YEARBOOK 1988

SUPREME COURT HISTORICAL SOCIETY

OLIVER WENDELL HOLMES, JR.
Associate Justice, 1902-1933

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The Supreme Court Historical Society

Establishing Justice

Sandra Day O'Connor

Editor's Note: This paper was delivered by Justice O'Connor as the Society's Thirteenth Annual Lecture on May 6, 1988. This paper is the text of that speech.

Precisely 201 years ago in Philadelphia, 55 delegates from 12 states at the Constitutional Convention set their minds and hearts to work in order "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

The delegates told us their purposes at the very start of their final draft of the Constitution. If the order of the list of their purposes means anything, "establishing Justice" was particularly important; it ranks second only to forming a more perfect union.

Many things are involved, of course, in the effort to "establish justice": enumerating rights possessed by every individual, setting standards for holders of public office, and placing limits on the powers of government are just a few examples. In a sense, the whole of the Constitution was an effort to establish justice by establishing a just government. But from my perspective as a judge, one thing that "establish justice" surely means is the establishment of a judicial system.

This is an auspicious time to examine the framers' development of Article III, creating the judicial branch of our government. We have witnessed recently the process of selection of a new Supreme Court Justice to replace Justice Powell, who retired after 15 years of distinguished service. The debate over the nominations of Judge Bork, Judge Ginsburg and Judge Kennedy focused public attention on the Court and has led to questions concerning the Court's role in our constitutional structure, its power, and the manner in which it operates. The answer to all these questions lies in Articles II and III.

The framers of our Constitution set for themselves a broad agenda. They were to create an entirely new structure of government. That we are still here with that structure intact is a powerful testament to the skill and wisdom they applied to their task. Whether the fact that 33 of the delegates were lawyers accounts for much of that skill I cannot say. The breadth of their work, however, often makes it difficult to divine precise guidance from their deliberations, for in certain instances, there was little debate concerning particular provisions.

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In reviewing the records of the Convention, one is struck by how little attention was paid to the judicial branch. In contrast to the extended debate concerning the composition and the structure of the legislative branch and the manner in which the executive should operate, which spanned months, the intermittent debate over the judiciary could have easily been conducted in a single afternoon. Perhaps

the delegates had exhausted themselves on other matters and were worn down by the hot Philadelphia summer when they turned finally to the judiciary. After all, they did not begin to discuss in earnest the more difficult questions concerning the third branch until after the Great Compromise--resolving the structure of the legislative branch--had been reached.

But comments made in the course of the debates that did take place concerning the judiciary suggest another reason: the general lack of controversy was due not to exhaustion but to a general high regard for the judiciary.

The experience with a despotic monarchy, and with state legislatures the framers felt had run wild, led to a wary, if not disparaging attitude toward the legislative and executive branches. A single executive was seen by Edmund Randolph as dangerously close to a monarchy. (Farrand, *Records*, I at 66 [June 1]) James Madison worried that the executive might "pervert his administration into a scheme of peculation and oppression." (Farrand, *Records*, II at 65 [July 20]) The legislature fared even worse in the delegates' minds. Gouverneur Morris predicted that "[t]he legislature will continually seek to aggrandize and perpetuate themselves," (Farrand, *Records*, II at 52 [July 19]) and in the view of Nathaniel Gorham of Massachusetts, "public bodies fe[lt] no personal responsibly[,] g[a]ve full play to intrigue and cabal" and engaged in "dishonorable measures." (Farrand, *Records*, II at 42 [July 18])

In contrast, the framers had only kind words for the judiciary. Oliver Ellsworth of Connecticut, for example, who became the third Chief Justice of the United States, saw the judiciary as possessing "wisdom and firmness" and "a systematic and accurate knowledge of the Laws." James Madison was even more effusive, arguing that the judiciary would preserve "a consistency, conciseness, perspicuity and technical propriety in the laws." (Farrand, *Records*, II at 74 [July 21]) And James Wilson pointed to the example of Great Britain where he felt the "security of private rights is owing entirely to the purity of her tribunals of justice." (Farrand, *Records*, [July 21])

Because they held judges in relatively high esteem, the framers were somewhat less concerned with erecting checks on judicial power than they were with creating similar checks on the other two branches. Perhaps there are those today who think our judges might not deserve such favored status, but in the minds of the framers, the third branch was the least dangerous branch.

When the framers did get around to discussing the judicial branch, they were faced with three primary questions: first and foremost, should there be a federal judiciary at all, and if so, should it be limited to one supreme court or include as well a host of lower federal courts; second, who should select the judges for whatever courts were established; and last, what should be the terms and conditions under which those judges would serve? All these issues were eventually addressed--or intentionally not addressed--and the result is the federal judiciary we have today: a third branch of 749 active judges and over 18,000 employees.

The idea that there should be some sort of national judiciary was present from the very start of the Convention. The Virginia plan, which set the groundwork for virtually all that was done at the Convention, provided that a "national judiciary be established to consist of one or more supreme tribunals and of inferior tribunals to be chosen by the national legislature." On the second full day of deliberations, the Convention approved a resolution "that a national government ought to be established consisting of a supreme Legislative, Executive, and Judiciary." Within two weeks, the delegates began considering a more detailed resolution on the national judiciary.

Starting with the language of the Virginia plan, the framers merely amended it to provide for "one supreme tribunal and one or more inferior tribunals." This version was approved by the full Convention without debate. Though the question of inferior tribunals was later briefly revisited, the passage of this resolution left us with the Supreme Court we have today.

Alexander Hamilton in the *Federalist Papers* offered some insight into why there was so little debate about creating the Supreme Court. He wrote that "laws are a dead letter, without courts to expound and define their true meaning and operation." This may be overstating the role of courts, but Hamilton's basic point was that laws created by the new national government would inevitably wind up in court, and thus a new national court was necessary to interpret them. Hamilton noted that "all nations" had found it necessary to establish

"one tribunal paramount to the rest... authorized to settle and declare in the last resort an uniform rule of civil justice." Since the framers were attempting to establish one unified nation, they naturally wanted one uniform set of laws. They felt only a single national Supreme Court could ensure that the national laws would be uniformly applied.

This desire for uniform interpretation and application of the laws continues to the present. My colleagues and I on the Supreme Court usually choose to review cases that present issues over which lower courts have split. We find resolving such conflicts to be so important we have incorporated this factor into our Rules as a consideration governing review on *certiorari*.

The people have also demonstrated their desire for uniformity in the application of our national laws. In the 14th Amendment, added to our Constitution in 1868, "equal protection of the laws" was elevated from a worthwhile goal to a constitutional imperative. And we on the Supreme Court have a very concrete, daily reminder of the need for uniform application of the laws: our building is inscribed with the words "Equal Justice Under Law."

There is another reason the framers found one supreme tribunal indispensable. Simply put, judges could not be trusted to agree with each other. In an observation as true today as it was 200 years ago, Hamilton noted in the *Federalist Papers* that "We often see not only different courts, but the judges of the same court differing from each other." This could certainly be said of the Supreme Court today. Of the 175 cases we heard argument in last year, there were differing opinions in all but 25. The framers recognized that since we judges could not seem to agree, the only way to get a final answer was to have one final court of last resort. In short, Hamilton accurately reflected the attitude of the framers toward the Supreme Court when he said that the need for "one court of supreme and final jurisdiction is a proposition which is not likely to be contested."

Oliver Ellsworth, while serving in the Senate, drafted the Judiciary Act of 1789. He left the Senate to become the third Chief Justice of the United States.

Notwithstanding the agreement concerning the need for a Supreme Court, the issue of the lower federal courts--inferior tribunals in the parlance of the framers--was hotly contested. Only one day after the modified Virginia plan resolution sanctioning "one or more" inferior courts had been approved, John Rutledge of South Carolina, who later was nominated as a Chief Justice of the United States, moved to reopen debate. He argued that the Supreme Court was sufficient to ensure uniformity and that lower federal courts were too great an intrusion on state courts. Another delegate echoed this concern, lamenting that "the people will not bear such innovations," and predicting that the states would revolt at such encroachments on their jurisdiction. Roger Sherman joined the opposition to inferior tribunals, but he cited no such lofty concerns as state sovereignty. For him, it was a matter of simple economic efficiency. He saw lower federal courts as an expensive redundancy because the state courts were already in place and could do the same job.

James Madison was not swayed. He stuck to the Virginia plan's proposal, offering an argument that made him a dear friend to all Supreme Court Justices. He was concerned that unless there were inferior federal courts dispersed throughout the country with final jurisdiction in many cases, the appeals to the Supreme Court would become oppressive. Madison thus became the first to express concern with the workload of the Supreme Court. While this argument alone sounds more than sufficient to a Supreme Court Justice faced with our Court's large workload, Madison had another motive for supporting lower federal courts. He worried that without lower federal courts, the Supreme Court would be left powerless. Having no federal trial courts

to rely on, the Court would be forced to merely send cases back to the state courts which he feared would simply come up with the same result again. Providing no lower federal courts, Madison picturesquely warned, would leave "the mere trunk of a body, without arms or legs to act or move."

The rest of the delegates were unmoved by Madison's elegant plea. By a 5 to 4 vote, with two state delegations divided, the Convention voted to eliminate the lower federal courts. The consummate politician, Madison immediately offered a compromise; he proposed an amendment empowering the legislature to institute inferior tribunals, without mandating that it do so. This solution garnered overwhelming support.

Thus, only nine sessions into the Convention, the delegates had already agreed on the basic structure of the judicial branch of government. The result was the first clause of Article III, section 1 of our Constitution, which reads as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

After spending the month of June hammering out the structure of the other two branches, the framers returned to the judiciary and the remainder of Article III on July 18, when they resolved the important question of who should select the judges.

The Convention's earliest discussion of who should exercise the power of appointment took place in the course of the delegates' approval of the idea of a federal judiciary. Benjamin Franklin slyly suggested the method employed in Scotland. As Franklin explained it, in Scotland the judges were selected by the lawyers, "who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves."

The Virginia plan had called for appointment by the national legislature. Agreeing with this scheme, Madison had initially argued for selection by the Senate. But after the Great Compromise had left that body composed of an equal number from each state, he, together with other delegates from larger states, changed his tune, favoring Executive appointment instead. Those from smaller states, predictably, favored legislative appointment.

With the battle lines drawn, some hyperbole began. First the larger states attacked legislatures in general. One delegate said public bodies would be "indifferent" to selecting qualified judges, since they "feel no personal responsibility," citing the Rhode Island legislature which had recently dismissed judges who had the temerity to hold one of their acts invalid as an example of "the length to which a public body may carry wickedness and cabal." Another delegate lamented that "appointments by the legislatures have generally resulted from... personal regard, or some other consideration than. . . the proper qualifications."

Delegates from smaller states came to the defense of legislative appointment. Roger Sherman, for example, argued that the Senate "was composed of men nearly equal to the executive, and would of course have on the whole more wisdom." These delegates from smaller states also attacked the Executive as unfit to exercise the appointive power. They warned that he would use it to garner favor from the larger states upon whom he would depend for election and that he could not possibly know enough to select qualified individuals.

Nathaniel Gorham of Massachusetts eventually suggested that the Convention adopt the method employed in his home state, where the executive appointed the judges with the advice and consent of the legislature. This suggestion, which sounds eminently sensible and familiar to our modern ears, fell on deaf ears at the Convention initially. Instead the delegates voted on a proposal by Madison that the judges be nominated by the executive, with the appointments becoming final unless two-thirds of the Senate disapproved. Madison mounted an elaborate defense of his proposal, but when the roll was taken, he had fallen short. Seizing the moment, advocates of legislative appointment immediately moved that the Senate appoint the judges and without further debate, the motion passed.

This is where matters stood until the waning weeks of the Convention, when mysteriously and without debate, a change was made. On August 31, a mere three weeks before the Convention adjourned, a committee with one member from each state was appointed to consider a variety of proposed changes to the draft constitution. Four days later, this Committee of Eleven reported back a host of changes, among which was a section adopting Gorham's

idea: The President was to appoint judges of the Supreme Court with the advice and consent of the Senate. Without debate, this provision was approved, leaving us with the second clause of Article II, section 2, which reads as follows:

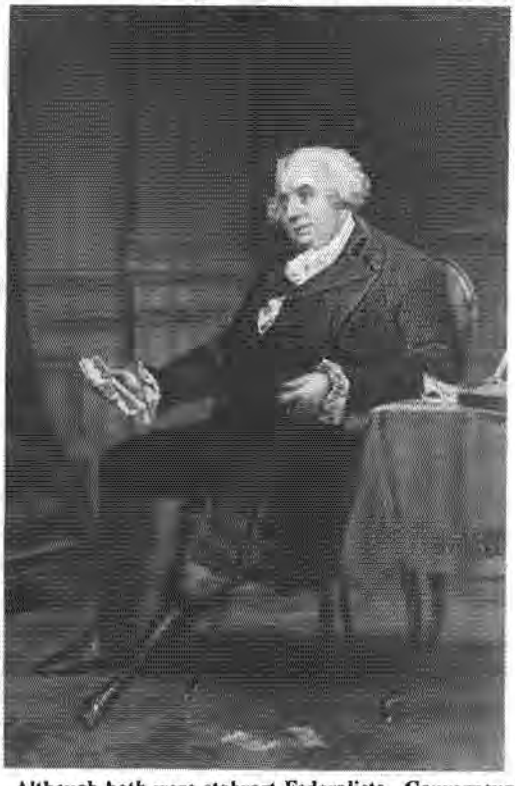
> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

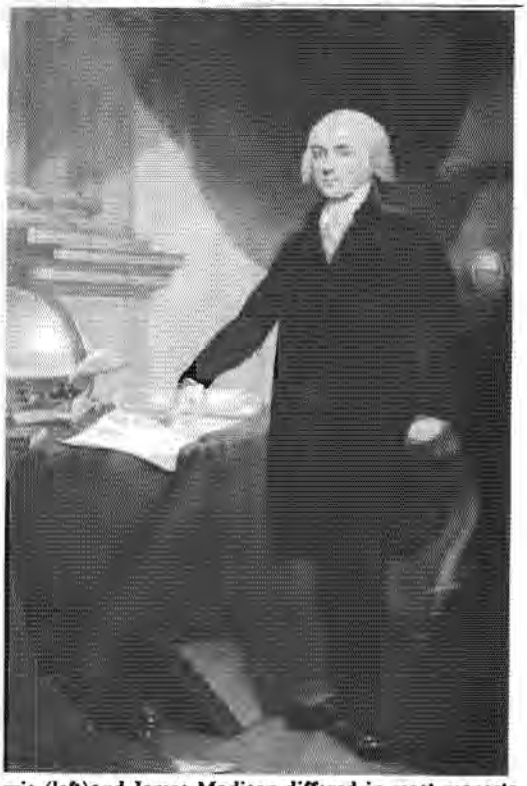
It is this clause which was at the forefront of public attention in September during the Senate hearings on Judge Bork's nomination. As we have just seen, however, the history of this clause offers little guidance as to its proper construction; the meaning of its crucial phrase, "Advice and Consent," was never discussed. Thus, as is true with so many other provisions of the Constitution, it has been left initially to the branch that must exercise a specified power or apply a particular provision to give content and meaning to the broad language employed by the framers.

Now that they had decided we should have federal judges and who should pick them, the final question confronting the framers with respect to the judiciary was the terms and conditions under which these new federal judges would serve. Today, we generally take for granted the willingness of the other branches of government to enforce the decisions of the federal courts, even those with which they disagree.

Our judicial ancestors, however, did not always fare so well. In Georgia, judges had been whipped for some of their rulings. In Massachusetts, they had been beaten and terrorized. In Pennsylvania the treatment was less violent, but equally cruel. The Pennsylvania legislature landed on the rather simple strategy of enacting drastic cuts in judicial salaries, starving the judges out of office or into compliance.

The delegates at the Convention recognized that such actions did not produce an atmosphere conducive to impartial, detached decisionmaking. The Declaration of Independence noted similar behavior by the King of England, charging that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and





Although both were stalwart Federalists, Gouverneur Morris (left) and James Madison differed in most respects. Morris was brilliant and vehement; Madison was thorough and matter-of-fact. Morris, a long-time bachelor, was called a libertine, where Madison was a conventional family man. Madison was friendly, but Morris, an extrovert, relished society and shone in it. Despite a long absence, Morris spoke more than any other member of the Convention. Madison became a fixture in the new national government; Morris went to Europe, where he remained for a decade.

payment of their salaries." At the Convention, the framers sought for ways to prevent such dependency by insulating judges from the potential wrath of the other branches. As with the other areas, here, too, the Virginia plan provided the model. It called for judges "to hold their offices during good behaviour" and provided that there be "no increase or diminution" of judicial salaries. This aspect of the Virginia plan was first addressed in the Convention on July 18, when Gouverneur Morris, in a move that has forever endeared him to the entire federal bench, proposed that the resolution be amended to permit increases in judicial salaries. Morris thought that increases could be authorized without creating any dependence of the judiciary on the legislative branch. Thankfully the rest of the delegates concurred.

But the remainder of the Virginia plan's treatment of judges remained intact. The only attempt to change the formulation came late in the Convention when John Dickinson of Delaware suggested that judges should be removable "by the Executive on the application by the Senate and House of Representatives." Gouverneur Morris, now quickly on his way to becoming patron saint of the federal judiciary, immediately opposed the motion, arguing that "it was fundamentally wrong to subject judges to so arbitrary an authority." Edmund Randolph joined Morris, arguing that Dickinson's motion "weaken[ed] too much the independence of the judges."

Dickinson's proposal was defeated, with only one state voting in its favor, and the Convention immediately approved judicial tenure during good behavior by an overwhelming vote. This left us with the provision we have today, the second clause of section 1 of Article III which reads as follows:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

With this third issue resolved, the framers had finished with the judiciary. In the *Federalist Papers*, Hamilton described the end-product, writing that:

> The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and neither force nor will but merely judgment;... the judiciary is beyond comparison the weakest of the three departments.

This was certainly correct 201 years ago, and indeed, is in a sense equally true today. Judges must rely upon private citizens to bring cases before them and upon other branches of government to enforce their decisions. But at the same time, as one of our greatest Chief Justices, John Marshall, said, "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all." This fact, particularly in what seems to be an increasingly litigious society, gives the third branch considerably more influence than any of the delegates to the Constitutional Convention might have expected. My hope is that when we judges exercise this influence and power during the third centennial of our franchise that we also consistently exercise the sound judgment the framers were so confident we possess.

Self-Preference, Competition, and the Rule of Force: The Holmesian Legacy

Gary J. Aichele

Editor's Note: *This article was originally presented at the 1985 Annual Meeting of the Northeastern Political Science Association. It was part of a larger study, recently published by Twayne Publishers as part of its Twentieth-Century American Biography Series, titled* Oliver Wendell Holmes, Jr.--Soldier, Scholar, Judge.

Nearly thirty years ago, Philip Kurland commented that Mr. Justice Holmes was "in greater danger than ever of becoming a legend, or more accurately, the subject of several diverse and contradictory legends."[1] Kurland's observation remains a fair description of contemporary research on Holmes. It seems "the Yankee who strayed from Olympus" only to become the "devil's disciple" has more recently been chastised as a friend of late 19th-century *laissez-faire* capitalism in its most virulent form.[2] In the most recent work on Holmes--H.L. Pohlman's *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence*--Grant Gilmore's characterization of Holmes' theory of liability as "a shield for capitalist interests" is rejected in favor of an interpretation which sees Holmes as a legal positivist in the tradition of Bentham and Austin.[3] Pohlman also disputes the conclusions reached by G. Edward White and Robert Gordon concerning the extent to which Holmes' jurisprudence is flawed by certain irreconcilable inconsistencies.[4] Thus, "the rise and fall" of Holmes' reputation continues unabated, and the significance of his jurisprudence and legal theory continues to stimulate further research and debate.[5]

It is difficult to study the life and work of Oliver Wendell Holmes, Jr. for very long without becoming uncomfortably aware of the enigmatic nature of this seminal figure in American law. Yosal Rogat noted some twenty years ago that Holmes, like his contemporaries and close personal friends William James and Henry Adams, withdrew behind "a public mask."[6] Reflecting the considerable degree to which Holmes "stepped out of life," this detachment provides a partial explanation for his inscrutability.[7]

Another factor, however, that may account for the difficulty of ever really "knowing" Holmes is the unusually paradoxical nature of his impact upon his own and succeeding generations. Exclaiming that "the apotheosis of Holmes defeats understanding," Rogat concluded his 1964 article by noting the scope of the paradox:

> Primarily interested in the common law, as a judge Holmes greatly influenced only constitutional law... Generally indifferent to civil liberties interests, Holmes is regarded as their champion. Unconcerned with contemporary realities, Holmes inspired a school of legal 'realists'. Uninvolved with the life of his society, Holmes affected it profoundly.[8]

Such a list suggests that any synthetic interpretation of Holmes' jurisprudence will be hard pressed to explain seemingly unexplainable contradictions. This is not to suggest that such a theory is unattainable, but only to note that such a theory has not yet been achieved.

If a useful theory is to be developed, I suspect that it will be one which focuses on the centrality of Holmes' fascination with authority, domination and power.[9] Whether reading Holmes' own words or those of his commentators, even a casual student is struck by the extent to which the language is "charged with battle imagery and metaphors of violence."[10] Such language enhances considerably Holmes' central tenet that "the life of the law has not been logic" but "experience."[11] The law, for Holmes, "embodies the story of a nation's development through many centuries," and little doubt exists that for the thrice-wounded Civil War veteran, the story is a bloody one.[12] Though obviously rhetorical, such language suggests a preoccupation with physical force that can not easily be discounted.

One particularly significant aspect of this preoccupation is Holmes' acceptance of the legitimacy of self-preference:

> The *ultima ratio*, not only *regum*, but of private persons, is force. . . at the bottom of all relations,

> however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing. [13]

Consistent with--and perhaps even derived from--this assertion is the conclusion that "the first requirement of a sound body of law" is that "it should correspond with the actual feelings and demands of the communitys whether right or wrong."[14] For Holmes, it all came down to a single "ultimate" question: "what do the dominant forces of the community want"?[15]

While at least one commentator has noted the implications of such a doctrine for unpopular minorities within the community, and others have examined the similarities in thinking between "Hobbes, Holmes and Hitler,"[16] less attention has been directed to determining the actual significance of these ideas for Holmes' own jurisprudence. I find it striking that the legal theory of a man obsessed with the ubiquity of force should itself have been so impotent, leaving its author virtually helpless in the face of the struggle he so vividly described. Though Holmes continued to exhort young men to "share the passion and action of [their] time at peril of being judged not to have lived,"[17] the mature jurist found it increasingly difficult to care at all about the outcome of the war being waged around him.

In an article which examines the critical period of years that Holmes sat on the Supreme Judicial Court of Massachusetts-- years largely overlooked between the publication of *The Common Law* ending Holmes' intellectually most productive period and his ascension to the Supreme Court of the United States--Mark Tushnet suggests that Holmes' theory underwent a critical revision as a result of his actual experience as a judge.[18] Tushnet examines Holmes' decisions in several key areas--most significantly those of industrial relations and labor organization--and discovers what at first appear to be inconsistencies. Attempting to account for his discovery, Tushnet makes the following comment:

> On the bench, [Holmes] repeatedly dealt with problems to which the grand generalizations of *The Common Law* provided either no answers or too many answers. As he dealt with the particularized problems that the cases presented, an intellectual conflict arose. Holmes, the theorist, came to believe that individual cases could be resolved only by choosing among particularized policies....Persisting fragments of the more cosmic view of *The Common Law* surely played some part in his judicial avoidance of policy, but a complete explanation must rest on the fact that Holmes' theories gave him no basis for choice among policies.[19]

For those who agree with Tushnet's analysis--and I do--the question of why Holmes found his own theory so utterly deficient remains an intriguing one. My hunch is that the answer can be provided by Holmes' conception of the relation of law to power. Always at the center of Holmes' thinking, the preeminence of power became a more pronounced aspect of Holmes' jurisprudence as time went on. It provides, however, the common thread from first to last.

The Common Law, Holmes' most successful attempt to formulate a comprehensive and coherent theory of law, attacked "the *elegantia juris*" and prevailing notion of the day that the law was best understood as a formal system of logic. Holmes emphatically rejected such a perspective, and offered instead an explicitly organic explanation of how the law developed. Influenced by the work of Henry Adams and others, research that argued forcefully that the roots of Anglo-Saxon law lay in Teutonic rather than Roman history, Holmes attempted to prove that legal rules grew out of the actual struggles of a prior time, and reflected neither the command of God nor the legal sovereign. Holmes denied that the law could be properly understood "as if it contained only the axioms and corollaries of a book of mathematics,"

Associate Justice Oliver Wendell Holmes, Jr. posed for this photograph shortly after joining the Court in 1902.

and corollaries of a book of mathematics," focusing his study instead on "the customs, beliefs, or needs of a primitive time.[20] Holmes thus advanced the radical notion that the "felt necessities of the time" had "a good deal more to do than the syllogism in determining the rules by which men should be governed."[21]

In Holmes' mind, the growth of the law was clearly organic, and he identified "considerations of what is expedient for the community" as "the secret root from which the law draws all the juices of life."[22] Every principle of law developed through litigation was "in fact and at bottom the result of more or less definitely understood views of public policy."[23] Asserting the primacy of such considerations, Holmes believed it "pretty certain" that men will "make laws which seem to them convenient without troubling themselves very much {with} what principles are encountered by their legislation."[24]

The success of *The Common Law* established Holmes' reputation as a serious legal scholar and earned him an appointment to the faculty of the Harvard Law School, which he quickly departed to join the Supreme Judicial Court. His effort to derive from historical case studies a single, unifying theory of law proved somewhat less successful, however. The theoretical conclusion of *The Common Law* was that the law increasingly relied on standards that were objective and external. Implicit in this conclusion was Holmes' acceptance of the growing power of the organized state to impose its will, and the increasing subordination of the interests of the individual to the interests of the collective. The law is an instrument of the state, and if it is to be an efficient instrument, it must be able to compel what the community wills. Standards of liability and proof must be objective rather than subjective precisely because subjective motivation ceased to be of importance when viewed only as an obstacle to social control.

Holmes' attempt to refine the conclusions of his socio-historical investigations into a "philosophically continuous series" has exposed him to the charge of replacing one *"elegantia juris"* with another.[25] Nevertheless, one is struck by the degree to which the conclusions of *The Common Law* presume that society, i.e.,"the community," is an organism--an integrated collective being capable of exerting a single collective will. Perhaps this view of society reflected a nineteenth-century commitment to enduring values shared by all members of the community, or the intellectual homogeneity of Brahmin Boston. Whatever its source, the view that society was motivated by a consensus on what constituted beneficial social ends serves as the underpinning for much of Holmes' theory; it was precisely this underpinning that gave way under the weight of the individual cases that demonstrated all too convincingly that no such consensus actually existed.

The collapse of Holmes' confidence in his own premise is the central motif of his judicial career. In 1897, the seasoned judge delivered an address marking the dedication of a new law school. Entitled "The Path of the Law," the lecture ostensibly reprised the familiar themes of *The Common Law*. From the outset, however, Holmes attempted to shore up the foundations of his theory. Plagued by doubt, he grasped for certainty. His very opening line asserted that law was "not studying a mystery but a well-known profession."[26] Rejecting once more that logic was "the only force at work in the development of the law," Holmes also noted "the pitfalls of antiquarianism," instructing his listeners that the only utility of understanding the past was "the light it throws upon the present."[27] In a prophetic statement, Holmes concluded that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[28]

This new emphasis on statistics and economics suggests the extent to which Holmes hoped such new expertise might ease his job as a judge. Law had become for Holmes simply "a set of predictions" concerning "what courts do." The value of a legal rule was determined by the degree to which it increased a lawyer's ability to predict court action.[29] If enduring community values no longer provided a stable foundation for such predictions, perhaps statistical analysis could.

Returning to a theme developed in *The Common Law*, Holmes continued to argue that behind the general form of legal rules lay "the practical motive" for their enforcement. Holmes proposed that if his audience would wash the law with "cynical acid" they would see this practical motive more clearly.[30] Holmes pressed his point home by suggesting a view of law that would "stink{s} in the nostrils of those who think it advantageous to get as much ethics into law as they can."[31] To understand the law fully, one had to look at it from a "bad man's"

point of view:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[32]

Holmes' motive in proposing such a perspective seems clear: if the law was to have any degree of certainty, it was essential that a reasonably prudent man could be held accountable for the consequences of his conduct regardless of his actual knowledge of the law or intent to violate it. It is likely that Holmes himself adopted this view of the law as a way to hedge his bet that his earlier theoretical assumptions about the evolution of the law might still prove true. Holmes believed that by adopting this "wider point of view" from which "the distinction between law and morals becomes of secondary or no importance," he had made possible a clearer vision of the law, one which revealed "the relative worth of ourdifferent social ends."[33] By this point in his judicial career, he had concluded that:

> a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.[34]

Holmes' day-to-day experience on the bench had confirmed his belief that "behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[35] Holmes concluded that the law was a battleground "where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in given time and place."[36] This frank acknowledgment of the relativism of legal rules clearly was at odds with the deterministic tone of *The Common Law*. Having revealed the extent to which judges were "taking sides upon debatable and often burning questions," Holmes urged judges to accept the duty and responsibility for making wise decisions.[37]

Two years later, Holmes returned to the problem of determining the relative worth of social ends in an address to the New York State Bar entitled "Law in Science and Science in Law." Holmes stated what he believed to be an obvious and accepted truth, that "every one instinctively recognizes that in these days the justification of a law...cannot be found in the fact that our fathers always followed it," but rather in "some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants."[38] Understood in explicitly instrumental terms, the law must be judged by the degree to which it promotes desired social ends. The problem with such a conception of the role of law is that it strips law of any ethical or moral meaning of its own, and reduces law to simply the process through which society gets what it wants. And where there is doubt, Holmes encouraged judges to "exercise the sovereign prerogative of choice."[39]

For nearly a half-century--from his appointment to the Massachusetts Supreme Judicial Court in 1883 until his retirement from the Supreme Court of the United States in 1932--Oliver Wendell Holmes, Jr. faced the challenge such "choice" presented. Early in his judicial career, Holmes appeared committed to implementing the ideas he had developed in *The Common Law*. But as time went on, he increasingly absented himself from making the most difficult choices about the relative worth of competing public policies. As early as 1873, Holmes had accepted the proposition that "in the last resort a man rightly prefers his own interest to that of his neighbors," as well as Herbert Spencer's assertion that legislation invariably shifts burdens from the shoulders of the strong to those of the weak, thereby accomplishing a "redistribution of discomfort."[40] A confirmed Darwinist, Holmes assumed that the fittest would not only prevail, but that they had earned the right to survive through victory in combat. Holmes rejected the idea that legislation could guarantee the greatest good for the greatest number; such a calculus presumed an equality of ability and identity of interest which experience had taught Holmes did not exist. If in a given situation legislation actually did prefer the greatest good for the greatest number it was because the majority enjoyed sufficient power to put disagreeable burdens on the shoulders of those too weak to resist the imposition. Holmes concluded that "all that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* su-

preme power in the community."[41] This instruction, more than any other, came to serve as Holmes' own guide.

If this willingness to acquiesce to the will of the community explains Holmes' opinions in cases like *Lochner* v. *New York* (1905), *Coppage* v. *Kansas* (1915), *Hammer* v. *Dagenhart* (1918), *Adkins* v. *Children's Hospital* (1923), and the notorious language of *Buck* v. *Bell* (1927), can it also explain his famous dissents in *Abrams* v. *U.S.* (1919), *Gitlow* v. *New York* (1925), *Olmstead* v. *U. S.* (1928), and *U.S.* v. *Schwimmer* (1929)? A clue to the answer may lie in a dissent Holmes wrote in 1896 while on the Massachusetts high court. The case--*Vegelahn* v. *Guntner*[42]--involved the right of laborers to picket. Holmes' angry comments to his English friend, Sir Frederick Pollock, about the way his dissent in support of the workers was misinterpreted by the press as support for organized labor makes clear that Holmes cared little about the lives and interests of those his opinion seemed to help.[43] Though he explicitly denigrated the efficacy of strikes as a way to increase labor's share of the wealth of society, he upheld labor's right to organize because to do otherwise would have ignored the reality of who was coming to enjoy power in the community. Moreover, Holmes could not distinguish this right from similar rights the Court had upheld for entrepreneurs. In a telling portion of his opinion, Holmes argued that "the doctrine generally has been accepted that free competition is worth more to society than it costs."[44] Foreshadowing the day when cost-benefit analysis would be presented in full dress as a comprehensive and acceptable theory of law, Holmes' emphasis on "free competition" and "fair play" characterized many of his most important decisions. Unable to intervene in the contest because he was unable to determine for himself the relative worth of competing social ends, Holmes chose to become the impartial umpire, protecting the combatants' right to a fair fight. His dissent in *Abrams* summarizes his position:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market... Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[45]

Justices Holmes and Justice Brandeis outside the Capitol Building where the Supreme Court met before 1935.

Read in a certain light, this is no more than a restatement of Holmes' position in *Lochner* that his own personal agreement or disagreement with the legislative policy involved had "nothing to do with the right of a majority to embody their opinions in law."[46] Thus, what ultimately mattered most for Holmes was that the game be played according to certain notions of a "fair fight," and that the arena remain open for all contestants. He cared little about winners and losers, confident that over time the strongest would inevitably prevail.

It is interesting to note that within a year of his dissent in *Abrams*, Holmes had noted that even "a dog will fight for his bone,"[47] and that he had come "devilish near to believing that "might makes right."[48] These two comments highlight the degree to which Holmes saw force as the central dynamic of social relations. In the "universal struggle of life," force settled everything.[49] Fascinated by power, Holmes rejected moral sensibility as weakness. For Holmes, all moral and aesthetic preferences were "more or less arbitrary... Do you like sugar in your

coffee or don't you...So as to truth."[50] Unrestrained by any particular interest in shaping the future, Holmes self-consciously let "the crowd" decide the most important questions facing society. "In my epitaph," Holmes quipped, "they ought to say 'here lies the supple tool of power'."[51] Where the crowd led, Holmes was prepared to follow: "If my fellow citizens want to go to Hell I will help them. It's my job."[52] Holmes supposed that "the crowd if it knew more wouldn't want what it does--but that is immaterial."[53] Such collective ignorance was immaterial precisely because Holmes' test of excellence for judicial decision was "correspondence to the actual equilibrium of force in the community--that is, conformity to the wishes of the dominant power."[54] In a remarkably direct statement, Holmes noted that "of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise" but "wise or not, the proximate test of a good government is that the dominant power has its way."[55] Holmes was no optimist--he fully expected that the crowd would ultimately destroy the way of life he preferred.[56] Convinced by his own theory that his own kind were destined for extinction, Holmes was prepared to "bow to the way of the world."[57] But what of those who yielded less willingly? Holmes' conclusion was no less resigned. Having accepted "how limited a part reason has in the conduct of men,"[58] Holmes fully expected that raw force would be the ultimate arbiter. "When men differ in taste as to the kind of world they want the only thing to do is to go to work killing."[59] In Holmes' theory, "war not only is not absurd but is inevitable and rational."[60] Such a conclusion was entirely consistent with his grim statement that "all society rests on the death of men. If you don't kill 'em one way you kill 'em another."[61]

Perhaps Holmes was not entirely serious in these comments, but they provide an important insight to the larger philosophical view of Holmes the jurist. Moreover, one should be careful in evaluating a late-nineteenth century jurisprudence from a post-Auschwitz, post-Hiroshima perspective. Holmes' theory undoubtedly sounds different to a contemporary ear, but the question really remains the same--is the Holmesian legacy one that continues to have value, or is it essentially bankrupt? Holmes' abdication of responsibility for choices he endorsed, and the ultimate impotence of his jurisprudence in the face of difficult questions suggests that although the impact of his decisions was substantial, his solution to the fundamental question of how a judge should decide a case has little enduring value for those who now must exercise "the sovereign prerogative of choice."

Endnotes

[1] Kurland, Book Review, 25 *U. Chi. L. Rev.* 206, 206 (1957).
[2] Gilmore, *The Ages of American Law* (Yale, 1977), pp. 66-67.
[3] Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (Harvard, 1984), p. 151.
[4] *Ibid.*, pp. 152-156.
[5] See G. Edward White' s "The Rise and Fall of Justice Holmes," 39 *U. Chi. L. Rev.* 51 (1971).
[6] Rogat, "The Judge as Spectator," 31 *U. Chi. L. Rev.* 213, 230.
[7] *Ibid.*
[8] *Ibid.*, p. 256.
[9] *Ibid.*, p. 236.
[10] See Rogat, n. 131, pp. 238-239.
[11] Holmes, *The Common Law* (Little, Brown, 1881), p. 1.
[12] Ibid.; See also Holmes's opinion in *Missouri* v. *Holland*, 252 U.S. 416 (1920).
[13] *The Common Law*, p. 44.
[14] *Ibid.*, p. 41.
[15] *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (Shriver, ed., 1936) p. 187.
[16] See Gilmore, pp. 49-50, and Palmer, "Hobbes, Holmes and Hitler," 31 *A.B.A.J.* 569 (1945).
[17] Holmes, "Memorial Day Address, 1895," reprinted in *The Mind and Faith of Justice Holmes* (Lerner, ed. 1943), p. 20.
[18] Tushnet, "The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court," 63 *Virginia L. Rev.* 975 (1977).
[19] *Ibid.*, p. 1049.
[20] *The Common Law*, p. 1, 5.
[21] *The Common Law*, p. 1.
[22] *Ibid.*, p. 35.
[23] *Ibid.*
[24] *Ibid.*, p. 211.
[25] Gilmore, p. 53.
[26] Holmes, "The Path of the Law," *Collected Legal Papers* (Harcourt, Brace, 1920) p, 167.
[27] *Ibid.*, pp. 194-195.
[28] *Ibid.*, p. 187.
[29] *Ibid.*, p. 168.
[30] *Ibid.*, p. 174.
[31] *Ibid.*, p. 175
[32] *Ibid.*, p. 171.
[33] *Ibid.*, p. 170, 242.
[34] *Ibid.*, p. 186.
[35] *Ibid.*, p. 181.
[36] *Ibid.*
[37] *Ibid.*, p. 184.
[38] Holmes, "Law in Science and Science in Law," *Collected Legal Papers,* p. 225.
[39] *Ibid.*, p. 239.
[40] Holmes, "The Gas-Stokers' Strike," 7 *Am. L. Rev.* 583 (1873), reprinted in 44 *Harv. L. Rev.* 795 (1931).
[41] *Ibid.*
[42] 167 Mass. 92, 44 N.E. 1077 (1896).
[43] 1 *Holmes-Pollock Letters* 106 (Howe, ed. 1941)
[44] 167 Mass. 92, 104, 106; 44 N.E. 1077, 1080 (1896).
[45] *Abrams* v. *U.S.*, 250 U.S. 616, 630 (1919).
[46] *Lochner* v. *New York,* 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
[47] Holmes, "Natural Law," 32 *Harv. L. Rev.* 40, 42 (1918).
[48] Holmes to Bryce (September 17, 1919) cited in Howe, *The Proving Years* (Harvard, 1963, p. 46, n. 41.
[49] *Plant* v. *Woods,* 176 Mass. 492, 505; 57 N.E. 1011, 1016 (1900) (Holmes, C.J., dissenting). See also Rogat at p. 235.
[50] 1 *Holmes-Pollock Letters* 105(Howe, ed. 1941).
[51] Holmes to C.E. Hughes, cited in Pusey, 1 *Charles Evans Hughes* (Macmillan, 1951), p. 287.
[52] 1 *Holmes-Laski Letters* 249 (Howe, ed. 1953).
[53] 1 *Holmes-Pollock Letters* 163 (Howe, ed. 1941).
[54] Holmes, "Montesquieu," *Collected Legal Papers*, p. 250, 258.
[55] *Ibid.*
[56] 2 *Holmes-Laski Letters* 114 (Howe, ed., 1953).
[57] *Ibid.*
[58] 1 *Holmes-Laski Letters* 122 (Howe, ed. 1953).
[59] 1 *Holmes-Laski Letters* 116 (Howe, ed., 1953).
[60] 2 *Holmes-Pollack Letters* 230 (Howe, ed., 1941).
[61] 1 *Holmes-Laski Letters* 431 (Howe, ed., 1953).

Sutherland's Recollections of Justice Holmes

David M. O'Brien

Before his appointment to the Supreme Court in 1939, Felix Frankfurter planned to write a biography of his beloved Justice Oliver Wendell Holmes. In 1931, just a year before the 91-year old Justice retired from the bench, Frankfurter edited a collection of essays dedicated to Justice Holmes. Among those who contributed to Frankfurter's edition of Mr. Justice Holmes *were Benjamin Cardozo, John Dewey, Learned Hand, Harold J. Laski and John Wigmore. In 1935, following Justice Holmes' death, Frankfurter wrote the Justice's former law clerks, asking them for their recollections of working with him and of his opinions written during their clerkship years. Arthur E. Sutherland provided Frankfurter with his reflections on Justice Holmes during his clerkship in 1927-1928. Frankfurter, however, never completed the biography of the Justice he so admired. In 1938, a year before his own appointment to the Supreme Court, Frankfurter did publish an analysis of Justice Holmes' views on the Constitution and the role of the Court in* Mr. Justice Holmes And The Supreme Court.

Frankfurter's own work on the Court and other wide-ranging interests virtually foreclosed the possibility of his writing a definitive biography of Justice Holmes. Yet, he remained deeply committed to the project. And he persuaded his friend, historian Mark De Wolfe Howe to undertake the project. Howe, though, failed to complete the project as well. In 1957, his first volume, Justice Oliver Wendell Holmes: The Shaping Years *appeared and a second,* Justice Oliver Wendell Holmes: The Proving Years, *followed in 1963.*

Nor did Sutherland publish or further expand as he might have on the recollections of Justice Holmes which he sent Frankfurter in 1935. Sutherland's clerkship with Justice Holmes had come at the suggestion of then-Professor Frankfurter, with whom he had studied at Harvard Law School. After his clerkship, Sutherland returned to his hometown of Rochester, New York, where he practiced law until 1941. He then served in the army during World War II. Rather than returning to his legal practice after the war, Sutherland joined the faculty at Cornell Law School and taught there for five years. In 1950, he returned to Harvard Law School, where he taught until his death in 1973. Among his many publications are The Law and One Man *(1956),* Constitutionalism in America *(1965),* Apology for Uncomfortable Change *(1965), and* The Law at Harvard, 1817-1967 *(1967), as well as leading casebooks on commercial and constitutional law.*

The following excerpts come from his "Recollections of Justice Holmes," located in the Manuscript Room in the Harvard Law School, and published here with the kind permission of its curator, Judith Mellins.

Boswell has never been the subject of my especial admiration. After all, the easy talk of friends was never intended for public display in print. If Dr. Johnson talked for the book, Holmes surely did not. I take no pleasure in the thought that time must wear dull my memories of the Justice, and of the easy daring that made up so large a part of the charm of his talk. On the other hand I do not choose to write down for public repetition every striking statement of his which stays in my mind. He would have been less generous of his conversation if he supposed that he was to be recorded. One can only try to choose what he would have wanted.

I first remember hearing about Justice Holmes when I was in college and my father recommended that I read *The Common Law.* I was surprised that the author of the *"One Hoss Shay"* was still alive! (Later, when I used to answer a good many letters for the Justice, I came to realize that many people were similarly confused between the Doctor and his son.)

Later in my first year at the Law School I was walking on Brattle Street with Fred Davenport when he pointed to a young man

across the street. "That's Jim Nicely," he said. "He's editor of the Law Review and next year he's to be secretary of Justice Holmes." I was duly impressed with the heights to which man could climb.

Joie Beale and Manley Hudson commended us to "Privilege, Malice and Intent". In Frankfurter's seminar on Federal Jurisdiction, Holmes was frequently mentioned. Bart Leach was his secretary. Charles Denby, the urbane and immaculate, was to succeed him after our class graduated. I left Cambridge and went home to Rochester to practice law. Harvard was still a present excitement. Corcoran, I heard, was to succeed Denby--a shocking departure from tradition, to pick two secretaries from one class. During my second year out of law school, I was grubbing away one day, wishing I could get enough free time for a trip to Northampton to see a girl I was to marry the next fall, when I had a telegram from Felix Frankfurter suggesting that I might be Holmes' secretary the next year. Excitement was crossed with doubt--I vaguely remembered a tradition that the secretary mustn't be engaged. A horrid alternative! I went to Cambridge (via Northampton) to see Frankfurter. He expressed doubt but said he'd see the Justice. Finally I had a telegram in Rochester from Felix Frankfurter saying that I could have the job and the lady too. It worked out very well.

I wrote to the Justice and a day or two later received this letter:

April 2, 1927

Supreme Court of the United States
Washington, D.C.

My dear Mr. Sutherland:

All that I hear gives me reason to be very glad that you are coming to me next year,--provided of course that I am here to be come to. For in view of my age I have to reserve the right to die or resign, although I devoutly hope to do neither. As to reading the last years of our reports I don't regard it as necessary as a qualification, notwithstanding the fact that 'my favorite author' as Thackeray says, is a contributor. When the summer comes send me your address that we may have a word before the work begins.

Very truly yours,
O. W. Holmes

I was still a little uneasy about my ignorance of federal matters, and wrote the Justice expressing my appreciation of the opportunity and my concern about my capacity. He was reassuring:

May 28, 1927

My dear Mr. Sutherland:

Don't bother about preparations for coming here. As to the advantages I must leave you to your own judgment and my ex-Secretaries. There is one point on which I was thinking to write to you. My Secretaries in times past have felt free after I left for Boston except when some specially scrupulous one offered his services in the summer. But circumstances have changed. If I should live so long and still remain in good condition I shall have a lot of certioraris to examine in the summer time as to which a secretary might give me real help--not to speak of some lesser matters. You undoubtedly would get a good substantial vacation but I should wish to feel free to call on you for help at convenient moments in the four months during which you will be drawing pay. I hope this intimation will not disappoint you, but it would preclude making plans to be away from me for the whole of the summer time.

Yours very truly,
O. W. Holmes

Sutherland accompanied Oliver Wendell Holmes on his visits to Beverly Farms. This photo was taken on the beach of the swimming club. Holmes used to sit in the sun and stare out across the water. "Small sail[boats] were sometimes outside his vision," wrote Sutherland. "He used to pretend that I made up the story that they could be seen, just to plague him."

His quite unnecessary worry lest I be grieved at not having four months pay for doing nothing was characteristic. He was extremely sensitive for other people's feelings.

About the first of October I arranged to come to Washington to meet Tom Corcoran at the Justice's house so he could start me off right. He and I went to 1720 Eye St. together, and he went in and up to the library on the second floor with a boldness that astounded me. He showed me the checkbook, the list of securities and due dates; he told me I'd have to go "fish in the pool" with the Justice at the Riggs Bank. While we were talking there was a stir outside the door, and a white-haired old man, bent far over, with a surprising breadth of shoulder, came in from the hall.

"Well, upon my word! Upon my word!" he said. I was in doubt whether or not he was displeased at our being there.

The routine of work was easy. "Pet's for cert" had to be examined in some quantity; Arthur Thomas, the messenger, used to bring in a dozen or more a day. I'd arrive at the Justice's house at 9:30, and go to work on records and whatnot. By and by the Justice would come in, slippered and wearing a mohair house coat. He'd sit down at the big desk. Thomas would bring his mail immediately and he would begin to open his letters with a miniature saber. How did Thomas know when he sat down, and so bring the mail? The Justice used to speculate on the mystery. He thought Thomas was ready at the door, and opened it when Holmes' chair creaked. Generally there'd be two or three requests for autographs--he'd sign the card if a return stamp was enclosed. "Crank" letters, asking assistance, were turned over to the secretary to read; he was always afraid that some genuine wrong would be left unrighted if he threw them aside. A few close friends used to get answers in the Justice's own hand, written with a horrible old pen caked with ink. Most letters were written in longhand by the secretary and signed by the Justice. He had no typewriter. "How I loathe conveniences" was one of his cherished sayings.

The big desk in the library on the second floor was the center of his life. There he sat most of his waking hours when he wasn't in court. His will (one of the first things he showed me) was in a special place in the flat desk drawer. The cork from the bottle of champagne he and Shattuck opened when "The Common Law" came out was in a drawer on the right. There he wrote opinions, slowly, illegibly, with a sputtering pen. There he sat and smoked "Between the Acts Little Cigars". There he sometimes read frivolous and sometimes heavy books. There he sometimes dozed a little. Occasionally, when he wanted to sleep or read more at ease, he would move to a leather-upholstered chair near his desk--a complicated device, with a foot rest that could be made to shoot out by pressing a lever. He would have me cover his legs with a shawl and turn on the electric heater, and he would take his ease. But mostly he sat at his desk.

Occasionally Mrs. Holmes would come in--sometimes to speak to the secretary, sometimes hailing her husband, "Holmes! Holmes, j!" If he was at work he'd talk a little while, and then with great vigor say, "Now, Dickie, see here, you run along, I've got to work." Dickie, not at all disconcerted, would walk to the Secretary's desk and talk to him while the Justice fidgeted a little.

If the Court was in session, the Justice left at 11:30 for the Capitol. It was a solemn rite. Thomas generally helped him put on his shoes (high black shoes, much polished) and I helped put on his rubbers. He liked the professional slap I used to give the side of his foot when the rubber was on. Once I was telling Mrs. Willebrandt about this process at a tea at the Brandeis'. "Oh," said she, "to sit at the feet of Justice Holmes!" I told the Justice about it; thereafter he used to ask for his rubbers by saying, "Hey, young fella, Willebrandt me!"

After the rubbers, the coat. The mohair jacket was hung up and the suit-coat held for the judicial arms. Thomas came for the morocco-bound docket, which had to be taken to court. The Justice went to the elevator and lowered himself to the first floor while the secretary went down the stairs. Holmes (who enjoyed little plays) used to pretend to be amazed to see the secretary outside the elevator when he closed the door above and when he opened it below. He said it was like a "Faust" he saw once, in which the devil at the stamp of Faust's foot disappeared in one spot and simultaneously appeared in another by means of a 'double'. Buckley was at the door, his highly polished and decidedly antiquated automobile, retained by the month, waiting at the curb. A last conference with Dickie would

ensue. The Justice would go down the brownstone steps with the secretary, and would climb into the car. Buckley would start it slowly off while the secretary returned to the library and the pile of petitions for certiorari.

The secretary sometimes used to lunch with Mrs. Holmes. It was no trifling snack--places for four were always set and the meal served with formality. Mrs. Holmes was a delight to talk with. She used to sit very straight, on the edge of a chair--not slumped back in the corner. She was bright, alert, quick--like some little bird. "Dickie" was a perfect name for her. Her responses were immediate--there was no lapse in her comprehension for a moment or two after one spoke to her, as is often true of the old. She must have had the same irrelevant, diverse charm as a girl in Boston, before the war. It was a time very real and present to her. I remember one day talking to her about Adams' "Education", and the comments he made on Rooney Lee at Harvard. "Oh," she said, "I've often danced with Rooney Lee." It was as if she were mentioning a partner at last Saturday's cotillion!

She had few companions. Sue (my wife) became a great friend; the two used to sit for hours in the parlor on the ground floor in front of the tiled fireplace, while Dickie told little amusing inconsequential stories. "The proletariat" was a phrase she fancied. Once we four went out to see some apple blossoms. The farmer said that if we'd only been there a day or two before they'd have really been worth seeing. When we drove away Dickie sniffed. "The proletariat," she said, "always loves to diminish one's pleasure in a prospect by explaining how much one has missed by not coming some other time." Neither she nor the Justice was filled with a sentimental love for mankind in general, though both were endlessly tender toward individuals. The flavor of both was mildly acid. I think the reason for this was their habit of honesty--most people who express a universal charity are deluding themselves. The Justice used to say men were like melons; there were big ones with watery pulp and weak flavor; and there were a few small ones with rare savor. Statesmen, he said, were apt to be big melons; he mentioned Harding as an example. I asked him once how he felt toward people generally. "Oh," he said with the greatest tolerance and good humor, "I dare say the generality of mankind is made up of swine and fools." He accepted the fact without rancor as one accepts the facts of bad weather or old age or evil.

They were buoyant and amusing in their relations with one another. The Justice used to call on the secretary to witness various high crimes and misdemeanors on Dickie's part, to be used as grounds for a future divorce suit. Dickie called him Wendell, or Holmes, or Holmes, j. Sometimes he called her "Woman". Once I remember them standing by Buckley's car in front of 1720 Eye st., waiting to get in and go somewhere. Mrs. Holmes stood talking with Buckley for several minutes. Finally the Justice said, "Woman, less jaw and more git." She turned to him cheerful good humor. "Holmes," she said, "You be damned!

I remember seeing her in a softened mood only once. She came into the library carrying a little white silk dress, all made of a countless number of ruffles, and told me that the Justice's mother had made it for him before he was born. It was brittle with age and she had decided to burn it up in the fireplace. I urged her not to do it, and she waited a minute, looking at the fine sewing. "Think of her," she said, "putting in all those little stitches." Then she crumpled the little dress in the grate and touched it with a match flame; it flared like tissue paper.

She loved to shop; her house was full of little odds and ends she'd bought here and there. There was an Oriental shop called the Pagoda, kept by a Mr. Osgood, where she used to buy all manner of things. There were artificial butterflies hung on the lamp-shade in the living room, for example. Their houses conformed to no set style. I think 1720 Eye St. or the house in Beverly Farms would have given an interior decorator severe pain. They liked them as they were; were completely poised in their own tastes, and the suggestion that they should have complied with somebody else's idea of how to live would only have amused them. They were not herdbound; an aloofness from common prejudice was their most conspicuous spiritual feature; it was the essence of the Justice's greatness; and he might well have lacked much of it were it not for the same quality in his wife. Together they occupied a "jour d'ivoire".

When the Court was not sitting, the Justice used to go riding with Buckley every morning, and sometimes in the afternoon as well. Rock Creek Park was a favorite trip; another was up the Potomac to the Chain Bridge. Another was

around Hains' Point and back along the Tidal Basin. One of the first trips we took was to a point up the Potomac nearly opposite of Ball's Bluff. It was the anniversary of the Battle--October 12th. The Justice told me of the slow climb up the bank of the river, of his being hit in the pit of the stomach by a spent ball, of the Colonel's saying, "Go to the rear, Mr. Holmes," of his being shot through the breast and helped away by his 1st Sgt., of his mentioning his vial of laudanum to a colleague, or surgeon, and of its disappearance from his pocket!

Once I asked him about courage, and said that I wondered if I'd have the strength to face fire. He said with complete understanding that when he went into the army he'd had the same doubt, and wondered whether he'd be "biting a bullet" (a figure of speech: actual biting of a lead slug to relieve nerve tension was of an older time). He said he had consoled himself with the reflection that armies were made up of average people, and that no more would be demanded of him than the general run of people could accomplish.

Once we went out to Fort Stevens, the site of an attack by southern troops where the President was under fire. The Justice showed me where the federal skirmish-line was, and spoke of seeing the President in the works; but until I read of it in a magazine, years after his death, I never heard of the Justice saying "Get down, you damn fool" to Abraham Lincoln.

Much of his thought had a military cast. Courage and hardihood he valued. He had a definition of a gentleman not now often encountered--one who for a point of honor would gladly risk his life. He said there were few gentlemen.

Once he spoke to me with scorn of some person's remark that war was illogical. "War," he said, "is supremely logical." He said that if two nations disagreed over something important, the simple logic of the situation called for the stronger one to impose its will on the weaker. He said that he had decided in the Sixties that war was an organized bore; but that it was a great spiritual experience as well.

He had little patience for books picturing Robert E. Lee as a kindhearted and noble soul, far superior to Grant in strategical skill. Grant was his man. He and Mrs. Holmes and I shared a great admiration for the statue of Grant down in front of the Capitol; the general is mounted watching something, his

Holmes poses in his Union uniform during the Civil War.

collar up around his neck, his hat over his eyes. He looks like a tired officer on a horse; not a pasteboard hero. Mrs. Holmes liked the story of the discouragement of the sculptor, his illness, and the surprise of his wife when his design was accepted.

From time to time the Justice used to say that he disliked to talk of the war: but I think that like other soldiers of other wars, he enjoyed telling about it. He told me of carrying a message, mounted, when he was on the 6th Corps Staff; when as he put it, he "got in among 'em." Three Confederate troopers appeared in front of him. Holmes was armed with a saber and a pistol. He had been reading a novel about adventure in Mexico, and there crossed his mind the account of some one thrusting an adversary through the body until he felt his saber-hilt strike the other's breastbone. Holmes started to draw his own saber, and then recollected that the confederates were cavalrymen and probably better swordsmen than he. So he drew pistol instead, thrust it at the body of the nearest trooper and pulled the trigger, only to have the weapon misfire. He "did a Comanche" as well as he could (his own words) and rode past at a gallop. Two or three carbines went off behind him, but he was unhurt and reached his friends, who greeted him by "Here comes the chain-pump" (a name he'd gained by being somewhat continuously talkative, as the chain on a pump was continuously rattling). He said to me of the trooper he'd tried to shoot, "I wonder if that

fella's still alive. I'd like to have a drink with him."

His modesty about his own dexterity and horsemanship was characteristic. He told me that after the war, in England, he was invited to be a member of somebody's staff, mounted, at a review. He had never learned to be entirely at ease on a horse, and was concerned about appearing awkward. So he left a note in his shoes outside his hotel door, to be called early in time to get dressed and mount up--well knowing that the "boots" would not get the note until too late. This shocking piece of disingenuous maneuvering gave him an excuse for not turning up in time!

Mrs. Holmes told me that on the same visit the little son of a man whom the Colonel was visiting asked to see the visitor, and on seeing him, wept. The child had expected to see somebody in a busby and scarlet coat; and was badly let down on seeing a young man in ordinary clothes.

The Justice said that he had reached the height of military comfort when he was on the 6th Corps Staff, and had his orderly trained to wake him up in the morning and give him a whiskey cocktail and a chew of tobacco!

One of his most difficult times was after he was shot in the heel at Fredericksburg, and was convalescing in Boston. He came to cringe in advance in expectation of the remark, "Ah! Achilles!" from every visitor.

He had been very vigorous all his life, and gave up physical activity with reluctance. Mrs. Holmes told me that at sixty-five, a short walk was his only exercise. (But I saw him at Beverly Farms in the summer of 1928, jumping around the lawn after a moth!) He used to say, "Shall we creep an inch?" and away we'd go for a few blocks. He expressed ironic admiration for my ability to twirl a walking stick--but agreed on another gesture with that article. We were talking about the statement ascribed to Coke that a man could lawfully beat his wife if he used a stick no bigger than his thumb. So we devised a minatory salute for wives, and on approaching Mrs. Holmes and Sue somewhere or other, we solemnly held up our sticks with our thumbs beside them to show that the weapons were within the legal limit.

He told me a good many stories of his boyhood and youth. He stood much in awe of his father--"my guv'nor"--whose judgments on points of social convenance were severe. The Doctor was pretty emotional, and it took his son some time to learn that his expressions needn't always be taken literally.

The Holmeses were not very prosperous in the Justice's youth. When the young man married they lived in a couple of rooms. Mrs. Holmes (she told me) once cut her head open when she raised it up suddenly and hit a coffee-grinder fastened to the wall. They were happy with a small house at Beverly Farms (or Prides') where they did a good deal of gardening. The Justice told me that he and his wife used to drag manure around from one flower-bed to another on an old shutter, and that the purchase of a wheel-barrow after much careful discussion and planning, was a great luxury!

He had once taken up etching, and had framed in his library one very good print he had made himself. He had a lot of prints--Durers particularly; and Benson's animal and bird etchings. When I confessed ignorance and interest, he was very kind, and took endless pains to explain them. As in other things, he was completely simple in his discussion of pictures. He used no ready-made technical phrases to tell what he saw in them.

Books were of course very important to him. He showed me a Hobbes' *Leviathan,* and explained what a hard time he'd had getting to read it; he'd been about to read it when the war broke out and he set the book aside; then he'd come home from the army and studied law and had been about to tackle Hobbes again when he became engaged to be married which set him back again!

He was entirely without conventional prejudice in his judgment of books. He said to me once,

"With certain universally recognized exceptions, and excepting personal tastes, the literature of the past is a bore. Now for the first time you stand on the mountain peak--a free man!"

One of the exceptions his personal taste required was *Casanova's Memoirs.* He told me that when he was forty, he had thought because of a serious ailment his life was about over, and that the *Memoirs* had done him a lot of good.

He said that he thought that somewhere in heaven a great book of records was being kept, where he got credit for dull but worthy books read. Those he was able to identify very easily by noticing whether, when reading, he glanced at the thickness of unread pages to come. If he found himself doing that he knew

The crossing-tender at Beverly Farms was a friend of Holmes. In September 1928, the Justice had lent him Moby Dick, saying that in it was the mystery and terror of the universe. Sutherland and Holmes paused on their daily walks to exchange opinions with the watchman.

the book was one he'd get credit for....

Holmes' first dissent of the year was in *Compania General De Tabacos de Filipinas* **v.** *Collector* (1927) 275 U.S. 87. Taft wrote the prevailing opinion, holding that the Philippine Organic Act, which contains due-process and equal-protection clauses, forbade the Government of the Islands to impose a tax upon a premium paid by a corporation authorized to do business in the Philippines, to insure goods shipped from the Islands, where the contract of insurance was entered into in France where the premium was paid and where the loss was to be settled. The majority relied upon *Allgeyer* **v.** *Louisiana* (1897) 156 U.S. 578. Holmes said,

> It seems to me that the tax was justified and that this case is distinguished from that of *Allgeyer* and from *St. Louis Cotton Compress Co.* v. *Arkansas* (1922) 260 U.S. 346 by the difference between a penalty and a tax. It is true, as indicated in the last cited case, that every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement when seen in its organic connections with the whole. Taxes are what we pay for civilized society, including a chance to insure. A penalty on the other hand is intended altogether to prevent the thing punished.

When he was working on this opinion, the Justice (presumably to amuse himself) asked me what the difference was between a tax and a penalty. I said it was a question of moral feeling; if the discouraged act carried general moral condemnation, the exaction was a penalty. He condemned this suggestion with some scorn. The law, he said, must not be confused with morals. I suspect that the vigor of his rejection of the suggestion hid a doubt. His own definition of a penalty depends on the state of mind of the legislators, which probably has an origin in some general public feeling of social condemnation. I suspect that the impost in question disclosed an intention in the minds of the island legislators to stop purchases of foreign insurance.

[Most of Holmes'] opinions are short. Quaere--did he write tersely because of the mechanical difficulty of operating his rusty sputtering steel pen, or could he tolerate the crusted weapon only because he used it little? At any rate, the wholly unnecessary prolixity of certain "great" opinions is demonstrated by Homes' pithy paragraphs. Most long opinions are efforts to apologize for the court's failure to say what it means.

The *Nebbia* opinion could have been written by Holmes in a page. After all, the court there can only have concluded that its previous observations on the constitutionality of price-fixing statutes were outmoded, and should be repudiated! Lawyers understand the convention that brings a judge to explain elaborately that he is not doing something which he obviously is doing. The lay public either turns away in irritation, or, more frequently, studies the involved logical progressions with solemn credulity, like Roman augurs examining portentous entrails. The greatness of Holmes probably lay in his ability to see what was essential in a controversy, and to state it in plain terms. He was a well-born gentleman, with common sense, who knew a great deal of law. Besides these blessings he had certain personal graces such as a discriminating literary style, a distinguished manner of speech, and a charming appearance.

Holmes wrote in *Casey* **v.** *United States* (1928) 276 U.S. 413 speaking for the majority in affirming a conviction of Casey for buying 3.4 grains of morphine not in or from an original stamped package. The evidence tended to show that he delivered, for pay, a shirt soaked in morphine solution, to a government

agent pretending to be an addict who had requested it. The proof that he had purchased it, etc., within the district was purely presumptive; i.e.--the statute presumed illegal purchase from possession.

Holmes was for conviction. McReynolds, Butler, Brandeis and Sanford dissented! The ground of dissent might be summarized as this--that the morals of opium-eating are no federal concern--and that such a remote presumption is a poor sort of basis for putting a man in prison anyhow. Brandeis thought the federal government was in a pretty cheap business when it hired Casey to sell it a morphine soaked shirt, and then imprisoned him in a burst of righteousness.

Holmes' "liberalism" by no means made him a soft, money-granting sympathetician.

He dissented in *Untermyer* v. *Anderson* (1928) 276 U.S. 440, with Brandeis and Stone. The majority held unconstitutional a statute imposing a gift tax on gifts previously made. Holmes' opinion, as always, wasted noting. He said,

"We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the beginning of the year."

Donnelly v. *U.S. of A.* (1928) 276 U.S. 505 Holding that Fed. Prob'n Director was guilty of an offense in failing to report his knowledge of illegal transportation. Butler wrote for prosecution. Originally the court voted for reversal and acquittal. But Butler at conference argued 'em round. Holmes spoke admiringly to me of Butler's force. He said you could see what a prosecuting officer he had made.

Black & White Taxicab & Transfer Co. v. *Brown & Yellow Taxicab & Transfer Co.* (1928) 276 U.S. 518

I sat in the courtroom and heard the old man read his dissent. His words and voice and manner were disdainful. It seemed as though he were obliged to hold something unpleasant in his hands. I can still hear his careful voice speaking of "this dirty business". As usual, he came briefly to the essential point--"We have to choose, and for my part I think it is less evil that some criminals should escape than that the government should play an ignoble part".

Brandeis, Stone and Butler also dissented. Taft's prevailing opinion stressed the great size of the conspiracy to run liquor into Washington--a little confession of weakness--for even Holmes, with his insistence on the importance of differences of degree, would scarcely say that the rules of evidence should bear harder on a man selling a lot of liquor than on one selling a little!

On June 4, 1928, last opinion-day of the Term, he joined with Stone in a dissent of Brandeis in *National Life Insurance Co.* v. *U.S.* (1928) 277 U.S. 508. The majority had held invalid a provision of the Revenue Act of Nov. 23, 1921, which had the indirect effect of taxing state and federal bond-interest.

Aloofness, calm, unsentimental clarity, words like those come to my mind when I try to describe the Justice's mental processes. His thought was a little cruel; it was so exact and so lacking in human prejudices. His style reflected the hard clearness that we think of as typically French (although, to be sure, he was no great addict of French letters; he read only one book in that language while I was with him, a ponderous opus by Demogue called "Notions Fondamentales du Droit Prive"). He had a startling ability to see the obvious, and to point it out more exactly than most men. That we may reasonably expect to pay taxes for the service government furnishes; that a change in the name of a governmental power will not make its exercise illegal; that there is no "law" without physical power to enforce it, and so that the "general common law" was a myth--all these "apercus" (a word he was fond of) are obvious when stated, but Holmes was great because he saw them when other men did not.

He was as realistic and unbound by convention in his thought about other things as he was about the law. I have heard him swear disgustedly at somebody's oratund suggestion of the creative force of labor, and add that thought, which directs force, is the only creator. I remember his sitting at his desk talking (I think) to Dean Acheson, and saying that there is a little white worm eating at the heart of every investment, and that there was a little white worm day by day eating away at his life. He chuckled a little.

"Damned little fellow," he said, "eating it away, eating it away!"

He never spoke of any religion. He told me once that he was a little swirl of electrons in the cosmos and some day the swirl would dissolve. I was a bit terrified at this calm, bleak old man, looking composedly at the extinction which he necessarily had to expect any day.

The Grand Panjandrum: Mellow Years of Justice Holmes

John S. Monagan

Editor's Note: *This article is excerpted from the recently published book entitled* The Grand Panjandrum: Mellow Years of Justice Holmes *written by John S. Monagan and published by University Press of America.. The book details Justice Oliver Wendell Holmes' relationship with Lady Clare Castletown utilizing extensive excerpts from the Justice's lengthy correspondence with Lady Clare.*

Lady C

While much of Wendell's flirting with the ladies could be dismissed as harmless posturing, his long and fervid relationship with Lady Clare Castletown must be placed in an entirely different category. Emily Ursula Clare Saint Leger, the daughter of the Fourth Viscount Doneraile, was the wife of Bernard Edward Barnaby Fitzpatrick, Baron Castletown of Upper Ossory. He was a graduate of Eton and Oxford (Brasenose) and had served as a life guards officer, as sheriff of Queen's County and as a member of Parliament for Portarlington. His family estates comprised 22,510 acres in Queen's (now Laois) County, Ireland, with an income before the First World War of what amounts to $850,000 in today's dollars. Although elected as a Conservative, one commentator said of him: "No one except Lord C. himself can, I think, say what his political principles are: I should make even that reservation with reservations."[1] The principal residence of the Castletowns in Ireland was at Grantstown (Granston) in Queen's County, but they lived also at the house of her family, Doneraile Court,[2] situated north of Mallow in Cork County. They also had a house at Chester Square in London.

While Lady Clare possessed wealth and status, it is apparent that the simple pastoral life she was leading and the personality of her husband did not satisfy the needs of her nature. Without children to occupy her attention, she was ripe to be captivated by the handsome and charming visitor from Massachusetts. Her husband loved horseplay, big-game shoots, and wardroom humor. This general knocking about doubtless grew less congenial over the years to a gentler soul who found pleasure in discussing art and literature with a more sympathetic person, such as Wendell, while other guests were shooting or riding to the hounds.

That there was some abnormality in the relations between Clare and her husband, Barney Fitzpatrick, is apparent in his book of memoirs which was published in 1926, the year of her death; the book barely mentions his wife of forty-nine years. Accordingly, her search for sympathetic understanding was not limited, as testified to by "intimate" letters recorded in the Archives office in London. While she encouraged Wendell's advances, she was a "friend and clearly a lover" of the melodramatically named Percy Latouche of Newbery, Kilcullen, County Kildare, Ireland. Clare was just forty-three-and Wendell fifty-five-when they met. He experienced an emotional trauma which rivalled the physical blow of the bullet that had struck him at Ball's Bluff thirty-five years before. She swept him off his feet and the passion

Oliver Wendell Holmes, Jr. writing a letter in his study.

and strength of his sentiments surge through the 103 letters he wrote her over the next thirty years--copies of which are on deposit in the Harvard Law School Library. Begun in Cork City, immediately after his departure at the close of is first visit to Doneraile, the correspondence continues until the time of her death in 1926 and contains some of the tenderest and most sensuous prose written by this master of the English language. Some of them rank with the great love letters of all time.

Since none of Lady Castletown's letters survive, the picture created by this correspondence is somewhat one-sided; it leaves the lady as a vague and mysterious figure while revealing in a blaze of light all the intimacies of Wendell's emotional nature. The survival of her letters is all the more significant in view of his efforts to keep the exchange secret. He had her address her letters to him at the Court House in Boston and his letters were frequently written from the same place. With characteristic caution, he admonished her to dispose of his letters. On September 5, 1898, he sent a warning: "By the by permit me to suggest that you do not put my letters into the waste paper basket which you trust so much. Fire or fragments and the waterways when you destroy if you do as I do."

From the very beginning of the correspondence, it is apparent that Lady Castletown had set profound vibrations in motion. Wendell's first letter was written at 8:00 p.m., the evening of his departure from Doneraile, on August 22, 1896, on stationery of The Queen's Hotel in Queenstown (now Cobh), some forty miles away, where he had gone to take the boat to Boston.

My dear Lady,

It is the stopping so sudden that hurts as your countryman truly remarked. I am here. I have eaten my dinner without heart and my only amusement is to imagine just how far you have got with your new pleasures. I saw them getting into the vehicle and I approve your judgment.

I forgot to steal some notepaper and I can't write with this pen. I only cling to your hand for a moment until the earth puts its shoulder between us–which is more than the world can do I hope in twenty years. Goodbye dear friend goodbye, my heart aches to think how long it may be.

Hon. O. W. H.
Court House,
Boston

The next letter, written on the stationery of the Cunard Royal Steamship *Etruia* was begun on the next day, Sunday, August 23, 1896, and contained entries for subsequent days, constituting a mini-journal of the trip as well as a *cri du coeur.*

My dear Lady,

I sent you a line of farewell last and now am well out to sea. But still I can't break off. There are so many things I should have said but only thought of too late. And yet when you get this the telegrapher will be in the ascendant once more. Ah well, I also am one having authority - (Do you think the cheek of that, how horrid?)

24th. Last night I talked with an old Catholic priest who united with me in the odious vice of smoking. I talked with him because he came aboard with me from Queenstown and he seemed to keep me a little nearer to Hibernia. It is a gray morning with a leaden sea and I too am somewhat leaden--not from the sea–You are reading my Queenstown letter. . . .

25th. The farther I get away the harder does it seem. Meantime I imagine the divertissements of Doneraile continuing and am not the more unselfishly happy on the account.

26th. A distraction and a misery. I am nailed to preside at one of these infernal concerts in aid of whatever they do aid. If I try to think of something to say I shall not have to think of you.

27th. Yesterday was, and to-day begins, under the shadow of their hellish entertainment--but I sit and meditate about you and when I ought to be preparing a speech. The speech will be a poor thing in consequence and you none the happier unless you tell me this makes you so. If, as I asked you, you have written to me don't answer this unless you want to wait for my answer--so will a regular course be established--but write you must. No one sees your letters and they shall be destroyed if you prefer. . . .

The feigned irritation at his shipboard role is characteristic of Wendell, but the impression and ambiguity of his observations accompanied a troubled incoherence that is not characteristic. This is not the calm Olympian of the letters to Pollock or Laski.

Wendell received the letter which he awaited so eagerly and responded immediately:

Commonwealth of Massachusetts,
Supreme Judicial Court,
Court House,
Boston, Saturday Sept. 5/'96

Dear Lady,

I have just this moment received your most adorable letter. It is what I have been longing for and is water to my thirst. You say and do everything exactly as I should have dreamed. I shall take it out and read it and be happy again. Do I often come back? I love your asking it. I think my letter from shipboard an-

swered for that time and now I answer for since then and hereafter. Oh yes indeed I do and shall. I do not forget easily, believe me--and your letter was all that was wanting to assure me that we should abide together. If you believe that, distance is easily, or at least more easily, borne. I say your letter was all that was wanting to assure me. Possibly one thing more--an assurance that you too do not forget easily when the moment is past. (Later. Tell me that for I have been thinking and thinking about it.) If you say it I shall believe it. I still carry in my pocket a handkerchief (one of my own with a little infinitesimal dark smear upon it--with it I once rubbed away a--Do you remember?

Isn't that fool thing for a serious Judge?... By the by, I ordered the second imprint of my speeches to be sent to you as soon as I arrive. Read them again and the 2nd memorial day one which you haven't seen, love them a little, for I put my heart into the accidental occasion--just that is to say to one who cares, you will understand that there is high ambition and an ideal in this externally dull routine and much of the passion of life.... I was not able to get to Bev. Farms on my arrival a week ago Saturday. All was prepared to receive me--my nephew of whom I told you has gone and got engaged and he and his young woman were expecting me at 7 1/2 p.m. When the thing was over, my wife, though far from well went to the livery stables for a driver and a pair of horses and posted through the night to Boston, 30 or 40 miles, arriving about 1 1/2 in the morning-- would not wake me--but, there she was in the morning. Imagine my joy--but also my shame to have her make the effort rather than myself--although I knew I ought not to do it on the infernal consideration of health which I have to remember all the time....

Well dear leady I must stop for the moment. Write to me soon. I long every day to hear from you, and live Doneraile over--I picture you to myself in all sorts of ways. By and by we shall settle into some sort of rhythm in writing but I have not yet learned patience in waiting. The thing to believe and take comfort in, however, is that we are not going to part company-- and I am very sure that if we do it will not be I who does it--I am only less confident that it will not be you.

H.

The thought of Fanny, far from well, posting through the night over the thirty odd miles to Boston arouses our compassion and there is a slightly hollow ring in Wendell's expression of regret. One may well ask whether it was necessary at all for him to describe to Lady C. this somewhat demeaning exercise of Fanny.

There is great ambiguity in the words "abide together" in their suggestion as to both past and future activity and speculation is stimulated as to the composition of the "dark smear" and its source. One wonders also in what ways he pictured her to himself.

The cryptic signature was one he was to use at various times.

Wendell sent a brief, informal and urgent note prefiguring his later discussion of the permanence of their intimacy and, although undated, it apparently was dispatched soon after his letter of September fifth:

Monday 10 a.m.
Court House

It is so hard to stop. Will you remember me when the other amusements begin? as they will if they have not already. The suggestion of p. 77 is of ambiguous import--but you didn't mean it so did you. Which is which from our point of view? How much more we might have talked had I dared assume that you thought our intimacy permanent. I think it so unless you forbid me. At 7 this a.m. which is 12 with you I was awake and thinking of you. Where were you? Answer this soon. I must to work. I know I am forgetting a lot of things I wanted to say but they will come in time.

Goodbye H.

I open this to add two things--please send me the photographs as soon as may be--also I hate that little colored picture in your scrap book wh. someone gave you of a woman and dog--I don't mean the photograph of you.

The reference to "p. 77" is unclear but tantalizing. It seems unlikely that Lady Clare could have written a letter of this length. Perhaps this was the citation of a passage in some book known to both of them, but one is left to wonder where it was and what its import.

Wendell's next full letter was written while on the circuit he had described to Lady C. and its mood is somewhat more settled than that of those preceding it. The judgment of his host city reveals a marked provincialism:

Worcester, Mass.
WORCESTER CLUB
Sept. 30/96
Wednesday
7 3/4 P.M.

Dear Lady

I am here for a few days on circuit (address always Court House Boston) for one of the hardest weeks of the year--and I did hope that it would be mitigated by a letter from you. I have received two--the last Sept. 6 in answer to mine written at sea. I have written 2 since that and sent you my book. Oh it is time that I heard. This is only to give you a fillip and to repeat Rip Van Winkle's are we so soon forgotten when we are dead? Little things still happen which connect me with Doneraile very closely in an external way. I don't need them--believe me, but there is a sort and delight in them. For instance a day or two ago I put on for the first time the thick boots on which I took my last walk with you and found them stiff from the wetting of that day and dull from the oiling they got afterwards. But

I am no good for a letter at this moment after law and jaw from 9 to 6. ... If a letter or letters of yours don't cross this I shall think ill of you, but they will. I find your writing adorable--you talk--and yet we got to know each other and that is much. How you would hate this town where I am spending a week. How dull and squalid the whole business and surroundings would seem--and yet when you put into them that they afford a chance to do a part of one's work they don't trouble you and your spirit is as calm as great fatigue will let it be. I shall go back to my hotel in a moment--play a game of solitaire on my bed, read a little Hegel and turn in early.

Goodbye--as I said this is put to stir you up--and forbid you to forget me. I think of you and think and think--and sit in the conservatory.

H.

Don' t forget to send me the photograph.

Wendell refers to the Doneraile "conservatory"--as he does more specifically later--as a place holding magical memories for him.

His next letter was written a week later and makes a significant reference to Fanny, but, while purporting to clarify his feelings about the two ladies, makes even more ambiguous the exact state of his relation to each:

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court,
Court House, Boston.

Thursday a.m.
October 7, 1896

Dear Literal Lady,

I have received your third letter (Sept 25th recd. last--Two answers begun before this and burned. It didn't matter--the quickest mail closed Friday) It is adorable like its predecessors. I have read them until I learn them. I should think mine are very slow in getting to you. I have written two or three since the one you mentioned--the last from Worcester last week.... But you were literal. Does my writing--did my talk sound as if I thought we were casual acquaintances? Such a surmise is a million years in the past .... All I meant was to reproduce my first feeling that one cannot assume at once from the fact that one has talked with an open heart that the other is doing more than yielding for a moment to a fancy of the moment and showing an intimacy by which she may not be prepared to abide. We were both very loud in our profession of familiarity with somewhat cynical views of life, but thank the Lord we neither of us are cynical at bottom and my guards are down long ago. I believe you seriously and sincerely and it would be a deep grief to me to dream it possible that any thing could interrupt our affection. My life is my wife and my work but as you see that does not prevent a romantic feeling which it would cut me to the heart to have you repudiate. But why talk like that? You must know me pretty well, and as I said I believe in you. As the little boy said when the other one said 'Give me the core' (of the apple). 'There ain't going to be no core'--There ain't going to be no repudiation and I am rather ashamed to have squared off so at you--I won't begin my letter over again but pass to other themes. You speak of the touch of isolation in my speeches. It has reference to my work. One cannot cut a new path as I have tried to do without isolation. I have felt horribly alone. But the result has been far more immediate than I have dared dream of its being and the real danger perhaps is that when one has been for a moment in the lead, he should wrap himself in his solitude and sit down and before he knows it instead of being in advance the procession has passed him and his solitude is in the rear.... while you are reading I am sitting in court and writing decisions when you don't break up my work as you are doing now. You have done enough disturbance to please even your imperious demands. I have been dreaming with you when I should have been deciding whether an ambiguous document is a promissory note.... I haven't been reading much--mainly a book of Hegel's. The beast has insights, but these are wrapped up in such a humbugging method and with so much that is unintelligible or unreal or both that you have to work your way. Now I am going to call on Lady Playfair an amiable Boston girl and to ask her if she knows you. If she does she will have an excess of what otherwise she has to offer.... I send her a bunch of roses when she comes here, and she talks to me about an old friend whom this time I have seen as lately as she. Oh my very dearest friend how I do long to see you. I know your hands reach across the sea and I kiss them. I continually hunger and thirst for letters. But oh if I could see you. *Au revoir.*

H.

Holmes remained a vigorous man even in his later years, continuing his practice of daily walks.

H.

In differentiating between the objects of his affection, Wendell shows a scholastic capacity to distinguish when he says that his life is equally in his "wife" and his "work"--but that he can still harbor a "romantic feeling" for the new object of his affections. How far from a true understanding of the judicial mind, one speculates, must have been those advocates in the Boston Court House arguing before him the ambiguities of an alleged promissory note. Here, too, Wendell seizes the opportunity, offered him by Lady Clare, to picture himself as the romantically lone mariner navigating for the first time seas of thought which no other has previously sailed.

In a letter written at the beginning of the week after the national election--the outcome of which he appears to have miscalculated--Wendell figuratively rides the range of subjects:

Monday a.m.
November 9, 1896.

I was disappointed on Saturday not to get a letter from you--and lo and behold, this morning I get a perfectly dear one which makes me happy, when I was blue, and has given me as much of a start as McKinley's election has given the country. Really I am not expressing in cold words the delight I feel. Understand it--also I loved your[?] at one place in the letter. As Lord Coke says Littleton's 'etc.' covered a multitude of nice points.... It is quite sure that I do want a tremendous lot of your sympathy and I never doubt that you would give it to me in all the serious interest of my work if I had the chance to explain all that I was thinking about from moment to moment. I take all for granted dear friend as I hope and believe you do. At the same time I want you to keep telling me of it until the air hums. *Please* don't let it be so long again. what a dreadful thing distance is.... I have just read two improper French books--one light wicked and amusing--the other serious and rather[?]. The latter (Aphrodite) let me to reflect for the 1000000000th time on the illusion of freedom. A man says I am going to let myself slip and have my heart out--and he finds that out of restraint he got an infinity by suggestion which vanishes before the finite act. I told my wife, a propos, that morals were like an intelligent French stage dress which by partial concealment effects an indecency that one would vainly strive for with the nude. You must keep one stocking on if you want a figure to look undressed.

After intervening letters, a hasty line from Wendell expresses his exasperation that the demands of the workaday world tear him from extended communication with his "dear lady."

Friday
December 4/96
1 PM

My Dear Lady

A letter from you, ah so short and hurried, has come this minute--and the mail closes at 3 and I have much that must be done meantime, but I will send you a line (I am interrupted by a notice that a Congressman whom I invited to lunch is waiting for me--and for you)--a line to kiss your dear hands--and to tell you that you are mistress of the troublant in your discourse--by Jove--but I long to see you.

I will write soon--but you don't deserve it for you might take more trouble for a fellow.

Remember me meantime amid your diversions.

Yours ever
OWH

The modern reader irrelevantly feels a twinge of nostalgia at the confidence of the writer in the punctual performance of the postal service. The politically sensitive is intrigued by Wendell's seeking out a member of Congress for lunch--a mundane relationship of a type rarely mentioned in his letters--and wonders if the conference may have had some relationship to the recent election which will transfer administration of the government in Washington to members of Wendell's party. A student of Wendell's tendresse will note his fascination with the kissing of hands as well as his expression of permanent dedication at the close.

Later that same day after the congressional lunch, and repentant over the brevity of this note, Wendell wrote a longer and less harried reply to Lady C.

Following several previous letters and inspired by a particularly warm missive from Lady Clare, Wendell (on February 2, 1897) soared into an emotional response, tempered, however, by a longish but colorful critique of the French novels he had been reading.

There is no salutation this time:

Yesterday as I hoped I received one from you marked Jan. 23 that thrilled me through and through. The sadness, the passionate eloquence and the ever elusive shimmer of it, which you command so well, I loved them all. Were you thinking of some past I know nothing about or the present I wonder, with a man's skeptical stupid tenderly solicitous mind. Adorable exasperating gift of the little joker--now you see it and now you don't. I saw you at all events as I always long to see you and it makes me happy when I do. I shall send you by this mail the photograph I had taken for you as I wrote the other day... . I had it green for Ireland. I hope you will like it. You will see that I am looking at you as you bid me do--and I was thinking of you in the conservatory, I believe, so

far as it is possible to think of anything after being emptied of all content by the glare and the fussy manipulation of the photographer. . . . Tell me when you receive it and if it is all right so that I can have the negative destroyed.

I have been reading P. Loti's *Galilee*.[3] I took it up some time ago but dropped it and now have taken it up again and finished it. *Pecheur d'Islande* for the first time makes articulate the sense of the antediluvian. What I have often tried to describe as I realized it coming down the [?] to the top of the [?] Glacier[4] where one seems to have got behind the scenes into the workshop of creation–where behemoth was made–where man was not expected and it was sacrilege to go. Then *Au Maroc* gives you a similar feeling about man–the feeling that I go looking at the photograph of the pharaoh–and thinking that there was the actual part of one who stood on the *arrete* at the top of all the recorded self knowledge of the race, that is, at the beginning of History–and looking back at the ascent on the other side–the feeling that it gives me to think that a hundred and fifty successive men, who could be gathered in a small room, take us back to the unknown. . . .–Galilee is something of the same with the figure of Christ living in it for a moment. Yet I suspect his thought to be rather banal–and that his gift is his amazing power of description of which he makes the 19th cent. cocktail–bitter, sweet, hot, cold, strong. As Jules Lemaitre[5] says, he likes Renan,[6] though, for a different combination he is troublant–in Renan it is the union of passion or rather enthusiasm and irony, both equally genuine. In P.L. it is the *primitif* and the *affine*. I kiss your hands. . . I met my philanthropic cousin last night and asked her why she didn't send me the improving article on Charities which she promised me for you. I wish I knew more definitely why you are always sad. Women are more often so than men, I think. They have more time to think at large and apart from the matter in hands. I can't stop to sympathize with the sorrows of the race even if I were not bitterly conscious that I do not love my fellow man as much as I ought. But I infer that with you it is more specified. I have some things to feel sad about. For one my old partner, with whom I studied, and to whom I am bound by a thousand ties, is very ill–a great head, a strong heart and a mighty energy–Yet I am such a damned egotist, I am so full of my work, so eager to prove my power–that I get the fundamental vital happiness out of life in spite of everything. I should think better of myself if I were more miserable. Goodbye. You are very dear.

O.W.H.

Regardless of his balancing of his initial surge of emotion with a more detached intellectual commentary, he makes plain the profundity of his feeling and the continuing strength of his commitment. Further quotation is not required to demonstrate that this attachment was powerful and not an ephemeral fancy.

Since the quoted letters provide an adequate picture of Wendell's mind and emotions, it is appropriate to pass over numerous other letters written in this period and jump to correspondence regarding his plans for a second visit to Lady Clare--a matter over which he fussed and fretted and to which he devoted a great deal of time and thought. Early in the vital year, he began to hash over the details of his trip, greeting his friend with a more intimate, if somewhat arch, Celtic cognomen:

COMMONWEALTH OF
MASSACHUSETTS
Supreme Judicial Court,
Court House, Boston

February 17, 1898.

Dear Hibernia,

You have the gift of graces and the gift of charm when you see fit to use them–that I swear. I can't tell you how the few words of your wire pleased me, apart from the weight they lifted off my mind. And it was a weight. Now I have received a second letter which shows that the burden has begun to lift a little from you even then. I proceed to answer that, I have very little doubt that I shall come over this summer unless something goes wrong unexpectedly. Unfortunately I cannot choose my time. . . . As my time is so short, and I have a good many friends and acquaintances in England I would rather not be torn by you going to France until I had left, especially as I have to be careful still. I loathe the idea of your finding another playmate however. You will do what you can to help me see as much of you as possible wont you? I imagine all sorts of adorable romantic visits or excursions, such as England is full of–and some one or more of which it seems as if our [?]--even a hansom in London is an enchanted solitude. But indeed there will be enchantment wherever I see you and when I think of it with any realizing feeling my heart stands still. Would you dine with me some evg? Several people did, last time. You would smile if you saw some of my learned friends but I am not sure that I ought not to make more of a point of seeing the remarkable men who know anything I am interested in than I did the last time. I used to say that the common or garden judge didn't fizzle and that I would rather talk to a nice girl. Perhaps if I had been less interested in talking to nice girls it wd. have been better for my reputation, considered as an article to help or hurt my conduct. But I always have neglected it in that way, and have contented myself with grinding my teeth and raging inwardly when I heard the second rate exalted and talked of in terms of the 1st rate and when I heard myself talked of in any terms by people who didn't understand my aims and my ideas on the plane of which I talked–so there--laugh again at my egotism if you like. By the way I do despise the apologetic "*Egoism*" without the T which is in common use nowadays. Now then quick my charmeress tell me that something nice will be practical within the times I name. I have been working pretty hard for three weeks and went home with a headache yesterday. Today there is a lull and I have caught up with my work. Hence I have skipped from the bench into the adjoining room where being alone I kneel gallantly on one knee and kiss your beloved hands. . . .

Wendell's concern about being "careful still" seizes the attention. Does this mean that the secrecy of their attachment would be endangered if they met outside the normal channels of society in England? Is this inconsistent with his visions of "romantic excursions"? Does he envisage a time when for some reason he will no longer have to be careful?

That visits might be both adorable and romantic suggests a wide range of possible experiences, but one is brought up short by the tremulous inquiry which indicates that dinner together would be the peak of bliss and achievement.

His eager imagination could even make a Victorian hansom a place of enchantment, although its practical limitations as a place for serious dalliance are readily apparent.

Parenthetically, in this letter Wendell intrudes his constant and hypersensitive concern about being given his proper due as a first-rank figure in the world of thought; he demonstrates his almost petty concern about the niceties of language with his stricture on the use of *egoism,* an indulgence which his opposition has not affected.

After three other letters, Wendell wrote briefly, showing his anxiety about their meeting and his concern that his letters should not be seen by those who might not understand--or who might understand too well:

March 18/98

Dear Hibernia,

This is just to say that I dispatched a letter to you--"British Legation, Tangier, Morocco." If by any chance you are not there perhaps it were as well to send for it. Until I have reopened communication I hesitate to write freely. I shall wait anxiously for an answer to my inquiries whether your last letter meant that there was any, the slightest doubt of my seeing you somewhere. I has assumed that you would make an effort if one were necessary–I need not say that I would.

The spring is in the air and you are in my heart.

I kyh,
O.W.H.

Wendell was a fidgety swain indeed. After the certainty he had already expressed about his plans, as the time for sailing approached, he broke out in a rash of scruples and doubts. Conceivably Fanny's physical condition might have been a factor. She had suffered through a long siege of rheumatic fever in 1896; its effects were debilitating and her recovery slow. To be sure, Wendell did not mention this:

June 9/98

Beloved friend. I am nigh insane with the question of coming to England. I have made up my mind that I ought to put it off and my wife now urges me to go and threatens horrid results to me if I do not. I feel I shall be a selfish pig if I do, and I don't know. If I do not come you will know that I do not give up seeing you even for a time–i.e. put it off a year without deep sorrow. Since I began to write I have almost decided not to come. I will not go into the reasons which really amount to a delicate balancing of what is the fair thing etc. under existing circumstances–but I do entreat you neither to scold nor to turn away in vexation. I really believe that it disappoints me even more than I hope it will you--and that is a good deal. If I have entered into your life hold fast to me even though it has to be with a hand (I kiss it) stretched across the Atlantic. Life seems short and its chances few. One thing that tremendously urges me to go is the reflection that I am *sur le retour*[7] and opportunities are not to be trifled with. Next year I shall hope to come--for if that were disappointed also–the next I am anchored with the summer equity. Oh my friend how will it be? Shall I get a cross answer or one of those in which you let out your adorable kindness?

Of course something still may happen to change my mind–but I regard it as definitely less likely than it has been heretofore.

Yours OWH

It is impossible to escape the feeling that Wendell enjoyed this Hamlet-like soliloquy. Perhaps he was showing the characteristic that the astute Fanny years later was to encapsulate for Felix Frankfurter. "Wendell has a new toy," she told Felix when he came calling and entered their presence in an atmosphere weighted with gloom, "it is called despair."

Then, eleven days later, the clouds dissipated, the sun shone forth and all was well:

POST OFFICE TELEGRAPHS
Ju 18,98
6:37 p.m.
Boston

TO Lady Castletown Seventyeight Chester Sq. Ldn
Just settled sail Umbria June twentyeight

Justice

And so the die was finally cast and, apparently with Fanny's concurrence, "Justice" did sail on the *Umbria*, did reach London seven days later, and did meet his "Hibernia" again after a separation of two years. One cannot help speculating how differently this affair might have been conducted in the present day with its daily jet plane service between Boston and

The details of Wendell's visit are sparse. He did meet friends and people of stature in London as he had planned. He did visit Ireland and did spend some time with Lady Clare. Whether or not they were able to enjoy adorable and romantic excursions can only be inferred from a letter he wrote immediately upon his return, which describes not only his profound emotional experience, but also the physical and nervous near-collapse which he suffered. Significantly, even in the midst of prostration, he continued his admonition about the destination of any letters:

Beverly Farms Address
Court House
Boston
Sept. 5/98

I am here in the kind of collapse that comes after nervous tension. The weather is very hot and I suppose I still am relaxed by the opiate I took the first night. My trouble turned out to be shingles which accounts for the neuralgia etc. It is getting better but I still can't sleep through even 6 or 7 hours without a dose. So don't mind beloved friend if I am dull this time. I hope my voyage letter caught the return steamer so that you will get it by the end of this week I think you will see from it how I yearn and long for you. Your telegram met me and gave me a joy which I can't express–only I did so wish that I had found some expression as you did which I could entrust to the telegraph. I loved your "tender" and hugged it to my heart. And now do you think you can meet time and distractions and still care for me so much? I believe you will. I firmly believe that time will make no difference to me. Oh my dear what a joy it is, to feel the inner chambers of one's soul open for the other to walk in and out at will. It was just beginning with you. Do not cut it off because of a little salt water.... [Here Wendell issues the warning about destroying letters which has already been quoted]... As I talk literature dear Clare I kiss your feet and proceed to talk on. It is rather odd to read letters of Sir W. Knollys[8] to his sister, saying how much he would like to make many a mother if his existing encumbrances only might be gathered away, as he had a lawful lady.... This is only a bulletin to repeat my love to you and tell you how I am.

Yours H

This is an amazingly revealing epistle. Perhaps the "voyage letter," being closer to the experience, would have contained more intimate details of their relations, but, no letter with the requisite date or context is included in the Harvard collection. In any case, there is ample material in the foregoing communique to reemphasize the depth of the passion Wendell had conceived and made apparent in previous letters and which, we must conclude, was encouraged and reciprocated by Lady Clare.

Wendell acknowledges that he belongs to Clare. Abandoning any formal salutation, he details the "nervous tension" consequent upon their meeting and describes in sensual language their still-expanding intimacy. Even in the course of expressing his deep emotion, his caution asserts itself and he immediately turns to his warning about the destruction of the papers. Of all the revelations, the most significant is found in the reference--after figuratively kissing the feet of "dear Clare"--to the desire of Sir. W. Knollys to propagate widely if his existing "encumbrances" could be "gathered away." With Knollys, as with Wendell, there was an existing wife. When Wendell closed by repeating his "love," the word was manifestly not used euphemistically.

The last letter to Lady Clare is dated August 27, 1926; the final letter in this remarkable collection, written on stationery of the Supreme Court of the United States, is dated November 3, 1926, and is directed to Lord Castletown:

My dear Castletown

Please accept my thanks for your kind letter which relieves my wonder but increases my anxiety as to lady Castletown. I feared but did not know that she was ill. As I do not know the nature of the illness I can do nothing but hope it is not grave. Please give her my love and tell her I think about her a great deal and shall continue anxious until I hear more, & I hope better news. All goes well with me in spite of my 85 years, and I have been hard at work since the October term began–now relieved by three weeks adjournment with all my work done.

With regard to publishers I am rather helpless. From the very little I know I should think G. P. Putnam & Sons New York would be as likely as any that I know of to be interested in your work. Mr. George Haven Putnam[9] who, I suppose, is the head of the firm, is an old soldier of the Civil War and has published reminiscences himself. I have an impression that he is rather in that line. A brother is head of the Library of Congress from which I first got your book before I got a copy for myself. I wish I could tell you more.

You do not say how your are yourself, but I infer that you are well.

Every sincerely yours
O.W. Holmes

Lady Castletown died on March 11, 1927.

Aside from the last letter to Lord Castletown, there are 102 letters from Wendell to Lady Clare in the Holmes papers at the Harvard Law School Library. A letter or two may

Lady Clare in the Holmes papers at the Harvard Law School Library. A letter or two may have been lost or abstracted, but, barring these, the collection forms a record of his communications over a period of thirty years. Her letters were destroyed by him--although a single cryptic note in the Frankfuter papers at the Library of Congress, reading "O.W.H. Lady Castletown [sic], Ireland" suggests that a letter or a photograph might have been removed.

Wendell wrote warm letters to many lady friends. He wrote 330 to Mrs. John Chipman Gray.[10] On occasion, too, he verbally "kissed a lady's hand," but in none of the other series did the passion and sensual imagery kindle the pages as in the letters to Lady Clare. In them there is a unique sense of wonder and of delight.

Although the correspondence covered a period of thirty years, eighty-six letters, or 83 percent of the total, were written in the three years from Wendell's first meeting in 1896 to the period surrounding his second meeting in 1898. Apart from flurries in 1914 and 1916, these were the major years. He wrote eighteen in 1896, including two on December fourth; thirty-three in 1897, including five in December, and thirty-five in 1898, including four and a cable in June prior to his voyage. After 1898, there was a sudden drop in numbers--to two for the year--and then a long hiatus when no letters were sent, from that year until 1914. The letters were then resumed, but they had become more impersonal and detached.

Several possible reasons explain this change of direction. For one thing, Wendell became Chief Justice of the Massachusetts Supreme Judicial Court in 1899 and this promotion altered his obligations and way of life and restricted his freedom. For another, he and Lady Clare may have realized the difficulties that lay in the way of any change of their relationship. Finally, there is a strong suspicion that Fanny, knowing Wendell better than he knew himself, put her foot down, as she was supremely able to do.

Wendell made several other visits to the home of the Castletowns at Doneraile Court in Cork County. He stayed there in 1903 after he had gone on the bench of the Supreme Court of the United States. At that time he made the acquaintance of the Anglicized Irish novelist and Roman Catholic canon, Patrick Augustine Sheehan, a friend of the Castletowns and pastor of the Doneraile parish church. This acquaintance ripened into a warm friendship and resulted in a charming exchange of letters (also discussed in Mr. Monagan's book--Ed.) which have recently been published. Wendell visited Ireland again in 1907 and he saw the Castletowns in 1909 as he "flitted through London" on his way to receive an honorary degree of Doctor of Laws (D.C.L.) at Oxford. His last visit came in 1913, just before the first World War made steamship travel inadvisable.

By this time, the Castletowns had come upon hard times. The fall involved disastrous speculation, loss of property interests, receivership, vastly reduced income, physical decline for Lord Castletown and a painful eye operation for Lady Clare. Canon Sheehan told Wendell in March 1911 that Doneraile Court had had to be let and that the deer in the park had been killed and their meat sold. He added that "universal sympathy" had been "awakened for Lord and Lady Castletown, especially the latter." But conditions proved to be somewhat better than the canon had feared; Wendell was entertained in adequate style when, after again fussing about traveling without Fanny, he went on to Doneraile after "the season" in London had ended.

Canon Sheehan died later the same year. It is interesting to note that at no time during his ten-year friendship with Wendell did this Catholic pastor give any indication that he felt the intentions of his American friend toward Her Ladyship were anything other than strictly honorable.

In view of the warmth of the relations between Wendell and Lady Clare and the extent of their correspondence, it is somewhat strange that this remarkable romantic excursion has never come to light. There are only the briefest of references to the Castletowns in the major compilations of letters and biographies and the existence of this fascinating collection appears to be known to very few people. In fact, the existence of the letters was not known until Mark Howe, working on the authorized biography of Wendell and coming upon the Castletown connection, concluded that letters must have survived. Advised by his wife, Molly (herself Irish, a novelist and former Abbey Theatre actress), he found a Joycean, Dublin character to investigate. This was Eoin "Pope" O'Mahoney, a feckless geneologist and descendant of Daniel O'Connell, the Irish Libertor. The sobriquet had been bestowed on O'Mahoney because of his exalted rank in the Knights

Holmes on the grounds of Beverly Farms

of Malta, a Catholic order given to gorgeous uniforms and dedicated to the defense of the Papacy. O'Mahoney went down to Cork and discovered that, contrary to Wendell's direction, his letters had not been destroyed. They were in the possession of the latter day Lady Doneraile whose husband was a distant cousin of Lady Clare. Handwritten copies and typewritten transcripts of the letters were made and these were presented in 1967 from Lady Doneraile to the Harvard Law School Library. The present location of the original letters is not known, although one turns up from time to time in the hands of autograph dealers. A very recent investigation in this country and in Ireland indicated that Lady Mary Doneraile had died in 1975 and that the Doneraile title had lapsed.

Unfortunately, Mark Howe died in 1957 before he had completed the section of his biography dealing with the years of Wendell's acquaintance with Lady Clare. Since Howe's death, thirty years after that of Wendell, other judicial luminaries from Harvard and elsewhere have come to prominence and the keenness of interest in Wendell whom Justice Benjamin N. Cardozo praised so unstintingly has naturally diminished. Symbolically, the great Hopkinson portrait of Wendell has been removed from its prominent, designated place in the main reading room of the Harvard Law School Library and has been relegated to a less notable location in the dim light of a lower floor in Pound Hall. The work which Howe began was never finished, although selected scholars were authorized to continue the task. Thus, the attention of researchers has not been called to this treasure trove and no publication has been made until recently. One might conclude that fate intervened to keep secret this Celtic interlude of Wendell and Lady Clare.

The Castletown affair presents a piquant puzzle. At this late date, what appraisal can be made? How far did it go, and did Fanny know about it?

If the letters had been written in our time, the conclusion that there had been a fully realized relation with physical intimacy would be irresistible. Supporting this conclusion, in the actual case, are the intense and sustained emotional involvement, the supersecrecy and destruction of the evidence suggesting guilt, the pitch and fervor of the language with its images of carnal conjunction, the proposals for romantic excursions, the tendency to extracurricular high jinks in some of the British country houses of that day and, finally, the reference Wendell made in one of the letters to Fanny's being an encumbrance to wider ranging on his part.

But, there is another side. We note Wendell's emphasis on symbols of minor substance: the handkerchief with its smudge (of what?), the conservatory, an unlikely place for anything but a furtive squeeze; the excessive use of the figure of kissing a hand (which Wendell used frequently to other correspondents) or, on occasion, the feet, but a complete lack of the specifics of more intimate amorous dalliance, the suggestion of a dinner *a deux* as the summit of daring misconduct. If Wendell's attitude toward war was Arthurian, perhaps his attitude toward love was Tennysonian and, as a latter-day Galahad, he kept his passion within bounds. It does appear, however, that his own evidence points in the other direction.

It is worthy of note that Wendell went out of his way with at least three people--Biddle, Corcoran, and Isabella Wigglesworth--to emphasize that he had never been unfaithful to his wife. "I've always liked the dames," he told Wigglesworth, "but I've never stepped over the edge." Was it meaningful that he volunteered

this information? Biddle believed him, as did the others, but it appears that Wendell felt the need of a defense and the reiteration raises questions about its reliability.

Fanny was painfully aware of Wendell's tendency to philander, but there is no direct evidence that she knew of the Castletown affair. In estimating what Fanny knew and when she knew it, one is forced to rely upon inferences from the known facts, coupled with a knowledge of Fanny's character, her absorption in him, and her familiarity with his foibles. This story, retold by one of the secretaries, is an example of her technique in dealing with this phenomenon:

"One morning, the Justice had made one of his calls and was being entertained in her home by one of his charming lady friends. After they had settled down and were in the midst of their *tete-a-tete*, the doorbell rang and a card was brought in. It was Fanny's card and on it was written: 'Wendell, I'm downstairs waiting in the carriage.' Of course, he got up and left immediately."

Both Isabella Wigglesworth and Katharine Bundy, who as younger women knew Fanny, feel certain that she was aware of Lady Clare and Wendell's attraction to her. When asked if she thought that Fanny knew of the correspondence and involvement, Wigglesworth said, "I have been wondering. I bet she did. She was no fool. I bet she urged him to go to see the lady and get it off his chest." Here is a possible and not unreasonable suggestion. Wendell was now fifty-seven and, acting with subtlety and understanding, Fanny pushed the affair to its conclusion. At any rate, the pitch of Wendell's interest in Cork declined markedly and he turned for solace and stimulation to his friends on Beacon Street and in Beverly Farms and to his coterie of devotees in Washington.[11]

Endnotes

[1] G.E. Cokayne, *The Complete Peerage of England, Scotland and Ireland* (London: Gibbs, 1913). The quote is from Rev. A. B. Beavan.
[2]Doneraile Court was one of the Irish "great houses" built by the Anglo-Irish ascendancy and the seat of the Saint Leger family after whom the famous Saint Leger Stakes horse race was named. The surrounding park land has been taken over by the Irish government and the house with its chaste Georgian facade has been donated to and is being restored by the Irish Georgian Society. See *Burke's Guide to Irish Country Houses* (Ireland: Mark Bence-Jones, 1978), vol. 1.
[3]Pierre Loti (Julien Viaud) (1850-1923), naval officer and French novelist; an impressionist writer of penetrating melancholy who excelled in depicting exotic scenes.
[4]Although the descriptive words are illegible in this letter, Wendell was probably repeating a description: "I came down from the Monch to the top of the Aletsch Glacier and felt as if we were committing a shuddery sacrilege, surprising Nature in her privacy before creation was complete. .. ." Letter to Baroness Moncheur, September 5, 1915. See Howe, *The Shaping Years*, pp. 237, 310.
[5]Jules Francois-Elie Lemaitre (1853-1914), French critic and dramatist, member of the Academie Francais.
[6]Joseph-Ernest Renan (1823-1892), French critic philologist and historian, author of *Vie de Jesus*.
[7]Sur le retour: to be upon the decline of life.
[8]Sir William Thomas Knollys (1797-1885), soldier, treasurer and comptroller of household of the Prince of Wales (1862-77); gentleman usher of the Black Rod (1877-83); father of Viscount Knollys, the letter writer.
[9]George Haven Putnam (1844-1930), president of G. P. Putnam & Son, publishers (1872-1930), served in Union Army through Civil War, organized American Publishers' Copyright League.
[10]Mrs. John Chipman Gray ("Nina") was the wife of the Civil War veteran, lawyer, professor at the Harvard Law School who, uncharacteristically, combined teaching and practice; a close friend of Holmes, for a time Gray chose his secretaries. Author of the once-famous *Rule Against Perpetuities* and *The Nature and Sources of the Law*.
[11]The affair was first publicly treated in John S. Monagan, "The Love Letters of Justice Holmes,"

Justice Holmes and the Year Books

Milton Handler and Michael Ruby

Editor's Note: *Milton Handler is Professor Emeritus of Law, Columbia University. Michael Ruby, his grandnephew, has adapted this article from an oral history with Professor Handler.*

One of the less controversial cases handled during the 1926 term of the Supreme Court was *Hudson* v. *United States*. The issue was whether a court could impose a prison sentence, and not only a fine, after accepting a plea of *nolo contendere*. In a case of first impression that laid the foundation for the widespread use of the plea in the criminal law, the Court agreed unanimously that a defendant who pleaded *nolo* could be sentenced to prison. Chief Justice Taft assigned Justice Stone to write the opinion of the Court. As Stone's law clerk, I helped research the *nolo* plea at the Library of Congress, where I spent many hours supplementing the Justice Department's brief in the case. Among other things, the government had traced the plea back to the 15th century *Year Books* and had arranged for Professor Beale of the Harvard Law School to translate one of the rulings from Norman French to English. Stone quoted the Beale translation in the draft opinion that he sent to the other Justices during the November recess.

When the Court was back in session, Stone returned to his chambers one day after hearing arguments and recounted a brief conversation that he had had with Justice Holmes. "Why did you use the Beale translation in the footnote to the *Hudson* opinion?" Holmes had asked Stone. "Surely, we can translate the *Year Books* ourselves." "Perhaps you can, but you must exclude me and my law clerk," Stone responded. "I'll translate it then," Holmes said. Stone directed me to provide Holmes with the *Year Book* in question. That's where the fun began.

I returned to the Library of Congress and asked to take out the volume containing the extract from 9 H. VI. I was informed that the rare edition was under lock and key and could only be examined on the premises. I explained that the book was being taken out by Justice Stone for Justice Holmes. "I'm sorry," the bureaucrat said, "but I must abide by the rules. Whoever wants to consult the *Year Books* must come to the Library." I told him that the 85-year-old Holmes, a distinguished member of the Supreme Court and a revered figure in public life, should not be required to come to the Library to examine a book. He was unimpressed. I thereupon decided to try my luck with the Librarian of Congress, who agreed to release the book on two conditions. I would have to sign a document taking full responsibility, and a security guard would have to deliver the book to Holmes.

When the guard brought the book to Stone's chambers the next day, it was wrapped in paper and tied with the proverbial governmental red tape and a wax seal. He set off for Holmes' house on Eye Street with the Judges' messenger, Edward Joice, who with his father and grandfather had served the Court in an unbroken line since its inception. When they returned, I noticed that the seal on the package was unbroken, the red tape still in place. I asked Joice for an explanation. "Well," he said, "we were ushered to the top floor of Holmes' home, where he has his chambers overlooking the garden. The Justice met us and said, 'Gentlemen, please wait here in the anteroom.' Through the open door, we could see him walk over to a bookshelf, pick out a book, open it, take a piece of paper and translate the passage. He then handed me the paper, which I now give to you." As I looked at Holmes' remarkably legible handwriting, I had to shake my head. Here I had gone to all this trouble to withdraw the volume and Holmes had a complete set on his library shelves.

It was Holmes' translation, and not Beale's, that appeared in a footnote on the fifth page of Stone's opinion. The passage read as follows:

WESTON. If one is indicted for Trespass, and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty?

PASTON. (J.) Yes; certainly.

Which was agreed by all the Court.

WESTON. It is of record that he admitted it.

BABBINGTON. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admitti per finem*). Therefore, if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilty) by his charter. And I and all the Court are against you on this point."

The folio reads *admittit*, obviously a mistake. In his opinion, Stone summarized this somewhat obscure exchange from the dawn of the common law: "Its effect is that if one, indicted for trespass, has 'put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admitti per finem*),' his plea, if accepted, does not estop him from afterwards pleading not guilty." Relating the precedent to the chief issue in Hudson, Stone observed that "there is no suggestion that would warrant the conclusion that a court, by the mere acceptance of the plea of *nolo contendere*, would be limited to a fine in fixing sentence."

Six months later, Stone graciously set up an appointment for me to meet the great Olympian before the end of my clerkship. We walked over to Holmes' spacious home, which had an elevator that took us to the fourth floor. Although the Court was in recess, Holmes was formally attired in a cutaway, striped trousers and a stiff-bosom shirt with a winged collar. He invited us into the study where he had translated the passage from the *Year Books*. I sat on a couch with Stone and Holmes' law clerk, Thomas "Tommy the Cork" Corcoran; Holmes sat at his desk, which overlooked the garden. The two Justices did most of the talking, as both Corcoran and I were awed in their presence.

At one point, Holmes observed that in the course of writing the opinion in the recent trademark case, *Beech-Nut Packing Co.*, v. *P. Lorillard Co.*, he had occasion to read a fascinating book on the history of law and usage of trademarks. Stone asked whether Holmes was referring to a doctoral dissertation by Frank Schechter. The senior Justice nodded. Stone told him that he had persuaded Schechter, who

Milton Handler, Justice Stone's former law clerk, claims that Justice Holmes was the fastest writer on the Court. After receiving an assignment on Saturday afternoon, Holmes would produce page proofs of his well-crafted opinions by Monday afternoon. He carefully counted the words so that his opinions always filled exactly two printed pages.

was a trademark counsel for BVD Co., to take a year off from practice to stand as the first candidate for a doctorate in law at Columbia. Learning that Stone had inspired the writing of this book, Holmes rose, walked across the room and shook Stone's hand. "I congratulate you on one of the great acts of your life," he said.[5]

When the two Justices moved on to other topics, Corcoran and I dutifully retired to his office for a chat. The conversation drifted to the subject of Holmes' writing habits. I knew from experience and from previous discussions that Holmes was by far the fastest writer on the Court. When Taft handed out assignments at the end of a Saturday conference, Holmes would set right to work. He would write his opinion on Sunday and have his law clerk check the references on Monday morning. By Monday afternoon, when most of the other Justices had hardly begun writing, Holmes would circulate in page proofs a beautifully crafted opinion. After Stone had looked at the proofs, he would pass them along to me, and I noticed that Holmes' opinions had an uncanny tendency to fill exactly two printed pages. Corcoran explained this conundrum easily enough. Holmes penned each paragraph on a separate sheet of paper and counted the words. That way, if possible, the opinion would end on the last line of the printed page.

Corcoran told a little story to illustrate this predilection. One Monday morning, after studying a new opinion by Holmes, "Tommy the Cork" went into the Judge's chambers and suggested the inclusion of an additional point. Holmes listened and shook his head sadly. "Is the idea no good?" Corcoran asked. "No, it's a very good idea," Holmes said. "But I can't use it. It would take another paragraph."

When I rejoined the Justices a little later, I asked Holmes if he would sign the authorized etching of himself that I had recently purchased. "I autographed the plate," he pointed out. "I know, but I was wondering if you might add a special inscription." "Send it over," he said. When he sent it back, the brown ink read:

> "To Milton Handler. We cannot live our dreams, we are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done. Oliver Wendell Holmes June 2, 1927."

I was thrilled with the special inscription. In my ignorance, I thought it had been composed especially for me. Subsequently, when I read Holmes' collected papers, I discovered that it was a sentence from an address delivered at Brown University many years before. Happily, I was not the only one inspired by this thought.

Endnotes

[1] 272 U.S. 451 (1926)
[2] *Id.* 456.
[3] *Ibid.*
[4] 273 U.S. 629 (1927).
[5] This paragraph is adapted from Milton Handler, "Are the State Antidilution Laws Compatible with the National Protection of Trademarks?", 75 TMR-270-1 (1985).

William Pinkney: The Supreme Court's Greatest Advocate

Stephen M. Shapiro

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Even this envy owns now those charms are fled--
William Mason

Throughout his long career as Attorney General, William Wirt was haunted by the specter of William Pinkney. And undoubtedly Pinkney was a great haunter. Wirt could not recall his first encounter with Pinkney without a convulsive shudder. Wirt had prepared his case for days; he had compiled a brilliant speech; and he was fully equipped to challenge Pinkney's "papal infallibility."

When, however, Wirt arrived at the Supreme Court, he discovered to his horror that he had misplaced his notes. The grim result was inescapable. Pinkney delivered an oration in his most vehement and masterful manner while Wirt confessedly sank under the "conscious imbecility" of his own faltering performance. In his next grapple with Pinkney, Wirt vowed, the tables would be turned. Whatever the difficulty, whatever the cost, he would beard "that damned magician Glendower." Wirt, after all, was proceeding under the authority of President Monroe; he was the Attorney General of the United States; and the will of the federal government could not be frustrated by legal chicane. This time Pinkney routed Wirt with a speech so overwhelming that the jury acquitted Pinkney's client--an infamous pirate --without even leaving the jury box.

William Pinkney (1764-1822)

In the golden age of law that followed the American Revolution, the Supreme Court bar was populated by legal giants cut of the same cloth as John Marshall and Joseph Story. It was an era of interminable speeches, brilliant triumphs, wild temerities, and mortifying defeats. There was Daniel Webster, "Black Dan," who could argue the Devil out of his due. There was the indefatigable Walter Jones, who argued more than 300 cases in the Supreme Court. There was the exiled Irish patriot, Thomas Addis Emmet, a man "older in sorrows than years," and of legendary eloquence. And there was the aristocratic William Wirt, who served as Attorney General for 12 years and appeared in nearly every important constitutional case of his day. But none of them was as great as William Pinkney.

Chief Justice Marshall, who observed the lions of the legal profession from 1801 to 1835, declared that Pinkney was the greatest man he had ever seen in a court of justice. Chief Justice Taney, who presided from 1836 to 1864, found "none equal to Pinkney." Justice Joseph Story delivered an identical verdict: "His clear and forcible manner of putting his case before the Court, his powerful and commanding eloquence, and, above all, his accurate and discriminating law knowledge, give him, in my opinion, a great superiority over every other man whom I have ever known."

His rivals at the bar were equally awed by Pinkney. Walter Jones pronounced Pinkney "the man of the century." Thomas Addis Emmet deemed him "the greatest of advocates." Pinkney's genius extorted tribute even from the envious William Wirt: "To compare Pinkney

with Webster is to measure the relative brightness of the sun and a farthing candle."

Pinkney's career was one of astonishing dynamism. Born in Annapolis in 1764, he passed his childhood years in pastoral seclusion. His father was a Tory loyalist; but when the harrow of Revolution passed over the nation, William Pinkney sided with the patriots. As a youth he secretly lent his aid to General Washington's troops. Following the war, the Pinkney estate suffered confiscation--the penalty prescribed for Tory loyalists--leaving the family in destitution.

Samuel Chase, later Associate Justice of the Supreme Court, discovered Pinkney at a debate in Annapolis and invited him to his office to study the law. As a fledgling member of the Maryland bar, Pinkney attended the Maryland ratification convention and, like his mentor Samuel Chase, voted against the federal constitution, apparently on the ground that it lacked a bill of rights. In short succession, Pinkney was elected a member of the Maryland legislature, Mayor of Annapolis, Attorney General of Maryland, and a Member of Congress. While Pinkney was still a young man, President Washington selected him to represent the United States in the nation's first international arbitration. President Jefferson later appointed Pinkney Minister to Great Britain. Upon Pinkney's return to the United States, President Madison named him to serve as Attorney General of the United States.

When relations with Great Britain disintegrated once again, Pinkney sounded the tocsin in fiery pamphlets, led a battalion of riflemen in the War of 1812, and suffered a near-fatal wound at the battle of Bladensburg. President Monroe later named Pinkney Minister to the Imperial Court of Russia; upon his return to America, he served as United States Senator for Maryland, delivering famous speeches on the Missouri Compromise and the treaty power of the federal government.

But these enormous patriotic exploits, encompassing a multitude of distinguished careers, were to Pinkney mere diversions from his real calling--the private practice of law. He turned to statecraft, he told his friends, to give himself a chance "to breathe a while; the bow forever bent will break." His more strenuous exertions were reserved for his profession.

Pinkney was the undisputed master of maritime and prize law in the United States. He was expert in marine insurance law, the law of estates, real property law, international law, criminal law, and constitutional law. He appeared in innumerable cases in the Maryland trial and appellate courts. And he presented 84 arguments in the Supreme Court of the United States, the theatre of his greatest achievements.

Pinkney's arguments were something new and startling in the courtrooms of America. His knowledge of the law vastly exceeded that of his peers; he prepared his speeches for weeks on end; and he delivered them with a passionate vehemence that swept all opposition before him. In addition to his possession of logical powers that would be the envy of a mathematician or general in the field, Pinkney possessed the finer skills of poetic ornamentation. He had learned from his brothers at the English bar the style of classical allusion, which was whipped into them from their earliest youth. George Ticknor, New England's elder literary statesman, observed that Pinkney left his rivals far behind him: "He left behind him, it seemed to me at the moment, all the public speaking I had ever heard."

Despite their high contemporary esteem, few of Pinkney's speeches have survived. In contrast to Daniel Webster, who doggedly transcribed his speeches and circulated them to the public, Pinkney delivered his orations without leaving any written memorial. Fortunately, Pinkney's admirer, Francis Wheaton, the Supreme Court's Reporter of Decisions, copied down large portions of his arguments in two famous cases--*The Nereide*, 9 Cranch 388, and *McCulloch* v. *Maryland*, 4 Wheaton 316--the first of which was a defeat for Pinkney, and the last a timeless victory.

The *Nereide* argument was a well-publicized duel of wits between Pinkney and one of his leading rivals, Thomas Addis Emmet. The two great advocates had exchanged bitter words in a case earlier in the 1815 Term; and each was now on his mettle for the contest, which lasted four full days. Pinkney contended in *The Nereide* that goods transported by a neutral shipper on board an enemy ship were subject to seizure by American privateers. After demonstrating that the shipper had effectively adhered to the enemy, Pinkney attacked Emmet's claim that such a belligerent might wrap himself in the banner of "neutrality":

> We . . . have Neutrality, soft and gentle and defenceless in herself, yet clad in the panoply of her

warlike neighbours--with the frown of defiance upon her brow, and the smile of conciliation upon her lip – with the spear of Achilles in one hand and a lying protestation of innocence and helplessness unfolded in the other. Nay, ... we shall have the branch of olive entwined around the bolt of Jove, and Neutrality in the act of hurling the latter under the deceitful cover of the former....

Call you that Neutrality which thus conceals beneath its appropriate vestment the giant limbs of War, and converts the charter-party of the compting-house into a commission of marque and reprisals; which makes of neutral trade a laboratory of belligerent annoyance; which ... warms a torpid serpent into life, and places it beneath the footsteps of a friend with a more appalling lustre on its crest and added venom in its sting?

Freed of the "cretan labyrinth of topics and authorities that seem to embarrass it," the issue was only too plain: Emmet's claim of "neutrality" was "in the balance of the law lighter than a feather shaken from a linnet's wing" when the "maritime strength of this maritime state ... [was] thrown into the opposite scale." Had his florid oratory carried him too far? Pinkney could not be sure. After all, he reminded the Court, his gorgeous metaphors, "hastily conceived and hazarded," were amply justified by the presence of ladies of fashion--"this mixed and (for a court of judicature) *uncommon* audience."

Unhappily, Pinkney's eloquence did not carry the day; but it did command the admiration of all in attendance, including Chief Justice Marshall, who paid the losing advocate extraordinary tribute in his opinion (9 Cranch 430):

With a pencil dipped in the most vivid colours, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection: its want of resemblance.

Despite the chilling presence of the investigative faculty of the great Chief Justice, Justice Story's dissenting opinion in *The Nereide* embraced Pinkney's argument with all the warmth of its original delivery. He later declared: "I hope Mr. Pinkney will prepare and publish his admirable argument; it will do him immortal honor."

To every advocate, it is said, providence directs one special case that calls on his forensic gifts in a way that is perfectly suited, predestined, and foreordained. For William Pinkney, that case was *McCulloch* v. *Maryland*, which he argued before the Supreme Court for three full days. Scholars have noted that John Marshall's opinion for the Court in *McCulloch* is an epitome of Pinkney's speech, stripped of its amplification and soaring rhetoric. It was Pinkney who explicated the "necessary and proper clause" of the Constitution; and it was Pinkney who demonstrated that the power of the state to tax a federal instrumentality constituted the power to destroy.

Samuel Chase sponsored the legal education of William Pinkney and remained influential in his student's career.

Pinkney Speaks

Pinkney's argument was prophetic in its description of the importance of the Supreme Court's ruling in *McCulloch*.

Sir, it is in this view that I ascribe to the judgment that may be pronounced in this cause, a mighty, a gigantic influence, that will travel down to the latest posterity, and give shape and character to the destinies of this republican empire. ... I have a deep and awful conviction ... that upon that judgment it will mainly depend whether the constitution under which we live and prosper is to be considered, like its precursor, a mere phantom of political power to deceive and mock us--a pageant of mimic sovereignty, calculated to raise up hopes that it may leave them to perish,--a frail and tottering edifice, that can afford no shelter from storms either foreign or domestic--a creature half made up, without heart or brain, or nerve or muscle,--without protecting power or redeeming energy--or whether it is to be viewed as a competent guardian of all that is dear to us as a nation.

Pinkney's argument, Justice Story believed, set a new standard of excellence for the bar:

> I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and methaphysics about State rights and State sovereignty he brushed away with a mighty besom.

Daniel Webster, who argued on the same side as Pinkney in the *McCulloch* case, has often been accorded the palm of victory. However, Pinkney's modern biographer, Professor Robert M. Ireland, has shown through the private correspondence of Justice Duvall that, before Pinkney's extraordinary oration, the Court entertained "very strong doubts" about the correct result. Pinkney simply swept them away with the "mighty besom" of his overwhelming argument according to the *The Legal Career of William Pinkney* [pp. 186-187 (1986)].

Pinkney's magnetism as an advocate stemmed from the strange union of his forensic "vehemence" and the beauty of his verbal portraiture. He would regale the audience with oratorical bouquets, and rip his opponents to tatters. His speeches were marvels of legal erudition, romantic fancy, and despotic insolence, poured forth in hypnotizing profusion.

In his arguments, Pinkney did not neglect to make an offering to his muse--usually an extravagant compliment to the ladies of fashion who attended his performances and inspired his rhetoric. In the midst of a heated debate, he would start his speech anew upon spotting a group of late-arriving ladies. Once he remarked, with greater deference to his claque of feminine admirers than to the bench, that he would not weary the court by going through a long list of cases to prove his argument, as it would not only be fatiguing to them, but inimical to the laws of good taste, which on the present occasion, (bowing low) he wished to obey.

To entertain the ladies, William Wirt complained, Pinkney would adopt "his tragical tone in discussing an act of Congress." On such occasions, the belles of the city sat entranced for hours; and when Pinkney finished speaking, the audience in the courtroom arose and dispersed as if the Court had adjourned.

Without fail, the dandiacal Pinkney would flatter, eulogize, and patronize the ladies--the more exalted the company, the more uninhibited the praise. Dolley Madison would excite poetic transports. Still more would the Empress of Russia:

> Of the reigning Empress it is impossible to speak in adequate terms of praise. It is necessary to see her to be able to comprehend how wonderfully interesting she is. It is no exaggeration to say, that . . . she combines every charm that contributes to female loveliness, with all the qualities that peculiarly become her exalted station. Her figure, although thin, is exquisitely fine. Her countenance is a subduing picture of feeling and intelligence. Her voice is of that soft and happy tone that goes directly to the heart, and awakens every sentiment which a virtuous woman can be ambitious to excite. Her manner cannot be described or imagined. It is graceful, unaffectedly gentle, winning, and at the same time truly dignified. Her conversation is suited to this noble exterior . . . . It is not, therefore, surprising that she is alike adored by the inhabitant of the palace and the cottage, and that every Russian looks up to her as to a superior being. She is, indeed, a superior being, and would be adored, although she were not surrounded by imperial pomp and power.

Pinkney's gladiatorial nature placed an equally passionate stamp on his rhetoric. The rebellious son of a Tory, whose inheritance had been confiscated and who shifted for himself, had many old scores to settle. He withdrew from other men. He insisted on being addressed like one of the great. His contemporaries recalled that he seldom laid open his heart: he kept something to himself he scarcely told to any. This inner tension relieved itself in compulsive midnight work, in pacing the floors before dawn to memorize his great speeches--speeches which Chancellor Kent described as "bold, dogmatic, arrogant, sarcastic, denunciatory, vehement, and masterly."

Preposterous Extremes

The same fierce psychological chemistry that propelled William Pinkney to professional eminence plunged him into preposterous extremes of vanity. Pinkney, according to his friend Theophilus Parsons, was "vain of his vanity." All manner of absurdities whisked through his head. The corpulent, middle- aged Pinkney wore rigid stays to give him the figure of a youth; his servants pelted him with fine salt to preserve his florid complexion; he attended the proceedings of the Supreme Court in amber-colored doeskin gloves, a giant cravat, and a blue coat studded with gilt buttons.

William Pinkney, Ticknor observed, was "a man formed on nature's most liberal scale, who, at the age of fifty, is possessed with the ambition of being a pretty fellow, wears corsets to diminish his bulk, uses cosmetics,...and dresses in a style which would be thought foppish in a much younger man."

Pinkney's vanity often rendered his court appearances perfect specimens of theatrical contrivance. On one occasion, Pinkney's friend, H. M. Brackenridge, happened upon him "in a bushy dell or thicket, worthy of the pastorals of Theocritus." Pinkney was there rehearsing one of his courtroom speeches. For a full hour the outline was traced, and certain passages repeated and elaborated with every variety of emphasis and intonation. That, however, was only the prelude to a cunning subterfuge designed to magnify Pinkney's courtroom stature:

> I did not fail to be at the courthouse the next morning. The court and bar were waiting impatiently for Mr. Pinkney. They were all out of humor; a messenger had been sent for him. He came at length, with a somewhat hurried step. He entered, bowing and apologizing: "I beg your honor's pardon, it really escaped my recollection that this was the day fixed for the trial. I am very sorry on my own account, as well as on account of others; I fear I am but poorly prepared, but as it cannot be avoided, I must do the best in my power." He was dressed and looked as if he had just set out on a morning walk of pleasure, like a mere Bond Street lounger. His hat, beautiful and glossy, in his hand, his small rattan tapping the crown. He drew off his gloves, and placed them on the table. He was dressed most carefully, neatly but plainly, and in the best fashion. His coat was of blue broadcloth, with gilt buttons; his vest of white Marseilles, with gold studs, elegantly fitting pants and shining halfboots; he was the polished gentleman of leisure accidentally dropped down in a motley group of inferior beings.

William Wirt, also an author, published his first work, *Letters of theBritish Spy,* in 1803. Wirt initiated the practice of publishing the opinions of the Attorney General.

A stunt so outrageous could have but one possible outcome. It was, of course, a complete success:

> The words and sentences seemed to flow into each other in perfect musical harmony, without sudden break or abruptness, but rising and falling, or changing with the subject, still retaining an irresistible hold on the attention of the listeners. No one stirred; all seemed motionless, as if enchained or fascinated, and in a glow of rapture, like persons entranced--myself among the rest although some portions of the speech were already familiar to me, having heard them before, and this circumstance threatened to break the spell: but the effect was complete with the audience, and the actual delivery was so superior to the study, that the inclination to risibility was checked at once, and my feelings were again in unison with those around me. It was a most wonderful display, and its effect long continued to master my feelings and judgment.

With all of his vehemence and vanity, with all of his energy and utter want of self-restraint, it is not surprising that William Pinkney clashed personally as well as professionally with his rivals. Emmet and Wirt invoked the *code duello;* Webster threatened fisticuffs; and many other brothers of the bar chattered with rage over Pinkney's despotic and dogmatizing manner. Francis Wheaton confided to Chancellor Kent that Pinkney was the "brightest and meanest of mankind."

Not the least galling of Pinkney's accomplishments was his ability to earn a golden harvest of fees--reputed to be greater than $20,000 per year--more than any American lawyer ever garnered before the Civil War. A sizable portion of that fortune, his detractors noted, he expended annually on his luxurious wardrobe.

Yet for all his vanity, William Pinkney never encouraged any reporter to write down his speeches; preservation of speeches would be no more than "unprofitable and expensive prolixity," he told Wheaton. In the ultimate act of egotism, Pinkney did not deign to gather up his own fallen words. He was a man for the forum. Taney remarked that Pinkney "would not have bartered a present enjoyment for a niche in the Temple of Fame. He was willing

to toil for the former, but made no effort to leave any memorial of his greatness."

In his last argument before the Supreme Court, which took place in 1822, William Pinkney opposed Daniel Webster in *Ricard* v. *Williams*, 7 Wheaton 59, a case which raised property law issues of vexing complexity. Pinkney had prepared his speech for more than a week and was both sick and exhausted as the crowds thronged the Court to hear him. Pinkney, it was quickly observed, labored under an illness which burdened his speech, and yet he assailed the listening ears of the Court for two full days.

The justices urged him to rest before continuing; but he replied to Francis Wheaton that "he did not desire to live a moment after the standing he had acquired at the bar was lost, or even brought into doubt or question." Following the completion of argument, Pinkney suffered a collapse; the bow so often bent had finally snapped.

When Pinkney was carried home in an exhausted state, Theophilus Parsons left with him the newly published *Spy* by James Fenimore Cooper. Cooper's tale was a vivid conspectus of the great events of Pinkney's lifetime: the outbreak of the Revolution; the victories of General Washington; the clash between Patriot and Tory; and the renewal of war in 1812. Pinkney's imaginative excitement over the book precipitated the onset of delirium. The mighty tide of his intellect was ebbing away. Within a few days of his last argument in the Supreme Court, the Colossus of Maryland was gone. There was no mistaking the cause: Pinkney, quite simply, had worked himself to death.

The public was stunned by the news of Pinkney's death. They felt as if some shocking reversal of the course of nature had occurred. Pinkney, who stood before them in the full pride of his strength, was suddenly laid in the dust of his fifty-seventh year. His career had symbolized unbounded achievement, the upswing of the culture cycle of 1776. His funeral oration, delivered in the traditional puritan manner, was a *memento mori* of an earlier day:

> But there is a great moralist still; and that is Death. Here is a teacher who speaks in a voice which none can mistake; who comes with a power which none can resist . . . . The noblest of heaven's gifts could not shield even him from the arrows of the destroyer; and this behest of the Most High is a warning summons to us all.

The Justices of the Supreme Court adjourned proceedings as a mark of their "profound respect" for Pinkney. They resolved to wear black crepe armbands for the remainder of the Court's term. The members of the bar adopted an identical resolution.

Labor in the Capitol was suspended. A funeral procession of some two hundred coaches accompanied Pinkney to his grave; no procession of its like had been seen before in Washington. In all respects, the pomp and ceremony befitted the flamboyant orator.

In their dejection, Pinkney's admirers feared that his fame was now extinguished forever. Where now were his tricks, his quiddities? Pinkney's fame, said Theophilus Parsons, was only "written as in running water." In fact, however, it was not entirely so.

Strange as it seemed, Attorney General Wirt could not put out of his mind the memory of "that damned magician Glendower." As Wirt confided in his correspondence: "No man dared to grapple with him without the most perfect preparation, and the possession of all his strength. Thus, he kept the Bar on the alert, and every horse with his traces tight." It was not only the war-horses of the bar who remembered Pinkney. Aspiring neophytes like Rufus Choate, who witnessed Pinkney's last argument, constructed their own forensic style on his model. Biographic notices of Pinkney appeared and reappeared. Students were exhorted to study the fragments of his speeches. The magician's spell, in fact, was advancing, not receding.

The passage of time only confirmed that Pinkney had set the standard for those who appeared before the nation's highest court. He had given the new institution a fund of public respect and intellectual glamour. To the utter chagrin of Attorney General Wirt, it was plain that Pinkney's ghost would not soon quit the place.

Harper's Weekly Celebrates the Centennial of the Supreme Court of the United States: A Bicentennial Retrospective

Peter G. Fish

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The Judiciary Act of 1789 mandated opening of the United States Supreme Court's initial term on the first Monday in February 1790.[1] The Court lacked a quorum on that date, but the next day, Tuesday, February 2, 1790, the requisite number of Justices assembled and organized the Court in the old Royal Exchange at the intersection of Broad and Water Streets in what is now the financial district of New York City.[2] A hundred years later, on the first Tuesday in February, 1890, the New York Bar, the Association of the Bar of the City of New York, and the American Bar Association jointly sponsored the official centennial celebration. Chief Justice Melville W. Fuller, the Associate Justices, President Benjamin Harrison and his Cabinet, and members of the House and Senate Judiciary Committees attended.[3]

Harper's Weekly, the leading popular journal of the day, publicized the Supreme Court centennial. Established in 1857 by the New York publishing house of Harper and Brothers, this self-styled "Journal of Civilization's" illustrations and political coverage under editor George W. Curtis (1863-1892), earned wide acclaim.[4] True to form, its issue of February 8, 1890 featured an appropriate essay by forty-five-year-old Elihu Root, a prominent New York lawyer then on the threshold of a distinguished career in public service. Entitled *"The Centennial of the Supreme Court,"* Root's piece reflected the conservative response to perceived political threats arising out of post-Civil War agricultural distress and industrial strife.[5] The High Court, he wrote, had "contributed more than any other agency toward the successful working and stability of the Federal Constitution and the triumph of the American experiment in government."[6] Above all, that institution had stood firm against "the most formidable danger which threatens the permanence of democratic government. . .," that arising from "a tyrannical majority."[7]

Leading the Court against the feared majoritarian tide were Chief Justices who served during its first century of existence. *Harper's* honored them with a special centerfold containing portraits of each.[8] Omitted was that of John Rutledge of South Carolina. Appointed Chief Justice by President George Washington, he presided over the 1795 August Term, but the Senate subsequently refused to confirm his nomination.[9] Depicted front left to right on the top row: John Jay (1789-1795); Oliver Ellsworth (1796-1799); John Marshall (1801-1835); Roger B. Taney (1836-1864); from left to right on the bottom row: Salmon P. Chase (1864-1873); Morrison R. Waite (1874-1888); Melville W. Fuller (1888-1910).

The portraits were, like all of *Harper's* illustrations, wood engravings or woodcuts as they were called. Unlike stone lithographs and copper or steel etchings, wood engravings could be locked up with raised or "hot lead" type employed by publications with newspaper formats. In the United States *Harper's* led in the use of this illustration medium as did the *Illustrated London News* abroad. But even in 1890, photo-engraving was making inroads and would eventually displace the older craft-based technology.[10]

The portrait of the first Chief Justice is a copy of an original completed in 1794 by the renowned American painter Gilbert Stuart (1755-1828), best known for his "Athenaeum Portrait" of George Washington. Stuart had studied in England under Benjamin West (1738-1820) and returned to America in 1792, working in New York City from 1793-1794 and in Philadelphia and Germantown, Pennsylvania from 1794-1803 before beginning a long and successful residency in Boston.[11] *Harper's* portrait was cut from a copy of the Stuart original

probably executed by Henry Peters Gray (1819-1877). Gray was a leading nineteenth-century American portrait and figure painter who, early in his career, studied and copied the old masters hanging in Italian museums.[12]

William R. Wheeler (1832-1894) was credited by *Harper's* with the portrait of Connecticut's Oliver Ellsworth. A portrait painter and miniaturist, specializing in children's portraits, Wheeler at age 30 began an extended residency in Hartford, Connecticut in 1862, long after Ellsworth's death in 1807.[13] Ralph Earl[e] (1751-1801) painted the original portrait of the second Chief Justice on which this copy is based. Earl[e] was esteemed the best portrait painter in Connecticut in the late eighteenth century. He typically placed his subjects in conventional period settings complete with draperies and cluttered landscapes. His Ellsworth portrait was the exception. Executed in 1792 in the midst of his subject's illustrious seven-year senatorial career (1788-1796) which had included sponsorship of the 1789 Judiciary Act, the portrait included Ellsworth and his wife of twenty years, as well as the family's red-roofed white mansion in Winsor, Connecticut and its grounds, patriotically enveloped by thirteen elms, visible through the window-framed background.[14] The Wheeler copy apparently derived from a copy of Earl[e]'s original by Charles Loring Elliott (1812-1868), who reputedly painted more than 700 portraits of eminent people in his New York studios.[15] The Wheeler-Elliott portrait of Ellsworth, purchased by the Supreme Court under the Act of October 2, 1888,[16] notably cropped Earl[e]'s wife and thus eliminated the original painting's theme of domesticity.

Harper's erroneously attributed its portrait of John Marshall to Rembrandt Peale (1778-1860), the most gifted son of Charles Wilson Peale (1741-1827) and, like Stuart, a former pupil of Benjamin West.[17] However, this likeness of the great Chief Justice was apparently cut from an oil painting commissioned in 1880 by the Library Committee of Congress and executed by Richard Norris Brooke (1847-1920). Brooke's source was the monumental posthumous portrait of Marshall done in 1859 by the portrait and historical painter William DeHartburn Washington (1834-1870) for the Fauquier County Courthouse in Warrenton, Virginia. Washington, in turn, derived his portrait from one by Henry Inman (1801-1846) and commissioned by the Bar of Philadelphia.[18] Inman was a major American portraitist and landscape painter who did his study of Marshall in 1831, four years before his subject's death in the same city.[19] The Inman portrait received wide circulation through the exceptional lithography of Albert Newsam and engraving by Asher Brown Durand whose portrait work has reputedly never been surpassed by an American engraver.[20]

Harper's Weekly celebrated the Supreme Court's centennial in its February 8, 1890 issue with a centerfold honoring the Chief Justices who presided during the Court's first century: Top, left to right: John Jay (1789-1795); Oliver Ellsworth (1796-1799); John Marshall (1801-1835); Roger B. Taney (1836-1864). From left to right on the bottom row: Salmon P. Chase (1864-1873), Morrison R. Waite (1874-1888), Melville W. Fuller (1888-1910). John Rutledge, who was appointed Chief Justice by President George Washington and presided over the 1795 August Term, was omitted from the centerfold because his appointment was not confirmed by the Senate.

George Peter Alexander Healy (1813-1894) painted the portrait of 79-year old Roger Brooke Taney in 1856, a year before the Court handed down its fateful Dred Scott decision. Healy studied in Paris and became one of the nineteenth century's most successful portrait painters even though his fame rests as much upon his historical works, including "Franklin Urging the Claims of the American Colonies Before Louis XVI" and "Webster's Reply to Hayne." His portrait subjects included most prominent statesmen of his time as well as social and business leaders. Presidents from John Quincy Adams through Abraham Lincoln sat for him as did Chief Justice Taney, whose head reflects characteristic Healy traits--strength and dignity.[22] Friends of Taney raised the necessary funds to purchase this painting from the artist for the Supreme Court.[23]

Salmon Portland Chase's portrait is the first of the seven cut from a photographic original. The studio of famed Civil War photographer Mathew B. Brady (1823-1896) produced the portrait. The actual photographer was probably not Brady, but rather his wife's nephew, Levin C. Handy, who carried on the work of the Brady National Photographic Art Gallery while the firm's founder wallowed in bankruptcy, devastating litigation, and alcohol.[24] A care-worn Chase, frustrated in his attempts to achieve the presidency from his position of Chief Justice, assumed a Napoleonic pose in the uncropped Brady-Handy original photograph.[25]

Adele M. Fassett (Lornelia Adele Strong) (1831-1898) painted the portrait of Morrison R. Waite from which *Harper's* cut its centennial portrait. A portrait and figure painter, Fassett studied in New York, Paris and Rome before establishing a studio in Chicago in 1855. In 1875, she moved to Washington where, in 1876, she did the likeness of Waite, then in the third year of his chief justiceship. The following year Fassett produced her most noted work, a historical painting, "The Florida Case Before The Electoral Commission." Set in the old Supreme Court Chamber with the great courtroom advocate William Maxwell Evarts at its center, the canvas contains portraits of approximately 260 men and women.[26] The Waite portrait was purchased from the artist by the Supreme Court with money appropriated under the 1888 Act.[27]

The centennial Chief Justice was Melville Weston Fuller whose *Harper's* portrait originated in the studio of Charles Milton Bell (1848-1893).[28] C.M. Bell, as he was known professionally, established his own Washington photography business in 1873, and soon enjoyed a reputation rivalling that of Mathew Brady's. Although noted today for his photographs of native Americans, Bell's subjects included a large and diverse cross-section of Washington notables. Among them was President Grover Cleveland, the one who had named Fuller to the High Court and with whom Bell enjoyed a close business relationship.[29]

Under Fuller the Supreme Court would hew closely to the theme struck by Elihu Root in his *Harper's* essay. Six weeks after the centennial issue appeared, the Court handed down its decision in *Chicago, Milwaukee and St. Paul Railway Co.* v. *Minnesota*.[30] That historic ruling interposed national judicial power between popular majorities and the rates charged by investor-owned private utilities. The Fuller Court would thereafter limit government's power to restrain economic enterprise by the application of the substantive due process doctrine,[31] and at the same time control industrial strife by use of equitable restraints on labor unions.[32] Meanwhile, *Harper's Weekly* would continue to serve with pictures, political essays, and fiction stories a literate middle class readership until its demise in 1916.[33]

Endnotes

[1] Act of September 24, 1789, sec. 1, 1 Stat. 73.

[2] Charles Warren, *The Supreme Court in United States History, 1789-1835* (Boston: Little, Brown and Co., 1928) 1:46-48; *The Documentary History of the Supreme Court of the United States, 1789-1800: Appointments and proceedings*, Maeva Marcus and James R. Perry (eds.) (New York: Columbia Univ. Press, 1985) 1:171-176.

[3] 134 U.S. 711 (1890); Hampton L. Carson, *The Supreme Court of the United States: Its History and Its Centennial Celebration, February 4th, 1890* (Philadelphia: A.R. Keller Co., 1894) 2:585-735.

[4] Frank Luther Mott, *A History of American Magazines. 1850-1865* (Cambridge: Harvard Univ. Press, 1938), pp. 468, 469, 483.

[5] *Harper's Weekly* (Feb. 8, 1890) 34:110; see Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967).

[6] *Harper's*, *supra* note 5.

[7] *Id.*

[8] *Id.* pp. 104-05.

[9] Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court,* 2d ed., (New York: Oxford Univ. Press, 1985), pp. 72-73.

[10] David M. Sander, *Wood Engraving: An Adventure in Printmaking* (New York: The Viking Press, 1978), pp. 19-20.

[11] Charles Merrill Mount, *Gilbert Stuart: A Biography* (New York: W.W. Norton and Co., Inc., 1964), pp. 176-180, 183-185, reproduction of the Stuart original in the National Gallery of Art follows p.128.

[12] *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1931) 7:517-518; Charles E. Fairman, *Art and Artists of the Capitol of the United States of America* (Washington: Government Printing Office, 1927),;361, reproduction of Gray's copy on p.362.

[13] George C. Groce and David H. Wallace, New York Historical Society's *Dictionary of American Artists, 1564-1860* (New Haven: Yale Univ. Press, 1957), p.678.

[14] William Sawitzky, *Connecticut Portraits by Ralph Earl, 1751-1801* (Connecticut Tercentenary Commission, 1635-1935) (New Haven: Yale Univ., Gallery of Fine Arts, 1935), pp. 4-8, 15-16, reproduction of the original in *Wadsworth Atheneum*, p. 14. The artist's name is variously spelled Earl or Earle.

[15] Fairman, *supra* note 12, pp. 280, 284, 363.

[16] 25 Star. 547.

[17] Groce, supra note 13, p.493; See Andrew Oliver, *The Portraits of John Marshall* (Charlottesville: The Univ. Press of Virginia, 1977), pp. 158-162.

[18] Oliver, *supra* note 16, pp. 134-138; reproduction of Brooke's copy is on p.161; of Washington's, on p.160; of Inman's original, on p.135.

[19] *Id.*, pp. 134-138.

[20] *Id.*, pp. 138-142; *American Portrait Prints: Proceedings of the Tenth Annual American Print Conference,* Wendy Wick Reaves (ed.) (Charlotttesville, The Univ. Press of Virginia, 1984), p. 76 (*"A.B. Durand after H. Inman"*),;p.126 (*"Childs and Inman,"* publisher of Newsam's work).

[21] The original is reproduced in Charles Warren, *The Supreme Court in United States History, 1836-1918* (Boston: Little, Brown and Co., 1928), 2: facing title page; a dated copy is in the Biographical File, Prints and Photos Division, Library of Congress; *Scott* v. *Sandford*, 19 How. 393 (1857).

[22] Groce, *supra* note 13, p.304; *Cyclopedia of Painters and Paintings*, John Denison Champlin, Jr. (ed.) (New York: Empire State Book Co., 1927) 2:219-20; see Marie DeMare, *G.P.A. Healy: American Artist* (New York: David McKay Co., Inc., 1954).

[23] Fairman, *supra* note 12, p.361.

[24] Dorothy Meserve Munhardt and Philip B. Munhardt, Jr., *Mathew Brady and His World* (Alexandria, Va.: Time-Life Books, 1977), pp. 64-65.

[25] On Chase's presidential ambitions, see David M. Silver, *Lincoln's Supreme Court* (Illinois studies in the Social Science: Volume 38 (Urbana: The Univ. of Illinois Press, 1956), p. 209;J.W. Schuckers, *The Life and Public Services of Salmon Portland Chase* (New York: D. Appleton and Co., 1874) pp. 560-573. The original glass negative (LCBH 83-1392) is in the Brady-Handy Collection, Prints and Photographs Division, Library of Congress.

[26] *Dictionary of American Biography*, (New York: Charles Scribner's Sons, 1931) 6:296; Fairman, *supra* note 12, p. 314, *"Electoral Commission"* reproduced with key, pp. 313--314; a reproduction of the Waite portrait in the Biographical File, Prints and Photographs Division, Library of Congress.

[27] Fairman, *supra* note 12, p. 363.

[28] The original is reproduced in *Memorials of The Justices of the Supreme Court of the United States*, Roger F. Jacobs (ed.) (Littleton, Colorado: Fred B. Rothman and Co., 1981) 2:152.

[29] James Glenn and Kathleen Collins, *"History of the C.M. Bell Photographic Studio, Washington, D.C., 1873-1909,"* typed ms., Prints and Photographs Division, Library of Congress.

[30] 134 U.S. 418 (1890).

[31] *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895); *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897); *Smyth* v. *Ames*, 169 U.S. 466 (1898); *Lochner* v. *New York*. 198 U.S. 45 (1905).

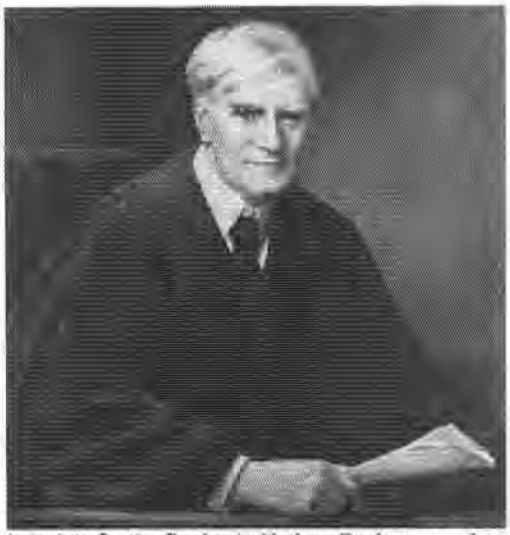
[32] *In re Debs*, 158 U.S. 564 (1895).

[33] Mott, *supra* note 4, p.469.

Justice Cardozo: One-Ninth of the Supreme Court

Milton Handler and Michael Ruby

Editor's Note: *This article originally appeared in the* Cardozo Law Review, *Volume 10, October/November, 1988. Milton Handler is a Professor Emeritus of Law, Columbia University. Michael Ruby, his grandnephew, has adapted this article from an oral history with Professor Handler. Portions of this text expand on themes addressed in an earlier work. See M. Handler, Benjamin N. Cardozo, in* Twenty-Five Years of Antitrust *1271 (1973).*



Associate Justice Benjamin Nathan Cardozo served on the Court from 1932 through 1938.

Part I

As a young professor, I had the privilege of gaining some glimpses into the private life of Justice Cardozo. I knew him slightly in the latter years of his tenure on the New York Court of Appeals, and more intimately after he moved from New York to spend the last years of his life in Washington. He was a self-effacing man, jocularly referring to himself as "one-ninth of the Supreme Court," but much to my surprise this trait did not govern his debut on the Court--a landmark civil rights decision. His second opinion, an antitrust ruling handed down on the same day, presents a judicial mystery that I will endeavor to solve after giving my impression of the Justice.

My first contact with Cardozo came when I was in my third year at Columbia Law School, where he was worshipped by my generation of law students. We eagerly read his every opinion, not only those that adorned the various casebooks that we studied, but also those that he was handing down at the time as a member of the Court of Appeals. In my capacity as the book review editor of the *Columbia Law Review* in 1926, I had the temerity to invite him to review a work on legal philosophy. This was the beginning of a correspondential relationship.

Four years later, after I had embarked on my teaching career, I discovered an opinion by Judge Barrett, a New York jurist in the 1890s, while putting together a chapter on trademarks for a casebook on trade regulation. The clarity and brevity of the one-page ruling impressed me as an example of the art of opinion writing, of which Cardozo had written in his *Law and Literature*.[1] I used the opinion in class in the mimeograph edition of my casebook to indicate how the analysis of a trademark controversy could be stated in a few paragraphs, and sent a copy of the ruling to Cardozo with my comments. The Chief Judge promptly responded that it "brings back reminiscences of my youthful days when I heard him dictate opinions almost equally precise and graceful."[2]

Later that year, I was called upon to assemble a list of legal classics for incoming students to read during the summer before their first term. I included Cardozo's *The Nature of the Judicial Process* among titles by Gray, Ames, and Holmes, whom Cardozo revered and would soon succeed on the Supreme Court. I forwarded the list to Cardozo, whose response was a study in shifts of tone:

> Truly a lad studying at Columbia Law School today can hardly fail to learn that law is wedded to philosophy and literature and art.
>
> Of course, to a good many of the boys these readings will be idle chatter, but some few in every class will feel the curiosity to keep the chatter up--which is all, I suppose, that the wisest of us can do.
>
> I felt very proud when I saw my own little book sandwiched in between those of the immortals.[4]

The Chief Judge began in an avuncular tone and concluded rather humbly. In between, he expressed the practical man's ambivalence toward legal philosophy, denigrating it as "idle chatter," and then proceed to justify the enterprise in the same sentence.

When President Hoover nominated Cardozo to the Supreme Court on February 15, 1932, everyone at Columbia was overjoyed. I knew from experience that the appointment was the result of years of effort on the part of Cardozo's admirers. When I had clerked for Justice Stone in 1926, he related to me the circumstances of his own recent appointment by President Coolidge. The tale disconcertingly featured Cardozo.

When Justice McKenna retired in 1924, Coolidge summoned Stone, his Attorney General and former classmate at Amherst, to obtain advice on whom he should appoint as the successor. According to Stone's account, Coolidge said, "I regard this as an important responsibility of the Presidency and would welcome your suggestions. Think about it for a while." "Mr. President," Stone said, "I can present my recommendation right now. I don't have to give it any thought." "Whom do you have in mind?" "Benjamin Nathan Cardozo, the outstanding jurist of our times." "Isn't he a Hebrew?" the President asked. "Yes, but in my view, that's irrelevant." "Well, we have one Hebrew on the Court now, Brandeis, and I don't believe that I would want to be the one to add another," Coolidge concluded. Then Coolidge turned to Stone and asked, "what about my appointing you?" "Mr. President, I cannot be considered in the same breath as Cardozo. He has every attribute of judicial greatness. I possess nothing comparable. You would be appointing someone much inferior to Cardozo." Coolidge said nothing and Stone continued: "You know, Mr. President, I've had an academic career. I retired from the deanship and went into private practice. Lo and behold, I wasn't in practice for a year when you appointed me Attorney General. At that time, I indicated that I would take it only for a limited period, because I really am anxious to get back to New York." "Still," Coolidge said, "I want you to consider this. please take it up with Agnes and let me know your decision." After discussing it with his wife, Stone, as might be expected, accepted the appointment.[5]

Though he found himself appointed to replace Justice McKenna in 1925, then Attorney General Harlan Fiske Stone recommended Benjamin Cardozo to fill the vacancy on the Court. Stone was named Chief Justice of the United States in 1941.

Stone also told me that a few years before that, as Dean of Columbia Law School, he had recommended Cardozo to President Harding, who chose Pierce Butler. A few years afterward, Stone recommended Cardozo as President Hoover's first appointment, which went to Owen J. Roberts. When Hoover was about to make his second appointment, Stone recommended Cardozo for the fourth time. While "Stone does not appear to have been 'in' on the decision," according to the definitive account of Cardozo's appointment, "his opinion doubtless carried some weight with Hoover."[6]

I joined the chorus of well-wishers after Cardozo's prompt confirmation by the Senate, but I could not help wondering how he would adjust to the shift from being New York's much admired Chief Judge to being the freshman Justice on the High Court. I wrote Cardozo that, on the basis of Stone's experience as the junior Justice, he should expect that many of the cases assigned to him would be relatively unimportant, unlike the significant questions with which he dealt in his Court of Appeals

decisions. I also offered to apprise his clerk of some aspects of a Supreme Court Justice's work with which he might not be entirely familiar. At the end of each term of the Court, outgoing clerks break in incoming ones, and I had something of the sort in mind. Cardozo responded:

> I am grateful for your letter. I put it aside to be answered more fully; but alas! the mountain of other letters still unacknowledged warns me to be brief. What you wrote interested me, and I hope some day we may discuss it.
> You are good to offer to help my secretary, and I may take advantage of the offer later.[7]

Cardozo's legal secretary, as clerks were then called, contacted me a week later. He was a middle-aged man by the name of Joseph Paley who had worked for Cardozo since 1918 and who would accompany the new Justice to Washington until the completion of his first term. Thereafter, Cardozo emulated many of his colleagues by annually selecting a third-year law student as his clerk.

At a luncheon at the Men's Faculty Club at Columbia, I reviewed with Paley the many ways in which the Supreme Court and the Court of Appeals differed in the conduct of business. I outlined the work of a Supreme Court clerk and touched on some of the problems a new Justice might face, such as the preponderance of mundane cases likely to be assigned to him. Paley said that Cardozo was not concerned that the issues in a case might appear trivial, because in Cardozo's view a great judge could find a question meriting innovative treatment even in the most humdrum cases, thus echoing what he had written in *Law and Literature*.[8] Although I was 28 years old at the time, and no fountain of wisdom, I was dubious. I remembered how few interesting cases had come Stone's way during my year with him.

When Cardozo took his seat on March 14, 1932, I was curious to see how he would exercise his right, as a new Justice, to choose the first case for which he would write the Court's opinion. Thereafter, as is well known, all assignments are made by the Chief Justice, or by the senior Associate Justice if the Chief Justice is not part of the majority. I had a theory that if you wanted to ascertain a new Justice's personality, you should study his first opinion. If he selected something so unimportant that it would not be noticed, you could take it as proof of modesty; if he selected a blockbuster, you could take it as evincing a certain self-confidence, self-importance, and perhaps even arrogance. Stone, for example, chose an absolutely trivial case, because he did not want his first opinion to receive any notice.[9] I thought that Cardozo, who was shy and self-effacing, would assign himself something quite unimportant. To my surprise, and as proof that my amateur psychoanalysis was completely unfounded, he took a 5-4 decision that made the front pages of newspapers across the land.

The new Justice delivered his first batch of opinions on May 2. The case that made the headlines, *Nixon v. Condon*,[10] struck down a Texas statute that gave the State Executive Committee of the Democratic party the authority to bar black citizens from voting in primaries, which were tantamount to election in that heavily Democratic state. While Cardozo handed down five other opinions that day, a look at the dates on which the cases were argued shows that *Nixon* had to be his first opinion.

Of the five other cases, one was argued on March 17 and 18, and the others on April 14 and 15. *Nixon*, however, was argued on January 7 and then reargued on March 15--the day after Cardozo took his seat. Since this was a 5-4 decision, it would appear that the Court split right down the middle after the first argument. With a new Justice appointed, Chief Justice Hughes put the case on the calendar for argument on the day after Cardozo was sworn in. As Cardozo was the swing and controlling vote, it would only have been natural for the Chief Justice to have assigned the opinion to him. Nonetheless, Cardozo had the right to choose his first case, and thus might have refrained from selecting what was certain to be a landmark ruling in favor of something less conspicuous.

Notably, Cardozo's ruling was a very narrow one, hinging on a technicality. He maintained that the Executive Committee did not have the authority to bar black voters, because "[w]hatever inherent power a State political party has to determine the content of its membership resides in the State convention,"[11] and not in the Executive Committee. Since the Committee derived its power from the state enactment and not from the party convention, the exclusion of the black voters was the act of the state of Texas and not of the party. Cardozo hardly addressed the

state's position "that a political party is merely a voluntary association" with "inherent power like voluntary association generally to determine its own membership."[12] Ducking the issue, he wrote:

> As to that, decision must be postponed until decision becomes necessary. Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.[13]

After Roosevelt's election later that year, I had the opportunity to gain a more intimate view of Cardozo. A couple of days before the inauguration on March 4, Rex Tugwell called me and said that he was going to be the "number two" man in the Department of Agriculture under Henry Wallace. He wanted me as the "number three" man to help him in the field of food and drug regulation, which we were keen on strengthening. I researched the job and found that it also included such uninspiring matters as supervising the army of lawyers who negotiated the acquisition of land for the construction of roads. Skeptical about the post and newly married, I decided to go down to Washington to investigate the matter further with Tugwell and Wallace. I also resolved to seek the counsel of Stone, Brandeis, and Cardozo.

I visited Tugwell at the Department of Agriculture in the first days of the new administration. He was sitting at a large desk with a pile of documents in front of him. As he was telling me about the position and the Department's lofty goals, he was signing the papers one by one. When he finished with them, a clerk came in with a wheelbarrow filled with more papers. Tugwell, talking all the time, set to work on these. Finally, I said, "Rex, what are you doing?" "The law requires that everything that goes out of this department be signed by the Secretary. I'm the Acting Secretary. The moment you come here, you're going to be the Acting Secretary."

Nonplused by his remarks, I went to see Brandeis. The 76-year-old Justice brushed aside my reservations, saying: "This is going to be the most active department in the new administration. With Wallace and Tugwell, the fur is going to fly and it will be a place of great intellectual excitement."

I went to Cardozo next, who took the opposite tack. "You're like me," he said, "you're born and bred in the streets of New York. This isn't intellectually challenging. You should stay a professor, or become a judge." Finally, I visited Stone, who urged a middle course, saying: "If you want to come to Washington, I'll speak to some people and get you something more in line with what you've been doing." In the end, I took Cardozo's advice and stayed in New York, but I also agreed to draft the food and drug reform bill for the "100-day" session. The legislation, which encountered furious opposition from the affected industries, was not enacted until 1938, and then only in a watered down form.[14]

By the summer, I regretted following my own and Cardozo's instincts. At Raquette Lake in the Adirondacks, I read in the newspapers almost every day about the agencies being set up to administer the New Deal programs. I naively thought that every one of our social and economic problems was about to be solved, and that nothing would be left for my generation to accomplish in the future. So I made some inquiries and was invited by Senator Wagner to come down in October to serve as General Counsel to the National Labor Board, the prototype for the National Labor Relations Board.

In the year that I lived in the capital, I called on Cardozo a number of times. The Justice, a bachelor in his early sixties, lived at 2101 Connecticut Avenue, an elegant apartment house still standing near the bridge over Rock Creek park on the way to the Shoreham Hotel. His apartment was spacious and exquisitely furnished, with a study, which doubled as Cardozo's chambers, next to the living room. This was before the erection of the Supreme Court building, when most of the Justices had no official chambers and did their work at home.

Cardozo, like many other shy people, could be very loquacious with visitors. It was clear from everything he said that he was lonely and unhappy. He missed New York, where he had resided harmoniously with his older sister until her death, and felt uprooted living in Washington, where he lacked the companionship of his old friends and felt too old to make new ones. He declined almost all formal dinner invitations, not merely because of their general dullness, but because he was always placed next to some venerable widow.

On the Court, he felt somewhat overshadowed by Brandeis and Stone, men of affairs whose greater experience better equipped them for the problems of statecraft with which the Supreme Court deals. He indulged in the affectation that he did not care overmuch for the work of the Court, and was wont to say that all that counted was a Justice's vote--not his persuasiveness, industry, scholarship, or wisdom. Cardozo was merely "one-ninth" of a High Court dominated by an old-line majority that would endeavor to throttle the state and federal efforts to cope with the Depression.

His tenure on the Court of Appeals had been in marked contrast. Instead of being the junior member of the Supreme Court, he had been surrounded by disciples who looked up to him as a master, especially after he became Chief Judge. Instead of working in relative isolation, he had spent the two weeks of each month that the Court of Appeals was in session with his fellow judges at an Albany hotel. They would discuss cases over breakfast, lunch, and dinner in monastic seclusion, free from distraction and interference. According to the recollections of two of his Supreme Court clerks, he was even nostalgic for the cases he had handled on the New York tribunal.[15]

During one of my visits, the Justice described his unusual method of opinion writing. As soon as a case was assigned to him, he would work day and night with hardly any food or sleep until the opinion met his exacting standards. I said to him, "But you must realize, Mr. Justice, that there will always be another case to which you will have to turn."

"I well realize that," he said, "but that is my nature, to give myself over to my work." I knew that there could be no rest in his life, because as soon as he had expended himself on one case, he would plunge into another.

Cardozo returned my visits by paying several calls at the Westchester, an apartment hotel where I lived with my wife, Marion. On one occasion, he stopped by on a Sunday, when I was still in New York after giving my classes at Columbia on Friday afternoon and Saturday morning. when Marion and I returned late that afternoon, the receptionist at the Westchester handed us our mail and said, "A very distinguished-looking gentleman called to see you this afternoon. He left his card, which has a very funny first name." She handed it to me and it said, "Mr. Justice Cardozo."

It was customary in that era in Washington for visitors to leave cards when making a call. Mrs. Stone, for example, would go out some days in her chauffeured car with as many as 20 to 30 cards. She would drive to the embassies, to the homes of the Supreme Court Justices and Cabinet Secretaries, and to the White House. The chauffeur would hand the Stones' card to the butler of the establishment. Similarly, visitors would drive up to the Stones and deposit their cards, just to show that they were maintaining social relations between dinner parties, which the Stones attended practically every night. On one of their more low-key evenings, they invited Marion and me for dinner, which consisted of a turkey that weighed more than ten pounds. Although Marion and I were small and thin, the 290-ound Justice and Mrs. Stone were such terrific eaters that the four of us polished off the entire platter.

In due course, Marion called Mrs. Stone and said she would like to have a dinner party for the Stones, Cardozo, and Senator Wagner, who was a widower. "We go to so many formal parties," Mrs. Stone said, "so make it absolutely informal." New to Washington, Marion did not know what informal meant. "Do you mean black tie?" she asked. "No, just business suits," Mrs. Stone replied. I invited Cardozo and Wagner, whose staff called me half a dozen times to confirm how the Senator should attire himself. On the night of the party, Marion was wearing an ordinary dress and I had put on a business suit. Our distinguished guests started to arrive. The Stones appeared--he in white tie and she in an evening dress. Cardozo came in a tuxedo. Wagner's staff had settled on a funeral suit with striped pants and cutaway for the Senator. Only Marion and I, the hosts, had complied with Mrs. Stone's wishes.

Our apartment at the Westchester, with its rented furniture, was not palatial. It had a small kitchen and foyer, a living room, and a bedroom. We had set up a table in the foyer and Marion had engaged special help, whose loud voices were audible from the nearby kitchen. The food was truly inedible. To make matters worse, the fire alarms in the building went off during the meal. I stepped out to reconnoiter and ascertain whether there was any danger. After all, we were responsible for the lives of two Supreme Court Justices and a leading member of the Senate. I soon discovered that there was no danger and returned to the table for more unpalatable food. Fortunately, we had some good wine that could assuage our

guests' thirst, if not their hunger.

After the disastrous meal, we repaired to the living room. Stone turned to Wagner at one point and said, "I'm curious to know, Mr. Senator, what is the constitutional theory on which the Administration is proceeding in the development of its comprehensive program of reform and reconstruction?"

The Senator from New York, who had imbibed a good deal, responded brashly, "Mr. Justice, our theory is very simple. If the program doesn't work, we don't care if your Court holds it unconstitutional. If the program does work, you wouldn't dare to declare it unconstitutional."

Breaking in at that point, Cardozo said softly, "If I were you, Mr. Senator, I wouldn't dare two-ninths of the Supreme Court of the United States."

After about a half hour, the Stones and Wagner rose and left together, no doubt with the intention of filling their empty stomachs. Cardozo, noticing that Marion was chagrined and very much upset, remained for several hours to help restore her equanimity. This was characteristic of the Justice. Drawing her out, he discovered that her master's thesis had been on colonial literature, and they discussed the works of John Cotton, Thomas Hooker, Cotton Mather, and other "builders of the Bay Colony," whose writings were just beginning to awaken interest after two centuries of neglect. Cardozo appeared to be fully familiar with that recondite field, as he was with all phases of English and American literature, to say nothing about his prodigious learning in philosophy and related fields. By the time he left, the night that should have been our moment of youthful triumph had been saved from utter catastrophe.

I can best end the first part of this memoir by quoting two passages from Chief Judge Lehman's *A Memorial*:

> Many have found his mental ability remarkable. His friends know that the beauty of his character, his selfless devotion to his work, his firm adherence to principle and, may I add, his love for his friends and his perfect charity to all men were far more remarkable...[16]
>
> .... In his heart there was love so great that it excluded all other feelings. Shy and retiring though he was, he found his greatest happiness...in the companionship of his friends. The great legal thinker was at all times and under all circumstances the gentle, modest, loving man.[17]

Part II

I will now turn to the judicial mystery that surrounds Cardozo's second opinion on the Supreme Court, *United States* v. *Swift & Company*, in which the Court overturned a District Court modification of the Meat Packers' Consent Decree. The original decree, entered in 1920, had broken up the meat packers' monopoly and enjoined them from engaging in a number of activities, including "manufacturing, selling or transporting any of 114 enumerated food products." Swift and Armour & Company filed a petition to modify the decree in 1930, arguing that changed conditions in the meat-packing and grocery business warranted alterations. The District Court in Washington rejected part of the petition, but permitted the meat packers to sell at wholesale the 114 grocery products. The Government appealed the decision to the Supreme Court.

The case was argued before the Court two days after *Nixon*, on March 17 and 18, and the decision was handed down on the same day as *Nixon*. Rejecting the modification, Cardozo spoke for a court of four--Justices McReynolds, Brandeis, Roberts and himself. Justices Butler and Van Devanter dissented. Chief Justice Hughes and Justices Sutherland and Stone took no part in the consideration and decision of the case. For many years, Cardozo's opinion was regarded as the fountainhead of all learning on the modification of consent decrees, with most subsequent rulings starting and ending with his formulation.

Long after the decision, when I was Chairman of the American Friends of the Hebrew University in the 1960s, Professor Prashker, the father of one of Stone's law clerks, donated the handwritten drafts of Cardozo's first two opinions, *Nixon* and *Swift*, to the University. There were numerous corrections and eliminations on the foolscap holographs. I deciphered the first few pages of both texts, which were not all that legible, checked them against the published opinions, and concluded that they were authentic final drafts. At a function of the Friends, I presented the documents to the President Justice of the Supreme Court of Israel, who turned them over to the Jewish National Library in Jerusalem.

Subsequently, when I was delivering an antitrust lecture in Chicago, I sat at the head table with Arthur Curtis, the Associate General Counsel of Swift. During dinner, I mentioned, in passing, the story of how I had

Justice Cardozo *(standing, far right)* wrote the majority opinion for the Court in *United States* v. *Swift & Company* (1932). Justices McReynolds *(seated, second from right)*, Brandeis *(seated, far left)* and Roberts *(standing, far left)* comprised the remainder of the four-member majority. Associate Justices Van Devanter *(seated, second from left)* and Butler *(standing, second from left)* dissented. Chief Justice Hughes *(seated, center)* and Associate Justices Stone *(standing, second from right)* and Sutherland *(seated, far right)* did not take part in the decision.

obtained the handwritten draft of the *Swift* opinion for the Hebrew University. He asked whether he could procure a copy. I suggested that he write to the Jewish National Library. In 1970, he wrote to tell me that he had obtained the copy, and that to his amazement, he found that Swift had won in the handwritten opinion, whereas the company had suffered a total defeat in the ruling that was published in the United States Reports. He then sent me a typed copy that he had made of the handwritten draft.

Needless to say, I immediately compared the typed copy to the draft with the published opinion from beginning to end. As it turned out, the holograph was the final draft, but only for part of the opinion. The opening pages, which describe the 1920 decree, correspond word for word with the beginning of the printed opinion. At that point, the two texts briefly diverge. The published ruling inserts a paragraph and a half that criticizes the meat packers' efforts to have the decree vacated in 1924. Then the opinion returns to the point where it departed from the draft. The texts correspond word for word again for several pages that discuss the District Court's decision and affirm the power of a court to modify a consent decree. Finally, at the midway mark, the opinions go their separate and diametrically opposite ways.[20] At that point where the texts diverge for good, the draft frames the issue in this way:

> Power to modify existing, we are brought to the question whether the events that have intervened between February 1920 and January 1931, give fair support to the conclusion that in respect of the sale of groceries and other enumerated articles the restraints believed to be necessary in 1920 are unnecessary now.

Cardozo finds that one major event has intervened since the original decree was entered--"the monopoly, rampant in 1920, is lifeless today." He then describes the District Court's interpretation of the role of the prohibition on the sale of groceries:

> The modifying decree goes upon the theory that the prohibition of the sale of groceries was placed in the consent decree in aid of the dominant purpose to disrupt the combination, and that it may not reasonably be continued after that purpose has been attained. To continue it thereafter is to turn the process of injunction into an instrument of punishment.

Shortly afterward, returning to the role of the prohibition, Cardozo accepts the lower court's analysis:

> The only reason for depriving the defendants of the power to sell groceries and kindred articles was to make it certain that the combination then uniting them would be broken up so completely that none of it would survive. The framework of the bill of complaint makes this plain, if it could otherwise be doubtful. The bill informs us that the attempted monopoly of substitutes for meat was conceived by the defendants after competition in meat itself had been effectually eliminated, the one form of combination being complementary to the other. At the time of the first decree excision of these substitutes was an appropriate measure, if an extreme one, whereby to make certain that the combination would be ground to pieces.

Cardozo goes on to weigh the objections raised against allowing the meat packers to deal in groceries:

> The chief voices in opposition have been those of wholesale grocers who would be glad to exclude the defendants from the field they occupy themselves. What they fear, one may be permitted to suspect, is not monopoly. There can be no monopoly while the defendants are active in rivalry and not in concert. What they fear is competition.

From the standpoint of competition,

> the hardship to the defendants is working public damage rather than public gain. The defendants by dealing in other foodstuffs will be enabled so to distribute their "overhead and sales cost as to effect economies in the distribution of meats and other live stock products and of non-meat food products" . . . The normal consequence of these and like economies will be to enable the packers to sell at lower prices and thus to stimulate competition with ensuing public gain.

Finally the new Justice touches on changes in the grocery industry since 1920, when the meat packers had "special advantages" as a result of their "ownership of refrigerator cars." In the process, he portrays this country at the dawn of the present age:

> The finding is that the railroads of the country have so increased the number of these cars that there is ample supply for all who need them, and moreover that the increase in motor trucks and the development of good roads have served to make refrigerator cars less important than they used to be.

These arguments, which would have saved the day for the defendants and which were cited in Justice Butler's dissent, were discarded in the published opinion. Also discarded were some pearls of wisdom:

> It is as true of such an inquiry as of the judicial process generally that courts will act on probabilities, and will not stand aloof till probability gives way to certainty. If they did otherwise, they might hold back forever.

At the point where the texts diverge, the printed ruling frames the issue quite differently:

> Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.
>
> The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open.[21]

Instead of asking what has changed between 1920 and 1931 in the meat-packing and grocery businesses, he focuses on the meat packers' renunciation in the original decree.

Cardozo cites two reasons for the renunciation, and concludes that those reasons persist "with undiminished force today."[22] The first reason in 1920 was the meat packers' ownership of refrigerator cars, which put them

> in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now. Their capacity to make such distribution cheaply by reason of their existing facilities is one of the chief reasons why the sale of groceries has been permitted by the modified decree, and this in the face of the fact that it is also one of the chief reasons why the decree as originally entered took the privilege away.[23]

In his draft, Cardozo accepted this reasoning himself, arguing that a modification of the decree would increase competition in the grocery business. He also found that changed conditions had reduced the significance of the refrigerator cars.

More important, Cardozo changed his mind about the rationale for the renunciation in the original decree. In the draft, he viewed the prohibition on the sale of groceries as facilitating the demise of the meat monopoly. In the published opinion, Cardozo explicitly rejected this reading of the decree:

> It was framed upon the theory that even after the combination among the packers had been broken up
>
> and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether. It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up.[24]

At this point, Cardozo returns to the issue of the meat packers' consent, the point where

the draft and published opinion diverged:

> We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court.[25]

At the very end of the opinion, Cardozo sounds this theme again:

> Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.[26]

Although Cardozo begins by affirming a court's "power to modify" a consent decree, he concludes by virtually withdrawing that right. The new Justice codifies this restriction near the end of the opinion in a passage that became the foundation for the Cardozo test on the modification of consent decrees:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[27]

I have sought desperately to solve the mystery of this 180-degree shift by the new Justice. I contacted Professor Andrew L. Kaufman of Harvard Law School, who is writing a biography of Justice Cardozo, to see whether there were any relevant documents in Justice Cardozo's papers that might shed some light on what transpired. Unfortunately, it appears that Cardozo's papers were either destroyed during his lifetime or after his death in 1938. At my request, Professor Kaufman checked the Brandeis archives at Harvard Law School--again to no avail. I was not surprised by the lack of results, because I knew from experience that Brandeis never had a secretary, wrote everything in longhand, and thus would not have retained any copies of his correspondence with other Justices.

What about the rest of the Court? Unfortunately, Cardozo's and Brandeis' docket books, which would reveal the original vote of the Justices in conference, no longer exist. As far as I know, the docket books of the four other Justices who sat on *Swift* have been devoured by time as well. Cardozo's handwritten draft contains no indication of any dissent, suggesting that originally all six Justices concurred in permitting the modification of the decree. If that be the case, four judges, including Cardozo, must have changed their minds to produce the 4-2 ruling against modification. Another possibility is that Cardozo and one other Justice had joined Butler and Van Devanter, the eventual dissenters, in the original decision. If Cardozo alone had joined them and the Court had voted 3-3 in conference, the District Court's modification would have been affirmed by a divided court and Cardozo would have never written the draft.

One can only speculate, but I suspect that Brandeis persuaded Cardozo to change his mind, for it was Brandeis who had rejected the first attempt by the meat packers to vacate the decree in 1928.[28] The defendants, represented by the future Chief Justice, Charles Evans Hughes, had sought to invalidate the decree on the basis of a series of highly technical and tenuous claims, all of which were summarily rejected in Brandeis' unanimous opinion. In addition, some of the language that made its way into Cardozo's printed opinion is quite harsh--more in keeping with Brandeis' style than Cardozo's.

As for the other Justices who voted against modifying the decree, McReynolds was not on speaking terms with Brandeis and was consistently unpleasant to Cardozo, but he was a firm believer in vigorous antitrust enforcement. Thus it is not difficult to understand why he would have gone along with the change. Justice Roberts' position is enigmatic and I have been unable to locate any material that would be enlightening on his original vote or on the vote that he cast in favor of the revised opinion.

The changes wrought by the revision have had a disastrous effect on the law governing the modification of consent decrees. Cardozo imposed a severe standard that rarely could be satisfied. As a result, changes in a decree, no

matter how necessary or desirable, could not be obtained for a long time. I reviewed the applicable case law in *Consent Decrees: Contracts, Judicial Act, Neither or Both*.[29] The courts have struggled with the Cardozo standard and essentially have discarded it in recent decisions.[30] As for the meat packers, they tried again in 1960 to have their decree modified, and were again rebuffed.[31] Finally, in 1975, after most of the meat packers had either gone out of business or had lost out in the race against new competitors, the Government agreed to the abrogation of the decree.[32] The facts cited in the Cardozo draft have been proved correct by the later economic developments, and the obstinate refusal of the Supreme Court to remove the fetters imposed by the consent decree has been proved unwarranted.

This opinion and *Nixon* shattered two presuppositions I had about Cardozo. This shy and self-effacing gentleman selected a blockbuster as his maiden effort as a Supreme Court Justice, and the author of *The Nature of the Judicial Process* failed in the published ruling to permit pragmatic considerations to overcome the anti-business ideology that characterized antitrust enforcements.

Endnotes

[1]B. Cardozo, *Law and Literature and Other Essays and Addresses, in Selecting Writings of Benjamin Nathan Cardozo* 339 (M. Hall ed. 1947).

[2]Letter From Chief Judge Benjamin N. Cardozo to Professor Milton Handler (July 29, 1930) (copy on file at *Cardozo Law Review*).

[3]B. Cardozo, *The Nature of the Judicial Process* (1921).

[4]Letter from Chief Judge Benjamin N. Cardozo to Professor Milton Handler (Nov. 23, 1930) (copy on file at *Cardozo Law Review*).

[5]See Burlingham, Harlan Fiske Stone, 32 A.B.A.J. 322, 323 (1946), for an abbreviated account of Stone's selection.

[6]See Kaufman, "Cardozo's Appointment to the Supreme Court", 1 *Cardozo L. Rev.* 23, 40-41 (1979).

[7]Letter from Justice Benjamin N. Cardozo to Professor Milton Handler (Feb. 28, 1932) (copy on file at *Cardozo Law Review*).

[8]See B. Cardozo, *supra* note 1, at 355 ("It is a false and cramping notion that cases are made great solely or chiefly by reason of something intrinsic in themselves. They are great by what we make of them.").

[9]*May* v. *Henderson*, 268 U.S. 111 (1925) (summary proceedings in bankruptcy setting aside a payment to a favored creditor of the funds of the bankrupt.).

[10]286 U.S. 73 (1932).

[11]*Id.* at 84.

[12]*Id.* at 83.

[13]*Id.* at 84.

[14]Federal Food, Drug, and Cosmetic Act, ch. 675 Sec. 1, 52 Stat. 1040 (1938) (current version at 21 U.S.C. Secs. 301-92 (1982 & Supp. IV 1986)).

[15]See Rauh, Siegel, Doskow & Stroock, "Recollections of Four Cardozo Law Clerks", 1 *Cardozo L. Rev.* 5, 16 (1979).

[16]See B. Cardozo, *supra* note 1, at xvi.

[17]*Id.* at xvii.

[18]286 U.S. 106 (1932).

[19]*Id.* at 111.

[20]Quoted portions of the handwritten draft are reprinted in the Appendix following the original version of this Article.

[21]*Id.* at 115.

[22]*Id.*

[23]*Id.*

[24]*Id.* at 116.

[25]*Id.* at 116-117.

[26]*Id.* at 119.

[27]*Id.*

[28]*Swift & Co.* v. *United States*, 276 U.S. 311 (1928).

[29]See 2 M. Handler, *Twenty-Five Years of Antitrust* 931 (1973).

[30]*United States* v. *Motor Vehicle Mfrs. Ass'n*, 1982-83 Trade Cas. (CCH) Par. 65,175, at 71,653 (C.D. Cal. 1982); *United States* v. *Carrols Dev. Corp.*, 1982-1 Trade Cas. (CCH) Par. 64,510 at 72,823-24 (N.D.N.Y. 1981); cf. *United States* v. *Columbia Artists Management, Inc.*, 1987-1 Trade Cas. (CCH) Par. 67,600, at 60,601 (S.D.N.Y. 1987).

[31]*United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D.Ill. 1960), aff'd, 367 U.S. 909 (1961).

[32]*United States* v. *Swift & Co.*, 1975-1 Trade Cas (CCH) Par. 60,201, at 65,700-06 (N.D.Ill. 1975).

Judging New York Style: A Brief Retrospective of Two New York Judges

Andrew L. Kaufman

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I have been doing some work recently that has led me to consider the contrasting careers of two New York judges. Coming from the same background, they followed very different paths to the same court, the Supreme Court of New York, and, more importantly, they brought widely divergent attitudes toward judging. One, whom I shall call Judge A for the time being, was a nineteenth-century judge. The other, Judge B, was a twentieth-century judge, although he began practicing law in the nineteenth century.

Judge A came from an old American family, one that was in the country before the Revolution. Early association with one of the prominent practitioners of the day plus family and political connections combined to advance his career rapidly. The family connections derived mainly from his marriage to a socially prominent family. His wife was the daughter of the Vice President of the New York Stock Exchange, a man who was also a prominent lay religious leader and philanthropist. Judge A's political career was in Democratic New York City politics. He allied himself with up and coming Tammany Hall politicians--first Mayor Fernando Wood, perhaps the first of the nineteenth-century urban political bosses, and then with the even more notorious Boss Tweed. These alliances led him to election first to the Court of Common Pleas and then to the Supreme Court of New York.

Judge B was also the descendant of an old American family, both branches of which had been in this country before the American Revolution. But he came from a family that had been disgraced; his father had resigned from the bench just in time to avoid impeachment. Nevertheless, his father had resuscitated his practice and provided for his family. Judge B's preparation for college was the work of his tutor, Horatio Alger, and Judge B performed spectacularly at Columbia College and Law School. He never married but devoted himself almost exclusively to his practice, which increasingly consisted of handling difficult cases at the trial and appellate level for his fellow lawyers. He was a lawyer's lawyer.

I can testify from having read dozens of his briefs that he was well cast in that role. That, however, was his only professional role. Judge B stayed miles away from politics and took very little part in the extracurricular life of the profession. Nevertheless he became rather well known in what is today called the elite portion of the bar. Thus, when one of the recurrent anti-Tammany coalitions was stitched together in 1913, Judge B was selected as nominee for a Supreme Court judgeship to help round out the ticket.

By now you may have figured out the identity of our judges. Judge A was the father of Judge B. Judge A was Albert Cardozo, remembered, if at all, as one of the three judges whose ouster was one of the main spurs to the formation of the Association of the Bar of the City of New York. Judge B was his son, Benjamin N. Cardozo, revered as a saintly and progressive judge, indeed one of the first of our "modern" judges.

The contrast between the judicial careers of father and son is not wholly captured by the contrast between dishonesty and integrity, although parenthetically I must say that I do believe that Albert Cardozo, good family man and pillar of his congregation, was dishonest. The only charge that appears from the record of the hearings looking toward his impeachment to have been demonstrated is that he appointed his nephew to receiverships hundreds of times and often took a fifty per cent share of his fees. However, to capture the contrast between father and son one must go further and examine their contrasting attitudes toward law, toward judging. An editorial from the *New York World*

urged the election to the New York Supreme Court of Judge Cardozo:

> One of the marked characteristics of the present age is the part taken by the people in the formation of public sentiment, and the determination of public questions. We are ceasing to have public men as acknowledged leaders; great progressive ideas arise, not from individuals, but from the public at large. A judge now must... possess a sympathy with the active members of the bar around him, as co-operators toward the common end of doing justice to the litigants, and advancing the progress of the science to which their labors are given. It is this that enables the judge to take... every new idea, and saves him from a blind adherence to obsolete rules, and to principles that have lost their application.... There is no more delicate and difficult task than in adjusting old principles to the new Cases, presented by the rapid transitions of the business of men.
>
> Under our present system...we have better judges and a better growth of law than in any preceding age; and it is entirely in accordance with the public good to commit our interests to the class of good judges of whom the one now presented to the public is a brilliant example.

The editorial was written in 1867 urging the election of Albert Cardozo although with the advantage of hindsight we know that it was the son and not the father who lived up to the promise of the editorial. The proof with respect to Albert's judicial performance is more elusive on this issue than with respect to his personal behaviour. It is hard to know why judges decide as they do. But the suspicion is strong that Albert Cardozo behaved in accordance with the worst manifestation of the notion that law is a part of politics.

A brief catalogue is in order. The constitutionality of the Excise Law, diminishing the hours for sale of liquor and opposed by Albert's supporters in the German community, came before him. He held the statute unconstitutional and then resisted efforts to facilitate speedy review. At the same time, he demonstrated his awareness of the political consequences of his decision when he wrote a colleague that upholding the statute would have meant his own political death. He added that the judges who had voted to uphold the law would ultimately be condemned by the people--although he also proclaimed that he would have boldly upheld the law if he had had different convictions. Fraud in the execution of a lease of property to the City by his old mentor Fernando Wood was alleged. Cardozo refused to permit the City to attempt to prove it on the ground that the allegations set forth insufficient facts. In the struggle between Gould and Fisk on the one hand and Commodore Vanderbilt on the other for control of the Erie R.R., injunctive relief was needed by Gould and Fisk to set aside the order of the regular judge handling such matters.

Cardozo issued the order even before his term to hear such matters began.

Later, the attempt of Gould and Fisk to corner the gold market failed, leaving them

Albert Cardozo's alliances with Tammany Hall politicians such as Boss Tweed helped get him elected to the Supreme Court of New York. He used his position to advance his political fortunes and those of his allies.

Benjamin Cardozo was two years old when his father resigned from the bench to avoid impeachment. He eventually joined his father's old law firm, but his approach to the judicial role differed markedly from his father's.

with enormous obligations to purchase gold.

An ingenious scheme was hatched to prevent enforcement of these contracts by having the Gold Exchange Bank, the clearing house for transactions on the Gold Exchange, thrown into receivership. Thomas Shearman, a leader in the attack on the massive judicial corruption in New York City, drew the papers, including a blank affidavit, for a plaintiff yet to be found, stating that unnamed officers and agents of the Bank had admitted that it was insolvent and paying favored creditors. Shearman then called in another leader of the bar, and more importantly the partner of Oakey Hall, Mayor of the City, to present the papers. Who consummated the outrageous procedure? Albert Cardozo. Other examples could be given but perhaps I have said enough to make my point. If the public perception and common sense inferences are justified, then the career of Albert Cardozo is an example of judicial law-making gone wrong, of the perversion of the idea that judge-made law must take account of the facts of political (and social and economic) life. His way was to use the judicial role to advance the political fortunes of himself and his allies.

Describing and defending the proper judicial role was the life work of Albert's son, Benjamin. It would be a mistake to say that he consciously set out to take a different path from Albert. Benjamin was two when his father resigned from the bench and we simply do not know how much he came to know of the details of his father's judicial activities except for his resignation and accompanying disgrace.

Benjamin did not turn his back on the past entirely--although his father was dead when he was admitted to the bar, he did join his father's old law firm. But it is not Benjamin Cardozo's 23 years of practice that are relevant here; it is his approach to the judicial role, which stands in sharp contrast to that of his father.

Benjamin Cardozo presents us with two views of the judge--one from the lecture platform and one from the bench. In some ways the words from the podium have dominated the words from the bench. The Cardozo we honor is to a large extent the Cardozo of *The Nature of the Judicial Process*. At a time when the notion that judge-made law was regarded by some as dangerously radical, Cardozo eloquently defended the proposition that on some occasions at least it is appropriate and necessary for judges to make new law. In so doing, he addressed two questions that are still being heatedly debated: are the sources of this new judge-made law subjective or objective, and is there a difference between judicial and legislative law-making?

Cardozo's treatment of the first question was typical of his approach to such questions. He began by down playing the importance of the issue and ended by concluding that judging contains elements of both. He down played the issue by stating that sometimes "the controversy has seemed to turn upon the use of words and little more. " But he then concluded that while our jurisprudence commits us to the objective standard, the "perception of objective right takes the color of the subjective mind." And where does the "objective right" come from? To what do judges look? "Customary morality." Whose customary morality? That of "right-minded men and women."

That is not a wholly happy choice of words. By referring to right-minded men and women, he avoided the charge that judicial law-making is nothing but an intuitive Gallup poll. But he left himself open to two other charges: that modern horror of horrors, elitism, and the further accusation that the term "right-minded men and women" is simply a euphemism for the judge's own values. Cardozo responded by emphasizing the nature of the restraints on judges against imposing their own values. He asserted, and it is the linchpin of his belief in judicial law-making and the rule of law, that the judge's power of innovation is "insignificant ... when compared with the bulk and pressure of rules that hedge him on every side." A judge

> legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart.... [R]estrictions... are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.

We may say that these are vague and general precepts, so vague indeed as not to restrict judges from doing anything they wish.

Perhaps. But they were too vague for Cardozo and for most judges of his generation. There was a felt sense of restriction.

Indeed, his explicit recognition of the arguments for innovation was a revolt against a perceived overrigid conception of restriction. The trick was to see the possibility of reform

In 1932 a strong national movement began for the appointment of Benjamin Cardozo, Chief Judge of the New York Court of Appeals, to replace Justice Holmes on the Supreme Court. Republican President Herbert Hoover yielded to public pressure and nominated Cardozo, a Democrat.

of judge-made law while keeping some valid sense of viable restriction in the name of "the rule of law." For that was the essence of Cardozo's view of what truly distinguishes judges from legislators.

No one has done much better in describing the process of choice in the difficult cases than what Cardozo spoke 65 years ago: "History or custom or social utility or some compelling sense of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge and tell him where to go." The emphasis in reading the Cardozo of *The Nature of the Judicial Process* has been on his defense of innovation as captured in his reference to the "compelling sense of justice" and "the pervading spirit of our law." But that is because not enough attention has been paid to the rest of the lectures, to the references to the importance of logical analysis, history, and custom; perhaps that is because we have thought that Cardozo did not really believe that they were so important. To test that judgment we should take a quick look at his judicial performance.

It is here that I have found my biggest surprise. For here, at least to today's eyes, the major and minor features of *The Nature of the Judicial Process* are changed--if not reversed, they are at least equalized. Cardozo the innovator dims. Cardozo the judge obeying his perceptions of the limitations of the judicial role emerges.

For many of us, the Cardozo we remember is the Cardozo of *MacPherson v. Buick* and other like tort cases and the Cardozo of all those wonderful contracts cases where he seems to spin contracts and consideration out of the air so to speak. But to reread those cases all together is to find no clear pronouncement of new doctrines but rather holdings supported by so many qualifications and considerations that it is hard to say which are crucial.

We are told, however, that Cardozo was the master of using qualifications and special facts to advance doctrine case by case until the qualifications and special facts have disappeared and doctrine has advanced a long way. Not so. When we read all the cases, we find that Cardozo believed the qualifications, believed in the ad hoc nature of his great decisions; we

Benjamin Cardozo (left) with Chief Justice Charles Evans Hughes at his swearing in. In his lectures *The Nature of the Judicial Process* Cardozo had argued that it is sometimes necessary and appropriate for judges to make new law.

find that in fact the cases did depend on all the circumstances he used to distinguish prior cases.

Let me give just a few examples, starting with *MacPherson v. Buick.* That justly famous decision abolished the privity requirement for suits by the ultimate purchaser of a new car against the manufacturer where the probability of danger (not just possibility, Cardozo emphasized, but probability of danger) to the user if the product is defective ought to have been foreseen. Much has been written about Cardozo's subtlety in bringing about an important modernization of tort law.

And yet the modernization was probably less in New York than in any other jurisdiction in the United States, for in New York a series of five cases involving such products as mislabeled medicine, defective scaffolding, and an exploding coffee pot had brought New York very close to the *MacPherson* principle. Thus Cardozo's low-key opinion, virtually devoid of a sense of dramatic change and focusing on the application of general principles of doctrine to new facts, may well be a rather more accurate presentation of his real thinking than has generally been recognized.

Four months after the decision in *MacPherson,* Cardozo had to deal with the *Perry* case. A construction company, in violation of statute, stored nitroglycerin caps in tin boxes marked blasting caps. It placed them inside larger storage boxes in a chest on public property alongside the Erie Canal. One Sunday it left the chest unlocked and open. Two boys stole one of the storage boxes and the next day while they and an eight-year old friend were playing with the contents, the caps exploded killing all three boys. This suit involved only the eight-year old boy and the Appellate Division had affirmed a nonsuit against the plaintiff. For one who believes either that doctrinal advance or sympathy for injured plaintiffs help explain the *MacPherson* language about foreseeability, the outcome in *Perry* should be clear. And Warren Seavey, writing after Cardozo's death about his influence on the law of torts, falls prey to his expectations, stating that the defendant in *Perry* was held liable for the foreseeable consequences of the way it stored the nitroglycerin caps. But Seavey's wish was father to his thought. His statement of the holding is wrong. In fact, Cardozo's opinion actually affirmed the nonsuit, picking up language from *MacPherson* that while it was possible that the box might be stolen, it was not "probable," and probability was the test of foreseeability. It is hard to square *Perry* with an expansive view of *MacPherson.*

Then there is the well-known *Hynes* case, where Cardozo reversed a judgment in favor of a railroad when a boy was injured by high tension wires falling from the railroad's poles notwithstanding that the boy was trespassing on the railroad's property while preparing to dive into the public waterway--and *Wagner,* where Cardozo reversed another judgment in favor of a railroad when a passenger was injured while attempting to rescue his cousin, who had been thrown from the train through the railroad's negligence. On the other hand, there is the most famous railroad case of all, *Palsgraf,* where Cardozo took a judgment away from a poor woman and formulated his theory that an actor is liable only for violation of a duty owed to the particular injured party and not for violation of a duty owed to someone else. The fact is that for every Cardozo opinion creatively advancing tort law beyond the old doctrine to find liability for an injured party, there is another where Cardozo quite deliberately refuses to do so. He seemed to have been moved by the desire not to have negligent

Cardozo is perhaps best remembered for his decisions on contracts cases. Author Andrew L. Kaufman argues that Cardozo's holdings did not advance particular doctrines because he believed that the circumstances and qualifications of each case were crucial.

parties held responsible for all consequences that followed from their carelessness. Such a large scale reformulation of doctrine was for the legislature, not the court.

The same approach is also apparent in a study of Cardozo's contract cases. There is a string of cases taught in most contracts courses that is used to show how he manipulated consideration doctrine to "find" the existence of a contract or to "find" consideration where previously no contract or consideration had been thought to exist. If I jog your memory, you will doubtless recall *Wood v. Lucy, Lady Duff Gordon,* the case where he found that a writing was " 'instinct with an obligation,' imperfectly expressed." If I press even further, you may remember *De Cicco v. Schweizer,* where a parent's promise to their daughter's fiance to pay their daughter a fixed sum of money per year for life in consideration of the upcoming marriage was held enforceable; and *Allegheny College v. National Chautauqua Bank*, where a charitable subscription to a fund named in honor of the donor was held enforceable after her death; and *Jacob & Youngs v. Kent,* where a builder was held to have substantially performed a contract notwithstanding the fact that instead of using the Reading pipe required by the contract's specifications, he used the equivalent Cohoes pipe. All of these cases are used to show Cardozo's commitment to the elevation of a realistic approach to commercial practice over the technicalities of precedent and doctrine.

Yet there is another series of cases less often found in casebooks: *Sun Printing & Publishing Assn v. Remington*, in which Cardozo refused to enforce a commercial contract where the parties had fixed the price for four months and then left future price open but subject to a maximum; or *Murray v. Cunard Shipping Lines,* where Cardozo enforced a provision in a shipping line's passenger ticket that required notice of injury to be given within 40 days notwithstanding the fact that plaintiff spent most of the nine-month period before giving notice in the hospital recuperating from the injury caused by the defendant's negligence and notwithstanding the further fact that the passenger did not have the ticket because the defendant had collected it when he boarded the ship; and finally *Dougherty v. Salt,* where Cardozo allowed oral testimony to refute the recital of consideration in a note given by an aunt to her eight-year-old nephew.

I will not discuss the differences in the details of the cases that were crucial. What is important is that the differences in detail *were* crucial for Cardozo. He had been a practicing lawyer for 23 years and facts were very important to him. That is a matter that has not always been appreciated in the academy. Cardozo was not an avid creator of wildly new doctrine. He was a slow and cautious creator of expansions of old doctrine. He was most creative not just when the justification was strong but also when the doctrinal step to be taken was small. That approach was reinforced by Cardozo's general approach to theory, whether at the more specific level of doctrine or at the more abstract level of legal theory. Cardozo was a person who listened hard to what people were saying, who attempted to find the applicable insights in all positions, who sought to sieve out the rhetorical extremes of positions, and who sought to minimize differences. In short, he was essentially a compromiser, in the best sense, a person who sought accommodation and as much unification as possible in society.

I do not mean to denigrate Cardozo's achievement. At a time when judges were under heavy attack by political progressives for their failure to adapt the law committed to their care to modern needs and also under heavy pressure from within portions of the legal community to adopt an institutional position heavily bound by precedent that would leave change to the legislature, Cardozo spoke eloquently for the former position. But in defending that view, he quite clearly stated that there were many sources of law to which a judge should look, and he named and discussed the claims of logic, history, and precedent. It should be no surprise then that when we look over the sweep of his opinions, we should find that they reflect the effort of the conscientious judge to give scope to all the elements to which he referred as appropriate sources of law. And he was a conscientious, thinking judge whose most important contribution to the art of judging may well have been the demonstration of the continued viability of the common law style of judging--notwithstanding the possibility of gross manipulation of the sort attributed to Albert and, even more importantly, notwithstanding the attacks on the tradition that have taken increasingly complex, abstract, and philosophical turns in our own day.

Columbians as Chief Justices: John Jay, Charles Evans Hughes and Harlan Fiske Stone

Richard B. Morris, Paul A. Freund and Herbert Wechsler

Editor's Note: *In its 1987 Gino Speranzo lectures, Columbia University paid tribute to the three Columbians who served as Chief Justices of the United States.*

John Jay: First Chief Justice
By Richard B. Morris

John Jay was to be the first among equals--serving as Chief of a six-man Court comprising figures politically congenial--assuming the title of the first Chief Justice of the Supreme Court (although the President addressed him as Chief Justice of the United States). In his 78th *Federalist* letter, Hamilton had gone out of his way to reassure his readers that the judicial branch would always be the "least dangerous to the political rights of the constituents," for unlike the other two branches, "it had no influence over the sword or the purse." However, he was careful not to deny to the federal judiciary the power to invalidate "unconstitutional laws."

In those founding days of our republic, the early academic careers of the public officers were not held up to the scrutiny of the press, of Senate confirmation hearings, or of television. Fortunately for Jay, who may have the distinction of being the only Chief Justice to be suspended from college in his senior year. What happened was preserved in the family tradition, while the official record of the college is conspicuously silent on the affair. It seems that a crowd of students smashed a table in College Hall. Dr. Myles Cooper, high Tory and King's College's second president, rushed in and proceeded to interrogate the students one by one. None admitted guilt or knowing the culprit. When Jay's turn came, he denied doing it but admitted knowing who did. He refused, however, to inform against a fellow student. Haled before a faculty committee, Jay looked up his copy of the college statutes and could find no obligation of one student to inform on another. On the other hand, the statutes did enjoin obedience and proper deportment.

Jay was suspended, but an indulgent faculty permitted him to return to college for commencement, and his name appears first on the list of graduates, which included only one other at that time. Jay had already shown himself to be a principled and unbending young man.

No one really knew the exact role the Supreme Court would play when the six judges took their oaths and received their commissions. The Judiciary Act of 1789 had burdened the Supreme Court Justices with the arduous duties of circuit riding, which they early decried, even being prepared to cut their salaries if that burden could be removed--a notion, by the way, seemingly inhibited by Article III, section 1, which states that the judges' compensation "shall not be diminished during their continuance in Office."

In any case, among the Founding Fathers who shaped the destiny of the new nation, John Jay has not received adequate recognition for his seminal contributions as statesman and constitutional expositor. Circumstances have conspired to keep Jay out of the spotlight which has played on the central figures in the great constitutional drama: he did not attend the Constitutional Convention. Unlike other major figures of the time, save Franklin and Hamilton, he never became President (although he did obtain a number of electoral votes for that office.) Yet no one who did not serve in the presidency had the opportunity to distinguish himself in as many different high state and federal offices as Jay. Save for perhaps John Quincy Adams, no one else can claim to have been principal in the negotiation of two major treaties of the United States with foreign nations.

Constitutional historians have not dealt charitably with Jay. His term on the Supreme Court has, as I propose to show, been dismissed as a period of marking time. To take two most recent examples: a recent volume on the early history of the Court is subtitled Antecedents and Beginnings and devotes a mere three out of seventeen chapters to the High Court, 1790-1801, and two chapters to the circuit court,

while the succeeding volume dealing with the Marshall Court, 1840-1815, bears a subtitle "Foundations of Power, John Marshall." This ignores the fact that the foundations of national power were laid in the pre-Marshall Court and were built upon and invested with prestige and boldness of purpose in contrast to the relatively prudent and even non-political course that Marshall steered through stormy waters.

Of all the high Federalists, save perhaps Hamilton, John Jay, a central figure in Confederation years by reason of his post as Secretary for Foreign Affairs, held the most advanced views of centralization, of the subordination of the states to the federal government, and of the separation of powers. He had collaborated with Alexander Hamilton and James Madison in writing *The Federalist*, along with a powerful polemic, *An Address to the People of the State of New York*, published in the spring of 1788, with its trenchant and irrefutable expose of the weakness of the Confederation. In correspondence with Thomas Jefferson and Washington, Jay had previously advocated the separation of powers and checks and balances, and he had persuaded the Confederation Congress to adopt the resolution holding treaties to be part of the supreme law of the land--an injunction to the states later embodied in the supremacy clause of the Constitution.

If Jay's Court rendered relatively few decisions (although the Chief Justice himself handled some 400 cases on circuit), the Justices of the Supreme Court riding circuit took advantage of their confrontation with the local populace to include in their charges to grand juries expositions of the Constitution and the national political scene. Far from feeling that such comments were improper, they deemed it incumbent upon the Court to instruct the public in the essence of the brand new Constitutional system in whose construction they themselves had labored so strenuously. In the early days, Jay's charges, when delivered in the northern circuit, were courteously received; but it took courage to tell an audience of French sympathizers that they should be neutral in their conduct or to tell the host of southern debtors that they were honor-bound under the treaty with Great Britain of 1783 to pay their pre-war debts due British creditors. Taking into consideration the prevailing ignorance about the Constitution and the widespread opposition on the part of segments of the American people to its ratification, the Jay Court felt they were duty- bound to use the grand jury charges as a vehicle to educate and enlighten the nation. In the post-Jay years, Associate Justice Samuel Chase's grand jury charges assumed the character of violent diatribes, and brought about his impeachment.

The issue of separation of powers arose early. In November 1790 Alexander Hamilton, Secretary of the Treasury, submitted to Jay the question as to whether all branches of the government should intervene and assert their opposition to the principle of states' rights recently enunciated by the Virginia legislature. That body, under prodding from Patrick Henry, had condemned Hamilton's proposal for the assumption of the debts as unconstitutional. Hamilton sounded distraught. "This is the first symptom of a spirit which must either be killed or will kill the Constitution of the United States." Hamilton's feverish comment was no more out of character than Jay's cool response. He considered it inadvisable. "Even indecent interference of state assemblies will diminish their influence. The national government has only to do what is right, and if possible, be silent."

When in July of 1793 Secretary of State Thomas Jefferson passed on to Jay a request of President Washington for "the opinions of the judges of the Supreme Court" on various aspects of the executive regulations adopted under the Proclamation of Neutrality, Jay awaited the assembling of the full Court before replying. His answer pointed out that "the lines of separation drawn by the Constitution" provided checks upon each branch of the government by the other. Hence, since they were judges of a court of last resort, they felt it improper to decide extrajudicially on such matters, "especially as the power given by the Constitution to the President of calling on the heads of department for opinions, seems to have been *purposely* as well as expressly united in the executive department." Jay's memorable argument was unanswerable, and ended the notion of extrajudicial opinions. But the doctrine of separation of powers did not deter Jay privately from giving solicited advice to President Washington regarding both domestic and foreign matters, including matters of war and peace. He even wrote a draft of the famous Neutrality Proclamation.

Of Jay's major decisions, his first was his vote in *Chisholm* v. *Georgia* to uphold the suability of states in federal tribunals. *Chisholm* v. *Georgia* was grounded in a suit brought by the executors of a citizen of South Carolina, who

under contract had supplied the State of Georgia with cloth and clothing during the war. When the case first arose in the Georgia Circuit Court, Governor Edward Telfair was served, and entered a plea denying the jurisdiction of the court on the ground that Georgia was a free and sovereign state. After preliminary hearings in Georgia, the case was put on the Supreme Court calendar for August 1792. When the case came up for argument, Georgia again refused to appear; its distinguished counsel, Alexander J. Dallas and Jared Ingersoll, denied the Court's jurisdiction, entering a formal remonstrance which Attorney General Randolph sought to refute. Randolph argued that the Constitutional provision giving the Supreme Court jurisdiction in cases in which a state was a party covered the cases in which the state was the defendant as well as the plaintiff and cited the Judiciary Act of 1789, which empowered the Court to issue all writs necessary for the exercise of its jurisdiction.

Before a large audience the Court rendered its decision in February 1793, the majority upholding its jurisdiction over the case, Iredell alone dissenting. Long recognized as a stalwart adherent of popular sovereignty, James Wilson was equally stalwart in his support of national sovereignty. Wilson's views on the suability of states by private citizens of other states should hardly have come as a surprise, since he had stated these views both at the Pennsylvania Ratifying Convention and in his law lectures at the College of Philadelphia.

But it is the Chief Justice's notion of sovereignty and his exposition thereof in this case which should concern us today. Jay contended that the sovereignty of the country as a whole passed from the *Crown* of Great Britain to the *people* of the colonies under the Declaration of Independence, and that "the people in their collective and national capacity, established the present Constitution." "The sovereignty of the nation is in the people of the nation," so ran his exposition, "and the sovereignty of each state in the people of each state." Thus the Chief Justice anticipated by twenty-six years John Marshall's classic finding in *McCulloch* v. *Maryland* that "the government of the Union then is emphatically and truly a government of the people."

As for the dissenter, James Iredell of North Carolina, the intensity of states' rights feelings and the hostility of the exercise of federal jurisdiction could not be lost upon him. Adopting a narrow construction of the Judiciary Act, which implied that *Congress possessed the power to confer* such jurisdiction but had *actually not done so*, Iredell's dissent was founded on his conception of the *reserved powers of the states*. Clearly Iredell's opinion could find support in Hamilton's cautionary note about the judiciary in *The Federalist*, and in the arguments at the Virginia Convention by James Madison and John Marshall.

And clearly the other states thought so, for *Chisholm* v. *Georgia* burst like a bomb upon an unsuspecting nation, and the majority decision was quickly repudiated by the Eleventh Amendment adopted in 1798.

What is notable and lasting about the majority opinion in *Chisholm* v. *Georgia*, so quickly overruled by Constitutional amendment, is that it raised the crucial question of the base upon which the powers of the federal government rested. Did these powers emanate from the states or from the people as a whole? Jay and Wilson had declared the people to be the source of authority. In the years to come, when the states' rights doctrine threatened the cause of national unity, Jay's position in the *Chisholm* case was continually called to mind and reaffirmed. On the Supreme Court Bench John Marshall asserted the people to be the source of authority in decisions such as *McCulloch* v. *Maryland*; Daniel Webster proclaimed it from the floor of the Senate; and Chief Justice Chase reaffirmed the doctrine in the years following the Civil War. The conclusion of that terrible conflict would finally vindicate Jay's concept, set forth seventy years before, of one national and one people, consisting of "free and equal citizens," with "equal justice for all."

If there was one question upon which the leading framers of the Constitution were united it was on the *obligation of contracts*, and there was widespread opposition to the issuance of paper money by the states and to a variety of moratory legislation on behalf of debtors. Shays' Rebellion, it must be remembered, had only just wound its way down within weeks of the Constitutional Convention. Jay's attitude did not remain in doubt. Sitting on circuit for the District of Rhode Island (long a hotbed of pro-debtor agitation), the Chief Justice handed down a ruling in an unreported case which the court files still preserve. This was the lawsuit of *Alexander Champion and Thomas Dickason* v. *Silas Case*. The suit turned on an act of the Rhode Island General Assembly, passed in

February 1791, allowing debtors a three-year extension to settle accounts with their creditors and for an exemption for all arrests and attachments for such term. The court invalidated the statute on the ground that it conflicted with the obligation of contract clause of the Constitution, and the legislature of Rhode Island concurred meekly in the decision.

On the other hand, the storm over the collection of debts due by Virginia debtors to British creditors made before the war proved more than a tempest in a teapot. The issue involved the provisions of the Treaty of Peace with Great Britain, which provided that creditors shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted. For Jay, as Secretary for Foreign Affairs during the Confederation years, the failure of certain state courts to enforce this treaty pledge provided some justification for England's unreadiness to fulfill her part of the treaty--that is, withdraw from the frontier. Also he had made no secret of his views.

The argument over British debts reached a climax in the notable case of *Ware* v. *Hylton*. Not by coincidence had Jay, in a charge to the grand jury in May of 1793, declared that "debts fairly contracted should be honestly paid." Immediately after this bold charge came the hearing of *Ware* v. *Hylton*. In this case in the Virginia circuit court, Jay's was the minority opinion, the majority holding that the payment under Virginia law to the state loan office covered that portion of the debt represented by the face amount of the certificate, but even the majority refused to accept the defendant's plea that the Treaty of 1783 was not controlling. When the case reached the Supreme Court, Jay had already resigned as Chief Justice to accept the elected post of governor of New York, but the Court unanimously upheld his earlier dissenting view. Justice Chase held that the British treaty must prevail over state laws, for under the Constitution a treaty supersedes all state laws which derogate from its provisions.

In the year 1794, however, this and other controversial issues had clouded relations between Great Britain and the United States. To settle outstanding grievances President Washington dispatched John Jay to the Court of Saint James's on a controversial diplomatic mission. This was a regrettable precedent, for Jay did not resign from the Court until his return from England, and a Justice of the Supreme Court can hardly serve on a controversial diplomatic mission without bringing the Court into politics or raising the implication that somehow such presidential nominations for extrajudicial duties constitute a reward for conduct on the Bench. Jay's acceptance seems inconsistent with his strict views on the separation of powers, but, as he explained it to his wife, the pressing public considerations impelled him "to put duty above ease and domestic concerns." In fact, this meant the longest separation from his beloved wife Sally in their very happy and close-knit marriage.

Jay, as a diplomat in England, had been criticized for settling for relatively minor gains--although the withdrawal of the British Army from the frontier posts hardly falls in that category--but the terms of the treaty divided the nation and spurred an opposition party, which the framers of the Constitution had never contemplated.

Although Jay did not sit in the great Carriage Tax Case, in which the Court rendered its decision interpreting the meaning of the term "direct tax" as used in the Constitution and upholding the validity of the act of Congress, he did as early as 1790, in a unanimous memorandum to President Washington, suggest that one section of the Judiciary Act requiring Supreme Court Justices to sit in circuit was unconstitutional, both as regards the distinction the Constitution makes between judges of the Supreme Court and inferior courts and legislation which, by providing the same salary for two jobs, in effect reduced the compensation of the Supreme Court Justices. Furthermore, the act required the Court to rule on errors of its own members sitting in circuit. Attorney General Randolph was sympathetic, and passed the memorandum on to Congress--which did nothing. In a second protest in 1792, the Court merely stressed hardship and not unconstitutionality. But except for a brief respite at the end of Adams' term, the Supreme Court Justices, whether constitutionally or not, were required to engage in the arduous duties of circuit riding until late in the nineteenth century.

Before leaving Jay's role on the Bench, reference should be made to his landmark decision in *Glass* v. *Betsey*. Speaking for the Court and reversing the decision of the District Court of Maryland, Jay asserted the full power of the United States District Court, under its admiralty jurisdiction, to determine the legality of prize ships brought into ports of the United

States by any foreign nation, in this instance French privateers, and denied the right of any foreign nation, in the absence of treaty stipulation, to establish a court for the exercise of such jurisdiction within the territory of the United States. Charles Warren has observed that "no decision of the Court ever did more to vindicate our international rights, to establish respect among other nations for the sovereignty of the country."

In retrospect, Jay's contribution to the Supreme Court in its formative years takes on significant dimensions despite the paucity of business that came before the tribunal in its early days. He and his associates brought the federal court system in close contact with the people of the states by their arduous circuit riding and relatively crowded dockets.

Although he had been New York State's first Chief Justice, Jay had not practiced law for many years and his decisions do not bear the stamp of a technician in the law. Instead, he is remembered as a creative statesman and an activist Chief Justice whose concepts of the broad purposes and powers of the new nation under the Constitution were to be upheld and spelled out with boldness and vigor by John Marshall. In bringing the states into submission to the federal government, in securing from both the states and the people reluctant recognition of the supremacy of treaties, and in laying the foundation for the later exercise by the Supreme Court of the power to rule on the Constitutionality of acts of Congress, Jay gave bold direction to the new constitutional regime. His tireless efforts both before and during his tenure as Chief Justice to endow the national government with energy, capacity, and scope and to assert the authority of the people over that of the states attest to his vision, courage, and tenacity. It remained for others to spell out the safeguards for individual liberties and the limitation on national power which are so essential to the maintenance of a democratic society in a federal republic. As a humanitarian and civil libertarian (a leading opponent of slavery), John Jay, the patrician, could take pardonable pride in the result.

Jay has been painted by historians and a recent columnist as staunchly aristocratic, a supernationalist who first coined the term "Americanize." I think he deserves a better epitaph, and I can think of no better one than his own words in a letter to Benjamin Rush, penned a few years before he ascended to the High Court: "I wish to see all unjust and all unnecessary discriminations abolished, and that the time may soon come when all our inhabitants of every colour and denomination shall be free and equal partners of our political liberty."

Chief Justice Charles Evans Hughes
By Paul A. Freund

To the dwindling band of us who witnessed Charles Evans Hughes at the center of the Bench, his commanding, magisterial presence seemed preordained by nature. It comes as a surprise, then, to learn that early in his tenure as Associate Justice (1910-1916) he was on the verge of a breakdown, unsure of his capability, thinking of resignation, agitated, a deeply troubled figure whom Chief Justice White, in a late-night walk with him, tried to calm and to reassure. The conventional explanation is that he took his seat without a break and a rest from the crowded final period of his governorship of New York, and that he found early on that he required an annual vacation: he was one of those, like Brandeis, who could do a year's work in eleven months but not in twelve. Hughes himself recognized his need early in life. It was in 1894 that he recorded in his *Autobiographical Notes* that he "discovered" Switzerland.

This explanation, in Hughes' case, implies more than a sensitive nervous system; it signifies a temperament of great intensity, utter immersion in the work at hand, the severest demands on his own powers. As Chief Justice he and his wife declined all evening social invitations except for Saturdays. Their Saturday evenings were booked a year in advance. Efficiency was his watchword. In mid-life he gave up smoking; this, he said characteristically, increased his efficiency twenty-five percent.

He arrived regularly at his office at 8:30, after a brisk walk. He managed with just one law clerk, who was a fixture for a number of years. He never missed a day of the Court's sessions, except for a period of illness in 1939 lasting several weeks. The circumstances are revealing. The Justices were assembled at a celebration of the sesquicentennial of Congress. Hughes was scheduled as a major speaker. He approached the rostrum with faltering steps, and spoke under an obvious strain, without notes. At the end of the ceremony he motioned to his colleagues, "Come on, brethren, we have work to do." It was a Saturday, conference day. Justice Roberts urged the Chief to postpone the

conference, but to no avail. That evening the Hugheses were hosts on their weekly allowable social event. That night Hughes collapsed; a physician was called, and diagnosed a bleeding ulcer.

On the bench his concentration was total. He transfixed counsel with a steady gaze, betraying a readiness to intervene by a flickering of the eyelids. His questions were designed to bring a case into focus. He would say, "Doesn't your case come to this?" Or "Isn't this your real point?" followed usually by counsel's answering "Your Honor, you have stated it better than I could." And, as I will show later, he could rescue counsel floundering under a battering from elsewhere on the bench.

It would be a mistake, however, to picture Hughes as a cold and calculating machine. When he resigned as Associate Justice to run for the presidency in 1916, Holmes wrote of him in a letter to Sir Frederick Pollock: "I shall miss him consumedly, for he is not only a good fellow, experienced and wise, but funny, and with doubts that open vistas through the wall of a nonconformist conscience." This warmer side of his nature showed itself in his role as Chief Justice, to which I now turn.

Those who knew him as Chief Justice, found, at close range, only his neatly trimmed white whiskers to be frosty. I have pertinent testimony from two men who, as it happens, were members of the Senate when Hughes was nominated in 1930, and who voted against his confirmation--C.C. Dill of Washington, known in the West as the father of Grand Coulee Dam, and Hugo L. Black. Some years ago in Spokane I spoke with Senator Dill, who at ninety had total recall. He had voted against Hughes, he said, because Hughes as counsel for private power interests during his interregnum (1916-1930) had advocated private operation of Muscle Shoals and had argued that a licensee of the Federal Radio Commission to operate a radio station enjoyed a vested right, not to be displaced save for fraud or the like. The latter issue reached the Supreme Court in 1933, and Dill, having heard reports that the decision was about to be announced, was in the courtroom, deeply apprehensive. To his happy surprise, Hughes delivered a ringing opinion upholding the Commission's authority to conduct a renewal hearing on a competitive basis. At the adjournment, Dill went to the Chief's chambers, was ushered in, and said, "Chief Justice, I am here to eat crow." Hughes threw back his head and laughed. "Don't you know, Dill, that as a lawyer you do your best for your client, and as a judge you decide in the public interest?" After that, Dill recalled, whenever he presented a constituent for admission to the Supreme Court Bar, Hughes would say to the applicant "You are fortunate to have Senator Dill as your sponsor."

The second witness to Hughes' mellower nature was closer to the daily life of the Court. Near the close of his tenure, Justice Black recalled that early in his service certain columnists (Hughes liked to call them the daily calumnists) wrote that Black was writing dissenting opinions too indiscriminately. The Chief came to him and said, "I hope you are not going to be influenced by what you may have read about your dissenting opinions. Dissents have been the lifeblood of this Court."

Thirty years later, Black was still moved by the episode. It was all the more impressive because Hughes was known to be generally averse to dissents in practice, however much he had lauded them philosophically as the "brooding spirit of the law."

Perhaps the most exacting duty of a Chief Justice is the task of presiding at conference. When I asked Black about Hughes in this role he said simply, "We haven't had anyone like him since." This from one who served under three successors. Justice Brandeis, who retired while Hughes was Chief Justice, was more descriptive. He said, with admiration, "Sometimes our conferences lasted six hours and Hughes would do almost all the talking." Still, Justice Frankfurter asserted, discussion was actually freer under Hughes' strict enforcement of orderly progression among the brethren than in the more at-large speaking tolerated under successors. It evidently took some courage and preparation to contest Hughes' statement and analysis of a case, delivered from scanty notes which he consulted sparingly.

As Chief Justice, Hughes proved to have more effective political sense than he showed as a candidate for President. A supreme test came with President Roosevelt's Court plan early in 1937. Hughes was asked to testify before the Senate Committee, and although inclined at first to do so, was dissuaded by the advice of Justice Brandeis that he should not appear. On the Saturday before the opposition witnesses were to be called, Senator Wheeler went to see Brandeis in the hope of getting a statement. Brandeis said that any statement should come

from the Chief Justice, and when Wheeler protested that he did not know Hughes, Brandeis replied that Hughes knew Wheeler and what he was trying to accomplish. Thereupon Wheeler phoned Hughes, was welcomed at the Chief Justice's house, and arranged that a letter be drafted by Hughes for presentation on Monday. Over the weekend Hughes composed the letter, refuting the administration's claim that the Court needed additional members to cope with its docket, and submitting that more Justices would be counter-productive: more to hear, to confer, to consult, to write, to agree. Probably the most telling part of the letter was the statement that it was joined by Justices Brandeis and Van Devanter, and that although there was not time to consult others, Hughes was confident it had the support of all the members of the Court. Hughes explained the episode at the next conference of the Court, and no complaint was voiced. Nevertheless, in other quarters Justice Stone objected, not without reason, to the gratuitous assertion about those who had not been consulted, and to an oblique advisory opinion in the letter to the effect that for an enlarged Court to sit in panels might violate the constitutional mandate of "one Supreme Court."

When Senator Wheeler picked up the letter late on Sunday, Hughes remarked, pointing to the concurrence of Brandeis and Van Devanter, "They are the Court." They were, of course, the respected senior members of the liberal and conservative blocs on the Court.

Hughes may have been thinking of the occasion in 1935 when he testified in opposition to Senator Black's bill to expedite appeals in certain federal constitutional cases; on that appearance he was flanked by the same colleagues, Brandeis and Van Devanter. The fraternal relationship of Hughes and Brandeis merits some brief attention. When the colleagues of Justice Holmes concluded sadly that the time for his retirement had come, Hughes approached Brandeis to deliver the message to the old warrior. Brandeis countered that the message had best come from the Chief, who acquiesced and carried out the mission. Holmes' law clerk recounted that Hughes left the Holmes house with tears in his eyes, and on the way out met Brandeis coming in, surely not by accident. At the close of several terms, Brandeis had indicated to Hughes that he was ready to retire, but was persuaded by the Chief to continue. It was in the spring of 1939 that Brandeis made the final decision; turning to the clerk of the Court at the close of a session, he said "I'll not be in tomorrow."

A Chief's relations with his colleagues are most subject to strain in the assignment of opinion-writing. If presiding at conference is the most exacting function, assignment is the most delicate. When Hughes was in the majority on a divided Court, he sought to entrust the opinion to a moderate member. In cases of extraordinary moment, such as the Gold Clause cases and the Labor Relations Act decisions, he understandably acted as spokesman. In some instances there were considerations of individual appropriateness. Several cases involving enlarged review of the fairness of criminal trials of Negroes were assigned to Justice Black. The Social Security cases were assigned to Justice Cardozo, even though he was in a minority on the threshold question of standing to sue. The first and ill-fated flag-salute case was assigned to Justice Frankfurter, because of his moving statement at conference on the role of the public schools in fostering a spirit of national unity amid diversity--this despite the advice of Frankfurter and Roberts that the opinion should be taken by Hughes himself. (It would have helped Frankfurter's place in history if their advice had been accepted.)

The assignment process was not without criticism. Justice Stone let it be know that in his view Hughes was self-centered in this regard, keeping too many of the major cases for himself, and also choosing to author decisions for a "liberal" majority while designating others to write for a conservative majority. When the criticism came to Hughes' attention after his retirement, he sought to deflect it by stating that he had wanted to assign the Gold Cases to Stone, but that Stone in conference took a position different from that of either bloc of Justices. (Justice Stone did indeed write a separate concurring opinion, which, in my estimation, was the only completely honest opinion, intellectually, in the whole lot.)

At oral argument, Hughes brought a case into focus and often rescued a counsel from an onslaught from the Bench. In the Ashwander case, preferred stockholders of Alabama Power Company sued to enjoin the company from carrying out a contract with the Tennessee Valley Authority for the sale of properties at Muscle Shoals, on the ground that TVA was unconstitutional. Counsel for the plaintiffs began by luridly describing the plans and programs of

the TVA for the entire Tennessee River and its tributaries. Hughes grew impatient. "Would you mind telling us at once what this suit is, who brought it, and against whom?" Counsel was "just coming to that," but had to be pressured again to state the issue before the Court. It was, he said, "the validity of the program of the Tennessee Valley Authority." To which Hughes countered, "It is the validity of a contract, is it not?" With that, the focus was set, the bounds were drawn, and TVA escaped the first barrage against it.

In the Gold Cases, turning on devaluation of the dollar, Solicitor General Reed was the unhappy target of a bombardment from Justice Butler, who wanted to know whether the government could call a dime a dollar, could make 15 grains of gold the equivalent of 25 grains, could indeed make one grain of gold satisfy a promise to pay the 25 grains. Reed was reduced to saying "I presume it could." At this point Hughes intervened. "Well, the Government could provide for paper money, could it not?" "And is it the effect of the *Legal Tender* decisions that although money may have been borrowed on a gold basis, the Government may provide for repayment on a paper basis?" Mr. Reed was too battle-weary or too painfully honest to appreciate the neatness of Hughes' question. He responded, "Do you mean by 'borrowed on a gold basis' that that was written into the obligation." The rescue operation was thus almost aborted. Hughes tried again. "No, I am not speaking of the gold clause; but I am speaking of the borrowing of money which, at the time it was borrowed, was worth a certain amount of gold, and I am asking if the *Legal Tender* decisions did not have the effect of deciding that the Government could thereafter constitutionally provide for the discharge of that debt in paper money." The words "on a gold basis" were the one perfectly-designed bridge to throw up between the precedents of 1870 and the case at bar; the one formula whose careful ambiguity could temper the shock of repudiation with the shock of recognition.

Justice Brandeis used to say that the way to deal with the irresistible (like the "curse of bigness") was to resist it. I hardly think that Hughes would have made that response. More like Margaret Fuller, he would accept the universe, at least where the issue was one of centralizing power and not of fundamental human rights. A forecast of his views on national power over the economy was provided during his earlier service on the Court, in what was perhaps his proudest opinion, the *Shreveport* case. The Interstate Commerce Commission, to equalize railroad freight rates between equidistant points, had ruled that a carrier must either lower its interstate charges or raise its intrastate rates--despite a provision in the Interstate Commerce Act prohibiting the Commission from regulating intrastate rates. The Commission, Hughes reasoned, was not violating its charter; it was regulating not intrastate rates "as such," but the "relationship" between the two sets of rates. The opinion is doubly revealing--not only for Hughes' sympathetic acceptance of national power, but for his ability to surmount subtly an inconvenient clause or an embarrassing precedent. After all, in a similar vein he sustained a law that forbade employers from discharging an employee for refusing to promise not to join a union (the *Coppage* case), while not overruling a prior decision (the *Adair* case) that had overturned a statute outlawing the firing of employees who joined a union. Yellow-dog contracts, it seems, came in different shades, making it possible to discern more clearly the legitimate claims of organized labor.

It should not have been too surprising that in the New Deal period, even putting aside the danger of President Roosevelt's Court Reorganization plan, Hughes was able to support a state minimum-wage law without overruling the *Adkins* precedent, on the ground that the new law took account of the needs of the employer as well as of the employees. Or that, after joining a majority striking down the wage and hour provisions of the Guffey Coal Act, he could deliver a ringing opinion upholding the collective-bargaining provisions of the Labor Relations Act. Or that, while chastising the government for abrogating gold clauses in its outstanding bonds, sounding like Secretary of State Hughes lecturing Latin American states on the immorality of default, he could nevertheless give victory to the Treasury, exonerating it of any obligation to pay a premium on the bonds, since the bondholders could not prove any "damages"--as if a creditor holding a monetary obligation for an arithmetically determined sum must show "damages" in order to recover. In what was surely the nadir of constitutional law, when a majority ruled invalid under the commerce clause a federal railway pension plan because philanthropy toward ex-employees was unrelated to efficiency of railway operations, Hughes put aside his allergy to

5-4 decisions and wrote an uncharacteristically stinging dissent. If his position on key issues had carried the day in the Court, the Court plan may well have been averted.

True, he joined in overturning the Recovery Act and the Agricultural Adjustment Act, but the former was sinking under the weight of failing enforcement and was due to expire by its own terms in a few weeks, while in the latter case Hughes had tried to base the decision on the curable ground of excessive delegation of power, but was forestalled at conference by Justice Stone, who argued cogently that the principle of congressional ratification of executive action would be compromised by the Chief's suggestion. At all events, Hughes did insist on an espousal in Roberts' opinion of the broad view of the spending power, which proved valuable in the subsequent Social Security case, however paradoxically it was treated in the AAA case itself.

The juridical universe that he accepted, adroitly at times, was not *toto caelo* at odds with that of Franklin Roosevelt. Relations between the two men, both schooled in the political life of Albany, never became embittered. When the Chief administered the presidential oath to F.D.R. for the third time, in 1941, he was tempted to say, he reminisced, "Franklin, don't you think this is getting a trifle monotonous?"

The drama of the Court crisis, which turned mainly on national power over the economy, has obscured the seminal contribution of the Hughes Court in the area of civil liberties and civil rights. The change in 1930 from Taft and Sanford to Hughes and Roberts was one of the identifiable watersheds in the Court's history. A remarkable series of decisions, generally authored by Hughes himself, established new benchmarks in freedom of the press, of speech, and of assembly. Local dictators like Mayor Hague and Governor Huey Long received their comeuppance. Governor Sterling of Texas was held subject to the injunctive power of a federal district court. The reach of *habeas corpus* was extended. Racial segregation in higher education was struck down. These decisions were the doctrinal wellsprings for the post-World War II surge in the Court's guardianship of procedure, participation, and personhood. As the struggles over national power fade into the inevitabilities of battles long ago, these other advances will stand out as the most memorable legacy of the Court under Hughes.

Harlan Fiske Stone
By Herbert Wechsler

Harlan Fiske Stone was an alumnus of Columbia Law School in the class of 1898; that was, however, but the start of his relation to the school. He served as a lecturer in law from 1899 to 1903, adjunct professor from 1903 to 1905, and professor and dean of the faculty from 1910 to 1923, when he resigned to devote himself to full-time practice.

Stone's personal achievement in the classroom was, by all accounts, spectacular. However, during his thirteen years as dean, his targets went beyond establishing a firm tradition of great teaching and attention to the growth of students' minds. What he developed was a complex of ideas concerning what law is and is not, how it could be thought about most usefully, and what it could be made to be. He had a vision of a school that conceived of law as "neither formal logic nor the embodiment of inexorable scientific law" but rather as "a human institution, created by human agents to serve human ends." He sought to recruit a faculty that, seeing law for what it is, would, by their teaching, scholarship and public service facilitate its prudent adaptation as conditions changed or time threw up new problems and new social needs. I do not mean, of course, to represent him as a great reformer; he was not. His concern, which he believed should also be the school's concern, was, in his modest terms, for "law improvement," the enduring task of nurturing the systematic and objective reassessment and refreshment of existing legal institutions. He thought that the then leaders of the bar had failed in the performance of that vital function, as undoubtedly they lamentably had; and he trusted to the schools to fashion future leaders who would understand and would discharge the duties of a great profession. It is not too much to say that the Law School's character in modern times derives, and hopefully will long continue to derive, from Stone's conceptions of law teaching and of law, developed and articulated there well over half a century ago.

Stone's decision in 1923 to devote his energies to full-time practice, a decision motivated at least in some part by his distaste for Nicholas Murray Butler, was promptly frustrated by President Coolidge in 1924. Congressional investigation of the work of the Department of Justice under Harry M. Daugherty, President Harding's appointee as Attorney General, had

investigation of the work of the Department of Justice under Harry M. Daugherty, President Harding's appointee as Attorney General, had uncovered a malodorous condition that could be remedied only by his replacement. Coolidge called on Stone, whom he had known at Amherst, to take on the rescue operation, a summons Stone did not believe he could refuse. His appointment, warmly acclaimed in Congress and the press, was followed promptly by the reconstruction that was urgently required. In a bare nine months as the Attorney General, Stone won widespread recognition for the integrity, courage, candor and skill that he displayed in rehabilitating the department. It was not surprising, therefore, that when Associate Justice McKenna retired after long service on the Supreme Court, Coolidge nominated Stone as his successor. The nomination was widely applauded in the Congress and the press, notwithstanding a flurry of opposition led by Senator George Norris of Nebraska, who sought to picture Stone as a representative of Wall Street. When the votes on confirmation were counted in the Senate, only six were cast in opposition. One of these, that of Senator Norris himself, was recanted sixteen years later when Stone was unanimously confirmed as Chief Justice. "In the years that have passed," the Senator said, "I became convinced, and am now convinced, that in my opposition to the confirmation of his nomination I was entirely in error. . . . It is a great satisfaction to me to rectify, in a very small degree, perhaps, the wrong I did him years ago." The statement tells us something nice about George Norris. It tells us even more about the magnitude of Stone's achievement as an Associate Justice in the years from 1925 to 1941.

When Stone came to the Court, the dominant problem of American public affairs was that of marshaling the capacities of government to promote individual and social welfare by ordering the economic forces that industrial enterprise had unloosed. Efforts to fashion constructive legislative intervention had encountered conceptions antipathetic to government that had prevailed for a long time. Such conceptions might be defeated at the ballot box; it was more difficult to overcome them on judicial review by the Supreme Court. Restrictive applications of the due process and equal protection clauses of the Fourteenth Amendment weighed heavily upon the power of the states to formulate protective measures, with further restrictions derived from the negative implications of the commerce clause if the activity was interstate. At the same time, the power expressly conferred on Congress "to regulate commerce. . . among the several states" was interpreted so narrowly that it precluded national action of fundamental economic reach. However the issue might be posed in concrete cases, the protent was that governmental action must confine itself to very modest limits if the judicial test were to be survived.

In the overthrow of this entrenched position Justice Stone played a heroic part. The pioneering work had, to be sure, been done for years by Justice Holmes and Justice Brandeis. That Stone would largely share and strongly fortify their dissenting views was not apparent at the start of his judicial career, but before long became quite clear. By 1929, Chief Justice Taft was voicing his chagrin that, as he put it, Stone "has ranged himself with Brandeis and with Holmes in a good many of our constitutional differences." Justice Cardozo replaced Justice Holmes in 1932 and cast his lot with the dissenters, but that, of course, produced no change in the numerical division of the Court. By 1937, however, in the shadow of the Roosevelt Court Reorganization plan, Chief Justice Hughes and Justice Roberts joined Brandeis, Stone and Cardozo in determining the course of the decisions. As the Old Guard Justices departed in the four succeeding years, to be replaced by Roosevelt supporters, the "historic shift of emphasis in constitutional interpretation," as Stone modestly described what had occurred, transformed the jurisprudence of the Court relating to the issues that had been in controversy for so long.

These issues, it is useful to recall, varied significantly during Stone's long tenure. For roughly the first decade they primarily involved the validity of state attempts to cope with economic problems by regulation and taxation. Thereafter, the issues involved primarily the validity of national attempts to come to grips with problems thought by both the President and Congress to defy an insular solution, the host of measures that derived from the New Deal. Throughout, but especially in the last years, there also were more poignant issues to be faced; the claims of individuals that fundamental areas of personal freedom and autonomy (civil liberty, if you will, and civil rights) were protected against governmental infringement by the Bill of Rights and Civil War Amend-

"as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

Stone's work in dealing with the issues I have noted is embodied in more than 200 opinions for the Court or in dissent that cannot possibly be summarized in a brief paper. It may, however, be instructive to provide some illustrations of the contribution that he made.

1. *State Regulation*. When Stone was appointed to the Court, the majority held fast to the dogma that governmental regulation of prices or of wages was invalid, an impairment of the liberty of contract deemed to be protected by the Fourteenth Amendment. In 1927 and 1928 Stone dissented vigorously on the issue of price, perceiving "no controlling difference between reasonable regulation of price...and other forms of appropriate regulation...," a position that prevailed in 1934 when minimum prices fixed under the New York fluid milk law were sustained. With price regulation out of the shadow, the question of wages remained. That issue came to the Court in 1936 to be turned aside on highly technical grounds that Stone considered insufficient. His dissent protested that "It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent." A year later the battle was over when the Washington minimum wage law was sustained.

From that time forth there was no doubt that whatever lines might ultimately be drawn, the states had regained the power to govern, save as their power might be limited or preempted by the national authority in areas in which it is supreme.

2. *The Powers of Congress.* Prior to the explosive issues engendered by the Roosevelt program, the scope of the great vehicles of national power embodied in the Constitution had not during Stone's service been the subject of important consideration. When the first test of the New Deal came in an attack on the Petroleum Code, the Code was held invalid on the ground of excessive delegation, Justice Stone joining in the judgment. The Gold Clause cases followed with a narrow escape for the government in the case of the government bond, Justice Stone concurring only in result. Promptly thereafter, the Railroad Retirement Act, mandating that the interstate roads establish pensions for their superannuated employees, was held invalid--not only on due process grounds that could be remedied but also on the fatal ground that it was not a regulation of "commerce," with Brandeis, Stone and Cardozo joining in Hughes' powerful dissent. Three weeks later the N.I.R.A. was stricken down, the Court unanimous that the delegation was too wide and that the labor provisions of the Live Poultry Code dealt with a local matter beyond reach of Congress.

The Tennessee Valley Authority Act was, to be sure, sustained at the next term, Chief Justice Hughes writing the opinion, but the Agricultural Adjustment Act fell with a declaration that Congress could not use the national spending power to induce farmers to reduce their crops, agricultural production being the exclusive concern of the states. The Bituminous Coal Conservation Act was next to go on the ground that mining coal also was "production" and not commerce, notwithstanding the dependence of much of the country on its availability and use; labor conditions in the mines were also the exclusive concern of the state. Reading the decisions together, the Social Security Act seemed doomed, and it was difficult to see how the National Labor Relations (Wagner) Act could succeed under the standards by which the Coal Act had failed. Hughes and Cardozo each filed dissents in the Coal case in which Brandeis and Stone concurred. The dissent in the Agricultural Adjustment case was written by Justice Stone, with only Brandeis and Cardozo in support.

Justice Stone's dissent in the case of the A.A.A. marks in many ways the high point of the struggle. Because Congress, it was assumed, could not compel a farmer to reduce his crops, it could not (by a magnificent non-sequitur) "indirectly accomplish those ends by taxing and spending to purchase compliance." So Justice Roberts had reasoned for the Court. The position was ridiculed by Justice Stone:

> The government may give seeds to farmers but may not condition the gift upon being planted in places where they are most needed or even planted at all. The government may give money to the unemployed but may not ask that those who get it shall give labor in return, or even use it to support their families. . . All that, because it is purchased regulation infringing

state powers, must be left for the states, who are unable or unwilling to supply the necessary relief.

Even more significant, however, than Justice Stone's position on the merits was his reminder that the only check upon the Court is "our own sense of self-restraint," that "the conscience and patriotism of the Congress and the Executive" are also "a restraint on the abuse of power," and that "interpretation of our great charter of government" leads to destruction when it "proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any of the three branches of government."

This was more than an answer on the specific issues of the case. It was a frontal charge to the a majority of the Court. In the struggles that followed in the Congress and the country, it was the battle cry of the attack.

The story moves quickly thereafter. Early in February 1937, the President proposed his Court Reorganization Plan in a message to Congress; it would have authorized the President to appoint, with the consent of the Senate, an additional Justice of the Supreme Court for each Justice over seventy years of age who did not retire on full salary, save that the number of Justices could not at any time exceed fifteen.

At the height of the great debate upon the plan, the Court sustained the collective bargaining provisions of the Railway Labor Act in an opinion by Justice Stone. Two weeks later the National Labor Relations Act survived the judicial test, Chief Justice Hughes writing the opinions of five members of the Court. The judgments sustaining the Social Security Act followed, Cardozo writing in support of the federal statute and Stone in support of the enactment of the state.

Decisions of the next few years made clear how far the terms of settlement of the great crisis finally accorded to the national authority the powers that a modern nation needs. One of the most important of these judgments was Stone's opinion in the Darby Lumber case in 1941, sustaining the Fair Labor Standards Act of 1938. Federal authority, he held, may deal directly with the conditions of productions for interstate commerce. The old Child Labor Act decision of 1918, *Hammer* v. *Dagenhart*, in which Justice Holmes filed his great dissent, was with much satisfaction overruled. The opinion finally rejected the idea that radiations from the Tenth Amendment limited the scope of national authority. The amendment reserved what was not delegated but did not circumscribe the delegations.

In a very different field from commerce, Stone affirmed in *United States* v. *Classic* the power of Congress to penalize abuses in the conduct of primaries to select candidates for federal office, specifically, the denial of the right of a qualified elector to vote. The decision laid the predicate for the later ruling forbidding the long-standing exclusion of Negroes from Democratic primaries in the South, a crucial step in the modern enfranchisement of blacks and the political rejuvenation of a vital portion of the country.

It would distort Justice Stone's participating in the reformulation of constitutional doctrine to epitomize his contribution in terms of the vindication of government alone. For it is the paradox of the period that new areas of constitutional protection were emerging even as the power to govern was being sustained. Thus the First Amendment freedoms of religion, speech and press were held, with Stone's support, to be protected against action of the states by the due process clause of the Fourteenth Amendment and were accorded a progressively expansive meaning.

Stone wrote little in this field but what he wrote was of immense importance, culminating in his lone dissent in the compulsory flag salute case of 1940, which became the judgment of the Court in 1943. The Constitution, he admonished, "expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist." That moving statement, made nearly a half-century ago, assuredly epitomizes the main thrust of constitutional development and exegesis in our time.

Any appraisal of the influence that courts or judges of the past have exerted on the future is certainly a problematic venture. I make bold nonetheless to say that the fact that the power to govern is unchallenged now in areas where government is sorely needed, that our federalism is more viable than it once was, that civil rights and civil liberty are more secure, may be attributed in part to the persuasiveness of Stone's opinions in his 21 years of service on the Supreme Court.

F.D.R.'s Court-Packing Plan: A Second Life, A Second Death

William E. Leuchtenburg

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The story of Franklin D. Roosevelt's Court-packing plan is a twice-told tale.[1] Every history of America in the twentieth century recounts the familiar chronicle--that in February of 1937, FDR, in response to a series of decisions striking down New Deal laws, asked Congress for authority to add as many as six Justices to the Supreme Court, only to be outwitted by the Court itself when Chief Justice Charles Evans Hughes demonstrated that Roosevelt's claim that the Court was not abreast of its docket was spurious; when the conservative Justice Willis Van Devanter retired, thereby giving the President an opportunity to alter the composition of the bench; and when, above all, the Court, in a series of dramatic decisions in the spring of 1937, abandoned its restricted conception of the scope of the powers of both state and national governments. In short, it is said, Roosevelt's Court-packing plan went down in a defeat because, in the catchphrase that swept Washington that spring, "a switch in time saved nine."[2]

All true enough. But what this familiar account leaves out is that Roosevelt, apparently vanquished in the spring of 1937, brought out another Court scheme--little different from the first--in early summer, and, despite all that had gone on before, came very close to putting it through.

One can well understand, though, how the traditional version has found such acceptance, for by early June of 1937 Roosevelt appeared to be thoroughly whipped. After the events of May--Van Devanter's announcement, an adverse vote by the Senate Judiciary Committee, the Social Security decisions[3]--each poll his agents took of attitudes in the Senate showed the same result: the President no longer had

President Franklin D. Roosevelt and members of his Cabinet posed for their first photograph in 1933. Front row (left to right): Secretary of War George H. Dern, Secretary of State Cordell Hull, the President, Secretary of the Treasury William H. Woodin and Attorney General Homer S. Cummings. Back row: Secretary of Agriculture Henry A. Wallace, Secretary of the Interior Harold Ickes, Secretary of the Navy Claude A. Swanson, Postmaster General James A. Farley, Secretary of Commerce Daniel C. Roper, and Secretary of Labor Frances Perkins.

the votes to enact his Court bill.[4] On Capitol Hill, the debonair chairman of the Senate Judiciary Committee, Henry Fountain Ashurst, who was covertly opposed to the legislation, was heard humming an old tune: "Massa's in the Cold, Cold Ground."[5]

With his plan foundering, Roosevelt heard still more dismaying news: The Vice President was skipping town. At the end of a Friday afternoon Cabinet meeting, John Nance Garner, who was counted on by the President to hold party regulars in line, revealed abruptly that he was going home to Texas that very weekend and that he would be away for quite a while.[6] Over the weekend the Vice President tossed a fishing rod into his sixteen-cylinder limousine, told his wife to climb in, and directed his chauffeur to head for the Southwest.[7] His departure created a sensation, for it marked the first occasion in more than a third of a century that Garner had left the capital while Congress was in session.[8] Though it is by no means clear that the Vice President's departure was related to his sentiments about Court-packing, his behavior flashed a signal to other Democrats in Washington: that one did not have to put up any longer with FDR's exotic ideas and even more exotic advisors, that it was perfectly all right, good for the country and even good for the party, to turn one's back on the White House.[9]

Two days after Garner took French leave, Roosevelt received a much bigger jolt: the long-awaited adverse report of the Senate Judiciary Committee.[10] Of the ten Senators who signed the document, seven came from FDR's own party, but almost from the opening word the report showed the President's proposal no mercy. The plan, the report said, revealed "the futility and absurdity of the devious."[11] An effort "to punish the Justices" whose opinions were resented, the bill was "an invasion of judicial power such as has never before been attempted in this country."[12] If enacted, it would create a "vicious precedent which must necessarily undermine our system."[13]

Without ever directly saying that Roosevelt was another Hitler, the report called attention to "the condition of the world abroad" and maintained that any attempt to impair the independence of the judiciary led ineluctably to autocratic dominance, "the very thing against which the American Colonies revolted, and to prevent which the Constitution was in every particular framed."[14] Consequently, the report concluded, "[w]e recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle."[15] In a final thundering sentence that, before the day was out, would be quoted in every newspaper in the land, the report ended: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[16]

Senator Henry Fountain Ashurst (D-Arizona) was Chairman of the Senate Judiciary Committee when it conducted hearings on the bill to enlarge the Supreme Court. On March 11, 1937 Sen. Ashurst greeted Assistant Attorney General Robert H. Jackson (left) as he arrived at the Capitol to testify before the Committee. Sen. Ashurst covertly opposed Roosevelt's scheme.

Recognizing that a document signed by so many prominent Democrats was an immense boon to their cause, opposition organizations saw to it that the pamphlet had the widest possible circulation. A committee headed by the publisher Frank Gannett, which got hold of the document three days before it was issued, airmailed a copy to every daily newspaper in America before the release date; Methodists hostile to the plan sent copies to more than one hundred thousand clergymen.[17] The Government Printing Office soon found that it had a runaway best seller. Thirty thousand pamphlets were sold to the public in less than a month while Congressmen gobbled up another seventy thousand for free distribution.[18]

The report gained much of its power from its stinging invective. The constitutional commentator Burton Hendrick observed: "The gentlemen who wrote this Report give the President little credit for sincerity. . . . The accusation is one of the most formidable ever framed against an American President."[19] In like manner, a newspaper correspondent wrote: "History-minded persons who have delved into

the records were unable to discover an instance where a President was so scathingly indicted in a congressional committee report." The Senators, he said, plainly implied that the President had practiced deceit.[20]

Since the seven Democrats who signed the report included seasoned veterans of party warfare, it seemed reasonable to suppose that they had deliberately chosen to express their views in a way that would provoke a clean break with the President. In attacking Roosevelt's motives and in refusing to concede any merit whatsoever to the bill, they had chosen a brutally divisive tactic. Nobody expected the President to forgive them for their words, however much he might have excused their deeds. "No more harshly worded document was issued forth. . .within the memory of the present generation in Washington," wrote the Boston Herald's Washington correspondent. "There are no involved sentences--all are direct, hard and intentional blows. . . .If the so-called conservative wing of the Democratic party persists in bucking the President on his every move from now on, the adverse committee report may well prove their document of secession."[21]

Delighted by all this evidence of internecine bickering, Roosevelt's hardcore opponents believed that, at long last, they had him on the run. A new Gallup survey found that support for judicial reform had been sliding at the rate of about one percent a week down to a new low of forty-one percent.[22] FDR's opponent in the 1936 campaign, Alf Landon, wrote: "His right wing is smashed and in retreat[;] his center is confused and wavering[,] his left wing advanced so far it is out of touch with his center,"[23] and the columnist Raymond Clapper jotted in his diary: "This seems most serious ebb of Rvt [Roosevelt] sentiment since he took office."[24] As adjournment fever swept Capitol Hill, the administration feared it could not withstand the movement to table the Court legislation and pack up and go home.

At Whitehall, British Prime Minister Anthony Eden was kept abreast of events by dispatches from Sir Ronald Lindsay, His Majesty's ambassador to Washington.

To many observers it seemed improbable that Roosevelt could salvage anything from the debris. The report, wrote the Kansas editor William Allen White, "delivered the coldest wallop that the President has had to take. He can't stand another one."[25] Five thousand miles away, in London, Anthony Eden received what appeared to be the final verdict. His Majesty's ambassador at Washington, Sir Ronald Lindsay, informed him: "Seven Democratic Senators have committed the unforgivable sin. They have crossed the Rubicon and have burned their boats; and as they are not men to lead a forlorn hope one may assume that many others are substantially committed to the same action. One can only assume that the President is fairly beaten."[26]

But at precisely this point, when his fortunes had sunk to their lowest, Roosevelt brought about an astonishing recovery that breathed new life into the apparently moribund idea of Court-packing. The President understood that if he was to save the Court bill, he had to move quickly.[27] So when the Senate majority leader, Joseph T. Robinson, suggested that the President meet with Democratic officials for a weekend of frank discussion, he readily agreed. Asked which party leaders he wanted to invite, Roosevelt grinned and said every Democrat in Congress was a party leader; all of them should be asked, all four hundred and more of them.[28] Robinson knew just the place: The Jefferson Island Club in Chesapeake Bay, a former bootleggers' hideout that was now a Democratic fish and game club.[29]

On June 16, while Washington continued to hum with talk of the Judiciary Committee report filed two days before,[30] the President, as he had so often in the past, diverted attention

to the White House by announcing to 407 surprised Democratic Congressmen that they were invited to picnic with him over the weekend of June 25. At 9 a.m. that Friday, a flotilla of Navy patrol boats carrying more than one hundred Congressional Democrats and government officials weighed anchor in Annapolis harbor. On each of the next two days, another relay of Congressmen, chosen by lot, was ferried to the island.[31]

When the Congressmen arrived at the island, not knowing what to expect, they discovered that a whiz-bang entertainment had been arranged. They swam in the nude, shot clay pigeons, fished, swapped stories, played pinochle, knocked a softball around, and enjoyed the amenities of the julep room.[32] They sang such sentimental ballads as "The Old GOP, She Ain't What She Used To Be" and "My Sweetheart's A Mule in the Mines."[33] There was even a hog-calling contest.[34] One reporter wrote: "Horrified members of Congress clamped their hands to their ears as three members of the House rent the peaceful air with wails, bellows and u-la-las. The trees were reported to shiver. The waters of the bay quivered and farmers on the mainland barely restrained their pigs from plopping off to a drowning."[35] At long tables on the lawn, Congressmen ate a shore lunch of crabs, potato salad, cold cuts, apple pie, and iced tea. In the afternoon they sought the shade of the clubhouse or drank cold beer under the trees.[36]

The Congressmen found the President in a jovial mood and altogether accessible. For six hours each day he sat in a big chair under a mulberry tree near the water's edge and greeted scores of guests by first name, even those he had never met before.[37] Dressed in old white linen trousers, coatless and tieless, his soft shirt opened at the neck, he seemed completely at ease,[38] and reporters on press boats circling the island could hear his laugh booming across the water.[39]

The Jefferson Island frolic proved to be an inspired idea. Almost every one agreed, noted a correspondent for *The New York Times*, "that the President had done himself a 'world of good.' "[40] Roosevelt, the *Cleveland Press* had remarked before the picnic, "is a gambler for small gains. That is, he never overlooks the slightest chance when engaged in a big legislative battle, as he has often demonstrated. Who can tell . . .that out of his three-day family party he might not clinch the few votes needed to put over a compromise on his court plan. . . ?"[41] By many accounts, that is just what the President did.[42]

After the camaraderie of Jefferson Island, not a few Democratic Congressmen began to have second thoughts about the Senate Judiciary Committee report. Foes of the President had been picturing him as a man consumed by rancor and determined to secure revenge. Instead, the legislators had found a jolly innkeeper who radiated geniality. He had greeted

A jovial Franklin D. Roosevelt relaxed on the Chesapeake Bay at the Jefferson Island Club, a former bootleggers' hideout, to which he had invited all 407 Democratic Congressmen for a weekend of fun and games. James A. Farley (left), Postmaster General and Chairman of the Democratic National Committee, shared a joke with the President. The weekend frolic was a success in that it rallied support for a revised Court bill.

the authors of the vitriolic committee report magnanimously and had given every impression of "a large soul rising above contumely."[43] The Washington columnist Arthur Krock commented:

> The dramatization was perfect; the hero played his role flawlessly; and the audience began to forget his faults and indignantly to recall his aspersed virtues. "It reminded me," said a cynical spectator today, "of what happens in the gallery when, on the stage, a long-suffering son slaps the face of his father. Forgetting the provocation the father gave, remembering only the instinct and precept, the audience turns on the son for going too far."[44]

No longer was the opposition boasting of an early victory. At Whitehall, Anthony Eden now received very different intelligence from His Majesty's envoy at Washington. In a follow-up dispatch Sir Ronald Lindsay informed him:

> The meeting of the Democratic Congress on Jefferson Island...had rather surprising results, for the Roosevelt charm was turned onto them as through a hose pipe and they have returned to the Capital in a far more malleable spirit....The feelings which induced seven Democratic Senators to sign the adverse report...are no longer in fashion.[45]

It was during this period of new found euphoria that the administration put together its revised Court bill. In its new form, the legislation authorized the President to appoint one additional Justice per calendar year for each member of the Supreme Court who had reached the age of seventy-five. (Originally, the age had been seventy, and they could be named all at once.) Since there were currently four Justices seventy-five or over, the bill would empower him to name four new Justices, if none of these men left the bench, as well as one Justice to fill the Van Devanter vacancy, but the total of five could not be reached until the beginning of 1940.[46] Under this so-called "compromise," FDR lost very little. The most immediate effect of the measure would be to permit Roosevelt by the beginning of January, 1938--only six months away--to add three Justices to the Court: one for the 1937 calendar year, one for the 1938 calendar year, and one to fill Van Devanter's slot. The principle of Court enlargement was very much intact.

The prospects for enacting this new bill appeared very promising. All through the month of June, Joe Robinson had been piecing together a majority. At his direction his chief lieutenants--Sherman Minton, Hugo Black, and Alben Barkley--worked the Senate corridors, buttonholing their Democratic colleagues, and, when they sensed someone was weakening, bringing him to the majority leader's office to see if a commitment could be extracted.[47] Robinson and his aides found that a number of Senators were not so hostile to this new version as they had been to the original bill, and the White House brought pressure on others. "Wait until the heat is turned on," FDR's agent on Capitol Hill, Tommy Corcoran, told a Senator in the troubled days after the Judiciary Committee report was released. "What do you mean by turning on the heat?" the Senator asked. With a disarming grin, Corcoran replied, "The heat of reason."[48]

In the final days of June the majority leader held three caucuses, each attended by some fifteen Senators, at which he explained in detail the nature of the new legislation, which was nearing finished form, and implored his fellow Democrats not to desert the leader of their party. He ended each session by stating that he would regard every man in the room as pledged to vote for the revised measure unless someone spoke up on the spot. Only one man did, and he indicated simply that he wanted more time. When the process was completed, Robinson was able to give the President the news he most wanted to hear: he had his majority.[49]

Most independent observers agreed.[50] Though the press was overwhelmingly antagonistic to the proposal, Washington correspondents credited Robinson with some fifty commitments. "[T]he best guessing," wrote Raymond Clapper in his column, "is that the new . . . court-enlargement bill. . .will get through. . . ."[51] Privately, the opposition conceded that these reckonings were correct. In a confidential tally sheet prepared for the leading lobbyist against the Court plan, the publisher Frank Gannett, Nebraska Senator Edward Burke admitted that if the roll were called right away, FDR would wind up the winner, fifty-two to forty-four.[52]

To be sure, the opposition, with its estimated forty-four votes, might well mount a filibuster, but many doubted that a filibuster would succeed. Roosevelt's opponents, who had been charging him with perverting the democratic process, would be in an embarrassing position if they sought to deny the people's representatives in Congress an opportunity to vote and thereby contrived the triumph of the

will of a minority.[53] Nor did no-holds-barred hostilities appeal to party moderates. "Among the conciliatory Democrats," noted *The New York Times,* the filibuster was "losing favor. They have apparently come to the conclusion that the party would not present a pretty spectacle to the country by engaging in that kind of warfare."[54]

A national periodical that had been single-mindedly hostile to Court packing from the start summed up the melancholy situation for its cause. At no time in the history of successful filibusters could the foes of a piece of legislation count so many Senators in their ranks as were aligned against the Court bill, observed *Business Week*.[55] Unhappily, though, the measure still might be adopted. *Business Week* explained:

> [D]espite the size of the opposition, and the ease with which they could prevent a vote being reached by Christmas[,] were they anything like as determined as were the much smaller number who fought Woodrow Wilson on the Versailles treaty, no one [could] be sure of the outcome. Too many of them are not willing to run a real, organized filibuster. Too many of them are uncertain whether they would be justified in the eyes of their consitutents.[56]

When the "Great Debate" on Court packing finally opened in July, a full five months after FDR's original message, a number of commentators thought that Joe Robinson had put together a winning combination. Despite all the talk of the opposition's delaying tactics, the Washington bureau of the *Portland* (Maine) *Press Herald* reported: "General opinion is the substitute will pass, and sooner than expected, since votes enough to pass it seem apparent, and the opposition cannot filibuster forever."[57] Such forecasts, though, rested wholly on the ability of Joe Robinson to bully, persuade, or cajole enough reluctant Democrats to go along with him. Without the majority leader, FDR's cause was doomed.

Robinson knew that a very difficult struggle lay ahead, and he concluded that there was only one way he could prevail--by turning the Great Debate into an endurance contest.[58] As early as May the columnist Mark Sullivan had reported:

> Some of the President's partisans say he'll win on the court issue as soon as he gets the help of a powerful ally, namely, hot weather--and Congressmen want to go home. Grimly they added, 'The White House is air-conditioned; the homes of the Congressmen are not; and Washington in summer is a very hot climate.'[59]

In truth, the prospect of being trapped in the capital through all of July and August and even beyond was enough to make strong men quail, and one-third of the Senate was over

As Senate majority leader, Senator "Joe" Robinson (left) led the fight to approve Roosevelt's Court-packing scheme. This photo was taken years earlier, with Senator Charles Curtis who became Vice President in 1929.

Senator Royal S. Copeland, (left), an anti-New Deal Democrat from New York, was the only physician in the Senate. His warnings to legislators about the danger of Washington's summer heat prompted New Dealers to nickname him "the ancient mariner." Here he inspects a ventilating fan in the Senate chamber while R.H. Gray, Chief Engineer of the Senate, looks on.

Senator Sherman Minton, a Democrat from Indiana, received a threatening letter--containing a bullet--warning him not to support the Court-packing scheme. The threat reflected how acrimonious the debate had become. Minton was appointed Associate Justice to the Supreme Court by President Harry Truman in 1949 and served until 1956.

sixty.[60]

Washington's heat had a quality of unpleasantness that had won it an international reputation. The British Foreign Office categorized the climate in the American capital as "subtropical,"[61] and in 1937 Noel Coward, recalling a 1925 tryout of *The Vortex*, wrote:

> In later years I have travelled extensively. I have sweated through the Red Sea with a following wind and a sky like burnished steel. I have sweated through steamy tropical forests and across acrid burning deserts, but never yet, in any equatorial hell, have I sweated as I sweated in Washington . . . .The city felt as though it were dying. There was no breeze, no air, not even much sun. Just a dull haze of breathless discomfort through which the noble buildings could be discerned, gasping like nude old gentlemen in a steam room. The pavement felt like grey nougat and the least exertion soaked one to the skin.[62]

Just as Robinson had anticipated, a heat wave struck in the first week of the Great Debate, as torrid weather seared the eastern two-thirds of the nation.[63] Bridges and roads buckled under the blazing sun, and in Tuckahoe, New York, Babe Ruth toppled over on a golf course and had to be treated by a physician for heat exhaustion.[64] In the capital that day a Congressman wrote a friend, "Please remember that people in Washington are committing suicide to escape the heat,"[65] and Senator McNary informed his sister, "We are having a hot spell and the weather is just as hot as ----, at least as hot as I think it is."[66] Thousands of Washingtonians fled the city for relief in the mountains of Maryland and Virginia, but the Congressmen were condemned to remain in a steamy city that saw the thermometer holding at eighty-two degrees at midnight.[67]

Robinson knew that he did not have the two-thirds of the Senate required to impose cloture, but he surmised that there were limits to the price his Democratic colleagues would pay to balk the President, and he was determined to keep raising that price. He could do so by insisting on strict adherence to the rules, moving on to Saturday sessions, and requiring evening and all-night meetings.[68] Although the words were never spoken, the assumption behind Robinson's maneuvers was that if Senators continued to be obstinate, they would do so at the risk of their lives.[69]

Death had arrived unseasonably early that year. Before the opening session of the seventy-fifth Congress had convened, South Dakota's Senator Peter Norbeck was gone.[70] By March, Congressman Charles W. Tobey was

writing a former New Hampshire governor about the situation in the House: "Death has taken four of our members so far this year, and there is a sense of pressure constantly as one carries on here."[71] In April Senator Nathan Bachman of Tennessee had died.[72] Yet no one could be certain that Death was a friend of Court packing. Two Senators were undergoing treatment at Washington's Naval Hospital, and both were counted on the administration side of the ledger. There were even grounds for concern about Robinson himself, though few knew how serious they were.[73]

On the opening day of the Great Debate, Robinson made an aggressive two-hour speech that carried the fight to the enemy. His face an angry purple, his voice bellowing, his arms pawing the air, both feet stamping the floor, Robinson gave the appearance of an enraged bull.[74] When the opposition Senators, like so many *bandilleros,* tormented him with pointed questions, he roared all the louder and charged around the floor as though it were a *plaza de toros.*[75]

Throughout the afternoon, Robinson, though finding it hard to choke off his wrath, appeared ready to go round after round with his antagonists, but, altogether unexpectedly his presentation came to a precipitate end in a curious, even shocking, fashion. After talking for some two hours, the majority leader reached into his pocket for a cigar and struck a match to light it. Since striking a match on the Senate floor was, as one writer noted, "frowned upon almost as severely as striking a senator,"[76] his colleagues stared at him in unbelief. His face, usually florid, turned ashen, and he seemed not to know quite where he was. He spoke a few words with the match in his hand, but, as it began to burn his fingers, he flung it to the floor and stamped it out. When Burke tried to ask him yet another question, Robinson said abruptly, "No more questions today. . . . Good bye."[77]

That odd note of farewell signalled what was to come. Over the next several days, Robinson had a hard time enduring both the enervating weather and the relentless assaults on his bill in the Senate chamber. Little more than a week after the Great Debate began, he left the Capitol at the end of the day's proceedings to make his way through the heat to his apartment in the Methodist Building across the plaza. On the next morning his maid entered the apartment and found Senator Robinson sprawled on the floor. He had been dead since midnight.[78]

Robinson's death sent shock waves through the Senate.[79] On the day that the majority leader's body was found, the implacable anti-New Deal Democrat Royal Copeland, a physician, told his colleagues:

> My fellow Senators, I am sorry sometimes that I ever studied medicine. Nearly 50 years have elapsed since I received that coveted diploma; but the embarrassment of medical knowledge is that many times it discloses to the medical man in the face and bearing of a friend the warning his dissolution is near at hand. Mr. President, I say in all seriousness to my brethren the menace is here in this Chamber today.[80]

Copeland, whom New Dealers called "the ancient mariner," said he saw death written on the countenances of others in the Senate if Congress did not adjourn right away.[81] The legislators did not need such admonitions to remind them of the ubiquity of death. Secretary of the Interior Harold Ickes commented in his diary: "There are a lot of men in the Senate no longer young who, in their mind's eye, probably pictured themselves found dead on bathroom floors from heart ruptures."[82]

Determined to exploit his obsession to the fullest, foes of the judiciary bill accused the President and his New Deal cronies of nothing less than manslaughter. "Joe Robinson was a political and personal friend of mine," declared Senator Burton K. Wheeler. "Had it not been for the Court Bill he would be alive today. I beseech the President to drop the fight lest he appear to fight against God."[83] Wheeler's statement revealed the poor judgment that was to characterize other of his public utterances. "Your bad taste," a Massachusetts mayor wired him, "is surpassed only by your conceit in assuming the role of God's spokesman."[84]

But Wheeler's "ghoulish" remarks reflected a widespread apprehension that, as the *Philadelphia Inquirer* claimed, "[d]eath has assumed leadership in the Senate."[85] A reader of the *Washington Post* wrote:

> The death of Senator Robinson, chief advocate of Roosevelt's court packing scheme, indicates that the Divine Power which spread the fogs to cover the movements of the hard pressed colonial army of the Revolution is still guarding the three-pillared edifice which those heroes built.[86]

Not everyone found these florid deductions persuasive. "I do not take much stock in the contention that God was taking a hand in this Court controversy," remarked a former gover-

nor of North Carolina. "If He were, I think probably He would have struck in another direction."[87]

That acerbic remark revealed what many Senators had come to feel--that the acrimony was getting altogether out of hand. One morning Senator Minton received a bullet in the mail wrapped in a two-foot-long piece of white scrap paper with the printed penciled message: "Sen. Sherman Minton. Don't mistake. I am educated. If you support Roosevelt's court bill we will get you-- you dirty rubber stamp." The communication ended with an obscenity.[88] On that same day Congressmen received a mimeographed flyer asking, "What will be gained by the passage of this bill, should thousands of citizens, with blood in their eyes, converge upon the Capital of Our Nation, and exact the retribution which is rightfully and justly theirs?"[89]

In this overcharged atmosphere, Senators who had been tenuously committed to the Court plan only by ties to Senator Robinson concluded that the time had come to bail out. On the afternoon of July 21, several of the first-year Senators, after conferring for two hours, reached a crucial decision--that the struggle must be brought to an immediate end. That judgment meant that on one afternoon the opposition had gained five votes, giving the forces for recommittal an absolute majority for the first time.[90] "After the self-delivery of the freshmen Senators, we had fifty or fifty-one votes," the opposition Senator Hiram Johnson confided, "but we did not have them until then."[91] By nightfall, the Administration Senators knew that it was all over except for the formal burial ceremonies. "They've got the votes. It's up to them," Minton conceded. "I guess if we get anything through, it will be nothing more than the picture of the Supreme Court on a postage stamp."[92]

Roosevelt's attempt to reorganize the judiciary, which had outlived so many countermoves--the Chief Justice's testimony, "the switch in time," Van Devanter's retirement--could not survive the loss of Robinson. To be sure, the resistance to the Court bill in Congress, especially from Hatton Sumners, the powerful chairman of the House Judiciary Committee, almost certainly meant that the President would have to agree further to compromise. But with the majority leader's influence he could probably have preserved the essence of Court packing. Historians are distrustful of explanations that rest on a single episode, and properly so. Yet after all that had happened since February, it was, in the final analysis, not the impact of the Supreme Court decisions or broad social forces that brought about the defeat of Court packing, but the death of Joe Robinson, an altogether fortuitous event.

On the morning of July 22, 1937, Vice President Garner, now back in Washington, chaired a meeting of Senate leaders to see what could be salvaged from the wreckage. "There is no use kidding yourselves," he told the FDR loyalists. "No matter what your ideas are, everybody with any sense knows that all proposals with reference to the Supreme Court are out of the window."[93] Oblivious to the fact that he was addressing a Senate committee that included a sizable component of Republicans, the Vice-President, his eyes brimming with tears, pleaded for party harmony. "We must not give the President any kicks in the face. Angrily dismissing Barkley's effort to get the committee to agree to leave the Administration's bill on the calendar, so that the President would escape an explicit defeat, the Wheeler faction insisted that the measure be recommitted, and without delay.[95] Barkley won only two concessions--the words "Supreme Court" would not be spoken in the Senate chamber and there would be no roll call to embarrass the President and his followers.[96]

Having forced the Administration Senators to agree to eat crow, the President's adversaries required that one of FDR's supporters cook the bird too. They wanted the motion to bury the bill introduced not by Wheeler but by Barkley. When the new majority leader refused, his Kentucky colleague, Senator Logan, was struck with the unpalatable assignment. At two o'clock in the afternoon, Logan rose laboriously to his feet to request the Senate to recommit the bill he had sponsored.[97] The chore was even more painful than he had anticipated, for in expectation of being in on the kill, foes of the measure, who thronged the Capitol in such record numbers that lines extended all the way down the stairs to the doors of the building, occupied every seat in the galleries, and members of the House crowded the divans lining the walls of the room. Logan carried out his part of the bargain. Now the opponents were to do their part--permit a rapid disposition of the matter without debate, mention of the Supreme Court, or a record vote.[98]

But the stage managers of this charade reckoned without the Republican Senator from

Oregon, Charles McNary. The minority leader did not mean to let the Democrats off easily. He insisted on a roll call.[99] As one historian has written, "So the first pledge would be broken. The Republicans did not feel bound by any agreements Burton Wheeler might have made that morning in the Judiciary Committee. They had used him well. Now they discarded him."[100]

Before roll could be called, Hiram Johnson made an inquiry that shattered the second feature of the accord. To get around mention of the words "Supreme Court," Logan had employed the circumlocution "judicial reform." Johnson now wanted to know what "judicial reform" referred to. "Does it refer to the Supreme Court or to the inferior courts?" Disconcerted, Logan replied: "I might say to the Senator from California that the Committee on the Judiciary this morning had an understanding that we did not think it was proper to embrace in the motion what it should refer to." Johnson would not be put off. "The Supreme Court is out of the way?" he persisted. Logan conceded, "The Supreme Court is out of the way."[101]

And though a meaningless roll call still lay ahead, it was at this moment that Roosevelt's second effort at Court packing, an endeavor that for quite some time appeared destined to be crowned with success, came to an end. Arms outstretched, his eyes fixed on the galleries, Senator Johnson cried, "Glory be to God."[102]

Endnotes

[1] The standard accounts are J. Alsop & T. Catledge, *The 168 Days* (1938) *and L. Baker, Back to Back: The Duel Between FDR and the Supreme Court.* (1967). See also Leuchtenburg, "The Origins of Franklin D. Roosevelt's Supreme Court 'Packing' Plan", in *Essays on the New Deal* 69 (H. Hollingsworth & W. Holmes ed. 1969).

[2] Letter from Edward Corwin to Homer Cummings (May 19, 1937) (available in Corwin Manuscripts, Princeton University).

[3] *Helvering* v. *Davis,* 301 U.S. 619 (1937) (upholding the Social Security Act's provision of "Federal Old-Age Benefits"); *Steward Mach. Co.* v. *Davis* 301 U.S. 548 (1937) (upholding unemployment compensation on employers).

[4] *New York Herald Tribune*, June 10, 1937, at 5, col. 1; *New York Times*, June 7, 1937, at 24, col. 1; *id*, June 5, 1937, at 1 col. 1; *New York Times*, June 4, 1937, at 1, col. 8.

[5] *New York Herald Tribune*, June 6, 1937, at 28, col. 1.

[6] *Time*, June 21, 1937, at 15.

[7] Clippings (available in John Garner Manuscripts, Scrapbook 13, Archives, University of Texas, Austin, Texas); see also *Time supra* note 6, at 15.

[8] B. Timmons, *Garner of Texas* 216-21 (1948).

[9] B. Donahoe, *Private Plans and Public Dangers* 49 (1965); J. Farley, *Jim Farley's Story* 83-86 (1948); Letter from Josiah W. Bailey to Charles D. Hilles (November 30, 1938) (available in Hilles Manuscripts, Box 229, Yale University); Letter from Turner Catledge to Joseph W. Alsop (Nov. 11, 1937) (available in Cummings Manuscripts, University of Virginia); Breckinridge Long Diary (June 14, 1937) (available in Long Manuscripts, Library of Congress); see *Detroit News*, June 16, 1937, at 22, col. 3 (available in Prentiss Brown Scrapbooks, Brown Manuscripts, Michigan Historical Collections, Ann Arbor , Michigan).

[10] Senate Committee on the Judiciary, *Reorganization of the Federal Judiciary*, S. Rep. No. 711, 75th Congress, 1st Session, 1 (1937).

[11] *Id.* at 10.

[12] *Id.* at 11.

[13] *Id.* at 13.

[14] *Id.* at 15.

[15] *Id.* at 23.

[16] *Id.*

[17] Letter from Rev. Ralph E. Noller to Amos R.E. Pinchot (October 13, 1937) (available in Amos Pinchot Manuscripts, Box 60, Library of Congress).

[18] S. Williamson, *Frank Gannett* 194 (1940); Letter from Homer H. Gruenther to John Bauer (June 30, 1937) (available in Maury Maverick Manuscripts, Box 5, University of Texas Library, Austin Texas).

[19] Hendrick, "Senate Report No. 711", *Saturday Review*, June 26, 1937, at 7.

[20] Hayden, "Court Bill Becomes a Wraith", *Detroit News*, June 15, 1937, at 7.

[21] *Boston Herald* (article by Henry Ehrlich; date unknown) (available in H. Styles Bridges manuscripts, Scrapbook 56, New England College).

[22] *Washington Post*, June 20, 1937 Sec. 3, at 5, col. 1.

[23] Letter from Alf Landon to Arthur Vandenberg (June 24, 1937) (available in Vandenberg Manuscripts, "Personal-Confidential" File, Clements Library, University of Michigan).

[24] Raymond Clapper Diary (June 23, 1937) (available in Clapper Manuscripts, Library of Congress).

[25] Letter from William Allen White to David Hinshaw (June 17, 1937) (available in William Allen White Manuscripts, Series C, Box 268, Library of Congress).

[26] Letter from R.C Lindsay to Anthony Eden (June 22, 1937) (available Public Record Office, London, No. 554E, F.O. 371, 20668 (A4640/542/45)).

[27] Pearson & Allen, "Washington Merry-Go-Round", *Cleveland Press*, June 23, 1937, Sec. 2, at 1, col 7.

[28] *Time*, June 28, 1937, at 9; *New York Times*, June 17, 1937, Sec.1, at 7, col. 5; see *Washington Post*, June 17, 1937, at 1, col. 2.

[29] Breckinridge Long Diary (June 14, 1937) (available in Long Manuscripts, Library of Congress).

[30] See *id.*

[31] *New York Herald Tribune*, June 22, 1937, at 5, col. 1; *Watertown* (New York) *Daily Times*, June 22, 1937 (available in Royal Copeland Scrapbooks, Michigan Historical Collections, University of Michigan); see also *Buffalo Evening News*, June 22, 1937, at 16, col. 3.

[32] *Time*, July 5, 1937, at 7-8; *New York Herald Tribune*, June 28, 1937, at 1, col. 4; New York Times, June 26, 1937, at 1, col. 3; *id.*, June 17, 1937, Sec.1, at 7 col. 5; Lawrence Lewis Diary (June 26, 1937) (available in Lewis Manuscripts, State Historical Society of Colorado, Denver, Colorado).

[33] *Washington Post*, June 26, 1937, at 8, col. 3.

[34] *New York Herald Tribune*, June 28, 1937, at 6, col. 3.

[35] *Id.* at 1, col. 4.

[36] *Detroit News*, June 28, 1937, at 14, col. 2; *id.* at 27, col. 1.

[37] *Washington Post*, June 27, 1937, at 10, col. 1; *New York Times*, June 26, 1937, at 1, col. 3; Lawrence Lewis Diary (June 26, 1937) (available in Lewis Manuscripts, State Historical Society of Colorado, Denver, Colorado); Breckinridge Long Diary (June 27, 1937) (available in Long Manuscripts, Library of Congress).

[38] *New York Times*, June 27, 1937, Sec. 1, at 20, col. 4; *id.*, June 26, 1937, at 4, col. 5; *Washington Post*, June 26, 1937, at 8, col. 2.

[39] *Washington Post*, June 26, 1937, at 8, col. 4.

[40] Catledge, "Outing Promises Gain in Good-Will", *New York Times*, June 28, 1937, at 5, col. 1; see also Breckinridge Long Diary (June 27, 1937) (available in Long Manuscripts, Library of Congress); Letter from Daniel Roper to William E. Dodd (June 30, 1937) (available in Roper Manuscripts, Box 15, Duke University); Letter from Daniel Roper to Key Pittman (June 28, 1937) (available in Pittman Manuscripts, Box 14, Library of Congress).

[41] *Cleveland Press,* June 17, 1937, at 15, col. 5.

[42] See e.g., Breckinridge Long Diary (June 27, 1937) (available in Long Manuscripts, Library of Congress).

[43] Krock, "One Result of the Jefferson Islands Picnic", *New York Times,* June 29, 1937, at 20, col. 5.

[44] *Id.*

[45] Letter from R.C. Lindsay to Anthony Eden (July 6, 1937) (available in Public Record Office, London, No. 592E, F.O. 371, 20668 (A4931/542/45)).

[46] Homer Cummings Diary (June 18-July 2, 1937) (available in Cummings Manuscripts, University of Virginia); Stanley Reed, Memorandum for the Attorney General (June 18, 1937) (available in President's Secretary's File--Supreme Court, Franklin D. Roosevelt Library, Hyde Park, New York).

[47] J. Alsop & T. Catledge, *supra* note 1, at 227-28.

[48] Johnston, "White House Tommy", *Saturday Evening Post*, July 31, 1937, at 6.

[49] J. Alsop & T. Catledge, *supra* note 1, at 240-41; *New York Times,* July 3, 1937, at 1, col. 4; Letter from Grenville Clark to William H. King (June 29, 1937) (available in Clark Manuscripts, Series VII, Box 2, Dartmouth College); Letter from Charles D. Hilles to Viscount Knollys (July 12, 1937) (available in Hilles Manuscripts, Box 212, Yale University); Letter from W.K. Hutchinson to Alf Landon (July 23, 1937) (available in Landon Manuscripts, Box 85, Kansas State Historical Society, Topeka, Kansas); see Letter from James A. Farley to Claude G. Bowers (July 1, 1937) (available in Farley Manuscripts, Box 5, Library of Congress); see also *New York Times*, June 5, 1937, at 1 col. 6; Letter from George W. Hutsmith to

Edward Gluck (June 1 & 4, 1937) (available in Clark Manuscripts, Series VII, Box 2, Dartmouth College).

[50] See Colmer, "Congressional Sidelights" (available in Colmer Manuscripts, Box 150, University of Southern Mississippi); letter from Clarence Hancock to Joseph F. Graydon (June 26, 1937) (available in Hancock Manuscripts, Box 1, George Arents research Library, Syracuse University); letter from Kenneth McKellar to Charles T. Pennebraker (July 10, 1937) (available in McKeller Manuscripts, Box 97, Memphis Public Library, Memphis, Tennessee).

[51] Clapper, "In the Capital", *Cleveland Press*, July 7, 1937, at 15, col. 7.

[52] Burke's tally of the roll call ten days before the final vote on the Court bill (available in Frank Gannett Manuscripts, Box 16, Cornell University).

[53] *New York Times*, July 6, 1937, at 1, col 5; *id.*, July 4, 1937, at 1, col. 3: Letter from H. Styles Bridges to Robert P. Bass (April 7, 1937) (available in Bass Manuscripts, Box 46, Dartmouth College); Letter from Hiram Johnson to Garrett W. McEnerney (July 7, 1937) (available in Johnson Manuscripts, Bancroft Library, University of California, Berkeley, California).

[54] *New York Times*, July 4, 1937, at 2, col. 7.

[55] "How to Bust Court Filibuster?" *Business Week*, July 17, 1937, at 14.

[56] *Id.*

[57] *Portland Press-Herald*, July 7, 1937, at 13, col. 6 (available in Wallace White Manuscripts, Box 81, Library of Congress).

[58] See *Detroit Free Press*, July 11, 1937, at 2, col. 1.

[59] Sullivan, "Where is the New Deal Heading?: Contradictory Direction Held Confusing to Baffled Capital", *New York Herald Tribune*, May 16, 1937, Sec. 2, at 2, col. 1.

[60] See *New York Times*, July 15, 1937, Sec. 1, at 1, col. 5; *Detroit Free Press*, July 11, 1937, at 2, col. 1; *New York Times*, May 10, 1937, Sec. 1, at 1, col. 7; Letter from George B. McClellan to George H. Moses (May 23, 1937) (available in Moses Manuscripts, Box 4, New Hampshire Historical Society, Concord, New Hampshire).

[61] W. Manchester, *The Glory and the Dream* 4 (1974).

[62] N. Coward, *Present Indicative* 219-20 (1937).

[63] *New York Herald Tribune*, July 10, 1937, Sec.1, at 1, col. 5.

[64] *Id.*, July 11, 1937, Sec. 1, at 1, col. 1.

[65] Letter from Thomas Amlie to Alfred M. Bingham (July 10,1937) (available in Bingham Manuscripts, Box 1, Yale University).

[66] Letter from Charles McNary to Mrs. W.T. Stolz (July 10, 1937) (available in McNary Manuscripts, Box 1, Library of Congress).

[67] See *The Sunday Star*, July 11, 1937, Sec. A, at 1, col. 8; *The Evening Star*, July 10, 1937. Sec. A, at 1, col. 5.

[68] *Cleveland Press*, July 14, 1937, at 14, col. 1.

[69] See *New York Herald Tribune*, May 16, 1937, sec. 2, at 2, col. 1.

[70] *Id.*, July 15, 1937, at 3, col.5.

[71] Letter from Charles W. Tobey to Robert and Edith Bass (March 23, 1937) (available in Robert P. Bass Manuscripts, Box 46 (R-Z folder: Arizona, 1937), Dartmouth College).

[72] *New York Herald Tribune*, July 15, 1937, at 3, col. 5.

[73] Dr. Henry J. Rutherford, "Case History" (available in Bernard Baruch Manuscripts, Princeton University); see also *Los Angeles Times*, June 24, 1937, Sec. 1, at 6, col. 5 (available in Royal Copeland Scrapbooks, Michigan Historical Collections, University of Michigan).

[74] *Cleveland Press*, July 14, 1937, at 14, col. 1; *Evening Journal & New York American*, July 14, 1937, at 2, col. 1.

[75] 81 *Congressional Record* 6787-91 (1937); J. Alsop and T. Catledge, *supra* note 1, at 225-26; New York Herald Tribune, July 7, 1937, Sec. 1, at 1, col. 1.

[76] Clapper, "In the Capital", *Cleveland Press*, July 7, 1937, at 15, col. 7; see *Time*, July 19, 1937, at 10.

[77] 81 *Congressional Record* 6797-98 (1937); *Time* July 19, 1937, at 10.

[78] J. Alsop & T. Catledge, *supra* note 1, at 267; T. Catledge, *My Life and Times* 96 (1971); *Time*, July 26, 1937, at 10; *New York Herald Tribune*, July 15, 1937, at 1, col. 8; *New York Times*, July 15, 1937, at 1, col. 8.

[79] See Tucker, "Behind the News", *Poughkeepsie Eagle News*, July 24, 1937 (available in Royal Copeland Scrapbooks, Michigan Historical Collections, University of Michigan); *New York Times*, July 15, 1937, at 1, col. 8.

[80] 81 *Congressional Record* 7153 (1937).

[81] *Id.*; see also *Cleveland Press*, July 15, 1937, at 16, col. 6.

[82] 2 H. Ickes, *The Secret Diary of Harold L. Ickes* 172 (1953-54).

[83] *New York Times*, July 15, 1937, at 13, col. 8.

[84] *Id.* July 16, 1937, at 2, col. 4.

[85] *New York Herald Tribune*, July 15, 1937, at 4, col. 3 (quoting the *Philadelphia Inquirer*); see also *United States News*, July 19, 1937 (avail-

able in Jesse Jones Manuscripts, Box 332, Library of Congress).

[86] Letter to the Editor, *Washington Post,* July 19, 1937, at 6, col. 4.

[87] Letter from O. Max Gardner to B.B. Gossett (July 16, 1937) (available in Gardner Manuscripts, Box 15, Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina).

[88] *Washington Daily News*, July 21, 1937, at 2, col. 4.

[89] Letter from the Vigilantes and Affiliated Organizations U.S.A. to "Congressman" (July 20, 1937) (available in Sam Hobbs Manuscripts, University of Alabama, Tuscaloosa, Alabama).

[90] Interview with Prentiss Brown (July 7, 1965); see *Detroit News,* July 21, 1937, at 1, col. 3 (available in Prentiss Brown Scrapbooks, Brown Manuscripts, Michigan Historical Collections, University of Michigan); *New York Herald Tribune*, July 21, 1937, at 1, col. 8; *Washington Post*, July 21, 1937, at 1, col. 8; Typescript, Press Release, July 21, 1937 (available in Overton Manuscripts, Box 2, Louisiana State University, Baton Rouge, Louisiana); letter from John Overton to Richard W. Leche et al. (July 22, 1937) (available in Overton Manuscipts, Box 2, Louisiana State University, Baton Rouge, Louisiana).

[91] Letter from Hiram Johnson to John Francis Neylan (July 24, 1937) (available in Johnson Manuscripts, Bancroft Library, University of California, Berkeley, California).

[92] *New York Times*, July 22, 1937, at 2, col. 2.

[93] L. Baker, *supra* note 1, at 265; see also Allen, "Roosevelt's Defeat--The Inside Story", 145 *The Nation* 123, 124 (1937); 2 H. Ickes, *supra* note 82 at 171; B. Timmons, *supra* note 8, at 224.

[94] *Detroit Free Press*, July 23, 1937, at 4, col. 3; see *Louisville Courier-Journal*, July 23, 1937, at 1, col. 8.

[95] Vandenberg, "The Biography of an Undelivered Speech", *Saturday Evening Post,* October 9, 1937, at 32; *New York Times*, July 23, 1937, Sec. 1, at 2, col. 4; *New York Herald Tribune*, July 23, 1937, at 2, col. 2.

[96] L. Baker, *supra* note 1, at 266-67; *A Many Colored Toga* 379 (G. Sparks ed. 1962); see *News-Week,* July 31, 1937, at 5.

[97] 81 *Congressional Record* 7375 (1937); Detroit Free Press, July 23, 1937, at 4, col. 2.

[98] J. Alsop & T. Catledge, *supra* note 1, at 289-92.

[99] *New York Times*, July 23, 1937, Sec. 1, at 2, col. 4.

[100] L. Baker, *supra* note 1, at 272.

[101] 81 *Congressional Record* 7381 (1937); L. Baker, *supra* note 1, at 272-73; Maddox, "Roosevelt vs. The Court", *America History Illustrated*, November 1969, at 4, 10; *New York Herald Tribune,* July 23, 1937, at 2, col. 2.

[102] *New York Herald Tribune*, July 23, 1937, at 1, col. 8.

The Court-Packing Plan and the Commerce Clause

Robert L. Stern

Perhaps the most dangerous attack upon the independence of the United States Supreme Court was President Franklin D. Roosevelt's proposal early in February, 1937 to allow the President to appoint up to six additional Justices to the Supreme Court to sit in addition to each Justice over 70 years of age. Although the professed object was to alleviate congestion in the Court, the obvious, though unexpressed, purpose was to overturn the rulings of five or six of the Justices invalidating both state and federal laws regulating business, including the major statutes of the New Deal. All of the four Justices--Van Devanter, McReynolds, Sutherland and Butler--who invariably voted against constitutionality, as well as Chief Justice Hughes and Justice Brandeis, were then over 70.

A few days later *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, and other cases involving the constitutionality of the National Labor Relations Act were argued. The Washington minimum wage case--*West Coast Hotel Co.* v. *Parrish*--had been argued early in December.

On March 29 the Court sustained the constitutionality of the Washington statute (300 U.S. 379), overruling *Morehead* v. *Tipaldo*, 298 U.S. 587 (1936), which had invalidated a New York minimum wage statute on June 10, 1936, ten months before. On April 12 in the *Jones & Laughlin* case, the Court upheld the constitutionality of the NLRA as applied to manufacturers of goods shipped in interstate commerce, in substance overruling *Carter* v. *Carter Coal Co.*, 298 U.S. 238, which eleven months before had found that the commerce power did not permit federal regulation of labor regulations in the coal industry. The same nine judges were sitting.

Chief Justice Hughes, who had dissented in the *Morehead* case but had joined with the conservative majority in the part of the *Carter* decision dealing with labor relations, wrote the opinions for the majority of five in both *West Coast Hotel* and *Jones & Laughlin*. Justice Roberts, who had concurred in the decisions against constitutionality in both *Morehead* and *Carter Coal*, joined with the Chief Justice to make the majority in both *West Coast Hotel* and *Jones & Laughlin* cases. The Social Security Act was held constitutional by the same 5 to 4 vote in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 and *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 on May 24, 1937. No change in the membership of the Court occurred until the end of the Term the next week when Justice Van Devanter retired.

After these decisions the Court-packing plan made no progress in Congress, although the President stubbornly refused to withdraw it. The unsatisfied question was what had induced Justice Roberts and to a lesser extent the Chief Justice, to change their votes. The general consensus at the time was that the plan had achieved its purpose, that the legislation designed to cope with the problems of the great depression of the 1930s would no longer be held unconstitutional.

To lawyers it then seemed obvious, as I wrote in 1946 ("The Commerce Clause and

President Franklin D. Roosevelt in 1937.

the National Economy, 1933-1946", 59 *Harv. L. Rev.* 645, 681), that though "No one who did not participate in the conferences of the Court will know the answers to those questions,

> few attributed the difference in results between the decisions in 1936 and those in 1937 to anything inherent in the cases themselves–their facts,...the arguments presented, or the authorities cited. But the consensus among the lawyers speculating on the Court's sudden reversal was that the Chief Justice and Mr. Justice Roberts believed that the continued nullification of the legislative program demanded by the people and their representatives–as manifested in the 1936 election–would lead to acceptance of the President's Court plan, and that this would seriously undermine the independence and prestige of the federal judiciary, and particularly of the Supreme Court, without preventing the President from attaining his objective. Chief Justice Hughes was subsequently cited for his "statesmanship" in using the cases as potent weapons in a successful campaign, in which he was somewhat inhibited by his judicial position, to combat the plan. Whether or not there was any basis for these conjectures, government counsel, or most of them, accredited their victory more to the President than to anything they had said or done.

The object of this paper is to revaluate this conclusion on the basis of information which has subsequently become available, and perhaps with more objectivity, years after the author had participated in many of the commerce clause cases writing briefs in support of the constitutionality of the statutes. For facts subsequently disclosed cast doubt on the accuracy of the assumption that the Court-packing proposal had motivated the votes of Chief Justice Hughes and Justice Roberts.

A. The Minimum Wage Cases.

An article by Merlo J. Pusey, the principal biographer of Chief Justice Hughes, in the 1984 issue of this *Yearbook*, ("The Hughes Biography: Some Personal Reflections", 48), stated that "until the Hughes biography was published" in 1951 "the fact was not known outside the Court" that "Justice Roberts had switched his vote in regard to the state minimum wage laws before the Court-packing bill had been disclosed". Another article in the same issue by John Knox, former law clerk to Justice McReynolds ("Some Comments on Chief Justice Hughes", 34, 41) called attention to the fact that, when voting in that case in the normal course several weeks after it was argued in December, 1936, with Justice Stone absent because of illness, the Court had divided 4 to 4.

That meant that Justice Roberts must have voted with Chief Justice Hughes and Justices Brandeis and Cardozo against the four conservatives. The formal vote of 5 to 4 after Stone had returned to the bench also was taken "shortly before the President's plan was announced" early in February. Although the opinion was not handed down until March 29, the above facts show that neither the Chief Justice nor Justice Roberts had been influenced by the plan when they determined to sustain the state statute in that case.

The details as to Roberts' vote in the minimum wage cases were more fully revealed in 1955, four years after Pusey's biography of Hughes was published. In a memorandum given by Roberts to Justice Frankfurter shortly after Roberts' retirement from the Court in 1945, Roberts told the whole story.

Frankfurter deemed it appropriate to make the memorandum public in his contribution to an issue of the University of Pennsylvania Law Review (104 U. of Pa. L. Rev. 311, 314), commemorating Justice Roberts shortly after his death. The memorandum confirmed what Mr. Pusey had already learned from Chief Justices Hughes, that Roberts voted against the validity of the New York minimum wage statute in the *Morehead* case because New York was arguing only that that case was distinguishable from the Court's 1923 decision in *Adkins* v. *Childrens Hospital*, 261 U.S. 525, "that it was unnecessary to overrule the Adkins case in order to sustain" New York's position. In Justice Roberts' words:

> The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. At conference I so stated, and stated further that I was for taking the State of New York at its word. The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground. The vote was five to four for affirmation, and the case was assigned to Justice Butler.
>
> I stated to him that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins*, and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case. The case was originally so written by Justice Butler, but after a dissent had been circulated he added matter to his opinion, seeking to sustain the *Adkins* case in principle. *My proper course would have been to concur specially on the narrow ground I had taken.* I did not do so. But at conference in the Court I said

> did not do so. But at conference in the Court I said that I did not propose to review and re-examine the *Adkins* case until a case should come to the Court requiring that this should be done. (Italics added)

The italicized sentence indicates that Roberts subsequently concluded that he should have restricted his concurrence to the narrow ground of New York's failure to request an overruling of *Adkins*. In his article Justice Frankfurter agreed, as did Dean Erwin N. Griswold in a companion article ("Owen J. Roberts as a Judge", 104 *U. of Pa. L. Rev.*, 332, 343-344 (1955)), in which he concluded:

> the only criticism that can be made, I think, is that [Roberts] did not sufficiently make his position known in the *Tipaldo* case. . . . He did not take the steps to identify the procedural issue with himself. This may have been an error in opinion writing. It was not a vote under political pressure.

B. The Labor Board Cases.

Hughes and Roberts had, of course, not taken a position in the Labor Board cases before the Court-packing plan was announced on February 5, 1937. Those cases were argued from February 9 to 11.

Mr. Knox recalled that "at one of the Saturday conferences not long after these dates the Justices cast their votes and once again Roberts sided with the liberals and the final vote stood at 5 to 4--the same as in the *West Coast Hotel* case." This of course does not establish whether in those cases Hughes or Roberts were influenced by the Court plan when they surprisingly changed the Court's position as to the scope of the commerce power.

1. Chief Justice Hughes.

As to Chief Justice Hughes, in 1913 and 1914, when he was first on the Court, he wrote the leading opinions in the *Minnesota Rate Cases*, 230 U.S. 352, 398, and the *Shreveport Case*, 234 U.S. 342, which established the power of Congress "to regulate many interstate activities impinging on interstate commerce. Congress could protect interstate commerce from injury, no matter what the source of that injury might be." (Pusey, *Yearbook* 1984, p.50.)

His opinion for a unanimous Court in the *Schechter* case in 1935 reaffirmed that principle. The Court there held, not unreasonably, that although the Sherman Act had the year before been held applicable to the wholesaling of live poultry from other states in New York City, the specific practices involved in the NRA Code were too indirectly related to interstate commerce to come within the commerce power. Cf. *Local 167* v. *United States*, 291 U.S. 293 (1934).

Two weeks before *Schechter* the Chief Justice had written a strong dissent from Justice Roberts' opinion for a conservative majority of five in the *Railroad Retirement* case. He concurred with those five Justices, however, in invalidating the Agricultural Adjustment Act in *United States* v. *Butler*, 297 U.S. 1, early in 1936. In that case, where the government had relied on the tax and general welfare clauses, not the commerce clause, Roberts' opinion seemed to state without qualification that Congress had no power to regulate agricultural production. In the *Carter Coal* case a few months later Hughes did not join in Sutherland's majority opinion, but in a "separate" opinion of his own agreed with the part of the majority opinion which held that federal power did not extend to the regulation of labor conditions in the coal industry no matter how great the effect on interstate commerce.

Those opinions will be considered more fully below with respect to Justice Roberts, who had written or concurred in them fully. Insofar as the Chief Justice was concerned, despite his *Carter* opinion, his prior pronouncements and votes as to the scope of the commerce power and his failure to join in the majority opinions in *Railroad Retirement* and *Carter* gave some reason to believe that he would not join the conservative wing of the Court in passing upon the validity of the National Labor Relations Act. His record as a whole was not sufficiently one-sided to warrant discrediting his own statements as recorded by Mr. Pusey (at p. 768) after Hughes' retirement from the Court. Professor Paul Freund, writing in 1967, was persuaded by this material, even though he thought that Hughes' "own protestations that he was perfectly consistent are not perfectly convincing. . ."in the light of his separate opinion in *Carter*. (Freund, "Charles Evans Hughes as Chief Justice", 81 *Harv. L. Rev.* 4, 34 (1967). I agree that these subsequent disclosures preclude anyone who had not talked to him, as Pusey had, from concluding that his votes in the

Labor Board cases were so inconsistent with his prior positions as to establish that they were motivated by a desire to defeat the Court-packing plan.

Mr. Pusey's biography, which undoubtedly reflected the Chief Justice's position, suggests that the 1935 and 1936 decisions invalidating the earlier New Deal statutes and the subsequent 1937 cases were entirely consistent, because the later statutes had been more skillfully drafted in the light of accepted commerce clause principles. There is something to this explanation of the later decisions; of course, the draftsmen of the newer statutes took advantage of what the decisions invalidating the earlier laws had said. But that is by no means the whole story. Language and reasoning in *Railroad Retirement*, *Butler*, and *Carter* could reasonably be read to mean that five or six of the Justices believed that Congress completely lacked power to regulate intrastate aspects of interstate industry, no matter what the economic effect. If those decisions could have been construed as curable by better draftsmanship, the Administration's lawyers, who were never charged with stupidity, would never have accepted the necessity of a challenge to the independence of the Supreme Court in a way which was certain to arouse tremendous opposition even among many of their own supporters. Although the earlier cases might have been distinguishable, there was little reason to believe at the end of 1936 that a majority of the Court wanted to distinguish them.

2. **Justice Roberts.**

Justice Roberts' prior opinions left little room for such hope. His opinion for the Court three weeks before *Schechter* in *Railroad Retirement Board* **v.** *Alton Railroad*, 295 U.S. 330, from which Chief Justice Hughes and Justices Brandeis, Stone and Cardozo dissented, seemed to manifest his approach as to the scope of the commerce power. The majority there held that a federal statute establishing a retirement program for railroad employees "is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution" (295 U.S. at 362). Characterizing the majority decision as holding that "the subject matter itself lies beyond the reach of" the commerce power even for interstate railroads, the dissenters insisted that

Justice Owen J. Roberts at his desk

the "sovereign power to govern interstate carriers extends to the regulation of their relations with their employees who likewise are engaged in interstate commerce." (295 U.S. at 375-376.) The majority's restrictive interpretation of the commerce power as applied to railroads clearly foreshadowed the attitude of the same five Justices with respect to federal regulation of aspects of less interstate industries no matter what the effect on interstate commerce.

Any doubts on that score would seem to have been removed by two decisions in 1936. The opinion by Justice Roberts for six Justices (including Chief Justice Hughes) in *United States* v. *Butler*, 297 U.S. 1, invalidated the Agriculture Adjustment Act of 1933, which taxed processors of agricultural products in order to provide funds to pay farmers for reducing the size of their crops and thereby to raise farm prices from disastrously low levels.

The government relied on the power to tax and provide for the "general Welfare," not the commerce clause. After holding that the "general Welfare" was not limited by the specific powers granted Congress, Justice Roberts' opinion found it unnecessary to decide whether such an appropriation in aid of agriculture fell within the general welfare. For it found that no power to "regulate and control agricultural production," even by spending tax money, had been granted, and that therefore the Tenth Amendment forbade any such action by Con-

gress (297 U.S. at 68). Thus, although the opinion does not mention the commerce power, it left the undoubted impression that the six Justices who joined in it thought that Congress had no power to regulate production in any industry.

This was confirmed four months later in *Carter* v. *Carter Coal Company*, 298 U.S. 238. Five justices, including Justice Roberts, there joined in an opinion by Justice Sutherland holding that labor relation in the coal industry could not be regulated under the commerce power; restraints upon the production of coal by strikes could not be said to directly affect interstate commerce no matter what the magnitude of the effect (298 U.S. at 308):

> If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.

The opinion thus gave no weight to the government's evidence that labor disputes in the coal industry, which the regulation of labor relations was designed to reduce or resolve, could shut down all the railroads in the United States and the industries dependent on the railroads, thus stifling a large proportion of all interstate commerce. The opinion then held the entire Coal Act unconstitutional on the ground that the other provisions, which related to price fixing, were inseparable from the labor provisions.

The uncertainty as to the basis for Justice Roberts' change in position led Charles A. Leonard to embark upon a thorough study in the 1960s. This resulted in a short book in 1971 entitled: *A Search For A Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937* (National University Publications, Kennikat Press, Port Washington, N.Y.) Professor Leonard examined all possible sources for an explanation of Roberts' change of position. He interviewed Roberts' family, other Justices, his law clerks, and other persons who knew him, but to no avail.

The Justice left no papers which threw any light on the reasons for his vote in the *Jones & Laughlin* case. Professor Leonard could find only three possible relevant statements which are summarized in his book as follows (pp. 155-157):

> [1] Appearing before the Senate judiciary subcommittee [in 1954] he [Roberts] declared, 'Now I do not need to refer to the Court-packing plan which was resorted to when I was a member of the Court. Apart from the tremendous strain and the threat to the existing Court, of which I was fully conscious, it is obviously if ever resorted to, a political device to influence the Court and to pack it so as to be in conformity with the views of the Executive or the Congress, or both.
>
> [2] On the other hand, in his Oliver Wendell Holmes Lectures delivered at Harvard in 1951, the former Justice declared that 'looking back it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country – for what was in effect a unified economy.'
>
> [3] In the memorandum which Roberts gave to Felix Frankfurter when he left the Court in 1945, the retiring Justice concluded his relating of the facts in the West Coast Hotel case with the following comment: 'These facts make it evident that no action taken by the President in the interim had any causal relation to my action in the Parrish case.'
>
> Nothing further can be offered in refutation of the accusation that Roberts bent to the wind of executive-legislative threat.

The third item was, of course, conclusive as to *West Coast Hotel*. But it did not refer to Roberts' vote in the *Jones & Laughlin* case, which was not the subject of his memorandum to Justice Frankfurter. Whether any negative inference can reasonably be drawn from the fact that Roberts made such a statement *only* as to *West Coast Hotel* is doubtful.

Professor Leonard's attempt to uncover further information was unsuccessful. He notes (p. 155) that "respected commentators" during that period had different views. Professors Carl B. Swisher and Edward S. Corwin were inclined to believe that the Court plan was a major factor (p. 155). Professor Felix Frankfurter wrote to Justice Stone the day after the Washington minimum wage decision that "Roberts' somersault is incapable of being attributed to a single factor relevant to the professional judicial process" (Leonard, at p. 137) This not very subtly implies that an extraneous factor had been decisive, a position which in 1945 Justice Frankfurter found to be incorrect.

On the other hand John Lord O'Brian, an eminent attorney, who was a close social as well as professional associate of the members of the Court during this period, told the author (Leonard) that in his opinion the personalities of the Justices precluded any sort of knuckling under pressure from Congress or the White House. "I don't think the Court plan had an influence on the Court. These men

Robert Jackson supported Roosevelt's Court Plan. He later explained the President's motivation in an oral history: "Roosevelt thought the Court ought to cooperate with him in an emergency...he would have carried the cooperative theory to the extent that he would have consultations between the President and the Court as to remedies for some of the evils of the depression.....Roosevelt didn't see clearly the line of distinction between executive and judicial powers as some people did." In his book, *The Struggle for Judicial Supremacy*, Jackson examined the legal difficulties that the administration faced from the decisions of the Court and their consequences.

duction of the bill made them more stubborn than before".(*Id.* at 155.) After Roberts' death, Erwin Griswold concluded, because of his reasonable belief in Roberts' integrity and high regard for the judicial process, that "Roberts' votes in these cases seem to me to be fully explicable simply as a natural development of his views." (104 *U. of Pa. L. Rev.* at 345 (1955)).

I have not attempted to redo the massive project undertaken by Mr. Leonard. All that can accurately be said is that Roberts' opinions and votes in 1935 and 1936 are difficult to reconcile with his joining in the Labor Board decisions in 1937.

Numerous possible reasons have been advanced "for the change: political pressure, the overwhelming victory of the administration at the polls in November, 1936, the labor strife, especially in the automotive industry, Roosevelt's Court Reorganization plan, and, 'finally, Justice Roberts, even though reluctant to take the lead, remained open to persuasion, and gradually became convinced of the need for change." (Professor Mario Einaudi, as summarized on p. 137 of Professor Leonard's book). Nevertheless it is difficult to believe that what Roberts himself described as a "threat to the existing Court, of which [he] was fully conscious", might not have had some effect. Pointing in the opposite direction is the confidence of persons who knew him that Roberts' undoubted integrity would not permit a judicial decision to be influenced by such an extraneous consideration.

To his own questions as to what might have caused the change, Professor Leonard could only say (p. 137): "These are questions which after thirty-plus years have still not been answered."

After 50 years, they almost certainly never will be. The speculation in my 1946 article as to the conjectures of governmental counsel that the President's plan rather than the merits of the cases or the quality of the law work was responsible for the *Jones & Laughlin* decision implies much more certainty on the subject than I now have.

The reader more than 50 years after the events described above may wonder why the Supreme Court in 1937 would have taken seriously such a revolutionary, and indeed absurd, proposal to overturn Supreme Court decisions. Certainly any such proposal these days by a President, or a President and Congress, to enlarge the Court so as to overrule unpopular

enlarge the Court so as to overrule unpopular decisions would be branded as outrageous, for lack of a stronger word. And it did arouse strong opposition in 1937--although its defeat was by no means certain until after the decisions discussed above.

In Professor Paul Freund's words ("Charles E. Hughes as Chief Justice", 81 *Harv. L. Rev.* 4, 13 (1967)), such a "shockingly crude . . . assault on the independence of the judges cannot be understood without an appreciation of the atmosphere in the courtroom"--and I add, in the nation. A letter from Judge Learned Hand in June, 1937 described the Court as having "been controlled by the most amazing lot of crustaceans" -- although President Roosevelt's "expedient was as bad as the evil and so disingenuous that he would have been injured very seriously, if anything could injure him". (*Id.* at 25.)

First, it should be noted that neither Attorney General Homer Cummings nor President Roosevelt had previously been regarded as in any way radical or hostile toward the judiciary or judicial decisions. Persons supporting the plan included Hugo Black and Robert Jackson, subsequently distinguished members of the Supreme Court. I remember that my own feelings were mixed. Obviously, they may have been affected by my participation as a young lawyer in the Department of Justice in the writing of briefs in many of the commerce clause cases during that period.

Those who supported the plan, or even had doubts about it as I did, were affected by their knowledge of the plight of the country at that time. To use only figures I can remember, industrial production by that time had fallen almost 50 percent, about one-third of the public was out of work, prices and wages had fallen to disastrous levels. The price of oil at the wellhead had dropped to five cents *per barrel* -- and I don't mean per gallon. (See 59 *Harvard Law Review* 654.) Wages for railroad trackmen had gone as low as 10 cents per hour.

President Roosevelt was attempting to bring the nation out of a downward spiral of wages, employment and prices. The new laws were designed to raise prices, often by diminishing the quantity of a product being grown or mined, and to improve employment and purchasing power by requiring collective bargaining and imposing maximum hours and minimum wages. These were deemed to be reasonable methods of improving the economy which, of course, consisted largely of interstate commerce.

The Supreme Court in *Butler* and *Carter* had by a 6 to 3 vote held that the federal government had no power to deal with such problems, and, prior to the *West Coast Hotel* case, by a 5 to 4 vote that the states didn't either. The result was that no governmental agency could take steps which were reasonably regarded as methods of defeating the depression, both generally and in interstate industries. This was the dilemma which the Roosevelt administration--and the nation--faced in 1937.

From this distance, with knowledge that two of the conservative justices would retire within a year, it is easy in hindsight to say that in time the Supreme Court would change and that drastic action was not necessary. But to tell the country to continue to wait, perhaps for years, would not have satisfied the farmers, workers, unemployed, or even many businessmen (including both my father and my wife's father), who were out of work or receiving less than a living wage. Of course, if the proposed remedies had clearly been unconstitutional no one could have blamed the Justices; a constitutional amendment would have been recognized to be essential. But when three or four of the outstanding members of the Supreme Court, including such prominent Republicans as Stone and Hughes, as well as Brandeis and Cardozo, took the opposite position, the President and the public not unreasonably blamed the judicial blockade on the other justices, four of whom, frequently with Roberts in support, had held unconstitutional the major efforts to deal with the nation's economic problems.

We do not know now, and did not then, whether the laws in question would have adequately revived the nation's economic and commercial structure. World War II eventually did that. But the above facts may demonstrate how sensible and conscientious public servants could support such a dangerous attack on the independence of the judiciary. It would have been a terrible precedent. I hope nothing like that will happen again.

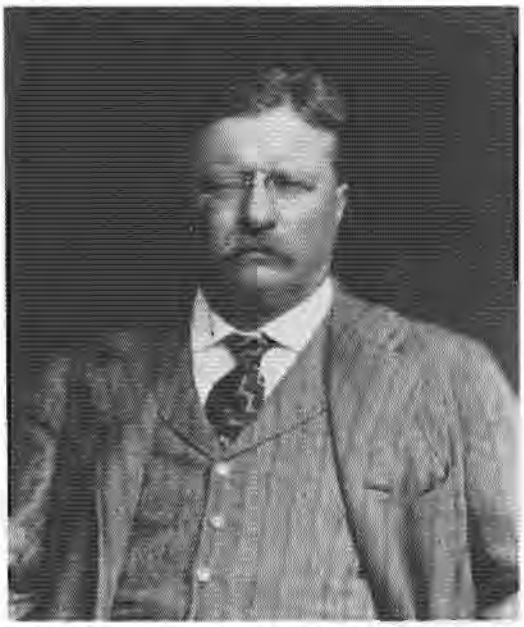
The Judicial Bookshelf

D. Grier Stephenson, Jr.[1]

It was one of George Washington's first concerns as President: the individuals who would sit on the Supreme Court of the United States. "Impressed with a conviction that the true administration of Justice is the firmest pillar of good government," he wrote his future Attorney General Edmund Randolph in 1789, "I have considered the first arrangmement of the Judicial department as essential to the happiness of our country and the stability of its political system." Under the Articles of Confederation which the recently ratified Constitution replaced, there had been no national Judiciary. While the Court's precise role in the new political system was unclear, Washington realized the impact the Court might have in the young Republic. This required, he told Randolph, "the selection of the fittest characters to expound the laws and dispense Justice...."

The first session of the newly constituted Supreme Court was scheduled for February 1, 1790, in the Royal Exchange building at the foot of Broad Street in New York City. The occasion was inauspicious. Only three of the six Justices were present, so the Court adjourned until the 2nd. By then a fourth Justice had arrived. A newspaper account of the day reported, "As no business appeared to require immediate notice, the Court was adjourned."

Two centuries ago, the Justices had not carved out their role in American government. Months would pass before the Supreme Court even decided its first cases. Yet the time was near when observers could say with near accuracy, "[E]very decision becomes a page of history."[2] Though Alexander Hamilton labeled the Court the "least dangerous" branch, regarding it as the weakest of the three, the Justices have had an impact on American life that can scarcely be exaggerated. "In not one serious study of American political life," proclaimed President Theodore Roosevelt in 1902, "will it be possible to omit the immense part played by the Supreme Court in the creation, not merely the modification, of the great policies, through and by means of which the country has moved on to her present position...."[3]



Alexander Hamilton's *(left)* description of the Court as the "least dangerous branch" was probably a commonly held view of the Court's potential to affect public life in the early nineteenth century. By the dawn of the twentieth century, President Theodore Roosevelt's *(right)* acknowledgement of the Court's "immense" role in shaping America's constitutional development reflected the Court's impact in the intervening years.

Roosevelt's estimate remains equally true today. It describes a reality made possible by, and bound up with, democratic politics and a written Constitution--a reality continually reflected by the Court's place at the center of scholarly inquiry.

The Justices

The Supreme Court is no stranger to constitutional conflict. Often the Justices have found themselves at the center of the storm. Publication of Charles Fairman's *Five Justices and the Electoral Commission of 1877*, as a supplement to Volume VII of the Holmes Devise *History of the Supreme Court of the United States*, is a reminder that the Court once had a role in resolution of the nation's most serious electoral crisis: the disputed presidential election of 1876.[4] Electoral disputes are always serious if their resolution affects the outcome. Democracies turn to elections not just as a convenient method of choosing leaders but as a way of *legitimizing* them. A "stolen" election thus undercuts the majoritarian premise which supports the government. In presidential politics, a disputed election threatens the national political community. This was especially the case in 1876 and 1877, barely a decade after Appomattox.

Because of conflicting returns in November 1876 from Florida, Louisiana, and South Carolina (and one electoral vote from Oregon), it was unclear whether Democratic candidate Samuel J. Tilden of New York or Republican nominee Rutherford B. Hayes of Ohio had a majority of the electoral votes. Tilden had a majority of 250,000 in the 8,323,000 popular votes cast. Hayes had 165 undisputed electoral votes, Tilden 184 (one less than the number needed to win). In early 1877 Congress created an Electoral Commission composed of five Representatives, five Senators, and five Associate Justices of the Supreme Court. Controlled by the Republicans, the Senate chose three Republicans and two Democrats. Con-

President Rutherford B. Hayes holds a Cabinet meeting at the White House in this *Harper's Weekly* illustration. Hayes *(right, inset)* might never have occupied the White House had it not been for the ruling of the Electoral Commission of 1877 in his favor over his Democratic opponent, Samuel J. Tilden. Charles Fairman's *Five Justices and the Electoral Commission of 1877* deals with the Justices' involvement in resolving the disputed election of 1876. The book is a supplement to Volume VII of the Oliver Wendell Holmes Devise.

trolled by the Democrats, the House chose three Democrats and two Republicans. Four Justices (two known to be members of each party) selected the fifth. Their choice was Joseph P. Bradley, also a Republican. Eventually the commission voted eight to seven by party lines to resolve the dispute in Hayes' favor, giving him 185 electoral votes to Tilden's 184.

Ultimately, the commission's decision rested on whether Congress should accept a state's certification of election returns as binding, or go behind the certification to examine the merits of individual disputes. Article I, Section 5 clearly gives each house the authority to "be the Judge of the Elections, Returns and Qualifications of its own Members. . . ." Did the same oversight extend by implication to presidential electors? By adopting the former position, the commission effectively gave the election to Hayes. Fairman accepts this as a constitutionally correct position, considers Bradley's written opinion as "the most important document in the history of the Electoral Commission,"[5] and demonstrates that the dominant view was the one largely favored by both Democrats and Republicans before the election of 1876 when Congress debated the question of disputed contests.

The focus of *Five Justices* is on the role of the five members from the Supreme Court, especially Justice Bradley.[6] Fairman's interest in the Commission rests partly on the widespread impression in historical literature that its members, including the Justices, were motivated chiefly by partisan advantage. Of special concern to Fairman is an account which singled out Bradley as one who initially was inclined to take a position favorable to Tilden but who, at the last-minute urging of others, and at the offer of a possible bribe, was won over to a position favorable to Hayes. This was the *Secret History* of Democratic national chairman Abram S. Hewitt, written first in 1878, revised in 1895, and left to be published only when all the participants in the dispute had passed away. Allan Nevins' biography of Hewitt appeared in 1935.[7] According to Fairman, Hewitt's account "was presented at length as true and reliable. So confident was he [Nevins] in the story that he failed to test it." Rather he went on to supply elaboration. After painstaking study, I became convinced that Hewitt's account was not reliable, and that Nevins in his infatuation with his subject had led historians astray."[8] Aside from exploring an important constitutional issue, Fairman's objective in this volume lies in restoring "the good name of Justice Bradley"[9] in this *extra-curiam* episode from Supreme Court history.

Associate Justice William O. Douglas is the subject of a recent work by Melvin I. and Philip E. Urofsky.

If *Five Justices* elucidates Bradley's role in a critical event of the nineteenth century, *The Douglas Letters* provides insight into the twentieth-century career of a law teacher, New Deal figure, explorer, author, and Justice whose work on the Court extended from 1939 to 1975. With the assistance of Philip E. Urofsky, Melvin I. Urofsky has collected and annotated several hundred letters that William O. Douglas wrote to various individuals between 1928, when he was on the faculty of the Columbia Law School, and 1979, some six months before his death in 1980. The earliest letters include one to Nicholas Murray Butler (April 5, 1928) and one to Thomas Reed Powell (November 18, 1930). Given Douglas' wide-ranging activities and accomplishments, the book is noteworthy. As Urofsky explains,

> Douglas' life and work ... are important because of his involvement in many of the important legal and political developments of the middle fifty years of this century. How historians will ultimately evaluate his contribution is difficult to predict: it is unlikely that he will ever share the pantheon of Holmes, Brandeis, and Cardozo, or perhaps even the second level of Black or Frankfurter. But Douglas will continue to fascinate laypersons and scholars for many years to

come, for few members of the nation's highest court have ever led such colorful and controversial lives.[10]

The volume is also noteworthy because it shares such sparse company. While the public and private papers of many Justices are available for study at the Library of Congress and at other libraries around the nation, publication of a Justice's letters occurs only infrequently. In this century, aside from some of the Holmes correspondence and the multi-volume set of Brandeis letters (the latter also edited by Melvin Urofsky) the list is short.[11]

The appearance of a collection of letters by a Justice as prominent as Douglas is thus significant for two reasons. First, even if the letters and other papers are open to the public at a library, the number of persons realistically who will ever see the letters is very small. This is to be expected because of the effort and expense involved in research. In such situations, the general public benefits from the labors of publicists who do see them. By contrast, publication in book form makes the papers available to thousands of interested students of the Court and other readers as well. Second, the letters of a Justice offer glimpses of government rarely matched by the papers of other leading personalities in Washington. Letters of a recent President, Representative, or Senator will probably not explain as much about the executive and legislative branches if only because so much of what occurs is the work of staff. Justices of the Supreme Court are probably the only remaining high officials for whom their own papers are valuable, if not complete, indicators of their roles within the decision-making process.

The Douglas Papers at the Library of Congress contain hundreds of thousands of items. The papers were closed to the public at the time Urofsky had access to them, presumably to give the staff in the Manuscript Division time to complete the cataloging. "Those [letters] selected for this volume," Urofsky notes, "have been edited . . . in a manner that allows Douglas to speak for himself. . . ." The book thus represents a tiny sample of what the entire collection contains. In addition to the possibility of distortion of Douglas' record such selection necessarily injects, one wonders whether Douglas "cleansed the files" of embarrassing materials before his death. Urofsky responds:

> We have heard conflicting stories from persons who ought to know; the evidence in the papers themselves is far from conclusive. There are gaps, especially in files dealing with his private life; one expects certain folders to be thicker. However, there are many letters still extant which one might have expected to have been destroyed if a purge had taken place. There does not seem to have been any systematic or wholesale destruction of documents, and beyond that, one will have to wait until the library cataloging is complete to identify any large gaps in the contents, if in fact they exist.[12]

Urofsky has made the volume more useful by inclusion of a short but instructive introductory essay on Douglas and by a topical organization of the letters: Part I, Yale and the SEC; Part II, Mr. Justice Douglas; Part III, A Very Public Justice: Part IV, Husband, Father, and Friend; Part V, Final Things. Each part in turn is divided into two or more chapters. For example, Part I contains chapters entitled "Professor Douglas" and "Commissioner Douglas." Part III contains chapters entitled "Politics," "Environmentalist," "Travel and Foreign Affairs," and "Writer and Speaker." Part II contains correspondence with twenty of the twenty-nine Justices with whom Douglas sat during his years on the Court: Stone, Black, Reed, Jackson, Vinson, Minton, Clark, Warren, Brennan, Whittaker, Harlan, Stewart, White, Goldberg, Fortas, Marshall, Burger, Blackmun, Powell, and Rehnquist. Part V contains twenty-three pages of letters relating to the impeachment threat against Douglas in 1970, concluding with one to Congressman Emanuel Celler, Chairman of the House Judiciary Committee, dated December 1, 1971. "Dear Manny, . . . This is really not a note of thanks, as you only did your constitutional duty. . . . Your career has brightened the conscience of America and made everyone within the radius of your actions and your words more mindful of the democratic ideal under our republican form of government."[13]

The letters alert the reader to characteristics of both Douglas and the Court. Several letters written about the time of his appointment by President Roosevelt to the Court in 1939 express surprise. "It was wholly unexpected so far as I was concerned. . . ." Yet his biographer James Simon has made it clear that Douglas not only knew he was being considered for the seat held by Brandeis but worked for the appointment in his own behalf.[15] On Chief Justice Warren, Douglas' memoirs exhibit high praise, yet letters to Justice Minton in 1961 show that Douglas' feelings were mixed: ". . . I never dreamed I'd be here when a Chief

Justice degraded the Court like Earl Warren is doing. It's a nasty spectacle. Perhaps the old boy is off his rocker." Among significant cases, the letters reprinted in the book contain no mention of the flag-salute cases of 1940 and 1943.[17] Students of constitutional interpretation have wondered why it took Douglas, as well as Black and Murphy, so long to "discover" their error in joining Frankfurter's wellnigh unanimous opinion in the first case. On the far-reaching decision in *United States* v. *United States District Court*,[18] announced in the *Reports* with a vote of 8-0, Douglas wrote Justice Powell urging him to base his opinion on the Constitution, rather than lodging it on more narrow statutory grounds:

> . . . Traditionally an opinion would . . . be in the province of the senior Justice to assign. That was not done in this case and the matter is of no consequence to me as a matter of pride and privilege–but I think it makes a tremendous difference in the result. I am writing you this note hoping you will put on paper the idea you expressed in Conference and I am sure you will get a majority. I gather from the Chief's memo that he is not at all averse to that being done.[19]

On the obscenity question, Douglas made clear in a "Memorandum to the Conference" in 1965 that he would not vote to accept cases involving censorship.

> Censorship is anathema to me and so distasteful, as well as unconstitutional, that I have decided not to make the fourth vote to bring these cases here so that we can sit as censors and apply our literary code to literature–a code which I have no reason to believe to be better than that of the lower courts. If there is to be censorship, I can see advantages in its being decentralized, administered locally so as to reflect varying views.[20]

Throughout, *The Douglas Letters* adds to what scholars know about Douglas and the Court during his years as a Justice. Representing weeks of reading and toil among the late Justice's papers, the Urofsky volume is a major contribution to the literature.

William H. Rehnquist was the last Justice confirmed by the Senate while Douglas was on the Court. His arrival predated Douglas' departure by four years. Already Rehnquist is the subject of a judicial biography, Donald Boles' *Mr. Justice Rehnquist, Judicial Activist: The Early Years*. Work on the volume was completed shortly before President Reagan nominated Associate Justice Rehnquist to the Chief Justiceship, to replace the retiring Warren Burger. As Chief, Rehnquist became only the

Donald Boles seeks to establish the hypothesis that Associate Justice (now Chief Justice) William Rehnquist *(above)* should be viewed as a judicial activist rather than a conservative in Boles' recent book on Rehnquist's early years on the Court.

third in Supreme Court history (after Edward D. White and Harlan F. Stone) to advance to the center chair while a member of the Court. As a nominee on two occasions, Rehnquist has been among the most controversial in modern times. There were 26 negative votes in the Senate in 1971 against his confirmation, 33 against his promotion to Chief in 1986.

Boles lays bare most of the objections voiced against Rehnquist[21] and promises that his book is the first of a "several-volume study" of Rehnquist. Chronologically, it takes the reader mainly through the Senate hearings on Rehnquist's nomination to fill Justice Harlan's seat in 1971, although there are references to cases the Court decided after Rehnquist joined the bench as well as some mention of the controversy surrounding his appointment as Chief Justice in 1986.

Boles' book is not a biography in the usual sense. This volume does not contain an in-depth study of Rehnquist's pre-Court personal and professional life. Rather it is a study of the intellectual origins and development of Rehnquist's views on constitutionally significant issues. In the author's words, the book "takes Mr. Rehnquist at his word [in an interview in 1985] when he says that he believes his views on the role of government and the courts in relation to individual rights have changed

very little since he moved to the bench. If this is true, it would seem especially important to look carefully at the early instances and manner in which he revealed his intellectual outlook on these subjects." Boles probes the past accordingly. "[H]is opinions of today," writes Boles, "should come as no surprise to anyone who paid attention to his earlier writings or public comments." What the reader finds is hardly a flattering portrayal,[22] but one that includes citations to some scholarly evaluations and to a wealth of journalistic commentary about one who may well be one of the most influential American jurists of the last quarter of this century. As Profesor Howard has observed, "Justice Rehnquist will be recognized as a catalyst to many of that tribunal's great struggles."[23]

Boles states that a study of Rehnquist's past provides support for David Shapiro's analysis of the Justice's first five years on the Court. He found that Rehnquist resolved (1) conflicts between the government and the individual in favor of the former, (2) conflicts between state and national authority in favor of the former, and (3) conflicts over the extent of federal jurisdiction against the national government.[24] Neither is Boles surprised by Owen Fiss and Charles Krauthammer's contention that Rehnquist is not a judicial conservative but a judicial activist. "He is no conservative," they write, "as that term is ordinarily understood in the law, but rather a revisionist of a particular ideological bent."[25] Later volumes in Boles' study of Rehnquist will presumably test the staying power of the values the author finds dominant in his life before 1971. Rehnquist's elevation to the center chair in 1986 may mean that leadership becomes a significant variable. While providing a perspective on Rehnquist, Boles has, perhaps unknowingly, added perspective to the uncertainties Presidents confront when making nominations to the High Court. Throughout American history, one notes presidential frustration over "judicial surprises": Justices whose votes do not match presidential expectations. However, persons who have developed a firm ideological position prior to nomination may occasion fewer "surprises." For Presidents keenly interested in the ideology of a nominee, someone who has long held and expressed clear views may prove especially attractive. The coming years may see more, not fewer, Justices of the temperament, whether of the right or left, Boles ascribes to Rehnquist.

The Court At Work

Donald Boles' characterization of Rehnquist is not readily apparent in Chief Justice Rehnquist's own book, *The Supreme Court: How It Was, How It Is*. Rehnquist's announced purpose in writing this volume--which appeared after sixteen years of service on the Court, including one term as Chief Justice--is "to convey to the interested, informed layman, as well as to lawyers who do not specialize in constitutional law, a better understanding of the role of the Supreme Court in American government."[26]

That goal is important, to be sure, but is one shared with many others who have written about the Court. His statement understates the uniqueness of the book. No other person has written a book about the Court while holding the nation's highest judicial office. John Marshall's biography of George Washington explained federalist principles of government.[27] William Howard Taft authored a book about the presidency and published a volume of essays on government before President Harding named him to the Court.[28] As Chief, Taft expounded in at least one book on the nature of American constitutional government.[29] The lectures of Charles Evans Hughes on the Court[30] remain a classic over 60 years after publication, yet the book appeared 12 years after his resignation as Associate Justice and two years before his appointment as Chief. Chief Justice Stone left an abundance of papers to scholars of the Court,[31] but no book. Chief Justice Warren's short volume on democratic government appeared after his retirement, as did his memoirs.[32] Chief Justice Burger made a large number of addresses (many of them published as articles), but authored no book on the Court in general. *The Supreme Court; How It Was, How It Is* is thus of instant importance because of its author.

Rather than using the book as a vehicle for his own constitutional views, Rehnquist devotes most of the volume to a description of the institution. No one reads very far into the book without a sense of the affection Rehnquist has for the highest court in the land. While avoiding discussion of the Court's substantive doctrines since 1953, Rehnquist begins with his own introduction to the Court, as a clerk to Justice Robert H. Jackson in 1952. The second part of the study is historical--broad-brush

comments on the institutional development of the Court and its decisions in principal cases from John Marshall's era to the mid-twentieth century. The author follows "a trail on the borderland between American history and constitutional law, and [gives] some idea of how the Court has responded to important developments in the history of our country."[33] The concluding part is a description of the Court's current decision-making procedures.

Much of the first part focuses on a landmark case during Rehnquist's clerkship with Justice Jackson: the Steel Seizure Case.[34] While the case has been exhaustively analyzed in the literature,[35] Rehnquist adds a new perspective, important because he was there. There is a report of Justice Jackson's comment to his clerks following the conference: "Boys, the President got licked."[36] There is Rehnquist's observation "that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, . . . and . . . had a considerable influence on the Court." Reflecting on his own experience as a Justice, the author admits, "I was recently asked at a meeting . . . whether the Justices were able to isolate themselves from the tides of public opinion. My answer was that we are not able to do so, and it would probably be unwise to try."[37] The Chief Justice was not asked how this admission accords with the doctrine of original intent, nor did he volunteer to elaborate. He does, however, give some attention to the ideological motivations behind Presidents' nominations to the Court: "[P]residents who have been sensible of the broad power they have possessed, and have been willing to exercise those powers, have all but invariably tried to have some influence on the philosophy of the Court as a result of their appointments to that body."[38] But he also notes "that the Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity. The well-known checks and balances . . . have supplied the necessary centrifugal forces to make the Supreme Court independent of Congress and the president."[39] New Justices, he says, are unlike new members of Congress. The former typically arrive one at a time; the latter arrive as a class, perhaps as many as 70 to 80 in the House. Without cohorts, the former takes his or her place with eight colleagues: the latter often form a bloc and cooperate with each other from the start.

The Supreme Court offers other insights on the Court's role as well as into Rehnquist's thinking about the institution he leads: "[T]here is no reason to doubt that [the Court] will continue in the everlasting search of civilized society for the proper balance between liberty and authority, between the state and the individual."[40] The Court's role "is no more to exclusively uphold the claims of the individual than it is to exclusively uphold the claims of the government. . . . And if it finds the scales evenly balanced, the longstanding 'presumption of constitutionality' . . . means that the person who seeks to have the law held unconstitutional has failed to carry his burden of proof on the question."[41]

On the role of law clerks: "[T]he law clerk is not simply turned loose on an important legal question to draft an opinion embodying the reasoning and the result favored by the law clerk."[42] On the nature of the judicial conference: "I feel quite strongly a preference for the Hughes style over the Stone style insofar as interruptions of conference discussions are concerned. . . . But the Chief Justice is not like the Speaker of the House of Representatives; it would be unheard of to declare anyone out of order, and the Chief Justice is pretty much limited to leading by example."[43] On granting certiorari, while recognizing that a decision to grant review is "rather subjective" and "made up in part of intuition and in part of legal judgment," he states: "One factor that plays a large part with every member of the Court is whether the case . . . has been decided differently from a very similar case coming from another lower court: If it has, its chances for being reviewed are much greater than if it hasn't."[44]

As Rehnquist and others have long acknowledged, selection of Supreme Court Justices is one of a President's most important functions. This is not only because of the issues the Court confronts but because the average tenure of Justices is much longer than the average tenure of Presidents. The total number of Justices since 1789 (105) is only slightly greater than the present number of United States Senators. Presidential choices in staffing the Supreme Court and the lower federal courts thus tend to extend a President's influence on the nation long after he has left office.

Neil D. McFeeley's *Appointment of Judges*[45]

Among the numerous judicial appointments of President Lyndon Johnson *(left)* were two Justices of the Supreme Court--Associate Justices Thurgood Marshall *(above, left)* and Abe Fortas *(above, right)*. According to author Neil McFeeley, Johnson took a personal interest in establishing the selection criteria for judicial appointments during his administration, emphasizing the need for candidates to be in accord with the President on such issues as civil rights and his policy on the Vietnam war.

undertakes study of federal judicial selection in the presidency of Lyndon Johnson (1963-1969). The statistics illustrate the importance of the subject: Johnson named 125 District Court Judges, 41 Appeals Court Judges, two Supreme Court Justices (Marshall and Fortas), and 13 other Judges. Seventeen years after the end of the Johnson presidency, one of the Supreme Court Justices, 35 of Appeals Court Judges, and 87 of the District Court Judges remained on the bench in active or senior status.

McFeeley's volume is the sixth in a series of studies designed to comprise an administrative history of the Johnson presidency. "How President Johnson managed the executive branch to achieve the objectives of law and presidential purpose is the broad question which jointly they strive to answer." McFeeley explores the management process by which information was filtered and transmitted to the President and through which the President's criteria for selection would prevail."[46] The management process is essential because no President, even given a preference to do so, can do all or most of the work involved in judicial selection. So the "sub-presidency" becomes crucial to the President's success in meeting his goals. The term denotes "all those who have served the President . . . in the exercise of his responsibilities." They include individuals "in departments or independent agencies who had separate official responsibilities but whose loyalties to the president led them to look at problems from a presidential perspective."[47]

While McFeeley used some secondary sources in his study, he relies mainly on the files of aides, officials, and agencies stored at the Lyndon B. Johnson Library in Austin, Texas. The files contain memoranda to Johnson from his principal advisers in the White House and senior officials in the Department of Justice. There are oral histories and staff memoranda on the politics of selection. Of course much goverment business increasingly is done on the telephone. Where no records are made of conversations, they obviously are not available to McFeeley. Moreover, some materials that might be embarrassing to individuals remain restricted, at Johnson's request, as are reports by the Federal Bureau of Investigation on potential nominees. McFeeley did not examine files of participants (such as Senators and lobbyists) which are not part of the holdings in the Johnson Library. McFeeley largely confirms the findings of J. Woodford Howard's study of appointments to the courts of appeals,[48] where four major factors were at work: "political participation, professional competence, personal ambition, plus an oft-mentioned pinch of luck. . . . Judgeships normally are rewards for political service. . . . To the politically active as well as to the party faithful go the prizes." Luck consists of "knowing the right people at the right time."[49] To these McFeeley adds "the President's increasing aversion to criticism, particularly from within the administration, and his demand for personal loyalty. Another was the requirement for agreement with Viet-

nam policy from all appointees." Political clearance became a key part of the selection process "as Johnson's attitude toward dissent hardened."[50]

Johnson's interest in appointing black Judges, and in having others take an interest in his interest, is reflected in a memorandum Johnson dictated for Press Secretary George E. Reedy: "Find out how many Negro Judges I have named. Have a planted question--each time one is announced-- ask if this is a Negro judge? All of every kind--and tell the number--7 or 8--51 more than any other President."[51] Advocacy of civil rights was a key criterion. A memorandum written in June 1966 refers to the views of a particular nominee to a lower federal court: "How is he on civil rights? Ask Ramsey to thoroughly explore background--prior associations in cases, etc., and give me memo before I act. I want this on every Judge."[52]

As noted, Johnson named both Abe Fortas and Thurgood Marshall to the Supreme Court, and McFeeley devotes part of a chapter to their nominations. It should also be recalled that Johnson nominated Fortas to succeed Chief Justice Warren in 1968, a nomination Johnson withdrew on October 2 (at Fortas' request) after the Senate failed to approve it. (Johnson had nominated Judge Homer Thornberry of Texas to take Fortas' place as Associate Justice.)

One of the questions about Johnson's last year in the White House is why he did not submit another name to the Senate. His failure to do so guaranteed that the choice of the new Chief would fall to his successor, widely thought to be Richard Nixon at that point. Advisers put forth the names of Erwin Griswold and former Justices Tom Clark and Arthur Goldberg. One memorandum bluntly stated, "Even if the Senate shirks its responsibilities, you should not end your term in office leaving vacant the most important appointment a President can make." To avoid the problems with a recess appointment, Johnson was urged to make an appointment right away and, if necessary, to submit it again when the Senate reconvened in January 1969. Apparently persuasive, however, was a memorandum dated December 9, which evaluated probable opposition in the Senate Judiciary Committee and on the floor: "So if a nomination were submitted I think it unlikely that it could be confirmed. To reject Goldberg might prove slightly embarrassing for the Republicans but to be repudiated again by the Senate on a Chief Justice nomination would also be embarrassing to the President. I would recommend against the nomination of a Chief Justice either in a special session or in the 91st Congress."[53]

Finding himself in a similar situation in 1801, President John Adams, much to Thomas Jefferson's chagrin, followed an altogether different course. A few weeks before he left the White House, Adams named Secretary of State John Marshall Chief Justice of the United States. If Adams had taken President Johnson's route, Chief Justice Ellsworth's successor probably would have been Spencer Roane of Virginia, an ardent defender of states' rights. In that event, history during the crucial formative years would have been drastically altered, perhaps for the worse.

Considering Johnson's many judicial appointments, however, McFeeley concludes that the selection process worked well, even though Johnson's last year ended on a sour note with the failure to get the Senate to approve Warren's successor and the concomitant mooting of the Thornberry nomination. On balance the sub-presidency was highly effective. "Communication and control were the goals of the process and to a large extent those goals were met, as Johnson generally was able to accomplish his objectives in the area of judicial selection."[54] This was largely because of the kind of assistants and advisers the President had around him and because of his own involvement. "Perhaps the major difference between the Johnson process and others was the role of Johnson himself. Lyndon Johnson was not a bystander at the selection process, but rather a participant. . . . Johnson participated in selection at all levels of the federal judiciary and his participation was much more than a formality."[55] Johnson's interest even extended to reading the thank-you letters that appointees wrote.

The Work of the Court:
The Supreme Court in History

G. Edward White is author of one of the most recent installments in the Holmes Devise *History of the Supreme Court of the United States:* volumes III and IV bound together as one book entitled *The Marshall Court and Cultural Change, 1815-35.*[56] The series, as originally projected, is nearing completion. The volumes covering the nineteenth century are

now in place; forthcoming are two volumes focusing on the Taft and Hughes Courts.

Professor White's task in analyzing the second part of the Marshall Court is formidable. As he notes, the time was one of the Court's "most famous but one of its least accessible periods." In contrast to other volumes in the *Holmes Devise History*, White's does not claim to be a "lawyer's history," but attempts to "locate the Marshall Court in the larger culture of which it was a part."[57]

White begins with the labels commonly attached to the Marshall Court: nationalist, Federalist, property-conscious, and Chief Justice-dominated. Each contains some truth. However, "the difficulty with the entrenched labels for the Marshall Court is not that they mischaracterize but that they oversimplify: they conceal complexities and in the process blunt rather than sharpen understanding." Instead, White examines the latter Marshall years "by considering the Court as an institution functioning in a culture composed of the entrenched belief structure of republicanism and the emerging oppositionist belief structure of liberalism."[58]

To gain access to the beliefs of the Justices who served on the Court during this period, White has made an effort "to reconstruct, as far as possible, internal evidence about the Marshall Court's deliberative processes. . . ." The working life of the Court, including "the manner in which cases came to it, the setting of its deliberations, its deliberative practices, . . . can be seen as having an ideological character." White believes that the problem of judicial discretion--the degree of choice the Justices possessed--and the need to separate this discretion from the outward appearance of partisan political activity--was "foremost in the minds of Marshall and his contemporaries."[59]

The Court's cultural context in the years 1815-1835 consisted of three central features. First was the conception, widespread in the early nineteenth century, that America was a republican society.[60] This view stressed the uniqueness of the United States and the opportunity such uniqueness presented to its people to attain the status of a virtuous citizenry. The second pervasive cultural feature was a sense that republican virtues, synonymous with the Revolutionary period, were passing into history. Republicanism was an ideology of restraint, subordinating "individual self-interest to the good of society as a whole." By contrast, the liberalism of the late eighteenth and early nineteenth centuries was an ideology of permissiveness, encouraging free markets and discouraging governmental interference in the affairs of citizens. For the latter, property was a "source of economic freedom and productivity," not "a source of political and social stability."[61] Clashes over the role of corporations or the place of credit can, White believes, be seen as clashes between republicanism and emerging liberalism. The third central feature was "the absence of a historicist theory of cultural change." Change was not viewed as a given, but as part of a cyclical pattern of events. Accordingly, certain institutions could be placed "outside time" to resist the "inexorable process of decay."[62]

According to White, the idea "that the past could be preserved and the exceptionalism of America made permanent seemed particularly applicable to American Jurisprudence." But "the interpretation and declaration of legal principles by federal judges, so far from ensuring the permanence" of constitutional principles, tended to violate them. They owed their appointment to partisan selection; moreover, interpretation threatened both "discretion" (the opportunity to make partisan decisions) and "consolidation" (reading the Constitution to reduce state prerogatives). So the Marshall Court tended to regard discretion as "mere legal discretion" and characterized "consolidationist" decisions as merely applications of the language and spirit of the Constitution."[63]

The Marshall Court adopted a three-pronged response to the problem constitutional interpretation in a changing age presented. First, the Court "recast the language of the Constitution, so that extracted principles could be made applicable to an altered cultural environment." So, "contract" and "commerce" were cut loose from the bonds of the eighteenth century and "converted into permanent principles. . . . In each of the great constitutional cases that came before the Marshall Court a critical word or group of words in the Constitution's text was recast through this technique, converted into a principle, and made applicable to a situation not explicitly contemplated by the Framers." The second prong of the Marshall Court's response was "to recast doctrine in nonconstitutional cases as it recast textual language in constitutional cases." That is, "prior common law decisions were converted to authorities and at the same time

Americanized." Recast doctrines appeared in the form of enduring principles. The third prong was institutional: the "creation of mechanisms to promote selective, collegial, and confidential decisionmaking, so that the discretionary features of judging would not be exposed to public scrutiny."

By emphasizing unanimity and continuity, the Court was able to hide its choices beneath the cloak of nondiscretion. Responding to the contradictions in the culture of the early nineteenth century, the Court defined its role as one of "preserving, perfecting, and modifying the exceptional American version of republicanism in the face of cultural change."[64]

This aspect of the Marshall Court may prove to be the most difficult to grasp, White believes. "It may be easier to fathom Judges riding in stagecoaches . . . than to imagine their seeing their declarations of legal rules and principles as anything other than creative lawmaking." Their ideology was "designed to ensure the permanence of an experimental form of social organization by forestalling change and asserting the universality of certain beliefs. The years of the Marshall Court may have been the first time...in which the possibility that the future might never replicate the past was truly grasped. But if that insight was grasped, it was not embraced." The Justices' task was to reaffirm first principles. The Court's "consciousness was affected--one might say imprisoned--by that perception: it was," White concludes, "a Court of its time."[65]

Just as the Supreme Court in Marshall's day confronted a largely uninterpreted constitutional text, the Court in the years following the Civil War faced the uninterpreted generalities of section one of the Fourteenth Amendment, sometimes called the "Second Constitution." For several decades there was considerable debate on and off the Court over whether this amendment was intended to apply the Bill of Rights to the states. Most scholars agree with Chief Justice Marshall's opinion in *Barron* v. *Baltimore*[66] that Congress and the ratifying state legislatures did not suppose that the first eight amendments applied to the states. After 1868, the question became whether the Fourteenth Amendment accomplished what Congress in 1791 had not.[67] In *Adamson* v. *California*, Justice Black, dissenting, insisted on a doctrine of total incorporation. Replying, Charles Fairman attempted to disprove Black's thesis.[68] Among the Justices, the issue had largely lain dormant since *Duncan* v. *Louisiana*.[69] By then the Court had brought, in piecemeal fashion, most of the provisions of the Bill of Rights to bear on the states. In evolutionary stages, the Court wrought revolutionary results.

Michael Kent Curtis' *No State Shall Abridge*[70] could not have appeared at a more opportune time. President Reagan's second attorney general, Edwin Meese, announced to the American Bar Association in 1985 that the process of "incorporating" the Bill of Rights had been based on error. Nothing can be done "to shore up the intellectually shaky foundation upon which the [incorporation] doctrine rests." Meese reopened public debate over the Fourteenth Amendment. Curtis' book, virtually completed by the time Meese made his 1985 address, is in effect a response. Curtis believes that Black was correct. Curtis arrives at this position--a position rejected by most Justices and others who have considered the question--in light of the antislavery crusade that produced the Fourteenth Amendment. "It reflected Republican legal theories, theories that were often at variance with conventional constitutional doctrine. Indeed, when read in light of Republican constitutional theory, much that seems confusing in the congressional debates leading up to the Fourteenth Amendment becomes clear. No one will ever be able to reduce the debates to perfect harmony. But the hypothesis advanced here makes sense, rather than nonsense, of what leading Republicans had to say."[72] Removing slavery meant a return to the nation's original purposes as found in the Declaration of Independence and the preamble to the Constitution.

Contributing to the difficulties any constitutional historian faces when examining the Fourteenth Amendment is the fact that most of the amendment concerned northern dominance and penalties on southern resurgence as an outcome of the Civil War. Section one, the part that (along with the enforcement clause) has retained significance, contains only 67 of the amendment's 428 words. So Curtis notes, "the questions we ask today . . . were not the questions Republicans were typically most determined to talk about." That is, he is searching for "understanding of a question to which they [the Republicans in Congress] devoted comparatively little direct attention."[73]

While most of *No State Shall Abridge* focuses on the formation of the Fourteenth

Amendment, Curtis devotes the final two chapters to an overview of the Fourteenth Amendment in the Supreme Court. An important issue in the twentieth century has been the extent to which the amendment protects rights not found in the Bill of Rights. Believing that the amendment was so limited led Justice Black to dissent in *Griswold* v. *Connecticut*,[74] where the Court relied on "penumbras" in the Bill of Rights to invalidate a state law banning the use of birth control devices. Curtis, while not exploring this question in detail, sides with the Griswold majority. Because constitutional protections such as the Fourth Amendment have their origin in English law, "much of the progress in the history of liberty resulted from a very libertarian reading . . . of the intent of the framers of the Magna Carta. Any attempt to freeze understanding of liberty at a certain period in history confronts the historical fact of evolution."[75]

Curtis admits that his research, especially on the larger issue of the applicability of the Bill of Rights, is not conclusive.

> In a real sense one can never prove that the amendment was designed to apply the Bill of Rights to the states. One can simply take the hypothesis and see how well it fits the evidence. The hypothesis fits the evidence very well indeed. On the other hand, one can take the contrary hypothesis -- that except for due process (without substantive content or the procedural content of the Bill of Rights) the amendment only provided for equality under state law. That hypothesis can be refuted easily and is impossible to reconcile with most of the evidence."[76]

The irony of Curtis' book is that it rests on original intent. Original intent was the basis of Mr. Meeses' objection in 1985 to the modern judicial approach to the Fourteenth Amendment. Whether one chooses Curtis' (and Black's) history or another, *No State Shall Abridge* clearly demonstrates that the doctrine of original intent cuts both ways.

Unlike White's comprehensive review of the later Marshall Court's important constitutional and nonconstitutional decisions or Curtis' survey of the origins of a constitutional doctrine, Charles A. Lofgren offers an analysis of a single case.[77] Like White's book, however, *The Plessy Case* draws on a wealth of cultural material and therefore reveals much about the political and legal life of America during the late nineteenth century. Above all, it adds a chapter to present understanding of what historian C. Vann Woodward has called "the strange career of Jim Crow."

Charles A. Lofgren's *The Plessy Case* provides an in-depth look at *Plessy* v. *Ferguson* in which the Court upheld a Louisiana law providing for separate train cars for white and black passengers.

It speaks volumes about *Plessy* v. *Ferguson's* place in American politics and constitutional law nearly a century after the case was decided that the author feels obliged at the outset to make clear his intentions in this scholarly exhumation. While acknowledging that Justice Harlan's dissent "was the morally correct response in a republic founded on the truth 'that all men are created equal,' " Lofgren explains that "simply condemning the decision promotes an understanding neither of it nor of America in the late nineteenth century."[78] Significantly, Lofgren shows that the national press in 1896 greeted the decision with apathy and that in many scholarly works it remained unnoticed or obscure for many years after 1896.[79] The omissions suggest for Lofgren not just widespread acquiescence of many white Americans in the Compromise of 1877, but that in its time Plessy was "not especially controversial." Yet, significance may rise from insignificance. "A decision which is largely commonplace may . . . serve nicely as a kind of prism through which to refract and analyze some of the tenets of a period."[80]

The origins of *Plessy* are not widely known. First, the case was not only arranged but did

not result in a conviction before the decision by the United States Supreme Court. Second, the case originally rested on commerce clause arguments, not mainly on equal protection grounds.

After Louisiana enacted the Separate Car Act in 1890, blacks in New Orleans organized the Citizens Committee to Test the Constitutionality of the Separate Car Law. For legal talent, they were successful in interesting lawyer-novelist Albion W. Tourgee of Maysville, New York, in their case. By arrangement with the Louisville and Nashville Railroad, a black passenger named Daniel Desdunes would board a train with an interstate ticket but would not sit, at the conductor's direction, in the car reserved for blacks. Lawyers for the railroad, which also opposed the statute, insisted that a passenger, not the company's conductor, swear out a complaint. This plan was derailed, however, when the state supreme court handed down a decision in an unrelated case, overturning the conviction of a conductor for admitting a black into the car reserved for whites. Judge John H. Ferguson used this decision to dismiss the case against Desdunes.

The Committee then turned to Homer A. Plessy, a thirty-four-year-old friend of Daniel Desdunes' father. Plessy bought an intrastate ticket on June 7, 1892, on the East Louisiana Railway for a ride between New Orleans and Covington. In what Lofgren concludes was prearranged, Plessy was arrested and was arraigned before Judge Ferguson in Criminal District Court. At this point, James C. Walker (Plessy's local attorney) changed the argument by dropping reference to the interstate commerce issue as well as to Plessy's race.

Because Louisiana procedure did not provide for a direct appeal for minor convictions of this sort, Walker petitioned the State Supreme Court to halt the trial proceedings before they began. On November 22, Chief Justice Francis T. Nicholls (who as governor in 1890 had signed the separate car bill into law) ordered Judge Ferguson to show cause why the prohibition should not be made permanent. The following month, the full court found that there was no constitutional conflict between the separate car law and the Thirteenth and Fourteenth Amendments. In January, attorney Walker was in position to request a writ of error from the Supreme Court of the United States.

Tourgee's brief in the High Court adopted an affirmative rights position, based on both the Thirteenth and Fourteenth Amendments, that the Constitution forbade "legally mandated racial assortment."[81] But decisions before the mid-1890's made this argument difficult to maintain. Tourgee also attempted to show that the state law degraded blacks, as suggested in 1880 in *Strauder* v. *West Virginia*: that the Fourteenth Amendment conferred on blacks "the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."[82] In other words, Tourgee had to prove that the law was not a reasonable police regulation that promoted the welfare, health, and morals of the people. As Lofgren explains, however, "*having opened the issue,* neither he nor his colleagues examined, in order to discredit, the legal sources and purported empirical evidence that pointed to a contrary conclusion regarding the reasonableness of separation." And the position lodged in Justice Henry Billings Brown's opinion for the majority was that the separate car law was a reasonable exercise of the state's police power. "If one ignores Brown's convoluted, clouded, and underdeveloped presentation, it was all simple and routine."[83]

It was in January 1897 that Homer Plessy entered a plea of "guilty" for boarding the white car and paid a fine of $25.00. The entire litigation cost $2,762 of the $2,982 the Committee had raised to challenge the law. Contrary to the Committee's objectives, the Supreme Court had ratified classification based on race. The outcome, writes Lofgren, "came not from startling recent shifts in doctrine, nor from the Court's setting off boldly in a new direction in the case itself. Rather, it turned, almost inexorably, on incremental change. Acceptable law and passable social science--by the light of the day--together denied the self-evident truth of the Declaration of Independence...." Yet the Committee and counsel were able to have their arguments "displayed on the record--indeed, memorialized in Justice Harlan's dissent--to instruct later generations." *Plessy* made a difference not for what it did but for what it came to symbolize, "negatively and positively, and for the sobering and nagging questions about citizenship in a scientific age that it posed--and

Associate Justice Oliver Wendell Holmes, Jr.'s dissent in Abrams v. United States provided the title for Richard Polenberg's *Fighting Faiths* --a study of the *Abrams* and other free speech cases.

poses--to anyone paying attention."[84]

Just as *Plessy* v. *Ferguson* is a landmark case in the constitutional history of racial discrimination, *Abrams* v. *United States* has long been required reading for anyone attempting to fathom the development of the constitutional law of free speech in the twentieth century. Richard Polenberg's *Fighting Faiths*[85] is a detailed study of the Abrams case and other cases raising free speech claims during and immediately after World War I. The title of the volume comes from Justice Holmes' dissent in *Abrams:* "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . ." The book is also about leading theoreticians of free speech such as Zechariah Chafee, Jr., and about radicalism, ethnicity, and bureaucracy. Polenberg relied on the usual judicial sources and secondary materials, but he also researched nearly 100 manuscript collections and obtained more than 600 pages of formerly classified documents under the Freedom of Information Act, from the Bureau of Prisons, the Bureau of Immigration, and the Office of Naval Intelligence.

In 1918, Congress enacted the Sedition Act (later repealed in 1921). Among other things, it made criminal the saying or doing of anything to obstruct the sale of United States bonds, the uttering or publishing of disloyal or abusive language intended to cast contempt on the form of government of the United States, the Constitution, the flag, the uniform of the Army or Navy, or urging resistance to the United States or promoting the cause of its enemies. In August 1918, Jacob Abrams and other Russian immigrant radicals scattered leaflets in New York City condemning intervention by American troops in the Russian revolution. Arrests under the Sedition Act followed. The trial at the United States Courthouse in New York in October was held before Judge Henry De Lamar Clayton of the Middle and Northern Districts of Alabama.

When the Supreme Court heard the Abrams case on appeal in 1919, the free speech provisions of the First Amendment were relatively undeveloped even though the First Amendment had been part of the Constitution since 1791. The Justices as a group had not been nearly so inclined to protect non-property rights during the years they defended property from what they considered undue regulation by the state and national governments. Professor Felix Frankfurter later tried to account for this apparent inconsistency: "That a majority of the Supreme Court which frequently disallowed restraint on economic powers should so consistently have sanctioned restraints of the mind is perhaps only a surface paradox. There is an underlying unity between fear of ample experimentation in economics and fear of the expression of ideas."[86]

Seven months earlier, the Court had decided *Schenck* v. *United States*, in which Justice Holmes formulated the "clear and present danger" standard for judging the constitutionality of restrictions on speech. As Polenberg notes, in its form in *Schenck*, the test "was not at all solicitous of the rights of dissenters." But between this case and *Abrams*, "Holmes' thinking would undergo a significant change, and the Abrams case would play a central role in that change."[87] After the Court upheld Eugene Debs' conviction under the Espionage Act in 1919,[88] Learned Hand wrote Holmes to argue for suppression only when one has incited listeners to violate the law. In both *Schenck* and *Debs*, no incitement had been established. Holmes replied, "I don't know what the matter is, or how we differ so far as your letter goes."[89] According to Gerald Gunther, the statement

reveals "the primitiveness of Holmes' first amendment thinking at that time."[90]

Criticism of Holmes in the pages of the *New Republic* by Ernst Freund came next. Holmes composed (but did not mail) a letter to editor Herbert Croly defending the ruling in *Debs*, adding: "I hated to have to write the Debs case and still more those of the other poor devils before us the same day and the week before. I could not see the wisdom of pressing the charges, especially when the fighting was over and I think it quite possible that if I had been on the jury I should have been for acquittal. . . ."[91] Zechariah Chafee's article "Freedom of Speech in War Time," published in the June issue of the *Harvard Law Review* ,then caught Holmes' attention. The thrust was that Holmes' principle only needed refinement, to limit suppression to incidents of direct incitement. Discussions with Harold Laski in the summer of 1919 led Holmes to reconsider his position in *Schenck* and *Debs*. By October, Polenberg believes Holmes "had begun to view the issue of free speech differently than he had in March." While he had not moved all the way to Hand's incitement test or to the position advocated by Chafee, he was "more sensitive to the value of free speech as a means of getting at the truth, to the importance of experimentation, and to the need to treat dissenters mercifully. . . ."[92]

Harry Weinberger, Abrams' attorney, argued for an even more stringent test. In his brief, he quoted Thomas Jefferson: "It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In other words, action could be punished, but speech itself must be "perfectly unrestrained."[93] The majority was unpersuaded. Polenberg observes that Justice Clarke's opinion was "quite consistent with the position that Oliver Wendell Holmes had taken in *Schenck*, *Frohwerk*, and *Debs*. Clarke's *Abrams* opinion, in November, was very much like one Holmes might have written eight months later."[94]

Holmes' dissent held in effect that speech was protected unless an immediate check was required to save the country. Polenberg relies on an account by Stanley Morrison (Holmes' clerk) as told to Dean Acheson, (Brandeis' clerk at the time) concerning a visit by some of the brethren (Justices Van Devanter, Pitney and another) to convince Holmes to change his mind. "They laid before him their request that in this case, which they thought affected the safety of the country, he should, like the old soldier he had once been, close ranks and forego individual predilections. Mrs. Holmes agreed. . . . The Justice regretted that he could not do as they wished. They did not press." Justice Brandeis was on Holmes' side. "I join you heartily & gratefully. This is fine--very," he commented on Holmes' dissent.[95]

It was in 1969 in *Brandenburg* v. *Ohio*[96] that the Supreme Court adopted a direct incitement test as a measure of constitutional restrictions on free speech. Abrams and his colleagues paid "a heavy price for voicing their inner convictions, a price none of them could have foreseen when they emigrated to America, embraced radicalism, or denounced United States intervention in Soviet Russia." Yet, Polenberg notes, their action "had far-reaching consequences" for First Amendment doctrine. The case "contributed...to a process of judicial reconsideration which eventually placed freedom of speech on a firmer constitutional basis."[97]

The Work of the Court: The Contemporary Court

While the literature on the Supreme Court contains many excellent studies such as Polenberg's and Lofgren's on a single case, typically they concern older cases. There are at least two reasons why this is so. First, sometimes years must pass before the full significance of a case is apparent. The development of constitutional law is incremental. A case may achieve notoriety not simply because of what it decides but because of events that follow. Second, within limits, sources of information often increase as time passes. This is especially true with respect to private papers and other manuscript collections, as well as oral histories. It is noteworthy therefore that Barbara Hinkson Craig's *Chadha*[98] appears five years after the Supreme Court's decision in *Immigration and Naturalization Service* v. *Chadha*.[99]

Craig accomplishes two impressive tasks. She follows Chadha's case from the beginning, revealing a human drama worthy of a novel. She also places Chadha's story in the context of a debate on the future of the American constitutional system. *Chadha* is thus readable, and good, political science. Because her research related to very recent events, she had to rely heavily on interviews as well as court and other legal documents. Four individuals were cen-

tral to her work: Jagdish Rai Chadha himself, Public Citizen Litigation Group attorney Alan Morrison (who represented Chadha), Larry L. Simms (who served in the Office of Legal Counsel in the Justice Department during the Ford, Carter, and Reagan administrations), and former Representative Eliott Levitas of Georgia. She had access to all of Morrison's files, and Simms "provided a detailed account of the Justice Department's involvement in the cases and aided me in my effort to secure interviews with senior Justice Department personnel in the three Administrations." What Craig's study may have lost in terms of access to some manuscript sources by having been written so soon is more than balanced by what she gained in terms of information and perspectives which might otherwise never have become part of the historical record, at least not to the extent seen here. The trail did not grow cold.[101]

From the outset, few doubted the significance of the Chadha decision. The Supreme Court not only declared the legislative veto unconstitutional, but called into question the constitutionality of about 200 statutes enacted in the past half century containlng a legislative veto provision. As Justice Powell observed in his concurrence, "The encompassing nature of the ruling gives one pause." In 1984, speaking to a group of political scientists, Chief Justice Burger called *Chadha* the most important case decided in the 1982-83 term, "especially in the long run. Some say *Chadha* is one of the ten most important cases in our history. I'd say that is perhaps stretching it a bit, but *Chadha* is certainly among one of the fifty most important in our history."[102] The decision's conclusiveness led former Solicitor General Rex Lee, who was actively involved in the litigation, to call *Chadha* a "slam dunk" decision.[103]

Because of the technical nature of the litigation, some background on *Chadha* is in order. The case arose from Section 244(a)(1) of the Immigration and Nationality Act which authorized the Attorney General, in his discretion, to suspend the deportation of a deportable alien. Under Section 244(c)(1), the Attorney General was required to report such suspensions to Congress. Section 244(c)(2) authorized *either* house of Congress by resolution to invalidate the suspension before the end of the session following the one during which the suspension occurred. The Attorney General discharged his responsibilities through the Immigration and Naturalization Service, part of the Department of Justice.

Jagdish Rai Chadha is an East Indian who was born in Kenya and who was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. He remained in the United States after his visa had expired in 1972 and was ordered by the Immigration and Naturalization Service to show cause why he should not be deported. Through an attorney, Chadha then applied for suspension of the deportation order, and an immigration judge ordered the suspension. On December 16, 1975, the House of Representatives exercised the veto authority reserved to it under Section 244(c)(2). Without action by either house of Congress, Chadha's deportation proceedings would have been cancelled after Congress adjourned in 1975 and his status would have become that of permanent resident alien. The House resolution was not like an ordinary law. That is, it was not submitted to the Senate and it was not presented to the President for his signature. Here lay the constitutional rub.

Why the House vetoed Chadha's suspension remains unclear. His was one of six vetoed, out of 339 suspension cases then before Congress. According to Craig, "Although no one then, or now, knows for sure what the reasoning was, and Eilberg [Representative Joshua Eilberg, chairman of the Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee] has refused to give any explanation (the files on the case were sealed by the committee, and . . . no freedom-of-information requirement applies to Congress . . .) past action of the committee offers a possible explanation for the action." Because the use of nonimmigrant visas by persons who then seek to remain permanently in the United States is arguably unfair to those who wait their turn under the immigration rules, it is conceivable that the House was trying to reduce the number of such abuses. "Perhaps Chadha had meant all along to try to accomplish this too, but the fact remains that even if his intention had been to return to Kenya, he was not able now to do so because of events that had taken place since his departure."[104]

In all probability, Chadha's case reached the Supreme Court only because others were able to use it as a vehicle for an assault on the legislative veto. His case became a story not just about constitutional litigation but about

"the politics of federal regulation, about Congress, about the president, about the courts, about interest groups, about the weak and the powerful---in short, it is a story about politics American-style."[105] Chadha's case became all these things in large part because of an attempt by Congressman Levitas and others to pass a "generic" legislative veto. Under this proposal, either house of Congress would have thirty days in which to veto any administrative rule adopted by an agency under the Administrative Procedure Act. Significant opposition came from the Justice Department. Antonin Scalia, then Assistant Attorney General for the Office of Legal Counsel, declared: "We are opposed to these bills, for reasons both of practicality and of constitutional principle."[106] He voiced objections previous administrations had made to the legislative veto since the device first appeared in 1932. From a President's perspective, the veto allowed Congress to make inroads into rule-making discretion it had delegated to the executive branch. From the perspective of a member of Congress, the veto maintained some congressional control in an era when delegation of legislative authority had become a practical necessity.

Opposition to the Levitas measure also came from Alan Morrison who headed the Public Citizen Litigation Group, which until 1980 was associated with Ralph Nader. Not only did the legislative veto seem to go against the separation of powers, but from the perspective of a "citizens lobby" the veto allowed interest groups to wield considerable influence on Capitol Hill. Morrison's interest in Chadha's case was providential for both. The case acquired visibility and legal resources it might not otherwise have enjoyed, and provided Morrison with "the weapon he needed" to continue the battle against the veto.[107]

For most of this century interest groups have been active in constitutional litigation.[108] Interest groups large and small sometimes develop their own cases, as was done by the National Association for the Advancement of Colored People in the 1950s. At other times groups submit *amici* briefs when another case raises an issue close to the group's concern. As illustrated by *Chadha*, groups can also assume control of an existing case. As Craig explains, The vast expansion of the agenda of U.S. politics in the 1960's and 1970's that added among many other items, consumer protection concerns, was accompanied by an equal growth in organized interest groups.... At the same time courts were increasingly willing, even eager, to seize upon controversial constitutional issues. This judicial activism, accomplished by lowering the standing and political-question barriers and allowing "class action" suits, has meant easier access to the courts and encouraged more groups to seek redress there. A receptive judiciary has prompted innovation in group litigation, and the publicity accorded each successful challenge has encouraged more groups to knock on the courtroom door. "What irony," Craig observes---"Ralph Nader's interest group working to benefit Ronald Reagan's presidency"[109]

The near unanimous ruling in 1983 against the legislative veto does not mean that the debate is over. In Craig's words, "If a majority of the Supreme Court continues to evaluate exercises of questionable congressional power under literal interpretation of the Constitution while, at the same time, it continues to evaluate delegations of congressional power to the executive under a more expansionist notion of the Constitution, Congress is unlikely to come out the winner."[110] Moreover, even the practical legality of the legislative veto does not seem to have been settled. Since *Chadha*, more than 100 laws have been enacted with the constitutionally dubious veto attached, many of them committee vetoes rather than one house vetoes.[111] As Craig concludes, "there is much to be learned from this long constitutional struggle over how a two-hundred-year-old document is applied in the world of today.[112] Like the other volumes surveyed here, Craig's points to the special place of the Supreme Court in the American political system. Over a century ago, in reflecting on a president's search for a new Chief Justice, the Times of London observed, "The Supreme Court of the United States is a unique institution. No other country possesses a tribunal endowed with such transcendent authority."[113] That observation remains true and assures continued attention to the "least dangerous" branch.

Endnotes

[1] The volumes surveyed in this article are listed alphabetically by author below.

DONALD E. BOLES, *Mr. Justice Rehnquist, Judicial Activitist: The Early Years.* Ames: Iowa State University Press, 1987. Pp. xi, 149.

BARBARA HINKSON CRAIG, *Chadha: The Story of an Epic Constitutional Struggle.* New York: Oxford University Press, 1988. Pp. ix, 262.

MICHAEL KENT CURTIS, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights.* Durham, N.C.: Duke University Press, 1986. Pp. xii, 275.

WILLIAM O. DOUGLAS, *The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas,* ed. Melvin I. Urofsky. Bethesda, Md.: Adler & Adler, 1987. Pp. xxiv, 448.

CHARLES FAIRMAN, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Supplement to Volume VII; Five Justices and the Electoral Commission of 1877.* New York: MacMillan, 1988. Pp. xvii, 202.

CHARLES A. LOFGREN, *The Plessy Case: A Legal-Historical Interpretation.* New York: Oxford University Press, 1987. Pp. ix, 269.

NEIL D. MCFEELEY, *Appointment of Judges: The Johnson Presidency.* Austin: University of Texas Press, 1987. Pp. xi, 199.

RICHARD POLENBERG, *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech.* New York: Viking, 1987. Pp. xiv, 431.

WILLIAM H. REHNQUIST, *The Supreme Court: How It Was, How It Is.* New York: William Morrow, 1987. Pp. 338.

G. EDWARD WHITE, *The Oliver Wendell Holmes History of the Supreme Court of the United States: Volumes III-IV; The Marshall Court and Cultural Change, 1815-35.* New York: MacMillan, 1988. Pp. xxi, 1009.

[2] Attorney General George W. Wickersham, in a memorial address following Chief Justice Melville W. Fuller's death, 1910. 219 U.S. xv.

[3] Quoted in 1 C. Warren, *The Supreme Court in United States History* 1 (1926).

[4] *Five Justices* is Fairman's third contribution to the *Holmes Devise History.* Volume VI, *Reconstruction and Reunion, 1864,* Part One (1971) was one of the first volumes in the series to appear. His second, Volume VII, *Reconstruction and Reunion, 1864-88,* Part Two, was published in 1987.

[5] *Id.*, 95.

[6] Fairman's scholarly interest in Bradley is longstanding. See his "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," 54 *Harvard Law Review* 977, 1128 (1941); "The Education of a Justice: Justice Bradley and Some of His Colleagues," 1 *Stanford Law Review* 217 (1949); "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court 1870-1892," 30 *Boston University Law Review* 49 (1950); "The So-Called Granger Cases, Lord Hale, and Justice Bradley," 5 *Stanford Law Review* 587 (1953); and "Mr. Justice Bradley," in A. Dunham and P. Kurland, eds., *Mr. Justice* (2d ed., 1964). Bradley also figures prominently in Fairman's *Mr. Justice Miller* (1939).

[7] A. Nevins, Abram S. Hewitt, with *Some Account of Peter Cooper* (1935).

[8] Fairman, *supra* n. 1, xvii-xviii; Fairman's refutation of the Hewitt-Nevins view appears on pages 159-196.

[9] *Id.*, 173.

[10] Urofsky, *supra* n. 1, x.

[11] For example, M. Howe, ed., *Holmes-Pollock Letters,* 2 vols. (1941), and *Holmes-Laski Letters,* 2 vols. (1953); *The Letters of Louis D. Brandeis,* 5 vols. (1971-1978).

[12] *Id.*, xxiii. The Douglas letters were not available to James Simon when he wrote his biography of Douglas, *Independent Journey* (1980).

[13] Urofsky, *supra* n. 1, 413.

[14] *Id.*, 44.

[15] Simon, *supra* n. 12, 192.

[16] *Id.*, 124; compare to W. Douglas, *The Court Years 1939-1975* 240 (1980).

[17] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[18] 407 U.S. 297 (1972).

[19] Douglas, *supra* n. 1, 144.

[20] *Id.*, 201.

[21] Boles delves, for example, into the controversy surrounding a memorandum Rehnquist wrote while clerking for Justice Jackson in 1952 concerning *Brown* v. *Board of Education.* Boles, supra n. 1, 95-103. This account complements information contained in Richard Kluger's *Simple Justice* 605-610 (1976). The existence of the memorandum became public knowledge during the 1971 hearings on

Rehnquist's nomination.

[22] Boles, *supra* n. 1, ix, 19. See Jenkins, "The Partisan: A Talk with Justice Rehnquist," *The New York Times Magazine* 28 March 3, 1985). For example, Boles concludes, "If there is virtue in consistency, then Justice Rehnquist is indeed a virtuous man. . . .Of course, if there is a virtue in consistency, there is also no assurance that consistency will insure accuracy--accuracy in reading constitutional history or accuracy in reporting Court precedents. Nor does consistency guarantee a sense of what is fair and equitable, all of which are key elements in the concept of the due process of law. In short, consistency is no guarantee against wrongheadedness." Boles, *supra* n. 1, 133.

[23] A. Howard, "Justice Rehnquist--A Key Fighter in Major Battles," *ABA Journal* 49 (June 1986).

[24] Shapiro, "Mr. Justice Rehnquist: A Preliminary View," 90 *Harvard Law Review* 293 (1976). The Shapiro article is almost half the length of Boles' book.

[25] O. Fiss and C. Krauthammer, "The Rehnquist Court: A Return to the Antebellum Constitution," *The New Republic* 20 (March 10, 1982).

[26] Rehnquist, *supra* n. 1., 7.

[27] *The Life of George Washington*, 5 vols. (1904-1807).

[28] *Our Chief Magistrate and His Powers* (1916); *Popular Government* (1913).

[29] *Liberty Under Law* (1922).

[30] *The Supreme Court of the United States* (1928).

[31] A. Mason, *Harlan Fiske Stone* (1956).

[32] *The Memoirs of Earl Warren* (1977); *A Republic, If You Can Keep It* (1972).

[33] Rehnquist, *supra* n. 1, 8.

[34] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

[35] E.g., M. Marcus, *Truman and the Steel Seizure Case* (1977).

[36] Rehnquist, *supra* n. 1, 94.

[37] *Id.*, 95, 98.

[38] *Id.*, 236.

[39] *Id.*, 249.

[40] *Id.*, 319.

[41] *Id.*, 318.

[42] *Id.*, 300.

[43] *Id.*, 293.

[44] *Id.*, 265.

[45] McFeeley, *supra* n. 1.

[46] *Id.*, ix, 1.

[47] E. Redford and M. Blissett, *Organizing the Executive Branch: The Johnson Presidency* 11 (1981).

[48] J. Howard, *Courts of Appeals in the Federal Judicial System* (1981).

[49] *Id.*, 90.

[50] McFeeley, *supra* n. 1, 48-49.

[51] Quoted in *id.*, 80.

[52] Quoted in *id.*, 87.

[53] Quoted in *id.*, 120.

[54] *Id.*, 3.

[55] *Id.*, 137.

[56] White, *supra* n. 1.

[57] *Id.*, xvii, xviii.

[58] *Id.*, 3.

[59] *Id.*, 4.

[60] Note the discussion in id., 50-51. White's emphasis on republicanism and its tension with competing values is not unique. See R. Newmeyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 1985), surveyed in Stephenson, "The Judicial Bookshelf," *Yearbook 1986* 102. See also H. Commager, *The Empire of Reason* (1977).

[61] White, *supra* n. 1, 50, 51.

[62] *Id.*, 6.

[63] *Id.*, 6, 8.

[64] *Id.*, 8, 9.

[65] *Id.*, 974-975.

[66] 32 U.S. (7 Pet.) 243 (1833).

[67] 332 U.S. 46 (1947).

[68] Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding," 2 *Stanford Law Review* 5 (1949).

[69] 391 U.S. 145 (1968).

[70] Curtis, *supra* n. 1.

[71] *New York Times*, August 3, 1985, p. 7, col. 3.

[72] Curtis, *supra* n. 1, 6-7.

[73] *Id.*, 15-16.

[74] 381 U.S. 479 (1965).

[75] Curtis, *supra* n. 1, 208.

[76] *Id.*, 217.

[77] Lofgren, *supra* n. 1.

[78] *Id.*, 4.

[79] Charles Warren's *Supreme Court in United States History*, first published in 1922, makes no mention of *Plessy*, and the revision in 1926 lists it only in a footnote. The 1948 edition of Henry Steele Commager's *Documents of American History* omitted the case.

[80] Lofgren, *supra* n. 1, 5.

[81] *Id.*, 162.

[82] 100 U.S. 303, 308 (1880).

[83] Lofgren, *supra* n. 1, 164, 191.

[84] *Id.*, 208. There is substantial irony in the origins of the authors of the two opinions in *Plessy*: Brown, who spoke for the majority, was Massachusetts-born and Yale educated; Harlan was Kentucky-born, educated at Centre College and Transylvania University, and had owned slaves before the Civil War.

[85] Polenberg, *supra* n. 1.

[86] *Mr. Justice Holmes and the Supreme Court* 62 1938.

[87] Polenberg, *supra* n. 1, 207-208.

[88] 249 U.S. 211 1919.

[89] Polenberg, *supra* n. 1, 219.

[90] Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine, 21 *Stanford Law Review* 719, 741 (1975).

[91] Quoted in Polenberg, *supra* n. 1, 221.

[92] *Id.*, 227.

[93] Quoted in *id.*, 230.

[94] *Id.*, 235.

[95] Quoted in id., 236. Yet in *Gilbert* v. *Minnesota*, a year later, Holmes but not Brandeis voted to uphold a conviction under a state sedition law. 254 U.S. 325 (1920).

[96] 395 U.S. 444 (1969).

[97] *Id.*, 369-370.

[98] Craig, *supra* n. 1.

[99] 409 U.S. 919 (1983). Craig has written a historical account of the development of legislative vetoes. See her *The Legislative Veto: Congressional Control of Regulation* (1983).

[100] Craig, *supra* n. 1, ix.

[101] As the author explains, "information for this book has come from a variety of sources: legislative hearings and floor records, administrative documents, court briefs and decisions, and other official records in the public domain; internal memoranda and letters provided to the author; and dozens of interviews with individuals involved in the legislative veto cases. All information not otherwise available through normal channels remains in the files of the author and, except for comments and information provided off the record or not for attribution, will be made available to other scholars upon request." Id., 241.

[102] Quoted in *id.*, 232.

[103] Remarks by Rex Lee at Franklin and Marshall College, October 24, 1985.

[104] *Id.*, 23-24.

[105] *Id.*, vii-viii.

[106] Quoted in *id.*, 51.

[107] *Id.*, 90.

[108] C. Vose, *Caucasians Only* (1959); Sorauf, "Winning in the Courts: Interest Groups and Constitutional Change," *This Constitution* 4 (Fall 1984); L. Epstein, *Conservatives in Court* (1985).

[109] Craig, *supra* n. 1, 90-91, 240.

[110] *Id.*, 239.

[111] Remarks by Louis Fisher of the Congressional Research Service, at the annual meeting of the American Political Science Association, September 2, 1988. Practically, a committee veto means a subcommittee veto.

[112] Craig, *supra* n. 1, 232.

[113] Editorial, January 17, 1874.

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