Introduction

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The mission of the Supreme Court Historical Society is to collect, preserve, and promote the history of the Supreme Court of the United States. The Society carries out its mission not only by conducting educational programs for students and teachers, but also by presenting public programs and lectures, producing documentaries and books, and acquiring artifacts and documents of historical significance in cooperation with the Curator of the Supreme Court.

The *Journal*, of course, plays an essential role in carrying out the mission of the Society, as it serves as the only publication devoted exclusively to publishing the latest historical scholarship on the Court. It is a mission that our editorial board, Director of Publications Clare Cushman, and I take very seriously. Part of the *Journal*'s longstanding purpose, moreover, has been to promote and publish the work of young scholars—the next generation of constitutional and Supreme Court historians. To that end, since 1995 the Society has bestowed the Hughes-Gossett Student Award upon an outstanding student paper submitted to the *Journal.*

In addition to this award, I am proud to announce that our editorial board has decided to offer a research grant for early career scholars researching and writing about the history of the Court. Awarded on a competitive basis in June of each year, the $1,000 grant, named in memory of the distinguished scholar Henry J. Abraham, supports the research of those who are pursuing academic careers in legal history, including graduate students, law students, and those who are no more than five years from completion of either the Ph.D. or J.D. The award will be given on the basis of the applicant's potential for producing publishable work in the field of Supreme Court history, and the grant recipient will be expected to produce an article for submission to the *Journal*. Our board is very excited about this ongoing commitment to young scholars. If you know of someone who qualifies, please make that person aware of this opportunity! More information is available on the Society's website.

This issue of the *Journal* highlights the work of young scholars. In case you haven't noticed, Prof. Brad Snyder's seminar on the Warren Court, which he has offered over the past few years at Georgetown University Law Center, has been the source of several papers of late, including last year's winner of the Hughes-Gossett Student Award. Under Brad's mentorship, these students have

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produced outstanding essays based on an impressive array of primary sources. Three essays in this issue come straight from Brad's seminar.

The first of these essays, by Theodore Salem-Mackall, explores Justice Hugo Black's opinions in cases involving mandatory arbitration. Although best known for his opinions in civil rights and civil liberties cases, Black dissented in a string of Warren-era mandatory arbitration cases, out of a general wariness of corporate power and a deep belief in each person's right to a fair "day in court." Salem-Mackall, who originally wrote the paper while a law student, is currently a Law Clerk at Cleary Gottlieb Steen & Hamilton LLP. The second essay, by Gabriel Valle, tells the largely unexplored story of Gus Garcia and *Hernandez v. Texas* (1954), which involved the rights of Mexican-Americans to serve on juries. Although overshadowed by a contemporary case, *Brown v. Board*, and its emphasis on the struggle of Black Americans to desegregate schools, Valle shows the importance not only of Garcia's advocacy but also the *Hernandez* decision. Valle is a J.D. candidate at Georgetown. Third and finally, Jordan L. Lampo's essay chronicles the internal deliberations in *Shapiro v. Thompson* (1969), in which the Court invalidated state durational residency requirements to receive public assistance, thereby contributing to the establishment of a constitutional right to travel. The unusual lineup in the case—with Justice William Brennan and outgoing Chief Justice Earl Warren on opposites sides—makes for a fascinating story. Lampo is also a J.D. candidate at Georgetown.

In addition to these student essays, Helen Knowles, Associate Professor of Political Science, State University of New York at Oswego and a member of the *Journal*'s editorial board, offers a thoughtful reflection on her career development. In particular, Knowles shows how Dennis Hutchinson's biography of Justice Byron "Whizzer" White, along with her long relationship with the Society, has shaped her professional and intellectual journey as a scholar of the Court. As Helen points out, she won the 2005 Hughes-Gossett Student Award—further evidence that the Society has played an important part in launching academic careers. Because of its unique character, Knowles' autobiographical essay, I hope, will spur other scholars to submit their reflections on their professional journeys in the field of Supreme Court history.

Finally, we bookend this issue with two pieces by more seasoned scholars. Laurence M. Hauptman is State University of New York Distinguished Professor Emeritus of History at SUNY New Paltz, where he taught courses on Native American history, New York history, and Civil War history for four decades. Here he combines two topics that have received scant attention in these pages over the years, Justice Samuel Nelson of New York and the rights of indigenous Americans. His rich discussion of the influences upon Nelson demonstrates once again the multitudes of stories and histories that remain to be told. And last but not least, D. Grier Stephenson Jr., Charles A. Dana Professor of Government, Emeritus, at Franklin and Marshall College, offers another edition of "The Judicial Bookshelf," a longstanding tradition within the *Journal*.

As this issue attests, the Society is making an impact on the field of Supreme Court history, as well as on the careers of those who commit their professional lives to this discipline. Thank you for reading the *Journal* and supporting the Society.

Justice Samuel Nelson and the Seneca Indians

Laurence M. Hauptman

Scholars examining the career of Justice Samuel Nelson, who served on the Supreme Court from 1845 to 1872, have considered the jurist's record on the bench to be mediocre.[1] According to historian Frank Otto Gatell, Justice Nelson "did not leave a deep impression on the history of the court."[2] Political scientist Carl B. Swisher concluded that Nelson was a "stable, sound, and unspectacular judge"; that he "was not a man of deeply philosophical bent or soaring imagination"; and that he exhibited an "unwillingness to stretch the law to make it conform to local moral sentiment."[3] Indeed, Nelson has largely been viewed through the lens of his concurring opinion in *Dred Scott v. Sandford* (1857).[4] Consequently, scholars have labeled him a "doughface justice," castigating him, along with Justice Robert Grier of Pennsylvania, for being the only two Northern jurists on the bench who voted with the majority in the case.[5]

In assessing Nelson's overall importance, scholars examining the justice's service on the Taney-led and Chase-led Courts have failed to analyze or even mention two of his most important opinions: *Fellows v. Blacksmith* (1857) and *The New York Indians* (1866). In the first of these cases, Nelson favored the Tonawanda Senecas; a decade later, the justice favored the treaty rights of the Seneca Nation of Indians.[6] The cases permanently affected the Tonawanda Senecas and the Seneca Nation of Indians, two separate, federally recognized governments that today occupy four reservations in western New York State: Allegany, Cattaraugus, Oil Spring, and Tonawanda.

After the Revolution, the Senecas, original members of the Iroquois Confederacy, occupied approximately six million acres of lands. Their vast territory was attractive to land speculators, promoters of canals and turnpikes, New York politicians pushing for Empire State development, and Americans seeking access to the Great Lakes and Ohio Country. As a result, from the time of the federal Treaty of Fort Stanwix in 1784 onward,

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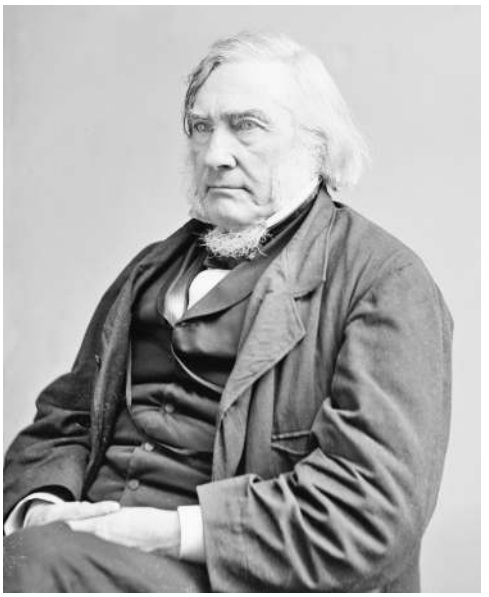
the Senecas faced unrelenting pressures to cede all or select parcels of their land. Despite specific assurances made by the Washington administration in the federal Treaty of Canandaigua in1794 to guarantee the Seneca land base, dispossession continued. In the federal Treaty of Big Tree in 1797, federal officials recognized ten, later eleven, Seneca reservations totaling 202,000 acres. However, because of the nefarious actions of state and federal politicians in collusion with the Holland and later Ogden Land Companies, the Senecas continued to be dispossessed and threatened with removal to the Indian Territory well into the 1850s.[7]

The question arises about why Nelson favored the Senecas' position in his opinions in 1857 and 1866. After all, Nelson had been a loyal member of Martin Van Buren's Albany Regency, the fledgling Democratic political machine that dominated New York politics in the 1820s, and which in the 1830s had pushed for Indian removal from New York State. Even Nelson's appointment to the United States Supreme Court in 1845 was tied to Jacksonian politics after three Whigs had been rejected by the Democratic-controlled Senate.[8] However, Nelson was to write the Court's opinion in *Fellows v. Blacksmith*. and convince all of his fellow jurists, including five appointed by Presidents Jackson and Van Buren, to vote with him. He even persuaded Justice James Moore Wayne, a Georgian who had actively been a proponent

Table 1: Seneca Land Losses in Treaties During Justice Nelson's Lifetime*

1797	Federal-Seneca treaty at Big Tree [Geneseo: Seneca lands, in what later became the 14 counties of western New York, reduced to 10 territories, approximately 202,000 acres. Oil Spring Reservation, originally left out, was later added in 1801.The treaty also recognized the Senecas' residual rights to hunt and fish on the ceded territory.
1802	Federal-Seneca treaty at Buffalo Creek: loss of Canadaway Reservation and majority of lands along Lake Erie on the Cattaraugus Reservation.
1802	Federal-Seneca treaty at Buffalo Creek: loss of Little Beard's Reservation.
1802	New York State-Seneca treaty-loss of a mile strip along the Niagara River from Buffalo Creek to Black Rock to Stedman's farm, but Senecas reserve fishing and camping rights*
1815	New York State-Seneca treaty-loss of Grand Island and other islands in the Niagara River*
1823	Federal-Seneca treaty at Moscow, New York: loss of part of the Gardeau, also known as the White Women's [Mary Jemison's] Reservation*
1826	Federal-Seneca treaty at Buffalo Creek: loss of the remaining Seneca reservations in the Genesee Valley—Big Tree, Canawaugus, Caneadea, Squawky Hill, and the rest of Gardeau. 33,409 acres of the Tonawanda Reservation and 36,638 acres of Buffalo Creek were also lost as well as 5,128 acres at Cattaraugus*
1838	Federal-Six Nations treaty at Buffalo Creek. The Senecas are dispossessed of all of their residential communities in New York State*
1842	Federal-Seneca treaty at Buffalo Creek returns Allegany and Cattaraugus Indian Reservations, but not the Buffalo Creek and Tonawanda Indian Reservations. The Tonawanda Band of Senecas are able to buy back 7500 acres of their lands only after a new federal treaty in 1857.

* N.B.: Never properly ratified by the United States Senate by a 2/3 vote as required under federal law.



Scholars mostly remember Samuel Nelson as a "doughface" for his concurring opinion in *Dred Scott v. Sandford* (1857) and have failed to consider two of his seminal opinions favoring the Tonawanda Senecas and the Seneca Nation of Indians.

of removal of Creeks and Cherokees, to support his opinion.[9]

Justice Nelson's favorable response to the crises facing the Senecas was conditioned by a myriad of factors. He selectively drew inspiration and ideas from four separate sources. First, Nelson's residence in Cooperstown, New York, and his connections there to the family of James Fenimore Cooper influenced his interest in Native Americans. Second, by the 1850s, he was cognizant of the tenor of the times, one that increasingly portrayed the Tonawanda Senecas as underdogs fighting the outlandish tactics employed by the Ogden Land Company. Third, Nelson's view of Seneca treaty rights was to some degree influenced by the court decisions and writings of Chancellor James Kent, the most highly respected and influential jurist and law school professor in New York State in the first half of the nineteenth century. Fourth, Nelson in *Fellows v. Blacksmith* was significantly

The Tonawanda Seneca Nation and the Seneca Nation of Indians are the two federally recognized Seneca tribes in Western New York.

influenced by the effective presentation made by John H. Martindale, the Tonawanda Senecas' attorney. Ironically, a decade later, Nelson was persuaded to support the Seneca Nation in the case, *The New York Indians*, when Martindale now serving as the attorney general of New York State, made a less-than-spectacular argument before the United States Supreme Court.

Nelson's Rise to Prominence

Samuel Nelson was born in Hebron, Washington County, near the recently established border with Vermont, on November 11, 1792. His parents, John Rodgers Nelson and his wife Jean McArthur were Scot-Irish immigrants who ran a prosperous farm. On graduating from Middlebury College, he read law at the firm of Savage and Woods in Salem, New York. After being admitted to the bar, he moved to central New York, establishing his first law office in Cortland. There he married Pamela Woods, the daughter of his law partner, a marriage that lasted until her death in 1822. The couple had five children.[10]

Nelson's political career had begun in 1820 when he was chosen as a presidential elector for James Monroe. The next year, he was selected as a delegate to the New York State Constitutional Convention where he favored universal white male suffrage without any property requirements. (Twenty-five years later, he would also serve as a delegate to the state constitutional convention that established much of the present state court structure, including creating the New York Court of Appeals.) Because of Nelson's growing involvement in state politics, Governor Joseph C. Yates appointed him state circuit judge on the Sixth Circuit in 1823. Two years later, after his wife Pamela's death, he moved his family and established his residence and law practice in Cooperstown. He soon remarried. His second wife, Catherine Russell, was the daughter of Dr. John Russell, a physician and the local congressman, and Elizabeth Williams who could trace her lineage back

Samuel Nelson set up his law office (pictured) in Cooperstown two years after Governor Joseph C. Yates appointed him state circuit judge in 1823.

to Dutch settlers in New Netherland in 1647. The couple had two daughters and a son, adding to Nelson's several children from his first marriage. Nelson and his large brood resided in Cooperstown for almost the next half-century. There in "Leatherstocking Country," he was soon to become one of the area's most prominent citizens, the president of the Otsego County Educational Society, as well as a close friend of James Fenimore Cooper and his family.[11]

In 1831, Governor Enos Throop appointed Nelson to the New York State Supreme Court of Judicature. In this capacity, he was also an "ex-officio" member of the Court for the Correction of Errors, then the state's court of last resort. In 1837, Governor William Marcy appointed him chief justice of the New York State Supreme Court of Judicature. Nelson would serve until 1845. His major opinions dealt with banking and financial matters, rights granted by the state to localities, and the limits on eminent domain. None of his cases in state courts dealt with Native Americans, their lands, or overall status.[12]

Crises in Seneca County

The case of *Fellows v. Blacksmith* stemmed from two federal treaties "negotiated" with the Seneca Indians between 1838 and 1842.[13] On January 15, 1838, the Van Buren administration concluded the Treaty at Buffalo Creek. Under this fraudulent treaty consummated as a result of bribery, forgery, the use of alcohol, and other nefarious methods, the Senecas, a divided people, 'ceded' all their remaining New York lands, except the one-mile-square Oil Spring Reservation, to the Ogden Land Company and relinquished their rights to Menominee lands in Wisconsin purchased for them by the United States. In return, the Indians accepted a 1,824,000-acre Kansas reservation set aside by the federal government for all the six Iroquois nations [Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora] as well as the Stockbridge-Munsee. For a total of 102,069 acres in New York, the Indians were to receive $202,000—$100,000 of which was to be invested in safe stocks by the president of the United States; the income earned was to be returned to the Indians. The United States was also to provide a modest sum to facilitate removal, establish schools, and purchase farm equipment and livestock for the Indians' use. The Indian nations had to occupy these Kansas lands, then part of the Indian Territory, within five years or forfeit this reservation. In 1846, an Iroquois Emigrant Party, composed of approximately two hundred members of the Six Nations, left for Kansas, but the vast majority of Senecas remained in New York.[14]

Even though there was no clear evidence that a majority of the chiefs had approved the 1838 treaty and that the United States Senate had not approved it by a two-thirds vote, President Martin Van Buren, nevertheless proclaimed it as a legally binding accord in March 1840. Criticism of the events behind the Treaty of Buffalo Creek of 1838 led to a second Seneca Treaty in 1842, in which the Allegany and Cattaraugus Reservations were returned to the Indians; however, the return of the Tonawanda and Buffalo Creek Reservations was not included. [15] In December 1848, Senecas, faced with internal political reverberations from the two treaties, overthrew their council of chiefs on the Allegany and Cattaraugus Reservations and created an elected system of governance, the Seneca Nation of Indians. The Tonawandas, who separated from their kin on the Allegany and Cattaraugus Reservation, retained their council of chiefs and continued to struggle to maintain their reservation. Finally in 1857 as a result of their successful case before the U.S. Supreme Court, *Fellows v. Blacksmith*, the Tonawanda Senecas were able to negotiate a treaty that recognized their separate federal tribal status from the Seneca Nation of Indians, and

provided a mechanism for these Indians to remain in western New York.[16]

The Ogden Land Company faced stumbling blocks in its push to carry out its agenda. The company's tactics, which included preventing the Tonawandas from planting their crops and sending armed men onto the reservation to intimidate and threaten the Indians, did not win them public support.[17] Ely S. Parker, Tonawanda Seneca Sachem, feared that the violence would even lead them to kill Senecas. Since the 1838 and 1842 treaties primarily benefitted the Ogden Land Company, a question arose as to whether the federal government had the legal or moral right to aid the schemes of a private land speculators in their efforts to remove the Senecas.

Federal officials faced this dilemma when the Tonawanda Senecas refused to leave their territory. The chiefs specifically pointed to Articles 4 and 5 of the 1842 treaty that required an appraisal of improvements and payment to the Tonawandas for their residences, barns, mills, and dams on their reservation. [18] They had opposed the work of appraisers Thomas Love and Ira Cook, appointed jointly by the War Department and the Ogden Land Company, when they came onto their reservation to assess these improvements. Faced with no cooperation from the Indians, Love and Clark came up with a figure totaling $15,018.36 for the improvements.[19] Later, when a new appraiser, Horace Gay, was appointed, the Tonawandas continued to refuse payment and surrender their lands. When these efforts failed, the Ogdens nevertheless attempted to deposit these so-called "improvement moneys" in an account held for the Indians by the United States Treasury. The Tonawanda chiefs also refused to cooperate with the state census takers, denying them the ability to quantify individual and tribal holdings.[20]

In 1846, the Tonawanda chiefs hired John H. Martindale as their attorney. He was the son of Henry H. Martindale, a former anti-Jackson, anti-Masonic, abolitionist-leaning congressman from Washington County, New York. The younger Martindale was born on March 20, 1815 in Sandy Hill, now Hudson Falls, less than sixteen miles from Justice Nelson's birthplace. Martindale attended West Point where he was graduated third in his class of 1835. Martindale resigned his commission soon after graduation and began reading law under his father's tutelage. He was to open a law office in Batavia in the late 1830s and subsequently was elected district attorney there in 1842 and again in 1848 Subsequently, Martindale moved his law practice to Rochester. Despite his absence from the military for nearly a quarter of a century, Martindale, nevertheless, received a commission as brigadier general in the Union Army at the outbreak of the Civil War. After the war, Martindale was elected Attorney General of New York State. Not re-elected, he returned to practicing law in Rochester from 1867 until just before his death in 1881.[21]

In his legal battles in state and federal courtrooms on behalf of his Tonawanda clients and in his negotiations in Albany and Washington, Martindale was to accomplish a miracle: namely saving these Indians from removal, negotiating a favorable federal treaty, and buying back 7500 acres of the original reservation to provide a home for them in the future. Between 1846 and 1848 alone, Martindale was to initiate thirty ejectment suits against white trespassers: Ogden employees, individuals who purchased Indian lands at auction from the company, and squatters.[22] Indeed, the Tonawanda Senecas, at the advice of Martindale, brought so many cases that in 1852 they decided to limit these time-consuming efforts, fearing that they might affect their major court efforts. [23]

In July 1846, Joseph Fellows, one of the so-called "proprietors" [trustees] of the Ogden Land Company, accompanied by his servant Robert Kendle, entered the Tonawanda Reservation and attempted to take possession of Chief John Blacksmith's sawmill, dam

and the surrounding parcel of land. Fellows claimed ownership of the property under the treaty of 1838 and confirmed in the treaty of 1842. In the process of securing this property, the two men threatened Blacksmith and then assaulted him, attempting to intimidate and drive the chief and his family away.

Immediately, Martindale filed a civil suit against Fellows and Kendle. Fellows argued that the reservation was Ogden Land Company-owned and that the trespassers were actually the Indians. Fellows falsely claimed that many Tonawandas had applied for their "improvement moneys"; that these Senecas were beggars and/or thieves stealing "his" or white settlers' crops on the former reservation and stripped of "his" timber resources; that the Indians were impediments to the progress of the county, not taking advantage of the fertile land and water power potential; and that the Indians were violent people, who had rebuffed the Ogden's attempt to take possession of their newly-acquired lands. He insisted that they were not trespassers and had properly tried to survey and appraise these lands under articles four and five of the 1842 treaty, that the appraisers had properly assessed the improvements made by the Indians, and that the company had actually paid the Indians by depositing the improvement moneys with the United States Treasury, which held the sum in trust for the Tonawandas.[24] In a trial at Batavia, Blacksmith was awarded $825 in damages, but Fellows appealed the verdict.[25]

In 1851, the case was heard on appeal before the Eighth Circuit Court of the New York State Supreme Court., based in Chautauqua County. Judge Richard P. Marvin, a former Whig attorney from Jamestown, New York, saw merit in Fellows' contentions, namely that the Ogden Land Company had legal title to the lands in question and thus he had a right to enter onto the Blacksmith parcel. Blacksmith and his legal team then appealed the decision to the New York Court of Appeals.[26]

Public Opinion and the Senecas, 1838–1856

By the time the case reached the New York Court of Appeals, the nefarious efforts

Some of the Seneca signatories to the Buffalo Creek Treaty of 1838. The Tonawanda chiefs refused to sign the treaty.

by Ogden Land Company had been fully exposed in both scholarly publications as well as in daily newspapers. For over a decade, the Society of Friends had protested the company's deplorable tactics in the consummation of the Buffalo Creek Treaty of 1838.[27] By the early 1850s, others joined in the condemnation of these land jobbers. In his highly influential **League of the Haudenosaunee, or Iroquois** (1851), the first major ethnography of an American Indian community, Lewis Henry Morgan wrote:

> Not only have every principle of Humanity, every Christian precept been violated by this [Ogden Land] company in their eager artifices to despoil the Senecas; but the darkest frauds, the basest bribery, and the most execrable intrigues which foulest avarice could suggest, have been practiced, in open day upon this defenseless and much-injured people.[28]

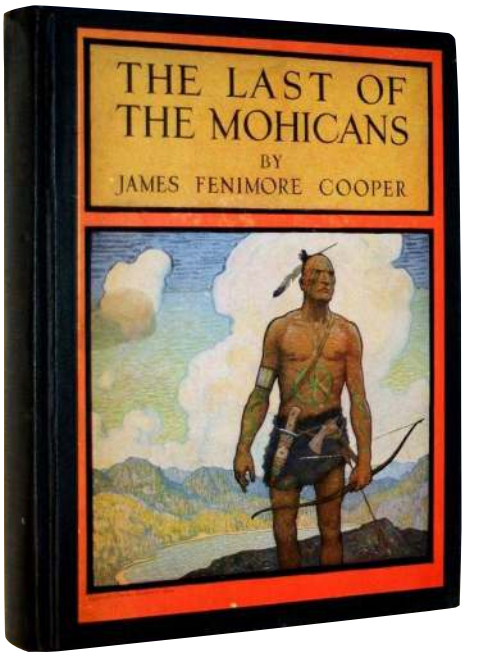
Anthropologist Peter Whiteley has written: "Besides romantic nostalgia (and perhaps settler guilt), Morgan's ethnological conscience was clearly pricked by current events." Whiteley has aptly observed: "While it is perhaps excessive to claim the League as a political tract, it was clearly a conjunctural document motivated in a context of a threat to the Native communities and with direct interest of Native participants in the research."[29]

As early as 1846, Morgan, then a Rochester attorney, had participated in a meeting in Batavia; his aim was to defend the Tonawandas against the actions of the Ogden Land Company. After this meeting, he was appointed as the special messenger to take the petition protesting the land jobbers' methods of intimidation to Congress.[30] Indeed, Morgan was the Tonawanda Senecas' greatest publicist. After his book was published, it won high praise. In the favorable review in the *New York Evening Post*, then a major newspaper, the reporter indicated that the author's desire was "to encourage a kinder feeling towards the Indian, founded on a truer knowledge of his civil and domestic institutions, and his moral and intellectual capabilities." The reviewer indicated that Morgan had not shied away from writing about "the present condition of the tribes" and that the author believed "fully in the teachableness of the Indian, and his capacity of taking an equal rank in the march of civilization."[31]

The anthropologist was not alone in his critique. Newspapers presented the Tonawandas as underdogs, helpless victims courageously fighting off the Ogden proprietors. Farmers in western New York reacted to the nefarious methods of the powerful and politically well-connected, Ogden proprietors such as James Wadsworth, fearing that he

In his highly influential *The League of the Ho-dé-no-sau-nee, or Iroquois* (1851), the first major ethnography of an American Indian community, Rochester attorney Lewis Henry Morgan (above) defended the Tonawanda against the greed of the Ogden Land Company.

and the company would have too much economic and political control over their lives. They also feared that the company's speculative methods might lead it to encourage rentals instead of outright sales, that would result in its establishment of exploitative tenancies, which the farmers deemed a type of unproductive agriculture.[32] Importantly, the challenges to the Ogdens came at the very same time when mostly white tenants. known as the "Calico Indians," were waging an anti-rent war in the Upper Hudson Valley, challenging the Van Rensselaer family and their control over vast holdings that dated back two hundred years to their patroonship in New Netherland. It should also be pointed out that John Van Rensselaer was an Ogden proprietor, actively pushing the company's agenda well into the late 1850s.[33]



Nelson developed a close friendship with the novelist James Fenimore Cooper, as both were pillars of the community in Cooperstown. Cooper and his daughter Susan, a distinguished environmentalist, both expressed empathy for the plight of American Indians and likely influenced Nelson.

Nelson in Leatherstocking County

Upon moving to Cooperstown in the mid-1820s, Nelson set up his law practice.[34] There in Leatherstocking Country, Nelson became James Fenimore Cooper's close confidante and lifelong friend. Although hardly a romantic, the judge was undoubtedly familiar with Cooper's extraordinary novels, often referred to as the **Leatherstocking Tales**. They evoked images of determined American frontiersmen such as Natty Bumppo and noble American Indians such as Chingachgook and other members of the "vanishing race."[35] As the two most prominent members of the upper crust of the village, the Cooper and Nelson families socialized together; the two men enjoyed each other's company. Nelson even bought Cooper's fire-damaged elaborate residence and rebuilt it on Otsego Lake.

James Franklin Beard, the editor of Cooper's correspondence and journals, has pointed out that the two men "were much alike in their attitudes and interests and although they seem almost never to have corresponded, they maintained a warm friendship until the novelist's death."[36] Nelson and Cooper served together as co-wardens of the Christ Episcopal Church in the village as well as on its building committee. They frequently discussed troubling matters related to the church locally and nationally, and both attended religious conferences together, including the 65th Annual Diocesan Convention of the Protestant Episcopal Church held in New York City.[37]

Nelson and Cooper also had common concerns about farming techniques, the outcome of local elections, whether Zachary Taylor was worthy of the presidency, and even on international relations with Great Britain in the wake of a war scare after the killing of an American citizen on the Niagara frontier.[38] Cooper wrote a college recommendation for Nelson's son Rensselear, while Judge Nelson hired Cooper's son Paul

to serve as his assistant after the young man became an attorney.[39] The novelist's daughter, Susan Fenimore, later remarked that when her father "rallied at intervals" before his death, "he took pleasure in seeing old friends like Judge Nelson."[40]

Although there is no direct reference in Cooper's letters and journals about discussing Indian matters with Judge Nelson, just before his death, the novelist did indicate his own feelings about what was necessary to safeguard Indigenous rights. In June, 1851, Cooper wrote George Copway, [Kah-ge-ga-gah-Bowh = He who stands Forever], the noted Mississauga Ojibwe author and ethnographer who had just published his first two books on Native peoples. Copway was the son of a chief, an herbalist, former Methodist minister (defrocked), and the first Canadian Indigenous person to publish a book.[41] Responding to Copway's praise of his work, Cooper encouraged him to defend his people in his writings: "The Red man has a high claim to have his cause defended, and I trust you will be able to do much in his behalf."[42]

The influence of Cooper's daughter Susan Fenimore on Nelson should not be overlooked. Nelson's children, especially his two daughters, were friends of Cooper's children and attended school together. Although Susan spent much of her life in her father's shadow busily editing and preparing new editions of his masterpieces, she accomplished much on her own. She was one of the founders of environmental literature, publishing **Rural Hours** in 1850, the first book on nature written by an American woman. To her, American Indians were an essential part of the fabric of the natural world whose continued existence was sadly threatened, similar in her view to indigenous plants faced with the invasion of European weeds.[43]

In **Rural Hours**, Cooper described a chance encounter with three Oneida women who had come into Cooperstown's environs. At the conclusion of the Oneida women's visit, Cooper noted that it was "painful, indeed, to remember how little has yet been done for the Indians during the three centuries since he and the white man first met on the Atlantic coast."[44] While her descriptions were maternalistic and used the uncomfortable racially-charged language of the day, her writing, nonetheless, revealed her empathy for the Oneidas and her words were clearly intended to evoke sympathy and an understanding of their plight. Indeed, for the next forty years of her life, she devoted much of the time working with Episcopal Bishop Jackson Kemper to help the Oneida Indians, most of whom had resettled in Wisconsin.[45]

Nelson and the U.S. Supreme Court, 1845–1872

In the mid-1840s, Nelson ran for a seat in the United States Senate, but was defeated by John A. Dix. However, just after his defeat, Whig President John Tyler nominated him for a seat on the United States Supreme Court after the death of Associate Justice Smith Thompson of New York. The opportunity came after the Democratic-controlled Senate rejected several of Tyler's Whig nominees, including John Spencer, the Secretary of War, who along with his father Ambrose, had negotiated the Seneca Treaty of 1842. Because of his able and uncontroversial service of twenty years as a judge in New York's courts, the staid Democrat was seen as an acceptable candidate by both parties and he was confirmed unanimously by voice vote just ten days after his nomination.[46]

Influence of James Kent

Throughout his long judicial career, Nelson frequently quoted from opinions and other writings by legal scholar James Kent (1763–1847). Kent was the eminent Chancellor of the New York Court of Chancery, former chief justice of the New York State

Supreme Court of Judicature, and the first professor of law at Columbia University.[47] Known in the legal community in the Empire State as the "American Blackstone," Kent's influence in the first half of the nineteenth century was second to none. Like Nelson, Kent was part of James Fenimore Cooper's circle of friends and associates. In the mid-1820s, the Chancellor Kent was even a member of Cooper's Bread and Cheese Club in New York City, where discussions centered on literature and politics. Like the extraordinary Cooper family, Kent reveled in nature, but saw it, and the American Indians who occupied it, as soon-to be vanishing from the New York scene.[48]

Importantly, historians have concluded that Kent's court decisions, lectures, and writings influenced Chief Justice John Marshall's opinion in *Cherokee Nation v. Georgia*.[49] Chancellor Kent clearly expressed his opinions on the status of Indigenous nations in two major cases involving the Oneidas—*Jackson ex dem. Gilbert v. Wood* (1810) and *Goodell v. Jackson ex dem. Smith* (1823) and in his **Commentaries**. In Goodell, a case that dealt with a deed executed in 1797 to a non-Indian, Kent found it to be illegal. In his decision, the Chancellor posed the question, namely whether the Oneidas "form a part of the body politic, or people of the state" that could be affected by state law. He concluded that the answer was negative, holding that American Indians were not citizens within the state, but are distinct tribes or nations, pointing to the Constitution and the Anglo-American Treaty of 1794 [Jay Treaty]. To him, they were independent and distinct from U.S. citizens, adding: "we do not enforce our rights against the Indians by process of law, but by arms."[50] In his famous **Commentaries** published three years later, Kent wrote:

> But while the ultimate right of our American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force of arms in the event of a just and necessary war.[51]

Perhaps influenced by the Society of Friends who he admired and their protest over the Buffalo Creek Treaty of 1838, the Chancellor scribbled out an opinion in 1840.[52] In his brief, he stated that that the treaty was legally binding, and that under it, the Ogden Land Company had acquired title. However, he importantly pointed out that until a consideration stipulated in the treaty provisions was paid to the American Indians, the federal government had the responsibility to protect the Senecas

Another influence on Nelson was James Kent, the eminent law professor. He wrote a brief in 1840 stating that the Treaty of 1838 was legally binding but that the federal government had the responsibility to protect the Senecas from intruders, that reservations could not be partitioned and sold off, and that Senecas could not be forced off their territories.

from intruders; that the reservations could not be partitioned and sold off; and that the Senecas could not be forced off their territories.[53]

Whether Justice Nelson was aware of Kent's brief cannot be determined; however, Nelson, like the Chancellor, was a strict constructionist, narrowly defining the law based on the specific language found in legislation or in treaties. Prior to *Fellows v. Blacksmith*, Nelson's only involvement in a case involving Indigenous peoples was *United States v. Brooks* (1850), a suit concerning lands of the Caddo Indians in Louisiana. This case as well as *Fellows v. Blacksmith* dealt with non-Indians' attempts to confirm their title to tribal lands. Unlike the Blacksmith case where articles IV and V dealt with specific obligations of the Ogden Land Company, namely the issue of payments for improvements made to the Tonawanda Senecas, *United States v. Brooks* was silent on the parcel in dispute. In 1801, the Caddo chiefs had allowed Francois Grappe and his three sons to settle within their territory, lands along the Red River. In 1835, the Caddos and the United States had made a treaty negotiated by federal commissioner Jehiek Brooks for tribal lands, whose bounds included the Grappe lands. Brooks, a Jacksonian land speculator, then turned around and purchased the lands from the Grappes and began to sell off parcels.

After the treaty was ratified by the Senate, the Caddo chiefs protested, claiming that this parcel was not intended to be included in its provisions; however, there was no specific reference to the Grappe parcel or the Caddos' retention of it in the treaty. In 1846, the United States attorney filed suit against Brooks alleging he had fraudulently included the Grappe property in the 1835 treaty. In a unanimous decision, Justice James Moore Wayne, the former mayor of Savannah and ardent supporter of Jacksonian removal policies, wrote the opinion in which he found for Commissioner Brooks based upon the exact wording of the treaty. Wayne stated that the Court could not consider the "conjectural intimations" by the Caddos and their attorneys, "concerning the influences which were used to secure the reservation [in the treaty of 1835], or in the designs of the commissioner [Brooks] in having it done."[54] In the end, without specific language about the disputed parcel in the treaty, Nelson deferred to his Southern colleague.

Two years after the decision in the Caddo decision, the Blacksmith case reached the New York Court of Appeals. There, Martindale, now practicing law in Rochester, once again represented the Tonawanda Senecas, he emphasized that the Tonawandas in their treaties with Washington had the protection of the United States and repeated the same arguments he had been using since 1846, namely that the removal of these Senecas from their territory could only take place if and when they accepted the monetary consideration for the improvements. The Ogden Land Company was represented by John C. Spencer, the former Secretary of War who along with his father Ambrose had negotiated the Treaty of 1842. Spencer repeated the Ogden Land Company's claims that the Indians were themselves the trespassers, occupying the company's lands illegally, stripping the timber and defending their actions by attacking the company's agents. He insisted that the appraisal of the improvements had properly been carried out and that the company had attempted to deposit moneys for these Senecas in an account held by the United States Treasury. Spencer also pointed out that only an Indian nation, not an individual Indian, had standing to bring an action in trespass. [55]

By the time the Court of Appeals made its decision in 1852, Chief Blacksmith had died. Nevertheless, his estate's executors, his wife Susan, and Ely S. Parker who had taken the sachem's place on the Iroquois Confederacy's Grand Council, persisted in their pursuit of justice.[56] In a 6–1 decision, the appeals court sided with the Tonawandas holding that Fellows' title was invalid because the Indians'

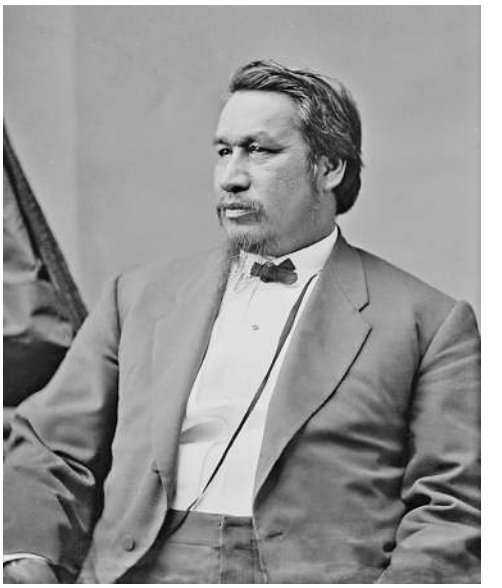
acceptance of payment of compensation for the improvements was a pre-condition to the carrying out of the entire treaty of removal. Although recognizing the legitimacy of the Ogden Land Company's preemption to Seneca lands, the court held that

> this right conferred upon them no title. It was entirely worthless until the Indians chose to treat with them, and to sell their lands, or if you please the right of possession or occupancy . . . This right of occupancy has been solemnly and repeatedly guaranteed to the Indians, and is considered as sacred as the fee simple of the whites.[57]

The Court of Appeals then remanded the case back to the New York Supreme Court. Subsequently, a writ of error was granted by the United States Supreme Court allowing the Tonawanda case to be heard before it.

On January 15–17, 1857, the High Court heard arguments in *Fellows v. Blacksmith*. Martindale at the hearing continued his service as the lead attorney in the case, aided by his law partner, J. A. Verplanck, who later became a New York Superior Court judge, and by Ely S. Parker. Ransom Gillet, a former Jacksonian Democratic congressman, federal commissioner at the Buffalo Creek Treaty of 1838, and later assistant attorney general of the United States, served as the attorney for Fellows and Kendle.[58]

At the time, Jacksonian Era appointees still held great influence on the Supreme Court. Associate Justice James M. Wayne from Georgia was the last member of the Marshall Court to serve on the bench and was hardly sympathetic to Indigenous rights since his days pushing an Indian removal agenda. Other Jacksonians included Chief Justice Roger B. Taney of Maryland and Associate Justices John Catron of Tennessee. Justice John McLean of Ohio had started out as a Jacksonian, but frequently shifted party affiliation with a hope of a presidential run; while Justice Peter V. Daniel of Virginia had been nominated by President Martin Van Buren, a Democrat, in 1841.



At the death of Chief Blacksmith in 1851, Ely S. Parker succeeded him as a Tonawanda sachem. President Ulysses Grant later appointed him to be the first Native American to hold the position of Commissioner of Indian Affairs.

On March 16, 1857, Justice Nelson delivered the unanimous opinion affirming the New York Court of Appeals decision. Known as a conciliator during his long service on the court, Nelson carefully crafted his written opinion and successfully generated consensus on the Court. Just as Nelson had deferred to Justice Wayne in *U.S. v. Brooks*, the justices on the bench apparently deferred to Nelson in this case, which dealt with New York State and one of its Indigenous peoples. Aware that five of his colleagues on the bench were appointed by Jackson and Van Buren, and that several, especially Wayne, had strongly supported federal Indian removal policies, Nelson did not question the validity of the Buffalo Creek Treaty of 1838 and how its "negotiations" were was carried out. Moreover, in his typical conciliatory fashion, he did not point blame either at the Federalists, Jeffersonians, Jacksonian Democrats, or Whigs for what had befallen the Senecas.[59]

Nelson started his opinion by recounting the history of this litigation which first began after John Blacksmith brought a case against Fellows and Kendle, who had entered the chief's sawmill and yard on the Tonawanda Reservation "by force and arms."[60] He noted that the federal Treaty of Canandaigua with the Six Nations in 1794 specifically acknowledged and recognized the lands reserved to the Senecas. He then quoted the language in this treaty:

". . . the United States will never claim the same nor disturb the Seneca Nation, nor any of the Six Nations, or their Indian friends residing thereon, and united with them in the free use and enjoyment thereof, but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right of purchase."

After focusing on the history of the lands in question, Nelson came to the conclusion that neither the 1838 nor the 1842 treaty made any provision as to the mode and manner in which the removal of the Indians or surrender of reservations was to take place. The grantees have assumed that they were authorized to take forceable possession of the two reservations [Buffalo Creek and Tonawanda], or of the four [including Allegany and Cattaraugus], as the case would have been under the first treaty 1838].[61]

He then pointed out that previous removals of American Indians westward had been undertaken by the federal government alone, meaning they were initiated by the Senate and the president, not precipitated by any High Court decision. To Nelson, if the justices allowed the Ogden Land Company to force the Senecas off their reservation, it would not only go against the usages and practice of the government, but would be inconsistent "with

In *Fellows v. Blacksmith*, Nelson (fourth from right) persuaded all his brethren, including those who had supported Jacksonian Indian removal policies, of the merits of the Tonawandas' Seneca treaty arguments. Left to right: Clerk of Court D.W. Middleton, Justices David Davis, Noah H. Swayne, Robert C. Grier, and James M. Wayne, Chief Justice Salmon P. Chase, Nelson, and Justices Nathan Clifford, Samuel F. Miller and Stephen J. Field.

the peace of the country, or with the duty of the government to these dependent people, who have been influenced by its counsel and authority to change their habitations."[62] In language reminiscent of John Marshall in *Cherokee v. Georgia*, Nelson referred to the Senecas as a "quasi-nation, possessing some of the attributes, of an independent people." He noted that they were in "a state of pupilage and held the relation to the government as a ward to his guardian," and thus their interests had to protected. He added: "It is difficult to believe that it could have been intended by the government that these people were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of the courts of justice."

Nelson even went further, calling litigation to forcibly remove the Senecas "appalling." He continued:

> We think, therefore, that the grantees [Ogden Land Company] derived no power under the treaty to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law; that no private remedy of this nature was contemplated by the treaty, and that a forcible removal must be made, if made at all, under the direction of the United States; that this interpretation is in accordance with the usages and practice of the government in providing for the removal of Indian tribes from their ancient possessions, with the fitness and propriety of the thing itself, and with the fair import of the language of the several articles bearing upon the subject.[63]

In his concluding remarks, Nelson affirmed the New York Court of Appeals' decision, namely that "the appraisal of the improvements, and payment therefore, were conditions precedent to the surrender of them by the Indians, and that the refusal of the Tonawanda band to permit the appraisal did not excuse the performance of these conditions." The Justice concluded with these words: "The ground upon which we have placed our judgment is not in conflict with this view. We hold that the performance was not a duty that belonged to the grantees, but for the government under the treaty."

The unanimous decision in *Fellows v. Blacksmith* thus held that private beneficiaries of American Indian treaties could neither expel tribes by force or by a cause of action in a court decision. As a result of the success in blocking the Ogden Land Company's efforts, Martindale, eight months later, was able to convince the Buchanan administration to negotiate a new federal treaty. For the first time, the United States recognized that the Tonawandas as a separate entity from the Seneca Nation of Indians, that they were governed by a council of chiefs whose names were on the signed accord, and that they had a right to remain in their New York homeland and not be removed to the Indian Territory. Importantly, in Article 4 of this 1857 treaty, the Tonawandas were given permission to use moneys previous allocated for their removal to the Indian Territory, to buy back part of their reservation from the Ogden Land Company, 7500 of their 12,800 acres they owned before the consummation of the Buffalo Creek Treaty of 1838.[64]

In 1857, the Supreme Court. heard a second case, *The People ex rel, Cutler v. Dibble*, involving the Tonawanda Senecas and their lands.[65] Three non-Indians, Asa Cutler and Arza and John Underhill, had settled on the Tonawanda Reservation after the Buffalo Creek Treaty of 1838, having allegedly purchased property "legally" from the Ogden Land Company. Taking Martindale's advice, the Tonawandas sought relief by going into the local Genesee County court asking the judge, Edgar C. Dibble, to issue a warrant to

remove these non-Indians. The Senecas insisted that a New York State law passed by the legislature in 1821 had prohibited non-Indians from settling or residing on their lands. This state law also provided that a judge at the county court level had the right to issue a warrant of ejectment permitting a sheriff to remove trespassers.[66] The Genesee County Court held for the Senecas. Nevertheless, the three non-Indians, appealed the decision, claiming that it violated the two treaties and allowed Judge Dibble to overstep his authority by removing them from these lands. They insisted that the Senecas no longer owned these reservation lands, since the Treaty of 1842 had confirmed a conveyance to the Ogden Land Company first set out in the Buffalo Creek Treaty of 1838. They pointed out that the whole amount of the consideration, namely the improvement moneys, had been deposited in the United States Treasury for the Senecas. Their attorney argued that the Senecas were themselves the trespassers, interfering with the carrying out of the two treaties by continuing to occupy these lands. The case slowly wended its way through the state courts, reaching the New York Court of Appeals in 1857. That court affirmed the lower courts' decisions and held that the three men were trespassers, having not acquired property rights on the Tonawanda Reservation.[67] However, in 1857, the Supreme Court granted a hearing as a result of a writ of error filed by the plaintiffs' attorney.

Justice Robert C. Grier of Pennsylvania wrote the unanimous opinion affirming the judgment of the New York Court of Appeals. The justice, a states-rights advocate, insisted that the 1821 New York statute, which prohibited non-Indians from settling or residing on their lands, was a constitutional exercise of the state's police power. Grier wrote: "The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States." In his opinion, he agreed with Nelson's opinion in *Blacksmith v. Fellow.* Grier held that the ejectment of the Tonawandas as trespassers from their own reservation was beyond the authority of the Court's jurisdiction and that such an action could only be taken by Congress.[68]

In upholding the state statute, Grier and his fellow justices (including Nelson) created a legal dilemma for the future. By recognizing state jurisdiction in a legal action involving a federally recognized tribe, the Supreme Court opened the door for heated legal debates, protest demonstrations, court actions, and congressional legislation over the next one hundred and seventy-five years. Consequently, courts now must make determinations about where state law begins and ends in cases involving New York state's federally recognized Indian nations with longstanding treaty rights with the federal government.[69]

The New York Indians

In the five years after the Civil War, the United States Supreme Court heard three cases related to the taxation of Indian nations: *The Kansas Indians* and *New York Indians*, both decided in 1866, and *Cherokee Tobacco*, decided in 1870. In *The Kansas Indians*, a case involving the Shawnees, the Miamis, and the Weas, who had all been removed to the Indian Territory, the Court, with Justice Nelson in the majority, held that local taxes could not be levied on Indian lands allotted in fee simple, as long as tribal organization continued to exist. In *Cherokee Tobacco*, the Court, in the absence of Justice Nelson, who was ill at the time, held that the federal government had the right to levy excise taxes on the Cherokee's tobacco operations within the Indian Territory.[70]

Nelson was back on the bench for the third case, *The New York Indians*.[71] The case stemmed from two acts passed by the New York State Legislature. On May 9, 1840, it had passed an act that gave the county boards of supervisors in Erie, Chautauqua,

Rochester attorney John Henry Martindale served as counsel for the Senecas. His argument in *Blacksmith* prevailed, but he underperformed in *The New York Indians* (1866).

and Cattaraugus Counties the right to assess highway taxes on all lands within the Allegany and Cattaraugus Indian Reservations like neighboring non-Indian communities that "they may deem reasonable and necessary, to put the highways and bridges within said reservation in good repair."[72] The next year, the state legislature passed "An Act authorizing the construction and repair of roads and bridges on the Indian lands in the Counties of Erie and Cattaraugus." This act authorized the county boards of supervisors in the two counties to survey and construct roads across three of the Seneca communities—Buffalo Creek, Cattaraugus, and Allegany Indian Reservations. Significantly, the cost of these two-year road-building projects would be borne by the Indian residents of each reservation—$5,000/year at Buffalo Creek and $4,000/year at Cattaraugus and Allegany. If these taxes were not paid, the state comptroller was authorized to advertise and sell off these lands.[73] In 1853, in a response to a request by the Cattaraugus Board of Supervisors, the New York State Comptroller issued orders of foreclosure on lands where the Senecas refused to pay these taxes. In the next three years, the state sold off 13,300 acres of these foreclosed lands.[74]

The Ogden proprietors and their successors in interest brought suit. The plaintiffs claimed that the state had violated their pre-emption rights to Seneca lands as set forth in federal treaties by its actions authorizing their foreclosure and sale. The Seneca Nation intervened in the case arguing that the state's taxation, foreclosure, and sales were illegal, since they preceded a five-year timeline for the removal of the Indians from their lands as required in the Buffalo Creek Treaty of 1838. They pointed out that, as early as 1840, Joel R. Poinsett, the United States Secretary of War, had written to the Ogden trustees indicating that the Senecas had the right of "peaceable possession of the whole of their lands for the period of five years unless they voluntarily remove sooner appear to be perfect, and that no steps can be taken for the disposal of any portion of the land in question before that time, without their consent."[75] The Senecas also noted that the federal government had even provided assurance of protection from state taxation in the Seneca Treaty of 1842. They pointed to Article IX of that treaty, which gave a vague assurance by the federal government to intervene on behalf of the Senecas.[76]

The New York State Supreme Court decision favored Joseph Fellows, deciding that the Ogden Land Company had retained its pre-emption right. On appeal, the case in 1861 reached the New York Court of Appeals and once again was decided in favor of the company. However, the other component of the case, namely the tax status of Seneca lands, was not adjudicated and the case was

subsequently appealed to the United States Supreme Court.[77]

In 1865, Major General Martindale, who had mustered out of Union military service for health reasons, was elected attorney general of New York. The next year, Martindale was put in the awkward position, requiring him to defend the state's efforts at taxing the Indian lands. Ironically, Martindale, as the legal adviser to the Senecas, had lobbied in 1860 to get the legislature to recognize the tax-free status of Tonawanda lands the tribe had purchased back from the Ogden Land Company.[78] Perhaps because of his fifteen-year struggle on behalf of the Senecas, this accomplished Rochester attorney appears to have made what can only be interpreted as a half-hearted attempt to carry out his defense of the state's position. Knowing full well that the state's authorization of county highway taxes occurred several years before the Treaty of 1838 was to go into effect, the time when the Senecas were to leave their reservation for Kansas, Martindale, argued:

> taxes were not authorized by the legislature until after the lands were conveyed by the Indians to our own citizens, and after the purchase had been approved by the general government. Under these circumstances, the intent presumable, not less than the intent expressed, was to impose and enforce the tax in respect to the interest rightfully acquired by our citizens.[79]

Perhaps purposely obfuscating the issues, Attorney General Martindale brought in extraneous material with little relevance to his case at hand. Strangely, he cited the Treaty of Canandaigua of 1794 in his arguments for taxing the Senecas; however, this specific historic treaty never dealt with taxation, and has usually been used by the Six Nations themselves to defend, not to restrict tribal sovereignty! He also made reference to a provision of the Hartford Compact between New York and Massachusetts from 1786 that he claimed gave the towns the right to levy taxes, although this historic document never specified that it applied to non-citizen Indians.[80] Whether Martindale simply had a poor high court performance or whether he intentionally sabotaged the case cannot be fully determined. Despite opposing the Seneca Nation in the case, the attorney general, nevertheless, remained in good standing with them. After the decision was rendered, he was even approached by the president of the Seneca Nation for legal advice.[81]

On December 1, 1866, the Supreme Court rendered its decision in *The New York Indians*. In the unanimous opinion written by Nelson, the Justice insisted that under the Treaty of Buffalo Creek of 1838, there was a five-year window before its provisions, namely the transfer of title to the Ogdens and removal of the Indians to Kansas, were to fully go into effect. However, he maintained the state legislature, nevertheless, had exceeded its authority in violation of this federal treaty by ignoring this timetable and passing the two tax authorization acts in 1840 and 1841. Nelson then claimed that the Cattaraugus Board of Supervisors could not levy taxes before the Indians were scheduled to be removed to the West under the Buffalo Creek Treaty of 1838 and that the state laws authorizing county officials to do so were thus unconstitutional. Apparently influenced by Kent's decision in *Goodell v. Jackson ex dem. Smith.* and Marshall's decision in *Cherokee Nation v. Georgia*, he then emphasized that the Senecas were entitled to the "undisturbed enjoyment" in their ancient possessions until they sold their lands and were formally removed from them in pursuance of the treaty provisions. Importantly, Nelson, continuing to channel Chancellor Kent, wrote:

> . . . all agree that the Indians right of occupancy creates an infeasible title

> to the reservations that they may extend from generation to generation and will cease only by the dissolution of the tribe or their consent to sell to the party [Ogden Land Company] possessing the right of pre-emption.[82]

In a firm rebuke to Albany legislators, he added that "the rights of the Indians do not depend on this or any statutes of the states, but upon treaties, which are the supreme law of the land. . . ." The justice concluded:

> The time for the surrender of the possession, according to their consent given these treaties we must look to ascertain the nature of these rights, and the extent of them." in the treaty, had not expired when these taxes were levied. . . The taxation of the lands was premature.[83]

As early as 1871, New York state officials contested Nelson's opinion and the Court's decision in *The New York Indians*.[84] Since then, they have repeatedly attempted to apply state taxes, more recently on cigarettes and gasoline, on the Senecas. In the last three decades, these actions have resulted in increased tensions, massive demonstrations that have led to partial shutdowns of two of the state's major roads, a substantial increase in litigation, and have even led to the passage of federal legislation. Significantly, the Senecas have repeatedly cited the treaty of 1842 and Nelson's opinion in *The New York Indians* in attempts to make their case.[85]

Conclusion

Despite legal scholars' dismissal of Samuel Nelson as a jurist of little significance, his role in Seneca history was a major one, affecting their nations' lands, treaties, and sovereignty right down to the present time. In just one decade during a tumultuous era in America, Nelson's opinions helped shape Seneca existence. In *Fellows v. Blacksmith*, he persuaded all of his colleagues on the bench, including those who had supported Jacksonian Indian removal policies of the merits of the Tonawandas' Seneca treaty arguments brought forth by attorney Martindale. In the process, his decision was the necessary precursor to the Tonawandas' signing a new federal treaty that allowed them to use the money set aside for their removal to the Indian Territory to buy back a part of their reservation, be recognized as a separate Seneca government, and remain in their western New York homeland. Yet, Nelson's defense of the Senecas also led him to accept Justice Grier's opinion in *Cutler v. Dibble.* In hoping to protect the Senecas from trespassers and violence directed at them, Nelson supported this decision that opened the door for state jurisdiction in Indian matters, one that is largely resented by a majority of Senecas today. Importantly, after the end of the Civil War, in the case of The New York Indians, the jurist from Cooperstown challenged New York state laws that gave counties the authorization to tax Seneca Nation lands. This case has been frequently cited by these Indigenous peoples in their legal attempts to fight off state taxation right down to the present.

As a resident of Leatherstocking Country, Nelson's empathy for Native Americans was influenced by his connections to the Cooper family. His opinions also came at a time when the Seneca Indians were seen both by the public at large and influential scholars as underdogs fighting off the intimidation employed by the corrupt Ogden Land Company. Importantly, Nelson's specific legal opinions were shaped two men: John H. Martindale and Chancellor Kent. Martindale's prescient arguments made in briefs and in courtroom arguments in *Fellows v. Blacksmith* was followed by his less-than-satisfactory performance made in *The New York Indians*. Thus, in just one decade, the United States Supreme

Court, led by a rural attorney from Cooperstown, helped shape Seneca legal existence well into the future.

ENDNOTES

[1] The lack of one single collection of Nelson correspondence has limited studies of Nelson's career. The best study is Frank Otto Gatell. "Samuel Nelson," **Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions**, Leon Friedman and Fred L. Israel, eds. (Chelsea House, 1969), 817–829. See also: Edwin Countryman, "Samuel Nelson," *Green Bag*, 19 (June 1907): 329–334; Richard H. Leach, "The Rediscovery of Samuel Nelson, 34 (1953), 64–71. For favorable evaluations in New York of Nelson's role as a jurist, see his obituaries: "Samuel Nelson: The Death of a Venerable Jurist," *New-York Tribune*, Dec. 15. 1873; and "Louis Agassiz- Samuel Nelson," *Brooklyn Daily Eagle*, Dec.15, 1873; "Death of Judge Nelson," *Buffalo Courier*, Dec.15, 1873.

[2] Gatell. "Samuel Nelson," 829

[3] Carl B. Swisher, **History of the Supreme Court of the United States, The Taney Period, 1836–1864** (Macmillan Publishing Co. 1974), 5: 221.

[4] *Dred Scott v. Sandford* 19 How 393 (1857). For the case and its impact, see Don E. Fehrenbacher, **The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law** (Oxford Univ. Press, 1978). David Konig, Paul Finkelman, and Christopher A. Bracey, eds. **The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law** (Ohio Univ. Press, 2013).

[5] R. Kent Newmyer, **The Supreme Court Under Marshall and Taney**; 2d ed. (Wiley-Blackwell, 2005), 139. See also Kermit L Hall, et al. **Oxford Companion to the Supreme Court of the United States**, 2d edition (Oxford Univ. Press, 2005) 925. Timothy L Hall, **Supreme Court Justices: A Biographical Dictionary** (Facts on File, 2001) 111

[6] *Joseph Fellows, Survivor of Robert Kendle, Plaintiff in Error v. Susan Blacksmith and Ely S. Parker, Administrator of John Blacksmith, Deceased*. 60 U.S. (19 How.) 366 (1857); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866). The citations about Nelson's life noted above in note 1 do not mention his opinions relative to American Indians, nor do the following mention the Seneca cases: Newmyer, **The Supreme Court Under Marshall and Taney**; Swisher, **History of the Supreme Court of the United States, vol.5: The Taney Period**; Timothy S. Huebner, **The Taney Court: Justices, Rulings, and Legacies** (ABC-CLIO, 2003); Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Univ. Press of Kansas, 1997); Stuart Streichler, **Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism** (Charlottesville, Virg.: Univ. of Virginia Press, 2005); Robert Saunders, Jr. **Archibald Campbell: Southern Moderate** (Univ. of Alabama Press, 1997) ; Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War** (Louisiana State Univ. Press, 2003).

[7] For the Treaty of Fort Stanwix, see 7 Stat.,15 (Oct. 22. 1784). For the Treaty of Big Tree, see 7 Stat., 601 Sept. 15 1797). For more on the dispossession of the Senecas, see Laurence M. Hauptman, **Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State** (Syracuse Univ. Press, 1999) and his **The Tonawanda Senecas' Heroic Battle Against Removal: Conservative Activist Indians** (SUNY Press, 2011).

[8] Robert V. Remini, "The Albany Regency," *New York History* 39 (Oct.1958): 341–55; Huebner, The Taney Court, 12. Swisher, **History of the Supreme Court of the United States**, 5: 215–22. For the Albany Regency push for Iroquois dispossession, see. Hauptman, **Conspiracy of Interests**, 175–190.

[9] "Wayne, James Moore," **Biographical Directory of the United States Congress**, bioguide congress.gov. For more on Justice Wayne's career, see Alexander A. Lawrence, **James Wayne Moore: Southern Unionist** (Univ. of North Carolina Press, 1943).

[10] See note 1 for biographical sources on Nelson.

[11] *Ibid.* See also James Grossman, **James Fenimore Cooper** (William Sloan Associates, 1949). 246; Ralph Birdsall, **The Story of Cooperstown** (Charles Scribner's Sons, 1925), 299–32. According to Elizabeth Zoe Vicary, 8 of Nelsons' 11 children survived to adulthood, "Nelson, Samuel (10 Nov, 1792–13 Dec. 1873)" **American National Biography**, eds. Mark Carnes and John Garraty (Oxford Univ. Press, 1999): 16: 284–285 [Hereafter *ANB*].

[12] In addition to the sources cited in note 1, see G. Jenni Parrish, "Samuel Nelson," **Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices**, ed, Melvin Urofsky (Congressional Quarterly Press, 2006), 380.

[13] Treaty of Buffalo Creek, 7 Stat., 550 (Jan. 15, 1838); Seneca Treaty [of Buffalo Creek], 7 *Stat.*, 586 (May 20, 1842).

[14] See *Ibid.* For more on the frauds, see Henry Manley, "Buying Buffalo from the Indians." *New York History,* 28 (July,1947): 313–29; Society of Friends. Joint Committee on Indian Affairs, **The Case of the Seneca Indians in the State of New York** (Philadelphia: Matthew and Thompson,1840). Although approximately 200 Iroquois went west, Thomas S Abler and Elisabeth Tooker, claim that 65 members of the Emigrant Party who left New

York for Kansas in 1846 were Senecas. "Seneca," **Handbook of North American Indian. Vol. 15: The Northeast**, eds, Bruce Trigger and William Sturtevant (Smithsonian Institution,1978), 511.

[15] Seneca Treaty [of Buffalo Creek], 7 *Stat.*, 586 1842). For more on this treaty, see Laurence M. Hauptman, "State's Men, Salvation Seekers. and the Senecas: The Supplemental Treaty of Buffalo Creek, 1842," *New York History* 78 (Jan.1997), 51–82.

[16] The best treatment of the upheaval leading to the establishment of the Seneca Nation of Indians is still Thomas S. Abler, **Dispute and Party Conflict in the Political System of the Seneca Nation (1845–1895)** [1969], (reprint, Salamanca, Allegany Territory: RAJ Publications. 2018). See also Laurence M. Hauptman, **Coming Full Circle: The Seneca Nation of Indians, 1848–1934** (Univ. of Oklahoma Press, 2019), 3–35. For later cases in the U.S. Supreme Court dealing with the Buffalo Creek Treaty of 1838, see *New York Indians v. United States*, 170 U.S.1, 614 (1898); and 170 v. US 464 (1898). In addition, the Indian Claims Commission, 1946–1977 dealt with monetary compensation relating to the Treaty of 1838.

[17] Ely S, Parker feared that the violence would even lead them to kill Senecas. Parker affadavit to R.H. Shankland) [Federal Indian Sub-agent], Dec. 30, 1848, Office of Indian Affairs, New York Agency Records, M234, MR 587, Record Group 75, National Archives [Hereafter OIA, NYAR, M234 MR, RG, NA]. For the Ogden Land Company's tactics, see Mary Conable, "A Steady Enemy: The Ogden Land Company and the Seneca Indians." (Unpublished Ph.D dissertation, Rochester: Univ. of Rochester, 1995), 300-04. .

[18] Tonawanda chiefs protest to President Tyler, June 1, 1842, February 1,1843, OIA, NYAR, M234, MR 584, RG75, NA; Jan. 9, June 19, July 12, 1843; Mar. 30, Apr. 16, 21, 1844, OIA, NYAR, M234, MR 585, RG75, NA. Tonawanda chiefs' protest to Governor William Seward, June 4, 1842, William Seward MSS, Box 18, Folder Seneca, Rush Rhees Library, Univ. of Rochester.

[19] Thomas Love and Ira Cook appraisers] to T. Hartley Crawford [Commissioner of Indian Affairs] Dec.28, 1843; Tonawanda Chiefs to President John Tyler, Jan. 9, 1843, Dec. 30, 1843, Mar. 29, Apr. 21, 1844, OIA, NYAR, M234, MR 585, RG75, NA.

[20] N. L. Benton [New York Secretary of State] to Henry Roe Schoolcraft, June 24, 1845, Henry Roe Schoolcraft MSS., Microfilm Reel 35, Library of Congress. Unlike other reservations, there is no material listed for the Tonawanda Reservation in the 1845 census. Part VII, New York State [Schoolcraft] Census, 1845, New York State Archives [Hereafter NYSA].

[21] N. L. Benton [New York Secretary of State] to Henry Roe Schoolcraft, June 24, 1845, Henry Roe Schoolcraft MSS., Microfilm Reel 35, Library of Congress. Unlike other reservations, there is no material listed for the Tonawanda Reservation in the 1845 census., Part VII, New York State [Schoolcraft] Census, 1845, New York State Archives [Hereafter NYSA].

[22] For example: *Isaac Doctor v. Philander Filkins*; *Tommy Hill v. Asa Cutler; David Printup v. Philander Filkens*, Oct. 17, 1846, Genesee County Court Records, Genesee County Court of Pleas, Civil Filings A–F (1847), Genesee County Clerk's Office, Batavia, N.Y.

[23] Ely S. Parker to [Isaac] Newton Parker, July 15, 1852, Ely S. Parker MSS., Box 3, American Philosophical Society [Hereafter ESP MSS., APS]. Just before their hiring in 1846, Martindale and Verplanck were described as "competent lawyers." Nicholson Parker to Ely S. Parker, June 11, 1846, ESP, APS.

[24] Joseph Fellows to William Medill, [Commissioner of Indian Affairs], Apr. 14, May 14,1846, OIA, M234, MR 586, RG75, NA.

[25] John *Blacksmith v. Joseph Fellows and Robert Kendle*, Oct. 13, 1847, Circuit Court Records, 1834–1854; for the countersuit, see *Joseph Fellows and Robert Kendle v. John Blacksmith*, Feb. 28,1849, Genesee County Court Records, Genesee County Court of Pleas, Civil Filings A–F (1847), Genesee County Clerk's Office, Batavia, N.Y.

[26] Legal proceedings in the case. including Judge Marvin's decision, can be followed in: *The Court of Appeals; John Blacksmith, Respondent, against Robert Kendle and Joseoh Fellows, Appellants*, Case on Appeal (Batavia, N.Y.: D.D. Waite, 1851, Records of the Court of Appeals, Series J29002-82, A Vol. 756, Box 34, (1878), NYSA.

[27] See for example, Society of Friends, *The Case of the Seneca Indians in the State of New York* (1840).

[28] Lewis Henry Morgan, **The League of the Haudenosaunee, or Iroquois** (Rochester: Sage and Bros., 1851; reprint with an introduction by William N. Fenton, New York: Corinth Books,1962), 32–34, 458.

[29] Peter Whiteley, "Why Anthropology Needs More History," *Journal of Anthropological Research* 60 (Winter 2004):503–04.

[30] "Mass Meeting for the Indians," *New-York Tribune*, Apr.1, 1846.

[31] For this book review of Morgan's classic, see *New York Evening Post*, Mar.19, 1851.

[32] See for example; "Robbery of Indian Lands," New York *Herald*, Jan. 26, 1857. One newspaper praised the Tonawanda Senecas who "clung with tenacity of their race" to fight back and remain in their homes. "Local and Miscellaneous: The Tonawanda Indians," *Buffalo Morning Express*, June 12, 1857; Conable, "A Steady Enemy," 302–303.

[33] Conable, "A Steady Enemy," 230 Charles W. McCurdy, **The Anti- Rent Era in New York Law and**

Politics, 1839–1865 (Univ. of North Carolina Press, 2000). John Van Rensselaer to James Denver (U.S. Commissioner of Indian affairs], July 8, 1857, OIA, NYAR, M234, MR588, RG 75, NA. In 1859, the New York Court of Appeals found against the continuation of the Van Rensselaer's manorial system. *Rensselaer v. Hays* 19 N.Y.68 (1859).

[34] The Clark Foundation preserved the building he worked in and moved his office in the 1940s across Lake Avenue to the Farmers' Museum in the 1940s.

[35] James Fenimore Cooper's **Leatherstocking Tales** was a series of five novels that followed the life of Natty Bumppo, later called Hawkeye, on the eighteenth-century New York frontier: **The Pioneers** (1823), **The Last of the Mohicans** (1826), **The Prairie** (1827), **The Pathfinder** (1840), **and The Deerslayer** (1841).

[36] James Fenimore Cooper, **Letters and Journals of James Fenimore Cooper**, ed. James Franklin Beard (Belknap Press of Harvard Univ. Press, 1960–1968), 3: 376n2.

[37] "A Troublesome Clergy." [James Fenimore Cooper Journal entry], in: **Letters and Journals of James Fenimore Cooper**, 5: 59–62 JFC to Mrs. Pomeroy, April 12, 1838; in *ibid.*, 2: 374–376. Duane Hamilton Hurd, **History of Otsego County. . . .** (Philadelphia: Evarts and Farris. 1878), 275.

[38] See the following in **Letters and Journals of James Fenimore Cooper:** JFC to Mrs. Cooper [Susan Augusta Delancey Cooper. hereafter SADC], May 14, 1842, 4: 288 (Re: Nelson and farming); JFC to SADC, Mar. 11, 1849, 6: 17 [Zachary Taylor]. JFC to Daniel Dewey Barnard, Dec, 1, 1842) [local elections]. 4: 322–323; JFC to SADC, Feb. 23, 1850, 2: 142 [Washington politics]. JFC to William Bradford Shubrick April 13, 1841 4:148–151; and JFC to Charles Jared Ingersoll, Oct. 9, 1841, 4: 175–177 [*Caroline* Affair, war scare, and subsequent McLeod arson and murder case]. For the McLeod case, see Kenneth R. Stevens; **Border Diplomacy—The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837–1842** (Univ. of Alabama Press, 1989).

[39] See the following in **Letters and Journals of James Fenimore Cooper:** JFC to William Branford Shubrick, Nov, 3, 1859; 4: 148–151; JFC to Charles Jared Ingersoll, Oct. 9, 1841, 4: 175–177. JFC to Shubrick 6:230: [hiring of Paul Cooper]; JFC to Benjamin Silliman [recommendation to Yale University for Rensselaer Russell Nelson], Sept. 16, 1842, 4; 313–314.

[40] Susan Fenimore Cooper, "A Tiel Tree or an Oak, 1851," in **Letters and Journals of James Fenimore Cooper**, 6: 256.

[41] **The Life, History and Travels of Kah-ge-gah-Bowh** (Albany: Weed and Parsons, 1847). See also Copway's **The Traditional History and Characteristics Sketches of the Ojibway Nation** (Boston: Mussey & Co., 1850; reprint, Wilfred Laurier Univ Press, 2014).

[42] JFC to George Copway June 17, 1851, in **Letters and Journals of James Fenimore Cooper** 6: 275. **The Life, History and Travels of Kah-ge-gah-Bowh** (Albany: Weed and Parsons, 1847). See also Copway's **The Traditional History and Characteristics Sketches of the Ojibway Nation**.

[43] By a Lady [Susan Fenimore Cooper], **Rural Hours** (G. P. Putnam, 1850; reprint, Syracuse Univ. Press. 1968). For analyses of her work, see **Susan Cooper: Essays on Nature and Landscape**, eds. Rochelle L. Johnson and David Patterson (Univ. of Georgia Press, 2002). Rochelle L. Johnson, **Passions for Nature: Nineteenth-Century America's Aesthetics of Alienation** (Univ. of Georgia Press, 2009), 90–110; and Tina Gianquitto, "**Good Observers of Nature": American Women and the Scientific Study of the Natural World, 1820–1885** (Univ, of Georgia Press, 2007), 100–136; For a comparative analysis of Cooper's and Thoreau's writings, see Rochelle L. Johnson, "Walden, Rural Hours, and the Dilemma of Representation" **Thoreau's Sense of Place: Essays in American Environmental Writing**, Richard L. Schneider, ed. (Iowa City, Univ. of Iowa Press, 2000).

[44] Cooper, **Rural Hours** (1968 reprint edition),117–23.

[45] For her positive impact on the Oneidas, see Laurence M. Hauptman, L. Gordon McLester, III, and Judy Cornelius, "Another Leatherstocking Tale: Susan Fenimore Cooper, The Oneida Indians, and the Episcopal Church," *New York History*, 94 (Winter/Spring 2013): 9–39. In 1885 and 1886, Susan Fenimore Cooper's he fourteen articles, "Mission to the Oneidas," appeared in the major Episcopal publication in Chicago. Her book-length manuscript is in Yale University's Beinecke Library: Susan Fenimore Cooper, "Oneida: A Sketch," James Fenimore Cooper MSS., YCAL MSS. 415, Series II: Writings, Box 22, Folder 472.

[46] Swisher, **History of the Supreme Court of the United States**, vol.5: **The Taney Period**, 221; Countryman, "Samuel Nelson," 332.

[47] For a brief summary of Kent's legal thought, see David Raack "To Preserve the best Fruits: The Legal Thought of Chancellor James, Kent," *American Journal of Legal History*, 33 (Oct.,1989): 320–66.

[48] Albert H. Marckwardt, "The Chronology and Personnel of the Bread and Cheese Club," *American Literature* 6 (Jan. 1935): 389–99. John T. Horton, **James Kent: A Study of Conservatism, 1763–1847** [1939] (Da Capo Press, 1969) 101–03, 121.

[49] *Cherokee Nation v. Georgia.* 30 U.S (5 Pet.)1 (1831). Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics and Morality," *Stanford Law Review* 21 (Feb.1969): 506–508, 511, 506n31; 506n31; Jill

Norgren, **The Cherokee Cases: Two Landmark Federal Cases the Fight for Sovereignty** (Univ. of Oklahoma Press, 2004) 60, 108.

[50] *Goodell v. Jackson ex dem. Smith*. 20 Johns 693 (1823).

[51] James Kent, "Commentary #50: Of the Foundation of Title to Land," **Commentaries on American Law** (N.Y.: Halstead, 1826; reprint, Da Capo Press, 1971) 3: 311–12.

[52] Kent praised the Quakers for their efforts to improve society. James Kent, **Memoirs and Letters of James Kent**, ed. William Kent (1898; reprint Da Capo Press, 1970) 123.

[53] James Kent, "Legal Opinion on Seneca Indians v. Ogden and Fellows, 1840," Series II: Legal Opinions, Notes and Correspondence Regarding Issues of the Law, James Kent Family MSS, 1785–1901, Box 2, Folder 27, Columbia University Rare Book and Manuscript Library.

[54] *U.S. v. Brooks*, 51 U.S.442 (1850).

[55] *Blacksmith v. Fellows* 7 N.Y. 401 (1852. *The Court of Appeals; John Blacksmith, Respondent, against Robert Kendle and Joseph Fellows, Appellants,* Case on Appeal (Batavia, N.Y.: D.D. Waite, 1851, Records of the Court of Appeals, Series J29002-82, A Vol. 756, Box 34, (1878), New York State Archives. For the Spencers, father and son, see Laurence M. Hauptman, "State's Men, Salvation Seekers and the Senecas: The Supplemental Treaty of Buffalo Creek, 1842," *New York History*, 78 (Jan., 1997): 51–82.

[56] "Death of John Blacksmith," *Buffalo Commercial*, April 22, 1851.

[57] *Blacksmith v. Fellows* 7 N.Y. 401 (1852). *The Court of Appeals; John Blacksmith, Respondent, against Robert Kendle and Joseph Fellows. Appellants*, Case on Appeal (Batavia, N.Y.: D.D. Waite, 1851).

[58] *Joseph Fellows, Survivor of Robert Kendle, Plaintiff in Error v. Susan Blacksmith and Ely S. Parker, Administrator of John Blacksmith, Deceased*. 60 U.S. (19 How.) 366 (1857). Verplanck is listed as the trial judge in a criminal case in Superior Court, criminal term, in the *Buffalo Courier*, May 1, 1864. "Ransom Hooker Gillet, "Autobiography," in: Box 5, Folder 10, Ransom H. Gillet MSS, New York State Library [Hereafter NYSL]. For more on Gillet, see Hauptman, **The Tonawanda Senecas' Heroic Battle Against Removal**, 42–43, 97–98, 104.

[59] *Joseph Fellows, Survivor of Robert Kendle, Plaintiff in Error v. Susan Blacksmith and Ely S. Parker, Administrator of John Blacksmith, Deceased*. 60 U.S. (19 How.) 366 (1857)

[60] *Ibid*., at 368.

[61] *Id.*, at 371. On. Dec. 16, 1786, New York State and the State of Massachusetts made a compact that recognized New York States' jurisdiction over the western part of New York State, totaling 6 million acres; Massachusetts, in return, obtained the right of preemption, the title to all of the land, giving it the exclusive right to extinguish by purchase the possessory rights of the Indian tribes (except for a narrow strip along the Niagara River, the title to which was recognized as to belonging to New York). The compact also provided that Massachusetts could sell or assign its preemptive rights.

[62] *Id.*, at 372

[63] *Id.*, at 373.

[64] U.S. Treaty with the Tonawanda Band of Senecas 11 Stat, 735;12 Stat.,991 (Nov. 5, 1857). Immediately after the Blacksmith case was decided, Martindale pushed for a new treaty. Ely S. Parker to William Parker, Mar, 18, 1857. #3404, ESP MSS., APS; Ely S. Parker, Martindale, et al. to James W. Denver [U.S. Commissioner of Indian Affairs] June 30, 1857, Ely S. Parker MSS. # 3302, ESP, APS.

[65] *People of the State of New York in ex rel. Cutler v. Dibble,* 62 U.S. (21 How.) 366 (1858)

[66] *Laws of New York*, 1821, 44th sess., Chap. CCIV (Mar. 21. 1821).

[67] For the state courts' actions on this case, see *People of New York in ex rel. Cutler v. Dibble* 18 Barb 412, N.Y. Sup. Gen. Term; affirmed 16 N.Y.201 (1854).

[68] *People of New York in ex rel. Cutler v. Dibble*, 62 U.S. 366 (1858). For Justice Grier, see Stuart Streichler, "Grier, Robert Cooper (5 Mar.1794–25 Sept., 1870)." *ANB*, 9: 583–584.

[69] See Gerald Gunther, "Governmental Power and New York Indian Lands: A Reassessment of a Persistent Problem of Federal-State Relations," *Buffalo Law Review* 7 (Fall 1958), 1–14. See also Deborah A. Rosen, "Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790–1880," *American Journal of Legal History* (2004); Robert B. Porter, "Note: Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 5 U.S.C. 232, 233, 27 *Harvard Journal of Legislation* 497 (1990).

[70] *The Kansas Lands*, 72 U.S. 737 (1866); *Cherokee Tobacco*, 18 U.S.616 (1870).

[71] *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866).

[73] *Laws of New York*, 63rd sess., chap. 254 (May 9, 1840): 26–27.

[73] *Laws of New York*, 64th sess., chap.166 (May 4, 1841): 134–136.

[74] Notice of Tax Sales, Oct. 11,13, 1856, OIA, NYAR, M234. MR588, RG75, NA. L. Burrows [New York State Comptroller] to De Witt Littlejohn [New York State Assembly Speaker] with attachments concerning tax sales of Seneca lands, Jan. 9, 1857, in: Society of Friends, **Documents and Official Reports Illustrating the Causes Which Led to the Revolution of the Seneca Indians in 1848** [Hereafter **Documents and Official Reports**] (Baltimore: William Wooddy, 1857), 80–81.

[75] Joel R. Poinsett to Messrs. Ogden and Fellows, Oct. 7. 1840. In: "Papers on Appeal," *Joseph Fellows, et al. v. Robert Dennison, Comptroller, etc. and Thomas W. Olcott.* Records of N.Y. Court of Appeals, 1847–1911, 203: 42–43, New York State Library.

[76] Memorial of the President John Luke and the Seneca Nation and Councilors to the New York Assembly and Senate, Jan.1. 1857, Society of Friends, *Documents and Official Reports*, 82. Federal Treaty with the Senecas 7 Stat., 586 (May 20, 1842).

[77] *Fellows v. Dennison*, 23 N.Y. 420 (1861)

[78] "An Act to Relieve the Tonawanda Band of Seneca Indians from Certain Taxes on the Tonawanda Reservation," *Laws of New York*, chap. 491 (Apr.17, 1860), 980–81.

[79] *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866).

[80] *Ibid.* For the Treaty of Canandaigua, see Treaty with the Six Nations, 7 Stat., 44 (Nov. 11, 1794).

[81] John H. Martindale to Isaac Halftown [President of Seneca Nation], Oct. 30, 1866, Indian Collection, Buffalo History Museum Library.

[82] See note 79.

[83] *Ibid*.

[84] "The Taxes on the Indian Reservation," *Cattaraugus Republican*, May 18, 1871.

[85] See for example: "Senecas Clash with Police Over Tax Ruling," *New York Times*, July 17, 1992; "Seneca Business Owner to Challenge State in Court," *Jamestown (N.Y.) Post -Journal*, May 5, 2022. Amanda M. Murphy "A 'Tale of Three Sovereigns': The Nebulous Boundaries of the Federal Government, New York State, and the Seneca Nation of Indians Concerning State Taxation of Indian Reservation Cigarette Sales to Non-Indians." *Fordham Law Review*, 79 (2011): 2300–2346. Public Law 111–154: Prevent All Cigarette Trafficking Act, 124 *Stat*. 1087 (March 31, 2010). Available at—http://www.gpo.gov/fdsyslpk. . . . 54/pdf/pluw-111publ154.pdf. In addition to the state tax issue, Congress in 1948 and 1950, transferred criminal and civil jurisdiction over the Six Nations to New York State.

A Hero Forgotten: Gus Garcia and the Litigation of *Hernandez v. Texas* (1954)

Gabriel Valle

In 1951, in the east end of Jackson County, Texas, if Mexican-American attorney Gus Garcia had attempted to stop by the local restaurant for lunch before his next trial, he would have been greeted with a sign reading "No Mexicans Served."[1] When Garcia walked into the Jackson County courtroom to defend his client Pete Hernandez, on trial for the murder of Joe Espinoza, he would have been greeted by a sea of white faces on the jury.[2] Finally, should Garcia have needed to use the restroom at the courthouse, there would have been two available; one room unmarked, and the other with two signs above reading "Colored men" and "Hombres Aqui."[3]

Gustavo 'Gus' Garcia lived amongst and advocated against these pervasive reminders that, to white Texans, Mexican Americans were distinct and decidedly second-class citizens. As a young and promising Mexican-American civil rights attorney, Garcia took it upon himself to challenge these injustices. The talented attorney's trailblazing impact on Mexican-American civil rights deserves wider recognition.[4] His dedication to Mexican-American civil rights transformed a local open-and-shut murder case with an unsympathetic plaintiff and factual deficiencies into a brief but national reckoning on Mexican-American civil rights.

A Cantina, A Gun, and An Opportunity

Although Gus Garcia rocketed to national fame during the *Hernandez* case, he was already a respected San Antonio attorney when Pete Hernandez initially approached him seeking representation.[5] By all accounts, Garcia was a prodigy. A native Texan, Garcia was born in Laredo to one of the state's oldest families, which first settled there in 1765.[6] Garcia graduated valedictorian of his high school class, going on to study at the

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University of Texas at Austin and became the first Mexican-American debate team captain.[7] Garcia graduated in 1936, and received his LL.B. at the University of Texas at Austin two years later.[8] After graduation, Garcia initially served as an assistant San Antonio city attorney, followed by a stint as an assistant criminal district attorney. When the U.S. entered World War II, Garcia served in the Pacific Theater, earning the rank of First Lieutenant and serving as a Judge Advocate General in Yokohama, Japan.[9]

After the war, Garcia returned to Texas and began to make a name for himself. He possessed an "awesome eloquence," in both Spanish and English, allowing him to enrapture courtrooms and crowds alike as he simultaneously nurtured a career in the law and speaking on behalf of local Mexican-American candidates for public office.[10] Anywhere Garcia went in Texas, the local attorneys and Mexican-American population would praise this "brilliant" young attorney, who possessed "one of the finest legal minds anywhere."[11]

It was Garcia's work on *Delgado v. Bastrop ISD* in 1949 that established him as a preeminent Mexican-American civil rights attorney. *Delgado* was a challenge to Mexican-American school segregation in Texas. The case went before Judge Ben H. Rice on the U.S. District Court for the Western District of Texas. Judge Rice's ruling ordered a permanent injunction from the "segregating of pupils of Mexican or other Latin American dissent in separate schools," as well as in "facilities and services."[12] The injunction did allow, however, for separate classes within the same school for first grade students, "solely for instructional purposes," especially if the

***Delgado v. Bastrop ISD* (1949) was a successful challenge to Mexican-American school segregation in Texas, although it allowed for some separate classroom instruction. Gustavo "Gus" Garcia (right) made his name litigating that case, along with Hector P. Garcia and Hector de Pena (left and middle).**

student's English was not sufficient.[13] A full five years before *Brown*, Garcia had won a watershed school desegregation victory, chipping away at Texas Mexican-American school segregation.

Hearing of Garcia's reputation as an attorney and champion for his people, the twenty-six-year-old Hernandez sought him out for representation. The facts were not promising. On February 23, 1951, Pete Hernandez was working as a migrant cotton picker in Edna, Texas for Joe Espinoza, a cotton planter.[14] At a local cantina that evening, Espinoza and Hernandez got into a heated argument. Hernandez left, went home to retrieve his gun, returned to the cantina, and shot Espinoza point blank outside of the building in front of numerous witnesses.[15] Hernandez was indicted on September 20, 1951, by a grand jury with no Mexican-American representation. Eight witnesses testified against Hernandez, swiftly indicting him for murder with "malice aforethought . . . against the peace and dignity of the state."[16]

Although the facts of Hernandez' case presented an open-and-shut murder conviction, the mechanics of the trial intrigued Garcia. It was no secret Mexican Americans were treated as a distinct and unequal class in Texas, similar to the treatment at that time of African Americans in the South.[17] The *Delgado* case had been decided just two years prior, and while progressive, still allowed for some separate classroom education. Additionally, six years earlier in a nearby county, a Mexican-American congressional Medal of Honor recipient had been denied service at a local restaurant on account of his Mexican heritage.[18]

Given these instances of overt discrimination and a preliminary investigation into the history of jury composition in the region, Garcia knew he had "an excellent opportunity to make a test case," for the exclusion of Mexican Americans from juries.[19] Hernandez could not afford to pay Garcia's costs for his trial, let alone for an appeal with possible national reach. Garcia took the case *pro bono*.[20] Numerous times Garcia expressed his preference to "soak in the applause" rather than "make a fat legal fee."[21]

Initial Proceedings

Discussing his strategy, Garcia recalled in a memoir that it was necessary "to lay the proper predicate," by preserving all possible lines of argument and introducing supporting evidence for the appellate record.[22] To do so, he prepared a series of motions to quash the indictment and a motion to quash the jury panel on Fourteenth Amendment grounds.

The Supreme Court's jury selection precedents applying the Fourteenth and Fifteenth Amendments were a mixed bag. In *Neal v. Delaware* (1880), the Court ruled the Fourteenth and Fifteenth Amendments invalidated a provision in the Delaware constitution that limited jury service to 'white' males, but these amendments did not require people of color to serve on any given jury.[23]

Eighteen years later, however, the Court swerved in *Williams v. Mississippi* (1898). There, the justices unanimously held Mississippi's requirements to be a grand or petit juror, which included many hallmarks of race-based voter disenfranchisement such as literacy tests and poll taxes, did not violate the Fourteenth Amendment.[24] The Court determined the laws "did not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."[25] Despite holding twelve years prior in *Yick Wo v. Hopkins* that the potential for racial discrimination under a law may be enough to invalidate the law, the Court in *Williams* distinguished away the case stating that *Yick Wo* involved the administration of laws "so exclusively against a particular class of persons," that no matter how "fair on its face" the law appeared, it's application rendered it unconstitutional.[26]

In *Strauder v. Virginia* (1879), the Supreme Court held it was a violation of the Equal Protection Clause to bar individuals from serving on grand or petit juries on account of the individual's race or previous condition of servitude.[27] A half century later, in *Norris v. Alabama* (1935), the Court held that systemic exclusion of African Americans from jury service on account of being treated as a distinct class violated equal protection, a rule that came to be called the 'Rule of Exclusion'.[28] Garcia hoped to expand and apply these precedents in the context of Latin American jury exclusion, relying on clear evidence of unequal treatment on the basis of national origin and the creation of a subjugated and distinct Latin American class.

On October 4, 1951, Garcia filed his motion to quash the indictment. In it, he outlined five justifications: first, in the "selection of the Grand Jury Commissioners," who in turn chose the jury members, "defendant was . . . denied the equal protection of the law," under the Fourteenth Amendment; second, the defendant was deprived of his equal protection rights "in the selection of the Grand Jurors who returned this Indictment"; third, there were persons, especially of Mexican-American dissent, on the tax and poll rolls "who are qualified for Jury Commission and Grand Jury service"; fourth, approximately twenty-five percent of Jackson County's population was of Mexican Dissent and "considered as members of a separate race" by the people of Jackson County; and fifth, that the defendant had not had an opportunity to raise his constitutional rights "prior to the Commission of the alleged offense averred in this indictment."[29]

On the same day, Garcia filed a motion to quash the jury panel. In the motion, Garcia pushed his key narrative: that persons of Mexican heritage were treated as a distinct class in Jackson County: Mexican-American citizens in Jackson were eligible to serve on juries, and despite their eligibility were "systematically, intentionally, and deliberately" prevented from serving.[30] To support these

Gus Garcia (pictured in 1952) was by all accounts brilliant, charismatic and eloquent. Born in Laredo, he became a preeminent Mexican-American civil rights lawyer.

contentions, Garcia contended that people of Mexican-American origin were explicitly prevented from serving on juries, treated as a distinct class in society, and the defendant had not yet been able to challenge these violations of his Fourteenth Amendment rights.[31]

These petitions served more to lay the appellate groundwork than in a feasible way to overturn the indictment. Despite this, Garcia was disheartened to see that no one "on [their] side," such as local Mexican Americans or League of United Latin American Citizens (LULAC) leaders, or even anyone "mildly sympathetic," was present at the hearing for these motions.[32] Garcia learned post-hearing that"' Mexicans don't attend court," in the area, and even more problematically, Hernandez had killed a "well liked and respected" local figure.[33] Killing a fellow Mexican American would have made it difficult to win Hernandez' murder trial, even with Mexican Americans on the jury.

Choosing such an unsympathetic plaintiff placed the larger test case at risk. If Garcia appealed to the Supreme Court, it was entirely possible Hernandez would draw criticism from the various Mexican-American populations across the Southwest. Many portions of the Mexican-American population could potentially object to having their race represented by a man who had killed his own people in a national conversation on the qualification of Mexican-Americans to sit on juries.

Establishing the Record

Despite a discouraging turnout in the courtroom, Garcia was determined to make the most of his hearing and hammer home the "three essential elements" to a claim of systematic jury service exclusion: No one of Mexican-American dissent had served on a Jackson County jury in the last 25 years, there were qualified Mexican Americans living in Jackson County, and "discrimination and segregation" were commonplace in the county.[34]

Garcia called on several prominent local officials, the first of which was Jackson County court clerk Gena Lee Lawrence, to corroborate the allegation presented in his motions. During Garcia's direct examination of Lawrence, he asked her if she could recall in her fifteen years of service ever seeing a Mexican American serve on a jury commission, grand jury, or venire. She answered, "I don't think so; I don't recall there ever was."[35] Further, Garcia asked that Lawrence be given the chance later to go over her records to ensure his claim that no Mexican-American had served on a Jackson County jury in over 25 years "is not contradicted."

Next, Garcia asked Lawrence if people of Mexican dissent in the area were commonly referred to as "Mexican" or "Latin Americans" while people of other national origins were referred to as "white," to which Lawrence responded, "we all understand that the Latin Americans are considered white."[36] Further, when asked if people of Mexican heritage were denied service at restaurants in the area, Ms. Lawrence answered "no, sir."[37]

Wayne Hartman, the District Attorney for the twenty-fourth judicial district of Texas, conducted cross-examination for the state.[38] Lawrence answered affirmatively that she could recall no one of Mexican-American heritage "on name alone," serving on a jury, but that there could have been people with Mexican blood who nonetheless served.[39] On re-direct, Garcia was able to mitigate some of the damage from Lawrence's testimony. Garcia asked her if she had heard "people say 'Mexican' and 'white man' in contrast," to which she answered "yes, sir."[40] Additionally, Garcia asked if Lawrence could recall any person in Jackson County who was of Mexican heritage but had an Anglo name. Lawrence replied, "I don't recall any."[41]

The next defense witness was Claudius Branch, a Jackson County tax collector and assessor. On direct examination, Garcia attempted to establish the Mexican population in Jackson County, and their ability to fulfill

the property and tax requirements to vote. Branch testified that the total Jackson County population was "something like 18,000," with "around 15 per cent [sic]" being of Mexican descent. Further, after affirming that he was familiar with the county requirements for serving on any kind of jury, Branch testified that in 1951 "there [were] persons with Spanish names" eligible for service. Garcia tried to go for the knockout blow, asking Branch if since coming to the position in 1946 he had ever known of a "Spanish named person," serving on a jury. Branch evasively replied "I have not had any reason to check it."[42]

What emerged from this hearing was a mixed record. It was clear discrimination existed against Mexican Americans in Jackson County, and that there was a noticeable dearth of Latino names on juries in the County. However, there was not unquestionable evidence the jury had struck Mexican Americans solely on account of their race. This relatively weak record would prove to be a sticking point for Supreme Court clerks and justices alike on appeal.

Unsurprisingly, Judge Frank M. Martin of the 24th Judicial District of Texas promptly overruled Garcia's motion.[43] Accordingly, Garcia attempted to file a final application for suspended sentence on October 8, as "all trial lawyers with one eye cocked on the appellate court . . . are wont to do."[44] This too was rejected, and the trial proceeded on October 8.

Hernandez' trial was a quick affair. It began promptly at 9 am on October 8, with the clerk instructing a special venire of 130 men to gather at the courthouse at 10 am.[45] Voir dire examination of the jurors began at 1:30 pm, and was concluded by 5 pm the next day, ultimately requiring "twelve talesman" (additional jurors) to complete the jury panel.[46] Garcia filed another motion to quash the entire jury panel, including the use of talesmen.[47] Both motions were promptly rejected by Judge Martin. The presentation of evidence began on October 11, and the jury

Gus Garcia, Peter Hernandez and John J. Herrera on the courthouse steps in 1953. Hernandez was a Mexican-American migrant cotton picker who shot a man point blank in front of several witnesses in Edna, Texas. Herrera, a member of the League of United Latin American Citizens, took on the case with Garcia after Hernandez was tried by an all-white jury.

received the case at 4:30pm that afternoon. After three and a half hours of deliberation, the jury returned the verdict: guilty "of murder with malice aforethought," with a sentence of life imprisonment.[48]

That same evening, Garcia filed a motion for new trial, arguing that the verdict was against the law, and against the evidence. The motion was later amended on December 15, 1951, attaching the initial motions to quash the jury panel and indictment.[49] Judge Martin promptly denied the motion, but granted permission to appeal to the Court of Criminal Appeals for the State of Texas in Austin.[50]

The Court of Last Resort

Garcia and his team prepared briefs and argument at the state appeals court.[51] 'Carlitos' Cadena, a law professor at St. Mary's School of Law and John J. Herrera, both members of the League of United Latin American Citizens, had joined Garcia's team). Although the transcript of the appellate argument has not been preserved, on June 18, 1952, Judge Lloyd W. Davidson issued the opinion for the Texas Court of Criminal Appeals. The

opinion lists only Davidson as an author, but said the opinion was "approved by the court."[52]

Judge Davidson traced the history of the Equal Protection Clause under the Fourteenth Amendment from its ratification. He discussed the *Slaughter-House Cases* (1873) and *Norris v. Alabama* (1935), which held that the systematic exclusion of African American from jury service was unconstitutional. He concluded that "so far as the question of discrimination in the organization of juries in state courts is concerned," the Fourteenth Amendment "contemplated and recognized only two classes." Falling under the amendment's protection: whites and African Americans.[53] Further, under *Sanchez v. State* (1951),[54] Mexicans were considered part of the white race, and so far as the Texas Court of Criminal Appeals had "been advised," "no member of Mexican nationality challenges that statement," except of course for Garcia and his legal team.[55] Davidson concluded by recognizing that Mexicans as a special class "within the white race," would violate equal protection principles as it would "extend special privileges not accorded to all others of that class similarly situated."[56] With Hernandez' appeal to state court denied, and the Texas appellate court being the court of last resort in Texas for criminal cases, the stage was set for a Supreme Court challenge.

The Supreme Court

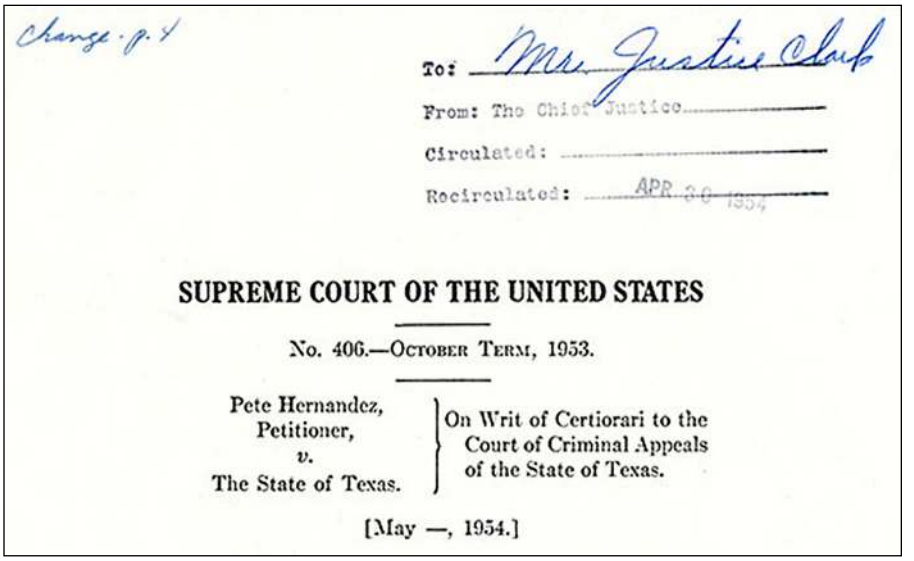
On losing their appeal at the Texas Court of Criminal Appeals, Garcia and his team seriously debated appealing to the United States Supreme Court. Garcia had diligently filed a motion for rehearing to preserve his right to appeal, but whether the team would now follow through was an open question.[57] Despite taking the case specifically to serve as a test vehicle, Garcia had "little hope" their petition would be chosen out of the "hundreds" submitted, and the funds to even file a petition were extremely limited.[58] After many discussions with other local civil rights attorneys and "harboring many misgivings," Garcia filed a petition for certiorari on January 19, 1953, the "last day allowable."[59] The petition had to be typewritten, as there was "no money" to afford printing services.[60]

An Unconvincing Start

Hernandez's petition arrived while Chief Justice Fred M. Vinson was still alive—he would die suddenly of a heart attack in August. His chief clerk, James C.N. Paul, wrote the first memo on the case. A 1951 graduate of the University of Pennsylvania Law School, Paul began clerking for Vinson after graduation.[61] Paul's memo immediately pointed out an unanticipated hurdle for Garcia and his legal team. Although they had in fact filed on the last day, the petition was not "received" by the Supreme Court until January 20, and not filed by the Court until January 21, two full days after the petition window had expired.[62]

However, luck and precedent were on Hernandez' side. Paul pointed out that the Clerk of Court's office was closed on January 20 for Inauguration Day. Thus, the petition was allowable as it had arrived on a federal holiday. [63] But, there was yet another hurdle: the typewritten nature of the petition and record. Paul relayed to the chief justice that "neither a motion nor an affidavit [had] yet been submitted asking permission to proceed on typewritten papers." Paul additionally noted that Garcia had not yet responded to the Clerk of Court's letter "calling attention" to the defect.[64]

Willing to set these procedural deficiencies aside, Paul's attitude towards the case's merits seemed lukewarm at best. In his memo, Paul outlined the basic details of the proceedings below, chiefly that Hernandez was a U.S. citizen of Mexican descent, had been convicted of murder with a sentence of life imprisonment, the conviction had been



Change p. 4

To: Mr. Justice Clark

From: The Chief Justice

Circulated:

Recirculated: APR 30 1954

SUPREME COURT OF THE UNITED STATES

No. 406.—October Term, 1953.

Pete Hernandez, Petitioner, v. The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[May —, 1954.]

Chief Justice Earl Warren announced the *Hernandez* decision on May 3, 1954, two weeks before *Brown v. Board of Education*. Above is his draft that was circulated to Justice Tom C. Clark.

upheld on appeal, and petitioner was arguing an equal protection violation given that Mexican-Americans were regarded in Texas as a "distinct race" and thus denying jury service based on their race violated their constitutional rights.

Paul also reviewed the appellate court's reasoning, particularly its reliance on a "two classes" theory of equal protection.[65] Paul argued that the lower court's "reasoning . . . if not its conclusion, [was] open to doubt." He wrote the Fourteenth Amendment did not require Mexican-Americans on the panel when a Mexican-American was on trial, but it did "protect 'Mexicans' as a class from unreasonable discrimination," given the amendment was not "limited to just Negro[e]s."[66] However, Paul had reservations about the strength of the record. Specifically, given the only evidence presented was the absence of Mexican sounding names from the jury rolls, the testimony of the jury commissioners who swore they "simply made their selection from a taxpayer list," with no instructions given to discriminate, seemed plausible.[67]

Paul did not advocate for granting certiorari outright; rather, he recommended the state be given a chance to file a brief for the case. He suggested before "disposing of the petition," the court should give the state a chance to respond.[68] Chief Justice Vinson appears to have agreed, and someone penciled in the margins of Paul's memorandum "Held Response." Allowing the state to file a response pushed deliberation to next Term and inadvertently set the case on a path for reconsideration under new leadership and new clerks.

The New Chief

In September 1953, shortly before the start of the Term, Chief Justice Vinson died suddenly of a heart attack.[69] Given the timing of his death and his position on the Court, there was an immediate scramble to find a suitable replacement. Earl Warren was nominated on September 20, 1953, as a recess appointment and soon after began work as chief justice.[70]

As a former governor of California, a state with a significant Mexican-American

population, Warren was uniquely suited for his first major case on the Court. Moreover, Warren had been governor during the 1947 *Mendez v. Westminster* case in California. In *Westminster*, the Ninth Circuit unanimously upheld the lower court's ruling that Mexican-American segregation in schools violated the Fourteenth Amendment.[71] Following the decision, Governor Warren went further and repealed all remaining school segregation laws in the state.[72] In Warren, the Court gained a justice both sensitive to and supportive of Garcia's aims.

As Warren settled into his new role, his new clerks, including Paul, who stayed over a second Term, were busy catching him up to speed on the upcoming Term's docket before the Court's October 5 Conference. One new clerk was Richard J. Flynn.[73] A 1953 graduate of Northwestern University School of Law, Flynn was initially accepted as a clerk for Chief Justice Vinson but was reassigned to Warren upon his death. Flynn wrote his own memo on *Hernandez* in preparation for the October 5 Conference. It began with a brief recitation of the lower court proceedings, outlining the basic facts of the case and the Fourteenth Amendment claims. Specifically, Flynn observed that while the Supreme Court had previously held the Texas method of using jury commissioners was "fair on its face," Garcia was challenging "the administration of the law."[74]

On the constitutional question, Flynn argued that the Texas Appellate Court's assertion that the Fourteenth Amendment "recognized only two classes," was "fallacious."[75] If Mexican Americans were discriminated against "as a class," they are "entitled" to Fourteenth Amendment protection.[76] Flynn then recounted the evidence from Garcia's pre-trial hearings. The record showed "a separate school had existed," "there was some exclusion from public places," and the toilets in the courtroom were segregated.[77] Flynn argued "the record [could] be read to support" a finding that Mexicans were treated as a separate class in Jackson County, and thus subject to Fourteenth Amendment protection.[78] Finally, Flynn, like Paul, noted the procedural errors, chiefly the filing date which the State of Texas challenged in its brief, and the typed nature of the petition. However, unless "barred by failure to conform to the rules," Flynn argued certiorari should be granted.[79]

Finally, Justice William O. Douglas had his clerk, James F. Crafts, prepare a short memorandum in preparation for the October 5 Conference. A native of Rochester NY, Crafts attended Harvard University, graduating magna cum laude in 1950, before receiving his JD from Stanford University in 1953.[80] Crafts' memo took the most vehement stand against the Texas appellate court ruling, reflecting the fire of his boss's own opinions. Crafts initially addressed the procedural deficiencies but waved them off as things that "can probably be gotten around."[81]

Further, Crafts agreed the state had "brashly stipulated" that no one with a Mexican name has served on a jury in the county for twenty-five years. With those facts, had "the petitioner been a Negro, summary reversal would be justified." Crafts concluded by stating it was "not necessary," to currently consider the "tortured reasoning," the Texas court relied on, it was sufficient that the question presented was "substantial" and worthy of granting certiorari.

Though all three memos differed in their tones and zeal, two of the three outright advocated for granting certiorari, and Paul's advocated first for more briefing from the state of Texas. All three memos concluded that Texas's two-class interpretation of the Fourteenth Amendment was incorrect. Interestingly, despite having his chief clerk prepare a certiorari memo, Chief Justice Warren took no part in the "consideration or decision" to grant certiorari, most likely because of his recent arrival on the Court, and that this was a carry-over case from the previous Term.[82]

On October 5, every justice except Stanley F. Reed agreed with the certiorari memos and voted to hear the hand-typed Mexican-American civil rights case.[83]

Acceptance and Raising Funds

On October 12, 1954, Columbus Day in the United States, but "El Dia de la Raza" in Mexico and Latin America, Garcia found out his petition had been accepted.[84] Although Garcia was elated, the notification came with a $900 fee to cover requisite court costs.[85] Thankfully, the local branch of the League of United Latin American Citizens (LULAC), the leading national Latin American civil rights advocacy organization, was able to cover them. "In violation of established procedure," the local San Antonio Council No. 2 LULAC division provided $900 from their scholarship fund to cover the court costs of litigation.[86]

Given the paucity of funds at Garcia's disposal, voluntary donations were as essential to the case as the legal team's arguments. Garcia utilized his veteran and local community connections to collect "$3,000 all told for all purposes," from various G.I. Forums, LULAC divisions, private donations, and the Texas Good Relations Association.[87] Garcia and his team had a shoe-string budget to cover all legal fees, transportation, living expenses, and any other costs of litigation.[88] Somewhat resentfully, Garcia noted the NAACP and Thurgood Marshall were working with sums of $45,000-$100,000 per case.[89] A search of the NAACP files did not reveal any communication or solicitation from Garcia and his team on the *Hernandez* case.

Despite their tight budget, Garcia, along with his co-counsel, travelled to Washington, determined to emerge victorious. Appearing with Garcia as co-counsel were Carlos Cadena and John Herrera. Cadena was, like

The American GI Forum, a congressionally chartered Hispanic veterans and civil rights group, provided crucial support for the case. Carlos Cadena is at center; Garcia is second from right with his hand on James De Anda's shoulder.

Garcia, a respected Texas civil rights attorney who held a professorship at St. Mary's University School of Law. In 1965 he was appointed to the Texas Fourth Court of Appeals and in 1977 became the first Mexican American to become chief justice of the court.[90] Herrera served as a national president for LULAC and earned renown as a civil rights attorney for facilitating cooperation with the American G.I. Forum, and filing the first discrimination complaint in Texas with the President's Employment Practice Commission."[91]

In pursuing the case, Garcia and his team made history as the first all-Mexican-American attorneys to argue before the Supreme Court in representing a defendant.[92] Additionally, *Hernandez v. Texas* marked the first time a "case involving the civil rights of Latin Americans" came before the Supreme Court.[93] Thus, the legal team itself as well as its interpretation of the Fourteenth Amendment represented monumental historical firsts.

To Classify by "Blondes and Brunettes, or Redheads and Others"[94]

On December 31, 1953, the State of Texas filed its merits brief in opposition. Texas initially attacked the date of the filing. The brief argued that with a late filing and no extension requested, the petitioner should have been denied jurisdiction.[95]

Attacking the petitioner's substantive argument, the brief argued that Garcia "far overestimates the evidence in this case." Texas's brief stated that over "some seventy-nine pages of testimony," and no less than six witnesses for the petitioner, much of the testimony was about "school procedure," and every jury commissioner had testified under oath that "no discrimination was allowed in selecting the jury lists."[96] This, Texas argued, proved "full performance of all legal duties," on Texas' part.[97]

Next, the brief emphasized that Hernandez was a white man, and to "divide the white race into small segments," such as by hair color or religion would "[encumb[er] the jury system as to utterly ruin it." The state then quoted the criminal appeals court opinion in its entirety, taking up well over half of its short fifteen-page brief.[98] The state's brief thus amounted to a refutation of the hearing testimony, and a word-for-word reiteration of the lower court opinion. Only one Supreme Court precedent was cited, *Brown v. Allen* (1953), which according to the state suggested a hesitation to "upset state procedure," but in the distinct context of a habeas petition."[99] Texas's brief was altogether unremarkable. If Texas were to win, it would have to overcome not only its weak brief, but the talented Garcia in oral argument. Garcia's merits brief was more than three times in length, with twenty-three pages alone devoted to a legal analysis of the Fourteenth Amendment Claim. As opposed to Texas' brief, it was all argument and did not include extensive quotation of the lower court opinion. Garcia's brief presented two arguments. First, the "intentional, arbitrary, and systematic exclusion of persons of Mexican-dissent" from juries is a denial of their liberty, due process, and equal protection rights.[100] Second, where "over a period of twenty-five years, no persons of Mexican descent have been called for jury service," and there were qualified candidates available, the Texas Court of Appeals' failure to "apply the 'Rule of Exclusion'" from *Norris v. Alabama* resulted in a deprival of due process and equal protection.[101]

Garcia attacked the Texas Court of Appeals' untenable position. Throughout Texas, "persons of Mexican dissent occupy a definitive minority status."[102] Despite this, the Texas Court of Appeals maintained that Mexican Americans are members of the white race and to protect their right to sit on juries would be to extend "special privileges" not granted to other members of the class, making Mexican Americans a "special class within the white race."[103] Garcia succinctly pointed out

the logical fallacy in this argument: "the court is apparently under the impression that, in Jackson County, Texas, only Negroes are allowed to serve as jurors."[104]

Garcia's argument section concluded by pointing out the absurdity of setting up a double standard in applying the *Norris v. Alabama* rule of exclusion. The Texas Court of Appeals decision made it so there is "one rule of evidence for Negroes, and a different rule for persons of Mexican dissent."[105] "Given the same facts, but changing the color of the accused," Garcia argued the state of Texas requires Mexican Americans to show "express discrimination," and "bear this more onerous burden of proof solely and simply because they are not Negroes."[106]

"That Wetback from Tennessee"[107]

Oral argument on January 11, 1954, began one hour earlier than expected, causing the news reporters to miss most of the "historic opening argument" By Carlos Cadena, Garcia's co-counsel.[108] Regrettably, oral arguments at the Supreme Court were not recorded until the October 1954 Term, just one year after *Hernandez* and *Brown*. Instead, journalists selected snippets to relay to the public in the newspapers. *El Paso Times* reporter Sarah McClendon did manage to capture parts of Cadena's argument. Cadena told the justices it was "ironic of Texas courts," to deny Fourteenth Amendment rights to Latins by reminding Latins they "are white."[109] Although "glad to be considered so legally," Cadena forcefully iterated that Latins wished to "be so considered legally and socially."[110]

By the time Garcia stepped to the podium to argue, the press was present. Felix Frankfurter led off the questioning, asking Garcia if Latins had been living in Jackson County "for some time without being called for jury service."[111] Garcia answered in the affirmative. Tom C. Clark, the Supreme Court's native Texan who "displayed some familiarity" with the Texas system of jury selection, seemed at times to attack Garcia's position.[112] Clark pointed out that according to the evidence only six per cent of the Latin population "were freeholders and eligible for jury duty."[113] Boldly, Garcia retorted: "Evidently the Justice is not aware that in Texas the law does not require a man to hold a poll tax to serve on the petit jury."[114]

Building on Cadena's earlier comments expressing a desire for social and legal assimilation, Warren asked Garcia if "assimilation into the Texas population would eventually come about." Garcia answered he was hopeful one day it would, but "two or three" counties in Texas were still "plenty of trouble." Garcia pressed further, telling Warren if the Court could "just give the Mexicans a chance" to be on juries, they "will not dodge jury service as so many white people do."[115]

Focusing on the legal argument, the *Dallas Morning News* reported that Garcia pointed out the double standard the Texas Court of Appeals had applied to Mexican Americans. Citing *Norris v. Alabama*, Garcia observed that African Americans could make a case of discrimination if they were "available and qualified," for jury service while the Texas Appellate Court had "chided" Mexican Americans as seeking "special privileges" in making the same argument.[116] Instead, the Texas courts would prefer that Mexican-Americans trust the impartiality of citizens who "do not want to go to school," with or give "service in public places," to Mexican Americans.[117]

Garcia's most famous quip came when the Court asked the attorney if Latins in Jackson County were "newcomers" and possessed the requisite command of English to serve in a meaningful capacity.[118] Incensed, Garcia retorted "Your Honor, my people were in Texas 100 years before Sam Houston arrived," adding, Sam Houston was just "that wetback from Tennessee."[119]

"Against the array of Latin talent," Texas sent assistant attorney general Horace Wimberley to represent the state.[120] Wimberley

A unanimous Supreme Court held that the Fourteenth Amendment protects Mexican Americans as a "special class" separate from whites. Unlike whites, they faced pernicious discrimination, as evidenced by this restaurant sign in Dimmitt, Texas, 1949.

said those in Texas "regret the situation, but deny there was any discrimination against the Latin-American race." Wimberly emphasized that the Mexican American-white relations were "better than it was some time ago," and everyone was "friendly," and wanted to "treat each other right." Throughout his argument, Wimberly emphasized that Texas's jury system did not "inten[d] to be unfair or hurt" anyone and jury commissioners always selected jurors with "regard to individual qualifications," not racial motive.[121]

Despite voting to deny certiorari, Justice Stanley Reed was skeptical of Texas' argument. Reed asked Wimberley if over a period of ten years, a commissioner had "carefully considered qualifications," but still no "Mexican or negro" was chosen, would Wimberley "consider that there was discrimination?" Wimberley conceded "there might be an inference of discrimination," but quickly added there "may be an explanation . . . maybe the jury commissioners thought they couldn't understand the case as well." Reed quickly shut down Wimberley's explanation, stating there was "no such explanation in the record." Warren then asked Wimberley to explain how there could be no discrimination, yet this exclusion could "continue for 25 years." Wimberley could only respond "that question was not asked."[122]

On rebuttal, Garcia observed that even the state of Texas itself, in arguing there was no discrimination, had referred to a distinct Latin American "race," separate from the white race and bearing badges of inequality.[123] Garcia concluded with a witticism that left the Courtroom erupting in laughter. Garcia pointed out that Mexicans accounted for fourteen percent of the population but had not served on a jury in twenty-five years. With those numbers, there "must be a 'white man' in the woodshed somewhere."[124]

According to contemporaneous and posthumous accounts, Chief Justice Earl Warren was so impressed with Garcia's oral argument and asked so many questions of Garcia that he allowed the young attorney an extra fifteen minutes of time.[125] As *El Paso Times* reporter Sarah McClendon stated, regardless of the outcome, to have "reached this far on a typewritten petition and small contributions," was a feat to be proud of in of itself.[126]

The Decision

On January 16, five days after Garcia and his team's impressive oral argument, the justices discussed *Hernandez*.[127] In Conference, the chief justice spoke first. Warren thought the petitioner had "clearly made out a case" that evidence of Mexican-American discrimination was a part of "community life" in Jackson County.[128] He cast his vote to reverse. Justices Hugo L. Black, Stanley F. Reed, Felix Frankfurter, Harold H. Burton, and William O. Douglas all agreed with the chief justice, also voting to reverse. Burton noted the justices were particularly taken by the fact that no Mexican American had served on a jury "for 25 years."[129] Initially, Justice Robert H. Jackson also voted to reverse, agreeing that the evidence of national

origin discrimination was clear here and the right of Mexican Americans to serve on juries was distinct from the proportional representation issue.[130]

The justices stood seven in favor of reversal when Clark spoke. The Court's native Texan, Clark possessed first-hand knowledge of the conditions Mexican Americans lived in Jackson County. On December 13, 1952, during the initial Conference on the *Brown v. Board of Education* case, Clark had spoken to the issue of Mexican Americans in Texas, painting the "Mexican problem," as "more serious. Far more retarded, "than even as pervasive an issue as segregation in the South.[131] A mere month before the *Hernandez* Conference in January 1953, the justices again discussed *Brown* and Clark raised the Mexican-American issue. He said that in several predominantly Mexican-American counties, especially near San Antonio, a mere two hours away from Jackson County by car, "there is trouble with Mexicans and whites." Further, in the context of the *Brown* case, Clark explicitly stated "I don't like the system of segregation and will vote to abolish it."[132]

Despite this strong anti-segregation stance and repeated declarations that Mexican American segregation was of far greater concern during both the *Brown* Conferences, Clark was the first justice to favor affirming the Texas Court of Criminal Appeals' decision. For Clark, the issue came down to the evidence in the record and concerns over federalism. Clark felt, up to this point, this Court had gone "pretty far on inferences," and the evidence presented of no "Mexican" names on the jury lists was some of the "flimsiest proof" he had seen. Additionally, he thought this court was "causing a lot of trouble to the states." It's not clear if Clark meant "trouble" in the context of this specific case, or the entire term given that *Brown* would come down in a matter of months, but his comments suggested the latter. The Justice's concerns exemplified how *Hernandez* would be wedded to *Brown*, and the Court's self-awareness over the expenditure of its political capital.

Echoing Clark's concerns, Sherman Minton spoke next. He thought there "was no proof here," and mere estimations of the number of Mexicans eligible for jury service in the county were insufficient.[133] With Minton's comments, each justice had spoken once. However, Jackson spoke up again, and appears to have switched his position. Now tentatively arguing for affirmation, Jackson cited concerns about the "weak proof" on record.[134] However, by the end of the discussion, both Douglas and Burton recorded in their notes that the vote was 7–2 in favor of reversal; Jackson had switched back to his initial position and confirmed this in his own docket book.[135]

By the end of the Conference, the justices had divided into two camps. Although all agreed that the situation in Texas was untenable and the denial of Mexican Americans to serve on juries was a Fourteenth Amendment violation, Clark, Minton, and for a brief period Jackson voiced concerns over deciding a case with implications on state power so close to *Brown*, and on what the three justices considered weak evidence. Ultimately, only Clark and Minton voted to affirm.[136] With a seven-person majority, Warren assigned the majority opinion to himself.

Warren entrusted clerk Richard Flynn, who had prepared one of the initial memoranda on the case, with drafting the opinion. Warren's other two clerks had also attended law school at Northwestern; there were no Texans or Mexican Americans to receive the assignment. Flynn's final rough draft was completed sometime around April 19.[137] Warren largely approved of the draft, with most suggestions made by the chief justice and fellow clerks being grammatical and slight edits to the case citations.[138] Flynn incorporated Warren's edits into his draft, promptly had a revised version completed by April 27,

and sent the new version to the printers the next day for circulation to the other justices.

Two days later, approval for Warren's opinion started to arrive at his chambers. Reed's memo on April 29 praised the draft as "excellent," and Burton's, arriving the same day, thought it a "clear and simple statement."[139] Jackson, initially skeptical in Conference, sent a short memo stating, "I agree."[140] The biggest surprise was a handwritten note dated April 30 from Clark to Warren. Clark relayed that although he and Minton still believed the facts section as written "set up a 'straw man'," the two had "decided not to dissent on a factual basis."[141] Warren had "covered the law in the field so well" that Clark and Minton were compelled to "go along."[142] For Warren, this was the best possible turn of events. Now, he spoke for a unanimous Court moving to strike down a dual-race interpretation of the Fourteenth Amendment.

Frankfurter's Suggestions: A Plea for Strategic Victory

On reading the chief justice's initial draft, Frankfurter wrote a two-page response memorandum to the April 27 draft outlining his "two worries" and circulated the response to Warren on April 29.[143] Frankfurter wrote he was "of course . . . for your result," but prior "to the disposition of the Segregation Cases," caution was perhaps needed. Frankfurter's first concern was with Warren's discussion of the scope of the Fourteenth Amendment. Frankfurter questioned the sageness of a "generalized pronouncement," that the Fourteenth Amendment was not limited to a "two-class theory," across all contexts, particularly in light of the upcoming *Brown* decision.[144]

Even though *Brown* is remembered today as establishing the Fourteenth Amendment as an instrument for outlawing segregation, Warren's draft in *Hernandez* was prepared to in some sense go even further. Warren's draft read the Fourteenth Amendment to apply to all individuals, not just white and Black plaintiffs, and not limited to the context of juries. Nothing in Frankfurter's memorandum indicates he was necessarily against this interpretation, more so the timing of issuing such a sweeping change to Fourteenth Amendment precedent.[145]

Frankfurter's second point was based on similar questions of caution and spoke to Clark and Minton's concerns. Frankfurter asked Warren if it were even necessary to reach a pronouncement establishing "the existence of two definable groupings in the community based on differences of race, color, or national origin reflected generally in the social institutions of a community." Frankfurter pointed out that the instances of discrimination Warren identified in his draft opinion "were not revealed in the record and indeed were not practiced."[146]

Although the evidence Warren cited clearly showed that Mexican Americans generally were treated as a subordinated class in Texas, the specific examples cited were not present in *Hernandez'* case. The Court was willing to take a strong stance against jury segregation, but, considering the other cases that Term, Frankfurter thought it was wise to "cover no more ground than is needed to establish an unequivocally inadmissible discrimination."[147]

Frankfurter agreed that the "fact that Mexicans are set apart in the community tends to show they are in an inferior position in the eyes of non-Mexicans." However, he thought the "systematic exclusion of all members of a particular group, otherwise qualified," was sufficient to forcefully demonstrate an Equal Protection Clause violation. The impact of *Hernandez* was to be measured by its temporal relation to *Brown*.

Frankfurter's letter repeatedly referred to the "disposition of the Segregation Cases," and advocated for a narrow ruling in *Hernandez* considering those cases.[148] However,

Frankfurter's caution does not equate to a lack of conviction in achieving equality under the Fourteenth Amendment. Rather, Frankfurter's caution reflected what he believed to be the best chance for an accepted and authoritative decision for the school segregation cases.

The question of school desegregation, its constitutionality, and how to draft a convincing opinion on the issue weighed heavily on Frankfurter. During the October 1952 Term, Frankfurter assigned his clerk Alexander Bickel to "read every word in the Congressional Globe," which resulted in a sixty-page report on the legislative history of the Fourteenth Amendment.[149] Frankfurter reported the legislative history was "in a word, inconclusive," and that the "39th Congress . . . neither manifested that the Amendment outlawed segregation in the public schools . . . nor that it manifested the opposite."[150]

Given this inconclusiveness, Frankfurter realized an opinion outlawing segregation must be well-grounded and legally convincing to avoid as much as possible accusations that the Court was not giving "a Constitutional stamp to [its member's] merely personal attitudes towards these issues."[151] Thus, to Frankfurter, to issue two major reinterpretations of the Fourteenth Amendment related to race and nationality within weeks of each other posed a threat to his ultimate goals of legitimate and accepted opinions on school desegregation and equal protection. Given this, Frankfurter advocated for a limited reach in *Hernandez*, to preserve as much institutional legitimacy as possible for the school segregations cases.[152]

Warren immediately set upon re-drafting the opinion. Warren re-drafted the bold and concise "no 'two-class' theory of the Fourteenth Amendment," language for what ultimately appears in the final draft.[153] Warren's edited language still broadened the Fourteenth Amendment's reach to cover Mexican Americans and preserves the 'two class theory' phrase but couches the language in more ambiguous and verbose terms.[154] Warren choose to disregard Frankfurter's second suggestion, and left in the opinion the section discussing how there was clear evidence that Mexican Americans were treated as a separate and distinct group in Jackson County.

"It Taxes our Credulity"

On May 3, 1954, the justices assembled, taking their seats on the bench in front of a bustling Courtroom. Chief Justice Warren pulled out a prepared memo and announced the *Hernandez* decision from the bench, a practice reserved for cases of particular significance. Warren's memorandum, with "announcement from the bench" penciled in across the top, outlined the facts of the case, and presented the main question at issue: were people of Mexican dissent "singled out" on account of their race, and if so, were they "systematically excluded" from serving on juries.[155] Further, Warren emphasized that "community prejudices are not static," and the petitioner's burden was to show community prejudice served to bar Latins from jury service.

Warren reiterated that the petitioners had carried their burden and summarized the evidence presented to the Court, including that citizens frequently distinguished between Latins and whites, the schools had been segregated until very recently, a restaurant carried a 'No Mexicans' sign, and the toilets in the courtroom were segregated.[156] The *Dallas Morning News* reported that Warren said "it taxes our credulity to say that mere chance resulted in," there being no Mexicans on a jury out of the "6,000 jurors called in the last 25 years."[157] Warren concluded by stating "the result bespeaks discrimination, whether or not it was a conscious decision on the part of any independent jury commissioner."[158] The Court announced its reversal of the lower court decision and adjourned for a two-week recess before reconvening to announce the segregation cases.[159]

News coverage of *Hernandez* and personal letters to Warren quickly recognized the opinion as significant. Senator Dennis Chavez of New Mexico praised the opinion as one of "far reaching importance," and requested a personal copy from Warren for "study and information."[160] The *Corpus Christi Times* lead with the headline "Supreme Court Upsets Texas Murder Conviction."[161] The article noted that the Court had not yet announced its "awaited decision on school segregation," but banned jury exclusion on the basis of "ancestry or national origin," when a "distinct class is demonstrated." The article identified a potential point of future litigation, as Warren did not define what a non-discriminatory "reasonable classification," could be.[162] The *Dallas Morning News* ran a similar article on May 4, 1954, reporting Jackson County had violated the Fourteenth Amendment in "habitually excluding persons of Latin-American descent."[163]

These articles reflected an issue Garcia and other Mexican-American civil rights attorneys would face in the years after *Hernandez*. Each article recognized a newly identified interpretation of the Fourteenth Amendment but reported the case as largely a one-off event and opportunity for Hernandez to receive a retrial. Any subsequent press coverage and momentum Garcia would have to fight for himself.

Aftermath: "Our Guinea Pig"

Though Garcia secured Mexican Americans the right to fair jury trial, freedom was not in store for Hernandez. He received a new trial in 1955 and was again found guilty, but this time given a sentence of only twenty years, as opposed to his initial life sentence.[164] Much to Garcia's credit, even after this defeat, Garcia advocated for his client and continued to help reduce Hernandez' prison sentence. As late as 1960, Garcia was still writing letters to the Board of Pardons and Paroles in Austin asking to discuss "personally" Hernandez' freedom in Austin. Garcia felt "conscience-stricken" that the "boy" who in serving as the team's "guinea pig," was willing to risk the death penalty to gain a vindication of rights for his fellow Mexican Americans had been languishing in state prison "continuously since August 1951."[165]

Garcia's request to meet in person was granted, and the attorney traveled to Austin to plead Hernandez' case. The Board of Pardons and Paroles objected to Hernandez' prison record. The Board reported it was "very bad in recent years," and Hernandez had not even attended church, a "simple way of getting additional points," toward parole.[166] Despite these reservations, it seems Garcia's meeting was a success. On June 8, 1960, he informed Hernandez that the Austin Board of Pardon and Paroles was recommending him for parole.[167] In a similar letter to close friends and co-counsels in the case, Garcia felt his conscience was finally "clear in this matter."[168] After several months of pestering, including "letters, long distance calls, and two personal visits in Austin," Garcia had gained a victory for his client yet again.[169]

In Garcia's letter to Hernandez, Gus wrote some parting advice. Garcia asked Hernandez to not "think of the past," because most people "will be ready to show you kindness and understanding if you only give them a chance." Unfortunately, Hernandez' fate is unknown after his release on parole.[170] Hopefully, Hernandez heeded Garcia's advice. Regardless, Garcia had ensured his client, who had risked his life on appeal, was now at least able to re-enter society.

A 'White' Man's Death

By June 1960, Garcia had only four years left to live. He had always possessed a "legal brain of the very first order," but in his later years his abilities were increasingly limited by

his alcohol consumption.[171] His close friend and *Hernandez* co-counsel Carlos Cadena described Garcia as acutely aware of his demons, but also steadfast in his conviction that if "the Mexican people wanted his leadership, they would have to put up with his . . . idiosyncrasies."[172]

It's not clear what event, if any, tipped the scales for Garcia and eventually caused him to lose his battle with alcohol addiction. However, in 1960, Garcia inquired with Adolfo Chavez about obtaining a divorce from his wife either in Europe or Mexico.[173] Additionally, in 1960 and 1961, Garcia passed "several bad checks," causing several San Antonio lawyers to petition for Garcia's disbarment.[174] Though not disbarred, Garcia's license was suspended for a year, but he was able to regain it and attempt to press forward.[175]

By January 28, 1963, Gus Garcia found himself in the Waco, Texas VA Hospital for alcoholism treatment. Writing his old friend, co-counsel, and LULAC member Johnny Herrera, Garcia thanked him for lending him money, allowing Garcia to pay his "poll tax and get a haircut."[176] Garcia's condition was taking a significant mental toll on the once promising and lauded attorney. Garcia felt he had reached the "final turning point in [his] life." By that point, his only available options were "the right road . . . the gutter or a suicide."[177] Despite his severe financial state, Garcia refused to ask Herrera for more money, asking only that his friend come down and lend Garcia his "guidance and counseling."[178]

By July, Garcia's condition had still not improved sufficiently for a discharge and Herrera was concerned that "all indications" pointed towards Garcia remaining hospitalized "the rest of [that] year."[179] It is unclear if Herrera informed Garcia that his wife Eleanor had contacted Herrera about her estranged husband. In her letter, Eleanor describes how Garcia hadn't "been a father," to his daughters in "years," and that on discharge if Garcia attempted to return home, she "wouldn't hesitate a second to call the police."[180] Herrera responded that Gus knew it was "all over between you two," but even an occasional letter "would be of the greatest aid," in making a full physical and professional comeback.[181]

Tragically, Garcia's comeback was not to be. In June 1964, Garcia, by then penniless, asked Raul Acevado, a local shop keeper, if he could sleep for a night on a bench in Acevado's office in the San Antonio farmer's market.[182] After breakfast on June 3, Garcia told Acevado he was having a hard time breathing, and shortly thereafter collapsed on the floor, his body in the throes of a seizure.[183] Ravaged by alcoholism, Garcia died later that afternoon; he was just forty-eight. The coroner listed his cause of death as "fatty liver with liver failure."[184] The champion of Mexican American rights was delt one final indignity: on Garcia's death certificate under 'Race or Color,' the coroner wrote simply "white."

Hernandez' Initial Reception

Despite a favorable Supreme Court ruling, it remained to be seen how *Hernandez* would impact lower courts decisions. In 1956, a plaintiff filed a motion to re-hear their conviction for marijuana possession to the Texas Court of Criminal Appeals, claiming "Latin Americans as a class had been discriminated against in the selection of the jury commission."[185] Specifically relying on *Hernandez*, the plaintiff argued that in light of the discrimination, the verdict was invalid.

The court denied the motion stating the plaintiff had not met his burden and proven that "Latin Americans constituted a separate class," in the specific county in question.[186] Thus while Texas courts routinely recognized the principles that *Hernandez* stood for, the watershed case could and was distinguished away depending on whether the

judge determined the Latin population in a particular county to be truly distinct.[187]

Why *Brown*, Why not *Hernandez*?

A March 12, 1974, *San Antonio Express News* article by Jose Chacon referred to Garcia as a "premature hero."[188] In the article, the author credited Garcia with a historic victory, but faulted the attorney for not "communicating the significance of the decision to his people," on returning from Washington.[189] The article also described *Hernandez v. Texas'* temporal proximity to *Brown* as a positive, implying *Brown* should have spurred a civil rights revolution on the African and Mexican American fronts. Unfortunately, Garcia did not "receive the support of his own people," and the cause of Mexican American equality was largely a localized effort, left to individual attorneys such as Garcia and Herrera rather than a nationwide organized movement.[190] Chacon also cites Thurgood Marshall's appointment to the Supreme Court in 1967 and Garcia's descent into obscurity as further proof that *Hernandez* was failed by a lack of community support. This is a leap too far. Marshall was an establishment appellate NAACP attorney and a repeat player at the Supreme Court. Garcia was a local hero, but only argued at the nation's highest court once. Marshall's appointment was much more a product of his appellate attorney status, involvement with the Kennedy and Nixon administrations, and the civil rights movement's focus on African American status.

The failure of *Hernandez* to spark a nationwide movement cannot be tied to any one specific factor. The utilization of a test case where the plaintiff had clearly committed a capital offense would not garner a lot of public sympathy. The case's proximity to *Brown* overshadowed *Hernandez,* as any national conversation on Mexican American rights was halted two weeks later when the Court announced *Brown*. Additionally, Garcia and Herrera did not have access to a well-funded, national organization like the NAACP to bring more test cases in federal court, relying instead on local LULAC chapters as they tried to apply *Hernandez'* promise to the state level. Finally, perhaps Garcia's descent into obscurity cost the cause its most convincing and dedicated voice, a loss it couldn't recover from.

Regardless of the ultimate reasons for *Hernandez'* failure to permanently enter the national conversation, what's beyond question is Garcia's contribution to the case. Through ingenuity, dedication, and peerless advocacy Garcia turned an open and shut murder case in a small Texas town into the country's first national legal reckoning on Mexican American rights. No matter how short lived the discussion, it was unquestionably thanks to Gus.

ENDNOTES

[1] Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment, Supreme Court Record, at 38.

[2] *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

[3] *Ibid.* at fn 5 (1954) ('Hombres Aqui' translates to 'Men Here').

[4] *See generally*, Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice*, 28 T. Marshall L. Rev. 145 (2003); Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 Chicano-Latino L. Rev. 153 (2005).

[5] "International Assembly to Hear S.A. Attorney," *San Antonio Express*, Sunday Jan. 27, 1952, Gus Garcia papers, Box 1, F10.

[6] *Ibid.*

[7] Sam Kindrick, "Story of Gus Garcia Deserves Telling, Retelling," as published in *The San Antonio Express News*, June 1970, Gus Garcia Papers, Box 1, File 10, https://utexas.app.box.com/s/7a2hvphsks7nhxzyhtmb5ngxvyl75qso.

[8] Cynthia Orozco, Garcia, Gustavo C. (1915–1964), Texas State Historical Association: Handbook of Texas, (Dec. 04, 2021), https://www.tshaonline.org/handbook/entries/garcia-gustavo-c.

[9] "International Assembly to Hear S.A. Attorney."

[10] "Seizure Kills Gus Garcia," *San Antonio News*, June 4, 1964, Gus Garcia Papers, Box 1, Folder 10.

[11] "Gus Garcia: Legal Genius," *The Houston Post*, June 1971, Garcia Papers, Box 1, Folder 10.
[12] Delgado v Bastrop Indep. Sch. Dist., Civil Action No. 388, 2 (W.D. Tx. 1949), https://texashistory.unt.edu/ark:/67531/metapth248861/citation/#top/.
[13] *Ibid.* at 2–3.
[14] *Hernandez v. Texas*, The Lone Star and The Supreme Court (2020), https://www.lonestarhighcourt.org/hernandez-v-texas-1954; Charge of the Court, Supreme Court Record, at 12-13.
[15] *Hernandez v Texas*, The Lone Star and The Supreme Court (2020), https://www.lonestarhighcourt.org/hernandez-v-texas-1954.
[16] State of Texas v. Hernandez, Supreme Court Record, at 1.
[17] "Seizure Kills Gus Garcia," (One of Garcia's most noteworthy cases up to that point had been the 'Three Rivers Case,' where Garcia won the right for a decorated Mexican American WW2 service man to be buried in Arlington). https://utexas.app.box.com/s/7a2hvphsks7nhxzyhtmb5ngxvyl75qso.
[18] "A Cotton Picker Finds Justice—An Informal Report to the People," [Hereinafter Cotton Picker] at 1, Garcia Papers. Box 1, Folder 4. https://utexas.app.box.com/s/ohp5aqfp0gwzte7kb44leun3t47rkuis. https://perma.cc/9FCZ-BAEP.
[19] *Ibid.* at 2.
[20] *Id.* at 3.
[21] "Top of the News," San Antonio Express, June 14, 1964, Garcia Papers, Box 1, Folder 10, https://utexas.app.box.com/s/7a2hvphsks7nhxzyhtmb5ngxvyl75qso.
[22] "Cotton Picker" at 2.
[23] *Neal v. Delaware*, 103 U.S. 370 (1880),
[24] *Williams v. Mississippi*, 170 U.S. 213 (1898).
[25] *Ibid.* at 225
[26] *Id. Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[27] *Strauder v. West Virginia*, 100 U.S. 303 (1879).
[28] *Norris v. Alabama*, 294 U.S. 587 (1935).
[29] Motion to Quash Indictment October 4, 1951, Supreme Court Record, at 2–3.
[30] *Ibid.* at 3.
[31] *Id.* at 3–4.
[32] Cotton Picker at 2.
[33] *Ibid.*
[34] Cotton Picker at 4.
[35] Transcript of Motion to Quash Jury Panel and Motion to Quash the Indictment, Supreme Court Record, at 27.
[36] *Ibid.* at 28.
[37] *Id.*
[38] *Obituary, Wayne Hartman*, Victoria Advocate (Feb. 22, 2010), https://www.victoriaadvocate.com/obituaries/wayne-l-hartman/article_461bde65-8219-5b84-b923-034ace1d7b74.html.
[39] Motion to Quash Indictment October 4, 1951, Supreme Court Record, at at 30.
[40] *Ibid.* at 32.
[41] *Id.* 32–33.
[42] *Id.* at 34–35.
[43] Motion to Quash Jury Panel, Supreme Court Record, at 5, 15–16; Cotton Picker at fn 2, Box 1, Folder 4 (In his personal account, Garcia remembers Judge Martin as a "former ace prosecutor himself," before taking the bench).
[44] Cotton Picker at 3.
[45] Charge of the Court, Supreme Court Record, at 15.
[46] *Id. at* 16.
[47] Transcript of Hearing on Motion to Quash the Indictment, Motion to Quash Jury Panel, and Motion to Quash the Talesmen After Special Venire was Exhausted, Supreme Court Record, at 82.
[48] Verdict of the Jury, Supreme Court Record, at 16.
[49] Motion for New Trial, Supreme Court Record, at 19–20.
[50] *Ibid.* at 22.
[51] Cotton Picker, at 4
[52] Hernandez v. State of Texas in the Court of Criminal Appeals of Texas, Supreme Court Record, at 98.
[53] *Ibid.* at 95-97.
[54] *Sanchez v. State*, 479 S.W. 2d 933.
[55] Hernandez v. State of Texas in the Court of Criminal Appeals of Texas, Supreme Court Record, *at* 95.
[56] *Ibid.*
[57] Cotton Picker at 4–5.
[58] *Ibid.* at 5.
[59] *Id.*
[60] *Id.*
[61] Sally A. Downey, *James C N Paul, 85, Helped Found First Law School in Ethiopia*, The Philadelphia Inquirer (Sept. 22, 2011), https://www.inquirer.com/philly/obituaries/20110922_James_C_N__Paul__85__helped_found_first_law_school_in_Ethiopia.html.
[62] James C N Paul to Chief Justice Fred Vinson, "Memoranda for Certiorari," at 1, Earl Warren Papers, Library of Congress, Box 154, Hernandez v Texas Folder.
[63] *Ibid.* (citing *Nat'l. Bank v Lamb*, 337 US 38, 40 (1950)) (In his autobiography of the case, Garcia makes no mention of just how close the petition came to being thrown out on procedural grounds. It's possible that Garcia never learned of the filing delay, or he simply did not want to admit to a calculation error in his autobiographical account).
[64] *Ibid.*
[65] *Id.* at 3.
[66] *Id*.
[67] *Id.* at 4.
[68] *Id.* at 2.
[69] Robert H Jackson Center, *James C N Paul, C.J. Fred Vinson's Law Clerk 51 and 52 Terms*, Youtube (2007), JCNP YouTube (2007), https://www.youtube.com/watch?v=axuPWWTBs4o ("He was really in very

bad physical shape, didn't get enough exercise on the court, that was plain. Probably put down a little too much alcohol in relation to his lack of exercise. Smoked steadily . . . uh . . . with a little spittoon like Sherman Minton.").

[70] *Earl Warren*, The Supreme Court Historical Society, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-earl-warren-1953-1969/ (Interestingly, Warren was not officially confirmed by the senate until March 1, 1954, a fact almost unimaginable given today's confirmation process.)

[71] *Westminster School Dist. Of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

[72] Charles Wollenberg, *Mendez v. Westminster: Race, Nationality and Segregation in California Schools*, 53 Cal. Historic Quarterly 317, 329 (Winter 1974).

[73] *Lawyer Richard J. Flynn Dies*, Wash. Post (Sept. 29, 1998), https://www.washingtonpost.com/archive/local/1998/09/29/lawyer-richard-j-flynn-dies-at-69/73b08b59-ed92-43cf-8e91-a3a26c8025f8/.

[74] Richard Flynn to Chief Justice Earl Warren, "Memoranda for Certiorari," at 1, Earl Warren Papers, Library of Congress, Box 154, Hernandez v Texas Folder.

[75] *Ibid. at* 2

[76] Citing to *Traux v Reich, Takahaski v Fish and Game Commission*, and *Strauder v West Virginia. Traux* was a 1915 labor law case concerning an Austrian immigrant who was dismissed under an Arizona state law requiring eighty percent of work staff to be natives. The case held that the right to work could not be refused solely on account of race. *Takahaski* held a California statute ban on issuing fishing licenses to aliens, specifically Japanese immigrants, an unconstitutional violation of the Equal Protection Clause. *Strauder v West Virginia* held a state law allowing only white individuals to serve on juries was a violation of the Equal Protection Clause.

[77] Richard Flynn to Chief Justice Earl Warren, "Memoranda for Certiorari," at at 3.

[78] *Ibid.*

[79] *Id.* at 4.

[80] *James F Crafts*, Sfgate Powered by Legacy (Aug. 19, 2017), https://www.legacy.com/us/obituaries/sfgate/name/james-crafts-obituary?id=8049672.

[81] James F. Crafts to Justice William Douglas, "Memoranda for Certiorari," at 1, Sept. 20, 1953, William Douglas Papers, Library of Congress, Box 1147, Argued Cases No. 400–49 Oct. Term '53.

[82] Motion for Rehearing Overruled Without Written Opinion, Supreme Court Record, at 111.

[83] Conference Certiorari Vote Sheet for October 12, 1953, William Douglas Papers, Box 1146, Misc. Docket for October 53.

[84] Cotton Picker at 5. ("El Dia de la Raza" translates loosely to "The day of the Race" a phrase which generally conveys a pride in Latin heritage.)

[85] *Ibid.* at 5.

[86] *Id.* at 5–6.

[87] *Id.* at 5.

[88] *Id*. at 7.

[89] *Id.* at 7.

[90] *Carlos Cadena*, Texas Law Tarlton Law Library Jamail Center for Legal Research, (Nov. 3, 2021), https://tarlton.law.utexas.edu/first-year-societies/carlos-cadena.

[91] Cotton Picker at 1.

[92] While it was long believed that Garcia and his team were the first Latin-American attorneys to represent a defendant before the Supreme Court, Professor Michael A. Olivas argues the first Mexican-American attorney to argue before the Court was Manuel Ruiz Jr. in the 1952 case *Buck v. California*. *See https://newstaco.com/2011/03/31/the-first-latina-latino-lawyers-to-argue-before-supreme-court/.* There are likely some Puerto Rican lawyers who argued cases before the Supreme Court in the early twentieth century, but research needs to be done to give them their due.

[93] John J. Herrera to J.C. Machuca, Typed Letter, January 19, 1954, The Portal to Texas History.

[94] Brief in Opposition, Supreme Court Record, at 4.

[95] *Id.* at 2.

[96] *Id.* at 3.

[97] *Id.*

[98] *Id.* at 4–14.

[99] *Id.* at 5.

[100] Brief for Petitioner, Supreme Court Record, at 4.

[101] *Ibid.* at 18.

[102] *Id.* at 13.

[103] *Id.* at 14.

[104] *Id.* at 15.

[105] *Id.* at 23.

[106] *Id.* at 23–24.

[107] *Jury Bias Put to High Court*, San antonio light, Jan 12, 1954, LULAC Hernandez v Texas Electronic Collection, http://www.jfklulac.com/gus-garcia---hernandez-vs-texas.html.

[108] Cotton Picker at 8.

[109] Brief for Petitioner, Supreme Court Record, at 112.

[110] *Ibid*.

[111] *Id.*

[112] *A West Texan in Washington*, ElPaso Times, Jan. 16, 1954, LULAC papers, http://www.jfklulac.com/gus-garcia---hernandez-vs-texas.html.

[113] *Ibid.* at con't. from page 1.

[114] *Id.*

[115] *Id.*

[116] Ruth Schumm, *High Court Hears Discrimination Case*, Dallas Morning News, Jan. 12, 1954, at 10.

[117] *Id.*

[118] *Jury Bias Put to High Court*.

[119] *Ibid*.

[120] *Id*.
[121] *Id.*
[122] *Id.*
[123] *A West Texan in Washington*, El Paso Times, Jan. 16, 1954, LULAC papers, http://www.jfklulac.com/gus-garcia---hernandez-vs-texas.html.
[124] *Ibid.*
[125] Schumm, *High Court Hears Discrimination Case*.
[126] *A West Texan in Washington*, ElPaso Times
[127] Conference Notes for January 15, 1953, Conference, William O. Douglas Papers, Library of Congress, Box 1147, Argued Cases No. 400–49 Oct. Term '53 Folder (Translation by both Prof. Brad Snyder and Gabriel Valle).
[128] *Ibid.*
[129] Conference Notes for January 15, 1953 Conference, Harold H. Burton, Library of Congress, Box 238, Conference Notes October Term 1953 Folder.
[130] *Ibid.*
[131] Conference Notes for December 13, 1952 Conference, William O. Douglas Papers, Box 1147, Folder (Translation done between Prof. Snyder and Gabriel Valle).
[132] Conference Notes for January 15, 1953 Conference, William O. Douglas Papers, Box 1149, Segregation Cases Folder; Conference Notes for January 15, 1953 Conference, Harold H. Burton Papers, Box 238, 239, 244, Conference Notes October Term 1953 Folder.
[133] Conference Notes for January 15, 1953 Conference, William O. Douglas Papers, Box 1149, Segregation Cases Folder.
[134] *Id.*
[135] Conference Docket Book Jan. 18, 1954, William Douglas Papers, Box 1146, Administrative Docket Folder; Conference Notes for *Hernandez v Texas* Jan. 18, 1954, Harold Burton Papers, Library of Congress, Box 238, Conference Notes October Term 1953 Folder; Record of Vote for *Hernandez v Texas*, Robert Jackson Papers, Library of Congress, Box 148, Folder 4.
[136] Conference Notes for *Hernandez v Texas*, Burton Papers; Conference Vote Sheet Jan. 18, 1954, William Douglas Papers.
[137] Chief Justice Warren to the Court, Memorandum by the Chief Justice," Apr.19, 1954, Earl Warren Papers, Box 570, Hernandez v Texas Folder.
[138] Richard Flynn to Earl Warren, "Dick Flynn's First Draft With Retyped Pages," Apr. 28, 1954, Earl Warren Papers, Box 570, Hernandez v Texas Folder.
[139] Stanley Reed to Earl Warren, Note, April 29, 1954, Warren Papers, Box 570, Hernandez v Texas Folder; Harold Burton to Earl Warren, Note, April 29, 1954, Warren Papers, Box 570, Hernandez v Texas Folder.
[140] Robert Jackson to Earl Warren, Note, Apr. 30, 1954, Warren Papers, Box 570, Hernandez v Texas Folder.
[141] Tom Clark to Earl Warren, Note, April 30, 1954, Warren Papers, Box 570, Hernandez v Texas Folder; Harold Burton to Earl Warren, Note, April 30, 1954, Warren Papers, Box 570, Hernandez v Texas Folder.
[142] Tom Clark to Earl Warren, Note, April 30, 1954, Warren Papers, Box 570, Hernandez v Texas Folder.
[143] Felix Frankfurter to Earl Warren, Memorandum, April 29, 1954, at 1, Warren Papers, Box 570, Hernandez v Texas Folder.
[144] *Ibid.*
[145] *Id.* ("Is it not highly undesirable to make generalized pronouncements of that nature prior to the disposition of the Segregation cases? I would delete the entire paragraph.")
[146] *Id.*
[147] *Id.* at 1–2.
[148] *Id.*
[149] Felix Frankfurter Memoranda to The Court, Dec. 3, 1953, William Douglas Papers, Box 1149, October Term, 1953 Folder.
[150] *Id.*
[151] Felix Frankfurter Memoranda to Chief Justice Earl Warren, September 26, 1952, Earl Warren Papers, Box 571, Opinions of the Chief Justice—Segregation State Cases Folder. Earl Warren papers—memo box 571.
[152] For a complete and compelling discussion about Frankfurter's role in the school desegregation cases, *see* Brad Snyder, Democratic Justice: Felix Frankfurter, The Supreme Court, and the Making of the Liberal Establishment 570–597 (2022).
[153] Earl Warren, Final Draft of Hernandez v Texas, May 1, 1954, Warren Papers, Box 540, Hernandez v Texas Folder.
[154] Hernandez v Texas, 347, US 475, 478 (1954) (As edited, the passage reads: "The Fourteenth Amendment is not directed solely against discrimination due to a 'two class theory' that is based on differences between 'white' and Negro.")
[155] Earl Warren, "Announcement From the Bench," n.d., Warren Papers, Box 570, Hernandez v Texas Folder.
[156] *Ibid*.
[157] Dallas morning news, May 4, 1954, 10.
[158] *Ibid*.
[159] "Can't bar Mexicans Off Juries, court decides," May 3, 1954, LULAC Papers, http://www.jfklulac.com/gus-garcia---hernandez-vs-texas.html.
[160] Letter from Sen. Dennis Chavez to Earl Warren, May 6, 1954, Earl Warren Papers, Box 570, Hernandez v Texas Folder; Senator Dennis Chavez, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Chavez.htm (Senator Chavez served 27 years as a senator and was a graduate of the Georgetown University Law Center).
[161] Corpus Christi Times, May 4, 1954, 2.
[162] *Id.*
[163] Dallas morning news, May 4, 1954, 10.
[164] Letter from Garcia to the Honorable Jack Ross, Bd. Of Pardons and Paroles, Feb. 12, 1960, LULAC Papers.
[165] *Ibid.*
[166] Gus Garcia to Pete Hernandez, Letter, June 8, 1960, LULAC Papers.

[167] *Ibid.*

[168] Gus Garcia to Hector P. Garcia, George Sanchez, J.J. Herrera, Frank Jasso, James de Anda, Letter, June 8, 1960, LULAC Papers.

[169] *Ibid.*

[170] *Pete Hernandez*, Ancestry, https://www.ancestrylibrary.com/discoveryui-content/view/202133:4876?tid=&pid=&queryId=7c0aae14268d722646d46a5fc2cd87d9&_phsrc=FxA20&_phstart=successSource (A search of Ancestry.com revealed records for a "Pete Hernandez" who passed away in June 1966 in Jackson County, Texas. This date matches up with his release, however with no age at death provided and no record of his life it is impossible to tell for certain.).

[171] "Gus Garcia . . . Once Brilliant Career Ends," Anonymous, Texas Newspaper, The Portal to Texas History, https://texashistory.unt.edu/ark:/67531/metapth248886/m1/1/.

[172] *Ibid.*

[173] *Id.*

[174] Cynthia E. Orozco, *Gustavo Garcia*, Texas State Historical Association (Oct. 27, 2020), https://www.tshaonline.org/handbook/entries/garcia-gustavo-c.

[175] Seizure Kills Gus Garcia, san antonio news, June 4,1954, Gus Garcia Papers, Box 1, Folder 10.

[176] Gus Garcia to "Johnny" Herrera, Handwritten Letter, Jan. 28, 1963, LULAC Papers.

[177] *Ibid.*,2–3.

[178] *Id., 2.*

[179] John J. Herrera to Eleanor R. Garcia, Typed Letter, July 27, 1963, The Portal to Texas History.

[180] Eleanor R. Garcia to John J. Herrera, Typed Letter, November 13, 1963, The Portal to Texas History.

[181] *Ibid.*

[182] Seizure Kills Gus Garcia, san antonio news, June 4,1954, Gus Garcia Papers, Box 1, Folder 10.

[183]"Ex-Champion of Latins Dead," June 4, 1954, Gus Garcia Files, Folder 1, Box 10.

[184] Death Certificate for Gustavo Garcia, June 3, 1954, Gus Garcia Files, Box 1, Folder 11.

[185] *Ramirez v. State*, 163 Tex. Crim. 491 (1956).

[186] *Ibid.* at 494.

[187] *See Walker v. State*, 162 Tex. Crim. 408, 416 (1955) ("It must be remembered that the guarantee of the Fourteenth Amendment against discrimination in the organization of a grand jury is not limited or restricted to members of the different races but extends to and includes all classes and groups which, by reason of some special condition or fact situation, are established in the particular county or community.); *see also Gonzales v. State* March 22, 1967 (Ct. of Criminal Appeals Tx) (Held that Latin American population in Wichita County Texas was not sufficiently distinct to fall under *Hernandez*).

[188] san antonio news, March 12, 1974, Gus Garcia Papers, Box 1, Folder 11.

[189] *Ibid.* at 2

[190] *Id.*

"Hugo Will Pull My Hair Out": Justice Black and Mandatory Arbitration on the Warren Court

Theodore Salem-Mackall

Call arbitration what you want, but do not call it uncontroversial. Early common-law courts refused to enforce contractual agreements to arbitrate claims, holding that parties' could not "oust" courts of their jurisdiction.[1] Early American courts adopted this "ouster doctrine," and treated arbitration agreements as "revocable at will."[2] Their skepticism, along with a dollop of private sector lobbying, lead to the 1925 passage of the Federal Arbitration Act. The FAA made agreements to arbitrate "as enforceable as other contracts" in federal court.[3]At the time of the FAA's passage, concerns existed that large corporate interests would use mandatory arbitration clauses contained in form contracts to frustrate worthy claims. The FAA's congressional advocates intended for the bill to have a narrow scope in order to forestall this.[4] Yet a few progressive members of Congress were not relieved by such promises. Among them was a young Alabama senator who, though he would not actually join Congress until a year after the FAA's passage, opposed expanding the scope of mandatory arbitration throughout his life: Hugo Lafayette Black.

Justice Black, who served on the Court from 1937–1971, is best known for his monumental decisions on school desegregation, freedom of the press, and procedural protections for criminal defendants.[5] What he is less known for is his status as one of the Supreme Court's foremost critics of mandatory arbitration. From 1961–67, Black dissented in six cases enforcing a mandatory arbitration clause contained in a contract or collective bargaining agreement.[6] His dissents often argued that strict enforcement of arbitration clauses came at the expense of a party's constitutional right to their "day in court."[7] The early Warren Court shared Black's concerns. In 1953, the Court held in *Wilko v. Swan* that the right to bring Securities Act claims in

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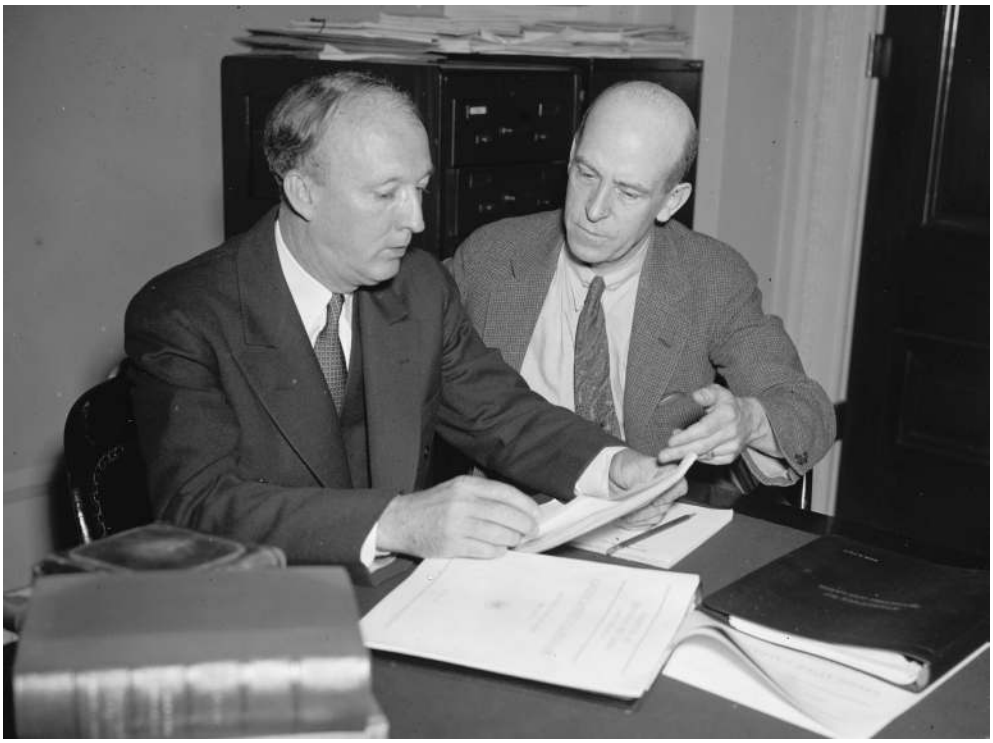
federal court could not be waived through a form contract containing an arbitration agreement.[8] Yet this hostility did not last. In 1967, a very different Warren Court decided *Prima Paint v. Flood & Conklin*.[9] *Prima* established that the Federal Arbitration Act made arbitration agreements "valid, irrevocable and enforceable" in federal court,[10] and superseded any contrary state arbitration rules in diversity cases.[11] The decision implicitly overruled a 1956 Supreme Court holding that the Federal Arbitration Act was a procedural statute that could "affect the rule of decision," and could violate *Erie R. Co. v. Tompkins* if applied to override contrary state law. *Prima Paint* also made arbitration clauses "severable" from the rest of contracts, allowing arbitrators to review "fraud in inducement" defenses to breach claims rather than courts.[12] *Prima* marked the first in a long line of Supreme Court cases that gradually established modern "liberal enforcement" of arbitration clauses.[13] Justice Black opposed every aspect of the case. In a dissent longer than the opinion, he described it as a "statutory mutilation."[14]

Hugo Black and the Federal Arbitration Act

Black's skepticism of arbitration stemmed from his wariness of corporate power and deep belief in each person's right to a fair "day in court." Throughout his life, Black displayed a deep respect for the right to fair trials decided by impartial courts. He began his career as a Birmingham trial lawyer. This experience left him with a "devout belief" in the jury system, and in his eventual political career he pushed for stronger procedural safeguards in trial courts. To Black, only procedures which ensured fundamental fairness could allow the judiciary to achieve just outcomes and maintain its legitimacy.[15]

Black's political career was shaped by the Great Depression. The traumatic experience of watching Alabama residents beg for food pushed him to support the New Deal's efforts to regulate capitalism. As a Senator from 1927 to 1937, this support brought him into conflict with a range of "high-powered, deceptive, telegram-fixing, letter-framing, Washington-visiting [lobbyists]."[16] Black sparred with special interests over his attempts to provide municipal power to impoverished Alabama towns.[17] He watched them push for exemptions to his Black-Connery bill, which became the basis for the Fair Labor Standards Act.[18] These experiences left Black wary of how corporations could manipulate the justice system to entrench their power.

To Black, the procedures which accompanied arbitration fell short of fairness. The FAA itself was designed to help corporations. It emerged at the end of a long lobbying campaign that drew its "principal support from trade associations . . . [and] commercial and mercantile groups in the major trading centers."[19] Many of these lobbyists positioned arbitration as a refined alternative to incoherent jury decisions.[20] Yet the fact that these interests lobbied so heavily for arbitration indicated to Black that they intended to use it to preclude worthy legal claims.[21] His concern was shared by others. In committee debates related to the bill, Senator Bill Walsh of Montana raised concerns that arbitration clauses might be imposed by powerful actors on consumers or employees in order to foreclose legal claims. Black believed that instead of shifting legal claims to a fair private forum, the strict execution of mandatory arbitration clauses in private contracts would simply exile claims to biased, inadequate forums designed to favor a corporate defendant's interests. It would be unconscionable to apply the FAA in such a way, one that waived an individual's right to their "day in Court" by the stroke of a pen. Black's arbitration decisions would display a consistent effort to prevent arbitration from doing so.



As a Senator from 1927 to 1937, Hugo L. Black sparred with special interests and corporations and was skeptical of the Federal Arbitration Act, passed in 1925. He is pictured above signing a maximum hours and minimum wage bill in 1937 as Chairman of the Senate Committee on Education and Labor.

1953: *Wilko v. Swan*—"I Certainly Have Plenty of Biases"

The early Warren Court shared Black's antagonism towards mandatory arbitration, as displayed in its 1953 decision in *Wilko v. Swan*. The plaintiff was investor Anthony Wilko, who was induced by his stockbroker to buy 1600 shares of Air Associates common stock based on fraudulent assurances that they would increase in value.[22] He resold two weeks later at a $3,888 loss. Wilko sued the brokerage under § 12(2) of the 1933 Securities Act, which generates liability for any person who offers a security through a prospectus containing a material misstatement.[23] The firm moved for a stay, asserting that their relationship was governed by a mandatory arbitration clause included in their margin contract.[24] Judge Henry Goddard of the Southern District of New York denied their motion, [25] but a divided Second Circuit reversed, holding that the FAA allowed parties to agree to arbitrate a dispute in advance.[26] Judge Charles Clark dissented, arguing that a binding arbitration clause in a stock purchase agreement implicitly waived §22 of the Securities' Act's provision of a federal forum to securities buyers. This, in turn, violated §14 of the Act, which voided any waiver of compliance with its substantive requirements. Clark also argued that pre-dispute arbitration agreements contravened Securities Act policy, as they made purchaser's rights "capable of nullification by . . . fine-print restrictions of the broker's devising."[27] The Court granted *certiorari* in *Wilko* on June 1, 1953.[28]

Unfortunately, Anthony Wilko was broke and had not been able to litigate his own case.

AIR ASSOCIATES STOCK

Public Offering of 25,000 Shares to Be Made Next Week

The registration statement filed with the Securities and Exchange Commission covering 49,000 shares of $1-par value common stock of Air Associates, Inc., of Garden City, L. I., has become effective, F. Leroy Hill, president, announced yesterday.

Public offering of 25,000 shares of this stock, proceeds from which will be used for new equipment and additional working capital, is expected to be made early next week through Robinson, Miller & Co., Inc., and Cohu Brothers, underwriters, Mr. Hill said.

Net sales of the company for the six months to March 31 were $627,344, compared with $413,468 in same period last year, Mr. Hill reported. Net profit before Federal taxes for the two periods was $36,068 and $27,489 respectively.

Anthony Wilko, the plaintiff in *Wilko v. Swan* (1953), bought 1600 shares of Air Associates common stock from a broker who made fraudulent assurances that they would increase in value pursuant to a merger. Above is Air Associate's 1937 announcement of a public offering of its shares.

He proceeded *in forma pauperis* at the Supreme Court due to "losses sustained in [the] transaction." So the SSEC., wanting to ensure vigorous Securities Act enforcement, made itself the dispute's "primary party." The agency filed an *amicus* brief which Wilko's counsel deferred to and the agency's general counsel participated in oral argument.[29]

At the time the Court was reviewing the *Wilko* petition, the case held major implications for arbitration's future. The FAA had been pushing lower courts to abandon their previous hostility to the practice.[30] Arbitration clauses were becoming *de rigueur* in adhesion contracts; some 90% of stock brokerages required arbitration of customer-broker disputes by 1953.[31] Yet the practice remained on shaky legal ground. Some courts refused to enforce arbitration agreements.[32] Questions remained about which statutory claims could be arbitrated.[33] Early Supreme Court cases interpreting the FAA only dealt with the Act in relation to maritime law.[34] *Wilko* represented a turning point. A ruling in favor of arbitration could expand it to a wider range of claims and contracts. A decision against it could require "almost every [stock-broker] margin contract . . . to be rewritten."[35]

Justice Black recognized *Wilko*'s importance for the future of arbitration. When the case receded into Conference on December 9, 1953,[36] he was among the first to speak.[37] Black stated that the case came down to a conflicting presumption between the Arbitration and Securities Acts. Yet here, he believed the Securities Act won out. The Act guaranteed stock purchasers a federal forum. Purchasers could not be bound by pre-dispute arbitration agreements which foreclosed this right.[38] Black also expressed his approval of Judge Clark's dissent, and its holding that allowing the arbitration of Securities Act claims would frustrate enforcement.[39] Yet Justice Stanley F. Reed pushed back, arguing that the Court could not hold that arbitration was unable to vindicate statutory rights.[40] William O. Douglas, Harold H. Burton, and the newly-appointed Chief Justice Earl Warren voted with Black to reverse, but the majority of the Court went with Reed.[41] After Conference, *Wilko* was a 5–4 vote in favor of pre-dispute arbitration of statutory claims. Justice Reed would write the majority opinion.[42]

Reed's opinion would have vastly expand the Federal Arbitration Act's reach in the 1950s, until the Justice had a change of heart. After a series of tortured drafts,[43] Reed wrote to the Conference on November 20 that "further consideration" of *Wilko* changed his mind.[44] He also circulated a new memo which later became the majority opinion.[45] Reed's draft opinions showed his vacillation, writing that "two [statutory] policies, not easily

reconcilable, are involved in this case."[46] Yet it ultimately endorsed Justice Black's Conference position: pre-dispute arbitration agreements waived purchasers' right to proceed in federal court in violation of §14 of the Securities Act, and Congress's goal of creating an efficient cause of action for defrauded purchasers was "better carried out" by making those agreements unenforceable.[47]

Black approved of this new draft, writing Reed two days after it circulated that he was "glad he came out that way."[48] In fact, Black pushed Reed to make his opinion *harsher* on arbitration. Where Reed took pains to state "the Federal Arbitration Act establishes the desirability of arbitration as an alternative to the complications of litigation," Black noted that "arbitration can be just as complicated [as litigation]" and "its usefulness has been greatly exaggerated." Where Reed ended by "discounting . . . any bias that we as judges . . . have for the judicial process as against arbitration . . . ," Black wrote: "I certainly have plenty [of biases against it] insofar as a man's right to sue is to be governed by law rather than by contract where bargaining power of the parties' is essentially unequal."[49]

Reed would not adopt Black's rhetoric, but his final opinion relayed his colleague's view of the case.[50] It also won a 6–2 majority, as Tom Clark switched his vote, and Robert H. Jackson concurred in the judgement.[51] Even the case's dissenters, Felix Frankfurter and Sherman Minton, allowed some questions about arbitration. While Frankfurter did not believe that Securities Act claimants were unable to vindicate their rights in arbitration,[52] he admitted that, if Wilko faced no choice but to assent to this clause, then it could be unconscionable.[53] In short, the Court went from allowing arbitration of federal statutory claims at Conference to expressing unanimous skepticism about arbitration's use in the final opinion. *Wilko* came out as a win for the Alabama justice.[54]

1957–65: The Warren Court Begins to Break with Justice Black on Labor Arbitration

The Warren Court began to break with Black on arbitration in a different context than FAA cases: arbitration between employers and labor unions. Labor arbitration developed separately from commercial arbitration.[55] Mandatory employer-union arbitration agreements in collective bargaining agreements were a widely-used "middle-class panacea" for labor conflict by the 1950s.[56] The Warren Court expressed approval of the practice in 1957's *Textile Workers Union v. Lincoln Mills*.[57] The Court reaffirmed *Lincoln Mills* three years later in a trio of cases known as the "*Steelworkers* trilogy."[58] *Steelworkers* took care to distinguish labor arbitration from the contractual type; it stated that *Wilko*'s "hostility" to arbitration arose where "arbitration [was] the substitute for litigation." In the labor context, arbitration was "the substitute for industrial strife." Courts should liberally enforce arbitration clauses contained in collective bargaining agreements with any "doubts . . . resolved in favor of coverage."[59]

After *Steelworkers*, the Warren Court enforced arbitration clauses contained in collective bargaining agreements in a slew of 1960s cases. Hugo Black became their primary opponent. In case after case, he dissented from a majority who, in his view, allowed their "leanings to treat arbitration as an almost sure and certain solvent of all labor troubles" override other issues.[60] Many of these decisions inflamed Black. For example, in *Republic Steel v. Maddox* (1965),[61] which ruled that an Alabama steelworker had to press his severance-pay claim through union arbitration procedures before bringing any state court claim,[62] Black hurriedly drafted his dissent on the paper of the majority's draft: "[the] philosophy of this opinion is that arbitration of disputes is so superior to

court determination that all disputes must be [routed through it . . . since Magna Carta at least in this country, English court have held a right to settle . . . disputes."[63] His final dissent was no less sweeping: "the Court's decision to] expand, apparently without limit, the kinds of claims subject to compulsory arbitration . . . interprets federal law in a way that is revolutionary. Yet the Court dispenses of this case as easily as it would reach the conclusion that 2 plus 2 equal 4."[64]

Black's seeming opposition to labor arbitration might appear strange at first. He was a staunch ally of organized labor as a senator and a justice.[65] Labor arbitration served union's interests by encouraging employers to enter collective bargaining agreements.[66] To be sure, Black never spoke of labor arbitration with the same vehemence he applied to mandatory arbitration. He did not participate in the *Lincoln Mills* or *Steelworkers* decisions, but never expressed disapproval of them. He voted to enforce some arbitration clauses contained in collective bargaining agreements. In *Drake v. Bakeries* (1961), Black voted with the majority to enforce one such clause, writing on Byron White's draft that his "doubts" about the case, "were resolved by your opinion."[67] Yet Black's dissents show a desire for the Court to ease their *reflexive* approval of labor arbitration clause enforceability. For example, he argued against reading a general "intent" to arbitrate out of contractual language which displayed no specific language regarding the practice.[68] Underlying these arguments was Black's understanding that interpretive principles developed in labor arbitration cases could extend to mandatory arbitration ones. Once the Court generated a policy of strict enforcement of arbitration clauses contained in collective bargaining agreements, that interpretive principle could easily be shifted to mandatory arbitration clauses contained in other contracts.[69] Such an extension might have disastrous consequences for individuals looking to enforce statutory rights.

From 1961–67 Justice Black stubbornly dissented in six cases enforcing a mandatory arbitration clause contained in a contract or collective bargaining agreement.

Yet Black's rhetoric in the labor cases had little effect on their outcome. He dissented alone in almost all of these cases. The 1960s Warren Court intended to act in labor's interests.[70] Organized labor came out on the side of labor arbitration.[71] It was important enough to unions that, during one 1965 case dealing with whether a union steelworker could bring a backpay claim in state court or had to initially bring the claim through labor grievance procedures, the AFL-CIO filed its first ever *amicus* brief taking an *employer's* side in an employee-employer dispute.[72] The justices thus were not going to impede the development of this new "kingpin" of federal labor policy.[73] In time, Black's concerns that the Court's warm feelings about labor arbitration would soon be extended to statutory claim arbitration would be proven right.

Moseley v. Electronic & Missile— "No Room for Halfway Decisions"

Black's concerns that the Warren Court would extend its presumption of strict enforceability of labor arbitration clauses to statutory claim arbitration are confirmed by the deliberations around *Moseley v. Electronic & Missile* (1963).[74] *Moseley* involved a federal subcontractor's damages claim against their general contractor under the Miller Act, which grants federal subcontractors that right of action for breach.[75] The prime contractor filed a motion to compel arbitration under their agreement's terms.[76] The Middle District of Georgia enjoined arbitration because the subcontractor raised a colorable fraud in inducement defense which a federal court had to resolve.[77] Judge Elbert Tuttle reversed for a divided Fifth Circuit, holding that the FAA "expressly and unequivocally" conferred a right to arbitrate disputes.[78] In addition, Judge Tuttle held that the arbitrator, rather than the federal court, could litigate the fraud in inducement defense. In making this holding, the Fifth Circuit adopted the reasoning of a recent Second Circuit case called *Robert Lawrence v. Devonshire Fabrics*.[79] *Devonshire* saw Judge Harold Medina hold that the FAA was a substantive statute which precluded state arbitration law,[80] and, where a plaintiff raised fraudulent inducement as a defense to a motion to compel arbitration, arbitrators' could review the fraud claim unless their defense centered *specifically* on the arbitration clause.[81] *Devonshire* radically expanded the FAA.[82] That case's importance was not lost on the Supreme Court, which granted cert in 1960,[83] only to see it dismissed after settlement.[84]

The Court granted a writ of *certiorari* in *Moseley* on December 3, 1962.[85] This grant followed a split 4–5 vote, with Byron White and Arthur Goldberg switching their initial votes[86] due to the "important question of the availability of commercial arbitration under the Miller Act."[87] Only Earl Warren and Hugo Black initially voted to grant the writ.[88] Black probably did so because *Moseley*, on its face, seemed like a similar case to *Wilko*. Both sides in *Moseley* raised similar arguments. Petitioner argued that allowing Miller Act arbitration would negate the statute's federal forum and impair enforcement;[89] respondent focused on the FAA's lack of specific exceptions for Miller Act claims.[90] *Moseley* could mark another loss for mandatory arbitration advocates. It could also resolve the question raised by *Devonshire*: whether a fraud in inducement defense had to be litigated by the federal court, or if an arbitrator could resolve the issue.[91]

At oral argument, Black made clear what his position was on *Moseley*: against arbitration. When respondents' counsel argued that the Miller Act was a "venues statute which could be waived," he asked sarcastically, "do you think Congress left claims to that [federal] forum without saying anything?"[92] Black also challenged respondents' argument that arbitration must take place in New York, stating that a ruling in their favor required the Court "to hold that 435 members of Congress . . . passed [the FAA] intending that a man in South Georgia could waive his right to have his case tried under the Miller Act in South Georgia, and must go all the way to New York or to London . . . Or to Switzerland . . . in order to try his case."[93] Black also implied that the subcontractor had the right to have the federal court, not the arbitrator, decide the fraud claim; he stated that "the books are filled with cases that people have been defrauded by written contracts," and courts had a right to review them.[94]

Black unsurprisingly voted to reverse at *Moseley*'s Conference.[95] Earl Warren would too, "[agreeing] with" Black that Miller Act claims could not be arbitrated.[96] Yet their position found no other supporters. Byron White and Tom Clark said that the case involved "interstate commerce" and was covered by the

FAA. William J. Brennan and Arthur Goldberg made clear that the Miller Act did not preclude arbitration. Justice John M. Harlan actually endorsed *Devonshire*. The entire Court, except for Black and Warren, held that Miller Act claims were arbitrable, and only modified the lower court's decision by holding that the arbitration should take place in Georgia rather than New York.[97] The arbitration hostility which the Warren Court once exhibited in *Wilko* seemed nonexistent.

Black would not go down that easy. Soon after Conference concluded, he began looking to exert influence with other justices. On April 22, three days later, he sent a letter to the Court suggesting that a ruling in favor of the general contractor in *Moseley* would require them to overturn precedent.[98] The next day, he wrote a letter to Justice Arthur Goldberg.[99] Hoping to "at least . . . get [Goldberg] to look closely at *Moseley*'s materials,"[100] Black wrote Goldberg that

> I read the legislative history of the [FAA] last night . . . That Act was drafted and promoted by the [Chamber of Commerce] and merchants and was intended to meet their particular needs. The Arbitration Act could not have been passed but for assurances . . . that its arbitration system could not be applied to industrial workers and employment contracts.

Black played on Goldberg's pro-labor sympathies while seeking to distinguish Mosley's statutory claim arbitration from the Court's other labor arbitration cases:

> This is one of the many reasons why I said to you in re *Moseley* that there is no room for halfway decisions. Whether you are right or wrong in believing that arbitration of labor disputes is a highly desirable public policy, I am convinced by the history and language of the Arbitration Act that it would be a complete distortion . . . to hold that it applies to employment contracts.[101]

Black also attempted to influence the rest of the Court. On May 31, 1962, he circulated a massive memo to the Court explicitly outlining his views on arbitration, and arguing for a reversal in *Moseley*.[102] This memo included a range of arguments: allowing arbitration of Miller Act claims could increase public works' expenditures,[103] the transaction did not involve "interstate commerce," and any arbitration which takes place should occur in Georgia, not New York. Black also attacked the lower court's endorsement of *Devonshire*, and its holding that fraud in inducement claims could be decided by an arbitrator rather than a federal court. *Moseley*'s subcontractor made colorable allegations of fraud. §4 of the FAA stated that a court must be satisfied that the "*making* of the agreement for arbitration . . . is not in issue" in order to enforce an agreement.[104] Black, ever the textualist, pointed out that a fraud in inducement claim puts the "making" of an agreement at issue. He also pointed to statements by FAA sponsors stating that courts must hear "all defenses, equitable and legal" which could exist before enforcing arbitration agreements; this would encompass fraud in inducement.[105]

Black's massive memo primarily centered on two arguments which were central to his view of arbitration: a statutory grant of a federal forum could not be waived through pre-dispute contracts involving unequal bargaining power,[106] and allowing arbitration of statutory claims could frustrate their vindication.[107] Black supported his first claim by pointing out how *Moseley*'s federal contractor, who possessed a monopsony after the contract was granted, imposed this venue waiver on a subcontractor without leverage. The court could not hold that the

subcontractor truly assented to this dispute resolution method given how "theoretical equality of opportunity to bargain at arm's length is often a fiction in our world of commercial reality." Enforcing the waiver was even more objectionable in the context of the Miller Act, which was "meant to guard against the evils resulting from inequality of bargaining power" between contractors and subcontractors. For Black's second argument, that arbitration of statutory claims impaired their enforcement, he examined the FAA's history. Drawing on his Senate experience, he pointed out that the statute "must be interpreted in light of the [large business interests] of the bill's supporters." The FAA was drafted by, and principally benefited, large mercantile groups. Its enacting legislature intended for it to only apply to simple contractual disputes within that community. They did not intend for it to apply to captive consumers, employees, or subcontractors.[108]

Here, perhaps understanding the gap between him and the rest of the Court on labor arbitration, he again distinguished *Moseley* from that context: "it does not follow that because [labor] arbitration has value in such situations the [FAA] should be construed to cover any and all areas . . . heedless of the commands of other statutes designed to preserve the ancient, treasured right to judicial trials."[109] He then related contractual arbitration back to the corrupt intentions of the FAA's proponents: "we should be especially careful not to apply the Arbitration Act sweepingly in view of the avowed purpose of its proponents to do away with the constitutional right to trial by jury."[110] Citing a statement by one of the bill's drafters, stating that one of the "evils" it was intended to address was the failure of non-expert juries to reach decisions "regarded as just . . . by the standards of the business world,"[111] Black warned that they should look carefully at a bill "intended to do away with what its supporters called an 'evil' but the Constitution calls a 'right.'"[112]

Black was moving mountains to make the Court see his view. At first, the justices appeared to be having none of it. Tom Clark's early drafts ignored most of Black's arguments.[113] They rejected his view that the Miller Act's federal venue could not be waived. There was no enumerated arbitration exception in the Miller Act, and the FAA "deemed [arbitration] to be in furtherance of, rather than detrimental to, the public interest."[114] So, upon reading Clark's draft on June 3, Black prepared to make his memo a dissent.[115]

Yet Black's memo may have slowly influenced the Court. Clark noted on one draft that "Black is the only one who would . . . reverse the Court of Appeals . . . the Justice and the others agree with the Arbitration point made by Black. But they think the District Court could go on to decide the other points in the contract."[116] This note indicates that Black's arbitration memo was getting some traction. Other justices were also taking issue with Clark's draft. Goldberg wrote Clark that "I am generally in agreement with . . . the result you have reached, but the route you have taken to get there . . . troubles me."[117] Eventually, all these issues got to Clark. On June 5th, Clark sent Douglas a short note: "I have been talking to the brothers and they are convinced that we do not need to reach the arbitration issue. It was not an issue as to enforceability below as the respondent did not pray for anything other than a stay. I have therefore . . . eliminated this part of the opinion." Knowing how this would affect Black, Clark added, "I suppose this will cause Hugo to pull my hair out but I believe that it is right."[118]

Moseley finally came down on July 11, 1962.[119] It would not rule on the arbitrability of Miller Act claims, or most of the case's other issues. It only remanded to the lower Court to determine the subcontractor's fraud in inducement defense.[120] The final opinion did not oppose Miller Act arbitrability, but it also did not endorse it. In addition, the Court

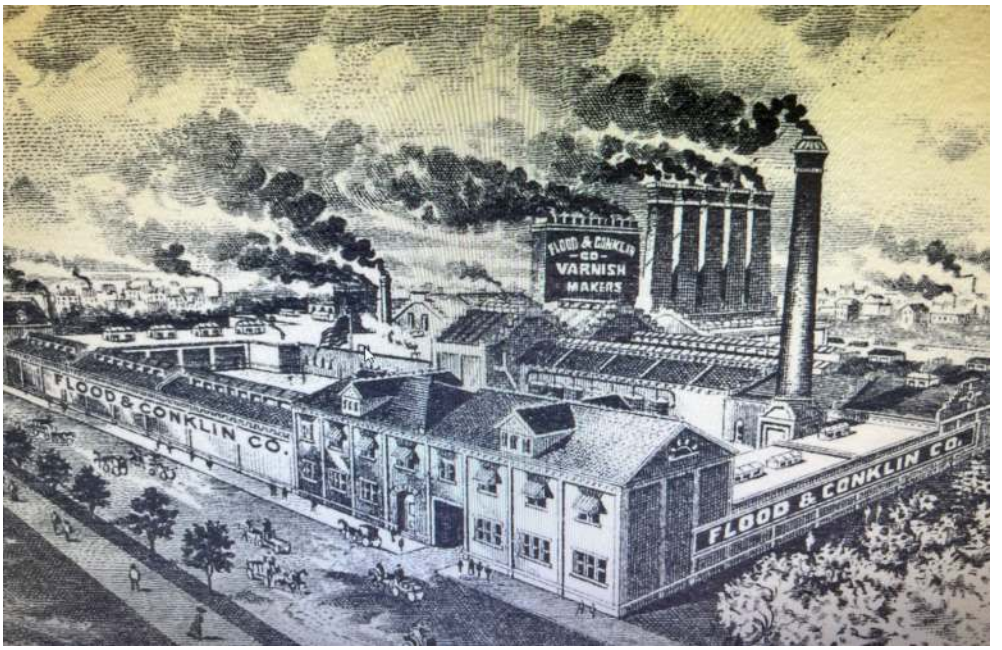
remanded to the District Court, not the arbitrator, to determine the subcontractor's fraud defense.[121] This defeated any Supreme Court endorsement of *Devonshire*. Black's vast dissent would be shaped down to a short concurrence joined by Warren. Black's concurrence pointed out the questions which the opinion left open but approved of the Court's decision to remand to the District Court. It also cast enmity towards *Devonshire*, and its allowance for arbitrators to review fraud in inducement claims: "fraud in the procurement of an arbitration contract makes it void . . . and this question of fraud is a judicial one which must be decided by a court."[122]

Moseley's final opinion probably did not make Black want to "pull out" Clark's hair; he probably breathed a sigh of relief. He could, at least, call this fight a draw. Unfortunately, *Moseley* showed that this Warren Court was a very different one than the one which decided *Wilko*. Gone were Reed's reversals, Jackson's protections for judicial review of arbitral decisions, Burton's concerns about arbitrators' pro-industry bias, or even Frankfurter's admission that certain arbitration clauses might be unconscionable. In their place were younger justices with a rosy view of arbitration. Brennan pushed for arbitration as a labor lawyer.[123] Harlan's comments in Conference indicated that he was a solid advocate of arbitration.[124] White went on to join a number of arbitration decisions which went much farther than the Warren Court would.[125] To make matters worse, Black's old allies, perhaps shaped by their experiences in the labor cases, appeared to become more flexible about arbitration. Clark was unpredictable.[126] Chief Justice Warren could change his legal views based on his "gut" reaction to a case.[127] Even Douglas did not join Black's *Moseley* opinion. The Warren Court appeared headed for a full break with Black on arbitration. That break would arrive soon, over a contract dispute regarding paint.

Prima Paint—"Un-American Procedures"

In October 1964, Flood & Conklin Manufacturing Co. entered a "Consulting Agreement" with Prima Paint Corp. to facilitate Prima's purchase of F&C's paint business.[128] The agreement provided that F&C's chairman would furnish "consultation" in connection with the business transfer in exchange for a percentage of Prima's sales receipts. Their agreement included a broad arbitration clause. In early 1965, Prima Paint notified F&C's attorneys that F&C breached their contract by fraudulently representing that they were solvent when they intended to file a bankruptcy petition. On November 12, the company filed a diversity lawsuit in the Southern District of New York seeking rescission of the contract based on fraudulent inducement. F&C cross-moved for a stay pending arbitration, arguing that any question as to fraud in inducement was for the arbitrators and not the District Court.[129] The District Court granted F&C's motion.[130] The Second Circuit affirmed, holding that, under their *Devonshire* precedent, a broad arbitration clause made any defense of fraud in inducement in the entire contract, rather than just the arbitration clause, one that arbitrators' could review.[131] Although New York law would command a different result, the FAA's "national substantive law" superseded that state rule.[132]

Prima Paint filed a petition for *certiorari* in August of 1966.[133] White, Stewart, Harlan, Warren, and Black all voted to grant the writ.[134] The reason for Black's vote can be surmised. *Prima* "raised the same issues"[135] as *Devonshire*: whether the FAA was a substantive statute, and whether arbitrators could decide fraud in inducement defense. *Prima* was a great chance for Black to strike down both those holdings. Indeed, the party's merits briefs in *Prima*, as well as an *amicus* brief filed by the American Arbitration Association on respondent's behalf,[136] generally



Flood & Conklin, a venerable New Jersey varnish company, agreed to sell its paint business to Prima Paint Corp. in 1964. But the company was quickly discovered to be insolvent and the contract went to mandatory arbitration.

addressed the same matters that *Devonshire* ruled on.[137] Oral argument in the case made even more clear that, for Black at least, *Prima* was a proxy battle on *Devonshire*. Black was silent for most of Prima Paint's argument in favor of referring their fraud claim to the District Court. However, when Flood & Conklin's lawyer, one Martin Coleman, arrived to endorse *Devonshire*, Black sent him a string of stern rebukes.[138] At one point, Coleman asserted that the FAA was meant to eliminate common law courts' "hostility to arbitration on the theory that it divested courts of its jurisdiction . . ." Black interrupted, "which it does." Coleman admitted that it did but added that Congress "passed [the Federal Arbitration Act" in derogation of the common law." Black responded, "Which was subjected to charges that it was unconstitutional." Coleman said, in a sheepish tone, "I don't believe so, your honor."[139] Later, when Gerald Aksen of the American Arbitration Association, took the stand, Black tied the lawyer up in questions about—of all things—AAA's founding date.

Prima would be a close case at its March 17 Conference.[140] Warren was the first to speak.[141] One would expect that Warren would vote to reverse. After all, a vote to affirm in *Prima* was a vote in favor of *Devonshire*, and Warren was the *only* justice who joined Black's *Moseley* concurrence specifically refuting that case. Yet Warren voted to affirm with just a conclusory statement that the FAA created federal substantive law that applied in diversity cases.[142] Black voted to reverse without any recorded explanation, as did Douglas.[143] Justice Harlan, who already endorsed *Devonshire* during *Moseley*'s Conference, voted to affirm, reiterating that Congress enacted the FAA as a substantive statute under its Commerce Clause Power. Potter Stewart began a long talk about how they may need to return to the FAA's limited original intent. His view of the case was unclear; Douglas originally wrote down that

Stewart wanted to affirm, but later switched Stewart's vote to a reversal.[144] The last three justices, White, Brennan, and Abe Fortas, all voted to affirm without much discussion. *Prima* left Conference as a 6–3 vote in favor of Flood & Conklin and *Devonshire*. Fortas was assigned the majority opinion.[145]

Fortas began drafting a terse majority opinion for *Prima*.[146] First, the contract "[evinced] a transaction in interstate commerce" for FAA purposes; this was a Maryland corporation buying a New Jersey business.[147] He then turned to the case's central issue of whether arbitrators could review fraud in inducement defenses. Fortas referred to § 4 of the FAA, which lays out that a federal court can only enforce arbitration clauses once it is satisfied that "the *making* of the agreement for arbitration or the failure to comply (with the arbitration agreement) [was] not in issue."[148] For Fortas, the way that "making" related to "agreement for arbitration" meant that "a federal court may consider only issues relating to the making and performance of the [actual] agreement to arbitrate."[149] Federal courts could only review fraud in inducement challenges to contracts containing arbitration clauses when the challenge centered on the specific clause rather than the entire contract.[150] Fortas also held that the FAA was a substantive statute which authorized federal courts to generate rules of decision in diversity cases.[151] He then pushed Prima Paint's dispute with F&C into arbitration, because their fraud defense centered on the entire contract, rather than the arbitration clause.

Fortas's opinion was short and direct, almost to the point of curtness. Its central holding and arguments remained the same throughout the editing process, although its specific language and structure did change somewhat.[152] The case would not completely affirm *Devonshire*,[153] but enshrined its three central holdings: the FAA was substantive law, arbitration clauses were "separable," and fraud-in-inducement defenses could be reviewed by arbitrators. After *Prima* circulated, Warren, Clark, and Brennan joined Fortas's draft without the slightest comment.[154] Byron White did the same with just one edit. White asked Fortas if he needed a footnote pushing federal courts presiding over diversity cases to at least consult state law whenever it significantly conflicted with the federal rule.[155] Fortas responded that "he was inclined to strike" the footnote, and only included it because of the "bitchy problem" of his "[general] inclination . . . to reduce federal law—to use state substantive rules unless there is a pretty clear and strong reason to apply federal law . . . Otherwise e.g. there might be a different standard in inducement of the arbitration clause and fraud-in-inducement of the contract itself."[156] Fortas's evident issues with his own holding did not prevent him from cutting that footnote.[157] For the majority, *Prima* was to be a short decision which firmly established the Federal Arbitration Act's power over states and fraud defenses. To quote Black in *Moseley*, there was "no room for half-measures."[158]

Black began drafting a dissent by hand after reading Fortas's opinion. His words were vicious from the start:

> The Court here holds to me what it is fantastic, that the legal issue of the contracts voidness because of fraud is to be decided by persons designated to arbitrate the factual controversy between the contracting parties . . . the arbitrators the Court holds are to adjudicate the legal validity of the contract . . . in all probability will be non-lawyers wholly unqualified to decide legal issues. I am by no means sure that forcing persons to forego their opportunity to [try] their legal issues in the courts denies them due process. I

> am fully satisfied that Congress did not impose any such un-American procedures in the Arbitration Act.[159]

Black's dissent grew from this intro. He first attacked *Prima*'s central holding that arbitrators could rule on fraud in inducement defenses. Displaying the consistency of his arbitration views, Black made this argument by reiterating arguments developed in his earlier *Moseley* memo: a colorable fraud accusation put the "making" of the contract, and any arbitration clause contained within it, into issue.[160] He also pointed out that the Court's holding contravened the institutional competency of courts and arbitrators. Arbitrators could quickly resolve disputes related to day-to-day contractual performance.[161] Yet courts had more expertise in fraud proceedings and could "determine with little delay" that arbitration should proceed if claims were specious.[162] Black closed at his most pointed:

> the only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine [their] compensation.[163]

Black's dissent did not only respond to *Prima*. The Justice also took aim at the case to which he gave "credit for the creation of a rationalization to justify this statutory mutilation": *Devonshire*.[164] Black described *Devonshire*'s holding that the FAA was enacted as substantive law as a ploy to avoid the statute's "emasculation" by states.[165] He cited a number of statements from the FAA's legislative history stating that the bill was "establishing a procedure,"[166] and "does not involve any new principle of law."[167] He also pointed out that the FAA does not provide an independent federal-question basis for jurisdiction.[168] He then related his *Devonshire* attacks back to the majority opinion. The FAA just placed arbitration agreements "on the same footing as other contracts."[169] The Court's new separability rule made arbitration clauses *supreme* over other contracts, which required rescission-in-whole rather than in "tidbits." Black closed by arguing that the Supreme Court, in following *Devonshire*, a case "whose creator practically admitted was judicial legislation," was just looking to "promote the policy of arbitration."[170] (This argument was not a new one for Black; he frequently raised it in his dissents to the Court's labor arbitration cases.)[171]

Black's dissent circulated on June 1.[172] Fortas's notes on the draft were incredulous. He reiterated that he viewed the FAA's language on the "making" of the agreement as only "pertaining to the arbitration clause."[173] In response to Black's claim that courts had more expertise with fraud claims than arbitrators, he pointed out that "a lot want [non-expert] juries to decide it."[174] At one point, when Black quoted one of the FAA's private-sector drafters as to the bill's intent, Fortas wrote "this is the sponsor? . . . They're just lobbyists."[175]

Perhaps one of the other justices spoke to Black about toning down his rhetoric. The next day, Black recirculated the draft with one descriptor removed: "un-American."[176] Yet the diplomatic Harlan also wrote Fortas the day after Black's draft circulated: "in view of Hugo's strong treatment, you might wish to consider, if time permits, a more full-dress exposition of the majority side . . ."[177] Fortas did edit his opinion in subtle ways, such as taking more time to substantiate his holding that the FAA was substantive law enacted under the Commerce Clause.[178] Black responded by adding his own footnote saying that Fortas's evidence showed that the Act applied to commerce generally, but did

not reflect a Congressional intent to enact the FAA under the Commerce power.[179] Black's dissent was immediately joined by Potter Stewart.[180] Within a week of its circulation, Douglas joined it as well.[181] Yet none of the justices who voted against Black at Conference switched their vote.

It is interesting to note that *Prima*'s written record does not reveal the kind of active lobbying by Black which occurred in *Moseley*. Deliberations may have occurred outside the written record. Yet it is possible that, by this point, Black knew how unpopular his arbitration positions were becoming. Arbitration had been pushed by the business community for a long time.[182] Courts were starting to accept the practice,[183] as were the other justices. Indeed, given how close-run deliberations over *Wilko* and *Moseley* were, Black may have been lucky to keep a case like *Prima* away for as long as he did. It did not help that *Prima* arrived when Black was growing old, cranky and out of touch with the rest of the Court.[184] By 1967, younger justices like William Brennan were becoming the main driver of majorities.[185] Black increasingly took the role of a silent, elder statesman. He remained a keen advocate for his old positions but was increasingly unable to bring new people over to them.[186] In *Prima*, it likely did not help matters that the majority opinion was written by Fortas, with whom Black had a very frosty relationship.[187]

The Court issued *Prima Paint* on June 12, 1967.[188] Added in was a short concurrence from Harlan explicitly endorsing *Devonshire*

Warren Court justices William Brennan (standing, second from left) and Abe Fortas (standing, right), were strongly pro-labor and viewed arbitration as beneficial for the collective bargaining process. Justice Black (seated, second from left) realized, however, the greater implications of extending mandatory arbitration and its benefit to corporations.

over the majority's slightly different reasoning.[189] Reaction to the case was muted, as is usually the case for arbitration decisions. The decision impacted some federal litigation.[190] A law review article questioned whether it withheld too much power from courts.[191] Only one group truly celebrated it: the corporate law community. *The Business Lawyer* applauded *Prima's* expansion of the scope of contractual arbitration clauses.[192] After decades of lobbying, big business was finally getting the liberal arbitration grants they sought.

V. Conclusion

The primary reason for the Court's shift on arbitration centers on the justices' desire to expand labor arbitration. Many of the Warren Court justices appointed after 1960, such as William Brennan, Abe Fortas, and Arthur Goldberg, were strongly pro-labor. Labor arbitration was viewed as beneficial for the collective bargaining process. So the Court, in case after case, expanded it. Statutory text related to labor arbitration was read expansively, and policy judgements were rendered in favor of the practice. Yet, this expansion created a logical inconsistency: labor arbitration statutes and contractual provisions could not be expanded without the same logic applying to mandatory arbitration. Indeed, this idea was cited by lawyers for Prima Paint in their oral argument.[193] For lawyers like Fortas or Brennan, helping labor was always the first priority. Even if doing so helped a few East Coast commercial interests, many of whom had lobbied for the process for some time, that was of little consequence given the greater cause of helping the unions.[194] Only Black truly appreciated the greater implications such an extension would have.

Other causes should be accounted for as well. As noted above, the business community had, by this point, lobbied for expanding arbitration for decades. As business grew more complex throughout the 1960s, the Warren Court's more genteel members, such as Harlan, saw little reason to oppose corporate America's goals. Some of the justices, including Warren himself, were concerned about expanding federal dockets. Arbitration helped alleviate this by taking certain cases out of protracted court proceedings.[195] Last, it should be noted that arbitration was, and remains, a low-salience issue. The Warren Court took on a wide number of issues with greater importance to the press, historians, and most of the justices: race, religious liberty, freedom of speech. Compared to these, a paint company's choice of forum for their fraud defense barely registered for the justices—except for Black.

Indeed, Black's stubborn views on arbitration are best understood as one manifestation of his broader interest in protecting each individual's constitutional right to a "day in court." Black truly believed in the virtues of neutral courts with strong procedural protections and juries of one's peers. That belief shines through his arbitration dissents. His notes on Reed's *Wilko* opinion, his *Moseley* memo, and the *Prima* dissent, all consistently express the view that arbitration should not be allowed to erode individuals' constitutional right to bring claims in a court of law. The rest of the Warren Court would defend each individual's right to a fair day in court within other contexts.[196] Yet, in *Prima*, it still voted, with precious little discussion, to facilitate the banishment of legal claims to private forums run by individuals with compromising financial interests. Only Black, the former trial lawyer and New Deal senator, truly understood how arbitration could abridge individual's precious right to a fair "day in court," and fought against it doing so. In this respect, Black's arbitration dissents show remarkable consistency with the rest of his jurisprudence. Certain sections of the *Moseley* memo, such as Black's statement that the FAA should not be construed to take away the "ancient, treasured right to judicial

trials in independent courts according to due process of law,"[197] recall a more famous Black quote from a more famous decision, *Gideon v. Wainwright*: "our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[198] For Hugo Black, that right to a fair trial should not be taken away through a mere signature on predrafted paper.

ENDNOTES

[1] *E.g.*, *Vynoir's Case*, 8 Co. Rep. 81b et seq. (1609).

[2] *See*, *e.g.*, *Insurance Co. v. Morse*, 22 L.Ed. 365 at 365 (1874). *See also*, Steven A. Certilman, *A Brief History of Arbitration in the United States*, N.Y.S. Disp. Resol. Lawyer 10, 10–13 (discussing arbitration in the early Republic).

[3] *See* Julius Cohen & Henry Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev., 265, 270 (1926) (describing the Act's limited intent).

[4] *See*, *e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Passed By Congress*, 34 Fla. St. U. L. Rev. 99, 105–12, (describing how the act's supporters did not believe that it would apply to any workers or consumers, and the act's own drafters believed it would not apply to important statutory claims); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L.R. 1939, 1964–90 (arguing that the FAA was intended only to redress federal court procedural failings court as part of a wider 1930s legal reform movement); Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 Va. J. Soc. Pol'y & L. 195, 203–07 (describing how the FAA was not intended to apply in state court); Richard Frankel, *The Arbitration Clause as Super Contract*, Wash. U. L. Rev., 531, 538–40 (2014) (discussing how the statute was not intended to intrude on state substantive law).

[5] *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Dennis v. United States*, 341 U.S. 494, 579 (1951) (J. Black dissenting), *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

[6] See *Local 174 Teamsters, Chauffeurs, Warehousemen & Helpers of America, v. Lucas Flour Company*, 369 U.S. 95, 107–10 (1962); *James B. Carey, as President of the Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp.*, 375 U.S. 261, 274–76 (1964) (J. Black dissenting), *Republic Steel Corp. v. Charlie Maddox*, 379 U.S. 650, 660–70 (1965) (J. Black dissenting); *Florence Simmons v. Union News Co.*, 382 U.S. 884, 884–88 (1965) (J. Black dissenting); *Manuel Vaca et al. v. Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased.*, 386 U.S. 171, 204–10 (J. Black dissenting) (1967) *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407–25 (1967) (J. Black dissenting). *See also*, *Sinclair Refining Co. v. Samuel M. Atkinson et al.*, 370 U.S. 370, 370 (foreclosing federal court injunctions against strikes even when utilized to enforce mandatory arbitration agreements within collective bargaining agreements in a majority opinion by Black); *Commonwealth Coatings Corp., v. Continental Casualty Co., et al.*, 393 U.S. 145, 145 (1968) (holding that courts could set aside arbitral awards where relevant financial biases were not disclosed in an opinion by Black); *H.W. Moseley v. Electronic & Missile Facilities, Inc., et al.*, 374 U.S. 167 (1963) (discussed *infra* at 10–21).

[7] *See*, *e.g.*, *Republic Steel*, 379 U.S. at 669 (J. Black dissenting) (arguing against the Court's grant of mandatory arbitration based in part on "a vast difference between [the Court's] philosophy and mine concerning . . . the role of courts in our country . . . it was in [Magna Carta] that there originally was expressed in the English-speaking world a deep desire of people to be able to see differences according to standard, well-known procedures in courts. Because of these deepseated desires, the right to sue and be sued in courts according to the 'law of the land' became recognized . . .); *Prima Paint*, 388 U.S. at 407 (J. Black dissenting) ("I am by no means sure that forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law.").

[8] *See Wilko v. Swan*, 346 U.S. 427, 428–29 (1953).

[9] *See Prima Paint v. Flood & Conklin*, 388 U.S. at 395.

[10] 9 U.S.C. § 2.

[11] *Prima*,. at 404–05. *See Norman C. Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 198 (1956).

[12] *Prima*, at 402–04.

[13] *See*, *e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L. Q. 638, 654–59 (1996) (discussing how *Prima* started to expand the FAA's scope); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Passed By Congress*, 34 Fla. St. U. L. Rev. 99, 114–23 (relaying how *Prima* paved the way to allow FAA application to states); Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts*, 93 Ky. L. J. 423, 426–34 (2004) (discussing

Prima's creation of a seperability doctrine for arbitration clauses); J. Maria Glover, *Mass Arbitration*, Stan. L. Rev. at 52 n.326 (forthcoming) (last revised: Nov. 6, 2021) *available at* SSRN (discussing *Prima* as the first in a long line of FAA Supreme Court precedent expanding the statute).

[14] *Prima*, at 416 (J. Black dissenting).

[15] *See* Roger K. Newman, *Hugo Black: A Biography*, Fordham Univ. Press, 34 (1997) (describing Black's "devout belief in the jury system" as beginning during his years in Alabama trial courts); 372 (relaying one of Black's major goals as "ensuring a fair trial in accordance with constitutional safeguards").

[16] United States Senate, *Lobbyists*, (Sep. 28, 1987) (last updated 1989) (quoting Hugo Black's radio address in relation to a bill opposed by private utility lobbyists).

[17] *See* Virginia Van der Veer Hamilton, *Hugo Black: The Alabama Years*, Univ. of Alabama Press 178 (1982).

[18] *See* Newman, *Hugo Black*, 48.

[19] *Prima Paint*, at 409 n.2 (*citing* 50 A.B.A.Rep. 357 (1925)). Black's claim is accurate. *See* Moses, *Statutory Misconstruction*, at 101 (relaying how the FAA's principal drafters, Julius Cohen and Charles Bernheimer, were drawn from the New York State Chamber of Commerce, and "organized the support of the national business organizations" in favor of the bill).

[20] *See* Joint Hearings before the Subcommittees of the Committee on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 35 (1924) (describing the push for arbitration as a response to certain poor jury decisions).

[21] *See* Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9–11 (1923).

[22] *See Wilko v. Swan*, 346 U.S. 427, at 428–29.

[23] *See* Brief for the Securities and Exchange Comm'n as Amicus Curiae, *Wilko v. Swan*, No. 39, 1953 WL 78482 at 6–8 (1953).

[24] *Wilko*, at 429–30.

[25] Wilko v. Swan, 107 F. Supp. 75, 76 (S.D.N.Y., 1952).

[26] Wilko v. Swan, 201 F.2d 439, 439 (2d. Cir., 1953).

[27] *Wilko*, 201 F.2d at 446 (J. Clark Dissenting).

[28] *See Wilko v. Swan*, et al., 345 U.S. 969 (1953).

[29] *See* Request of Amicus Curiae to Participate in Oral Argument, William O. Douglas Papers, Library of Congress, Box 1146, Court Memoranda, No. 39 (Oct. 2, 1953). *See* Petition for Leave to Proceed *in Forma Pauperis*, Stanley F. Reed Papers, Univ. of Kentucky, Box 154, Folder 7, No. 39 (1953). Cert. Memo to CA 2, Earl Warren Papers, available at Georgetown University Law Center, Williams Library, Microfilm Collection, Reel 8, No. 39 at 6 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress). *See* Brief for the Securities & Exchange Comm'n., *Wilko v. Swan*, at 6–8; *See* Petitioner's Brief, *Wilko v. Swan*, No. 39, 1953 WL 78483 at 3–4 (1953). *See* Request of SEC to Participate in Oral Argument, Earl Warren Papers, available at Georgetown University Law Center, Georgetown Law Library, Microfilm Collection, Reel 8, No. 39 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress).

[30] *See*, *e.g.*, Park Constr. Co. v. Indep. School Dist. No. 32, 296 N.W. 475, 477 (Minn. 1941) (expressing disapproval of the old "ouster doctrine").

[31] *See*, *Washington Checklist: Supreme Court to Hear Investor's Complaint on His Margin Account*, Wall St. Journal., 3 (Jun. 2, 1953), (citing the New York Stock Exchange for this statistic).

[32] *See*, *e.g.*, Kulukundis Shipping Co. S/A v. Amtorg Trading Corporation, 126 F.2d 978, 986 (2d Cir., 1942) (refusing to submit a maritime dispute to arbitration).

[33] *See* Cohen & Dayton, *The New Federal Arbitration Law*, at 270 (describing the Act's limited intent).

[34] The Court ruled on four cases related to the FAA before 1953, all of which implicated maritime law. *See Shanferoke Coal & Supply v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Schoenamsgruber v. Hamburg American*, 294 U.S. 449 (1935); *Marine Transit Corp. v. Dreyfus et al.*, 284 U.S. 263 (1932); *The Anaconda v. American Sugar Refining Co.*, 342 U.S. 42, 45 (1944). In one, the Court declined to rule on whether a federal court could compel specific performance of an arbitration agreement which required state arbitration. *See*, *Shanferoke*, at 452–53. In another, the Supreme Court granted parties to a maritime transaction the right to proceed in *both* arbitration and federal court. *See*, *The Anaconda*, at 45.

[35] *See Supreme Court to Hear Investor's Complaint*, Wall St. Journal. *See also*, "Bench Memo," Harold Burton Papers, Library of Congress, Box 224, at 4 (Oct. 21, 1953). (expressing worries that allowing arbitration clauses in stock purchase agreements would allow the "trade to avoid the statute by sticking it in a clause requiring disputes to be arbitrated by their own boys.") [hereinafter "Burton *Wilko* Bench Memo].

[36] See *Wilko v. Swan* Record of Opinions Circulated, Robert Jackson Papers, Library of Congress, Box 184, No. 39, (1953) (displaying the date) [hereinafter "Robert Jackson *Wilko* Notes"].

[37] *See*, *Wilko v. Swan* Conference Notes, William Douglas Papers, Library of Congress, Box 1147, Argued Cases, *Wilko v. Swan*, No. 39 (1953) [hereinafter "Douglas *Wilko* Conference Notes"].

[38] *See*, "Douglas *Wilko* Conference Notes," *and* "Robert Jackson *Wilko* Notes," (writing that Black said "could not be bound by arbitration").

[39] *See* "Douglas *Wilko* Conference Notes."

[40] *See, Id.*

[41] *See, id. See also*, *Wilko v. Swan* Conference Notes, Harold Burton Papers, Box 239, No. 39 at 1–2 (showing a similar account of proceedings).

[42] *See* Docket Book, Harold Burton Papers, Box 238, No. 39 (1953).

[43] *See, Wilko v. Swan* Draft Opinion, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7, at 7 (1953) (showing heavily edited Reed drafts in which he attempts to rule the opposite way in *Wilko*).

[44] *See* "To the Conference," Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7 (Nov. 20, 1953).

[45] *See Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6 at 1 (Nov. 20, 1953) (in which "memorandum by Reed" is crossed off and labeled "opinion").

[46] *Ibid.* at 11.

[47] *Id.*

[48] *Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6, at 12 (Nov. 22, 1953).

[49] *Ibid.* at 5–6, 11.

[50] *Wilko*, 346 U.S. at 427.

[51] *See*, *ibid.* at 438–39 (J. Jackson Concurring).

[52] *See, id.* at 439–40. (J. Frankfurter, dissenting). Frankfurter's opposition was meaningful given his pivotal role in creating and implementing the Securities Act. *See* Adam C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 Va. L. Rev. 842, 842 (2009) (describing Frankfurter's "pervasive" involvement with the securities laws).

[53] *See*, *Wilko* at 440 (J. Frankfurter dissenting).

[54] The Court reiterated *Wilko*'s limited view of the FAA just three years later in *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956). *Bernhardt* held that Vermont state law, which was hostile to arbitration, still governed in a federal diversity case which involved the enforceability of an arbitration clause. *Bernhardt* therefore ruled that the FAA was a *procedural* statute which, if applied to the states, could affect substantive outcomes in violation of *Erie*. *Polygraphic* "emasculated" the FAA by commanding the application of state arbitration law in diversity cases. *See* Roger H. Broach, 46 Tex. L. Rev. 260, 263 (1967). Of course, Black joined the opinion.

[55] *See, e.g.*, Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 25 No. 3 U.F.L.R. 373, 376 (Summer 1983).

[56] 29 U.S.C. §§ 101–15 (1976). § 8 of the Act specified that "[n]o restraining order or injunctive relief shall be granted" in any labor dispute case "to any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration:" *Ibid.* § 108.

[57] 353 U.S. 448 (1957).

[58] *United Steelworkers v. American Manufacturing Co*., 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp*. 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Black did not participate in these decisions.

[59] *See United Steelworkers v. Warrior & Gulf*, at 578, 582–83.

[60] *Carey v. Westinghouse*, 375 U.S. 261, 276 (1964) (J. Black dissenting).

[61] 379 U.S. 650.

[62] *Ibid.*

[63] *See* Draft, Hugo Black Papers, Box 264, *Republic Steel Corp. v. Maddox*, at 31.

[64] *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, *Republic Steel v. Maddox*, No. 43, 1964 WL 81230, at 4–7 (1964).

[65] *See* Newman, 154–55.

[66] These agreements were often utilized in exchange for no-strike clauses. *See generally*, W.E. Akin, *Arbitration and Labor Conflict: The Middle Class Panacea, 1886–1900*, 29 No. 4 The Historian 565 (1967).

[67] *See Drake Bakeries v. Local 50* Draft, Byron White Papers, Library of Congress, at 12 (Jun. 11, 1962).

[68] *Lucas Flour*, 369 U.S., at 108–09 (J. Black dissenting).

[69] *See*, *e.g.*, Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Had Come*, 52 Baylor L. Rev. 781 (Fall 2000) (analyzing some similarities between commercial and labor arbitration law).

[70] *See, e.g.*, Lee Modjeska, *Labor and the Warren Court*, 8 Ind. Relations L. J. 479, 479 (1986) ("the Warren Court supported the Wagner Act philosophies of strong unionism and vigorous support of the principle of collective bargaining . . .").

[71] See, e.g., Brief for the Petitioner, *United Steelworkers of America v. Am. Manuf. Co.*, No. 360, 1960 WL 63603, at 29-41 (Mar. 11, 1960) (laying out the importance of arbitration to collective bargaining).

[72] *See* Brief for the American Federation of Labor and Congress of Indus. Orgs. as Amicus Curiae, *Republic Steel Corp. v. Maddox*, No. 43, 1964 WL 81230, at 1–6 (Aug. 18, 1964).

[73] *Ibid*.

[74] *See Moseley*, 374 U.S. at 167.

[75] *See* 40 U.S.C. § 3133.

[76] *See Moseley*, 374 U.S. at 168.

[77] *See* Electronic & Missile Facilities, Inc. v. U.S. for Use of Moseley, 306 F.2d 554, 555 (1962).

[78] *See, ibid*. at 554, 555–58. Judge Richard Rives, in dissent, said allowing arbitration of this claim would run against the intent of the Miller Act. *See, id.* at 558–60 (J. Rives dissenting).

[79] 271 F.2d 402 (2d Cir., 1959).

[80] *Ibid.* at 406–09

[81] *Devonshire*, 271 F.2d at 409-12.

[82] *See, ibid.* at 410 ("any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.").

[83] *See Devonshire*, 362 U.S. at 909.

[84] *See Prima Paint Corp. v. Flood & Conklin* Cert. Memo, William O. Douglas Papers, Box 1380, No. 343 at 1 (Aug. 30, 1966) [hereinafter "Douglas *Prima Paint* Cert. Memo"].
[85] *See* United States of the Use of H.W. Moseley, d/b/a Moseley Plumbing and Heating Company v. Electronic & Missile Facilities, 371 U.S. 919, 919 (1962).
[86] *See United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al.* Docket Book, William O. Douglas Papers, Box 1280, No. 401 [hereinafter "Douglas *Moseley* Docket Book"].
[87] *See* Arthur J. Goldberg, *Memorandum to the Conference Re: No. 401 United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al*, William O. Douglas Papers, Box 1282, Office Memoranda, No. 401 (Nov. 19, 1962).
[88] *See* "Douglas *Moseley* Docket Book."
[89] *See* Brief of Petitioner, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105581 at 28–31 (Jan. 25, 1963) [hereinafter "*Moseley* Petitioner Brief"].
[90] *See* Brief of Respondents, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105582 at 6 (Feb. 28, 1963) [hereinafter "*Moseley* Respondents' Brief"].
[91] *See "Moseley* Respondents' Brief," at 17–21.
[92] *See* Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc.*, No. 401, Oyez, (Apr. 16, 1963) https://www.oyez.org/cases/1962/401.
[93] *See* Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc.*, No. 401, Oyez, (Apr. 17, 1963) https://www.oyez.org/cases/1962/401.
[94] *See*, *ibid.*
[95] *See U.S. for Use of Moseley v. Electronic & Missile Facilities, Inc.* Conference Notes, Library of Congress, Madison Building, Box 1260, Argued Cases, No. 401 at 1 (1962) [hereinafter "Douglas *Moseley* Conference Notes"].
[96] *See*, *ibid.*
[97] *See*, *id.*, at 1–4.
[98] *See Re: No. 401—United States for the Use of H.W. Moseley d/v/a Moseley Plumbing and Hearing Company v. Electronic & Missile Facilities, Inc., et al*; Hugo L. Black Papers, Box 373 (Apr. 22, 1963). The letter argued that a decision in favor of respondent in *Moseley* would overturn the Court's 1956 holding in *Polygraphic* that the FAA was a procedural statute which did not apply in state courts. *See Polygraphic*, 350 U.S. at 198.
[99] *See* Letter to Arthur Goldberg, Hugo L. Black Papers, Box 373, Moseley v. Electronic and Missile Facilities at *1 (Apr. 23, 1963) [hereinafter "Black Goldberg Letter"].
[100] *See* Note from Clerk Clay to Hugo Black, Hugo L. Black Papers, Box 373.
[101] *See* "Black Goldberg Letter," 1.
[102] *See* Memorandum for the Conference by Mr. Justice Black, Justice Hugo Black Papers, Library of Congress, Box 373, United States *ex rel.* Moseley v. Electronic & Missile Facilities (May 31 1963) [hereinafter "Black *Moseley* Arbitration Memo"].
[103] *See*, *ibid.* at 6.
[104] *Id*., 23–29.
[105] "Black *Moseley* Arbitration Memo," at 26.
[106] *See, ibid.* at 3–14.
[107] *See, id.* at 14–24.
[108] *Id.* at 15–23.
[109] "Black *Moseley* Arbitration Memo," at 21–22.
[110] *Ibid.* at 22.
[111] *See, id.* (citing Joint Hearings before the Subcommittees of the Committee on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 35 (1924)).
[112] Black *Moseley* Arbitration Memo, at 23.
[113] Draft Opinion, William J. Brennan Papers, Box I:92, Folder 62–401, United States *ex rel* Moseley v. Electronic & Missile Facilities, at 1–7 (Jun. 4, 1963).
[114] *Ibid.* at 4–6.
[115] *See* Memo for the Conference, Hugo L. Black Papers, Box 373, Moseley v. Electronic and Missile Facilities (June 3, 1963) (crossing out "memo" and writing "dissent").
[116] *Moseley* Memo, Tom Clark Papers, University of Texas, Box A146, Folder 11, at 1 (May 1963).
[117] Letter from Arthur Goldberg to Tom Clark, "Re: No. 401—U.S. for Use of Moseley etc. v. Electronic & Missile Facilities", University of Texas, Box A146, Folder 11, at 1–2 (Jun. 5, 1963).
[118] Note from Tom Clark to William Douglas, William O. Douglas Papers, Box 1283, Office Memoranda, Miscellaneous (June 5, 1963).
[119] *See Moseley*, 371 U.S. at 167.
[120] *See*, *ibid.*, at 168–72.
[121] *Ibid*., at 172 (J. Black Concurring).
[122] *Ibid.*
[123] See Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 Notre Dame L. Rev. 321, 325 (1958) (quoting U.S. NEWS AND WORLD REPORT, 70 (Oct. 12, 1956)).
[124] *See* "Moseley Douglas Conference Notes."
[125] *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–29 (1985).
[126] *See* Newman, 257.
[127] *See* Mark Tushnet, *The Warren Court in Historical and Political Perspective*, 22 (Sep. 20, 1993).
[128] *See Prima Paint*., at 397.
[129] *Ibid.*, at 398–99.
[130] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 262 F. Supp. 605, 607 (S.D.N.Y., 1966).
[131] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315, 317 (2d Cir., 1966).
[132] *Ibid.* at 318. This holding mattered because this was a New York contract, and New York law required the

matter to be remanded to the District Court. *See Prima Paint Corp. v. F&C Mfg. Co.* Cert. Memo, Tom C. Clark Papers, Box 218, Folder 5, No. 343 at 1 (1966) (indicating this in a written note).

[133] *See "*Douglas *Prima Paint* Cert. Memo," at 2.

[134] *See Prima Paint v. F&C Conklin* Docket Book, William O. Douglas Papers, Box 1373, No. 343 (1967). [hereinafter "Douglas *Prima Paint* Docket Book"].

[135] "Douglas *Prima Paint* Cert. Memo," at 1.

[136] *See* Brief of the American Arbitration Association as Amicus Curiae in Support of Respondent, *Prima Paint v. Flood & Conklin Mfg. Co.*, No. 343 1967 WL 113919 at 4–5 (1966) (warning that a finding against "seperability" would frustrate the intent of "thousands of commercial businessmen" who utilized arbitration clauses).

[137] *See* Brief for the Petitioner, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113916 at 12–24 (1967) (arguing that arbitration clauses are not "separable" and due process required a judicial interpretation of whether the parties actually agreed to arbitrate); Brief for Respondent, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113917 at 7–21 (1967) (citing *Devonshire* throughout to support its argument that the FAA was substantive and arbitrators could review fraud claims); Reply Brief for Petitioner and Brief for Petitioner in Opposition to the Motion and Brief of the American Arbitration Association as Amicus Curiae, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, No. 343, 1967 WL 113918 at 20–22 (arguing that the existence of fraud negates the existence of any valid contract or arbitration clause within it)

[138] *See* Oral Argument, *Prima Paint Corporation v. Flood & Conklin Mfg. Company*, Oyez, (Mar. 16, 1967) https://www.oyez.org/cases/1966/343.

[139] *Ibid.*

[140] *See Prima Paint Corp. v. Flood & Conklin Mfg* Docket Sheet, William O. Douglas Papers, Box 1373, No. 342 (1967) [hereinafter "Douglas *Prima* Docket Sheet"].

[141] *See Prima Paint Corp. v. Flood & Conklin Mfg.* Conference Notes, William O. Douglas Papers, Box 1373, No. 343 at 1 (Mar. 17, 1967). [hereinafter "Douglas *Prima* Conference Notes"].

[142] Warren's Bench Memo on *Prima* is absent from the Congressional archives. We do not know his reasoning for this switch. However, one could point out that Warren's relationship with Black had grown frosty by this point; Warren said in early 1966 following disagreements in certain cases that "Black has hardened and gotten old. It's a different Black now." *See* Newman, 570.

[143] Douglas's attitude towards the merits is not recorded in his own Conference notes or *certiorari* memo. However, his *certiorari* memo does mention that the lower court decision "flies in the face of Bernhardt v. Polygraphic Co." *See "*Douglas *Prima* Cert. Memo," at 1. Given that Douglas wrote *Bernhardt*, it is possible he did not appreciate how *Prima* threw that opinion into question.

[144] *See* "Douglas *Prima* Conference Notes," 2.

[145] *See "*Douglas *Prima* Docket Sheet," 176.

[146] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.* Draft, Abe Fortas Papers, Yale Univ. Lib., Box I:41, Folder 837 1 (1966) [hereinafter Fortas *Prima* Draft].

[147] *See ibid.* at 7–8.

[148] *See* Fortas *Prima* Draft, 7–8 [emphasis added].

[149] *See Prima*, at 404.

[150] This holding implicitly made such agreements "separable" from the rest of their contract.

[151] *See Prima*, at 404–05.

[152] *Compare* Fortas *Prima* Draft 1–15 (ruling that the transaction involved interstate commerce, the FAA was substantive, and fraud-in-inducement claims could be referred to arbitrators) to *Prima*, 388 U.S. at 401–07 (making the same holdings in a different order).

[153] Fortas did not apply the FAA to completely supersede state law or include *Devonshire*'s language that contractual arbitration clauses were to be liberally construed. *See Devonshire*, 271 F.2d at 404–05, 410.

[154] *See* Letter from Earl Warren to Abe Fortas, "Re: No. 343—Prima Paint v. Flood & Conklin Mfg.," (Jun. 1, 1967); Letter from Tom C. Clark to Abe Fortas, "Re: No. 343, Prima Paint v. Flood and Conklin Mfg. Co." (May 19, 1967); Letter from William Brennan to Abe Fortas, "RE: No. 343—Prima Paint v. Flood & Conklin Mfg. Co. (May 19, 1967); *all documents taken from* Abe Fortas Papers, Yale University Library, I:41, Folder 836.

[155] *See* "Re: No 343—Prima Paint Corporation v. Flood & Conklin Mfg. Co.," Byron White Papers, Library of Congress, Madison Building, Box I:105, Folder 66–343 (May 22, 1967).

[156] *See* Note from Abe Fortas to Byron White, Byron White Papers, Library of Congress, Box I:105, Folder 66–343 (1967).

[157] *See Prima Paint v. Flood & Conklin* Circulated Draft, Byron White Papers, Box I:105, Folder 66–343 (June 6, 1967).

[158] "Black Goldberg Letter."

[159] *Prima Paint* Draft Dissent, Hugo L. Black Papers, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1966) (handwritten draft).

[160] *Ibid.* at 412–15.

[161] *Compare "*Black *Moseley* Arbitration Memo," at 24–26 ("Section 4 of the Act, 9 U.S.C. § 4, requires that before a court may direct arbitration according to the parties' agreement, it must be satisfied 'that the making of the agreement for arbitration . . . is not in issue . . . when the existence is in dispute—as when the contract is alleged to have been procured by fraud—then arbitration cannot be compelled until this issue has been determined") and *Prima Paint*, at 410–11 (J. Black Dissenting) ("Section 4 [of the FAA] merely provides that the court must order arbitration if it is 'satisfied that

the making of the agreement for arbitration is not in issue.' . . . a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate").

[162] *See Prima*, at 416 (J. Black dissenting).

[163] *Ibid.*

[164] *Prima*, at 416 (J. Black dissenting).

[165] *See*, *ibid.*

[166] *See*, *id.* at 418 n. 19 (quoting Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and its Application*, 20 Ill. L. Rev. 11 A.B.A.J. 153, 154 (1925)).

[167] *See*, *id.* at 419–20 (quoting 65 Cong. Rec. 1931 (1924)).

[168] *See*, *id.* at 420, n.24 ("this seems implicit in § 3's provision for a stay by a 'court in which such suit is pending and § 4's provision that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . '").

[169] *See, id.* at 423 (quoting H.R.Rep.No.96, 68th Cong., 1st Sess. (1924)).

[170] *Id. at* 425 (J. Black dissenting). *See, e.g.*, *Lucas Flour*, 369 U.S. at 107–10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference).

[171] *See, e.g.*, *Lucas Flour*, 369 U.S. at 107–10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference).

[172] *See Prima Paint Corp. v. Flood & Conklin* Draft (J. Black Dissenting) Abe Fortas Papers, Box I:41, Folder 838 at 1 (Jun. 1, 1967) [hereinafter "Fortas Comments on Black *Prima* Dissent"].

[173] *See ibid.* at 6.

[174] *See* "Fortas Comments on Black *Prima* Dissent," 10.

[175] *See*, *ibid*. 8.

[176] See Prima Paint Corp. v. Flood & Conklin Draft (J. Black dissenting), Abe Fortas Papers, Box I:41, Folder 838 at 1 (Jun. 2, 1967).

[177] *See* John Marshall Harlan II to Abe Fortas, "Re: No. 343—Prima Paint v. Flood & Conklin," Abe Fortas Papers, I:41, Folder 836 (Jun. 1, 1967).

[178] *See Prima*, at 405 n.13.

[179] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* at 12 n.22 (Jun. 8, 1967)

[180] *See Ibid., Prima Paint Corp. v. Flood & Conklin Mfg. Co*, at 1 (Jun. 2, 1967) (showing Justice Stewart joining the opinion one day after circulation).

[181] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, at 1 (Jun. 7, 1967) (showing Justice Douglas joining the opinion).

[182] *See*, e.g., Margaret Moses, at 100-12 (describing these efforts).

[183] *See, e.g.*, *Devonshire*, 271 F.2d at 402.

[184] *See* Newman, at 595.

[185] *See ibid.* at 569–70.

[186] *See* Newman, at 595. *See*, *id.* at 589–90 (describing the tension between Fortas and Black as the true tension on the Court at this time).

[187] *See*, *ibid.* at 589–90 (describing the tension between Fortas and Black as the true tension on the Court at this time).

[188] *See Prima*, at 395.

[189] *See Prima*, at 407 (J. Harlan Concurring).

[190] *See, e.g.*, United States Gypsum Co. v. United Steelworkers of America, AFL-CIO, 384 F.2d 38, 49 (5th Cir., 1967) (citing *Prima* to send an issue to arbitration which was a "classic question for arbitral determination").

[191] *See* Roger H. Broach, *Under the Federal Arbitration Act in a Diversity Suit an Allegation of Fraudulent Inducement to a Contract Involving Interstate Commerce Will Not Prevent Enforcement of a Broad Arbitration Clause in the Contract*, 46 Tex. L. Rev. 260, 265–66 (December 1967).

[192] *See* Robert Coulson, *Prima Paint: An Arbitration Milestone*, The Business Lawyer, Vol. 23, No. 1, 241 241–48 (November 1967).

[193] *See* "Prima Oral Argument," 167.

[194] *See* Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 54 B.C. L. Rev., 1237, 1237 (May 23, 2013).

[195] F. Yorick Blumenfeld, Congestion in the Courts, (Nov. 16, 1960) available at https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1960111600#REF[6] (last visited Sep. 22, 2021) (quoting Chief Justice Earl Warren: "interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans . . .").

[196] *See generally*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 No. 2, Mich. L. Rev., 249 (1968) (describing the Warren Court's groundbreaking efforts to protect the rights of defendants in a range of cases).

[197] "Black *Moseley* Arbitration Memo," at 22.

[198] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The Last Days of the Warren Court: How Justice Brennan Orchestrated *Shapiro v. Thompson* (1969)

Jordan Lampo

On April 21, 1969, the Supreme Court invalidated state durational residency requirements for receipt of public assistance and helped establish a fundamental, constitutional right to travel in *Shapiro v. Thompson*.[1] In announcing *Shapiro*, Justice William J. Brennan "read lengthy excerpts" from his majority opinion to spectators in the Courtroom.[2] Brennan's prioritization of protecting the poor through the Fourteenth Amendment in *Shapiro* did not come as a surprise that day. Since he joined the Warren Court in 1956, Brennan and his fellow justices had been addressing wealth discrimination, hoping to apply the Equal Protection Clause to protect the rights of the poor.

Chief Justice Earl Warren dissented in *Shapiro*. This was unusual. Brennan and Warren had been allies for twelve years, more often than not voting together on landmark cases. Notably, the chief justice had voted with the majority and Brennan in: *Gideon v. Wainwright* (1963),[3] holding the Sixth and Fourteenth Amendments guarantee a right for legal counsel to an indigent defendant accused of a felony; *Douglas v. California* (1963),[4] holding that states must provide indigent persons with counsel on a first appeal of right to challenge a criminal conviction; and *Harper v. Virginia Board of Elections* (1966),[5] holding a state law conditioning the vote on payment of a $1.50 poll tax denied equal protection. But *Shapiro* was different. Brennan had to deploy his persuasive powers to marshal a majority without Warren, who was about to retire.

The story of how Brennan orchestrated *Shapiro* bears re-examination, as it took many twists and turns to arrive at the final decision. Moreover, the case took on heightened drama as some of the justices were worried about antagonizing Congress with a decision that

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would require states to pay assistance to indigents at a time when Congress was debating whether to raise judicial salaries.

The Warren Court

The Warren Court spanned fifteen years (1953–1969) and Brennan served for twelve of them.[6] One of Warren's clerks, Robert T. Lasky, summed up the relationship between the chief justice and the associate justice:

> Spearheaded by . . . Warren and . . . Brennan, the Warren Court radically expanded the reaches of the judicial power and altered constitutional law in a way that reverberates to this day. . . . Warren was the leader of the liberal wing; Brennan would provide its intellectual underpinnings.[7]

Lasky said Warren knew Brennan, the "intellectual anchor" who did "real hard, heavy lifting from a thinking standpoint," could articulate legal arguments in a manner the former governor of California could not.[8] Another clerk, Paul J. Meyer, recalled that Warren and Brennan were always "very close" and that Brennan was "clearly Warren's tight ally of the Court."[9] Their companionship has led historians to refer to their overlapping time on the bench not as the "Warren Court," but "the Brennan Court."[10]

Brennan and Warren mostly voted in lockstep. Warren often tasked Brennan with convincing a fifth justice to join them alongside liberal-leaning Justices Hugo L. Black and William O. Douglas.[11] If Brennan was successful in garnering a fifth vote, then Warren would have the assignment power. Often, Warren assigned Brennan to write opinions in seminal cases. Notably, the chief justice assigned him *Baker v. Carr*,[12] the reapportionment case that Warren deemed "the most important case of [his] tenure,"[13] and *Cooper*

Earl Warren and William J. Brennan served together on the Court for 12 years and mostly voted in lockstep. Above they are shown examining Chief Justice John Marshall's Courtroom notes at the National Archives in 1966.

v. Aaron,[14] a 1958 case denouncing Southern resistance to school desegregation.

Thurgood Marshall was appointed in 1967, and soon became Brennan's ally.[15] Marshall's presence gave the Court a solid block of seven liberal justices. Such a large number of like-minded justices put Brennan at ease—he no longer needed to rely on using Warren's opinion assignment power to force wavering justices to author opinions that aligned with his liberal values.

Beginnings of the Case

In June 1966, Vivian Thompson moved from Dorchester, Massachusetts to Hartford, Connecticut to live with her mother.[16] Thompson was a 19-year-old, unwed mother of one with a second child on the way. After her mother could no longer support her financially, Thompson moved into her own apartment but remained near her aging mother's Hartford home.

Thompson did not have the means to cover her living expenses. Since she was pregnant again she could not participate in a job training program. And because she was no longer a Massachusetts resident, she did not qualify to receive Aid to Families with Dependent Children (AFDC) assistance from Boston. Thompson applied for Connecticut public assistance. On November 1, 1966, Bernard Shapiro, Commissioner of Welfare for Connecticut, denied Thompson's AFDC application solely because she had not met the Conn. Gen. Stat §17-2d residency requirement, which stated in relevant part:

> When any person comes into [Connecticut] without visible means of support for the immediate future and applies for [AFDC] . . . within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, [and] provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement.[17]

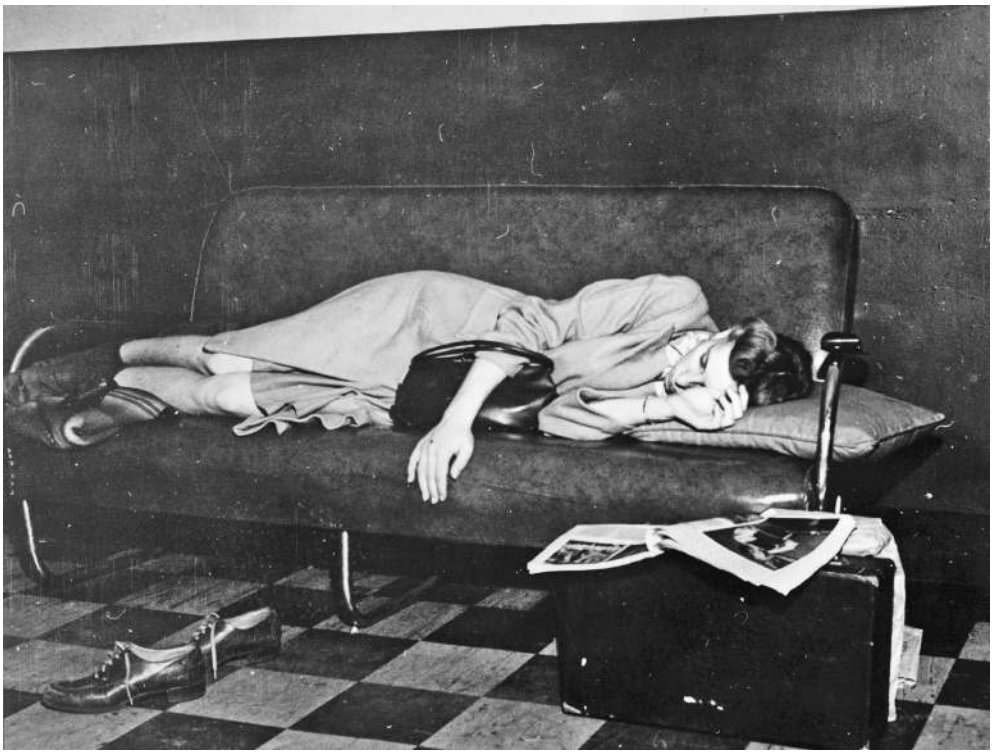
To "protect its fisc" and ensure receipt of federal funding, Connecticut imposed the maximum waiting period—one year.[18] Thompson subsequently filed suit in the Connecticut District Court, alleging an impermissible infringement on her constitutional rights.

Shapiro was initially framed to contest the right to receive welfare benefits. Originally the Aid to Dependent Children program, "welfare" was enacted as part of the Social Security Act of 1932 during the Great Depression, meant to help qualifying single mothers. In 1962 it was renamed the Aid to Families with Dependent Children (AFDC) program. The program was criticized with three arguments: AFDC encouraged poor adults who could work to not work; it caused dependency—people embraced it as a way of life rather than as a temporary safety net; it encouraged having children out of wedlock. The case came before the courts at the height of such criticisms, meaning its decision would likely be taken as a comment on the AFDC's policy effects.

The Connecticut District Court

The Connecticut District Court found the welfare waiting periods had a "chilling effect on the right to travel."[19] The "right to travel" originated in *Edwards v. People of State of California*,[20] a 1941 case where the Supreme Court struck down a California law making it a misdemeanor for residents to bring non-resident indigents into the state. The Court held that the law infringed on an indigent's "privilege of [United States] citizenship" to "move freely from State to State." "[I]f national citizenship means less than [having the right to travel], it means nothing."

According to the Connecticut court, *Edwards* extended to the instant case, because the "right of interstate travel embodies not



The *Shapiro* case questioned whether the federal Social Security Act permitted states to enact residency requirements of up to one year as a prerequisite to receiving welfare benefits. The plaintiffs argued it infringed on their right to travel. Above a girl waits between buses at the Chicago Greyhound Terminal.

only the right to pass through a state but also the right to establish residence therein."[21] The judges applied rational basis review, which requires only that a classification be "rationally related" to some legitimate state interest. Notwithstanding the deferential nature of this standard, the district court still struck down the Connecticut statute as constitutionally impermissible. "Even if the [statute's] purpose were valid," it wrote, "the classifications are unreasonable."[22] First, the "classification based on wealth" was unreasonable because Connecticut did not show "the applicant with cash would be a lesser drain on the state treasury." Second, the residency requirements were unreasonable because the state did not show that applicants who lived in the state for one year would be "lesser burdens than applicants without jobs or one year's residence."

The state appealed to the Supreme Court under the Three Judges Act, which authorized direct appeals to the Supreme Court.[23]

The Supreme Court Hears the Case, May 1968

On January 12, 1968, the justices noted *Shapiro v. Thompson*'s probable jurisdiction—but which justices did so is unclear.[24] Brennan's docket book indicated that all but Chief Justice Warren, William O. Douglas, and Thurgood Marshall noted probable jurisdiction.[25] Warren's docket book varied from Brennan's: He drew checkmarks next to each justice's name but appears to have erased the marks next to Marshall, Brennan, and Douglas's names.[26] Warren's docket book in the following Term confirms the three did not note

probable jurisdiction.[27] These discrepancies were the first of many disagreements surrounding *Shapiro* and its sister cases, *Washington v. Legrant*[28] and *Reynolds v. Smith*[29]—referred to in tandem as "the Welfare Cases."

On April 12, Vivian Thompson's counsel, Francis J. MacGregor, filed her brief, which alleged four reasons as to why Connecticut's residency requirement statute was invalid. First, the statute infringed on the right to travel in violation of the Privileges and Immunities Clause of the Fourteenth Amendment. Second, the statute violated the Fourteenth Amendment by abridging the right to establish residence in Connecticut. Third, the statute violated the Equal Protection Clause because it discriminated against persons based on their wealth. Fourth, the statute violated the Equal Protection Clause because its classification was unreasonable considering the statutory purpose.[30] The latter two allegations sought equal protection coverage for poor persons.

On May 1, the Court heard the Welfare Cases. According to Brennan's Term Summary, questioning "focused on the 1966 [Social Security Act] amendments and from there the problems began."[31] The federal Social Security Act (SSA) permitted states, in relevant part, to enact residency requirements of up to one year as a prerequisite to receiving welfare benefits.[32] The state of Connecticut, understanding SSA residency requirements as constitutionally permissible, urged the Court to extend such logic to residency requirements in public assistance statutes.[33] Whether the SSA regime was controlling "loomed important," as it turned *Shapiro*'s question from a state's power to *restrict* travel, perhaps under the Equal Protection Clause, into "whether Congress [] *regulated* travel [beyond] its limitations."[34]

Francis MacGregor, Assistant Attorney General of Connecticut, argued on behalf of Bernard Shapiro, Commissioner of Welfare of the State of Connecticut. MacGregor split his time with the Assistant Attorney General of the State of Iowa, Lorna Williams.[35] MacGregor argued the Court could, itself, create a "rational explanation" for the statutory classifications at issue, but Brennan asked MacGregor to "suggest one."[36] MacGregor proffered that although the statutes discouraged traveling to "get on . . . welfare," they eased the state's administrative burden. States had a "considerable problem" when it came to the insufficient "amount of welfare funds" they were receiving. The state's administrative interest, MacGregor insisted, therefore outweighed the statute's impact. Discussion of statutory impact piqued Warren's interest, who asked whether Connecticut "claimed" Thompson as a citizen. MacGregor answered the question with another question: "Well, would she have come [to Connecticut] if welfare was not available[?]"

Brennan and Warren's comments about the reasonableness of the classification shone a light on their conflicting stances. With "so many dollars [are] available," Brennan suggested states could protect their fiscal interests without implementing waiting requirements. Warren asked whether a state lacking funding could constitutionally "cut off all those who have been [in the state] for five years."[37] MacGregor replied that "some states . . . have [a] five [year] residency requirement" under the SSA."[38]

When Lorna Williams took her turn at the podium, Justice Abe Fortas dominated the conversation with her, only letting Justice Potter Stewart interject briefly.[39] Warren and Brennan both remained quiet throughout Williams' argument, with Warren speaking up only to thank Williams for her argument.[40]

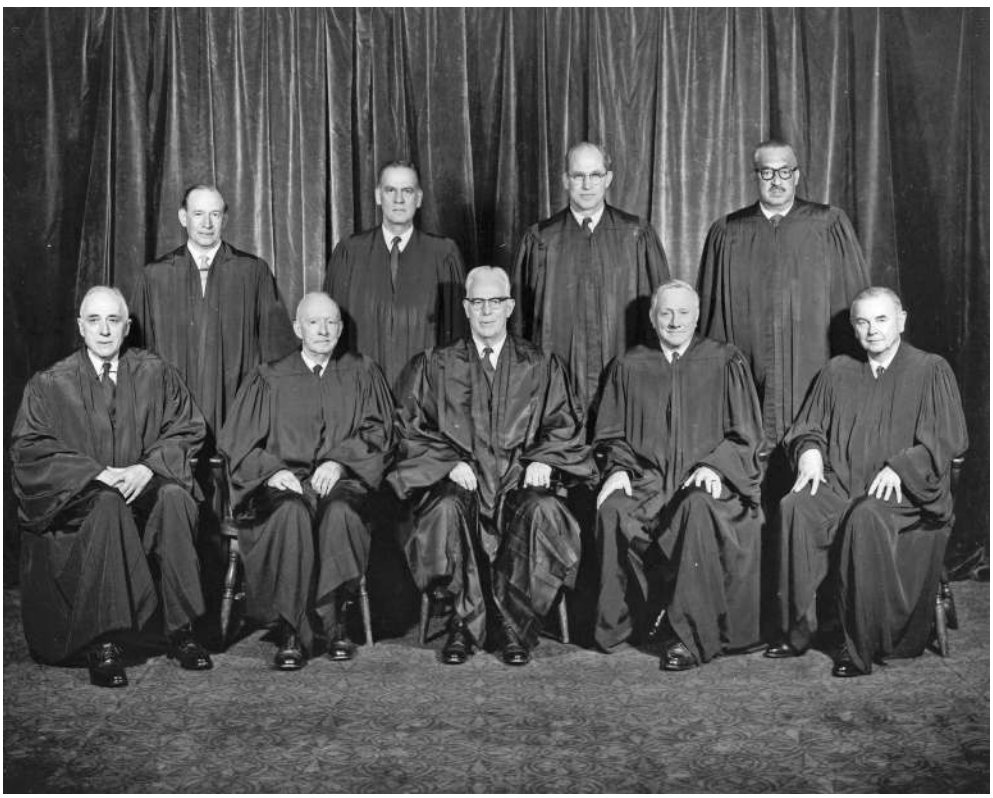
Brian L. Hollander, a Hartford attorney, argued on behalf of Thompson. Fortas, again monopolized questioning to focus on whether residency requirements for welfare payments "burden[ed] . . . the right to travel."[41] Brennan interrupted to clarify: Constitutionally, disqualifying Thompson for "no reason

except that she's not been in the state for one year . . . cannot be done," he stated, "that's really your argument."[42]

Washington v. Legrant and *Reynolds v. Smith*

Shapiro did not arrive before the Court alone. Two other appeals were heard in tandem with *Shapiro—Washington v. Legrant*[43] and *Reynolds v. Smith*.[44] The three cases were aggregated because, like Shapiro, appellants in both *Legrant* and *Reynolds* sought certiorari after a "three-judge District Court [held] unconstitutional a [nonfederal] statutory provision which denie[d] welfare assistance to residents . . . who ha[d] not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance."[45] In *Reynolds v. Smith*, Juanita Smith was denied AFDC aid on the ground that she had not lived within Pennsylvania for one year proceeding the filing of her application. *Washington v. Legrant* had four appellees. Three of them—Minnie Harrell, Gloria Jean Brown, and Clay Mae Legrant—applied for and were denied AFC. Vera M. Barley, the fourth appellant, applied for and was denied benefits from a disability program. All four appellants were denied aid by their respective jurisdictions on similar grounds to *Reynolds*.[46]

During the portion of oral argument dedicated to *Washington v. Legrant*, Warren focused on the Social Security implications. He asked Richard Barton, Assistant Corporation Counsel for the District of Columbia, arguing on behalf of Walter E. Washington, the Chief Executive of the District, whether the type of dispersed aid impacted the constitutionality



The Warren Court justices heard the first oral argument in the Welfare Cases in May 1968.

of waiting periods. Barton answered in the negative—in his opinion, even the SSA residency requirements were unconstitutional. Brennan interjected: "But I gather your argument," he said, is that the government has a "broader latitude . . . to regulate the right to travel . . . [I]s that your point?" Barton replied, "Yes, it is."[47]

Peter S. Smith, Legrant's counsel, argued no welfare applicants moved "for the purpose of getting public aid." Brennan, for the last time during oral arguments, spoke to clarify Smith's position: "the reasons why" people went to a state were not decisive—what mattered is whether they participated in interstate travel.[48] Warren remained silent.

During argument for *Reynolds v. Smith*, William C. Sennett, Attorney General of Pennsylvania, discussed the state's treatment of indigent non-residents seeking disability: "reciprocal agreements" allowed Pennsylvania to provide benefits to non-residents coming from one of 18 states.[49] If the person requesting benefits came from one of the other 32 states, Pennsylvania would arrange for the requester to return to their state of origin—and if they refused to leave, "individual counties" could "provide benefits." Interested, but not enough to inquire further, Warren reaffirmed what he had heard: "[So y]ou do have programs . . . that [permit indigents to receive disability benefits]." Replied Sennett, "That's correct, Mr. Chief Justice."[50]

Conference

On the afternoon before most Conferences, "Brennan and the Chief would get together" to discuss "the cases and the approaches."[51] If they could corral five votes at Conference, Warren would have assignment power, and the pair would be in a fortunate position heading into drafting. That Warren voted in the majority at the Welfare Cases Conference meant he had the assignment power—with a caveat. Brennan explicitly asked Warren not to assign him the opinion. presumably when the pair met the day before Conference.[52]

On May 3, 1968, the justices met to discuss the Welfare Cases and vote on the merits.[53] Douglas, Warren, and Brennan's Conference notes show the original vote was 5–4, reversing all three of the lower courts.[54] The Chief Justice, voting to reverse, spoke first.[55] Warren felt "very strongly" that waiting requirements were "appropriate because otherwise [states] would not be as generous in [their] welfare and assistance programs, if anyone who just arrived in the state could get [welfare]."[56] "[Warren] just can't see," transcribed Brennan, "how [he] can say that the [SSA] is [unconstitutional]."[57] Douglas, too, wrote in his Conference notes that Warren couldn't "say [the SSA] is bad" because "Congress lets states [have] discretion as to residence up to one year."[58] Douglas also noted Warren wished to "reverse" because there existed "another category of state relief available to indigent[s] who can't prove 1 year residence."

Brennan found it "hard to say" residency requirements constituted "invidious discrimination" because the requirements did, in fact, ease administrative problems, and the statutory impact on indigents was incidental to the scheme's real purpose. He therefore cast a "tentative[]"vote to reverse.[59] Warren assigned himself to author the Welfare Cases.[60]

Drafting

On June 1, nearly one month after the initial Conference, Warren assigned the Welfare Cases to his law clerk, Charles Wilson. At the direction of Warren, Wilson read "more than 5,000 pages of . . . legislative history of the Social Security Act" before he began writing.[61] Wilson's draft maintained that the SSA proved Congress properly "authorized the States to impose one-year waiting periods" prior to receiving benefits under the commerce power."[62] On June 3, Warren circulated a draft opinion, but it "did little to

hold the majority together" because it did not go further than interpreting §402(b).[63]

Warren refused to re-examine the right to travel "partly because of the pressure of time as the end of the Term approached and partly because the uncertain Conference vote . . . did not make the cases an ideal vehicle for re-examining the meaning and scope of the right. . . ."[64] Brennan was "not at all convinced" by Warren's logic and found it particularly difficult to support the inference that states were constitutionally permitted to act on their "desire to exclude indigents" from interstate travel.[65] Unwilling to join Warren, and largely uninterested in providing substantive feedback, Brennan did not respond to the draft.

After drafting one handwritten and two typewritten versions of his dissent, Douglas circulated a printed copy to the Court on June 5.[66] Douglas "would join the opinion of the court" if this case concerned the commerce power—but under *Edwards*, "[t]he right of movement is a 'privilege' or 'immunity' protected by §1 of the Fourteenth Amendment." The lower courts should be affirmed, he thought, because the states gave "no substantial justification for the interference with the right to travel."

Two days later, the justices decided the Term would end on June 17, and that they would hold a final Conference on June 13.[67] Brennan, however, would not attend the final Conference because he would be at Harvard to accept an honorary degree.[68] The fast-approaching end of the Term and Brennan's absence sparked an urgency in Fortas, who hurried back to his office to "plug[] away at the dissent," hoping Brennan "and other uncertain Justices would hold off until [its circulation.] But time was fast running out."[69]

On June 10, John M. Harlan circulated a concurrence that justified Congressional waiting requirements as "reasonable" means that served various state interests.[70] Brennan believed Harlan's effort was more convincing than Warren's or Douglas's but found several of Harlan's reasons "reduced to the proposition that the States wanted to keep out indigents."[71] He did not need to settle for Harlan's concurrence. The same day, Fortas, in a state of "near desperation," submitted a "rough draft [of his dissent] to Brennan."[72] It was nowhere near finished, but Brennan believed Fortas's draft did "an effective job of demolishing the chief justice's opinion and a fairly credible job of dealing with [] Harlan's."[73]

Listing his arguments in bullet points, Fortas labeled the purported justifications as "unreasonable" acts which exceeded their constitutionally permitted scope.[74] "Congress was justified in authorizing the state to interfere with the right to travel because it did so in order to induce the states to cooperate in the program to provide improved welfare benefits to the needy," he wrote. "This is the only reason advanced to justify the state legislation."[75] The Connecticut statute "obviously and palpably was designed to discourage poor people from [engaging in interstate travel] . . . by denying relief to residents who have been resident for less than a year." "The fact that here we deal with the right to travel," Fortas said, "makes no difference." He did not believe it could be "seriously contended" that Congress would be "constitutionally justified" in claiming state cooperation as a "need" when the legislative effect was blatantly discriminatory—for example, if the legislation allowed the building of segregated southern schools. This analogy to authorizing programs to build segregated schools resonated with Brennan—the same analogy appeared in the justice's eventual majority opinion.

On June 11, Brennan joined Fortas's dissent. Brennan agreed the cases could be disposed of on the burden argument alone and expressed hesitancy as to whether it was necessary to "add the additional support of a denial of equal protection."[76] Believing "he may have a Court [now that] Justice Brennan

[was] considering changing his vote," Fortas took and applied Brennan's comments.[77] He printed and circulated a draft of his dissent on the morning of the June 13 Conference.[78]

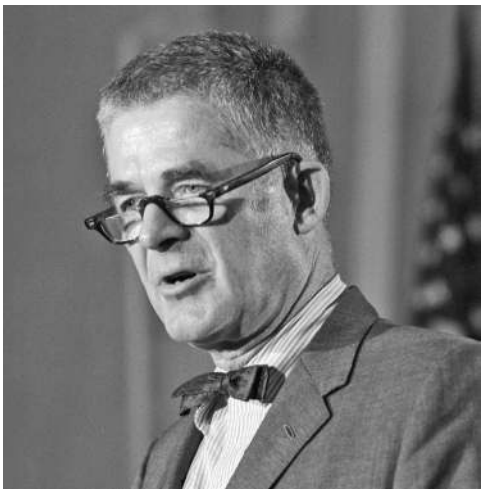
But "Fortas' jubilation was short-lived."[79] The other justices were not as enthusiastic about Fortas's dissent—Douglas scribbled "Really? So what?" next to a point made about how the residency requirement "obviously and palpably" discouraged "poor people from coming [or leaving]."[80] At Conference, the justices split 4–4. "Justice Stewart apparently refused to be rushed into making a deciding vote."[81] His refusal wrested control from both Warren and Brennan—and with that, the Welfare Cases were put over for reargument. On June 19, at the end of the Term, the parties were instructed to "brief and argue [law clerk Wilson's proposed] question" of which "test of validity [should] apply" to the residency requirements.[82] On June 26, Warren announced that he was retiring as soon as his successor, Abe Fortas, was confirmed.

Reargument: October 1968

Thompson's supplemental brief presented two arguments.[83] First, the "one-year residence requirement violates the Equal Protection and Due Process Clauses by discriminating, without justification, between persons identically situated in relation to fundamental human needs, solely because of the exercise of geographic migration." Second, "§402(b) of the Social Security Act is not controlling."

Reargument of the Welfare Cases spanned two days, from October 23 to October 24, 1968.[84] Connecticut Assistant Attorney General Francis MacGregor and Iowa Assistant Attorney General Lorna Williams again argued on behalf of the appellants.[85] Two weeks earlier, Fortas, the nominee for chief justice, had withdrawn his name in the face of allegations that he had advised President Johnson on policy matters and lied to the Senate about it and that he had accepted fees for university lectures from parties with business before the Court. Warren would stay on the Court for the rest of the Term and participate in *Shapiro* to its conclusion. During oral argument, Fortas spoke more than any other justice. Unlike the first set of arguments, there was much discussion of the right to travel, the Fourteenth Amendment, and which standard of review to apply. Richard Barton, Assistant Corporation Counsel for the District of Columbia in the *Washington* case, argued that fiscal conservation and "prevention and detection of fraud" were two constitutionally "proper legislative purpose[s]."[86] Barton distinguished *Edwards v. California* (1941),[87] which had struck as unconstitutional a law criminalizing the bringing of a non-resident indigent person into California and *United States v. Guest* (1966),[88] which condemned as impermissible a criminal conspiracy affecting an individual's right to free interstate passage.[89] Those cases, contested Barton, concerned "a direct infringement upon the right to travel," whereas the Welfare cases "mere[ly] discourage[d]" exercise of the right.[90]

Instead of Hollander, Smith, or Sennett arguing for the three appellees as they had in May, Archibald Cox, Harvard Law Professor and former Solicitor General, took over.[91] Cox said "the courts below were right in very largely ignoring §402(b)" in their analysis, as there existed "no question" of judicial deference to the legislative judgment that "a one-year requirement is a good thing."[92] This statement elicited Warren's first comment of the day because his draft from the previous term relied on §402(b).[93] Making a nod to Cox's oral argument in the seminal *Reynolds v. Sims* (1964),[94] which held that the electoral districts of state legislative chambers must be roughly equal in population, Warren asked whether "instead of the appellees asking for [welfare, indigents] ask[ed] for . . . and were denied the right to vote . . . How would that appeal to you on the travel argument that you made?"[95]



Archibald Cox, Harvard Law Professor and former Solicitor General, argued the cause for the appellees in all three cases on the re-argument in October 1968.

Cox took a narrow approach, arguing "the differentiation between old and new residence serves a useful purpose" for exercising voting rights.[96] But an old man, Cox proffered, should be eligible to receive a pension "as soon as he becomes a resident," as waiting periods in the old-age pension context did not serve a legitimate purpose.[97] The Court recessed for the evening–-and Brennan went home without uttering a word.

Cox began argument the next morning by advising the Court that it need not "break new constitutional ground in [the Welfare cases]."[98] Rather, the justices needed only to stay in "accordance with settled constitutional principles" by "condemning discrimination" in legislation that bore no "rational relationship to some state objective."[99]

Warren re-visited his voting rights question from the previous day. He mentioned that there exists "no distinction" between people who were "temporarily in a community and those who have lived there for a long time" when voting for the president of the United States. Cox pointed out that the "Constitution itself introduced that distinction," and promptly shifted to answer Stewart's questions concerning the percent of welfare applications in the District from people who hadn't satisfied the year-long waiting requirement. Brennan finally broke his silence—but only to correct Cox's presented figures, rather than to ask a material question.[100]

Justice Byron R. White asked whether out-of-state tuition is unconstitutional. Cox replied: "[C]ollege education, important as it is," is not a "basic necesssit[y] in life." Warren asked, "What is then, General?" Said Cox: "[W]hether you preserve the family, or whether people have food or shelter over their heads, or whether they go free, . . . is more fundamental, more important to human existence than whether one has the benefit of a college education."[101] Brennan got the last word, again only to clarify what he had heard: "Your argument is that if [fiscal conservation] were the[] real [statutory] purpose then [the statutes would] be unconstitutional in a different way than they are being unconstitutional right now."[102] Cox agreed.

Conference

The following Monday, October 28, the justices met to discuss the Welfare Cases.[103] The initial Conference vote was 5–3 to affirm.[104] Douglas noted that Stewart, who had refused to make up his mind in the Term prior, "follow[ed] Cox's argument & brief," and cast a vote to affirm the lower court's holding that the Connecticut statute was unconstitutional.[105] Brennan, too, voted to affirm. White passed on the initial vote. Warren "adhere[d] to [his] earlier views" and voted to reverse.[106] Black and Harlan maintained their votes to reverse.[107] Because Warren voted with the minority, opinion assignment power fell to the most senior justice in the majority—Douglas, who assigned the opinion to Brennan.[108] That Douglas assigned the opinion to Brennan and not Fortas seems curious. Fortas had authored a dissent urging

the Court to affirm in the previous Term and contributed extensively in oral reargument. Perhaps Douglas felt hesitant to assign Fortas a case that would strike down congressional legislation considering the Senate had on October 4 refused to vote on Fortas's nomination to replace Warren as chief justice.

Douglas received a note from "A," which informed him that he would be "assigning the welfare cases."[109] It could be that 'A' was Fortas, seeing as he wrote the Welfare Case dissent the Term before. Regardless of who was behind the message, "A" suggested tactically assigning the opinion to maintain his majority: "Do not hesitate to assign [the cases to Stewart] if you think that's [necessary] to ensure that he doesn't fall of the wagon." If this note had any impact on Douglas's decision in assigning the Welfare Cases, it is logically sound that Brennan received the opinion over Fortas and Stewart. Brennan was known for creating and maintaining majorities—and in a case with a razor-thin margin such as the Welfare Cases, his ability to navigate the pulse of the Court seemed much needed.

Brennan's reputation for cobbling together majorities may not alone have convinced Douglas to assign him the opinion. Perhaps Brennan's history—namely, his work to develop equal protection for the poor in *Griffin v. Illinois*[110] and *Gideon v. Wainwright*[111]—suggested he should author *Shapiro*. After all, affirming the Welfare Cases meant tackling the underdeveloped constitutional question of what standard of review should apply to legislation burdening the fundamental right to travel. The notion of "levels of judicial scrutiny" was suggested in Footnote 4 of *United States v. Carolene Products Co.* in 1938.[112] Most recently, *Loving v. Virginia,*[113] decided the Term before, found that statutes must be narrowly tailored and use the least restrictive means possible to achieve a compelling government purpose if implicating a fundamental right. If Brennan could convince other justices that the standard of review to apply turned on the defendant's socio-economic status, he would be that much closer to establishing income as a constitutionally cognizable class.

Brennan and his clerks had a theory as to why Douglas did not assign Fortas to write the majority: The "shortcomings" in Fortas's dissent in the Term prior "played a large role in Mr. Justice Stewart's hesitation last term" and "Professor Cox's arguments . . . finally and firmly persuaded Justice Stewart" to cast an affirming vote.[114] Assigning Fortas to write the majority would risk losing Stewart's vote.

The assignment likely irritated Warren. Brennan had, after all, refused to author the opinion just months prior. But Brennan's willingness to accept such a task after reargument supports this theory—he did not wish to be the one to pen the welfare holdings unless he was expanding equal protection for the poor. Whether in blatant defiance or to regain a semblance of control, Warren refused to cast his final vote before each justice first circulated his respective opinions.[115]

Drafting

On October 24, 1968, immediately after reargument, Harlan circulated a 17-page memorandum that largely echoed his drafted concurrence from the Term prior.[116] Without acknowledging the memo, Brennan began working on the majority opinion. On December 2, Brennan circulated his draft.[117] Notwithstanding the tight 5–3 initial Conference vote, with Harlan, Warren, and Black voting to reverse, Brennan adopted Professor Cox's argument: "fundamental rights" deserved the strictest standard of review. Waiting requirements impermissibly classified "between new and old residents" and "penalized the exercise of the right to interstate travel."[118] Against the suggestion of his clerks, who worried he may lose his majority for taking

such a broad approach, Brennan echoed Cox and stated the one-year residency requirements put at stake "the very means to subsist–food, shelter, and . . . necessities of life."[119]

Douglas, Stewart, Fortas, and Marshall all joined Brennan's opinion.[120] On December 4, only two days after Brennan circulated the opinion, Marshall wrote Brennan asking to "join me in this one," calling it a "perfect job—clear and precise—not over-broad—just right."[121] Fortas joined on December 6, stating simply, "I agree."[122] Before Stewart and Douglas responded, however, Harlan wrote on December 5: "I shall circulate a dissent in these cases."[123]

Given that Stewart had refused to cast a decisive vote on the Welfare Cases in the previous Term, Brennan likely expected him to continue to waiver. Stewart did "express[] hesitation about the use of the compelling interest analysis" in Brennan's opinion.[124] He believed the proper form of review to be a "traditional standard of equal protection"—rational basis review.[125] Brennan was "amazed by Stewart's position,"[126] particularly because Brennan understood *Carrington v. Rash* (1965),[127] authored by Stewart himself, as applying a heightened standard of review to strike legislation burdening the fundamental right to vote." [128]

In a memo to Stewart, Brennan addressed the impact of *Carrington* on the Welfare Cases.[129] Brennan acknowledged that while his majority "strongly implies . . . administrative objectives advanced as justification for the waiting period requirement do not qualify" under rational basis review, such was not the message he meant to convey. He went "no further than to say" even under rational basis review, "a classification of welfare applicants according to whether they have lived in the state for one year would seem irrational and unconstitutional." Brennan found this distinction important, as he felt "uneasy" issuing a "flat statement that the waiting period requirement is invalid" under the most deferential standard of review because he wasn't sure precedent could support such a claim.

To prove his point, Brennan cited *Carrington*, which found a state's interest in "administrative benefit" did not justify infringing on *bona fide* residents' exercise of voting rights. "If the [*Carrington*] issue did not involve an underlying constitutional right," said Brennan, "'some administrative benefit' would have sufficed" as a justification. To protect the right, then, meant to "go beyond" rational basis review—just as the Court did in *Carrington*. Brennan was not willing to forgo a compelling interest standard–the Welfare Cases, he said, "clearly" involved the underlying right to travel.[130] If Brennan were satisfied with anything *less* than strict scrutiny, he could have produced Fortas's dissenting opinion (applying rational basis review) from the previous Term with little to no substantive change.

Brennan's refusal to change the standard of review worked. Stewart conceded his insistence on rational basis review was mistaken and agreed a compelling interest analysis was appropriate because "the right of interstate travel . . . was a constitutional right."[131] He was willing to accept Brennan's opinion "as long as no reliance was placed on *Carrington* or on *Williams v. Rhodes*,[132] another case involving the right to vote." Instead of conducting a "lengthy analysis of the doctrinal roots of the right to travel," Stewart suggested Brennan cite *United States v. Guest* (1966).[133] *Guest* held that it violates the Fourteenth Amendment if a state participates in a conspiracy to deny African Americans of full and equal enjoyment to access state highways, based on the "constitutional" right to travel. Further, *Guest* held that the right to interstate travel "occupies a position fundamental to the concept of our Federal Union" and is "firmly established and repeatedly recognized [by our Constitution]"—in other

words, the right emanated from the "Constitution itself." Stewart, who wrote the *Guest* majority, stopped short of identifying a home for the right, even though earlier cases like *Edwards v. California* (1941) identified the right to travel as protected by the "privileges or immunities clause of the Fourteenth Amendment."[134] Concurring justices in *Edwards* proposed that impairing a person's ability to freely traverse interstate borders violated the implied rights of U.S. citizenship, and thereby violated the individual's right to equal protection under the Fourteenth Amendment.

Brennan used the *Guest* Court's refusal to identify a particular source of the right to recognize it as fundamental. Indeed, his majority later said: "the nature of our Federal Union and our constitutional concepts of personal liberty . . . require that all citizens be free to travel throughout … our land uninhibited. . . ."[135] Brennan could use *Shapiro*, then, to further protect the poor by finding that a state's purpose of inhibiting a poor person's exercise of the right as constitutionally impermissible. Brennan agreed to cite *Guest* and refrain from placing reliance on *Carrington*. On January 7, 1969, Stewart told the Conference he was "glad to join the [majority] opinion."[136]

Black and Harlan: Drafting

While Brennan was preoccupied with Stewart, Black circulated an opinion concurring in part and dissenting in part.[137] He relied heavily on *Takahashi v. Fish & Game Commission* (1948),[138] an opinion he authored, which posited that state legislation could not infringe on the rights of the people to reside where they wished. If Brennan would quote *Takahashi* in his opinion, Black would join to affirm the state cases and issue a brief dissent in *Washington v. Legrant*, which concerned an Act of Congress.[139] Brennan obliged, leaving him with six votes upholding application of a strict scrutiny analysis on infringing an indigent's right to cross state lines.

On January 7, 1969, Harlan circulated his dissent. He scrutinized the majority's heightened standard of review—in his opinion, strict scrutiny should only be applied in cases concerning a legislative classification involving race.[140] Brennan thought this to be a "surprisingly weak" statement, seeing as the Court applied heightened levels of review in striking non-racial classifications as recently as the Term prior in *Loving v. Virginia*.[141] Harlan accused the majority of legislating from the bench, while simultaneously suggesting an *ad hoc* equal protection balancing test, a standard often criticized as being legislative itself.[142] He concluded his dissent by stating the majority "turned on the right to the necessities of life rather than the right of interstate travel." Harlan circulated another draft on February 10,[143] and another on February 17.[144] Brennan responded to none of Harlan's opinions.

To Brennan's surprise, on February 19, Black wrote to the Conference asking Brennan to "[p]lease note at the end of your opinion 'Mr. Justice Black dissents'," notwithstanding the incorporated references to *Takahashi*.[145] Brennan likely saw no point in trying to get Black to change his mind: the Alabama justice was blatantly contradicting his own precedent and without him Brennan still had five votes. Brennan deleted the *Takahashi* references.[146] White, after reading Harlan's third dissent draft, voted to affirm on February 21: "I have been slow but I am now traveling with you as the Due Process Clause or some other provision tells me I have the right to do."[147]

Stewart and Marshall Delay Their Response to Harlan

Stewart told Brennan he wished to address Harlan's dissent.[148] It was a logical request as Harlan negatively referenced two of

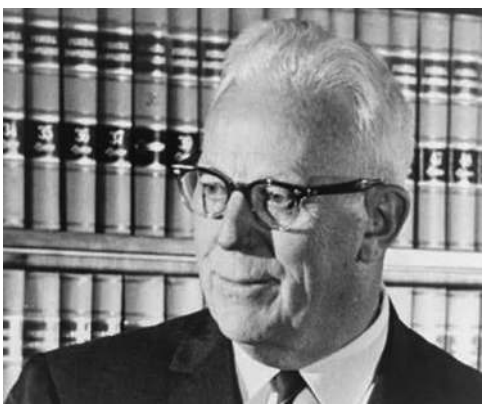
Stewart's opinions: *Carrington* and *Guest*. A few days after his request, Stewart notified Brennan that "a series of distractions this week" meant he had "simply not been able to give any thought to *Shapiro*."[149] Stewart insisted his concurrence would be only a few paragraphs, but he would not have drafts ready for at least a week more.[150] A week later, Stewart again wrote Brennan to tell him Marshall, instead, would respond to Harlan.[151] Brennan saw "no reason" why Marshall should respond, and Marshall did not give him any.[152]

Several days passed without an opinion from Marshall's chambers. Brennan was growing impatient. Warren, however, would not come down on one side or the other until Stewart and Marshall circulated their thoughts. Stewart and Marshall were in no hurry—Marshall told his clerks he was "not [actually] planning to write a concurrence."[153] It can be inferred that Marshall and Stewart were instead attempting to stall deciding *Shapiro* until after Congress voted to raise salaries for the justices on March 1.[154] The worry was that Congress would be dismayed if *Shapiro* increased the burden on states to pay for indigent assistance. If Marshall and Stewart delayed *Shapiro*, Congress could not cast a retaliatory vote against the pending judicial salary bump.[155]

On March 1, 1969, with Brennan growing impatient and Warren silent, Congress put into effect the highest salaries for federal judges since at least 1913.[156] The salary for Associate Justices increased from $39,500 to $60,000.[157] Chief Justice Warren saw an increase from $40,000 to $62,500.[158] Five days after the salaries were announced, Stewart, not Marshall, circulated a brief concurrence. He asserted the Court "simply recognize[d], as it must, an established constitutional right, and [gave] to that right no less protection than the Constitution itself demands."[159] Surely, two justices delaying a case concerning access to the "necessities of life" to ensure an increase of their own salaries was not an irony missed on Brennan. With each associate justice having voiced his opinion, it was time to hear from Warren.

Warren's Response

In 1967, Warren, along with four others, voted in Conference to reverse the lower courts and find the Connecticut statute constitutional.[160] In 1968, Warren voted again to reverse—but only two other justices agreed with him.[161] Brennan did not expect Warren to vote in the majority: he believed Warren favored residency requirements because they "enabled a State to give more liberal benefits without fear of being swamped by indigent immigrants."[162] As the former governor and attorney general of California, Warren had personal experience with the impact that lack of waiting requirements could have on a state. The California state disability program had "been destroyed" by the legislature after too many persons who were disabled "flock[ed] in[to California] just to grab more generous [welfare] benefits."[163] To fix the issue, California "imposed a five-year



Having served as governor of California from 1943 to 1953, Chief Justice Warren knew the impact that lack of waiting requirements could have on a state. He did not join Brennan's opinion because he was more concerned about protecting citizens from out of staters moving to California for its generous welfare benefits than about the right to travel.

residency requirement to be eligible for [welfare] benefits."[164] Warren thought a one-year residency requirement in place of a five-year requirement "was an absolutely fair resolution," which aligned with his reputation for feeling a "responsibility . . . to the citizens and the voters of the State."[165] Warren also likely viewed *Edwards* as another example of states trying to prevent "freeloaders" from coming into California specifically, much more than he viewed it as a case concerning the right to travel.

In contrast, Brennan categorically prohibited Congress's ability to enact waiting period requirements.[166] To otherwise permit such an exercise of congressional power, he claimed, would allow them to legislate outside of their constitutionally permitted authority.[167] The paragraph, located on page 22, was identical to the school segregation analogy from Fortas's dissent in the 1967 Term, which had led Brennan to switch his vote and affirm.[168] It read:

> Congress may not authorize the States to violate the Equal Protection Clause. Doubtless, Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? The need, real or apparent, to enlist state cooperation in a joint federal-state program does not validate congressional legislation which authorizes the States to violate the Equal Protection Clause.[169]

To Brennan's surprise, Warren proposed a compromise: if Brennan removed this paragraph, Warren, in return, would concur for the state cases and dissent only for the District of Columbia case.[170] A mandatory waiting period in the District, he reasoned, wouldn't raise congressional power issues under the Commerce Clause because Congress only legislated in the District to put it "on the same footing as the States which had imposed waiting periods."[171]

Brennan did not understand why Warren would concur—such a stance did not seem to square with Warren's experiences—nor did he understand why Warren believed removing this paragraph would "leave open the question of congressional power."[172] Brennan figured he could avoid this "agreement with the Chief if enough of the Justices who had voted with him complained about the omission of the [contested] paragraph."[173] Accordingly, Brennan did not flat-out refuse Warren's request, as he had done earlier in the Term with Stewart. Given Warren's announced retirement, Brennan may have wanted to refrain from burning a twelve-year-old bridge. Further, if publicizing the compromise to the other affirming justices could get them to back up his opinion, the majority would present as a solid front to the rest of the Court and potentially convince them, too, of the legal soundness of his arguments.

On March 25, 1969, Warren circulated a concurrence stating the majority opinion "[left] open the question whether Congress could constitutionally impose a residence requirement on the States."[174] Brennan circulated a version of his opinion omitting the page 22 paragraph, and wrote to his majority—Douglas, Stewart, White, Fortas, and Marshall—to explain "the deletion of the paragraph at page 22."[175] Brennan implied the deletion meant Warren might concur rather than dissent because the Chief Justice believed the omission meant the question of congressional power "remained open."[176] Brennan personally "doubt[ed] that deletion would do that" but was willing to omit the paragraph because it would produce a "7–2 [holding] . . . and, in this area, I think that is desirable."[177]

The joining justices reacted as Brennan expected they would. The next day, on March 26, Fortas responded that the majority opinion, in his view, "does not leave open the question of Congressional power" and that the chief justice's concurrence put everything in a state of "utter confusion."[178] Fortas believed the majority still made clear that "Congress could not authorize a waiting period requirement," although he would "prefer reinstating the deleted material."[179] Omission or not, he said, Fortas was "with [Brennan] either way."[180]

Brennan was "not altogether displeased" with Fortas's note.[181] Such a response was anticipated, if not welcomed, by Brennan. The other joining justices soon followed suit: Stewart and White in the majority, as well as Harlan in the dissent, believed Brennan's opinion settled the issue of congressional power. "The power of Congress to impose nationwide residence requirements is therefore not an open one but has been foreclosed," submitted Douglas.[182]

On March 28, Douglas, with Brennan's approval, circulated a brief concurrence about the deleted paragraph.[183] Douglas read the majority opinion "differently" than Warren because, to Douglas, the majority settled the congressional power issue.[184] Stewart, White, Fortas, and Marshall—all in the majority—planned to join Douglas's concurrence, therefore undermining Warren's concurrence.[185] As a result, Brennan "put the controversial paragraph back in the opinion," Douglas withdrew his concurrence, and Warren went back to the drawing board.[186]

On April 3, Warren circulated his dissent for the Welfare Cases, suggesting they all be reversed as he originally did in 1967.[187] But unlike the prior Term, Warren cited *Street v. New York*,[188] a case pending before the Court, to support his argument.[189] The Welfare Cases announcement would, yet again, be delayed—they could not, as a matter of procedure, be announced until *Street* was decided. Brennan privately asked Warren to remove his "hardly necessary" *Street* reference.[190] The other justices asked the same at Conference.[191] Warren refused them all.[192]

Nearly three weeks later, on April 21, the Welfare Cases and *Street* came down together. With a 6–3 final vote to affirm, Brennan, Douglas, Fortas, Marshall, Stewart, and White held that absent a compelling state interest, state laws infringing on the right of interstate travel impermissibly classify in violation of the Equal Protection Clause of the Fourteenth Amendment.

Conclusion

One can only imagine Warren's reaction to the decision. But by then the Chief Justice was counting the days until he retired, having promised President Richard Nixon he would stay to the end of the Term and until his successor, Warren Burger, was confirmed. On the Burger Court, Brennan would continue his agenda of using the Fourteenth Amendment to protect the poor. For example, in 1970, he wrote the majority opinion in *Goldberg v. Kelly*[193] invoking the Due Process Clause to prevent states from terminating welfare benefits without a fair notice and a hearing. However, as the number of Nixon-nominated justices increased, the Court scaled back Brennan's efforts to use the Fourteenth Amendment to prevent wealth-based discrimination. In 1973, Justice Harry Blackmun, a Nixon nominee, authored the majority opinion in *United States v. Kras*,[194] which held that the Due Process Clause does not require a federal district court to waive a bankruptcy filing fee for indigent individuals. That same year, in *San Antonio Independent School District v. Rodriguez*,[195] the Court issued a 5–4 decision that San Antonio Independent School District's financing system, which was based on local property taxes, was not a violation of the Fourteenth Amendment's Equal Protection Clause. In

hindsight, *Shapiro v. Thompson* represented the apex of Brennan's efforts to use the Fourteenth Amendment to protect the poor—but only by breaking ranks with his friend and ally Earl Warren.

ENDNOTES

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[2] "Justice Brennan Term Summary, Law Clerks," October 1968 Term, Brennan Papers, Box II: 6, Folder 10.
[3] 372 U.S. 335 (1963).
[4] 372 U.S. 353 (1963).
[5] 383 U.S. 663 (1966).
[6] Seth Stern & Stephen Wermiel, **Justice Brennan: Liberal Champion** (2010).
[7] Laura McCreery interviewing Robert T. Lasky, "The Law Clerks of Chief Justice Earl Warren: Robert T. Lasky," July 31, 2005, The Regents of the University of California, https://digitalassets.lib.berkeley.edu/roho/ucb/text/lasky_robert_2014.pdf.
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[9] Laura McCreery interviewing Paul J. Meyer Wilson, "The Law Clerks of Chief Justice Earl Warren: Paul J. Meyer," August 14, 2005, The Regents of the University of California, https://digitalassets.lib.berkeley.edu/roho/ucb/text/meyer_paul_2014.pdf.
[10] Mark Tushnet, **The Warren Court In Historical and Political Perspective** (1993).
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[12] 369 US 186 (1962).
[13] Earl Warren, **The Memoirs of Earl Warren** (1977).
[14] 358 US 1 (1958).
[15] Thurgood Marshall to William J. Brennan, "Memorandum to the Conference," December 4, 1968, Brennan Papers, Box I: 186, Folder 3.
[16] *Thompson v. Shapiro*, 270 F.Supp. 332, 332 (1967).
[17] Conn.Gen.Stat. §17–2d.
[18] *Thompson*, 270 F.Supp. at 333.
[19] *Ibid.*
[20] 314 U.S. 160 (1941).
[21] *Ibid.* at 336.
[22] *Id.* at 337.
[23] The Three Judges Act, 28 U.S. Code §2284, allows for direct appeal to the Supreme Court.
[24] William O. Douglas's Docket Book, October 1967 Term, William O. Douglas Papers, Library of Congress, Box 1399.
[25] Brennan's Docket Book, October 1967 Term, Brennan Papers, Box I: 161, Folder 2.
[26] Earl Warren's Docket Book, October 1967 Term, Earl Warren Papers, Library of Congress, Box 385, Folder 4.
[27] *Ibid.*, October 1968 Term.
[28] 390 U.S. 940, 88 S.Ct. 1054 (1968).
[29] 390 U.S. 940, 88 S.Ct. 1053 (1968).
[30] *Making of Modern Law*, Shapiro v. Thompson, Brief for the Appellee, October Term, 1967.
[31] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers.
[32] Public Law 89–97 of 1965.
[33] Brief of Appellant, Shapiro v. Thompson, October Term 1967.
[34] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers.
[35] Oyez, Shapiro v. Thompson, Oral Argument, May 01, 1968 at 00:00:54.
[36] *Ibid.* at 00:09:21.
[37] *Id.* at 00:9:21 to 00:19:21.
[38] *Id.* at 00:19:50.
[39] *Id.* at 00:20:17–00:31:52.
[40] *Id.* at 00:31:52.
[41] *Id.* at 00:34:39.
[42] *Id.* 1at 01:00:22.
[43] 390 U.S. 940, 88 S.Ct. 1054 (1968).
[44] 390 U.S. 940, 88 S.Ct. 1053 (1968).
[45] *Shapiro*, 372 U.S. at 335.
[46] *Id.*
[47] Oyez, Shapiro v. Thompson, Oral Argument, May 01, 1968 at 1:27:13.
[48] *Ibid.* at 01:24:29–01:32:50.
[49] *Id.* at 02:06:19.
[50] *Id.* at 02:07:42.
[51] Laura McCreery interviewing Earl Dudley, "The Law Clerks of Chief Justice Earl Warren: Charles H. Wilson," June 3, 2005, The Regents of the University of California, https://digitalassets.lib.berkeley.edu/roho/ucb/text/dudley_earl_2014.pdf.
[52] "Justice Brennan Term Summary, Law Clerks," October 1967 Term.
[53] Douglas's 1968 Calendar, 1968, Douglas Papers, Box 1112.
[54] Brennan's Docket Book, October 1967 Term, Brennan Papers, Box I: 161, Folder 2; Douglas's Docket Book, October 1967 Term, Douglas Papers, Box 1399.
[55] Supreme Court of the United States, *Supreme Court Procedures*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.
[56] Laura McCreery interviewing Scott Bice, "The Law Clerks of Chief Justice Earl Warren: Scott Bice," October 29, 2004, The Regents of the University of California, https://digitalassets.lib.berkeley.edu/roho/ucb/text/bice_scott_2014.pdf.
[57] Brennan's Docket Book, October 1967 Term, Brennan Papers, Box I: 161, Folder 2; Douglas's Docket Book, October 1967 Term, Douglas Papers, Box 1399.

[58] Douglas's Conference Notes, October 1967 Term, Douglas Papers, Box 1399.
[59] *Ibid.*
[60] Warren's Docket Book, October 1967 Term, Warren Papers, Box 385, Folder 4.
[61] *Ibid.*
[62] Warren to Conference, "Opinion," June 3, 1968, Douglas Papers, Box 1442.
[63] Douglas to Conference, "Dissent," June 5, 1968, Douglas Papers, Box 1442; Social Security Act, 42 U.S.C. §§301–1305.
[64] *Ibid.*
[65] Warren to Conference, "Opinion," June 3, 1968, Douglas Papers, Box 1442.
[66] Douglas to Conference, "Dissent," June 5, 1968, Douglas Papers, Box 1442.
[67] "FA" to William Douglas, "Note," June 13, 1968, Douglas Papers, Box 1443.
[68] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers, Box II: 6, Folder 10.
[69] *Ibid.*
[70] John M. to Conference, "Concurrence," June 10, 1968, Douglas Papers, Box 1442.
[71] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers, Box II: 6, Folder 10.
[72] "FA" to Douglas, "Note," June 13, 1967, Douglas Papers, Box 1443.
[73] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers, Box II: 6, Folder 10.
[74] Fortas to Brennan, "Typewritten Draft Dissent," June 10, 1968, Brennan Papers, Box I: 176.
[75] *Ibid.*
[76] *Id.*
[77] "AF" to Douglas, "Note," June 13, 1967, Douglas Papers, Box 1443.
[78] Fortas to Conference, "Dissent," June 13, 1968, Douglas Papers, Box 1442.
[79] "Justice Brennan Term Summary, Law Clerks," October 1967 Term, Brennan Papers, Box II: 6, Folder 10.
[80] Fortas to Conference, "Dissent," June 13, 1968, Douglas Papers, Box 1442.
[81] "Justice Brennan Term Summary, Law Clerks," October 1967 Term.
[82] Warren to Conference, "Note from Law Clerk, Charles Wilson," June 19, 1968, Brennan Papers, Box I: 161; *Reynolds v.* Smith, Supplemental Brief for the Appellants at 2.
[83] *Making of Modern Law*, Shapiro v. Thompson, Supplemental Brief for Appellees on Reargument, October Term, 1968.
[84] Oyez, Shapiro v. Thompson, Oral Reargument, October 23–24, 1968.
[85] Brief of Appellant, Shapiro v. Thompson, October Term 1967.
[86] Oyez, Shapiro v. Thompson, Oral Reargument, October 23, 1968 at 00:46:25.
[87] 314 U.S. 160.
[88] 383 U.S. 745.
[89] Brief of Appellant, Shapiro v. Thompson, October Term 1967; Oyez, Shapiro v. Thompson, Oral Reargument, October 23, 1968 at 00:38:24.
[90] *Ibid.* at 00:47:58.
[91] Supplemental Brief of Appellee, *Shapiro v. Thompson*, October Term 1968.
[92] Oyez, Shapiro v. Thompson, Oral Reargument, October 23, 1968 at 01:21:38.
[93] Warren to Conference, "Opinion," June 3, 1968, Douglas Papers, Box 1442.
[94] Then-Solicitor General Cox argued *Reynolds v. Sims*, 377 U.S. 533 (1964), in front of the Court and prevailed, thereby playing a large role in establishing the famous "one person, one vote."
[95] Oyez, Shapiro v. Thompson, Oral Reargument, October 23, 1968 at 01:37:45.
[96] *Ibid.* at 01:38:47.
[97] *Id.* at 01:53:55.
[98] *Id.* at 00:02:58.
[99] *Id.* at 00:07:53.
[100] *Id.* at 00:26:38–00:34:21.
[101] *Id.* at 00:39:51–00:40:16.
[102] *Id.* at 00:52:14.
[103] Douglas's Docket Book, October 1968 Term, Douglas Papers, Box 1428.
[104] Warren's Docket Book, October 1968 Term, Warren Papers, Box 385, Folder 4.
[105] Douglas's Docket Book, October 1968 Term, Douglas Papers, Box 1428.
[106] *Ibid.*
[107] Warren's Docket Book, October 1968 Term, Warren Papers, Box 385, Folder 4.
[108] Douglas's Docket Book, October 1968 Term, Douglas Papers, Box 1428.
[109] "A" to Douglas, "Note," n.d., Douglas Papers, Box 1443.
[110] 351 U.S. 12 (1956).
[111] 372 U.S. 335 (1963).
[112] 304 U.S. 144.
[113] 388 U.S. 1 (1967).
[114] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.,
[115] *Ibid.*
[116] Harlan to Conference, "Memorandum to the Conference," October 24, 1968, Byron White Papers, Box 137.
[117] Brennan to Conference, "Opinion," December 1968, Brennan Papers, Box I:183, Folder 4.
[118] *Ibid.*
[119] *Id.* at Folder 3.
[120] Justices to Conference, "Joining Majority Opinion," December 1968, Brennan Papers, Box I:183, Folder 3.

[121] Marshall to Conference, "Joining Majority Opinion," December 4, 1968, Brennan Papers, Box I:183, Folder 3.
[122] Fortas to Conference, "Joining Majority Opinion," December 6, 1968, Brennan Papers, Box I:183, Folder 3.
[123] Harlan to Conference, "Refusal to Join Majority Opinion," December 5, 1968, Brennan Papers, Box I:183, Folder 3.
[124] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[125] *Ibid.*
[126] *Id.*
[127] 380 U.S. 89 (1965).
[128] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[129] Brennan to Stewart, "Note on *Carrington*," January 1969, Brennan Papers, Box I:183, Folder 3.
[130] *Ibid.*
[131] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[132] 393 U.S. 23 (1968).
[133] 383 U.S. 745 (1966).
[134] 314 U.S. 160 (1941).
[135] 394 U.S. 618 (1966).
[136] Stewart to Conference, "Joining Majority Opinion," January 7, 1969, Brennan Papers, Box I:183, Folder 3.
[137] Black to Conference, "Dissent," January 7, 1969, Hugo Black Papers, Library of Congress, Box 407, Folder 10.
[138] 344 U.S. 410.
[1391] Black to Brennan, "Note," n.d., Papers, Box 407, Folder 10.
[140] Harlan to Conference, "Dissent," January 7, 1969, Black Papers, Box 407, Folder 10.
[141] "Justice Brennan Term Summary, Law Clerks," October 1968 Term; *Loving v. Virginia*, 388 U.S. 1 (1967).
[142] Harlan to Conference, "Dissent," January 7, 1969, Black Papers, Box 407, Folder 10.
[143] *Ibid.* on February 10, 1968.
[144] *Id.* on February 17, 1968.
[145] Black to Conference, "Note," January 7, 1969, Black Papers, Box 407, Folder 10.
[146] *Ibid.*
[147] White to Conference, "Joining Majority Opinion," February 21, 1969, Brennan Papers, Box I:183, Folder 3.
[148] Stewart to Brennan, "Note," n.d., Brennan Papers, Box I: 183, Folder 3.
[149] *Ibid.* at Folder 3.
[150] *Id.*
[151] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] Congressional Research Service, *Judicial Salary: Current Issues and Options for Congress*, CRS Report for Congress, https://sgp.fas.org/crs/misc/RL34281.pdf.
[157] *Ibid.*
[158] *Id.*
[159] Stewart to Conference, "Concurrence," March 5, 1969, Black Papers, Box 407, Folder 10.
[160] Warren's Docket Book, October 1967 Term, Warren Papers, Box 385, Folder 4.
[161] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[162] *Ibid.*
[163] Laura McCreery interviewing Charles Wilson, "The Law Clerks of Chief Justice Earl Warren: Charles H. Wilson," August 4, 2004, The Regents of the University of California, https://digitalassets.lib.berkeley.edu/roho/ucb/text/wilson_charles_2014.pdf.
[164] *Ibid.*
[165] *Id.* https://digitalassets.lib.berkeley.edu/roho/ucb/text/brown_tyrone_2014.pdf.
[166] Brennan to Conference, "Opinion," March 1969, Brennan Papers, Box I: 183, Folder 4.
[167] *Id.*
[168] Fortas to Brennan, "Typewritten Draft Dissent," June 10, 1968, Brennan Papers, Box I: 176.
[169] Brennan to Conference, "Opinion," March 1969, Brennan Papers, Box I: 183, Folder 4.
[170] Brennan to Affirming Justices, "Note on Page 22," March 25, 1969, Brennan Papers, Box I: 183, Folder 4.
[171] *Ibid.bi*
[172] *Id.*
[173] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[174] Warren to Conference, "Concurrence," March 25, 1969, Brennan Papers, Box I: 183, Folder 4.
[175] Brennan to Affirming Justices, "Note on Page 22," March 25, 1969.
[176] Warren to Conference, "Concurrence," March 25, 1969.
[177] Brennan to Affirming Justices, "Note on Page 22," March 25, 1969, Brennan Papers, Box I: 183, Folder 4.
[178] Fortas to Affirming Justices, "Re: Note on Page 22," March 26, 1969, Brennan Papers, Box I: 183, Folder 4.
[179] *Ibid.*
[180] *Id.*
[181] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[182] Douglas's Conference Notes, October 1968 Term, Douglas Papers, Box 1443.
[183] Douglas to Conference, "Concurrence," March 28, 1969, Brennan Papers, Box I: 183, Folder 4.
[184] *Ibid.*
[185] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.

[186] Ronald J. Greene to Marshall, "Note on Status of *Shapiro*," n.d., Marshall Papers, Box 50, Folder 10.
[187] Warren to Conference, "Dissent," April 3, 1969, Brennan Papers, Box I: 183, Folder 4.
[188] 394 U.S. 576 (1969); "Justice Brennan Term Summary, Law Clerks," October 1968 Term, Brennan Papers, Box II: 6, Folder 10.
[189] "Justice Brennan Term Summary, Law Clerks," October 1968 Term.
[190] *Ibid.*
[191] *Id.*
[192] *Id.*
[193] 397 U.S. 254 (1973)
[194] 209 U.S. 434 (1973).
[195] 411 U.S. 1 (1973).

Supremely Influential: How *The Man That Once Was Whizzer White* Shaped My Career

Helen J. Knowles-Gardner

"He graduated from Yale Law School; he served in the Navy in World War II; and he was a Rhodes Scholar at Oxford University . . ." Introducing my "law and courts" students to the extraordinary biography of Byron R. White usually begins with these observations. Although this summary of his accomplishments is traditionally prefaced with a statement saying that White had a "résumé you pretty much can't beat," I still have not captured my students' attention. Yale Law seems several worlds away for them; World War II is ancient history; and they have no idea what a Rhodes Scholar is. So, I continue. "Deputy Attorney General during the presidency of John F. Kennedy; and then one of Kennedy's appointments to the Supreme Court of the United States in 1962, serving on that Court until 1993." *Some* of the students are now impressed.

> "Oh," I then casually remark, "and he played in the N.F.L."
>
> *Now* I have the attention of *all* of the students, attention generally confirmed with numerous exclamations of "whoa" or "say what?"

While I love bringing Justice Byron R. White to life in this manner, I always feel rather ashamed at doing so. Ashamed, because I have the distinct feeling that White is sitting in the corner of the classroom politely trying not to roll his eyes in frustration that yet another person has capped off their description of his lifetime of accomplishments with reference to his athletic achievements. In 1935, a *Denver Post* journalist "saddled" the rising college football star White "with a name he did not seek, did not like, and could not shake."[1] Much to White's dismay,

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the name "Whizzer White"—and all that it embodied—stuck with him, through thick and thin. Far too frequently journalists were wont to undermine (not necessarily deliberately, sometimes just carelessly) the man's legal, political, and judicial accomplishments by reminding their readers of the notable fact that "Whizzer" White had once been a standout on the gridiron.

My shame does not last long, however, for the simple reason that "Justice of the Supreme Court of the United States *and* N.F.L. player" is a unique biographical description that has, over the years, etched itself into the memories of my students, and captivated their attention, just like it did for me during the winter of 2000.

I was in my first year of graduate school, and had very quickly reached the conclusion that studying Supreme Court politics and history was my educational *raison d'être*. At the end of my first semester, I sought out suitable winter break reading material at the local bookstore. Little did I know that one of my purchases was a book that would have a truly significant influence on my career. The book captivated my attention and burned one of its central arguments (and a good many anecdotes and useful pieces of information) into my memory in a way very few books have ever done (and likely ever will). That aptly titled biography of White—**The Man Who Once Was Whizzer White**—(hereinafter referred to as **Whizzer White**), written by one of the Justice's former clerks, Dennis Hutchinson, is the book in question.

At the end of the Prologue to that volume, Hutchinson recalls White's mid-career observation that, "[j]udges have an exaggerated view of their role in our polity."[2] I do not have an "exaggerated view" of the "role" that **Whizzer White** has played in shaping and influencing my own research, scholarship, and teaching. It has been, and always will be supremely influential.

An Influence On My Researching

My original marginalia, circa January 2001, begin to appear in the pages of chapters eleven and twelve of my well-thumbed copy of Hutchinson's book (back then, I was less prone to extensive annotation and page corner-folding of volumes). There is one noticeable exception, however. A solitary, pencil-written exclamation point appears next to the paragraph at the top of page three. And it is there that we find the second thing about White's life and career which I almost always convey to my students. Imagine, I say to them, that you are a clerk to a justice of the Supreme Court. One day, he/she places file boxes full of his/her manuscripts in front of you, spanning twenty-five years of cases, and instructs you to burn all of them. The students are horrified when I tell them that this is not a hypothetical; this really happened. Admittedly, in White's case it was a shredder "obtained specifically for the occasion," and not a fireplace; but the method of disposal is of secondary importance. As Hutchinson observes, "[o]ne of the clerks, who had academic ambitions recalls vividly putting one file after another marked *Miranda v. Arizona* through the shredder." Observed that clerk, "'I thought, Well, here's an article; here's an entire book. I couldn't believe how much history was going down the chute.'"[3]

In an endnote, Hutchinson briefly discussed the manuscripts that remained after White's retirement, which the Justice donated to the Library of Congress. Hutchinson was not optimistic that there would be anything left of much substantive and analytical value for scholars and researchers.[4] Perhaps inevitably, in its April 26, 2012 press release announcing that those papers were now open for researchers to access, the Library of Congress struck a more sanguine tone about the "183,500 items in 858 boxes (361.4 linear feet)" that were "expected to add to knowledge of the court's interpretation

of constitutional law over three decades."[5] The release proceeded to emphasize specific landmark cases such as *Miranda v. Arizona* (1966),[6] *New York Times v. United States* (1971),[7] *Roe v. Wade* (1973),[8] and *Bowers v. Hardwick* (1986).[9] In terms of sheer volume, to the lay person "183,500 items in 858 boxes (361.4 linear feet)" sounds like a significant cache of manuscripts. Contrasted with, for example, the papers of Justice Harry A. Blackmun (530,800 items—630.2 linear feet),[10] the surviving White papers do seem to pale in numerical comparison. However, the Blackmun papers are notorious among the archival and research communities because the Justice threw hardly anything away. As his daughter Sally observes, he was a "world-class pack rat,"[11] and that shows in the voluminous collection of manuscripts he donated to the Library of Congress.[12]

The author Helen Knowles in her commencement robes after receiving her Ph.D. in political science from Boston University.

A better point of comparison is probably Justice William J. Brennan, Jr.' s papers, which amount to 379,000 items—434.8 linear feet of material.[13] In terms of linear feet, Brennan's papers occupy only about seventeen percent more space than White's. However, notice that in terms of numbers of items, Brennan's papers contain almost fifty-two percent more than White's. These numbers lend credence to Hutchinson's belief, at his time of writing, that although "[t]he detailed contents of the [White] collection" had "not been publicly disclosed . . . they are believed to contain no conference notes, intracourt memoranda, staff work, or personal correspondence."[14] The Brennan papers simply contain a far greater number of items, per linear foot, because they contain all of the things Hutchinson concluded were missing from White's donated manuscripts.[15] Brennan's papers have proven a veritable treasure trove of information for scholars, in large part because of the existence of these items. For example, the summaries and histories of Brennan's opinions, compiled on a regular basis by his clerks, contain invaluable material related to the cases the Justice participated in.[16] The White files are devoid of personal correspondence;[17] and the paucity of scholarship, published since 2012, that makes substantive use of, or even mentions the White papers, is a telling sign that so much history did indeed go "'down the chute"' in 1986.[18] The magnitude of this scholarly loss is not at all clear to my students—who invariably have no experience undertaking archival research—until I show them some of the docket sheets from the Blackmun files. Then they understand.

Here, however, I am not lamenting this loss in order to emphasize the influence that **Whizzer White** had on my teaching. Rather, I want to explain the way in which Hutchinson's one-paragraph anecdote, about White's destruction of his papers, propelled me into archival research in a manner that changed

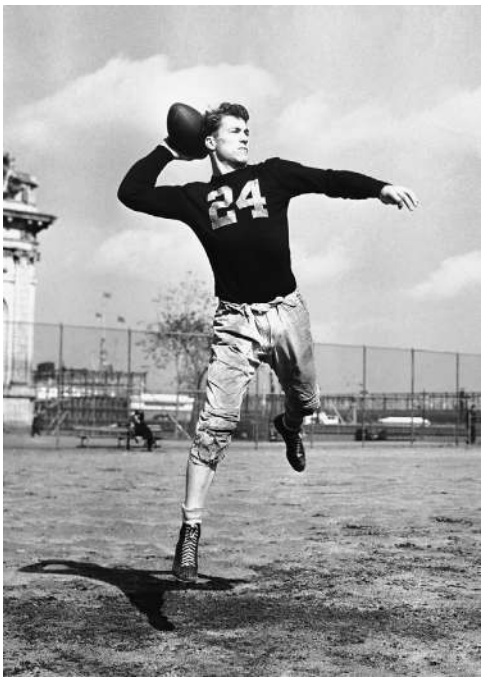
my life. I can draw a direct line between the book's whetting of my appetite to do serious archival research and a series of firsts: my first conference paper; first published article; my doctoral dissertation which became my first book; my first academic award; and my first tenure-track job.

What I later came to know as "qualitative research" was not taught in my graduate school program. As an undergraduate, perhaps channeling my childhood dream of becoming a librarian, I threw myself into purely optional primary research for my senior thesis in a manner which, in hindsight, must have rather surprised my advisors. For it was research that involved interviewing key individuals and traveling to several different archives. (I am fairly certain I didn't really know what I was doing in the archives at the Air Force Historical Research Agency in Montgomery, Alabama, but to this day I fondly remember the kindness that the staff showed this young rookie researcher). Therefore, I did not come into my chosen Ph.D. program as a complete archival novice. Nevertheless, during that first year of graduate school we were neither expected nor encouraged to undertake the kind of outside research that entailed going to archives. However, over that first winter break my consumption of **Whizzer White** told me that, White's shredding notwithstanding, there were almost certainly publicly-accessible primary documents out there written by, and shedding light on the jurists and politicians about whom I wanted to write.

I brought this knowledge, and accompanying enthusiasm, into a Spring 2001 political biography course and, realizing that the John F. Kennedy Presidential Library and Museum was just a short subway ride away from campus, I immediately planned to write something about President Kennedy's two Supreme Court appointments. The resulting paper made extensive use of twenty-two primary documents and three oral histories from the JFK Library (yes, I listed each document separately in the paper's bibliography!)

An Influence on My Writing

"Most biographers," as Robert Post has observed, "examine human lives not to predict and control them, but to understand or appreciate their meaning or value or significance."[19] Specifically, authors of judicial biographies strive to accomplish two broad principal goals. First, they seek to tell their readers what makes their subject distinctive, primarily by explaining the judge's decision-making *processes* and not just case-specific outcomes; this educates the reader about the means as well as the ends.[20] Second, they recognize and discuss the socio-political and institutional context of that decision-making. We perhaps do not have to go as far as to say that judicial biography is "a handmaiden of legal realism, Progressivism, and political jurisprudence."[21] However, it would be very wrong of us to ignore the fact that judicial biographies, when done well, serve the all-important goal of *humanizing* the law. As J. Woodford Howard once observed, a judicial biography's "prime object" should be "to describe and relate the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time."[22] Insofar as only one quarter of it is about White the jurist, one might argue that **Whizzer White** is not actually a "judicial biography." However, quite apart from the fact that Hutchinson has himself described it as such,[23] that argument misunderstands the nature of a "judicial biography." One cannot fully appreciate the "meaning or value or significance"[24] of a judge's life and career, or understand their judicial decision-making,[25] without understanding how and why the individual in question came to be a judge. In other words, the process of selecting White to fill the first Supreme Court vacancy that arose during the Kennedy administration is just as



Byron White did not like the nickname "Whizzer" and couldn't shake it off despite his outstanding achievements in government and the judiciary. A *Denver Post* journalist tagged him with it in 1935—the year this photo was taken—for his talent on the gridiron.

much a part of White's judicial biography as are the decisions he made from the bench.

It is easy, today, to look at the selection, nomination, and appointment of Supreme Court justices and jump to the conclusion that the process is hyper-politicized, nothing more than a series of partisan points-scoring war games. Any scholar who arrives at that conclusion without taking seriously the history of the appointments process is doing their work—and the audience(s) for their scholarship—a serious disservice. Studying what came before enables us to identify and, *crucially* for both historical and contemporary examples, analyze patterns of continuity and change over time. The archival research that I undertook after reading **Whizzer White** made this very clear. From that research I learned several valuable lessons about the appointments process in particular, and American political history in general, lessons that have since informed both my research and my teaching.

Reflecting upon his brother's two Supreme Court appointments (both in 1962), then-Attorney General Robert F. Kennedy made the following observation:

> You wanted someone who generally agreed with you on what role government should play in American life, what role the individual in society should have. You didn't think how he would vote in an apportionment case or in a criminal case.[26]

There is every reason to be skeptical about the substance of this political statement. Even though presidents select Supreme Court nominees for myriad reasons, it is clear that when they nominate individuals who share their view of the "'role government should play in American life,"' they do so with the hope (and perhaps expectation) that this shared understanding will be carried over into the justices' rulings.[27] Critical analysis of this statement, however, cannot and should not end with this skepticism; and indeed, when I delved into the documents at the Kennedy library I found primary materials that told a very different story than that which Robert Kennedy had wanted readers, in 1964, to believe about the Supreme Court appointments legacy of his brother. When put together with the complementary material in **Whizzer White**, a clear picture emerges and, with it, an important point that the research taught me about the Supreme Court appointments process and its place in American history. Namely, that it is not always the *primary* goal of a president to use his/her Supreme Court appointments to shift the ideological direction of the Court's decision-making.

The White Appointment

President Kennedy's two opportunities to make appointments to the Supreme Court

came when Justices Charles E. Whittaker and Felix Frankfurter left the Court within four months of each other in 1962. As Hutchinson explains, there is no shortage of *varying* accounts of the filling of the first of these vacancies (with White). Those accounts involve "many" individuals "taking credit for influencing the outcome." Hutchinson's own research shows, however, that the way in which events *actually* unfolded is not only "now reasonably clear," but also "differs in two principal respects from the standard accounts."[28] First, the Kennedy administration had longer to contemplate Whittaker's replacement than has previously been suggested; and second, for that "first vacancy 'the president had one name in mind from day one.'"[29] Thus, "the only question was whether any information or argument would dislodge him from his initial preference" for White; as history tells us, it did not.[30]

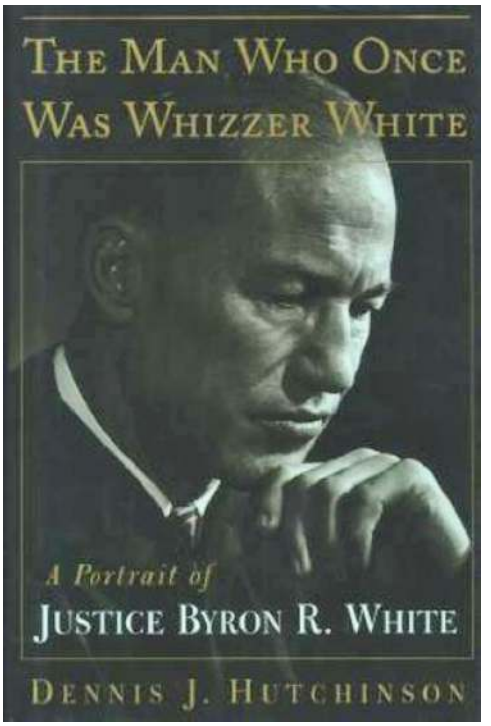
Although Hutchinson does touch upon Kennedy's second nomination—Secretary of Labor Arthur J. Goldberg to replace Justice Frankfurter—his focus is on White. The archival research I undertook not only dug into both of the president's Supreme Court nominations, but also generated an important conclusion that goes beyond the analysis contained in Hutchinson's book. Namely, that the Kennedy administration was concerned with the jurisprudential views it hoped to see its second nominee (Goldberg) bring to the Supreme Court, but *only* the second one. Today, because we so often neglect to consider what came before, we focus on what has become the current norm—the presidential goal of appointing justices to the Court in hopes of affecting the jurisprudential agenda.[31] That this was not a goal when White was appointed—and *why* it was not a goal—is something that scholars of the Supreme Court would do well to understand and remember, just as I did after undertaking the research prompted by reading **Whizzer White**.

On March 29, 1962, the day before the announcement that the administration was sending the nomination of White to the Senate, Theodore C. Sorensen, Special Counsel to the President, addressed the subject of judicial appointments. In a quickly written memorandum to the president, a memorandum that ultimately served no real substantive purpose for the White appointments process (because White was a shoo-in),[32] Sorensen listed possible candidates for the vacancy, and warned Kennedy away from appointing a politician; the preference was for someone "hailed by all for his judicial mien." In a handwritten addition to the document, Sorensen observed that while White's name *was not on the list*, he could nevertheless be considered a possible nominee. Yes, Clark M. Clifford, a Washington lawyer whose advice on such matters was often sought by the Kennedy administration, expressed the concerns that came from a number of quarters when he thought the "Bar would regard" the appointment of White "as primarily political."[33] And, yes, as **Whizzer White** makes clear, there is little doubt that the nomination did, in some respects, represent a reward for White for his service to the Kennedys (in just the same way as had his selection as Deputy Attorney General).[34] However, the "political" aspect of White's nomination had more to do with executive-legislative branch relations than with any reward for services rendered.

In 1962, there was no serious reason to fear that the Democratic Party would lose control of either the House or the Senate.[35] Nevertheless, Kennedy's nomination of White as his first Supreme Court appointment was made with Congress in mind. Writing in 1960, in the first edition of his instant classic **Presidential Power and the Modern Presidents**, Richard E. Neustadt observed that "[*t*]*he probabilities of power do not derive from the literary theory of the Constitution*."[36] He drew a crucial distinction between presidential authority and presidential influence, concluding that a president's ability to utilize and control his influence matters far more than his ability to exercise authority.

Unlike authority—the formal "power" that he or she is allocated by the Constitution, statutory law, or national custom, "influence" is the personal, individual power that the president has by virtue of his or her election or ascension to that office. It is power that he or she shares with no one, because only he or she is the president; and it is power that he or she must, in order to succeed, meld or manipulate to his or her own advantage. It is the fact that this power is possessed by the president alone that gives it the ability to make or break a presidency; hence Neustadt's conclusion that the power of persuasion lies at the heart of the presidency.

True to this way of thinking about presidential power, Kennedy was looking down the road and anticipating the powers of persuasion that he would need to use to bargain with recalcitrant members of his own party when he nominated White. Particularly in the Senate, he was looking to guarantee support for several controversial policy initiatives (primarily the components of his civil rights agenda), and the White nomination was one way to placate influential senators. Kennedy was using a "power" that the Constitution gave to him, and him alone, and he knew that the Senate was unlikely to block his choice by exercising the related "power" that was given to it, and it alone. Nevertheless, an astute exercise of his power required him to use this "power" in a non-confrontational manner if he wanted to maximize his future bargaining power.



***The Man Who Once Was Whizzer White*, written by Justice White's former clerk Dennis Hutchinson, was the inspiration for the author's choice of career path and research pursuits.**

The Supreme Court appointments process was the perfect example of Kennedy meeting this need because the congressional opposition to his legislative agenda was expected to come from the southern Democrats whose powerful senatorial presence established a system of de facto divided government in Washington.[37]

In March 1962, President Kennedy was acutely aware that his first selection for the high court could not be made without the blessing of Senator James O. Eastland (D-MS), who chaired the Committee on the Judiciary. Kennedy had appointed a number of men to lower court federal judgeships in the South, appointments about which he was confronted at a March 1963 press conference. A journalist asked Kennedy to respond to New York Governor Nelson Rockefeller's "charge" that the President was "appointing 'segregationist judges,'" and also the concerns of "some NAACP officials" that those appointments "had blunted a certain amount of the aggressive stand that the Executive Branch had taken against segregation and race problems in the South."[38]

Kennedy said that while he thought "some of the judges may not have ruled as I would have ruled in their cases," they could be praised for "sharing . . . the general outlook of the South," and that they had "done a remarkable job in fulfilling their oath of office."[39] Robert Kennedy's observation was far

more realistic. His brother, he observed, was "attempting to obtain the passage of important legislation in many, many fields, and the appointment of a judge who is recommended by the chairman of a committee or a key figure on a committee can make the whole difference on his legislative program."[40] Deputy Attorney General Nicholas Katzenbach offered an even more candid assessment of the new judges: "They're all Eastland's."[41]

In the event a president develops "a reputation for avoiding fights (perhaps in the interest of preserving other priorities), then senators have an incentive to resist a presidential nomination in the expectation that a more attractive nominee will soon be forthcoming."[42] By the spring of 1962, when it came time for him to fill a vacancy on the nation's highest court, President Kennedy had established this reputation with Eastland; the Senator had seen the chief executive work hard to try and preserve his civil rights policymaking capital by, in part, deferring to senatorial wishes for appointments to the lower courts. The nomination of Byron White was by no means ideal for Eastland. However, it was an indication that President Kennedy was preserving his power for a future day by settling for what he *needed*, rather than going after what he ultimately *wanted*—something which became clear when, a few months later, he had the opportunity to name a second individual to serve on the Supreme Court.[43]

When Justice Frankfurter announced his retirement on August 28, 1962, the opportunity to choose his replacement prompted far more discussion about the jurisprudential direction of the Court than had occurred when Whittaker retired. Goldberg's appointment to the Supreme Court facilitated the work of what has been described as the "real Warren Court"—the Warren Court famous for its expansive rulings enhancing civil rights and civil liberties.[44] Frankfurter had stood as an important obstacle to that jurisprudential change, writing opinions that epitomized judicial restraint.[45] Admittedly, the Court was more reluctant to defer when the government acted in ways that were seen as violating individuals' non-economic liberties. Yet, for the Court to acknowledge the importance of this, it was necessary to face the reality that supporting such activism would leave it open to the charge that it was returning to the jurisprudence of an earlier era, the same type of activism it sought to abandon in the 1930s.

By 1962, these varying understandings of the proper judicial role bitterly divided the Court. Frankfurter was the Court's most forceful supporter of restraint; therefore, his departure made the second Kennedy appointment much more jurisprudentially significant than the first. If the Kennedy Administration chose to appoint someone cut from more activist cloth, then it would provide Chief Justice Earl Warren with the necessary majority for proceeding full throttle with his Court's revolution, seriously questioning "the traditional progressive conviction that a diminished judiciary was a necessary precondition for reform."[46] While he spent only three Terms on the Court, Goldberg's judicial voting record makes it very clear that he was no Frankfurter. In cases involving civil liberties and civil rights, Goldberg assumed the traditional "liberal" position in 89.2% of cases; this was almost forty-five percentage points higher than the voting record of the Justice he replaced.[47]

Indeed, when one compares data relating to Goldberg and White, one finds clear support for the conclusion that President Kennedy's two appointments brought quite different judicial philosophies to the Court. As Hutchinson notes, "[d]uring the first term they sat together, White and Goldberg were on the opposite side of nine of thirteen 5–4 decisions issued by the Court."[48] During the three Terms that the two justices were on the Court together—the October 1962, October 1963, and October 1964 Terms—White and Goldberg only voted in agreement with each

other 63% of the time.[49] And if we go beyond the end of Goldberg's tenure (he resigned in July 1965), and look at the remainder of White's tenure (through 1993), we find that overall White was a much more conservative justice than Goldberg. Martin-Quinn (M-Q) scores are a standard (albeit imperfect) political science measurement of the ideology of Supreme Court justices; a score that has a negative value is considered liberal, while positive values are conservative. White's M-Q score is 0.42313; Goldberg's is −1.05367.[50]

A Networking Influence

Like any good researcher (as I later came to appreciate), those spring 2001 trips to the Kennedy Library yielded far more material than I could squeeze into one seminar paper (in my office I still have my original storage boxes crammed full of the yellow paper photocopies). Not wishing to let good materials go to waste, and now smitten with the idea of continuing to write about the Kennedy administration, I returned to Columbia Point that fall with a desire to find out more about something Hutchinson mentioned on page 340. "[I]n the words of a *New York Times* headline," he wrote, the 1961 Term had been "one of the 'Most Significant in its [the Court's] History,'"[51] largely because of the two 1962 decisions *Engel v. Vitale*[52] and *Baker v. Carr*[53] (neither of which White participated in).[54]

Unlike *Engel*'s landmark Establishment Clause decision, *Baker*'s equally landmark-status legislative reapportionment decision did not cross my intellectual radar screen during my first year of constitutional law and civil liberties courses in graduate school. Hutchinson's briefest of references to *Baker*

Deputy Attorney General Byron White is at right in this photo of President John F. Kennedy signing the Circuit and District Judges Appointment Act in May 1961. Kennedy would appoint White to the Supreme Court less than a year later, saying "he has excelled at everything."

piqued my interest, however, because I had gathered some material about the case during my spring research trips to the Kennedy Library. Having devoted some of my summer reading time to background research, including the devourment of another superb biography—Ken Gormley's volume about Archibald Cox[55]—that fall I went back to the archives to gather material for a paper I was writing for that semester's constitutional theory course. Little did I know that this piece of work would end up as something far more important than just another seminar paper. That paper, focusing on one of *Baker*'s progeny—*Lucas v. Forty-Fourth General Assembly of Colorado* (1964)[56]—ultimately became my first published journal article—an award-winning publication in this journal—thereby beginning my association with the Supreme Court Historical Society.[57]

The Society has had a far greater impact on my career than any other professional association. Beyond publishing my article about *Lucas* in this journal, early on the Society had faith in my work about the stories behind the landmark 1937 decision in *West Coast Hotel v. Parrish*.[58] It published my first article about those stories in 2012,[59] and nine years later the Society invited me to deliver a virtual talk about the book that emerged out of my research.[60] In short, I treasure my Society membership, and consider it a badge of pride that this is the only academic journal whose Board of Editors I have ever been asked to join. I can draw a straight line between the research at the JFK Library that **Whizzer White** spurred me to undertake, and that seat on the Board.

An Influence On My Teaching

Many years ago, towards the end of the semester, a student came to see me during office hours. I knew the previous few months had not been easy for her; she had worked very hard to maintain good grades despite needing to take some time off for medical reasons. "I wanted to tell you why I have been struggling, she said." I sat across the desk from her, trying to disabuse her of the notion that she owed me any kind of explanation. "I had an abortion, and there were complications; I was hospitalized. I wanted to tell you because I don't know what your views are on abortion." The student was taking my civil liberties course and did not know how I felt about the termination of a pregnancy. To me, this was a perfect indication that I was doing my job right. Although it sets me apart from almost all of my colleagues, I remain fiercely wedded to the belief that a political science professor should keep their personal political views out of the classroom. As that pedagogical approach seems to be increasingly falling from favor in the academy, I have given considerable thought to another one of Hutchinson's main arguments, an argument that resonates with me and is, therefore, another reason why **The Man Who Once Was Whizzer White** has been supremely influential upon my career.

I have never found the labels "liberal" and "conservative"—as they apply to Supreme Court justices—particularly helpful (just as I have always found it problematic, and analytically shortsighted, to reduce judicial behavior to the sum of jurists' votes in a manner that labels them in quantitative, binary terms). White also disliked such labels; but his rejection of them did not merely represent an attempt, on his part, to prevent people from placing him into specific jurisprudential categories. As Hutchinson makes very clear, it is simply wrong to try and categorize White in this way. In 1961, the *New York Times* ran a short article explaining—because several visitors to the White House had been curious—that the new attorney general kept a football on the mantel of his office fireplace for those occasions when it benefited him and his deputy to toss the pigskin around during intense legal discussions.[61]

As Hutchinson observes, "[w]ith no extra effort on his part, White had become a conspicuous emblem of the New Frontier."[62] This is perhaps one of the most important lines in the book, and underscores the problems associated with labeling White as "liberal" and/or "conservative" without adequate contextual consideration about what those labels mean now, and what they meant in 1962. The most incisive analyses of White's judicial career are those that eschew simplistic application of such labels. As William E. Nelson (who clerked for White during the October 1970 Term) observes, "White was appointed to the Supreme Court because he was a *Kennedy liberal* and . . . although the Justice's approach may have changed marginally during his three decades on the bench, on the whole he adhered faithfully to *the political values that had led to his appointment*."[63]

Hutchinson brings chapter 11 of his book—about White's involvement with John F. Kennedy's 1960 presidential campaign in Colorado—to a close with the following passage:

> John Kane [a Coloradan who became chairman of Students for Kennedy] remembers a conversation at Saliman's Grill in Denver around the time of the election . . . in the company of White, Dolan, and Tom Sharp, a former president of the student body at the University of Colorado and a Phi Gam—like White and Kane—who was working as Ira Rothgerber's office manager. *What we need*, one of the younger men proclaimed, *is a liberal administration after the hibernation of the Eisenhower years*. To White, the statement was nonsense: *I've never understood what people mean when they say that—'liberal.' Labels mean nothing. They don't make policy and they don't decide practical problems*.[64]

This anecdote makes a point that Hutchinson repeatedly emphasizes about White and, tellingly, returns to at the end of the book:

> The most dreary aspect of Byron White's decision to retire was the empty investigation made by several journalists into the nature of White's "liberalism." . . . As White arrived home at the end of the day he retired, ABC News stuck a microphone through his car window and asked him whether he was a "conservative" or a "centrist." White replied:
>
> "Being a conservative or a centrist is all in the minds of the speaker. It just depends on what you think—and if you think I'm one, you're right, but other people might think I'm something else and they're right." To the *New Republic*'s Jeffrey Rosen, the answer was laughable and confirmed that White was a "perfect cipher" who "was uninterested in articulating a constitutional vision."[65]

As Hutchinson goes on to explain, "the Justice's nine-second answer to ABC hardly sustains, or even relates to, such a broad indictment" as Rosen had issued. However, "perhaps that was not actually the point. In any event, those who had followed White's career recognized the authenticity of the response, which had been uniform since he was first asked the question in Washington more than three decades earlier."[66]

The Limits of Labeling White

As noted above, in 2012 when the Library of Congress announced that White's papers were now open to researchers it emphasized the role that the cache of manuscripts might play in aiding scholars researching certain landmark cases in which the Justice

participated.[67] When White left the bench in 1993, and again upon the occasion of his death in 2002, numerous academic journal articles and newspaper articles reflected upon his thirty-one years of Supreme Court service. Although the articles did not always mention the same cases, and some focused more of their attention on what are generally regarded as having landmark status, they all reached the same conclusion—namely, that one cannot accurately affix a simple ideological label to White's work as a justice.[68]

As noted above, various sources of data, including the M-Q scores, show that President Kennedy's two Supreme Court appointments brought very different types of jurisprudence to the bench. In this section of this article, one might add to those data the rates at which the two jurists took libertarian positions in cases (broadly defined as "favor[ing] the personal rights of the individual"). Over the course of the three terms they served together, Goldberg took the libertarian position approximately 79% of the time; contrast that with White who only cast libertarian votes in 35.7% of cases.[69] These data all support a broad conclusion that White was quite a "conservative" jurist.

Some of White's notable votes and opinions—those which have always gained considerable attention in analyses of his work and legacy—can indeed be labeled as "conservative." Take, for example, three of the landmark cases emphasized in the Library of Congress press release (and also discussed in most retrospectives of his career, and most of the major newspaper obituaries): *Miranda v. Arizona*, *Roe v. Wade*, and *Bowers v. Hardwick*. Aptly discussed within the chapter of **Whizzer White** that is entitled "The Warren Court: White, J., Dissenting," *Miranda* (1966) "was a watershed for White." He thought the landmark ruling, which held that the Fifth Amendment required law enforcement officials to tell criminal suspects that they had a right to remain silent and a right to an attorney, "was as unwise as it was constitutionally unwarranted."[70] He (along with Justice Potter Stewart) joined the dissenting opinion of Justice John M. Harlan, which made its objection to the majority's ruling clear from the outset by stating that it "represents poor constitutional law and entails harmful consequences," the "serious[ness]" of which, "only time can tell."[71]

White brought his own dissent (which Harlan and Stewart joined) to a close with sharp words of warning and criticism:

> Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, *if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket*, which forecloses more discriminating treatment by legislative or rulemaking pronouncements.[72]

Such was White's opposition to the decision in *Miranda*, that "[h]e even went to the extent of publicly criticizing" it in a strategic speech whose content the *New York Times* journalist Fred Graham astutely described as White's "'realiz[ation] that the aging liberal majority of the Warren Court could not remain intact much longer.'"[73]

Seven years later, in *Roe*, the reason why White cast one of the two dissenting votes in the landmark abortion case (the other dissenter

being Justice William H. Rehnquist) was abundantly clear—he could "find nothing in the language or history of the Constitution to support the Court's judgment."[74] This was a conclusion that led him later to describe *Roe* "as the *only illegitimate decision the Court rendered during my tenure*."[75] White's propensity to rule against individual rights claims can also be seen in another landmark decision—*Bowers v. Hardwick* (1986), although this time his opinion spoke for a five-justice majority of the Court (whose holding that there was no constitutionally protected right to engage in sodomy was overruled in *Lawrence v. Texas* in 2003).[76] Hutchinson observes that in *Bowers*, "[f]or better or worse, White was more concerned about the decision than the opinion."[77] Be that as it may, the fact remains that it is White's *opinion* in the case that will always be an important part of his legacy (and not, generally, for positive reasons). As Linda Greenhouse observed in her *New York Times* obituary, "*Bowers v. Hardwick* was probably the one opinion of Justice White's that was best known to the general public."[78]

White's reasoning was consistent with that which he employed in his dissent in *Roe*—that there was no enumerated, or historically supported constitutional right to engage in the activity at issue. He observed that, "until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."[79] It was what he said next, however, that "captured the attention of lawyer and scholar alike who flooded the law reviews with critiques."[80] Wrote White: "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[81] The way in which, over the years, most of my students have reacted to that sentence (after they are given a dictionary definition of the word "facetious") is instructive. Whatever respect they had for the justice who once played in the N.F.L. is now significantly diminished.

Together, White's opinions in *Miranda*, *Roe*, and *Bowers* paint a portrait of a deeply "conservative" justice; and there are others—especially relating to civil rights—to which one could point for confirmation that this is an appropriate label to attach to the Justice.[82] However, as Pierce O'Donnell—who clerked for White during the October 1973 Term—observes, "[h]istory teaches that liberalism and conservatism are relative concepts that are definitionally imprecise in the present and *virtually useless over time*. Justice White proved to be what anyone who knew him expected: his own man, complex to be sure, but a free agent nonetheless."[83] In this respect, it is also worth noting that there are areas of the law wherein White cast votes, and wrote opinions that are not easily explainable in binary "liberal" or "conservative" terms, because those labels obscure the reasons why White took the positions he did in certain cases. Take, for example, the First Amendment's protections of expressive freedom and press freedom. Burt Neuborne is right, that these clauses are "not the preserve of a political enclave"; they do not represent either "a liberal doctrine . . . [or] a conservative doctrine," but, rather, "an American doctrine."[84] And this can be seen throughout the history of the Court's free speech jurisprudence.[85] The Supreme Court Database, a widely-used political science resource for quantitative analysis of the justices' votes, might code White's vote in *New York Times v. Sullivan*[86] as liberal, and those he cast in *Gertz v. Welch*[87] and *Branzburg v. Hayes*[88] as conservative,[89] but that is an inadequate description (and explanation) of White's behavior in these three cases.

In *Sullivan* (1964), "arguably the most important First Amendment case in history,"[90] the Court recognized the crucial democratic

importance of enabling "uninhibited, robust, and wide-open" discourse "on public issues."[91] It revolutionized libel law by requiring public officials to prove that the person accused of libeling them acted with "'actual malice'—that is, with knowledge that it [what they said or printed] was false or with reckless disregard of whether it was false or not."[92] This was an area of the law "that haunted White . . . throughout his tenure on the Court."[93] On numerous occasions he expressed regret at joining Justice William J. Brennan's majority opinion, and in 1985 he wrote a separate opinion that explicitly encouraged the Court to revisit that decision and the "actual malice" standard.[94] He vociferously dissented in *Gertz v. Welch* (1974), another libel law case, opposing what he described as the majority's "razing [of] state libel laws" (which much more strongly favored individuals claiming defamation) in cases when someone was neither a public official nor a "public figure." Such persons needed added protection, he wrote, especially "when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few."[95] In those few lines from his *Gertz* dissent, we see an important explanation for White's position in these cases, an explanation that has little to do with "liberal" or "conservative" (or "libertarian") labels. Instead, as Hutchinson makes very clear, it has everything to do with an important aforementioned theme of **Whizzer White**—namely, the way in which the media never allowed White to dispense with the "Whizzer White" moniker. Yes, "[t]he Supreme Court of the United States provided White with a welcome perquisite—the luxury of controlling public appearances, and especially relations with the media, on his own terms." However, that "career" also "required a dexterity in public relations that he did not fully welcome but *that he developed by necessity*. In every year but one from 1962 to 1969 he received or presented an award connected with his athletic past."[96]

And so it was, also, in cases involving the First Amendment protections afforded journalists (or, in White's view, not afforded to journalists). A trio of 1970s decisions (beginning with *Branzburg v. Hayes*) that limited the constitutional rights and protections of the press led to White being "derided by both academics and journalists as . . . a knave and a fool."[97] For example, in *Branzburg* the Court—through a majority opinion written by White—rejected reporters' arguments that in order to gather evidence of wrongdoing, they often needed to promise confidentiality to sources.[98] Perhaps, on one level, such decisions can be coded as "conservative," but that does not help to explain White's views. As Hutchinson observes, "[t]he criticism" that White received in response to such decisions "was a source more of pride or amusement than of pain." For "[h]e had spent much of the last half century of his life not caring what others thought of him, *especially in print*."[99]

To return to J. Woodford Howard's observation about a judicial biography, its "prime object" should indeed be "to describe and relate the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time."[100] As **Whizzer White** demonstrates, it is to these factors—rather than simplistic ideological labels—that one needs to look to understand White's jurisprudence. Which is why I wholeheartedly believe that it is the duty of political science professors to make their students feel comfortable to be their own person, "complex," as any human being is, "but a free agent nonetheless."[101] We should not be defined by ideological labels; and teachers should not seek to preference one political view over another. I like to think that my commitment to this is why the student confided with me in the manner she did.

Conclusion

In April 2022, one might have expected to see White afforded some measure of Supreme Court social media stardom. For that month marked the sixtieth anniversary of the Coloradan's nomination, confirmation, and appointment to the nation's highest bench; and it also represented the twentieth anniversary of the Justice's passing. One of the enduring lessons of Hutchinson's biography, however, is that White took a dim view of much of the media coverage of his career. It is probably safe to say, therefore, that White "would have HATED twitter."[102] This is especially so in light of the fact that the aforementioned April anniversaries prompted several postings referring to him as a #historicalhottie,[103] or some such hashtag. One law professor went so far as to write that the competition wasn't "even close. He's not just law-school hot, he's a genuine hunk," because "[t]he man has a jawline that can cut glass and the lips of an angel . . . [and] played in the NFL DURING law school. Swooooooon."[104] Is it any wonder White destroyed his papers?

That decision "'to clean up the place'"[105] in 1986 deprived scholars of valuable material with which to analyze White's legacy. Yes, one can turn to the manuscripts of White's brethren for help in understanding the Justice's thirty-one years on the Supreme Court;[106] but as biographies of other justices have shown, there is nothing quite like reading manuscripts that come straight from the idiomatic horse's mouth. For example, it is impossible to imagine Linda Greenhouse writing **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** had her subject's voluminous manuscripts not been so freely available for interested researchers to peruse and use.[107]

The absence of manuscripts from White's chambers makes Hutchinson's book even more impressive. Yes, he brought to the project a perspective that only a former White clerk could possess.[108] However, White let it be known, in no uncertain terms, that Hutchinson would get no help from his former employer. He unequivocally stated: "'You are on your own, as I indicated before. I would not like to do anything to suggest that what you are doing is an authorized biography.'"[109]

I, for one, owe much of my research, writing, and teaching—in short, much of my academic career—to Hutchinson for forging ahead with his project and producing a majestic volume. For it is a volume that demonstrates, with crystal clarity, that an immense amount can be learned about the history and politics of the Supreme Court of the United States as an institution—and, indeed, the political history of the United States—by learning about **The Man Who Once Was Whizzer White**.

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ENDNOTES

[1] Dennis J. Hutchinson, **The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White** (New York: Free Press, 1998), 39.

[2] *Ibid.*, 8 (quoting White).

[3] *Id.*, 3.

[4] *Id.*, 479 n2.

[5] "Papers of Supreme Court Justice Byron R. White Opened for Research," updated April 26, 2012, accessed May 20, 2022, https://www.loc.gov/item/prn-12-089/.

[6] 384 U.S. 436 (1966).

[7] 403 U.S. 713 (1971).

[8] 410 U.S. 113 (1973).

[9] 478 U.S. 186 (1986).

[10] "Harry A. Blackmun papers, 1913–2001," accessed May 20, 2022, https://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms003030&_faSection=overview&_faSubsection=did&_dmdid=.

[11] Quoted in Jean Patteson, "The Justice's Daughters," *Washington Post*, August 1, 2004.

[12] "The Release of Justice Blackmun's Files: NPR's Nina Totenberg Has Advance Look at Papers, Oral History," NPR, updated March 2, 2004, accessed May 20, 2022, https://www.npr.org/2004/03/02/1741430/the-release-of-justice-blackmuns-files.

[13] "William J. Brennan papers," accessed May 20, 2022, https://www.loc.gov/item/mm82052266/.

[14] Hutchinson, **Whizzer White**, 479n2.

[15] A good example of a Brennan biography making extensive use of the materials in the Justice's papers is Seth Stern and Stephen Wermiel, **Justice Brennan: Liberal Champion** (New York: Houghton Mifflin Harcourt, 2010).

[16] I drew upon many materials from the Brennan papers, including some of those clerk-authored case histories and summaries, for my book about the jurisprudence of Justice Anthony M. Kennedy. Helen J. Knowles, **The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty**, updated paperback ed. (Lanham, MD: Rowman & Littlefield, 2018), see, for example, 105–06, and accompanying endnotes 289nn91 and 93.

[17] "Byron R. White papers, 1961–1992," accessed May 22, 2022, https://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms003003&_faSection=overview&_faSubsection=scopecontent&_dmdid=d14980e18.

[18] Hutchinson, **Whizzer White**, 3.

[19] Robert C. Post, "Judging Lives," *New York University Law Review* 70 (1995): 550.

[20] Michael J. Gerhardt, "The Art of Judicial Biography," *Cornell Law Review* 80 (1995): 1597.

[21] J. Woodford Howard, Jr., "Alpheus T. Mason and the Art of Judicial Biography," *Constitutional Commentary* 8 (1991): 41.

[22] J. Woodford Howard, Jr., "Judicial Biography and the Behavioral Persuasion," *American Political Science Review* 65, no. 3 (1971): 704–5.

[23] Dennis J. Hutchinson, "The Man Who Once Was Whizzer White," *Yale Law Journal* 103, no. 1 (October 1993): 43n.

[24] Post, "Judging Lives," 550.

[25] Gerhardt, "Judicial Biography," 1597.

[26] Quoted in James E. Clayton, **The Making of Justice: The Supreme Court in Action** (New York: E.P. Dutton, 1964), 52.

[27] The Supreme Court appointments literature is immense, but what remains a very useful overview of different presidential agendas/strategies, over time, is Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton**, new and revised ed. (Lanham, MD: Rowman & Littlefield, 1999).

[28] Hutchinson, **Whizzer White**, 310.

[29] *Ibid.*, 311 (quoting Myer (Mike) Feldman, who was deputy counsel to President Kennedy).

[30] Hutchinson, **Whizzer White**, 311.

[31] For an instructive discussion of the situation in 2020/2021, see Linda Greenhouse, **Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months that Transformed the Supreme Court** (New York: Random House, 2021).

[32] Hutchinson, **Whizzer White**, 319, 311.

[33] Memorandum from Theodore C. Sorensen to President Kennedy, March 29, 1962. Box 88A, Papers of President Kennedy, President's Office Files, Departments and Agencies. John F. Kennedy Presidential Library and Museum.

[34] Hutchinson, **Whizzer White**, generally chapters 11–14.

[35] In the eighty-seventh Congress (1961–1963), the Democratic Party held the House by 262–175, and the Senate by 63–36. After the 1962 midterms this changed to 258-176-1 and 67–33.

[36] Richard E. Neustadt, **Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan** (New York: Free Press, 1991), 37 (the original is italicized). Neustadt worked for the Truman administration from 1950 through 1953, and after the publication of his book he served in an advisory capacity for both the Kennedy and Johnson administrations. Thomas J. Lueck, "Richard E. Neustadt, Historian, Dies at 84; Studied Power and Advised Three Presidents," *New York Times*, November 3, 2003.

[37] For in-depth analyses of the post-1945 political changes in the American South that helped to create this situation see, for example, Dewey W. Grantham, **The Life and Death of the Solid South: A Political History** (Lexington: University Press of Kentucky, 1988); James L. Sundquist, **Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States**, revised ed. (Washington, D.C.: The Brookings Institution, 1983); V.O. Key, Jr., **Southern Politics in State and Nation**, new ed. (Knoxville: University of Tennessee Press, 1993).

[38] "News Conference 51, March 6, 1963," accessed May 28, 2022, https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-press-conferences/news-conference-51.

[39] *Ibid.*

[40] Quoted in Robert Dallek, **An Unfinished Life: John F. Kennedy 1917–1963** (Boston: Little, Brown, 2003), 494–5.

[41] Quoted in Richard Reeves, **President Kennedy: Profile of Power** (New York: Touchstone, 1993), 466.

[42] Keith E. Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," *Supreme Court Review* 2006 (2006): 407 n20.

[43] Mark Silverstein and William Haltom, "You Can't Always Get What You Want: Reflections on the Ginsburg

and Breyer Nominations," *Journal of Law and Politics* 3 (1996).

[44] David P. Currie, **The Constitution in the Supreme Court: The Second Century, 1888–1986** (Chicago: University of Chicago Press, 1990), 415.

[45] See Brad Snyder, **Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment** (New York: W. W. Norton, 2022). For a useful discussion of this aspect of Frankfurter's jurisprudence as it compared to the jurisprudence of Justice Black, see Mark Silverstein, **Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making** (Ithaca, NY: Cornell University Press, 1984).

[46] Mark Silverstein, **Judicious Choices: The Politics of Supreme Court Confirmations**, 2nd ed. (New York: W.W. Norton, 2007), 33.

[47] C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978," *American Political Science Review* 75, no. 2 (1981): 357.

[48] Hutchinson, **Whizzer White**, 341.

[49] Ira H. Carmen, "One Civil Libertarian Among Many: The Case of Mr. Justice Goldberg," *Michigan Law Review* 65, no. 2 (1966): 306–308.

[50] Daniel G. Klemonski, Oliver K. Natarajan, Samuel H. Studnitzer, and Paul M. Sommers, "Ideological Reversal among Supreme Court Justices," *Open Journal of Social Sciences* 5 (2017): 292.

[51] Hutchinson, **Whizzer White**, 340.

[52] 370 U.S. 421 (1962).

[53] 368 U.S. 186 (1962). Hutchinson, **Whizzer White**, 340.

[54] Hutchinson makes only two references to *Baker*. One appears next to the mention of *Engel* on page 340. The other appearance is thirty-two pages earlier and, ironically, I am sure that I only noticed it when I re-read the book for this writing of this article. Hutchinson, **Whizzer White**, 308.

[55] Ken Gormley, **Archibald Cox: Conscience of a Nation** (Reading, MA: Perseus, 1997).

[56] 377 U.S. 713 (1964).

[57] Helen J. Knowles, "May It Please The Court?: The Solicitor General's Not So 'Special' Relationship—Archibald Cox And The 1963–1964 Reapportionment Cases," *Journal of Supreme Court History* 31, no. 3 (November 2006). For this article, I received the Society's 2006 Hughes-Gossett Award for that year's best article published in the *Journal* and authored while the recipient was a student.

[58] 300 U.S. 379 (1937).

[59] Helen J. Knowles, "'Omak's Minimum Pay Law Joan D'Arc': Telling the Local Story of *West Coast Hotel v. Parrish* (1937)," *Journal of Supreme Court History* 37, no. 3 (November 2012).

[60] Helen J. Knowles, *Making Minimum Wage: Elsie Parrish Versus the West Coast Hotel Company* (Norman: University of Oklahoma Press, 2021); "Making Minimum Wage: Elsie Parrish v. The West Coast Hotel Company—A Lecture by Helen Knowles," updated December 8, 2021, accessed May 28, 2022, https://supremecourthistory.org/supreme-court-historical-society-events/2021-1208-making-minimum-wage-elsie-parrish-west-coast-hotel-co/.

[61] "Attorney General Finds Football is Useful in Tackling Problems," *New York Times*, March 3, 1961.

[62] Hutchinson, **Whizzer White**, 271.

[63] William E. Nelson, "Justice Byron R. White: A Modern Federalist and a New Deal Liberal," *Brigham Young University Law Review* 1994, no. 2 (1994): 313 (quotation, italics added), and more broadly the entire article.

[64] Hutchinson, **Whizzer White**, 259.

[65] *Ibid.*, 444.

[66] *Id.*

[67] In addition to (as noted above) mentioning *Miranda*, the Pentagon Papers case, *Roe*, and *Bowers*, the press release also noted White's involvement in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *INS v. Chadha*, 462 U.S. 919 (1983); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); and *United States v. Fordice*, 505 U.S. 717 (1992). "Papers of Supreme Court Justice Byron R. White Opened for Research."

[68] See, for example, Rex E. Lee, "On Greatness and Constitutional Vision: Justice Byron R. White," *Journal of Supreme Court History* 1993 (1993): 5–10; Rex E. Lee and Richard G. Wilkins, "On Greatness and Constitutional Vision: Justice Byron R. White," *Brigham Young University Law Review* 1994 (1994): 291–312; Linda Greenhouse, "Byron R. White, Supreme Court Justice for 31 Years, Dies at 84," *New York Times*, April 15, 2002; Charles Lane and Bart Barnes, "Longtime Justice Byron White Dies," *Washington Post*, April 16, 2002.

[69] Carmen, "One Civil Libertarian Among Many," 305, 306, 308.

[70] Hutchinson, **Whizzer White**, 344.

[71] 384 U.S. at 504 (Harlan, J., joined by Stewart and White, JJ., dissenting).

[72] 384 U.S. at 545 (White, J., joined by Harlan and Stewart, JJ., dissenting) (italics added).

[73] Hutchinson, **Whizzer White**, 345, 346.

[74] 410 U.S. at 221 (White, J., joined by Rehnquist, J., dissenting).

[75] Hutchinson, **Whizzer White**, 368.

[76] 539 U.S. 558 (2003).

[77] Hutchinson, **Whizzer White**, 451.

[78] Greenhouse, "Byron R. White, Supreme Court Justice for 31 Years, Dies at 84."

[79] 478 U.S. at 193–194.

[80] Hutchinson, **Whizzer White**, 451.

[81] 478 U.S. at 194.

[82] The Greenhouse obituary provides an excellent overview of White's civil rights legacy. Greenhouse, "Byron R. White, Supreme Court Justice for 31 Years, Dies at 84."

[83] Pierce O'Donnell, "Common Sense and the Constitution: Justice White and the Egalitarian Ideal," *University of Colorado Law Review* 58, no. 3 (Summer 1987): 436 (italics added).

[84] Burt Neuborne, "First Amendment," *Touro Law Review* 6 (1989): 130. Also see Floyd Abrams, **Friend of the Court: On the Front Lines With the First Amendment** (New Haven, CT: Yale University Press, 2013).

[85] Helen J. Knowles and Steven B. Lichtman, eds. **Judging Free Speech: First Amendment Jurisprudence of US Supreme Court Justices** (New York: Palgrave Macmillan, 2015).

[86] 376 U.S. 254 (1964).

[87] 418 U.S. 323 (1974).

[88] 408 U.S. 665 (1972).

[89] For more details about this aspect of the coding methods used by the Database, see "The Supreme Court Database: Online Code Book," accessed August 13, 2022, http://scdb.wustl.edu/documentation.php?var=decisionDirection.

[90] Helen J. Knowles and Steven B. Lichtman, "Introduction: Oh What a Tangled Web They Weave," 17, in **Judging Free Speech**, Knowles and Lichtman, eds.

[91] 376 U.S. at 270.

[92] 376 U.S. at 280.

[93] Hutchinson, **Whizzer White**, 352.

[94] *Ibid.*, 352, 421–422. The case was *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment).

[95] 418 U.S. at 402 (White, J., dissenting).

[96] Hutchinson, **Whizzer White**, 336, 352 (italics added).

[97] *Ibid.*, 382 (quotation), and more generally 382–383.

[98] The other two decisions to which Hutchinson points, here, are *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) and *Herbert v. Lando*, 441 U.S. 153 (1979).

[99] Hutchinson, **Whizzer White**, 384.

[100] Howard, "Judicial Biography," 704–5.

[101] O'Donnell, "Common Sense and the Constitution," 436.

[102] "rip justice byron white, you would have HATED twitter," (@greatbritttain), April 10, 2022, https://twitter.com/greatbritttain/status/1513345816102010882. On more than one occasion I have thought about the irony that in 1993 when he retired, White was replaced by Justice Ruth Bader Ginsburg, who would ultimately come to embrace her high-profile popular culture (and social media-influenced) status as the "Notorious RBG."

[103] @MaybellRomero, "#historicalhottie?," April 15, 2022, https://twitter.com/MaybellRomero/status/1515120188034801669.

[104] @SteveClowney, "1. Byron White. The #1 hottest Justice is "Whizzer" White," April 26, 2022, https://twitter.com/SteveClowney/status/1518976138751578112.

[105] Hutchinson, **Whizzer White**, 3.

[106] As the notes indicate, Hutchinson himself made use of the archived papers of nine justices. Hutchinson, **Whizzer White**, 478.

[107] Linda Greenhouse, **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** (New York: Times Books, 2005).

[108] It should be noted that when putting pen to paper to expound upon an individual's life, the biographer has to be careful to avoid the hagiographic tendency of exhibiting excessive sympathy towards one's main subject. Dennis J. Hutchinson, "Judicial Biography: Amicus Curiae," *New York University Law Review* 70 (1995): 724. **Whizzer White** avoids this pitfall.

[109] Quoted in Hutchinson, **Whizzer White**, 5.

The Judicial Bookshelf

Donald Grier Stephenson, Jr.

Introduction: Supreme Court History as a Parade of Themes

Of the hundreds of books about the Supreme Court published in the twentieth century, surely few have been more widely read and referenced than **The American Supreme Court** by Robert G. McCloskey, professor of government at Harvard University from 1946 until his death in 1969. First published in 1960 by the University of Chicago Press, this compact and elegantly written one-volume interpretive history of the Court has been updated now through six editions by McCloskey's student, Sanford Levinson of the University of Texas.[1]

The paragraph that concluded the Epilogue in the initial edition combined a historical overview with what appeared to be an admonition for the Warren Court, ironically just as it was on the eve of an even more activist phase.

> From 1789 to the Civil War, the Court labored to establish a reasoned argument for the cause of union. From the war to 1937 it performed a similar function on behalf of laissez faire. Toward the end of each of those periods, the judges overstepped the practical boundaries of judicial power and endangered the place they had earned in the American governmental system. Since 1937, the Court has striven to evolve a civil rights doctrine that will realize the promise of the American libertarian tradition, yet accord with the imperatives of political reality. Even when criticisms are duly acknowledged, the fact remains that the Court has contributed more to an understanding of this issue than any other agency in American life. It would be a pity if the judges, having done so much, should now once again forget the limits that their own history so compellingly prescribes.[2]

McCloskey's paragraph illustrates a common goal of many who write about the Court: Highlighting one or more themes that capture the essence of a period of judicial history.

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Indeed, in fewer than 150 words, McCloskey pointed to at least four such themes, the last of which was hardly a surprise. As William Lasser observed some three decades later in the context of warnings against an overreach of judicial power, the theme of "weakness and vulnerability pervades the literature on the Supreme Court."[3] This theme perhaps echoed the same "forbearance in the use of power" to which Paul Freund referred as he eulogized Justice Felix Frankfurter in 1965.[4] The word forbearance itself is a reminder that the Court's work of deciding cases occurs in at least three dimensions as it may choose to allow, to direct, as well as to forbid.

Yet in the context of deciding cases contemporary observers as well as someone decades hence might well choose to associate the words political or partisan as both a related and even an identifying theme for the Court of this part of the twenty-first century. That characterization, however, is hardly novel or even distinctive in that the label could also easily be applied to much of the Court's history. Indeed, scholars have long regarded the Court as political in numerous ways.

Perhaps most obviously, the Court is political because its decisions shape public policy by deciding what government—national, state, or local—may or may not do. At least since the 1960s, for example, the Court has overseen operation of the criminal justice system to a degree never before experienced, from police-citizen encounters through punishment. Second, decisions clarify the boundaries of political authority, focusing less on *what* may be done than on *who* may do it or *how* it may be done. The Steel Seizure Case[5] turned not on whether government could cope with labor disruptions but on whether President Truman in the executive order had exceeded his authority and intruded into Congress's law-making domain. The Legislative Veto case[6] did not question government's authority to deport a particular individual but instead challenged the device by which Congress had mandated deportation. Third, the Court itself may become an issue in presidential elections, as has happened at least a dozen times since 1800 because of unpopular decisions. Quadrennial campaigns in the past four decades, for example, would have taken a different shape without the Supreme Court's 1973 abortion decision[7] and its progeny. (The question as to the effect, if any, of Court decisions on voter turnout has been the subject of recent research[8] not only with respect to presidential elections but also to the most recent off-year election and the Court's abortion decision of 2022.[9]) The Court has thus been political from practically the beginning in that its rulings have allowed or scuttled objectives of the major parties. Finally, the justices may touch the electoral process itself, as happens in cases on voting rights, representation, campaign finance, and certainly with the disputed Florida vote count in the 2000 presidential election[10] as well as some emergency appeals after the 2020 election.[11]

Yet, fortifying the perception that the Court is not merely political but has become truly an extension of a partisan process has been a confluence of circumstances and practices in recent years. These in turn have made the claim of a partisan-laden Court both more convincing and more difficult to rebuff. Consider, for instance, the journalistic convention whereby a print or video news story about a case identifies justices and other federal judges as having been appointed by this or that Democratic or Republican president. The unspoken suggestion of that comment is that party explains the vote or decision. That notion, furthermore, has found its way into comments by elected officials.

Moreover, undercutting efforts to counter accusations of a partisan Court is the fact that in some high-profile decisions the voting among the justices often aligns closely with the party of the appointing president, just as confirmation votes in the Senate have recently sharply paralleled party lines. Perhaps such

correlations were on the mind of the 46th president in October 2022 when at a fundraiser he said "The Supreme Court is more of an advocacy group these days than it is . . . evenhanded. . . ."[12]

Contrary to the present situation, socially and culturally provocative rulings such as *Brown v. Board of Education*,[13] *Roe v. Wade*, and some on religious freedom, national security, and criminal justice that sorely agitated Congress and the public several decades ago were often decided by majorities where the appointing presidents reflected a partisan mix. Consequently, even when some elected officials, journalists and commentators sharply criticized such decisions, they usually did so outside a partisan construct. Denigrators might instead refer to justices as liberal or activist, misguided, or plainly wrong-headed. However, a decision on even a highly salient issue would frequently lack a clear partisan identification.[14] In contrast, the cumulative effect today reflects a transformation of political combat to a point where one segment of political elites and their allies and spokespersons leap beyond mere disagreement with a decision to a posture that questions the Court's "legitimacy."

Significantly, partisanship also seems almost embedded institutionally in that party has long played a role in the selection of new members of the Court. While a president's choice of a particular nominee is the usually the product of multiple factors, among them has long been an individual's party identification—in the modern era whether the person is a Democrat or Republican. Moreover, this is no recent development. The practice dates from nearly the beginning of government under the Constitution, as a national party system was beginning to take shape. Indeed, the first exception to what has become virtually a rule did not occur until 1863, when President Abraham Lincoln, a Republican, picked Stephen Field, a Democrat. Moreover, the custom of choosing within one's party has persisted with only a handful of exceptions since Field's time. Since World War II, for example, there appear to be only three: Democratic President Harry Truman's selection of Republican Harold Burton in 1945, Republican President Dwight Eisenhower's appointment of Democrat William Brennan in 1956, and Republican President Richard Nixon's choice of Democrat Lewis Powell in 1971. There have been no crossovers since.

Moreover, partisanship (or at least a sense of indebtedness to party) seems to be reflected even with respect to departures from the Bench. Of the 20 retirements from the Court since 1945 that were not precipitated by a major health calamity—or sudden need to leave the Court, only six occurred in situations where the presumed party identification of the departing justice differed from the party identification of the president who then named a replacement.

The Company They Keep

Those troubled by such indications of partisanship will find little solace in **The Company They Keep** by Neal Devins, professor of government and law at the College of William and Mary and Lawrence Baum, emeritus professor of political science at Ohio State University.[15] Their subtitle accurately captures the focus of this timely volume: "How Partisan Divisions Came to the Supreme Court."

Acknowledging that some of the forces and factors currently lending a partisan hue to the Court have been present for a long time, the authors grapple with what they see as a changed situation. They begin by assigning a specific definition to the term partisanship. For them it encompasses more than party-line voting by senators, whereby Democratic senators vote almost exclusively for nominees of Democratic presidents, alongside similar voting by Republican senators. Instead, the

enhanced partisanship identified by the authors is the end result of today's appointment process. This process has yielded a Court in which "since 2010 (*and for the first time*) *all* Republican appointees are more conservative than *any* Democratic appointees"[16] as reflected in the justices' voting behavior. In short, the polarization of the parties has been contagious, spilling over into Supreme Court appointments so that in "today's polarized Senate, it is unimaginable that Antonin Scalia would be unanimously confirmed or that Ruth Bader Ginsburg would receive all but three (out of forty-three) Republican votes."[17]

The cumulative result of recent appointment practices will surprise no one attuned to current affairs in that "a Court with a Republican majority often reaches different outcomes than one with a Democratic majority on the very wedge issues that divide the parties."[18] Furthermore, one suspects that those decisions then contribute a further effect whereby the Court's own work unavoidably amplifies the perceived differences between the parties. While it has been widely noted for some time that Democratic presidents appoint liberals and Republican presidents try to appoint conservatives, the authors look beyond the prevailing and unremarkable consensus that the Court is shaped by the political and social environment within which the justices work. Within that environment, they insist, lies a less noticed but impactful phenomenon—the "orientation of Supreme Court justices toward elite networks whose approval is important for them." Attentiveness to those networks "has also helped create [and maintain] party line divisions on the Court."[19]

Devins and Baum develop their argument and present their findings across five chapters that are followed by 69 pages of notes. The chapters in turn are enriched by eleven tables and five figures (or graphs). However, both tables and figures would have been more useful and accessible had their titles been listed separately in the table of contents. Similarly, the notes might beneficially have been augmented by a separate bibliography that listed in one place the authors' sources.

At the outset and as background to what follows, the authors lay out three related foundational points that capture their findings and projections. The first points to one major outcome of the polarization of the Democratic and Republican parties: the vigilant appointment *only* of justices whose ideological views reflect the dominant positions in the appointing president's party. No longer does one find a situation, as before the mid-1980s where "ideology played a less pronounced role in Supreme Court appointments." Then there were occasions when "Republican presidents sometimes [perhaps unknowingly] appointed liberals and Democrats sometimes appointed conservatives."[20] [However, in their discussion of *Roe v. Wade* and *Planned Parenthood v. Casey*[21] to illustrate positions of justices that did not adhere to what party label might have anticipated, the authors are incorrect in stating that with *Planned Parenthood* "the two Democratic appointees were split between the opposing camps."[22] In 1992 there was only one Democratic appointee, Justice Byron White.

Regarding justices who disappointed some of the appointing president's expectations, one thinks of President George H. W. Bush's selection of David H. Souter to the seat vacated by Justice William J. Brennan, Jr. in the summer of 1990. Remarkably, Souter was so freshly sworn as a judge on the U. S. Court of Appeals for the First Circuit that he had written no opinions and was still without chambers.[23] [However, Devins and Baum misleadingly report that "the1991 term" was "his first year as a Justice" on the High Court.[24] Souter was confirmed on October 2 and took the judicial oath on October 9, 1990.][25]

Souter had been state attorney general and a trial judge before Governor John Sununu (by 1990 Bush's chief of staff) placed

him on the New Hampshire Supreme Court in 1983. Yet this background yielded few clues to his thinking on the most divisive federal constitutional issues. Moreover, without a significant trail as well of non-judicial writings the contrast with what had abundantly been known about Judge Robert Bork in 1987 was stunning. Nonetheless U. S. Senator Warren Rudman of New Hampshire, who had long been a promoter for Souter, urged his nomination on Sununu and White House counsel C. Bowden Gray as the ideal nominee, someone unlikely to incite a Bork-like confirmation fracas on the eve of the November midterm elections. Yet he also conveniently seemed to meet the administration's goal of a strict constructionist, and believer in both judicial restraint and adherence to precedent. As Souter had encapsulated his legal philosophy in 1976 when named to his state's supreme court, "The more we allow language to be debased, the more free-swinging we are in our interpretations of legal language, the greater risk we run of having the public perceive our actions as arbitrary and personal, not grounded in the constitutional process."[26] It was not long, however, until it became apparent that the 105th justice, whom one senator—shortly after Souter's nomination—had labeled the "stealth candidate,"[27] would become a reliable member of the liberal wing of the Court.

In the category of "lessons learned,"—but in a less polarized atmosphere than today's—the Bush administration's stringent efforts to avoid a controversial nominee in filling Justice Brennan's seat seemed to parallel the Reagan administration's third (and this time successful) effort to replace Justice Lewis F. Powell who retired in 1987. In doing so, however, the authors note that in turning to Judge Anthony M. Kennedy of the Court of Appeals for the Ninth Circuit, the White House "advanced a candidate who had earlier been rejected on ideological grounds"[28] but who now, under the circumstances, seemed both acceptable and confirmable, as Souter would appear three years later.

The footnote Devins and Baum attach to the quoted words in the preceding paragraph directs the reader to chapter six of David Alistair Yalof's **Pursuit of Justices** (1999) wherein lies ample indication that the nominee might well stray from the preferred strict constructionist fold. Yalof drew from an assessment prepared by Justice Department staff person Steven Matthews that noted Kennedy in 1980 had "only grudgingly upheld the validity of naval regulations prohibiting homosexual conduct, citing *Roe v. Wade* and other privacy right cases very favorably in the process." Matthews concluded, "this easy acceptance of privacy rights as something guaranteed by the Constitution is really very distressing."[29] Students of the Court will be quick to recall that among the hallmarks of Justice Kennedy's long Supreme Court tenure were several landmark opinions expanding constitutional protections for sexual freedom.

The second foundational theme that Devins and Baum advance is a key causal factor that proves to be central to their book. The justices "do not respond primarily to pressures from the other branches of government or the weight of mass public opinion. Rather, the primary influence on them is the elite world in which the Justices live both before and after they join the Supreme Court." Accordingly, they "take cues primarily from the people who are closest to them and whose approval they care most about, and those people who are part of political, social, and professional elites"[30] These elites thus comprise "the company they keep," as the book's title implies.

Thus, while the partisan divisions the book investigates certainly begin with the choices various presidents make in filling vacancies, it is the various networks of associational elites the authors highlight that have not only helped shape the nominees but operate continually after their appointments

to fortify them in their views. Elite groups range from law school faculties to media outlets in both print and electronic journalism to think tanks and advocacy organizations. While the authors are persuasive in what they write about the influence of these elites on the justices, their contentions nonetheless remain more in the category of highly suggestive hypotheses or possibilities than proven conclusions.

As a third foundational point that underlies the first two, the authors insist that that "the Supreme Court is still a *court*."[31] That is, the justices "respond to expectations among legal elites that they still act like legal decision makers. Those expectations help explain the frequency of unanimous or near-unanimous decisions and decisions that cut across ideological lines even in an era of high polarization." Moreover "the differences between the Court and Congress are highlighted by the differences in the ways that members of the two institutions respond to partisan and ideological polarization"[32]—a difference a reader might suspect is partly or even largely due to the fact that members of one branch are electorally accountable while members of the other are not.

For those who lament the current partisan divisions on the Court, the authors hold out little more than a thin hope for improvement in the short term. "So long as party polarization continues, it is quite likely that the current coincidence of partisan and ideological lines on the Court will also continue." Indeed, Devins and Baum warn, "there are reasons to expect that partisan lines on the Court become sharper over time." This bleak outlook seems probable because new justices "will be accustomed to an elite world in which there are two camps engaged in bitter competition. . . . They will have gone through career paths that are defined largely by party and ideology. Most notably Democrats will identify with and associate with groups such as the American Constitution Society; Republicans will be members of the Federalist Society."[33]

Returning to their book's principal theme, the authors remind readers that prospective justices are groomed in such "elite social network that make them both more ideological and more likely to stand firm in their ideological convictions."[34] However, while the reader is apt to credit the authors with an important argument, the risk remains that it tends to depict prospective nominees and hence future justices as what a movie buff might term a judicial variant of a Manchurian Candidate.

Nonetheless, and despite indications to the contrary, the authors do confess that the changes they report "are not necessarily permanent." If the movement toward stronger polarization among political elites is reversed, that reversal can be expected to affect both the appointments of Supreme Court justices and the partisan and ideological element of the justices' social identities." That outcome, however "seems quite unlikely in the near future."[35] Nonetheless, in contemplating the prospects for change the reader should remember that the prospects for change or mere continuation of the status quo are also a function of vacancies on the Bench which occur only on an irregular and therefore unpredictable basis.

Remarkably, Devins and Baum conclude with a somewhat reassuring reiteration that the Court, despite the existing polarization, nonetheless remains different from the elected branches of government. However, they nonetheless label the current situation "a consequential change,"[36] one that has transformed the institution into something vastly different from the Court in any other period of its history. The reader is thus left with the troubling question whether, without some significant return to an earlier and more typical pattern, the Court will indeed continue to appear and to function substantially different from the other branches in ways beyond the physical and most obvious.

Salmon P. Chase

At least since publication of Albert Beveridge's four-volume **Life of John Marshall** about a century ago, biography has provided the clearest and most inclusive window into the Supreme Court. According to the extensive bibliography compiled by Henry Abraham for what proved to be the last edition of his classic and widely consulted work on Supreme Court appointments[37]—and with some modest updating for this essay by this author—some 53 justices (roughly half of the 107 justices who had completed their service as of early 2023) have been the subject of at least one serious published book-length study of their lives. Indeed, one suspects that the count would be higher but for the extremely brief tenures of some members of the Court.

If that count suggests that service on the Court alone goes far toward making an individual biography-worthy, the number also poses a related question: of those justices who have been the subject of a biography, how many would have been so honored had they never sat on the Court? A few moments of thought bring several names to mind, such as William Howard Taft and Charles Evans Hughes from the twentieth century as well as Louis D. Brandeis and perhaps Oliver Wendell Holmes, Jr. From the eighteenth, John Jay might make the cut. Yet for the nineteenth century, even John Marshall and Roger Taney might not today be sure-fire prospects for exhaustive book-length treatments.

No hesitation, however, has deterred authors from Salmon Portland Chase who had remarkable accomplishments in public affairs even prior to becoming the sixth chief justice. Indeed, he was the subject of a major biography by Albert Bushnell Hart as early as 1899, barely twenty-six years after his death in 1873. Chase—born in 1808 in New Hampshire and named for an uncle who had been the leading lawyer in Portland in what is now the state of Maine—is at the center of a new biography by attorney and John Jay biographer Walter Stahr.[38] His **Salmon P. Chase**[39] joins the same author's biography of William Seward indicating that Stahr has had ample experience exploring the sources and grappling with the prominent political personalities of the middle third of nineteenth century America. Moreover, Stahr's subtitle for his book on Chase—"Lincoln's Vital Rival"—provides a hint of the story that the author tells. (Nonetheless, it may come as a surprise to the reader to learn on the first page of the first chapter that Chase detested his name as being not only pretentious but "fishy" as well. Indeed, when an admirer wrote Chase during the Civil War that he intended to name his son Salmon Portland, Chase was quick to offer contrary advice. Acknowledging that his uncle was an excellent lawyer and Portland a respectable city, Chase nonetheless advised the father to think of "the feelings of your boy, fifteen yours hence or twenty" and to search for a better name.)[40]

Reflecting a subject with an active public life that spanned a critical time in American history rich with primary sources, Stahr's book is, not surprisingly, a hefty volume of 659 pages. These contain twenty-six chapters plus an introduction and conclusion. Readers of this engaging and insightful book will appreciate the inclusion of some 92 illustrations in grayscale, although it would have been helpful also to have a list of those illustrations and their page numbers tucked in the rear or near the table of contents. (The only semblance of such a list is for the 23 illustrations not obtained from the Library of Congress.[41]) Nonetheless, the illustrations are a reminder of the invaluable legacy of refinements to the science of photography in the mid-nineteenth century. For example, Stahr includes what may well be the first group photograph of the justices of the Supreme Court, dating from 1867.[42] Some 136 pages of notes follow the conclusion and precede a thorough and invaluable index. While the

notes reflect the author's extensive research, some readers will wish for a separate bibliography of the published sources that were consulted similar to the list of manuscript sources that is provided.[43] Also especially helpful, given the many twists and turns of Chase's life, would have been a chronology.

By late 1864 when Chase ascended to the chief justiceship, Stahr's account makes clear that he had already had a considerable impact on national life as a founder of the Free Soil Party, United States senator from Ohio and Ohio's first Republican governor.[44] Even more impactful, he was secretary of the Treasury in the Lincoln administration, a position Chase used to establish policies that were vital to the outcome of the Civil War. In his three years at the head of the Treasury Department, Chase managed to raise the hundreds of millions of dollars necessary to finance the war, partly through direct appeals to the public to purchase bonds—that is, for the public to invest in the success of northern forces on the battlefield that would in turn enable the union to survive. The wartime crisis also allowed him to create a national banking system and a single national currency.

"Before the war," Stahr explains, "American currency was a confusing mix of foreign and domestic coins and more than ten thousand different types of banknotes—difficult to value and easy to counterfeit." After 1865—thanks largely to Chase—money consisted of "coins minted by the federal government and notes printed and backed by the federal government." Before then, Stahr explains, "there were no national banks, only a host of almost ten thousand state banks, ranging from the large and stable to the small and spurious."[45] In contrast, after 1865, a strong system of national banks existed. Thus, in this respect alone, Chase deserves part credit for the overall success of the Lincoln administration. Accordingly, it is hardly a coincidence that Chase's name remains embedded within the name of one of the country's largest banks. For Stahr, such achievements alone qualify Chase as an especially important figure in American history and justify the author's desire to introduce him to a new generation of readers. It is thus entirely understandable that Chase's pre-Court life occupies the bulk of the book, and in so doing cements the conclusion that Chase would indisputably rate a biography had he never spent a day on the bench.

The reader soon grasps the significance of the book's subtitle. First, Stahr insists that Lincoln's own election as president in 1860 could not have happened had individuals like Chase not helped to form and build anti-slavery political movements and parties—first the Free Soil and later the Republican—as essential groundwork. Indeed, Stahr goes into some detail early in the book to demonstrate that it was Chase, not Lincoln, who was the greater and perhaps the more sincere foe of slavery.[46]

Second, Chase's work at the Treasury Department, as noted, contributed mightily to a union victory that in turn sealed Lincoln's success as president. Much less well known, however, is the strong rivalry between Chase and Lincoln. Not only had Chase sought the Republican presidential nomination in 1856, but he had been a major contender for that party's nomination against Lincoln in 1860. Then while at the Treasury he worked for his party's nomination in 1864 when Lincoln successfully sought reelection. (His thirst for the presidency still not quenched, he pursued the Democrat nomination in 1872 even after becoming chief justice.)

Nonetheless, just as Lincoln's fortunes (and the nation's) were greatly dependent on Chase, he probably would never have achieved prominence at the highest national levels without his work as an attorney on anti-slavery causes during the two decades before his first election to the Senate in 1849. This stage of Chase's life unfolded after the Dartmouth graduate moved from New

England to Washington as a school teacher and developed a beneficial relationship with William Wirt who became a mentor. Soon Chase was admitted to the District of Columbia bar thanks in part to some leniency of the examining panel headed by the noted jurist William Cranch. Afterward, like many of his generation, he ventured to the "western country," as Ohio was sometimes described, and set up practice in Cincinnati in 1830. With a population of about 25,000 and a location across the Ohio River from Kentucky, what was even then sometimes called the Queen City" was probably the most pro-slavery city in the Buckeye State before the Civil War.

It is in chapter four ("Some Great Scheme") that Stahr recounts the Matilda episode, one of Chase's legal endeavors on behalf of a slave and one that illustrates his public spirit, boldness, and intellectual energy. Such courtroom encounters helped earn for him the epithet "attorney general for runaway slaves."[47] In 1836 an enslaved woman named Matilda escaped from a boat moored at a Cincinnati wharf. James. G. Birney (who would be the Liberty party's candidate for president in 1840 and 1844) took her into his household as a servant. Matilda's owner (and father) hired a detective who found and seized her under the terms of the Fugitive Slave Act of 1793. Chase intervened on her behalf in a state court, claiming that she was neither a slave nor a fugitive. Freedom, not slavery, was the natural or default status for all Americans, Chase argued. Slavery was therefore unique as a species of property in that it could exist only by the positive law of a state (hence its common designation as the "peculiar institution"). On this point the law of a state was final. Ohio, where slavery was forbidden, was as sovereign as Maryland, where slavery was allowed and from which Matilda had come. Thus, the national government was as powerless to interfere with the status of slavery within a state that recognized or prohibited it as that state's recognition of slavery was to determine a person's status outside its borders, he insisted. Arriving on Ohio's free soil, Matilda became free, and having been freely brought there by her owner, she was not a fugitive. Moreover, Matilda's recapture, Chase concluded, violated at least two provisions of the Bill of Rights: the Fourth Amendment guaranty against unreasonable seizures and the Due Process Clause of the Fifth. For Chase the significance of his reasoning went well beyond her freedom. Without protection elsewhere, slavery as an economic institution could not survive.

His elaborate argument, however, was to no avail. Before an appeal could be taken against an adverse court ruling, Matilda was returned to her captors, ferried to the opposite shore, and literally 'sold down the river.' Birney's opponents then brought charges against him for sheltering a fugitive. Pressing arguments similar to those he had advanced in Matilda's case, Chase appealed Birney's conviction to the state supreme court which, bypassing Chase's fundamental argument, held for Birney on the technical ground that he lacked knowledge that Matilda was a fugitive. Nonetheless, the court took the unusual step of directing that Chase's argument be published, presumably believing it to be sufficiently meritorious to bring it to the attention of the bar.[48]

Chase's political successes, however, contrasted sharply with the personal tragedies in his life. If no one is without at least some heartbreaks, Chase drew more than his share. While his marriage to Catharine Jane ("Kitty") Garniss in 1834 linked him to one of the city's leading families, she died a year later. His marriage to Eliza Ann ("Lizzie") Smith in 1839 was cut short by her death in 1845. He married Sarah Bella ("Belle") Dunlop Ludlow the following year but was left a widower for the third time in 1852. Chase's three unions yielded six daughters, yet only two survived infancy or early childhood. Such

mortality was appalling even by nineteenth century standards when medicine lagged well behind the progress of other sciences. Perhaps the anti-slavery side of his law practice, involving as it did the anguish of others, provided a healthful diversion from the calamities of his own life.

Chapter 21 ("So Help Me God") recounts Lincoln's nomination of Chase for the center chair upon Roger B. Taney's death in October 1864. From the perspective of a reader some 18 decades later, an initial reaction might be that little in the realm of public comment has changed regarding vacancies on the Supreme Court. Different newspapers from varying partisan perspectives offered their recommendations. Those inside the administration, presumably after conversation with Lincoln—like today's ever-present and all-knowing "anonymous sources" offered theirs. Frontrunners included Associate Justice Noah Swayne, who seemed to have numerous cheerleaders, as did Secretary of War Edwin Stanton and Justice David Davis, who had been mightily instrumental in Lincoln's nomination and election in 1860 and whom Lincoln had named to the bench in 1862. Yet there was also a noticeable chorus for Chase, as reflected in the letter Alphonso Taft—father of a future chief justice—sent to Chase once Lincoln had announced the nomination. "I will forgive Mr. Lincoln much for this. To be chief justice of the United States is more than to be president, in my estimation."[49]

Stahr offers an overall appraisal of Chase in the last eight pages of the book. He accepts the view of other scholars that Chase deserves acclaim for the way in which he presided over the impeachment trial of President Andrew Johnson. As for his service on the Court, the author reports Justice William Strong's view that that Chase would have better served the Court had he abandoned his presidential ambitions. Stahr includes Justice Samuel Miller's observation that Chase was "endowed by nature with a warm heart and a vigorous intellect, but all these warped, perverted, shriveled by selfishness generated by ambition." But even Miller conceded that he was a "great man" and a "better man" than "most men with long public careers."[50] Among others who have served on the Court, the author believes that Chase would rank higher in esteem had he served longer, written more opinions and included more legal analysis in the opinions he did write.

In place of a focus on any particular period of his life, Stahr believes Chase should be evaluated on "his whole life's work." Judged in this fashion, the author believes that Chase ranks "as one of the great Americans of his generation." The central message that emerges from Chase's life "for our generation is that change is possible. . . . Slavery ended in America not because of vast impersonal forces," the author concludes, "but because of the work of individual men and women, and Salmon P. Chase deserves his central place in this great American story."[51]

On Account of Sex

In his assessment of Chase's judicial service, Stahr adds that Chase might well be rated more highly by scholars today had serious illness not prevented him from filing an opinion to accompany his dissent in *Bradwell v. Illinois*,[52] the Supreme Court's first case involving gender discrimination.[53] Decided on the same day and with the same voting alignment among the justices as the Slaughterhouse Cases,[54] *Bradwell* was also grounded in section one of the Fourteenth Amendment, ratified only five years earlier. The litigation challenged the state's refusal to license the otherwise qualified Myra Bradwell to practice law merely because she was a woman. However, nearly a century would pass before the Court deployed the Fourteenth Amendment or any other part of the Constitution on behalf of gender equality. While there have been opponents of

gender-based discrimination since the earliest years of the Republic, and particularly after the Seneca Falls Convention of 1848, justices of the Supreme Court for a long time did not appear to be among them. "The Constitution," remarked Ruth Bader Ginsburg at a conference at West Virginia University in 1978, "was viewed by jurists until well past this century's midpoint as a virtually empty cupboard for sex equality claims."[55]

Ginsburg's role in what may fairly be described as a legal revolution is the focus of **On Account of Sex** by Philippa Strum, senior scholar at Washington's Woodrow Wilson International Center for Scholars, and professor emerita of political science at the City University of New York. As the subtitle of this compact and eminently readable monograph promises, Strum examines "Ruth Bader Ginsburg and the Making of Gender Equality Law."[56] Accordingly, Strum has not written a traditional judicial biography. Instead, the book develops two principal themes: Ginsburg's work as director of and litigator at the Women's Law Project of the American Civil Liberties Union, and revealing glimpses into the decision-making process at the Supreme Court as the justices decided gender cases particularly before her tenure of 27 years as a justice.

While her thirteen years on the U. S. Court of Appeals for the District of Columbia Circuit are largely passed over in the book, the significance of even the *timing* of her appeals court appointment should not be overlooked, especially since that appointment later enhanced her "eligibility" for the Supreme Court. Ginsburg's appellate nomination on April 14,[57] and confirmation on June 18, 1980, meant that she was among the last of President Jimmy Carter's 59 appointments to the appeals benches. Carter's presidency was then followed by 12 years of a Republican controlled White House. Given that in the modern era presidents only rarely make judicial nominations outside their party, it then seems plain that had Carter *not* chosen Ginsburg in 1980, she most probably would never have had service on an appeals court by the time Bill Clinton became president in 1993, an event followed by Justice Byron White's retirement announcement in March and Ginsburg's nomination for the High Court in June of that year.

Readers abreast of recent literature on the Court know that Strum's scholarship includes not only a biography of Justice Louis Brandeis[58] but also several case studies including an account of the eventually unsuccessful six-year courtroom battle fought by Virginia Military Institute (VMI) to retain its all-male status.[59] Thus, Strum is a newcomer neither to research on gender discrimination nor to the case study genre. Moreover, given the amount of biographical material on Ginsburg which her book contains, including what appears to be copious amounts of information gleaned from interviews and correspondence with Ginsburg, one would not be surprised to learn soon that a full-scale biography is in the works.

On Account of Sex is one of the most recently published entries in the Landmark Law Cases & American Society Series, published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull Williamjames Hull Hoffer. Remarkably, this succession of case studies now claims nearly eight dozen titles, the large share of which treat decisions by the United States Supreme Court. As such, the Kansas series fits comfortably into and has substantially enlarged and enriched an established scholarly category that has been an instructive part of literature on the judicial process for more than six decades.[60]

The Strum addition, however, differs from most volumes in the Kansas series in that it focuses on the legal contributions of a single individual, rather than following a single piece of litigation from start to finish. Nonetheless, it adheres to the organization

and generally pursues the objectives of most of the other entries. Like them, Strum's helpfully includes a thorough bibliographical essay, and, essential for a focus on so accomplished an individual, a detailed chronology.

Yet also like the other books in the series hers sadly lacks footnotes or endnotes. While footnotes or endnotes are not usually important for classroom use, where, one suspects the principal marketing thrust for the Kansas series is directed, their presence would greatly aid use of the bibliographical essay for general readers and scholars, with probably no loss of appeal to either a classroom or wider audience. In defense of the omission of footnotes or endnotes, the series editors have explained elsewhere that they "asked all authors to omit formal citations in order to make our volumes more readable, inexpensive, and appealing for students and general readers."[61] The defect in that explanation, however, seems easily illustrated by three quotations. The first two appear on page 58: one by Nancy Stearns, the second by Aryeh Neier. Stearns and Neier were individuals with whom Ginsburg worked at the Women's Rights Project. The third is on page 151 where Ginsburg quotes an unidentified federal district judge who laments, "In dealing with Supreme Court 1970s sex discrimination precedent, lower court judges feel like players at a shell game who are not exactly sure there is a pea." Without a citation provided for any of the quotations, the reader is left adrift, wondering about the specific source of each.

A major strength of the book's eight numbered chapters is Strum's reference to some 31 sex discrimination or gender-related cases, many of which are accompanied by extended analysis. Several merit attention here. As expected, one finds *Reed v. Reed*[62] in which the Supreme Court first invalidated a gender-based statute, and a case for which Ginsburg—then a professor at Colombia University Law School—wrote the merits brief on behalf of Sally Reed. Judged violative of the Equal Protection Clause of the Fourteenth Amendment was an Idaho law directing that males be preferred to equally qualified females in the appointment of administrators for estates. The Court acknowledged that "the objective of reducing the work load on probate courts by eliminating one class of contests is not without some legitimacy." Then, purporting to apply the traditional rationality standard, a unanimous bench held that "a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to work the very kind of arbitrary legislative choice forbidden by" the Fourteenth Amendment.[63] While pleased by the outcome, Ginsburg had hoped her brief would instead convince the Court to apply strict scrutiny—that is, to place gender discrimination in the same category as race, and so to judge such distinctions by the exceedingly tougher standard.

Two years later Ginsburg delivered the oral argument in *Frontiero v. Richardson*.[64] Challenged under the equal protection component of the Fifth Amendment's Due Process Clause was a Defense Department policy that treated male and female personnel differently when obtaining support for dependent spouses. However, strict scrutiny again proved to be out of reach, even though a plurality agreed that it should be the correct measure. Nevertheless, four other justices in this 7–1 ruling probed the rationality of the statute and concluded that it was constitutionally defective. During oral argument in this case Strum reports that remarkably the "justices were absolutely quiet as she spoke." This was so unusual that "Ginsburg was left wondering if the justices considered what she had to say to be so unimportant that they saw no reason to interact with it."[65] Although the plurality in *Frontiero* failed to secure the fifth vote to attach strict scrutiny to gender classifications, Justice Lewis Powell's

concurring opinion—joined by Chief Justice Warren Burger and Justice Harry Blackmun, remains a reminder of the hazard of crystal ball gazing.[66]

Nonetheless, compromise within the Court regarding the rational basis and strict scrutiny tests then accounted for Justice William Brennan's opinion in *Craig v. Boren*,[67] that Strum dubs the "thirsty boys" case[68] where the Court spelled out an intermediate level of scrutiny for gender-based distinctions. In this case, an Oklahoma statute prohibiting the sale of 3.2 percent beer to males under 21 and to females under 18 fell short constitutionally. "[T]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," explained Justice Brennan.[69] In other words, the purpose of the statute must be valid, and the justices must be convinced that another law treating the sexes equally would not do as well. *Craig* warned that gender-based distinctions were constitutionally at high risk.

That assessment turned out to be especially true with respect to single-sex education in state-supported institutions of higher education, a matter the Court first confronted in *Mississippi University for Women v. Hogan*.[70] "Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender," Justice Sandra Day O'Connor advised in one of her first opinions for the Court, "must carry the burden of showing an exceedingly persuasive justification for the classification."[71] Apparently tightening the standard from *Craig* the justices found unpersuasive the state's argument that a female-only nursing school served a substantial government interest by compensating for discrimination against women. Instead, they concluded that the Mississippi policy only tended to perpetuate the stereotyped view of nursing as exclusively a woman's job. Furthermore, even though Title IX of the Education Amendments of 1972 expressly authorized traditionally single-sex state universities to continue admitting only men or women, O'Connor explained that Congress could not permit by statute something the Fourteenth Amendment forbade.

Hogan then determined the outcome of the six-year battle fought by Virginia Military Institute (VMI) to retain its all-male status, litigation that forms the centerpiece of Strum's "Epilogue." In *United States v. Virginia*[72] *Justice* Ginsburg, applying what she called "skeptical scrutiny"[73] spoke for the Court as it ordered 7–1[74] an end to single-sex education at VMI. Invalidated was an arrangement by which women seeking specialized military education could instead enroll in the state-financed Virginia Women's Institute for Leadership at nearby Mary Baldwin, an independent college for women.

Strum's "Introduction" contains what might be the most appropriate conclusion to her book insofar as one might search for an apt description of Ginsburg's lifetime impact. "It is 'the rare prophet,' eulogized Rabbi Lauren Holtzblatt in the Great Hall of the Supreme Court on September 23, 2020, "who not only imagines a new world but also makes that world a reality in her lifetime."[75]

The Presidents and the Constitution: Volume II

While Justice Ginsburg's career illustrates that presidents such as Carter and Clinton may adroitly use their Article II authority to shape the Supreme Court and other federal courts, that shaping has in reality long been a two-way street. Just as the justices help to define presidential authority though the process of deciding cases, the record is also clear that presidents themselves in turn have effectively shaped the Constitution through their own actions.[76] As Justice Felix Frankfurter insisted in his concurring opinion in the Steel

Seizure Case, presidential actions may help to mark the limits of presidential power

> [T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore, the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by Art. II.[77]

Presidents may also effectively engage in constitutional interpretation by acting or refusing to act on certain matters, as did Andrew Jackson when he vetoed Congress's renewal of the charter of the Second Bank of the United States because he thought Congress lacked the authority to charter a bank in spite of the Marshall Court's ruling to the contrary.[78] Similarly, a few decades later Abraham Lincoln refused in his first inaugural address to accept the Court's decision in the Dred Scott Case[79] as a valid reading of Congress's powers under the Constitution.[80]

It is constitutional change in this larger institutional sense—one encompassing presidential actions, inactions, and Supreme Court appointments and decisions—that characterizes the updating of **Presidents and the Constitution,** an important resource edited by Ken Gormley,[81] who is president of Duquesne University and former dean of the law school at Duquesne. Gormley's book first appeared as a single volume in 2016 and contained chapter-length essays on the presidents from George Washington through Barack Obama.[82] In 2020, volume I appeared and included the chapters on the presidents from the founding era to the Progressive era. Volume II[83] moves the story forward, beginning with Woodrow Wilson and concluding with Donald J. Trump. In its scope, depth, and especially its timeliness, this most recent volume represents an addition to the literature not only on the presidency but also the Supreme Court, and American political and constitutional history generally.

A key to grasping the contribution of Gormley's book lies in the subtitle of the initial 2016 volume: "A Living History." Its message is that the American presidency is not static, but unfolding. As it came from the hands of the Framers, the Constitution, after all, provides in Article II at best only a sketchy outline of the presidency. Article II is much shorter than Article I on the Congress and lacks Article I's fulsome detail which seemed to create Congress nearly full-blown. Indeed, if the Constitution were a script for a play or a screenplay for a motion picture, the president would clearly seem to have been given a "bit part," at least by the standards of Article I.

"As reduced to parchment in the new U. S. Constitution," wrote Gormley, "the presidency was therefore a uniquely American office,"[84] one without parallel in the world of its day. It was also perhaps a surprise, given the colonial experiences with King George III and royal governors, attempts in

some of the earliest state constitutions to keep their chief executives on a very short leash, and the absence of a separate executive under the Article of Confederation. Thus, "the new American presidency would be defined by the Constitution but also would be allowed to play itself out, gradually giving definition to the sparse words of the written document."[85] The result is that each time a new president takes office that person "inherits a rich body of experience and precedent; he or she must draw upon that valuable storehouse in riding out unexpected gusts, gales, and tsunamis, keeping the ship of state steady and creating a fresh set of markers for future occupants of the office. At the same time each president must wrestle with unplanned events, in order to shape his or her own legacy."[86] Thus, the Framers' unfinished sketch continues to acquire new dimensions and detail.

In addition to a chapter on President Trump jointly authored by Gormley, Joy G. McNally, and Joseph Disarro that updates the book up to the eve of President Joseph Biden's inauguration, Gormley has added a concluding chapter on the "Evolving American Presidency" that lays out a series of "connecting threads"[87] or themes that weave their way through most of the various presidencies from Washington to Trump. "Not only do they allow readers to map out important points of intersection among the forty-four distinct chief executives, but they also provide a context for understanding why individual presidents behave as they do and offer clues as to where the current of history will likely take future American presidents as they confront issues that are simultaneously new and part of the inevitable cycle of recurring historical events."[88] The list of the recurring themes—each of which merits a short essay—will contain few surprises for regular readers of the *Journal*: "Race, A Haunting Theme;" "The Commerce Clause;" "National Security versus Free Speech and Privacy;" "Gender: The Forgotten Struggle;" "Special Prosecutors: Policing Modern Presidents;" "Safeguarding Presidential Powers: Executive Privilege;" "Shaping the Supreme Court;" "After the White House: Post-Presidential Roles." With such a range of connecting threads, Gormley's expectation seems to be an American application of the phrase from 1849 usually attributed to Jean-Baptiste Alphonse Karr: "the more things change, the more they stay the same."[89]

Appropriately, this final chapter contains a sentence which echoes the books surveyed here and which—perhaps not surprisingly—could just as appropriately have been written about the Supreme Court and its justices: "As the framers' unfinished sketch . . . continues to emerge through the energetic performance of the individual[s] thrust into [those] high office[s] at specific moments in history, the story will continue to gain new layers of texture and sharp detail."[90]

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

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ENDNOTES

[1] The most recent edition was issued in 2016.

[2] Robert G. McCloskey, **The American Supreme Court** (1960), 231.

[3] William Lasser, **The Limits of Judicial Power** (1988), 3.

[4] Brad Snyder, **Democratic Justice** (2022), 720.

[5] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

[6] *Immigration and Naturalization Service v. Chadha,* 462 U. S. 919 (1983).

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

[8] Brian Christopher Jones, "Surprisingly (Un)Inspiring Judicial Decisions," 2023 *University of Illinois Law Review Online* 1.

[9] *Dobbs v. Jackson Women's Health Organization*, 579 U. S. ____, 142 S. Ct. 2228 (2022).

[10] *Bush v. Gore,* 531 U. S. 98 (2000).

[11] For example, see *Texas v. Pennsylvania*, order list for December 11, 2020, 592 U. S. ___ (2020).

[12] https://www.nbcnews.com/politics/supreme-court/biden-says-supreme-court-advocacy-group-evenhanded-rcna51864, last accessed January 26, 2023.

[13] 347 U. S. 183 (1954).

[14] Perception of the Court as overtly partisan may account for what Gallup reported in September 2022: "Forty-seven percent of U.S. adults say they have 'a great deal' or 'a fair amount' of trust in the judicial branch of the federal government that is headed by the Supreme Court. This represents a 20-percentage-point drop from two years ago, including seven points since last year, and is now the lowest in Gallup's trend by six points. The same press release added: "In addition to documenting record-low trust in the federal judiciary, the new Gallup poll also finds a record-tying-low 40% of Americans saying they approve, and a record-high 58% saying they disapprove, of the job the Supreme Court is doing." https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx, last accessed on September 29, 2022.

[15] Neal Devins and Lawrence Baum, **The Company They Keep** (2019), hereafter Devins.

[16] *Ibid*., xii, emphasis added.

[17] *Id*., 108.

[18] *Id*., xii.

[19] *Id*., xvi.

[20] *Id*., 2.

[21] 505 U. S. 833 (1992).

[22] *Ibid*., 75.

[23] Henry J. Abraham, **Justices, Presidents and Senators** (5th edition, 2008), 291.

[24] Devins, 75.

[25] The Supreme Court's *Journal* for the October 1990 Term notes on page iii that the "1989 Term closed and 1990 Term convened October 1, 1990; adjourned October 7, 1991."

[26] "Nominee Known as Tough Judge, Private Man," Nashua Telegraph, July 24, 1990, p. 22, https://newspaperarchive.com/nashua-telegraph-jul-24-1990-p-22, last accessed on October 4, 2022.

[27] The phrase is the title of chapter three in Tinsley E. Yarbrough, **David Hackett Souter, Traditional Republican on the Rehnquist Court** (2005).

[28] Devins, 122.

[29] Yalof, **Pursuit of justices**, 146.

[30] Devins, 3.

[31] *Ibid*., emphasis in the original.

[32] *Id*.

[33] *Id.,* 154–155.

[34] *Id*., 145.

[35] *Id*., 157.

[36] *Id*.

[37] Henry J. Abraham, **Justices, Presidents and Senators**, 393–419.

[38] **John Jay: Founding Father** (2005).

[39] Walter Stahr, **Salmon P. Chase** (2021), hereafter Stahr.

[40] *Ibid*., 7.

[41] *Id*., 799–800.

[42] *Id*., 557.

[43] Stahr, 663–664. The notes do not seem to indicate whether the author consulted **David F. Hughes, Salmon P. Chase: Chief Justice**, unpublished Ph.D. Dissertation, Princeton University, 1963. This lengthy study is accessible through University Microfilms. However, an article by Hughes drawn from his dissertation was published in the *Vanderbilt Law Review* and is cited in note 7 on page 768 of Stahr's book.

[44] After his four-year term as governor, Chase was returned to the Senate in 1861 when he was then named to Lincoln's cabinet.

[45] Stahr, 4–5.

[46] *Ibid*.

[47] *Id*., 3.

[48] Birney *v*. State, 8 Ohio 230 (1837).

[49] Stahr, 507.

[50] *Ibid*., 656.

[51] *Id*., 659.

[52] 83 U.S. (16 Wallace) 130 (1873).

[53] *Ibid*.

[54] 83 U. S. (16 Wallace) 36 (1873).

[55] Quoted in Philippa Strum, **On Account of Sex** 3. (2022), hereafter Strum.

[56] See previous note.

[57] Strum states that Ginsburg was nominated to the Appeals Court on April 8, *id*., 162. However, the Biographical Directory of Federal Judges maintained by the Federal Judicial Center dates the nomination as April 14, 1980.

[58] **Louis D. Brandeis** (2014).

[59] **Women in the Barracks: The VMI Case and Equal Rights** (2002).

[60] For example, see Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959), and C. Herman Pritchett and Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[61] William E. Nelson, ***Marbury v. Madison*** (2d ed., 2018), 157.

[62] 404 U. S. 71 (1971).

[63] *Ibid*., at 76.

[64] 411 U. S. 677 (1973).

[65] Strum, 72.

[66] "There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." 411 U. S. at 692.

[67] 429 U. S. 190 (1976).

[68] Strum, 124.

[69] 429 U. S. at 197.

[70] 458 U. S. 718 (1982).

[71] *Ibid*., at 724.

[72] 518 U. S. 515 (1996).

[73] *Ibid*., at 531.

[74] Justice Scalia dissented, and Justice Thomas recused himself.

[75] Strum, 2. Oddly, although her name is mentioned at least three times early in the book, Rabbi Holtzblatt's name does not appear in the index.

[76] See Robert Sigliano, **The Supreme Court and the Presidency**, chapter 2. (1971).

[77] *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610–611 (1952).

[78] *McCulloch v. Maryland*, 17 U. S. (4 Wheaton) 316 (1819).

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

[80] The Jackson and Lincoln messages appear in James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (1908), vol. 2, 581–82, and vol. 6, 9, respectively.

[81] Ken Gormley, ed., **The Presidents and the Constitution** (2016). The editor's full name is Kenneth G. Gormley, but only "Ken Gormley" appears on the book's title page, hereafter cited as Gormley, 2016.

[82] This author contributed chapters 22 and 24 on Grover Cleveland for Gormley's 2016 book.

[83] Ken Gormley, **The Presidents and the Constitution**, volume II (2022), hereafter Gormley.

[84] Gormley, 2016, 8.

[85] *Ibid*.

[86] *Id*., 654.

[87] Gormley, 311.

[88] *Ibid*., 312.

[89] https://www.saveaquote.com/quotes/authors/jean-baptiste-alphonse-karr/pag2, last accessed on January 10, 2023.

[90] *Ibid*., 326–327.

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the making of the agreement for arbitration is not in issue.' . . . a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate").

[162] *See Prima*, at 416 (J. Black dissenting).

[163] *Ibid.*

[164] *Prima*, at 416 (J. Black dissenting).

[165] *See*, *ibid.*

[166] *See*, *id.* at 418 n. 19 (quoting Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and its Application*, 20 Ill. L. Rev. 11 A.B.A.J. 153, 154 (1925)).

[167] *See*, *id.* at 419–20 (quoting 65 Cong. Rec. 1931 (1924)).

[168] *See*, *id.* at 420, n.24 ("this seems implicit in § 3's provision for a stay by a 'court in which such suit is pending and § 4's provision that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . '").

[169] *See, id.* at 423 (quoting H.R.Rep.No.96, 68th Cong., 1st Sess. (1924)).

[170] *Id. at* 425 (J. Black dissenting). *See, e.g.*, *Lucas Flour*, 369 U.S. at 107–10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference).

[171] *See, e.g.*, *Lucas Flour*, 369 U.S. at 107–10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference).

[172] *See Prima Paint Corp. v. Flood & Conklin* Draft (J. Black Dissenting) Abe Fortas Papers, Box I:41, Folder 838 at 1 (Jun. 1, 1967) [hereinafter "Fortas Comments on Black *Prima* Dissent"].

[173] *See ibid.* at 6.

[174] *See* "Fortas Comments on Black *Prima* Dissent," 10.

[175] *See*, *ibid*. 8.

[176] See Prima Paint Corp. v. Flood & Conklin Draft (J. Black dissenting), Abe Fortas Papers, Box I:41, Folder 838 at 1 (Jun. 2, 1967).

[177] *See* John Marshall Harlan II to Abe Fortas, "Re: No. 343—Prima Paint v. Flood & Conklin," Abe Fortas Papers, I:41, Folder 836 (Jun. 1, 1967).

[178] *See Prima*, at 405 n.13.

[179] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* at 12 n.22 (Jun. 8, 1967)

[180] *See Ibid., Prima Paint Corp. v. Flood & Conklin Mfg. Co*, at 1 (Jun. 2, 1967) (showing Justice Stewart joining the opinion one day after circulation).

[181] *See Prima Paint v. Flood & Conklin* Draft Dissent, Hugo L. Black Papers, Box 395, *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, at 1 (Jun. 7, 1967) (showing Justice Douglas joining the opinion).

[182] *See*, e.g., Margaret Moses, at 100-12 (describing these efforts).

[183] *See, e.g.*, *Devonshire*, 271 F.2d at 402.

[184] *See* Newman, at 595.

[185] *See ibid.* at 569–70.

[186] *See* Newman, at 595. *See*, *id.* at 589–90 (describing the tension between Fortas and Black as the true tension on the Court at this time).

[187] *See*, *ibid.* at 589–90 (describing the tension between Fortas and Black as the true tension on the Court at this time).

[188] *See Prima*, at 395.

[189] *See Prima*, at 407 (J. Harlan Concurring).

[190] *See, e.g.*, United States Gypsum Co. v. United Steelworkers of America, AFL-CIO, 384 F.2d 38, 49 (5th Cir., 1967) (citing *Prima* to send an issue to arbitration which was a "classic question for arbitral determination").

[191] *See* Roger H. Broach, *Under the Federal Arbitration Act in a Diversity Suit an Allegation of Fraudulent Inducement to a Contract Involving Interstate Commerce Will Not Prevent Enforcement of a Broad Arbitration Clause in the Contract*, 46 Tex. L. Rev. 260, 265–66 (December 1967).

[192] *See* Robert Coulson, *Prima Paint: An Arbitration Milestone*, The Business Lawyer, Vol. 23, No. 1, 241 241–48 (November 1967).

[193] *See* "Prima Oral Argument," 167.

[194] *See* Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 54 B.C. L. Rev., 1237, 1237 (May 23, 2013).

[195] F. Yorick Blumenfeld, Congestion in the Courts, (Nov. 16, 1960) available at https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1960111600#REF[6] (last visited Sep. 22, 2021) (quoting Chief Justice Earl Warren: "interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans . . .").

[196] *See generally*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 No. 2, Mich. L. Rev., 249 (1968) (describing the Warren Court's groundbreaking efforts to protect the rights of defendants in a range of cases).

[197] "Black *Moseley* Arbitration Memo," at 22.

[198] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

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