On October 24, 2005 Rosa Parks, the "Mother of the Modern-Day Civil Rights Movement" who famously refused to give her seat to a white passenger on a bus in 1955, passed away. As her funeral procession made its way to Detroit's Woodlawn Cemetery on November 2, thousands of people lined the streets in tribute to Rosa Parks. The outpouring of support was an unmistakable testament to Rosa Parks's legacy.\(^1\)

Ironically, ten miles east of Woodlawn Cemetery is Elmwood Cemetery where Justice Henry Billings Brown, the author of *Plessy v. Ferguson*, is buried. In a fascinating twist of fate, Rosa Parks, the woman who helped end racial segregation in America, is buried a short distance from Justice Brown, the man who wrote the opinion that is credited with the fact that Rosa Parks was born in 1913, the same year that Justice Brown died. Yet, while Rosa Parks is well remembered, the same cannot be said of Henry Billings Brown, who has descended into relative obscurity.

The degree to which Justice Brown has been forgotten is surprising given the tremendous attention *Plessy v. Ferguson* has received in light of the Civil Rights Movement. In fact, few realize that Brown was the first Justice of the Supreme Court of the United States from Michigan. For example, the Bentley Historical Library in Ann Arbor, Michigan, a well-known historical archive that is dedicated to preserving the history of Michigan, fails to recognize Brown as an Associate Justice of the Supreme Court of the United States, or as a judge on the United States District Court for the Eastern District of Michigan. The oversight by the Bentley Library illustrates Justice Brown's anonymity. Yet, Justice Brown was widely respected as a jurist by his contemporaries. He was "thought by his associates on the Supreme bench a good judge, fair minded, open to conviction, willing to listen to argument, willing to be convinced if he thought he was wrong, affable, having no jealousy of his associates."\(^2\)

Justice Henry Billings Brown was appointed to the Supreme Court of the United States in 1890. During his fifteen and a half year tenure on the Supreme Court, Justice Brown wrote hundreds of opinions for the Court, mainly in, but not limited to, admiralty and patent law, which were his specialty.

Justice Brown was a pleasant, sociable, and gracious member of the Fuller Court. Those familiar with him noted that he worked both efficiently and diligently on cases before him, and was dedicated to the ideal of doing "justice." He remained humble and was never given to pretension. His colleague, Justice Day, described him as "a capital judge and a genial and loveable companion, free from littleness, rejoicing in the good fortune of his brethren, and at all times upholding the honour and dignity of the Court."

Henry Billings Brown was born March 2, 1836 in South Lee, Massachusetts, a small paper manufacturing town. Henry became acquainted with industrial life at an early age. He recalled, "Among my earliest recollections is that of sitting in a forge, watching the sparks fly from the trip hammer and marveling why water was used to stimulate instead of extinguish fires." Henry's father owned and operated several

Continued on page 10
A Letter from the President

I am very pleased to inform you that the Society is embarking on a new research project that will ultimately result in a book, tentatively titled: Courtwatching: Eyewitness Anecdotes in Supreme Court History. As the title suggests, the book will feature colorful, amusing, enlightening, and poignant anecdotes in Supreme Court history. Each chapter will focus on a general topic utilizing letters, diary entries, and newspaper accounts by Justices, Court reporters, clerks, advocates, family members and other eyewitnesses to illuminate different aspects of that topic. The eyewitness accounts will then be stitched together into a thematic essay that traces and develops the theme through different eras and different contexts.

The book will be edited by our Director of Publications, Clare Cushman, and four scholarly consultants: Melvin I. Urofsky, professor emeritus of constitutional studies at Virginia Commonwealth University and author of a forthcoming Brandeis biography; Ross Davies, associate professor of law at George Mason University and editor of The Green Bag; Patricia Evans, senior librarian at the Supreme Court; and Lyle Denniston, editor of SCOTUS blog and former Supreme Court reporter for the Boston Globe and Baltimore Sun.

December 7, 2006—The Supreme Court in the Gilded Era: An Overview
Speaker: Professor James B. O’Hara

Professor O’Hara is a member of the faculty and an administrator at Loyola College, Baltimore. An expert in the literature of the Supreme Court, he serves as Chair of the Society’s Publications Committee, and of the Ad Hoc Committee of the Justices. Professor O’Hara has appeared twice before in Silverman Lectures, and has spoken on the Court throughout the country.

February 27, 2007—Associate Justice Stephen Field
Speaker: Professor Paul Kens

Field moved to California during the Gold Rush days, and was appointed to the Supreme Court of the United States by President Lincoln. Considered outspoken and controversial, he served longer on the Court than any previous Justice, eclipsing Marshall’s record before stepping down.

Professor Kens is associate professor of political science and history at Southwest Texas State University and the author of two books examining the Lochner case, one of the landmark cases of the Gilded Era. He has written about Field, and edited the issue of the Journal of Supreme Court History that contained Field’s memoirs.
Constitution "color-blind," and insisted that "separate but equal" was inherently flawed. Author of 123 dissents, Harlan is perhaps the most important of the several Justices who were noted for dissent in their own day. Professor Przybyszewski is an Associate Professor of History at Notre Dame University and the author of the book: The Republic According to John Marshall Harlan. She also served as editor of Some Memories of a Long Life, 1854-1911, a memoir written by Harlan's wife, Malvina Shanklin Harlan. The manuscript was originally published by the Society as a special volume of the Journal of Supreme Court History.

On May 2, Professor Sandra VanBurkleo spoke about William Johnson, known as the "First Dissenter." He served on the Court from 1805-1834, under the leadership of Chief Justice John Marshall. Marshall discouraged individual opinions, thinking that they undermined the authority and prestige of the Court. Johnson proved to be a significant impediment to that plan, and is credited with writing the first dissent in the history of the Court, in the case of Halsell's Lessee v. Douglas (1805). During his thirty-year career on the bench, Johnson wrote 18 dissents, and 36 separate opinions, single-handedly posing a great challenge to Marshall's attempt at a united Court.

Professor VanBurkleo is an Associate Professor of History and Adjunct Professor of Law at Wayne State University. She authored Belonging to the World: Women's Rights and American Constitutional Culture. Professor VanBurkleo's association with the Society is of long duration, as she once was a member of the staff of the Documentary History Project.

On May 11, Professor Lucas Morel, Associate Professor of Politics in the Williams School of Commerce at Washington and Lee University, spoke about the Dred Scott dissents. Characterized by Chief Justice Charles Evans Hughes as a "self-inflicted wound", the Court's decision in the Dred Scott case is considered by many to be the most disastrous in history. Every single Justice wrote an opinion in the case. Chief Justice Taney authored what the record called the opinion of the Court, but each of the other Justices in the majority wrote concurring opinions. Justices Benjamin Curtis and John McLean wrote individual dissents. The plethora of opinions has led some scholars to conclude that there really is no majority opinion for the case.

Professor Morel is a member of the scholarly advisory committee of the Abraham Lincoln Bicentennial Commission, and is also the author of numerous books, including Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government. He has also written numerous editorials and op-ed pieces.

In the concluding program on May 18, Professor Calvin H. Johnson spoke about Pollock v. Farmers' Loan & Trust Co. The initial case and its rehearing are commonly referred to as "the Income Tax Cases." The issue involved levying of federal taxes on earned income. In a 5-4 decision, the Court ruled that the tax was an unconstitutional direct tax. The majority opinion, argues that the federal government should not be denied "an inherent attribute of its being—a necessary power of taxation."

Professor Johnson is the Andrews & Kurth Centennial Professor at the University of Texas School of Law. He is the author of Righteous Anger at the Wicked States: The Meaning of the Founders Constitution. He has served as the Chair of the American Association of Law Schools. As is customary, an upcoming issue of the Journal of Supreme Court History will contain the text of these outstanding presentations.
On Friday, April 28, 2006, the Robert H. Jackson Center and the Supreme Court Historical Society co-hosted a program at the Jackson Center in Jamestown, New York, on West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1942).

Barnette is the landmark decision in which the Supreme Court reversed its previous holding and invalidated a compulsory public school flag salute and recitation of the Pledge of Allegiance. The Court held, 6-3, that these West Virginia requirements violated schoolchildren’s First Amendment rights, which exist, according to Justice Robert H. Jackson’s ringing, often-quoted opinion for the Court, to strengthen “individual freedom of mind in preference to officially disciplined uniformity...”.

The Barnette program featured scholarly, lawyerly and human perspectives on the great case. Shawn Francis Peters, author of the award-winning book Judging Jehovah’s Witnesses (University of Kansas Press 2000; paperback 2002), introduced the program by describing the civil liberties cases involving Jehovah’s Witnesses during the first decades of the 20th century.

The centerpiece of the program, following Mr. Peters’ remarks, was a notable roundtable discussion featuring participants in the Barnette litigation more than 60 years ago. These included the “Barnette” sisters themselves, Gareth Barnett Edmonds and Marie Barnett Snodgrass, whose family name was misspelled by the Court. Mrs. Edmonds and Mrs. Snodgrass are Jehovah’s Witnesses. As young students, they were expelled from their public school because they adhered to their belief that the Bible (e.g., Exodus 20:4-5) forbade them to bow down to graven images such as the American flag. They recalled their court case and discussed their childhood experiences in moving terms.

The Barnette roundtable discussion was moderated by Professor John Q. Barrett of St. John’s University School of Law and the Jackson Center, who also delivered closing remarks.

The Barnette sisters entered discussion by Washington, D.C. attorney Bennett Boskey, who from 1941-1943 was chief law clerk to Chief Justice Harlan Fiske Stone. In June 1940, when Stone was an Associate Justice, he had dissented powerfully but alone from the Court’s decision in Minersville School District v. Gobitis, 310 U.S. 586, upholding Pennsylvania’s flag salute requirement. Three years later, the Barnette Court, with Chief Justice Stone in the majority, overruled Gobitis.

The Barnette sisters went home. Out of their refusal to follow the requirements, a great Supreme Court case was born, one that would make the “Barnette” name synonymous with the notion that the Constitution of the United States protects religious beliefs from coercion by the state or local officials.

It was, at best, an awkward move to engage in civil disobedience and refuse a school board order—or say no to a school principal on grounds that there was a higher law, something more important than patriotism. Only months earlier, the Japanese had bombed the U.S. Naval base at Pearl Harbor, Hawaii, and the United States was at war.

Slip Hill Grade School—with 20 or 25 students—was so poor it had only a picture of a flag. In front of that picture, all students were required to place their right hands over their hearts, and recite the familiar words:

“If that was the case, the principal said, he had no choice. “Time of hysteria’—that’s how a cousin of the Barnett sisters, Dave McClure, described the general mood in those days. McClure was 11 when he was expelled from his school near Charleston, West Virginia in 1942. Nonetheless, he walked a mile to school every day for two years in a row at attendance class, only to be turned away each time. Would he salute the flag? His teacher asked each morning.

“It was not an idle threat. A prosecutor obtained a warrant to prosecute for having encouraged truancy, a misdemeanor subject to a $50 fine and 30 days in jail. It did not matter that the kids wanted to be in school—and sought to go every day. West Virginia law—and the laws of other states as well—exposed the parents of the ‘truant’ child to criminal charges.”

Eventually, the matter was dropped.

Five hundred miles away, at the Jehovah’s Witness headquarters in Brooklyn, New York, a young Texas-born lawyer named Hayden Covington learned of the Barnett sisters’ plight.

Covington and sympathetic lawyers around the country had argued cases in state and federal courts, even before the U.S. Supreme Court, seeking to overturn restrictions that prevented Jehovah’s Witnesses from handing out leaflets on a street corner or going door-to-door to preach.

Five years before the Barnett case, in 1937, the Witnesses challenged a mandatory flag salute requirement in Minersville, Pennsylvania, where school officials expelled Witnesses Lilian Gobitis, 12, and her younger brother, William, 10, because they refused both to recite the pledge and to salute the flag.

At first, the Witnesses met with success. A federal district
A federal appeals court upheld the decision, noting in a footnote that in Germany, Adolf Hitler said he considered the Jehovah’s Witnesses to be “quacks” and had dissolved their society and confiscated their literature. The implication was clear: such persecution went on in Nazi Germany, but the United States was different.

The Minersville school superintendent was unimpressed. He called the decision a “hodge-podge of perverted quotations” from judges who believe that “little children have the right and the ability to formulate religious beliefs and conscientious objections.” The school district appealed to the U.S. Supreme Court, where it found two supporters.

By an 8-1 vote, the Supreme Court in 1940 reversed the lower courts and upheld the school expulsions. The Justices in Minersville School District v. Gobitis said the states could require all students, no matter what their religious beliefs, to salute the flag and recite the pledge. The flag, they said, was an essential symbol of national unity and transcended all internal differences. In the Supreme Court’s view, the need of school officials to inculcate patriotism in its students trumped the religious beliefs of the Gobitis family.

Private religious beliefs, according to the Supreme Court, had to give way to government use of the flag law—particularly if that law was not targeted at a religious minority but applied to everyone. “The ultimate foundation of a free society is the binding tie of cohesive sentiment,” Justice Frankfurter wrote. The decision’s majority opinion cited a number of precedents, among them the 1937 Minersville case. The Minersville School Board v. Gobitis was decided 6-3.

The consequences of the Supreme Court’s decision were soon recorded on the streets and in schools around the country. The Gobitis case became a symbol of a country, where the mood was often ugly and the Witnesses were soon recorded on the streets and in schools around the country. The Gobitis family found itself at the center of a municipal ordinance taxing the proceeds from the sale of a municipal bond issue. The court judge ruled in their favor: he held that Pennsylvania’s law requiring all students, no matter what their religious beliefs, to salute the flag or saying the pledge, notwithstanding the Supreme Court’s decision in 1939, was an essential symbol of national unity and transcended all internal differences. In the Supreme Court’s view, the need of school officials to inculcate patriotism in its students trumped the religious beliefs of the Gobitis family.

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Henry Billings Brown—continued from page 1

and was never so happy as when allowed to "assist" at the completing his work.

New England. Yet, before he began his "proper" education, son Henry. His mother was "a woman of great strength of her sons' attendance upon church, and was, in short, a typical strict in the performance of her religious duties, insistent upon important effect in directing my studies."

Puritan mother." Billings Brown, Henry's father, "though not an educated [sic], was a most intelligent man, and a great reader of history and biography, with occasional incursions into the domain of poetry and romance." Henry's interests were more in line with his father's interests than with his mother's, as he became an avid reader of both history and science and was less interested in religious subjects.

Henry grew up in an affluent, but not rich, family. His parents insisted that he receive a proper education, in part because Henry's father had already determined that Henry would become a lawyer. "[W]hen my father said to me one day, 'My boy, I want you to become a lawyer, I felt that my fate was settled, and had no more idea of questioning it than I should have had in imposing a decree of Divine Providence." Henry readily accepted his father's choice, because according to him, "[I]t was not a bad idea... as it settled the doubts which boys usually have regarding their future... and it had an important effect in directing my studies."

Henry attended several of the best preparatory schools in New England. Yet, before he began his "proper" education, Henry's mother insisted on his desire to read. In her diary she wrote, 'We find it necessary to divert his mind from his books on account of his eyes failing him. I have thoughtlessly indulged him in reading evenings the winter past, but seldom as long as he wished, yet I now see my error and lament it exceedingly.'

In 1845, the Brown family moved to Stockbridge, Massachusetts, so that Henry could begin his formal education. His parents enrolled him in the Stockbridge Academy, where he began to study Latin. Henry recalled, "Upon our removal to Stockbridge in 1845, I was entered as a scholar at the Academy and began the study of Latin, which I have always thought and still think, should be the foundation of the intellectual equipment of every educated man." Once in school, Henry learned his strengths and weaknesses. He wrote, "I have discovered that my strength as well as my inclination lay in the direction of languages rather than of mathematics."

Henry entered Yale University in 1852 at the youthful age of sixteen, two years younger than most of his peers. Years later, he would write that being younger than his peers made it difficult for him to adjust to life in college. "Two years is a short time in the life of a man, but as between two boys in their should have had in imposing a decree of Divine Providence." He had great trouble adjusting to the rigors of academic life.

At Yale, Henry was paralyzed to a certain degree by his adolescent immaturity, leading him to write, "My desire at first was merely to keep in college, and in truth I hardly did any serious work." He "grew to be ambitious as a scholar, but he does not appear to have loved study for its own sake." He "had some prejudices to overcome, but I finally succeeded in graduating not with a high, but with a highly respectable, standing." After graduation, Henry's father paid for Henry to travel throughout Europe for a year. It was a remarkable experience for Henry, which he remembered fondly. In his Memoir he states: "After graduation, my father, who was most kind and indulgent, albeit somewhat hot tempered, offered me a year of travel in Europe. I regarded this as a most valuable opportunity, and, having accepted it, I set out to travel in Europe."

Brown received his first professional break in Spring 1861 after the election of Abraham Lincoln. Through his connections, Brown was admitted to the Michigan Bar and became a practicing attorney. He began his career by the poster above. Brown avoided military service by paying a substitute to take his place. Brown's professional career gravitated toward the Marshal's office whenever any question arose as to "tying up a vessel to secure a claim." Shortly thereafter, Brown was appointed Assistant United States Attorney for the Eastern District of Michigan. He was extremely active in the office, trying cases, interrogating witnesses, preparing indictments, and attending the sessions of the grand jury. Brown later recalled, "This really was the beginning of my professional activity, and by the expiration of the District Attorney's official term I had built up a practice, principally in the admiralty branch, which justified my taking an office to myself." Through his hard work and dedication as an Assistant United States Attorney and a deputy U.S. Marshal, Brown was able to open a private practice, which specialized in admiralty law. On December 31, 1861, Brown wrote in his diary, "Indeed, I have already had quite a number of admiralty cases (for which I have a particular partiality), brought to me through my connections with the marshal's office... My professional business is much greater than it was a year ago, and long may it live and grow." Yet, Brown never enjoyed the competitive nature of private practice, and the constant need to secure business was frustrating. "I have done but little because I could get but little to do, and it is not my nature to drum business as most Western lawyers do."

On April 12, 1861, the Civil War began. Brown, a staunch supporter of the Union, was deeply opposed to secession. Yet, even after the war began, Brown foresaw that conflict was on the horizon. He always had an acute sense of social tensions in society. In his last diary entry in 1860, for example, Brown wrote, "The
situation of the country is dreadful and civil war appears almost inevitable. Abolish the Union, God help us!"

A year later, after the fall of Fort Sumter, he proclaimed:

"The country, my greatest source of anxiety at present, is in a dreadful state. We have entered upon a war to which I can see no possible end, during the present administration. As I see the inevitable consequences in the loss of life, property, in the vast issues of paper money and consequently high prices, and depreciation of the value of money, and in the breaking up of the whole social system, it absolutely makes me shudder. What its end shall be no man can tell, but all can safely prophesy that it will work immense injury to both sections.

Brown seriously considered joining the Union army, but in the end he avoided serving by paying eight hundred and fifty dollars to a substitute to take his place in the draft, a common practice for wealthy men during the war. Brown writes, "Twice I thought very seriously of participating in the terrible Civil War which has raged the entire year, but circumstances which I now regard as fortunate prevented me entering the service."

Brown was able to substitute through marriage. In 1864 to Caroline Pitts, the daughter of a prominent Detroit businessman, whose wealth ironically came from the lumber industry, the same trade Henry's father had been involved in back in South Carolina. Henry was, "firm-looking, well educated, intellectual, and sympathetic with all her husband's ambitions." Their marriage was "a happy one...[and] After his marriage his society was largely with his friends and relations, but their acquaintances extended to the most cultured and wealthy people of the city." While Henry loved children, he and his wife never had any of their own, probably because Mrs. Brown "suffered much from ill health." In 1868, Caroline's father died and left a large portion of his wealth to her husband, Caroline, making her and Henry financially secure. They no longer had to depend on the inconsistent income of Henry's private practice, and even more importantly, the inheritance allowed Henry the financial freedom to accept his first judicial appointment.

In 1868, Republican Michigan Governor Henry Crapo appointed Brown to a temporary position as a state judge in the Wayne County Circuit Court in Detroit. However, his time on the bench was short-lived. The increased voter turnout under the uncongenial strifes of the Bar, and the constant fear lest by some mistake of my own the interests of my clients would be hurt. Brown was a competent lawyer, but his private practice left much to be desired. It was only after his appointment to the federal court that many of his desires and ambitions were satisfied.

After his defeat, as a state judge, opening Brown's mind to the idea of a judicial career.

Governor Henry Crapo appointed Brown to a temporary position as a state judge, opening Brown's mind to the idea of a judicial career.

President Andrew Jackson, decided Worcester v. Georgia, in 1829. He is currently a law student.

As every student of the Supreme Court knows, after Chief Justice John Marshall decided Worcester v. Georgia, in 1829, President Andrew Jackson resorted, "Well: John Marshall has made his decision; now let him enforce it!" But did Jackson really say that? The question is worth a brief inquiry.

Although Marshall's opinion was rendered in 1832, the earliest known report of Jackson's alleged retort did not appear in print until 1846. The famous quote is reported by Horace Greeley in volume I of The American Conflict. Greeley appended the following footnote:

"I am indebted for this fact to the late Governor George N. Briggs, who was in Washington as a member of Congress when the decision was rendered."

There is no indication as to how then-Congressman Briggs acquired his information. Greeley makes no claim that he has seen the words attributed to Jackson in the courtroom. They remain "best, double hearsay, with all of the infirmities of such evidence. Greeley's account is not triple hearsay because the words attributed to Jackson are not offered for their truth, only for the fact that they were said. A further basis for doubt is the 32-year gap between Jackson's purported words and Greeley's report of them. The Oxford Dictionary of American Legal Quotations asserts that Greeley's book is the first occasion when Jackson's words were attributed to him in print. Charles Warren also reports that before Greeley, "No previous historian appears to have said that although "[w]e run no risk of returning to the days when a President [responding to this Court's efforts to protect the Cherokee Indians] might have said [the famous quote], we do risk a self-inflicted wound."

The Seventh Circuit referred to the quote as "the remark allegedly made by President Jackson." Distinguished constitutional scholars have regularly expressed doubt about the authenticity of the Jackson remarks. R. Kent Newmyer flatly states that Jackson "Never said it." Edwin A. Miles expresses doubt about the words' attribution:

"Every will concede only that Jackson is reported to have said the words. Finally, Joseph C. Burke sums up the position of the skeptics: "While most historians will admit that they cannot prove what Jackson said, none seems to doubt that he thought it and acted on it."
uttered the quote and a bankruptcy judge in Illinois called it have asserted uncritically that the remark was made?''

Jackson said it?''

alleged remark, I think the quotation should be considered

President Andrew Jackson. This painting appears on the East Portico of the U.S. Capitol.

Photo caption for picture on page 13

The picture shown on page 13, is an artist's depiction of Chief Justice John Marshall administering the oath of office to incoming President Andrew Jackson. This painting appears on the East Portico of the U.S. Capitol Building.
This illustration titled The Overworked Court, appeared in an issue of Puck. It depicts the heavy increase in the workload of the Court that occurred during the Gilded Era, the result of proliferating business and expansion.

The subject.
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