A Note from the Editor (Emeritus)

Melvin I. Urofsky

It is hard for me to believe that I have been the chair of the board of editors for twenty-eight years. I certainly did not think my tenure would last this long when I went up to Washington from Richmond to meet Leon Silverman and David Pride one afternoon in 1993. Leon handed me a copy of what was then known as the *Yearbook of the Supreme Court Historical Society* and asked me what I thought.

Since I had never met either one of these men before (the meeting had been arranged by an old friend of mine, Dr. Maeva Marcus, the head of the Documentary History Project), I felt I had nothing to lose and so told them: with very few exceptions, the articles were not original, but had been published elsewhere; many were from law reviews, a source known far and wide for deadly dull writing; and the topics were, at least to me, not very interesting. I expected that this negative assessment would not be received well, but then they asked me what I would do to change it.

Still having no clue that this was actually an audition, I said that the production quality was good, in terms of paper, layout, etc., but the content should be changed. Publish only original articles. Do not accept law review-type pieces that focused on doctrine; the membership, mostly lawyers, could get those elsewhere. Make it a history journal, and while the articles could be written by people who were not historians (political scientists, lawyers, judges, etc.), all the articles should relate to the Society's mission—promulgating the history of the United States Supreme Court. This history should be interpreted widely, and could include articles on important cases, justices, the building, but all had to be interesting. Finally, I told them that if the Society wanted to have a serious journal, it had to come out more than once a year.

When I finished, I expected Leon and David would thank me politely, and let me go back to Union Station. Instead, they were smiling broadly (and Leon smiling broadly was something to behold) and congratulated me on becoming the new editor! I was nonplussed, and the two of them took my silence as assent, a form of reasoning well known to lawyers and law students. I then protested that I lived in Richmond, that I already had a full plate, but they assured me all would be well. Their secret weapon—Clare Cushman, more about whom in a little bit.

Once I had agreed, sort of, for the next few years I turned into a pain to my colleagues in the field of constitutional history. As I have told readers many times,

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this is a relatively small field in which we all know each other. So I would call, or write, or corner them at one of our professional meetings pleading for an article. I got publishers I knew to alert me when they were going to put out a book that touched on the Court's history, and I would try to get the author to pull out an article for the *Journal*, a journal, I might add, that at the time was not widely known in the field.

Then we had a stroke of luck, when the Society and the Jewish Historical Society of Washington joined in sponsoring a lecture series on the Jewish justices. Although there had been some skepticism about how popular the topic would be, it turned out that a lot of people were interested, and the Courtroom, where the lectures took place, was filled for every event. When the discussion turned to publication, I suggested that this could be a separate issue of what has now become the *Journal of Supreme Court History*. Moreover, the leaders of the Society decided that there should be a lecture series each year, today known as the Leon Silverman Lectures. With that decision made, we moved from an annual to a biannual publication, and a few years later the *Journal* began to come out triennially.

While I was soliciting articles, I would often be asked "What kind of articles are you looking for?" My answer would be well-written and interesting pieces about the history of the Court broadly conceived (although I never thought we would get one—and an interesting one—about the "mustache war"),[1] that would appear in a publication akin in style to *American Heritage*—glossy high-quality paper, illustrated, and taking a broad view of its subject.

When my colleagues and people in the field whom I did not know began to send in articles, some of them adaptations of chapters in books they were writing, I felt that in some ways we had achieved the type of publication that I had described in that earlier meeting. In my "introduction" to each issue, I have always written that we have put out a feast and invite the readers to enjoy. Those of us who work on the *Journal* are always encouraged when we hear from our members that they do.

One of the side benefits that accompanied the editorship is that once we began having an annual lecture series, the Society invited me several times to participate. In fact, I gave the first lecture in that first series, one on Louis D. Brandeis in the "Jewish Justices." Another benefit has been that over the years I have had the great good fortune to meet many of the justices. On my study wall I have two pictures of myself, my wife Susan, and two of our grandchildren, one with Justice Elena Kagan, and the other with Justice Sonia Sotomayor. All of us at the Society recognize that the men and women who sit on the High Court are especial friends to the Society.

I mentioned Clare Cushman before, and I have on many occasions said that she is the real heart of the *Journal*. While I may get the articles, it is Clare who is in charge of editing, fact-checking, getting pictures, and making sure the whole process moves forward in an orderly and timely fashion. Clare is also a historian, has written books on the Court, and, from my point of view more importantly, articles for the *Journal*. My gratitude to her for making these twenty-eight years go so well is boundless. And when it came time to turn over the editorship, my first words to my successor were, "You have Clare."

In the past several years, I recognized some important things. First, a new generation of scholars were entering the field, and since I had already retired from the university, I did not know them or their work as well as those of my peers. Second, some friends of mine who headed museums and historical societies were retiring, and all of them said that it was incumbent on them to make sure a successor was at hand. So third, I needed an associate editor from this new generation, one who could continue the work

of reaching out, of soliciting articles, and of making the *Journal* not only known to them, but also ensuring that they saw it as a quality venue for their work. Fourth, that person had to be a respected scholar; you do not run a first-rate scholarly journal with a second-rate scholar.

The person who immediately came to mind was Professor Timothy S. Huebner of Rhodes College, whose work I respected, and who was himself one of the new generation of constitutional scholars. At a meeting I got Tim into a corner to chat, and then said I wanted him to become the associate editor and, in time, my successor. He seemed, at least momentarily, at a loss for words, and having learned from history (I am, after all, a historian), I took his silence for assent. There is no doubt in my mind that, as the knight said in one of the Indiana Jones movies, I "had chosen well."

At this past June's annual meeting of the Society, the leadership accepted my resignation and confirmed Tim as editor. This is the first issue for which he will write the introduction.

The board also passed a resolution thanking me, for which I am grateful, but as I have said on some similar occasions, there is a certain irony here. They have honored me for something that has been a pleasure for me to do. Being the editor of this *Journal* has not been onerous. The editor's hat allowed me to reach out to colleagues, to keep abreast with some of the latest work in the field, to expand my own intellectual horizons as to what constitutes the history of the Court, and to meet some very interesting people. This has been my feast, and I am grateful that I have been able to enjoy it all these years.

ENDNOTES

[1] See Todd C. Peppers, "Chief Justice Melville Weston Fuller and the Great Mustache Debate of 1888," *JSCH* vol 55.2.

Introduction

Timothy S. Huebner

Since this is my first "Introduction" as Editor of the *Journal*, I thought it might be appropriate first to introduce myself.

My interest in Supreme Court history began during my time as a graduate student at the University of Florida, where I earned a Ph.D. in U.S. history under the late Kermit L. Hall. At the time, Kermit was editing the **Oxford Companion to the Supreme Court of the United States**, and as his graduate assistant I spent countless hours reading, editing, and cross-referencing essays for the volume. All of the justices, landmark cases, and important concepts were included, so working on the **Companion** gave me a wide-angle view of the Court. By the time we completed the **Companion** (and I had received my degree), I was hooked. I knew I wanted to spend my academic life thinking, teaching, and writing about the Court and the Constitution. A few years later, I published my first article in the *Journal*, and decade and a half after that, I began serving as Associate Editor. I consider it a high calling—and a real pleasure—to engage students, scholars, and the public about the history of this enduring yet evolving institution. I believe that in doing so, we all become better caretakers of our inherited tradition and wiser participants in our civic life.

This issue contains two essays pertaining to civil rights, one of the most significant issues that the Court has engaged over the course of its history. Robert Whitaker, an Associate Professor of History, Philosophy, and Social Sciences at Hudson Valley Community College, examines the Warren-era justices' speeches in the aftermath of the landmark case, *Brown v. Board of Education*. Whitaker's close study shows the justices' rhetorical attempts to engage in a public dialogue about democracy and equality. Jordan Alexander's essay, in contrast, focuses on the politics of the post-*Brown* era. Alexander, an adjunct history professor at Middle Tennessee State University, examines Edward W. Brooke of Massachusetts, the first popularly elected African-American senator since Reconstruction. Often left out of the narrative of the Civil Rights Movement, Brooke helped thwart President Richard Nixon's two unsuccessful nominees to the Court, Clement Haynsworth, Jr. and G. Harrold Carswell, both of whom seemed to pose a threat to the advancement of civil rights.

Dissenting opinions have been woven into the history of the Court since the early nineteenth century. Charles Cooper's essay chronicles the work of a recent "Lone Dissenter," William H. Rehnquist. A founding

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partner and Chairman of Cooper & Kirk, PLLC, Cooper focuses on Rehnquist's time as an associate justice, when Rehnquist articulated his opposition to the notion of a "living constitution" and emerged as lonely voice among his colleagues, a role that changed once he became the chief and the Court turned toward a more originalist orientation.

As readers of the *Journal* know, these pages always contain a variety of offerings, and this issue is no different. This time we have a photo essay—a collection of pictures taken by John Costelloe, clerk to Justice Robert H. Jackson. John Q. Barret, a Professor of Law at St. John's University School of Law and an expert on Jackson, offers a delightful description of Costelloe's career as well as the photographs of the justices included here. Another unique feature of this issue: poetry. Todd C. Peppers and Mary Crockett Hill have written an engaging account of Chief Justice Melville W. Fuller's career as a poet. Peppers, the Fowler Chair in Public Affairs at Roanoke College and a visiting professor of law at Washington and Lee Law School, is a frequent contributor to these pages. Hill is an assistant professor in the Department of English and Communication Studies at Roanoke College and herself the author of several published collections of poetry. Finally, in addition to Grier Stephenson's Judicial Bookshelf, we have two book reviews by a member of our Board of Editors, Paul Kens.

It is hard to believe that my dear colleague, the *Journal*'s long-serving Editor, Mel Urofsky, has retired. Mel's career as a historian of the Court is so long and so distinguished that he seems to embody the field of Supreme Court history. He certainly made the *Journal* what it is today. Thank you, Mel, for your service to the legal history profession and to the Supreme Court Historical Society. I wish you well and hope that you enjoy this and future issues of the *Journal* that you have done so much to advance.

"Destructive to Judicial Dignity": The Poetry of Melville Weston Fuller

Todd C. Peppers and Mary Crockett Hill

Introduction

In the spring of 1888, President Grover Cleveland nominated Melville Weston Fuller to be the next Chief Justice of the Supreme Court. Fuller's nomination was met with a flurry of peculiar articles in the Democratic-leaning *New York Sun*. One set of articles focused on Fuller's mustache, arguing that the Court was not ready for modern styles of facial hair;[1] the second group of articles asserted that Fuller was a mediocre amateur poet and, as such, was not fit to sit on the high Bench.

Although there have been many debates over the relevant qualifications for a Supreme Court nominee, Fuller's nomination was the first—and last—time in history where the quality of a nominee's verse was debated in national and regional newspapers. In this essay, we weigh the merits of two claims leveled against Fuller: (1) he was a mediocre poet, and (2) his penchant for verse colored and polluted his judicial opinions. As judge and jury, we conclude that neither charge is supported by a preponderance of the evidence.

Fuller as Poet

Melville Weston Fuller was born on January 11, 1833, in Augusta, Maine. Fuller's parents divorced when he was quite young, and he and his older brother Henry were raised by his mother, Catherine. Fuller biographer Willard L. King describes Catherine as a "tiny woman of intense verve" who "fought like a tigress to secure an education for her sons."[2] Catherine doted on her youngest son, "Melly."

At a young age, "books soon became Melville's chief interest in life."[3] Fuller, his brother, and his mother lived with his maternal grandfather, himself once the Chief Justice of Maine's Supreme Judicial Court, and Fuller both devoured his grandfather's personal library and started his own. King describes Fuller as a "methodical little boy" who was also "fussy": "One of his early

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books [in his library] contains this inscription in his childish handwriting 'Whoever reads this book let him not think I bent the leafs as I did not. M.W. Fuller.'"[4]

Fuller's first documented foray into poetry took place when he was sixteen years old and the president and official poet of a local literary society called the "Dialectic Club." Quoting from the club's catalogue, King writes that the club was "'founded for mutual improvement' but was particularly devoted to 'exercises in discussion and composition.'"[5] King does not include any poems written by Fuller during his membership in the club but notes that Fuller took part in the club's theatrical performances, including playing the parts of Macbeth and Brutus in different productions.

In the fall of 1849, sixteen-year-old Fuller enrolled at Bowdoin College. His interests in writing continued, and Fuller joined the Athenaean Society, where he honed his debating skills, and wrote for the local newspaper. The Athenaean Society boasted of an impressive library of over five thousand books, and King writes that Fuller checked out more of these books than did any other student.

As for Fuller's talents at poetry, King is circumspect:

> Of his poetry in college the less said the better, although some of his later poems had more merit. Most of his college poems were odes written for class dinners at the end of the year...[h]e spent the rest of his life trying to live down the reputation as a poet that he thus gained among his classmates.[6]

Of the adult Fuller's skills as a debater, King is kinder. "His extemporaneous style [of debate] far surpassed his prepared speeches in effectiveness," King writes. "His written style had been spoiled as a medium of communication by overindulgence in the classics and Carlyle."[7]

Shortly after his graduation from Bowdoin in the fall of 1853, Fuller suffered the loss of his beloved mother. Catharine's premature death meant that she did not get to see her son enroll in Harvard Law School in 1854. As Fuller struggled with his grief, he poured his feelings into a poem entitled "Remorse."

> I may not flee it! in the crowded street,
>
> Or in the solitude by all forgot,
>
> 'Tis ever there, a visitant unmeet,
>
> Deep in my heart, the worm that dieth not.
>
> There is no consolation in the thought
>
> That from her lips no chiding words were spoken,
>
> That her great soul on earth for nothing sought,
>
> Toiling for me until its chords were broken.
>
> Too late, the knowledge of that deep devotion!
>
> Too late, belief of what I should have done!
>
> Chained to my fate, to suffer the corrosion
>
> Of my worn heart until life's sands are run.
>
> Why should I weep? why raise the voice of wailing?
>
> Why name the pangs that keep me on the rack?

The New Chief Justice as a Poet.

The class of 1853 at Bowdoin College contained a young poet destined to sustain intimate personal and political relations with a certain Man of Destiny, of whose existence he never dreamed until at least thirty years later. MELVILLIUS WESTON FULLER was writing odes to the silver moon that shone upon the campus, and sonnets to the red-headed girls of Topsham, at the time when STEPHEN G. CLEVELAND was braving the panther's howl at Fayetteville. It has been generally but erroneously stated that EDVARDUS JOHANNES PHELPS was likewise a Bowdoin poet, and a classmate of MELVILLIUS. That is not the fact. EDVARDUS first wooed the Muses in the classic shades of Middlebury, Vermont; and he was in politics before MELVILLIUS was out of PALEY. Nevertheless, Destiny has had her eye on the three youths, and at last she brought them together.

Melville Weston Fuller in 1853, the year he graduated from Bowdoin College. Bowdoin celebrated Fuller's collegiate poetry—mostly odes written for class dinners—when he was appointed chief justice in 1888.

> Or prayers or tears alike were unavailing,
>
> She has gone hence! I cannot call her back.
>
> And I alone must wander here forsaken—
>
> In crowded street or in secluded spot,
>
> From that sad dream, oh never more to waken
>
> Or cease to feel the worm that dieth not.

A year later, Fuller reached again for his pen in a time of personal turmoil. While a junior at Bowdoin College, Fuller became engaged to a seventeen-year-old local beauty named Susan Howard Robinson. King characterizes the relationship as "stormy," adding that Robinson repeatedly broke up with Fuller because of family pressure. After Robinson permanently ended the engagement in 1854,[8] an emotional Fuller channeled his sentiments into verse. As one might imagine, Fuller's "Dost Thou Remember!" mixes the sweet adoration of young love with the bitterness of finding oneself jilted. A sense of moral righteousness thrums through the poem: "Dost though remember, when… vows were uttered… / (Vows I have kept, would it were so with thine!)"

Fuller's early poems adhere to the standards of his day. They are conventional in both form and content—rhythmically regular, predictably rhymed, and thematically normative. A quick scan is enough to reveal many of the stylistic hallmarks of popular 19th century verse: ardent exclamations ("Ah, blessed hour," "oh nevermore"), metrical elisions ("o'er," "mem'ry"), archaic pronouns ("Dost thou," "thine eyes"), syntactic inversions ("her great soul on earth for nothing sought," "at thy shrine a worshipper I bow"), random personifications ("sweet Past," "Affection's potent spell"), cliched phrases ("golden days of yore," "life's sands are run,"),[9] and Biblical allusion ("the worm that dieth not").[10]

Yet, while Fuller's poems might not be considered stylistically innovative or

philosophically profound, there is value in what may be an expression of genuine emotion, first at the loss of his mother and then at his betrothed's disavowal. To the contemporary ear, his poetry might be considered best when it is least conventional. His stark realization after his mother's death that "I cannot call her back" is touching in its simplicity. Likewise, his admission that he still admires the young woman who spurned him shows, if nothing else, an estimable vulnerability.

In the spring of 1856, Fuller—now a practicing Attorney—moved to Chicago. He would spend the next thirty years building his law practice while dabbling in Democratic politics—he was heavily involved in Stephen A. Douglas' 1858 senatorial campaign against Abraham Lincoln—as well as continuing his dalliances in the literary life. Within a few years of arriving in his adopted hometown, Fuller was publicly flexing his poetic muscles—and sharing them with the world.

In August 1859, the *Chicago Press and Tribune* published a poem that "Melville W. Fuller, Esq. of this city" gave at the Bowdoin College commencement, presumably earlier that spring. The brief poem took on the hypocrisy of a churchgoing character named "Flora McFlimsey": it opens, "To no religion are her feelings true; / She goes to church because her neighbors do"; and closes in much the same vein, "She smiles at hell—and thinks about her bonnet."[11]

Arguably, it is an odd poem to read at a college commencement. But Bowdoin College must have liked the poem, for it would again turn to Fuller to share his literary talents with his fellow alums, this time asking him to read his original poetry at meetings of the college's Chicago alumni chapter,[12] but we do not know the topic of the poem at this return engagement.

Approximately a year later, the *Chicago Press and Tribune* reported that Fuller would be reading his poem "Borrowed Light" at an upcoming meeting of the Young Men's Association. The *Press* and *Tribune* informed its reader that "[w]e are informed that Mr. Fuller's poem is humorous, and we know that that there is nothing so health-giving as a good laugh and exercise."[13]

At a function celebrating the anniversaries of the creation of University of Chicago's literary societies, Fuller was called upon to give a poetry reading. Although we do not know anything about the poem itself, the *Chicago Daily Tribune* rated it "a very credible performance." Reported the *Tribune*: "Mr. Fuller's appearance on the stage was pleasing—his voice without being loud was clear and distinct—his confidence unbounded. The poem though lengthy was well received, from the numerous happy hits it contained gleaned from the wide field over which it traversed."[14]

Over the next twenty years, Fuller's reputation as an Attorney grew and he found himself becoming a member of Chicago's social elite. In 1877, Fuller was invited to join the newly created Chicago Literary Club. Fuller became a regular attendee of its weekly meetings, and King writes that the club's members called Fuller "Mel" and "loved his shining face as much as they admired his brilliant speech."[15] A few years later, Fuller started writing pieces for the literary review magazine *The Dial*. In fact, Fuller's reputation as a man of letters sparked invitations to speak at prominent events, including a speech before the Illinois State Bar Association in January 1879 which lasted a staggering three hours.[16]

There are several examples of Fuller also applying his talents to lyric writing as well as poetry. In the 1868 presidential campaign, Fuller anonymously penned several campaign songs in opposition to Grant's run for the White House. One of the songs went as follows:

Hurrah for that glorious hero, Grant!

The bondholder's choice is he;

> He'd speak if he could, but luckily he can't
>
> And the masses won't know what a regular plant
>
> A "glorious hero" can be.[17]

While a long-life Democrat, Fuller was called the "non-partisan poet" by the *New York Tribune* because he helped draft a campaign "ode" for Zachariah Chandler, the Republican Senator from Michigan. The *Tribune* reported that "Mel" Fuller was recruited by a young men's Republican club to write a campaign poem to be read at an important political rally: "I am assured that Mr. Fuller appreciated the compliment. Though a democrat, he was not a bigoted one, and he admired the strong personality of Old Zach." The only condition was that the authorship of the poem remained secret.

> He gratified his republican friends by handing them an ode of the most complimentary character. If any fault could be found, it was that the verses were perhaps too smooth to fit the rugged subject…[t]he poetry, in the language of one of the participants, was "shot off" at the proper time and was one of the best features of the reception.[18]

Fuller as Chief Justice

In the spring of 1888 President Grover Cleveland, a long-time friend of Fuller's, nominated him to be Chief Justice. The first sign that the *Sun* would be offering unusual commentary regarding the Fuller nomination was on May 3, 1888. In an article entitled "The New Chief Justice as a Poet," the *Sun* proposed that President Grover Cleveland should have rested the nomination on a comparison of the quality of Fuller's poetry versus the poetry of Fuller's alleged rival for the nomination, Edward John Phelps. A

"Mel" Fuller in 1867 as a Chicago Attorney and real estate speculator. A decade late he would be invited to join the newly created Chicago Literary Club.

Vermont native and a graduate of Middlebury College, Phelps was the current Minister to the United Kingdom, and his nomination was championed by Vermont Senator Edmunds. King suggests that Phelps' advanced age (66), combined with the fact that the Supreme Court already had a Justice from New England (Horace Gray), doomed his potential nomination.[19]

Phelps had also written light verse as a college student. Since the President had not taken their literary skills into account, the *Sun* announced that it would do so.[20]

After praising itself for rescuing the men's poetry "from oblivion," the *Sun* noted that the amateur poets did not "cultivate the same field of the Muses." "The poetical taste of the new Chief Justice seem to incline the elegiac, the sonorous, the not too profoundly philosophical vein which renders some of LONGFELLOW'S poems so popular and commonplace," while the poetry of Phelps "is far more individual. He is a humorist,

a satirist, lashing the follies and chastising the nuisances of every-day life with sharp, snappy, and sometimes slightly profane lines that have the crack of a whip."[21]

The specific poems scrutinized by the *Sun* were a recent poem written by the Chief Justice for a memorial service in honor of former President Ulysses S. Grant and an undated poem by Phelps entitled "Waiting at Essex Junction," written about a weary traveler waiting at a station for a late train in the small village of Essex Junction, Vermont.

The *Sun* printed the opening lines of Fuller's poem about the fallen Grant:

> Let drum to trumpet speak—
>
> The trumpet to the cannoneer without,
>
> The cannon to the heavens from each redoubt,
>
> Each lowly valley and each lofty peak,
>
> As to his rest the great commander goes
>
> Into the pleasant land of earned repose.[22]

Intrigued by the article, a few days later the *New York Herald* sent a correspondent to see Fuller and obtain a copy of the full poem. Although Fuller gave the reporter a copy, the future Chief Justice seemed reluctant. "I really don't know that I want to be known as a poet," Fuller told the *Herald* reporter. "It's rather destructive to judicial dignity." The reporter observed that Fuller "smiled in rather a quizzical way" when uttering the words. Nevertheless, Fuller handed over the poem,[23] which goes on to portray Grant as "the grand soul of true heroic mould." The poem culminates with a rousing bid for his immortality: "Fame, faithful to the faithful, writes on high, / His name as one that was not born to die."

The *Sun* then considered the first stanza of Phelps' poem about Essex Junction:

> With saddened face and battered hat
>
> And eye that told of blank despair
>
> On a wooden bench a traveler sat,
>
> Cursing the fate that brought him there.
>
> Nine hours, he said, we've lingered here,
>
> Waiting for that delusive train
>
> Which always coming, never comes.
>
> 'Till weary and worn, sad and forlorn,
>
> And paralyzed in every function –
>
> I hope to hell
>
> Their souls may dwell
>
> Who first invented Essex Junction.[24]

Despite the fact that Phelps' poem was "shocking as is its profanity" (the poem contained the word "hell"), the *Sun* proclaimed that "Essex Junction" was "the product of genius" and could not have been matched by Fuller even if he "had spent half a lifetime in weary waiting upon the platform at Essex Junction."

Concluded the unnamed reporter:

> [I]f the nomination had been destined for the better poet of the two, and if MR. CLEVELAND had been a competent judge of those qualities of verse which unerringly indicate, to such as can be read them alright, the mental processes, habits of mind, and individual characteristics of the author, the great judicial prize of the republic would have gone to EDVARDUS, and not to MELVILLIUS.[25]

The contrast between these two poems is hardly as extreme the *Sun* suggests. On one hand, we have a somewhat milquetoast eulogy for a politician that the eulogizer opposed during his lifetime, and on the other, a jaunty complaint about train delays. One might argue that neither is "genius." True, the Phelps poem does create some interesting rhythms that overall have a pleasing effect, but it certainly does not merit the reporter's comparison of Phelps to Matthew Arnold, a poet who had generated an outstanding and esteemed body of verse up to the point of his death the month before. By most standards, neither Fuller nor Phelps would be labeled a "significant poet"; instead, it might be said that they—like so many of their contemporaries—made significant space in their lives for poetry.

The *Sun*'s love affair with Phelps was short-lived. A year later, the *Sun* returned to the subject of E.J. Phelps. According to the *Sun*, Phelps had been an obscure figure whose intellectual capacities were assumed but not proven; in fact, to date the only interesting thing about Phelps had been his authorship of "Essex Junction." That had all changed, reported the *Sun*, with the publication of an essay that Phelps wrote on modern society, a truly fatal mistake. "Mr. Phelps might have passed into history as an Olympian intelligence," said the *Sun*, but his essay revealed "sloppy English," "sleazy philosophy," and "superficial criticism." In short, Phelps was a fraud: "When he fancies that he is thundering he is only squalling. The intellect which he lets loose is hardly leonine—porcine is the more exactly term."[26]

It might be worth pausing for a moment and ask why the *New York Sun* was fixated on Fuller's verse. The owner and editor of the *Sun* was Charles Anderson Dana. Both Dana and his newspapers were supporters of the Democratic Party, although bad blood existed between Dana and President Cleveland, blood that spilled over onto the editorial pages of the *Sun*.[27] There is no historical evidence, however, that Dana had a similar vendetta against Fuller. Perhaps the Chief Justice was simply a tool that Dana could use to broaden his attacks against the Cleveland administration.

Fuller's status as a poet caught the attention of other newspapers. The *New York Tribune* described Fuller as "a man of decided literary tastes" and a "bibliophile" who "in his leisure moments sometimes writes poetry."[28] Of Fuller's penchant for poetry, the *Tribune* predicted that Senators "will probably overlook when they come to judge of his fitness for Chief Justice."

In an interview with the *Saint Paul Daily Globe*, Fuller supporter and congressman Frank Lawler praised Fuller for his literary talents:

> I see by the papers that considerable attention is given to the poetical genius of the new Chief Justice. Well, it don't surprise me in the least. Chief Justice Fuller is a mighty bright man, and no doubt would have made a name, if he has not already done so, in the field of poetry. He has written a good deal of poetry but I don't think that fact ought to detract from his legal ability.[29]

When the reporter humorously asked Lawler if President Cleveland took into account Fuller's "close relation with the muses" in making the selection, Lawler responded that the President "appointed Judge Fuller because of his fitness for the position and his legal learning." Lawler added, however, that "it would have been a most excellent selection even if his poetry had been taken in consideration...[h]is poem on 'Grant' is a magnificent thing, and is conclusive that he has the true poetic afflatus."[30]

Shortly after Fuller's confirmation in July 1888, the *Sun* published a short warning. "The republic is opportunity, Chief Justice Fuller. But you had better give up poetry

Edward John Phelps (above), a Vermont native serving as Minister to the United Kingdom, was Fuller's rival for the Supreme Court vacancy. President Cleveland chose his friend Fuller for the seat, but the press declared Phelps' poetry to be superior.

now."[31] Another shot was fired at Fuller after the Chief Justice observed, likely in reference to his new position, that he would "have to tread the wine-press alone." "Let Mr. Fuller cheer up," fired back the *Sun*. "[H]e will not have to tread the wine-press alone. He will have the assistance of eight gentlemen, every one of whom weights, in pounds avoirdupois, from fifteen to one hundred percent more than Chief-Justice Fuller."[32] With this latter comment, the *Sun* was comparing Fuller's short nature and small frame to the brawny build of Justices like Horace Gray and John Marshall Harlan.

Fuller was not the only Supreme Court nominee whose poetry caught the attention of journalists. After David J. Brewer joined the Supreme Court in 1889, his weakness for verse was periodically discussed in the newspapers. "Both Justice Brewer and Chief Justice Fuller wrote poetry in their earlier years," reported the *Emporia Republican*. "This shows what obstacles men can overcome when they are made of the right stuff."[33] The *Evening Journal* stated that Brewer was "alleged" to have been a poet in his young days, as if Brewer had been charged but not convicted of the crime of writing poems.[34] Fortunately for Brewer, the newspapers did not obtain and dissect copies of his poems.

In the years following Fuller's appointment to the Supreme Court, the *New York Sun* continued to be fixated on Fuller's poetry. Shortly after he took the center chair, the *Sun* reported on Fuller's poems "Remorse" (discussed above) and "Bacchanalian Song." The fact that "Remorse" was written about the death of Fuller's beloved mother did not deter the *Sun* from sarcastically dissecting his talents. The newspaper reminded its readers that the two poems came from an early period in Fuller's life, before "the cares of an increasing law practice began to narrow and harden his imagination, and to dull the sense of melody that had responded so sensitively to the whispering pines."[35]

The *Sun* did not reproduce either poem, but two years later the full text of "Bacchanalian Song," written in 1856 when Fuller was a struggling lawyer, appeared in several newspapers. The poem opens with a conventional enough comparison between "wine in our goblets" and the "the cup of life," but it soon turns to imagery that riled Fuller's critics:

> The flag at our mast-head is pleasure's own banner,
>
> And to the breeze boldly its broad folds we fling;
>
> Which each stout-hearted sailor will raise the hosanna
>
> To ivy-crowned Bacchus, our jolly-souled king.[36]

The *Sun* took offense at Fuller's use of religious terminology in a poem about alcoholic spirits, specifically that "in order to meet the exigencies of rhyme he should dare so far as to address 'hosannas' to the heathen deity Bacchus."[37] Oddly, the same line drew the ire of the *Saint Paul Daily Globe* two years later, when it told its readers that the

poem "contains one line grossly offense to good taste."

> The Chief Justice urges his compassion in revelry to 'raise the hosanna to ivy-crowned Bacchus, our jolly-souled king'—a sentiment not only impolitic, as introducing monarchical notions in a free republic, but outraging the sense of propriety by the use of a word restricted to scared themes. The circumstance that the Chief Justice needed hosanna to rhyme with banner is no valid excuse.[38]

When Fuller's friends put his name forward as a candidate for the 1892 presidential election, the *Sun's* interest in his poetry was renewed. According to the *Saint Paul Daily Globe*, the *Sun* had located "a spirited bacchanalian, the existence of which had not been suspected. We hasten to lay this new Fuller poem before the country, with the assurance that we have irrefutable evidence of its authenticity."[39]

> Oh, bright is the gleam of the silv'ry stream,
>
> As it leaps from its native mountain;
>
> And sweet to the taste, in the desert waste,
>
> Is the draught from the pure, cool fountain;
>
> But sweeter than this, with its transient bliss,
>
> To me in the desert roaming,
>
> And brighter still, than the sparking rill,
>
> Is the wine in our goblets foaming.
>
> Chorus: Then fill each glass as the moments pass,
>
> Let the red wine mantle high!
>
> As pledge we here, to mem'ry dear,
>
> The pleasant years gone by.
>
> Oh, hard is the strife of the battle of life,
>
> To the solider youth contending!
>
> Full soon may fail e'en the plated mail,
>
> He fancied himself defending,
>
> Yet we'll on to the fight with hearts so light,
>
> At the stirring trumpet's tone.
>
> And never will yield the battle field
>
> 'Till victory is our own.
>
> Chorus: Then drink to-night, with hearts so light,
>
> To the untried world before us,
>
> And gayly laugh, as the wine we quaff,
>
> And join in the merry chorus.[40]

"As no person with an ear for music need to be informed," comments the *Globe*, "this bacchanalian by the Chief Justice is intended to be sung to the well-known air of 'Sparkling and Bright.'"[41]

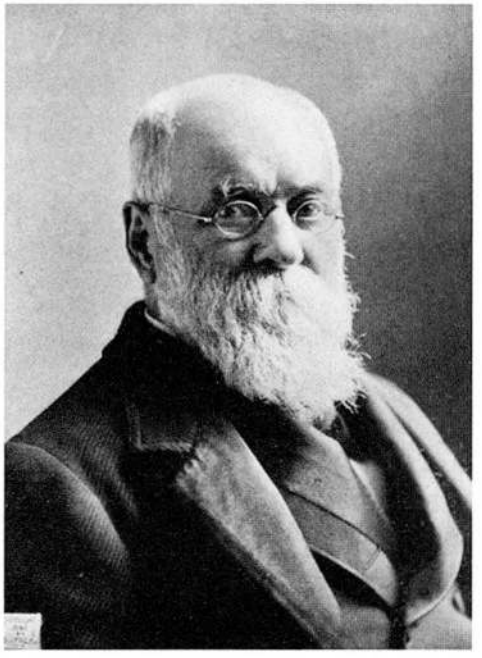
Cognizant of the efforts to advance Fuller's candidacy, the *Globe* tartly observed that Fuller's "promoters," include Minnesota businessman John F. Meagher, "have exactly what was wanting, a song melodiously available for campaign purposes, and at the same time a declaration of the candidate's personal opinions on the liquor question." The poem also let the public know that Fuller "prefers a red wine charged with carbonic acid to the purest and coolest samples of Adam's ale. Of course, this sentiment will have to be

modified for campaign circulation in Maine, Kansas and a few other benighted localities." The *Globe* made one promise to its readers: before Fuller became the Democratic nominee for President, the *Globe* intended "to have gathered the material for the 'Complete Fuller Songster" that will sing him in to the White house [sic], if anything can."[42]

Fuller's song previously appeared in a section reserved for "Songs of Bowdoin" in the 1868 anthology *Carmina Collegensia: A Complete Collection of the Songs of the American Colleges,* where it shared a page with two other Bowdoin entries, "Old Time"—half fight song, half shanty, entirely rife with private jokes—and "Song of the Smoker," a paean in which a man lovingly addresses his cigar. The manuscript as a whole is littered with references to drink in its many forms: beer, wine, cups, quaff, draught, rum, gin, and the like. So, while the newspapers of the day may have scorned Fuller for penning something so crass as a drinking song, there would be few college graduates who had not sung one.

As for Fuller's lyrical mastery, his toast to "the untried world before us" has both imagery and sentiment more poetic than many contemporaneous offerings in that genre. One need look no further than Yale's "Bingo," with the omnipresent cheer, "Here's to good old Yale, drink it down, drink it down," or Harvard's "It's a Way We Have at Old Harvard: A Drinking Song," with its nursery-rhyme-ish repetition: "It's a way we have at old Harvard, It's a way we have at old Harvard, It's a way we have at old Harvard, To drive dull cares away, To drive dull cares away, To drive dull cares away". Yet, if the measure of a drinking song's success hinges on its ability to be sung with ease when drunk, Fuller may indeed have missed the mark. "Full soon may fail e'en the plated mail" does not roll off even the most sober of tongues.

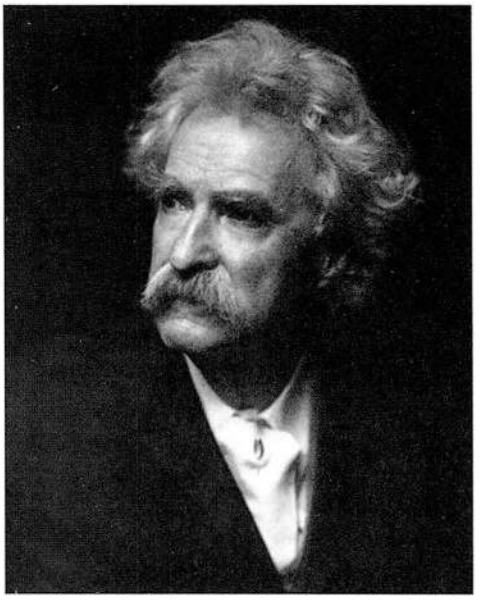
The *Sun* continued to find opportunities to hound the Chief Justice. In praising a poem by another judge, a little ditty on the topic of legal causation, the *Sun* remarked: "We recall our somewhat occasionally too frivolous and romantic but always beautiful friend, the Hon. Melville Weston Fuller, from his wanderings in the maze of melody." Pointing to a line in the aforementioned poem—"existence was without a cause—the *Sun* concluded: "Mr. Fuller will observe that Existence is like his poetry."[43]



Charles Anderson Dana, owner and editor of the *New York Sun*, scrutinized Fuller's verse. Although Dana and his newspapers were supporters of the Democratic Party, he was a foe of President Cleveland.

As we conclude our discussion of Fuller the poet, there is another wrinkle to the story: the Chief Justice's physical resemblance to Mark Twain. The *New York Times* reported that once an admirer of Fuller stopped Twain on the street and, confused, ask for the autograph of "the Chief Justice." Twain immediately complied, writing the following for the court enthusiast: "It is delicious to be full, But it is heavenly to be Fuller. I am cordially yours, Melville W. Fuller."[44]

History does not record if Fuller knew about Twain's little deception, but the two



"It is delicious to be full, but it is heavenly to be Fuller. I am cordially yours, Melville W. Fuller," wrote Samuel Clemens (aka Mark Twain) when a fan of his doppelganger, Chief Justice Fuller, stopped him on the street to ask for an autograph.

men had the opportunity to discuss it in October 1901, when they both entered Yale's Hyperion theater to received honorary degrees.[45] Might Fuller's reputation as an artist have been artificially enhanced by the public's confusion whether it was Samuel Clemens or Melville Weston Fuller who occupied the Court's center chair?

Although the bulk of attacks centered on the quality of Fuller's poetry, with the sneering subtext that writing verse was not manly, additional articles implied that Fuller's flirtation with verse bled into his judicial opinions. For example, let us return to the *Sun*'s attack in May 1889 on Fuller's "Bacchanalian Song." After snidely remarking that Fuller's law practice had "dull[ed] his sense of melody," the newspaper turned its attention to Fuller's opinion writing:

> Judged by every literary standard, how superior these poems of Chief Justice Fuller's are to the opinions which he is now handing down from the Bench of the Supreme Court! Many lawyers would rejoice if the Chief Justice would write his opinions in verse. It makes their heads ache to read his abominable prose, and when they have read it they do not know what it means.[46]

The *Sun* launched a second barrage against his legal craftsmanship in the spring of 1892. Fearful that former President Grover Cleveland might fail in his bid to become the Democratic Party's presidential nominee, a call went out to draft Fuller.[47] And, right on schedule, the *Sun* again mocked Fuller as a poet and as a jurist.

> Beautiful as are the love songs, the threnodies and the Bacchics which the world owes to the genius of the Hon. Melville W. Fuller, the fact remains that his prose style is disgraceful. English as she wrote by the Chief Justice in his judicial opinions and decisions is something fearfully and wonderfully made. It is muddy, inelegant and diffuse.[48]

This time, however, the *Sun* offered evidence in support of its bill of indictment, to wit, the concluding paragraph of Fuller's majority opinion in *Hammond v. Hopkins*,[49] a case that turned on whether the beneficiaries of a trust had timely filed a bill of complaint against the trustee. Ironically, at Fuller's death, newspapers across the country pointed to that opinion as the best example of how Fuller's poetic bent crept into his opinion writing.

Fuller wrote:

> In all cases where actual fraud is not made out but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions

> and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hourglass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused.

"The trope is quite worthy of the author of 'Fill each glass as the moments pass,'" roared the *Sun*. "Just how the hour-glass can 'supply' the ravages of the scythe is not quite clear, and it does not need to be clear." Concluded the paper:

> If the Chief Justice had suggested the remedial action of bone-dust, or phosphates, or top-depressing of any kind, he would have destroyed the imaginative beauty of the figure and eliminated the idea of Chrono- with his scythe in one hand and his hours glass in the other. These little flights of poetic fancy from the Bench of the Supreme Court or elsewhere are not proper subjects for too close analysis.[50]

At least one newspaper was horrified to learn that poetry had snuck into the Supreme Court. After reporting that an Attorney had the temerity to quote from an unidentified poem during oral argument, the *Middleton Transcript* urged swift action. "The court of last resort in the country should give the final decision against this practice once and for all. The courts have troubles enough as it is without poetry being added to their burdens."

The *New York Sun* was not the only newspaper to use Fuller's poetic oratory as a means of attacking his political leanings and judicial philosophy. In response to an unidentified "frothy" speech that Fuller made in the fall of 1888 on the topic of friendship, the *Indianapolis Journal* sneeringly remarked that the Chief Justice "managed to get in two or three hackneyed Latin quotations, a French spelling book phrase, and jingling couplet of anonymous poetry and a misquotation of the threadbare 'star of empire' passage." Concluded the *Journal*: "We presume all this shows a great legal mind."[51]

King does not address the *Sun*'s attack against Fuller's judicial style of writing, but he does concede that Fuller's opinions were not as memorable as those by some of his brethren. "Fuller's judicial opinions are labored and cannot compare in sparkle with his rare after-dinner speeches," writes King. "His opinions contain no lofty phrases, no grandiloquent passes, no person conceits to betray a hungry ego in their author."[52] Pointing out that the majority of Fuller's opinions involved dry procedural issues, King concludes that "[m]ost of these were models of pithy brevity. But some of his opinions are not as tightly knit or as well organized as an ideal opinion of the Court should be."[53]

Indeed, some of Fuller's opinions may even have, as the *Sun* suggested, induced headaches, such as this pretzel-esque declaration in *Cole v. Cunningham*[54]:

> This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud.[55]

Fuller's affection for stringing together oblique clauses, however, may be superseded by his romance with the semicolon, which he sprinkled through his legal writings like confetti. In one relatively short majority opinion (*Leisy v. Hardin*[56]), Fuller found occasion to use as many as 62 semicolons, at times employing a half dozen in a single grammatical construction.

As syntactically complicated as his opinions are at times, Fuller's legal writings for the most part offer standard fare, with an occasional poetic flourish. He veers from

time to time into alliteration ("persons and property," "lives, limbs," "pestilence and pauperism"),[57] anaphora ("*Was it intended* by the statute of 1858 to make any other discrimination than that more accurately expressed in the statute of 1878? *Was it intended* to discriminate against the judgments and decrees of the Federal courts in Wisconsin as if they were foreign courts or courts of another State? *Was it intended* to disparage the jurisdiction and authority of the Federal courts?"),[58] or diacope ("The *right* to remain in the United States, in the enjoyment of all the *rights*, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable *right*, and certainly a *right* that cannot be taken away without taking away the liberty of its possessor").[59]

Similarly, Fuller's opinions show intermittent indulgences in heightened phraseology or metaphor. When he writes in *Briggs v. Spaulding*[60] of invalids who must not be asked to "retire at once from the affairs of this world and confine themselves to preparation for their passage into another," one cannot help but sense a slight poetic lift. Perhaps when his thoughts turned more expansive, his expression ventured more deeply into the metaphorical. In his dissenting opinion in *Downes v. Bidwell*, a case that held that the Constitution's Revenue Clause did not extend to United States territories, Fuller writes of the "star of empire, whose course Berkeley had sung sixty years before," and notes, "It will be time enough to seek a ford when, if ever, we are brought to the stream."[61]

Having reviewed over thirty opinions drafted by the Chief Justice, we do not believe that Fuller's "prose style is disgraceful"[62] or "abominable"[63] or his opinions "muddy, inelegant and diffuse."[64] Nor do we believe that the Chief Justice is guilty of "little flights of poetic fancy from the Bench of the Supreme Court."[65] We concede that Fuller does not possess the writing skills of Oliver Wendell Holmes Jr., Robert H. Jackson, or Antonin Scalia. And it is hard to defend Fuller's love affair with the semicolon. That being said, the attacks on his opinion writing, as well as his amateur poetry, are unfair and misguided.

Author's Note: We would like to thank Katie Gallagher for her superb research assistance as well as Chad Oldfather, Charles Peppers, and Susan Stein for reading earlier versions of this article.

ENDNOTES

[1] See Todd C. Peppers. "Melville Weston Fuller and the Great Mustache Debate of 1888." *Journal of Supreme Court History* Vol. 45, No. 2 (July 2020): 140–150.

[2] Willard L. King. **Melville Weston Fuller: Chief Justice of the United States, 1888-1910** (The MacMillan Company, 1950), 11.

[3] *Ibid.* 12.

[4] *Id.*

[5] *Id.* 16.

[6] *Id.* 24. All that biographer James W. Ely Jr. says is that Fuller "pursued his passion for writing poetry" while at Bowdoin. **The Chief Justiceship of Melville Weston Fuller, 1888-1910** (University of South Carolina Press, 1996), 5.

[7] *Ibid.* 52.

[8] In October 1857, Robinson married John Noble Goodwin. A native of Maine, Goodwin's political career would include serving in Congress, as the Chief Justice of the Arizona Territorial Supreme Court, and as Governor of the Arizona Territory.

[9] The phrase "sands of time" was memorably used in Henry Wadsworth Longfellow's 1838 poem "A Psalm of Life":Lives of great men all remind usWe can make our lives sublime,And, departing, leave behind usFootprints on the sands of time;Like Fuller, Longfellow was a Bowdoin graduate, and he went on to teach at Bowdoin for a few years in his early twenties, several decades before Fuller's entry to the college.

[10] "The worm that dieth not" refers to hell. This idea appears both in the Old Testament ("And they shall go forth, and look/Upon the carcases of the men that have transgressed against me: /For their worm shall not die," Isaiah 66:24) and the New Testament ("Where their worm dieth not, and the fire is not quenched," Mark 9:48).

[11] **History of Cook County, Illinois–, Being a General Survey of Cook County History, Including a Condensed History of Chicago and Special Account of Districts Outside the City Limits; from the Earliest Settlement to the Present Time** (Goodspeed Historical Association, 1909), 588.

[12] "The Chicago Bowdoin Club," *The Portland Daily Press* (Portland, Maine), April 8, 1880.
[13] "Poetry and Gymnastics," *Chicago Press and Tribune*, February 21, 1860.
[14] "Commencement of the University of Chicago: Anniversary Exercises of the Literary Societies." *Chicago Daily Tribune*, July 2, 1862.
[15] King, **Melville Weston Fuller,** 90.
[16] *Ibid* 88.
[17] *Id.*78.
[18] "A Non-Partisan Poet." The *Morning News* (Savannah), September 6, 1888 (reprinting an article from the *New York Tribune*).
[19] *Ibid.*105–106.
[20] "The New Chief Justice as a Poet." *New York Sun*, May 3, 1888.
[21] *Ibid.*
[22] There are some striking similarities to King Claudius' short speech in *Hamlet*, Act 5, scene 2: "And now let the drum and the trumpet play, and the trumpet signal the cannon outside to fire, and let the cannon tell the heavens and the heavens tell all the earth that the king is drinking now to Hamlet's health." Did Fuller mean to compare Grant's death to that of the villainous Claudius?
[23] "Melville Fuller: The Chief Justice Who Is to Be." *The Memphis Appeal*, May 6, 1888.
[24] The original station was built in the 1850s and at one time served five different railroad lines. An article in the October 11, 1894, *News and Citizen* (Morrisville) declared that Essex Junction had been "immortalized" by Phelps' poem.
[25] *Ibid.* After the Chief Justice's confirmation on July 20, 1888, the *Sun* briefly returned to the topic of his literary skills. "[Y]ou had better give up poetry now." *New York Sun*, July 23, 1888.
[26] "An Autograph Portrait." *New York Sun*, November 27, 1889.
[27] Janet E. Steele. **The Sun Shines for All: Journalism and Ideology in the Life of Charles A. Dana 131** (Syracuse University Press, 1993).
[28] "M.W. Fuller is Named." *The New York Tribune*, May 1, 1888.
[29] "Mr. Fuller's Muse." *Saint Paul Daily Globe*, May 20, 1888.
[30] *Ibid.*
[31] *The New York Sun*, July 23, 1888.
[32] *The Indianapolis Journal*, October 2, 1888 (quoting the *New York Sun*).
[33] *The Emporia Republican*, January 9, 1890.
[34] *The Evening Journal*, January 7, 1890.
[35] "The Chief Justice on Remorse and Revelry." *The New York Sun*, May 27, 1889.
[36] "Bacchanalian Song." *The Seattle Republic*, June 19, 1903.
[37] "New Poem by Fuller." *Saint Paul Daily Globe*, August 17, 1891
[38] *Ibid.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *New York Sun*, August 4, 1894.
[44] "Melville W. Fuller, Chief Justice, is Dead." *The New York Times*, July 5, 1910.
[45] "Roosevelt There: Yale Men in the Elm City Honoring Him Today." *Waterbury Democrat*, October 23, 1901.
[46] "The Chief Justice on Remorse and Revelry." *The New York Sun*, May 27, 1889.
[47] King, **Melville Weston Fuller,** 163–164.
[48] "Hour Glass and Scythe: Dana Drops Cleveland to Have Some Fun with the Chief Justice." *The Morning Call* (San Francisco), April 24, 1892 (reprinting a *New York Sun* article).
[49] 143 U.S. 224 (1892).
[50] "Hour Glass and Scythe." *The Middleton Transcript*, April 8, 1916.
[51] *Ibid.*
[52] King, **Melville Weston Fuller,** 332.
[53] *Ibid.*
[54] 133 U.S. 107 (1890).
[55] *Ibid.* 112.
[56] 135 U.S. 100 (1890).
[57] 135 U.S. 100 (1890).
[58] *Metcalf v. Watertown*, 153 U.S. 671 (1894) (emphasis added).
[59] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (emphasis added).
[60] 141 U.S. 132, 155 (1891).
[61] 182 U.S. 244, 374 (1901).
[62] "Hour Glass and Scythe."
[63] "The Chief Justice on Remorse and Revelry." *The New York Sun*, May 27, 1889.
[64] "Hour Glass and Scythe."
[65] *Ibid.*

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Law Clerk John Costelloe's Photographs of the Stone Court Justices, October 1943

John Q. Barrett

When Attorney General Robert H. Jackson was appointed an Associate Justice of the Supreme Court of the United States in 1941, he hired a Department of Justice attorney, John Francis Costelloe, to come with him as his law clerk.

The Law Clerk

John Costelloe was born in 1916 in Ames, Iowa. He was not quite two years old when his father died. His mother then moved with her four children to Lincoln, Nebraska. Costelloe grew up there, attending parochial schools and then the University of Nebraska, graduating in 1937. He then attended Harvard Law School, becoming an editor and the treasurer of the *Harvard Law Review* and graduating in 1940.[1]

Following law school, Costelloe took and passed the Massachusetts bar examination and was admitted to practice in 1940. He got his first job as a lawyer at the U.S. Department of Justice in Washington. Indeed, it was Attorney General Robert H. Jackson himself who, at least formally, hired Costelloe—his August 1940 letter of appointment, signed by both Jackson and Assistant to the Attorney General Matthew F. McGuire, designated Costelloe a Junior Attorney in the Claims Division (today's Civil Division), to be paid $2,000 per year in Grade P-1.[2]

Justice Jackson was appointed to the Court in July 1941. He promptly hired Costelloe—Jackson must have known him at least a bit—to follow him from the Department of Justice to the Court to be his law clerk. Costelloe started clerking in August. The job paid $3,600 per year.[3]

In those days, each associate justice had only one law clerk, so Justice Jackson and John Costelloe worked together very closely. During the Court's October Term 1941, Jackson was pleased with Costelloe's work and liked him a lot. Jackson showed it, among other ways, by calling him "Johnny." That

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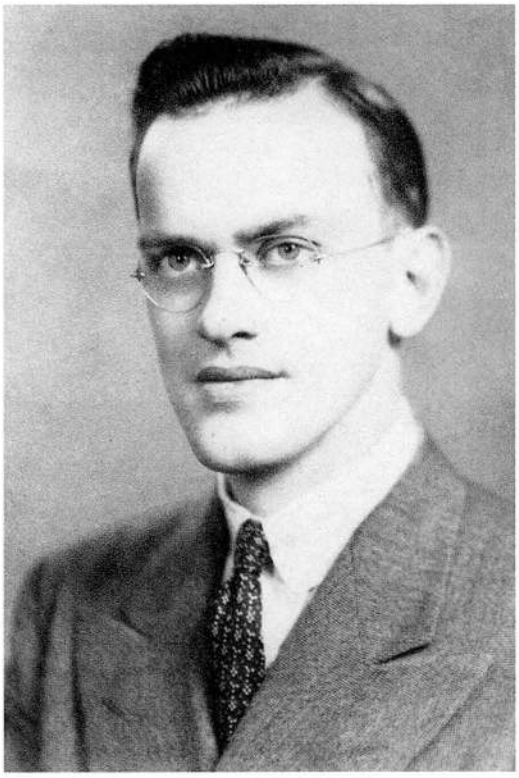


John F. Costelloe, circa 1940, when he was a junior attorney in the Claims Division of the Justice Department. Justice Robert H. Jackson hired him as his first clerk, for the 1941 Term.

was not a nickname that Costelloe used. In fact, when he later married, he explained to his wife that he was only to be called "John," with the single exception of Justice Jackson, who did, would, and could call him "Johnny."

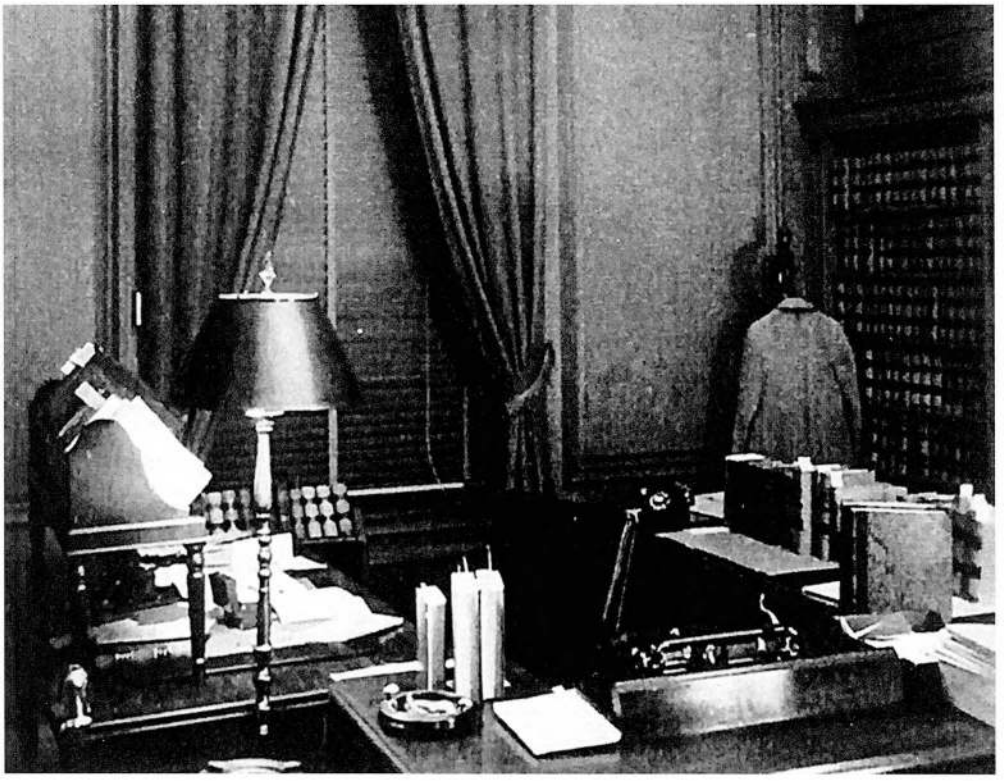
During their first year together, Justice Jackson asked Costelloe to continue clerking for a second year and he accepted. (About six years later, when Costelloe was applying for admission to the New York State bar, Jackson explained, in his reference letter as a former employer, that Costelloe's "work [had been] so satisfactory that I retained him a second year, although it is customary to change [law clerks] each year."[4])

In those early months of 1942, the USA had become part of World War II, but Costelloe was physically unable to follow his many peers who enlisted in the military. He was ineligible because he was partially deaf and wore hearing aids. So he served the country by continuing to clerk for Jackson.

Costelloe's second year as Justice Jackson's sole law clerk began with a series of summer research assignments. Jackson wrote memoranda to Costelloe framing thoughts and asking questions regarding *Wickard v. Filburn*, the case concerning the constitutionality of the U.S. government penalizing a farmer for violating his wheat production quota under the Agricultural Adjustment Act[5]; the Court would be hearing reargument in that case in the Fall. Jackson also assigned Costelloe to research the proper standard of review for federal courts, including the Supreme Court, hearing appeals from Board of Tax Appeals decisions.[6] Costelloe also assisted Jackson during the Court's Summer 1942 Special Term to hear arguments in *Ex parte Quirin*, the case concerning the legality of the then-ongoing U.S. military commission trial of eight Nazi German would-be saboteurs who had been apprehended in the USA.[7]

Starting in the Fall, Costelloe's second clerkship year included the entirety of the Court's October Term 1942. During those nine months, Costelloe worked closely with Jackson on everything, including what became his now-canonical opinions for the Court in *Wickard v. Filburn*, affirming federal power under the Commerce Clause to penalize the overproducing and thus commerce-affecting farmer, and in *West Virginia State Board of Education v. Barnette*, the decision that the Constitution bars government from compelling Jehovah's Witnesses schoolchildren to salute and pledge allegiance to the U.S. flag.[8]

Jackson continued to be very happy with Costelloe as his law clerk and assumed that he would be staying for a third year. Indeed, Jackson might have been thinking that he had lucked into having a career law clerk similar to the one employed by his colleague Justice Owen J. Roberts since 1930.[9]



Costelloe's desk in Justice Jackson's chambers, circa 1942. Before departing his clerkship, he photographed each justice with his German-made Rolleicord camera using black and white film. Costelloe held the camera by hand (no tripod) and used only available light (no flash). His children recently donated his photos of justices to the Supreme Court.

On March 9, 1943, Jackson wrote to his friend Judge Jerome Frank of the U.S. Court of Appeals for the Second Circuit. Judge Frank apparently had recommended his law clerk for a clerkship with Jackson. The Justice wrote that he would not be needing one:

> [I] doubt very much if I shall make a change in law clerks this year. Johnny Costelloe is deferred [from the military draft] on account of his hearing. He has a pretty thorough knowledge of my erratic ways of working, and we get on very well. These are days when one doesn't shift more than he has to.[10]

On that day or the next, Jackson mentioned to Costelloe his (Jackson's) expectation that Costelloe would be staying on for a third clerkship year. To Jackson's surprise, Costelloe, age 27, said that he wanted to move on and begin private law practice.

Jackson understood that interest to get on with private practice. He himself had, in his youth, hurried to finish his law studies and be admitted to the bar as fast as he legally could (when he turned age 21 in 1913 and had completed three years of law study),[11] and he then had had a very active, varied, and exciting private practice for twenty years before he came to Washington. So Jackson wrote to Judge Frank again to update him:

> I have talked with Costelloe and find that he thinks after two years of service here it might be better for him to move into some other work.

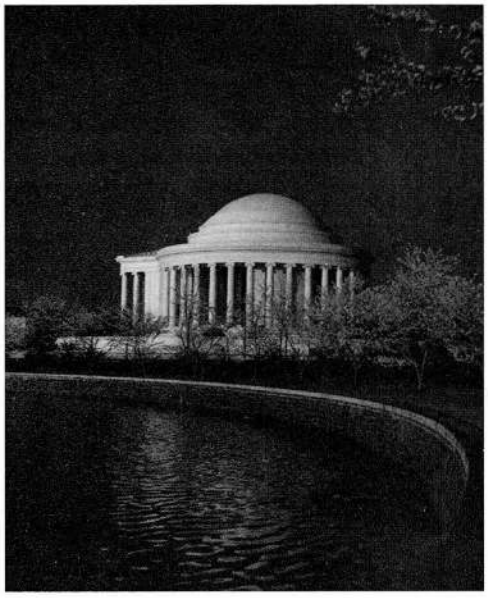
> Of course, I agree that that is true. His attitude is that he will stay if I do not find someone who is satisfactory and vows that the greatest drawback of the spot is that he likes it too well.[12]

Jackson soon explained the situation to his son William E. Jackson, then a second-year student at Harvard Law School. Bill Jackson strongly recommended his schoolmate Phil C. Neal to be Bill's father's next law clerk. Bill reported to his father that Neal would be graduating from Harvard before the end of 1943 because it now was compressing law school so students could finish faster and get on to military service, and that Neal's history of childhood illness and possible heart damage likely would cause the military to reject him. Justice Jackson interviewed Neal, liked him, and hired him to start clerking as soon as he was done with law school, contingent on the U.S. Army not claiming him first.[13]

Phil Neal indeed did not pass the military's medical examination. But due to Harvard's newly-telescoped, untraditional academic calendar and then to Neal taking the Illinois bar examination, he was not available to start clerking for Justice Jackson until October 17, 1943.[14] Costelloe thus continued to clerk for Jackson until that time.[15]

The Law Clerk-Photographer

Although John Costelloe's work as Justice Jackson's law clerk was demanding, he had at least one important hobby during those years: as a photographer who developed his own film and made his own prints. Indeed, he used his photographic skills and equipment in his work for Jackson, giving him microfilms of research materials that Costelloe collected and photographic prints from those microfilms.[16] And he often took and printed photographs of subjects such as the Jefferson Memorial and other Washington sites.



A photographer who developed his own film and made his own prints, Costelloe also took and printed photos of various Washington sights, including this one of the Jefferson Memorial.

On Friday, October 8, 1943, the justices were at the Court, finishing the first week of the new Term. At noontime, they met in conference.[17] And on or about that day, John Costelloe went from chambers to chambers and took individual portrait photographs of Chief Justice Harlan F. Stone and Associate Justices Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge. As Costelloe took more than one photograph of Douglas and Jackson, which still exist, it is probable that he took multiple photographs of each justice. I have found no document that explicitly dates Costelloe's photographing, but Justice Douglas's secretary Edith Waters did jot "John Costello" on her calendar page for October 8.[18] I believe that her note means that Costelloe came that day to Justice Douglas's chambers and took his photograph, and that Costelloe likely also visited and took photographs of each of the justices on that date.

John Costelloe took his photographs of the justices with a German-made Rolleicord camera using black and white film. He held the camera by hand (no tripod) and used only available light (no flash). He probably developed the film himself shortly after he took the photographs. The chemical process of film development would have fixed the negatives' images on the film. But perhaps World War II chemical shortages and wartime rationing rules made it impossible for him to develop the film promptly. We know, in any case, that Costelloe held onto either undeveloped film or unprinted negatives for the next three-plus years. It was not possible for him to print his portraits until 1947.

The Printed Portrait Photographs

In 1947, John Costelloe, living in New York City, finally was able to use his photographic negatives, developed then or earlier, to print his October 1943 photographs of the justices. He used his own printing equipment.[19]

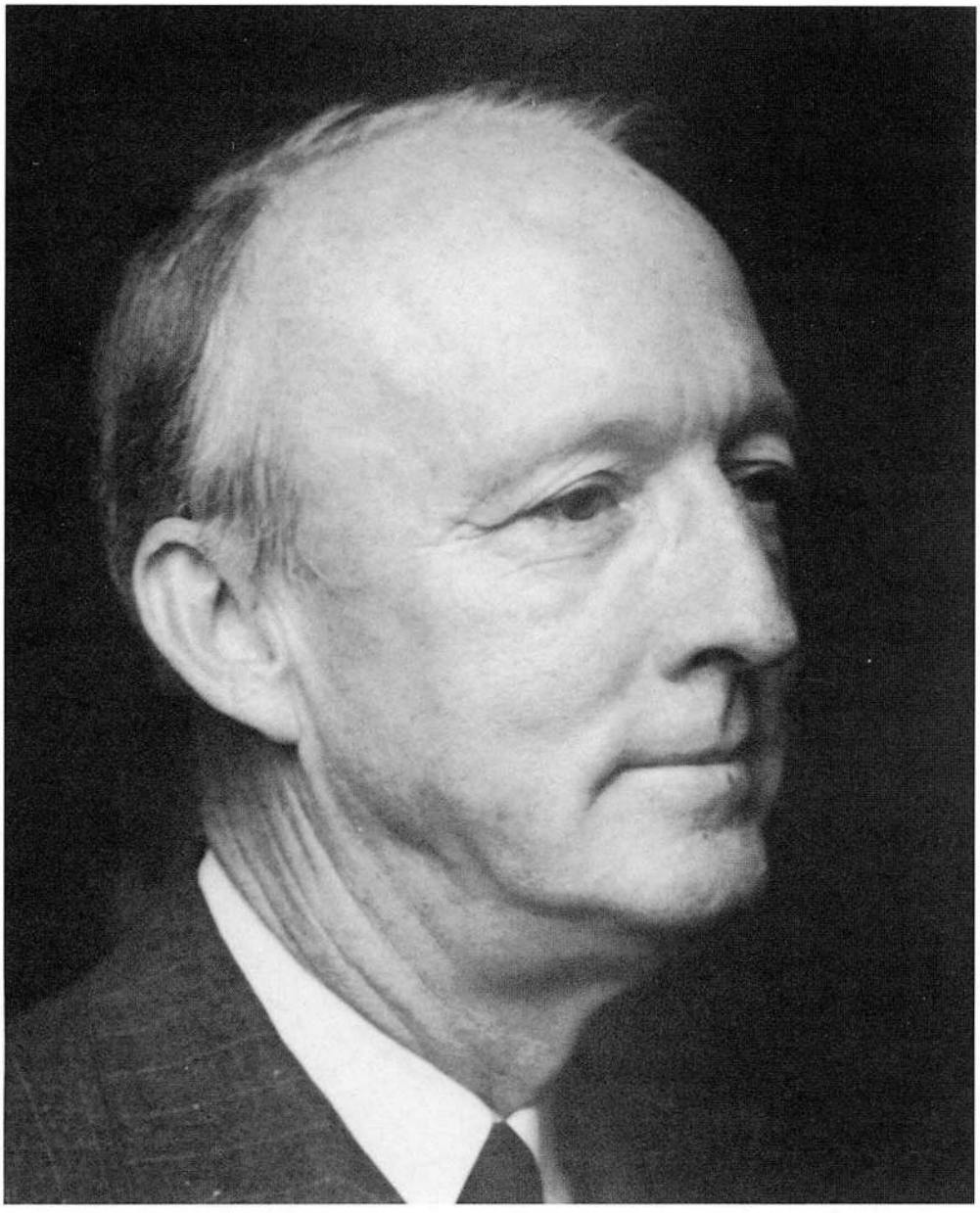
As was his habit, Costelloe worked to show nuances in his prints. They have a lovely warm tone. Each shows a bust-length image of the justice against a black background.

Costelloe then wrote from New York to at least the seven Stone Court justices who were still living and still serving on what had become the Vinson Court (Chief Justice Stone had died in April 1946). Justice Roberts had resigned from the Court in summer 1945 and moved home to Pennsylvania. In his letter to Justice Rutledge, and I assume in a similar letter to the other six or seven still-living justices, Costelloe reminded him that "you permitted me to take your photograph when I was at the Court as a law clerk. Now that materials have become available to amateurs, I have finally been able to make prints."[20] Costelloe included multiple prints—small ones for the justice to keep, with offers to send more on request, plus larger prints. He asked the justices to inscribe two of the latter, one for himself and one for his friend Carlton Fox, with whom he served in the Justice Department.[21]

Seven Justices sent inscribed photographs back to John Costelloe:

- Justice Black, dating his inscription June 17, 1947, wrote: "For John Costelloe with kind regards Hugo L Black."
- Justice Reed wrote, on June 19: "To John Costelloe with pleasant memories of our association in the work of the Supreme Court Stanley Reed."
- Justice Frankfurter wrote, on June 12: "For John F. Costelloe, who plays tricks with the camera but not with his mind."
- Justice Douglas wrote, on a print of the more serious of the two photographs that Costelloe took of him: "For John F. Costelloe with warm regards Wm. O. Douglas."
- Justice Murphy wrote: "To John F. Costelloe with every good wish Frank Murphy."
- Justice Rutledge, on June 16, wrote: "With best wishes to John F. Costello [sic] Wiley Rutledge.[22] Justice Rutledge kept Costelloe's printed photograph of him, and after he died it became part of the Rutledge papers and artifacts that his family donated to the Library of Congress.
- Justice Jackson, Costelloe's former boss, praised the printed photographs and noted that his chambers staff thought they were "excellent."[23] Jackson inscribed two photographs for Costelloe, using slightly differing words. On one, Jackson wrote, with a fountain pen that appears not to have functioned perfectly (the ink is light in spots): "For John F Costelloe with the high regards and good wishes of Robert H Jackson." On the other, Jackson wrote, in dark and even ink: "For John F Costelloe with the friendship and esteem of Robert H Jackson."

The absence in Costelloe's collection of an inscribed photograph from Justice Roberts suggests either that Costelloe never sent him



Hugo L. Black

one to inscribe, or that if he did, Roberts did not inscribe and return it. These photographs were treasures that Costelloe saved for the rest of his life, so it is unlikely that he would not have kept, as carefully as he kept the others, any inscribed photograph he received from the Justice. Moreover, Costelloe's son Kevin recalls that his father was disappointed not to have an inscribed photograph of Justice Roberts.

The Lawyer and His Photographs

Following his clerkship with Justice Jackson, Costelloe returned to the Department of Justice, landing a position in the Tax

William O. Douglas

Division. (Jackson, who in 1936 had served as Assistant Attorney General heading the Tax Division, the first of his four DOJ jobs on his rise to become U.S. Attorney General, probably assisted Costelloe in getting this job.) He worked there for the next two-plus years. In March 1946, Costelloe moved to New York City to become Tax Director in the law department at the Radio Corporation of America (R.C.A.).

Throughout these years, Costelloe stayed in touch with Jackson, continuing to be one of his favorite former law clerks even as that club grew bigger. For example, when Costelloe wrote to Jackson, who was prosecuting Nazis in Nuremberg, on his birthday in 1946

William O. Douglas

and enclosed an amusing news item about Attorney General Tom C. Clark,[24] Jackson dictated a letter back, thanking "Johnnie" for his letter "afford[ing] a light moment in the cloudy Bavarian atmosphere."[25]

After 1946, as Costelloe's life moved forward in New York City, he sent Justice Jackson occasional letters and notes. In 1948, for example, Jackson provided, at Costelloe's request,[26] a reference supporting Costelloe's application to join the New York bar. Jackson wrote, in a sweetly sarcastic note to Costelloe that accompanied the questionnaire that Jackson had filled out for Costelloe to submit to the bar examiners, that he (Jackson) "filled it in[] exercising sufficient moderation so as not to unduly inflate your ego or excite the suspicion of

Felix Frankfurter

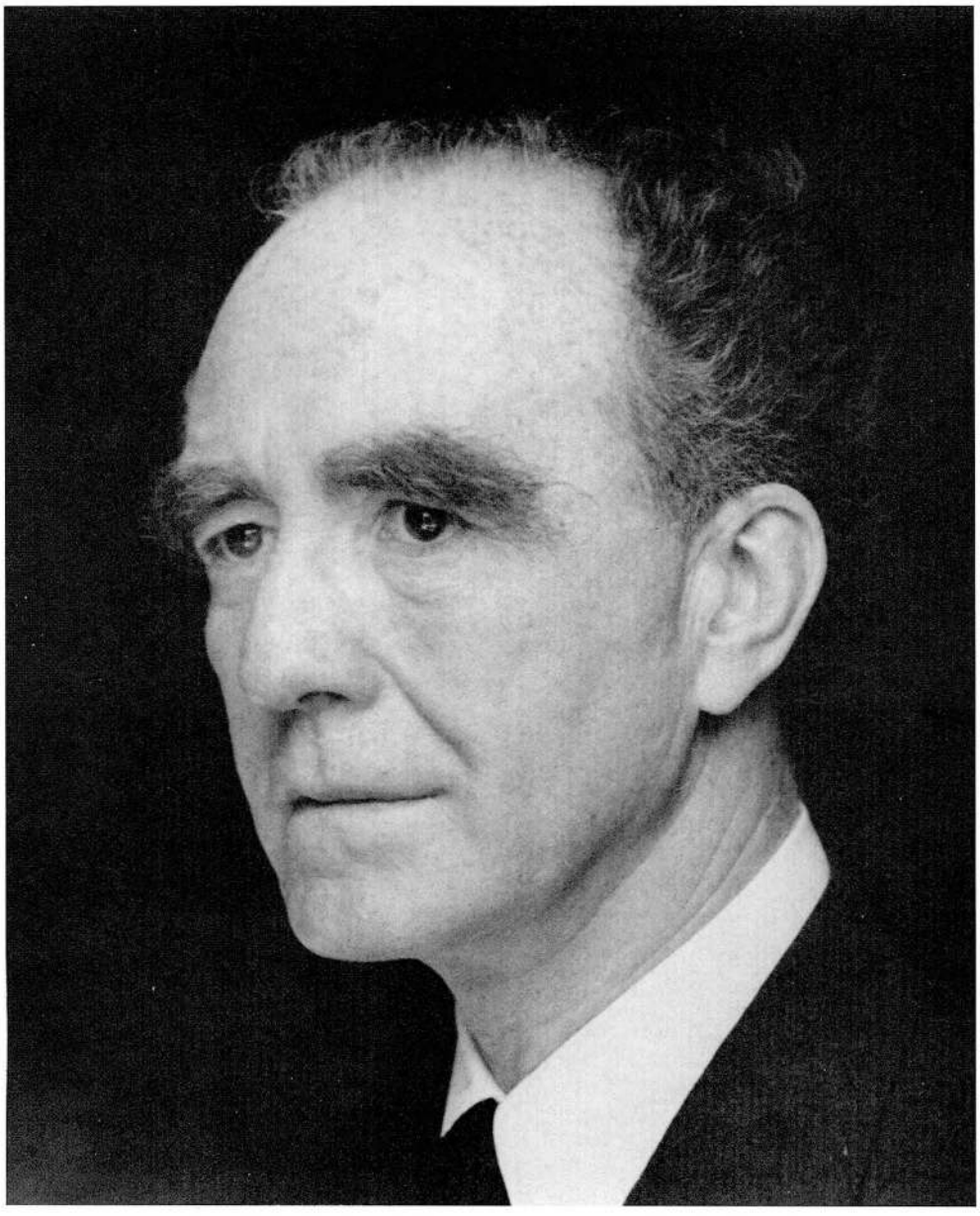
the examiners as to the impartiality of my testimony...."[27]

In April 1949, Costelloe wrote that he wanted to "drop by" the Court soon to see if Jackson could "leave off tuning up constitutional law long enough to pass inspection on a very fine wife I recently acquired."[28] Costelloe had married G. Frances ("Gee") Martin two months earlier. Perhaps that news surprised Jackson—just a few months earlier, his former secretary Ruth Sternberg, who had worked for Jackson while Costelloe was the law clerk and thus knew him well, had expressed doubt to Jackson that Costelloe was the marrying type. She wrote to Jackson in January 1949: "I had a Christmas card from Johnny Costelloe. He says he is on the brink of matrimony, [but] that I will believe

Robert H. Jackson

when I see the announcement. He has been on the brink too many times for me to take him seriously."[29] In any case, Jackson sent a reply to Costelloe that meant a lot to both newlyweds: "Bring the lady in and I will give you an impartial verdict in her favor and promise to be discreet in what I say."[30] I do not think that visit came to pass, but soon enough Costelloe got to introduce his wife Gee to Justice Jackson when the Costelloes came to hear him speak at an Association of the Bar of the City of New York (ABCNY) event.

The Costelloes and Justice Jackson sent each other Christmas cards. In one, the Costelloes included a photograph of their first baby. In a later one, the Costelloes sent a photograph of their three children. Jackson responded by writing on his card, "My love



Frank Murphy

to all the family and with the hope I may someday soon get to see them all."[31]

Justice Jackson never met the entire Costelloe family. He did meet the eldest child, Paul—John Costelloe brought this toddler along with him to the Supreme Court on October 6, 1951, when Jackson's current and former chambers personnel assembled for a luncheon celebrating his tenth anniversary of service on the Court.

After this event, Jackson promptly wrote and sent Costelloe a note expressing his thanks:

> Dear Johnny:
>
> It was a great pleasure to see you here on Saturday although it took me some time to get next to what it all meant. It was a gay occasion. I appreciate your part in it and in

Stanley F. Reed

the gift of Churchill's incomparable story of the great tragedy of our times.[32] Hope it will not be so long in meeting again. Thanks and best wishes

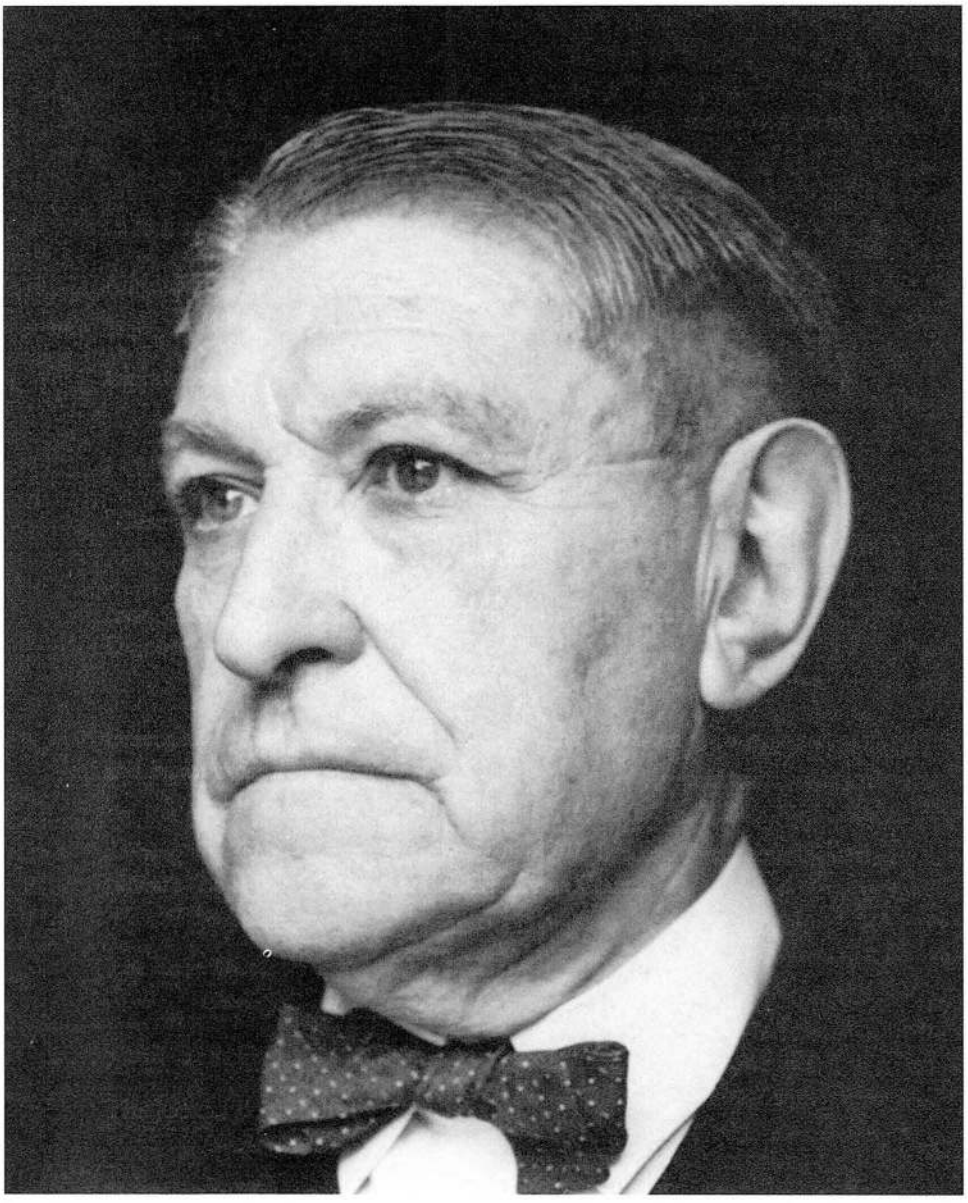
Sincerely

Robert Jackson[33]

Jackson's note prompted Costelloe to write back, sharing reflections on the anniversary party and his clerkship years earlier, and noting that he soon would be sending prints of the photographs that he had taken at the party:

Dear Mr. Justice—

Your fine note on last Saturday's fiesta was more than thoughtful, and I have taken the liberty of



Owen J. Roberts

bragging by showing it to some favorite friends and relations.

Finding the days at the Court so vivid after all those years gave me a bit of a start. They were the best ever, and doubtless always will be.

I've often wanted to stop by for a chat with you, but have refrained in the belief that if all your erstwhile workmen did as I wished, you would have a little time for making law. Now I wish that I had refrained less and imposed more. I mean to do so in the future.

The negatives came out well; and the photo finisher should soon have the prints made. I will send them along when he does. Also, a picture

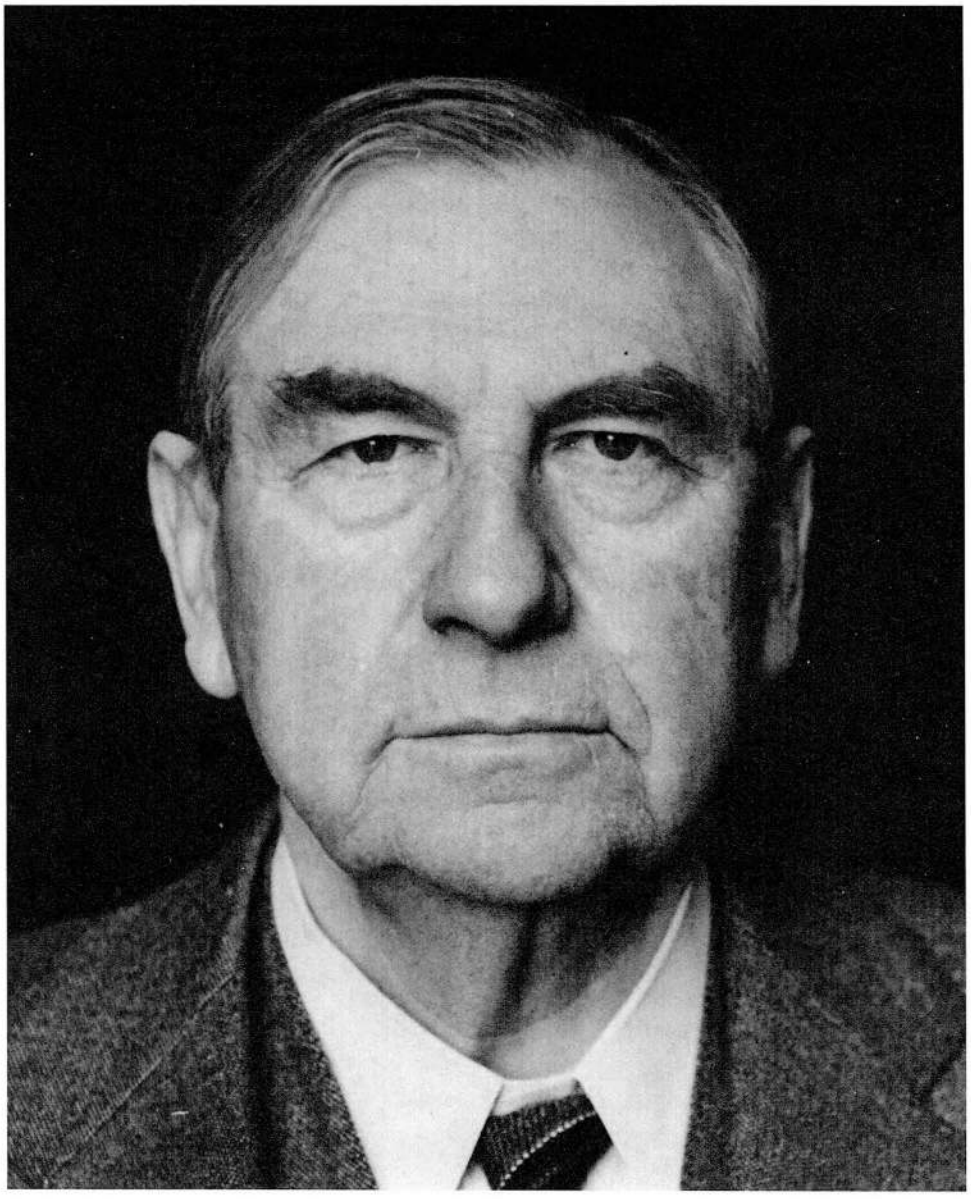
Wiley Rutledge

> of my fine son gobbling a choice bit of your festive cake. Few little boys have such a chance, and none could have more gusto.
>
> ...
>
> As ever,
>
> Johnny[34]

It seems that Costelloe, who probably took snapshots on this 1951 occasion rather than more formal photographs, let a photo shop print them. The whereabouts of these negatives and prints is unknown.

Just three years later, John and Gee Costelloe and their son Paul attended Justice Jackson's funeral in Washington's National Cathedral.

During Jackson's life and afterward, John Costelloe treasured his 1943 Supreme Court Justice photographs. It seems that



Harlan F. Stone

in 1948, a year after Costelloe had made his prints, he was interested in exhibiting some or all of them at the ABCNY, but that the exhibition never occurred.[35] He did exhibit the photographs in his home. His son Paul remembers that they were on the walls as he was growing up. His daughter Ann recalls that "a gravity" surrounded the collection; she "knew very young that these were important men." Almost thirty years later, Costelloe still had the photographs on display—in a 1976 article, he mentioned, in passing, that his "photographs of the Justices, good subjects and great mentors," were "on the walls" at his home.[36] His son Kevin recalls that his father was "incredibly proud of his service with Jackson." All three Costelloe children recall their father

speaking of his Supreme Court clerkship often and fondly. But no one knows what happened to his photographic negatives.

John Costelloe was R.C.A.'s Tax Director from 1946 until 1958. He then became a partner in the New York law firm of Chadbourne, Parke, Whiteside and Wolff and was an Adjunct Professor at New York University School of Law. He lived in Manhattan and in Centerport on Long Island. In 1966, he served on the U.S. Department of Commerce's panel on Invention and Innovation. He also participated in the Lawyers Lobby against the Vietnam War.

In 1977, Costelloe moved to semi-retirement in the Berkshires in western Massachusetts, a landscape of big hills, small mountains, and great beauty. He lived there year-round and had a law office in Lenox, where he had owned property since the late 1960s. Into the 1980s, scholars tracked him down to inquire about *Wickard v. Filburn* and other aspects of his clerkship with Justice Jackson.[37]

In those years, Costelloe continued to be an avid photographer. He regularly used a Leica or a Rollei from his collection to photograph Berkshire landscapes, local characters, and, especially, performers at Tanglewood, just up the road from his home. He sometimes exhibited photographs in the Lenox Library. In September 1992, less than a year before his death, he donated to the Library, located in a historic former county courthouse, ten color photographs that he had taken of that beautiful building.

It is difficult to know when Costelloe's fascination with cameras and film began. It might have been back in his teenage and young adult years in Nebraska, when he and his brother ran a successful printing business. It is something that he passed along, as several of his descendants enjoy using cameras to capture beautiful moments.

John Costelloe's children, following his lead and their mother's explicit wishes, have donated to the Supreme Court his 1943 photographs of the justices. This seems a fitting conclusion to his Jackson clerkship there nearly eighty years ago. Costelloe was very proud to have assisted that Court in its work:

> The nine Justices, some of them old, and the Law Clerks, most of them young, and a devoted library staff and a dozen or so secretaries to the Justices, tried hard to keep some order in the judicial system and to keep other branches of Government from getting all out of proportion and shape in wartime. I wondered that it all came off as well as it did, even accepting confusion as a legitimate weapon in the arsenal of a branch of government especially weak in wartime.[38]

Costelloe remembered those days as "the best ever."[39] He captured that photographically in his portraits of the Stone Court Justices.

Author's Note: I dedicate this publication to the memory of John Francis Costelloe (1916–1993)—it is an honor to tell some of his story and to be, in effect, his agent in publishing some of his beautiful and historically significant photographs. I thank the members of his immediate family—his late wife G. Frances ("Gee") Martin Costelloe (1925–2016) was my kind, fascinating, and very helpful friend, and their children Paul M. Costelloe, Kevin M. Costelloe, and Anne C. Landenberger have been very generous to me and to history, including by donating to the Supreme Court the photographs of the Justices that are published here. I also thank the Court's Curator Catherine Fitts, its Collections Manager for Graphic Arts Franz Jantzen, and this *Journal*'s editor Clare Cushman for assistance and friendship; John Costelloe's niece Maria Metzler Johnson (1945–2019) and her husband Calvin H. Johnson for sharing documents and knowledge; James L. Walker (1942–2019)

for similar generosity; Ryan Reft, Jeffery M. Flannery (now retired), Patrick Kerwin, Loretta Deaver, Lara S. Szypszak, and everyone at the Library of Congress's Manuscript Division for expertise, assistance, and constant friendship; personnel at the Lenox Library and the Berkshire Athenaeum for answering questions and sending documents; Michael Zhang for technological support to THE JACKSON LIST and wise advice; and Danielle M. Stefanucci and Sarah E. Catterson for excellent research assistance.

Notes

[1] *See Attorney John Costelloe Dies; Law Career Spanned 50 Years*, BERKSHIRE EAGLE, Aug. 12, 1993.

[2] *See* Letter from Robert H. Jackson to John F. Costelloe, Aug. 23, 1940 (copy in author's possession).

[3] *See* Notation on Supreme Court Marshal's Office file notecard on John Costelloe.

[4] Letter from Robert H. Jackson to Marjorie Merritt, Exec. Sec'y, Nat'l Conf. Bar Exam'rs., Aug. 23, 1948, in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. ("RHJL"), Box 22, Folder 5.

[5] *See* 317 U.S. 111 (1942). For scholarship on *Wickard v. Filburn*-related issues that discusses memoranda that Justice Jackson wrote in Summer 1942 to law clerk Costelloe regarding issues in the case, see Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From* Swift *to* Jones and Laughlin, 61 FORDHAM L. REV. 105, 159 (1992); G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 904–05 (1997); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 212–25 (text) and 301–04 (endnotes) (1998); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1138 and 1145–46 (2000); Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009, 1050, and 1053 (2003); Barry Cushman, *Small Differences?*, 55 ARK. L. REV. 1097, 1144, and 1147 (2003); Robert A. Schapiro and William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1257 n.323 (2003); David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1274 n.278 (2004); Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C.L. REV. 1399, 1434–35 (2008); Matthew J. Lindsay, *Federalism and Phantom Economic Rights in* NFIB v. Sebelius, 82 U. CIN. L. REV. 687, 729 (2014); David S. Schwartz, *Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model*, 2020 WIS. L. REV. 195, 210 (2020).

[6] *See* John Q. Barrett, *Justice Jackson on "What the Law's Going to Be—At Least Until Its "Gelding,"* 6 GREEN BAG 2D 125 (2003) (discussing Costelloe's work on this Jackson project).

[7] *See* 317 U.S. 1 (1942).

[8] *See* 319 U.S. 624 (1943). For scholarship that discusses some of law clerk Costelloe's work with and for Justice Jackson on *Barnette* and related Jehovah's Witnesses' cases, see Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CRT. REV. 455, 475–76 (2002); Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 431–32, 433 n. 284, and 434 (2008); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUMBIA L. REV. 1915, 1967–69 (2016); John Q. Barrett, *Justice Jackson in the Jehovah's Witnesses' Cases*, 13 FIU L. REV. 827, 842–43 (2019) (quoting a Jackson note to "Johnny" Costelloe).

[9] This clerk, Albert J. Schneider, worked for Justice Roberts for all of his fifteen years of service on the Court. *See* Clare Cushman, *Fountain Pens and Typewriters: Supreme Courts Stenographers and Law Clerks, 1910–1940*, 41 J. SUP. CT. HIST. 39, 55, 63 (2016).

[10] Letter from Robert H. Jackson to Jerome N. Frank, Mar. 9, 1943, in Jerome New Frank Papers (MS 222), Manuscripts and Archives, Yale University Library ("JNFY"), Series III, Box 57, Jackson file.

[11] *See* John Q. Barrett, *Albany in the Life Trajectory of Robert H. Jackson*, 68 ALBANY L. REV. 513, 529 (2005); John Q. Barrett, *Admission to Practice Law in New York's Courts (1913)*, JACKSON LIST post, Dec. 12, 2013, https://thejacksonlist.com/wp-content/uploads/2014/04/20131212-Jackson-List-Bar-Admission.pdf

[12] Letter from Robert H. Jackson to Jerome N. Frank, Mar. 10, 1943, in JNFY, Series III, Box 57, Jackson file.

[13] *See* John Q. Barrett, *Phil C. Neal (1919–2016), Jackson Law Clerk*, JACKSON LIST post, Oct. 22, 2016, https://thejacksonlist.com/wp-content/uploads/2016/11/20161022-Jackson-List-Phil-Neal.pdf

[14] *See* Letter from Robert H. Jackson to Chief Justice Harlan Fiske Stone, July 10, 1944, in RHJL, Box 132, Folder 1.

[15] The Supreme Court Marshal's Office file notecard on John Costelloe, see *supra* note 3, shows that he began clerking on August 6, 1941, and that he resigned at the close of business on Sunday, October 17, 1943. This probably means that he was on the Court's payroll

for that period. *Cf.* Letter from John F. Costelloe to Robert H. Jackson, Aug. 7, 1948, in RHJL Box 22: "My recollection is that I began work as your law clerk August 15, 1941, and continued until about October 17, 1943."

[16] *See* John F. Costelloe, *Lawyers' Use of Editing Equipment*, 48 N.Y. ST. BAR J. 622, 623 (Dec. 1976).

[17] *See* Entry by Edith Waters, Ever Ready desktop calendar page, Oct. 8, 1943, in William O. Douglas Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 1107.

[18] *See* Note by Edith Waters, *id.*

[19] I have not located information that identifies the particular printing equipment he used in 1947. *Cf.* Letter from John F. Costelloe to Robert H. Jackson, Aug. 7, 1948 (describing an impending vacation during which Costelloe planned to "catch up on a lot of things ... [including] finishing an automatic roll-paper developing machine"), in RHJL Box 22, Folder 5.

[20] Letter from John F. Costelloe to Justice Wiley Rutledge, June 10, 1947 (in author's possession).

[21] *See id.* Costelloe asked Justice Rutledge also to inscribe a photograph to his friend Carlton Fox (1882–1968), the attorney in the Department of Justice's Tax Division who "made the compilation of legislative history of the Revenue Acts [that is] in the [Supreme] Court library." *Id.*; *accord* Nicholas Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 335, and n. 231 (2013) (describing Fox's legislative history). Costelloe also asked Jackson to inscribe a photograph to Fox. *See* Letter from Robert H. Jackson to John F. Costelloe, June 16, 1947 (in author's possession). I assume that Costelloe asked this of each Justice, that each complied with the request and mailed back to Costelloe a print inscribed to Fox along with the print(s) inscribed to Costelloe, and that he soon gave Fox the prints that were inscribed to him. I have no information about what became of these prints.

[22] The photograph now is part of the holdings in the Library's Prints and Photographs Division, and it is available online, credited to photographer John F. Costelloe. *See* https://www.loc.gov/item/2003689110/ (visited May 31, 2021). Judge John Ferren also published the photograph, crediting Costelloe, in his fine biography of Justice Rutledge. *See* JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE (2004).

[23] Letter from Robert H. Jackson to John F. Costelloe, June 16, 1947 (in author's possession): "I am glad to inscribe the photos for you and Carlton Fox, and I appreciate the gift of the other prints. Everyone here pronounces them excellent."

[24] *See* Letter from John Costelloe to Robert H. Jackson, Feb. 13, 1945 [sic—1946], in RHJL Box 112, Folder 6.

[25] Letter from Robert H. Jackson to John Costelloe, Mar. 26, 1946, in RHJL Box 112, Folder 6.

[26] *See* Letter from John F. Costelloe to Robert H., Jackson, Aug. 7, 1948 (asking Jackson to complete and return a former employer affidavit), in RHJL Box 22, Folder 5.

[27] Letter from Robert H. Jackson to John F. Costelloe, Aug. 18, 1948. Because Jackson, delayed by being away from the Court on vacation, took more than a week to complete and return to Costelloe this former employer questionnaire for him to submit to the bar examiners, Costelloe went ahead without it, submitting an application that just listed Jackson as reference. This caused the examiners to write to Jackson, asking him to confirm that Costelloe had been his law clerk and "satisfactory from the standpoint of character, reputation and legal ability." Letter from Marjorie Merritt to Honorable Robert H. Jackson, Aug. 19, 1948. Jackson replied promptly, confirming Costelloe's two-plus years as his law clerk and endorsing his fitness for New York bar membership. *See* Letter from Robert H. Jackson to Marjorie Merritt, Aug. 23, 1948. Each of these documents is in RHJL Box 22, Folder 5.

[28] Letter from John F. Costelloe to Robert H. Jackson, Apr. 6, 1949, in RHJL Box 10, Folder 7.

[29] Letter from Ruth M. Sternberg to Robert H. Jackson, "January 11" [1949], in RHJL Box 20, Folder 8.

[30] Letter from Robert H. Jackson to John Costelloe, Apr. 15, 1949 (underlining by Jackson) (in author's possession). A typed, unsigned carbon copy of this letter is in RHJL Box 10, Folder 7.

[31] Christmas card from Robert H. Jackson, no date (in author's possession).

[32] As a 10th anniversary gift, Jackson's Supreme Court family gave him a copy, signed by each of them, of Winston Churchill's book THE GATHERING STORM, the first volume of his series on the Second World War.

[33] Note from Robert H. Jackson to John F. Costelloe, undated, stamped received on Oct. 10, 1951 (in author's possession).

[34] Letter from John F. Costelloe to Robert H. Jackson, Oct. 30, 1951, in RHJL 15-10.

[35] Costelloe in early 1948 wrote to Justice Black reminding him of the photographs that Costelloe had taken in 1943 and the prints he had sent in 1947. He requested his permission to include it in the upcoming (the would-be second, it seems) ABCNY exhibition of members' photographs. *See* Letter from John F. Costelloe to Justice Hugo L. Black, Jan. 30, 1948. I assume that Costelloe sent a similar request to each justice whom he had photographed in 1943. Justice Black promptly wrote back, giving his permission. *See* Letter from Justice Black to Costelloe, Feb. 6, 1948. Costelloe then wrote back to state his thanks, and to report with disappointment that he had been advised by the ACBNY sponsoring

committee that the exhibition "ha[d] been postponed indefinitely for want of a sufficient number of exhibits." Letter from Costelloe to Justice Black, Feb. 20, 1948. Each of these documents is in the Hugo L. Black Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 20, Folder 3.

[36] Costelloe, *Lawyers' Use of Editing Equipment*, 622.

[37] *See, e.g.*, Letter from John F. Costelloe to Professor James L. Walker, undated (circa May 1986; replying to a May 12, 1986, letter) (in author's possession).

[38] Costelloe, *Lawyers' Use of Editing Equipment*, 622.

[39] Letter from John F. Costelloe to Robert H. Jackson, Oct. 30, 1951.

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Defending Democracy: Speeches of the Warren Court Justices and *Brown v. Board of Education*

Robert A. Whitaker

Introduction

While speeches and public appearances are crucial to electoral success for members of Congress and presidents, for Supreme Court justices the constitutional protection of life tenure and lack of an electoral constituency suggest little need for the justices to speak outside the Court. Further, some extrajudicial commentary has proven problematic for the justices. The impeachment of Justice Samuel Chase in 1804 was motivated in part by Chase's extrajudicial commentary critical of the Jefferson administration. While justices' commentary on cases or issues involving elected officials or government policy is often problematic for the institutional prestige and legitimacy of the Court,[1] speeches off the bench date to the Jay Administration,[2] and the justices have defended their rulings and authority through extrajudicial commentary since at least 1808 when Justice William Johnson wrote a newspaper reply to criticisms by the Attorney General of a circuit decision.[3] John Marshall defended *McCulloch v. Maryland*[4] through anonymous pieces he sent to newspapers.[5] Given the potential risk to institutional prestige and the apparent lack of need, there is little wonder Justice Felix Frankfurter once famously described the act of a justice speaking off the bench as "foolish."[6] The norm of judicial "lockjaw" counsels the justices to "not speak in public about matters of public law and intra-Court affairs."[7] As Justice Potter Stewart once put it, "When a Supreme Court justice does make a public speech, you are likely to hear a discussion of some exciting and dangerous subject like, 'The Problem of Congestion in the District Courts.'"[8] The justices' speeches are often seen as little more than "sleepy civics lessons."[9] However, during the sixteen years of the Warren Court (1953–1969), the justices collectively delivered more than six hundred speeches, a large number for an act presumed to be of little consequence. Given

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this, what did these justices talk about in their speeches, and what is the relationship between the content of their speeches and the Court's institutional authority?

The speeches of the Warren Court justices reveal many topics. Although Chief Justice Earl Warren claimed "we do not discuss our opinions in public,"[10] beginning in 1954, as the Court prepared to hand down *Brown v. Board of Education,*[11] speeches by two justices gave hints of the ruling, and in the months and years following it, in the face of "massive resistance" and attacks on the Court, Warren, along with several justices of both liberal and conservative proclivities provided an elaborate defense of *Brown*, desegregation, and racial equality. Delivered to audiences at colleges, universities, law schools, bar associations, judges' conferences, and civic organizations, the speeches appear to have been a response to attacks on the Court and judicial authority following *Brown.* The justices' responses took differing forms. A few speeches, such as those of Justice Harold H. Burton, repeated standard "civics" themes about the Court, but those by others, including Warren and Justices William O. Douglas, Tom C. Clark, William J. Brennan, and John M. Harlan, drew upon the symbolism of the Cold War and framed desegregation and equality as intended not only to fulfill a historic American commitment to democracy but also to demonstrate its value and power in the global political arena. Shaped by the political context of the Cold War, many of these speeches touted the foreign policy benefits of desegregation, complementing *Brown's* legal claims with assertions that actions to promote equality at home would inspire other nations to embrace and support democracy. By presenting this Cold War frame in their commentary, these justices implied segregationists and critics of the Court as illegitimate and essentially as domestic enemies of democracy. Although these speeches failed to stem criticism of the Court, they complemented *Brown's* claims of constitutional authority and the Court's traditional bases of legitimacy in its assertions of constitutional interpretive authority and finality[12] with a set of political claims that sought both to elevate the Court above the intense criticism and direct attacks on its authority and to depict it as an institutional guardian of democracy committed in the fight to defeat communism. This defense persisted well into the second decade of the Warren Court but faded as violence consumed the nation and the justices' speeches revealed divisions over *Brown's* legacy and the Court's role and responsibility in furthering civil rights.

As *Brown* sent shock waves through American politics, and in contrast to the ruling's assertions that segregation constituted a racial "badge of inferiority," the speeches from 1954 until approximately 1965 demonstrate an effort by justices of both ideological wings to broadly engage audiences in a dialogue about democracy, communism, equality, and the Court. This dialogue took different forms, with the conservative justices such as Tom C. Clark and John M. Harlan generally praising democracy itself, urging their audiences acting as "the people" to protect rights, and depicting the Court as a passive institutional actor, while the liberal justices, including Warren, William O. Douglas, and William J. Brennan, generally spoke more frequently, championing the Court and the Constitution as fulfilling a democratic obligation to advance the cause of racial equality. Douglas went furthest in his explicit praise for desegregation as the solution to a myriad of American domestic and foreign policy problems and his advocacy for active political movements overseas to counter communism. Between 1965 and 1969, as domestic turmoil intensified, a debate concerning civil rights and *Brown's* legacy emerged, with Harlan and Black somewhat critical of the Warren Court's activism and Warren and others, such as Abe Fortas, defending the Court's civil rights jurisprudence as the

TABLE 1 Study of Speeches by Members of the Court, 1953–1969

Justice	Speeches 1954–1965	Notes
Warren	122	
Clark	105	
Brennan	89	Joined October 15, 1956
Douglas	70	Represents approximately 20 percent of his speeches[13]
Harlan	29	Joined March 28, 1955
Frankfurter	23	Retired August 28, 1962
Goldberg	14	Joined October 1, 1962
Black	8	
Burton	5	Retired October 13, 1958
Stewart	4	Joined October 14, 1958
Fortas	3	Joined October 4, 1965
Jackson	1	Died October 9, 1954
Minton	0	Retired October 15, 1956
Reed	0	Retired February 25, 1957
White	0	Joined April 16, 1962
Whittaker	0	Retired March 31, 1962
Totals	473	

product of historic and societal pressures and movements.

This study examined a total of 628 speeches given by Warren Court justices from October 1953 through June 1969, not a complete record.[14] The textual content of speeches collected from archives and online sources containing the papers and speeches of the Warren Court justices was analyzed to assess the political purposes of speech and the ability of judicial speech to construct specific understandings and to emphasize specific meanings including the meanings the justices attach to their discourse.[15] Recent studies of judicial speech, in which analysis has been limited to a small number of speeches, have found speech performing "educative or civic functions" or appearing biographical in nature.[16] Here, however, the use of interpretive tools across this sample delves beneath the "surface politics"[17] of judicial speech, often seen as a boundary between law and politics, to illustrate how speeches actively draw upon external political frames to construct new narratives of judicial authority. I argue the justices' discourse with their audiences and the themes, values, and contexts they emphasize represent political acts to construct and rework the bases of institutional legitimacy. This focus on the relationship between institutional authority and judicial speech differs from justice-centric studies of speech, which examine what the justices as individuals "expect to gain from their public expressions."[18] This approach also differs from a typical linear causal analysis, which may seek to measure incremental change in legitimacy as a quantifiable dependent variable, such as audience impact or to explore quantitatively other types of relationships by reducing extrajudicial commentary to sets of independent and dependent variables.

The Cold War and *Brown*

The Cold War shaped Americans' views of democracy as "a set of beliefs about the nature and moral power of the nation."[19] The themes of racial equality, democracy, and global political advantage that emerged in many speeches appear rooted in the U.S. Justice Department's *amicus curiae* brief filed with *Brown I* in October 1952. The brief urged the justices to view desegregation through the lens of foreign policy: "It is in the

present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed."[20] Further, the brief highlighted the political risk of perpetuating segregation:

> The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.[21]

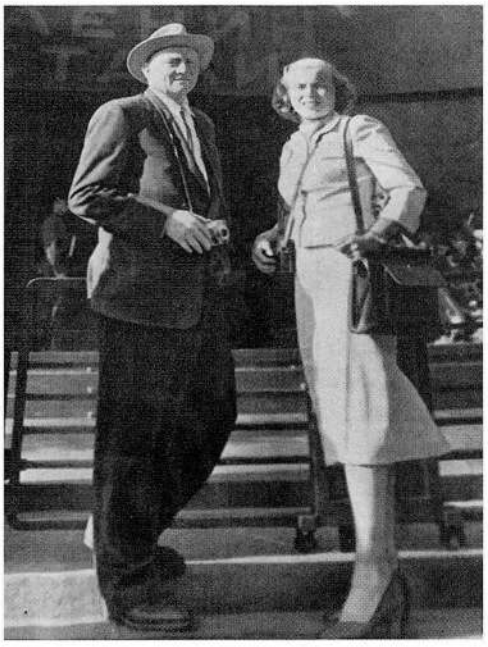
The domestic sanction of segregation risked "the effective maintenance of our moral leadership of the free and democratic nations of the world."[22] *Plessy v. Ferguson,*[23] with its doctrine of separate-but-equal, provided communist adversaries with "the most effective kind of ammunition for their propaganda warfare."[24] Segregation was "troubling and embarrassing" for the United States,[25] and the brief urged Americans to "prove by their actions that the ideals expressed in the Bill of Rights are living realities, not literary abstractions."[26] *Brown* does not directly address the brief's themes, with its only explicit nod to democracy a suggestion that integrated public education would advance students' capacity for citizenship and military service.[27] Warren's opinion did not cite the brief, but his speeches would soon describe the Cold War as "world war of ideas,"[28] suggesting he and other justices were aware of the political implications of the Cold War as a "war of propaganda."[29] Although William O. Douglas made similar statements prior to the brief, condemning lynching in the United States in a speech in India in 1950,[30] the speeches by several justices for a decade following *Brown* amplified and expanded the brief's claims, redeploying its arguments in speeches defending desegregation, equality, and the Court.

Speeches Prior to *Brown*

While *Brown* was reargued in 1953, Warren's first major address as chief justice, "Free Investigation and Faithful Experiment" at Columbia University in January 1954, made no mention of the pending school desegregation issue, instead defending free speech and inquiry and condemning "totalitarian governments," which "cannot tolerate dissenting views."[31] Warren praised Columbia graduates who served on the Court, such as Charles Evans Hughes, who understood the law "could not be a living thing serving the needs of every oncoming generation if it should always be anchored to the status quo and preconceptions of the past."[32] Despite the speech's emphasis on freedom of thought, Warren's assertions that "our strength is in our diversity,"[33] and his prediction that the "power of freedom of thought"[34] would "permeate the Iron Curtain, for no people of any race will long remain slaves"[35] placed race and equality squarely within conceptions of American democracy and noted the international appeal of these values. The *Washington Post* praised the speech for "the great possibility for an ultimate free world"[36] but the *Wall Street Journal* expressed concern as it anticipated Warren's departure from the "preconceptions of the past."[37]

A month later, Douglas gave his first presentation of "Democracy vs. Communism in Asia,"[38] his most prominent statement on desegregation, democracy, and the defeat of communism. Douglas delivered the speech routinely for more than a decade, from February 1954 and October 1965.[39] This speech documents Douglas's extensive travels in Asia and his observations of the growing influence of communist ideas there, and it urged United States to bolster a growing pro-democracy movement in Asia that was itself driven by demands for racial equality.

The speech lamented the ease with which travelers to those lands could locate Marxist literature but not the political writings of Paine or Jefferson. American political ideals were not used to their full potential. Equality was "a firm article of the American faith," and like the *amicus* brief, "Democracy vs. Communism" warned that without consistent efforts to promote equality domestically, the United States would cede the power of example and the political high ground to the Russians, who "have made a fetish of equality" and "worked hard to be identified with the original American creed – that all men are created equal."[40] The values of "liberty, equality, and freedom constitute the one true advantage we have over the totalitarian world," Douglas asserted, claiming these values would "bring us victory if we will only make them vital forces in our domestic affairs and translate them into affirmative terms when we come to foreign policy."[41]



Justice William O. Douglas spoke widely about the need to promote desegregation and racial equality in the USA so as not cede the moral high ground to Russia, which he said had "made a fetish of equality." Douglas and his wife, Mercedes, toured Russia in September 1955 and are shown here visiting the tomb of Lenin.

As Warren and Douglas spoke of race, democracy, and global politics, Justice Felix Frankfurter, who rarely spoke off the bench, instead seemed to hint at the difficulties the justices faced in deciding *Brown*. In one of his few actual speeches, a lengthy one in April 1954 before the American Philosophical Society in Philadelphia, Frankfurter described the human element of judging. He noted that "the Court is concerned with how men feel,"[42] and quoting *Graves v. O'Keefe*,[43] asserted that "the Constitution was designed for a developing nation"; describing the act of overturning precedent, Frankfurter noted that "it makes a difference if the validity of an old doctrine… was always in controversy."[44] Frankfurter explained that dissents and lack of unanimity were natural aspects of judging: if the "answers" in cases were "automatic," judges would be replaced by "IBM machines."[45] In a hint of the grounds upon which *Brown* struck down segregation in the schools, Frankfurter described the Constitution as describing how the justices view due process as the weighing "the interest of the individual over against the interest of society."[46] Avoiding any mention of education, democracy, or the Cold War, Frankfurter observed that "society keeps changing" and "law presupposes sociological wisdom as well as logical unfolding."[47]

A week before the Court handed down *Brown* in May 1954, Douglas, in another speech that mirrored the Cold War claims of the Justice Department brief, decried "the division of the world into two camps."[48] Speaking to the American Association for United Nations, the Justice described America as "preoccupied with military bases" and called instead for efforts "to seek bases in the hearts of men of all races."[49] As in his "Democracy vs. Communism in Asia" speech, Douglas advocated the spread of American political ideals to counter militarism and colonial oppression dominant in Asia, and he called

for "rallying the people of the world to the democratic front," suggesting "we can help them make their revolutions in the democratic tradition."[50] Douglas championed the inspirational powers of the values of "equality, liberty, and independence," which he proclaimed "the most contagious force loose in the world... while the fever of Russian communism runs its course."[51]

The Backlash to *Brown*

Brown v. Board of Education thrust the Warren Court into a national debate over judicial power. The South's immediate reaction of "stunned silence" to the ruling soon gave way to condemnation of the Court and outright rejection of the decision.[52] Southern politicians' speeches and interviews decried *Brown* as an intrusion of elite northern federal ideology into state affairs. As attacks on the Court grew, Warren and Douglas, as well as Justices Clark, and Harlan, who joined the Court in 1955, all made speeches praising the power of democracy and describing equality as a major advance in the worldwide effort to defeat communism.

Just three weeks after *Brown*, speaking at Sarah Lawrence College, Douglas explicitly linked school desegregation with democracy: "We are anti-Communism," Douglas told the graduates and their families, "but not pro-democracy," demanding that America show "faith in the principles of equality"[53] and actively "stand for freedom... for freedom for men of the colored races as for freedom for men of the white race."[54] To Douglas, the solution was obvious, as he stated in the speech's closing:

> No matter how often the problem is stated or restated it comes back to the question of our faith in the principles of equality proclaimed in our Declaration of Independence and Bill of Rights. Once that point of equality is settled, everything will be settled – in foreign policy as well as in domestic affairs; in the United Nations, was well as in our own public schools.[55]

Warren, as chief justice the face of the Court and the target of much of its criticism, as evinced in the ubiquitous "Impeach Earl Warren" billboards appearing across the south, did not mention the ruling or desegregation in his initial public appearances after *Brown*. But his first major speech following the decision, delivered before an audience of 2,000 at the dedication of the American Bar Center in Chicago in August 1954 and broadcast across four national radio networks, described the "global struggle" against "the godless totalitarian state"[56] and the power of demonstrating "freedom and justice for all"[57] to the world. In aspirational tones, perhaps reflecting his political experience as governor and former vice-presidential nominee, Warren described to the audience how the active promotion of democratic ideals at home would secure world peace:

> ...if we are to achieve a peaceful world, it will be accomplished through ideas rather than armaments; through a sense of justice and mutual friendships rather than with guns and bombs and guided missiles. We are living in a world of ideas and going through a world war of ideas. Everywhere there is a contest for the hearts and minds of people.[58]

Nearly repeating the Justice Department's *amicus* reference to the Bill of Rights verbatim, post-*Brown*, Warren made democracy and the Constitution synonymous: "The extent to which we maintain the spirit of our Constitution, with its Bill of Rights, will in the long run do more to make it both secure and object of adulation than the number of hydrogen bombs we stockpile."[59] The Court's primary source of institutional authority, its

As the Cold War heated up, the Warren Court justices made speeches praising the power of democracy in the worldwide effort to defeat communism. They defended the *Brown* decision from attacks by linking the benefits of desegregation at home to fighting communism abroad. Above are American and Soviet tanks facing each other at Checkpoint Charlie in Berlin.

claim to legitimate constitutional interpretation, now included promoting the "spirit of our Constitution" to the world to advance America's foreign policy aims. Warren repeated this theme of American political leadership in a speech in Williamsburg, Virginia, in September 1954, to commemorate John Marshall:

> As a nation we make no pretense except to a passion for justice based upon the dignity and rights of the individual. We stake everything we have on our belief that only through this kind of justice can there be order and contentment within nations and peace between the countries of the world.[60]

While Warren depicted equality as a national goal, a task to be achieved to help secure world peace, Douglas specifically identified American schools as the primary symbol of this effort. To Douglas, the nation's schools represented the true "melting pot," where racial equality "was more than a declaration of principle, it was a working creed."[61] Speaking before the Bronx County Bar Association in December 1954, Douglas highlighted the power of American example, recounting the nation's history of immigration, exclusion, and racism and claiming "the example…of the building of one community and one people out of many races" was the United States' "most enduring contribution" to global peace.[62]

President Dwight Eisenhower, whose ambivalence toward *Brown* and refusal to defend the Court left the justices "deeply resentful,"[63] appeared with Warren at another event commemorating Marshall in Philadelphia in 1955. Eisenhower described how a national commitment to accept political change would lead to "domestic tranquility"; history showed "change has been peaceful and selective; and always conforming to the principles of our founding documents."[64] But

without mentioning race or desegregation specifically, the president also suggested resistance to *Brown* would imperil America's prestige on the world stage: "We must never agree to injustice for the weak, for the unfortunate, for the underprivileged...if we accept destruction of the principle of justice for all, we cannot longer claim justice for ourselves as a matter of right."[65] In a response to the president, Warren asserted the Constitution, with support from the courts, would help support the American cause: "If the world is made to see that the provisions of our Constitution guaranteeing human rights are living things enjoyed by all Americans and enforceable in our courts everywhere, it will do much to turn the tide in our favor, and therefore, toward peace."[66]

Although the justices very rarely mentioned *Brown* by name, the single most explicit defense of the case in this period appeared in a speech Tom Clark gave to a lawyers' group in Chicago in September 1954. Clark praised *Brown*, calling it a "great decision of freedom and equality."[67] While Warren and Douglas often highlighted a judicial role and responsibility in promoting rights and democracy, Clark disavowed such a role, particularly for the Supreme Court, asserting that "the impartiality and detachment required of a court prevents the Supreme Court from pressing ahead with that militant spirit so necessary in preventing the curtailment of freedom."[68] Asking his audience rhetorically "Who are the real 'Minute men' of freedom?," Clark told his audience the protection of rights ultimately fell to the "vigilance" of "we the people,"[69] and he urged the audience to "carry on the fight to promote the main business of human life – individual freedom – both here and throughout the world."[70] Clark continually called attention to the limited judicial role in promoting freedom, telling an audience at Marshall College in West Virginia in September 1955, "Whether the Constitution becomes a dead letter, a strait jacket, or a living instrument under which...our changing needs may find protection, depends solely on the people."[71]

With Warren and Douglas framing the protection of democracy as a fundamentally judicial task, conservatives such as Clark and Harlan used their speeches to distance the Court from this responsibility, instead stressing to their audiences the public role in protecting freedom. Harlan, in one of his first speeches as a justice after he had replaced Justice Robert H. Jackson on the Court in 1955, told an audience at Brandeis University that the school's doors were "open equally to students of any race, creed, or color," Harlan warned the future of American democracy depended on "the independence, alertness, and common sense of our people," which he described as "the final bulwark of our way of life."[72] At Evansville College later that year, Harlan noted America's unique position of "free-world leadership which has been thrust upon us" and predicted that "the powers of the rays of freedom" were "ultimately bound to penetrate from the free world into the communist countries."[73]

While many of the justices speaking in this period offered praise for democracy, the Constitution, or the Court, assigning the leadership role of protecting democracy to "the people" emerged as a consistent theme in many of the conservative justices' speeches. Speaking to a fraternal organization in Richmond in 1957, Clark noted the inscription of "equal justice under law" over the entrance to the Court, telling the audience, "We should tell the world, what is our law,"[74] but to Clark the "we" meant the people and organizations, which he charged with the task of demonstrating the power of American law globally to promote equality: "they can help bring us our human goal of peace through the development of governments committed to the proposition of equal justice under law."[75]

The Cold War–inspired themes of democracy and combating communism, while a major element of the justices' speeches following *Brown*, were not the

only means of judicial defense of the institution. Other speeches appealed to the traditional, "civics lessons" symbols of judicial authority, including the Court's history, tradition, and relationship with the Constitution, and, in the Court's defense, nearly every justice at some point pointed to the history, continuity, or what they saw as the traditional role and function of the Court. Justice Harold H. Burton delivered few speeches in his limited time on the Warren Court, but his commentary provides an example of this type from the period immediately following *Brown*. Speaking in Cleveland in 1956, Burton invoked the traditional baseball metaphor to describe the justices: the "judges are the umpires – the Constitution and the laws are the rule books," which he claimed "provides the best solution yet found for making workable a government of laws, not of men" and "implements Equal Justice Under Law."[76] To Burton, the Court was "endowed with independence and continuity," and its "unique responsibility" was to serve as:

> the keystone that holds in place the members of the governmental arch which the Framers of our Constitution designed to sustain a representative federal republic, dedicated to the preservation for the individual of the greatest freedom consistent with like freedom for all.[77]

Democracy and equality thus emerged from constitutional structure and function, and Burton's speeches omitted any depiction of race, the Cold War, and ideological conflict.

Attacks on the Court

The justices' speeches obviously did little to stem the growing attacks against the Court following *Brown*, and the voices of criticism soon expanded into legal and academic circles. A loose coalition of elected officials, prominent legal scholars, state judges, and legal organizations, including the American Bar Association, joined in the criticism of the Court. While southern U.S. Senators accused the Court of yielding the rule of law to "rule by men,"[78] and southern state legislatures pushed "reams" of new segregation statutes and closed public schools,[79] the Court's announcement of the "all deliberate speed" implementation timetable for desegregation in *Brown II*[80] failed to placate critics. In March 1956, 101 members of Congress signed the "Declaration of Constitutional Principles," a statement of opinion better known as the Southern Manifesto, which decried *Brown* as "a clear abuse of judicial power,"[81] and accused the justices' "personal political and social ideas" of shaping their view of the case.[82] The Manifesto, and the White House's failure to condemn it, helped unify opponents and foster "indifference" to the Court's authority both in and outside the South.[83]

"Massive resistance" came to symbolize the broad struggle over constitutional meaning, enforcement of desegregation, and the reach of the Warren Court's legitimacy. The American Bar Association accused the justices of abusing their power and called for Congress to enact curbs, prompting Warren to resign his ABA membership.[84] At a 1958 judges' conference, 36 state chief judges accused the Court of abandoning a "government of laws, not men" and urged the justices to "exercise self-restraint."[85] Noted federal jurist Learned Hand described *Brown* as an "extreme" decision that constituted a "*coup de main*" by the Court.[86] Legal scholar Herbert Wechsler condemned the Court in his famous "neutral principles" lecture.[87] Former justice James F. Byrnes, then South Carolina governor, claimed the "Supreme Court must be curbed."[88] Justice Jackson's former clerk William H. Rehnquist wrote in *U.S. News & World Report* that clerks with left-wing political ideologies controlled the justices.[89]

Conservatives on the Warren Court, such as Tom C. Clark (standing at left), used their public speeches to impress upon audiences that it was the public, not the judiciary, that was responsible for protecting freedom, thereby avoiding centering the Court as the political agent of change.

Commentators described the post-*Brown* attacks on the Court as the most powerful challenges to judicial power since Roosevelt's "Court-packing" plan a generation earlier.[90]

As the Warren Court's critics attacked judicial authority and desegregation on the floor of Congress and in state houses, in the newspapers and public square, and on billboards, the justices perceived a significant threat to the Court in ways that necessitated more, not less, extrajudicial commentary. Elected officials seeking votes in a spirited campaign might rebut criticisms and attacks through direct, pointed rebuttals in their speeches. In contrast, the justices' speeches proffered a distinct rhetoric of judicial defense that often praised democracy and the advancement of individual rights and equality and presented desegregation as correct not only as a matter of law or through the execution of judicial process but correct politically as well by aiming to secure a significant American foreign policy advantage.[91] In these speeches, the justices sought to temper criticism of the Court and the outcome of desegregation by initiating a broader discussion of democracy itself, highlighting the potential foreign policy benefits of advancing racial equality at home, where the Court or the people functioned as institutional guardians of democracy at a time when the system was itself threatened by communist, totalitarian rule.

Although the justices devoted significant attention to these themes in their speeches following *Brown,* their docket revealed an institution in retreat from the pursuit of racial equality. Following *Brown* II in 1955, the justices ducked the issue of miscegenation[92] in *Naim v. Naim.*[93] But through the end of the decade and amid the 1957 Little Rock crisis, outside the Court Warren's speeches continued to highlight democracy and freedom in aspirational terms. On a visit to San Juan in 1956, Warren praised Puerto Rico's constitution, expressing hope its "zeal for

the democratic process" would serve as a "guiding light" for populations forced with choosing between "the rule of force or by the force of law."[94] At Villanova University in 1957, the chief justice reminded the audience of a national duty to promote democracy: "As one of the leaders of the world," the United States must "continuously testify to our belief in justice and our practice of it,"[95] and he added, "other free nations will be fortified in their pursuit of the same ideal."[96] At the dedication of a courthouse in Los Angeles in 1958, Warren concluded his remarks with a call that American could "prove to the world" by "absorb[ing] millions of people from other parts of our land" and provide them with justice to "entitle us to the envy of the world."[97] The next day, at the dedication of a cardiovascular research center at the University of California-San Francisco, Warren praised the development of the center as a step forward for democracy globally, not unlike desegregation: "Today we are engaged in a great competition with the Soviet Union seeking to demonstrate to the millions of uncommitted peoples all over the world that the open democratic society affords a greater measure of human welfare than the totalitarian systems established in the name of communism."[98]

Other Justices

Joining the Court in 1956, Justice William J. Brennan soon adopted the Warren-Douglas praise for democracy and institutional leadership in his own speeches. Brennan's early speeches discussed state-level judicial reform, trial tactics for attorneys, and case backlogs in state courts, likely following from his state court experience, but as criticism of the Court amplified, Brennan's speeches referenced the global cause for democracy. Speaking at the Third Circuit Judicial Conference in 1957, Brennan described the American experience of "surviving perils" as a "symbol to the entire world of the hope for the true essence of freedom."[99] In an address to law students at Georgetown in 1958, Brennan described "the protection of our growing concept of freedom in the rapidly shifting environment of our times and in the face of many adverse forces is the grand task of all Americans today."[100] Like Warren, Brennan framed the advance of democratic ideals as a national responsibility that fell on both the people and its institutions.

Following the Little Rock crisis, Justice Hugo L. Black, in one of his few remaining speeches, took aim at southern resistance to desegregation, condemning the dangers of "nullification."[101] Speaking at the University of New Mexico in May 1958, Black warned against what he called "severe attacks"[102] on the Bill of Rights, particularly his cherished First Amendment. Rather than praising democracy in the language of Douglas, Warren, and Brennan, Black, like Clark, appealed to a sense of public responsibility and guardianship, and he decried the dangers these attacks posed to democracy at home: "No one of these [constitutional rights] can be destroyed without impairing a substantial part of the dividing line between this free country and those controlled by arbitrary rulers."[103]

Cold War Concerns Continue in the 1960s

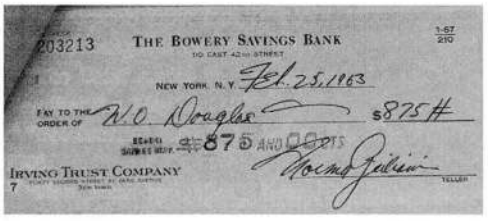
With the close of the decade and President Eisenhower's warnings of the looming "military-industrial complex" in 1961, changing circumstances and changing membership on the Court brought a gradual shift toward a more skeptical view of democracy, where domestic threats supplanted the concerns with communism's overseas expansion. Warren's most prominent speech of the decade, "The Bill of Rights and the Military," asserted that "free government is on trial for its life"[104] but focused primarily on issues such as the relationship between military and civilian authority and the application of the

Justice William J. Brennan spoke at the American Bar Association Prayer Breakfast, August 4, 1968, in Philadelphia. One of the most prolific speechmakers on the Warren Court, he criticized the Southern states' delay in implementing desegregation.

Constitution to military actions. Speeches of the early 1960s also evinced a growing sense of concern mixed with some dismay toward the rapid advance of technology and space exploration. Speaking at Colby College in May 1963, Warren lamented that "we have never learned the simple art of living together peacefully. It is a strange paradox that our present preoccupation is not so much with the solution of this problem as with the exploration of outer space."[105] Douglas, often collecting honoraria of $1,500 or more as he continued delivering "Democracy vs. Communism in Asia," also expressed deep concern with technological advance, predicting in somewhat alarmist tones in one speech that unchecked rapid technological development would culminate in ideological conformity, with "patrolled" classrooms, "professors tested for unorthodoxy," press censorship, and "judges handpicked to carry out orders."[106]

Still, the democracy themes present in many 1950s speeches persisted well into the new decade. Speaking in San Antonio, May 1, 1961, "Law Day," Justice Clark described "'equal justice under law' as more than an abstraction. It is a way of life,"[107] as he told the audience the key to destroying "the communist propaganda machine" was "by example right here at home."[108] Clark called his audience to join in the cause, asserting "We must have more democracy here at home before we can have more for export."[109] In a 1962 speech to a Chicago business group, Clark also again brought race into the discussion of democracy, asserting "our national purpose" was not "the promotion

of a single ethnic stock or culture... We honor all stocks, all races, all cultures."[110] William O. Douglas, in a 1965 speech to the Women's Organization for Rehabilitation Through Training, a global volunteer organization, claimed the Declaration of Independence "lifts the hearts of men the world over" and called for giving the ideals of equality, independence, freedom, and justice "our vigorous sponsorship" to counter any fears of communism as the "wave of the future."[111]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7 TELLER

Justice Douglas's stock speech from 1954 to 1965, "Democracy vs. Communism in Asia," emphasized that Court-backed efforts to desegregate led to significant foreign policy advantages in Asia. Above is an uncashed honorarium check for $875 to Justice Douglas for a 1963 speech.

Brennan's speeches of this period often stressed the need for greater civic education, but in a 1962 address to a teachers' organization, he noted that "our American values are not only being challenged by the Soviet bloc but scrutinized closely by the neutral nations."[112] Justice Arthur Goldberg, speaking at "World Freedom Day" in Philadelphia in 1964, decried the Soviet Union's human rights record and reminded the audience "our national commitment is to extend liberty and equality to all, regardless of race, creed, or color...."[113] But as criminal justice reform emerged as a new priority for the Court in its second decade, democracy encompassed not only race but protecting the rights of the accused. Speaking at Washington University of St. Louis in February 1965, Warren recited those rights, telling his audience "it is only by scrupulous adherence to these safeguards that we can maintain the spirit as well as the letter of a truly democratic system of government."[114]

Warren's speeches in the closing years of the decade also revealed less reliance on the Cold War imagery and rhetoric and an emerging concern with *Brown's* legacy. In a 1965 speech at the Bohemian Grove, a deep-woods, members-only gathering in California of prominent business, civic, and political leaders,[115] the chief justice offered his most candid attack of the Court's critics and a defense of *Brown* and other controversies, including the Court's recent school prayer rulings. The aspirational democratic leadership role Warren often proclaimed in his 1950s speeches was gone, and Warren's speeches now revealed some concern with the legacy of both *Brown* and the Court. Warren noted "The critics have been loud in their outcries that the Court has been wrong,"[116] but he expressed confidence "that in the long run, we will be treated as we deserve."[117] Recounting some attacks on the Court over the past several years, Warren claimed the critics failed to understand the Court's proper function and role and falsely believed the Court "looks about for sore spots in the society and proceeds to operate upon them. That is not how we work."[118] Further, he said, the charges of judicial activism leveled at the Court demonstrated a similar misunderstanding among the Court's critics: "we reflect the burning issues of our society, we do not manufacture them."[119] Issues on the Court's docket were "a reflection of the times," and the civil rights decisions in the United States reflected global political pressures or what he called a "tide running in the world... toward self-determination for all peoples and for equality, regardless of race, color, or creed."[120]

Interestingly, Justice Potter Stewart, who spoke infrequently in public, shared some of Warren's assessment, noting the divisive issues reaching the Court, and in his standard speech, "A View from Inside the Court," given several times in the late 1960s, Stewart

described the Court's role in society as determined largely by society itself:

> The Court is not a council of Platonic Guardians given the function of deciding our most difficult or emotional questions according to the justice's own notions of what is just, wise, or politic. To the extent that function is a governmental function at all, it is a function of the peoples' representatives. The justices are charged with deciding according to the Constitution and law.[121]

Stewart noted: "the calendar of the Supreme Court will be a fairly reliable mirror of the domestic problems confronting our nation."[122]

The optimistic, aspirational tones of the 1950s and predictions that democracy would overrun communism were absent, replaced with a grievance that critics fundamentally misunderstood the Court's enterprise. As Warren told his audience at the Bohemian Grove, "It would do well if people read our decisions before they attacked them."[123] However, he did not completely abandon the theme of exporting American democracy, and in what appears to be his last mention of *Brown*—in a speech given in 1969, Warren proclaimed the decision "redeemed" the "pledge of equality" in the Declaration of Independence and, with other rulings and acts of Congress, "loosed the bonds of injustice."[124] But in his closing, he echoed his themes of the previous decade, proclaiming "we must offer worthy example by solving our own problems... and demonstrating the strength of a multi-racial society."[125]

Judicial Activism

As Warren combined direct attacks on critics with praise for Brown's practical accomplishments in his final years on the Court the speeches by the justices in the 1960s also revealed greater tensions among the conservative justices over the proper role of the Court and social change, particularly with civil rights and federalism. Speaking at the U.S. Subtreasury Building on Wall Street in August 1964, Harlan, whose speeches a decade earlier praised democracy and the American people, now amplified the criticisms of Warren Court judicial activism:

> the effect of these two doctrines [federalism and separation of powers] is to put within the range of federal cognizance only those matters, whether or not denominated civil rights, for which a source of federal, legislative, or judicial competence can fairly be found in the Constitution or its Amendments. There is no such thing in our constitutional jurisprudence of a doctrine of civil rights at large, standing independent of other constitutional limitations or giving rise to rights born out of the personal predilections of judges as to what is good.[126]

Although Harlan joined the Court in extending civil rights protections into new areas in *Heart of Atlanta Motel v. United States*[127] and *Katzenbach v. McClung*,[128] his speech, with Justices Clark and Brennan and retired Justices Stanley F. Reed and Charles Whittaker all in attendance, chided the Court for departing from what he called "principled constitutionalism."[129] At the First Circuit Conference in 1968, Harlan claimed "the 1954 school desegregation cases" were "constitutionally correct" but had "generated a degree of federal judicial intervention in state concerns that finds no parallel in our history."[130] He expressed regret with the path of civil rights, noting "in the field of race relations, I suspect we would have been further along toward lasting solutions had the vicissitudes of history not made

necessary the exertion of federal authority to break down the barriers of progress."[131] Justice Black's Carpentier Lectures at New York University law school in 1968 similarly decried a "tendency now among some to look to the judiciary to make all the major policy decisions of our society, under the guise of determining constitutionality."[132] To Black, much of the Warren Court's recent jurisprudence represented a shift away from what he perceived as the Court's proper role: "To the people who have such faith in our nine justices, I say that I have known a different Court from the one today."[133]

Justices in the Court's liberal wing, not surprisingly, assessed the trajectory of civil rights quite differently. Justice Brennan, in a 1969 speech to the National Association of Attorneys General, noted the enactment of civil rights legislation to "give effect" to *Brown*, but he could not hide his dismay with the lagging pace of desegregation in the states.[134] "What greater breakdown is there of law and order than the refusal of states themselves to obey the law?"[135] he asked. In one of the few appearances the justices made in the deep south, and in sharp contrast to Warren's Bohemian Grove claim that the Court was simply "reflecting the burning issues of society,"[136] William O. Douglas praised the Court for its role in promoting civil rights, telling the Alabama ACLU "the creation of a multi-racial, multi-religious, multi-ideological nation" is "our constitutional ideal"—"An independent judicial cannot do it alone, for it happily has no power to initiate change... yet without an independent judiciary, it cannot be done at all."[137]

In "The Fourteenth Amendment and Equality Under Law" at New York University law school in 1968, Justice Abe Fortas noted the "roaring conflict"[138] playing out across the nation, which, since *Brown*, had "witnessed a great thrust toward the realization of equality of right for all."[139] Like Warren, Fortas described the Court as a passive receptor of powerful external political forces; he claimed that "the causes of this thrust are not to be found in the personnel of the Supreme Court" but rather the "product of a pervasive social movement."[140] Speaking in the same lecture program as Fortas, Warren warned these social forces now constituted a threat to democracy: "unless we put our national house in order, the fires fanned by racism will ultimately consume the entire structure."[141] But Warren also offered a response to Black and Harlan's criticisms, claiming he would "oppose any attempt to usurp state power through...judicial decision," but the "Constitution is not a rigid and unbending document"[142]; he pledged the Court would not retreat from its cause of advancing democracy: "The Court's decisions during the 1950s provided the necessary impetus for the concerted national action on behalf of Negro equality... The seriousness of the Nation's current racial problems will not permit any slackening of effort by any branch of government."[143]

Differing Conceptions of Democracy

The intense attacks on the Court following *Brown* shaped the narratives of judicial speech for much of Warren's tenure. In the first years following the decision, Warren, along with Douglas, delivered speeches frequently praising equality and freedom at home as the fulfillment of a unique American democratic mandate that carried global political consequences in the struggle against communism. Warren spoke in aspirational and visionary tones, praising government institutions for advancing a national push for equality that in turn would promote democracy, making values of equality, freedom, and justice worldwide "objects of adulation" and bringing the defeat of communism. Douglas praised Court-led desegregation in the United States as a major step in countering the growing influence of communist ideology, especially in Asia, with equality providing a

"tremendous" foreign policy advantage and where institutions such as the Court were responsible for supporting the effort. Douglas's "Democracy vs. Communism in Asia," his stock speech from 1954 to 1965, emphasized these points.

Others, such as Justices Clark and Harlan, avoided centering the Court as the institutional agent of political change as had Douglas, but they nevertheless told their audiences how the advance of democracy at home would advantage America's foreign policy aims. Their speeches, similarly lauding democracy and equality and in at least one instance *Brown* itself, generally predicted the eventual failure of communism, but, departing from the democracy themes advanced by the liberal justices, their view of the protection of democracy and rights was one that was fundamentally a public, not judicial, responsibility. Harlan described the "alertness" of the public as the primary defense of democracy against communism,[144] and Clark urged organizations to use their networks to show American democracy to the world.

As the Warren Court's judicial authority and legitimacy fell under intense scrutiny following *Brown*, the justices' speeches countered the accusations of judicial activism and partisanship from the Court's critics with a counter-narrative that invited audiences to assess the Court and its actions through the lens of Cold War politics and payoff. The Cold War provided the justices with a political opportunity in their speeches to frame the promotion of democracy and steps toward racial equality efforts that would enable the defeat of anti-democratic forces, the ultimate American foreign policy goal of the day. Through their speeches, as domestic politics rendered compliance with the Court's desegregation order an open question, the justices transformed the issue of school desegregation from *Brown's* textual analysis of Fourteenth Amendment law and sociology into a discussion of the foreign policy advantages of racial equality, freedom, and the pursuit of "equal justice under law" at home. By shifting desegregation from a question of judicial policy and authority and toward an expression of democracy with significant foreign policy benefit to the United States, these speeches sought to recast the Court's basis of institutional authority beyond its traditional assertions of constitutional finality and into an area where several justices, through their identification with the Court and with their praise of democracy and the values of equality and freedom, could plausibly suggest the Court as an institutional ally in the fight against communism. Thus, these speeches complemented the legal claims of authority expressed in the language of constitutional interpretation in decisions such as *Brown* or the appeal to judicial supremacy in *Cooper v. Aaron*[145] with political claims for audiences to view the Court on the basis of its engagement with advancing democracy and defeating communism.

Frequency of Speeches

Warren, Clark, Brennan, and Douglas represented the Court's most prolific speakers for a decade following *Brown*. (See Table I.) By the second decade of the Warren Court, with the riots and violence of the 1960s and a docket of expansive reforms in the areas of criminal justice, electoral processes, and social issues, the 1950s themes of defeating communism yielded to new narratives of civil rights, *Brown*, and democracy. However, there was no decrease in the number of speeches, as membership changes on the Court appear to have replaced justices with less propensity to speak off the bench, such as Frankfurter and Burton, with those who were much more likely to do so, such as Fortas and Goldberg, particularly after 1965.

The decade also brought into the public realm a simmering internal conflict concerning federalism and judicial power, with Justices Harlan and Black voicing criticism

in their speeches of the civil rights movement's use of the courts and judicial intervention, while Warren and Douglas, now joined by fellow liberals Fortas and Goldberg, countered with speeches claiming the Court was responding to public demands and a "worldwide" revolution and push for equality. 1960s America, with assassinations, race riots, and urban violence, represented a somewhat darker image of democracy from the previous decade, and Warren and Douglas did not issue calls to demonstrate American democracy to the world with the same enthusiasm of a decade earlier. Of greater concern, however, especially to Warren, was the Court's legacy and *Brown's* accomplishments. The "defense of democracy" themes that animated many speeches of the 1950s yielded to a different defense of democracy, one where Douglas praised civil rights advocates for engaging with the Court, Harlan and Black expressed regret that the path of civil rights ran through the Court, and they chided their fellow justices for eviscerating the boundaries of federalism, and Warren accused critics of failing to understand what he claimed was the Court's truly passive nature, where the institution responded to, not fomented, "the burning issues of our society."[146] But even amid these shifts, Warren still offered occasional praise for democracy and its appeal to overseas observers.

Beyond the Warren Court

While much of the justices' rhetoric in the Warren Court speeches appears intended to preserve institutional legitimacy amid significant attacks on the Court, "Defending democracy," as a mode of judicial defense, appears to have outlived the Warren Court and the Cold War itself. In 2010, in two highly controversial free-speech cases, one protecting the free-speech rights of protesters from the Westboro Baptist Church of Topeka, Kansas,[147] a group known for repugnant signs and images depicting and condemning homosexuality and for picketing the funerals of U.S. service members, and a second case concerning so-called crush videos depicting the violent deaths of small animals,[148] Justice Anthony Kennedy voted with the majority in both cases, finding that the speech in question enjoyed First Amendment protections. In a 2012 speech at the Heritage Foundation in Washington, Kennedy defended the rulings, explaining that the speech, while repugnant, showed the capacity of free speech to tolerate a wide range of ideas and demonstrated the value of democracy on the world stage. In echoes of Earl Warren's 1950s speeches, with the Cold War long ended, Kennedy told his audience "the verdict is out on democracy" globally and he described other nations monitor America "to see how democracy works."[149] Kennedy's speech, "The Constitution and its Promise," described the important protections for free speech in the pair of rulings, which he said would "make our speech the envy of the rest of the world so that freedom can advance,"[150] a point virtually identical to Earl Warren's remarks in his speeches from the 1950s of "advancing freedom" and drawing the "envy" of the world.[151]

Conclusion

Although the justices appealed to democracy when the Court faced criticism, it is doubtful the speeches justices make in defense of the institution or its rulings "move" audiences or shift public opinion in measurable ways. Despite dozens of speeches justifying desegregation and praising democracy, elite-level attacks on the Court not only continued in the wake of *Brown*, but appeared to increase in the late 1950s. Speaking in his memoirs of that time, Warren described the criticism and challenges to his Court's authority as continual throughout his 16 years on the bench. On the one hand, the justices' speeches sound themes that

stand as somewhat patriotic and nationalistic, not unlike statements by other prominent political actors of the day. But with no constituency, and election to win, the justices' speeches are notable not for their frequency or for transgressing the "lockjaw" norm, but for showing how the justices, outside the Court, invoke the political context external to the Court in defense of their rulings. In a "world war of ideas," democracy became a vehicle by which the justices defended institutional authority, and these ideas in these speeches, framed as equality, desegregation, and vigilance toward democracy, provided a new space in which the justices could rebut attacks on the Court by framing the justices as broadly concerned with promoting democracy and securing Cold War political advantage for the United States.

From this perspective, the speeches by the justices of the Warren Court and the narratives they construct about the institution, the issues it faces, and its rulings are most valuable in helping us understand how the justices, who must tread with understandable care in their extrajudicial commentary, engage the public sphere. Rather than perceiving judicial speech as an act of constrained judicial behavior, however, we should recognize that the speeches represent a measure of departure from the institutional constraints apparent on the bench, and constitute "political possibilities" for the justices who choose to give them. Political scientist John Brigham (1987) makes this point in his observation of the Warren Court: "equality in the Warren period was not simply an argument in support of one side in a case... It stood as the basis for elevating and insulating the institution from the accountability we associate with 'normal' politics."[152] Speeches, which frequently described equality in terms of aspirational democracy and Cold War political advantage, were crucial to this effort. By performing this task of "elevating" and "insulating" the Court from the political attacks of anti-desegregation elites, Warren, Douglas, and others attempted to ground institutional legitimacy not only in the traditional realms of independence, objectivity, and judicial detachment, but in the more advantageous terrain of Cold War advantage and American exceptionalism. The justices might have repeated in their speeches *Brown's* concern with erasing the "badges of inferiority" or Fourteenth Amendment law, but sensitive to letting the decision more or less "speak for itself" as the lockjaw motif might imply, some justices spoke not at all or, in Justice Burton's case, only repeated narratives of the Court in the most traditional, civics-style commentary. Although judicial commentary perceived as partisan in nature may obviously tarnish the institutional prestige of the Court, as events throughout its history have demonstrated, the greater significance of judicial speech lies in the opportunity it affords the justices to enhance institutional legitimacy. For several members of the Warren Court, their speech response shifted the terrain on which *Brown* and the Warren Court's institutional authority were debated in the public sphere, from the hostile territory of the Southern Manifesto and John Birch Society billboards to a realm where democracy, equality, the Court, and the people stood to varying degrees as representations of American democratic promise and fulfillment.

Free of the constraints of written opinions and "written justifications"[153] of legitimacy, speeches present the opportunity to assert a variety of claims to institutional authority. In a traditional sense, speeches may appeal to the Court's institutional association with the Constitution, a connection some justices such as Burton and others at times were happy to assert. But speeches also present the justices with political opportunities to engage the public sphere through the presentation of specific narratives about the Court and issues facing it, whether signaling future action, such as Frankfurter's presuppositions on "sociological understanding" a

month before *Brown*, or through countering the claims of critics, such as in Warren's Bohemian Grove response "that is not what we do," or through Black's and Harlan's concerns with the Court's activism, or by buttressing support for controversial decisions, such as making constitutional rights "the object of adulation" after *Brown*, or in Justice Kennedy's remarks in 2012, making free speech "the envy of the rest of the world."[154]

These speeches suggest the relationship between institutional legitimacy and extrajudicial commentary is more than simple "risk and reward," where an ill-advised comment may be perceived as "political" and inappropriate. Instead, speeches provide justices with an opportunity to detach themselves from the constraints of expression on the bench and expand the terrain on which the justices can construct and promote claims to institutional authority. Although Warren asserted the justices took much of the criticism in the wake of *Brown* "in silence, leaving it to the people to form their own opinions concerning the Court's actions,"[155] the speeches here show the justices trying to help their audiences with that act of opinion-forming to which Warren alluded. The speeches tell a significantly different story than one of a silent Court, instead showing some justices responding with traditional claims of judicial authority rooted in the place, structure, and role of the Court and Constitution, but other justices repeatedly telling their audiences how equality, as a democratic imperative, could help win the Cold War. This frame, present in the Justice Department's 1952 *amicus* brief, enabled the justices in turn through their speeches to offer their audiences desegregation and racial equality through the lens of global politics, communism, and Cold War triumph. For the Warren Court, the Cold War provided an especially useful political context to buttress the legal justifications for *Brown* in the opinion itself not only with reassertions of the Court's traditional function, role, and history—a common theme in speeches—with political claims to elite audiences, such as bar associations, legal academics, judges, and prominent elected officials, that desegregation and the pursuit of racial equality would advance the cause of democracy itself and ultimately benefit the United States in the foreign policy arena.

These speeches also prompt some reconsideration of the traditional narrative of the Court's retreat in the face of "massive resistance,"[156] synonymous with Hamilton's claim the judiciary possessed "mere judgment."[157] In addition to his claims that the Court weathered the criticism in silence, Warren also claimed the attacks came at great harm to the Court, suggesting they were "effective because it is a one-sided affair," suggesting desegregation withered until congressional action a decade later due to a lack of response.[158] While it is true *Brown* is rarely mentioned by name, it is mentioned, but more commonly, the "color line," racial equality, freedom, justice, and education are repeatedly linked to triumph over communism, fulfilling the mandates of democracy, and demonstrating its capacity to the world. Justice Douglas's most prominent speech, "Democracy vs. Communism in Asia," was seemingly about the politics of a continent many Americans knew little about. But its claims that equality and racial integration fulfilled a national commitment to democracy and provided a powerful rejoinder to Soviet propaganda and ideology reflected the national political priorities and foreign policy of the United States. This narrative provided a judicial response to critics' charges that desegregation represented the Court engaging in judicial activism of the highest degree, disregarding the Constitution, public opinion, and the traditional authority of state governments. By inviting their audiences to view racial equality not only on the legal claims asserted in the text of the opinions themselves, but as a powerful assertion of democracy both inside and outside the United

States, these speeches aimed to challenge their critics on the terrain of unity of national purpose and American exceptionalism and to ponder the possibility of weakening a Court committed not to ideology but democracy.

Although the Warren Court justices gave many speeches, the vast majority of the Court's rulings do "stand on their own." Warren himself liked to claim that a decision of the Court "speaks for itself better than any informal discussion of it later."[159] The decisions capture much of the public and scholarly attention given the justices and the Court. But assessing judicial speech helps show its unique qualities as a fundamentally judicial behavior. In contrast to the rhetoric of elected officials, the justices did not call out their critics by name or repeat their points in their opinions. In the *Brown* era, they did not let *Brown* "speak for itself" as critics hammered away at the Court, questioned judicial authority, and resisted desegregation. For Earl Warren, William O. Douglas, and others, the Justice Department brief asserting the foreign policy advantages of promoting democracy at home offered an opportunity to defend against the attack on institutional legitimacy and to position their institution away from the language of judicial tyranny, overreach, and ideology over law, as defined by their opponents, onto terrain where these justices could depict their institution as a "pronouncer and guardian" of democratic values amid a turbulent, global political conflict.[160]

The justices may appear in the "public eye" more frequently than others,[161] and while they obviously remain mindful of the traditional expectations concerning extrajudicial commentary, the Warren Court speeches show that within these traditional norms, there is still considerable room for the politics of constructing institutional authority. In their speeches, justices across the ideological spectrum attend to judicial authority not only through appeals to traditional "ideologies of authority"[162] but through political claims to values such as equality, individual rights, and the power of democracy to displace communism. These speeches suggest legitimacy for the Court rests not only in traditional conceptions of law and constitutional finality but in the rhetorical appeals justices make to their audiences to construct "systems of belief" about the Court and its institutional rank.[163]

ENDNOTES

[1] Leslie B. Dubeck, "Understanding Judicial Lockjaw: The Debate over Extrajudicial Activity," *New York University Law Review* 82 (2007): 569–601; Christopher W. Schmidt, "Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech," *Chicago-Kent Law Review* 88 (2013): 487–526; Alan F. Westin, ed. **An Autobiography of the Supreme Court: Off-the-Bench Commentary by the Justices** (New York: Macmillan, 1963), 1.

[2] Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court," *The Supreme Court Review* (1973): 123–158.

[3] Westin, **An Autobiography of the Supreme Court**, 19.

[4] 17 U.S. 316 (1819).

[5] Westin, **An Autobiography of the Supreme Court**, 19.

[6] Westin, **An Autobiography of the Supreme Court**.

[7] *Ibid.*

[8] Potter Stewart, "Yale Law Journal Banquet 4-9-60" [New Haven, CT, April 9, 1960], Potter Stewart Papers, Box 656-69 (MS 1367), Manuscripts and Archives, Yale University Library, New Haven, CT.

[9] Adam Liptak, "Public Comments by Justices Veer Toward the Political," *New York Times*, March 19, 2006, https://www.nytimes.com/2006/03/19/politics/public-comments-by-justices-veer-toward-the-political.html.

[10] "Chief Justice, Irked at Question, Nearly Walks Out on News Talk," *Sacramento Bee*, June 4, 1967. Earl Warren Papers, Box 822, Manuscript Division, Library of Congress, Washington, DC.

[11] 347 U.S. 483 (1954).

[12] Keith E. Whittington, **Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History** (Princeton: Princeton University Press, 2009).

[13] Due to an exceptionally large number of speeches, comprising some 99 boxes of Justice Douglas's papers at the Library of Congress and the limitations of this study, a sample of speeches was obtained by systematically

selecting 20 of the 99 boxes. Therefore, the actual number of speeches Justice Douglas delivered in this period is likely significantly greater than that of Chief Justice Warren or Justices Clark and Brennan, for whom complete sets of speeches were obtained.

[14] Outlines, talking points, notes, eulogies, introductions, and brief, informal remarks (e.g. toasts) were omitted, and some speeches were missing from the archives or unavailable.

[15] James P. Gee, **An Introduction to Discourse Analysis: Theory and Method** (New York: Routledge, 1999); Peregrine Schwartz-Shea and Dvora Yanow, **Interpretive Research Design: Concepts and Processes** (New York: Routledge, 2012).

[16] Richard L. Hasen, "Celebrity Justice: Supreme Court Edition," *Green Bag* 19 (2016): 169–170; Schmidt, "Beyond the Opinion."

[17] Rogers M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 89–108.

[18] Lawrence Baum, **Judges and Their Audiences: A Perspective on Judicial Behavior** (Princeton: Princeton University Press, 2006), 3.

[19] Mary L. Dudziak, **Cold War Civil Rights: Race and the Image of American Democracy** (Princeton: Princeton University Press, 2000), 10–11.

[20] Philip B. Kurland and Gerhard Casper, eds. "Brief for the United States as Amicus Curiae (*Brown v. Board of Education*, 347 U.S. 483)," In **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law**, Vol. 49, *Brown v. Board of Education* (1954 and 1955), (Arlington, VA: University Publications of America, 1975), 121.

[21] *Ibid.*

[22] The brief quotes this phrase from a letter to the Attorney General, dated December 2, 1952. The source of the letter is not identified.

[23] 163 U.S. 537 (1896).

[24] Kurland and Casper, **Landmark Briefs**, 122–123.

[25] Dudziak, **Cold War Civil Rights**, 12.

[26] Kurland and Casper, **Landmark Briefs**, 147.

[27] 347 U.S. at 493.

[28] Earl Warren, "Address by Earl Warren, Chief Justice of the United States, at Dedication of the American Bar Center, [78th annual meeting of American Bar Association,] Chicago, Illinois, Aug. 19, 1954," Earl Warren Papers, Box 794, Manuscript Division, Library of Congress, Washington, DC.

[29] Dudziak, **Cold War Civil Rights**, 48.

[30] Mary L. Dudziak, "*Brown* as a Cold War Case," *Journal of American History* 91 (2004): 37.

[31] Earl Warren, "Free Investigation and Faithful Experiment," Speech read at the Alexander Hamilton Bicentennial Dinner, Columbia University, New York, NY, January 14, 1954. Earl Warren Papers, Box 792, Manuscript Division, Library of Congress, Washington, DC.

[32] *Ibid.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] "Warren's View of Freedom [editorial]," *Washington Post*, January 16, 1954. Newspaper clipping in Earl Warren Papers, Box 792, Library of Congress Manuscript Division, Washington, DC.

[37] "Review and Outlook: The Preconceptions of the Past [editorial]," *Wall Street Journal*, January 18, 1954. Newspaper clipping in Earl Warren Papers, Box 792, Library of Congress Manuscript Division, Washington, DC.

[38] William O. Douglas, "Speech by Mr. Justice William O. Douglas (alternately titled "Democracy vs. Communism in Asia"; Washington DC Chapter Americans for Democratic Action, Willard Hotel, January 26, 1957"), William O. Douglas Papers, Box 735-10, Manuscript Division, Library of Congress, Washington, DC. On numerous other occasions, Justice Douglas spoke from skeletal outlines or bulleted talking points labeled or otherwise identified as "Democracy vs Communism in Asia." A single complete printed version of this speech dated January 26, 1957, can be found in Douglas's papers when he spoke to the organization Americans for Democratic Action in Washington, DC, and it used here for analysis.

[39] Douglas's travel itineraries show he delivered "Democracy vs. Communism in Asia" February 10, 1954, at a high school in Denver; September 6, 1956, at the Rotary Club of Yakima, Washington; January 26, 1957, at Americans for Democratic Action, Washington, DC; October 27, 1958, Oak Park Community Lectures, Illinois; October 28, 1958, at Marshall College, West Virginia; March 14, 1960, at Stevens Institute of Technology, New Jersey; October 19, 1961, at New Jersey Bank and Trust Company; February 5, 1963, at Bluffton College, Ohio; and January 13, 1965, at a high school at Kennett Square, Pennsylvania. An untitled speech of nearly identical content as "Democracy vs. Communism in Asia" was given October 25, 1965, before the Women's Organization for Rehabilitation and Training in Pittsburgh. It is highly likely Justice Douglas delivered "Democracy vs. Communism in Asia" more frequently than appears here, and no other speech by any justice in this study was delivered as frequently or for such an extended period.

[40] Douglas, "Washington D.C. Chapter Americans for Democratic Action (Democracy vs. Communism in Asia)."

[41] *Ibid.*

[42] Felix Frankfurter, "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation,

Read Before the American Philosophical Society by Felix Frankfurter, [Philadelphia, PA,] April 22, 1954," Felix Frankfurter Papers, Reel 125, Manuscript Division, Library of Congress, Washington, DC: 307.

[43] 306 U.S. 466 (1939).

[44] Felix Frankfurter, "Some Observations on the Nature of the Judicial Process," 308.

[45] *Ibid.,* 315.

[46] *Id.,* 304.

[47] *Id.,* 304-305.

[48] William O. Douglas, "Address of Mr. Justice William O. Douglas Before the American Association for United Nations, Hunter College Auditorium, New York City, Monday, May 10, 1954," William O. Douglas Papers, Box 715-12, Manuscript Division, Library of Congress, Washington, DC.

[49] *Ibid.*

[50] *Id.*

[51] *Id.*

[52] Lucas A. Powe Jr., **The Warren Court and American Politics** (Cambridge: Belknap Press of Harvard University, 2000).

[53] William O. Douglas, "Sarah Lawrence College—Bronxville, New York—June 3, 1954, by Mr. Justice William O. Douglas," William O. Douglas Papers, Sundquist Research Library, Yakima Valley Museum, Yakima, WA.

[54] *Ibid.*

[55] *Id.*

[56] Earl Warren, "Dedication of the American Bar Center."

[57] *Ibid.*

[58] *Id.*

[59] *Id.*

[60] Earl Warren, Untitled manuscript (speech read at Marshall–Wythe–Blackstone Commemoration Ceremonies, College of William and Mary, Williamsburg, VA, September 25, 1954), Earl Warren Papers, Box 794, Manuscript Division, Library of Congress, Washington, DC.

[61] William O. Douglas, "Speech by Mr. Justice William O. Douglas, Bronx County Bar Association, New York, New York, December 1, 1954," William O. Douglas Papers, Sundquist Research Library, Yakima Valley Museum, Yakima, WA.

[62] *Ibid.*

[63] Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality** (New York: Knopf, 1976), 753.

[64] Dwight D. Eisenhower, "Address at the Annual Convention of the American Bar Association, Philadelphia, August 24, 1955, http://www.presidency.ucsb.edu/ws/index.php?pid=10356&st=&st1.

[65] *Ibid.*

[66] Earl Warren, Untitled manuscript (alternately titled "Chief Justice John Marshall, a Heritage of Freedom and Stability," response to an address by the President of the United States, at the American Bar Association John Marshall Bicentennial Ceremonies, Philadelphia, PA, August 24, 1955), Earl Warren Papers, Box 796, Manuscript Division, Library of Congress, Washington, DC.

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[69] *Id.*

[70] *Id.*

[71] Tom C. Clark, "An Address by the Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States, Marshall College, Huntington, West Virginia, September 29, 1955," Tom C. Clark Papers, Box D6 Folder 8, Tarlton Law Library, University of Texas, Austin, TX, 5.

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[81] "The Southern Manifesto," *Federal Judicial Center*, http://www.fjc.gov/history/home.nsf/page/tu_bush_doc_6.html.

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[83] Alexander Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (New Haven: Yale University Press, [1962] 1986), 258; see also Whittington, **Political Foundations of Judicial Supremacy**.

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[86] Learned Hand, **The Bill of Rights: The Oliver Wendell Holmes Lectures** (Cambridge: Harvard University Press, 1958), 55.

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[90] Kluger, **Simple Justice;** Powe, **The Warren Court**.

[91] Dudziak, **Cold War Civil Rights**.

[92] Powe, **The Warren Court**, 71–72; Mark Tushnet, ed., "The Warren Court as History." In *The* **Warren Court in Historical and Political Perspective** (Charlottesville, VA: University Press of Virginia, 1993): 5.

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[109] *Id.*, 6.

[110] Tom C. Clark, Untitled manuscript, [Executives Club, Grand Ballroom, Hotel Sherman] Tom C. Clark Papers, Box D16 Folder 2, Tarlton Law Library, University of Texas, Austin, TX, 8.

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[118] *Id.*, 5.

[119] *Id.*, 6.

[120] *Id.*, 11.

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[153] Schmidt, "Beyond the Opinion," 492.
[154] Kennedy, "The Constitution and Its Promise."
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[161] Hasen, "Celebrity Justice."
[162] Brigham, **Cult of the Court**, 43–51; Whittington, **Political Foundations of Judicial Supremacy**.
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Striving for Civil Rights: Senator Edward W. Brooke, President Richard Nixon's "Southern Strategy" and the Supreme Court

Jordan Alexander

Introduction

President Richard Nixon's nominations of Judge Clement F. Haynsworth Jr. and Judge G. Harrold Carswell to the Supreme Court in 1969 and 1970 demonstrated his allegiance to the White South and Sunbelt South. Nixon used the election victory as an opportunity to repay his one million southern constituents for their votes while disregarding the interests of Black Americans. His Supreme Court nominees would fill the vacancy of Associate Justice Abe Fortas, who resigned from the Supreme Court amid allegations of involvement in a financial scandal. The nominations were a larger ploy in President Nixon's strategy of appealing to disillusioned White southern voters. They felt betrayed by the Democratic Party as the national coalition gradually became more inclusive of Black Americans and adopted a stronger civil rights platform throughout the 1950s and 1960s.[1] Thus, the president attempted to fulfill three objectives: (1) roll back the civil rights gains of the Warren Court, which many conservatives viewed as increasingly liberal; (2) placate the majority of southern Christians throughout the region who were angry with the High Court's decisions removing prayer (1962) and Bible reading (1963) from the public schools; and (3) solidify his power base among the White South. Nixon, who was looking ahead to the 1972 presidential election, wanted not only to deprive George Wallace, the hard-right segregationist governor of Alabama, of votes but also to demonstrate to the White South that his racial views had changed since leaving political office in 1961.[2]

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Thus, the president's reversal on civil rights endeared him to millions of White southerners who felt abandoned by the Democratic Party while struggling with the onslaught of federal intervention in their way of life, passage of civil rights legislation, and Black Americans' legal challenges to White supremacy.[3] Nixon and the Republicans readily embraced these disgruntled citizens seeking a new political home. However, President Nixon experienced a hindrance to his nominees' appointments. Senator Edward W. Brooke (R-Mass.), the first popularly elected African-American senator since Reconstruction, disagreed with the nominations. As a lifelong Republican, Brooke believed in the national coalition's virtues of egalitarianism, progressivism, duty, and self-help,[4] but the nominations were antithetical to Brooke's work of protecting civil rights and liberties. Therefore, he decided that his commitment to civil rights was more important than allegiance to the Republican Party and the president, a stance which led to the apex of Brooke's power in the Senate.

Senator Edward W. Brooke: Who He Was

Senator Brooke's life and political career defied Jim Crowism, accentuating his relevancy in the historical record.[5] This is not a biographical study of Brooke, but it is important to know a few things about his early life and entrance into politics. Edward W. Brooke, III was born on October 16, 1919, in Washington, DC, to Edward W. Brooke Jr., a lawyer for the Veterans Administration, and Helen Seldon Brooke, a homemaker.[6] Brooke and his older sister, Helene, lived a comfortable, sheltered life, surrounded by the close-knit, middle-class, Black community within the segregated city.[7] His parents instilled in him the values of a solid Christian faith, hard work, integrity, racial pride, self-respect, and respect for others: traits that served Brooke well in politics and the larger world, which was "a complex place with conflicting interests."[8] Thus, he was aware of his identity as a Black American and the injustices committed against his people, long before he embarked on a political career.[9] In 1936, Brooke graduated from Paul Laurence Dunbar High School and enrolled in Howard University, where he majored in social science (concentrating on history, economics, political science, and literature).[10]

Brooke developed a greater awareness of racial injustices through his civil rights activism.[11] During his collegiate career, Brooke joined in a boycott, led by the civil rights activist Mary Church Terrell, to protest a People's Drug Store "because we couldn't even go in ... and sit at the counter."[12] His participation in the demonstration, which was the "only [real] protest ... I've done in my life," reinforced the harsh reality of legalized segregation.[13] In addition, he was a member of Alpha Phi Alpha Fraternity and joined the Reserve Officer Training Corps (ROTC) during his undergraduate career.[14] Brooke received his commission as a second lieutenant in the Army after completing the program.[15] When he graduated from Howard University in June 1941, much of the world was engulfed in World War II. As a military officer, Brooke voluntarily served as a defense counselor in the Army. He studied the court martial manual and began defending soldiers.[16] Although he dealt with limited amounts of racism and prejudice, Brooke's experiences with Jim Crowism as he defended soldiers in military court and engaged in combat influenced the young man to consider the larger possibilities of law school and a future in politics, where he could protect Black Americans' civil rights.[17]

In 1945, Brooke courted Remigia Ferrari-Scacco, a young, privileged, Italian woman, while he was on break in Genoa, Italy. After the war, he settled in Boston and enrolled in Boston University's advanced Law School program in 1946, made possible by the GI Bill of Rights.[18] In 1947, Ferrari-Scacco immigrated to Boston because of her love for Brooke and the implicit promise of marriage. They married later that year.[19]

After graduating from law school in 1948, he established a law practice in Roxbury, Massachusetts, where Black residents were the majority. As Brooke's law practice slowly grew, he represented many Black clients at trial and assisted other Roxbury residents seeking justice for civil rights abuses. Having proven his talent in the courtroom, Brooke decided to seek political office.[20]

In 1950, Brooke campaigned as a "cross-filer" for the Republican and Democratic nominations as the state representative from the Twelfth Ward in Roxbury, Massachusetts.[21] As he noted in his memoir, Brooke "was not a member of either party," and therefore, "cross-filing made it easier to reach out across the political spectrum."[22] During this era, Massachusetts politics went through transformations as an ascendant Democratic party challenged the Republicans' hegemony after a century of state governance.[23] Campaigning for the Republican and Democratic nominations enabled Brooke to observe the inner workings of both political parties.[24] Although he won the Republican nomination, Brooke lost the general election.[25] As Brooke recalled in his memoir, he had chosen to affiliate with the Republican Party because

> [M]y parents were Republicans, and I had always admired the party of Lincoln and the Republican virtues of duty and self–help. My father had taught me to believe in free enterprise and distrust big government. ... I admired the conservative regard for history and precedent. Like my father, I agreed with Abraham Lincoln that government should do for people only that which they cannot do for themselves.[26]

The more Brooke studied Massachusetts politics, he came to believe that Democrats ignored Black Americans' needs and consistently undermined civil rights legislation. The Democratic Party, at the local and state levels, was corrupt and many officials rewarded their supporters through patronage. While the Republican Party in the state also had its share of corruption, the example of effective Republican statesmen, such as Senator Leverett Saltonstall and Governor John Volpe, influenced his decision to seek the attorney generalship years later.[27]

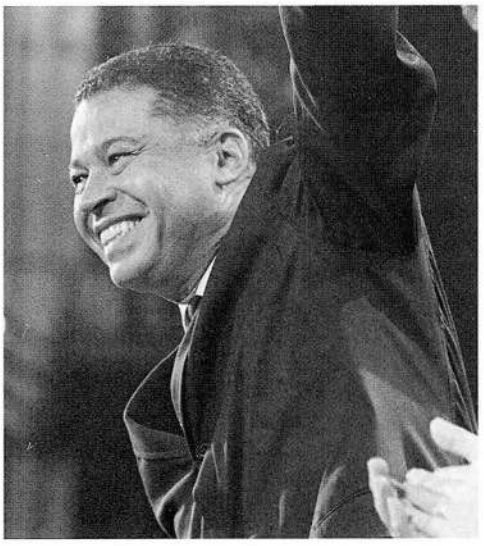
Brooke's consecutive defeats in state elections strengthened his desire for political office. In 1952, he campaigned again on the Republican ticket for the position of state representative and lost the general election.[28] By this time, the state legislature had abolished cross-filing and Brooke decided "to remain a Republican – partly out of [family] loyalty; ... and partly for purely practical reasons. White Democrats largely controlled Boston and state politics, and they had traditionally offered few opportunities to Negroes."[29] In 1960, he campaigned for Massachusetts' Secretary of State in a five-way race.[30] Although Brooke lost the election, he garnered 1,095,054 votes; the plurality between the two candidates was only 111,790 votes.[31] The political coalition that Brooke created would lead to victories in coming years, beginning with his election as Massachusetts' first African-American attorney general in 1962.

As attorney general, Brooke honored his campaign promise to restructure the Attorney General's office by strengthening the role and enforcement power of the public office. He "created a complaints section within the criminal division ..." which allowed residents to file formally written grievances regarding injustice and discrimination without fear of reprisal, coercion or harassment.[32] In addition, Brooke "reorganized the department into [thirteen] different divisions, each headed by a chief personally responsible to him."[33] He had the most correspondence with the Civil Rights and Liberties Division, which dealt with numerous complaints regarding racial matters, especially fair housing and the Boston busing crisis.

Brooke's protection of civil rights was not limited to Massachusetts. In December 1965, the Supreme Court invited all the states to take part in a test case, *South Carolina v. Katzenbach*, that would define the constitutionality of the recently passed Voting Rights Act. After Brooke accepted the primary leadership role in filing an *amicus curia* brief on behalf of the U.S. Attorney General, Nicholas Katzenbach, he reached out to other attorneys general to join him in supporting the brief. His office, in conjunction with law professors, college students, and volunteers from collegiate civil rights groups, wrote a strong, well-defined brief that supported the 1965 Voting Rights Act. Assistant Attorney General Levin H. Campbell, the chief of the Civil Rights and Liberties Division, served as the liaison between Brooke's office and the other states; despite Brooke's busy schedule, he oversaw the drafting of the *amicus curia* brief and contributed ideas to strengthen their case before the Supreme Court.[34] The effort was successful and culminated in a victory for the Civil Rights Movement.

During this experience, Brooke decided that a career in the Senate would allow him to create stronger civil rights legislation, serve as an advocate for Black Americans, reform the federal government from within, and ensure the national Republican coalition's return to its historical status as the party of the common American citizen.[35] In addition to Brooke's desire "to be in the seat [of] power," he wanted "to prove that whites would vote for blacks" and that "blacks should be in the seat of power, with their own power base."[36] For these reasons, Brooke decided to campaign for the U.S. Senate in December 1965. After a heated Republican primary and statewide election, on November 8, 1966, Brooke became the first popularly elected African-American senator since Reconstruction.[37]

Brooke allied himself with the Republican Party to protect civil rights and transform the political system from within.[38] He



In 1966, Edward Brooke (R-Mass.) became the first popularly-elected African-American senator since Reconstruction. He said he chose to align himself with the Republican Party to protect civil rights and transform the political system from within.

"refuse[d] to become cocky or distant from Negroes," but "[was] friendly, cooperative and willing to bargain, which ma[de] his position even more important because he c[ould] serve as a link between both races and both parties."[39] As he noted in his memoir, "If I was being used, from my point of view, I was using them [the Republicans] as much as they were using me."[40] Thus, Brooke became a subtle revolutionist.

However, many Black Americans in Boston viewed Brooke as an anomaly, as a Republican. To them, he seemed distant from their struggles and concerns because Brooke did not participate in marches or demonstrations.[41] His interracial marriage and biracial children led some Black Americans to view him suspiciously.

As the first, popularly-elected, African-American attorney general, and later, U.S. senator in Massachusetts, with a majority White electorate, Brooke was determined to protect everyone's civil liberties and rights, especially for his people—who continued experiencing the humiliating injustices of Jim

Crowism. Yet his important legislative work has been overlooked because he preferred to work quietly instead of participating in demonstrations and press conferences. His role in the ill-fated Haynsworth and Carswell nominations to the Supreme Court in 1969 and 1970 particularly deserves greater attention and praise.

Nixon and the Southern Electorate

On March 31, 1968, speaking before the nation in a televised address, President Lyndon B. Johnson stunned many Americans by declining the Democratic Party's nomination for the upcoming presidential election. The controversy of the Vietnam War, the Tet Offensive, the Great Society's unfulfilled expectations, and increasing racial tensions had taken its toll on Johnson.[42] Moreover, these factors severely divided the Democratic Party. Over the next several months, the party struggled to find a viable candidate to oppose the Republican nominee, Richard Nixon. Senator Robert F. Kennedy, the former attorney general in his late brother's administration, was highly favored as the top Democratic challenger. However, his assassination in June 1968 after winning the California primary election left the Democrats bereft of a worthy candidate. Thus, at the Democratic National Convention in Chicago, Illinois, during the last week of August, antiwar protestors clashed with police while city Mayor Richard Daley tried to keep the peace in the convention hall. Moreover, the lack of support for any of the three candidates, Vice President Hubert Humphrey, the antiwar advocate Senator Eugene McCarthy, and Senator George McGovern, who struggled to unite Senator Kennedy's supporters, demonstrated the national coalition's deep divisions and rivalries.[43]

The Democratic Party reluctantly accepted Vice President Hubert Humphrey as its presidential nominee and Senator Edmund Muskie as his running mate. However, their campaign was no match for Senator Richard Nixon, the California Republican, former U.S. congressman, leader of the House Committee on Un-American Activities' (HUAC's) televised hearings during the 1950s, and former vice president under Dwight Eisenhower. Nixon utilized the pandemonium from the urban riots and racial violence during the Civil Rights Movement to campaign on a platform of restoring law and order throughout the nation.[44] Using this rhetoric to implicitly blame the civil rights activists and demonize the social movement, the Republican nominee appealed to the silent majority of middle-class White Americans, who struggled with the seemingly imminent threat to their supremacy, sense of entitlement, and socioeconomic power, in the aftermath of the Civil Rights Movement's landmark victories. Nixon's appeals resonated with many middle-class White Americans living in the Sunbelt South, a large region stretching from southern Virginia to southern California.[45] This angered many Black Americans, especially Senator Brooke, who campaigned for Nixon.[46] Recalling his experiences at the Republican National Convention, the senator observed that,

> The outcome ... disturbed me. I hardly knew Nixon, and what little I did know, about his nasty, red–baiting campaigns in California, distressed me. In addition, I had learned that he had told southern delegations that he opposed busing and that his administration would not 'ram anything down your throats.' He also expressed his opposition to federal involvement in local school board matters and vowed to appoint 'strict constructionists' to the Supreme Court. That seemed to be Nixon's code word for judges who would oppose or slow desegregation. I was disappointed,

> but I accepted the will of the convention and hoped for the best.[47]

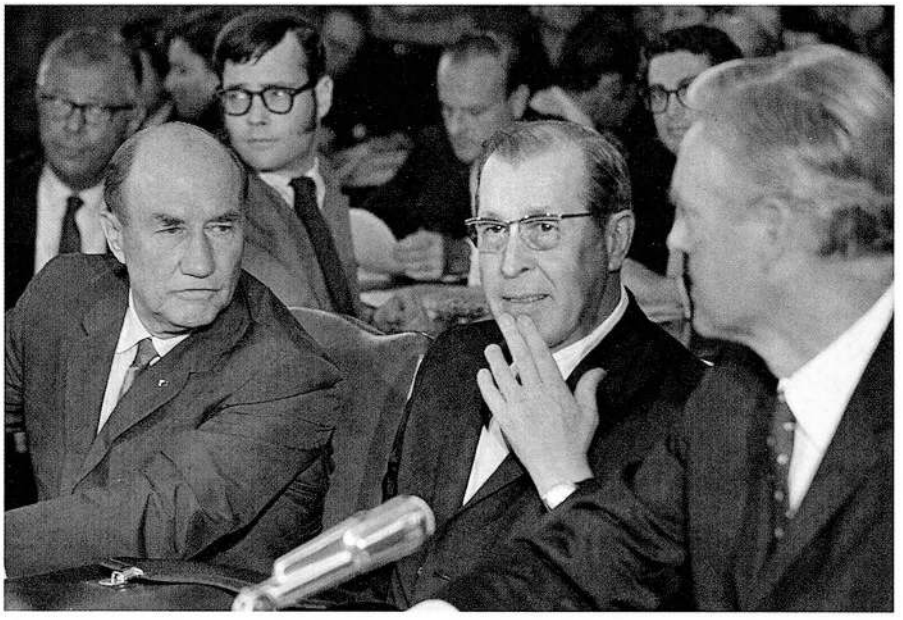
Deeply concerned by the Nixon campaign's beguiled racist appeal to conservative White voters, Brooke remained somewhat optimistic that the Republican nominee "would try to 'bring us together.'"[48] Throughout the region, White middle-class families utilized various tactics to resist integration, such as massive resistance, which led to intense political lobbying, and later, the creation of intra-city political coalitions. They could not afford to surrender their "way of life" for court injunctions and vowed to expand their fight to surrounding areas.[49] Thus, Nixon's promises on the campaign trail galvanized the Silent Majority to boldly defy federal laws with impunity. In his recollection of the Republican nominee's campaign rhetoric, Brooke noted that,

> Nixon's 'southern strategy' ... used code words to appeal to white racists, especially in the South. I bluntly accused him and his campaign of this, but he strongly denied it. [H]is vow to keep 'law and order' evoked the age–old police abuse of African Americans. Nixon did recast the phrase as 'order and justice,' but I was still troubled by his lack of racial sensitivity.[50]

The convention's proceedings and Brooke's conversation with Nixon about the "law and order" campaign rhetoric demonstrated the Black legislator's limited influence within the Republican Party. Although Brooke used his voice and votes to advocate for racial justice, the approximately one million White Americans whom Nixon represented did not care about civil rights abuses toward Black Americans. The Silent Majority merely wanted to preserve its hegemony, sense of entitlement, and privilege. Therefore, Nixon's desire to serve the interests of this political coalition meant abandoning his previous position on civil rights when he was vice president during the Eisenhower Administration.[51] The Republican nominee's race baiting angered Brooke. Although Brooke voted for Nixon, the senator's decision to follow his convictions in the aftermath of the election would define the rest of his career.[52]

Capitalizing on the fears of the Silent Majority, Nixon won 31,710,470 popular votes and 301 votes in the Electoral College.[53] Humphrey garnered 30,898,055 popular votes and 191 Electoral College votes.[54] George Wallace, the third-party candidate and notorious segregationist governor of Alabama, earned forty-six votes in the Electoral College and 9,906,473 popular votes.[55] However, Nixon had to fend off challenges by the conservative Republican icon Ronald Reagan, a former actor and then-governor of California, and Nelson Rockefeller, a moderate Republican and three-term governor of New York. Even more important, South Carolina's Republican senator Strom Thurmond guaranteed the South's loyalty to the national coalition and helped secure twenty-two delegate votes for the new president.[56] Throughout his administration, Nixon would remain indebted to the region for his victory.

Nixon's demagoguery, race baiting, and reversal on civil rights was a challenge for Brooke, who could either remain loyal to the new president or follow his convictions and risk ending a promising career in the Senate. By standing on his principles, Brooke reaffirmed his commitment to protecting civil rights because he was "[n]ot bound by ideological, philosophical, or party constraints."[57] For example, militant Black civil rights activists wanted to meet with the new president but were turned away. In another instance, Senator Brooke arranged a meeting between Nixon and many Black civil rights leaders who wanted to express their concerns about the nation's social ills and Black citizens' hopes for the incoming



Senators Strom Thurmond (R-S.C.) and Ernest Hollings (D-S.C.), Clement Haynsworth's biggest supporters, flanked the judge during his confirmation hearings.

administration. Although he listened, Nixon did not promise anything. A few months into his first term, the president gradually hindered the implementation process of federal desegregation policies, thereby revealing his commitment to a "southern strategy."[58]

The Haynsworth and Carswell Episodes: A Capsule

The president's nomination of Judge Clement F. Haynsworth, Jr. to the Supreme Court on August 18, 1969, strained Brooke's relationship with the Nixon Administration. The senator had several conversations with the new president regarding civil rights during the campaign and the first months of the president's first term. As Brooke recalled in his memoir, Nixon

> intimated that, after the election, he would drop [the 'southern strategy']. ... I thought once Nixon had finally achieved his dream of the presidency, he would abandon the unsavory tactics that had helped elect him. But it soon became clear that his 'southern strategy' was far from dead, and our relationship began to sour.[59]

Nixon used the election victory as an opportunity to repay his one million southern constituents for their votes and disregarded the needs of Black Americans. Thus, Brooke decided that his commitment to civil rights was more important than allegiance to the Republican Party and the president.

Nixon's first Supreme Court nominee, Clement F. Haynsworth, Jr., would counteract the liberalism of the Warren Court.[60] Haynsworth was the chief judge of the Fourth Circuit Court, whose jurisdiction encompassed the states of Maryland, Virginia, South Carolina, North Carolina, and West Virginia.[61] In the 1950s, Haynsworth abandoned the Democratic Party as the political coalition took a firmer stance regarding civil rights. Thus, he became an "Eisenhower Democrat" during the former general's presidential campaigns in 1952 and 1956.[62] The president's subsequent victories

launched Haynsworth to statewide prominence in South Carolina. The lawyer's admiration and campaigning for Eisenhower during the elections did not go unnoticed.

By 1957, Haynsworth completely embraced the Republican Party. To display his gratitude, President Eisenhower nominated him to the Fourth Circuit Court and the Senate confirmed his appointment on April 4, 1957.[63] In 1964, he became the circuit's chief judge.[64] In this role, Haynsworth listened to various cases involving businesses and civil rights.[65] He often ruled against the interests of labor unions and Black Americans. The Supreme Court later reversed several of his decisions in civil rights cases.[66]

Haynsworth's narrow, strict interpretation of the Constitution, especially the Fourteenth Amendment, was a larger ploy into President Richard Nixon's strategy of appealing to disillusioned, White southern voters. They felt betrayed by the Democratic Party as the national coalition gradually became more inclusive of Black Americans and adopted a stronger civil rights platform throughout the 1950s and 1960s.[67] Despite the mounting opposition to Haynsworth, President Nixon refused to withdraw the nomination because he was determined to balance the liberalism of the Warren Court with southern, conservative, strict constructionists who would roll back the gains of the Civil Rights Movement. White southerners' massive resistance strategies, as well as the Nixon Administration's slowness, effectively stalled the process of school integration because these residents desperately wanted to hold on to their cherished way of life. Moreover, the president's "law and order" rhetoric became a rallying cry "... that could be interpreted to mean a tougher stand against marching minorities ... against accused persons or against demonstrating students" because "... [t]he mood of many Americans was not toward greater tolerance or toward more liberal interpretations of civil liberties or civil rights."[68] Indeed, Nixon's actions not only demonstrated his mastery as a political demagogue who capitalized on the nation's social ills to garner more votes, prestige, influence, and favor with the White South but also an insatiable desire for power that ultimately led to his downfall.[69]

Although he did not vocally support White supremacy from the bench, Haynsworth demonstrated in his record as a federal judge a commitment to Jim Crowism that was an affront to the Warren Court's legacy of rectifying racial injustices and ensuring equality for ethnic minorities and the politically disenfranchised.[70] Senator Edward Kennedy and other members of the Judiciary Committee, disturbed by Haynsworth's record on race and labor unions, wanted to hear more testimony from the judge.[71] However, Senator James Eastland, the chairman of the Committee, overruled them and sent the nomination to the Senate on October 9 by a vote of ten yeas to seven nays.[72] Numerous statements in favor of and against his appointment were entered into the record during the weeklong hearings as the Senate discussed his qualifications.

Senator Brooke Opposes the Haynsworth Nomination

Senator Brooke objected to the nomination, saying in a letter to President Nixon, "If there is a consensus in the Senate at the moment, I think it is the view that Judge Haynsworth is not the distinguished jurist whom the country expected to be nominated."[73] The burden to confirm or reject the nomination rested on the Senate. An August 1969 news article analyzing Haynsworth's nomination noted that, in addition to southern social mores having a strong effect on Haynsworth's legal career, "It would be tragic indeed for the U.S. Supreme Court to be influenced in its decisions by an associate who cannot bring himself to believe in true equality."[74] Brooke feared that Haynsworth, if confirmed, would issue

rulings in favor of the Nixon Administration that would further polarize the nation socially, racially, and politically rather than serve as a conduit of healing and reconciliation. Moreover, Haynsworth's conservative rulings on the Supreme Court would embolden segregationists to continue defying the federal government while simultaneously punishing working class Americans and ethnic minorities who struggled to assert their civil rights. Brooke further commented that Haynsworth's judicial record regarding civil rights and improper business dealings "raises grave questions about the wisdom of confirmation."[75]

Although Haynsworth's civil rights record was very troubling, allegations of ethical impropriety were more damaging to his credibility during the nomination process. Further investigation revealed that he ruled against the National Labor Review Board's (NLRB) charges of unfair labor standards in a case involving the Darlington Manufacturing Company, a textile mill, which "had closed a plant to avoid a union election and had failed to provide any compensation for the workers left unemployed."[76] Even more disturbing was the fact that Haynsworth had investments in Carolina Vend-A-Matic, a vending machine company that conducted business with the embattled textile mill. Interestingly, charges of financial and ethical improprieties had forced Associate Justice Abe Fortas to resign. Coincidentally, the Nixon Administration produced documentation that the late Robert F. Kennedy, the former attorney general, launched an investigation into Haynsworth's financial misconduct and cleared him of any wrongdoing after a thorough review of the evidence.[77] However, as one editorial noted, "Since a conflict of interest caused Justice Fortas to step down from the Court, it is entirely improper that his place should now be filled by a man guilty of a similar indiscretion."[78] During the Senate Judiciary Committee's interview of Judge Haynsworth, which began on September 16 and lasted until September 26, 1969, Democratic Senator Edward Kennedy, an opponent of the nomination, openly questioned two southern, conservative senators as to whether or not his brother would have cleared the judge's egregious record, which warranted further scrutiny and ultimately, the Senate's rejection, as Haynsworth could not live up to the high standards as a Supreme Court justice.[79] Similarly, after Senator Brooke's thorough review of Haynsworth's judicial record, he believed that rejection of the jurist's nomination would defeat President Nixon's southern strategy.[80]

Brooke's work was complicated by the Republican Party's embracing of White segregationists. For example, Senator Strom Thurmond was a Dixiecrat-turned-Republican from South Carolina who supported President Nixon's nominees because he was an avowed segregationist.[81] Moreover, Thurmond held considerable influence in the Republican Party. Thus, Brooke broke ranks with some party leaders, especially Thurmond, by voting "Nay" against Haynsworth due to his questionable record regarding civil rights and labor unions. Regardless of party leaders' views, especially the president, Brooke did not waver in his vote and put the nation's interests ahead of party loyalty. In a letter to Nixon, the senator wrote,

> My review of Judge Haynsworth's record convinces me that his treatment of civil rights issues is not in keeping with the historic movement toward equal justice for every American citizen. ... Is Judge Haynsworth the man to restore the nation's confidence in the utter integrity of the Supreme Court? ... The widespread discontent with his nomination shows, I believe, that he is not. ... A sizeable and growing number of Republi-

> can senators, together with a large number of Democrats, have indicated their inclination to oppose the nomination.[82]

The senator discreetly informed the president that he would vote against Haynsworth if Nixon pushed the nomination forth. The judge's record demonstrated his hostility to the Civil Rights Movement and partiality in upholding the laws. Although Haynsworth was a Republican proselyte, he did not forsake his southern heritage. His rulings at the appellate level maintained the long-standing traditions of White southerners' hostility to federal intervention as well as localized, brutal oppression of Black Americans who actively protested their denial of first-class citizenship.[83] Consequently, Senator Brooke's convictions informed his decision to help organize a bipartisan coalition to defeat the nomination. He told President Nixon the unvarnished truth:

> If this nomination is put to the Senate, it will be extremely embarrassing to those of us who face a great conflict between our principles and our sense of obligation to you. It may well be that there will be sufficient votes to deny Judge Haynsworth confirmation. ... [W]ith many of us obliged to voice strong criticism and others prepared to offer only the most grudging acceptance, I honestly believe that the interests of justice would best be served by such a withdrawal.[84]

Although voting against the president was tantamount to career suicide, Brooke was more focused on how the potential nominee would affect the nation through his rulings on the High Court. Haynsworth's unjust decisions would not only have stunted the nation's social, political, and economic growth in attempts to satisfy the president's insatiable lust for power but also catered to the silent majority of voters in the North and Sunbelt South, as well as hostile southern Whites, who relied on massive resistance strategies to hinder desegregation. From Brooke's perspective, preserving republicanism, civil rights, and labor unions meant opposing President Nixon, the leader of the Republican party. He subsequently worked with Democratic senators Birch Bayh, Quentin Burdick, Philip Hart, Edward Kennedy, and Joseph Tydings to vocalize their opposition to the president's nominee.[85] Their individual views comprised a scathing report that Haynsworth was unqualified to serve on the Supreme Court.

Despite Brooke's plea for Nixon to withdraw the nomination, the President, on October 14, 1969, "told GOP Congressional leaders ... that he was 'firmly and unequivocally determined' to press for confirmation of Haynsworth's nomination."[86] Less than a week later, on October 20, 1969, "President Nixon, in an impromptu press conference in his White House office, affirmed vigorously his support of the nomination of Haynsworth and said that he would not withdraw the nomination even if Haynsworth requested it."[87] During the heated debates on the Senate floor, Democrats and Republicans stated their support or opposition to the nomination.

As the Senate debated Haynsworth's nomination, Senator Brooke commented,

> The rejection of this nomination would be a personal tragedy for Judge Haynsworth. I regret that deeply. But his confirmation could be a collective tragedy for the Nation, and that risk is simply too real and too grave to accept. We cannot afford to fill the ninth seat on the Court with a man who enjoys anything less than the full faith and respect of those whom he serves. We cannot afford to weaken the reverence on which the Court's power is ultimately founded.[88]

Brooke meant that respect for the Supreme Court would be severely affected if the Senate confirmed Haynsworth's nomination, knowing the allegations of financial impropriety as well as judicial misconduct. Moreover, a majority of the American people would view every branch of the federal government, especially Congress, with a deep level of mistrust because congressional leaders served as a checks and balances system regarding the president's agenda as they assessed the nation's needs. Therefore, Brooke's politicking with important Republican colleagues, including conservatives Len B. Jordan and John J. Williams, who was also the chair of the Republican Committee on Committees; liberals Charles H. Percy and Mark O. Hatfield; Minority Leader Hugh Scott; Robert P. Griffin, the party whip; and, Margaret Chase Smith, the chairwoman of the Senate Republican Leadership Conference, not only ensured critical opposition to the nomination but also contributed in the decisive victory against Haynsworth's appointment. On November 21, 1969, seventeen liberal, in addition to some moderate, Republicans collaborated with thirty-eight Democrats, most from the North, to reject the nomination. In contrast, twenty-six conservative and other moderate Republicans, along with nineteen southern Democrats, voted in favor of confirmation. The final vote, fifty-five nays to forty-five yeas, a historic blow to Nixon's southern strategy, demonstrated schisms and changes within the national Republican coalition.[89]

Nixon Nominates Carswell

Frustrated that the Senate rejected his first nominee, President Nixon nominated another southern jurist, G. Harrold Carswell, a Georgian by birth and a Floridian by residence.[90] Throughout Carswell's legal career, his partial compliance with federal law and use of his political office to hinder school desegregation policies became an egregious blight on his derisory judicial record. In 1958, the U.S. District Court for Northern Florida experienced a vacancy. President Dwight Eisenhower selected Carswell for the position, which came as no surprise because he had favor with the Republican Party's state leadership, including Congressman William Cramer, who also nominated him to the federal appointment.[91] During his hearing before the Judicial Committee, Carswell reassured one senator that he would not declare an act of Congress unconstitutional, which required him to take an oath.[92] Thereafter, the Senate confirmed the nomination.[93] Thus, Carswell's appointment at the age of thirty-seven made him the youngest judge in the nation.[94]

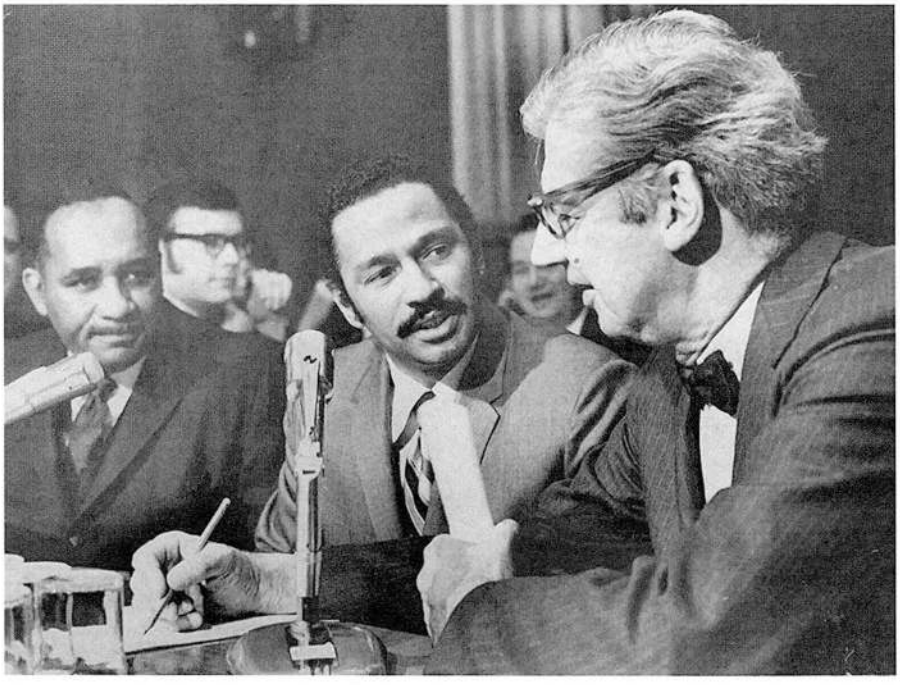
Over time, partial compliance with federal law and the use of his political office to hinder school desegregation policies became an egregious blight on Carswell's derisory judicial record. For instance, in 1960, Black students filed a petition with his court, requesting Judge Carswell to integrate their faculty. He interpreted the *Brown* decision very narrowly to assume that the Supreme Court's ruling specifically applied to students. Simultaneously, his limited reading of the Fourteenth Amendment influenced him to rule that racially segregated school faculties did not violate the Equal Protection Clause. Although Chief Justice Earl Warren's majority opinion was somewhat vague, he forcefully decreed that segregation is immoral and should not influence children's opportunities to receive a quality education.[95] The Fifth Circuit Court of Appeals later overturned Carswell's decision.[96] Nevertheless, Carswell's district court rulings reflected a strong desire to maintain the strict boundaries of legalized segregation in American society.[97]

In 1964, he advocated a "freedom of choice" proposal that prevented the complete desegregation of public schools throughout his jurisdiction. Later that

On December 12, 1969, President Richard Nixon (right) announced that Haynsworth (left) would continue to serve as Chief Judge of the 4th Circuit following the Senate's vote of 55 to 45 not to confirm him. Senator Brooke worked with Democrats to defeat the nomination because of Haynsworth's poor record regarding civil rights and labor unions and over allegations of his ethical impropriety.

year, Judge Carswell's district court ruling blatantly disregarded the Fifth Circuit Court's decision that forced a local school district to implement a court-mandated policy.[98] His actions contradicted the decisions of the Fifth Circuit of the U.S. Court of Appeals, led by Chief Judge Elbert P. Tuttle and judges John M. Wisdom, John R. Brown and Richard T. Rives, which struck down segregation as unconstitutional. Their rulings guaranteed the constitutionality of the 1964 Civil Rights Act and 1965 Voting Rights Act, thereby ensuring the Civil Rights Movement's success and continuance.[99] According to Judge Carswell's district court ruling, the decision to integrate or not rested with the school board.[100] His actions were not only a direct challenge to the federal government but also emboldened White Floridians to zealously defend Jim Crow society. Similarly, a limited interpretation of the Fourteenth Amendment allowed him to exclude Black Americans from serving on juries.[101] In 1900, the Supreme Court, in *Carter v. Texas*, declared that purging Black citizens from jury lists was unconstitutional.[102] Although Carswell ignored this precedent, he gradually integrated his courtroom to maintain favor with the Eisenhower Administration.[103]

In 1966, Congress created the position for a new judge in the Northern District of Florida to ameliorate the increasing workload. Ironically, Carswell remained complacent in his position while constantly complaining about the district courts' procrastination in ruling cases. Judge Carswell's nominal enforcement of desegregation policies was evenly matched by his mediocrity and laziness in judging cases from 1958 until 1969.[104] The lifetime appointment to the U.S. District Court for Northern Florida came with a sizeable salary.[105] He dismissed hundreds of cases that came before his bench and his rulings in other cases were inconsequential. Thus, the unruled cases gradually became backlogged despite Judge Carswell having the least crowded docket. Similarly, the judge's printed opinions lacked scholarly



In February 1970, three witnesses testified before the Senate Judiciary Committee against the nomination of G. Harrold Carswell. (Left to right) Clarence Mitchell of the NAACP, Rep. John Conyers (D-Mich.) and Joseph Rauh of the Leadership Conference on Civil Rights argued that his judicial record was tainted with racism and that Carswell had demonstrated incompetency as a judge.

merit and higher federal courts oftentimes opposed the findings, thereby signifying Carswell's disrespect for his craft. The written opinions were superficial, judicially unsound and incorporated very little secondary source literature. Whenever Carswell wrote opinions and appellate courts reviewed the rulings in various cases, the courts invalidated his decisions most times.[106] As historian Bruce H. Kalk commented, "In Judge Carswell's final five years on the bench, the Court of Appeals and the Supreme Court regularly upheld him in criminal cases. In every other category, however, Carswell was overruled on appeal two-thirds of the time."[107]

Nevertheless, he remained committed to upholding Jim Crowism from the bench because Carswell was a southerner "by ancestry, birth, training, inclination, belief, and practice" who "yield[ed] to no man in the firm, vigorous belief in the principles of white supremacy...."[108] In 1966, while serving as a federal judge, he sold property with a restrictive covenant in the legal documents.[109] Although the Supreme Court ruled the practice was unconstitutional in *Shelley v. Kraemer* (1948), that did not prohibit southern Whites, including Carswell, from devising other methods of segregating. Moreover, he could not feign unawareness of his actions because Judge Carswell, in relation to a similar occasion, commented that he read documents before signing them.[110] Indeed, the judge was so engrossed with maintaining the parameters of legalized segregation in his personal life that he did not consider the deleterious effects on his career or future political aspirations.[111]

In 1969, Richard Nixon's inauguration and Republicans' victories in Congress enhanced Carswell's political aspirations. In April of that year, Warren Burger, the new Chief Justice of the United States, and an associate of Carswell, nominated him for

a promotion.[112] Later that year, President Nixon named Carswell to the Fifth Circuit of the U.S. Court of Appeals.[113] Many liberals in the Senate and American public greatly opposed the nomination, including the Leadership Conference on Civil Rights (LCCR) who noted that "Carswell had been 'more hostile to civil rights cases than any other federal judge in Florida.'"[114] Despite numerous protests, the Senate confirmed the jurist to the Fifth Circuit Court.[115] However, upon his confirmation, Carswell committed two errors that demonstrated his immaturity. In the first incident, he joined a majority of the justices to deny a court appearance to a woman whose employer fired her because she was pregnant. The woman took her case to the Supreme Court, which sided with her claims and ordered that she receive a hearing.[116]

In December 1969, Carswell's telling of a racist joke during a meeting for the Georgia Bar Association demonstrated adherence to his White supremacist convictions.[117] The judge tried to downplay the racial implications, but the damage was done because the lawyers attending the meeting were highly offended.[118] Anthony Lewis, a reporter for the *New York Times*, when analyzing Carswell's qualifications in a 1970 editorial, commented, "That record display[s] ... extraordinary insensitivity. It ... raise[s] questions about Judge Carswell's fitness for a lifetime position on a court that must decide some of the most sensitive and almost important racial question[s] before the country."[119] Thus, the two incidents revealed Carswell's misogyny, lack of racial sensitivity, sense of entitlement, and commitment to White supremacy.[120]

Despite this evidence against Judge Carswell, President Nixon nominated him to fill the Supreme Court vacancy on January 18, 1970. The announcement angered many civil rights activists and organizations, such as the National Association for the Advancement of Colored People (NAACP), National Urban League (NUL), and Leadership Conference on Civil Rights (LCCR), who opposed his nomination to the Fifth Circuit Court in 1969 because of his appalling judicial record regarding civil rights. His past came to light as soon as the nomination was announced. Before long, civil rights activists discovered and publicized a 1948 campaign speech where Carswell affirmed his belief in White supremacy. Despite the mounting controversy over the nomination, "Many white Americans [came] to resent black demands, and the President want[ed] to take account of their feelings," which was not completely unfounded, because "resentment and alienation among white people" became "a serious social danger."[121] Nixon, always a cunning political demagogue, appealed to the Silent Majority with his race-baiting rhetoric and defiant actions to ensure the votes of this vital political bloc.[122] Simultaneously, and less of a concern, was the "bitterness in the black community" that "could destroy the racial peace he desire[d]."[123]

Opponents of the nomination coalesced around Carswell's dismal civil rights record, chauvinism, and perceived lack of intellectual competency, citing the numerous times the U.S. Court of Appeals and Supreme Court reversed many of his rulings.[124] Many of the opponents were moderate Republicans and northern, liberal Democrats, but a few were southern Democrats. Other moderate, conservative and liberal Republicans, as well as the rest of the Southern Bloc, supported the nomination. The Senate Judiciary Committee held intense hearings from January 27 to February 3, 1970.[125] The Committee heard favorable and unfavorable testimonies from law professors, colleagues, civil rights attorneys, and civil rights activists. Their sworn depositions presented the message of an unabashed White supremacist who disregarded federal law for his personal preferences.[126]

After five days of stirring testimony, the Senate Judiciary Committee's deliberations mirrored the intense battle in the Senate that would decide Carswell's fate.

The panel's blocking of the nomination on February 3 and February 5 demonstrated the intensity surrounding the controversy. Senator James Eastland, the chairman of the Committee, rejected a letter from Senators Edward Kennedy, Philip Hart and Joseph D. Tydings, requesting that Carswell also respond to allegations of discriminatory behavior toward civil rights lawyers and judicial incompetency. Despite the unresolved issues, the Committee voted thirteen to four to report Carswell's nomination to the Senate for confirmation.[127] Thereafter, the legislature entered a lengthy and heated debate.

Brooke's Response to the Carswell Nomination

Brooke's speech on the Senate floor demonstrated his opposition to the Nixon Administration's southern strategy. He noted how Carswell, as a district attorney, federal district court judge and circuit court justice, used his influence, as well as legal knowledge, to effectively hinder federal desegregation policies. Thus, the senator commented,

> I cannot in good conscience support confirmation of a man who has created such fundamental doubts about his dedication to human rights. ... If ... the President's laudable quest for greater harmony in our society will be undermined by this appointment, I trust that the Senate will deny confirmation of this regrettable nomination.[128]

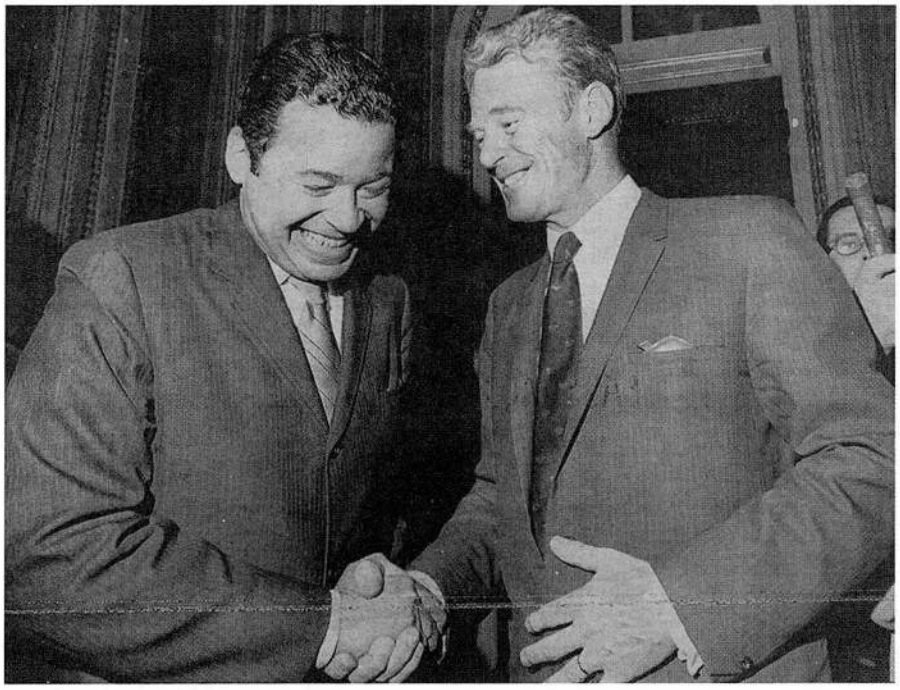
The judge's appalling civil rights record not only exhibited laziness but also a narrow interpretation of the Fourteenth Amendment. Of more alarming concern, Judge Carswell, throughout his tenure on both the district and circuit courts, allowed his personal convictions to overrule his duty to uphold the law, which led him to dismiss numerous civil rights cases, in addition to other hearings, with prejudice, while insulting Black lawyers, litigants, and civil rights attorneys seeking equality. His incompetence and White supremacist views, an affront to the scholarly and judicial reputation of the highest court in the nation, clearly warranted rejection. Democratic Senator Birch Bayh, who also opposed the nomination, commented,

> [T]he thing that concerns me the most about this whole matter is ... namely, the drifting apart of our people, rather than tending to solidify as one Nation indivisible. ... I am becoming alarmed at some of the emotions rampant in our country today, directed in such a manner that it almost plays upon the worst in us rather than inspiring us to get up on our toes and do our best.[129]

Carswell's nomination would further divide the nation along political and racial lines, with reprehensible consequences. Thus, Senator Bayh wanted an exemplary Supreme Court nominee to unite the country while inspiring all Americans to work toward a more equitable, just society.

Impassioned, eloquent speeches by Brooke, Bayh, and others did not sway the hearts and mindsets of the legislators. Indeed, the Republican coalition that Brooke helped organize during the Haynsworth nomination dissipated. The principal Senate leadership, comprised of Senator Robert Griffin, the assistant minority leader, and Senator Hugh Scott, the minority leader, voted in favor of Carswell. Conversely, Senator Margaret Chase Smith, the chairwoman of the Senate Republican Leadership Conference, voted against the nomination. There is a reason for these changes.

The president's overconfidence of victory led to his carelessness in overseeing the nomination. For example, the Nixon Administration used underhanded tactics of coercion and intimidation to persuade many undecided Republican senators to consider



After the Senate voted on April 6 against sending the Carswell nomination back to the Senate Judiciary Committee and to move forward with a vote, Brooke shook the hand of Senator Edward J. Gurney (R-Fla.), one of Carswell's supporters. However, Brooke would break ranks with his party to vote against the nominee.

voting "yes" on the confirmation by attempting to overwhelm them with letters from their constituents and bribe them with political favors, such as White House support during re-election campaigns.[130] Nixon's tactics backfired, costing him the respect and support of major Republican legislators.[131] During a private meeting with Brooke, Nixon noted, "Oh, Ed, we're going to win this one. This time we're going to win."[132] Senator Brooke responded, "Mr. President, one thing I've learned since I've been here is how to count. You don't have the votes. He's going to be rejected, Mr. President."[133] Thus, Brooke's boldness, independent mindset and willingness to vote his convictions revealed his dedication to protecting civil rights.

As the time for the Senate proceedings drew closer, the Nixon Administration's final effort to rally Republican senators to its cause was a failure. Nixon aide Bryce Harlow called Republican Senator Marlow Cook, telling him that Senator Margaret Chase Smith would vote "yes" on Carswell.[134] Greatly disturbed by the news, Cook telephoned Senator Brooke to see if there was any validity to Harlow's information. Equally worried, Brooke rushed to meet Senator Smith, who was in the midst of lunch, to discuss the rumors.[135] After apologizing for the disturbance, he informed the senator that the White House publicly stated her intention of voting for the judge.[136] Upon hearing this unexpected news, Smith became enraged because she neither committed nor publicized how she would vote.[137] She immediately called Bryce Harlow, asking him if he told anyone that she would vote in the affirmative. His wavering answer angered Smith even more. After excoriating Harlow for impugning her honor, Smith slammed the phone on the receiver. Brooke left the meeting feeling somewhat confident.[138]

Cook's phone calls to Brooke and fellow Republican Senator Winston Prouty guaranteed Carswell's rejection in the Senate on

April 8, 1970.[139] Visitors in the galleries waited with bated breath during the proceedings later that day. As Vice President Spiro Agnew, the president pro tempore of the Senate, began the roll call vote, Cook voiced "No," which shocked the spectators.[140] Senator Prouty's "No" garnered jubilance and Senator Smith's faintly heard vote of "No" led the anti-Carswell faction to erupt in cheers throughout the galleries.[141] When the vice president announced the results, the Senate rejected the nomination by a slim margin of fifty-one nays to forty-five yeas, another historic defeat for the Nixon Administration.[142] In his recollection of Haynsworth's and Carswell's defeats, Brooke noted,

> [T]hough I wasn't on the Judiciary Committee, I scrutinized very closely what they were doing so far as confirmation of judicial appointments, and I did that particularly in these two occasions, which came up after the [Abe] Fortas tragedy and all that was going on. Some of these [issues] came up, obviously, under my party's President, Richard Nixon. I ran into this constantly with my party's President.
>
> I did my homework. My staff did its customarily high-quality research. We discussed it; we talked on every little issue. We'd review a letter or a speech. We'd have a meeting on one of these speeches and say well now, he said this, what does he mean? That was the kind of detail we got into. … [S]o I could go to the floor … I thought all the time I was talking … I never had a note or anything. I felt so strongly. I just stood up and talked. Sometimes the gallery would be empty, and maybe one person [would be] up there and nobody sitting and listening. … I made my point and got heard eventually. … I listened to both sides and I voted accordingly.[143]

Judge Carswell and his wife, Virginia, were photographed on April 9 after learning that his nomination had been rejected and he would not fill the seat vacated by Abe Fortas.

Furious that his strategy to appoint "strict constructionists" to the Supreme Court did not go as planned, President Nixon held a press conference in the Briefing Room of the White House. He blamed a liberal media, as well as Democratic and Republican opponents, for the "vicious assaults on their [Haynsworth's and Carswell's] intelligence, their honesty and their character."[144] Brooke's work helped secure these monumental victories and the Senate confirmed Harry Blackmun, a judge with a more sympathetic record on civil rights and labor unions, to fill the seat later that year.[145] However, his politicking was not enough to prevent the nomination of Judge William H. Rehnquist to the Supreme Court.[146] On December 10, 1971, Brooke's vote was one of several "nays" in the sixty-eight to twenty-six vote that confirmed Rehnquist as an Associate Justice of the Supreme Court. Nevertheless,

Brooke's organization of bipartisan coalitions in the Senate to reject the nominations of Haynsworth and Carswell demonstrated his commitment to fairness, justice, and a more equal society over partisan politics.[147]

Conclusion

Senator Brooke's position in the Senate enabled him to protect civil rights during his two terms in office. His story is commendable when viewed in the context of an African-American legislator striving to protect civil rights while helping the national Republican coalition remember its historical foundations as a political party that once represented a diverse American public. While he was an elitist, Brooke did not cater to large corporations, upper middle-class Whites and the social elites, but sought to protect civil rights for Black Americans, the socioeconomically disadvantaged and the politically marginalized within American society. As one observer put it:

> ... he [was] a very sensitive, informed civil righter, adhering more to constructive programs of education, employment and health than to 'agitation via riots[,]' ... [whose] greatest service to Negroes ... [came] in face–to–face confrontations in the 'club' and in behind–the–scene negotiations to strengthen legislation.[148]

Yet Brooke struggled to help Republican politicians understand the need for bipartisanship on the ground that stronger cooperation from both political parties could inspire all Americans to work for the greater good of humanity as the nation experienced unprecedented challenges domestically and abroad.[149]

Although he was not as renowned as some of his contemporaries, such as Dr. Martin Luther King, Jr., Shirley Chisholm, and John Lewis, Brooke made an indelible impact in the area of civil rights, specifically fair housing, the Supreme Court, and education. Senator Brooke's legacy has been ignored for many years within Civil Rights Movement historiography because of his neutrality and moderate political views. People remember visible social justice leaders who make them feel valued. Moreover, Brooke failed to engage with working class Blacks and younger, more militant civil rights activists. He did engage with Black professionals and upper middle-class Blacks, but they still questioned his commitment to the Black cause. Brooke was disappointed that his civil rights work received little recognition from the public, especially Black Americans, but was glad that the Congressional Record preserved his legacy.[150]

Senator Edward W. Brooke was not a southern street activist; he was an established policymaker who was nurtured by a generations-old, but rapidly diminishing, tradition of public service in the Republican Party. Local civil rights activists confronting issues of police brutality, voter suppression, unequal education, and fair housing through such methods as registering voters, organizing demonstrations and lobbying for change opened the doors for policymakers like Senator Brooke to make their considerable contribution. Protest became policy, and laws and regulations that addressed so many of the pressing issues of the movement became the law of the land, although activists today continue to take steps to ensure that the gains of the 1960s and 1970s are not lost. Today, we recognize the Civil Rights Movement as richer and more complex as we try to understand its implications for our current times. Brooke's subtle revolutionist methodology created a foundation for future political leaders to become more vocal while working within the political system.[151] Perhaps his biggest legacy is his opposition to two problematic Supreme Court nominees who would have changed the complexion of the Court for decades to come.

ENDNOTES

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The Lone Dissenter

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The dissenting opinion plays a paradoxical role in American law. On the one hand, it weakens what Judge Learned Hand, an avowed opponent of dissenting opinions, called the "monolithic solidarity on which the authority of a bench of judges so largely depends."[1] On the other hand, according to Justice William J. Brennan, a vigorous defender of the dissenting opinion, it "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[2]

The paradox of the dissenting opinion is inherent in the unique nature of the judiciary among the three branches of the federal government. Unlike the legislative and executive branches, the judiciary does not command obedience by the threat of force but instead seeks to persuade through the power of reason. Our courts do not act; they speak. Like the prophets of the Old Testament, the power of the Court is in its voice.

This has been recognized since the very beginning. It is why Hamilton emphasized, in that famous passage in Federalist 78, that the judiciary "may truly be said to have neither force nor will, but merely judgment."[3] And it is surely why Chief Justice John Marshall—in words no less familiar to lawyers than Hamilton's—justified the function of judicial review by his emphatic reference to the "duty of the judicial department to say"—*to say*—"what the law is."[4] This is what Professor Alexander Bickel called "the mystic function" of the Supreme Court. When it speaks through its opinions, it provides the symbolic "voice of the Constitution," by articulating and defending "a coherent body of principled rules" of law that stand above ordinary politics.[5] Indeed, when the Court is interpreting and enforcing the rules established by the Constitution—the supreme law of the land—its rulings even stand above, and can nullify, ordinary laws enacted through the democratic process established in Article I. So, it is critical that the Court get it right.

Because the Court's authority is ultimately dependent on its ability, through its written opinions, to win the assent of the political branches of government, we can see why the Court's credibility is at its zenith when the Court speaks as one. The Marshallian postulate that it is the "duty of

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the [Court] to say what the law is" is premised on the notion that the law is determinate and discoverable, and disagreement within the Court is at war with that notion. A dissent by definition calls into question the Court's judgment as to "what the law is," weakening the power of that judgment both by showing that it was not inevitable and, if the dissent is ultimately successful, by showing that it was not even correct.

It was likely to counter this threat to the Court's credibility, and thus its authority, that Chief Justice Marshall abandoned the custom of the King's Bench of having each judge issue an opinion, instead having the Court issue a single, *seemingly* unanimous opinion for the Court. I say "seemingly" because, as Justice Brennan noted in an essay entitled "In Defense of Dissents," disagreements among the members of the early Marshall Court "were deliberately kept private," and Marshall himself "delivered a number of opinions which, not only did he not write, but which were contrary to his own judgment and vote at conference."[6] So, when Marshall uttered his famous postulate in 1803, the Court was unanimous only in its pursuit of unanimity, concealing from public view its disagreements over "what the law is." No member of the Marshall Court dissented publicly until 1806,[7] and there seems little doubt that this consistent unanimity, although counterfeit, significantly contributed to the rise of the Court's institutional authority in those early years.

Yet, dissent can also *strengthen* the decisions of the Court, in at least two ways. Most immediately, a strong dissent serves as whetstone to the majority's steel—forcing the rest of the Justices to hone their own, contrary opinions and to answer the concerns voiced by a fellow justice. And more generally, a dissent also, in the words of Chief Justice Charles Evans Hughes, makes "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[8] By the very act of dissenting, a judge expresses confidence that reason, not numbers, ultimately determines what the law is. In this way, the dissenter in the long term forcefully strengthens the Court's performance of Bickel's "mystic function"—ensuring that, when the Court proceeds down the wrong path, later generations will not be left without witness.

This role is distilled to its essence in the lone dissent. Like Thomas More, the patron saint of our profession, the lone dissenter refuses to pursue fellowship at the cost of embracing what he or she believes to be an error fundamental enough to speak up. The lone dissenter endures in the hope that, though standing alone today, by standing with reason, a majority will stand with him or her in the fullness of time.

We should all be thankful that our Supreme Court has had its fair share of lone dissenters, and that some of their lone dissents are now the law of the land. Perhaps best known are the lone dissents that the Great Dissenter, Justice John Marshall Harlan the Elder, issued in the *Civil Rights Cases*[9] and in *Plessy v. Ferguson*,[10] dissents that gave witness to a grievous error that a majority of the Court would not itself come to see until 60 years later in *Brown v. Board of Education*.[11] In other cases, the Congress has acted to vindicate a justice's solitary dissenting voice through legislation. And in some cases, of course, the witness of the dissenter continues to stand alone, his or her reasoning as of yet still failing to move a majority of the Court.

Associate Justice Rehnquist's Lone Dissents

One lone dissenter in particular, William H. Rehnquist, is the focus of this article. But the article is actually a story of ***two*** justices: one, the *associate* justice who for 15 years waged a largely singular battle to dissuade the

Court from being what he called a "council of revision," substituting its own "set of values for those which may be derived from the language and intent of the framers" of the Constitution;[12] and the other, the *chief* justice who for the next 21 years led the Court as an institution.

Although Rehnquist took his seat as an associate justice in the 1971 Term, he had already earned his reputation as ***THE*** Lone Dissenter by the end of the 1974 Term, when his law clerks presented him with a Lone Ranger doll, in tribute to his six solo dissents that Term. It became a prized memento that had a permanent place on the mantelpiece in his chambers.[13] His reputation as THE Lone Dissenter continued to grow throughout the 1970s and early 1980s, although it was not an admiring one, at least not among members of the press and law school faculties. Anthony Lewis, the liberal legal journalist who covered the Supreme Court for the *New York Times*, captured the intellectual class's long-standing animosity in 1986 when he commented on Justice Rehnquist's nomination to become the chief justice:

> In his years on the Court Justice Rehnquist has single-mindedly pursued a vision very different from the broad consensus: a vision of judges doing little or nothing to restrain official power or protect individuals.... It is no disrespect to Justice Rehnquist to say that such a *loner*, a judge so often out *at the edge of the Court*, is a curious choice to be Chief Justice of the United States.[14]

Rehnquist's Pathbreaking Article

I was in law school during the mid-1970s, and it was largely through Justice Rehnquist's lone dissents that I learned about his vision of the role of the Court in constitutional interpretation, the vision that Anthony Lewis sought to marginalize. That vision rejected the prevailing orthodoxy favoring what was then commonly called "Living Constitutionalism." He challenged that orthodoxy directly in a pathbreaking 1976 law review article aptly entitled, "The Notion of a Living Constitution."

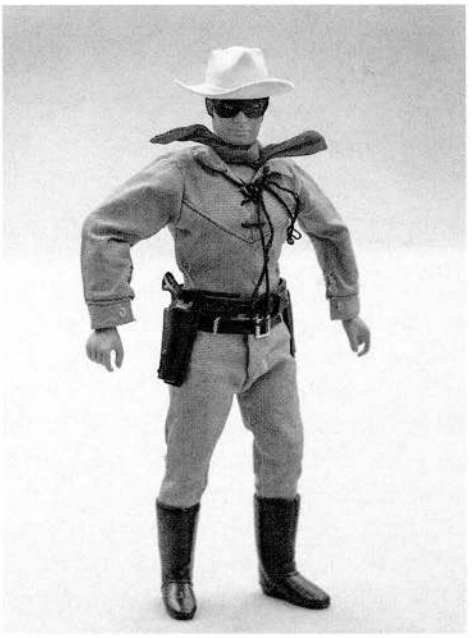
He opened the article by noting the daunting nature of challenging an approach to judging with such an attractive label: "[I]t seems certain," he quipped, "that a living Constitution is better than what must be its counterpart, a dead Constitution."[15] He then explained that the "Living Constitution" theory sees the judiciary "as the voice and conscience of contemporary society" and urges the "nonelected members of the federal judiciary [to] address themselves to a social problem simply because other branches of government have failed or refused to do so."[16] Although Justice Rehnquist developed his argument at great length, the crux of his critique was this:

> Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are ... a small group of fortunately situated people with a roving commission to second-guess Congress [and] state legislators ... concerning what is best for the country.[17]

At bottom, this conception of the role of the judiciary could not be squared, Justice Rehnquist argued, with Chief Justice Marshall's justification of judicial review in *Marbury v. Madison*, which was the only justification acceptable in a "Nation[] which prides itself on being a self-governing representative democracy."[18]

I read this article a law student in the mid-1970s, and it had a profound influence

on me: Rehnquist was a clear and solitary voice on the Court calling on the Court to interpret the provisions of the Constitution to mean what they were understood to mean by the Framers who drafted them and by the people who adopted them. He pressed that view both in his extrajudicial writing and in his judicial opinions. But it was the lone dissent that let Rehnquist be Rehnquist. In his 1986 confirmation hearing to become the chief justice, he admitted that when a justice is writing an opinion for, say, a five-justice majority, "you have to accommodate the views of the four other people, … [s]o there is often compromise." But "if you are a sole dissenter, you are writing only for yourself."[19] Through those separate opinions, the Lone Dissenter provided me and my generation of law students with a view of the law, and of the role of the courts, that sharply differed from the reigning orthodoxy in the law schools.



At the end of the 1974 Term, Rehnquist's clerks presented him with a Lone Ranger doll in tribute to the six solo dissents he had written. The doll found a permanent place on the mantelpiece in his chambers.

A Reputation Earned Not by Numbers Alone

Why did Justice Rehnquist so quickly became famous, and is today remembered, as THE Lone Dissenter? I believe that Justice Rehnquist earned his reputation not just because of the quantity of his solo dissents, but because those dissents together limned the lines of a controversial mode of constitutional interpretation that has come to be known as originalism. Justice Rehnquist became known as the Lone Dissenter because he—with all due respect to Justice Scalia—was the original originalist on the Supreme Court.

To be sure, Justice Rehnquist's reputation as one of the Court's great Lone Dissenters was certainly earned on the numbers. During his first ten terms on the Court, he authored forty-nine lone dissents. In the 1978 Term, when I clerked for him, he authored seven lone dissents, constituting just over 5% of all cases. He had written seven the Term before and would author eight in the next term. Indeed, and remarkably, his *very first opinion* as a justice, published less than three months after he was sworn in as a member of the Court, was a lone dissent. No other justice in the Court's history opened his or her tenure by authoring a lone dissenting opinion. (It should be noted that Justice Brockholst Livingston cast a lone dissenting vote in his first case, *Higginson v. Mein* (1808), but he neither authored an opinion nor otherwise stated his reasons for so doing.) And, a lone dissent—a single line reiterating a position he had staked out in a previous lone dissent—was among Rehnquist's early opinions as chief justice.[20] No one ever accused Bill Rehnquist of not having the courage of his convictions.

But while the statistics support Rehnquist's reputation as a prolific lone dissenter, they do not, standing alone, explain how he became THE Lone Dissenter. In fact, Justice Rehnquist was an *amateur* soloist when compared with two of the justices

with whom he served on the Court. Justice William O. Douglas, who once described "the right to dissent [as] the only thing that makes life tolerable for a judge on an appellate court,"[21] was the Supreme Court's all-time leading lone dissenter. He dissented all by himself in 225 cases, which was 4.3% of the cases decided by the Court on a plenary basis during his 37-year tenure. Indeed, during their four terms on the Court together, Justice Douglas crushed Justice Rehnquist by a score of 60 solos to 18. Justice John Paul Stevens places second on the all-time list with 167 solo dissents, which was 3.9% of the cases decided during his more than 34 years on the Court. Alongside these numbers, Rehnquist's 74 lone dissents seems paltry, although they qualify him for seventh place on the list of the Court's leading soloists.

As Justice Rehnquist pointed out during his 1986 Senate confirmation hearings, Justice Stevens had by then overtaken Justice Rehnquist as the Court's leading lone dissenter—by a score of 48 to 47. Given that both Justice Stevens and Justice Douglas had outpaced Justice Rehnquist in solo dissents during their terms on the Court with him, one cannot help but wonder whether, if either Douglas or Stevens had been nominated to become the chief justice, Anthony Lewis would have characterized those justices as "loners" whose frequent presence on the outer edge of the Court made them "curious choice[s] to be Chief Justice of the United States."

Rehnquist's Originalist Judicial Philosophy

So the numbers alone do not explain why Associate Justice Rehnquist was accorded such fame as THE Lone Dissenter. I believe that this title was attached to him by the intellectual class to accentuate the view that his originalist approach to interpreting the constitution was "extreme" and "outside the mainstream." Even today, he is remembered this way in the law schools. Just last year, in an article entitled "The Supreme Court's Liberals Should Follow Conservative Justice Rehnquist's Lead [and] Dissent, Dissent, Dissent," liberal law professor Jon Michaels wrote: "Dubbed the 'lone dissenter' during the 1970s, when the court skewed left, the future chief justice's dissents kept the fire lit for then-marginalized conservatives. Rehnquist proffered theories that not only eventually commanded majorities, but also provided young conservatives cover to develop radical positions far from the then-judicial mainstream."[22]

Rehnquist's originalist jurisprudence pervades many of the sixty-five lone dissents that he penned during his fifteen years of service as an associate justice of the Court. His dissent in the 1979 case, *Parklane Hosiery Co., Inc. v. Shore*,[23] is a particularly well-articulated example of his judicial philosophy. The Court majority repealed the mutuality requirement for collateral estoppel, over the objection that mutuality was required by the Seventh Amendment's command that "the right to jury trial *shall be preserved*."

> It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which was included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.[24]

"[D]evelopments in the judge-made doctrine of collateral estoppel," Rehnquist explained, "cannot, consistent with the Seventh Amendment, contract in any material fashion

the right to a jury trial that a defendant would have enjoyed in 1791."[25] He continued:

> Whether this Court believes that use of a jury trial in a particular instance is necessary, or fair or repetitive is simply irrelevant. If that view is rigid, it is the Constitution which commands that rigidity. To hold otherwise is to rewrite the Seventh Amendment so that a party is guaranteed a jury trial in civil cases unless this Court thinks that a jury trial would be inappropriate.[26]

Justice Rehnquist advocated this originalist approach to constitutional interpretation in case after case during his fourteen years of service as an associate justice. His lone dissents in three doctrinal areas best illustrate his judicial philosophy: federalism, unenumerated fundamental rights, and commercial speech.

The Lone Dissenter is perhaps best known for his defense of the sovereign powers reserved to the States by the Tenth Amendment and the limitations on the scope of federal power that are implied by the express enumeration of those powers in the Constitution. In the 1985 case of *Supreme Court of New Hampshire v. Piper*,[27] for example, the Court struck down as violative of the Privileges and Immunities Clause a residency requirement that the State of New Hampshire had adopted for admission of lawyers to the state bar. Justice Rehnquist, alone, filed a dissenting opinion, reminding his fellow justices of the genius of our constitutional system of dual sovereignty:

> [T]he Framers also created a system of federalism that deliberately allowed for the independent operation of many sovereign States, each with their own laws created by their own legislators and judges. The assumption from the beginning was that the various States' laws need not, and would not, be the same; the lawmakers of each State might endorse different philosophies and would have to respond to differing interests of their constituents, based on various factors that were of inherently local character.[28]

The brand of originalism William H. Rehnquist brought to the Court focused not only on the Constitution's text but also on the inherently restraining purpose and effect of the federal government's limited enumerated powers. He is pictured here in 1972, the year of his appointment as associate justice.

Because resident lawyers "are better equipped to write those state laws and adjudicate cases arising under them," Justice Rehnquist believed the states retained the power to restrict law practice to residents. In *Fry v. United States*, likewise, Justice Rehnquist said that "there can be no more fundamental constitutional question than that of the *intention of the Framers of the Constitution* as to how authority should be allocated between the National and State Governments."[29] And the Framers' intention, he said in lone dissent, prohibited Congress from regulating the wages that a State may pay its own employees to perform traditional government

functions. He drew support from the Court's 1890 decision in *Hans v. Louisiana*,[30] where, "after canvassing the understanding of the Framers of the Constitution," the Court had held that the Constitution's protection of state sovereign immunity from suit by "Citizens of [another] State" extends beyond [the Eleventh Amendment's] text to forbid federal courts from entertaining suits by citizens *from that same state*.[31] Just as the result in *Hans* was based on the original understanding of the Constitution, even if not dictated by the Eleventh Amendment's text, Justice Rehnquist urged the Court to look beyond the terms of the Tenth Amendment and consider the original understanding of federalism that animated its drafting and ratification:

> Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.[32]

Consider next Justice Rehnquist's lone dissents from decisions invoking the "fundamental rights" strand of equal protection jurisprudence. In the 1972 case of *Weber v. Aetna Casualty and Surety Co.*, for instance, he issued his second lone dissent, disagreeing with the Court's invalidation of a Louisiana workers' compensation law that prioritized benefits payments to legitimate children over illegitimate children.[33] The majority found that this classification impermissibly endangered "sensitive and fundamental personal rights," but the Lone Dissenter concluded that that approach was "devoid ... of any historical or textual support in the language of the Equal Protection Clause," and impermissibly left "to the Justices of this Court the determination of what are, and what are not, 'fundamental personal rights.'"[34] As he explained at some length,

> Those who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action through legislation or otherwise. While the determination of the extent to which a right is protected may result in the drawing of fine lines, the fundamental sanction of the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of the doctrine of fundamental personal rights. This body of doctrine created by the Court can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.[35]

Justice Rehnquist picked up a similar theme in *Green v. Georgia*, this time in the context of the Due Process Clause.[36] There the Court held that a state's hearsay rules could not be applied to prevent the introduction of evidence by a defendant in a death penalty case. As Justice Rehnquist argued in dissent, "The Court today takes another step toward embalming the law of evidence in the Due Process Clause of the Fourteenth Amendment * * *."[37] "Nothing in the United States Constitution," he argued, "gives this Court any authority to supersede a State's code of evidence because its application in a particular situation would defeat what this Court conceives to be 'the ends of justice.'"[38]

It is evident from these examples that Justice Rehnquist's brand of originalism was not the textualist originalism that, largely

thanks to Justice Antonin Scalia, came to dominate the bench and the bar's understanding of the theory. Rather, Justice Rehnquist's originalism was more holistic, focusing not only on the Constitution's text but also on the inherently restraining purpose and effect of the federal government's limited enumerated powers.

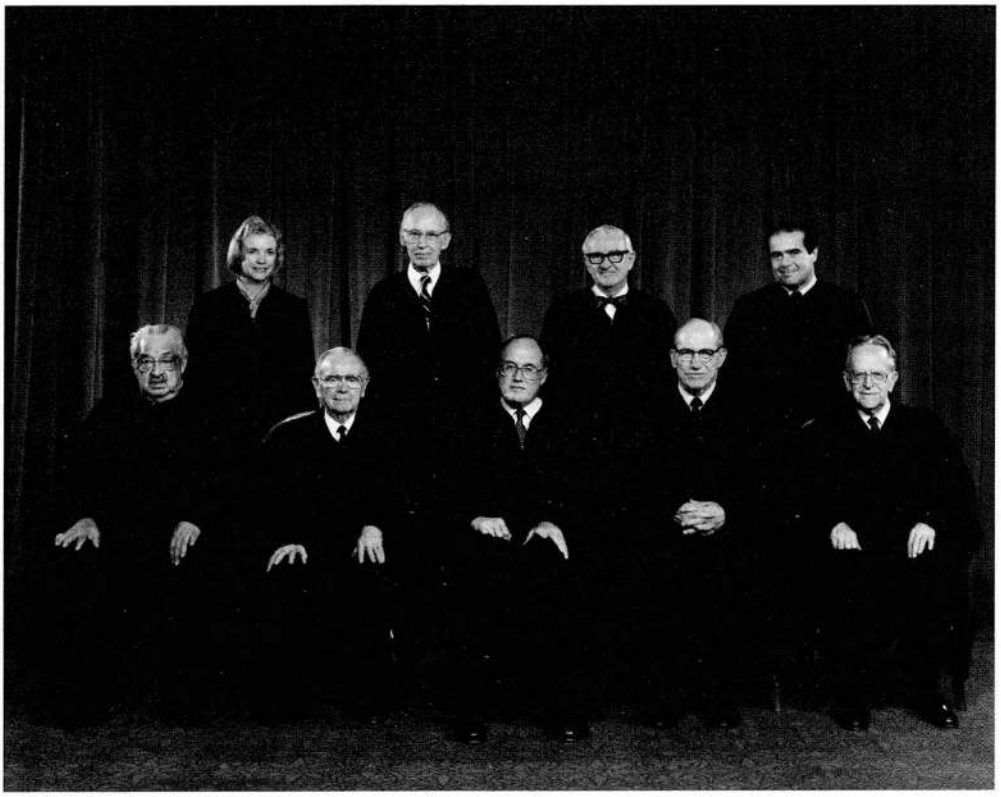
This is also evident from his well-known dissents on the issue of commercial speech. When the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.* extended First Amendment protection to the advertising of prescription drug prices, for example, Justice Rehnquist again penned a lone dissent, warning against the judicial usurpation of the legislative authority to balance "matter[s] of desirable public policy."[39] "There is certainly nothing in the United States Constitution," he wrote, "which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession."[40] Citing a series of opinions repudiating the *Lochner*-era Court's *conservative activism* regarding economic rights, Justice Rehnquist echoed Justice Black's call for a "return[] to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."[41] Justice Rehnquist's opinion was prescient in lamenting that, in due time, prescription drugs would surely "be advertised on television during family viewing time." Perhaps it was just as well that he passed away before the advent of ubiquitous TV ads for pharmaceuticals, including drugs addressing a variety of intimate personal "dysfunctions."

Chief Justice Rehnquist's Lone Dissents

In these lone dissents and many more like them, Associate Justice Rehnquist challenged the living constitutionalism that animated the activism of the Warren and Burger Courts and that dominated the lecture halls and law journals of the time. But in 1986, when he moved to the center chair, something happened. The Lone Dissenter's output of separate opinions declined dramatically. After authoring 66 lone dissents in 15 years as an associate justice, he authored only nine in his 21 years as the chief. He went from dissenting alone in over three percent (3.15%) of all cases before 1986 to doing so in less than one half of one percent (0.48%) of cases thereafter.

This sharp decline in lone dissents is likely attributable to two separate but closely related events: Justice Rehnquist's appointment as the chief justice and Justice Scalia's appointment to fill the seat that Rehnquist vacated. It cannot be denied that Justice Rehnquist's move to the center chair produced a substantial change in his outlook about his role as a member of the Court. And this does not refer to the four gold stripes that he later began wearing on his robe sleeves! Indeed, Justice Rehnquist himself predicted that his new role on the Court might alter his jurisprudential approach. At his Senate hearing in 1986, several senators opposed to his confirmation echoed Anthony Lewis' suggestion that Justice Rehnquist's controversial status as a lone dissenter made him a poor choice to lead the Court as chief justice. In an exchange with Senator Charles Mathias (R-MD), Justice Rehnquist agreed that consensus on the Court helps to provide clarity as to "what the law is," and he conceded that "if one were ... in lone dissent ... very, very frequently, it probably would have an effect on how you were able to perform as Chief Justice."[42] He believed that a chief justice can promote consensus most effectively through leading by example:

> Senator, the Chief Justice can cajole or urge, as Chief Justice Warren did Justice Reed, but I have a feeling that when you get to the ordinary



When Rehnquist moved to the center chair in 1986 (the Court is pictured during his first Term as chief justice) his lone dissents declined dramatically: he authored only nine in his 21 years as chief and 66 in his 15 years as associate justice. Moreover, the Rehnquist Court was unanimous 41% of the time, an increase from the Warren and Burger Courts which issued unanimous decisions in 25% of cases.

> kind of case that it does not work very often. I think one thing the Chief Justice can surely do is lead by example. That is, if the Chief Justice makes it a practice of not writing separately, except when he feels it is absolutely necessary, I think that then the Chief might have some weight in speaking to someone else and saying, Look, do you really need to say this? But if the person spoken to has the feeling that the pot is calling the kettle black, they will not get anywhere.[43]

Lead by example he did, confining his lone dissents to those occasions he deemed "absolutely necessary." This is the approach the other chief justices have taken, both before and after Rehnquist. Since the days of John Jay, chief justices have written lone dissents at less than half the average rate; Chief Justice Salmon P. Chase never wrote in lone dissent; Chief Justices William H. Taft, Charles Evans Hughes, and Fred Vinson wrote only one lone dissent each. The current chief justice authored his first—and, to date, his only—lone dissent in his fifteenth year on the Court.

Justice Rehnquist made a conscious choice, I believe, to lead by example, and the Court followed that lead. Where only 25% of decisions in both the Warren and Burger Courts were unanimous, the Rehnquist Court was unanimous 41% of the time. During the Warren and Burger Court years, almost one-and-one-half percent (1.4%) of cases drew a lone dissent; during the Rehnquist years, this

declined by one-third to less than one percent (0.89%).

Justice Rehnquist's view of the role of the chief justice is, however, surely only a partial explanation of the marked decline in his output of lone dissents. The second reason that he so rarely found it "absolutely necessary" as chief justice to go it alone was the growing influence on the Court of the originalist jurisprudence that he had advocated in all those earlier lone dissents. As already noted, the Lone Dissenter's ascent to the chief-justiceship was accompanied by the arrival of Justice Scalia—an avowed originalist—on the Court. And the data suggest that Justice Rehnquist finally had a soulmate. From 1986 to 1990, the Chief and Justice Scalia were in the minority in 7–2 splits ten times. In contrast, from 1981 to 1985, Chief Justice Burger and then-Justice Rehnquist found themselves in a two-justice minority exactly twice. As a matter of statistics, the substitution of Antonin Scalia for Warren Burger may have eliminated eight opportunities for lone dissents only in Rehnquist's first five years as chief justice. The data thus suggest that Chief Justice Rehnquist wrote alone less often because, as an originalist, he was no longer alone.

Quite apart from this admittedly unscientific statistical support, the conspicuous root fact is that the Rehnquist Court was, as a whole, far more originalist than the Warren or Burger Courts. And while few of the specific decisions from which Justice Rehnquist dissented alone as an associate justice have been expressly reversed, one need only look at the doctrinal areas discussed earlier to see how significantly the center of gravity on the Court shifted after he became chief justice.

While those early years saw Justice Rehnquist stake out a solitary originalist defense of federalism and state sovereignty, Chief Justice Rehnquist's Court is perhaps best known for its "federalism revolution." The cases are so well known as to roll off the tongue: *Lopez*,[44] *Printz*,[45] *Seminole Tribe*,[46] *Morrison*.[47] In each of those cases, a majority of the Court defended a reinvigorated theory of federalism, rooted in the original meaning of the Constitution, that follows on a direct through-line from the theory Justice Rehnquist advanced in his early lone dissents. The chief justice was in the majority in all of those cases—and he wrote the majority opinion in all of them except *Printz*. A similar tale can be told about unenumerated rights. Justice Rehnquist rode alone, in cases like *Aetna Casualty*[48] and *Green*,[49] to warn against the dangers he saw in "awkwardly engraft[ing]" a "judicial superstructure" of unenumerated fundamental rights upon the Constitution. But in 1997 he authored a pair of landmark majority opinions that ushered in a sea change in this area of constitutional doctrine. In *Washington v. Glucksberg*,[50] Chief Justice Rehnquist held for the Court that the Due Process Clause does not guarantee a substantive right to assisted suicide. He emphasized that the Court must "exercise the utmost care" in recognizing new claims of unenumerated fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."[51] Accordingly, only rights objectively found to be "deeply rooted in our legal tradition[s]" can claim protection under substantive due process.[52] And in *Vacco v. Quill*, handed down on the same day, he effectively held that the same restraints cabin the "fundamental rights" strand of Equal Protection doctrine.[53]

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Justice Rehnquist's legacy as the Lone Dissenter is a tale of two justices. By restraining his own urge to dissent when he moved to the center chair, Chief Justice Rehnquist helped to create a Court that was more restrained and collegial; that was more committed to achieving consensus. That he had been one of the Court's great soloists throughout his 15 years as an associate justice made the example that he offered as chief justice all the more powerful and persuasive.

But his more important legacy, his jurisprudential legacy, lies in the broader shift in the Court's jurisprudence—and American legal thought as a whole—toward an originalist approach to constitutional interpretation and away from "the Living Constitution." For as Justice Kagan stated during her confirmation hearings, the original understandings and the intentions of the Founders are now central to the interpretation of the Constitution: "Sometimes," to quote Justice Kagan, the Founders "laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply ... what they [tried] to do."[54] This is how the Lone Dissenter, beginning with his inaugural opinion in 1972, interpreted the Constitution. And this is how the Constitution is interpreted today, far more often than in 1972. To again quote Justice Kagan, today "we are all originalists."[55] The Lone Dissenter is no longer alone.

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Notes

[1] Learned Hand, THE BILL OF RIGHTS 72 (1958).

[2] William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1985).

[3] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[4] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[5] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill 1962).

[6] William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 433 (1985).

[7] *Simms and Wise v. Slacum*, 7 U.S. (3 Cranch) 300 (1806). Justice Paterson dissented.

[8] CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES – ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 67–8 (Columbia University Press 1928).

[9] *United States v. Stanley; United States v. Ryan; United States v. Nichols; United States v. Singleton; Robinson et ux. v. Memphis & Charleston R.R. Co.*, 109 U.S. 3 (1883).

[10] 163 U.S. 537 (1896).

[11] 347 U.S. 483 (1954).

[12] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695, 698 (May 1976).

[13] John M. Nannes, *The Lone Dissenter*, 31:1 J. OF SUPREME CT. HIST. 1 (Mar. 2006).

[14] Anthony Lewis, *Abroad at Home: The Court: Rehnquist*, N.Y. TIMES A15 (June 23, 1986) (emphasis added).

[15] William H. Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693, 693 (May 1976).

[16] *Ibid.* at 695.

[17] *Id.* at 698.

[18] *Id.* at 696.

[19] *Nomination of Justice William Hubbs Rehnquist, Hearings before the Committee on the Judiciary*: 99th Cong. at 264 (July 31, 1986) (statement of Just. Rehnquist).

[20] *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 146 (1987) (Rehnquist, C.J., dissenting) (*citing Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 720–727 (1981) (Rehnquist, J., dissenting).

[21] Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* 4 (2015).

[22] Jon D. Michaels, *The Supreme Court's liberals should follow conservative Justice Rehnquist's lead—dissent,*

dissent, dissent, L.A. TIMES (July 9, 2018), https://lat.ms/3aOPirK.

[23] 439 U.S. 322, 333 n.20 (1979).

[24] *Ibid.* at 339.

[25] *Id.* at 347–48 (Rehnquist, J., dissenting).

[26] *Id.* at 348 (Rehnquist, J., dissenting).

[27] 470 U.S. 274 (1985).

[28] *Ibid.* at 290–91.

[29] *Fry v. United States*, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).

[30] 134 U.S. 1 (1890).

[31] 421 U.S. at 557 (Rehnquist, J., dissenting).

[32] *Ibid.*

[33] 406 U.S. 164 (1972).

[34] *Ibid.* at 172, 179 (Rehnquist, J., dissenting).

[35] *Id.* at 179.

[36] 442 U.S. 95 (1979).

[37] *Ibid.* at 98 (Rehnquist, J., dissenting).

[38] *Id.*

[39] 425 U.S. 748, 784 (1976) (Rehnquist, J. dissenting).

[40] *Ibid.* at 784 (Rehnquist, J., dissenting).

[41] *Id.*

[42] *Nomination of Justice William Hubbs Rehnquist, Hearings before the Committee on the Judiciary*, 99th Cong. at 139–40 (July 31, 1986) (statement of Just. Rehnquist).

[43] *Ibid.* at 139.

[44] *United States v. Lopez*, 514 U.S. 549 (1995).

[45] *Printz v. United States*, 521 U.S. 898 (1997).

[46] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[47] *United States v. Morrison*, 529 U.S. 598 (2000).

[48] *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972).

[49] *Green v. Georgia*, 442 U.S. 95 (1979).

[50] 521 U.S. 702 (1997).

[51] *Ibid.* at 720.

[52] *Id.* at 722.

[53] 521 U.S. 793, 793 (1997).

[54] *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Hearing before the Committee on the Judiciary United States Senate*, 111th Cong. at 62 (June 28–30, July 1, 2010).

[55] *Ibid.*

The Judicial Bookshelf

Donald Grier Stephenson Jr.

Death of Justice Ginsburg, Appointment of Justice Barrett

News of Justice Ruth Bader Ginsburg's death on September 18, 2020, spread quickly across the nation. For many, it was difficult to think of another justice in the modern era whose life had been more remarkable and consequential. With her appointment by President Bill Clinton in 1993, she arrived at the Supreme Court with enviable accomplishments in hand: 13 years as a judge on the U.S. Court of Appeals for the District of Columbia Circuit, a tenure that followed eight years with the Women's Rights Project of the American Civil Liberties Union. It was especially with the ACLU that she had been a warrior for gender equality, winning five of the six cases she argued at the Supreme Court. For her service as a justice, the **United States Reports** remain a monument to her legacy. According to one count, her name appears on 541 opinions: 306 for the majority, 115 dissents, 90 concurrences, and an additional 30 that are labeled simply as "other."[1] Moreover, in the mind of the general public, she is widely remembered as having achieved folk hero status, as well as for maintaining a well-publicized friendship with her jurisprudential opposite, Justice Antonin Scalia, a bond that demonstrated the importance of collegiality in the workings of the Court. The Senate vote of 96–3 to confirm Justice Ginsburg and the vote of 98–0 for Justice Scalia in 1986 endure as reminders of a calmer era of Supreme Court appointments.

Along with the other notable entries on the Ginsburg resume, however, it was her tenure as an appeals judge that made her later selection for the Supreme Court a reasonable possibility. Credit for her appointment to the Supreme Court, therefore, belongs not only to President Clinton but to President Jimmy Carter, as a look at recent appointment patterns reveals. With the exceptions of Richard Nixon's choices of Lewis Powell and William H. Rehnquist, Ronald Reagan's of Sandra Day O'Connor and Barack Obama's of Elena Kagan, every one of the 19[2] Supreme Court appointees since 1969 has been a judge on one of the U.S. courts of appeals. In contrast to appointment practices six or seven decades ago, federal appellate

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court experience therefore has all but become a perquisite for a seat on the Supreme Court.

Furthermore, aside from enhancing her "eligibility" for the Supreme Court, even Ginsburg's appeals court appointment owed much to timing even beyond the obvious necessity of a vacancy to fill. Her nomination on April 14, and confirmation on June 18, 1980, meant that she was among the last of President Carter's 59 appointments to the appeals benches. Carter's presidency was then followed by 12 years of a Republican-controlled White House. Given that in the modern era presidents only rarely make judicial nominations outside their party, it then seems plain that had Carter not chosen Ginsburg in 1980, she most probably would never have had service on an appeals court by the time Bill Clinton became president in 1993.

Justice Byron White's announcement on March 19 of his intention to retire meant that Clinton would be the first Democrat since Lyndon Johnson to send someone to the Court. Indeed, White was the only member of the court to have been named by a Democrat. But Clinton's choice of Ginsburg did not come quickly. During the 1992 campaign, he had indicated a preference for Supreme Court nominees with a "big heart" and stature in public life who had perhaps run for election, not just those with prior judicial service. Indeed, it was not until June 22, after a "slow and frustrating"[3] search process—one that included refusals by at least three prospective nominees—that the president settled on Ginsburg, with her confirmation following on August 26, thus assuring (to borrow from the subtitle of a recent book) that she would not remain in the "shadows of the Supreme Court."[4] As the authors of that book note, "President Clinton was happy to check the woman box for the shortlist but not willing to actually [sic] select more than one woman for the Court"[5] following the opportunity presented when Justice Harry Blackmun retired.[6]

In sharp contrast to the drawn-out Ginsburg appointment, the swearing in of her successor, Judge Amy Coney Barrett from the U.S. Court of Appeals for the Seventh Circuit, marked the completion of one of the swiftest Supreme Court appointments in recent history. President Donald Trump announced the nomination on September 29, and Judge Barrett was confirmed on October 26, 2020. Furthermore, those familiar with the backgrounds of both Ginsburg and Barrett recognized that there was an illuminating connection between the two jurists: both reached the Court with ample experience as classroom teachers. Justice Ginsburg's included nine years at Rutgers Law School and eight years at Columbia Law School, while Justice Barrett had taught at Notre Dame Law School for 15 years, with an additional year in a visiting position at the University of Virginia Law School.

Justices in Academia

The classroom connection between Justices Ginsburg and Barrett posed the question as to how common a teaching position has been for other justices, either before appointment or while sitting. Even among current members of the Court besides Justice Barrett, Justice Elena Kagan was dean of Harvard Law School prior to becoming solicitor general in the Obama administration, and Justice Breyer, who followed Justice Ginsburg onto the Court a year later, taught at both Harvard's law school and its Kennedy School of Government.

These current examples merely reflect a remarkable pattern that with varying numbers extends back to the Court's beginnings. Helpful data are available in **The Supreme Court Compendium**[7] and the "Biographical Directory of Article III Federal Judges, 1789-present." The latter source is maintained online by the Federal Judicial Center.[8] Together these resources show that of the 115 justices to date, some

31, including the ones mentioned above, were teachers at some point prior to arriving at the Court, or, for a few, held teaching positions while sitting on the Court.

Among the 31, the larger group includes those who held part-time positions before their time on the Court. In the twentieth century for example, both Chief Justice Warren E. Burger and Justice Harry A. Blackmun taught at Mitchell College of Law some years before their own appointments, with Blackmun also having taught at the University of Minnesota. Similarly, Justice John Paul Stevens taught at the law schools at Northwestern University and the University of Chicago, and Justice Anthony Kennedy taught at McGeorge School of Law at the University of the Pacific. Yet perhaps the most unexpected listing among the part-timers belonged to Justice Henry Billings Brown, who taught not only at the University of Michigan but at the Detroit Medical College as well.

Among the much smaller number of justices who taught during their Court tenure, the earliest was Justice James Wilson, who gave law lectures at the University of Pennsylvania in 1789–1790, just as the Court was being established. Much later, Justice Willis Van Devanter gave lectures at George Washington University. However, no one seems to have exceeded the span of the first Justice John Marshall Harlan, who lectured part time on constitutional law at Columbian Law School (now the law school at George Washington University) from 1889 until 1910. Justice Harlan met some of his classes on Sunday evenings and a record of some of what he said has survived in the form of letterpress notes taken by a student. These remain part of the Justice's papers at the Library of Congress. Consisting mainly of what is often called "black letter law," the Harlan lecture notes, as this author found during one research trip to Washington, provide few insights into the justice's broader legal thinking or to inside views of decision-making at the Court during the chief justiceship of Melville W. Fuller that paralleled Harlan's teaching career.

Also apparently in a class by himself is Justice Joseph Story, who, roughly a half-century before Harlan, held a chair as a professor of law at Harvard Law School from 1829 until 1845, while he sat with the Court and somehow also fulfilled his circuit court obligations. As a biographer explains, Story's moonlighting was facilitated because the "sequence of instruction" was altered "to accommodate ...his judicial commitments."[9]

Yet a different group includes those who held what can fairly be described as full-time faculty appointments prior to their service on the Supreme Court. In this category, one finds Justice Oliver Wendell Holmes at Harvard,[10] former president and future Chief Justice William Howard Taft at Yale, and Chief Justice Harlan Fisk Stone at Columbia, where he was also dean of the law school. Yet unlike Holmes who was a sitting state judge when appointed to the Court in 1902, Justice Felix Frankfurter had actively been in the professoriate at Harvard from 1914 until President Franklin D. Roosevelt named him to the Supreme Court in 1939. Indeed, according to a biographer, Frankfurter's teaching at Harvard "continued up until a few days before he took his place on the Supreme Court."[11] Further into the era of what is often called the "modern Court," one finds academics like Justice William O. Douglas (Columbia and Yale universities) and Justice Abe Fortas (Yale), as well as Justice Wiley Rutledge with his broad teaching and administrative experience at the law schools of the University of Colorado, Washington University, and the State University of Iowa.[12] Moreover, among even more recent members of the Court, any count of justices who engaged in full-time teaching before going to the Court should also include Justice Antonin Scalia, who taught at the law schools of the University of Virginia and the University of Chicago before being named to the court.

The fact that so many justices have been teachers at some point in their careers should not be surprising. Before the proliferation of law schools in the United States during the late nineteenth and early twentieth centuries, the legal profession developed and expanded because its members themselves engaged in teaching, although usually not in the traditional classroom. Instead, they introduced, prepared, and guided novices into the law through what James Willard Hurst called the "office apprentice system of legal education."[13] Thus, as law schools developed and multiplied, it was perhaps understandable that those who were or would become justices and who accordingly were leaders of their profession would view time in a classroom almost as a matter of duty or obligation.

The Litchfield Law School: Training Ground for Henry Baldwin, Levi Woodbury, and Ward Hunt

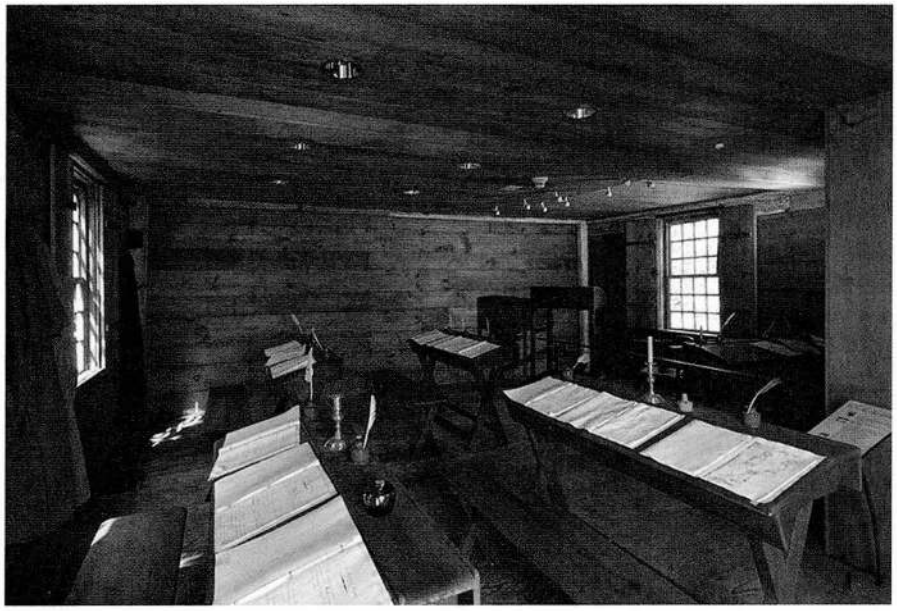
Although some justices have been active classroom participants in legal education for decades, it may nonetheless seem remarkable to some that, for many justices, a law school experience formed no part of their preparation for the Bench. Indeed, according to one count, of the 115 justices who have served to date, only slightly more than half (63) attended law school, "and of those only 45 were graduated." Furthermore, it was not until 1957 that an *entire* Supreme Court "was composed of law school graduates."[14]

Focus on the contribution of early legal education in the United States and its connection with the Supreme Court is the subject of **The Litchfield Law School** by Paul DeForest Hicks, an attorney and retired investment banker whose previous book-length publications include biographies of Joseph Henry Lumpkin, the first chief justice of the Supreme Court of Georgia, and John E. Parsons,[15] an attorney, philanthropist, and reformer in New York in the late nineteenth century.

The Litchfield Law School, located in the town of the same name in northwestern Connecticut,[16] was founded in 1784 by Tapping Reeve and, with James Gould, operated for nearly a half-century. By the time it closed in 1833, perhaps as many as twelve hundred young men had received legal tutelage there, although the author explains that because of incomplete enrollment data from the school's earliest years, the total figure is an approximation. Students arrived and departed at various times of the year, with the course of study normally lasting 14 months. Some students stayed as long as eighteen months, although residency for a minimum of three months was required. From Hicks's account, there apparently were no women law students, although the town was also home to the Litchfield Female Academy, which began operation in 1792 and provided instruction to some three thousand women during its forty-one-year existence.

The regimen at Litchfield would have substituted for the state or county-required two-year office apprenticeships "that were common for college graduates, with longer periods required for non-graduates."[17] Instruction at Litchfield may also have been appealing because it avoided some of the tedium of law-office education which future president John Adams once described to his friends as consisting of "Old Roman Lawyers and Dutch Commentators"[18] in addition to the requisite Blackstone. According to an 1823 description by Yale's president Timothy Dwight,

> Law is here taught as a science, and not merely nor principally as a mechanical business; not as a collection of loose, independent fragments, but as a regular, well-compacted system. At the same time the students are taught the practice by being actually employed in it. A [moot] court is constituted; actions are brought and conducted



In his new book, Paul DeForest Hicks makes a convincing case that the Litchfield Law School provided the most innovative and successful legal education program in the country from 1783 to 1833. Three justices—Henry Baldwin, Levi Woodbury, and Ward Hunt—graduated from the school.

> through a regular process; questions are raised; and the students become advocates in form. Students resort to this school from every part of the American Union.[19]

The national appeal that Dwight mentioned resulted in turn from the school's policy to teach a national curriculum in which lectures were updated as legal principles evolved in the various states. Yet because Litchfield was not affiliated with a college or university, it did not award degrees as other developing law schools did. While Hicks emphasizes the importance of Litchfield's library, that fact alone makes the reader wonder about the logistical challenges: of making legal developments across the nation to Litchfield in an age before the national reporter system, widespread telegraphy, a multitude of commercial publishers, and the Internet.

Among Litchfield's alumni were a considerable number of nineteenth-century notables including Aaron Burr, John C. Calhoun, and Augustus Baldwin Longstreet. Overall, Hicks's tally records two vice presidents, 100 members of the U.S. House of Representatives, 28 U.S. senators from 11 states, 6 members of presidential cabinets, 14 governors of 6 states, and 18 chief justices from the states' highest courts. Moreover, the list includes three justices of the Supreme Court of the United States: Henry Baldwin, Levi Woodbury, and Ward Hunt. With that trio, Hicks calculates that Litchfield is tied with the University of Michigan for a fourth-place ranking behind Harvard with 20, Yale with 11, and Columbia with 7, in terms of law alumni or alumnae who have served on the Court.[20] Their connection with Litchfield allows Hicks to focus attention on those names from the Court's roster who were largely overshadowed by some of their colleagues on the Supreme Court.

Baldwin, a Pennsylvanian and President Andrew Jackson's second appointee to the High Court, served between 1830 and 1844 and, among other things, is remembered not only for his authorship of **A General View of**

the Origin and Nature of the Constitution and Government of the United States[21] (1837) but also for his efforts "to seek a middle ground between [John] Marshall's expansive view of national power and the extreme positions taken by states' rights advocates."[22] A frequent dissenter in a judicial age when dissents were frowned upon—Baldwin cast the sole dissent in *Worcester v. Georgia*[23] and dissented without opinion in *The Amistad*[24]—Hicks also notes the judgment of historians that Baldwin suffered at times from bouts of mental illness.[25]

Levi Woodbury of New Hampshire was appointed to the Court by President James Polk to fill the vacancy created by Justice Joseph Story's death in 1845. According to Hicks, Woodbury had strong ambitions for the presidency. Indeed, in the 1840s, when Calhoun was considering a run for the White House, Woodbury was discussed as a possible running mate to provide geographical balance to the ticket. Furthermore, but for Woodbury's death in 1851, he might well have been chosen as the Democratic nominee in 1852 instead of Franklin Pierce, also from the granite State.[26]

Ward Hunt became the second of President Ulysses Grant's four Supreme Court appointments after fellow-New Yorker Justice Samuel Nelson retired in 1872. While Hunt—in sharp contrast to Baldwin—dissented in only seven cases during his decade on the Court, one of those was a passionate demurral in *United States v. Reese*[27] in which the Waite Court gutted the Enforcement Act of 1870 that had been passed under the Fifteenth Amendment to protect the voting rights of those who had been freed by the Thirteenth. Ironically, Hunt is also remembered for his part as circuit justice in presiding over the trial of Susan B. Anthony after she voted in the election of 1872 in Rochester, New York. Against her contention that the Fourteenth Amendment prohibited the state from barring her vote, Hunt insisted that "the rights in the amendment were guaranteed to citizens of the United States, but not to the citizens of the states." Each state therefore had the right to set its own voting qualifications.[28] In short, Hunt drew on the reasoning that Justice Samuel Miller had used against the aggrieved butchers in the Slaughterhouse Cases when the Fourteenth Amendment came before the Supreme Court for the first time in 1873.[29] Hunt imposed on Anthony a fine of one hundred dollars plus costs of prosecution, a penalty Anthony refused to pay. Hicks's general assessment is that Hunt did not "achieve the potential forecast by the *New York Times* when he was nominated: 'No appointment which President Grant has made has been based upon stronger recommendations....'"[30]

Aside from attention to the three justices, the bulk of the rest of the compact volume's 21 short chapters focuses on the contributions of Litchfield alumni during various periods of the nineteenth century and in various locations in the United States. Moreover, no reader will fail to appreciate and be impressed by the fourteen high-quality illustrations and portraits that are lodged between chapters 16 and 17.

Frequency and Significance of Court Invalidations of Acts of Congress

Instruction at Litchfield would surely have included some attention to an element of the American legal system that had begun taking shape in the very late eighteenth and early nineteenth centuries: judicial review. A history and analysis of the Supreme Court's application of its authority to sit in judgment on the validity of acts of congress is the subject of **Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present** by Keith E. Whittington of the Department of Politics at Princeton University.[31] With due respect to both author and publisher, no one in search of an introduction to the Supreme Court or constitutional interpretation should pick this title as

a first choice. The volume hardly pretends to be pool or surfside reading, nor does it fall into the category of the useful and easy-to-read case studies for which Whittington's publisher has become well known. Indeed, a clue that this should not be a starting place for beginners is that it is not until page 13 that the author acknowledges "[i]t would be useful to clarify what we mean by the power of judicial review." With its 319 pages plus notes and index, the book instead is a major work of scholarship that should be a must-read for anyone with a serious interest in the constitutional dimension of the Supreme Court's role in American government. That recommendation is understandable as soon as one realizes the gargantuan scope of the research Whittington has undertaken and the complexity of the analysis he has generated.

Stretching from the Court's earliest sessions after 1790 through the 2017 Term, the author's research agenda dictated examination of the 1,308 cases in which the Court reviewed the constitutional validity of an act of Congress, which would include (the reader learns from Sanford Levinson's Foreword) 345 cases which invalidated or limited statutory provisions and 963 which upheld federal legislation against a constitutional challenge.[32] Whittington's analytical goal is an understanding of the Court's use of what has long been a powerful tool as the justices interact with the elected parts of the government. "Political leaders have developed a love-hate relationship with judicial review,"[33] Whittington acknowledges in the first chapter. This fact "creates both challenges and opportunities for judges" in that it "is the nature of judicial review to take power and policy choices out of the hands of elected politicians and place them in the hands of judges." Yet, were judges systematically to thwart "the will of united majorities, their political situation would likely become untenable." Thus while "courts might hope to exercise independent judgment," their "status as a powerful political institution is always dependent on the goodwill of others."[34]

The "central concern" of the book became a quest to understand "how the justices of the Supreme Court have navigated these opportunities and challenges. How have they managed to exercise judicial review for more than 200 years, and how have they chosen to make use of this significant power?" Given that judicial review "is generally viewed as a fundamentally obstructionist force within democratic politics, the question then becomes how obstructionist the Court has actually been and whose 'agenda has been blocked' or promoted?"[35]

As he examines that central concern and its related questions, Whittington reminds the reader that he has not written "primarily a history of the evolution of judicial review" but rather "a political history of the Court's use of judicial review to define and enforce limits on congressional power."[36] Moreover, in counterpoint fashion, he weaves into his analysis a debate between two influential scholars from the middle twentieth century, Robert Dahl and Alexander Bickel, both of Yale University. For Bickel, who taught law, the Court typically acted in a counter-majoritarian fashion frequently obstructing the will of the majority.[37] For Dahl, who taught political science, the justices played a different role, with the Court ordinarily aligned with, not against, the prevailing political forces of the day. "The political views on the Court," Dahl argued, "are never for long out of line with the views dominant among the lawmaking majorities of the United States."[38] Instead of moving against the popular mood, the Court acts as a legitimizer with the justices placing the stamp of approval on policies including even those once deemed constitutionally unacceptable. With nuanced testing of both positions, Whittington discovers that while each speaks some of the truth, the Court has been less counter-majoritarian than Bickel posited and more so than Dahl supposed.

That assessment emerges from the book's eight substantive chapters. Of these, two are introductory, and five focus on distinct periods: the beginning through the Civil War and Reconstruction, from Reconstruction through the Progressive era and World War I, and from the New Deal years until the end of the 2017 Term. Within those broad demarcations, sub-chapters focus on specific developments and trends. A conclusion precedes an appendix in which Whittington explains the unexpectedly difficult process for the researcher in determining exactly when the Court has engaged in judicial review.

Helpfully the first chapter alerts the reader to no fewer than seven themes the author develops. The first is that there has been "far more" judicial review of federal laws than "has been generally appreciated."[39] Just as an iceberg is more massive than what is visible above the water's surface, the very notable instances of invalidations have tended to obscure the less memorable ones that have helped to "establish the Court's significance in constitutional debates." Second, "in upholding laws against constitutional challenge," the Court has "helped silence critics of congressional power" and so has "advance[d] a common project of governance with its allies in the elected branches." The Court's role as a "nation builder, helping to craft government institutions and procedure and knit together a diverse and far-flung country" is a third theme. With this point, Whittington notes that while the "Court's work as a defender of minority interests against majoritarian political leaders is often the most visible aspect of its history, that is ultimately a much smaller function than its role as an arm of the national state."[40]

The fourth theme will come as no surprise to those already well read in the Court's history. The "Court's basic approach to its task," Whittington writes, "has undergone substantial development over time." That is, the power of "judicial review did not emerge full blown from the Philadelphia Convention of 1787." Or, as he correctly insists in chapter three, "*Marbury* was not the big bang, and *Dred Scott* was not a bolt from the blue. The process of institutionalizing the power of judicial review could not be achieved in a day, and it could not be achieved by the unilateral dictate of the Court." Indeed, judicial review "was routinized long before *Dred Scott*."[41]

As a fifth theme, the author explains that "the justices participate in an often partisan process of constructing a set of constitutional values, principles, and rules that can command support from the political leaders and activists who dominate the political arena at the time." This idea connects with the sixth in that "the justices are part of the national political scene, but they also stand apart from it. They pursue their own priorities and a distinct set of interests and values within the bounds set by the larger political context in which they operate."[42]

Finally, "judicial review operates within a political context composed of fractious political coalitions, strategic political leaders, and numerous interests." Thus, for the author, the image of the Court's standing against the will of the people is misleading. Instead "the Court is navigating a far more complex political environment and working in conjunction with allies elsewhere in the political system." Thus, for Whittington, the "power of judicial review has been meaningful ... not because the Court stands against politics but because of how the Court operates within politics."[43]

From the abundant insights the author supplies, a reader might spot yet another theme: the usefulness of judicial review. The Constitution in Article VI declared itself, along with treaties and acts of Congress, to be the "supreme law of the land." Yet this clear and confident declaration carried with it a key question which the text did not answer: Who or what would sustain that supremacy? Thus, in addition to the basic conflict-resolution function usually offered by a system of courts, the idea of judicial review assigns the maintenance of constitutional supremacy to

the highest court in the land. Yet even that august position itself must acknowledge both obligations and limits. As Whittington notes, the "simple fact is that judicial review, as it has historically been practiced, is a fairly low-stakes game. Political leaders can afford to tolerate an independent judiciary armed with the power to invalidate statues because the justices usually do little political damage." However, were "the Court to change its behavior and dramatically shift its caseload to important legislation, and particularly if it tended to invalidate such statutes, that would no doubt test the limits of judicial independence."[44]

That important point nonetheless poses a second question. Why, with notable exceptions, has the general public along with their elected officials been mainly content to accept the Court's authority? Does acceptance stem mainly from the usefulness of the Court's referee function, from its role in making constitutional government a reality, or perhaps also from something else? How important is it to have a widely-shared perception that most of the time the justices do their work of deciding cases not as partisans or agents of various factions but as judges who strive to subordinate their own personal preferences in an effort conscientiously to safeguard, construe, and apply the Constitution and acts of Congress? As Alexander Hamilton anticipated in his Federalist Number 78 in what proved to be classic understatement at the founding, the Court's power consists of "neither force nor will but merely judgment." Or as Justice Robert H. Jackson insisted in 1953, "We are not final because we are infallible, but we are infallible only because we are final."[45]

Whittington's book leads the reader to ponder whether a shared civic understanding may therefore be essential to the Court's work. The justices, after all, succeed at their task of deciding cases to the extent that their decisions convincingly appear to rest not on their personal predilections but on what the law of the land requires. Achieving that goal is challenging because the judicial selection process itself places on the bench individuals who possess not only contrasting personal values and partisan backgrounds but contrasting theories of constitutional and statutory interpretation as well. The resulting mix then leads to case outcomes on fiercely contested issues that often favor one side, but not the other. Even in the best of circumstances but particularly in a time of extreme partisanship, the Court may unavoidably appear to fall short in reaching a goal of principled decision-making.

Given the objective of **Repugnant Laws**, its author properly provides only passing attention to the Court's invalidation of state laws and local ordinances. However, in terms of instances of judicial review, it bears noting that the justices have been far more active with that part of their docket,negating state legislation far more often than acts of Congress. Nonetheless, Whittington offers some intriguing comparative data observing, for example, that since the beginning of the twenty-first century, the "Court has struck down state laws at a historically low rate that has not been seen since before the Civil War."[46]

Centralization of Federal Authority

While Whittington limited his primary focus to the Court's examination of federal legislation, cases that shape the federal balance lie at the center of **The US Supreme Court and the Centralization of Federal Authority** by Michael A. Dichio. The author was on the faculty at Fort Lewis College when his book was published and now teaches political science at the University of Utah.[47] This addition to the bibliography of American federalism opportunely complements what Whittington has produced in that it appraises instances of Supreme Court review of state and local legislation in addition to those acts of Congress affecting

the status of state and national relations. The book's focus is important in that the Court's decisions in this area have had much to do with shaping one of the most distinctive features of the American political system.

Although many consider judicial review to be America's unique contribution to statecraft, federalism may continue to be of equal influence abroad and of unending importance at home. The term refers to a dual system in which governmental powers are constitutionally distributed between central (national) and local (state) authorities. In Justice Anthony Kennedy's succinct and dramatic description, federalism

> was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[48]

Such a design conveniently fitted into James Madison's basic requirement, as stated in *The Federalist*, No. 51, to so contrive "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Just as separation of powers guaranteed tension among the three branches of government, the Constitution's federal arrangement assured tension between the states and the central government.

Not surprisingly, the relationship between the national government and state governments animated debates at the Philadelphia Convention and the struggles over ratification in the months that followed. The states, after all, were givens, having been ongoing concerns. By 1787, political life under the Articles of Confederation had revealed two overall but related defects: insufficient power in the central government alongside insufficient limits on the states. However, realities dictated that measures to address either would necessarily have a centralizing effect. Moreover, attempts in Philadelphia never succeeded in drawing a precise boundary within the text of the Constitution, as the Articles had effectively done, between the authorities of the different levels of government. The document's haziness on this key topic soon manifested itself in the emergence of the now-familiar groupings of Federalists and Anti-federalists as political activists fell into one camp or the other depending on their preferences for the dominance of one level of government or the other across a range of issues. The absence of a clear boundary also assured that the relationship would perforce be worked out over time through a succession of conflicts large and small.

Thus at the founding, the role that the proposed Supreme Court might play in this power struggle did not go unnoticed. In particular, Dichio properly notes the concern expressed by Judge Robert Yates, one of three delegates New York sent to the Convention.[49] After observing the meeting's direction away from a modest revision of the Articles, Yates left Philadelphia, returned home and, once the Convention finished its work in September 1787 became a soldier in the pamphlet war that soon commenced in the states over the merits and demerits of the proposed new plan of union. While the eighty-five essays by Publius comprising *The Federalist* undoubtedly became the most famous and still the most widely read of that era's unofficial political declarations, Yates made his own distinct contribution to what turned out to be a huge outpouring of printed material during the ratification period. As Dichio reports, of the sixteen essays that

comprise his "Letters of Brutus," four target what Yates perceived as the dangers to the states posed by the Supreme Court, dangers vividly depicted in menacing language, as was often the custom of the day.

> The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states," insisted Brutus Number XI. "Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. That the judicial power of the United States, will lean strongly in favour of the general government, it will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations. ... This power in the judicial, will enable them to mould the government, into almost any shape they please... .[50]

That assessment in XI led to a crescendo in Brutus XV:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself... . [W]hen this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.[51]

Significantly, these forceful indictments were surely on Alexander Hamilton's mind as he defensively penned his famous 78th *Federalist* that anticipated the role of the future Court while simultaneously minimizing its potency.

While Yates's alarms conveniently provided the author with a research question, Dichio was left potentially with a sizeable research challenge in how to select cases. Noting that the Court has handed down some 31,000 decisions, Dichio could have, akin to Whittington, looked at all those involving central versus state or local authority. (Oddly, Dichio writes that the Court has handed down that number of decisions "since 1754."[52] Because the Court's first session was not until 1790, however, the year 1754 immediately catches the attention of the reader who then learns in note 3 on page 210 that Dichio chose 1754 because the first volume of the Supreme Court's reports—published by Philadelphia attorney Alexander Dallas—included cases decided by Pennsylvania courts, some of which dated from 1754. However, none of those pre-national cases could involve issues that are part of the book.) Nonetheless, examining all of the pertinent cases since 1790 would have produced a to-do list perhaps even longer than Whittington's.

Instead, Dichio chose to work with a much smaller number of cases, but a subset chosen in an unexpected way, undertaking what amounted to a poll of 58 law school casebooks and treatises on constitutional law published between 1822 and 2010 (listed in App. 2), which described 12,192 cases, from which he extracted the 624 most-frequently-

appearing constitutional decisions (listed in App. 3); thus he "avoided the hindsight bias that would occur if I chose cases according to modern scholars' opinions about their landmark status." Most of that large number of cases, however, were not Supreme Court cases, and of that group, 8,391 were cited in only one book. Thus the 624 plucked from the herd were those that "overlapped across the books six times or more." Dichio regarded the 624 cases, all but five of which were Supreme Court cases, as "both representative of the Court's landmark decisions and important in guiding lower courts across the country."[53]

In Dichio's judgment, the method "developed not only a stronger foundation from which to assess the Court's position toward the state but also uncovered constitutional law cases that legal scholars once considered salient but present-day scholars consider superseded or defunct." Moreover, even "if these cases have been superseded, they still shaped constitutional development when they were decided."[54] Helpfully, the 58 casebooks and treatises are listed in Appendix 2 and names of the 624 cases comprise Appendix 3. Equally beneficial is the author's tip to the reader in the Introduction about terminology where he observes, "this book uses 'central state, 'federal state,' 'American state', and 'federal/national/central government,' interchangeably. They all represent the action of the highest level of government in the United States. This conception requires one to think bout he supervisory role the Court plays as part of the central state in a federal system."[55]

Throughout, Dichio depicts the effects of the Supreme Court as an arbiter in relations between the national and state governments, charting and interpreting "the complicated relationship between American constitutional law and changes in federal governmental power from the 1790s to the 1990s." The result is a demonstration "that the Court is an institution that continuously defines and redefines the boundaries of federal authority, not one that expands or contracts that authority during neat, specific eras."[56]

For readers thoroughly grounded in the nation's constitutional development, the author's conclusions will not come as a surprise. Although the Framers "built the United States on a foundation of limited government, ... federal authority has expanded persistently throughout American history. Accordingly, the constitutional structure seems to have enabled, not limited, the authority of the federal government," as the Court's rulings "have steadily and persistently strengthened and consolidated the central state."[57] This effect has come about "both by invalidating state level regulations (such as abortion regulations) and by validating federal level rules (such as the Affordable Care Act)."

> Moreover, the trend Dichio highlights has generally been constant across issues and time.
>
> Whether the problems facing the nation pertained to national-state relations over slavery, business-government relationships dealing with workplace and corporate regulation, or individual-government relations over issues of equality, the Court's—and the country's—answer has tended in one direction: toward more federal authority, more government. This is the unifying theme across every period of American constitutional development, both at critical junctures and during normal, noncritical periods.[58]

Furthermore, such gradual accretions of authority, he believes, will continue. While he observes a "gradual uptick" during the past quarter century "in the Court's penchant to restrict federal power, the role that the Court has played in constitutional development ... suggests that this is a temporary blip, and that over time, the Supreme Court will continue

to extend and consolidate the power of the federal state."[59]

Such findings lead to a question: Why? The fact that the Court has decided cases involving conflicts between the national and state governments "does not explain why it often decided in favor of the federal government when doing so."[60] The author suggests both institutional and legal reasons to account for the prominent trend identified. "First, the design of the federal political system, typified by interdependence among the branches, encourages expansion." That is, "politicians influence and manipulate the structure of the federal judiciary to entrench their policy and ideological preferences."[61] That is, it entails a centrifugal bias Second, "the Court may tend to confirm and centralize the power of the federal state because it fears reprisal from the other branches if its rulings deviate too far from Congress's or the president's preferences."[62] Alongside institutional parameters lies the law in that the "Court uses legal reasoning and logic to reach its decisions."[63] But such tools would often be useless without a Constitution the text of which is sufficiently pliable—as Robert Yates cautioned—to justify desired outcomes. Finally, a reader might suggest that the trend *toward* rather than *away* from centralization may at least be partly a product of perceived necessity arising out of the quest for national survival and advancement.

Clerking for Lower Court Judges

Regardless of the Court's past or present effect on the federal balance, six sitting justices, fully two-thirds of the current Bench reached the Court having had the unique inside experience of clerking for one or more justices. Chief Justice John G. Roberts clerked for Justice William H. Rehnquist, Justice Barrett for Justice Antonin Scalia, Justice Stephen Breyer for Justice Arthur Goldberg, Justice Neil Gorsuch for Justices Byron R. White and Anthony Kennedy, Justice Elena Kagan for Justice Thurgood Marshall, and Justice Brett Kavanaugh for Justice Kennedy. While law clerks in varying numbers have been part of the life of the Court since the late nineteenth century, only well into the second half of the twentieth did the clerkship institution—what Justice William O. Douglas once referred to as the "junior Supreme Court"[64]—begin to receive serious scholarly attention.

Ironically, it was Rehnquist himself who, as a young attorney in the 1950s, helped to turn one of the first spotlights on clerkships at the Supreme Court. In a nationally circulated article he suggested that the clerks had too much influence and perhaps injected a liberal bias into judicial decision-making.[65] The controversy ignited by Rehnquist's article continued after he joined the Court, with publication of **The Brethren** (1979) by journalists Bob Woodward and Scott Armstrong and **Closed Chambers** (1998) by Edward Lazarus, a former clerk to Justice Blackmun. With varying emphases and examples, both books claimed that the clerks wielded much control within the Court, although neither volume was scholarly rigorous in making its claims.[66]

Law Clerks and the Judicial Process (1980) by John Bilyeu Oakley and Robert S. Thompson explored the use of clerks from the perspective of judges in California. H.W. Perry's **Deciding to Decide: Agenda Setting in the United States Supreme Court** (1990) built on the work of Doris Marie Provine's **Case Selection in the United States Supreme Court** (1980) in examining the certiorari-granting/denying process and demonstrated that clerks played a major role in the Court's case selection process. Bradley J. Best's **Law Clerks, Support Personnel, And the Decline Of Consensual Norms On The United States Supreme Court, 1935–1995** (2003) highlighted the role of clerks in opinion writing, the increase in the number of concurring and dissenting opinions, and the formation of voting coalitions within

the Court. In a class by itself remains **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (2002), edited by Dennis J. Hutchinson and David J. Garrow. This account of Knox's clerkship with Justice James C. McReynolds stands as a reminder to any prospective clerk that one should be wary lest one's wishes be granted. That list was then augmented by a pair of important books published in 2006: **Sorcerer's Apprentices** by Artemus Ward and David Weiden and **Courtiers of the Marble Palace by** Todd C. Peppers. Peppers and Ward then co-edited **In Chambers: Stories of Supreme Court Law Clerks and Their Justices** (2012). This collection was followed by **Of Courtiers and Kings: More Stories of Supreme Court Law Clerks and Their Justices** (2015), which Peppers co-edited with Clare Cushman. Most recently Peppers, who is professor of public affairs at Roanoke College and a visiting professor at Washington & Lee University Law School, has broadened his focus with an edited volume entitled **Of Courtiers and Princes: Stories of Lower Court Clerks and Their Judges**.[67]

This latest volume in this clerkship sequence is a reminder of the uniqueness of the institution across government, especially at the national level. In Congress and the executive branch with staffs and assistants that literally number in the thousands, there is nothing comparable to the clerkships that have become key to the operation of the federal judiciary, from the district courts through the appeals court to the Supreme Court. As Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, himself a former clerk to Justice Lewis F. Powell Jr., writes in the "Foreword," from "the perspective of the bench, clerks are family. If not sons and Daughters, then certainly nieces and nephews."[68] From the remembrances Peppers has compiled as well as from his experience as an appellate judge, Wilkinson draws some lessons.

> Certain clerking principles are universal. Since a judge must be conversant with many more cases than a clerk, the clerk must know his or her cases cold. Particularly impressive is the clerk who answers accurately on the spot a judge's factual inquiry about a case, without having to say 'I'll get back to you on that.' A good clerk must also be a two platoon player, alert to the best defenses against opposing views and to the most effective offensive thrusts. All this within the framework of seeking justice under law, which is after all the ultimate aim of the enterprise.[69]

Peppers has assembled twenty essays authored by twenty-two former clerks about twenty judges. Among the latter are the first women to sit on state supreme courts as well as early judges of color in the federal courts. The essays in turn are grouped into three parts: Part I deals with six state appellate judges; Part II features six federal district judges; and Part III presents eight federal appeals court judges. The images that emerge from the essays provide a view less about the general work of the judiciary below the Supreme Court and more about how judges on those lower courts select and use their clerks. One senses that a judge and clerk are as much in a teacher–student as in an employer–employee relationship. Moreover, as Judge Wilkinson explains, "the jobs are every bit as important and in many ways every bit as difficult as clerkships on the Supreme Court." It is at the lower levels "where law first shifts from relative informality to a more formal posture, from a greater emphasis on finding facts to a de novo review of questions of law. And on those legal issues, the clerks and judges whom they serve struggle with far less assistance than clerks on the Supreme Court."[70]

Within this collection of memories about judges—some notable and some obscure—is

Of Courtiers and Princes: Stories of Lower Court Clerks and Their Judges **features a chapter about Ruth Bader Ginsburg's clerkship with Judge Edmund L. Palmieri, who served on the United States District Court for the Southern District of New York. Above Ginsburg (second from left) hosts a party for the judge (right) in her apartment.**

a true gem. The third entry in Part II is "Remembrance of Judge Edmund L. Palmieri." Palmieri was appointed to the United States District Court for the Southern District of New York by President Dwight Eisenhower in 1954 and was the first Italian-American to sit on the Southern District's bench. The first woman he hired as a law clerk was Ruth Bader Ginsburg, fresh out of law school at Harvard and Columbia universities and among the first women to have a clerkship in the federal judiciary. (Among the book's eighteen illustrations that follow page 160 is an undated photograph of Palmieri at a party in Ginsburg's New York apartment.)

Unlike the other essays in the book, this entry has two parts. Material that Peppers inserted about Ginsburg is followed by remarks about Palmieri that Justice Ginsburg delivered at a memorial service for the judge after his death in 1989. Peppers' contribution recounts the gender-based difficulties Ginsburg encountered from both Justice Felix Frankfurter and the Second Circuit's Judge Learned Hand in obtaining a judicial clerkship as well as Palmieri's own reluctance to hire her given that Ginsburg by this time was also a mother with a four-year-old. As one observer recalled, Judge Palmieri acquiesced only reluctantly at the strong urging of Professor Gerald Gunther "and a written promise by a male student that if the appointment of Ginsburg did not work out he would leave his law firm to take over the clerkship."[71]

From Ginsburg's remarks at his memorial service and with their Brooklyn roots and love of opera, one senses the bond that developed between them over the course of her clerkship in 1959–1961. As she recalled, "I observed the workways of a wise and compassionate jurist, but I learned at least as much about the art of good living."[72] Justice Ginsburg's memories as well as those of other law clerks included in Peppers' book are another reminder of the long-standing and beneficial link between the judicial profession and teaching.

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

DICHIO, MICHAEL. A. ***The US Supreme Court and the Centralization of Federal Authority***. (Albany: State University of New York Press, 2018). Pp. xxvi, 268. ISBN: 978-1-4384-7252-2 (paper).

HICKS, PAUL DEFOREST. ***The Litchfield Law School: Guiding the New Nation***. (Westport, CT: Prospecta press, 2019). Pp. xi, 254. ISBN: 978-1-63226-100-7, (cloth).

PEPPERS, TODD C., ED. ***Of Courtiers & Princes: Stories of Lower Court Clerks and Their Judges***. (Charlottesville: University of Virginia Press, 2020). Pp. xiv, 327. ISBN: 978-0-8139-4459-3 (cloth).

WHITTINGTON, KEITH E. ***Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present***. Lawrence: University Press of Kansas, 2019). Pp. xxi, 410. ISBN: 978-0-7006-2779-0 (cloth).

Notes

[1] "Opinions Authored by Justice Ruth Bader Ginsburg," https://supreme.justia.com/justice-ruth-bader-ginsburg-cases; last accessed September 28, 2020.

[2] This number excludes Justice Rehnquist's appointment to the center chair in 1986.

[3] Henry J. Abraham, **Justices, Presidents, and Senators**, 5th ed. (2008), 304.

[4] Renee Knake Jefferson and Hannah Brenner Johnson, **Shortlisted: Women in the Shadows of the Supreme Court** (2020).

[5] *Ibid.*, 117.

[6] For Blackmun's seat, Clinton named Judge Stephen Breyer of the First Circuit Court of Appeals, who had also been a strong contender to replace Justice White.

[7] First published in 1996 and now in its sixth edition (2015), this valuable reference work is compiled by Lee Epstein, Jeffrey J. Segal, Harold J. Spaeth, and Thomas G. Walker. It is for those who take the details and statistics of the Supreme Court's past exceedingly seriously what, in pre-Internet days, **Total Baseball** was for baseball enthusiasts. Subtitled "The Official Encyclopedia of Major League Baseball," the latter work was compiled by John Thorn and others and was last issued in a seventh edition in 2004.

[8] https://www.fjc.gov/history/judges; last accessed November 2, 2020.

[9] Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** (1970), 319.

[10] See chapters 4 and 5 of G. Edward White, **Justice Oliver Wendell Holmes** (1993).

[11] Helen Shirley Thomas, **Felix Frankfurter: Scholar on the Bench** (1950), 21.

[12] See Part II of John M. Ferren's biography of Rutledge: **Salt of the Earth, Conscience of the Court** (2004).

[13] James Willard Hurst, **The Growth of American Law** (1950), 186.

[14] Abraham, **Justices, Presidents, and Senators**, 49 n., emphasis in the original, with data updated by this author. The same source reports that the last to serve without a law degree was Justice Stanley F. Reed, with the next to last Justice Robert H. Jackson. According to Abraham, the last justice to serve with no law school attendance of any kind was James F. Byrnes.

[15] Paul DeForest Hicks, **The Litchfield Law School** (2019), hereafter Hicks.

[16] Litchfield is situated about 15 miles east of the New York state line and 18 miles south of the Massachusetts state line.

[17] Hicks, 3.

[18] *Ibid.*

[19] *Id.*, 11–12.

[20] *Id.*, 151.

[21] Unlike Joseph Story's **Commentaries on the Constitution of the United States** (1833), which was initially published in three volumes, Baldwin's treatise was did not examine the Constitution in its entirety but was a discourse on the nature of the Union and offered a view that was at odds with Story's.

[22] Hicks, 152.

[23] 31 U.S. (6 Peters) 515 (1832).

[24] 40 U.S. (15 Pet.) 518 (1841).

[25] Hicks, 153–154.

[26] *Ibid.*, 156.

[27] 92 U.S. 214 (1876).

[28] Hicks, 157.

[29] 83 U. S. (16 Wallace) 36 (1873).

[30] Hicks, 158. From Hicks's brief account of Hunt's nomination, much of the "stronger recommendations" seems to have consisted of ample persuasion by U.S. Senator Roscoe Conkling (R-NY), who had himself earlier turned down Grant's offer of the chief justiceship following Chief Justice Salmon P. Chase's death.

[31] Keith E. Whittington, **Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present** (2019), hereafter Whittington.

[32] The same "Foreword," however, is partly incorrect in stating that the income tax was "notoriously declared unconstitutional by the Court in 1894." *Id.*, xvii. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 came down in May 1895 on rehearing.

[33] Whittington, 3.

[34] *Ibid.*, 3-4.
[35] *Id.*
[36] *Id.*, 35.
[37] Alexander M. Bickel, **The Least Dangerous Branch** (1962), 16–17.
[38] Robert A. Dahl, "Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker," 6 *Journal of Public Law* 279, 285 (1957). Whittington, 35.
[39] *Ibid.*
[40] *Id.*, 61.
[41] *Id.*, 35.
[42] *Id.*, 37.
[43] *Id.*, 293.
[44] *Brown v. Allen*, 344 U.S. 443, 540 (1953), Jackson, J., concurring in the result.
[45] Whittington, 237.
[46] The cover, title page, and Library of Congress Cataloging-in-Publication Data on p. vi use "US" in the title, instead of the usual U.S. or United States. Dichio's book is hereafter cited as Dichio.
[47] U.S. *Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).
[48] The other two were Alexander Hamilton and John Lansing Jr.
[49] Brutus XI, in Edward S. Corwin, **Court Over Constitution (1938)**, p. 243. Brutus XI, XII, and XV are reprinted as an appendix to Corwin's book, pp. 231–262.
[50] Dichio, 27, 79.
[51] Dichio, 28.
[52] *Ibid.*, 31.
[53] *Id.*, 28–29.
[54] *Id.*, xix.
[55] *Id.*, xvi–xvii.
[56] *Id.*, 139.
[57] *Id.*
[58] *Id.*, 151–152.
[59] *Id.*, 149.
[60] *Id.*, pp. 149–150.
[61] *Id.*.
[62] *Id.*, 150.
[63] Bernard Schwartz, **Decision: How the Supreme Court Decides Cases** (1996), p. 48.
[64] William H. Rehnquist, "Rehnquist, Who Writes Decisions of the Supreme Court?" *U.S. News & World Report*, Dec. 13, 1957; Rehnquist, "Another View: Clerks Might 'Influence' Some Actions." *U.S. News & World Report*, Feb. 21, 1958. See also William D. Rogers, "Do Law Clerks Wield Power in Supreme Court Cases?" *U.S. News & World Report*, Feb. 21, 1958. Rogers had clerked for Justice Stanley Reed.
[65] On **The Brethren**, see Stephenson, Book Review, 46 *Brooklyn Law Review* 373 (1980).
[66] Todd C. Peppers, **Of Courtiers and Princes: Stories of Lower Court Clerks and Their Judges** (2020), hereafter Peppers.
[67] *Ibid.*, viii.
[68] *Id.*, viii–ix.
[69] *Id.*, vii.
[70] *Id.*, 123.
[71] *Id.*, 124.
[72] *Id.*, 124.

BOOK REVIEWS

Paul Kens

Renee Knake Jefferson and Hanna Brenner Johnson, **Shortlisted: Women in the Shadows of the Supreme Court**. New York: New York University Press, 2020, xiv + 287 pp.

In **Shortlisted,** authors Renee Knake Jefferson and Hanna Brenner Johnson have written a captivating and meticulously researched account of the eighteen women who have made it to a presidents' shortlist of potential nominees to the Supreme Court. The heart of this book comes from stories of the personal backgrounds and early careers of these women and the circumstances that brought each of them to the point of being mentioned for a place on the Court. Woven in is an account of the unique political dynamics that led each woman to be shortlisted. But each woman's story also reveals the social and cultural prejudices they faced. For most of the twentieth century, those prejudices kept every one of them from moving from a shortlist of potential nominees to being nominated for a seat on the Court. Continuing their study up to the time of Justice Elena Kagan's appointment to the Court in 2010, the authors find that gender stereotyping still comes into play when a woman is under consideration for a seat on the Supreme Court.

President John F. Kennedy and President Lyndon B. Johnson both considered Sonia Mentschikoff for a Supreme Court appointment. A graduate of Columbia Law School, she eventually became one of the first female partners of a Wall Street firm, the first woman Harvard law professor, and dean of University of Miami School of Law.

The story of Florence Allen, the first women to be shortlisted, set the tone for those that followed. Allen was born in 1884, just eleven years after the 1973 United States Supreme Court upheld an Illinois decision to deny Myra Bradwell admittance to the Illinois bar because she was a woman. In his opinion for the Court, Justice Joseph Bradley wrote, "The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life."[1]

Although she was born into this time, when women were not welcome in the legal profession, Allen's family did not discourage her from studying law. After receiving her undergraduate and master's degrees from Western Reserve University, she entered the University of Chicago Law School in 1909 as the only woman in a class of roughly 100 students. The Chicago Law School was not unique. Most of the prestigious law schools of the era either prohibited women altogether or admitted very few. After one year at Chicago, Allen transferred to New York University Law School, where she graduated second in her class in 1913. Despite her high ranking, the large firms in New York

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did not extend her an offer of employment. Neither did the firms in her home state, so she opened her own firm, volunteered for Cleveland Legal Aid, then eventually took a position as a county assistant prosecutor.

During the early stage of her career, Allen also worked tirelessly as a speaker and organizer for the women's suffrage movement. In 1920, the year the Nineteenth Amendment gave women the right to vote, she won a race for the common pleas court, making her the first female judge in Ohio. Two years later, she became the first woman to sit on a state court of last resort when she was elected to the Supreme Court of Ohio. In each instance, Allen credited her friendships with the women of Ohio for her success. One lesson Jefferson and Johnson draw from Allen's victories is how important voting rights are in the struggle for equality.

As a justice of the Ohio Supreme Court, Allen built a reputation strong enough to attract the attention of President Franklin D. Roosevelt, who nominated her to the United States Sixth Circuit Court of Appeals. With a unanimous confirmation from the Senate, Allen became the first woman to receive a lifetime appointment to a federal appellate court. The unanimity did not extend into the chambers of the circuit, however. None of the judges on the Sixth Circuit favored her appointment. She was nevertheless there, where she served for 24 years. During that time, her reputation continued to grow to the extent that she attracted attention as a possible nominee for the Supreme Court.

Franklin D. Roosevelt had eight opportunities to fill seats on the Supreme Court, and Allen's name was among lists of potential nominees to fill four of the five vacancies that occurred between 1937 and 1939. Despite support from friends, including Eleanor Roosevelt, Allen never made it beyond a shortlist. Jefferson and Johnson make the point that, by the end of his presidency, Roosevelt had replaced almost every sitting justice on the court but had not nominated a woman. Their account of the political dynamics of each of the appointments leads them to identify factors that worked against a woman being nominated. In addition to gender stereotyping about both the role of women in society and their ability, another point that stands out is what the authors refer to as political cronyism, the tendency of presidents to appoint male friends and loyal supporters. They conclude that "judicial appointments at the time were essentially an extension of the 'old boys club' to which Judge Allen clearly did not belong."

No other woman reached the shortlist until 1962, when President John F. Kennedy and President Lyndon B. Johnson both considered Soia Mentschikoff. Mentschikoff had an unassailable record of success. A graduate of Columbia Law School, she eventually became one of the first female partners of a Wall Street firm, taught at both Harvard and Chicago law schools, and was once described as one of the best legal minds in the country. She also had the support of two men prominent in the law and politics: her husband Karl Llewllyn and her former classmate Nicholas Katzenbach. Yet, Mentschikoff did not receive the nomination.

Although the authors do not uncover obvious gender discrimination as the reason for passing over Mentschikoff, it was clearly a major factor nearly a decade later when Richard Nixon put Sylvia Bacon and Mildred Lillie on shortlists. Nixon, his attorney general John Mitchell, and Chief Justice Warren Burger were all strongly opposed to having a woman on the Court. Nixon, who was of the opinion that women were "too erratic and emotional" to be on the Court, placed these two qualified women on the shortlist only to appease growing pressure from women's organizations, academics, government officials, and his wife and daughters. Never intending to nominate a woman, he hoped to pick up one or two points in the upcoming 1972 election.

For Jefferson and Johnson, Nixon's decision to put Lillie and Bacon on his shortlist

was simply an act of tokenism. But their backgrounds and treatment as potential nominees in 1970 also epitomized the experiences of a generation of women who had seen some gains but continued to face obstacles to full acceptance in the legal profession. Lillie, for example, was actively discouraged from going to law school. Her father told her it was a ridiculous idea. When she entered The University of California, Berkeley Law School in 1935, she found herself one of only two women in her class. At least one professor, who could not tolerate the presence of women in his class, referred to the women as "mister." She found support among some of the male students, but many, subscribing to a particular view of gender roles, complained that she was wasting a seat that should have gone to a man. Upon graduation, private firms refused to hire a woman, so Lillie began her career in the public sector. Eventually she became a municipal court judge, then worked her way up to the California Court of Appeal, where she built a stellar record. Then, after adding her on a shortlist with reluctance, Nixon decided not to put her name forward for nomination.

These women were successful to a degree that they were considered possible nominees to the nation's highest court, but the authors' main point is that, for the better part of a century, no woman made the final cut. That changed in 1981, when Ronald Reagan nominated Sandra Day O'Connor, who became the first woman to join the Court. Not stopping there, Jefferson and Johnson continue their study by tracing the experiences of women who came afterward. Although the treatment of women has obviously changed, they still find a tendency in politics, the legal profession, and the press to turn to gender stereotyping to women who have been shortlisted, nominated, and appointed in recent times. For Jefferson and Johnson, the history of women shortlisted is not just about women in the law. They conclude the book by using the lessons it offers to provide a list of strategies for women in any profession who want to move from shortlisted to selected.

In her publicity quote for the book, Linda Greenhouse writes, "This fascinating book reconstructs a chapter of women's history that has been hiding in plain sight...". That it is. The stories Jefferson and Johnson tell will resonate with many lawyers who are nearing retirement age. For women and men who are in the early stages of careers in law or other professions, they may be an eye-opener. Regardless of their age or experience, however, **Shortlisted** is well worth reading.

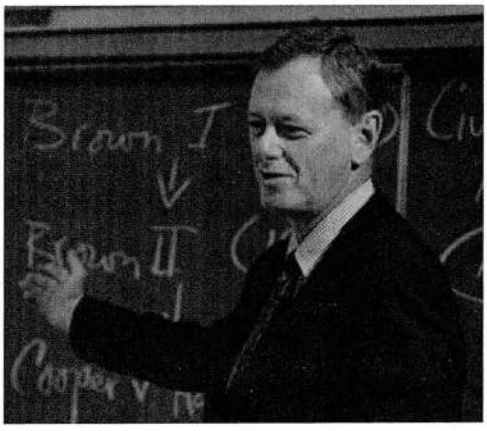
Melvin I. Urofsky, **The Campaign Finance Cases: *Buckley*, *McConnell*, *Citizens United*, and *McCutcheon***. Lawrence: University Press of Kansas, 2020. xv + 237 pp. Chronology, list of cases, bibliographic essay, and index.

In 2010, *Citizens United v. Federal Election Commission*[2] assumed a place among Supreme Court cases like *Brown v. Board of Education* and *Roe v. Wade* familiar even to those Americans who are not legal professionals or academics. Most people associate it with the idea that the Court had ruled that corporations are "people" for purposes of constitutional law; this idea that corporations have the same rights as flesh-and-blood human beings produced an immediate public backlash. In his 2010 State of the Union Address, President Obama publicly criticized the Court for its decision. Soon journalists, academics, and politicians were calling for a constitutional amendment to overturn it. On the lighter side, the decision inspired satirical protests such as a woman marrying a corporation, and a corporation registering to run for political office.

In **The Campaign Finance Cases**, Melvin I. Urofsky reminds readers that *Citizens United* is not just about corporations having the same rights as people. He

maintains that the majority's reasoning neither invented nor relied on the legal fiction that corporations are persons. Rather, the case's importance stems from being the most visible of a string of modern Supreme Court decisions addressing the constitutionality of campaign finance laws. His book aims to explain the impact of the Court's having been drawn into the debate about controlling the influence of money in political campaigns, especially large amounts of money provided by wealthy donors.

To accomplish this, Urofsky walks readers through a concise history of money in politics from 1757 when George Washington spent just enough money to buy refreshments for voters, through *McCutcheon v. Federal Election Commission* in 2014. Although the amount of spending steadily grew throughout the nineteenth century, he observes that organized solicitation of campaign money from wealthy donors and companies did not begin to develop until the 1895 presidential contest between William McKinley and William Jennings Bryant. Only then did Congress begin enacting laws designed to limit the impact of large donations on political campaigns. Efforts at reform tended to follow a pattern. Usually in the wake of a political scandal, Congress would pass a campaign finance measure. It would not take long before campaigns would find a way around the new restrictions. Later, usually following another scandal, the process would repeat. Urofsky notes that these repeated attempts to enact laws restricting the influence of money in elections proved futile because elected officials generally have no interest in limiting the amount available for campaigns. Money, he states more than once, is a necessary element of political campaigns. As if by design, the reforms Congress enacted always proved to be filled with loopholes and therefore ineffective.



Mel Urofsky's thoroughly researched book, *The Campaign Finance Cases*, examines how Congress responded to the growing influence of money in elections over time and carefully analyzes the featured cases. Urofsky recently retired of editor as this *Journal* after nearly thirty years.

Watergate provided the impetus for the modern era of campaign finance reform. In 1974, Congress reacted to the scandal by amending the Federal Elections Commission Act to include limitations on contributions to campaigns and on expenditures by independent parties aimed at supporting campaigns. These provisions were challenged in *Buckley v. Valeo* (1976). Urofsky explains that *Buckley* was a watershed moment because it marked the first time the Court recognized political donations as symbolic speech entitled to First Amendment protection. In addition, the Court introduced a formula by which it balanced the right of free speech against a legitimate government interest, which it defined as "avoiding corruption or the appearance of corruption." As he follows subsequent court decisions, Urofsky shows that *Buckley* left as many questions as answers about the validity of various methods Congress might employ to regulate campaign spending. Among them was the question of how to apply the test "corruption or the appearance of corruption." Nevertheless, *Buckley*'s framework remains in place through the three post *Buckley* cases he features in the book.

McConnell, Citizens United, and *McCutcheon* all involved challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as McCain-Feingold. The BCRA was aimed at reducing the corrupting influence of soft money and corporate contributions in elections. Tracing the basic outcome of the featured cases, along with some less familiar ones Urofsky brings into the story, reveals a trend. The first featured case, *McConnell*, resulted in victory for regulation when a plurality of the Court upheld what it described as "[t]The BCRA's two principal features: the control of soft money and regulation of electioneering communication." The electioneering communication provision, which prohibited corporations and unions from using money from their general treasuries to fund broadcast advertisements mentioning a candidate, provided the primary issue the Court faced seven years later in *Citizens United. There the Court* reversed direction and overruled the regulation, holding that electioneering communication was political speech entitled to protection of the First Amendment. It went on to state that a speaker should not be denied that protection merely because of its status as a corporation. The trend of ruling against regulation continued when, in 2014, *McCutcheon* overruled the BCRA's limit on the total amount of money one individual could contribute to multiple candidates and party organizations in an election cycle.

While the outcome of these cases and the trend they reveal is obviously important, the heart of this book comes from its rich historical background of legislative history, its overview of developments in the law, and its succinct legal analysis of featured cases. The task Urofsky undertook was not an enviable one, if only for the reason that the featured cases tend to be divided into multiple parts that address different sections of the legislation, and each has multiple concurring and dissenting opinions. Urofsky handles the complexity by keeping a steady eye on his main point. From the outset, he is clear that he is writing to refute a common perception that the decisions in these cases reflect a commonly assumed liberal/conservative split among the justices. Rather he sees the cases, and the split among the justices, as reflecting a conflict between two worthy but contradictory goals. One is the desire to protect the integrity of the political system from the impact of large contributions from wealthy donors, unions, or corporations. The other is the need to protect political speech, which is at the core of First Amendment protection.

The Campaign Finance Cases is a thoroughly researched account of how Congress responded to the growing influence of money in elections over time and a careful analysis of the featured cases. At the same time, it provides a very readable history of one of the most vexing problems facing American democracy today. Although he seems to favor the goal of protecting the First Amendment and points out that the majority of the Court has moved in that direction, Urofsky also seems genuinely torn about the tension between these goals. Perhaps because of that, he has written a thought-provoking and important book.

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Notes

[1] *Bradwell v. Illinois*, 83 U.S. 130 (1873).

[2] 558 U.S. 310 (2010).

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Amplification: On page 63 of vol. 46.1, "Father on the Bench: Justice William R. Day and Kinship Recusal," it should be noted that Charles L. Woodbury was counsel to a second case presided over by his father, Levi Woodbury, while the Associate Justice was serving as a Circuit Justice for the District of Massachusetts. In *Colt v. Massachusetts Arms Co.,* 6 F. Cas. 161, 1 Fish. Pat. Cas. 108 (1851), Charles represented the plaintiff, Colt Manufacturers, in a patent case.

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