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### ***General Statement***

The Supreme Court Historical Society is a private non-profit organization, incorporated in the District of Columbia in 1974. The Society is dedicated to the collection and preservation of the history of the Supreme Court of the United States.

The Society seeks to accomplish its mission by supporting historical research, collecting antiques and artifacts relating to the Court's history, and publishing books and other materials which which public awareness of the Court's contribution to our Nation's rich constitutional heritage.

Since 1975, the Society has been publishing a *Quarterly* newsletter, distributed to its membership, which contains short works on the Court's history and articles detailing the Society's programs and operations. In 1976, the Society began publishing an annual collection of scholarly articles on the Court's history entitled the *Yearbook* which was renamed the *Journal of Supreme Court History* in 1990.

The Society initiated the Documentary History of the Supreme Court of the United States. 1789-1800 in 1977 with a matching grant from the National Historic Publications and Records Commission (NHPRC). The Supreme Court became a co-sponsor in 1979 since that time the Project has completed three of its expected eight volumes, with a fourth volume to be published in early 1992.

The Society also co-publishes Equal Justice Under Law, a 165-page illustrated history of the Court, in cooperation with the National Geographic Society. It co-sponsored in 1986 the 300-page Illustrated History of the Supreme Court of the United States. It co-sponsored with the Court, the publication of the United States Supreme Court Index to Opinions in 1981, and is currently funding a ten-year update of that volume. The Society is also currently developing a collection of illustrated biographies of the Supreme Court Justices which will be published in cooperation with Congressional Quarterly, Inc. in late 1992.

In addition to its research/publications projects, the Society is now cooperating with the Federal Judicial Center to develop a pilot oral history project on the Supreme Court. The Society is also conducting an active acquisitions program which has contributed substantially to the completion of the Court's permanent collection of busts and portraits, as well as period furnishing, private papers and other artifacts and memorabilia relating to the Court history. These materials are incorporated into displays for the benefit of the Court's 800,000 annual visitors which are prepared by the Court Curator's Office.

The Society also funds outside research, awards cash prizes to promote scholarship on the Court and sponsors or co-sponsors various lecture series and other educational colloquia to further public understanding of the Court and its history.

The Society ends 1991 with approximately 4,000 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enable the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 111 Second Street, N.E., Washington, D.C. 20002, Tel. (202)543-0400.

The Society has been determined eligible to receive tax deductible gifts under Section 501 (c) (3) under the Internal Revenue Code.

***Journal of Supreme Court History 1991***

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## ***William J. Brennan, Jr.***

## **William H. Rehnquist**

William J. Brennan, Jr. was appointed to the Supreme Court in the fall of 1956, and retired from it in the summer of 1990. He served on the Court for nearly thirty-four years, a length of time which was exceeded by only five other members of the Court. But he will be remembered for a good deal more than this rather accidental statistic.

At the time Brennan was appointed, Earl Warren had been Chief Justice for several years, and the Court had already handed down its unanimous decision in *Brown v. Board of Education*. But in many other areas of constitutional law, the "Warren Court" of the 1950s was closely divided between opposing views. What we now think of as the "Warren Court" in these other areas of constitutional law did not really emerge until Arthur Goldberg replaced Felix Frankfurter on the Court in 1962, and thereby provided a reliable fifth vote for the Warren Court's constitutional doctrines of the 1960s. Justices Black and Douglas had been on the Court for many years before he came, acting as heralds or outriders for some of the positions ultimately adopted by the Warren Court. But Brennan's abilities as a judicial craftsman, and his willingness to accept "half a loaf" if that were necessary to obtain a Court opinion, played a large part in translating what had at first been dissenting views into established jurisprudence.

Justice Brennan's opinion for the Court in *Baker v. Carr* redefined the "political question" doctrine narrowly, and opened up the federal courts to those seeking legislative reapportionment. In *New York Times v. Sullivan*, his opinion for the Court established new constitutional protections for the media when defending actions seeking damages for defamation. He also wrote the Court opinion in *Malloy v. Hogan*, which was one of several opinions during this period which held that the Fourteenth Amendment incorporated, as against the states, critical provisions of the Bill of Rights.

I first became acquainted with Bill Brennan in 1972, when I was appointed to the Court. By this time, Warren Burger had replaced Earl Warren as Chief Justice, and the Court had lost its predictable liberal bent. But the skills which Bill Brennan brought to the work of judging enabled him on numerous occasions to put together majorities espousing the side of individual rights in which he believed so deeply. But just as important to the Court as his judicial philosophy, Bill Brennan brought to the work of the Court a personal warmth and friendliness which prevented disagreements about the law from marring the good personal relations among

the Justices.

No constitutional doctrine of any particular era is destined to endure forever in all of its manifold details. Changes in the composition of the Court, changes in the times, and changes in the problems which confront the nation will very likely lead to changes in judicial doctrine. But the enduring legacy of Justice Brennan--the high value which he placed on claims of individual constitutional rights asserted against the authority of majoritarian self-government--is in no danger of being forgotten or disregarded simply because he has left the bench. The very idea of judicial review--first espoused by Chief Justice John Marshall in *Marbury v. Madison* nearly two centuries ago--is based upon the idea that the people who ratify the Constitution intended by that act to place limitations on popular government. So long as the Supreme Court endures, it will have the benefit of Justice Brennan's contributions to constitutional jurisprudence as it examines new questions which pit claims of constitutional rights on the part of the individual against the authority of the majority of the people to regulate their own affairs.

## ***Clerking for Justice Brennan***

### **Robert O'Neil**

Serving as a law clerk for Justice Brennan during the 1962 Term was a unique opportunity. The Court's complexion was undergoing marked change. When Dick Posner (now Judge Posner of the Court of Appeals for the Seventh Circuit), and I were invited to be Justice Brennan's clerks, Justice Frankfurter was generally believed to be the Court's most influential member. Before we arrived and the Term began, Justice Goldberg's appointment had profoundly altered the Court's balance of intellectual forces and had enhanced Justice Brennan's influence.

Though Justice Brennan had already managed to bring together more than a few 5-4 majorities for important principles, his views on most civil rights and liberties questions had remained those of a minority. The change in the autumn of 1962 was dramatically sudden. After conference on the very first Friday of the new Term, Justice Brennan returned to his chambers with an expression of what could only be termed triumph. That experience recurred week after week, each group of cases bringing with it a new opportunity for him to join in shaping--or, in some instances, to lead in reshaping--rapidly emerging constitutional principles. That was the year of *habeas corpus*, of prayer and Bible reading, of bank mergers, of sit-ins, of unemployment benefits for sabbatarians, and of many other issues on which the Justice left an indelible mark.

Yet we did not fully appreciate the completeness of the new consensus. A few days after the end of the Term, Dick Posner and I were reflecting during our daily morning coffee with the Justice. He asked each of us how many times we thought he had dissented that Term. We both guessed it had been about a dozen times. He held up four fingers--the number, we supposed, of dissenting opinions he had written--but in fact the total number of dissenting votes among the hundred and fifty cases during a turbulent Term.

Perfect unison, of course, was not attained. One day I overheard him explaining to Justice Goldberg, whose friend and counselor he had quickly become, why he had not voted to grant certiorari in a case involving a criminal procedure issue Goldberg knew was ripe for change and important to Brennan. Senior Justice looked at junior colleague, asking with some amusement, "And where, Arthur, were you going to get the fifth vote?" The issue was one of the few on which Chief Justice Warren was still the old California prosecutor--something that Brennan knew, but Goldberg did not.

I recall vividly the mounting influential part Justice Brennan played in the Court's deliberations during the 1962 Term. His colleagues--perhaps the Chief more than others -- seemingly sought his views informally and often.

I also recall fondly Justice Brennan's remarkably collegial working relationship with two clerks who had boundless confidence in the Justice's capacity to persuade other members of the Court even of what at first may have seemed to be outlandish positions.

Among other qualities, Justice Brennan will surely be recalled for the care with which he carried out his judicial tasks. He was mindful of details as well as major themes. I vividly recall an exchange during his luncheon visit with the clerks' group that confirmed my belief on that score. One of the less reverent of my fellow clerks questioned the Justice about a footnote in a relatively minor opinion of his earlier that Term. I knew that the Justice had seen and approved the footnotes, though I doubted he had acted with great care. The Justice dispelled my doubt when, smiling at the impertinent questioner, he declared, "Well, Dick, if you'd read the next sentence you'd realize we limited our comments to the \_\_\_\_\_ Act."

I should have known better. Never since then have I had the slightest doubt that every word bearing the Justice's name (and some that bore a colleague's name though they may have been Brennan suggestions) had been indelibly stored in his memory. That was simply the way he worked. He owed the Court and the Constitution no less. (His total absorption and recall enabled him, at his former clerks' reunion in 1985, to go through the group Term by Term, from 1956 through 1984, naming the clerks and discussing--completely without notes--several key opinions from each of the Terms.)

A quality equally deserving of tribute is that innate modesty which marked the Justice's whole career. You might see it in the puckish delight he took in strolling the sidewalks that border the Court--still unrecognized in his early years there--and asking tourists what they thought went on in that imposing building. Or it might be his offer to hold a place in the ticket line at Union Station for a student headed home for Thanksgiving who dropped his backpack on the Justice's feet while rushing off to make a phone call. (The venue offers added evidence of modesty The Justice himself was waiting to buy a coach ticket to Philadelphia, where he would give the keynote address to a national teachers group. But this was the same terminal where, six years earlier, the Attorney General of the United States had discovered at the lunch counter a New Jersey judge who was expected to dine with the President before his Supreme Court nomination, but modestly assumed he was on his own for dinner.)

The nomination of Justice Brennan brought to general notice a quite different quality--that of courage and conviction. His had been a recess appointment in the fall of 1956. He served for

some weeks before confirmation hearings began. During that interval the Court heard argument in several highly sensitive internal security cases. At the start of the hearings before the Senate Judiciary Committee, Senator Joseph McCarthy insisted on knowing how the Justice felt, and even how he had voted, in these cases. Brennan flatly (if politely) refused to divulge his views or his votes. He explained important principles of judicial confidentiality, and in the process taught the Senator and the press some vital lessons about separation of powers--as well as ensuring his confirmation.

The courage he had shown during the hearings was something about which we all knew, though he never mentioned that experience. It did seem, though, to shape his views on the most basic issues of free expression and academic freedom. We always sensed that principle was paramount for him, and that--practical architect of consensus though he was--principle prevailed over all other considerations in the process of shaping precedent. The centrality of principle has to be one of the transcendent values with which he imbued each of us who were privileged to serve with him.

A final quality I would recall from that Term and from the rest of the Justice's career was an abiding insistence on fairness. We learned from him the need for fairness quite as much in small as in large matters, as exemplified in his dealing with a law clerk as well as in dispensing justice for millions of Americans, or in defining the rights of states. He has always believed that trust and integrity and equity among individuals profoundly shape the way we deal with institutions and governments. It would be hard to imagine a finer teacher or a nobler mentor than William J. Brennan, Jr.

## ***A Remembrance: Mr. Justice Brennan***

### **October Term 1960**

#### **Richard S. Arnold**

From July 1960 to July 1961 I served as law clerk to Mr. Justice Brennan--maybe the best job I ever had. In those days, each of the Justices, as a rule, had two law clerks. To this rule there were two exceptions: Justice Douglas had one, and the Chief Justice had three. Instead of a second law clerk, Justice Douglas had a second secretary, and the word among the law clerks (possibly, as a class, the greatest gossips the world has ever seen) was that he needed two secretaries, not for court work, but to help him type his books. The extra complement for the Chief was due to the fact that his office had special duties in connection with what was then called the Miscellaneous Docket, made up mainly *of in forma pauperis* cases. The Chief also had the services of the law clerk for the retired Justices (Reed and Burton), neither of whom was then doing any judicial work of his own, so far as I knew.

I did not meet Justice Brennan until I came down to Washington to start work. One did not apply for a clerkship then. At least, one did not apply to Justices Frankfurter and Brennan, and they were the Justices I knew the most about, since I was a student at the Harvard Law School, which both of them had attended. Justice Brennan's law clerks were selected by Paul Freund, at that time Carl M. Loeb University Professor and certainly one of the leading figures of this century in the study of constitutional law and the history of the Supreme Court. (He was also General Editor of the Holmes Devise History of the Supreme Court of the United States.) Justice Brennan's confidence in Professor Freund was so great that the task of choosing law clerks was delegated entirely to him.

If you were picked, Mr. Freund called you into his office and asked you if you wanted the job. This occurred without warning and without any gathering of resumes, references, transcripts, or the like. The Frankfurter clerks were selected, much, I suppose, in the same way, by Professor Albert M. Sacks, who later became Dean of the Law School. Justice Frankfurter usually insisted on law clerks who had already served with a court of appeals, but Justice Brennan had no such prerequisite.

So, in December of 1959, the middle of my third year, I was called to Professor Freund's office, offered the job, and accepted on the spot. A letter from Justice Brennan confirming the

appointment came in due course. What a contrast this is with the present-day system, which appears to me, from the admittedly imperfect vantage point of an inferior court, to be chaotic, degrading, and nerve-racking, especially to the applicants for clerkships. (Warning: this piece suffers from perhaps the most common vice of reminiscences--the feeling that things were wonderful in the past and have declined steadily ever since.)

What was Justice Brennan like as a boss? No one, I guess, is perfect, but I really cannot remember a single reason to complain about the Justice, his approach to the law, his relationships with the other members of the Court, or the way he treated his law clerks. In addition to the two law clerks, there were two other staff members in chambers. Mary Fowler, now Mrs. Brennan, was the Justice's secretary. Olyus Hood was his messenger. Mr. Hood had a small desk in one corner of the room where Mary also worked. He had a wonderful sense of humor and was especially good at calling the White House, the Mint, and other parts of government to arrange tours for visiting friends and family, always announcing himself impressively as calling from Justice Brennan's chambers.

No one told us how to do the job. One of our immediate predecessors, Jerry Nagin, was still in the building when we arrived (my co-clerk was Dan Rezneck), and Jerry gave us some useful pointers, but there was nothing like an orientation program, a law clerks' manual, or similar formal indoctrination. The Justice expected us to arrive fully equipped and ready to go to work. Either we lived up to his expectations, or he was too tolerant to point out otherwise. To say that he was unfailingly kind and courteous, especially to subordinates, would be an understatement. He was delightful to be around, and simply to be in his presence was an education. If he found something to criticize, either in one of the multitudinous cert. memos we did, or in a bench memorandum, or in a draft opinion, he did so gently. (This was not true in all of the other chambers, we heard.)

We spent a good deal of time with him outside the Supreme Court Building. On most days, we drove back and forth to work with him. All three of us, the Justice and the two law clerks, lived in Georgetown, and we used to pick him up at his house on Dumbarton Street on most mornings. We talked about cases and legal problems all the way into work and all the way home. We did not normally work at night, at least not at the Court itself, but we did work regularly on Saturday mornings, and we would usually eat lunch on Saturdays at the Methodist Building, across Maryland Avenue from the Court. Sometimes in the afternoon, when one of our own cars was not available, one of the messengers would drive us home in a Court car. This was always a thrill, especially as there was a vague hint of wrongdoing about it. Apparently some statute forbade the use of Court cars for personal purposes, and someone had classified going to and

from work as "personal." As a result, the Deputy Assistant Secretary of something or other who lived near the Justice on Dumbarton would be picked up every morning by a government car and driver to be taken to the Pentagon, while an Associate Justice of the Supreme Court of the United States had to ride in a law clerk's rattle-trap.

What about the relations among the members of the Court? There was a great deal, of course, that the law clerks knew nothing about. No one was allowed in the Conference except the Justices themselves, and no record, in the formal verbatim sense, was made of the Conference. But the Justice would always sit down with us and go over his notes when he returned from Conference. (Actually, to say "always" is an exaggeration: I remember well a few times when he would come back from Conference on Friday afternoon and be too tired to talk. He would just hand his notebook to us and let us find out for ourselves what had happened. At the time, I didn't understand what made him so tired. How could it be tiring to sit in a room and talk about the law with eight other people? Having now suffered through a few thousand conferences involving anywhere from three to twelve judges, I know what made him so tired.)

The closest relationship Justice Brennan had was with the Chief Justice. The Chief, as we called him (though not to his face), would come around to see Justice Brennan on Thursdays before the Friday conference. They would go into the Justice's inner office and close the door. We learned that they were going over the conference list for the next day. Of course we did not know what happened during these meetings, but we did know that Justice Brennan and Chief Justice Warren voted together more than any other two members of the Court. With the intellectual arrogance typical of law clerks, we assumed that the Chief Justice was "getting his directions," or words to that effect, from Justice Brennan, and maybe he was, in some sense, but the relationship between them was warm and friendly, and they were a great team. You could not meet Chief Justice Warren even once, incidentally, without realizing what had made him such a successful politician. (He had been, for example, elected governor of California as the nominee of both the Republican and the Democratic Parties.) His entire attention was focused upon every person he met, however outwardly insignificant. Nor was there any hypocrisy in this attitude. He was a considerate gentleman in every sense of the word, and he was able to show it.

Next door to us was Justice Frankfurter, who had not only attended but also taught at the Harvard Law School. One of his students, Class of 1931, had been William J. Brennan, Jr., and we imagined, not without some reason, that Justice Frankfurter had hoped that Justice Brennan, once joining the Supreme Court, would become one of his disciples. This did not come to pass, and we gathered that "Felix," as we familiarly called him in private, had been perhaps a little patronizing of our boss at the beginning. In any case, by the time I arrived, four years after



Justice Brennan came to the Court, the relations between him and Justice Frankfurter were cordial. Justice Frankfurter, **in** fact, would sometimes stop in our law clerks' office to talk to Reznick and me. Justice Frankfurter did not walk and talk; he bounced and bubbled. He enjoyed debating the law and talking about everything under the sun.

Each year Justice Frankfurter would have a black-tie dinner at his house and invite all of the law clerks who had been to Harvard. In the 1960 Term, there were five of us out of a total of eighteen--two with Brennan, two with Frankfurter, and one with Harlan. Also at the dinner were Tony Amsterdam, a third, unpaid Frankfurter clerk, from Penn, and Charles Fried, a Harlan clerk, from Columbia. Harlan clerks, we joked, became "honorary Harvard men," because Harlan was so close to Frankfurter. Indeed, the Harvard Law School made Justice Harlan a member of its Visiting Committee, in preference to Justice Brennan, which was a great mistake, in my opinion. I say this not out of any lack of respect for Justice Harlan, but simply because "the" Law School did not treat Justice Brennan very well at first, possibly on account of the fact that some of the faculty did not agree with him. Harlan was the soul of dignity. He deserved the title of "august" if anyone ever did. And yet, when Justice Brennan saw him in the halls, he would say delightedly, "Hiya, Johnny." I do not believe that anyone else, including his mother, ever called Justice Harlan "Johnny."

The Court family had many more member than just the Justices, the law clerks, and the other immediate chambers staff. There was a secretarial pool, a Marshal's office, and a char force, the people who make the building work, and without whom there would be no functioning Court. There was also a police force, though nothing like the present apparatus which modern security seems to demand. Justice Brennan appeared to know all of these people by name. He spoke to them, and they spoke to him, and there was respect on both sides.

The day in July of 1961 when I left Justice Brennan's chambers for the last time as an employee was one of the saddest in my life. I remember and cherish the job not primarily because of the intellectual aspects, the arguments over legal principle, and the like, though these were indeed impressive for a twenty-four-year-old baby lawyer, but rather for the personal association. Justice Brennan is a special person. He never lost sight of the human dignity of every other person--even including law clerks. (Occasionally, as always happens with lawyers, we would disagree about something, but this never disturbed the Justice. He knew that only one person in our office had a vote.) One learns a lot from books, and law students learn almost exclusively from books--or, in these latter days, from computer screens. But one learns also from people. To watch Justice Brennan, to be in his presence almost every day, and to work under his direction--all of these were priceless opportunities. Hardly a day goes by when I do not think of

something he said or did. "He hath a daily beauty in his life." [1]

#### Endnotes

1. Othello, act V, sc. i, 1. 19.

## ***Preservation's Supreme Authority***

**Paul Goldberger**

*Editor's Note: This article was originally published on September 16, 1990, in The New York Times. Copyright 1990 by The New York Times Company. Reprinted by permission.*

Mention the name William J. Brennan, Jr. to a legal scholar, and you are likely to hear encomiums for the retiring Supreme Court Justice's reputation as one of the century's great defenders of individual liberties. Justice Brennan was the intellectual anchor of the Warren Court, the activist who merged an idealistic outlook with a rigorous respect for the Constitution.

But there was another part of Justice Brennan's legacy, one that may turn out to have every bit as much effect on American society as his decisions on civil liberties. Justice Brennan had more impact on the look and feel of the American landscape than any other Justice of the Supreme Court--perhaps more than any architect, city planner, or public official. On issues ranging from whether a community was within its rights to ban billboards to whether it was fair for a town to create zoning that had the effect of excluding certain minority groups, Justice Brennan was in the forefront. Throughout his long career, he made the questions of how land could be used, and how the rights of private property owners could be balanced against the public good, a constant theme.

There are many important Brennan decisions on land use, but none so celebrated as his 1978 decision in *Penn Central Transportation Co. v. New York City*--better known as the Grand Central case, in which the Supreme Court upheld for the first time the principle on which landmark preservation laws are based. When a city declares a building like Grand Central to be a landmark, Justice Brennan declared, it is acting for the public good. The burden that landmark designation places on an owner must be balanced against the public benefits that can come from saving a building like Grand Central Terminal.

The case goes back to the attempt by Penn Central, the bankrupt railroad that was (and still is) the terminal's owner, to make more money from the structure by putting a 55-story office building designed by Marcel Breuer on its roof. The plan was roundly rejected by the New York City Landmarks Preservation Commission, which called the design "nothing more than an esthetic joke."

Penn Central promptly sued, and the New York State Supreme Court decided in favor of the

railroad. That court believed that the tradeoff didn't work--that in designating Grand Central an official landmark, the city had so diminished the potential of Penn Central to profit from the structure that it amounted to a virtual taking of private property without compensation. State appellate courts disagreed, but the railroad pressed on to the Supreme Court. Advocates of landmark preservation were equally eager to have the Supreme Court settle the matter: the preservation movement, which had been gaining steam rapidly through the 1960s and 1970s, had never had its underlying principles tested in the arena of the Supreme Court, and preservationists felt that in Grand Central they had found as strong a case as they would ever come up with.

After all, if Grand Central Terminal was not a landmark, what was? And given that New York City had allowed Penn Central the option of selling off the air rights above the terminal to adjacent sites, the company's suggestion that its financial hands were tied by landmark designation could well be called into question. Penn Central could obviously make money from Grand Central: just not as much as if the Breuer building were built.

Justice Brennan agreed. His opinion brilliantly balances esthetic and political concerns, never losing sight of the overriding presence of the Constitution, which keeps his work on course like a gyroscope. Justice Brennan did not attempt to evolve a simple formula for testing whether a community had been excessive, and therefore illegal, in its application of landmarks laws; it was not in his nature to apply simplistic tests. Instead, he looked to the particulars of the Grand Central case, examining this history of New York City's landmarks law and the saga of Grand Central Terminal in detail, and analyzing them so eloquently that a principle emerged, subtly but firmly, from his words.

If that principle could be summarized, it would be this: a community has the right to declare that certain important pieces of private property have a public role to play, so long as it safeguards the rights of the owners of those properties. Private property rights are not absolute--but a community must show the real public benefit, as well as the inherent fairness, of a restriction like landmark designation for the restriction to be legal. The real goal is to achieve a balance between the public good and the private right, a balance that maybe different in each case.

It is hard not to come back again and again to the idea of balance, of equilibrium, in Justice Brennan's thinking in all his land-use decisions--in those involving a community's right to use zoning laws to ban certain kinds of buildings, to restrict the size and types of housing lots, to make esthetic judgments about what kinds of new buildings can be built, or to determine who can occupy housing within its borders. In their book

Landmark Justice, which thoughtfully and sensitively analyzes Justice Brennan's contributions in the area of land use, Charles Haar and Jerold S. Kayden said this of the Justice's opinions: "In his careful balancing of interests, thoroughly explained and justified for all to see, a hallmark of a civilized democracy is magnified." They called Justice Brennan "a humane jurist, frequently imbuing the U.S. Constitution's vision for a just and free society in ideas and language transcending technical legal prose."

So it should come as no surprise that for all his careful analysis of the financial options presented to Penn Central in the Grand Central situation, Justice Brennan in his opinion also made some more sweeping observations: "In recent years large numbers of historic structures, landmarks and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways." He wrote approvingly of the "widely shared belief that structures with special historic, cultural or architectural significance enhance the quality of life for all."

The Grand Central decision had the effect of upholding not only New York's trailblazing landmarks laws but also literally hundreds of similar efforts in communities around the country. Yet it would be a mistake to think of Justice Brennan as in any way cool or indifferent to the rights of property owners. In another of his famous land-use cases, his 1981 dissent in *San Diego Gas & Electric Co. v. The City of San Diego*, he took a much more sympathetic attitude toward property owners than many of his fellow Justices. He argued that the Constitution required that communities compensate property owners when certain regulations placed on their properties, even if otherwise reasonable, were nonetheless so restrictive as to amount to a taking of the property.

"If a policeman must know the Constitution, why not a planner?" Justice Brennan asked. There is no better reminder of Justice Brennan's wisdom.

## ***Stare Decisis and Judicial Restraint***

**Lewis F. Powell, Jr.**

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The beginning of October Term 1989 marks an appropriate occasion to address again the subject of *stare decisis*. At the close of the 1988 Term, commentators who agreed on little else unanimously proclaimed a "shift in direction" on the Court. They described the 1988 Term as a watershed and predicted reexamination of numerous areas of the law "previously thought to be settled." You will not be surprised to learn that I take these pronouncements, like many that have preceded them in past years, with a grain of salt. In the era of "sound bites" and instant opinion polls, it is dangerous to apply broad labels to a single Term of the Court. I emphasize at the outset that in intellect and experience this is a strong Court.

The past Term presented an array of unusually difficult cases. This in turn resulted not only in five to four decisions but in splintered rulings without majority opinions. Unhappily, some opinions--on both sides of issues--included language that in time the authors may regret. I was concerned about the tone of some dissents when I was nominated for the Court in 1971. But I was reassured when it became evident that what one Justice may say about another's opinion rarely should be viewed as personal criticism. I considered each of the Justices with whom I was privileged to serve as a personal friend, as well as a lawyer whose qualifications to serve on the high Court I never questioned. Justice Kennedy also has high qualifications.

### *A. Stare Decisis in the 1988 Term*

Any talk of change at the Supreme Court prompts consideration of *stare decisis*. Several of the Court's opinions in the past Term have contained explicit discussions of *stare decisis*, both in statutory and constitutional cases.

Perhaps the most significant of the statutory cases is *Patterson v. McLean Credit Union*,<sup>[1]</sup> in which the Court reconsidered the decision in *Runyon v. McCrary*<sup>[2]</sup> that applied 42 U.S.C.

sec. 1981 to private contracts. The majority opinion did not hold that *Runyon* was correctly decided. But the Court unanimously agreed that, regardless of its initial correctness, *Runyon* should be reaffirmed on *stare decisis* grounds.[3] Justice Kennedy's Court opinion reviewed a number of the Court's past opinions and stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." [4] A constitutional case involving *stare decisis* was *South Carolina v. Gathers*. [5] In *Gathers* the Court was urged to reconsider *Booth v. Maryland*, [6] an opinion I wrote for the Court in my last Term. *Booth* held that the Eighth Amendment limits comment in capital sentencing proceedings on attributes of a murder victim and his family that were unrelated to the commission of a crime. Justice White, who had dissented in *the Booth* case, declined to overrule it. He joined Justice Brennan's opinion for the Court in *Gathers*. The four dissenters in *Gathers* explicitly called for overruling *Booth*. Justice Scalia discussed *stare decisis* at length. While he acknowledged "some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible," he argued that a Justice must be free to vote to overrule decisions that he or she feels are not supported by the Constitution itself, as opposed to prior precedents. [7]

Of course, a new Justice is less bound by precedent in construing a provision of the Constitution than a Justice who was sitting when a precedent was decided. The Court's decision in *Webster v. Reproductive Health Services*, [8] perhaps more controversial than the "flag burning" case, [9] provides an illustration. Justice Scalia and Justice Kennedy declined to follow *Roe v. Wade* [10] in that case. Justice Scalia would have overruled *Roe* explicitly. Justice Kennedy joined the Chief Justice and Justice White in limiting *Roe*.

The end result was a badly fractured Court with five separate opinions. As I joined *Roe* and wrote the Court opinion in *Akron Center for Reproductive Health, Inc.*, [11] there is no secret as to how I would have voted in *Webster*. I do not say this as a criticism of the Court. In its long history, the presence on the Court of even a single new member often brings change.

## *B. Current Health of Stare Decisis*

In light of the past Term, it may be of interest to consider broadly the current health of the principle of *stare decisis*. Some lawyers and academics have suggested that the principle is now ignored or is at least in serious decline. [12] I cannot agree. I am reminded of Mark Twain's often quoted cable from Europe to the Associated Press: "The reports of my death are greatly exaggerated." In my view, Justice Stevens' 1983 assessment in his *New York University Law*

*Review*[13] article remains correct today. Over rulings occur with some frequency, but when considered in light of the business of the Court as a whole, they are rare. As Justice Stevens pointed out: "Two or three overrulings each Term are, indeed, significant." [14] But the Court, in the exercise of certiorari jurisdiction, considers thousands of cases a year. The vast majority involve nothing more than application of previously decided cases. This is *stare decisis*.

A review of the Burger and Warren Courts illustrates my view of *stare decisis* as a rule of stability, but not inflexibility. The Burger and Warren Courts spanned a roughly equal number of years: Chief Justice Warren presided for the sixteen-year period between 1953 and 1969; Chief Justice Burger for seventeen years between 1969 and 1986. Counting the overruled decisions of each year reveals that during Warren's tenure the Court overruled sixty-three cases. The Burger Court, of which I was a member, overruled some sixty-one cases. Of course, the precise number can vary depending on the method of counting. I have chosen to rely primarily on explicit overrulings. In any event, the point is plain. On a rough average, the Court has overruled fewer than four cases per Term. Thus, it has overruled a significant and fairly constant number of prior decisions over time. But when the totality of cases is considered, the general rule of *stare decisis* remains a fundamental component of our judicial system.

Of course, the importance of cases overruled also is relevant. It can be said fairly that the overruling of major decisions was infrequent under both Chief Justices. I mention briefly some of the more celebrated overrulings of the Warren and Burger Courts.

By far, the most important of the Warren Court cases is *Brown v. Board of Education*. [15] Brown explicitly overruled the 1899 case of *Cumming v. Board of Education*, [16] the 1927 case of *Gong Lum v. Rice*, [17] and, of course, rejected *Plessy v. Ferguson*. [18] The Warren Court overruled a number of criminal procedure decisions in a series of cases that "incorporated" the Bill of Rights through the Fourteenth Amendment. [19] In its overall effect on the structure of constitutional judicial review, the incorporation cases are perhaps of unique significance. In other areas, *Baker v. Carr*, [20] overruled *Colegrove v. Green*, [21] and brought legislative apportionment controversies under judicial review. And *Brandenburg v. Ohio*, [22] overruled *Whitney v. California*, [23] finally making the "clear and present danger" standard the law.

The Burger Court also had its share of important overrulings. In *Miller v. California*, [24] the Court overruled the *Memoirs* case [25] and established a new standard for obscenity. In *Gregg v. Georgia*, [26] the Court overruled *McGautha v. California* [27] and began the present course of Eighth Amendment scrutiny of capital punishment. Several cases broke new ground in expanding the rights of women. For example, *Taylor v. Louisiana*, [28] invalidated restrictions on jury service by women, overruling a case decided in 1961. [29] And in *Batson v.*



*Kentucky*,[30] an opinion I wrote in 1986, the Court overruled *Swain v. Alabama*,[31] easing the evidentiary burden of defendants who claim racial discrimination in the jury selection process.

### *C. Proper Role of Stare Decisis*

The records of the Burger and Warren Courts are consistent with the traditional role of *stare decisis* that I have described. For example, the Burger Court demonstrated a greater sensitivity to the public interest in law enforcement than that reflected in some of the decisions of the Warren Court. Yet it did not overrule those Warren Court decisions, such as *Mapp v. Ohio*,[32] *Massiah v. United States*,[33] and *Miranda v. Arizona*,[34] that announced broad principles protecting the rights of criminal defendants. Rather, the Burger Court, with due regard for *stare decisis*, set about the difficult task of clarifying the scope of these sweeping decisions.[35]

Fortunately, there is no absolute rule against overruling prior decisions. *Brown* itself stands as a testament to the fact that we have a living Constitution. And where it becomes clear that a wrongly decided case does damage to the coherence of the law, overruling is proper. But I repeat that the general rule of adherence to prior decisions is a proper one. This is true both for statutory and constitutional cases. Justice Frankfurter aptly noted the critical importance of *stare decisis* when he described it as the principle "by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us." [36] The specific merits of *stare decisis* are familiar; I comment on them briefly.

(i) The first is one of special interest to judges: it makes our work easier. As Justice Cardozo put it: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." [37] Few cases that reach the Supreme Court are easy. Most involve hours of study and reflection; the conscientious judge must make many close calls. It cannot be suggested seriously that every case brought to the Court should require re-examination on the merits of every relevant precedent.

(ii) *Stare decisis* also enhances stability in the law. This is especially important in cases involving property rights and commercial transactions. Even in the area of personal rights, *stare decisis* is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior.

(iii) Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions.

#### *D. Recent Threats to Traditional Stare Decisis*

Though the doctrine of *stare decisis* as I have described it remains strong, challenges to the traditional conception of *stare decisis* have appeared recently in two areas.

The first of these challenges concerns *stare decisis* in statutory cases. The idea has long been advanced that *stare decisis* should operate with special vigor in statutory cases because Congress has the power to pass new legislation correcting any statutory decision by the Court that Congress deems erroneous. Thus, if Congress fails to respond to a statutory decision, the courts can assume that Congress believes that the statutory interpretation was correct.

I am in general agreement with this view. But it can be taken to extremes. Three Justices last Term joined with Justice Stevens in suggesting that where a significant time has passed without action by Congress, the Supreme Court's prior statutory decisions become as binding on the Supreme Court itself as on lower courts.[38]

In my view, the Court should hesitate to adopt such a categorical rule. It reflects an unrealistic view of the political process and Congress' ability to fine tune statutes. Correction of erroneous statutory interpretations in some cases may be vital to the effective administration of justice and the coherence of the law. But correction may have little political constituency in Congress. The Court, therefore, has a responsibility to ensure that its statutory interpretations follow the intent of the drafting Congress as well as to ensure that erroneous interpretations do not damage the fabric of the law. Some statutes--I mention "RICO"[39]--are a mishmash of ambiguities. Indeed, some "statutory" law consists of an open-ended statute that has been left almost entirely to "common law" development in the courts. Federal antitrust law is an example.

A second recent challenge to traditional *stare decisis* is the renewal of calls for a relaxation or even outright elimination of *stare decisis* in constitutional cases. Some Court opinions hint at this.[40] And the argument has been made directly by a former Assistant Attorney General in the *Cornell Law Review*. [41] This view of *stare decisis* also has little to commend it.

Those who would eliminate *stare decisis* in constitutional cases argue that the doctrine is simply one of convenience.[42] These critics say *stare decisis* is useful only to judges who would defend their own erroneous decisions against shifting majorities on the Court. It is true that *stare decisis*, as applied, can be based on subjective standards that are unprincipled. It is also true that *stare decisis* is cited far more often by dissenters when a case has been overruled than by a Justice who relies *on stare decisis* to uphold a case even though he or she thinks that the case was wrongly decided. But the elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law.

#### *E. Important Factors if Stare Decisis is to Work*

Looking to the decades ahead, several conditions are important to the future long term health of *stare decisis*. Speaking broadly, these conditions all involve judicial restraint. This means recognition that the Court's function is to decide cases involving specific issues and particular parties. The Court does not sit to make announcements of abstract principles or to give advisory opinions. Unnecessary resolution of broad questions always raises the stakes. It creates incentives for future attacks on the Court's opinions. In each case the Court should focus specifically on the particular facts of the case and the questions properly presented. Too often, Justices write more broadly than necessary to decide the case before the Court. Law clerks do not make the decisions, but they often add expansive footnotes that a Justice may accept uncritically. In a subsequent case, the footnote will be cited as the law.

Related aspects of judicial restraint that promote a modest model of adjudication include attention to the rules of standing. The Court also should hesitate to create new areas of judicial oversight, such as where the Court is asked to infer private rights of action in statutes.[43] Deference to bodies that may be more expert in a particular field, such as school boards and the military, is also appropriate.[44] Intelligent use of certiorari jurisdiction will allow the Court to avoid precipitous judgments in new areas of the law that the Court later may regret.

I also mention the frequency of separate writings and splintered opinions. Last Term, the Court decided eighteen cases--over ten percent of its entire merits docket--without an opinion joined by a majority of the Court. Although I have written my share of separate opinions, *in hindsight* I would urge the Court to look carefully at the effects of this practice on respect for the Court as an institution. Splintered decisions provide insufficient guidance for lower courts. They

may promote disrespect for the Court as a whole and more emphasis on "vote counting." Failure of the Court to settle on a rationale for a decision invites perpetual attack and reexamination. The Justices "have an institutional responsibility not only to respect *stare decisis*, but also to make every reasonable effort to harmonize [their] views on constitutional questions of broad practical application." [45]

### *Conclusion*

It is evident that I consider *stare decisis* essential to the rule of law. This is readily understood with respect to business and economic issues, and to the Court's interpretation of statutes on which parties rely in planning their conduct. As I have noted, the doctrine applies with less force when new Justices confront the interpretation of the Constitution. Yet, even here, there is a body of constitutional decisions and principles that merits respect. Much of the language of the Constitution, particularly the provisions of the Bill of Rights and the Fourteenth Amendment, require interpretation. After two centuries of vast change, the original intent of the Founders is difficult to discern or is irrelevant. Indeed, there may be no evidence of intent. The Framers of the Constitution were wise enough to write broadly, using language that must be construed in light of changing conditions that could not be foreseen. Yet the doctrine of *stare decisis* has remained a constant thread in preserving continuity and stability.

I emphasize that the views which I have expressed are not intended as either praise or criticism of particular cases. The point that I hope to make is a broader one. History shows that change is inevitable. The first airplane flew less than four years before I was born. Today space crafts are commonplace. Voyager II, launched in 1977, sent back in August 1989 important scientific information about Neptune. [46] The inevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law. In the long run, restraint in decision-making and respect for decisions once made are the keys to preservation of an independent judiciary and the guardian of rights.

### *Endnotes*

1. 109 S. Ct. 2363 (1989).
2. 427 U.S. 160 (1976).

3. I joined the majority in *Runyon* for reasons largely attributed to *stare decisis*. As I stated in my concurring opinion:

If the slate were clean I might well be inclined to agree with Mr. Justice White that sec. 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

*The applicability of sec. 1981 to private contracts has been considered maturely and recently, and I do not feel free to disregard these precedents.*

*Id.* at 186 (Powell, J., concurring) (footnote omitted).

4. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (quoting *Welch v. Texas Dept' of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (opinion of Powell, J.)).
5. 109 S. Ct. 2207 (1989).
6. 482 U.S. 496 (1987).
7. *Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting).
8. 109 S. Ct. 3040 (1989).
9. *Texas v. Johnson*, 109 S. Ct. 3040 (1989).
10. 410 U.S. 113 (1973).
11. 462 U.S. 416 (1983).
12. See, e.g., Maltz, "Some Thoughts on the Death of Stare Decisis in Constitutional Law," 1980 *Wis. L. Rev.* 467.
13. Stevens, "The Life Span of a Judge-Made Rule," 58 *N.Y.U. L. Rev.* 1 (1983).
14. *Id.* at 4.
15. 347 U.S. 483 (1954).
16. 175 U.S. 528 (1899).
17. 275 U.S. 78 (1927).
18. 63 U.S. 537 (1896).
19. See e.g., *Mapp v. Ohio*, 376 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), and applying the Fourth Amendment's exclusionary rule to state criminal trials).

20. 369 U.S. 186 (1962).
21. 328 U.S. 549 (1946).
22. 395 U.S. 444 (1969).
23. 247 U.S. 357 (1927).
24. 413 U.S. 15 (1973).
25. *Memoirs v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).
26. 428 U.S. 153 (1976).
27. 402 U.S. 183 (1971).
28. 419 U.S. 522 (1975).
29. *Hoyt v. Florida*, 368 U.S. 57 (1961).
30. 476 U.S. 79 (1986).
31. 380 U.S. 202 (1965).
32. 376 U.S. 643 (1961).
33. 377 U.S. 201 (1964).
34. 384 U.S. 436 (1966).
35. See “Remarks of Lewis F. Powell, Jr.,” A.B.A. Litigation Section Meeting (Aug. 12, 1986).
36. *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).
37. B. Cardozo, *The Nature of the Judicial Process* 149 (1921).
38. See *Rodriguez do Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1922-23 (1989) (Stevens, J., dissenting).
39. The RICO statute, short for “Racketeer Influenced and Corrupt Organizations Act,” is codified at 18 U.S.C. sec. 1961 *et seq.* I continue to believe that Congress never intended the private civil actions it created in RICO to be used to file ordinary fraud and breach of contract claims against respected, legitimate businesses. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 523-30 (1985) (Powell, J., dissenting).
40. See, e.g., *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting). Justice Douglas expressed similar views in a 1949 article in the *Columbia Law Review*. He asserted that a Justice must remember “above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.” Douglas, “Stare Decisis,” 49 *Colum. L. Rev.* 735, 736 (1949).

41. See Cooper, “Stare Decisis: Precedent and Principle in constitutional Adjudication,” 73 *Cornell L. Rev.* 401 (1988).
42. See *id.* at 402.
43. Whether a particular private actor should have the right to a civil-court remedy for violations of certain statutory rights is likely a matter of importance to many disparate groups in our society. As such, the question should be resolved by our elected representatives, not by “relatively uninformed federal judges who are isolated from the political process.” *Common v. University of Chicago*, 441 U.S. 677, 731 (1979) (Powell, J., dissenting). Even if Congress wants to avoid the hard political choices involved in creating a new private right of action by leaving this work to the courts, the judicial branch has a constitutional obligation to avoid making such fundamentally legislative choices. Every time the courts “indulge Congress in its refusal to confront these hard questions,” we unwisely and unconstitutionally denigrate the political process and the distinct nature of our tripartite system of government. *Id.* at 743 n. 14, 746-47.
44. See, e.g., *Board of Education v. Pico*, 457 U.S. 853, 893-94 (1982) (Powell, J., dissenting); *Brown v. Glines*, 444 U.S. 348 (1980).
45. *Robbins v. California*, 453 U.S. 420, 436 n. 4 (1981) (Powell, J., concurring in judgment).
46. See *Wash. Post*, Aug. 24, 1989, at A3, col. 1.

## ***Oliver Ellsworth, Third Chief Justice***

### **James M. Buchanan**

Each year the editors of the *Journal of Supreme Court History* select for the cover an individual who has played an important part in the history of the Supreme Court. This year we have chosen Oliver Ellsworth, who served as the third Chief Justice of the United States from 1796 to 1800.

To most Americans, Ellsworth is associated more with his service in the Constitutional Convention than on the Supreme Court. The story of Ellsworth's role in creating the Great Compromise that permitted the delegates to go forward to complete the Constitution and, in turn, our government, is taught in high school social studies classes nationwide.

His service as Chief Justice, on the other hand, is less well known. The explanation for this in part lay in the short time he actively served on the Bench--a little over three and a half years. His judicial obscurity can also be attributed to his service on a Court which historians tend to describe as merely an overture to the John Marshall period.

For the past fifteen years a team of editors and researchers have worked to illuminate the formative years of the Supreme Court. Supported by grants from the National Historical Publications and Records Commission and private foundations, and organized under the auspices of the Supreme Court Historical Society, they have amassed a unique collection of over 20,000 documents pertaining to the early years of our highest federal court.

To date, their efforts have produced four books in three volumes. More are in the production process. When complete, [The Documentary History of the Supreme Court of the United States, 1789-1800](#) will comprise the most complete record assembled of any period in the Court's two-hundred year history. Published documents will have been drawn from over 800 repositories in this country and in Europe; annotations and headnotes will guide the reader through Court minute books, cases, and other pertinent manuscripts.

The most recently published volume comprises the last installment of a two-volume series that focuses on the Justices as they rode circuit.[1] These two volumes, combined with the two-book record of the Court's minutes and official and private correspondence pertaining to appointments, give us a unique window from which we can view the professional lives of the early Justices.

The fourth volume, especially, is important to those interested in Ellsworth's judicial career.



The Chief Justice's correspondence and writings, including grand jury charges he wrote while on circuit, compiled here for the first time, will add to what we already know from his biographers.[2] This record, combined with the documents contained in the two-part, volume one, helps our understanding of Ellsworth's life and work during his brief three-year tenure as Chief Justice.

The Court that Ellsworth inherited in 1796 had been in business a short five years and in the course of its half-decade of existence docketed a little over 25 cases. The Court had moved its home three times: from New York's Merchants Exchange to Philadelphia's Statehouse, and then its City Hall. Before the first decade was out it would move once again--this time to the new capitol on the Potomac. It would, however, have to wait until the 1930s before finding a permanent home.

Ellsworth, the nation's third Chief Justice in less than seven years, replaced John Rutledge of South Carolina, an interim appointment. An impolitic speech denouncing the controversial Jay Treaty had caused Senate Federalists--among them Ellsworth--to deny his appointment. Distraught, Rutledge attempted suicide a few weeks later. Rutledge had been nominated to replace John Jay, the Court's first Chief Justice, who had resigned after a little over six years' service. In another five years time, Ellsworth and all but one of the original six Justices appointed by Washington would be gone as well.

The high turnover of Court personnel--at least by late twentieth century standards--can be explained in part by the nature of political life in late 18th century America. The Senate and the House suffered as well. One facet of duty on the Court, however, is probably more the cause: the circuit ride.

Each spring and fall the Justices set out to hold a series of courts in three separate circuits: the Eastern, Middle, and Southern. These circuits stretched from Savannah, Georgia, to Windsor, Vermont. The distances travelled and the time spent on the road soon became an aggravation for some and an unbearable hardship for others. This duty, combined with the practice of the Supreme Court meeting during the two worst months of the year--February and August-- gave some of those approached with a Supreme Court appointment pause to consider.

If Ellsworth had any second thoughts about joining the Court, the documents do not reflect it. The judiciary, after all, was practically his creation. His service on the Senate committee that drafted the Judiciary Act of 1789, which gave life to Article III of the Constitution, is well known.[3] Associate Justices William Paterson and James Wilson were familiar faces, having served with him in the Constitutional Convention. (Ellsworth also worked with the just-departed John Rutledge, chair of the Convention's Committee of Detail.)

His nomination and confirmation met with widespread approval. New Hampshire Congressman Jeremiah Smith told a colleague that "no appointment in the U.S. has been more wise or judicious than this: He is a very able lawyer a very learned man a very great Politician & a very honest man in short he is every thing one would desire." The President described his nominee as having "the Stiffness of Connecticut; though his Air and Gait are not elegant; though He can not enter a Room nor retire from it with the Ease and Grace of a Courtier: yet his Understanding is as sound, his Information as good and his heart as Steady as any Man can boast.[4]

With Ellsworth joining the Bench, the Court which had begun its February 17<sup>th</sup> Term with only four members was again complete.[5]

Ahead lay the despised circuit duty whose scheme, ironically, was laid out by the Senate committee he chaired. His draw of the grueling and much-to-be-avoided 1,800 mile Southern Circuit consisting of Georgia, South Carolina, and North Carolina brought the reality of his legislative handiwork home in ways he heretofore did not expect. One can only wonder what went through the mind of Associate Justice James Iredell, the perennial rider on that circuit, when news that the author of the plan that had caused him so much agony got stuck with it the first time around.

That he would go the Southern Circuit seems to have been an unpleasant surprise for the new Chief Justice, expecting instead that he would take the Eastern Circuit, a route closer to friends and family. Breaking the news to his wife Abigail, Ellsworth assured her that despite his initial bad fortune "[I]t will not fall to my lot again to go into that Country in less than three years & probably never. Nor is it likely that I shall hereafter have occasion to be from home more than about two months at any onetime."[6]

To his young children, Ellsworth penned a post-script: "Daddy is going about a thousand miles further off, where the oranges grow--and he will begin to come home & come as fast as he can, and will bring some oranges."[7]

And so on March 24, 1796, with a "trusty servant" by his side and in good health, Ellsworth began his circuit by departing Philadelphia by ship and arriving in Charleston six days later.

On April 25, 1796, one month and many hundreds of miles after he left Philadelphia, Ellsworth opened his first circuit court in Savannah, Georgia. He used the occasion to charge the grand jury with a short disquisition of the importance of laws and government. Laws, he told the jurors, "are the national ligatures and vehicles of life" giving to the nation "harmony of interest, and unity of design."

As was so often the case, the metaphorical allusions contained in grand jury charges bore

directly on political considerations of the day and this one was no different. The Jay Treaty, which Ellsworth as a Senator had worked diligently to ratify, was in trouble **in** the House. Republicans, not at all happy with the Treaty in the first place, were holding up funding of the Treaty until President Adams relinquished certain papers relating to Treaty negotiations. Ellsworth believed that the President's refusal to turn over the documents was indeed Constitutional. The House Republicans, Ellsworth told his jurors, were dangerously close to upsetting the fragile balance that produced the "good of all." Their actions blocking the treaty were nothing more than "impetuosity in legislation" brought by the predominance of "faction."[8]

Ellsworth was not alone in spreading the word. To the north, his colleague James Iredell was busily denouncing the Treaty blockade in charges to the grand juries of New Jersey and Pennsylvania. They cheerfully responded by returning replies supporting the Treaty.[9]

The Treaty took center stage at the circuit court for the district of South Carolina. On his way from Savannah to Columbia, Ellsworth had passed through Charleston where British Vice-Consul Benjamin Moodie presented him with a petition for injunctive relief to hear the case of the ship *Amity*. The *Amity* had been seized by the French privateer Leo and brought to Charleston for sale as prize. Moodie had brought the case to U.S. District Court judge Thomas Bee,[10] who ruled that the court did not have jurisdiction because of the provisions in Article 17 of the French/American Treaty of Amity and Commerce. Moodie, not to be deterred, sought Ellsworth's help and succeeded. Ruling that the sale violated Article 24 of the Jay Treaty, Ellsworth granted an injunction and sent the case to the Columbia circuit court which was to meet May 12.

Ellsworth rounded out his swing through the South at the Circuit Court for the District of North Carolina by declaring that that state's statute restricting the recovery rights of British creditors was unconstitutional under the Jay Treaty. A treaty, he reminded the grand jurors, is a national act and has supremacy over statutes--any other construction of this equation, he concluded, is "absurd."[11]

Ellsworth missed the entire February 1797 Term because of an onset of a debilitating medical condition.[12] He later described his ailment as a "gravel and . . . gout in my kidneys." Increasingly, it would affect his ability to carry out his work and eventually contribute to his decision to resign three years later.[13]

That spring Ellsworth had recovered enough to ride the Eastern circuit. Unlike the much-dreaded Southern, the Eastern circuit,[14] with its familiar roads and proximity to friends and family, undoubtedly was much welcomed by him.

That spring, with French attacks on American shipping contributing to what seemed to many to be an inexorable slide towards war, Ellsworth made sure that his charges to the grand juries of the Eastern circuit would leave little doubt in anyone's mind what the Federalist, and government's, position was. He reported to Secretary of the Treasury Oliver Wolcott, Jr. that his circuit riding allowed him to assess the public mood and it was supportive of the administration's policies. Through Wolcott he urged the President and Federalist-dominated Congress to take "any proper measures" to quell the crises at hand.[15] For his part, Ellsworth would ensure that the Court would close ranks with the Congress and the Executive to present a unified voice of the government.

Through a series of charges on his journey around the courts of the Eastern circuit, Ellsworth carried the Federalist message: pro-French partisans attempting to "separate the people from the government" will not succeed." Their work, he told the grand jurors, "estranges honest men, poisons the sources of public confidence, and palsies the hand of administration." The ultimate course, unless checked by vigilance and "prompt support and energy," is "sedition & rebellion." [16]

Ellsworth's charge contributed to the increasingly strident public policy debate. The editor of the the pro-Republican New York *Argus* lambasted Ellsworth for undertaking "to arraign, in terms the most opprobrious, the conduct of a great and powerful nation [France]." "It is a business," the editor scolded, "with which Judges and Jurymen, as such, ought not to concern themselves." [17]

Abigail Adams didn't like Ellsworth's charge either, but for other reasons. She told her husband that "I have just been reading chief Justice Ellsworth's Charge to the Grand jury at New York! Did the good gentleman never write before? Can it be genuine? The language is stiffer than his person, I find it difficult to pick out his meaning in many Sentences, I am Sorry it was ever published." [18]

Ellsworth returned from the East to preside over the Court's eight day long August Term. That fall, he rested while Cushing, Paterson, and Wilson rode the circuits. [19]

A flare-up of his ailment occurred in January 1798, forcing him to make a late start for the February meeting of the Court. His health began to be of growing concern to individuals outside the immediate Court circle. Frederick Wolcott reported to his brother that the Chief Justice "is considerably unwell, & I understand quite hypocondriac." [20]

By the time he reached New Haven, Ellsworth was reduced to travelling at a "gentle and cautious" pace--a feat of great difficulty given the usual rutted and ice-strewn roads. The Court opened without him on February 5 and Patterson wondered whether Ellsworth's condition

would prevent his attendance at all. Iredell, despairing that with James Wilson on the run from his creditors and Ellsworth missing, the **number** of Justices present barely made a quorum. He predicted glumly that the Chief Justice would not show at all.[23]

Ellsworth, proceeding along at his "gentle and cautious" pace, apparently did make it to Philadelphia but not before the Court had broken up. Abigail Adams told William Cushing's wife, Hannah, shortly after the Court adjourned that "I have seen [the Chief Justice] since you left us, and engaged him to dine with us the next day. But he sent an apology as being too unwell. He is upon the whole better than when he came." [24]

His journey to Philadelphia, however, was not **in** vain. The Senate then in session, Ellsworth took the opportunity to work on reforming the circuit riding system. "I left pending before the Senate," he told Cushing, "a judiciary bill with a prospect of its making some progress this Session....It goes to relieve us from circuit riding, to form five new districts and two associate district Judges for the circuit Courts." [25] Despite his optimism the Senate tabled the bill and nothing more came of it. [26]

The August 1798 Term of the Court opened with Ellsworth back at the center seat. The Court met for three days before hastily breaking up after reports of a yellow fever outbreak in the town convinced attorneys arguing cases that reasonable prudence took precedent over jurisprudence. [27]

The previous month the Federalist dominated Congress passed the first of a series of acts that were designed to stifle First Amendment rights of pro-French and anti-administration critics. The Court fell in behind the President and Congress, delivering pointed charges to grand juries in all circuits calling for them to seek out and bring to the bar persons violating the statutes.

It is in this milieu that Ellsworth issued a charge to the grand jury that articulated his views on the existence and extent of a federal common law. The question, as one commentator later put it, "merited the most serious attention of the people of America" and had in fact been the subject of sporadic debate during the preceding decade. [28] For Ellsworth, the common law "as brought from the country of our ancestors, with here and there an accommodating exception, in nature of local customs, was the law of every part of the union at the formation of the national compact." The notion that the Founders intended a "discontinuance" of the common law "is not to be *presumed*; and is a supposition irreconcilable with those frequent references in the constitution, to the common law, as a living code." [29]

August Term 1799 again saw the Court decimated by illness. Only Ellsworth and three Associates attended. Cushing and Iredell missed the entire Term because of illness. [30] It was to be Ellsworth's last Term as a presiding Chief Justice. The previous February, Adams

appointed him minister plenipotentiary to France, along with William Davie and William Vans Murray, in an attempt to head off war with that revolutionary country. For the remainder of the year, Ellsworth waited for the President's call that would send him on a mission he thought it his duty to attend. In November it came and he and his colleagues departed on their mission, leaving behind the business of the Court he had worked so hard to create.

Ellsworth never again sat on the Court.[31] On October 16, 1800, he resigned his commission telling President Adams, that the constant affliction of "the gravel, and the gout in my kidneys, the unfortunate fruit of sufferings at sea, and by a winters journey through Spain," combined to overcome any contemplation of returning to the Court. Broken in body, he sought the restorative climate of the south of France. He eventually returned to his native Connecticut and entered a life of retirement. Ellsworth died at his farm in Windsor on November 26, 1807.[32]

### ***Endnotes***

1. *The Documentary History of the Supreme Court of the United States, 1789-1800*. Volume 3: *The Justices on Circuit, 1795-1800*, (New York: Columbia University Press, 1990).
2. Ellsworth's leading biographer remains William Garrott Brown, *The Life of Oliver Ellsworth* (New York: MacMillan, 1905). For his early life, see Ronald J. Lettieri, *Connecticut's Young Man of the Revolution: Oliver Ellsworth* (Deep River, Conn.: New Era Printing, 1978). Biographical sketches are contained in George Van Santvoord's *Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States* (Albany, New York: Weare C. Little, 1882); Ellsworth's entry in VI *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1931); Kenneth Bernard Umbreit's *Our Eleven Chief Justices* (New York: Harper, 1938); and Michael Kraus's "Oliver Ellsworth" in *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, ed. Leon Friedman and Fred L. Israel, 5 vols. (New York: R.R. Bowker, 1969).
3. 14 of 32 sections of the Judiciary Act are in his handwriting.
4. Jeremiah Smith to William Plumer, 5 March 1796, DHSC I:843, John Adams to Abigail Adams, 5 March 1796, DHSC I:842.

5. Marylander Samuel Chase joined the Supreme Court on February 4, replacing the ailing Justice Blair.
6. Oliver Ellsworth to Abigail Ellsworth, 20 March 1797, *DHSC III*:101.
7. James Iredell to Hannah Iredell, 18 March 1796, *DHSC III*:96; 101n.
8. Oliver Ellsworth's Charge to the Grand Jury of the Circuit Court for the District of Georgia, Columbian Museum [Savannah], 25 April 1796, *DHSC III*: 119-20.
9. *DHSC III*: 102, 106 April 2, 1796, and April 12, 1796, and Iredell correspondence.
10. *Moodie v. Ship Amity*.
11. Kraus, "Oliver Ellsworth" in *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, ed. Leon Friedman and Fred L. Israel, 4 vols. (New York: R.R. Bowker, 1969).
12. Jeremiah Smith to William Plumer, 13 February 1797, *DHSC I*: 856.
13. Oliver Ellsworth to David Ellsworth, 10 October, 1800, *DHSC I*:900; Oliver Ellsworth to Oliver Wolcott, Jr., 16 October, 1800, *DHSC I*:900.
14. The Eastern Circuit consisted of New York, Connecticut, Vermont, New Hampshire, Massachusetts, and Rhode Island.
15. Oliver Ellsworth to Oliver Wolcott, Jr., May 14, 1797, and May 29, 1797, *DHSC*, III:180-82.
16. Oliver Ellsworth's Charge to the Grand Jury of the Circuit Court for the District of New York, 1 April, 1797, *DHSC*, III: 158-59.
17. *Argus* [New York], 11 April, 1797, *DHSC III*: 161-62.

18. Abigail Adams to John Adams, 17 April 1797, *DHSC III*:169. A week later John replied humorously: “You and Such petit Maitres and Maitresses as you,” he wrote, “are forever criticizing the Periods and Diction of Such great Men as Presidents and Chief Justices. Do you think their Minds are taken up with Such Trifles, there is Solid, deep sense in that Morsel of Elsworths—You ought to be punished for wishing it not published,” John Adams to Abigail Adams, 24 April, 1797, *DHSC III*:171.
19. *DHSC III*:492.
20. Frederick Wolcott to Oliver Wolcott, Jr., 23 January, 1798. *DHSC I*:857.
21. Oliver Ellsworth to William Cushing, 4 February, 1798, *DHSC I*:857.
22. William Paterson to Euphemia Paterson, 5 February, 1798, *DHSC I*:856.
23. James Iredell to Hannah Iredell, 5 and 8 February, 1798, *DHSC I*:858.
24. Abigail Adams to Hannah Cushing, 9 March, 1798, *DHSC I*:859.
25. Oliver Ellsworth to William Cushing,, 15 April, 1798, *DHSC III*:251.
26. *DHSC III*:251 note. *See also*, *DHSC III*, Appendix B, for an annotated summary of circuit court legislation, 1790-99.
27. James Iredell to Hannah Iredell, 6 August, 1798, *DHSC I*:860.
28. “Citizen” in *Argus*, 9 August 1799, *DHSC III*: 376.
29. Oliver Ellsworth’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina, 7 May 1799. *DHSC III*: 358. For a more extensive treatment of the issue of the origins of federal common law *see*, Stephen B. Presser, “A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Samuel Chase, and the Broken Promise of Federalist Jurisprudence.” *Northwestern University Law Review* 73



(1978-1979): 26-111; Stewart Jay, "Origins of Federal Common Law: Part One." *University of Pennsylvania Law Review* 133 (June 1985): 1002-1116, and "Origins of Federal Common Law: Part Two." *University of Pennsylvania Law Review* 133 (July 1985): 103-116, and "Origins of Federal Common Law: Part Two." *University of Pennsylvania Law Review* 133 (July 1985): 1231-1333; Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic." *Law and History Review* 4 (Fall 1986): 223-265; Robert C. Palmer, "The Federal Common Law of Crime." *Law and History Review* 4 (Fall 1986): 267-323; and Stephen B. Presser, "The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer." *Law and History Review* 4 (Fall 1986): 325-335. *See also*, headnote to the Spring and Fall Circuits 1799, *DHSC III*: 318-323.

30. *DHSC I*:317.

31. Oliver Ellsworth to John Adams, 16 October, 1800, *DHSC I*: 123.

## ***John Marshall Harlan's Unpublished Opinions: Reflections of a Supreme Court at Work***

**David M. O'Brien**

Tall, courtly, and unfailingly courteous, Justice John Marshall Harlan was "the personification of a New York patrician. He looked and acted like one," recalls Justice Harry Blackmun, "at once soft and polite, but with steel beneath it." [1] A grandson named after the other Justice John Marshall Harlan, who sat on the Court from 1877 to 1911, the second Harlan was born on May 20, 1899. His father was a prominent attorney in Chicago, Illinois. After attending Princeton University as an undergraduate, he spent three years studying jurisprudence as a Rhodes Scholar at Balliol College in Oxford, England, and later earned his law degree at New York Law School in 1924. For a quarter of a century, then, he practiced law in a leading Wall Street law firm, periodically taking leaves to serve as an assistant U.S. attorney, trial prosecutor, and chief counsel for the New York State Crime Commission. In 1954, Republican President Dwight D. Eisenhower appointed him to the Court of Appeals for the Second Circuit. Less than a year later, following the untimely death of Justice Robert H. Jackson, he was elevated to the Supreme Court, where he served until September 1971. [2]

On the Supreme Court, Harlan won respect for more than just his old-world charm and dedication. Justice William J. Brennan, for one, praised his "precisely stated views at conference," "extraordinarily wonderful opinions," and "profound understanding of the Constitution." [3] In the tradition of Justices Oliver Wendell Holmes, Louis D. Brandeis, and Felix Frankfurter, Harlan was a "judicial conservative" and advocate of "judicial self-restraint." [4] His devotion to taking each case on its own merits, meticulous attention to details, and vigilant guard against the Court's overreaching when deciding cases, made him a "lawyer's judge." [5] As one of his law clerks, who later served as chairman of the American Civil Liberties Union, Professor Norman Dorsen, observed:

*Few Justices have so painstakingly or successfully explained their premises and line of argument, and few in the Court's entire history are as safe as he from the charge that judicial opinions are no more than fiats accompanied by little or no effort to support them in reason. [6]*

During sixteen-and-one-half Terms (from 1955 to 1971), Harlan wrote his fair share of the Court's opinions. In his time on the Bench, the Court disposed of 39,663 cases, handing down 1,931 full written opinions. Harlan wrote 176 opinions for the Court (or 9.1 percent of the cases disposed by full written opinion). He also published 173 concurrences, 289 dissents, and 82 separate opinions (in which he concurred and dissented in part), as well as individual statements in another 182 cases, along with 47 other opinions written in his capacity as circuit justice for the U.S. Court of Appeals for the Second Circuit. The 902 opinions he published altogether, in which Harlan publicly explained his views and laid out his judicial philosophy, amount to more than 46 percent of the cases disposed by full-written opinion during his tenure.[7] In addition, he left behind some important off-the-bench speeches and articles, providing insight into the value of oral argumentation,[8] the internal operation of the Court as an institution,[9] and his views on the tradition and role of the judiciary in a democratic society.[10]

Justice Harlan's legacy, of course, lies primarily in his published works. They reveal an evolution in his judicial philosophy and examine some of the great controversies confronting the Court and the country during the Cold War in the late 1950s, throughout the turbulent 1960s, and at the beginning of the 1970s. Among his many notable opinions for the Court are *Cohen v. California*,[11] reaffirming the principle of First Amendment freedom of speech, and *Boddie v. Connecticut*,[12] striking down under the Fourteenth Amendment's Due Process Clause Connecticut's law requiring a \$60 filing fee for those seeking a divorce. Along with other impressive dissenting opinions are those in *Reynolds v. Sims*,[13] protesting the Warren Court's "reapportionment revolution," and in the landmark ruling in *Miranda v. Arizona*,[14] where he sharply criticized the majority's departure from settled constitutional law.

With pride in his work and contributions to the Court, Harlan annually bound in a single volume virtually all of the opinions he produced each term. Included were both copies of his published opinions and many of his published opinion and many of his unpublished opinions.[15] Along with the latter, he attached "A Note on Undelivered Opinions," listing most of the more than 67 cases in which he circulated but withheld publication of an opinion. He also briefly explained the circumstances that led him to abandon opinions. In five instances, Harlan noted, but did not include or discuss, unpublished opinions in cases carried over to another term.[16] With nineteen others, he offered explanations for withholding drafts, yet did not include them in his collection.[17] All told, Harlan's volumes contain 47 unpublished opinions.

Justice Harlan undoubtedly appreciated the historical value of his unpublished opinions in providing "a glimpse of the Supreme Court at work." [18] Neither was he alone in preserving for

posterity his unpublished opinions.[19] Justice Frankfurter exhaustively collected his papers and assumed conservatorship of the papers of Justices Brandeis and William Moody. Revering Brandeis as he did, Frankfurter made Brandeis's unpublished opinions available and pressed his former law clerk, Alexander Bickel, into undertaking their publication. Nor was Bickel's volume, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work*,[20] the last to bring unpublished opinions to light.[21]

Harlan's unpublished opinions are notable in what they reveal about the Justice and the Court at work. Their importance resides less in revelations about controversial rulings than in recording the day-to-day work of the Court, "the fluidity of judicial choice,"[22] and the dynamic process of individual and collective deliberation that takes place prior to the announcement of the Court's rulings. They underscore Harlan's keen attention to every aspect of the Court's work, from decisions to grant petitions for certiorari or summarily dispose of appeals, to tentative votes at conference on the merits of cases, post-conference deliberations over proposed opinions for the Court, and the impact of circulating separate concurring and dissenting opinions. They also register his abiding concern with the facts in each case, whether raising major constitutional questions or the less important (and as he referred to them) "pewee" cases.[23] "For John Harlan," as Chief Justice Warren E. Burger observed, "the 'pewee' case received the same in-depth concentration as every other case." [24] Above all, Harlan's unpublished opinions further attest to his reputation as a highly skilled craftsman of the law.

## I

Deciding what to decide became more time-consuming and crucial during Harlan's tenure on the bench. The annual number of filings swelled from 1,406 to 3,422 cases and the Court's docket more than doubled, growing from 1,566 cases in 1954 to 4,212 in the 1970 Term.[25] The cornerstone of the Court's operation, in Harlan's words, became "the control it possesses over the amount and character of its business." [26] Of necessity, the overwhelming number of cases were denied. Still, at times Harlan thought cases should have been granted or otherwise disposed of differently than had originally been decided at conference. And in some cases he circulated opinions with the hope of persuading the others to reconsider.

Justice Harlan's bound volumes contain nine of ten unpublished opinions that aimed at winning reconsideration of the majority's initial conference dispositions. Sometimes, they failed to persuade. *Myers v. Gockley*, [29] was one such case. There, Harlan found the lower court confused about the impact of an earlier *per curiam* opinion, in *Singer v. Meyers*, [30] which

dealt with the exhaustion of state remedies in federal *habeas corpus* suits. In his capacity as the circuit justice for the Second Circuit, he had also heard of similar confusion. Harlan thus prepared a brief *per curiam* summarily deciding *Myers* and further explaining the holding in *Singer*. But it met with little enthusiasm in the other chambers and strong opposition from Justice Brennan. Hence, Harlan dropped his suggestion and the Court denied certiorari.

With three others, Harlan succeeded in turning the Court around.[32] *United States v. International Boxing Club*,[33] had held that professional boxing, unlike professional baseball,[34] was not immune from antitrust laws. On remand and following a trial, the district court concluded that the government had proven an unlawful conspiracy under the Sherman Antitrust Act, and the International Boxing Club (IBC) immediately appealed to the Supreme Court. In response to the IBC's jurisdictional statement, though, the government waived its right to file a motion for affirming the lower court's decree. At conference on January 3, 1958, then, the Court voted to ask the government to file a brief stating its position. But shortly after the government filed its motion to affirm, the Justices split seven-to-two to deny review. Only Frankfurter and Harlan voted to note probable jurisdiction and in protest Harlan circulated a dissenting opinion. Justices Frankfurter and Tom Clark immediately joined him. Later, at the conference on March 14, Brennan changed his vote. With that (the vote of four Justices) probable jurisdiction was noted,[35] and Harlan withdrew his proposed dissent.[36]

In another instance, during the 1958 Term a majority voted to summarily vacate the judgment below in *Magenau v. Aetna Freight Lines, Inc.*,[37] a diversity of action suit for the wrongful death of a worker. The Court of Appeals for the Third Circuit had reversed a district court on the ground that Pennsylvania's Workmen's Compensation Act provided exclusive remedies. Brennan drafted a brief *per curiam* opinion, vacating that decision with instructions to remand the case for a new trial. Harlan nonetheless felt strongly that the case should have plenary consideration. Again, he circulated a dissent from the Court's summary disposition. His circulation gathered the votes of Justices Frankfurter, Charles Whittaker, and Potter Stewart. Based on the informal "rule of four"--the practice of granting petitions for certiorari when at least four Justices agree that a case merits full consideration--the case was granted full briefings and oral arguments. The vote on the merits of the case, however, was again to reverse the appellate court. Clark wrote for the majority and Harlan, along with Stewart, joined a dissenting opinion written by Frankfurter.

On yet another occasion, Harlan circulated an opinion for the purpose of making the conference vote more informed. *Montana v. Rogers*, later delivered as *Montana v. Kennedy*,[38] involved the deportation of Mauro Montana, an alien, who sought a declaratory

judgment to determine his citizenship. The facts in the case were troubling and tragic. Montana's mother was a native-born U.S. citizen who was married in the United States to a citizen of Italy. Montana was born in 1906 in Italy, while his parents were temporarily residing there, and came to the United States that same year with his mother. For 55 years he had lived in America without becoming naturalized.

While not contesting the grounds for his deportation, Montana claimed U.S. citizenship under two congressional statutes, re-enacted in 1874. One statute, originating from legislation passed in 1802, provided that, "children of *persons* who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States be considered as citizens thereof." But, the other statute, re-enacting a provision passed in 1855, extended citizenship only to children born outside of the United States whose *fathers* were or may be at the time of their birth, citizens of the United States. Montana's attorney argued that the statutes should be construed in such a way as to extend U.S. citizenship to individuals born outside of the country if either of their parents were U.S. citizens.

Despite the severity of deporting a 55 year-old man, who had continuously resided in the country and whose mother was a U.S. citizen, the administrations of Eisenhower and John F. Kennedy maintained that the statutes should be construed to embrace only children of parents who were *both* American citizens. The Court of Appeals of the Seventh Circuit upheld the government's position and Montana appealed to the Court. At conference, five Justices, including Harlan, voted to grant Montana's petition for certiorari, but four others voted to deny. In order to facilitate a more informed vote, Frankfurter suggested that Harlan draft a memorandum examining the basis for Montana's claims. He did so and the case was granted plenary consideration. Harlan subsequently turned his memorandum into an opinion announcing the Court's decision, rejecting Montana's claims for U.S. citizenship.

When a majority voted to summarily decide several other cases, Harlan circulated opinions protesting the Court's actions as well.[39] During the 1957 Term, for example, a bare majority voted to reverse three Federal Employer's Liability Act (FELA) cases. Harlan concurred in two but dissented in one with a circulated opinion. Justices Hugo Black and Whittaker joined him, while Clark withdrew his vote to reverse in the case in which Harlan proposed to dissent. Certiorari was thus granted in that case, but later was settled by agreement of the parties.[40] A majority remained for summarily reversing the two cases.[41] Harlan had circulated another memorandum concurring in those two cases, but ultimately decided to withhold it and set forth his views in other FELA cases that term.[42]

## II

Justice Harlan withheld publication of fifteen opinions in cases so sharply dividing the Court that agreement was finally reached to either issue a brief *per curiam*, affirm the judgment below by an equally divided Court, dismiss a case as improvidently granted, or hear rearguments. In seven of these cases, Harlan preserved his unpublished opinions.[43]

In *United States v. American Freightways*,[44] for instance, the Court faced the question of whether a "partnership" was a "person" under criminal provisions of the Interstate Commerce Commission. The conference vote was to reverse a district court's dismissal of an indictment against American Freightways, with Douglas, Frankfurter and Burton voting to affirm. Harlan was assigned and later circulated a draft of an opinion for the Court, while Douglas sent around a dissent. In February 1957, however, Justice Stanley Reed retired. Consequently, there were only five votes for reversal. Black, then switched sides at conference. As a result, the Justices were deadlocked, Harlan's opinion was withdrawn, and the lower court's ruling was affirmed by an equally divided Court.

In another case, *Kremen v. United States*,[45] Harlan suppressed an opinion, stating his views on the scope of the Fourth Amendment, when the majority finally decided to issue a brief *per curiam*. He did so after Douglas's proposed opinion for the majority invited a vigorous dissent from Clark. On further consideration, the Court decided to hand down a brief *per curiam*. Harlan prepared the latter, which won approval six-to-two, with Clark and Black noting their dissent.

By contrast, Harlan withdrew his opinion in *Hicks v. District of Columbia*,[46] when the Court decided, after oral arguments, to dismiss the case as improvidently granted. At conference, the majority voted to reverse a conviction for vagrancy, and Black was assigned to work up an opinion for the Court. When his draft circulated, though, he failed to persuade four others to join his analysis based on the Fourteenth Amendment's Due Process Clause. Douglas and Fortas each responded with concurring opinions, while Harlan and Stewart circulated dissenting opinions. "With the situation still in a state of flux, in part because of the reluctance of certain Justices to join any opinion," Harlan noted in his papers, "and in part because of the lack of a record and the presence of difficult procedural problems, it was agreed to dismiss the writ of certiorari as improvidently granted." [47]

Justice Harlan abandoned opinions because the Court decided to hear rearguments in eleven cases.[48] This happened, for one, in *Time, Inc. v. Hill*,[49] an important First Amendment case. The Hill family had sued *Life* magazine for a pictorial essay on the opening of a Broadway play, *The Desperate Hours*, based on the Hills' experiences as hostages of three escaped

convicts. But *Life's* account failed to differentiate between the truth and fiction in the play. The Hills won in New York courts, which held that *Life* invaded their privacy and portrayed them in a false light. After hearing oral arguments in late April, 1966, the Justices split six-to-three for affirming the courts below, with Black, Douglas, and White voting to reverse.[50] On May 2, Warren gave the opinion assignment to Fortas.[51] Little more than a month passed before he circulated a draft, broadly embracing a constitutional right of privacy. Shortly afterwards, White circulated a dissent. Fortas's draft also prompted Douglas to send out a forceful dissent, arguing that under the First Amendment the press enjoyed complete immunity from such suits. For his part, Harlan prepared, but did not circulate, an opinion reaching the majority's result but on the basis of a "weighing process," ostensibly balancing the Hills' privacy interests against those of the public under the First Amendment.

Fortas reworked his draft in *Time, Inc. v. Hill*, in light of White's criticisms. Yet by the time it circulated Brennan indicated that he might vote the other way. Given the growing fragmentation of the majority, and the fact that the Court was running up against the end of its Term, Fortas proposed, and the others agreed, to holding the case over for the next term. In the end, Brennan wrote for a bare majority, reversing the judgments of the New York courts.[52] Fortas converted his opinion into a dissent, which Warren and Clark joined. Harlan filed a separate opinion in part concurring and dissenting. While Harlan swung over from his original conference vote and concurred, he disagreed with the majority's "view of the proper standard of liability to be applied on remand," and thought that Brennan went too far in requiring the Hills to prove "reckless or knowing fictionalization," instead of mere negligence on the part of *Life*.<sup>[53]</sup>

Another important case, *Shapiro v. Thompson*,<sup>[54]</sup> was similarly carried over for re-argument and resulted in another ruling contrary to that originally voted on at conference. Vivian Thompson had applied for assistance under the Aid to Families with Dependent Children program, two months after moving from Massachusetts to Connecticut. She was nineteen years old, pregnant, and the mother of one child. Thompson was denied assistance because she failed to meet Connecticut's one-year residency requirement for receiving such assistance. She sued Bernard Shapiro, the state's welfare commissioner, in federal district court. That court held that the residency requirement had a "chilling effect on the right to travel" and denied Thompson's "fundamental right" to travel under the Fourteenth Amendment Equal Protection Clause. Shapiro then appealed to the Supreme Court, which granted review and consolidated the case with others challenging the constitutionality of residency requirements in Pennsylvania and the District of Columbia.



After hearing oral arguments in *Shapiro*, the Justices split five-to-four for reversing the lower court and upholding the residency requirements. Subsequently, Chief Justice Warren circulated an opinion for the majority. Harlan responded with a concurrence, and Douglas and Fortas circulated dissents. By the end of the Term, though, Stewart was uncertain as to exactly where he stood, leaving the others divided four-to-four. Rather than issue an affirmance by an equally divided Court, the Justices decided to carry the case over to the 1968 Term. After rearguments, by a six-to-three vote the Court affirmed the lower court and struck down the residency requirements. Brennan wrote for the majority, Stewart filed a concurrence. Warren, joined by Black, dissented, as did Harlan in a separate opinion.

Two years later, Fortas's resignation and the battles in the Senate over Republican President Richard Nixon's two initial nominees, Clement F. Haynsworth, Jr. and G. Harrold Carswell, to fill his seat created severe problems. In several cases the Justices were equally divided and eventually decided to carry them over, prompting Harlan to withdraw a number of opinions. In *Sanks v. Georgia*,<sup>[55]</sup> for instance, Harlan had circulated a proposed opinion for the Court. It held that Georgia's requirement that defense bonds be posted prior to obtaining judicial review of summary evictions violated the Fourteenth Amendment's Due Process Clause. Three Justices (White, Douglas, and Stewart) immediately joined him. Brennan, along with Marshall, also joined but filed a concurrence, indicating their view that the result might be reached under the Fourteenth Amendment's Equal Protection Clause. Then, the day before the last conference of the term, Black circulated a dissenting opinion. He claimed that Mrs. Sanks, one of the appellants, had available equitable remedies under Georgia's laws, and the other appellant, Mrs. Momman, was not properly before the Court because of a procedural defect in filing her appeal. In the meantime, Georgia had also revised the statutory provisions at dispute in *Sanks*. Subsequently, at the Justices' Friday conference, Harlan said he would respond to Black's circulation with the addition of footnotes to his opinion. On Saturday, June 27, 1970, he submitted his revised footnotes and indicated continued willingness to have the decision come down on Monday. But, Black, joined by the Chief Justice, argued that the case should be held over for reargument. A majority agreed and Harlan withdrew his opinion. The next Term, Harlan revised his opinion for the Court, holding that developments in the case made it unnecessary to reach the questions presented; Black issued a brief concurrence claiming that the case should have been dismissed as moot.

No less illustrative of the importance of post-conference deliberations is the handling of another appeal, related to *Sanks*, arriving at the end of the 1968 Term. On June 23, 1969, the Court granted Gladys Boddie's motion to proceed *in forma pauperis* and noted probable

jurisdiction in *Boddie v. Connecticut*.<sup>[56]</sup> Boddie and several others were appealing a three-judge district court ruling that she was not deprived of her constitutional rights under the Fourteenth Amendment by Connecticut's law requiring a \$60 filing fee as a precondition for obtaining a divorce.

Following oral arguments in *Boddie* on December 8, 1969, the Justices voted to reverse even though, as Harlan noted, the majority did not agree on a single theory for reaching that result. Harlan undertook the assignment of drafting a narrow opinion, invalidating the filing-fee requirement, in conjunction with the one he was working on for *Sanks*. His short opinion relied on a discussion of the Due Process Clause in his draft for *Sanks*, basically extending it in *Boddie*. Four Justices signed on to his draft, while Brennan and Marshall joined but with a concurrence, as in *Sanks*, explaining their view that *Boddie* could alternatively be disposed under the Equal Protection Clause. Brennan wanted to go much farther than Harlan in holding that indigents are constitutionally guaranteed access to judicial proceedings in all circumstances. By contrast, Black countered in a proposed dissent that no provision in the Fourteenth Amendment guaranteed indigents access to civil proceedings.

At the Court's last scheduled conference for the Term, when Black requested that *Sanks* be carried over to the next Term, Harlan suggested that *Boddie* as well be carried over. That was appropriate, he thought, since his opinion in *Boddie* drew heavily on the analysis in *Sanks*. Other Justices urged him to revise *Boddie* so that it could stand independently of *Sanks* and still come down. But, the next day, at the suggestion of Chief Justice Burger, the conference agreed to carry *Boddie* over. The following Term, after hearing rearguments on November 17, 1970, Harlan resumed work on his opinion, which was finally announced in early March 1971. In line with his original circulation, Harlan reversed the lower court on due process grounds. Douglas and Brennan filed concurring opinions, while Black stood alone with his dissent.<sup>[57]</sup>

In three other cases, Harlan withheld opinions because the Justices were so split that, as a compromise, they agreed to avoid addressing divisive issues.<sup>[58]</sup> In one, the Justices originally decided to reverse an obscenity conviction in *Redrup v. New York*.<sup>[59]</sup> The conference vote was to do so on the basis of a *scienter* requirement for such prosecutions, that is, requiring the government to show that defendants charged with "pandering" and selling allegedly "obscene" materials knew that the materials were indeed obscene. Assigned to prepare the Court's opinion, Fortas wrote a draft that reversed the lower court based on the state's failure to apply a *scienter* requirement, which he deemed constitutionally required. Harlan promptly circulated a dissenting opinion, while Brennan circulated a long memorandum indicating that he would reach Fortas's result but upon different *scienter* grounds. As post-conference deliberations

continued it became apparent that a majority was unable to agree on a constitutional definition of *scienter*. In order to dispose of the case, a majority decided to rest its reversal on the obscenity of the materials. The argument was made in a brief *per curiam* opinion that avoided the *scienter* issue. Instead of his proposed dissent, Harlan issued a briefer one criticizing the majority's handling of *Redrup* and other similar cases.[60]

Finally, as previously noted, in the absence of Fortas's successor during the 1969 Term the Justices split four-to-four in a number of cases and were forced to carry them to the next Term. *United States v. White*, was one of these cases. *White* came before the Court on a petition for certiorari from the federal government. The lower court had construed the landmark ruling in *Katz v. United States*,[61] requiring police to obtain search warrants before undertaking wiretaps, to have overruled an earlier decision in *On Lee v. United States*. [62] *On Lee* held that third-party electronic monitoring of conversations, with the consent of one of the participants, fell outside of the scope of the Fourth Amendment's warrant requirement. And *On Lee* indeed bore on James White's conviction for selling narcotics. White was convicted, in part, on incriminating statements he made to a police informer who carried a concealed radio transmitter that enabled police to record his conversations. At his trial, White's recorded conversations were introduced as evidence against him. His attorney argued that those incriminating conversations should be excluded in light of *Katz*. On appeal, a federal appellate court agreed with the government in its ruling that *Katz* had overturned *sub silentio On Lee*.

Besides the question of whether *Katz* overturned *On Lee*, however, from the briefs and oral arguments in *White* it appeared that the eavesdropping took place prior to the ruling in *Katz*. And that raised a different and problematic issue. In *Desist v. United States*,[63] the Court had declined to apply *Katz* retroactively to cases arising from electronic surveillance that occurred prior to *Katz*'s coming down. Given the circumstances in *White*'s case, *Katz* was not directly controlling and, Harlan noted, the Justices voted to dismiss *White*. [64] In line with that vote, Justice White circulated a *per curiam* opinion. Chief Justice Burger, Stewart, and Brennan signed on. Black circulated an opinion concurring in the result, based on his dissent in *Katz*, yet reiterating his position that all constitutional rulings ought to be fully retroactive.[65] Harlan and Douglas agreed with Black on the issue of retroactivity and each issued his own dissenting opinion. While not formally joining Harlan's circulation, Marshall sided with him during conference. Thus, the Court was split four-to-four on the merits of the case and four-to-four on the retroactivity question. Consequently, they agreed to hear rearguments. In the end, Chief Justice Burger and Stewart, along with Fortas's successor, Blackmun, joined White's opinion, reversing the lower court and reaffirming *On Lee*. Black and Brennan concurred in the result,

while Douglas, Harlan, and Marshall published separate dissenting opinions.[66]

### III

Opinions announcing the Court's decisions are the most difficult to produce because they represent a collective judgment and must command the support of at least four other Justices. Because all votes are tentative until final opinions come down, Justices often negotiate the language of proposed opinions for the Court. At times they must accept minor editorial and, sometimes, even major substantive changes in order to hold on to an opinion for the Court. Writing the Court's opinion, as Holmes put it, requires that a 'judge can dance the sword dance; that is he can justify an obvious result without stepping on either blade of opposing fallacies.'[67] In connection with his writing assignments, Harlan withheld several initial circulations due to various developments during post-conference deliberations that further reveal the dynamics of the Court as a collegial institution.

Two of Harlan's unpublished circulations, actually written prior to opinion assignments, amassed majorities and led to his authorship of the Court's opinion in four cases. *United States v. Brosnan* and *Bank of America v. United States*,[68] presented an intercircuit conflict over whether federal tax liens might be extinguished in state court proceedings, regardless of whether the federal government was a party to the proceedings. In *Brosnan*, the Court of Appeals for the Third Circuit held that the government's lien could be extinguished, despite the absence of the federal government's participation in a state court's proceedings. By contrast, the Ninth Circuit ruled the other way in *Bank of America*.

Breaking five-to-four at conference, a bare majority voted to affirm *Brosnan* and to reverse *Bank of America*. Afterwards, but before drafts circulated, Whittaker abandoned the majority in *Brosnan*. He did so in a circulation distinguishing the two cases and explaining why he thought *both* should be reversed. That also meant there no longer was a majority agreeing on a single theory for deciding both cases. At best, only a plurality appeared prepared to join an opinion for the Court. Harlan, who respected the tradition of institutional opinions for the Court's decisions, was disturbed by this development. And in response to Whittaker's memorandum, Harlan circulated one of his own. Besides rebutting the distinction drawn by Whittaker, he pressed his argument for reversing the government's position in both cases. Whittaker, in turn, was moved to reconsider and change his vote in *Brosnan* back to affirming the lower court. Harlan then assumed the task of writing the Court's opinion on the basis of his unpublished memorandum.

In two other companion cases, *T.I.M.E., Inc. v. United States* and *Davidson Transfer & Storage Co., Inc. v. United States*,<sup>[69]</sup> Harlan's circulated draft also amassed a majority. Both of these cases involved challenges to federal appellate court holdings that shippers of goods by certified common carriers had cause to recover charges paid on the basis of tariffs set by the Interstate Commerce Commission because the tariffs were unreasonably high. Following oral arguments in those cases, the Justices voted six-to-three to reverse, with Black, Douglas, and Clark voting to affirm. The majority appeared to agree that the cases were controlled by an earlier ruling, *Montana-Dakota Utilities Co. v. Northwestern Public Service*.<sup>[70]</sup> Chief Justice Warren, however, was somewhat uncertain about his vote, as was Douglas. Both wanted to await a circulation before firmly committing their votes. Given the split and the indecision of two Justices (one in the majority and one in the minority), it was decided that the cases should be handed down with a brief *per curiam* opinion, disposing of them on the basis of *Montana-Dakota*.

Shortly after conference, though, Justice Black circulated a lengthy memorandum, arguing that *Montana-Dakota* was not controlling and that legislative history strongly supported affirming the lower courts. Warren and Whit-taker were won over by that argument and, in contrast to the original vote, there were now five votes for an affirmance. Black's memorandum nevertheless troubled Harlan. From his research, he concluded, like Black, that *Montana-Dakota* was not controlling. Still, unlike Black, he maintained that the courts below should be reversed. Accordingly, he circulated a memorandum, agreeing with Black's analysis of *Montana-Dakota* but disagreeing with his result. Once committed to reversing, and then uncommitted by Black's analysis, Whittaker again reverted to reversing the lower court on the basis of Harlan's analysis. Subsequently, Harlan revised his memorandum as the opinion for the Court. Black reworked his draft which, joined by Warren, Douglas, and Clark, was published as a dissent.

Justice Harlan also withheld thirteen opinions drafted in connection with his assignment to prepare an opinion for the Court. He did so for a number of reasons. In one unusual case, *Whiteley v. Warden of Wyoming State Penitentiary*,<sup>[71]</sup> Harlan not only undertook to write for the Court but prepared a concurring opinion as well! In accord with the conference vote, he circulated an opinion ordering the release of a state prisoner on federal *habeas corpus* grounds, because evidence introduced at trial was seized after an arrest that fell short of the requirements of the Fourth Amendment. Harlan also prepared a separate memorandum explaining his continued disagreement with the Court's watershed ruling extending the "exclusionary rule" to the states in *Mapp v. Ohio*.<sup>[72]</sup> Unlike Brennan, who once wrote an opinion for the Court and

added a separate concurring opinion in the same case, Harlan later suppressed his separate opinion.

In light of criticisms of proposed opinions, Harlan was occasionally persuaded to withhold his initial circulations and to substantially revise his opinion for the Court.[74] In the 1966 Term, for instance, the Court agreed to decide two important Fifth Amendment cases, *Marchetti v. United States* and *Grosso v. United States*.<sup>[75]</sup> Both raised questions about whether requiring gamblers to register with the Internal Revenue Service (IRS), and to pay occupational taxes on their gambling earnings, violated the Fifth Amendment's guarantee against self-incrimination. By registering with the IRS, gamblers became open to state and federal prosecutions for engaging in organized gambling, and thus to incriminate themselves.

Assigned to write the Court's opinion in *Marchetti* and *Grosso*, Harlan initially circulated drafts that would have overturned the registration and occupational tax provisions but upheld excise taxes on gamblers. In response, White, Clark, and Warren circulated separate opinions dissenting from *Marchetti* and concurring in *Grosso*. By contrast, Douglas, joined by Black, and Brennan, along with Fortas, were willing to join in *Marchetti* if Harlan revised his opinion. They, alas, sharply disagreed with his opinion for *Grosso*. Harlan thus confronted the prospect of having no solid majority back either of his circulations.

On *Marchetti*, Harlan was inclined to accommodate the others. Brennan made it somewhat easier for him to do so. On receiving his draft, Brennan wrote back:

*I think your conclusion is fully supported without that part of your Part III... I expect, however, that you'd rather not omit that portion. Could you stop at Part III at page 10, and make anew section IV beginning with the [next] full paragraph....If so, I could file a concurrence stating that I join the judgment of reversal for the reasons expressed in Parts I, II, and V of your opinion.*<sup>[76]</sup>

Douglas, however, immediately circulated a concurrence for *Marchetti* and a dissenting opinion for *Grosso*. Although Brennan preferred these drafts, he thought it wiser to try to head off a major dispute within the majority. "Is there anything about Parts I, II, IV and V which you can't join?" he asked Douglas, emphasizing that "it might be helpful on this prickly problem if we could join as much as possible of what John has written."<sup>[77]</sup> Black, the senior associate, who assigned the opinion to Harlan, agreed. But he told Harlan: "With my constitutional beliefs I could not possibly agree with any part of subdivision III of your opinion except the next to the last sentence in the last paragraph."<sup>[78]</sup> After thinking it over for two days, Harlan offered a

compromise:[79]

*Because of the fact that you, Bill Douglas and Bill Brennan feel so strongly that Part III of my opinion in this case contains implications that were never intended on my part--namely that the taxing power may in some circumstances override the protections afforded by the Fifth Amendment privilege--I have decided to delete that section of my opinion, and am recirculating accordingly.*

With his revised draft of *Marchetti*, Harlan hung on to a bare majority but still was alone on *Grosso*. Each of the drafts offered by Douglas and Brennan employed, in different ways, the "required records" doctrine. White then sent a memorandum to the other chambers, pointing out that the "required records" doctrine was neither briefed nor argued by counsel before the Court. It might be best, he suggested, therefore to hear rearguments. Harlan agreed and wrote Black:[80]

*I am faced with the unusual experience of having to withdraw from the opinion which I prepared for the Court in this case under your assignment. I intend to propose at next Thursday's Conference that this case, and also No. 181, *Grosso v. United States*, be set for re-argument next Term, as suggested by Brother White in his separate opinion, dissenting in *Marchetti*, and concurring in the Judgment in *Grosso*.*

The proposal was accepted and, after rearguments, Harlan resumed further revisions of his drafts in both cases. Not only did he succeed in holding onto his opinion assignments, but Harlan gathered the votes of seven other Justices, leaving only Warren dissenting in *Marchetti* and *Grosso*. [81]

Sometimes, Harlan was unwilling to yield and, after losing his opinion assignment, was forced to file a dissenting opinion. [82] Such were the circumstances behind the opinion announced in *O'Callahan v. Parker*. [83] James O'Callahan, a soldier stationed in Hawaii, was tried and convicted in court-martial for, while on an evening pass, breaking into a Honolulu hotel and attempting to rape a young woman. O'Callahan sought a writ of *habeas corpus*, contending that under the Sixth Amendment he was entitled to a trial in civil courts and that his alleged crimes were not service-connected, and hence beyond the jurisdiction of courts-martial. When a federal district court rejected his claims, he appealed to the Supreme Court.

After oral arguments in *O'Callahan*, the Justices voted six-to-three to affirm the lower court. Black, Douglas, and Marshall voted to reverse. Chief Justice Warren assigned the opinion to Harlan, who in time circulated an opinion broadly sustaining court-martial jurisdiction over military personnel. His draft, however, gathered the votes only of Stewart and White. Douglas circulated a sharp dissent, which Black joined. Warren, Brennan, and Fortas, moreover, concluded that they could not join Harlan's proposed opinion. For his part, Fortas sought narrower grounds on which he might concur in the result. But, in the end, he too prepared a dissent, shortly before resigning from the Court. With the Justices so divided, Harlan gave up his assignment and the case was reassigned to Douglas. Harlan later modified his draft and filed it as a dissent, joined by Stewart and White.

As in *O'Callahan*, there were other cases in which Harlan was left with little room to negotiate due to other Justices switching their votes. Harlan's proposed opinion for the Court thus became a dissenting opinion in *Armstrong v. United States*.<sup>[84]</sup> Cecil Armstrong sought just compensation from the federal government, as guaranteed by the Fifth Amendment, for its taking of liens that he possessed on certain uncompleted boat hulls and other building materials. But the Court of Claims held that Armstrong had failed to establish his claim to the liens, and therefore was not entitled to compensation.

On appeal to the Court, six Justices voted to reject the lower court's conclusion that Armstrong had never had liens on the property. However, the majority also agreed that there had been constitutional "taking of property" under the Fifth Amendment. Assigned by Chief Justice Warren to draft the Court's opinion in *Armstrong*, Harlan in due course circulated a draft. By the time he did so, though, Warren, Douglas, and Stewart had changed their minds. They now took the position that there was an unconstitutional taking of property. Along with the three Justices originally in the minority at conference, a new majority thus emerged for reversing the lower court on constitutional grounds. Black was reassigned the opinion for the Court and Harlan turned his draft into a dissent, which Frankfurter and Clark joined.

## IV

As an element of judicial strategy during post-conference deliberations, Harlan occasionally circulated proposed concurring opinions in order to try to move the majority closer to his views. Like other Justices, he later suppressed his drafts if the author of the Court's opinion accommodated him and he saw no point in filing a separate concurrence.<sup>[85]</sup> A couple of



examples from his unpublished opinions exemplify Harlan's tactics and practice.

Assigned to write the Court's opinion in the controversial "school prayer" case of *Engel v. Vitale*.<sup>[86]</sup> Justice Black initially circulated a draft that created problems for the others, including Harlan. His proposed opinion was sweeping in striking down the New York State Regents' nondenominational prayer, which public school children were required to recite at the beginning of each school day. According to Black, the law was unconstitutional in three respects: (1) it was an official government-sanctioned school prayer; (2) it constituted an endorsement by the state of one kind of religion over another; and (3) it aided religion with tax funds and, therefore, ran afoul of the Court's earlier rulings.<sup>[87]</sup>

The breadth of Black's opinion moved Harlan to prepare and circulate a short concurrence. He agreed that the Regents' prayer was "incompatible with the constitutional principle of governmental aloofness from religious affairs," but added that,

*I see nothing in the decision reached here that lies uneasily against the fact that school children and others express reverence for our country by reciting religious phrases contained in such historical documents as the Declaration of Independence or by singing officially espoused anthems which include professions of faith in a Supreme Being or against the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise, taking the form of a direct entreaty for divine assistance, that this case presents.*

*We are, of course, a "religious people,... It is that very fact indeed which the foundation of the wall of separation built by the Constitution between church and state, assuring to every person in the land the right to worship or not worship according to his conscience, free of all official restraints and pressures, direct or indirect, whether by way of governmentally established religious forms or curbs on religious practices.*

*Recognizing the high motives which prompted the Regents' Prayer, I must, with all humility conclude that its official use in the schoolroom breaches the wall of separation. On this basis I concur in the judgment of the Court.*<sup>[88]</sup>

When the conference later discussed Black's proposed opinion, there remained a majority for striking down New York's law. But only three others (Warren, Brennan, and Clark) were prepared to join in his opinion. Because the Court's ruling was bound to further fuel the

"school prayer" controversy and Black's draft had the support of only a plurality, Stewart suggested that it might be wise to carry the case over for reargument. In that way, perhaps, a majority might be marshalled in support of an opinion for the Court's decision. At that suggestion, however, Harlan indicated a willingness to join Black's opinion if it were more narrowly drawn. Black agreed to accommodate Harlan's, as well as Douglas's, suggested changes, and Harlan withdrew his concurrence.

Justice Harlan's proposed concurrences in nine other cases[89] succeeded in getting his views incorporated in the Court's opinion and he thereafter withheld them,[90] or simply filed a brief statement concurring in the result.[91] In *Johnson v. New Jersey*,[92] for instance, the Warren Court limited the retroactive application of its controversial ruling in *Miranda v. Arizona*,[93] which came down just one week before *Johnson*. When *Johnson* was initially discussed in conference, a majority agreed to limit *Miranda's* application to all pending, non-final cases at the time *Miranda* was handed down. Subsequently, Chief Justice Warren circulated an opinion that struck Harlan as too broad and inviting countless appeals. Accordingly, he circulated an opinion stating that he would further restrict *Miranda's* retroactivity to only those cases involving confessions taken after the *day* *Miranda* was announced, on June 13, 1966. Several days after his draft circulated, the Justices again discussed other cases pending the Court's announcement of *Miranda*. At that time, a majority supported Harlan's position. Rather than reassign the opinion to Harlan, Warren agreed to rewrite his opinion for the Court. Harlan abandoned his circulation in favor of publishing a brief caveat reiterating his view that "the new constitutional rules promulgated in (*Miranda* and its companion cases are both unjustified and unwise." [94]

Although persuading a majority to accommodate his position, Harlan was not always satisfied. Even though the author of the Court's opinion met his demands, Harlan at times went ahead anyway with the publication of a concurring opinion, albeit substantially revised in light of the revisions made in the majority's opinion.[95] The deliberations behind the Court's reversal of the government's denial of conscientious-objector status to the world-famous and controversial boxer, Muhammad Ali, further illuminate Harlan's sense of justice, deference to precedents, and meticulous attention to details. Ali's case,[96] moreover, was highly complex and widely publicized as a symbol of the troubled 1960s when opposition to the Vietnam War steadily mounted and racial divisions continued to bitterly divide the country.

In 1966, Ali, who two years earlier had changed his name from Cassius Clay and become a Black Muslim, refused induction into the Army. He claimed exemption from military service on the ground that, as a Black Muslim, he was a conscientious objector. In his words, "I am a

member of the Muslims and we do not go to war unless they are declared by Allah himself." According to his religious beliefs, Ali would fight only in a "Holy war" and Black Muslims did not consider the war in Vietnam to be that.

The government, however, denied Ali's status as a conscientious objector on three grounds. First, he did not qualify under the religious exemption provision of the Military Service Act because he objected to fighting only in certain kinds of wars. As a selective conscientious-objector, Ali was not entitled to exemption. Second, the government deemed Ali's objections to be primarily personal and political, not religious. Finally, draft board officials doubted the sincerity of Ali's religious claims. A federal district court upheld the government's position and sentenced Ali to five years in prison. After a court of appeals affirmed his conviction, Ali appealed to the Supreme Court.

During oral arguments on Monday, April 19, 1970, Solicitor General Erwin N. Griswold argued the government's case. Although he conceded that there were problems with the grounds on which the government had denied Ali exemption from the draft, Griswold persuasively argued that Ali was properly denied exemption as a selective conscientious objector. A majority of the Court appeared to agree with Griswold when the Justices met in conference on Friday, April 23. With Marshall recusing himself, the vote went five-to-three for affirming the lower court. Shortly thereafter, on May 3, Chief Justice Burger assigned Harlan to prepare an opinion for the Court.[97]

Before setting about drafting an opinion, Harlan devoted considerable time to studying the record. As he read it and learned more about the Black Muslim religion, he became convinced that Ali was not a "selective" conscientious objector after all. Harlan found Ali's religious beliefs to be substantially like those of other conscientious objectors of different faiths who had received draft exemptions. There was also a precedent for granting Ali's claim and reversing the lower court. Ali's claims, he concluded, were basically the same as those of Anthony Sicurella, a member of the Jehovah's Witnesses, who had sought exemption during the Korean war. Sicurella claimed that his religious beliefs permitted him to fight only "in the interests of defending Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack." [98] Moreover, the Court upheld Sicurella's claim to exemption from the draft.[99]

Harlan thus prepared and circulated a memorandum setting forth his new position and why he had settled on reversing the lower court, instead of affirming as he and the majority voted at conference. Brennan and Stewart, two of the three in the minority at conference, agreed to join his memorandum if it became the opinion for the Court. Douglas, another who had voted

to reverse, continued to believe that Ali was, indeed, a selective conscientious objector. Still, he agreed to vote for a reversal based on his view of the First Amendment's guarantee for religious freedom, as he had stated in dissenting opinions in earlier conscientious objector cases.[100] The other four Justices (Burger, Black, Blackmun, and White) voted to affirm Ali's conviction and, Harlan noted,[101] were reluctant to go as far as he. They disagreed with him about whether there was no "basis in fact" for concluding that Ali's objections to fighting were "selective." With the Justices basically split four-to-four, Harlan reworked his opinion in the hope of persuading one more to side with him. His revised draft would have reversed Ali's conviction based on an analysis of prior rulings which, he argued, indicated that the "basis in fact" test should not be applied with full rigor in Ali's case. His recirculation failed to attract a fifth vote, however.

Late in Term, the Justices faced the unhappy prospect of Ali's case going down as an affirmance by an equally-divided Court. At that point, Stewart suggested a compromise: a reversal based on the fact that the government had departed from the reasons originally given for denying an exemption to Ali in its briefs and oral arguments before the Court. Before the Court, the government conceded that its first two grounds were invalid and that its third--the sincerity of Ali's religious beliefs--had been erroneously considered in the first place. Stewart's suggestion met with general approval and appeared preferable to the alternative of handing down an affirmance by an equally-divided Court, Stewart, thereafter, circulated a *per curiam* opinion which commanded the Court, without even a single dissent. Withdrawing his two earlier circulations, Harlan filed a one paragraph statement concurring in the result based on *Sicurella*.<sup>[102]</sup>

Finally, in two cases Harlan circulated concurrences but, as post-conference deliberations evolved, withdrew them in favor of joining another's dissenting opinion.<sup>[103]</sup> The most interesting of these involved the Warren Court's response to challenges to the Eisenhower administration's imposition of restrictions on the right to travel abroad. Two passport cases in the 1957 Term raised important yet distinct questions. The widely publicized case of *Kent v. Dulles*,<sup>[104]</sup> challenged the statutory and constitutional authority of the Secretary of State to issue regulations denying American citizens passports on the ground that they were Communists or adhered to the Communist Party line. The other, *Dayton v. Dulles*,<sup>[105]</sup> posed the question of whether individuals could be constitutionally denied passports based on information contained in government files but not made available to them. In both cases, lower courts upheld the government's position.

During conference discussion of *Kent* and *Dayton*, a bare majority settled on reversing

the lower court in *Kent*. Chief Justice Warren was joined by Black, Frankfurter, Douglas, and Brennan. The majority for a reversal in *Dayton* was larger due to the fact that Harlan and Whittaker sided with *Kent's* majority there. Later, Douglas was assigned by Warren the task of writing opinions for the Court in both cases. Because conference votes are always tentative until opinions come down on "Opinion Days," Douglas faced the vexing task of writing opinions that held on to the majorities in both cases, especially the bare majority in *Kent*. Ironically, when his drafts circulated, the seven-member majority in *Dayton*, instead of the bare majority in *Kent*, began to come apart.

Justice Frankfurter, along with the others in the majority, signed on to the draft in *Kent*. But, Frankfurter refused to join Douglas's draft in *Dayton* on the ground that he now felt that, in light of the holding in *Kent*, it was unnecessary for the Court to address the constitutional question presented in *Dayton*. Harlan agreed and circulated a proposed concurring opinion in *Dayton*. Whittaker was persuaded and, abandoning the conference majority in *Dayton* joined Harlan.

In response to these alarming defections, Douglas promptly recast his proposed *Dayton* opinion, disposing of it on the basis of *Kent* and declining to reach the constitutional issues posed. When Douglas's revised draft reached Frankfurter's chambers, "F.F." was pleased. He agreed to switch back to form a majority for a reversal in *Dayton*. Douglas thereby secured bare majorities in both cases.

During the following weeks when Douglas circulated further drafts in *Kent* and *Dayton*, one of the dissenters, Justice Clark, circulated lengthy dissenting opinions in both cases. As President Truman's former Attorney General, he had no doubt that the government had both statutory authority and constitutional power to deny passports to Communists and Communist-sympathizers. In response to his circulated dissent in *Kent*, Harlan suggested that Clark eliminate discussion of the Constitutional issue because Douglas's revised draft for the majority had not reached it. Clark agreed to do so, and Harlan withdrew his proposed concurring opinion in order to join Clark's dissent in *Dayton* and *Kent*.

## V

Dissenting opinions, in the words of Chief Justice Charles Evans Hughes, who rarely wrote them, appeal "to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court

to have been betrayed.”[106] Dissenting opinions are a way of undercutting the majority's decision and the reasoning in its opinion. The threat of one, therefore, may be useful for a Justice trying to persuade the majority to narrow its holding or to tone down some of the language in its proposed opinion. Even more dramatically proposed dissents may move the majority to entirely reconsider its position. Harlan preserved in his collected opinions three (out of four) unpublished dissents[107]that, after contributing to a recasting of the majority's opinions, he decided to then abandon.[108]

During the 1962 Term, Harlan succeeded with a circulated dissent in not only getting his views accommodated but in turning the Court around on its disposition of a case. In *Florida Lime & Avocado Growers, Inc. v. Paul*,[109] White initially circulated a proposed opinion for the court which rested on federal preemption grounds. Black, Douglas, and Clark agreed with him. But Stewart responded with a concurrence which took issue with White's preemption analysis and reached the same results on the basis of the Commerce Clause. Harlan agreed with Stewart's treatment of the preemption issue. Yet, he disagreed with his contention that, on the facts in the record, there was a violation of the Commerce Clause. Moreover, he circulated a dissenting opinion to the other chambers. Following these exchanges Brennan sent out a proposed dissent of his own. It dealt with the preemption issue at great length and incorporated Harlan's views on the Commerce Clause. That prompted Harlan and Stewart to abandon their opinions in favor of Brennan's. Deliberations, however, soon took a new twist when Warren and Goldberg agreed to join Brennan as well. With these turn of events, Brennan commanded a bare majority and White wrote for the dissenters.

On other occasions, Harlan circulated but later suppressed dissents due to signing on to another's instead. He preserved four such unpublished opinions in his bound volumes.[110] One of these, *Lambert v. California*,[111] raised a challenge to the constitutionality of a Los Angeles city ordinance making it a felony offense for a convicted felon to remain in the city for more than five days without registering with the police.

Virginia Lambert, a convicted felon, appealed her conviction for failing to register with the LAPD. On appeal, the Justices heard oral arguments during the 1956 Term and, then, carried the case over for two days of rearguments, on October 16 and 17, 1957. At conference the vote was unanimously to reverse. Chief Justice Warren assigned the opinion to Douglas. His initial draft struck the city's ordinance under the Fourteenth Amendment on the ground that the phrase "punishable as a felony" was too vague to sustain a criminal conviction. But, Douglas's initial draft failed to win the support of even a majority of the Justices, and so he redrafted it, sharply narrowing the basis for overturning Lambert's conviction.

Douglas's revised opinion in *Lambert*, which eventually was adopted and published,[112] held that Los Angeles's ordinance was invalid as applied to a person "who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." By the time his revised opinion circulated, however, Harlan had concluded that the ordinance could constitutionally apply to convicted felons, even if they had no knowledge of their duty to register. Before his dissent circulated, Frankfurter beat him to the punch with one of his own. Withholding his draft, Harlan joined Frankfurter's dissent, as did Whittaker; Harold Burton separately noted his own dissent. Douglas's opinion for the Court, originally written for a unanimous Court, thus ended up as an opinion for only a bare majority.

## VI

Reflection, dedication, and candor led Justice Harlan at times to change his mind on the disposition of cases and the development of law. Occasionally, he even painstakingly explained publicly his shift in positions on decided cases.[113] The "Cases of the Murdering Wife's"[114] as Justice Frankfurter referred to them, are illustrative of Harlan's open mindedness, frankness, and constant concern with deciding only the issues at hand, rather than over-reaching in constitutional adjudication.

Both cases, *Reid v. Covert*,[115] and *Kinsella v. Krueger*,[116] involved women who allegedly killed their husbands while stationed abroad in the military. They raised the issue of the constitutionality of subjecting civilians living abroad with military personnel to courts-martial under the Uniform Code of Military Justice, which did not extend the same guarantees as those in the Bill of Rights for criminal trials. When the Court initially discussed the cases at conference during the 1955 Term, the vote went five-to-four to hold that the jurisdiction of courts-martial expired when the women were transferred to penal institutions in the United States, and that the women were entitled to protection of the guarantees of the Bill of Rights.

Following that conference vote, Chief Justice Warren took the opinion assignment for himself. But, shortly afterwards, Justice Reed changed his vote, and a new majority emerged for deciding the cases in the way other than had been agreed on at conference. Justice Clark was reassigned responsibility for writing opinions in both cases. Later, Harlan joined Clark's opinion for the Court holding that the women could be tried under military law. Frankfurter filed an opinion expressing his reservations about the Court's ruling,[117] and Warren, Black, and Douglas dissented.[118]

The next Term, however, Harlan joined the three dissenters in pressing for a

reconsideration of *Reid* and *Kinsella*. Circumstances, then, changed rather unexpectedly and dramatically within the Court. On October 15, 1956, Justice Sherman Minton, who had voted with the majority in *Reid* and *Kinsella*, retired. Two weeks later, over the objections of Clark, Burton, and Reed, rearguments in the cases were granted.[119] Then, in another surprising turn of events, on the day before hearing rearguments, February 26, 1957, Justice Reed stepped down. That left only four Justices (Clark, Burton, Frankfurter, and Harlan) from the six-member majority that had upheld courts-martial jurisdiction over civilian-dependents stationed abroad with military personnel, and Frankfurter and Harlan were now wavering on where they stood.

After hearing rearguments, there once again was a majority for limiting the jurisdiction of courts-martial and enforcing the guarantees of the Bill of Rights. The three dissenters (Warren, Black, and Douglas) from the Court's ruling in *Reid I* were joined by Brennan, who had replaced Minton on the Bench. Reed's successor, Justice Whittaker, did not participate in the cases. And Frankfurter and Harlan now swung over to the other side, leaving Clark and Burton resigned to file a dissent.

This time around Chief Justice Warren assigned the Court's opinion for *Reid II* to Black. But, his draft ultimately commanded only a plurality of the Justices. Frankfurter and Harlan filed separate concurring opinions. For his part, Harlan explained his reasons for voting to rehear the cases and for ultimately taking a different position in the disposition of the cases. He had concluded that the majority in *Reid I*, which he joined, was mistaken in its interpretation of precedents "as standing for the sweeping proposition that the safeguards of Article III and the Fifth and Sixth Amendments automatically have no application to the trial of American citizens outside the United States, no matter what the circumstances." [120]

Justice Harlan, nevertheless, refused to go as far as Black did in his rather sweeping opinion for the Court in *Reid II*. Whereas Black would extend all of the constitutional rights guaranteed under the Bill of Rights to civilians who were subject to courts-martial, Harlan remained committed to narrowly addressing and deciding the cases before the Court. In his words:[121]

*[F]or me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it...*

*On this basis, I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, is required in every case for the trial of a civilian dependent of a serviceman overseas. The Government, it*



*seems to me, has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would be [] impractical.... [E]xcept for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress's power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments. Where, if at all, the dividing line should be drawn among cases not capital, need not now be decided. We are confronted here with capital offenses alone; and it seems to me particularly unwise now to decide more than we have to. Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose, as my four brothers would do, our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems.*

Besides Muhammad Ali's case,[122] Harlan changed his mind and withdrew, yet preserved as unpublished, opinions in four other cases.[123] *United States v. Shirey*[124] was one of these. There, the Court voted to note probable jurisdiction and hear oral arguments in an appeal by the government challenging a federal district court's dismissal of an indictment for bribery. George Shirey had been under investigation for allegedly bribing a member of Congress in violation of a federal statute penalizing "whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration" of the use of influence to obtain government office.[125] Shirey allegedly promised Pennsylvania's Representative S. Walter Stauffer that he would contribute \$1,000 to the Republican Party if the Congressman used his influence to obtain for him the postmastership of York, Pennsylvania. But, a federal district court dismissed the indictment upon concluding that the government had failed to establish Shirey's offense under the statute.

At conference, the Justices voted six-to-three to reverse the lower court in *Shirey*, with Black, Whittaker, and Stewart dissenting. Chief Justice Warren subsequently gave Harlan the task of drafting the Court's opinion. When further researching the case, however, Harlan discovered some legislative history that had not been dealt with in either the briefs or oral arguments before the Court. And he decided that the district court's decision should be affirmed, rather than reversed.

Having changed his mind about the disposition of *Shirey*, Harlan circulated a

memorandum detailing his reading of the legislative history of the statute and explaining why he thought that the Court should reach a result contrary to the conference vote. His memorandum persuaded Douglas to switch over, from "reversing" to "affirming." Along with the three Justices (Black, Whittaker, and Stewart) who had constituted a minority at conference, Harlan and Douglas were in the position of forging a new majority on the Court.

Justice Harlan thus reworked his draft with the hope that it would indeed be in a majority. But, Frankfurter remained unconvinced by his usual ally's draft and post-conference switch.

Moreover, when Frankfurter circulated a proposed dissenting opinion, ironically, Douglas was moved to once again change his mind. With Douglas rejoining Frankfurter and the others who had voted to reverse at conference, Frankfurter's draft commanded a bare majority. Harlan, in turn, withdrew his initial opinion, and revised his second draft as a dissenting opinion, which Black, Stewart, and Whittaker joined.[126]

## VII

Justice Harlan's unpublished opinions provide more than just "a glimpse of the Supreme Court at work." [127] They document his painstaking craftsmanship and record both his exceptional productivity and devotion to considering (and at times reconsidering) the merits of each case. In addition, they underscore his fair minded and farsighted judicial philosophy, along with his strong independent judgment and abiding concern with the Court's institutional role in American government. Central to his judicial philosophy and work on the Court was Justice Harlan's wise counsel that

*the courts are not the full answer to all the problems that are bound to arise in assuring that our free ways of life will remain undiminished. The role of the courts is by no means as wide as many seem to assume.... [I]n the last analysis it is the independence, alertness, and common sense of our people that are the final bulwark of our way of life, whether it be in protecting civil liberties, economic freedoms, and property rights, or in preventing erosion of our institutions. I am not talking theoretically, but with the utmost realism, when I say that the responsibility which rests on the individual citizen for keeping the American system intact in*

*the difficult times ahead is a very real and great one.*[128]

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### **Endnotes**

1. Quoted by Justice Lewis F. Powell, “Remarks before the American Law Institute Dinner,” Mayflower Hotel, Washington, D.C. (May 15, 1986).
2. For further discussion of Justice Harlan’s appointment to the Supreme Court, see, H. J. Abraham, *Justices and Presidents* 159-262 (2d ed. 1985).
3. Interview with Justice Brennan, Washington, D.C. (July 14, 1986). For other Justices’ recollections of Justice Harlan, see Powell, *supra*, note 1, and “In Memoriam: Honorable Justice John Marshall Harlan,” 92A S. Ct. 5-47 (1972).
4. For further discussion, see, W. N. Seymour, “Mr. Justice Harlan,” 41 *American Bar Association Journal* 434 (1955); Ledbetter, “Mr. Justice Harlan: Due Process and Civil Liberties,” 20 *South Carolina Law Review* 389 (1968); N. Lewin, “Justice Harlan: ‘the full measure of the man,’” 58 *American Bar Association Journal* 579 (1972); J.H. Wilkinson III, “John M. Harlan and the Values of Federalism,” 57 *Virginia Law Review* 1185 (1971); and a symposium devoted to Justice Harlan to 85 *Harlan Law Review* 369 (1971).
5. N. Dorsen, “John Marshall Harlan,” in L. Friedman and F. Israel, eds. *The Justices of the United States Supreme Court, 1789-1978: Their Lives and Major Opinions*, Vol. 4, 2803, 2806 (1980). See also, his second essay on Justice Harlan in Vol. 5 of that collection, at p. 215.
6. *Id.* at 2819.

7. For a list of Justice Harlan's opinions, see, L. Blandford and P. Evans, eds. *Supreme Court of the United States 1789-1980: An Index to opinions Arranged by Justice*, 921-949 (Kraus International Publications, 1983). For a collection of some of Justice Harlan's Leading opinions, see, D. Shapiro, ed. *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan* (1969).
8. See e.g., J. Harlan, "the Role of Oral Argument," reprinted in M. Cannon and D. O'Brien, eds. *Views from the Bench: The Judiciary and Constitutional Politics* 87 (1985).
9. See e.g., J. Harlan, "A Glimpse of the Supreme Court at Work," 11 *University of Chicago Law School Record* 1 (1963); J. Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 *Australian Law Journal* 108 (1959); and J. Harlan, "Address (on the work of the Court)," 58 *Law Library Journal* 372 (1965).
10. See, in particular, J. Harlan's essays, "Live and Let Live," and "Thoughts at a Dedication: Keeping the Judicial Function in Balance," reprinted in Shapiro, *supra* note 7, at 285-291.
11. *Cohen v. California*, 403 U.S. 15 (1971).
12. *Boddie v. Connecticut*, 401 U.S. 371 (1971).
13. *Miranda v. Arizona*, 384 U.S. 436 (1966).
14. *Reynolds v. Sims*, 377 U.S. 533 (1964).
15. Justice Harlan's bound volumes of his published and unpublished opinions may be found in the John Marshall Harlan Papers at the Seeley G. Mudd Library, Princeton University, Princeton, New Jersey. [Hereafter cited as Harlan Papers, MLPU.] The volumes are located in Boxes 4, 18, 37, 55, 76, 101, 131, 154, 185, 214, 272, 295, 326, 369, and 407.
16. Prior to the 1966 Term, Justice Harlan neither discussed nor listed the opinions that he withheld in cases carried over for reargument in the following Term. In the volumes for

the 1966 and 1967 terms, he noted without further discussion that five opinions were withheld because cases were carried over for reargument. *See*, Harlan Papers, Boxes 272 and 295, MLPU.

17. Justice Harlan discussed these 19 cases in the volumes for the 1968, 1969, and 1970 terms. *See*, Harlan Papers, Boxes 326, 369, and 407, MLPU.
18. *See, supra* note 9.
19. *See*, for instance, the collections of papers of Chief Justices Harlan Fiske Stone, William Howard Taft, and Earl Warren, as well as those of Justices Hugo Black, William J. Brennan, Jr., Harold Burton, William O. Douglas, Felix Frankfurter, and Robert H. Jackson, all of which are located in the Manuscripts Room of the Madison Building, Library of Congress, Washington, D.C.
20. A. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (1957).
21. *See, e.g.*, B. Schwartz, ed., *The Unpublished Opinions of the Warren Court* (1985); and B. Schwartz, ed., *The Unpublished Opinions of the Burger Court* (1988). For a comparison of Bickel's collection, *supra* note 20, and Schwartz's publication, as well as criticisms of uses of Justices' private papers, *see* the author's book review in 4 *Constitutional Commentary* 212 (1987).
22. *See, e.g.*, J.W. Howard, "On the Fluidity of Judicial Choice," 62 *American Political Science Review* 43 (1968); W. Murphy, *Elements of Judicial Strategy*, Ch. 3 and 7 (1964); and D. O'Brien, *Storm Center: The Supreme Court in American Politics* Chs. 4 and 5 (2d ed., 1990).
23. Quoted by Chief Justice Burger in his "Memorial for Justice Harlan," 92A *S. Ct.* 5, 45 (1972).
24. *Id.*

25. Based on the official records of the Clerk of the Supreme Court of the United States.
26. Harlan, “A Glimpse of the Supreme Court at Work,” *supra* note 9, at 4.
27. Justice Harlan did not include his circulated but unpublished opinion in his collection for *Milton v. Wainwright*, 407 U.S. 371 (1972). That case presented a question of the retroactivity of the rule announced in *Massiah v. United States*, 377 U.S. 201 (1964). At conference, there emerged a majority for granting certiorari and summarily holding *Massiah* fully “retroactive,” even though the conviction in *Milton* was final six months prior to the Court’s handing down of *Massiah*. In accord with that conference vote, Justice Stewart circulated, a proposed opinion for the Court, but only three other Justices signed on and Justice Harlan circulated a proposed dissent. When the case was again taken up at conference, it was finally decided that the case should be given full plenary consideration, leading Harlan to suppress his circulation. Harlan Papers, Box 407, MLPU.
28. Justice Harlan, for example, circulated an opinion for *Stanley v. United States*, 352 U.S. 1015 (1957), a jury instruction cases that came to Court shortly after *Delli Paoli v. United States*, 352 U.S. 232 (1957), which had been decided by a bare majority. Harlan circulated a proposed *per curiam* reversing the lower court on the basis of *Delli Paoli*. But, conference vote was to deny review and only Justices Frankfurter and Brennan joined Harlan in voting to grant *Stanley*.
29. *Myers v. Gockley*, 396 U.S. 847 (1969).
30. *Singer v. Myers*, 392 U.S. 647 (1968).
31. *See*, Harlan Papers, Box 369, MLPU.
32. Besides the cases discussed in the text, *see*, Harlan, “Note on Unpublished Opinions” for *Radich v. New York*, 401 U.S. 531 (1971), which affirmed the lower court’s judgment by an equally-divided Court. Harlan Papers, Box 407, MLPU.
33. *United States v. International Boxing Club*, 348 U.S. 236 (1955).

34. *See, Toolson v. New York Yankees*, 346 U.S. 356 (1953).
35. *International Boxing Club v. United States*, 356 U.S. 910 (1958).
36. *See*, Harlan Papers, Box 37, MLPU.
37. *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959). *See*, Harlan Papers, Box 55, MLPU.
38. *Montana v. Kennedy*, 366 U.S. 308 (1961). *See also*, Harlan Papers, Box 101, MLPU.
39. *See* Harlan Papers, Boxes 407 and 326, discussing unpublished opinions that circulated for *Milton v. Wainwright*, 407 U.S. 371 (1972) and *Shanker v. Rankin*, 393 U.S. 930 (1968), MLPU.
40. *See, Baird v. New York Central R.R. Co.*, 355 U.S. 943 (1958) and Harlan Papers, Box 37, MLPU.
41. *See, Gibson v. Thompson*, 355 U.S. 18 (1957), and *Palermo v. Luckenbach Steamship Co.*, 355 U.S. 20 (1957), and Harlan Papers, Box 37, MLPU.
42. *See, Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 254 (1958); and *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 332 (1958). *See also*, Harlan Papers, Box 37, MLPU.
43. Justice Harlan discussed, but did not include in his collection his initial circulations in the following cases: *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Spinelli v. United States*, 393 U.S. 410 (1969); *Kolad v. United States*, 390 U.S. 136 (1968); *Shapiro v. Thompson* 394 U.S. 618 (1969); *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971); *United States v. Knox*, 396 U.S. 77 (1969); *Dutton v. Evans*, 400 U.S. 74 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972); and *Johnson v. Louisiana*, 406 U.S. 356 (1972). *See*, Harlan Papers, Boxes, 295, 326, 369, and MLPU.

44. *United States v. American Freightways*, 352 U.S. 1020 (1957). See, Harlan Papers, Box 18, MLPU.
45. *Kremen v. United States*, 353 U.S. 346 (1957).
46. *Hicks v. District of Columbia*, 383 U.S. 252 (1966).
47. Harlan Papers, Box 241, MLPU.
48. The cases in which Justice Harlan withheld an original circulation because the Court decided to carry the cases over for reargument were: *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Spinelli v. United States*, 393 U.S. 410 (1969); *Kolod v. United States*, 390 U.S. 136 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971); *United States v. Knox*, 396 U.S. 77 (1969); *Sanks v. Georgia*, 401 U.S. 144 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *United States v. White*, 401 U.S. 745 (1971); *Dutton v. Evans*, 400 U.S. 74 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972); and *Johnson v. Louisiana*, 406 U.S. 356 (1972). See, Harlan Papers, Boxes 241, 295, 326, and 407, MLPU.
49. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See, Harlan Papers, Box 341, MLPU.
50. For further discussion, see, B. Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 642-645 (1983). See also, B. Schwartz, ed., *The Unpublished Opinions of the Warren Court* 240-303 (1985).
51. Assignment Sheets, Earl Warren Papers, Box 125, Manuscripts Division, Library of Congress.
52. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).
53. *Id.* at 402 (Harlan, Jr., sep. op.).
54. *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also, Harlan Papers, Box 369, MLPU.



55. *Sanks v. Georgia*, 401 U.S. 144 (1971). *See also*, Harlan Papers, Box 369, MLPU.
56. *Boddie v. Connecticut*, 395 U.S. 974 (1969).
57. *Boddie v. Connecticut*, 401 U.S. 371 (1971).
58. *See* Harlan's notes on *Typographical Union v. National Labor Relations Board*, *Redrup v. New York*, and *Gent v. Arkansas*, in Harlan Papers, Box 101 and 272, MLPU.
59. *Redrup v. New York*, 386 U.S. 767 (1967).
60. *See, Redrup v. New York*, 386 U.S., at 771 (Harlan, Jr., dis. Op.). In *Gent v. Arkansas*, 386 U.S. 767 (1967), the Warren Court also initially voted to declare an Arkansas obscenity statute void on its face. And to that end, Justice Fortas prepared and circulated a proposed opinion for the Court while Harlan prepared a dissent. But, as with *Redrup* problems soon emerged and it was decided to hand down *Gent* based on the obscenity of the materials presented. Harlan thus withdrew his opinion dealing with the validity of Arkansas' statute. *See* Harlan Papers, Box 272, MLPU.
61. *Katz v. United States*, 389 U.S. 347 (1967).
62. *On Lee v. United States*, 343 U.S. 747 (1952).
63. *Desist v. United States*, 394 U.S. 244 (1969).
64. The Court relied on the authority of *DeBacker v. Brainard*, 396 U.S. 28 (1969), when initially voting to dismiss *United States v. White*, 401 U.S. 745 (1971). *See* Harlan Papers, Box 369, MLPU.
65. *See, Linkletter v. Walker*, 381 U.S. 618 (1965).
66. *United States v. White*, 401 U.S. 745 (1971).
67. Quoted by A. Mason, "review of The Holmes-Einstein Letters," in *New York Review of*

- Books 60* (November 22, 1964).
68. *United States v. Bronson and Bank of America v. United States*, 363 U.S. 237 (1960).  
See Harlan Papers, Box 101, MLPU.
  69. *T.I.M.I. Inc. v. United States, and Davidson Transfer & Storage Co., Inc. v. United States*, 359 U.S. 464 (1959). See Harlan Papers, Box 55, MLPU.
  70. *Montana-Dakota Utilities Co. v. Northwestern Public Service*, 341 U.S. 246 (1951).
  71. *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971). See also, Harlan Papers, Box 407, MLPU.
  72. *Mapp v. Ohio*, 367 U.S. 643 (1961).
  73. *Abbate v. United States*, 359 U.S. 187 (1959).
  74. Justice Harlan also withheld proposed opinions after receiving other Justices' criticisms and revising his draft accordingly in *NAACP v. Gallion*, 368 U.S. 16 (1961), and in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). For further discussion of Harlan's circulations, see Harlan Papers, Boxes 131 and 326, MLPU.
  75. *Marachetti v. United States*, 385 U.S. 1000 (1967), and *Grosso v. United States*, 385 U.S. 810 (1966).
  76. Letter to Justice Harlan, March 23, 1967, in William J. Brennan Papers, Box 157, Manuscript Room, Library of Congress [hereafter cited as Brennan Papers, LC]. See also, Harlan Papers, Box 297, MLPU.
  77. Letter to Justice Douglas, in Brennan Papers, Box 157, LC.
  78. Letter from Justice Black, April 4, 1967, in Brennan Papers, Box 157, LC.
  79. Letter to Justice Black, April 6, 1967, in Brennan Papers, Box 157, MLPU.

80. Letter to Justice Black, May 2, 1967, in Brennan Papers, Box 157, MLPU.
81. *Marchetti v. United States*, 390 U.S. 39 (1968); and *Grosso v. United States*, 390 U.S. 62 (1968).
82. See, “Note on Unpublished Opinions” for *O’Callahan v. Parker* and *United States v. Harris*, in Harlan Papers, Boxes 326 and 407, MLPU.
83. *O’Callahan v. Parker*, 395 U.S. 258 (1969). See also, Harlan Papers, Box 326, MLPU.
84. *Armstrong v. United States*, 364 U.S. 40 (1960).
85. Besides the cases discussed in the text, see Harlan’s notes on his unpublished opinions for *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), in Harlan Papers, Boxes 76 and 369, MLPU.
86. *Engel v. Vitale*, 370 U.S. 421 (1962). See also, Harlan Papers, Box 131, MLPU.
87. See, *McCullum v. Board of Education*, 333 U.S. 204 (1948).
88. Harlan Papers, Box 131, MLPU.
89. Only six of the unpublished opinions in nine cases, however, are preserved in Justice Harlan’s bound volumes. In two cases, *Chandler v. Judicial Council*, 398 U.S. 74 (1970), and *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), he simply noted the circumstances that led him to withhold a proposed opinion. See, Harlan Papers, Boxes 369, MLPU.
90. Along with the cases discussed in the text, Harlan circulated opinions, and later withheld them after the majority accommodated his views, in *Goss v. Board of Education*, 373 U.S. 683 (1963), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Berman v. United States*, 378 U.S. 530 (1964), *Adderley v. Florida*, 385 U.S. 39 (1966), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966). See Harlan Papers, Box 154, 185, and 272,

MLPU.

91. See also, Harlan's notes on and brief opinion in *United States v. O'Brien*, 391 U.S. 367 (1968), in Harlan Papers, Box 295, MLPU.
92. *Johnson v. New Jersey*, 384 U.S. 719 (1966).
93. *Miranda v. Arizona*, 384 U.S. 436 (1966).
94. *Johnson v. New Jersey*, 384 U.S. 719, at 736 (1966).
95. Justice Harlan's collection includes two unpublished opinions that were abandoned after the majority accommodated his views, but in cases in which he nevertheless filed concurrences. See, circulated but unpublished opinions for *Cheff v Schnackenberg*, 384 U.S. 373 (1966), *Peters v. New York*, 392 U.S. 40 (1968), and *Clay v. United States*, 403 U.S. 698 (1971), in Harlan Papers, Boxes 241, 295 and 407, MLPU. In two other cases involving similar circumstances, Harlan did not preserve his initial circulations but discussed why he suppressed them in a "Note on Undelivered Opinions." The cases were *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Tooahnippah (Goomba) v. Hickel*, 397 U.S. 598 (1970). See Harlan Papers, Boxes 369 and 407, MLPU.
96. *Clay v. United States*, 403 U.S. 698 (1971). See Harlan Papers, Box 407, MLPU.
97. See, "Assignment Sheets," Brennan Papers, Box 224, Library of Congress.
98. Quoted in *Sicurella v. United States*, 348 U.S. 385, 387 (1955).
99. *Id.*
100. See, e.g., *Gillette v. United States*, 401 U.S. 437, 463 (1971) (Douglas J., dis. op.).
101. See, Harlan Papers, Box 407, MLPU.
102. *Clay v. United States*, 403 U.S. 698, at 710 (Harlan, J., con. op.).

103. *See also*, Harlan's notes on *Chauffeurs Union v. Yellow Transit Freight Lines, Inc.*, 370 U.S. 711 (1962), in Harlan Papers, Box 131, MLPU.
104. *Kent v. Dulles*, 357 U.S. 166 (1958) and Harlan Papers, Box 37, MLPU.
105. *Dayton v. Dulles*, 357 U.S. 144 (1958), and Harlan Papers, Box 37, MLPU.
106. C. Hughes, *The Supreme Court of the United States* 68 (1928).
107. Justice Harlan did not preserve in his collection his circulated but unpublished opinion in *Coleman v. Alabama*, 399 U.S. 1 (1970). *See* Harlan Papers, Box 569, MLPU.
108. Besides the cases discussed in the text, *see also*, Harlan's notes on and unpublished opinions for *United States v. Seeger*, 380 U.S. 163 (1965), and *Forty Fourth General Assembly v. Lucas*, 379 U.S. 693 (1965), in Harlan papers, Box 214, MLPU.
109. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). *See also*, Harlan Papers, Box 154, MLPU.
110. Along with *Lambert v. California*, 355 U.S. 225 (1957), Harlan withheld proposed dissents and signed on to another's in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), *Thompson v. Immigration and Naturalization Services*, 375 U.S. 384 (1964), and *Greenwald v. Wisconsin*, 390 U.S. 519 (1968). *See*, Harlan Papers, Boxes 76, 185, and 295, MLPU.
111. *Lambert v. California*, 355 U.S. 225 (1957).
112. *Id.*
113. Besides *Reid v. Covert*, 354 U.S. 1 (1957) (Harlan J. con. op.), *see*, *Mackey v. United States*, 401 U.S. 667 (1971) (Harlan, J., sep. op.).
114. This discussion draws on that of the author's in *Storm Center*, *supra* note 22, at 289.

115. *Reid v. Covert*, 351 U.S. 487 (1956).
116. *Kinsella v. Krueger*, 351 U.S. 470 (1956).
117. *Reid v. Covert*, 351 U.S. 487, at 492 (Frankfurter, J., sep. op.).
118. *Id.* (Warren, D.J., dis. op.).
119. *See, Reid v. Covert*, 352 U.S. 901 (1956).
120. *Reid v. Covert*, 354 U.S. 1, at 65, 67 (Harlan, J., con. op.).
121. *Id.* at 75-77.
122. *See*, text and notes at *supra* note 96.
123. *See*, text and notes at *supra* note 96.
124. *United States v. Shirey*, 359 U.S. 255 (1959). *See also*, Harlan Papers, Box 55, MLPU.
125. 18 U.S.C.A. Sec. 214.
126. *United States v. Shirey*, 359 U.S. 255, at 263 (Harlan, J., dis. op.).
127. *See, supra* note 19.
128. Harlan, Address, “Live and Let Live” delivered at Brandeis University (October 30, 1955), reprinted in Shapiro, *supra* note 7, at 285, 288-289.

## ***John Marshall Harlan and the Warren Court***

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Justice Harlan was an indispensable component of the Warren Court. This is true not only, as a wiseacre might say, because losers are needed if there are to be winners, but because he provided a form of resistance to the dominant motifs of the Court that was intelligent, determined, professionally skillful, and above all principled. In a sense he defined the Court by his dissents. For this performance over 16 years Harlan received extraordinary praise. Earl Warren himself said, "Justice Harlan will always be remembered as a true scholar, a talented lawyer, a generous human being, and a beloved colleague by all who were privileged to sit with him." [1] Judge Henry Friendly, who first worked with Harlan as a young lawyer in the early 1930s, boldly asserted, "there has never been a Justice of the Supreme Court who has so consistently maintained a high quality of performance or, despite differences in views, has enjoyed such nearly uniform respect from his colleagues, the inferior bench, the bar, and the academy." [2] There are many similar accolades. [3]

I shall in this paper indicate the nature and extent of Harlan's views as a counterpoint to the Warren Court majority. But I shall also suggest that it would be a mistake to conceive of Harlan solely in this light, as an inveterate reactionary seeking to forestall the brave new world that his brethren sought to welcome or even to create. To a surprising degree, Harlan concurred in the liberal activism of the Warren Court, picking his spots carefully and above all seeking (though not always successfully) to be true to his core values of federalism and a limited judicial function. What emerges, in sum, is not a right-wing Justice as he is sometimes conceived, but rather someone much closer to the center, a moderate figure avoiding the extremes.

**I**

Initially, I shall present Harlan the dissenter from the principal themes of the Warren Court. Perhaps the most central of these is Equality, an idea that "[O]nce loosed...is not easily cabined," as Archibald Cox said in his valuable book on the Warren Court.[4] Harlan vigorously opposed egalitarian rulings of many kinds. He was most vehement in condemning the reapportionment decisions, first *Baker v. Carr*,[5] in which the Court acknowledged federal jurisdiction to decide the issue whether state legislative districts were malapportioned, then *Reynolds v. Sims*,[5] in which the Court established the one person-one vote rule, and then the many sequels to these rulings.[7] Harlan never became reconciled to what he regarded as a wholly unjustified encroachment into the political realm, saying in *Reynolds* that "it is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States." [8]

Closely related to the apportionment cases are those dealing with the right to vote. Here, too, he dissented, from the ruling that invalidated Virginia's poll tax, from a decision that opened school board elections to a man who was neither a parent nor a property-holder in the district, and from the decision upholding Congress's power to extend the franchise to 18 year olds.[9]

The poll tax case illustrates an aspect of the Court's egalitarianism to which Harlan especially objected, its acceptance of the idea that government has an obligation to eliminate economic inequalities as a way to permit everyone to exercise human rights. The leading case was *Griffin v. Illinois*,[10] in which a sharply divided Court held that where a stenographic trial transcript is needed for appellate review, a state violates the Fourteenth Amendment by refusing to provide the transcript to an impoverished defendant who alleges that reversible errors occurred at his trial. Harlan's dissent maintained that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." [11] He later dissented from *Douglas v. California*,[12] which held that a state could not deny counsel to a convicted indigent who seeks his only appeal by right to a higher court.

Another example of the genre is Harlan's protests at efforts to transform welfare payments into entitlements. Thus, in a major effort, he maintained that states could deny such payments to otherwise eligible welfare applicants who had not resided in the state for a year or more.[13]

Harlan also found himself out of step with the prevailing view on criminal procedure, where the Warren Court rewrote the book, transforming the law relating to confessions and line-ups, the privilege against self-incrimination, wiretapping and eavesdropping, and the



admissibility of illegally obtained evidence, among other aspects of criminal cases. The linch-pin of most of the rulings was the doctrine of selective in-corporation, under which the Court applied to state criminal trials under the Fourteenth Amendment's due process clause the protections of the first eight amendments to the Constitution that were deemed "fundamental."<sup>[14]</sup> Rejecting Harlan's view that the due process clause established a general test of "fundamental fairness" not tied to the particular provisions of the Bill of Rights, the Court completed a massive reform of criminal procedure in an astonishingly brief period of time. Harlan vigorously dissented from most of the seminal decisions, including those applying the exclusionary rule to illegally seized evidence, incorporating the privilege against self-incrimination, establishing the "Miranda" rules for warning individuals being taken into police custody, and the requirement of a jury trial in criminal cases.<sup>[16]</sup> He equally opposed the Court's conclusion that the guarantees of the Bill of Rights that were "selectively" incorporated should apply to the states in exactly the way in which they applied to the federal government.<sup>[17]</sup> In these cases he asserted that a "healthy federalism" was inconsistent with the assertion of national judicial authority.<sup>[18]</sup>

Harlan also objected, in the interests of federalism, to extensions of congressional power. The two most significant cases of this sort were *Katzenbach v. Morgan*,<sup>[19]</sup> and *United States v. Guest*,<sup>[20]</sup> which adopted broad theories in sustaining, respectively, the authority of Congress to invalidate state English language literacy tests for voting as applied to individuals who completed sixth grade in Puerto Rican schools and to punish private (not state) action that interferes with constitutional rights.

At the same time Harlan, often contrary to the majority, deferred to congressional judgments that impaired civil liberties. For example, he conceded broad authority to Congress over citizenship, rejecting any constitutional right to prevent involuntary denationalization;<sup>[21]</sup> he protested a softening of the immigration law that provided for deportation of an alien who had ever been a member of the Communist Party, however nominally;<sup>[22]</sup> and he did not recognize a constitutional right to travel abroad, first recognized in *Kent v. Dulles*,<sup>[23]</sup> and solidified in *Aptheker v. Secretary of State*.<sup>[24]</sup> In all these cases he refused to overturn actions of the elected branches of government that resulted in severe and arguably unjustified harm to individuals.

There is no doubt, in light of these cases and others, that Justice Harlan was a regular and frequent dissenter from many of the Warren Court's key liberal decisions. In addition, especially in his early Terms, there were many important cases in which Harlan was part of a majority that rejected constitutional theories supported by the liberal Justices. For example, he

wrote the prevailing opinions in cases rejecting First Amendment claims by individuals who were held in contempt by the House Un-American Activities Committee and denied admission to the practice of law for refusing to respond to questions concerning Communist activities, and by a man sentenced to prison because of membership in the Communist Party.[25] These cases have not been overruled, but later actions overturned majority decisions of which Harlan was a part that, for example, permitted states to question criminal suspects without concern for the privilege against self-incrimination, and to deny women the right to serve on juries equally with men.[26] Here too Harlan was out of step with the liberal activism that distinguished the Warren Court.[27]

## II

But this is far from the whole story. Justice Potter Stewart, one of Harlan's closest colleagues, recognized this when he said, "I can assure you that a very interesting law review article could someday be written on 'The Liberal Opinions of Mr. Justice Harlan.'"[28] In virtually every area of the Court's work, there are cases in which he was part of the consensus and, indeed, in which he spoke for the Court.

Harlan joined *Brown II*[29] and *Cooper v. Aaron*,[30] decisions instrumental in protecting the principle of the initial school segregation case, *Brown I*. [31] He also joined every opinion decided while he was on the Court that applied the principle of *Brown* to other sorts of state-enforced segregation.[32]

He concurred in *Gideon v. Wainwright*,[33] the right-to-counsel case, and wrote the opinion in *Boddie v. Connecticut*,[34] which held that a state could not deny a divorce to a couple because they lacked the means to pay the judicial filing fee. Although both these cases were decided under the due process clause, they were, at bottom, judicially mandated equalization of economic circumstance in situations where Harlan concluded that it would be fundamentally unfair to deny poor people what others could afford.

In the criminal procedure area, while opposing the exclusionary rule in state prosecutions, he consistently supported a strong version of the Fourth Amendment protection against unreasonable searches and seizures by federal authorities,[35] including application of the principle to wiretapping and eavesdropping.[36] He also wrote a separate opinion to underscore his agreement with the ruling that extended criminal due process protections to juveniles accused of delinquency.[37] And he joined the decision overruling earlier cases upholding the federal registration requirements for gamblers, concluding that they could avoid

prosecution for violation of the statutes by pleading the privilege against self-incrimination.[38]

Turning to free expression, one finds a host of important cases in which Harlan supported the constitutional right. For example, he wrote the important opinion in *NAACP v. Alabama*,[39] which held that the right of individuals to join civil rights groups anonymously when exposure would have entailed great personal risks was a form of freedom of association protected by the First Amendment. He joined *New York Times Co. v. Sullivan*,[40] which first imposed limits on libel judgments against the media, and some (though not all) of the sequels to that case.[41] He joined opinions that barred states from seating an elected legislator who had been denied his seat because of his sharply critical views on the Vietnam War, and from convicting a leader of the Ku Klux Klan for "seditious" speech.[42] And he wrote for the Court to protect the right of a black man, who was unnerved by the fact that a civil rights leader had been shot, to express himself strongly about the country while burning the flag.[43] Harlan also wrote a number of opinions, all curbing variants of McCarthyism, that nominally are decided on non-constitutional grounds but rested on First Amendment principles. In the first of these, *Cole v. Young*,[44] which invalidated the discharge of a federal food and drug inspector, Harlan interpreted a statute authorizing dismissals of government employees "in the interests of national security" to apply only to jobs directly concerned with internal subversion and foreign aggression. The next year, in what Anthony Lewis has described as a "masterfully subtle opinion,"[45] Harlan construed the Smith Act to permit prosecution of Communist Party leaders only for speech amounting to incitement to action rather than for "abstract doctrine" advocating overthrow.[46] A third instance involved companion cases[47] in which the government had revoked the naturalization of two persons who were asserted to have obtained their citizenship improperly. The government contended that they were Communists and therefore not "attached to the principles of the Constitution of the United States" as required by the applicable statute. Harlan's opinion found that "clear, unequivocal and convincing evidence" was lacking that the individuals were aware, during the relevant period prior to their becoming citizens, that the Communist Party was engaged in illegal advocacy. During the 1950s these decisions were milestones in lifting the yoke of political repression.

Freedom of religion also showed Harlan as frequently, but not invariably, protective of constitutional guarantees. He joined decisions that prohibited organized prayer in the public schools[48] and invalidated a requirement that state officials declare a belief in God.[49] And while approving state loans of textbooks to church schools,[50] he balked when tax-raised funds were used to reimburse parochial schools for teachers' salaries, textbooks and instructional materials.[51] Similarly, while unwilling to protect adherents to Sabbatarian faiths who objected

to Sunday closing laws and to unemployment compensation laws that required a willingness of the applicant to work on Saturdays,[52] Harlan wrote a powerful opinion during the Vietnam War declaring that a statute that limited conscientious objection to those who believed in a theistic religion "offended the Establishment Clause" because it "accords a preference to the 'religious' [and] disadvantages adherents of religions that do not worship a Supreme Being." [53]

In all these cases, Harlan emphasized that "[t]he attitude of government towards religion must...be one of neutrality." [54] Harlan was sophisticated enough to appreciate that neutrality is "a coat of many colors." [55] Nevertheless, as Professor Kent Greenawalt has observed, "no modern Justice ha[s] striven harder or more successfully than Justice Harlan to perform his responsibilities in [a neutral] manner..." [56]

A final area of civil liberty, sexual privacy, is of particular importance because Harlan produced the most influential opinions on this subject written by anyone during his tenure. In the first case,[57] a thin majority, led by Justice Frankfurter, refused to decide whether a Connecticut law that criminalized the sale of contraceptives to married and unmarried people alike violated the Constitution, finding that there was no threat of prosecution. Harlan's emotional opinion[58]--a rarity for him --not only differed with this conclusion but also extensively defended the proposition that Connecticut's law violated the due process clause of the Fourteenth Amendment, a position that prevailed four years later in concurring in *Griswold v. Connecticut*, [59] It is impossible to know whether Harlan would have extended this reasoning to support the result in *Eisenstadt v. Baird* [60] which held that a state could not punish the distribution of contraceptives to unmarried persons, or to *Roe v. Wade's* [61] recognition of abortion as a personal right, both decided soon after he retired. But I am confident that, at a minimum, he would have protected the right of a married woman to proceed with an abortion that was dictated by family considerations.

Harlan's participation in the major thrusts of the Warren Court was not confined to civil liberties and civil rights. In economic cases, too, he often went along with the majority's support of government regulation of business, despite the fact that his private practice of law often involved the defense of antitrust and other actions against the government and that he was acutely aware of the effect of regulation on business. [62] To be sure, he frequently voted to limit the impact of regulatory statutes, [63] but there are also many important antitrust cases in which he sided with the government or private plaintiff. [64]

### III

What should one conclude from the many decisions in which Justice Harlan, a conservative, supported constitutional rights, often in highly controversial cases in which the Court was split? That he was in step with the majority of the Warren Court? Plainly not; there are too many instances where he marched separately. That he was essentially a civil libertarian? No again; not only are there too many cases to the contrary, but at a basic level that is not the way Harlan reacted to injustice. This is not to say that he was insensitive to human suffering or unmoved by evidence of arbitrariness. It is rather that something else was at the core.

In my opinion, that something was Harlan's deep, almost visceral, desire to keep things in balance, to resist excess in any direction. Many times during my year with him he said how important it was "to keep things on an even keel." To me, that is the master key to Harlan and his jurisprudence. One recalls Castle, the hero of Graham Greene's novel, *The Human Factor*, as he muses on those who are "unable to love success or power or great beauty." [65] Castle concludes that it is not because these people feel unworthy or were "more at home with failure." It is rather that "one wanted the right balance...." In reflecting on some of his own perplexing and self-destructive actions, Castle decides that "he was there to right the balance. That was all." [66] Harlan was not a man who avoided success or power or, if one knew Mrs. Harlan, great beauty, but nevertheless in his own eyes he was there to right the balance. It is significant that he entitled a major speech at the American Bar Association *Thoughts at a Dedication: Keeping the Judicial Function in Balance*. [67]

There is evidence of balance not only in the decisions discussed above but in his elaborate views on doctrines of justiciability. These are closely related to his frequent preoccupation with judicial modesty or, put negatively, his opposition to excessive judicial activism, which in turn is related to the central theme of his judicial universe--federalism. As I suggested in 1969,

*His pervasive concern has been over a judiciary that will arrogate power not rightfully belonging to it and impose its views of government from a remote tower, thereby enervating the initiative and independence at the grass roots that are essential to a thriving democracy.* [68]

Harlan's thinking on jurisdictional issues was also related to his long years as a practicing lawyer where he customarily represented defendants in litigation. In that role he had to be "constantly aware that it is easier and quicker to achieve victory on grounds such as want of federal jurisdiction, lack of standing or ripeness, or failure to join an indispensable party, than

to prevail on the merits of a lawsuit." [69]

That this earlier sensitivity to issues of justiciability carried over to his judicial years is seen in the many instances where Harlan urged jurisdictional rules to avoid deciding controversial cases. Among the most notable are his dissenting opinions in *Baker v. Carr*, [70] and *Reynolds v. Sims*, [71] where he concluded that the issue of legislative reapportionment was a political question; in *Dombrowski v. Pfister*, [72] where he objected to the adjudication of the constitutionality of Louisiana's Subversive Activities and Communist Control Act in a federal suit to enjoin a state criminal prosecution under the statute; in *Fay v. Noia*, [73] and *Henry v. Mississippi*, [74] where he criticized expansion of federal judicial authority to review state criminal convictions which previously were unreviewable because the convicted person had not complied with state procedural requirements; and in *Flast v. Cohen*, [75] where he dissented from the Court's holding that taxpayers had standing to challenge federal financial aid to religious schools.

On the other hand, reflecting his balanced approach, Harlan wrote or joined many opinions that expanded the Court's jurisdiction. Perhaps the most striking was *Poe v. Ullman*, [76] where he vigorously rejected, in a dissent, the reasoning of Justice Frankfurter in dismissing an early challenge to Connecticut's birth control law on the ground that the statute was not being enforced. Again, in *NAACP v. Alabama*, [77] the first case explicitly recognizing a freedom of association, his opinion for the Court proceeded to its First Amendment conclusion only after overcoming difficult procedural obstacles involving the doctrines of standing and independent state ground. And in the first school prayer case, [78] and again in the ruling that ordered the House of Representatives to seat Adam Clayton Powell, [79] both decisions of unusual sensitivity, Harlan joined majority opinions that rejected substantial justiciability defenses. [80]

Harlan's often unappreciated willingness to expand judicial authority can be seen in several cases involving the broadening of remedies in civil rights and economic cases alike. In one case, again differing with Frankfurter, he wrote a concurring opinion sanctioning the expansion of federal remedies against municipal officials who violated an individual's civil rights. [81] In a second ruling, involving a provision of the Securities and Exchange Act that prohibited false and misleading proxy statements in respect to mergers, Harlan agreed that a stockholder could sue for rescission and damages even though the statute was silent on private lawsuits to enforce the statute. [82]

*Stare decisis* is another important area relating to legal process and the judge's role in which Harlan's actions betrayed a more activist spirit than is commonly recognized. His general

insistence on adhering to precedent was

*the product of a conservative mind one that is distrustful of abrupt change, comfortable with accustomed rules and practices, and therefore reluctant to revise the judgments of predecessors. It can also be partially traced to his long career at the bar, where, in advising clients and preparing for litigation, Harlan worked with precedent, relied on it and was imbued with its significance in ordering day-to-day affairs.*[83]

There are many examples of his unwillingness to reach beyond accustomed boundaries.[84] But there are also many contrary instances. He voted to overrule *Betts v. Brady*,[85] and grant an absolute right of counsel to defendants in felony prosecutions. In *Marchetti v. United States*,[86] he spoke for the Court in overruling a decision that denied the privilege against self-incrimination to gamblers prosecuted for failing to register and pay taxes. And in *Swift & Co. v. Wickham*,[87] he wrote in the course of overruling an earlier decision that "[u]nless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice..."[88]

A striking aspect of Harlan's approach to *stare decisis* is that he would often follow precedent from which he had dissented when it was initially established.[89] Equally striking is that Harlan followed this principle even as it carried him to dissent from the Court's failure to follow precedent with which Harlan disagreed. Thus, in *Green v. United States*,[90] the Court held that where a defendant is convicted of a lesser included offense and then secures reversal of the conviction, the defendant may be retried only for the lesser included offense. Although Harlan dissented in *Green*, he dissented again in *North Carolina v. Pearce*,[91] where he found, contrary to the Court, that *Green* mandated the conclusion that a defendant once "convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed." [92]

Finally, one may point to cases in which Harlan exhibited a trait familiar to all of his law clerks--his exceptional open-mindedness and willingness to listen to new arguments. In these cases he dissented from the Court's refusal to hear oral argument on constitutional claims, although in each of them he was not predisposed to agree that the appeal had merit. Thus, he joined Justice Douglas's dissent from the refusal to hear a plea of the Veterans of the American Lincoln Brigade that the organization was improperly ordered to register as a Communist front

organization under the Subversive Activities Control Act.[93] Similarly, despite his earlier *Barenblatt*[94] ruling, he would have heard a challenge to contempt citations by the House Un-American Activities Committee against an uncooperative witness.[95] And in perhaps the most far-reaching action, he would have set down for oral argument a complaint by the state of Massachusetts that raised the issue of the legality of the Vietnam War, although he ordinarily accorded great deference to decisions of the elected branches of government on matters of war and peace.[96]

In one area Harlan was inflexible; he consistently refused to widen the scope of "state action" under the Fourteenth Amendment to encompass discrimination engaged in by what he regarded as private actors.[97]

#### IV

The Warren Court ended in mid-1969, but Harlan remained for two more Terms, a brief period in which he was the leader of the Court. Possessing seniority and an unmatched professional reputation, he took advantage of the replacement of Earl Warren and Abe Fortas by Warren Burger and Harry Blackmun to regain the position of dominance that Justice Frankfurter and he shared until Frankfurter retired in August 1962. Thus, as Chief Judge Friendly has noted, against an average of 62.6 dissenting votes by Harlan per Term in the period between 1963 and 1967, he cast only 24 such votes in the 1969 Term and 18 in the 1970 Term.[98]

This new situation meant that Harlan could reassert conservative themes in his own opinions or join such expressions in the opinions of others. For example, during this period he adhered to his longstanding opposition to expansion of the constitutional rights of poor people to public assistance by voting with the majority in the leading case rejecting welfare as an entitlement.[99]

He prevailed in a series of criminal justice decisions, including those that confined the reach of the confrontation clause, denied a jury trial in juvenile delinquency proceedings and permitted the closing of such hearings to the public, and authorized capital sentencing without guidelines.[100] And in an important case that involved both the rights of poor people and procedural due process, he joined Justice Blackmun's opinion that rejected Fourth Amendment claims in sustaining the power of caseworkers to make unannounced visits to the homes of welfare recipients to check their eligibility and to provide rehabilitative assistance.[101]

In the First Amendment area Harlan also maintained longstanding positions, but here he



was more often in dissent. The most notable occasion was the *Pentagon Papers* case[102] where he would have permitted a prior restraint of newspaper publication of an extensive and politically embarrassing history of the Vietnam War. He also dissented in an important libel case[103] and in two decisions confining the authority of bar examiners to probe into the associations of applicants.[104] But he prevailed in another bar admission case, recalling issues from earlier days, that sustained questions about Communist associations,[105] and he again joined the majority in an obscenity prosecution that rejected privacy as well as free speech claims.[106]

With regard to the breadth of the judicial role, he maintained his strong opposition to expansion of the state action doctrine, even when the consequence was to limit racial equality,[107] and he took a similar position in rejecting a Fourteenth Amendment claim against an amendment to a state constitution that provided for a community referendum before a low-rent housing project could be constructed or acquired.[108]

At the same time that Harlan was, under Chief Justice Burger, renewing his formidable conservative record, he nevertheless adhered to a balanced judicial profile. Although liberal activist rulings did not dominate his last biennium on the Court, there surely are many examples of the genre.

Thus, in the equality area, he maintained his support for desegregation,[109] and he joined the new Chief's important opinion that expanded remedies against discriminatory employment tests.[110] And his opinion, noted earlier, in *Boddie*,[111] which invalidated a state statute that denied poor couples the right to a divorce because they could not afford court filing fees came during this period. Harlan's reliance on the due process clause to reach this result was widely criticized,[112] and the doctrine has not survived, but the case stands as a rare example of Harlan's reaching out to right an economic imbalance that prejudiced poor people in American society.[113] In another such case involving criminal justice, Harlan joined the Court's opinion prohibiting the incarceration of indigents who were unable to pay criminal fines.[114] He continued his deep concern for Fourth Amendment rights[115] and wrote an extensive concurring opinion in support of "beyond reasonable doubt" as the proper standard of proof in juvenile delinquency hearings.[116] And in the First Amendment field he wrote a widely cited opinion that protected the display in a state courthouse of a "scurrilous epithet" ("Fuck the draft") in protest against conscription.[117] From 1969-1971, Harlan also manifested flexibility by joining majorities that considerably expanded federal remedies for civil rights violations[118] and overcame rigid theories of *stare decisis* in a variety of cases.[119]

## V

The pattern of decisions provides ample proof that Harlan was not a one dimensional Justice. What is less clear is the source of his drive to keep things in balance, to eschew an extreme ideology.

Two possibilities may be suggested. The first is the familiar notion that in any society patricians (like Harlan) are concerned less with results in particular controversies, and certainly less about pressing any group against the wall, than in assuring the smooth functioning of institutions without the precipitation of volatility or deep-seated enmities. This means that dissent should be allowed an outlet, that racial minorities should be able to hope, that political power should not become centralized and therefore dangerous. Thus his decisions supporting desegregation, a strong federal presence, and law and order. Thus also his fears about court-dominated reapportionment and about an "incorporation" of the Bill of Rights through the Fourteenth Amendment that represented too dramatic a break with established doctrine. But thus also, Harlan's willingness to take reformist steps, to overrule outdated precedent selectively and before a problem worsened, and above all, to listen closely to many voices.

A second source of Harlan's overall philosophy is Legal Process theory, which had its heyday for almost exactly the period that he served on the Supreme Court. In the early 1950s, Henry Hart produced an early draft of the work that he and Albert Sacks published at Harvard Law School in a "tentative edition" in 1958 (it was also the final edition). The moderate philosophy embodied in these materials was tailor-made to Harlan's personality. It emphasized the central role that procedure plays in assuring judicial and legislative objectivity<sup>[120]</sup> and the corollary "principle of institutional settlement,"<sup>[121]</sup> which holds that judgments properly arrived at by institutions operating within their appropriate sphere of authority should be accepted as binding on the entire society until duly changed. Not surprisingly, Harlan was attracted to this theory, which enabled him to take constitutional steps as long as they were not too long or jarring, while simultaneously offering him ample institutional reasons for resisting excessive judicial authority.<sup>[122]</sup>

By 1971, when Harlan left the Supreme Court, Legal Process theory, buffeted by events in society at large, was beginning to lose its hold, even at Harvard, and the more extreme philosophies of law and economics and critical legal studies moved to the forefront. The struggle within the Court became ever more polarized as strong civil libertarians, which Harlan was not, waged battle with doctrinaire conservatives, which Harlan also was not.

## CONCLUSION

It fell to John Marshall Harlan, by nature a patrician traditionalist, to serve on a Supreme Court which, for most of his years, was rapidly revising and liberalizing constitutional law. In these circumstances, it is not surprising that Harlan would protest the direction of the Court and the speed with which it was traveling. He did this in a remarkably forceful and principled manner, thereby providing balance to the institution and the law it generated. Despite this role, Harlan joined reformist rulings on the Court during his tenure to a degree that his overall jurisprudence can fairly be characterized as conservative primarily in the sense that it evinced caution, a fear of centralized authority, and a respect for process. In short, the nature and results of Harlan's jurisprudence were far more mixed than his conservative reputation would allow.

## Endnotes

1. Warren, "Mr. Justice Harlan, As Seen by a Colleague," 85 *Harv. L. Rev.* 369, 370-371 (1971).
2. Friendly, "Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court," 85 *Harv. L. Rev.* 382, 384 (1971).
3. E.g., Freund, Foreword to *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan*, xii-xiv (D. Shapiro, ed., 1969); Wright, K. "Hugo L. Black: A Great Man and a Great American," 50 *Texas L. Rev.* 3-4 (1971); Lewin, "Justice Harlan: "The Full Measure of the Man," 58 *A.B.A.J.* 580 (1972); Powell "Annual Dinner Address" (May 15, 1986), The American Law Institute, Remarks and Addresses at the 63<sup>rd</sup> Annual Meeting. May 13-16, 1986). The first full biography of Justice Harlan has recently appeared, T. Yarborough, *John Marshall Harlan: Great Dissenter of the Supreme Court* (1992).
4. A. Cox, *The Warren Court* 6 (1968).
5. 369 U.S. 186 (1962).

6. 377 U.S. 533 (1964).
7. *Avery v. Midland County*, 390 U.S. 474, 486 (1968) (Harlan, J., dissenting); *Hadley v. Junior College Dist.*, 397 U.S. 50, 59 (1970) (Harlan, J., dissenting).
8. *Reynolds v. Sims*, 377 U.S. at 615 (Harlan, J., dissenting).
9. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 634 (1969) (Harlan, J., joining Stewart, J., dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).
10. 351 U.S. 12, 29 (1956) (Harlan, J., dissenting).
11. *Id.* at 34.
12. 372 U.S. 353, 360 (1963) (Harlan, J., dissenting).
13. *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969) (Harlan J. dissenting). *See also*, *Levy v. Louisiana*, 391 U.S. 68, 76 (1968), where Harlan in dissent took the view that a state law granting children the right to sue for wrongful death of their mother could validly be interpreted to deny this right to nonmarital children who lived with and were dependent on her.
14. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).
15. *See generally*, U. Kamisar, *Police Interrogation and Confessions* (1980).
16. *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); (Harlan, J., dissenting); *Miranda v. Arizona*, 384 U.S. 436, 504 (1966) (Harlan J., dissenting); *Duncan v. Louisiana*, *supra* note 14, 391 U.S. at 171 (Harlan, J., dissenting).
17. *E.g., Malloy v. Hogan*, 378 U.S. 1, 27-29 (Harlan J., dissenting) (1964) (self

incrimination); *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring in the result) (confrontation); *Benton v. Maryland*, 395 U.S. 794, 801 (1969) (Harlan, J., dissenting) (double jeopardy). *See also*, Harlan's separate opinion in *Williams v. Florida*, 399 U.S. 78, 117 (1970), noting that the necessary consequence under incorporation of the holding that a twelve person jury is not required in state criminal trials is, through a "backlash," the application of the same lesser standard in federal cases.

18. *See Benton v. Maryland*, 395 U.S. 784, 801 (1969) (Harlan, J., dissenting); *See also, Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).
19. 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).
20. 383 U.S. 745, 762 (1966) (Harlan, J., concurring in part and dissenting in part).
21. *Perez v. Brownell*, 356 U.S. 44 (1958); *Trop v. Dulles*, 356 U.S. 86, 114 (1958) (Harlan J., joining Frankfurter, J., dissenting); *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (Harlan, J., dissenting).
22. *Rowoldt v. Perfetto*, 355 U.S. 115, 121 (1957) (Harlan, J., dissenting).
23. 357 U.S. 116 (1958).
24. 378 U.S. 500 (1964).
25. *Barenblatt v. United States*, 360 U.S. 109 (1959); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Scales v. United States*, 367 U.S. 203 (1961). Another, particularly harsh decision was *Flemming v. Nestor*, 363 U.S. 603 (1960), which upheld the denial of social security benefits to an alien who was deported because he had been a member of the Communist Party many years before.
26. *Lerner v. Casey*, 357 U.S. 468 (1958), overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964); *Hoyt v. Florida*, 368 U.S. 57 (1961), overruled by *Taylor v. Louisiana*, 419 U.S. 522 (1975).

27. For discussion of these themes, *see* Wilkinson, “Justice John M. Harlan and the Values of Federalism,” 57 *Va. L. Rev.* 1185 (1971); Caplan, “Questioning Miranda,” 38 *Vand. L. Rev.* 1417 (1985).
28. *See* “John Marshall Harlan 1899-1971” (memorial addresses delivered at a meeting of the Association of the Bar of the City of New York by Justice Potter Stewart, former Attorney General Herbert Brownell, and Professor Paul Bator), cited in Gunther, “In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,” 24 *Stan. L. Rev.* 1001, 1004 n. 23 (1972).
29. 349 U.S. 294 (1955).
30. 358 U.S. 1 (1958).
31. 347 U.S. 483 (1954).
32. *E.g.*, *Goss v. Board of Education*, 373 U.S. 683 (1963) (school case); *Griffin v. County School Board*, 377 U.S. 218 (1964) (same); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (public accommodations); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (same); *Watson v. City of Memphis*, 373 U.S. 526 (1963) (recreational facilities).
33. 372 U.S. 335, 349 (1963).
34. 401 U.S. 371 (1971).
35. *E.g.*, *Giordenello v. United States*, 357 U.S. 480 (1958) (defective search warrant); *Jones v. United States*, 357 U.S. 493 (1958) (no probable cause to search).
36. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *But see*, *Berger v. New York*, 388 U.S. 41, 89 (1967) (Harlan, J., dissenting) (opposing application of exclusionary rule where state engaged in electronic eavesdropping).
37. *In re Gault*, 387 U.S. 1, 65 (1967) (Harlan, J., concurring in part and dissenting in part).

38. *Marchetti v. United States*, 390 U.S. 39 (1968).
39. 357 U.S. 449 (1958).
40. 376 U.S. 254 (1964).
41. *E.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Garrison v. Louisiana*, 379 U.S. 64 (1964). *But see*, *Rosenblatt, v. Baer*, 383 U.S. 75, 96 (1966) (Harlan, J., concurring in part and dissenting in part).
42. *Bond v. Floyd*, 385 U.S. 116 (1966), *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
43. *Street v. New York*, 394 U.S. 576 (1969).
44. 351 U.S. 536 (1956). *See also*, *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957) (security discharges in both cases invalid because agency failed to follow prescribed procedures).
45. Lewis, "Earl Warren," in *The Warren Court: A Critical Analysis* 15 (R. Sayler, B. Boyer and R. Gooding, Jr., eds., 1969).
46. *Yates v. United States*, 354 U.S. 298 (1957).
47. *Nowak v. United States*, 356 U.S. 298 (1957).
48. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).
49. *Torcaso v. Watkins*, 367 U.S. 488 (1961).
50. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).
51. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

52. *Sherbert v. Verner*, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting).
53. *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan J., concurring in the result).
54. *Board of Educ. v. Allen*, 392 U.S. at 249.
55. *Id.*
56. Greenawalt, “the Enduring Significance of Neutral Principles,” 78 *Colum. L. Rev.* 982, 984 (1978).
57. *Poe v. Ullman*, 367 U.S. 497 (1961).
58. *Id.* 522 (Harlan, J., dissenting).
59. 381 U.S. 479, 499 (1965) (Harlan, J., concurring).
60. 405 U.S. 438 (1972).
61. 410 U.S. 113 (1973).
62. An informed discussion of Harlan’s time at the bar is Wood, “John M. Harlan, As Seen by a Colleague in the Practice of Law,” 85 *Harv. L. Rev.* 377 (1971).
63. *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) (Harlan, J., concurring); *United States v. Continental Can Co.*, 378 U.S. 441, 467 (1964) (Harlan, J., dissenting).
64. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) (Harlan, J. concurring); *Brown Shoe Co. v. United States*, 370 U.S. 294, 357 (1962) (Harlan J., dissenting in part and concurring in part); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 (1959) (Harlan J., concurring in the result).



65. G. Greene, *The Human Factor*, 148 (Vintage ed. 1978).
66. *Id.* at 149.
67. 49 A.B.A.J. 943 (1963).
68. Dorsen, "The Second Mr. Justice Harlan: A Constitutional Conservative," 44 *N.Y.U. L. Rev.* 249, 271 (1969).
69. *Id.* at 254.
70. 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).
71. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). *See also, Wesberry v. Sanders*, 376 U.S. 1, 20 (1964), in which Harlan dissented at length from a ruling that in congressional elections "as nearly as is practicable one man's vote . . . is to be worth as much as another's," *Id.* at 7-8.
72. 380 U.S. 479, 498 (1965) (Harlan, J., dissenting).
73. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).
74. 379 U.S. 443, 457 (1965) (Harlan, J., dissenting).
75. 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).
76. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting); *see supra* note 57 and accompanying text.
77. 357 U.S. 449 (1958).
78. *Engel v. Vitale*, 370 U.S. 421 (1962).
79. *Powell v. McCormack*, 395 U.S. 486 (1969).

80. Another Harlan opinion that adopted a broad view of standing is *Parmelee Transp. Co. v. Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77 (1958).
81. *Monroe v. Paper*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring).
82. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).
83. *Dorsen*, *supra* note 68, at 257.
84. *E.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (Harlan, J., dissenting from the overruling of *Perez v. Brownell*, 356 U.S. 44 (1958)); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan J., dissenting from overruling of *Wolf v. Colorado*, 338 U.S. 25 (1949).
85. 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).
86. 390 U.S. 39 (1968), overruling *United States v. Kahriger*, 245 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955).
87. 382 U.S. 111 (1965).
88. *Id.* at 116, overruling in part *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), an opinion by Justice Frankfurter in which he had joined. Other cases where Harlan was willing to overrule obsolete precedents are *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Walker v. Southern Ry.*, 385 U.S. 196, 199 (1966) (Harlan, J., dissenting).
89. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan J., concurring) (Following *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Ker v. California*, 374 U.S. 23 (1963)); *Ashe v. Swenson*, 397 U.S. 436, 448 (1970) (Harlan, J., concurring) following *Benton v. Maryland*, 395 U.S. 784 (1969)); *Burns v. Richardson*, 384 U.S. 73, 98 (1966) (Harlan, J., concurring in the result) (following *Reynolds v. Sims*, 377 U.S. 533 (1964)).
90. 355 U.S. 184 (1957) (Harlan J., joining in Frankfurter, J., dissenting); *see also, id.* at 330 (Harlan, J., dissenting).

91. 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part).
92. *Id.* at 751. *See also, Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 503-504 (1971) (Harlan, J. dissenting).
93. *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 380 U.S. 53, 514 (1965).
94. *See supra* note 25 and accompanying text.
95. *Stamler v. Willis*, 393 U.S. 217 (1968), appeal dismissed from 287 F. Supp. 734 (N.D. Ill. 1968). *See also, Wiseman v. Titicut Folliers*, 398 U.S. 960 (1970) (Harlan, J., dissenting from denial of writ of certiorari).
96. *Massachusetts v. Laird*, 400 U.S. 886 (1970).
97. Among many other examples that could be cited, despite Harlan’s strong commitment to racial equality, he did not believe (1) that a state was responsible for discrimination by a privately owned and operated restaurant open to the general public, even though it was located in a municipal parking facility that was constructed with public funds, was tax exempt and flew the state flag, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); or (2) that land bequeathed in trust to a Georgia city as a “park and pleasure ground” for white people was unconstitutionally administered because a state court replaced public trustees with private ones and the park was municipally maintained, *Evans v. Newton*, 382 U.S. 296 (1966); or (3) that a state constitutional amendment, adopted by referendum, that protected the right of private parties to exercise total rights over real property, including the ability to discriminate on the ground of race, was invalid because the state was thereby encouraging the discrimination, *Reitman v. Mulkey*, 387 U.S. 369 (1967). And in a nonracial context Harlan dissented from a holding that a privately owned shopping mall was the equivalent of a company town so as to bar peaceful picketing of a supermarket in the mall. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968).

98. See Friendly, *supra* note 2, at 388.
99. *Dandridge v. Williams*, 397 U.S. 471, 489 (1970) (Harlan, J., concurring).
100. *McKeiver v. Pennsylvania* and *In re Burns*; 403 U.S. 528, 557 (1971) (Harlan, J., concurring in the judgments); *McGautha v. California*, 402 U.S. 183 (1971).
101. *Wyman v. James*, 400 U.S. 309 (1971).
102. *New York Times Co. v. United States*, 403 U.S. 713, 752 (1971) (Harlan, J., dissenting).
103. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting).
104. *Baird v. State Bar*, 401 U.S. (1971); *In Re Stolar*, 401 U.S. 23 (1971).
105. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).
106. *United States v. Reidel*, 401 U.S. 351, 357 (1971) (Harlan, J., concurring).
107. *Palmer v. Thompson*, 403 U.S. 217 (1971). *But see, Adickes v. Kress & Co.*, 398 U.S. 144 (1970).
108. *James v. Valtierra*, 402 U.S. 137 (1971).
109. *Adickes v. Kress & Co.*, *supra* note 107; *Northcross v. Board of Educ.*, 397 U.S. 232 (1970).
110. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
111. *Boddie v. Connecticut*, *see supra* note 34 and accompanying text.
112. *See, e.g.*, “The Supreme Court, 1970,” 85 *Harv. L. Rev.* 3, 104-113 (1971). *But see, L. Tribe American Constitutional Law* 1462-63, 1639-1640 (2d ed. 1988).

113. See also, *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which Harlan joined Justice Brennan’s path-breaking opinion granting welfare recipients pre-termination procedural rights.
114. *Williams v. Illinois*, 399 U.S. 235 (1970); see also, *Tate v. Short*, 401 U.S. 395, 401 (1971) (Harlan, J., concurring in the judgment).
115. *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).
116. *In re Winship*, 397 U.S. 358, 368 (1970) (Harlan, J., concurring).
117. *Cohen v. California*, 403 U.S. 15 (1971).
118. E.g., *Bivens v. Six Unknown Names Agents*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring in the judgment).
119. E.g., *Welsh v. United States*, 398 U.S. at 344; (Harlan, J., concurring in the result) (statutory case); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (Harlan, J., common law (admiralty) case).
120. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 715-16 (tent. ed. 1958).
121. *Id.* at 4-5.
122. As I have recently pointed out, *The Legal Process* is not a work of constitutional law and “the authors regarded constitutional problems as distinct sorts of issues.” Dorsen, “In Memoriam; Albert M. Sacks,” 105 *Harv. L. Rev.* 11, 13 n. 12 (991). Nevertheless, many judges and scholars adapted legal process themes to constitutional cases. E.g., J. Ely, *Democracy and Distrust* (1980).

## ***John Marshall and the Origins of Supreme Court Leadership***

**Robert G. Seddig**

"The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known..."[1] The power which Alexander M. Bickel attributes to the United States Supreme Court has come gradually. Nowadays, owing in large part to the development of the American doctrine of judicial review, the Supreme Court is a major national policy making institution.[2] We accept Bickel's statement as legal aphorism. The wellspring of such power lies in the case law and procedure of the Court in its infancy. It is inevitable, then, that legal scholars devote much attention to the Supreme Court in an inchoate period: The Jay and Ellsworth Courts (or, the Pre-Marshall Court, as it is often called), 1789-1800, and the Marshall Court, 1801-1835. From such beginnings, we can learn about the Supreme Court as an institution of politics and law.

The heritage of John Marshall, fourth Chief Justice of the United States, is not limited to constitutional law. To the important precedents of *Marbury v. Madison*,[3] *McCulloch v. Maryland*,[4] *Dartmouth College v. Woodward*,[5] and *Gibbons v. Ogden*[6] to mention four whose "radiating potencies" go far beyond the actual holdings of the decision—we must add the precedent of effective court leadership. The judicial statesmanship which Marshall contributed to the Republic in the first third of the nineteenth century is manifested not only through constitutional interpretation, but also through the manner in which he shaped the Court as a legal institution. The tradition of leadership--both within the Court and without--begins with John Marshall who, according to Oliver Wendell Holmes, indisputably is the "one alone" to be chosen "if American law were to be represented by a single figure." [8]

### *Leadership and the Supreme Court*

Before he became Chief Justice, Charles Evans Hughes wrote that

*[p]opular interest naturally centers in the Chief Justice as the titular head of the Court... [He] has an outstanding position, but in a small body of able men with equal authority in the making of decisions, it is evident that his actual influence will depend upon the strength of his character and the demonstration of his*

*ability in the intimate relations of the judges.... While the Chief Justice has only one vote, the way in which the Court does its work gives him a special opportunity for leadership.[9]*

So pervasive was John Marshall's influence that it became the tradition after 1835 to designate a Court period by the name of its Chief Justice. Some may dispute this. More recently, Justice Potter Stewart argued:

*There's no such thing as the Burger Court.... Nor was there such a thing as the Warren Court. The fact is that only twice in history that I know of has the Chief Justice been the leader of the Court--in the days of Chief Justice John Marshall and in the days of Chief Justice Charles Evans Hughes.... Each led not because he was Chief Justice but because of his intellectual force, his personality, his professional competence, and his gift of articulate expression.[10]*

*As primes inter pares*, the Chief Justice is in a unique position to influence. But as both Hughes and Stewart have said, his "actual influence" will depend on a number of factors.

In approaching leadership on the Supreme Court, the obvious starting point is the Chief Justice who "does have some authority which other members of the Court do not possess." The "head position" within a group provides the opportunity, and perhaps the expectation, for leadership. "The Chief Justice has the opportunity to be first among equals, but may not seize the opportunity." [12] In other words, the office could be what the occupant chose to make it in defining his role. In assessing the origins of Supreme Court leadership, it is critical to understand how John Jay, Oliver Ellsworth, and Marshall shaped the role as Chief Justice, for they set the tone for future generations.

Supreme Court leadership has a social and task component. [13] The task leader is concerned with "production emphasis" and consequently "makes more suggestions, gives more opinions, orients the discussion more frequently, and successfully defends his ideas more often than the others." [14] The social leader is more concerned with successful interpersonal relations within the group: he "attends to the emotional needs of his associates by affirming their value as individuals and Court members." [15] D. Grier Stephenson has argued that task leadership, in turn, has managerial and intellectual aspects. Managerial leadership consists of staying abreast of the docket, maintaining a maximum degree of court unity, expeditious direction of judicial conference, and thoughtful and deliberate assignment of opinions. An intellectual leader is one

who could present his views forcefully and persuasively, be a principal source of ideas and doctrine, and provide tactical and strategic guidance in political dilemmas.[16]

In assessing the origins of Supreme Court leadership in the nineteenth century, it is important, especially as we consider internal leadership, to conceive of the Court as a small group with the Chief Justice as its titular head. This provides a set of "given conditions" from which we can begin our analysis. Our principal concern is with the leadership of John Marshall, but some understanding of the Pre-Marshall Court is necessary. The traditions which Chief Justices Jay and Ellsworth established are important in our assessment of changes which occurred after 1801.

### *The Pre-Marshall Court*

In naming John Jay first Chief Justice of the United States, President George Washington urged him "...to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric." [17] With some hyperbole, Charles Warren argues that of "all appointments to be made, that of Chief Justice... was by far the most important and had given to the President the greatest concern." [18] The six-member Court met for the first time in New York on February 1, 1790, with three members absent. There was little business until August 1792:

*During the first two and a half years... the Supreme Court met, read commissions, formulated rules, admitted gentlemen of the law to practice before it, and heard a few motions. While the Justices of the Supreme Court were rendering important decisions in the Circuit Courts no important case had come to the Supreme Court for decision.* [19]

*Chisholm v. Georgia*, [20] and *Georgia v. Brailsford*, [21] allowed the Jay Court to render important judgments on the nature of state sovereignty. Yet the principal judicial tasks took place on circuit. As a consequence, there was little inducement for the Justices to develop a sense of teamwork and cooperation: the "institutional arrangements governing Supreme Court action during the first decade of its existence were conducive to individuality in decision making to a degree that has probably never been approximated since 1800." [22] Following the English practice, the Justices delivered their opinions seriatim. English court norms decreed that,



generally speaking, judges rarely consulted each other or rendered a general opinion. "Guidance, if not control, over any change in this tradition... would, one might suppose, rest with a Chief Justice." [23] In this regard, Chief Justice Jay was not innovative, for he continued the English custom. Such solo performances "permitted the expression of shades and variations in reasoning, whether in concurrences or dissent, which has scarcely been equaled since." [24] However, in Jay's last decision, he felt the necessity for an unequivocal declaration on whether United States District Courts possessed all the powers of a Court of Admiralty, especially in light of the Neutrality Proclamation of April 22, 1793. The Chief Justice delivered an "opinion of the Court," although by "electing to use the decretal form to register its unanimous opinion," the Court "evaded entering into the reasons for its conclusion respecting the power of the District Court." [25] Nonetheless, the precedent for a single opinion was established.

On June 29, 1795, Jay resigned to become governor of New York, not having sat as Chief Justice since February, 1794. The Senate rejected the nomination of John Rutledge as second Chief Justice on December 15, 1795; three months later it approved Oliver Ellsworth, principal architect of the Judiciary Act of 1789, as Chief Justice.

Julius Goebel, Holmes Devise historian of the 1790s, concludes that "[u]ntil Ellsworth took his seat on the Bench such evidence as we have does not indicate that the place of Chief Justice had been one of leadership." [26] Ellsworth's senatorial career attests to his capacity and potential for institutional leadership, although the limited duration of his Chief Justiceship reduced the chances for such development. "By all accounts, he presided over the Supreme Court with perfect self-possession, and he knew how to assert the dignity of his office if any one, even one of his brethren on the bench, offended against it." [27] Ellsworth did try to promote shorter opinions, and there is some indication that, toward the end of his tenure, the Justices would try to achieve consensus and present a single opinion either through their chief or the senior Justice. The percentage of opinions delivered seriatim declined, while the percentage of majority opinions by the Chief Justice increased. [28] "Actually the trend toward the elimination of separate opinions had already set in during Ellsworth's Chief Justiceship...." [29] In 1800 during Ellsworth's French mission the Justices reverted to the older practice, but the expectation that a single opinion might flow from unanimous decision did exist. [30] Major alteration in internal procedure occurred after John Marshall became the fourth Chief Justice on February 4, 1801. In no small measure, the change was a response to intensified party conflict between the Federalists and Republicans: "there is a good deal of historical evidence which indicates that the evolution of the Supreme Court's internal procedures and customs was strongly influenced by the currents and eddies of political conflict." [31] But, moreover, the

change in internal procedure is only one of a number of indicators that John Marshall was an exceptionally effective leader.

### *Court Leadership and Chief Justice John Marshall*

The fourth Chief Justice, John M. Shirley wrote:

*was simple and unpretentious, and as modest, sensitive, and adverse to every form of notoriety as he was courageous; he had an ardent social nature, a seductive personal magnetism; he was a delightful companion, fluent, and facile in conversation...; he was full of sly, waggish humor, genial and convivial; his temper was serene and imperturbable, his patience almost inexhaustible, and his judgment clear, cool, wary, and calculating.[32]*

In personality, John Marshall, from an early age, possessed a rare combination of traits that, taken alone, might indicate the potential for leadership.[33] Such potential appeared during his American army career at Valley Forge: "he could deal with diverse and disgruntled people and encourage them not always to agree but at least to respect and understand one another...."[34] Marshall was particularly adept at successful social relations, owing to a combination of traits and "personal magnetism." "It is," Albert J. Beveridge says, "interesting to search for the sources of his strange power." [35] Joseph Story, a colleague on the Marshall Court after 1811 and an eminent American jurist, attested to Marshall's capacity:

*It did not happen to him, as it has happened to many men of celebrity, that he appeared greatest at a distance; that his superiority vanished on a close survey; and that familiarity brought it down to the standard of common minds. On the contrary it required some degree of intimacy fully to appreciate his powers; and those who knew him best, and saw him most, had daily reason to wonder at the vast extent and variety of his intellectual resources.[36]*

At an early age Marshall realized the necessity for a strong national government, an important political attitude that his fellow countrymen in Virginia were to challenge throughout his career. Until he was forty-one, he had refused all appointments to public service that might interfere with his career and the development of a strong financial base for his family.[37] He

accepted reluctantly President John Adams' appointment as one of three ministers to France in 1797. One year later he refused a nomination to become an Associate Justice on the Supreme Court, suggesting that Bushrod Washington be named in his place; later in 1798 he was elected to the U.S. House of Representatives where he sat for one term before becoming Secretary of State in Adams' administration. A loyal Federalist, Marshall abstained from supporting such Federalist excesses as the hated Alien and Sedition Acts. "The future Chief Justice understood the temper of the American people far better than his Federalist associates in New York and Washington...."[38] Marshall was devoted both to George Washington and to John Adams, as well as to Federalist political philosophy. "Such political loyalty and influence can easily make a man a federal judge, but no amount of popularity can make a judge so appointed a great jurist." [39]

When Chief Justice Marshall sat for the first time in the February 1801 Term it was quickly apparent that he intended major changes. The growing threat of Republican challenges to the federal judiciary after the election of President Thomas Jefferson no doubt inspired Federalist judges to work together. To such Federalist determination, the new Chief Justice added procedural innovations that promoted still further cohesion. The new modes of procedure gave the Chief Justice "a key role in the decision-making process and seriously reduced the independence of the individual Justices in this process." [40]

In the place of individual, often conflicting opinions, Marshall urged a single majority opinion which would represent the expression "of the Court." Such an opinion would enable the Court to speak as one voice, thereby increasing its own stability and prestige.[41] The quest for a single opinion inevitably increased the importance of bargaining and persuasion among the Justices. Majority opinions were to become in many cases collective, rather than individual, instruments of the law.[42] Furthermore, the elimination of seriatim opinions had the net effect of increasing greatly the need for interaction among the Justices.

Marshall's proposed innovation went beyond the majority opinion. The principal spokesman for the Court, he proffered, was to be the Chief Justice--a direction in which Ellsworth was moving at the end of his brief career. "Since it is the majority opinion alone that furnishes the principal rationale for court decisions and draws the implications of the decision for those in similar litigations, leadership in this instance... [is] highly effective in promoting the leader's point of view in the law." [43] No doubt Marshall sought to enhance the importance of a position which the Republican *Aurora* had deemed a "sinecure" just a month before he took office.[44] The single-voice majority opinion strengthened both the Supreme Court and the Chief Justiceship.

During his thirty-four years on the Supreme Court John Marshall was, by all accounts, an eminently successful leader. Such a conclusion applies not only to his internal management of Court business, but also to the judicial statesmanship for which he is better known. Marshall's conception of national unity and strength created an indispensable cornerstone in the development of American society and politics. Felix Frankfurter said:

*Marshall's ideas, diffused in all sorts of ways, especially through the influence of the legal profession, have become the presuppositions of our political institutions. He released an enduring spirit, a mode of approach for generations of judges charged with the awesome duty of subjecting the conduct of government and the claims of individual rights to the touchstone of a written document, binding the government and safeguarding such rights.[45]*

Marshall did not dominate the Court either through repression or social cajolery. Nor was he merely a "court manager." [46] Marshall's leadership produced a careful orchestration of social, political, and legal objectives in which all Justices were concerned and intimately involved. The new Chief was able to foster a spirit of cooperation and teamwork. The Court became a "family," hardly an inappropriate term for seven men who roomed and boarded together during court sessions in Washington. [47]

### **1801-1810: The Establishment of Judicial Power**

When John Marshall became Chief Justice, Supreme Court prestige was at low ebb. In spite of very modest beginnings, the Court had established a basis of power before 1801; Congress felt it necessary to overrule an unacceptable decision in *Chisholm v. Georgia*, only by *amending* the Constitution. [48] As early as 1790, American politicians were not inclined to treat a decision of the Supreme Court lightly. Yet, as R. Kent Newmyer suggests, "[n]ot only had the Court failed to capture the high ground, but the power it did hold was in jeopardy. [49] Political attacks upon the Court and its practices intensified after Jefferson's election. Rapid turnover in Court personnel, a relatively light caseload, and a diminishing pool of qualified talent for Court appointment all threatened to reduce Court prestige even more after 1801. Marshall's perceptions of the judicial function and related procedural innovations were to come precisely at the right time.

Until President Jefferson first had an opportunity for appointment in 1804, the composition of the Court was wholly Federalist. Of the Associate Justices, William Paterson--urged as a possible successor to Ellsworth--and Bushrod Washington were able jurists. The new Chief Justice was strongly attracted to Washington, the nephew of the first President, a social relationship that would continue until 1829.[50] Likewise Samuel Chase was a man of genuine ability; his political excesses, however, led to impeachment, but not conviction. The remaining two, William Cushing and Alfred Moore, were less able. Cushing was in ill health much of the time after 1801 until his death in 1810; Moore "made scarcely a ripple in American judicial history." [51] Generally speaking Marshall's Federalist colleagues were men of considerable political and legal stature and, "consequently, were not apt to accept any domineering by a new member of the Court even if the novice were the Chief Justice." [52]

"It is clear that Marshall sought to maintain a nice balance between his two overriding objectives--expounding officially his basic Federalist constitutional theory and maintaining a solid judicial front as a means of enhancing the authoritativeness of the Court." [53] One cannot dissociate Marshall's constitutional philosophy from his conception of the judicial function. In many cases--as W. W. Crosskey and others are quick to point out--Marshall's position of conservative nationalism is modified, even adulterated, by the desire to maintain unity. [54] In short, Marshall was not a "high Federalist." "John Quincy Adams and Joseph Story consciously distinguished between levels of Federalism when they described John Marshall as a 'federalist of the Washington School.'" [55]

Marshall spoke for the Court in every case over which he presided through 1804; there was but one concurring and one dissenting opinion. [56] In this initial period of "federalist unanimity," the new Chief Justice firmly established a number of norms which were to affect the internal operation of the Supreme Court throughout its history. As we have seen, the establishment of such norms was attributable both to external political conditions and to Marshall's role conception. To this we must add personality: "Marshall, though firm and decided, was by nature a moderando." [57]

The norms which Marshall urged upon the Federalist group were: the importance of unanimity, at least as the Court presented its opinion; the minimization of dissent and internal argumentation; a willingness to compromise, which led to "fluidity of judicial choice;" [58] the maintenance of internal harmony, cooperation, and teamwork in both task and social concerns; and the importance of the position of Chief Justice as the locus of leadership functions. [59] Marshall achieved the acceptance of such norms through domination and authoritarianism. In group dynamics, this is all the more important because such norms became the consensus of the

group by 1804. By 1804 all of the Justices sought to achieve the same objectives that Marshall had urged in the beginning. The real test, of course, was to come after 1804 when presumably, Jeffersonian appointees might challenge the ideological and behavioral homogeneity.

Internal unity was but one ingredient in the quest for increased judicial strength. Two cases in 1803, *Stuart v. Laird*,<sup>[60]</sup> and *Marbury v. Madison*,<sup>[61]</sup> laid the foundation for a strengthened, increasingly independent judiciary. In *Stuart* the Court, Marshall not sitting, upheld the constitutionality of the Judicial Repeal Act of 1802, which had the effect of returning the judiciary to the institutional arrangements of 1789, including the arduous task of circuit riding for members of the Supreme Court. Justice Paterson's opinion gives the appearance of unanimity, although there is reason to believe that Chase considered the circuit riding requirement as unconstitutional.<sup>[62]</sup> *Stuart* manifests the same limited construction of the doctrine of judicial review as Marshall's opinion in *Marbury v. Madison*. *Marbury* is Marshall at his best. Although a traditional, legal approach to the questions *Marbury* presented could have led to a denial of jurisdiction, thereby precluding discussion of the more important constitutional issues, the Chief Justice turned the questions around--"twistification" Jefferson called it<sup>[63]</sup>--so that he might first discuss the merits and the doctrine of judicial review. He "took the engaging position of declining to exercise power which the Constitution held from it, by making the occasion an opportunity to assert a far more transcendent power."<sup>[64]</sup> The case is significant not only because it firmly implanted the American doctrine of judicial review--a doctrine, to be sure, that was evolving throughout the 1790s<sup>[65]</sup>--but also because "Marshall seized this opportunity to establish the Court as supreme arbiter over both Congress and the Executive."<sup>[66]</sup> *Marbury* is but one of many indications of Marshall's intense commitment not only to the strength of an independent judiciary (for in this case the Court protected itself from an unconstitutional enlargement of its original jurisdiction) but to the vitality of national institutions generally.

The Republicans not only sought to reduce the number of federal judgeships, as they had with the Repeal Act of 1802, but also to "affect the personnel of the courts, either through actual removal or through intimidation."<sup>[67]</sup> Justice Chase was spared his position when the administration was unable to muster the requisite majority in the Senate; federal Judge John Pickering of New Hampshire, however, was removed. Jeffersonian Congressmen introduced constitutional amendments to facilitate the removal of judges. As Donald C. Morgan suggests, the conflict was never more intense than in 1804 when President Jefferson sent his first appointment, William Johnson, Jr., to the Supreme Court. "Of his loyalty to Jefferson and his intentions to sustain Jeffersonian doctrine there is little doubt."<sup>[68]</sup>

Johnson represented the first "threat" to the internal security of the Federalist Supreme Court, for, as we have seen, the norms of internal unity were well settled by 1804. Johnson had three possible courses of action:

*[H]e might desert to the enemy. By shaping his ideas to fit the Federalist pattern he would win the acclaim of his fellow judges and become a court spokesman.... In the second place, he might adopt the strategy of the open attack; a determined drive against Federalist rulings would protect his intellectual integrity and his fame with the party but would place him in a position of virtual ineffectiveness on the Court.... Finally, he might have recourse to infiltration. A cautious policy of limited acquiescence in majority rulings and of protest at strategic points would afford opportunity to influence decisions and to retain status.[69]*

The new Justice soon learned the power of group norms. "[I] was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he was willing to take the trouble and it is a mark of respect to him...."[70] The course of action which Johnson chose he recounted in a letter to Jefferson many years later:

*Some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other... At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all. I therefore bent to the current, and persevered until I got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the judges to record their opinions or not ad libitum.[71]*

Johnson had "bent to the current," although his strong will and somewhat modified Republican ideology had a marked effect upon internal operations and, often, if only through concurrence or dissent, interpretation of law. And, as Morgan ably demonstrates, "more than any other judge he could lay claim to having established the principle and practice of

dissent."[72]

From 1805 until 1810, the Republicans were able to gain minority representation. Henry Brockholst Livingston replaced Paterson in 1807 and Thomas Todd filled a newly-created seventh seat in 1808. The frequent absence of both Justices Chase and Cushing increased the importance of the new members. Yet the statistics of this period indicate that Marshall was able to persuade his new colleagues that he should put forth most majority opinions.

With the exception of 1810, Marshall wrote from 88 to 100 per cent of the majority opinions in each of these years; and he wrote *all* opinions in constitutional cases with the exception of *Stuart v. Laird*.

In 1807 Johnson registered his first dissent in *Ex Parte Bollman*,[73] a case which involved a petition for a writ of *habeas corpus* for Erick Bollman, an accomplice of Aaron Burr, who was committed for treason. In his opinion, Johnson described the internal pressure not to dissent a "painful sensation." [74] Johnson was not alone in the minority in *Bollman* (although no other Justice signed the dissenting opinion); furthermore, he had wanted to dissent a year earlier in *Ex Parte Burford*[75] but he acquiesced in the majority.[76] In 1808 and 1809 the number of dissenting opinions increased markedly, owing in no small measure to the contributions of Johnson and Livingston. The number of tin-reported dissents is difficult to assess accurately, but we do know, for example, that Mr. Justice Todd had wanted to dissent with Johnson in *Rose v. Himely*[77] but he chose to remain silent.

There was some experimentation with internal procedure after 1805, but the dominant mode continued to be majority opinions written by the Chief Justice. Dissent increased. Furthermore, when the Court did divide, "the size of the majority and the identity of the dissenters often remained a mystery, a condition that led to confusion both for contemporaries and for later scholars." [78] For example, a careful examination of majority opinions shows that Marshall used the terms "majority of the Court" and "unanimous" on different occasions.[79] Taken at face, such word choice indicates variations in internal cohesion. Occasionally, as in *Rose v. Himely*, the "majority of the Court"-- two--was embarrassingly small.[80]

The Republican attack on the Court continued through the Burr Trial in 1807, although the grounds for a limited rapprochement lay just below the surface. "[T]here had, in fact, always been a theoretical affinity between judicial power and the Republican policy of limited government.... The shift in the positions of the two parties after 1800 paved the way for reconciliation.... It became painfully clear to the Republicans that national authority depended heavily on the federal courts." [81]

The issues of national power played an important part in the case law of this period. In



*United States v. Fisher*,<sup>[82]</sup> Marshall broadly construed a congressional statute to allow the national government priority in the collection of debts. In 1809 the Court, ostensibly in a unanimous opinion, repudiated an effort by Pennsylvania to interfere with the enforcement of decrees by the U.S. District Court. The assertion of national authority not only drew the two political parties more closely together, it also increased internal harmony within the Court. "In cases involving state power, however, the seeds of later divisions were planted."<sup>[83]</sup> In one of the most important cases of this early period, *Fletcher v. Peck*,<sup>[84]</sup> the Court voided a Georgia law which had, in effect, repealed earlier grants of land.<sup>[85]</sup> Johnson's appeal to natural law principles--thereby avoiding the increasingly difficult question of interpreting the contract clause--saved this concurrence from being an open dissent.<sup>[86]</sup> Finally, the "first dissenter" diverged from Marshall on the nature of congressional control of court jurisdiction.<sup>[87]</sup> The departure of Federalists from the Court not only affected internal operations, but also created divergences in two of three areas of constitutional interpretation.<sup>[88]</sup>

Of "Jefferson's three appointees, only one, William Johnson, gave promise of fulfilling the goal of a multi-voiced judiciary."<sup>[89]</sup> One might expect that Livingston also would speak out, for he had dissented frequently as a member of the New York Supreme Court presided over by James Kent. "Upon joining the Marshall Court, however, he became almost moot by comparison..."<sup>[90]</sup> And Thomas Todd likewise was silent during the twenty years he spent on the Court.

As an effective leader, Marshall, with consummate skill, had been able to persuade members of his Court to agree to a variety of norms he considered important. "[O]ne variable that needs to be measured [in understanding the group phase of decision making is the extent to which judges on a collegial court value unanimity. The accuracy of votes as indicators of judicial values on policy questions declines as the importance of unanimity to judges increases."<sup>[91]</sup> There is little question about the strength of the norm favoring unanimity during this period; its effect upon the three Republican members is evident in the small number of dissents and concurrences, apologies in Court opinions, and personal correspondence. Both Marshall and Washington worked diligently to perpetuate this norm, and, as we shall see, they were able to bring Joseph Story gradually to agree with the importance of such a practice.

Marshall's accomplishments in this period, especially in the initial sessions in 1801 and 1803, but also with the coming of Republican Justices, are remarkable. Furthermore, the extent to which Marshall chose to speak for the majority--a majority which often varied greatly in size--indicates task leadership unequalled since. And yet, from all evidence available, Marshall accomplished tasks and established norms without domination, but through a *modus operandi*

which included democratic consensus, compromise, and persuasion. To many his "peculiar influence" was attributable largely to personality.[92] His democratic manner, gregariousness, and exceptional sensitivity toward the feelings of others[93] were clearly important ingredients in Marshall's leadership effectiveness. Joseph Story, in a laudatory note, indicated many of the critical components of such complex leadership in his characterization of the Court conference:

*You heard him pronounce the opinion of the court in a low but modulated voice, unfolding in luminous order every topic of argument, trying its strength, and measuring its value, until you felt yourself in the presence of the very oracle of the law.... You heard principles stated reasoned upon, enlarged and explained until you were lost in admiration at the strength and stretch of the human understanding.... Follow him into the conference room, a scene of not less difficult or delicate duties, and you would observe the same presiding genius, the same kindness, attentiveness and deference; and yet, when the occasion required the same power of illustration, the same minuteness of research, the same severity of logic, and the same untiring accuracy in facts and principles.[94]*

### **1811-1825: The Golden Age of Constitutional Interpretation**

The origins of Supreme Court leadership lay firmly in the first decade of Marshall's Chief Justiceship, and likewise that decade is important as federal judicial power assumed full legitimacy.

*United States v. Peters* (1809)[95] marked the beginning of a "golden age" of constitutional interpretation for the Marshall Court. Only three members--Marshall, Livingston, and Washington--were present for the February 1811 Term, and no session ensued. From 1812 to 1823 the composition of the Court was constant; in 1811 President James Madison appointed Joseph Story and Gabriel Duval to replace Chase and Cushing. Former President Jefferson argued that "it will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall..."[96] With the appointments of Story and Duval, in name, at least, a majority after 1812 was Republican. Owing to the increased Republican predilection toward national power "as well as to the steady and directing influence of the Chief Justice, the Republican members of the Court gradually espoused the cause of

nationalism--Justices Johnson and Story at times exceeding Marshall in urging the expansion of the powers of the federal government and the consequent diminution of the authority of the states." [97] James McClellan argues convincingly that historians have exaggerated the "directing influence" of Marshall on Story in the 1810s. [98] Irrespective of such assertions one cannot deny the strong bond that developed between Marshall and Story; they grew to be of like mind in the protection of vested rights and the development of the doctrine of national supremacy. And, after some early dissenting opinions by Story, their agreement extended to internal norms and procedures. [99]

Following the War of 1812, the United States experienced a resurgence of national unity and enthusiasm. "Having thwarted invasion from abroad and having survived disunion at home, Madison's administration was eager to turn again to the internal development of the country." [100] And, as Newmyer suggests, the "diverse economic energies of the agrarian South, the commercial- industrial North, and the burgeoning West appeared to be the foundation blocks of a self-sustaining economy." [101] President Madison's program included a protective tariff, national bank, and federally-funded internal improvements. Should questions arise about such national policies, the Supreme Court had emerged from the early struggles of the century best qualified to speak authoritatively on the Constitution.

The mode of a single-voice majority opinion continued, although the Chief Justice was more willing after 1812 to divide opinion-writing with his colleagues. [102] In 1812 Marshall wrote 65 per cent of the majority opinions; for thirteen years thereafter his average was about 40 per cent. In constitutional law cases likewise, there was greater diversity in opinion writing, especially in 1816 and 1823 when Story and Washington shared the responsibility. Justice Johnson, especially before 1819, continued to contribute disproportionately to dissent totals. Story too issued dissents with uncharacteristic frequency before he agreed to accept the norm which Marshall and Washington had fostered. About internal conditions in 1812, Story wrote: "We live very harmoniously and familiarly. We moot questions as they are argued, with freedom, and derive no inconsiderable advantage from the pleasant and animated interchange of legal acumen." [103]

The greatest degree of unanimity occurred in controversies concerning questions of national power; in this area, with some minor exceptions, one may describe the Court as an ideological monolith until 1823. There were however, more tentative explorations and divergences in relation to state powers and the doctrine of vested rights.

The precise role of the federal courts was a matter of intense debate between Republicans and Federalists; the problem had two facets:

jurisdiction and judicial power proper. In 1812 *United States v. Hudson and Goodwin*[104] raised for decision the matter of jurisdiction. Speaking for the majority (which we now know did not include Marshall and Story),[105] Justice Johnson ruled that the federal courts could not take jurisdiction over offenses made criminal under the English common law.[106] Courts, Johnson argued, might possess some limited inherent powers essential to their functioning, but jurisdiction over such criminal acts was not among them. The opinion was characteristic of Johnson's desire to defer to legislative--hence, popular--control over federal criminal jurisdiction. Story strove to "correct" *the Hudson*, took the Federalist path: "[n]ationalism and economic conservatism alike impelled them to exalt the judiciary..."[107]

By 1815 Story had become a confirmed nationalist, although the origins of such an ideology antedate his Court appointment. He joined Marshall and Washington to create a highly cohesive bloc whose members shaped the constitutional law and intra-court norms of this period. In his initial terms, Story had felt embarrassment about open disagreement, as in *The Nereide* (1815):

*It is matter of regret that in this conclusion I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect... Had this been an ordinary case I should have contented myself with silence...[108]*

By 1818 Story indicated his preference for the establishment norms of Marshall and Bushrod Washington:

*At the earnest suggestion (I will not call it by a stronger name) of Mr. Justice Washington, I have determined not to deliver a dissenting opinion in Olivera v. The United Insurance Co. (3 Wheaton 183). The truth is, I was nevermore entirely satisfied that any decision was wrong than that this is, but Judge Washington thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary occasions weakens the authority of the Court and is of no public benefit.[109]*

During this period Story became committed to the kind of unity the Court had enjoyed to 1810;[110] his eminent training in the law complemented Marshall's talents perfectly so that during the golden age both Justices contributed important leadership.[111] Story provided a

specialized intellectual leadership," while Marshall continued to provide the necessary task and social leadership for which he and his Court are famous.[112]

Of the many important constitutional decisions in the golden age, several involve the interpretation of national power. So long as the vexing issue of corollary state power was not intertwined, such decisions produced unanimity and firmness of purpose. "Indeed the unity seemed to deepen with the passage of time." [113] In *McCulloch v. Maryland* Chief Justice Marshall wrote a unanimous majority opinion upholding the constitutionality of the national bank. "[T]he genius of the *McCulloch* opinion lay not in its originality but in its timing, practicability, clarity, and eloquence." [114] The opinion, like those in *Marbury*, *Cohens v. Virginia*, [115] and *Gibbons Ogden*, [116] bore the mark of judicial statesmanship--the ability to shape and to foresee the destiny of the Republic through the mechanism of constitutional interpretation.

In *Anderson v. Dunn* [117] and *Cohens v. Virginia*, the Court supported congressional power over contempt and fixed firmly the appellate jurisdiction of the Supreme Court over state judiciaries. By 1821 Marshall and his colleagues had completed the foundation of the doctrine of national supremacy, even though a majority of the Court was Republican and in spite of the fact that there were internal disagreements about exclusive versus concurrent national powers.

By 1816--"the year of assertion" [118]—Story had become an important leader whose talents complemented Marshall's well: he had begun "sitting in silent dissent when the inherent criminal jurisdiction of the federal courts was denied by the narrowest of margins, and, similarly, his first opinions were the epitome of taciturn self-effacement." [119] *Martin v. Hunter's Lessee*, [120] asserted the power of federal courts to review the decisions of state judiciaries in all constitutional questions; in his majority opinion, Story insisted that Congress was constitutionally required to give the federal courts their full jurisdiction. *Martin* raised the difficult question of exclusive versus concurrent powers; on this subject there was internal division among the Justices. Johnson wrote a lengthy separate opinion in *Martin* putting forth a theory of concurrent powers "that made the Supreme Court the final arbiter of constitutional cases but also insisted that such authority operated only upon litigants and not upon state courts." [121] In general, in similar cases of the period, Story and Washington favored exclusive power, and Johnson, with the likely adherence of others, favored concurrent power. [122] Marshall, the "moderando," tended to side ideologically with Story and Washington, although he approached the question of power with a touch of pragmatism and flexibility, an implicit indicator at least of his willingness to compromise principles slightly in order to mediate.

In the "golden age," there is probably no more significant Term than that of 1819, the

year of *McCulloch v. Maryland*. And within that Term, there is no more striking example of Marshall's leadership effectiveness than *Sturges v. Crowninshield*.<sup>[123]</sup> The decision held invalid a New York law of 1811 for insolvent debtors as it applied to existing contracts. The Chief Justice's opinion affirmed a concurrent state bankruptcy power, but, at the same time, had invoked the contract clause as a barrier against relief legislation. As the opinion was written, the decision held unconstitutional only retrospective state laws; the question of prospective legislation remained. Eight years later a badly divided court in *Ogden v. Saunders*,<sup>[124]</sup> held that a similar New York law of 1801 was constitutional as it operated prospectively. In speaking about the power to enact bankruptcy laws in *Sturges*, Marshall conceded that powers possessed by the states prior to the adoption of the Constitution were retained "except so far as they maybe abridged by that instrument."<sup>[125]</sup> In both cases Marshall appears to have treated bankruptcy and insolvency laws synonymously. In his dissenting opinion in *Ogden v. Saunders*, Marshall avoided discussion of bankruptcy laws and declared that state insolvency laws were unconstitutional whether they operated retrospectively or prospectively.

The Chief Justice effected a major compromise in the *Sturges* opinion.<sup>[126]</sup> Justice Johnson laid bare the *modus operandi* in his opinion in *Ogden*:

*The report of the case of Sturges v. Crowninshield needs also some explanation. The Court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication. The minority thought it better to yield something than risk the whole....*<sup>[127]</sup>

By examining relevant circuit court cases Roper has demonstrated that Livingston and Johnson (and probably Duval as well) "Gave in on upholding the retroactive operation of debtor relief laws, but wrung from Marshall the concession that the power to pass bankruptcy laws was concurrent."<sup>[128]</sup> Washington surrendered less than any of the other Justices. That both Story and Washington gave way to Marshall's compromise attests to the continued importance of internal norms. "Ironically, it was the Chief Justice, the alleged dominator of the Court, who seems to have conceded as much as his brethren."<sup>[129]</sup> There is, however, little irony here. To one familiar with Marshall's personality and the nature of effective Court leadership, the *Sturges* maneuvering should come as no surprise.

As with *Sturges*, there was little internal unity in *Dartmouth College v. Woodward* a decision which produced a wave of concurring opinions and a single, opinionless dissent. Both Story and Washington wrote separate opinions vindicating *Dartmouth College*; Livingston, too,

had written a separate opinion which was not published. Yet he endorsed all three opinions reaching this result. Johnson joined the Chief Justice, but explicitly withheld his approval from the opinions of Story and Washington, a further, though subtle, indication of Marshall's ability to create important bonds between divergent Justices like Johnson and himself. The *Dartmouth College* case, in holding that corporate charters were contracts which could not be impaired by state governments, served as an important precedent upon which the evolving doctrine of vested rights could rest.[130]

The conservative nationalism for which the Marshall Court is known was melded together in the 1819 term. "...Marshall expressed, as much as he led, opinion when at the Great Term he took the instrument of federal judicial supremacy, as cast by Story in *Martin v. Hunter's Lessee*, and inscribed upon the *tabula rasa* of the constitutional text a codex of national power and private property." [131] From 1819 to 1821, the Court handed down five epochal decisions which, taken together, form the constitutional backbone of the golden age of interpretation.

The number of dissents is markedly fewer after 1818:

*[t]o a surprising extent the other judges came to share Marshall's distaste for public dissent and proved their compliance by word and deed. In fact, with the sole exception of William Johnson, no member of the Marshall Court during the years prior to 1823 spoke out in separate opinions, whether concurring or dissenting in more than eight cases.*[132]

By 1819 the Court had begun to draw fire, not only for its nationalist decisions but also because of "suspicion concerning the true views of the Republicans on the Court." [133] That suspicion was nowhere greater than with Thomas Jefferson who wrote to Johnson in 1822:

*There is a subject respecting the practice of the court of which you are a member, which has long weighed on my mind.... The subject of my uneasiness is the habitual mode of making up and delivering the opinions of the supreme court of the U.S.*[134]

Johnson replied to Jefferson in a now famous letter that told much about internal procedures on the Marshall Court. In the years following his appointment, as Morgan demonstrates with painstaking care, Johnson became the "lone protestant against the

irregularity of Marshall's procedures." [135] Johnson had struggled to maintain independence and courage, yet the normativeness of the Court had had its effect upon his behavior. Johnson's efforts were not without effect, for he "wrung from Marshall not only a grudging tolerance for individual expression, but in addition a greater opportunity for others to speak for the Court." [136] After 1812 Marshall had definitely abandoned his claim to be the sole author of majority opinions.

From 1812 until 1819 Johnson was willing to accept the norms of the Marshall Court and to acquiesce in compromise. After 1819 it appears, for a time, that Johnson virtually relinquished the rights that he had secured theretofore. "Although there is evidence that he extracted a *quid pro quo* from his brothers in the language of the reported opinions, he surrendered his independence and threw the weight of his silent vote behind the Court's pronouncements." [137] In his letter to Jefferson, Johnson had explained that he "bent to the current, and persevered until I got them to adopt the course they now pursue...." [138] Donald Morgan argues that the correspondence with Jefferson rekindled Johnson's spirit of independence and reform. Beginning in 1823 Johnson reasserted the importance of dissenting decisions; and he wrote in *Gibbons v. Ogden* that "[I]n questions of great importance, and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way." [139] Thereafter Johnson made it a practice to speak his mind in concurrence or dissent in matters of constitutional interpretation. "Generally, he moved steadily away from a strictly literal construction of the Constitution and toward the historical method Jefferson had advocated." [140]

By 1823 other changes occurred. *Green v. Biddle* [141] became a "rallying point for states' rights and anti-Court forces in the South and West." [142] Having heard argument three times, the Court voided Kentucky laws that provided that no claimant under Virginia title--bolstered by a 1791 agreement between Virginia and Kentucky in which the latter had agreed not to invalidate titles to land held under Virginia law--could take land until he had reimbursed the original settler for improvements made on it. Through Justice Washington the Court held that the laws violated the original agreement between the states and thus the contract clause of the Constitution. The majority opinion in *Green*--a case in which Marshall did not sit--represented the most expansive construction of the contract clause to date, following a liberal trend which originated with *Fletcher v. Peck* and continued with *Dartmouth College*. "Such an extension of the contract clause verged on the fantastic." [143] Johnson could not maintain his silence; the Court's exaggerated deference to property rights was beginning to disturb him more than it had in the 1810s, and, Johnson moved more in support of state power as the locus of public policy



making.

In 1823 the composition of the Court changed with the appointment of Smith Thompson to succeed Livingston. The golden age was drawing to a close. The years 1812 until 1823 are, better than any, "the Marshall Court," when the Justices stood together to build the doctrines of national power and judicial supremacy. Internal opposition there was--especially with Johnson, Livingston, and, occasionally, Todd and Duval--although it "never crystallized, never organized into a permanent bloc." [144] That it did not, attests to Marshall's effectiveness as a leader. "Mutual respect, communal living, congenial principles, and personal friendship"--all, by the way, good indicators of solid group cohesion--"held dissent to an insignificant minimum, bound the Court together as never before or since, and enabled it to exploit the opportunities for lawmaking in the postwar period." [145]

William W. Story maintained that the death of Livingston "occasioned the first breach in the Judicial circle of the Supreme Court, from the time that my father became a Judge...." [146] In 1824 a combination of forces--increased public hostility to Court decisions, the appointment of Thompson, [147] Johnson's renewed spirit--provided a foretaste of the important transformation which was to affect the Supreme Court after 1825.

In the last of the important nationalist opinions, *Gibbons v. Ogden*, Marshall produced an "intricate blend of decisiveness and calculated vagueness that occupied solid nationalist ground, placated both extremes, and left the Court room to make future adjustments." [148] Marshall again eschewed distinct line drawing between national and state power, creating there by a "flowing federalism" that left room to maneuver in the forthcoming development of state power.

To the surprise of many lawyers, the Court in 1825 refused to extend the admiralty jurisdiction of the federal courts to inland lakes and rivers. [149] The end of sweeping nationalist interpretations was at hand.

### **1826-1835: A Time of Transition**

The 1826 Term was pleasant. Chief Justice Marshall wrote his wife, Polly, that the "harmony of the bench will, I hope never be disturbed. We have external & political enemies enough to preserve internal peace." [150] For two Terms, 1825 and 1826, the Justices had cast nary a dissent. Yet the internal harmony was to be short-lived. [151] The signs of change in 1824 and 1825 were, in fact, portentous.

By all accounts, 1827 marks the unmistakable beginning of a period of change, a transition from the conservative nationalism of the golden age to the salient policies of the Taney Court with its emphasis upon dual federalism and state police power. These were "uncertain and hesitant years [which] form a marked contrast with that of the decade from 1815 to 1825 when, with something in the nature of a pontifical air, the Court was expounding and applying the principles of Hamiltonian nationalism."<sup>[152]</sup>

In 1827 Supreme Court sessions were lengthened to accommodate the increased caseload. Robert Trimble replaced Thomas Todd. And Marshall's leadership began to decline. More and more difficult was the maintenance of internal norms. Dissent increased sharply. Although Marshall continued to write about two-fifths of the majority opinions, he was compelled to dissent in two major cases, one involving constitutional interpretation. Likewise, Mr. Justice Washington--who with Marshall<sup>[153]</sup> and Story<sup>[154]</sup> formed the "old guard" on matters of internal unity and procedure--was moved to take an ideological position apart from his chief and to express a dissent, his first since 1818 when he had sided with Marshall and Johnson in *The New York*.<sup>[155]</sup> He said: "It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this court...."<sup>[156]</sup> Unfortunately for Marshall, such "habits" were changing even, apparently, with such a close ally as Washington.

No case exemplified better the growing conflict than *Ogden v. Saunders*. It had been argued first in 1824, but owing to a division among the Justices, no decision was rendered until three years later. The Justices divided 4-3 over the constitutionality of a New York insolvency law so far as it was applicable to contracts made after passage of the legislation. We can only presume that the group atmosphere had changed so much that Marshall could not obtain concessions from his brethren--and in turn grant some himself--in a manner characteristic of *Sturges v. Crowninshield* in 1819. He was forced to dissent.

The Justices delivered opinions seriatim which may have weakened their impact and may well have encouraged Marshall to press hard his minority views."<sup>[157]</sup> Washington, Johnson, Thompson, and Trimble upheld the act following, in large measure, the reasoning in Johnson's pioneering opinion in *Green v. Biddle*. In "his major essay on property,"<sup>[158]</sup> Johnson held that in the absence of federal bankruptcy legislation a state act which applied to contracts made after its passage was valid without qualification. His opinion is indicative of a growing acceptance of the importance of state power; yet Johnson had not abandoned the excessive nationalism of his concurring opinion in *Gibbons v. Ogden*:

*[Johnson] stood with Marshall in supporting national power to meet the unforeseeable needs of the future. For nearly two decades, he also shared much of Marshall's esteem for a powerful judiciary, particularly as an instrument for enforcing property rights against the states. Yet increasingly he drew on Jefferson; government, federal or state, was a tool for serving the needs of various classes of persons. In his final decade he looked to the states for economic and social regulation.[159]*

Marshall reaffirmed his position that under no circumstances could a state law negate the substance of a contract. He made no mention of the apparent *Sturges* "concession" that state bankruptcy laws might be valid in the absence of congressional legislation. Marshall was opposed to state insolvency laws because he felt that they would encourage speculation, an unwise use of capital.[160] But by 1827 "a majority of the members of the court were becoming increasingly concerned with the need to maintain for the states some degree of control in regard to the regulation of contracts." [161]

In *Brown v. Maryland* (1827), [162] the Court, speaking through Marshall, invalidated an act requiring all importers of foreign articles to take out a license. Using the "original package doctrine," he argued that there "is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country." [163] Nonetheless, as in *Gibbons*, Marshall did not preclude some concurrent authority by the national and state governments over articles while in the process of importation. The Chief Justice's continued suspicion of state power is evident in *Weston v. Charleston*; [164] yet there is evidence of a growing acceptance of state authority on Marshall's part in this period of transition.

The death of Washington in 1829 struck a further blow at the Marshall Court. In place of the old Federalist, President Andrew Jackson named Henry Baldwin, an erratic individual whose behavior contributed greatly to increased internal disruption. [165] For Trimble, who had served but one Term, Jackson, with some delay, named John McLean. Like Thompson, McLean was "almost immune to Marshall's logic and persuasive powers," [166] even though the new appointee grew increasingly nationalistic in his constitutional interpretation during the Taney years. McLean was the first to select housing accommodations apart from his brethren, thereby upsetting another long-standing custom. Just as depressing as the changed composition of the Court were the politics of the new Chief Executive. Marshall made no attempt to hide his discomfort. [167]

From 1830 to 1835, Marshall was no longer able to lead in the effective manner of the

preceding twenty-nine years. Consensus about internal norms disappeared. Dissent increased greatly after 1829. And in three notable instances, the Justices were forced to postpone decisions because internal conflict was so great. "The tide was now flowing toward the support of state regulations and toward judicial noninterference."<sup>[168]</sup> The evidence indicates that Marshall was pulled somewhat grudgingly into the transition period of the 1830s. He lamented the internal strife. He worried about eccentric newcomers who wanted to break long-standing custom and board by themselves. All of this represented a "revolutionary spirit,"<sup>[169]</sup> which, poignantly meant that the old Court was gone.

Throughout this last period Johnson, *not Marshall*, is perhaps the key figure.<sup>[170]</sup> "Justice Johnson, like so few Supreme Court members before or since, was in step with his political time, whereas Marshall, Story and their carbon-copy colleagues lagged increasingly behind."<sup>[171]</sup> Johnson's opinions in *Green v. Biddle* and *Ogden v. Saunders* pave the way for a smooth transition to the Taney Court and the development of state police power. Yet even in his nationalist opinions, Marshall had allowed room for growth, especially the growth of state-power over internal concerns. As Johnson says, "Small wonder that the Taney Court found within Marshall's decisions sufficient material from which to erect their own precedents without violation of the rule of *stare decisis*."<sup>[172]</sup>

During this last period Marshall began to change--a change not dramatic but perceptible. The paucity of primary sources from this period makes an assessment of such change difficult; perhaps it is indicative of a changing economic and political climate, as represented by the Jacksonian spirit perhaps indicative of the Chief Justice's continued attempts to lead, to moderate, and, of consequence, to compromise. Evidence of such change comes not from *Ogden v. Saunders*, *Brown v. Maryland* or *Craig v. Missouri* (1830),<sup>[173]</sup> for these are Marshall opinions squarely in the tradition of the golden age. One looks instead to *Willson v. Blackbird Marsh Creek Co.* (1829),<sup>[174]</sup> and *Providence Bank v. Billings* (1830).<sup>[175]</sup>

Chief Justice Marshall's opinion in *Willson v. Blackbird* "has met with widely varying interpretations, and has been considered inconsistent with the view expressed in *Gibbons v. Ogden* and in *Brown v. Maryland*. Marshall opened the way for state regulation when the federal government had not acted."<sup>[176]</sup> Nonetheless the decision increased uncertainty about the dormant state of congressional power. If nothing else, the *Willson* opinion marks a cautious movement away from the strongly nationalist opinions of a decade earlier.

*Providence Bank v. Billings* is a better indicator of change than *Willson*.<sup>[177]</sup> Rhode Island had chartered Providence Bank in 1791; thirty years later the legislature imposed a bank tax on capital stock. The stockholders of the bank argued that the tax was unconstitutional

because it impaired the obligation of contract created by the original charter.

Marshall concluded that the Court could find nothing that indicated either of the parties intended a tax exemption: "The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank." [178] The opinion also emphasized the need to protect the integrity of the taxing power. *Providence Bank* is significant because it represents a retreat from the expansive interpretations of the contract clause as in *Fletcher v. Peck*, *The Dartmouth College Case*, and *Green v. Biddle* and because of its concern for the powers of government--especially state government. "If Taney had written the same opinion, historians would see it as another manifestation of his concern for 'community rights,' and even more likely, as further evidence of his 'state's-rights' proclivities." [179] *Ogden v. Saunders* "proved to be a turning point in terms of contract clause decisions. For in all the contract clause cases decided by the Marshall Court subsequent to 1827, the Court upheld every state act under consideration." [180] In other words, both John Marshall and his Court began to accept the limited interpretation of the contract clause which Johnson had urged in *Green* in 1823. "Justice Johnson pleaded for a construction of the contract clause which left the regulation of contracts largely to the wisdom of the state governments." [181] "Mr. Justice Johnson, at least, had discovered society;" [182] furthermore he had set the tone for the work of the Court in the last period. "Very possibly...it was pressure from Johnson and the new appointees that led Marshall, in 1830, to admit the vital importance of...[state taxation] power." [183]

The trend of Marshall's decisions after 1826 was unmistakably in the direction of state power, as it was with the entire Court. Morgan has said that "[o]ne is mystified by Marshall's role in many of the cases of this period." [184] Yet the evidence suggests change, a movement away from the "Marshall monolith" of the golden age. The decisions after *Ogden*--but preeminently *Providence Bank*--enabled Chief Justice Taney to "cut his 'new' constitutional cloth with Marshall's razor." [185]

In 1830 the long-standing custom of living and boarding together was broken, a further example of changing practices. "Judges Johnson and McLean do not live with us," Marshall wrote his wife, "in consequence of which we cannot carry on our business as fast as usual." [186] The concern continued, for he wrote Story on May 3, 1831:

*I am apprehensive that the revolutionary spirit which displayed itself in our circle will, like most other revolutions, work inconvenience and mischief in its progress.... We have like most other unquiet men, discont[ent]ed with the things*

*that are, discarded accommodations which are reasonably convenient without providing a substitute. We pull down without enquiring how we are to buildup... I think this is a matter of some importance, for if the Judges scatter ad libitum the docket, I fear, will remain quite compact, losing very few of its causes; and the few it may lose will probably be carried off by seriatim opinions.[187]*

In the fall of that year Marshall underwent surgery in Philadelphia for gallstones; a slow, painful recovery heightened his concern about the future. One month later, he wrote Story:

*There has been some difficulty about our next winter's arrangement.... I was a little apprehensive that you would be unwilling to locate yourself so far out of the center of the city, but your other friends seem to think you will be greatly pleased.... Mr. Johnson... will quarter by himself and our brother McLean will of course preserve his former position. The remaining five will, I hope, be united.[188]*

In spite of intense divisiveness, Marshall continued his quest for unity. "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for some many years." Yet, Marshall went on, "I cannot be insensible to the gloom which lours over us." [189] He could look back on the 1831 Term with some dismay. Not only had the norms of unanimity broken down, but the Court had become deadlocked over one of the most significant cases of the Jacksonian period, *Charles River Bridge v. Warren Bridge Co.*, [190] At issue was the interpretation of the original charter of the Charles River Bridge whose proprietors charged that the Commonwealth of Massachusetts had impaired the obligation of contract by chartering a second, competing bridge. The Court's construction of the contract clause was critical here, as it had been in *Ogden and Providence Bank*.

Stanley Kutler argues that Marshall did not favor the argument of *Charles River Bridge*, in spite of historians' mater-of-fact assumption that he had. [191] His evidence is convincing. [192] That Story failed to mention Marshall's concurrence in his views when the case was finally handed down in 1837 supports further the Chief Justice's stand after the first argument. If Kutler is correct, this is additional evidence of change in Marshall's constitutional philosophy in the direction of state prerogative and away from an expansive construction of the

contract clause. It also suggests that by 1831 Marshall was no longer able to lead the Court out of stalemate.

Unable to reach a decision, the Court accepted a motion for reargument in 1833. "But it did nothing and the case continued on the docket as the last 'Marshall Court' rapidly disintegrated." [193]

Marshall's recuperation from surgery was so successful that he was in full vigor for the 1833 Term. At seventy-eight he rendered "the last of the series of vital decisions on constitutional law which had made the Chief Justiceship of John Marshall so memorable an era in American history." [194] *Barron v. Baltimore*, [195] held that the fifth amendment did not apply to the states, an opinion which demonstrates his continued deference to state power during this period. [196]

After 1832 the Supreme Court ceased to be a center of political attack. The caseload was concerned mostly with commercial and land questions. In the 1834 Term, Marshall was forced to add two important constitutional cases to *Charles River Bridge* because the Court could not reach a decision. [197] "The practice of this Court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four Judges concur in opinion, thus making the decision that of a majority of the whole Court." [198] Such was the character of a new court norm, one clearly indicative of internal disunity. Little important business came before the Court in 1835, Marshall's last Term. Within a few months after the Court adjourned, the Chief Justice's health began to fail; he died on July 6 after thirty-four years of service on the bench.

The decade from 1826 until Marshall's death marked a movement away from the monolith of the golden age; it was a period of uncertainty and change, yet it provided an important transition to the Taney Court after 1836. It was a period of transition as much for Marshall as for the Supreme Court. Unlike Johnson, Marshall was not well attuned in 1830 to changing economic and political conditions. [199] Marshall sadly yielded, as he said, 'to the conviction that our constitution cannot last.' [200]

In conclusion, a monolithic view of the "Marshall Court" ignores important variations in constitutional interpretation and in Court leadership. Marshall had not, in fact, "dominated" his brethren during any of the three periods; he had provided effective task and social leadership. By 1835 the Chief Justiceship was a position of profound importance and power in the American political system. "Marshall's preeminence was due to the fact that he was John Marshall, not simply that he was Chief Justice; the combination of John Marshall and the Chief Justiceship has given us our most illustrious judicial figure." [201]

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### ***Endnotes***

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2. See generally, G. Schubert, *Judicial Policy-making: The Political Role of the Courts* 138-83 (rev. ed. 1974).
3. 5 U.S. (1 Cranch) 137 (1803).
4. 17 U.S. (4 Wheat.) 316 (1819).
5. 17 U.S. (4 Wheat.) 518 (1918).
6. 22 U.S. (9 Wheat) 1 (1824).
7. See *Hawks v. Hamill*, 288 U.S. 52, 58 (1933), as quoted in F. Frankfurter, “John Marshall and the Judicial Function” in *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution* 533 (P. Kurland ed. 1970).
8. O.W. Holmes, *Collected Legal Papers* 270 (1920).
9. Charles Evans Hughes, *The Supreme Court of the United States* 56-58 (1928).
10. Interview with Potter Stewart, *The New Yorker*, October 19, 1981, 35.
11. W. Murphy, *Elements of Judicial Strategy* 82 (1964).
12. C. Sheldon, *The American Judicial Process: Models and Approaches* 68 (1964).



13. D. Danelski, “the Influence of the Chief Justice in the Decisional Process,” in *Courts, Judges, and Politics: An Introduction to the Judicial Process* 497 (w. Murphy and C. Pritchett eds. 1961). *See, more recently*, R. Steamer, *Chief Justice: Leadership and The Supreme Court* 18-32 (1986) and L. Baum, *The Supreme Court* 154-56 (3<sup>rd</sup> ed. 1989).
14. *Id.* at 151.
15. *Id.* at 152.
16. Stephenson, “The Chief Justice as Leader: The Case of Morrison Remick Waite,” 14 *Wm. & Mary L. Rev.* 899, 900-01 (1973).
17. Letter from George Washington to John Jay, October 5, 1789, in C. Warren, *The Supreme Court in United States History* 36 (1923).
18. *Id.* at 33.
19. F. Monaghan, *John Jay*, 307-308 (1935).
20. 2 U.S. (2 Dall.) 419 (1793).
21. 2 U.S. (2 Dall.) 402 (1793).
22. J. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures* 105 (1964).
23. 1 J. Goebel, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 777 (1971).
24. J. Schmidhauser, *supra* note 22, at 105.
25. *See Glass v. The Sloop Betsey*, 3 U.S. (3 Dall. 6 (1794); J. Goebel, *supra* note 23, at 765.

26. J. Goebel, *supra* note 23, at 777.
27. W. Brown, *The Life of Oliver Ellsworth*, 243 (1905).
28. For supporting data, see D. Morgan, *Justice William Johnson: The First Dissenter* 46 (1954).
29. *Id.* at 47 n.18.
30. J. Goebel, *supra* 23, at 778.
31. J. Schmidhauser, *supra* note 22, at 104.
32. J. Shirley, *The Dartmouth College Causes and the Supreme Court of the United States* 377 (1895).
33. See, e.g., A. Magruder, *John Marshall* 255-78 (1885); 4 A.J. Beveridge, *The Life of John Marshall* 59-96 (1919); and R.K. Newmeyer, *The Supreme Court Under Marshall and Taney* 20 (1968).
34. L. Baker, *John Marshall: A Life in Law* 47, 316, 540 (1974).
35. 4 A.J. Beveridge, *supra* note 33, at 60.
36. Quoted in 3 *John Marshall: Life, Character and Judicial Services* 369 (J. Dillon ed. 1903).
37. L. Baker, *supra* note 34, at 217.
38. Johnson, "John Marshall," in 1 *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions* 285, 288 (L. Friedman and F. Israel eds. 1969).
39. *Id.*

40. J. Schmidhauser, *supra* note 22, at 109.
41. See J. Shirley, *supra* note 32, at 309-10.
42. See Crosskey, "Mr. Chief Justice Marshall," in *Mr. Justice* 3, 14-2 6 (A. Dunham and P. Kurlan eds. 1964).
43. S. Ulmer, "Courts as Small and Not So Small Groups" 20 (1971).
44. *Aurora*, January 8, 1801, in 1 C. Warren, *supra* note 17, at 174.
45. F. Frankfurter, "John Marshall and the Judicial Function" in *Felix Frankfurter on the Supreme Court: Extra-judicial Essays on the Court and the Constitution* 534 (P. Kurland ed. 1970).
46. See D. Roper, "Review of Irwin S. Rhodes, *The Papers of John Marshall: A Descriptive Calendar*," 15 *American Journal of Legal History* 140, 144 (1971).
47. 4 A.J. Beveridge, *supra* note 33, at 87.
48. A. Mason, *The Supreme Court: Palladium of Freedom* 76 (1962).
49. R. K. Newmeyer, *supra* note 33 at 87.
50. Blaustein and Mersky, "Bushrod Washington," in 1 *The Justices of the United States Supreme Court*, *supra* note 38, at 243-48.
51. Friedman, "Alfred Moore," in 1 *The Justices of the United State Supreme Court*, *supra* note 38, at 279.
52. J. Schmidhauser, *supra* note 22, at 110.
53. Morgan, "Marshall, the Marshall Court, and the Constitution," in *Chief Justice John Marshall: A Reappraisal* 168, 170 (W.M. Jones ed. 1956).

54. Crosskey, *supra* note 42, 1t 24-26.
55. D. Dewey, *Marshall Versus Jefferson: The Political Background of Marbury v. Madison* 18 (1970).
56. D. Morgan, *supra* note 28, at 306.
57. J. Shirley, *supra* note 32, at 345.
58. See Howard, "On the Fluidity of Judicial Choice," 62 *American Political Science Review* 43 (1968); and J. Shirley, *supra* note 32, at 304-16 .
59. For a similar list of court norms, see Morgan, "The Marshall Court and Civil Liberties," in *Aspects of Liberty* 168 (M. Konvitz and C. Rossiter eds. 1958).
60. 5 U.S. (1 Cranch) 299 (1803).
61. 5 U.S. (1 Cranch) 137 (1803).
62. See D. Morgan, *supra* note 28 at 48 n. 22.
63. Letter to James Madison, May 25, 1810, 11 *The Works of Thomas Jefferson* 141 (P. Ford ed. 1905).
64. Corwin, "Marbury v. Madison and the Doctrine of Judicial Review," 12 *Mich. L. Rev.* 538, 543 (1914).
65. See Corwin, "The Establishment of Judicial Review," 9 *Mich. L. Rev.* 102, 283 (1910), 1911); E. Corwin, "The Doctrine of Judicial Review: Its Legal and Historical Basis" 50-57 (1914); and A. Mason, *supra* note 48, at 73-76.
66. A. Mason, *supra* note 48, at 83.

67. D. Morgan, *supra* note 28, at 48.
68. *Id.* at 43, 53.
69. *Id.* at 53-54.
70. Letter to Thomas Jefferson, December 10, 1822, in *id.* at 181-82.
71. *Id.* at 182.
72. *Id.* the Practice of dissent, of course, dates to the Jay Court. *See Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792), 2 U.S. (2 Dall. 415 (1793).
73. 8 U.S. (4 Cranch) 75 (1807).
74. *Id.* at 107. A recent analysis argues that it “seems plausible to suggest that the nature of the cases and the nature of the judicial process were as much responsible for the frequent unanimity of vote.” J. Stookey and G. Watson, “Johnson Marshall and His Court: Applied Behavioral Jurisprudence” in *John Marshall’s Achievement: Law, Politics, and Constitutional Interpretations* 66 (T. Shevory ed. 1989). Johnson’s comment—and the wealth of commentary from other Justices as well—suggests that this interpretation is too simplistic. It may (as one factor among many) account for unanimity in some cases (even constitutional law cases) during the Marshall era.
75. 7 U.S. (3 Cranch) 448 (1806).
76. *See* his comments in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 107.
77. 8 U.S. (4 Cranch) 448 (1806).
78. Morgan, *supra* note 53, at 173.
79. The term “unanimous” was used first in *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 363 (1803). “Majority of the court” was used in *United States v. Fisher*, 6 U.S. (2 Cranch)

358, 397 (1805) and *Mountz v. Hodgson*, 8 U.S. (4 Cranch) 324, 327 (1808); there was a dissent noted in the former, but none in the latter. In *Rhineland v. The Insurance Co. of Pennsylvania*, 8 U.S. (4 Cranch) 30, 45-46 (1807), Chief Justice Marshall used both “unanimous” and “majority of the court” in different parts of the opinion, referring perhaps to different levels of cohesion among the Justices, no one of whom, however indicated a dissent. For further use of the term “unanimous,” see *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806) (in which Johnson had wanted to dissent); *Knox v. Summers*, 7 U.S. (3 Cranch) 496, 498 (1806); and *Sthreshley v. The United States*, 8 U.S. (4 Cranch) 169, 171 (1807).

80. For Marshall’s apology, see *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281, 285 (1810).
81. R.K. Newmeyer, *supra* note 33, 1t 34-35.
82. 6 U.S. (2 Cranch) 358 (1805).
83. Morgan, *supra* note 53, 15 173.
84. 10 U.S. (6 Cranch) 87 (1810).
85. See C.P. Magrath, *Yazoo: Law and Politics in the New Republic—The Case of Fletcher v. Peck* 1-49 (1966).
86. 10 U.S. (6 Cranch) 358 (1805).
87. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).
88. Morgan, *supra* note 53, at 174.
89. D. Roper, “Judicial Unanimity and the Marshall Court—A Road to Reappraisal,” 9 *American Journal of Legal History* 118, 121 (1965).
90. *Id.* at 122.

91. W. Murphy and J. Tanenhaus, *The Study of Public Law* 155 (1972).
92. 4 A.J. Beveridge, *supra* note 33, at 61.
93. *See, e.g.*, his letter to Joseph Story, June 26, 1831, in *The Political and Economic Doctrines of John Marshall* 133-36 (J. Oster ed. 1914).
94. 3 *John Marshall: Life, Character and Judicial Services*, *supra* note 36, at 376.
95. 9 U.S. (5 Cranch) 115 (1809).
96. C. Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835*, 332 (1944).
97. *Id.* at 333.
98. J. McClellan, *Joseph Story and The American Constitution: A Study in Political and Legal Thought* 294-312 (1971).
99. *See, e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814); *The Venus*, 2 U.S. (8 Cranch) 253, 288 (1914); *The Merimack*, 12 U.S. (8 Cranch) 317, 332 (1814); *The Brig Short Staple v United States*, 13 U.S. (9 Cranch) 55, 64 (1815); and *The Nereide*, 13 U.S. (9 Cranch) 388, 436 (1915).
100. 1 R. Holfstadter, W. Miller, and D. Aaron, *The American Republic to 1865*, 347 (1959).
101. R.K. Newmyer, *supra* note 33, at 39.
102. *See, e.g.*, J. B. Thayer, *John Marshall* 55-56 (1901).
103. Letter to Nathaniel Williams, February 16, 1812, in 1 *Life and Letters of Joseph Story* 214 (W. Story ed. 1851).
104. 11 U.S. (7 Cranch) 32 (1812).

105. See D. Morgan, *supra* note 28, at 79; and G. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* 147 (1970).
106. D. Morgan, *supra* note 28, at 80.
107. *Id.* at 92.
108. *The Neireide*, 13 U.S. (9 Cranch) 388, 455.
109. Letter to Henry Wheaton, April 8, 1818, in 1 *Life and Letters of Joseph Story*, *supra* note 103, at 303-04.
110. Letter to Henry Wheaton, April 10, 1818, *id.* at 305.
111. See J. McClellan, *supra* note 98, at 294-312.
112. See, e.g., S. Krislov, *The Supreme Court in the Political Process*, 56 (1965); and 4 A. J. Beveridge, *supra* note 33, at 92. For thoughts of the areas where Marshall contributed intellectual leadership, see e.g., *John Marshall's Defense of McCulloch v. Maryland* 1-21 (G. Gunther ed. 1969) and R. Faulkner, *The Jurisprudence of John Marshall*, *passim* (1968).
113. Morgan, *supra* note 53, at 175.
114. R. K. Newmyer, *supra* note 33, at 45.
115. 19 U.S. (6 Wheat.) 264 (1821).
116. 22 U.S. (9Wheat.) 1 (1824).
117. 19 U.S. (6 Wheat.) 204 (1821).
118. G. Dunne, *supra* note 105, at 141.



119. *Id.* at 147.
120. 14 U.S. (1 Wheat.) 304 (1816).
121. G. Dunne, *supra* note 105, at 148.
122. Morgan, *supra* note 53, at 176.
123. See J. Shirley, *supra* note 32, at 314-316, regarding the collective opinion in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).
124. 25 U.S. (12 Wheat.) 213 (1827).
125. Roper, *supra* note 89, at 126.
126. See J. Shirley, *supra* note 32, at 314-16; and Roper, *supra* note 89 at 125-28.
127. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 272 (1827).
128. Roper, *supra* note 89, at 126.
129. *Id.* at 127.
130. On the doctrine of vested rights generally, see Corwin, “The Basic Doctrine of American Constitutional Law,” 12 *Mich. L. Rev.* 247 (1914).
131. G. Dunne, *supra* note 105, at 184.
132. D. Morgan, *supra* note 28, at 176.
133. *Id.* at 177.
134. Letter to William Johnson, October 27, 1822, in 12 *The Works of Thomas Jefferson*,

- supra* note 63, at 247.
135. D. Morgan, *supra* note 28, at 178.
136. *Id.* at 179.
137. *Id.* at 180-81, 186 n. 79.
138. Note 71 *supra*.
139. 22 U.S. (9 Wheat.) 1, 223 (1824).
140. D. Morgan, *supra* note 28, at 186-87.
141. 21 U.S. (8 Wheat.) 1 (1823).
142. R. K. Newmyer, *supra* note 33, at 69.
143. D. Morgan, *supra* note 28, at 186-87.
144. Morgan, *supra* note 53, at 177.
145. R. K. Newmyer, *supra* note 33, at 84.
146. 1 *Life and Letters of Joseph Story*, *supra* note 103, at 424-5.
147. Even Thompson, however, grew to accept the norm against dissents. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827) and *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834).
148. R. K. Newmyer, *supra* note 33, at 51.
149. *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). “It is interesting to note that before this decision Justice Story had been extremely liberal in construing the extent of

- admiralty jurisdiction.” C. Haines, *supra* note 96, at 526 n. 79. This case is further indication of a gradual movement away from increased national power during this transition period.
150. *My Dearest Polly: Letters of Chief Justice John Marshall to His Wife, With Their Background, Political and Domestic, 1779-1831*, at 291 (F. Mason ed. 1961).
  151. One indication of the coming divisiveness is the disagreement among the Justices regarding candidates for clerkship of the Supreme Court. *See* 2 *The Papers of John Marshall: A Descriptive Calendar* 267 (I. Rhodes ed. 1969).
  152. C. Haines, *supra* note 96, at 580.
  153. *See, e.g.*, Marshall’s statement in *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827). “I should now, as is my *custom*, when I have the misfortune to differ from this court, acquiesce silently in its opinion. . . .” (emphasis added.)
  154. Story’s commitment to the norm of unity is evident in *Inglis v. Trustees of the Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 145 (1830): “It is not without reluctance that I deviate from my *usual practice* of submitting in silence to the decision of my brethren when I dissent from them. . . .” (emphasis added).
  155. 16 U.S. (3 Wheat.) 59, 77 (1818).
  156. *Mason v. Haile*, 25 U.S. (12 Wheat.) 370, 379 (127).
  157. Morgan, *supra* note 53, at 180.
  158. D. Morgan, *supra* note 28, at 224.
  159. Morgan, “William Johnson,” in 1 *The Justices of the United States Supreme Court 1789-1969*, *supra* note 38, at 371.
  160. Johnson, *supra* note 38, at 299.

161. J. Schmidhauser, *The Supreme Court as Final Arbiter in Federal-State Relations, 1789-1957*, at 48 (1958).
162. 25 U.S. (12 Wheat.) 419 (1827).
163. *Id.* at 439.
164. 27 U.S. (2 Pet.) 449 (1829).
165. See Frank O. Gatell, "Harry Baldwin," in 1 *The Justices of the United States Supreme Court 1789-1969*, *supra* note 61, at 576-777. See also, 2 *Life and Letters of Joseph Story*, *supra* note 103, at 273.
166. D. Loth, *Chief Justice: John Marshall and the Growth of the Republic* 347 (1949).
167. See, e.g., *Letter to his Wife*, February 1, 1829, in 4 A.J. Beveridge, *supra* note 33, at 467.
168. Morgan, *supra* note 53, at 180-81.
169. Letter to Joseph Story, May 3, 1831, in *The Political and Economic Doctrines of John Marshall*, *supra* note 93, at 132.
170. See, e.g., D. Loth, *supra* note 166, at 348. But for a far different interpretation of Johnson's role during this period, see 3-4 G. E. White, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: the Marshall Court and Cultural Change, 1815-1835*, at 342-343 (1988).
171. F. Rodell, *Nine Men: A Political History of the Supreme Court of the United States from 1790 to 1955*, at 107 (1955).
172. Johnson, *supra* note 38, at 290.
173. 29 U.S. (4 Pet.) 410 (1830).

174. 27 U.S. (2 Pet.) 245 (1929).
175. 29 U.S. (4 Pet.) 514 (1830).
176. *The Supreme Court and the Constitution: Readings in American Constitutional History* 97 (S. Kurler ed. 1984).
177. For further evidence of change, see *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830); *Beatty v. Knowler*, 29 U.S. (4 Pet.) 152 (1830); and *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1932).
178. 29 U.S. (4 Pet.) 514 (1930).
179. S. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* 66 (1971).
180. J. Schmidhauser, *supra* note 161, at 48.
181. *Id.*
182. D. Morgan, *supra* note 28, at 222.
183. *Id.* at 229, n. 97.
184. Morgan, *supra* note 53, at 182.
185. Garvey, “The Constitutional Revolution of 1837 and the Myth of Marshall’s Monolith,” 18 *Western Pol. Q.* 27, 30 (1965).
186. Letter to his Wife, January 31, 1830, in *My Dearest Polly: Letters of Chief Justice John Marshall to His Wife*, *supra* note 150, at 318.
187. Note 169, *supra*.

188. Letter to Joseph Story, November 10, 1831, in *The Political and Economic Doctrines of John Marshall*, *supra* note 93, at 139.
189. Letter to Joseph Story, October 12, 1831, *id.* at 137. *See also*, 4 A.J. Beveridge, *supra* note 33, at 518.
190. 36 U.S. (11 Pet.) 420 (1837).
191. S. Kutler, *supra* note 179, at 172-79. *See* C. Haines, *supra* note 96, at 611, for the “traditional view” of Marshall’s position.
192. S. Kutler, *supra* note 179, at 176.
193. *Id.* at 58.
194. 2 C. Warren, *supra* note 17, at 240.
195. 3 U.S. (7 Pet.) 243 (1833).
196. “. . .[T]he forthright character of Marshall’s opinion suggests that it may indeed have been a corporate ruling.” Morgan, *supra* note 59, at 174.
197. *Briscoe v. Bank of Kentucky*, 33 U.S. (8 Pet.) 121 (1834), and *Mayor of New York v. Miln*, 34 U.S. (9 Pet.) 85 (1835), *See* A. J. Beveridge, *supra* note 33, at 554 n. 2 and 2 C. Warren, *supra* note 17, at 250.
198. *Briscoe v. Bank of Kentucky*, 33 U.S. (8 Pet.) 121 (1834).
199. Francis P. Weisenburger argues that “in the last decade of his life he [Marshall] seemed somewhat out of tune with the vibrations of an expanding nation.” *The Life of John McLean: A Politician on the United States Supreme Court* 158 (1937). *See also*, F. Rodell, *supra* note 170, at 107 and 2 C. Warren, *supra* note 17, at 274.
200. R.K. Newmyer, *supra* note 33, at 87. *See also*, Letter to Joseph Story June 3, 1833, in

*The Political and Economic Doctrines of John Marshall, supra note 93, at 151.*

201. Hughes *supra* note 9, at 58.

## ***The Warren Court in American Fiction***

### **Maxwell Bloomfield**

Since the days of the early Republic Americans have tended to view their highest judicial body -- the Supreme Court of the United States-- with a mixture of awe and suspicion. The well-publicized debates that preceded the ratification of the Constitution implanted some enduring judicial stereotypes in the public consciousness. Proponents of a strong national government assured newspaper readers that the new federal judiciary would be the "least dangerous branch" of the government, since the Court would have no control over the nation's finances or military forces. In *The Federalist Papers* (1787-1788) Alexander Hamilton further defended the life-tenure and salary provisions of the Constitution as essential devices to protect a body of skilled jurists from the encroachments of Congress and the President.[1] Opponents of the Court, on the other hand, charged that, with its independence of popular control, it might easily become a despotic agency bent upon its own aggrandizement. In Pennsylvania the anonymous author of the *Letter of a Democratic Federalist* (1787) predicted that the Court would collaborate with Congress to establish a dangerously consolidated government, in which citizens might have to travel hundreds of miles to prosecute a lawsuit.[2] These archetypal images of the Court--a group of Platonic guardians vs. a conspiratorial political cabal--have persisted, and continue to provide a point of departure for creative writers.

Few nineteenth-century novelists mentioned the Court in their works, and none sought to portray the effects of a major Court decision upon American society. In part their lack of interest reflected the realities of antebellum federalism. Prior to the Civil War Americans lived under a state-centered federal system, in which the power of the national government seldom intruded upon their daily lives. Most writers, moreover, agreed with Hamilton that the Justices were merely passive oracles of the law, and had no hand in shaping important public policies. Even James Fenimore Cooper, a major critic of American institutions, could find nothing much to say about the Court. In *The Monikins* (1835), an otherwise biting attack on the excesses of Jacksonian Democracy, Cooper simply introduced the Justices as the "Supreme Arbiters" of the country of "Leaplow," whose functions were "to revise the acts of the other three agents of the people, and to decide whether they are or are not in conformity with the recognized principles of the Sacred Allegory." [3] Such noncommittal treatment of the Court was in keeping with the generally reverent tone adopted by other early writers.[4]



With the rise of the modern regulatory state, however, a more critical view of the Justices soon became popular. Turn-of-the-century authors, reflecting the reformist concerns of the Populist and Progressive eras, depicted the Court as a politicized body that promoted the interests of Big Business at the expense of the general welfare. Some popular novelists, including Robert Herrick, followed Charles Beard and other scholars in blaming socioeconomic conditioning for the Court's hostility toward economic regulation. Herrick's *A Life for a Life* (1910) presented the Justices as ancient logic-machines, who had been programmed to respond only to the legal formulae of a pre-industrial age. Other writers espoused a cruder vision of class conflict. In Reginald Wright Kauffman's Socialist novel, *The Spider's Web* (1913), the Justices are little more than hired employees of a sinister "Money Power." Such negative appraisals of the Court persisted into the 1930s, as writers emphasized the Justices' power to obstruct national economic recovery by striking down important New Deal measures. Judicial intransigence eventually led to Franklin Roosevelt's abortive Court-packing plan of 1937, which opened a new chapter in the literary history of the high bench.

After 1937 the Justices accepted the legitimacy of federal and state economic regulation, and turned their attention increasingly to issues of civil liberties and civil rights. Through the due process clause of the Fourteenth Amendment they gradually applied the guarantees of the Bill of Rights for the first time to the states. Under Chief Justice Earl Warren (1953-1969) this trend accelerated, bringing to the Court a whole range of morally charged issues--from obscenity to the rights of suspected criminals--that made a strong appeal to the literary imagination. In addition, as Alexander Bickel has noted, "[A] broadly-conceived egalitarianism was the main theme in the music to which the Warren Court marched."<sup>[5]</sup> Writers found the democratic thrust of some major decisions well suited for the construction of dramatic plots, especially since the cases involved humanistic values that any reader could appreciate. For all these reasons, the Warren Court inspired a uniquely rich and varied body of fiction, which may be analyzed in terms of three major categories: (1) works that describe the social effects of the *Brown* decision; (2) works that portray the criminal justice system after the Court's "due process revolution"; and (3) novels and plays that focus upon the Court as a functioning institution. These categories are by no means exhaustive. Other themes, including the Court's response to the Communist hysteria of the 1950s, might be added, and no effort will be made in this essay to include all relevant titles within the three designated categories. Rather, books have been selected to illustrate representative perspectives on the Court that may be found in a much larger body of creative literature.

## CIVIL RIGHTS FICTION

"In the United States," Lief Carter has observed,

*the Constitution and the meanings the Supreme Court imputes to it, play, judging from the prominent treatment educators and journalists give it, a major role in maintaining beliefs in the goodness of the polity. We read judicial opinions in constitutional cases, not just their legal outcomes, because the opinion, not the outcome, persuades us that we experience political goodness together.[6]*

The decision in *Brown v. Board of Education*[7] stirred the national conscience as few judicial pronouncements have ever done, but did not persuade white Southerners to desegregate their schools. Instead, organized resistance to the *Brown* ruling quickly spread throughout the South. As Southern blacks in turn launched boycotts and other demonstrations in support of their civil rights, creative writers exploited the theme of racial justice to create what might be termed fictional impact studies of the desegregation decision.

In two early novels *Brown* acts as a catalyst to force quiescent liberals--representatives of the "silent South"--to take a public stand against conservative community opinion. George Case, the protagonist of Paul Darcy Boles's *Deadline* (1957), is a newspaper editor in a large Southern city. Once an outspoken foe of the Ku Klux Klan, he has lapsed into a troubled silence on racial issues since the *Brown* ruling, which he considers as potentially devastating to traditional Southern life as an erupting volcano or a hydrogen bomb blast:

*Yes, he thought; that was the beginning of it; right after the Court decision, when the news spread not the way a newspaper carries it but like an old fire, the spook of a fire that is blown again to hot coals; a silent spreading of news even--not talked out all the way, except in the wild noise of rednecks on street-corners and in hideouts like drugstores and horse parlors--silent and yeasting inside the blood of the working veins. That was the declaration of war. That was what I couldn't touch; that was when I began to make my peace. For am I not against war, against it so that I do not dare to take up arms?[8]*

While Case wrestles with his conscience and his sense of professional responsibility, his friends offer conflicting advice. Finally, when the Yankee owners of his paper warn him not to offend the sensibilities of his segregationist readers, he decides against further equivocation. In an emotional speech before the local Women's Club, he declares his support for *Brown*, "this terrible, inconsiderate order, this foul yet wonderful order, of the Supreme Court of the United States of America." The Court, he urges, has given the South a unique opportunity to grow up:

*By actually, first time to my knowledge in history, settin' our own deadline for decency humanity what you will. By provin' for all time—first to the North, then to the world to the atomic-waiting world—and most of all maybe to ourselves--that we can handle our own affairs with courage and dispatch and joy and simple honor that can stand as a mark for civilization to aim at through all days to come. So I'm for integration. Now. Handled by us, with no federal intervention wanted or needed.[9]*

As his listeners walk out on his speech in dismay, Case feels a countervailing sense of inner satisfaction. He prepares an even stronger statement of his integrationist views for the Sunday paper, knowing that he will not be permitted to publish any further editorials. Other professional types--a schoolteacher and a minister--must choose between principle and self-interest in Lettie Hamlett Rogers's novel *Birthright*(1957). When Martha Lyerly's fifth-grade students demand to know why segregated schools are unconstitutional, she ignores her principal's order to keep silent, and explains that the nation was founded so that all persons might enjoy equal opportunity and equal treatment under the law:

*The Supreme Court has held that no person can be turned away from a public school because of his color. We're all Americans together. If there's a heaven, I don't think there'll be two gates, one marked White and the other Colored. I don't believe Saint Peter is going to say, 'Colored souls please seat from the rear.' [10]*

The children, who have imbibed their parents' racial prejudices, react with shocked disbelief, and Martha finds herself ostracized by the small Southern town in which she lives. The

school board refuses to renew her teaching contract; she receives threatening messages warning her to leave town; and in time she does.

Her example nevertheless causes a local minister, Seth Erwin, to reexamine his own beliefs and obligations in light of the *Brown* ruling. A cautious man from a politically powerful family, Erwin has always avoided controversy, yet is driven despite himself to preach a stirring sermon against segregation in his fashionable church.

*You could not overturn a whole tradition and a whole heritage [he reflects]. The Court's way was not only not the right way but the way of retrenchment and regression and grievous trouble;...So, knowing which to the very marrow of his bones, Seth Erwin had to preach his sermon!*[11]

While his family connections protect him from physical violence, he loses most of his congregation. His commitment to racial justice continues, however, as he works with black civil rights activists to secure the school board's compliance with the desegregation decision.

Black protagonists occupy center stage in many other works. Lucy Daniels's *Caleb. My Son* (1956) describes the divisive effects of *Brown* upon an Afro-American working-class family in North Carolina. To the children of Asa and Effie Blake, the Warren Court's ruling means an end to all forms of racial inequality. Caleb, the eldest son, organizes a group of young militants in immediate response to *Brown*. "We got a right to all these things," he tells them.

*We always had a right. But now they's a law. Now they gotta live up t' what they always say.... We gotta give 'em a chance t' do it, though. If they don't, we'll make 'em, but we gotta give 'em time...*[12]

When some gang members grow restive despite Caleb's pleas for patience and non-violence, he agrees to start dating a white girl as a defiant demonstration of equality. News of his action splits the black community and embitters relations within his family. His father, a conventional man who has long accepted his place within a caste system, vows to stop him from disgracing the family name:

*A white woman! ....All his life he been tol' 'white's white and black's black.' An' now wid his big ideas 'bout equality, he done laid down the*

*most important laws he ever learnt.[13]*

When Caleb flouts his father's authority, Asa goes in search of him with a shotgun, and kills him as he approaches with his blonde girlfriend.

By the 1960s the inability of the federal courts to enforce their decisions--a characteristic originally noted by Hamilton--had become a subject of satirical commentary. Langston Hughes, the noted Afro-American writer, adverted to the problem several times in his popular newspaper sketches featuring Jesse B. Simple, the homespun Harlem philosopher. In "A Rude Awakening," Jesse dreams that the races have exchanged position, so that a black Supreme Court is now trying to protect the civil rights of white litigants, with the same infuriating delays:

*What is getting into white folks since Chief Justice Thurgood Marshall handed down that last decree from the Supreme Court bench granting everybody the right to file another suit to get their rights? Don't they want to go through the orderly process of the courts and sue and file until they get to be old men and womens?*

*If at first you don't succeed file and file again, I say. White folks, these things take time. Don't rush into integration without preparation. Just because a handful of old Negroes wearing robes in the Supreme Court says your rights are constitutional, it does not mean they are institutional. Our great institutions like the University of Jefferson Lee belong to us, and not even with all deliberate speed do we intend to constitutionalize the institutionalization of our institutions.[14]*

As the leaders of the civil rights movement looked increasingly to Congress and the executive branch for assistance, novelists played down the role of courts in describing the later phases of the struggle. Yet the *Brown* decision remained an important literary symbol--a reference point that legitimized all subsequent steps toward racial equality. In his representative novel *Sippi* (1967), which chronicles the increasingly violent confrontations between white and black Mississippians in the 1960s, John Oliver Killens begins by illustrating the corrosive effect of *Brown* upon traditional class relationships. When Jesse Chaney, a black sharecropper, first hears of the decision, he stops picking cotton and runs to the house of his paternalistic employer, Charles Wakefield:

*'The Supreme Court done spoke!' Jesse shoute4 like he had just got that old-time religion and his soul had been converted. 'Ain't going around to the back door no more.... And another thing--ain't no more calling you Mister Charlie. You just Charles from here on in.'*[15]

Chaney transmits his sense of empowerment to his son, Charles Othello, the hero of the story, who becomes an important civil rights leader in the 1960s.

*Brown* similarly encourages Afro-Americans to claim their constitutional rights in Ntozake Shange's Betsey Brown (1985). "The time has come for us to do something about our second-class citizenship, and this separate but equal travesty we call our lives," Greer Brown, a black physician, tells his teenaged daughter Betsey and his other children.[16] As he prepares them to participate in civil rights demonstrations and to become the first minority students in the all-white public schools of St. Louis, he constantly reminds them of the Warren Court's pronouncement that integration is the law. Led by Betsey, the children march off to their first day of integrated classes, chanting

*All they can say is it's the law  
All they can say is it's the law  
Do they do it? Do they do it?[17]  
Naw.*

While all civil rights fiction portrayed the Court in Hamiltonian terms as a wise and impartial tribunal, some writers also introduced the counterimage of an oppressive federal judiciary, which the opponents of *Brown* used as an ideological rallying point. The Court's integration order "is jest the start of the nigger-New York Jew plan for gittin their hands on the fair bodies of our Southern white women," asserts a speaker at a Ku Klux Klan rally in Ben Haas's *Look Away. Look Away* (1964). From racially mixed classrooms it is but a step to more intimate forms of social equality that will end by transforming the South into a mongrelized democracy. Stripped by judicial fiat of their police powers under the Tenth Amendment, the Southern states will again succumb to federal tyranny, as in the Reconstruction era. Only a revitalized Klan, the speaker warns, can save the South from "the dirty New York Communist Jews and the Communists in Washington and the Jew Court with its Frankfurters and its Warrens and its traitors like Hugo Black that used to be a Klansman himself." [18]

Other novelists rang changes upon this theme of judicial conspiracy and subversion.

Jesse Hill Ford, in *The Liberation of Lord Byron Jones* (1965), describes a meeting of the black shirted Citizens group, whose president announces that the dues will help pay for

*scientific studies of the nigger because it has got to be proved to some people scientifically that the nigger is the inferior race he is before we can either get the Supreme Court impeached or reversed. It don't matter which we do and we are going to do one or the other.*[19]

Although such inflammatory harangues generally lead to terrorist assaults upon blacks, they may also provoke acts of symbolic violence directed against the Court itself, as in this scene from Lisa Alther's *Original Sins* (1981):

*A young boy sitting on an older man's shoulders threw a rope over an elm branch. He fitted the noose around the neck of a dummy wearing a sign reading " 'Justice' Earl Warren." The crowd fell silent, watching. The dummy dangled and twisted in the dusk. The boy dumped kerosene on it and held a match to it. As it was enveloped in leaping flames, the crowd howled.*[20]

While literary works reflected--and exploited--the controversy engendered by *Brown*, no writer used a fictional format to attack the Court's civil rights decisions. The situation was quite different, however, with respect to issues of criminal justice.

## **CRIMINAL JUSTICE AND THE COURT**

In the 1960s the Warren Court handed down a series of landmark decisions that nationalized the procedural rights of defendants in criminal cases.[21] Commentators, looking at the new rules governing illegally seized evidence, self-incrimination, and access to legal counsel, spoke of them as creating a "due process revolution." Law enforcement officials in turn charged that such decisions "handcuffed" the police and "coddled" criminals. Crime control became a major issue in the presidential election of 1968, as Republican candidate Richard Nixon attacked the Court for its excessive leniency toward lawbreakers.

Creative writers played upon popular fears of impending anarchy in their generally negative

treatment of the Court's criminal justice rulings. Typical was Joseph Wambaugh's best selling novel, *The New Centurions* (1970), which presents the police as "civilization's" last line of defense against the barbaric hordes of the nation's ghettos. In tracing the parallel careers of three young Los Angeles policemen, Wambaugh repeatedly contrasts their firsthand knowledge of criminals with the erroneous ideas of the general public, including Supreme Court Justices. "... fl]t sometimes seems to policemen that the court is lying in wait for bad cases like Mapp versus Ohio so they can restrict police power a little more," observes a criminal law instructor at the police academy.

*You're going to be upset, confused and generally pissed off most of the time, and you're going to hear locker room bitching about the fact that most landmark decisions are five to four, and how can a working cop be expected to make a sudden decision in the heat of combat and then be second-guessed by the Vestal Virgins of the Potomac....[22]*

Within a year after his graduation, one of Wambaugh's protagonists decides to commit perjury in all future stop-and-search situations, so that "he would never lose another case that hinged on a word, innuendo, or interpretation of an action by a black-robed idealist who had never done police work." [23] Writers of detective fiction--a genre known for its no-nonsense approach to crime fighting--took a similarly disdainful view of the Court's efforts to protect defendants' rights. "Screw the Miranda or the Escobedo decisions," growls the tough ex-cop Gillian Burke in Mickey Spillane's *The Last Cop Out* (1973), as he prepares to hunt down and destroy a powerful Mob figure. [24] Hardboiled detectives have always operated on the fringes of the criminal justice system, of course, and their penchant for vigilante action long antedates the era of the Warren Court. [25] More noteworthy has been a tendency in recent fiction to portray the attractiveness of vigilantism for lawyers and judges opposed to the Court's criminal justice rulings.

"I just achieved freedom for a murderer," laments a brilliant defense attorney in Mitchell Benjoya's *Final Judgment* (1978).

*A man is free, walking the streets, because Of me and a system. We function together, the system and I, indispensable to each other to set murderers free. Do you know the magnitude of culpability for me*



*inherent in that marriage?[26]*

To assuage his guilt, the attorney assumes the role of executioner, employing an underworld figure to kill his most unsavory clients in the name of 'justice.' Similarly, in the hit movie *The Star Chamber* (1983), a group of disgruntled trial judges forms a secret society to plot the assassination of dangerous criminals they have been forced to release because of the "technicalities" associated with the due process revolution. (The term "Mirandize" crops up repeatedly in the screenplay as a pejorative.)

The growth of the victims' rights movement in the 1980s added to this chorus of literary criticism. In Richard Speight's *Desperate Justice* (1987), the killer of a young girl blurts out a confession to the police, who have entered his apartment without a warrant. Later he regains his nerve, and demonstrates "an uncanny awareness of the limits that the law placed on his interrogators, almost daring them to go too far and do too much." [27] When the trial judge refuses to admit the confession into evidence, the victim's parents are appalled:

*All of the decisions, big and small, had seemed to them to be based on what was fair' to the defendant, not on what was right.... Like many other victims of crime, like thousands before them who had been burdened with tragedy only to find their tragedy compounded in the courtroom, they were rapidly losing faith in the system.[28]*

After the jury returns a verdict of "not guilty, by reason of insanity," the distraught mother of the murdered girl pulls a pistol from her handbag and kills the defendant.

A comparable quest for retributive justice affects even the Supreme Court in Allen Drury's novel *Decision* (1983). Here a newly appointed liberal Justice reverses position and votes to water down the *Miranda* holding in a case involving the convicted killer of his only daughter. The conservative temper of the Reagan years appears as well in the argument of an-other Justice during the conference preceding the announcement of the decision:

*Which is the greater good the 'rights' of an individual who cares nothing for law or human life and has by his own deliberate act forfeited all claim to charity, or the good of the society which has already suffered deeply from his twisted evil, and could suffer much more if swift and final punishment is not visited upon him? ... It is time, I think; to forget*

*the precious niceties of the law, the extreme straining after gnats that has plagued our jurisprudence in these recent decades, the general emphasis on further punishing the victim by letting the criminal either go free altogether or escape with chastisement that is not only inadequate but is, in a grim, ghastly sort of way, outright laughable.[29]*

Countering these negative assessments of the due process revolution are a few works that praise the Warren Court for democratizing the administration of justice. These authors are sympathetic to the plight of minority and low-income defendants, whose legal rights were often ignored by police and prosecutors in the pre-Warren years. The hero of Dean Coffin's *Under the Robe* (1970) is a compassionate traffic court judge who shares the egalitarian spirit behind the Court's rulings, and transforms his own courtroom into a showcase for the equal treatment of all defendants, regardless of race or wealth. In words that might have been lifted from Warren's opinion in *Miranda v. Arizona*, he lectures an irate police chief:

*[Y]ou forget that an individual facing a policeman on any kind of charge doesn't face him on a man-to-man basis. No, sir. There's a lot of authority in that uniform. The Supreme Court has been trying to protect the rights of defendants against charges by police who, by the very nature of their office, have more authority than defendants, especially those defendants without a lawyer and without knowledge of their rights, or of the legal processes.[30]*

A similar concern for protecting the rights of the disadvantaged motivates the Italian-American defense attorney who is the protagonist of John Nicholas Lannuzzi's *Courthouse* (1975). "Respect for the law starts in the courtroom," he observes:

*We cannot possibly expect respect for the law if the system singles out certain individuals--perhaps powerful or wealthy--and gives them special consideration merely because they've got connections.[31]*

In an interesting variation on Wambaugh's argument for the intuitive knowledge of policemen, he also insists that defense lawyers are the only persons in a highly bureaucratized system who really understand defendants as human beings, not "just indictment numbers."

In contrast to the literature of civil rights and criminal justice, a third category of works provides a more balanced perspective on the Court by taking readers inside the institution for a firsthand view of the process of adjudication.

## THE COURT AS LITERARY ARTIFACT

Andrew Tully's *Supreme Court* (1963) was the first full-length treatment of the high bench in American fiction. Its publication signaled that the Court as a political institution had finally begun to make an impression upon the popular imagination comparable to that of Congress and the Presidency. Several factors help to explain how creative writers by the early 1960s could anticipate a profitable market for fiction about the Justices and their work: (1) The Warren Court's recent decisions in such areas as race relations and the rights of alleged Communist subversives had generated a political backlash that included Congressional efforts to limit the Court's power and grass-roots demands for the impeachment of Chief Justice Warren. The nightly news on television familiarized a national audience with these assaults upon the Court. (2) Certain advances in the art of judicial biography enhanced the attractiveness of the Court as a literary subject. The remarkable success of Catherine Drinker Bowen's study of Oliver Wendell Holmes, Jr.--*A Yankee from Olympus* (1944)--suggested that readers might respond with similar enthusiasm to a gossipy story about a colorful fictitious Justice. (3) Writers had access to new scholarly works, including Alpheus Thomas Mason's award-winning *Harlan Fiske Stone: Pillar of the Law* (1956), that provided fresh insights into the work routine of the Justices and the process of collective decision-making.

In any event, Tully's gamble paid off. *Supreme Court* became a popular book club selection and an example for later authors who wished to take their readers inside the walls of the Justices' "marble palace." Since 1963 eight notable works of fiction have appeared that examine at length the internal and external pressures operating upon the Court. Six of them are novels: William Woolfolk's *Opinion of the Court* (1966); Henry Denker's *A Place for the Mighty* (1973); Walter F. Murphy's *The Vicar of Christ* (1979); William J. Coughlin's *No More Dreams* (1982); Margaret Truman's *Murder in the Supreme Court* (1982); and Allen Drury's *Decision* (1983). Two plays round out the list: Jay Broad's *A Conflict of Interest* (1972) and Jerome Lawrence and Robert E. Lee's *First Monday in October* (1978), which enjoyed a second life as a 1981 movie.

Collectively, these works tend to follow a common format: A new Justice is appointed to the Court. He (or she) meets the brethren, each of whom expresses a clearly articulated juristic

philosophy and displays some distinguishing personal eccentricity. The physical and intellectual traits of living Justices are carefully scrambled, so that recognizable liberals come out sounding like conservatives, and vice-versa. The new appointee finds himself/herself immersed at once in a series of dramatic cases. These generally involve recent civil rights issues that have been widely discussed in the media. After hearing oral argument, the Justices deliberate gravely, even portentously, with one another. They are well aware of the historic dimensions of their work. As an Associate Justice in *The Vicar of Christ* puts it, "One could look at a finished opinion and know that it would shape the future course of the law and perhaps even western civilization."<sup>[32]</sup> Often tempers flare; brawls break out in the robing room, and acrimonious debate resounds at the conference table. But at some point institutional loyalties prevail over personal differences, as the Justices join in a common effort to save the Court from some external danger, usually provided by a new Court-packing plan or a threatened impeachment.

Within this general plot structure, the influence of the Warren Court is discernible in two ways. First, the idea that the Court's most important duty is to promote democratic values and protect individual rights--a leitmotif of the Warren years--resounds through these works. As the judicial protagonist of Supreme Court explains to the President, a Cold Warrior who is trying to pack the Court with conservatives:

*[J]ust as your function is to promote the welfare of the people as a whole, our function—the function of the courts--is to guard the welfare of the individual, of the minorities. Our function is to decide that any interference with the basic rights of the citizenry, as set forth by the Bill of Rights, is wrong.*<sup>[33]</sup>

Second, political and legal criticism of the Warren Court for its alleged "lawmaking" reappears in fictional form, as characters in each work debate the legitimacy of judicial activism. Responding to a hostile questioner at his confirmation hearing, a judicial nominee in *The Vicar of Christ* offers the most enlightened assessment of the judicial role to be found in this literature. After noting that he does not believe a judge should legislate, he adds

*...but no more than the chair can I prescribe a general rule that distinguishes judging from legislating in all circumstances. Our Constitution is so wonderfully vague in many places that a judge has to be creative in interpreting it.... All we can reasonably ask of judges is that they be aware of their views on issues of public policy be willing to re-examine those views in light of any new*

*evidence, and be sensitive to resist the temptation to read those views into the Constitution.*[34]

For anyone interested in the history and practices of the Court, these works--and especially the novels—offer a body of well-researched background information, coupled with a soap opera plot that includes some painful romantic entanglement for the susceptible protagonist. But the most valuable lesson they impart is that the adjudication of constitutional rights involves a continuing dialogue between the Justices and the public over the meaning of the national experience and the democratic ideals that have shaped it. "The dignity of man rests at the core of the galaxy of American constitutional values," comments the Chief Justice in *The Vicar of Christ*.

*Its spirit suffuses every clause. Government's duty to protect and cherish that dignity is the moral and political motive force of the whole constitutional system.*[35]

In such imagery one may also glimpse the literary legacy of the Warren Court.

### **Endnotes**

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7. 349 U.S. 294 (1955).
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15. John Oliver Killens, 'Sippi, pp. xvii-xix (1967).
16. Ntozake Shange, *Betsey Brown* 156 (1985).
17. *Ibid.* 97.
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19. Jesse Hill Ford, *The Liberation of Lord Byron Jones* 122 (1965).
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21. These decisions include: *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); and *In re Gault*; 387 U.S. 1 (1967).
22. Joseph Wambaugh, *The New Centurions* 21 (1970).
23. *Ibid.* 109.
24. Mickey Spillane, *The Last Cop Out* 111 (1973).
25. See, e.g., William Ruehimann, *Saint With a Gun: The Unlawful American Private Eye* (1974).
26. Mitchell Benjoya, *Final Judgment* 177 (1978).
27. Richard Speight, *Desparate Justice* 36 (1987).
28. *Ibid.* pp. 42-43.
29. Allen Drury, *Decisions*, pp. 416-417 (1983).
30. Dean Coffin, *Under the Robe*, pp. 118-119 (1970).
31. John Nicholas Iannuzzi, *Courthouse*, pp. 236-237 (1975).
32. Walter F. Murphy, *The Vicar or Christ* 138 (1979).

33. Andrews Tully, *Supreme Court*, pp. 402-403 (1963).
34. Murphy, *supra* note 32, pp. 128, 130.
35. *Ibid.* 176.

## ***Thomas Jefferson and the Court***

### **Warren E. Burger**

*Editor's Note.- Chief Justice Burger delivered this address as the Society's Annual Lecture on June 3, 1991.*

My story begins on a brisk spring morning in 1801, March 4. A group of men were waiting in the Capitol for the President-Elect of the United States to take the oath of office. One of the two men waiting was John Marshall. Marshall had just taken office as Chief Justice of the United States by President Adams's appointment but, at Jefferson's request, he was still holding the office of Secretary of State. Waiting with Marshall was a short, slim fellow about the same age, 45 or 46, named Aaron Burr, who had just taken the oath as Vice-President of the United States. (Remember at that time we had no formalized political parties as such. Men filed as candidates for President and the candidate who received the most votes became President and the runner-up became Vice-President.) John Adams, the incumbent President, came in third. Neither Jefferson nor Burr had secured the required majority in the Electoral College and the election went into the House of Representatives where, on the 36th ballot, Jefferson was elected by a margin of one vote.

Another carriage drew up with Mr. Jefferson and some of his friends. Jefferson was a widower, his wife having died a number of years before. The men greeted each other formally and John Marshall administered the oath of office to Jefferson. Jefferson's inaugural speech was brief and conciliatory: "We are all Republicans and all Federalists."

That meeting of Marshall and Jefferson alone deserves a footnote in history. Although they were cousins, Thomas Jefferson did not like John Marshall--to put it mildly--and John Marshall did not have all that much respect for Thomas Jefferson. Here another footnote tells something of the politics of 1800:

Alexander Hamilton had written to John Marshall during the campaign that, as much as he distrusted and disliked Thomas Jefferson, the choice between Thomas Jefferson and Aaron Burr was clear, and he hoped Marshall would do what he could to develop support for Jefferson, the lesser of two evils. Now Hamilton's "lesser" was President. It was probably a surprise to Marshall that Jefferson asked him to administer the oath.

The odds are that Jefferson never cared much for Aaron Burr and, on that day, it must



have rankled him that the man who almost took the Presidency away from him was going to be his Vice President. What was Burr thinking about while he was waiting for Jefferson's arrival? What was going through Burr's mind about their relationship? That if he had not killed Hamilton in a duel he might be President? Did he rue his failure to solicit votes in the House? And John Marshall, did he think back to the time when Thomas Jefferson, then Governor of the State of Virginia, handed Marshall his certificate to practice law?

Our story now moves on to one of the great cases in Supreme Court history, *Marbury v. Madison*. And it is a great case, just as John Marshall was the Great Chief Justice even though the immediate cases were small. Mar-bury, a local political figure, was appointed a justice of the peace by Adams, a position that has long since been abolished. Adams had sent Marbury's nomination to the Senate, the Senate had unanimously approved it, and the nomination went back to the White House, where the President signed and Secretary of State John Marshall attested Marbury's commission. Jefferson recites in one of his letters that, when he took office, he found that Marbury's commission had not yet been delivered, and he destroyed it.

At that time there was a statute of the United States, Section 13 of the Judiciary Act of 1789, which had been largely drafted by Oliver Ellsworth, who was later to become the third Chief Justice. Section 13 provided in part that, if a member of the Executive Branch did not do what the law required, any person injured by that failure could bring an original action in the Supreme Court of the United States to compel performance. Relying upon this statute, Mar-bury sued Jefferson's Secretary of State James Madison in the Supreme Court to get his commission.

We know, of course, that the Constitution carefully defines what actions may originally be brought in the Supreme Court, and it does not include the kind of action that Marbury brought pursuant to Section 13 of the Judiciary Act. Marshall's 1803 opinion for the Supreme Court in *Marbury v. Madison* is remarkable for a number of reasons, but principally because it is generally viewed as the case that established the principle of "judicial review," the authority of the Supreme Court to invalidate a legislative act if it is in conflict with the Constitution. Although *Marbury* was the first Supreme Court decision to declare an Act of Congress unconstitutional, the principle of judicial review had been established previously, in a different context, in the Court's 1796 opinion in *Ware v. Hylton*.

Coincidentally, *Ware* was the only case that John Marshall ever argued in the Supreme Court, and he lost. I cannot believe that the fact that Marshall lost *Ware* explains his failure to cite to it in *Marbury*. I have speculated on that omission for some time, but the only explanation that suggests itself is that *Ware* was factually distinguishable, in that *Ware* struck down a *state* statute on the grounds that it conflicted with the 1783 Treaty of Peace between the United States

and Great Britain. The state statute in question--which had been passed when Jefferson was Governor of Virginia at the beginning of the Revolution--called for Virginia debtors to pay debts owed British creditors into a fund, and provided that the impounded funds would be paid to the British creditors when the War was over.

John Marshall, remarkable lawyer that he was, knew very well that the Treaty Clause of the Constitution, like the Constitution itself, was the supreme law of the land, and that any state or federal legislative act that conflicted with the terms of a federal treaty was void. So Marshall avoided the point. Remarkably, Marshall's entire oral argument was taken down in shorthand and has been preserved for history. The substance of Marshall's argument to the Court--which can be found in Professor William Swindler's fine work on Marshall and the Constitution--was that since the debts were incurred and the funding mechanism was created before the Constitution was framed and adopted, the Treaty Clause had no application. It was a good argument but, given Marshall's views on Article III, he could not argue otherwise, because the Treaty Clause is perfectly clear. Marshall lost the case and, in my view, as a judge I think he would have reached the same result that the Court did. It seems curious, however, that he did not cite to *Ware in Marbury*, or at least make some tangential reference to it, for in that time setting aside a state law was, in the minds of many people, more serious than setting aside a law passed by the Congress.

After *Marbury v. Madison* was decided, Thomas Jefferson referred to the Supreme Court Justices as "thieves in the night." Curiously, there were times when he seemed to acknowledge that the Supreme Court held the power of judicial review over legislative action, but he did not agree with that idea if it threatened to obstruct something he wanted done. In the 17,000 or more letters that Jefferson left to posterity, there is no real explanation for his view of judicial supremacy. Many scholarly works have exhaustively reviewed all of Jefferson's letters, yet there is no explanation of why Jefferson was so bitter toward the Supreme Court. Possibly it was because, although Jefferson did not love England, he was an admirer of the parliamentary system, and he espoused the idea that the hardy yeomen of America, not six or nine non-elected Justices, should run the country. It deserves mention that Marshall went out of his way to scold--even excoriate--Jefferson's petty handling of Marbury's commission. But here we see Marshall the teacher -- although not yet the sophisticated teacher of later years.

Jefferson's close friend and recognized spokesman, William Branch Giles, was a member of the U. S. House of Representatives from Virginia and later became a member of Senate. He wrote:

*Judges ought not be independent of the coordinate branches of the government but should be so far subservient as to harmonize with them in all the great measures before the country.*

In other words, the Supreme Court was supposed to do what the President and the Congress told the Justices to do. In one letter written in 1801--two years before *Marbury-Giles* said to Jefferson:

*It appears to me that the only check upon the judiciary system as it is now organized and filled is the removal of all its executive officers indiscriminately.*

Of course, men close to Virginia politics knew that John Marshall had made his position clear on this subject long before anyone thought of his being a member of the Judiciary. As a young man still in his thirties at the Virginia Ratification Convention in 1788, Marshall responded in debate to Patrick Henry's opposition for a strong Judiciary saying:

*To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?*

Marshall's view was the prevailing view among lawyers of that day. Indeed, even Thomas Jefferson's favorite judge, Spencer Roane, the Chief Justice of Virginia, whom Jefferson likely would have appointed as Chief Justice had the opportunity arisen, held a Virginia statute unconstitutional on the grounds that it conflicted with the Virginia Constitution.

The record is clear that Jefferson wanted to destroy or at least curtail the independence of the federal courts, but he decided to go about it gradually. In 1800, there were only thirteen federal district judges in the country, one for each State, and the six Justices of the Supreme Court who had to go out on circuit trying cases and hearing appeals. John Pickering, the District Judge from New Hampshire, suffered from poor health, exacerbated by his excess use of spirits. He had not done any work or shown up at his court a long time, and was obviously not fit to carry on the work of a federal judge. In that day, however, there was no provision for the retirement of federal judges for medical reasons. Pickering was impeached by the House in the morning under the guidance of William Branch Giles, Jefferson's close associate, and the Senate trial was conducted in the afternoon. Pickering made no appearance **in** person or by counsel,

and put in no defense. He was swiftly convicted and removed from office.

It is accepted by many historians that a major purpose of the Pickering impeachment proceedings was to condition the American mind to the idea that "lifetime" federal judges were not really appointed for life, but only "during good behavior," and could be removed from office for something less than "high crimes and misdemeanors." Congress can hardly be faulted for removing a judge whose health prevented him from performing his duties, but the use of the impeachment process in this manner set a pattern.

Jefferson's next step was use the impeachment process against a Supreme Court Justice. This time, Jefferson selected another somewhat vulnerable member of the Judiciary, Justice Samuel Chase of Maryland. Chase was a very able lawyer who had signed the Declaration of Independence and had been a member of the Continental Congress, but as a Justice he was somewhat injudicious, especially when riding circuit hearing cases as a trial or appellate judge. He lacked judicial temperament and, while riding circuit, he mistreated lawyers, especially, it was said, Jeffersonian lawyers. None of Chase's conduct really amounted to high crimes and misdemeanors sufficient to support an impeachment, but Jefferson was out to make a point.

Some of the great lawyers of that day, and there were many great ones, saw the impeachment of Chase as an attack on judicial independence, not just on Chase. They viewed the proceedings as the second step in a plan to subjugate the Judiciary, and they believed that the third step would be an attempt at removal of Chief Justice John Marshall--indeed, this is what Marshall and other members of the Supreme Court thought. Accordingly, some of the ablest lawyers of the day got together and defended Chase and he was acquitted by a narrow margin. John Marshall and his brother Thomas Marshall were witnesses on behalf of Chase. Here was one time in his career when John Marshall was subject to criticism by his peers. He testified so mildly and meekly and in such a tentative way that his own brother criticized him. He would answer questions by saying "I don't respond to hypothetical questions," or "I was not there, I cannot respond." Marshall's performance during Chase's trial was not important in the long run, but it is interesting to note that these great men--Jefferson and Marshall--showed weakness at times.

At the end of Jefferson's first term in office, Jefferson did not want any part of Aaron Burr in his administration, and it is reasonable to assume that Burr did not want any part of being Vice-President. Jefferson had totally ignored him during the early years and the only time he got any attention was when he presided over the Senate impeachment trial of Justice Chase. Interestingly, while Burr was presiding over the trial of a Supreme Court Justice, he was under indictment for murder in New York and New Jersey as a result of his duel with Alexander

Hamilton. Duelling was against the law in those states. Even Burr's critics conceded, however, that he presided fairly in the Chase trial, uninfluenced by Jefferson's sudden flood of patronage.

We turn to Burr now. He was a very astute politician, an extraordinary lawyer, very successful in his own career. He had been Attorney General of New York, Senator from New York and then Vice President. With nothing to do after 1804, his fertile mind turned to ideas about the development of the West. First he explored ideas with various American leaders and then he went off to Europe, ostensibly to get financing. None of the chiefs of state in the countries of Europe would see him, but he encountered other leaders in the countries of Europe exploring ideas for financial support for expansion and development of our West.

When he returned to the United States he went out West and Jefferson, who was always suspicious of him, finally ordered General James Wilkinson, the military commander of the western territory, to check up on Burr and follow him. Wilkinson did that and sent regular reports to Jefferson. There are about twenty or more pages in Professor William Swindler's book on Marshall and the Constitution covering Wilkinson's reports on Burr's activities.

Burr had assembled up to 100 men, and they had supplies and flat boats coming down from Pittsburgh, ultimately into the Mississippi. Wilkinson's reports led Jefferson to send a series of messages to Congress. In that day they did not have press releases and press conferences, but Jefferson's messages were filled with very damaging accusations against Burr. There was a proclamation in 1806 saying that Burr and a group of people were "conspiring and confederating" together to plan an invasion of Mexico, and that this was a "criminal enterprise." Rumors circulated of Burr's aspirations to become "conqueror" of the Southwest territory. Jefferson's formal message to Congress recited that Burr's group was "organized and officered by people with military background," and he called upon all officers of the government and all judges to watch out for Burr and take him into custody.

There is page after page of that kind of language in Jefferson's messages to Congress. The essence of it was that Burr was a traitor and should be hanged. Jefferson was talking about his former Vice-President, a man who served as a colonel on George Washington's staff in the Revolution, and who served in the United States Senate. Then, acting on the basis of the information he had received and his messages to Congress, Jefferson had the United States attorneys in one of the districts in the South try to get an indictment against Burr. A grand jury heard the evidence against Burr but refused to return an indictment on the grounds that the evidence did not warrant such action. Jefferson then went to another district and the grand jury said the same thing, "not enough evidence." Then the military arrested Burr and brought him back in chains to Virginia and in Richmond he was hauled before the grand jury again.

In those days, John Marshall, like the other Justices, was trying cases and overseeing grand juries as well as sitting on temporary courts of appeals. Grand jury hearings on Burr went on for weeks with Marshall presiding. The record of the Burr case would be almost as large as Professor Swindler's entire book. Here was John Marshall, not only the judge, but John Marshall the jurist-statesman and John Marshall the teacher. He moved very slowly. It was very difficult to find people to sit on the grand jury because of the campaign against Burr that Jefferson had waged for months in Congress and in the press. For months the country had been saturated with messages and reports that Burr was a traitor, a treasonous plotter, and a criminal. However, they finally got a grand jury and the grand jury did indict. Then it went to a jury of 12 for a trial on charges of treason and, again, it was very difficult to get a jury that had not heard much about the claims and had no fixed opinions. But they finally secured a jury to try the case. Then the Constitution came into play, and John Marshall instructed the jury on the Treason Clause, which provides that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court." The history of the Treason Clause begins in England where it had been rather easy in earlier times for the Kings to secure a treason conviction against some fellow who was not keeping in step politically. Only one witness for the prosecution was enough. Our delegates at Philadelphia were very conscious of this.

In Burr's case, there was some evidence of overt acts that might look like treason, or at least a plan to commit treason. There were some overt acts that might suggest some people were preparing to get into armed activities with Mexico. But the fact they all had guns was of course no evidence of treason. In those days people did not go ten miles out of Richmond or Charleston without a gun, either to get a deer, or turkey or pheasant, or simply to protect themselves from highwaymen or roving Indians. Marshall was precise and clear in his jury instructions, especially on the constitutional requirement that there be two witnesses to the same overt act. And there was no such evidence. During the trial, Burr, the lawyer that he was, said that he wanted to see all of General Wilkinson's reports. As it turned out, Jefferson and his people did not want to call Wilkinson as a witness, but Marshall granted Burr's request and Marshall reviewed the reports. When they got through cross-examining General Wilkinson there was no reputation left in that man. He was torn to shreds as a falsifier and there was nothing left of his credibility. In response to Burr's request to see the military reports, Jefferson at first objected and argued that the reports could not be released because they were reports from a military commander to the Commander-in-Chief, and that such release would pose a threat to national interest. Jefferson was asserting what we call today "executive privilege." Marshall responded

stating that he would decide whether there was anything in the reports that might endanger the national interest. The first reports that Jefferson sent in, over objection, had what we would call today asterisks and Marshall wanted to know what "these things were." "Omissions."

"Omissions by whom?" By the President in the national interest. Marshall then said he would look at all the omitted material *in camera* and decide on its admissibility. By that time, Burr and his very brilliant set of lawyers had milked the issue for all it was worth; General Wilkinson, the major witness against him, had been torn to shreds, and the jury acquitted Burr.

In Washington, or perhaps Monticello, wherever Jefferson was, he raged, saying John Marshall had directed a verdict in favor of Burr. But no one could seriously think that Marshall was biased in favor of Burr. Marshall's close friend and wartime and political comrade, Alexander Hamilton, had been killed by Burr in a duel. Indeed, Burr would have had a reasonable basis to challenge Marshall's impartiality in the case because of his friendship with Hamilton.

But when we look at these three remarkable men, Thomas Jefferson was an aristocrat with a huge plantation, who wrote eloquently about the dignity of every human being while he was farming his vast estate with two or three hundred slaves. He was on record against slavery in principle, but he was locked in along with the others in the South. The plantation economy was locked in with slavery; it was pretty difficult to get away from it. But when you think of his conduct, particularly his statements about the Supreme Court and judicial independence, his conduct in the Burr case, it's a far jump, but one I am willing to make. Jefferson's conduct there was reminiscent of the late unlamented Senator Joseph McCarthy from Wisconsin. McCarthy did not send messages to Congress as devastating as the messages Jefferson sent regarding Burr, but his technique was the same. In reality, Jefferson's conduct was even worse than McCarthy's, because what he said and wrote carried more weight with the people than the words of one United States Senator.

John Marshall was one of 14 children who grew up in the backwoods. He had a tutor who moved around and lived with families in those days. And then for one year he lived at a tutor's home with a number of students. While Jefferson's scholarly attainments, and they were very great, are often commented on, we have all tended to overlook that John Marshall read the great works in Latin and Greek but he never made a point of this. In those days there were no law schools. He studied law privately and spent only a few months at the College of William and Mary in Williamsburg under the great teacher George Wythe. He left when he was 26 to marry Polly Ambler who was 17. They in turn had six or seven children. It was never attributed to Jefferson himself, but some of his entourage said that Marshall was a backwoods bumpkin

country lawyer. He in-deed came from the backwoods, but "country bumpkin lawyer" hardly fits the mind that we see in those monumental opinions of his. One of the least unfavorable things that Jefferson said about Marshall was, and it was really an unconscious compliment, was that "whenever I talk to John Marshall I am very careful." If you concede his first premise, no matter how innocuous or innocent, "you are lost." He didn't put it quite that way, but he said you find at the end of a conversation with Marshall that you have agreed to something that you don't agree with at the start. Pretty good compliment.

Now, as to Burr, what would have happened if he had done a little campaigning and been elected President? He might have been a great President. He was a man of extraordinary political skills and experience, an extraordinarily able lawyer; in that sense in the same class with Marshall and Jefferson. A man eager to do something to expand the country, a true activist. He, like Jefferson, would have been in favor of carrying out the Louisiana Purchase, even though Jefferson himself acknowledged that the Louisiana Purchase was an unlawful act. In one of his letters responding to criticism about the Louisiana Purchase, Jefferson said that "there are times when a leader must rise above the law in the overall national interest." Burr would have done the same. We wouldn't want that as a general rule, but Franklin Roosevelt had to do much the same to carry out the Lend Lease program, and he probably saved England and thereby saved the whole world from a lot worse.

So as we look at these men with all of their talents and virtues, and some flaws, the conclusion I have long since reached is in the form of a question. Who would want to be governed by angels and judged by saints?

For my part, I will let the angels and saints stick to their regular jobs.



## ***The Judicial Bookshelf***

### **D. Grier Stephenson, Jr.**

As scholars assess developments in American constitutional government a half century or even a full century hence, they will look back to the extraordinarily rich and varied writings of those who preceded them. This is the opportunity afforded today's students as well. One's insights into a particular period are enhanced by those who wrote at another time.

Consider *Popular Government*, a collection of four essays written barely more than a century ago by the English legal historian Sir Henry Sumner Maine,[1] who wrote approximately halfway between establishment of government under the Constitution and our own time. For the contemporary reader who looks at the volume from a distance of 106 years, his treatment of the judiciary contains both the familiar and the unfamiliar--the Court of today as well as the Court of yesterday. Then as now, one sees an institution beset by the tension posed in the American political system between popular sovereignty and limited government, between "government by the people" and legal restraints on the people's government. The tension is the hallmark of a government founded on both the consent of the governed and the expectation, in Justice Jackson's words, "that we submit ourselves to rulers only if under rules." [2]

In Maine's British-based observations on the American political system fifteen years before the turn of the twentieth century, the Supreme Court "was not only a most interesting but a virtually unique creation of the founders of the Constitution." In his view, the division of policy-making authority between the President and Congress, the concept of a national government of limited powers, and the existence of the states meant that the political system needed an institution both to expound the Constitution and to clarify the boundaries of political authority. For Maine, judicial review was essential to American government. "The success of this experiment [judicial review] has blinded men to its novelty," Maine wrote. "There is no exact precedent for it, either in the ancient or in the modern world." The Court's constitutional role was the product of "the unsatisfactory condition of English Constitutional law [at the time of the American Revolution], and of its many grave and dangerous uncertainties." The Framers wanted to avoid "a system under which legal questions were debated with the utmost acrimony, but hardly ever solved...." [3]

Yet there are sharp contrasts between the Court Maine knew and the Court of today. Maine wrote at a time when the Court was chiefly a supreme court of errors. Constitutional

issues still accounted for a small part of the Court's business. In 1875, for example, they occupied only about six percent of the docket, compared to about half the docket a century later. It was not until six years after publication of *Popular Government* that Congress created the Circuit Courts of Appeals in 1891, the first true and lasting intermediate appellate bodies in the federal judicial system. With introduction of some certiorari jurisdiction (to be greatly expanded in 1925) and a soon-to-be-enlarged corpus of federal legislation (being in Congress in Maine's day was very much a part time job), a different role for the Court could emerge. In contrast to the docket of the nineteenth century, public law in both its constitutional and statutory forms now consumes the Court's time. Moving beyond its dispute-resolution role, the Court has become mainly a maker of public policy for uniform application across the nation.

Maine also wrote before a sizeable fraction of the constitutional cases which did arise involved the Bill of Rights. The dominant conception of the Bill of Rights in the late nineteenth century may well have had more in common with the late eighteenth century than with the late twentieth century. For Maine, the Bill of Rights consisted of "a certain number of amendments on comparatively unimportant points."<sup>[4]</sup> Although he does not elaborate, one suspects that by "comparatively unimportant" he meant unimportant judicially--that they had not become a common source of federal litigation. That could not happen to any significant degree without two occurrences: first, the provisions of the Bill of Rights would have to be applied to the states through the Fourteenth Amendment (given the large place, relative to the national government, state and local governments had in the lives of their citizens). This extension had not yet begun in 1885. Indeed, only the year before in *Hurtado v. California*<sup>[5]</sup> the Supreme Court placed a seemingly immovable barrier in its way. Moreover, the Fourteenth Amendment as well as the other two Civil War amendments seemed to Maine, with one notable exception, to have had little impact. "[A]t the present moment the working of the Constitution of the United States does not, save for the disappearance of negro slavery, differ from the mode of its operation before the civil convulsion of 1861-65."<sup>[6]</sup>

Second, Americans would have to re-think the purpose of a bill of rights in a democratic government. The idea of a bill of rights was hardly unique to Americans. Bills of rights in the earliest state constitutions and the federal Bill of Rights were themselves offshoots of English constitutional documents such as the Petition of Right of 1628 and the Bill of Rights of 1689. But the onset of democratic government ultimately brought a radical change in the nature of bills of rights. Before, a bill of rights was a mainly hortatory device to protect the majority ("the people") from the minority (the Crown, for instance), the many from the few. Though rights were proclaimed, no practical enforcement mechanism existed. Later, with political power lodged in

the hands of a majority of those admitted into the political community, bills of rights and constitutional limitations were transformed into devices to protect the few from the many. Because of majoritarianism, protection would not reliably come from the legislature, where "the many" would prevail. Protection would have to come from the courts. Liberty would have to become a juridical concept. Some had glimpsed the beginning of this transformation a century before Maine. James Madison, in his correspondence with Thomas Jefferson over the desirability of a federal bill of rights had observed, "Wherever the real power in a Government lies, there is the danger of oppression." In reply, Jefferson asserted:

*In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hand of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.[7]*

Change thus overtakes research and is ever the threat to one's certainties and conclusions. Maine's depiction of the Court has to be understood in the light of events he could not foresee, events that have become the scholarly grist for others.

Recent books are ample evidence that attention to what Maine called an "interesting" and "virtually unique creation" continues at a quick pace. For books about the Court, a useful framework of analysis consists of at least five elements: the political and intellectual environment, personnel, past, process, and product. The first refers to the governmental and social systems in which the Court operates. The second includes individual Justices. The third encompasses the nation's history, as well as the vast body of judicial decisions from prior eras. The fourth points to the manner in which the Court arrives at its decisions. The last consists of the Court's current and recent decisions--the end result of the decision making process--as well as their acceptance and implementation. Each of these elements finds expression in varying degrees in the books surveyed here.[8]

### ***Political and Intellectual Environment***

The Constitution entrusts the composition of the Supreme Court, as well as the lower federal courts, to both the President and the Senate. The choice of the former requires the

consent of the latter. It is therefore not surprising to discover that the process designed, in Madison's words, to give the nation a "bench happily filled" has become at heart political-- "political" both in the narrow (meaning partisan) and broad (meaning affecting the allocation of power and influence) senses of that word. That partisan considerations rather than the fitness of nominees would often be the Senate's controlling consideration would surprise most members of the Founders' generation, except for a few who, like John Adams, visualized clearly the rise of political parties.[9]

Senatorial approval is usually forthcoming, but not always. Through 1991, 106 individuals have served on the Court, including Justice Thurgood Marshall's replacement.[10] Of all the nominations to the Court Presidents have submitted to the Senate, 26 have been rejected or withdrawn or have otherwise failed to pass. By contrast, the Senate has blocked only nine nominations to the Cabinet since 1789. Senators therefore view their constitutional obligation to give "advice and consent" as entailing greater scrutiny and more independence with Justices than with heads of executive departments. Enhanced attention to the former is explained by the Court's place in the political system, life tenure, and the fact that the Court, unlike the Cabinet, is outside the executive branch.

Yet scrutiny by the Senate has not been even. Most of the instances when a Supreme Court nominee failed to win approval occurred in the nineteenth century. From 1900 through Justice Thomas's confirmation in 1991, Presidents sent 58 names to the Senate. Of these, only five (John Parker, Abe Fortas, Clement Haynsworth, Harrold Carswell, and Robert Bork (Douglas Ginsburg withdrew his name before President Reagan got around to sending the formal nomination to the Senate)) were unsuccessful. The remaining 20 unsuccessful nominations all date from the nineteenth century, save John Rutledge's as Chief Justice in 1795. Indeed, from the rejection of Wheeler Peck-ham in 1894 until President Johnson's selection of Associate Justice Fortas to succeed Earl Warren as Chief Justice in 1968--a period of 74 years--the Senate failed to act favorably on only one nomination to the Court: Judge Parker's in 1930. These figures should not suggest that the remaining appointments encountered no substantial opposition. A few did, including President Wilson's appointment of Louis D. Brandeis in 1916. But the Senate's generally relaxed scrutiny after 1894 understandably led one Court-watcher to observe in 1965 that future rejections would be unlikely.[11] Perhaps the Seventeenth Amendment, ratified in 1913 and providing for the popular election of United States Senators, removed at least for a time some of the basis for political differences between the President and the Senate.

Changed circumstances negated such predictions. Within less than two years from 1968,

three nominations failed in the Senate. This turn of events presents the question John Massaro attempts to answer in *Supremely Political*--"why the United States Senate periodically rediscovers its power of advice and consent and refuses to confirm a nominee to the high court." [12]

To answer this question, Massaro considers the Fortas, Haynsworth, and Carswell nominations not in isolation but in the context of past nominations, both the majority that succeeded and the minority that did not. (There is also a chapter on the difficulty President Reagan had in filling the seat vacated in 1987 by Justice Powell.) Specifically, Massaro wants to know whether the cases of Fortas, Haynsworth, and Carswell are "separate, idiosyncratic events" or whether they "reflect a discernible pattern of factors associated with unsuccessful nominations." [13] Ironically, of these three troubled nominations, the latter two came about only as a result of the resignation of Fortas as Associate Justice in the spring of 1969, following the Senate's refusal to approve his promotion to the center chair the previous fall and the revelation in *Life* of Fortas's financial relationship with Louis E. Wolfson. [14]

For Massaro the key factors in determining whether a nomination fails or succeeds are the nominee's ideology (as perceived by the Senate), timing, and presidential management. Ideology includes the views and political outlook of the nominee. Timing refers to the months remaining in a President's term. (The timing is "bad" if that number is twelve or fewer.) However, the concept of timing might also be enlarged to include events occurring coincidentally with the nomination which work for or against the President's having his way. Presidential management, the third factor, must be considered because the Constitution gives to the executive the sole authority to decide whom the Senate will be asked to approve. For this reason, Massaro thinks of the President as having "ultimate accountability" for assuring Senate confirmation, even though the president's wishes are hardly the only ones that matter.

Presidential management includes in turn two distinct stages: pre-nomination and post-nomination. During the former, the President directs the screening process to obtain complete information on all candidates for the vacancy and then selects someone confirmable by the Senate. During the latter, the President oversees the carrying out of a strategy to gain confirmation and takes care "that positive relationships are generally maintained with senators to provide the most favorable atmosphere possible for the nomination during the Senate's deliberations." [15]

Massaro believes that presidential management may well be the most important factor when either of the other two is unfavorable. He arrives at this position by examining the impact of the other two factors, ideology and timing. Among previous nominations, where a majority of

the Senators and the President were of different parties (which presents *a prima facie* case for an ideological division between the Senate and the President), or where the nomination was forwarded to the Senate in the last full year of a President's term (a problem in timing), the rate of refusal is 19 percent. If neither condition is present, the rate of refusal is only 10 percent. If both conditions are present, the rate is an astonishing 71 percent.[16]

With the Fortas, Haynsworth, and Carswell nominations, only one of the two detracting conditions was present in each. With Fortas, although President Johnson, a Democrat, faced a Senate firmly in Democratic control, Chief Justice Warren's announcement to retire occurred in the last year of his term and after he had informed the nation dramatically in March that he would not seek renomination for a second full term. Although the Haynsworth and Carswell nominations fell early in President Nixon's first term (and so presented no timing difficulty), the Republican President had to deal with a Democratic Senate. Ordinarily, for each of the three, the odds would still have favored confirmation. The key to the failure of all three lies in "an appreciation of the roles Presidents Johnson and Nixon played in these defeats. Both Presidents failed to exercise the astute management called for in attempting to gain Senate approval...."[17] To a large degree, Massaro explains the defeat of Robert Bork in the same way.

With Haynsworth, whose ordeal began when Fortas's ended, the problem was the inability to sever the "Fortas-Haynsworth connection"--the ethical doubts that swirled around Haynsworth just as they had about Fortas. The White House staff could not make a "credible" distinction between the two in order to shore up support for Haynsworth, especially among Senators already troubled on ideological grounds. From an analysis of pertinent documents, Massaro shows that Bryce Harlow had recommended that Haynsworth be encouraged to withdraw his name when it became apparent that the connection with Fortas could not be erased.[18]

The connection with Fortas was critical in another way too: it buttressed the tendency of Fortas's own supporters to vote "no" on Haynsworth. This is what Rowland Evans and Robert Novak called the "post-Fortas lust for revenge among Democratic senators." [19]

Indeed, the volume's strength is its consideration of presidential management. This is also a weakness, since the scope of the factor may be too broad to be entirely useful. Since presidential management encompasses so vast an expanse of decisions and oversight, almost any negative result can be attributed to it. In the end, if the Senate rejects a nominee, one could always contend that, had the President picked someone else (an act of management), the outcome would have been different. Nonetheless, by focusing attention on the President's role from start to finish, Massaro leaves the accurate impression that confirmation is so important and

politically sensitive a post as Supreme Court Justice rarely 'just happens.' It is the product of careful planning and execution, and (as most Presidents discover) good luck.

The Haynsworth nomination is the subject of another book which appeared shortly after Massaro's: *Clement Haynsworth. the Senate. and the Supreme Court* by John P. Frank, with a foreword by Justice Lewis F. Powell. Like Massaro's, Frank's work devotes space to the Carswell nomination. Unlike Massaro's, Frank's begins not with Johnson's nomination of Fortas to be Chief Justice but with Fortas's resignation, it reviews Nixon's successful nomination of Judge Harry A. Blackmun, and it refers to the Bork nomination only in passing.

John Frank is no newcomer to the study of the Supreme Court. Once a clerk to Justice Hugo L. Black, Frank has written widely on the Court and on individual Justices.[20] Of particular relevance to the Haynsworth matter are articles Frank wrote on judicial appointments and judicial disqualification in 1941 and 1947, respectively.[21] His latest book is a significant addition to the literature on the political setting of Supreme Court nominations. Not only was Frank a participant in the Haynsworth hearings (he testified on the conflict-of-interest issue), but he was able to gain access to some hitherto confidential documents. For example, Frank made use of a lengthy oral history dictated by Haynsworth containing his own impressions of the nomination,[22] the Haynsworth Papers at Furman University, memoranda from the Department of Justice (including some written by then Assistant Attorney General William Rehnquist) which Frank acquired through the Freedom of Information Act, an interview with former Attorney General John Mitchell, the Earl Warren Papers at the Library of Congress, as well as other papers and interviews. While the book contains no startling revelations, these sources allowed Frank to provide information not available to others such as Robert Shogan and Richard Harris who also wrote helpful books on this period of Court history.[23]

Unlike Massaro, Frank does not believe that errors in "presidential management" (to use the former's term) contributed significantly to Haynsworth's defeat, that is, unless one decides that the selection of Haynsworth was flawed from the start.

*Haynsworth knew that a number of senators were called from the White House or in some instances by the president himself and that the president really worked at getting Haynsworth confirmed. Harry Haynsworth [Judge Haynsworth's cousin and principal adviser during the confirmation proceedings] was present at frequent meetings with the attorney general, who was directly involved on a day-to-day basis. Any suggestion that the administration was not putting its full power into it,*

*from Harry's personal observation and knowledge, was simply unwarranted.[24]*

A bigger factor was bad luck. Haynsworth's chances for confirmation were dearly hurt when Senator Everett Dirksen, the Republican minority leader, died on September 7, only three weeks after Nixon's announcement of the nomination. Senator Hugh Scott, who replaced Dirksen, and Senator Robert Griffin, the assistant Republican leader, voted against him.

Haynsworth's undoing also stemmed from what Massaro would call ideology. Given the Nixon administration's position on issues and the so-called "Southern strategy" (by which the Republican party hoped to appeal to disaffected white Southern Democrats), Haynsworth was a logical choice. "If the...administration had wanted to choose a judge zealous for civil rights, it certainly would not have chosen Haynsworth. If it wished to choose a judge temperate on civil rights, it might well have chosen him." [25] With civil rights and labor organizations opposed to Haynsworth, these groups could make their views known to Senators from those states in which their memberships counted the most. There, Haynsworth's confirmation became a local issue.

Ideology alone or combined with the hard feelings on the Fortas resignation, however, would probably have been insufficient, Frank believes. The opposition needed Republican Senators to go over the fifty-vote line, many of whom were less likely to be affected by the ideological concerns of labor and civil rights groups. Birch Bayh, the leader of the opposition to Haynsworth in the Senate, therefore looked for another way to block the nomination. "From the standpoint of one wishing to defeat a major nomination, his tactics were flawless. First and foremost, he raised the doubts, and then he kept them alive." And the doubts were about Haynsworth's participation in the Darlington and Brunswick cases where, arguably, he should have disqualified himself.

*The very labeling of subtle questions of disqualification as "ethical problem "s was half the battle. The Haynsworth episodes were basically practical problems of judicial administration that could be resolved one way or another. While there are preferred ways of dealing with them, and they are to a degree ethical as well as practical, by the time Bayh was finished with them, they were exclusively ethical questions, and he was halfway home.[26]*

And doubts about ethics had been central to the calls for Justice Fortas's resignation. As



with Fortas, Frank believes, a frontal assault would not work, "so recourse had to be taken to character assassination." [27] Doubts over ethics made it easy for those with ideological doubts to engage in "political retaliation, a sort of legislative murder [of Haynsworth] in response to an executive assassination [of Fortas]," given their bitter memories of Fortas's resignation a few months earlier.

Frank believes that the Senate treated Haynsworth shabbily, a view that does not derive from agreement with Haynsworth's constitutional views.

*Had I been elected president in 1968..., I would have made none of these appointments, and had I been attorney general in 1969,... I would not have participated in forcing Justice Fortas off the Court. Perhaps one can achieve some objectivity through earnest regret at the series of events.*

Frank considers the Clement F. Haynsworth, Jr., Federal Building in Greenville, South Carolina (Haynsworth's home town) to be "an extraordinary but unanimous apology in stone from the Congress of the United States for having traduced the character of a good man." [28]

Accordingly, Frank seems to prefer, within limits one supposes, a role for the Senate in confirmation proceedings which stresses "only the quality of a Court nominee," a measure which he acknowledges comes from "a world in which we once lived but do not now." But he also notes that Supreme Court judging may have become "too important to be left to the merely professionally able." [29] Republicans and Democrats have occupied both sides of this issue during the last 25 years, but never the same side at the same time.

As noted, prior to the defeat of Judge Haynsworth, the only previous nomination to the Court in the twentieth century to fail in the Senate was Judge John J. Parker's in 1930. The struggle over his nomination is the subject of *The NAACP Comes of Age* by Kenneth W. Goings. [30]

The title accurately portrays the theme of the book. For Goings, the most important result of the opposition by the National Association for the Advancement of Colored People to Parker was not his defeat but the impact on the organization itself. First, because the NAACP had recently suffered a major lobbying embarrassment when the Dyer Anti-Lynching bill failed to pass Congress, the successful campaign against Parker reinvigorated the NAACP and solidified "the position of the organization in the eyes of black and white America." Second, members of the NAACP "received valuable experience in lobbying and organizing that helped make future successes possible." Third, the successful injection of race into the confirmation

deliberations marked one of the first times since Reconstruction, Goings believes, that race became an issue in national politics.[31] The book is therefore as much a study in the evolution of an interest group as an examination of Parker's confirmation.

In light of Massaro's emphasis on presidential management, the "why-Parker?" question arises. Goings offers little explanation other than suggesting (he calls it "a hint of an answer") that Parker suited President Hoover's purposes. First, a southerner would be replacing a southerner. Parker was a North Carolinian and would fill the vacancy created by the death of Justice Edward Terry Sanford of Tennessee.[32] Second, "the Republican party viewed [Parker] as a valuable component in its plans to build a lily-white party in the South to challenge the lily-white Democrats." [33]

It is entirely possible that had these been Hoover's only motivations and had the only opposition to Parker come from the NAACP, he would have been easily confirmed. But another way of looking at the Parker fight is in the wake of Hoover's nomination of Charles Evans Hughes as Chief Justice only three months before. While the Senate approved Hughes, few anticipated the depth of the opposition that would develop. The debate was so caustic that the 26 negative votes (with 18 Senators not voting) seemed almost anti-climactic. (One of the negative votes was cast by Senator Hugo Black of Alabama, who would join the Hughes Court seven years later. Black also voted against Parker.) [34] Senator Robert LaFollette had said, "We are put upon notice by the action of the Supreme Court itself that in passing upon the nominations of members of that court we are filling the jury box which ultimately will decide whether there is to be effective regulation and control of the great organizations of capital in the United States." [35] In choosing Hughes and then Parker, Hoover was "foreshadowing the 1936 impasse between Court and Congress, as well as F.D.R.'s crusade of 1937 to bring the judiciary into line with the basic necessities of the modern state." [36] In short, Parker was viewed ideologically by Republican insurgents and Democratic liberals as being insufficiently progressive on labor and other matters, given the urgencies of the day. The campaign which had warmed up on Hughes was able, barely able, to push Parker aside, with 49 votes cast or paired against him on May 7.

Goings hints that Hoover may have had some reason to question Parker's professional qualifications. Parker apparently had been considered for Attorney General the previous year, and Hoover asked Justice Harlan Stone for an assessment. Goings reports that, in Stone's view, his appointment to the court of appeals during the Coolidge administration had been a "surprise" but that his work had been received favorably. Goings then reprints the following part of Stone's assessment:

*I should say that he does not possess the intellectual acuteness or range of legal knowledge of the present Solicitor General for example. His political experience and contacts might favor approaches that could be well dispensed with in the public service.... My doubt would be as to his organizing and administrative capacity and whether he would have that success of judgment and keenness of perception which would save him from having things put over him.[37]*

However, in a sentence Goings does not include, Stone also stated, "He is a man of vigorous, attractive personality, is said to try cases very well and, on the whole, made a favorable impression on me as a man of character and ability." [38] William D. Mitchell, the Solicitor General, received the appointment instead of Parker. In fact, whatever doubts Stone may have had about Parker's suitability to be Attorney General would not necessarily carry over to his suitability to be an Associate Justice of the Supreme Court. The qualities desired in the two positions are not entirely the same.

Significantly, perhaps, Stone later went out of his way to express to Parker his unhappiness with the treatment he received in the Senate on his Supreme Court nomination.

*I don't know of anything that gives less satisfaction than a letter such as I am writing now. Yet I don't feel like going away for the summer holiday without letting you know how sorry I am that you received the treatment, at the hands of the Senate, which you did. It was an unhappy combination of circumstances which brought about the result.... But you have the consolation of knowing that what the Senate does or fails to do cannot affect your capacity to do good judicial work, and to increase the good reputation which you have established as a Judge.[39]*

Stone had already written his sons that Parker was "the unfortunate victim of the circumstances which have developed this issue, for he is really a very decent sort of a chap." [40]

Stone may have been somewhat sensitive about his relationship with Parker. When a gossip book about the Court was published in 1936, the authors asserted, "When Justice Sanford died, Stone had warned Hoover against the appointment of John J. Parker...." [41] As Stone wrote Parker in January 1937,

*The impression created is that I was opposed to [the nomination], which is quite a mistaken one. It is true that I warned him that there might be opposition of the character which afterward developed in the hope that he would take precautionary measures to forestall it. I have always thought if that had been done that the outcome might have been different. Having had some experience with the difficulties of judicial decisions on labor problems I perhaps appreciated it more than others.[42]*

Years later, Parker repaid Stone's confidence when he offered a generous assessment of Stone's constitutional jurisprudence.

*[He did not] subscribe to what has been called "judicial automatism," and had no delusions that judicial duty could be performed merely by laying "the article of the Constitution which is invoked beside the statute which is challenged" and deciding "whether the latter squares with the former." Nor did he suffer from the other delusion that the Constitution must be interpreted like a contract with reference to what the framers had in mind at the time. He saw that, with the exception of a few specific provisions, the Constitution was the expression of great general principles of government to be applied to the changing conditions of human society.[43]*

There was irony in Parker's praise of Stone. The words within the second and third pairs of quotation marks were those of Justice Owen J.

Roberts, who was Hoover's safe choice for Sanford's seat after Parker was defeated.

Parker himself held out hopes for another appointment to the high court at a later time, Goings records. In a letter to his brother in late May 1930, he predicted, "I believe that eventually I shall be appointed to the Supreme Court and confirmed." And at least through 1953, his name was put forth for consideration each time a vacancy opened on the Court.[44] Indeed, Goings might have noted that Justice Felix Frankfurter thoroughly researched and evaluated Parker's appeals court opinions at the request of President Franklin Roosevelt in early 1941.[45] Parker's name may have been on a "short list" at the White House to replace Justice James C.

McReynolds. The McReynolds seat, however, went to Senator James F. Byrnes.

Unlike some commentators,[46] Goings does not believe the Senate's rejection of Parker (or the refusal by a later President to nominate him again) was a mistake. The Senate's verdict on his record was accurate. "One wonders if Chief Justice Warren would have been able to get a recalcitrant Parker to agree to a unanimous decision" in *Brown v. Board of Education* in 1954, Goings poses.

*Given Parker's record after Brown, one thinks not. Indeed Parker's feelings on race overwhelmed even the most important tenet of his judicial philosophy--adherence to Supreme Court doctrine. The NAACP had no way of knowing what his decisions would be twenty-five years after the confirmation fight, but Parker's background, his governor campaign, his judicial philosophy, and his political ambitions indicate that in the Association's struggle for change Parker would have been more of a hindrance than a help.[47]*

Being on the winning side in 1930 brought unintended consequences for the NAACP, Goings concludes. It meant that the NAACP was able to energize itself as a major force for political, economic, and social equality, and a significant player in other Senate confirmation conflicts.

Those later conflicts included Judge Robert Bork's nomination to the Supreme Court in 1987, a move opposed in coordinated and unprecedented ways by virtually every civil rights organization in the United States. The conflict over Bork is the subject of Ethan Bronner's *Battle for Justice*,[48] one of several books about an event which will surely tint judicial selection well into the twenty-first century.[49]

Unlike some accounts of the Bork affair, Bronner's comes as close as seems humanly possible to being factual and nonideological in its approach. As a story, it is a marvelous synthesis of an array of decisions, conversations, documents, moves, and counter-moves. It is also an example of excellent journalism. Bronner's sources include the obvious printed materials plus interviews with Judge Bork, members of his family, and others in a position to offer first-hand accounts. Most of the sources are credited by name in the "Acknowledgements."

If one applies the Massaro framework to the replacement of Justice Powell, there was the obvious problem of the ideological difference between the President and the majority of the Senate. Powell retired only six months after the Republican party lost its six-year control of the

Senate--a period during which President Reagan had successfully replaced Justice Stewart with Judge Sandra O'Connor, Chief Justice Burger with Justice Rehnquist, and the latter with Judge Antonin Scalia. A problem of timing also existed, even though Reagan was in his third, not fourth, year of his second term. By mid-1987, the Reagan Presidency had clearly been weakened by disclosures from the Iran-contra affair. Moreover, Attorney General Meese was preoccupied with conflict-of-interest accusations. Success would therefore depend on presidential management, and Bronner's narrative reveals weaknesses in this category.

For example, Bork's supporters gravely underestimated the nature and extent of the opposition to Bork. The nomination had hardly been announced before Senator Edward Kennedy fired one of the opening shots.

*Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only--protector of the individual rights that are the heart of our democracy.[50]*

According to Bronner, Bork and William Ball (White House congressional liaison) thought Kennedy's words were "such a departure from tradition and such a distortion of the nominee's record as to be of no consequence. They shrugged off the speech as the ravings of a desperate politician. Kennedy, they thought, had blown it. They were dangerously wrong in their assessment." [51] The campaign against Bork briefly took on the intensity of the antiwar movement of the late 1960s and early 1970s. Indeed, many of those prepared to "block Bork" had come of age politically at that time.

Second, Bronner believes that Bork did not prepare carefully, or was not properly prepared, for the hearings before the Senate Judiciary Committee. As one supporter confessed, "We had just seen what Ollie North had done, and we figured Bork is a lot smarter. He'll run circles around those guys." That sentiment played into the hands of Bork's foes, since anything less than a stunning performance in committee would work against his chances.

Third, conservative interest groups, the obvious force to counter attacks on Bork from the left, either sat on the sidelines altogether or fell short in marshaling their members. This was

especially important since the grass-roots campaign the public witnessed was largely against the nomination.

Curiously, substantial opposition should have been expected, Bronner maintains, since that had been one of the factors which argued strongly in favor of Scalia's being selected in place of Bork in 1986 when Chief Justice Burger retired.

*The choice of Scalia over Bork in 1986 was a complex political calculation. Rehnquist had been a lone right-wing dissenter during his fifteen years on the Supreme Court. The administration knew his promotion to chief justice would draw intense liberal opposition. To send up Rehnquist with Bork would promote an explosive combination that might place both nominations in jeopardy, despite a Republican majority in the Senate. It would make more sense...to offer a less controversial nominee along with Rehnquist. thereby siphoning off liberal energy toward the future chief justice. The plan worked.[52]*

Bronner is convinced that the effects of the fight against Bork will persist. Hard feelings may have inspired some of the negative campaigning during the 1988 presidential election. Moreover, Presidents will think twice before putting forth Supreme Court nominees who can be characterized as advocating a broad "New Right" agenda. Aside from what Bork might have brought to the Court, Bronner sees a tragic aspect to the defeat in Bork's

*failure to articulate appealingly a concern shared by many: Americans have grown accustomed to letting judges and bureaucrats make difficult social policy choices for them. They seem resigned to allowing courts and government agencies take [sic] responsibility on issues that a self-governing people ought to work out in greater detail through the democratic process.*

This was a message Bronner believes that Bork never conveyed in an understandable and persuasive way--the message that "Americans have relinquished the power of self-definition to the courts." [53]

## ***Personnel***

"The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them." [54] Three Justices, Taft, Black, and Rehnquist--one of a bygone era, one of the modern period, and the third a member of the present Court--are the subjects of recent volumes.

Interest in prominent figures of one day normally persists only if their lives contain meaning for later generations. Some two decades have passed since Justice Hugo Black completed his 34 years of service on the Supreme Court, but his memory endures. Indeed, a study of the modern Supreme Court cannot be undertaken without a thorough understanding of Black's life and work. First, his intellect and legacy have been entwined with American constitutional development at least since President Roosevelt named him to the Bench in 1937. At his death in 1971 Black had served with almost one-third of the total membership of the Supreme Court since 1789. After an expanse of 34 years, it is easy to forget how his appointment at the outset was tarnished by the revelation (after he was sworn in as a Justice) of membership in the Ku Klux Klan and how he seemed so ill prepared for the tasks he faced that Justice Stone asked Professor Felix Frankfurter at the Harvard Law School for help in tutoring the new Justice. [55]

Second, Black was identified with most of the distinguishing characteristics of the Supreme Court during the period in which Hughes, Stone, Vinson, Warren, and Burger were Chief Justices. One outstanding characteristic was the rise to prominence of civil liberties and civil rights as key constitutional issues. Of the 160 cases the Court decided in 1935-1936, for example, only two involved non-property issues in civil rights. By 1960-1961, of the 120 decisions in which opinions were rendered dealt with the subject. That the Justices would become entangled in the most implacable of these questions was not surprising. What distinguished the modern Court was not its involvement but its responses. Black played an important part in the nationalization and standardization of constitutional rights. Few Justices have seen as many of their dissenting positions become the law of the land.

Third, Black articulated a judicial philosophy which provides a useful starting point for any study of the Court and its decisions. His philosophy stood in contrast to that of Felix Frankfurter and, later, John M. Harlan. The divergent approaches reflected in their thinking help to explain the theoretical tensions which continue to beset the Court. Fourth, in some respects Black was not completely *of* the Court he so strongly influenced. If he differed from colleagues such as Frankfurter and Harlan, he also differed from Justices such as William o.



Douglas and William J. Brennan, Jr. He could chastise in the strongest terms the latter Justices' defense of liberties which Black felt had not been revealed with sufficient explicitness in the Constitution. In his dual concern with protecting constitutional liberties and limiting judicial power, one suspects Black would have agreed with Chief Justice Marshall's self-evaluation that he had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required." [56]

As edited by Tony Freyer, who contributed the introductory essay, *Justice Hugo Black and Modern America* [57] is a comprehensive look at Black's life and work on the occasion of the one-hundredth anniversary of his birth in 1886. The contents originally appeared as two special issues of the *Alabama Law Review* in 1985 and 1987. [58] Reprinted in book form, the articles can now enjoy the wide audience they deserve. They supplement at least five earlier symposia on Justice Black published in various law reviews at different intervals of his judicial career.

The book is in two parts, the first covering Black's years in Alabama and the United States Senate (1886-1937), and the second his years on the Supreme Court (1937-1971). Counting Freyer's essay, there are 16 articles in all. Authors include Justices Brennan and Arthur J. Goldberg, plus several scholars who have written their own books on Black: Virginia Van der Veer Hamilton, [59] Irving Dillard, [60] Gerald T. Dunne, [61] and Howard Ball. [62] Norman Redlich's piece is an imaginary interview with Black upon reaching the one hundredth milestone, as inspired by a conversation Redlich had with Black on his eightieth birthday. [63]

One of the most helpful parts of the book is the bibliography prepared by Cherry Lynn Thomas and Jean McCulley Holcomb on Black's Court years. Hardly anything seems to have been omitted. It includes a summary of the Court's holding in each case in which Justice Black wrote the majority opinion, plus a listing of all of Black's separate opinions, concurring and dissenting. Then follow lists of books and articles by and about Black, including lists of reviews of the books in legal and general periodicals. Aside from the perspectives on Black which the essayists present, the bibliography alone justifies publication. It should be the beginning point for anyone venturing into a study of Black. One only wishes it included his Alabama and congressional years as well.

Tinsley E. Yarbrough's *Mr. Justice Black and His Critics* [64] is the product of an interest in Black which spans some 20 years. Although Black's constitutional jurisprudence has long been the focus of scrutiny and criticism, as the bibliography in *Justice Black and Modern America* attests Yarbrough's book is the first exclusively to assess the arguments raised by those who found fault with one or another aspect of Black's opinions.

The criticisms are many. As Yarbrough says, Black's jurisprudence found a ceiling as well

as a floor in the Constitution, an approach which meant that the government sometimes won in contests against the individual and sometimes lost. That approach does not satisfy those who believe that judgments are authoritative and will last only if grounded in a theory of justice. Others accused Black of believing in a mechanical or a self-interpreting Constitution. Sometimes critics said he read too much into the Constitution, especially in his first two decades on the Bench. Later, other critics said that he read too little into the document, or that his method of deciding cases produced arbitrary results.

Yarbrough, for one, believes that "early as well as late in his career, Justice Black was essentially consistent in both his approach to the judge's role and construction of specific constitutional provisions and that his interpretations are generally well grounded in the Constitution's text and history." [65] Still, he insists he has not written an apology for Black, but has simply turned the tables on the critics--to assess their own assessments. Whether one accepts Yarbrough's analysis of Justice Black's critics, one thing is certain: probably in no other single book is there a more readable and thorough analysis of Black as a constitutional positivist.

To understand the critics, one must first understand the subject of criticism. The volume contains a systematic review of Black's thinking on the "total" incorporation of the Bill of Rights into the Fourteenth Amendment, a hallmark of Black's public thinking at least since *Adamson v. California*, and his private thinking as early as 1939. [66] Contrary to the prevailing understanding of Black, Yarbrough concludes that Black found the source of the incorporation not in the due process clause, but in the moribund privileges and immunities clause of the Fourteenth Amendment. There is also an extensive review of Black's absolutist approach to the guarantees of the First Amendment, his more restrictive construction of the equal protection clause of the Fourteenth Amendment, and his flexible approach to the Fourth Amendment's protections against "unreasonable searches and seizures."

Since Black, as a positivist, believed that principal responsibility for lawmaking lay with the people's representatives and not their judges, Yarbrough sees in Black's jurisprudence an attempt to find a workable balance between popular government and limits on the people's government. Black searched for "constitutional constructions which were compatible with plausible readings of language and history," Yarbrough concludes, "and thus consistent with his conception of judicial review, yet restrictive of judicial choice, and thus compatible with democratic principles." [67]

Being the target of serious critics is a sign that one has thoughts others deem worthy of consideration. As a leading figure in Supreme Court history, Justice Black "endures" because his ideas still matter. Yet, it is a measure of what constitutional law and the role of the Senate in

reviewing nominees to the Supreme Court have become since Black's death that, in all probability, a nominee today (other than, perhaps, someone appointed, as Black was, from the ranks of the Senate) espousing a constitutional jurisprudence like Black's would be defeated.

William Howard Taft is another figure in Supreme Court history whose legacy, particularly in judicial administration, remains important. Among eminent public officials, Taft is unusual in that virtually all of his adult life, from age 25 until his death at age 72, was spent in public service. The exception is an eight-year gap between 1913 (when he left the White House) and 1921 (when President Harding named him Chief Justice). This is the period of Taft's professional life generally glossed over by biographers, aside from references to his professorship at Yale and time spent on the lecture circuit. Students of Taft and of this period in American political history should therefore be pleased that James F. Vivian has edited a volume[68] containing the newspaper columns Taft wrote for the Philadelphia *Public Ledger* between November 1, 1917, and July 5, 1921.

It was Cyrus H. K. Curtis of the Curtis Publishing Company who created this literary opportunity for the former President. For an annual stipend of \$10,000, Taft agreed to submit one column per week, although events sometimes pushed him into writing more frequently. Most of the columns dealt with the World War, negotiations over the League of Nations, ratification of the Nineteenth Amendment, and the presidential campaign and election of 1920. But other columns bear on issues the Supreme Court faced or issues Taft would confront as Chief Justice.

For example, a column of May 9, 1918, lauds enactment of the Sedition Act, about which Taft approvingly noted, "The mere expression of treasonable sentiment can be promptly punished with severity...."[69] The column for June 20 attacks critics of the Supreme Court's decision in *Hammer v. Dagenhart*,[70] which struck down Congress's Child Labor Law as an abuse of the commerce power. "The Court says the law invades the function of the states. Why does this reason not satisfy the complainants?" Taft queried. "In matters entrusted to the states by the Constitution, we must look to the states for proper laws and their effective enforcement. To do otherwise is to confess our national system a failure." [71] Shortly after becoming Chief Justice, Taft and the Court faced a second national statute to eliminate child labor, this time passed under the taxing power. In *Bailey v. Drexel Furniture Company*,[72] Taft spoke for the majority: "The case before us cannot be distinguished from that of *Hammer v. Dagenhart*" the Chief Justice declared. "Grant the validity of this law, and...the word 'tax' would be [used] to break down all constitutional limitation on the powers of Congress and completely wipe out the sovereignty of the States."

Other columns reflected Taft's interest in judicial administration and the integrity of the courts. There was praise on June 20, 1921, for a decision by the Colorado Supreme Court invalidating that state's provision for the recall of judges. In a column on November 22, 1920, he sharply attacked inefficient systems of criminal justice in the states. "Delay in prosecution is the great refuge of criminals," he asserted. Moreover, too much care was taken to avoid convicting an innocent person.

*For years the administration of the criminal law in many of our state courts has been humiliatingly inefficient and a real disgrace to our civilization. The theory that ninety-nine guilty men should escape rather than one innocent man should be punished has been carried in practice to a ridiculous extreme. The prosecuting machinery of the law is of human construction and must sometimes err in undue severity and in the punishment of innocent persons. If we insist that we shall not have prosecutions without absolute insurance that no accused person shall be unjustly dealt with, then we must give up prosecution altogether and have no criminal law. The innocent man who suffers injustice under a properly framed code of criminal procedure is a sacrifice to a public cause, as clear as any martyr.[73]*

Perhaps the most interesting piece appeared on May 20, 1921, on the death of Chief Justice Edward Douglass White, the man Taft would soon succeed. Although generally a review of White's long career, Taft's column reflected on the nature of the office White held.

*The Chief Justice is the head of the court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized learning and statesmanlike foresight. expected to promote teamwork by the court, so as to give weight and solidarity to its opinions.[74]*

Taft applied the description to the careers of both White and Chief Justice Marshall. Shortly, he would aspire to the same standard.

Taft was the tenth Chief Justice. William H. Rehnquist is the sixteenth. Unlike all but two of his predecessors, Rehnquist was already an Associate Justice when he was appointed to the

center chair, and while he has been Chief only since 1986, his total service on the Court now surpasses 20 years. His views have become the focus of at least two book-length studies, the more recent being Sue Davis's *Justice Rehnquist and the Constitution*.<sup>[75]</sup>

Books about Supreme Court Justices commonly fall into four categories. The longest books are usually biographies covering virtually every aspect of the subject's life, even though the Court years may be a major part of the work. Henry F. Pringle's study of Chief Justice Taft falls into this group.<sup>[76]</sup> A second type confines itself mainly to the subject's judicial decisions, normally stressing constitutional doctrine and jurisprudence. Tinsley Yarbrough's book on Justice Black, discussed above, is an example. A third category places the views of the Justice in a larger political and social context. Consider, for instance, the collection of studies by G. Edward White in *The American Judicial Tradition*.<sup>[77]</sup> A fourth type looks at the members of the Court statistically and comparatively as a way of relating the ideas of one justice to the others. The focus is on votes for or against certain values, rather than on the substance of cases and the progression of doctrine.<sup>[78]</sup>

Davis's is primarily of the second type. She begins with the appointment of Rehnquist to replace Justice Harlan in 1971, and considers exclusively his constitutional jurisprudence as reflected in judicial opinions through June 1986. The goal is to lay before the reader a systematic analysis of the judicial values of William Rehnquist. Generally, her analysis is evenhanded, although the final pages of the book leave no doubt that she rejects those values.

Rehnquist must be understood as a legal positivist, she believes. Legal positivism forges common ground with Justice Black, with the conspicuous difference that the latter's positivism usually led him to very different conclusions. The legal positivist sees the legislature as the principal lawmaker, with judges having a reduced role to play. Legal positivism also means that the authority and legitimacy for law flow from its enactment by the people's representatives, not from the law's compatibility with moral values which exist outside the law. Coupled with positivism is a particular ordering of judicial values. For example, Davis finds that Rehnquist places a "preeminent" value on federalism, with "the theme of state autonomy" running "throughout his opinions." Indeed "the value that Rehnquist assigns to federalism is so high that it abrogates the prescription for a minimal role for the judiciary."

Subordinate to federalism are rights of private property--that is, the right of the owner of property to be free from undue regulation by government, especially state governments. At the bottom of the hierarchy are other individual rights such as freedom of speech and protections for persons accused of crimes.<sup>[79]</sup> The puzzle is why Rehnquist does not place all individual rights, including those of property, on the same level.

A right entails a corresponding obligation on another. In a democratic political order, a right usually means a restriction placed on the majority in the interest of the individual or a minority of the people. If one values law because it flows from the people, why not then make all individual rights equally subordinate? The answer cannot be that some rights but not others find explicit mention in the Constitution which is the ultimate law. While this fact neatly explains Rehnquist's position in cases like *Roe v. Wade*,<sup>[80]</sup> it does not explain why, among rights which are mentioned, he prefers some (property) over others (free speech). She offers several possible explanations. First, Rehnquist may not believe that the Fourteenth Amendment brings the provisions of the Bill of Rights, including the First Amendment, squarely to bear against the states. Second, he may believe that the Framers valued property rights more than other rights, although that preference is not evident from the text of the Constitution itself. Third, he may believe that property rights are more important because they promote stability in society.

Scholars probe judicial opinions and other sources for clues about a Justice's values. Such intellectual explorations would be little more than mental exercises were those values not translated into public policy when cases are decided. The unarticulated assumption of studies like Davis's is that Justices are not merely legislators in judicial garb, voting this way or that to further a particular agenda. Rather, the assumption is that judges are indeed different from legislators not because they lack preferences but because, first, they are not obliged to reflect popular will and, second, they routinely speak the language of the fundamental values of the political system. The legitimizing force in the legislative chamber is 51 percent of the votes. In the appellate courtroom it is reasoned judgment, wrestled from an authoritative source such as a constitutional or statutory provision. Whether the subject is Justice Black or Chief Justice Rehnquist, ideas are studied because they are supposed to matter. Years hence, someone may well publish a book on "Chief Justice Rehnquist and His Critics." Davis's book will be one of the sources, Tinsley Yarbrough's book the model.

### ***The Past***

In neither the Congress nor the Presidency does the past reside in the present to the extent it does at the Supreme Court. The Court of the 1990s is clearly different from the Court of the 1790s, yet past generations have left landmarks which remain. For the Court those landmarks consist mainly of precedent--the gloss earlier Justices placed on the Constitution. Preeminent among the Court's traditions--indeed, the thing which sets it apart from the courts

in most countries of the world--is judicial review. And in most texts on American constitutional law, *Marbury v. Madison*,<sup>[81]</sup> is the leading case.

Robert Lowry Clinton's *Marbury v. Madison and Judicial Review*<sup>[82]</sup> is a significant examination of how the relation between the Court and the other agencies of the national government, especially Congress, has evolved during different periods in American history. Publication is timely. The last decade has witnessed widespread debate about judicial review on at least two fronts: first, the proper approach the Supreme Court should employ in interpreting the Constitution, and, second, whether and to what extent Supreme Court decisions should be binding on the rest of the political system.<sup>[83]</sup> Broadly described, the volume is a study in myth-making and in the separation of powers. The point of Clinton's study is that the *Marbury* of contemporary constitutional law is not the *Marbury* of history, that scholars need to do much "unlearning" if they are to understand the case correctly, and that fundamental change is needed if the political system is to rest on a sure constitutional footing.

Before, during, and after *Marbury*, Clinton believes that a generally agreed-upon and limited view of judicial power existed: that the federal courts could invalidate acts of coordinate branches of government with finality only when the acts violated constitutional restrictions on judicial power. Of course, this was what happened in *Marbury*: the Court invalidated part of an act of Congress which intruded on the judiciary's Article III functions. At variance with the common view, Clinton does not see Marshall's decision as a clever way off the horns of a political dilemma, no matter how great the feud between Federalists and Democratic Republicans during President Jefferson's first term.

*Marbury was not a political decision but was based on sound constitutional doctrine and existing legal precedent. In short, it was precisely the sort of case that the Founders considered appropriate for the exercise of judicial review. A failure to exercise authority in that case would surely have impaired the Court's ability to properly perform its own functions.*<sup>[84]</sup>

This reading of the case is strikingly narrow and differs from the contemporary interpretation that authorizes courts to strike down any act of Congress or of the executive which the judges find to be in violation of the Constitution. Furthermore, under the contemporary interpretation a decision of the Supreme Court is supposed to be "final" until changed by the Court or by amendment of the Constitution, a position the Court itself articulated in *Cooper v. Aaron*.<sup>[85]</sup> "[H]anded down to subsequent generations in a manner not

unlike that of Plato's 'noble lie'...the judicial mythology embedded there has served to authorize small groups of judges to preempt other organs of government in deciding fundamental constitutional questions." [86] Even the term "judicial review" is of comparatively recent origin, Clinton reports, probably having not appeared any earlier than 1910. [87] The mythological *Marbury* grew out of debates over judicial power during the Progressive era. "By 1903, friends of the Court had elevated *Marbury* to a status commensurate with the Declaration of Independence!" [88] Even those opposed to the Court's use of judicial review accepted *Marbury* as the source of the problem. The *Marbury* of myth developed to counter advocates of legislative supremacy who would have denied courts any review of legislative acts whatsoever.

Clinton is not content with a revamping of history. His conclusions about the evolution of *Marbury* carry consequences.

*[T]he fundamental rationale for the institution of Article III courts was the belief of the Founders that impartiality, neutrality, and objectivity were plausible and worthwhile goals for independent judges. Since it is exactly that proposition that is denied by modern proponents of judicial non-neutrality, adoption of that myth undermines in toto the conventional foundation of judicial independence.* [89]

Hamilton, after all, in *Federalist* Nos. 78 and 81 had assumed such impartiality to reside in the "power of judgment." Therefore, those who would import values into the Constitution because neutrality and objectivity cannot be achieved undercut judicial review itself.

In place of the current understanding of judicial review, Clinton proposes "functional coordinate review" which would confine judicial review to the invalidation of laws of a judicial nature, as exemplified by the facts of the *Marbury* case. Functional review in turn leaves a "derivative discretion in Congress--and, to an extent, in the president--to disregard judicial decisions which set aside laws on the basis of constitutional provisions not addressed to the courts." [90]

Clinton finds certain advantages in his theory. First, it is consistent with the text of the Constitution and with his understanding of the Framers' intention regarding the judicial power. Second, the theory is consistent with judicial decisions of the founding period. Third, it "satisfies the demand for objectivity inherent in a conception of courts as organs of government exercising judgment rather than will. It is neutral with respect to particular results." Accordingly, Congress can pursue conservative or liberal policies, and, so long as it does not encroach on policies



entrusted to the courts, no court would have the authority to invalidate the legislature's preference. Clinton uses three examples. The Supreme Court would have no authority to interpose its views were Congress to require racially segregated schools for the District of Columbia or to ban the movement in interstate commerce of goods made with child labor. However, were Congress to forbid courts from excluding coerced confessions from trials, the judiciary could properly invalidate the law because the statute not only contravenes the Fifth Amendment but is directed to what courts do. The decision in the third example would also be final because trial courts would be bound to follow it. The only legislative recourse would be impeachment.

Without doubt, coordinate review would generate more public debate on the constitutionality (as well as the wisdom, one imagines) of various policies. Were it to be adopted, the electoral process itself might become the ultimate validating authority on which interpretation was "correct" or at least to prevail. Yet, one reels from the prospect of political anarchy. Instances would arise in which the lines would not be clear, when opposing groups would use the ambiguity to partisan advantage. "I do not think so," Clinton replies, "but even if it does, a measure of uncertainty in constitutional matters is healthy." [91] For him, the notion that finality must reside somewhere is also myth, an attitude unknown to the Framers. The dilemma with the present version of judicial review is that it requires acquiescence in the decision, no matter how great the flaw. By contrast, Clinton's coordinate review "allows the affected department the discretion to disregard the Court's decision if its own interpretation of the Constitution differs from that of the Court." [92] What would be required would be a principled explanation by the department defending its interpretation as correct. [93] The recommended overhaul would add a new dimension to separation of powers, to be sure, but would make governing at the national level even more difficult than it currently is. [94]

Clinton's book is revolutionary--both in its message for current scholarship and its prescription for statecraft. However, even agreement with Clinton's reading of history does not necessarily lead to the constitutional results he advocates. The Constitution in practice has long been different in so many ways from the words of the Constitution (and of the knowable intent of those who wrote it). As Robert H. Jackson characterized American constitutional interpretation,

*During its early days, [the Court] had the aid of counsel who expounded the Constitution from intimate and personal experience in its making....The passing of John Marshall marked the passing of that phase of the Court's*

*experience. Thereafter the Constitution became less a living and contemporary thing--more and more a tradition. The work of the Court became less an exposition of its text and setting and purposes and became more largely a study of what later men had said about it. The Constitution was less resorted to for deciding cases, and cases were more resorted to for deciding about the Constitution. This was the inevitable consequence of accumulating a body of judicial experience and opinion which the legal profession would regard as precedents.[95]*

Nonetheless, Clinton has challenged the status quo. His book is one no student of the Court can prudently disregard.

### **Process**

The Court's decision making procedures as well as its past shape the outcome of cases. How the Court operates internally is important since the Supreme Court has always been a collegial body. Unlike most intermediate appellate courts in the state and federal judicial systems, all justices typically participate in all decisions. Glimpses of the process promote understanding, and usually appreciation, of the institution.

Such glimpses are the distinguishing mark of *The Ascent of Pragmatism* by Bernard Schwartz,[96] an author whose recent books have also provided scholarly insight into the formation of the Court's major decisions of the past four decades.[97] The focus of this latest volume is the Burger Court.

Of the sixteen Chief Justices, Warren Earl Burger's tenure surpasses all but three. Only Chief Justices Marshal, Taney, and Fuller served longer. Of the eight Chief Justices appointed thus far in the twentieth century, Burger served longer than any. Longevity alone makes the Burger era an appealing one to study.

But there is more. The Burger years followed the Warren years. Beginning in 1953, Earl Warren's tenure as Chief Justice was one of the most active and remarkable in American history, particularly so after Justice Goldberg's arrival in 1962 which produced a nearly certain minimum of five votes for positions Warren advocated.[98] Hardly an aspect of life went untouched by landmark decisions on race discrimination, legislative apportionment, and the Bill of Rights. Warren's Court launched a revolution in constitutional jurisprudence.

The Court became an issue in the presidential election of 1968 to a degree not witnessed since 1936. Republican candidate Richard Nixon ran against the record of the Warren Court and promised, if elected, to change the Court by strengthening the "peace forces as against the criminal forces of the country."<sup>[99]</sup> Nixon's appointment of Burger in 1969 therefore seemed to fulfill his campaign pledge against judicial activism. Given the new Chief's record on criminal justice, he seemed made to order for the new administration. Little wonder that commentators awaited major change.

Remarkably, the Court under Chief Justice Burger did not overturn outright a single major decision of the Warren Court. The persistence of the Warren Court's jurisprudence during the period is all the more noteworthy when it is remembered that by 1986 when Burger retired, only three members of the Warren Court were still sitting, and of the three only Justices Brennan and Marshall had been closely identified with the Warren Court's major accomplishments. Although some of the Warren Court's landmark rulings on criminal justice were restricted, especially with respect to the exclusionary rule,<sup>[100]</sup> the Burger Court practiced its own kind of judicial activism, as seen in cases involving race and gender discrimination and abortion.

Moreover, with the possible exception of William Howard Taft, Burger was the most active Chief Justice *outside* the Supreme Court. He treated his office like a pulpit from which he campaigned energetically for changes in legal education, professional standards for bench and bar, criminal sanctions, prisons, and the administration of justice. By virtually all accounts, the federal judiciary's relations with Congress improved substantially after 1969, and most of the credit for that fairly seems to lie with Burger. Any one of these developments offers ample reason to study the Burger period.

Schwartz's book examines the Court in three ways. The volume opens with a review of the personality and ideas of each Justice<sup>[101]</sup> followed by some generalizations on decision-making procedures, both old and new.<sup>[102]</sup> The most significant observation is additional evidence of the increased reliance by almost all members of the Court on their clerks both in making recommendations on which cases to accept for review and in writing opinions. Collectively Schwartz refers to the clerks today as "the Junior Supreme Court."<sup>[103]</sup> This development contradicts the observation made long ago by Justice Brandeis that "the reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington 'who do their own work'"<sup>[104]</sup>

However, Chief Justice Rehnquist recently reported that "the individual justices still continue to do a great deal more of their 'own work' than do their counterparts in the other branches of the federal government."<sup>[105]</sup> Schwartz's finding and the Chief Justice's

observation may not be in conflict. That the clerks do more does not necessarily mean that the Justices do not do more of their own work than those occupying comparable positions in the executive and legislative branches. Yet the finding is ironic since it was Rehnquist as a young attorney in 1957 who made an issue of the role of the clerks.[106] And if some or most of the Justices have delegated much of the case-selection work (admittedly a burdensome task) to their clerks, this fact would seem to undercut some of the arguments made against the proposal of the group headed by Professor Paul A. Freund in 1972 to create a National Court of Appeals. That court would have done most of the screening of cases for the Supreme Court, referring the most important ones to the Justices and disposing of the rest itself.[107]

The concluding chapter is an overview of the major characteristics of the Burger Court's jurist prudence, focusing on changes which might have occurred which did not. It is from here than the book gets its name. Schwartz concludes that the Burger years were marked principally by a pragmatic approach to constitutional issues rather than a result-oriented decision making. The latter had characterized the Warren Court. In part the pragmatic approach evolved, he finds, because of the dominant role played by four or five Justices at the Court's "center," between two Justices on the ideological left and two on the ideological right. The approach also evolved because, except for the issues of gender discrimination and abortion, the Burger Court was largely faced with cases involving application of doctrine inherited from the Warren Court. Much of this business by its nature meant that little new ground would be broken; instead, the Court had to decide whether to extend a ruling, and if so, how far.

The middle and longest part of *The Ascent of Pragmatism* is an account of the Justices' deliberations in conference on many cases decided between 1969 and 1986. As Schwartz explains,

*The conferences themselves, at which cases are discussed and the votes taken on decisions, are, of course, completely private -- attended only by the Justices themselves. The secrecy of the conference is, indeed one of the great continuing Court traditions. I have tried to reconstruct the conferences in most of the cases discussed.... The conference discussions are given in conversational form and the quotes are taken verbatim from notes made by a Justice who was present.*[108]

There seem to be at least two problems with this admittedly prized source. First, in contrast to the variety of sources upon which Schwartz draws in other parts of the book, his

reconstruction of conversations at the conference appear to come from a single source: "the notes made by a Justice who was present." This seems to mean that all the notes upon which he relies were the notes of only one member of the Court, not that for each conference conversation he reconstructs he relied on the notes of a single Justice (that is, Justice "A" for conference "A," Justice "B" for conference "B," and so forth). While the source for the notes Schwartz uses maybe accurate, it is also possible that they are not. The notes after all were made by a conference participant. It is surely difficult to write a complete account as the meeting proceeds. One must therefore have to rely partly on memory in recording and reconstructing exchanges. Are positions accurately stated and correctly attributed? Have points been omitted? Are the inaccuracies and omissions which might be present consequential? Even minutes for a meeting are ordinarily written by a secretary who takes notes but who does not participate. And minutes are subject to review at a later meeting by all who were present at the first.

Second, how can the acknowledged benefits of confidentiality at conference continue to be enjoyed when at least one Justice makes notes of everyone's statements and views and shortly makes them available to someone (like Schwartz) who was not present? Access to memoranda and other materials which reveal the Court's deliberations has been controversial at least since 1956 when Alpheus Mason's biography of Chief Justice Stone was published.[109] Few today would argue that such documents should be forever closed. Mason's book appeared about a decade after Stone's death; the controversy arose mainly because Justices Black, Reed, Douglas, and Frankfurter (all of whom had sat with Stone) were still on the Bench. By contrast, Schwartz's volume was published only four years after Burger retired, giving the confidentiality of the later Burger conferences a short run.

One wonders what the impact of publication is on the members of the Court as they attend conferences each week. Are the thoughts they offer privileged now but not in four years? And if not for four years, should they remain privileged for three, or two, or one? *The Ascent of Pragmatism* implicitly raises an issue one wishes the author had explored. Will such publication of information have negative effects on the Court's decision making processes? Only the Justices can say.

## ***Product***

Scholars like Schwartz are interested in process because of its effects on the results of the Court's work: its decisions. *A Conflict of Rights* by Melvin I. Urofsky[110] ventures into the

ideological minefield of affirmative action to present a study of *Johnson v. Transportation Agency*,<sup>[111]</sup> which came down in late March of the first year of the Rehnquist Court. Urofsky is no newcomer to the study of the Court. Previous works include co-editorship of the letters of Justice Brandeis and some of Justice Douglas's papers<sup>[112]</sup> and authorship of *Louis D. Brandeis and the Progressive Tradition*.<sup>[113]</sup>

Unlike most judicial case studies, this one is not about a constitutional case. It involved a challenge under Title VII of the Civil Rights Act of 1964 to an administrative decision to promote Diane Joyce in place of Paul Johnson into the job of road dispatcher in Santa Clara County, California. Having scored second out of seven on an examination, Johnson claimed that the promotion should have been his, since Joyce was ranked fourth. He charged that the county had placed the thumb of gender on the scales.

*Johnson* was much like an earlier Title VII case, *United Steelworkers v. Weber*.<sup>[114]</sup> Indeed, Urofsky reports that the facts of the cases were sufficiently close that several members of the Court did not want to grant certiorari to the Ninth Circuit. (The facts of the two cases are actually closer than Urofsky's book acknowledges in at least one place.<sup>[115]</sup> *Weber* did not involve mere hiring in contrast to promotion in *Johnson*. At stake in the earlier case was admission into an apprenticeship program, with admission being determined on the basis of seniority at the plant. Those admitted would presumably already be employed. Obviously, entrance to an apprenticeship program is not the same as a promotion either, but it was the way to advance to the better-paying craft jobs.)

*Johnson* is probably less significant for what it decided (it did not really break new ground) than for the fact that it was decided as it was. The ruling in *Weber* had been five to two, with Justices Powell and Stevens not participating. Since 1979, Justices O'Connor and Scalia had arrived and Justice Stewart and Chief Justice Burger had departed. Dissenting in *Weber* had been the Chief Justice and Justice Rehnquist. Dissenting in *Johnson* were Chief Justice Rehnquist and Justices White (who had been one of the five in the majority in *Weber*) and Scalia.

In 1964 Anthony Lewis, then the Supreme Court correspondent for *The New York Times*, wrote *Gideon 'A' Trumpet*, the story of *Gideon v. Wainwright*<sup>[116]</sup>, a landmark ruling on right to counsel. Lewis's book has long been regarded as being in a class by itself. It told an appealing story well, described the Justices and their decision making procedures, and explained clearly a complex legal issue. Urofsky's book is to the present Court what *Gideon's Trumpet* was to the Warren Court. The Justices, the process, and the issue come alive in an engaging narrative. While the author leaves little doubt that he supports the Court's decision

upholding the gender-based affirmative action in question, Urofsky's treatment of affirmative action is balanced and avoids the temptation to depict issues and individuals in stark categories of good versus bad or right versus wrong. As the author says in the Preface, "Whether *Johnson* ...ever takes its place among the 'great' cases or not, it dealt with an important issue, and we can understand that issue better if we can place it in a human context." By this measure the book easily succeeds.

*Johnson* came down less than three years before the two hundredth anniversary of the Supreme Court's first session, a span of time that includes a multitude of changes in the institution and in the law. Many of those changes are highlighted in the books surveyed here. One suspects that other changes in the coming century, some perhaps as pronounced as these, await the Court. Yet even as they may ever be alert to trends and directions, scholars write on the basis of what is and what has been. Changes which do occur will therefore qualify today's observations as surely as contemporary observations, like Henry Sumner Maine's a century ago, will enrich those to come.

The books surveyed in this article are listed alphabetically by author below.

ETHAN BRONNER, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton, 1989). Pp. 399.

ROBERT LOWRY CLINTON, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989). Pp. xii, 332.

SUE DAVIS, *Justice Rehnquist and the Constitution* (Princeton, N.J.: Princeton University Press, 1989). Pp. x, 247.

JOHN P. FRANK, *Clement Haynsworth, the Senate, and the Supreme Court* (Charlottesville: University Press of Virginia, 1991). Pp. xvi, 148.

TONY FREYER, ed., *Justice Hugo Black and Modern American* (Tuscaloosa: University of Alabama Press, 1990). Pp. x, 457.

KENNETH W. GOINGS, "The NAACP Comes of Age:" *The Defeat of Judge John J. Parker*

(Bloomington: Indiana University Press, 1990). Pp. xii, 125.

JOHN MASSARO, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany: State University of New York Press, 1990). Pp. xiii, 272.

BERNARD SCHWARTZ, *The Ascent of Pragmatism: The Burger Court in Action* (Reading, Mass.: Addison-Wesley, 1990). Pp. x, 482.

MELVIN I. UROFSKY, *A Conflict of Rights: The Supreme Court and Affirmative Action* (New York: Charles Scribner's Sons, 1991). Pp. xii, 270.

JAMES F. VIVIAN, ed., *William Howard Taft: Collected Editorials, 1917-1921* (New York: Praeger, 199). Pp. xxix, 626.

TINSLEY E. YARBROUGH, *Mr. Justice Black and His Critics* (Durham, N.C.: Duke University Press, 1988). Pp. xii, 323.

### ***Endnotes***

1. H. Maine, *Popular Government* (1886). The English edition was published first in 1885, three years before Maine's death in 1888. The fourth essay is entitled "The Constitution of the United States" and is the one of interest here.
2. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (concurring opinion).
3. Maine, pp. 218, 221-222.
4. *Id.* at p. 243.
5. 110 U.S. 516 (1884). Justice Harlan was the single dissenter.
6. Maine, p. 245.



7. Madison to Jefferson, October 17, 1788; Jefferson to Madison, March 15, 1789, reprinted in A. Mason and D. Stephenson, Jr., *American Constitutional Law*, 9<sup>th</sup> ed. (1990), pp. 322-323.
8. Books are listed with full citation just before the endnotes.
9. J. Harris, *The Advice and Consent of the Senate* (1953), pp. 28-30, 34.
10. Although both John Rutledge and Charles Evans Hughes served as Associate Justice, then resigned, and were later named Chief Justice, each is counted only once. Similarly, Edward Douglass White, Harlan Fiske Stone, and William H. Rehnquist—the three Chief Justices to have been named from the ranks of sitting Associate Justices—are counted only once.
11. S. Krisloy, *The Supreme Court in the Political Process* (1965), p. 13.
12. J. Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (1990), ix.
13. *Id.*, x. The literature on the politics of Supreme Court appointments is voluminous, both in book and periodical form. To cite only four books, consider J. Harris, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (1953); D. Danelski, *A Supreme Court Justice is Appointed* (1964); R. Scigliano, *The Supreme Court and the Presidency* (1971); H. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2d ed. (1985).
14. See B. Murphy, *Fortas* (1988), pp. 545-577, for details on Justice Fortas's resignation. The article which precipitated the resignation is W. Lambert, "The Justice . . . and the Stock Manipulator," *Life*, May 5, 1969, p. 32. See also D. Stephenson, Jr., Book Review, 35 *University of Pittsburgh Law Review* 741 (1974).
15. Massaro, p. 35.

16. *Id.* at p. 136.
17. *Id.* at p. 25.
18. *Id.* at p. 85.
19. R. Evans, Jr., and R. Novak, *Nixon in the White House: The Frustration of Power* (1971), p. 164.
20. *Mr. Justice Black: The Man and His Opinions* (1949); “Justice Murphy: The Goals Attempted,” 59 *Yale Law Journal* 1 (1949); “Fred Vinson and the Chief Justiceship,” 21 *University of Chicago Law Review* 212 (1954); *Marble Palace: The Supreme Court in American Life* (1958); *The Warren Court* (1964); *Justice Daniel Dissenting* (1964).
21. “The Appointment of Supreme Court Justices,” 1941 *Wisconsin Law Review* 172, 343, 461 (1941); “Disqualification of Judges,” 56 *Yale Law Journal* 605 (1947).
22. According to Frank, his agreement with Haynsworth stipulated that he could not make use of this oral history until after Haynsworth’s death. Haynsworth died in 1989.
23. R. Shogan, *A Question of Judgment* (1972) [mainly on the Fortas nominations]; R. Harris, *Decision* (1971) [mainly on the Carswell nomination].
24. J. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (1991), p. 96.
25. *Id.* at 20-21.
26. *Id.* at 93.
27. *Id.* at 134.
28. *Id.* at xiv.
29. *Id.* at 136.

30. K. Goings, *The NAACP Comes of Age: The Defeat of Judge John J. Parker* (1990).
31. *Id.* at xi.
32. Sanford died unexpectedly on March 8, 1930, only a few hours before Chief Justice Taft's death. The latter had resigned on February 3.
33. *Id.* at 21.
34. As a Senator in early 1937, Black was also one of the staunchest supporters of President Roosevelt's "Court-packing" plan, which Hughes opposed.
35. 72 *Congressional Record* 3563 (1930).
36. A. Mason, *Harlan Fiske Stone* (1956), p. 293.
37. Hoover Library Papers, quoted in Goings pp 20-21. William D. Mitchell was Solicitor General at that time.
38. Quoted in A. Mason, *Harlan Fiske Stone* (1956), p. 300.
39. Letter from Stone to Parker, June 4, 1930, quoted in *id.*, pp. 299-300.
40. Letter from Stone to his sons, April 18, April 30, 1930, quoted in *id.*
41. D. Pearson and R. Allen, *The Nine Old Men* (1936), p. 112.
42. Quoted in Mason, *Harlan Fiske Stone*, p. 300. Interestingly, the reference here is to "labor," not to race.
43. Remarks of Judge John J. Parker, "In Memory of Harlan Fiske Stone," November 12, 1947, *Proceedings of the Bar and officers of the Supreme Court of the United States*, 1948.

44. Goings, p. 89.
45. *Roosevelt and Frankfurter: Their Correspondence 1928-1945*, annotated by Max Freedman (1967), pp. 580-581.
46. H. Abraham, *Justices and Presidents*, 2d ed. (1985), p. 43; W. Murphy and C. H. Pritchett, *Courts, Judges and Politics*, 1<sup>st</sup> ed. (1961), p. 279; C. Curtis, Jr., *Lions Under the Throne* (1947), pp. 96, 308. For Justice Douglas's views on Parker, see W. Douglas, *The Court Years 1939-1975* (1980), p. 17.
47. Goings, p. 90.
48. E. Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989).
49. Other books on the Bork nomination include P. McGuigan and D. Weyrich, *Ninth Justice: The Fight for Bork* (1990) and M. Pertschuk and W. Schaetzel, *The People Rising* (1989). The former includes extensive information not found elsewhere about the strategies of conservatives in connection with the nomination. The latter presents an analysis from a liberal ideological perspective.
50. Quoted in Bronner, p. 98. With only minor alterations, the statement on Bork was nearly the same as Kennedy's statement on William Rehnquist when the Senate considered him for Chief Justice twelve months before. See, *Nomination of William H. Rehnquist to be Chief Justice of the United States*, 99<sup>th</sup> Cong., 2d sess. Senatorial Executive Report no. 99-18, September 8, 1986, p. 77.
51. *Id.* at 99.
52. *Id.* at 32.
53. *Id.* at 351-352
54. Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.

55. A Mason, *Harlan Fiske Stone* (1956), p. 469; J. Simon, *The Antagonists* (1989), p. 99.
56. Quoted in 4 a. Beveridge, *The Life of John Marshall* (1919), p. 522.
57. T. Freyer, ed., *Justice Hugo Black and Modern America* (1990).
58. Volume 36 (spring 1985) and volume 38 (winter 1987).
59. *Hugo Black: The Alabama Years* (1972); *The Senate Career of Hugo L. Black* (1968).
60. *One Man's Stand for Freedom: Mr. Justice Black and the Bill of Rights* (1963).
61. *Hugo Black and the Judicial Revolution* (1977).
62. *The Vision and the Dream of Justice Hugo L. Black: An Examination of a Judicial Philosophy* (1975).
63. N. Redlich, "Justice Black at Eighty," *The Nation*, March 21, 1966, p. 322.
64. T. Yarbrough, *Mr. Justice Black and His Critics* (1988).
65. *Id.* at xi.
66. *Id.* at 108.
67. *Id.* at 260.
68. J. Vivian, ed., *William Howard Taft: Collected Editorials, 1917-1921* (1990).
69. *Id.* at 58.
70. 247 U.S. 251 (198). The vote was five to four. Justice Day wrote the majority opinion; Justice Holmes wrote a dissent which was joined by Justices McKenna, Brandeis, and

- Clarke.
71. Vivian, pp. 69-70.
  72. 259 U.S. 20 (1922). Justice Clarke was the only dissenting Justice.
  73. Vivian, p. 504.
  74. *Id.* at 58.
  75. S. Davis, *Justice Rehnquist and the Constitution* (1989). The earlier study was *Mr. Justice Rehnquist, Judicial Activist: The Early Years* by Donald E. Boles (considered in this space in the *Yearbook 1988*, pp. 102-103).
  76. H. Pringle, *The Life and Times of William Howard Taft*, 2 vols. (1939).
  77. G. White, *The American Judicial Tradition* (1976). See also, R. Newmyer, *The Supreme Court under Marshall and Taney* (1968).
  78. The pioneering work of this type was C. Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (1948).
  79. Davis, pp. 18-19.
  80. 410 U.S. 113 (1973).
  81. 5 U.S. (1 Cranch) 137 (1803).
  82. R. Clinton, *Marbury v. Madison and Judicial Review* (1989).
  83. See the addresses by Justice Brennan and former Attorney General Edwin Meese in Paul G. Cassell, ed., *The Great Debate: Interpreting Our Written Constitution* (1988).
  84. Clinton, p. 79.

85. 358 U.S. 1 (1958). The case involved opposition to federal court orders arising from the attempt to integrate the public school system in Little Rock, Arkansas.
86. *Clinton*, p. x.
87. E. Corwin, "The Establishment of Judicial Review," 9 *Michigan Law Review* 102 (1910).
88. *Clinton*, p. 140.
89. *Id.* 225 (emphasis in the original).
90. *Id.* at 226.
91. *Id.* at 23.
92. *Id.* at 232.
93. On this point, readers will want to compare Clinton to John Agresto's *The Supreme Court and Constitutional Democracy* (1984).
94. See L. Cutler, "To Form a Government," in P. Woll, ed., *American Government: Readings and Cases*, 10<sup>th</sup> ed. (1990), p. 53. Cutler's essay first appeared in *Foreign Affairs* (Fall 1980).
95. R. Jackson, Address, February 1, 1940, 84 L. Ed. 1428.
96. B. Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (1990).
97. For example, see Schwartz's *Super Chief: Earl Warren and His Supreme Court* (1983); *Swann's Way: The School Busing Case and the Supreme Court* (1986); and *Behind Bakke: Affirmative Action and the Supreme Court* (1988).
98. The solid liberal activist majority after 1962 consisted of Chief Justice Warren and

Justices Black, Douglas, Brennan, and Goldberg (who took Justice Frankfurter's place and who in turn was replaced by Abe Fortas in 1965). It was not uncommon for these five to pick up one or two additional votes. The Warren majority became more solid once Thurgood Marshall replaced Justice Clark in 1967.

99. Quoted in A. Mason and D. Stephenson, Jr., *American Constitutional Law*, 9<sup>th</sup> ed. (1990), p. 4.
100. *See United States v. Leon*, 468 U.S. 897 (1984).
101. Schwartz, pp. 1-35.
102. *Id.* at 35-39.
103. Schwartz says the phrase was Justice Douglas's. *Id.* at 35.
104. Quoted in C. Wyzanski, Jr., *Whereas--A Judge's Premises: Essays in Judgment, Ethics, and the Law* (1965), p. 61.
105. W. Rehnquist, *The Supreme Court: How It Was, How It Is* (1987), p. 261.
106. *See* W. Rehnquist, "Who Writes Decisions of the Supreme Court?" *U.S. News & World Report*, December 13, 1957, p. 74. Justice Frankfurter apparently encouraged his former clerk Alexander M. Bickel to reply in an article in the *New York Times Magazine* (April 17, 1958, p. 16) that "the law clerks are in no respect any kind of kitchen cabinet."
107. *Report of the Study Group on the Caseload of the Supreme Court* (1972).
108. Schwartz, ix (emphasis added).
109. A. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956).
110. M. Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* (1991).



111. 480 U.S. 616 (1987). On the case itself, see U.S. Commission on Civil Rights, *Toward an Understanding of Johnson* (1987).
112. M. Urofsky and D. Levy, eds., *The Letters of Louis D. Brandeis*, 5 vols. (1971-1978); M. Urofsky and P. Urofsky, eds. *The Douglas Papers* (1987).
113. Published in 1980.
114. 443 U.S. 193 (1979).
115. Urofsky, *A Conflict of Rights*, p. 156. It is not clear whether the confusion rests with members of the Court or with the account Urofsky provides of what they said.
116. 372 U.S. 335 (1963).

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