letter footnoted on page 92 of **Justice James Iredell** by Willis P. Whichard as being in the North Carolina State Archives. Iredell took his oaths of office on May 12, 1790, before Justice John Rutledge.

[57] Emphasis added. Reeder, "*First Homes of the Supreme Court*," 1958 reprint from Proceedings of the American Philosophical Society, Vol 76, No. 4, 1936, 591. Notes letter sold at auction in 1913 not located by Mr. Reeder in 1936. Present location unknown. A typescript copy located at Swarthmore College Library, Konkle Manuscripts.

[58] Emphasis added. John Blair Letter, 1791 February 9, Accession #5951, Albert and Shirley Small Special Collections Library, University of Virginia, Charlottesville, VA.

[59] Emphasis added. Papers of John Jay, Columbia University, Butler Library, Rare Book Collection.

[60] *The Federal Gazette*, and *Philadelphia Evening Post*, February 2, 1789. Advertisement reads, "Just Imported, In the Grange, Capt. Roberts, from Liverpool, and the last shops from London, etc. and now Opening for Sale, by JOHN SHIELDS, the sixth door below Chestnut in Second-Street, Philadelphia, A large and general Assortment of Goods." A long list of items follows. Shields ran many other advertisements in Philadelphia papers giving his address as No. 63, South Second-Street, and then in 1792 to No. 22, Chestnut Street. His name appears in Philadelphia City Directories from 1785 to the early 1800s. In *The Freeman's Journal, or, the North-American Intelligencer*, a John Shields listed as Treasurer below the "Hon. James Wilson, Esq. President" on December 9, 1789, and December 4, 1790, in the *Pennsylvania Mercury*.

[61] Rare Book Division, The New York Public Library. "New York City directory," *The New York Public Library Digital Collections*. 1790.

[62] George Douglas, jun, merchant, 236 Queen (Pearl) Street, New York. Also listed in many advertisements in

New York newspapers. Interestingly, a George Douglas, Esq., was the Treasurer of the St. Andrew's Society of New York in 1793, but it is unclear if this is the father, son, or some other person.

[63] The Residence Act of 1790 became law on July 16, 1790, so the justices likely knew they would be meeting in Philadelphia the following year.

[64] One New York "merchant tailor" named John Banks had a relationship with George Douglas, Jr., and might be a link in determining the origin of the robes.

[65] **Documentary History, Vol 1, Part 1**, 182, footnote 49.

[66] **Documentary History, Vol 1, Part 1, 74–79**. Johnson retook his oaths before Chief Justice Jay under his regular commission on August 6, 1792.

[67] Emphasis added. Thomas Johnson to James Wilson, January 9, 1792, Hampton Carson Collection, Box 10, Rare Book Department, Free Library of Philadelphia.

[68] Emphasis added. February 11, 1792, *Gazette of the United States* (Philadelphia, PA).

[69] Emphasis added. February 24, 1792, *The Argus* (Boston, MA), and other papers such as *Daily Advertiser* (New York, NY) and *Gazette* (Providence, RI).

[70] James Wilson to Thomas Johnson, March 13, 1792, Hampton Carson Collection, Box 22, Rare Book Department, Free Library of Philadelphia.

[71] Jay Papers, Columbia, also **Documentary History, Commentaries, Vol I, Part 2,** p. 736.

[72] James Iredell also wrote to Jay with the sentiment that he would not be returning as chief justice on February 16, 1792, **Documentary History, Vol I, Part 2**, 732.

[73] To date, the author was unable to document the use of robes by the early justices while on circuit. This may have been to avoid the odd appearance of having one or two Supreme Court justices in robes while the district court judge was not. Benjamin Henry Latrobe noted in his journal the lack of robes in Virginia courts, including the federal court, in 1796, see **Documentary History Volume 3**, 187–88, which includes Latrobe's drawing "Remains of good old fashions, exhibited in the Foederal Court, June 1, 1797." The conjecture that the small figure of the presiding judge at far right represents James Iredell "wearing a robe and wig" does not hold up upon close inspection. The figure with a pointed nose is a likely a caricature of an English judge and not meant to portray what Iredell was actually wearing that day, see **Latrobe's View of America, 1795–1820**, entries 38 and 48. The practice of wearing robes on circuit may not have started until the 1820s, based on an 1824 letter of Francis Walker Gilmer who wrote, "I wish they would impeach and [break] Story for introducing new costumes into the federal court." Library of Virginia, Francis Walker Gilmer Papers, Accession 18765, "Letter, 4 December 1824, Francis Walker Gilmer, New York, to Dabney Carr."

[74] The wearing of robes at inaugurations is an old Court tradition and may date back to Washington's second inaugural in 1793 but the earliest documented report of justices in robes at an inaugural located to date is from the 1809 Inauguration of James Madison. "Original Articles for The Enquirer – Extract of a letter from Washington, dated February 28, 1809," *The Enquirer*, March 14, 1809.

[75] Benjamin Bourne to [William Channing], Februrary 21, 1792, Benjamin Bourne Papers, Rhode Island Hostorical Society. Bourne refers to what became *Hayburn's Case*, 2 U.S. 409 (1792) which the Court heard argument in but did not decide.

[76] Emphasis added. "On the Dresses of the Judges," *Federal Gazette*, Philadelphia, 1792.

[77] Reeder, "First Homes of the Supreme Court," 580, notes the old Court House was located at Second and Market Streets. For more on early Pennsylvania courts, see Martin, **Bench and Bar of Philadelphia** (1883), and Konkle, **Benjamin Chew, 1722-1810**, University of Pennsylvania Press, 1932, chapters XVIII-XXI.

[78] Emphasis added. *Dunlap's American Daily Advertiser*, February 9, 1793. The identity of the "A.B.C." pseudonym was not determined. Francis Hopkinson, a federal district court judge, may have used a similar abbreviation but he died in 1791 and could not have been the author.

[79] Emphasis added. No title, *Federal Gazette* (Philadelphia), February 20, 1793.

[80] Emphasis added. "A Review of the Revenue System in Thirteen Letters," Letter XII, *Independent Chronicle* (Boston), September 1, 1794. A year earlier, on August 26, 1793, the *Chronicle* had a letter mentioning "scarlet and silk" robes but the comment appears directed at the Massachusetts state judges more than the U.S. Supreme Court.

[81] See Ede & Ravenscroft, **Legal Habits,** 57.

[82] Letter from *American Minerva* published in the *Columbian Centennial*, May 7, 1794.

[83] Emphasis added. "For the Aurora," *Aurora General Advertiser*, March 30, 1795.

[84] For one example, see "Anniversary of American Independence," *Independent Gazetteer*, July 8, 1795.

[85] Emphasis added. August 11, 1795, Manuscripts and Archives Division, The New York Public Library, "Letter to [James] Iredell [New York?]," Emmet Collection.

[86] Blair's absence at August Term 1795 documented in **Documentary History, Volume I, Part I**, 244. He would send his resignation to President Washington, dated October 25, 1795.

[87] *Justice William Paterson* by James Sharples Sr., c. 1796–98, Collection of the Supreme Court of the United States, Accession number 1961.1.

[88] Another partially finished portrait of Jay started in 1784 by Stuart was discovered in London by John Trumbull and completed by him in 1818.

[89] For more on Sharples and his family, see Knox, **The Sharples**, Yale University Press, 1930. Ellen Sharples also drew Judge Paterson and her sketch shows the robe as well. Whether Ellen made the sketches at the same time as her husband or if she made the sketches later is unknown.

[90] Jay and Hughes correspondence 1931, Charles Evans Hughes Collection, Collection of the Supreme Court of the United States, and other research files. When robe was on exhibit in "The Supreme Court: Three Significant Days in Its History," Chief Justice Warren E. Burger attempted to have it transferred to the Court.

[91] Author's conversations with Smithsonian curatorial staff and descriptions on museum catalog cards. Thank you to Harry Rubenstein and the conservation staff at the National Museum of American History for making the robe available for viewing.

[92] ***Catalog of the North Carolina Historical Exhibit, Jamestown Ter-Centennial Exposition***, Norfolk, VA, 1907. Thank you to Professor Ross Davies of the Antonin Scalia Law School, George Mason University for the tip on this catalog.

[93] North Carolina Museum of History, Accession number 1914.71.2.

[94] Thank you to Registrar Katherine Beery and Textile Conservator Paige Myers for making this possible.

[95] Sumner, "'Let Us Have a Big Fair': The North Carolina Exposition of 1884," *NCHR* 69 (January 1992); *The North Carolina Historical Exhibit at the Jamestown Ter-Centennial Exposition, Norfolk, VA, April 29–December 1, 1907*, 14 (1916).

[96] A detailed analysis of the design elements may yield more similarities. The author's expertise in eighteenth-century robe construction is somewhat lacking.

[97] Author's conjecture on robe alterations. Some terms used may not be the correct technical terms for describing the construction of the robes.

[98] The North Carolina Museum of History staff was unsure if sections of the Iredell were dyed, but they did not rule it out. Additional testing will be required to understand what happened to the robe.

[99] The fragile conditions of the two robes make transportation for a direct side-by-side comparison of the robes difficult. A project to more fully compare and analyze the robes was under consideration by the National Museum of American History but is on hold. Political History Curator Claire Jerry hopes to have a study done once the pandemic eases.

[100] Chief Justice Ellsworth and Justice Chase had served on state courts, Chase most recently as the chief judge of the Maryland General Court. That court may have been wearing scarlet robes at the time based on an observation of a young Roger B. Taney who described the court in this way in his memoir; see Tyler, **Memoir of Roger B. Taney, LLD,** 1872, 64.

[101] Emphasis added. "A Card to Judge Chase," *The Times, and District of Columbia Daily Advertiser*, Alexandria, VA, June 25, 1800.

[102] **Documentary History, Volume 3**, 324–431.

[103] Emphasis added. Debates in the U.S. Senate on the Judiciary in 1802 (First Session of the Seventh Congress) and repeated in many newspapers. Mason may be referring to the case of *Chisholm* v. *Georgia* (1793), in which the Court found a person could sue a state in federal court even if not living in the state, a decision made moot by the Eleventh Amendment, passed in 1795.

[104] Smith, **John Marshall,** 612, footnote 34. Smith also suggests Marshall adopted the robe of the Supreme Court of Appeals of Virginia, but it is not believed that state court was wearing robes c. 1801 and apparently did not adopt them until 1920, see "Robes for Judges," Virginia Law Register 6, no. 6 (October 1920): 479.

[105] According to Preservation Virginia staff, Howard Sutcliffe of River Region Costume and Textile Conservation completed conservation of John Marshall's robe in late 2020. Closed group tours will be able to view the robe and a corresponding exhibition.

[106] Author's discussions with Preservation Virginia staff Jennifer Hurst-Wender and Lea Lane, Fall 2020.

[107] Marshall's confirmation was on January 27, his commission issued on January 31, and he sat with the Court on February 4.

[108] According to records, the donation of the Iredell robe to the North Carolina Hall of History was in the name of James Iredell V, of Norfolk, Virginia, who was only five years old.

[109] For more on the observances for Washington's death, see Kahler, **The Long Farewell: Americans Mourn the Death of George Washington**, University of Virginia Press, 2008.

[110] Emphasis added. Robes Research files, Office of the Curator, Collection of the Supreme Court of the United States. Efforts to track down Mrs. Patterson's descendants that may know of this robe have been unsuccessful. No Court employee with the initials "WAM" has been identified.

[111] **Notions of the Americans** (1850), J. F. Cooper II, 48.

Matthew Hofstedt is the Associate Curator of the Supreme Court of the United States.

The "Unrepentant Secessionist": The Nomination of L.Q.C. Lamar and the Retreat from Reconstruction

Joseph Angelillo

On December 6, 1887, President Grover Cleveland sent a stack of papers to the United States Senate. The pile contained a host of nominations, as Congress had resumed its session the day before and the twenty-second president had several posts within his Cabinet to fill. These included Secretary of the Interior, Postmaster General, Secretary of the Treasury, two assistant cabinet secretaries, and—though it lay outside of his cabinet, perhaps most important—an associate justiceship of the Supreme Court.[1] About to enter the final year of his first term as president, Cleveland was not inexperienced in sending nominations over for the Senate's "advice and consent." However, the first Democrat elected president since the Civil War, Cleveland entered into his toughest confirmation battle by including a note reading "I nominate Lucius Q.C. Lamar of Mississippi, to be Associate Justice of the Supreme Court of the United States, in place of William B. Woods, deceased."[2] The president had chosen Lamar, his sixty-two-year-old Secretary of the Interior, to sit on the Supreme Court.

More than a prominent member of Cleveland's cabinet, Lamar was a Southerner and a former secessionist, who had personally drafted the Mississippi Ordinance of Secession in 1861. Seemingly departing from his rebel background, Lamar had since eulogized arch-Radical Charles Sumner in 1874 and emerged as a proponent of national reunion, serving in the House of Representatives and Senate. President Cleveland appointed Lamar to serve as Secretary of the Interior in 1884, and when a Supreme Court vacancy occurred in 1887, Cleveland nominated Lamar to fill it. It had been three and a half decades since the last Southerner, John A. Campbell, had been nominated to the Court. Following debate in the national press and the Senate, Lamar was confirmed by a two-vote margin, making him only the fifth justice until that time to be confirmed by

DOI: 10.1111/jsch.12256

a margin of less than five votes.[3] Thus, appearing a "reconstructed" rebel who served in the nation's highest court, Lamar developed a reputation as a conciliatory figure and symbol of national reunion.[4]

Indeed, Lamar epitomized national reunion to some contemporaries, with moderate Republicans at the *New York Times* responding to his nomination by calling him "a man of vigorous mind and studious habits and of unquestionable integrity."[5] Yet the debate over his nomination reveals much that clouds his reputation as an amiable figure. In his service with the Confederacy and post-War political career, he confronted Black suffrage in a manner that was anything but conciliatory to Black Americans. He further antagonized Black suffrage when, as a Senator, he took a stance on the legality and validity of the Reconstruction Amendments and the federal government's power to enforce voting rights under the Amendments. These actions proved central points of contention during the debate over his nomination, and press reactions revealed the shifting tide of support for the Reconstruction Amendments and Black suffrage. In short, his nomination reveals that, rather than a lauded leader in the advance toward national reunion, Lamar should be regarded as central in the retreat from Reconstruction.

Secessionist Roots

Lamar's antebellum career saw him emerge as a secessionist. Born in Georgia and named after his father, Lucius Quintus Cincinnatus Lamar II came into the world on September 17, 1825. He studied at Emory College in Atlanta, and while he did not receive an extensive legal education, he followed his father-in-law to the University of Mississippi to teach law. He took up politics and developed a friendship with Jefferson Davis, and both won election to Congress in 1856 as Democrats. With the 1860 election of Abraham Lincoln causing several slaveholding states to fear for the fate of their peculiar institution, secessionist fervor grew in Mississippi, and both Lamar and Davis resigned their congressional seats, Lamar doing so to participate in the 1861 Mississippi secession convention. There, at age 35, he personally drafted the Mississippi Ordinance of Secession and the resolution supporting South Carolina's secession from the Union.[6] The Mississippi Secession Ordinance's inclusion of a charge that all oaths taken in support of the United States Constitution be "abrogated and annulled" displayed Lamar's place as one of the state's foremost secessionists.[7] With Mississippi taking part in the rebellion, Lamar next enrolled in the Confederate Army and joined Davis—now President of the Confederacy—in Richmond.

During the Civil War, Lamar served in several Confederate leadership positions. As a soldier, he fought at the 1862 Battle of Williamsburg, and Davis subsequently appointed him to the post of commissioner to Russia to earn foreign recognition of the Confederacy. However, he never made it to Russia and failed to convince audiences in London and Paris to recognize the South's independence. After his return, he spent the remaining years of the War working with the Confederate War Department and speaking on behalf of Davis.[8]

Appomattox and the 1865 defeat of the Confederacy put a temporary pause on Lamar's public career. With rebels initially barred from reentering the federal government, Lamar returned to private law practice and regained his position at the University of Mississippi. Over the next five years, three constitutional amendments—the Thirteenth, Fourteenth, and Fifteenth, also known as the Reconstruction Amendments—would be ratified, ending the institution of chattel slavery, providing for birthright citizenship, and outlawing overt racial discrimination in voting rights.[9] These amendments stood poised to create a dramatic shift in the social order of the South, as did the Republican-imposed

federal occupation of the former states of the Confederacy.[10] Like many Southerners, Lamar would not stand for this, but he hid behind a "reconstructed" image while defying the federal government's attempts to secure freedpeople's rights at several turns.

Such an episode of defiance occurred in 1871, one year after the ratification of the Fifteenth Amendment. As part of his legal practice, Lamar—still not "thoroughly reconstructed" and feeling that "there was a determination to disgrace every white man in the eyes of the negroes"—defended several Klansmen in a federal court hearing in Mississippi.[11] During this hearing, later discussed by the *New York Times*, Lamar apparently feared physical attack, rose, and brandished a chair. When ordered to stand down by the judge, a federal marshal rushed toward Lamar and "lay his hands on him," after which Lamar struck him "severely."[12] According to later descriptions from the *New York Tribune*, Lamar broke "a small bone at the cap of the [Marshall's] eye," much to the excitement of the Klansmen.[13] This episode not only displayed defiance to the federal government and its attempts to secure the rights of Blacks but it perhaps also spurred condemnation from the Supreme Court itself. The Court perhaps so acted in *U.S. v. Cruikshank* (1876), which arose from the 1873 Colfax Massacre and confronted issues of the federal government's power to enforce Blacks' Fourteenth Amendment rights.[14] In the federal circuit opinion for the decision—the core of which the Supreme Court later redeployed in its review of the case—Justice Joseph P. Bradley wrote that "an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment."[15] In this declaration, Bradley directly quoted *Moore v. Illinois* (1852), an antebellum ruling decided nineteen years prior to Lamar's assault upon the marshal.[16] Although Bradley did not craft the language condemning an assault upon a federal marshal specifically to denounce Lamar, it does not seem too far a stretch to speculate that the justices, themselves federal judges, knew of Lamar's actions. Perhaps Bradley had simply found the perfect precedent to criticize the "unreconstructed" former rebel for his continued resistance to federal enforcement efforts.

After Mississippi's readmission to the Union in 1870, Lamar demonstrated a willingness to end sectionalism and supported national reconciliation. This could be seen especially in his famous eulogy of Radical Republican Charles Sumner in 1874 on the floor of the House of Representatives, to which Lamar won election in 1872.[17] In this noted speech, described in John F. Kennedy's **Profiles in Courage** as "a turning point in relations between the North and South," Lamar called on his colleagues to mend sectional tensions. This speech has emerged as perhaps the most prominent moment of his career, as Lamar himself—a former secessionist eulogizing the nineteenth century's most staunch white advocate of abolition, Black suffrage, and land appropriation—epitomized such a unifying message.[18] He reinforced such guises of a "reconstructed" proponent of national reunion in an article published in the *North American Review*. There, he argued in favor of voting rights for freedpeople, recognizing that "There are many honest, intelligent, and independent men among the Negroes in every Southern State."[19] These actions lent Lamar credibility as a conciliatory figure, which boosted him to election to the Senate in 1876.[20]

While Lamar projected this "reconstructed" guise in Washington D.C., those in Mississippi knew him for what he was: a leader of the "Redemption" of Mississippi to white rule. This "Redemption" saw paramilitary groups of white supremacists engage in a campaign of violence and intimidation to prevent Black citizens from exercising their voting rights gained under the Four-

Born and raised in Georgia, Lamar later moved to Mississippi and personally drafted the Mississippi Ordinance of Secession in 1861. He joined the Confederate Army as a Lieutenant Colonel and fought in the Battle of Williamsburg.

teenth and Fifteenth Amendments. These white supremacists undertook these efforts with the goal of "redeeming" Mississippi or restoring it to white Democratic rule.[21] As described by historian Nicholas Lemann, Congressman Lamar, rather than directly carry out violence against Black citizens, headed the political wing of the Democratic Party in Mississippi, where he made no effort to hide his support for "Redemption" in his personal correspondence.[22] In an 1873 letter to his legal partner Edward Clark, he lamented living in a state where "strangers" held political rights. "I say strangers," Lamar clarified, because "Northern men and enfranchised Negroes were new to the political interests and institutions of the state."[23] Lamar abhorred Black voters, called Republican rule "irresponsible," and asked, "Where is the constituency to which these men will be responsible?" He answered, "Negroes!" He seemed livid that any elected officials bore responsibility to Black Americans, as he went on to claim that Black voters could not measure up to the moral code of an "enlightened" constituency. This constituency, Lamar clarified, meant white people.[24]

With such racial prejudices, it comes as no surprise that Lamar opposed federal investigations into the atrocities of "Redemption." Scores of Black Americans were killed in the 1874 Vicksburg Riots, after which President Ulysses S. Grant deployed federal troops to end the violence. Ever the opponent of the federal government and its attempts to enforce Black rights, Lamar had hoped the federal investigation into the riots would vindicate Democrats and display that the true issue rested on the continued presence of federal troops in the South. Further, he hoped that the investigation would hold Black citizens, rather than white people, responsible for the violence. He displayed such hopes in a letter to his partner Clark, where Lamar downplayed white violence by arguing that "the number of negroes killed and wounded by negroes far exceeds that of negroes killed and wounded by white men."[25] Further, Lamar labeled federal occupation of the South a "terrible ordeal of plunder and oppression" for white Southerners.[26] This dodging of white violence against Black voters displayed a stark antagonism of Black citizens. Such posed a challenge to the rights gained by freedpeople under the Reconstruction Amendments.

The "Redemption" of Mississippi achieved its goal. Democrats retook the Mississippi state government in the 1876 Elections, and the new Democratic state legislature elected Lamar to the United States Senate. Lamar not only failed to condemn white violence, but he also denied its existence and benefited from it. Thus, while Lamar appeared a celebrated proponent of burying

the post-war hatchet in the House and Senate, he used this guise to conceal the killing of Black Americans in Mississippi. Traces of this anti-Reconstruction Lamar appeared in his Senate service as well, as even his most recent biographer admits that Lamar opposed any measure to support federal enforcement of Black rights.[27] Such actions paint a picture of a bitter secessionist who sought to revive the antebellum social order, where Black Americans enjoyed none of the rights conferred by the Reconstruction Amendments.

The Edmunds Resolution

As Lamar entered his third year in the Senate in 1879, he faced a crucial juncture in the post-war enforcement of Black suffrage. By that time, Lamar and his Southern Democratic collogues appeared to have defeated federal enforcement efforts. State governments throughout the South had returned to white Democratic rule, while Northern Republicans had bargained away the presence of federal troops in that region in exchange for Rutherford B. Hayes taking the presidency. Lamar himself had supported this "Compromise of 1877."[28] With occupying troops returned to their barracks, the 1878 midterm elections saw much violence and voter suppression, resulting in Republicans losing their Senate majority.[29] Republicans did not, however, bow to these victories for Lamar and his southern allies. Surely understanding that come March 1879 their 38–36 majority would be replaced by a nine-vote deficit and likely anticipating Democratic attempts to "nullify the legislation based on the last amendments to the Constitution," Republicans proposed a resolution to affirm the federal government's role in protecting Black rights under the Reconstruction Amendments.[30] This resolution afforded Lamar an opportunity to declare his position on these issues publicly.

Chairman of the Senate Judiciary Committee George Edmunds of Vermont took the floor to propose this resolution on January 7, 1879, as the Senate reconvened after the holiday recess. Entering his thirteenth year in the Senate, Edmunds had taken an active role in Andrew Johnson's impeachment and played a key role in establishing the Electoral Commission of 1877, on which he served.[31] He began, "Mr. President...I think [it] is the best time possible to offer [the] resolutions that I hold in my hand." He next expressed high hopes for acceptance, saying "if they be unanimously adopted," his resolution might "cement more perfectly the good-will and concord and unity of sentiment that are supposed to exist all over the country."[32] He then announced the text of his resolution: "*Resolved as the judgement of the Senate*, That the thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States have been legally ratified and are as valid and of the same paramount authority as any other part of the Constitution"; that each state bore common interest in enforcing the Constitution, the Reconstruction Amendments, and the rights secured by such; and that the executive branch was obligated to carry out the laws with "impartial execution." Further, with the violence of "Redemption" and the subsequent 1878 elections surely on his mind, Edmunds included in his resolution a charge of Congressional duty "to provide by law for the full and impartial protection of all citizens of the United States, legally qualified, in the right to vote for Representatives in Congress."[33] Thus, Edmunds offered an affirmation of three issues: that the Reconstruction Amendments were indeed legally ratified, that they remained valid, and that they empowered Congress to protect voting rights.

Viewed in any context, the Edmunds Resolution did not attempt to expand the reach of the Reconstruction Amendments. Edmunds did not seek to affirm the ability of the federal government to punish private wrongs or directly prosecute state-level rights violations under the Fourteenth Amendment,

as this power remained largely unclarified under the ambiguous and indecisive rulings in the *Slaughterhouse Cases* (1873), *U.S. v. Cruikshank* (1876), and *U.S. v. Reese* (1876).[34] Rather, he proposed a firmer backing to the legislation passed under the Reconstruction Amendments. With a thin Republican majority and only two months remaining before Democrats took over, such a seemingly minimalist resolution stood fair chance of passing. However, these issues did bear a history of contention in the Reconstruction era. While the Thirteenth Amendment and emancipation were broadly accepted as valid, some viewed the Fourteenth and Fifteenth Amendments as nothing more than by-products of vindictive Radical Republicans' forcing the Amendments onto the South through military Reconstruction. However, this opposition primarily came from southern whites, such as Confederate leaders Jefferson Davis and Alexander Stephens.[35] Though at one time these secessionists represented the breadth of the argument, by the time of the proposal of the Edmunds Resolution, the Democratic Party had "proclaimed as part of its political faith that the Constitutional amendments and reconstruction acts were unconstitutional, revolutionary, and void."[36] Further, the federal government's power to enforce voting rights under the Reconstruction Amendments was disputed during this era, although the Supreme Court held in *Cruikshank* and *Reese* that the Fifteenth Amendment afforded Congress plenary power to enforce voting rights.[37] Despite such precedent, Senate Democrats—including L.Q.C. Lamar—would oppose the Edmunds Resolution.

Following a caucus, Senate Democrats announced a substitute resolution for the Edmunds one on January 20. Proposed by John Morgan of Alabama, the Democratic substitute denied the federal government's power to enforce the Fifteenth Amendment and punish any voting rights violations, holding instead that only individual states could prevent such crimes. Like the Edmunds Resolution, the substitute upheld the Reconstruction Amendments as binding, but it did not concede that they had been properly ratified.[38] These dueling resolutions sparked two weeks of Senate debate, with Edmunds opposing Morgan's resolution and refuting Democratic claims. Edmunds specifically referenced Supreme Court opinions to make his case, relying on *Cruikshank* and *Reese* to affirm Congressional power to enforce the Fifteenth Amendment.[39] Morgan himself made several speeches in defense of the Democratic substitute, while Democratic senators such as Thomas Bayard of Delaware and William Whythe of Maryland decried the Edmunds Resolution as an unnecessary centralization of power, a revival of sectionalism, and an invalid declaration of Congressional ability to protect voting rights.[40]

The high volume of Republican press coverage surrounding the dueling resolutions squarely supported Edmunds. The *New York Times* published several articles criticizing Democratic senators who supported Morgan's resolution, calling the substitute "dangerous" and labeling reasons to oppose the Edmunds Resolution "pure twaddle."[41] This coverage joined with numerous articles from other Republican newspapers such as the *New York Tribune* and *Chicago Tribune*, while press support for the Senate Democrats was found in Democratic newspapers such as the *Memphis Daily Appeal*. Black newspapers also contributed their views, with the New Orleans *Weekly Louisianan* noting that the resolutions "have excited considerable comment in the newspapers as well as lively and interesting discussions on the floor of the Senate." The paper also recognized implications for federal enforcement, opposing Morgan's resolution as a "re-assertion of State rights in the old Calhoun style."[42] Thus, the resolutions emerged as a widely covered and hotly debated topic nationwide.

The peak of the Senate debate occurred on February 5, when Edmunds clashed with

Rep. Lamar's moving eulogy in 1874 for Massachusetts Sen. Charles Sumner, leader of the Radical Republicans (shown here on his deathbed at age 63), emphasized the need for unity and a new spirit of collaboration between North and South. The oration won Lamar national acclaim as the "great pacificator."

his Democratic adversaries for over ten hours. Lamar did speak during the debate, attempting to interrupt Edmunds while the latter derided Senate Democrats for opposing enforcement efforts. Yet Lamar could only utter "Mr. President" before Edmunds cut him off and refused to cede the floor.[43]

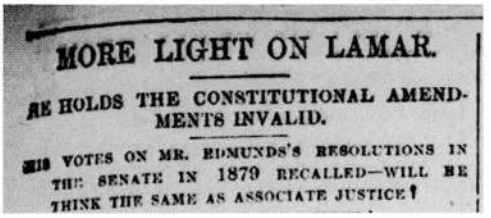
When Morgan's Resolution came to a vote, the Senate rejected it by a margin of thirteen. The votes in favor of the Democratic substitute mainly came from Southern Democrats, including L.Q.C. Lamar.[44] At around 11 P.M., the Edmunds Resolution finally came to a vote. It passed by a slim margin, with twenty-three senators in favor, sixteen against, and thirty-seven "absent." Twenty-eight abstentions came from "pairs," or agreements to abstain in conjunction with a member of the opposition, so to preserve the margin of the vote. Fourteen members from each of the two parties were "paired," while nine senators truly abstained (that is, without pairing; thus, the vote might also be read as thirty-seven in favor, thirty against, and nine abstained, as those "paired" might otherwise have voted with their party, although this cannot be known for sure).[45]

One of the "Nay" votes came from L.Q.C. Lamar, who joined fifteen Democratic senators in denying the legitimacy of the Reconstruction Amendments. While three of the opposing Democrats came from northern states, showing Northern wariness toward rights enforcement, the remaining thirteen negative votes came from Southern Democrats, with senators from Deep South states such as Georgia, Mississippi, and Alabama opposing the Resolution. Only Republicans voted in favor of the Edmunds Resolution, including the sole Black member of the Senate, Republican Blanche Bruce of Mississippi.[46]

Lamar sent a clear message with his votes on the Edmunds Resolution and its Democratic substitute. Given the reign of violence and voter suppression throughout the

TABLE 1: Senate Vote on the Edmunds Resolution

Party	Yea	Nay	Paired Affirmative	Paired Negative	Abstain
Democrat	-	16	-	14	6
Republican	22	-	14	-	2
Independent	1	-	-	-	1
Total	23	16	14	14	9



MORE LIGHT ON LAMAR.

HE HOLDS THE CONSTITUTIONAL AMENDMENTS INVALID.

HIS VOTES ON MR. EDMUNDS'S RESOLUTIONS IN THE SENATE IN 1879 RECALLED—WILL HE THINK THE SAME AS ASSOCIATE JUSTICE?

During the hearings about Lamar's nomination to the Supreme Court in 1888, the press made an issue of his opposition to the Edmunds Resolution, which affirmed the rights of Black citizens.

South, it would take a true enemy of federal enforcement of Black rights to go beyond abstaining and vote "no" on an 1879 resolution supporting the Reconstruction Amendments. Lamar demonstrated that he was such an enemy, standing against the power of the federal government to enforce suffrage by voting for the Morgan Resolution and against the Edmunds Resolution, and discrediting the Amendments as illegally ratified with the same votes. He did so a mere five years after his eulogy of Sumner, providing a stark example of the anti-Reconstruction Lamar, who now joined his resistance to federal enforcement with a vote denying the legitimacy of the Reconstruction Amendments.

Only Lamar's stance on the single issue of the validity of the Reconstruction Amendments remains hard to discern. He first seemed to admit their binding nature by voting for Morgan's resolution, which stipulated them as valid, without addressing them as legally ratified, but he then seemed to recant this by voting against the Edmunds Resolution. He shared such votes with his southern white allies, however, who also denied the legality of the Thirteenth, Fourteenth, and Fifteenth Amendments while appearing mixed on the Amendments' binding nature.[47] While this vote remained obscure in the annals of Senate history, it would reemerge in the debate over Lamar's nomination to the Supreme Court.[48]

Supreme Court Nomination

Lamar's nomination to the Supreme Court came in late 1887, eight years after the Edmunds Resolution, and proved a widely covered and debated topic in the national press. This debate had constitutional implications, as many opposed Lamar for his vote discrediting the Reconstruction Amendments and voter suppression during "Redemption." These positions epitomized the nomination's place as the culmination of Lamar's career of opposition to the Reconstruction Amendments.

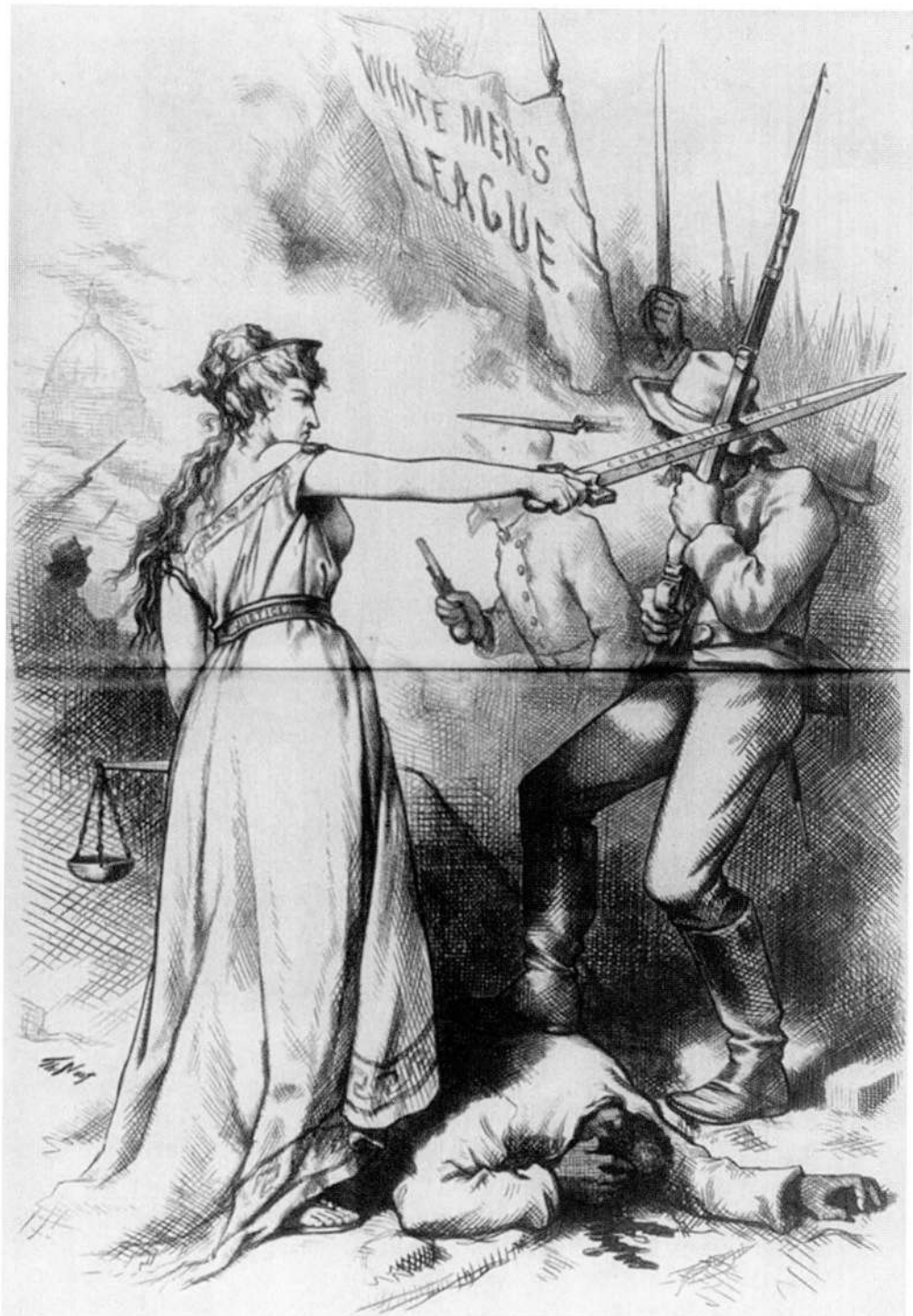
The country had changed a great deal between the Edmunds Resolution and the Lamar nomination. The Republican-dominated Supreme Court's ruling in the *Civil Rights Cases* (1883) had denied Congress's authority under the Fourteenth Amendment to punish private acts of discrimination, yet the Court had affirmed one of the core points of the Edmunds Resolution—federal authority to directly enforce suffrage—a mere one year later with *Ex parte Yarbrough* (1884).[49] Continued attacks on voting rights left no Black congressmen in the House of Representatives for the first time since 1869, while no Black Americans had served in the Senate since Blanche Bruce's departure in 1881.[50] The country seemed to move away from sectionalism

with the 1884 election of Grover Cleveland to the presidency, making Cleveland the first Democrat elected to that office since James Buchanan in 1856. Through all this shifting, however, Lamar remained a consistent opponent to Black Americans and the Reconstruction Amendments. Cleveland had nominated Lamar to the position of Secretary of the Interior in 1884, and in need of an Assistant Secretary, Lamar encouraged his partner Clark to join him in Washington in this role. To make the decision easier for the Vicksburg-based Clark, Lamar added that "Vicksburg is cut off and the negroes are threatening Miss. with an inundation more terrible than floods."[51] Such language, comparing an influx of Black citizens to a natural disaster, placed Lamar's white supremacy on full display.

The death of Republican-nominated Justice William Burnham Woods gave a Democratic president the opportunity to nominate a Supreme Court justice for the first time since James Buchanan nominated Nathan Clifford in 1857. Historian Charles Calhoun argues that Cleveland chose Lamar because of Lamar's southern origins, hoping to invigorate the former's southern base.[52] Having squeaked into the White House with margin of victory that amounted to less than forty electoral votes, and with neither Cleveland nor Republican James G. Blaine having commanded a majority of popular votes in 1884, Cleveland certainly needed to affirm the states he carried come 1888, especially in the South.[53] Thus, with a Southerner within Cleveland's own cabinet regarded as a leader of national reconciliation, Lamar likely seemed a natural pick. Although no evidence exists to show that Cleveland actively supported Lamar's constitutional views or white supremacy, secessionists still held great popularity throughout the South, and the belief that the Reconstruction Amendments were invalid remained pervasive in that region after the war. Cleveland surely reasoned that placing a former Confederate on an otherwise entirely Republican-nominated Supreme Court could help him secure reelection. Cleveland went forward with this nomination, submitting it to the Republican-majority Senate on December 6, 1887.

Lamar's resistance to the Reconstruction Amendments entered the nomination debate on December 15, 1887, when after a week of coverage dealing mostly with issues of sectionalism, the *New York Tribune* revealed Lamar's vote on the Edmunds Resolution, publishing an article with the ominous subhead: "[Lamar] holds the Constitutional Amendments invalid. His votes on Mr. Edmund's Resolutions in the Senate in 1879 recalled." The *Tribune* summarized the Edmunds Resolution and levied fierce attacks against Lamar, claiming that his vote revealed his opinion that "the last three amendments to the Constitution are not valid and binding in the sense that the remainder of that instrument is." The *Tribune* considered the consequences of such views, querying, "If the amendments are not valid in the opinion of Mr. Lamar, what of laws enacted under them?"[54] This alluded to the distinct possibility that Lamar, if confirmed, would likely have to rule on such legislation. Thus, the *Tribune* criticized Lamar for adopting "as part of his political faith" the denial of the legality and validity of the Reconstruction Amendments, displaying the centrality of this issue in the nomination.[55]

The *Tribune* also discussed Lamar's voter suppression, writing that the nominee "owes all the prominence he has had for ten years to this crime, to which he is a knowing accessory." Expanding upon this accusation, the paper discussed the "Redemption" of Mississippi and the rewards the nominee reaped from it, recognizing that "Mr. Lamar was made United States Senator by the midnight whipping of negroes, and assassinations both of whites and blacks, by astounding frauds upon the ballot box." "Men were lashed and butchered, and ballot-boxes were stuffed to make Mississippi a Democratic

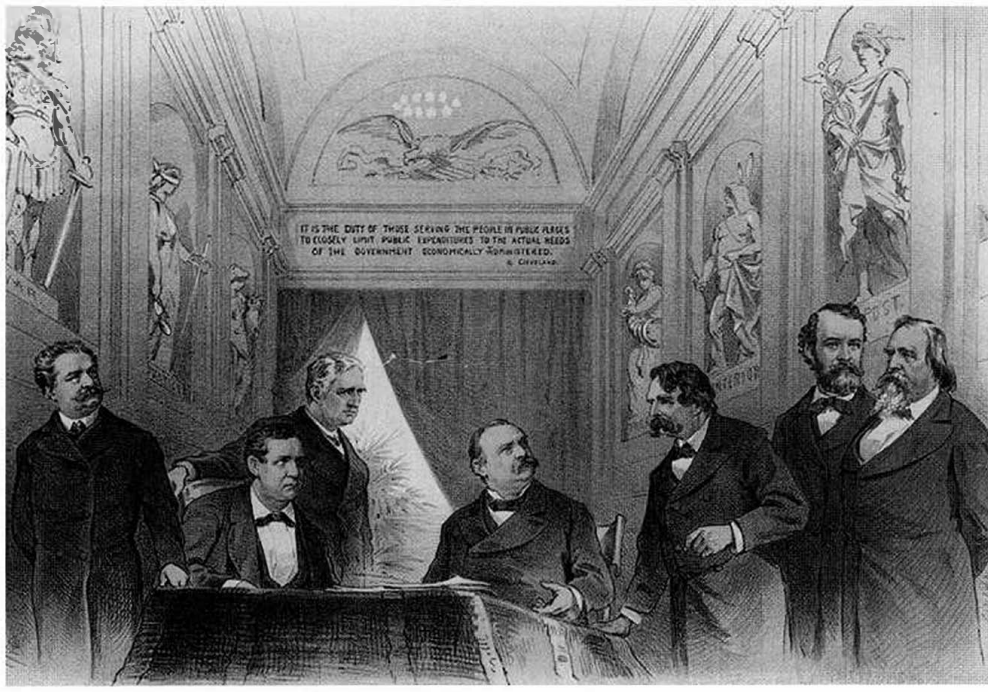


While asking for national reconciliation, back in Mississippi Lamar supported the "Redemption" movement, which encouraged white paramilitary groups to prevent Black citizens from exercising their new voting rights. This 1874 cartoon shows: Lady Justice trying to stop racial violence by white vigilantes. {Crop image to cut out caption at the bottom and white border around drawing}

State," the *Tribune* wrote, and "No one dares say that Mr. Lamar did not know of these outrages." After all, given Lamar's status as Mississippi's most prominent politician, "are we to believe that the leader of the Democratic party in that state...was the only intelligent citizen in the United States who did not understand the situation?" Summing up its arguments, the newspaper "urged Republican Senators to maintain Republican principles by voting against a man who represents the wickedest crimes ever known in American politics."[56] That the *Tribune*—previously the voice of the pro-reunion Liberal Republican movement—attacked Lamar so vigorously indicates how egregious it considered the nomination.

As throughout Reconstruction, Black Americans deployed the practices of Black constitutionalism to oppose Lamar's confirmation actively, as seen in the Chattanooga-based Black newspaper *Justice*.[57] It published a letter from editor Edwin F. Horn on December 24 that made clear that Lamar's nomination was "one of great importance to colored people" and addressed many reasons to oppose it.[58] These included Lamar's regard for Jefferson Davis and his efforts "by force of arms to destroy the government and the constitution." However, Horn seemingly pardoned the nominee for such offenses, stating his intention to "forget" and "pass over" them. This proved a tactic to magnify the issue of Lamar's vote on the Edmunds Resolution, for in addressing this offense, Horn forgave Lamar no further. He drew the line by writing "a man who voted 'no' to the validity of the [Reconstruction] amendments is not the man to sit on the bench of the Supreme Court." In this vein, Horn addressed the implications of Lamar's "nay" vote for Black people, recognizing that "the rights of 7,000,000 people are peculiarly bound up in the three amendments." Horn captured the essence of Blacks' argument against Lamar by asking, "If you were a colored man, would you not doubt Mr. Lamar's friendliness?"[59] Given that the nominee cast a vote opposing the legality and enforcement power of the amendments that ended slavery and established their citizenship, Black Americans doubted the nominee's ability to uphold their rights.

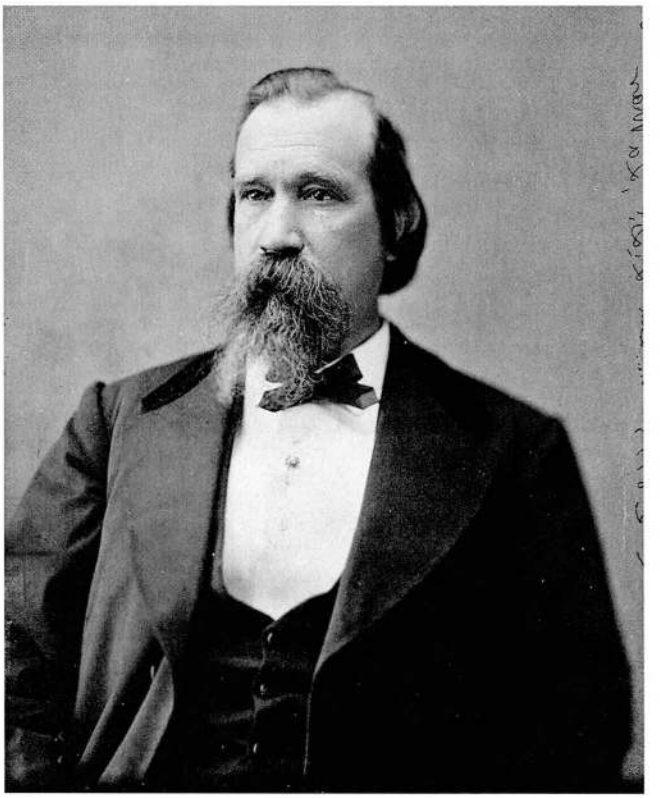
Indeed, Lamar's stance on the Reconstruction Amendments emerged as a central issue for Black Americans, which they combined with the nominee's secessionist roots to oppose confirmation. "The Senate should never confirm Secretary Lamar as a member of the Supreme Court," the *Cleveland Gazette* declared on January 7, as he was an "an unrepentant secessionist." The paper emphasized constitutional issues by harkening to Lamar's vote on the Edmunds Resolution, which for the *Gazette* amounted to a declaration that the Reconstruction Amendments "were not a part of the Constitution of the United States." As with the *Tribune* and *Justice*, the *Gazette* addressed the practical implications of this constitutional stance, asking, "Is he a safe man to decide in regard to the principles underlying those amendments?" With such implications in mind, the *Gazette* brilliantly captured the frustrations of the Black community by asking, "Is the war to be fought over again, and shall everything already accomplished go for naught? Shall the rebels come to the front and take the government again?" Though the resolution of the Civil War saw Black Americans gain rights and keep secessionists out of government, an individual who represented all they opposed stood poised to gain a seat on the nation's highest court, a position he could use to rule against them. Black Americans had themselves fought for their abolition and suffrage, recognized by the *Gazette* in writing, "Is it that we wish blood of the hundreds and thousands who fell in the war to destroy the Southern Confederacy, to rise up against us to condemn us?"[60] Black Americans wanted to ensure those who fell had not done so in vain. Keeping Lamar off the Supreme Court, they believed, accomplished this purpose.



President Grover Cleveland (center) appointed Lamar (far right) as his Secretary of the Interior in 1885 to gain Southern support for his Democratic administration. Cleveland would nominate him to the Supreme Court two years later.

For Democrats, resistance to Lamar constituted a prime example of "waving the bloody shirt," or rehashing the memory of the Civil War to keep issues of racism and sectionalism alive. The Democratic *Memphis Appeal* joined this camp, specifically targeting the *Tribune* and writing on December 17 that the New York newspaper "is wasting a great deal of time" attempting to oppose Lamar.[61] They criticized the continued references to the War while praising Senators who "do not believe in the bloody shirt as a fitting political issue in these days." According to the *Appeal*, attacks on Lamar proved unfair, especially given the Democratic claim that the South "is as loyal and as true to the Union as any other section of the country."[62] The *Appeal* further discounted criticism of the nominee, labeling it nothing more than an opportunity to create a partisan fight.[63] This encapsulated the Democratic counterattack against Radicals. Democrats saw the opposition as an unnecessary partisan effort to punish the South further for their rebellion, which they saw as behind them. That the nominee had voted against the validity of the Reconstruction Amendments made no difference to them.

Strikingly, many moderate Republicans joined Democrats in their support of the nominee, showing a Republican retreat from the Reconstruction Amendments. The *New York Times* displayed such by shifting from its 1879 position on the Edmunds Resolution. At that time, the *Times* had called opposition to the Resolution "pure twaddle" and the Democratic substitute "dangerous."[64] Yet on December 23, 1887, the paper wrote that Lamar's Senate service "made him familiar with constitutional questions and the legislation with which the Supreme Court has to deal."[65] Such praise seems rather ironic, as Lamar's Senate tenure did grant him exposure to a constitutional question: the



Lamar (pictured) was confirmed by a vote of 32-28, ending a quarter-century monopoly of Supreme Court appointments by the Republican Party. Only Republican senators opposed Lamar, including President Pro-Tempore John Ingalls (R-KS) and George F. Edmunds (R-VT) who was head of the Senate Committee on the Judiciary.

validity and legality of the Reconstruction Amendments and the federal government's power to enforce voting rights. Though then-Senator Lamar had voted for the Democratic substitute and against the Edmunds Resolution, the *Times* in 1888 displayed no qualms with praising Lamar's time in the Senate. This displayed an indifference to the Amendments and a stark moderate Republican reversal, further evidenced by a glowing endorsement issued in the same *Times* article, which praised Lamar as "an able, studious, and scholarly man, of sufficient dignity, fair-minded and upright beyond question." The paper also joined the Democratic *Appeal* in discounting opposition to the nomination as "based solely on the fact that Mr. Lamar is an ex-Confederate."[66] If anything, this minimization of Lamar's Confederate service and Senate tenure revealed that many moderate Republicans joined the Democrats in criticizing Radicals for "waving the bloody shirt," without actually saying those words.

The *Times* went on to confront the Edmunds Resolution itself, which further displayed its move away from the Reconstruction Amendments. "One of the grave causes of opposition to Mr. Lamar," the *Times* wrote on January 4, "is his vote against declaring the thirteenth, fourteenth, and fifteenth amendments to the Constitution valid." The paper proceeded to downplay this issue, calling Lamar "a fully 'reconstructed' citizen" before voting on the Edmunds Resolution, and refuting that any senator "has any honest doubt about either his honesty or his loyalty." This attempt to justify an individual who

had voted against the Edmunds Resolution—a position it in 1879 called "dangerous"—further displayed moderate reversal on the issue, as did the *Times'* accusing Republicans of holding a double standard with regard to the validity of the Reconstruction Amendments. This led the paper to raise the issue of the Democratic substitute to the Edmunds Resolution. Given that the substitute also held the Reconstruction Amendments as valid yet Edmunds and other Republicans voted against it, the *Times* pondered why Radicals would deride Lamar for voting the same way on the same issue.[67] When confined to the version of events presented by the *Times*, this seems explicit evidence of a double standard. However, the *Times* did not remotely tell the full story. While the Edmunds Resolution and the Democratic substitute indeed shared a common thread of holding the Reconstruction Amendments as valid, the substitute held them as not empowering the federal government to enforce voting rights and remained silent on the issue of the Amendments' legality.[68] Thus, the Republicans voting against the substitute supported the legitimacy of the Amendments, while Lamar's vote against the Edmunds Resolutions displayed opposition to these stances. This distorting the past in order to minimize Lamar's vote on the Edmunds Resolution further displays moderate indifference to the Reconstruction Amendments.

Of course, not all moderate Republicans consented to and supported Lamar. Indeed, the *Indianapolis Journal*, native to Indiana—a state that notably voted for Cleveland in 1884—published at least thirty articles opposing the Lamar nomination. Like the *Tribune*, this opposition included many anti-Lamar editorials, with one even calling Lamar "extremely absent minded."[69] Further, the *Journal* engaged with issues of constitutional interpretation, with several pieces discussing the Edmunds Resolution.[70] Such coverage displays that not all moderate Republicans were primed to retreat from Reconstruction, further evidenced by the *Journal* noting the anti-Lamar stance of the Indiana-based *Shelbyville Republican*.[71] Unlike the *Tribune*, however, the *Journal* kept coverage of the Lamar nomination mostly in the paper's later pages while reserving the front page for issues such as economics and the tariff question, demonstrating that issues of racism no longer remained central for many Republicans. Additionally, the *Journal* referenced other moderate publications that supported the Lamar nomination, including *Harper's Weekly*, which declared that "neither the [Republican] party nor the Senate can properly object to [Lamar's] proposed elevation to the bench."[72] Thus, though some moderate Republicans remained committed to the Reconstruction Amendments and accordingly opposed Lamar, these dissenters likely constituted a vocal minority.

The dueling of newspapers such as the *Tribune* and *Appeal* turned the confirmation battle into a symbolic referendum, as the issue of whether a longtime opponent of the Reconstruction Amendments would join the nation's highest court teased at much larger issues. Perhaps the largest of these was whether the public accepted the work of the Supreme Court in interpreting the Reconstruction Amendments, and supported enforcement of Black suffrage under the Amendments. These interpretations had grown stricter as Reconstruction passed, and if the Republicans truly cared to see this trend reversed, one would expect them unflinchingly to deny a seat to an individual who voted against the legality, validity, and federal enforcement power of the Amendments. They did not, and the largely favorable response to Lamar from the national press indicates a hastening retreat from the Reconstruction Amendments.

Of course, the issue of Lamar's confirmation still remained, and as January 1888 came, the nomination hung in limbo. The Republican-majority Senate Judiciary Committee, still chaired by George Edmunds, reinforced this limbo with a majority report

advising against confirmation on January 9.[73] The *Times* gave little thought to the report, labeling it "the petty policy of the Republicans" while calling a pro-Lamar letter written by conservative Republican Senator William M. Stewart of Nevada "a hard blow" to continued opposition.[74] Though Stewart had supported the Fifteenth Amendment in 1870, his letter downplayed Lamar's vote on the Edmunds Resolution, which made Stewart's support of the nominee further evidence of the moderate Republican shift away from the Reconstruction Amendments.[75] After all, Stewart, once an advocate for the Reconstruction Amendments, now minimized the vote that saw Lamar deny the legitimacy of his efforts.

With Stewart's defection, Senate Democrats had thirty-eight votes in favor of confirmation, while Republicans counted thirty-seven against. Therefore, any Republican hope of deadlocking confirmation depended on convincing the lone independent—Readjuster Harrison Riddleberger of Virginia, himself a Confederate veteran—to vote against confirmation.

Following a dramatic statement from Riddleberger on January 12, confirmation finally occurred on January 16, 1888.[76] According to the *Times*, several senators spoke in favor of Lamar during a three-hour session, including Riddleberger and Democrats James Z. George of Mississippi, Richard Coke of Texas, and Henry B. Payne of Ohio.[77] According to the *Tribune*, Republicans speaking against Lamar included George F. Hoar of Massachusetts and William M. Evarts of New York. Hoar spoke on voter suppression, emphasizing Lamar's silencing of Black voters during "Redemption," while Evarts mainly discussed Lamar's vote on the Edmunds Resolution, asking his colleagues how "a man declaring certain amendments not to have been ratified legally could logistically give them his support." Edmunds, being Chair of the Senate Judiciary Committee, spoke for over thirty minutes against Lamar and attacked the nominee's lack of "industry, application, and perseverance."[78] The opposition largely used episodes from Lamar's secessionist roots and his vote on the Edmunds Resolution against him, further evidencing the nomination's place as the culmination of his career of opposition to the Reconstruction Amendments. However, this did not prevent confirmation.

In the final vote, thirty-two "yeas" trumped twenty-eight "nays." Twenty-nine Democrats voted for confirmation and eight abstained in pairs with Republicans, while none voted against confirmation or abstained without pairing. Most of these Democrats largely represented Deep South states such as Georgia, South Carolina, Mississippi, and Alabama, with each senator from these states voting in favor of Lamar. Only Republicans opposed Lamar, with twenty-eight voting against confirmation, including President Pro-Tempore John Ingalls, Senator Hoar, and Edmunds. Unlike the Republicans at the *New York Times*, these Republicans demonstrated a commitment to the Reconstruction Amendments. However, this did not prevent confirmation, as two Republicans joined Riddleberger in voting in favor of Lamar. As expected, Stewart voted to confirm Lamar, while an unexpected defection came from Leland Stanford of California. He, Stewart, and Riddleberger added three affirmative votes to the twenty-nine Democrats supporting Lamar, giving the nomination thirty-two "Yeas," enough for the Senate to confirm the nominee.[79]

Press responses mostly accorded with pre-confirmation stances. Democrats celebrated confirmation, holding Lamar's elevation to the Supreme Court as a "triumph of reason over rancor." The *Appeal* lauded Lamar himself, celebrating his ascension to "the bench made illustrious by Marshall, Taney, and Campbell."[80] Aside from referring to Roger B. Taney—author of the infamous opinion in *Dred Scott v. Sanford* (1857)—the *Appeal* here also referred to

TABLE 2: Senate Vote on the Confirmation of L.Q.C. Lamar to the Supreme Court

Party	Yea	Nay	Paired Affirmative	Paired Negative
Democrats	29	-	8	-
Republicans	2	28	-	8
Independent	1	-	-	-
Total	32	28	8	8

John Archibald Campbell, the last Southerner to have served on the Supreme Court, a member of the *Dred Scott* majority who had resigned from the Court to fight for the Confederacy and later returned to argue against federal enforcement power under the Reconstruction Amendments.[81] This epitomized what Democrats expected from Lamar as a justice. Meanwhile, both ends of the Republican Party—the more Radical and the moderate—responded with minimal commentary. In a page four editorial, the *Tribune* derided Lamar's confirmation as a "mistake" that Riddleberger, Stewart, and Stanford would "live to see." In speaking of these defecting Republicans, the *Tribune* stated that they "have virtually allowed the Democrats to dictate the Republican party."[82] Such a statement captures the Republican shift that Lamar's nomination symbolized. The *Times* surprisingly also wrote relatively little, including only some details of the Senate debate and not the final vote. The only substantial difference between the two newspapers appeared in the emphasis the *Times* placed on speeches supporting confirmation, on which the *Tribune* did not report.[83] However, based on the *Times'* stances during the debate, its ultimate satisfaction with confirmation should not be doubted.

Lamar's judicial career can best be described as unremarkable. He served on the Court for five years and rarely deviated from its holdings, issuing a mere thirteen dissents. His opinions did not carry as much controversy as those written by justices such as Joseph P. Bradley or Samuel F. Miller, evidenced by Lamar's ninety-six opinions only generating four dissents.[84] Only once did Lamar address issues of race while on the Court and then only tangentially. This occurred in *Logan v. United States* (1892), which saw the Court affirm the right of an American citizen held in federal custody to "be protected by the United States against unlawful violence," a right that the majority found stemmed from a federal statute that forbade conspiracy against civil rights.[85] Lamar dissented alone, writing a single sentence that cited lack of jurisdiction of federal courts over attacks against federal prisoners.[86] Given that Lamar wrote so little in this case, his exact motivations for dissenting remain unclear. Whether this dissent symbolized Lamar's laying the groundwork for removing federal purview over civil rights remains purely speculative. However, the Court essentially did that just four years after *Logan*, ruling in *Plessy v. Ferguson* (1896) that state statutes providing for "separate but equal" accommodations for Black citizens did not violate the Equal Protection Clause of the Fourteenth Amendment.[87] Though Lamar, who died on January 23, 1893, at age 67, did not live to see that case, his dissent in *Logan* and his pre-judicial record support a case that he would have joined his colleagues in placing segregation and disfranchisement beyond the purview of federal courts.

History has remembered L.Q.C. Lamar as a man who helped rebuild the United States after the Civil War, calling for reunion while eulogizing Charles Sumner and seeing his confirmation onto a Republican-

dominated Supreme Court by a Republican-majority Senate. He has been remembered as a personification of a reunited nation, as he appeared a "reconstructed" former rebel who threw his loyalty to the United States. However, whether through his actions or the approval of those actions by other parties, Lamar truly represents a double-dealing enemy to Black Americans and their rights during the Reconstruction era. As a secessionist and opponent of Reconstruction, he showed blatant disregard for the Reconstruction Amendments by suppressing the Black vote in Mississippi. Such incidents led to the proposal of the 1879 Edmunds Resolution, which saw Lamar deny the legality and validity of the Reconstruction Amendments, as well as the authority of the federal government to enforce Black suffrage. This vote, along with Lamar's prior offenses against Black Americans, was the central point of opposition when Grover Cleveland nominated him to the Supreme Court. Much Republican press still supported this nomination, however, displaying a growing indifference to the Reconstruction Amendments and Black rights. In sum, rather than the "pragmatic patriot" that his biographers point to, Lamar was central in the retreat from Reconstruction.

Author's Note: I am deeply indebted to Dr. Timothy Huebner, both for this essay and for all the guidance he provided during my time at Rhodes College. I would not be a historian without him. I also owe a tremendous debt of gratitude to Dr. Etty Terem, Dr. Jeffrey Jackson, Dr. Robert Saxe, Dr. Ali Masood, and to the entire Department of History at Rhodes College. Finally, I must acknowledge my late father, Dr. Joseph Angelillo I. Though he never got to read this essay, his love has impacted my life and research in countless ways.

Notes

[1] "Congress in Session," *New York Tribune*, December 6, 1887.

[2] "Lucius Quintus Cincinnatus Lamar II – Supreme Court Nomination," Nominations, Rice on History, January 12, 2012, https://riceonhistory.wordpress.com/2012/01/12/lucius-quintus-cincinnatus-lamar-supreme-court-nomination-1887/#respond.

[3] See "Supreme Court Nominations," Nominations, United States Senate, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

[4] For biographies of Lamar, see James B. Murphy, **L.Q.C. Lamar, Pragmatic Patriot** (Baton Rouge: Louisiana State University Press, 1973) and Wirt Armistead Cate, **Lucius Q.C. Lamar, Secession and Reunion** (Chapel Hill: University of North Carolina Press, 1935). See also, Leon Friedman and Fred Israel, **The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions, vol. 2** (New York: Chelsea House, 1969) and John F. Kennedy, **Profiles in Courage** (London: Hamish Hamilton, 1964). On Lamar's Supreme Court nomination, see Daniel J. Meador, "Lamar to the Court: Last Step to National Reunion," *Supreme Court Historical Society Yearbook* 1986 (1986), 27–47. Also on the nomination, see Willie D. Halsell, "The Appointment of L.Q.C. Lamar to the Supreme Court," *Mississippi Valley Historical Review* 28, no. 3 (December 1941): 399–412; Charles Warren, **The Supreme Court in United States History, vol. 2, *1836–1918*** (Boston: Little, Brown, and Company: 1928), 624; Charles Fairman, **History of the Supreme Court of the United States, vol. 5, Reconstruction and Reunion, 1864–88** (New York: The Macmillan Company, 1971), 732.

[5] "The Cabinet Changes," *New York Times*, December 7, 1887.

[6] Friedman and Israel, **The Justices of the United States Supreme Court**, 1432; Willie D. Halsell, "The Friendship of L.Q.C. Lamar and Jefferson Davis," *Journal of Mississippi History* 6 (July 1944), 132–33; Murphy, **L.Q.C. Lamar**, 59–60.

[7] Mississippi Secession Ordinance, January 9, 1861.

[8] Friedman and Israel, **The Justices of the United States Supreme Court**, 1436.

[9] On the Reconstruction Amendments, see Eric Foner, **The Second Founding: How the Civil War and Reconstruction Remade the Constitution** (New York: W.W. Norton and Company, 2019).

[10] On Military Reconstruction, see Timothy S. Huebner, **Liberty and Union: The Civil War Era and American Constitutionalism** (Lawrence: University of Kansas Press, 2016), 371.

[11] "Affairs at the Capital," *New York Times*, June 28, 1887.

[12] "Affairs at the Capital," *New York Times*.

[13] A Bit of Obscure History," *New York Tribune*, June 27, 1887. For more information on this episode, see David

M. Hargrove, **Mississippi's Federal Courts: A History** (Jackson: University Press of Mississippi, 2019), 97.

[14] On the Colfax Massacre, see Eric Foner, **Reconstruction: America's Unfinished Revolution** (New York: Harper & Row, 1988), 437. On *Cruikshank*, see Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (New York: University of Cambridge Press, 2011), 87–128.

[15] *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No, 14,897), aff'd, 92 U.S. 542 (1876).

[16] *Moore v. People*, 55 U.S. 14 How, 13 13 (1852).

[17] Murphy, **L.Q.C. Lamar**, 88–89; Friedman and Israel, **The Justices of the United States Supreme Court**, 1437.

[18] Kennedy, **Profiles in Courage**, 174.

[19] James G. Blaine, L.Q.C. Lamar, et al., "Ought the Negro to Be Disenfranchised? Ought He to Have Been Enfranchised?" *North American Review* 128, no. 268 (March 1879), 225–83.

[20] Kennedy, **Profiles in Courage**, 190.

[21] Nicholas Lemann provides one of the few accounts of political violence in the Reconstruction Era with his survey of Redemption in 1875. See Lemann, **Redemption: The Last Battle of the Civil War** (New York: Farrar, Straus and Giroux, 2006).

[22] Lemann, **Redemption**, 119–20.

[23] L.Q.C. Lamar, letter to Edward Clark, October 16, 1873. L.Q.C. Lamar Collection, Department of Archives and Special Collections, University of Mississippi, Oxford, MS.

[24] L.Q.C. Lamar, letter to Edward Clark, October 16, 1873. See also, Lemann, **Redemption**, 68–70.

[25] L.Q.C. Lamar, letter to Edward Clark, February 1, 1875. Also, see Lemann, **Redemption**, 96–98.

[26] L.Q.C. Lamar, letter to Edward Clark, February 1, 1875.

[27] Murphy, **L.Q.C. Lamar**, 204.

[28] On the "Compromise of 1877," see Foner, **Reconstruction**, 564–601. On Lamar's involvement, see Kennedy, **Profiles in Courage**, 176–77.

[29] Brandwein, **Rethinking the Judicial Settlement of Reconstruction**, 141.

[30] For the party division of the Senate, see "Party Division," History, United States Senate, https://www.senate.gov/history/partydiv.htm. For the quote, see "The Protection of Voters," *New York Times*, February 3, 1879.

[31] For biographical information on Edmunds, see "Edmunds, George Franklin," Retro member details, Biographical Directory of the U.S. Congress, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=E000056.

[32] *Cong. Rec.*, 45th Cong., 3rd sess., 1879, vol. 8, pt 3: 342.

[33] *Cong. Rec.*, 45th Cong., 3rd sess., 1879, vol. 8, pt 3: 342.

[34] On the ambiguous and indecisive rulings regarding the Fourteenth Amendment, see *Slaughterhouse Cases*, 83 U.S. 36 (1873), *United States v. Cruikshank*, 92 U.S. 542 (1876), and *United States v. Reese*, 92 U.S. 214 (1876). On these cases, see Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003); Brandwein, **Rethinking the Judicial Settlement of Reconstruction**; Huebner, **Liberty and Union**; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* 1978 (1978).

[35] Huebner, **Liberty and Union**, 408–12.

[36] "Dead Against Lamar," *New York Tribune*, January 4, 1888. The issue of the constitutionality of the Fourteenth Amendment's ratification received some scholarly attention after Reconstruction. See Forrest McDonald, "Was the Fourteenth Amendment Constitutionally Adopted?" *Georgia Journal of Southern Legal History* 1, no. 1 (Spring/Summer 1991).

[37] 92 U.S. 542 (1876) and 92 U.S. 214 (1876). On this "Fifteenth Amendment exception," see Brandwein, **Rethinking the Judicial Settlement of Reconstruction**, 98–101.

[38] For the text of Morgan's resolution, see "Forty-Fifth Congress," *New York Times*, January 21, 1879. On Morgan, who was also a Confederate veteran, see Thomas Adams Upchurch, "Senator John Tyler Morgan and the Genesis of Jim Crow Ideology, 1889–1891," *Alabama Review* 57, no. 2 (April 2004): 110–31.

[39] "Senate," *New York Times*, February 4, 1879.

[40] *New York Times*, February 5, 1879.

[41] *New York Times*, February 5, 1879, and "The Protection of Voters," *New York Times*.

[42] "Washington Letter," *Weekly Louisianan*, February 15, 1879.

[43] *Cong. Rec.*, 45th Cong., 3rd sess., 1879, vol. 8, pt 3: 1005–6.

[44] For the debate, see *Cong. Rec.*, 45th Cong., 3rd sess., 1879, vol. 8, pt 3: 997–1029.

[45] "Senate," *New York Times*, February 6, 1879. Congresspeople will mostly pair in the event of one of the members not being able to be present in the chamber at the time of the vote. However, many of the paired Republicans and Democrats were still in the chamber, raising the question as to just how committed Republicans were to the Reconstruction Amendments in 1879.

[46] *Cong. Rec.*, 45th Cong., 3rd sess., 1879, vol. 8, pt 3: 1029. For the parties and years of service of the Senators, see "Senators of the United States," Art and History, United States Senate, https://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf.

[47] Daniel Meador attempted to address Lamar's position in his article on the Lamar confirmation. Because of

Lamar's vote on the Morgan resolution, Meador seems to regard Lamar as unwavering in supporting the Reconstruction Amendments' binding nature, while simply doubting their legal ratification. However, Meador fails to address that the Edmunds Resolution also included a charge of the continued validity of the Amendments, and completely ignores the implications the dueling resolutions bore for federal enforcement of voting rights. See Meador, "Lamar to the Court," 39.

[48] Aside from Meador, no Lamar biographer has examined the Edmunds Resolution and Lamar's votes on such in depth. Murphy provides a glancing reference to the episode. See Murphy, **L.Q.C. Lamar**, 262.

[49] See *Civil Rights Cases*, 109 U.S. 3, 25 (1883); *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[50] "Black-American Representatives and Senators by Congress, 1870–Present," History, United States House of Representatives, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/.

[51] L.Q.C. Lamar, letter to Edward Clark, 1884.

[52] Charles W. Calhoun, **From Bloody Shirt to Full Dinner Pail: The Transformation of Politics and Governance in the Gilded Age** (New York: Hill and Wang, 2010), 102. See also Charles W. Calhoun, **Conceiving a New Republic: The Republican Party and the Southern Question** (Lawrence: University Press of Kansas, 2006), 216–17.

[53] "Presidential Election of 1884: A Resource Guide," Library of Congress.

[54] "More Light on Lamar," *New York Tribune*, December 15, 1887.

[55] "Dead Against Lamar," *New York Tribune*, January 4, 1888.

[56] "A Word to Republican Senators," *New York Tribune*, January 2, 1888.

[57] For Black activism during Reconstruction, see Hugh Davis, **"We Will Be Satisfied With Noting Less": The African American Struggle for Equal Rights in the North during Reconstruction** (Ithaca and London: Cornell University Press, 2011). On Black constitutionalism, see Huebner, **Liberty and Union**, 424–5 and Timothy S. Huebner, "'In Defiance of Judge Taney': Black Constitutionalism and Resistance to *Dred Scott*," *Journal of Supreme Court History* 45, no. 3 (November 2020): 215–35.

[58] On Horn and *Justice*, see Gail Buckley, **The Hornes: An American Family** (New York: Applause Books, 2002), 48.

[59] "Mr. Lamar and the Colored People," *Justice*, December 24, 1887.

[60] "Lamar and the Supreme Court," *Cleveland Gazette*, January 7, 1888.

[61] "Lamar," *Memphis Appeal*, December 17, 1887.

[62] *Memphis Appeal*, December 18, 1887.

[63] "Lamar's Confirmation," *Memphis Appeal*, December 29, 1887.

[64] *New York Times*, February 5, 1879, and "The Protection of Voters."

[65] "Mr. Lamar as an Issue," *New York Times*, December 23, 1887.

[66] *Ibid.*

[67] "Why Lamar Is Opposed," *New York Times*, January 4, 1888.

[68] "Forty-Fifth Congress," *New York Times*, January 21, 1879. Daniel Meador essentially deployed this reasoning in justifying Lamar's vote on the Edmunds Resolution. See Meador, "Lamar to the Court," 39.

[69] *Indianapolis Journal*, January 11, 1888.

[70] "The Lamar Resolution," *Indianapolis Journal*, January 4, 1888.

[71] *Indianapolis Journal*, December 26, 1887.

[72] *Indianapolis Journal*, January 9, 1888, and "The Nomination of Mr. Lamar," *Harper's Weekly*, January 7, 1888.

[73] *New York Times*, January 10, 1888.

[74] "Lamar Sure of Success," *New York Times*, January 10, 1888. On Stewart, see Foner, **The Second Founding**, 101.

[75] "Lamar," *Memphis Appeal*, January 13, 1888.

[76] On this statement, see Meador, "Lamar to the Court," 43, and *Cong. Rec.*, 50th Cong., 1st sess., 1888, vol. 19, pt 1: 402. For official recognition of the confirmation, see *Cong. Rec.*, 50th Cong.: 475. Because the confirmation occurred in closed session, the *Congressional Record* simply notes that the Senate did confirm Lamar and includes neither a breakdown of the vote nor transcripts of speeches, so one must rely on newspaper articles for these details.

[77] "A Majority for Lamar," *New York Times*, January 17, 1888.

[78] "Mr. Lamar Confirmed," *New York Tribune*, January 7, 1888. Curiously, the *Tribune* did not report on Edmunds discussing his own 1879 Resolution, so often cited by Lamar's detractors. It remains unknown if he did.

[79] "Mr. Lamar Confirmed."

[80] "Justice Lamar," *Memphis Appeal*, January 17, 1888, and "Mr. Justice Lamar," *Memphis Appeal*, January 17, 1888, respectively, for the two quotes cited.

[81] On Campbell, see Leon Friedman and Fred Israel, **The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions, vol. 2** (New York: Chelsea House, 1969), 927–62. On Taney and Campbell, see Timothy S. Huebner, **The Taney Court: Justices, Rulings, and Legacy** (Santa Barbra: ABC-CLIO, 2003).

[82] "Mr. Justice Lamar," *New York Tribune*, January 17, 1888.

[83] See "A Majority for Lamar" and "Mr. Lamar Confirmed."

[84] Murphy, **L.Q.C. Lamar**, 264. Bradley authored such controversial opinions as the circuit opinion of *U.S. v. Cruikshank*, as well as the *Civil Rights Cases*. See 92 U.S. 542 (1876) and 109 U.S. 3 (1883), respectively. Miller authored the opinion in the *Slaughterhouse Cases* and *Bradwell v. Illinois*. See 83 U.S. 36 (1873) and 83 U.S. 130 (1873), respectively.

[85] *Logan v. United States*, 144 U.S. 263, 263 (1892).

[86] 144 U.S. 263, 310 (1892).

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

Joseph Angelillo is currently pursuing a Ph.D. in U.S. Constitutional History at the University of Florida.

Father on the Bench: Justice William R. Day and Kinship Recusal

Clare Cushman

As the Supreme Court entered the twentieth century, it had not established a consistent institutional practice or even guidelines for its members to decide when to recuse themselves from a case when there may be a conflict of interest with one of the parties involved. In the nineteenth century, it had been left up to the individual justice to choose whether to opt out when a relative, friend, or business ally brought a case before the high bench, and justices nearly always chose to opt in. When William R. Day took his seat on the Court in 1903, his benchmates still lacked a uniform protocol for disqualifying themselves when a family member was involved in a case. Justice Day thus had to chart his own path when his four sons—William Louis Day (1876–1936), Luther Day (1879–1965), Stephen Albion Day (1882–1950), and Rufus Spalding Day (1884–1963)—developed robust appellate practices and presented cases to the Supreme Court by written brief and oral argument. As a devoted father who wanted his sons to enjoy successful legal careers but who also sought to protect the integrity of the institution he served for 19 Terms, Justice Day often faced the difficult decision of whether to disqualify himself in a case. A close examination of the legal practices of the four Day sons is thus warranted to shed light on their father's sense of judicial propriety and on the evolving conventions of kinship recusal practice at the Supreme Court during his tenure.

History of Kinship Recusal Practice at the Supreme Court

Congress passed its first recusal statute in 1792, but it only applied to lower federal courts.[1] The statute was amended many times over the next century and a judge's relative appearing as a party became grounds for a judge to disqualify himself,[2] but it would not be until 1948 that federal disqualification law was amended to include the Supreme Court.[3] Of course, the justices were familiar with both the compulsory terms and the practices of lower court judges, many previously having served on appellate courts.

DOI: 10.1111/jsch.12257

To understand the conventions regarding kinship recusal at the Supreme Court when Day arrived at the Court, a comprehensive accounting of family members who practiced before the justices during its first century would be useful. Unfortunately, no such work exists. Based on anecdotal evidence, however, a few generalities emerge. In the nineteenth century, the elite legal world was tight-knit and it was not unusual for relatives of the justices—brothers, uncles, brothers-in-law, nephews—to appear before the Supreme Court. The only example found of a *son* is Charles L. Woodbury, who argued an admiralty jurisdiction case before his father in 1847: Justice Levi Woodbury ruled against him on circuit in Boston.[4]

The standards for judicial behavior regarding conflict of interest in that era were, by today's standards, lax and the presence of a relative rarely triggered a recusal. For example, although Chief Justice Roger B. Taney's brother-in-law, Baltimore attorney Francis Scott Key, appeared frequently before the Court, Taney almost never recused himself.[5] Likewise, when George Ticknor Curtis, a Boston attorney, argued for Dred Scott's freedom before the high court in 1857, his brother, Justice Benjamin Curtis, did not disqualify himself and cast one of two dissenting votes in favor of George's client.[6] The justices raised no questions about Justice Curtis's possible bias and praised his brother's performance.[7]

The most notable examples of non-recusal in the nineteenth-century occurred when Justice Stephen J. Field participated in several cases that his brother, preeminent oral advocate David Dudley Field, argued in the wake of the Civil War. David appeared before the Supreme Court bench in several constitutionally significant cases about the imposition of national power over the defeated Confederacy.[8] Not only did Justice Field consistently choose to sit, he even wrote the five-to-four decision in *Cummings v. Missouri* ruling in favor of his brother's client, a priest who refused to take a loyalty oath to the Union.[9] While "Field had ample precedent for retaining his seat while his brother argued a case,"[10] his choice to participate in these cases looked very different 60 years later when judicial practices and recusal norms had changed. When the Supreme Court made its first pronouncement on the connection between kinship and recusal in *Tumey v. Ohio* (1927), which held that it was appropriate to permit state courts and legislatures to develop rules regarding recusal and disqualification, Chief Justice William H. Taft intentionally omitted examples of previous justices not recusing themselves in his majority opinion so as not to impugn their reputations.[11] Taft was particularly discomfited by the example of Justice Field, whose non-recusal vis-à-vis his brother now seemed improper.[12]

The Conflicting Examples of Justices Peckham and Harlan

When Day took his seat about midway between *Cummings v. Missouri* (1867) and *Tumey v. Ohio* (1927), the practice of kinship recusals had evolved at the Supreme Court. There was still no institutional norm, but individual justices had begun to opt out when a family member successfully brought a case to the Court. Notably, Justice Rufus W. Peckham, who served from 1896 to 1909, recused himself in five cases argued by his older brother, New York attorney Wheeler H. Peckham.[13] That Justice Peckham had previously served as a lower court judge on the New York Court of Appeals may have influenced his thinking on recusal practices. (Lacking a recorded explanation by Justice Peckham as to why he opted out in these cases, we can only assume his recusal was based on the brotherly kinship connection and not some other explanation.) Rufus Peckham did, however, participate in two other cases brought by Wheeler Peckham, and it would be interesting to know why they passed muster. Justice Peckham joined

the majority opinion in a 1902 New York inheritance tax law case, which his brother co-argued on behalf of a Spanish national against the I.R.S.[14] The other decision in which he participated was an original jurisdiction case between South Dakota, the complainant, who was represented by Wheeler, and North Carolina.[15] Peckham joined Justice David Brewer's majority opinion, which ruled against his brother's client, South Dakota, which may be why he did not feel the need to disqualify himself. The vote was five to four, so Peckham may also have opted to participate because his recusal would have caused a stalemate. All the cases Wheeler Peckham argued took place prior to Justice Day's arrival on the Court (Wheeler died in 1905), so Day would not have benefited from observing his colleague Rufus Peckham wrestle with decisions about kinship recusal.

Justice Day did witness the decisions made by another bench-mate, Justice John Marshall Harlan, whose service was 1877–1911. Harlan took an old-fashioned tack, perhaps because, unlike Peckham, he had not sat on a lower court subject to recusal guidelines. Harlan consistently approached the kinship recusal question in the same way as had Field, with whom he served on the Court from 1877 to 1897. Justice Day may have been more influenced by Harlan than by the more modern Peckham, however, for two reasons. First, he enjoyed a strong friendship with Harlan, who lived around the corner from him. Indeed, Day considered Harlan "a friend without limits," calling their relationship "close and cordial" when the Kentucky justice died in 1911.[16] Second, Harlan's example may have seemed more pertinent because Day and Harlan both had *sons* practicing before them, a closer kinship bond than that of a brother. Indeed, Day would arrange for three of his sons to be hired as Supreme Court clerks, just as Harlan had done for two of his sons.[17]

Justice Harlan's second son, John Maynard Harlan, clerked for his father in the 1878 Term; his younger brother James S. Harlan apprenticed at Melville W. Fuller's law firm in Chicago before becoming Fuller's first Supreme Court clerk in 1888 when he was appointed chief justice. The Harlan brothers went on to develop successful law practices in Chicago with James admitted to the Supreme Court bar in 1889 and John Maynard admitted in 1891.[18] They regularly appealed cases to the Supreme Court, separately or together, arguing nine before their father and writing briefs in three others.[19] Justice Harlan never recused himself in the cases his sons briefed or argued. In one case, he even dissented when the Court ruled against the plaintiff whom James and John Maynard were representing and for whom the older son argued the case in an appeal from the State Supreme Court of Illinois.[20] Harlan's biographer concludes that the justice "appears to have been careless about the judiciary's reputation for fairness. He regularly sat and voted in cases argued before the Court by close associates, specifically his intimate friend and former partner Gus Willson, and by close relatives, such as his nephew Harlan Cleveland and even his sons."[21]

Indeed, Justice Harlan's reluctance to recuse himself went hand-in-hand with his unabashed nepotism. He tirelessly used his political influence to try to secure James a federal judgeship, although he was unsuccessful. Harlan did manage to get him appointed attorney general of Puerto Rico, where he served ably from 1901 to 1903, an experience James leveraged once he returned to Chicago and began representing clients on appeals from the district court in Puerto Rico to the Supreme Court.[22] But Justice Harlan kept pushing for a judgeship and President Theodore Roosevelt finally appointed James to the Interstate Commerce Commission in 1906, where he served with distinction until his retirement in 1918. In considering appointing James, however, Roosevelt had voiced reservations about the propriety of cases coming from that body

When William R. Day (standing at right) joined the Supreme Court in 1903, he was not issued guidelines about whether to recuse when his attorney sons brought cases before him. Individual justices made their own decisions: Rufus Peckham (second from left, standing) usually opted out when his brother briefed and argued cases; John Marshall Harlan (seated, second from left) chose not to recuse when his sons did.

before his father's tribunal. To clinch his son's appointment, Harlan had threatened President Roosevelt with stepping down from the Court and had defiantly argued that there was no potential conflict of interest. He reasoned that each justice "in deference to his conscience will do his duty fearlessly, without fear or favor, and regardless of the personnel of the tribunal whose official action comes under his examination."[23] In other words, Harlan was not concerned about the poor optics of nepotism or conflict of interest because he had a profound faith in judges' integrity.

Justice Day was also no stranger to the practice of nepotism, hiring three of his sons—Luther, Stephen, and Rufus—to clerk for him during fourteen out of his nineteen years of service on the Court. He also managed to persuade Chief Justice Melville W. Fuller to take Stephen on as a clerk for a term. However, in 1905 Justice Day nonetheless made queries and voiced qualms about violating nepotism rules before engaging Stephen to succeed Luther as his clerk. He wrote to both his bench-mate David J. Brewer and Attorney General William Moody asking for clarification on nepotism rules.[24] Moreover, when Day's four sons, including his eldest, William, represented parties before the Court, he showed more concern for the reputation of the Court than had Harlan, and he recused himself in most instances. With an eye to propriety, Justice Day often chose to disqualify himself when one of his sons argued a case or was on a brief, but not in every instance. This tendency toward recusal was perhaps due to the fact that, like Peckham, Day had been a lower court judge—serving on the Court of Appeals for the Sixth Circuit from 1899 to 1903—and had been subject to disqualification rules

there. Unfortunately, Day never expressed his thoughts in writing on the capacity for a justice to maintain impartiality when a relative was acting as counsel. Accordingly, to try to determine Day's views on kinship bias and recusal, we are left to scrutinize his actions every time his sons presented cases to the Supreme Court.

Stephen A. Day: First Son to Petition the Supreme Court, 1910

After Stephen A. Day completed his clerkships with Justice Day (1905 Term) and Chief Justice Fuller (1906 Term), he moved to Chicago and developed a legal practice at the corporate law firm of Pam & Hurd.[25] He was admitted to the Supreme Court bar on November 16, 1911,[26] but had been on the brief in a case that was heard by the justices the previous term, making him the first Day son to petition the Supreme Court. Stephen and Max Pam, the founder of his firm, represented a Chicago postmaster who was being compelled to redeliver mail to a corporation whose address had been incomplete.[27] Justice Day did not recuse himself in *Central Trust Co. v. Central Trust Co. of Illinois* (nor did Fuller, Stephen's former employer) and voted to affirm the ruling of the Seventh Circuit refusing to interfere with post office business. In the 1912 Term, Stephen represented police officers against the City of Chicago in two companion cases asking whether the Supreme Court had jurisdiction to review judgments of the Illinois Supreme Court on writs of error.[28] Both were dismissed in a memorandum opinion as there was no federal question involved: Justice Day again did not recuse.[29] After those three cases, Stephen never practiced again before the Supreme Court, but he did revise a legal textbook in 1917, **Federal Appellate Jurisdiction and Procedure,** which included instruction on practicing before the high bench.[30]

In 1914, Stephen entered into a law partnership with Peter S. Grosscup, a former appeals court judge for the Seventh Circuit who had stepped down from the bench amid controversy three years earlier.[31] Grosscup had been appointed to be a circuit court judge in 1899 by his friend William McKinley, who was also a close friend of Justice Day. Stephen's younger brother, Rufus, served as their Chicago firm's "Washington Representative,"[32] although when Grosscup brought a case to the Supreme Court in 1918 neither of the Day brothers' names were attached to it.[33] Justice Day did not recuse himself; in that era a son's law partner being on a brief was not considered a reason for recusal.

In 1911 Stephen A. Day was the first of Justice Day's sons to bring a case to the Supreme Court. He was on the brief in a case from the Seventh Circuit in which his Chicago firm, Pam & Hurd, represented a local postmaster.

William L. Day's Supreme Court Appellate Practice

Unlike his three younger brothers, William L. Day did not clerk for his father and had gone straight from Michigan Law School in 1900 to practicing law in Canton, Ohio. He was admitted to the Supreme Court bar on December 21, 1908,[34] but his nascent

appellate practice was interrupted when President Roosevelt appointed him district attorney for the Northern District of Ohio. Three years later, President Taft appointed him district court judge for the Northern District of Ohio at the impressively young age of thirty-five. In May 1914, his $6,000 judicial salary no longer adequate to support his wife, Estelle, and their two children, William joined the Cleveland firm of Squire, Sanders & Dempsey.[35] His seat on the district court was filled by John H. Clarke, whom Woodrow Wilson would appoint to the Supreme Court in July 1916. When William did business before the Supreme Court, he thus had ties to both Ohio justices, although Clarke had been a politically active Democrat and William, like his father, was prominent in Republican circles, so their link may have been weak.

William made his first oral argument in December 1916, at age forty, four years after Stephen's last appearance before the Supreme Court. Known as "Big Will" in college, when William stood before the high bench, Oliver Wendell Holmes Jr. reportedly marveled at the discrepancy between the athletic son who was over six feet,[36] and his slight father, who was about five feet six inches and weighed 125 pounds. Holmes passed a note down to his bench-mate: "My the boy's a block off the old chip, isn't he Day?"[37] William's client was a Chicago meat-packer against a railway that had rented the company warehouse space next to its track.[38] At issue in the case was whether the meat-packers' private cars should be subject to public tariffs as they were on railway property. As with Stephen, Justice Day did not recuse himself and William argued before him. The Court split six to three, with Day signing on to Justice Louis D. Brandeis' majority opinion upholding the Ohio State Supreme Court's judgment, which had ruled against William's client.[39]

By the time William co-argued his second case, in March 1918, Justice Day had recused himself in cases argued by his younger brothers Luther and Rufus. Accordingly, Justice Day took "no part in the consideration or decision of the case," *Toledo Newspaper Co. v. United States*.[40] William's appeal from the Sixth Circuit challenged a contempt citation that Judge John M. Killits had issued to the editor of the *Toledo News-Bee* for publishing articles and cartoons critical of court rulings during a six-month dispute, in which the judge was involved, between the city and a railroad company. William had served on the District Court for the Northern District of Ohio with Judge Killits, his client. So had Justice Clarke, who recused along with Day, his fellow Ohioan. The Court's decision to affirm the Sixth Circuit's holding was five to two in favor of William's client, with Justices Holmes and Brandeis dissenting.[41]

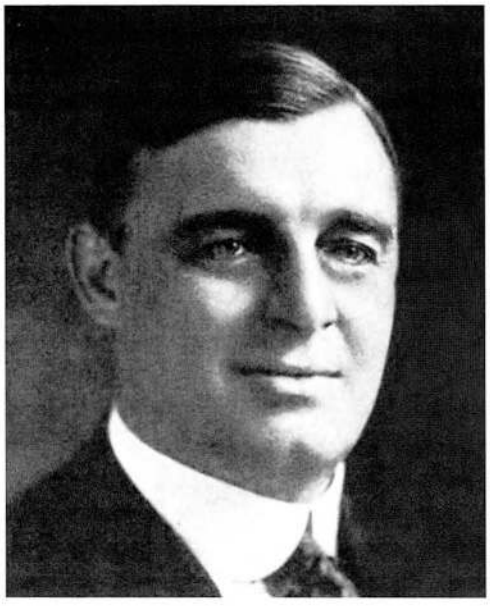
In 1919, William and his new law partner Wilbur Wilkin were appointed special assistants to the Ohio attorney general to investigate crime in Cleveland. Conducting thousands of interviews with people involved in gambling, vice, and other criminal activities, the firm of Day & Wilkin was instrumental in uncovering bail-bond scandals and securing an indictment for the murder of a Cleveland police patrolman. They were too busy to take cases on appeal, but in the 1920 Term, William found time to submit two separate petitions to the Supreme Court from Ohio. Justice Day recused in both cases and the Court found in favor of his son's clients. In the first case, which William co-argued, he represented the Rock Island Railway in asking for a writ of prohibition or of mandamus to prevent the District Court for the Northern District of Ohio from proceeding further against the railway on the ground that the court did not have jurisdiction.[42] In the second, appealed from the Northern Ohio district court, he represented a sugar dealer charged with criminal proceedings under the Lever Act, which was enacted during World War I to prevent "unjust or unreasonable rate or charge in handling or dealing in or with"

any necessaries, including food.[43] The case was decided under the authority of *United States v. L. Cohen Grocery Co.*,[44] which held the act unconstitutional as it set up "no ascertainable standard of guilt."[45] Day recused himself in the *Cohen* case as well.

First Recusal by Justice Day in a Son's Case: Luther Day, 1917

Second son, Luther, served as his father's first clerk in the 1903–4 Supreme Court Terms, having clerked for Judge Day on the court of appeals. He returned to practice law in Canton, Ohio, where the Day boys had spent their childhoods. Luther left Canton for greener pastures in 1911 and established himself in Cleveland as a trial and appellate lawyer at the firm of Goulder, Day, White & Garry. William joined him in Cleveland in 1914, working for the large and distinguished firm of Squire, Sanders & Dempsey before the two Day brothers formed their own firm in 1919. Ohio clients hired them to take appeals to the Supreme Court, and they sometimes used Rufus to file the motions, as he was based in Washington and filled the logistical role of local counsel.[46] That their father was sitting on the Supreme Court and they had insider knowledge of how the justices operated likely factored into the decision of attorneys and litigants to hire them to bring matters before the Court, yet they were also able lawyers who were increasingly prominent in the Ohio bar and would likely have been engaged on their own merit.

At age 37, Luther joined the Supreme Court bar on October 16, 1916,[47] to appeal a case from the Sixth Circuit on behalf of his client, the Zenith Steamship Company.[48] On January 11, 1917, Luther stood at the podium and in his "clear and penetrating"[49] voice argued that an injured deck hand's accusation of negligence under the Ohio Employers' Liability Act was invalid because the steamship company he worked for was engaged in interstate commerce.[50] He did not face his father while declaiming in the Courtroom, however, because Justice Day was not sitting on the bench. In what appears to be the first time Day recused himself because a son participated in a case, the Court Reporter noted that "Mr. Justice Day took no part in the consideration or decision of this case." In a *per curiam* decision, the Court ruled for Luther's client and the case was remanded to the District Court for the Northern District of Ohio.[51] Two terms later, Justice Day again recused, this time in a copyright infringement case from the Court of Appeals for the Sixth Circuit that Luther argued on behalf of a Columbus newspaper being sued by an illustrator. The Court, minus Day, ruled against Luther's client, holding that penalties awarded by the newspaper "in lieu of actual damages and profits" cannot be less than $250 for each case of copyright infringement.[52]



Justice Day did not recuse himself when his eldest son, William L. Day, argued before the Supreme Court in December 1916, the first time one of his four sons participated in oral argument. William (pictured in 1921) was with the firm Squire, Sanders & Dempsey in Cleveland and the case was an appeal from the Sixth Circuit.

Rufus S. Day's Appellate Practice While Also Serving as Law Clerk, 1915–1922

Young Rufus's appellate practice before his father's Court was highly unusual and more problematic in that he also served as his father's law clerk while representing clients. Following in his brothers' footsteps, Rufus had first clerked for Justice Day in the 1907–10 Terms, and then returned to Canton to practice law. When his mother, Mary S. Day, died tragically in December 1911, Rufus returned to Washington to keep his father company. He brought his new bride, Madge, who served as social hostess when they moved into Justice Day's Victorian home at 1301 Clifton Street. Rufus was admitted to the D.C. bar in May 1912 and set to work building up a legal practice, joining a six-person firm.[53] A son, Rufus Jr., was born in 1913 and a daughter, Madge, in 1916. Their father developed a practice before the D.C. courts and became a member of the Supreme Court bar on January 26, 1914.[54] With his law partner Samuel Herrick and two other attorneys, Rufus filed his first motion before the Supreme Court on October 18, 1915, representing an Indiana railroad employee seeking to recover damages for personal injuries under the Employers' Liability Act, which the railroad challenged on the ground that the employee was not engaged in interstate commerce when the accident occurred.[55] The motion to affirm the judgment below was granted in a memorandum opinion by Justice James C. McReynolds by direction of the Court because the case was "so frivolous as not to need further argument." The case had not been argued and Justice Day did not recuse himself.[56]

As Justice Day was suffering from a bout of pneumonia from January 3, 1916, through the end of the Term, he was absent from the bench when Rufus presented his next two cases to the Court and was thus not confronted with decisions about whether to partuicipate.[57] In the first, Rufus and his two co-counsel challenged the jurisdiction of the Supreme Court of the Philippines in determining the provisions of a divorce decree affecting conjugal property.[58] In the second, Rufus and his three co-counsel successfully represented the plaintiff, a Texas railroad brakeman who claimed personal injury. The Court held that a violation of the Safety Appliance Act gave an injured employee the right to be compensated under the Employers' Liability Act even if he was not engaged in interstate commerce at the time of the injury.[59] It is possible, of course, that Justice Day, while convalescing, was still reviewing materials at home and could have cast a vote to review the petitions or sent his vote on the argued cases to the Conference, but that scenario is unlikely, as suggested by Day's letter written in May to his friend and colleague Mahlon Pitney: "I keep tab on the court proceedings and read its decisions, for I am trying to keep up with the procession. You certainly are turning out the work and I am glad for all your sakes that the hard term is mostly gone."[60]

When his father returned to the bench for the 1916 Term after a restorative summer, Rufus filed three petitions for certiorari: two were "dismissed by counsel" and might never have been seen by Justice Day, and the third was denied.[61] As the justices' votes in Conference to grant cert were not made public and there are no docket books available for these terms, it remains unknown whether Justice Day recused himself from cert discussions in cases in which one of his sons was involved or if he informed his brethren that a son represented a party in the case.[62] The ratio of cert petitions filed by the Day brothers that were accepted to those denied does not generally seem to indicate any preferential treatment.

When Justice Day's law clerk resigned abruptly in September 1917 and left him in the lurch, Rufus, still living with his wife and children under his father's roof, was asked to clerk again for his father.[63] With the United

Six weeks after his elder brother William's first appearance before the Supreme Court, in January 1917 second son Luther Day (pictured) also brought a case before his father's Court. This time Justice Day recused. Luther became a prominent member of the Ohio bar and founded the Cleveland firm that is now Jones Day.

States now at war with Germany, Justice Day worried about finding good candidates for the job. At age thirty-three, Rufus dutifully volunteered but apparently on condition that he not give up his lucrative legal practice. At this point in his career, a Supreme Court clerkship as a launchpad no longer applied; he was being a loyal son. Yet Rufus may also have hoped the clerkship would be good for his business. While clerking for Justice Day, he continued unabashedly to advertise himself in law directories: "Rufus S. Day: Practices before the Federal Courts, Executive Departments, and the Federal Commissions."[64]

This double career raises many questions. Were potential clients—litigants and out-of-town attorneys—more likely to hire him because from his service *as a clerk* he had valuable insider knowledge of the Court's workings and of his father's jurisprudence? This scenario seems unlikely because Rufus made no mention of his clerkship in these advertisements, probably because in that era it was a clerical position that did not confer status. Surely, however, potential clients would have expected that *as a son*, he would know how to write appeals in such a way that his father would view their petition favorably and vote to take up their case for review. Yet did clients always know who his father was? And if so, were they at all concerned that Justice Day might recuse himself? Did Rufus discuss his private appellate work with his father? It is difficult to imagine that they did not chat about his clients with while they lived and worked together in their Clifton Street home.

When Rufus argued his first Supreme Court case on November 19, 1917, it triggered Justice Day's second recusal in a son's case, following his opting out of Luther's case ten months earlier.[65] In *Boldt v. Pennsylvania R. Co.* (1918), Rufus represented the widow of a conductor against the owner of a freight train yard accused of negligence under the Employers' Liability Act.[66] The propriety of a current clerk also the son of a sitting justice arguing a case went unremarked, although the press wa keeping close tabs on the Day family's social life, reporting that Justice Day, Rufus, and Madge hosted a dinner at their home for 22 in honor of Chief Justice Edward D. White, and another one two weeks later for Justice Willis Van Devanter, who shared an April 17 birthday with Justice Day.[67] However, Justice Day himself was evidently concerned about propriety and "took no part in the consideration and decision of this case."[68]

How did Rufus manage to serve as a satisfactory clerk while also preparing a case for oral argument? After all, Justice Day was not slacking in his work, and Rufus would, for example, have helped with his father's majority opinion in *Hammer v. Dagenhart* (1918), which invalidated a congressional enactment that prohibited the interstate shipment of goods produced by child labor.[69] The key to Rufus's juggling act may lie in the fact that as a Washington lawyer he was

prized for his geographical desirability. In Justice Day's era, admission to the Supreme Court bar required being physically present in the Courtroom to take the oath of office. Further, the Court's practice was only to notify *local* counsel about the scheduling of an argument because they could be counted on to know the procedures and customs of practicing before the Court and were not subject to travel snafus.[70] Rufus therefore may not always have been expected to spend time writing briefs for clients, but may have been hired only (or primarily) to file motions at the Supreme Court and to serve on the ground as local counsel by out-of-town attorneys (including his brothers in Ohio). Indeed, the Reporter of Decisions who served from 1902 to 1916 noted, "[u]ntil 1925 the petitions were presented by a member of the Bar, who was usually a Washingtonian acting on behalf of out-of-town counsel."[71]

Rufus's dual role as law clerk and appellate lawyer continued for the rest of his father's tenure. In the 1917 and 1918 Terms, Rufus filed two petitions on behalf of clients from the Sixth Circuit—one with his brother Luther—and another from the Court of Appeals of the District of Columbia (with Samuel Herrick), all of which were denied.[72] When Rufus and Herrick appealed a patent case from the Court of Claims in March 1919, Justice Day did not recuse himself, perhaps because Herrick argued and Rufus had minimal involvement.[73] In the 1919 Term, Rufus brought up another case from the Sixth Circuit that was denied.[74] In a second petition filed the same day, from the Eighth Circuit, Rufus was one of several attorneys representing three insurance companies against multiple claims from a plaintiff whose husband had committed suicide. The Court heard the case and handed down its decision in the 1920 Term: this time Justice Day recused himself even though Rufus only filed the petition and neither argued the case nor was on the brief.[75]

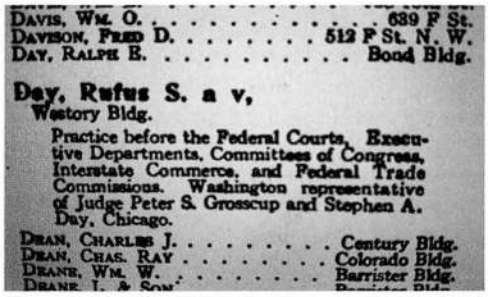
When Congress appropriated funding in 1919 for the justices each to hire a "law clerk" in addition to their current "stenographic clerk," Day, instead of adding a second clerk, simply promoted Rufus to the new, more remunerative, position, the same action taken by most other justices with their clerks. Thus, Rufus's salary climbed from $2,000 to $3,600. Despite this added income, Rufus continued his robust legal practice, representing clients in D.C. courts and in the Supreme Court. He parted ways with Herrick and became "a lawyer in solo practice,"[76] billing himself as "Formerly of the Ohio Bar. General Practice. War Claims."[77] In the 1920 Term, Justice Day recused himself in two cases his law clerk son appealed to the Supreme Court. The first was a high-profile case from the Southern District of New York in which Rufus represented professional gambler and con artist Jules W. Arndstein, the husband of comedian Fanny Brice.[78] Accused of $500,000 theft and sale of securities, "Nicky" Arndstein refused to answer questions during bankruptcy proceedings in New York courts on self-incrimination grounds and had been jailed for contempt.[79] Rufus co-argued the case and the Court allowed his client to be released.[80] The second case involved an appeal from the Court of Claims to review a judgment against the United States involving extra work generated by a government engineer at the expense of an Ohio construction company in excavating a ship channel in the Detroit River.[81] The Supreme Court ruled for Rufus's clients, who were seeking compensation for their construction firm's overtime. He was on the brief with two lawyers from Cleveland but did not argue the case. Justice Day nonetheless "took no part in the decision." Of course, as with all Justice Day's recusals in cases involving his sons, there may have been reasons other than kinship for him to sit out, especially in cases coming from Ohio where he had many connections.

Rufus Day lived in his father's home on Clifton Street with his wife and two children (pictured is Justice Day with his grandson, Rufus Jr.) while developing a robust legal practice in Washington.

The last business any of the Day brothers brought before the Supreme Court prior to their father stepping down in November 1922 were two unsuccessful petitions from the Second and Fourth Circuits Rufus and his co-counsel had filed in March and October of that year.[82] At this juncture, Rufus was billing his services in **Martindale's American Law Directory** as "general practice, federal tax matters,"[83] but not touting himself as a specialist in Supreme Court practice or even appellate law. A third petition, which had been dismissed in June 1922, is notable because Rufus's opponent was his future boss, Solicitor General James M. Beck, a Warren Harding appointee.[84] Rufus had campaigned in Ohio for Senator Harding during his 1920 presidential campaign[85] and was rewarded by an appointment as special assistant to the attorney general on February 28, 1923.[86] Rufus worked directly for Solicitor General Beck, preparing the petitions and briefs filed by the government in the Supreme Court. He also argued three cases in the spring of 1923.[87] It must have been strange to look up at the bench and see his father absent and Pierce Butler as the new justice. Sadly, Justice Day was again stricken with pneumonia and chronic bronchitis and had to resign from the Mixed Claims Commission on May 21. He died on Mackinac Island on July 9, 1923, at age seventy-three.

Back in Cleveland after Justice Day's Death

In 1924 Rufus returned to Ohio for good. He joined William and Luther in their Cleveland firm of Day & Day, and the three brothers went on to represent clients before the Supreme Court more than 50 times. Occasionally all three were on the briefs: "Messrs. Rufus S. Day, Wm. L. Day, and Luther Day, all of Cleveland, Ohio, for plaintiffs in error."[88] William died of a heart attack at age fifty-nine in 1936, the same year the brothers' litigation-focused firm became Day, Young, Veach & LeFever.[89] It merged in 1939 with a corporate-oriented firm to become Jones, Day, Reavis & Pogue (now called Jones Day).[90] Luther and Rufus retired together in 1957 at ages seventy-eight and seventy-two.[91] In tribute, a district judge


DAVIS, WM. O. . . . . 639 F St.
DAVISON, FRED D. . . . . 512 F St. N. W.
DAY, RALPH E. . . . . Bond Bldg.

Day, Rufus S. a v,
Westory Bldg.
Practice before the Federal Courts, Executive Departments, Committees of Congress, Interstate Commerce, and Federal Trade Commissions. Washington representative of Judge Peter S. Grosscup and Stephen A. Day, Chicago.

DEAN, CHARLES J. . . . . Century Bldg.
DEAN, CHAS. RAY . . . . . Colorado Bldg.
DEANE, WM. W. . . . . Barrister Bldg.
DEANE, J. & SON . . . . . Barrister Bldg.

Rufus signed on to be his father's law clerk for a second time in the 1917 Term, serving until Justice Day retired in 1922. Rufus did not give up his legal practice during his clerkship and continued to advertise his services in *Martindale's American Law Directory* (pictured) and bring cases before the Supreme Court.

wrote in a bench opinion that Luther was "considered, I believe, by our leading lawyers as possibly the greatest trial lawyer in Ohio history."[92]

Conflict of Interest and Recusal

Filing cert petitions, submitting written briefs, sitting at counsel table, and especially arguing cases all raise the specter of impartiality and impropriety when it is the child of a justice appealing the case. Recusal is thus the logical "out" for the parent justice to avoid even a hint of personal bias or its appearance. The aim of recusal is both to protect appellants by helping to ensure an impartial decision-maker for their claims and "to preserve the legitimacy of the judicial system as a whole."[93] Accordingly, Justice Day duly disqualified himself in nine instances when one of his sons litigated a case, an action clearly printed in the opinion released to the public. Yet we do not know on what basis Day made these decisions to opt out or why he chose to participate in six of their other cases. Was he influenced by the kinship recusal actions of Peckham or Harlan? When he decided not to recuse, was it because the Court was going to issue a memorandum opinion or the case lacked significance? By the time the Court decided on its disposition or outcome, it would have been too late in the process to recuse so it is unlikely that he decided to participate when the ruling went against his son's client and no bias could be construed. As the justices cannot call on other judges to replace them, as is true in some state high courts, Day may have felt a strong duty to try to sit if possible to provide a full bench, even if doing so gave the appearance of impropriety.[94] Furthermore, recusing himself may have *looked* unbiased, but by leaving only eight justices participating in a decision his action could have introduced the possibility of a four-to-four split and a non-precedential affirmation of the lower court decision. In practice, however, Justice Day's recusals did not result in any evenly divided Courts.

The selection of cert petitions for review raises another set of questions in terms of kinship and personal bias. In decisions where the Court reported that Justice Day "took no part in the consideration or decision of this case," he probably did not participate in cert review (if the case was indeed granted review through a cert petition as the justices' discretion in selecting cases was weaker prior to 1925). What about reviewing petitions for his sons' cases that were not chosen to be argued? Did he cast a vote in Conference to accept or deny any of those, or did he refrain systematically? And even if Day disqualified himself in all cert discussions, he may have unintentionally disfavored his sons' clients if they were the petitioners. Indeed, as Steven Lubet argues, at the certiorari stage the disqualification of a Supreme Court justice actually may harm the very party it was intended to protect. Lubet's research indicates that when a justice appears biased *against* the party petitioning for review, "the right of the petitioner to *apparent impartiality* may be secured [by recusal], but only at the cost of *actual disadvantage* when it comes to obtaining Supreme Court review" as recusals leave fewer justices from whom to secure the necessary four votes.[95] Thus, Justice Day's decisions over whether to recuse when his

sons brought a case to the Court distorted the process in favor of the respondent.

Ethical considerations are a two-way street, and one could argue that the onus should have been on Justice Day's sons not to practice before the Supreme Court. As kin, they put their father in the position of having to make recusal decisions regularly to protect judicial integrity. As attorneys, the Day brothers were subject to the American Bar Association's 1908 Canon of Ethics, which 31 state bar associations, including D.C., Ohio, and Illinois, had adopted by 1914.[96] The code enumerated ethical guidelines for attorneys and included a section on conflict of interest:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.[97]

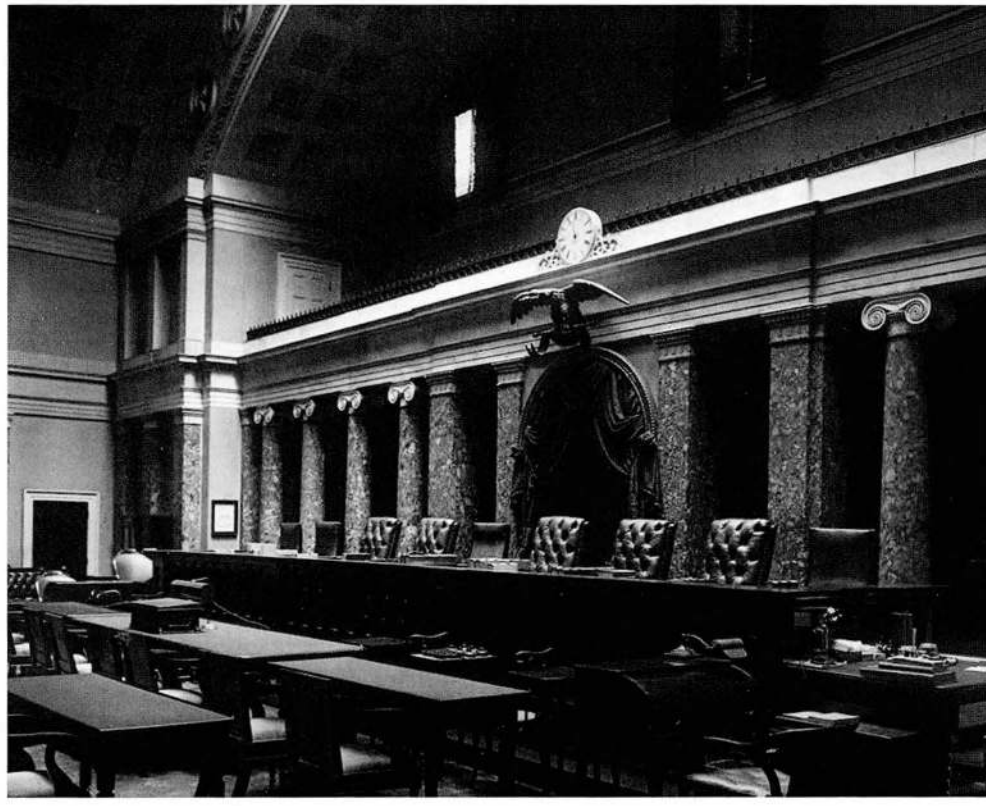
Did Stephen, William, Luther, and Rufus disclose their connection to Justice Day to their clients because it was ethical or because it gave them an advantage in being hired, or both? Or was their father so well known that there was no need to mention the relationship? Ohio clients would have surely been aware their father sat on the Supreme Court, but the postal worker and police officers Stephen represented in Chicago may not have known and thus needed to be told.

The Day brothers do not appear to have received any sanctions from bar associations. To the contrary, Luther was greatly respected by his peers for both his legal acumen and his probity. Praised the Cleveland Bar Association in 1930, "He doesn't get clients through political connections or win verdicts in that way; he doesn't negotiate retainers at his club or through memberships on Boards of Directors; he wins his cases because of his ability."[98] Moreover, in his words of advice to his fellow attorneys, Luther demonstrated a keen ethical mind:

> Be a constructive lawyer first and a case lawyer second. When you get a case don't run straight to the library, to look up the law to support your side. Decide in your own mind first what you think the law ought to be on the basis of right and wrong and then try to find the law to support your view.[99]

As a law clerk whose job was to support his father in selecting which cases to vote to take up for review and then in how to decide them, Rufus faced an added ethical challenge. Because he also represented the litigant in several of these same cases he was helping his father decide on the merits, he clearly violated the Canon of Ethics. Moreover, as Rufus shared a home with his father, it is unlikely that he was able to refrain from discussing his client work, particularly if it overlapped with Court business. This would have violated Section 3 of the Canon, which recommends attorneys maintain their "independence" from a judge:

> A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.[100]



Justice Day's sons sat at counsel table looking up at an empty chair behind the bench because their father had declined to participate in their cases for reasons of propriety.

The ethical choice for Rufus would have been to turn down the second clerkship and move out of the house if he wanted to continue his private practice. Likewise, Justice Day should have asked him to give up his outside clients when Rufus signed on to clerk for him. Much of his ethical lapse of judgment can be attributed to the fact that even though Rufus was on the government payroll, Justice Day did not see him as a Supreme Court employee but as a "private secretary" who worked directly for him in his home and performed mundane clerical duties.[101] It is this misperception that likely contributed to Justice Day's tolerance for having his law clerk litigate cases before his tribunal. Day was not alone in this attitude; his colleague David Brewer had assured him in 1905 that it was ethical to hire his son Stephen because a Supreme Court law clerk did not take an oath of office, worked directly for the justice in his home and not for the "public," and was "simply a typewriter, a fountain pen" performing stenography.[102]

Moreover, it had long been the practice of Justice Department lawyers to accept working for modest government salaries on the understanding that they would simultaneously bolster their income by continuing their private practice. Rufus's double income as law clerk receiving a government salary and private attorney billing clients should be considered in this larger context. In 1924 Attorney General Harry M. Daugherty successfully advocated for increasing the salaries of government lawyers, not to avoid conflicts of interest, but on the ground that their jobs had become so demanding that they no longer had time to practice law on the side:

> The old arrangement under which United States attorneys and their assistants received small salaries and devoted the greater part of their time to their private practice can no longer continue as the volume of public business in the majority of the districts requires their entire time.[103]

Framed in this context, it is possible that Justice Day thought it would be unfair to curtail his son's lucrative legal practice simply because his father was inconveniently sitting on the high bench.

Aftermath

Three years after Justice Day stepped down from the Court, the appearance of the child of a sitting justice before the Supreme Court drew the attention of the mainstream press. In 1925 Justice Louis D. Brandeis' daughter, Susan Brandeis, argued *Margolin v. United States*, a case from the Second Circuit involving a lawyer's handling of a veteran's insurance claim.[104] Unlike the Day or Harlan sons, the episode made news—albeit mostly because of the novelty of being the first *daughter* of a justice to argue a case.[105] Press accounts consistently noted, however, that "out of official delicacy," Justice Brandeis was not present on the bench and took no part in the decision, which went against his daughter's client.[106] The norms regarding judicial propriety and the offspring of members of the Court practicing before their parents had clearly evolved.

By 1933 Justice Willis Van Devanter, who had served on the Court since 1911 and had sat with Day for ten Terms, advised Chief Justice Charles Evans Hughes that justices "seldom if ever" participated in cases involving their kin. He explained the evolution of the recusal practice:

> Formerly it was the general practice of members of the Court to sit in such cases, but the practice has gradually undergone a change so that now a member of the Court seldom if ever sits in a case where a near kinsman such as a brother or son participates in the presentation of the case either by oral argument or printed brief.... The change here mentioned was brought about not by any action of the Court but by the individual action of the Justice particularly concerned.[107]

Van Devanter gave as an example the actions of Hughes' predecessor as chief justice, William H. Taft, who served from 1921 to 1930 and had virtually no overlap with Justice Day. He reported that Taft "always refrained from sitting in a case where his brother or either of his sons appeared as counsel." Van Devanter, however, was incorrect: Taft had participated in a few cases where his brother, New York lawyer Henry W. Taft, represented a party.[108] The fact that Van Devanter misremembered the recusal actions of his Court colleague may indicate that the justices were not closely keeping track of one another's recusal choices. It also shows that Taft, like Day and Peckham, did not have a completely consistent recusal policy regarding his kin. The institutional norm for recusal had gradually evolved toward a greater effort to sit out in the interest of judicial propriety, but still remained ad hoc several years after Day's tenure on the bench had concluded.

Notes

[1] Act of May 8, 1792, ch. 36, §11, 1 Stat. 278.

[2] Richard E. Flamm, "The History of Judicial Disqualification in America," *ABA Judge's Journal*, vol. 52, no. 3 (July 2013).

[3] 28 U.S.C. § 455.

[4] *United States v. New Bedford Bridge*, 27 Fed. Cas. 91, 94 (No. 15867) (C.C.D. Conn. 1847).

[5] Taney did recuse himself in at least one case, *Gaines v. Relf*, 40 U.S. 9 (1841). The decision noted "Mr. Chief Justice Taney did not sit in this cause, a near family relative being interested in the event," but this was

probably not because Key, his now deceased brother-in-law, had argued the case but because his estate might have benefited from the settlement of the property dispute. Carl B. Swisher, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Vol. V: The Taney Period, 1836–64** (1974), 761.

[6] *Scott v. Sandford*, 60 U.S. 393 (1857).

[7] Swisher, **The Taney Period**, 614.

[8] *Ex Parte Milligan*, 71 U.S. 2 (1866); *Ex Parte McCardle*, 74 U.S. 506 (1868); *United States v. Cruikshank*, 92 U.S. 542 (1875).

[9] *Cummings v. Missouri*, 71 U.S. 277 (1867).

[10] Carl B. Swisher, **Stephen J. Field Craftsman of the Law** (1930), 152.

[11] 273 U.S. 510 (1927).

[12] Willis Van Devanter told Charles Evans Hughes about Taft's reluctance to name justices who participated in cases involving their kin in his *Tumey* opinion. See letter from Willis Van Devanter to Charles Evans Hughes, October 7, 1935, quoted in Joshua E. Kastenberg, "Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of *Tumey v. Ohio,*" 65 *Cleveland State Law Review* 317 (2017), 366.

[13] *Central Pacific Railroad v. Nevada*, 162 U.S. 512 (1896); *Warner v. New Orleans*, 167 U.S. 467 (1897); *New Orleans v. Warner*, 175 U.S. 120 (1899); *Knowlton v. Moore*, 178 U.S. 41 (1900); *New Orleans v. Warner*, 180 U.S. 199 (1901) are the cases in which Justice Peckham recused himself.

[14] *Eidman v. Martinez*, 184 U.S. 578 (1902).

[15] *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

[16] William Rufus Day to Horace Lurton, October 17, 1911, Lurton Papers, undated A-J. See also "Seen and Heard in the Grand Stand." *Washington Post*, May 10, 1905, 9, in which Day persuades Harlan to give up an afternoon of golf to attend a baseball game with him.

[17] See generally Clare Cushman, "Sons of Ohio: William Rufus Day, Nepotism and His Law Clerks," *Journal of Supreme Court History*, vol. 45, no. 1 (2020), 236–61.

[18] See Malvina Shanklin Harlan, **Some Memories of a Long Life 1854–1911** (Modern Library, 2002), 258.

[19] Cases John Maynard Harlan argued: *Chandler v. Pomeroy*, 143 U.S. 318 (1892); *Farley v. Hill*, 150 U.S. 572 (1893); *Leathe v. Thomas*, 207 U.S. 93 (1907); *Laborde v. Ubarri*, 214 U.S. 173 (1909); *Moxley v. Hertz*, 216 U.S. 344 (1909); John Maynard was also on the briefs in *Hilton's Administrator v. Jones*, 159 U.S. 584 (1895); *Cliff v. United States*, 195 U.S. 159 (1904); *Perez v. Fernandez* 202 US 80 (1906), and he filed an amicus brief in *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186 (1911). Cases James S. Harlan argued or was on the briefs: *Cleveland v. Richardson*, 132 U.S. 318 (1889); *Cornell University v. Fiske*, 136 U.S. 152 (1890) (on the brief); *Dunham v. Jones*, 159 U.S. 584 (1895); *Serralles' Succession v. Esbri*, 200 U.S. 103 (1906); *Perez v. Fernandez* 202 US 80 (1906) (James argued and John Maynard was on the brief). Both brothers filed petitions that were dismissed or denied: 140 U.S. 693 (1890), 145 U.S. 99 (1892), 159 U.S. 264 (1895), 195 U.S. 628 (1904), 199 U.S. 614 (1905), 207 U.S. 602 (1907), 208 U.S. 618 (1908), 212 U.S. 587 (1908).

[20] *Leathe v. Thomas*, 207 U.S. 93 (1907). Both Harlan and Day dissented.

[21] Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (1902), 154. The appellate practices of Harlan's sons have not been closely examined by his biographers.

[22] *Perez v. Fernandez*, 202 US 80 (1906); *Seralles' Succession v. Esbri*, 200 U.S. 103 (1906).

[23] John Marshall Harlan to Theodore Roosevelt, July 5, 1906, quoted in Beth, **The Last Whig Justice**, 155.

[24] For Brewer's considered response, see David Brewer to William Rufus Day, August 13, 1905, Papers of William R. Day, Library of Congress, Box 20, File A-C [hereinafter Day Papers]. Day's letter to Moody and Moody's letter in response have not been found. See generally, Cushman, "Sons of Ohio."

[25] **The National Cyclopedia of American Biography**, vol. 17 (New York: 1920), 253.

[26] *Journal of the Supreme Court* [hereinafter *JSCT]* 1911, 56.

[27] *Central Trust Co. v. Central Trust Co. of Illinois*, 216 U.S. 251 (1910). Argued by Max Pam for the respondent on January 18, decided February 21, 1910.

[28] *JSCT* 1912, 71–72. Argued on December 16, 1912; both dismissed on January 6, 1913, for want of jurisdiction, *ibid.*, 82.

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

[30] Elijah N. Zoline, revised by Stephen A. Day, **Zoline on Federal Appellate Jurisdiction and Procedure, with Forms** (New York: Clark Boardman Co., 1917).

[31] See Richard Cahan, **A Court That Shaped America: Chicago's Federal District Court from Abe Lincoln to Abbie Hoffman** (Northwestern University Press, 2002), 41–44, for the checkered career of Peter S. Grosscup (1852–1921).

[32] **Hubbell's Legal Directory**, 1921, 68. Rufus S. Day's entry says: "Washington Representative of Stephen A. Day and Judge Peter S. Grosscup. Advisory Council Offices: New York Life Building, Chicago."

[33] *International News Service v. Associated Press*, 248 U.S. 215 (1918).

[34] *JSCT* 1907, 71.

[35] William married Elizabeth E. McKay (Estelle) in 1902, and they had two children: William R. Day was born in 1904, Jean Day in 1910.

[36] William wrote his father from college that he weighed 193 pounds and Luther 152. William L. Day to William Rufus Day, June 6, 1899, Day Papers, Box 2 Letter D.

He was also president of the Athletic Association at the University of Michigan, *The Michigan Alumnus*, vol. 42, no. 2 (1935), 512.

[37] This anecdote was published in *Everybody's Magazine*, vol. 33 (July–December 1915), 771, and in "Justice Day's Giant Son," *Atlanta Constitution*, December 5, 1915, D8. In 1941, Rufus also related it to Day's biographer: see Joseph E. McLean, **William Rufus Day**, 62, note 42. However, there is no record of William appearing before the Supreme Court as an advocate prior to December *1916* so the fact that these accounts were published in December *1915* is puzzling and may indicate he was in the Courtroom for another reason.

[38] *Swift & Company v. Hocking Valley Railway Company*, 243 U.S. 281 (1917). *JSCT* 1916, 86, argued December 5, 1916.

[39] *Ibid.*,162–63, decided March 6, 1917. Justices McKenna, Van Devanter, and McReynolds dissented.

[40] *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). *JSCT* 1917, 168, argued March 8, 1918.

[41] *Ibid.*, 267, decided June 10, 1918.

[42] *Ex Parte Chicago, R.I. & Pacific Ry. Co.*, 255 U.S. 273 (1921). *JSCT* 1920, 96 and 151, argued December 13, 1920 and February 28, 1921.

[43] The Food Control Act of 1917 as amended in 1919, quoted in *G. S. Willard Co. v. Palmer*, 255 U.S. 106 (1921), at 106–7.

[44] 255 U.S. 81 (1921)

[45] *Ibid.*, at 89.

[46] For example, see *Pennsylvania RR. Co. v. Mary Price* 245 U.S. 671 (1918). *JSCT* 1917, 110. Petition was denied.

[47] *JSCT* 1916, 19.

[48] *Schwede v. Zenith S.S. Co.*, 244 U.S. 646 (1917).

[49] Law partner Arthur L. Dougan described Luther's voice this way, quoted in Albert Borowitz, **Jones, Day, Reavis & Pogue: The First Century** (JonesDay: 1993), 66.

[50] *JSCT* 1916, 29. Argued January 11, 1917.

[51] *Ibid.*, 261. Decided May 21, 1917.

[52] *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919). *JSCT* 1918, 57, argued November 15, 1918. *JSCT*1918, 147, decided March 3, 1919.

[53] "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.

[54] *JSCT* 1913, 124.

[55] *JSCT* 1915, 17, argued October 18, 1915.

[56] *Pennsylvania Co. v. Donat*, 239 U.S. 50 (1915). *JSCT* 1915, 34, judgment affirmed November 1, 1915.

[57] A third petition by Rufus was denied on February 28: *Courtney v. Georger*, 241 U.S. 660 (1916).

[58] *De La Rama v. De La Rama*, 241 U.S. 154. *JSCT* 1915, 220, decided May 1, 1916. "Writ of error dismissed and decree affirmed with costs. Opinion by Mr. Justice Holmes."

[59] *San Antonio & Aransas Pass Railway Co. v. Wagner*, 241 U.S. 476 (1916). Decided June 5, 1916. "Messrs. Robert J. Boyle, Rufus S. Day, Samuel Herrick, and A. B. Storey for plaintiff in error."

[60] William R. Day to Mahlon Pitney, Canton, Ohio, May 3, 1916, D'Angelo Law Library Rare Book Room, University of Chicago Library.

[61] *JSCT* 1916, 77. December 4, 1916. "No. 308. Baltimore & Ohio Railroad Company, plaintiff in error, V. William C. Hagen. Motion to dismiss or affirm or place on the summary docket submitted by Mr. Rufus S. Day and Mr. F. S. Monnett for the defendant in error in support of the motion, and by Mr. Alfred A. Frazier, Mr. Edward Kibler, and Mr. George E. Hamilton for the plaintiff in error in opposition thereto." The case was dismissed by counsel on June 4, 1917, *ibid*, 274. *JSCT* 1916, 13. January 22, 1917. "No. 308. The Baltimore & Ohio Railroad Company, plaintiff in error v. William C. Hagen. In error to the Court of Appeals for the Fifth District, Licking County, State of Ohio." "Dismissed, per stipulation of counsel," *ibid*, 39. *JSCT* 1916, 274. June 4, 1917. "No. 1102. P. C. O'Brien, county treasurer of Cuyahoga County, appellant, v. John D. Rockefeller. Motion to dismiss submitted by Mr. A. E. Clevenger and Mr. W. B. Sanders for the appellee in support of the motion, and by Mr. Samuel Doerfler and Mr. Thomas S. Dunlap for the appellant in opposition thereto. Petition for a writ of certiorari submitted by Mr. Rufus S. Day in behalf of Mr. Samuel Doerfler and Mr. Thomas S. Dunlap for the appellant in support of the petition, and by Mr. A. E. Clevenger and Mr. W. B. Sanders for the appellee in opposition thereto." The petition was denied on June 11, *ibid.*, 283.

[62] The justices' Docket Books in the collection of the Office of the Curator at the Supreme Court have a gap between 1901 and 1922.

[63] John A. Lombard clerked for Justice Day during the 1914, 1915, and 1916 Terms but resigned when Day tried to rehire his previous clerk James G. Bachman. See Cushman, "Sons of Ohio," 249–53.

[64] **Hubbell's Legal Directory**, 1916, 58, *ibid.*, 1921, 73; **Martindale's American Law Directory** 1918, 1227.

[65] *JSCT* 1917, 69–70, argued November 19, 1917.

[66] 245 U.S. 441, decided January 7, 1918.

[67] "Society," *Washington Post*, April 1, 1917, 6; "Society," *The Washington Herald*, April 18, 1917, 6.

[68] *JSCT* 1917, 69–70, decided January 7, 1918.

[69] 247 US 251 (1918).

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

[71] Charles Henry Butler, **A Century at The Bar of the Supreme Court of the United States** (NY: Putnam, 1942), 111.

[72] *JSCT* 1917, 110. January 7, 1918. "No. 800, The Port Graham Coal Company, petitioner, v. Orren G. Staples. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia submitted by Mr. Rufus S. Day, Mr. Samuel Herrick, and Mr. Joseph W. Cox for the petitioner, and by Mr. Bynum E. Hinton for the respondent." Petition denied, *ibid.*, 119. *JSCT* 1918, 7. October 8, 1918. "No. 503. Herbert E. Edwards, petitioner, v. The United States of America. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit submitted by Mr. William R. Harr in behalf of Mr. Rufus S. Day and Mr. Luther Day for the petitioner, and by Mr. Solicitor General Davis for the respondent." Petition denied, *ibid.*, 24. *JSCT* 1917, 75. December 9, 1918. "Nos. 742 and 743. John J. Shea, petitioner, v. The United States of America. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit submitted by Mr. Rufus S. Day in behalf of Mr. Edmund H. Moore, Mr. Sherman T. McPherson, and Mr. Edward P. Moulinier for the petitioner, and by Mr. Solicitor General King and Mr. Assistant Attorney General Porter for the respondents." Petitions denied, *ibid.*, 82.

[73] *Moore v. United States*, 249 U.S. 487 (1919). It is not clear to what extent Rufus participated in the case, *JSCT* 1918 reports that Herrick argued for the appellant on March 21, but makes no mention of Rufus. Likewise, *U.S. Reports* lists "Mr. Samuel Herrick, with whom Mr. P. M. Liddy was on the brief, for appellant." However, *Supreme Court Reporter*, vols. 39–40, 322, states "Messrs. Samuel Herrick and Rufus S. Day, both of Washington, D.C., for appellant. Mr. Assistant Attorney General Frierson, for the United States." *JSCT* 1918, 204, decided April 14, 1919.

[74] *JSCT* 1918, 6. October 6, 1919. "No. 545. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, petitioner, v. Ellsworth G. Cole. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit submitted by Mr. Rufus S. Day in behalf of Mr. Andrew Squire and Mr. Thomas M. Kirby for the petitioner, and by Mr. Albert E. Powell for the respondent." Petition denied, *ibid.*, 40.

[75] *Northwestern Mut. Life Ins. Co. v. Johnson*, 254 U.S. 96 (1920). *JSCT* 1919, 6. October 6, 1919. "No. 306. National Life Insurance Company of Montpelier, Vermont, v. A. M. Miller, Administrator, etc. Motion for a writ of certiorari to bring up the whole record and cause submitted by Mr. Rufus S. Day in behalf of Mr. George Lines and Mr. George B. Young for the Insurance Companies, and by Mr. S. F. Prouty for Isabel H. Johnson." After several motions, the case was carried over to the 1920 Term and decided on November 15, 1920, *JSCT* 1920, 63–64.

[76] 1921 Census lists him as a "lawyer in solo practice." He also wrote to his father on letterhead of his Washington, D.C. firm "Rufus S. Day" on July 1, 1921. Day Papers, Box 34 Letter D.

[77] **Martindale's American Law Directory**, 1920, 1239.

[78] *Arndstein v. McCarthy*, 254 U.S. 71 (1920).

[79] *JSCT* 1920, 46–47, argued October 21–22, 1920. *JSCT* 1920, 52, decided November 8, 1920.

[80] "Arndstein's Release from Jail Ordered by Supreme Court," *New York Tribune*, November 9, 1920, 9.

[81] *U.S. v. L.P. & J.A. Smith*, 256 U.S. 11 (1921). Argued: March 22 and 23, 1921. Decided: April 11, 1921.

[82] *Insurance Company of North America v. Harry Brigham*, 258 U.S. 625; *H.P. Converse v. Portsmouth Cotton Oil Refining*, 260 U.S. 724.

[83] **Martindale's American Law Directory**, 1922, 1205. With William A. Harr, a member of the D.C. Board of Trade, Rufus litigated a case on December 1, 1921, asking the "District Supreme Court" to compel the Secretary of the Treasury, the Treasurer of the United States, and the McCaul construction company to give a full accounting of funds appropriated to build the Alabama Claims House in Birmingham.

[84] *JSCT* 1921, 237. April 17, 1922. "No. 887. William E. Woodbridge, appellant, v. The United States. Appeal from the Court of Claims. Docketed and dismissed, on motion of Mr. Solicitor General Beck for the appellee." *JSCT* 1921, 277. May 29, 1922. "No. 887. William E. Woodbridge, appellant, v. The United States. Motion to reinstate submitted by Mr. Rufus S. Day for the appellant." The case was eventually argued in October 1923 after Justice Day's death and without Rufus's participation. *Woodbridge v. United States*, 263 U.S. 50 (1923) was handed down in November 1923.

[85] "Harding a Born Leader and He Looks the Part," *Sunday Magazine, The Sun and the New York Herald*, June 20, 1920, 1.

[86] "Justice Day's Son to Join Daugherty Staff," *The Des Moines Register*, March 1, 1923, 1.

[87] *Riddle v. Dyche*, 262 U.S. 333 (1923); *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923); *Atwater & Co. v. United States*, 262 U.S. 495 (1923).

[88] *Timken Roller Bearing Co. v. Pennsylvania R. Co.*, 273 U.S. 665 (1927).

[89] "Luther Day," "Rufus Spalding Day," *Who's Who in Law*, vol. 1, 1937, 235.

[90] "Day Brothers End Long in Day Law," *Cleveland News*, May 1, 1957.

[91] "Luther Day, 85, Dies, Noted City Lawyer," *Cleveland Plain Dealer*, February 8, 1965, 4; "Rufus S. Day, Jr., 70, Lawyer," *Cleveland Plain Dealer*, March 3, 1963.

[92] U.S. District Judge James Connell, *United States v. Malleable & Steel Casings Co*, 1957 Trade Cas. (N.D. Ohio, 1957) at 73584.

[93] Louis Virelli, Jr., **Disqualifying the High Court; Supreme Court Recusal and the Constitution** (University Press of Kansas, 2016), xii.

[94] Debra Lyn Bassett, "Recusal and the Supreme Court," 56 *Hastings L.J.* 657 (2005), 672–73.

[95] Steven Lubet, "Disqualifications of Supreme Court Justices: The Certiorari Conundrum," *Minnesota Law Review*, vol. 80, no. 3 (1996), 658.

[96] James M. Altman, "Considering the A.B.A.'s 1908 Canons of Ethics," 71 *Fordham L. Rev.* 2395 (2003) 2395.

[97] Section 6, ABA *Canon of Ethics* 1908.

[98] *Journal of the Cleveland Bar Association*, April 1930, 3.

[99] *Ibid.*, December 1930, 15.

[100] Section 3, ABA *Canon of Ethics*, 1908.

[101] Cushman, "Sons of Ohio," 253–57.

[102] David Brewer to William Rufus Day, August 13, 1905, Papers of William R. Day, Library of Congress, Box 20, File A-C.

[103] **Report of the Attorney General** (Washington: GPO, 1924) 1.

[104] 269 U.S. 93.

[105] See, for example, "Brandeis's Daughter in Supreme Court Today to Argue New York War Insurance Case," *New York Times*, October 5, 1925, 1.

[106] For example, "Susan Brandeis Lawyer," *Brooklyn Daily Eagle*, October 6, 1925, 1.

[107] Willis Van Devanter to Charles Evans Hughes, October 7, 1933. Papers of Willis Van Devanter, Library of Congress, Box 36.

[108] William H. Taft did not recuse himself in the following cases where his brother, Henry W. Taft, was of counsel: *Cheung Sum See v. Nagle*, 268 U.S. 336 (1925); *Chang Chan v. Nagle*, 268 U.S. 346 (1925); *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). For more on Taft's views on recusal practices, see Joshua E. Kastenberg, "Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of *Tumey v. Ohio,*" 65 *Cleveland State Law Review* 317 (2017).

Clare Cushman is Director of Publications and Resident Historian at the Supreme Court Historical Society

Make Way for Tomorrow: How Justice Tom C. Clark Departed from and (Almost) Returned to the Supreme Court

Craig Alan Smith

Introduction

In the midst of the Great Depression, filmmaker Leo McCarey released *Make Way for Tomorrow* (1937), considered by Orson Welles "the saddest movie ever made." The film depicts the hardships and sacrifices families faced and features an elderly couple who lost their home to a bank foreclosure, forcing them to depend on their adult children. Without adequate space for both parents, their children place them into two separate households, where their presence becomes a constant source of friction. In the end, plans are made to move the family matriarch to an elderly care facility, but the patriarch will be shipped west to live with distant relatives. On one level, the film portrays the parents' serene dignity as they endure their children's benign neglect. During their final, tragic goodbye, the parents realize they might never again see each other. Ultimately, they sacrificed their own happiness for their children's sakes.[1]

The same year that McCarey released his poignant film, a Dallas-based lawyer, Tom Clark, got a job at the Justice Department in the Bureau of War Risk Litigation, and a freshman congressman, Lyndon B. Johnson, began his first term in the U.S. House. The private lives and public careers of these two Texans became intertwined over the ensuing three decades. Clark advanced through the Justice Department, serving as an assistant attorney general and later as President Harry S. Truman's attorney general before Truman appointed him to the Supreme Court, and Johnson advanced to the U.S. Senate, the vice presidency, and, with the death of President John Kennedy, the presidency. No doubt, their Texas roots gave them an affinity for one another, and due to their long government

DOI: 10.1111/jsch.12258

careers, their attachment increased over time. In spring 1967, their mutual devotion was displayed when Johnson nominated Clark's son, Ramsey, to become attorney general, and nearly simultaneously Clark announced that he would leave the Supreme Court.

Like the film that debuted when he arrived in Washington, D.C., Clark willingly sacrificed his professional achievements to make way for his son's. However, in this instance, it was not Ramsey who proved insensitive to his father's position, but rather Clark's longtime friend, Lyndon B. Johnson, who demonstrated callous disregard in order to advance his own selfish political aims. Johnson did this first by forcing Clark off the Court; eighteen months later he contrived—unsuccessfully, as it turned out—to force Ramsey out of the Cabinet in order to return Clark to the Court.

This is a tale about relationships, those between Johnson and Clark and between father and son, as well as the president's relationship with the Court and how Johnson sought to manipulate it. Of course, Johnson's dissembling methods have been widely recognized, including his calculation that Clark would vacate the Court if Ramsey became the attorney general. However, taped White House phone calls have revealed the extent of the president's involvement and the real potential for failure. Therefore, this is also a tale of contingencies. Nothing was certain in Johnson's calculations until it actually happened, and there were plenty of "near misses" in the process. In addition, the tapes reveal that a crucial phone call between Johnson and his acting attorney general was less concerned with convincing Tom Clark to make a decision than with persuading Ramsey to accept that decision. Ramsey was, after all, the only person who could have foiled the president's plans.

The seeming inevitability of what happened should not detract from the potential of it coming unraveled. Johnson did not have to elevate Ramsey Clark to be the attorney general, but he did, and his reasons appear obvious in retrospect. With Clark off the Court, Johnson could propel his civil rights agenda by naming the first African-American justice, Thurgood Marshall. This was not the first, nor would it be the last time that Johnson tried to orchestrate the selection of justices. In fact, his final effort, elevating Abe Fortas to chief justice, ended in colossal failure, and he considered—however briefly—turning to the Clarks to salvage the situation. Moreover, Clark did not have to retire from the Court, and for a while it looked as though he might not. Neither did he have to signal his intentions to the White House, but when he did, Johnson had what he needed to fulfill his designs for the Court. Finally, Ramsey Clark, a man of high principles with intense family loyalties, did not have to accept Johnson's nomination, which became the president's gravest concern.

Historical Background

Tom Clark served on the Supreme Court for eighteen years, during which eight of his brethren departed from the bench. The first two to leave, Chief Justice Fred Vinson in 1953 and Robert H. Jackson the following year, died while in office, but most of the others retired from active service when illness compelled it. Those who cited poor health included Sherman Minton (1956), Harold Burton (1958), Charles Whittaker (1962), and Felix Frankfurter (1962). One justice, Stanley Reed (1957), cited his age, although his biographer believed it had as much to do with anticipated disappointment in case outcomes.[2] Federal law since 1869 had permitted justices to retire and receive their full salary if they were at least 70 years of age and had spent ten years on the federal bench. In 1937, as a result of Roosevelt's failed Court-packing plan, Congress amended the law so retired justices could serve on lower federal courts in senior status, a provision that Clark took full advantage of in retirement; and in 1954 lawmakers

further revised the statute by adjusting the age and length of service requirements, making it possible for Clark to retire when he did. He became eligible for a lifetime pension at his present salary in September 1964, having reached the age of 65 and having served on the Court for fifteen years.[3]

Unlike so many of his brethren, Clark was still relatively young at age sixty-seven and in moderately good health when he announced his retirement. For the past few years, he had suffered from recurring bouts of vertigo, which was no secret among the bench and bar, but with medication he had managed to control it.[4] The one exception to Supreme Court departures prior to Clark's was when Arthur Goldberg resigned after three years to become the U.S. Ambassador to the United Nations. Unsurprisingly, it was Lyndon B. Johnson who, having recently won the presidency in his own right, became the driving force behind Goldberg's stepping down.

The Goldberg episode presaged some of the same shenanigans that Johnson used to drive Clark off the Court, leading to some of the same conclusions about why Johnson had done it—namely, to appoint his own nominees. In the case of Goldberg, the president wanted his longtime friend and legal advisor, Abe Fortas, on the Court. After attempts at enticing Goldberg to return to the Cabinet failed, Johnson found his opportunity when U.N. Ambassador Adlai Stevenson died unexpectedly. Supposedly using the strong-arm tactics that typified his negotiating skills, the president convinced Goldberg that the country needed him, and Goldberg probably believed he could bring peace to Vietnam. Truthfully, though, according to one White House top advisor, the arm-twisting and call to service were more of a "charade" for the public's benefit. Goldberg was not that reluctant to leave the Court, and Johnson did not have to work that hard to get him to go.[5]

The same was true for Goldberg's replacement, Abe Fortas, who feigned reluctance to leave his lucrative law practice, leading Johnson to give him "the treatment." Their performances were just as convincing.[6] The public perception of the president bending others to his will was the image that Johnson fostered, but, behind the scenes, in his private telephone conversations, he could appear as unsure and equivocating as he was conniving and duplicitous. As we will see, getting Clark to leave the Court in order to replace him with Thurgood Marshall was not as foregone a conclusion as it appeared, nor was it entirely farfetched that Johnson might consider bringing Clark back to the Court.

The Relationship between Clark and Johnson

Clark and Johnson first met at the nation's capital prior to the outbreak of World War II. Clark had thought he was going to D.C. to become an assistant attorney general, but he ended up serving in a backwater bureau of the Justice Department trying insurance cases involving World War I veterans. A few years later, he was put in charge of the Antitrust Division's west coast regional offices, where he served as civilian coordinator of Japanese-American evacuations following the attack on Pearl Harbor. Johnson, who was Clark's junior by nine years, had arrived in Congress as a strong supporter of the New Deal and President Roosevelt's Court-packing plan. At the outbreak of war, he became the first congressman to enlist in the armed forces, and Clark recalled fondly a San Francisco send-off party when "Lyndon took off for the South Pacific as Lieutenant Commander."[7]

The ties that bound Clark and Johnson were personal as well as professional. When Clark sought Justice Department advancement, Congressman Johnson became one of his most ardent supporters. His endorsement of Clark to become assistant to the attorney general—today the deputy attorney general—so impressed Clark that the latter

promised to assist Johnson in any endeavor, "whether it be political or otherwise, night or day, all you have to do is whistle and I am the boy that will be there, and I mean as fast as the planes will come."[8] Although Clark did not receive the appointment, within another sixteen months he became an assistant attorney general, and he credited Johnson as much as anyone for that success.[9] Soon thereafter, Clark's older brother, Bill (William Henry, Jr.), died in a plane crash along with nine other passengers, and Clark recalled how "Lyndon went to Tennessee with me to the fallen airliner."[10]

While Johnson served in the U.S. House, he and Clark frequently met at what was known throughout Washington as the "Board of Education," a small room on the first floor of the Capitol downstairs from the House Chamber made famous by Speaker Sam Rayburn (D-TX) as a place to socialize and plot strategy. Before he became attorney general, Clark recalled getting invited to "the little room," Rayburn's preferred epithet, about twice a week on average. As the years passed, their professional courtesies extended to personal and familial closeness, leading Clark to reflect long afterward, "I have a warm affection for the Johnson family. Our family has been thrown together.... There's a thread of affection and of admiration that has been all through our lives."[11]

After Johnson entered the U.S. Senate and Clark joined the Supreme Court, the two men continued to see a great deal of each other. They conferred on legislative matters, such as a pension for justices' widows, and they genuinely enjoyed each other's company. As one of Clark's law clerks, Larry Temple (1959–60), who also had served as special counsel to Johnson (1967–69), recalled, "I know they were very fast and famous friends." "I had not realized until later the fondness with which Lyndon Johnson held Tom Clark," Temple continued, "I know that Tom Clark was totally devoted to Lyndon Johnson ... and liked him. Lyndon Johnson was one of the half-dozen people of whom Tom Clark was most fond."[12]

Ramsey's Rise

As a result of their two decades of friendship, Clark had no misgivings about calling on Vice President-elect Johnson to secure a government job for his thirty-three-year-old son, Ramsey. The oldest of Clark's surviving children, Ramsey had served briefly in the Marines at the end of World War II before following in his father's footsteps as an undergraduate at the University of Texas. After earning his law degree at the University of Chicago, Ramsey joined his family's Dallas law firm, now managed by his uncle, Robert, where he served for nearly a decade. Inspired in part by the youthful energy of the Kennedy campaign, Ramsey decided in 1960 that he wanted to enter government service. Like his father, he wanted to work at the Justice Department, and his preference was to become the assistant attorney general of the Antitrust Division. However, President-elect John F. Kennedy and his brother, Robert, who would become the attorney general, already had someone in mind for that position.[13]

How Ramsey landed the top spot at the Lands Division depended on whose recollection to believe. Ramsey remembered acting independently, whereas his father recalled assisting him. According to Ramsey, his father was not involved with his appointment, because Ramsey had "talked to some of the people I had known the best that had access and influence to the administration." Instead of mentioning his father, Ramsey claimed that he "talked personally" with House Speaker Sam Rayburn and Justice William O. Douglas, who "probably put it over." Johnson may have known of his interest, but Ramsey doubted "whether he pushed it."[14] Therefore, Ramsey wanted to be remembered as someone who did not have to rely on his father, even though his

Attorney General Tom C. Clark (waving hat at center) celebrated Lyndon B. Johnson's Senate win in 1949 with the Texas delegation. Longtime friends, Johnson had been instrumental in helping Clark's rise at the Department of Justice.

father's connections undoubtedly made his advancement possible.

Tom Clark, on the other hand, acknowledged that Ramsey had spoken to him and that he had called upon Johnson to pressure Robert Kennedy. In fact, when all the assistant attorneys general positions but Lands were taken, Clark was surprised that Ramsey even considered it. In order to secure the position for his son, Clark turned to Johnson, who reportedly said, "If you want me to do this, I'll level on it, but otherwise if you don't think it's a good thing, I won't do it." Clark told Johnson to go ahead, and after Ramsey became an assistant attorney general, Clark claimed that he never again asked Johnson to intercede on his son's behalf.[15] Of course, that became unnecessary after Johnson succeeded to the presidency because he could remake the Justice Department on his own terms.

Johnson's opportunity arrived in September 1964 when Robert Kennedy resigned to campaign for the U.S. Senate. To replace Kennedy as attorney general, Johnson turned to the deputy attorney general, Nicholas Katzenbach, who had been serving as the acting attorney general for several months already. To replace Katzenbach as deputy attorney general, the number two position, Johnson nominated Ramsey, who had served admirably as head of the Lands Division for four years.

In mid-February 1965, Ramsey and Katzenbach were sworn in together. According to newspapers reports, "President Johnson gave an affectionate and witty salute," and with obvious pleasure he

"presided over and dominated" the ceremony. After Katzenbach recited the oath for Justice Byron White, Ramsey recited it for his father, who "seemed more nervous than his son and occasionally stumbled slightly."[16] As reported, it was "a highly emotional moment" for Tom and Ramsey Clark, but it portended something more consequential than a father's pride in his son's accomplishment. Fundamentally, it raised a conflict-of-interest question as pronounced as if Ramsey had become the attorney general. Intriguingly, the widespread consensus at the time and afterward was that no conflict existed, making Clark's decision to retire two years later all the more perplexing.

The Appearance of Justice

Citing "any possible conflicts in cases that may arise," on the last day of February 1967, Tom Clark announced his intention to retire shortly after Johnson nominated Ramsey as attorney general. Ten days later, with the president, vice president, solicitor general, and every Court member present, Clark again administered the oath of office to Ramsey in "a brief, sentimental ceremony."[17] During his final term, while Ramsey served as deputy attorney general or acting attorney general, Clark participated in all but four cases decided by written opinions. He voluntarily disqualified himself from a case where Ramsey was a named party, having been substituted for Katzenbach and Kennedy, and he recused himself from three antitrust cases where his former law clerk, Donald Turner, the assistant attorney general, was involved.[18] Otherwise, Ramsey's promotion to attorney general had little impact on Clark's participation in argued cases. By comparison, in his first four terms, Clark had disqualified himself from more than twice as many cases with written opinions (53) than all the remaining 14 terms combined (25).

Considering that Ramsey had worked at the Justice Department for six years prior to becoming attorney general, was it necessary for Clark to retire when he did? Certainly, there was no statutory requirement for him to retire, just as there was no legal obligation for him to disqualify himself from cases. At the time, the law on federal judicial recusal with few exceptions left it entirely to the justice's own discretion whether to participate in a case.[19] For example, the only other time that Clark had disqualified himself because of Ramsey's involvement was when Ramsey represented Safeway Stores before the Court.[20] Although Ramsey did not prevail, Clark recalled how Justice Felix Frankfurter shared a note on the day of Ramsey's argument, reading, "Your lad did very well. He may not win his case, but he got everything possible out of it."[21] Clark himself had represented Safeway in private practice, but he later admitted his views on disqualification had relaxed. "Indeed, I sat in cases involving Safeway stores even though I represented them in 1937," he said, "I think you can go to ridiculous lengths in abstention."[22]

Indeed, when Ramsey became the acting attorney general, a position he held for five months, speculation immediately focused on whether there was a conflict of interest. The consensus among lawyers and laymen alike was that no conflict existed. In fact, the outgoing attorney general, Nicholas Katzenbach, was the first to advise the president that there was no conflict. "Nick says the solicitor general is the one before the Court, not the attorney general," Johnson explained in a private phone call, "And he didn't think the justice would have to disqualify himself."[23] One week later, Johnson learned that past and current presidents of the American Bar Association, most of the justices on the Court, and Solicitor General Thurgood Marshall saw "no incompatibility" with Clark remaining on the bench.[24] Furthermore, immediately after Clark announced his intention to retire, there was a "flurry of protest" in legal circles led by former Republican Attorney General

On March 10, 1967, Justice Clark swore in his son, Ramsey, at the Department of Justice as his family, President Lyndon B. Johnson, Solicitor General Thurgood Marshall, and Vice President Hubert Humphrey looked on. Johnson appointed Ramsey to be attorney general to force his father to resign from the Court and open up a seat so he could name Marshall to be the first African-American justice.

William Rogers, who offered to obtain statements from former Attorneys General Herbert Brownell and Francis Biddle supporting his contention that no conflict existed. As one analysis of the episode concluded, "With such bipartisan and professional support, Johnson could easily have refused to accept the senior Clark's resignation without much overt damage to the administration."[25]

Legal experts were not alone in their assessment that no conflict existed. As speculation mounted over whether Ramsey would become the attorney general, ordinary citizens voiced their objections to Clark's potential retirement. The constitutional principle of separation of powers and the legal intricacies of who actually represented the government before the Court may have been lost on most people, but they still could not fathom why Clark should retire. As one concerned writer put it, "If it was all right for the President's brother to be Attorney General, then there is nothing wrong for a Supreme Court Justice having a son as Attorney General."[26] Remarkably, the diverse range of opinions from judges, lawyers, politicians, and laymen was matched by the sheer volume of letters Clark received urging him to remain on the

Court. Several of his archival files are filled to bursting with such sentiments, including this one from a federal judge in Wisconsin: "I have been worried because of the speculation in some magazines that you were going to resign on account of your son's position, but recently have been most pleased to read the speculation that you will not resign. There is no reason why you should.... I sincerely hope and trust that you will not resign."[27]

Setting aside all other considerations, there was one fundamentally compelling reason why Clark could stay on the Court, if he chose. His son had worked at the Justice Department for six years. As one astute Court observer remarked shortly afterward, "There was, in fact, no functional difference between the son's relationship to the Supreme Court as Deputy Attorney General or, certainly, as Acting Attorney General, a post he held for a long time, and his final position as Attorney General." Of course, this was in reference to Clark's disqualifying himself from cases, and on that he "could have made his decision either way." The same held true for his decision to retire. "When the son was Assistant Attorney General for the Lands Division," the observer continued, "and even when he was Deputy Attorney General and thus the number two man in the Department, the father did not disqualify himself."[28] In other words, as Clark had participated in cases while Ramsey was an assistant attorney general, he could continue to do so when Ramsey advanced through the Justice Department because Ramsey's relationship to cases before the Court actually had *diminished.*

Moreover, Ramsey realized there was no conflict, and he told an interviewer, "The cases came to the Supreme Court that I had participated in in the lower courts, and had actually been involved in formulating the position taken by the government. Dad always sat on the cases; he never, as far as I know, disqualified himself in any cases, because I happen to have been in it."[29] In fact, during the four years Ramsey headed the Lands Division, the question of a conflict of interest never arose. "I don't know why it didn't," Ramsey recalled,

> In fact, your proximity to actual cases in the Supreme Court is much greater as Assistant Attorney General than as Attorney General, because they are much closer to specifics and to individual cases.... Actually, as Deputy I was much further away from the work of the Supreme Court than I had been as Assistant Attorney General in the Lands Division where we would have six or eight cases before the Court in a single term.[30]

Therefore, Ramsey believed if he became the attorney general his father could remain on the Court. At the news conference following his nomination, he was asked whether his appointment posed a barrier to his father's service, and he replied, "from my standpoint, it won't."[31] Eighteen months later, disappointed over his father's retirement, Ramsey recalled, "I felt that his career, my dad's career, had been the great pride of our family and that it was *unthinkable* that he would resign. I told him that, and that was the extent of the discussion. It was a little comment that was made several times, but I thought it was *unthinkable* that he would resign."[32]

Why, then, did Clark retire? Certainly, as he frankly admitted, he did it for his son, not wanting to "interfere with Ramsey's future."[33] However, there was more to his decision than paternal affection. Because an actual conflict of interest was spurious at best—no one seriously accepted it—Clark justified his decision by advancing a novel proposition. Like Caesar's wife, he wanted his relationship with Ramsey to be beyond reproach. "While there is no actual conflict," he wrote, "the potential is there, and the appearance of justice is as important and

Legal experts generally agreed that there was no conflict of interest for Justice Clark in having his son serve as attorney general. In fact, they argued that Ramsey would have less contact with the Supreme Court than he had as assistant attorney general litigating cases. Above are Attorney General Ramsey Clark and President Johnson at a Cabinet meeting in 1967.

effective as the real thing."[34] The *appearance* of justice, which he considered "more important than justice itself," became Clark's defensive lodestar. Whenever questioned, he fell back on public *perception*, or the potential for bias even if none existed. He also wanted to serve as a role model for other judges, many of whom likely had sons practicing law who might appear before them. He did not want to become "an example or excuse for them," because "judges throughout the country would be influenced by my action."[35] To some extent, this reflected a new standard for judicial disqualification, one that Congress waited another half-dozen years after Clark retired to impose on federal judges.[36]

Such lofty ideals, however, belied a more banal consideration—one not lost on contemporary commentators. As *New York Times* editor James "Scotty" Reston perceptively asked, "If there was no conflict of interest between the Texas Clarks when Ramsey was deputy attorney general, it is not quite clear why there should be a conflict with young Clark in the top Justice Department job." Whether Clark *should* retire was no longer a valid question. If he did retire, as Reston believed he would, then Johnson faced a credibility problem, because the unmistakable conclusion was that collusion had occurred.[37]

All the President's Men

Despite Clark's professed self-sacrificing motives, his apparent selflessness had more calculating origins. As many have supposed—correctly, as it turned out—Johnson used Ramsey as a pawn to force Clark from the Court for one principal purpose, to make history by appointing Thurgood Marshall as the first African-American justice.[38] White House phone recordings reveal the president's

involvement, who became his emissaries, and how he convinced father and son to serve his interests. The tapes disclose Johnson's deceptions, yet they also show him grappling for answers and feeling frustrated with turns of events. The "master political strategist," as one Marshall biographer called the president, was not as unfailing as he appeared, nor was his scheme to create a Court vacancy inexorable. Moreover, one of the most oft-cited conversations that Johnson had with Ramsey about becoming the attorney general has been largely misunderstood.[39] In that conversation, held four months into Ramsey's service as acting attorney general, the president was not trying to pressure Ramsey's father to retire. As will be explained, that was no longer necessary. Instead, Johnson was lining up Ramsey to accept the inevitable.

The circumstances leading to Clark's departure from the Court began, surprisingly enough, with undersecretary George Ball leaving the State Department. For the past five years, Ball had been an opponent of continued American involvement in Vietnam because he viewed southeast Asia as peripheral to America's interests. Following the U.S. commitment in 1965 to substantially increase ground forces, by the time Ball resigned in September 1966 there were over 350,000 American soldiers in Vietnam, where upward of 36,000 had been killed or wounded. In order to replace Ball, the president sought counsel from several Cabinet members, including Attorney General Katzenbach, who had himself become dissatisfied at the Justice Department, in part because of a long-standing internal squabble with the FBI over wiretapping.

Apparently, the FBI had installed an illegal eavesdropping device in the hotel room of Fred Black, an influential Washington lobbyist. Although no evidence used to convict Black of tax evasion was obtained from the wiretap, Solicitor General Marshall revealed its existence to the Supreme Court. Therefore, the Court wanted to know who was responsible, and thus began a public smear campaign between FBI director J. Edgar Hoover and former Attorney General Robert Kennedy, each blaming the other. Katzenbach came to Kennedy's defense but earned Hoover's "obvious resentment" for demonstrating that the FBI director had authorized illegal surveillance. As a result, Katzenbach volunteered to step down from his Cabinet-level post, which many saw as a demotion, to move into Ball's position at the State Department.[40] Now the path was clear.

From there, events proceeded rapidly. There were less than two weeks before the Court's term began, when, coincidentally, the justices would reconsider Fred Black's appeal. In an ironic twist, Justice Clark, whose son was now on the hot seat to review the extent of FBI secret surveillance, composed the Court's *per curiam* opinion ordering a new trial.[41] During the news announcement of Ball's departure from State and Katzenbach's from Justice, reporters asked the president whether Ramsey was precluded from becoming attorney general because of his father's position on the Court. "I haven't made any decision on that," he answered.[42]

Privately, however, Johnson resorted to his usual tactic of misdirection, one that he had employed previously when naming Thurgood Marshall as solicitor general. In that instance, the president repeatedly and persistently had reminded Marshall that he should not expect to go on the Supreme Court.[43] This time, Johnson told Ramsey not to expect to become attorney general. When asked shortly afterward, "Did he give you any special reason?" Ramsey answered, "He felt that my father would have to resign, and he didn't think that would be right.... I told him that suited me fine. I never had figured on being attorney general." In fact, Johnson announced at a news conference the day after telling reporters he had not made a decision that speculation over Ramsey becoming attorney general was "totally

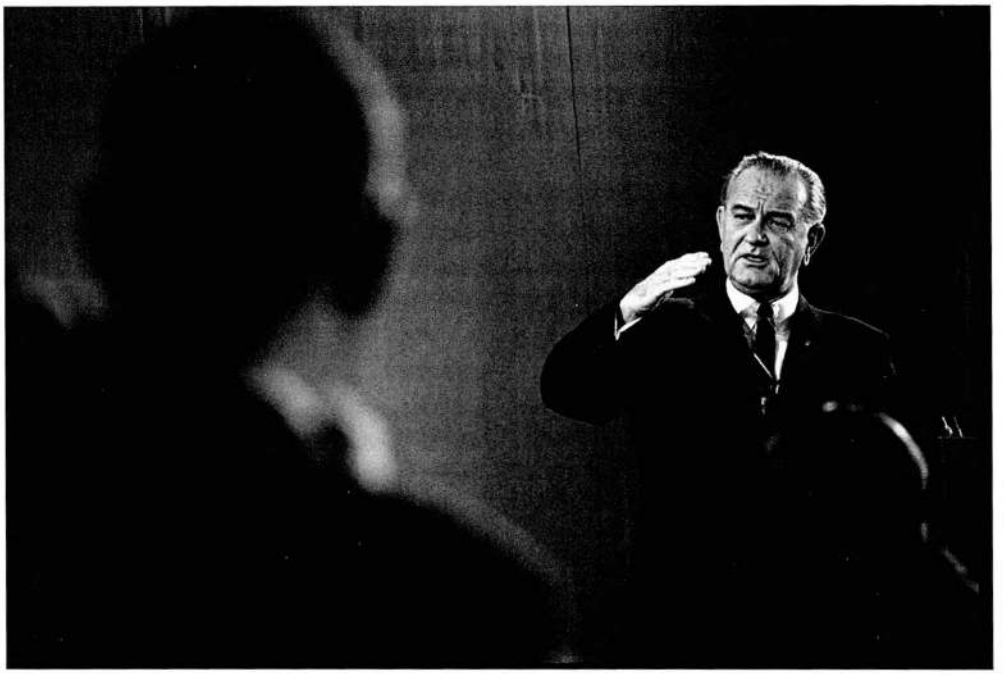
unreliable and uninformed." He said, "The very fact that [Ramsey's name] is there is the best indication that it's not going to happen."[44]

Of course, this misdirection was part of the familiar Johnson "treatment." One of the president's top aides who recalled him telling Ramsey not to expect to become attorney general explained how the ploy worked. "LBJ made that same point to a number of others, assuming what he had said would get back to Tom Clark and would lead him to step down from the Court."[45] From the day he decided to send Katzenbach to the State Department, Johnson realized he had an opportunity to change the Court; he just had to figure out how to do it. Undoubtedly, he would need Senate approval, so one of the first people he contacted was his close friend and political ally, Senate minority leader Everett Dirksen (R-IL), who frequently advised Johnson on pending appointments. Katzenbach had recommended Ramsey as his replacement, and Johnson wanted to know how much support to expect from Senate Republicans. He also wanted Dirksen's opinion on whether Justice Clark should retire as a result, a course that Katzenbach opposed but that the president favored. Dirksen cautioned Johnson about making any final decision and promised to find out how much support he could muster for Ramsey.[46]

Senate support probably came second nature to a president who had spent 12 years in the upper house. Johnson also needed assurances, which would be extraordinarily problematic given the impropriety of his scheme. He had no way of knowing whether Clark would retire or how Ramsey might react. Fortunately, he had men "on the inside" who could pass information on to the principals and report back to the president. Of course, all of this was done with Johnson's explicit direction, "Don't commit *me*." Therefore, he could orchestrate the exchange of information while appearing to be uninvolved. One of his inside men was Katzenbach, who up until his term at Justice officially ended dutifully carried out the president's directives to discover how Clark and Ramsey might behave. In addition, Johnson's inside man at the Court, Abe Fortas, proved more consequential because he was unscrupulous about sharing privileged information with the president.

As already mentioned, Fortas had been Johnson's first Court appointment, and the two men shared decades of history. Fortas was so trusted that when Johnson assumed the presidency, Fortas became an unofficial presidential advisor on all matters foreign and domestic. So ubiquitous was Fortas' influence that, as one Fortas biographer observed, "only the White House aides knew the astonishing range and extent of the contacts between the justice and the president."[47] Moreover, one of Johnson's principal reasons for wanting Fortas on the Court was so that he could serve as a "mole" for the president, keeping Johnson informed of potential case outcomes. "There was apparently nothing Fortas wouldn't do for Johnson," observed one Johnson biographer, "including crossing ethical lines.... Fortas knew that revealing private discussions among the Court's members was a violation of judicial ethics."[48] In this instance, Fortas became indispensable, because he had ready access to internal Court deliberations, and he had no compunction about sharing them with the president.

Fortas immediately had a conversation with Clark to gauge his reaction to Ramsey becoming attorney general, because, as Fortas put it, Clark "ought to be now getting down to the short strokes" of what he would do. "His own position was very clear," Fortas confidentially informed the president, "that he certainly was not going to stand in Ramsey's way."[49] As Clark was eligible for a full pension, he was prepared to retire "if that would be helpful to Ramsey." Since Clark appeared committed to leaving the Court, Johnson turned his attention to his primary objective of naming Clark's replacement.



Worried that Ramsay would balk at forcing his father off the bench in accepting the attorney general position, Johnson blindsided him by announcing his appointment to the press without his consent.

The president asked Fortas how Thurgood Marshall might change the direction of the Court, and Fortas had a ready response. "That would give us a solid majority," he said. "I mean that it would firm up the liberal side of the Court in all probability." Looking at the upcoming term, Johnson even asked how Marshall might "mess up your wiretapping thing." Again, Fortas breached the better part of discretion, telling the president, "We'll certainly lose a vote on that, but the other side won't gain one," referring to Marshall's likely recusal in the Fred Black appeal. Clearly, Johnson trusted Fortas and depended on his opinion. The two discussed potential nominees for solicitor general and the public reaction to nominating Marshall. Hungering for reassurance, Johnson wondered how the country might react to Clark's retirement and whether Clark believed he would nominate Ramsey.[50]

The same day he spoke to Fortas, September 22, Johnson was on the phone with Katzenbach, who gave him the proverbial "good news/bad news." In discussing the situation with other justices, namely, Hugo Black, who alone thought that Clark should retire, Katzenbach learned that Clark had, indeed, expressed that commitment. However, in conversations with Ramsey, he discovered that Ramsey was just as determined for his father to remain on the Court. "Both of them sit in a slightly stiff-necked position," Katzenbach reported, "it's going to be difficult to do *anything*." This was a possibility that could stymie the president's plans. Even with a commitment from Clark, Ramsey might refuse to accept the nomination.

Johnson needed certainty amid so many variables. He told Katzenbach what he had heard from Fortas, that Chief Justice Earl Warren was adamant for Clark to remain on the Court, and Everett Dirksen had said he "wouldn't give a damn" if Clark did. Therefore, Johnson wanted Katzenbach to speak directly with Clark, so long as it was clear that it was not coming from the president. In sounding out Clark, Katzenbach was to play

up Clark's loyalty and service, reassuring him that he could continue to judge all over the country on lower federal courts. "He could do a good many things," Johnson directed, "and he could probably be as much service there [riding circuit] and more than he could where he is."[51]

Two days later, Johnson again conferred with his operatives, who shared similar reports, namely, that Clark was prepared to retire but the president could face criticism if it appeared "forced." "You ought not be in a position of having official knowledge of what the father's going to do," Fortas observed ironically, because that was *exactly* what Johnson was trying to do. Katzenbach repeated how "stiff-necked" both men were being, and he brought up how difficult it would be to advance any nomination that fall because the Senate Judiciary chairman, James Eastland (D-MS), was facing a reelection campaign back home. Reportedly, the Clarks had plans to visit each other over the weekend, but Johnson was not content to bide his time, so he directed Fortas and Katzenbach to find out where each man stood.[52]

In a follow-up call to Fortas the same day, Johnson expressed his frustration with the conundrum he faced, that he wanted a solid commitment from Clark without making one of his own. As Johnson was in no hurry to find another attorney general, he thought he could leave Ramsey in an acting role because it posed the same conflict of interest for Clark, resulting in the same outcome. Fortas, on the other hand, recommended nominating Ramsey outright so that Clark had a clearer basis for retirement. "Well, wouldn't that then put it on *me*?" Johnson asked, "If he's gonna resign, why didn't he resign *before* the appointment?"

> "Because that would indicate foreknowledge," Fortas answered, "It would indicate that he knew that you were going to appoint his son."
>
> "Well, shouldn't I know before I put [Ramsey] in that position – that he's [Tom] not gonna be there?"
>
> "No, Mr. President," Fortas cautioned, "You ought not to know officially.... I think unofficially you don't want to put him on the spot unless he agrees, but officially you ought not to know."[53]

Thus the first hurdle appeared, of how to deliver to the president a solid commitment from Clark "unofficially."

With one week remaining before the Court's term began, time was running out, and Tom Clark appeared to be having second thoughts. Presumably, he had discussed the situation with Ramsey, who was adamant that his father remain on the Court. "I think I've gone about as far as I can go," Katzenbach reported. Clark still wanted Ramsey to become attorney general, but perhaps he did not have to retire after all. This development threatened to derail Johnson's plans, so he authorized Katzenbach to speak surreptitiously to the chief justice to "get a reaction out of him."[54] Two days later, Johnson received his answer, but not the one he expected. In a note marked "private," Clark wrote directly to the president, "I understand that you wish me to stay on the Court." Incredulous, Johnson spluttered at Katzenbach, "We haven't given him any impression we want him to stay on the Court *at all*, have we?" Fumbling for an answer, Katzenbach said meekly, "No sir, unless I did it by any inadvertence."

Judged against future events, this may have been a trial balloon; Clark wanted to see if he could keep his Court seat after Ramsey became attorney general. In his note to the president, Clark had presented a lineup of legal professionals—members of the American Bar Association, his brethren, even Katzenbach—who thought he could continue serving. Distraught over this development, Johnson was at a loss how to control the

situation. He became suspicious of certain justices who may have convinced Clark to stay, and he directed Katzenbach to speak to the others. The real problem, though, as Katzenbach reminded Johnson, was not the legal community but the general public, or who he called the "less sophisticated people." They would perceive an ethical problem, Katzenbach said, "when a father's sitting on his son's cases." That was the key, what ordinary people thought, and Johnson wanted both Tom and Ramsey Clark to realize it. "This is a very serious problem," he said, "I cannot in my judgment, as I see it, go this another round with him on the Court." There had to be a *quid pro quo*, but it had to be discreet and entirely deniable. "I don't know how to get him word," Johnson groused, "I don't know *who* to get him word."[55]

The Waiting Game

Predictably, Washington gossip, whether inadvertent or intentionally leaked, filled the nation's newspapers. Nothing was concealed, no possibility or prognostication, making it impossible to ignore. For example, before the Court term opened, seasoned Washington correspondents Robert Allen and Paul Scott predicted if Ramsey became attorney general then "the retirement of his father from the Supreme Court would be certain to follow."[56] All through October, press speculation focused on the likelihood of Ramsey's becoming attorney general and Tom Clark's leaving the Court. The only exceptions were astute Washington insiders Drew Pearson and Jack Anderson, who questioned the impropriety of playing such games when there were other, arguably better-qualified candidates for attorney general.[57] Otherwise, a steady drumbeat of conjecture filled news reports.

The struggle to open up a Court seat kept Johnson and Clark in the headlines, leading distinguished journalist Ruth Montgomery to speculate accurately that the president wanted to promote Ramsey, "but only if Ramsey's father resigns from the highest bench in the land." For five months the nation waited, looking for any outward signs, including Tom Clark's behavior on the bench.[58] Reporters Allen and Scott saw a number of "significant straws in the wind" indicating Ramsey would be nominated attorney general, including his Texas roots, which some saw as a liability. Reflecting the porousness of Washington secrecy, Allen and Scott reported on Tom Clark's "indifferent" health and that he had confided to "intimates" his willingness to retire for Ramsey's sake. Perhaps the most prescient prediction came from David Lawrence, founder of *U.S. News and World Report*, who expected Ramsey to become attorney general, his father to retire from the Court, and for Thurgood Marshall to replace him. But even Lawrence wondered about the question "being asked frequently in Washington these days," because none of the principals had commented publicly.[59]

Needless to say, as the Court opened its term, public comment became unnecessary because Clark had privately but formally declared his intention to retire. This was the break Johnson needed, and it set in motion all that came afterward. Katzenbach and Fortas had been meeting with Clark to help him formulate his plans, and on the Court's opening day, October 3, Fortas called to give the president the news. "He wants you to know that if and when it happens," Fortas reported, "that he will feel it necessary to forthwith exercise his retirement rights." Ramsey had just become the acting attorney general, and the president's gambit had paid off.

Moreover, Clark intended to write a letter to Chief Justice Warren stating his intentions, which he did a few days later. Imagine the president's gratification as Fortas read to him portions of Clark's letter to the chief justice. "In the event that Ramsey becomes Attorney General that it is my intention to retire from the Court." Reacting with intense relief, Johnson exclaimed, "Well

that's it! *That's it!*" The first hurdle was overcome, making the next challenge Ramsey's reaction. Reportedly, Clark intended to tell Ramsey about his letter to the chief justice at an upcoming World Series game, but that offered no assurance Ramsey would cooperate.[60] A Court vacancy depended on Ramsey's *becoming* the attorney general, and Johnson was taking no chances.

Nearly four months elapsed between Ramsey's becoming acting attorney general and Johnson's first conversation with him about becoming *the* attorney general. In the meantime, there was foreboding that the Court's term would become the most fractious in half a decade. In fact, by the time the president had his conversation with Ramsey in late January 1967, the Court had already issued five decisions that split along ideological lines, including *Keyishian v. Board of Regents*, which involved university professors who had lost their jobs for refusing to attest to membership in "subversive" organizations. Clark wrote an impassioned dissent for four conservative justices, accusing the majority of discarding 15 years of judicial precedents.[61]

Moreover, the Court remained under sustained attacks for its perceived liberal activism, particularly in the areas of desegregation, school prayer, apportionment, obscenity, and criminal procedure. Even though Clark had supported, even defended, some of the purported excesses of the Warren Court, he was still regarded as more a centrist or conservative justice. Therefore, the prospect of his retirement posed potential political challenges for the president, who had recently vetoed an omnibus crime bill for D.C., leading to charges that he was lax on crime. Against this backdrop of increasing civil unrest—rising crime, anti-war protests, urban riots—many Americans were wary about Clark leaving the Court. In fact, on the day Ramsey was nominated, he received a disgruntled note imploring him to turn it down. "The country needs your father on the Supreme Court a hell of a lot more than it needs you as Attorney General," the writer declared. Content to agree, Ramsey sent the note to his father, remarking, "This fellow's right!"[62]

As Katzenbach had warned, Ramsey was as determined for his father to remain on the Court as Clark was to advance his son's career. Now it was time for Johnson to make sure that Ramsey understood what was at stake. During an ordinary conversation about Justice Department matters, such as nominees for deputy attorney general, out of the blue the president asked, "What are your thoughts about solicitor [general]?" At first, Ramsey was stumped, admitting that he had not thought about it because there was no vacancy.[63] Johnson was being coy, as though his interest was hypothetical, and he wondered if the current solicitor general, Thurgood Marshall, would change the Court balance. "Won't he just be in the liberal's pocket up there 100 percent of the time?" he asked. Somewhat naively, Ramsey answered that it depended on whom Marshall replaced: he was more liberal than Justice John M. Harlan but less liberal than Justice Hugo L. Black, save for civil rights. Of course, Johnson was not considering replacing Harlan or Black, so he got straight to the point, asking, "Do you think you can be attorney general with your daddy on the Court?"

At first, Ramsey misunderstood the president, thinking he wanted to know whether Ramsey could fulfill his duties with his father on the Court. After fumbling for an answer, he finally said, "I think other people ought to judge that really. I know as far as I'm personally concerned, that that would not affect my judgment." Undoubtedly, Johnson meant something different, and as that realization dawned on Ramsey, he continued to flounder. "I'd hate to see dad get off the Court," he said, "I think he's at the height of his judicial power." This must have been the moment Ramsey had dreaded, defying

the president, so he tried to present it as politically advantageous.

> [Clark] more than any other member of the Court stands for a lot of things that the American public is pretty strong for right now—tough law enforcement, things where I really don't agree with him, but I think from the standpoint of your business that you'd hate to lose that. I think the police community and that some other conservative areas, why, dad ranks awfully high with people. For you to replace him with a liberal would hurt you.[64]

This was not what Johnson wanted to hear. He was not seeking a recommendation, because his mind was made up. Furthermore, he was not about to reveal how well he understood Tom Clark's intentions, which Fortas had conveniently shared months earlier. So he put it bluntly to Ramsey. "In my judgment, if you were, if you became attorney general, he'd *have* to leave the Court, if for no other reason than the public appearance of the old man sitting on his boy's case. Every taxi driver in the country would tell me that the old man isn't judging fairly, and his own boy's sending them up."[65] Public appearance had been the key all along; a guileful politician such as Johnson understood that, and now he wanted Ramsey to accept it. To press his point, Johnson expressed regret at losing Clark, saying, "I think you lose the best friend we got on the Court, I think the best philosophically speaking.... I think he believes about what I believe."[66] Of course, Johnson's professed regret was transparently insincere, considering how he then discussed Marshall's views with Ramsey and how liberal justices would have "a field day." It must have been discomforting for Ramsey to listen to the president plot a course to which he objected. His only recourse was to decline, but Johnson had a plan for that as well.[67]

The Announcement

On Tuesday, February 28, 1967, Johnson spent part of his morning lining up support for the nomination he planned to make later that day. Justice Clark, too, had been making arrangements, preparing a press statement that he intended to release shortly after the president's announcement. First, Johnson called James Eastland, the Senate Judiciary Committee chairman, to gain his support for Ramsey's nomination and to gauge his reaction to Clark's retirement. Like other politicians and jurists, Eastland saw no conflict of interest. "Of course, your average man will not discern the difference," he told the president, "and won't accept the explanation that it's the solicitor general [before the Court]." Trotting out the same excuse he had used before, Johnson painted the public reaction. "I would imagine they'd say, 'Well, the old man's gonna be for his boy.' That's what they'd say in Johnson City. They'd say, 'God damn, don't you tell me the old man ain't gonna be for his boy.'" Undoubtedly, the public reaction was less consequential than Ramsey's, and Eastland reminded the president of the likely outcome. "I understand Ramsey says he won't take it," Eastland warned, "Peyton Ford tells me Ramsey won't take it at all if it means his father would have to retire." Johnson merely brushed this aside; he had already anticipated as much and had made preparation. Not that he disclosed it to Eastland, any more than he disclosed knowing exactly what Tom Clark intended to do. "I would imagine he will resign from the Court," Johnson speculated, adding, "he's never told me that."[68]

Once Johnson had Eastland's assent, he called Everett Dirksen to shore up Republican support. Unaware that the announcement was planned for later that day, initially Dirksen hesitated to back Ramsey. After seeing him in action, Dirksen confessed, "I couldn't quite make up my mind whether he had that legal robustness that you'd like to have in

President Johnson (right) considered reappointing Tom Clark (left) to the Supreme Court to fill the seat of his crony, Associate Justice Abe Fortas, whom he intended to promote to the center chair being vacated by Chief Justice Earl Warren. This would mean that Ramsey might be forced to resign, an outcome Johnson did not disfavor as he had clashed repeatedly with his attorney general over Vietnam and civil rights.

an attorney general." Again, Johnson was not seeking recommendations; he planned to nominate Ramsey and he needed Dirksen on board.[69] After Dirksen came around, the table was set and all that remained was to serve up Ramsey as quickly as possible.

Later that afternoon, Ramsey received a call to go to the White House. As he recalled, while sitting with the president in the Oval Office, the press corps entered suddenly. Undeniably, it had been pre-arranged to catch him off-guard. Without warning, Johnson announced, "I want you to observe as I sign the nominating papers for Ramsey Clark to be Attorney General." After the papers were signed and a few remarks, Johnson dismissed the newsmen, telling them, "If you have any questions, Mr. Clark will be outside to answer them in just a couple of minutes."[70] It was a masterstroke of timing, designed to prevent Ramsey from declining. While he stood by watching Johnson sign his nomination papers, he had no time to process, let alone consider how to respond before being pushed in front of a news conference. Clearly by design, the only person unprepared for the announcement was Ramsey.

The *coup de grace* arrived shortly after Ramsey's nomination when Justice Clark released his press statement. "Mrs. Clark and I are filled with both pride and joy over Ramsey's nomination by the President to become the Attorney General," it began. Clark was not yet prepared to indicate when his retirement became effective, whether at the end of the Court's term or immediately upon Ramsey's confirmation. He intended to review the Court's remaining docket to see if there would be "any possible conflicts." However, he did reveal—for the first time publicly—that he had conveyed his decision to the chief justice at the start of the term to step aside for his son as soon as the president acted.[71]

Even though they had never spoken to each other directly, Johnson and Clark both knew the inevitable outcome. At the news of Clark's retirement, the president innocently told reporters that he had not discussed any potential conflicts with either of the Clarks, leaving Ramsey somewhat at a loss. He had been unaware of his father's decision beforehand, even though he continued to maintain publicly it was unnecessary.[72] At that point, it was too late. As one Marshall biographer correctly surmised, "The timing of the announcements seemed to indicate that a deal had been cut." If there was such a deal, Ramsey never knew about it.[73]

Following Ramsey's nomination, Tom Clark considered and composed his retirement letter to the president. In his earliest draft, he explicated the cases remaining on the Court's docket as justification for his decision to continue serving until the end of the term. By the time he presented his letter in mid-March, however, none of that remained. Instead, Clark simply expressed his gratitude to Presidents Roosevelt and Truman for advancing his Justice Department and Supreme Court careers. At the urging of the Clerk of the Court, John Davis, who assisted Clark with his letter, he also lauded Johnson, who had "served with higher distinction and for longer tenure" than his own 30 years of government service.[74] On Clark's last day, Monday, June 12, he delivered his final opinion for the Court, *Berger v. New York*.[75] Later that evening, he attended a retirement party in his honor, where the guests included Ramsey, the president, and Thurgood Marshall, who Johnson planned to nominate the next day. This time, Ramsey was in on the secret, so when he informed Marshall to report to the White House, he knew what the president had planned.[76]

Bringing Clark Back?

Johnson's machinations to change the Court's composition had succeeded twice. He had convinced Goldberg to leave in order to turn his seat over to Fortas, and he had arranged Clark's departure in order to make the historic Marshall appointment. Therefore, the first time a Court vacancy presented itself that Johnson had *not* designed was in June 1968 when Chief Justice Earl Warren submitted his retirement. Warren, who had been eligible for retirement at full salary for nearly five years, had decided to step aside in order to allow Johnson to choose his successor. Although he cited his age at 77 as his principal reason, Warren did not want a potential Republican—especially the presidential frontrunner Richard Nixon—to make the choice. However, the president's decision not to seek reelection complicated both Warren's plans and Johnson's options.

Anti-war sentiment had increased amid widespread civil unrest, due in part to the recent assassination of Martin Luther King, Jr., and Democratic Party divisions had been riven further by the assassination of Senator Robert Kennedy. This gave Nixon's "law and order" campaign a good chance of succeeding. Accordingly, Warren gave the president the greatest possible latitude, indicating that his retirement became "effective at your pleasure." In other words, Warren remained available and continued as chief justice throughout the Court's summer recess possibly into the next term, depending upon when a successor was confirmed. If Johnson failed to secure an appointment during the remaining seven months of his presidency, his Republican rivals most likely would choose the next chief justice.

That was the situation Johnson faced in June 1968 when he called Senate Judiciary chairman James Eastland to discuss potential nominees. Warren's replacement was never in doubt, as Johnson immediately thought of Fortas, who had always aspired to the center chair. The dilemma facing the president—beyond obvious lame duck considerations—was choosing someone to fill Fortas' vacated seat. A balanced pair of nominees stood a

better chance of Senate approval than did Fortas on his own. Johnson had garnered wavering support for Fortas from other key senators, notably minority leader Everett Dirksen and chair of the powerful Senate Armed Services Committee, Richard Russell (D-GA), who led southern Democrats. Their support was essential to stave off a potential filibuster.[77] Now the president wanted Eastland to review options with him to find the best possible "package," one that, as Johnson put it, "would be satisfactory to all of them, that wouldn't make the Democrats too mad but would be satisfactory to the Republicans. That's a key vote, and it's got to be a key man."[78]

During the course of their conversation, Johnson's mind meandered from one possibility to another, and it was difficult to discern whether he was genuinely exploring options or sounding out Eastland to see if their preferences matched. One idea that repeatedly crept into the president's discourse was to refuse to accept Warren's resignation, sparing Johnson the turmoil of making a nomination. "If [Vice President Hubert] Humphrey's elected," he said at one point, "why he could name him, and if Nixon's elected, why, Warren could go on and serve it out." Undoubtedly, Johnson was not seriously passing up the chance to name the next chief justice, but his status as a lame duck probably weighed on him. He told Eastland about a recent editorial recounting how, just before leaving office, President John Adams had named John Marshall chief justice, and Johnson was determined to see this through. At times, he toyed with the idea of returning Arthur Goldberg to the Court, but he knew two liberal-minded justices would not pass Senate muster, and he did not want to have to "bull it through." As enticing as it sounded, Goldberg was out of the question. "I just think that the Republicans would raise hell, and the southern democrats would raise hell," the president grouched. "Of course, Goldberg [would] raise hell if I don't do it!"[79]

Another possibility bandied about was returning Tom Clark to the Court, which was Eastland's preferred option initially. Johnson approached it as an "outrageous" idea, but he said, "There would be a lot of strange things these days." Obviously, returning Clark to the Court presented another perceived conflict with Ramsey serving as attorney general, meaning that Ramsey would be forced to resign this time. That was not nearly as preposterous as it sounded, and Johnson and Eastland considered it from several angles. Clearly, forcing Ramsey to resign to assure Fortas' confirmation as chief justice was no different, in Johnson's mind, from forcing Clark to resign to appoint Thurgood Marshall. Manipulating the Clarks had become habit forming. "I don't know what the liberals would say about throwing Ramsey out and putting his daddy back in," Johnson reflected, "and I don't know whether he would do it or not. I don't know, but I believe Tom's pretty noncontroversial among the Republicans and among the Southerners." Eastland agreed, but he wondered, "Would that be treating Ramsey right?"

As far as Eastland was concerned, Ramsey could continue as attorney general without creating a conflict, but Johnson balked at the idea. "No, they won't allow that at all, neither one of them would do it on that basis." Advancing Tom Clark's prospects, Eastland suggested he might not need Senate confirmation, an especially attractive option, considering it applied to Fortas as well. That was out of the question. "The country might look upon it as kind of a Texas trick or something," Johnson protested, "Man leave the Court and then come back on the Court. That might be bad." As a final appeal for Tom Clark's return, Eastland reminded Johnson of his reported dissatisfaction with his attorney general, saying, "There have been many rumors to get rid of Ramsey."[80]

It was no secret that Johnson had been at odds with his attorney general over everything from wiretapping to the war in

Vietnam. The president had been dismayed when Ramsey refused to prosecute civil rights activist Stokely Carmichael following rioting during the long hot summer of 1967, and the following year Johnson had lost patience with Ramsey's tolerance of the poor people's campaign and the presence of Resurrection City on the National Mall. Originally conceived by Martin Luther King, Jr., the poor people's campaign had brought upward of five thousand protestors to Washington, D.C., where they camped for six weeks in ramshackle shelters. Resurrection City, as it was called, appalled the president. He told Eastland, "I've wanted [Ramsey] to be a little tougher on the law and order stuff, and these damn Resurrection City, and I wanted him to be a little tougher on the subversives than he is."[81] However, creating a vacancy for attorney general proved too much, and Tom Clark's return to the Court stalled.

Eventually, Johnson returned to the option he personally favored, although he preferred "to go somewhere else" besides Texas, if he could. Judge Homer Thornberry appeared the most attractive alternative, given that he had legislative and judicial experience, was a progressive southern Democrat, and provided a good balance to Fortas' more controversial nomination. Besides, Thornberry and Johnson had been good friends for decades, so despite potential charges of cronyism the president knew where he stood. "I know that Homer would be very much like Tom Clark," Johnson said, "I don't think he'd be brilliant, I don't think he'd be exceptionally outstanding, but they tell me that lawyers like him on the court." Even though Eastland preferred Clark for the Court, Johnson went in a different direction. "If I had my druthers," he said, "and didn't have to bother with you and Dirksen and [Senate majority leader Mike] Mansfield and all the newspapers, I'd name Homer Thornberry." With the president's mind made up, Eastland promised to find out how Senators might react to Fortas and Thornberry.

A few days later, as soon as the president had announced the nominations, Tom Clark congratulated Thornberry. "It is good to have a Texan there again," he wrote, "and it could not have happened to a better person."[82] Needless to say, Clark's enthusiasm was misplaced, as was Johnson's confidence that Fortas could overcome an embittered Senate fight. The Fortas fiasco, as it has been remembered, faced sustained opposition, led in part by Senator Robert Griffin (R-MI), who stood firm against any lame duck appointment. Just as significant, the Fortas nomination evoked intense hostility. As Eastland later observed, he "had never seen so much feeling against a man as against Fortas." There was plenty of resentment to go around, stemming from anti-Semitism to the Court's recent liberal activism.

Of course, Fortas made the situation worse by agreeing to testify before the Senate Judiciary Committee, where he lied under oath about his intimate relationship advising the president. Russell then accused the president of holding hostage one of Russell's candidates for a federal judgeship, even though it had been Ramsey Clark who objected to the nominee, and Johnson lost Russell's support with the votes to block a filibuster. Once Russell joined Griffin in bipartisan opposition, Fortas' nomination was doomed. When the Judiciary Committee returned for more hearings later in the fall following campaign delays, it learned that Fortas had engaged in questionable dealings by accepting payments to teach summer seminars at American University. Although the Judiciary Committee reported his nomination favorably, a filibuster ensued, effectively ending Fortas' chances.[83]

With slightly less than a week remaining before the Court term opened, Fortas' fate was certain. The Senate vote to invoke cloture passed by a bare majority (45 to 43), far short of the two-thirds needed to end debate. As a result, Fortas asked Johnson to withdraw his nomination. Fortas would retain his seat, but who would become the next chief justice was

still unresolved. Discontented with southern Democrats and conservative Republicans for denying Fortas the chief justiceship, Johnson briefly countenanced making another nomination. Time was quickly running out, and he needed to find someone who could satisfy the broadest political spectrum. On the same day as the cloture vote, the president told Dirksen his bold idea. "I don't want you to mention this to another human," Johnson said, "What if we sent Tom Clark up there to act as chief justice?" The idea had merit, Dirksen answered. "Well, he's served before," he said, "and the fact that he's off [the Court] doesn't make any difference, he just goes right back on."[84]

Johnson seemed to be grasping at straws after failing to appreciate Republican tenacity to have the next president name the chief justice. Hoping to placate his erstwhile ally, he offered Dirksen the prospect of several Court nominations in the near future on the probability of Nixon winning the election. "You're going to get [Hugo] Black," he said, "He's eighty-four, and he can't go on.... You've got [William] Douglas, who's got a bad heart. You've got [John] Harlan, who's got eye trouble." Johnson thought most southerners would support Clark for chief justice, as would most conservatives, and he appeared unconcerned about losing his attorney general. After all, two acting attorneys general already had served for longer than what remained of his term. "Could you support Clark?" he asked Dirksen. "I could," his friend answered.[85]

As soon as Johnson withdrew Fortas' name from consideration, news reports indicated that the White House was seeking Senate support for another nomination. That Johnson finally relented to the inevitable without submitting another name should not discount these efforts. Tom Clark in particular was mentioned by "reliable Capital sources," because the Democratic controlled Senate "would unite and confirm a nominee like [him]."[86] In addition, Johnson discussed the possibility of submitting another nomination with several aides who were "not usually close to the judicial selection process." One of those aides suggested Clark, as did one of the president's oldest friends, Willard Deason, who had known Johnson since their days at college. Deason could imagine a nation with a "glow in its heart at the thought of the son now stepping down in deference to the Father."[87]

Whether Clark would accept the nomination was highly doubtful, particularly if it meant forcing his son out as attorney general. However, Johnson was not going to let that stand in his way. Shortly after speaking with Dirksen, he called Ramsey to share the substance of his earlier conversation, including Dirksen's support for returning Tom Clark to the Court. For nearly four minutes, Johnson spoke uninterruptedly, developing his rationale for bringing Clark back. "I said [to Dirksen], 'Well, we made Tom Clark resign ... when we named Ramsey attorney general. We just got two or three months left. What if [Tom] went back up there and became chief?'" Ramsey undoubtedly understood his father's sacrifice, and here he was listening to the president outline his own, potential sacrifice. "I think the question we got to look at sixty-nine years of age," Johnson continued, "Course, that helps him a little bit with the Republicans ... he might not want to go but two or three or four years, but he would be a bridge, he'd be kind of a mediator, he'd be pulled in to salve both sides, and be fair."[88]

Again, Johnson was grappling to find a way out of the Fortas fiasco, and he seemed unconcerned with—or oblivious to—how this might affect his attorney general. "So why don't we just take one that's really on the Court now?" he asked. "He just stepped off because his boy was attorney general. Let him go in there, and he's familiar with it, he doesn't have to learn the ropes again, become familiar with how to be chief justice, and he can serve three, four years, whatever time he wants." When the president finally

finished, after telling his bewildered attorney general to think it over, all Ramsey could offer was that his father's relationship with the president, as well as his Texas roots, made the possibility problematic.[89]

Afterward

Ultimately, Richard Nixon won the presidency, and he chose Judge Warren E. Burger to replace Earl Warren, who continued as chief justice through one final term. Tom Clark remained in retirement, where he sat by designation on lower federal courts all over the country.[90] Abe Fortas became embroiled in another ethical scandal that eventually led to his Court resignation, and Nixon twice attempted to fill Fortas' vacated seat, but each time Senate Democrats rebuffed him, in part due to partisan retaliation over Fortas' failed nomination for chief justice. Ramsey Clark returned to private practice, where he found time to compose a book that reflected portions of his Justice Department career called **Crime in America**.

In his book, Ramsey took aim at the FBI and its director, J. Edgar Hoover, a stalwart of Washington political intrigue after heading the Bureau for over 45 years. In one critical passage, Ramsey wrote, "The FBI has so coveted personal credit that it will sacrifice even effective crime control before it will share the glory of its exploits." According to Ramsey, "This has been a petty and costly characteristic," and Hoover, whose "excessive domination" and "self-centered concern for his [own] reputation," was to blame.[91]

In a scathing review of **Crime in America**, renowned political scientist James Q. Wilson, who considered it more partisan than political, dismissed Ramsey's attack on the FBI as folly. "Picking a public fight with J. Edgar Hoover," Wilson observed, "not only makes it harder to secure Clark's objective of Mr. Hoover's resignation, it also puts Mr. Clark on the losing end of a popularity contest."[92] Iconic radio broadcaster Paul Harvey had a similar reaction to Ramsey's contretemps, writing, "If [Ramsey] Clark is, as some say, seeking a national following which might propel him to national political prominence in 1972, he should never have gone lion hunting with a pea-shooter."[93] Of course, Harvey may have had other motives for defending Hoover, as he and Hoover had been friends for decades. As reported by the *Washington Post* in 2010 after Harvey's death, Harvey often submitted advance copies of his radio scripts to Hoover for comment and approval. Hoover unleashed his indignation in a rare public interview, calling Ramsey a "jellyfish" and a "softie" and adding that "if ever there was a worse attorney general [than Robert Kennedy, to whom Hoover had stopped speaking while still in office] it was Ramsey Clark. You never knew which way he was going to flop on an issue."[94] Although this public clash in fall 1970 had grabbed headlines, it hardly detracted from Ramsey's earnestness or his idealism. As one trenchant critic of **Crime in America** conceded, "It would be a pity if his book were remembered only for his bitter controversy with the indomitable Mr. Hoover."[95]

Soon enough, Tom Clark was prepared to stick up for his son. Using notes he had prepared in advance and speaking by phone from San Francisco where he was assigned to judge a federal district court trial, he acknowledged that when he was attorney general, he had had some problems with Hoover, but he said, "I never aired them publicly." Clark and Hoover had been friends for over thirty years, but he found Hoover's squabble with Ramsey unbecoming. "We're both getting pretty old," he said, "perhaps too old." Reluctant to dwell on personalities or petty differences, Clark regarded the conflict "like a hot cup of coffee. It ought to sit in a saucer for a while to cool off." Despite their differences, Tom and Ramsey Clark were devoted to each other, which had been clearly displayed earlier that year in an appearance

together on "Meet the Press." Clark was not going to tolerate Hoover's disparagement, and he defended his son, saying, "Ramsey is not any Mr. Milquetoast. He's always spoken up. I've never known him to dodge any issue."[96] Ramsey may have served less than two years as attorney general, but he still had political aspirations. His father had sacrificed his Court seat to advance Ramsey's career, and he was not going to let a little name-calling stand in the way of Ramsey's future.[97]

Notes

[1] According to Peter Bogdanovich, when Leo McCarey won an Academy Award for another film, *The Awful Truth*, released the same year, McCarey thanked the Academy for the Oscar, but, he said, "you gave it to me for the wrong picture."

[2] John D. Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (New York: Vantage Press, 1994), 626–27.

[3] See Artemus Ward, **Deciding to Leave: The Politics of Retirement from the United States Supreme Court** (Albany: State University of New York Press, 2003), 129 and 155. At the time, several newspapers reported on Clark's retirement eligibility, Special collections: Scrapbooks, news clippings, and printed materials (scrapbooks), box D179, Tom C. Clark Papers, Tarlton Law Library, The University of Texas at Austin (Clark Papers).

[4] In May 1963, Clark had an attack at the Seventh Circuit Judicial Conference. Writing to the president of the American Judicature Society, he explained, "I went into 'orbit' Monday night at the American Bar Association Dinner and had to absent myself rather abruptly." Clark to Sterry R. Waterman, May 22, 1963, General office material: General correspondence and office files (GC), box B125, Clark Papers. Three years later, while testifying before a House appropriations subcommittee, its chairman cautioned him against appearing in person due to recent episodes. "Significant Straws," *The Lewiston Daily Sun* [Maine], October 8, 1966, 4.

[5] Joseph A. Califano, Jr., **The Triumph & Tragedy of Lyndon Johnson: The White House Years** (New York: Simon & Schuster, 1991), 39. See also, David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (Chicago: University of Chicago Press, 1999), 81–82.

[6] Robert Dallek, **Flawed Giant: Lyndon Johnson and His Times, 1961–1973** (New York: Oxford University Press, 1998), 235. See also, Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations** (New York: WW Norton, 1994), 15.

[7] Clark to Claudia "Lady Bird" Johnson, March 6, 1973, GC, box B66, Clark Papers.

[8] Clark to Johnson, November 14, 1941, Tom C. Clark Papers, Justice Department Correspondence, box 9, Harry S Truman Library and Museum (HSTL).

[9] Oral history interview with Tom Clark by Joe B. Frantz, October 7, 1969, Internet Copy, LBJ Library.

[10] Clark to "Lady Bird," March 6, 1973.

[11] Frantz interview, October 7, 1969. See also, Mimi Clark Gronlund, **Supreme Court Justice Tom C. Clark: A Life of Service** (Austin: University of Texas Press, 2010), 223–24.

[12] Oral History Interview with Larry Temple by Joe B. Frantz, June 11, 1970, Internet Copy, LBJ Library.

[13] Frantz interview, October 7, 1969.

[14] Ramsey Clark, recorded interview by Larry J. Hackman, June 29, 1970, Robert F. Kennedy Library Oral History Program.

[15] Frantz interview, October 7, 1969. See also, Richard Schott and Dagmar Hamilton, **People, Positions, and Power: The Political Appointments of Lyndon Johnson**, An Administrative History of the Johnson Presidency, edited by Emmette Redford (Chicago: University of Chicago Press, 1983), 88–90.

[16] "President Praises 2 Justice Officials as They Are Sworn," *New York Times*, February 14, 1965, 1, 35.

[17] Laura Kalman, **The Long Reach of the Sixties: JBJ, Nixon, and the Making of the Contemporary Supreme Court** (New York: Oxford University Press, 2017), 368, n. 21 and figure 8.

[18] *Honda v. Clark*, 386 U.S. 484 (1967); *United States v. First City Bank of Houston*, 386 U.S. 361 (1967); *United States v. Sealy*, 388 U.S. 350 (1967); and *United States v. Arnold, Schwinn*, 388 U.S. 365 (1967).

[19] 28 U.S.C. § 455, "Disqualification of justice, judge, or magistrate," (1948). For the next quarter of a century, by and large disqualification remained, as one commentator put it, a "personal, independent, unreviewable decision by an individual justice whether to participate in an individual case." Louis J. Virelli, "Congress, the Constitution, and Supreme Court Recusal," *Washington and Lee Law Review* 69 (Summer 2012): 1547.

[20] *Safeway Store v. Oklahoma Retail Grocers*, 360 U.S. 334 (1959). Clark's brother and Ramsey's uncle, Robert, also assisted in preparing the briefs.

[21] Clark to Howard Warnock, September 25, 1967, GC, box B132, Clark Papers.

[22] Interview with Robert Ireland, May 8, 1973, Fred Vinson Oral History Project, University of Kentucky.

[23] Johnson and Everett Dirksen, September 21, 1966, tape WH6609.10, program no. 10, citation no. 10817, White House Tapes, Presidential Recordings Program. Katzenbach had a similar recollection, **Some of It Was Fun: Working with RFK and LBJ** (New York: W.W.

Norton, 2008), 212–13. See also Kalman, **The Long Reach of the Sixties**, 87.

[24] Johnson and Katzenbach, September 28, 1966, tape WH6609.13, prog. no. 2, cit. no. 10848.

[25] Schott and Hamilton, **People, Positions, and Power**, 92.

[26] G.D. Norton to Clark, January 21, 1967, GC, box B131, Clark Papers.

[27] Kenneth Grubb to Clark, February 3, 1967, GC, box B95, Clark Papers.

[28] John P. Frank, "Disqualification of Judges: In Support of the Bayh Bill," *Law and Contemporary Problems* 35, no. 1 (Winter 1970): 47–48.

[29] Ramsey Clark Oral History Interview I, October 30, 1968, by Harri Baker, Internet Copy, LBJ Library.

[30] Ibid. See also Gronlund, **A Life of Service**, xii.

[31] "Ramsey Clark Nominated to be Attorney General," *New York Times*, March 1, 1967, 1. See also, "Ramsey Clark Named Attorney General," *The Washington Observer*, March 1, 1967, 1.

[32] Ramsey Clark interview by Harri Baker, October 30, 1968. See also, Schott and Hamilton, **People, Positions, and Power**, 92; and Clare Cushman, **Courtwatchers: Eyewitness Accounts in Supreme Court History** (Lanham, MD: Rowman & Littlefield, 2011), 64.

[33] Clark to Potter Stewart, March 30, 1967, GC, box B111, Clark Papers.

[34] Clark to Lowell Wadmond, March 23, 1967, GC, box B123, Clark Papers.

[35] Clark to Martin E. Joyce, September 26, 1967, GC, box B132, Clark Papers. See also, Frantz interview, October 7, 1969; and Oral History Interview with Tom C. Clark by Jerald L. Hill and William D. Stilley, Washington, D.C., March 20, 1976, HSTL.

[36] 28 U.S.C. § 455, "Disqualification of justice, judge, or magistrate," (1974). The impetus for the 1974 amendments was, in part, Justice William H. Rehnquist's decision to participate in a case after respondents requested his disqualification, *Laird v. Tatum*, 408 U.S. 1 (1972).

[37] "President Johnson and the Supreme Court," *St. Petersburg Times*, February 25, 1967, 8.

[38] The literature on this is extensive and includes Marshall biographies, such as Howard Ball, **Thurgood Marshall and the Persistence of Racism in America** (New York: Crown, 1998), 194, and Juan Williams, **Thurgood Marshall: American Revolutionary** (New York: Random House, 1998), 329, as well as institutional studies, such as Lucas A. Powe, Jr., **The Warren Court and American Politics** (Cambridge, MA: Harvard University Press, 2000), 291, Yalof, **Pursuit of Justices**, 88–89, Ward, **Deciding to Leave**, 170, and Cushman, **Courtwatchers**, 64–65, to name a few examples.

[39] See, for example, Howard Gillman, who relied on Yalof, **Pursuit of Justices**, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," the Schmooze Discussion Group, University of Maryland School of Law, March 3–4, 2006; and Christine Nemacheck, **Strategic Selection: Presidential Nomination of Supreme Court Justices**, Constitutionalism and Democracy, edited by Gregg Ivers and Kevin McGuire (Charlottesville: University of Virginia Press, 2007), 18.

[40] Jeanne Kuebler, "Wiretapping and Bugging," in Editorial Research Reports 1967, vol. I (Washington, DC: CQ Press, 1967), 241–60. http://library.cqpress.com/cqresearcher/cqresrre1967040500; Morgan Cloud (op-ed), "The Bugs in Our System," *New York Times*, January 13, 2006. See also, Katzenbach, **Some of It Was Fun**, 211–12; "Solons Mystified at Katzenbach Switch to Sub Cabinet Level," *Warsaw Times-Union* [Indiana], September 22, 1966, 16; and "Katzenbach Named Assistant to Rusk," *The Palm Beach Post*, September 22, 1966, 1.

[41] *Black v. United States*, 385 U.S. 26 (1966). Black was later acquitted. See also Kalman, **The Long Reach of the Sixties**, 82. Alexander Charns believed that Clark should have disqualified himself from Black's case because Ramsey served as the Justice Department's liaison with the FBI, **Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court** (Urbana: University of Illinois Press, 1992), 172, n. 42.

[42] "Katzenbach Switches Jobs," *Eugene Register Guard* [Oregon], September 21, 1966, 1.

[43] See Neil D. McFeeley, **Appointment of Judges: The Johnson Presidency**, Administrative History of the Johnson Presidency (Austin: University of Texas Press, 1987), 111. See also Kalman, **The Long Reach of the Sixties**, 93. According to Williams, the president pulled Marshall aside the day before nominating him to do this, **Thurgood Marshall**, 330.

[44] Ramsey Clark interview by Harri Baker, October 30, 1968. See also Schott and Hamilton, **People, Positions, and Power**, 88 and 90. Over 40 years later, Ramsey Clark still believed that the president was sincere at the time, Gronlund, **A Life of Service**, xii.

[45] Califano, **The Triumph and Tragedy of Lyndon Johnson**, 207–08. Johnson's biographer, Robert Dallek, saw a similar pattern of intentional misdirection to create suspense over who would replace Clark on the Court, **Flawed Giant**, 440–41. See also, Robert Dallek, **Lyndon B. Johnson: Portrait of a President** (New York: Oxford University Press, 2004), 293.

[46] Johnson and Dirksen, September 21, 1966, tape WH6609.10, prog. no. 10, cit. no. 10817. According to Katzenbach's memoir, he had recommended Ramsey Clark because civil rights leaders liked him; however, Katzenbach telescoped his conversations with the president to make it appear that Johnson had completed all of his arrangements with Tom Clark more quickly than actually happened, Katzenbach, **Some of It Was**

Fun, 212–13. For more on Katzenbach's opinion, see Williams, **Thurgood Marshall**, 329, or Ward, **Deciding to Leave**, 170.

[47] Bruce Allen Murphy, **Fortas: The Rise and Ruin of a Supreme Court Justice** (New York: William Morrow, 1988), 235.

[48] Dallek, **Flawed Giant**, 233 and 559. See also, Silverstein, **Judicious Choices**, 17.

[49] Johnson and Fortas, September 22, 1966, tape WH6609.11, prog. no. 3, cit. no. 10821. See Kalman, **The Long Reach of the Sixties**, 87.

[50] Ibid., and Johnson and Fortas, September 22, 1966, tape WH6609.11, prog. no. 4, cit. no. 10822. See also Kalman, **The Long Reach of the Sixties**, 87–88.

[51] Johnson and Katzenbach, September 22, 1966, tape WH6609.11, prog. no. 9, cit. no. 10827.

[52] Johnson and Fortas, September 24, 1966, tape WH6609.12, prog. no. 1, cit. no. 10832; and Johnson and Katzenbach, September 24, 1966, tape WH6609.12, prog. no. 2, cit. no. 10833. See also Kalman, **The Long Reach of the Sixties**, 89.

[53] Johnson and Fortas, September 24, 1966, tape WH6609.12, prog. no. 3 and 4, cit. no. 10834 and 10835.

[54] Johnson and Katzenbach, September 26, 1966, tape WH6609.12, prog. no. 7, cit. no. 10838.

[55] Johnson and Katzenbach, September 28, 1966, tape WH6609.13, prog. no. 2, cit. no. 10848. Kalman wondered if Clark's letter was designed to keep his Court seat after Ramsey became attorney general, **The Long Reach of the Sixties**, 89–90.

[56] "Offer Timely Aid for Russia's Finances," *The Lewiston Daily Sun* [Maine], September 30, 1966, 4.

[57] "Washington Merry Go Round," *Daytona Beach Morning Journal*, October 4, 1966, 2. Ramsey recalled anywhere from six to ten other names being considered and that he had discussed several with Johnson, including presidential advisor and later Secretary of Defense Clark Clifford, interview by Harri Baker, October 30, 1968.

[58] "Tom Clark's Decision," *Mid Cities Daily News* [Dallas, TX], October 25, 1966, 4. According to Montgomery, "Capital watchers . . . observed that every justice actively participated in the discussions except Clark, who sat chin in hand as if lost in deep thought."

[59] "There's No Place for Politics in High Court Appointments," *The Palm Beach Post*, October 6, 1966, 6; and *U.S. News & World Report*, October 31, 1966, 22. Johnson was certainly aware of Lawrence's column, as he described it to Katzenbach, October 3, 1966, tape WH6610.02, prog. no. 6, cit. no. 10917.

[60] Johnson and Fortas, October 3, 1966, tape WH6610.02, prog. no. 1, cit. no. 10912; and Johnson and Fortas, October 6, 1966, tape WH6610.03, prog. no. 7, cit. no. 10929. See also Kalman, **The Long Reach of the Sixties**, 90. On Saturday, October 8, the Los Angeles Dodgers lost to the Baltimore Orioles in game 3 of the World Series.

[61] *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Joining Clark's dissent were Justices John Harlan, Potter Stewart, and Byron White. These same four also dissented in *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein*, 385 US 511 (1967); in two other close decisions, *Spencer v. Texas*, 385 U.S. 554 (1967) and *Fortson v. Morris*, 385 U.S. 231 (1966), Hugo Black joined the conservative majority. There were a total of 21 close decisions (5 to 4 vote) in the 1966 term.

[62] Zinn Garrett to Ramsey Clark, February 28, 1967, GC, box B131, Clark Papers. Ramsey later claimed that his "strong recommendation" had led to Johnson's veto, Gronlund, **A Life of Service**, xii.

[63] Johnson and Clark, January 25, 1967, tape WH6701.09, prog. no. 1, cit. no. 11407.

[64] Johnson and Clark, January 25, 1967, tape WH6701.09, prog. no. 2, cit. no. 11408. Dallek presented these remarks as though they were a reaction to Clark's retirement, rather than as arguments to avoid it, **Flawed Giant**, 406.

[65] Johnson and Clark, January 25, 1967, tape WH6701.09, prog. no. 2, cit. no. 11408.

[66] Ibid.

[67] Ibid. Kalman, who made extensive use of these recordings, wondered why Johnson "continued to go out of his way" to remind Ramsey that his father had to retire, and why Johnson continued "to harp on the necessity" of doing so, unless it was to let Ramsey know "how much trouble he was taking to make him Attorney General." **The Long Reach of the Sixties**, 367, n. 17.

[68] Johnson and Eastland, February 28, 1967, tape WH6702.07, prog. no. 1, cit. no. 11574. While Tom Clark served as the attorney general, Ford was the assistant to the attorney general and later assistant attorney general of the Civil Division. When the position of deputy attorney general was created in 1950, Ford became the first person to hold that position.

[69] Johnson and Dirksen, February 28, 1967, tape WH6702.07, prog. no. 4, cit. no. 11577.

[70] Ramsey Clark interview by Harri Baker, October 30, 1968. See also, Schott and Hamilton, **People, Positions, and Power**, 91–92; and Gronlund, **A Life of Service**, xiii.

[71] See, for example, news clipping, March 1, 1967, scrapbooks, box D180; news clipping, *Washington Post*, March 1, 1967, scrapbooks, box F15; undated memo, General office material: Literary productions, box C98, Clark Papers. See also, Yalof, **Pursuit of Justices**, 89; and Alexander Wohl, **Father, Son, and Constitution: How Justice Tom Clark and Attorney General Ramsey Clark Shaped American Democracy** (Lawrence: University Press of Kansas, 2013), 310–11. Oddly enough, even though Wohl acknowledged Clark had

made a prior commitment to Warren, he doubted Clark had made a prior commitment to Johnson because that would be "out of character."

[72] "Ramsey Clark Nominated to Be Attorney General," *New York Times*, March 1, 1967, 1. See also, "Ramsey Clark Named Attorney General," *The Washington Observer*, March 1, 1967, 1.

[73] Williams, **Thurgood Marshall**, 329.

[74] Several undated memos, and Clark to Johnson, March 15, 1967, GC, box B66, Clark Papers.

[75] *Berger v. New York*, 388 U.S. 41 (1967).

[76] Ball, **Thurgood Marshall**, 193; and Williams, **Thurgood Marshall**, 330.

[77] Coverage of Warren's retirement and Fortas' nomination has been thorough. See, for example, Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon & Schuster, 1997), 498–501; Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (New York: Riverhead Books, 2006), 493–96; and Michal R. Belknap, **The Supreme Court Under Earl Warren, 1953–1969** (Columbia: University of South Carolina Press, 2005), 281–87.

[78] Johnson and Eastland, June 23, 1968, tape WH6806.03, prog. no. 4, cit. no. 13135.

[79] Ibid.

[80] Ibid. See also Kalman, **The Long Reach of the Sixties**, 135.

[81] Johnson and Eastland, June 23, 1968. For more on Johnson's dissatisfaction, see Lonnie T. Brown, "A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael," *South Carolina Law Review* 62 (2010): 3, Digital Commons @ Georgia Law; Lizzy Ratner, "Ramsey Clark: Why I'm Taking Saddam's Case," The Observer.com, January 10, 2005; and Ramsey Clark Oral History Interview V, June 3, 1969, by Harri Baker, Internet Copy, LBJ Library.

[82] Clark to Thornberry, June 26, 1968, GC, box B116, Clark Papers.

[83] See, for example, Dallek, **Flawed Giant**, 556–64, who relied upon Califano, **The Triumph and Tragedy of Lyndon Johnson**, 307–17; Silverstein, **Judicious Choices**, 18–28; Yalof, **Pursuit of Justices**, 91–94; and Ward, **Deciding to Leave**, 171–73.

[84] Johnson and Dirksen, October 1, 1968, tape WH6810.01, prog. no. 1, cit. no. 13501.

[85] *Ibid.*

[86] Frank van der Linden, "LBJ Sounding Out Support for Another Court Nominee," *The News and Courier* [Charleston, SC], October 3, 1968, 7. Arthur Goldberg, among others, was also mentioned as a likely candidate. See McFeeley, **Appointment of Judges**, 118–19; Murphy, **Fortas**, 527–28; and Cray, **Chief Justice**, 504.

[87] McFeeley, **Appointment of Judges**, 117–18. Deason and Johnson were classmates at Southwest State Teachers College in San Marcos, Texas, and Deason served as Johnson's administrative assistant in the National Youth Administration of Texas from 1935 to 1937.

[88] Johnson and Clark, October 1, 1968, tape WH6810.01, prog. no. 4, cit. no. 13504.

[89] Johnson and Clark, October 1, 1968, tape WH6810.01, prog. no. 5, cit. no. 13505. Kalman condensed Johnson's lengthy monologue to a single suggestion, **The Long Reach of the Sixties**, 172.

[90] See, for example, Stephen L. Wasby, "Retired Supreme Court Justices in the Courts of Appeals," *Journal of Supreme Court History*, 39 (March 2014): 146–65; and Craig Alan Smith, "Sitting by Designation: Retired Justice Tom Clark's Federal Court Service," *Journal of Supreme Court History* 43, no. 3 (2018): 321–47.

[91] Quoted in *New York Magazine*, November 23, 1970, 11.

[92] Wilson, "The Moralist," *Commentary Magazine*, March 1971. Wohl cited one favorable newspaper review by Nicholas Pileggi, a crime fiction author, and contended that Ramsey's book was published "to great acclaim from reviewers" and received "numerous kudos," **Father, Son, and Constitution**, 376–77. For other uncomplimentary reviews, see Leon Radzinowicz, "The Vision of Ramsey Clark," *The Virginia Quarterly Review* 47, no. 3 (Summer 1971): 459–64; Kenneth Graham, book review, *National Black Law Journal* 1, no. 2 (1971): 186–88; and Henry Ruth, Jr., book review, *The Journal of Criminal Law, Criminology, and Police Science* 63, no. 2 (June 1972): 269–270.

[93] Enclosure, Clark to Frank Rose, December 3, 1970, GC, box B102, Clark Papers.

[94] "FBI's Hoover Scores Ramsey Clark, RFK," *Washington Post*, November 17, 1970, 1. See also, William W. Keller, **The Liberals and J. Edgar Hoover: Rise and Fall of a Domestic Intelligence State** (Princeton, NJ: Princeton University Press, 1989), 139.

[95] Radzinowicz, "The Vision of Ramsey Clark," 460.

[96] "Tom Clark to Hoover: 'We're Both Getting Old'," *St. Petersburg Times*, November 20, 1970, 11. See also, undated memo, General office material: Literary productions, box C95, Clark Papers.

[97] In 1974, Ramsey Clark ran for the U.S. Senate after winning the New York Democratic primary, but he lost the general election to his Republican opponent; in 1976 he tried again but failed to win the New York Democratic primary. See also Wohl, who erred in claiming Ramsey's Senate campaigns were in 1972 and 1974, **Father, Son, and Constitution**, 382 and 390–91.

Craig Alan Smith is a Professor of History and Political Science at California University of Pennsylvania. He is currently writing a new biography of Justice Tom C. Clark.

Rosenberger's Unexplored History

Rachael E. Jones

Introduction

Rosenberger v. Rector & Visitors of Univ. of Virginia (1995), decided by the Supreme Court a quarter-century ago,[1] addressed a key tension in the religious liberties doctrine. The case represented the collision of two lines of cases. "No Aid" cases such as *Lemon v. Kurtzman* (1971)[2] stood for the premise that funding of religion is explicitly prohibited. A conflicting line of "Equal Access" cases, beginning with *Widmar v. Vincent* (1981),[3] stood for the proposition that the government could not exclude religious groups from open forums. *Rosenberger*, a challenge brought by a student at the University of Virginia, answered which line of cases would win out in this clash. Not only did *Rosenberger* dictate that the Equal Access cases would trump the No Aid cases, but it also extended the conclusions of the Equal Access cases. *Rosenberger*, for the first time, announced that the neutrality principle of equal access to resources extended not only to facilities but also to public funding. This is a crucial allowance, and reflections of this expansion can be seen in recent cases.

Rosenberger also represents an important part of doctrinal trends in the religion context. As a whole, funding cases represent an area in which there has been a fair amount of doctrinal convergence, largely on the principle of neutrality.[4] *Rosenberger* foreshadowed this rise of the principle of neutrality. *Rosenberger* is also a turning point in the predominant doctrinal pivot from the position in early cases in which the key question was "to what extent is the state forbidden from supporting religion" to a point in which the key question is now "to what extent is the state required to support religion."[5] *Rosenberger* therefore represents an interesting inflection point as an early case asking essentially the latter question. The case is likewise a salient and early example of a trend toward a steady "unraveling" of limits on aid.[6]

On Shifting Ground: The Landscape Pre-*Rosenberger*

The doctrinal framework and litigation strategy that led to *Rosenberger* originated years earlier. The case beginning the Supreme Court's Establishment Clause jurisprudence in earnest was announced in

DOI: 10.1111/jsch.12259

1947. *Everson v. Board of Education* involved public funds being spent on reimbursement for busing children to parochial schools.[7] Justice Hugo L. Black, writing for the Court, discussed the inherent tension at issue: first, the state is bound by a no-aid principle, but at the same time, religious individuals cannot be excluded from receiving general public benefits. The Court's jurisprudence has developed considerably since then, but the concerns at stake in *Everson* inform questions still at issue today.[8]

While *Everson* marks the beginning of modern Establishment Clause jurisprudence, the specific line of cases leading up to *Rosenberger* began with *Widmar v. Vincent*. In *Widmar*, the University of Missouri prevented a religious group from meeting in University buildings. The district court upheld the restriction, finding that it was required by non-establishment principles.[9] The Supreme Court ruled against the University, holding that once it had created a forum that was "generally open to student groups," excluding the religious group was impermissible content-based discrimination.[10] *Widmar* created a model litigation strategy for plaintiffs, and this basic structure would be repeated in a line of cases christened the "Equal Access" cases, including *Lamb's Chapel v. Center Moriches Union Free School District*, *Rosenberger*, and *Good News Club v. Milford Central School*. The *Widmar* formula involved challenging a public institution's restriction on the use of its resources or facilities by raising a free speech challenge to exclusion from a public forum.

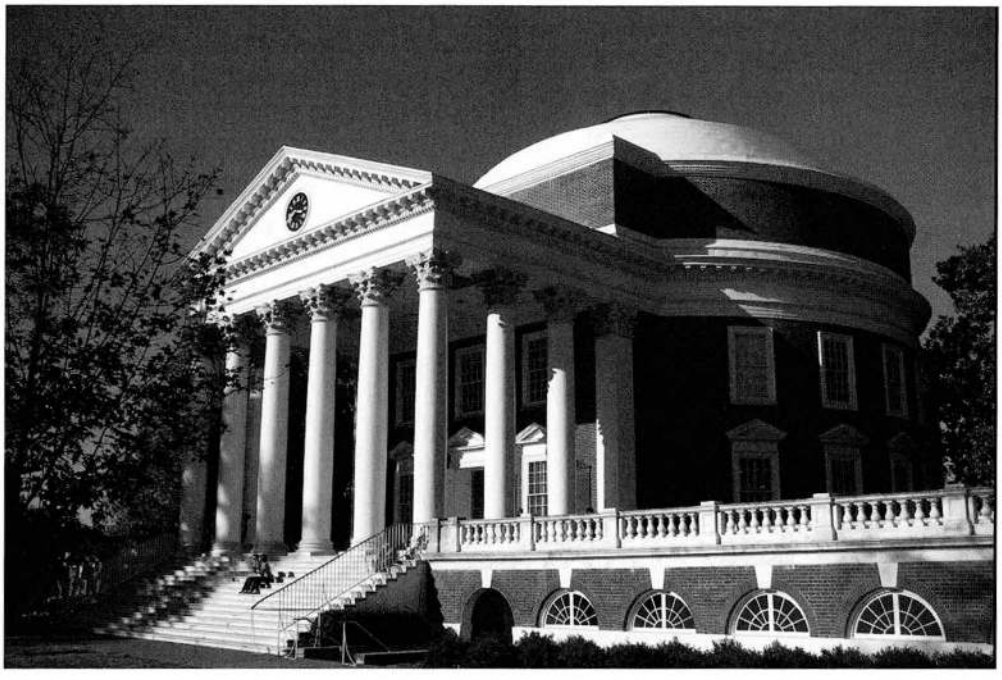
Lamb's Chapel, another installment in this line, followed blueprint. There, New York law allowed local districts to regulate after-hours use of schools but prohibited use for religious purposes.[11] An evangelical church that was denied access challenged the regulation. As in *Widmar*, the district court upheld the regulation on Establishment Clause grounds, and as in *Widmar*, the Supreme Court held that the exclusion of the religious group was an impermissible violation of free speech principles.[12]

However, the principles of this line of cases were in some tension with another constellation of cases expressly prohibiting government aid to religion, especially in the context of funding.[13] Notable cases advancing this perspective included *Lemon v. Kurtzman* and *Committee for Public Education & Religious Liberty v. Nyquist*.[14] To some extent, these two lines of cases came to a head in *Rosenberger*, as the Court was forced to confront whether equal access or no-aid principles would govern.[15]

The Path of the Case

Like many other colleges and universities, the University of Virginia funds student activities through a Student Activities Fund (SAF).[16] The process began in 1946 but was codified for the first time in 1968.[17] SAF funds are collected by a mandatory fee from students; at the time of the *Rosenberger* case, this fee was $14 per semester.[18] In order to receive funding, an organization must obtain Student Council approval as a Contracted Independent Organization (CIO). While students on the Student Council allocate funding, the non-student Board of Visitors (BOV) sets the guidelines for funding. CIO-classified organizations and groups are then eligible for reimbursement from the SAF.[19] However, regardless of CIO status, the Board guidelines exclude certain activities from receiving SAF reimbursement. In 1990–91, the funding guidelines excluded funding for a "religious activity," defined as an activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[20]

In 1990–91, there were 343 CIOs, 135 of which applied for SAF funding,[21] and 118 received the funding. Notably, conflict over SAF subsidies predated the litigation. Just a few years prior to *Rosenberger*, a separate funding issue embroiled the SAF, and by



The University of Virginia denied a $5,800 funding request by a student Christian magazine, *Wide Awake*, from its student activities fund because University guidelines prohibited funding any publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."

extension, the Student Council. In 1989, the *Virginia Advocate*, a political publication, was denied funding based on the guidelines' ban on financing political activities.[22] The *Advocate* appealed the funding decision and succeeded in a challenge that made national news.[23] The Student Council reversed its decision to deny funding after it decided that "publishing anything is an expression, not activity" and that "essentially any publication that wants to exist is eligible for funding."[24]

A year later, in 1990, University of Virginia student Ronald Rosenberger founded and became the publisher of *Wide Awake*, a magazine "of philosophical and religious expression."[25] The magazine aimed to "facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints" and to "provide a unifying focus for Christians of multicultural [backgrounds]."[26] In January 1991, *Wide Awake* applied for $5,862 in funding from the SAF to finance the printing of its magazine,[27] setting in motion the *Rosenberger* case.

Beginnings

The events that precipitated the filing of the *Rosenberger* case occurred fairly rapidly, partially because individuals on both sides of the litigation understood the potential stakes. When *Wide Awake* applied for funding in early 1991, Student Council members quickly perceived potential problems and acted to involve the administration. After receiving *Wide Awake*'s funding request, Cynthia Wilbricht, Vice President for Student Organizations, contacted the Office of the General Counsel of the University, sending a copy of the magazine and seeking guidance about whether or not *Wide Awake* could be funded, both under the guidelines and according to constitutional law.[28] The University's General Counsel, James Mingle, was clear that *Wide Awake*, as a producer of a

"pervasively religious pamphlet," was a "religious activity" that could not be funded.[29] Thirteen days later, Wilbricht sent official notification to Rosenberger that *Wide Awake* would not receive funding.[30]

Wide Awake responded the very same day, by distributing a press release stating its intent to appeal.[31] While some scholars have reported that lawyers did not begin assisting Rosenberger until months later at the district court,[32] in fact, *Wide Awake* quickly retained legal counsel while within the internal University processes. By March 3, mere weeks after the denial of funding, Rosenberger and *Wide Awake* submitted their appeal with Michael McDonald of the Center for Individual Rights (CIR) as their attorney.[33] CIR, an advocacy group based in Washington, D.C., was founded in part to be a conservative counterweight to liberal litigation groups such as the ACLU.[34] The appeal *Wide Awake* submitted with McDonald's assistance specifically referenced the *Virginia Advocate*'s earlier appeal and cited the decision that "publishing anything is an expression, not activity" as precedent that *Wide Awake* should receive funding.[35]

On March 18, McDonald contacted the Student Council and the BOV on behalf of his clients, threatening litigation if the funding was not approved.[36] As a result, Mingle reported to the Board on March 22, discussing the possibility of "potential litigation," but he expressed his opinion that the funding decision was legally appropriate.[37] Despite the prospect of litigation, on April 16, Ronald Stump, the Associate Dean of Students, wrote Rosenberger to inform him officially that his appeal was denied and that *Wide Awake* would not be funded as a result of its status as a "religious activity."[38] *Wide Awake* again took to the court of public opinion, openly accusing the Student Council of "hypocrisy."[39]

McDonald wrote directly to the members of the BOV, informing them of his clients' intent to file suit if the Board did not overturn the funding decision.[40] Mingle also contacted the Board, reiterating his stance from the March 22 meeting that the funding decision was appropriate and was anchored in the requirements of the Establishment Clause.[41] He reached this conclusion after consulting with other lawyers, including University of Virginia law professor John Jeffries, who "concurred" that "the funding denial is legally defensible."[42] The Board ultimately affirmed the Student Council's rejection of funding.

As a result, in May, McDonald wrote to Mingle, again discussing his plan to sue over the denial of funding to *Wide Awake* but also writing that he hoped they could meet "to avoid unnecessary litigation."[43] Before that meeting, Mingle consulted with Robert O'Neil, a lawyer, constitutional law scholar, and former University of Virginia President, as well as (again) with Jeffries. After these consultations, Mingle reflected on the University's position, noting that "while I do not relish the prospect of the University becoming entangled in a constitutional dispute ... I believe that the Board's guidelines on the Student Activity Fee ... are legally correct and defensible."[44] Mingle and McDonald met in May in Charlottesville in a meeting which appears to have been the beginning of a strained relationship; years later, McDonald remained disgruntled that Mingle "dug in his heels" and made "us drive to Charlottesville."[45] After their conversation about the case, Mingle was not entirely certain *Wide Awake* would continue with the litigation; he noted that the lawyers claimed that they would file a lawsuit, but he was not sure "[w]hether this reflected posturing or serious resolve."[46] Mingle would soon get his answer when *Wide Awake* promptly filed suit in the federal district court.

A few aspects of the beginning of the litigation are significant. First, this opening narrative answers questions some scholars had raised about the authenticity of the University's asserted justifications for the Board's

funding guidelines.[47] The record of private correspondence between Mingle, Stump, and the BOV suggests the reasons they officially asserted regarding the University's educational mission and its interpretation of the Establishment Clause were genuine representations of their understandings.[48] Correcting misconceptions that had identified Jeffries as actively litigating the case for the University, an accurate picture of the University legal team shows that at this stage Jeffries was only minimally involved as a "sidelines consultant."[49] The record also shows that McDonald and CIR were involved much earlier in the case than has been previously recognized by some. The record reveals that McDonald and CIR had an immediate and primary role in shaping the litigation.

An accurate understanding of CIR's influential position at the case's nascence is important both for understanding the trajectory of the *Wide Awake* case and for the light it sheds on CIR, its strategies, and its role in the conservative legal movement.[50] Indeed, CIR and the *Rosenberger* case were part of a shifting perspective in the conservative legal community, as a new generation of conservatives moved from "insist[ing] on judicial restraint" to "actively using the courts to establish new [rights] or [to] reinvigorate old ones."[51] Part of this strategy involved finding and selecting "cases with the potential to alter the nation's constitutional debate" and then litigating these cases in order to "place significant opportunities for legal change before the court."[52]

CIR appears to have understood early the possibility for *Wide Awake* to become an influential case, as did the University. The latter can be seen both from the quick action and involvement of high-ranking University administrators and also from their private reflections. For example, President O'Neil wrote in 1992 that he had an "early sense that this was likely to be one of the most difficult and divisive of cases in the field."[53]

District Court and Court of Appeals

As noted, McDonald, on behalf of his clients, filed a lawsuit in federal district court on July 11, 1991. The complaint alleged a variety of violations: of free speech; of free press and free association; of free exercise of religion; of equal protection of the laws; and of 42 USC § 1983.[54]

After receiving the complaint, Mingle reached out further to O'Neil and Jeffries, sending them the complaint and inviting their insights.[55] Officially joining Mingle on the side of the University were Mary Sue Terry, the Virginia Attorney General, as well as Caroline Lockerby and Paul Forch from the attorney general's office.[56] The attorney general's office was connected to the school in that it appointed the general counsel to the University,[57] but one notable dynamic at this stage of the litigation was the beginning of ongoing friction between Mingle and the attorney general. The crux of the tension was the attorney general's office's, and specifically Paul Forch's, opinion that Mingle was not sufficiently communicative with and responsive to the attorney general's office.[58] The disagreement would become more acute, but even at this early juncture, the fault lines were apparent.

With Mingle as counsel, on August 30 the University moved to dismiss the case, relying on Eleventh Amendment immunity.[59] This motion was not granted. *Wide Awake* then moved for summary judgement on November 12. With the assistance of the attorney general as well as consultation from O'Neil and Jeffries, the University cross-moved for summary judgement in January 1992.[60] The University argued that the SAF was a non-public forum, that exclusion of religious organizations was justified based on the limited SAF funds, and that the ineligibility was grounded in the Establishment Clause.[61]

At this point, one of the University's main strategies was to show that its policy did

not discriminate against Christians and that the bar on religious funding was applied equitably. This argument was partially a response to *Wide Awake*'s claims that discrimination was afoot because the University funded other semi-religious organizations such as Black Voices and the Jewish Law Students Association (JLSA).[62] Conversely, the University hoped to show that *Wide Awake* was not denied funding because it was Christian but because it was pervasively sectarian in a manner that the noted organizations were not. As a result, the University dedicated much time to research about other CIOs, as by collecting their constitutions and obtaining affidavits from their presidents about the scope of their organizations' activities, with the affidavits to aver that the organizations had never received any complaints about the nature or extent of their religious activities.[63]

Mingle told Jeffries that his strategy would be to "take the offensive" by also "quickly noting the depositions of the plaintiffs, principally to pin down the conspicuously sectarian character of the Wide Awake organization."[64] This would support the argument that *Wide Awake* was not denied funding because it was Christian. Indeed, the University sought to prove that "the reason for denial of funding is not solely Wide Awake's Christian content or Christian expression" and that the funding of Black Voices, the C.S. Lewis Society, and JLSA was "not inconsistent with Wide Awake's denial. These groups have religious expression as incidental or part of their activities... . However they do not advocate a relationship with a religious deity."[65] As will be seen, Mingle's strategy at the beginning of the litigation contrasts with the University's later points of emphasis. The distinction between *Wide Awake* and other organizations, which the University was to raise at the Supreme Court level,[66] also shows a fundamental divergence between what the University thought were key litigation issues and what the Court would see as determinative. Ultimately, none of the Supreme Court opinions would discuss the distinction between *Wide Awake* and other organizations.

On May 20, 1992, District Court Judge J. Harry Michael Jr., a graduate of the University of Virginia's college and law school, ruled in the University's favor.[67] Primarily, he held that the SAF was a non-public forum, that denying funding to *Wide Awake* was not viewpoint discrimination, and that there were no Free Exercise or Equal Protection violations. Regarding the Free Exercise claims, the Judge explained that the court could not see any "burden[s] of constitutional magnitude that ha[d] been imposed on the plaintiffs." As to the Establishment Clause, Judge Michael found that so "long as the University's Establishment Clause fears are reasonable, the Guideline restriction must stand." Notably, Judge Michael cited and attempted to distinguish *Widmar*. Specifically, he quoted Justice John Paul Stevens' concurrence in that case, which stressed the number of discretionary decisions that a university routinely needs to make in the course of its operation.[68] This would become one of the University's key arguments as the litigation continued.[69]

In June 1992, *Wide Awake* appealed the district court's ruling. Oral argument took place in the Fourth Circuit Court of Appeals on November 30, 1992,[70] with Michael McConnell having McDonald on Rosenberger's team to argue the case for *Wide Awake* against Mingle, who was joined again by Forch and Lockerby from the attorney general's office on the brief. Notably, Jeffries remained a consultant and was not listed on the brief.[71] On March 14, 1994, the Fourth Circuit delivered its decision, written by Chief Judge Samuel Ervin. The decision held that the University guidelines discriminated "on the basis of [*Wide Awake*'s] content," but the University had a "compelling interest in maintaining strict separation of church and state,"[72] and so the court affirmed the district court's decision.

Public Opinion

Along with its litigation effort, the University engaged in public relations activity concerning the case. The extent of the involvement of the general counsel's office and the legal team in the public relations effort, and the degree to which it shaped the University's strategy, is striking. Given that the University had its own separate Public Relations Department, the legal team's high degree of commitment is specifically notable. For example, Mingle and the general counsel's office closely monitored the news involving the case throughout the litigation.[73] Mingle himself became involved in outreach to various individuals to encourage good press coverage about the case. For example, he wrote a letter encouraging an author that: "Your Op-Ed in the Times Dispatch was excellent... . [You have] said publicly what a lot of Virginians feel and have expressed privately. That's a real public service."[74]

Other than the University's status as an institution that needed to sustain its elite image, donations, and applications by prospective students, another less obvious factor seemed to be driving the University's sensitivity toward public relations. Specifically, the University was still smarting from the recent sting of the publicity around the *Virginia Advocate*'s defunding. The University's decisions during the *Wide Awake* litigation should be considered in the context of the recent *Advocate* turmoil. For example, at the University of Virginia Appropriations Committee's discussion and vote regarding *Wide Awake*'s funding, the chair warned the other members about the importance of confidentiality, in an apparent reference to the *Advocate*'s defunding: "I know its going to be a big thing and its going to blow up ... I just don't want anybody on the committee commenting on this, because we're going to say as little as possible, because I just don't want it blown out like ... other issues have in the past."[75] Likewise, Ronald Stump, the Associate Dean of Students, wrote about his concern regarding the *Wide Awake* case in light of the "Virginia Advocate case of a few years ago," which was "generally misunderstood by the general public" and received "much criticism for the apparent decision to not fund a specific viewpoint."[76]

It does appear that the University's concerns about negative public perception of the *Wide Awake* litigation were justified. As the case began to appear in the national and local news, the University's mailboxes became crowded with letters from angry, if often misinformed, individuals. For example, letters chastised the University for wrongs such as banning *Wide Awake* from campus and barring Christians from attending the University.[77] University employees responded to these letters to try to "correct ... any misinformation about the University's policies." The responses also attempted to seek out the origin of the misinformation in an effort to prevent erroneous rumors from spreading.[78] Ultimately, consideration of which decisions would fare well in the court of public opinion affected a variety of University decisions, a thread running through the history of the litigation.

Filing for Cert

After losing in the Fourth Circuit, *Wide Awake* filed a petition for certiorari in the Supreme Court. The University then drafted an opposition brief, with Mingle again consulting both O'Neil and Jeffries.[79] Their timeline was tight: Mingle wrote to Jeffries and O'Neil for assistance on September 6, with the response having to be filed by September 23 and printed even earlier.[80]

The drafting of the brief opposing cert exacerbated the tensions between the attorney general's office and the University's general counsel's office. After the brief was finalized, Forch, in the attorney general's office, sent a long and caustic note to Mingle, sharply criticizing "the 'final' draft" that was

In March 1994, the Fourth Circuit delivered its decision, written by Chief Judge Samuel Ervin (pictured). He held that the University guidelines discriminated "on the basis of [*Wide Awake's*] content," but that the University had a "compelling interest in maintaining strict separation of church and state."

sent to the printer. He wrote that the brief's design "increases the prospect of grant of cert," and he thought the brief should have been substantially rewritten. He again complained about the "absence of time provided to the AG to review" the brief, noting that this "concern" had been raised before and saying he could not "seem to get [the message] through" to Mingle. He upbraided Mingle, writing that his "perennial reaction that the AG should defer to experienced counsel is … presumptuous when dealing with highly sensitive legal issues before the highest court of this land." He closed by noting that these remarks were meant to be constructive commentary, but that Mingle needed to "do a better job at building confidence" at the attorney general's office.[81]

The ongoing tension with the attorney general's office is notable in several respects. In addition to providing important information about the way the University conducted its legal defense and its tendency toward insularity, it underscores the broader contention that particular personalities and relationships were important in the litigation. Indeed, Forch's letter begs the question of what might have occurred if, instead of Mingle, a lawyer with a more collegial, collaborative relationship with the attorney general's office was in Mingle's position and had taken the advice of the office to completely rewrite the cert brief.

Prelude to the Supreme Court

On October 31, 1994, the Supreme Court granted cert.[82] This began a critical debate within the BOV regarding how to move forward with the case, as the "course of action" was "absolutely up to" the Board.[83] The Board seriously considered decisions that would dodge the prospect of a loss at the Supreme Court, including attempting to either settle or moot the case.

On November 12, the Board members met to consider their potential options.[84] They met with Virginia Attorney General James Gilmore, and then met to vote. Between the *Rosenberger* case itself and the conflict with the attorney general, the stakes were high. The behavior of the Board members indicates their perception of the risks; "several" members consulted outside counsel in addition to Mingle before the meeting and the vote. Public image remained a primary guiding principle for the Board—the notes open with a comment regarding how the group was "very concerned about [the] case & how UVA will appear publicly." The relationship between the University and the attorney general had become even more strained—despite the already-noted tie between the attorney general's office and the University, both Gilmore and Virginia Governor George Allen were Republicans who had just entered office that year, and they had new perspectives divergent from those of their Democratic predecessors, who had supported the University throughout the litigation.[85] The Board meeting notes commented that the case had become a "cat & dog fight with [the] AG."

One potential option on the table was to "change the regulation" by removing the religious restriction from the SAF funding guidelines, which as a result would "moot the case."[86] However, several members of the Board noted that this would still be expensive—even if they paid *Wide Awake* the money originally requested, it would be difficult to "avoid [paying] attys fees."[87] Another option would be to attempt to settle the case, the position advocated by Attorney General Gilmore. He argued that "the Fourth Circuit's establishment clause holding is wrong" and that the University "could avoid the payment of substantial attorneys fees" by settling.[88] Mingle advised the Board against this, warning that "[s]ettlement of the case would be expensive and dangerous." Mingle counseled the Board to proceed with the litigation, because "[f]unding the Wide Awake journal [would] expose the University to the possibility of suit by persons who would regard such action as" an Establishment Clause violation. "Because of this feature," Mingle noted, "the University needs a clear resolution of this case. Any resolution that does not resolve its merits exposes the University and the Board of Visitors to considerable future litigation and legal exposure."[89]

Ultimately, the Board decided to "stay the course," voting to continue to defend the policy.[90] Thirteen Board members so voted, two voted against, wanting to "fund *all publications*," and one abstained.[91] A key consideration in the Board's determination appears to have been Mingle's argument that failing to resolve what funding guidelines were permissible would result in "years of uncertainty and years of expensive litigation."[92] According to one Board member, "Mingle made a convincing case" and persuaded the Board "we should go forward." Another influential factor seems to have been the impact of other options on the University's public appearance. One Board member commented that it "feels [like] we need to go forward" as this was related to the "strategy re: dealing with press."[93] Five days after the vote, on November 17, the University announced to the press that the Board would continue to defend the policy.[94] The very same day, coincidentally,[95] the office of the attorney general also publicized that it would be opposing the policy and would intervene on the side of *Wide Awake*.[96]

Brief Writing

With the green light from the Board that the University would go forward with the case, the legal team began writing the Supreme Court brief around December 1994.[97] The team considered the brief significantly more important than the oral argument. Jeffries wrote to Mingle that the reduced importance of the oral argument was "especially true today, as the current crop of justices have gotten into the habit of interrupting so frequently that no coherent presentation can be made."[98] In the brief, and later at oral argument, the University diverged from the approach it had taken earlier in the litigation. In a somewhat dramatic pivot, it retreated from its Establishment Clause claims, a move that has since puzzled commentators and provoked criticism. The change seems to be accounted for by the increased role of John Jeffries, who had a key role in writing the brief, and his assessment of the Fourth Circuit's opinion. Indeed, Jeffries had unique ideas for how to address the litigation, and he took the lead.

After cert was granted, John Jeffries officially joined Mingle as counsel.[99] Mingle remained lead counsel, but Jeffries moved from having a role on the "sidelines" to being "active co-counsel." Now, Jeffries was fully on board, and he also took on the central role of writing the brief.[100] This change in Jeffries' role and his primary authorship of the brief can account for the University's shifting argumentation strategy.

The Fourth Circuit's opinion, of which Jeffries was highly critical, helps explain

the shift in the University's stance. Jeffries thought the opinion represented an antiquated view of the Establishment Clause that the majority of the justices would not endorse. In an early draft of the University's brief for the Supreme Court, he planned to devote an entire section to why the Court should sidestep and effectively ignore the Fourth Circuit's decision.[101] This portion was later edited out, but it is illustrative of his mindset.

Jeffries' assessment of how the justices would approach the case (and the Fourth Circuit's opinion) in turn affected the University's stance. He perceived that while the four liberal justices would agree with the Fourth Circuit's approach to the Establishment Clause, only those four justices would adopt such a position. He also estimated that these four justices would already be in the University's camp, so defending the Establishment Clause reasoning used by the Fourth Circuit was unnecessary. For this reason, the merits briefing aimed to sway specifically Justices Sandra Day O'Connor and William H. Rehnquist, of whom the University needed one, and only one.[102]

In December 1994, Jeffries wrote that "my firm conviction is that this case will not be decided on [the] ground [of the Establishment Clause and] that any sustained attention to it would be deflective and counterproductive." He was "convinced that [the Establishment Clause] argument is a loser for us."[103] As a result, he recommended placing a primary focus on the issue of viewpoint discrimination. He wrote to the legal team:

> regardless of the Court's conceptualization of the case, a conclusion that the University had practiced viewpoint discrimination would be dispositive. In essence, viewpoint discrimination is a silver bullet that allows plaintiffs to win no matter what the doctrinal category or the standard of review. Persuasive answers to these contentions are, therefore, our overriding objectives.[104]

With Jeffries as primary author, the final Supreme Court brief focused almost exclusively on public forum doctrine and viewpoint discrimination.[105]

The Letter

During the litigation, a sensitive issue regarding Justice Antonin Scalia arose for the members of the litigation team. The situation, not previously discussed, provides a compelling miniature case study showcasing the extent to which unique and specific personalities, internal institutional politics, and concern with public image shaped the course of the litigation. This sub-narrative began years earlier, in 1967, when Scalia left private practice to teach at the University of Virginia School of Law. He served as a professor at the University until 1971, after which he worked in various governmental positions.[106] Scalia was subsequently nominated for a seat on the D.C. Circuit and, in 1986, to the Supreme Court of the United States.[107]

Three years after he was appointed as a justice, the University nominated former Professor Scalia for the Thomas Jefferson Award.[108] The award is the "highest honor[] given to members of the University community who have exemplified in character, work and influence the principles and ideals of Jefferson, and thus advanced the objectives for which he founded the University."[109] Apparently catching both the awards committee and the University by surprise, Scalia responded by sending then-President Robert O'Neil a biting letter. He described what he interpreted as unfair treatment by the University toward his children's applications for admission and characterized the University's behavior as either "intentional disfavor" or "gross neglect." He closed the letter by refusing the award and noting that he would not accept "anything else" from the

University, "[n]ot now. Now ever."[110] O'Neil responded a little over a week later. Opening the letter with the personal greeting, "Nino," instead of attempting to explain the conduct of the admissions committee, he opted to express his "deep sense of sadness" at Justice Scalia's "estrangement." He concluded by articulating his hope that "the future may offer some promise for rapprochement."[111] Justice Scalia did not respond.[112]

In February 1995, the letter and the subsequent fallout came to the attention of the litigation team. A series of emails ensued; among those involved were the University's Dean of Admissions, the current and former University Presidents, and the rest of the litigation team. Some members of the group did not interpret the letter kindly: John Blackburn, Dean of Admissions, thought that Scalia was "accus[ing] me of lying to him."[113] O'Neil, former President and then consultant to the litigation team, observed that Scalia "has a tendency to brood forever about such things, and he may be brooding yet." O'Neil also expressed that in this context, and because of Scalia's status as a former member of the faculty, he "really should excuse himself from the Wide Awake case." Despite his hope that Justice Scalia would recuse, O'Neil was doubtful, "because of his interest in the subject – to say nothing of his brooding about the admissions case."[114] Of course, the desire for Scalia to recuse himself was not without self-interest; the legal team was not completely certain how Scalia would view the case,[115] but predicted they would likely be "pound[ed]" by him at oral argument, and noted that of the justices, he was also "among the most voluble."[116]

Individual justices have complete discretion over their own recusal. They are not required to explain their recusal decisions, and they rarely do so.[117] This dynamic helps explain why the University chose not to pursue recusal. The litigation team did discuss asking for recusal, but ultimately decided against doing so, both because they thought recusal was not necessarily appropriate in this case and because it was unlikely that the Justice would agree to recuse himself.

In reaction to the series of emails about Justice Scalia's letter, Mingle emailed the group with a serious warning regarding confidentiality. Of utmost import, wrote Mingle, was keeping "this sensitive matter very confidential." The team was instructed to share the information strictly on "an absolute 'need to know'" basis. Mingle closed by underscoring the stakes: "If the circle enlarges and the press picks up the issue, it could have damaging impact on the Wide Awake litigation before the Supreme Court."[118] Two people responded, assuring Mingle of their commitment to confidentiality; after that, the email thread, and all further evidence of the discussion in the historical record, promptly ends.[119] Notably, Scalia and the University do appear to have later reached a détente. In 2008, nearly twenty years after it was originally offered, the Justice accepted the Thomas Jefferson Award.[120] In the counterfactual in which Scalia recused himself, the Court would have split four to four, effectively affirming the Court of Appeals and changing the ultimate outcome of the litigation.

Oral Argument

It was not predetermined that Jeffries would represent the University at Supreme Court oral argument. During January 1995, the litigation team considered its options, which involved choosing between Mingle and Jeffries. Advantages the general counsel's office considered of having Mingle argue the case included his extensive "litigation experience" as well as his "experience in this particular case," namely, "knowledge of the facts, cases, [and] types of questions which will be raised in oral argument."[121] Mingle had represented the University in both lower courts and had been successful, which cut in favor of choosing him to represent

the University. Mingle was thought to be "more comfortable (and conversant) with the Establishment Clause issue." Furthermore, Mingle was "familiar with McConnell's" approach. Unlike Jeffries, Mingle was not an academic and could present a "contrast" to the "academic style of McConnell." However, the optics did not support choosing Mingle. The team worried that "politics" and the "appearance of liberal institutional bias" weighed against having Mingle argue the case. Furthermore, there were institutional considerations—Lawson wondered "what is the practical effect of saying you will argue it if Capelin [sic] et al, and Low say Jeffries should? If we lose, how will the[y] react?" Choosing Jeffries would also present both advantages and drawbacks. Jeffries' leadership role on the brief helped recommend him.[122] However, the team worried that Jeffries had less experience with the case and the facts. Some in the general counsel's office were anxious that they could lose control over the case, and that Jeffries might "cut ties to our office, and rely on his own colleagues who are not familiar with the history of the case."[123]

However, the team eventually selected Jeffries to argue the case. Mingle thought it was ultimately "a close call," but that Jeffries' "con law expertise" as well as "insights into Supreme Court decision-making and how particular Justices may be tilted" presented clear advantages.[124] Moreover, Jeffries' status as a former clerk to Justice Powell and a "[f]riend of conservatives" on the Court could have a positive influence.[125] Also of crucial importance were the optics: due to his more limited role earlier in the case, the general counsel's office hoped Jeffries presented a perspective that was "dissociated from [the] institution."[126] According to Mingle, this distance could also hopefully "offset the albeit uninformed viewpoint of some politicos that Mingle is the legal advocate and policy architect of the University's position."[127] Furthermore, Lawson conjectured that Jeffries' "academic" style might be more "appealing" to the "clerks."[128] In sum, Jeffries provided a "[c]onservative contrast" that could help the University's appearance.[129]

Preparation for the Court

After the brief was filed, the attorneys took a month off. Jeffries wrote that he needed to take several weeks "away from this case."[130] As a result, preparation for oral argument did not start in earnest until February. The team's oral argument preparation included several approaches. The first step involved the "in-house team assembling and reacting" to a "detailed argument outline."[131] Next, a moot court with outsiders was arranged and was scheduled for February 22; it included Pamela Karlan, Amy Wax, Beth Hodson, and George Rutherglen.[132] It does not appear that the group made the mistake of not consulting with enough dissenters. Instead, the team attempted to recruit people actively "hostile to our position" in order to "learn what to expect."[133]

On March 1, 1995, Jeffries faced off against McConnell at oral argument before the justices. Here, Jeffries doubled down on the strategy taken in the brief of retreating from the University's Establishment Clause argument. When asked about the position, Jeffries told the Court, "Obviously, if the Establishment Clause forbids us from giving direct aid to religion, there is an end to the matter, but we do not stand on that ground."[134] Instead, Jeffries emphasized the importance of the University's discretion. As Jeffries stated: "There cannot be a right of access to the budget of the University of Virginia."[135]

The team had divergent reactions to the March 1 oral argument. The next day, Jeffries wrote Mingle that he was not optimistic about the outcome. To him, "the signals seemed" to be "all wrong" because "the Justices weren't sufficiently interested in the questions that go our way." Despite his pessimism about

the result, however, Jeffries had "no second thoughts about our preparation" of the case.[136] Conversely, Mingle felt "optimistic about the outcome," as a result of being convinced that "the case will be decided on the briefs and the case record, which I believe are strong for the University on both counts." Mingle told Jeffries that he thought the justices' "rigorous questioning of both sides essentially reflected what we argued" regarding the discretionary nature of resource allocations. Mingle did not even consider this a "close case."[137]

Upon reflection, both Mingle and Jeffries thought that their most "serious obstacle" was the Fourth Circuit's opinion. Jeffries wrote:

> [Our] [f]irst and most important [obstacle] was the disastrous opinion of the Fourth Circuit, which put the right result on patently wrong grounds. That started everyone off with a predisposition toward reversal. I shall always believe that if the Fourth Circuit had written a minimally competent opinion, cert would not have been granted or, if it had been, we would have prevailed on the merits.[138]

Mingle concurred that "we were handicapped by the Fourth Circuit's erroneous reasoning." He also thought the justices might have had different grievances with the appellate ruling and that some justices might be motived "to straighten out the free speech side of the Fourth Circuit's analysis" while some "(especially Scalia) wanted to correct the Establishment Clause side of the appellate decision." As a result, he forecasted that the Court would "avoid the Establishment Clause issue – because of the wide implications of endorsing cash subsidies to pervasively sectarian organizations" and instead "decide the case on narrow grounds." Specifically, Mingle predicted that the court would use a public forum analysis to dispose of the case.[139]

The Decision

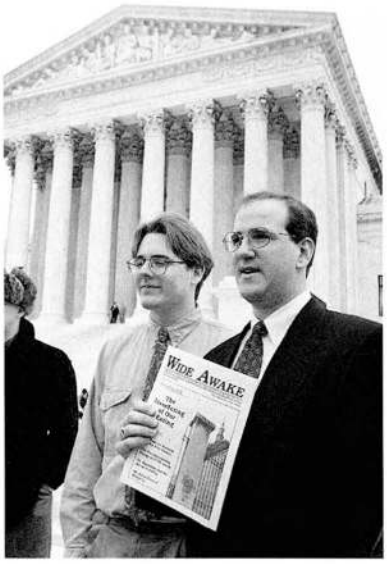
Ultimately, Jeffries' predictions proved sagacious. The Supreme Court indeed reversed the Fourth Circuit, handing down its ruling on June 29, 1995. Justice Anthony Kennedy delivered the Court's decision, joined by Justices Rehnquist, O'Connor, Thomas, and Scalia. Justice Kennedy held that the University had created a limited public forum with the SAF, though it was a forum in more of a "metaphysical" sense than the "spatial" forums at issue in *Widmar* and *Lamb's Chapel*. Justice Kennedy also explained that while "the distinction" between content and viewpoint discrimination "is not a precise one," here the University had indeed engaged in viewpoint discrimination. The Court dismissed the University's arguments about discretion and its attempts to distinguish *Widmar* and *Lamb's Chapel* on the basis of the difference between access to funding (a limited resource) and access to facilities (a practically unlimited resource); Justice Kennedy retorted that scarcity cannot justify viewpoint discrimination.[140]

The Court then turned to the Establishment Clause, noting that while the University had apparently retreated from this argument, it was the basis of the Fourth Circuit's opinion and therefore required discussion. Looking to precedent, Justice Kennedy concluded that there was "no difference in logic or principle, and no difference of constitutional significance" between the facility access cases like *Widmar* and *Lamb's Chapel* and the access at issue in *Rosenberger*. As a result, he said, "To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint."[141]

Justices O'Connor and Thomas each concurred in separate opinions. Justice O'Connor confronted the tension in the case

head on, acknowledging that the case "lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities." Her opinion recognized that difficult line drawing was required, but she found that "careful judgment and fine distinctions," as applied to this case, supported the majority's holding.[142] In contrast, Justice Thomas concurred primarily to spar with the dissent over historical analysis. His concurrence and the dissent dispute at length over James Madison's *Memorial and Remonstrance Against Religious Assessments* and its implications regarding the meaning of the Establishment Clause.[143]

Justice David Souter wrote for the four dissenters, positing primarily that the funding at issue violated the Establishment Clause. He also distinguished *Mueller*, *Witters*, and *Zobrest* as indirect aid cases, in which the funding reached religious institutions "only as a result of the genuinely independent and private choices of aid recipients."[144] Turning to the speech clause, Souter first gave a nod to the University's argument regarding the significant discretion usually afforded to universities,[145] but he then devoted the heart of the next section of his opinion to arguing that the restriction is not in fact viewpoint discrimination, distinguishing viewpoint discrimination as "taking sides in a public debate,"[146] whereas here, the University had not favored or disfavored any religion, and thus did "not skew debate by funding one position but not its competitors."[147]



Ronald Rosenberger (right) co-founder of *Wide Awake*, was photographed on the steps of the Supreme Court on March 1, 1995, after the Court heard oral argument in his First Amendment challenge. Fellow magazine co-founder Robert Prince is at left.

Post-Decision Reactions

The decision was both cheered and vilified on a national level. Conservative organizations and Christian advocacy groups such as the Christian Legal Society celebrated the decision.[148] Conservatives felt invigorated by the holding; Jay Sekulow, chief counsel for the American Center for Law and Justice, a conservative advocacy group, applauded the decision for "cross[ing] a critical threshold in the fight for religious liberty." He also predicted that the decision would "propel and energize other religious liberty issues."[149] Sekulow fulfilled his own prophesy, going on to litigate both *Santa Fe Independent School District v. Doe* and *Pleasant Grove*. However, other religious groups like the American Jewish Congress, separationist advocates such as the Americans United for Separation of Church and State, and civil liberties groups including People for the American Way were angered by a decision they considered to be wrongly decided.[150] Contemporaneous legal scholarship was likewise split, with the majority's decision garnering both praise[151] and criticism.[152]

Several universities other than the University of Virginia felt the immediate sting of the decision, as they were compelled quickly to revise similar funding policies. Ironically, apparently least moved by the decision were University of Virginia students, with one newspaper reporting that many students

commented that "they knew little about the case."[153]

Epilogue

After the Supreme Court decision, the parties continued to dispute the pending issue of Rosenberger's claims for compensatory damages from the University, as well as fees and costs.[154] Among the items at issue was what time periods should be included when calculating Rosenberger's attorneys' fees; pre-district court and post-Supreme Court fees were in question. Ultimately, after almost a year, the parties reached an agreement. On May 14, 1996, the parties signed a joint statement in which it was agreed that litigation pending in the district court would be dismissed. *Wide Awake* assented to release claims for money damages, attorneys' fees, and costs, and in return, the University agreed to pay CIR $12,500.[155] The discussions surrounding the settlement do indicate ongoing tensions between McDonald and Mingle. One of McDonald's letters to the general counsel's office levied several personal complaints against Mingle. He still resented Mingle making the parties meet in Charlottesville in 1991, and he also wrote that when Mingle argued that *Wide Awake*'s attorneys were not entitled to fees for their work at the trial level, "[w]ith all due respect, he cannot have been serious."[156]

For the University, the questions and concerns raised by *Rosenberger* did not end with the litigation. From the school's perspective, the decision left the University in the lurch, as it was "clear" that "the University [could] not continue to administer the mandatory SAF while excluding religious activities funding," but the case did not give guidance to the University about how to amend the program.[157] The University was also under significant time pressure: it needed to research and design a new plan, but only a few months after the Court handed down its decision, a new academic year would begin and "another round of student allocations" would need to be dispersed. As a result, Peter Low commented, a plan needed to be made "as soon as possible."[158]

The Board needed to address two interrelated issues. First, "and more pressing," it needed to revise the guidelines to comply with the Court's ruling. Second, it also needed to focus these revisions on "how best to revise the Guidelines to withstand scrutiny in the event new constitutional claims are asserted in the future."[159] According to the analysis from the general counsel's office, the "most significant issues" specifically "looming on the immediate horizon" were:

> (1) does the decision invalidate the Board's long-standing bans on the funding of electioneering and lobbying activities? (2) how deeply will the courts delve into the allocation of amounts of money among eligible speech-conducting organizations? (3) must the University provide a mechanism by which students required to pay this mandatory fee may withhold their contributions from speech activities with which they personally disagree?

The University perceived potential litigation on all fronts: if the University failed to amend the guidelines in certain respects, it faced litigation similar to that in *Rosenberger*. But it was also concerned that amending the guidelines to attempt to avoid litigation, for example, by allowing electioneering or lobbying speech, could expose the University to other problems and "implicate the University's tax exempt status under section 50(1)(c)(3) of the Internal Revenue Code." Based on the number of outstanding questions, the University considered itself an "obvious and inviting target" for litigation from "groups of all persuasions."[160]

One possibility researched by the Office of the General Counsel in the summer of

1995 was that by switching from a mandatory SAF fee to a discretionary fee, the University could get out from under the *Rosenberger* decision. Theoretically, thought the Office, by only accepting voluntary fees, the University could avoid having the activity classified as "state action" and therefore immunize itself from First or Fourteenth Amendment claims.[161] However, by the end of the summer, the Office no longer viewed this as a feasible option; instead, it concluded that "even if the mandatory fee were abolished and replaced by a voluntary contribution solicited by students ... it is very likely that 'state action' could be found in the allocation process, particularly if the board set any guidelines or if an existing agency of student governance, such as the Student Council, allocated the funds." A new approach was therefore required, and the University turned to other options. A Student Activities Fee Task Force was set up, and it consulted with the general counsel's office. Possibilities under consideration included completely abolishing the SAF; keeping the SAF but discontinuing funding for any speech-oriented activities; keeping the SAF but discontinuing content-based exclusions and writing new, "explicitly neutral" guidelines; and discontinuing content-based exclusions but continuing "to give student council discretion to allocate funds."[162]

The general counsel's office advocated for completely abolishing the SAF. From the Office's perspective, this strategy was legally airtight: "Nothing in the Supreme Court's decision ... requires a university to provide a mechanism for funding any student activities," so this would be "unquestionably the most prudent course." The major benefit of this approach was avoiding the cost of further litigation to resolve the outstanding questions left in the wake of *Rosenberger*.[163] The expense was indeed likely to be major: the annual size of the SAF was only $400,000, but while unresolved at the time, the *Rosenberger* litigation was poised to exceed that cost. The University considered the very "real prospect" that it faced future litigation costs that would swallow the size of the SAF to be strong evidence of the prudence of not continuing the program. The general counsel's office therefore concluded that "the safest response ... is for the University to get out of the business of funding activities altogether."[164]

The University also considered the possible option of keeping the SAF but discontinuing any funding of speech activities. Like abolishing the SAF, this would hopefully inoculate the University from future *Rosenberger*-style litigation. However, this option was less than ideal, as defining "speech" activities "would entail line-drawing of great difficulty that could itself result in considerable risk of litigation." Another discrete option would be completely rewriting the SAF guidelines to be explicitly neutral. This possibility was also disfavored, as "such criteria would be extremely difficult to craft, and ... [t]he more detailed they were, the more rigid and unresponsive to the real budgeting needs of the organizations they would be." Also cutting against this option was the perception that unless each organization received equal funding, "no such criteria could eliminate substantial discretion in the appropriating body. And such discretion would invite lawsuits." Finally, the "simplest approach" other than complete SAF abolition would be abandoning content-based restrictions but otherwise leaving "the present system in place." One of the main benefits of this approach was its speed, given the University's serious time constraints, as this plan would "avoid complete restructuring" of the current program.[165]

While the exact reasoning behind the ultimate decision is unclear, the choice that the University ultimately made among the options considered is revealing. What was thought to be the most prudent plan (abolishing the SAF) was ultimately rejected for reasons seemingly unrelated to legal or

financial considerations; it was thought to be an unfavorable public relations move: "the University would surely be criticized heavily in public for taking this course, and it is likely that some would suggest that the University had closed down this valuable source of funds to spite the Christians who had taken it to court and won." This public relations issue was considered to be a "significant drawback."[166]

In the end, the school decided to eliminate content distinctions but leave the SAF otherwise unchanged. It also implemented a process by which students could elect to opt out of the SAF fee. Remarkably, the University therefore chose the option that it assessed would entail "the maximum exposure to the risks and costs of litigation,"[167] apparently because it was the best public relations decision. When the Board discussed and rationalized its decisions publicly, these PR-related concerns remained unmentioned; instead, the University stressed the damage changing the SAF policies would have on student organizations and student life.[168] To the last, the University remained focused on its status and image.

Legacy

Rosenberger determinatively expanded the principle of equal access to resources to public funding. It also represented a clash in lines of cases, establishing that the principles underlying the Equal Access line of cases would trump No Aid principles. *Rosenberger* remains an oft-cited case. Specifically, recent years have seen an uptick in citations from the Supreme Court, with the citations coming from a variety of justices from both sides of the idealogical spectrum.

The case also captures an essential tension between free speech and Establishment Clause jurisprudence. The strain lies in the fact that as a result of the lines of free speech and religion cases, the state faces a Catch-22. Universities like Virginia are vulnerable to free speech claims when they create a public forum, limited purpose public forum, or forum by designation. Universities can immunize themselves from speech claims if they internalize or otherwise adopt the speech, making said speech the government's.[169] In so doing, however, they would simultaneously make themselves susceptible on Establishment Clause grounds. To the extent that it represents this double-edged sword, *Rosenberger* epitomizes an inherent strain between the speech and religion elements of the First Amendment.[170]

Rosenberger is also part of ongoing doctrinal trends in subtler ways. For example, echoes of *Rosenberger* can be seen in the recent Establishment Clause cases on the subject of religious symbols. Indeed, *Rosenberger*'s focus on history and the meaning of the Establishment Clause[171] resounds in *American Legion*'s focus on understanding and considering history.[172] The case also embodies inherent tensions at the center of both religious liberty and free speech doctrines. Regarding the religion clauses, a central tension in the religious liberties legal doctrine is whether or not religion is "special" and whether or not religion is "special" for some purposes but not others.[173] This concept effectively splits the court in *Rosenberger*. The dissenters contended that religion is special and is therefore subject to certain handicaps that other organizations are not, but the *Rosenberger* plaintiffs and the majority took the stance that religion should not be treated specially vis-à-vis other organizations, and instead should be considered in a neutral fashion.[174] This conception is in inherent tension with the Court's view that religion is special in other areas, which it has expressed, for example, in the ministerial exception context.[175] Thus, this question of just how special religion is cuts to the heart of the religious liberties legal doctrine,[176] and is implicated in a variety of other religious liberty cases,[177] making the case of ongoing interest.

Author's Note: I need to recognize and thank Professor Micah Schwartzman, as well as the archivists at the University of Virginia Special Collections Library, for their help throughout the research process. Thank you also to Professor Frederick Schauer, the Virginia Law Review team, and the Dartmouth College History Department.

Notes

[1] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[3] *Widmar v. Vincent*, 454 U.S. 263, 265 (1981).

[4] *Mitchell v. Helms*, 530 U.S. 793, 837 (2000) (O'Connor, J., concurring) ("Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002). ("In sum, the Ohio program is entirely neutral with respect to religion . . . we hold that the program does not offend the Establishment Clause.")

[5] See generally, *Espinoza v. Montana Department of Revenue*, 393 Mont. 446 (2018); Micah Schwartzman & Richard C. Schragger, "Establishment Clause Inversion in the Bladensburg Cross Case," *ACS Supreme Court Review* 21, 26 (2019).

[6] Douglas Laycock, "The Many Meanings of Separation," 70 *U. Chi. L. Rev.* 1667, 1690 (2003). ("Restrictions on aid have been steadily unraveling since 1986.")

[7] *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 3 (1947).

[8] Mark Storslee, "Religious Accommodation, the Establishment Clause, and Third-Party Harm," 86 *U. Chi. L. Rev.* 871, 919 (2019) (discussing *Rosenberger* as an example of the tension in the values of the doctrine).

[9] *Ibid.* at 266; John Noonan & Edward Gaffney, **Religious Freedom,** 1299 (2010).

[10] 454 U.S. 263 at 277.

[11] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993).

[12] *Ibid.* at 395.

[13] Mark Storslee, "Religious Accommodation, the Establishment Clause, and Third-Party Harm," 86 *U. Chi. L. Rev.* 871, 919 (2019). ("Critics of *Rosenberger* have argued that the decision is in tension with anti-establishment values because it sanctioned the direct funding of private religious speech.")

[14] *Committee for Public Ed. v. Nyquist*, 413 U.S., at 780, 93 S.Ct., at 2968 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); Micah Schwartzman, Case Book Chapter 15, 1 (draft) (2019). ("Originally, and for many years, the dominant view on the Court was that government was prohibited from extending certain forms of aid to religious actors. Excluding religion from public benefits was constitutionally required, in other words. Especially in the context of public schools, that seemed to be the case to a significant degree. In cases like *Lemon v. Kurtzman, Committee for Public Education v. Nyquist, Levitt v. Committee for Public Education, Meek v. Pittenger*, and *Wolman v. Walter*, the Court struck down various forms of aid that might support religious functions, even if the aid was available to secular private schools.")

[15] Christopher L. Eisgruber & Lawrence G. Sager, **Religious Freedom and the Constitution**, 35 (2009) (The "collision" of these "opposing lines of cases" came with *Rosenberger*).

[16] Student Activities Fee Guidelines, University of Virginia Student Council 3 (2018). The Student Council notes that SAF stands for "Student Activities Fee," but the Court used the term to mean "Student Activities Fund," so I adopt the Court's use, for clarity.

[17] Letter from James Mingle to John Jeffries (Dec. 12, 1994) (on file with Special Collections); Student Activities Fee Guidelines 3 (2018).

[18] *Rosenberger*, 515 U.S. 819, 824 (1995).

[19] Student Activities Fee Guidelines (2018).

[20] *Rosenberger*, 515 U.S. at 823.

[21] The SAF remains in place today. The current Student Council representative declined requests for access to current funding data.

[22] Alessandra Griffiths, Advocate Seeks Funds on Appeal, Cavalier Daily News, Mar. 15, 1989.

[23] *Ibid.*; Newspaper Clippings (on file with Special Collections) (including national newspapers, such as the *Wall Street Journal*).

[24] Griffiths, Advocate Seeks Funds on Appeal (quoting Aileen Lopez, then-Vice President of Student Organizations).

[25] Ronald Rosenberger Affidavit, at 1 (Nov. 8, 1991) (on file with Special Collections); Wide Awake Constitution (on file with Special Collections).

[26] Wide Awake Constitution (on file with Special Collections); cf. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 826 (1995) (misquoting the Wide Awake constitution to say "background" not "backround").

[27] Letter from Ronald Stump to James Mingle (Jul. 23, 1991) (on file with Special Collections) (discussing allegations filed in suit, as reviewed by Stump, Mike Marcellin, and Bill Hancher).

[28] Letter from Cyndi Wilbricht to James Mingle (Feb. 15, 1991) (on file with Special Collections).

[29] James Mingle Notes on Letter from Cyndi Wilbricht (undated) (on file with Special Collections).

[30] Letter from Cynthia Wilbricht to Ronald Rosenberger (Feb. 26, 1991) (on file with Special Collections).

[31] Press Release, Wide Awake Productions (Feb. 26, 1991) (on file with Special Collections).

[32] Davison M. Douglas, "Rosenberger v. Rector and Visitors of the University of Virginia: The Triumph of the Neutrality Principle," in **Cases in Context** 255 (Leslie Griffin ed., 2010) (Claiming that: "After exhausting those internal appeals, Rosenberger and his co-editors decided to find a lawyer or legal organization who might take their case." This is not correct; the letters discussed here show McDonald was retained before Wide Awake exhausted its options within the University); Ellen Messer-Davidow, "Rosenberger v. University of Virginia: From Discourse and Dollars to Domination," The S. Atlantic Q., 2001 ("Having exhausted the internal appeals process, WAP contacted the Center for Individual Rights, a conservative legal foundation in Washington, D.C., to craft a lawsuit against the university").

[33] Appeal of the Decision to Defund Wide Awake Productions; Memo from Mike Marcellin, to the Appropriation Committee, The Defunding of Wide Awake Productions; Letter from Michael McDonald to Lynn Lawson (Jul. 27, 1995) (on file with Special Collections) ("March 1991 [was] when we formally agreed to represent Rosenberger, et al.").

[34] Douglas, "Triumph of the Neutrality Principle."

[35] Appeal of the Decision to Defund Wide Awake Productions (on file with Special Collections).

[36] Letter from Ronald Stump to Ronald Rosenberger (Apr. 16, 1991) (on file with Special Collections); Letter from Michael McDonald to Lee A. Barnes, President of Student Council (Mar. 18, 1991) (on file with Special Collections) (urging recipient to "reverse the Appropriation Committee's decision and to fund *Wide Awake* . . . this will be the only way to avoid a long and expensive judicial proceeding").

[37] Letter from James Mingle to Board of Visitors (May 6, 1991) (on file with Special Collections).

[38] Letter from Ronald Stump to Ronald Rosenberger (Apr. 16, 1991) (on file with Special Collections).

[39] Brad Wilcox, "Wide Awake Cries Hypocrisy," *University Journal*, Apr. 24, 1991. ("Wide Awake Executive Editor Rob Prince accused members of the Student Activities of 'hypocrisy' for funding Black Voices 1990–1991 saying 'they have just as much religious expression as we have in our magazine.'")

[40] Letter from Michael McDonald to Raymond Bice, Board of Visitors (Apr. 25, 1991) (on file with Special Collections).

[41] Letter from James Mingle to Board of Visitors (May 6, 1991) (on file with Special Collections).

[42] Letter from James Mingle to Waller H. Horsley (Apr. 24, 1991) (on file with Special Collections); Memorial Resolutions, Resolutions Adopted by the Board of Visitors (Jun. 8–9, 2017) (confirming Waller Horsley served as a Board member in 1991).

[43] Letter from Michael McDonald to Lynn Lawson (Jul. 27, 1995) (on file with Special Collections).

[44] Letter from James Mingle to Waller H. Horsley (Apr. 24, 1991) (on file with Special Collections).

[45] Letter from Michael McDonald to Lynn Lawson (Jul. 27, 1995) (on file with Special Collections).

[46] Letter from James Mingle to Robert O'Neil (Jun. 10, 1991) (on file with Special Collections) (thanking O'Neil for his assistance).

[47] Noah Feldman, **Divided by God: America's Church–State Problem and What We Should Do About It**, 282–83 (2006). ("It is thus unclear whether the university's Establishment Clause rationale was an actual motivation or a concoction for litigation.")

[48] See, for example, Letter from James Mingle to Waller H. Horsley (Apr. 24, 1991) (on file with Special Collections) (advising the Board that "[t]he ineligibility of religious organizations and activities . . . is justifiably based on the constitutional principle of state neutrality toward religion, which is anchored in . . . the federal constitution's Establishment clause"); see also, Letter from Ronald Stump to James Mingle (Sep. 21, 1992) (on file with Special Collections). ("The brief suggests a suspicion that educational mission is a post hoc excuse. The original guidelines included mission and the exclusion of religious, political, social, etc., activities. I don't think that educational mission is an excuse for a fear of violating the Establishment Clause; rather, the two conditions stand separately and alone.")

[49] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections) (describing Jeffries' pre-Supreme Court role as a "sidelines consultant"); Randall P. Bezanson, **How Free Can Religion Be?** 190, 209 (2010) (not mentioning Mingle, but incorrectly identifying Jeffries as litigating the case for the University at the district and appellate level).

[50] CIR would go on to represent a variety of parties in litigation related to the First Amendment. See Michael E. Rosman, "Fighting Words: Individuals, Communities and Liberties of Speech," 13 *Constitutional Commentary* 317 (1996). For example, CIR wrote an amicus brief for the respondents in *Morse v. Fredrick*. Hans Bader, "Bong Hits for Jesus: The First Amendment Takes a Hit," 113 *Cato Sup. Ct. Rev.* 133, n. 70, 146–47 (2006–07).

[51] Amanda Hollis Brusky, "Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement," 36 *Law & Soc.* Inquiry 516, 524 (2011). ("This relatively recent focus on litigation as a

principal strategy reflects something of a paradigm shift within the conservative legal community . . . whereas the previous generation of conservatives 'had insisted on judicial restraint,' second- generation PILFs, such as the Center for Individual Rights and the Institute for Justice, concluded that their agendas could only be advanced by 'actively using the courts to establish new [rights] or [to] reinvigorate old ones'") (quoting Steven M. Teles, **The Rise of the Conservative Legal Movement: The Battle for Control of the Law** (2008)).

[52] *Ibid.* at 524 ("This new, more strategic approach, . . . allowed firms to 'pick cases with the potential to alter the nation's constitutional debate, transform the reputation of the conservative movement, and place significant opportunities for legal change before the court.'") (quoting Teles, at 221 (2008)).

[53] Letter from Robert O'Neil to James Mingle (Jan. 27, 1992) (on file with Special Collections).

[54] Compl. (Jul. 11, 1991) (on file with Special Collections).

[55] Letter from James Mingle to John Jeffries (Aug. 26, 1991) (on file with Special Collections); Letter from James Mingle to Robert O'Neil (Aug. 26, 1991) (on file with Special Collections).

[56] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175 (W.D. Va. 1992).

[57] University of Virginia, https://universitycounsel.virginia.edu.

[58] Note from Paul Forch to James Mingle (Feb. 10, 1992). ("Jim=why didn't these changes get incorporated [in the Defendant's Brief in Opposition to Plaintiff's MSJ] . . . Bit disconcerting to have this work done [at the AG's office] for you . . . only to have it omitted.")

[59] Mot. to Dismiss (Aug. 30, 1991) (on file with Special Collections).

[60] Def. Motion for Summary Judgement (Nov. 11, 1991) (on file with Special Collections).

[61] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175, 178 (W.D. Va. 1992).

[62] Brad Wilcox, "Wide Awake Cries Hypocrisy," *University Journal*, Apr. 24, 1991 (on file with Special Collections). ("Wide Awake Executive Editor Rob Prince accused members of the Student Activities of 'hypocrisy' for funding Black Voices 1990–1991 saying 'they have just as much religious expression as we have in our magazine.'")

[63] Affidavit of Saquib Lakhani, President of Muslim Students Organization (Dec. 13, 1991) (on file with Special Collections); Affidavit of Michael Tow, President of Jewish Law Students Association (Dec. 11, 1991) (on file with Special Collections). Very similar affidavits were taken from the President of the C.S. Lewis Society as well as the President of Black Voices.

[64] Letter from James Mingle to John Jeffries (Aug. 26, 1991) (on file with Special Collections); Letter from James Mingle to Robert O'Neil (Aug. 26, 1991) (on file with Special Collections).

[65] Letter from Ronald Stump to James Mingle (Nov. 26, 1991) (on file with Special Collections).

[66] Resp. Brief, *Rosenberger v. Rector and Visitors of the University of Virginia*, 1995 WL 16452 (1995), 7.

[67] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175 (W.D. Va. 1992). Interestingly, examining the original *Wide Awake* constitution shows that the district court in fact misquoted the document, writing that *Wide Awake*'s constitution aimed to "publish a magazine of philosophical and religious *expressions*" as opposed to its stated aim to publish a Christian journal of "religious expression." This misquotation is likely of minimal import, but does have minor interest to the extent that "expressions" suggests a more pluralistic perspective than does "expression." Other scholarship, presumably referencing the district court's language, has repeated and promulgated the flawed language: See Robert L. Kilroy, "Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of *Rosenberger v. Rector & Visitors of the University of Virginia*," 6 *Cornell J. L. & Pub. Pol'y* 701 (1997); Shannon Romero, "*Rosenberger v. Rector in University of Virginia:* A Wolf in Sheep's Clothing," 22 *J. Contemp. L.* 253 (1996); Luba L. Shur, "Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest," 81 *Va. L. Rev.* 1665 (1995).

[68] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175, 180–83 (W.D. Va. 1992), aff'd, 18 F.3d 269 (4th Cir. 1994), rev'd, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[69] Resp. Brief, *Rosenberger v. Rector and Visitors of the University of Virginia*, 1995 WL 16452 (1995), 31.

[70] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 18 F.3d 269, 270 (4th Cir. 1994).

[71] Bezanson, at 190 ("Jeffries had been involved in the Rosenberger case from the beginning, winning the case for the university in the district court and the court of appeals.") (without citation and not discussing anyone but Jeffries).

[72] 18 F.3d 269 at 270, 281.

[73] The *Wide Awake* archival boxes from the general counsel's office contain stacks of news clippings, as well as correspondences indicating that the news about the case was being tracked (on file with Special Collections).

[74] Letter from James Mingle to Frank L. Hereford and Joshua P. Darden (Dec. 15, 1994) (on file with Special Collections).

[75] Appropriations Committee Deliberations, Wide Awake (undated) (on file with Special Collections).

[76] Letter from Ronald Stump to Waller H. Horsley (Jan. 14, 1991) (on file with Special Collections).

[77] Letter from Louise M. Dudley to Essie E. Stalls (Aug. 24, 1994) (on file with Special Collections) ("I am responding to your recent letter [regarding the suggestion that] Christians are not allowed to attend the University of Virginia."); Letter from Melinda D. Church, Assistant to the University President, to Jerome K. Layton (Jul. 22, 1994) (on file with Special Collections) (informing the letter writer that contrary to his impression, the "University has never barred publication of Wide Awake").

[78] Letter from Louise M. Dudley to Essie E. Stalls (Aug. 24, 1994) (on file with Special Collections).

[79] Letter from James Mingle to John Jeffries (Sep. 6, 1994) (on file with Special Collections).

[80] Letter from James Mingle to Robert O'Neil (Sep. 6, 1994) (on file with Special Collections).

[81] Letter from Paul Forch to James Mingle (Sep. 21, 1994) (on file with Special Collections); see also Letter from Paul Forch to James Mingle (Nov. 7, 1994) (predicting, after the Supreme Court did indeed grant cert: "uVa [sic] will lose this one. Do you want to bet and add to your liability?").

[82] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 513 U.S. 959 (1994) (granting cert).

[83] Notes from Meeting of the Board of Visitors (Nov. 12, 1994) (on file with Special Collections).

[84] It appears that they voted outside the presence of Gilmore. The following notes are of the Nov. 12, 1994, Board meeting. The notes are in Mingle's handwriting (in my opinion), but it is not entirely clear whether or not he was present, or if the notes come from someone else recounting the events of the meeting to him. However, the detail of the notes informs the assumption that he was present.

[85] Douglas, "Triumph of the Neutrality Principle," 261; University of Virginia, https://universitycounsel.virginia.edu; see generally Michael Singer, "Constitutional Crisis in the Commonwealth: Resolving the Conflict between Governors and Attorneys General," 41 *U. Rich. L. Rev.* 43 (2006–07).

[86] Notes from Meeting of the Board of Visitors (Nov. 12, 1994) (on file with Special Collections); Draft of Letter from Hovey S. Dabney to James Gilmore (Nov. 14, 1994) (on file with Special Collections).

[87] Notes from Meeting of the Board of Visitors (Nov. 12, 1994) (on file with Special Collections).

[88] Letter from Hovey S. Dabney, Rector, University of Virginia to James Gilmore, Virginia Attorney General (Nov. 17, 1994) (on file with Special Collections). ("The Board was also concerned about the effect of your suggestion that we settle the case at this stage of the litigation.")

[89] Gilmore Visit to BOV Talking Points Memorandum (Nov. 9, 1994) (on file with Special Collections).

[90] Letter from Hovey S. Dabney, Rector, University of Virginia to James Gilmore, Virginia Attorney General (Nov. 17, 1994).

[91] Notes from Meeting of the Board of Visitors (Nov. 12, 1994) (on file with Special Collections) (noting Broadhead & McNeely's position).

[92] Letter from Hovey S. Dabney, Rector, University of Virginia to James Gilmore, Virginia Attorney General (Nov. 17, 1994).

[93] Notes from Meeting of the Board of Visitors (Nov. 12, 1994) (on file with Special Collections).

[94] Press Release, University of Virginia (Nov. 17, 1991) (on file with Special Collections).

[95] Interestingly, archival documents reveal the timing of these clashing press releases was not planned, and was in fact a coincidence. Email from Leonard Sandridge to John Jeffries, Peter Low, Jim Jeffries, Elizabeth Zintl (Nov. 17, 1991) (on file with Special Collections) ("[T]he UVA press release will be released early this afternoon . . . We have learned that the AG is sending out a press release today (our timing turns out to be good).").

[96] Press Release, Office of the Attorney General of Virginia (Nov. 17, 1991) (on file with Special Collections) (stating that "this is a case about free speech. The issue is whether speech expressing a religious viewpoint enjoys the same protection against government discrimination as other forms of speech").

[97] Letter from Ronald Stump to James Mingle (Nov. 1, 1994) (on file with Special Collections) ("I understand . . . that the U's brief will not get going for a month or so").

[98] Letter from John Jeffries to James Mingle (Jan. 27, 1995) (on file with Special Collections).

[99] By late 1994, the legal team was established, and would include Mingle, Jeffries, Peter Low, and Lynn Lawson. Notes Meeting re: Wide Awake (Nov. 29, 1994) (on file with Special Collections). The University apparently considered outside counsel, but decided to continue using only in-house resources. Letter from James Mingle to James Gilmore (Dec. 5, 1994) (on file with Special Collections).

[100] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections). ("I appreciate your central role in writing the brief, as well as the assistance of Lynn, Peter, and Earl.")

[101] *Ibid.*

[102] Conversation with John C. Jeffries Jr.

[103] John Jeffries, Memo (Dec. 14, 1994) (on file with Special Collections); see also John Jeffries, Memo (Jan. 9, 1995) (on file with Special Collections).

[104] *Ibid.*

[105] Resp. Brief, Rosenberger v. Rector and Visitors of the University of Virginia, 1995 WL 16452 (1995), 7.

[106] Antonin Scalia, **Scalia Speaks: Reflections on Law, Faith, and Life Well Lived** 419 (2017).

[107] Joan Biskupic, **American Original** (2009) (discussing, in Chapter Six, Scalia's nomination process).

[108] Previous recipients include Hardy C. Dillard, Dumas Malone, and William H. Webster. Nomination of William H. Webster: Hearings Before the S. Select Comm. on Intelligence, 100th Cong. (1987). In 2017, John Jeffries received the award. Matt Kelly, Jeffries, Rheuban Earn Thomas Jefferson Awards at Fall Convocation, Nov. 3, 2017, https://news.virginia.edu/content/jeffries-rheuban-earn-thomas-jefferson-awards-fall-convocation.

[109] Kelly, 118; Rebecca P. Arrington, Justice Antonin Scalia to Receive U.Va.'s 32nd Thomas Jefferson Foundation Medal in Law, Feb. 14, 2008, *UVA Today*, https://news.virginia.edu/content/justice-antonin-scalia-receive-uvas-32nd-thomas-jefferson-foundation-medal-law (describing the award).

[110] Letter from Antonin Scalia to Robert M. O'Neil (Nov. 9, 1989) (on file with Special Collections).

[111] Letter from Robert M. O'Neil to Antonin Scalia (Nov. 17, 1989) (on file with Special Collections).

[112] Email from Alexander Gilliam to Elizabeth Zintl, John Casteen, and Gordon Burris (Feb. 8, 1995, 14:43 EST) (on file with Special Collections). ("Bob . . . remembers no contact at all with him after the letter.") Casteen then forwarded this email to Mingle and Low.

[113] Email from John Blackburn to John Casteen (Feb. 6, 1995, 12:14 EST) (Casteen then forwarded this email to Mingle and Low).

[114] Email from Alexander Gilliam to Elizabeth Zintl, John Casteen, and Gordon Burris (Feb. 8, 1995, 14:43 EST) (on file with Special Collections).

[115] Memorandum from Lynn Lawson and James Mingle Re: Pros/Cons of JM v. JJ Arguing the Case (Jan. 19, 1995) (on file with Special Collections).

[116] Letter from John Jeffries to James Mingle (Jan. 27, 1995) (on file with Special Collections).

[117] Louis J. Verrilli III, Supreme Court Recusal, ACS Forum (Oct. 28, 2020).

[118] Email from James Mingle to Peter Low, John Casteen, Elizabeth Zintl, Alexander Gilliam, and Jack Blackburn (Feb. 9, 1995, 14:40 EST) (on file with Special Collections).

[119] Email from Elizabeth Zintl to Peggy E. Kite (Feb. 10, 1995, 12:09 EST) (on file with Special Collections); Email from Alexander Gilliam to Peggy E. Kite (Feb. 9, 1995, 15:07 EST) (on file with Special Collections).

[120] Andrew Martin, "Saying Goodbye to Nino," UVA Lawyer (2016) https://www.law.virginia.edu/uvalawyer/article/saying-goodbye-%E2%80%98nino%E2%80%99; see also, Arrington, "Justice Antonin Scalia to Receive U.Va.'s 32nd Thomas Jefferson Foundation Medal in Law."

[121] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections) (Mingle writes that his "litigation (trial and appellate) experience, and knowledge of the substantive arguments, factual background, and the procedural history" were "pluses" weighing in favor of him arguing the case).

[122] Letter from John Jeffries to James Mingle (Jan. 27, 1995) (on file with Special Collections).

[123] Memorandum from Lynn Lawson and Jim Mingle Re: Pros/Cons of JM v. JJ Arguing the Case (Jan. 19, 1995) (on file with Special Collections).

[124] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections).

[125] Memorandum from Lynn Lawson and Jim Mingle Re: Pros/Cons of JM v. JJ Arguing the Case (Jan. 19, 1995) (on file with Special Collections).

[126] Memorandum from Lynn Lawson and James Mingle Re: Pros/Cons of JM v. JJ Arguing the Case (Jan. 19, 1995) (on file with Special Collections).

[127] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections).

[128] Memorandum from Lynn Lawson and James Mingle Re: Pros/Cons of JM v. JJ Arguing the Case (Jan. 19, 1995) (on file with Special Collections). ("Clerks are likely to be academic types; may find Jeffries more appealing.")

[129] *Ibid.* (on file with Special Collections) (noting that Jeffries was a "[f]riend of conservatives on Court – [we] need to think about which votes we can count on").

[130] Letter from John Jeffries to James Mingle (Jan. 17, 1995) (on file with Special Collections).

[131] Letter from James Mingle to John Jeffries (Jan. 19, 1995) (on file with Special Collections).

[132] Letter from James Mingle to Robert O'Neil (Feb. 10, 1995) (on file with Special Collections).

[133] Letter from John Jeffries to James Mingle (Jan. 17, 1995) (on file with Special Collections).

[134] Rosenberger v. Rector and Visitors of University of Virginia, 1995 WL 117631 (U.S.), 30–31 (U.S. Oral. Arg., 1995).

[135] *Ibid.* at 37. Note that is consonant with the argument the University made in the District Court that the SAF was not a public forum. Cf. Bezanson, at 211 (claiming that with this statement in the oral argument, "here Jeffries is making a new . . . argument").

[136] Letter from John Jeffries to James Mingle (Mar. 2, 1995) (on file with Special Collections) (writing that the questions the justices asked do not "allow much optimism about the outcome").

[137] Letter from James Mingle to John Jeffries (Mar. 13, 1995) (on file with Special Collections). ("[T]here may be close cases, but this case – with Wide Awake's undisputed religious character—is not it.")

[138] Letter from John Jeffries to James Mingle (Mar. 2, 1995) (on file with Special Collections).

[139] Letter from James Mingle to John Jeffries (Mar. 13, 1995) (on file with Special Collections).

[140] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829, 830, 831, 835 (1995). ("The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.")

[141] *Ibid.* at 837–38, 843, 845.

[142] *Id.* at 847–48 (O'Connor, J., concurring).

[143] *Id.* at 854 (1995) (Thomas, J., concurring); Id. at 868 (Souter, J., dissenting).

[144] *Id.* at 868, 880 (Souter, J., dissenting). ("Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause.")

[145] *Id.* at 892–3 (Souter, J., dissenting).

[146] *Id.* at 895 (Souter, J., dissenting).

[147] *Id.* at 896 (Souter, J., dissenting).

[148] Ana Puga, "Justices Side With Religious Group on Funds," *The Boston Globe*, Jun. 30. 1995. Newspapers in this section were featured in 1995 *Sup. Ct. Preview* 93 (1995–96).

[149] Ellen Debenport, "Supreme Court Asserts Religious Freedom," *St. Petersburg Times*, Jun. 30, 1995.

[150] David G. Savage, "High Court Ends Term: Court Calls for 'Neutral' Approach to Religion Issues," *Los Angeles Times*, Jun. 30, 1995.

[151] See Richard S. Albright, "Constitutional Law – First Amendment," 73 *U. Det. Mercy L. Rev.* 789, 791 (1996); Kara R. Moheban, "Constitutional Law," 115 S. Ct. 2510 (1995), 30 *Suffolk U. L. Rev.* 237, 247 (1996); "Note, Viewpoint Discrimination – Funding for Religious Publication" 109 *Harv. L. Rev.* 210, 214 (1995). ("The Court's decision in Rosenberger was one of last Term's finest.")

[152] See Robert L. Kilroy, "Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of Rosenberger v. Rector & Visitors of the University of Virginia," 6 *Cornell J. L. & Pub. Pol'y* 701 (1997); Kristine Kuenzli, "Opportunity Wasted: The Supreme Court's Failure to Clarify Religious Liberty Issues in Rosenberger v. Rector and Visitors of the University of Virginia," 32 *Gonz. L. Rev.* 85, 121 (1997).

[153] Debenport, "Supreme Court Asserts Religion Freedom," 186. ("Officials at Old Dominion University and the College of William and Mary say they, too, will rewrite their guidelines. Under their current rules, they said, a publication such as 'Wide Awake' would not have been funded.")

[154] Letter from Michael McDonald to Lynn Lawson (Jul. 27, 1995) (on file with Special Collections).

[155] Agreement Between the Parties Pending in the District Court (May 14, 1996) (on file with Special Collections).

[156] Letter from Michael McDonald to Lynn Lawson (Jul. 27, 1995) (on file with Special Collections).

[157] Memorandum from Lynn Lawson and Earl Dudley to Student Activities Fee Task Force Memo Re: Limitations and Options in Response to *Rosenberger* Decision (on file with Special Collections).

[158] Notes from the President's Cabinet Meeting (Jul. 6, 1995) (on file with Special Collections) (noting that new allocations would need to be made in September).

[159] Letter from William Hurd, Deputy Attorney General of Virginia, to Earl Dudley, Special Assistant Attorney General at the University of Virginia (Aug. 21, 1995) (on file with Special Collections).

[160] Memorandum from Lynn Lawson and Earl Dudley to Student Activities Fee Task Force Memo Re: Limitations and Options in Response to *Rosenberger* Decision (on file with Special Collections).

[161] Memorandum from Stephanie Bland to Lynn Lawson (Jul. 24, 1995) (on file with Special Collections) ("The best way for the University to avoid future challenges to the manner in which student activity fees are allocated involves avoidance of the state action doctrine. In First and Fourteenth Amendment litigation, a plaintiff can only bring a claim if the defendant acted under 'color of' state law."); Memorandum from Lori Schweller to Lynn Lawson (Jul. 22, 1995) (on file with Special Collections) ("My impression is that making fees voluntary eliminates the element of compulsion that causes the First Amendment violation.") (citing *Carroll v. Blinkin* 957 F. 2d 991 (2nd Cir. 1992); *Smith v. Univ. of Cal.* 844 P.2d 500 (Cal. 1993)).

[162] Memorandum from Lynn Lawson and Earl Dudley to Student Activities Fee Task Force Memo Re: Limitations and Options in Response to *Rosenberger* Decision (on file with Special Collections).

[163] *Ibid.*

[164] *Ibid.*

[165] *Ibid.*

[166] Memorandum from Lynn Lawson and Earl Dudley to Student Activities Fee Task Force Memo Re: Limitations and Options in Response to *Rosenberger* Decision (on file with Special Collections).

[167] *Ibid.*

[168] Board of Visitors Minutes, Aug. 21 1995, University of Virginia Library Online, http://xtf.lib.virginia.edu/xtf/view?docId=2006_01/uvaGenText/tei/bov_1995-08-21.xml;query=%22wide%20awake%22%20%22board%20of%20visitors%22;brand=default.

[169] 515 U.S. 819, 833 (1995). ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.") (citing *Rust v. Sullivan*, 500 U.S. 173, 196–200 (1991)); Louis Michael Seidman, "The Dale Problem: Property and Speech Under the Regulatory State," 75 *U. Chi. L. Rev.* 1541, 1571–73 (2008) ("Rosenberger maintains, rather than

destroys, government discretion either to keep the money itself and use it to promote its own message or to give it to private individuals who can use it for whatever message they desire . . . [If the government] instead keep[s] the money and use[s] it for its own purposes . . . free speech rights disappear.")

[170] Discussion with Fredrick Schauer (2019) (discussing this tension and the idea of a Catch-22); Frederick Schauer, "Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment," 2015 *Sup. Ct. Rev.* 265, 299 (2015) (discussing tension in the doctrine).

[171] See Catherine E. Lilly, "Rosenberger v. Rector and Visitors of University of Virginia: The Supreme Court Revisits the Framers' Intent behind the Religion Clauses," 22 *J. Contemp. L.* 485 (1996); Jennifer Lynn Davis, "Serpentine Wall of Separation between Church and State: Rosenberger v. Rector and Visitors of the University of Virginia," 74 *N.C. L. Rev.* 1225 (1996).

[172] "First Amendment-Establishment Clause-Government Display of Religious Symbols-American Legion v. American Humanist Ass'n," 133 *Harv. L. Rev.* 262, 265 (2019).

[173] See generally, Christopher C. Lund, "Religion Is Special Enough," 103 *Va. L. Rev.* 481, 482–83 (2017). ("Virtually every case involving the Religion Clauses carries with it questions about religion's distinctiveness . . . Such questions now stand front and center in conversations about the meaning of the Religion Clauses"); Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism," 99 *Va. L. Rev.* 917, 956 (2013); Christopher L. Eisengruber & Lawrence G. Sager, **Religious Freedom and the Constitution**, 35 (2007). ("Everson's "no aid" idea . . . suggests that government must treat religious viewpoints worse than others if equal treatment would benefit religion.")

[174] Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism," 99 *Va. L. Rev.* 917, 956 (2013). ("The Court has found it impermissible to treat religious speakers worse than their secular counterparts [citing *Rosenberger*]. Religious institutionalism, by contrast, would arguably counsel treating churches better than their secular analogs.) & Esther Diskin, "Religious Free Speech," *The Virginian-Pilot and The Ledger-Star*, Jun. 30, 1995 (Jay Sekulow commented regarding the *Rosenberger* case: "We have crossed a critical threshold in the fight for religious liberty . . . The message is clear: Religious speech or speakers must be treated exactly the same way as any other group.")

[175] See the discussion of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* in Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism," 99 *Va. L. Rev.* 917, 974 (2013).

[176] See Micah Schwartzman, "What If Religion Is Not Special?," 79 *U. Chi. L. Rev.* 1351, 1354–55 (2012). ("Some theories hold that religion should not be treated differently from secular ethical and moral views under the Establishment Clause, but that it should be given more favorable treatment under the Free Exercise Clause. Another set of theories takes the opposite view, namely that religion should be distinctively disfavored under the Establishment Clause but not given any special treatment under the Free Exercise Clause. More recently, some have argued that religion is morally distinctive in both contexts, while others have argued that it is not special in either of them.")

[177] See generally, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Widmar v. Vincent*, 454 U.S. 263, 265, 102 S. Ct. 269 (1981).

Rachael E. Jones is a student at University of Virginia School of Law.

BOOK REVIEW

Workers Against the City: The Fight for Free Speech in Hague v. CIO by Donald W. Rogers, (University of Illinois Press, Urbana, Illinois, 2020)

Reviewed by Henry S. Cohn

Donald Rogers, a lecturer in history at Central Connecticut State University and a board member of several Connecticut civic and historical societies, including the Connecticut Supreme Court Historical Society, previously published an article on the rights of assembly at the open-space courtyard of an indoor mall.[1] Now he has written a refreshing and thorough study of the Supreme Court case of *Hague v. Committee for Industrial Organization*,[2] which considered the constitutionality of municipal restrictions on outdoor assembly.

The *Hague* case began in 1937, when the CIO labor union distributed flyers in Jersey City, New Jersey, a busy port city adjacent to New York City. The CIO's action was opposed by Frank Hague, Jersey City's mayor. Although Hague had begun his career as a reforming Jersey City council member, rooting out corruption and inefficiency, by 1937 he had amassed executive power and become "the boss." His administration was known to be corrupt. The media repeated his frequent declaration, "I am the law!" Unions did not fit into Hague's goal of attracting businesses to Jersey City.

On November 29, 1937, Hague turned a cadre of police on a group of CIO members marching to a site in the city where a demonstration was to take place. He relied upon a 1924 ordinance banning leafleting and on a permit-requirement ordinance of 1930. The police destroyed handouts, arrested some marchers, and even "deported" some unionists to the town line. This type of police activity continued in the city for the next few months.

The CIO's lawyers, of course, opposed the anti-labor nature of Hague's enforcement activities, but the entry of the American Civil Liberties Union (ACLU) into the controversy turned the dispute into a civil rights struggle. The CIO and the ACLU sought relief in the New Jersey Federal District Court early in 1938. The plaintiff-union members' evidence consisted of a recitation of the brutality against them as they attempted to distribute their literature and to hold demonstrations. Hague's lawyers relied upon the city's rights to control assembly as set forth in its 1924 and 1930 ordinances. Hague claimed that a municipality had unfettered control over the use of municipal streets and open spaces. Under questioning by ACLU's legendary attorney Morris Ernst, Hague charged that the labor union membership included dangerous Communists. He sought to make a statement that Ernst was a "Red" himself, but the district judge refused to permit it.

The district judge was Coolidge appointee William Clark, a great-grandson of Simon Cameron, a member of Abraham Lincoln's Cabinet. In 1930, in an independent streak, he had held that the Eighteenth Amendment providing for prohibition was unconstitutional, because it was not adopted by constitutional convention but rather by state legislative ratification. His opinion was reversed on appeal. In 1938, while Clark was presiding over *Hague*, President Franklin D. Roosevelt appointed him to the Third Circuit Court of Appeals. In 1943, during World War II, he resigned his judgeship to join the U.S. Army. After the war, he lost a case in the Court of Claims in which he sought to return

DOI: 10.1111/jsch.12260

Mayor Frank Hague of Jersey City, who opposed the CIO labor union's distribution of flyers, is shown lighting his cigar with the Constitution and Bill of Rights.

to the bench. He held thereafter the quasi-judicial appointment of Chief Justice of the Allied High Commission Court of Appeals, stationed in Nuremberg, Germany.

In his *Hague* decision, Judge Clark struck down enforcement of the city's ordinances, referring at the end of his opinion to city officials as "wicked clowns."[3] He declared, "[F]reedom of speech and assembly come within the meaning of liberty as used in the Fourteenth Amendment." He ordered the city to permit the union free movement and to allow it to distribute leaflets and display information. In the only aspect of his opinion that was unfavorable to the plaintiffs, he allowed the city to control union activities in the city parks.

The city appealed to the Third Circuit. Strange stirrings seemed to be occurring behind the scenes.[4] The case initially was to be assigned to a panel of five judges, including two who were retired, one (Joseph Buffington) having cognitive issues and being nearly blind. The CIO and ACLU sought relief from this unusual panel in a petition to the Supreme Court, because under the U.S. Code the normal panel would have been three judges. Although the Court denied the petition, Owen J. Roberts, as the supervising Supreme Court Justice for the Third Circuit, intervened, and it is likely that this intervention led to the setting up of a regular three-judge panel. Professor Rogers states that Judge Buffington had made public negative comments about District Judge Clark's ruling, so the five-judge panel might well have reversed or stayed Clark's ruling.[5]

Another interesting development in the appeal was that the American Bar Association filed an *amicus curiae* brief in favor of the CIO and the ACLU, through a newly formed committee on the Bill of Rights. A former president of the association, Arthur Vanderbilt, a longtime New Jersey opponent of Mayor Hague's, supported the filing. Hague accused Vanderbilt of Communist leanings and tried unsuccessfully to block the filing. The brief, written with the help of the legal scholar Zechariah Chafee, argued that governments had the duty to support free public discussion. The ABA also filed a similar brief in the U.S. Supreme Court.

The three judges on the panel were:

(1) John Biggs Jr. of Wilmington, Delaware, a Roosevelt appointee. He was a graduate of Princeton and Harvard Law School. His college roommate was F. Scott Fitzgerald, and he served as guardian of Fitzgerald's daughter and as the executor of Fitzgerald's will. He remained on the Third Circuit until 1979, hearing close to 4,000 cases and writing 1,500 opinions.

(2) Albert Maris, appointed by Roosevelt to the Eastern District of Pennsylvania and then to the Third Circuit, where he served for over fifty years, from 1938 to 1989, and heard notable civil rights cases. His revision of several federal judicial codes has led to his being called "the father of modernized judicial procedure."[6]

(3) J. Warren Davis, who was appointed to the Third Circuit by Woodrow Wilson

in 1920, after four years as a New Jersey federal district court judge. Three months after *Hague* was decided in the Third Circuit in 1939, Davis was charged criminally with taking a bribe in a bankruptcy case and he switched his status to inactive. In an unusual twist, it was Judge Clark, now on the Third Circuit, who alerted the Justice Department that Davis may have been engaged in illegalities. Also, during the prosecution of Davis, it was revealed that Davis had ghostwritten the infirm Buffington's decisions. That Davis was the presiding judge for the Third Circuit *Hague* appeal could explain the original five-judge panel episode. After two hung juries in 1941, the prosecutor nolle prossed the charges against Davis.

In the *Hague* case, the Third Circuit issued a majority opinion by Judge Biggs, joined by Judge Maris, with Judge Davis dissenting in part.[7] Judge Biggs affirmed Judge Clark's decision, but he modified the district court order to allow the labor union members the right to assemble in the city parks. The three judges agreed that the rights sought were protected by the First Amendment as applied to the states through the Fourteenth Amendment, which thus also supplied the necessary federal jurisdiction. Regarding the parks issue, Judge Biggs distinguished an important precedent relied upon by the city and by Judge Davis' partial dissent, *Davis v. Massachusetts*,[8] in which the defendant was convicted of violating a Boston ordinance that prohibited any person from giving a public address without a permit from the mayor. The Supreme Judicial Court of Massachusetts, in an opinion by its Justice Oliver Wendell Holmes Jr., affirmed the conviction, as did the U.S. Supreme Court. Biggs found *Davis* inapplicable to *Hague* because, in *Hague* the CIO had applied for permits. Biggs also found *Davis* no longer sound law in light of subsequent Supreme Court decisions. Professor Rogers sees Biggs' opinion as taking a new approach to First Amendment right-to-assemble claims, allowing the gathering in public spaces for protests, subject to narrowly tailored state regulation, in contrast with the more restrictive approach that had governed before the 1930s.

Both sides sought certiorari in light of the Third Circuit's decision, and it was granted. Seven justices were seated for the *Hague* case, as Justice William O. Douglas had not been on the Court when the case was argued, and Justice Felix Frankfurter recused himself because of his close previous ties to the ACLU. The seven justices were Chief Justice Charles Evans Hughes, a Hoover appointee as chief justice and a moderate; Justice Harlan F. Stone, a Coolidge appointee and a moderate; Justice Owen J. Roberts, a Hoover appointee, famous for his "switch" during the Roosevelt Court-packing dispute; Justice Hugo L. Black, Roosevelt's first appointee; Justice Stanley Reed, a 1938 Roosevelt appointee and former solicitor general; and the two remaining "horsemen" of conservativism, Justices James Clark McReynolds and Pierce Butler.

On February 27–28, 1939, the case was argued and, on June 5, 1939, the Court issued its opinions. Justice Roberts wrote a plurality opinion joined by Black and in part by Hughes, constituting a modified affirmance of the Third Circuit. Justice Stone wrote a concurring opinion in which Justice Reed joined. Chief Justice Hughes wrote a separate concurring opinion, joining Justice Roberts in part and Justice Stone in part. Justices McReynolds and Butler each filed a dissent.

Professor Rogers reports that Chief Justice Hughes' choice of Justice Roberts to write the lead opinion may be explained by his social ties to Roberts. There was a question about the assignment because Hughes had issued a concurring opinion, agreeing in part with Justice Stone's concurring opinion. Professor Rogers states that Justice Stone had had a falling out with Hughes and that this led to the choice of Roberts. The holding in

Hague would have been clearer if Stone had written the main opinion, instead of Roberts, according to Rogers.[9]

Justice Roberts' opinion followed the two lower courts in distinguishing *Davis v. Massachusetts* and their injunctive orders against the city, with minor adjustments. He approved of the injunction issued against the city in this case, but he modified it by removing the lower courts' subsidiary orders setting forth the exact terms of any revised city ordinances. Roberts famously found that streets and parks "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions."

Roberts' rationale was unique, however. The assembly rights were based on the Fourteenth Amendment's provision on the privileges and immunities of national citizenship, not on the incorporation of the First Amendment in its Due Process Clause. The Privileges and Immunities Clause also provided the statutory jurisdiction for the case to be heard in federal court. There was no need to show actual damages. The jurisdictional holding rejected a key argument by the city and established a precedent. The city raised the issue that there was no subject matter jurisdiction for an injunctive action in federal court under the U.S. Code. The city further claimed that the plaintiffs had not proved damages in the amount of $3,000. Justice Roberts, in a precedent-setting holding on jurisdiction, found that the federal civil rights statute, now codified as 42 U.S.C. section 1983, provided jurisdiction. This statute provided that jurisdiction in federal court existed for rights allegedly secured by the Constitution, here the Privileges and Immunities Clause. Under 42 U.S.C. section 1983, there was no requirement to prove damages.

Justice Stone's concurrence accepted the approach of Judge Biggs that the Due Process Clause of the Fourteenth Amendment incorporated the right of assembly set forth in the First Amendment. The jurisdiction must be based on a federal right under the Due Process Clause, as the plaintiffs had not satisfied the Privileges and Immunities Clause. Chief Justice Hughes straddled the fence, stating that he concurred in general with Justice Roberts on the right to assemble, but found jurisdiction under Stone's approach. Justices McReynolds and Butler dissented on the ground that *Davis* was still good law and that the city had wide powers to restrict assembly.

Professor Rogers' analysis of *Hague* is incisive and original. First, he points out that the case did not involve merely correcting the actions of one rogue mayor, as some scholars have written. There were other cities with administrations equally eager to crack down on demonstrators. According to Rogers, the significance of *Hague* is more complex and broader. A contribution of the book is that it explains *Hague* in terms of the general development of the right of freedom of assembly.

Second, because of the procedural history of the case, *Hague* did not have a major effect on labor law cases. It was a civil rights case. When the CIO in the future sought to hold mass meetings or to picket, *Hague* was not especially relevant as a precedent.[10]

Most importantly, Rogers concludes that *Hague* should not be read as a triumph for the First Amendment's right to assemble. It was more a transitional case from *Davis* to modern First Amendment holdings. With Justice Roberts relying on the Privileges and Immunities Clause and Justice Stone relying on the Due Process Clause, *Hague's* message was muddled. Even Chief Justice Hughes' opinion is unclear, as he adopted Roberts' use of the Privileges and Immunities Clause, but undercut it by agreeing with Stone that that clause presented a jurisdictional problem.

Rogers notes that today we still debate the limits of municipal power. One might compare *Edwards v. South Carolina*[11] with *Adderly v. Florida*.[12] *Edwards* held that protesters could not be arrested for peaceably

demonstrating for a cause, whereas *Adderly* allowed the county to draw a line at protests at a jail.

Rogers has chosen excellent photographs for his book, including four by prize-winning photographer Margaret Bourke-White that appeared in a February 7, 1938 *Life Magazine* report on Frank Hague's exploits.

Notes

[1] D. Rogers, "Bombshell or Bellwether? The Story of *Cologne* v. *West Farms Associates*," VII *Connecticut Supreme Court History* 1 (2014), discussing *Cologne* v. *West Farms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984). The majority in *Cologne* with two dissents held that the courtyard was not the equivalent of a town green, and the management of the mall could exclude a group that wanted to petition in favor of the Equal Rights Amendment.

[2] 307 U.S. 496 (1939). [Hereinafter CIO].

[3] *CIO v. Hague*, 25 F. Supp. 127 (D.N.J. 1938).

[4] See Benjamin Kaplan, "The Great Civil Rights Case of *Hague* v. *CIO*: Notes of a Survivor," 25 *Suffolk Law Review* 913 (1991).

[5] Rogers, 146; see also, Kaplan, 922, note 27.

[6] For example, see legal-dictionary. the free dictionary.com. for Albert Branson Maris.

[7] *Hague v. CIO*, 101 F.2d 774 (3d Cir. 1939).

[8] 167 U.S. 43 (1897).

[9] Rogers, 168.

[10] *Ibid.*,186.

[11] 372 U.S. 229 (1963) (First Amendment right to assemble at protest over segregation).

[12] 385 U.S. 39 (1969) (Justice Black's majority opinion held that assembly at a county jail was not protected).

Henry S. Cohn is a Trial Judge Referee in Connecticut

Contributors

Joseph Angelillo is currently pursuing a Ph.D. in American Constitutional History at the University of Florida.

Henry S. Cohn is a Judge Trial Referee in Connecticut.

Clare Cushman is Director of Publications and Resident Historian, Supreme Court Historical Society.

Ruthanne Deutsch is a founding partner at Deutsch Hunt PLLC.

Matthew Hofstedt is the Associate Curator of the Supreme Court of the United States.

Rachael E. Jones is a law student at University of Virginia School of Law.

Craig Alan Smith is a Professor of History and Political Science at California University of Pennsylvania. He is currently writing a new biography of Justice Tom C. Clark.

Clarence Thomas is Associate Justice of the Supreme Court.

DOI: 10.1111/jsch.12261

Illustrations

Page 8, AP Images, photo by Pablo Martinez Monsivais
Page 11, Courtesy of Ruthanne Deutsch
Page 14, Courtesy of The National Museum of American History
Page, Currier & Ives engraving, Courtesy of the Metropolitan Museum of Art
Page 17, (both) Collection of the Supreme Court of the United States
Page 19, Sketch by T. Dart Walker, *Harper's Weekly,* February 24, 1894, page 173.
Page 30, Both images by Matthew Hofstedt, Curator's Office, Supreme Court of the United States
Page 35, Engraving by Alonzo Chappel published by Johnson, Fry & Co. Collection of the Supreme Court of the United States
Page 45, Virginia Clay-Clopton, **A Belle of the Fifties: Memoirs of Mrs. Clay, of Alabama, Covering Social and Political Life in Washington and the South, 1853–66** (New York: Doubleday, Page & Company, 1905),164.
Pages 48, 51, 53, 54, 59, Library of Congress
Page 65, Collection of the Supreme Court of the United States
Page 66, U.S. House of Representatives
Page 68, Cleveland Public Library
Page 70, Courtesy of Jones Day
Page 72, *Washington Star,* 1913
Page 73, *Martindale's American Law Directory*
Page 75, Collection of the Supreme Court of the United States
Page 85, LBJ Library, photographer unknown.
Page 87, White House photo.
Page 89, LBJ Library, photo by Yoichi Okamoto
Page 92, Photo by Mike Geissinger. White House Press Photo.
Page 97, LBJ Library, photo by Yoichi Okamoto
Page 109, https://www.flickr.com/photos/8136496@N05/1849131201.
Page 114, Library of Congress
Page 120, AP Images, photo by Denis Paquin
Page 132, *Daily Worker*, December 1, 1937, Prints and Photographs Division Library of Congress

Cover: Ruth Bader Ginsburg, photographed in 1993 at her confirmation hearings by Michael R. Jenkins. Library of Congress.

Correction: The college attended by Willis Van Devanter, Indiana Asbury University in Greencastle Indiana, was renamed DePauw University in 1884.

DOI: 10.1111/jsch.12262