Introduction

Timothy S. Huebner

This issue of the *Journal* follows soon after the previous issue. Because of some delays with our publisher, the July edition appeared late, but we are now back on track. This issue should be arriving right on schedule, and we anticipate no further problems.

As my predecessor Mel Urofsky frequently noted, Supreme Court history encompasses a wide variety of topics. Over the past several years, we have learned a great deal, for example, about those who worked closely with the justices on a daily basis—their clerks and messengers—and this issue begins with another such story of an unknown and unseen contributor to the work of the institution. Arthur A. Thomas served as messenger to Justices Stephen A. Field, David J. Brewer, Rufus Peckham, Horace Lurton, James C. McReynolds, and Oliver Wendell Holmes Jr. Although records of Thomas' life and long service to the Court are scarce, Todd C. Peppers, the Fowler Chair in Public Affairs at Roanoke College and a visiting professor of law at Washington and Lee Law School, carefully pieces together the sources to offer a poignant account of Thomas' service, especially his relationship with Holmes.

Unearthing new records, of course, can also shed light on well-worn topics. We have long known that the battle over the confirmation of Louis D. Brandeis was one of the most controversial in Supreme Court history. Peter Scott Campbell has discovered two letters, which show that the opposition to Brandeis' nomination from some in the Boston legal community actually pertained to the suicide of Samuel D. Warren, Brandeis' first law partner. The letters, written after Brandeis' death in late 1941, offer contrasting views of the Justice from the perspective of two contemporaries, Boston attorney Richard Walden Hale and Edward F. McClennen, one of Brandeis' partners. Campbell provides background and context. He serves as technical services librarian at the University of Louisville and manages the library's collection of Brandeis' papers.

The Warren Court continues to be one of the most popular topics covered in these pages, and this issue contains two essays on Warren-era landmark cases. The first essay on the Warren era pertains to *Brown v. Board of Education*, particularly its status as a constitutional icon. Jeffrey Hockett, Professor of Political Science at the University of Tulsa, explores how and why *Brown* became such a universally revered opinion. According to Hockett, a host of social and political factors converged to elevate *Brown* from its "less

DOI: 10.1111/jsch.12276

than iconic beginning" to its current status as among the most famous and consequential cases in Supreme Court history. Hockett's perceptive analysis challenges us to consider that part of the reason for *Brown*'s place in the constitutional canon is that the Court eventually negated the decision's potential for far-reaching reform. *Brown* began to function instead, he writes, "as a particularly powerful element of our mythology of racial progress."

The second essay, on *Trop v. Dulles*, delves deeply into this important Eighth Amendment case, best known for its famous statement that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Courtney Christensen, who wrote the article as a J.D. Candidate at Georgetown University Law Center and is now an associate at Shearman and Sterling, makes extensive use of notes from the justices' conference in order to demonstrate how the arguments and draft opinions in the case evolved over time. The piece offers an illuminating inside look at the making of a majority opinion.

Adding, finally, Grier Stephenson's latest installment of the "Judicial Bookshelf," you will see that this issue offers a range of topics from a variety of contributors. As always, our authors have given us much to read, mark, and inwardly digest. Thanks for reading.

Arthur A. Thomas: A Hero of a Valet

Todd C. Peppers

Introduction

During his time on the Supreme Court, Justice Oliver Wendell Holmes Jr. was the beneficiary of adulation from his legal secretaries (today we refer to them as law clerks) and young legal scholars, like Felix Frankfurter and Harold Laski. While the Justice basked in the warm glow of their hero worship, he was quick to point out to them that "no man is a hero to his valet." The phrase was not original to Holmes, although the expression sounds like it sprang from his clever mind. The underlying meaning is simple—the servant tending daily to his employer sees flaws and human failings.

Assuming that Holmes was correct, how would he have answered the related question of whether a valet can be a hero to his employer? There were instances when Holmes was greatly moved by the heroism of soldiers under his command and impressed by the hard work of his law clerks. But in this essay we will examine the actions of a historically obscure man who took it upon himself to preserve Holmes' memory. His name was Arthur A. Thomas, a one-time messenger to Holmes who publicly shared his affection for his late employer.

Arthur A. Thomas

So who was this man whose actions reworked Holmes' aphorism? Much of Thomas' personal history is unknown. A native of Wheeling, West Virginia, federal census data lists Thomas' birth date as December 9, 1862, and his race as "mulatto." Despite these census records, Thomas once told a reporter that he didn't know his exact age. "When I was born, they didn't keep records like they do nowadays...and nobody ever told me my age."[1]

Thomas moved to Washington, DC, in about 1880, after a relative (perhaps his brother, who worked for the federal government) convinced Supreme Court Justice Stephen J. Field to hire Thomas as a personal valet. In an odd historical coincidence, Thomas worked at Justice Field's home at 31 1st Street NW—the site of the future Supreme Court building. There Thomas worked alongside William H. Joice, the Supreme Court messenger who spent

DOI: 10.1111/jsch.12277

three decades in Field's employ. As a personal valet, Thomas was not a government employee and his salary was paid by Justice Field.

Thomas married Aurelia A. Raife, a Maryland native of mixed race, on December 11, 1884. The couple purchased a home at 1436 Q Street in Washington, DC, in 1909, where they lived until 1943. According to census records, for at least two decades they supplemented their income by renting to boarders. The couple had no children, and Aurelia was an invalid during the final years of her life.

A brief word about messengers. The position of messenger dates to the mid-nineteenth century. Supreme Court Associate Curator Matthew Hofstedt writes that most messengers were Black men who worked at the Court for decades. Besides delivering correspondence and handling the justices' court papers, messengers performed all personal duties requested by the justices. In a memorandum written in the late 1800s, former Supreme Court Marshal John Wright explains that a messenger was the "personal attendant" of his justice. "He procures and serves the judge's luncheon at the 2 o'clock recess, looks after his robe and his carriage at proper times and performs any personal service the judge desires."[2]

The Supreme Court Marshal's Office assigned messengers to the justices, and typically a messenger automatically worked for their justice's successor. "Not only would this [arrangement] keep a trusted employee on the payroll," explains Hofstedt, "but it also provided the new member of the Court with a veteran messenger who could help him adjust to his new routines."[3] Referring to Supreme Court messengers as "perpetual," a local South Carolina paper added:

> Every Justice of the Supreme Court selects his own clerk, but he must take the messenger bequeathed to him by his predecessor. The other justices all feel that that it is due to them that a new and untried messenger should not be brought into their confidential circle every time there is a change upon the bench.[4]

In the instance of Justice Stanley Matthews, the newly-appointed jurist was forced to accept his new messenger even though Matthews protested that he wanted to keep his current valet.

Thomas' time as a Supreme Court messenger would be shaped by a series of deaths. After Justice Field died in the spring of 1899, Thomas took a position as valet with Justice David J. Brewer, the nephew of the late Justice Field. Shortly thereafter, a messenger position became available with Justice Rufus Peckham. Both Justice Brewer and Sue Field, widow of Justice Field, wrote letters of recommendation to the Marshal's Office on Thomas's behalf. "Arthur is an entirely reliable man," Mrs. Field wrote. "The Judge found him an excellent valet, and I leave the house in his care during the summer. He knows, also, quite well, the duties of a messenger to a Supreme Court Judge…I would be greatly pleased if you could secure the position mentioned for Arthur."[5] Thomas was immediately hired. By then the job of messenger provided lifetime employment at the Court at a decent government salary.

Thomas remained with Justice Peckham from the fall of 1900 until the fall of 1909, when Peckham's death led to a messenger position with Peckham's successor, Justice Horace Lurton. After Lurton's death in 1914, Thomas briefly worked for Justice James C. McReynolds (who was nominated to replace Lurton). Given Justice McReynolds' grim personality, racist attitudes, and endless demands, Thomas could not have been pleased with this new assignment.[6]

Arthur Thomas and Justice Holmes

It was the death of a Supreme Court messenger, not a justice, that landed Thomas

Arthur Thomas was briefly a personal valet to Justice Stephen J. Field (left) and worked alongside William H. Joice (right), the Supreme Court messenger who spent three decades in Field's employ. Neither men were government employees; Field paid them directly.

a position with Justice Holmes. On June 22, 1915, George Marston—Justice Holmes' messenger—suffered fatal burns while fighting a fire in his home.[7] It is not known how Thomas came to Justice Holmes' attention, but he was soon hired to replace Marston. Thomas must have thanked his lucky stars when he took his new position—undoubtedly his short tenure with McReynolds was enough to show Thomas that the Justice's difficult reputation was richly deserved. The move from McReynolds to Holmes, however, violated the Court norms described above. Perhaps it was McReynolds' rare

affection for Justice and Mrs. Holmes that explains why Thomas was permitted to change assignments. Or perhaps McReynolds' penchant for firing his employees led to Thomas' escape.[8]

Thomas worked for Holmes from 1915 to the Justice's retirement in January of 1932. Because the current Supreme Court building did not exist, Thomas worked out of the Holmes' residence on Eye Street. Fanny Holmes supervised a full complement of domestic servants, and, while the Court was in session, Thomas was not given any duties other than those related to Court business. Thomas did, however, keep watch over the Holmes' residence when the Justice and Fanny Holmes summered at their Beverly Farms home.

Former Holmes law clerk Arthur E. Sutherland (October Term 1927) recalls that Holmes was mystified by Thomas' efficiency:

> By and by the Justice would come in, slippered and wearing a mohair house coat. He'd sit down at the big desk. Thomas would bring his mail immediately and he would begin to open his letters with a miniature saber. How did Thomas know when he sat down, and so bring the mail? The Justice used to speculate on the mystery. He thought Thomas was ready at the door, and he opened it when Holmes' chair creaked.[9]

Thomas also delivered the daily collection of cert. petitions. When it was time for Holmes to leave for the Court, it was Thomas who helped put on the Justice's well-polished, high black shoes and coat before handing the Justice his leather-bound docket book. Later in the day, Thomas would bring the Justice's lunch to the Court.

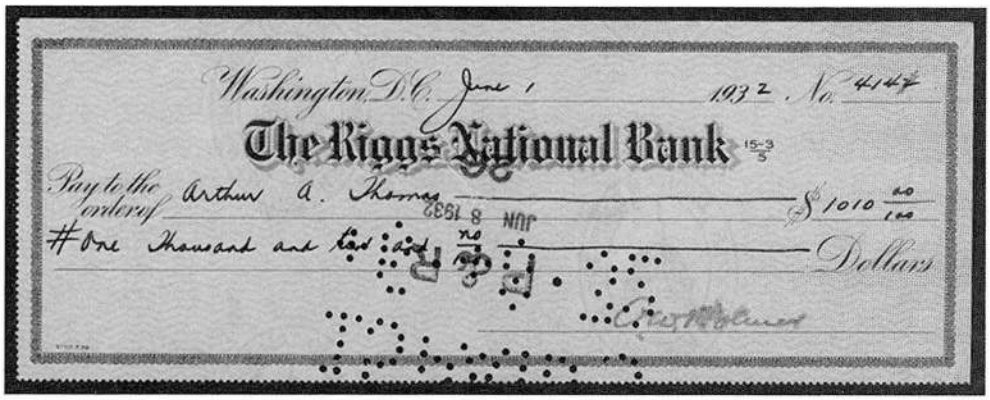
In an era in which messengers were seen but not heard, what is remarkable is that Thomas spoke to the press about Holmes; while the Justice himself loathed reporters, he once trusted Thomas to give an interview for a story about Holmes' eighty-fifth birthday. When asked about his employer's health, Thomas replied:

> The judge seems to me just as young as ever. There was a time when he had what he called a rusty hinge in his back, lumbago. I reckon it was, but he's got rid of that. Worked it off, I reckon. My, how he can work. As for eating, he's certainly good at that, too. He eats everything. Don't eat a big lot, but enough for any man.[10]

The article added that Holmes ate a breakfast of coffee, fruit, cereal, and toast, and at evening had a dinner "consisting of about everything the ordinary American eats, including meat, but all in moderation." No mention was made of the anchovy paste that generations of law clerks recalled seeing the Justice smear in copious amounts on his morning toast.

I have not found other examples of messengers speaking publicly about their justices. The explanation, in part, must lie in the relationship between Holmes and Thomas. A few years after the Justice's death, Thomas remarked: "I always had the greatest affection for Justice Holmes, and I think that he had the same for me."[11] He elaborated: "Of course he was a judge and I was a messenger, but Justice Holmes and I were quite good friends."[12]

In January of 1932, Holmes "bowed to the inevitable" and retired from the Supreme Court. His retirement came approximately two months before his ninety-first birthday. His departure from government service meant that Holmes would no longer have the services of his long-time messenger. In recognition of Thomas' dedication, on June 1, 1932, Holmes wrote his former aide a check for $1,010.00.


Washington, D.C. June 1 1932 No. 4147

The Riggs National Bank 15-3/5

Pay to the order of Arthur A. Thomas $1010 20/100

#One thousand and ten and no/100 Dollars

JUN 8 1932

In recognition of Thomas' dedicated service, on June 1, 1932, Justice Holmes wrote his former aide a check for $1,010.00. Holmes had retired in February at age 91.

President Herbert Hoover nominated Benjamin Cardozo to succeed Justice Holmes, but Thomas did not transfer to the chambers of the Court's newest justice. "I was supposed to work for Mr. Justice Cardozo, but he said that he needed a young messenger," explained Thomas. "So the Marshal put me in charge of the [courtroom] door."[13] The Court made certain concessions in recognition of Arthur's age. "As custodian of the heavy doors at the main entrance to the chamber, Mr. Thomas was provided with a comfortable chair and a strong silken rope to pull open the portals."[14] Assigning older messengers to serve as doormen or robing room attendants was the closest the Court could come to providing retirement income for its employees as the government failed to offer them pensions.

Even after Thomas was assigned new duties at the Supreme Court, the Marshal's Office allowed him to pay twice-daily visits to Holmes.[15] This is further evidence of the strong personal bonds between the Justice and his messenger. Thomas recounted that after greeting him, the retiree would ask "[h]ow are things at the court, and how are [you] getting along."[16] Of the elderly Holmes, Thomas later remarked: "Why, Mr. Justice Holmes was smart as a whip right up to the very last. And I think he would have stayed that way no matter how old he became."[17]

The Marshal appointed Thomas (above) to be the Courtroom doorkeeper, a position reserved for aging messengers to provide them with retirement income, as the government failed to offer them pensions. Before Thomas, Richard Nugent was the doorkeeper, having served for 57 years as a messenger to Ward Hunt, Samuel Blatchford, and Morrison R. Waite, before his death in 1929 at age 81.

Marking Anniversaries of Holmes' Death

National and international newspapers carried the news of Justice Holmes' death in March of 1935. Few papers, however, ran stories on the first anniversary of Holmes' death, until a small paid notice in the *Evening*

Star caught the attention of journalists. It was an "in memoriam" piece written by Thomas.

> Holmes, Oliver Wendell. In sad remembrance of the late associate justice of the supreme court, Oliver Wendell Holmes, who passed to his reward one year ago today, March 6, 1935. Death is the gate to endless joy, but we dread to enter there.

The memoriam was signed as follows: "His Old Messenger, Arthur A. Thomas."

Newspapers across the country reported on Thomas' act of devotion to Holmes.[18] One newspaper—the *Montgomery Advertiser*—took the occasion to both honor Thomas and lament the lost tradition of such "in memoriam" notices, which the paper speculated was due to the fact that "modern man is more occupied with the affairs of the living" and possesses "a sophistication which frowns on public displays of sentiment."[19]

When pressed to explain why he placed the ad, Thomas said that the Justice had no family in the area and "I thought that someone ought to do something."[20] Thomas added that he "regretted that he couldn't say more [in the "in memoriam" notice], but 'being a colored man, I had to be careful not to say too much.'"[21] In the social order of Washington, DC, Thomas was rightfully concerned that a White reader might take umbrage at a Black servant thinking he was qualified to assess the accomplishments of a White employer.

An enterprising reporter also asked Thomas what Holmes would have thought of the newly built Supreme Court building. "The judge never did get to see it," said Thomas, "but I guess 'twas just as well—he wouldn't have liked it anyway."[22] It is likely that Holmes would have agreed with Harlan Fiske Stone, who referred to the new building as "the temple of Karnak."

For the rest of his life, Thomas observed Holmes' passing by placing flowers on his grave site at Arlington National Cemetery. And additional tributes appeared in the *Evening Star*. In March of 1937, Thomas again placed an "in memoriam" notice in the *Evening Star*.

> Clearness, repose and depth characterized his intellect; purity, impartiality, love of justice and respect for public and private rights were marked elements of his greatness.[23]

As with the original notice, Thomas personally composed the new one. He was modest about his contribution. "They [the lines] aren't as nice as I'd like them to be," he told a reporter. "No words could do right by Justice Holmes. I did the best that I know how, though—well, it's just a humble tribute." Thomas assured the nameless reporter, however, that he would "make up an even better one next year."[24]

Despite his promise for a grander tribute, Thomas' 1938 notice simply marked the occasion of Holmes' death and described him as "an upright man, unpretentious gentleman and an impartial judge."[25] Subsequent "in memoriam" pieces were variations on this theme. The 1940 ad referred to Holmes as "[f]aithful and true in all his ways, [d]evoted and honest to the end of his days, [a]n upright man, unpretentious gentlemen and an impartial judge.[26] The same text was used in the 1941 ad.[27] And, as with the original ad, newspapers kept reporting on Thomas' annual tribute.[28]

It was not solely Thomas' yearly acts of devotion that placed him in the public spotlight. In the spring of 1937, a reporter asked Thomas what he thought of President Franklin D. Roosevelt's Court-packing plan. In an article entitled "Elderly Doorman Cool to Court Plan," the *Evening Star* stated:

> Because his own ability to perform his duties is unimpaired by age, Arthur A. Thomas is convinced that the elderly members of the Supreme Court must be equally capable of

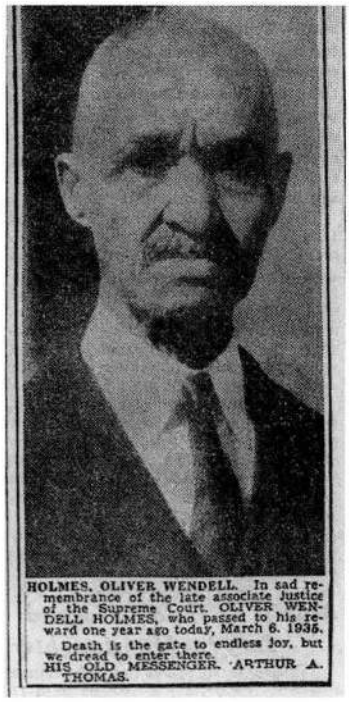
holding down their jobs. "After all," he said, "they're much smarter than me. And if I can do my work satisfactorily, why can't they?"[29]

As evidence of his work ethic and longevity, Thomas pointed to the fact that he had only taken three sick days since starting at the Court. Added the reporter: "Regardless of his age, however, Thomas is 'ready to retire tomorrow' if his salary would continue, but no pensions have been provided by the Government for attaches of the tribunal."

Finally, Holmes was not the only justice that Thomas celebrated on important anniversaries. On Justice Louis Brandeis' 80th birthday, the *Washington Post* reported that messages received at the Brandeis home included a short note from Thomas. "Congratulations of your birthday and may you live to enjoy many more," wrote the former messenger.[30] Given Brandeis' habit of regularly calling on Justice Holmes, Brandeis and Thomas undoubtedly knew each other.

Thomas' long career exemplifies the behind-the-scenes lives at the Court—the many unknown and unheralded people whose careers supported the justices. Messengers were servants to be seen and not heard—and not given pensions. Even in the 1930s and 1940s, the only public recognition of messengers came in their obituaries—and the reporters who crafted these announcements seemed more impressed with the fact that the justices themselves attended the funerals than with the lengthy service of the messengers themselves. And newspapers certainly did not ordinarily interview messengers and inquire about their opinions on political issues of the day, as they did with Thomas and FDR's Court-packing plan.

What is also striking is that Thomas seems to have been more than a valet. The affection in his "in memoriam" notices as well as his public comments about Holmes suggests that a substantive relationship existed between the two men. Holmes would have not considered Thomas to be his equal, but one wonders if the Justice drew Thomas into conversations about Holmes' favorite topic: man's place in "the cosmos."


HOLMES, OLIVER WENDELL. In sad remembrance of the late associate Justice of the Supreme Court, OLIVER WENDELL HOLMES, who passed to his reward one year ago today, March 6, 1935.
Death is the gate to endless joy, but we dread to enter there.
HIS OLD MESSENGER, ARTHUR A. THOMAS.

A year after Holmes' death, Thomas (pictured) placed a newspaper announcement in the *Evening Star* in memory of the late Justice. Thomas would memorialize Holmes in this way until he retired from the Court due to ill health in 1938. The former messenger also observed Holmes' passing by placing flowers on his grave site at Arlington National Cemetery.

Thomas retired from the Court in 1938. Doubtless his retirement was due to his wife's poor health and his own advanced age. Aurelia Thomas died at their home on March 26, 1940 after a long illness. She was buried at the Columbian Harmony Cemetery, one of the oldest and largest black cemeteries in the District of Columbia. Thomas posted a "card of thanks" in the *Evening Star*, expressing gratitude to friends and family for their "sympathy and kindness" to him as well as their "beautiful floral expressions," all of which "lightened the burden he sustained by the loss of his wife."[31]

The Death of Arthur Thomas

Thomas died at his home on April 23, 1943, after what was described as a short illness. His funeral was held two days later at the Metropolitan A.M.E. Church on M Street in Washington, DC. Traditionally, the justices themselves attended the funerals of former messengers. We don't know if this practice was followed for Thomas' service, but it was reported that Thomas was "honored as justices of the Court are" and "many prominent people in Washington attended his funeral."[32] As with his wife, Thomas was buried at the Columbian Harmony Cemetery. In a fitting tribute, two years later his nephews Raymond and Charles Thomas ran a short "in memoriam" piece in honor of their "devoted uncle."[33]

There is a sad postscript to the story of Arthur A. Thomas. In 1960, Columbian Harmony Cemetery was sold to a business developer. As part of the sale, it was agreed that 37,000 of the dead buried at the historical cemetery would be exhumed and reinterred at the National Harmony Memorial Park in Maryland. The agreement did not include the movement of markers and headstones, and most of the dead were reinterred in mass graves. Only recently was it discovered that many of the original stone grave markers were dumped into the Potomac to solidify the shoreline.[34] So we cannot do what Arthur A. Thomas did, namely, commemorate an honorable man by placing flowers on his grave.

Conclusion

Of course, we can only guess what Holmes would have thought of Thomas' actions. The elderly Holmes did enjoy sunning himself in the adulation of younger lawyers and jurists, although one suspects that Holmes was too clever to completely ignore the poorly disguised self-interest of silver-tongued flatters like Felix Frankfurter and Harold Laski. Thomas, however, had no personal agenda save celebrating the life of a man that he loved and respected. And for Holmes, whose childhood was filled with books about chivalrous knights and noble quests, he likely would have been moved to tears by the heroic and selfless deeds of his former messenger.

Author's Note: I would like to thank Margaret Stein, Susan Stein, and Supreme Court Associate Curator Matthew Hofstedt for reading previous versions of this article.

ENDNOTES

[1] Phillip H. Love. "Elderly Doorman Cool to Court Plan." *The Evening Star*, February 13, 1937.

[2] Quoted in "Afterward: A Brief History of Supreme Court Messengers" by Matthew Hofstedt. *Journal of Supreme Court History* Vol. 39 (2014): 259–263.

[3] "A Brief History of Supreme Court Messengers," 260.

[4] "Perpetual Supreme Court Messengers." *The Abbeville Press and Banner*, July 4, 1888.

[5] June 30, 1900, letter from Sue Field to Supreme Court Marshal John Wright. Courtesy of the Office of the Curator, Supreme Court of the United States.

[6] See Dennis J. Hutchinson and David J. Garrow, eds. **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Law Clerk in FDR's Washington**. University of Chicago Press (June 1, 2002).

[7] "Suffers Burns While Fighting Fire." *The Evening Star*, June 23, 1915.

[8] For an account of Justice McReynolds' sour relationship with his law clerks, see Clare Cushman. "James C. McReynolds's Other Law Clerks, 1914–1941." Todd C. Peppers and Clare Cushman, eds. **Of Courtiers & Kings: More Stories of Supreme Court Law Clerks and Their Justices**. University of Virginia Press (December 2015).

[9] Arthur E. Sutherland. "Reflections of Justice Holmes." Reprinted in "Sutherland's Recollections of Justice Holmes." *Supreme Court Historical Society Yearbook* 1988: 19–25.

[10] "Justice Holmes, 86 Today Keeps Young by Working Hard." *The Tampa Tribute*, March 7, 1927.

[11] "Loyal Messenger Pays for Tribute to Holmes." *The Morning News* (Wilmington), March 7, 1936.

[12] "Arthur Thomas, 80, Veteran Messenger in the Supreme Court, Dies." *The Evening Star*, April 24, 1943.

[13] Phillip H. Love. "Elderly Doorman Cool to Court Plan." *The Evening Star*, February 13, 1937. Serving as the court's gatekeeper seems to be a position awarded to aging messengers. For example, Richard Nugent worked at the Supreme Court for 57 years—including serving

as a messenger to Justices Ward Hunt and Samuel Blatchford as well as Chief Justice Morrison Waite. From age 73 to 81, Nugent held the position of door keeper. "Richard Nugent, 81, a U.S. Supreme Court Employee for 57 Years, Dead." *The New York Age*, December 28, 1929. A similar appointment was made for messenger J. Edward Joice, who had previously worked for Justices Joseph McKenna and Harlan Fiske Stone before becoming a doorkeeper.

[14] "Arthur Thomas, 80, Veteran Messenger in the Supreme Court, Dies." *The Evening Star*, April 24, 1943.

[15] "Loyal Messenger Pays for Tribute to Holmes." *The Morning News* (Wilmington), March 7, 1936.

[16] "Sole Public Tribute to Holmes."

[17] "Arthur Thomas, 80, Veteran Messenger in the Supreme Court, Dies." *The Evening Star*, April 24, 1943.

[18] See, for example, "Negro Pens Tribute to Justice Holmes." *The New York Times*, March 7, 1936; "Sole Public Tribute to Holmes Is Paid by His Ex-Messenger." *The Washington Post*, March 7, 1936; "Doorman Remembers Late Justice Holmes." *The Chattanooga Daily Times*, March 7, 1936; "Aide Buys 'Memoriam' in Tribute to Holmes." *The Morning Post* (Camden), March 7, 1936; "Negro Proffers Tribute to Late Justice Holmes." *The Salt Lake Tribute*, March 7, 1936; "His Former Aide Honors Holmes: Colored Man Alone Recalls Death of Loved Justice." *The Times Union* (Brooklyn), March 6, 1936; "Tribute of Holmes' Servant." *St. Louis-Dispatch*, March 6, 1936. Some of the newspaper headlines contain racist tropes, such as the *Boston Globe* reporting about the ad placed by Justice Holmes' "faithful negro." "Loving Tribute by Holmes Messenger: Memory Kept Green by Faithful Negro." *The Boston Globe*, March 7, 1936.

[19] "A Simple Memorial Notice." *The Montgomery Advertiser*, March 10, 1936.

[20] "The Messenger Remembered." *The Province Vancouver*, April 3, 1936 (reprinting an article from *Time* magazine).

[21] "Negro Proffers Tribute to Late Justice Holmes." *The Salt Lake Tribune*, March 7, 1936.

[22] "Negro Proffers Tribute."

[23] "High Court Aide Pens Holmes Tribute on Death Anniversary." *The Evening Star*, March 6, 1937.

[24] "High Court Aide Pens Holmes Tribute."

[25] "In Memoriam." *The Evening Star*, March 6, 1938.

[26] "In Memoriam." *The Evening Star*, March 6, 1940.

[27] "In Memoriam." *The Evening Star*, March 6, 1941. I have been unable to locate the text of the 1939 ad, but it was run. It is unclear whether Thomas purchased an ad in 1942.

[28] "Justice Holmes Again Honored by Ex-Aide, 79." *The Evening Star*, March 6, 1941.

[29] Phillip H. Love. "Elderly Doorman Cool to Court Plan." *The Evening Star*, February 13, 1937.

[30] "'Work as Usual,' Brandeis' Role on Reaching 80." *The Washington Post*, November 14, 1936.

[31] "Card of Thanks." *The Evening Star*, April 5, 1940.

[32] Erich Brandeis. "Looking at Life." *The Morning Call* (Allentown), May 5, 1943.

[33] "In Memoriam." *The Evening Star*, April 23, 1945.

[34] Gregory S. Schneider. "A Virginia State Senator Found Headstones on His Property." *Washington Post*, October 25, 2020.

Louis D. Brandeis and the Death of Samuel D. Warren

Peter Scott Campbell

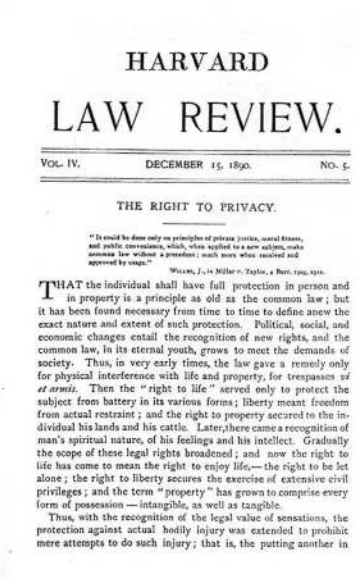
Louis D. Brandeis was not the first Supreme Court nominee to have a difficult time getting confirmed by the Senate, but somehow his name has become emblematic of how contentious the confirmation process has become. Nominated to the Court by Woodrow Wilson on January 28, 1916, Brandeis was not confirmed by the Senate until June 1—a wait of 125 days, which was until recently the record for the longest period of time the Senate has taken to consider a nomination.[1]

Just what was it that made Brandeis' nomination so controversial? Brandeis was the first Jewish nominee to the Court, and it is generally held that anti-Semitism played a significant role in the debate (although Brandeis was skeptical about that idea).[2] That said, those opposed to him taking a seat on the Court raised many other issues during the Senate Judiciary Committee hearings, almost all of which seemed to share a single theme: that Brandeis was temperamentally unfit to be a judge. Although many of these accusations unsurprisingly came from bankers and industrialists who were alarmed by Brandeis' activism against trusts and big business, it is surprising to note that these allegations also emerged from Brandeis' colleagues in the Boston bar. While five lawyers testified on Brandeis' behalf, six others testified against him, and many more signed a petition denouncing his nomination.[3] Many of the lawyers who testified complained that Brandeis had a reputation for being "untrustworthy" without fully explaining what they meant. However, a pair of recently unearthed letters reveal a cause of many Boston's lawyers' dislike of Brandeis that was never spoken aloud during the confirmation hearings: the suicide of Samuel D. Warren.[4]

The Warren Family

If Warren's name is known at all today, it is for being Brandeis' first law partner and for being the coauthor with Brandeis of the landmark article "The Right to Privacy."[5] But in late nineteenth-century Boston, Warren was by far the more prominent figure. The son of

DOI: 10.1111/jsch.12278



HARVARD

LAW REVIEW.

VOL. IV. DECEMBER 15, 1890. NO. 5.

THE RIGHT TO PRIVACY.

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."

WILLES, J., in Millar v. Taylor, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

Louis D. Brandeis and Samuel D. Warren were classmates at Harvard Law School and ranked first and second in their class, respectively, graduating in 1887. They went on to start a law firm in Boston together, and in 1890 they coauthored the groundbreaking article "The Right to Privacy," published in the law review Brandeis had helped found.

a paper mill owner, Warren was a member of one of Boston's most prominent families.[6] He attended Harvard Law School with Brandeis, and while it is often claimed that Brandeis had the highest-grade point average in the history of the law school, Warren was ranked right behind him as second in their class. The two grew to be close friends while at school, and it was Warren's idea that they start a firm together. Warren's family connections gained them some important clients early on, but the sharp legal acumen of both men quickly made Warren and Brandeis one of the most prominent law firms in the city. (The firm was so successful, it is still in business today under the name Nutter McClennen & Fish.) Brandeis also maintained close relations with Warren's family, and it was through their connections that Brandeis made friends with many of Boston's top citizens.[7]

In 1888, Warren and Brandeis' lives were upended by the death of Warren's father. In order to keep S. D. Warren & Co., the family's mill, from being sold off, Warren and Brandeis devised a complicated trust that not only created a board to run the mill, but also distributed its profits among Warren's family. One immediate consequence of this arrangement was that Warren had to leave the law firm so that he could manage the mill.

For a number of years, matters flowed smoothly. Warren's mother and siblings agreed to the terms of the trust, and as long as the firm continued to make a healthy profit, nobody complained. However, the mill eventually began to experience a downturn in business, which led to smaller payouts to the family members. Warren's brother Ned, who had paid little attention to the terms of the trust when it was created, became incensed at the loss of money and was convinced that the trust was devised to unfairly benefit Samuel at the expense of the rest of the family. Negotiations between the brothers to resolve the matter broke down, and in 1909, Ned sued Sam.[8]

Brandeis and his firm rallied behind Warren. A partner in Brandeis' firm, Edward McClennen, began preparing to defend him, but the suit never came to trial. On February 18, 1910, shortly after being deposed, Warren took his own life. His death shocked Boston's elite, and as the two letters reprinted below show, it would have a profound impact on Brandeis' confirmation hearings.

Richard Hale's View of Brandeis

While researching his biography of Brandeis,[9] Alpheus Mason came across a letter written by Richard Walden Hale, a Boston attorney who, like Brandeis, engaged in public service work around Boston. Also like Brandeis, Hale founded a prestigious law firm that is still in business today (originally Hale and Dorr, but now called WilmerHale). The two men worked together on a number of occasions, most notably in the creation of savings bank life insurance in Massachusetts.

Written a couple of weeks after Brandeis' death in an apparent response to a friend's request, Hale's letter looked back at his association with Brandeis. While expressing admiration for much of what Brandeis accomplished during his life, Hale pronounced that he had been unfit to serve on the Supreme Court.

Hale's argument was that Brandeis' high-minded ideals not only kept him from being impartial, but also led him to actions that he deemed were unethical and even injurious to people around him. Hale gave many small examples of what he calls Brandeis's "shrewd" behavior, but he emphasizes two in particular that had an impact on his confirmation hearings.

The first matter is Brandeis' denunciation of the United Shoe Machinery trust. This controversy was brought up repeatedly during the hearings, and it is perhaps the one issue that is hardest for Brandeis' defenders to explain away. The United Shoe Machinery was the consolidation of a number of shoe manufacturers who leased their equipment to shoe companies under terms that kept those companies from using other manufacturers' equipment. Brandeis joined the United Shoe Machinery's board of directors for a time to protect the interests of some clients who owned shares in one of the companies that had become incorporated during the merger. While on the board, Brandeis gave advice on various topics and helped defend its business practices before the Massachusetts legislature. Years after he left the board, however, Brandeis became concerned by the company's monopolistic practices and began publicly denouncing the company. Many of Brandeis' detractors accused him of hypocrisy, and in his letter Hale uses the incident as an illustration of how he felt that Brandeis' principles led him to behave unethically.[10]

Hale states that Warren's death was the "matter for which Boston hated [Brandeis] most." While admitting he did not know

Brandeis developed close relations with Warren's family, and it was through their connections that the young lawyer made friends with many of Boston's top citizens. Many Boston lawyers turned against him after the suicide of Samuel (pictured in 1875) in 1910, unfairly blaming Brandeis for his death.

the facts of the matter, Hale nonetheless relates the story he claimed was believed by "all Boston." In this version of events, after having gotten Warren into the mess by creating the trust, Brandeis refused to come to Warren's aid because he was too consumed by the Ballinger–Pinchot affair.[11]

McClennen's Retort

In the course of interviewing McClennen for the biography, Mason sent him a copy of Hale's letter. McClennen had joined Brandeis' firm shortly after graduating from Harvard Law School in 1895, and he remained there until his death in 1948. (His tenure is reflected in the firm's current name Nutter McClennen & Fish.) Over the years, McClennen became recognized in the firm as their top litigator, especially after Brandeis began to devote most of his time to public service work. Brandeis valued his abilities so much, that he sent McClennen to Washington to act on his behalf during his confirmation hearings.

While McClennen was already preparing materials for Mason, he immediately penned a blistering reply to Hale's letter. The two

letters are a fascinating study in contrasts. Hale's letter, although ostensibly written by a friend, is full of innuendo and snide contempt. While professing admiration for Brandeis' work in establishing savings bank life insurance in Massachusetts, Hale derides nearly everything else: from Brandeis' ubiquitousness in Boston's society, to his Supreme Court opinions, and even to how large his estate was at the time of his death. Hale's description of Brandeis as shrewd, coupled with an indirect reference to Shylock from *The Merchant of Venice*, gives his letter a distinct anti-Semitic tone—a not uncommon attitude among Boston's patrician class of the time.

McClennen's letter, on the other hand, is unstintingly complimentary toward Brandeis. Written less than two months after Brandeis' death, McClennen's affection toward his former mentor is evident, as is his anger over Hale's accusations. He devotes most of his letter to the circumstances surrounding the fight over the Warren family trust. The misconception that Brandeis had "refused to defend" Warren seems to have stemmed from the fact that Brandeis had assigned the litigation of the case to McClennen. However, as McClennen points out, local court rules prohibited Brandeis from representing Warren since he had created the trust and was therefore likely to be called to testify as a witness. However, just because Brandeis was not trying the case that does not mean that he washed his hands of the affair. As McClennen points out, Brandeis was heavily involved in creating the response to the lawsuit, along with McClennen and Warren himself.

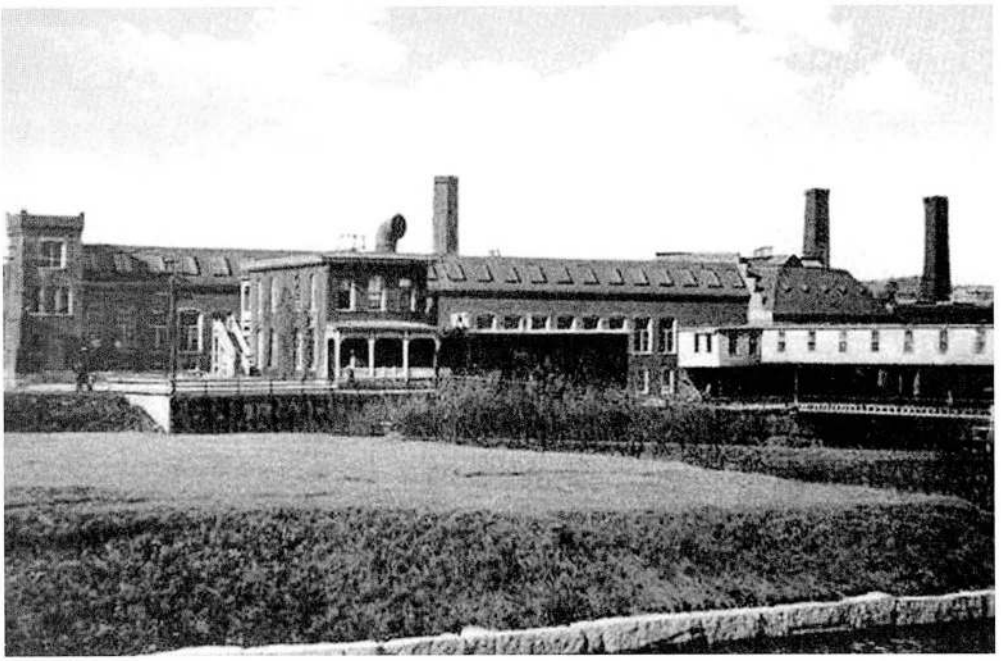
Hale's accusations seem to have struck at McClennen's professional pride, as he makes a point to mention that his abilities were not only appreciated by Brandeis and Warren,[12] but also generally by members of the Boston bar. He even goes as far as to hint that his trial skills may have been better than Brandeis' at the time, since, as McClennen points out, Brandeis had rarely set foot in a Boston courtroom during the previous fifteen years. This long absence from the local courts may have been another reason for the antipathy shown to Brandeis by other Boston lawyers.

While Hale claims "all Boston" believed Warren killed himself over Brandeis' alleged betrayal, it is unclear how widespread the rumor actually was. Brandeis and McClennen were apparently unaware of it at the time of the hearings, but it was widespread enough for McClennen's son to have heard it at a dinner party years later. Overall, though, it seems to have remained a closely guarded secret among Boston's elites as there is almost no reference to it in any writings about Brandeis and Warren.

McClennen also deals briefly with the United Shoe Machinery affair, minor accusations made by Hale, and others that had been relayed by Mason. But the letter also revealed some charming personal information about Brandeis, such as his sense of humor and his relations with his fellow justices.

McClennen's letter is also interesting for what it does not say. McClennen and Hale both graduated from Harvard Law School in 1895, and they were both prominent Boston lawyers at the same time. It is inconceivable that they did not know each other. Yet McClennen never once mentions Hale by name. Instead, he only refers to him indirectly, such as "the writer of the false assertion" and someone who was not "conscious of his obligation to his fellow men." McClennen's dislike of Hale fairly oozes from the page. Given that they worked for what were Boston's most prestigious firms—firms that still bear their names—could there have also been some professional rivalry at play?

As informative as these two letters are, Mason made little use of them in his book. He does not mention McClennen's explanation of Brandeis' legal inability to represent Warren at all, and in regard to Warren's death, Mason instead quotes a 1936 letter Hale wrote to his son in which he implies merely that Brandeis "hastened" Warren's death.[13]



Samuel D. Warren left the law firm when his father died to take over the family's paper mill (pictured) in Westbrook, Maine. His brother Ned sued him in 1906 when the payouts dipped, claiming that Brandeis had structured the trust of the mill to benefit Samuel at the expense of his siblings.

However, the letters provide new insights into controversies that still surround Brandeis, and thus deserve to be seen by a wide audience. They also provide an entertaining look at the passion Brandeis provoked from the people around him—both his detractors and his defenders.

The Letters

October 20, 1941
Charles C. Burlingham, Esq.[14]
850 Park Ave.
New York City, N. Y.
Dear Charles:

You prick me into writing an obituary notice of Brandeis. I took my law degree in 1895. He took his in 187[7]. I cannot remember not knowing him. But my earliest memories seem to be of my law student days, when Samuel Dennis Warren left the Holmes office to form Warren and Brandeis[15] and always rammed Brandeis down the throats of Boston blue blood. Then the family paper mills claimed Warren and my first memories at the bar are of the great mercantile firm of Brandeis, Dunbar and Nutter.

My first vivid memory of Brandeis is that he and Mrs. Brandeis drove in a buggy from Dedham to my home in Dover one Sunday afternoon. You can fix the date by the story. I was known to have written the best book that ever was written about Dreyfus.[16] To your motion for specifications of it being best I answer that it must have been for it was the shortest with the smallest pages. Brandeis said: "I have come to ask you to write a book like that against Ballinger." Hale said: "Did you and Pinchot bribe Ballinger's stenographer to betray him?"[17] Two hours later we were still friends and Mrs. Hale and Mrs. Brandeis pried us apart.

The general reputation of the man and of his firm was that embodied in Dr. Johnson's Dictionary *sub-title* SHREWD which he defines as "more artful than good." High-minded, astute, artful. One partner third in seniority was my bachelor partner in a firm for

week ends. Another, Ezra Thayer,[18] couldn't stand it and left for Moorfield Storey's place. He was an intimate also.

Then came the nomination and all the members of the bar who had been done in by the astute men of that firm lined up their serried ranks and hastened to the fray. The volumes of evidence before the committee are still in print. Your congressman can get you a set to own. Who ever read it carefully after the event? I did and made money by doing so. See below.

They form a pattern. At the time I said that a Boston Aristocrat thinks that the straight and narrow path leads from the front window of the Somerset Club to the coupon room and back again. On State Street, it was and is bad form to hit too hard. You should never plead fraud charges against a fellow State Street-er or club member. In my code of legal ethics, the contrary is true. How admirable for me that the same should be my diagnosis of Brandeis and of his code.

There is that line between the utmost that is ethical and the step beyond it that is immoral. If you take a case it is your duty to live up to the line and get your client's pound of flesh. As it is human to err no advocate can live way up to the line 100 times without leaning over x/100ths of those lines.

Now the pattern woven into all the charges against Brandeis is just that. The facts were in no case seriously in dispute. Each time I admired him for his devotion without limit to a cause. Each time evidence was added that the way he leaned over the line proved that he was a supreme advocate and was supremely unfit to be a judge.

Years afterward Henry W. Lanier [published?] a magazine called the Golden Book. It had a page each month of quandaries in ethics principally legal. I recurred to my copy of the Brandeis record and sold each month to that paper a $5.00 or $10.00 item. I always stated the facts of each case, as the friends of Brandeis had described it in their version. Anyone could see the leaning over the line.

One case will do for all.

(1) The Shoe Machinery Trust hired him and paid him to contend that they were not a trust.[19] They told him their confidences on that score. That ended.

(2) He was offered a retainer by the U.S. to contend that they were a trust. He evidently then believed they were. The matter was complicated. The defense was astute, conclusive or specious whichever you please. Brandeis saw that no other lawyer could lick it and therefore thought that it was his duty to accept the retainer.[20]

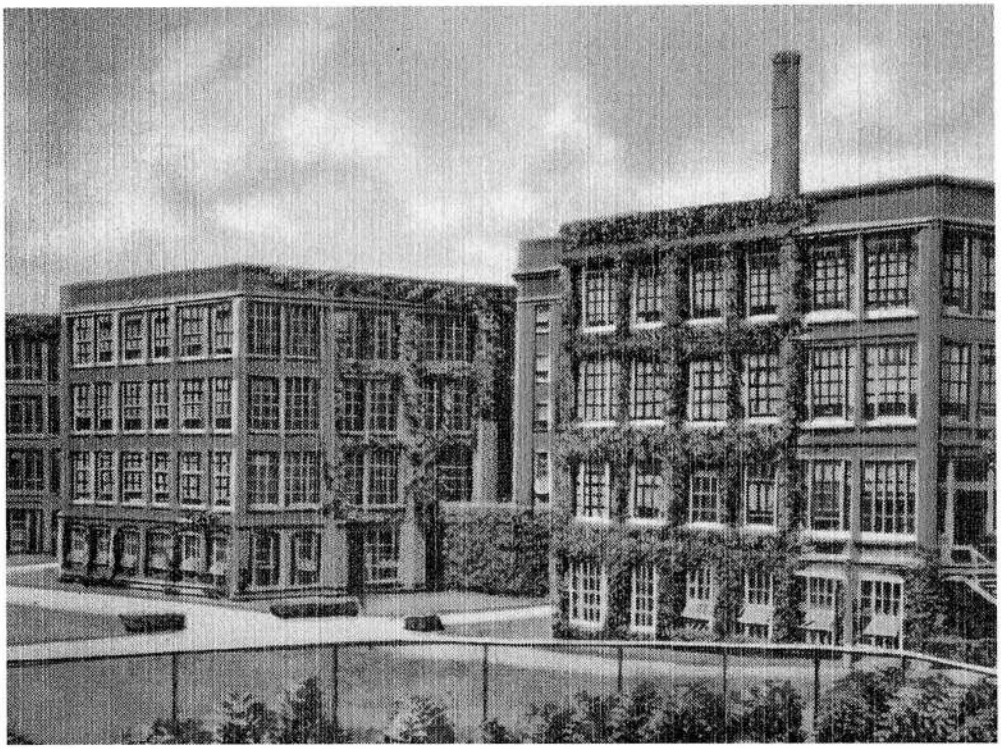
   (A) Against his former client.

   (B) Within the very scope within which their confidence in him had been placed in his hands. Why? Because of a tremendous ethical urge to stop monopoly.

The matter for which Boston hated him worst did not fit into that record, but it does fit into the same pattern. I do not know these facts beyond doubt about them. I describe rather what all Boston believed to be the facts. Samuel Warren was sued by a lousy brother for fraud about the Warren paper mill family trusts. Brandeis refused to defend him. Why? Because there were services to the public, at that time which Brandeis thought that it was his duty to undertake. He did not have time for both.

Now Warren had "made" Brandeis. Some other success may have awaited him somewhere else, but Warren started him in Boston so fast and pushed him so far that when he went on the bench in 1916 he was so rich that he was annoyed at it as inconsistent with his social views.[21]

The serious strain of the lousy case killed Warren. See the fire in his daughters' eyes as they remember that as his health and happiness faded away he believed that the genius of Brandeis could have shielded him, but was asked and refused.[22] But look at the other side of the shield. I mean great service to American humanity which Brandeis rendered



Boston attorney Richard Walden Hale wrote biographer Alpheus T. Mason that he believed Brandeis had been unfit to serve as a justice. Among his criticisms, Hale cited Brandeis' inconsistent relationship with the United Shoe Machinery Co. (pictured). Brandeis served on the company's board of directors, but later denounced it for monopolistic practices.

in the Life Insurance field. Here I was his disciple and his lieutenant. (The fundamental thought I heard from the mouth of Holmes at an earlier date and I presume that Brandeis did too.)

Holmes said, "Insurance is nothing but a savings bank cross bred to an actuary."

Hughes showed it up;[23] how far it had fallen from any read "mutual" saving. Then he rested. Brandeis took it up and brought it to function in Savings Bank Life Insurance. Read the stock dividend opinion of Brandeis.[24] Then you must agree with me that the function he thought he was performing on that court was not that of a judge. He was there to advocate.

I love to be in the middle and agree with both sides for reasons satisfactory to neither. So both sides misunderstand and kick me.

What is wrong with this picture? Speak up!

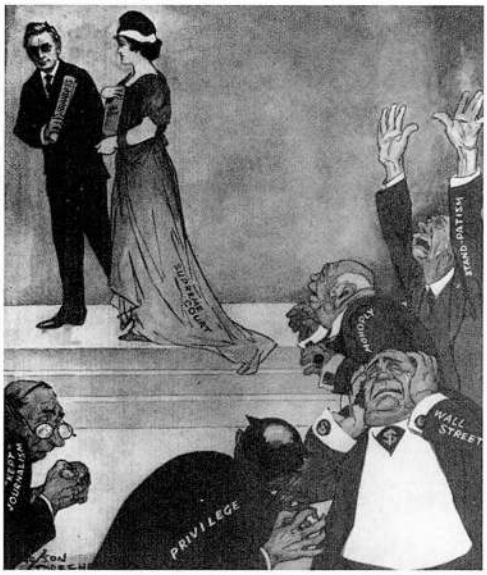
December 1, 1941
Professor Alpheus T. Mason
Princeton University
Princeton, N. J.
Dear Professor Mason:

Your letters of November 15 and November 17, I will hold in consideration in the later work on the *Brandeis—The Lawyer* chapter and without replying to them in detail at present.[25] There are a few things in them however that I will cover at this writing.

The acknowledgment of these letters has been awaiting an opportunity to do this.

1. *The abominable lie that Brandeis refused to defend Samuel D. Warren.*

Some time ago I talked to you about this but I think you had no opportunity to make any notes. It involves a description of



Brandeis' colleague, Edward F. McClennen, wrote Mason that the charges against Brandeis at his contentious confirmation hearing in 1916 had been politically motivated. Fear of Brandeis' socialistic disposition and anti-Semitism bolstered the opposition to his nomination, as this cartoon depicts.

some length. It necessitates my relating to you the position I had attained in Brandeis's eyes in 1909. The narrative of the Warren case is given, as you are aware, in the report from the Judiciary Committee to the Senate in Executive Session on the Nomination of Louis D. Brandeis, 64th Congress, First Session, Ex. Rept. No. 2, Part 1, pages 3 to 6.[26] Please read this as part of this letter. It is too long to repeat here.

During the long discussions precipitated by Edward P. Warren's attitude from 1901 to 1910 and the retention of counsel by him in 1903, Mr. Brandeis was the adviser and guide in the courses pursued by Samuel D. Warren. This continued through the inception of the suit began in the latter part of 1909 and until it became evident that there was to be an active trial. Then arose for consideration who should be the leading trial lawyer for the trustees and S. D. Warren & Co.

With one exception due to the importunities of a contemporary lawyer, Mr. Brandeis had not been the leading lawyer in any trial in a Massachusetts court conducted by Brandeis, Dunbar & Nutter for more than ten years.

I began active trial work in the courts in 1896. In the ensuing fourteen years I had been engaged very nearly exclusively in trials in court and in preparation therefor. From 1905 on I was the leading trial lawyer of the office in all of the larger cases tried by it. Mr. Brandeis attended at times but never assumed control of the trials. His attendance was usually merely until the client should become habituated to the idea that I should conduct the trial. Mr. Brandeis had acquired a confidence in my abilities as a trial lawyer that I will rate, adopting his fondness for figures, at 200% of the truth of the matter. It was unthinkable in the office that anyone else should conduct the defense of the Warren case.

There was of course the added fact that Mr. Brandeis had the charges of bad faith not been disclaimed in the course of the hearings, would have [had] to testify as a witness in the case. If the rules were enforced, he could not [have been] permitted to participate in the introduction of evidence or the cross-examination or argument of the case. This, however, was not the reason why I was chosen to conduct the trial. The choice would have been the same even if he [had not been going] to testify.

The Ballinger hearings had nothing to do with the choice. If Ballinger had never been born, the choice would have been the same.

In determining whether the choice was a wise one, it is necessary to consider, not the fact of my fitness for the job, but the belief of the parties involved in my fitness. Holding the beliefs which they held, it was for them a wise choice.

S. D Warren & Co. had not been in litigation much. Two or three years before 1909 they had a case in Maine involving a large possible adverse recovery and their public standing, or the standing of a local

improvement company which they managed and controlled. The case was in the hands of leading Maine lawyers for the Warren interests. I went to Maine to try the case. It resulted in an adverse verdict below and a reversal thereof in the Supreme Court of Maine, where I argued the case. All this was known and approved by Mr. Warren at the time of the trial of the Warren case we are now discussing.

Mr. Warren told me of the reliance that he had upon me and the relief that had come to him in the fact that I was looking out for their interests in the pending trial.

The leading counsel for Edward P. Warren was Sherman L. Whipple. I had tried with and against Mr. Whipple before this trial. He had expressed high regard for my ability as a trial lawyer and confidence in me. As a result, the accounting facts to a large extent were put in evidence by me, thereby relieving Mr. Warren, by so much, from testifying. Mr. Whipple had little contact with Mr. Brandeis as a trial lawyer. It was within a year or two of this time that Mr. Whipple was instrumental in having the Governor offer me a position on the bench and was earnest in his effort to have me accept it.

I know that you will not misinterpret my tooting my own horn in this manner. I do it because it is important that this abominable lie be scotched. I never heard it until one of my sons had it related to him at a dinner party, by a former partner of one of the leading opponents of the confirmation of Mr. Brandeis, who by no possibility could have any knowledge of the truth of the scandalous assertion that he was making more than twenty years after the death of Samuel D. Warren.

2. *The continuing attitude of some opponents to confirmation.*

It is not to be expected that any reasonable lawyer who had signed a brief purporting to be based on the evidence before the subcommittee of the Committee on the Judiciary would now say what he said in his brief was not so. This, however, does not bear on the facts of the matter. If you consult the record itself, you will find that there was no disregard of professional ethics and no lack of judicial temperament. Instead of saying that the confirmation was altogether political, the statement should have been phrased that the opposition was altogether political. It included (1) anti-Semitism, (2) professional envy, (3) professional jealousy, (4) honest, misguided fear of an undue communistic or socialistic disposition, (5) fear of adverse decisions on questions which would injuriously affect the interests of the opposers in litigation then pending or imminent, (6) individuals who had been fairly and justly treated by Mr. Brandeis in ways they disliked, (7) those who were swept into the opposition by some of the foregoing and, in some cases, gave their signatures in opposition at the behest of a former opponent employed and paid by the opposition to collect signatures. The test of my assertion that nothing was shown of disregard of professional ethics or lack of judicial temperament in Mr. Brandeis, lies in reading the complete record, with the pros and cons in juxtaposition. The various matters are comprehensively, fairly, and as clearly as possible with due regard to brevity, dealt with at pages 2–24[27] of the above cited report. The page references to the evidence appear in this report. This gives the means of testing the accuracy of the various statements made. This report is supplemented and emphasized in the succeeding pages 38–60.[28]

If you will look at those two reports you will see how free they are from either dragging something out of its context to produce a distortion or political disregard of the poise essential to true presentation.

3. *Brandeis was not mean to opponents.*

There has never come to my attention any instance of the kind. The suggestion to the contrary made to you did not come from one who had experienced any mean treatment, and must have been based upon report of some one else, if it was not a pure

invention. I cannot deal with it more specifically without knowing something about the incident which is claimed to be a basis for any such assertion. It is peculiarly difficult to give any credence to the suggestion when we consider that in the twenty years before Mr. Brandeis went on the bench, matters of litigation were not in his charge and that other members of the office were the ones determining whether extensions of time should be granted, or times of trial should be fixed or changed, or the other matters where the pleasures of practicing law are increased by an interchange of accommodations. I never have heard of his failing in any of the courtesies which should be extended to an adversary. He was quite the contrary. If you can dig out any incident that needs an explanation, I shall be glad to see what I can find out about it.

4. *Brandeis did not lack a sense of humor.*

He had the quick perceptions of the surroundings and the point of view of other men which make for humor. In trials and arguments and negotiations he did not often make use of the humorous. He was intent on the main object of a logical and sympathetic presentation and did not consider that a display of humor was helpful. Away from the stress of this, if his mind was free, he was one of the quickest to perceive a humorous situation and to present things in a humorous way. The idea of any lack of humor in him is based upon his serious preoccupations. Many a time he was so engaged in his serious thinking on serious matters that he was thereby insulated from other matters, be they serious or humorous. He could hardly repress his mirth until the interview was over, where the client told him what a successful year the client had had and started to relate the story by saying his wife had died in April.

I will mention one typical story of his. He was contemptuous of those who maneuvered for high station or bragged about it, where the situation was not warranted by merit. He was amused by the lengths to which climbers would go. He told of the farmer's wife who yearned for social position and who on attendance at the County Fair, looked in on the prize pig and said, "I am somewhat acquainted in the town that that 'ere pig comes from."

Engrossment in the serious often prevented his knowing of the humorous, but he had a very fine sense of humor.

I remember that in the course of an argument in the Supreme Court some four years ago, counsel quoted language of Mr. Justice Brandeis in an earlier opinion, so out of its context that the Justice did not recognize it. He said, "Did I say that?" Mr. Justice Butler, sitting beside him, said, "You certainly did. Do you want to take it back now?" The appreciation of the humor of the remark was written all over Brandeis's face. Incidentally, it showed how cordial their relations were notwithstanding the repeated differences of opinion in the cases on which they sat.

5. *Ezra Thayer's reasons for joining the firm of Story, Throndike, Palmer & Thayer.*

At the beginning of 1900, Brandeis was forty-three, Dunbar thirty-seven and Nutter thirty-seven; Story was fifty-four, Thorndike about the same, and Palmer was about Thayer's age, and a classmate. Story was the only striking court lawyer in the group. Thayer was an able trial lawyer. When the offer from Story came, Thayer told me that he thought that practice was flowing into the Story office more easily than into that of Brandeis, Dunbar & Nutter. Mrs. Thayer wanted him to accept. There was not in his dealing the slightest expressed, implied or felt criticism of the great ability, high character, and ethical qualities of Brandeis. James Bradley Thayer (his father) told me that he regretted the decision because of the high regard in which he (James Bradley Thayer) held the partners whom Ezra was leaving. It was James Bradley Thayer who originally had sent me to Brandeis when I

was leaving Law School. No one conscious of his obligation to his fellow men could ever have made the assertion that Thayer left because he couldn't stand it.

6. *Brandeis was not retained by the United States against the Shoe Machinery Company.*

The assertion to the contrary is another illustration of a flagrant disregard of ascertainable facts and substituting false assumption therefor. The matter is fully stated in the report above cited, in pages 3–16 thereof.[29] The writer of the false assertion professed familiarity with this record, but he had overlooked the statement on page 16:[30] "These services have been without compensation to Mr. Brandeis." The services referred to in the quotation were to the Shoe Manufacturers' Alliance. Not only did Mr. Brandeis not receive compensation, but he was not retained by the United States and did not act in the case.

Sincerely yours,

Edward F. McClennen

ENDNOTES

[1] Merrick Garland is now considered by some to be the record holder for having the longest confirmation process, but since there were never any hearings or a vote on his nomination, it could be argued that Brandeis' record still holds.

[2] In an interview with Edgar E. Siskin, Brandeis dismissed the idea that anti-Semitism played a major role in the Senate hostility to his nomination. "Some people ... felt that the opposition was motivated by anti-Semitism, that some of the Senators were against me because I was a Jew. But I never felt that it was. They may have opposed me because I had advocated certain legislation or represented a point of view with which they had no sympathy. But my being a Jew had little to do with it." Edgar E. Siskin, "Mr. Justice Brandeis: A Rabbi's Recollection," 18 no. 2 *American Jewish Archives* (November 1966) 131.

[3] For a list of all the witnesses who appeared in the confirmation hearings, see "A Timeline of Louis D. Brandeis's Confirmation – Part 1," *Brandeis and Harlan Watch*, brandeiswatch.wordpress.com/2020/08/04/a-timeline-of-louis-d-brandeiss-confirmation-part-1/.

[4] Both of the letters reprinted here were in Edward McClennen's possession at the time of his death in 1948. Subsequently, they were donated to the University of Louisville and incorporated into their collection of Louis D. Brandeis' papers [Folder WB 50339-7].

[5] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).

[6] For a detailed look at Samuel Warren and his family, see Martin Green, **The Mount Vernon Street Warrens** (1989).

[7] For Brandeis' account of how he was accepted into Boston's society, see Peter Scott Campbell, "Notes for a Lost Memoir of Louis D. Brandeis," 43 *Journal of Supreme Court History* (2018) 40–41.

[8] For a more detailed look at the legal implications of the trust and Ned's lawsuit, see Richard W. Palmer, "Contracting Around Conflicts in a Family Representation: Louis Brandeis and the Warren Trust," 8 *The University of Chicago Law School Roundtable* 353 (2001).

[9] Alpheus Thomas Mason, **Brandeis: A Free Man's Life** (1946).

[10] Brandeis, of course, did not agree. For a succinct account of Brandeis' view of his actions, see his defense of his actions in a February 24, 1912, letter to Moses Edwin Clapp, which is reprinted in Melvin I. Urofsky and David W. Levy, editors, **Letters of Louis D. Brandeis, Volume II: (1907–1912) People's Attorney** (1972) 551–560.

[11] During the first half of 1910, Brandeis represented *Collier's Magazine* and Louis R. Glavis during congressional hearings that were held to determine whether Richard A. Ballinger, Taft's Secretary of State, had tried to illegally approve the sale of public lands in Alaska. The hearings touched off a political firestorm and made Brandeis nationally famous. For a complete account of the affair, see Alpheus Mason, **Bureaucracy Convicts Itself: The Ballinger–Pinchot Controversy of 1910** (1941).

[12] Brandeis once claimed that "McClennen was the best lawyer he ever knew." Urofsky, **Louis D. Brandeis: A Life** (2009) 58.

[13] **Brandeis: A Free Man's Life**, 239–240.

[14] Charles Culp Burlingham (1858–1959) was a New York City lawyer, civic leader, and acquaintance of Brandeis.

[15] Hale's memory is a little off here. He would have been around eight years old when Warren & Brandeis was formed in 1879.

[16] Richard Walden Hale, **The Dreyfus Story** (1899).

[17] One of the more dramatic moments of the Ballinger–Pinchot hearings came when Ballinger's stenographer, Frederick M. Kerby, gave testimony that directly contradicted public statements made by the attorney general and other officials.

[18] Ezra Ripley Thayer (1866–1915) was the son of influential Harvard Law School professor James Bradley Thayer. He started working in Brandeis's firm in 1882.

Despite what Hale says, Thayer seems to have been an admirer of Brandeis. In a February 3, 1913, letter to Norman Hapgood, Thayer wrote, "Lots of the talk which is going about concerning him is rubbish, or worse. The most serious criticism to which he is open, *me judice*, would refer to unfair fighting. It is the adversary who has most to complain of." **Brandeis: A Free Man's Life**, 389. In a macabre coincidence, Thayer would also commit suicide while serving as the Dean of Harvard Law School.

[19] The majority report of the Judiciary Subcommittee on Brandeis' nomination held that Brandeis was not paid by United Shoe Machinery to defend them from charges of being a trust. "At this time Mr. Coolidge, one of the counsel for the United Co., and who was experienced in legislative matters, was ill, and Mr. Winslow requested Mr. Brandeis to act. He did so, and in April, 1906, he appeared before a committee and argued against the proposed legislation, adopting the facts furnished him by Mr. Winslow. He stated that he was counsel for a large number of shoe manufacturers and Mr. Winslow then knew of this fact. He, Mr. Winslow, denied it emphatically on February 16, 1916, until confronted with this statement." **Nomination of Louis D. Brandeis, Hearings before the Subcommittee of the Committee on the Judiciary, United States Senate, on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, Together with the Report of the Subcommittee of the Committee on the Judiciary Thereon**, 1916 (hereafter, **Nomination**) 184.

[20] In 1911 and 1912, Congress held a number of hearings on the possibility of amending the Sherman Anti-Trust Act. Brandeis appeared at a number of the hearings but he was never retained by the government. When asked at one hearing who he represented, he replied, "I represent primarily myself." **Hearings before the Committee on the Judiciary, House of Representatives, H. R. 11380, H. R. 11381, H. R. 15926, and H. R. 19959, January 26, 27, and February 19, 1912**, 13.

[21] Brandeis' estate was worth more than three million dollars, which was a considerable sum in 1941. **Louis D. Brandeis: A Life**, 754.

[22] After Warren's death, Brandeis wanted to continue the fight over the trust, but Warren's widow and siblings bought Ned's shares of the trust to end the matter. It is unknown how Warren's daughters really felt about Brandeis' role in the fight, but it is clear that his siblings held no grudge against Brandeis since they continued to use his firm as the company's lawyers. **Brandeis: A Free Man's Life**, 240 and 389.

[23] In 1905, future Supreme Court Chief Justice Charles Evans Hughes acted as the attorney for a New York Assembly Committee that investigated practices performed by life insurance companies. The abuses uncovered by the committee made headlines and shocked the nation.

[24] Hale presumably is referring to *Eisner v. Macomber*, 252 U.S. 189 (1920), where Brandeis wrote a dissenting opinion that declared that stock dividends were income that could be taxed under the Sixteenth Amendment.

[25] Mason had trouble gathering information about Brandeis' experiences as a practicing attorney and relied on McClennen for much of that information. McClennen would provide Mason with a 29-page document which he reworked into the article "Louis D. Brandeis as a Lawyer," 33(3) *Massachusetts Law Quarterly* 3 (1948).

[26] The report ended being attached to the nomination hearings, so McClennen's citations to pages in the report are inaccurate. The Warren case is actually discussed in **Nomination**, 177–180.

[27] **Nomination**, 176–198.

[28] **Nomination**, 212–234.

[29] **Nomination**, 182–190.

[30] **Nomination**, 190.

Brown v. Board of Education and the Politics That Created a Constitutional Icon

Jeffrey Hockett

Introduction

Few scholars or educators of law or politics would dispute the contention of the authors of a recent retrospective on *Brown v. Board of Education of Topeka* that the Supreme Court's 1954 school desegregation ruling was "the most important decision of the 20th century."[1] Indeed, *Brown* can be said to have achieved canonical status within the legal academy, as evidenced by the fact that no other ruling has been regarded by so many individuals as, to borrow one of many similar encomiums, "the greatest moral triumph constitutional law ha[s] ever produced."[2] The 88 percent approval rating that *Brown* received in a Gallup opinion poll taken forty years after the decision was rendered supports the view that the ruling is "largely sacred" not only among academics but "in American political culture" as well.[3] The contrast between that supermajority figure and the 62 percent of Americans that approved of *Brown* in 1961 (the last time Gallup sought that information until 1994) reveals that the ruling's reputation developed over time.[4] In fact, *Brown* generated enormous controversy for a number of years after it was rendered. Even journalists and scholars who favored desegregation conceded the charge of southern politicians that the justices had circumvented traditional legal constraints in declaring segregation unconstitutional.[5]

Gerald Rosenberg observes that the conventional explanation for *Brown's* eventual elevation to canonical or iconic status is that the decision and related desegregation rulings "played a crucial role in producing both changes in civil rights and an active civil rights movement."[6] Yet, pervasive and current as the belief may be within the academy that *Brown* inspired activists who then prompted Congress to pass important civil rights legislation, the wider public is unlikely to be familiar with the written opinions that accompany even well-publicized rulings,

DOI: 10.1111/jsch.12279

let alone draw a causal connection between the desegregation decision and a social reform movement that gained widespread attention in the mid-1960s.[7] *Brown's* reputation in the broader American political culture is more likely a function of the public's view of the institution that the Court declared unconstitutional in 1954. And opinions concerning segregation needed to change significantly in order to benefit *Brown's* reputation, since a poll taken two years after the Court's ruling revealed that only 48 percent of Whites favored desegregated schools.[8]

To acquire insight into the process by which the *Brown* decision achieved canonical status in American political culture, we must set aside the conventional assumption that it is "great jurists who show the rest of us the way through their wisdom," and consider, instead, the import of the inverse relationship —that nonjudicial actors and events can strongly affect the public's understanding of constitutional requirements and, in turn, of the meaning and significance of Supreme Court rulings.[9] In this case, *Brown's* ascent toward iconic status involved a confluence of social and political events that eventually led to the ruling being conceptualized as a righteous attack on an institution that helped maintain a system of White supremacy, an interpretation that deviated from the decision's narrow but controversial social science-based rationale that school segregation harms the personalities of African-American children.[10] The circumstances that would eventually lead the public to regard *Brown* as a historic legal challenge to White supremacy included civil rights protests and racial incidents that focused national and international attention on the struggle for racial equity in this country; a felt strategic need among non-southern Democrats to respond to African-American political demands; and the decision by Democratic elites (especially, Presidents John F. Kennedy and Lyndon B. Johnson) and, relatedly, members of the media to echo civil rights activists and frame desegregation as a moral issue of national importance. In the absence of proper framing, millions of Americans viewed racial segregation as a reasonable exercise of state power, regarded activists as troublemaking malcontents, and considered the *Brown* decision unwarranted.

Ironically, one of the Supreme Court's most significant actions in the history of *Brown's* ascent to iconic status was to secure the decision's reputation by constitutionalizing the efforts of nonjudicial actors who sought to restrict the reformist potential of the ruling. The success of the civil rights movement in linking racial segregation to White supremacy ensured that the public's approval of the abstract *principle* of desegregation would survive a White backlash against civil rights that widespread urban unrest, negative media framing, and Richard Nixon's 1968 "law and order" presidential campaign prompted. However, the Court's early busing decisions, the controversial nature of which was reinforced by Nixon's anti-busing rhetoric and negative media framing of the issue, imperiled *Brown's* standing. President Nixon's Supreme Court appointees would help preserve *Brown's* status by limiting the impact of busing to the *de jure* segregation that characterized the South. This action effectively eliminated the threat that *Brown* posed to the *de facto* segregation that is typical of non-southern school districts across the nation, and is a form of segregation that was also, although less obviously, the product of racist governmental policies.

A Less Than Iconic Beginning

As Michael Klarman observes, "Virtually everyone today agrees that [the *Brown* decision] was right, though this was not so in 1954, when it was decided."[11] At the time, a broad swath of elite opinion—journalistic, legal, scholarly, and political—challenged the ruling's jurisprudential merit. A number of commentators pointed up the novelty of

the apparent basis of the holding in *Brown*, namely, Chief Justice Earl Warren's reference in his eleventh footnote to the petitioners' social science evidence as support for the conclusion that racially segregated public schools are inherently unequal and, therefore, unconstitutional.[12] The day following the announcement of the ruling, for example, James Reston of *The New York Times* declared that "[t]he Court's opinion read more like an expert paper on sociology than a Supreme Court opinion."[13] The august constitutional scholar, Alpheus T. Mason, lamented similarly: "Rather than rely on available judicial precedents, the Court invoked two of the flimsiest of all our disciplines—sociology and psychology—as the basis of its decision."[14]

Predictably, southern congressmen attacked the *Brown* decision for ignoring traditional legal constraints that had provided racial segregation with a constitutional grounding. The inconsistency between the Court's ruling and the history of the Fourteenth Amendment was a main theme of the "Southern Manifesto" of March 1956—a statement of protest against *Brown* that more than 90 southern congressman signed. The Manifesto recalled the arguments of the lawyers for the defendant school boards and emphasized that "[t]he debates preceding the submission of the 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States."[15] The Manifesto also criticized the justices for ignoring the force of precedent, noting that *Plessy v. Ferguson* "expressly declared that under the 14th Amendment no person was denied any of his rights if the States provided separate but equal facilities"; this principle, "restated time and again, became a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life." Echoing the public peace rationale that figured prominently in the arguments of the school boards' lawyers, the Manifesto proclaimed that the desegregation ruling was "destroying the amicable relations between the White and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding."[16]

A study that the National Opinion Research Center (NORC) conducted in 1956 indicated that the benign view of racial segregation advanced in the Manifesto was not confined to the South. While Americans overwhelmingly rejected the concept of White supremacy, they largely denied its existence in this country. Almost 80 percent of Whites believed that African Americans "are as intelligent as white people" and are just as capable as Whites "if they are given the same education and training." However, most Whites at that time did not believe that there were institutional impediments to Black advancement, as 69 percent of respondents indicated that they thought Blacks were "treated fairly" in America. With particular reference to the matter at issue in *Brown*, only 48 percent of Whites approved of the integration of public schools; thus, over 50 percent did not regard racial segregation in education as manifestly unfair to African Americans.[17]

In view of these results, it stands to reason that Americans at this time were nearly evenly divided about the worth of the *Brown* decision. In polls taken in May, June, and December of 1954, and April of 1955—using a question that drew an explicit connection between the Court's ruling and the matter of school segregation—only 55, 54, 52, and 56 percent of respondents, respectively, expressed their approval of the decision.[18]

In response to the benign, public order rationale that segregationists offered in support of the practice and to continued scholarly criticism of the *Brown* decision, Charles Black articulated a powerful defense of the ruling based on the view that segregation was, in fact, an indispensable component

Emmett Till's mother, Mamie Till-Mobley, and grandmother, Alma Spearman, mourned at his graveside in Chicago. Till, age 14, was lynched in Mississippi in 1955, after being accused of offending a White woman in her family's grocery store. His killers were acquitted.

of a system of racial oppression.[19] Echoing certain of the petitioners' arguments, Black contended that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law." While he acknowledged "the entirely sincere protestations of many southerners that segregation is 'better' for the Negroes" and "is not intended to hurt them," he believed that "a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority at least for the indefinite future."[20] To understand that "[t]he movement for segregation was an integral part of the movement to maintain and further '[W]hite supremacy,'" Black argued, we must consider the fact "that segregation was imposed on one race by the other race; consent was not invited or required." Southern race relations, in short, present "a picture not of mutual separation of [W]hites

and Negroes, but of one in-group enjoying full normal communal life and one outgroup that is barred from this life and forced into an inferior life of its own."[21]

Black supported the point that the noninvolvement of African Americans in the construction of southern society secured the group's inferior status therein by noting that "[s]egregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory." He mentioned, in particular, "the long-continued and still

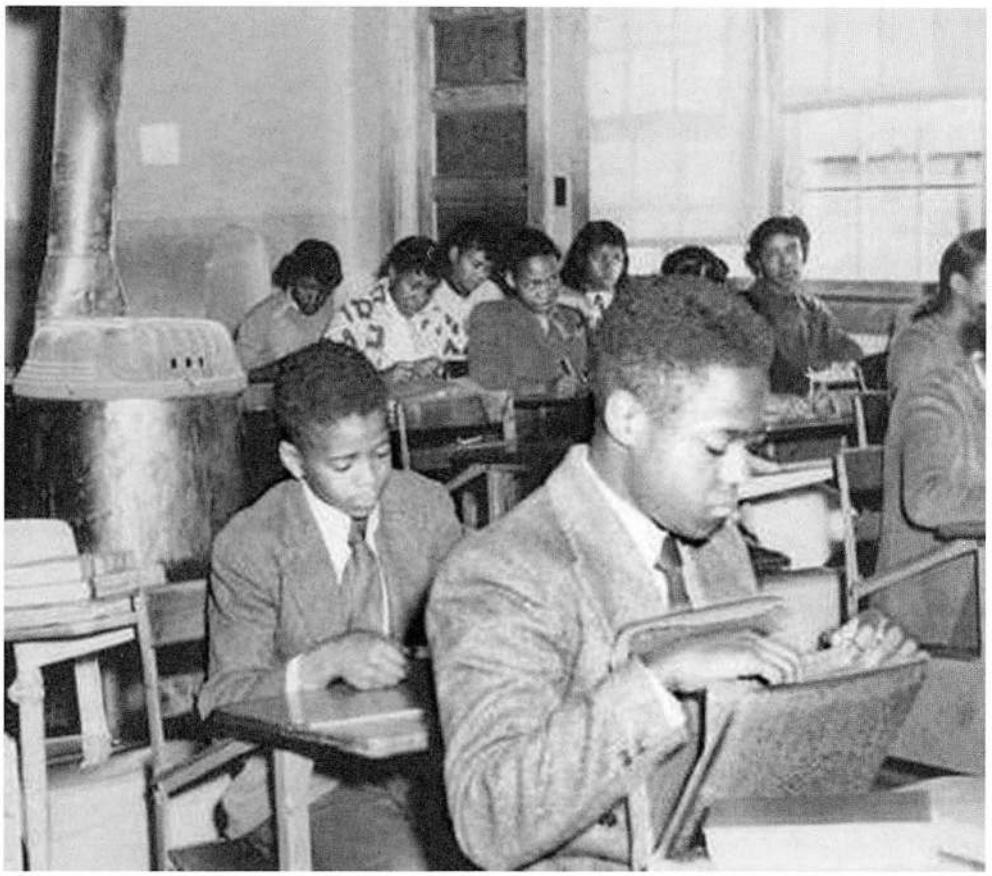
largely effective exclusion of Negroes from voting," as well as the fact that "segregation is the pattern of law in communities where the extralegal patterns of discrimination against Negroes are subjected to the strictest codes of 'unwritten law' as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying 'Sir,' and all the rest of the whole sorry business." These oppressive cultural norms, he suggested, "assist us in understanding the meaning and assessing the impact of [contemporaneous] state action."[22]

Black speculated that the justices in *Brown* likewise regarded segregation as oppressive, and that this belief formed the actual basis of the decision (as opposed to "the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense"). He suspected that the Court was disinclined to "[spell] out that segregation ... is perceptibly a means of ghettoizing the imputedly inferior race" because of a "reluctance to go into the distasteful details of the southern caste system." This "venial fault" of the opinion aside, he reiterated that the justices "had the soundest reasons for judging that segregation violates the fourteenth amendment," and expressed confidence "that in the end the [desegregation] decisions will be accepted by the profession" on the basis that "the segregation system is actually conceived and does actually function as a means of keeping the Negro in a status of inferiority."[23] Presumably, Black would have agreed that the impact of exposure to evidence that revealed the oppressive nature of segregation would affect the wider public's view of the *Brown* decision, as well as that of the legal profession.

The Oppressive Nature of Segregation Revealed?

After the Court rendered *Brown*, there was no shortage of highly visible, oftentimes violent racial events, whether linked specifically to school desegregation efforts or to the matter of civil rights more generally, with which to test the validity of Black's thesis regarding changes in the decision's reputation. By Black's reckoning, these events would eventually demonstrate *Brown's* moral force by revealing the necessary connection between segregation and White supremacy. Legal deficiencies notwithstanding, the decision would come to be respected and interpreted as a historic ruling that recognized—and regarded as constitutionally relevant—"the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority," and "the other equally plain fact that such treatment is hurtful to human beings."[24]

Tragic, well-publicized demonstrations of the brutality inhering in the southern caste system had occurred well before the publication of Black's essay in 1960. In the year following *Brown*, for instance, the notorious kidnapping, torture, and murder of the fourteen-year-old Chicagoan, Emmett Till (who supposedly violated southern racial mores while visiting relatives in Money, Mississippi), received significant national attention from more than 100 newspapers and television reporters, as well as a tremendous international response.[25] The next year, Autherine Lucy's effort to attend graduate school at the University of Alabama marked the first school desegregation case to become an international event, in large measure because of the violence directed at the aspiring student. The forceful condemnations of the thousand-person mob's actions that appeared in certain newspapers in this country were echoed in the media of Denmark, Sweden, Holland, Poland, Nigeria, and India. Summarizing the results of an opinion survey, the United States Information Agency concluded that the episode "qualifies as not less than an international *cause celebre* with a quarter to a third in Western Europe alluding more or less specifically to the incident as a basis of



A number of students at this all-Black high school in Farmville, Virginia, were plaintiffs in the lawsuit *Davis v. County School Board of Prince Edward County* (1952)—one of the five cases combined into *Brown v. Board of Education.*

recent unfavorable treatment of Negroes in the U.S."[26]

Presidential involvement in the Little Rock crisis of 1957–1958 ensured high visibility not only for the event itself, but also for *Cooper v. Aaron*,[27] the first school desegregation case since *Brown* in which the Supreme Court rendered a full opinion. President Dwight Eisenhower's intervention and the Court's ruling were responses to the efforts of Arkansas Governor Orval Faubus and the state legislature to block the desegregation of Central High School. After the governor defied a lower court order and sent National Guard troops to prevent nine Black students from entering the school, the president felt compelled to send federal troops to enforce the ruling and protect the students.[28] During the twenty days that Eisenhower waited to act, Americans and international observers witnessed the extraordinary hostility directed at the "Little Rock Nine." Some 95 percent of Americans indicated in a September 1957 Gallup poll that they had either heard or read about the trouble in Little Rock over school integration.[29] The event also "attracted more international attention than any previous civil rights battle" and "brought a full-scale international outburst over racial conditions in the U.S."[30] In a widely covered ruling that denied the Little Rock school officials' request for a two-year postponement of their desegregation program, the Supreme Court's opinion, which every justice signed, focused

on the constitutional irrelevance of violent White resistance: "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."[31]

Spectacular examples of desegregation-related White violence would continue early in the next decade. The sit-in movement, which four students launched in February of 1960 in Greensboro, North Carolina, and was then organized by the Student Nonviolent Coordinating Committee (SNCC), was very effective in highlighting for Americans the oppressive and humiliating nature of segregation. By the end of the year, some 70,000 individuals participated in sit-ins at lunch counters and other segregated settings in 100 cities. The contrast between the politeness, bravery, and composure of the protestors in the face of the intimidation and, at times, violent responses of segregationists was instructive.[32]

The "freedom riders" performed a similar service for the nation in the spring of 1961, when these activists sought to force bus companies to abide by *Morgan v. Virginia*, in which the Supreme Court declared unconstitutional segregated seating on interstate bus lines, and *Boynton v. Virginia*, where the Court extended the *Morgan* precedent to include segregated terminal facilities.[33] James Farmer, co-founder of the Congress on Racial Equality (CORE) and leader of the freedom riders, explained that he and his fellow demonstrators "were counting on the bigots in the South to do our work for us." The defenders of segregation did not disappoint. The frequency and brutality of the violence directed at the riders as they made their way through the Deep South was so shocking that even the southern press remarked on its cruelty.[34]

Over time, these and other events increased the visibility of the issues of racial segregation and civil rights. While these matters received no mention prior to 1955 (and then only slight mention that year) in Gallup polls that asked respondents to identify the nation's "most important problem," two polls conducted in 1956 revealed that 18 percent and, then, 12 percent of Americans ranked civil rights as the most important issue that year.[35] During the Little Rock crisis the following year, 29 percent of respondents identified integration or racial problems as the country's most important issue. That result not only represented a substantial increase in the proportion of Americans who thought that these policy matters ranked first in order of importance. It also marked the first time that such matters were listed first overall among the issues that respondents mentioned.[36] Although for the next several years other issues (especially the economy or foreign affairs) would supplant racial matters in order of importance, a measurable percentage of Americans (ranging from four percent to ten percent) consistently mentioned integration as the nation's most important problem.[37]

In spite of the number and severity of well-publicized, oftentimes violent events linked to desegregation efforts in the years immediately following *Brown*, the evidence does not provide much, if any, support for Charles Black's expectation that the decision would come to be viewed and respected as a historic legal challenge to White supremacy. The scholarly debate over *Brown's* jurisprudential merit mentioned briefly in the preceding section took place largely after the Little Rock crisis and the violent events that preceded it. And, like scholarly opinion, public sentiment remained conflicted about the decision's worth. In late May and early June of 1961, in the final Gallup poll (until 1994) that asked respondents whether they approved of *Brown*, 62 percent of those questioned indicated their acceptance of the decision. (As with earlier polls, the question posed drew an explicit

connection between the Court's ruling and the matter of school segregation.)[38] Although that figure represented an increase of eight percent over the average of 54 percent in the four polls taken during the year following the decision, this development was hardly a reflection of overwhelming support, let alone an indication of iconic status.[39] Furthermore, the high point of 62 percent achieved in 1961 did not necessarily suggest a continuing upward trend in approval, since that figure had been matched (in fact, exceeded by one percent) in 1956, while the three polls taken between the period 1956 and 1961 averaged less than 60 percent.[40]

It is tempting to conclude that the absence of convincing evidence of any significant improvement in *Brown's* reputation at the end of the 1950s was a function of insufficient public exposure to violent racial events, since it was during the 1960s that "the civil rights movement put the brutality of Southern racism starkly before a broad national and international audience."[41] However, the reaction of much of the world to the events summarized above reveals that there were more than enough racial incidents prior to the height of the civil rights movement to illustrate the connection between segregation and White supremacy. Media located in nations with largely non-White populations such as India, Libya, and Nigeria had no trouble discerning that segregation was a form of racial oppression.[42] And well before Little Rock, as Mary Dudziak observes in her work on the Cold War implications of racial segregation, a communication from the U.S. embassy in Moscow noted that the press of the Soviet Union attempted to exploit America's vulnerability with non-White populations by "hammer[ing] away unceasingly on such things as 'lynch law,' segregation, racial discrimination, deprivation of political rights, etc., seeking to build up a picture of an America in which the Negroes are brutally downtrodden with no hope of improving their status under the existing form of government."[43]

Criticism of the oppressiveness of American race relations was not limited to the press of non-White nations and the media of the United States' chief Cold War rival; it also came from the nation's closest allies. Azza Salama Layton observes that "[t]he British often expressed cynicism about Americans lecturing them about having 'an empire in India' and 'a colony in Africa' while they had Little Rock." Criticism regarding Little Rock also appeared in news reports and editorials in Switzerland, Holland, Ireland, Luxembourg, Belgium, and Denmark.[44] A 1957 survey of opinion in Western Europe (including Great Britain, West Germany, France, Italy, and Norway) reported that "opinions of race relations in the U.S. are highly unfavorable." American officials were unable to take comfort in the survey's observation that those opinions "apparently have not become materially more so as a result of Little Rock," because, as the study explained, "America's standing in the area of race relations was already in a very depressed state prior to the Arkansas desegregation incidents, and hence not readily susceptible to further decrease."[45]

Racial Violence and Media Frames

The fact that the American public's endorsement of *Brown* was merely lukewarm—even though there were enough well-publicized, violent racial events in the mid-to-late 1950s and early 1960s to alert even Western Europeans to the oppressiveness of racial segregation—does not negate Charles Black's general thesis regarding the process by which the decision's reputation would eventually improve. However, Black's argument—that increased public exposure to illustrations of the nature of segregation would burnish *Brown's* reputation—was too uncomplicated. It is the case that media images and messages can have a powerful impact upon the public's attitudes, racial or otherwise.[46] But studies of racial attitudes demonstrate that news media present events,

SUPREME COURT OF THE UNITED STATES

Nos. 1, 2, 4 and 10.—October Term, 1953.

1	Oliver Brown, et al., Appellants, v. Board of Education of Topeka, Shawnee County, Kansas, et al.	On Appeal From the United States District Court for the District of Kansas.
2	Harry Briggs, Jr., et al., Appellants, v. R. W. Elliott, et al.	On Appeal From the United States District Court for the Eastern District of South Carolina.
4	Dorothy E. Davis, et al., Appellants, v. County School Board of Prince Edward County, Virginia, et al.	On Appeal From the United States District Court for the Eastern District of Virginia.
10	Francis B. Gebhart, et al., Petitioners, v. Ethel Louise Belton, et al.	On Writ of Certiorari to the Supreme Court of Delaware.

[May 17, 1954.]

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions,

The author argues that *Brown*'s "ascent toward iconic status involved a confluence of social and political events that eventually led to the ruling being conceptualized as a righteous attack on an institution that helped maintain a system of White supremacy." This interpretation, he argues, "deviated from the [Supreme Court] decision's narrow but controversial social science-based rationale that school segregation harms the personalities of African-American children." Pictured is the first page of the ruling, handed down on May 17, 1954.

such as violent racial incidents, in a frame, that is, "a central organizing idea or story line that provides meaning to an unfolding strip of events, weaving a connection among them. The frame suggests what the controversy is about, the essence of the issue."[47] And, while media frames "help individual citizens make sense of the issues that animate political life," journalists do not convey information in a neutral manner. Rather, the frames that print and visual media convey are the creation of elites who hope "to advance their interests and ideologies."[48] Furthermore, "the media seem to respond to the agendas of the most prominent American newsmakers—particularly the president of the United States, but also prominent movement leaders with their own agendas."[49]

At first glance, the circumstances prior to *Brown* would seem to have been conducive to the construction of influential media frames inimical to benign characterizations of racial segregation and that linked desegregation efforts to the fight against White supremacy. Civil rights initiatives on the part of a president would receive ample media coverage, in view of the fact that, since the time of Franklin D. Roosevelt, as Sidney Milkis notes, Americans had come to "expect both that the federal government would remain active in domestic and world affairs and that, within the government, the president would take the lead." Milkis also observes that "[t]hose who occupied the White House during [the mid-20th century]—Harry Truman, Dwight Eisenhower, John Kennedy, and Lyndon Johnson—wielded executive power according to Roosevelt's vision of modern presidential leadership."[50] What's more, these presidents embraced Woodrow Wilson's model of the "rhetorical presidency," which, as Jeffrey Tulis avers, involves "'go[ing] over the heads' of Congress to the people at large in support of legislation and other initiatives." The contemporary resort to "popular or mass rhetoric"—which stands in marked contrast to the nineteenth-century concern that such presidential appeals to public sentiment "could manifest demagoguery, impede deliberation, and subvert the routines of republican governance"—is intended to "constitut[e] the people to whom it is addressed by furnishing them with the very equipment they need to assess its use—the metaphors, categories, and concepts of political discourse."[51]

Making use of this model of leadership, President Truman proposed a number of initiatives on behalf of African Americans in response to the growth of Black political influence in electorally significant states and to the Democrats' loss of Congress following the midterm elections of 1946 (due, in part, to the party's negligence regarding civil rights). After the publication of the recommendations of Truman's Committee on Civil Rights (a body that the president formed one month after the Democrats lost their congressional majority), and following his reelection in 1948, Truman proposed that Congress elevate the civil rights section in the Department of Justice to its own division, afford federal protection against lynching, provide more adequate protection of the right to vote, create a permanent Fair Employment Practices Committee, and prohibit discrimination in interstate transportation facilities. Tellingly, however, Truman stopped short of embracing several desegregation measures that the Committee on Civil Rights recommended, including a proposal that federal grants-in-aid and other forms of federal assistance stipulate that recipients not segregate on the basis of race. Instead, the president's anti-segregation initiatives were not highly visible, since (except for an executive order regarding military desegregation) they took the form of *amicus curiae* briefs to the Supreme Court.[52]

The relative timidity that Truman exhibited in his legislative initiatives reflected an acknowledgment of political reality. For one-party politics and restricted voting in the South made veterans of conservative

southern legislators who, in turn, benefited from a seniority system that placed them in powerful positions in both houses of Congress. And those very congressmen—who doomed the president's civil rights bills, even though Truman put forth no desegregation initiatives—were responsive to a very important element of the Democratic coalition. The South's plantation and industrial elites and the working classes of the industrialized North were the main components of the New Deal coalition that Franklin D. Roosevelt established in 1933. These elements of this strange political alliance were united by a shared antipathy for northern capital. (Southerners also favored New Deal measures that ameliorated the impact of the Depression upon southern agriculture.)[53] However, as Richard Bensel observes, the "principal compromise among the policy positions assumed by the New Deal alliance ... centered on race," and "under this arrangement the northern wing implicitly tolerated southern racism as the price of participation in a majority coalition."[54] As a result, there was a strong disincentive at this time for Democratic politicians at the national level to engage in any serious critical examination of the nature of racial segregation.

Truman's apprehensiveness about alienating southern Democrats was reflected in the substance and tone of his statements on civil rights, including the message to Congress in February of 1948 that formally outlined his legislative proposals. After observing rather abstractly that "there is a serious gap between our ideals and some of our practices," the president declared that "the Federal government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the law are not denied or abridged anywhere in America."[55] William C. Berman notes that, while most progressives and moderates were pleased with Truman's civil rights overtures, a "number of liberals were disappointed with the moderate, apparently equivocal stand the president had taken on the subject of segregation."[56] Truman should have anticipated this sort of criticism, since he had been warned that his failure to insist on the desegregation of institutions that receive federal aid (as well as the other anti-segregation initiatives that his Committee on Civil Rights had recommended) might "create the impression that the President oposses [*sic*]" such anti-segregation policies.[57]

In the absence of a dominant political narrative linking segregation to White supremacy, public opinion prior to *Brown* was not predisposed to view the decision as a historic contribution to the advancement of human rights. A national poll taken in late November 1948, for example, suggests that even those who would have been regarded as fairly liberal at the time most likely would have possessed views on racial equality that fell short of support for public school desegregation. A majority of Americans (69 percent) supported the view that "poll taxes should be done away with." However, a minority of respondents indicated: that the federal government "should have the right to step in and deal with the crime [of lynching]" (43 percent); that the federal government "should go ["all" or "part of the way"] in requiring employers to hire people without regard to their race, religion, color, or nationality" (42 percent); and that "Negroes ... should not be required to occupy a separate part of a train or bus when traveling from one state to another" (49 percent).[58] Any expectation that progressive opinion outside the South might have displayed a preference for school desegregation receives less than ample support when one considers the marginal differences recorded for the responses of non-southerners to the same questions in a poll taken in 1949.[59]

Circumstances following the presidential election of 1952—in which Dwight Eisenhower, while not ignoring African Americans, appealed to and won a significant

portion of the southern White vote—provided even less fertile ground for the construction of media frames that would enhance *Brown's* reputation by revealing a connection between segregation and White supremacy.[60] Whether or not there is any validity to the argument of some scholars that Eisenhower pursued a "hidden-hand" strategy in the realm of civil rights during his eight years in office, the fact remains that his public statements did not convey much of a sense that he was committed to bringing about significant change in American race relations.[61] With specific reference to *Brown*, Eisenhower did not publicly champion the view that the decision made an important contribution to the achievement of racial equality or that desegregation was a moral imperative. Much to the dismay of Chief Justice Earl Warren, the president repeatedly refused to endorse the desegregation decision.[62]

When presented with the opportunity during the Little Rock crisis to offer instruction on the oppressive nature of segregation, Eisenhower chose, instead, to prevaricate. Had the recently-reelected president decided to use his personal popularity and the prestige of his office to support the cause of desegregation, he hardly could have hoped for more favorable circumstances. Aside from the fact that television had become established in most American households by the mid-1950s, Thomas Leonard observes that "Little Rock's troubles reached a viewing public that dwarfed the television audience when the [1950s] began: eighty-five percent of all homes were watching for five hours a day."[63] Additionally, as Sasha Torres maintains, "Little Rock was the perfect story for network news. It was oversaturated with dramatic images, and it satisfied television's craving for moral absolutes."[64] However, after reporters asked the president to convey a message on desegregation to youngsters, Eisenhower "repeated the mantra of southern Whites that 'it is difficult through law and through force to change a man's heart.'"[65] He also failed to distinguish between the causes of the NAACP and the Ku Klux Klan when he condemned "extremists" on both sides of the issue. The president even observed empathetically that "[t]here are very strong emotions on the [segregation] side, people that see a picture of mongrelization of the race."[66] And, in his formal address to the nation on desegregation in Little Rock, Eisenhower offset his declaration that "[m]ob rule cannot be allowed to override the decisions of our courts" with the statement that "[o]ur personal opinions about the [*Brown*] decision have no bearing on the matter of enforcement."[67]

In their study of media and Eisenhower's crisis rhetoric, Steven Goldzwig and George Dionisopoulos observe that the president's Little Rock "address conspicuously avoided the ethical questions raised by resistance to desegregation." They also contend that,

> given the widespread public accounts of President Eisenhower's feelings about the Supreme Court's integration decision, his sympathy for the South, and his concerns for the doctrine of states' rights, ... the president may have inadvertently given comfort to the very extremists he decried in his televised address.[68]

Studies of the print media coverage of particular racial events in the years immediately following the *Brown* decision illustrate the connection between contemporary political narratives that did not challenge the dominant, benign characterization of segregation and the frames used to report those events. For all the media attention that the murder of Emmett Till received, for example, "the story was framed as a social aberration rather than representative of a systemic problem."[69] With regard to coverage of the freedom riders, Richard Lentz points out that, while "*Time* and *Newsweek* magazines criticized the outrageous collapse of order in Alabama"

that permitted White mobs to attack the riders, *Time* offset its "stinging rebuke to the [state's] officials" with a "cold disdain for the agitators of CORE," who "'were...hunting for trouble—and found more of it than they wanted.'"[70] (A majority of Americans shared this sentiment, as 64 percent of respondents to a 1961 Gallup poll indicated that they "disapprove of what the 'freedom riders' are doing.")[71]

Similarly, Melissa Hickman Barlow observes in her study of the coverage given to race and crime in *Time* and *Newsweek* magazines that there was a "common tendency" in reports on civil rights events like the Little Rock crisis "to condemn those engaged in violence against Blacks, while at the same time intimating that the real victims [we]re those ['moderates'] not directly involved on either side of the struggles." In addition, "the white mobs, though clearly portrayed negatively and as in the wrong, were portrayed as mobs who [*sic*] were passionate about their segregationist cause, rather than as individual criminals."[72] Not surprisingly, then, in addition to the polls discussed earlier that evidenced the country's unenthusiastic embrace of *Brown* from the mid-1950s to early 1960s, a Gallup poll taken in May of 1959 found that 53 percent of Americans believed that the desegregation decision caused a lot more trouble than it was worth.[73]

"We Are Confronted Primarily with a Moral Issue"

Following the Eisenhower presidency, a changed political response to highly visible, violent racial events presented much more favorable circumstances for the improvement of *Brown's* reputation through the construction of media frames that would characterize segregation as a form of racial oppression. The actual or anticipated violence that greeted peaceful demonstrators in southern cities in 1963, as well as subsequent civil rights events, contributed to a significant shift in the tone and substance of presidential rhetoric—rhetoric that would echo the appeals to morality and patriotism of prominent activists, and was calculated to secure the passage of desegregation legislation. Such changes in presidential rhetoric acquired added force because of the example John F. Kennedy set of using television to communicate directly with the nation. Furthermore, as William Lunch observes, it was "during the Kennedy administration that the networks increased the length of their nightly news programs from fifteen minutes to half an hour," broadcasts that "focused on national politics and presented the president in the accepted context as the dominant, even commanding, figure in the national government."[74] All of these developments focused the nation's attention on the institutional manifestations of southern racism, and eventually inspired anti-segregation legislation that was of such moment that it eventually led southerners to abandon the New Deal coalition to the detriment of the Democratic party's dominant national alliance.

The impetus for this fundamental transformation of American politics was a loss of patience by civil rights advocates with the continued unwillingness of national politicians to press for meaningful change in race relations. The civil rights posture of the Kennedy administration proved distressingly familiar to civil rights groups. Emulating the Truman administration, Kennedy pursued a moderate civil rights policy in an effort to appeal to African-American voters without alienating southern segregationists.[75] Convinced that such caution was merely racial conservatism masquerading as political prudence, the Reverend Martin Luther King Jr. and the leaders of the Southern Christian Leadership Conference (SCLC) planned a series of demonstrations for May of 1963 in Birmingham, Alabama—generally regarded as the most segregated city in the South—with the intention of focusing the nation's

attention on the oppressiveness of segregation and forcing substantive legal reforms. There was certainly the potential for a public reckoning with the nature of segregation, as over 250 journalists from this country and around the world covered the event. The city's police commissioner, Eugene "Bull" Connor, who chose to respond violently when the SCLC staged its Children's Crusade, ensured that news viewers and readers across the country witnessed the club-wielding patrolmen, vicious police dogs, and high-pressure water hoses that he unleashed upon the peaceful, very youthful protesters.[76]

After Birmingham-inspired demonstrations spread to almost 180 cities (resulting in some 15,000 arrests nationwide) over a six-week period, President Kennedy concluded that the avoidance of widespread racial violence required national legislation to dismantle segregation.[77] On the occasion of Governor George Wallace's defiance of a federal court order to desegregate the University of Alabama, the president announced his initiative in a televised address, using rhetoric that acknowledged the oppressive nature of segregation and appealed to Americans in explicitly moral and patriotic terms. Racial equality, he declared, was not a "sectional," "partisan," or "even a legal or legislative issue alone." Rather, "[w]e are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution." Kennedy added: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons," "are not yet freed from social and economic oppression." The president reminded his national audience that "[t]oo many Negro children entering segregated grade schools at the time of the Supreme Court's [*Brown*] decision nine years ago will enter segregated high schools this fall, having suffered a loss which can never be restored."[78]

In sharp contrast to the confined rhetoric that Presidents Truman and Eisenhower used when discussing the matter of racial inequity, as Goldzwig and Dionisopoulos maintain in their study of Kennedy's civil rights discourse, the president sought to secure anti-segregation legislation by exploiting "the mythic moralist stance of the American Dream" and "serving as a sort of televangelist of American democratic ideals." In making "a conscious appeal to American morality" in his "deliberative and epideictic address," they contend, "Kennedy had made the long and difficult transition from 'principled bystander' to public advocate" for racial justice.[79]

To help ensure that the president would not allow his civil rights bill to die in Congress, Martin Luther King and other activists organized a "March on Washington" for August 28th, at which the civil rights leader would deliver his own anti-segregation appeal to the more than 200,000 people in attendance and to a national television audience.[80] King began his address—which would combine a moralistic message with strong patriotic themes—by connecting the contemporary demand for civil rights with the work of the "great American, in whose symbolic shadow we stand today, [who] signed the Emancipation Proclamation." Lamentably, King noted, "the Negro is still crippled by the manacles of segregation and the chains of discrimination" a century after Lincoln's historic act. He comforted his listeners with the hopeful affirmation, "I still have a dream," one that he said was "deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal." Concluding with a similar mixture of patriotic and religious references, he declared that when Americans "allow freedom to ring," they "will speed up the day when all of God's children—Black men and White men, Jews and Gentiles, Catholics and Protestants—will be able to join hands and to sing the words of the old Negro spiritual,

Peaceful protestor Walter Gadsden, age 17, was attacked by police dogs on May 3, 1963, in Birmingham during a civil rights protest. More than half the respondents of a Gallup poll that year identified racial problems as the most important issue facing the nation.

'Free at last, free at last; thank God Almighty, we are free at last.'"[81]

The moralistic anti-segregation messages of Kennedy and King were tragically reinforced, as was the connection between segregation and violence, through the contemporaneous creation of civil rights martyrs. The day after the president delivered his civil rights address, Medgar Evers, the NAACP's field secretary in Mississippi and a decorated veteran of the Second World War, was shot outside his home in Jackson. Not three weeks after King spoke of his dream for the nation, a bombing of the Sixteenth Street Baptist Church in Birmingham killed four young African-American girls who were waiting for the church service to begin. In June of 1964, three civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—disappeared after being arrested near Philadelphia, Mississippi. Their mutilated bodies would be found in early August.[82]

While President Kennedy's assassination on November 22, 1963, was not connected to the southern defense of segregation, his successor to the office of the presidency would portray him as a martyr for the cause of civil rights. In his address to a joint session of Congress five days after Kennedy's death, Lyndon B. Johnson declared that "no memorial, oration, or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long."[83] Around six weeks later, Johnson would echo the moralistic civil rights messages of Kennedy and King in his first State of the Union

address. After summarizing ambitious international and domestic agendas, with special emphasis given to the "war against poverty," the new president sought to "make one principle of this administration abundantly clear: All of these increased opportunities—in employment, in education, in housing, and in every field—must be open to Americans of every color." He insisted that "this is not merely an economic issue, or a social, political, or international issue. It is a moral issue."[84]

The marked shift in tone that Presidents Kennedy and Johnson employed was necessary but not sufficient to secure passage of the Civil Rights Act, since the stalwart opposition of southern Democrats was not the only obstacle to reform. Republican concerns over the proposed legislation were assuaged by presidential reassurances that thirty states (i.e., outside the South) were already in compliance with the bill's provision to end racial segregation in public accommodations (Title II), and by a legislative compromise that afforded private employers a credible level of protection against the employment discrimination provision (Title VII). Republicans did not regard Title VI's ban on federal funding of racially discriminatory programs (including segregated schooling) as much of a threat because the provision was understood to exclude the *de facto* segregation that characterized northern public schools, even though (as national officials would be advised in the very near future following widespread racial violence in urban areas of the North and West) *de facto* segregation was a consequence of racist housing and zoning policies.[85]

Following the defeat of a historic southern filibuster, the president signed the Civil Rights Act into law on July 2, 1964. In his comments marking the occasion, Johnson echoed themes from his earlier statements regarding the need for the law's protections. He stressed that it is not only the "principles of our freedom" and "[o]ur Constitution, the foundation of our Republic," that forbid the deprivation of those rights to millions of Americans; "[m]orality forbids it" as well. The president then introduced a new theme—that the Civil Rights Act reflected a national consensus. The legislation, he observed, "received the bipartisan support of more than two-thirds of the Members of both the House and the Senate," and the votes of an "overwhelming majority of Republicans as well as Democrats." Offering an olive branch to southerners, whose representatives were not part of that consensus, the president suggested that the law's "purpose is not to divide, but to end divisions." "Its purpose is national, not regional."[86] However, since the legislative consensus was achieved through an understanding that the bill focused on the *de jure* segregation of the South (and that was at issue in *Brown*), and did not include the *de facto* segregation that characterized other parts of the country, this effort to downplay the sectional emphasis of the measure was rather disingenuous.

The passage of the Civil Rights Act was followed by another legislative event that would further alienate southerners while contributing to more favorable circumstances for the improvement of *Brown's* reputation. The context surrounding this legal development would inspire moralistic presidential rhetoric intended, in this instance, to overcome the disenfranchisement of African Americans, which had served to maintain racial segregation. Although President Johnson was predisposed to favor legislation that would help compensate for the Democratic party's loss of southern White voters by restricting the ability of southern officials to institute racially discriminatory voting regulations, his cautiousness prompted civil rights advocates to pursue the same strategy that led to the Civil Rights Act.

Dallas County, Alabama, Sheriff Jim Clark accommodated the strategists' plans by inflicting highly visible, shocking brutality upon peaceful protestors who sought to

dramatize racial discrimination in southern voting by marching from Selma to Montgomery on March 7, 1965. The willingness of Alabamians to resort to extreme forms of violence in order to preserve White supremacy was on full display not only on what became known as "Bloody Sunday," but also with the notorious murders of civil rights activists Jimmie Lee Jackson, James Reeb, William Moore, and Viola Liuzzo.[87]

In response to large demonstrations in a number of cities, and to the sustained criticism of liberal politicians and civil rights leaders who were impatient with the president's temporizing, Johnson announced that he would introduce voting rights legislation to Congress. In a speech delivered to the members of both houses of that body and televised to some 70 million Americans, Johnson drew heavily upon the themes of patriotism and morality to make his point. He characterized the events "last week in Selma, Alabama," as "a turning point in man's unending search for freedom," as was the case "at Lexington and Concord." He noted that, in Selma, "long-suffering men and women peacefully protested the denial of their rights as Americans" but "were brutally assaulted." Invoking the martyred White Unitarian minister, James Reeb, the president lamented that "[o]ne good man, a man of God, was killed." Yet he identified "the American Negro" as the "real hero of this struggle," since "[h]is actions and protests, his courage to risk safety and even his life, have awakened the conscience of this nation" and "called upon us to make good the promise of America." Echoing the anthem of civil rights activists, Johnson proclaimed that "we shall overcome" the "crippling legacy of bigotry and injustice." Although he sought to assuage southern sensibilities by acknowledging that the scourge of racial oppression was a national rather than a regional phenomenon, he nevertheless assigned moral culpability to the South when he confessed: "[As] a man whose roots go deeply into Southern soil, I know how agonizing racial feelings are. I know how difficult it is to reshape the attitudes and structure of society."[88]

In his analysis of Johnson's voting rights address, Garth Pauley contends that the president both "repeated arguments that African American activists had long advanced" and "appropriated the discursive tactics and strategies" that these individuals employed. Specifically, Johnson enhanced his effort to "contextualize[] the current civil rights struggle as part of a larger, transhistorical struggle for the United States to fulfill its divine promise and to do God's will on earth" by "play[ing] the role of the nation's prophet/priest." The "tone of [the president's] voice, his speaking rate, and his vocal emphasis" enabled him to address his listeners in "the persona of a preacher; not that of a hellfire-and-brimstone evangelical, but rather the persona of a solemn minister."[89]

The minister to whom Johnson was most rhetorically indebted focused squarely on the southern version of racial oppression in a speech he delivered to some 30,000 people eighteen days after Bloody Sunday. The occasion for Martin Luther King's address was the completion of the march from Selma to Montgomery, made possible by the federalization of the National Guard of Alabama, among other forms of national support.[90] King declared that, "[i]n focusing the attention of the nation and the world today on the flagrant denial of the right to vote, we are exposing the very origin, the root cause, of racial segregation in the Southland." Rejecting the conventional view that Jim Crow "[came] about as a natural result of hatred between the races immediately after the Civil War," he drew upon "the noted historian, C. Vann Woodward," who "clearly points out [that] the segregation of the races was really a political stratagem employed by the emerging Bourbon [plantation and industrial] interests in the South." Segregation "told [the White worker] that no matter how bad off he was,

at least he was a White man, better than the Black man." But the system that cultivated this sense of racial superiority through the oppression of Blacks had a substantial economic drawback for working-class Whites, in that it enabled plantation and mill owners to use the threat of cheap Black labor to keep workers' wages artificially low. By securing "the free exercise of the ballot by the Negro," the protestors would bring an end to a form of economic injustice that transcended racial categories, as well as to an "evil" system of racial oppression. Combining his historical discussion with appeals to patriotism and morality, King reminded those before him of the individuals who made the ultimate sacrifice to "continue our triumphant march to the realization of the American dream." "[W]e must go on and be sure," he declared, that "Medgar Evers, three civil rights workers in Mississippi last summer, William Moore," "Reverend James Reeb, Jimmy Lee Jackson, and four little girls in the church of God in Birmingham on Sunday morning" "did not die in vain."[91]

While King would later become the most celebrated martyr for the cause of racial justice, he lived to witness the fulfillment of the voting rights campaign. Following the passage of the Voting Rights Act of 1965, he heard President Johnson remark in a national address: "It was only at Appomattox, a century ago, that an American victory was also a Negro victory. And the two rivers—one shining with promise, the other dark-stained with oppression—began to move toward one another." With the Voting Rights Act, "the Negro story and the American story fuse and blend." Indicating that the national consensus over voting rights did not include the South, he announced that his administration would commence lawsuits over poll taxes in Mississippi, Texas, Alabama, and Virginia, and would soon "designate many counties where past experience clearly shows that Federal action is necessary and required" to "register[] eligible men and women" to vote.[92]

Those residing in the targeted states took slight comfort in Johnson's reassurance that "there is always room for understanding toward those who see the old ways crumbling."[93] In fact, the Voting Rights Act accelerated the exodus of southerners from the Democratic Party, which had begun in earnest following the passage of the Civil Rights Act. As Richard Bensel notes, "[t]he 89th Congress (1965–66) marked the end of New Deal coalition effectiveness," because "the enactment of major civil rights legislation [by that body] destabilized the political hegemony of the plantation elite within the South and signaled a more or less explicit campaign to turn the Democratic party into a truly national working-class organization."[94]

Brown's Reputation Ascendant

There is considerable evidence that the pressure from civil rights demonstrations that prompted a shift in the manner in which Presidents Kennedy and Johnson spoke about and approached racial segregation served to increase the salience of the issue in the public's political evaluations. Television coverage vastly expanded the audience for civil rights protests beyond those who acquired their news from printed sources, and Johnson's demand that the networks make television time available to him without explanation ensured that the broader public was alerted to his framing of such events and of federal responses to them.[95] With regard to print media, the percentage of total coverage on civil rights demonstrations in *The New York Times* increased from less than one percent around the time of the Little Rock crisis to three percent for the mid-1960s, the years in which demonstrations occurred in Birmingham and Selma, among hundreds of other protest sites.[96] Relatedly, mentions of segregation in *Newsweek*, which totaled almost 100 in the year that the Court rendered *Brown*, increased to approximately 150 in the year of the Little Rock crisis,

and then to 221 in the year of the Birmingham and Birmingham-inspired demonstrations. *Newsweek's* segregation references remained above 100 per year until the late 1960s.[97]

The impact of this increased reportage was reflected in the percentage of Americans identifying racial problems or civil rights as the country's "most important problem." Following the Birmingham demonstration and the March on Washington in 1963, 52 percent of those who responded to a Gallup poll identified racial problems as the most important issue facing the nation, which was more than double the percentage attributed to the second-ranking issue, international problems.[98] The following year, racial strife was identified as the nation's most important problem by at least 40 percent of respondents in three of four polls, and was the highest-ranking issue in two of those polls.[99] In a 1965 poll taken shortly after Bloody Sunday, 52 percent of respondents identified civil rights as the country's most important issue. In four subsequent polls that year, 23, 27, 17, and 19 percent of respondents identified that same issue as the most important problem, with the issue ranking highest or tied for first in two of the polls, and second in the others.[100] Civil rights would remain somewhere around half its peak level as the most important problem until 1969.[101]

Evidence of the increased salience of racial segregation as a policy issue, of course, does not necessarily imply that the public was exposed to news reports that portrayed anti-segregation protestors as participants in a battle against racial oppression or White supremacy. As Richard Lentz observes, print media reports on the events that prompted the Democratic party's shift toward a meaningful civil rights agenda initially stressed to the public not the heroism of the peaceful protestors, but the threat to social order that demonstrations presented. With regard to Birmingham, *US News & World Report* depicted Martin Luther King "as a sinister and ruthless leader 'helping to mastermind the ... protests' and promising to escalate demonstrations in a city already suffering from violence." Both *Newsweek* and *Time* "shared a distaste for a confrontation that they believed was forced by King, as well as a misplaced confidence in the good will of southern moderates." The former publication "chose terms ... that bespoke invasion and militancy," while the latter identified King as "part of the problem because his 'drive inflamed tensions at a time when the city seemed to be making some progress, however small, in race relations.'" To be sure, reports of the event included descriptions of the brutality that Bull Connor unleashed on the Children's Crusade. However, these stories also took King to task for jeopardizing the safety of children.[102]

Following the March on Washington, two of these publications revised their assessments of King's leadership and his cause. Initially, Lentz notes, *Newsweek* was opposed to the event, "preferring a 'consensus of conscience' to demonstrations likely to cause resentment among congressmen." In a similar manner, *Time's* fear of "[t]he 'dangers of militancy' prompted the magazine to turn to [the gradualism of] Roy Wilkins and the NAACP in the weeks before the March." But the peaceful nature of an event of such scale and the patriotic themes of King's address inspired both magazines to portray "the March as a rite of national idealism." King's reputation improved "with *Time* because his oratory was 'catching, dramatic, inspirational,'" while *Newsweek* appreciated his invocation of the Declaration of Independence when he challenged America to "rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'" At the same time that these magazines revised their views of King, "[t]hey transformed ... Bull Connor from lame-duck buffoon to savage racist." Lentz concludes that "the power of King's oration [in Washington]

ultimately derived from the confluence of two antithetical symbols—the Birmingham of Bull Connor with its snarling police dogs and lashing fire hoses, and the March with its assemblage of Americans sharing King's dream of America made whole."[103]

Interestingly, both news magazines returned to the theme of social order at the outset of events in Selma. The initial reports from *Time* and *Newsweek* suggested that, once again, King was preparing an unnecessary confrontation, to the consternation of southern moderates. As was the case after the March on Washington, however, both magazines followed Bloody Sunday with revised assessments of the parties to the conflict. Recall that the events intervening between the violent confrontation and the media frame revision included a presidential address, as well as a speech by Reverend King to a throng of peaceful protestors. Lentz observes that "*Time* sought to prove that the cause in Selma was America's cause," and contended that "President Johnson's 'strong, yet measured words made it perfectly plain that the day was not far off when all American citizens would be equal in the polling place.'" *Newsweek* drew a contrast between "citizens exercising their fundamental right to protest the denial of another right that 'is supposed to be beyond debate [viz.] the right to vote'" and "[Sheriff] Clark's 'cavalry that mounted a Cossack charge into the scattering column,'" "'swinging billies, brandishing bullwhips, and chucking tear-gas grenades.'" With regard to Johnson's speech, the magazine pointed out that "'the first Southern president in a century' ... 'had ranked the bloodied ground of Selma...with Lexington and Concord and Appomattox among the great landmarks of the American quest for freedom.'"[104]

The magazines also acknowledged the sacrifices of James Reeb and Viola Liuzzo. *Time* suggested that, with the Reeb killing, "[t]he 'white racists in their blind ferocity' had created a new martyr whose murder ... caused 'telegraph wires across the country [to burn] with expressions of outrage,'" while the Liuzzo murder was an "'act of moronic savagery [that] once again outraged the national conscience.'" *Newsweek* commented that "the march—and the outraged reaction to Viola Liuzzo's death on the road from Selma—made plainer than ever the nation's expanding commitment to the right of oppressed people to protest their lot."[105]

An examination of egalitarian cues in *Newsweek* over time provides another indication of the impact that the political transformation of the mid-1960s and the attendant change in presidential rhetoric had upon the construction of print media frames inimical to benign characterizations of racial segregation and that linked desegregation efforts to the fight against White supremacy. As Paul Kellstedt explains, "*Newsweek* is framing an issue in egalitarian language whenever it reminds its readers about that strain of American beliefs which emphasizes the equal worth of all people." Egalitarian cues "have the effect of making a connection in the minds of the American public between a highly abstract value that most citizens believe in—equality—and a set of highly concrete circumstances in American politics—the political and social position of black Americans." During the mid-to-late 1950s, the "battles over desegregation in the South led to an abundance of egalitarian cues ... (including 219 in 1957 alone)." But the "heyday of egalitarian coverage ... was in the 1960s. In 1963, an astonishing 482 egalitarian cues were found in the magazine—an average of roughly nine per week." Civil rights protests over segregation and the related issue of Black disenfranchisement, and the responses to these matters by the Kennedy and Johnson administrations—which were "willing to engage in a very public discussion with Martin Luther King, Jr."—provided the context for the stories that contained these cues. The annual number of egalitarian cues

Before the 1963 March on Washington (pictured are marchers on Constitution Avenue), the media urged incrementalism and expressed concern that demonstrations and militancy might cause resentment among congressmen. But the scale and peaceful nature of the March inspired many news outlets to see it as a crucial moment of national idealism.

would fluctuate between 200 and 400 until the early 1970s.[106]

As with national news magazines, visual media framing of the nature of segregation and the goals of civil rights activists evidenced the impact of altered presidential rhetoric. Once Presidents Kennedy and Johnson "interpreted black nonviolent resistance in the face of violent opposition in moral terms using equalitarian ideals, the mainstream national news media adopted that interpretation."[107] John Chancellor of NBC News recalled that, for their reporting on the southern response to anti-segregation and voting rights demonstrations, "network journalists became famous in the North as champions of a just cause—and became infamous in the South, where by 1963 the networks were referred to as the African Broadcasting Company, the Negro Broadcasting Company, and the Colored Broadcasting Company."[108]

Polling data indicate that public opinion corresponded with the news magazines' negative framing of the tactics of the major civil rights protests of the mid-1960s.[109] But, consistent with the magazines' revised assessments of King's cause and leadership and with television framing of the demonstrations, Americans proved sympathetic to the goals of civil rights activists. Several months after the passage of the Civil Rights Act, a Gallup poll revealed that 58 percent of the public supported the legislation. And a Harris Poll conducted after Bloody Sunday and the speeches by President Johnson and Martin Luther King found that the public sided with the demonstrators over the state of Alabama by a margin of 48 percent to 21 percent, while a Gallup poll revealed that 76 percent of respondents favored Johnson's proposed voting rights legislation.[110]

NORC polling data acquired over the course of the Eisenhower, Kennedy, and Johnson administrations provide a sense of how the media's eventual construction of frames that characterized desegregation efforts as part of a battle against racial oppression affected white attitudes toward various forms of racial segregation. The percentage of Whites who approved of desegregated accommodations increased 15 points (73 percent to 88 percent) from 1963 (two years into the Kennedy presidency) to 1970 (one year after Johnson left office), while White acceptance of desegregated transportation increased 26 percentage points (62 percent to 88 percent) from 1956 (five years into the Eisenhower presidency) to 1970.[111]

With particular relevance to the *Brown* decision, the proportion of Whites who believed that White and Black students should attend the same schools increased 25 points (50 percent to 75 percent) from 1956 to 1970.[112] Recall that this indirect measure for *Brown's* merit is required since no polls on that matter were taken between 1961 and 1994. It is reasonable to assume that respondents' approval of desegregated schools would provide a fairly accurate reflection of their acceptance of the desegregation decision, since Gallup polls that measured approval of *Brown* (and consistently used a question that drew an explicit connection between the ruling and the matter of school segregation) were nearly equivalent to relatively contemporaneous percentages of Americans who favored the "same schools" for Black and White children.[113] Unlike the fluctuating nature of the polls on *Brown's* merit that were conducted in the years immediately following the decision, the four polls taken during the Kennedy and Johnson administrations evidenced a clear upward trend in White approval of desegregated schools (from 63 percent in 1963 to 71 percent in 1968).[114] Furthermore, the percentage of White Americans approving of desegregated schools indicted, indirectly at least, that *Brown's* reputation was approaching the level one would expect for an iconic Supreme Court ruling.

The 1967 Senate confirmation hearing of President Johnson's nomination of Thurgood Marshall to the Supreme Court affords another indirect but pertinent illustration of the increased status that the *Brown* decision had achieved in American political culture toward the end of the Johnson administration. The fact that "Southerners [on the Senate Judiciary Committee] would not even allude to *Brown* when they faced off against Marshall," even though he had been the NAACP's lead attorney when the case was argued before the Court, spoke volumes about the nation's changed perception of the nature of segregation and of the ruling that declared that institution unconstitutional.[115] Another example of *Brown's* improved reputation involved the deeply conservative Nixon Supreme Court nominee, William H. Rehnquist, who felt compelled during his 1971 confirmation hearing to send a reassuring letter to the chair of the Senate Judiciary Committee (after doubts were raised about Rehnquist's commitment to desegregation), in which he declared: "I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."[116]

In view of the likelihood that the change in the public's view of segregated schools was a function of the connection that Kennedy, Johnson, King, and the media drew between segregation and racial oppression, it is reasonable to assume, in conformity with Charles Black's 1960 thesis, that any change in *Brown's* reputation would have been a result of Americans coming to regard the decision as an attack upon a pernicious institutional manifestation of White supremacy.[117] This revision of *Brown's* meaning even began to make its way into contemporary constitutional scholarship. In 1968, Robert Bork, a critic of the living Constitution jurisprudence that informed *Brown* (among many

other Warren Court rulings), conceded that the decision "was surely correct."[118] Two years after Johnson left office, he echoed Black's theory regarding the constitutional *in*significance of the social science evidence that Chief Justice Warren invoked; in sharp contrast to earlier scholars who questioned *Brown's* legitimacy by challenging its sociological basis, Bork declared: "It has long been obvious that the case does not rest upon the grounds advanced in Chief Justice Warren's opinion, the specially harmful effects of enforced segregation upon black children."[119] While Bork struggled to provide an alternative justification for the ruling, another conservative jurist, J. Harvie Wilkinson, averred, in conformity with Black's reinterpretation of *Brown's* meaning, that the decision was "one of those last, great actions whose moral logic seemed so uncomplex and irrefutable," because the "opposition seemed so thoroughly extreme, rooted as it was in notions of racial hegemony and the constitutional premises of John C. Calhoun."[120]

White Backlash

Brown's status in American political culture would continue to increase after Johnson left office. Over the course of the Nixon and Ford presidencies, the proportion of Americans who favored Black and White children attending the same schools increased from 74 percent in 1970 to 85 percent in 1977. The latter figure approximates the 88 percent approval rating that *Brown* received in 1994.[121] Curiously, this increase occurred in spite of circumstances that were much less conducive to the construction of media frames favorable to the efforts of civil rights advocates.

The alteration of the landscape in which the civil rights movement operated began well before the presidential election of 1968. Five days after President Johnson signed the Voting Rights Act, devastating violence erupted in the almost-entirely Black, economically-depressed Watts section of Los Angeles. The Watts unrest, which was sparked by a confrontation between White police officers and Black youths, lasted nearly a week, and resulted in over thirty deaths, some 4,000 arrests, and tens of millions of dollars of damage from fire and vandalism. One object lesson of Watts—that spectacular forms of racial violence were not limited to the South—was reinforced over the next two years, as unrest occurred in, among other places, Chicago, Cincinnati, Newark, New Brunswick, and Detroit, as well as in Tampa and Atlanta.[122]

Post-mortem examinations of these instances of urban violence revealed causes that appeared more complex than the sources of southern racial oppression, and demanded forms of remediation even more expansive than those recently devised for the South. The National Advisory Commission on Civil Disorders (a.k.a. the Kerner Commission), which President Johnson established to analyze the violence that occurred in multiple cities during the summer of 1967, was unsparing in its assignment of blame: "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II," since "discrimination in employment and education" and the "enforced confinement [of Blacks] in segregated housing and schools" (i.e., the *de facto* segregation that was excluded from the purview of the Civil Rights Act of 1964) have deprived "great numbers of Negroes [of] the benefits of economic progress." Remedies commensurate with the scale of the problems identified would involve not only the prohibition of "residential segregation" and "the 'neighborhood school' policy, which transfers segregation from housing to education," but also "a commitment to national action—compassionate, massive and sustained, backed by the resources of the most powerful and the richest nation on this earth."[123]

The desperation evidenced in the urban violence of the late 1960s was

manifested as well in the splintering of the civil rights movement. After his twenty-seventh activism-related arrest, which occurred during the summer of 1966, Stokley Carmichael, the twenty-four-year-old head of the SNCC, began to call for "Black Power." This rallying cry represented a challenge to the leadership of Martin Luther King, as well as to White America. In Carmichael's view, King's moderation and tactic of nonviolence had made insufficient progress toward ending poverty and hunger, to say nothing of segregation. The meaning ascribed to Black Power by those attracted to the concept ranged from the achievement of self-respect, self-reliance, and pride in Black identity to the repudiation of King's dream of a racially integrated society.[124]

For his part, King feared that calls for Black Power would weaken the civil rights movement, while alienating Whites who might otherwise be sympathetic to the cause of racial justice. He remained convinced that justice would be achieved "by persons who have the courage to put an end to suffering by willingly suffering themselves rather than inflict suffering upon others."[125] And, in contrast to "the SNCC's recent conclusions," he had not "given up on integration" and "still believe[d] in Black and White together." King conceded, however, that the legislative accomplishments that were a consequence of the suffering endured at Birmingham and Selma were insufficient to address the complex problems of northern cities. He now called for "an economic bill of rights" that "would guarantee a job to all people who want to work and are able to work," and "an income for all who are not able to work."[126]

At the same time that the urban unrest of the late 1960s demonstrated the need for federal action that would eclipse the legislative response to southern racial injustice, it complicated efforts to fulfill the economic recommendations of the Kerner Commission and Martin Luther King. President Johnson had already linked the issue of race with his War on Poverty in a speech that he delivered at Howard University two months before the Watts violence. After suggesting that African Americans "are trapped—as many whites are trapped—in inherited, gate-less poverty," "lack training and skills," and "are shut in, in slums, without decent medical care," he stressed that "[w]e are trying to attack these evils through our poverty program, through our education program, through our medical care and our health programs, and a dozen more of the Great Society programs that are aimed at the root causes of this poverty."[127] After Reverend King championed economic rights following the outbreak of urban violence, print media framing established a linkage between race and poverty; prior to this point, journalists had treated these issues separately. As Paul Kellstedt observes, "in the middle to late 1960s, several major shifts in the tone of media coverage of race emphasized that blacks were disproportionately poor and disproportionately dependent on government assistance."[128] With urban violence occurring in spite of the War on Poverty, defenders of Johnson's anti-poverty initiatives, let alone proposals to address urban unrest with yet more federal funding, assumed an enormous burden of proof.

Televised reporting on urban violence compounded the burden of civil rights activists. In her study of visual media and the unrest in Watts, Elizabeth Wheeler notes that "the [television] journalists 'learn[ed]' only from the police, not from community members or other African American leaders." This approach to news gathering inspired stories in which the "Watts community becomes the outsider who confirms the consensus among police, TV, and imagined [White] audience" that the violence is properly conceptualized as "random criminal chaos" rather than "the logical outcome of White racism."[129]

National news magazines further undercut economic proposals to address racial violence when stories on urban unrest adopted the perspective of law enforcement officials

over that of civil rights advocates. Melissa Hickman Barlow points out that *Time's* cover story on the violence in Watts went so far as to place much of the blame for the devastation on failed Black leadership, while *Newsweek's* cover story on the challenges facing big city police departments acknowledged no distinction between Black political violence and the generic issue of crime. Rather than examine the economic deprivation and discrimination that King identified as the sources of Black rage, the article drew a contrast between police officers who "struggled to achieve middle-class status" and "the very different values of the slum." Both magazines continued to favor law enforcement accounts of urban violence in cover stories devoted to the summer unrest of 1967. *Newsweek* "described the situation that triggered the violence [in Detroit] as a 'trivial police incident'" and ascribed "partial blame [to] Black Power 'demagogues.'" *Time* likewise indicated that the unrest in Detroit was "sparked by routine police actions" and added that "the riots [were] unjustified because of the Great Society programs." The magazine's article on the turmoil in Newark suggested "that Blacks had nothing to complain about," and stressed that the violence "was often directed toward innocent white victims."[130]

The assassination of Martin Luther King in April of 1968 dealt a tremendous blow to efforts to respond to urban unrest through economic redistribution, as well as to the civil rights movement generally. The murder felled the most visible proponent of economic justice and prompted violence in more than 130 cities, resulting in forty-six deaths, thousands of injuries, over 20,000 arrests, and approximately $100 million in property damage.[131] National newsmagazines responded to King's death by leaving undisturbed the existing media narrative regarding the nature and causes of urban violence. Richard Lentz observes that *Time* and *Newsweek* dealt with the emphasis that King placed on the connection between racial and economic injustice by effectively ignoring the argument and substituting a "benign, reformist image of King." They presented King "as a heroic moderate opposed to [Black Power] extremists," and as a man whose contribution to the cause of racial justice "was essentially limited to his role as a prophet from the South, the man who had destroyed Jim Crow."[132]

The changed circumstances in which civil rights activists operated had negative consequences for public opinion as it pertained to matters relevant to their movement. By the late 1960s, increased anxiety over social disorder overtook concern for civil rights among the items identified as the country's "most important problem." In 1968, 29 percent of respondents to a Gallup poll identified "crime and lawlessness (includ[ing] riots, looting, [and] juvenile delinquency)" as the nation's most important issue, second only to the Vietnam war (52 percent) and ranked above concern for race relations (13 percent).[133] Relatedly, 47 percent of individuals who lived in large cities indicated that same year that "shooting is the best way" to deal with "anyone found looting stores during race riots." The preceding year, 76 percent of Whites who lived in large cities believed that "Negroes are treated the same as whites" in their community.[134] And, in a survey carried out for the Kerner Commission, only 19 percent of respondents to an open-ended question regarding the reasons for racial inequality in jobs, education, and housing identified racial discrimination as a primary cause, while "the largest proportion of answers attributed Black disadvantage to lack of motivation (for example, 'not trying')."[135]

Richard Nixon's 1968 presidential campaign exploited and reinforced the White backlash against the civil rights movement that urban unrest had inspired, and which, along with the increasing unpopularity of the Vietnam War, had convinced Johnson not to seek reelection.[136] Early that year, Nixon

"condemned the official Kerner Commission report on civil disorders for blaming 'everybody for the riots except the perpetrators of violence' and promised 'retaliation against the perpetrators' that would be 'swift and sure.'"[137]

Nixon returned to these themes in his acceptance speech at the Republican National Convention. "As we look at America," he began, "we see cities enveloped in smoke and flame. We hear sirens in the night." He then drew a sharp contrast between those responsible for "unprecedented lawlessness" and "unprecedented racial violence" and "the great majority of Americans, the forgotten Americans—the non-shouters, the non-demonstrators," who "are not racists or sick" and "are not guilty of the crime that plagues the land." Observing that "there is no quarrel between order and progress," he vowed to "re-establish freedom from fear in America." And "to those who say that law and order is the code word for racism," he emphasized that "[o]ur goal is justice for every American." He made clear, however, that racial justice and the War on Poverty (not to mention proposals for additional assistance to urban communities) were mutually exclusive. In spite of "hav[ing] been deluged by government programs for the unemployed, programs for the cities, programs for the poor," he asserted, "we have reaped from these programs an ugly harvest of frustration, violence and failure across the land."[138]

Although Nixon received less than one Black vote in ten, he prevailed in the general election over Hubert Humphrey, 301 electoral votes to 191. The remaining 46 votes were awarded to the third-party candidate, George Wallace, whose populist campaign and racial conservatism captured five states in the Deep South. This election revealed that, even though the South had not yet fully embraced the Republicans, the opposition of that region to the civil rights legislation of the mid-1960s portended the demise of the Democratic party's dominant national alliance.[139] As Hugh Davis Graham suggests, "the combined Nixon-Wallace [popular] vote in 1968 arguably represented a conservative majority of 57 percent," which "appears in retrospect to have displaced the Democrats as the 'normal' majority of American presidential contests."[140]

Preserving *Brown's* Status by Limiting Its Scope

At first glance, the White backlash that was so damaging to the aspirations of the civil rights movement in the late 1960s and that contributed to the election of Richard Nixon seems to have had few negative repercussions for the *Brown* decision. Indeed, NORC polls conducted in 1970 and 1972 revealed that the percentage of Americans who said they believed that White and Black students should attend the same schools increased 12 points—from 74 percent to 86 percent.[141]

Howard Schuman and his colleagues point us toward an explanation of this anomaly when they contend that "the data indicate that there [was] no longer an attempt by any significant number of Americans to justify segregation *in principle*, and that this evolution occurred steadily not only through the 1970s but indeed to the present day" (i.e., 1997). Schuman also observes that this "liberal leap" in opinion was in significant measure a southern phenomenon.[142]

Earl Black's study of segregation as a campaign issue in southern gubernatorial contests provides some insight into the regional opinion shift to which Schuman refers. Following *Brown's* legal challenge to the South's racial caste system, Black observes, "militant segregationists were elected governor of every southern state at some point." However, several variables—including social and economic trends like urbanization and industrialization, the decrease of the relative size of the Black population, and "such spectacular political

events as the *Brown* decision, the civil rights movement, the Civil Rights Act of 1964, and the Voting Rights Act of 1965"—reshaped "the milieu of southern electoral politics" by the 1970s. "In most Peripheral South campaigns the principle of racial segregation [became] a dead or dying issue," while "truculent demands for the preservation of racial segregation [were] replaced by more euphemistic language in the Deep South." In other words, agreement on the general principle of desegregation did not suggest a liberalization of views regarding what that principle implied in practice. Rather, the "considerable progress [that] ha[d] been made, in many states, toward eliminating or reducing the explicitness of the more blatant forms of race baiting" was offset by the fact that many White candidates "have found and will continue to find [less overt] ways to appeal to anti-[B]lack prejudices."[143]

Public opinion data regarding the pace of desegregation corroborate Earl Black's argument that the legacy of the civil rights movement did not extend much beyond the achievement of consensus on abstract principle and, relatedly, rendering explicit defenses of White supremacy politically unpalatable. The data also reveal that resistance to desegregation in practice was in no way limited to the South. For, in 1966, the year following the unrest in Watts, 52 percent of Whites outside the South indicated in a Gallup poll that the Johnson administration was "pushing integration too fast." That figure represented an increase of 18 percent from 1965, the year in which the Voting Rights Act became law and not so long after the passage of the Civil Rights Act of 1964.[144]

Additional evidence that resistance to desegregation efforts extended beyond the South is seen in Institute for Social Research (ISR) polls that allowed respondents who were asked about segregation in general to select the option "something in between" "strict segregation" or "desegregation." While the proportion of respondents selecting strict segregation decreased from 25 percent in 1963 to 11 percent in 1976, and the percentage favoring desegregation increased from 27 to 36 during that same period, "something in between" those options was overwhelmingly the public's preferred choice in those (and other) years (48 percent in 1963, and 53 percent in 1976). Schuman points out that "[b]eginning about 1970 [the desegregation] response showed a tradeoff with the vague middle response 'something in between,'" and that "*this effect occurred almost entirely in the North* and was especially pronounced among the college-educated."[145]

A 1970 Gallup poll that focused on public education indicated that 46 percent of White respondents thought that "the racial integration of schools in the United States is going too fast."[146] That same year, a Harris poll revealed that only 59 percent of Americans agreed with the statement that the "[i]ntegration of schools has been the law of the land since 1954 and it was about time to enforce the law."[147] Along the same lines, ISR polls indicated that support among Whites for federal intervention into public school desegregation decreased from 48 percent in 1966 to 21 percent ten years later. Providing context for this sizable shift in White opinion, Schuman avers that "[s]upport for federal desegregation efforts was high in the early [to mid-] 1960s, especially among more educated Northern Whites, because attention was focused on ending *de jure* segregation in the South. The media presented the federal effort as essential in the face of crude and often violent attempts by Southern Whites to circumvent decisions of the Supreme Court that required an end to enforced segregation of schooling." However, "Northern support began to erode at the beginning of the 1970s, when attention shifted to altering *de facto* segregation in the North, especially but not only through court-ordered busing."[148]

Contrary to the presumption of innocence that informed northern opposition to

In 1973 students in Charlotte, North Carolina, were bused to integrate schools. A 1970 Gallup poll indicated that 46 percent of White respondents thought that "the racial integration of schools in the United States is going too fast."

busing, *de facto* school segregation in the North, Midwest, and West was not the unintended consequence of the free choices of individuals. Rather, as Richard Rothstein explains (echoing the insights of the Kerner Commission), it was a function of public policies that effectively segregated every metropolitan area in the United States. Racial zoning ordinances, racist public housing programs, government enforcement of racially restrictive covenants, and the impact that racial discrimination in employment and the criminal justice system had on the incomes of African Americans all contributed to housing patterns that created racially homogeneous schools outside the South.[149]

Northern opposition to court-ordered busing as a remedy for *de facto* school segregation was preceded by southern resistance to the same remedy in cases of *de jure* segregation. Some federal judges in the South viewed busing as the only means by which they could satisfy the Supreme Court's 1968 directive in *Green v. County School Board of New Kent County*, which, in rejecting an ineffective "freedom of choice" school desegregation plan, required "a plan that promises realistically to work, and promises realistically to work *now*."[150] A district court judge's use of busing to desegregate the enormous 550-square mile Charlotte-Mecklenburg school system, in which Black students were concentrated in one quadrant of the city, was at issue in *Swann v. Charlotte-Mecklenburg Board of Education*. In this 1971 case, the Supreme Court held that "the remedial techniques used in the District Court's order were within that court's power to provide equitable relief," and that "implementation of the decree is well within the capacity of the school authority."[151]

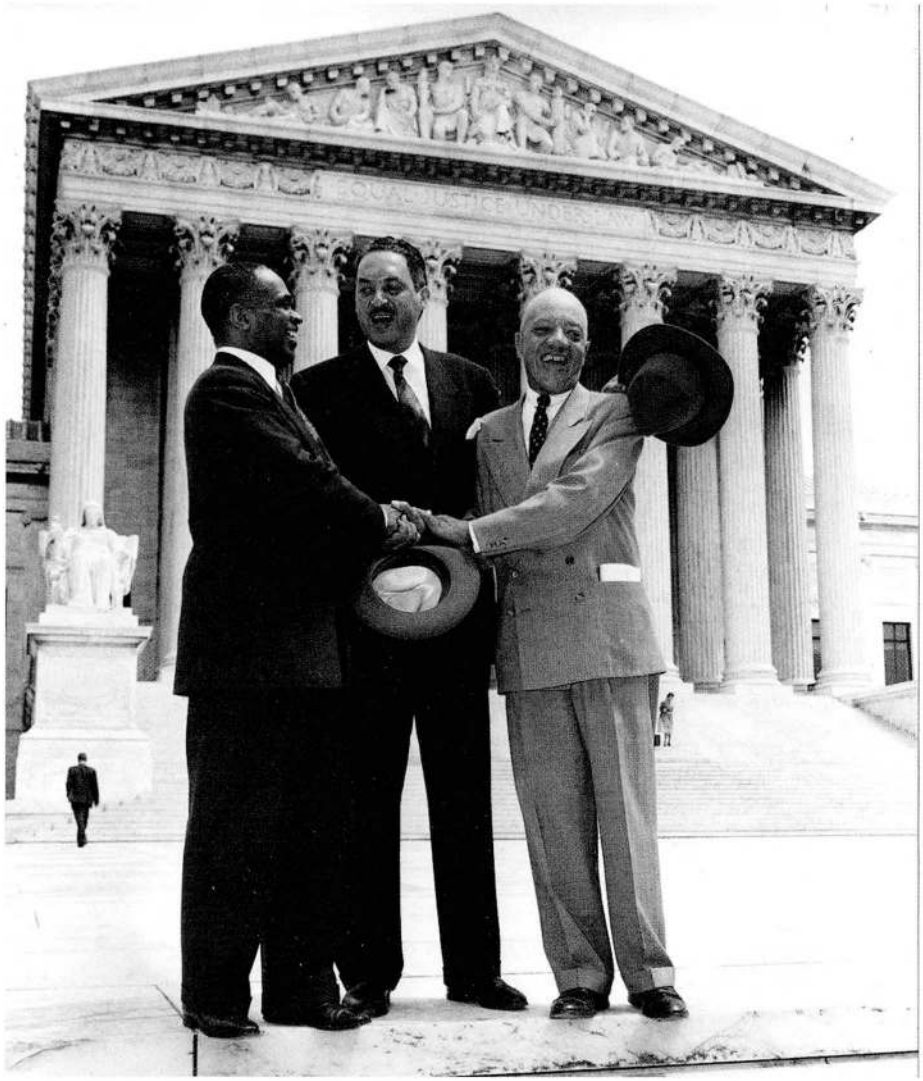
The salience of the busing issue and the likelihood that the Court's ruling in *Swann* would be controversial were revealed in a Gallup poll conducted the preceding year. An impressive 94 percent of the respondents indicated awareness of the busing issue, and 86 percent of those individuals said that they opposed this practice. While not providing specifics, the pollsters emphasized that "Southerners are most opposed to busing, but regional differences are not great."[152]

Richard Nixon would do his part to resist court-ordered busing, although—consistent with non-southern opinion, which was content to support desegregation efforts so long as they were restricted to the South—he was less concerned with preventing busing in cases of *de jure* segregation in the South than *de facto* segregation in the North. Not surprisingly, he did not always clarify this distinction in his public pronouncements on the matter.[153] The Nixon administration did not offer much resistance to busing in the Charlotte-Mecklenburg school system when the *Swann* case was argued before the Supreme Court, though the administration did allow that it "did not think 'the Fourteenth Amendment granted students an absolute right to attend school with children of other races.'"[154] After the Court approved the lower court's use of busing in *Swann*, Nixon stated that whatever he had "said that is inconsistent with the Supreme Court's decision is now moot and irrelevant," since "nobody, including the President of the United States, is above the law as it is finally determined by the Supreme Court of the United States." He added, however, that, since the Court "did not deal with the problem of *de facto* segregation as it exists in the North and perhaps as it may eventually exist in the South," he would "hold to [his] original position[] ... that [he did] not believe that busing to achieve racial balance is in the interests of better education."[155]

Nixon would speak again on busing as it pertained to *de facto* school segregation in the North when it became clear that the matter would be "the charged racial issue in [the presidential election of] 1972."[156] The matter came before the Supreme Court in *Keyes v. Denver School District No. 1*, the first non-southern school segregation case to which the justices gave plenary consideration.[157] With the case originally scheduled for oral argument in April (only to be delayed until the fall), Nixon gave a televised address in March in which he called upon Congress to adopt a moratorium on court-ordered busing. Although the moratorium did not become law, Matthew Delmont contends that Nixon "cemented his stature as the nation's most influential critic of school desegregation."[158] The president received positive reinforcement from a Gallup poll conducted shortly after his address, which revealed that 66 percent of the respondents favored his proposal, with just 25 percent opposed. An August Gallup poll, in which most respondents chose busing (along with welfare) when asked to identify the social issue that would be most important to them in determining their choice for president, indicated the political relevance of the issue.[159]

The ruling in *Keyes*—that district-wide busing is permissible if school administrators are found to have engaged in intentional racial discrimination toward one part of the district—came after Nixon comfortably won reelection. Public opinion ran decidedly against the Court in the year prior to and the years following the decision. In a 1972 ISR poll, only five percent of respondents favored busing children out of their own neighborhoods in order to achieve racial integration, as compared to 85 percent who were willing to sacrifice integration so as to keep children in their neighborhood schools. The percentage favoring out of neighborhood busing remained the same in polls conducted in 1974 and 1976, while the preference for neighborhood schools stayed above 80 percent.[160]

Such opinion polls suggest that busing would have been controversial even in the



(From left) Lawyers George E.C. Hayes, Thurgood Marshall, and James M. Nabrit Jr. celebrated their victory in *Brown* on the steps of the Supreme Court. However, in the years ahead, the Supreme Court would essentially decline to allow *Brown's* desegregation potential to expand to include regions of the country that were beyond the focus of the civil rights movement in the mid-1960s.

absence of the racial animosity that the urban unrest of the mid-1960s generated. As J. Harvie Wilkinson explains, busing to desegregate "presuppose[s] inconvenience: that schools nearer home be bypassed for schools farther away, if racial balance [is] thereby improved."[161] However, Kellstedt avers that the Black poverty and dependence stereotype that the print media perpetuated following the outbreak of urban violence in the mid-1960s was reinforced by stories in the early 1970s when the busing issue came to the fore, "with *Newsweek* making approximately one mention [of the stereotype] per issue over this time span."[162] Anxiety over imagined racial deficiencies was thus added to the matter of personal inconvenience when courts sought to desegregate schools by busing students.

In addition to print publication perpetuation of the poverty and dependence racial

stereotype, television framing of the busing issue reinforced White backlash against school desegregation efforts. Delmont observes that extensive national news coverage of desegregation efforts in Boston in the mid-1970s was "without regard for the history of school segregation that led to the court orders," since the reports failed to point out that *de facto* (like *de jure*) segregation was the result of intentional discriminatory public policies. Furthermore, "[u]nlike earlier civil rights struggles in the South, media coverage of Boston presented no specific black students—like Elizabeth Eckford and the Little Rock Nine ...-- whose rights seemed to be at stake." And, "[w]hile not overtly sympathetic to the white protestors, national television coverage legitimated the view that 'busing' was the problem in Boston," in part because media "framed the area's opposition ... as a product of protecting neighborhood traditions." The lack of context, combined with the media's fixation on the use of local or federal force to maintain peace, made governmental resort to "force seem like the first action in the 'busing' dispute, more immediate than the federal, state, and local policies that shaped residential and school segregation." As a result, the "visibility of the Boston 'busing crisis' made the city a cautionary tale for other cities that implemented court-ordered or voluntary 'busing' plans for school desegregation after 1974."[163]

In view of President Nixon's criticism of busing in the context of *de facto* school segregation, media framing that provided an incomplete and slanted treatment of the issue, and given the strong public sentiment against busing as a means of achieving desegregated schools, it is likely that, had the Court not altered its approach in this area of constitutional law, public approval of *Brown* would have been decidedly lower than the 88 percent rating the decision received in 1994. Much to the delight of the critics of busing—and to the benefit of *Brown's* reputation in American political culture—the four Nixon appointees to the Supreme Court helped bring desegregation jurisprudence into line with public opinion.

In 1974, Chief Justice Warren Burger and his colleagues Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist joined the Eisenhower appointee, Potter Stewart, to form a bare majority in the case *Milliken v. Bradley*, the last major desegregation decision of the Nixon administration, and the first case in which the Court did not accept a remedy that the NAACP sought.[164] *Milliken* involved the Detroit school system (then fifth largest in the nation), which had experienced a recent, significant growth in the proportion of African American students due to the exodus of Whites to the suburbs. The federal district court determined that the desegregation of a school district that was over 80 percent Black required the busing of students between Detroit and some of the surrounding suburban districts. Even though the lower court found that the Detroit school district had engaged in segregative practices, the Nixon administration's *amicus curiae* brief to the Court argued that any remedy should be confined to the city of Detroit.[165] Writing for the majority, and in conformity with the administration's position, Chief Justice Burger stated that suburban districts that had not caused or contributed to the violation could not be made part of the remedy without a "drastic expansion of the constitutional right itself, an expansion without support in either constitutional principle or precedent."[166]

In his dissent, Justice Thurgood Marshall (who had argued on behalf of the petitioners in *Brown* as a lawyer for the NAACP) lamented: "[By] allowing [White] flight to the suburbs to succeed, the Court today allows the State to profit from its own wrong and to perpetuate for years to come the separation of the races it achieved in the past by purposeful state action." He added: "Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the

Constitution's guarantee of equal justice than it is the product of neutral principles of law."[167] In support of his reading of public opinion, Marshall might have made reference to a 1972 NORC poll, which revealed that 87 percent of respondents expressed opposition to inter-district busing. It is also worth noting that 85 percent or more of respondents held that same opinion from 1974 to the end of the Ford presidency in 1977.[168]

As Kevin McMahon notes, "within the boundaries of *Milliken*, court-ordered busing would continue."[169] Yet while the Court allowed for inter-district busing if a constitutional violation within one district produces a significant segregative effect in another district, Gary Orfield observes that only "[i]n a handful of cases outside the South" did "federal courts [find] grounds to mandate city-suburban desegregation" after *Milliken*.[170] In short, the Supreme Court essentially declined to allow *Brown's* desegregation potential to expand to include regions of the country that were beyond the focus of the civil rights movement in the mid-1960s. The desegregation decision thus remained linked in the nation's collective conscience with the struggle to overcome the undisguised forms of White supremacy that were defended in the spectacularly violent manner of Bull Connor and Sheriff Jim Clark, this in spite of the fact that northern *de facto* segregation was no less morally problematic (although less obviously so) than southern *de jure* segregation. Ironically, then, the fulfillment of Charles Black's prediction regarding the eventual acceptance of *Brown's* legitimacy (although by a process that was more complicated than he anticipated) also marked the point at which the Court declared the ruling's irrelevance to minority children who lived outside of the South.

Conclusion

With regard to *Brown's* regional orientation, it should be emphasized that desegregation efforts in the South showed considerable promise following the passage of the Civil Rights Act of 1964. "Under President Johnson," Gary Orfield avers, "the federal government vigorously enforced desegregation. Federal rules and sanctions took hold in 1965, backed by cutoffs of federal aid to school districts and extensive litigation by Justice Department civil rights lawyers." The Supreme Court's desegregation rulings provided Justice Department lawyers and litigants seeking integrated classrooms with legal ammunition:

> [I]t was a simple matter to file motions or issue regulations to have a plan updated to the newer standards required by *Green* and *Swann*. After *Swann*, more than a hundred districts rapidly implemented new desegregation plans, imposing a move to districtwide orders for immediate and total desegregation of students, faculties, and transportation.[171]

As a consequence of the combined efforts of legislative, executive, and judicial officials, "[b]y 1970, the schools in the South, which had been almost totally segregated in the early 1960s, were far more desegregated than those in any other region." Thus, "[c]ivil rights advocates crushed by the *Milliken* defeat could at least celebrate the fact that millions of African American and Latino schoolchildren were enrolled in Southern school districts where desegregation was feasible and an increasingly accepted part of community life."[172]

This regional progress toward school desegregation would be short-lived, however. Orfield contends that the move toward political and judicial conservatism in the 1980s eventually "turned the nation from the dream of *Brown* toward accepting a return to segregation" in the South. "[N]ew resegregation policies [were] spelled out" in the Supreme Court's key desegregation

rulings of the early 1990s, decisions that "largely displace[d] the goal of rooting out the lingering damage of racial segregation and discrimination with the twin goals of minimizing judicial involvement in education and restoring power to local and state governments, whatever the consequences."[173] After these rulings, Orfield maintains, "the road to segregation seemed to be wide open."[174] And, in relatively short order, the "resegregation in the South" began "to challenge the high segregation levels of parts of the urban North."[175]

Notwithstanding the Supreme Court's conspicuous retreat from an understanding that the *Brown* decision implied something more than the prohibition of only the most overt manifestations of White supremacy, Orfield and Susan Eaton note that "conservatives and liberals alike still treat the 1954 ruling as a source of pride."[176] In this way, *Brown* now appears to serve the same function in American political culture that Martin Luther King came to play when, following his assassination, national news magazines reframed his image. To borrow Richard Lentz's words: "Shorn of [his economic] radicalism," "the centrists could once more honor King as a prophet. By so doing, they could honor America and themselves for what they had done, and for what they thought they had done, to liberate their Black countrymen."[177] Similarly, the 88 percent of Americans who indicated their approval of *Brown* four decades after the Court rendered the decision—and after a later Court had effectively negated the ruling's reformist potential—revealed that the decision functions as a particularly powerful element of our mythology of racial progress. Yet, with this country having reached another inflection point in its long, troubled history of race relations, it is comforting to reflect on an important lesson of this account of *Brown's* ascent to iconic status: that, with leadership compelled to respond to those who insisted that the nation live up to its promise of racial equality, Americans demonstrated a capacity to support Supreme Court rulings and political actions that secured meaningful (albeit, incomplete) progress toward the fulfillment of that goal.

Author's Note:
The author would like to thank the University of Tulsa for a sabbatical leave that facilitated the completion of this article.

ENDNOTES

[1] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954); Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue, and Gary Orfield, "Harming our Common Future: America's Segregated Schools 65 Years after *Brown*," The Civil Rights Project, Center for Education and Civil Rights, May 10, 2019, https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf.

[2] Robert H. Bork, **The Tempting of America: The Political Seduction of the Law** (New York: Touchstone, 1990), 77. For references to numerous scholarly works that praise the *Brown* decision, see Michael J. Klarman, "*Brown*, Racial Change, and the Civil Rights Movement," *Virginia Law Review* 80 (1994): 8 n.2. For a study of constitutional law casebooks that reveals *Brown's* canonical status in law school classrooms, see Jerry Goldman, "Is There a Canon of Constitutional Law?" *American Political Science Association Newsletter, Law and Courts Section of the American Political Science Association* (Spring 1993): 2–4. For a robust conception of a constitutional canon that accurately reflects *Brown's* status within the legal academy and in American political culture, see J. M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 970–76.

[3] Erica Frankenberg and Rebecca Jacobsen, "The Polls – Trends: School Integration Polls," *Public Opinion Quarterly* 75 (2011): 807; Joseph Carroll, "Race and Education 50 Years After *Brown v. Board of Education*," May 14, 2004, https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx;Jack M. Balkin, ed., **What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision** (New York: New York University Press, 2001), 4 (quoted).

[4] George H. Gallup, **The Gallup Poll: 1935–1971,** 3 vols. (New York: Random House, 1972) 3: 1723.

[5] Jeffrey D. Hockett, "The Battle Over *Brown's* Legitimacy," *Journal of Supreme Court History* 28 (2003): 30–41.

[6] Gerald N. Rosenberg, **The Hollow Hope: Can Courts Bring About Social Change?**, 2nd ed. (Chicago: University of Chicago Press, 2008), 39–40.

[7] James L. Gibson and Gregory A. Caldeira, "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court," *Journal of Politics* 71 (2009): 429–41.

[8] Herbert H. Hyman and Paul B. Sheatsley, "Attitudes Toward Desegregation," *Scientific American* 195 (1956): 35–36.

[9] Balkin and Levinson, "The Canons of Constitutional Law," 1014–18, 1021–22.

[10] In support of the contention that segregation "generates a feeling of inferiority [in Black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," Chief Justice Earl Warren said: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." At this point, Warren attached a footnote that included references to a number of social science studies. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494 n.11 (1954).

[11] Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York: Oxford University Press, 2004), vii.

[12] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494 n.11 (1954). To demonstrate the inherent inequality of educational segregation, the NAACP's lawyers referred to social science studies that purportedly revealed the psychological harm that segregation inflicted upon Black children. And, to demonstrate that educational segregation had no basis in reason, the association referred to social science studies that attributed differences in the educational performances of racial groups to environmental causes, and that documented peaceable integration efforts in a number of social contexts. See Brief for Appellants, *Brown v. Board of Education of Topeka, Kansas*, 1952, 6–10, Papers of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (hereafter cited as NAACP Papers), Box II-B-138; Appendix to Appellants' Briefs, *Brown v. Board of Education of Topeka, Kansas*, *Briggs v. Elliott*, and *Davis v. County School Board of Prince Edward County, Virginia*, 1952, 3–10, 12–16, NAACP Papers, Box II-B-138.

[13] James Reston, "A Sociological Decision," *New York Times*, 18 May 1954, Late City edition.

[14] As quoted in Paul L. Rosen, **The Supreme Court and Social Science** (Urbana: University of Illinois Press, 1972), 174–75.

[15] Congressional Record, Senate, vol. 102, Part 4, p. 4515, March 12, 1956. For the arguments of the lawyers for the defendant school boards regarding the intentions informing the equal protection clause of the Fourteenth Amendment, see Leon Friedman, ed., **Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952–55** (New York: Chelsea House, 1969), 207–13.

[16] Congressional Record, Senate, vol. 102, Part 4, p. 4515, March 12, 1956. For the public order defense of segregation that the lawyers for the school boards championed in *Brown*, see Friedman, ed., **Argument,** 59–60, 93.

[17] Hyman and Sheatsley, "Attitudes Toward Desegregation," 35–36, 38–39.

[18] Gallup, **The Gallup Poll,** 2: 1249, 1250, 1332–33; Julie Ray, "Reflections on the 'Trouble in Little Rock,' Part II," March 4, 2003, https://news.gallup.com/poll/7900/reflections-trouble-little-rock-part.aspx. The wording of the poll was as follows: "The United States Supreme Court has ruled that racial segregation in the public schools is illegal. This means that all children, no matter what their race, must be allowed to go to the same schools. Do you approve or disapprove of the decision?"

[19] Charles L. Black, "The Lawfulness of the Segregation Decisions," *Yale Law Journal* 69 (1960): 421–29. For a summary of the scholarly controversy over *Brown's* jurisprudential merit, see Laura Kalman, **The Strange Career of Legal Liberalism** (New Haven: Yale University Press, 1996), 22–42.

[20] Black, "The Lawfulness of the Segregation Decisions," 421, 424. For the petitioners' effort to link segregation to White supremacy, see Brief for Appellants in *Brown v. Board of Education of Topeka, Briggs v. Elliott, Davis v. County School Board of Prince Edwards [sic] County*, and for Respondents in *Gebhart v. Belton* on Reargument, 1953, 50–64, NAACP Papers, Box II-B-142.

[21] Black, "The Lawfulness of the Segregation Decisions," 424–25.

[22] *Ibid.*, 425.

[23] *Id.*, 428, 430, 430 n.25. There is evidence to suggest that several of the justices involved in *Brown* did, in fact, regard segregation as a form of racial oppression. See Jeffrey D. Hockett, **A Storm Over This Court: Law, Politics, and Supreme Court Decision Making in Brown v. Board of Education** (Charlottesville: University of Virginia Press, 2013), 92–126.

[24] Black, "The Lawfulness of the Segregation Decisions," 427.

[25] John A. Salmond, **"My Mind Set on Freedom": A History of the Civil Rights Movement, 1954–1968** (Chicago: Ivan R. Dee, 1997), 23; Azza Salama Layton, **International Politics and Civil Rights Policies in the United States, 1941–1960** (Cambridge: Cambridge University Press, 2000), 164 n.90; Azza Salama Layton,

"International Pressure and the U.S. Government's Response to Little Rock," *Arkansas Historical Quarterly* 56 (1997): 259.

[26] Layton, **International Politics and Civil Rights Policies in the United States,** 118—21 (United States Information Agency report quoted on p. 118); Layton, "International Pressure and the U.S. Government's Response to Little Rock," 260; Klarman, **From Jim Crow to Civil Rights,** 258, 390, 423; J. W. Peltason, **58 Lonely Men: Southern Federal Judges and School Desegregation** (Chicago: University of Illinois Press, 1971), 138–42.

[27] 358 U.S. 1 (1958).

[28] Layton, "International Pressure and the U.S. Government's Response to Little Rock," 260–261; Peltason, **58 Lonely Men,** 161–78.

[29] Julie Ray, "Reflections on the 'Trouble in Little Rock,'" February 25, 2003, https://news.gallup.com/poll/7867/reflections-trouble-little-rock.aspx; Steven R. Goldzwig and George N. Dionisopoulos, "Crisis at Little Rock: Eisenhower, History, and Mediated Political Realities," in **Eisenhower's War of Words: Rhetoric and Leadership,** ed. Martin J. Medhurst (East Lansing: Michigan State University Press, 1994), 203–06.

[30] Layton, "International Pressure and the U.S. Government's Response to Little Rock," 260–63 (pp. 260, 261 quoted); Layton, **International Politics and Civil Rights Policies in the United States,** 122–31.

[31] *Cooper v. Aaron*, 358 U.S. 1, 16 (1958); Mary L. Dudziak, "The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy," *Southern California Law Review* 70 (1997): 1703–12; Mary L. Dudziak, **Cold War Civil Rights: Race and the Image of American Democracy** (Princeton: Princeton University Press, 2000), 145–51.

[32] David R. Goldfield, **Black, White, and Southern: Race Relations and Southern Culture, 1940 to the Present** (Baton Rouge: Louisiana State University Press, 1990), 119–20; John Hope Franklin and Alfred A. Moss Jr., **From Slavery to Freedom: A History of African Americans,** 7th ed. (New York: Alfred A. Knopf, 1994), 495–96.

[33] *Morgan v. Virginia*, 328 U.S. 373 (1946); *Boynton v. Virginia*, 364 U.S. 454 (1960).

[34] Goldfield, **Black, White, and Southern,** 124–30 (James Farmer quoted on p.124); Klarman, **From Jim Crow to Civil Rights,** 373–74, 379, 431–32.

[35] Gallup, **The Gallup Poll,** 2: 1018, 1225–26, 1345, 1376, 1447–48, 1451–52.

[36] *Ibid.*, 1523; Tom W. Smith, "America's Most Important Problem – A Trend Analysis, 1946—1976," *Public Opinion Quarterly* 44 (1980): 170–71; Rosenberg, **The Hollow Hope,** 129–30.

[37] Gallup, **The Gallup Poll,** 2: 1539, 1545–46, 1570; *ibid.*, 3: 1595–96, 1610–11, 1632–33, 1656–57.

[38] *Ibid.*, 3: 1723.

[39] See above, note 18, and accompanying text.

[40] Gallup, **The Gallup Poll,** 2: 1465, 1507, 1518; ibid., 3: 1616; Julie Ray, "Reflections on the 'Trouble in Little Rock,' Part II," March 4, 2003, https://news.gallup.com/poll/7900/reflections-trouble-little-rock-part.aspx.

[41] Dudziak, "The Little Rock Crisis and Foreign Affairs," 1716 n.387.

[42] Mary L. Dudziak, "Desegregation as a Cold War Imperative," *Stanford Law Review* 41 (1988): 85; Layton, "International Pressure and the U.S. Government's Response to Little Rock," 262–63, 267.

[43] Dudziak, "Desegregation as a Cold War Imperative," 88–90 (U.S. embassy communication quoted on pp. 89-90); Dudziak, **Cold War Civil Rights,** 121–23; Dudziak, "The Little Rock Crisis and Foreign Affairs," 1691.

[44] Layton, "International Pressure and the U.S. Government's Response to Little Rock," 264–65; Dudziak, "Desegregation as a Cold War Imperative," 86.

[45] As quoted in Dudziak, "The Little Rock Crisis and Foreign Affairs," 1695–96.

[46] Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, **Racial Attitudes in America: Trends and Interpretations,** rev. ed. (Cambridge: Harvard University Press, 1997), 196–237.

[47] William A. Gamson and A. Modigliani, "The Changing Culture of Affirmative Action," in **Research in Political Sociology,** vol. 3, ed. Richard D. Braungart (Greenwich, CT: JAI Press, 1987), 143.

[48] Donald R. Kinder and Lynn M. Sanders, **Divided by Color: Racial Politics and Democratic Ideals** (Chicago: University of Chicago Press, 1996), 163–65.

[49] Paul M. Kellstedt, **The Mass Media and the Dynamics of American Racial Attitudes** (Cambridge: Cambridge University Press, 2003), 133.

[50] Sidney M. Milkis, **The President and the Parties: The Transformation of the American Party System Since the New Deal** (Oxford: Oxford University Press, 1993), 150–51.

[51] Jeffrey K. Tulis, **The Rhetorical Presidency** (Princeton: Princeton University Press, 2016), 4, 95, 203.

[52] William C. Berman, **The Politics of Civil Rights in the Truman Administration** (Columbus: Ohio State University Press, 1970), 74–75, 83–84, 117–18, 157–58, 172–73; Donald R. McCoy and Richard T. Reutten, **Quest and Response: Minority Rights and the Truman Administration** (Lawrence: University Press of Kansas, 1973), 99–101, 116–17, 129–30, 178–80, 211–12, 218–19, 340–43.

[53] Goldfield, **Black, White, and Southern,** 54; Berman, **The Politics of Civil Rights in the Truman Administration,** 157–78; Monroe Lee Billington, **The Political**

South in the Twentieth Century (New York: Scribner, 1975), 64–68.

[54] Richard Franklin Bensel, **Sectionalism and American Political Development: 1880–1980** (Madison: University of Wisconsin Press, 1984), 152–53, 233, 371–73, 403–05 (pp. 372–73 quoted).

[55] As quoted in Berman, **The Politics of Civil Rights in the Truman Administration,** 83–84. For other examples of Truman's moderate civil rights rhetoric, see *ibid.*, 61–63, 120–21, 126–27, 140, 164, 167, 184, 191, 194–95, 206–07, 235.

[56] *Ibid.*, 85.

[57] Comments on Draft of President's Message on Civil Rights, January 30, 1948, Harry S. Truman Presidential Library and Museum, https://www.trumanlibrary.gov/library/research-files/comments-draft-presidents-message-civil-rights.

[58] Gallup, **The Gallup Poll,** 2: 782–83.

[59] The portion of non-southerners who thought that the federal government "should go ["all" or "part of the way"] in requiring employers to hire people without regard to their race, religion, color, or nationality," did not rise above 42 percent. Similarly, only a slight majority of non-southerners—55 percent—thought "Negroes...should not be required to occupy a separate part of a train or bus when traveling from one state to another." *Ibid.*, 810. This poll did not contain a question regarding lynching.

[60] Robert Frederick Burk, **The Eisenhower Administration and Black Civil Rights** (Knoxville: University of Tennessee Press, 1984), 15, 27, 46, 69, 92, 133, 205; McCoy and Reutten, **Quest and Response,** 331; Berman, **The Politics of Civil Rights in the Truman Administration,** 204–05, 221, 230–31; Milkis, **The President and the Parties,** 164.

[61] For a scholarly inquiry regarding Eisenhower's supposed "hidden-hand" approach to civil rights, see Fred Greenstein, **The Hidden-Hand Presidency: Eisenhower as Leader** (New York: Basic Books, 1982).

[62] Klarman, **From Jim Crow to Civil Rights,** 324–25; Michael S. Mayer, "With Much Deliberation and Some Speed: Eisenhower and the *Brown* Decision," *Journal of Southern History* 52 (1986): 75; Earl Warren, **The Memoirs of Earl Warren** (Garden City, NY: Doubleday, 1977), 291.

[63] William M. Lunch, **The Nationalization of American Politics** (Berkeley: University of California Press, 1987), 78; Thomas C. Leonard, "Antislavery, Civil Rights, and Incendiary Material," in **Media and Revolution: Comparative Perspectives,** ed. Jeremy D. Popkin Jr. (Lexington: University Press of Kentucky, 1995), 125–26.

[64] Sasha Torres, **Black, White, and in Color: Television and Black Civil Rights** (Princeton: Princeton University Press, 2003), 19.

[65] Klarman, **From Jim Crow to Civil Rights,** 324.

[66] Peltason, **58 Lonely Men,** 46–50 (Eisenhower quoted on pp. 46–47); Goldzwig and Dionisopoulos, "Crisis at Little Rock," 202–03, 212.

[67] Dwight D. Eisenhower, "Address to the Nation on Desegregation in Little Rock, Arkansas," September 24, 1957, https://www.americanrhetoric.com/speeches/dwighteisenhowerlittlerock.htm.

[68] Goldzwig and Dionisopoulos, "Crisis at Little Rock," 209, 213.

[69] Stephanie Greco Larson, **Media and Minorities: The Politics of Race in News and Entertainment** (New York: Rowman and Littlefield, 2006), 166–67.

[70] Richard Lentz, **Symbols, the News Magazines, and Martin Luther King** (Baton Rouge: Louisiana State University Press, 1990), 52–53.

[71] Gallup, **The Gallup Poll,** 3: 1723.

[72] Melissa Hickman Barlow, "Race and the Problem of Crime in *Time* and *Newsweek* Cover Stories, 1946 to 1995," *Social Justice* 25 (1998): 157–58; Larson, **Media and Minorities,** 164–65.

[73] Joseph Carroll, "Race and Education 50 Years After *Brown v. Board of Education*," May 14, 2004, https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx.

[74] Lunch, **The Nationalization of American Politics,** 78; Michael J. Robinson, "Television and American Politics: 1956–1976," *The Public Interest* (Summer 1977): 10–11.

[75] Hugh Davis Graham, **Civil Rights and the Presidency: Race and Gender in American Politics, 1960–1972** (New York: Oxford University Press, 1992), 25–45; Steven R. Goldzwig and George N. Dionisopoulos, "John F. Kennedy's Civil Rights Discourse: The Evolution from 'Principled Bystander' to Public Advocate," *Communication Monographs* 56 (1989): 181–82.

[76] Nick Kotz, **Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws that Changed America** (New York: Houghton Mifflin, 2005), 55–59; Lentz, **Symbols, the News Magazines, and Martin Luther King,** 84; Goldzwig and Dionisopoulos, "John F. Kennedy's Civil Rights Discourse," 188–90.

[77] Kotz, **Judgment Days,** 13–14, 43, 59, 66–67, 106–07; Graham, **Civil Rights and the Presidency,** 53–54.

[78] John F. Kennedy, "Civil Rights Address," June 11, 1963, https://www.americanrhetoric.com/speeches/jfkcivilrights.htm; Goldfield, **Black, White, and Southern,** 114–17.

[79] Goldzwig and Dionisopoulos, "John F. Kennedy's Civil Rights Discourse," 191, 193–94.

[80] Kotz, **Judgment Days,** 61–64.

[81] Martin Luther King Jr., "I Have a Dream," in **The Essential Writings and Speeches of Martin Luther**

King Jr., ed. James M. Washington (New York: Harper Collins, 1986), 217–20; Larson, **Media and Minorities,** 171.

[82] Kotz, **Judgment Days,** 62, 65; Klarman, **From Jim Crow to Civil Rights,** 437–39; Graham, **Civil Rights and the Presidency,** 87.

[83] Lyndon B. Johnson, "Address to Joint Session of Congress," November 27, 1963, https://millercenter.org/the-presidency/presidential-speeches/november-27-1963-address-joint-session-congress; Graham, **Civil Rights and the Presidency,** 73–74; Kotz, **Judgment Days,** 32–34; Milkis, **The President and the Parties,** 170–72, 176–77, 196–97.

[84] Lyndon B. Johnson, "State of the Union," January 8, 1964, https://millercenter.org/the-presidency/presidential-speeches/january-8-1964-state-union; Kotz, **Judgment Days,** 61

[85] Graham, **Civil Rights and the Presidency,** 54–57, 63–83; Kotz, **Judgment Days,** 136–41; Gavin Wright, "The Regional Impact of the Civil Rights Act of 1964," *Boston University Law Review* 95 (2015): 760.

[86] Lyndon B. Johnson, "Remarks upon Signing the Civil Rights Bill," July 2, 1964, https://millercenter.org/the-presidency/presidential-speeches/july-2-1964-remarks-upon-signing-civil-rights-bill; Graham, **Civil Rights and the Presidency**, 77, 86.

[87] Kotz, **Judgment Days,** 251, 254–58, 262–85, 296, 325; Graham, **Civil Rights and the Presidency**, 90–93; Garth E. Pauley, "Rhetoric and Timeliness: An Analysis of Lyndon B. Johnson's Voting Rights Address," *Western Journal of Communication* 62 (1998): 30–34; Lyndon B. Johnson, "Statement on Arrests in Violo Liuzzo Murder," March 26, 1965, https://millercenter.org/the-presidency/presidential-speeches/march-26-1965-statement-arrests-violo-liuzzo-murder.

[88] Lyndon B. Johnson, "Speech before Congress on Voting Rights," March 15, 1965, https://millercenter.org/the-presidency/presidential-speeches/march-15-1965-speech-congress-voting-rights; Kotz, **Judgment Days,** 298–314; Lentz, **Symbols, the News Magazines, and Martin Luther King,** 143–44.

[89] Pauley, "Rhetoric and Timeliness," 40–42.

[90] Kotz, **Judgment Days,** 320–25.

[91] Martin Luther King Jr., "Our God Is Marching On!" March 25, 1965, https://kinginstitute.stanford.edu/our-god-marching; C. Vann Woodward, **The Strange Career of Jim Crow,** 3rd rev. ed. (New York: Oxford University Press, 1974).

[92] Lyndon B. Johnson, "Remarks on the Signing of the Voting Rights Act," August 6, 1965, https://millercenter.org/the-presidency/presidential-speeches/august-6-1965-remarks-signing-voting-rights-act; Graham, **Civil Rights and the Presidency**, 93–98; Kotz, **Judgment Days,** 328–31, 336–37.

[93] *Ibid.*

[94] Bensel, **Sectionalism and American Political Development,** 405.

[95] Robinson, "Television and American Politics," 15–16; Lunch, **The Nationalization of American Politics**, 78.

[96] Kinder and Sanders, **Divided by Color,** 98–99.

[97] Kellstedt, **The Mass Media and the Dynamics of American Racial Attitudes,** 35–36.

[98] Gallup, **The Gallup Poll,** 3: 1842.

[99] *Ibid.*, 1881, 1894, 1898, 1905.

[100] *Id.*, 1934, 1944, 1966, 1973, 1979; Kinder and Sanders, **Divided by Color,** 101–02.

[101] Smith, "America's Most Important Problem," 170–71; Kinder and Sanders, **Divided by Color,** 101–02.

[102] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 75–88; Larson, **Media and Minorities,** 170.

[103] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 99, 102, 104, 107 (quoting Martin Luther King Jr.), 109, 111–12; Larson, **Media and Minorities,** 171.

[104] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 145–46, 153–55, 161; Larson, **Media and Minorities,** 172–73.

[105] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 154, 162 (quoting *Newsweek*), 164.

[106] Kellstedt, **The Mass Media and the Dynamics of American Racial Attitudes,** 34–38.

[107] Larson, **Media and Minorities,** 161.

[108] Torres, **Black, White, and in Color,** 22–23 (quoting John Chancellor); Robinson, "Television and American Politics," 12.

[109] Like *Time* and *Newsweek*, the public objected to mass demonstrations organized to do away with segregation and to secure voting rights. See Gallup, **The Gallup Poll**, 3: 1828–29, 1836, 1884; and Paul Rosenberg, "Think Black Lives Matter Is 'Divisive'? The Civil Rights Movement Split the U.S. Far More," July 20, 2016, https://www.salon.com/2016/07/20/think_black_lives_matter_is_divisive_the_civil_rights_movement_split_the_u_s_far_more/.

[110] Andrew Kohut, "50 Years Ago: Mixed Views about Civil Rights but Support for Selma Demonstrators," March 5, 2015, https://www.pewresearch.org/fact-tank/2020/01/16/50-years-ago-mixed-views-about-civil-rights-but-support-for-selma-demonstrators/; Gallup, **The Gallup Poll**, 3: 1933.

[111] Schuman et al., **Racial Attitudes in America: Trends and Interpretations,** 103–05.

[112] *Ibid.*; Frankenberg and Jacobsen, "The Polls – Trends: School Integration Polls," 790–91.

[113] The percentage of Americans that favored Black and White children attending the same schools in a 1963 NORC Poll (65 percent) was nearly equivalent to the percentage that approved of *Brown* in a 1961 Gallup Poll (63 percent). Furthermore, the percentage of Americans

favoring "same schools" in a 1995 PSRA/Newsweek Poll (92 percent) corresponded closely to the percentage approving of *Brown* in a 1994 Gallup/CNN/USA Today Poll (88 percent). Frankenberg and Jacobsen, "The Polls – Trends: School Integration Polls," 790, 807.

[114] *Ibid.*, 790.

[115] Laura Kalman, **The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court** (Oxford: Oxford University Press, 2017), 103.

[116] As quoted in *ibid.*, 302. Brad Snyder contends that "*Brown's* exalted status in the constitutional canon was ultimately the work of conservatives," and that William H. Rehnquist "began the widespread endorsement of *Brown* by conservatives" during his 1971 Senate confirmation hearings. Brad Snyder, "How the Conservatives Canonized *Brown v. Board of Education*," *Rutgers Law Review* 52 (2000): 383, 449, 493. In contrast to Snyder, I argue that conservative acceptance of *Brown's* constitutional legitimacy was a *consequence* rather than a *cause* of *Brown's* canonical status. In other words, by the time of the Rehnquist confirmation hearings, statements of approval from conservatives represented a recognition of an established fact of American political culture rather than the conferral of a necessary element of legitimacy.

[117] See above, notes 19–24, and accompanying text.

[118] Robert H. Bork, "The Supreme Court Needs a New Philosophy," *Fortune* (December 1968): 138, 141, 166.

[119] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 13.

[120] J. Harvie Wilkinson III, **Serving Justice: A Supreme Court Clerk's View** (New York: Charterhouse, 1974), 133. That Bork's effort to justify *Brown* (despite its avoidance of the social sciences) remained all-too-reminiscent of the living Constitution concept that he sought to dissociate from the ruling does not negate the point that he felt compelled to attempt to legitimize a ruling that living Constitution critics had theretofore regarded as irredeemable. See Bork, "Neutral Principles and Some First Amendment Problems," 13–15.

[121] Frankenberg and Jacobsen, "The Polls – Trends: School Integration Polls," 790, 807.

[122] Graham, **Civil Rights and the Presidency,** 99; Kotz, **Judgment Days,** 338–39, 365, 380–81, 389; Kinder and Sanders, **Divided by Color**, 102–03; **Report of the National Advisory Commission on Civil Disorders** (New York: Bantam Books, 1968), 1–108.

[123] **Report of the National Advisory Commission on Civil Disorders,** 1–2, 203, 426; Kotz, **Judgment Days,** 381, 392, 409, 427.

[124] Kotz, **Judgment Days,** 360–63; Graham, **Civil Rights and the Presidency,** 100; Schuman et al., **Racial Attitudes in America**, 33–34.

[125] Martin Luther King Jr., "Nonviolence: The Only Road to Freedom," in **The Essential Writings and Speeches of Martin Luther King Jr.**, ed. James M. Washington (New York: Harper Collins, 1986), 57, 61; Kotz, **Judgment Days,** 361–62.

[126] Martin Luther King Jr., "Showdown for Nonviolence," in **The Essential Writings and Speeches of Martin Luther King Jr.**, ed. James M. Washington (New York: Harper Collins, 1986), 67–70; Kotz, **Judgment Days,** 343, 363–67, 369, 380–83, 399.

[127] Lyndon B. Johnson, "Remarks at the Howard University Commencement," June 4, 1965, https://millercenter.org/the-presidency/presidential-speeches/june-4-1965-remarks-howard-university-commencement.

[128] Kellstedt, **The Mass Media and the Dynamics of American Racial Attitudes,** 106–29 (p. 108 quoted); Larson, **Media and Minorities,** 173–74.

[129] Elizabeth A. Wheeler, "More than the Western Sky: Watts on Television, August 1965," *Journal of Film and Video* 54 (2002): 11, 14, 16.

[130] Barlow, "Race and the Problem of Crime in *Time* and *Newsweek* Cover Stories," 161–68; Larson, **Media and Minorities**, 173–75.

[131] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 283.

[132] Richard Lentz, "The Resurrection of the Prophet: Dr. Martin Luther King, Jr., and the News Weeklies," *American Journalism* 4 (1987): 59–60 (quoted), 74; Lentz, **Symbols, the News Magazines, and Martin Luther King**, 281–307; Barlow, "Race and the Problem of Crime in *Time* and *Newsweek* Cover Stories," 168–70.

[133] Gallup, **The Gallup Poll,** 3: 2151; Smith, "America's Most Important Problem," 171–72; Kinder and Sanders, **Divided by Color**, 101–02; Schuman et al., **Racial Attitudes in America**, 28–29.

[134] Gallup, **The Gallup Poll,** 3: 2128, 2072.

[135] Schuman et al., **Racial Attitudes in America,** 153–54.

[136] Kotz, **Judgment Days,** 344–45, 367–70, 388–99, 407–11; Lyndon B. Johnson, "Remarks on Decision Not to Seek Re-Election," March 31, 1968, https://millercenter.org/the-presidency/presidential-speeches/march-31-1968-remarks-decision-not-seek-re-election.

[137] Kinder and Sanders, **Divided by Color,** 225.

[138] Richard M. Nixon, "Presidential Nomination Acceptance Speech, Republican National Convention," August 8, 1968, http://www.4president.org/speeches/nixon1968acceptance.htm; Jeremy D. Mayer, "Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign," *The Historian* 64 (2002): 361–62; Kinder and Sanders, **Divided by Color,** 104–05.

[139] Kinder and Sanders, **Divided by Color,** 220, 225–27.

[140] Graham, **Civil Rights and the Presidency,** 136; Mayer, "Nixon Rides the Backlash to Victory," 363–66.

[141] Frankenberg and Jacobsen, "The Polls – Trends: School Integration Polls," 790, 807; Schuman et al., **Racial Attitudes in America,** 105.

[142] Schuman et al., **Racial Attitudes in America,** 285–88 (emphasis added).

[143] Earl Black, **Southern Governors and Civil Rights: Racial Segregation as a Campaign Issue in the Second Reconstruction** (Cambridge: Harvard University Press, 1976), 12–14, 282, 304; Kinder and Sanders, **Divided by Color,** 221–23.

[144] Gallup, **The Gallup Poll,** 3: 1933, 2031.

[145] Schuman et al., **Racial Attitudes in America,** 106–08, 119–20 (emphasis added).

[146] Gallup, **The Gallup Poll,** 3: 2240.

[147] As quoted in Kevin J. McMahon, **Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences** (Chicago: University of Chicago Press, 2011), 99.

[148] Schuman et al., **Racial Attitudes in America,** 122–27.

[149] Richard Rothstein, **The Color of Law: A Forgotten History of How Our Government Segregated America** (New York: Liveright Publishing, 1923), vii–viii, 17–57, 77–91, 139–75.

[150] *Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968) (emphasis in original); J. Harvie Wilkinson III, **From Brown to Bakke: The Supreme Court and School Integration, 1954–1978** (Oxford: Oxford University Press, 1979), 116–18, 136.

[151] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30 (1971); Wilkinson, **From Brown to Bakke,** 137–39.

[152] Gallup, **The Gallup Poll,** 3: 2243–44.

[153] Matthew F. Delmont, **Why Busing Failed: Race, Media, and the National Resistance to School Desegregation** (Oakland: University of California Press, 2016), 116–17; Lawrence J. McAndrews, "The Politics of Principle: Richard Nixon and School Desegregation," *Journal of Negro History* 83 (1998): 193.

[154] McMahon, **Nixon's Court,** 30, 57–58, 83–84, 90–92, 101 (p. 101 quoted).

[155] As quoted in *ibid.*, 104–05 (McMahon's emphasis removed).

[156] Bruce Miroff, **The Liberal's Moment: The McGovern Insurgency and the Identity Crisis of the Democratic Party** (Lawrence: University Press of Kansas, 2007), 236.

[157] *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973).

[158] Delmont, **Why Busing Failed,** 134, 139; McMahon, **Nixon's Court,** 193, 195–96.

[159] McMahon, **Nixon's Court,** 193, 309 n.58.

[160] Schuman et al., **Racial Attitudes in America,** 123.

[161] Wilkinson, **From Brown to Bakke,** 135.

[162] Kellstedt, **The Mass Media and the Dynamics of American Racial Attitudes,** 48–51.

[163] Delmont, **Why Busing Failed,** 6, 192–93, 199, 201, 204, 207.

[164] *Milliken v. Bradley*, 418 U.S. 717 (1974); McMahon, **Nixon's Court,** 210–11.

[165] McMahon, **Nixon's Court,** 209–10.

[166] *Milliken v. Bradley*, 418 U.S. 717, 747 (1974).

[167] *Ibid.*, 806, 814; McMahon, **Nixon's Court,** 211.

[168] Schuman et al., **Racial Attitudes in America,** 123–25. No poll on this topic was conducted in 1973.

[169] McMahon, **Nixon's Court,** 211.

[170] Gary Orfield, "Turning Back to Segregation," in Gary Orfield, Susan E. Eaton, and the Harvard Project on School Desegregation, eds., **Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education** (New York: New Press, 1996), 12–13; Delmont, **Why Busing Failed,** 17, 118, 140–41, 210.

[171] Orfield, "Turning Back to Segregation," 8, 14.

[172] *Ibid.,* 8, 13, 58; Rosenberg, **The Hollow Hope,** 49–54.

[173] Orfield, "Turning Back to Segregation," 1, 2–3. In *Board of Education of Oklahoma v. Dowell*, 498 U.S. 237 (1991), the Supreme Court held that, once the vestiges of *de jure* segregation are eliminated, a school district is released from its obligation to maintain desegregated institutions. The Court further relaxed the requirements on school boards in *Freeman v. Pitts*, 503 U.S. 467 (1992), by holding that federal courts may relinquish supervision of districts even if full compliance with desegregation plans has not been achieved in every area of school operations.

[174] Orfield, "Turning Back to Segregation," 20.

[175] Gary Orfield, "The Growth of Segregation: African Americans, Latinos, and Unequal Education," in Gary Orfield, Susan E. Eaton, and the Harvard Project on School Desegregation, eds., **Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education** (New York: New Press, 1996), 59.

[176] Gary Orfield and Susan E. Eaton, "Introduction," in Gary Orfield, Susan E. Eaton, and the Harvard Project on School Desegregation, eds., **Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education** (New York: New Press, 1996), xix.

[177] Lentz, **Symbols, the News Magazines, and Martin Luther King,** 342.

Trop v. Dulles: How Earl Warren's Contradicting Legal Opinions Secured Trop's Victory

Courtney Christensen

Introduction

On March 31, 1958, the Supreme Court held in *Trop v. Dulles* that the Eighth Amendment's prohibition on "cruel and unusual punishment" barred Congress from denaturalizing citizens as a punishment.[1] It was an important result, albeit one announced by a highly regarded chief justice, Earl Warren, who in this instance could marshal the support of only three other members of the Court. The result was important, and the principles for which *Trop* stands are worthy of our respect. But there is so much more to the story, of a chief justice's struggle to reach the result he wished and what that process tells us about the Court and the manner in which it functions.

Albert Trop, the plaintiff in the case, was denaturalized a result of his court-martial conviction for desertion in the time of war.[2] The Court, in an opinion by Chief Justice Earl Warren, held that his punishment violated the Eighth Amendment and restored Trop's lost citizenship.[3] Today, *Trop* is known for its contribution to the Eighth-Amendment jurisprudence, with a particular focus on the plurality's statement that the "amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[4] However, at the time *Trop* and its companion cases, *Perez v. Brownell*[5] and *Nishikawa v. Dulles*,[6] were argued, *Trop* was considered among the most important and controversial cases of the term,[7] not due to the Eighth-Amendment question, but because the case represented fundamental questions of constitutional law, including "What's the nature of Congress' power? What's the structure of the Constitution?"[8]

Despite the unexpected nature of the issue, Warren's determination to decide the case in Trop's favor and his willingness to change his theoretical views regarding congressional power led the case to be decided

DOI: 10.1111/jsch.12280

Albert Trop was court-martialed for escaping from a military stockade, where he had been confined for a disciplinary infraction while serving as a private in the U.S. Army in Casablanca in 1944. Above are American soldiers serving in Morocco in 1943, after the Allies had regained control of the region.

on Eighth-Amendment grounds. As the justices deliberated over the course of almost a year in Trop's case, Warren considered at least four different legal theories, and at times directly contradicted his own previous draft opinions, in his attempt to gain five votes for a judgment to restore Trop's citizenship.

Case Beginnings

The facts giving rise to the case were uncontested.[9] In 1944, twenty-year-old Trop, an Army private stationed in Morocco, escaped from a military stockade where he was being held for a previous disciplinary infraction. He and a companion felt the conditions of the stockade were "intolerable."[10] Shortly after escaping, however, they decided to return the stockade and were found walking back to the base, ending his "desertion."[11] At no time did he attempt contact with the enemy.[12] Trop was convicted by a court-martial for deserting the service during wartime, received a dishonorable discharge, and was sentenced to three years hard labor and forfeiture of all allowances.[13] Unbeknownst to him, Trop was also stripped of his U.S. citizenship as a result of his conviction.[14] He did not learn of his expatriation until November 1952 when the State Department denied his passport application.[15]

Even then, Trop was unsure as to why he had lost citizenship and wrote to the State Department in 1954 asking if he had lost his citizenship, civil liberties, or both, and the authority under which they were revoked.[16] After finally confirming his lack of citizenship, Trop asked the ACLU to represent him

in a challenge to his denaturalization in court, and in February 1955, Osmond Fraenkel, General Counsel to the ACLU,[17] agreed to litigate Trop's case.[18]

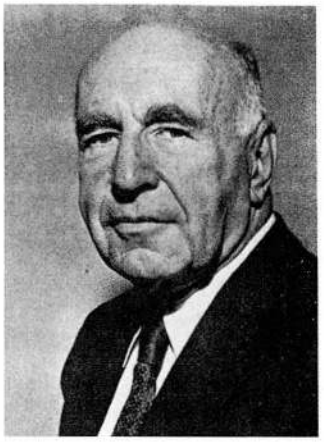
Upon taking the case, Fraenkel and the ACLU notably did not consider the Eighth Amendment as a legal basis to restore Trop's citizenship, choosing instead to argue that the statute allowing Trop's denaturalization was unconstitutional under the Due Process Clause or, alternatively, that the statute did not apply to him.[19] The organization planned to

> tak[e] the position ... that it is unconstitutional to deprive a native-born citizen by statute of his right to citizenship granted by the Constitution, except possibly where there is some voluntary action committed in connection with adherence to some other sovereignty, under a statute narrowly drawn to cover that possibility, and that this statute fail[ed] to distinguish between desertions per se and desertions to another army.[20]

Two alternate arguments were also considered: That the statute was unreasonable, as it provided a penalty to a court-martial conviction that was unrelated to protecting the army, and that it was improper to allow denaturalization to depend upon a court-martial, as opposed to a civilian trial.[21]

The statute at issue in Trop's case, Section 401(g) of the Nationality Act of 1940, stated, in pertinent part:

> (a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization should lose his nationality by ... (g) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: Provided, that, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or introduction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost.[22]



Osmond Fraenkel, General Counsel to the ACLU, litigated Trop's case after the soldier found out he was stripped of his citizenship as a result of his conviction. Fraenkel's clients included Harry Bridges, the Scottsboro boys and Bertrand Russell, along with numerous labor leaders, college professors, high school teachers and students caught up in repeated waves of anti-Communist sentiment.

Interestingly, despite Warren's efforts to employ various legal theories until he found a position that secured five votes for Trop, he never drafted opinions on three of the positions initially discussed by the ACLU: That the statute did not distinguish between the two forms of desertion; that the statute, acting as a *penalty* itself, did not relate to

protecting the army; and that it was improper to permit the loss of citizenship on a court-martial. Warren dismissed the statutory claim in almost every draft opinion (perhaps his only consistent position[23]), and his clerk, Jon Newman, rejected the argument that the *penalty* was not related to protecting the army in response to an opinion by Justice William J. Brennan.[24] However, Justice Hugo L. Black, in a concurring opinion, argued that it was improper to permit the loss of citizenship by court-martial, a concurrence Warren did not join.[25] Warren's knowledge and rejection of these theories, which the ACLU continually advocated for, displayed his willingness to go outside the main legal arguments presented to restore Trop's citizenship.

Procedural History

In the initial complaint filed on December 29, 1955, Fraenkel argued that the statute providing for Trop's loss of citizenship was unconstitutional as it exceeded Congress's power to regulate native-born citizens, an argument highlighted in an ACLU press release regarding the complaint.[26] Fraenkel emphasized that Trop never intended to become a national of another country or expatriate himself.[27]

In the accompanying brief to the district court requesting summary judgment, Fraenkel asked for a declaratory judgment regarding Trop's citizenship status and argued that congressional power to expatriate is limited to those who surrender their nationality or make some voluntary act to acquire and adhere to a new nationality. In the alternative, Fraenkel argued that the statute should be construed as requiring desertion to the enemy, and therefore inapplicable to Trop.[28]

Press coverage of the suit, encouraged by the ACLU, was so widespread that a prisoner in Attica State Prison, William Burke, wrote to Patrick Murphy Malin, the Director the ACLU, to express interest in the case, as he, too, had lost citizenship as a result of a wartime desertion under the statute and, as a result, was frequently under a deportation order from the U.S. Immigration Service.[29]

The case was argued in United States District Court for the Eastern District of New York in May 1956. Fraenkel reflected that the chief judge, Robert Alexander Inch, was "unexpectedly favorable."[30] However, the district court granted the government's motion for summary judgment and denied Trop's motion for summary judgment without explanation, simply stating that there was no genuine issue of material fact and Trop was not entitled to judgment as a matter of law.[31] After the announcement of the district court's decision, Fraenkel wrote to Trop again informing him of Chief Judge Inch's decision and of Fraenkel's intent to appeal the decision.[32]

On appeal to the Second Circuit, Fraenkel made many of the same arguments he made at the district court level, with a small addition.[33] At the end of his brief, Fraenkel included a citation to a comment published in the *Yale Law Journal*, which contended that expatriation constitutes cruel and unusual punishment. However, the brief stopped short of actually mentioning the Eighth Amendment, simply noting that the comment provided more information regarding the impact of denationalization.[34] This appeared to be the first time that the Eighth-Amendment argument was even hinted at in relation to Trop's case. Following the oral argument at the Second Circuit, Fraenkel wrote to Alan Reitman, the director of public relations for the ACLU, that his panel of appellate judges—consisting of Charles Edward Clark, Learned Hand, and Thomas Swan—was "very much interested."[35]

However, the Second Circuit affirmed the district court's ruling against Trop in an opinion written by the renowned Judge Hand, who had been on the bench since 1909 and now had senior status.[36] Notably, Hand's opinion explicitly refused to address

an Eighth-Amendment claim, writing "[the court has] not considered, and [does] not consider, whether under the circumstances at bar 'expatriation' was, or was not, a 'cruel and unusual' punishment under the Eighth Amendment" because Trop did not make this argument in his complaint, motion for summary judgment, or at argument, and it was not discussed by the district court. Hand did acknowledge that there may have been a vague reference to the issue in Trop's brief but concluded that portion of the brief appeared to support the more "general argument that all involuntary expatriation is a denial of 'Due Process of Law.'" Hand rejected Trop's statutory and constitutional arguments, holding that the statute applied to Trop despite the fact that the soldier had not deserted to the enemy and that the statute was within Congress's power to enact.[37]

In a dissenting opinion, Clark stated that he would have addressed the constitutionality of the statute under the Eighth Amendment, writing, "punitive expatriation of person with no other nationality constitutes cruel and unusual punishment and is invalid as such."[38] From a procedural standpoint, Judge Clark believed the Eighth-Amendment claim was preserved by Fraenkel's reference to the comment in the *Yale Law Journal* and did not think Fraenkel's "refreshingly brief statement" needed anything else to support the claim.[39]

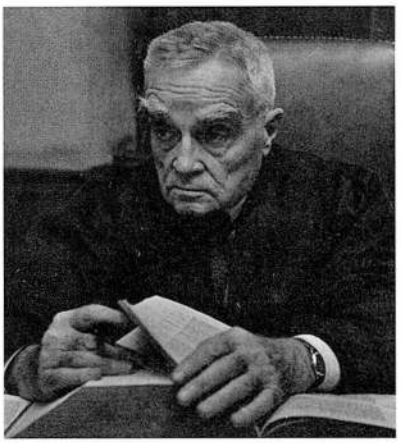
The Second Circuit's decision was critical because it at once reaffirmed congressional power as the main issue in the case, and yet also provided necessary momentum for the Eighth-Amendment argument, even though Hand's opinion showed the unlikelihood of a successful Eighth-Amendment argument. Further, the lack of pleading and the brevity of the argument in the briefing may indicate that Fraenkel himself did not believe the Eighth Amendment had much merit. However, Clark's dissent, which gave the Eighth-Amendment argument momentum, provided Warren and Fraenkel with the opportunity to utilize the Eighth-Amendment as an alternative path to victory for Trop. The dissent normalized the argument such that almost every justice on the Supreme Court was forced to address the issue at some point during deliberations, even if they did not believe the argument was viable.

Supreme Court Briefing and Oral Argument, 1956 Term

In his petition for a writ of certiorari in Trop's case, Fraenkel presented the question for review as, "[m]ay Congress deprive a native born citizen of his nationality solely because he has been convicted of the technical offense of desertion in war time by court martial and, for that reason, dishonorably discharged from the armed forces, absent any contact with the enemy or with any foreign state or intent to make such contact, with the result that loss of American nationality would result in statelessness?"

The question presented was similar to the question presented in two other cases already on appeal to the Supreme Court, *Perez v. Brownell* and *Nishikawa v. Dulles*, both of which were litigated by the ACLU.[40] In *Perez*, Charles A. Horsky, an influential attorney who argued in the Supreme Court against Japanese internment in *Korematsu v. United States*,[41] argued that expatriating Perez for draft dodging and voting in a foreign election was unconstitutional.[42] In *Nishikawa*, an individual of dual nationality challenged his loss of U.S. citizenship as a result of his conscription in the Japanese army.[43] All three cases, collectively known as the denationalization cases, challenged subsections of Section 400 of the 1940 Nationality Act.[44]

A cert memo for Douglas emphasized the relationship between *Trop*, *Perez,* and *Nishikawa*, noting the U.S. Solicitor General believed that the Court's decision in *Perez* would have "great bearing" on the Court's decision in *Trop* and could possibly control



Judge Learned Hand of the Second Circuit Court of Appeals affirmed the district court's decision, explicitly stating that the loss of citizenship did not amount to cruel and unusual punishment under the Eighth Amendment.

the outcome.[45] This memo further summarized the Second Circuit's decision in *Trop*, noting specifically the majority opinion's refusal to recognize Trop's Eighth-Amendment argument because it was not properly pled.[46]

In Fraenkel's Supreme Court merits brief, he continued to focus on the lack of congressional power to denaturalize Trop.[47] However, likely following prompting from Judge Clark's dissenting opinion, Fraenkel highlighted the Eighth-Amendment argument at the end of the brief.[48] Fraenkel, like Chief Justice Warren's eventual plurality opinion, also took steps to distinguish *Perez* and *Nishikawa*. However, Fraenkel took a different approach from Warren, who found a distinction between a penalty and a regulation, and argued that, as compared with *Perez*, the statute that resulted in the loss of citizenship in *Trop* applied to domestic as well as international acts (as exemplified by the letter from William Burke who was convicted by court-martial of desertion domestically[49]) and, further, did not involve an aspect of dual citizenship, as it did in *Nishikawa*.[50]

Trop was first argued on May 2, 1957. In his opening argument, Fraenkel emphasized the limits on congressional power, arguing that "Congress has no power to destroy the nationality of a native-born American" without a voluntary abrogation of citizenship. He further stated that Congress did not have the power to expatriate citizens under its implied powers of sovereignty and was limited in Trop's case by the Eighth Amendment and the Due Process Clause of the Fifth Amendment.[51] He received very few questions from the justices.

In contrast to Fraenkel's oral argument, the justices actively questioned the government's lawyer, Oscar Davis, on the practical implications of denaturalization, wondering about the possibility that Trop, and others similarly situated, could be deported or have their citizenship restored by a presidential pardon. While Warren doubted that the president would be able to do so, Justice Felix Frankfurter appeared to try to aid Davis in this line of questioning, suggesting that a presidential pardon is more about retroactivity than restoration. Justice Brennan briefly expressed an interest in congressional power, wondering whether Congress could deprive an individual of citizenship for a civil or criminal crime unrelated to the military.[52]

Fraenkel again wrote to Trop, who was by then located in Newfoundland despite his lack of passport, with an update regarding the argument.[53] While Fraenkel conveyed his impression that the arguments went "quite well" in all three denaturalization cases, he also noted that "Frankfurter indicated his usual hesitancy about declaring any act of Congress unconstitutional." However, Fraenkel further mentioned that the "government's attorney was also questioned by several of the justices concerning the extent to which Congress could go."[54] Based on the argument and the lack of past expression about the power of Congress to expatriate a citizen, Fraenkel made no predication on the outcome of the case, but confirmed a "good chance of winning" remained.[55]

Deliberations

The Court met for conference on the day following the oral argument.[56] Warren indicated he would reverse all three nationalization cases; he believed citizenship should only be taken away for a voluntary act of renunciation.[57] Warren argued that Congress did not have the power to punish by taking away citizenship, considered the idea that denaturalization was cruel and unusual punishment, and worried about a slippery slope if the Court deprived Trop of his citizenship in this case.[58] Warren believed that a deserter could not be made a stateless person and emphasized that Trop left the base for just one day and turned himself in.[59] Justice Black contended that there was no constitutional power to strip what the Constitution gives to someone and the granted power of sovereignty was not enough to strip a person of his nationality.[60]

Frankfurter argued that if a state can kill a man, it can deprive him of his nationality. He emphasized his belief that Congress was entitled to its own idea about which acts sufficiently denounce citizenship. The justice continued that it was a proper function of Congress to ask, "what is nationality?" He further noted that the Due Process Clause was the only check on Congress's power within the realm of nationality and concluded by again emphasizing that Congress can determine which acts repudiate citizenship. Frankfurter wanted to affirm both *Trop* and *Perez* in order to uphold Congress's power to expatriate, yet wished to remand *Nishikawa* on a burden of proof issue.[61]

Douglas indicated that he would reverse all three denaturalization cases, as noted both in his conference notes and in Justice Harold H. Burton's. Burton agreed with Frankfurter that the nation should be the primary consideration and Congress had the power to denaturalize a citizen for certain actions, whether an individual voluntarily renounced citizenship or not. Burton voted to affirm all three denaturalization cases. Justice Tom C. Clark agreed generally with Burton but, like Frankfurter, wanted to remand *Nishikawa* to apply a proper burden of proof standard. Justice John Marshall Harlan noted his belief that expatriation constituted pure punishment in Trop's case and that he would reverse the decision on that ground but wanted to affirm *Perez* and *Nishikawa*.[62]

Justice Brennan noted that Congress had the power to provide for loss of nationality. He agreed with Frankfurter that the cases turned on the Due Process Clause for each of the nationality cases but believed the facts of each case called for different results. Brennan expressed his belief that desertion in time of war may not have been enough to denationalize a citizen and the statute had potentially gone too far. However, he thought voting in a foreign election might have suggested a transfer of allegiance. Ultimately, Burton's conference notes show Brennan voted to reverse all three cases. Justice Charles Whittaker noted his belief that Congress could expatriate a citizen if that individual has indicated a denunciation of allegiance and showed hesitancy to strike down an act of Congress and voted to affirm all three cases.[63]

On June 3, 1957, Warren circulated his first opinion in *Trop* with a presumed majority, including Brennan, Black, Douglas, and Harlan, along with draft majority opinions for *Perez* and *Nishikawa*.[64] Both the *Perez* and *Trop* drafts held that "Congress has no power to prescribe loss of citizenship as the consequence of conduct inconsistent with fundamental obligations of citizenship. The Fourteenth Amendment leaves no authority in Congress to decide who among United States citizens are deserving of continued citizenship."[65] In the *Trop* draft, Warren continued, "furthermore, it seems clear that there is no rational relation between the operative effect of this statute as applied to a deserter who does not go over to the enemy and the congressional power to regulate citizenship

in the interest of preventing the acquisition or retention of dual nationality."[66] The draft explicitly indicated that the principles applied in the *Perez* opinion apply in *Trop* as well.[67] This draft was Warren's first approach to reversing the Second Circuit decision in Trop's case and closely reflected arguments originally raised by Fraenkel.[68]

Significantly, this draft did not even reach the Eighth-Amendment issue as the chief justice found that the statute at issue in Trop's case was not penal. Warren wrote, "we accept the contention that Congress intended only to exercise whatever power it possesses independently to prescribe conditions for the loss of citizenship." Warren included a number of reasons to support the finding that Section 401(g) was a regulation and not a penalty, including the phraseology and the subsection placement within the whole statute. He acknowledged "the Cabinet Committee which proposed the [Act] referred to the Act of 1865 punishing deserters by forfeiture of their rights of citizenship as a precedent for § 401(g)" but rebutted this argument by noting the committee's statement that the statute was "technically ... not a penal law."[69]

The language Warren employed here stands in stark contrast to his ultimate opinion in the case. In this first draft, he specifically relied on the Cabinet Committee's statement that Section 401(g) was not penal to argue that the statute was a regulation and not a penalty.[70] However, in the final opinion, Warren responded to this same argument (that the committee clarified that the statute was not a penalty) by apparently mocking his first draft's rebuttal. In the published opinion, Warren wrote, "how simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!"[71] The final opinion then found the statute to be penal, providing the opportunity for an Eighth-Amendment violation.[72] This complete change in positioning indicates Warren's acquiescence to changing principles to meet his desired outcome.

On June 7, 1957, after reading Warren's draft opinions, Frankfurter wrote to the conference that he was unable to agree with the opinion in *Perez* and, given the "far-reaching issues" at stake, asked to put the matters over, including the "subsidiary issues" of *Trop* and *Nishikawa*, to the next term.[73] The draft opinion further received poor reception from Burton's clerk, Roger C. Cramton, who labeled the constitutional theory underlying Warren's opinions in *Trop* and *Perez* as "not only unclear but illogical" and faulted the chief justice's *Trop* draft for failing to consider the statute a penalty and therefore failing to reach the Eighth-Amendment issue. Cramton further accused Warren of line drawing based upon emotional appeal as opposed to "rational distinction."[74] On June 24, 1957, the case was scheduled for reargument in the next term.[75]

Briefing and Oral Argument, 1957 Term

Before the second oral argument, both sides filed supplemental briefing. In a brief significantly shorter than the government's supplemental brief, Fraenkel focused solely on statutory interpretation, introducing a new construction of the statute that would allow the Court to find for Trop and avoid the constitutional question.[76] In contrast, the government's joint brief filed for both *Perez* and *Trop* concentrated on congressional power. The government argued forcefully that Congress had the power to enact Section 401(g) through both inherent and express powers, including the power to wage war, raise armies, and regulate the government of the armed forces.[77]

In the early stages of litigation and in the supplemental brief, the ACLU argued that Trop's citizenship could be restored if the Court found that the statute did not apply to him.[78] However, at the second round of oral argument, on October 29, 1957, this

position was largely dismissed. There was little interest from either Fraenkel or the justices that the case should be decided on statutory grounds, with Frankfurter quipping "you're not [giving] me any encouragement to avoid [the] constitutional decision, thank you very much."[79] Indeed, even Warren, who was willing to reverse his own legal theories to issue a judgment in Trop's favor, never made the argument that the statute could be construed as inapplicable to the soldier.[80]

Fraenkel spent the majority of his time focusing on Congress's power to expatriate and concluded by presenting the Court with multiple avenues by which it could find for Trop, stating, "whether you call it lack of power, lack of due process, or an attempt to inflict a cruel and unusual punishment ... it all adds up to the same single result that [citizenship] is not something for which Congress can take away nationality of an American-born."[81] Warren ultimately considered, if not drafted full opinions, on all three of these grounds in order to gain judgment for Trop.[82]

Notably, during the government's oral argument, delivered by the Solicitor General, J. Lee Rankin,[83] Warren's questions focused largely on the facts of the case.[84] As in the first oral argument, this may have shown his inclination to develop facts that sustained his motivation to find for Trop and could be utilized for an Eighth-Amendment argument.

On October 29, 1957, the justices met for their second conference regarding the denaturalization cases. At this conference, Warren, Black, and Douglas voted to reverse *Trop* and restore Trop's citizenship, while Frankfurter, Burton, Harlan, Whittaker, and Clark voted to affirm *Trop,* upholding his loss of citizenship. Brennan was undecided despite noting that the cases were now "clearer." Harlan commented that it would be difficult to be affirm any of the denaturalization cases and reverse in another, that there was "no help" for these cases in the Fourteenth Amendment, and that it was a bad time to limit Congress's power. At this second conference, Warren lost his initial majority and Frankfurter was given the assignment to write the majority opinions in both *Perez* and *Trop*, affirming the lower court opinions and upholding their denaturalization.[85]

On the same day, Frankfurter wrote to Harlan regarding his colleague's comment that the denaturalization cases were "tough."[86] In the letter, Frankfurter urged Harlan that any doubt he felt regarding the cases must be resolved in favor of constitutionality.[87] While Harlan originally remained equivocal regarding Trop's case,[88] he was ultimately persuaded by Frankfurter and joined Frankfurter's eventual dissenting opinion in *Trop.*[89]

Shortly following the second oral argument, the case gained national press attention. Anthony Lewis, the Supreme Court reporter for *The New York Times*, published an article on the denaturalization cases, which focused on the sources of congressional power to expatriate citizens, and highlighted *Perez* as the leading case.[90] Like many of the previous documents and briefs regarding the *Trop* case, the article did not mention the Eighth Amendment as a possible route to victory for Trop, again underlining the unexpected nature of a judgment based on the Eighth Amendment.

Deliberations

On November 21, 1957, Frankfurter began circulating his draft majority opinion in *Trop*, which upheld the constitutionality of the statute and Trop's denaturalization.[91] Within the month and with only minor suggested changes, the opinion was joined by Black, Harlan, and Clark.[92] While there is no record of Whittaker's response to the *Trop* opinion, he did quickly join Frankfurter's proposed majority opinion in *Perez*, which upheld Congress's power to denaturalize its citizens, a view in alignment with Whittaker's comments at the first conference.[93] Given that Frankfurter viewed *Trop* as a subsidiary

question of *Perez*,[94] it is likely Whittaker at least considered joining Frankfurters draft opinion in *Trop* as well.

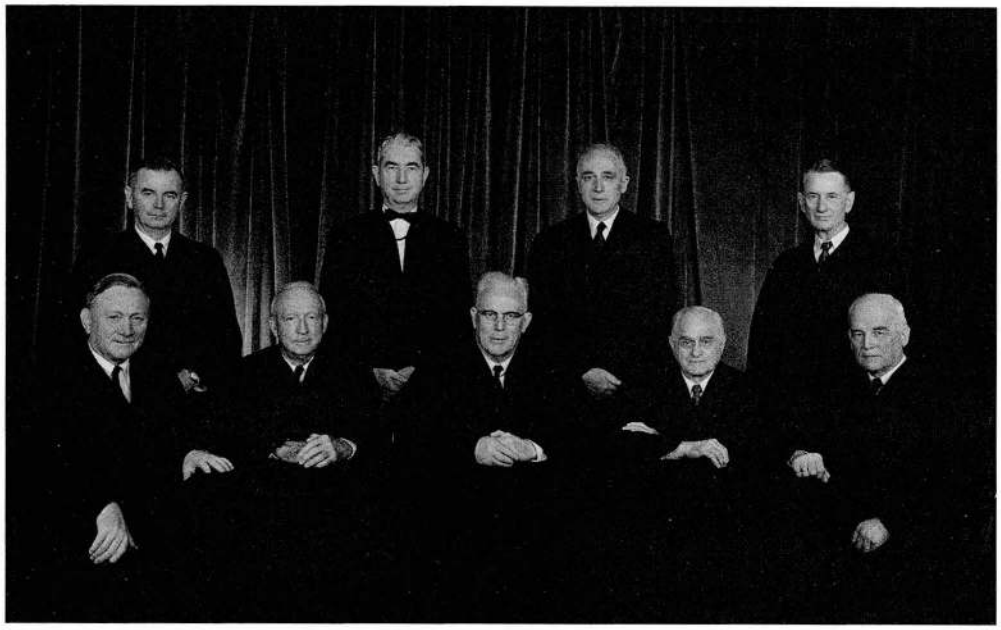
In response to Frankfurter's majority opinion, Warren drafted a combined dissent for both *Trop* and *Perez*,[95] showing, as in his original opinion and as others predicted, a belief that *Perez* and *Trop* centered around the same issue of congressional power to denaturalize its citizens and would likely control one another. As compared with the first proposed draft for *Trop*, which focused on the limitations placed on congressional power by the Fourteenth Amendment, this draft focused on the argument that the power to denaturalize a citizen must stem from the inherent power of sovereignty, which he believed could not extend to denaturalizing citizens without a voluntary renouncement of citizenship.[96] The draft further insisted that the opinion was not meant to deplete the strength of the Necessary and Proper Clause,[97] perhaps in an effort to address Harlan's expressed concerns regarding limiting congressional power and regain Harlan's vote to reverse Trop's case. Despite his vote at the second conference, as of November 1957, Harlan still displayed some indecision regarding the case.[98]

This draft, which combined *Trop* and *Perez*, was Warren's second approach to finding the statute unconstitutional, and therefore restoring Trop's citizenship. However, this draft, like the initial draft proposed by Warren, was ultimately be contradicted by Warren's final opinion. In a departure from his original draft, Warren maintained in his second draft that the Court was not facing "the relatively easy question of whether denationalization is an appropriate sanction; the issue here is the fundamental question of whether this technique is 'within the scope of the Constitution' and 'within the letter and spirit of the Constitution.'"[99] While Warren's final opinion in *Trop* did initially state his belief that Congress lacked the ability to expatriate Trop, the final opinion changed the constitutional question presented to the Court. The opinion instead stated, "the constitutional question posed by § 401(g) would appear to be whether or not denationalization may be inflected as a punishment, even assuming that citizenship may be divested pursuant to some constitutional power."[100]

However, Warren quickly discarded the second draft opinion. After consulting with Black, Warren separated his *Perez* and *Trop* opinions, given Black's prediction that Warren may be able to gain a majority to reverse Trop's case but that a similar opportunity did not seem to exist in the *Perez* case.[101] In notes regarding the decision to split the opinions, Black highlighted the potential to discuss punishment in *Trop* but not in *Perez*.[102]

Following this discussion, Warren began to work with his clerk, Jon Newman, to draft a new dissent for *Trop*. In the following weeks, memos from Newman, drafted as opinions, showed a development of the chief justice's opinion and provided methods by which the subsection at issue in Trop's case could be struck down even if the related subsection at issue in Perez's case was upheld.[103]

The first memo from Newman, offering a third approach to holding the statute unconstitutional, began in the same vein as Chief Justice Warren's original majority opinion in *Trop* and, like the first two approaches, found that the statute was not a penalty.[104] However, under a new theory, the memo concluded that the statute could not be upheld as a regulation because the legitimate ends of the statute, assumed to be carrying out Congress's war powers, were not reasonably related to the means: Trop's expatriation.[105] As compared with the first and second approaches advanced by Warren, this approach focused not on congressional power to denaturalize but instead found a due process violation, a position similar to the argument originally advanced by the ACLU[106] and discussed by Brennan at first conference and



Earl Warren (center, seated) struggled to win a majority for his opinion in *Trop* holding that "denationalization as a punishment is barred by the Eighth Amendment" because it inflicts the "total destruction of the individual's status in organized society." The decision was 5–4, with Justice William J. Brennan (standing, at left) concurring.

oral argument.[107] However, it does not appear that Warren ever signed off on this approach, and there is no record of its circulation to other members of the Court.

A revised version of Newman's memo represented the fourth and final approach used by Warren to reverse *Trop*'s case and distinguish it from *Perez*. Similar to the first three, the memo addressed whether the statute was a penalty or a regulation. However, this draft completely contradicted every previous opinion considered by Warren and concluded that Section 401(g), the subsection of the statute that applied only in *Trop*, was in fact a penalty and not a regulation. After finding the statute to be a penalty, the memo was able to address the Eighth-Amendment issue and strike down the law as constituting cruel and unusual punishment. The memo was the basis of the draft opinion that was ultimately sent to Douglas, Black, and Brennan on February 19 and 20, 1958. Black and Douglas quickly joined the opinion.[108]

However, Brennan was less than receptive to the draft. His return comments criticized Warren's reliance on the Eighth Amendment to strike down statute, writing "why deal with the Eighth Amendment if the basic premise of [Warren's draft dissent in] *Perez* has merit that the Congress has no power to strip citizenship?"[109] He further stated that aside from his belief that the Eighth Amendment should not be the basis of Warren's dissent, he also doubted that expatriation violated the Eighth Amendment, asking "is not the chamber of horrors which add up to cruel and unusual punishment [in this draft] overdrawn? Since most rights are state-created rights that may or may not, depending on state law, be forfeited in consequence of expatriation, and since aliens have the protections of the federal constitutional guarantees, are the consequences as painful and inhumane as are suggested?"[110]

Brennan's issue with taking an Eighth-Amendment approach is further displayed in

a memo regarding the *Trop* case. While it questioned whether expatriation was effective as a punishment, it pointed out that the Court's use of the Eighth Amendment to hold the law unconstitutional created even greater issues. Brennan argued that "one would hesitate, mainly because even though vengeance might be beyond the power of Congress to exact, a penalty which seems to the judge to serve no purpose other than vengeance might indeed be something else quite different to the informed legislator." He concluded with the warning that just because a judge thinks the penalty unwise does not make the penalty unconstitutional.[111]

Brennan distributed his own proposed dissent in *Trop* on February 24, 1958. Similar to Warren's most recent draft opinion, Brennan found that the statute at issue in *Trop* to be separate from *Perez*, characterizing it as a penalty and not a regulation. However, Brennan did not use the penalty as an invitation to analyze the statute under the Eighth Amendment. Brennan instead argued that while Congress did have the power to impose a penalty against deserters, Congress could not impose expatriation specifically as a punishment because it served none of the purposes of punishment, such as deterrence and rehabilitation.[112]

When Warren received Brennan's draft, Newman was quick to criticize Brennan's approach. The clerk argued that Justice Brennan's reasoning was actually holding the statute unconstitutional under the Necessary and Proper Clause, as opposed to finding the statute unconstitutional because, when employed as a penalty, it violated the Due Process Clause, as Brennan claimed his draft did. Ironically, Newman's criticism of the distinction in Brennan's opinion was similar to Brennan's memo criticism of Warren's use of the Eighth Amendment: that the approach makes the Court a super-legislator.[113]

In response to Brennan's opinion, Newman wrote he found "much merit in the contention that a sanction which serves none of the legitimate purposes of punishment is beyond Congress's punishing power, even if the technique chosen is not cruel and unusual." However, Newman continued,

> it must be candidly recognized that this approach deeply stirs the sediment beneath what since *McCul-loc[h] v. Maryland* ... has been exceedingly calm water. 'Necessary' in the Constitutional sense has never meant more than whether a reasonable legislature might deem the challenged action advisable ... . Obviously, for this Court to say that denationalization is not a 'necessary' punishment places the Court squarely in the role of the super-legislature, second-guessing the Congress.

Upon reflection many years later, Newman would characterize Brennan's approach as "the surface anomaly between having upheld the regulatory measure but [striking] down the penal measure."[114]

Despite Brennan's critical comments and proposed alternate approach to the case, Warren's draft opinion remained largely unchanged.[115] Just two days after receiving Brennan's proposed dissent in *Trop*, Warren circulated his draft dissent to Whittaker.[116]

Although Newman's comments criticized the legal theory of Brennan's draft concurrence, Warren potentially may have refused to change his draft in response to Brennan's criticism for a reason other than disagreement over legal reasoning.[117] Once Warren received confirmation that Brennan would vote to reverse *Trop*'s case, even if it were on alternative grounds, Warren instead may have left his draft opinion unchanged in order to gain a fifth vote for a judgment for Trop.[118] As Brennan's claimed due process approach to *Trop*'s case strongly resembled the legal reasoning in Newman's first memo,[119] Warren had a clear opportunity

to integrate Brennan's criticism into his final draft opinion. However, Warren decided against revising the legal reasoning behind the final *Trop* opinion. Employing Brennan's approach would have resulted in a statement that, in *Trop*'s case, congressional power was limited by the Due Process Clause, a theory that the remaining five justices of the Court appeared unwilling to sign on to. In contrast, by focusing on the specific facts of *Trop*'s case and the specifics of the subsection to find the statute a penalty and an Eighth-Amendment violation, Warren was able to draft an opinion that allowed him to reverse *Trop*'s case without denying Congress's power to regulate in this field.[120]

Warren may have used this approach to persuade Whittaker to join his opinion. Whittaker believed Congress had the power to denaturalize its citizens,[121] yet had already displayed an inclination to vote against a statute employing this congressional power based on the facts of a specific case and the specific wording of a statute.[122] In *Perez*, Whittaker originally planned to join Frankfurter's opinion holding that Congress had the power to expatriate and could expatriate Perez in his specific case.[123] However, Whittaker changed his vote to dissent in the *Perez* case, not because his theory of congressional power had evolved, but instead because he learned of facts in the case that convinced him that the statute was overbroad as it applied to Perez.[124] Those facts were included in Warren's draft dissents in that case.[125]

Whittaker's willingness to decide cases that ultimately went against his beliefs regarding constitutional power on a factual basis was candidly acknowledged and criticized by Frankfurter.[126] When Whittaker wrote to Frankfurter on March 5, 1958 (after receiving Warren's draft dissent in *Trop* deciding the case on Eighth-Amendment grounds), to inform him of his difficulty of deciding all three denationalization cases, Frankfurter was quick to respond that it is "inadmissible as a matter of constitutional law to invalidate an act of Congress because the immediate, particular situation before the Court may not come within the admittedly reasonable general purpose of the statute."[127]

On March 12, 1958, Brennan recirculated his draft as a concurrence, noting his understanding that there were now four votes for Warren's opinion, and despite his efforts, he could not merge his opinion with Warren's.[128] In a memo to Warren, Black, Douglas, and Whittaker, he wrote that he could not combine his opinion with Warren's as he did not believe that Congress was wholly without power to provide for expatriation of citizens in certain cases and his approach would make the determination regarding an Eighth-Amendment violation unnecessary.[129]

On March 17, 1958, Whittaker officially signed onto Warren's opinion in *Trop*.[130] On this same day, a draft dissent in *Trop* by Burton was given to Frankfurter, although it appears to have been uncirculated.[131] The draft made clear Burton's view that expatriation did not violate the Eighth Amendment, as "it placed the offender in a no more cruel and unusual status than that of many aliens who are so content with it that they do not seek naturalization."[132]

In the days leading up to the announcement of the decision, Frankfurter noted the conflation of constitutional theories Warren advocated. Frankfurter wrote to Brennan that Warren's approach to denying power from Congress was not in fact the type of denial that Black and Douglas, both of whom joined Warren's opinion, had in mind, specifically referencing Warren's statement in *Nishikawa* that "every exercise of governmental power must find its source in the constitution. The power to denationalize is not within the letter or spirit of the powers with which our Government was endowed."[133] Frankfurter commented,

> I wonder if it is the fact that English is not my mother tongue that I cannot read the chief's opinion, no matter what he says in conversation about it, as being the kind of denial of power that Back and Douglas espouse ... I think they joined his opinion in *Nishikawa* because the whole atmosphere, if not the very words, represent their views.[134]

These comments likely referenced the belief that Black and Douglas were focused on using Section 1, clause 1 of the Fourteenth Amendment to limit congressional power in all three denaturalization cases, whereas Warren apparently believed there was no congressional power to denationalize citizens to begin with.[135]

Supreme Court Decision

Ultimately, Chief Justice Warren's plurality opinion, joined by Black, Douglas, and Whittaker, took three key steps to find in Trop's favor. Warren first stated his belief that Congress did not have the power to expatriate individuals involuntarily. However, he acknowledged the Court's opinion in *Perez*, which found that Congress could expatriate individuals even when they did not voluntarily renounce their citizenship. Warren then distinguished Trop's case by finding that the subsection of the statute applicable to Trop was in fact a punishment and not a regulation, as was the subsection of the statute at issue in *Perez*, a position that directly contradicted his earlier draft in *Trop*, which stated that the subsection at issue in Trop's case was a regulation and not a penalty.[136]

By finding the subsection to be a punishment, Warren was then able to consider the Eighth-Amendment issue and hold that expatriation constitutes cruel and unusual punishment. Reflecting his questions at oral argument, Warren wrote that while expatriation involved no physical torture, it involved

> the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development ... he would enjoy the limited rights of an alien ... [and] his rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

Warren was then able to hold Section 401(g) unconstitutional and restore Trop's citizenship.

Brennan's final concurring opinion mirrored his earlier drafts and also found the subsection to be a punishment. He argued that while Congress had the power to expatriate citizens, in Trop's case, expatriation was a penalty (as opposed to a regulation) not reasonably calculated to achieving Congress's legitimate end objective of waging war, given that expatriation serves none of the purposes of punishment. He found the statute unconstitutional as exceeding congressional power and did not reach the Eighth-Amendment issue.

Black, joined by Douglas, concurred to add his belief that the power of denaturalization should not be placed in the hands of military authorities, but should instead be decided by a civilian court.

In his dissenting opinion, Frankfurter, joined by Clark, Burton, and Harlan, found that Congress had the power to denaturalize Trop under the "war powers," including the power to wage war and provide for a common defense. He continued that the statute was a regulation that was reasonably related to executing these powers and denied that the statue was a punishment, arguing that even if the statute were construed as a punishment, it was not in violation of the Eighth Amendment, as it was not cruel and unusual.[137]

Case Reception

While celebrating that Trop's case ultimately won at the Supreme Court level, the ACLU also acknowledged that the organization lost on its theory of the case. An ACLU Alumni Article, titled "Loss of Citizenship Issue Still Complex," framed all the three cases as a convoluted win, stating that

> While the Union technically 'won' two[138] of the three cases it was backing, analysis of the rulings indicates that a sharply-divided Court rejected the basic proposition advanced by the Union. This is that a voluntary act clearly showing renunciation of allegiance to the United States is the only basis on which the constitutional right of citizenship can be withdrawn.[139]

The significance of the ACLU's central constitutional theory loss was emphasized by Douglas, who *The New York Times* depicted as "bitterly describ[ing] the majority in *Perez* [which held that Congress had the power to expatriate its citizens without voluntary renunciation] as 'perhaps the most important constitutional pronouncement of this century.'"[140] Frankfurter, in securing five votes for his majority opinion in *Perez*, was able to set a precedent regarding congressional power: Congress did have the power to expatriate its citizens, even if a citizen did not display a voluntary act transferring allegiance. In contrast, Warren's plurality opinion, while ensuring a victory for Trop, left no precedent regarding Congress's power to expatriate citizens.

Warren's opinion further confused the press as to the constitutional theory that emerged from the case, although almost all articles recognized that the central issue at stake was whether Congress could denaturalize individuals and not whether expatriation violated the Eighth Amendment.[141] An article in *The New York Times* summarized that

> A sharply divided Supreme Court upheld today the power of the Government to deprive native-born Americans of their citizenship. The court found constitutional limits on this power of expatriation. But the nature of those limits was left uncertain by the diversity of views among the justices, who wrote twelve separate opinions in three related expatriation cases.[142]

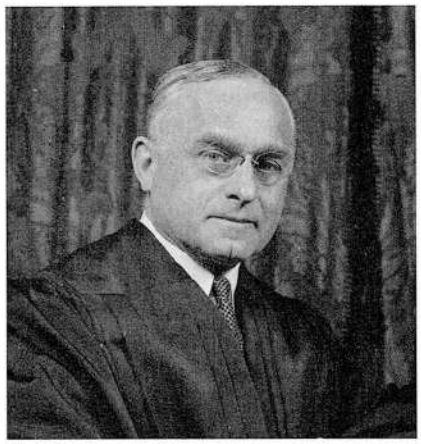
A *Washington Post* article regarding the decisions was slightly harsher, concluding that the "complex division of the Supreme Court in the nationality cases decided last Monday leaves must to be desired." However, the article ultimately blamed Congress for providing Warren with the opportunity to strike down a portion of it, despite the fact that his view of congressional power lost, writing "[p]erhaps the chief conclusion to be drawn from these cases is that Congress ought to take a more careful look at its carelessly prepared statute of 1940 before the Court finds it necessary to whittle more of it away."[143] The author of the article, Howard L. Dutkin, indicates awareness, at least among some Supreme Court reporters, that Warren used, what could be viewed as, a loophole to secure a victory for Trop.

Some of Fraenkel's views of the case are reflected in two of his books, **The Rights We Have** and **The Supreme Court and Civil Liberties**. These suggest yet again the idea that the Eighth-Amendment argument was a surprising choice to employ in order to restore Trop's citizenship, even in Fraenkel's opinion. In one book, Fraenkel emphasized that the Eighth Amendment was designed to prevent physical harm and claimed the amendment had an "interesting" application in *Trop* and even implied some incredulity that it was used there. In the second, Fraenkel

writes, the "Eighth Amendment has seldom been invoked. Electrocution has been held not to violate it, not even when the first attempt has failed because of a mechanical defect. But in the *Trop* case, decided in 1958, four members of the Court held that deprivation of nationality constituted cruel and unusual punishment,"[144] highlighting the juxtaposition between traditional Eighth-Amendment jurisprudence and its application in Trop's case.

However, Warren's willingness to use whichever constitutional theory necessary to secure Trop's citizenship was not unappreciated. With his restored citizenship, Trop was able to obtain a passport and appears to have to put it to frequent use throughout his lifetime, making at least two trips to Bermuda, before finally settling in California, where he lived for the remainder of his life.[145]

On April 5, 1958, Albert Trop sent a thank you note to the ACLU for successfully litigating his case and wrote that despite the dissenting opinion, the ACLU had saved him from "a fate worse than death," apparently embracing Warren's view that expatriation violated the Eighth Amendment. The letter did not recognize that this rationale was not even originally presented by the ACLU, despite the fact that Trop had copies of the original complaint. However, Trop continued to praise the ACLU and recognized that the victory of his case was greater than himself, calling it a win for the ACLU and the "7,000 men who had been disenfranchised [and] are no longer second-class human beings." In giving his "eternal gratitude" to the ACLU, Trop emphasized the meaning of the ACLU's work, writing, "one of the greatest contributions to our complex society is to give hope to the hopeless. This you have done."[146] Given that the ACLU initial theories of the case ultimately lost, and it was instead Warren's willingness to propose various contradicting legal theories that ensured Trop's victory, perhaps this thank you note should have also been passed to the chief justice.



Justice Felix Frankfurter dissented on the ground that desertion from the military can be punished by the death penalty. "Is constitutional dialectic so empty of reason," he asked, "that it can be seriously urged that loss of citizenship is a fate worse than death?"

Author's Note: I wish to thank Professor Brad Snyder of Georgetown University Law Center.

ENDNOTES

[1] *Trop v. Dulles*, 356 U.S. 86 (1958).

[2] *Ibid.* at 88.

[3] *Id.*

[4] *See* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (University of Pennsylvania Press 2012); Arthur J. Goldberg, Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1173 (1970).

[5] *Perez v. Brownell*, 356 U.S. 44 (1958).

[6] *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

[7] Earl Warren to Conference, Earl Warren Papers, Library of Congress, Box 535 Folder 4 (referencing *Trop* as one of the most important cases heard in the 1956 term); Felix Frankfurter to Conference on June 7, 1957, William Brennan Papers, Library of Congress, Part I Box 10, Folders 2–3 ("the issues at stake are too far-reaching and the subject matter calls for too extensive an investigation").

[8] Oral History Interview with Jon Newman (hereinafter Newman interview); NY TIMES, *High Court Backs U.S. Expatriation: But Sharply Split Opinions Find Constitutional Limits in Citizenship Cases*, April 1, 1958; *Perez*, 356 U.S. at 89.

[9] *Trop*, 356 U.S. at 87.

[10] *Ibid.*

[11] *Id.* at 88.

[12] Petitioner's S.Ct. Brief, ACLU Files, Box 1740, item 396 at 109 (hereinafter ACLU Files).

[13] *Trop,* 356 U.S. at 88.
[14] *Trop v. Dulles* Complaint, ACLU Files, 109.
[15] *Ibid.*
[16] Albert L. Trop to U.S. State Dep't, Passport Division, Oct. 20, 1954 ACLU Files at 100.
[17] ACLU History, ACLU, https://www.aclu.org/other/aclu-history-early-breakthroughs-free-speech (last visited December 9, 2020).
[18] Herbert Levy to Osmond Fraenkel, February 11, 1955, ACLU Files, 97.
[19] *Ibid.*
[20] Levy to Fraenkel, ACLU Files, 97.
[21] *Ibid.*
[22] Plaintiff Brief, United States District Court at 2, ACLU Files.
[23] Warren draft *Trop* dissent, Earl Warren Papers, Library of Congress, Reel 10, 236 (hereinafter Warren Papers).
[24] Newman memo, Warren Papers, Box 446, Folder 4; Brennan Draft *Trop* concurrence, Brennan Papers, Library of Congress, Box 10, Folders 2–3.
[25] *Trop*, 356 U.S. at 104.
[26] Trop Complaint, ACLU Press Release, January 11, 1956, ACLU Files, 106, 40.
[27] Trop Complaint, ACLU Files, 106.
[28] Plaintiff Brief, ACLU Files, 109.
[29] Fraenkel to Alan Reitman, September 5, 1956, ACLU Files, 89; William Burke to P.M. Malin, March 13, 1956, ACLU Files, 85.
[30] Fraenkel to Trop, May 9, 1956, ACLU Files, 93.
[31] E.D.N.Y. Decision, ACLU Files, 32.
[32] Fraenkel to Reitman, May 22, 1956, ACLU Files, 91.
[33] Plaintiff-Appellant Brief to 2d Cir., ACLU Files, 29.
[34] *Ibid.*
[35] Fraenkel to Reitman, October 11, 1956, ACLU Files, 88.
[36] See e.g. Jerome N. Frank, *Some Reflections on Judge Learned Hand*, Speech, YALE. L. J. (1955).
[37] See generally *Trop v. Dulles,* 239 F.2d 527, 529–530 (2d Cir. 1956).
[38] *Ibid.*
[39] *Trop v. Dulles*, 239 F.2d 527, 529–530 (2d Cir. 1956).
[40] *Perez*, 356 U.S. at 44; *Nishikawa,* 356 U.S. at 129.
[41] Historical Society of the District of Columbia Circuit, *A Summary of the Oral History of Charles A. Horsky*, https://dcchs.org/oral-history-summary-of-charles_a-_horsky/ (last visited December 9, 2020); *Perez v. Brownell*, Oyez, https://www.oyez.org/cases/1957/44 (last visited December 6, 2020).
[42] Brief for Petitioner, *Perez v. Brownell*, 356 U.S. 44 (1958)(No. 524).
[43] *Nishikawa*, 356 U.S. at 131.
[44] *Trop,* 356 U.S. at 86; *Perez*, 356 U.S. at 44; *Nishikawa,* 356 U.S. at 129.
[45] Cert Memo, Douglas Papers, Library of Congress, Box 1191 (hereinafter Douglas Papers).
[46] *Ibid.*
[47] Brief for Petitioner, *Trop v. Dulles*, 356 U.S. 86 (1958)(No. 710).
[48] *Ibid.*
[49] Burke to Malin, ACLU Files at 85.
[50] Brief for Petitioner, *Trop v. Dulles*, 356 U.S. 86 (1958)(No.710).
[51] *Trop v. Dulles*, Oyez, https://www.oyez.org/cases/1957/44 (last visited December 6, 2020).
[52] *Ibid.*
[53] Fraenkel to Trop, May 6, 1957, ACLU Files at 82.
[54] *Ibid.*
[55] *Id.*
[56] Docket Books, Douglas Papers, Box 1184; Docket Books, Burton Papers, Box 294 folder 7.
[57] Conference Notes, Douglas Papers, Box 1191.
[58] *Ibid.*
[59] *Id.*
[60] Conference Notes, Douglas Papers, Box 1191.
[61] *Ibid.*; Conference Notes, Burton Papers, Box 296, Folder 2.
[62] *Id.*; Conference Notes, Douglas Papers, Box 1191.
[63] Conference Notes, Douglas Papers, Box 1191; Conference Notes, Burton Papers, Box 296, Folder 2.
[64] Trop Draft Dissent, June 3, 1957, Warren Papers, Reel 10 at 236.
[65] *Ibid.*
[66] *Id.*
[67] *Id.*
[68] Trop Complaint, ACLU Files, 109.
[69] Trop Draft Dissent, June 3, 1957, Warren Papers, Reel 10, 236.
[70] *Ibid.*
[71] *Trop,* 356 U.S. at 94.
[72] *Id.* at 98–99.
[73] Frankfurter to Conference, June 7, 1957, Brennan Papers, Part I Box 10, Folders 2–3.
[74] Cramton Memo, Burton Papers, Burton Box 296, Folder 7.
[75] Docket Books, Douglas Papers, Box 1184.
[76] Brief for Petitioner, *Trop v. Dulles*, 365 U.S. 86 (1958) (No. 77).
[77] Brief for Respondent, *Trop v. Dulles*, 356 U.S. 86 (1958) (No. 70).
[78] Trop District Court Brief, Second Cir. Appellant Brief, ACLU Files, 109, 20.
[79] *Trop v. Dulles,* Oyez, https://www.oyez.org/cases/1956/70 (last visited October 27, 2020).
[80] Trop Draft Dissent, June 3, 1957, Warren Papers, Reel 10, 236; *see Trop,* 356 U.S. at 86.
[81] *Trop v. Dulles,* Oyez, https://www.oyez.org/cases/1956/70.
[82] See generally Warren Papers, Reel 10.

[83] Rankin had played a significant role in other high-level cases, such as *Brown v. Board of Education* and *Baker v. Carr.* He would go on to serve as General Counsel on the Warren Commission investigating whether Lee Harvey Oswald acted alone in the Kennedy assassination. J. Lee Rankin Biography, Dep't of Justice, https://www.justice.gov/osg/bio/j-lee-rankin.

[84] *Trop v. Dulles,* Oyez, https://www.oyez.org/cases/1956/70.

[85] Conference Notes, Burton Papers, Box 296, Folder 2; Docket Books, Douglas Papers, Box 1184.

[86] Frankfurter to Harlan, October 29, 1957, Frankfurter Papers Part II, ProQuest, Box 102, Folders 11–15.

[87] *Ibid.*

[88] Harlan to Frankfurter, November 19, 1957, Frankfurter Papers Part II, ProQuest, Box 102, Folders 16–19.

[89] *Ibid.*; *Trop*, 356 U.S. at 114.

[90] Anthony Lewis, N.Y. TIMES, *3 U.S.-Born Fight for Nationality: To Test in High Court Power of Congress to Eliminate Their Citizenship*, Nov. 11, 1957, 24.

[91] Frankfurter Draft Majority Opinion, Frankfurter Papers Part II, ProQuest, Box 104, Folders 14–18.

[92] Black to Frankfurter, Harlan to Frankfurter, Clark to Frankfurter, *Ibid.*

[93] Conference Notes, Douglas Papers, Box 1191.

[94] Frankfurter to Conference, June 7, 1957, Brennan Papers, Part I Box 10, Folders 2–3.

[95] Draft Perez and Trop Dissent, Warren Papers, Reel 10 part 1, 241.

[96] *Ibid.*

[97] *Id.*

[98] Harlan to Frankfurter, November 19, 1957, Felix Frankfurter Papers Part II, ProQuest, Box 102, Folders 16–19.

[99] Draft Perez and Trop Dissent, Warren Papers, Reel 10 part 1, 246.

[100] *Trop,* 356 U.S. at 94.

[101] Black Notes, Warren Papers, Box 582, Folder 6.

[102] *Ibid.*

[103] Newman Memo #1, Warren Papers, Reel 10 Part 1, 200.

[104] *Ibid.*

[105] *Id.*

[106] Levy to Fraenkel, ACLU Files, 97.

[107] Conference Notes, Douglas Papers, Box 1191; *Trop v. Dulles,* Oyez, https://www.oyez.org/cases/1956/70 (last visited October 27, 2020).

[108] See generally Newman Memo 2, Warren Papers, Reel 10 Part 1, 206; *Trop*, 356 U.S. at 86.

[109] Brennan to Warren, Brennan Papers Part I, Box 10, Folders 2–3.

[110] *Ibid.*

[111] Trop Memo, *id.*

[112] Brennan Draft Dissent, Brennan Papers, Box 10, Folders 2–3; Newman Memo re: Brennan Opinion, Warren Papers, Box 446, Folder 4.

[113] Newman Memo re: Brennan Opinion, Warren Papers, Box 446, Folder 4.

[114] Brennan Draft Dissent, Brennan Papers, Box 10, Folders 2–3; Newman Memo re: Brennan Opinion, Warren Papers, Box 446, Folder 4; Newman Interview.

[115] Draft Trop Dissent, Warren Papers, Reel 10 Part 2, 103.

[116] Warren to Whittaker, February 26, 1958, *id.*, 104.

[117] Later, Justice Brennan will write that he was unable to merge his opinion and the chief justice's opinion. Brennan to Warren, Black, Douglas and Whittaker, Warren Papers, Reel 10 Part 2.

[118] Brennan to Warren, Brennan Papers, Box 10, Folders 2–3.

[119] Newman Memo #1, Warren Papers, Reel 10 Part 1 at 200.

[120] *Trop*, 356 U.S. at 93.

[121] Whittaker dissent in *Perez*, conference notes, original agreement with FF's opinion in Perez.

[122] Whittaker to Frankfurter, March 5, 1958, Frankfurter Papers Part II, ProQuest, Box 102, Folders 11–15.

[123] Whittaker to Frankfurter on November 21, 1957, *ibid.*

[124] Whittaker to Frankfurter, March 5, 1958, *id.*

[125] *Id.*; *Perez,* 356 U.S. at 84.

[126] Frankfurter to Whittaker, March 5, 1958, Frankfurter Papers Part II, ProQuest, Box 102, Folders 11–15.

[127] *Ibid.*

[128] Brennan to Warren, Brennan Papers Part 1, Box 11, Folder 5.

[129] Warren Papers, Box 446, Folder 5; Brennan Papers Part I, Box 11, Folder 5.

[130] Whittaker to Warren, March 17, 1958, Warren Papers, Reel 10 Part 1, 41.

[131] Burton Draft Dissent, Frankfurter Papers Part II, ProQuest, Box 102, Folders 11–15.

[132] *Ibid.*

[133] Brennan Papers, Box 9 folder 4.

[134] *Ibid.*

[135] Conference Notes, Douglas Papers, Box 1191; Conference Notes, Burton Papers, Box 296, Folder 2; *Perez*, 356 U.S. at 79.

[136] *Trop*, 356 U.S. at 86; e.g. Warren Papers, Warren Reel 10 Part 2 at 236.

[137] See generally *Trop*, 356 U.S. at 86.

[138] The ACLU counted *Nishikawa* as a "win," despite the Court's refusal to rule on the constitutional issue.

[139] *ACLU Bulletin,* ACLU Files, 78.

[140] *High Court Backs U.S. Expatriation: But Sharply Split Opinions Find Constitutional Limits in Citizenship Cases"*, N.Y. TIMES, April 1, 1958.

[141] See e.g. *id.*; "*Man without a Country,*" WASHINGTON POST, April 5, 1958, A6; Howard L. Dutkin, High Court Restores Deserter's Citizenship, WASHINGTON EVENING STAR, April 1, 1958.

[142] *High Court Backs U.S. Expatriation: But Sharply Split Opinions Find Constitutional Limits in Citizenship Cases*, THE NEW YORK TIMES, April 1, 1958.

[143] *Man without a Country*, WASHINGTON POST, April 5, 1958, A6.

[144] Osmond Fraenkel, *The Rights We Have*, ACLU Files, Box 1192, Folder 18 Item 470; Osmond Fraenkel, *The Supreme Court and Civil Liberties*, ACLU Files, Box 992, Folder 11, item 1219.

[145] Immigration and Flight Records, Albert L. Trop, Ancestry Library (last visited December 8, 2020); Cal. Death Records, Albert L. Trop, Ancestry Library.

[146] Trop to the ACLU, April 5, 1958, ACLU Files, 80.

The Judicial Bookshelf

Donald Grier Stephenson, Jr.

Introduction: Choosing Chief Justices

The Supreme Court's 115 justices to date owe their appointments to 42 presidents, but the roster of the 17 chief justices reflects the choices of only 15 of the nation's 46 chief executives. Moreover, while most presidents have regarded filling a vacancy on the Court as among their most important and potentially far-reaching decisions, naming a chief justice has often called into play consideration of background and qualifications beyond those routinely considered when the task is one of naming an associate justice. Indeed, it appears that a substantial majority of those selected for the center chair have presented credentials of public service at a high level. Indeed, this is a pattern that began to form at the beginning of government under the Constitution, even though that charter provides no guidance at all. Although it spells out qualifications for president, representative, and senator, it omits requisites of any kind for the judiciary—not even that federal judges be lawyers.

A perceived distinction between an associate justice and the chief justice apparently weighed heavily upon President George Washington after the Judiciary Act of 1789 opened the first appointment opportunities upon its passage on September 24. Filling the bench was a responsibility he took seriously as he indicated three days later in a statement to Edmund Randolph,[1] the first attorney general: "Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." In particular, according to Charles Warren, the selection of a chief justice "was by far the most important and had given to the President the greatest concern. Rightly he felt that the man to head this first Court must be not only a great lawyer, but a great statesman, a great executive and a great leader as well."[2] Accordingly, for chief justice, Washington's choice was John Jay, a "gentleman" who in John Marshall's estimation "[f]rom the commencement of the revolution... has filled a large space in the public mind,"[3] and who, as Washington expressed to Jay himself,

DOI: 10.1111/jsch.12281

possessed the "talents, knowledge and integrity" necessary to head "that department which must be considered as the keystone of our political fabric."[4]

Marshall's characterization of the first chief justice as someone who has "filled a large space in the public mind" may well align with the framers' understanding of the importance of the office in that the Constitution assigns solely to the chief justice the awesome responsibility of presiding when the president is on trial. Thus, for Washington, Marshall, and perhaps others, the chief justice would be someone who was not only qualified to be a justice, but someone who possessed additional credentials sufficient for *chief* justice. Jay, after all, had been a delegate to the first Continental Congress, chief justice of the Supreme Court of Judicature of New York, president of the second Continental Congress, minister plenipotentiary to Spain, secretary of foreign affairs under the Articles of Confederation, and negotiator of the Treaty of Paris with Great Britain.

Washington's view of and expectations for the office of chief justice anticipated both stability and influence, objectives, however, not realized until the tenures of Marshall (1801–1835) and Roger B. Taney (1836–1864). This remarkable stretch of 63 years for two chiefs followed the Court's initial twelve years, a period that alone witnessed three chiefs. Such turnover suggested that whatever distinction the office "first enjoyed was diluted by the attitude of early incumbents toward it."[5]

Yet that doleful assessment hardly derives from preparation in that Jay's immediate successors possessed impeccable credentials. Aside from various state government positions in South Carolina, John Rutledge had been a delegate to the Stamp Act Congress and the Continental Congress, member of the Federal Constitutional Convention and the South Carolina convention to ratify the U.S. Constitution, as well as one of the first six associate justices of the U.S. Supreme Court.[6] In naming Oliver Ellsworth to follow Rutledge as chief justice, Washington no doubt considered his accomplishments as a delegate to the Continental Congress and the Federal Constitutional Convention, as a judge on the Connecticut Superior Court, and as senator from Connecticut during which service he helped to shape the Judiciary Act of 1789.

With President John Adams' choice of Marshall and President Andrew Jackson's selection of Taney, the expectation of the chief justice as someone who filled "a large space in the public mind" seemed to be reaffirmed. Marshall's public accomplishments by 1801 meant that he was already about as close to being regarded a "founder" as one could be without actually being one. With Taney, aside from positions in Maryland state government, his pre-Court resume included acting secretary of war, attorney general of the United States, and secretary of the treasury. Similarly, in Salmon P. Chase, President Abraham Lincoln chose for chief justice someone who had been governor of Ohio, senator from the Buckeye State as well as secretary of the treasury. Yet, selection of the next two chief justices marked a break in the pattern in that neither Morrison R. Waite nor Melville W. Fuller, named respectively by Presidents Ulysses Grant and Grover Cleveland, reached the Court with the national stature of their predecessors. Indeed, with respect to Waite, there seemed utter surprise and, for some, perhaps concern at his selection. "We have a Chief Justice," Justice Stephen Field commented in a letter, "that would never have been thought of for the position by any person except President Grant.... He is gentlemanly...[but how much of a lawyer remains to be seen.... My objection to the appointment is that it is an experiment whether a man of fair...abilities can make a fit Chief Justice of the United States—an experiment which no man has a right to make with our Court."[7]

In his selection of Edward Douglass White, President William Howard Taft had not only turned to a former U.S. senator but

became the first president to elevate a sitting member of the Court as chief. Still it was President Warren G. Harding's nod to Taft as White's replacement that, in perhaps a hint of Marshall's estimate of Jay, restored the pre-Lincoln pattern. Aside from being a judge on the U.S. Court of Appeals and a former president, Taft had been solicitor general of the United States, president of the U.S. Philippine Commission, civil governor of the Philippine Islands, and secretary of war.

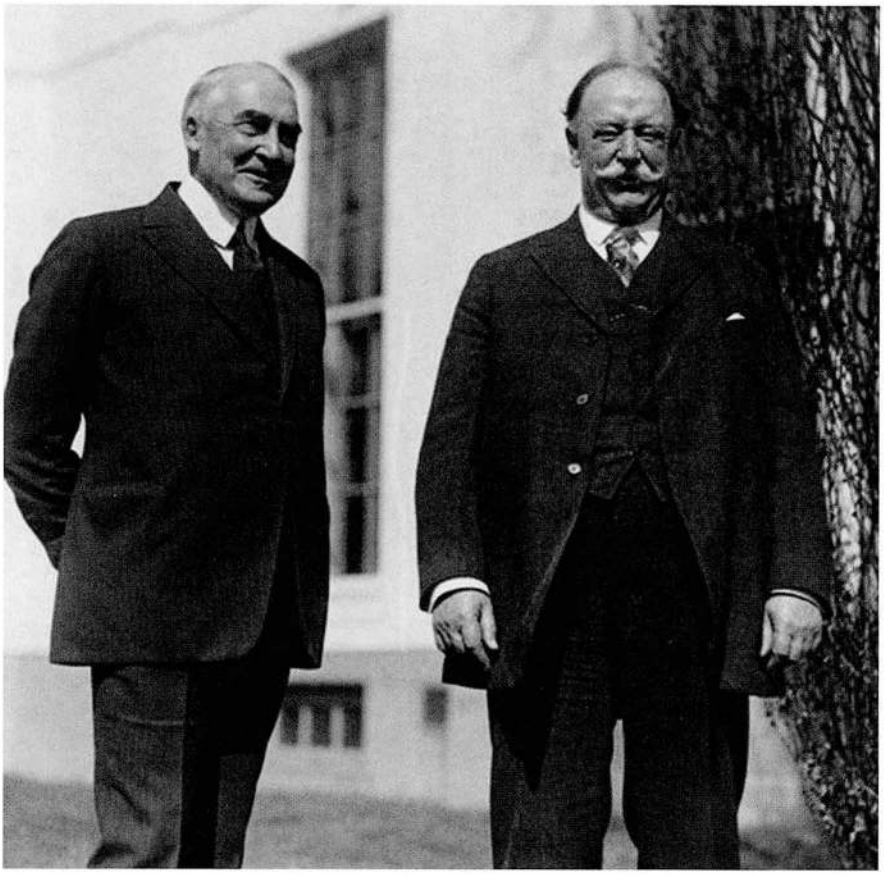
Preference for a chief justice with ample national stature then surely accounted for President Herbert Hoover's appointment of Charles Evans Hughes, who had been not only a former justice, but governor of New York, Republican candidate for president of the United States, secretary of state, and member, Permanent Court of Arbitration at The Hague. At Hughes's retirement Franklin D. Roosevelt's appointment of Harlan Fiske Stone not only imitated Taft's selection of a sitting justice but ensconced a former attorney general and law school dean as chief. In contrast, President Harry Truman's designation of Frederick M. Vinson combined federal judicial, legislative, and executive service in that the Kentuckian had been a member of the U.S. House of Representatives, judge on the Court of Appeals for the District of Columbia, judge on the Emergency Court of Appeals, director of the Office of Economic Stabilization, administrator of the Federal Loan Administration, and director of the Office of War Mobilization and Reconversion, as well as secretary of the treasury.

Barely nine months into his presidency, Dwight Eisenhower's appointment of Earl Warren (then governor of California and a former state attorney general and Republican candidate for Vice President in 1948) reflected a desire to name someone with broad experience in public affairs. As James Simon has written, for a person "with no training in law or the history of the Court,... Eisenhower held strong opinions on the qualities he was looking for in a chief justice."[8] In a letter to his brother Milton, the president indicated that he sought "a man (a) of known and recognized integrity, (b) of wide experience in government, (c) of competence in the law, (d) of national stature in reputation so as to be useful to restore the Court to the high position of prestige it once enjoyed."[9]

Appointed by presidents Richard M. Nixon, Ronald Reagan, and George W. Bush, the three most recent chief justices (Warren E. Burger, William H. Rehnquist, and John G. Roberts Jr.) had surprisingly similar backgrounds. Each had judicial experience (Rehnquist was associate justice, while Burger and Roberts sat on the Court of Appeals for the District of Columbia Circuit). Each also had held positions in the executive branch (at the assistant attorney general level in the Department of Justice or the White House). One had an already established reputation as a leader of the bar of the Supreme Court. Thus, even if one concludes that the pre-Court professional experiences of this trio do not rise to level of filling, in Marshall's words, "a large space in the public mind," the roster of the 17 chiefs nonetheless indicates that a minimum of eleven or twelve truly deserve that distinction.

The Chief Justiceship of William Howard Taft, 1921–1930

The tenth chief justice and the Court are the focus of **The Chief Justiceship of William Howard Taft, 1921–1930** by Jonathan Lurie, emeritus professor of history and law at Rutgers University.[10] Lurie's book is the most recent addition to "The Chief justiceships of the United States Supreme Court," a valued undertaking of the University of South Carolina Press under the series editorship of Herbert Johnson, emeritus professor of law at the University of South Carolina. With publication of this volume on the Taft Court, the series, with the notable



President Warren Harding posed with William Howard Taft outside the White House in 1921, after announcing the former president's appointment to the Supreme Court. Taft, whose chief justiceship is the subject of a new book by Jonathan Lurie, emphasized unanimity on the Court and was instrumental in helping pass legislation to reform the judiciary.

exception of a title on Chief Justice Taney, now includes entries from the pre-Marshall Court through Warren Burger's tenure.[11] As a scholar, Lurie is as comfortable writing about the Court generally as he is with Taft in that his books include a coauthored examination of the Slaughterhouse Cases,[12] a volume on the Chase Court,[13] and a monograph on Taft himself.[14] The result of his most recent contribution is a deeply researched, thoughtful, and accessible addition to judicial literature generally and particularly to material on Taft.

Aside from a focus on Taft, however, what should a reader expect from a volume entitled as this one is? One would not expect, for instance, a full-scale biography and period study on the order of Henry F. Pringle's **The Life and Times of William Howard Taft** that was published in two volumes in 1939. Alternatively, one might expect something less sweeping in scope and more akin to Alpheus Thomas Mason's **William Howard Taft: Chief Justice**, published in 1964, with its emphasis on Taft's Court years. While hardly slighting Taft's various endeavors prior to his arrival at the Court, Lurie achieves a good combination by combining attention to Taft as *chief* justice with appropriate attention to the eleven associates with whom he served, alongside fulsome attention to major judicial decisions during Taft's tenure.[15]

Probably every author who has contributed a volume to Johnson's series has felt that the chief justiceship assigned to him (each of the authors to date has indeed been male) was both significant in the story of the Court and offered a book-worthy individual to convey to readers. Yet with this book on the Taft Court, such a generalization is perhaps doubly true. As Johnson writes in the series editor's Preface, the Taft Court "represents the first step toward the emergence of the Supreme Court as we know it today."[16] Yet as familiar as certain elements or features of the Taft Court may seem to contemporary readers, it may be just as important to keep in mind that in the broad sweep of the Court's past, the Taft Court from the perspective of the early twenty-first century comes close to being lodged in ancient judicial history. Current readers of this *Journal* are, after all, about as far removed in time from the Taft Court as the Taft Court was from the beginnings of Roger B. Taney's chief justiceship.

Moreover, among the thirteen completed chief justiceships since 1800, Taft's was among the briefer ones. While Salmon P. Chase's tenure was roughly the same as Taft's, only Stone and Vinson, of the other eleven chiefs, sat for shorter periods. Also, while Taft was appointed in mid-1921 and resigned in February 1930, Lurie explains that by the end, "he was so ill that he conducted virtually no business as chief justice in 1930,"[17] so Taft's functional span was actually less than even the official dates suggest.

Nonetheless, the years of the Taft Court were filled with events and developments of major judicial significance, some of which bore Taft's direct imprint, as illustrated by his own appointment to the Court. Although it was President Warren Harding who named Taft chief justice, it had been *President* Taft's own actuarial calculations that advantageously positioned himself when at age 53 Taft picked Justice Edward Douglass White, age 65—and not Justice Charles Evans Hughes, age 48—for chief justice in 1910 upon the death of Chief Justice Melville Fuller. While some justices have craved the presidency, with Taft the craving was decidedly otherwise: he craved the chief justiceship. Thus, following White's death on May 19, Harding fulfilled Taft's dreams with a nomination on June 30, whereupon the Senate, bypassing its Committee on the Judiciary, confirmed Taft unanimously the same day.

As a former federal appeals court judge, solicitor general, and president, Taft reached the Supreme Court with an acute sense of the importance of judicial selection. Although he had twice turned down nomination offers from President Theodore Roosevelt for a seat as associate justice, Taft as president made six nominations to the Court, including his elevation of Justice White to the center chair, more than any other single-term president to date. Aside from Taft, Harding was able to make three other Supreme Court appointments (George Sutherland, Pierce Butler, and Edward Sanford) during his abbreviated term, and Chief Justice Taft had a hand—sometimes a major hand—in the selection of each and was hardly reticent as to appropriate qualifications for lower court judges too.

In a letter of welcome to Sutherland soon after his appointment, Taft did not minimize the importance "of having judges of learning in the law" on the Court but observed that "the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service." In particular, service on the Court required a "sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted...." A justice "must needs keep abreast of the actual situation in the country so as to understand all the phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions."[18]

Furthermore, as Lurie explains, "Taft did not intend to wait and react to a proposed nominee. Rather, he sought to ensure that Harding put forward only nominees who fit Taft's criteria." A member of the Supreme Court should be committed to "constitutional government, as understood by the legal classicists of his time: strong support for property rights, proper respect for the Fourteenth Amendment, and impressive credentials either as an attorney or legislator, or previous experience on the bench. Party affiliation was secondary...."[19]

Taft's influence was greatly facilitated by a comfortable relationship with Harding. In a discussion of Taft's "well-coordinated machinations on Butler's behalf," Lurie notes that Taft succeeded because of the president's "notorious insecurity when dealing with judicial appointments. Not a lawyer himself, he relied to an excessive degree on Taft, who described his efforts in vetting possible judicial appointments ... as 'a labor of love.'"[20] Also helpful was Taft's relationship with Henry Daugherty, the attorney general, who also realized he needed help. Taft had opened the door soon after Harding's inauguration when he wrote to Daugherty that "if you don't mind it, my interest in the Federal Judiciary, where I know something of the situation, makes me anxious to give you benefit of what I have learned from considerable experience.... I am not butting in, but I am only testifying, without any personal slant, and only with a view of helping if I can"—an offer to which Daugherty shortly replied "I want you at all times to feel free to make new suggestions."[21]

Taft shared his views on appropriate nominees with others as well. When Harding was confronted with Justice Mahlon Pitney's impending departure, Taft expressed to Elihu Root his fear that "it would be too bad to have Harding put on our bench a man who would side with Brandeis in criminal questions."[22] When Harding seemed to waiver over what became Sanford's eventual nomination, Taft sounded out Root about Henry Stimson, who had been Taft's secretary of war. "There are a great many reasons why Stimson would make a good judge".... "[T]he only thing I know against [him] is his good opinion of [Felix] Frankfurter." Yet "I suppose it does not indicate an unsoundness of views as to the Constitution on Stimson's part.... I know you can give me assurance that he is not in favor of breaking down the Constitution or making it a mere scrap of paper. On the other hand, I feel we ought not to have too many men on the Court who are as reactionary on the subject of the Constitution as McReynolds...."[23]

With respect to Taft's overall influence on nominations, Lurie accepts the assessment of David Danelski in his study[24] of the Butler nomination that while Taft by no means controlled the nomination process, "it did mean that if he objected to a particular candidate, that candidate had practically no chance of nomination."[25] However, the convenient confluence Taft enjoyed came to an end upon Harding's death in August 1923 and President Calvin Coolidge's dismissal of Daugherty in early 1924 and was never replicated. As the author explains, "Coolidge had been a successful attorney, while [Herbert] Hoover, a self-made millionaire as a mining engineer, felt no need to rely on Taft, as had Harding."[26]

Taft's chief justiceship is also remembered because of the emphasis he placed on unanimity. He despised dissents. The author reports that during his eight full terms, Taft authored 249 opinions for the Court but filed only three written dissents. Moreover, lengthy dissents, such as some filed by Justice Louis D. Brandeis, bothered him even more. They were simply "a form of egotism. They don't do any good and only weaken the prestige of the Court. It is much more important what the Court thinks than what any one thinks."[27] During his tenure, Taft also suppressed at least 200 dissenting votes which he had cast earlier in order to stand

with the majority. Moreover, he "sometimes would reassign an opinion to a different justice to gain greater support... or he would take the insights in a threatened dissent and somehow incorporate them into a finished opinion that ultimately received the votes of the entire court."[28]

Other legacies of Taft's Court tenure were legislative, foremost of which was what has come to be known as the Judges' Bill of 1925, to which Lurie appropriately devotes the entire fourth chapter. "The truly remarkable conditions under which the Judges' Bill had been prepared, presented, and passed remain worthy of note. Never before had several justices been so involved in arts of the legislative process. ...Taft's tactics as a spokesman, lobbyist, and political persuader were significant and effective, even if they went to the cusp of appropriate judicial conduct. In the end Congress as a whole, as well as the ABA were content to let the justices carry the bill. To this day the bill remains the bedrock for the court's virtually complete control over its docket."[29] For Lurie, the law remains a "unique statute. Authored by the court, and nurtured by several of its members, passage... resulted from an intriguing lack of interest in Congress [during a lame-duck session], matched by effective presentations from the justices, especially Van Devanter."[30]

The Judges' Bill followed legislation in 1922 initially advocated by Taft in 1921 as he became the first chief justice to appear before a congressional committee. At Taft's urging, Congress not only increased the number of lower court judges in the federal system to relieve overburdened dockets, but gave the chief justice authority to shift judges among the circuits to take account of varying caseloads. Finally, Congress authorized an annual conference of senior circuit court judges over which the chief justice would preside. Today that conference provides a forum from which the federal judiciary as a "unified entity" may raise issues of national concern.[31]

An additional legislative achievement for which Taft deserves major credit is entirely tangible: the Supreme Court Building. This addition to Capitol Hill replaced the Court's cramped quarters in the Old Senate Chamber where, as some said, the arrangement was like living with relatives. Yet achieving this objective required not only the support of Congress but convincing senior colleagues Holmes, Brandeis, and McReynolds who were well ensconced and altogether comfortable working from their residences in Washington. As Lurie explains, "[b]y 1927 Taft... had not only picked out a possible site for the proposed building but had also selected his architect [Cass Gilbert] and indeed had already instructed him—albeit on an informal basis—to undertake preliminary sketches. The fact that no specific congressional authorization for it had yet been voted made no difference to the chief justice."[32] By December 1928, effective lobbying by Taft led to creation of a congressionally authorized building commission consisting of Taft (who was chosen chair) and Van Devanter, four members of Congress, and the architect of the Capitol. President Hoover laid the building's cornerstone on October 13, 1932, after Hughes had succeeded Taft as chief justice.[33]

Most of the ten chapters in Lurie's book convey pieces of the rest of the legacy of Taft's chief justiceship: his Court's decisions. A close look at the Index of Cases reveals that some twenty-two decisions by the Taft Court that the author cites and/or examines are still very much part of the "canon" of American constitutional law as reflected in casebooks, treatises, and on academic syllabi. While the list includes some decisions that were later overruled, inclusion in Lurie's analysis demonstrates their importance at least for the time and circumstances in which they were rendered and in other instances their significance for decades afterward. Moreover, with respect to decisions like *Olmstead v. United States*[34] and *Whitney v. California*,[35]

the cases remain central today because of a separate opinion that was filed even though in both instances the decisions themselves have long since been overruled.

Helpfully, Lurie has used selected cases not only to address their issues and outcomes but to provide a window into the workings of the Taft Court. A good example is *Myers v. United States*,[36] which commenced after President Woodrow Wilson in 1916 removed a postmaster in Portland, Oregon, without adhering to a statute of 1876 stipulating that postmasters of certain classes be appointed and removed by the president with the advice and consent of the Senate. In the decision's broad and generous affirmation of presidential power, the case represented what Taft, who assigned the opinion to himself, "considered to be the most important case of his judicial tenure. Not without reason did he refer to it as a 'monument.'"[37] Indeed, one scholar has recently labeled his opinion "epochal."[38] After all, "who better than a former chief executive could be more familiar with the unfortunate results of congressional tampering with the independent power of executive removal?"[39] For Taft, absent any express provisions in the Constitution on the president's power of removal of executive branch appointees, any congressionally imposed restrictions on removal were constitutionally invalid. The power of removal—like the power of appointment itself—was incident to the power (and constitutionally imposed responsibility) to execute the laws. In finding the act of 1876 invalid, the Court also doubled back to pass similar judgment on the Tenure of Office Act of 1867 that had lain at the center of the impeachment of President Andrew Johnson.[40]

By April 14, 1925, *Myers* had been argued, re-argued, and submitted. However, not until October 25, 1926—more than a year and a half later—did the case with its opinions come down. According to Lurie, at least two colleagues were far less interested than Taft in a speedy disposition. After the case was first discussed at Conference, Taft realized that Brandeis, Holmes, and McReynolds would dissent, producing a split that he found "both disconcerting and disagreeable—all the more so as it presaged a major characteristic of his remaining years on the bench—more frequent dissents, some contentious." Particularly worrisome was what he knew about Holmes and Brandeis, in particular the former's "gift for epigrammatic phrases" and the latter's "impressive—and—exhaustive scholarship." Thus, the chief justice realized that "his opinion would have to be as thorough as he could make it."[41]

"I have heard nothing yet from the dissenters in my big case," Taft wrote to his son Robert in December. In mid-January 1926, he wrote to son Horace that "the reason I have not announced the opinion in that big case of mine... is because Brandeis has been holding off, and this morning I get [sic] his dissenting opinion. I thought mine was pretty long, but his is 41 pages, with an enormous number of fine print notes and with citations from statutes without number.... [I]t may turn out to be a stronger opinion than I indicated...and I shall have to take time." Then in a letter to Robert he pointed to McReynolds as another difficulty. He "expects to dissent and he wishes to have full time to prepare what he has to say." Indeed, "McReynolds is always inconsiderate. There is no reason why he should not have written his opinion before [especially] as he knew that Brandeis took the last recess to prepare his."[42]

On October 24, he informed Robert that he would announce his opinion the following day, but added it "is made long because the discussion is a historical one, and in view of the character of the objections made in the dissents, I found it necessary to extend the opinion in answering the arguments that were advanced by the dissenting Judges.... Holmes' dissent is about five lines long and hardly seems to indicate that he rises to the question."[43] Taft's reference to the length of the Holmes opinion was only slightly under

the mark in that it totaled 223 words. In the *United States Reports*, Brandeis's dissent consumed 55 pages, with 87 footnotes, while Taft's opinion for the Court surpassed Brandeis's with 71 pages, while the McReynolds dissent totaled 62 pages. Even at this distance, it is difficult not to be impressed with the depth of research and historical analysis on display in these opinions. Yet even with so fulsome a display of the record from the nation's founding years, a paradox still shines through. Three justices drew one conclusion and six another, showing that examination of the same historical record does not necessarily lead members of a group to the same conclusion.

According to Lurie, the dissents in this case in particular truly troubled the chief justice perhaps even more than usual. About Brandeis, he wrote to Robert that he "loves the veto of the group upon effective legislation or effective administration. He loves the kicker, and is therefore in sympathy with the power of the Senate to prevent the Executive from removing obnoxious persons because he always sympathizes with the obnoxious person." Brandeis and McReynolds, Taft insisted, belonged "to a class of people that have no loyalty to the court and sacrifice almost everything to the gratification of their own publicity and wish to stir up dissatisfaction with the decision of the court, if they don't happen to agree with it." Moreover, with respect to McReynolds, Taft explained to his youngest son Charles, the greater the agitation against the Court "growing out of any opinion of his, the better he likes it, because it exalts in a way that tickles [in] him the spirit of opposition."[44] Such ruminations lead the author to conclude that by 1926 Taft had become "unable to distinguish between loyalty to his court as an institution and legitimate disagreement concerning legal interpretation of a statute."[45]

One imagines that Taft expected his position in *Myers* to have some staying power, but such was not to be. Five years after his death, a unanimous Court narrowed *Myers* significantly in *Humphrey's Executor v. United States*[46]; litigation begun after President Franklin D. Roosevelt dismissed a member of the Federal Trade Commission because of policy differences. Congress, however, had specified that commissioners could be dismissed only for misfeasance or malfeasance. Ironically it was Justice George Sutherland who had silently joined Taft's opinion in *Myers* who now spoke for the bench in constricting it: "[T]he necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department, and who exercises no part of the executive power vested by the Constitution in the President."[47] Only rarely has so substantial a ruling on presidential power been so substantially trimmed so soon.

Very early in the book, Lurie quotes from a letter Holmes wrote to Harold J. Laski when the prospects seemed good that Harding would name Taft chief justice: "I would rather have Hughes.... Taft is said to be indolent" and "I never saw anything that struck me as more than first rate second rate [*sic*]," even though he "did well as a Circuit Judge."[48] The epilogue then, interestingly, includes a strikingly similar assessment from Brandeis who said his chief justice possessed "a first rate-second rate mind."[49] For Lurie the Brandeis comment points the way to an assessment of Taft's chief justiceship that overall left the author "with a lingering sense of admiration, although [one] tempered by ambivalence."[50] Lurie explains that his ambivalence stems from the fact that Taft, in contrast to colleagues Holmes and Brandeis, was not an outstanding jurist, an assessment, Lurie insists, Taft would have accepted. Moreover, with a handful of exceptions, most cases in which Taft spoke for the Court have not "survived the test of ongoing scholarly interest,"[51] and of those cases from his Court which do remain of high interest it is often the

***The President and the Supreme Court*, by Paul M. Collins Jr. and Matthew Eshbaugh-Soha, examines the frequency at which presidents have spoken publicly about the Supreme Court and referenced case law in their speeches. Above, Stephen Breyer and President Bill Clinton walked to the Rose Garden on May 16, 1994, where the president officially introduced his appointee to the nation.**

dissents which continue to attract the most attention.

Yet, while accurate, explains Lurie, this view "does not present a balanced assessment of Taft. If not a great *jurist*, he was a truly outstanding *chief justice*, and in his case this distinction is critical." As chief justice, "Taft offered a perspective and experience unique in the Court's history. Never before (or since) has a member of the Supreme Court possessed the administrative background that Taft brought to the center seat."[52] Indeed, Lurie ranks Taft with John Marshall as a great chief justice "not because of his jurisprudence or many of his specific decisions, but rather because of his administrative excellence and intuitive understanding of his court's current needs and future aspirations. All seven chief justices who succeeded him since 1930 have utilized his administrative innovations" just as the "numerous visitors to *his* court still gaze with awe on what his determination accomplished."[53]

The President and the Supreme Court

While Woodrow Wilson's second term ended in 1921, the stricken former president died two years before *Myers* came down. Had timing of that case and/or his illness been different, one suspects the decision might have elicited a comment from the twenty-eighth chief executive, thereby perhaps meriting discussion in **The President and the Supreme Court** by Paul M. Collins Jr. and Matthew Eshbaugh-Soha, who teach political science at the University of Massachusetts, Amherst, and the University of North Texas, respectively.[54] In contrast to the breadth suggested by the title, however, their focus is narrower, and so readers should not confuse this book with the similarly titled but far

more comprehensive **The Supreme Court and the Presidency** by Robert Scigliano, published in 1971. Helpfully, their subtitle points the way: "Going Public on Judicial Decisions from Washington to Trump."

Most publicly aware individuals today would surely agree that modern American presidents are not only loquacious, but eagerly so. Indeed, the authors note that "going public" (or speaking out) is one of a president's "most commonly employed strategies of leadership." Citing one source, Collins and Eshbaugh-Soha report that since 1953, presidents have spoken publicly nearly 310 times per year, with a peak of 449 speeches during Bill Clinton's administration.[55]

As for presidential remarks on Supreme Court decisions in particular, they explain that their interest springs from two particular incidents. The first was President Barack Obama's State of the Union Address in 2010 during which, with six justices sitting a few feet in front of him, he criticized by inference the Court's decision in *Citizens United v. Federal Election Commission*[56] which, on First Amendment grounds, overruled one prior decision and part of another that had allowed regulation of corporate speech in elections. "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[57] Obama's reprimand reminded some of Ronald Reagan's even more pointed rebuke concerning prayer in public schools in his 1983 State of the Union address where the forty-fourth president insisted "God never should have been expelled from America's classrooms."[58] As with Obama's comment, Reagan's immediate audience included members of the Court. The occasion for the second was a press conference in April 2012 following oral arguments in March on the constitutionality of the Patient Protection and Affordable Care Act (dubbed Obamacare), the signature legislative achievement of the president's first term.

> I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this Court will recognize that and not take that step.[59]

The Court's decision in this litigation came down on June 28,[60] upholding the central part of the legislation.

Among the questions arising from such instances of "going public" is their frequency, a matter the authors addressed by compiling a "first-of-its-kind database on all presidential mentions of Supreme Court cases"[61] beginning with George Washington and extending through Barack Obama (1789–2017). (The first two years of the Trump presidency (2017–2018) are specially addressed in a concluding chapter.) The authors' use of the word "mentions" (as a noun) is an important limiting device in that they consider and include only a president's references to the Court's decisions that occur in public speeches as opposed to private correspondence or other writings. Also apparently excluded would be a third party's recollection that might be found, for example, in a volume of memoirs, a newspaper article, or an associate's kiss-and-tell account. Narrowing mentions in this way was motivated, the authors explain, by their "desire to investigate how presidents use the going public strategy

in relation to the Supreme Court." Mentions in other venues would be "a different form of engagement with the Court than using public rhetoric to discuss judicial decisions."[62]

To facilitate analysis, the authors divide their database into two parts: historical and modern. The former includes mentions from the Washington through the Truman administrations, with the latter running from the Eisenhower through the Obama administrations. Together, data from the two sets are revealing. Among the historical presidents, "only about half mentioned a Supreme Court case... with Andrew Jackson being the first president to do so."[63] The 124 mentions from this period ranged from a low of one from a single president to a high of 53 for Franklin D. Roosevelt.

Data from the modern era portray a very different picture. "The 937 Supreme Court cases mentioned...represents [*sic*] almost a 650 percent increase over presidents who governed prior to 1953.... Thus, no matter how one views the data, attention devoted to Supreme Court decisions in public speeches by modern presidents positively dwarfs that of their predecessors."[64] The authors account for the sharp contrast by suggesting that in the historical period "presidents were not as publicly active...and that the Court had not yet begun weighing as much into substantive matters of public policy in the field of civil rights and liberties, compared with the modern era."[65] One might add another reason: Modern means of communication such as radio and television and later the Internet and social media have made "going public" not only easier but perhaps more efficacious.

Another question the authors address concerns timing. That is, a president might comment on a pending case, as did Obama in 2012, or refer to a decided case as he had done in 2010. However, the authors report that "the vast majority of speeches devoted to cases involve discussions of already decided cases."[66] Indeed, the percentages are nearly identical for both the historical and modern periods. However, while "it has become somewhat more common since the Carter Administration for presidents to address cases prior to a ruling, no president has made more than 13 appeals."[67]

The authors also address presidential motivation in going public. A president might speak out about a yet-to-be-decided case to shape public attitudes, to send a signal to the bench as to the kind of decision the president is prepared strenuously to implement, or to nudge one or more justices to a desired doctrinal or institutional conclusion and thus the preferred outcome. Presumably, however, any such cues would have already been sent through the work of the solicitor general, in the modern era, at least. As to decided cases, a president might want to connect a decision to a reelection campaign, to promote one's policy goals or legacy, "to ensure that the executive branch implements the policies underlying those decision in a manner consistent with his preferences, or address recent cases to influence the Court's decisions in future cases touching on a similar subject matter."[68]

The focus of the book raises normative concerns as well, issues that Collins and Eshbaugh-Soha address in detail as they highlight the tradition of coordinate construction alongside the expectation of judicial independence. Prominent in the thinking of chief executives such as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, among others, the former maintains that constitutional interpretation is a shared responsibility in that all constitutional officers—not only Supreme Court justices and other federal judges—have a role to play. From this perspective, accordingly, going public on a Supreme Court case falls within the bounds of presidential propriety. Favorable or unfavorable comments on a Supreme Court decision become part of the mass of viewpoints bolstering or questioning a particular ruling. In like fashion, a comment on a case not yet decided may be an instrument

by which presidents promote their reading of a statute or constitutional provision.

In contrast to coordinate construction, which derives its legitimacy from practice, the norm of judicial independence in the American context traces part of its origin to the ninth grievance (of twenty-seven) which the Declaration of Independence "submitted to a candid world. ... He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Eleven years later in Philadelphia, the Framers had those words in mind as they drafted section one of the Constitution's Article III. For Collins and Eshbaugh-Soha, the tendency of modern presidents to comment on pending cases "clearly" reveals "a break in tradition from their historical counterparts" in that when the latter did so, they usually did so only in general terms.[69]

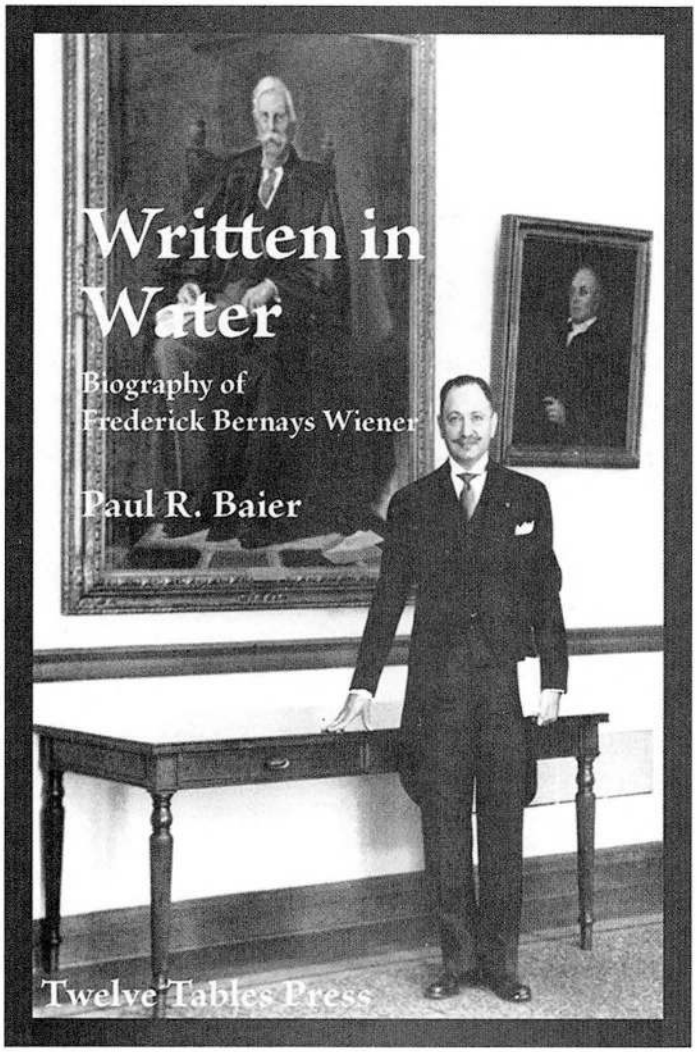
Lighting the Way

Just as President Obama's remark about the litigation prospects of the Patient Protection and Affordable Care Act had a prominent place on page one of **The President and the Supreme Court**, the same statute and the Defense of Marriage Act (DOMA) and legal action surrounding them mark the beginning of **Lighting the Way** by Douglas Rice, who teaches political science and legal studies at the Amherst campus of the University of Massachusetts.[70] His study is a compact and challenging foray into an examination of the role of the Supreme Court and the rest of the federal judiciary in influencing public policy, especially with respect to civil rights. In this reviewer's characterization, the book's central question seems to be whether the Court in the modern era *leads* or is *led*? The question is important because as the author writes near the end of his book, "The dialogue over public policy in America occurs not just in the legislative and executive branches but also in courtrooms across the country, with that judicial *attention* mattering for the future course of public policy."[71]

However, anyone reading Rice's book or even this review essay should be forewarned: For Rice, the word "attention" is not only important but central throughout. While this author has no way of knowing with certainty, it seems highly probable that with the exception of the word "court," conjunctions, and definite and indefinite articles, "attention" may well appear more often in the book than on any other noun—so often in fact that the reader might have expected to find "attention" as an entry in the index. (There is no such entry.) So as one reads through the book, it may be helpful to remember that Rice seems to be using this most favored word possibly and variously to suggest awareness, consideration, engagement, and/or involvement.

To address his central question about agenda setting, the author lays out two views of the policy-making (or shaping) process. The passive view maintains that the judiciary's involvement in an issue typically increases "only after congressional and presidential attention and legislation, perhaps only if there are controversies during implementation" as occurred after enactment of Obamacare.[72] In contrast to this perception stands the proactive view in which judicial involvement with an issue leads to increased attention to it by the executive branch and/or Congress as occurred after a federal district court invalidated DOMA and the Justice Department announced it would no longer defend the statute. That policy in turn engaged in different ways both Democrats and Republicans in Congress and helped to highlight an ongoing national debate over marriage equality.

With the latter situation—perhaps even better exemplified, as Rice notes, by events following the Court's historic decision in *Brown v. Board of Education*,[73] action by courts both "precedes and encourages issue attention in other branches" even if that attention occurs well in the future.[74] In short, with the former the judiciary is led, while



Paul R. Baier of LSU Law School has published a biography of Frederick Bernays Weiner, one of the leading members of the Supreme Court Bar in the twentieth century.

with the latter the judiciary can be in a policy-guiding leadership role. As the author inquires, do "the courts generally lag other institutions in addressing policy areas, as the passive view suggests, or do they instead spur the attention of other institutions, as the proactive view suggests?"[75]

However, for the latter situation, Rice explains that two conditions that must be present for the judiciary to energize the attention of other branches: a viable political constituency and what he calls the constitutional power condition. For the first, "the policy at issue must be one with activists …interested and mobilized in pursuit of political change."[76] These would be individuals or groups who will be helped or harmed by what courts decide. For "interest groups involved in creating or fighting legislation before Congress, the courts may offer a natural follow-up venue for their conflict." For interest groups on the losing end of the legislative battle, the courts offer an opportunity to seek to limit or explicitly override legislation. Correspondingly, groups that have successfully fought for legislation may try to

convince judges to broaden it through their rulings."[77] The second condition refers to a situation where courts "have constitutionally based policymaking power within that policy area." That is, "ownership of constitutionally based policymaking power in an area ... provides courts with an important tool to force the attention of other institutions onto an issue."[78]

To test his thinking, Rice constructed a database of all published federal court decisions from the period 1950–2000.[79] Initially sorting them into nineteen issue areas, he then compressed them for convenience into nine: civil rights, defense, economic activity, environment, health and science, labor, law and crime, social welfare, and transportation.[80] His research also cataloged interest group involvement through amici briefs which were filed. Analysis, in turn, led him to believe that he has "demonstrated that the courts produce changes in issue attention." This conclusion he finds particularly significant as a way to "increase attention to particular issues that are increasingly unlikely to be heard or decided upon in a modern Congress widely described as dysfunctional. It is perhaps during these periods that the courts can bet be used to encourage other institutions to action...."[81] Thus, "for those with policies left unattended to by the elected branches of government and the public at large, the courts are, at least sometimes, a viable outlet for disrupting the status quo and garnering subsequent attention. The outcome, of course, of that attention is unknowable, but if the status quo is unbearable, the federal court system as an agenda-setting institution offers a particularly promising avenue."[82] Interesting as Rice's claim may be, it nonetheless leaves the reader wondering about the long-term effects on a judiciary that can be prompted to lead as well as to follow.

Written in Water: Frederick Bernays Wiener

Each of the books thus far examined in this essay has at least one thing in common aside from the Court itself: the work of attorneys. One states only a basic truth to observe that the federal judicial system could not function without them. However, books about the Court tend, for obvious reasons, largely to emphasize the justices and their decisions, with members of the Supreme Court bar and their work typically remaining in the background. For this reason, publication of **Written in Water** by Paul R. Baier, who teaches law at Louisiana State University, is a welcome event.[83] Beneath the title on the book's cover, one learns the subject: "Biography of Frederick Bernays Wiener." On the title page, the author credits the assistance of the late Washington attorney Jacob A. Stein and alerts the reader in the subtitle to expect something beyond the conventional: "An Experiment in Legal Biography." The title itself comes from a caption, written in red ink on a legal size envelope that contained some materials Wiener planned for an autobiography. The so-labeled envelope was among Wiener's legal papers that were turned over to Baier upon Wiener's death.

A New Yorker by birth, Wiener (1906–1996) was educated at Brown University and Harvard Law School. He became an expert on military law and, while in the solicitor general's office and later as private counsel, argued numerous cases at the Supreme Court, including some in constitutional law that have landmark or near-landmark status. The list includes *Moose Lodge v. Irvis*[84] that dealt with racial discrimination by a private club and *Elkins v. United States*[85] that interred the "silver platter" doctrine.

Even among writing experiments Baier's must surely be unusual. It is hardly a typical biography filled with narrative, context, and analysis. Rather, it seems best described as a documentative portrayal in that it consists of a series of writings by and about Wiener along with other documents, interspersed with observations by Baier, that convey various events, and stages of Wiener's life. These are organized almost as if the resulting whole were a play. Indeed, on page three one finds

the "Dramatis Personae" consisting of no fewer than 52 names—a roster that seems to include most of the American legal notables of the twentieth century and a few British names as well, with Aristotle and Sigmund Freud added for good measure. Beneath the names appears this addendum: "—And a host of other characters to be encountered on the stage of this off-Broadway Fritz Wiener Show."

The documents and the author's commentary in turn are presented in 41 chapters that highlight various cases and individuals. These chapters are followed by an appendix consisting of "Salient Law Review Articles, Peppery Book Reviews, and a Learned Letter to the Editor."[86] Combined, these materials consume a hefty 448 pages. However, a reader might have appreciated a few extra pages that could have accommodated what nearly every book requires: an index. Given the richness of the materials Baier has packed into this volume, an index would have been a valuable tool in mining what it contains.

Some readers of this *Journal* may already know that Wiener occupies a special place in Supreme Court history. Baier tells the story in chapter XXV, "Murdering Wives." Mrs. Covert and Mrs. Smith were convicted in courts martial pursuant to a "status-of-forces" executive agreement with England for having killed their husbands. When the case reached the Supreme Court, Weiner lost.[87] He then filed a petition for rehearing. "Against all odds, it was granted. For the first and only time in the Court's history, the Supreme Court reversed itself, without a controlling change in membership, withdrawing its original opinion and substituting an opinion[88] written by Justice Huge L. Black that set Fritz's murdering wives free."[89] The vote was 6–2. In Baier's estimate, "Colonel Wiener achieved his greatest triumph. He was Daniel Webster come back to the Bar of the Supreme Court. Webster saved Dartmouth College; Fredrick Wiener saved the boundary of civilians under Military Justice."[90]

This review essay began with a survey of the credentials of those who have been chief justice. Wiener knew three of them (Charles Evans Hughes, Harlan Fiske Stone, and Earl Warren) professionally. Moreover, Baier's Epilogue concludes with an appropriate reminder of the continuing impact of the Second Branch of government upon the Third: "Presidents come and go, but the Court endures—reshaped from time to time by those same Presidents."[91]

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

BAIER, PAUL. R. ***Written in Water: Biography of Frederick Bernays Wiener*** (Northport, NY: Twelve Tables Press, 2020). Pp. xvi, 448. ISBN: 978-1-946074-22-5 (paper).

COLLINS, PAUL M., JR., AND ESHBAUGH-SOHA, MATTHEW. ***The President and the Supreme Court: Going Public on Judicial Decisions from Washington to Trump*** (New York: Cambridge University Press, 2019). Pp. xviii, 267. ISBN: 978-1-108-72389-3 (paper).

LURIE, JONATHAN. ***The Chief Justiceship of William Howard Taft, 1921–1930*** (Columbia: University of South Carolina Press, 2019). Pp. xiv, 255. ISBN: 978-1-61117-987-3 (cloth).

RICE, DOUGLAS. ***Lighting the Way: Federal Courts, Civil Rights, and Public Policy*** (Charlottesville: University of Virginia Press, 2020). Pp. xi, 156. ISBN: 978-0-8139-4394-7 (cloth).

ENDNOTES

[1] Randolph was appointed on September 26.

[2] Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 1, 33.

[3] John Marshall, **The Life of George Washington**, vol. 2 (2nd ed., 1848), 169.

[4] Warren, **The Supreme Court in United States History**, 36.

[5] Alpheus Thomas Mason, "The Chief Justice of the United States," 17 *Journal of Public Law* 20, 20 (1968).

[6] Rutledge held a recess appointment as chief justice to succeed Jay, but the Senate did not confirm. His service as associate justice had lasted only 19 months.

[7] C. Peter Magrath, **Morrison R. Waite: Triumph of Character** (1963), 107.

[8] Simon, **Eisenhower vs. Warren** (2018), 136.

[9] *Ibid.*, 136–137.

[10] Jonathan Lurie, **The Chief Justiceship of William Howard Taft, 1921–1930** (2019), hereafter cited as Lurie.

[11] Listed in order of year of publication, the series includes: William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995); Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997); James W. Ely Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995); Walter F. Pratt Jr., **The Supreme Court under Edward Douglass White, 1910–1921** (1999); Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953** (1997); Earl M. Maltz, **The Chief Justiceship of Warren Burger, 1969–1986** (2000); Michal Belknap, **The Supreme Court under Earl Warren, 1953–1969** (2005); William G. Ross, **The Chief Justiceship of Charles Evans Hughes, 1930–1941** (2007); Paul Kens, **The Supreme Court under Morrison R. Waite, 1874–1888** (2010).

[12] With Ronald M. Labbé, **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (2003).

[13] **The Chase Court** (2004).

[14] **William Howard Taft: The Travails of a Progressive Conservative** (2012).

[15] Aside from Taft, members of his Court included, in order of appointment: Justices Oliver Wendell Holmes Jr., William R. Day, Willis Van Devanter, Mahon Pitney, James C. McReynolds, Louis D. Brandeis, John H. Clarke, George Sutherland, Pierce Butler, Edward Sanford, Harlan F. Stone.

[16] Lurie, ix.

[17] *Ibid.*, 1.

[18] *Id.*, 43.

[19] *Id.*, 45.

[20] *Id.*, 49.

[21] *Id.*, 45.

[22] *Id.*, 49.

[23] *Id.*, 49–50. Still the best single study of Taft's influence on judicial nominations is Walter F. Murphy's "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," *Supreme Court Review* (1961), 159–193. This author could find no listing of Murphy's article in Lurie's bibliography (which appears between pages 237 and 241) or elsewhere in his book.

[24] David Danelski, **A Supreme Court Justice Is Appointed** (1964).

[25] Lurie, 49.

[26] *Ibid.*, 50.

[27] *Id.*, 23.

[28] *Id.*

[29] *Id.*, 89.

[30] *Id.*, 88-89.

[31] *Id.*, 233.

[32] *Id.*, 182.

[33] The newly constructed building opened to the public on October 7, 1935.

[34] 277 U.S. 438 (1928).

[35] 274 U.S. 357 (1927).

[36] 272 U.S. 52 (1926).

[37] Lurie, 121.

[38] Robert Post, "Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of *Myers* v. *United States*," 45 *Journal of Supreme Court History* 167, 167 (2020).

[39] Lurie, 121.

[40] Congress repealed the Tenure of Office Act in 1887 when Grover Cleveland was president.

[41] Lurie, 122.

[42] *Ibid.*, 123. The "*sic*" is Lurie's.

[43] *Id.*

[44] *Id.*, 126n. 34.

[45] *Id.*, 126.

[46] 295 U.S. 602 (1935).

[47] *Id.*, at 628.

[48] Lurie, 19. The "*sic*" is Lurie's.

[49] *Ibid.*, 232.

[50] *Id.*, 235.

[51] *Id.*, 233.

[52] *Id.*

[53] *Id.*, 235, italics in the original.

[54] Paul M. Collins Jr. and Matthew Eshbaugh-Soha, **The President and the Supreme Court** (2019), hereafter cited as Collins.

[55] *Ibid.*, 6.

[56] 558 U.S. 310 (2010).

[57] https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address, last accessed June 28, 2021.

[58] Alpheus Thomas Mason and Donald Grier Stephenson Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 18th ed. (2022), 570.

[59] Collins, **The President and the Supreme Court**, 1.

[60] *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012).

[61] Collins, 17.

[62] *Ibid.*, 18.

[63] *Id.*, 192.

[64] *Id.*

[65] *Id.*, 193.

[66] *Id.*, 193.
[67] *Id.*, p. 21.
[68] *Id.*, p. 20.
[69] *Id.*, p. 193.
[70] Douglas Rice, **Lighting the Way (2020)**, hereafter cited as Rice.
[71] *Ibid.*, 126, emphasis added.
[72] *Id.*, 1.
[73] 347 U.S. 483 (1954)
[74] Rice, 2.
[75] *Ibid.*
[76] *Id.*
[77] *Id.*, 69.
[78] *Id.*, 3.
[79] *Id.*, 46.
[80] *Id.*, 49.
[81] *Id.*, 126.
[82] *Id.*
[83] Paul R. Baier, **Written in Water** (2020), hereafter cited as Baier.
[84] 407 U.S. 163 (1972).
[85] 364 U.S. 206 (1960)
[86] Baier, vii–ix.
[87] *Reid v. Covert* 351 U.S. 487 (1956). Wiener lost his argument that, as civilians, the U.S. Constitution required that they be entitled to a trial by jury.
[88] *Reid v. Covert*, 354 U.S. 1 (1957).
[89] Baier, 243.
[90] *Ibid.* The use of "Colonel" is not honorific. Wiener served during World War II in the Judge Advocate General's Corps, retiring from the United States Army in 1966 with the rank of colonel.
[91] Baier, 401.

Contributors

Peter Scott Campbell is the technical services librarian at the University of Louisville and manages the library's collection of Supreme Court Justice Louis D. Brandeis' papers.

Courtney Christensen wrote this article as a third-year J.D. Candidate at Georgetown University Law Center and is now an associate at Shearman & Sterling.

Jeffrey Hockett is professor of political science at the University of Tulsa.

Todd C. Peppers holds the Fowler Chair in Public Affairs at Roanoke College and is also a visiting professor of law at the Washington and Lee School of Law.

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

DOI: 10.1111/jsch.12282

Illustrations

Page 273, *Leslie's Weekly*, 1894.
Page 275 (top), courtesy of Todd Peppers
Page 275 (bottom), photo by Margaret Bourke-White, *Time & Life Pictures*
Page 277, *Evening Star*
Page, 281, *Harvard Law Review*
Page 283, photo by William Notman, courtesy Harvard Art Museum
Page 284, unknown photographer, reproduced from an original postcard by an unknown publisher
Page 286, Boston Public Library, Tichnor Brothers collection #67589
Page 287, *Puck Magazine*, 1916 photo mechanical print, Library of Congress
Page 295, Collection of the Smithsonian National Museum of African American History and Culture, Gift of Lauren and Michael Lee
Page 297, U.S. National Archives and Records Administration This photograph shows Miss West's English 9 class (with 34 students enrolled) at Moton High School, a school for black students. It was used as Defendant's Exhibit No. 60, one of several photographs entered by the defendants to try to prove they were providing equal facilities in both black and white schools in the landmark Civil Rights case *Dorothy E. Davis, et al.* v. *County School Board of Prince Edward County, et al.*
Page 306, photo by Bill Hudson, Associated Press
Page 312, photo by Rowland Scherman, U.S. National Archives and Records Administration
Page 319, photo by Warren K. Leffler, *U.S. News & World Report Magazine*
Page 321, AP Images
Page 332, U.S. Army
Page 333, Thomas Y. Crowell Co.
Page 336, photo by Daniel Weiner, 1951
Page 341, Collection of the Supreme Court of the United States
Page 346, Library of Congress
Page 353, National Archives
Page 359, AP Photo/Doug Mills

Cover image: George F. Edmunds (R-VT) solicited votes from senators on the nomination of Henry Billings Brown to the Supreme Court in 1890. Edmunds chaired the Committee on the Judiciary from 1872 to 1879 and then from 1881 to 1891. James McMillan (R-MI), whose signature is at the bottom, was also on the committee.

DOI: 10.1111/jsch.12283